ValpoScholar Valparaiso University Law Review

Volume 50
Number 3 *Spring 2016*

*p.*719

Spring 2016

Transgender and the Judiciary: An Argument to Extend Batson Challenges to Transgender Individuals

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Notes

TRANSGENDER AND THE JUDICIARY: AN ARGUMENT TO EXTEND *BATSON* CHALLENGES TO TRANSGENDER INDIVIDUALS

I. INTRODUCTION

The shuffle of feet echoed in the courtroom as thirty individuals made their way into the gallery.[1] The judge and attorneys observed what appeared to be a diverse body. Each side organized their questions and awaited the judge's instructions. The judge offered a few opening remarks, housekeeping rules, and indicated with a nod that voir dire was now underway.[2] Voir dire is a familiar practice to the trial attorneys and each side is well versed in its rules and procedures. The judge initiated the jury selection process by questioning the potential jurors based on their questionnaires, after which the attorneys were given the opportunity to ask additional questions. The dispute before the panel of potential jurors related to a licensing agreement and the pricing of HIV medications, "the latter being a subject of considerable controversy in the gay community."[3] SmithKline Beecham ("GSK") brought the suit against Abbott Laboratories ("Abbott") alleging antitrust, breach of contract, and unfair trade practice claims.[4]

Continuing with a line of questioning about employment, the judge focused her attention on Juror C, a self-identified transgender male. Juror C informed the judge that he worked as a computer technician for the Ninth Circuit Court of Appeals in San Francisco. Throughout the conversation Juror C stated that his partner studied business. The judge proceeded with follow up questions and the potential juror referred to his partner three more times using the masculine pronoun he. In response to

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1 This hypothetical situation is loosely based on *SmithKline Beecham Corporation ("GSK") v. Abbott Laboratories*. *See* 740 F.3d 471, 474–76 (9th Cir. 2014) (noting the facts of the original case, which focused on a self-identified homosexual male, however these facts have been altered to reflect an openly transgender male).

2 *See* MARGARET BULL KOVERA & BRIAN L. CUTLER, JURY SELECTION 7 (2013) (defining voir dire as a "pretrial hearing in which attorneys and/or the judge question prospective jurors in an attempt to uncover any bias that may threaten their impartiality"). Voir dire differs depending on the jurisdiction and whether the case is pending in state or federal court. *Id.* at 6.

3 *GSK*, 740 F.3d at 474.

4 *Id.*

the judge's follow up questions, Juror C explained that he had friends with HIV and personally took an Abbott or GSK medication. Subsequent to the judge's colloquy with the potential jurors, Abbott's counsel began a brief questioning of Juror C. First, Abbott's counsel questioned Juror C's knowledge of the medication that was of central concern in the litigation. Abbott's counsel asked, "Do you know anything about the medications that any of [your friends] are on?"[5] Juror C stated he did not and the attorney followed up with, "Do you know whether any of [your friends] are taking any of the medications that we are going to be talking about here[?]"[6] Again, Juror C responded that he did not know whether his friends were taking those medications. In total, Abbott's counsel asked Juror C five questions, all regarding his knowledge of the HIV medications at issue in the litigation. Abbott's counsel failed to ask Juror C any questions that would determine his ability to decide the case fairly and impartially.

Abbott exercised its first peremptory strike against Juror C.[7] GSK's counsel immediately raised a *Batson* challenge explaining the first strike was a peremptory of someone who is, or appears to be, transgender.[8] The attorney stated Abbott's use of a peremptory strike in that way was discriminatory. GSK's counsel explained the problem was that the litigation involved AIDS medication, a medication well known in the Lesbian, Gay, Bisexual, and Transgender ("LGBT") community. GSK's counsel informed the judge that Abbott's strike was an attempt to exclude a transgender male from the jury pool. The judge responded that *Batson*

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5 *Id.*

6 *Id.*

7 *See* Jason Matthew Lamb, Note, *The Constitution, Peremptory Challenges, and* United States v. Martinez-Salazar, 22 WHITTIER L. REV. 843, 843 (2001) (stating peremptory challenges are exercised during voir dire to remove a member of the venire who may be biased); *see also* FED. R. CRIM. P. 24 (2015) (providing the number of peremptory strikes each side is entitled to use during voir dire). In capital cases when the government seeks to impose the death penalty, each side may exercise twenty peremptory strikes. FED. R. CRIM. P. 24. Other felony cases entitle the government to six peremptory strikes and the defendant to ten peremptory challenges in situations where the defendant faces imprisonment for more than one year. *Id.* In a misdemeanor case where the defendant is charged with a crime that is punishable by imprisonment for one year or less, a fine, or both, each side has three peremptory strikes. *Id.*

8 *See* JEFFERY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY 288 (3d ed. 2011) (explaining that the Supreme Court case *Batson v. Kentucky* established *Batson* challenges to address juror discrimination). Subsequent to the *Batson* decision, the Court held that: (1) the defendant and juror do not need to be the same race; (2) peremptory challenges may not be exercised in a discriminatory manner by criminal defense attorneys; (3) discriminatory peremptory challenges may not be used in civil trials; and (4) peremptory challenges may not be used against Hispanics and Latinos in a discriminatory manner. *Id.*

does not apply to transgender individuals. Moreover, the judge explained that there was no way to know who is and is not transgender. GSK's counsel quickly reminded the judge that Juror C was a self-identified transgender male. Regardless, the judge dismissed GSK's objection to Abbott's strike and Juror C was removed from the venire.

A peremptory challenge on the basis of an individual being transgender is not covered by a *Batson* challenge. Because a *Batson* challenge is the only way to determine the counsel's motivation for exercising a peremptory strike, it is necessary to include transgender into the class of minorities that are afforded *Batson* protection. Specifically, the ongoing speculation and bias directed toward transgender individuals is too frequent to turn the other way and allow prejudicial inferences to go unsupported. This Note proposes that the Ninth Circuit's analysis of *Batson* as applied to sexual orientation should be expanded to transgender individuals in federal courts.[9] Part II of this Note provides the history of *Batson* and discusses society's understanding of transgender individuals.[10] Part III of this Note analyzes the effect of *Batson* on sexual orientation and urges its extension to transgender individuals.[11] Finally, Part IV of this Note concludes by reinforcing the idea that *Batson* was appropriately expanded to sexual orientation and should again expand to include transgender individuals.[12]

II. BACKGROUND

The Sixth Amendment of the United States Constitution guarantees a right to an impartial jury of your peers.[13] Unfortunately, impartiality is not always easy to come by in a society overflowing with deeply rooted opinions and beliefs.[14] Voir dire, or the process of selecting jurors, is

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9 *See infra* Part III (arguing that the court correctly applied *Batson* to sexual orientation and asserting it should also be applied to transgender individuals).

10 *See infra* Part II (introducing *Batson v. Kentucky* and reviewing the pivotal cases that followed as well as discussing societal views and discrimination towards transgender individuals).

11 *See infra* Part III (examining the impact *Batson* had on sexual orientation and the need to apply the same test to transgender individuals).

12 *See infra* Part IV (concluding the Ninth Circuit's extension was appropriate and proposing federal courts extend *Batson* to transgender persons during jury selection).

13 *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ").

14 *See* Karen Hughes & Mark Penn, *What Are American Values These Days?*, TIME (July 4, 2012), http://ideas.time.com/2012/07/04/what-are-american-values-these-days-2/ [http://perma.cc/5UDX-YYZD] (discussing a belief in God and religion, family values, and moral values as high among Americans).

implemented to serve the goal of jury impartiality.[15] Voir dire has the ability to allow individuals to partake in the judicial system, yet the possibility for a potential juror to be stricken because of prejudice or bias exists.[16] Courts have ruled that screening potential jurors on factors that cause inequality, such as race, gender, and sexual orientation is unconstitutional.[17] Although discrimination is a common occurrence in regard to these traits, identifying as transgender is also a common basis

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15 FREDERICK, *supra* note 8, at 2. In addition to attaining an impartial jury, voir dire has four major goals: information gathering, rapport, education, and persuasion. *Id*. Information gathering is the process of obtaining information from potential jurors and is arguably the most important goal of voir dire. *Id*. Rapport concerns the ability of attorneys to build a positive relationship with the jurors. *Id*. Education promotes a juror's understanding of legal principles and the law. *Id*. Persuasion regards an attorney's influence on a potential juror to adopt a specific perspective. *Id*.

16 *See* Suzy M. Sidote, *Judging a Book by Its Cover: Lessons on Cracking the Voir Dire Code*, ABA (2008), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/138.authcheckdam.pdf [http://perma.cc/6TPF-RZ9D] (discussing the pros and cons of voir dire); *see also* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1198 (2003) (recommending four ways to improve voir dire and increase the ability to recognize biased jurors during voir dire); Brian J. McKeen & Phillip B. Toutant, *The Case for Attorney-Conducted Voir Dire*, 90 MICH. B. J. 30, 30 (2011) (explaining that "attorney-conducted voir dire improves the truth-finding function of courts"). First, increase the frequency with which juror questionnaires are used. Hans & Jehle, *supra* note 16, at 1198. Second, change the method of questioning jurors during voir dire. *Id*. at 1199. Third, broaden the types of questions asked of jurors during voir dire. *Id*. at 1200. Fourth, include a time frame where attorneys may question jurors. *Id*. at 1201. Denying an attorney's request to participate in voir dire directly may infringe on the right to a fair trial. McKeen & Toutant, *supra* note 16, at 30. Moreover, denying an individual the opportunity to participate in voir dire may deprive parties of their equal protection rights. *Id*. *See also* FREDERICK, *supra* note 8, at 2 (noting two types of challenges that can be exercised by the party to prevent a potential juror from sitting on the jury if there is a perceived bias or prejudice, challenges for cause and peremptory challenges); KOVERA & CUTLER, *supra* note 2, at 14 (stating two methods that may be used during voir dire for challenging the impartiality of a potential juror are challenges for cause and peremptory challenges).

17 *See infra* Part II.A.2 (explaining three cases in which the court determined peremptory challenges based on an individual's race, gender, and sexual orientation are discriminatory). *See also* Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89, 91 (1994) (discussing that gender and race have been historically discriminated against); *Civil Rights 101 Gays and Lesbians*, THE LEADERSHIP CONF. (2015), http://www.civilrights.org/resources/civilrights101/sexualorientation.html [http://perma.cc/DT54-J6VD] (showing gays and lesbians have been subjected to a long standing history of discrimination on the basis of sexual orientation). *See generally* GEORGE M. FREDRICKSON, RACISM A SHORT HISTORY 5 (2002) (reviewing the history of racial discrimination).

for inequality.[18] Similar to individuals who identify as gay and lesbian, transgender individuals also have a long history of discrimination.[19]

This Part of the Note introduces jury selection and provides a detailed understanding of *Batson*, a pivotal turning point in the judicial system.[20] First, Part II.A.1 explains the process of selecting a jury and the use of peremptory challenges.[21] Next, Part II.A.2 introduces *Batson* to illustrate the impact that decision had on voir dire.[22] Third, Part II.A.3 reviews the expansion of *Batson* to gender and sexual orientation.[23] Finally, Part II.B discusses what it means to identify as transgender and outlines the history of discrimination against transgender individuals.[24]

A. Voir Dire and the Creation of Batson *Challenges*

Jury selection is an essential process in furthering an individual's constitutional right to an impartial jury.[25] The act of selecting a jury is comprised of several steps and procedures including strikes to remove a potential juror.[26] Using a strike to exclude an individual from the jury pool is problematic when it is based on discriminatory reasons.[27] In

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[18] *See Non-Discrimination Laws*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2015), http://transequality.org/issues/non-discrimination-laws [http://perma.cc/3S4M-SKM6] (stating transgender people face discrimination in all aspects of life). The National Center for Transgender Equality suggests improving several federal policy areas that would improve transgender lives and promote anti-discrimination. *Id*. *See also Issues*, TRANSGENDER LAW CTR., http://transgenderlawcenter.org/issues [http://perma.cc/EVE7-T64M] (listing employment, family law, health care, housing, identity documents, immigration, prisons, public accommodations, and youth as primary areas in which transgender individuals frequently encounter discrimination).

[19] *See infra* Part III.C (distinguishing transgender individuals from sexual orientation and discussing the history of discrimination toward transgender people).

[20] *See infra* Part III.A (reviewing the procedure of jury selection and explaining *Batson*).

[21] *See infra* Part II.A.1 (explaining the process of jury selection and peremptory challenges).

[22] *See infra* Part II.A.2 (introducing *Batson* and its effect on the voir dire process).

[23] *See infra* Part II.A.3 (reviewing the expansion of *Batson* to gender and sexual orientation).

[24] *See infra* Part II.B (providing an understanding of what transgender means, including misconceptions and stereotypes, and an overview of the discrimination faced by transgender individuals).

[25] *See* FREDERICK, *supra* note 8, at 2 ("[T]he goal of jury selection is to select an impartial jury . . . ."); *see also* U.S. CONST. amend. VI (ensuring the right to an impartial jury).

[26] *See* FREDERICK, *supra* note 8, at 5–10 (reviewing the jury selection process and peremptory challenges); *see also* KOVERA & CUTLER, *supra* note 2, at 6 (providing an overview of the jury selection process); Gary R. Giewat, *Systematic Jury Selection and the Supplemental Juror Questionnaire as a Means for Maximizing Voir Dire Effectiveness*, 34 WESTCHESTER B.J. 49, 52 (2007) (explaining that systematic jury selection serves to reduce the likelihood of juror bias).

[27] *See infra* Part II.A (discussing the use of peremptory strikes to remove members of the venire based on race, gender, and sexual orientation and explaining the Court's view that such motivating factors were discriminatory).

Batson, the Court addressed the issue of racial discrimination during jury selection and provided a foundation for ensuring equality during voir dire.[28] The Court extended *Batson* to include gender and sexual orientation; therefore, widening the impermissible classifications that a strike may be based on for the purpose of selecting a jury.[29] Part II.A.1 explains jury selection and peremptory challenges.[30] Part II.A.2 introduces the landmark case, *Batson v. Kentucky*.[31] Part II.A.3 discusses the expansion of the Court's decision.[32]

1. Jury Selection and Peremptory Challenges

The process of selecting a jury begins by generating names of individuals who make up a community.[33] Once a jury pool has been established, members of the venire participate in voir dire.[34] Voir dire is defined as "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury."[35] The purpose of voir dire is to allow both sides of the case the opportunity to question potential jurors and determine whether the individual is eligible to serve as a juror.[36] To be eligible to sit on a jury, a

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28 *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (holding peremptory strikes based on an individual's race is discriminatory).

29 *See generally* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (finding peremptory challenges premised on gender discrimination violate one's constitutional rights and are subject to *Batson*); SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (holding sexual orientation is an impermissible basis for a peremptory challenge and *Batson* applies).

30 *See infra* Part II.A.1 (explaining the process of selecting a jury and the procedures that accompany jury selection).

31 *See infra* Part II.A.2 (discussing *Batson v. Kentucky*, the seminal case for *Batson* challenges).

32 *See infra* Part II.A.3 (reviewing the Court's decision to expand *Batson* beyond race).

33 *See* KOVERA & CUTLER, *supra* note 2, at 5–6 (explaining that the process of jury selection starts with compiling a group of individuals). For an extended period of time, potential jurors were generated using voter registration lists. *Id*. at 5. However, this process proved problematic because it failed to represent a fair sampling of the community due to demographic differences between individuals who register to vote and those that do not. *Id*. To remedy demographic bias among potential jurors, multiple sources are now used to generate jury pools including driver's licenses, taxpayers, and recipients of unemployment benefits. *Id*. at 6. *See also* 28 U.S.C. § 1861 (2012) (outlining a plan for random jury selection).

34 *See* KOVERA & CUTLER, *supra* note 2, at 6 ("The second stage of jury selection begins when these potential jurors—called *venirepersons*—report to the courthouse for jury service."); *see also* Leah M. Provost, Note, *Excavating from the Inside: Race, Gender, and Peremptory Challenges*, 45 VAL. U. L. REV. 307, 310–12 (2010) (reviewing the jury selection process and introducing peremptory challenges).

35 *Voir Dire*, BLACK'S LAW DICTIONARY (3d. pocket ed. 2006).

