

Defense Barred Under New York Constitution from Racially Discriminating Through Exercise of Peremptory Challenges

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to investment bankers would hold them directly liable to shareholders in the buyout context, given that the shareholders are the primary beneficiaries of their fairness opinions.³⁶ The standard established by the First Department in *Schneider*, however, imposes liability regardless of whether the bankers knew that the shareholders would potentially rely on their advice.³⁷ On the other hand, use of a more traditional framework of third party liability, that does not improperly superimpose agency theory on a corporate relationship, furthers the policy considerations favoring the extension of liability without unreasonably expanding the scope of an investment banker's liability.

John J. Kim

Defense barred under New York State Constitution from racially discriminating through exercise of peremptory challenges

New York Criminal Procedure Law section 270.25 affords both prosecutors and criminal defendants the right to exercise per-

dictions, derived from the *Restatement (Second) of Torts* section 552 (1965), which permits recovery by any foreseeable plaintiff. *Credit Alliance*, 65 N.Y.2d at 553, 483 N.E.2d at 119, 493 N.Y.S.2d at 444; see, e.g., *Spherex, Inc. v. Alexander Grant & Co.*, 122 N.H. 898, 904, 451 A.2d 1308, 1312 (1982) (accountant liable to all foreseeable plaintiffs); *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 413 (Tex. App. Dallas 1986) (foreseeability expanded to all parties accountant "knew, or should have known" would receive information).

The general trend in accountant liability seems to be moving toward a more expansive basis of liability and away from the previous rule that an accountant could not be liable for mere negligence to a non-contractual party. See *Ultramares Corp. v. Touche*, 255 N.Y. 170, 189, 174 N.E. 441, 448 (1931). In *Ultramares*, Judge Cardozo expressed the concern that holding accountants liable to third parties for mere negligence would "expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 179, 174 N.E. at 444. The realities of the accountant's increasingly vital role has, however, led many courts to recognize the need for an enhanced degree of legal responsibility. See *Mess*, *supra* note 34, at 855.

³⁶ See Note, *supra* note 1, at 136 n.93; *Wells*, 127 A.D.2d at 202-03, 514 N.Y.S.2d at 2. In *Wells*, the court held that the investment bankers were liable to the stockholders for their negligent preparation of a fairness opinion because they must have been aware of the stockholders' reliance on their opinion. *Id.*

³⁷ See *Schneider*, 159 A.D.2d at 296, 552 N.Y.S.2d at 574. In *Schneider*, the shareholders never alleged reliance, nor any claim that the investment bankers' advice was passed on or was intended to be passed on to the shareholders. *Id.* It is submitted, therefore, that investment bankers should not be subject to an unlimited scope of liability, but should, however, be accountable for damages caused by their negligent advice if the injured party was a foreseeable one.

emptory challenges.¹ In *Batson v. Kentucky*,² the United States Supreme Court limited the state's use of peremptory challenges by holding that the equal protection clause of the fourteenth amendment prohibits the prosecution from exercising peremptory challenges in a racially discriminatory manner.³ The *Batson* Court,

¹ See CPL § 270.25 (McKinney 1982). Section 270.25(1) defines a peremptory challenge as "an objection to a prospective juror for which no reason need be assigned." *Id.* It then sets forth the number of peremptory challenges each party is permitted to use according to the class of crime involved. See *id.* at 270.25(2); see also *People v. Thompson*, 79 A.D.2d 87, 97-99, 435 N.Y.S.2d 739, 747-48 (2d Dep't 1981) (detailed discussion of history of peremptory challenge in New York).

² 476 U.S. 79 (1986).

³ *Id.* at 89. *Batson* drastically changed the law in this area insofar as it lifted a heavy burden from the shoulders of criminal defendants attempting to challenge a prosecutor's exercise of peremptory challenges on racial grounds. See *id.* at 101-02 (White, J., concurring). Prior to *Batson*, *Swain v. Alabama*, 380 U.S. 202 (1965), served as the governing standard in determining when the prosecutor's use of peremptories violated the fourteenth amendment's equal protection clause. See *Batson*, 476 U.S. at 90-93. In *Swain*, a black defendant asserted an equal protection violation due to the prosecutor's exercise of peremptory challenges to exclude all black jurors. *Swain*, 380 U.S. at 203. In view of the significant purpose the peremptory challenge serves in our criminal justice system, the *Swain* Court was reluctant to sacrifice the peremptory challenge by subjecting each of the prosecutor's challenges to the traditional demands of the fourteenth amendment's equal protection clause. *Id.* at 221-22. To do so, the Court held, "would establish a rule wholly at odds with the peremptory challenge system as we know it." *Id.* at 222. Instead, the Court created a rebuttable presumption that every state challenge exercised by the prosecutor is exercised for the purpose of obtaining a fair and impartial jury. *Id.* This presumption would not be overcome by a defendant's mere allegation of racial discrimination. *Id.* To successfully rebut the presumption, the *Swain* Court required proof of a prosecutor's continuous, systematic exclusion of blacks in "case after case," for reasons wholly unrelated to the case being tried. See *id.* at 223-24; Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 12 (1988). The "case after case" requirement forced a defendant to go outside the realm of his own case to gather evidence of the prosecutor's discriminatory use of peremptories. See *Swain*, 380 U.S. at 224-25; see also Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1161 (1966) (defendant required to show "prosecutor's conduct . . . in earlier trials . . . in which he was not involved . . . [and] which his opportunities for gathering evidence are severely restricted"). The practical difficulties involved in meeting this standard are evidenced by the dearth of cases holding that invidious discrimination has been demonstrated under the *Swain* standard. See Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 299 & n.36 (1989); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1362 & n.31 (1985). *Swain* was highly criticized for the overwhelming burden it imposed on defendants alleging racially discriminatory tactics in the jury selection process. See, e.g., Raphael, *supra*, at 299 (defendant's burden under *Swain* "impossible to meet"); Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 197 (1978) ("major problem" with *Swain* is defendant's "heavy, yet poorly articulated burden of proof"); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 293, 302 (1968) (depicting *Swain* as "blind to realities" and "an insurmountable

