COUNTY COURT OF NEW YORK
SULLIVAN COUNTY

People v. Robar[1]
(decided September 3, 2010)

The defendant, a properly licensed hunter,[2] was hunting alone on his property when he observed "a deer moving through [the] trees."[3] The defendant took aim, pulled the trigger, and shot his prey—alas, it was not a deer moving through the forest, but rather a man who consequently suffered injury to his groin and buttocks.[4] That man survived, but criminal charges were brought against the defendant.[5] At voir dire, defense counsel used peremptory challenges to remove potential jurors who were licensed, active hunters.[6] In response, the People moved for a *Batson* hearing, arguing that "[h]unters are a *Batson*[7] class of protected citizens."[8] The court held that licensed hunters were a "recognized class of persons entitled to all rights afforded by the civil rights clause of the New York State Constitution."[9] Although the court declined to hold that hunters were a "cognizable and protected class" under *Batson*, it nevertheless held that "exclusion of all licensed hunters . . . is a *Batson*-'like' violation," and ordered a new trial.[10]

The defendant, Robert Robar, was properly licensed to hunt antlered or antlerless deer.[11] On the morning of November 24, 2009,

1 907 N.Y.S.2d 627 (Sullivan Cnty. Ct. 2010).
2 *Id.* at 628 n.2.
3 *Id.* at 628.
4 *Id.*
5 *Id.*
6 *Robar*, 907 N.Y.S.2d at 629.
7 Batson v. Kentucky, 476 U.S. 79 (1986).
8 *Robar*, 907 N.Y.S.2d at 629.
9 *Id.* at 632.
10 *Id.*
11 *Id.* at 628 n.2.

the defendant was hunting on his property.[12] He believed that he was alone because his companions had "gone to town to purchase supplies."[13] While in the woods, the defendant claimed that he saw a deer moving in the distance.[14] He followed the animal's movement, and when it began to move away, the defendant shot it.[15] The deer turned out to be a man named Terry Pelton, who suffered serious injury to his buttocks and groin.[16] Pelton was wearing camouflage, but did not wear the blazing orange colors[17] recommended by the New York State Department of Environmental Conservation.[18] The defendant brought his victim to the hospital as soon as he realized that his deer was actually a man.[19]

Jury selection began on August 23, 2010, with twenty-three potential jurors.[20] When it was revealed that six of those potential jurors were active and licensed hunters, defense counsel peremptorily challenged all of them.[21] In response, the People moved for a *Batson* hearing.[22] The hearing was held, and the court found that the defense's non-discriminatory reasons for removing hunters were mere pretext.[23] At the hearing, the court requested legal authority suggesting that hunters are a protected class.[24] After a few days, though, it was apparent that neither party would provide the requested precedent. Therefore, the court recessed for the day to conduct its own research.[25] The following morning, the court

[12] *Id.* at 628.

[13] *Robar*, 907 N.Y.S.2d at 628.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Robar*, 907 N.Y.S.2d at 628-29.

[19] *Id.* at 629.

[20] *Id.*

[21] *Id.*

[22] *Id.* The court conducted a *Batson* hearing. *Robar*, 907 N.Y.S.2d at 629. Although the court found that the defense attorney's reasons were mere pretext, it reserved decision until a later date and requested authority from both sides regarding whether or not hunters were a protected class. *Id.* Neither party requested an adjournment or a stay of the proceedings. *Id.* at 630. The issue was raised "at various times" during the People's direct case, but the court continued to reserve the decision. *Id.*

[23] *Id.* at 629.

[24] *Robar*, 907 N.Y.S.2d at 630-31.