36 *See* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 128 (2003) (discussing voir dire as a process implemented to determine whether potential jurors will be impartial); *see*

person must demonstrate the ability to remain unbiased or unprejudiced in order to properly analyze the information presented and adhere to the law.[37] With impartiality as the primary goal of jury selection, voir dire allows for challenges to remove members of the venire.[38]

There are two methods for striking, or challenging, a potential juror: challenges for cause and peremptory challenges.[39] The former is exercised when a member of the venire demonstrates a personal bias or prejudice that would inhibit their ability to remain impartial.[40] The latter allows attorneys to excuse a potential juror without articulating a reason.[41]

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also FREDERICK, *supra* note 8, at 2 (explaining the selection of an impartial jury is the primary goal behind jury selection); David Kennedy, *Jury Voir Dire*, 41 AUG-MD. B.J. 34, 36 (2008) ("Voir dire is an important element in protecting the constitutional right to an impartial jury.").

37 *See Developments in the Law – The Civil Jury III. Jury Selection and Composition*, 110 HARV. L. REV. 1443, 1454 (1997) (describing exceptions and exemptions that enable a potential juror to refrain from serving on a jury). An individual selected for jury duty may use a hardship excuse, which requires the individual to articulate an undue hardship that would result if the individual were required to commit to jury duty. *Id.* at 1455. However, such excuses ultimately make ensuring an impartial jury more difficult. *Id.* Although potential jurors might have a sincere interest in avoiding jury duty, the interest in a representative pool outweighs that of the individual. *Id*.

38 *See* RICHARDSON R. LYNN, JURY TRIAL LAW AND PRACTICE 45 (1986) (pointing out the constitutional requirements of the venire for the jury selection process). The right to an impartial jury guaranteed by the Sixth Amendment requires that the venire be compromised of a fair cross section of the community. *Id. See also* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 157 (1989) (examining voir dire and the process of eliminating prospective jurors).

39 *See* FREDERICK, *supra* note 8, at 2 (stating a potential juror may be excused from the venire through the exercise of a challenge for cause or a peremptory challenge); *see also* KOVERA & CUTLER, *supra* note 2, at 14 (noting two methods that may be used to challenge the impartiality of a potential juror: challenges for cause and peremptory challenges); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 545–46 (1975) (discussing challenges for cause and peremptory challenges used during voir dire). Traditionally attorneys used challenges for cause in situations where the juror was a relative of one of the parties or his or her participation would result in a mistrial. Babcock, *supra* note 39, at 549–50. Peremptory challenges, unlike challenges for cause, may be used without providing a reason for its use. *Id*. at 550.

40 *See* KOVERA & CUTLER, *supra* note 2, at 14 (stating a challenge for cause is exercised when the individual who is conducting voir dire believes the potential juror demonstrated a bias or prejudice that would prevent him or her from ensuring a fair evaluation of the evidence). Personal experiences and attitudes are types of sources of bias that may be used to support a challenge for cause. *Id. See also* FREDERICK, *supra* note 8, at 2 (explaining that challenges for cause focus on the inability of the potential juror to "meet specific statutory qualifications"). Examples of statutory qualifications include bias or prejudice or residential requirements. *Id.*

41 *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) (differentiating challenges for cause from peremptory challenges). "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Id.* (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)). *See also* JONAKAIT, *supra* note 36, at 139

Peremptory challenges are limited and vary by jurisdiction.[42] These challenges are heavily restricted because attorneys are not required to provide support for the challenge.[43] When a peremptory challenge is used, a litigant will ask to excuse the potential juror unless opposing counsel raises an objection to the strike.[44] Attorneys may object when a challenge appears motivated by discrimination or the potential juror belongs to a protected class.[45]

The practice of removing potential jurors that belong to a protected class is prohibited "because of concerns that the removal of entire categories of jurors will deprive the jury of certain attitudes or life

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(explaining that peremptory challenges "are exercised by the parties after rulings on the challenges for cause"). A peremptory challenge does not require the "showing of bias" provided it is not implemented for the purpose of excluding a juror on the basis of race or gender. *Id*. *See also* KOVERA & CUTLER, *supra* note 2, at 19 (noting that attorneys can excuse potential jurors using a peremptory challenge, which does not require the attorney to provide a reason for the challenge). Since potential jurors are required to swear that all bias will be put aside while hearing the evidence, attorneys are not required to demonstrate that actual bias exists when exercising a peremptory challenge. *Id*. at 19–20.

42 *See* JONAKAIT, *supra* note 36, at 139 (showing that jurisdictions vary on the number of peremptory challenges allowed). "Although numbers vary, peremptory challenges exist for all civil and criminal jury trials." *Id*. *See also* KOVERA & CUTLER, *supra* note 2, at 20 (stating that unlike challenges for cause, peremptory challenges are limited and vary by jurisdiction, trial type, crime seriousness, and other factors such as the size of the jury). Even though peremptory challenges are restricted in the number available, a judge has the discretion to grant additional peremptory challenges if he believes it would ensure an impartial jury. *Id*.; *see also* Gary C. Furst, Note, *Will the Religious Freedom Restoration Act be Strike Three Against Peremptory Challenges?*, 30 VAL. U. L. REV. 701, 701–03 (1996) (explaining the purpose of peremptory challenges and its constitutional restrictions).

43 *See* JOSHUA DRESSLER & ALAN C. MICHAELS, CRIMINAL PROCEDURE VOLUME 2: ADJUDICATION 225 (4th ed. 2006) (providing an overview of peremptory challenges including three purposes the challenge serves to promote). First, a peremptory challenge may be used as a backup to challenges for cause. *Id*. Second, peremptory challenges "provide the parties with an opportunity to participate in the construction of the decision-making body, thereby enlisting their confidence in its decision." *Id*. at 226. Third, peremptory challenges enable parties to take advantage of the "core of truth in most common stereotypes." *Id*.

44 *See* Furst, *supra* note 42, at 701–02 (stating peremptory challenges afford litigants "a means of obtaining the right to a fair trial by an impartial jury"); Jay M. Spears, Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1502 (1975) (stating the judicial system allows parties to use a peremptory challenge in order to strike members of the venire).

45 *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding it is impermissible to exclude cognizable groups from serving on juries). *See also* LYNN, *supra* note 38, at 97 (discussing that peremptory challenges "allow flexibility in striking jurors about whom you feel uncomfortable, but cannot show bias sufficient for a challenge for cause"). Only specifically knowledgeable jurors can be removed with a peremptory challenge. *Id.* In addition, peremptory challenges may "relieve social pressures that might result if counsel expressed the stereotyped, sometimes racist, view of people that motivates many challenges." *Id*. at 98.

experiences that may be relevant for evaluating the evidence in a case."[46] *Swain v. Alabama* addressed the problem with precluding persons from serving as jurors based on certain characteristics or traits.[47] The Supreme Court recognized the issue with using a peremptory challenge to remove all African American venire members.[48] However, the Court reasoned "[t]he essential nature of the peremptory challenge is . . . one exercised without a reason stated, without inquiry and without being subject to the court's control."[49] Therefore, *Swain* held that the presumption that the prosecutor used the challenge to obtain an impartial jury stands and cannot be overcome absent evidence.[50] The Court reexamined its stance in *Batson*.[51]

2. The *Batson v. Kentucky* Decision

In 1986, a Kentucky state court convicted an African American man on charges of second-degree burglary and receipt of stolen goods.[52] The

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46 KOVERA & CUTLER, *supra* note 2, at 22 (quoting Hans & Vidmar, 1982).

47 *See* Swain v. Alabama, 380 U.S. 202, 209 (1965) (reviewing the issue of whether a black man was unjustly removed from the venire during jury selection because he was black). *Swain* dealt with an African American male convicted of rape. *Id.* at 203. Swain challenged his conviction on the grounds that Alabama violated the Fourteenth Amendment Equal Protection Clause when all six African Americans were removed from the venire through peremptory challenges. *Id.* at 210. The Supreme Court acknowledged that the systematic removal of venirepersons based solely on race would be discriminatory, however, Swain failed to meet his burden and demonstrate that the state had used its peremptory challenges to purposely remove all African Americans from all cases across the county. *Id.* at 224.

48 *See id.* at 222–23 (stating that the petitioner's claim raises an issue regarding the removal of all African Americans from the venire); *see also* DRESSLER & MICHAELS, *supra* note 43, at 228 (explaining that in *Swain*, the Court recognized "race, religion, nationality, occupation or affiliations of people summoned for jury duty" as a basis for frequent peremptory challenges).

49 *Swain*, 380 U.S. at 220 (quoting State v. Thompson, 206 P.2d 1037, 1039 (1949)).

50 *See id.* at 222 (stating the presumption that the prosecutor is using the challenge for the purpose of obtaining a fair and impartial jury is not overcome). *See also* DRESSLER & MICHAELS, *supra* note 43, at 228 (summarizing that "the Court insulated from inquiry the prosecution's use of peremptory challenges to remove African-Americans in a particular case"). Furthermore, *Swain* noted that where a defendant "*might* have a valid Fourteenth Amendment claim," he would still have the burden of establishing the existence of "extreme, ongoing practice" of removing African Americans from the venire. *Id. See also* KOVERA & CUTLER, *supra* note 2, at 23 (noting the *Swain* decision required the defendant to provide evidence of "systematic racial discrimination across cases in the prosecution's use of peremptory challenges" to establish a Fourteenth Amendment violation).

51 *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986) (stating the Court is required to re-examine the *Swain* decision regarding the evidentiary burden placed on a criminal defendant who alleges he was denied equal protection through the State's use of peremptory challenges used to exclude members of his race from the jury).

52 *See id.* (introducing the petitioner and reiterating the Court's need to reevaluate the precedent set forth under *Swain*); *see also* Jean Montoya, *The Future of the Post*-Batson

trial took place in the Jefferson County Circuit Court where the presiding judge conducted voir dire.[53] Members of the venire included both white and African American individuals.[54] During the jury selection process, the prosecutor permissibly used his peremptory challenges to excuse all four African American members of the venire.[55] The petitioner's counsel moved to discharge the jury on the ground that the prosecutor's peremptory challenges violated the petitioner's rights under the Sixth and Fourteenth Amendments.[56] The defense argued the prosecutor's act of

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Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory, 29 U. MICH. J.L. REFORM 981, 982 (1996) (stating the 1986 *Batson* decision is where the Court began "to tackle the problem of race and gender discrimination in jury selection").

53 *Batson*, 476 U.S. at 82–83. *See* FREDERICK, *supra* note 8, at 5 (demonstrating that voir dire may be conducted by either an attorney, judge, or both). The voir dire style depends on who is questioning the potential jurors. *Id.* Generally, in federal courts judges conduct voir dire whereas in state courts the attorney plays a more pivotal role in the examination of potential jurors. *Id.* Although it is not necessarily of high importance who conducts voir dire, judges are highly regarded and therefore, voir dire conducted by a judge may be less likely to yield honest and candid responses from the members of the venire. *Id. See also* Michelle Mahony, *The Future Viability of* Batson v. Kentucky *and the Practical Implications of* Purkett v. Elem, 16 REV. LITIG. 137, 145 (1997) (explaining that at trial the judge conducted the "initial" phase of voir dire examination).

54 *Batson*, 476 U.S. at 83. *Swain*, like *Batson*, also dealt with race as a primary issue with regard to the jury and peremptory strikes. Swain v. Alabama, 380 U.S. 202, 205 (1965); *see also* DRESSLER & MICHAELS, *supra* note 43, at 228 (describing the *Swain* jury as one comprised of only white jurors after the prosecution struck all six of the African Americans in the venire).

55 *Batson*, 476 U.S. at 83. Justice Rehnquist explained that such strikes are not unconstitutional, "so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on." *Id.* at 137–38 (Rehnquist, J., dissenting). *See also* DRESSLER & MICHAELS, *supra* note 43, at 229 (inquiring whether the exercise of a peremptory challenge based only on the assumption that a juror might be more sympathetic to a defendant that shares his race is unconstitutional racial discrimination). The Court's earlier decisions struck systems that excluded certain races or treated individuals of a certain race as unqualified. *Id. See generally* Norris v. Alabama, 294 U.S. 587, 588 (1935) (addressing the constitutionality of excluding African Americans from serving on grand or petit juries).

56 *Batson*, 476 U.S. at 83. The Sixth Amendment states:

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

removing all four African American members of the venire deprived the petitioner of his right "to a jury drawn from a cross section of the community" as well as his right to equal protection of the laws.[57] The judge ruled that the parties were entitled to use their peremptory challenges to "strike anybody they want to."[58] The petitioner's motion was denied and an all-white jury convicted the petitioner on both counts.[59]

Following the jury's decision, the petitioner appealed to the Kentucky Supreme Court to challenge the prosecutor's use of peremptory challenges.[60] The petitioner urged the court to follow precedent of other states and hold that the prosecutor's conduct violated his Sixth and Fourteenth Amendment rights.[61] The Kentucky Supreme Court affirmed

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> due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

57 *Batson*, 476 U.S. at 83.

58 *Id. See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1085 (2011) (stating peremptory challenges, although not mandated by the Constitution, have a very long history dating back to English Common Law). Peremptory challenges are permissible to remove a member of the venire "without a reason stated, without inquiry and without being subject to the court's control." *Id.* (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965)).

59 *See Batson*, 476 U.S. at 83 (explaining that the defense's request for a hearing to address the motion to discharge the jury was denied). The trial judge failed to expressly rule on the defense's request for a hearing, but instead observed that both parties were entitled to use their peremptory challenges to "strike anybody they wanted to." *Id.* The judge further articulated that the cross section requirement is only applicable to the selection of the venire and not to the selection of the petit jury itself. *Id*.

60 *See id.* (noting that following the judge's denial of the petitioner's motion to discharge the jury and the subsequent conviction of the petitioner, the petitioner appealed to the Kentucky Supreme Court).

61 *See id.* (urging the court to follow the principles in *People v. Wheeler* and *Commonwealth v. Soares*). *Wheeler* held that the use of peremptory challenges to remove prospective jurors from the venire based solely on group bias violates the right to trial by a jury drawn from a representative cross section of the community. People v. Wheeler, 583 P.2d 748, 768 (Cal. 1978). *Soares* ruled that defendants convicted of first-degree murder sufficiently established a prima facie case that the use of peremptory challenges by the prosecution were designed to exclude persons from a trial jury on the basis of race, and the court's failure to allow a hearing on the issue deprived the defendants of their constitutionally guaranteed right to a jury drawn from the community. Commonwealth v. Soares, 387 N.E.2d 499, 518 (Mass. 1979). The petitioner in *Batson* argued the Court should find that the prosecutor's peremptory challenges violated his Sixth Amendment rights as well as section eleven of Kentucky's Constitution. *Batson*, 476 U.S. at 83. The petitioner further argued that the facts demonstrated the prosecutor engaged in a "pattern" of discriminatory challenges in this case, and under *Swain*, established an equal protection violation. *Id.* at 84.

the holding of the trial court by stating its reliance on *Swain*.[62] The Supreme Court of the United States granted certiorari.[63]

In a thirty-four page opinion, the Court held that denying a person participation in jury service based on his or her race is discriminatory and unconstitutional.[64] The Court reversed and remanded it back to the Kentucky Supreme Court.[65] The Court further articulated a three step inquiry to address the concern of racially motivated peremptory challenges.[66] First, the defendant must establish a prima facie case of purposeful discrimination.[67] Second, once a prima facie case has been

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[62] *See Batson*, 476 U.S. at 84 (declining to follow other state's precedent that the petitioner set forth and reaffirming its reliance on *Swain*). The court found that a defendant who alleges a lack of a fair cross section must establish a systematic exclusion of a body of jurors from the venire. *Id.*

[63] *Id.*

[64] *See id.* at 100 (holding that peremptory challenges on the basis of race are discriminatory). The Court reaffirmed the principle previously articulated in *Swain*, which "recognized that a [s]tate's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 84 (quoting Swain v. Alabama, 380 U.S. 202, 203–04 (1965)); *see also* John J. Hoeffner, Note, *Defendant's Discriminatory Use of the Peremptory Challenge After* Batson v. Kentucky, 62 ST. JOHN'S L. REV. 46, 49 (1987) (summarizing the *Batson* decision as a violation of the Equal Protection Clause and Fourteenth Amendment). In *Batson*, the Court "emphasized the jury's central position as a protective barrier against the arbitrary exercise of power by the state, and stated that to allow purposeful discrimination in jury selection would endanger this protection." Hoeffner, *supra* note 64, at 49 (quoting *Batson*, 476 U.S. at 86).

