

# NOTE

## Beyond Comparison: Practical Limitations of Implementing Comparative Juror Analysis in the Context of Sexual Orientation

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### ABSTRACT

*Serving on a jury is an important civic duty. As such, the exclusion of potential jurors on the basis of their race, gender, or other discriminatory characteristics violates their rights under the Equal Protection Clause of the Fourteenth Amendment, according to *Batson v. Kentucky* and its progeny. This Note proposes replacing the practice of comparative juror analysis with increased deference to trial courts to determine an attorney's intent in striking a particular juror. This Note supports this proposal by exploring the Ninth Circuit's recent decision in *SmithKline Beecham Corp. v. Abbott Laboratories* and its implications for *Batson*'s three-part test to challenge a discriminatory peremptory strike. Specifically, this Note focuses on how the Ninth Circuit's decision highlights the practical limitations of conducting a comparative juror analysis for "nonvisible" protected classes.*

*Comparative juror analysis became central to the three-part *Batson* test following the Supreme Court's decision in *Miller-El v. Dretke*. In that case, the Court emphasized that trial judges should effectuate *Batson*'s third prong by comparing a struck juror with "nonstruck" panelists to determine if the reason proffered for the removal was pretextual. But this process is problematic because it assumes that a person has a "categorical identity" that is easily identifiable to the public.*

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Even prior to the Ninth Circuit's extension of *Batson*, this aspect of comparative juror analysis presented challenges. First, comparative juror analysis does not address how to treat nonvisible—and therefore not-easily-identifiable—traits. For example, comparative juror analysis fails to articulate how to treat persons who may be multiracial and who still may be struck for discriminatory reasons. Second, comparative juror analysis fails to articulate whose perspective is considered (e.g., if multiracial jurors identify as “white,” but the litigants identify them as “black”).

These shortcomings are particularly relevant when *Batson*'s protections are extended to sexual orientation. Specifically, because comparative juror analysis assumes that protected traits are visibly apparent, this prong fails to address the nonvisible nature of sexual orientation. This is true both for the struck juror, who must be a “member” of the protected class to meet *Batson*'s first prong, and for the entire panel, whose treatment must be compared to that of the struck juror to determine if the proffered reason for the peremptory strike was pretextual. With this in mind, this Note proposes eliminating the use of comparative juror analysis and, instead, proposes that greater deference be given to trial courts to determine the intent of the attorney exercising the strike.

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## INTRODUCTION

*“The reality of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate . . . . By requiring trial courts to be sensitive to the . . . discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice.”*<sup>1</sup>

During voir dire, trial judges often conduct brief interviews with potential jurors (or “veniremen”).<sup>2</sup> These interviews usually focus on the venireman’s ability to serve impartially as a juror and can involve invasive questioning about a person’s past experiences, including “religious beliefs, drinking habits, jobs, hobbies, and prior experience with lawyers.”<sup>3</sup> During one such interview in *SmithKline Beecham Corp. v. Abbott Laboratories*,<sup>4</sup> a case involving two pharmaceutical companies in dispute over an HIV drug’s licensing agreement, Juror B self-identified as gay.<sup>5</sup> Specifically, Juror B stated that “his ‘partner’ studied economics and investments” and subsequently “referred to his partner three times by using the masculine pronoun, ‘he.’”<sup>6</sup> No other jurors self-identified as gay.<sup>7</sup>

Although Juror B also referenced knowing persons with HIV and stated that he took either “an Abbott or a GSK medication” during voir dire, neither side attempted to remove Juror B for cause.<sup>8</sup> Instead, Abbott used a peremptory strike to remove Juror B.<sup>9</sup> When SmithKline challenged the strike and argued that *Batson v. Kentucky*<sup>10</sup> prohibited discrimination on the basis of sexual orientation, Abbott provided no reason for the strike and instead chose to rely on the

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1 *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

2 See 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, 157–58 (1989).

3 *Id.* at 158. These interviews can also be extremely time-consuming. See *id.* at 157 (“In one notorious case, lawyers examined more than 1000 prospective jurors over a four month period before finding twelve who could try the defendant.”).

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

5 See *id.* at 474.

6 *Id.*

7 See *id.* at 476.

8 See *id.* at 474–75.

9 See *id.* at 475. Unlike “for cause” strikes where litigants petition a judge to remove jurors “whenever there is sound reason to consider him or her biased” (perhaps based on their knowledge of a witness, an attorney, or a conflict of interest), peremptory strikes traditionally allowed litigants to remove potential jurors without any given reason. See Alschuler, *supra* note 2, at 202–03.

