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Gender Based Peremptory Challenges and the New York State Constitution

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GENDER BASED PEREMPTORY CHALLENGES AND THE NEW YORK STATE CONSTITUTION

INTRODUCTION

New York State's peremptory challenge statute[1] allows an attorney to exclude a prospective juror from a petit jury[2] "for which no reason needs to be assigned."[3] In the past, attorneys have, in most cases,[4] been allowed unrestricted use of peremptory challenges.[5] More recently, the New York State courts have begun to inquire into the attorney's motive for excluding certain groups of prospective jurors.[6] In the past few years, the court of appeals has firmly established that attorneys are prohibited from using peremptory challenges for racially discriminatory purposes.[7] The court of appeals, however, has not

1. N.Y. CRIM. PROC. LAW § 270.25(1) (McKinney 1982).

2. Petit jury is an ordinary jury selected for criminal or civil cases that is distinguishable from a grand jury. BLACK'S LAW DICTIONARY 856 (6th ed. 1990).

3. N.Y. CRIM. PROC. LAW § 270.25(1) (McKinney 1982).

4. Prior disputes have mostly centered on the number of peremptory challenges allowed for certain crimes. *See, e.g.*, People v. Anthony, 24 N.Y.2d 696, 249 N.E.2d 747, 301 N.Y.S.2d 961 (1969) (no prejudice when court allowed thirty challenges); People v. King, 47 A.D.2d 594, 363 N.Y.S.2d 682 (4th Dep't 1975) (defendants were granted ten additional peremptory challenges in violation of the statute).

5. People v. Muriale, 138 Misc. 2d 1056, 1065, 526 N.Y.S.2d 367, 373 (Sup. Ct. Kings County 1988), *appeal denied*, 76 N.Y.2d 740, 557 N.E.2d 1198, 558 N.Y.S.2d 902 (1990). "Until recently, it had been a long-standing policy in New York not to inquire into a lawyer's reason for the use of a peremptory challenge." *Id.*

6. *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*, 111 S. Ct. 1859 (1991); People v. Jenkins, 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990); People v. Kern, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 111 S. Ct. 77 (1990); People v. Scott, 70 N.Y.2d 420, 516 N.E.2d 1208, 522 N.Y.S.2d 94 (1987).

7. *Jenkins*, 75 N.Y.2d at 556, 554 N.E.2d at 50, 555 N.Y.S.2d at 13 (prosecution prohibited from excluding prospective black jurors from a petit jury); *Kern*, 75 N.Y.2d at 643, 554 N.E.2d at 1236, 555 N.Y.S.2d at 648 (defendant prohibited from excluding prospective black jurors from a petit

yet been given the opportunity to decide whether this prohibition extends to gender based discrimination.[8]

This Comment takes the view that such gender based discrimination is prohibited by the New York State Constitution. Gender based discrimination adversely affects the criminal defendant's[9] right to an impartial jury,[10] and it also unfairly denies women[11] the right of citizenship to serve on a jury.[12] In

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jury); *Scott*, 70 N.Y.2d at 425, 516 N.E.2d at 1211, 522 N.Y.S.2d at 97 (defendant established a *prima facie* claim that the prosecution uses its peremptory challenges to exclude blacks from the petit jury).

8. People v. Blunt, 162 A.D.2d 86, 89, 561 N.Y.S.2d 90, 92 (2d Dep't 1990) *aff'd on remand*, No. 901-05958, 1991 N.Y. App. Div. LEXIS 12602 (2d Dep't Oct. 7, 1991). "[T]he question of the use of peremptory challenges to discriminate based on gender is relatively novel." *Id.*

The United States Supreme Court has also not addressed this issue. People v. Irizarry, 165 A.D.2d 715, 716, 560 N.Y.S.2d 279, 280 (1st Dep't 1990).

9. Discussion of defendant rights in civil proceedings is beyond the scope of this Comment. This Comment will focus on a defendant's federal and state constitutional rights in a criminal proceeding. Generally speaking, defendants in a civil proceeding enjoy less Federal Constitutional protection. For example, civil litigants do not enjoy sixth amendment rights. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 437 (1986) (holding that orders disqualifying counsel in a civil case do not qualify for interlocutory appeal).

10. *See infra* Part III, sections C and E.

11. The focus of this Comment will be on female prospective jurors' rights under the New York State Constitution. Men, of course, are also subject to systematic exclusion solely on the basis of gender by an attorney's use of peremptory challenges and are entitled to the same federal and state constitutional protections as provided for women. *See* Craig v. Boren, 429 U.S. 191, 210 (1976) (holding that men and women are given the same equal protection rights under the Federal Constitution from instances of gender based discrimination); People v. Liberta, 64 N.Y.2d 152, 168, 474 N.E.2d 567, 576, 485 N.Y.S.2d 207, 216 (1984) (holding that the New York State Constitution's equal protection clause protects men from instances of gender based discrimination).

While not addressed in this Comment, such instances of alleged discrimination do exist. *See* State v. Adams, 533 So. 2d 1060 (La. Ct. App. 1988) (no sixth amendment violation when prosecution excluded men from female defendant's trial); Rosenthal v. Weckstein, 19 Mass. App. 944, 473 N.E.2d 202 (Mass. App. Ct. 1985) (comments made by judge as to possible sixth amendment violation when plaintiff excluded men from jury were not prejudicial to plaintiff); State v. Olivera, 534 A.2d 867 (R.I. 1987) (no sixth

Part I, this Comment begins with a historical perspective of women and jury service in New York State. It then provides a brief background of the jury selection process in New York State, expanding on the challenge for cause and peremptory challenge rules. Part II examines several United States Supreme Court decisions regarding the criminal defendant's and female prospective juror's rights under the Federal Constitution. This Part concludes that presently, the Federal Constitution offers the criminal defendant and female prospective juror no protection from gender based peremptory challenges. Part III argues that the New York State Constitution offers extended protection to criminal defendant's and female prospective juror's rights beyond those guaranteed under the Federal Constitution. This Part concludes that attorney use of peremptory challenges predicated solely on the basis of gender is prohibited by the New York State Constitution.

I. BACKGROUND

A. History of Women and Jury Service in New York State

A survey of New York State legislative acts regarding jury selection from 1683 to 1937 shows that women were statutorily prohibited from serving on a jury.[13] In 1683, section 5 of the Charter of Liberties and Privileges of 1683 called for "a jury of

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amendment violation when six of seven prosecution peremptory challenges were used to exclude males).

12. *See infra* Part III, sections C and E.

13. People v. Irizarry, 142 Misc. 2d 793, 800, 536 N.Y.S.2d 630, 633 (Sup. Ct. Bronx County 1988), *rev'd*, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dep't 1990).

In 1870, Wyoming was the first state to allow women to serve on a jury. Daughtrey, *Cross Sectionalism in Jury-Selection Procedures after Taylor v. Louisiana*, 43 TENN. L. REV. 1, 51-53 (1975). In 1898, Utah was the first state to statutorily permit women to serve on a jury. Mahoney, *Sexism in Voir Dire: The Use of Sex Stereotypes in Jury Selection*, WOMEN IN THE COURTS, 129 n.3 (1978).

twelve men as near as may be peers or equals . . . ."[14] Chapter 378 of the Laws of 1896 stated that only "[a] male citizen of the United States of at least ten years' standing, and a resident of the county" may serve on a jury.[15] Furthermore, New York State Constitutions of 1777, 1821, 1846, 1894 also failed to confer the right to women.[16]

At that time, New York State's exclusion of women from jury service was constitutionally permissible under *Strauder v. West Virginia*,[17] an 1879 United States Supreme Court decision. In *Strauder*, the Supreme Court invalidated, under the equal protection clause of the fourteenth amendment,[18] a state statute that prohibited blacks from jury service.[19] The Court went on to add, however, that the states still had the authority, absent a racial basis, to exclude certain groups, including women, from jury service.[20]

At the turn of the twentieth century, the New York State Legislature passed two acts which sought to prohibit racial discrimination in its jury selection process. In 1895, the New York State Legislature passed a statute entitled, "An Act to Protect All Citizens In Their Civil and Legal Rights,"[21] which

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14. *Irizarry*, 142 Misc. 2d at 800, 536 N.Y.S.2d at 633.

15. People v. Dunn, 157 N.Y. 528, 530, 52 N.E. 572, 573 (1899).

16. Bamberger, *Democraticizing the Supreme Court: 300 Years of the Jury*, May-June 1991 N.Y. ST. BAR J. 30, 32.

17. 100 U.S. 303 (1879).

18. The fourteenth amendment provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

19. *Strauder*, 100 U.S. at 306.

20. *Id.* at 310. The Court stated:

> We do not say that within the limits which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males . . . We do not believe the Fourteenth Amendment was ever intended to prohibit this. Its aim was against discrimination because of race or color.

Id.

21. Act of June 15, 1895, ch. 1042, § 3, 1895 N.Y. Laws 974, 974 (McKinney).

prohibited exclusion from jury service based on race, creed or color.[22] In 1909, section 13 of New York Civil Rights Law[23] was enacted which also prohibited disqualification from jury service based on race, creed or color.[24] Both of these acts, however, failed to include women as one of the groups not subject to exclusion.

In 1936, New York State's Judicial Council recommended that women should be eligible for jury service.[25] Interestingly, this recommendation was based on the need to secure a larger and better educated juror pool rather than on equality principles.[26] A year later, the legislature followed the Council's recommendation and eliminated the male gender only qualification by amending sections 502,[27] 598[28] and 686[29] of the New York Judiciary Law.[30] In 1938, the legislature again amended section 13 of the civil rights law to add "sex" as a classification protected from jury selection discrimination.[31] The legislature also amended section 596 of New York Judiciary Law in 1940 to explicitly grant women the right to serve on a jury.[32] Section 599, however, permitted women an automatic exemption from jury

22. *Id.*

23. Act of February 17, 1909, ch. 14, § 13, 1909 N.Y. Laws 620, 621 (*see*, Consolidated Laws of 1909, ch. 6, codified as amended by N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976)).

24. *Id.*

25. SECOND REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, 87, 94 (Albany, 1936).

26. *Irizarry*, 142 Misc. 2d at 801, 536 N.Y.S.2d at 634.

27. Act of May 24, 1937, ch. 513, §§ 1, 2, 1937 N.Y. Laws 1171, 1171 (McKinney) (repealed 1977).

28. *Id.* at N.Y. Laws 1172-73.

29. *Id.* at N.Y. Laws 1173-74.

30. *Irizarry*, 142 Misc. 2d at 801, 536 N.Y.S.2d at 634.

31. Act of March 26, 1938, ch. 163, § 1, 1938 N.Y. Laws 684, 684 (codified as amended N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976)). In 1945, the legislature added national origin as a protected classification. Act of March 27, 1945, ch. 292, § 2, 1945 N.Y. Laws 672, 672-73 (codified as amended N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976)).

32. Act of March 20, 1940, ch. 202, 1940 N.Y. Laws 769, 772 (McKinney) (repealed 1978).

service that was not provided for men.[33]

This automatic exemption effectively diminished the woman's right to serve on a jury. Instead of summoning women for jury service and then asking them if they wanted an exemption, the county jury board[34] would only subpoena women who affirmatively volunteered for jury service.[35] In *People v. Cosad*,[36] the county court observed that the Jury Board of Seneca County had systematically excluded women from jury service resulting in a violation of the criminal defendant's state and federal constitutional rights.[37] This decision was unfortunately overshadowed by the United States Supreme Court decision in *Fay v. New York*[38] which held that the automatic exemption for women was constitutional.[39]

In 1974, the constitutionality of New York State's automatic exemption for women was again under attack in *National Organization for Women v. Goodman*.[40] In *Goodman*, the New

33. *Id.* at 773. Section 599 provided, in pertinent part, that "[e]ach of the following persons . . . , although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom: . . . (7) a woman." *Id.*

34. A county jury board typically consists of a resident supreme or appellate court judge, a county judge and a member of the county board of supervisors. N.Y. JUD. LAW § 503 (McKinney 1975 & Supp. 1991).

