REASSIGNING *BATSON*: A MODERN APPROACH

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Abstract

In *Batson v. Kentucky*, the Supreme Court of the United States held that using peremptory challenges to strike jurors solely on their race violates the Equal Protection Clause. Following that decision, the Supreme Court extended *Batson* to gender-based peremptory challenges, holding that state-sponsored group stereotypes rooted in historical prejudice that bars a potential juror from serving on a jury violates that juror's equal protection right. As it currently stands, there is no federal statute prohibiting peremptory strikes on the basis of sexual orientation or gender identity. And although some courts at the state and federal level have held such strikes prohibited under *Batson*, the Supreme Court has yet to address the issue. The lack of protection for jurors based on their sexual orientation or gender identity fosters discrimination in the law, violates the rights of the stricken juror as well as a defendant's right to an impartial jury, and undermines public confidence in judicial proceedings. Following the Supreme Court's recent decision in *Bostock*, all federal courts should recognize gender identity- or sexual orientation-based discrimination as discrimination based on sex. This Note argues that *Batson* should be extended to all federal and state trial courts to expressly prohibit the exclusion of jurors based on sexual orientation or gender identity. There is no reason that the logic applied in *Bostock* should apply in the workplace but not in the jury box.

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INTRODUCTION

The Sixth Amendment guarantees all criminal defendants the right to a trial with an impartial jury.[1] This guarantee fosters "public confidence in the fairness of our system of justice."[2] To ensure fair and impartial trials, peremptory challenges help eliminate bias by allowing potential jurors to be stricken from the venire pool by counsel.[3] However, a violation of an accused's right to a fair and impartial trial, as well as a citizen's right to sit on a jury, occurs when a discriminatory peremptory challenge wrongfully prevents a cognizable group from serving on a jury.[4] Long acknowledging that peremptory challenges themselves are not a constitutional guarantee,[5] the Supreme Court has restricted peremptory challenges, and continues to restrict them further.[6]

A peremptory strike on the basis of a discriminatory characteristic "offends the rights and dignity of the excluded juror, interferes with the

1. U.S. CONST. amend. VI.

2. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

3. *See* JEFFERY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY 2 (3d ed. 2011) (explaining that the voir dire process is helpful in attaining an impartial jury); Jessica Satinoff, *Coming Out of the Venire: Sexual Orientation Discrimination and the Peremptory Challenge*, 11 FIU L. REV. 463, 466 (2016).

4. *Batson*, 476 U.S. at 87.

5. *E.g.*, Rivera v. Illinois, 556 U.S. 148, 152 (2009).

6. *See*, *e.g.*, *Batson*, 476 U.S. at 79; J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 127 (1994).

litigant's right to a fair trial by an impartial jury, and 'undermines public confidence in the fairness of our justice system.'"[7] Further, such a strike violates a potential juror's "equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[8] A *Batson* challenge, first established by the Court in the landmark case *Batson v. Kentucky*,[9] is the only way to determine a counsel's motivation for exercising a peremptory strike. A federal statute now prohibits the exclusion of jurors on the basis of "race, color, religion, sex, national origin, or economic status."[10] However, under the current framework, attorneys remain free to use peremptory challenges to remove potential jurors from the venire pool on the basis of sexual orientation or gender identity. Thus, the potential expansion of *Batson* to include lesbian, gay, bisexual, and transgender (LGBT) individuals is necessary to ensure the protection of a historically marginalized group.

This Note proposes that the Supreme Court's sexual orientation and gender identity inclusive theory of sex discrimination established by *Bostock v. Clayton County*[11] should apply to the jury box, and that the protections of *Batson* should, thus, extend to LGBT individuals.[12] Part I of this Note discusses the history of *Batson* and its evolution to include more protected classes. Part II of this Note discusses sexual orientation and gender identity in voir dire. Finally, Part III of this Note concludes that the protections of *Batson* should extend to protect individuals from discrimination on the basis of sexual orientation and gender identity.

I. EVOLVING HISTORY OF *BATSON*

A defendant has the right to trial by an impartial jury consisting of members who are selected pursuant to nondiscriminatory criteria.[13] To satisfy the Sixth Amendment's right to a trial by an impartial jury,[14] courts engage in voir dire—the process of questioning and selecting jurors to hear the case. During voir dire, there are two ways to remove a potential juror: either through a challenge "for cause"—the exclusion of

7. Sandy Weinberg, *A.B.A. Report to the House of Delegates*, 2018 A.B.A. SEC. CRIM. JUSTICE REP. 108D 1 (2017), http://www.abajournal.com/files/2018_hod_midyear_108D.pdf [https://perma.cc/C63F-R83M] [hereinafter A.B.A. Resolution] (quoting *Batson*, U.S. 476 at 87).

8. *J.E.B.*, 511 U.S. at 128.

9. 476 U.S. 79 (1986).

10. 28 U.S.C. § 1862 (1980).

11. 140 S. Ct. 1731 (2020).

12. *See id.* at 1741.

13. Powers v. Ohio, 499 U.S. 400, 400 (1991) ("[A]lthough an individual juror does not have the right to sit on any particular petit jury, he or she does possess the right not to be excluded from one on account of race."); Martin v. Texas, 200 U.S. 316, 321 (1906); *J.E.B.*, 511 U.S. at 141–42.

14. U.S. CONST. amend. VI.

a juror who indicates an inability or unlikeliness to judge a peer fairly and impartially[15]—or through a peremptory challenge, which is the removal of a juror without justification.[16] A lawyer may use an unlimited number of challenges for cause to remove a juror so long as they can articulate "an express reason as to why the court should not permit the person to sit on the jury."[17] Conversely, peremptory challenges generally do not require a party to give a reason why it struck a particular juror; typically, these strikes go unchallenged. And although the Constitution does not require any specific minimum or maximum number of peremptory challenges, such challenges are nonetheless limited by statute.[18] Notably, although their use is traditional, the Constitution does not prohibit or require the use of peremptory challenges.

Dating back to ancient Rome,[19] peremptory challenges have stood the test of time and continue to remain an important part of our legal system.[20] The "principal value" of peremptory challenges is to "help[] produce fair and impartial juries by eliminating extreme bias on both sides of a case."[21] And considering the overwhelming support from attorneys[22] as well as an unwillingness for courts to eliminate the *Batson* system, peremptory challenges will likely continue to be an important part of a jury trial for years to come.[23] Despite this, the Supreme Court has continuously noted that peremptory challenges "are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and fair

15. Swain v. Alabama, 380 U.S. 202, 220 (1965) (noting that "challenges for cause permit rejection of jurors on a narrowly specified, provable[,] and legally cognizable basis of partiality").

16. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

17. V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 2.12, at 2-26 (4th ed. 2010).

18. *See* 28 U.S.C. § 1870 (1959) (limiting peremptory strikes in civil cases in federal court to three for each party); *see also* ELLEN KREITZENBERG, JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY § 8:4 (2022) ("[T]he optimal number of peremptory challenges to allow each side is a matter upon which reasonable minds can differ.").

19. Satinoff, *supra* note 3, at 467.

20. *Id.* at 466.

21. A.B.A. Resolution, *supra* note 7, at 4 (citing Swain v. Alabama, 380 U.S. 202, 218–19 (1965)); *see also* STARR & MCCORMICK, *supra* note 17, at 2-29 ("The purpose of peremptory challenges is to ensure a fair and impartial jury by enabling each party to dismiss the most partial potential jurors.").

22. *E.g.*, Tera Bias, *The Impact of Technology on Equal Protection as Applied in Voir Dire: Examining Inventions' Influence on Peremptory Strikes and the Standard of Review*, 17 SMU SCI. & TECH. L. REV. 163, 185 (2014) ("[T]he American Bar Association continues to support the use of peremptory challenges, the standards of which presume peremptory challenges to be nondiscriminatory in nature.").

23. On August 30, 2021, the Arizona Supreme Court filed its order making Arizona the first state to eliminate peremptory challenges in civil and criminal cases. *See* Arizona Supreme Court, No. R-21-0020, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Aug. 30, 2021).

trial."[24] Accordingly, as with any discretionary judicial function, the judiciary must do a cost-benefit analysis to determine whether the targeting of a suspect class is necessary to meet a compelling government interest.[25] This Part gives a history of *Batson* challenges, followed by an overview of its elements, and finally discusses evolving restrictions placed on discriminatory peremptory challenges.

A. *History of* Batson

Although the peremptory challenge system is a beneficial tool to promote judicial fairness, it also has the potential to perpetuate unconstitutional discrimination. By "eliminating a particular group's experiences and perspectives from the interaction on the jury panel,"[26] a discriminatory peremptory challenge fosters discrimination in the law,[27] erodes public confidence in the judicial system,[28] and violates the rights of the defendant as well as the excluded juror.[29] The need to prevent such invidious discrimination has led to restrictions on peremptory challenges, both by statute[30] and precedent.[31]

The Supreme Court began restricting peremptory challenges in *Swain v. Alabama*,[32] where the Court held that denying Black venirepersons the opportunity to serve on a jury violated the Equal Protection Clause.[33] In *Swain*, the petitioner, a Black man, was convicted of rape and sentenced

24. *E.g.*, Georgia v. McCollum, 505 U.S. 42, 57 (1992); Rivera v. Illinois, 556 U.S. 148, 157 (2009) ("[T]here is no freestanding constitutional right to peremptory challenges.").

