

CPL § 270.25: Unrestricted Use of Peremptory Challenges Held Constitutional If Venire Consists of a Representative Cross Section of the Community

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the city if the owner is found even fractionally liable. Pursuant to *O'Connor*, however, if no liability is assessed against the building owner, plaintiffs will be completely precluded from recovery against the city.¹⁰⁶ It is submitted that no logical rationale can support this inequitable outcome. More importantly it is suggested that as concurrent decisions, *O'Connor* and *Garrett* have frustrated this area of the law and have rendered prospective liability unpredictable.

Although the courts consistently assert that abrogation of the special duty rule lies within the legislative domain, they should be mindful that the judiciary was the exponent of this rule. Indeed, it is hoped that the Court will exercise its rightful role and rectify the inconsistencies plaguing the law of municipal liability.

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CRIMINAL PROCEDURE LAW

CPL § 270.25: Unrestricted use of peremptory challenges held constitutional if venire consists of a representative cross section of community

The peremptory challenge¹⁰⁷ enables litigants to remove pro-

¹⁰⁶ Under *Garrett*, a plaintiff may bring a suit against the owner of a building or premises upon which the negligent event occurred. If that party is found liable to any degree he may properly implead the city and satisfy the plaintiff's judgment against him through contribution from the city. See SIEGEL § 169, at 209.

An important aspect of impleader actions is the outcome of the independent suit between the plaintiff and the original defendant. If no liability can be assessed against the defendant in the suit brought by the plaintiff, then the impleader action must fail irrespective of the third party's liability. With these principles in mind, the effect of *Garrett* may be summarized as follows. If the owner is found to be 1% liable, and the city 99% or any fraction thereof, the owner may implead the city for contribution and receive a percentage of the judgment. However, if the city is found to be 100% liable, no impleader action will lie because liability cannot be assessed against the owner. Thus, plaintiffs will be completely precluded from recovery.

¹⁰⁷ Challenges are available during jury selection to enable both prosecutors and defense counsel to screen out jurors who may be prejudiced against either position. J. VAN DYKE, *JURY SELECTION PROCEDURES* 139 (1977). Either party may use "challenges for cause" without limit to screen out openly biased jurors, provided the court is satisfied that the juror is biased. *Id.* at 140. "Peremptory challenges," however, since they are not subject to control by the court, may be utilized to screen out jurors for no apparent reason; that is, it is not necessary for the attorney to show any biases harbored by the juror. *Id.* at 139-40. Prosecutors enjoyed unlimited use of peremptory challenges at common law. *Id.* at 147. In 1305, the English Parliament curtailed the use of peremptory challenges by the Crown, but sustained

spective jurors from the venire¹⁰⁸ without articulation of cause or proof of bias.¹⁰⁹ Use of this statutorily authorized procedure has been attacked as a denial of the defendant's right to trial by an "impartial jury"¹¹⁰ when it is employed to exclude veniremen solely

the use of 35 of these challenges by the defense, a number that since has been reduced. *Id.* at 147-48. As an alternative, a system that directed those challenged by the King to "stand aside" was developed. *Id.* at 148. This allowed the prosecutor temporarily to remove persons from the venire, the list of summoned jurors, *see infra* note 108, who would then be asked to remain pending the seating of an acceptable jury from the remaining veniremen. J. VAN DYKE, *supra*, at 148. The burden of showing cause for such removals was on the Crown only if the parties were unable to seat a jury. *Id.*

New York originally rejected both peremptory challenges and the alternative English procedure. *Id.* at 148-49, 171 n.46. It was not until 1858 that the statutory authority to use peremptory challenges finally was granted to the prosecutor. Ch. 332, § 1, [1858] N.Y. Laws 557; *People v. Thompson*, 79 App. Div. 2d 87, 98, 435 N.Y.S.2d 739, 747-48 (2d Dep't 1981); *see Walter v. People*, 32 N.Y. 147, 159 (1865). In *Walter*, the Court of Appeals upheld the constitutionality of a legislative enactment which granted peremptories to the prosecutor. 32 N.Y. at 159. Examining article 1, section 2, of the New York State Constitution, the Court concluded that prosecutorial challenges posed no threat to a defendant's right to trial by jury. *Id.*

The use of peremptory challenges in New York currently is regulated by a statute that provides, in pertinent part: "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." CPL § 270.25(1) (1982). The statute limits the number of peremptory challenges allowed each party to 20 in cases where a class A felony is being tried, to 15 in cases involving class B or class C felonies, and to 10 in all other cases. *Id.* § 270.25(2)(a)-(c). In addition, two challenges are permitted for each alternate chosen regardless of the crime charged. *Id.* In joint trials, all defendants are treated as a single defendant in determining the permissible number of challenges, and agreement by a majority of the defendants is required to strike a venireman peremptorily. *Id.* § 270.25(3).