however, specifically declined to decide whether the same restric-

obstacle to the vindication of . . . constitutional rights").

Batson held that a defendant could establish "a prima facie case of purposeful discrimination . . . solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96. Thus, under *Batson*, defendants are no longer required to conduct surveys of prosecutorial conduct in past trials prior to alleging an equal protection violation. *Id.* at 102 (Marshall, J., concurring).

Batson articulated several factors for determining whether a prima facie case has been established. *Id.* at 96-97. First, the defendant "must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* at 96 (citation omitted). This standard has since been extended to grant a criminal defendant standing to allege a *Batson* violation without being a member of the group against which bias is claimed. See *Powers v. Ohio*, 111 S.Ct. 1364 (1991) (criminal defendant has standing to raise third-party equal protection claims of jurors excluded by prosecution because of race regardless of defendant's race). See also *Holland v. Illinois*, 110 S.Ct. 803 (1990) wherein the same argument posited under sixth amendment fair cross section requirement was rejected. Second, it is presumed that peremptory challenges constitute a jury selection practice that gives those who are inclined to discriminate an opportunity to do so. *Batson*, 476 U.S. at 96. Lastly, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* The presence of these factors "raises the necessary inference of purposeful discrimination." *Id.* In determining whether a defendant has made the requisite prima facie showing, the *Batson* Court deferred largely to trial courts, directing them to consider "all relevant circumstances." See *id.* at 96-97. Illustrating the types of factors to be considered, the Court stated that "a 'pattern' of strikes" against black jurors as well as questions and statements by the prosecutor during voir dire "may support or refute an inference of discriminatory purpose." See *id.* at 97. Once a prima facie showing has been made, "the burden shifts to the State to come forward with a [racially] neutral explanation for challenging black jurors." *Id.* Although this burden does not rise to the level of explanations justifying challenges for cause, "the prosecutor may not rebut the defendant's prima facie case . . . by stating merely that he challenged jurors of the defendant's race on the assumption . . . that they would be partial to the defendant." *Id.* Nor can the prosecutor rebut the defendant's prima facie case by simply denying any discriminatory motive or assuring the court of his good faith. *Id.* at 98.

New York appellate courts have recognized *Batson's* retroactive application to cases tried prior to *Batson*, see *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), and have remitted cases for the purpose of conducting reconstructive/evidentiary hearings to permit the prosecutor to proffer racially neutral explanations for the peremptorily challenged jurors in question. See, e.g., *People v. Baker*, 558 N.Y.S.2d 44, 45-46 (1st Dep't 1990) (remanded to allow prosecutor "meaningful opportunity" to provide race-neutral reasons for striking black jurors); *People v. Bryant*, 159 A.D.2d 962, 962, 552 N.Y.S.2d 778, 778 (4th Dep't 1990) (same); *People v. Dove*, 154 A.D.2d 705, 705, 546 N.Y.S.2d 686, 686 (2d Dep't 1989) (same). Because *Batson* creates a rebuttable presumption of purposeful discrimination upon the defendant's showing of a prima facie case of discrimination, evidentiary hearings are necessary to afford the people an opportunity to rebut the presumption. Similarly, courts have remanded cases for the purpose of providing defense counsel an opportunity to make a prima facie showing of discriminatory use of peremptory challenges by the prosecution in accordance with the *Batson* standards. See, e.g., *People v. Hockett*, 121 A.D.2d 878, 879, 503 N.Y.S.2d 995, 996 (1st Dep't 1986) (remand for evidentiary hearing out of "fairness"). Where reconstructive hearings are impossible, however, courts have simply ordered new trials. See *People v. Scott*,

tion applies to the defense.⁴ Recently, in *People v. Kern*,⁵ the New York Court of Appeals held that the civil rights clause of the New York State Constitution⁶ prohibits purposeful discrimination in the exercise of peremptory challenges, whether exercised by the prosecution or the defense.⁷ In addition, the court held that the judicial enforcement of a defendant's racially discriminatory peremptory challenge constitutes state action violative of the equal protection provision of the state constitution.⁸

