

Extending *Batson* to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity

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This Article argues that it is now time to extend Batson to all federal and state trial courts and expressly prohibit the exclusion of jurors based on their actual or perceived sexual orientation or gender identity. The lack of protection for jurors based on their actual or perceived sexual orientation or gender identity fosters discrimination in the law, violates the rights of lesbian, gay, bisexual, and transgender (LGBT) persons who may be excluded from serving on juries, violates the rights of LGBT persons whose criminal or civil cases are heard in court, and undermines public confidence in judicial proceedings that discriminate against entire categories of individuals.

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I. INTRODUCTION

In *Batson v. Kentucky*,¹ the U.S. Supreme Court ruled that a prosecutor could not use peremptory challenges to exclude potential jurors from a criminal case based solely on their race.² The Supreme Court ruled that dismissing potential jurors without a valid, racially neutral reason violated the Equal Protection Clause.³ The landmark case gave its name to what we now call a “*Batson* challenge,” an objection to the improper use of peremptory challenges to exclude potential jurors based on criteria such as race. Excluding jurors because of their race violates the rights of those prospec-

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

2. *Id.* at 99. *Accord* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019).

3. *Batson*, 476 U.S. at 89, 100.

tive jurors to serve on the jury and denies defendants a jury representative of the community.

Later cases extended *Batson* to civil cases⁴ and to cases where jurors were excluded on the basis of sex⁵ and certain other categories. A federal statute now prohibits the exclusion of jurors on the basis of “race, color, religion, sex, national origin, or economic status,”⁶ but does not yet prohibit excluding potential jurors based on their actual or perceived sexual orientation or gender identity.⁷

This Article argues that it is now time to extend *Batson* to all federal and state trial courts and expressly prohibit the exclusion of jurors based on their actual or perceived sexual orientation or gender identity.⁸ The lack of protection for jurors based on their actual or perceived sexual orientation or gender identity fosters discrimination in the law, violates the rights of lesbian, gay, bisexual, and transgender (LGBT) persons who may be excluded from serving on juries, violates the rights of LGBT persons whose criminal or civil cases are heard in court, and undermines public confidence in judicial proceedings that discriminate against entire categories of individuals.

II. BACKGROUND

A. REMOVAL FOR CAUSE AND REMOVAL BY PEREMPTORY STRIKES

If potential jurors state during voir dire that they would find a particular defendant guilty or liable no matter what the facts presented in court establish or what the law requires, those potential jurors should be removed for cause.⁹ Depending on the circumstances of the challenge to seating a particular juror, a challenge “for cause” may also arise as “a challenge to

4. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

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

6. 28 U.S.C. § 1862 (1980). “Economic status” is included in this list of factors because it has sometimes been used as a proxy for racial discrimination.

7. Six states have statutes that prohibit excluding jurors in state courts on the basis of sexual orientation, gender identity, or transgender status. *See infra* notes 247-75 and accompanying text.

8. “Gender identity” should be read in this article to include both “gender identity” and “gender expression.” The concept should also be read to include “actual or perceived gender identity” and “actual or perceived gender expression.”

9. JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION* 335 (4th ed. 2018). The investigation of a juror’s actual bias can include “statements the potential juror makes during voir dire or in some other setting (e.g., responses to questions contained in supplemental juror questionnaires or statements made to others or posted online) that reflect bias against a party or an inability of the juror to discharge his or her duty.” *Id.*

the array,”¹⁰ “a challenge to the pool,”¹¹ “a challenge for favor,”¹² or as “a principal challenge.”¹³ All challenges for cause must have “an express reason as to why the court should not permit the person to sit on the jury.”¹⁴ And “[a]ll challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.”¹⁵

If a juror says that despite believing a defendant to be guilty or liable, the juror will nonetheless be fair and impartial in deciding the case, then the trial court may seat the juror.¹⁶ Although the number of challenges for cause are unlimited, in practice these challenges for cause are granted infrequently.¹⁷

If a party cannot remove a juror for cause, the party can instead use a peremptory challenge to remove a potential juror.¹⁸ A peremptory challenge is “a statute-specified number of strikes that lawyers can exercise against potential jurors.”¹⁹ The failure of a trial court to remove a potential juror for cause will not “in and of itself call into question the impartiality of the final jury unless it results in seating a juror who should have been dismissed for cause.”²⁰ Additionally, “any error in failing to sustain a challenge for cause is waived if a party proceeds to trial without using all peremptory challeng-

10. A “challenge to the array” is “a challenge to the entire panel based on some alleged irregularity in the process of summoning or selecting prospective jurors.” V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* § 2.12, at 2-23 (4th ed. 2010).

11. See, e.g., *State v. Neil*, 457 So. 2d 481, 482 (Fla. 1984).

12. A “challenge for favor” is “a challenge to an individual prospective juror where the facts raise a suspicion of bias.” STARR & MCCORMICK, *supra* note 10, at 2-23.

13. A “principal challenge” is “a challenge to an individual prospective juror based on alleged incompetency as a matter of law.” *Id.* at 2-23 to 2-24.

14. *Id.* at 2-24.

15. 28 U.S.C. § 1870 (1959).

16. FREDERICK, *supra* note 9, at 335. Some state courts hold that “any reasonable doubt as to the impartiality of the juror should be resolved in favor of the juror’s removal.” *Id.* It will not be enough for the court “merely to elicit a statement from the juror that he or she can be impartial if that statement is not reasonable or believable.” STARR & MCCORMICK, *supra* note 10, at 2-24.

17. FREDERICK, *supra* note 9, at 335. Challenges for cause should ideally “be made outside the presence of the potential jurors so that the jurors under consideration are less likely to take offense at these challenges.” *Id.*

18. *Id.* See also *Batson v. Kentucky*, 476 U.S. 79, 108 (1986) (Marshall, J., concurring) (“Much ink has been spilled regarding the historic importance of defendants’ peremptory challenges.”).

19. FREDERICK, *supra* note 9, at 335.

20. STARR & MCCORMICK, *supra* note 10, at 2-25. Furthermore, even if the defendant ends up using all of his peremptory challenges to remove jurors who should have been removed for cause, “the court’s error is harmless if the jury that is ultimately selected is impartial.” *Id.*

es.”²¹ If a juror should have been removed for cause but was not, it is up to the parties to use a peremptory challenge to remove that juror.

Historically, a party could exercise its peremptory challenges on any basis without having to give a reason why it was striking a particular juror.²² Parties are granted a certain number of peremptory challenges by statute, and although the right to peremptory challenges is not a fundamental right, peremptory challenges have come to be described as “a basic right of trial by jury.”²³

“The purpose of peremptory challenges is to ensure a fair and impartial jury by enabling each party to dismiss the most partial potential jurors.”²⁴ The law presumes that both sides will use their challenges to remove those prospective jurors who seem to be biased against their client or in favor of the opponent, and thus “the extremes of potential prejudice on both sides will be eliminated, [hopefully] leaving a jury as impartial as can be obtained from the available venire.”²⁵ Allowing lawyers to use peremptory challenges to remove jurors who may be biased toward one party or the other “furthers the interest of the state, the parties, and society in an impartial jury and a fair trial.”²⁶

21. *Id.* at 2-26. Parties must use their peremptory challenges before the jury is sworn. Parties cannot save peremptory challenges for later use during trial. *See id.* at 2-27.

22. *See, e.g.*, JAMES J. GOBERT, ELLEN KREITZENBERG, & CHARLES H. ROSE III, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* §§ 8:1 at 363, 8:4 at 372 (3d ed. 2009).

23. STARR & MCCORMICK, *supra* note 10, at 2-27. Although they are described as a “basic right,” the Supreme Court has also stated 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 a fair trial.” *Georgia v. McCullom*, 505 U.S. 42, 57 (1992). Accordingly, in some cases “the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.” *Id.*

24. STARR & MCCORMICK, *supra* note 10, at 2-27. In the United States, “[d]ue process requires that the system of challenges be reasonably equal and does not favor one party over the other.” *Id.* In England, trials for felonies at common law gave the defendant up to thirty-five peremptory challenges, while prosecutors had an unlimited number of challenges. *Id.* In the United States, an early statute gave a defendant thirty-five peremptory challenges in trials for treason and twenty challenges for other felonies punishable by death. GOBERT, KREITZENBERG & ROSE, *supra* note 22, at 364. On the state level, states “codified the prosecutor’s right of a peremptory challenge, granting the prosecutor a number of such challenges that ranged from one-half that allowed the defendant up to, in many states, an equal number.” *Id.*

25. *People v. Wheeler*, 583 P.2d 748, 760 (Cal. 1978).

26. GOBERT, KREITZENBERG & ROSE, *supra* note 22, at 365. “Removed from the panel which will decide the case will be those jurors who are clearly biased, as well as those whose impartiality is doubted even though there may be insufficient evidence to convince the trial judge to excuse the juror for cause.” *Id.* Additionally, “peremptory challenges allow attorneys to excuse jurors before whom they feel they may not be able to present the client’s case effectively.” *Id.*

The Constitution does not require any specific minimum or maximum number of peremptory challenges, “and the optimal number of peremptory challenges to allow each side is a matter upon which reasonable minds can differ.”²⁷ But “to the extent that peremptory challenges may lead to a jury that is not reflective of a fair cross-section of the community, the greater the number of peremptory challenges permitted, the greater the potential for distortion.”²⁸

In civil cases in federal court, each party is allowed three peremptory challenges.²⁹ If there are multiple plaintiffs or multiple defendants, the court may either consider those multiple plaintiffs or defendants as a single party for the purposes of making peremptory challenges or the court “may allow additional peremptory challenges and permit them to be exercised separately or jointly.”³⁰

B. PROVING DISCRIMINATION PRE-BATSON

Before it decided *Batson v. Kentucky*, the U.S. Supreme Court had historically held that a party could not establish racial discrimination simply by showing an underrepresentation of African Americans on a jury.³¹ On the state level, however, the highest courts of California,³² Massachusetts,³³

27. *Id.* at 367.

28. *Id.*

29. 28 U.S.C. § 1870 (1959).

30. *Id.*

31. STARR & MCCORMICK, *supra* note 10, at 2-29.

32. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). In *Wheeler*, two African American men were accused of murdering a white man. All of the African Americans in the jury venire were called to the jury box, were questioned on voir dire, and were passed for cause; “yet the prosecutor proceeded to strike each and every black from the jury by means of his peremptory challenges, and the jury that finally tried and convicted these defendants was all white.” *Id.* at 752. In considering the defendant’s objections to the all-white jury, the *Wheeler* court held “that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.” *Id.* at 762. The prohibition on using race to exclude jurors in *Wheeler* was later extended to sexual orientation.

33. *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979). In *Soares*, three African American defendants were charged with the murder of a white victim. *Id.* at 515. At the jury empanelment, the judge found thirteen black members of the venire were available to be seated as jurors. *Id.* at 508. The prosecutor peremptorily challenged twelve of these thirteen prospective jurors. *Id.* at 517. One African American man who was not challenged was seated and designated by the judge as foreman of the jury. *Id.* In total, the prosecutor exercised forty-four peremptory challenges through which he excluded 92% of the available black jurors, and only 34% of the available white jurors. *Soares*, 387 N.E.2d at 517. The three African American defendants were convicted of murdering the white victim. In setting aside the verdicts and remanding for a new trial, the Supreme Judicial Court of Massachusetts held that:

and Florida³⁴ had each ruled that using peremptory challenges to remove potential jurors based on their race or perceived affinity with the defendant violated the rights of the defendant to a trial by a jury fairly drawn from the community. Additionally, striking jurors based on their race or perceived affinity with the defendant violated the right of the individual stricken to serve on the jury. As the Florida Supreme Court stated, “it is time . . . to hold that jurors should be selected on the basis of their individual characteristics and that they should not be subject to being rejected solely because of the color of their skin.”³⁵

In *Batson v. Kentucky*,³⁶ the U.S. Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited prosecutors from using peremptory challenges to exclude potential jurors because of their race or because of an assumption that African American jurors could not impartially decide a case involving an African American defendant.³⁷

C. BATSON

James Kirkland Batson, an African American man, was charged with second-degree burglary and receiving stolen goods.³⁸ The prosecutor exercised his peremptory challenges to strike all four African Americans from the venire, leaving a jury composed of only white persons.³⁹ Defense counsel moved to discharge the jury before it was sworn, asserting that “the prosecutor’s removal of the black veniremen violated petitioner’s rights

there was sufficient evidence to create a prima facie case that the use of peremptory challenges by the prosecution was designed to exclude persons from the trial jury on the basis of race, and the failure of the trial judge to allow a hearing on this issue deprived the accused of their constitutionally protected right to a trial by a jury fairly drawn from the community.

