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Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges From Jury Selection

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ELIMINATING A SAFE HAVEN FOR DISCRIMINATION: WHY NEW YORK MUST BAN PEREMPTORY CHALLENGES FROM JURY SELECTION

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INTRODUCTION

On November 2, 1989, a Brooklyn jury convicted Milton Bennett of second degree murder and second degree and third degree criminal possession of a weapon.[1] On July 5, 1994, the Appellate Division of the New York State Supreme Court reversed Bennett's conviction because the prosecutor improperly used her peremptory challenges during jury selection and ordered a new trial.[2] During jury selection, the prosecutor exercised three peremptory challenges to exclude Black women from the jury.[3] Defense counsel, in turn, argued that the prosecutor employed the peremptory challenges in a purposefully discriminatory manner by intentionally removing African American women jurors solely on the basis of their race.[4] Such discriminatory use of the peremptory challenge is hardly uncommon. U.S. Supreme Court Justice Thurgood Marshall has stated, and this Note argues, that the only way to eradicate the racial prejudice that peremptory challenges inject into the jury selection process is to eliminate them entirely.[5]

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[1] People v. Bennett, 614 N.Y.S.2d 430 (2d Dep't 1994).

[2] *Id.*

[3] *Id.* at 431-32.

[4] *Id.* at 431.

[5] Batson v. Kentucky, 476 U.S. 79, 103 (1986). In *Batson*, an all-White jury convicted a Black defendant of second degree burglary and receipt of stolen

Instead of deeming peremptory challenges unconstitutional and forsaking the system entirely, the U.S. Supreme Court attempted to limit this unbridled use of peremptory challenges to comport with the guarantees of equal protection.[6] In 1986, the Court announced a framework to guide lower courts in their determination of improper discrimination in jury selection.[7] The initial burden rests on the party alleging purposeful discrimination to make a prima facie showing that raises an inference of discrimination.[8] The burden then shifts to the opposing party to rebut the inference by providing a neutral explanation for its challenged peremptory strikes.[9] Finally, the trial judge must determine whether the movant has proven purposeful discrimination.[10]

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goods. *Id.* at 82-83. The prosecutor used peremptory challenges to strike the only four Black people from the jury. *Id.* at 83. The defendant appealed to the U.S. Supreme Court, arguing, among other things, that the prosecutor's striking of Black jurors violated the defendant's equal protection rights. *Id.* The Court reversed and remanded the case, holding that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to remove jurors based solely on their race or on the assumption that Black jurors are incapable of impartially weighing the State's evidence against a Black defendant. *Id.* at 89. The Court set forth a framework to guide lower courts in implementing its holding. *Id.* at 96. For analysis and discussion of this framework, see *infra* notes 43-62 and accompanying text.

[6] *See Batson,* 476 U.S. at 97. The U.S. Constitution guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Equal protection insures that the government neither classifies its citizens in an irrelevant nor illegitimate manner, thereby inequitably allocating the benefits and burdens among similarly situated individuals, without a sufficient justification. The discriminatory exercise of peremptory challenges, without such an adequate explanation, enforced by the judiciary, in turn, is a violation of this guarantee of equal protection. *See* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished,* 65 TEMP. L. REV. 369, 400 (1992).

[7] *Batson,* 476 U.S. at 83-98. The appellate division applied the *Batson* framework in *Bennett* to determine that the prosecution purposefully discriminated against potential jurors with its peremptory challenges. *Bennett,* 614 N.Y.S.2d at 432.

[8] *Batson,* 476 U.S. at 93.

[9] *Id.* at 94.

[10] *Id.* at 98.

As Chief Justice Warren Burger predicted, the challenge to lower courts implementing the *Batson* framework has proven insurmountable due to insufficient guidance from the Supreme Court as to what constitutes a prima facie case and, more importantly, how to discern a race-neutral explanation.[11] However, this Note argues that even where lower courts have effectively formulated and used the *Batson* framework, as they have in New York State,[12] *Batson*'s attempt to accommodate the interests of achieving fair and impartial juries and abolishing discrimination from jury selection has been an exercise in futility.[13] The greatest problem posed by *Batson* is the impossibility of scrutinizing attorneys' attempts at race-neutral explanations for challenges that are arbitrary by nature. Not only can clever lawyers circumvent this requirement by proffering facially neutral explanations that have a discriminatory impact on potential jurors, but even when attorneys' explanations are deemed discriminatory, and their peremptory challenges are disallowed, both the juror's equal protection right and the peremptory nature of the peremptory challenge system have been compromised.[14] Thus, *Batson's* attempt to balance these conflicting interests of preserving the peremptory challenge system and protecting the defendant's and the challenged juror's equal protection rights necessarily fails. Because the peremptory challenge

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[11] Chief Justice Burger stated that because the Court made no attempt to instruct lower courts how best to implement the *Batson* framework, "there is no 'good' way to implement the holding, let alone a 'best' way." *Id.* at 131 (Burger, C.J., dissenting).

[12] For more information on New York cases which have applied the *Batson* framework, see discussion *infra* part III.

[13] *See infra* part V. *See generally* Broderick, *supra* note 6, at 420-22 (arguing that, notwithstanding the advances represented by *Batson*, peremptory challenges should be eliminated because they will continue to be used to discriminate in court proceedings and suggesting that increased use of challenges for cause will be sufficient to secure impartial juries); Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky: *A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990) (asserting that peremptory challenges should be eliminated because the *Batson* doctrine is ineffective in combating discrimination and recommending expansion of voir dire and challenges for cause to retain any benefits of the peremptory challenge).

[14] *See infra* part III.

is not a right guaranteed by the Constitution,[15] but rather is a creature of state statutory law,[16] this Note proposes that the New York State legislature abrogate the peremptory challenge statute from the Criminal Procedure Law entirely to protect potential jurors' equal protection and civil rights.[17]

Part I of this Note provides a brief background of the peremptory challenge and demonstrates how it perpetuates discrimination in the jury selection process. Part II examines the U.S. Supreme Court decisions of *Batson v. Kentucky* and its progeny, which further extend its holding and erode the free exercise of peremptory challenges. In part III, this Note focuses on the application of *Batson* in New York and its ineffectiveness in eradicating purposeful discrimination from the jury selection process. This part analyzes several decisions from New York's lower courts to explain the recurring problems with implementing the rebuttal, or race-neutral prong of the *Batson* doctrine. Part IV of this Note criticizes the Jury Project's recommendation, in its Report to the Chief Judge of the State of New York, to revise the peremptory challenge statute. This Note concludes by proposing that the New York State legislature's abrogation of the peremptory challenge statute in the Criminal Procedure Law is the only way to achieve *Batson's* true purpose of eliminating discrimination from the jury selection process.

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[15] *Batson*, 476 U.S. at 98.

[16] *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1993) (providing the number of peremptory strikes allowable for different crimes).

[17] *See* N.Y. CONST. art. I, § 11 which provides:

> 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.

N.Y. CIV. RIGHTS LAW § 13 (McKinney 1993) ("No citizen of the state possessing all other qualifications which are or 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.").

I. DISCRIMINATION IN JURY SELECTION: THE PEREMPTORY CHALLENGE

A peremptory challenge is defined as a challenge to a juror at the time of impanelling for which no reason need be advanced.[18] Purportedly, lawyers employ peremptory challenges to obtain fair and impartial juries, but in practice lawyers seek to assemble juries who are favorable to their clients.[19] For this reason, prosecutors, for example, commonly use their peremptory challenges to strike jurors who themselves or whose relatives have previously encountered the criminal justice system;[20] are unemployed or have employment that suggests a sympathetic predisposition to defendants;[21] or are unable to weigh the evidence fairly based on their statements or the attorney's perception of the juror's demeanor.[22] The peremptory challenge, although not a constitutional right, has a deeply rooted tradition in both England and America.[23] English common law allowed the criminal defendant thirty-five peremptory

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[18] BLACK'S LAW DICTIONARY 230 (6th ed. 1990).