[65] *Batson*, 476 U.S. at 100. The Court noted that if the trial court determines that the facts presented establish "prima facie" that purposeful discrimination occurred and the prosecutor fails to provide a neutral reason for his action, then the Court's precedent requires the petitioner's conviction be reversed. *Id.* The Court cited several cases as precedent, including: Whitus v. Georgia, 385 U.S. 545, 551 (1967) (holding that proof that the state employed identical procedures, which resulted in discrimination of the petitioner's initial trial "constituted a prima facie case of purposeful discrimination" in jury selection); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (ruling individuals who are of Mexican descent constitute a separate class from white individuals and members of that class had been systematically excluded from jury service); Patton v. Mississippi, 332 U.S. 463, 468–69 (1947) (holding the state of Mississippi "failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County").

[66] *See Batson*, 476 U.S. at 96 (describing a three step test to determine whether an exercised peremptory challenge was discriminatory); *see also* DRESSLER & MICHAELS, *supra* note 43, at 230 (pointing out that the *Batson* Court determined that *Swain* required defendants to meet "a crippling burden of proof [that] effectively immuniz[ed] peremptory challenges from constitutional scrutiny"). As a result of the Court's decision in *Batson*, *Swain*'s "no-proof-from-a-single-case rule" was abandoned and in its place, the Court established the framework for a *Batson* challenge. DRESSLER & MICHAELS, *supra* note 43, at 230.

[67] *See Batson*, 476 U.S. at 96 (explaining that a prima facie case is the first step in establishing purposeful discrimination). The Court notes that to establish a prima facie case, the defendant is first required to show that he belongs to a cognizable racial group and that the prosecutor exercised a peremptory challenge for the purpose of removing potential

established, the burden shifts to the prosecution to provide a neutral, or nondiscriminatory reason for the peremptory challenge.[68] Third, the judge reviews the record and determines whether the challenge is racially motivated and therefore unconstitutional.[69] The Court relied heavily on the principle set forth in *Strauder* and reexamined *Swain*.[70] On evaluation

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jurors who are also members of the same racial group. *Id.* Second, the Court states that the defendant may only rely on the fact that a peremptory challenge constitutes a jury selection process that allows "those to discriminate who are of a mind to discriminate." *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). Finally, the Court explained that the defendant must show these facts and any other relevant circumstances raise an inference that the prosecutor used the practice to exclude members of the venire from the jury based on their race. *Id. See also Timeliness of* Batson *Challenge*, 12 NO. 4 FED. LITIGATOR 117, 117 (1997) (suggesting a *Batson* challenge should be exercised immediately following opposing counsel's use of a peremptory strike to exclude a potential juror on the basis of discrimination).

[68] *See Batson*, 476 U.S. at 97 (discussing the second step in a *Batson* challenge is that the State, or the party who exercised the peremptory challenge, has the burden to prove that the strike was made for a neutral reason). The Court noted that although this requirement imposes a limitation in some cases on the full character of the peremptory challenge, it emphasized that the prosecutor's explanation did not need to rise to the level of a challenge for cause, which required justification for the strike. *Id.* The Court also stated that the prosecutor may not simply rebut the defendant's prima facie case by stating he challenged the jurors that shared the "defendant's race on the assumption— or his intuitive judgment— that" those individuals would be partial to the defendant because they shared race. *Id*. Further, the Court explained that the prosecutor may not rebut the defendant's case just "by denying that he had a discriminatory motive or affirm[ing] [his] good faith in making individual selections." *Id*. at 98 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)). *See also* Thompson v. United States, 469 U.S. 1024, 1026 (1984) (reviewing the exercise of peremptory challenges); Norris v. Alabama, 294 U.S. 587, 598–99 (1935) (discussing the necessary evidentiary support to rebut a prima facie case made by the defendant); McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984) (holding that subsequent to a prima facie showing, the prosecution need only provide "genuine reasons" for the challenge).

[69] *See Batson*, 476 U.S. at 98 (providing the third step of a *Batson* challenge as the trial court's requirement to review the record and determine if a showing of intentional discrimination was made). *See also* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 447 (1995–96) (explaining that the procedure for *Batson* challenges ends with the trial judge's ruling on the legitimacy of the claim). Melilli suggests the entire process of jury selection is "one of discrimination" and thus the underlying issue in the exercise of a *Batson* challenge is "whether the criteria upon which the discriminations are based are reasonable and acceptable." *Id*. at 449.

[70] *See Batson,* 476 U.S. at 85–90 (reviewing *Strauder v. West Virginia* and its established principles, as well as stating that *Swain v. Alabama* required reexamination). The Court stressed that the principles announced in *Strauder* have never been questioned by the Court, but rather "the Court has been called upon repeatedly to review the application of those principles to particular facts." *Id.* at 90. *See also* Judge Royal Furguson, *The Jury in To Kill a Mockingbird: What Went Wrong?*, 73 TEX. B.J. 488, 488 (2010) (describing *Strauder* as the first in a long line of cases in which "[t]he Supreme Court first dealt with the question of whether minorities could protect their own rights against discrimination"). In the 1879 case of *Strauder*, the Court held that the Fourteenth Amendment forbids the state from barring men,

of these cases, the Court determined that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[71] Thus, *Batson* laid the foundation for racial equality in jury selection, and that foundation supports its extension.[72]

3. The Supreme Court Expands *Batson*

The idea that a peremptory challenge could no longer be utilized as it pertained to race without neutral justification was monumental.[73] In essence, the Supreme Court announced that peremptory challenges prompted by blatant discrimination could no longer be attributed to a counsel's intuition of perceived bias.[74] Eight years after the *Batson* decision, the Supreme Court ruled in *J.E.B. v. Alabama ex rel. T.B.* that

based on race, from the jury pool. *Id.* The Court reasoned that excluding an African American man from jury service was equivalent to branding the individual and "prevented equal justice which the law aims to secure to all others." *Id.* (quoting Strauder v. State of West Virginia, 100 U.S. (10 Otto) 303, 308 (1879)); *see also* Montoya, *supra* note 52, at 987 (regarding *Swain* as a decision in which the "Supreme Court actually condoned the exercise of group-based peremptory challenges, including peremptory challenges based on race"). The *Swain* decision declined to scrutinize the prosecutor's actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Batson*, 476 U.S. at 91. However, the Court further observed that a state "may not exercise its challenges in contravention of the Equal Protection Clause." *Id.*

71 *Batson*, 476 U.S. at 86.

72 *See id.* at 100 (holding that peremptory challenges on the basis of one's race are discriminatory and entitled to further review under a three step test); *see also* Jeanette E. Walston, *Do Non-Discriminatory Peremptory Strikes Really Exist, or Is a Juror's Right to Sit on a Jury Denied When the Court Allows the Use of Peremptory Strikes?*, 17 TEX. WESLEYAN L. REV. 371, 377 (2010) (reviewing the establishment of *Batson* and its extension); Mikal C. Watts & Emily C. Jeffcott, *A Primer on* Batson*, Including Discussion of* Johnson v. California*,* Miller-El v. Dretke*,* Rice v. Collins*, &* Snyder v. Louisiana, 42 ST. MARY'S L. J. 337, 347 (2011) ("Since 2005, the Supreme Court has reinforced the *Batson* framework that prohibits the use of peremptory strikes as a tool for racial discrimination.").

73 *See* Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1101 (1994) (describing *Batson* as a major accomplishment in the effort to eliminate jury discrimination based on race); *see also* John Gibeaut, *Challenging Peremptories*, ABA J. (Aug. 29, 2005, 6:31 AM), http://www.abajournal.com/magazine/article/challenging_peremptories/ [http://perma.cc/UP6W-NCXA] (discussing Justice Marshall's praise of the Court's decision to end racial discrimination "by banning prosecutors from using peremptory challenges to cover racially motivated strikes of black jurors").

74 *See* Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH L. REV. 921, 924 (1988) (stating that because of *Batson*, peremptory challenges are no longer immune from judicial scrutiny); *see also* James R. Gadwood, *The Framework Comes Crumbling Down: Juryquest in a* Batson *World*, 88 B.U. L. REV. 291, 295 (2008) (explaining the Court's holding in *Batson* as one that applied the Fourteenth Amendment peremptory challenges and ruled that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

Batson would be extended to gender.[75] Twenty years later, the Ninth Circuit held in *SmithKline Beecham Corporation ("GSK") v. Abbott Laboratories* that the *Batson* analysis applied to peremptory challenges based on sexual orientation.[76] This Part of the Note discusses *J.E.B.* and the Court's reason for applying *Batson* to gender followed by an examination of the Ninth Circuit's decision to extend *Batson* to sexual orientation.[77]

In 1994, the Supreme Court granted certiorari to determine whether the Equal Protection Clause forbade peremptory challenges on the basis of gender.[78] The question arose from an Alabama district court case that involved the paternity and child support of a minor.[79] The State of Alabama filed a complaint on behalf of the minor's mother against the petitioner, a male, to determine paternity and order child support payments.[80] The trial court generated a jury pool of twelve males and twenty-four females.[81] During voir dire, the State exercised nine of its ten

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75 *See* 511 U.S. 127, 146 (1994) (holding that the intentional discrimination on the basis of gender in the use of peremptory challenges violates the equal protection clause).

76 *See* 740 F.3d 471, 489 (9th Cir. 2014) (finding peremptory challenges based on an individual's sexual orientation is discriminatory).

77 *See infra* Part II.A.3 (reviewing the Court's decision to extend *Batson* to gender in *J.E.B. v. Alabama ex rel. T.B.*, and the Ninth Circuit's decision to extend *Batson* to sexual orientation in *GSK*).

78 *See J.E.B.*, 511 U.S. at 129 (stating the Court is faced with the question of "whether the Equal Protection Clause forbids intentional discrimination on the basis of gender"); *see also* Hon. Cameron McGowan Currie & Aleta M. Pillick, *Gender-Based Peremptory Strikes: A Post* J.E.B. *Analysis*, 7-FEB S.C. LAW. 14, 17 (1996) (noting that the Alabama Court of Appeals rejected the argument that the state had violated the Constitution by excluding jurors on the basis of gender).

79 *See J.E.B.*, 511 U.S. at 129–30 (explaining the pretext of the case); *see also* David G. Hart & Russell D. Cawyer, Batson *and Its Progeny Prohibit the Use of Peremptory Challenges Based Upon Disability and Religion: A Practitioner's Guide for Requesting a Civil* Batson *Hearing*, 26 TEX. TECH L. REV. 109, 111 (1995) (discussing the Alabama case as one that arose out of the State's decision to file a complaint for paternity and child support against J.E.B., the petitioner).

80 *See J.E.B.*, 511 U.S. at 129, 131 (establishing the facts of the case). The District Court of Jackson County in Alabama called the matter forth for trial on behalf of the mother and began jury selection. *Id. See also* Susan Hightower, *Sex and the Peremptory Strike: An Empirical Analysis of* J.E.B. v. Alabama*'s First Five Years*, 52 STAN. L. REV. 895, 898 (2000) (revisiting *J.E.B.* and summarizing the main points of the pivotal case in gender equality).

81 *J.E.B.*, 511 U.S. at 129. *See also* Christopher M. Ferdico, *The Death of the Peremptory Challenge:* J.E.B. v. Alabama, 28 CREIGHTON L. REV. 1177, 1179–80 (1995) (acknowledging the fact that the jury pool consisted of thirty-six individuals). Initially, the court assembled sixty-two potential jurors for the panel. *Id.* at 1179. On review of the initial number of potential jurors, the judge determined that sixty-two individuals was excessive and subsequently instructed the court clerk to remove every other name until the number of potential jurors was thirty-six. *Id.* at 1179–80. With the venire set at twenty-four females and twelve males, the court utilized a struck jury method to select the petit jury. *Id.* at 1180. The first three members of the venire were struck using challenges for cause. *Id. See also* Keith A. Ward,

peremptory challenges to remove the male jurors.[82] Previously, the court excused three potential jurors for cause, therefore leaving only ten male members of the venire prior to the State's peremptory challenges.[83] As a result, females made up the entire jury.[84] Subsequently, the petitioner objected to the State's peremptory challenges asserting each were exercised on the basis of gender.[85] The court declined to follow the petitioner's claim and proceeded with the all-female jury.[86] The jury found the petitioner to be the father and the court ordered him to pay child support.[87] On review of the case, the Supreme Court held that, although a "relatively recent phenomenon[,]" peremptory challenges on the basis of gender are, like race, unconstitutional.[88]

"The Only Thing in the Middle of the Road is a Dead Skunk and a Yellow Stripe": Peremptory Challenges – Take 'Em or Leave 'Em, 26 TEX. TECH L. REV. 1361, 1367 (1995) (explaining that subsequent to challenges for cause in which three jurors were removed from the venire, the jury pool consisted of ten males and twenty-three females).

82 *J.E.B.*, 511 U.S. at 129. *See also* Ferdico, *supra* note 81, at 1180 (reviewing the party's exercise of peremptory challenges). The State, going first, exercised nine of its ten peremptory challenges. *Id.* J.E.B., however, used all ten of its peremptory challenges to remove nine women and the last male on the jury panel. *Id.*

83 *J.E.B.*, 511 U.S. at 129. *See also* Stacie L. Sanders, *Constitutional Law: Eliminating Gender-Based Peremptory Strikes: The End of the Peremptory Challenge?* [J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994)], 34 WASHBURN L.J. 193, 197 (1995) (noting three members of the venire, one female and two males, were excused from the venire for cause).

84 *J.E.B.*, 511 U.S. at 129. *See also* Ward, *supra* note 81, at 1367 (explaining that following challenges for cause and peremptory challenges, the jury was comprised of all females).

85 *See J.E.B.*, 511 U.S. at 129 (arguing that the logic of *Batson* forbids intentional discrimination on the basis of gender). The petitioner argued the State's peremptory challenges directed toward males violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The petitioner urged the court to follow the reasoning of *Batson* and find the peremptory challenge intentionally discriminated against gender. *Id.*

86 *See id.* (finding the petitioner's claim to be unpersuasive); *see also* Trlica Cosby, *Strictly Speaking: Viewing* J.E.B. v. Alabama Ex Rel. T.B. *as Sub Silentio Application of Strict Scrutiny to Gender-Based Classifications*, 32 HOUS. L. REV. 869, 872 (1995) (discussing the court's rejection of the petitioner's argument).

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

88 *Id.* at 131. The Court stated gender-based peremptory strikes were hardly practicable during most of our country's existence and until the twentieth century, women were completely excluded from jury service. *Id.* In its analysis, the Court stipulated that it was not necessary to determine whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of the Nation's history, but rather, it was only necessary to acknowledge that "our Nation has had a long and unfortunate history of sex discrimination." *Id.* at 136. The Court then went on to state that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. *Id.* at 146. Then the Court, quoting *Batson*, stated "[a]s with race, the 'core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's [gender].'" *Id.* at 146 (quoting Batson v. Kentucky, 476 U.S. 79, 97–98 (1986)). *See* DRESSLER & MICHAELS,

In *SmithKline Beecham Corporation ("GSK") v. Abbott Laboratories*, Abbot Laboratories, an HIV drug manufacturer, allegedly violated the implied covenant of good faith and fair dealing, antitrust laws, and the North Carolina Unfair Trade Practices Act.[89] During voir dire, the defense used its first peremptory strike against the only self-identified gay member of the venire.[90] GSK challenged the strike arguing it was based on the individual's sexual orientation.[91] The district court judge denied the challenge and removed the individual from the jury pool.[92] On appeal, the Ninth Circuit adopted a step-by-step approach under *Batson*'s three part inquiry.[93] First, the court determined that GSK established a prima

supra note 43, at 233 ("[T]he Court held that 'the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man . . . .'").

89 740 F.3d 471, 474 (9th Cir. 2014). *See* SmithKline Beecham Corporation, DBA GlaxoSmithKline v. Abbott Laboratories, 740 .F.3d 471 (9th Cir. 2014), THE CTR. FOR HIV LAW & POLICY (Mar. 2014), http://www.hivlawandpolicy.org/resources/smithkline-beecham-corporation-dba-glaxosmithkline-v-abbott-laboratories-740-f3d-471-9th [http://perma.cc/XUN8-QCRL] (describing the case as one that arose from a licensing agreement and the pricing of HIV medications).

