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## Behind the Venire: Rationale, Rewards and Ramifications of Heightened Scrutiny and the Ninth Circuit's Extension of Equal Protection to Gays and Lesbians During Jury Selection in *SmithKline v. Abbott*

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# BEHIND THE VENIRE: RATIONALE, REWARDS AND RAMIFICATIONS OF HEIGHTENED SCRUTINY AND THE NINTH CIRCUIT'S EXTENSION OF EQUAL PROTECTION TO GAYS AND LESBIANS DURING JURY SELECTION IN *SMITHKLINE v. ABBOTT*

**Abstract:** On January 21, 2014, in *SmithKline v. Abbott*, the U.S. Court of Appeals for the Ninth Circuit held that heightened scrutiny applies to classifications based on sexual orientation, and equal protection forbids striking jurors because they are gay or lesbian. The Ninth Circuit interpreted the Supreme Court's recent analysis in *United States v. Windsor* as applying heightened scrutiny, rather than rational basis review that has historically been used to assess issues surrounding sexual orientation. The Ninth Circuit also reasoned that given the historical exclusion and pervasive discrimination of gays and lesbians, this group requires equal protection. This Comment argues that while this ruling in theory represents a victory for equal rights, the practical effects could prove minimal and even potentially problematic.

## INTRODUCTION

In the last two decades of the twentieth century, courts started to utilize the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution to prohibit discrimination against potential jurors because of their race or gender.<sup>1</sup> In 2014, the U.S. Court of Appeals for the Ninth Circuit held in *SmithKline v. Abbott* that heightened scrutiny applied to classifications based on sexual orientation and that consequently equal protection also prohibited an attorney from striking a would-be juror because he was a gay man.<sup>2</sup>

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<sup>1</sup> See U.S. CONST. amend. XIV § 1 (“[No state shall] deny to any person within its jurisdiction the equal protection of the laws.”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (prohibiting discrimination in the form of peremptory strikes against jurors based on gender); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (prohibiting discrimination in the form of peremptory strikes against jurors based on race). These courts have held that a heightened level of scrutiny applies to the classifications of race and gender and that given their historical exclusion from fundamental aspects of society coupled with pervasive stereotyping surrounding each group, striking jurors based on these classifications violated the Equal Protection Clause. See *J.E.B.*, 511 U.S. at 136.

<sup>2</sup> 740 F.3d 471, 474 (9th Cir. 2014). Although the case dealt with only a gay male juror, the opinion indicates that heightened scrutiny and equal protection apply to classifications based on sexual orientation in general, and on numerous occasions mentions both gays and lesbians. See *id.*

This Comment discusses why the decision in *SmithKline* is a landmark case for the gay rights movement.<sup>3</sup> The extension of heightened scrutiny and equal protection to classifications based on sexual orientation ensures that gays and lesbians receive equal treatment and the opportunity to influence important societal decisions by serving as jurors.<sup>4</sup> At the same time, the decision's impact may prove limited as applied to juror striking, and could even put gay and lesbian jurors in potentially uncomfortable positions by exposing and discussing their sexuality.<sup>5</sup> Part I of this Comment discusses the history and current status of the law regarding equal protection and heightened scrutiny as they apply to jury selection.<sup>6</sup> Part II analyzes the Ninth Circuit's reasoning in *SmithKline* to determine that heightened scrutiny and equal protection extend to gays and lesbians.<sup>7</sup> Finally, Part III argues that this decision could yield both benefits and burdens for gay and lesbian jurors and the systems in which they serve, and proposes the total elimination of peremptory strikes as the most effective means to quash discrimination against minority groups in jury selection.<sup>8</sup>

## I. EQUAL PROTECTION AND HEIGHTENED SCRUTINY AS APPLIED TO JUROR STRIKING

Part A of this section will examine the U.S. Supreme Court's precedent regarding discrimination during the jury selection process based on race and gender, respectively.<sup>9</sup> Part B of this section will discuss the inexplicit level of scrutiny applied to classifications based on sexual orientation by the Supreme Court in recent decisions.<sup>10</sup>

### A. *The Batson Precedent*

In 1986, in *Batson v. Kentucky*, the U.S. Supreme Court held that the privilege of peremptory challenges in selecting a jury is subject to the guar-

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It is worth noting that the opinion does not mention other members of the sexual orientation spectrum, including bisexual jurors. *See id.*

<sup>3</sup> *See id.*; *infra* notes 9–88 and accompanying text.

<sup>4</sup> *See SmithKline*, 740 F.3d at 485.

<sup>5</sup> *See id.* at 486–87; *see also* Vikram Amar & Alan Brownstein, *The Ninth Circuit, in SmithKline v. Abbott Labs, Bars Lawyers From Removing Gay/Lesbian Jurors*, UC DAVIS SCHOOL OF LAW FACULTY BLOG (Jan. 31, 2014), <http://facultyblog.law.ucdavis.edu/post/the-ninth-circuit-in-smithkline-v-abbott-labs-bars-lawyers-from-removing-gaylesbian-jurors.aspx>, *archived at* <http://perma.cc/U4SJ-575T> (noting that objections to peremptory strikes based on sexual orientation could require jurors to affirm or deny their membership to an LGBT group).

<sup>6</sup> *See infra* notes 9–34 and accompanying text.

<sup>7</sup> *See infra* notes 35–59 and accompanying text.

<sup>8</sup> *See infra* notes 60–83 and accompanying text.

<sup>9</sup> *See infra* notes 11–24 and accompanying text.

<sup>10</sup> *See infra* notes 25–33 and accompanying text.

antees of the Equal Protection Clause.<sup>11</sup> A peremptory challenge is a party's ability to strike, or remove, a juror from the venire, or jury pool, with no explanation or reason.<sup>12</sup> Further, *Batson* made it constitutionally impermissible to strike a juror based on race.<sup>13</sup>

*Batson* established a three-pronged test to evaluate discrimination in jury selection.<sup>14</sup> First, the party challenging the peremptory strike must establish a prima facie case of intentional discrimination.<sup>15</sup> Second, the striking party must give a non-discriminatory reason for the strike.<sup>16</sup> Third, the court must decide whether the challenger has demonstrated purposeful discrimination.<sup>17</sup> If all three prongs are satisfied, Equal Protection demands that the strike be reversed.<sup>18</sup>

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<sup>11</sup> *Batson*, 476 U.S. at 84 (reaffirming the principle that “‘deliberate denial . . . on account of race of participation of jurors in the administration of justice violates the equal protection clause’” (quoting *Swain v. Alabama*, 380 U.S. 202, 203–04 (1965))); see U.S. CONST. amend. XIV §1 (“[No state shall] deny to any person within its jurisdiction the equal protection of the laws”).