70 N.Y.2d 420, 426, 516 N.E.2d 1208, 1212, 522 N.Y.S.2d 94, 98 (1987) (evidentiary hearing inappropriate due to absence of record, four-year lapse from time of trial and departure of presiding trial judge from trial court); *People v. Kinard*, 151 A.D.2d 963, 964, 542 N.Y.S.2d 413, 414 (4th Dep't 1989) (new trial granted where 10-year lapse from time of trial and death of trial judge rendered reconstruction hearing impossible). *But see* *People v. Lincoln*, 145 A.D.2d 924, 924, 536 N.Y.S.2d 609, 609 (4th Dep't 1988) (ordered reconstruction hearing despite trial judge's departure from trial court since trial judge available to testify).

⁴ *Batson*, 476 U.S. at 89 n.12 (declining to express "views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel"). In his concurring opinion, however, Justice Marshall noted that the "potential for racial prejudice . . . inheres in the defendant's challenge as well." *Id.* at 108 (Marshall, J., concurring). In addition, in his dissenting opinion, Chief Justice Burger predicted that the same restrictions being imposed on the prosecution's use of peremptories inevitably would be applied to defense counsel. *See id.* at 125-26 (Burger, C.J., dissenting). Recently, the Supreme Court again declined to expressly address the issue of defense counsel's exercise of peremptory challenges. *See Alabama v. Cox*, 488 U.S. 1018, 1018 (1989). Despite the Supreme Court's failure to define the parameters of defense peremptory challenges to date, the Court's most recent extension of *Batson* in *Powers v. Ohio*, 111 S.Ct. 1364 (1991), *see supra* note 3, has triggered the concern of the National Association of Criminal Defense Attorneys who "predict that the Court may now turn its attention to the jury selection practices of defense lawyers." *See* London, *Race and Juries: Burden Could Shift to Defense*, N.Y. Times, April 5, 1991, at B18, col. 3.

Several legal commentators and lower New York courts advocate the application of *Batson* to the defense. *See, e.g.,* Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 355 (1988) (arguing that discriminatory use of peremptory challenges by defense would "violate[] the equal protection clause and erode[] the community's belief in the fairness of the justice system"); *see also infra* note 14 (lower New York courts applying *Batson* to defense).

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

⁶ N.Y. CONST. art. I, § 2.

⁷ *See Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

⁸ *See id.* at 657, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658. The state and federal equal protection clauses prohibit only discrimination that constitutes state action. *See id.* at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. The Supreme Court has held that the acts of a private individual will constitute state action if there is "a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself." *See* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *see also* *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (equal protection clause applies only to state action). This test was intended to be flexible, finding state action only upon a careful weighing of all relevant facts and circumstances. *See* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). It has been suggested that to designate the criminal

Kern involved a highly publicized trial which stemmed from the controversial Howard Beach racial incident in which a group of white teenagers attacked three black men.⁹ The December, 1986 attack resulted in the death of one of the black men, Michael Griffith, and the severe beating of another, Cedric Sandiford.¹⁰ Three of the defendants tried were convicted of charges including manslaughter, assault, and conspiracy.¹¹ During jury selection, defense counsel began exercising peremptory challenges to exclude prospective black jurors.¹² The prosecution moved to require defense counsel to provide racially neutral explanations for peremptorily challenging black jurors.¹³ The trial court granted the prosecution's

defendant's use of peremptory challenges as state action would be an unprecedented expansion of the state action doctrine. See Note, *Defendant's Discriminatory Use of the Peremptory Challenge*, 62 ST. JOHN'S L. REV. 46, 56-57 (1987).

⁹ See *Kern*, 75 N.Y.2d at 643, 554 N.E.2d at 1236, 555 N.Y.S.2d at 648. The three black men who were attacked were Michael Griffith, Cedric Sandiford, and Timothy Grimes. *Id.* at 643, 554 N.E.2d at 1236-37, 555 N.Y.S.2d at 648-49. Testimony revealed that their car had broken down near a pizzeria where the incident took place and they walked into the town of Howard Beach to seek assistance. *Id.* At the same time, a group of white teenagers were attending a birthday party in Howard Beach. *Id.* at 643, 554 N.E.2d at 1237, 555 N.Y.S.2d at 649. While driving home another party-goer, two of the teenagers encountered Griffith, Sandiford, and Grimes crossing the street toward the pizzeria. *Id.* There was conflicting testimony regarding this confrontation. See *id.* When the teenagers returned to the party, one shouted "[t]here were some niggers on the boulevard, let's go up there and kill them." *Id.* at 644, 554 N.E.2d at 1237, 555 N.Y.S.2d at 649. The group arrived at the pizzeria wielding bats and clubs and chased the three blacks yelling "[n]iggers, get * * * out of the neighborhood." *Id.*

