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What's (Who You) Love Got to Do with It?*

Should Sexual Orientation Be a Permissible Basis for Peremptory Challenges?

Colin P. Saltry

Friday mornings in the Philadelphia Court of Common Pleas are unofficially designated as civil-jury days. The vast majority of jury panels leaving the Juanita Kidd Stout Center for Criminal Justice and heading over to City Hall on Friday mornings are listed for civil cases—anything from motor-vehicle accidents and contract disputes to complex medical-malpractice and products-liability cases. These panelists—not always bright-eyed and bushy-tailed, though more often than not awake and attentive—are Philadelphians of all stripes. They come from all corners of the city and are, for the most part, pleasant folks. My job as judge's tipstaff¹ is to work with these jurors by assisting the court and the litigants selecting juries and managing the courtroom. In my time at City Hall, I have empanelled nearly 100 civil juries and as a result can occasionally predict which side will strike which juror in which order. This rarely happens, but after a few automobile-accident cases, you get a feel for the types of experience or beliefs that might bias a juror to a particular set of facts. As prospective jurors answer the court's questions, one may reasonably characterize their answers as proxies for bias, and they include such things as familiarity with claims investigation, prior lawsuits, personal feelings regarding money-damage awards, and the like. Using a juror's stated experiences or beliefs as a proxy for bias are permissible bases for excusing that juror from serving on the jury by exercising a peremptory challenge.

But should litigants be permitted to exercise peremptory challenges to prevent otherwise qualified people from serving on a jury solely because of their sexual orientation?² While many argue that sexual orientation should never be a proxy for bias, the law has yet to align itself with this view. A juror's right to serve free of discrimination based upon sexual orientation is a developing concept, and while courts have rushed to secure equal protection to same-sex couples seeking civil marriage following the landmark *U.S. v. Windsor*³ decision, courts have

been less fleet-footed in securing similar protection for lesbian, gay, bisexual, and transgender (LGBT) jurors. As of this writing, the Supreme Court has yet to decide on a standard of review for evaluating equal-protection claims based on sexual orientation, let alone the permissibility of exercising peremptory challenges on that basis.

This paper discusses aspects of both the civil and criminal court systems beginning in part I, which describes the voir dire process generally—its background, purpose, and scope—as well as an overview of the mechanics governing the process. Part II highlights what limitations exist on the use of peremptory challenges to exclude jurors based on their race and gender. Part III covers current law regarding issues of sexual orientation and peremptory challenges. Part IV discusses some of the practical considerations at play regarding issues of sexual orientation that manifest during voir dire as well as evaluating several alternatives to the use of peremptory challenges. The paper concludes by asking whether sexual orientation should be protected under the line of cases stemming from *Batson v. Kentucky*, arguing that sexual orientation deserves the protections of heightened scrutiny and the protections afforded under *Batson*.⁴ Throughout the paper, intermingled with traditional citations, I have provided personal anecdotes that may offer insight into the practical effects of the legal and policy issues described. This commentary is not offered as expert knowledge, and it is included solely for the benefit and entertainment of the reader.

I. VOIR DIRE: THE PROCESS

The jury system originated in England sometime in the twelfth century.⁵ Beginning as a rubberstamp for the king's wishes, juries gradually developed independence in decision making over the succeeding centuries.⁶ The jury-selection process known as “voir dire”—from the French words “to see” and “to say,”⁷ often translated to mean “to speak the truth”⁸—

* TINA TURNER, *What's Love Got to Do with It?*, on PRIVATE DANCER (Capitol Records 1984).

Footnotes

Editor's Note: This article was initially submitted as part of a writing competition for law students sponsored by the International Association of LGBT Judges. Saltry's entry won first place and was then submitted to *Court Review* for publication consideration.

1. “[T]ipstaff. A court crier. The name derives from the crier's former practice of holding a staff tipped with silver as a badge of office.” BLACK'S LAW DICTIONARY (9th ed. 2009).
2. Much of the analysis in this paper is geared toward sexual orien-

tation. While issues surrounding gender identity and jury service would make for equally important reading, that discussion is omitted here.

3. 133 S. Ct. 2675 (2013).
4. 476 U.S. 79 (1986).
5. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 8 (1988).
6. See *In Penn's Case*, 6 Howell's St. Trials 951 (1670); *id.* at 9-10. See also *In Bushell's Case*, 124 Eng. Rep. 1006 (C. P. 1671).
7. Google Translate, <https://translate.google.com/#en/fr/See>, <https://translate.google.com/#en/fr/Say>.
8. 47 AM. JUR. 2D *Jury* § 195 (1969).

saw its first American iteration as part of the Massachusetts Jury Selection Law of 1760.⁹ That law allowed the questioning of potential jurors until their names were formally printed as part of the sheriff's jury list.¹⁰ As voir dire spread from New England to the rest of the colonies and eventually the United States, the process developed more structure. But two centuries of common-law development created disparities in voir dire practices and procedures between jurisdictions. So much so that in 1968, Congress mandated uniform procedures for the federal courts as part of the Jury Selection and Service Act.¹¹ The JSSA provides in part that "all citizens shall have the opportunity to serve as jurors" and that "no citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status."¹²