¹⁰⁸ The venire, which also is referred to as an array, is the pool of all eligible jurors from which a jury is to be drawn. STANDARDS RELATING TO TRIAL BY JURY 61 (Approved Draft 1968). In federal district courts, a venire is comprised of approximately 35 potential jurors in cases involving a single defendant charged with a single violation. G. BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 3 (1982). The number to be called is determined by considering the probable excuses and challenges, including peremptory challenges and challenges for cause, that will be granted before agreement on a 12-person jury is reached. *Id.*

¹⁰⁹ CPL § 270.25(1) (1982); *see People v. Presley*, 22 App. Div. 2d 151, 152, 254 N.Y.S.2d 400, 402 (4th Dep't 1964), *aff'd mem.*, 16 N.Y.2d 738, 209 N.E.2d 729, 262 N.Y.S.2d 113 (1965); A. SCHAUFELBERGER, BLACKS AND THE TRIAL BY JURY 119 (1973); *see also* R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 32 (1980) (no explanation necessary when asking juror to step down); M. TOBIAS & R. PETERSON, PRE-TRIAL CRIMINAL PROCEDURE 386 (1972) (peremptory challenges based more on whim than reason or fact).

In addition to the peremptory challenge, the statute provides for challenges for cause. CPL § 270.20 (1982). Challenges for cause are employed to strike prospective jurors from consideration when it is determined that they carry a statutorily specified bias. *Id.* These challenges may be exercised by both parties and, unlike peremptories, are unlimited in number. Bermant & Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy*, in THE TRIAL PROCESS 69, 73 n.5 (B. Sales ed. 1981).

¹¹⁰ The sixth amendment, which has been applied to the states through the fourteenth

on the basis of minority status.¹¹¹ The weight of authority has found that a jury drawn from a venire that is representative of a cross section of the community is impartial,¹¹² despite any subse-

amendment, *see* *Duncan v. Louisiana*, 391 U.S. 145, 160-62 (1968), guarantees a criminal defendant the right to an impartial jury, U.S. CONST. amend VI. The amendment reads, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

Similar guarantees are made to the citizens of New York in the State constitution. *See* N.Y. CONST. art. I, § 1 (guarantee against deprivation of rights without legal justification or judgment of peers); *id.* art. I, § 2 (guarantee of jury trial whenever provided for in United States Constitution); *id.* art. I, § 11 (guarantee of equal protection under the laws of New York). New York's equal protection clause has been held to be equivalent to its federal counterpart. *See, e.g.,* *Esler v. Walters*, 56 N.Y.2d 306, 313-14, 437 N.E.2d 1090, 1094, 452 N.Y.S.2d 333, 337 (1982).

¹¹¹ *See* J. VAN DYKE, *supra* note 107, at 150-51; Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 342 n.27 (1982). *Swain v. Alabama*, 380 U.S. 202 (1965), is the leading Supreme Court case concerning the use of peremptory challenges based on racial status. In *Swain*, the Court reviewed a black man's conviction by an all-white jury for the rape of a white woman. *Id.* at 203. Two prospective black jurors were exempt, and the prosecutor removed six more from the venire by challenge. *Id.* at 205. The Court, in refusing to reverse the conviction, stated that since "the venire need [not] be a perfect mirror of the community," a defendant has no right to demand perfect racial distribution in either the venire or the jury. *Id.* at 208. The Court implied that purposeful discrimination must be proven. *See id.* at 208-09. Therefore, the equal protection clause of the fourteenth amendment was not violated, although blacks were underrepresented by at least 10% in all Alabama County venires. *Id.* at 205, 208-09.

Regarding the use of peremptories, the *Swain* Court affirmed the validity of removal by challenge of any class or race from the venire without explanation, reasoning that a prosecutor's challenges need not be explained since a presumption exists that the peremptory challenges are being used to obtain an impartial jury. *Id.* at 221-22. In conclusion, however, the Court conceded that certain circumstances could require a different result, observing that if the prosecutor's office consistently removed blacks so that a black never served on a petit jury, "the Fourteenth Amendment claim takes on added significance." *Id.* at 223. This, according to the Court, would corrupt the intent behind permitting peremptory challenges, and thus would override the presumption that now protects the prosecutor. *Id.* at 224. In such a case, the burden is on the defendant to prove continual and systematic exclusion of blacks or other minorities by the use of such challenges. *Id.* at 227. In *Swain*, however, that burden was not met, despite the finding that no black had served on a petit jury in Talladega County for 15 years. *Id.* at 205. At least three New York courts have applied a rationale similar to that employed in *Swain*. *See* *People v. Castro*, 80 App. Div. 2d 656, 657, 436 N.Y.S.2d 410, 412 (3d Dep't 1981) (prosecutorial challenge of blacks), *rev'd on other grounds*, 55 N.Y.2d 972, 434 N.E.2d 253, 449 N.Y.S.2d 184 (1982); *People v. Boone*, 107 Misc. 2d 301, 302-03, 305, 433 N.Y.S.2d 955, 956, 958 (Sup. Ct. N.Y. County 1980) (peremptory challenges used to exclude Blacks and Hispanics); *People v. Kagan*, 101 Misc. 2d 274, 277-78, 420 N.Y.S.2d 987, 990 (Sup. Ct. N.Y. County 1979) (alleged challenges on basis of religion). *But see* *People v. Thompson*, 79 App. Div. 2d 87, 106, 435 N.Y.S.2d 739, 752 (2d Dep't 1981) (prosecutor's use of peremptories subject to judicial inquiry when it appears that exclusions are based on race).

