COURT OF APPEALS OF NEW YORK

People v. Luciano[1]

(decided June 3, 2008)

Ruben Luciano was charged with attempted murder, assault, and criminal possession of a weapon.[2] Before trial, jury selection was comprised of sixteen potential jurors.[3] During the voir dire process, the People raised a *Batson*[4] challenge, which required the defense to provide a "gender-neutral" explanation for five of its peremptory strikes.[5] The trial court accepted the gender-neutral explanations for three of the strikes, but concluded that the other two peremptory strikes were pretextual and discriminatory,[6] and therefore in violation of the Equal Protection Clause under the U.S. Constitution[7] and the New York Constitution.[8] Consequently, the court "seated the [two discriminatory strikes] and prohibited defense counsel from reusing those peremptories."[9]

Ultimately, Luciano was convicted of "criminal possession of a weapon in the second degree and assault in the second degree, and sentenced as a second felony offender to concurrent sentences of [fif-

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[1] 890 N.E.2d 214 (N.Y. 2008).

[2] *Id.* at 215.

[3] *Id.*

[4] *See* Batson v. Kentucky, 476 U.S. 79 (1986).

[5] *Luciano*, 890 N.E.2d at 216.

[6] *Id.*

[7] U.S. CONST. amend. XIV, states, in pertinent part: "No State shall . . . deny any person within its jurisdiction the equal protections of the law."

[8] N.Y. CONST. art. I, § 11, states, in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

[9] *Luciano*, 890 N.E.2d at 216.

teen] years and [seven] years, respectively."[10] Luciano appealed to the Appellate Division, First Department which reversed, concluding that "forfeiting two of [the] defendant's peremptory challenges violated the mandate of CPL 270.25(2) that each party 'must be allowed' the statutorily prescribed number of challenges."[11] The People appealed, which presented the New York Court of Appeals with a case of first impression: whether "forfeiting peremptory challenges used in a discriminatory manner is a permissible remedy."[12] The court ultimately concluded that although this remedy is permissible, it is not required and rather left to the discretion of the judge.[13]

Luciano "allegedly confronted and shot Angel Rodriquez at Rodriguez's place of employment."[14] During the voir dire process, defense counsel asked the sixteen potential jurors two specific questions to each: first, "whether [the] witness [was] more likely to tell the truth after taking an oath" and second, "whether the panelists had formed an opinion as to [the] defendant's guilt before the presentation of evidence."[15] The People presented their challenges for cause, which the court subsequently denied.[16] Defense counsel "challenged every potential juror who answered 'yes' to the oath question and 'I don't know' to the guilt question."[17] This too was rejected by the

[10] *Id.*
[11] *Id.*; *see also* N.Y. CRIM. PROC. LAW. § 270.25 (McKinney 2008).
[12] *Luciano*, 890 N.E.2d at 217.
[13] *Id.* at 219.
[14] *Id.*
[15] *Id.* at 215-16.
[16] *Id.* at 216.
[17] *Luciano*, 890 N.E.2d at 216.

court.[18]

After the appropriate challenges for cause, the proceedings continued with the People's right to exercise their peremptory challenges.[19] The People exercised four peremptory challenges without objection, which left five women and five men on the panel.[20] The defense counsel exercised its peremptory challenges and struck the remaining five women and three men.[21] In response to the striking of the five women, the People raised a *Batson*[22] challenge, which required the defense to provide a "gender-neutral" reason for each peremptory challenge.[23] The court accepted the gender-neutral explanation for three of the women, but concluded that the other two peremptory strikes were pretextual and discriminatory.[24] The defense counsel argued that the strikes were not pretextual and stated their reasons for the challenges.[25] However, the court found inconsistencies in the defense counsel's reasoning.[26] Due to this inconsistency, the court concluded that the challenges were in fact discriminatory