<sup>12</sup> BLACK'S LAW DICTIONARY 261–62 (10th ed. 2014) (defining peremptory challenge, also referred to as a “peremptory” or “peremptory strike,” as “one of a party’s limited number of challenges that do not need to be supported by a reason” and venire as “a panel of persons selected for jury duty and from among whom the jurors are to be chosen”). Rule 47 of the Federal Rules of Civil Procedure governs Jury Selection. See FED. R. CIV. P. 47(c). Jurors can be excused from the venire in two primary ways. See *id.* First, a juror may be excused for good cause, meaning if a judge or lawyer can identify any reason that would prevent that juror from being able to weigh evidence impartially. See *id.* Second, a juror can also be excused without cause via a peremptory challenge, which entitles each party in a civil case to three peremptory challenges. 28 U.S.C. § 1870 (2012). Peremptory challenges allow an attorney to strike a juror for nothing more than a feeling or, as described by Justice Rehnquist in his *Batson* dissent, a “seat-of-the-pants instinct.” 476 U.S. at 138 (Rehnquist, J., dissenting). The facts in *Batson* illustrate the power of the peremptory challenge: a black man was indicted with charges of second-degree burglary and receipt of stolen goods. *Id.* at 82 (majority opinion). On the first day of the trial, the judge conducted the *voir dire* (a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on the jury), removed certain jurors for cause, and then permitted the attorneys for each side to use their allotted peremptory challenges. See *id.* at 82–83. The prosecutor removed all four black members of the venire, resulting in the selection of an all-white jury. See *id.*

<sup>13</sup> *Batson*, 476 U.S. at 89.

<sup>14</sup> *Id.* at 97–98.

<sup>15</sup> *Id.*; see *SmithKline*, 740 F.3d at 476. Generally it is easy to establish a prima facie case. See *Johnson v. California*, 545 U.S. 162, 169 (2005) (explaining that the burden on the challenging party is not an onerous one and that the trial judge need only draw an inference that discrimination had occurred). Challengers make their prima facie case by producing evidence that the prospective juror is a member of a cognizable group, that counsel used a peremptory strike against the individual, and that the totality of the circumstances raises an inference that the strike was motivated by the characteristic in question. See *SmithKline*, 740 F.3d at 476.

<sup>16</sup> See *Batson*, 476 U.S. at 97–98; *SmithKline*, 740 F.3d at 476. The Court has stated that the “non-discriminatory reason” must be a “clear and reasonably specific” explanation of a “legitimate reason” for striking the juror. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1980).

<sup>17</sup> See *Batson*, 476 U.S. at 97–98; *SmithKline*, 740 F.3d at 476. Purposeful discrimination was easier to establish in *Batson*, where all of the peremptories used by the prosecutor were against

In 1994, in *J. E. B. v. Alabama ex rel T.B.*, the Supreme Court expanded *Batson* protection to strikes based on gender.<sup>19</sup> The Court set firm limits by narrowing the scope of its holding: peremptory strikes are still permissible against any group or class of individuals normally subject to ‘rational basis’ review.<sup>20</sup>

The issue for the Ninth Circuit in *SmithKline* becomes whether heightened scrutiny or rational basis review applies to classifications based on sexual orientation.<sup>21</sup> Rational basis review is the lowest form of scrutiny that courts use to determine a law’s constitutionality and requires only that any legislative action be based in some rational governmental interest.<sup>22</sup>

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black men. *See Batson*, 476 U.S. at 82–83. This prong is harder to prove when only one member of a suspect class is on the venire, as in *SmithKline*. *See* 740 F.3d at 474.

<sup>18</sup> *See Batson*, 476 U.S. at 100; *SmithKline*, 740 F.3d at 479. Because of the influence of the *Batson* decision, courts refer to the act of challenging a discriminatory peremptory strike as a “*Batson* Challenge.” *See* BLACK’S LAW DICTIONARY, *supra* note 12 at 261–62; *see also, e.g.*, *Sorto v. Herbert*, 497 F.3d 163, 174 (2d Cir. 2007) (upholding a district court’s denial of a “*Batson* Challenge”); *United States v. Brown*, 352 F.3d 654, 671 (2d Cir. 2003) (upholding district court’s denial of religion-based “*Batson* Challenge”); *Morning v. Zapata Protetin (USA) Inc.*, 128 F.3d 213, 216 (4th Cir. 1997) (holding that “*Batson* Challenge” raised after venire was excused was too late). Because it was a criminal trial, *Batson* was initially restricted to these types of peremptory challenges that were made by criminal prosecutors. *See* 476 U.S. at 82–83. In 1991, in *Edmonson v. Lee Concrete Co.*, the Supreme Court held that these types of peremptory challenges—those which attempted to exclude a juror because of race—were also impermissible in private civil actions. 500 U.S. 614, 616, 631 (1990).

<sup>19</sup> *J.E.B.*, 511 U.S. at 129. The *Batson* inquiry had previously been restricted to race-based allegations of discrimination. *See SmithKline*, 740 F.3d at 479. The Court in *J.E.B.* offered some guiding policy reasons for curbing discriminatory peremptory strikes by highlighting the potential effects of discrimination on a trifecta of afflicted groups: the litigants, the community and the individual jurors. 511 U.S. at 129. The Court further noted:

The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceeding . . . . The community is harmed by the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders . . . . All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.

*See id.* at 140.

<sup>20</sup> *J.E.B.*, 511 U.S. at 143 (noting that parties may still exercise their peremptory challenges to remove groups or classes subject to rational basis review).

<sup>21</sup> *See SmithKline*, 740 F.3d at 474.