Id. at 503. Seating a foreman of the same race as the defendants was not enough to remedy the exclusion of the other potential jurors.

34. *State v. Neil*, 457 So. 2d 481 (Fla. 1984). Neil, an African American, was charged with the second-degree murder of a black Haitian immigrant. *Id.* at 482. The jury pool called for his trial had thirty-one whites and only four African Americans. *Id.* The state used peremptory challenges to strike the first three African Americans called. *Id.* The defense objected to each of the three challenges, claiming a violation of Neil’s Sixth Amendment right to trial by an impartial jury, and moved to strike the entire pool. *Id.* at 482-83. The trial court held that the prosecution did not need to explain its reasons for striking almost all of the African Americans from the jury, and instead gave each side five additional preemptive strikes. *Neil*, 457 So. 2d at 483. The Florida Supreme Court directed the district court to remand for a new trial. *Id.* at 488.

35. *Id.* at 482.

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

37. STARR & MCCORMICK, *supra* note 10, at 2-29 to 2-30.

38. *Batson*, 476 U.S. at 82.

39. *Id.* at 83.

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.⁴⁰ The trial court denied the motion, stating instead that the parties could “use their peremptory challenges to ‘strike anybody they want to.’”⁴¹ The jury convicted Batson on both counts, and the Kentucky Supreme Court affirmed the convictions.⁴²

In reversing that decision, the U.S. Supreme Court recognized that “[r]acial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try.”⁴³ Instead, said the Supreme Court, “[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community”⁴⁴ and “[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”⁴⁵ In particular, the Court stated that “[d]iscrimination within the judicial system is most pernicious because it is ‘a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.’”⁴⁶

“By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges,” the Supreme Court wrote that its decision in *Batson* “enforces the mandate of equal protection and furthers the ends of justice.”⁴⁷ Furthermore, “[i]n view of the heterogeneous population of [the United States], public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”⁴⁸

The Supreme Court reaffirmed *Batson* in *Georgia v. McCullom*,⁴⁹ where it held that a peremptory challenge must “not be based on either the race of the juror or the racial stereotypes held by the party.”⁵⁰ *McCullom*

40. *Id.*

41. *Id.*

42. *Id.* at 83-84.

43. *Batson*, 476 U.S. at 87. The majority opinion was authored by Justice Powell. Justices White, Marshall, Stevens (joined by Brennan), and O’Connor authored concurring opinions. Chief Justice Burger and Justice Rehnquist dissented.

44. *Id.*

45. *Id.*

46. *Id.* at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). In *Strauder*, the U.S. Supreme Court invalidated a West Virginia statute that provided that only white men could serve as jurors. *Strauder*, 100 U.S. at 305. *See also* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2239 (2019) (“Even though laws barring blacks from serving on juries were unconstitutional after *Strauder*, many jurisdictions employed various discriminatory tools to prevent black persons from being called for jury service.”).

47. *Batson*, 476 U.S. at 99.

48. *Id.*

49. *Georgia v. McCullom*, 505 U.S. 42 (1992).

50. *Id.* at 59.

extended *Batson* to allow prosecutors to challenge peremptory challenges exercised by defense counsel.⁵¹ This meant that *Batson* was no longer just a tool for defense counsel to wield against the prosecution. When either side in a criminal case uses its peremptory challenges to remove jurors because of their race, the rights of the excluded jurors are violated. And “[a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial.”⁵²

D. EXTENDING *BATSON* TO CIVIL CASES

*Edmonson v. Leesville Concrete Company*⁵³ extended *Batson* to civil cases. In *Edmonson*, an African American construction worker brought a negligence action against the company for which he worked after suffering a job-site accident.⁵⁴ The company used two of its three peremptory challenges to remove potential jurors who were African American.⁵⁵ Citing *Batson*, the plaintiff objected to their removal, but the trial court held that *Batson* did not extend to civil trials.⁵⁶ The jury awarded the injured worker \$18,000 after a setoff for his own contributory negligence.⁵⁷ On appeal, the U.S. Supreme Court held that under the equal protection component of the Due Process Clause of the Fifth Amendment, a private party could not use peremptory challenges in a civil case to remove prospective jurors because of their race.⁵⁸ The Supreme Court concluded that using peremptory challenges to exclude jurors because of their race violated the equal protection

51. In *McCullom*, a grand jury in Georgia indicted several white defendants on charges of assault and battery against two African American victims. *Id.* at 44. Before the jury was selected, the prosecution asked for an order prohibiting defense counsel from exercising its peremptory challenges based on race. *Id.* The trial court denied the requested motion, stating that nothing in federal or state law restricted the defense attorneys in how they could use their peremptory challenges. *Id.* at 45. The Georgia Supreme Court affirmed but the U.S. Supreme Court reversed, holding that “the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.” *Id.* at 59. “Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges.” *McCullom*, 505 U.S. at 59.

52. *Id.* at 56. The U.S. Supreme Court affirmed that exercising peremptory challenges in a racially discriminatory manner “inflicts harm on the dignity of persons and the integrity of the courts, it constitutes state action for equal protection purposes, and a prosecutor has third-party standing to raise an equal protection claim on behalf of the excluded jurors.” STARR & MCCORMICK, *supra* note 10, at 2-31.

53. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

54. *Id.* at 616.

55. *Id.*

56. *Id.* at 617.

57. *Id.*

58. *Edmonson*, 500 U.S. at 624.

rights of the jurors removed, and that the other party in the civil litigation had third-party standing to raise the rights of the excluded jurors.⁵⁹

E. EXTENDING *BATSON* TO OTHER CATEGORIES

Batson was further extended to challenges based on gender in *J.E.B. v. Alabama ex rel. T.B.*⁶⁰ *J.E.B.* involved a paternity and child support claim in which the State of Alabama used nine of its ten peremptory challenges to remove male jurors.⁶¹ The male petitioner objected, arguing that the State's peremptory challenges were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶² The petitioner argued that the logic and reasoning of *Batson v. Kentucky* should similarly forbid intentional discrimination on the basis of gender.⁶³ The trial court rejected petitioner's claim and empaneled an all-female jury that found the petitioner was the father of the child in question.⁶⁴ The trial court ordered the man to pay child support.⁶⁵ The Alabama Court of Civil Appeals affirmed the order and the Alabama Supreme Court denied certiorari.⁶⁶

The U.S. Supreme Court, in its review of the case, held that exercising peremptory challenges based on the juror's gender could not survive the heightened equal protection scrutiny that the Supreme Court uses to evaluate distinctions based on gender. Because of the long and unfortunate history of sex discrimination in the United States, gender-based classifications require "an exceedingly persuasive justification" to satisfy equal protection scrutiny.⁶⁷ Instead of offering an "exceedingly persuasive justification" for striking the male jurors in *J.E.B.*, the State argued that its action:

may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might

59. *Id.* at 618.

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

61. *Id.* at 129.

62. *Id.*

63. *Id.*

64. *Id.*

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

66. *Id.* at 129-30.

67. *Id.* at 136 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

be more sympathetic and receptive to the arguments of the complaining witness who bore the child.⁶⁸

The Supreme Court rejected entirely this stereotype as a defense of the State's actions.⁶⁹

The *J.E.B.* Court explained that although no one has an absolute right to serve on a jury, once prospective jurors are summoned for jury service, they “have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”⁷⁰ The *J.E.B.* Court also stated that:

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. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. (citation omitted). The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.⁷¹

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.”⁷² Those courts have held that *Batson* applies only to those distinct groups that are entitled to heightened judicial scrutiny.⁷³ For example, *Batson* does not apply to challenges based

68. *Id.* at 137-38.

69. *Id.* at 138.

70. *J.E.B.*, 511 U.S. at 128. *Accord* Taylor v. Louisiana, 419 U.S. 522 (1975) (reversing a state conviction of a male defendant because women had effectively been excluded from jury service).

71. *J.E.B.*, 511 U.S. at 140.

72. Sandy Weinberg, *A.B.A. Report to the House of Delegates*, 2018 A.B.A. SEC. CRIM. JUSTICE REP. 108D, at 1, http://www.abajournal.com/files/2018_hod_midyear_108D.pdf [https://perma.cc/6MDR-XWC7] (“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)).

73. *Id.* (citing *Bowles v. Sec'y for the Dep't of Corrs.*, 608 F.3d 1313, 1316 (11th Cir. 2010)).

on obesity because obesity is not subject to heightened scrutiny.⁷⁴ *Batson* has also not yet been extended to age discrimination.⁷⁵

Lower courts have extended *Batson* to cognizable groups not yet addressed by the U.S. Supreme Court, including “Jews, Italians, whites, and Native Americans.”⁷⁶ And at least ten states appear to ban the exercise of peremptory challenges based on a potential juror’s religious affiliation.⁷⁷

F. REAFFIRMING *BATSON*

The U.S. Supreme Court most recently reaffirmed *Batson* in *Flowers v. Mississippi*.⁷⁸ Curtis Flowers, an African American man, was put on trial six times for the murders of four people.⁷⁹ The same prosecutor represented the State of Mississippi in each of the six jury trials.⁸⁰ Mr. Flowers was convicted in the first three trials, but the Mississippi Supreme Court reversed each conviction for prosecutorial misconduct in excluding black prospective jurors during the jury selection process.⁸¹ His fourth and fifth trials ended in mistrials with hung juries.⁸² And in his sixth trial, the prosecutor struck five of the six black prospective jurors, and the jury that was empaneled found Mr. Flowers guilty.⁸³ The Mississippi Supreme Court affirmed Mr. Flowers’s conviction in that sixth trial.⁸⁴ That case was then appealed to the U.S. Supreme Court, which vacated the judgment and remanded the case.⁸⁵ On remand, the Mississippi Supreme Court again af-

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

75. STARR & McCORMICK, *supra* note 10, at 2-35. “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.” *Id.* at 2-35 to 2-36. “Courts have also rejected a *Batson* claim based on the youth of the juror and have found youth to be a valid race-neutral reason for striking a juror.” *Id.* at 2-36.

76. *Id.* at 2-35.

77. The ten states are Arizona, California, Colorado, Florida, Hawai’i, Illinois, Mississippi, New Jersey, New York, and North Carolina. 705 ILL. COMP. STAT. 305/2(b) (2018); FREDERICK, *supra* note 9, at 336, 354 n.19 (naming the nine other states). *See also* GOBERT, KREITZENBERG & ROSE, *supra* note 22, at 389 (“Although members of a particular religion are arguably a cognizable group, the Supreme Court has yet to extend *Batson* to prohibit discrimination based on religion.”).

78. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

79. *Id.* at 2234.

80. *Id.*

81. *Id.* at 2235.

82. *Id.*

83. *Flowers*, 139 S. Ct. at 2228.

84. *Flowers v. State*, 158 So. 3d 1009 (Miss. 2014). The Mississippi Supreme Court held that the prosecutor’s “race-neutral reasons were valid and not merely pretextual.” *Id.* at 1058.