¹⁰ *Id.* at 645-46, 554 N.E.2d at 1238, 555 N.Y.S.2d at 650. The three blacks ran in different directions to escape their attackers. *Id.* at 644, 554 N.E.2d at 1237, 555 N.Y.S.2d at 649. Grimes escaped. *Id.* Griffith ran onto a six-lane highway and was accidentally struck by a car and killed. *Id.* at 645, 554 N.E.2d at 1238, 555 N.Y.S.2d at 650. Sandiford was beaten with baseball bats and tree limbs, but ultimately survived the attack. *Id.* at 645-46, 554 N.E.2d at 1238, 555 N.Y.S.2d at 650.

¹¹ *Id.* at 648, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651. Scott Kern, Jon Lester, Jason Ladone, and Michael Pirone were tried. Kern and Lester were convicted of second degree manslaughter, first degree assault and fifth degree conspiracy. *Id.* Ladone was convicted of second degree manslaughter and first degree assault. *Id.* Pirone was acquitted of all charges against him. *Id.* at 643 n.1, 554 N.E.2d at 1237 n.1, 555 N.Y.S.2d at 649 n.1. In addition, in exchange for his cooperation, Robert Riley pled guilty to second degree assault in satisfaction of all charges arising out of his involvement in the incident. See *People v. Riley*, 152 A.D.2d 757, 757-58, 545 N.Y.S.2d 37, 37-38 (2d Dep't 1989).

¹² See *Kern*, 75 N.Y.2d at 647, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651. On the first day of jury selection, after unsuccessfully challenging for cause several black jurors, defense counsel began using peremptories to exclude blacks. *Id.* The defense then applied for eight additional peremptory challenges arguing that "the black jurors did not 'want to be excused. They're coming in here, volunteering,' whereas white jurors 'who aren't anxious to serve are using all kinds of excuses to get off any duty.'" *Id.* The trial court denied the request. *Id.*

¹³ *Id.*

motion, holding that the principles set forth in *Batson* were applicable to the defense.¹⁴ The Appellate Division, Second Department, affirmed and concluded that the systematic exercise of peremptory challenges by either the prosecution or the defense to exclude blacks from the jury solely on the basis of race violates both the fourteenth amendment's equal protection clause and article I, section 2 of the New York State Constitution.¹⁵ The Court of Appeals unanimously affirmed the Appellate Division's decision¹⁶ holding that the civil rights and equal protection clauses of the New York State Constitution,¹⁷ rather than the federal equal pro-

¹⁴ *Id.* Immediately after the trial court issued its *Batson* ruling, the defendants instituted an article 78 proceeding seeking to prohibit enforcement of the trial court's order. See *Ladone v. Demakos*, 133 A.D.2d 435, 435, 519 N.Y.S.2d 417, 418 (2d Dep't), *appeal denied*, 70 N.Y.2d 607, 514 N.E.2d 389, 519 N.Y.S.2d 1031 (1987). The Appellate Division, Second Department, denied the application based upon the "availability of an adequate remedy at law, i.e., appeal." *Id.* at 436, 519 N.Y.S.2d at 419.

Following the trial court's ruling, Elizabeth Holtzman, the Kings County District Attorney, sought a judgment "declaring that both the United States and New York State Constitutions prohibit defense counsel from exercising 'race-based' peremptory challenges." *Holtzman v. Supreme Court of N.Y., Kings County*, 139 Misc. 2d 109, 111, 526 N.Y.S.2d 892, 893 (Sup. Ct. Westchester County 1988), *aff'd*, 152 A.D.2d 724, 545 N.Y.S.2d 40 (2d Dep't), *appeal denied*, 74 N.Y.2d 616, 549 N.E.2d 478, 550 N.Y.S.2d 276 (1989). Holtzman contended that her office had witnessed "'persistent use of peremptory challenges by criminal defendants and their attorneys along racial lines.'" *Id.* at 111, 526 N.Y.S.2d at 893 (quoting plaintiff's verified complaint). The court denied Holtzman relief on grounds ultimately sanctioned in *Kern*. See *id.* at 118-21, 526 N.Y.S.2d at 898-900 (rejecting contention that defense counsel's exercise of peremptory challenges constitutes state action under federal and state equal protection clauses). Subsequent cases reached the opposite result. See *People v. Piermont*, 143 Misc. 2d 839, 842, 542 N.Y.S.2d 115, 117 (Westchester County Ct. 1989) (holding state action not required for *Batson*'s applicability to discriminatory defense challenges since state constitution broader than federal prohibition against racial discrimination); *People v. Davis*, 142 Misc. 2d 881, 887-88, 537 N.Y.S.2d 430, 434 (Sup. Ct. Bronx County 1988) ("racially discriminatory defense peremptory challenges constitutes State action . . . because the Trial Judge and other State officials must participate, facilitate and acquiesce in the racial discrimination"); *People v. Gary M.*, 138 Misc. 2d 1081, 1089, 526 N.Y.S.2d 986, 994 (Sup. Ct. Kings County 1988) (defendant's racially discriminatory peremptory challenges constitute state action since state "supplies the tools . . . the place . . . the object . . . the setting . . . and enforces the discrimination"); *People v. Muriale*, 138 Misc. 2d 1056, 1062, 526 N.Y.S.2d 367, 371 (Sup. Ct. Kings County 1988) (racially motivated exclusion of juror by defense violates juror's equal protection right in view of state's "participation, facilitation and acquiescence" in discrimination), *aff'd on other grounds*, 159 A.D.2d 651, 553 N.Y.S.2d 39 (2d Dep't), *appeal denied*, 76 N.Y.2d 740, 557 N.E.2d 1198, 558 N.Y.S.2d 902 (1990).