<sup>22</sup> *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 357 (2001) (holding that only rational basis test applies to state actions toward the disabled); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (requiring states to show an “exceedingly persuasive justification” for the classifications based on gender and thus applying heightened scrutiny). To survive rational basis review and be deemed constitutional, the regulation in question need only be “rationally related” to a legitimate government interest. *See Cleburne*, 473 U.S. at 440. Examples of classifications subject to rational basis review are intelligence and physical disability. *See id.* The Court in *Cleburne* explains that

State actions that classify based on race and gender, however, are subject to heightened forms of scrutiny: gender is subject to intermediate scrutiny which requires the state action to be substantially related to an important government interest, while race is subject to strict scrutiny—the highest form—which requires the state action to be narrowly tailored to serve a compelling government interest.<sup>23</sup> These two heightened levels of scrutiny set a higher bar to meet than the threshold ‘rational basis,’ and therefore it is harder to prove that a law is unconstitutional under a rational basis standard than either heightened scrutiny standard.<sup>24</sup>

### *B. An Opaque Ruling from the Supreme Court in Windsor Allows for Interpretation in SmithKline*

Until 2013, the Ninth Circuit had applied rational basis review to matters of sexual orientation.<sup>25</sup> In 2013, in *United States v. Windsor*, the Supreme Court declared the Defense of Marriage Act’s definition of marriage (a legal union between a man and a woman) unconstitutional, implying that a higher level of scrutiny than rational basis review applied to classifications based on sexual orientation.<sup>26</sup> The Supreme Court in *Windsor* did not

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sex, unlike these classifications, usually has no impact on the individual’s ability to perform or contribute to society. *See id.* at 440–41. Therefore, there is no reason for any law to exclude them, save prejudice. *See id.*

<sup>23</sup> *See Cleburne*, 473 U.S. at 440–41. To survive intermediate scrutiny and be deemed constitutional, the regulation in question needs to be substantially related to an important government interest. *See id.* To survive strict scrutiny—the highest bar of constitutional scrutiny—the regulation must be narrowly tailored to serve a compelling government interest. *See id.* Courts believe that qualities like race and gender have little to no bearing on a legitimate state interest and are therefore solely discriminatory in nature. *See id.*

<sup>24</sup> *See SmithKline*, 740 F.3d at 480–81.

<sup>25</sup> *Id.* at 480. Most instances saw the Ninth Circuit apply rational basis review when evaluating military policies classifying individuals based on sexual orientation. *See, e.g., Witt v. Dep’t of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (applying rational basis review when a female Air Force nurse was suspended because of a relationship with another woman); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) (applying rational basis review when Navy service member attempted to prevent his discharge under “Don’t Ask, Don’t Tell” after revealing he was gay); *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 674 (9th Cir. 1990) (applying rational basis review when class action challenged Department of Defense policy of conducting expanded background checks into gay and lesbian applicants for top-secret security clearances).

<sup>26</sup> *See United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (“What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional . . . .”); Ian Bartrum, *The Ninth Circuit’s Treatment of Sexual Orientation: “Defining Rational Basis Review with Bite,”* 112 MICH. L. REV. FIRST IMPRESSIONS 142, 146 (2014) (discussing *SmithKline*, *Windsor*, and the Ninth Circuit’s heightened scrutiny treatment of sexual orientation generally); Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 166 (2014) (discussing whether *Windsor* applied the First Circuit’s “rational-basis-with-extra-bite”). *But see Windsor*, 133 S. Ct. at

explicitly require a heightened scrutiny standard when analyzing classifications based on sexual orientation, but the ambiguity of the ruling provided ample room for circuit interpretation.<sup>27</sup>

In 2014 in *SmithKline v. Abbott*, the Ninth Circuit took the opportunity to interpret the Supreme Court's level of scrutiny in *Windsor*.<sup>28</sup> Originating in the U.S. District Court for the Northern District of California as an anti-trust case, SmithKline Beecham Corporation sued Abbott Laboratories for alleged abuse of a licensing agreement for an HIV drug in a way that drove up prices and simultaneously funneled business to Abbott's own product.<sup>29</sup> At trial, Abbott used its first peremptory strike to rid the venire of its only self-identified gay member.<sup>30</sup> SmithKline's attorney challenged the strike under the precedent established in *Batson*, but was unsuccessful.<sup>31</sup>

The appeal presented the Ninth Circuit with two major issues: (1) whether heightened scrutiny applied to classifications based on sexual orientation and (2) whether, if heightened scrutiny applied, equal protection should bar an attorney from making a peremptory strike of a gay or lesbian

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2706 (Scalia, J., dissenting) (pointing out the majority's failure to draw a "strict-vs.-rational-basis scrutiny" distinction and instead relying on due process principles).

<sup>27</sup> See 133 S. Ct. at 2694; see also *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (holding Indiana and Wisconsin bans against same-sex marriage unconstitutional even if it is not subject to heightened scrutiny because the governments have failed to supply even a reasonable basis). But see *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014) (applying rational basis review, and not heightened scrutiny, to uphold Michigan's refusal to acknowledge same-sex marriages). In the *DeBoer* opinion, the Sixth Circuit notes the "light touch" that judges should use in reviewing laws under this standard. 772 F.3d at 404. "So long as judges can conceive of some "plausible" reason for the law—any plausible reason, and even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens." See *id.*

<sup>28</sup> See *Windsor*, 133 S. Ct. at 2682; *SmithKline*, 740 F.3d at 481.

<sup>29</sup> *SmithKline*, 740 F.3d at 474. SmithKline argued that Abbott violated the implied covenant of good faith and fair dealing, the antitrust laws and North Carolina's Unfair Trade Practices Act. *Id.* The pricing of HIV medications is a matter of significant concern among the gay community. See *id.* The CDC reports that gay and bisexual men were disproportionately affected by HIV than any other group in the United States. HIV Among Gay and Bisexual Men, CENTERS FOR DISEASE CONTROL AND PREVENTION (last visited Feb. 26, 2015), <http://www.cdc.gov/hiv/risk/gender/msm/facts/index.html>, archived at <http://perma.cc/L3FF-VETF>. Further, in 2010, gay and bisexual men accounted for seventy-eight percent of infections among newly infected men. See *id.*

<sup>30</sup> *SmithKline*, 740 F.3d at 474. During jury questioning, the potential juror's sexual orientation was allegedly revealed when he referenced his "partner" and then followed up by referring to his partner as "he." *Id.*

<sup>31</sup> See *id.*; see also *Batson*, 476 U.S. at 84. In challenging the strike of the only openly gay venire member, SmithKline's attorney argued that equal protection prohibited peremptory strikes on the basis of sexual orientation. *SmithKline*, 740 F.3d at 474. The district judge denied SmithKline's *Batson* Challenge to the peremptory strike. *Id.* The judge provided that she would reconsider her decision should Abbott strike another gay man. See *id.*

juror based on their sexual orientation.<sup>32</sup> The Ninth Circuit held in the affirmative for both of the issues.<sup>33</sup>

## II. USING *WITT* TO INTERPRET *WINDSOR*: APPLYING HEIGHTENED SCRUTINY AND EQUAL PROTECTION TO GAYS AND LESBIANS

*SmithKline v. Abbott Laboratories* stands for two propositions: that heightened scrutiny (as opposed to rational basis review) applies to classifications based on sexual orientation and, second, that equal protection prohibits peremptory strikes based on sexual orientation in jury selection.<sup>34</sup> Part A of this section will discuss the first point regarding heightened scrutiny, while Part B will discuss the second point regarding equal protection.<sup>35</sup>

### A. The Ninth Circuit's Heightened Scrutiny Conclusion

Because courts still permit peremptory strikes based on classifications that are subject to rational basis review, the degree of scrutiny applied to classifications based on sexual orientation is crucial.<sup>36</sup> In *SmithKline*, the Ninth Circuit analyzed the Supreme Court's decision in *United States v. Windsor* to determine what level of scrutiny applies.<sup>37</sup> The Ninth Circuit used its own test from a 2008 case, *Witt v. Dep't of the Air Force*, to determine that the Supreme Court used heightened scrutiny when considering the DOMA question in *Windsor*.<sup>38</sup>

<sup>32</sup> See *SmithKline*, 740 F.3d at 474.