85. *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016).

firmed the conviction by a vote of five to four.⁸⁶ The case was again appealed to the U.S. Supreme Court, which found that the trial court clearly erred in not finding a *Batson* violation.⁸⁷

The Supreme Court found that “four critical facts, taken together, require[d] reversal” of Mr. Flowers’s conviction in his sixth trial.⁸⁸ First, the Supreme Court found that “in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck.”⁸⁹ Second, in the sixth trial that was the subject of the latest appeal to the U.S. Supreme Court, “the State exercised peremptory strikes against five of the six black prospective jurors.”⁹⁰ Third, in the sixth trial the prosecutor “engaged in dramatically disparate questioning of black and white prospective jurors” in an apparent effort to uncover “pretextual reasons to strike black prospective jurors.”⁹¹ And fourth, the Supreme Court found that the prosecutor had used a peremptory challenge to strike “at least one black prospective juror . . . who was similarly situated to white prospective jurors who were not struck by the State.”⁹²

The Supreme Court declined to focus on any single fact, stating instead that in this case, “all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not ‘motivated in substantial part by discriminatory intent.’”⁹³ Justice Kavanaugh, writing for the majority, stated that the Supreme Court was not breaking any “new legal ground” by reaching this decision, but was simply

86. *Flowers v. State*, 240 So. 3d 1082 (Miss. 2017).

87. *Flowers*, 139 S. Ct. 2228. See also Robert Barnes, *The Supreme Court Tossed Curtis Flowers’s Death-Row Conviction, Ruling it was Racially Biased*, WASH. POST (June 21, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-overturns-mississippi-mans-murder-conviction-in-case-that-raised-questions-of-racial-bias-orders-new-trial/2019/06/21/6fc1b2d8-942d-11e9-b570-6416efdc0803_story.html?noredirect=on&utm_term=.8244193821de [perma.cc/XUG8-VG7J] (“Evans, a longtime prosecutor, has attempted to convict Flowers in a prosecutorial pursuit that may be without parallel.”); Adam Liptak, *Excluding Black Jurors in Curtis Flowers Case Violated Constitution, Supreme Court Rules*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/politics/curtis-flowers-supreme-court-in-the-dark-podcast.html> [perma.cc/L5KG-UW5A] (“Over the course of six trials, Mr. Evans relied on a signature tactic: he worked diligently to keep black people off Mr. Flowers’s juries.”).

88. *Flowers*, 139 S. Ct. at 2235.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Flowers*, 139 S. Ct. at 2235 (citing *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)).

enforcing and reinforcing *Batson* “by applying it to the extraordinary facts of this case.”⁹⁴

Justice Samuel Alito authored a concurring opinion in this “highly unusual case.”⁹⁵ He noted that in light of the earlier trials, “it was risky for the case to be tried once again by the same prosecutor in Montgomery County.”⁹⁶ Under other circumstances, he wrote, he would have had “no trouble affirming the decision of the Supreme Court of Mississippi, which conscientiously applied the legal standards applicable in less unusual cases.”⁹⁷ But because of the unusual circumstances here, Justice Alito agreed with the majority that Mr. Flowers’s capital conviction could not stand.⁹⁸

In a dissenting opinion joined in part by Justice Neil Gorsuch, Justice Clarence Thomas wrote that the Court should not have granted certiorari to hear the case because the reasons that the prosecutor gave for striking the black prospective jurors were adequate in his view.⁹⁹ And in the portion of his dissenting opinion that no other Justice joined, Justice Thomas tried to suggest that *Batson* might have been wrongly decided, in part because he doubted that “a party who has no personal constitutional right at stake should ever be allowed to litigate the constitutional rights of others.”¹⁰⁰

III. EXTENDING *BATSON* TO SEXUAL ORIENTATION AND GENDER IDENTITY

A. JURY SERVICE AND THE LGBT COMMUNITY

“Jury service is one of the most important responsibilities of an American citizen.”¹⁰¹ And the removal of even “a single juror through impermissible reasons is unconstitutional.”¹⁰²

94. *Id.* at 2235, 2251.

95. *Id.* at 2251 (Alito, J., concurring). Justice Alito wrote “Indeed, it is likely one of a kind.” *Id.* The New York Times noted in an editorial that “[t]he circumstances surrounding Mr. Flowers’s trial and subsequent retrials caused even Justice Samuel Alito, who has long been skeptical of capital defendants, to join the majority opinion and show some sympathy for Mr. Flowers.” Editorial Board, Editorial, *A Blow Against Racism in Jury Selection*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/curtis-flowers-supreme-court-mississippi.html> [perma.cc/GX3F-BXL9].

96. *Flowers*, 139 S. Ct. at 2252 (Alito, J., concurring).

97. *Id.*

98. *Id.*

99. *See id.* at 2253 (Thomas, J., dissenting).

100. *Id.* at 2270 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 135 (2004) (Thomas, J., concurring)).

101. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir. 2014). *See also Flowers*, 139 S. Ct. at 2238 (“Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”); COLO. REV. STAT. § 13-71-104(1) (2019) (“Juror service is a duty that every qualified person has an

Jury service is a particularly important aspect of citizenship for LGBT persons. Jury service gives LGBT persons “a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others.”¹⁰³ Serving on a jury is a right and duty of citizenship as important as exercising the right to vote – it is a measure of an individual’s full participation in society.¹⁰⁴ Denying any person the right to serve on a jury because of that person’s sexual orientation or gender identity harms the parties to the criminal or civil case, the individual juror excluded, that individual’s community, and the larger community of citizens who deserve juries selected from all eligible citizens. It taints the entire trial. As the Ninth Circuit stated:

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. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals

obligation to perform when selected.”); WIS. STAT. ANN. § 756.001(2) (West 2019) (“Jury service is a civic duty.”); *Jury Access Act*, NAT’L LGBT BAR ASS’N, <https://lgbtbar.org/programs/advocacy/jury-access/> [<https://perma.cc/9LUD-BTQY>] (“Currently, the United States Code prohibits discrimination on the basis of race, color, religion, sex, national origin and economic status. . . . Serving on a jury is a civic duty and to infringe upon that right is prejudicial. Equality extends to the courtroom and especially to juries. No one should be subjected to discrimination simply for performing a civic duty.”).

102. FREDERICK, *supra* note 9, at 337. See also *Flowers*, 139 S. Ct. at 2241 (“In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.”).

103. *SmithKline Beecham Corp.*, 740 F.3d at 485. 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. *Id.*

104. In 2011, Jonathan D. Lovitz, a gay man who had been called for jury duty in New York, told the court during voir dire that because he couldn’t “get married or adopt a child in the State of New York,” he couldn’t possibly “be an impartial judge of [another] citizen” when he was “considered a second-class citizen in the eyes of the justice system.” Natalie Hope McDonald, *Get Out of Jury Duty if You’re Gay?*, PHILA. MAG. (Mar. 7, 2011), <https://www.phillymag.com/news/2011/03/07/get-out-of-jury-duty-if-youre-gay/> [<https://perma.cc/UN5J-RD5V>]. The judge dismissed him from the venire. *Id.* Reports of the incident gave rise to the “Jury Duty Block” that encouraged LGBT individuals to make a similar statement if called for jury service “as a way to bring attention to discrimination” against members of the LGBT community. *Id.*

of justice on account of a characteristic that has nothing to do with their fitness to serve.¹⁰⁵

“To allow peremptory strikes because of assumptions based on sexual orientation is to revoke this civic responsibility, demeaning the dignity of the individual and threatening the impartiality of the judicial system.”¹⁰⁶ And yet peremptory challenges have been used to strike jurors based on their actual or perceived sexual orientation or gender identity. In California, for example, prosecutors used peremptory challenges to remove two gay jurors from a case prosecuting persons who were demonstrating outside a government office after California passed a statewide referendum suspending same-sex marriage.¹⁰⁷

B. ELEMENTS OF A SUCCESSFUL *BATSON* CHALLENGE

A successful *Batson* challenge has three parts.

“First, the party challenging the peremptory strike must establish a prima facie case of intentional discrimination.”¹⁰⁸ The challenging party satisfies this first step “by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”¹⁰⁹ At this first stage, the challenging party has only the burden of production, not persua-

105. *SmithKline Beecham Corp.*, 740 F.3d at 485.

106. *Id.* This Article argues that neither an individual’s sexual orientation nor gender identity (or gender expression) should be used as the basis for exercising a peremptory strike.

107. Weinberg, *supra* note 72, at 4 (citing Matthew T. Hall & Dana Littlefield, *Judge Slams Prosecutors for Dismissing Gay Jurors*, SAN DIEGO UNION-TRIBUNE (May 1, 2012), <https://www.sandiegouniontribune.com/sdut-judge-prosecutors-erred-dismissing-gay-jurors-2012may01-htmlstory.html> [<https://perma.cc/2SW9-6CR2>]). The judge in that case dismissed the entire jury panel.

108. *SmithKline Beecham Corp.*, 740 F.3d at 476 (citing *Kesser v. Combra*, 465 F.3d 351, 359 (9th Cir. 2006)). See also *Purkett v. Elem*, 514 U.S. 765, 767 (1995); STARR & MCCORMICK, *supra* note 10, at 2-30.

109. *SmithKline Beecham Corp.*, 740 F.3d at 476 (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)). This first step of establishing a prima facie case of discrimination has itself been expressed as a three-part test. To establish a prima facie case for a *Batson* challenge, the defendant must show “(1) that the juror is a member of a cognizable racial [or other protected] group, (2) that the prosecutor has exercised peremptory challenges against venire member of the defendant’s race [or other protected group], and (3) in combination with the above factors, any other relevant circumstances that raise the inference of purposeful discrimination.” FREDERICK, *supra* note 9, at 336. See also *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). These additional circumstances can include “any ‘pattern’ of exercising peremptory challenges” against a particular group “or the prosecutor’s questions and statements made during voir dire examination that would support or refute an inference of discriminatory intent.” FREDERICK, *supra* note 9, at 336.

sion,¹¹⁰ and the burden on the challenging party is “not an onerous one.”¹¹¹ But *Batson* challenges can “often involve tricky questions of proof.”¹¹² Prosecutors obviously know that if they offer an illegal basis for their challenge that it will be disallowed. “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.”¹¹³

Second, once the challenging party makes its prima facie case of discrimination, “the striking party must give a nondiscriminatory reason for the strike.”¹¹⁴ Although the explanation of why a peremptory challenge was used does not need to rise to the level of a challenge for cause,¹¹⁵ the explanation offered “cannot be simple assertions of intuition,” fear of possible partiality from a juror sharing a trait with the defendant, or an “affirmation of good faith by the prosecutor.”¹¹⁶ The Supreme Court has also said that this second step “does not demand an explanation that is persuasive, or even plausible,”¹¹⁷ so long as the explanation offered is facially neutral.

110. *SmithKline Beecham Corp.*, 740 F.3d at 476 (citing *Crittenden v. Ayers*, 624 F.3d 943, 954 (9th Cir. 2010)).

111. *Id.* (quoting *Boyd v. Newland*, 467 F.3d 1139, 1151 (9th Cir. 2004)).

112. 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-longstanding-views?utm_source=summary-newsletters&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/2VST-SYHS].

113. *Id.*

114. *SmithKline Beecham Corp.*, 740 F.3d at 476 (citing *Kesser v. Combra*, 465 F.3d 351, 359 (9th Cir. 2006)). See also *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240 (2019); *Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). In his concurring opinion in *Batson*, Justice Marshall lamented that “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.” *Batson*, 476 U.S. at 106 (Marshall, J., concurring). He also wrote that “[a] prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically,” and that a trial court’s “own conscious or unconscious racism may lead him to accept such an explanation as well supported.” *Id.*

115. *Id.* at 97.