[25] *Id.* at 630. The court requested the additional statutory or case law authority and would reserve decision until those materials were provided. *Id.* When the People continued to

announced that it found a *Batson* violation.[26] The court held that hunters are a class governed by the Civil Rights Clause, which guarantees the right to sit on a jury or be tried by a jury of the defendant's peers.[27] Therefore, the defense violated the protections afforded to licensed hunters by removing all licensed hunters from the jury.[28]

In determining whether the defendant's removal of licensed hunters was a *Batson* violation, the court first turned to the statutory source of peremptory challenges in New York State.[29] That statute defines peremptory challenges as "an objection to a prospective juror for which no reason need be assigned."[30] However, the use of such challenges is "not absolute or unfettered."[31] For example, the Equal Protection Clause of the United States Constitution and the Civil Rights Clause of the New York State Constitution limit their use.[32] Supreme Court case law indicates that *Batson* protections "would only apply to types of discrimination that would receive heightened scrutiny under equal protection analysis."[33] This includes race, gender, non-marital children, and aliens.[34] The New York Court of Appeals, on the other hand, has expanded *Batson* to protect people who suffer discrimination based on "race, gender, *or any other status* that implicates equal protection concerns."[35] Consequently, New York courts have granted protection based on race,[36] gender,[37] ethnic origin,[38] and religion.[39]

raise their *Batson* challenge, and neither party complied with the court's request, the court conducted the research on its own. *Id.*

[26] *Id.*

[27] *Robar*, 907 N.Y.S.2d at 631.

[28] *Id.* at 632 ("[The] [c]ourt does find that [hunters] are a class governed by the civil rights clause which guarantees the right to sit on a jury and for a defendant to be tried by a jury of his peers. Therefore, exclusion of all licensed hunters in the instant matter is a *Batson*-'like' violation against a fair trial.").

[29] *Id.* at 630 ("Peremptory challenges . . . [were] first recognized in New York in 1828.").

[30] *Id.* (citing N.Y. CRIM. PROC. LAW § 270.25 (McKinney 2010)).

[31] *Id.* (quoting People v. Kern, 554 N.E.2d 1235, 1240 (N.Y. 1990)).

[32] *Kern*, 554 N.E.2d at 1240.

[33] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 801 (3d ed. 2009) (citing J.E.B. v. Alabama, 511 U.S. 127, 129-45 (1994)).

[34] *Id.* at 801 (noting that aliens would not apply here because they do not serve on juries).

[35] People v. Luciano, 890 N.E.2d 214, 217 (N.Y. 2008) (emphasis added).

[36] *See, e.g.*, People v. Smocum, 786 N.E.2d 1275, 1278 (N.Y. 2003).

[37] People v. Allen, 653 N.E.2d 1173, 1177 (N.Y. 1995).

[38] People v. Rambersed, 649 N.Y.S.2d 640, 645 (Sup. Ct. Bronx Cnty. 1996) (protecting

New York courts have expanded protection beyond those protections granted by the Supreme Court. New York courts have found "race, gender, and religion to be cognizable and protected classes of persons."[40] However, courts have never considered licensed hunters to be a cognizable and protected class.[41] As a result, the court in *Robar* turned to the Civil Rights Clause of the New York State Constitution, which "protects a person['s] civil rights which are defined as 'those rights which appertain to a person by virtue of his citizenship in a state or a community.' "[42] Under article I, section 11 of the New York Constitution, a litigant's civil rights include the right to serve as a juror.[43] Therefore, the defendant's peremptory challenges "harm[ed] licensed active hunter's civil rights to be a juror and not be excluded simply because of their classification . . . [and also harmed] the jury process by not having a cross section of the community to represent a jury of the defendant's peers."[44]

The court ultimately found a "*Batson*-'like' violation" in the defendant's removal of licensed hunters.[45] This term can best be described as a situation where the class at issue is not protected under *Batson*, but the court still grants protection.[46] The court explicitly stated that it did not "find . . . that licensed hunters are a cognizable and protected class distinct under *Batson/Luciano*."[47] However, the court did find that licensed hunters are afforded constitutional protection as a recognized class of persons under the Civil Rights Clause of the New York State Constitution.[48] This clause includes

Italian-Americans).

[39] People v. Langston, 641 N.Y.S.2d 513, 514-15 (Sup. Ct. Queens Cnty. 1996) (protecting a Muslim individual).

[40] *Robar*, 907 N.Y.S.2d at 630-31.

[41] *Id.* at 631.

[42] *Id.* (quoting *Kern*, 554 N.E.2d at 1241).

[43] N.Y. CONST. art. I, § 11. The Civil Rights Clause states:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her 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.

Robar, 907 N.Y.S.2d at 631.

[44] *Id.*

[45] *Id.* at 632.

[46] *Id.*

[47] *Id.*

[48] *Robar*, 907 N.Y.S.2d at 632.