35. *See* Fay v. New York, 332 U.S. 261, 277-78 (1947) (court discusses women's privilege, not duty, to serve on a jury).

36. 189 Misc. 939, 73 N.Y.S.2d 890 (Cty. Ct. Seneca County 1947).

37. *Id.* at 940, 73 N.Y.S.2d at 891.

38. 332 U.S. 261 (1947).

39. *Id.* at 278. The automatic exemption for women was later reaffirmed as being constitutional in Hoyt v. Florida, where the Supreme Court, quoting *Fay*, stated that women have the privilege but not the duty to serve on a jury. 368 U.S. 57, 62 (1961).

40. 374 F. Supp. 247 (S.D.N.Y. 1974); *accord* DeKosenko v. Brandt, 63 Misc. 2d 895, 313 N.Y.S.2d 827 (Sup. Ct. N.Y. County 1970), *aff'd*, 36 A.D.2d 796, 318 N.Y.S.2d 915 (1st Dep't 1971). A female plaintiff, involved in a civil action to be tried before a jury, also contested the constitutionality of female automatic exemption. *Id.* at 896, 313 N.Y.S.2d at 828. In dismissing her claim, the judge added, "the [p]laintiff is in the wrong forum. Her lament should be addressed to the 'Nineteenth Amendment State of Womanhood' which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping . . . ." *Id.* at 898, 313 N.Y.S.2d at 830.

York Chapter of the National Organization for Women (NOW) brought an equal protection claim of gender based discrimination.[41] NOW claimed that the automatic exemption labeled women with stereotypical roles of being a "housewife" and "rearer of children."[42] To bolster its claim, NOW stated that then-recent United States Supreme Court decisions in *Reed v. Reed*[43] and *Frontiero v. Richardson*[44] would likely prohibit the automatic exemption under heightened judicial scrutiny.[45] The district court, however, stated that *Reed* and *Frontiero* did not overrule *Fay*, and held that the automatic exemption for women was still constitutional.[46] The district court added that it was up to the New York State Legislature to modify the automatic exemption rule.[47]

In 1975, the New York State Legislature did amend section 599 of the New York Judiciary Law by eliminating the automatic exemption for women.[48] This change, however, was in response to the Supreme Court's pending decision of *Taylor v. Louisiana*[49] rather than the district court's invitation.[50]

In *Taylor*, the Supreme Court rejected the state of Louisiana's practice of automatically exempting women from jury service, stating that the criminal defendant's sixth amendment right[51] to an impartial jury calls for mandatory inclusion of women in the

41. *Goodman*, 374 F. Supp. at 248.

42. *Id.*

43. 404 U.S. 71 (1971) (prohibiting male preference in appointing men over women as administrators of decedent estates).

44. 411 U.S. 677 (1973) (prohibiting female officers of the United States Air Force from having to prove their spouses are dependent for more than half of the officer's support while no such requirement exists for male officers).

45. *Goodman*, 374 F. Supp. at 249.

46. *Id.* at 250.

47. *Id.*

48. Act of July 1, 1975, ch. 382, § 1, 1975 N.Y. Laws 547, 547 (McKinney) (repealed 1978).

49. 419 U.S. 522 (1975).

50. *See* People v. Parks, 41 N.Y.2d 36, 42, 359 N.E.2d 358, 363-64, 390 N.Y.S.2d 848, 854 (1976).

51. The sixth amendment states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury." U.S. CONST. amend. VI.

jury pool.[52] The Court observed that exclusion of this group, which consisted of fifty-three percent of the citizens eligible for jury service, would deprive the defendant of being tried by a jury which truly represented a fair cross section of the community.[53]

Correctly fearing that *Taylor* would invalidate New York State's automatic exemption, the legislature passed a non-gender based parental exemption for people caring for children under sixteen years of age.[54] Therefore, under present New York State law, women and men are statutorily obligated to be summoned for jury service[55] and have an equal opportunity to be disqualified,[56] excused[57] or exempted.[58]

B. Jury Selection Process in New York State

In New York State, each county[59] contains a jury board,[60] which supervises the jury selection system in its respective county.[61] Every four years the county jury board appoints a commissioner of jurors to administer the jury selection system.[62] The commissioner of jurors enforces "the laws and rules relating to the drawing, selection, summoning and impanelling of jurors."[63]

A commissioner of jurors has the discretion to select prospective jurors from among such sources as voter registration lists, utility subscribers, motor vehicle operators and owners, state and local taxpayers, and volunteers who have served in the

52. *Taylor*, 419 U.S. at 537.

53. *Id.* at 531.

54. N.Y. JUD. LAW § 512(7) (McKinney 1975).

55. *See infra* note 73.

56. *See infra* note 70.

57. *See infra* note 71.

58. *See infra* note 72.

59. This is true, except in counties that contain cities with populations of one million or more. In such cities it is the county clerk who exercises the duties of the commissioner of jurors. N.Y. JUD. LAW § 502 (McKinney 1975).

60. *See supra* note 34.

61. N.Y. JUD. LAW § 502(a) (McKinney 1975).

62. *Id.* at § 504(a).

63. *Id.* at § 502(d).

past as jurors.[64] The commissioner, however, must select prospective jurors from these lists at random[65] and the jury venire[66] must represent "a fair cross-section [sic] of the community,"[67] and must be located in the jurisdiction of the court.[68] After selecting qualified[69] prospective jurors, who are neither disqualified,[70] excused[71] nor exempted,[72] the

64. *Id.* at § 506.

65. *Id.* at § 507. The United States Supreme Court has held that states are permitted to determine their own methods for selection of prospective jurors "so long as the source reasonably reflects a cross-section [sic] of the population suitable in character and intelligence for that civic duty." Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 332-33 (1970) (quoting from Brown v. Allen, 344 U.S. 443, 474 (1953)).

66. The venire is the group of prospective jurors summoned to appear at court for jury selection. BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).

67. N.Y. JUD. LAW § 500 (McKinney 1975).

68. *Id.*

69. *Id.* § 510. To qualify as a juror, a person must: be a United States citizen and be a New York State county resident; be between the ages of eighteen and seventy-six; be in sound mental and physical condition; not have a felony conviction; be intelligent and of good character; be "able to read and write the English language with a degree of proficiency sufficient to fill out . . . a juror qualification questionnaire"; and "be able to speak the English language in an understandable manner." *Id.*

70. *Id.* § 511. A person can be disqualified from serving as a juror if he or she is a member of the United States armed forces; is head of a civil department or an elected officer of a village, town, county, city, state or federal agency; is a federal judge or magistrate; or has served on a grand or petit jury within the state, including the federal court, within the last two years. *Id.*

71. *Id.* § 517(c). A person may be excused from jury service if he or she can prove that jury attendance "would cause undue hardship or extreme inconvenience" to the prospective juror. *Id.* Usually a prospective juror can be excused if he or she can show that he or she is in bad health or that there was a recent death in the family. *Id.*

72. *Id.* § 512. A person may be exempted from jury service if he or she is a member of the clergy or a Christian Science practitioner; physician, dentist, pharmacist, optometrist, psychologist, podiatrist, registered nurse, practical nurse, embalmer, Christian Science nurse, prosthetist or orthotist; a practicing attorney; a police officer, firefighter or peace officer; a sole proprietor of a business; a person over seventy years old; a parent, guardian or other person in charge of the supervision of children. *Id.*

commissioner of jurors, by service of summons,[73] orders those selected to appear in court to begin the jury impanelment process.[74] The impanelment process begins with the *voir dire*[75] examination by the attorneys.[76]

The *voir dire* stage[77] of a criminal trial gives the attorneys[78] the opportunity to interrogate the prospective jurors to ascertain their fitness to impartially decide the case.[79] Although the court has broad discretion[80] to exclude statements or questions by an attorney that are either irrelevant or repetitious,[81] it must allow a fair opportunity for the attorney to question the prospective juror's qualifications for jury service.[82] Any question asked in

73. *Id.* § 516. The commissioner can summon a prospective juror by mail or by directing the sheriff to serve the summons. *Id.*

74. *Id.* § 500.

75. "This phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

76. N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1982).

77. Procedurally, the court introduces twelve or more jurors for questioning. *Id.* § 270.15(1). After both sides have been given the opportunity to challenge for cause, the prosecution must exercise its peremptory challenges before the panel is tendered to the defense for challenge. *Id.* § 270.15(2). When a prospective juror is successfully challenged, the clerk of the court replaces this person with a new prospective juror. *Id.* § 270.15(3). This process continues until a jury is selected. *Id.*

78. In New York, it is the attorney who conducts the *voir dire. Id.* § 270.15(1). Along with New York, seventeen other states call for the attorneys to conduct the *voir dire* examination; in thirteen states it is the judge who conducts the examination; in the remaining nineteen states the judge and attorney share in the responsibility of conducting the examination. V. STARR & M. MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 40 (1985).

79. N.Y. CRIM. PROC. LAW § 270.15(1) (McKinney 1982).

80. *Id.* § 270.15(1); *see, e.g.*, People v. Boulware, 29 N.Y.2d 135, 272 N.E.2d 538, 324, N.Y.S.2d 30 (1971) (holding that defense counsel was not allowed to question prospective jurors as to knowledge of the law), *cert. denied*, 405 U.S. 995 (1972).

81. *Id.* § 270.15(1); *see, e.g.*, Fortune v. Trainor, 19 N.Y.S. 598 (1892) (improper to ask prospective juror a question that is irrelevant), *aff'd*, 141 N.Y. 605, 36 N.E. 740 (1892).

82. *Id.* § 270.15(1); *see, e.g.*, People v. Corbett, 68 A.D.2d 772, 418

order to elicit certain information regarding the prospective juror's point of view with respect to the parties or subject matter of the action, is usually deemed appropriate.[83] If an attorney believes that a prospective juror is biased, he or she may seek to remove the juror under the statutory rights of "challenge for cause"[84] or "peremptory challenge."[85]

C. Challenge for Cause

Historically, in New York State, challenges for cause have been deemed an essential mechanism for obtaining an impartial jury.[86] At common law, a prospective juror who, during the *voir dire* examination, had formed or expressed an opinion that the defendant was guilty would, as a matter of law, be disqualified from serving on that jury.[87] When the New York State criminal system was codified, however, the equivalent statute contained a modified version of the common law rule.[88] This statute severely limited the grounds for automatic disqualification, and provided that if a prospective juror's "actual bias"[89] was shown, he[90] could recite an "expurgatory oath"[91] to dispel doubt of his

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N.Y.S.2d 699 (4th Dep't 1979) (court did not abuse discretion by precluding defense counsel from asking prospective jurors about their attitudes towards oral sex), *aff'd*, 52 N.Y.2d 714, 417 N.E.2d 567, 436 N.Y.S.2d 273 (1980).

83. *Fortune*, 19 N.Y.S. at 599.

84. N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982).

85. *Id.* § 270.25.

86. People v. Doran, 246 N.Y. 409, 426, 159 N.E. 379, 396 (1927).

87. Greenfield v. People, 74 N.Y. 277, 288-90 (1878) (prospective juror who read a newspaper account of defendant's alleged crime and formed an opinion of guilt was properly challenged for cause).

88. Act of May 3, 1872, ch. 475, 1872 N.Y. Laws 1133, 1133-34 (Code Crim. Proc. § 376) (codified as amended, N.Y. CRIM. PROC. LAW § 270.20(1)(b) (McKinney 1982)).

89. 1872 N.Y. Laws at 1133-34.