90 *GSK*, 740 F.3d at 474. *See* Shmuel Bushwick, *Excluding Gay Jurors After* Windsor, ABA (Nov. 7, 2013), http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2013-1113-excluding-gay-jurors-after-windsor.html [http://perma.cc/BT3S-HTCU] (reviewing the pretext of the *GSK* case). Following Abbott's peremptory strike, GSK objected claiming Abbott violated *Batson* by basing the peremptory strike on the juror's answers during voir dire, which identified him as gay. *Id.*

91 *GSK*, 740 F.3d at 474. *See Will Batson Challenges Extended to Sexual Orientation?*, COURTROOM LOGIC (Feb. 3, 2014), http://courtroomlogic.com/2014/02/03/batson-challenges-and-sexual-orientation [http://perma.cc/9GHD-B844] (providing the excused juror's responses during voir dire questioning). The male venire member, Juror B, referenced "my partner" and "he" multiple times during voir dire questioning. *Id.* Further, Juror B openly identified himself as a gay man. *Id.*

92 *GSK*, 740 F.3d at 474.

93 *See id.* at 476 (discussing the first step in determining whether Abbott's peremptory strike was purposeful discrimination in establishing a prima facie case). The court found that GSK had established a prima facie case of intentional discrimination for several reasons, including the fact that the peremptory strike was used on the only self-identified gay member of the venire in a case where the subject matter is an issue of consequence to the gay community. *Id.* In addition, the court explained that there is reason to infer that Abbott used its peremptory strike to remove the potential juror 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." *Id.* The court noted that in *Johnson v. Campbell*, it found it significant that the struck juror's sexual orientation had no relevance to the subject matter of the litigation, whereas here, the facts of the case made it clear there was a significant impact on the gay community. *Id.* (citing 92 F.3d 951 (9th Cir. 1996)). On review of these facts and determinations, the court found that viewing the totality of the circumstances, there was no difficulty in finding GSK raised an inference of discrimination and established a prima facie case. *Id.*

facie case of intentional discrimination.[94] Second, the court reviewed the defense's response to GSK's claim of intentional discrimination.[95] Finally, the court reviewed the record and held that the district judge failed to correctly apply the law.[96] Judge Reinhardt found that all three prongs of *Batson* were satisfied and evaluated "the fundamental legal question before [the court]: whether *Batson* prohibits strikes based on sexual orientation."[97] The court held that sexual orientation is subject to heightened scrutiny and *Batson* applies to peremptory strikes on that basis.[98]

B. Transgender and the Discrimination of that Class

The courts considered the history of discrimination against racial minorities, women, and sexual orientation in its decision to expand

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[94] *See GSK*, 470 F.3d at 476 (stating that GSK satisfied the first step of *Batson* by establishing a prima facie case of intentional discrimination). The court noted that the individual who was the subject of the peremptory challenge was the only member of the venire who was openly gay. *Id*. Moreover, the court pointed to the fact that "[w]hen jury pools contain little racial or ethnic diversity, we have held that a strike of the lone member of the minority group is a 'relevant consideration' in determining whether a prima facie case has been established." *Id*.

[95] *See id*. at 477 (reviewing Abbott's decline to provide any justification for its strike when given the opportunity to do so by the district court). The court navigates the discussion that occurred between the district judge and Abbott's counsel, specifically noting that the judge indicated she might reject the *Batson* challenge on legal grounds and Abbott's counsel could adopt those grounds, but she advised him that "it might be the better part of valor" to identify the basis for the strike. *Id.* Abbott's counsel responded that he would simply rely on the grounds given by the judge. *Id.*

[96] *See GSK*, 740 F.3d at 478 (explaining that the district judge incorrectly applied the law to the *Batson* challenge). The court reviewed the three step test required by *Batson* and stated that because GSK had correctly established a prima facie case of intentional discrimination and Abbott offered no reason for the strike, the record clearly and persuasively demonstrates that the potential juror was struck because he was gay. *Id*. at 479. Moreover, the court found that it may perform the third step of the *Batson* challenge and conclude "even based on a 'cold record,' that [Abbott's] stated reasons for striking [Juror B] was a pretext for purposeful discrimination." *Id*. at 479 (quoting United States v. Alanis, 335 F.3d 965, 969 n.5 (9th Cir. 2003)).

[97] *Id.* at 479.

[98] *See id*. at 480–84 (explaining that on review of *United States v. Windsor*, sexual orientation is entitled to heightened scrutiny). The court begins by stating that *Windsor* did not expressly state which level of scrutiny it applied to the equal protection claim that was at issue in that case, but under *Witt v. Department of the Air Force*, it is aware of how to resolve the issue. *Id.* at 480 (citing 527 F.3d 806 (9th Cir. 2008)). Specifically, the court analyzes Supreme Court precedent "by considering what the Court actually did, rather than by dissecting isolated pieces of text." *GSK*, 740 F.3d at 480 (quoting *Witt*, 527 F.3d at 816). Applying the same analysis in *Witt*, as well as the analytical framework of *Windsor*, the court found that heightened scrutiny should be applied to equal protection claims involving sexual orientation. *Id*. at 484.

Batson.[99] During voir dire, these minorities are entitled to protective measures.[100] Unlike those in *Batson* and its progeny, transgender individuals are not afforded the same judicial protection in the jury selection process.[101] However, these individuals have endured the same intolerable treatment for an extended period of time.[102] This Part of the Note defines what it means to be transgender and discusses the type of discrimination transgender individuals face.[103]

1. Defining Transgender

The term transgender describes an individual who is born as one sex, but identifies as another.[104] According to the American Civil Liberties Union handbook, transgender is defined as an:

> [U]mbrella term used to describe a range of identities and experiences, including but not limited to preoperative, postoperative, and nonoperative transsexual people; male and female cross-dressers; intersex individuals; and men and women, regardless of their sexual orientation, whose appearance, behavior, or characteristics are perceived to be different than that stereotypically associated with their sex assigned at birth.[105]

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99 *See supra* Part II.A.2–3 (discussing factors considered by the courts when deciding whether to expand *Batson*).

100 *See supra* Part II.A.2–3 (explaining how voir dire applies in situations where members of the venire are discriminated against based solely on their race, gender, or sexual orientation).

101 *See infra* Part II.B.1 (showing that the law excludes transgender from *Batson* challenges).

102 *See infra* Part II.B.2 (outlining the discrimination toward transgender individuals).

103 *See infra* Part II.B (defining transgender and providing examples of situations and scenarios where transgender individuals are discriminated against).

104 *See* Holly V. Franson, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies,* 84 U. COLO. L. REV. 497, 500 (2013) (providing various definitions, but concluding the term transgender is difficult to define). Transgender can be defined as including individuals who do not conform to traditional gender norms and stereotypes. *Id*. *See also* Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Court Over What Clothing They are Allowed to Wear on the Job, Which Restroom They are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex,* 7 WM. & MARY J. WOMEN & L. 133, 153 (2000) (explaining that transgender is an umbrella term and terms such as cross-dresser, transvestite, and transsexual are subsets of the umbrella term). While transgender serves as an umbrella term, the focus of this Note is on individuals who identify as transgender either pre or post operation.

105 NAN D. HUNTER ET AL., THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE 172 (2004).

The term transgender is similar to gender variant and gender nonconforming.[106] Although transgender and sexual orientation appear to be coupled because they are merged into the common acronym "LGBTQ," which stands for lesbian, gay, bisexual, transgender, or queer, they are not representative of the same thing.[107] Transgender correlates to the individual's gender identification, whereas sexual orientation deals with an individual's sexual preference.[108] Identity is not equivalent to preference; therefore transgender cannot mean the same thing as sexual orientation.[109] Moreover, identifying as transgender does not inherently

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106 *See id.* (noting that gender variant and gender nonconforming are other terms used as synonyms for transgender). *See also* Franson, *supra* note 104, at 500 (explaining that there is no accepted or concrete definition for the term "transgender") (quoting Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 897–98 (2007)). Franson goes on to state that according to scholars, transgender includes a variety of people who do not conform to stereotypes and traditional gender norms. *Id. See* Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 558 (2003) (defining transgender as an umbrella term that encompasses all forms "of being at odds with 'traditional' concepts of gender"). Transsexual is defined as "[a] person who desires to change bodily sex characteristics, irrespective of whether the person has undergone, or intends to undergo, corrective genital reconstructive surgery (CGRS), also referred to as sex reassignment surgery (SRS)." *Id.* at 558–59. Intersex is defined as "[p]ersons who were born with mutated, incomplete, or dual genitals; with chromosomal patterns other than XX or XY; or whose gender identity development was affected in some manner by pre-natal hormonal imbalances." *Id.* at 559. The focus of this Note is specifically on transgender and will address only that term.

107 *See* Alexis Forbes, *A (Short) Primer on Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Culture in America*, THE JURY EXPERT (Feb. 6, 2014), http://www.thejury expert.com/2014/02/a-short-primer-on-lesbian-gay-bisexual-transgender-and-queer-lgbtq -culture-in-america/ [http://perma.cc/6BFP-VCU8] (differentiating transgender from sexual orientation, specifically lesbian, gay, and bisexual). "Transgender studies and advocacy is incorporated into LGBQ (lesbian, gay, bisexual, and queer) issues because transgender people experience similar stigmas and discriminatory experiences to what lesbians, gay men, bisexual men and women, and queer individuals encounter." *Id. See also* Ami B. Kaplan, *What Is the Difference Between Gay and Transgender?*, TRANSGENDER MENTAL HEALTH, http://tgmentalhealth.com/2012/10/26/what-is-the-difference-between-gay-and-transgender/#comments [http://perma.cc/S2E6-6X9B] (identifying differences between gays and transgender). Gay refers to "who you are attracted to" whereas transgender "has to do with one's *gender identity*." *Id.* The former deals with your attraction and the latter deals with your identity. *Id.*

108 *See Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression*, AM. PSYCHOL. ASS'N (2011) (describing the difference between sexual orientation and gender identity) [hereinafter *Answers to Your Questions*]. Sexual orientation differs from gender identity because the former deals with "an individual's enduring physical, romantic, and/or emotional attraction to another person" and the latter deals with the individual's "internal sense of being male, female, or something else." *Id. See also* Forbes, *supra* note 107 (stating that the term transgender does not provide any information as to the individual's sexual orientation).

109 *See Discrimination Against Transgender People,* AM. CIV. LIBERTIES UNION 1 (2014), https://www.aclu.org/lgbt-rights/discrimination-against-transgender-people

mean an individual is homosexual.[110] Transgender individuals can be gay, straight, or bisexual.[111] Being transgender means an individual may be biologically born as a male, but identifies as a female.[112] The same can be true for an individual born as a biological female who identifies as a male.[113] For these individuals, surgical procedures and medical

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[http://perma.cc/JQ5M-HWQF] (discussing that although transgender and sexual orientation are similar in that both generally face the same types of discrimination, those that identify as transgender often encounter more severe forms of discrimination). Because transgender individuals have issues with areas of the law that do not impact those of sexual orientation, they are distinct. *Id.* For example, transgender individuals face issues with identity documents that do not reflect the gender they identify with, sex-segregated public restrooms, dress codes that perpetuate traditional gender norms, and barriers on access to health care. *Id.*

110 *See* Forbes, *supra* note 107 (illustrating that a transgender individual can be heterosexual, homosexual, or bisexual). Because being transgender correlates to a different gender identity than that assigned at birth, a transgender person may be attracted to someone of the same sex with which they were biologically born. *Id.* However, because the transgender person does not identify with their biologically assigned sex, the attraction is heterosexual. *Id.* For example, if a biological transgender female identifies throughout her entire life as a male and is attracted to a female, that represents a heterosexual classification rather than a homosexual classification. *Id.*

111 *See id.* (noting that a transgender individual may identify as gay, lesbian, bisexual, asexual, pansexual, and/or heterosexual). Forbes states, "[i]t is not their sexual orientation, but the discrepancy between their gender identity and their sex that defines their transgender identity." *Id. See also* Joanne Herman, *Some Transgender People are Not Gay*, HUFF. POST (June 30, 2011, 10:31 AM), http://www.huffingtonpost.com/joanne-herman/some-transgender-people-a_b_886692.html [http://perma.cc/24AV-Y74X] (addressing the common misconception that all transgender individuals are gay). In 1990, lesbian and gay organizations started to include transgender in their missions. *Id.* The inclusion of transgender led many to believe that it was simply an extension of gay and lesbian, but transgender does not mean gay and gay does not represent transgender. *Id.* Herman illustrates her point by referencing Chaz Bono, who was born the daughter of Cher and Sony Bono, and came out as a lesbian in 1995. *Id.* It was not until 2008 that Chaz realized he was not a lesbian, but a man who was attracted to women. *Id.* Chaz, who is in a relationship with a female, is considered by society to be a heterosexual man. *Id.*

112 *See* HUNTER ET AL., *supra* note 105, at 172 (explaining that female-to-male transsexual ("FTM") persons are born with female bodies but have a strong male gender identity and male-to-female transsexual ("MTF") people are born with male bodies but have a female gender identity); *see also* Forbes, *supra* note 107 (discussing that like those individuals with an intersex gender identity, individuals with a queer gender identity believe that neither male nor female describe their gender self-concept). Persons with a queer gender identity believe that the "binary conceptualization of gender" inaccurately describes their identity. Forbes, *supra* note 107. Queer gender identity differs from intersex in that those individuals were born with the reproductive anatomy of only one sex, but identify with another sex. *Id.* Intersex individuals are born with both male and female sex characteristics. *Id.* This Note will not address queer gender identity.

113 *See* HUNTER ET AL., *supra* note 105, at 172 (elaborating on gender identity of transgender individuals).

treatments are available to aid in the transition process.[114] However, not all transgender individuals pursue a permanent sex change.[115] For example, an individual may alter their appearance through clothing, hairstyle, cosmetics, and other temporary lifestyle changes.[116] As it pertains to discrimination, advocacy for transgender individuals is frequently coupled with lesbians, gays, and bisexuals.[117] Although each classification faces similar forms of discrimination and prejudice, this Note focuses on the discrimination of transgender individuals.[118]

2. Discrimination of Transgender Individuals

Society is hardly deterred from discriminating against an individual—transgender individuals find no exception to this statement.[119] For example, according to the National Transgender Discrimination Survey, fifty percent of transgender individuals who

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[114] *See id.* (stating a majority of transsexual individuals, FTM and MTF, seek medical treatment to change their physical sex). Medical treatment can include hormone therapy and sex-reassignment surgery. *Id. See also Answers to Your Questions*, *supra* note 108 (explaining that the transitioning process for transsexuals is complex). First, trans individuals generally start with living day-to-day as a member of their preferred gender. *Id.* Next, the person might adopt common social changes that relate to the gender they identify with. *Id.*

[115] *See* JAIME M. GRANT ET AL., NATIONAL TRANSGENDER DISCRIMINATION SURVEY REPORT ON HEALTH AND HEALTH CARE 3 (2010), http://transequality.org/PDFs/NTDSReportonHealth_final.pdf [http://perma.cc/CG5U-4GVN] ("Transition is a process that some, but not all, transgender and gender non-conforming people undertake to live as a gender different from the one they were assigned at birth.").

[116] *See id.* (explaining that some transgender individuals transition through means such as appearance). Transgender individuals may take on the appearance of the gender they feel they should have been assigned. *Id.* Specifically, the transgender person might make changes in clothing and grooming, their name, or even change, if possible, their sex designation on identity documents. *Id. See also* Forbes, *supra* note 107 (discussing how transgender people often encounter emotional distress if their appearance does not line up with their self-identified gender). For example, some transgender individuals will change their clothing, physical form, and facial features. *Id.* In addition, the transgender individual may undergo behavioral treatments, such as cadence, posture, or speech lessons to aid the individual in enhancing their self-identified gender appropriately. *Id.*

[117] *See* Forbes, *supra* note 107 (noting that transgender advocacy is incorporated into lesbian, gay, bisexual, and queer or LGBQ, because transgender people experience similar stigmas and discrimination to what lesbians, gays, bisexuals, and queer individuals encounter).