"the right to sit on a jury and for a defendant to be tried by a jury of his peers."[49] Furthermore, New York State "regulates and licenses this class and this class specifically requires" protection under the Second Amendment of the United States Constitution.[50] "Therefore, exclusion of all licensed hunters in the instant matter is a *Batson*-'like' violation against a fair trial."[51] There being no cure for this violation, the court declared a mistrial.[52]

Analytically, the results of *Batson* and *Robar* are hardly similar. After all, protections based on race and recreational activities are rarely equated. The court in *Robar* based its holding on logic and constitutional case law. At the end of the decision, the court drew an analogy between a defendant-hunter and a hypothetical defendant-reckless driver.[53] It argued that a litigant's removal of all licensed drivers in a criminal reckless driving proceeding was as inappropriate as the defendant-hunter's removal of all licensed hunters.[54] This is because drivers as a class would be deprived of their right to serve as jurors, and the defendant would be deprived of the right to a jury of his peers.

Most protections in New York, but not all, are granted based on physical characteristics such as race or gender.[55] *Robar* expanded protection past such "immutable" traits towards recreational activities like hunting.[56] Therefore, the court took pains to support its holding with authority. For example, the New York Court of Appeals held that *Batson* protections extend to discrimination based on "race, gender, or any other status that implicates equal protection concerns."[57] This broad language supports expansion of *Batson* protections. Additionally, the court in *Robar* noted that hunters are a "recognized class" that is protected by the Civil Rights Clause[58]

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Robar*, 907 N.Y.S.2d at 632 n.6. ("By analogy, if a case involved a charge of reckless driving on a highway a litigant's peremptory challenge to all license[d] active highway drivers would be suspect.").

[54] *Id.*

[55] *See Batson*, 476 U.S. 79 (race); *J.E.B.*, 511 U.S. 127 (gender).

[56] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 672 (3d ed. 2006) [hereinafter CHEMERINSKY, PRINCIPLES AND POLICIES] (using the word "immutable").

[57] *Luciano*, 890 N.E.2d at 216-17.

[58] *Robar*, 907 N.Y.S.2d at 632.

because they are regulated by the State and they require Second Amendment protection.[59] In light of this decision, other groups that identify themselves by, for example, profession or employment, could also claim protection. As a result, this decision could have the effect of greatly expanding *Batson* protection beyond physical traits and towards other manners of personal or group identification.

The constitutional bedrock of this issue is *Batson v. Kentucky*,[60] where the Supreme Court held that equal protection is denied where the prosecutor uses peremptory challenges in a racially discriminatory fashion.[61] *Batson* signaled a significant shift in case law on this issue. Previously, the Court had held that racial discrimination by a prosecutor could only be proved over a period of time.[62] In other words, the defendant claiming discrimination had to show systematic discrimination on the part of the government. The Court in *Batson* expressly rejected that rule[63] in holding that the defendant must make a claim based "solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*."[64] Therefore, the defendant was no longer required to show that others had suffered discrimination.

Most importantly, the Court provided a three-prong test to determine whether the prosecutor used peremptory challenges in a racially discriminatory fashion.[65] First, the defendant must "establish a prima facie case of purposeful discrimination" in jury selection.[66] Second, the "burden shifts to the State to come forward with a neutral explanation" for its challenge.[67] Third, the court must decide whether the "defendant has established purposeful discrimination," or whether the State's race-neutral explanation was sufficient.[68]

These prongs have been further developed by the Court in

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[59] *Id.*

[60] 476 U.S. 79.

[61] *Id.* at 89.

[62] *See* Swain v. Alabama, 380 U.S. 202, 223 (1965), *abrogated by Batson*, 476 U.S. 79.

[63] *Batson*, 476 U.S. at 92-93 (rejecting the evidentiary formulation of *Swain* "as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause").

[64] *Id.* at 96 (emphasis added).

[65] *See id.* at 96-98.

[66] *Id.* at 96.

[67] *Id.* at 97.