¹¹² The United States Supreme Court has noted that a venire must consist of a representative cross section of the community in which the crime was committed to satisfy the

quent peremptory dismissals.¹¹³ Recently, in *People v. McCray*,¹¹⁴ the Court of Appeals upheld the constitutionality of the unrestricted use of the peremptory challenge by denying a defendant the opportunity to question the prosecutorial dismissal of seven black veniremen.¹¹⁵

In *McCray*, a black defendant was charged with robbing a

impartiality requirement. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946). The most recent and instrumental Supreme Court decision on this issue is *Taylor v. Louisiana*, 419 U.S. 522 (1975). The *Taylor* Court extended the right to a venire that is representative of the community to a defendant in a state court through application of the sixth and fourteenth amendments. *Id.* at 525. In *Taylor*, the defendant moved to quash the venire, which consisted of 175 men and no women, in his trial for aggravated kidnapping. *Id.* at 524. Although 53% of the eligible jurors in the jurisdiction were female, a state statute limited jury service to women who had filed petitions requesting to be considered for service. *Id.* at 523-24. The defendant appealed the denial of his motion and his subsequent conviction. *Id.* at 524. After the Louisiana Supreme Court upheld both the defendant's conviction and the constitutionality of the statute, the defendant appealed to the United States Supreme Court. *Id.* at 525. Reversing the lower court, the majority "accept[ed] the fair cross section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment." *Id.* at 530. The Court made clear the limits of its decision, emphasizing that the "[d]efendants are not entitled to a jury of any particular composition, . . . but the . . . venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538 (citations omitted). For a detailed analysis of *Taylor* and the impartiality requirement, see Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975); Note, *Taylor v. Louisiana: The Jury Cross Section Crosses the State Line*, 7 CONN. L. REV. 508 (1975).

¹¹³ See, e.g., *Hall v. United States*, 168 F.2d 161, 164 (D.C. Cir.) (peremptory challenge of 19 black veniremen during selection in a murder trial), *cert. denied*, 334 U.S. 853 (1948); *Watts v. State*, 53 Ala. App. 518, 301 So. 2d 280, 282 (Crim. App. 1974) (12 peremptory strikes by the prosecutor during robbery trial); *State v. Smith*, 55 N.J. 476, 483-84, 262 A.2d 868, 871-72 (three black veniremen struck in the jury selection following assault and battery indictment), *cert. denied*, 400 U.S. 949 (1970); *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585, 587-88 (1973) (defendant convicted of multiple offenses following peremptory exclusion of all blacks from the venire). *But see* *People v. Wheeler*, 22 Cal. 3d 258, 283, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978) (use of peremptory challenges on the basis of "group bias" abrogates impartial venire); *People v. Smith*, 91 Ill. App. 3d 523, 414 N.E.2d 1117, 1123-24 (1980) (court must enforce proper use of peremptories, and challenge of all blacks in venire is condemned); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, 515 (use of peremptory challenges to eliminate members of distinct groups violates defendants' right to a jury compiled from a cross section of community), *cert. denied*, 444 U.S. 881 (1979); *cf.* *State v. Crespin*, 94 N.M. 486, 612 P.2d 716, 718 (Ct. App. 1980) (although refusing to reverse on the facts, intermediate appellate court recognized need for judicial inquiry into peremptories in some circumstances); *People v. Thompson*, 79 App. Div. 2d 87, 110, 435 N.Y.S.2d 739, 755 (2d Dep't 1981) (New York State Constitution requires inquiry by trial judge when prosecution appears to be using peremptory challenges on basis of race).

¹¹⁴ 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 103 S. Ct. 2438 (1983).