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *See* Batson v. Kentucky, 476 U.S. 79 (1986).
[23] *Luciano*, 890 N.E.2d at 216.
[24] *Id.*
[25] People v. Luciano, 840 N.Y.S.2d 589, 590 (App. Div. 1st Dep't 2007). Juror number six was challenged was because "she was raised in Rockland County and lived in Parkchester, the Bronx, from which he concluded that she was conservative, and she answered the oath question affirmatively . . . ." *Id.* Moreover, juror number one was challenged because she too answered in the affirmative for the oath question and she stated "I don't know" to the guilt question. *Id.*
[26] *Id.* The court questioned why the defense counsel did not challenge juror number nine "who also lived in Parkchester, nor juror number five, who also answered the oath question affirmatively and gave the same response to the guilt question" as the juror who was challenged. *Id.*

and the two remaining women were seated on the jury.[27] Furthermore, since it was found that the two peremptory challenges were pretextual, the judge concluded that the defense should be precluded from reusing the misused challenges.[28] The defense attempted to establish their good faith by offering to strike "one of the male panelists on the same ground," but the judge was not convinced, stating that, " '[b]ecause [defense counsel] misstated the law [it does not have the right to use its challenges]. The law states that if you exercise the strikes [on a discriminatory basis] you forfeit those rights.' "[29]

As a result, Luciano was convicted and sentenced to prison.[30] The appellate division reversed, holding that the trial court "improperly denied [the] defendant the requisite number of peremptory challenges," as provided by CPL 270.25.[31] Ultimately, the Court of Appeals affirmed, "but on different grounds."[32]

The Court of Appeals recognized that the accused's right to peremptory challenges is "not a trial tool . . [they] are a mainstay in a litigant's strategic arsenal."[33] This right is outlined in the Criminal Procedure Law, which states that "each party 'must be allowed' an equal number of peremptory challenges and that a court 'must exclude' any juror challenged."[34] Furthermore, this had been the standard procedure until 1986 when the Supreme Court decided *Batson v.*

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[27] *Luciano*, 890 N.E.2d at 216.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Luciano*, 890 N.E.2d at 216.
[33] *Id.*
[34] *Id.*

Kentucky.[35] Prior to *Batson*, it was acceptable for "litigants [to] challenge a potential juror for any or no reason at all."[36] In *Batson*, the Court established that when a litigant exercises his or her peremptory challenge to strike a juror based on discriminatory reasons, it was a direct violation of the Equal Protection Clause of the U.S. Constitution.[37] The Court of Appeals in *Luciano* analyzed *Batson* and concluded that permitting forfeiture to be a remedy for the wrongful use of peremptory challenges would in turn promote the overall principle of *Batson*.[38] The court noted that the " 'purpose of the *Batson* rule is to eliminate discrimination, not minimize it,' " and by allowing the courts to exercise discretion in assigning forfeiture, it will deter litigants from making discriminatory peremptory challenges.[39] The court reasoned that if forfeiture was precluded there would be no deterring effect and in essence litigants would still be able to strike jurors for any cause, attempt to provide neutral reasoning and if unsuccessful, the litigant would not lose anything for her unconstitutional attempt to discriminate.[40]

Ultimately, the *Luciano* Court did not decide whether there was a *Batson* violation or not. Nevertheless, it is necessary to analyze *Batson* and the appropriate case precedent leading up to *Batson* in order to determine if the forfeiture remedy is permissible and constitutional. The underlying issue when determining whether forfei-

[35] *Id.*; *see also Batson*, 476 U.S. 79.
[36] *Luciano*, 890 N.E.2d at 216.
[37] *Id.*
[38] *Id.* at 218
[39] *Id.* (quoting People v. Bolling, 591 N.E.2d 1136, 1139 (N.Y. 1992)).
[40] *Id.*

ture is a permissible remedy to a *Batson* violation is whether there is a *Batson* violation to begin with.

It is important to analyze the cases which ultimately lead up to the *Batson* decision in order to fully understand its implication today. In 1880, the United States Supreme Court decided *Strauder v. West Virginia*,[41] which held that an African-American man, just like a Caucasian man, was entitled to the protections afforded under the Equal Protection Clause.[42] In *Strauder*, an African-American man was "indicted [sic] for murder in the Circuit Court of Ohio County, in West Virginia."[43] Pursuant to a statute at the time of the initial trial, African-Americans were not allowed to partake in the jury process.[44] Before the trial commenced, the defendant argued that the case should be removed to the United States Circuit Court because based on the current statute:

> [N]o colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens.[45]

Nevertheless, the defendant was convicted and sentenced.[46] How-

[41] 100 U.S. 303 (1880).

[42] *Id.* at 309.

[43] *Id.* at 304.

[44] *Id.* at 305 (stating that, " 'All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . .' ").