<sup>33</sup> See *id.*

<sup>34</sup> See *SmithKline Beecham Corp. v. Abbott Lab.*, 740 F.3d 471, 474 (9th Cir. 2014); *infra* notes 36–57 and accompanying text.

<sup>35</sup> See *infra* notes 36–57 and accompanying text.

<sup>36</sup> See *SmithKline*, 740 F.3d at 480; *supra* note 12 and accompanying text (defining peremptory strike); *supra* note 22 and accompanying text (defining rational basis review).

<sup>37</sup> *SmithKline*, 740 F.3d at 481; *supra* note 23 and accompanying text (defining the different levels of scrutiny); see also Amar & Brownstein, *supra* note 5 (discussing the Ninth Circuit's interpretation of "*Windsor* scrutiny").

<sup>38</sup> *SmithKline*, 740 F.3d at 474; *Witt v. Dep't of the Air Force*, 527 F.3d 806, 810–11 (9th Cir. 2008). In *Witt*, a female Air Force reservist was suspended from duty because of her sexual relationship with another woman. 537 F.3d at 809. She brought due process and equal protection challenges. *Id.* The Ninth Circuit used the Supreme Court's reasoning in *Lawrence v. Texas* and concluded that because *Lawrence* relied only on substantive due process and not on equal protection, it affected substantive due process cases, but not equal protection rules. See *id.* at 822; see also *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003). Therefore, the Ninth Circuit began applying heightened scrutiny to due process issues but continued to apply rational basis review to equal protection cases. See *SmithKline* 740 F.3d at 480. What Judge Reinhardt in *SmithKline* takes from *Witt*, however, is the strategy for interpreting what level of scrutiny the Supreme Court used when analyzing matters of sexual orientation, when they have not explicitly stated the level. See *id.* In other words, *Witt* gives a method for inferring the level of scrutiny the Supreme Court deems appropriate. See *id.*; *Witt*, 527 F.3d at 809.



In 2008, in *Witt*, the Ninth Circuit established a three-part test to discern the level of scrutiny used by the Supreme Court when the Court is not explicit.<sup>39</sup> The first prong asks whether the Supreme Court considered post-hoc rationalizations (or the actual purposes for) the law in question.<sup>40</sup> The second prong asks whether or not there is a legitimate state interest to justify the harm that the law might cause.<sup>41</sup> The final prong requires an investigation into the cases cited in the opinion, and whether they applied the heightened scrutiny or rational basis test.<sup>42</sup>

Applying the three-part test in *Witt*, the Ninth Circuit in *SmithKline* held that the scrutiny deployed in *Windsor* was indeed heightened scrutiny.<sup>43</sup> The Ninth Circuit concluded that the first part of this test was satisfied because of the *Windsor* opinion's extensive consideration of the actual purposes of DOMA.<sup>44</sup> Further, the Ninth Circuit concluded that the second prong of the test was satisfied because the Court focused heavily on the balancing of the state's interest in DOMA and the harm imposed on gays and lesbians.<sup>45</sup> According to the Ninth Circuit, this balancing indicated something more than rational basis, since it suggested a more rigorous analysis

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<sup>39</sup> See *SmithKline*, 740 F.3d at 480.

<sup>40</sup> See *id.* The *Windsor* opinion devotes many pages to detailing the actual purposes of DOMA, which indicates that the Court was employing a heightened level of scrutiny. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). The Supreme Court in *Windsor* quoted extensively from the legislative history of DOMA, including the House Report, in an effort to unveil the design, purpose and effect or the "essence" of the law. *Id.* Typically, under a rational basis of review, the Court may analyze the hypothetical reasons for a law. See *SmithKline*, 740 F.3d at 481. In *Windsor*, the Court went beyond hypothetical reasons and looked at Congress's "avowed purpose," which it determined was to protect marriage from the immorality of homosexuality. See 133 S. Ct. at 2693. Thus, the Court's analysis in *Windsor* is beyond that of rational basis review. See *id.*

<sup>41</sup> See *SmithKline*, 740 F.3d at 480.

<sup>42</sup> See *id.* at 483.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 482.

<sup>45</sup> See *id.* at 480. Whereas rational basis review typically is unconcerned with inequality that results from a state action, heightened scrutiny is evidenced by a balancing of the inequality and the state interest. *Id.* at 482. In *Windsor*, the Court spent considerable time weighing this balance. *Id.*; see also *Windsor*, 133 S. Ct. at 2693. As the *SmithKline* opinion notes, the words "harm" or "injury" do not typically appear in court decisions applying rational basis review. 740 F.3d at 482. The court in *Windsor*, however, used these words repeatedly, and considered the "effect" of DOMA eight times. *Id.* Additionally, *Windsor* discusses the "resulting injury and indignity" and the "disadvantage" to gays and lesbians as a result of the law. 133 S. Ct. at 2681. In the eyes of the Court, these considerations signaled a heightened scrutiny that went beyond traditional rational basis. *SmithKline*, 740 F.3d at 482. Professors Amar and Brownstein argue that in some circumstances, insistence on "legitimate" purposes for upholding a law is consistent with an application of rational basis review, rather than heightened scrutiny. Amar & Brownstein, *supra* note 5. The professors argue that "legitimate" applies to all standards of review and that any law that is deemed "illegitimate" may undermine the validity of the law, but outside of a scrutiny analysis. See *id.* Typically with intermediate-level scrutiny or strict scrutiny, an "important" or "compelling" state interest is required. See *id.*

of harm to the group than would be required under rational basis.<sup>46</sup> Thus, part two of the test was satisfied.<sup>47</sup> Finally, the Ninth Circuit found the third prong to be the least important factor because *Windsor* relied on two cases that apply heightened scrutiny, but also on one case that applied rational basis.<sup>48</sup> The Ninth Circuit therefore concluded that, although the last factor does not strongly sway one way or the other, *Windsor* scrutiny had required more than the traditional rational basis review.<sup>49</sup>