[19] Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 230-36 (1986) ("In practice . . . lawyers have converted this ostensible search for impartial juries into a search for favorable juries. Their strategy is to use peremptory challenges to eliminate prospective jurors who have cultural characteristics or social perspectives which the attorney suspects will limit the jurors' receptiveness to their clients' claims.").

[20] *See infra* notes 140-43 and accompanying text.

[21] *See infra* notes 132-39 and accompanying text.

[22] *See infra* notes 112-19 and accompanying text; 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) (providing common reasons for exercising peremptory challenges which fall into two categories: objectively verifiable reasons and unarticulable "gut" feelings).

[23] For a detailed account of the peremptory challenge's history, see Swain v. Alabama, 380 U.S. 202, 212-20 (1965); *see also* Batson v. Kentucky, 476 U.S. 79, 119-20 (1986) (Burger, C.J., dissenting) (tracing the history of the peremptory challenge back to the Romans in 104 B.C.).

challenges,[24] while the prosecutor had unlimited use of peremptory challenges.[25] Although the English Parliament rescinded the prosecutor's peremptory challenges in 1305, it was not until the 1988 Criminal Justice Act that Parliament abrogated the defendant's right to use peremptory challenges entirely because defense attorneys were misusing the system to stack juries with individuals biased toward their side.[26]

In contrast, attorneys in the United States widely use and rely upon the peremptory challenge mechanism, purportedly to achieve fair and impartial juries.[27] A petit jury is selected from the venire, a group of people summoned by the court for service.[28] The venirepersons, before selection to a petit jury, undergo a lengthy period of pretrial questioning, called the voir dire, during which the attorneys and the court ascertain each venireperson's ability to be fair and impartial judges of the evidence at trial.[29] At this time, attorneys may eliminate potential jurors who are most likely biased toward the other side.[30] Both the prosecutor and the criminal defendant are entitled to a certain number of peremptory challenges, but the number of challenges allowed varies from

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[24] *Swain*, 380 U.S. at 212 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (15th ed. 1809)).

[25] *Id.* at 213 (citing COKE ON LITTLETON 156 (14th ed. 1791)).

[26] *See* Broderick, *supra* note 6, at 372-73 (discussing the historical demise of peremptory challenges in England).

[27] *See Swain*, 380 U.S. at 218-20.

[28] For background and commentary on jury selection procedure, see JON VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 85-137 (1977).

[29] *See id.* at 140-41 (providing a brief description of the voir dire process); 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, 157-63 (1989) (describing the voir dire examination; arguing that the method is patronizing to prospective jurors due to the probing and personal nature of the questions asked and inefficient as a means of obtaining an unbiased jury because the questions are designed "not to gain information but to make a point").

[30] *See* Serr & Maney, *supra* note 22, at 8 ("[T]he closer the similarity between a prospective juror and the defendant, the more likely the prosecutor will strike the juror . . . [based] on the assumption that defendants and jurors of similar backgrounds are likely to share basic views about life.").

jurisdiction to jurisdiction.[31] In contrast, challenges for cause, which may only be exercised under specific statutory conditions where juror bias is evident, are unlimited.[32] However, because the courts traditionally do not require any reason to strike a juror peremptorily, attorneys have enjoyed the freedom to purposefully discriminate against potential jurors on the basis of race, gender and other invidious grounds.[33]

Such discrimination in jury selection violates the equal protection right of both the defendant and the excluded juror.[34] The defendant's right is potentially violated because he or she is denied the precise protection that a trial by jury is intended to provide.[35] In essence, when attorneys use discriminatory criteria to eject jurors, they pervert the guarantee that a peer jury consists of a body of the defendant's neighbors, associates and persons

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[31] *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1993), which states in 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:
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> > (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 class 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.

[32] Challenges for cause are appropriate, for example, when a prospective juror does not meet particular qualifications of the state judiciary law, when a juror possesses a state of mind likely to prevent the juror from rendering an impartial verdict, or when the juror is related to the defendant in any way. *See, e.g.*, N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1993) (providing reasons why courts may grant parties challenges for cause in criminal cases).

[33] Serr & Maney, *supra* note 22, at 7-8 ("Because peremptory challenges allow both the prosecutor and defendant to strike a prospective juror at whim, they provide ample opportunity to discriminate.").

[34] Batson v. Kentucky, 476 U.S. 79, 86 (1986); *see supra* note 6 and accompanying text.

[35] *Batson*, 476 U.S. at 86.

sharing a common background and social status.[36] Moreover, the excluded juror's equal protection rights are violated because the juror's competence is determined simply by the person's race[37] or gender,[38] rather than an by objective assessment of the juror's qualifications and ability to impartially consider the evidence presented at trial.

The peremptory challenge necessarily conflicts with these equal protection rights because peremptory challenges are by their very nature arbitrary and unexplainable, based on the "seat-of-the-pants" instincts of the challenging attorney.[39] Such a basis is "undoubtedly crudely stereotypical," and such instinctual stereotyping may, in many cases, be "hopelessly mistaken."[40] Further, such stereotypes are likely premised upon prejudice, whether conscious or unconscious; thus a peremptory challenge, requiring no explanation, may be used as a safe haven for discrimination.[41] Therefore, applying the Equal Protection Clause to the jury selection system has predictably diminished the peremptory nature of peremptory challenges.[42]

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[36] *See id.* (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

[37] *Id.* at 87.

[38] *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1422 (1994).

[39] *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting); *see* Alschuler, *supra* note 29, at 170 ("Peremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial. The Equal Protection Clause forbids the arbitrary classification of human beings, and peremptory challenges are inherently arbitrary.").

[40] *Batson*, 476 U.S. at 138.

[41] *See id.* at 106 (Marshall, J., concurring); Serr & Maney, *supra* note 22, at 7-9 (arguing that the very nature of peremptory challenges is in conflict with the guarantees of the Equal Protection Clause); *see also* Alschuler, *supra* note 29, at 163-70 (asserting the irreconcilable nature of peremptory challenges and equal protection guarantees).

[42] Serr & Maney, *supra* note 22, at 10 (citing Swain v. Alabama, 380 U.S. 202, 221-22 (1965)) ("[T]o limit or qualify peremptory challenges is to destroy them . . . . To subject the . . . challenge . . . to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory.").

II. THE SUPREME COURT DECISIONS

A. Batson v. Kentucky[43]

In an attempt to rid the justice system of this pervasive, invidious discrimination, the U.S. Supreme Court has curbed attorneys' unbridled use of peremptory challenges under the Fourteenth Amendment's Equal Protection Clause.[44] Unfortunately, the Court's effort has failed because discrimination in jury selection remains pervasive. In the 1986 landmark decision of *Batson v. Kentucky*, the Supreme Court reversed a burglary conviction of a Black defendant by an all-White jury.[45] On appeal, the defendant argued, among other things, that the prosecutor engaged in a pattern of discriminatory peremptory challenges by removing all four Black jurors on the venire.[46] The Court held that in criminal cases, the Equal Protection Clause prohibits prosecutors from intentionally discriminating against Black jurors by employing peremptory challenges to strike potential jurors solely on the basis of their race or on the unfounded assumption that Black jurors as a class could not impartially weigh the state's evidence against a Black defendant.[47]

Batson presented the Supreme Court with the opportunity to re-evaluate its prior analysis of discriminatory use of peremptory challenges announced in *Swain v. Alabama*.[48] In *Swain*, a Black defendant, convicted of rape and sentenced to death, moved to quash his conviction, arguing that he was denied his equal protection rights because the prosecutor used several of his

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[43] 476 U.S. 79 (1986).

[44] *Id.* at 89; J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1420 (1994); *see* Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991); *supra* note 6 and accompanying text.

[45] *Batson*, 476 U.S. at 83.