¹⁵ *People v. Kern*, 149 A.D.2d 187, 234, 545 N.Y.S.2d 4, 34 (2d Dep't 1989), *aff'd*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 111 S. Ct. 77 (1990).

¹⁶ *Kern*, 75 N.Y.2d at 659, 554 N.E.2d at 1247, 555 N.Y.S.2d at 659.

¹⁷ See N.Y. CONST. art. I, § 2. The New York State Constitution provides, in pertinent part:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be

tection clause, prohibit the discriminatory exercise of peremptory challenges by the defense.¹⁸

Writing for the court, Judge Alexander recognized that New York's civil rights clause prohibits discrimination of only those rights " 'elsewhere declared' by Constitution, statute or common law."¹⁹ Thus, the court construed jury service to be a civil right provided for under article I, section 1 of the state constitution,²⁰

subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Id. The first sentence of article I, section 2, is New York's equal protection provision which, like its federal counterpart, applies only to state action. *See Kern*, 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653; *see also* Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 360 n.6, 482 N.E.2d 1, 7 n.6, 492 N.Y.S.2d 522, 528 n.6 (1985) ("[w]e have held that the State . . . equal protection clause . . . is no broader in coverage than the Federal provision. . . and this equation . . . extends to the requirement of 'State action' "); *Esler v. Walters*, 56 N.Y.2d 306, 314, 437 N.E.2d 1090, 1094, 452 N.Y.S.2d 333, 337 (1982) ("State guarantee of equal protection 'is as broad in its coverage as that of the Fourteenth Amendment' " (quoting *Seaman v. Fedourich*, 16 N.Y.2d 94, 102, 209 N.E.2d 778, 782, 262 N.Y.S.2d 444, 450 (1965))).

The second sentence, New York's civil rights clause, "prohibits private as well as State discrimination as to 'civil rights.'" *See Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653; *see also* *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531, 87 N.E.2d 541, 548 (1949) ("[t]he second sentence . . . although applicable to private persons . . . protects only against 'discrimination in * * * civil rights' "), *cert. denied*, 339 U.S. 981 (1950).

¹⁸ *See Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1242, 555 N.Y.S.2d at 655.

¹⁹ *Id.* at 651, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653. In *Dorsey*, the Court of Appeals referred to the record of the 1938 New York State Constitutional Convention and held that the civil rights provision is not "self-executing" and required "legislative implementation to be effective." *Dorsey*, 299 N.Y. at 531, 87 N.E.2d at 548; *see also* *Holtzman v. Supreme Court of the State of New York, Kings County*, 139 Misc. 2d 109, 119-20, 526 N.Y.S.2d 892, 899 (Sup. Ct. Westchester County 1988) (discussing *Dorsey's* interpretation of New York's equal protection provision), *aff'd*, 152 A.D.2d 724, 545 N.Y.S.2d 40 (2d Dep't), *appeal denied*, 74 N.Y.2d 616, 549 N.E.2d 478, 550 N.Y.S.2d 276 (1989).

²⁰ *Kern*, 75 N.Y.2d at 651-52, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654. Article I, section 1 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 . . ." N.Y. CONST. art. I, § 1. The *Kern* court determined that jury service is a "'privilege[] of citizenship' secured to the citizens of this State by article I, § 1 of the State Constitution." *Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654. Echoing *Batson's* concern for excluded jurors and society as a whole, the court emphasized that "jury service is a means of participation in government." *Id.* at 652, 554 N.E.2d at 1242, 555 N.Y.S.2d at 654. Consequently, racially motivated peremptory challenges deny to prospective jurors an "opportunity to participate in the administration of justice, and . . . harm[] society by impairing the integrity of the criminal trial process." *Id.* The court rejected defense counsels' argument that such fundamental concerns incorporated in article I, section 1 extend only to qualification for jury service on the venire. *Id.* Judge Alexander observed 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." *Id.*