Contemporary voir dire is mostly a question-and-answer session conducted by the court.¹³ The process is conducted exclusively by the trial judge or court personnel, by the trial judge with varying levels of participation from the attorneys, or entirely by the attorneys. The trial judge has wide discretion in how voir dire is conducted.¹⁴ Generally speaking, the process begins when the venire is brought into the courtroom, where it receives a formal welcome from the judge,¹⁵ an introduction of the parties, lawyers, and potential witnesses, a brief overview of the process, and a description of the case to be decided.¹⁶ The jurors take an oath to tell the truth, and the questioning begins.¹⁷ Questioning is usually, but not always, directed at the venire rather than individual jurors, though at times the process may include both methods of questioning.¹⁸

Questions asked first are of a general nature, usually about personal information like age; background; marital, family, and employment status; area of residence; education level; prior jury service; experience with a lawsuit; and ability to be fair and impartial.¹⁹ As the questions progress, they tend to focus more on the specific circumstances of the case in question, provided that each question is limited in scope to elicit whether a juror could be fair and impartial.²⁰

Once questioning is completed, the parties then have an opportunity to exercise challenges for cause and peremptory challenges. A challenge for cause may be asserted by either party to exclude biased²¹ or incompetent jurors.²² Parties challenging a juror for cause must articulate their reason for the challenge. The trial judge has wide discretion in deciding challenges for cause, and such challenges are theoretically unlimited in number.²³ Peremptory challenges are exercised by the parties once all challenges for cause have been resolved and the court is nearly ready to seat the jury. In most circumstances, parties exercising them need not articulate a reason for the challenge, and as creatures of statute, they are limited in number.²⁴ Once all challenges have been exercised, the remaining jurors are seated in the jury box, they are sworn in, and the

[T]wo centuries of common-law development created disparities in voir dire practices and procedures between jurisdictions.

9. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 22-23 (1986).

10. *Id.* at 21-44.

11. 28 U.S.C. § 1861 (1968).

12. *Id.* at §§ 1861-62.

13. Dean A. Stowers, Note, *Juror Bias Undiscovered During Voir Dire: Legal Standards for Reviewing Claims of a Denial of the Constitutional Rights to an Impartial Jury*, 39 *DRAKE L. REV.* 201, 202 (1989-90).

14. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) ("The trial judge exercises substantial control over voir dire in the federal system. . . . The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. . . . The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes.").

15. See Pa. SSJI (Civ), § 1.10 (2013) ("Jury service is an important responsibility of citizenship, fundamental to our entire system of justice. The courts cannot function unless citizens serve as jurors. Thanks to jurors, our society resolves its disputes in a civilized manner, in a courtroom where citizens decide upon a verdict. . . . Thank you for serving your country in this most important role. We are about to select [insert number] jurors and [insert number] alternate jurors to try a civil case.").

16. *Id.* at § 1.40.

17. *Id.* at § 1.50.

18. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1908 (1991) (holding that the questioning of potential jurors in groups of four does not violate Sixth Amendment right to a fair jury).

19. Pa. SSJI (Civ), § 1.10 (2013).

20. Paul N. Luvera, *Truth or Consequences—Is Voir Dire Really a Waste of Time?*, 43 *WASH. ST. B. NEWS.*, May 1989, at 11.

21. Nancy L. Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 *HASTINGS L.J.* 959, 961 (1982) ("A challenge for cause may be exercised when counsel has reason to believe that a prospective juror will not be able to view the evidence at trial in an impartial manner due to some previous experience or some fixed attitude, such as an admitted bias.").

22. See *Peters v. Kiff*, 407 U.S. 493, 501 (1972) ("[T]he Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict") and MICHAEL T. NIETZEL & RONALD C. DILLEHAY, *PSYCHOLOGICAL CONSULTATION IN THE COURTROOM* 17-18 (1986) (providing examples of incompetency to serve, including inability to speak or understand English, physical or mental disability, certain types of felony convictions, and lack of U.S. citizenship or residence in the court's jurisdiction).

23. See 28 U.S.C. § 1870 (2006) (not specifying a limit: "[a]ll challenges for cause . . . shall be determined by the court").

24. See FED. R. CRIM. P. 24(b) (setting the number of peremptory challenges available in a criminal case at 20 for capital cases, 6 for the government with 10 for the defendant(s) in any other felony case with a term of imprisonment longer than one year, and 3 per side in a misdemeanor case where the crime is punishable by fine, one year or less imprisonment, or both), FED. R. CIV. P. 47(b), and 28 U.S.C. § 1870 (2006) (granting three peremptory challenges for each side in civil case).

The Court articulated a three-part test to determine whether a peremptory strike was motivated by a racially discriminatory purpose.

trial begins.²⁵ Part II discusses the limitations placed on the use of peremptory challenges in greater detail.