25. *See* Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 470 (2021) ("In the jury selection context governed by *Batson*, the Court has determined that targeting a suspect class can never pass this test.").

26. Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1016 (1989).

27. Batson v. Kentucky, 476 U.S. 79, 84 (1986).

28. *Id.* (emphasizing that the role of the jury is "safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge"); *see also* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 749 (1992) ("[C]ourts jeopardize their moral authority as chief enforcer of antidiscrimination norms, unless they impose the same requirements on themselves."); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) ("Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.").

29. *Batson*, 476 U.S. at 83 (holding that the discriminatory removal of an individual from the venire pool based on race "violate[s a] petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws").

30. *E.g.*, CAL. CIV. PROC. CODE § 231.5 (2006) (prohibiting peremptory challenges on the basis of sexual orientation).

31. *E.g.*, *Batson*, 476 U.S. at 84.

32. 380 U.S. 202 (1965).

33. *Id.* at 227–28; *see also* U.S. CONST. amend. XIV.

to death.[34] During voir dire, the prosecutor used peremptory strikes to remove all six Black jurors from the venire.[35] The Court held that, although denying Black venirepersons the opportunity to serve on a jury violates the Equal Protection Clause, the strikes were nonetheless constitutional because, while the petitioners proved discrimination in their particular case, they failed to show a pattern of systematic exclusion.[36]

Noted by the Supreme Court, the *Swain* requirement for a pattern of discrimination over a number of cases was hard to prove.[37] However, nearly twenty years later, the Supreme Court remedied its ruling in *Swain* in the landmark case of *Batson v. Kentucky* by doing away with the required showing of systematic exclusion—holding that prima facie discrimination may be evidenced by relying only on the facts of the case at issue.[38] In *Batson*, a Black man was charged with second-degree burglary and the receipt of stolen goods.[39] Following the prosecution's use of peremptory challenges to remove all four Black persons from the venire, the jury was comprised of only white people.[40] The all-white jury convicted Batson on both counts.[41] On appeal, the Supreme Court held that the prosecutor's use of peremptory challenges to strike all four Black people from the venire violated the Equal Protection Clause.[42] The Court reasoned that such intentional discrimination, which questions a juror's competency to serve based on race, was impermissible. The prosecutor could not "rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections."[43] Ultimately, "By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, [the Court's] decision enforces the mandate of equal protection and furthers the ends of justice."[44] The Court's ruling in *Batson* paved the way for more litigation over what constitutes permissible discrimination in voir dire.

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34. Swain v. Alabama, 380 U.S. 202, 203 (1965).

35. *Id.*

36. *Id.* at 224.

37. Batson v. Kentucky, 476 U.S. 79, 95 (1986) ("[S]ince the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case.").

38. *Id.*

39. *Id.* at 82.

40. *Id.* at 83.

41. *Id*.

42. *Id.* at 89.

43. *Id.* at 98 (internal citations omitted).

44. *Id.* at 99; *see also* Powers v. Ohio, 499 U.S. 400, 402 (1991) (permitting objection to racial peremptory challenges even when challenging party and excluded juror do not share same racial identity).

B. *Elements of a* Batson *Challenge*

Although the *Batson* ruling was originally limited to peremptory strikes by prosecutors, the Supreme Court has since extended the ruling to apply to civil litigants[45] and criminal defendants.[46] The Court in *Batson* outlined the current three-step test to prove a peremptory challenge is volitive of the Equal Protection Clause. First, the challenging party must make a prima facie case of intentional discrimination "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[47] This burden is not onerous;[48] a single challenge can be sufficient to establish a prima facie case.[49]

Once the defendant has established a prima facie case, the burden shifts to the striking party to articulate a group-neutral reason for the exclusion.[50] If the striking party is unable to give a nondiscriminatory reason, there is no third step; the *Batson* challenge will be sustained by the court.[51] This is because "irrational peremptories exercised on the whim of the prosecutor in no way contribute to the empanelment of an

45. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (extending *Batson* to apply to private civil litigants).

46. *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson* to criminal defendants).

47. SmithKline Beecham Corp. v. Abbot Lab'ys, 740 F.3d 471, 476 (9th Cir. 2014) (citing Johnson v. California, 545 U.S. 162, 170 (2005)). Illicit intent can be proven through circumstantial evidence including: (1) "the number and percentage of group members who have been excluded"; (2) "the possibility of an objective group-neutral explanation for the strike or strikes"; (3) "any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck"; (4) "differences among the various members of the allegedly targeted group who were struck"; (5) "whether those excluded are members of the same protected group as the defendant or the victim"; and (6) "the composition of the jurors already seated." Commonwealth v. Henderson, 486 Mass. 296, 311–12 (2020) (citing Commonwealth v. Jones, 477 Mass. 307, 322 (2017)); *see also* Michael C. Dorf, *Clarence Thomas Speaks—And Arguably Contradicts His Longstanding Views*, VERDICT (Mar. 28, 2019), https://verdict.justia.com/2019/03/28/clarence-thomas-speaks-and-arguably-contradicts-his-longstandingviews?utm_source=summarynewsletters&utm_medium=email&utm_campaign=2019-03-28-us-court-of-appeals-for-the-seventh-circuit-71d156c598&utm_content=text-verdict-title-1 [https://perma.cc/E6BL-PDKE] ("Prosecutors rarely admit that they were motivated by race, so defense attorneys must try to prove illicit intent through circumstantial evidence, including statistics about the race of the jurors struck.").

48. Crittenden v. Ayers, 624 F.3d 943, 955 (9th Cir. 2010).

49. Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose.").

50. Batson v. Kentucky, 476 U.S. 79, 94 (1986); *see also* Simmons, *supra* note 25, at 469 ("According to *Batson*, any disproportionate effect on a suspect class triggers a burden shifting that requires the state to prove the disparity is merely a coincidence, and that a race-neutral reason explains the real motivation for the statistical anomaly.").

51. Mark E. Wojcik, *Extending* Batson *to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U.L. REV. 1, 18 (2019) ("[A] common remedy for a Batson violation can be either to seat a juror who was improperly challenged or to start the jury selection process all over again with a new jury venire.").

unbiased jury, and thus cannot be justified under the Equal Protection Clause."[52] However, if the striking party can articulate a nondiscriminatory reason, then the court must ultimately determine whether a protected group was excluded from the jury as a result of purposeful discrimination[53] by examining "whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination."[54]

C. *Ever-Present Dangers of Pretext*

So long as the explanation offered is facially neutral, courts "[do] not demand an explanation that is persuasive, or even plausible."[55] This allows some crafty trial lawyers to offer neutral rationales, even when the true motive for a challenge is race or ethnicity.[56] This tactic is referred to as pretext. A case demonstrating a prosecutor's successful attempt at excusing a strike through pretext occurred in *Hernandez v. New York*.[57] In *Hernandez*, a jury convicted the defendant for attempted murder.[58] However, during voir dire, the prosecution struck three potential jurors with Spanish surnames.[59] Alleging impermissible discriminatory strikes, the defendant appealed his conviction.[60] Finding that the defendant had successfully made a case of prima facie discrimination, the prosecutor argued he had a nondiscriminatory reason for the challenge—that the stricken jurors either had a relative prosecuted by the district attorney's office or spoke Spanish and may not accept the translated testimony as final.[61] The Supreme Court addressed the question of whether a juror

52. Cheryl A. O'Brien, *Constitutional Law—Hernandez v. New York: Did the Supreme Court Intend to Overrule Batson's Standard of "Racially Neutral"?*, 15 W. NEW ENG. L. REV. 315, 345 (1993).

53. *Batson*, 476 U.S. at 98; *see also, e.g.*, Hernandez v. New York, 500 U.S. 352, 358–59 (1991).

54. *Flowers*, 139 S. Ct. at 2241.

55. Purkett v. Elem, 514 U.S. 765, 768 (1995); *see also* FREDERICK, *supra* note 3, at 336 ("While these explanations [for using peremptory challenges] need not rise to the level of a challenge for cause, they cannot be simple assertions of intuition, possible shared-race partiality, or affirmations of good faith by the prosecutor.").

56. *Purkett*, 514 U.S. at 768 (explaining that a race-neutral explanation offered by the strike's proponent need not be "persuasive, or even plausible"); *see also* Erica Hashimoto, *Motivating Constitutional Compliance*, 68 FLA. L. REV. 1001, 1019 (2016) ("[O]ther than the facts in the particular case—that the prosecutor struck most of the people of color or women from the jury—defendants often have little evidence that a particular prosecutor has engaged in intentional discrimination.").

57. 500 U.S. 352 (1991).

58. *Id.* at 355.

59. *Id.* at 358.

60. *Id.*

61. *Id.* at 360.

struck from jury service because of their Spanish language in a court translated proceeding violated a defendant's *Batson* protections.[62]

The Court found that the strikes were permissible, holding that peremptory challenges may be used to strike bilingual venirepersons so long as it is not based on race.[63] Noting that language ability could be a pretext for race-based challenges, the Court stated that, had the prosecutor relied on language alone as a basis for striking the juror, the Court would have found the strike unconstitutional.[64] However, in the context of his claim, it could be argued that the prosecutor offered race-neutral reasons for his strikes because of his heightened awareness that race could play in the trial.

