

PEREMPTORY CHALLENGES TO JURORS BASED ON SEXUAL ORIENTATION: PREEMPTING DISCRIMINATION BY COURT RULE

ESTHER J. LAST*

During jury selection in a case involving a medication for HIV, a potential juror who is male responds to a question from the judge, mentioning his partner.¹ He refers to his partner several more times using the masculine pronoun, “he,” in response questions from the judge.² He also states that he has friends with HIV.³ Defense counsel has a brief interaction with the potential juror, establishing only that the potential juror has no particular knowledge of the drug in the case.⁴ Defense counsel does not ask any questions about the potential juror’s ability to remain fair and impartial.⁵ Defense counsel then exercises a peremptory strike against the potential juror.⁶

Attorneys are not required to state a reason for striking a potential juror when exercising a peremptory challenge, but why was this man struck from the jury panel? Is this man gay? How would that be determined? If he is gay, is it acceptable to strike him solely for this reason? Should the attorney be forced to give a reason, other than the man’s sexual orientation, for the strike? Must it be a good reason? If there is no other reason, should the attorney be reprimanded?

INTRODUCTION

Trial by an impartial jury has been described as a critical constitutional right.⁷ In the quest to ensure that juries are made up of impartial members of the citizenry, the practice of allowing peremptory challenges, or allowing parties to remove potential jurors suspected of being biased, has developed in the American judicial system.⁸ To achieve this end, peremptory strikes were traditionally and

* J.D. Candidate, 2016, Indiana University Robert H. McKinney School of Law; A.B. 2000, The University of Chicago, Chicago, Illinois; Pharm.D. 2008, Midwestern University Chicago College of Pharmacy, Downers Grove, Illinois. I am very much indebted to Professor Joel Schumm for his advice and assistance in the completion of this Note. I am also forever grateful to my wife, Sarah Heck, for her unending patience, understanding, and encouragement.

1. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014).

2. *Id.*

3. *Id.*

4. *Id.* at 474-75.

5. *Id.* at 475

6. *Id.*

7. U.S. CONST. amend. VI; Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1370 (1993).

8. John J. Neal, Note, *Striking Batson Gold at the End of the Rainbow?: Revisiting Batson v. Kentucky and its Progeny in Light of Romer v. Evans and Lawrence v. Texas*, 91 IOWA L. REV. 1091, 1095 (2006); *see also* 28 U.S.C. § 1870 (2013); FED. R. CRIM. P. 24; FED. R. CIV. P. 47; Holland v. Illinois, 493 U.S. 474, 481 (1990) (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (1790)); Swain v. State of Ala., 380 U.S. 202, 215-17 (1965); Keith A. Ward, Comment, “*The*

by law universally permitted; however, jurisprudential action has somewhat changed the application of these challenges.⁹ Peremptory challenges are now susceptible to objection, called a *Batson* challenge, by the non-striking party if the non-striking party suspects that the seating of the potential juror is being challenged as an act of discrimination based on race, ethnicity, or sex.¹⁰ To date, *Batson* challenges have only been allowed based on these three classes.¹¹ Protection of jurors in only these three classes is inadequate to ensure a true cross section of the community or to protect the rights of gay, lesbian, and bisexual citizens to serve on juries. This Note argues that while extending *Batson* challenges to sexual orientation would be an appropriate application of equal protection, the *Batson* framework is not workable for sexual orientation. Rather, court rules should be adopted to prevent discrimination against gay, lesbian, and bisexual potential jurors.

Part I of this Note describes the history and use of peremptory challenges, including discriminatory uses. It also addresses the obligation of the lawyer to avoid discrimination in practice. Part II details the development of the common law limitations on the discriminatory use of peremptory challenges. Part III explores the possibility of extending *Batson* to prevent discrimination based on sexual orientation. This extension requires, first, that gay, lesbian, or bisexual sexual orientation be recognized as a class. Second, it requires the application of a heightened scrutiny standard to laws and practices that discriminate based on this class. Part III also addresses some practical problems of applying *Batson* to sexual orientation. Finally, Part IV discusses and proposes the better alternative of using court rules to remedy the discriminatory use of peremptory challenges.

I. PEREMPTORY CHALLENGES: HISTORY AND USE

A. *The Peremptory Challenge—A Very Brief History*

The Sixth Amendment's guarantee of a trial by impartial jury for criminal defendants is largely seen as the most critical constitutional right involving the jury.¹² The term "impartial jury" has been interpreted in two ways by the U.S. Supreme Court.¹³ It applies both to a juror's decision-making ability and to the composition of the jury, requiring that the jury represent a fair cross-section of the

Only Thing in the Middle of the Road is a Dead Skunk and a Yellow Stripe": *Peremptory Challenges—Take 'Em or Leave 'Em*, 26 TEX. TECH. L. REV. 1361, 1363 (1995).

9. BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

10. *Id.*

11. Throughout this Note, the terms sex and gender are used interchangeably. While this author recognizes that those terms are unique with different meanings, the law generally refers to class-based assignments of sex and gender interchangeably, so any distinction made here would unnecessarily complicate the discussion and analysis.

12. U.S. CONST. amend. VI; Hochman, *supra* note 7, at 1370.

13. Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 240 (1998).

population.¹⁴ In order to comport with the first meaning of impartial jury, the law has developed methods for deselecting from service jurors who might show bias; prospective jurors may be removed for cause or without cause by peremptory challenge, also called peremptory strike.¹⁵

Peremptory challenges are an established part of the Western legal tradition.¹⁶ They began during the Roman era and were continued under English common law.¹⁷ They were first codified in the United States in 1790 for use in federal cases.¹⁸ All states now have preserved the rights of peremptory challenges for both sides in civil and criminal cases.¹⁹

B. Federal and State Sources of Peremptory Challenge Authority

The rules for allocation of peremptory challenges in criminal cases are set forth in the Federal Rules of Criminal Procedure.²⁰ The number of peremptory challenges allowed for each side depends on the type of case: twenty per side in a capital case, six for the government and ten for the defendant in other felony cases, and three for each side in misdemeanor cases.²¹ At its discretion the court may allow additional challenges in cases involving multiple defendants.²² The Federal Rules of Civil Procedure and the United States Code specify the number of peremptory challenges allowed for federal civil cases.²³ Each side is permitted three peremptory challenges; though, again at its discretion, the court may allow additional challenges when there are multiple plaintiffs or multiple defendants.²⁴

State rules addressing peremptory challenges generally mimic federal rules in distinction and number.²⁵ Some states, however, introduce limitations to the way in which the challenges may be used.²⁶

C. Discriminatory Use of Peremptory Challenges

Peremptory strikes were traditionally and universally permitted by law; however, recent jurisprudential action has changed the application of these

14. *Id.*

15. Hochman, *supra* note 7, at 1371.

16. Ward, *supra* note 8, at 1363; Neal, *supra* note 8, at 1095.

17. Ward, *supra* note 8, at 1363; Neal, *supra* note 8, at 1095.

18. *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (1790)); Neal, *supra* note 8, at 1096.

19. 28 U.S.C. § 1870 (2013); FED. R. CRIM. P. 24; FED. R. CIV. P. 47; *Holland*, 493 U.S. at 481; *Swain v. State of Ala.*, 380 U.S. 202, 215-217 (1965).