II. LIMITATIONS ON THE USE OF PEREMPTORIES

The Constitution mandates that all criminal defendants receive a public trial by an impartial jury²⁶ and that all civil litigants receive the same right to a jury trial.²⁷ The Supreme Court described an impartial jury as having both individual and group components. On the individual level, the Court

stated that “a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court”²⁸ and that the juror “will conscientiously apply the law and find the facts.”²⁹ On the group level, the Supreme Court has determined that an impartial jury venire consists of a fair cross-section of the community.³⁰ This fair-cross-section requirement adheres only to the composition of jury venires and does not mandate the composition of petit juries.³¹

In 1986, the U.S. Supreme Court sought to end the practice of peremptory challenges exercised to discriminate against jurors on the basis of race. In the landmark case *Batson v. Kentucky*, the Court found that a prosecutor’s use of peremptory challenges to strike black jurors violated the equal-protection rights of those jurors excluded from the jury on the basis of race.³² The Court articulated a three-part test to determine whether a peremptory strike was motivated by a racially discriminatory purpose. *Batson*’s first step requires a defendant raising a challenge to make a prima facie showing that the government exercised its strikes in a pattern of discrimination. A

defendant may do this by demonstrating that they are “a member of a cognizable racial group,” “that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race,” that the exercise was discriminatory, and that “all of the relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.”³³ If a defendant establishes this prima facie case, step two shifts the burden to the government, which must “come forward with a neutral explanation for challenging black jurors.”³⁴ The government does not, however, need to meet the same burden necessary for establishing a challenge for cause.³⁵ Step three rests with the trial judge, who must consider all the relevant circumstances and then “determine if the defendant has established purposeful discrimination.”³⁶ The analysis articulated in *Batson* marked a historic departure from the traditionally “anything goes” nature of the peremptory challenge.

Following the *Batson* decision, the Court augmented its reasoning to include members of one racial group to raise third-party equal-protection claims on behalf of members of a different racial group. In *Powers v. Ohio*,³⁷ the Supreme Court allowed a white defendant to assert the rights of black venirepersons struck from the jury panel.³⁸ *Powers* held that the reverse of *Batson* is also true, that a prosecutor’s use of discriminatory peremptory strikes raises the same due-process claims for white and non-white defendants.³⁹ Additionally, *Georgia v. McCollum*⁴⁰ required that criminal defendants receive the same treatment regarding their discriminatory use of peremptory challenges as their prosecutorial counterparts.⁴¹ Finally, in *J.E.B. v. Alabama ex rel. T.B.*,⁴² the Supreme Court extended the *Batson* inquiry to prevent gender discrimination.⁴³

Expanding upon *Batson* and *Powers*, the Court extended its equal-protection arguments to civil cases.⁴⁴ In *Edmonson*, the Court found that a private litigant exercising a peremptory

25. Pa. SSJI (Civ), § 1.90, 1.110, 1.130 (2013).

26. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”).

27. U.S. Const. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved”).

28. Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984).

29. Wainwright v. Witt, 469 U.S. 412, 423 (1985).

30. See Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (“[T]he Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”); see also 28 U.S.C. § 1861 (1968) (“[A]ll litigants in Federal courts entitled to trial by jury shall have the right to . . . petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”)

31. Taylor, 419 U.S. at 538 (“[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive

groups in the community and thereby fail to be reasonably representative thereof.”)

32. *Id.*

33. *Id.* at 94.

34. *Id.* at 97.

35. *Id.*

36. *Id.*

37. 499 U.S. 400 (1991).

38. *Id.* at 415 (“We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.”).

39. *Id.* at 415 (“[T]o say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms.”).

40. 505 U.S. 42 (1992).

41. *Id.* at 59 (“We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”)

42. 511 U.S. 127 (1994).

43. *Id.* at 129 (“[G]ender, like race, is an unconstitutional proxy for juror competence and impartiality.”).

44. *Edmonson*, 500 U.S. at 622.

strike on the basis of race was impermissible under the Equal Protection Clause.⁴⁵ In reaching that conclusion, the Court had to determine whether private litigants in a civil case could be considered state actors for the purposes of equal-protection analysis. In a six-to-three decision, the Court found that a party's right to exercise peremptory challenges emanated from state authority—in this case, congressional statute—and that without the material assistance of the government—“reliance on governmental assistance and benefits, performing a traditional governmental function, and the injury caused was aggravated by the incidents of governmental authority”⁴⁶—a civil litigant's use of peremptory strikes constituted state action. The Court in *Edmonson*, as it has throughout the *Batson* line of cases, emphasized how the gravity of the harm done by excluding jurors based upon their race is magnified by the court system's material participation.⁴⁷

While it appears that groups and classes of individuals subject to heightened degrees of scrutiny—religion, national origin, etc.—would eventually receive the protections of the *Batson* analysis, the Supreme Court has declined to extend *Batson*'s protections beyond race and gender. Lower courts have issued differing rulings on these subjects,⁴⁸ and it remains to be seen whether the Supreme Court will extend the *Batson* analysis to other groups subject to heightened scrutiny. In light of this, should sexual orientation—which is technically not subjected to heightened-scrutiny review⁴⁹—receive actual heightened scrutiny and with it the added protections afforded under *Batson*? Part III makes the case for heightened scrutiny and analyzes current law with respect to sexual orientation and peremptory challenges.

III. SEXUAL ORIENTATION & PEREMPTORY CHALLENGES

There can be no question that members of the LGBT community have long suffered discrimination in our society—either passively through lost opportunities in employment and housing or actively through violence and intimidation.⁵⁰ As such, classifying the LGBT community as a “cognizable group” for purposes of a Sixth Amendment fair-cross-section claim can be assumed accurate. However, identifying the extent of LGBT representation in a given population and their subse-

quent representation on jury venires is all but impossible given the complexities of identifying members of the community absent their “coming out” to the court.⁵¹ Because of this, Sixth Amendment claims are likely doomed to fail.⁵² Thus, the only practical opportunity to protect members of the LGBT community from being systematically excluded from jury service exists during the peremptory-challenge phase of voir dire.