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

argument that *Batson's* protections did not extend to sexual orientation.<sup>11</sup>

Peremptory challenges can be used in either civil or criminal proceedings and allow litigants to strike veniremen without a showing of cause.<sup>12</sup> For most of its history, the essence of the challenge was that it could be “exercised without a reason stated, without inquiry and without being subject to the court’s control.”<sup>13</sup> But, beginning in 1986, the Supreme Court reversed course.<sup>14</sup> *Batson v. Kentucky* stands for the notion that peremptory strikes cannot be used to support discrimination in ways that the Equal Protection Clause otherwise prohibits.<sup>15</sup> However, *Batson's* narrow holding only protected jurors from being struck on the basis of race in a criminal context by the government,<sup>16</sup> and the Court later imposed subsequent limitations to prevent discriminatory strikes from being used by the defense in criminal trials,<sup>17</sup> in the civil context,<sup>18</sup> and to extend *Batson's* protections to gender discrimination.<sup>19</sup> Decided in 2014, *SmithKline Beecham Corp.* is the first federal appellate case to extend *Batson's* protections to sexual orientation.<sup>20</sup>

*SmithKline Beecham Corp.* is controversial from two perspectives: (1) it established that sexual orientation is subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amend-

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

12 See *infra* Part I. The challenges received the name “peremptory” because litigants did not need to provide any reason or explanation for their use. Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 961 n.1 (1998).

13 *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

14 See generally *Batson*, 476 U.S. at 84–89 (overruling *Swain*, 380 U.S. at 221–22).

15 See *id.* at 87 (holding that peremptory challenges used to exclude jurors on the basis of race violated not only the rights of the accused, but also the rights of potential jurors).

16 See *id.* at 82–84, 89. *Batson's* holding was, in fact, so narrow that it only protected against jurors of the same race as the accused from being struck. See *id.* at 86. Starting with *Powers v. Ohio*, the Court affirmed a juror’s independent right not to be excluded from a jury based on race. See *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (“To bar petitioner’s claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.”).

17 See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding a juror’s right not to be excluded on the basis of race protects against strikes exercised by both the prosecution and the defense).

18 See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622, 628 (1991) (finding that peremptory strikes in a civil suit between two nongovernment parties still constituted “state action” and warranted protection under the Equal Protection Clause).

19 See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that “gender, like race, is an unconstitutional proxy for juror competence and impartiality”).

20 *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486–87, 489 (9th Cir. 2014).

ment;<sup>21</sup> and (2) it expanded *Batson*'s increasingly large scope.<sup>22</sup> This Note accepts the premise that *SmithKline Beecham Corp.* was correctly decided; and, if sexual orientation is subject to heightened scrutiny,<sup>23</sup> *Batson* should be similarly extended.<sup>24</sup> Nonetheless, the Ninth Circuit failed to fully articulate the implications of extending protection to lesbian, gay, and bisexual ("LGB")<sup>25</sup> veniremen. Specifically, because Abbott offered no neutral reason for its strike, *SmithKline's Batson* challenge succeeded at its second step and the Ninth Circuit

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21 The Supreme Court has defined three lenses of review for equal protection cases: strict scrutiny, *see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to racial classifications), intermediate scrutiny, *see* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) ("Legislative classifications based on gender also call for a heightened standard of review."), and rational basis, *see* *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam) (stating that rational basis review applies "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage"). Of these three tests, strict scrutiny is the hardest for a law to overcome; "under it, laws are presumptively invalid, and the burden is on the government to show that they 'are narrowly tailored measures that further compelling governmental interests.'" Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1359 (2013) (quoting *Adarand Constructors, Inc.*, 515 U.S. at 227). The Ninth Circuit concluded that "[i]n its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline Beecham Corp.*, 740 F.3d at 481.

22 For the purposes of a *Batson* challenge, the discussion of scrutiny is relevant in determining if a struck juror is a member of a suspect class. *See J.E.B.*, 511 U.S. at 143. This is because peremptory strikes only can be used "to remove from the venire any group or class of individuals normally subject to 'rational basis' review," but groups subject to heightened scrutiny generally cannot be removed without reason. *Id.* Together with *J.E.B.*'s precedent, the Ninth Circuit's determination that sexual orientation is subject to heightened scrutiny meant that *Batson*'s protections applied to peremptory strikes exercised to discriminate on the basis of sexual orientation and a new trial was ordered. *SmithKline Beecham Corp.*, 740 F.3d at 489.

23 Although the Supreme Court struck down state laws banning same-sex marriages in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the majority opinion did not explicitly answer what level of scrutiny applies to discrimination on the basis of sexual orientation. Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 23–24 n.4 (2015). At least some scholars believe that the Court may have effectively concluded that sexual orientation is a suspect class entitled to heightened protection by its passing references to sexual orientation as an immutable characteristic. GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 33 (3d ed. Supp. 2015).