116. FREDERICK, *supra* note 9, at 336. “While the explanations for using peremptory challenges need not rise to the level of bias needed for a challenge for cause, these explanations must be clear, reasonably specific, and legitimate.” *Id.* at 347.

117. *Purkett*, 514 U.S. at 768. At this second step, the court looks only to see if the prosecutor’s explanation is facially valid. *Id.* In *Purkett*, the prosecutor said that he struck a juror “because he had long, unkempt hair, a mustache, and a beard.” *Id.* at 769. The Supreme Court found that this explanation was “race neutral and satisfies the prosecution’s step two burden of articulating a nondiscriminatory reason for the strike.” *Id.* In a dissenting opinion,

Some trial lawyers “have become extremely adept at offering such neutral rationales, even when the true motive for a challenge is race or ethnicity.”¹¹⁸ If the striking party cannot give a nondiscriminatory reason (or if the party gives a reason that was obviously not the real reason the juror was struck from the venire), the *Batson* challenge will be sustained. Although the Supreme Court declined to provide a specific remedy in the *Batson* decision itself for the discriminatory exercise of peremptory strikes,¹¹⁹ 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.¹²⁰

If the striking party does offer a nondiscriminatory reason, however, the court moves to the third step in which it must decide “on the basis of the record, whether the party raising the challenge has shown purposeful discrimination.”¹²¹ This is the step where the trial court examines the prosecutor’s stated reasons and determines whether “the peremptory challenges at issue were a result of purposeful discrimination.”¹²² The trial court “must determine whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination.”¹²³ If the court finds that they are, then the *Batson* challenge is upheld.

C. LITIGATION

In his concurring opinion in *Batson*, Justice White wrote that “[m]uch litigation will be required to spell out the contours of the Court’s equal pro-

Justice Stevens wrote that by adopting this standard, the Supreme Court replaced “the *Batson* standard with the surprising announcement that any neutral explanation, no matter how ‘implausible or fantastic,’ . . . even if it is ‘silly or superstitious,’ . . . is sufficient to rebut a prima facie case of discrimination.” *Id.* at 775 (Stevens, J., dissenting).

118. STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 222-23 (1994).

119. See *Batson*, 476 U.S. at 99.

120. See, e.g., FREDERICK, *supra* note 9, at 337; STARR & MCCORMICK, *supra* note 10, at 2-45; Hall & Littlefield, *supra* note 107 (court dismissed the entire jury panel). Some courts and legislatures have considered other alternative remedies such as “allocating the disaffected party additional peremptory challenges, loss of the unconstitutional challenge by the wrongdoer, financial penalties against the attorney exercising the contested challenge, and granting a mistrial.” FREDERICK, *supra* note 9, at 338. Some jurisdictions require that the adversely-affected party agree to the proposed remedy because some remedies (such as mistrial) may inadvertently benefit the party who made the discriminatory challenge. *Id.*

121. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 476 (9th Cir. 2014) (citing *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006)). See also *Purkett*, 514 U.S. at 767; *Batson*, 476 U.S. at 98.

122. FREDERICK, *supra* note 9, at 336.

123. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240 (2019).

tection holding today.”¹²⁴ His prediction has proven true in determining whether *Batson* extends to sexual orientation and gender identity.

1. State Courts

The California Supreme Court ruled in 1978 in *People v. Wheeler*¹²⁵ that jurors could not be constitutionally excluded based on their race, ethnicity, gender, or any similar group bias. In 2000, in *People v. Garcia*,¹²⁶ the California Appellate Court extended *Wheeler* to prohibit the use of peremptory challenges based on a juror’s sexual orientation.

During the trial of Cano Garcia for burglary, “it somehow became known that two members of the jury venire were lesbians.”¹²⁷ Both women worked for the same gay and lesbian foundation.¹²⁸ The prosecution excused both women, and defense counsel made a *Wheeler* motion (the California equivalent of a *Batson* motion) to challenge their exclusion from the jury.¹²⁹ The trial court denied the *Wheeler* motion, stating that “sexual preference” was “not a cognizable group.”¹³⁰ The trial court’s use of the term “sexual preference” rather than “sexual orientation” reflected a period when many people thought that someone could simply choose to be gay. The belief (prevalent at the time) that sexual orientation was a voluntary choice may thus have affected the trial court’s view on whether lesbians and gay men were a cognizable group.¹³¹

Noting that sexual orientation as a cognizable group for purposes of empaneling jurors was “terra incognita,” the appellate court stated that the terrain before it was “as stark as a moonscape and without discernible footprints: Our only issue is whether lesbians — and presumably gay males — constitute a cognizable class whose exclusion resulted in a jury that failed

124. *Batson*, 476 U.S. at 102 (White, J., concurring).

125. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978).

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

127. *Id.* at 340.

128. *Id.*

129. *Id.*

130. *Id.* The trial court ruled that “sexual preference is not a cognizable group” and explained that “I don’t think that your sexual preference specifically relates to them sharing a common perspective or common social or psychological outlook on human events. Lesbians or gay men vary in their social and psychological outlook on human events and I don’t think fit into this protection.” *Garcia*, 92 Cal. Rptr. 2d at 340.

131. The gay rights movement was “seriously hampered because many people consider[ed] ‘choosing’ to be gay a decadent, deviant decision.” Michael L. Closen, Susan Marie Connor, Howard L. Kaufman & Mark E. Wojcik, *AIDS: Testing Democracy - Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 874 (1986). The term “sexual preference” has now been replaced by “sexual orientation” because one’s sexual orientation is recognized not to be simply a matter of choice.

to represent a cross section of the community and thereby violated Garcia's constitutional rights."¹³²

Finding no guidance in federal law to resolve the question of whether sexual orientation was a cognizable group for purposes of empaneling jurors, the appellate court stated that the "pivot" of its analysis was in the definition of "cognizable group."¹³³ The appellate court first noted that "the right under the California Constitution to a jury drawn from a 'representative cross-section of the community' is violated whenever a 'cognizable group' within that community is systematically excluded from the jury venire."¹³⁴ The court next stated that to be "cognizable" for purposes of the representative cross-section rule, members of the group must satisfy two tests. First, the group members must "share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely because they are members of that group."¹³⁵ Second, "[t]he party seeking to prove a violation of the representative cross-section rule must also show that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded."¹³⁶

The appellate court found that lesbians and gay men satisfied both tests. First, they shared "a common perspective arising from their life experience in the group"¹³⁷ even though this common perspective did not necessarily translate to a having a group with identical opinions.¹³⁸ As the appellate court stated, "[t]his is not to say that all homosexuals see the world alike,"¹³⁹ but the court noted that members of the LGBT community do

132. *Garcia*, 92 Cal. Rptr. 2d at 341.

133. *Id.* at 343.

134. *Id.*

135. *Id.* The appellate court admonished that it was "not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events." *Id.* at 343-44.

136. *Garcia*, 92 Cal. Rptr. 2d at 345.

137. The court ruled that lesbians and gay men meet this first test of having a common perspective by stating:

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. at 344.

138. *Id.*

139. *Id.*

share a history of persecution by society.¹⁴⁰ The court also rejected an argument that the lesbian and gay community was “heterogeneous in all other respects: its membership cuts across racial, religious, sexual, economic, social, and occupational lines.”¹⁴¹ Although that observation about the rich diversity in the lesbian and gay community is true, the court stated that the argument would also be true for the communities of racial minorities and of women – other groups protected from the discriminatory use of preemptive challenges.¹⁴²

Second, the appellate court found that no other “group — or groups — in the community could adequately represent the views of homosexuals.”¹⁴³ The court stated that aside from racial and religious minorities, it could not think of a group that “has suffered such ‘pernicious and sustained hostility’ and such ‘immediate and severe opprobrium’ as homosexuals.”¹⁴⁴

Thus, finding that lesbians and gay men shared a common perspective and that the views of the lesbian and gay community were not represented by other groups, the appellate court held that lesbians and gay men “cannot be discriminated against in jury selection.”¹⁴⁵ The California Appellate Court decision was later codified as a state statute.¹⁴⁶

2. Federal Courts

An early attempt to extend *Batson* to sexual orientation in the federal courts failed in *Johnson v. Campbell*.¹⁴⁷ The court there rejected the *Batson* challenge for four reasons. First, the attorney did not “attempt to show any discriminatory motivation on the part of the opposing attorney.”¹⁴⁸ Second,

140. The court also stated that a common perspective among members of the group: [A]ffects how life experiences are seen, not how they are evaluated. And inclusion of a cognizable group in the jury venire does not assure any particular position; it assures only that the facts will be viewed from a variety of angles. It assures that as many different life views as possible will be represented in the important decisions of the judicial process.

Id.

141. *Garcia*, 92 Cal. Rptr. 2d at 345.

142. *See id.*

143. *Id.*

144. *Id.* at 346.

145. *Id.* at 348. The appellate court remanded to allow the trial court to determine whether the prosecutor had other reasons to support his peremptory challenges of the two prospective jurors. *Garcia*, 92 Cal. Rptr. 2d at 341, 348-49.

146. *See infra* notes 254-60 and accompanying text; Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN’S L.J. 157, 171-73 (2001).

147. *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996).

148. *Id.* at 953.

there was no showing that opposing counsel even knew that the potential juror was gay.¹⁴⁹ Third, there was an “obvious neutral reason” to strike the juror.¹⁵⁰ And fourth, the juror’s sexual orientation had no bearing on the subject matter of the case.¹⁵¹

Although the *Batson* challenge based on sexual orientation failed in *Campbell*, it succeeded some years later in the landmark case of *SmithKline Beecham Corp. v. Abbott Laboratories*,¹⁵² where a drug company used its first peremptory strike to remove the only self-identified gay man from the jury venire. SmithKline Beecham (“GSK”)¹⁵³ “challenged the strike under *Batson v. Kentucky*, arguing that [the man’s removal] was impermissibly made on the basis of sexual orientation.”¹⁵⁴ In ruling that the man’s removal from the jury venire was improper, the Ninth Circuit held that “heightened scrutiny applies to classifications based on sexual orientation and that *Batson* applies to strikes on that basis.”¹⁵⁵ The court also held that “equal protection prohibits peremptory strikes based on sexual orientation.”¹⁵⁶

GSK had brought an action against Abbott Laboratories, alleging a violation of the implied covenant of good faith and fair dealing, antitrust violations, and violations of a state Unfair Trade Practices Act.¹⁵⁷ Specifically, GSK claimed that Abbott had licensed GSK to market an Abbott HIV drug in combination with a GSK drug, but that Abbott then raised the price of Abbott’s HIV drug in order to drive business to Abbott’s own combination drug.¹⁵⁸

After a four-week trial, the jury reached a mixed verdict and found for Abbott on the antitrust and unfair trade practice claims and for GSK on the contract claims of good faith and fair dealing.¹⁵⁹ The jury awarded more than \$3.4 million in damages to GSK.¹⁶⁰ Abbott appealed the jury verdict against it. GSK cross-appealed for a new trial on all counts, asserting that

149. *Id.*

150. *Id.*

151. *Id.*

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

153. GlaxoSmithKline plc (“GSK”) is a British pharmaceutical company with headquarters in London.

154. *SmithKline Beecham Corp.*, 740 F.3d at 474.

155. *Id.* at 489.

156. *Id.* at 474.

157. *Id.*

158. *Id.* See also *U.S. Court to Decide Whether Gay Juror Can Be Removed from Antitrust Case*, THE GUARDIAN (Sept. 18, 2013, 11:32 AM), <https://www.theguardian.com/world/2013/sep/18/san-francisco-aids-norvir-gay-juror> [<https://perma.cc/3TZM-LFBN>]. The cost increase of Abbott’s HIV drug angered many in the gay community, which had been particularly hard-hit by the HIV pandemic. See *id.*

159. *SmithKline Beecham Corp.*, 740 F.3d at 475.