[68] *Batson*, 476 U.S. at 98 ("The trial court then will have the duty to determine if the defendant has established purposeful discrimination.").

recent years. To make out a prima facie case of purposeful discrimination, the party challenging the validity of the peremptive strike must first show that he or she is a member of a cognizable group.[69] Under Supreme Court case law, these groups include race and gender.[70] Although the *Batson* holding only applied to the prosecutor's use of peremptory challenges for racially discriminatory purposes, the Supreme Court expanded that holding in subsequent years. The first expansion of *Batson* extended to the use of peremptory challenges in civil suits.[71] *Batson* also extends to the use of peremptive challenges by the criminal defendant.[72] In *McCollum*, the Court held that the "defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection"[73] because discriminatory use violates the equal protection rights of potential jurors.[74] *Batson* was next extended to gender discrimination. In *J.E.B. v. Alabama ex rel. T.B.*, the Court held that the use of peremptive strikes for gender discrimination was prohibited under the Equal Protection Clause.[75] The right of potential jurors to be protected from discriminatory peremptive challenges was established in *Powers v. Ohio*, where the Court held that potential jurors have the right to not be excluded from the jury on account of race.[76]

After raising an inference of discrimination, the second prong shifts the burden back to the "challenged party" to provide a race-

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[69] *Id.* at 96.

[70] CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 56, at 721.

[71] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) ("We must decide . . . whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race."). In *Edmonson*, the Court held that the equal protection rights of potential jurors are violated when a private person in a civil case uses peremptory strikes to exclude potential jurors for racially discriminatory reasons. *Id.* (holding that "race-based exclusion violates the equal protection rights of the challenged jurors"). The Equal Protection Clause is implicated in this situation because peremptive strikes constitute state action since the challenge is "authorized by state law and supervised by the courts." CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 56, at 720-21.

[72] *See* Georgia v. McCollum, 505 U.S. 42, 55 (1992).

[73] *Id.*

[74] *See* Powers v. Ohio, 499 U.S. 400, 409 (1991). Furthermore, the use of peremptive strikes by the defendant constitutes state action for Equal Protection purposes because the challenges are provided by state statute. *See McCollum*, 505 U.S. at 54.

[75] 511 U.S. at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

[76] *Powers*, 499 U.S. at 409. This protection has since been extended to grand jurors. Campbell v. Louisiana, 523 U.S. 392, 394 (1998) (finding that a criminal defendant has standing to challenge the discriminatory removal of potential grand jurors).

neutral explanation for its challenge.[77] To fulfill this requirement, the challenged party must provide a " 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[78] However, this prong employs a low standard: in *Purkett*, the Court stated that the legitimate reason is not necessarily "a reason that makes sense."[79] Instead, it is "a reason that does not deny equal protection."[80] "It is not until the third step that the persuasiveness of the justification becomes relevant."[81]

The third prong is the stage where the court determines whether the challenging party established a claim of purposeful discrimination.[82] This inquiry has evolved in light of subsequent case law that favors finding neutral reasons for the use of peremptory challenges.[83] In *Hernandez v. New York*,[84] the Court upheld the prosecutor's removal of Latino jurors "because they spoke Spanish and therefore might not accept the translator's version of the testimony from witnesses who were going to testify in Spanish."[85] The Court drew a distinction between those peremptory strikes made for racially discriminatory purposes, and those made, for example, where the prosecutor doubts the juror's "ability to accept the official translation of trial testimony."[86] The latter

> may have acted like strikes based on race, but they were *not* based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the *Equal Protection Clause* unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and

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

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

[79] Purkett v. Elem, 514 U.S. 765, 769 (1995).

[80] *Id.*

[81] *Id.* at 768.

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

[83] *See* Hernandez v. New York, 500 U.S. 352, 375 (1991).

[84] *Id.*

[85] CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 56, at 720 (citing *Hernandez*, 500 U.S. at 356-57).