90. At this time women were excluded from jury service. *See supra* note 13 and accompanying text.

91. An expurgatory oath calls for the suspect prospective juror to declare under oath that his or her biased opinions will not influence his or her verdict. People v. Branch, 46 N.Y.2d 645, 650, 389 N.E.2d 467, 469, 415 N.Y.S.2d 985, 987 (1979).

alleged bias.[92] In 1971, when the old code was superseded by the present Criminal Procedure Law, the legislators deleted all references to the "expurgatory oath" requirement.[93]

Under the present statute,[94] a prospective juror may be properly excluded if it is shown that: 1) the person displays a particular bias that may prejudice the verdict;[95] or 2) the person is related to the defendant;[96] or 3) the person was a witness of the alleged crime;[97] or 4) that person served on a grand jury that indicted the defendant.[98]

Subsequent interpretation of the rule has given the "[t]rial [j]judge greater flexibility and greater responsibility in determining" whether a prospective juror "should be excused for cause."[99] If an attorney can prove that the prospective juror shows an inability to be impartial,[100] the trial judge should disqualify the juror.[101] Despite the greater judicial latitude for excusing a prospective juror for cause, the rule still has its limitations.

In New York State, the courts have imposed a high burden of proof to show impartiality,[102] and evidence of possible bias

92. *See, e.g.*, People v. McQuade, 110 N.Y. 284, 300, 18 N.E. 156, 162 (1888).

93. N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982); *see also* People v. Blyden, 55 N.Y.2d 73, 77, 432 N.E.2d 758, 761, 447 N.Y.S.2d 886, 888 (1982) (court held that trial court's refusal to discharge a prospective juror who made remarks showing racial bias prejudiced a black defendant).

94. N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1982).

95. *Id.* § 270.20(b).

96. *Id.* § 270.20(c).

97. *Id.* § 270.20(d).

98. *Id.* § 270.20(e).

99. People v. Culhane, 33 N.Y.2d 90, 104 n.2, 305 N.E.2d 469, 478 n.2, 350 N.Y.S.2d 381, 394-95 n.2 (1973).

100. It is also within the judge's discretion to excuse a prospective juror if he or she believes the person is impartial. People v. Fernandez, 301 N.Y. 302, 320, 93 N.E.2d 859, 868 (1950), *cert. denied*, 340 U.S. 914 (1951).

101. *See Branch*, 46 N.Y.2d at 650, 389 N.E.2d at 469, 415 N.Y.S.2d at 987.

102. *See, e.g.*, People v. Williams, 63 N.Y.2d 882, 472 N.E.2d 1026, 483 N.Y.S.2d 198 (1984) (holding that a prospective juror can be excused for cause only if there is a substantial risk of partiality).

usually does not excuse the prospective juror for cause.[103] Furthermore, an attorney is precluded from using the rule in instances where he or she has a strong belief that the prospective juror harbors a bias towards his or her client, yet has no actual proof to offer to the court.[104]

The New York State courts have permitted litigants the freedom to question a prospective juror's possible partiality in areas such as religion, race and national origin.[105] To uncover these biases, however, usually requires extensive questioning[106] and courts have sought to curtail the time permitted during the *voir dire* examination.[107] Moreover, an attorney may feel that he or she may prejudice the client's case by asking sensitive questions regarding a person's background or viewpoints that could lead to alienating the selected jurors.[108] Therefore, to avoid possible compromise of the client's rights, it seems prudent to simply peremptorily challenge the suspect prospective juror rather than confront the already mentioned obstacles by

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103. *See, e.g.*, People v. Duffy, 124 A.D.2d 258, 508 N.Y.S.2d 267 (3d Dep't 1986) (holding that a prospective juror's social contact with the district attorney was not sufficient to be excused for cause).

104. Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 356 (1982) [hereinafter Saltzburg].

105. People v. Presley, 22 A.D.2d 151, 254 N.Y.S.2d 400 (4th Dep't 1964) (litigants are permitted to question prospective jurors regarding their membership in racial, political or social organizations), *aff'd*, 16 N.Y.2d 738, 209 N.E.2d 729, 262 N.Y.S.2d 113 (1965). *See also* People v. Rubicco, 42 A.D.2d 719, 345 N.Y.S.2d 624 (2d Dep't 1973) (litigants are permitted to question prospective jurors regarding prejudice towards national origin), *aff'd*, 34 N.Y.2d 841, 314 N.E.2d 344, 359 N.Y.S.2d 62 (1974).

106. *See* Saltzburg, *supra* note 104, at 356.

107. *See* People v. Jean, 75 N.Y.2d 744, 551 N.E.2d 90, 551 N.Y.S.2d 889 (1989) (litigants are given fifteen minutes during the first two rounds of *voir dire* and ten minutes during the third round of examination). *See also* People v. Garrow, 151 A.D.2d 877, 542 N.Y.S.2d 849 (1989) (not abuse of discretion to limit each attorney's *voir dire* questioning to ten minutes in first round); People v. Barry, 134 A.D.2d 917, 522 N.Y.S.2d 72 (1987) (time limitation on *voir dire* did not violate due process since defense counsel had equal time to question).

108. People v. Muriale, 138 Misc. 2d 1056, 1066, 526 N.Y.S.2d 367, 374 (Sup. Ct. Kings County 1988).

challenging for cause.[109]

D. Peremptory Challenge

In *People v. Thompson*,[110] the court stated, "[t]he right to exercise peremptory challenges, unlike the right to exercise challenges for cause, is not an essential part of the mechanism for obtaining an impartial jury . . . ."[111] The Kings County Supreme Court, in *People v. Muriale*,[112] added that "[p]eremptory challenges by the defense may be regulated reasonably without violating a defendant's constitutional rights, and their exercise by the defense may have to yield to more compelling public interests."[113] Indeed, prior state court opinions have granted the legislature full discretion, without judicial intervention, in deciding which litigant is entitled to the challenge and how many are to be permitted.[114]

In 1777, New York State's first constitution granted both the prosecutor and the defense the right to peremptory challenges.[115] In 1786, however, the New York State Legislature enacted a statute abolishing the prosecution's right to peremptory challenges.[116] At that time, the defense was allowed thirty-five challenges.[117] In 1828, the legislature decreased the amount of peremptory challenges permitted to the defense to twenty without

109. *See* Saltzburg, *supra* note 104, at 355-57.

110. 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981).

111. *Id.* at 96, 435 N.Y.S.2d at 747.

112. 138 Misc. 2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. Kings County 1988).

113. *Id.* at 1060, 526 N.Y.S.2d at 370. According to the Kings County court, the compelling interests were public confidence in the justice system, the rights of minority jurors and the right to an impartial representative jury. *Id.* at 370-73.

114. *See* People v. Lobel, 298 N.Y. 243, 257, 82 N.E.2d 145, 151 (1948); People v. Doran, 246 N.Y. 409, 426, 159 N.E. 379, 385 (1927) (both courts stating that "[t]he matter of peremptory challenges rests entirely with the Legislature"); People v. McQuade, 110 N.Y. 284, 292, 18 N.E. 156, 158 (1888) ("The subject is regulated by statute.").

115. *Thompson*, 79 A.D.2d at 97, 435 N.Y.S.2d at 747.

116. *Id.* at 98, 435 N.Y.S.2d at 747-48.

117. *Id.* at 97, 435 N.Y.S.2d at 747.

allowing any for the prosecution.[118] In 1858 the prosecution was granted peremptory challenges, under the state constitution, depending on the severity of the crime.[119] The statute, however, permitted the prosecution only five challenges compared to the defendant's twenty.[120] In 1873, the legislature modified the peremptory challenge statute to allow the prosecution the same amount of challenges as the defense.[121] In addition, the modification allowed the parties to peremptorily challenge prospective jurors for all felonies and misdemeanors.[122]

Under the present statute,[123] the parties are allowed twenty challenges for a class A felony,[124] with two additional challenges for each alternate juror selected;[125] fifteen challenges for a class B or class C felony,[126] with two additional challenges for each alternate juror selected;[127] and ten challenges for all other cases, with two additional challenges for each alternate juror selected.[128]

Despite the New York State court's lack of judicial support, the United States Supreme Court, while holding that the peremptory challenge rule is not a constitutional requirement,[129] has proclaimed that it is essential to the American system of

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118. *Id.* at 98, 435 N.Y.S.2d at 748.

119. *Id.* at 98-99, 435 N.Y.S.2d at 748. Under the 1858 law, the prosecution was permitted five peremptory challenges for criminal offenses punishable by death or ten or more years imprisonment. The defense was given twenty challenges for such crimes. For less severe crimes, the prosecution was granted three challenges while the defense was allowed five challenges. *Id.*

120. *Id.* at 99, 435 N.Y.S.2d at 748.

121. *Id.*

122. *Id.*

123. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

124. The maximum sentence for a class A felony is life imprisonment. N.Y. PENAL LAW § 70(2)(a) (McKinney 1987).

125. N.Y. CRIM. PROC. LAW § 270.25 (2)(a) (McKinney 1982).

126. The maximum sentence for a class B felony is twenty-five years imprisonment. N.Y. PENAL LAW § 70(2)(b) (McKinney 1987). For a class C felony the maximum sentence is fifteen years imprisonment. *Id.* at § 70(2)(c).

127. N.Y. CRIM. PROC. LAW § 270.25(2)(b) (McKinney 1982).

128. *Id.* § 270.25(2)(c).

129. *See* Stilson v. United States, 250 U.S. 583, 586 (1919) (noting that trial by an impartial jury is all that is required by the Constitution).

justice[130] as a means of securing an impartial jury.[131]

The peremptory challenge serves as a last resort for the attorney to eliminate juror bias where the selection process and challenges for cause have failed.[132] It also allows an attorney to exclude suspect prospective jurors who may hold a bias towards his or her client, but will not admit to the bias when questioned.[133] Furthermore, it allows the attorney to exclude a juror whom he or she believes will be too influential upon the other jury members or too disruptive to effectively work in a group setting.[134] Lastly, and perhaps most importantly, the rule gives the criminal defendant confidence that the jury selected will afford him or her a fair and impartial verdict.[135]

The peremptory challenge rule, however, is subject to abuse when the attorney, instead of searching for characteristics that may show impartiality, chooses to rely on negative stereotypes, prejudices and other biases when deciding to exclude a prospective juror.[136] If this bias is directed towards a certain group, an attorney can, by exercise of the peremptory challenge, effectively eliminate that group from jury service.[137] In 1965, the United States Supreme Court addressed the issue of whether such actions by a prosecutor violated a criminal defendant's constitutional rights when they decided *Swain v. Alabama.*[138]

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130. *See* Pointer v. United States, 151 U.S. 396, 408 (1894) (stating that the peremptory challenge is "one of the most important of the rights secured to the accused"). *See also* Hayes v. Missouri, 120 U.S. 68, 70 (1887) (noting that the peremptory challenge is one of the most effective methods to exclude unfit jurors from jury service).

131. *See* Swain v. Alabama, 380 U.S. 202, 219 (1965).

132. *See* Saltzburg, *supra* note 104, at 357.

133. *Id.* at 356.

134. *Id.*

135. *Id.* at 356-57.

136. *See* Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1244 (1985).

137. *See* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 154 (1977) [hereinafter VAN DYKE].

138. 380 U.S. 202 (1965).

II. PEREMPTORY CHALLENGES AND FEDERAL CONSTITUTIONAL GUARANTEES

A. Criminal Defendant's Right to Equal Protection

In *Swain*, the United States Supreme Court granted a *writ of certiorari* to decide whether the prosecution's peremptory challenges used to exclude six black prospective jurors violated the equal protection clause of the fourteenth amendment.[139] The defendant was forced to base his claim on this amendment because the sixth amendment right to a jury trial, by an impartial jury, was not yet binding on the states.[140]

In its opinion, the Court sought to protect the peremptory challenge rule, stating that there is a presumption that the prosecutor uses the challenge to secure an impartial jury.[141] The Court concluded that a *prima facie* case of purposeful discrimination in the use of peremptory challenges is not made out merely by showing the exclusion of blacks in a given case.[142] Rather, it must be shown that the prosecution had systematically excluded every member belonging to the same racial group from the petit jury over a period of time.[143] After *Swain* was decided, criminal defendants found it difficult to meet the burden of proof required

139. *Id.* at 221.

140. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (holding that the sixth amendment right to a jury trial is binding on the states under the fourteenth amendment).

141. *Swain*, 380 U.S. at 221-22. "To subject the prosecutor's challenge in any particular case 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 . . . ." *Id.*

142. *Id.* at 227.