160. The jury awarded \$3,486,240 in damages to GSK on the contract claims of good faith and fair dealing. *Id.*

Abbott had “unconstitutionally used a peremptory strike to exclude a juror on the basis of his sexual orientation.”¹⁶¹

When the jury was being selected, the district court asked questions of the potential jurors based on their questionnaire answers and then allowed each side to ask additional questions.¹⁶² “Juror B,” a male, worked in San Francisco as a computer technician for the U.S. Court of Appeals for the Ninth Circuit.¹⁶³ Juror B revealed that his “partner” studied economics and investments, and he referred to his partner three times using the masculine pronoun.¹⁶⁴ Juror B also told the district court judge that he had taken an Abbott or GSK drug (but not the drugs at issue in this case) and that he had friends who were afflicted by HIV.¹⁶⁵

The questioning of Juror B by Abbott’s attorney was “brief and limited.”¹⁶⁶ He asked Juror B only five questions, each regarding his knowledge of the drugs at issue in the litigation.¹⁶⁷ Juror B’s answers disclosed that he had heard of only one of the drugs.¹⁶⁸ Abbott’s attorney asked no questions about when or which GSK or Abbott drug he had taken or for what purpose.¹⁶⁹ He also asked no questions whatsoever as to whether Juror B could decide the case fairly and impartially.¹⁷⁰

When the time came to use the peremptory challenges, Abbott used its first peremptory challenge to exclude Juror B.¹⁷¹ GSK immediately raised a *Batson* challenge, stating that Abbott wanted to “exclude from the pool anybody who is gay.”¹⁷² The trial court denied the *Batson* challenge, stating that it did not know whether *Batson* applied to civil cases, whether it extended to sexual orientation, or whether it applied when only a single juror

161. *Id.*

162. *Id.* at 474.

163. *Id.* The Ninth Circuit was, of course, the court that heard the appeal in this case.

164. *SmithKline Beecham Corp.*, 740 F.3d at 474. The district court judge also referred to Juror B’s partner in a follow-up question. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 475.

168. *SmithKline Beecham Corp.*, 740 F.3d at 475.

169. *Id.* Abbott’s attorney also asked no questions about Juror B’s employment at the U.S. Court of Appeals for the Ninth Circuit. Abbott might have based its peremptory challenge of Juror B’s employment with the Ninth Circuit if it had asked some questions about his work at the court. *Id.* at n.4. Having asked no questions about that work or his ability to be impartial in deciding the case, the court was left with the obvious inference that Juror B was excluded based on stereotypes of his sexual orientation rather than his actual experience, opinions, or impartiality. *Id.* Additionally, lawyers and other jurors closely related to lawyers were not stricken from the jury venire. *Id.* at 478, n.4.

170. *SmithKline Beecham Corp.*, 740 F.3d at 475.

171. *Id.*

172. *Id.*

was excluded.¹⁷³ Abbott's attorney did not explain why he struck Juror B, stating only that he had "no idea whether [Juror B was] gay or not" even though Juror B had discussed his male partner during the voir dire.¹⁷⁴

The district court allowed Abbott's strike but stated that it would reconsider that ruling if Abbott struck other gay men.¹⁷⁵ The record suggests that no other members of the LGBT community were in the jury venire.

On appeal, the Ninth Circuit found that GSK had established a prima facie case of intentional discrimination in Abbott's dismissal of Juror B.¹⁷⁶ "Juror B," said the Ninth Circuit, "was the only juror to have identified himself as gay on the record, and the subject matter of the litigation presented an issue of consequence to the gay community."¹⁷⁷ The Ninth Circuit also found there was "reason to infer that Abbott struck Juror B on the basis of his sexual orientation because of its fear that he would be influenced by concern in the gay community over Abbott's decision to increase the price of its HIV drug."¹⁷⁸ Because Abbott's increase in the price of its HIV drug "had led to considerable discussion in the gay community,"¹⁷⁹ the defense counsel's "potential for relying on impermissible stereotypes in the process of selecting jurors was 'particularly acute' in this case."¹⁸⁰

Additionally, Abbott failed to justify to the district court its use of the peremptory challenge to strike Juror B.¹⁸¹ Abbott's attorney instead implausibly stated that he did not know whether Juror B was gay (despite the discussion of his male partner) and asserted that his strike could not have been discriminatory because it was only the first strike used.¹⁸² The Ninth Circuit found that Abbott's "denial of discriminatory motive had the opposite effect of that intended. Because the denial was demonstrably untrue, it undermines counsel's argument that his challenge was not based on intentional discrimination."¹⁸³ Thus, "[t]aking all these factors together, including the

173. *Id.* As this Article demonstrates, *Batson* does apply to civil cases, it does apply when even a single juror is excluded on an impermissible basis, and it should be extended to sexual orientation and gender identity.

174. *Id.*

175. *SmithKline Beecham Corp.*, 740 F.3d at 475.

176. *Id.* at 476.

177. *Id.*

178. *Id.* On this point the Ninth Circuit distinguished *Johnson v. Campbell*, a case in which a gay juror was struck where sexual orientation had no relevance to the litigation. The Ninth Circuit noted that in *J.E.B. v. Alabama*, the U.S. Supreme Court had stated that "when the gender of the juror coincided with the subject matter of the case, the potential for an impermissible strike based on sex increases substantially." *SmithKline Beecham Corp.*, 740 F.3d at 476 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994)).

179. *Id.*

180. *Id.* at 477 (citing *J.E.B.*, 511 U.S. at 140).

181. *Id.*

182. *Id.*

183. *SmithKline Beecham Corp.*, 740 F.3d at 477-78.

absence of any proffered reason for the challenge,” the Ninth Circuit recognized “a strong inference . . . that counsel engaged in intentional discrimination” when he struck Juror B.¹⁸⁴ The Ninth Circuit concluded that “had the district judge applied the law correctly, she would necessarily have concluded that Abbott’s strike of Juror B was impermissibly made on the basis of his sexual orientation.”¹⁸⁵ Without any credible justifications for striking Juror B, the Ninth Circuit did not need to remand to find a *Batson* violation: the violation was obvious.¹⁸⁶

D. HEIGHTENED SCRUTINY FOR CLAIMS OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

Although the U.S. Supreme Court has not explicitly held that classifications based on sexual orientation, gender identity, or gender expression are subject to heightened scrutiny, lower courts and commentators recognize that the Supreme Court’s recent decisions “indicate a level of scrutiny that is significantly more stringent than rational basis, i.e., ‘heightened’” and that

the factors that the Supreme Court has looked to in determining whether heightened scrutiny should apply – whether the classified group has experienced a history of discrimination, whether the classification has any bearing on a person’s ability to contribute to society, whether the group is politically powerless, and whether the defining characteristic of the group is immutable – all point to finding that classifications based on sexual orientation or gender identity/expression are subject to heightened scrutiny.¹⁸⁷

State supreme court decisions in California,¹⁸⁸ Connecticut,¹⁸⁹ Iowa,¹⁹⁰ and New Mexico¹⁹¹ have also held that classifications based on sexual ori-

184. *Id.* at 478 (citing *Paulino v. Harrison*, 542 F.3d 692, 702-03 (9th Cir. 2008)). The Ninth Circuit also noted that “Abbott’s counsel asked Juror B only five questions and failed to question him meaningfully about his impartiality or potential biases.” *Id.*

185. *Id.* at 478-79 (citing *United States v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003)). Because GSK established a prima facie case of discrimination and because Abbott offered no nondiscriminatory reason for its strike of Juror B, “[t]he prima facie evidence that the strike was based on a discriminatory motive is unrefuted, and on appeal it is clear that Abbott has no further credible reasons to advance nor evidence to offer.” *Id.* at 479.

186. *SmithKline Beecham Corp.*, 740 F.3d at 479 (citing *Alanis*, 335 F.3d at 969-70).

187. Weinberg, *supra* note 72, at 1.

188. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

189. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

190. *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009).

191. *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013).

entation “are subject to heightened scrutiny.”¹⁹² Additionally, the Hawai’i Supreme Court originally held that a state law restricting marriage to opposite-sex couples was a classification based on sex that was also subject to strict scrutiny under the Hawai’i Constitution.¹⁹³

In *SmithKline Beecham Corporation*, the Ninth Circuit applied heightened scrutiny to classifications based on sexual orientation for purposes of equal protection in the selection of jurors. The Ninth Circuit stated definitively that “gays and lesbians are no longer a ‘group or class of individuals normally subject to “rational basis” review,’”¹⁹⁴ the standard under which legislation was usually upheld. Applying a standard of heightened scrutiny – or at least some unexpressed intermediate standard that is more stringent than rational basis – to classifications based on sexual orientation for purposes of equal protection analysis is a significant legal development because the Ninth Circuit and other courts had previously applied only rational basis review to equal protection claims based on sexual orientation, resulting in the affirmation of many policies that discriminated against LGBT persons.¹⁹⁵

The Ninth Circuit had previously applied heightened scrutiny to substantive due process claims based on sexual orientation. In *Witt v. Department of the Air Force*,¹⁹⁶ the Ninth Circuit considered the claim of an Air Force reservist who brought due process and equal protection challenges to her suspension from duty because she was in a sexual relationship with a civilian woman.¹⁹⁷ The Ninth Circuit looked to the U.S. Supreme Court’s decision in *Lawrence v. Texas*,¹⁹⁸ the landmark case that overturned *Bowers v. Hardwick*,¹⁹⁹ and declared that the Texas sodomy statute at issue was unconstitutional because it violated substantive due process. The Ninth Circuit noted that the *Lawrence* Court did not expressly articulate the level of scrutiny it was applying when it ruled that the Texas sodomy statute was an unconstitutional violation of substantive due process. The Ninth Circuit nonetheless held “that *Lawrence* requires something more than traditional

192. Weinberg, *supra* note 72, at 1.

193. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

194. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994)). Neither gender identity nor gender expression was discussed in *SmithKline Beecham* because it was not at issue in that case. Nonetheless, the court’s citation of *J.E.B.*—the case extending *Batson* to gender—also supports the extension of *Batson* to gender identity as well as sexual orientation.

195. See, e.g., *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *High Tech Gays v. Def. Industrial Sec. Clearance Office*, 895 F.3d 563, 574 (9th Cir. 1990).

196. *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

197. *Id.* at 809.

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

199. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia sodomy statute).

rational basis review.”²⁰⁰ But because *Lawrence* relied only on substantive due process and not equal protection for its decision, the Ninth Circuit followed the Supreme Court’s lead and applied an intermediate level scrutiny to substantive due process claims based on sexual orientation,²⁰¹ while it applied rational basis scrutiny to the equal protection claims.²⁰²

A few years later, the U.S. Supreme Court issued its decision in *United States v. Windsor*,²⁰³ a landmark decision that held that section 3 of the Defense of Marriage Act (“DOMA”)²⁰⁴ violated the Equal Protection Clause.²⁰⁵ The Supreme Court wrote that the principal purpose of DOMA is “to impose inequality”²⁰⁶ and that section 3 of DOMA “violates basic due process and equal protection principles applicable to the Federal Govern-

200. *Witt*, 527 F.3d at 813.

201. *Id.* at 821-22 (“Taking direction from what the Supreme Court decided in *Lawrence* and *Sell*, we hold that [Don’t Ask, Don’t Tell], after *Lawrence*, must satisfy an intermediate level of scrutiny under substantive due process . . .”).

202. *Id.* at 821-22. *See also* *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480 (9th Cir. 2014).

203. *United States v. Windsor*, 570 U.S. 744 (2013).

204. 110 Stat. 2419 (1986).

205. *See* section 3 of DOMA amended the Dictionary Act in Title 1 to provide that “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7 (2012). *Windsor* declared this section unconstitutional. *Windsor*, 570 U.S. 744.