While the *Batson* inquiry is essentially the same, the Supreme Court began strengthening the protections afforded under *Batson* in 2005 by altering steps one and three of the *Batson* test. Step one requires a party challenging a peremptory strike to make a prima facie case that the strike was motivated by racial prejudice. Step two shifts the burden to the striking party to articulate a non-discriminatory reason for the strike. Step three requires the court to determine whether the party challenging the strike has shown deliberate discrimination based on the record and the totality of the circumstances.⁵³ Following the 2005 decision in *Johnson v. California*,⁵⁴ the party in step one need only raise an inference of discrimination.⁵⁵ The preponderance-of-the-evidence standard required pre-*Johnson* was inappropriate because it forced the party to persuade the court in step one that there was impermissible discrimination present based upon a preponderance of the circumstances; essentially confusing steps one and three of the analysis. The court's review in step three was vastly expanded by *Miller-El v. Dretke* (*Miller-El II*).⁵⁶ In *Miller-El II*, the Supreme Court acknowledged the difficulty of determining a discriminatory purpose based on the exercise of peremptory strikes from the perspective of trial courts. The Court also listed a series of factors helpful in “ferretting out”⁵⁷ discriminatory peremptory challenges, including conducting statistical analysis of stricken jurors, conducting comparative analysis of all jurors, noting any contrasting questions between jurors of different racial backgrounds, any use of a “jury shuffle” by a trial court, and whether the particular court or juris-

[T]he Supreme Court began strengthening the protections afforded under *Batson* in 2005 by altering steps one and three of the *Batson* test.

45. *Id.*

46. *Id.* at 621-22.

47. *Id.* at 624 (“When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. . . . By enforcing a discriminatory peremptory challenge, the court ‘has not only made itself a party to the [biased act], but has elected to place its power, property and prestige being the [alleged] discrimination.’ *Burton v. Wilmington Parking Authority*, 365 U.S., at 725, 81 S. Ct., at 862. In so doing, the government has ‘create[d] the legal framework governing the [challenged] conduct,’ *National Collegiate Athletic Assn.*, 488 U.S., at 192, 109 S. Ct., at 462, and in a significant way has involved itself with invidious discrimination.”).

48. *See State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *but see* *U.S. v. Greer*, 939 F.2d 1076 (5th Cir. 1991).

49. *See Windsor*, *supra* note 3.

50. OUT OF THE PAST: THE STRUGGLE FOR GAY AND LESBIAN RIGHTS IN AMERICA (Jeffrey Dupre 1998).

51. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 813 (2002).

52. Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 245 (1998).

53. *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471, 476 (9th Cir. 2014).

54. 545 U.S. 162 (2005).

55. *Id.* at 170 (“A defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”).

56. 545 U.S. 231 (2005) (reversing the Fifth Circuit's denial of a *Batson* challenge on the merits).

57. *Id.* at 240-66.

Ambiguity reigns among the lower courts as well, as is best illustrated in the contrasting views of the Eighth and Ninth Circuit Courts of Appeal.

diction has a history of systematically excluding jurors for racially discriminatory reasons.⁵⁸ Finally, the Supreme Court held that appellate courts need not defer to the trial court's credibility determinations where the record fails to offer evidence of credibility.⁵⁹ In other words, trial courts are only accorded deference in their step-three determinations when evi-

dence of credibility exists in the record. The combined effect of these decisions has resulted in an overall strengthening of the *Batson* analysis.

Despite these improvements, a juror's right to serve free of discrimination based upon sexual orientation is still a developing concept. The Supreme Court has yet to decide on a standard of review for evaluating equal-protection claims based on sexual orientation,⁶⁰ let alone the permissibility of exercising peremptory challenges against people because of their sexual orientation. Ambiguity reigns among the lower courts as well, as is best illustrated in the contrasting views of the Eighth and Ninth Circuit Courts of Appeal.

A. *United States v. Blaylock*⁶¹

Eugene Blaylock—a gay man—and five other defendants were indicted on federal drug-trafficking charges stemming from a routine traffic stop in 2002. During jury selection, Blaylock raised a *Batson* challenge following one of the government's peremptory strikes, asserting that the juror was improperly struck because of his sexual orientation.⁶² At the time, the district court denied the challenge, suggesting that *Batson* was not applicable to sexual orientation and that even if it was, Blaylock had not made a *prima facie* showing of intentional discrimination.⁶³ Following trial, the jury acquitted Blaylock on several charges but found him guilty of "aiding and abetting possession with intent to distribute methamphetamine,"⁶⁴ a judgment that carried a mandatory minimum sentence of 120 months in prison plus five years' supervised release.⁶⁵ On

appeal, Blaylock again raised a *Batson* challenge to the government's peremptory strike. In a unanimous panel decision, the Court of Appeals held that the Eighth Circuit did not recognize sexual orientation as a *Batson* classification and went on to question the constitutionality of extending *Batson* to sexual orientation.⁶⁶ Further, the court reasoned that even if *Batson* covered sexual orientation, Blaylock's challenge would have failed because the government's stated reason for the challenge went beyond mere pretextual language.⁶⁷ In other words, Blaylock's challenge failed to satisfy *Batson*'s first step in raising an inference of impermissible discrimination.

