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

Lisa A. Stancati

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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.\textsuperscript{36} The standard established by the First Department in \textit{Schneider}, however, imposes liability regardless of whether the bankers knew that the shareholders would potentially rely on their advice.\textsuperscript{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.

\textit{John J. Kim}

\textit{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 \textit{Restatement (Second) of Torts} section 552 (1965), which permits recovery by any foreseeable plaintiff. \textit{Credit Alliance}, 65 N.Y.2d at 553, 483 N.E.2d at 119, 493 N.Y.S.2d at 444; \textit{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); \textit{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. \textit{See Ultramares Corp. v. Touche}, 255 N.Y. 170, 189, 174 N.E. 441, 448 (1931). In \textit{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.” \textit{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. \textit{See Mess, supra} note 34, at 855.

\textsuperscript{36} \textit{See Note, supra} note 1, at 136 n.93; \textit{Wells}, 127 A.D.2d at 202-03, 514 N.Y.S.2d at 2. In \textit{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. \textit{Id.}

\textsuperscript{37} \textit{See Schneider}, 159 A.D.2d at 296, 552 N.Y.S.2d at 574. In \textit{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. \textit{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).


\(^3\) *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-

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. Recently, in *People v. Kern*, the New York Court of Appeals held that the civil rights clause of the New York State Constitution prohibits purposeful discrimination in the exercise of peremptory challenges, whether exercised by the prosecution or the defense. 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.


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.


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
motion, holding that the principles set forth in Batson were applicable to the defense. 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. The Court of Appeals unanimously affirmed the Appellate Division's decision holding that the civil rights and equal protection clauses of the New York State Constitution, 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.


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

18 Kern, 75 N.Y.2d at 651-52, 554 N.E.2d at 1242, 556 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 "[p]rivilege[ ] 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, 556 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, 556 N.Y.S.2d at 654. Consequently, racially motivated peremptory challenges deny to prospective jurors an "opportu-

19 Id. at 651, 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, 422 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 cover-

20 Id. at 651, 554 N.E.2d at 1242, 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 de-

nit of "[t]he second sentence... although applicable to private persons... protects only against 'discrimination in... civil rights'"), cert. denied, 339 U.S. 981 (1950).
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


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.


24 Id. at 655-66, 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:

[It] 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.\(^2\)

Despite a criminal defendant’s compelling interest in obtaining an impartial jury through the exercise of unfettered peremptory challenges,\(^2\) 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.\(^2\)

The sixth amendment to the United States Constitution guarantees a criminal defendant the right to be tried by an impartial jury.\(^2\) 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.’”\(^3\) These efforts to keep the “scales” between the

\(^{1991}\)
prosecution and the defense "evenly held," coupled with Batson's reliance on the fourteenth amendment's equal protection clause rather than the sixth amendment, 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.

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. It is merely a statutory privilege, the
restriction of which poses no threat of depriving a criminal defendant of any constitutionally mandated right. Consequently, Kern stands not as a barrier to an accused’s ability to be tried impartially, but as a profound message that racial discrimination in New York courts will not be tolerated.

In addition, the Batson Court’s rationale for restricting the prosecutor’s discriminatory use of peremptory challenges applies equally to the defense. 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.” However, by leaving defense counsel free to discriminate on the basis of race, 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[ed] entirely with the Legislature”) (citations omitted); see also supra note 1 (discussing CPL § 270.25).

37 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).

38 See supra note 37.

39 See supra notes 18-26 and accompanying text.

40 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) (“[j]ustice requires that defendants be treated equally in the 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, 820-33 (1989) (arguing different treatment for prosecution and defense justified).

41 Batson, 476 U.S. at 87.

42 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. 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. 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, 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.

Lisa A. Stancati

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

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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 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.