206. *Id.* at 772. In holding section 3 of DOMA unconstitutional, the Supreme Court wrote that:

DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage.

Id.

ment.”²⁰⁷ The Court held that section 3 of DOMA was “invalid, for 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”²⁰⁸ and that “[b]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”²⁰⁹

Just as *Lawrence* did not expressly state the level of scrutiny it was applying to the substantive due process claim at issue in that case, *Windsor* did not expressly announce the level of scrutiny that the Supreme Court was applying to the equal protection claim. Although neither *Lawrence* nor *Windsor* expressly set forth the level of scrutiny it was applying, the Ninth Circuit wrote that “an express declaration is not necessary.”²¹⁰ And in his dissenting opinion in *Windsor*, Justice Scalia wrote that the Supreme Court majority opinion “certainly” was not applying the deferential rational basis standard of review to classifications based on sexual orientation.²¹¹

After declaring section 3 of DOMA unconstitutional in *Windsor*, the Supreme Court considered challenges to state constitutional amendments in laws in Michigan, Kentucky, and Tennessee and a state statute in Ohio that all defined marriage as a union between one man and one woman.²¹² In *Obergefell v. Hodges*,²¹³ the Supreme Court held that “same-sex couples may exercise the fundamental right to marry in all States”²¹⁴ and that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex charac-

207. *Id.* at 769.

208. *Id.* at 775.

209. *Id.*

210. *See also* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480 (2014) (“*Windsor* . . . did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. . . . Just as *Lawrence* omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does *Windsor* fail to declare what level of scrutiny it applies with respect to such equal protection claims.”).

211. *Windsor*, 570 U.S. at 793 (Scalia, J., dissenting). Justice Scalia’s dissenting opinion stated that the majority’s opinion in *Windsor* “does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.” *Id.* Recalling his “previously expressed skepticism about the Court’s ‘tiers of scrutiny’ approach,” Justice Scalia stated that he would have reviewed the classification of sexual orientation under DOMA “only for its rationality.” *Id.* He observed, however, that the majority opinion did not apply strict scrutiny as such but that it “certainly does not apply anything that resembles that deferential framework” found in the rational-basis cases. *Id.* at 794 (Scalia, J. dissenting).

212. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

213. *Id.*

214. *Id.* at 2607.

ter.”²¹⁵ The Supreme Court again “did not articulate what level of scrutiny it was applying in determining that denying same-sex couples the right to marry violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.”²¹⁶ The *Obergefell* decision nonetheless “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.”²¹⁷ The Supreme Court first recognized that “lesbians and gay men had been subject to historic discrimination by the government in the form of criminalizing same-sex intimacy, prohibiting certain employment, including military service, being excluded under immigration laws, and [facing discrimination] in many other areas.”²¹⁸ Second, the Supreme Court implicitly acknowledged that a person’s sexual orientation “does not bear any relation to an individual’s ability to contribute to society”²¹⁹ in that lesbians and gay men now have open lives and that same-sex couples establish loving families. Third, the Supreme Court implicitly recognized that “lesbians and gay men remain a politically vulnerable minority”²²⁰ and that “[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process” because the protection of fundamental rights cannot be submitted to a popular vote.²²¹ And finally, the Supreme Court in *Obergefell* held that “sexual ori-

215. *Id.* at 2608. In upholding the rights of the same-sex couples to marry and to have their marriages recognized by other states in the United States, the Supreme Court majority also stated:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Id.

216. Weinberg, *supra* note 72, at 7.

217. *Id.* Those four factors are: “(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.”

Id.

218. *Id.* (citing *Obergefell*, 135 S. Ct. at 2596-97).

219. *Id.* (citing *Obergefell*, 135 S. Ct. at 2596, 2600).

220. Weinberg, *supra* note 72, at 7 (citing *Obergefell*, 135 S. Ct. at 2606).

221. *Obergefell*, 135 S. Ct. at 2606.

entation is a defining and immutable characteristic.”²²² Thus, without expressly labeling the level of scrutiny it applied, the Supreme Court determined that a classification based on sexual orientation should be treated with suspicion and not be subject to deferential rational basis review.

E. BAR ASSOCIATION SUPPORT TO EXTEND *BATSON* TO SEXUAL ORIENTATION AND GENDER IDENTITY

Bar associations have begun to express their support for extending *Batson* to sexual orientation and gender identity or gender expression. At the American Bar Association midyear meeting in 2018, the ABA House of Delegates²²³ adopted Resolution 108D urging “federal, state, local, territorial[,] and tribal courts to extend *Batson v. Kentucky* . . . to prohibit discrimination against jurors on the basis of sexual orientation or gender identity/expression.”²²⁴

The report in support of ABA Resolution 108D was submitted by the ABA Criminal Justice Section and the National LGBT Bar Association.²²⁵ The report argued that excluding prospective jurors “based on invidious discrimination deprives the excluded individual of the opportunity to participate in one of our most important democratic institutions, interferes with the litigant’s right to a fair trial by an impartial jury, perpetuates stereotypes and . . . ‘undermine[s] public confidence in the fairness of our system of justice.’”²²⁶ The report notes that although “[a]ll discrimination is harmful,” the impact of discrimination “is exacerbated when it occurs within the courthouse.”²²⁷ The report observes that the use of peremptory challenges to exclude potential jurors based on sexual orientation or gender identity denigrates the dignity of the excluded jurors and wrongfully sends “a clear message” that LGBT individuals cannot be trusted to decide important issues upon which reasonable persons could disagree.²²⁸ And the report concludes that:

Utilizing peremptory challenges to strike prospective jurors on the basis of their sexual orientation or gender identi-

222. Weinberg, *supra* note 72, at 7 (citing *Obergefell*, 135 S. Ct. at 2594, 2596).

223. The A.B.A. House of Delegates is the policy-making body of the American Bar Association. See *ABA House of Delegates*, AM. BAR ASS’N, https://www.americanbar.org/groups/leadership/house_of_delegates/ (last visited Dec. 26 2019).

224. Weinberg, *supra* note 72.

225. Officially, the A.B.A. House of Delegates adopts only the resolution itself and not the accompanying report.

226. Weinberg, *supra* note 72, at 10.

227. *Id.*

228. *Id.* at 10-11.

ty/expression violates the Equal Protection Clause and significantly harms the judicial system by continuing a pattern of discrimination and exclusion based on invidious stereotypes. Accordingly, federal and state courts should extend *Batson* to apply to discriminatory uses of peremptory challenges based on sexual orientation and gender identity/expression.²²⁹

As the extension of *Batson* is now official policy of the American Bar Association, the ABA can now lobby in support of federal and state legislation to specifically prohibit the use of peremptory challenges based on sexual orientation.

F. LEGISLATIVE MEASURES TO EXTEND *BATSON* TO SEXUAL ORIENTATION AND GENDER IDENTITY

Federal legislation can prohibit using peremptory challenges in federal trial courts to exclude jurors based on their sexual orientation or gender identity, and state statutes can prohibit the practice in state trial courts.

1. *Federal Legislation*

A federal statute, 28 U.S.C. § 1862, provides that “[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the [U.S.] Court of International Trade on account of race, color, religion, sex, national origin, or economic status.”²³⁰ Section 1862 does not yet include the categories of sexual orientation or gender identity, but efforts have been made to add those categories through the Juror Non-Discrimination Act and the Jury ACCESS Act.

The “Juror Non-Discrimination Act” was first introduced in the U.S. House of Representatives in 2012 in the 112th Congress to add the categories of “sexual orientation” and “gender identity” to the other categories listed in 28 U.S.C. § 1862.²³¹ That first bill had only six cosponsors. The Juror Non-Discrimination Act was reintroduced in 2013 with thirty-one cosponsors,²³² in 2015 with forty-one cosponsors,²³³ and in 2017 with

229. *Id.* at 12.

230. 28 U.S.C. § 1862 (1982). Although the U.S. Court of International Trade is usually thought of as an appellate court for reviewing antidumping and countervailing duty determinations of the U.S. International Trade Commission and the International Trade Administration of the U.S. Department of Commerce, it can also, in theory, hold trials on matters such as the tariff classification or valuation of imported merchandise.

231. The Juror Non-Discrimination Act of 2012, H.R. 5848, 112th Cong. (2012).

232. The Juror Non-Discrimination Act of 2013, H.R. 312, 113th Cong. (2013).

233. The Juror Non-Discrimination Act of 2015, H.R. 864, 114th Cong. (2015).

eighty-four cosponsors.²³⁴ The legislation was most recently reintroduced in January 2019 as H.R. 874 and has seventy-seven cosponsors as of August 22, 2019.²³⁵ The bill was referred to the House Subcommittee on Courts, Intellectual Property, and the Internet on March 22, 2019.²³⁶

A companion bill was first introduced in the Senate in 2012, the “Jury Access for Capable Citizens and Equality in Service Selection Act” or the “Jury ACCESS Act.”²³⁷ That first bill had only two sponsors. Like its counterpart in the U.S. House of Representatives, it would have added the categories of “sexual orientation” and “gender identity” to the categories listed in 28 U.S.C. § 1862. The Jury ACCESS Act was reintroduced in the 113th Congress 2013 with three cosponsors,²³⁸ in 2015 with four cosponsors,²³⁹ and in 2017 with sixteen cosponsors.²⁴⁰ It was most recently reintroduced in the Senate in January 2019 and had thirteen cosponsors as of August 22, 2019.²⁴¹

Support for the Juror Non-Discrimination Act in the U.S. House of Representatives and the Jury ACCESS Act in the U.S. Senate may increase given that ABA Resolution 108D now authorizes the ABA’s Governmental Affairs Office to advocate for passage of the bills and to motivate members in key Congressional districts to have their representatives and senators support the legislation.

But even if both chambers passed the bill, the current president may likely refuse to sign it. During his first election campaign, President Trump had promised to be a strong advocate for the LGBT community.²⁴² He se-

234. The Juror Non-Discrimination Act of 2017, H.R. 1515, 115th Cong. (2017).

235. The Juror Non-Discrimination Act of 2019, H.R. 874, 116th Cong. (2019). The bill would amend 28 U.S.C. § 1862 by inserting “(including sexual orientation and gender identity)” after “sex.” The House of Representatives is now controlled by the Democrats, who represent most but not all of the co-sponsors of H.R. 874. A current list of cosponsors can be found at *Cosponsors*, CONGRESS (Mar. 22, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/874/cosponsors> [<https://perma.cc/9SME-95H6>].

236. H.R. 874, 116th Cong. (2019).

237. Jury Access for Capable Citizens and Equality in Service Selection Act of 2012 or the Jury ACCESS Act, S. 3618, 112th Cong. (2012).

238. Jury ACCESS Act, S. 38, 113th Cong. (2013).

239. Jury ACCESS Act, S. 447, 114th Cong. (2015).

240. Jury ACCESS Act, S. 635, 115th Cong. (2017).

241. Jury ACCESS Act, S. 250, 116th Cong. (2019). The current status and list of sponsors can be found at *Cosponsors*, CONGRESS (Jan. 29, 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/250/cosponsors> [<https://perma.cc/XD3E-SRNY>].