B. *SmithKline Beecham Corp. v. Abbott Laboratories*⁶⁸

Following the U.S. Supreme Court's decision in *Windsor*, the Ninth Circuit held that heightened-scrutiny review applied to equal-protection claims involving sexual orientation.⁶⁹ This case involved a contract dispute between two pharmaceutical companies—SmithKline Beecham Corp. (GSK) and Abbott Laboratories (Abbott)—regarding the licensing and pricing of HIV medication. During jury selection, under questioning from the federal district court judge, one of the jurors—"Juror B"—revealed that he had friends with HIV, that he was taking either a GSK or Abbott medication, and, through the repeated use of masculine pronouns, that he had a male partner. The trial judge also used masculine pronouns when inquiring about Juror B's partner. Abbott's attorney asked Juror B a total of five questions regarding the types of medication at issue in the case. Once individual voir dire was completed, Abbott exercised its first peremptory challenge against Juror B. GSK immediately raised a *Batson* challenge. In the ensuing discussion between the court and counsel, the judge raised three issues with GSK's motion, including (1) whether *Batson* applies to civil cases; (2) whether *Batson* ever applies to sexual orientation; and (3) how the court would practically identify those members of the venire who might be gay.⁷⁰ In response, Abbott's attorney stated that he had "no idea whether [Juror B] is gay or not."⁷¹ Subsequently, the judge allowed the strike.⁷²

On appeal, the Ninth Circuit conducted a *Batson* analysis of GSK's claim that Abbott improperly excluded Juror B because of his sexual orientation. The court found that GSK had estab-

58. *Id.*

59. See *Snyder v. Louisiana*, 522 U.S. 472 (2008) (reversing the trial court's refusal to grant a *Batson* challenge because the trial record showed no evidence that the trial court ever conducted a credibility analysis of the striking party's proffered neutral reason); and *Rice v. Collins*, 546 U.S. 333 (2006) (holding that the attempt to set aside the trial court's conclusion that the prosecutor did not strike a juror for racially discriminatory purposes did not satisfy the requirements for granting a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act).

60. Compare *Romer v. Evans*, 517 U.S. 620 (1996), with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Windsor*, *supra* note 3.

61. 421 F.3d 758 (2005), *cert. denied* 546 U.S. 1126 (2006).

62. *Id.* at 769.

63. *Id.*

64. *Id.* at 765.

65. *Id.* at 766.

66. *Id.* at 769.

67. *Id.* at 770.

68. *Supra* note 53.

69. *Id.* at 483 ("Windsor requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, Windsor requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with Windsor. (Citation omitted.) Because we are bound by controlling, higher authority, we now hold that Windsor's heightened scrutiny applies to classifications based on sexual orientation.")

70. *Id.* at 475 ("[H]ow [would] we know—I mean, the evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here, unless somebody happens to say something. There would be no real way to analyze it.")

71. *Id.*

72. *Id.*

lished a prima facie case of discrimination,⁷³ concluded that “the record persuasively demonstrate[d] that Juror B was struck because of his sexual orientation,”⁷⁴ and found that Abbott’s proffered neutral explanations were a pretext for purposeful discrimination.⁷⁵ Having concluded that GSK met the burden for sustaining a *Batson* challenge, the court had to decide whether *Batson* itself prohibited strikes based on sexual orientation.⁷⁶ Based on an earlier Ninth Circuit case interpreting the decision in *Lawrence*,⁷⁷ the court held that *Windsor* required application of heightened scrutiny to equal-protection claims based upon sexual orientation.⁷⁸ Upon these conclusions, the court established that *Batson* applies to peremptory strikes based on sexual orientation⁷⁹ then reversed and remanded the case for a new trial.⁸⁰

The divergent approaches taken to *Batson* challenges by the Eighth and Ninth Circuits demonstrate the ambiguity among the lower courts. As more and more individuals decide to come out and publicly acknowledge their sexuality, the more issues of sexual orientation will appear in court, either for litigants, their attorneys, or jurors hearing their cases. Part IV discusses some practical considerations at play when sexual orientation is an issue in the courtroom as well as alternate approaches to the current peremptory regime.

IV. PRACTICAL CONSIDERATIONS AND ALTERNATE APPROACHES IN EXERCISING PEREMPTORIES

A. Practical Considerations

In cases where sexual orientation becomes an issue, it seems natural to inquire about prospective jurors’ attitudes toward gays and lesbians, their experiences with the LGBT community, and possibly even their sexual orientations in the interests of empanelling an impartial jury. As the judge in *SmithKline* succinctly asked, “[h]ow [would] we know . . . who’s gay and

who isn’t here, unless somebody happens to say something.”⁸¹ Setting aside the juror’s privacy considerations, the most obvious solution—directly asking jurors their sexual orientation—might also yield the worst results. First, asking a direct question does not guarantee a direct answer. Any would-be inquisitors would have to deal with the challenge of gay covering,⁸² and even if that could be overcome thanks to a juror’s presentation, there would be no way to affirmatively identify jury panelists as LGBT short of a “friend of Dorothy” T-shirt, secret decoder ring, or similar foolishness.