Hernandez demonstrates the deference courts give to prosecutors when providing a nondiscriminatory justification for a strike. Thus, because establishing a prima facie case of impropriety "is not an onerous task,"[65] judges should "think long and hard before they decide to require no explanation from the prosecutor for the challenge and make no findings of fact."[66]

D. *Extension of* Batson *to Gender*

Since its ruling in *Batson*, the Supreme Court has continued to extend protection from discriminatory peremptory strikes beyond race.[67] Further, lower courts have extended *Batson* to cognizable groups not yet addressed by the Supreme Court, such as a potential juror's religious affiliation.[68]

Importantly, in *J.E.B. v. Alabama ex rel. T.B.*,[69] the Supreme Court extended *Batson* to gender-based peremptory strikes,[70] leading scholars to argue that the case has laid "the foundation for protecting transgender and gender-nonconforming jurors."[71] In *J.E.B.*, the State of Alabama, acting on behalf of a child in a paternity and child support case, used nine

62. *Id.* at 355.

63. *Id.* at 362.

64. *Id.* at 363–64. The Court further noted that there could be less-impacting alternatives, such as permitting Spanish-speaking jurors "to advise the judge in a discreet way of any concerns with the translation." *Id.* at 364.

65. *E.g.*, Commonwealth v. Jones, 477 Mass. 307, 321 (2017); Crittenden v. Ayers, 624 F.3d 943, 954 (9th Cir. 2010).

66. Commonwealth v. Issa, 466 Mass. 1, 11 n.14 (2013).

67. *See, e.g.*, *Hernandez*, 500 U.S. at 355 (extending *Batson* to protect ethnicity-based discrimination).

68. Wojcik, *supra* note 51, at 12.

69. 511 U.S. 127 (1994).

70. *Id.* at 136–37 (holding that peremptory strikes based on gender violate the Equal Protection Clause).

71. Julia C. Maddera, Batson *in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195, 200 (2016).

of ten total peremptory strikes against male jurors.[72] The court denied the male petitioner's objection, and an all-female jury found the petitioner was the father of the child in question.[73] On appeal**,** the Supreme Court held that the Equal Protection Clause prohibits peremptory strikes based on gender.[74] The Court reasoned that reinforcing prejudicial views of the abilities of men and women undermine judicial legitimacy and respect for the law.[75] While the Court acknowledged, as it had in previous cases, that no one has a right to serve on a jury, it reaffirmed that once an individual is summoned for jury service, he or she has "an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[76]

Given a "long and unfortunate history" of discrimination against women,[77] the Court applied heightened scrutiny to gender-based peremptory challenges. The Court emphasized, "Discrimination in jury selection, whether based on race or gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[78] Further, the Court noted, "While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, overpower those differences."[79]

The Supreme Court's decision in *J.E.B.* is largely controversial; the dissent argued that it "imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law."[80] Nonetheless, it has laid the foundation for future expansion of *Batson* to sexual orientation,[81] and—as courts and legislatures increasingly recognize the rights of transgender individuals—*J.E.B.* may be interpreted to further expand *Batson* to protect jurors on the basis of gender identity.

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

73. *Id.*

74. *Id.* at 139–40.

75. *Id.* at 140.

76. *Id.* at 128.

77. *Id.* at 136–37.

78. *Id.* at 140.

79. *Id.* at 135 (citing Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)).

80. *Id.* at 163 (Scalia, J., dissenting).

81. SmithKline Beecham Corp. v. Abbot Lab'ys, 740 F.3d 471, 484 (9th Cir. 2014) ("With *J.E.B.*'s concerns in mind and given that classifications on the basis of sexual orientation are subject to heightened scrutiny, we must answer whether equal protection forbids striking a juror on the basis of his sexual orientation. We conclude that it does.").

E. *Expansion of* Batson *to Sexual Orientation*

Justice Byron White's prediction in his concurrence of *Batson* has proven true: much ink has been spilled over the case's possible expansion.[82] Determining whether *Batson* extends to sexual orientation is no exception. The Supreme Court has yet to address whether *Batson* applies to sexual orientation or gender identity, leaving the lower courts to sort the matter out for themselves. This Section examines cases involving litigation over peremptory strikes based on sexual orientation at both the federal and state level. Notably, although the following cases address peremptory strikes based only on sexual orientation, their observations on the dignity of jurors and importance of jury service apply equally to any juror removed because of gender identity.[83]

1. Federal Litigation

Over time, precedent regarding discrimination of jurors based on sexual orientation has evolved. An early attempt to extend *Batson* to sexual orientation in federal court failed in *Johnson v. Campbell*.[84] However, the case failed not because the court determined that sexual orientation was not a suspect classification warranting protection,[85] but because the attorney did not "attempt to show discriminatory motivation on the part of the opposing attorney."[86] It was unclear whether opposing counsel knew of the potential juror's sexual orientation.[87] The striking party was able to provide a neutral reason for striking the juror.[88] And the juror's sexual orientation had no bearing on the subject matter of the case.[89]

However, the U.S. Court of Appeals for the Ninth Circuit addressed the issue again in the landmark case of *SmithKline Beecham Corp. v. Abbott Laboratories*,[90] extending *Batson* to challenges based on sexual orientation.[91] *SmithKline* involved an antitrust dispute over a licensing agreement for pricing of HIV medications.[92] During voir dire, the defendant, Abbott Laboratories, exercised a peremptory strike to remove

82. Batson v. Kentucky, 476 U.S. 79, 102 (1986) (White, J., concurring) ("Much litigation will be required to spell out the contours of the Court's equal protection holding today.").

83. Wojcik, *supra* note 51, at 15 n.103 ("Although the *SmithKline* decision addressed peremptory strikes based only on sexual orientation, its observations on the dignity of jurors and importance of jury service apply equally to any juror removed because of gender identity.").

84. 92 F.3d 951 (9th Cir. 1996).

85. *Id.* at 954.

86. *Id*. at 953.

87. *Id*. at 953–54.

88. *Id.*

89. *Id*. at 953.

90. 740 F.3d 471 (9th Cir. 2014).

91. *Id.* at 489.

92. *Id.* at 474.

a gay male juror from the venire.[93] GlaxoSmithKline (GSK), the plaintiff, objected to the strike and asked for the defendant's rationale.[94] The defendant did not attempt to conceal its discrimination of the stricken juror.[95] The trial judge allowed the juror to be stricken from the panel and the case proceeded.[96] GSK appealed after the jury awarded a verdict that was hundreds of millions of dollars less than what it originally sought.[97]

Finding that the prosecution struck the juror based on sexual orientation, the Ninth Circuit ruled that peremptory strikes to remove jurors based on their sexual orientation was prohibited by the Equal Protection Clause.[98] Applying heightened scrutiny, the court in *SmithKline* overruled its earlier decision in *Holloway v. Arthur Anderson & Co.*[99] and held that "gays and lesbians are no longer a 'group or class of individuals normally subject to rational basis review.'"[100] The court reasoned that *Batson* applied to strikes based on sexual orientation because of historical exclusion of gay men and lesbians from institutions of self-governance and the pervasive stereotypes about the group.[101] Citing *J.E.B.*, the Ninth Circuit "did not require that, to warrant the protections of *Batson*, women's experiences had to be identical to those of African Americans."[102]

2. State Litigation

Just as a federal court has found peremptory strikes on the basis of sexual orientation violate the Equal Protection Clause, so too have several state supreme courts. In 1978, the Supreme Court of California held in *People v. Wheeler*[103] that jurors may not be stricken on the basis of race, ethnicity, gender, or any similar group bias.[104] Extending *Wheeler*, the court in *People v. Garcia*[105] prohibited peremptory strikes based on a juror's sexual orientation.[106] In *Garcia*, a defendant stood trial for burglary.[107] After it "somehow became known that two members of the

93. *Id.*
94. *Id.*
95. *Id.* at 475.
96. *Id.*
97. *Id.*
98. *Id.* at 484.
99. 566 F.2d 659, 663 (9th Cir. 1977) (holding that transsexuals do not constitute a suspect class and rejecting both immutability and discrete and insular minority arguments).
100. *SmithKline*, 740 F.3d at 484 (citing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994)).
101. *Id.*
102. *Id.* at 486.
103. 583 P.2d 748 (Cal. 1978).
104. *Id.* at 761.
105. 92 Cal. Rptr. 2d 339 (Ct. App. 2000).
106. *Id.* at 347–48.
107. *Id.* at 340.

jury venire were lesbians,"[108] the prosecution removed both women from the venire.[109] The defendant made a *Wheeler* motion (California's equivalent of a *Batson* motion), challenging their exclusion.[110] The trial court denied the motion on the grounds that "sexual preference [was] not a cognizable group."[111] On appeal, the issue before the court was whether sexual orientation constituted a cognizable class whose participation is necessary to represent a cross section of the community.[112] Reversing the decision of the trial court, the California Court of Appeals held that lesbian and gay men "cannot be discriminated against in jury selection."[113] The court reasoned that lesbians and gay men shared "a common perspective arising from their life experience in the group,"[114] and no other "group—or groups—in the community could adequately represent the views of homosexuals."[115] Notably, this decision was later codified as a state statute.[116]

Similarly, when protestors were arrested for demonstrating outside of the San Diego County Clerk's Office in response to Proposition 8, prosecutors were verbally reprimanded by the judge after using peremptory challenges to remove two gay prospective jurors from the jury pool.[117]

More recently, in an issue of first impression, the Supreme Court of Massachusetts, in *Commonwealth v. Carter*,[118] held that sexual orientation is a protected class for purposes of a *Batson–Soares* challenge

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108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 341.
113. *Id.* at 348.
114. *Id.* at 343–44. The court explained:

> It cannot seriously be argued in this era of "don't ask; don't tell" that homosexuals do not have a common perspective—"a common social or psychological outlook on human events"—based upon their membership in that community. They share a history of persecution comparable to that of blacks and women. While there is room to argue about degree, based upon their number and the relative indiscernibility of their membership in the group, it is just that: an argument about degree. It is a matter of quantity, not quality.