143. *Id.* at 222. The Supreme Court went on to affirm the state conviction on the grounds that the defendant failed to offer substantial proof that the prosecutor systematically excluded all blacks from the petit jury. *Id.* at 224. Justice Goldberg believed, however, that the defendant did meet the requirements under the *Swain* test. *Id.* at 238 (Goldberg, J., dissenting). He noted that no black had ever served on a petit jury in Talladega County, Alabama. *Id.* (Goldberg, J., dissenting).

to make out a violation.[144] One federal circuit court of appeals noted that the *Swain* test required the defendant "to investigate, over a number of cases, the races of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges."[145] Concern over these difficulties led states to extend their own constitutional protection to prohibit peremptory challenges predicated solely on the basis of racial bias.[146] The Supreme Court also recognized these difficulties and reformulated the *Swain* test in *Batson v. Kentucky*.[147]

In *Batson*, a black male defendant was indicted on charges of second degree burglary and receipt of stolen goods.[148] During the jury selection process, the prosecutor peremptorily challenged all four prospective black jurors, thus causing an all white jury to be selected.[149] The Supreme Court granted a *writ of certiorari* to decide whether these challenges violated the defendant's

144. *See, e.g.*, United States v. Durham, 587 F.2d 799 (5th Cir. 1979) (black defendants were convicted by an all white jury and could not overcome presumption that prosecutor was acting to select a fair and impartial jury); United States v. Carter, 528 F.2d 844 (8th Cir. 1975) (defendant's proof that in fifteen cases against black defendants the Government had excluded 81% of blacks from juries failed to show that Government acted discriminatorily), *cert. denied*, 425 U.S. 961 (1976); State v. Steward, 255 Kan. 410, 591 P.2d 166 (1979) (no error when trial judge refused to dismiss the jury on grounds that prosecutor excluded all blacks from the jury panel); Commonwealth v. Green, 246 Pa.Super. 472, 400 A.2d 182 (1979) (exclusion of seventeen black prospective jurors did not establish prejudicial discrimination on part of prosecutor).

145. United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971).

146. *See* Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (Mass.) (presumption of proper use of peremptory challenges is rebuttable by showing pattern of challenges against members of discrete groups), *cert. denied*, 444 U.S. 881 (1979); *see also* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (noting that the test posed problems with: 1) indigent defendants' ability to pay the legal costs to uncover the facts necessary to prove a claim; 2) the resistance of trial judges in permitting the extra court time required to decide such claims; and 3) the lack of information that details the names and races of people who were peremptorily challenged).

147. 476 U.S. 79 (1986).

148. *Id.* at 82.

149. *Id.* at 83.

constitutional right to equal protection under the fourteenth amendment.[150] In reversing the conviction, the Court held that the prosecutor's use of peremptory challenges to exclude prospective jurors solely on the basis of race violated the defendant's right to equal protection.[151]

In its opinion, the Court recognized that the *Swain* test placed a "crippling burden of proof" on criminal defendants.[152] Consequently, the Court overruled the portion in *Swain* that forced defendants to make out a fourteenth amendment challenge over a series of cases and replaced it with a new standard that allowed criminal defendants to establish a *prima facie* case solely on the facts of their trial.[153]

According to *Batson*, the criminal defendant establishes a *prima facie* case that the prosecution's peremptory challenges result in purposeful discrimination by showing that: 1) he or she is a member of a cognizable racial group[154] and that the prosecutor's peremptory challenges removed a member whose race is the same as the defendant's;[155] 2) the state's peremptory challenge rule is subject to discriminatory abuse by the prosecutor;[156] and 3) facts and other relevant information that are introduced as sufficient to raise an inference that the peremptory challenges were used for discriminatory purposes.[157] If the defendant is able to make out a *prima facie* claim of purposeful discrimination, the prosecutor may rebut this claim by offering a race neutral explanation for the exercise of the challenges.[158]

In regard to the third part of the test, the Supreme Court essentially allowed the state trial courts to determine instances of

150. *Id.* at 82.

151. *Id.* at 89.

152. *Id.* at 92.

153. *Id.* at 95.

154. A cognizable group may be defined as one having common traits that define and limit the group, or share basic attitudes, ideas or experiences. United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

155. *Batson*, 476 U.S. at 96.

156. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

157. *Id.*

158. *Id.* at 97.

racially discriminatory peremptory challenges by the prosecution.[159] The Court did add, however, that a criminal defendant may establish a *prima facie* claim of discrimination by showing that the prosecution has systematically excluded blacks, by peremptory challenge, during the *voir dire* examination.[160] In addition, the criminal defendant may establish a claim on the basis of racially discriminatory questions or comments made by the prosecutor while examining the prospective jurors.[161]

While the Court did not fully enunciate the guidelines for determining an acceptable race neutral explanation for excluding black prospective jurors,[162] they did state it "need not rise to the level justifying exercise of a challenge for cause."[163] The Court, however, added that the prosecution must offer more than a mere denial of discriminatory motive or display a minimal showing of good faith for excluding the black prospective jurors.[164] The Court noted that it was unacceptable for the prosecution to exclude black prospective jurors because it believed they would be partial to a black defendant.[165] According to the Court, "[a] person's race simply 'is unrelated to his fitness as a juror.'"[166]

Subsequent to *Batson*, the Supreme Court has further modified and clarified its test. In *Powers v. Ohio*,[167] the Court held that a criminal defendant may assert a *Batson* claim even though he or she is not of the same racial class of the excluded black

159. *Id.*

160. *Id.*

161. *Id.*

162. The Court essentially left it to the discretion of the trial judges "to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against black jurors." *Id.*

163. *Id.* (citing McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984)); *see also* Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985), *vacated*, 478 U.S. 1001 (1986)).

164. *Batson*, 476 U.S. at 98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

165. *Id.* at 97 (comparing Norris v. Alabama, 294 U.S. 587, 598-99 (1935)).

166. *Id.* at 87 (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

167. 111 S. Ct. 1364 (1991).

prospective jurors.[168] In allowing the white criminal defendant standing to sue, the *Powers* Court permitted the defendant to assert the equal protection rights of the excluded black prospective jurors.[169] In *Hernandez v. New York*,[170] the Court, in a plurality opinion noted that the prosecution's disproportionate removal of members of a racial class, absent a racial motive, does not constitute a *Batson* violation.[171]

In *Edmonson v. Leesville Concrete Co.*,[172] the Supreme Court has also extended *Batson* to prohibiting the racially based peremptory challenge by the defendant in civil proceedings.[173] Justice Scalia, dissenting in *Edmonson*, observed that, *a fortiori*, this decision must extend *Batson* to prohibiting the criminal defendant from exercising racially based peremptory challenges.[174]

Batson and its progeny represent another significant step in eradicating racial discrimination in the jury selection process. The *Batson* test, however, still does not fully protect a criminal defendant from being tried by a truly unrepresentative jury. By limiting its holding to instances of only racially based peremptory challenges, criminal defendants are still susceptible to being tried and convicted by an unrepresentative jury resulting from the systematic exclusion of other certain cognizable groups.[175] While

168. *Id.* at 1366.

169. *Id.* at 1374.

170. 111 S. Ct. 1859 (1991).

171. *Id.* at 1867-68.

172. 111 S. Ct. 2077 (1991).

173. *Id.* at 2080.

174. *Id.* at 2095 (Scalia, J., dissenting). Further evidence is found in Holland v. Illinois, where five Justices, writing in three separate opinions, believed that *Batson* should be extended to prohibiting the criminal defendant from the use of racially based peremptory challenges. 110 S. Ct. 803, 811 (1990) (Kennedy, J., concurring); *id.* at 812 (Marshall, J., dissenting, joined by Brennan and Blackmun, J.J.); *id.* at 820 (Stevens, J., dissenting).

175. For example, in United States v. Sgro, the defendant who claimed to be of Italian-American descent appealed an extortion conviction contending that the prosecutor peremptorily challenged the only two ethnic Italians on the jury venire. 816 F.2d 30, 32 (1st Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988). The court of appeals, while not recognizing that *Batson* extends to other cognizable groups, ruled that the defendant failed to prove Italian-Americans were a cognizable group. *Id.* at 33. *But see* United States v. Biaggi,

a criminal defendant is not entitled to a jury that must contain members of his or her own race or color,[176] the defendant "does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria."[177] Aside from the criminal defendant, the female prospective juror is also adversely affected by gender based peremptory challenges.

B. Female Prospective Juror's Constitutional Rights

In *Carter v. Jury Commission*,[178] the Supreme Court recognized that "[d]efendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[179] While *Carter* only dealt with the exclusion of blacks in the jury pool stage of jury selection,[180] the *Batson* Court also recognized that racially based discrimination, exercised by the use of peremptory challenges, violates the excluded juror's constitutional right to serve on a jury.[181] In *Powers*, the Court implicitly ruled that black prospective jurors have standing to assert a *Batson* violation.[182] Women, like blacks, are similarly aggrieved when they are unfairly excluded from jury service.

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673 F. Supp. 96, 101 (E.D.N.Y. 1987) (holding that Italian-Americans do qualify as a cognizable group for purposes of proving a *prima facie* claim of discrimination under *Batson*), *aff'd*, 853 F.2d 89 (2d Cir. 1988). A commentator also noted that attorneys frequently classify prospective jurors' fitness to serve on a jury on the basis of their ethnicity, national origin, religion and political affiliation. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 181-82 (1989) [hereinafter Alschuler].

176. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879).

177. *Powers*, 111 S. Ct. at 1367.

178. 396 U.S. 320 (1970).

179. *Id.* at 329.

180. *Id.* at 322.

181. Batson v. Kentucky, 476 U.S. 79, 87 (1986) (citing *Strauder*, 100 U.S. at 308; Neal v. Delaware, 103 U.S. 370, 386 (1881); *Carter*, 396 U.S. at 329-330)).

182. Powers v. Ohio, 111 S. Ct. 1364, 1371-73 (1991).

In *Strauder*, the Court noted that the exclusion of blacks from jury service "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[183] Likewise in *Frontiero v. Richardson*,[184] the Court observed that gender classifications "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[185]

In 1946, the United States Supreme Court, in *Ballard v. United States*,[186] first began to discuss the adverse aspects of systematic exclusion of women from the jury pool.[187] In *Ballard*, the Court was confronted with a non-constitutional issue of whether the systematic exclusion of women from the jury pool violated section 275 of the Federal Judicial Code.[188] This statute called for the federal district court to apply the law of the state in which it is located when determining the qualifications of a juror.[189]

In California, where the case arose, state law permitted women to serve on a jury.[190] The Southern Federal District Court of California, however, failed to summon any women for jury service.[191] The petitioners[192] contended that the district court's systematic exclusion of women violated the federal statute.[193] In reversing the federal court conviction, the Court agreed with the petitioners and concluded that the congressional intent of the statute mandated that women be included in the jury pool.[194]

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183. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).
184. Frontiero v. Richardson, 411 U.S. 677 (1973).
185. *Id.* at 687.
186. 329 U.S. 187 (1946).
187. *Id.* at 193.
188. *Id.* at 190.
189. *Ballard*, 329 U.S. at 191.
190. *Id.*
191. *Id.* at 189-90.
192. The petitioners were appealing from a conspiracy conviction. *Id.* at 188.
193. *Id.* at 190.
194. *Id.* at 191. According to the Supreme Court, Congress knew that most

In its opinion, the Supreme Court rejected the view that a truly representative jury need only consist of members who have differing social, economic and political backgrounds.[195] The United States Government claimed that an "all male panel drawn from the various groups within a community will be as truly representative as if women were included."[196] The Supreme Court explained that "[j]ury competence is an individual rather than a group or class matter."[197] The Court believed that the "subtle interplay of influence one on the other" requires women to be present on a jury.[198]

This view in *Ballard* later became a constitutional requirement in 1975 when the Court decided *Taylor*.[199] In *Taylor*, the Court noted that "women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section [sic] requirement cannot be satisfied."[200] Despite the Supreme Court

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states allowed women to serve on a jury and therefore must have intended to include women on a jury when they enacted the statute. *Id.*

Section 1862 of the Federal Jury Selection Act provides that "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862 (1982).