[46] *Id.*

[47] *Id.* at 89.

[48] 380 U.S. 202 (1965); *see Batson*, 476 U.S. at 92-93 (explaining the inadequacies of the *Swain* decision).

peremptory challenges to remove Black members of the venire.[49] The Court rejected Swain's claim, stating that in order to raise an inference of invidious discrimination in violation of the Equal Protection Clause, the defendant must discharge the burden of proving systematic exclusion of Black potential jurors throughout the criminal justice system through prosecutors' exercise of peremptory challenges.[50] The *Batson* holding rescinded this heavy evidentiary burden placed on defendants, acknowledging the practical difficulties of proving that the state systematically has exercised peremptory challenges to exclude Blacks from the jury on account of race, and allowed defendants to rely on the factual circumstances of their own case.[51]

In overruling *Swain's* evidentiary burden, the Supreme Court announced a new framework for lower courts to evaluate claims of purposeful discrimination in the use of peremptory challenges.[52] As in any equal protection analysis, the burden is on the defendant who alleges discriminatory selection to prove that the prosecutor engaged in purposeful discrimination.[53] To make a prima facie showing of wrongful discrimination in the prosecution's use of peremptory challenges, the defendant must first establish that he or she is a member of a cognizable racial group.[54] The defendant must then show that the prosecution used its peremptory challenges to remove members of the defendant's race from the venire solely on the basis of race, based on factual and circumstantial inferences, which may include evidence of disproportionate impact on the cognizable group.[55] The Court proposed two "illustrative"

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[49] *See Swain*, 380 U.S. at 203-04.

[50] *Id.* at 224.

[51] *Batson*, 476 U.S. at 93 n.17.

[52] *Id.* at 93-98.

[53] *Id.* at 93.

[54] *Id.* at 94. For example, the defendant must show that the prosecution is removing Black jurors.

[55] *Id.* at 93 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)). For example, if the attorney exercises several peremptory challenges to exclude potential jurors who are unemployed, have low incomes or are uneducated, this may have a disproportionate impact on Black jurors' removal as opposed to White jurors, particularly in an urban community. *See* Serr & Maney, *supra* note 22, at 53.

examples to lower courts of evidence that could establish a prima facie case of discrimination: a pattern of strikes against Black jurors or the prosecutor's questions and statements during voir dire.[56]

Once the trial court concludes that the defendant has established such a prima facie showing of intentional discrimination, the burden shifts to the state to provide a race-neutral explanation for the challenges.[57] While the Court emphasized that the prosecutor's explanation "need not rise to the level of justifying a challenge for cause,"[58] the explanation must go beyond mere general assertions of the attorney's good faith and intuitive judgment in removing the Black jurors.[59] Rather, an acceptable neutral explanation must be "clear and reasonably specific"[60] and must be "related to the [facts of the] particular case to be tried."[61] Finally, it is within the sphere of the trial judge's discretion to decide whether or not the defendant has made out a case of purposeful discrimination.[62]

B. *Extensions of* Batson: *The Continuing Erosion of Peremptory Challenges*

In his concurring opinion in *Batson*, Justice Byron White foresaw that profuse litigation would be required to define the boundaries of the Court's equal protection holding.[63] The Court has consistently been forced to extend the *Batson* holding in failed

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[56] *Batson*, 476 U.S. at 97. The Court did not provide a bright line as to how many strikes against Black potential jurors will establish a pattern of strikes sufficient to raise an inference of discrimination, nor did it describe what implications from the prosecutor's voir dire inquiry will raise such an inference. Rather, the Court relied on its faith in the trial judges, experienced in supervising voir dire, to determine if the case by case circumstances create a prima facie case of discrimination. *Id.*

[57] *Batson*, 476 U.S. at 97.

[58] *Id.*

[59] *Id.* at 97-98.

[60] *Id.* at 98 n.20 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

[61] *Id.* at 98.

[62] *See id.* at 97-100.

[63] *Id.* at 102 (White, J., concurring).

attempts to strike a comfortable balance between the peremptory challenge and the guarantees of equal protection.[64]

The free use of peremptory challenges was further limited to comport with the guarantees of equal protection in 1991. In *Powers v. Ohio,*[65] the Court held that a criminal defendant could make a prima facie showing of intentional discrimination regardless of whether the defendant and the excluded juror share the same race.[66] In *Powers*, a White defendant was convicted of murder after the prosecutor peremptorily struck seven Black venirepersons from the jury.[67] The trial court rejected Powers' objections because *Batson* required, as a threshold matter, that the defendant and the excluded juror share the same race.[68] In reversing Powers' conviction, the Court held that a criminal defendant has standing to raise the equal protection claim of jurors who are wrongly excluded through race-based peremptory challenges because the defendant is injured by the risk that such discrimination taints the fairness of the entire judicial proceeding.[69] In addition, the defendant is an effective advocate of the juror's right because they share the mutual interest in eliminating discrimination from the proceedings and the juror is unlikely to litigate the issue of discrimination because it is such a burdensome process.[70] Thus, the free exercise of

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[64] *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994) (extending *Batson* to cases in which potential jurors are discriminated against based on their gender); Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992) (applying *Batson* framework to discriminatory peremptory challenges exercised by the defendant in a criminal case); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (extending the *Batson* framework to jury selection in civil cases); Powers v. Ohio, 499 U.S. 400, 415 (1991) (holding that a criminal defendant had third party standing to assert the equal protection right of an excluded juror, whether or not the defendant and the juror are of the same race).

[65] 499 U.S. 400 (1991).

[66] *Id.* at 402.

[67] *Id.* at 402-03.

[68] State v. Powers, No. 87AP-526, 1988 WL 134822, at *9 (Ohio App. Dec. 13, 1988), *appeal dismissed*, 536 N.E.2d 1172 (Ohio 1989), *rev'd*, 499 U.S. 400 (1991).

[69] Powers v. Ohio, 499 U.S. at 410-16.

[70] *Id.* at 413-15. The Court also extended *Batson* to private litigants in civil cases by holding that state action exists when private litigants exercise peremptory challenges in a discriminatory manner. *See* Edmonson v. Leesville

peremptory challenges was further constrained because the Court no longer required that the defendant and excluded juror be of the same racial group for the defendant to force the prosecutor to explain his or her strikes. Instead, the Court focused its attention on the paramount importance of equal protection guarantees over the tradition of peremptory challenges, and in that analysis, the peremptory system necessarily takes second place.

The Supreme Court further extended the *Batson* equal protection holding and encroached upon the arbitrariness of peremptory challenges in *Georgia v. McCollum*[71] by prohibiting criminal defendants from discriminatorily exercising their peremptory challenges.[72] In *McCollum*, White defendants were accused of assault and battery on a Black couple.[73] The state moved to prohibit the defendants from exercising their peremptory challenges in a discriminatory way by removing Blacks from the jury.[74] In applying *Batson's* equal protection analysis to criminal defendants, the Court held criminal defendants to be state actors. Because the Court enforces discriminatory peremptory challenges, regardless of whether the prosecution or the defense engages in the discrimination, the excluded jurors and the community at large will attribute the discrimination to the judicial process.[75] Thus, the Court held that the state had standing to raise the equal protection claim of the excluded juror.[76]

Most recently, in *J.E.B. v. Alabama ex rel. T.B.*, the Court extended *Batson* to prohibit intentionally discriminatory, gender-based peremptory challenges.[77] In *J.E.B.*, a father in a paternity action challenged the state's use of peremptory challenges to

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Concrete Co., 500 U.S. 614, 624-28 (1991). Moreover, injury to excluded jurors occurs in the courthouse, where society expects justice. *Id.* at 628.

[71] 112 S. Ct. 2348 (1992).

[72] *Id.* at 2353 ("Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases the juror is subjected to . . . discrimination.").

[73] *Id.* at 2351.

[74] *Id.*

[75] *Id.* at 2353-54.