¹¹⁵ *Id.* at 545, 443 N.E.2d at 916, 457 N.Y.S.2d at 442. The prosecutor used 8 of 11 peremptory challenges to exclude 7 blacks and 1 Hispanic. *Id.*

white man.¹¹⁶ During the voir dire,¹¹⁷ the defense counsel objected to the prosecutor's use of peremptory challenges, claiming that they were being used purposefully to exclude potential jurors on the basis of race.¹¹⁸ The defense requested a mistrial or, alternatively, a hearing to elicit an explanation for the exclusion of the black veniremen on nonracial grounds.¹¹⁹ Relying on *Swain v. Alabama*,¹²⁰ the trial court denied the defense motions and refused to require any inquiry into the prosecutor's use of peremptory challenges.¹²¹ The defendant's subsequent conviction was affirmed without opinion by the Appellate Division, Second Department.¹²²

On appeal, the Court of Appeals affirmed, concluding that a venire consisting of a representative cross section of eligible jurors in the jurisdiction in which the crime was committed satisfies the requirement of the sixth amendment.¹²³ Judge Gabrielli, writing

¹¹⁶ *Id.* at 551, 443 N.E.2d at 920, 457 N.Y.S.2d at 446 (Meyer, J., dissenting). The defendant was charged with first and second degree robbery. *Id.* at 544, 443 N.E.2d at 916, 457 N.Y.S.2d at 442.

¹¹⁷ Voir dire is the examination of prospective jurors chosen from the venire. See Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 545 (1975).

¹¹⁸ 57 N.Y.2d at 545, 443 N.E.2d at 916, 457 N.Y.S.2d at 442.

¹¹⁹ *Id.*

¹²⁰ 380 U.S. 202 (1965); see *supra* note 111.

¹²¹ *People v. McCray*, 104 Misc. 2d 782, 784, 429 N.Y.S.2d 158, 159 (Sup. Ct. Kings County 1980), *aff'd mem.*, 84 App. Div. 2d 769, 444 N.Y.S.2d 972 (2d Dep't 1981), *aff'd*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982). Judge Starkey opined that use of the peremptory challenge is immune from inquiry in any one case. 104 Misc. 2d at 784, 429 N.Y.S.2d at 159. The judge based his conclusion on applicable case law, as well as on a literal reading of section 270.25 of the CPL, which authorizes peremptory challenges. *Id.* at 785, 429 N.Y.S.2d at 160; see CPL § 270.25 (1982); *supra* notes 107 & 111 and accompanying text. Further, Judge Starkey noted procedural difficulties that he believed would make hearings examining the use of peremptories unworkable. 104 Misc. 2d at 784-85, 429 N.Y.S.2d at 160. Concluding, the Judge indicated that such hearings would be unduly time consuming and that the ultimate remedy of dismissing the jury and calling a new venire would be impractical to use on a routine basis. *Id.* at 785, 429 N.Y.S.2d at 160.

¹²² 84 App. Div. 2d at 769, 444 N.Y.S.2d at 972.

¹²³ 57 N.Y.2d at 549, 443 N.E.2d at 919, 457 N.Y.S.2d at 445. The majority interpreted the Supreme Court decision of *Taylor v. Louisiana*, 419 U.S. 522 (1975), as holding that a representative venire is a sufficient guarantee of impartiality to satisfy a defendant's sixth amendment rights. 57 N.Y.2d at 545, 443 N.E.2d at 917, 457 N.Y.S.2d at 443; see *supra* note 112 and accompanying text. The Court reasoned that as long as distinctive groups in the community are not systematically excluded from the venire, the jury will be sufficiently impartial, regardless of subsequent challenges. See 57 N.Y.2d at 545, 443 N.E.2d at 917, 457 N.Y.S.2d at 443. Having concluded that the use of peremptory challenges does not violate the United States Constitution, the Court focused on the New York State Constitution. *Id.* at 549-50, 443 N.E.2d at 919, 457 N.Y.S.2d at 445. The majority observed that the State Constitution was no more expansive than its federal counterpart. *Id.* at 550, 443 N.E.2d at 919, 457 N.Y.S.2d at 445.

for the majority,¹²⁴ maintained that the prosecutor's use of peremptory challenges could not be viewed as a violation of the defendant's rights, since the practice is instrumental in guaranteeing jury impartiality¹²⁵ by permitting the removal of veniremen with subtle and latent biases, as well as those who are patently biased.¹²⁶ The majority observed that extensive voir dire and challenges for cause are insufficient procedural devices to eliminate subtly biased veniremen.¹²⁷ The Court also noted that the statutory limitation on the number of challenges is itself a check on the present system, since it tends to discourage attorneys from employing challenges to eliminate members of specific groups.¹²⁸ Indeed, the Court maintained that a claim of discriminatory use of the peremptory challenge should be rejected absent an affirmative showing that the exclusion of minorities is part of a pattern which has existed in the prosecutor's office for an extended period of time.¹²⁹

In a dissenting opinion, Judge Meyer noted that since *Swain*

¹²⁴ Judge Gabrielli was joined by Chief Judge Cooke and Judges Jasen and Wachtler. The Chief Judge also filed a concurring memorandum opinion. Judge Meyer authored a dissent in which Judge Jones concurred. Judge Fuchsberg dissented in a separate opinion.