195. *Id.* at 193.

196. *Id.*

197. *Id.* (quoting Thiel v. Southern Pacific Co., 328 U.S. 217 (1946)).

198. *Id.* at 193-94.

199. Taylor v. Louisana, 419 U.S. 522 (1975); *see supra* notes 49-53 and accompanying text.

200. *Id.* at 531.

In Duren v. Missouri, the Supreme Court described what is required to make a *prima facie* violation of the fair cross section requirement. 439 U.S. 357, 364 (1979). According to the Court:

> A defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.

Id.

Under a fair cross section challenge, the defendant need not show purposeful discrimination by the prosecution. *See, e.g.*, Castaneda v. Partida, 430 U.S.

warning, women have continued to be systematically excluded from jury service.[201] For example, in *People v. Mims*,[202] the defendant, who was a black woman, appealed a murder conviction, contending that the prosecution's use of six peremptory challenges to exclude black female prospective jurors violated her equal protection rights under *Swain*.[203] When the trial judge asked the prosecutor for his reason for excluding these women, he simply responded that he did not want an "all-woman jury."[204] The appellate court found no error and affirmed the conviction.[205]

This practice of excluding women on the basis of their gender has been fueled by members of the legal profession, pointing to what they believe are strategic reasons for excluding prospective female jurors from jury selection. For example, one commentator stated that women have "prejudices that infect women in their jealousies against other women," and that "[f]emale jurors may react subconsciously with aversion toward a younger or more attractive female litigant."[206] Another commentator, a famous trial lawyer, stated, "[w]omen jurors tend to be more acutely opinionated and come to a quicker . . . decision than the male juror . . . . Once a female juror makes up her mind . . . even the most cogent of reasons rarely changes it."[207] Lastly, a Dallas, Texas prosecutor's trial manual stated, "I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is

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482 (1977) (evidence that county population was 79% Mexican-American, but, over eleven year period only 39% of grand jurors were Mexican-American).

201. *See* Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990) (nine women excluded); People v. Ashley, 207 Ill. App. 3d 984, 566 N.E.2d 745 (1991) (nine women excluded); People v. Crowder, 1616 Ill. App. 3d 109, 515 N.E.2d 783 (1987) (twelve of thirteen peremptory challenges used to excuse women).

202. 103 Ill. App. 3d 673, 431 N.E.2d 1126 (1981).

203. *Id.* at 676, 431 N.E.2d at 1128.

204. *Id.* at 675, 431 N.E.2d at 1127.

205. *Id.* at 679, 431 N.E.2d at 1130.

206. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553 (1975).

207. M. BELLI, 3 *Modern Trials*, § 51.68, at 447 (2d ed. 1982).

possible that their 'women's intuition' can help you if you can't win your case with the facts . . . ."[208]

Despite the presence of this invidious discrimination, these practices have persisted, unchallenged by constitutional scrutiny. In *Taylor*, the Court declared "that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, [therefore] we think it is no longer reasonable to hold that women as a class may be excluded or given automatic exemptions based solely on sex . . . ."[209] It seems plain that the criminal defendant's sixth amendment right to a jury, which is representative of the community, should extend to the peremptory challenge stage of jury selection.[210]

The Supreme Court, however, recently decided in *Holland v. Illinois*,[211] that *Taylor's* fair cross section requirement under the sixth amendment does not extend to the peremptory challenge stage of jury selection.[212] Besides *Holland's* limitation, *Taylor* does not provide women independent grounds to sue because only a criminal defendant can assert a claim under the sixth amendment.[213] Therefore, *Batson* provides a woman the sole means of protecting her constitutional rights if she believes that she was unfairly excluded by a peremptory challenge.

Assuming *Batson* is applicable to gender based peremptory

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208. *See* VAN DYKE, *supra* note 137, at 152 (quoting Texas Observer, May 11, 1973, at 9, col. 2.).

209. *Taylor*, 419 U.S. at 537.

210. Justice Marshall also called for the sixth amendment to be extended to the peremptory challenge stage of jury selection. He contended that "[t]here is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they then can be struck because of their race by a prosecutor's use of peremptory challenges." McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from the denial of certiorari).

211. 110 S. Ct. 803 (1990).

212. *Id.* at 807 (quoting *Taylor*, 419 U.S. at 527). According to the Court, once the venire is fairly selected, attorneys are then given unrestricted use of peremptory challenges. *Id.*

213. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury." U.S. CONST. amend. VI.

challenges, the female prospective juror must overcome other practical considerations. The female prospective juror may be unaware that she was discriminatorily excused from jury service.[214] Justice Murphy, dissenting in *Fay v. New York*,[215] observed that "[w]e can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes ordinary methods of proof."[216] Justice Kennedy, concurring in *Holland*, added that even if a prospective juror does detect discrimination, it is unlikely that he or she will raise a claim given the little incentive and resources available to mount such a legal claim.[217]

Both blacks and women share a long history of discrimination in the jury selection process. Both groups have been subject to a complete denial of being allowed to serve on a jury.[218] Similarly, both groups have been subject to systematic and purposeful exclusion in attorneys' use of peremptory challenges. Therefore, it seems reasonable that women should be given the same protection afforded to blacks under *Batson*.

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214. *See* Alschuler, *supra* note 175, at 193-94.

215. 332 U.S. 261 (1947).

216. *Id.* at 300 (Murphy, J., dissenting).

217. *Holland*, 110 S. Ct. at 812 (Kennedy, J., concurring). *See also Powers*, 111 S. Ct. at 1372-73 (noting the problems black prospective jurors confront in asserting an equal protection claim under *Batson*); Bobb v. Municipal Court, 143 Cal. App. 3d 860, 192 Cal. Rptr. 270 (1983). A female prospective juror, an attorney, refused to answer *voir dire* questions concerning her marital status and spouse's occupation on the basis that the court failed to ask the same questions of the male prospective jurors. *Id.* at 862-63, 192 Cal. Rptr. at 274. The First District Court of Appeal in California ruled that she was not in contempt of court for her refusal to answer such questions and held that the court's questions were violative of her equal protection rights under the California State Constitution. *Id.* at 864-67, 192 Cal. Rptr. at 271-74.

218. *Cf. Frontiero*, 411 U.S. at 684 ("Throughout much of the 19th Century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.").

C. The Applicability of Batson to Gender Based Discrimination

Traditionally, the fourteenth amendment was reserved to prohibit instances of racial discrimination.[219] The Supreme Court has stated, however, that other groups with past histories of discrimination deserve heightened fourteenth amendment protection.[220] In the past, the Court has recognized that women are a cognizable group in need of such constitutional protection.[221] The Court, nevertheless, seems reluctant to provide women the same protection afforded to blacks in eradicating discrimination in the jury selection process. The following Supreme Court decision is illustrative of this reluctance.

In *Alexander v. Louisiana*,[222] a black defendant, convicted of rape, alleged he was denied equal protection on the basis that the state's method of composing its jury lists had excluded blacks and women from jury service.[223] The Court reversed the conviction on the grounds that blacks were excluded from jury service, but chose not to hear the issue of whether the exclusion of women denies the criminal defendant equal protection.[224] The Court

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219. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (stating that the purpose of the fourteenth amendment was to prohibit discrimination on the basis of race or color).

220. The Supreme Court asserted that when a class is "single[d] out . . . for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." Hernandez v. Texas, 347 U.S. 475, 478 (1954).

221. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Reed v. Reed, 404 U.S. 71, 75 (1971). More recently, a federal district court added: "It is beyond dispute that women comprise a cognizable group for the purposes of the first element of the prima facie cases for violations of either the sixth amendment or Equal Protection Clause." United States v. Donohue, 574 F. Supp. 1269, 1276 (D. Md. 1983).

222. 405 U.S. 625 (1972).

223. *Id.* at 626-27.

224. *Id.* at 633-34 (citing Burton v. United States, 196 U.S. 283, 295 (1905)). The Court stated that since the defendant's conviction was reversed on racial grounds, there was no need to address the issue of whether the exclusion of women violates the defendant's equal protection rights under the fourteenth

contended that "this claim is novel in this Court" and found "nothing in past adjudications suggesting that [criminal defendants have] been denied equal protection by the alleged exclusion of women from grand jury service."[225]

Furthermore, over the past fifteen years the Court has explicitly given gender based claims less judicial scrutiny than that of race when envoking an equal protection violation.[226] In *Korematsu v. United States*,[227] the Court stated that any racial classification, to withstand a fourteenth amendment equal protection challenge, must pass a "strict scrutiny" test.[228] This test requires the state to show that its legislative act is "suitably tailored to serve a compelling state interest."[229] Whereas under the less demanding "intermediate approach," for a gender classification to survive a fourteenth amendment challenge it "must serve important govenmental objectives and must be substantially related to achievement of those objectives."[230]

Uncertainty over whether *Batson* applies to gender based

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amendment. *Id.*

225. *Id.* Justice Douglas contended that the Court should have addressed the issue of whether the state could restrict a woman's right to jury service. *Id.* at 634 (Douglas, J., concurring). Justice Douglas observed that "[t]he issue [was] squarely presented, it has been thoroughly briefed and argued, and it is of recurring importance." *Id.* (Douglas, J., concurring). The Justice proceeded to conclude that "[a] statutory procedure which has the effect of excluding all women does not produce a representative jury, and is therefore repugnant to our constitutional scheme." *Id.* at 644. (Douglas, J., concurring).

226. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (a gender classification against male purchasers of 3.2% beer did not substantially further an important governmental interest).

According to Justice Powell, gender classifications have been given less judicial scrutiny than racial classications because the latter "presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender based classifications do not share." Regents of University of California v. Bakke, 438 U.S. 265, 303 (1978).

227. 323 U.S. 214 (1944).

228. *Id.* at 216.

229. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

230. *Craig*, 429 U.S. at 197.

peremptory challenges has led to differing views among the federal circuit courts. In *United States v. DeGross*,[231] the Court of Appeals for the Ninth Circuit stated that *Batson* does apply to the use of peremptory challenges exercised solely on the basis of gender.[232] Conversely, the Court of Appeals for the Fourth Circuit in *United States v. Hamilton*,[233] has determined that *Batson* does not apply to such discrimination.[234]

In *Hamilton*, the criminal defendants petitioned for, but were denied, a *writ of certiorari* by the Supreme Court over the issue of whether *Batson* applies to gender based peremptory challenges.[235] While the Supreme Court's denial of a *writ of certiorari* certainly "imports no expression of opinion upon merits of the case,"[236] it does mean that the issue of whether *Batson* extends to gender based discrimination, in the near future, remains uncertain.[237]

The uncertainty over *Batson's* applicability to gender based peremptory challenges has forced criminal defendants and female prospective jurors to seek protection under their own respective state constitutions.[238] Similar to the time when, under *Swain*,

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231. 913 F.2d 1417 (9th Cir. 1990).

232. *Id.* at 1423.

233. 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1109 (1990).

234. *Id.* at 1042-43.

235. Petition for Writ of Certiorari at 9, *Hamilton*, *cert. denied*, 110 S. Ct. 1109 (1990).

236. United States v. Carver, 260 U.S. 482, 490 (1923).

237. "Because no issue of gender discrimination was presented in *Batson* and because the Supreme Court did not discuss the merits of this issue even in dictum, the burden of providing a reasoned consideration of the litigant's claim must fall initially upon lower courts." Alschuler, *supra* note 175, at 180 n. 107.

238. *See* State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990) (exclusion of women on the basis of gender denies them equal protection under state constitution); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) (holding that state constitution prohibits use of peremptory challenges against potential jurors, who are members of a cognizable group, on the basis of a presumed bias); State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (N.M. Ct. App. 1991) (defendant made out prima facie case of discrimination on basis of gender in jury selection in violation of state constitution).