20. FED. R. CRIM. P. 24.

21. *Id.*

22. *Id.*

23. 28 U.S.C. § 1870 (2013); FED. R. CIV. P. 47.

24. 28 U.S.C. § 1870; FED. R. CIV. P. 47.

25. *E.g.*, IND. JURY R. 18 (2013).

26. *E.g.*, N.H. R. CRIM. P. 22 (2014).

challenges.²⁷ Peremptory challenges are now susceptible to objection, called a *Batson* challenge, by the non-striking party if the non-striking party suspects a potential juror is being struck as an act of discrimination based on race, ethnicity, or sex.²⁸ To date, *Batson* challenges have only been allowed based on these three classes.²⁹

Several distinct yet related interests are at stake when considering the discriminatory application of peremptory challenges. First, there are the rights of the defendant to a trial by an impartial jury drawn from a fair cross-section of the community.³⁰ The Court has held that a jury pool from which segments of the population have been excluded does not satisfy the fair cross-section requirement because it cannot fulfill its purpose “to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”³¹ A defendant has an equal protection right to a jury selected without discriminatory criteria to ensure the type of protection that trial by jury is intended to provide.³²

Second, there are the rights of the potential juror.³³ As is further described below, *Batson* and its progeny show that individual citizens have an equal protection right to the opportunity to serve on a jury; that is, equal protection of the juror is violated if he or she is removed for a reason sufficient to constitute discrimination (based on race, ethnicity, or sex).³⁴ Third, there is harm to the community as a whole when peremptory challenges are used in a discriminatory manner.³⁵ In the context of race discrimination, the Court has described the purposeful exclusion of black persons from juries as an undermining of the confidence of the public in the fairness of the judicial system.³⁶ The Court held that “racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.”³⁷

27. BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

28. *Id.*

29. Sherrie J. O'Brien, J.E.B. v. Alabama ex rel. T.B.: *The Collapse of the Peremptory Challenge*, 14 ST. LOUIS U. PUB. L. REV. 655, 655-56 (1995).

30. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 370 (2010).

31. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968)).

32. Batson v. Kentucky, 476 U.S. 79, 85-86 (1986).

33. *Id.* at 86.

34. *Id.* at 87; Hernandez v. New York, 500 U.S. 352, 355 (1991); Powers v. Ohio, 499 U.S. 400, 402 (1991); see also Neal, *supra* note 8, at 1111 (providing that the Court has found attorneys to be state actors when they receive “assistance and authority from the court in conducting various stages of the trial”).

35. Powers, 499 U.S. at 402; Batson, 476 U.S. at 87.

36. Batson, 476 U.S. at 87.

37. Powers, 499 U.S. at 402.

D. Obligation of the Lawyer to Avoid Discrimination

The guidance given to the legal profession regarding discrimination in the practice of law does not specifically address protection of the juror's rights and may actually serve to undermine them.³⁸ The American Bar Association (ABA) Model Rule 8.4 states that professional misconduct occurs when a lawyer "engage(s) in conduct that is prejudicial to the administration of justice."³⁹ Comment 3 to the rule further explains:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).⁴⁰

The comment goes on to specifically exclude peremptory challenges from this rule: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."⁴¹ While the model rule discourages discrimination against members of classes beyond those that have already been held susceptible to a *Batson* challenge, discrimination in the process of jury selection does not necessarily constitute misconduct for any of these classes.⁴²

In seeking to regulate to this standard of professional conduct, states have generally employed one of two strategies: enacting a general rule regarding misconduct under which discriminatory use of peremptory challenges might fall, or enacting an express rule specifying that conduct in violation of *Batson* may subject the attorney to professional discipline.⁴³ A 2003 analysis of these rules as they relate to racism in jury selection determined that no lawyers in the 35 jurisdictions responding had ever been disciplined for racially discriminatory practices in jury selection.⁴⁴ While the data provided in that analysis suffers from some limitations based on non-response, it is reasonable to conclude that an actual number of formal complaints would be relatively small and that "lawyers, judges, and disciplinary officials seem to consistently regard racial discrimination in jury selection as not deserving of meaningful attention from a professionalism

38. See Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 271-278 (2003) (discussing the development of this rule and comment and the limits to them).

39. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2013).

40. *Id.* at cmt. 3.

41. *Id.*

42. *Id.*

43. Brown, *supra* note 38, at 278-79.

44. *Id.* at 282.

standpoint[.]”⁴⁵ What the profession is left with, then, is an obligation not to discriminate based on membership in certain classes but little in the way of enforcement or remedy if such discrimination is present in jury selection.⁴⁶

II. COMMON LAW LIMITATIONS ON THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES—RACE, ETHNICITY, SEX

The procedure for charging and refuting discrimination in peremptory challenges was established in the landmark U.S. Supreme Court case *Batson v. Kentucky*, which disallowed race-based peremptory challenges. The Court held that the use of peremptory strikes is subject to the guarantees of the Equal Protection Clause.⁴⁷ However, even before the modern procedure was established in *Batson*, the Court began its examination of racial discrimination in the jury selection process.⁴⁸

As early as 1879, in *Strauder v. West Virginia*, the Court recognized on equal protection grounds the impropriety of a state statute requiring all-white, all-male juries.⁴⁹ In *Strauder*, a black former slave was on trial for murder.⁵⁰ The Court held that “discriminating in the selection of jurors . . . against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man.”⁵¹ The Court first addressed the issue of equal protection in peremptory challenges in 1965 in *Swain v. Alabama*.⁵² Emphasizing the historical importance of peremptory challenges; however, the Court refused to find any violation of the Equal Protection Clause when all African-American potential jurors were struck by peremptory challenge in a single case.⁵³

It was against the backdrop of these cases that *Batson* was decided. *Batson* was a black man indicted on charges of second-degree burglary and receipt of stolen goods.⁵⁴ During jury selection, the prosecutor used his peremptory strikes to remove all four black persons who were among the potential jurors.⁵⁵ Before the jury was sworn in, defense counsel moved to discharge the jury, arguing that the removal of all black veniremen violated *Batson*’s rights to a jury drawn from a cross-section of the community under both the Sixth and Fourteenth Amendments and to equal protection under the Fourteenth Amendment.⁵⁶ *Batson*’s motion was denied, and he was ultimately convicted on both counts by

45. *Id.* at 285, 291-92.

46. *See generally id.*

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

48. *See generally* *Strauder v. West Virginia*, 100 U.S. 303 (1879).

49. *Id.* at 304.

50. *Id.*

51. *Id.* at 310.

52. *Swain v. Alabama*, 380 U.S. 202 (1965).

53. *Id.* at 221.

54. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

55. *Id.* at 83.