242. See, e.g., German Lopez, *Trump Promised to be LGBTQ-Friendly. His First Year in Office Proved it Was a Giant Con*, VOX (Jan. 22, 2018), <https://www.vox.com/identities/2018/1/22/16905658/trump-lgbtq-anniversary> [<https://perma.cc/62CR-D62M>].

lected an anti-gay vice president²⁴³ as his running mate, however, and as president he has adopted many policies and positions directly opposed to the LGBT community.²⁴⁴ Because the next national elections may produce a president who is genuinely friendlier to the LGBT community (or who may himself be a member of the LGBT community²⁴⁵), there is reason to work now to pass the Juror Non-Discrimination Act in the U.S. House of Representatives and its Senate counterpart, the Jury ACCESS Act. The legislation would expressly prohibit parties in civil and criminal actions in federal district courts from using peremptory challenges based on sexual orientation and gender identity.²⁴⁶

2. State Legislation

Even if 28 U.S.C. § 1862 were amended, that federal statute prohibits the exclusion of jurors only in federal district courts.²⁴⁷ Legislation or state court rules would still be needed to expressly prohibit the practice in state trial courts. At least six U.S. states have enacted statutes to prohibit the use of peremptory challenges of jurors based on their sexual orientation or gender identity.²⁴⁸

Wisconsin was the first state to prohibit discrimination against jurors on the basis of sexual orientation. The Wisconsin Supreme Court did so in 1996 when it was implementing Standard 4 of the 1993 American Bar Association Standards Relating to Juror Use and Management.²⁴⁹ The Su-

243. See, e.g., *A Timeline of Mike Pence's Discrimination Against the LGBT Community*, IND. DEMOCRATIC PARTY, <https://www.indems.org/a-timeline-of-mike-pences-discrimination-against-the-lgbt-community/> [<https://perma.cc/EMQ3-KZNH>].

244. See, e.g., Lopez, *supra* note 242.

245. Jeremy W. Peters, *Can a Gay Candidate Win the Presidency? As Much 'As Anyone'*, N.Y. TIMES, May 1, 2019, at A11, <https://www.nytimes.com/2019/04/30/us/politics/pete-buttigieg-2020.html> [<https://perma.cc/8SY9-Y4H9>].

246. The legislation would codify federal court decisions such as *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014).

247. 28 U.S.C. § 1862 (1982).

248. The laws of those six states—California, Colorado, Illinois, Minnesota, Oregon, and Wisconsin—are discussed further in this section. California, Colorado, Illinois, Minnesota, and Oregon prohibit discrimination based on both sexual orientation and gender identity. Wisconsin's statute prohibits discrimination based only on sexual orientation.

249. Standard 4 of the 1993 American Bar Association Standards Relating to Juror Use and Management on the subject of "Eligibility for Jury Service" provides that "all persons should be eligible for jury service except those who (a) are less than eighteen years of age, . . . (b) are not citizens of the United States, . . . (c) are not residents of the jurisdiction in which they have been summoned to serve, . . . (d) are not able to communicate in the English language, or (e) have been convicted of a felony and have not had their civil rights restored." The Standards Relating to Juror Use and Management do not expressly address sexual orientation or gender identity.

preme Court had held a public hearing in September 1996 on the petition of the Judicial Council to implement the ABA Standards Relating to Juror Use and Management.²⁵⁰

The court ordered that sections 756.001 to 756.03 of the Wisconsin statutes be repealed and recreated to include the categories protected under the Wisconsin Equal Rights Statute.²⁵¹ The Wisconsin statute section 756.001(3) on jury service now provides that:

No person who is qualified and able to serve as a juror may be excluded from that service in any court of this state on the basis of sex, race, color, sexual orientation as defined in [section] 111.32(13m), disability, religion, national origin, marital status, family status, lawful source of income, age or ancestry or because of a physical condition.²⁵²

Section 111.32(13m), in turn, defines “[s]exual orientation” as “having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.”²⁵³

In 2000, after the California Appellate Court’s decision in *People v. Garcia*,²⁵⁴ California codified a prohibition against striking jurors based on their sexual orientation.²⁵⁵ The California Code of Civil Procedure was

250. *In re* Amendment of §§ 17.15(2) et al., Wis. S. Ct. Order No. 96-08, at 1, <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=85484> [<https://perma.cc/5LG3-EPC8>].

251. Wisconsin statute section 756.001(3) was intended to implement Standard 4 of American Bar Association Standards Relating to Juror Use and Management “by expanding the nondiscrimination clause of prior [section] 756.01(3) to all classes protected under the [Wisconsin] state equal rights statute, [section] 101.22.” Judicial Council Note 1996; *In re* Amendment of §§ 17.15(2) et al., Wis. S. Ct. Order No. 96-08, at 11, <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=85484> [<https://perma.cc/5LG3-EPC8>]. The new statute entered into effect on July 1, 1997. It is interesting to note that this change to the Wisconsin statutes was ordered by the Wisconsin Supreme Court rather than coming about as a change initiated by the Wisconsin legislature.

252. WIS. STAT. ANN. § 756.001(3) (West 2019).

253. WIS. STAT. ANN. § 111.32(13m) (West 2019). Unlike statutory definitions found in other states, Wisconsin’s definition of “sexual orientation” does not include gender identity. Additionally, the statute defines sexual orientation as having a “preference,” as if a person could simply prefer one orientation over another. *See supra* note 131 and accompanying text.

254. *People v. Garcia*, 583 P.2d 748 (Cal. 1978).

255. The California statute has been cited as the first in the country on this issue. *See, e.g.,* Barry, *supra* note 146, at 171-73 (“Spurred by the appellate court’s decision in *Garcia*, the California legislature became the first in the country to forbid sexual orientation discrimination in jury selection.”). But Wisconsin adopted its law in 1996 (effective in 1997) while California adopted its law in 2000. Wisconsin should be acknowledged as the first state to ban exercising peremptory challenges based on sexual orientation. Some other documents, including the Report in Support of ABA Resolution 108D, do not include Wisconsin among

amended to provide that “[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.”²⁵⁶

This section of the California Code of Civil Procedure was again amended in 2016 by Assembly Bill 87.²⁵⁷ The California statute now provides that: “[a] party shall 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 a characteristic listed or defined in Section 11135 of the Government Code, or similar grounds.”²⁵⁸

Section 11135 of the California Government Code, in turn, provides in part:

No person in the State of California shall, on the basis of sex, race, color, religion, national origin, ethnic group identification, age, mental disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.²⁵⁹

Through its definitions of various terms, the California statute continues to prohibit discrimination based on both sexual orientation and gender identity.²⁶⁰

Colorado,²⁶¹ Minnesota,²⁶² and Oregon²⁶³ have also enacted statutes to expressly prohibit discrimination against jurors on the basis of their sexual

the jurisdictions listed that prohibit discrimination against jurors based on sexual orientation. This may be because the Wisconsin statute is not expressly tied to the exercise of peremptory challenges.

256. CAL. CIV. PROC. CODE § 231.5 (2000).

257. Stats. 2015, Ch. 115, § 1 (effective Jan. 1, 2016).

258. CAL. CIV. PROC. CODE § 231.5 (2019).

259. CAL. GOVT. CODE § 11135(a) (2019).

260. Under the California statute, the terms “sex” and “sexual orientation” have the same meanings as those terms are defined in subdivisions (q) and (r) of section 12926 of the California Government Code. “Sex” also includes, but is not limited to, a person’s gender. “Gender” is defined as “sex, and includes a person’s gender identity and gender expression.” CAL. GOVT. CODE § 12926(r)(2). “Gender expression” is defined as “a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” *Id.* And the term “sexual orientation” is defined under the California Government Code “as heterosexuality, homosexuality, and bisexuality.” *Id.* at § 12926(s).

orientation or gender identity.²⁶⁴ The most recent state to enact such a statute is Illinois.²⁶⁵ In Illinois, it took two legislative sessions (the 100th General Assembly and the 101st General Assembly) using a strategy of first amending Illinois state law to match existing federal exclusions and then adding in the categories of sexual orientation and gender identity.

In 2017, Illinois Senator Toi W. Hutchinson introduced Senate Bill 889 to amend the Illinois Jury Act by prohibiting the exclusion of any otherwise-qualified juror “on the basis of religion, national origin, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable military discharge, as those terms are defined in Section 1-103 of the Illinois Human Rights Act, or on the basis of race, color, or ancestry.”²⁶⁶ This first proposed legislation tracked the

261. COLO. REV. STAT. § 13-71-104(3)(a) (2019) (“No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, economic status, or occupation.”). Another Colorado statute defines “sexual orientation” as “a person’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person’s perception thereof.” *Id.* at § 2-4-401(13.5). Under this definition, “sexual orientation” includes transgender status in Colorado.

262. MINN. STAT. § 593.32 (2018) (“A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, economic status, marital status, sexual orientation, or a physical or sensory disability.”). Under other provisions of the Minnesota Statutes, “sexual orientation” is defined as “having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” *Id.* at § 363A.03(44). Under this statutory definition, “sexual orientation” includes gender identity in Minnesota.

263. OR. REV. STAT. § 10.030 (2017) (“Except as otherwise specifically provided by statute, the opportunity for jury service may not be denied or limited on the basis of race, religion, sex, sexual orientation, national origin, age, income, occupation or any other factor that discriminates against a cognizable group in this state.”). Another Oregon statute defines “sexual orientation” as an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.” *Id.* at § 174.100(7). Under this statutory definition, “sexual orientation” includes gender identity in Oregon.

264. Three of those jurisdictions (Colorado, Minnesota, and Oregon) incorporate protections for gender identity or transgender status under the definition of “sexual orientation.” One jurisdiction (California) protects gender identity under the definition of “sex.” Wisconsin protects only sexual orientation.

265. Public Act 101-327, 2019 Ill. Legis. Serv. (West).

266. S.B. 889, 100th General Assemb. (Ill. 2017) (as introduced on Feb. 7, 2017 by Illinois Senator Toi W. Hutchinson). One term that may be unfamiliar to some readers is the “order of protection status,” which is defined in the Illinois Human Rights Act as “a person’s status as being a person protected under an order of protection issued pursuant to the Illinois Domestic Violence Act of 1986, Article 112A of the Code of Criminal Procedure of 1963,

categories of persons protected under the Illinois Human Rights Act and would have guaranteed each person in those categories the right to serve on a jury.²⁶⁷ The bill would have also protected transgender persons because of how “sexual orientation” is defined under the Illinois Human Rights Act.²⁶⁸

Even though the categories named in SB889 were already protected categories under the Illinois Human Rights Act, the legislation could not pass in that form. It was, perhaps, too ambitious at first. SB899 was therefore amended to reduce the number of protected categories and to limit the scope of protection to “race, color, religion, sex, national origin, or economic status.”²⁶⁹ Those six categories are the same as those categories found in the federal statute prohibiting discrimination against jurors.²⁷⁰ It was politically difficult for opponents of the state legislation to argue that it was too broad or would cover too many categories when each of the categories protected in the amended version of the state bill were already protected under federal law. Eliminated from the proposed state statute were the categories of age, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, unfavorable military discharge, and ancestry – each of which are protected categories under the Illinois Human Rights Act.

the Stalking No Contact Order Act, the Civil No Contact Order Act, or an order of protection issued by a court of another state.” 775 ILL. COMP. STAT. 5/1-103(K-5) (2019).

267. The public policy of the Illinois Human Rights Act is “[t]o secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.” 775 ILL. COMP. STAT. 5/1-102(A) (2019).

268. Although “sex” is defined in the Illinois Human Rights Act as only “the status of being male or female,” 775 ILL. COMP. STAT. 5/1-103(O) (2019), the term “sexual orientation” is defined in the Illinois Human Rights Act as “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.” 775 ILL. COMP. STAT. 5/1-103(O-1) (2019). The definition of “sexual orientation” under the Illinois Human Rights Act specifically excludes “a physical or sexual attraction to a minor by an adult.” *Id.* Similar to the provisions of Colorado, Minnesota, and Oregon law previously discussed, Illinois law protects transgender rights under the definition of “sexual orientation.” *Id.*

269. See Amendment 1 to S.B. 889, 100th Gen. Assemb. (Ill. 2017) (introduced Mar. 28, 2017) and Amendment 2 to S.B. 889, 100th Gen. Assemb. (Ill. 2017) (introduced Apr. 4, 2017). The category of “economic status” is sometimes referred to as “socioeconomic status.” See, e.g., ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2, Rule 2.3(B) (AM. BAR ASS’N 2011). One’s economic status may not be a protected category such as race or gender, but a peremptory challenge based on a juror’s economic status (or socioeconomic status) will be prohibited because it can serve as a proxy for a peremptory challenge based on the juror’s race.