In Rhode Island, however, the state supreme court held that its state

the complainant's high evidentiary burden to prove a racially based peremptory challenge claim forced the states to fashion remedies under their own respective state constitutions, the states are again being called upon to protect against gender based peremptory challenges.[239] Accordingly, the next section discusses whether these aggrieved parties are protected under the New York State Constitution.

III. THE NEW YORK STATE CONSTITUTION PROHIBITS THE USE OF PEREMPTORY CHALLENGES PREDICATED SOLELY ON THE BASIS OF GENDER

A. Introduction

In 1984, a task force was created to investigate areas of discrimination that women encounter under the New York State court system.[240] After an examination of state statutes, court rules and practices, the task force concluded that "[w]omen are often denied equal justice, equal treatment and equal opportunity" under the New York State court system.[241] This task force recommended that the judiciary should take a more active role in promoting equality among women and men in court proceedings.[242] Despite the task force's recommendation, the judiciary was still reluctant to protect women from being peremptorily challenged solely on the basis of their gender.

For example, in *People v. S.R.*,[243] the Bronx County Supreme

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constitution does not prohibit gender based peremptory challenges. State v. Oliveria, 534 A.2d 867 (1987).

239. People v. Hernandez, 75 N.Y.2d 350, 360-61, 552 N.E.2d 621, 626, 553 N.Y.S.2d 85, 90 (1990) (Kaye, J., dissenting), *aff'd*, 111 S. Ct. 1859 (1991).

240. *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L. J. 16 (1986-1987).

241. *Id.* at 15.

242. *Id.* at 166.

243. 136 Misc. 2d 54, 517 N.Y.S.2d 864 (Sup. Ct. Bronx County 1987).

Court had the first opportunity, post-*Batson*, to decide whether the prosecution's use of its peremptory challenges purposely excluded women on the basis of their gender.[244] The defendant moved for a mistrial contending that the prosecutor's exclusion of women by peremptory challenge violated his rights under the equal protection clauses of both the fourteenth amendment of the Federal Constitution and the New York State Constitution.[245] The prosecutor, apparently thinking that he was being asked to articulate a non-racial reason as to why he excluded these women, responded: "The challenges . . . are based upon gender and not challenges based upon race. What I mean by that is it is my position that men tend to be less sympathetic than women so I am chosing [sic], I would opt more men over women."[246] Despite the discriminatory remark by the prosecutor, the court denied the defendant's motion for a mistrial.[247]

In its opinion, the court acknowledged that women experience discrimination under the New York State judicial system.[248] Furthermore, the court stated that women deserve the same protection as blacks receive under the federal and state constitutions, thus implicitly holding that *Batson* should apply to gender based discrimination.[249] The court, however, ruled that the prosecutor's statements were not violative of the federal and state constitutions because the prosecutor did not systematically exclude all female prospective jurors from jury service.[250]

In *People v. Merkle*,[251] the Second Department of the Supreme Court, Appellate Division also had an opportunity to decide whether the prosecutor's use of peremptory challenges purposely

244. *Id.* at 55, 517 N.Y.S.2d at 864.

245. *Id.* at 57, 517 N.Y.S.2d at 866.

246. *Id.*

247. *Id.* at 58, 517 N.Y.S.2d at 867.

248. *Id.* at 57, 517 N.Y.S.2d at 866.

249. *Id.*

250. *Id.* at 57-58, 517 N.Y.S.2d at 866. The court noted that the prosecutor failed to challenge four prior female prospective jurors. *Id.* at 58, 517 N.Y.S.2d at 866-67. The court also noted that the final composition of the jury was ten women and two men. *Id.* at 58, 517 N.Y.S.2d at 867.

251. 143 A.D.2d 145, 531 N.Y.S.2d 601 (2d Dep't 1988).

excluded women on the basis of gender.[252] The defendant, a male, was appealing a conviction by an all white jury of first-degree sexual abuse on the basis that the prosecutor systematically excluded women by use of his peremptory challenges.[253] The defendant alleged that the prosecutor violated his rights under *Batson* when the prosecutor peremptorily challenged seven of nine women present during the *voir dire* examination.[254]

Without deciding whether *Batson* is applicable to gender based discrimination,[255] the court stated that the "prosecutor satisfied whatever duty he may have had to offer a nondiscriminatory reason for use of peremptory challenges," thereby affirming the conviction.[256] The court noted that the prosecutor allowed one woman to serve on the jury, but she was excluded by the defendant's peremptory challenge.[257] The court also noted that the prosecutor permitted a woman to serve as an alternate juror.[258] Finally, the court explained that the prosecutor "articulated a non-gender-related basis for his exercise of peremptory challenges as against almost all of the prospective female jurors."[259]

As *S.R.* and *Merkle* succinctly demonstrate, female prospective jurors and criminal defendants are still not fully protected from discrimination arising from gender based peremptory challenges.[260] An attorney should be required to provide a

252. *Id.* at 145, 531 N.Y.S.2d at 602.

253. *Id.*

254. *Id.*

255. "We need not decide whether the scope of Batson v[.] Kentucky . . . is limited to cases of racial discrimination in the jury selection . . . ." *Id.* at 146, 531 N.Y.S.2d at 602.

256. *Id.*

257. *Id.* at 145, 531 N.Y.S.2d at 602.

258. *Id.*

259. *Id.* The prosecutor contended that he wanted female jurors who had young daughters since the victim was also a young female. *Id.* at 145-46, 531 N.Y.S.2d at 602. Therefore, he excluded seven of the nine female prospective jurors because they did not have any daughters. *Id.* He excluded the eighth female prospective juror because she had an older daughter. *Id.*

260. *See also* People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986

gender neutral reason for all uses of peremptory challenges.[261] In regard to racially based peremptory challenges, the New York Court of Appeals in *People v. Jenkins*,[262] applying federal constitutional law, noted that "[f]or purposes of equal protection, the constitutional violation is the exclusion of *any* blacks solely because of their race."[263] This Comment argues that the court of appeals can apply this same reasoning for gender based peremptory challenges under its own state constitution.

B. State Authority to Extend Constitutional Protection

In *Cooper v. California*[264] and *Pruneyard Shopping Center v. Robins*,[265] the Supreme Court has held that the states are permitted to grant or extend constitutional protection beyond that provided under the Federal Constitution.[266] This view was echoed in *People v. P.J. Video, Inc.*,[267] where the New York Court of Appeals noted that:

> Under established principles of federalism . . . the States . . . have sovereign powers. When their courts interpret State statutes or the State Constitution the decisions of these courts are conclusive if not violative of Federal Law. Although State courts may not circumscribe rights guaranteed by the Federal

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(Sup. Ct. Kings County 1988) (discussing the problems of fully protecting all unfairly excluded black prospective jurors from racially based peremptory challenges).

261. *Cf.* People v. Jenkins, 75 N.Y.2d 550, 558, 554 N.E.2d 47, 51, 555 N.Y.S.2d 10, 14 (1990) (noting that there can be a *Batson* violation even though the prosecution did not peremptorily challenge all black prospective jurors).

262. 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990).

263. *Id.* at 559, 554 N.E.2d 51-52, 555 N.Y.S.2d at 14-15 (emphasis in original).

264. 386 U.S. 58 (1967) (holding that state can provide increased protection from improper searches and seizures than is provided under the fourth amendment).

265. 447 U.S. 74 (1980) (holding that a state can restrict private owner's right to exclude as long as it does not contravene a federal constitutional provision).

266. *Id.* at 81; *Cooper*, 386 U.S. at 62.

267. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert.*

> Constitution, they may interpret their own law to supplement or expand them.[268]

The court added that "[i]n the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties."[269]

In regard to protecting criminal defendants and prospective jurors from discriminatory use of peremptory challenges, early decisions by the court of appeals were not responsive to broadening the scope of *Batson* under the state constitution.[270] In

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denied, 479 U.S. 1091 (1987).

268. *Id.* at 302, 501 N.E.2d at 559-60, 508 N.Y.S.2d at 911.

269. *Id.* at 303, 501 N.E.2d at 561, 508 N.Y.S.2d at 912; *see also* Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979) (stating that pretrial detainees in county jails are entitled to visitation rights under the state constitution's due process clause while not so under the federal equivalent), *cert. denied sub. nom.*, Lombard v. Cooper, 446 U.S. 984 (1980); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (positing that the state constitution's due process clause provides a criminal defendant more protection than the federal equivalent in regard to police brutality and coercion); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (both stating that defendant's right to counsel is more broad under the state constitution than the federal equivalent).

270. The New York State lower courts have been more responsive to broadening *Batson's* scope of protection under the state constitution. *See* People v. Green, 148 Misc. 2d 666, 561 N.Y.S.2d 130 (County Ct. Westchester County 1990) (the county court extended *Batson* by recognizing that hearing impaired prospective jurors are protected under the state's equal protection clause); People v. Davis, 142 Misc. 2d 881, 537 N.Y.S.2d 430 (Sup. Ct. Bronx County 1988) (the supreme court extended *Batson* by recognizing that white prospective jurors, along with black prospective jurors, are protected under the state's equal protection clause in ruling that the defense is prohibited from exercising racially based peremptory challenges). People v. Gary M., 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (Sup. Ct. Bronx County 1988) (the protection clause prohibited racially based peremtory challenges exercised by the defense); People v. Muriale, 138 Misc. 2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. Kings County 1988) (the supreme court extended *Batson* by recognizing that the state's equal protection clause prohibited the defense from exercising racially based peremptory challenges).

fact, in *People v. Scott*,[271] *People v. Hernandez*,[272] and *People v. Jenkins*,[273] the court of appeals chose to decide possible instances of discriminatory use of racially based peremptory challenges under federal constitutional law rather than state constitutional law.[274]

The court of appeals' reason for deciding possible violations of *Batson* under federal law can be found in the *Esler v. Walters*,[275] where it was determined that the New York State Constitution's equal protection clause[276] offered no greater protection than that of the federal equal protection clause found in the fourteenth amendment.[277] Since the criminal defendants in *Scott*, *Hernandez* and *Jenkins* all asserted federal equal protection claims,[278] the court apparently believed it was unnecessary to decide whether the prosecutor's alleged racially based peremptory challenges

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271. 70 N.Y.2d 420, 516 N.E.2d 1208, 522 N.Y.S.2d 94 (1987).

272. 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 86 (1990), *aff'd*, 111 S. Ct. 1859 (1991).

273. 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990).

In *Jenkins*, the court of appeals did broaden the scope of *Batson* under the Federal Constitution by allowing a criminal defendant to make out a *prima facie* claim of discrimination, even though the prosecutor did not peremptorily challenge all of the black prospective jurors. *Id.* at 556, 554 N.E.2d at 50, 555 N.Y.S.2d at 13. The court added that there is a *Batson* violation if the prosecution is found to have excluded a single prospective juror solely on the basis of race. *Id.* at 559, 554 N.E.2d at 51- 52, 555 N.Y.S.2d at 14-15.

274. Judge Kaye of the New York Court of Appeals, dissenting in *Hernandez*, believed that the court of appeals should have decided the prosecution's alleged discriminatory use of peremptory challenges under state constitutional law rather than federal constitutional law, thereby permitting the court to increase the protective scope of *Batson*. *Hernandez*, 75 N.Y.2d at 360, 552 N.E.2d at 626, 553 N.Y.S.2d at 90 (Kaye, J., dissenting).

275. 56 N.Y.2d 306, 437 N.E.2d 1090, 452 N.Y.S.2d 333 (1982).

276. The New York State Constitution's equal protection clause provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11.

277. *Esler*, 56 N.Y.2d at 313-14, 437 N.E.2d at 1094, 452 N.Y.S.2d at 337.