24 *See infra* Section I.B.

25 There is an argument that transgendered persons already receive protection under *J.E.B.*'s extension of *Batson*. However, sexual discrimination and discrimination based on gender identity have generally been disaggregated. *See* Anton Marino, *Transgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of the Transgender Identity*, 21 AM. U. J. GENDER, SOC. POL'Y & L. 865, 869–72 (2013). This Note focuses on "LGB" rights and considers sexual orientation narrowly in order to emphasize the "nonvisible" nature of sexual orientation. *See infra* Part II.

avoided the difficult question of how the test's third step, requiring comparative juror analysis, would be conducted in future cases.<sup>26</sup>

The difficulty in implementing *Batson*'s third step is highlighted by the trial court judge's initial reaction in *SmithKline Beecham Corp.* After SmithKline raised its *Batson* challenge, the judge remarked, "there is no way for us to know who is gay and who isn't here, unless somebody happens to say something" and "[t]here would be no real way to analyze it."<sup>27</sup> The judge's reaction highlights two challenges to *Batson*'s extension: (1) how to determine the sexual orientation of jurors and (2) how to "analyze it"—namely, how to determine if the strike was exercised on discriminatory grounds.<sup>28</sup> This Note will expand upon the trial judge's reaction and explore the use of comparative juror analysis in light of the "nonvisible" nature of sexual orientation.<sup>29</sup>

But *SmithKline Beecham Corp.* is just the beginning. In January 2015, opponents of Houston's Equal Rights Ordinance ("HERO") petitioned a Texas judge to be able to ask veniremen whether they were lesbian, gay, bisexual, or transgender during voir dire, claiming that members of those groups would be inherently biased against their position and therefore they should have the opportunity to strike LGB jurors.<sup>30</sup> If granted, the motion would have required closeted persons to decide between outing themselves and committing perjury.<sup>31</sup> Although the judge denied the motion, the LGBT Bar Association has since lobbied Congress to introduce bipartisan legislation to ban jury discrimination on the basis of sexual orientation.<sup>32</sup> Similar legislation is also being considered at the state level.<sup>33</sup>

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<sup>26</sup> See *SmithKline Beecham Corp.*, 740 F.3d at 477–79. For an explanation of *Batson*'s three-step inquiry, see *infra* notes 60–63 and accompanying text.

<sup>27</sup> *SmithKline Beecham Corp.*, 740 F.3d at 475.

<sup>28</sup> See *id.*

<sup>29</sup> See *infra* Sections II.A, II.B.

<sup>30</sup> See Dan Quinn, *Houston Equality Opponents Want to Bar LGBT People from Serving on Jury in Lawsuit*, TEXAS FREEDOM NETWORK, <http://tfn.org/houston-equality-opponents-want-to-bar-lgbt-people-from-serving-on-jury-in-lawsuit/> (last visited June 26, 2016); John Wright, *HERO Opponents Try to Bar Gay Jurors in Trial*, PROJECT Q ATLANTA (Jan. 28, 2015, 4:29 PM), [http://www.projectq.us/atlanta/HERO\\_opponents\\_try\\_to\\_bargay\\_jurors\\_in\\_trial?gid=16509](http://www.projectq.us/atlanta/HERO_opponents_try_to_bargay_jurors_in_trial?gid=16509).

<sup>31</sup> See Wright, *supra* note 30.

<sup>32</sup> The proposed Senate legislation is called the Jury ACCESS (Access for Capable Citizens and Equality in Service Selection) Act. See *Jury ACCESS Act/Juror Non-Discrimination Act*, LGBT BAR ASS'N, <http://lgbtbar.org/what-we-do/programs/jury-access-act/> [<https://perma.cc/F5LK-ECRG>] (last visited June 19, 2016). Companion legislation, the Juror Non-Discrimination Act, has also been proposed in the House of Representatives. See *id.*

<sup>33</sup> *California May Ban Discrimination Against Transgender Jurors*, NAPA VALLEY REG.