Imagine, for a moment, a situation in which a juror’s sexual orientation is in dispute for purposes of a *Batson* challenge. A plaintiff’s attorney may raise a challenge following the peremptory strike of a juror who “seemed to be gay.” In the ensuing colloquy, the attorneys argue—presumably based on appearance (stereotypes)—over the prospective juror’s sexual orientation. The judge would then have to determine whether the juror was actually gay or if the totality of the circumstances raised an inference that the juror might be gay. Imagine that the judge granted a *Batson* challenge on the juror suspected of being gay, only to offend the juror who disclosed that he was happily married to a woman. In seeking to determine a prospective juror’s sexual orientation without offending that juror, a basic level of interpersonal intelligence could yield the intended result.⁸³ Asking indirect questions, such as

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73. *Id.* at 478-79. First, the court noted that Juror B was the only venireperson to publicly identify himself as gay. Second, relying on the language in *Powers*, the court believed that because of the high level of concern in the gay community about price increases of HIV drugs, the “potential for relying on impermissible stereotypes in the process of selecting jurors was ‘particularly acute’ in this case.” *Id.* at 476-77 (quoting *J.E.B.*, 511 U.S. at 140). Third, the attorney for Abbott either did not or could not articulate a justification for the strike when given an opportunity by the court. Finally, the court found that the explanations offered on appeal were “pretextual.”

74. *Id.* at 479.

75. *Id.* at 478-79.

76. *Id.* at 479.

77. *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (articulating a three-factor analysis for interpreting the *Lawrence* decision: first, that *Lawrence* “did not consider the possible rational bases for the law in question as required for rational basis review”; second, that it “required that a legitimate state interest justify the harm imposed by the Texas law”; and third, that it “must have applied heightened scrutiny because it cited and relied on heightened scrutiny cases”).

78. *SmithKline*, *supra* note 53, at 483-84 (“*Witt* tells us how to interpret *Windsor*. Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. . . . Thus, there can no longer be any question that gays and lesbians are no longer a

‘group or class of individuals normally subject to “rational basis” review’” (quoting *J.E.B.*, 511 U.S. at 143).

79. *Id.* at 486 (“As illustrated by this case, permitting a strike based on sexual orientation would send the false message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation. Strikes based on preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate these stereotypes. . . . The history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group leads us to conclude that *Batson* applies to peremptory strikes based on sexual orientation.”).

80. *Id.* at 489.

81. *Id.* at 475.

82. Yoshino, *supra* note 51, at 837.

83. Personal Anecdote: During voir dire in a relatively simple motor-vehicle-accident case having nothing to do with sexual orientation, plaintiff’s counsel engaged in a painfully tone-deaf display of questioning. A male juror who presented as gay arrived in judge’s chambers for questioning during individual voir dire. After informing the court that he was engaged to another male, plaintiff’s counsel continually used feminine pronouns when referring to the juror’s fiancé despite the juror’s disclosure that his partner was male. The juror was later selected to serve and ended up being chosen as foreperson of the jury, which unanimously found in favor of the defendant. Whether the two facts are related is unclear; however, it is interesting to note the coincidence.

[R]equiring parties to disclose their reasons for exercising peremptories would go a long way in eliminating all types of impermissible discrimination

whether the particular juror has any gay friends or relatives, is active in any LGBT advocacy groups, has a roommate and what that roommate's occupation is (phrased as "his or her") might elicit enough information for an interested party to draw an inference that the prospective juror identifies as LGBT.⁸⁴ It remains unclear whether such questioning would be permissible, and even if it were, a reviewing court

might very well find a pretextual motive for a party's peremptory strike based on a cold record. These considerations demonstrate the difficulty in inquiring about jurors' sexual orientation and further demonstrate why using sexual orientation as a proxy for bias is an inappropriate use of the peremptory challenge.

B. Alternate Approaches

Restricting or Banning the Use of Peremptory Challenges

Legislatures give and legislatures take away, and what statute creates, statute may destroy. In an article chronicling the shortcomings of voir dire,⁸⁵ Kathrynne Young discusses three alternatives that possess their own appeal. The first finds its basis in Justice Marshall's concurrence in *Batson*, which calls for a total elimination of the peremptory challenge⁸⁶ by arguing that peremptories are often based on an attorney's hunch or gut feeling and that "a thin line exists between a stereotype and a hunch."⁸⁷ Further, echoing the Marshall concurrence, the essential hurdle for an attorney exercising a racially motivated peremptory strike is the creative hurdle necessary to articulate a racially neutral basis for the strike. Justice Marshall's concern may be somewhat lessened by the more recent developments in the law curtailing a trial-court's iron-clad discretion in making credibility determinations; however, the door remains open for discriminatory use. Another argument for eliminating peremptories suggests that peremptories are superfluous if the system regulating challenges for cause works as intended.⁸⁸ For-cause challenges work as intended when they exclude jurors incapable of impartiality or fairness, thereby rendering the peremptory challenge unnecessary. Despite these concerns, a total elimination of the peremptory seems unlikely. Besides the difficulty in getting Congress and

the state legislatures to reverse centuries of legal precedent, there is a fairness argument to be made for peremptories. "Empirical evidence indicates that people are most likely to perceive that a system is fair when they believe that the procedures it follows are fair,"⁸⁹ and the peremptory-challenge system creates (at least the illusion of) fairness.