[118] *See infra* Part III.C (distinguishing transgender from sexual orientation and arguing *Batson* should be applicable to the former like it is to the latter).

[119] *See* Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Court and in the Legislatures,* 7 N.Y. CITY L. REV. 161, 164 (2004) (stating that transgender individuals face several forms of discrimination in nearly all areas of life).

openly disclose themselves as transgender attempt suicide.[120] Educational facilities, places of employment, prisons, and even health care forums make up a small number of arenas where transgender discrimination occurs.[121] In schools, transgender students encounter bullying and harassment.[122] Eighty-two percent of transgender youth report feeling unsafe in schools and forty-four percent of those students report being bullied in schools.[123] In addition, places of employment host a considerable number of discriminatory behaviors and offenses toward transgender people.[124] Examples of discrimination in the work place

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120 *See* ANN P. HAAS ET AL., *Suicide Attempts Among Transgender and Gender Non-conforming Adults*, NAT'L TRANSGENDER DISCRIMINATION SURVEY 2 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf [http://perma.cc/XT6D-G4XF] (providing statistics for suicide attempts among transgender individuals).

121 *See* Coffey, *supra* note 119, at 165 (identifying schools and workplaces as common arenas for transgender discrimination). *See also Answers to Your Questions*, *supra* note 108 (explaining that transgender people face discrimination in most cities and states in nearly every aspect of their lives). According to the National Center for Transgender Equality and the National Gay and Lesbian Task Force, out of a sample of 6500 transgender people, the highest level of discrimination was experienced in employment, housing, health care, education, legal systems, and their families. *Id.* at 3–4. *See also Know Your Rights – Transgender People and the Law*, AM. CIV. LIBERTIES UNION (Apr. 24, 2013), https://www.aclu.org/lgbt-rights/know-your-rights-transgender-people-and-law [http://perma.cc/H4NC-FSVH] (discussing transgender rights in prison) [hereinafter *Know Your Rights*]. A majority of prisons house transgender inmates in cellblocks that correspond with their biologically assigned gender. *Id.* Because prisons are somewhat in fear of being held liable in the event the transgender person is raped or endures other forms of abuse, prisons are developing more respectful housing policies. *Id.*

122 *See* Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students From Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC'Y 245, 246 (2013) (identifying ongoing bullying of transgender students at schools); *see also Know Your Rights*, *supra* note 121 (discussing that several, but not all, states prohibit gender identity discrimination in public schools by issuing regulations or guidance clarifying what a school must do to accommodate the transgender student).

123 *See Transgender Bullying: A National Epidemic*, NOBULLYING (July 13, 2014), http://nobullying.com/transgender-bullying/ [http://perma.cc/F5R8-ABWS] (providing transgender bullying statistics). In addition to being bullied in schools, transgender students are often victims of cyber bullying. *Id.* Moreover, transgender youth who experience high feelings of rejection are "[a]bout six times more likely to be seriously depressed, [m]ore than eight times more likely to attempt suicide, [m]ore than three times more likely to abuse illegal drugs, [and] [m]ore than three times more likely to engage in risky sexual behavior." *Id.*

124 *See* Frye & Rose, *supra* note 106, at 559 (explaining that most employers do not provide protection to transgender people). *See also* Coffey, *supra* note 119, at 165 (discussing transgender discrimination in the workplace). Discrimination in the workplace typically is comprised of "harassment in the form of offensive or intimidating behavior by co-workers or supervisors, not addressing [the individual] by her or his chosen name or pronoun, refusing to allow the person to use the appropriate bathroom, and asking offensive questions about [the individual's] medical history or genitalia." *Id.*; *Employment Law Alert*: *Transgender Employees Protected Under Title VII*, STOEL RIVES LLP (Apr. 24, 2012), http://www.stoel.com/

include inappropriate and offensive language and denying the individual from using the restroom designated with the sex identified by the individual.[125] Although the amount and severity of the discrimination may vary with the specific type of work, the presence of discrimination is still significant.[126] Moreover, those who identify as transgender encounter unjust treatment in prisons.[127] For example, transgender inmates are often housed in the homosexual block of the inmate populations without regard

showalert.aspx?Show=9446 [http://perma.cc/TR9C-CQLB] (announcing the Equal Employment Opportunity Commission's ("EEOC") landmark decision that "intentional discrimination against a transgender individual is discrimination 'based on . . . sex' and thus violates Title VII"). The EEOC ruling resulted after a transgender woman was denied a position with the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). *Employment Law Alert*, *supra* note 124. The woman's complaint was based on "gender identity" and "sex stereotyping." *Id.* Initially, the EEOC declined to process the claim citing lack of jurisdiction, however on appeal, the EEOC ruled "when an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.'" *Id.* Prior to this ruling, the EEOC usually declined to pursue discrimination claims that arose from transgender status or gender identity. *Id.*

125 *See* Coffey, *supra* note 119, at 165 (discussing the discrimination of transgender employees in the workplace). *See also* Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 424 (2012) (noting that transgender individuals continue to face "intense, pervasive discrimination in the employment context"). Statistics from a national survey of approximately 6500 transgender individuals show that almost half of the respondents experienced an adverse employment action, including "denial of a job, denial of a promotion, or termination of employment." *Id.* (citing JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. AND NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NAT'L TRANSGENDER DISCRIMINATION SURVEY 53 (2011), http://www.thetaskforce.org/static_html/downloads/release_materials/injustice_latino_englishversion.pdf [http://perma.cc/A5X3-E66L]).

126 *See* Coffey, *supra* note 119, at 165 (identifying several accounts of transgender people losing their jobs as a result of their status). *See generally* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (ruling Title VII does not protect transsexuals and even if transsexual was considered female, the trial judge made no factual findings necessary to support the conclusion that the employer discriminated against her on this basis); Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982) (finding the word "sex" in the Title VII ban on sex discrimination in employment is to have plain meaning and does not encompass discrimination based on transsexualism); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977) (holding Title VII does not prohibit the discharge of an employee for undergoing the process of sex transformation, persons who undergo medical procedures to change their sex are not a "suspect class" for purposes of the Fourteenth Amendment, and the discharge of an employee for undergoing sex change procedures did not violate the doctrines of due process and equal protection).

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

to the individual's safety.[128] Health care is another area where a transgender person will likely face discrimination.[129] For example, Medicaid is often difficult to obtain to cover the medical expenses related to surgical procedures for gender reassignment.[130] Discrimination of transgender individuals expands beyond the examples put forth here, which is why judicial support and recognition of the issue should be addressed.

III. ANALYSIS

Batson paved the way for analyzing potential peremptory challenges on the basis of racial discrimination.[131] Since the 1986 decision, *Batson* has extended to discrimination on the basis of gender and sexual orientation.[132] While the Ninth Circuit determined that discrimination

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128 *See* Frye & Rose, *supra* note 106, at 561 (explaining that transgender people are "often classified and kept in the homosexual areas of the inmate populations"). Because there is an increased danger of rape and assault, transgender individuals should be housed separately for their own safety. *Id. See also* HUNTER ET AL., *supra* note 105, at 181 (noting that transgender and transsexual people who have not had genital surgery are classified according to their birth sex for purposes of housing them in prison). Because of the great risk of sexual violence toward transgender and transsexual inmates, some prisons have implemented a "solution" which entails segregating transgender and transsexual inmates. *Id.* The segregation provides greater protection to the prison, but it also results in the exclusion of the inmate from obtaining full access to things like recreation, educational and occupational opportunities, and associational rights. *Id.*

129 *See* Lisa Gillespie, *Transgender People Still Have Trouble Getting Some Health Care*, ST. LOUIS TODAY (July 22, 2015), http://www.stltoday.com/lifestyles/health-med-fit/transgender-people-still-have-trouble-getting-some-health-care/article_439733c4-9fac-5cd8-89ab-1381e7f8fa19.html [http://perma.cc/48U9-5CXU] (explaining the challenge of obtaining health care coverage for a transgender individual); *see also Discrimination Against Transgender People, supra* note 109 (stating that transgender people face difficulties meeting their basic needs, such as obtaining health care); *Know Your Rights*, *supra* note 121 (explaining that health care coverage is difficult to obtain for transgender people).

130 *See Know Your Rights*, *supra* note 121 (noting that Medicaid and Medicare traditionally have not covered gender reassignment procedures). Currently, the law does not provide much information about the insurance companies denying coverage to transgender individuals for routine medical treatment. *Id.*

131 *See supra* Part II.A.2 (discussing the *Batson* decision and the Court's determination that peremptory challenges motivated by race are discriminatory).

132 *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (holding race as motivation for a peremptory challenge is discriminatory). *Batson* was the first case to determine that a peremptory challenge based on race was discriminatory and in violation of the Equal Protection Clause. *Id.* at 84, 100. This case established the analytical framework for a *Batson* challenge, which requires a three step process of determining whether the challenge was discriminatory. *Id.* at 93–98. *See also* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) (finding a peremptory challenge based on gender is discriminatory and subject to a *Batson* challenge); SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (establishing that *Batson* is proper where sexual orientation is the basis for a peremptory challenge); IRINA Y. DMITRIEVA, *BATSON* CHALLENGES IN CIVIL LITIGATION: THE

aimed at lesbians and gays during voir dire now requires a thorough analysis under *Batson*, the same judicial review is not extended to transgender individuals.[133] As transgender becomes a more prevalent group in society with increased awareness and understanding, they too should be protected under *Batson*.[134]

This Note analyzes the expansion of *Batson* to sexual orientation and examines transgender individuals in the judiciary, ultimately conceding that *Batson* should again be expanded to protect transgender individuals.[135] First, Part III.A evaluates the analytical framework of *Batson* as applied to sexual orientation.[136] Second, Part III.B analyzes how transgender individuals are perceived in the judiciary and the need for judicial involvement.[137] Third, Part III.C distinguishes transgender from sexual orientation for the purpose of demonstrating the former is not currently protected under *Batson*.[138] Finally, Part III.D proposes that *Batson* be expanded to include transgender individuals to ensure equal protection during voir dire.[139]

UNDERESTIMATED POTENTIAL (2011) (reviewing the three step process established in the *Batson* decision). *GSK* thus far is the only court to extend *Batson* to sexual orientation. 740 F.3d at 489.

133 *See GSK*, 740 F.3d at 489 (announcing the expansion of *Batson* on the basis of sexual orientation, specifically as it defines gays and lesbians). *See also Discrimination Against LGBT Jurors Remains Legal*, THE AM. INDEPENDENT (May 1, 2012, 8:18 AM), http://americanindependent.com/215836/discrimination-against-lgbt-jurors-remains-legal [http://perma.cc/HFV2-8TJU] (outlining incidents in which members of the LGBT community have faced discrimination in the courtroom). One incident of discrimination involved a potential juror, Steve Grandell, who was dismissed from a trial in Hennepin County District Court in Minnesota. *Id*. Grandell was struck from the jury when the assistant district attorney exercised a peremptory challenge because "Grandell appeared to be a man dressed as a woman." *Id*. Grandell identified as transgender. *Id.* The defense attorney objected to the peremptory, but the judge overruled the objection. *Id.* Grandell later told the Star Tribune that he believed he was dismissed "not only because of his style but because the case that was being heard involves sexual assault between an adult and a minor." *Id.* Grandell stated that transgender people "are always lumped in with sexual deviants." *Discrimination Against LGBT Jurors Remains Legal*, *supra* note 133.

134 *See infra* Part III.D (urging the expansion of *Batson* to transgender individuals).

135 *See infra* Part III.A–D (discussing the expansion of *Batson* to sexual orientation and evaluating the need for judicial involvement with regard to transgender individuals as well as distinguishing sexual orientation from transgender).

136 *See infra* Part III.A (imploring the acceptance of the decision to extend *Batson* to sexual orientation).

137 *See infra* Part III.B (articulating factors that should be considered by the judicial system in its recognition and identification of transgender and explaining why judicial involvement is necessary).

138 *See infra* Part III.C (distinguishing sexual orientation from transgender).

139 *See infra* Part III.D (proposing the expansion of *Batson* to include transgender individuals, following the expansion to sexual orientation, which is necessary to ensure equal protection during voir dire).

A. Batson *Expanded to Sexual Orientation*

In 2014, the Ninth Circuit made the bold decision to extend *Batson* to sexual orientation.[140] This extension is likely to be controversial and widely disputed.[141] However, such contentions are misplaced, as sexual orientation is a class that warrants protection under *Batson*.[142] Part III.A.1 evaluates the three step test established in *Batson* and how it was correctly applied to sexual orientation.[143] Part III.A.2 examines the Ninth Circuit's determination under *United States v. Windsor*, that sexual orientation is a classification requiring a heightened level of scrutiny.[144]

1. A *Batson* Challenge is Appropriate for Sexual Orientation

Sexual orientation should be entitled to a *Batson* challenge.[145] GSK must establish a prima facie case of intentional discrimination because GSK challenged the defense's first peremptory strike against the only self-identified gay member of the venire.[146] The strike would be dismissed if GSK failed to demonstrate Abbott's strike was motivated by purposeful discrimination.[147] Generally, a minority is facially recognizable thus

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140 *See supra* Part II.A.3 (discussing the Ninth Circuit's decision to extend *Batson* to include sexual orientation).

141 *See infra* Part III.D.2 (addressing criticism of the court's extension of *Batson* to cover sexual orientation).

142 *See infra* Part III.D.2 (establishing criticism of *Batson* and the Ninth Circuit's decision to expand its protections is misguided).

143 *See infra* Part III.A.1 (reviewing each step of *Batson* as the Ninth Circuit applied the challenge to sexual orientation).

144 *See infra* Part III.A.2 (examining how the Ninth Circuit determined sexual orientation was subject to a heightened level of scrutiny upon review of *Windsor*).

145 *See* SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014) (articulating that peremptory strikes based on sexual orientation advance a "deplorable tradition" of unequal treatment). The court outlined a brief history of the treatment received by gays and lesbians in our society and noted they have been "systematically excluded from the most important institutions of self-governance." *Id.* at 484. Moreover, the court acknowledged that even in "prior cases that rejected applying heightened scrutiny to classifications on the basis of sexual orientation . . . gay and lesbian individuals have experienced significant discrimination." *Id.* (citing High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990)).

146 *Id.* at 476. GSK made the challenge against Abbott following Abbott's strike of the only self-identified gay member of the venire. *Id.* Because GSK made the challenge, they were required to "produce evidence that 1) the prospective juror is a member of a cognizable group; 2) counsel used a peremptory strike against the individual; and 3) 'the totality of the circumstances raises an inference that the strike was motivated' by the characteristic in question." *Id.*

147 *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) (stating the establishment of a prima facie case is first necessary to demonstrate a strike was discriminatory after which the burden shifts to the opposing side). *See also* Swain v. Alabama, 380 U.S. 202, 222 (1965) (establishing the standard for assessing a prima facie case). Because the challenger is first required to

creating a greater likelihood of establishing a prima facie case of intentional discrimination.[148] However, transgender, like sexual orientation, is often not facially neutral.[149] *Batson* should require the challenging party to articulate why the individual is part of a protected class that is typically prone to discrimination.[150]

Furthermore, because sexual orientation is a controversial subject, the second step of a *Batson* challenge is necessary to allow counsel the opportunity to defend the peremptory strike and ultimately any assumption of personal bias.[151] When an action is taken in a light unfavorable to a homosexual individual, the presumption exists that the action was prejudicially motivated.[152] Ultimately, because sexual orientation often triggers opposing opinions and beliefs, the court should

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establish a prima facie case of intentional discrimination before the burden shifts to the opposing side, it is understood that if the challenger fails to prove a prima facie case then the burden will not shift and the challenge becomes moot. *Id.*

148 *See* Cintas, *Minority Classifications*, http://www.cintas.com/company/supplier_diversity_requirements.pdf [http://perma.cc/AG4V-SK25] (defining minority as a person who is "a citizen of the United States who is African American, Hispanic, Native American, Asian Pacific, or Asian Indian"). These groups of minorities are more likely to be facially recognizable because their classification as a minority is based on racial or ethnic features, whereas minorities such as homosexuals are not facially identifiable. *Id.*; *see also Discrimination Against LGBT Juror Remains Legal*, *supra* note 133 (discussing issues with identification of gays and lesbians, specifically because an attorney cannot ask an individual if they are homosexual).