¹²⁵ 57 N.Y.2d at 549, 443 N.E.2d at 919, 457 N.Y.S.2d at 445. The Court noted that in *Swain*, 380 U.S. 202 (1965), the Supreme Court held that courts may not inquire into the prosecutorial use of peremptory challenges, 57 N.Y.2d at 546, 443 N.E.2d at 917, 457 N.Y.S.2d at 443, and interpreted *Swain* as an affirmation of customary jury selection practice, which is based on the assumption that an impartial jury may best be drawn "by first choosing a pool of jurors from the community at large, excusing those clearly biased, and then permitting the parties to excuse additional jurors who, in their view, are less likely than others to provide a fair trial." *Id.* (quoting Saltzburg & Powers, *supra* note 111, at 359).

¹²⁶ 57 N.Y.2d at 547, 443 N.E.2d at 917-18, 457 N.Y.S.2d at 443-44.

¹²⁷ *Id.* at 548, 443 N.E.2d at 918, 457 N.Y.S.2d at 444. The Court noted that during voir dire, the courtroom is open to spectators, a fact that would tend to inhibit many veniremen from voicing biases or prejudices clearly enough to justify a challenge for cause. *Id.* at 547, 443 N.E.2d at 918, 457 N.Y.S.2d at 444. Other veniremen would remain silent in an effort to remain on the jury. *Id.* Others would be unaware of their inability to be impartial. *Id.* The majority also observed that extended voir dire would be time consuming and, consequently, would be resisted by trial judges. *Id.* at 548, 443 N.E.2d at 918, 457 N.Y.S.2d at 444. Further, the litigants themselves might hesitate to probe biases through intensive questioning because they are fearful of alienating jurors who might not be challengeable for cause thereafter. *Id.* Finally, the majority noted that "[d]ue to the sensitivity of the subject of racial, religious or sexual prejudice, Trial Judges may be hesitant to strike a juror [for bias], particularly when the juror denies the existence of such bias." *Id.* at 549, 443 N.E.2d at 919, 457 N.Y.S.2d at 445.

¹²⁸ *Id.* at 549, 443 N.E.2d at 919, 457 N.Y.S.2d at 445.

¹²⁹ *Id.* at 546, 443 N.E.2d at 917, 457 N.Y.S.2d at 443 (citing *Swain v. Alabama*, 380 U.S. 202 (1965)); *supra* note 111 and accompanying text.

was decided, the sixth amendment, which specifically guarantees the right to an impartial jury, has been held applicable to the states.¹³⁰ Consequently, the Supreme Court's ruling that the sixth amendment is violated when the venire does not represent a cross section of the community¹³¹ casts doubt upon the continuing validity of the *Swain* doctrine in controversies involving jury selection procedures performed subsequent to the assembly of the venire.¹³² Judge Meyer argued that the exclusion of the seven black veniremen was a denial of the defendant's right to an impartial jury, since it ensured that the opinions of a representative cross section of the members of his community would not be accounted for during the deliberations.¹³³ Furthermore, the dissent contended that a peremptory challenge made solely on the basis of "potential affinity" is unfair, since a prosecutor can eliminate all minority members in the venire, but a minority defendant cannot eliminate all white veniremen¹³⁴ due to numerical limitations imposed by the

¹³⁰ 57 N.Y.2d at 552-53, 443 N.E.2d at 920-21, 457 N.Y.S.2d at 446-47 (Meyer, J., dissenting); see *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *supra* note 112 and accompanying text.

¹³¹ 57 N.Y.2d at 552-53, 443 N.E.2d at 921, 457 N.Y.S.2d at 447 (Meyer, J., dissenting). The *McCray* majority interpreted *Taylor v. Louisiana*, 419 U.S. 522 (1975), as indicating only that venires must reflect a representative cross section of the community in order to guarantee an impartial jury. 57 N.Y.2d at 545, 443 N.E.2d at 917, 457 N.Y.S.2d at 443. The dissent, however, contemplated a broader application of sixth amendment protection and expressed the belief that the Supreme Court might extend such protection to jury selection practices if given the opportunity. *Id.* at 553, 443 N.E.2d at 921, 457 N.Y.S.2d at 447 (Meyer, J., dissenting).

¹³² 57 N.Y.2d at 553, 443 N.E.2d at 921, 457 N.Y.S.2d at 447 (Meyer, J., dissenting). Judge Meyer reasoned:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. (Meyer, J., dissenting) (quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972)).

Judge Meyer disagreed with the majority's statement regarding the practical difficulties involved in conducting hearings to determine a prosecutor's good faith, asserting that initial delays would be replaced by efficient procedures which effectively would preserve the defendant's right to an impartial jury. 57 N.Y.2d at 555-56, 443 N.E.2d at 923, 457 N.Y.S.2d at 449 (Meyer, J., dissenting).

¹³³ 57 N.Y.2d at 551-53, 443 N.E.2d at 920-21, 457 N.Y.S.2d at 446-47 (Meyer, J., dissenting). It should be noted that the biases that are sought to be excluded need not be limited to those of a racial nature, but may also involve religious or ethnic considerations. See *supra* note 111.