[45] *Id.* at 304.

[46] *Strauder*, 100 U.S. at 304.

ever, the Supreme Court agreed with Strauder's equal protection argument and reversed the lower court's decision.[47]

The Court distinguished that the issue was not whether a criminal defendant has the right to a jury composed in whole or in part of people who are the same race as him, rather the issue was whether the Equal Protection Clause of the Fourteenth Amendment is violated when the composition of the jury is conducted in a discriminatory manner.[48] The Court noted that the Equal Protection Clause of the Fourteenth Amendment was created to ensure that the newly freed slaves would be granted the same rights under the U.S. Constitution as enjoyed by white citizens and that no State shall deprive any African-American citizen of those rights.[49] The Court concluded that the West Virginia statute clearly violated the Equal Protection Clause and stated that "[i]t is not easy to comprehend how . . . every white man is entitled to a trial by a jury selected from persons of his own race or color . . . and a negro is not, the latter is equally protected by the law with the former."[50]

Moreover, in 1965, the Supreme Court decided *Swain v. Ala-*

[47] *Id.* at 310-12.

[48] *Id.* at 305. This case is specifically important to the analysis because at the time it was decided, the Fourteenth Amendment was a recent addition to the United States Constitution and judicial interpretation was important to direct the social changes which were happening within the country, specifically the freedom of the slaves. *Id.* The Court noted that this amendment was mainly created to "secur[e] to a race recently emancipated, a race that through many generations had been held in slavery, all of the civil rights that the superior race enjoy." *Id.* at 306.

[49] *Id.* at 306; *see also* Smith v. Texas, 311 U.S. 128, 130 (1940) (stating that, "[f]or racial discrimination to result in the exclusion from jury service or otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government").

[50] *Strouder*, 100 U.S. at 309.

bama,[51] which held that the use of peremptory challenges in a discriminatory manner was not a violation of the Fourteenth Amendment.[52] In *Swain*, "Robert Swain, a Negro, was indicted and convicted of rape in the Circuit Court of Talladega County, Alabama, and sentenced to death."[53] Swain contended that when the prosecution used its peremptory challenges, it struck the six remaining African- American jurors for racially discriminatory reasons.[54] Swain argued that such use of peremptory challenges violated his Fourteenth Amendment rights and he moved to have the jury considered void.[55] The Court thoroughly examined the historical basis of peremptory challenges and concluded that the use of peremptory challenges in a discriminatory manner did not violate the Fourteenth Amendment.[56] The Court considered the use of peremptory challenges to be a tool for securing a well-balanced jury of citizens throughout the community and stated that:

> [W]e cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court.[57]

Furthermore, the Court explained that the purpose behind the use of

[51] 380 U.S. 202 (1965).
[52] *Id.* at 219, 222.
[53] *Id.* at 203.
[54] *Id.* at 210.
[55] *Id.*
[56] *Swain*, 380 U.S. at 221.
[57] *Id.* at 222.

peremptory challenges is to allow each side to strike jurors without providing any cause or reason for their actions.[58] However, the Court recognized that if a defendant could demonstrate that such discrimination occurred on a regular basis from the same opposing party, a proper equal protection challenge could arise, but Swain did not meet this standard and thus the Court did not examine it further.[59]

Following the *Swain* decision, the Court went on to further expand on the issue. In 1985, the Supreme Court decided *Batson v. Kentucky*, the leading case dealing with equal protection and peremptory challenges.[60] In *Batson*, the defendant was "indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods."[61] During voir dire, the prosecutor used his peremptory challenges and eliminated the four black persons sitting on the venire, leaving the jury composed of only white individuals.[62] The defense motioned to have the jury discharged on the grounds that the four potential jurors were removed based on their race; this was a direct violation of the defendant's Fourteenth Amendment equal protection rights because the defendant was not being properly tried by a "jury drawn from a cross section of the community."[63] The trial judge did not agree, stating that "the parties were entitled to use their peremptory challenges to 'strike anybody they want to.' "[64] Ultimately, the