149 *See* Forbes, *supra* note 107 (explaining similarities between sexual orientation and transgender and the identification of each).

150 *See* Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY J. GENDER L. & JUST. 157, 157 (2001) (providing support for the expansion of *Batson* to peremptory challenges on the basis of sexual orientation because issues with homophobia on juries may be improved).

151 *See* Giovanna Shay, *In The Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 407 (2014) (explaining ongoing issues with sexual orientation during voir dire and suggesting that intervention is necessary). Shay's review and examination of transcripts, court filings, and published opinions about jury voir dire on attitudes toward same-sex sexuality and LGBT issues demonstrates that "jurors express a range of homonegative attitudes." *Id.*

152 *See Discrimination Against LGBT Jurors Remains Legal*, *supra* note 133 (considering the trial of Harvey Milk in which Dan White's defense attorney excluded gay and lesbian individuals from the jury inferring the exclusion was discriminatorily motivated). The 1978 trial of Dan White, the man charged with the murder of Harvey Milk, a gay San Francisco city supervisor, included "[d]eliberate efforts" by White's attorneys to exclude lesbians and gays from the jury. *Id.* The judge informed the attorneys they could not ask the potential jurors their sexual orientation, but the attorneys still attained their objective of a heterosexual jury. *Id.* White's attorneys posed questions such as, "Have you ever supported controversial causes, like homosexual rights, for instance?" *Id.* One member of the venire was further questioned by White's attorneys regarding his "roommate." *Id.*

be the final party to review the record and rule on the matter.[153] Since judges are removed from the situation, they are in the best position to provide neutrality when considering the appropriateness of a *Batson* challenge.[154] Therefore, the three step analysis under *Batson* is both necessary and appropriate as applied to sexual orientation.[155]

2. The Ninth Circuit's Examination of *United States v. Windsor*

Juror disqualification based solely on an individual's sexual orientation is highly susceptible to inequality and discrimination, thus a heightened level of scrutiny is the proper standard to apply.[156] Since the

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153 *See Protected and Served?*, LAMBDA LEGAL, http://www.lambdalegal.org/protected-and-served-courts [http://perma.cc/W64M-FKPU] (reviewing the ongoing bias and negative treatment of LGBT individuals in the courtroom). Anti-LGBT beliefs and opinions are apparent in various environments, but because they are frequently noticed in a courtroom, judges must intervene with neutrality. *Id.*

154 *See* Bushwick, *supra* note 90 (explaining it was not until *GSK* that a federal court finally recognized sexual orientation as being protected under *Batson* against peremptory strikes). *See generally* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (holding peremptory challenges premised on gender are discriminatory and subject to a *Batson* challenge); Batson v. Kentucky, 476 U.S. 79, 100 (1986) (ruling peremptory challenges exercised on the basis of race are discriminatory); Swain v. Alabama, 380 U.S. 202, 227–28 (1965) (holding a peremptory challenge against an African American man, absent a sufficient showing of a prosecutor's participation in ongoing exclusion of African Americans from juries, does not give rise to an inference of systematic discrimination); SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (extending *Batson* to peremptory challenges based on sexual orientation); United States v. Osazuwa, 446 F. App'x 919, 920 (9th Cir. 2011) (affirming the trial court's decision to deny the claimant's motion under *Batson* to prevent the government from exercising a peremptory challenge against a potential juror on the basis of her sexual orientation); United States v. Blaylock, 421 F.3d 758, 769–70 (8th Cir. 2005) (deciding the trial court's decision to deny a *Batson* challenge to the government's peremptory strike of a panel member, even if the defendant made a prima facie case of purposeful discrimination on basis of sexual orientation, was not an error); Johnson v. Campbell, 92 F.3d 951, 954 (9th Cir. 1996) (finding that allegations that challenged whether a juror was gay did not establish a prima facie case or purposeful discrimination, even if sexual orientation is a protected classification under *Batson*). *Johnson*, *Blaylock*, and *Osazuwa* were three cases prior to *GSK* that reached federal court on the issue of whether sexual orientation was protected under *Batson*. Bushwick, *supra* note 90.

155 *GSK*, 740 F.3d at 489. *See also Protected and Served?*, *supra* note 153 (discussing discrimination against LGBT in the courtroom and the need for intervention); Forbes, *supra* note 107 (establishing the need for *Batson* with regard to LGBT to ensure nondiscriminatory reasons for exclusion on juries).

156 *See GSK*, 740 F.3d at 481 (explaining that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation"); *see also* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding sexual orientation requires something more than rational basis as laws motivated purely by animus serve no legitimate purpose, which is the standard for rational basis review); Barry, *supra* note 150, at 157 (supporting the expansion of *Batson* for peremptories based on sexual orientation); Bushwick, *supra* note 90

United States v. Windsor decision applied something more than rational basis review on the grounds that laws motivated purely by animus serve no legitimate purpose and thus fail rational basis, the Ninth Circuit's decision to apply a heightened level of scrutiny to juror discrimination based on sexual orientation was proper.[157] Although *Windsor* addressed a different issue, specifically, the constitutionality of the Defense of Marriage Act ("DOMA"), the Ninth Circuit was correct to mirror the analytical framework developed in the Court's decision.[158] If the Ninth Circuit had not adopted the same heightened level of scrutiny described in *Windsor*, then sexual orientation would still be subjected to rational basis review.[159] The problem with rational basis review as it relates to sexual orientation is that it is "ordinarily unconcerned with the inequality that results from the challenged state action."[160] However, *Batson* is utilized as a means to ensure equal protection thus heightened review is necessary.[161]

In sum, the Ninth Circuit's decision to expand *Batson* to sexual orientation was imperative and pertinent.[162] An individual's sexual orientation is a private, personal matter and therefore, when it is revealed during voir dire, either openly or through assumption, it should be analyzed under the *Batson* framework to ensure an absence of intentional

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(summarizing *GSK* and the arguments therein); Shay, *supra* note 151, at 407 (advocating for LGBT equality and discussing the issues that they face during voir dire).

157 *See GSK*, 740 F.3d at 480 (following the analytical framework of *Windsor* to determine heightened scrutiny is necessary for sexual orientation). The court in *GSK* specifically stated that *Windsor* "was decided just last term and is dispositive of the question of the appropriate level of scrutiny in this case." *Id.*

158 *Windsor*, 133 S. Ct. at 2695–96. The *Windsor* case reviewed DOMA, which denied spousal benefits to the surviving spouse of a same-sex couple. *Id.* The Court held DOMA's definition of marriage was unconstitutional because it deprived an individual of the liberties afforded to them under the Fifth Amendment. *Id.*

159 *See GSK*, 740 F.3d at 480 (establishing that because of the *Windsor* analysis for sexual orientation in the context of DOMA, heightened scrutiny is appropriate for evaluation of claims based on sexual orientation and equal protection). In *GSK*, the court noted that *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." *Id.* Because the *Windsor* Court did not expressly state a level of scrutiny, the court referenced a solution outlined in *Witt v. Department of the Air Force*. *Id.* (citing 527 F.3d 806, 816 (2008)). *Witt* provides that when the Supreme Court refrains from identifying its method of analysis, Supreme Court precedent is analyzed "by considering what the Court actually did, rather than by dissecting isolated pieces of text." *Id.* (quoting *Witt*, 527 F.3d at 816).

160 *GSK*, 740 F.3d at 482 (quoting McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)).

161 *See id.* at 486 (discussing the goal behind *Batson* and reviewing the Court's decision in *Windsor* regarding heightened protection).

162 *Id.* at 489.

discrimination.[163] In addition, because the Ninth Circuit followed the reasoning articulated in *Windsor*, a heightened level of scrutiny may now be applied for equal protection claims involving sexual orientation.[164] As a result, a *Batson* challenge is appropriate when a peremptory challenge based on sexual orientation is exercised.[165]

B. Transgender and the Judiciary

The influx of discussion regarding sexual orientation and marriage as it relates to the law has made the judicial system a frequent party to legal disputes.[166] The judiciary has inadvertently become familiar with sexual orientation including characteristics and traits that define the class.[167] Transgender, however, is a class with fewer recognizable characteristics.[168] Physical appearance, mannerisms, and certain words or

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163 *See id.* (finding that where it is known an individual is homosexual and a peremptory challenge is exercised on that basis, then *Batson* is proper); *see also* Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire,* 13 YALE J.L. & FEMINISM 1, 2 (2001) (contending sexual orientation for the purposes of voir dire should be treated similar to race, religion, ethnicity, and gender).

164 *See* United States v. Windsor, 133 S. Ct. 2675, 2693–96 (2013) (holding something more than rational basis is necessary when analyzing claims based on sexual orientation and equal protection, although the same was not expressly articulated in the Court's opinion); *see also GSK*, 740 F.3d at 484 (finding heightened scrutiny applies to classifications based on sexual orientation).

165 *GSK*, 740 F.3d at 489.

166 *See* Richard Wolf, *Supreme Court Delays Action on Gay Marriage*, USA TODAY (Jan. 9, 2015, 4:23 PM), http://www.usatoday.com/story/news/nation/2015/01/09/supreme-court-gay-marriage/21454467/ [http://perma.cc/8WJS-LVD7] (discussing the recent and ongoing discussion of same-sex marriage); *see also* R. U. Paige, *Proceedings of the American Psychological Ass'n, Inc., for the Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representative*, AM. PSYCHOLOGIST (forthcoming Vol. 60, Issue 5), http://www.apa.org/about/policy/marriage.aspx [http://perma.cc/R4A5-A7DK] (pointing out that research indicates that between forty and sixty percent of gay men and between forty-five and eighty percent of lesbians are currently involved in a romantic relationship) (citing J. Bradford et al., *Nat'l Lesbian Health Care Survey: Implications for Mental Health Care,* 62 J. CONSULTING & CLINICAL PSYCHOL. 228 (1994)).

167 *See* Eisemann, *supra* note 163, at 2 (explaining that issues involving sexual orientation and voir dire can arise in several ways leading to additional controversies the court must resolve, or at least address); *see also* Forbes, *supra* note 107 (reviewing traits and characteristics common to lesbian, gay, bisexual, transgender, and queer individuals in today's culture).

168 *See Know Your Rights*, *supra* note 121 (outlining frequent misconceptions regarding transgender individuals). While transgender is frequently used to describe a broad range of identities and experiences that fall outside of the traditional understanding of gender, it is important to note that not all individuals who do not conform to gender stereotypes identify as transgender. *Id.* There are several individuals who do not conform to gender stereotypes, but they also do not experience conflict between their gender identity and the gender assigned to them at birth. *Id. See also Discrimination Against Transgender People*, *supra* note 109 (providing information about the discrimination of transgender individuals).

phrases may be strong indicators of a transgender individual.[169] These traits can guide the judiciary in the identification of a transgender individual as is necessary with a *Batson* challenge.[170] First, Part III.B examines how the law considers factors such as physical appearance, mannerisms, and buzzwords in its identification of transgender.[171] Next, this Part scrutinizes why transgender individuals are in need of judicial involvement.[172] Finally, this Part argues transgender individuals should be entitled to a heightened level of scrutiny.[173]

Transgender is a group of individuals that have few recognizable and understood traits, thus requiring the law to consider additional characteristics.[174] Courts should consider the apparel worn by an individual that conflicts with that gender recognition because males and females have certain biological features that often distinguish the sexes.[175] Transgender individuals commonly dress in attire that is consistent with his or her gender identification.[176] Furthermore, a transgender individual

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Transgender individuals face similar experiences with regard to discrimination and inequality that lesbians and gays experience, however, "transgender people face a range of legal issues that LGB people rarely do: identity documents not reflective of one's gender, sex-segregated public restrooms and other facilities, dress codes that perpetuate traditional gender norms, and barriers to access to appropriate health care." *Id.*

169 *See* Forbes, *supra* note 107 (discussing different indicators for transgender individuals).

170 *See infra* Part III.B (examining factors for the Court to consider when identifying transgender individuals).

171 *See infra* Part III.B (reviewing factors the courts should consider in their identification of transgender).

172 *See infra* Part III.B (articulating the need for judicial involvement as a result of consistent discrimination of transgender individuals).

173 *See infra* Part III.B (considering why transgender individuals are entitled to heightened scrutiny).

174 *See* Coffey, *supra* note 119, at 164–65 (reviewing the judiciary's acknowledgement and response to transgender individuals in the courthouse). Coffey states that "[l]ittle legal recourse is available to combat gender identity discrimination, because traditional jurisprudence requires that individuals be classified into discrete and binary categories, even when some people do not fit easily into one category." *Id.* Furthermore, there is currently no U.S. jurisprudence mechanism for handling transgender issues because the courts work "'within a paradigm positing a rigid view of mutually exclusive sexes' and are 'incapable of coping with the medical proposition that sex operates along a continuum.'" *Id.* (quoting Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 333 (1993)).

175 *See* Forbes, *supra* note 107 (considering the mannerisms generally associated with men and women). A transgender individual may also consult a physician to decide what, if any, medical treatments are available to align the individual's physical appearance with their gender identity. *Id.*

176 *See id.* (discussing transgender individuals dressing in attire that is representative of the sex with which they identify). Forbes notes that "[t]ransgender individuals often experience emotional distress if their outward appearance (i.e., clothing, physical form, or facial features) is not in accord with their gender identity." *Id. See also* Franson, *supra* note 104, at 504 (describing one transgender child, "Jazz," who was born biologically as a male but

often displays mannerisms that are typical of men and women in an effort to emulate his or her gender identification.[177] For example, females typically accompany their speech with hand gestures and men often refrain from excessive gestures with speech.[178] Moreover, common words and phrases or buzzwords can generally be attributed to a specific gender.[179] In conversation, females are prone to higher pitches, excessive detail, and imagery whereas men are more prone to lower pitches and direct conversation.[180] Therefore, features like physical appearance,

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identifies as a female) (quoting Alan B. Goldberg & Joneil Adriano, *"I'm a Girl" – Understanding Transgender Children*, ABC 20/20 (Apr. 27, 2007), http://abcnews.go.com/2020/story?id=3088298&page=1 [http://perma.cc/S266-RREC]). At age five, Jazz's parents allowed her to present herself as a female and allowed her to wear dresses and other feminine clothing outside of the home. *Id.* (citing Goldberg & Adriano).

177 *See* Forbes, *supra* note 107 (stating transgender individuals observe the mannerisms of the sex they identify with and portray those mannerisms). *See also Male Mannerisms and Posture*, FEMALE TO MALE, http://www.femaletomale.org/ftm-passing-tips/male-mannerisms/ [http://perma.cc/5KL9-PMJC] (providing several insights and tips for appearing and presenting as a male through mannerisms and posture). For example, females are more prone to crossing their legs than males are as well as shaking or tapping their foot in the air. *Id.* Also, men tend to have a stronger grip than females when shaking hands. *Id.* Additional mannerisms and postures include the following: "[m]en slouch more than females, [men] don't move their bodies forward as much when in conversation, [m]en don't smile with their mouth open as often like women do, [m]en use navigational terms such as North, South, East, and West more often than women do, [and men] have bushier eyebrows." *Id.*

178 *See Gender & Gender Identity,* PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-info/sexual-orientation-gender/gender-gender-identity [http://perma.cc/FS57-VZPA] (discussing common societal gender stereotypes). Basic gender stereotypes include personality traits, domestic behaviors, occupations, and physical appearance. *Id.* A personality trait may be that a woman is expected to be passive and submissive and a man is expected to be self-confident and aggressive. *Id.* One example of domestic behaviors is that women typically care for children and men complete household repairs. *Id.* An occupational example might be women are nurses and secretaries and men are doctors and construction workers. *Id.* Physical appearance might be women are small and graceful, while men are tall and broad-shouldered. *Id.*

179 *See* Frye & Rose, *supra* note 106, at 559 (discussing character traits to be cognizant of when representing a transgender client). Frye and Rose stress the importance of addressing a transgender client with the correct pronoun to preserve the client's dignity and respect. *Id. See also Male Mannerisms and Posture*, *supra* note 177 (explaining that men have a deeper voice compared to females); Lannie Rose, *How to Pass in 10 Not-so-Easy Steps*, LANNIEROSE (May 2006), http://www.lannierose.com/words/howtopass.htm [http://perma.cc/G84S-A72R] (contributing ideas and suggestions to appear as a male). Rose suggests developing "a female voice" noting that a "resonant male voice is [a] dead giveaway." Rose, *supra* note 179.