270. 28 U.S.C. § 1862 (1982).

In May 2017, the Illinois House of Representatives and the Illinois Senate each passed the amended form of SB 889. The votes in each chamber were unanimously in support of the bill. Governor Bruce Rauner signed the bill into law in August 2017 as Public Act 100-228,²⁷¹ leaving for another day the protection of jurors based on other categories including sexual orientation or gender identity. The amended form of SB 889 extended protection only to the same categories of jurors protected by federal statute.²⁷²

Fortunately, the wait was not long. In the next General Assembly, Senator Hutchinson introduced Senate Bill 1378, an amendment to the Illinois Jury Act. Unlike her earlier first bill from 2017 that initially sought to protect all of the categories covered under the Illinois Human Rights Act, SB1378 in the 101st Legislature added only the category of “sexual orientation,” defined under the Illinois Human Rights Act to include gender identity.²⁷³ This bill unanimously passed the Illinois Senate just twenty-two days after it had been introduced. It was then sent to the Illinois House on March 7, 2019, where it passed unanimously seventy-six days later on May 22, 2019. The bill was sent to Governor J.B. Pritzker on June 20, 2019, who signed it into law on August 9, 2019.²⁷⁴ The law will enter into effect for Illinois on January 1, 2020.²⁷⁵

Both legislative chambers in Illinois voted unanimously to support protecting jurors from being removed because of their sexual orientation or gender identity. This bipartisan support is a signal for other states to proceed with similar legislation for state courts and for the U.S. Congress to amend the federal statute for federal district courts.

G. ETHICAL RULES FOR JUDGES AND LAWYERS

Because federal and state legislation does not yet prohibit excluding jurors based on their actual or perceived sexual orientation or gender identity except in a few jurisdictions, the ethical rules applicable to judges and lawyers can be used to expressly prohibit manifestations of bias or prejudice based on sexual orientation or gender identity, including bias in the

271. P.A. 100-228 (effective Jan. 1, 2018).

272. 28 U.S.C. § 1862 (1982).

273. 775 ILL. COMP. STAT. 5/1-103(O-1) (2019).

274. [Governor] Pritzker Signs Pro-LGBTQ Measures, WINDY CITY TIMES, Aug. 21, 2019, at 7.

275. As amended, the new Illinois law will provide that: “Except as otherwise specifically provided by statute, no person who is qualified and able to serve as a juror may be excluded from jury service in any court of this State on the basis of race, color, religion, sex, national origin, sexual orientation, or economic status. As used in this subsection, ‘religion’, ‘sex’, ‘sexual orientation’, and ‘national origin’ have the meanings provided in Section 1-103 of the Illinois Human Rights Act.” Public Act 101-327, 2019 Ill. Legis. Serv. (West).

selection of jurors.²⁷⁶ Rules could be drafted to specifically address the discriminatory use of peremptory challenges, or they could be drafted more broadly to cover the treatment of sexual orientation and gender identity in all aspects of litigation. Ethical rules of general application to court proceedings would not be limited to juror selection but would also apply to the treatment of parties, witnesses, counsel, and court personnel in all aspects of the civil or criminal litigation.

Rule 2.3 of Canon 2 of the ABA Model Code of Judicial Conduct requires judges to ensure that they and the lawyers appearing before them refrain from manifesting bias or prejudice, or engaging in harassment, based upon “sexual orientation . . . and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so”²⁷⁷ in court proceedings. This rule requiring the judge to monitor the acts of persons subject to the judge’s direction would apply not only to lawyers during jury selection but also to the treatment of parties, witnesses, counsel, and court personnel in all other aspects of the civil or criminal litigation.

Rule 8.4(g) of the ABA Model Rules of Professional Conduct provides that it is misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual

276. For more on the potential use of court rules to limit peremptory challenges based on sexual orientation, see Esther J. Last, *Peremptory Challenges to Jurors Based on Sexual Orientation: Preempting Discrimination by Court Rule*, 48 IND. L. REV. 313 (2014).

277. Rule 2.3 of Canon 2 of the ABA Model Code of Judicial Conduct states:

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.3 (AM. BAR ASS’N 2011).

orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”²⁷⁸

H. PRIVACY CONCERNS

Discrimination on the basis of sexual orientation or gender identity is widely condemned, but it is not expressly illegal throughout the United States. Many states prohibit discrimination in housing, public employment, and access to public accommodation on several bases, but many fail to include sexual orientation and gender identity among the prohibited categories of discrimination. So even though same-sex marriage is now legal throughout the United States after the U.S. Supreme Court’s decisions in *Windsor*²⁷⁹ and *Obergefell*,²⁸⁰ it remains the case that in some states a same-sex couple could marry on Saturday and be fired from their jobs on Monday.²⁸¹ The U.S. Supreme Court has agreed to hear three cases in its 2020 Term on whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against gay and transgender persons.²⁸²

Some states have not included sexual orientation and gender identity in their state non-discrimination statutes and federal courts are divided on whether federal nondiscrimination law applies to sexual orientation and gender identity. Consequently, and for other personal reasons, not all LGBT persons will want to disclose their sexual orientation or gender identity in

278. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (AM. BAR ASS’N 2011). The rule further provides that it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16” nor does the rule “preclude legitimate advice or advocacy” consistent with the Rules of Professional Conduct. *Id.*

279. *United States v. Windsor*, 570 U.S. 744 (2013).

280. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

281. *See, e.g., Guidance Counselor Loses Job at Indianapolis High School Over Her Same-Sex Marriage*, WXIN/CNN (Mar. 28, 2019), www.mysuncoast.com/2019/03/26/guidance-counselor-loses-job-over-her-same-sex-marriage/ [<https://perma.cc/7HSX-82ST>]; Kyra Gurney, *This Teacher Married Her Girlfriend. Then She Was Fired by a Miami Catholic School*, TAMPA BAY TIMES (Feb. 10, 2018), <https://www.tampabay.com/news/education/This-teacher-married-her-girlfriend-Then-she-was-fired-by-a-Miami-Catholic-school-165356997> [<https://perma.cc/R8NR-LKTV>].

282. Adam Liptak, *Justices to Weigh Wider View of Sex Bias Law*, N.Y. TIMES, Apr. 23, 2019, at A1, *Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/22/us/politics/supreme-court-gay-transgender-employees.html> [<https://perma.cc/W7L5-77JW>]. The cases that the Supreme Court agreed to hear are *Altitude Express Inc. v. Zarda*, No. 17-1623, *Bostock v. Clayton County, Ga.*, No. 17-1618, and *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, No. 18-107.

public documents or in a public courtroom.²⁸³ Nor should they need to. As the California Appellate Court stated in *Garcia*, because no one can be excluded from serving as a juror because of their sexual orientation, there should not be any inquiry about it.²⁸⁴

The fear of outing potential jurors as gay or lesbian does not mean that the judicial system should allow peremptory strikes based on sexual orientation or gender identity. The law can forbid peremptory strikes while still protecting the privacy rights of LGBT persons. First, drawing from nondiscrimination statutes and statutes criminalizing hate crimes, the law should prohibit strikes based on a potential juror's actual *or perceived* sexual orientation or gender identity. Jurors would not have to disclose or confirm their sexual orientation or gender identity. Second, as the *SmithKline* court noted, "prudent courtroom procedure" can allay concerns that extending *Batson* to sexual orientation will jeopardize the privacy of prospective jurors.²⁸⁵ Judges and attorneys must be sensitive to legitimate privacy concerns of potential jurors and use procedures that will avoid violations of privacy rights.

283. See, e.g., *People v. Garcia*, 92 Cal. Rptr. 2d 339, 341 (Cal. Ct. App. 2000) ("Sexual orientation is not something likely to be volunteered, either by heterosexuals or homosexuals, and it is even less likely to be the subject of inquiry by court or counsel."). Employees may be reluctant to disclose their sexual orientation or gender identity even in jurisdictions where they are protected by state or local law. See, e.g., Mary Grace Lewis, *The Work Closet*, THE ADVOCATE, Mar. 2019, at 19 (describing the findings of a study by the Human Rights Campaign Foundation "that over half of LGBTQ employees have remained closeted in their respective workplaces" and that although the LGBTQ community has made "substantial strides in equality," LGBTQ workers still experience discrimination in the workplace).

284. The *Garcia* court stated:

Nor do we perceive a great problem lurking with regard to inquiring of jurors about their sexual orientation. It simply should not be done. The Attorney General is right in this regard: No one should be "outed" in order to take part in the civic enterprise which is jury duty. The whole point is that no one can be excluded because of sexual orientation. That being the case, no one should be allowed to inquire about it. If it comes out somehow, as it did here, the parties will doubtless factor it into their jury selection decisions, just as they factor in occupation, education, body language, and whether the juror resembles their stupid Uncle Cletus. But there is no reason to allow inquiry about it.

Garcia, 92 Cal. Rptr. 2d at 347.

285. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 487 (9th Cir. 2014). "Courts can and already do employ procedures to protect the privacy of prospective jurors when they are asked sensitive questions on any number of topics." *Id.*

IV. CONCLUSION

Peremptory challenges of jurors should not be used in a discriminatory manner against any group of persons, including members of the LGBT community. Lawyers should instead “seek more information and employ more sophisticated rationales” when using peremptory challenges.²⁸⁶ Instead of relying on group stereotypes, lawyers should explore each individual juror’s “opinions, beliefs, and experiences.”²⁸⁷

It is time to extend *Batson* to prohibit the exclusion of potential jurors based on their actual or perceived sexual orientation or gender identity.²⁸⁸ The lack of protection for jurors based on their sexual orientation or gender identity fosters discrimination in the law, violates the rights of LGBT persons who may be excluded from serving on juries, violates the rights of LGBT persons whose criminal or civil cases are heard in court, and instills a lack of public confidence in judicial proceedings that permit wholesale discrimination against categories of individuals.

Federal and state statutes prohibiting discrimination against particular categories of jurors should be amended to include sexual orientation and gender identity. On the federal level, 28 U.S.C. § 1862 prohibiting the exclusion of jurors on the basis of “race, color, religion, sex, national origin, or economic status”²⁸⁹ should be amended to include sexual orientation and gender identity.²⁹⁰ On the state level, state legislatures can point to statutes in six states that prohibit discrimination based on sexual orientation or gender identity. That protecting the right of individuals to serve on juries is somehow controversial is disproved by the recent unanimous votes in both chambers of the Illinois General Assembly.

Until the federal and state statutes are amended, however, courts should continue to use their powers to prohibit the exercise of peremptory challenges based on sexual orientation and gender identity. Lawyers who are sensitive to the exclusion of jurors based on their actual or perceived sexual orientation or gender identity should raise *Batson* challenges on behalf of their clients and the excluded jurors. Using the *SmithKline* decision as a model, federal and state courts should weigh explanations of peremptory challenges and provide appropriate remedies when those challenges are

286. FREDERICK, *supra* note 9, at 338.

287. *Id.*

288. “Gender identity” should be read in this Article to include both “gender identity” and “gender expression.” The concept should also be read to include “actual or perceived gender identity” and “actual or perceived gender expression.”

289. 28 U.S.C. § 1862 (1982).

290. “Gender identity” or “gender identity and gender expression” can be protected as its own category or, as seen in the state statutes of California, Colorado, Minnesota, and Oregon, can be incorporated into the definitions of “sex” or “sexual orientation.”

impermissibly exercised on the basis of sexual orientation or gender identity.