56. *Id.*

an all-white jury.⁵⁷

On appeal to the Supreme Court of Kentucky, Batson pressed his claim regarding the prosecutor's discriminatory use of peremptory challenges.⁵⁸ Because the precedent set in *Swain* foreclosed an equal protection claim based on the prosecutor's actions, Batson directed the court to instead hold that his Sixth Amendment rights were violated by the prosecutor.⁵⁹ Batson also maintained that an equal protection violation under *Swain* was established in his case based on a pattern of discriminatory challenges.⁶⁰ The Supreme Court of Kentucky affirmed the decision of the lower court, reaffirmed its reliance on *Swain*, and did not adopt the reasoning offered by Batson.⁶¹ Batson appealed to the U.S. Supreme Court, which reversed, overturning *Swain* to the extent that *Swain* had required a defendant to carry the burden of proof in showing purposeful discrimination by the prosecutor.⁶²

Batson provided two major developments in the opposition of peremptory challenges.⁶³ The first was to establish the three elements necessary for a prima facie showing of discrimination in jury selection.⁶⁴ First, the defendant must show he is part of a cognizable racial group and the prosecution has used peremptory challenges to remove members of the defendant's race from the venire.⁶⁵ Second, the defendant may rely on the fact that peremptory challenges allow those who have the intent to discriminate to do so.⁶⁶ Third, the defendant must show the facts raise an inference that the prosecutor used peremptory challenges to exclude the veniremen based on their race.⁶⁷

The second major development was to set out the three-part evidentiary standard for determining when a constitutional violation has occurred.⁶⁸ The first part is for the defendant to make a prima facie showing of discrimination.⁶⁹ In the second part, the burden is shifted to the State to present a race-neutral explanation for challenging black jurors that is related to the case to be tried.⁷⁰ The strength of the required race-neutral explanation was further detailed in a later case where the Court stated, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible."⁷¹ Finally, in the third part, the

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 83-84.

61. *Id.* at 84.

62. *Id.* at 83, 92-93.

63. *See generally id.*

64. *Id.* at 96.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 96-98.

69. *Id.* at 97.

70. *Id.*

71. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

trial court must determine if the defendant has established a case of purposeful discrimination;⁷² that is, whether the explanation given by the State is pretextual.⁷³

Several cases have been decided by the U.S. Supreme Court since *Batson* that expand the situations in which *Batson* may be invoked.⁷⁴ In *Powers v. Ohio*, the Court eliminated the requirement that a defendant be a member of the same racial group of the peremptorily challenged jurors, holding that any criminal defendant may object to race-based exclusions, whether the jurors were of the same racial group as the defendant or not.⁷⁵ In *J.E.B. v. Alabama*, the Court extended *Batson* to gender-based discrimination, holding that gender is an “unconstitutional proxy for juror competence and impartiality.”⁷⁶ Importantly, the Court specified that “parties may [] exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review.”⁷⁷ Pursuant to this holding, lower courts’ determination of whether a class is protected under *Batson* has turned on the level of scrutiny applied to the class in an equal protection analysis.⁷⁸

III. EXTENDING *BATSON* TO SEXUAL ORIENTATION

The expansion of *Batson* to gender-based discrimination in *J.E.B.* demonstrates the ability of the Court to identify other classes, including those receiving less than strict scrutiny for protection.⁷⁹ It also indicates that any new application will likely turn on the identification of the class as one requiring some form of heightened scrutiny under an equal protection analysis.⁸⁰ Despite the number of cases the U.S. Supreme Court has heard involving both equal protection claims based on sexual orientation—the classification of persons based on conduct or orientation as gay/lesbian/bisexual—and substantive due process claims where the sexual orientation of one of the parties was relevant, it has not consistently applied one level of scrutiny when addressing the cases.⁸¹

72. *Batson*, 476 U.S. at 98.

73. *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting).

74. See *Powers v. Ohio*, 499 U.S. 400 (1991); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (applying *Batson* to gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying *Batson* to parties in civil cases).

75. *Powers*, 499 U.S. at 402; see also *Edmonson*, 500 U.S. at 629-31 (applying *Batson* to parties in civil cases).

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

77. *Id.* at 143.

78. See *United States v. Watson*, 483 F.3d 828, 833 (D.C. Cir. 2007) (holding that disability, specifically blindness, has not been recognized as a suspect class by the U.S. Supreme Court so a *Batson* challenge cannot be sustained and peremptory challenges to disabled jurors are subject to rational basis review).

79. See *J.E.B.*, 511 U.S. at 127.

80. See *id.*

81. Renee T. Hindo, *Connecticut’s Class Divide: Sexual Orientation as a Quasi-Suspect Class*, 87 U. DET. MERCY L. REV. 227, 232-33 (2010).

*A. The Legal Landscape of Gay, Lesbian, and Bisexual Persons as a Class*⁸²

The U.S. Supreme Court heard its first case considering the status of gay persons as a class in 1986 in *Bowers v. Hardwick*.⁸³ In that case, the Court upheld a Georgia law that made sodomy a criminal act.⁸⁴ The Court, refusing to extend a fundamental right to privacy to consensual sexual acts occurring in one's home, found instead that the moral disapproval of sodomy was a sufficient justification for upholding the law under rational basis review.⁸⁵ Because the issue in *Bowers* revolved around conduct common, but not exclusive, to a particular group of individuals, the Court could have performed an equal protection analysis, but it did not reach that question.⁸⁶

The U.S. Supreme Court next faced the question of gay, lesbian, and bisexual people as a class ten years after *Bowers* when it heard *Romer v. Evans*.⁸⁷ That case was brought after Colorado passed Amendment 2 to the Colorado Constitution, the effect of which was to overrule ordinances put in place by cities and municipalities to protect gay, lesbian, and bisexual people from discrimination based on sexual orientation.⁸⁸ Although the Colorado Supreme Court found that Amendment 2 "infringed the fundamental right of gays and lesbians to participate in the political process" and thus was subject to strict scrutiny under the Fourteenth Amendment, the U.S. Supreme Court declined to adopt that reasoning.⁸⁹ Rather, the U.S. Supreme Court embraced an equal protection analysis, reasoning that the objective the state intended to achieve was so bereft of legitimate government interest so as to fail under rational basis review.⁹⁰ Even so, the decision on equal protection grounds indicates that "the [U.S.] Supreme Court implicitly held that state antidiscrimination statutes may include sexual orientation as a protected class."⁹¹

The U.S. Supreme Court reconsidered the due process approach of *Bowers*

82. Although the term LGBT (lesbian, gay, bisexual, transgender) is widely used, a legal discussion of the specific class at issue is based on sexual orientation and not gender identity, so the class addressed in this Note does not include transgender individuals. Discrimination based on gender identity or presentation is an important topic but is, unfortunately, outside the scope of this Note.

83. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

84. *Bowers*, 478 U.S. at 186.

85. *Id.*

86. *Id.* at 201-02 (Blackmun, J., dissenting).

87. *Romer v. Evans*, 517 U.S. 620 (1996).

88. *Id.*

89. *Id.* at 625-26.

90. *Id.* at 632-33.