278. *Hernandez*, 75 N.Y.2d at 352-53, 552 N.E.2d at 621, 533 N.Y.S.2d at 85; *Jenkins*, 75 N.Y.2d at 553, 554 N.E.2d at 48, 555 N.Y.S.2d at 11; *Scott*, 70 N.Y.2d at 422, 516 N.E.2d at 1208, 522 N.Y.S.2d at 621, 533 N.Y.S.2d at 85.

were violative of the state constitution's equal protection clause.[279] The court of appeals, however, broke away from deciding possible instances of discriminatory use of peremptory challenges under federal law when it decided *People v. Kern*.[280]

In *Kern*, the court of appeals was confronted with the issue of whether the defense is prohibited from exercising racially based peremptory challenges.[281] During the trial court's *voir dire* examination, the defense peremptorily challenged several black prospective jurors, thus causing the prosecution to claim a *Batson* violation.[282] When the defense failed to offer a race neutral explanation for challenging one of the black prospective jurors, the trial judge ordered her to be seated among the other accepted jurors.[283]

Since the United States Supreme Court did not address this issue in *Batson*,[284] the court of appeals turned to the state constitution and found that the defense's racially based peremptory challenges were violative of both the equal protection clause[285] and the civil rights clause[286] of article I, section 11 of

279. In *Hernandez*, the court of appeals stated, "[o]ur analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right . . . ." 75 N.Y.2d at 358, 552 N.E.2d at 624, 533 N.Y.S.2d at 88.

280. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990), *cert. denied*, 111 S. Ct. 77 (1991).

281. *Id.* at 649, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

282. *Id.* at 647, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651.

283. *Id.* at 647-48, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651. This juror, however, was later excused by the court due to her son's illness. *Id.* at 648, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651. The defendants appealed nevertheless contending that the trial court unconstitutionally restricted their peremptory challenges. *Id.* at 648, 554 N.E.2d at 1240, 555 N.Y.S.2d at 652.

284. In *Batson*, the Supreme Court stated, "[w]e express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1988).

285. *See supra* note 275 and accompanying text.

286. The civil rights clause states, in pertinent part, that: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights . . . ." N.Y. CONST. art. I, § 11.

the state constitution.[287] In prohibiting the defense from exercising racially based peremptory challenges, the court expanded *Batson's* scope of protection by allowing the prosecution to assert an equal protection claim in place of the excluded black prospective jurors even though the state was not a member of a cognizable racial group of excluded prospective jurors.[288]

In *Kern*, the court of appeals did not address whether gender based peremptory challenges were prohibited under the state constitution.[289] This issue was subsequently decided by lower courts in *People v. Irizarry*[290] and *People v. Blunt*,[291] where both courts ruled that the prosecution is prohibited from exercising gender based peremptory challenges.[292] These two decisions, however, offer little insight as to why the state constitution prohibits gender based peremptory challenges.[293]

In *Irizarry*, the court decided the issue under federal constitu-

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287. *Kern*, 75 N.Y.2d at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

288. *Id.* at 654 n.3, 554 N.E.2d at 1244 n.3, 555 N.Y.S.2d at 656 n.3.

289. *Id.* at 652, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. The court of appeals in *Kern* limited its holding to covering only race based peremptory challenges. *Id.* at 642, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

290. 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dep't 1990).

291. 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990) *aff'd on remand*, No. 901-05958, 1991 N.Y. App. Div. LEXIS 12602 (2d Dep't Oct. 7, 1991).

292. *Irizarry*, 165 A.D.2d at 718, 560 N.Y.S.2d at 281; *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92.

293. *See* People v. Irizarry, 142 Misc. 2d 793, 536 N.Y.S.2d 630 (Sup. Ct. Bronx County 1988), *rev'd*, 165 A.D.2d 715, 560 N.Y.S.2d 279 (2d Dep't 1990). The Bronx County Supreme Court offered an extensive analysis of gender based discrimination in the jury selection process. *Id.* at 800-06, 536 N.Y.S.2d at 633-37. The appellate division, in reversing the supreme court, did not disagree with the court's decision that gender based peremptory challenges are prohibited. It reversed on the grounds that the prosecution failed to offer a gender neutral reason for excluding the female prospective juror. *Irazarry*, 165 A.D.2d at 718, 560 N.Y.S.2d at 281 (citing People v. Jenkins, 75 N.Y.2d 550, 558-59, 554 N.E.2d 47, 51-52, 555 N.Y.S.2d 10, 14-15 (1990)). While the Bronx County Supreme Court stated that gender based peremptory challenges are violative of the state constitutional provisions of sections 1, 2, 6, and 11 of Article I, and section 18 of Article VI, it only fully discussed such discrimination under the state's equal protection clause. *Id.* at 808-11, 536 N.Y.S.2d at 638-39.

tional law[294] and in *Blunt*, while holding that gender based peremptory challenges are violative of the state constitution's equal protection clause, the court failed to explain why it is violative of the provision.[295] Moreover, the *Blunt* court only addressed the criminal defendant's state constitutional rights, thus ignoring the female prospective juror's rights under the state constitution.[296] The following analysis, however, will demonstrate that the female prospective juror, along with the criminal defendant, are properly protected under the state constitution's equal protection clause.

C. New York State Constitution's Equal Protection Clause

In *Kern*, the court of appeals explained that section 11 of article I of the state constitution contains two provisions.[297] The first provision, the so-called "equal protection clause," provides that, "[n]o person shall be denied equal protection of the laws of this state or any subdivision thereof."[298] The second provision, the so-called "civil rights clause," which will be discussed in the following section, provides that "[n]o 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

294. *Irizarry*, 165 A.D.2d at 716, 560 N.Y.S.2d at 280. This decision is also subject to criticism because the appellate court, in holding that *Batson* prohibits gender based peremptory challenges, mistakenly stated that the United States Supreme Court applies a "strict scrutiny" test to gender based classifications. *Id.* at 716, 560 N.Y.S.2d at 280. According to the Supreme Court, such classifications require intermediate level scrutiny. *See supra* notes 225-29 and accompanying text.

295. *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92.

296. The court did note that gender based peremptory challenges violate a citizen's right to jury service, but it failed to state whether the unfairly excluded prospective juror has standing to assert an equal protection claim under the state constitution. *Id.* In *Irizarry*, the court stated that under federal constitutional law, a female prospective juror has standing to assert a *Batson* claim. *Irizarry*, 165 A.D.2d at 718, 560 N.Y.S.2d at 281.

297. *Kern*, 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 55 N.Y.S.2d at 653.

298. N.Y. CONST. art. 1, § 11.

state."[299]

In regard to the equal protection clause of the state constitution, the *Kern* court concluded that race based peremptory challenges are violative of this provision.[300] Likewise, the second department of the appellate division in *Blunt*, following the rationale of *Kern*, concluded that the state's equal protection clause also prohibits gender based peremptory challenges.[301]

In *Blunt*, the prosecutor peremptorily challenged eleven women from jury selection while excluding only one man.[302] On appeal, the defense contended that the prosecutor's actions amounted to a violation of the defendant's state constitutional rights under the equal protection clause.[303] The prosecution asserted that the defendant lacked standing to sue since he was not a member of the excluded class as called for under the *Batson* test.[304]

Referring to *Kern*, the court ruled that a male had standing to make a claim of discrimination even though he was not a member of the excluded class.[305] In *Kern*, the court of appeals held that the prosecution had standing to sue even though it was not a member of a cognizable group because an aggrieved party's race is irrelevant to an equal protection standing inquiry.[306] According to the *Blunt* court, a criminal defendant's gender is equally as irrelevant in being able to assert an equal protection claim.[307]

Turning to the issue of gender based peremptory challenges, the court pointed out that jury service is a privilege of citizenship protected under the state constitution and civil rights law.[308]

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299. *Id.*

300. *Kern*, 75 N.Y.2d at 657, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.

301. *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92.

302. *Id.* at 88, 561 N.Y.S.2d at 92.

303. *Id.*

304. *Id.* at 89, 561 N.Y.S.2d at 92.

305. *Id.*

306. *Kern*, 75 N.Y.2d at 654 n.3, 554 N.E.2d at 1245 n.3 555 N.Y.S.2d at 656 n.3.

307. *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92.

308. *Id.* at 88-89, 561 N.Y.S.2d at 92 (citing N.Y. CONST. art. 1, § 1 and N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976)). Section 1 of article I of the New York State Constitution provides: "No member of this state

Applying the rationale in *Kern*,[309] the court believed that the privilege of jury service logically extends to prohibiting gender discrimination under the state constitution's equal protection clause.[310] The court then stated that the *Batson* test is applicable to defendant claims of gender discrimination regarding the prosecutor's use of peremptory challenges.[311]

Applying the *Batson* test, the court ruled that the defendant had made out a *prima facie* claim of discrimination.[312] The court then remitted the case back to the trial court for an evidentiary hearing to determine whether the prosecutor had a gender neutral explanation for excusing the eleven women from jury service.[313]

If the court of appeals applied the same level of constitutional scrutiny to gender based discrimination as they apply to racially based discrimination, then the *Blunt* court would have properly concluded, without further discussion, that *Kern* extends to gender based peremptory challenges. The court of appeals, however, has followed the United States Supreme Court view that gender based discrimination deserves only "intermediate level scrutiny"[314] while race based discrimination deserves the

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shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers . . . ." N.Y. CONST. art. 1, § 1.

Section 13 of the New York Civil Rights Law provides, in pertinent part, that: "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 grand or petit juror in any court of this state on account of race, creed, color, national origin or sex." N.Y. CIV. RIGHTS LAW § 13 (McKinney 1978).

309. In *Kern*, the court of appeals held that the defense is prohibited from peremptorily challenging blacks solely on the basis of race. 75 N.Y.2d at 642-43, 554 N.E.2d at 1236, 555 N.Y.S.2d at 648.

310. *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92.

311. *Id.* at 89, 561 N.Y.S.2d at 92-93.

312. *Id.* at 89-90, 561 N.Y.S.2d at 93.

313. *Id.* On remand, the appellate division concluded that the prosecutor failed to articulate a gender neutral explanation for excluding female prospective jurors. No. 901-05958, 1991 N.Y. App. Div. LEXIS 12602 (2d Dep't Oct. 7, 1991).

314. People v. Liberta, 64 N.Y.2d 152, 168, 474 N.E.2d 567, 576, 485 N.Y.S.2d 207, 216 (1984) (holding that the New York State rape statute that excludes females from criminal liability is unconstitutional under the state

more stringent "strict scrutiny."[315] In *People v. Liberta*,[316] the court of appeals stated that a statute which permits unequal treatment between men and women "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective."[317]

Applying the intermediate test, it can be shown that gender based peremptory challenges, permissible under the New York State peremptory challenge statute,[318] are violative of the state constitution's equal protection clause. Peremptory challenges can serve an important governmental objective by helping the litigants secure a fair and impartial jury.[319] Permitting a party, however, the right to systematically exclude women by peremptory challenge thus resulting in an unrepresentative jury, will most likely lead to an infringement of the other party's right to an impartial jury.[320] Furthermore, gender based peremptory challenges fail to serve other important governmental objectives such as protecting a female prospective juror's state constitutional

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constitution), *cert. denied*, 471 U.S. 1020 (1985).

315. *See* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 385 N.Y.S.2d 82 (1970); *In re* Quinton, 49 N.Y.2d 328, 402 N.E.2d 126, 435 N.Y.S.2d 788 (both holding that racial classifications require strict scrutiny constitutional analysis).

316. 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), *cert. denied*, 471 U.S. 1020 (1985).

317. *Id.* at 168, 474 N.E.2d at 576, 485 N.Y.S.2d at 216.

318. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

319. *See, e.g.*, People v. McCray, 57 N.Y.2d 542, 547-48, 443 N.E.2d 915, 917-18, 457 N.Y.S.2d 441, 443-44 (1982) (describing the benefits of peremptory challenges in achieving a fair and impartial jury), *cert. denied*, 461 U.S. 961 (1983); *but see* People v. Thompson, 79 A.D.2d 87, 96, 435 N.Y.S.2d 739, 747 (2d Dep't 1981) (noting that peremptory challenges are not an essential method of securing an impartial jury).