Id.

115. *Id.* at 345.
116. *See* CAL. CIV. PROC. CODE § 231.5 (2006) (prohibiting peremptory challenges on the basis of sexual orientation).
117. Matthew T. Hall & Dana Littlefield, *Judge Slams Prosecutors for Dismissing Gay Jurors*, SAN DIEGO UNION-TRIBUNE (May 1, 2012, 11:43 AM), https://www.sandiegounion tribune.com/sdut-judge-prosecutors-erred-dismissing-gay-jurors-2012may01-htmlstory.html [https://perma.cc/943C-HMMU].
118. 172 N.E.3d 367, 372 (2021).

(Massachusetts's equivalent of a *Batson* challenge).[119] In *Carter*, two defendants were on trial for murder.[120] During voir dire, the prosecution used fourteen peremptory strikes, one of which was against a sixty-four-year-old female.[121] After being asked by the judge to clarify her household status, the juror answered that she had a "domestic partner."[122] The defendants raised a *Batson–Soares* challenge, asserting that the strike was against a person who "may be considered gay."[123] The judge chose not to do a *Batson–Soares* inquiry because sexual orientation, unlike gender and race, is not a suspect classification requiring such inquiry.[124] Thus, the judge declined to require the prosecutor to provide an explanation for striking a potentially gay person from the jury.[125]

On appeal, the defendants again raised a *Batson–Soares* challenge, asserting that one of the prosecution's strikes based on sexual orientation was unconstitutional.[126] Despite concluding that the defense failed to plead a prima facie case of discrimination,[127] the court nonetheless held that peremptory challenges based on a prospective juror's sexual orientation is prohibited by the Equal Protection Clause of the Fourteenth Amendment.[128] The court reasoned that "[t]hree important considerations *mandate* this conclusion":[129] (1) gay individuals have historically faced pernicious discrimination solely because of their sexual orientation;[130] (2) a person's sexual orientation is "inextricably bound up with sex;"[131] and (3) sexual orientation has no bearing on a person's ability to serve as an

119. *Id.* at 374.

120. *Id.* at 373–74.

121. *Id.* at 374, 378; *see also id.* at 372 (noting that "four [of the strikes were] based on the prospective jurors' race and one [was] based on a juror's sexual orientation").

122. *Id.* at 378.

123. *Id.*

124. *Id.* ("[T]he judge chose not to engage in any further Batson-Soares inquiry because this court has only required as much in instances involving 'gender and race,' and 'sexual orientation is not one of those suspect classifications.'").

125. *Id.* at 378.

126. *Id.* at 372.

127. *Id.* at 380–81 (noting that a prima facie case was not established because there were insufficient facts in the record to reasonably establish the stricken juror's sexual orientation).

128. *Id.* at 379 ("Given this painful history of discrimination, there is no question that gay people constitute a 'discrete group' as contemplated by [A]rt. 12 and as protected by the equal protection clause of the Fourteenth Amendment.").

129. *Id.*

130. *Id.*

131. *Id.* at 379–80 (quoting Bostock v. Clayton County Georgia, 140 S. Ct. 1731, 1737–38 (2020)); *see also* Maureen Leddy, *Mass. high court finds LGBTQ jurors are protected class*, AM. ASS'N. FOR JUST. (Sept. 9, 2021), https://auth.justice.org/resources/publications/trial-news/2021-sept-9-mass-high-court [https://perma.cc/6ZJJ-Z6QF] ("[B]y incorporating the U.S. Supreme Court's 2020 ruling in *Bostock* into its constitutional analysis, the [C]ourt agreed that sexual orientation and transgender status discrimination is also appropriately viewed through the lens of sex discrimination.").

impartial juror.[132] "[B]y unequivocally recognizing sexual orientation as a protected class, the Massachusetts Supreme Judicial Court has confirmed the importance of members of the LGBTQ community fully participating in one of the most fundamental aspects of American democracy—trial by a jury of one's peers."[133]

Further, noted by the concurrence, the first prong of *Batson* is irrelevant in the context of sexual orientation.[134] This is because "'sexual orientation, unlike race and gender, is concealable,' or at least more readily so."[135] Additionally, inquiring into one's sexual orientation is "an intolerable intrusion into privacy interests that courts ought to respect."[136]

II. GENDER IDENTITY IN JURY SELECTION

"Few places are a more real expression of the constitutional authority of the government than the courtroom, where the law itself unfolds."[137] That is because "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[138] No one should be subjected to discrimination simply for performing a civic duty. This is particularly harmful for the transgender community[139]—a group who has "suffered a long history of discrimination at the hands of the federal, state, and local governments, which has extended into the judicial system."[140] Courts have repeatedly failed to protect transgender jurors during voir dire.[141] However, the discriminatory removal of a juror based on sexual orientation or gender identity warrants the protections of *Batson*. Based

132. Carter, 172 N.E. at 380.

133. Leddy, *supra* note 131 (quoting the words of Casey Johnson, who is the AAJ LGBT Caucus Secretary).

134. *Carter*, 172 N.E.3d at 388 (Lowy, J., concurring) ("[U]pon timely objection to a peremptory challenge based on sexual orientation, we should conclude that that party has met the first prong of the *Batson* test.").

135. *Id.* at 386 (citations omitted).

136. *Id.* (citations omitted).

137. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) ("[D]iscrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there.").

138. Powers v. Ohio, 499 U.S. 400, 407 (1991); *see also* Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); SmithKline Beecham Corp. v. Abbot Lab'ys, 740 F.3d 471, 485 (9th Cir. 2014) ("Jury service is one of the most important responsibilities of an American citizen.").

139. *SmithKline*, 740 F.3d at 485 (noting that jury service "gives gay and lesbian individuals a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others").

140. A.B.A. Resolution, *supra* note 7, at 5.

141. *See infra* Section II.B (discussing cases in which courts have upheld discriminatory strikes against LGBT jurors).

on the reasoning of the court in *SmithKline*, denying any person the right to serve on a jury because of that person's sexual orientation or gender identity "demean[s] the dignity of the individual and threaten[s] the impartiality of the judicial system."[142] Failing to protect jurors from peremptory strikes based on their actual or perceived sexual orientation, gender identity, and gender expression denies countless individuals their constitutional right to a jury of their peers. Further, the discriminatory removal of LGBT individuals from the venire prevents the court from providing a defendant the requisite cross-section of the community.

This Part seeks to establish a foundation for further discussions regarding transgender rights by explaining current LGBT terminology, summarizing litigation over gender identity-based peremptory challenges, and arguing that gender identity deserves heightened scrutiny in regard to discriminatory peremptory strikes during voir dire.

A. *Terminology and Society's Evolving Understanding of LGBT Individuals*

Over time, social understanding and acceptance of LGBT individuals has grown. As societal acceptance increases, these individuals will have greater freedom to express their gender or sexual preference in ways that do not conform to traditional stereotypes. Ultimately, as social understanding has evolved, so too has the language used to describe members of the LGBT community. Language and labels are very important in LGBT culture.[143] This Section provides a brief survey on terminology and dispels common misconceptions about sexual orientation and gender identity.

Although they are often conflated, sex and gender are not the same thing. Sex refers to "the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones, and reproductive organs."[144] Gender refers to the socially constructed roles, behaviors, activities, and attributes that society has established for men and women.[145] Gender identity constitutes a person's inner feeling of being a man, woman, or another

142. *SmithKline*, 740 F.3d at 485 ("Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals.").

143. *See* Alexis Forbes, *A (Short) Primer on Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Culture in America*, THE JURY EXPERT (Feb. 6, 2014), http://www.thejuryexpert.com/2014/02/a-short-primer-on-lesbian-gay-bisexual-transgender-and-queer-lgbtq-culture-in-america/ [https://perma.cc/K5NH-UEJR].

144. *Gender and Health*, WHO, https://www.who.int/health-topics/gender#tab=tab_1 [https://perma.cc/CY44-ULT2].