[86] *Hernandez*, 500 U.S. at 375.

intentional discrimination, which is.[87]

The Supreme Court has developed this line of cases over the past twenty-five years. Since *Batson*, protection has been extended to shield a variety of people from the improper use of peremptory challenges, and individuals using challenges have been limited in their ability to exercise those tools. Expansion of *Batson* protections by the Supreme Court has been limited when compared to the New York State courts.[88] Indeed, the Supreme Court has only granted *Batson* protection based on race and gender.[89] Unlike New York, where the New York Court of Appeals provided expansive language regarding *Batson* expansion,[90] it is unclear whether *Batson* would prevent religious discrimination in the federal court.[91]

The Supreme Court indicated that the line is drawn based on the level of scrutiny that a group receives.[92] In *J.E.B.*, the Court "indicated . . . that *Batson* only would apply to types of discrimination that would receive heightened scrutiny under equal protection analysis."[93] This applies to race and gender, as suggested by Supreme Court case law.[94] Heightened scrutiny is also used for national origin and non-marital children.[95] All of these groups share one trait in common: they are all "immutable" characteristics. Race, gender, origin, and the marital status of one's parents are absolute. These are facts of life that the individual is unable to change.[96] As a result, the Supreme Court uses heightened scrutiny for the protection

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[87] *Id.*

[88] This is not to say that federal courts never extend *Batson* protection to a group that has not been expressly recognized by the Supreme Court. *See, e.g.*, United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007) (Native Americans); United States v. Bedonie, 913 F.2d 782, 795 (2d Cir. 1990) (Native Americans); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (religious groups). *But see* United States v. Marino, 277 F.3d 11, 23 (1st Cir. 2002) (finding that Italian-Americans are not a cognizable group); United States v. Santiago-Martinez, 58 F.3d 422, 423 (9th Cir. 1995) (holding that obese persons are not a cognizable group); Wysinger v. Davis, 886 F.2d 295, 296 (11th Cir. 1989) (finding that persons under age 25 are not a cognizable group).

[89] *See Batson*, 476 U.S. at 100 (race); *J.E.B.*, 511 U.S. at 146 (gender).

[90] *Luciano*, 890 N.E.2d at 217.

[91] CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 56, at 721.

[92] CHEMERINSKY, *supra* note 33, at 801.

[93] *Id.*

[94] *Id.*

[95] CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 56, at 672.

[96] *Id.*

of these individuals. Protections provided under *Batson* are granted along the same lines.

The New York Civil Rights Clause and the Federal Equal Protection Clause are somewhat "coextensive."[97] As a result, the New York State Constitution, like the Federal Constitution, prohibits discriminatory use of peremptive challenges.[98] Today, the challenges are codified in statute.[99] But the use of the challenges is "not completely unfettered."[100] Rather, the exercise of these litigious tools is subject to *Batson* and its progeny, and the New York equivalent. With the minimum constitutional requirement having been provided by the Supreme Court, and in light of the expansive language used by the New York Court of Appeals in *Luciano*, the New York courts moved beyond protections based on race and gender and afforded protections based on ethnic origin and religion.[101]

The New York Court of Appeals adopted *Batson* in holding that criminal defendants, like the prosecutor, are prohibited from exercising discriminatory strikes.[102] Furthermore, the court noted that the New York State Constitution "prohibits *private* as well as State discrimination as to 'civil rights.' "[103] Therefore, the constitutional prohibition against discriminatory peremptive strikes was expanded to include such use by criminal defendants.[104]

In *People v. Allen*,[105] the New York Court of Appeals adopted the three-prong *Batson* analysis.[106] First, because the party exercising the challenge "need give no reason at all for the exercise of a peremptory challenge, the initial burden logically falls on the

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[97] *Kern*, 554 N.E.2d at 1240.

[98] *Id.* ("[T]he State Constitution prohibits such discrimination as well.").

[99] N.Y. CRIM. PROC. LAW § 270.25 (McKinney 2010).

[100] *Kern*, 554 N.E.2d at 1240.

[101] *See Robar*, 907 N.Y.S.2d at 630-31 (listing a series of cases that expanded *Batson* protection to specific classes of people).

[102] *Kern*, 554 N.E.2d at 1241 ("[W]e turn to the question of whether the State Constitution permits the purposeful racial discrimination practiced by the defense here. We conclude that it does not."). This case expanded the prohibition of discriminatory strikes to criminal defendants in New York in 1990, two years before the Supreme Court did the same in *McCollum*.

[103] *Id.* (emphasis added).

[104] *Id.* The court also referred to jury service as a civil right and explained that the exclusion of a juror for racially discriminatory purposes "harms society by impairing the integrity of the criminal trial process." *Id.* at 1242.