### *B. Expanding Batson to Extend Equal Protection to Gays and Lesbians*

After determining that heightened scrutiny applied, the second fundamental question in *SmithKline* dealt with whether or not *Batson*-type strikes should be expanded to include sexual orientation.<sup>50</sup>

The Court drew on policy reasoning established in *J. E. B. v. Alabama ex rel. T.B.*, which extended the holding in *Batson v. Kentucky* to include discrimination against women.<sup>51</sup> Two primary factors animated the argument in *SmithKline* in favor of bolstering protection: (1) the historical exclusion of gays and lesbians from democratic institutions; and (2) the pervasiveness of stereotypes surrounding the group.<sup>52</sup> Both of these factors also applied to women in *J. E. B.*<sup>53</sup>

The *SmithKline* opinion fleshed out the history of discrimination against gays and lesbians in the past century and today.<sup>54</sup> The Ninth Circuit

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<sup>46</sup> See *SmithKline*, 740 F.3d at 483.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* Perhaps these analytic leaps of faith reflect *SmithKline* author Judge Stephen Reinhardt's reputation for progressive decisions. See Ward Farnsworth, Note, *The Role of Law in Close Cases: Some Evidence from the Federal Courts of Appeals*, 86 B.U. L. REV. 1083, 1090 (2006) (noting that the Supreme Court has reversed Reinhardt's decisions with frequency unparalleled by most other Circuit Court judges).

<sup>50</sup> See *SmithKline*, 740 F.3d at 474.

<sup>51</sup> See *id.* at 484; *supra* note 11 and accompanying text (discussing the *Batson* holding); *supra* note 19 and accompanying text (discussing the holding in *J.E.B.*).

<sup>52</sup> See *SmithKline*, 740 F.3d at 484.

<sup>53</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–37 (1994). The opinion in *J.E.B.* focused on the long historical exclusion of women in the legal and democratic processes: women could not hold office, vote, bring suits in their own name, or serve on, let alone be struck from, juries. See *id.* The Court asserted that allowing peremptory strikes based on gender perpetuates the invidious archaic stereotypes that explained this historical exclusion. *Id.*

<sup>54</sup> See *SmithKline*, 740 F.3d at 484–85. Gays and lesbians have faced discrimination in the realms of employment, immigration and military service, among others. See *id.* The present battle for marriage equality represents the level of legal discrimination that still persists in many states. See *Winning the Freedom to Marry, Progress in the States, FREEDOM TO MARRY* (Mar. 25, 2015), <http://www.freedomtomarry.org/states/>, archived at <http://perma.cc/JL5P-2ZQM>. A handful of states still have laws or constitutional amendments that deny same-sex couples the right to marry. See *id.* The Supreme Court will take on this issue in 2015. See Robert Barnes, *Supreme Court Agrees to hear Gay Marriage Issue*, WASH. POST (Jan. 16, 2015) <http://www.washington>

maintained that allowing strikes based on sexual orientation would perpetuate the stereotypes frequently associated with gays and lesbians.<sup>55</sup> Permitting strikes based on sexual orientation would reinforce these stereotypes and send a message to the public that gays and lesbians cannot adequately fulfill their civic duty as jurors.<sup>56</sup> The combination of historical exclusion and invidious stereotypes shaped the basis for the Ninth Circuit's opinion that there was a serious need to protect the rights of gay and lesbian jurors.<sup>57</sup>

### III. THE NINTH CIRCUIT'S DECISION IN *SMITHKLINE*: PROS, CONS, AND AN ALTERNATIVE SOLUTION

This Section argues that although the precedent set in *SmithKline* theoretically has the positive effect of ensuring gay and lesbian access to the jury system, it could introduce privacy issues and ultimately fall short of eliminating discrimination via the peremptory strike.<sup>58</sup> Part A of this section

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post.com/politics/courts\_law/supreme-court-agrees-to-hear-gay-marriage-issue/2015/01/16/865149ec-9d96-11e4-a7ee-526210d665b4\_story.html, archived at <http://perma.cc/SG26-RHMN>.

<sup>55</sup> See *SmithKline*, 740 F.3d at 486; see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 982–83 (N.D. Cal. 2010) *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (“Well-known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed and incapable of forming long-term intimate relationships. Other stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality. No evidence supports these stereotypes.”); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 829 (2014) (“For the better part of a century, stereotyped conceptions of homosexuals (particularly gay men) depicted them as sexually predatory, dangerous to children and antithetical to the family.”).

<sup>56</sup> See *SmithKline*, 740 F.3d at 486.

<sup>57</sup> See *id.* The Court eloquently iterated the important policy arguments in favor of this move in the opinion:

Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.

*Id.* at 475.

<sup>58</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486–87 (9th Cir. 2014) (urging caution in extending *Batson* strikes to sexual orientation “in light of significant sensitivities and privacy interests at stake”). In *SmithKline*, the Ninth Circuit cited a California state court opinion that noted that “No one should be ‘outed’ in order to take part in the civic enterprise which is jury duty.” See *id.* (citing *People v. Garcia*, 92 Cal. Rptr. 2d 339, 347 (2000)). Nonetheless, the Ninth Circuit reaffirmed that the challenges posed by extending *Batson* to sexual orientation should not sway the court to allow these types of peremptory strikes. See *id.* at 487. Furthermore, “prudent courtroom procedures” that already exist to address sensitive topics will alleviate the concerns. See *id.*

describes why applying heightened scrutiny to issues surrounding discrimination against gays and lesbians in jury selection is essential to safeguard their voice from being silenced.<sup>59</sup> Part B of this section highlights the privacy issues that challenging a strike based on sexual orientation might engender.<sup>60</sup> Finally, Part C of this section proposes an alternative solution: to eliminate the peremptory strike altogether in order to more effectively preclude nefarious attorneys from using them to further discriminatory agendas.<sup>61</sup>

*A. The Numerical Necessity of Heightened Scrutiny for Gay and Lesbian Representation on Juries*

Applying heightened scrutiny to questions of sexual orientation is critical (at least in the context of jury selection) because of the numerical imbalance between straight people and non-straight people.<sup>62</sup> The impact of striking gays and lesbians from a venire can be profound because gays and lesbians, like blacks and other non-white races, are outnumbered minorities without a numerically equal counterpart (as men are to women, and vice versa).<sup>63</sup> Unlike with gender, these groups are not subject to what academics call the “neutralizing effect.”<sup>64</sup> The neutralizing effect occurs when opposing peremptory challenges neutralize equally represented sides, leaving the venire with roughly the same amount on either side.<sup>65</sup> With gender, the theory works perfectly: the attorney for one side eliminates as many women as she can while the attorney for the opposing side eliminates as many men as she can, leaving the venire with roughly the same number of men and wom-

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<sup>59</sup> See *infra* notes 62–69 and accompanying text.