91. Elizabeth R. Cayton, Comment, *Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes*, 19 LAW & SEXUALITY 193, 199 (2010).

when it heard *Lawrence v. Texas* in 2003.⁹² Like *Bowers*, *Lawrence* involved a state statute criminalizing sexual acts between two persons of the same sex but not the same acts between two persons of the opposite sex.⁹³ Although the Court granted certiorari in part to address whether the statute violated the Equal Protection Clause of the Fourteenth Amendment, it ultimately used the case to reassess and overturn *Bowers* on substantive due process grounds.⁹⁴ While the Court acknowledged that it could resolve *Lawrence* under an equal protection analysis, it instead sought to address both equality and fundamental rights in its treatment of *Lawrence*.⁹⁵ “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”⁹⁶ However, the language employed by the Court helped to elucidate the link between conduct and class for equal protection purposes: “When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres.”⁹⁷ Additionally, Justice O’Connor, concurring in the judgment, presented an analysis of the constitutionality of the statute under an equal protection framework.⁹⁸

Justice O’Connor’s concurrence in *Lawrence* provided the background necessary for the majority of the Court to find that gays and lesbians are an identifiable class in a subsequent case: *Christian Legal Society v. Martinez*.⁹⁹ There, the Court addressed a First Amendment issue brought by the Christian Legal Society (CLS) chapter at Hastings College of Law at the University of California Berkeley.¹⁰⁰ CLS applied to be a registered student organization, an officially recognized student group eligible for funding and benefits extended by Hastings.¹⁰¹ In order to qualify to become a registered student organization, however, CLS was required to abide by the law school’s Policy on Nondiscrimination.¹⁰² CLS asked for an exemption from compliance with this policy because its bylaws “exclude[d] from affiliation anyone who engages in ‘unrepentant homosexual conduct.’”¹⁰³ After Hastings refused to exempt the group from the nondiscrimination policy, CLS sued, alleging violations of the

92. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

93. *Id.* at 562.

94. *Id.* at 578.

95. *Id.* at 575.

96. *Id.*

97. *Id.* (emphasis added).

98. *Id.* at 579-85.

99. Andrea L. Claus, Outstanding Student Articles, *The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHOENIX L. REV. 151, 159 (2011).

100. Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2984-3009 (2010).

101. *Id.* at 2979-80.

102. *Id.* at 2979.

103. *Id.* at 2980.

group's "First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion."¹⁰⁴ In its opinion, the U.S. Supreme Court did not expressly address an equal protection or due process issue involving sexual orientation; however, it did rely on both the *Lawrence* majority opinion and the concurrence of Justice O'Connor in that case to define gay *persons* as a status or class rather than identifying the group based on sexual *conduct*.¹⁰⁵

The most recent U.S. Supreme Court case, brought as an equal protection violation based on sexual orientation, was *United States v. Windsor*.¹⁰⁶ Edith Windsor met Thea Spyer in New York City in 1963.¹⁰⁷ The two entered into a long-term relationship, becoming registered domestic partners in 1993 when New York City began allowing that designation; they traveled to Ontario, Canada to marry in 2007.¹⁰⁸ The couple continued to reside in New York City.¹⁰⁹ When Spyer died in 2009, she left her entire estate to Windsor.¹¹⁰ Although the state of New York deemed their marriage valid, the Federal Defense of Marriage Act (DOMA), which defined, in section 3, marriage for federal purposes as being between one man and one woman, prevented Windsor from being considered Spyer's surviving spouse.¹¹¹ Because Windsor was thereby not entitled to the marital exemption from the federal estate tax, she paid \$363,053 in estate taxes after Spyer's death.¹¹² Upon being denied a refund based on the marital exemption, Windsor brought suit, contending that the guarantee of equal protection under the Fifth Amendment was violated by DOMA.¹¹³

While the suit was pending in the district court, the Attorney General notified Congress that, on order of the President, the Department of Justice would not defend the constitutionality of DOMA section 3.¹¹⁴ In making the decision not to defend DOMA, President Obama and Attorney General Eric Holder performed their own evaluation of sexual orientation-based classifications.¹¹⁵ Acknowledging that the U.S. Supreme Court had not yet indicated the appropriate level of scrutiny to apply to classifications based on sexual orientation, the Attorney General pointed to criteria the U.S. Supreme Court looks to when determining if heightened scrutiny applies.¹¹⁶ As summarized by the Attorney

104. *Id.* at 2981.

105. Claus, *supra* note 99, at 160.

106. *See generally* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

107. *Id.* at 2683.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, Attorney General, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

115. *Id.*

116. *Id.*

General, those criteria are:

(1) whether the group in question has suffered a history of discrimination; (2) whether individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual’s “ability to perform or contribute to society.”¹¹⁷

The Attorney General concluded that upon analysis of these four factors, heightened scrutiny should apply.¹¹⁸

Windsor’s case was first heard in the United States District Court for the Southern District of New York.¹¹⁹ Lacking Second Circuit precedent on homosexuals as a suspect class and reluctant to create a new suspect class, that court found DOMA section 3 unconstitutional in a rational basis review under the Equal Protection Clause.¹²⁰ Relying on the same U.S. Supreme Court analysis highlighted by the Attorney General in his letter to Congress, the U.S. Court of Appeals for the Second Circuit concluded that homosexuals were a quasi-suspect class and intermediate scrutiny review was warranted for section 3 of DOMA.¹²¹

Against this background of mixed lower court analyses in *Windsor*, the U.S. Supreme Court failed to provide additional guidance on sexual orientation-based classifications in its ruling.¹²² The Court held that DOMA section 3 violated the Fifth Amendment guarantee of liberty by forcing some state-sanctioned marriages to be less respected than others.¹²³ Justice Kennedy, in the opinion for the majority, explained in very particular terms the class of persons to which the opinion and holding applied: “[t]he class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State.”¹²⁴ He further concluded that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”¹²⁵

The framing by the Court of the affected class as one not based on sexual orientation, but rather on marital status as determined by the State, complicates the question of whether homosexuals constitute a suspect or quasi-suspect class. However, the Court’s language is reminiscent of that in *Lawrence* and demonstrates that laws targeting conduct that is unique to one class of persons

117. See *id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)).

118. Press Release, Attorney General, *supra* note 114.

119. See generally *Windsor v. United States* 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

120. *Id.* at 402.

121. *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).

122. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013).

123. *Id.* at 2695-96.

124. *Id.* at 2695.

125. *Id.* at 2696.

actually target that class of persons.¹²⁶ After all, it is generally, if not always, homosexual persons who enter into the same-sex marriages protected by the Court in *Windsor*.¹²⁷

B. The Potential for Extension of Batson

Because *Batson* developments thus far have been based on the status of a class as suspect or quasi-suspect, this author believes that extension of *Batson* to protect jurors based on sexual orientation would likely turn on this question as well. Thus, two questions persist: will the holdings of the Court be consistently interpreted to understand homosexuals as a class requiring heightened scrutiny and will the establishment of homosexuals as a distinct class suffice for the extension of *Batson*?

Although not yet addressed by the U.S. Supreme Court, other courts heard six cases involving *Batson* challenges based on sexual orientation. There are four cases from federal courts of appeals and two state court decisions, in Massachusetts and California. Three of the federal appeals cases that have been decided do little to clarify the potential extension of *Batson* challenges.¹²⁸ In those three cases, the parties issuing the *Batson* challenges failed to make the prima facie showing of discrimination required if *Batson* did apply.¹²⁹ Further, none of the three federal courts involved reached the question of whether homosexuals constitute a suspect class.¹³⁰

Johnson v. Campbell was a Ninth Circuit case in which a juror was excused by peremptory challenge after an exchange with the judge that revealed the juror to be a single freelance screenwriter who lived in West Hollywood, California.¹³¹ Campbell's attorney exercised a peremptory challenge of the juror; Johnson's attorney issued a *Batson* objection.¹³² In a side bar conversation, Johnson's attorney maintained that he thought the juror was gay and asked that the court question the juror to determine his sexual orientation.¹³³ The judge refused to question the challenged juror and denied the *Batson* challenge.¹³⁴ Considering these facts and the transcript of the voir dire, the appeals court held that Johnson's attorney failed to raise an inference that the peremptory challenge was based on purposeful discrimination, one of the three required elements for a prima facie

126. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (emphasis added).