[58] *Id.* at 220.
[59] *Id.* at 224-28.
[60] *Batson*, 476 U.S. at 79.
[61] *Id.* at 82.
[62] *Id.* at 82-83.
[63] *Id.* at 83.
[64] *Id.*

jury convicted the defendant on both counts.[65] The defendant appealed to the Supreme Court of Kentucky and argued that "the facts showed that the prosecutor had engaged in a 'pattern' of discriminatory challenges in this case and established an equal protection violation under *Swain*."[66] The Supreme Court of Kentucky affirmed, asserting that in order to be successful, the defendant had to demonstrate that there was a "systematic exclusion of a group of jurors from the venire."[67] The Supreme Court of the United States granted certiorari and reversed.[68]

Initially, the Court re-examined the *Strauder* decision and stated that it was well established that denying a juror the right to serve on a jury because of his race denies that individual his right to equal protection and thus amounts to a constitutional violation.[69] Next, the Court reflected on the *Swain* decision and ultimately decided that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race."[70] The Court established that the burden of proof that is placed on the defendant, as outlined in *Swain*, is not proper and instead created a modern approach for presenting a prime facia case for such discrimination.[71] First, the burden is still on the defendant to allege that peremptory challenges are being used in a discriminatory manner.[72] Also, the de-

[65] *Batson*, 476 U.S. at 83.
[66] *Id.* at 84; *see also Swain*, 380 U.S. 202.
[67] *Batson*, 476 U.S. at 84.
[68] *Id.*
[69] *Id.* at 85-87.
[70] *Id.* at 89.
[71] *Id.* at 93.
[72] *Batson*, 476 U.S. at 93.

fendant must show that he is a member of the group that is being discriminated against.[73] Unlike *Swain*, *Batson* established that the defendant can rely solely on the discrimination of his case rather than presenting a pattern of discrimination.[74] The burden then shifts to the State to provide non-discriminatory reasons for the challenges through a clear showing that the excluded juror was removed based on a reason other than race.[75] Subsequently, the court must decide whether the State's rebuttal is sufficient to survive the defendant's prima facie discrimination case.[76] The underlining holding of *Batson* is that peremptory challenges cannot be used in a discriminatory manner.[77] Such use not only violates the defendant's equal protection rights but also violates the juror's right to serve as a juror.[78]

The federal common law established that the use of peremptory challenges in a discriminatory manner is unconstitutional. States have adopted this ruling and adhere to at least the minimal requirements that are presented through the federal cases in assuring that peremptory challenges are not used in a discriminatory manner. New York is no exception. New York adopted the test set forth in *Batson* when determining whether or not a sufficient case of discrimination has been presented.[79]

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[73] *Id.*

[74] *Id.* at 95.

[75] *Id.* at 94. This cannot be accomplished by simply stating that the strike was not based on a discriminatory manner; sufficient reasoning must be put forth. *Id.*

[76] *Id.* at 98.

[77] *Batson*, 476 U.S. at 85-87.

[78] *Id.* at 87.

[79] People v. Allen, 653 N.E.2d 1173, 1174 (N.Y. 1995); People v. Kern, 554 N.E.2d 1235, 1240 (N.Y. 1990).

In *People v. Allen*,[80] the defendant was charged with incest and sexual abuse.[81] During voir dire, the prosecutor used fourteen peremptory challenges against male jurors.[82] The defendant moved for a mistrial, stating that the prosecution used its peremptory challenges in a discriminatory manner based on gender.[83] Before the People could provide gender-neutral explanations, the trial court denied the motion and the defendant appealed.[84] The appellate division held that the "trial court erred in summarily denying a mistrial without requiring the People to offer neutral reasons."[85]

On appeal, the New York Court of Appeals analyzed the steps that need to be taken by both the defendant and prosecution when charged with using peremptory challenges in a discriminatory manner.[86] First, when the prosecution has allegedly used its peremptory challenges in a discriminatory manner, the defense has to "raise the inference" of such misconduct to the court.[87] Secondly, in response, the prosecution has to provide a neutral explanation for the peremptory challenge and the court must determine whether or not the reasoning set forth by the prosecution is truthful or pretextual.[88] In *Allen*, the court concluded that the prosecution met its burden in offering gender-neutral explanations in response to the challenges and elaborated that this step in the analysis required a two-prong