Judiciary Law section 500,²¹ and Civil Rights Law section 13,²² which may not be denied to citizens solely on the basis of race. Moreover, the court rejected defense counsel's argument that *Batson* fails to restrict their exercise of peremptory challenges on the ground that such conduct is not state action and thus not subject to the mandates of the equal protection clause.²³ After noting applicable guidelines for determining the existence of state action,²⁴ the court reasoned that the state is "inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges."²⁵ Consequently, the court concluded

²¹ *Id.* at 652, 554 N.E.2d at 1242-43, 555 N.Y.S.2d at 654-55. New York's Judiciary Law section 500 sets forth the New York State Legislature's declared policy that "all eligible citizens shall have the opportunity to serve on grand and petit juries." N.Y. JUD. LAW § 500 (McKinney Supp. 1991).

²² *Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. New York's Civil Rights Law section 13 provides that "[n]o citizen of the state . . . shall be disqualified to serve as a . . . petit juror in any court of this state on account of race . . ." N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976). The court also rejected defense counsel's argument that this statute applies only to actions of the Jury Commissioner and not to their exercise of peremptory challenges under CPL section 270.25. *See Kern*, 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

²³ *See Kern*, 75 N.Y.2d at 656-57, 554 N.E.2d at 1244-45, 555 N.Y.S.2d at 657-58.

²⁴ *Id.* at 655-56, 554 N.E.2d at 1244-45, 555 N.Y.S.2d at 656-57. Recognizing that "there is no precise formula to determine State responsibility under the [federal equal protection] clause," the *Kern* court was guided by the fair attribution test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), which held that state action is present when there is "conduct allegedly causing the deprivation of a federal right . . . fairly attributable to the State." *See Kern*, 75 N.Y.2d at 655, 554 N.E.2d at 1244, 555 N.Y.S.2d at 656 (quoting *Lugar*, 457 U.S. at 937). The court then distinguished *Polk County v. Dodson*, 454 U.S. 312 (1981), which held that a public defender's withdrawal of an appeal constitutes a private function and hence, not action under color of state law under 42 U.S.C. section 1983, from cases involving affirmative acts by the state in discriminatory conduct. *Kern*, 75 N.Y.2d at 655-56, 554 N.E.2d at 1244-45, 555 N.Y.S.2d at 656-57. In determining whether an act is affirmative, the court focused on the nature and "degree of involvement by the State . . . such that the coercive power of the State has been enlisted to enforce private discrimination." *Id.* at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657.

²⁵ *Kern*, 75 N.Y.2d at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657. Relying on the practicalities involved in jury selection, the court stated:

[I]t is the Judge, with the full coercive authority of the State, who enforces the discriminatory decision by ordering the excused juror to leave the courtroom escorted by uniformed court officers or Deputy Sheriffs. The jurors do not know whether it is the Judge, the prosecutor or the defense attorney who has excused them, and the inference is inescapable to both the excluded jurors and the public that it is the State that has ordered the jurors to leave. When these jurors are so excluded solely because of their race, the State cannot ignore its role in the discrimination against them.

Id. at 657, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657. *But see* Note, *supra* note 8, at 52-53 (although *Batson*'s finding of state action under fourteenth amendment was proper, "the state action implicated in a defendant's discriminatory use of peremptories is much more

that *Batson* applies to the defense since "the judicial enforcement of racially discriminatory peremptory challenges exercised by defense counsel constitutes 'State action'" under New York's equal protection provision.²⁶

Despite a criminal defendant's compelling interest in obtaining an impartial jury through the exercise of unfettered peremptory challenges,²⁷ the *Kern* court properly restricted defense counsel's ability to discriminate racially through the exercise of peremptory challenges. It is submitted that this limitation on a defense counsel's discriminatory use of peremptory challenges, as articulated in *Kern*, should be extended to prohibit the exercise of similar challenges based upon factors other than race.²⁸

The sixth amendment to the United States Constitution guarantees a criminal defendant the right to be tried by an impartial jury.²⁹ Although the amendment is silent as to the prosecution's right to an impartial jury, New York courts have held that "[b]oth the defense and the prosecution are entitled to a fair trial before an impartial jury."³⁰ These efforts to keep the "scales" between the

attenuated").

²⁶ *Kern*, 75 N.Y.2d at 657, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.

²⁷ See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (peremptory challenges are necessary component of jury trial); *Pointer v. United States*, 151 U.S. 396, 408 (1894) (peremptory challenge is very important right of accused). Blackstone described the criminal defendant's common-law right to use peremptories as "an arbitrary and capricious species of challenge" which affords the accused "a good opinion of his jury, the want of which might totally disconcert him." 4 W. BLACKSTONE, COMMENTARIES 353. He concluded that no person "should be tried by any one man against whom he has conceived a . . . reason for . . . his dislike." *Id.*; see also Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1774 (1979) (peremptories grant lawyers freedom to follow their hunches regarding prospective jurors).