127. *See generally Windsor*, 133 S. Ct. at 2675.

128. *Johnson v. Campbell*, 92 F.3d 951, 952 (9th Cir. 1996); *see generally* *United States v. Ehrmann*, 421 F.3d 774 (8th Cir. 2005); *United States v. Blaylock*, 421 F.3d 758 (8th Cir. 2005).

129. *Johnson*, 92 F.3d at 952; *see generally* *Ehrmann*, 421 F.3d at 774; *Blaylock*, 421 F.3d at 758.

130. *Johnson*, 92 F.3d at 952; *see generally* *Ehrmann*, 421 F.3d at 774; *Blaylock*, 421 F.3d at 758.

131. *Johnson*, 92 F.3d at 952.

132. *Id.*

133. *Id.*

134. *Id.*

showing of discrimination required by *Batson*.¹³⁵

United States v. Ehrmann and *United States v. Blaylock* were companion cases from the Eighth Circuit.¹³⁶ Both appeals arose from the same peremptory challenge at the same federal district court trial.¹³⁷ The same appeals court heard both cases, expressing doubt that *Batson* applied to sexual orientation.¹³⁸ However, the court held that even if *Batson* did apply and the defendants made a prima facie case of purposeful discrimination, the defendants' challenges still failed because the government offered "legitimate nondiscriminatory reasons for striking the panel member."¹³⁹ The prosecutor explained that the panel member's liberal education, musician background, and status as a potential loner led him to strike the juror prior to learning about the panel member's sexual orientation.¹⁴⁰ Thus, these cases fell on the second and third elements of the evidentiary standard established under *Batson*.¹⁴¹

Like the preceding federal cases, the court in *Commonwealth v. Smith* never reached the question of whether sexual orientation, or in this case status as a transgender person, constituted a suspect or quasi-suspect class.¹⁴² There, the defendant's appeal included an argument that the prosecutor "improperly used a peremptory challenge to remove a juror who may have been either homosexual or [transgender]."¹⁴³ However the trial judge was never able to draw an inference that purposeful discrimination occurred.¹⁴⁴ The defendant did not raise a *Batson* challenge when the prosecutor struck the juror, the alleged class of the juror was not clear, and the prosecution did not present the reason it excused the juror.¹⁴⁵

Until January 2014, the case providing the most direct analysis of an additional legal argument of relevance to applying *Batson* to sexual orientation was decided in California in 2000.¹⁴⁶ As the state intermediate court stated, the issue there was "whether lesbians—and presumably gay males—constitute a cognizable class whose exclusion resulted in a jury that failed to represent a cross-section of the community and thereby violated [the defendant's] constitutional rights."¹⁴⁷ After the defendant lost at trial, he raised his appeal based on the striking of two female potential jurors; both were excused by the prosecution when it was determined that they worked for a gay and lesbian

135. *Id.* at 953.

136. *United States v. Ehrmann*, 421 F.3d 774 (8th Cir. 2005); *United States v. Blaylock*, 421 F.3d 758 (8th Cir. 2005).

137. *See Ehrmann*, 421 F.3d at 774; *see Blaylock*, 421 F.3d at 758.

138. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 769.

139. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 769.

140. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 770.

141. *Ehrmann*, 421 F.3d at 782; *Blaylock*, 421 F.3d at 770.

142. *See generally* *Commonwealth v. Smith*, 879 N.E.2d 87 (Mass. 2008).

143. *Id.* at 97.

144. *Id.*

145. *Id.*

146. *See generally* *People v. Garcia*, 92 Cal. Rptr. 2d 339 (Ct. App. 2000).

147. *Id.* at 341.

foundation.¹⁴⁸

Defense counsel made a *Wheeler* motion, under which California law “prohibits exclusion of jurors based upon race, ethnicity, gender, or ‘similar’ group bias.”¹⁴⁹ The trial judge, finding no cognizable group based on sexual preference, denied the motion.¹⁵⁰ On appeal, the court declined to undertake an equal protection analysis.¹⁵¹ Rather, it based its decision on the guarantees to a trial by an impartial jury found in the Sixth Amendment to the U.S. Constitution and article I, section 16 of the California Constitution.¹⁵²

Under California law, whenever a cognizable group is excluded from participation on a jury, the representative cross-section guarantee is violated.¹⁵³ California case law provides guidance on the determination of what constitutes a cognizable group for the purposes of the representative cross-section guarantee.¹⁵⁴ To be a cognizable group, group members must “share a common perspective arising from their life experience in the group” and “no other members of the community are capable of adequately representing the perspective of the group assertedly excluded.”¹⁵⁵ Under this analysis, the court concluded that gays and lesbians are a cognizable group and the peremptory strikes were subject to *Wheeler* and *Batson* challenges.¹⁵⁶ As the court found that *Wheeler* and *Batson* challenges to juror exclusion based on sexual orientation are allowable under California law, the case was remanded to the trial court to allow the prosecution to provide a neutral reason for the strike, the second prong of the evidentiary standard required by *Batson*.¹⁵⁷

The most recent and directly applicable case was decided by the U.S. Court of Appeals for the Ninth Circuit.¹⁵⁸ This case provides a factual situation substantially different from prior federal appeals, one that forced the court to address the issue of whether *Batson* applies to sexual orientation.¹⁵⁹ Oral arguments were heard in *Smithkline Beecham Corporation (GSK) v. Abbott*

148. *Id.* at 340.

149. *Id.* at 340 n.1 (citing *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978)).

150. *See id.* at 339.

151. *Id.* at 342.

152. *Id.*; *see also* U.S. CONST. amend. VI. (guaranteeing trial by an impartial jury); *see also* CAL. CONST. art. I, § 16 (“Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant’s counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.”).

153. *See Garcia*, 92 Cal. Rptr. at 343.

154. *Id.*

155. *Id.* at 343-45.

156. *Id.* at 347.

157. *Id.* at 341.

158. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

159. *Id.*

Laboratories (Abbott) in front of a three judge panel on September 18, 2013.¹⁶⁰ During the 2011 antitrust trial between the two pharmaceutical manufacturers involving an HIV medication, counsel for Abbott used a peremptory challenge to remove one potential juror after the man appeared to reveal that he was gay during voir dire by referring to his male partner.¹⁶¹ A lawyer for GSK raised a *Batson* challenge, indicating that the juror could be gay, which was relevant because the case involved an AIDS medication and the incidence of AIDS among the gay male community is well-known.¹⁶² The judge, demonstrating uncertainty with the application of *Batson* in this situation, gave three reasons why *Batson* might not apply: it might not apply in civil cases, it might not apply to peremptory challenges based on sexual orientation, and there would be no way to know if a prospective juror was homosexual unless he or she happened to mention that fact.¹⁶³ The judge then gave Abbott's counsel a chance to offer a neutral explanation for his challenge to the juror or to adopt her three reasons for not applying *Batson*.¹⁶⁴ Abbott's counsel chose to accept the judge's reasons.¹⁶⁵

Had Abbott's counsel provided a neutral reason, the peremptory strike would likely have stood even if *Batson* did not apply.¹⁶⁶ However, the judge did not have the opportunity to determine if the reason was sufficient to overcome a *Batson* challenge, if one did apply, because Abbott's counsel did not provide any explanation.¹⁶⁷

Abbott counsel's acceptance of the judge's reason opened the door to the appeal to the Ninth Circuit.¹⁶⁸ GSK raised the issue of the court allowing the discriminatory peremptory challenge on cross-appeal, and the Ninth Circuit had the opportunity to rule on this case and address the question of whether *Batson* should apply to sexual orientation rather than the question of whether the challenging party failed on one of the required elements of *Batson*.¹⁶⁹

The briefs of the parties on cross-appeal in this case offered insight into the arguments for and against applying *Batson* to sexual orientation in light of the most recent U.S. Supreme Court cases.¹⁷⁰ GSK argued that applying *Batson* to

160. *Smithkline Beecham Corporation v. Abbott Laboratories* ("Sexual Orientation of Jurors"), UNITED STATES COURTS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000692 (last updated June 24, 2013).