145. *What Does Transgender Mean?*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/topics/lgbtq/transgender [https://perma.cc/LFC4-LRVX].

gender not necessarily visible to others.[146] Conversely, gender expression refers to "[h]ow a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics."[147]

"Cisgender" is a term used for people whose self-concept of gender matches their sex.[148] Transgender individuals are people "whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."[149] In contrast, "transsexual," a term often conflated with transgender,[150] refers to "people whose gender identity is different from their assigned sex at birth who seek[] to transition from male to female or female to male."[151] Many transgender people do not prefer this term because it sounds "overly clinical."[152] Not all transgender individuals pursue a permanent sex change. For example, "cross-dressers" are people who occasionally wear clothes, makeup, and accessories culturally associated with the opposite sex.[153] Further, many consider the older term "transvestite" derogatory.[154] Similarly derogatory is the term "gender identity disorder."[155]

Transgender and gender-nonconforming do not mean the same thing.[156] Gender-nonconforming individuals are persons "whose gender expression is different from societal expectations related to gender."[157] Gender identity and sexual orientation—two distinct aspects of identity—are also often conflated.[158] "Transgender and gender-nonconforming individuals are often grouped under the umbrella of the

146. *Transgender Terminology*, NAT'L CTR. FOR TRANSGENDER EQUAL. 1, https://www.nawj.org/uploads/files/annual_conference/session_materials/transgender/transgender_terminology-ncte.pdf [https://perma.cc/JM9S-MCK3] [hereinafter *Transgender Terminology*].

147. *Id.*

148. Laurel Wamsley, *A Guide To Gender Identity Terms*, NPR, https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq#cisgender [https://perma.cc/6987-K949] (June 2, 2021, 6:01 AM).

149. *What Does Transgender Mean?*, *supra* note 145.

150. Maddera, *supra* note 71, at 204.

151. *Transgender Terminology*, *supra* note 146, at 1.

152. *Id.*

153. *Id.* The term "transgender" is used in this Note to include individuals who cross-dress because they share many of the same characteristics of transgender individuals regarding gender expression and have faced similar discrimination in the jury box; however, it should be noted that cross-dressers do not necessarily identify as transgender.

154. *Id.*

155. German Lopez, *Myth #8: Transgender people are mentally ill*, VOX (Nov. 14, 2018, 4:08 PM), https://www.vox.com/identities/2016/5/13/17938120/transgender-people-mental-illness-health-care [https://perma.cc/43HR-LLMG].

156. *Transgender Terminology*, *supra* note 146, at 1.

157. *Id.*

158. Maddera, *supra* note 71, at 205.

lesbian, gay, bisexual, and transgender community due to similar histories of discrimination, as well as social, academic, and psychological conflation of sexual orientation and gender identity."[159]

A transgender individual may be heterosexual, gay, straight, or bisexual. Likewise, a gay, bisexual, or straight person may identify as gender-nonconforming or genderqueer.[160] Discussed below, courts have historically conflated sexual orientation and gender identity when exercising peremptory strikes against transgender and gender-nonconforming jurors,[161] exacerbating the very stereotypes the law attempts to stamp out.

B. *Litigation Regarding the Expansion of* Batson *to Gender Identity*

Despite transgender rights having been addressed at length in the context of the military,[162] workplace,[163] prisons,[164] schools,[165] and healthcare,[166] there has not been as much discussion about transgender individuals in the jury pool. The paucity of case law does not mean that

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159. *Id.*

160. *Transgender Terminology*, *supra* note 146, at 1 (defining genderqueer as "[a] term used by some individuals who identify as neither male nor entirely female"); *see also* Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 247 (2021) ("In addition to reclaiming a slur for the LGBT community as a whole, 'queer' also serves to reinforce the place of 'genderqueer' individuals—a term for someone who does not conform to traditional gender roles.").

161. *See infra* Section II.B (discussing cases in which courts have conflated terminology and use outdated slurs when referencing LGBT individuals).

162. *See* Leyland v. Orr, 828 F.2d 584, 586 (9th Cir. 1987); *see also* Gary J. Gates & Jody L. Herman, *Military Service in the United States*, WILLIAMS INST. 1 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf [https://perma.cc/PPS7-PF7J] (noting that transgender individuals have historically been, and continue to be, excluded from open military service; the repeal of "Don't Ask, Don't Tell" only applied to lesbian, gay, and bisexual soldiers, and an estimated 15,500 transgender individuals who currently serve in the military are subject to discharge if they disclose their status or seek gender transition surgery).

163. Following the Supreme Court's holding in *Bostock*, Title VII protects private employees from discrimination based on their gender identity. 140 S. Ct. 1731 (2020). Further, Executive Order 11246 and Executive Order 11478 prohibit federal government and federal contractors from engaging in employment discrimination on basis of gender identity. Exec. Order 11,246, 3 C.F.R. § 339 (1964–1965); Exec. Order No. 11,478, 3 C.F.R. § 803 (1966–1970), *reprinted as amended in* 79 Fed. Reg. 42,971 (July 23, 2014).

164. *See* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 516 (2008) (discussing safety concerns for incarcerated transgender individuals and the violence they face while behind bars).

165. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th. Cir. 2021), *as amended* (Aug. 28, 2020) (finding a school board's policy requiring students to use bathroom corresponding to their biological sex violated Equal Protection Clause).

166. Lange v. Houston Cnty., 499 F. Supp. 3d 1258, 1272 (M.D. Ga. 2020) (finding that a county health care plan which excludes coverage for sex change services is not discriminatory action against transgender individuals under the ADA).

these jurors do not face discrimination during jury selection; striking parties often mask such discrimination, or the courts never address it. Given a lack of recourse, parties may be less likely to challenge opposing counsel's strike on the basis of gender identity. Additionally, transgender individuals often have trouble making it to the venire box. There are various reasons for the lack of representation. Many transgender individuals lack updated identification documents or records, keeping them from being drawn for a jury pool in the first place.[167] Further, many transgender individuals have felony convictions—due, in part, to them having disproportionate contact with the criminal justice system (due to factors such as homelessness, discrimination, poverty, targeting by law enforcement, and other discrimination)—resulting in a lifetime bar to jury service in thirty-one states and all federal courts.[168] And, although transgender individuals have not been excluded from juries *by law*, like women and Black venirepersons have, such discrimination is not always so explicit.[169] Prosecutors can easily give a nondiscriminatory reason for a strike.[170] Further, the paucity of case law is also likely a result of societal discrimination, resulting in these individuals remaining "closeted."[171] Many transgender individuals choose to remain closeted or postpone their transition for several reasons, including a risk of their losing job, a fear of discrimination, familial rejection, public harassment and violence, being evicted or otherwise denied housing, and even a fear of being murdered.[172] Thus, there are privacy concerns if and when jurors are asked questions to determine their transgender status. Therefore, without protection, many of these individuals who remain closeted would be unlikely to bring a claim.

This Section also examines three cases of gender identity-based peremptory strikes during voir dire. It is important to note that courts and litigants have conflated gender identity with sexual orientation and use

167. Maddera, *supra* note 71, at 211 ("In some cases, transgender individuals may never even make it to the venire box. States commonly draw jury pools from voter rolls or licensed driver lists, but an estimated 124,000 transgender individuals lack updated identification documents or records.").

168. *Id.* at 211–12 ("[T]ransgender individuals have often have disproportionate contact with the criminal justice system, as a result of factors including homelessness, discrimination, poverty, targeting by law enforcement, and other discrimination.").

169. *Id.* at 226.

170. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

171. *See* SmithKline Beecham Corp. v. Abbot Lab'ys, 740 F.3d 471, 485 (9th Cir. 2014) ("Being 'out' about one's sexuality [or gender identity] is also a relatively recent phenomenon.").

172. *E.g.*, Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C.L. REV. 1, 13 (2013) ("Disclosing one's same-sex preference or gender identity opens one to potential rejection from family and friends, possible loss of a job, or physical harm.").

outdated terminology, thus furthering the very stereotyping that the Equal Protection Clause forbids.

In *Goodman v. Lands End Homeowners Ass'n of Hilton Head*,[173] two vacationers brought a civil suit against a homeowners association seeking damages for injuries sustained after walking off a seawall and falling onto the beach below.[174] During voir dire, the defendant exercised peremptory challenges to remove three Black jurors.[175] In response to the district court's inquiry into whether the defendant had a race-neutral explanation for the strikes, the defense claimed that the third-stricken venireman "would not be a good juror for the defense because he was very effeminate."[176] After grappling with the strikes' constitutionality, the district court concluded that the explanation justified the strikes, and the jury found in favor of the defendant.[177]

The petitioners appealed, arguing the defendant's use of peremptory challenges violated both the equal protection rights of the stricken venireman, and the petitioner's right to an impartial jury representing a fair cross-section of the community.[178] Although the court rejected the petitioners' argument, the U.S. Court of Appeals for the Fourth Circuit did not address the constitutionality of striking a juror based on how a "juror appears from a masculine vs. feminine standpoint."[179] Instead, the court gave enormous deference to the district court's decision, noting that it would only overturn the decision upon a finding that the race-neutral explanation was clearly erroneous.[180] Concluding that the district court's finding was not, the Fourth Circuit ruled that because the district court did not find pretext, the proffered reason for the third juror's strike—his effeminacy—was not pretextual.[181]