²⁸ See *infra* note 43 and accompanying text (citing lower court cases giving expansive reading to *Batson*).

²⁹ U.S. CONST. amend. VI. The sixth amendment provides that the accused "shall enjoy the right to . . . an impartial jury." *Id.*; see also Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C.L. REV. 501, 542-45 (1986) (examining meaning of "impartial jury"); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 353-55 (1982) (analyzing Supreme Court's interpretation of "impartial").

³⁰ *People v. Guzman*, 125 Misc. 2d 457, 467, 478 N.Y.S.2d 455, 462 (Sup. Ct. N.Y. County 1984), *aff'd*, 148 A.D.2d 350, 538 N.Y.S.2d 986 (1st Dep't 1989), *aff'd*, 76 N.Y.2d 1, 555 N.E.2d 259, 556 N.Y.S.2d 7 (1990). The United States Supreme Court has also recognized this right. See, e.g., *Singer v. United States*, 380 U.S. 24, 36 (1965) (state has "legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal . . . most likely to produce a fair result"); *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) ("impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution"). Historically, the New York State Legisla-

prosecution and the defense "evenly held,"³¹ coupled with *Batson's* reliance on the fourteenth amendment's equal protection clause³² rather than the sixth amendment,³³ suggests that any effect *Kern* may have on the accused's right to an impartial jury is properly outweighed by the long-standing concerns of eliminating racial discrimination from jury selection.³⁴

By prohibiting defense counsel from racially discriminating through the exercise of peremptory challenges, the *Kern* decision does not unconstitutionally encroach upon a criminal defendant's sixth amendment right to an impartial jury. Although significant, the right to exercise peremptory challenges is not essential to obtaining an impartial jury.³⁵ It is merely a statutory privilege,³⁶ the

ture has endeavored to accord similar rights to both the prosecution and defense in the selection of a jury. See *People v. Muriale*, 138 Misc. 2d 1056, 1064, 526 N.Y.S.2d 367, 373 (Sup. Ct. Kings County 1988), *aff'd on other grounds*, 159 A.D.2d 651, 553 N.Y.S.2d 39 (2d Dep't), *appeal denied*, 76 N.Y.2d 740, 557 N.E.2d 1198, 558 N.Y.S.2d 902 (1990). For instance, under Judiciary Law section 500, all litigants are given the right to a jury drawn from a fair cross-section of the community. N.Y. JUD. LAW § 500 (McKinney Supp. 1991). Relying on the United States Supreme Court's recognition that the state also has the right to a fair trial, the court in *Muriale* stated that "[t]he historic intent of the Legislature . . . would be violated if restraints against racial discrimination applied only to the prosecution." *Muriale*, 138 Misc. 2d at 1064, 526 N.Y.S.2d at 373.

³¹ *Hayes*, 120 U.S. at 70; see also Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1734 (1977) (providing overview of cases supporting equal treatment of prosecution and defense).

³² See *Batson*, 476 U.S. at 85 n.4 (Court expressly resolves issue on equal protection grounds and declines to express view on sixth amendment argument). *Batson's* invocation of the fourteenth amendment's equal protection clause indicates the Court's desire to eliminate racial discrimination for the benefit of all who participate in jury selection. *Id.* at 87-88. New York courts have so recognized. See, e.g., *Muriale*, 138 Misc. 2d at 1061, 526 N.Y.S.2d at 371 (rights protected in *Batson* include those of excluded jurors as well as criminal defendants).

³³ *Batson*, 476 U.S. at 85 n.4. Resort to a sixth amendment analysis would have required the Court to focus exclusively on the rights of the accused.

³⁴ See *Strauder v. West Virginia*, 100 U.S. 303 (1879). As long as a century ago, the Supreme Court in *Strauder* stated:

The very fact that colored people are singled out and expressly denied . . . right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them . . . [--] 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.

Id. at 308; see also Raphael, *supra* note 3, at 295 (noting that even 100 years after *Strauder*, racial discrimination in the administration of justice and society as a whole continues to be "a fact of life").

³⁵ See *People v. Thompson*, 79 A.D.2d 87, 96, 435 N.Y.S.2d 739, 747 (2d Dep't 1981); see also Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 551 (1977) (suggesting lawyers exercise peremptory challenges not to empanel impartial jurors, but to obtain juries selectively predisposed to their position); Massaro, *supra* note 29, at 544

restriction of which poses no threat of depriving a criminal defendant of any constitutionally mandated right.³⁷ Consequently, *Kern* stands not as a barrier to an accused's ability to be tried impartially,³⁸ but as a profound message that racial discrimination in New York courts will not be tolerated.³⁹

In addition, the *Batson* Court's rationale for restricting the prosecutor's discriminatory use of peremptory challenges applies equally to the defense.⁴⁰ *Batson* recognized that the harms racial discrimination inflicts upon jury selection "touch[es] the entire community" and "undermine[s] public confidence in the fairness of our system of justice."⁴¹ However, by leaving defense counsel free to discriminate on the basis of race,⁴² *Batson*'s restriction on the freedom of prosecutors' to discriminate peremptorily accomplishes only half the measure necessary to eliminate racial discrimination from the jury selection process. *Kern* effectively closes the gap in the protection *Batson* created to achieve discriminatory-free

n.216 (same).