161. Adam Liptak, *Judges Weigh Exclusion of Jurors Because They're Gay*, N.Y. TIMES, July 30, 2013, at A14.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Brief of Plaintiff-Appellee and Cross-Appellant, *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (2014) Nos. 2011-17357, 2011-17373 [hereinafter GSK Brief], available at <http://cdn.ca9.uscourts.gov/datastore/general/2013/08/01/Document67.pdf>.

170. *See id.*

this case of a homosexual male who was struck from the jury panel was appropriate for four reasons.¹⁷¹ First, an Equal Protection Clause challenge is appropriate where the liberty rights of homosexuals have been impinged upon.¹⁷² GSK argued that heightened scrutiny is appropriate under equal protection when either: 1) the group is suspect/quasi-suspect, or 2) when a fundamental or important liberty right is at stake.¹⁷³ On this basis, GSK asked the court to apply the precedent of *Lawrence v. Texas* and find that the burdening of a liberty right (service on a jury) based on sexual orientation was unconstitutional.¹⁷⁴

Second, sexual orientation is a suspect or quasi-suspect class subject to heightened scrutiny.¹⁷⁵ Relying on the position of the Department of Justice and the four-part test employed by the Attorney General and the President, GSK argued that homosexuals meet the criteria of a class that should be protected.¹⁷⁶ Such classifications based on sexual orientation are subject to a heightened standard of scrutiny under the Equal Protection Clause.¹⁷⁷

Third, the striking of the gay man constituted gender based discrimination.¹⁷⁸ GSK claimed that the strike was partially gender based because the stereotypes implicated involve gay men and not female members of the homosexual community.¹⁷⁹ Although gender based strikes are prohibited under *Batson* and its progeny, this point underscores one way in which sexual orientation and gender are intertwined.¹⁸⁰ It is important that the peremptory challenge was used against a potential juror identified as a homosexual male, which is a subset of the male population.¹⁸¹

Fourth, no binding authority forecloses the application of *Batson* to the striking of a gay man.¹⁸² GSK maintained that previous Ninth Circuit cases that may appear similar are actually distinguishable and do not provide binding precedent.¹⁸³ The prior cases involved the military policy of “Don’t Ask, Don’t Tell” and were decided under rational basis review.¹⁸⁴ GSK further argued that

171. *See id.*

172. *Id.* at 19.

173. *Id.* at 19-25.

174. *Id.*

175. *Id.* at 25.

176. *See* Press Release, U.S. Attorney General Eric H. Holder, Jr., Department of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985)).

177. *Id.* at 25; *see also* GSK Brief, *supra* note 169, at 25.

178. GSK Brief, *supra* note 169, at 29.

179. *Id.* at 30.

180. *See id.*

181. *Id.*

182. *Id.*

183. *Id.* at 31-35.

184. *Id.* at 31-32.

the degree of judicial scrutiny is lower when military policies are involved, so the earlier cases do not guide the court here.¹⁸⁵ Additionally, those cases did not involve a fundamental right, so GSK argued that they do not control here.¹⁸⁶ Thus, the district court's error in not allowing the *Batson* challenge had no authority.¹⁸⁷

In response to GSK's cross-appeal, Abbott presented three reasons for the court not to allow a *Batson* challenge based on sexual orientation.¹⁸⁸ Abbott first argued that neither the U.S. Supreme Court nor the Ninth Circuit had ever extended *Batson* to apply to a non-suspect or non-quasi-suspect class.¹⁸⁹ In addressing GSK's dismissal of possibly binding precedent, Abbott identified that the appropriate level of deference granted by the court is based on the classification at issue, not by the nature, that is, military or civilian, of the regulation in question.¹⁹⁰ Additionally, Abbott highlighted the *Batson* requirement that the party issuing the challenge to the strike must demonstrate "an historical practice of excluding homosexuals *from jury service*," presumably to establish the class as suspect.¹⁹¹

Abbott's second argument against extending *Batson* here was that no court has endorsed the application of *Batson* based on the juror's membership in a class likely to exercise a right protected under substantive due process.¹⁹² As an example, Abbott highlighted that there is a substantive due process right to marry, but the existence of that right does not mean that peremptory challenges based on marital status violate *Batson*.¹⁹³ Finally, Abbott maintained that extending *Batson* to sexual orientation would create significant problems in implementation of the process because it is not always obvious whether someone is homosexual or bisexual, and further that it would be inappropriate for the court to inquire into the sexual orientation of potential jurors.¹⁹⁴

In an opinion issued on January 21, 2014, the Ninth Circuit first found that under the three-part *Batson* analysis, Abbott's peremptory strike of the juror was discriminatory.¹⁹⁵ The court further rejected Abbott's proffered justifications for its use of the peremptory strike against the juror, holding that classifications based on sexual orientation "are subject to heightened scrutiny . . . [and] that

185. *Id.* at 34.

186. *Id.* at 32.

187. *Id.* at 31.

188. Third Brief on Cross-Appeal of Defendant-Appellant and Cross-Appellee at 14-20, *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (2014), Nos. 2011-17357, 2011-17373, available at <http://cdn.ca9.uscourts.gov/datastore/general/2013/08/01/Document65.pdf>.

189. *Id.* at 14.

190. *Id.* at 15.

191. *Id.* at 16.

192. *Id.* at 17.

193. *Id.* at 17-18.

194. *Id.* at 18-19.