Allowing a strike because of perceived effeminacy—the display of feminine characteristics[182]—implicates issues of gender identity. By removing a juror on that basis, the court implied that the juror was somehow "defective by reason of his inadequate masculinity,"[183] which equates to saying that his feminine appearance and otherwise transgression of the traditional norms of masculinity was somehow permissible as a proxy for the defense counsel's race-neutral explanation for the strike. Notably, the Fourth Circuit may have ruled differently had

173. 961 F.2d 211 (4th Cir. 1992) (unpublished table decision).
174. *Id.* at *1.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at *2.
179. *Id.* at *3.
180. *Id.*
181. *Id.*
182. *Id.*
183. Maddera, *supra* note 71, at 207.

the case occurred after the Supreme Court extended *Batson* to gender-based peremptory challenges.[184]

In *Carter v. Duncan*,[185] the defendant was charged with petty theft and possession of a firearm and ammunition with a prior conviction.[186] During voir dire, the prosecution used peremptory challenges to remove five Black potential jurors, one of whom was a transgender woman named Christopher Lewis.[187] Lewis appeared for jury duty dressed as a woman, and petitioner's brief described her as a "cross dresser/transvestite."[188] The petitioner challenged the prosecutor's use of peremptory challenges. Arguing that the strikes were not racially biased, the prosecutor admitted the strike was made against Lewis because "[she] was a cross-dresser or transvestite."[189] Although defense counsel argued that society conflates "transvestites and homosexuals,"[190] the court denied the motion on the grounds that excluding a juror based on gender identity was reasonable and not racially motivated.

On appeal, the petitioner argued that the strike against Lewis was impermissible discrimination based on sexual orientation. However, the court rejected that argument as well for two reasons. First, the court noted the absence of information in the record about Lewis's sexual orientation.[191] Second, the court acknowledged the wide deference that is given to prosecutors in jury selection.[192] The court stated that "there is no federal law holding that either cross-dressers or transvestites constitute a protected class within the meaning of *Batson*."[193]

In *Commonwealth v. Smith*,[194] the petitioner was convicted of first-degree murder.[195] The petitioner challenged the prosecution's use of a peremptory challenge to strike a juror who "had some 'identification issues,' seemed to be a man dressed as a woman, and appeared to have breasts."[196] The petitioner argued on appeal that the trial judge allowed the prosecution to strike a juror claimed to be gay or transgender.[197] The

184. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129, 136–37 (1994) (holding that peremptory strikes based on gender violate the Equal Protection Clause); *see also* Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 415 (2000).

185. 2005 WL 2373572 (N.D. Cal. Sept. 27, 2005).

186. *Id.*at *1.

187. *Id.* at *5.

188. *Id.*

189. *Id.* at *16.

190. *Id.*

191. *Id.* at *16–17.

192. *Id.* at *18.

193. *Id.*

194. 879 N.E.2d 87 (Mass. 2008).

195. *Id.* at 90.

196. *Id.* at 95.

197. *Id.* at 90.

court acknowledged the novelty of the issue, but nonetheless declined to answer the question because of a lacking "necessary factual foundation" in the record.[198] Thus, the court upheld the striking of a transgender venire member justified by discriminatory stereotypes.

These cases show that transgender jurors face discrimination in the jury box. They also demonstrate that barring discrimination on the basis of sexual orientation is not enough. There is a large risk that striking parties will use proxies to hide a strike motivated by a juror's transgender status. This is because gender identity can be used as a proxy for sexual orientation. Ultimately, as societal acceptance and legal protections for transgender individuals increase, more transgender individuals will be called for jury service. Therefore, providing them protection from discriminatory peremptory strikes is crucial to ensure the shared perspectives of a historically marginalized group are not excluded from the jury box.

III. EXTENDING *BATSON* TO GENDER IDENTITY

Under the current state of the law, Congress has yet to enact legislation that fully protects transgender jurors in both state and federal court.[199] Nonetheless, a growing number of states prohibit gender identity discrimination in housing, healthcare, education, employment, and public accommodations.[200] And following the Ninth Circuit's decision in *SmithKline*, several states have enacted legislation explicitly protecting transgender jurors.[201] However, without the protection of federal anti-discrimination laws, the duty to extend *Batson* falls to the courts to exclude such discriminatory peremptory challenges.

Courts have not come to a consensus on how to approach the issue of which standard of review applies to gender identity-based discrimination—some extend sex discrimination to include gender identity, some reject gender identity as an independent suspect

198. *Id.* at 96.

199. Legislation has been introduced, but not passed, in both the house and the senate. H.R. 5, more commonly known as the Equality Act, was originally introduced in 2015 and recently reintroduced in 117th Congress and passed the House of Representatives on February 25th, 2021.H.R. 5, 117th Cong. (2021). The Equality Act, seeks to expand non-discrimination protections for transgender individuals in a variety of contexts, including the jury box. Specifically, the act seeks to amend 28 U.S.C. § 1862 to include sexual orientation, gender identity, and gender expression, thereby explicitly providing that transgender individuals cannot be removed from a jury without cause. *Id.*

200. *See Equality Maps: Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, www.lgbtmap.org/equality_maps/jury_nondiscrimination [https://perma.cc/MS75-SMK2].

201. Currently, the states of Illinois, Colorado, Washington, Maine, and Minnesota, have all passed jury access legislation that bans discrimination in voir dire on the bases of sexual orientation, gender identity, and gender expression. *Id.*

classification,[202] while others narrowly construe sex discrimination to exclude gender identity.[203] However, following the Supreme Court's recent landmark decision in *Bostock*, courts should interpret sex discrimination to be inclusive of discrimination based on sexual orientation or gender identity.[204] Further, should courts narrowly construe sex discrimination to exclude gender identity, gender identity should nonetheless survive heightened judicial scrutiny. Ultimately, the outcome is the same—gender identity-based discrimination in the jury box is unconstitutional and should be prohibited.

This Part first discusses the current state of legislature regarding gender-based discrimination in the jury box, and then examines the level of judicial scrutiny courts have applied for sexual orientation-based discrimination, followed by a similar examination of cases involving gender identity-based discrimination. This Note urges that the Ninth Circuit's reasoning in *SmithKline* and the Supreme Court's analysis of sex discrimination in *Bostock* be adopted by all courts when assessing discriminatory peremptory strikes based on sexual orientation or gender identity.

A. *Courts Should Adopt the Principles of* Bostock *in the Voir Dire Context to Prohibit Peremptory Challenges Based on Sexual Orientation and Gender Identity*

Following the ratification of the Fourteenth Amendment, its protections only applied to "freed slaves." It was not until *Strauder v. West Virginia*[205] that the Supreme Court extended the Fourteenth Amendment to other individuals.[206] Similarly, the Supreme Court should extend *Batson* to transgender and gender non-conforming individuals, "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[207] Notably, although the following cases discuss sex discrimination in the context of Title VII, the rationales should be similarly applied to equal protection jurisprudence.[208] Indeed, courts

202. *E.g.*, Holloway v. Arther Anderson & Co., 566 F.2d 659, 663 (9th Cir. 1977) ("Examining the traditional indicia of suspect classification, we find that transsexuals are not necessarily a 'discrete and insular minority' . . . .").

203. *See* Maddera, *supra* note 71, at 215–17 (discussing cases that narrowly construed sex discrimination).

204. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (holding that discrimination based on sexual orientation or gender identity is discrimination based on sex for the purposes of Title VII).

205. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

206. *Id.* at 71.

207. *Bostock*, 140 S. Ct. at 1741.

208. Notably, transgender individuals typically bring discrimination claims against employers under Title VII because it applies to private and public employers; conversely, an equal

utilize the same analytic framework in assessing claims of discrimination in both the context of Title VII of the Civil Rights Act of 1964[209] and the Equal Protection Clause. Ultimately, if "sex" encompasses gender identity in the workplace but not in the jury box, the law will not adequately protect transgender individuals from discrimination.

The Supreme Court began its recognition of transgender individuals in the landmark case *Price Waterhouse v. Hopkins*.[210] There, an employee sued her former employer for denying her partnership because she did not fit the partners' idea of what a female employee should look and act like.[211] Specifically, she was told that in order to get promoted she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[212] The Court held that such gender stereotyping constituted actionable sex discrimination under Title VII.[213]

Following the Supreme Court's decision in *Price Waterhouse*, courts have interpreted sex discrimination to also include sexual orientation and gender identity in a variety of contexts, including Title VII, the Gender Motivated Violence Act, the Equal Credit Opportunity Act, and § 1983 claims,[214] demonstrating the argument's growing prominence and an increased judicial understanding of transgender identity. Further, in *Macy v. Holder*,[215] the Supreme Court demonstrated judicial recognition of gender identity by holding that discrimination on the basis of gender identity is a form of sex stereotyping, and thus prohibited in employment as a form of discrimination on the basis of sex under Title VII.[216]

The themes of *Price Waterhouse* and *Macy* culminated in the recent landmark case of *Bostock*, where the Supreme Court explicitly extended the definition of sex discrimination under Title VII to encompass

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protection claim may only be brought against public employers and other state actors. *See* Maddera, *supra* note 71, at 222.

209. Title VII of the Civil Rights Act of 1964 (prohibiting discrimination in the workplace on the basis of race, color, religion, sex, or national original).