[80] *Allen*, 653 N.E.2d at 1173.
[81] *Id.* at 1175.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Allen*, 653 N.E.2d at 1175.
[86] *Id.* at 1177-78 (citing Hernandez v. New York, 500 U.S. 352, 358-59 (1991)).
[87] *Id.* at 1177.
[88] *Id.*

process.[89] First, "if the prosecutor offers no explanation, the defendant has succeeded in meeting the ultimate burden of establishing an equal protection violation" and second, "[i]f, however, the prosecutor offers facially neutral reasons supporting the challenge, the inference of discrimination is overcome."[90] Furthermore, the court asserted that the explanation could be any "facially neutral reason" even if it is one that does not make much sense; in essence, it can be anything so long as it does not violate the Equal Protection Clause.[91]

Moreover, not only did *Allen* emphasize the procedure that must be followed in raising a *Batson* challenge in New York, it also established that jury service is a privilege afforded under the New York Constitution,[92] and depriving an individual of this privilege based on race or gender not only violates the defendant's equal protection rights but also violates the excluded juror's equal protection rights by preventing participation in the governmental and democratic process as granted by the state constitution.[93]

Further, in *People v. Kern*,[94] the New York Court of Appeals held that the Equal Protection Clause of the New York Constitution is analogous to the Equal Protection Clause of the U.S. Constitution.[95] In *Kern*, defendants were convicted of manslaughter "and other charges arising out of their participation in an attack by a group of

[89] *Id.* at 1177-78.
[90] *Allen*, 653 N.E.2d at 1177.
[91] *Id.* at 1178 (citing Purkett v. Elem, 514 U.S. 765 (1995)).
[92] N.Y. CONST. art. I, § 1 states, in pertinent part: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof . . . ."
[93] *Allen*, 653 N.E.2d at 1177.
[94] 554 N.E.2d 1235 (N.Y. 1990).
[95] *Id.* at 1240.

white teen-agers upon three black men in the community of Howard Beach in Queens."[96] At trial, on the first day of jury selection, "defense counsel successfully challenged for cause one of the four black jurors on the panel . . . and subsequently peremptorily challenged all three black jurors."[97] The trial court held that the defense counsel could not use peremptory challenges to strike jurors in a discriminatory manner and ruled that the *Batson* application was applicable to the defense just as much as it was to the prosecution.[98] Ultimately, the defendants were convicted and appealed, arguing that "neither the State nor the Federal Constitutions prohibit a criminal defendant from exercising racially discriminatory peremptory challenges."[99]

The Court of Appeals re-examined *Batson* and stated that the equal protection rights afforded under the New York Constitution are coextensive with the U.S. Constitution when pertaining to equal protection for the defendants and therefore the prosecution cannot use peremptory challenges based on discriminatory reasons.[100] Furthermore, the court adopted the *Batson* test for setting forth a prima facie case for alleged discrimination.[101] Finally, the court addressed whether the concepts laid out in *Batson* applied to the defense just as

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[96] *Id.* at 1236.
[97] *Id.* at 1239.
[98] *Id.*
[99] *Kern*, 554 N.E.2d at 1240.
[100] *Id.*
[101] *Id.* at 1241; *see also Batson* 476 U.S. at 96

> First, the defendant is required to establish a prima facia case of discrimination by demonstrating that (1) he or she is a member of a cognizable racial group, (2) the prosecution has exercised peremptory challenges to exclude a member of that group from the petit jury, and (3) "these facts and any other relevant circumstances raise an inference" of purposeful discrimination.

much as they did to the prosecution.[102] The court dissected the Equal Protection Clause of the New York Constitution into two separate parts. It analyzed the first part, which states that " '[n]o person shall be denied the equal protections of the laws of this state' " as the equal protection right that is illustrated in the U.S. Constitution.[103] The court further explained that the protections that have been established by the U.S. Constitution and those principles outlined in *Batson* are the same as the principles followed in the New York Constitution.[104] Next, the court analyzed the second sentence of the New York Constitution's Equal Protection Clause, which states that " '[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights . . . by the state or any agency or subdivision of the state.' "[105] The court determined that this prong applied to a citizen's civil right to serve on a jury.[106] The court concluded that depriving a citizen of his or her civil rights "harms the excluded juror by denying this opportunity to participate in the administration of justice."[107] It does not matter if the defense or the prosecution causes this deprivation; either way it is unconstitutional because it results in a deprivation of individual rights.