[76] *Id.* at 2357.

[77] J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1422 (1994).

eliminate men from the jury.[78] Six justices held that intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause because "gender, like race, [is] an unconstitutional proxy for juror competence and impartiality."[79] Because the case involved a gender-based classification, the Court reached its conclusion by applying heightened equal protection scrutiny, which requires that the gender-based peremptory challenges be substantially related to an important government objective.[80] In applying heightened scrutiny, the Court does not balance the value of peremptory challenges as an institution against its determination to eliminate invidious discrimination from court proceedings.[81] Rather, the Court assesses whether peremptory strikes based on gender stereotypes substantially aid a litigant's effort to procure a fair and impartial jury[82]—the only legitimate state interest and the sole purpose of peremptory challenges.[83] The Court reasons that gender- or race-based discrimination in jury selection harms the litigants and the community, in addition to the individual jurors who are excluded from the judicial process.[84] The litigant is harmed by the risk that the prejudice that prompted the inappropriate exclusion of jurors will tarnish the entire judicial process.[85] The community is harmed because gender- and race-based peremptory challenges, which rely on wrongful stereotypes, reinforce societal prejudice and reduce the community's faith that a fair trial is possible.[86]

Thus, the Court's increasingly strict scrutiny demonstrates its hostility to discriminatory peremptory challenges and suggests that whenever peremptory challenges are subjected to equal protection analysis, the prospective juror's constitutional right not to be

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[78] *Id.*

[79] *Id.* at 1421.

[80] *Id.* at 1425-26. The only legitimate objective possible in the exercise of peremptory challenges is to secure a fair and impartial jury. *Id.* at 1426 n.8.

[81] *J.E.B.*, 114 S. Ct. at 1425-26.

[82] *Id.*

[83] *Id.* at 1426 n.8 (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991)).

[84] *Id.* at 1427.

[85] *Id.*

[86] *Id.*

discriminated against will always supersede the interest in preserving the arbitrary nature of the peremptory challenge to obtain fair and impartial juries.

III. THE APPLICATION OF *BATSON* IN NEW YORK: WHAT IS A NEUTRAL EXPLANATION?

The U.S. Supreme Court purposely steered clear of delineating specific procedures for lower courts to follow in implementing the *Batson* evidentiary scheme, recognizing the variety of jury selection techniques employed in state and federal trial courts.[87] Indeed, the Court left the quandary of determining what evidence will constitute a prima facie case and what explanations will be deemed race-neutral, or conversely, pretextual, to the lower courts. In turn, the New York courts have created their own evidentiary guidelines for the prima facie case under both the federal and state constitutions,[88] yet have had difficulty enunciating clear and predictable

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[87] Batson v. Kentucky, 476 U.S. 79, 99 n.24; *see id.* at 96-97; *see also* Alschuler, *supra* note 29, at 233 n.15, (citing V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 39-40 (Little Brown 1985)) ("[I]n thirteen states the judge alone conducts the voir dire examination; in eighteen states attorneys are primarily responsible for conducting this examination; in nineteen states the attorneys and judge share the examination; and 75 [%] of federal judges permit no oral participation of counsel in the voir dire examination.").

[88] *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 (1993) (establishing the minimum requirements to make out a prima facie case). In New York, a pattern of strikes or questions and statements made during the voir dire may be sufficient to raise the inference of discrimination in a particular case. People v. Jenkins, 75 N.Y.2d 550, 556, 554 N.E.2d 47, 50, 555 N.Y.S.2d 10, 13 (1990). The movant may also demonstrate that members of the cognizable group were excluded, while other venirepersons with the same material characteristics were not challenged. *See* People v. Bolling, 79 N.Y.2d 317, 324, 591 N.E.2d 1136, 1141, 582 N.Y.S.2d 950, 955 (1992). Additionally, if the prosecution, for example, strikes potential jurors of a cognizable group who, because of their experience and background would otherwise be considered pro-prosecution, this circumstance may raise the inference of a discriminatory motive. *Id.* Such inferences would also be raised if the stricken jurors were a heterogeneous group including, for example, different genders, careers and social backgrounds, yet all that they had in

standards for analyzing the legitimacy of a race-neutral explanation.[89] An analysis of New York State's implementation of the *Batson* doctrine demonstrates Justice Marshall's prescience in stating that the goal of ending the racial discrimination that peremptory challenges inject into the jury selection process will not be met by *Batson*, but rather will require eliminating peremptory challenges entirely.[90] Justice Thurgood Marshall feared that when the defendant established a prima facie case, thus shifting the burden, it would be very difficult for the trial court to assess the credibility of the prosecutor's motive to determine whether the neutral explanation provided is actually in good faith, or conversely, a pretextual proxy for discrimination.[91] A glance at New York courts' difficulty in distinguishing neutral from pretextual explanations reveals that *Batson*'s purpose of eliminating invidious discrimination, not just minimizing it, is being undermined along with the supposed arbitrary nature of the peremptory challenge.

A. The Subjective Nature of Pretext

The New York Court of Appeals' standard for determining whether an attorney has provided a race-neutral explanation is quite vague and merely mimics *Batson*. To rebut a prima facie case of discrimination, the attorney's explanation must not be based on race-related criteria, but it does not need to amount to a justification for a challenge for cause.[92] The explanation must also be

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common was their cognizable grouping. *See* People v. Scott, 70 N.Y.2d 420, 425, 516 N.E.2d 1208, 1211, 522 N.Y.S.2d 94, 97 (1987). Courts are instructed to take into account that the nature of peremptory challenges allows those who are already inclined to discriminate to do so. *See Bolling*, 79 N.Y.2d at 324, 591 N.E.2d at 1141, 582 N.Y.S. at 955. Finally, the mere inclusion of token members of the relevant cognizable group will not overcome an otherwise meritorious prima facie case. *Id.*

[89] *See, e.g.*, People v. Hernandez, 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990), *aff'd*, 500 U.S. 352 (1991) (suggesting methods to assess whether a race-neutral explanation is legitimate or pretextual).

[90] *Batson*, 476 U.S. at 105-08 (Marshall, J., concurring).

[91] *Id.* at 106 (Marshall, J., concurring).

[92] *See Batson*, 476 U.S. at 97; *see also* People v. Hernandez, 75 N.Y.2d at 355, 552 N.E.2d at 623, 553 N.Y.S.2d at 87; People v. Peart, 197 A.D.2d 599,

"clear and reasonably specific";[93] merely denying discriminatory motive or asserting good faith will not be sufficient.[94] Finally, even if the explanation proffered appears to be facially neutral, the trial court must reject the explanation unless it is particularly related to the factual circumstances of the case at bar.[95] Because these guidelines are so subjective and fact-based, the trial courts' determinations are entitled to great deference on appeal.[96] Of course, with this basis of review, reasonable minds can and will differ. The result has been that subjective explanations, relying on an attorney's perceptions, are beyond impeachment and the discriminatory use of peremptory challenges remains unchecked.[97]

600, 602 N.Y.S.2d 424, 424 (2d Dep't 1993); People v. Duncan, 177 A.D.2d 187, 193, 582 N.Y.S.2d 847, 851 (4th Dep't), *appeal denied*, 79 N.Y.2d 1048, 596 N.E.2d 414, 584 N.Y.S.2d 1016 (1992). For example, after the inference of discrimination is raised, an attorney cannot merely state that he or she peremptorily challenged a Black juror because Black jurors, in the attorney's experience, tend to sympathize with defendants.

[93] *Batson*, 476 U.S. at 98 n.20; *see* People v. Hernandez, 75 N.Y.2d at 355, 552 N.E.2d at 623, 553 N.Y.S.2d at 87 (stating that the neutral explanation must be "articulable").

[94] *Batson*, 476 U.S. at 98; People v. Bolling, 79 N.Y.2d 317, 320, 591 N.E.2d 1136, 1139, 582 N.Y.S.2d 950, 953 (1992).