¹³⁴ 57 N.Y.2d at 555, 443 N.E.2d at 922-23, 457 N.Y.S.2d at 448-49 (Meyer, J., dissenting).

statute.¹³⁵

In a separate dissent, Judge Fuchsberg argued that a clear violation of the defendant's sixth and fourteenth amendment rights had occurred.¹³⁶ He disagreed, however, with Judge Meyer, contending that use of the peremptory challenge is an invaluable asset, subject to explanation only in cases which clearly involve intentional exclusion on the basis of race, creed, color, or national origin.¹³⁷ Judge Fuchsberg concluded by observing that guidelines to ascertain the existence of such "purposeful and systematic discrimination" are best developed on a case-by-case basis, allowing for the exercise of judicial control and discretion in their formation and application.¹³⁸

The exclusion of an identifiable segment of the community from petit jury venires violates a defendant's constitutional guarantee to an impartial jury.¹³⁹ It is suggested that when a prosecutor chooses to remove all members of a minority class from the petit jury by the use of peremptory challenges, the stringent precautions taken in selecting the venire are nullified and the defendant is deprived of the possibility of seating a jury containing members of the challenged class.¹⁴⁰ By condoning the unquestioned use of the

ing). Judge Meyer reasoned that if black veniremen are challenged for bias on a racial basis, the minority defendant also should be able to remove members of the majority class who are more likely to align themselves with the prosecutor. *Id.*, 443 N.E.2d at 923, 457 N.Y.S.2d at 448 (Meyer, J., dissenting). However, in most cases, a black defendant's attempts to eliminate all white people from a jury are futile, since more whites are available in the venire than he has the ability to challenge. *Id.*, 443 N.E.2d at 922-23, 457 N.Y.S.2d at 448-49 (Meyer, J., dissenting) (citing *Commonwealth v. Soares*, 377 Mass. 461, 487-88, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979)).

Judge Meyer also argued that granting the defense motion for a hearing would not mean that a prosecutor always must establish cause for his challenges, nor would it require that a black man could never be peremptorily challenged. 57 N.Y.2d at 553-54, 443 N.E.2d at 921-22, 457 N.Y.S.2d at 447-48 (Meyer, J., dissenting). Rather, only the prosecutorial exclusion of many members of a race from consideration for the petit jury would warrant an explanation. *Id.* at 554, 443 N.E.2d at 921-22, 457 N.Y.S.2d at 447-48 (Meyer, J., dissenting).

¹³⁵ *Id.* at 555, 443 N.E.2d at 922, 457 N.Y.S.2d at 448 (Meyer, J., dissenting).

¹³⁶ *Id.* at 556-57, 443 N.E.2d at 923, 457 N.Y.S.2d at 449 (Fuchsberg, J., dissenting).

¹³⁷ *Id.* at 557, 443 N.E.2d at 923-24, 457 N.Y.S.2d at 449-50 (Fuchsberg, J., dissenting).

¹³⁸ *Id.*, 443 N.E.2d at 923, 457 N.Y.S.2d at 449 (Fuchsberg, J., dissenting).

¹³⁹ See *Taylor v. Louisiana*, 419 U.S. 522, 528, 530 (1975).

¹⁴⁰ In *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme Court implied that in order to obtain a new trial based on discriminatory use of peremptory challenges, a defendant must show a consistent and systematic use of such challenges to strike all members of a given class from the petit jury over a period of time. *Id.* at 223. This burden generally has proven to be impracticable to meet and virtually is impossible in many jurisdictions. See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 285-86, 583 P.2d 748, 767-68, 148 Cal. Rptr. 890, 908-09 (1978); Saltzburg & Powers, *supra* note 111, at 345 & n.42. Defendants generally cannot

peremptory challenge, the Court, it is submitted, has allowed the prosecutor to obtain indirectly what could not be obtained directly—the exclusion of an entire social class from the venire. Tolerance of this practice by the courts creates an appearance of judicially sanctioned inequality, which the peremptory challenge was instituted to eliminate.¹⁴¹

It is suggested that tolerance of such prosecutorial license is not necessary to the goal of insuring the impartiality of juries. Viable alternatives to the present challenge procedure, which utilize prophylactic measures to alleviate the temptation to abuse peremptories, have been adopted in other states,¹⁴² as well as by the