Young proposes two additional methods of curtailing the use of peremptories for discriminatory purposes by further restricting the number of challenges allotted and by requiring parties to give a reason for each peremptory challenge they exercise.⁹⁰ Her argument essentially suggests that a limited number of peremptories would force the court to exercise more for-cause challenges. This approach seems like a shortcut to totally eliminating the peremptory altogether. For example, the federal civil system permits parties only three strikes per side. To reduce that number to one or two seems arbitrary when the same level of resource commitment could completely end the problem by completely ending peremptories. Her second proposal has merit. By forcing the parties to articulate a reason for each of their peremptory strikes, Young's proposal short-circuits the *Batson* challenge by assuming steps one and two *sua sponte* and jumping right to step three (sort of):

An example of the way this proposal might operate is illustrated in the New York case *People v. Green*.⁹¹ There, an attorney used a peremptory challenge against a deaf juror. The trial judge asked about the reason for the strike, and the attorney replied that it was because of the juror's deafness, not because of any doubt that the juror would be able to communicate through a translator. The court held that the peremptory challenge violated the juror's Fourteenth Amendment equal protection rights. Even though people with disabilities are not a suspect class, they receive rational [basis] review, and a person's disability bears no rational relation to her abilities to serve as a juror.⁹²

While every trial court might not react in the same way as the one in *Green*, requiring parties to disclose their reasons for exercising peremptories would go a long way in eliminating all types of impermissible discrimination, including sexual orientation.

Bifurcated Voir Dire

As was previously discussed, the Sixth Amendment requires speedy, fair, and publicly accessible trials; therefore, all court proceedings including voir dire need to be publicly accessible. An effective way to remain within the letter and spirit of the

84. See *People v. White*, 172 Cal. Rptr. 612, 613-15 (Ct. App. 1981) (wherein the trial judge rejected defense counsel's request to ask jurors directly about their sexual orientations; all examples provided are actual questions used by White's attorneys).

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

86. "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges

entirely." *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

87. Young, *supra* note 85, at 264.

88. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

89. *Id.* at 267.

90. Young, *supra* note 85, at 268.

91. *People v. Green*, 561 N.Y.S.2d 130 (N.Y. Co. Ct. 1990).

92. Young, *supra* note 85, at 269.

law is to split voir dire into two components: general and individual voir dire. During general voir dire, the court or attorneys ask a series of yes-or-no questions in open court in the presence of the venire. Each juror has an opportunity to answer without fear of revealing any deeply personal or private information so publicly.⁹³ Any personal or more probing questions requiring more than a yes or no are conducted *in camera* in a more private setting with only the judge, attorneys, and court reporter present. Proceedings conducted *in camera*, while secluded, are still part of the public record and thus susceptible to public scrutiny, thereby fulfilling the dual goals of juror privacy and public openness. Further, proceedings conducted *in camera* provide the court an opportunity to preserve some level of confidentiality in jurors' responses by referring to them by their juror number, initials, or a letter.⁹⁴

Some have suggested an alternative method of soliciting private information from jurors through the use of Supplemental Jury Questionnaires (SJQs). While these devices are attractive in the abstract, they present their own set of challenges. First, jurors have to understand the questions being asked. It is easy to overlook the level of familiarity legal practitioners have with the mechanics of trial process. The questions asked, while reflective of and sensitive to the law, are often times too complex for a layperson's understanding. Even those jurors with the dubious benefit of having seen a police or legal procedural television show are left puzzled by the questions presented on the standard jury questionnaire created by an impartial court, let alone those questions submitted by zealous advocates for their clients.⁹⁵

The Implicit Association Test

One scholar argues for the inclusion of a test that measures prospective jurors' cognitive responses to stimuli during the jury-selection process. Attorney Dale Larsen, in a 2010 law review article,⁹⁶ asserted the novelty of including the Implicit Association Test (IAT) during voir dire to measure the degree to which potential jurors might be racially biased. Developed in the late 1990s, the IAT measures a person's response time to certain stimuli, which its proponents claim measures the implicit attitude (or implicit stereotype) of the subject. For example, the test subject is asked to associate two pairings, often a black face and a white face, with words like "good" and "bad." The IAT then measures how long—usually in milliseconds—it takes the test subject to pair the words with the visual stimuli. The thinking

goes that the shorter the response time, the lesser the degree of bias. Larsen provides an excellent explanation: "If an examinee associates white faces with positive words more quickly than black faces, then that examinee likely has a closer implicit attitudinal association between whites and positive thoughts than blacks and positive thoughts, thus, indicating an implicit bias in favor of whites."⁹⁷

While this option seems relatively attractive given its quantitative measurements, research into IAT's applicability outside of the racial context remains unproven despite over 250 IAT-related studies since 2006.⁹⁸ The heaviest considerations weighing against adoption of IAT—aside from non-racial applicability—are those presented by IAT's detractors, which include the test's cost and various equity considerations. First, they assert that the test uses measurements with little real-world value. The argument goes that the millisecond offers virtually no indication of "actual attitudinal preference"⁹⁹ and that it is "dangerous . . . to examine a person's IAT score and 'imbue [those] values with meaning' about the individual's implicit cognition."¹⁰⁰

Second, administering the IAT requires a significant investment of financial and professional resources in ensuring the test is conducted properly and measuring jurors' responses accurately. To maintain impartiality in the proceedings, one assumes that the court system must bear the burden of administering the test.¹⁰¹ Given the ever-present threat of budget cuts and the pressing needs already thrust upon an overburdened court system, it is highly unlikely that courts will squander scarce resources on a system with limited applicability and questionable accuracy in determining whether jurors are implicitly biased on account of race, particularly when the existing jury-selection process provides opportunities to ferret out such bias.