[95] *See Batson*, 476 U.S. at 98; *see also* People v. Hernandez, 75 N.Y.2d at 357, 552 N.E.2d at 624, 553 N.Y.S.2d at 88 (explaining that the "record-based beliefs" offered to discharge the "*Batson*-based burden" of rebutting the inference of discrimination must "not appear . . . as a matter of law . . . [or,] to the lower courts as a matter of fact[,] to be some facial facade").

[96] *Batson*, 476 U.S. at 97-98 n.21; People v. Hernandez, 75 N.Y.2d at 356, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88.

[97] *See infra* notes 114-27 and accompanying text; *see also* Joshua E. Swift, Batson's *Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 362-63 (1993) (arguing that soft-data exclusions, relying on attorneys' subjective impressions, should be eliminated because trial courts cannot effectively analyze these reasons; thus, *Batson's* protection against discrimination in jury selection remains illusory).

B. Clever Lawyers Can Invent Neutral Explanations

The seminal case on the issue of pretext is *Hernandez v. New York.*[98] *Hernandez* demonstrates lawyers' ability to manipulate their purportedly race-neutral explanations so that the explanations appear to be facially valid, while still perpetrating discriminatory dismissal of potential jurors. In *Hernandez*, a Latino defendant was convicted of attempted murder and on appeal argued that the prosecutor's use of peremptory challenges to exclude all Latino veniremembers was purposefully discriminatory.[99] Whether the defendant had established a prima facie case was not an issue.[100] The only issue was whether the prosecutor's explanation, that the jurors' words and actions had given him reason to believe that the jurors fluency in Spanish would complicate their ability to accept the interpreter's translation of the testimony given by Spanish-speaking witnesses and they would have undue impact on the jury, was race-neutral and nondiscriminatory.[101] Although the jurors stated that they would try to accept the interpreter's translation, the prosecutor countered that while he believed "in [the jurors'] heart[s] that they will try to follow it . . . , [he] felt . . . uncertainty as to whether they could accept the interpreter as the final arbiter."[102] The defendant, in turn, argued that the prosecutor's explanation was a pretext to keep Latinos off the jury because the Latino culture and the Spanish language were so "inextricably intertwined" that exclusion on the basis of language was inherently exclusion on the basis of ethnicity.[103] Moreover, the record did not indicate that the prosecutor asked any other non-Latino jurors

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[98] 500 U.S. 352, 360 (1991), *aff'g,* 75 N.Y.2d at 355, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

[99] People v. Hernandez, 75 N.Y.2d at 353, 552 N.E.2d at 622, 553 N.Y.S.2d at 86.

[100] *Id.* at 353, 552 N.E.2d at 621, 553 N.Y.S.2d at 85.

[101] *Id.* at 354, 356, 552 N.E.2d at 622, 623, 553 N.Y.S.2d at 86, 87.

[102] *Hernandez v. New York,* 500 U.S. at 356.

[103] People v. Hernandez, 75 N.Y.2d at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

if they spoke Spanish.[104] Yet, the court of appeals found that the prosecutor's concern that the Spanish-speaking jurors might be unqualified or reluctant to accept the evidence presented, constituted a legitimate neutral ground for using a peremptory challenge.[105] The court also noted that it was for the trial court to determine if the prosecutor's explanation was pretextual and appellate courts will generally defer to the trial courts on the fact-finding issue of pretext.[106]

This explanation exemplifies the kind of clever lawyering that circumvents *Batson* and jeopardizes the right of Latinos to participate in jury service.[107] Because the prosecutor claimed that he was classifying the potential jurors into two classes: those whose specific demeanor suggested to him that they could accept the official translation and those who persuaded him that they could not accept the translation, he convinced the court of appeals that his explanations were facially valid and that he had no discriminatory intent.[108] The Supreme Court, in affirming the New York Court of Appeals,[109] stated that if the prosecutor had merely explained that he did not want to seat any Spanish-speaking jurors or any Latinos, such explanations could be considered pretextual.[110] But, this distinction between neutral reasons and pretextual ones is ineffectual because they both have the same disproportionate impact on Latino jurors.[111] By attributing the challenge to the jurors'

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[104] *Id.* 75 N.Y.2d at 363, 552 N.E.2d at 628, 553 N.Y.S.2d at 92 (Kaye, J., dissenting).

[105] *Id.* at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87.

[106] *Id.* at 356, 552 N.E.2d at 624, 553 N.Y.S.2d at 88 (citing Batson v. Kentucky, 476 U.S. 79, 97-98 n.21 (1986)) (stating that fact-finding courts are entitled to "great deference").

[107] *See generally* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (1993) (asserting that because language is intrinsically intertwined with race in the Latino community, the arbitrary elimination of Latino members from juries is a natural and direct consequence of their Spanish language fluency).

[108] *See* Hernandez v. United States, 500 U.S. at 361, 372 (1991).

[109] *Id.* at 358.

[110] *Id.* at 371-72.

[111] *Id.* at 361 ("While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate

demeanor, a subjective perception, rather than to the jurors' language or ethnicity, an objective classification, the prosecution slyly subverted the inference of discrimination raised by the prima facie case.[112] *Hernandez*, therefore, stands as authority to exclude Latino venirepersons from juries where Spanish testimony will be offered as evidence. *Hernandez* also serves as a symbol of the ease with which a clever attorney's subjective impressions will be considered facially valid.[113]

Cases where courts accept explanations based on the attorney's subjective impressions validate Justice Marshall's fear that an attorney's own conscious or unconscious racism may underlie his or her subjective impressions of a particular juror.[114] Further, Justice Marshall suggested that a judge's conscious or unconscious racism may motivate him or her to accept such an explanation as neutral.[115] For example, in *People v. Duncan*, a defendant appealed from a manslaughter conviction, alleging that the prosecutor did not successfully rebut his prima facie showing of intentional discrimination against a Black venirewoman.[116] The prosecutor explained that, in addition to the woman returning late to the courtroom from a recess, it was his impression that, from the character of her answers, she was "feisty, independent, opinionated

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impact does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause.").

[112] *See* Andrew G. Gordon, *Beyond* Batson v. Kentucky: *A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 696-99 (1993) (using the *Hernandez* decision to argue that an ethical rule against discrimination in jury selection would prevent attorneys from proffering pretextual explanations for discriminatory peremptory challenges). Gordon's argument is flawed, however, because even if an ethical rule did curb some of the abuses, it would still fall far short of *Batson's* true purpose of eliminating discrimination from the jury selection process.

[113] Two commentators have suggested that a prosecutor's purportedly race-neutral explanations amount to "discrimination with a thousand disguises." Serr & Maney, *supra* note 22, at 43.

[114] *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[115] *Id.* (Marshall, J., concurring).

[116] People v. Duncan, 177 A.D.2d 187, 189, 582 N.Y.S.2d 847, 848 (4th Dep't), *appeal denied*, 79 N.Y.2d 1048, 596 N.E.2d 414, 584 N.Y.S.2d 1016 (1992).

and too much of a leader."[117] Moreover, the prosecutor felt that, given her attitude, this juror would try to control the deliberative process.[118] The trial judge accepted this explanation as nonpretext and the appellate division showed great deference to the trial judge's fact finding on appeal.[119] While prototypically this is exactly the kind of "seat-of-the-pants" instinct upon which attorneys rely when exercising their peremptory challenges, acceptance of such explanations, so easily grounded in prejudicial stereotypes, elucidates the pervasive potential for discrimination in peremptory challenges. Similarly, Justice Marshall warned that a prosecutor's conscious or unconscious racism might lead him or her to the subjective impression that a prospective Black juror is sullen or distant, a characterization that would not have occurred to the prosecutor if a White juror had acted in an identical manner.[120]

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[117] *Id.* at 189, 582 N.Y.S.2d at 849.