[105] 653 N.E.2d 1173.

[106] *Id.* at 1177-1179 (applying the *Batson* analysis to the facts of the case).

party opposing the strike to make out a prima facie case that a juror has been excused for an impermissible reason."[107] Then, the burden shifts to the other party "to overcome the inference of purposeful discrimination."[108] To overcome the claim of discrimination, the party must offer "facially neutral reasons supporting the challenge."[109] This is a question of law: "[A]ssuming the proffered reasons for the peremptory challenges are true, do the challenges violate the Equal Protection Clause?"[110] Finally, the court looks at the claims, "resolves factual disputes"[111] if necessary, and determines whether the challenge was exercised for a discriminatory purpose.[112]

The court in *Allen* also held that the right of a citizen to serve as a juror is protected by the Civil Rights Clause of the New York State Constitution as a civil right and a "fundamental means of participating in government."[113] As a result, the juror's equal protection rights are violated when a peremptive strike is used in a discriminatory fashion.[114] "Elimination of a potential juror because of generalizations based on race, gender or other status that implicates equal protection concerns is an abuse of peremptory strikes."[115]

New York courts have expanded protection from the discriminatory use of peremptive strikes beyond the protections granted by the Supreme Court. For example, protections are afforded in New York based on ethnic origin and religion, while those same classes are not protected under Supreme Court case law.[116] This is in part due to the language used by the New York Court of Appeals. On two occasions, that court seemed to embrace expansion when it stated that in addition to race and gender, protection would be afforded to

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[107] *Id.* at 1177.

[108] *Id.*

[109] *Id.*

[110] *Allen*, 653 N.E.2d at 1177-78.

[111] *Id.* at 1178.

[112] *Id.*

[113] *Id.* at 1177 ("Jury service—a privilege and a duty of citizenship—is a civil right established by our Constitution and a fundamental means of participating in government." (citations omitted)).

[114] *Id.*

[115] *Allen*, 653 N.E.2d at 1177.

[116] *See Rambersed*, 649 N.Y.S.2d at 645 (protecting Italian-Americans); *Langston*, 641 N.Y.S.2d at 514-15 (protecting a Muslim individual).

"any other status" that implicates equal protection concerns.[117] New York courts have interpreted this language by protecting ethnic groups,[118] racial groups,[119] and religious groups.[120]

All of those classes, except religious identification, are absolute characteristics that cannot be changed. Affording protection to religious groups may be seen as the point where the New York and the Supreme Court diverge. Religious identification is changeable, unlike race. By affording *Batson* protection based on a non-immutable trait, the New York courts opened the door to a decision like *Robar*. Identification as a hunter is not an absolute characteristic because an individual may cease hunting, and no longer identify himself as a hunter. Similarly, an individual may choose to leave one religion and join another, and no longer identify herself as a member of the initial religious group. By analogy, then, the court in *Robar* could reasonably conclude that hunters are entitled to *Batson* protection.

The fundamental difference between the Supreme Court and New York courts regarding *Batson* is the scope of expansion of protected classes. The current trend in New York law is a continued expansion of *Batson* protection, especially after *Robar*. Unless *Robar* is overruled on appeal, other courts may follow this trend and grant protection to groups that are not identified by immutable characteristics. Courts may also grant protection to groups that are perceived as uniquely requiring specific constitutional protection. For example, the court in *Robar* argued that hunters "specifically" require Second Amendment protection.[121] By the same logic, journalists might require *Batson* protection because they "specifically" require First Amendment protection. Furthermore, a court could analogize between hunters and another recreational group in order to expand protection to that group. As a result, there is a very real possibility that *Batson* protections could be widely expanded in New York. The Supreme Court, on the other hand, has narrowly expanded protection from the discriminatory use of peremptive strikes: *Batson* has only been expanded to include gender

117 *Luciano*, 890 N.E.2d at 216-17; *Allen*, 653 N.E.2d at 1177.
118 *Rambersed*, 649 N.Y.S.2d at 645.
119 *Kern*, 554 N.E.2d at 1241.
120 *Langston*, 641 N.Y.S.2d at 514-15.
121 *Robar*, 907 N.Y.S.2d at 632.