The Group-Dynamics Model

Juries are groups of 8 to 12 people who, over the course of a trial, become intimate (metaphorically) with each other and then deliberate in secret. Voir dire is an individual examination

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93. Personal Anecdote: In my courtroom, the general/individual voir dire process is simply a matter of respecting the privacy of the venirepersons. Based on my experience, most people presenting themselves for jury duty strive to be as truthful as possible (especially about not wanting to be there). For example, the judge usually explains that the questions are of a general nature so that the court and the parties can get an idea of what the panel's ideas are on particular issues. This way, the court is not asking jurors to reveal any personal information in the presence of total strangers.

94. As was the case with Juror B in *SmithKline*.

95. Personal Anecdote: In my experiences, jurors—when not wholly confused—will answer the question they think is being asked. The best example is one of analogy: where a question might ask

"would you mind if I borrowed your pencil?" the juror might answer "yes," meaning "you can borrow my pencil." These discrepancies between a juror's answer and intended answer are almost always resolved during individual voir dire.

96. Dale Larsen, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139 (2010).

97. *Id.* at 159.

98. *Id.*

99. *Id.* at 160.

100. *Id.* (quoting Hart Blanton & James Jaccard, *Arbitrary Metrics in Psychology*, 61 AM. PSYCHOL. 27, 32 (2006)).

101. Larsen's article omits this consideration.

of total strangers in open court designed to elicit bias from jury venirepersons. While these considerations are of paramount importance during voir dire, juries—once selected—complete their deliberations as a group in secret. Thus, considerations into how the jury will operate—the jury’s group dynamics—should factor into the selection process. One author¹⁰² summarized the limitations of voir dire and the importance of seeing group dynamics this way:

First, there is a difficulty in predicting the way in which the jurors will react to one another. This may be stated as an inquiry into the group’s basic assumptions. The voir dire examination simply cannot provide enough of the information necessary to assess jurors’ attitudes outside of the scope of the issues at trial. The second dilemma is the difficulty in predicting the power structure of the jury—what roles each individual will play. This includes determining who will be leaders, who will be strong dissenters, and who will sit idly by, contributing little to the deliberations. The effect of this inability to predict either the basic assumptions or the group power structure is that the lawyers have little control over the work group—the aspect of deliberations focusing on arriving at a verdict. The inevitability of this result suggests that an extensive voir dire will not provide significantly more insight into jury dynamics than a shorter, more tailored inquiry. Belaboring the jury selection process, therefore, has a high economic cost with few social benefits.¹⁰³

The Group Dynamics Approach offers a promising, innovative approach to the jury-selection process; however, to date, inquiries into how jurors may act in a group setting are either prohibited¹⁰⁴ or limited in scope.¹⁰⁵ Ultimately, voir dire should be strictly limited to discerning which jurors are incapable of being impartial. Trying to win a given case during voir dire is a fool’s errand,¹⁰⁶ resulting in discriminatory behavior that denies citizens their rights to serve as jurors.

CONCLUSION

Sexual-orientation discrimination deserves heightened-scrutiny analysis by the judiciary, and *Batson* should be extended to sexual orientation where peremptory strikes are exercised on that basis. First, staying true to the principles and purpose of voir dire requires that litigants impanel fair and impartial juries. Their use of peremptory challenges should reflect legitimate concerns based on stated bases for bias—not using stereotypes as proxies for that bias. The test articulated in *Batson* provides an adequate net to ensnare the improper use of stereotypes and innuendo as proxies for bias, and its protections should be extended to cover discrimination based upon sexual orientation. Given the history of discrimination and violence perpetrated against LGBT individuals, the community warrants the protections afforded under *Batson*. While practical considerations may weigh against the inclusion of sexual orientation as a protected characteristic under *Batson*, the resulting harm would leave gays and lesbians excluded from this country’s most cherished public institution: service on the petit jury. The ruling in *SmithKline Beecham Corp. v. Abbott Laboratories* is a promising development in this area, and one hopes that the Supreme Court resolves the discrepancy among the circuits in favor of a more perfect, more inclusive union. Until then, courts must strive to improve their voir dire procedures to protect the rights of all who enter their courtrooms—regardless of who they are or who they love.



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102. Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549 (1992).

103. *Id.* at 575-76.

104. See *Walks v. State*, 167 So. 523, 524 (Fla. 1936); *McGuire v. Richard Guthmann Transfer Co.*, 84 N.E. 723 (Ill. 1908).

105. *Temperly v. Sarrington’s Admin.*, 293 S.W.2d 863, 868 (Ky. 1956); *State v. Boyer*, 112 S.W.2d 575, 579 (Mo. 1938); *State v. Morgan*, 73 P.2d 745, 747 (Wash. 1937).

106. *Luvera*, *supra* note 20, at 11.