[118] *Id.*

[119] *Id.* at 194, 582 N.Y.S.2d at 851; *see, e.g.*, People v. Bessard, 148 A.D.2d 49, 543 N.Y.S.2d 760 (3d Dep't), *appeal denied*, 79 N.Y.2d 845, 546 N.E.2d 193, 546 N.Y.S.2d 1010 (1989). A similar result was reached in *Bessard*, where the explanation that two Black women did not fit an attorney's preconceived ideal juror profile was held to be a neutral explanation for peremptory challenges against them. *Id.* at 52, 543 N.Y.S.2d at 762. In *Bessard*, the defendant appealed from a murder conviction arguing, among other things, that the prosecutor did not provide a race-neutral explanation for striking two Black venirewomen. *Id.* at 52, 543 N.Y.S.2d at 761. To rebut the prima facie case, the prosecutor explained that he had an ideal juror profile for this case, consisting of older persons, coming from the same area where the murder took place, preferably males rather than females, because men were more likely to understand firearms and would therefore better comprehend complicated forensic evidence. *Id.* at 52, 543 N.Y.S.2d at 762. The prosecutor also asserted that he saw the two Black women laughing and he did not believe that this conduct suited a murder trial. *Id.* Notwithstanding the fact that this explanation was based on a host of stereotypes, the trial judge accepted the prosecutor's explanation that the two Black women did not fit his profile and the appellate court affirmed. *Id.* at 53, 543 N.Y.S.2d at 762. Although this case was decided before *Batson* was extended to gender-based discrimination, it is a clear indication of how a clever attorney can carefully outline a profile which appears facially valid, yet still contains discriminatory intent.

[120] *Bessard*, 148 A.D.2d at 53, 543 N.Y.S.2d at 762; *see also* Broderick, *supra* note 6, at 412 (listing several kinds of stereotypes upon which attorneys rely as the basis of their peremptory challenges); Alschuler, *supra* note 29, at 210

These kinds of subjective explanations are distressing not only because they may often be motivated by stereotypes, but also because they are difficult to challenge.[121] A judge must be acutely aware of the rapport between the potential juror and the lawyer if the judge is to verify these impressions. Even with such heightened awareness, it is very unlikely that a judge will be able to remember all of the body language and behavior of the veniremembers;[122] thus, these unverifiable explanations are easily exploitable by talented counsel. It is for this reason that Judge Kaye dissented from *People v. Hernandez*, arguing that the court of appeals should, under New York law,[123] clearly articulate guidelines for determining when a proffered explanation is neutral, thus rebutting the inference of discrimination or pretext.[124] Judge Kaye would hold that an explanation that may appear facially valid, yet has a disparate impact on a cognizable group, is inherently suspect and should be subject to heightened scrutiny.[125] Therefore, "a reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be accepted . . . [because] to conclude otherwise can too easily permit discriminatory practices to continue."[126] Although Judge Kaye believes that closer inspection of proffered neutral explanations will

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(citing a confidential manual used to instruct Dallas, Texas prosecutors in the technique of jury selection, which lists even more stereotypes upon which attorneys rely in exercising their peremptory challenges).

[121] *See* Swift, *supra* note 97, at 362 ("Subjective reasons, [such as a juror's body language, demeanor, facial expression or attitude,] are simply unimpeachable" because they are so difficult to verify.).

[122] *See* Serr & Maney, *supra* note 22, at 59 n.317 ("It is very unlikely that a trial judge can remember all the idiosyncracies exhibited by the prospective jurors during voir dire, especially when the prosecutor gives his explanation, if at all, subsequent to the questioning of all venirepersons.").

[123] *See* N.Y. CONST. art. I, § 11; N.Y. CIV. RIGHTS LAW § 13.

[124] People v. Hernandez, 75 N.Y.2d 350, 360, 552 N.E.2d 621, 626, 553 N.Y.S.2d 85, 90 (1990) (Kaye, J., dissenting).

[125] *Id.* at 362, 552 N.E.2d at 627, 553 N.Y.S.2d at 91; *see* Serr & Maney, *supra* note 22, at 54-55 (suggesting that unemployment, low income or a lack of education are facially neutral reasons which may have a disparate impact on minorities and can easily serve as a pretext for purposeful discrimination).

[126] People v. Hernandez, 75 N.Y.2d at 362, 552 N.E.2d at 627, 553 N.Y.S.2d at 91.

more effectively achieve *Batson's* purpose of eliminating invidious discrimination from the jury selection process, it is clear that even when judges do find pretext, such a finding neither affects this purpose, nor deters future attempts to discriminatorily exercise peremptory challenges. The only way to comply with the Supreme Court's mandate of equal protection and eradicate this invidious discrimination is to abolish peremptory challenges altogether.[127]

C. *Problems When Lawyers Cannot Invent Neutral Explanations*

Even when the *Batson* framework is functioning properly and pretextual explanations for discriminatory challenges are detected, the efficacy of both the peremptory challenge system and the entire criminal justice system is being undermined. The peremptory challenge system is being damaged because judges are undermining attorneys' free use of peremptory challenges by finding pretextual explanations for challenges which are supposed to require no explanation at all.[128] The criminal justice system is being damaged because when the attorney's explanations for striking a particular juror are deemed pretextual, the attorney is accused of lying on the one hand and discriminating on the other.[129] Not only does a discriminatory strike followed by a pretextual explanation offend and violate the equal protection rights of the excluded juror, but it erodes the trust that a judge puts in an attorney to be honest, fair and just in the courtroom.[130] Public confidence in the fairness and neutrality of the criminal justice system, in turn, wanes because the attorneys who practice within it cannot be trusted.[131] *Batson* sought to eradicate discriminatory peremptory challenges for these very reasons, yet ironically, eight years later, the problems remain even where the framework functions properly. For this

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[127] Batson v. Kentucky, 476 U.S. 79, 108 (Marshall, J., concurring).

[128] *See supra* note 42 (discussing how the application of equal protection analysis destroys the nature of the peremptory challenge system).

[129] Telephone Interview with Justice Phyllis Skloot-Bamburger, Supreme Court of the State of New York, Bronx County, N.Y. (Oct. 28, 1994).

[130] *Id.*

[131] *See* Broderick, *supra* note 6, at 418.

reason, the New York Legislature should eliminate peremptory challenges entirely.

One situation commonly found to be pretextual, although seemingly facially valid, is when an attorney uses the juror's employment, or lack thereof,[132] as an excuse for a peremptory challenge.[133] In *People v. Bennett*, for example, the prosecutor challenged two Black women based on her subjective feeling that their occupations suggested that they would be too sympathetic to the defendant.[134] The first woman worked for the Department of Income Maintenance, which the prosecutor described as a "liberal" profession and thus felt that the juror would be sympathetic to the "underprivileged" defendant.[135] The second woman was challenged for the same reason because she was a social worker who worked with pregnant women and mentally retarded people.[136] Significantly, the prosecutor did not believe that the defendant was underprivileged, nor did she question the potential jurors on their attitudes toward the "underprivileged."[137] Interestingly, the prosecutor did not challenge another non-Black juror who worked with deaf and mentally retarded people, but simply stated, "that's different."[138] Such frivolous transparent explanations now seem sinister, whereas under the classical peremptory paradigm, they would not have been required.[139] The attorney, unable to proffer

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[132] *See, e.g.*, People v. Williams, 199 A.D.2d 445, 446, 605 N.Y.S.2d 383, 384 (2d Dep't 1993), *appeal denied*, 83 N.Y.2d 916, 637 N.E.2d 289, 614 N.Y.S.2d 398 (holding pretextual the explanation that a juror "[had] a dim view of any person charged with a crime" because he was unemployed).

[133] *See generally* Serr & Maney, *supra* note 22, at 45 (discussing when a juror's employment or lack thereof may serve as a legitimate race-neutral explanation for a peremptory challenge and when it serves as mere pretext).