195. *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 475-76 (9th Cir. 2014).

equal protection prohibits peremptory strikes based on sexual orientation.”¹⁹⁶ The court pointed to *Windsor* as being dispositive in the determination of the appropriate level of scrutiny that was to be applied.¹⁹⁷ While acknowledging that the Court in *Windsor* did not state expressly that a heightened scrutiny standard applied, the Ninth Circuit interpreted the *Windsor* opinion by what the Court did rather than the words it used.¹⁹⁸ In doing so, the Ninth Circuit understood the Court to have employed a heightened standard in two ways: 1) by looking to the actual purpose of DOMA instead of hypothetical reasons for its enactment as would be the case under rational basis review, and 2) by seeking justification for the identified state interest served by DOMA which is unnecessary under rational basis review.¹⁹⁹

Having determined that *Windsor* required heightened scrutiny to be applied to classifications based on sexual orientation, the court looked to the logic of the decision in *J.E.B.* to inform its understanding of the application of *Batson*.²⁰⁰ The concerns raised in *J.E.B.*, under which the U.S. Supreme Court extended *Batson* to gender, were the harms to litigants, the community, and jurors when the judicial system appeared to condone the exclusion of a group from jury service.²⁰¹ Additionally, the Court was concerned that by condoning the exclusion of a group that had historically been excluded, which was women in the case of *J.E.B.*, the message was sent that “certain individuals . . . are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.”²⁰² Because the elements of exclusion and stereotype were present in *J.E.B.*, as they had been in *Batson*, the Court extended *Batson* to strikes based on gender.²⁰³ The Ninth Circuit, highlighting the main concerns of exclusion and stereotypes in the case of gays and lesbians, thereby found *Batson* to apply in this case.²⁰⁴

Upon this finding, the Ninth Circuit remanded the case for a new trial.²⁰⁵ On January 27, 2014, a motion by Abbott requesting an extension to file a petition for rehearing and for rehearing en banc had been granted.²⁰⁶ The petition for en banc hearing was rejected.²⁰⁷

196. *Id.*

197. *Id.* at 480.

198. *Id.*

199. *Id.* at 481-82.

200. *Id.* at 484-85.

201. *Id.* at 484.

202. *Id.* (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994)).

203. *Id.* at 484 (citing *J.E.B.*, 511 U.S. at 131-34, 140).

204. *Id.* at 485-86.

205. *Id.* at 489.

206. Order Granting 30-day Extension to file Petition for Rehearing at 1, *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (2014) Nos. 2011-17357, 2011-17373, available at http://cdn.ca9.uscourts.gov/datastore/general/2014/01/27/11-17357_order_granting_30-day_ext.pdf.

207. Order, *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (2014) Nos. 2011-17357, 2011-17373, available at <http://cdn.ca9.uscourts.gov/datastore/general/2014/06/24/11->

C. Practical Problems with Extending Batson

Examinations of the issue of extending *Batson* to apply to sexual orientation have called for such expansion,²⁰⁸ or they have at the very least noted that the opportunity for such expansion is still developing.²⁰⁹ Assuming, arguendo, that sexual orientation constitutes a class that would be protected for *Batson* purposes, the practical implications of expanding *Batson* to include the class of sexual orientation highlights the likelihood that such extension may not achieve the desired outcome²¹⁰ and may lead to an additional compromise of jurors' equal protection and privacy rights.²¹¹

The extension of *Batson* to sexual orientation is primarily complicated by the difficulty of demonstrating the first prong; to make a prima facie showing of discrimination, the objecting counsel would have to prove that a potential juror is gay, lesbian, or bisexual. If a potential juror happens to mention that he or she is gay, lesbian, or bisexual, the application of *Batson* is relatively straightforward and may be handled as would a *Batson* challenge based on race.²¹² If, however, the potential juror does not share this information, a *Batson* challenge would be brought upon the suspicion by one or both of the attorneys that the juror is homosexual or based on the perception that the juror is homosexual.²¹³

If homosexuality is suspected, one way to meet the first prong would be to obtain confirmation of the prospective juror's sexual orientation, but it is difficult to imagine how this information would be determined without introducing additional complications into the process, specifically complications that violate the juror's privacy interest.²¹⁴ The prospective juror might be asked directly in court and be forced to publicly reveal information that the juror would rather not share. This approach may be insulting to the juror and could even subject him or

17357.pdf.

208. See Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 26 (2001); Neal, *supra* note 8, at 1115.

209. E.g. Lynd, *supra* note 13, at 287.

210. Kathryn M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 271 (2011).

211. *Id.*

212. *Id.* at 255.

213. *Id.* at 256.

214. *Id.*; see Neal, *supra* note 8, at 1110-15. The privacy interest recognized in *Lawrence* is a serious limitation to these methods of determining a juror's sexual orientation. *Id.* In *Lawrence*, the state penalized private homosexual conduct; if a juror's disclosure of his or her private life or conduct is an acceptable ground for exclusion from jury service, the state is penalizing that private conduct. *Id.* at 1111. Thus, direct questioning, in camera interviews, and questionnaire based inquiries posed to jurors regarding sexual orientation all infringe on the juror's privacy interest as drawn in *Lawrence*. *Id.* at 1112. Neal suggests that attempts to secure an impartial jury should be made by using direct questioning to establish bias among potential jurors rather than attempting to determine if a juror is gay or lesbian. *Id.* at 1112.

her to the risk of professional, personal, or physical harm for this public announcement.²¹⁵ Further, if voir dire is conducted by the attorneys in the case, it is unlikely that a person being asked to respond to this question, whether homosexual or heterosexual, would form a favorable opinion of the questioning attorney.²¹⁶ Attorneys might be reticent to use the challenge at all given these potential effects.²¹⁷

More discreet methods of obtaining information regarding a juror's sexual orientation have their drawbacks as well. Written questionnaires, employed in some jurisdictions, might be used to inquire about jurors' membership in the class or questioning of the jurors might be done in camera.²¹⁸ However, written questionnaires do little to maintain the transparent nature of court proceedings, limiting the faith of the public that impartial juries are being selected, while also carrying the risk that they might become part of the public record and therefore may be no more private than questioning in court.²¹⁹ Questioning regarding sexual orientation done in camera is also problematic in that it, too, obscures the openness of jury selection.²²⁰ Even more troublesome, however, is the message such a practice sends, the message that being homosexual is something that is shameful and deserving of secrecy and therefore should only be discussed behind closed doors.²²¹ If an effort is made to question all jurors in camera regarding sexual orientation, the process is likely to overburden the court and ultimately, upset jurors.²²²

If it is not membership in the class, but rather the perception that the juror is a member of the class that must be shown to satisfy the first *Batson* prong, the proof required becomes even more challenging and potentially ridiculous.²²³ The attorneys involved might have to enter into a discussion based on stereotypes and inferences that are both insulting to the juror and inadequate for judicial consideration.²²⁴ The trial judge would be asked to determine if the characteristics at issue were sufficient to constitute the perception of homosexuality, introducing prejudice and guesswork into the analysis.²²⁵ The level of disrespect afforded to the juror in this situation might seriously counteract any equal protection benefits the process was designed to afford.²²⁶

One additional concern with allowing *Batson* challenges based on sexual orientation is the effect that such a practice might have on the behavior and

215. Young, *supra* note 210, at 258.

216. *Id.*

217. *Id.*

218. *Id.* at 258-60.

219. *Id.* at 259-60.

220. *Id.* at 258-59.

221. *Id.* at 259.

222. *Id.*

223. *Id.* at 256.

224. *See id.* (imagining how this interaction between opposing attorneys might proceed).

225. *Id.* at 258.

226. *Id.* at 261.

appearance of homosexual jurors.²²⁷ Rather than being open and sharing information regarding their sexual orientation, gay, lesbian, and bisexual jurors might instead modify their behaviors and appearance in order to achieve fair treatment by not being suspected to be members of the class in the first place.²²⁸ These types of modification result in gay, lesbian, and bisexual jurors becoming invisible in the jury selection process, leading to the suppression of information that might actually be relevant to jury selection and also penalizing those who do not attempt to conceal their identities.²²⁹

Ultimately, while extending *Batson* to include sexual orientation might be a legal possibility after *Windsor*, the hurdles to applying *Batson* in these cases outweigh the benefits. An appropriate solution to the problem of discrimination against potential jurors based on sexual orientation cannot be one that otherwise undermines those jurors' rights.