320. Section 500 of the State's Judiciary Law provides "that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community . . . ." N.Y. JUD. LAW § 500 (McKinney 1975 & Supp. 1991). According to the Kings County Supreme Court, in People v. Muriale, 138 Misc. 2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. Kings County 1988), this statute is provided "to insure that both sides at a trial have the benefit of an impartial jury." *Id.* at 1065, 526 N.Y.S.2d at 373.

right to serve on a jury[321] and promoting the public's confidence in the judicial system.[322] Lastly, gender based peremptory challenges are not substantially related to achieving an impartial jury because a female prospective juror is excluded on the basis of an attorney's own predisposed negative viewpoint of women rather than her own incompetence as a juror.[323] Therefore, both the female prospective juror and the criminal defendant should be able to assert that gender based peremptory challenges are violative of their equal protection rights under the state constitution. It seems doubtful, however, that these parties can receive the same protection under the state constitution's civil rights clause.

D. New York State Constitution's Civil Rights Clause

As mentioned in the preceding section, the New York State Constitution's civil rights clause specifies that a person shall not be discriminated in his or her civil rights on the basis of race, color, creed or religion.[324] According to the 1938 New York State Constitutional Convention, the term "civil rights" was interpreted to mean such rights defined by other provisions of the constitution, statute or common law.[325] In *Kern*, the New York Court of Appeals held that racially based peremptory challenges are prohibited under the civil rights clause of the state constitution because it is also expressly prohibited under the New

321. *Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654 (citing N.Y. CONST. art. I, § 1).

322. *Id.* at 654, 554 N.E.2d at 1243-44, 555 N.Y.S.2d at 655-56 (quoting *Batson*, 476 U.S. at 87-88); *see also Muriale*, 138 Misc. 2d at 1060-61, 526 N.Y.S.2d at 370.

323. *See* People v. Irizarry, 142 Misc. 2d 793, 810, 536 N.Y.S.2d 630, 639 (Sup. Ct. Bronx County 1988) (stating that gender based peremptory challenges fail the intermediate scrutiny test because there is no justification for excluding a female prospective juror on the basis of her gender), *rev'd on other grounds*, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dep't 1990).

324. N.Y. CONST. art. 1, § 11.

325. 4 Rev. Record of N.Y. State Constitutional Convention, 2626 (1938); *see also* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 531, 87 N.E.2d 541, 548 (1949), *cert. denied*, 339 U.S. 981 (1950); *Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1243, 555 N.Y.S.2d at 653.

York Civil Rights Law.[326]

This statute, entitled "Right to Serve on Juries,"[327] provides, in pertinent part, that "[n]o 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 grand or petit juror in any court of this state on account of race, creed, color, national origin or sex . . . ."[328] Since the classification of race is enumerated in both this statute and the civil rights clause provisions, the court properly concluded that racially based peremptory challenges are prohibited under the civil rights clause of the state constitution.[329]

Unfortunately, a female prospective juror is unable to assert a claim under the civil rights clause because gender is not specified as a prohibited classification.[330] She could, however, assert that a gender based peremptory challenge constitutes a statutory violation of section 13 of the civil rights law.[331]

Similarly, a criminal defendant is not protected under the civil rights clause. A criminal defendant could assert that his or her civil right to an impartial jury, as provided under section 12 of the state's civil rights law,[332] is violated by gender based peremptory challenges. Since criminal defendants are also not listed as a protected group, they suffer the same problem as female prospective jurors. Both a criminal defendant and female prospective juror, however, can assert that gender based peremptory challenges violate their rights under section one of

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326. *Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

327. N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976).

328. *Id.*

329. *Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

330. *See* N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982). In 1984, a proposal was made to amend the state's civil rights clause to add gender, along with race, color, creed and religion as a protected group. *Legislative Achievements for Women in New York State: A 20 Year Retrospective, New York City Commission on the Status of Women* at 47 (1985). This proposal, however, failed to become law. *Id.*

331. *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92; *see supra* note 308.

332. N.Y. CIV. RIGHTS LAW § 12 (McKinney 1976). Section 12 provides, in pertinent part, that "[i]n all criminal prosecutions, the accused has a right to . . . an impartial jury . . . ." *Id.*

article one of the state constitution.

E. New York State Constitution's Rights and Privileges Secured Provision

Section 1 of article I of the New York State Constitution provides that, "[n]o member of this state shall be . . . deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers . . . ."[333] In *People v. Kagan*,[334] the Supreme Court of New York County was confronted with the issue of whether this provision protects a criminal defendant from allowing a prosecutor to peremptorily challenge members of his own ethnic group solely on the basis of their ethnicity.[335]

In *Kagan*, two defendants who were Jewish were charged with violations of a banking law.[336] During jury selection, the prosecutor peremptorily challenged all four prospective jurors who were Jewish.[337] In interpreting section 1 of article I as prohibiting the prosecutor's use of peremptory challenges that systematically exclude prospective jurors solely on the basis of ethnic group, the court explicitly mentioned gender as one of the groups that is protected under the state constitution.[338]

In *People v. Thompson*,[339] the Second Department of the Supreme Court, Appellate Division also interpreted section 1 of article I as prohibiting the use of peremptory challenges that exclude cognizable groups.[340] In its opinion, the court explained that the constitutional provision had been interpreted as entitling

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333. N.Y. CONST. art. 1, § 1.

334. 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. New York County 1979).

335. *Id.* at 276, 420 N.Y.S.2d at 989. "This is a case of first impression, the courts of New York never having had the occasion to pass upon this question." *Id.*

336. *Id.* at 275, 420 N.Y.S.2d at 988.

337. *Id.* at 277, 420 N.Y.S.2d at 990.

338. *Id.* at 277, 420 N.Y.S.2d at 989.

339. 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981).

340. *Id.* at 106, 435 N.Y.S.2d at 752.

the criminal defendant to a trial by an impartial jury.[341] An impartial jury, according to the court, should consist of a fair cross section of the community as constitutionally required under *Taylor*.[342] Thus, the court construed *Taylor* as extending the fair cross section of the community requirement to the selection of the petit jury.[343] The court reasoned that *Taylor* should be extended to peremptory challenges because the unfair exclusion of cognizable groups, permitted under the peremptory challenge rule, would lead to the same discriminatory impact as excluding these groups from the jury venire.[344]

It is arguable, however, that the court of appeals, in *People v. McCray*,[345] has effectively overruled *Kagan* and *Thompson*. In *McCray*, the court stated that article I, section 1, of the constitution did not grant a court the authority to interfere with the attorney's use of peremptory challenges.[346] In its reasoning, however, the court heavily relied on *Swain's* view of permitting an attorney's unrestricted use of peremptory challenges.[347] Since *Batson* overruled the burden of proof portion of *Swain*, it can be argued that it is now *McCray's* holding which is suspect.[348] In

341. *Id.* at 96, 435 N.Y.S.2d at 746-47.

342. *Id.* at 101, 435 N.Y.S.2d at 749.

343. *Id.* The court also relied on section 500 of the Judiciary Law, which provides that "[i]t is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section [sic] of the community . . . ." N.Y. Jud. Law § 500 (McKinney 1975 & Supp. 1991).

344. *Thompson*, 79 A.D.2d at 101, 435 N.Y.S.2d at 749.

Several other states have also held that the fair cross section requirement extends to the petit jury. *See* Fields v. People, 732 P.2d 1145, 1151 (Colo. 1987) ("right to an impartial jury includes the right to a jury drawn from a . . . fair cross-section [sic] of the community"); Riley v. State, 496 A.2d 997 (Del. 1985) (state constitution provision is "functionally equivalent to the Sixth Amendment fair cross section requirement . . ."), *cert. denied*, 478 U.S. 1022 (1986).

345. 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983).

346. *Id.* at 550, 443 N.E.2d at 919, 457 N.Y.S.2d at 445.

347. *Id.*

348. *See* People v. Muriale, 138 Misc. 2d 1056, 1058-59, 526 N.Y.S.2d 367, 368-69 (Sup. Ct. Kings County 1988).

fact, clear evidence in the overruling of *McCray* can be found in *Kern* where the court of appeals rejected the defendant's contention that section 1 of article I extends only to prohibiting racial discrimination in the venire stage to jury selection.[349] In *Kern*, the court stated that "[a] citizen's privilege to be free of racial discrimination in the qualification for jury service is hardly a privilege if that individual may nevertheless be kept from service on the petit jury solely because of race."[350] Since *Kagan* and *Thompson* seek to extend defendant's criminal right protections, under the teachings of *Cooper*, *Pruneyard* and *P.J. Video*, it seems desirable to leave those holdings undisturbed.

A female prospective juror can also assert a claim of discrimination under this provision. In *Kern*, the court declared that jury service is a privilege of citizenship protected under section one of article one of the state constitution.[351] Following the state legislative view that all eligible citizens are entitled to serve on a jury,[352] the court proceeded to hold that jury service "is a privilege of citizenship which may not be denied our citizens solely on the basis of their race."[353] Since jury service is most probably a fundamental right of citizenship,[354] women should also be protected under this provision, thereby not allowing an attorney to peremptorily challenge them solely on the basis of their gender.[355]

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349. *Kern*, 75 N.Y.2d at 652, 554 N.E.2d at 1242-43, 555 N.Y.S.2d at 654-55.

350. *Id.*

351. *Id.* at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654.

352. N.Y. JUD. LAW § 500 (McKinney 1975 & Supp. 1991).

353. *Kern*, 75 N.Y.2d at 652, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

354. People v. Blunt, 162 A.D.2d 86, 88-89, 561 N.Y.S.2d 90, 92 (2d Dep't 1990); *see also* People v. Green, 148 Misc. 2d. 666, 669, 561 N.Y.S.2d 130, 132 (N.Y. Sup. Ct. New York County 1990) (noting that jury service may be a fundamental right).

355. *See* People v. S.R., 136 Misc. 2d 45, 57, 517 N.Y.S.2d 864, 866 ("this court condemns discrimination based upon gender or race to be equally abhorrent . . .").

CONCLUSION

An unfettered peremptory challenge rule invites purposeful discrimination.[356] As long as attorneys rely on negative stereotypes, the peremptory challenge rule will always be subject to abuse.[357] By statutorily permitting up to twenty peremptory challenges,[358] an attorney can effectively eliminate a cognizable group if he or she mistakenly believes that they possess a certain trait that might be adverse to his or her client's case. New York State courts, however, have determined that the peremptory challenge rule is not essential for selecting a jury,[359] and therefore must yield to more compelling state interests.[360]

Moreover, the New York State Constitution and statutory law contain provisions that call for the eradication of all forms of jury selection discrimination.[361] Accordingly, New York State courts have imposed restrictions on the use of the peremptory challenge rule that go beyond those called for by the United States Supreme Court.[362] One of these restrictions prohibits an attorney from invoking this rule to exclude women solely on the basis of their gender.[363] Perhaps, to fully ensure that the criminal defendant and prospective female juror are granted full protection under the state constitution, the New York State Legislature should limit the amount of challenges[364] or ban the statute in its entirety.[365]

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356. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring). "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Id.*

357. "It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." King v. County of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984).

358. *See supra* note 124 and accompanying text.

359. *See supra* notes 110-114 and accompanying text.

360. *See supra* notes 317-322 and accompanying text.

361. *See* N.Y. CONST. art. 1, §§ 1, 11; *see also* N.Y. CIV. RIGHTS LAW §§ 12, 13 (McKinney 1976); N.Y. JUD. LAW § 500 (McKinney 1975 & Supp. 1991).

362. *See supra* note 293.

363. *See supra* Part III, sections C and E.

364. *See People v. Hernandez*, 75 N.Y.2d 350, 359, 552 N.E.2d 621, 625,

Furthermore, the legislature should amend the state's civil rights clause to add gender as a protected classification.[366] This amendment will bring women within the full state constitutional protection as provided under *Kern*.[367]

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553 N.Y.S.2d 85, 89 (1990) (Titone, J., concurring) (suggesting that the state legislature limit the amount of peremptory challenges).

365. *See* Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall, J., concurring) (calling for peremptory challenges to be declared unconstitutional).

366. *See supra* note 300 and accompanying text.

367. *See supra* note 326 and accompanying text.