[134] 614 N.Y.S.2d 430, 432 (2d Dep't 1994). The defendant was convicted of murder and criminal possession of a weapon and appealed, arguing that the prosecutor exercised her peremptory challenges in a discriminatory fashion.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *See also* People v. Payton, 209 A.D.2d 661, 661-62, 613 N.Y.S.2d 25, 26 (2d Dep't), *appeal denied*, 84 N.Y.2d 830, 641 N.E.2d 172, 617 N.Y.S.2d 151 (1994) (holding pretextual the explanation that a White juror was challenged because the juror was an arts administrator who organized arts and education

a race-neutral explanation, may seem like a liar, intentionally fabricating reasons to mask a discriminatory intent. Thus, attention is drawn to the discrimination, but it is not eliminated.

Another facially valid explanation, which has been rejected as pretext, occurs when the attorney claims that the juror cannot be fair because he or she has a relative who has been prosecuted for a crime. In *People v. Manuel*,[140] the prosecutor removed two potential Black jurors because they had relatives who were prosecuted for crimes, but did not remove a potential White juror who had a relative who was jailed for assault and robbery.[141] Because this facially valid criterion was not equally applied to Black and non-Black jurors, the appellate division found the explanation to be a pretext for discrimination.[142] The foregoing kinds of pretext for racial discrimination are particularly disturbing in urban areas where "the burden of unemployment, low income or poor education is likely to fall disproportionately on minorities"; thus, these characteristics may be proxies for race and must be painstakingly scrutinized.[143] It is evident that even where pretextual explanations are being detected, the peremptory nature of the peremptory challenge and the integrity of the criminal justice system are both being subverted.

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programs for students); People v. Dabbs, 192 A.D.2d 932, 934, 596 N.Y.S.2d 893, 895 (3d Dep't 1993) (holding pretextual the explanation that a female juror's employment in an affirmative action unit of a state agency was an indication of a sympathetic attitude toward Blacks and other minorities); People v. Duncan, 177 A.D.2d 187, 190, 582 N.Y.S.2d 847, 849 (4th Dep't 1992), *appeal denied*, 79 N.Y.2d 1048, 596 N.E.2d 414, 584 N.Y.S.2d 1016 (holding pretextual the explanation that Black juror's employment as a technician at a local hospital indicated that the juror did not "really . . . give a damn," and, therefore, could not adequately serve on the jury).

[140] 182 A.D.2d 711, 582 N.Y.S.2d 735 (2d Dep't), *appeal denied*, 80 N.Y.2d 834, 600 N.E.2d 646, 587 N.Y.S.2d 919 (1992).

[141] *Id.* at 711, 582 N.Y.S.2d at 737.

[142] *Id. But cf.* People v. Richardson, 193 A.D.2d 969, 598 N.Y.S.2d 341 (3d Dep't 1993) (holding race-neutral the explanation that a Black potential juror could not serve on the jury because he had a cousin serving a jail sentence, although two White potential jurors who had relatives with criminal convictions were not peremptorily challenged).

[143] Serr & Maney, *supra* note 22, at 54; *see also* McMillian & Petrini, *supra* note 13, at 370.

IV. A CURRENT LEGISLATIVE PROPOSAL: CHIEF JUDGE KAYE'S JURY PROJECT

Committed to overhauling the New York jury system, Chief Judge Judith Kaye assembled a task force called the Jury Project, which recommended, among other things, a revision of New York's peremptory challenge statute in the Criminal Procedure Law.[144] The Jury Project report suggests that the number of peremptory challenges allowable should be reduced from twenty to fifteen for Class A felonies, from fifteen to ten for Class B and C felonies, from ten to seven for Class D and E felonies and from two to one per alternate.[145] Additionally, the report proposes that judges should have the authority to increase the number of peremptory challenges in appropriate cases.[146] The report explains that reducing the number of peremptory challenges will cut down on *Batson* violations, while preserving the power of the peremptory challenge as a tool to create fair and impartial juries.[147] However, this assertion is not entirely accurate.

While it is true that the Jury Project's recommendations would reduce the number of *Batson* violations, they compromise the goal behind *Batson*, thus defeating one of the Jury Project's own purposes.[148] The recommendations will reduce violations because it will be more difficult to meet the initial burden of the prima

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[144] N.Y. CRIM. PROC. LAW § 270.25.

[145] THE JURY PROJECT: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 65 (1994).

[146] *Id.* at 69 ("Such an increase may be appropriate in cases involving extensive pretrial publicity, a very large number of defendants, or other extraordinary circumstances.").

[147] *See id.* at 66. The report also recommends reducing voir dire time and cutting down on the number of prospective jurors needed to obtain a jury in a criminal case. *Id.* at 66, 68.

[148] The primary purpose of the Jury Project was not to resolve *Batson* issues in New York courts. Rather, the task force intended to overhaul the jury system, thereby reducing opportunities for *Batson* violations, saving prospective jurors' time and the state's money by requiring fewer citizens to report for service, and limiting the number of citizens who have the unsatisfying experience of performing jury duty without actually serving on a jury. *See id.* at 68.

facie case. Because the prima facie case is most often established by evidence of a *pattern* of strikes that appear discriminatory, once the number of peremptory challenges is reduced, it will be more difficult to establish such a pattern and thereby raise the inference of discrimination.[149] But, the inability to establish a prima facie case does not reduce the likelihood that peremptory challenges will be used in a discriminatory manner against any one particular juror. Individual potential jurors will still be denied their equal protection rights because the movant on their behalf will face prohibitive obstacles in establishing an inference of discrimination; therefore, this proposal is insufficient to secure the equal protection and civil rights of each potential juror.[150] Moreover, even when a prima facie case is established, the pretext problem remains a thorn in *Batson*'s side. Thus, *Batson*'s goal of eliminating invidious discrimination from jury selection is not addressed; it is merely swept under the carpet.

V. THE ONLY ALTERNATIVE: BANNING PEREMPTORY CHALLENGES

In their critical concurrence in *People v. Bolling*, New York Court of Appeals Judges Joseph Bellacosa, Sol Wachtler and Vito Titone implored the legislature to end "the proliferation and permutation of problems in the appellate pipeline" and "honor[ ] and achieve[ ]" the purposes of *Batson* by eliminating the peremptory challenge process.[151] They argued that peremptory challenges have outlived their usefulness and, notwithstanding the *Batson* limitations, cloak invidious discrimination, rather than make it disappear.[152]

Both the interest in preserving the peremptory challenge tradition and the interest in abolishing discriminatory jury selection

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[149] *See supra* note 88 (discussing the standards for the prima facie case in New York).

[150] *See* N.Y. CONST. art. I, § 11; N.Y. CIV. RIGHTS LAW § 13.

[151] People v. Bolling, 79 N.Y.2d 317, 326, 591 N.E.2d 1136, 1142, 582 N.Y.S.2d 950, 956 (Bellacosa, J., concurring).

[152] *See id.* (Bellacosa, J., concurring).

are disserved by the "middle ground" remedy of *Batson*[153] and the futile proposal to reduce the number of peremptory challenges allowable in New York. Peremptory challenges, by their very nature, are an arbitrary and subjective means of classifying individuals, which allow attorneys to exclude veniremembers based on no more than unprovable hunches and instincts.[154] This kind of classification is necessarily irreconcilable with the Equal Protection Clause, which demands sufficient justification for such divisions among citizens to assure that the classification is neither irrelevant nor illegitimate.[155] Thus, once conventional equal protection analysis is applied to peremptory challenges, as evidenced by *Batson* and its progeny, the peremptory challenge system necessarily decomposes.[156] Because peremptory challenges have not been declared unconstitutional, their application has created a legal fiction, the quasi-peremptory challenge, requiring a race-neutral explanation for challenges that should require no explanation whatsoever.[157] This legal fiction is inadequate to fully purge the jury selection process of its pervasive discrimination. The U.S. Supreme Court's desire to preserve the peremptory institution has

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[153] Serr & Maney, *supra* note 22, at 62. *Batson* is a "middle ground" remedy because, rather than eliminating peremptory challenges entirely, it requires explanations that compromise the peremptory nature of the challenges. The problem is that "analytically, there is no middle ground: [a] challenge either has to be explained or it does not." McMillian & Petrini, *supra* note 13, at 374.