afford to hire investigators to compile data sufficient to establish discrimination. 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 909. Nor is the public defender's office required to perform the task. *Id.* at 285-86, 583 P.2d at 767, 148 Cal. Rptr. at 909. Further, the process of jury selection is relatively swift in relation to the compilation of such data, and courts would be reluctant to interrupt the process to conduct an investigation. *Id.* at 286, 583 P.2d at 767-68, 148 Cal. Rptr. at 909. Lastly, assuming that both time and finances are available, there is no central register in which the names and races of those challenged would be listed. *Id.*, 583 P.2d at 768, 148 Cal. Rptr. at 909. For a partial list of cases in which the defendant has failed to meet his burden, see *Watts v. State*, 53 Ala. App. 518, 301 So. 2d 280, 282-83 (Crim. App. 1974); *State v. Holloway*, 219 Kan. 245, 249-50, 547 P.2d 741, 746-47 (1976); *State v. Ward*, 246 La. 766, 775, 167 So. 2d 359, 362, *cert. denied*, 380 U.S. 972 (1965). *But see State v. Brown*, 371 So. 2d 751, 754 (Sup. Ct. La. 1979) (prosecutor failed to show exclusion of blacks for reasons other than race following showing by defendant of systematic exclusion).

¹⁴¹ Lord William Blackstone, in defending peremptory challenges for defendants in criminal cases, cited the following among his reasons for doing so:

[H]ow necessary it is that the prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such a dislike.

A. SCHAUFELBERGER, *supra* note 109, at 119 (quoting 4 W. BLACKSTONE, COMMENTARIES *3531); see Saltzburg & Powers, *supra* note 111, at 341 n.21.

¹⁴² See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 271-72, 583 P.2d 748, 758, 148 Cal. Rptr. 890, 899 (1978). In *Wheeler*, two black defendants were convicted by an all-white jury of the murder of a white grocery store owner. *Id.* at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893. The prosecutor used his peremptories to strike seven blacks from the venire, some without questioning. *Id.* at 265, 583 P.2d at 753-54, 148 Cal. Rptr. at 895. After acknowledging the defendant's right to an impartial jury drawn from a cross section of the community, the Supreme Court of California identified the denial of the defense motion for a hearing as error. *Id.* at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907. The peremptory challenge was viewed by the *Wheeler* court to remove jurors with "a bias relating to the particular case on trial or the parties or witnesses thereto." *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902. A defendant's constitutional right, therefore, is violated when the prosecutor excludes veniremen for "group bias," since the resulting jury does not contain a representative cross section of the community. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The court noted that the presumption that a prosecutor is using his challenges constitutionally is rebuttable. *Id.* at 278-79, 583 P.2d at 762-63, 148 Cal. Rptr. at 904. If, on making a timely objection, the

Appellate Division.¹⁴³ A more comprehensive solution would be for New York to adopt the federal approach, in which the court is empowered to conduct voir dire and has broad discretion to permit challenges for cause.¹⁴⁴ It is suggested that these measures, coupled

defendant can prove to the satisfaction of the judge that the prosecutor's use of peremptories is based on "group bias," the burden shifts to the prosecutor to demonstrate that individual bias was the reason for the challenges. *Id.* at 280-81, 583 P.2d at 764-65, 148 Cal. Rptr. at 905-06. The judge then determines whether this burden has been met, and if so, the presumption of constitutionality has not been rebutted. *Id.* at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906. If, as in *Wheeler*, individual bias is not shown, the venire and the impaneled jurors must be dismissed and a new venire called. *Id.* at 282-83, 583 P.2d at 765-66, 148 Cal. Rptr. at 906-07. This approach also was adopted in *Commonwealth v. Soares*, 377 Mass. 461, 490-91, 387 N.E.2d 449, 516-18, *cert. denied*, 444 U.S. 881 (1979); *cf.* *State v. Crespino*, 94 N.M. 486, 487, 612 P.2d 716, 716-17 (Ct. App. 1980) (intermediate appellate court indicated peremptory challenge on basis of race justifies judicial inquiry, although the exclusion of one black venireman does not overcome presumption of prosecutorial good faith).

¹⁴³ See, e.g., *People v. Thompson*, 79 App. Div. 2d 87, 108-110, 435 N.Y.S.2d 739, 753-55 (2d Dep't 1981). In *Thompson*, the Second Department adopted the procedure set forth by the Supreme Court of California in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), agreeing that a presumption of legitimate use accompanies the prosecutor's peremptory strikes. 79 App. Div. 2d at 108, 453 N.Y.S.2d at 753. To rebut this presumption, the defendant must show that there is a "substantial likelihood" that the prosecutor is striking veniremen solely because of their race. *Id.* at 108, 435 N.Y.S.2d at 754. Only in that case would the court order the prosecutor to explain his challenges or risk a mistrial. *Id.* at 109, 435 N.Y.S.2d at 754. Unlike the *Wheeler* panel, however, the *Thompson* court would allow the trial judge complete discretion in determining whether the defense has made a sufficient showing of abuse of challenges to justify further inquiry. *Id.* at 111, 435 N.Y.S.2d at 755. Thus, a prosecutor may not be forced to explain his challenges, whether racially based or not if, after viewing the voir dire, the trial court rules against the defense motion for a hearing. *Id.*

In *McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), Judge Meyer, dissenting, commented on the inconsistency of this espousal of the *Wheeler-Swain* guidelines by the Second Department. *Id.* at 552 n.1, 443 N.E.2d at 920 n.1, 457 N.Y.S.2d at 446 n.1 (Meyer, J., dissenting). The dissent noted, however, that the Department's affirmation may be due to the fact that *Thompson* was not to be applied retroactively and the jury in *McCray* was selected some 9 months before that decision was rendered. *Id.* (Meyer, J., dissenting).