The federal common law has established that depriving a citizen of his or her right to participate on a jury due to that individuals' race, gender, or any other significant group characteristic is unconsti-

[102] *Id.* at 1241; *see also* N.Y. CONST. art. I, § 1.
[103] *Kern*, 554 N.E.2d at 1241.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1241-42.
[107] *Id.* at 1242.

tutional because it is a violation of the Equal Protection Clause under the Fourteenth Amendment. The concern of using peremptory challenges in a discriminatory manner can, and has, been known to violate equal protections in two different ways. First, the accused is denied the equal protections of the laws when jurors are excused based on race or gender.[108] It has been well established that it is the constitutional right of the accused to be tried before a jury of his or her peers. Refusing to sit a particular juror due to a group characteristic would violate the accused's equal protection rights. Second, the right to serve on a jury is a constitutional privilege that is granted to all citizens, and by excluding a juror based on a discriminatory reason deprives that juror of his or her constitutional right to serve on a jury and participate in the legal system.[109]

Both the U.S. Constitution and the New York Constitution provide the same equal protection rights for an accused at trial. Both exemplify through direct language that depriving an accused of his or her rights to be heard by a jury of his or her peers is a violation of that person's equal protection rights.[110]

One significant difference that is present between the U.S. and New York Constitutions is the incorporation of the right to sit on a jury. The federal common law has established and interpreted that depriving an individual of his or her right to sit on a jury based on race or color denies that person their right to fulfill their duty as a

[108] *Batson*, 476 U.S. at 89.
[109] *Strauder*, 100 U.S. at 309.
[110] U.S. CONST. amend. XIV; N.Y. CONST. art. I, § 11.

citizen and participate in the democratic system.[111] Accordingly, this denies that individual her equal protection rights. New York has established this concept through its common law but it is further recognized and portrayed in the New York Constitution.[112] Unlike the U.S. Constitution, New York directly states that the right to serve on a jury is a privilege.[113] This leaves little room for error and is probably the more sound approach, because over time the court systems change and the various judges interpret concepts differently. By addressing the concept directly, the New York Constitution leaves little room for interpretation and provides concrete certainty that rights will not be violated.

Nevertheless, it is thoroughly established that discrimination in any courtroom in the United States will not be tolerated. Both the U.S. Constitution and federal common law as well as the New York State Constitution and state common law have laid out similar interpretations when dealing with peremptory challenges and equal protection rights. The federal common law has sound precedent that outlines the analysis that a court would have to endure if a challenge on a peremptory was made.[114] The New York common law has outlined and adopted the federal tests verbatim into the state system.[115]

In *Luciano*, the main issue was not whether there was a constitutional violation but rather whether the judge's discretion to as-

[111] *See Strauder*, 100 U.S. at 310.
[112] N.Y. CONST. art. I, § 11.
[113] *Id.*; *see also Kern*, 554 N.E.2d at 1242.
[114] *Batson*, 476 U.S. at 96.
[115] *See Allen*, 653 N.E.2d at 1177.

sign forfeiture as a remedy was proper.[116] Prior to determining whether this is a viable remedy, the underlying right of equal protection had to be analyzed. However, minimal case law on the federal level exists when determining whether or not this is appropriate. Federal common law has established a substantially sound interpretation that using peremptory challenges in a discriminatory manner does represent a constitutional violation. Nevertheless, the New York court took this one step further and applied the federal law to determine that by allowing forfeiture as a remedy it in turn furthers the basic concepts outlined in *Batson* and all applicable federal precedent. This results in a great distinction between the federal and the New York common law on the relevant topic. Through *Luciano*, which is a case of first impression, New York has for the first time has established that this remedy is appropriate. On the other hand, the federal common law been generally silent on the issue. *Luciano* does not reach the conclusion of whether or not there was a *Batson* violation, but based on overwhelming precedent the court might have concluded that there was a violation.

The Equal Protection Clause provides rights that are so fundamental that the courts have been reluctant to allow such discriminatory misuse of peremptory challenges. If such conduct were allowed, a slippery slope of peremptory violations may result. Thus, by allowing forfeiture of peremptory challenges it directly deters litigants from abusing the privilege. Accordingly, this affirms the underlying reasoning behind the Equal Protection Clause as well as the estab-

[116] *Luciano*, 890 N.E.2d at 218.

lished Supreme Court precedent on the topic.

Natasha Shishov