IV. A POTENTIAL REMEDY NOT INVOLVING EXTENSION OF *BATSON*— EXTENSION OF COURT RULES

As described, there are a number of factors that must be satisfied before *Batson* can be extended to protect against discrimination based on sexual orientation. A class based on homosexual sexual orientation would likely need to be established as requiring heightened scrutiny. A method for ensuring equal protection of the class that does not violate the privacy interest of its members would also be necessary. The practical problems with extending *Batson* to the class are significant. Still, while there may be problems with peremptory challenges in general and with the application of *Batson* to sexual orientation specifically, protection of the juror's rights remains an important end. In the context of race, it has been said that discrimination in jury selection constitutes serious professional misconduct that must be addressed in order to preserve the public good.²³⁰ Given that the professional standards regarding discrimination are the same for race-based and sexual orientation-based classes,²³¹ violations of the standards should be treated with equal seriousness for discrimination based on these classes. In the absence of a *Batson* application to sexual orientation based discrimination, it is necessary that other means to prevent discrimination be explored.

The courts of each state are one possible avenue through which this type of discrimination may be addressed, at least at the state level. Because the state judiciary sets rules for the number and use of peremptory challenges, rules and procedures for objections to jurors being struck without cause could be set forth as well. While a comprehensive description of all state court rules addressing objections to peremptory challenges is outside the scope of this Note, some

227. *Id.* at 261-63.

228. *Id.* at 261.

229. *Id.* at 263.

230. Brown, *supra* note 38, at 315-16.

231. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013).

individual examples are helpful to highlight the current state of court rules in this area.

The Minnesota Rules of Criminal Procedure demonstrate one approach.²³² These rules include a statement that purposeful discrimination based on race or gender is not permitted in the exercise of peremptory challenges.²³³ The rules further provide the procedure by which an objection to a challenge is made by the opposing party and decided by the judge.²³⁴ This procedure essentially follows the requirements set by the Court in *Batson*.²³⁵ Of note, the Minnesota rules also include the possible remedies if the objection is sustained: the challenged juror may be reinstated to the panel or the entire jury may be discharged and a new jury selected.²³⁶

In contrast, the Indiana Jury Rules place the burden of identifying and resolving “constitutionally impermissible” use of peremptory challenges on the court.²³⁷ Under these rules, the court may, on its own initiative, “(a) inform the parties of the reasons for its concern, (b) require the party exercising the challenge to explain its reasons for the challenge, and (c) deny the challenge if the proffered basis is constitutionally impermissible.”²³⁸

Still another approach is found in the California Rules of Civil Procedure, which specify that a peremptory challenge may not be used “on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.”²³⁹

These three examples highlight just some of the ways that individual states can and do address discriminatory use of peremptory challenges. However, they also highlight the incomplete development of a means by which to combat discrimination in the jury selection process. Under the Indiana rule, for instance, it is unlikely that an objection to a *Batson* challenge based on sexual orientation would stand; the success of the objection would be driven by the court’s understanding of constitutionally impermissible bases. As sexual orientation has not yet been established as a suspect or quasi-suspect class, an Indiana court might not only overrule the objection but also may be acting in error if it allowed the objection.²⁴⁰ Given the existence of a professional standard prohibiting discrimination, this paradox is deplorable.

To prevent this hypothetical from becoming a reality, court rules against the discriminatory application of peremptory challenges should ideally include an open-ended list of classes that are at risk for discrimination, the process by which an objection is raised and resolved, and the possible remedies available to be

232. MINN. STAT. ANN. § 26.02 subdiv. 7 (West 2014).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. IND. JURY R. 18(d) (2013).

238. *Id.*

239. CAL. CIV. PROC. § 231.5 (West 2014).

240. Hindo, *supra* note 81.

applied at the court's discretion. Importantly, rules must avoid the major pitfall of a *Batson* application; the privacy of the juror must be protected. To accomplish this, rules should forego the requirement of actually demonstrating that the struck juror is part of a cognizable class. Rather, an objection could be raised based on apparent discrimination and the responding party given the opportunity to offer a non-discriminatory explanation for the strike. While this would essentially transform a peremptory strike into a type of for cause strike, it would only be required when an objection based on purposeful discrimination has been raised.

A rule meeting these criteria might look like a combination of those established in California and Minnesota.²⁴¹ This rule could read:

Section 1. Rule. A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.²⁴²

Section 2. Objection and Resolution. The objection and all arguments must be made out of the hearing of all prospective or selected jurors. All proceedings on the objection must be on the record. The objection must be determined by the court as promptly as possible, and must be decided before the jury is sworn.

(a) Any party, or the court, at any time before the jury is sworn, may object to a peremptory challenge on the ground of purposeful discrimination of the type provided in Section 1. The objecting party need not establish that the juror is actually of the race, color, religion, sex, national origin, sexual orientation, or similar ground that is the basis of the discrimination. If the objecting party fails to state appropriate grounds for the objection, the objection must be overruled.

(b) The responding party must articulate the non-discriminatory explanation for exercising the peremptory challenge. The responding party must present facts that satisfy the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the responding party. If the responding party fails to articulate a non-discriminatory explanation, the objection must be sustained.²⁴³

Section 3. Remedies. If the court overrules the objection, the prospective juror must be excused. If the court sustains the objection, the court must—based upon its determination of what the interests of justice and a fair trial to all parties in the case require—either:

(a) Disallow the discriminatory peremptory challenge and resume jury selection with the challenged prospective juror reinstated on the panel; or

(b) Discharge the entire jury panel and select a new jury from a jury panel not previously associated with the case.²⁴⁴

Additionally, professional conduct standards should be created or updated in all jurisdictions to indicate that purposeful discrimination by an attorney in the

241. *Id.*; MINN. STAT. ANN. § 26.02 subdiv. 7 (West 2014).

242. Adapted from CAL. CIV. PROC. § 231.5 (West 2014).

243. Adapted from MINN. STAT. ANN. § 26.02 subdiv. 7 (West 2014).

244. Adapted from *id.*

exercise of peremptory challenges constitutes professional misconduct.

CONCLUSION

The peremptory challenge is a well-established component of the American judicial process.²⁴⁵ However, it is not a component that is protected from modification to improve its use and help it to better achieve its purpose. The development of *Batson* challenges to combat racial discrimination, while not perfect, serve as a measure to remedy some of the ills inherent in the system. The extension of *Batson* challenges to ethnicity and sex further demonstrate the ability to adapt this process to meet the evolving identification of discriminatory practices. Discriminatory use of peremptory challenges based on sexual orientation has been identified, and it is now time for the process to evolve again. However, the practical limitations of extending *Batson* to this class outweigh the potential benefits.

Limitations to extending *Batson*, however, cannot force the law to ignore the protection of gay, lesbian, and bisexual jurors' equal rights. Jurisdictions should proactively amend court rules to prevent this discriminatory practice, and lawyers should be held to the highest professional standards and actively work to prevent discrimination based on sexual orientation in this process.

245. Neal, *supra* note 8, at 1095.