¹⁴⁴ See STANDARDS RELATING TO TRIAL BY JURY, *supra* note 108, at 63-66. Federal Rule of Criminal Procedure 24(a) provides that the trial court may permit each litigant to examine the veniremen or may, in its discretion, conduct its own examination. FED. R. CRIM. P. 24(a). If the trial judge chooses to examine the veniremen, the litigants must be permitted to supplement his inquiry or, in the alternative, the trial judge must pose further questions to the extent he deems proper. *Id.* The trial judge has great discretion in conducting voir dire, and his decisions will not be reversed without proof that he abused his discretion, resulting in prejudice to the defendant. *United States v. Liddy*, 509 F.2d 428, 434-35 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975). Further, since trial judges have virtually plenary discretion to allow a challenge for cause, an order permitting or denying a challenge will not be set aside absent a showing of clear prejudice. *United States v. Brown*, 644 F.2d 101, 104 (2d Cir.), *cert. denied*, 454 U.S. 881 (1981). Indeed, the burden of proving that the trial judge abused his discretion by failing to allow a challenge for cause is one of the most arduous in the federal system. *United States v. Gullion*, 575 F.2d 26, 29 (1st Cir. 1978).

with a greater limitation on the available number of peremptory challenges, would not only eliminate abuse of challenges by the litigants, but also would serve to convert voir dire in New York from an adversarial contest to an impartial seating of a defendant's peers.¹⁴⁵

Richard C. Cavo

ESTATES, POWERS & TRUSTS LAW

EPTL § 5-1.1: Buy-and-sell agreement directing payment to third party upon death of testator held a testamentary substitute

Section 5-1.1 of the Estates, Powers and Trusts Law (EPTL) permits a surviving spouse to elect to take a specified share of the decedent's estate despite the existence of a valid will.¹⁴⁶ To prevent

Since the adoption of judicially controlled voir dire by the federal courts, state courts have looked for ways to curb the abusive tendencies of the present counsel-based system. See Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839, 847 (1968). Counsel-controlled voir dire has engendered cumbersome delays in an already overtaxed judicial system. See Recent Developments, *Civil and Criminal Procedure—Voir Dire Examinations—New Jersey Supreme Court Places Primary Responsibility for Conducting Voir Dire Examinations on Trial Court Judges*, 15 VILL. L. REV. 214, 217 (1969). Voir dire conducted by counsel allows a litigant to attempt to influence prospective jurors toward his client's position under the facade of unearthing juror bias. *Id.* at 218. It is suggested that judicial control of voir dire will not only curtail the delays and adversarial abuse present in counsel-controlled voir dire, but will allow the court discretion to review potentially prejudicial practices as well. Note, *Selection of Jurors by Voir Dire Examination and Challenge*, 58 YALE L.J. 638, 644 (1949).

The State of Illinois has adopted the federal court method of judicially controlling voir dire. See, e.g., ILL. ANN. STAT. ch. 110A, § 234 (Smith-Hurd Supp. 1982); see *People v. Lexow*, 23 Ill. 2d 541, 179 N.E.2d 683, 684 (1962). New Jersey, recognizing the inherent benefits of the federal system, also has instituted the operative elements of that system in its courts. N.J. COURT RULES 1:8-3(a) (1983). The New Jersey statute grants the trial judge broad discretion to control the line of questioning by advancing only those questions he deems to be probative of a venireman's ability to be impartial. *Id.* See *State v. Manley*, 54 N.J. 259, 269, 255 A.2d 193, 199 (1969).

¹⁴⁵ See generally Bermant & Shapard, *supra* note 109, at 77, 85-91 (discussing present format of voir dire and questioning its place in an adversarial advocacy system).

¹⁴⁶ EPTL § 5-1.1 (1981 & Supp. 1982-1983). The concept of a "forced share" for a surviving spouse was introduced in New York in 1929 with the enactment of section 18 of the Decedent Estate Law (DEL), ch. 229, § 18, [1929] N.Y. Laws 500 (current version at EPTL § 5-1.1 (1981)) [hereinafter cited as DEL]. Until that time, a survivor was provided for through the common-law doctrines of dower and curtesy. See Cox, *The Right of Election*, 32 ST. JOHN'S L. REV. 164, 164-67 (1958). See generally Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 42-55 (1948) (historical overview). In New York under the Statute of Dower, the "widow shall be endowed of the third part of all the lands whereof her