210. 490 U.S. 228 (1989).

211. *Id.* at 235.

212. *Id.*

213. *Id.* at 258.

214. *See* Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (noting that a bank's refusal to give a loan application to a male dressed in women's clothing solely because of the way he was dressed was sex discrimination prohibited by the Equal Credit Opportunity Act).

215. EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

216. *Id.* at *11 ("[D]iscrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."); *see also* Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *6 (July 15, 2015) ("Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex.").

discrimination on the basis of sexual orientation or gender identity.[217] *Bostock* was an aggregate of three cases with the same fact pattern: "An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."[218] The issue before the Court was whether discrimination on the basis of sexual orientation or gender identity was discrimination under Title VII.[219] The Court held that it was. Importantly, rather than requiring Title VII to explicitly list sexual orientation or gender identity, the Court held that discrimination based on sexual orientation or gender identity "necessarily entails discrimination based on sex; the first cannot happen without the second."[220] The Court reasoned that sexual orientation and gender identity are "inextricably bound up with sex."[221] Thus, an employer who discriminates on the basis of sexual orientation or gender identity "must, along the way, intentionally treat an employee worse based in part on that individual's sex."[222]

Rejecting the employer's argument that discrimination based on sexual orientation or gender identity are not referred to as sex discrimination in ordinary conversation,[223] the Court pointed out that liability for sex discrimination had already been extended to include sexual harassment,[224] and motherhood discrimination.[225] Further, the Court noted that an individual's sexual orientation or gender identity have no bearing on the individual's competency as an employee.[226]

Equality extends to the courtroom, and especially to jury composition. Condemning discrimination in the workplace but allowing it to persist in

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217. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020); *see also id.* at 1739 ("[T]he statute prohibits employers from taking certain action's 'because of sex.'").

218. *Id.* at 1737.

219. *Id.* at 1753 ("The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

220. *Id.* at 1746–47 ("By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today."); *see also id.* at 1739 ("The only statutorily protected characteristic at issue in today's cases is 'sex.'").

221. *Id.* at 1742.

222. *Id.*

223. *Id.* at 1745.

224. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

225. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring) ("[P]ersons of like qualifications [must] be given employment opportunities irrespective of their sex.").

226. *Bostock*, 140 S. Ct. at 1741 ("An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'") (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)).

the courtroom implies that the government sanctions such discrimination. Just as an employer who intentionally discriminates against employees for being homosexual or transgender has discriminated based on sex,[227] so too do attorneys who remove prospective jurors based on their sexual orientation or gender identity. Because notions of sex discrimination have evolved to include discrimination on the basis of gender identity or expression following the Supreme Court's *Bostock* decision, courts should apply the same rationale in the context of Title VII to the jury box to protect transgender jurors. Thus, the Supreme Court's decision in *J.E.B.*—prohibiting gender-based peremptory challenges—should also be interpreted to include challenges on the basis of sexual orientation and gender identity.

B. *Equal Protection Analysis: Discrimination Based on Sexual Orientation or Gender Identity Warrants Heightened Scrutiny*

Following the Supreme Court's *Bostock* decision, all federal law references to discrimination on the basis of sex should also be interpreted to include sexual orientation and gender identity.[228] However, that interpretation has not yet been applied in the voir dire context. Should courts decide to narrowly define sex discrimination to exclude sexual orientation and gender identity, such classifications nonetheless warrant a degree of scrutiny higher than rational basis review.

Under the current state of the law, parties may use peremptory challenges to remove "any group or class of individuals normally subject to 'rational basis' review."[229] However, since the Supreme Court's decision in *J.E.B.*, federal courts have held that *Batson* "prohibits peremptory challenges based on *any* classification that warrants heightened judicial scrutiny."[230] That is because the "total or seriously disproportionate exclusion of [a protected class] from jury venires is itself such an 'unequal application of the law . . . as to show intentional

227. *Id.* at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.").

228. *Jury Access*, LGBTQ+ BAR, https://lgbtqbar.org/programs/advocacy/jury-access/ [https://perma.cc/74NT-VE89] ("[T]he Bar believes that the U.S. Supreme Court's opinion in *Bostock v. Clayton County* should ultimately be interpreted to mandate that all federal law reference to nondiscrimination on the basis of sex also include sexual orientation, gender identity, and gender expression . . . .").

229. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994).

230. A.B.A. Resolution, *supra* note 7, at 1 ("A member of a class entitled to heightened scrutiny . . . receives protection under the rule established in Batson.") (quoting United States v. Watson, 483 F.3d 828, 831 (D.C. Cir. 2007)).

discrimination.'"[231] Thus, determining the appropriate level of scrutiny for gender identity classifications is "central to the inquiry."[232]

When determining what level of review to apply, the Supreme Court has historically applied an analysis of four factors: (1) whether the classified group has suffered a history of discrimination; (2) whether the classification has any bearing on a person's ability to perform in society; (3) whether the group is a minority or politically powerless; and (4) whether the defining characteristic is "immutable" or beyond the group member's control.[233] Courts apply strict scrutiny to government actions that target groups who belong to a "suspect class,"[234] such as race, national origin, and alienage.[235] Courts apply heightened scrutiny to quasi-suspect classes, such as gender[236] and legitimacy of birth.[237] Under strict or heightened scrutiny, the burden is on the state to prove that an action was not discriminatory.[238] Generally, to satisfy strict or heightened scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[239] The Supreme Court undertook a scrutiny analysis in *J.E.B.* and *Batson*. Under both a strict and heightened scrutiny analysis, the Supreme Court determined that no substantial state interest is promoted by allowing jurors to be peremptorily eliminated from the jury solely because they are members of a protected class.[240]

1. Sexual Orientation

Before discussing gender identity, it is important to first address sexual orientation. Although not the focus of this Note, applying heightened scrutiny to sexual orientation-based discrimination will likely

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231. Batson v. Kentucky, 476 U.S. 79, 93 (1986) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)) (internal citations omitted).

232. Maddera, *supra* note 71, at 212.

233. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–32 (1996) (summarizing and applying the factors); Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987) (same); Lyng v. Castillo, 477 U.S. 635, 638 (1986) (same); Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (same).

234. Maddera, *supra* note 71, at 212.

235. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

236. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); *Virginia*, 518 U.S. at 555 ("[A]ll gender-based classifications today warrant heightened scrutiny.") (internal quotation marks omitted).

237. *See, e.g.*, Gomez v. Perez, 409 U.S. 535, 537–38 (1973) (holding state exclusion of illegitimate children from right of action for wrongful death of parent violates the Equal Protection Clause).

238. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136–37 (1994).

239. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993) (internal citations omitted).

240. *E.g.*, Batson v. Kentucky, 476 U.S. 79, 87 (1986); J.E.B., 511 U.S. at 140.

be the trend courts will follow. In addition to federal courts,[241] several state supreme courts have held that sexual orientation classifications are subject to heightened scrutiny.[242] Importantly, in the wake of *Obergefell v. Hodges*,[243] discussed below, courts will likely find sexual orientation to warrant a degree of scrutiny higher than rational basis.

Building on precedent, the Supreme Court in *United States v. Windsor*[244] held that Section 3 of the Defense of Marriage Act (DOMA)—legislation that prohibited same-sex marriage—violated the Equal Protection Clause.[245] Although the Court, as it had in the past, did not explicitly address what level of review it applied,[246] the Court applied something more than rational basis review.[247] Following *Windsor*, the Supreme Court in *Obergefell* held that denying same-sex couples the right to marry violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[248] Again, the Court did not expressly articulate what standard of review it had applied. Nonetheless, the Court determined that classifications based on sexual orientation should be treated with suspicion and are subject to a level of scrutiny above rational basis review.[249] While precedent suggests that the Supreme Court would apply a rational basis review to LGBT legislation, *Obergefell* demonstrates a potential shift in the manner in which society and courts view the LGBT community.

In the context of peremptory strikes, the Ninth Circuit in *SmithKline*, applying the same analysis as the Supreme Court in *Windsor*, explicitly found that disqualifying otherwise eligible citizens from public benefit solely because of their sexual orientation triggers a strict or heightened scrutiny analysis.[250] This Note proposes that courts follow the same rationale employed by the Ninth Circuit and determine that

241. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 985–90 (N.D. Cal. 2012); Baskin v. Bogan, 766 F.3d 648, 655 (7th Cir. 2014).

242. *See* Griego v. Oliver, 316 P.3d 865, 884 (N.M. 2013); Varnum v. Brien, 763 N.W.2d 862, 886 (Iowa 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 452–53 (Conn. 2008).

243. 576 U.S. 644 (2015).

244. 570 U.S. 744 (2013).

245. *Id.* at 775.

246. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (addressing sexual orientation discrimination in the due process context).

247. *Windsor*, 570 U.S. at 793–94 (Scalia, J., dissenting) (noting that the Court "does not apply strict scrutiny . . . [b]ut the Court certainly does not apply anything that resembles that deferential framework.").

248. Obergefell, 576 U.S. at 681.

249. A.B.A. Resolution, *supra* note 7, at 7 (noting that the Court in *Obergefell* "implicitly acknowledge[d] that [the] four factors the Court has considered in determining whether a classification should be treated with suspicion are satisfied with respect to sexual orientation").