protection.[122] However, the Supreme Court indicated that protection could be granted to those groups that require heightened scrutiny under equal protection analysis.[123] These groups include race, gender, and non-marital children.[124] While several circuit courts granted *Batson* protection to certain religious groups, the Supreme Court has not ruled on this issue.[125] Therefore, religious status is an outstanding question in federal courts.[126] New York courts, on the other hand, have afforded a broad scope of protection under *Batson*, thanks in part to the expansive language used by the New York Court of Appeals. In contrast to the Supreme Court's requirement that protected groups be subject to heightened scrutiny, *Batson* protections in New York could include "race, gender or any other status that implicates equal protection concerns."[127]

The source of these differences is the language used by the highest courts. Supreme Court cases have limited expansion to those groups who receive heightened scrutiny.[128] This applies to specific groups and a limited number of people. The New York Court of Appeals used broader, open-ended language that could embrace "any other status."[129] This language could conceivably apply to any group, even hunters or "active highway drivers."[130]

Affording protection to hunters is a curious expansion in light of previous holdings. Being a hunter is neither an immutable characteristic, like race, gender, or ethnic origin, nor is it as fundamental as religious identification. Additionally, hunters are not traditional victims of discrimination who require protection. As a result, this is a holding that would not likely find support in the Supreme Court. Indeed, the traditional reasons for granting protection to established groups do not apply to hunters.

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122 *J.E.B.*, 511 U.S. at 129.

123 CHEMERINSKY, *supra* note 33, at 801.

124 *Id*.

125 CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 56, at 721.

126 *Id.* In State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994), the Minnesota Supreme Court upheld a conviction where the prosecutor used a peremptory challenge against a Jehovah's Witness. Justice Thomas dissented in the denial of certiorari and argued that a reading of *Batson* and *J.E.B.* together indicates that *Batson* protection should be granted to any group subject to heightened scrutiny.

127 *Luciano*, 890 N.E.2d at 216-17.

128 CHEMERINSKY, *supra* note 33, at 801.

129 *Luciano*, 890 N.E.2d at 216-17.

130 *Robar*, 907 N.Y.S.2d at 632 n.6.

Robar is an intriguing decision that presents a familiar issue in a unique light. The court is reluctant to declare that hunters are a protected class, and surprises the reader by finding a "*Batson*-'like' violation" when the hunter used peremptory challenges to remove other hunters from the jury pool. Perhaps the court recognized that hunters were unlikely to be declared a protected class by a higher court, and consequently refused to find a *Batson* violation or hold that hunters are a protected class. Instead, the court addressed the discrimination it saw at voir dire by declaring a "*Batson*-'like' violation" and ordering a new trial. This middle ground allowed the court to address the discrimination against potential jurors without declaring a new class of protected citizens.

Robar is rich with interesting lawyering decisions.[131] For example, it is curious that defense counsel chose to remove licensed hunters from the jury pool. It seems logical that the defendant hunter would want hunters on the jury. The defendant was licensed, he hunted on his land, and he accidentally shot a trespasser. Indeed, this accident could have happened to any hunter, and it is likely that other hunters would have sympathized with the defendant's troubles. Therefore, logic suggests that it should have been the State, not the defendant, who wanted to remove licensed hunters from the jury pool. Yet it was the defense that sought to remove licensed hunters, and the State objected.

Robar is an interesting decision that captures the attention of the curious mind. It is intriguing that a state court granted to hunters the protection that is normally afforded to individuals based on race or gender. This case has important practical implications because it expands protections that are commonly encountered by practicing

[131] The decision shows the frustration of the court with the parties. For example, the court makes clear that neither party provided the "requested legal precedent" after the initial *Batson* hearing, *Robar*, 907 N.Y.S.2d at 630, and the court ultimately had to conduct its own research because neither party provided case law addressing hunters or a similar class. *Id.* at 631.

attorneys. As a result, it would not be surprising if this case were considered on appeal.[132]

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[132] Subsequent to the writing of this Article, the Appellate Division rejected the *Robar* court's decision. "There is no authority for the position, dubious at best, that [hunters] are a cognizable group on par with race, ethnicity (or ethnic origin), gender or any other status . . . ." Robar v. LaBuda, 2011 WL 1584842, at *4 (App. Div. 3d Dep't 2011).

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