180 *See* Simma Lieberman, *Differences in Male and Female Communication Styles*, SIMMA LIEBERMAN ASSOCS., http://www.simmalieberman.com/articles/maleandfemale.html [http://perma.cc/4QBM-UMQR] (explaining variants between males and females when communicating). *See also* Lisa Evans, *Are We Speaking a Different Language? Men and Women's Communication Blind Spots*, STRONG FEMALE LEAD (June 11, 2014, 5:07 AM), http://www.fastcompany.com/3031631/strong-female-lead/are-we-speaking-a-different-

mannerisms, and buzzwords are necessary for the law to be cognizant of its identification of transgender persons.[181]

Comparable to sexual orientation, transgender individuals also encounter prejudice, social biases, and bullying.[182] If discrimination of this nature warrants judicial intervention for sexual orientation, it also should for transgender individuals.[183] Absent legal involvement, the safeguards currently in place, while not perfect, would be nonexistent.[184] Therefore, transgender individuals should be entitled to the same judicial

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language-men-and-womens-communication-blind-s [http://perma.cc/Q42Y-8QFX] (reviewing difference in communication styles between men and women). Common perceptions of the variations in communicating between the sexes includes the idea that women ask too many questions, lack the feeling of inclusion, wish to be viewed as a team member, and seek companionship, whereas men like "individual acknowledgement" and resolved disputes independently. *Id.*

181 *See* Forbes, *supra* note 107 (explaining the steps transgender individuals may take to pursue physical expression aligned with their gender identity); *see also* Theodore R. Burns et al., *Competencies for Counseling with Transgender Clients*, ASS'N FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ISSUES IN COUNSELING 2 (2009), http://www.counseling.org/docs/competencies/algbtic_competencies.pdf?sfvrsn=3 [http://perma.cc/PW7X-FCAN] (expressing the need for training and competencies when working with transgender clients to ensure appropriate assistance).

182 *See* Jamie Johnson, *Recognition of the Nonhuman: The Psychological Minefield of Transgender Inequality in the Law*, 34 LAW & PSYCHOL. REV. 153, 153 (2010) (acknowledging the difficulties transgender individuals face). Johnson addresses the "psychological impact felt by transgender individuals when ongoing discrimination and violence against them is too often misunderstood, ignored, and perhaps perpetuated by legislatures and the judiciary." *Id.* at 154.

183 *See* SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (establishing sexual orientation is a discriminatory basis for a peremptory challenge therefore judicial involvement through a *Batson* challenge is necessary). *See also* Ryan Goellner, *The New* Batson *Challenge, Part II: Clarifying* Windsor*'s Standard of Review,* U. CIN. L. REV. (Apr. 1, 2014), http://uclawreview.org/2014/04/01/the-new-batson-challenge-part-ii-clarifying-windsors-standard-of-review/ [http://perma.cc/E48Y-DMZN] (noting the advancement made by the Ninth Circuit in its decision to extend *Batson* to sexual orientation). Goellner suggests that because *GSK* is the first and only decision to extend *Batson* challenges to sexual orientation, it "has [the] potential to influence other federal circuits in expanding the safeguards of *Batson*." *Id.* at 3. Federal courts have addressed the rights of LGBT persons in several discriminatory situations. *See generally* Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) (holding the supervisor of an individual born male who was subsequently diagnosed with gender identity disorder and alleged discrimination against her supervisor on the basis of sex and medical condition did not have a sufficiently important governmental interest to justify termination of the employee, and thus, violated the Fourteenth Amendment); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 150–52 (N.D.N.Y. 2011) (addressing an alleged violation of the Equal Access Act Section 1983, Title IX, New York Human Rights Law and New York Civil Rights Law as it related to the treatment of a high school student and his sister based on the student's sexual orientation).

184 *See GSK*, 740 F.3d at 489 (finding sexual orientation is entitled to heightened protection under *Batson*). Because this case expanded *Batson* to transgender individuals, it is representative of one of the ongoing safeguards to consider the rights and equalities homosexuals and implement protection in the judiciary. *Id.*

involvement as sexual orientation.[185] Moreover, transgender, like sexual orientation, should be analyzed as a protected class entitled to heightened scrutiny.[186] Since *Windsor* established that rational basis review was no longer the proper level of scrutiny for claims involving sexual orientation, it too should no longer be the proper analysis for transgender.[187] Similar to sexual orientation, transgender represents a class of individuals that, according to *Windsor*, should not be tolerant of a second-class status.[188] If the Supreme Court failed to acknowledge that a legitimate government purpose was necessary when hindering the rights of individuals based on sexual orientation, then rational basis would remain the proper standard of review.[189] Therefore, because transgender is comparable to sexual

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185 *See Know Your Rights*, *supra* note 121 (advocating for the rights of transgender individuals and drawing attention to their need for legal and judicial intervention). *See also* Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 152 (2005) (discussing transgender individuals and the law). Lloyd focuses her discussion on the "dehumanizing rhetoric the law relies on to excuse doctrinally unsupportable denial of legal protection for transgender people, before parsing through the narrow room this judicial animus leaves for an injured transgender person to state a claim." *Id.* Specifically, Lloyd pursues transgender justice by analyzing the discrimination transgender individuals face. *Id.*

186 *See GSK*, 740 F.3d at 484 (finding that *Windsor* requires the court to apply heightened scrutiny to classifications based on sexual orientation); *see also Discrimination Against Transgender People*, *supra* note 109 (advocating for more protection of transgender individuals because of the ongoing discrimination). The decision to analyze sexual orientation under a more rigorous review was based on the idea that restrictions or limitations on the basis of sexual orientation should meet a legitimate government purpose to justify the restriction. *GSK*, 740 F.3d at 480–84. Because transgender persons are also restricted on the basis of their classification, they too should be entitled to a more rigorous review. *Id.*

187 *See* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (finding, but not expressly stating, sexual orientation requires something more than rational basis review).

188 *Id.* at 2693. *See also* Laverne Cox, *Beyond Second-Class Citizenship for Transgender People*, HUFF. POST (May 10, 2012, 5:12 PM), http://www.huffingtonpost.com/laverne-cox/transgender-rights_b_1506180.html [http://perma.cc/H9LS-HQD5] (explaining the Gender Expression Nondiscrimination Act ("GENDA") and articulating support for its goal—transgender equality). Cox notes that "[m]any transgender folks are fighting for our lives and basic civil rights all over [the] country." *Id.* Cox explains that GENDA has been passed for the past five years in the state assembly, but the bill has not yet been passed in the Senate. *Id.* Because the bill has yet to achieve passage in the Senate, trans individuals are still facing inequality in facets of life where other, nontransgender individuals, are not. *Id.*

189 *See Windsor*, 133 S. Ct. at 2694 (discussing the Court's concern with the public message sent by DOMA regarding the status occupied by gays and lesbians in society); *see also GSK*, 740 F.3d at 480 (explaining that in past decisions the court applied rational basis review to claims involving sexual orientation, however, on review of *Windsor*, the court now applied a heightened level of scrutiny to claims based on sexual orientation). *See generally* Phillips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997) (applying rational basis review when upholding Department of Defense and military policies that classified individuals on the basis of sexual orientation).

orientation as it relates to inequality and discrimination, the only appropriate level of scrutiny is heightened scrutiny.[190]

C. Expanding Batson *to Transgender Individuals*

Batson should be explicitly expanded to include transgender individuals.[191] Traditionally transgender and sexual orientation are coupled together and although the two concepts appear similar, they each represent distinct characteristics.[192] Since transgender and sexual orientation are both susceptible to discrimination and inequality, these individuals should be entitled to the same legal protections.[193] However, it is also because transgender and sexual orientation are comprised of distinct characteristics that the Ninth Circuit's expansion of *Batson* to sexual orientation cannot be viewed as inclusive of transgender.[194] Part III.C examines the critical differences between sexual orientation and transgender by arguing that because transgender differs from sexual orientation, transgender cannot currently be protected under *Batson*.[195]

Transgender should fall within the realm of heightened scrutiny because the courts consider immutability and history of disparate treatment in the determination of whether a class is subject to heightened scrutiny.[196] The Ninth Circuit's holding in *GSK* determined that sexual orientation would no longer be analyzed under traditional rational basis

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190 *See GSK*, 740 F.3d at 489 (holding a heightened level of scrutiny is necessary for review of sexual orientation as *Batson* challenges apply).

191 *See infra* Part III.D (proposing federal courts extend *Batson* to transgender).

192 *See infra* Part III.C (examining the distinctions between transgender and sexual orientation).

193 *See infra* Part III.D (arguing that transgender, like sexual orientation, should be covered under *Batson*).

194 *See infra* Part III.D (explaining that although transgender and sexual orientation share a history of discrimination, transgender, unlike sexual orientation, is not protected by *Batson* during voir dire).

195 *See infra* Part III.C (evaluating the distinctions between sexual orientation and transgender).

196 *See* SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (considering *Windsor* and the harm to gays and lesbians). The court points to *Windsor*'s balance of the government's interest against the harm or injury to gays and lesbians and notes, "[t]he federal statute is invalid, for no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* (quoting *Windsor*, 133 S. Ct. at 2696 (emphasis added)); *see also Windsor*, 133 S. Ct. at 2681 (stating that DOMA violates basic due process and equal protection principles). *Windsor* reiterates the Constitution's guarantee of equality "'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Id.* (quoting Dep't of Agriculture v. Moreno, 413 U.S. 528, 534–35 (2013)).

review, but instead a "heightened level of scrutiny."[197] The Ninth Circuit relied heavily on the analysis outlined in *Windsor*, which articulated "classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose."[198] Immutability describes a trait or characteristic that is beyond the individual's control.[199] Transgender is an immutable trait because gender identity establishes a psychological or physiological condition.[200] Although a transgender individual may elect to undergo procedures for permanent gender reassignment, the immutability correlates to the individual's condition of not identifying with his or her assigned sex.[201] Moreover, transgender individuals face discrimination in almost all spectrums of life, including education, housing, employment, and health care.[202] On review of factors like immutability and past discrimination, the courts have held sexual orientation is entitled to heightened scrutiny.[203] Therefore, since transgender also exhibits and satisfies these factors, these individuals should also be entitled to a heightened level of scrutiny.[204]

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197 *See supra* Part II.A.3 (reviewing the Ninth Circuit's decision in *GSK* that was heavily influenced by *Windsor*).

198 *GSK*, 740 F.3d at 482–83.

199 *See* Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 902 (2007) (describing immutability as it applies to the law and the Court's consideration for heightened scrutiny).

200 *Id. See also* Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (stating suspect class status is determined when the following four criteria are met: historical discrimination, immutability, political powerlessness, and disparate treatment that is not based on actual ability). Elkind responds to a presumed criticism of immutability as it relates to transgender, stating the "criticism is misplaced, however, because the condition of not identifying with one's own biological gender is not alterable." Elkind, *supra* note 199, at 902 & n.33 (citing *Frontiero*, 411 U.S. at 686).

201 *See* Elkind, *supra* note 199, at 902 & n.34 (clarifying what immutability means). Elkind notes that Kari Balog reviews "the Court's emphasis on group's inability to change a trait as an indicator of immutability and implying that the heredity of a trait may be of utmost importance in the analysis." *Id.* (citing Kari Balog, *Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How it Is Met*, 53 CLEV. ST. L. REV. 545, 556–57 (2005)).

202 *See supra* Part II.B.2 (addressing transgender discrimination in various aspects of life).

203 *See Frontiero*, 411 U.S. at 686–87 (addressing the criteria for immutability and acknowledging sexual orientation as a class subject to heightened scrutiny).

204 *See* Elkind, *supra* note 199, at 897 (urging the Supreme Court to classify transgender as a suspect class due to their history of discrimination and immutability). Based on the history of disparate treatment the transgender community has faced, as well as the immutability of the trait, Elkind asserts transgender should be classified as a suspect class. *Id. See also* Samantha J. Levy, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 167–68 (2002) (discussing the benefits of classifying transgender individuals as part of a "'gender-identity' class").

D. Contribution

Since the Supreme Court's 1986 decision in *Batson*, peremptory challenges and voir dire have evolved.[205] With the Ninth Circuit's recent expansion of *Batson* to include sexual orientation, given the opportunity the Supreme Court should continue the evolution of *Batson* to cover transgender individuals. Although there is currently no case before the Court where a peremptory strike was used to remove a transgender individual from the venire, solely based on that individual's gender identity, one will inevitably confront the Court.[206] No longer is a peremptory strike permissible to excuse a member of the venire where discrimination was the sole motivation for the strike.[207] The Court's articulation of the three step test for evaluating a *Batson* challenge has helped overcome racial and gender discrimination among jurors.[208] The Ninth Circuit has elected to extend the protection of a *Batson* challenge beyond race and gender to sexual orientation.[209] This recent extension is a positive advancement for proponents of homosexual equality, however transgender individuals remain unprotected by *Batson*.[210] Part III.D.1 explains why the Court's expansion of *Batson* to include transgender

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[205] *See supra* Part II.A.3 (discussing the expansion of *Batson* and its effect on race, gender, and sexual orientation).

[206] The author acknowledges the trial court would be the first to encounter the issue. However, the trial court lacks the discretion to expand *Batson* to transgender individuals because this class does not fall within the already established classifications applicable under *Batson*. Therefore, the extension of *Batson* is likely and should occur at the upper levels of the judicial hierarchy.

[207] *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (holding peremptory strikes motivated by discriminatory reasons are unconstitutional and require further inquiry).

[208] *See supra* Part II.A.2 (reviewing the *Batson* decision and the establishment of a three step test).

[209] *See* SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (extending *Batson* to sexual orientation). *See also* Goellner, *supra* note 183 (reviewing *GSK* and hypothesizing what the court's decision will mean for future litigations). Goellner explains that *GSK* is a notable decision because:

> [I]t represents a further extension of *Batson*'s growing protections, but more importantly, because it demonstrates how the Supreme Court's decision in *Windsor* invited lower federal courts to declare a standard of review for laws that classify persons based on sexual orientation and initiated a legal battle to distill the "spirit of *Windsor*" into a manageable judicial standard.

Id.

[210] *See supra* Part III.C (urging the Court to extend *Batson* to ensure equal protection during voir dire for those who identify as transgender).

individuals is the best solution.[211] Part III.D.2 combats arguments against *Batson* and its extension.[212]

This Note proposes that the Court should recognize discrimination of transgender individuals during voir dire. Developing the analytical framework to ensure equal protection to transgender individuals during a peremptory strike is difficult. However, this Note does not suggest starting from ground zero to support its goal, but rather proposes extending the already existing test established in *Batson* be extended to transgender individuals.[213] Courts are well versed in *Batson* challenges and are capable of correctly applying its analysis.[214] Thus, simply extending *Batson* to cover transgender individuals would ensure venire equality.

1. *Batson* Should be Extended to Include Transgender Individuals

The Ninth Circuit ruled a peremptory strike based on sexual orientation is discriminatory, thus a *Batson* challenge properly requires heightened scrutiny.[215] Although this ruling advances equal protection for gays and lesbians during the jury selection process, transgender

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211 *See infra* Part III.D.1 (arguing the Court's extension of *Batson* to include transgender individuals would be the best solution to eliminate juror discrimination of that class).

212 *See infra* Part III.D.2 (combatting criticisms of *Batson* and the Court's expansion of *Batson*).

213 *See Discrimination Against LGBT Jurors Remains Legal*, *supra* note 133 (insinuating that the government's failure to take a position results in ongoing discrimination of LGBT jurors). "[U]nder the Obama administration, the Department of Justice has declined to urge judges to bar discrimination against LGBT potential jurors." *Id. See generally* Batson v. Kentucky, 476 U.S. 79, 96–99 (1968) (establishing a three part test to evaluate potentially discriminatory peremptory challenges).