250. SmithKline Beecham Corp. v. Abbot Lab'ys, 740 F.3d 471, 484 (9th Cir. 2014) ("[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.").

discriminatory peremptory strikes based on sexual orientation or gender identity warrants review higher than rational basis under the Equal Protection Clause. As protections based on sexual orientation increase, people may begin to question why banning discrimination on the basis of gender identity is necessary. However, because courts and legislatures recognize a line between sexual orientation and gender identity, transgender jurors will remain vulnerable if only sexual orientation is protected. And, as discussed above, attorneys will continue to strategically use other categories as substitutes for impermissible proxies in order to defeat *Batson* challenges. Thus, although sexual orientation and gender identity are two distinct classifications, the same logic that applies to extend protections for sexual orientation discrimination should apply equally to gender identity discrimination.

2. Gender Identity

Like race and gender, gender identity discrimination is based on "prejudice and antipathy" as opposed to serving a "legitimate state interest,"[251] warranting a heightened scrutiny analysis.[252]

a. History of Discrimination

The long history of discrimination against transgender people should convince the courts to analyze such discrimination under a heightened standard of review or classify transgender individuals as a separate protected class.

The protections of the Fourteenth Amendment have been extended to groups that have "historically been the object of discrimination."[253] Like race and sex, transgender prejudices have led to decades of discrimination. For example, courts did not begin invalidating the outwardly discriminatory laws criminalizing cross-dressing established in the nineteenth century until the late 1970s and 1980s.[254] Further, the

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251. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

252. Indeed, there are cases in which courts have already applied heightened scrutiny to gender identity classifications in contexts other than the jury box. *See*, *e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (noting that sex stereotyping based on gender-nonconforming behavior is impermissible discrimination); Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000); Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) ("Accordingly, governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody 'the very stereotype the law condemns.'") (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 138 (1994)).

253. United States v. DeJesus, No. 99-728 (JBS), 2002 WL 32989738, at *6 (D.N.J. Jan. 24, 2002).

254. Maddera, *supra* note 71, at 226 ("Starting in the mid-nineteenth century, numerous jurisdictions criminalized cross-dressing. Courts did not begin to invalidate these laws until the late 1970s and 1980s.").

transgender community has suffered systematic exclusion from many opportunities. Like the gay community, transgender individuals have been subject to historic discrimination by the government in many forms: criminalizing same-sex intimacy; prohibiting certain employment, including military service; being excluded under immigration laws; and in many other arenas.[255] Transgender individuals have historically been targets of hate crimes and have high rates of suicide.[256]

Historical discrimination of LGBT individuals has invidiously penetrated their ability to serve on a jury. And, as discussed above, the paucity of case law is not indicative of a lack of discrimination. Indeed, data indicates a substantial number of non-heterosexual prospective jurors encounter bias in some form.[257] LGBT individuals have reported being forced to disclose their sexual orientation against their will during voir dire, and forced to hear judges, attorneys, and witnesses sometimes make negative comments about a person's sexuality.[258] For example, in a California study, thirty percent of lesbian or gay court users believed those who knew their sexual orientation did not treat them with respect, and thirty-nine percent believed their sexual orientation was used to lessen their credibility.[259]

b. Bearing on Juror Competence

"A fundamental objective of a fair jury system is that no person or class of persons be denied the right to serve on a jury because of status of race, religion, sex or age so long as they are competent."[260] Competence

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255. Obergefell v. Hodges, 576 U.S. 644, 661 (2015) ("Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.").

256. *See* Ann P. Haas et al., *Suicide Thoughts and Attempts Among Transgender Adults*, NAT'L TRANSGENDER DISCRIMINATION SURVEY 2 (Sept. 2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf [https://perma.cc/5H7N-C9KJ] (providing statistics for suicide attempts among transgender individuals).

257. See Vanessa H. Eisemann, *Striking A Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 8 n.55 (2001) (citing an empirical study in California courts, which noted that twenty-two percent of gay and lesbian court users felt threatened because of their sexual orientation in general, and thirty-eight percent felt threatened when sexual orientation became an issue).

258. *See* Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: the Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669, 674–75 (2011) (examining empirical studies in California and New Jersey that evaluated the experiences of lesbians and gay men with the court system).

259. Judicial Council of the State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee*, J. COUNCIL OF CAL.5 (Jan. 2001), http://www.courts.ca.gov/documents/sexualorient_report.pdf [https://perma.cc/63EV-KY8M].

260. State v. Willis, 293 N.E.2d 895, 896 (Mun. 1972).

to serve as a juror ultimately depends on an ability to impartially consider evidence presented at a trial.[261] The court in *United States v. Watson*[262] determined that disabled persons did not qualify for the protections of *Batson*, reasoning that the jurors who were stricken were blind and thus were unable to see the visual evidence presented to them.[263] Similarly, *Batson* does not apply to challenges based on obesity because obesity is not subject to heightened scrutiny.[264] Further, "Several circuits have considered and rejected the claim on the grounds that age is not a suspect class that is subject to either strict or heightened scrutiny."[265]

However, much like race, alienage, and national origin—and unlike disability, weight, or age[266]—gender identity does not bear any relation to an individual's ability to serve as a juror or their ability to contribute to society.[267] Just as sexual orientation and gender identity were found not to have any bearing on an employee's competence, so too must they have no bearing on juror competence.

c. Political Powerlessness

Just as lesbian women and gay men have been deemed a politically vulnerable minority,[268] so too should transgender individuals. A group is politically powerless upon a showing of "a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs."[269] The transgender community has certainly experienced such social and cultural isolation. The group represents a small percentage of the population. And, as discussed above, current legislation falls short of providing them much needed protection as only a minimal number of states have enacted protections for transgender individuals. Further, the group lacks representation as non-transgender

261. *See* Thiel v. Southern Pacific Co., 328 U.S. 217, 223–24 (1946); *see* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (noting juror competence depends on "assessment of individual qualifications and ability impartially to consider evidence").

262. 483 F.3d 828 (D.C. Cir. 2007).

263. *Id.* at 834.

264. United States v. Santiago-Martinez, 58 F.3d 422, 423 (9th Cir. 1995).

265. STARR & MCCORMICK, *supra* note 17, at 2-35–2-36.

266. Obergefell v. Hodges, 576 U.S. 644, 668 (2015) (discussing that same-sex couples are just as capable as opposite-sex couples to get married or raise children).

267. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 612 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (concluding that "[b]eing transgender bears no [] relation" to an individual's ability to contribute to society).

268. *Obergefell*, 576 U.S. at 679 ("Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.").

269. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., dissenting).

legislators cannot identify with the transgender community or the experiences of its members.[270]

d. Immutability

Immutability is often analyzed by addressing whether the characteristic is a trait determined at birth.[271] Since the Supreme Court's recent holding in *Obergefell*, sexual orientation has been recognized as a defining and immutable characteristic.[272] Similarly, transgender individuals do not belong to a group because of their behavior; they identify as transgender because of a "physical or psychological immutable trait that is associated with Gender Identity Disorder."[273] Notably, immutability may be difficult to prove for those individuals without the disorder.

Ultimately, judicial interpretation of sex discrimination has expanded to reflect our evolving understanding of sexual orientation and gender identity. Just as Title VII did not initially protect LGBT individuals but was later extended to be LGBT-inclusive, so too should the protections of *Batson* be extended to LGBT individuals. Put simply, adhering to originalism would likely result in finding transgender individuals merit no constitutional protections.[274] By that logic, courts may never apply interpretations of anti-discrimination law in different contexts. Therefore, courts should apply heightened scrutiny to peremptory challenges that strike potential jurors based on sexual orientation and gender identity.

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270. Powers v. Ohio, 499 U.S. 400, 401 (1991) ("[D]iscrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt.").

271. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (emphasizing that the immutability of a trait is determined largely by whether it is an "accident of birth" and thus is virtually impossible to change).

272. *Obergefell*, 576 U.S. at 658, 661; *see also* Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012) ("[S]exual orientation is recognized as a defining and immutable characteristic because it is so fundamental to one's identity."); Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 322 (D. Conn. 2012) ("Although sexual orientation, like national origin, may not be as obvious a badge as race or sex, that does not indicate that it cannot also be immutable or that such a classification does not also offend the principles of equal protection.").

273. Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 901 (2007).

274. See *Obergefell*, 576 U.S. at 671, where the court explained:

> If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

CONCLUSION

The current state of the law is insufficient to provide LGBT jurors the protection they are entitled to. The LGBT community has been historically discriminated against and excluded from institutions of self-governance. Given this history, ensuring their participation in our judicial system is necessary to create a cross-section of the community. However, as societal acceptance of the LGBT community increases, and more individuals choose to live openly, so too will there be a greater likelihood of discrimination. Protecting transgender individuals from discriminatory peremptory strikes is in accordance with *Batson*.

The Supreme Court's recent decision in *Bostock* exemplifies a shift in judicial recognition of LGBT individuals. Regardless of whether gender identity discrimination is grouped under sex discrimination, or narrowly construed to exclude gender identity from sex discrimination, the result is the same. Courts should interpret *J.E.B.*'s prohibition on gender-based peremptory challenges to also include challenges based on sexual orientation and gender identity.