<sup>60</sup> See *infra* notes 70–76 and accompanying text.

<sup>61</sup> See *infra* notes 77–88 and accompanying text.

<sup>62</sup> See Amar & Brownstein, *supra* note 5 (discussing the minority status of gays and lesbians that facilitates their complete eradication from the venire).

<sup>63</sup> See *id.*; Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 370 (1992). Professor Broderick argues that the peremptory challenge is “habitually employed to discriminate against citizens on the basis of invidious and atavistic classifications” and “subverts the representativeness” of the jury by removing minorities. See Broderick, *supra*. In particular, Broderick recognizes that historically all blacks called for jury duty could be “easily precluded from reaching the jury box” by means of the peremptory challenge. See *id.* at 384.

<sup>64</sup> See Amar & Brownstein, *supra* note 5.

<sup>65</sup> See *id.*; Brian A. Howie, *A Remedy Without a Wrong: J.E.B. and the Extension of Batson to Sex-Based Peremptory Challenges*, 52 WASH. & LEE L. REV. 1725, 1752 (1995) (noting that since men and women represent roughly half the population, the venire will reflect that amount and both sides will be equally subjected to peremptory challenge from either side and thus the system as a whole does not treat each side differently).

en.<sup>66</sup> Thus the neutralizing effect has evened out the playing field and in theory neither gender is numerically prejudiced by the peremptory strikes.<sup>67</sup>

Because gays and lesbians represent a minority group, they do not have the theoretical benefit of the neutralizing effect.<sup>68</sup> Considering societal percentages reflected in the jury pool, the attorney for one side could use peremptory strikes to eliminate all the gays and lesbians from the venire with ease, resulting in an entirely straight jury and the stark absence of any gay or lesbian voice.<sup>69</sup>

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<sup>66</sup> See Amar & Brownstein, *supra* note 5; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 159 (1994) (Scalia, J. dissenting). In his dissent, Justice Scalia argued that the jury selection process did not discriminate against women because each side struck both sexes in equal numbers and is thus “evenhanded”: for each man struck by the government, the petitioner’s lawyer struck a woman. See *J.E.B.*, 511 U.S. at 159. Justice Scalia went on to explain that this pattern does not display systemic sex-based discrimination, but rather each party’s desire to achieve a favorable jury for their side. See *id.*; see also Howie, *supra* note 65, at 1752 (explaining that *J.E.B.* provides evidence that the system does not classify between men and women in that both sides struck both men and women in “almost identical proportions”). This assumes the split was fifty-fifty to begin with, which may not always be the case. See *J.E.B.*, 511 U.S. at 159.

<sup>67</sup> See Amar & Brownstein, *supra* note 5; see also *J.E.B.*, 511 U.S. at 129. In *J.E.B.*, the state used nine out of ten peremptories to remove male jurors, while the petitioner used all but one peremptory to remove female jurors. 511 U.S. at 129. Nevertheless, due to a disproportionate amount of women venire members, the resulting jury was all female. See Howie, *supra* note 65, at 1752 (crediting the all-female empanelment in *J.E.B.* to the “luck of the jury panel draw”).

<sup>68</sup> See Amar & Brownstein, *supra* note 5; Kathryn M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 251 (2011). Young describes the silencing effect of not applying *Batson* protection to gays and lesbians: “the side opposing a gay litigant is empowered to dismiss the jurors (gays and lesbians) who might most effectively guard against anti-gay arguments behind the jury room’s closed doors.” See Young, *supra*, at 251; see also Paul R. Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 239 (1998) (providing the example of the trial for the gay-bashing killing of John O’Connell in San Francisco in 1985, in which defense counsel sought to identify all gay and lesbian jurors in order to systematically exclude them). The same is true for racial minorities. See Amar & Brownstein, *supra* note 5. Professors Amar and Brownstein explain using a numerical example. *Id.* If a jurisdiction is comprised of seventy-five percent whites and twenty-five percent racial minorities, the jury pool will often roughly reflect those percentages. See *id.* So, a proportional drawing of twelve would-be jurors would contain nine whites and three non-whites. See *id.* If each side is allotted three peremptory strikes, each side could begin aggressively removing people based on race and the result would be the elimination of all the non-whites from the venire, leaving seven white people. See *id.* Assuming the now empty spots are filled evenly again to reflect the demographic percentages of the community, we add 1.5 non-whites and 4.5 whites, bringing out totals to 10.5 whites and 1.5 non-whites going into the trial. See *id.* This is clearly a very calculated example, but can serve to reflect the type of systemic issue that discriminatory peremptory strikes can have on minority groups and their representations on juries. See *id.*

<sup>69</sup> See Amar & Brownstein, *supra* note 5; see also Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 755 (1993) (arguing that eliminating peremptory strikes could solve the problem of litigants disproportionately excluding minority venire members and thereby produce a more heterogeneous jury).

*B. When the Jury Is Not Out: Potential Drawbacks to Heightened Scrutiny and Equal Protection*

Although the opinion in *SmithKline* signifies a jurisprudential victory for the gay rights movement, the reality of courtroom practice will prove that this decision provides little protection against discrimination.<sup>70</sup> The key distinction between this case and *Batson v. Kentucky* and *J. E. B. v. Alabama ex rel. T.B.* is that unlike those cases in which the would-be juror's classification (as an African-American or a woman, respectively) is usually perceptible, sexual orientation is not a characteristic that can always be easily identified.<sup>71</sup> In fact, a juror's classification as gay or lesbian is typically unrecognizable unless the person reveals it, either explicitly or inferentially, as happened in *SmithKline*.<sup>72</sup>

The often hidden nature of sexual orientation presents some problems with regard to discrimination claims.<sup>73</sup> First, in order for an attorney to

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<sup>70</sup> See *SmithKline*, 740 F.3d at 486; see also David Herr & Steve Baicker-McKee, *Jury Trials—Batson Analysis*, 29 FED. LITIGATOR, Mar. 2014, at 17, 17. In the “litigation tips” section of this brief review of the *SmithKline* decision, the authors note that the attorney using the peremptory strike failed to articulate any non-discriminatory reason for the strike. Herr & Baicker-McKee, *supra*, at 17. This suggests that attorneys wishing to discriminate based on sexual orientation need only prepare a non-discriminatory reason to circumvent this problem. See *id.*; Young, *supra* note 68, at 245. Young argues that while the case for extending *Batson* protection to gays and lesbians is strong and would be an improvement on the current absence of protection, it would be “glaringly inadequate” to protect jurors’ equal protection rights. Young, *supra* note 68, at 261. Young warns that in practice it would raise problems and “ultimately prove unfaithful to the *Batson* court’s vision,” and describes how the process of questioning jurors about LGBT identity could prove “absurd and insulting.” See *id.* at 258; see also Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 452 (2014) (discussing practical issues).