[154] *See* Swain v. Alabama, 380 U.S. 202, 219 (1965) (citing Lewis v. United States, 146 U.S. 370, 378 (1892)).

[155] *See supra* note 6 (providing a brief explanation of equal protection analysis).

[156] *See* Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting) (arguing that there is no logical end to the application of equal protection scrutiny to peremptory challenges because "every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a 'classification' subject to equal protection scrutiny").

[157] Alschuler, *supra* note 29, at 200 (arguing that the "quasi-peremptory" challenge denies courts the "indulgence" of presuming that prosecutors act for legitimate reasons even where they probably do not).

allowed the judiciary to censure some blatant forms of discrimination while allowing other, more concealed forms to flourish.[158]

Lawyers are encouraged to discriminate more creatively, arriving at clever race-neutral explanations for their challenges, which are no more than crude and unbecoming ways of classifying human beings that *Batson* permits and validates.[159] Whether the explanation is accepted, and stereotypes flourish, or rejected as pretextual and the attorney is perceived as a liar or a discriminator, jurors' equal protection and civil rights are abridged and the integrity of the criminal justice system and the public confidence therein is eroded. Therefore, the legislature should confront the reality of *Batson*'s "euphemisms and . . . rationalizations"[160] and declare peremptory challenges what they really are and should be—challenges for cause. Abrogation of the peremptory challenge system would protract the incalculable damage being done to the credibility of the criminal justice system and the constitutional rights of potential jurors not to be arbitrarily discriminated against.

Opponents to such an abrogation argue that peremptory challenges encourage confidence in the fairness and neutrality of the criminal justice system because such challenges are a critical means of selecting impartial jurors.[161] However, this argument is unpersuasive because it ignores the decrease in public confidence

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[158] Alschuler, *supra* note 29, at 201 (citing Chisolm v. State, 529 So. 2d 635, 639 (Miss. 1988)) (That peremptory challenges cannot be exercised for a racially discriminatory reason in no way precludes their exercise for a "non-race based reason that objective and fair-minded persons might [otherwise] regard as absurd.").

[159] *See* Alschuler, *supra* note 29, at 201.

[160] People v. Bolling, 79 N.Y.2d 317, 326, 591 N.E.2d 1136, 1142, 582 N.Y.S.2d 950, 956 (Bellacosa, J., concurring).

[161] *See* Batson v. Kentucky, 476 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (quoting W. FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852)). Justice Scalia, an avid supporter of the peremptory challenge system, argues that the system should be upheld because, as a whole, it has been even-handed and that is why it has coexisted with the Equal Protection Clause for 120 years. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1437 (1994) (Scalia, J., dissenting). However, this argument is disingenuous; school segregation also had a long history of coexisting with the Equal Protection Clause until the Court saw fit to eradicate that particular kind of invidious discrimination. Brown v. Board of Educ., 347 U.S. 483 (1954).

in the system where potential jurors are being discriminated against based on stereotypes. Groups that are continually excluded from this civic duty are likely to presume that the government classifies them in offensive ways and is unresponsive to their rights and concerns.[162] Moreover, this argument ignores the decline in the public's faith in the fairness of judicial proceedings because when attorneys' explanations are deemed pretext, the attorney is accused of lying and the assumption is that dishonesty infects the entire process.

Other opponents of abolishing the peremptory challenge system insist that the handicap of not being able to strike jurors with deviating backgrounds and opinions will enhance their extreme positions on the jury and extend jury deliberations or encourage more hung juries.[163] However, in order for the jury to function properly, it must reflect the defendant's peers in society.[164] Moreover, the challenge for cause is still an available remedy to eliminate radical jurors. Thus, eliminating peremptory challenges would ensure jury service and equal protection to potential jurors with traditionally underrepresented viewpoints more than it would exacerbate extreme opinions.[165]

Perhaps the strongest argument against eliminating peremptory challenges to protect prospective jurors' equal protection rights is that it improperly exalts the rights of the excluded juror over the rights of a criminal defendant who may face imprisonment or even

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[162] Broderick, *supra* note 6, at 419. (Arguments that peremptory challenges promote confidence in our legal system by allowing litigants to actively select their juries ignore "the peremptory's countervailing ability to diminish the public's overall estimation of the judiciary's fairness.").

[163] Gurney, *supra* note 19, at 255 (citing John C. Harrison, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1190 n.55 (1980)). The argument that peremptory challenges should be maintained to prevent the administrative burdens of extended jury deliberations and hung juries fails because administrative burdens have never been held an adequate justification for violating individuals' rights to equal protection. *See* Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973).

[164] Gurney, *supra* note 19, at 255-56 (arguing that eliminating peremptory challenges would not significantly alter jury diversity and would assure jury service to those who have been underrepresented in the past).

[165] Gurney, *supra* note 19, at 256.

death.[166] Although prospective jurors are protected, defendants are less able to guard themselves from being judged by a biased jury because there will be no mechanism to remove jurors with latent biases unless a juror openly admits prejudice during voir dire.[167] Even though this argument is compelling, it is important to remember that defendants are still afforded the opportunity to challenge biased jurors for cause.[168] It is true that attorneys could no longer rely on their subjective and perhaps stereotypical impressions to strike jurors without explanation, but the challenge for cause provides a suitable mechanism to achieve fair and impartial juries if attorneys carefully and strategically develop their voir dire questions to elicit informative responses from potentially biased jurors.[169] Moreover, equal protection is a constitutional right, whereas the right to a peremptory challenge may be withheld without encroaching on any constitutional guarantee.[170] Thus, although the criminal defendant's stake in preserving the peremptory challenge appears more significant where he or she faces harsh penalties for crimes charged, the defendant remains adequately protected by the challenge for cause rubric, and cannot constitutionally discriminate against other citizens to achieve what he or she considers to be a fair and impartial jury.[171]

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[166] Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

[167] *Id.* (Thomas, J., concurring).

[168] Under New York's Criminal Procedure Law, a challenge for cause is an objection to a prospective juror which may be made, inter alia, on the grounds that he or she has "a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based on the evidence adduced at trial." N.Y. CRIM. PROC. LAW § 272.20.

[169] *See* Gurney, *supra* note 19, at 245-46, 257-62.

[170] *McCollum*, 112 S. Ct. at 2358; *see supra* part I.

[171] *See McCollum*, 112 S. Ct. at 2358 ("It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.").

CONCLUSION

In *Batson v. Kentucky*[172] and its progeny, the U.S. Supreme Court endeavored to prevent racial discrimination in the exercise of peremptory challenges. The Court attempted to accommodate the competing interests of the equal protection rights of citizens not to be improperly discriminated against when they report to court for jury service and the traditional belief that the free use of peremptory challenges insures fair and impartial juries. New York lower courts' application of the *Batson* framework, however, confirms that the *Batson* remedy fails to balance these interests successfully. Discriminating attorneys are still able to rely on stereotypical assumptions to strike jurors from the venire so long as the attorneys invent a clever explanation to mask their discriminatory intent. Thus, excluded jurors' equal protection rights are still being violated. In addition, where attorneys are less astute and their explanations are deemed pretextual, the discrimination is not prevented, but merely recognized. In either case, the arbitrary nature of the peremptory challenge is jeopardized. As a solution, this Note recommends that the New York legislature eliminate the peremptory challenge statute from the Criminal Procedure Law. In reality, eliminating the peremptory challenge is the only way to achieve *Batson's* true purpose of removing discrimination from the jury selection process.

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[172] 476 U.S. 79 (1986).