214 *See* Sean G. Overland, *The Shrinking Strike Zone: Avoiding Problems During Jury Selection in the Age of* Batson, THE JURY EXPERT (May 2010), http://www.thejuryexpert.com/wp-content/uploads/OverlandTJEMay20101.pdf [http://perma.cc/LE88-C8QT] (identifying the following six major cases involving *Batson* and the judiciary's expansion of its principles: J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (applying *Batson* to strikes based on gender); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (expanding *Batson* to strikes made by criminal defendants); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (finding that *Batson* is applicable to civil litigation); Hernandez v. New York, 500 U.S. 352, 371–72 (1991) (extending *Batson* to peremptory strikes based on ethnicity); Powers v. Ohio, 499 U.S. 400, 415–16 (1991) (expanding *Batson* protections to defendants of any race); and Batson v. Kentucky, 476 U.S. 79, 100 (1986) (banning peremptory challenges based solely on juror's race)). As depicted in these six cases, the Court has attained experience in dealing with *Batson* challenges. *Id.*

215 *See* SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (holding that a peremptory strike on the basis of someone's sexual orientation is discriminatory, therefore, a *Batson* challenge is appropriate).

individuals are still unrecognized.[216] The inclusion of transgender in an already established standard that is applicable to other highly discriminated classes of persons is not only proper, but also expected.[217] Extending *Batson* to transgender individuals will help eliminate the use of peremptory strikes motivated by bias or prejudice.[218] Without the inclusion of transgender in *Batson* challenges, individuals who identify as transgender will have no recourse when exempted from jury service because of his or her gender identification.[219]

Historically, the Court elected to expand *Batson* to groups that were subject to discrimination.[220] Comparable to race, gender, and sexual orientation, transgender also endures inequality and encompasses characteristics that are unchangeable.[221] Transgender individuals are susceptible to discrimination in various environments including academic

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[216] *See id.* (discussing that sexual orientation is subject to heightened scrutiny and a peremptory challenge purely based on sexual orientation is impermissible). The *GSK* court says nothing regarding transgender individuals, but instead focuses their discussion only on sexual orientation. *Id.* Moreover, the court discusses and evaluates the impact the conduct had on the "gay community." *Id.* at 476. The court's inherent language is representative of their intent only to include sexual orientation, or rather gay and lesbian, in *Batson* challenges. *Id.*

[217] *See* Eric Lesh, *From Marriage Recognition to the Jury Box, the* Windsor *Decision Continues to Extend the Promise of Equality*, LAMBDA LEGAL (Jan. 30, 2014), http://www.lambdalegal.org/blog/20130130_windsor-continues-to-extend-promise-of-equality [http://perma.cc/NFL8-RQCN] (discussing the Ninth Circuit decision in *GSK* to extend *Batson* to sexual orientation is one step toward advancement of equality for gender identity and sexual orientation).

[218] *See* DRESSLER & MICHAELS, *supra* note 43, at 234 (explaining how the implementation of *Batson* was to help eliminate attorney bias and discrimination geared toward potential jurors); *see also* Ogletree, *supra* note 73, at 1101 (noting that *Batson* has been viewed as a "major accomplishment in the effort to eliminate this form of jury discrimination").

[219] *See Juror Non-Discrimination Act/Jury ACCESS Act*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/juror-non-discrimination-act-jury-access-act [http://perma.cc/7B4Y-VY7M] (introducing the Juror Non-Discrimination Act and Jury Access for Capable Citizens and Equality in Service Selection ("ACCESS") Act as proposed legislation that would prohibit attorneys from seeking to strike a potential federal juror based on their sexual orientation or gender identity). The Jury Non-Discrimination Act was reintroduced in the 113th Congress in the House of Representatives by Representative Susan Davis, a Democrat from California, on January 18, 2013. *Id.* Senators Jeanne Shaheen, a Democrat from New Hampshire, Sheldon Whitehouse, a Democrat from Rhode Island, and Susan Collins, a Republican from Maine, reintroduced the Jury ACCESS Act in the Senate on January 22, 2013. *Id.* The proposed legislations are a result of the Supreme Court's failure to address the discrimination in jury service based on sexual orientation and gender identity. *Id.* Discrimination of LGBT individuals "undermines the justice system and could hurt crime victims by preventing a fair trial by a jury of their peers." *Id.*

[220] *See supra* Part II.A.3 (outlining the Court's expansion of *Batson*).

[221] *See supra* Part II.B.1 (identifying characteristics of transgender individuals, including immutable traits).

settings, the workplace, and receiving health care benefits.[222] The crux of a *Batson* challenge is the assurance of equal protection. In the seminal case, *Batson v. Kentucky*, the Court relied heavily on equal protection principals in its decision to establish *Batson* challenges.[223] Inequality is a strong precursor in the decision to extend *Batson*. As transgender individuals encounter frequent discrimination, the Court should extend *Batson* to cover transgender.

Moreover, transgender is an immutable trait.[224] Everyone is assigned a gender at birth, but of key importance among transgender individuals is the internal conflict such a person faces when he or she does not identify with their assigned sex. The inability to control, or change, the sex an individual is designated at conception is universal. However, unlike those who identify with and are accepting of their assigned sex, transgender individuals do not share the same contentment. Transgender individuals may elect to undergo medical procedures to alter their assigned anatomical biological sex, but that is not what the immutability is attributable to.[225] Specifically, the immutable characteristic is the psychological and physiological trait.[226] As such, the Court should extend *Batson* to include transgender individuals because, in addition to a history of discrimination, transgender is an immutable trait.

Finally, as transgender individuals become more prevalent in society and the media, so too should the safeguards that would ensure their equal protection in the judicial process. The Ninth Circuit recognized the need to extend *Batson* to cover sexual orientation, but sexual orientation and transgender are not mutually exclusive.[227] As a result, the Ninth Circuit's decision has no impact on transgender individuals. While the Ninth Circuit's decision might serve as a conduit for the advocacy of gays and lesbians, transgender individuals will continue to fall outside the scope of *Batson*. The Court must continue its evolution of *Batson* to include transgender individuals. Without the Court's expansion, there will be no remedy available to transgender persons removed from juries, even in the face of blatant discrimination.

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222 *See supra* Part II.B.2 (discussing the discrimination of transgender individuals in schools, work environments, health care settings, and prisons).

223 *See supra* Part II.A.2 (reviewing the Court's decision in *Batson*).

224 *See supra* note 204 and accompanying text (identifying transgender as an immutable trait).

225 *See supra* Part II.B.1 (defining transgender and establishing that medical procedures are available to alter one's anatomical sex).

226 *See supra* note 204 and accompanying text (acknowledging the immutability of transgender individuals).

227 *See supra* notes 107–11 and accompanying text (distinguishing sexual orientation from transgender individuals).

2. Commentary

Batson is pivotal in ensuring that minorities are treated equally during the jury selection process.[228] This Note proposes the Court continue to evolve and expand *Batson* again to include transgender individuals. Including this immutable class in *Batson*'s protections will help prevent venire discrimination against a group of persons that too frequently face inequality. While this proposition advocates for the extension of *Batson*, there are critics of *Batson* and its progeny.

Since the *Batson* decision, peremptory challenges have been heavily scrutinized.[229] Even in the decision itself, Justice Marshall's concurrent opinion advocated for "eliminating peremptory challenges entirely."[230] Although discrimination is a sincere concern, some suggest *Batson* is not a useful means to prevent discrimination.[231] However, without *Batson*, there is no regulation to ensure discrimination was not the motivating factor for using a peremptory challenge.[232] Absent the Court's development of *Batson* challenges, individuals could be excluded from serving on juries without reason; a right that every U.S. citizen should be

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228 *See supra* Part II.A.1 (explaining the *Batson* decision and its impact on equality among the venire).

229 *See* Batson v. Kentucky, 476 U.S. 79, 105 (1986) (showing that Justice Marshall agreed with the Court's decision that the use of a peremptory challenge to remove blacks from a jury is a clear Equal Protection violation, however, allowing the defendants to challenge the racially discriminatory use of a peremptory challenge is an insufficient remedy); *see also* Alschuler, *supra* note 38, at 157 (noting that *Batson*, while an appropriate remedy at the time for addressing racial discrimination, inevitably became problematic); *Jury – Should The Peremptory Challenge Be Abolished?* (2015), http://law.jrank.org/pages/7925/Jury-SHOULD-PEREMPTORY-CHALLENGE-BE-ABOLISHED.html [http://perma.cc/QXR7-E44P] (discussing critiques of *Batson* challenges). One of the biggest arguments against *Batson* is that it deprives the attorney of total discretion and turns a peremptory challenge into a challenge for cause, which requires a full justification for its use. *Jury – Should The Peremptory Challenge Be Abolished?*, *supra* note 229. Other arguments include the increased cost of litigation and the breeding ground for discrimination. *Id.*

230 Jameson B. Carroll et al., *Striking Back Against Peremptory Strikes*, TORT TRIAL & INS. PRACTICE SELECTION AM. BAR ASS'N (2010), http://www.kslaw.com/imageserver/KSPublic/Library/publication/4-09%20ABA.pdf [http://perma.cc/S5CY-5DC8] (quoting *Batson*, 476 U.S. at 107 (1986)).

231 *See* DRESSLER & MICHAELS, *supra* note 43, at 236 (pointing out Justice Marshall's critique of *Batson*). Justice Marshall did not disagree with the anti-discrimination principles of *Batson*, but instead argued that the "Court has consistently underestimated the interest litigants will have in attempting to evade *Batson* with pretexts . . . [by underestimating] the interest litigants have in continuing to discriminate by race and gender if they can get away with it." *Id.* (quoting Ogletree, *supra* note 72, at 1104).

232 *See* Jonathan B. Mintz, Note, Batson v. Kentucky*: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1029 (1987) (discussing discrimination and peremptory challenges before *Batson*).

able to participate in. *Batson* is necessary to ensure all individuals regardless of race, gender, sexual orientation, or transgender identification can fulfill their civic duties and play an essential role in the justice system—serving on a jury. While *Batson* is not a perfect resolution to the issue of discrimination in judicial proceedings, the test still provides some barrier to voir dire discrimination, and thus, is necessary.[233]

Additionally, critics contend the Ninth Circuit's extension of *Batson* to sexual orientation was unnecessary. Unlike race and gender, sexual orientation is not always transparent, making the expansion of *Batson* to sexual orientation more complicated than its former extensions.[234] Even further, a question that could elicit whether a member of the venire is gay is one that would be impermissible.[235] However, *Batson* needs to be applicable to provide protection when the issue does arise. The stigma that is attached to sexual orientation provokes ongoing discrimination of that class and as such, warrants *Batson*'s protection during voir dire.[236] For these reasons, the Ninth Circuit's decision to expand *Batson* for claims involving sexual orientation during jury selection was proper.[237] However, it did not go far enough as those who identify as transgender are still without *Batson* protection.

Finally, critics contend that transgender falls under the category of sexual orientation. This contention is misplaced because the former does

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[233] *See* Ogletree, *supra* note 73, at 1101 (stating *Batson* has been viewed as a "major accomplishment" in the effort to eliminate jury discrimination).

[234] *See Race and Sexual Orientation: Commonalities, Comparisons, and Contrasts Relevant to Military Policy*, http://psychology.ucdavis.edu/faculty_sites/rainbow/html/military_race_comparison.html [http://perma.cc/A8MH-QJU6] (outlining differences between race and sexual orientation).

[235] *See* Paul R. Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 U.C.L.A. L. REV. 231, 246 (1998) (stating an attorney may not directly inquire as to a potential juror's sexual orientation). Lynd discusses the difficulty of identifying an individual's sexual orientation based on stereotypical behavior. *Id.* Moreover, Lynd concludes that the "only accurate way to know a person's sexual orientation remains an individual's self-declaration." *Id.* at 245.

[236] *See Pro & Con Arguments: "Should Gay Marriage Be Legal?"*, PROCON.ORG, http://gaymarriage.procon.org [http://perma.cc/6F7Z-TZFM] (reviewing both stances on the issue of gay marriage, indicative of the lack of uniform acceptance in U.S. society). *See also* Seth Forman, *Five Arguments Against Gay Marriage: Society Must Brace for Corrosive Change*, NY DAILY NEWS (June 23, 2011, 4:00 AM), http://www.nydailynews.com/opinion/arguments-gay-marriage-society-brace-corrosive-change-article-1.131144 [http://perma.cc/N6CQ-UEMS] (discussing anti-homosexual unions). Forman notes the following five arguments: (1) religious freedom; (2) rights of children; (3) whether traditional marriage; (4) education; and (5) husbands. *Id.*

[237] *See* Goellner, *supra* note 183 (describing the Ninth Circuit's decision to extend *Batson* to sexual orientation as "notable").

not correspond to the latter or vice versa.[238] If transgender is coupled with gay, lesbian, and bisexual, then it would already be covered under a *Batson* challenge per the Ninth Circuit's decision. This argument fails because sexual orientation and transgender are not mutually exclusive.[239] Due to a lack of understanding regarding transgender individuals, many assume sexual orientation encompasses transgender, but this assumption is incorrect. Since there are distinct differences between the two classifications, the assumption that the Ninth Circuit's ruling to expand *Batson* to sexual orientation also covers transgender is misguided.[240] The term transgender cannot be found anywhere in the Ninth Circuit's decision.[241] In addition, the Ninth Circuit did not impliedly include, or intend to include, transgender with sexual orientation.[242] Moreover, because transgender is poorly understood and frequently discriminated against, it should be entitled to protection under *Batson*.

In sum, *Batson* should be expanded to include transgender individuals. If the Court fails to evolve and expand *Batson*, venire discrimination on the basis of one's gender identity will continue to be permissible. Following the reasoning applied to race, gender, and sexual orientation, transgender individuals more than satisfy the requirements to warrant *Batson* protection.

IV. CONCLUSION

Batson made it possible for minorities to be protected from blatant discrimination during voir dire. The establishment that race, gender, and sexual orientation are classifications that cannot be used as a reason to remove a member from the venire was substantial. While these groups may find solace in the judiciary's acknowledgement of discrimination, transgender individuals cannot share that sentiment. Currently, transgender individuals face an alarmingly high rate of discrimination in

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238 *See supra* Part II.B.1 (explaining what it means to identify as a transgender individual compared to what sexual orientation identifies).

239 *See supra* Part II.B (distinguishing transgender from sexual orientation and asserting the two classes are not equivalent).

240 *See generally* SmithKline Beecham Corp. ("GSK") v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (extending *Batson* to sexual orientation after rigorous review of *Windsor*). The court focuses only on sexual orientation in its decision to extend *Batson*. *Id.*

241 *See id.* at 471–89 (reviewing the court's published opinion of which there is no mention or use of the term transgender).

242 *Id.* at 489. The Ninth Circuit did not include a comparison or distinction between transgender and sexual orientation. *Id.* at 471–89. Instead, the court based its holding on *Windsor* and the evaluation of sexual orientation. *Id.* This is suggestive that the court did not imply that transgender would be encompassed in its decision to extend *Batson*. *GSK*, 740 F.3d at 489.

nearly all aspects of life. Furthermore, transgender individuals are susceptible to inequality because of inadequate or absent legal barriers. On consideration of only one of these facts, the Court should be inclined to expand *Batson* to cover transgender individuals. However, transgender individuals present more than just discriminatory treatment in several realms of life. The fact that transgender individuals are still widely misunderstood should by itself alarm the judiciary and render the need for action. *Batson* is an already established and workable solution. Therefore, the Court should formally recognize transgender as a class in need of protection under *Batson* as it has previously done with race, gender, and sexual orientation.

In the hypothetical described at the beginning of this Note, the judge reminded GSK's counsel that Abbott's peremptory strike against Juror C—a self-identified transgender male—is not subject to a *Batson* challenge. Even in light of the blatant discrimination that prompted Abbott's strike, Juror C had no recourse. Although the purpose of *Batson* is to ensure venire equality, only those who fall within a selected class identified by the Supreme Court may utilize *Batson*'s protection. If Abbott's counsel had removed Juror C because he was African American, the only female among males, or even on the basis of his homosexuality, then *Batson* would apply. However, Abbott's counsel removed Juror C because he openly identified as a transgender male, and this action, while deplorable, was permissible. If the Court had previously extended *Batson* to include transgender individuals, Juror C would have remained on the jury and exercised his civic duty. Accordingly, the Court should acknowledge the existence of discrimination toward transgender individuals during voir dire and expand *Batson* to include that class of people as this Note proposes. Until the Court extends *Batson* to include individuals like Juror C, those who identify as transgender may continually be peremptorily removed during voir dire and denied the opportunity to participate in the judicial system.

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