<sup>71</sup> *Supra* note 11 and accompanying text (discussing the *Batson* holding); *supra* note 19 and accompanying text (discussing the holding in *J.E.B.*); see also, Shay, *supra* note 70, at 452 (noting that *Batson* challenges based on sexual orientation pose practical issues since a prospective juror’s sexual orientation or transgender status, unlike race, are not included on the jury questionnaire). Shay also discusses the issue of whether a striking attorney discriminated against prospective jurors because of their membership to a LGBT group or because of a perception that the juror is LGBT. See Shay, *supra* note 70, at 452; see also Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 DRAKE L. REV. 669, 680 (2011) (describing the “hidden identity” of sexual minorities, how it is typically unidentifiable “visually, by accent, or surname, and how many heterosexuals cannot identify gay men or lesbians who do not disclose their sexual orientation); Lynd, *supra* note 68, at 267 (noting that classification by sexual orientation is an uncertain, subjective assessment, and that even the jurors themselves may be unsure about their precise sexual orientation); Young, *supra* note 68, at 255 (whereas race and gender are sometimes readily apparent, gays and lesbians are forced to choose whether or not to disclose their sexual identity, a concealable characteristic).

<sup>72</sup> See *SmithKline*, 740 F.3d at 474. The juror in *SmithKline* referred to his “partner” multiple times and used the pronoun “he” during the *voir dire*. *Id.* The juror never explicitly told the judge or the attorney for either side that he was a gay man. See *id.*

<sup>73</sup> See Amar & Brownstein, *supra* note 5. Professors Amar and Brownstein note that it is hard enough to show discrimination when the juror’s membership to the class is obvious. See *id.* It is

make a discriminatory peremptory strike based on sexual orientation, he or she would have to know (or presume to know) that person's sexual orientation.<sup>74</sup> Therefore, it would be necessary to tease this information out of the jurors through questioning that would likely be uncomfortable, especially for jurors who do not wish to expose their sexual orientation to the court.<sup>75</sup> Second, a *Batson* Challenge against one of these discriminatory strikes could invite a barrage of inquiries that could thrust a juror's sexuality into the center of a court hearing.<sup>76</sup>

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not an easy task for even a skilled litigator to prove that the opposing counsel struck a black person because she was black or a woman because she was a woman, and these are characteristics that are outwardly apparent. *See id.* But see Anna N. Martinez, *Striking Jurors Based on Sexual Orientation Is Discriminatory*, 91 DENV. U. L. REV. ONLINE 71, 74 (2014), <http://www.denverlawreview.org/online-articles/2014/4/10/striking-jurors-based-on-sexual-orientation-is-discriminator.html>, archived at <http://perma.cc/UPM8-KLB3>. In outlining the effects of the *SmithKline* decision, Martinez asserts that jurors need not "out" themselves, but rather a *Batson* Challenge could be raised "where the constellation of information from juror questionnaires and *voir dire* permits the parties to adduce the juror's classification." Martinez, *supra*, at 74.

<sup>74</sup> *See SmithKline*, 740 F.3d at 476. *Batson* precedent requires that the party challenging the peremptory strike establish a prima facie case of intentional discrimination. *See id.* The adjective "intentional" presupposes knowledge of the juror's class membership on the part of the attorney employing the discriminatory strike. *See id.* This is axiomatic for race and gender, but not always so for sexual orientation. *See id.*; Amar & Brownstein, *supra* note 5.

<sup>75</sup> *See* Amar & Brownstein, *supra* note 5. On the other hand, the decision in *SmithKline* could have the opposite effect. *See SmithKline*, 740 F.3d at 476. It may incentivize attorneys to refrain from asking any sexual orientation-related questions, so as to preserve the ability to strike a juror without appearing to do so for discriminatory reasons. *See id.* One loophole in the discriminatory peremptory protections is the ease with which an attorney can fabricate a non-discriminatory reason for the strike. *See* Adam Liptak, *Court to Decide if Lawyers Can Block Gays from Juries*, N.Y. TIMES SIDEBAR (July 29, 2013), <http://www.nytimes.com/2013/07/30/us/court-weighs-exclusion-of-jurors-because-theyre-gay.html?src=xps>, archived at <https://perma.cc/YL5T-C8H3?type=pdf>. In *SmithKline*, the attorney for Abbott made the faulty step of failing to provide another reason for striking the gay juror. *See* 740 F.3d at 475. For example, the fact that the juror previously worked at the Ninth Circuit or that he had friends who were afflicted with HIV/AIDS were reasonable grounds for striking the juror. *See id.* Justice Marshall expressed his discomfort with this issue in his *Batson* concurrence, stating that if an attorney can so easily generate a non-racial explanation for the strike, the Court's protection might prove "illusory." *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

<sup>76</sup> *See SmithKline*, 740 F.3d at 486–87. This could be avoided by careful regulation and judicial intervention, however. *See id.* California has had a law banning discrimination against gays and lesbians in jury selection since 2001. CAL. CODE CIV. P. 231.5 ("A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."); *see also* *People v. Garcia*, 92 Cal. Rptr. 2d, 339, 347 (2000) (making clear that "no one can be excluded because of sexual orientation . . . [and] no one should be allowed to inquire about it"). The court in *Garcia* further noted: "If it comes out somehow, as it did here, the parties will doubtless factor it into their jury selection decisions, just as they factor in occupation, education, body language, and whether the juror resembles their stupid Uncle Cletus. But there is no reason to allow inquiry about it." 92 Cal. Rptr. 2d, at 347.