³⁷ See *Batson*, 476 U.S. at 91 (Constitution does not grant right to peremptories); *Stilson v. United States*, 250 U.S. 583, 586 (1919) (same); *People v. Lobel*, 298 N.Y. 243, 257, 82 N.E.2d 145, 152 (1948) (peremptory challenges "rest[] entirely with the Legislature") (citations omitted); see also *supra* note 1 (discussing CPL § 270.25).

³⁸ See *Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("the right of peremptory challenge . . . may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial") (citations omitted); *Hayes*, 120 U.S. at 71 (defendant may not complain if tried by impartial jury because "nothing more" required by Constitution); Note, *Peremptory Challenge: Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 159 (1967) (being tried by jury composed of members of same race is "merely a fancied advantage; not a constitutional right"). Indeed, in *Batson*, due to the inherent potential for racial discrimination in the exercise of peremptory challenges, see *Serr & Maney*, *supra* note 3, at 7-8 ("[b]ecause peremptory challenges allow both the prosecutor and the defendant to strike a prospective juror at whim, they provide ample opportunity to discriminate"), Justice Marshall advocated elimination of the peremptory challenge entirely. See *Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("only by banning peremptories entirely can [racial] discrimination be ended."); see also Note, *The Case For Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 239 (1986) (peremptory challenges not constitutionally available).

³⁹ See *supra* note 37.

⁴⁰ See *supra* notes 18-26 and accompanying text.

⁴¹ See *supra* note 4 and accompanying text; see also *Batson*, 476 U.S. at 108 (Marshall, J., concurring) (potential for racial discrimination exists in defendant's peremptories); *id.* at 126 (Burger, J., dissenting) ("[o]nce prosecutors are limited in their use of peremptory challenges, could we rationally hold that defendants are not?") (emphasis in original). But see Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 826-33 (1989) (arguing different treatment for prosecution and defense justified).

⁴² *Batson*, 476 U.S. at 87.

⁴³ See *supra* note 4 and accompanying text.

jury selection procedures in New York. Although *Kern* applies only to the exercise of race-based peremptory challenges, the principles promoted therein can and should be extended to prohibit the use of peremptory challenges based upon factors other than race. New York courts have already supported the application of *Batson* to bar the prosecution's peremptory excusal of jurors based on characteristics such as gender and hearing impairment.⁴³ A further extension of *Batson* to prohibit such challenges by defense counsel would be appropriate and consistent with the spirit of the *Kern* decision.

The New York Court of Appeals in *Kern* properly recognized the rights of New York citizens participating in jury selection to be free of racial discrimination by the defense as well as the prosecution.⁴⁴ Confronted with the task of balancing the equal protection rights of criminal defendants against the equal protection rights of prospective jurors, the *Kern* decision reflects New York's determination to eliminate discrimination from jury selection procedures. Mindful of the abundant measures embodied in our criminal justice system to protect the rights of criminal defendants,⁴⁵ the *Kern* court properly resolved this issue in favor of the rights of New York's jury-participating citizens. The decision could trigger other states to broaden their state constitutions to surpass the protections presently afforded prospective jurors under *Batson's* interpretation of the fourteenth amendment's equal protection clause. Such results may then induce the Supreme Court to end its perennial silence on this issue.⁴⁶

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New York Court of Appeals overrules Bartolomeo, allowing a suspect represented by counsel on a prior pending charge to answer questions on new unrelated charges in the absence of counsel

Traditionally, the New York Court of Appeals, relying on New

⁴³ See *People v. Blunt*, 162 A.D.2d 86, 89, 561 N.Y.S.2d 90, 93 (2d Dep't 1990) (applying *Batson* to gender-based discrimination); *People v. Irizarry*, 560 N.Y.S.2d 279, 280 (1st Dep't 1990) (same); *People v. Green*, 561 N.Y.S.2d 130, 131 (Westchester Co. Ct. 1990) (applying *Batson* to prosecutor's peremptory excusal of hearing impaired juror).

⁴⁴ See *Kern*, 75 N.Y.2d at 653-56, 554 N.E.2d at 1243-45, 555 N.Y.S.2d at 655-57.

⁴⁵ See U.S. CONST. amends. IV, V, VI, and XIV; see also 4 W. BLACKSTONE COMMENTARIES, *supra* note 27 (describing peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous").

⁴⁶ See *supra* note 4.