### C. A Preferable Solution: Eliminating Peremptory Strikes Completely

Justice Marshall's concurrence in *Batson* advocates a more radical and effective solution: eliminate peremptory strikes completely.<sup>77</sup> His opinion questions an attorney's right to cut a juror by using an "arbitrary and capricious species of [a] challenge," which has traditionally been a hallmark of the American jury selection process.<sup>78</sup> There is no constitutional right to peremptory challenges, and the Supreme Court has reiterated the fact that withholding them does not impair a person's right to an impartial jury and a fair trial.<sup>79</sup> Striking the peremptory challenge would theoretically have no significant effect on the formation of the venire, because the attorney still has the option to excuse a juror by bringing a challenge for cause.<sup>80</sup> The attorney need only explain her reasoning as to why that juror would be unfit to weigh evidence impartially.<sup>81</sup>

Furthermore, growing evidence indicates that the *Batson* method of preventing discriminatory peremptory challenges is ineffective, leading some to believe that disposing of them may be the only way to truly quell discrimination.<sup>82</sup> In 2005, in *Miller-El v. Dretke*, Justice Breyer's concurrence outlined

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<sup>77</sup> See *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring). Although recognizing the "historic step towards eliminating the shameful practice" of racial discrimination in jury selection achieved in *Batson*, Justice Marshall nonetheless declares in his concurrence: "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system." See *id.* at 106.

<sup>78</sup> See *Miller-El v. Dretke*, 545 U.S. 231, 272 (2005) (quoting 4 W. BLACKSTONE, COMMENTARIES \*346).

<sup>79</sup> See *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring); see, e.g., *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919); see also Broderick, *supra* note 63 (asserting that peremptory strikes are "not a privilege of constitutional dimension," despite its reputation as a "vital" part of the impartial jury system).

<sup>80</sup> See FED. R. CIV. P. 47(c); see also Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996). Professor Melilli argues that peremptory challenges largely have served as excuses for inadequate functioning of the challenge for cause and an opportunity to employ ugly group stereotypes. See Melilli, *supra*, at 503. He compares the lawyer using peremptory challenges to "a child in a candy store with a pocketful of change and a commitment to leave the store without any cash." *Id.*

<sup>81</sup> See Melilli, *supra* note 80, at 503.

<sup>82</sup> See *Batson*, 476 U.S. at 102–04 (Marshall, J., concurring). Justice Marshall's concurrence highlights a number of cases in which the striking of black jurors is "both common and flagrant." *Id.*; see, e.g., *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975); *McKinney v. Walker*, 394 F. Supp. 1015, 1017–18 (D.S.C. 1974); *United States v. McDaniels*, 379 F. Supp. 1243, 1282 (E.D. La. 1974). One of the most egregious examples was a cite to a prosecutor's instruction book used in Dallas County, Texas that instructed prosecutors to eliminate "any member of a minority group," including "Jews, Negroes, Dagos, Mexicans . . . no matter how rich or how well educated." See *Batson*, 476 U.S. at 102–04. The book was effective: between 1983 and 1984, prosecutors in the county used peremptory strikes on 405 of 467 eligible black jurors, reducing the odds of a black person sitting on a jury to one in ten, versus one in two for a white person (quoting DALL.



the holes in the *Batson* process.<sup>83</sup> Namely, Justice Breyer asserts that attorneys are free to use strikes that fall below *Batson*'s prima facie discrimination requirement, that they can easily tender a non-discriminatory reason for the strike, and that it requires judges to engage in awkward and fruitless questioning to find discrimination that could be invisible to the judge and even the attorney.<sup>84</sup>

Studies echo Justice Breyer's concerns.<sup>85</sup> A survey conducted around the same time as the *Miller-El* decision revealed that of 113 Federal Appellate cases reviewing race-neutral explanations under *Batson*, the courts found the allegedly non-race-based explanation proffered by the attorney sufficient in 109, or ninety-six percent, of the cases.<sup>86</sup> Other studies confirm this statistic and reiterate the critique that *Batson* fails to create any substantial hurdle for attorneys intending to discriminate during jury selection, not to mention those who discriminate unknowingly because of unintentional biases.<sup>87</sup> Moreover, surveys that tracked the opinions of practicing attorneys revealed that many believe that *Batson* challenges prove futile in preventing discrimination.<sup>88</sup>

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MORNING NEWS, Mar. 9, 1986). *See id.* But see Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution to Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J. L. & PUB. POL'Y 323, 324 (2013). Professor Griebat agrees that *Batson* challenges have proven inadequate, easy to circumvent and are only a "watered down version" of a challenge for cause. *See* Griebat, *supra*, at 324. However, he argues that instead of eliminating peremptory challenges, states should require them to be made by use of a blind questionnaire to reduce gender or racial biases. *See id.*

<sup>83</sup> *See Miller-El*, 545 U.S. at 272.

<sup>84</sup> *See id.* Justice Breyer also highlighted the juror grading systems that pervade modern trial preparation, assigning and deducting points to jurors based on their demographic characteristics in order to collect friends and weed out enemies. *See id.* As a final point, Justice Breyer cites England's success at holding fair trials without peremptory challenges. *Id.*

<sup>85</sup> *See* Eric N. Einhorn, *Batson v. Kentucky and J.E.B. v. Alabama ex rel. T.B.: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 189 (1994); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1009 (1996).

<sup>86</sup> Einhorn, *supra* note 85, at 189. These courts allowed both objective and subjective explanations that relate to a variety of factors, some of which are vague: employment, education, age, housing, marital status, crimes, employment of relatives, appearance, language skills, eye contact, intuition and attentiveness. *See id.* at 189–94; *see also* Griebat, *supra* note 82, at 332 (polling thirty-five cases from the Kansas Supreme and Appellate courts, in which only four *Batson* challenges succeeded).

<sup>87</sup> Montoya, *supra* note 85, at 1009 (highlighting results of 1994 survey of trial lawyers indicating that while *Batson* precedent may have helped educate responsible attorneys about risks of discrimination during jury selection, it does little to thwart lawyers intending to discriminate, still less for those who do so unconsciously).

<sup>88</sup> *See id.*

## CONCLUSION

The *SmithKline* decision should be heralded as a victory for fairness and equality. The extension of heightened scrutiny and equal protection to matters of sexual orientation represents a tremendous step for the courts in the quest to provide an inclusive environment for all people. Furthermore, the protection that *SmithKline* provides for gay and lesbian jurors in particular is paramount for ensuring that the jury room hears these voices. Nevertheless, practical issues of demonstrating discrimination, identifying sexual orientation, and potentially “outing” jurors temper the victory. Peremptory strikes provide the ammunition in a loaded weapon against which *Batson* armor has proven inadequate. Abolishing the peremptory strike—and the venire discrimination it perpetuates—would be the most effective way to advance the march towards equal rights in the jury-selection system.

JAMES LOBO

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