To address the difficulty in applying *Batson*'s third step to sexual orientation, this Note will first briefly introduce the purpose of peremptory strikes and the test used to challenge discriminatory uses of the practice, as outlined in *Batson v. Kentucky* and its progeny.<sup>34</sup> Part I will also introduce the concept of comparative juror analysis and its effect on the *Batson* test following the Court's decision in *Miller-El v. Dretke*.<sup>35</sup> Part II will then address current difficulties in implementing comparative juror analysis in the context of sexual orientation,<sup>36</sup> a problem that already exists in the context of race.<sup>37</sup> Part III then articulates a proposal for alleviating this difficulty—namely, eliminating the preference towards comparative juror analysis and, instead, granting trial court judges greater deference in determining the intent of the attorney exercising the challenged strike.<sup>38</sup>

## I. THE HISTORY OF PEREMPTORY STRIKES AND THE NEED FOR *BATSON*

Congress first codified the English practice of peremptory challenges in 1790.<sup>39</sup> Like their English counterparts, the early “American colonists prized the right to trial by jury as a bulwark against government oppression and . . . viewed the local and lay characteristics of the jury as keys to its effectiveness.”<sup>40</sup> Peremptory challenges were viewed as tools to increase the perception of a trial's fairness. As the Supreme Court explained in *Lewis v. United States*,<sup>41</sup> peremptory challenges were adopted to assure that “a prisoner (when put to defend his life) . . . [has] a good opinion of his jury.”<sup>42</sup> The practice ensured that no party was “tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike.”<sup>43</sup> When viewed in this way, the historical justification for

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(Mar. 19, 2015), [http://napavalleyregister.com/ap/state/california-may-ban-discrimination-against-transgender-jurors/article\\_f452af15-f7eb-5924-b010-5529d0739f7b.html](http://napavalleyregister.com/ap/state/california-may-ban-discrimination-against-transgender-jurors/article_f452af15-f7eb-5924-b010-5529d0739f7b.html).

<sup>34</sup> See *infra* Part I.

<sup>35</sup> *Miller-El v. Dretke*, 545 U.S. 231 (2005); see *infra* Section I.C.

<sup>36</sup> See *infra* Part II.

<sup>37</sup> See *infra* Section II.C.

<sup>38</sup> See *infra* Part III.

<sup>39</sup> See Crimes Act, ch. 10, § 30, 1 Stat. 110, 119 (1790).

<sup>40</sup> Jim Goodwin, Note, *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739, 741 (1996) (quoting Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 504 (1986)).

<sup>41</sup> *Lewis v. United States*, 146 U.S. 370 (1892).

<sup>42</sup> *Id.* at 376 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*347).

<sup>43</sup> *Id.* (quoting 4 BLACKSTONE, *supra* note 42).

peremptory strikes seems to parallel “for cause” strikes—as both effectuate the goal of impaneling an impartial jury.

Although peremptory challenges developed in criminal trials, Congress first extended the practice to federal civil trials in 1872.<sup>44</sup> All fifty states later recognized the practice in the civil context as well.<sup>45</sup> Although civil litigants typically do not have an adversarial relationship with the government, peremptory strikes remain relevant because “[s]hould either party . . . invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict.”<sup>46</sup> These civil peremptory strikes, like their criminal counterparts, were also unrestrained: just as parties in a criminal context were concerned that jurors inherently favor the opposing party’s position, parties in the civil context did not want jurors who favored the adversary’s position to decide the outcome of their case.

The danger in traditional peremptory strikes is that attorneys rely only on hunches or stereotypes.<sup>47</sup> Specifically, unlike “for cause” strikes, which require a justification prior to a juror’s removal, peremptory strikes require no given reason. Thus, even though the Supreme Court recognized in *Strauder v. West Virginia*<sup>48</sup> in 1879 that “a black criminal defendant was denied equal protection of the laws when he was tried by a jury from which blacks had been excluded by state law,”<sup>49</sup> prosecutors were able to circumvent the Court’s protections by using strikes to impanel all-white or racially imbalanced juries.<sup>50</sup> It would not be until a full century later, in 1986, that *Batson v. Kentucky* would limit the use of peremptory challenges.<sup>51</sup> Section I.A will discuss the Supreme Court’s first articulation of the *Batson* test for challenging peremptory strikes as discriminatory. Section I.B will then discuss developments following *Batson*, focusing specifically on the Court’s expansion of *Batson* in *J.E.B. v. Alabama ex rel. T.B.*,<sup>52</sup> before turning to the Court’s most recent modification of *Batson* in *Miller-El v. Dretke* in Section I.C.

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44 See Act of June 8, 1872, ch. 333, 17 Stat. 282.

45 See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 827 (1997).

46 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991).

47 See *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting).

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

49 Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 725 (1992).

50 See *Batson*, 476 U.S. at 129 (Burger, C.J., dissenting).

51 See *id.* at 82–100 (majority opinion).

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



### A. *Batson's Test*

In *Batson v. Kentucky*, the Supreme Court held that discriminatory peremptory challenges used to exclude veniremen on the basis of race violated not only the rights of the accused, but also the rights of potential jurors.<sup>53</sup> The petitioner, a black man, had been indicted by the State of Kentucky on charges of second-degree burglary and receipt of stolen goods.<sup>54</sup> During voir dire, the prosecutor used his peremptory strikes to remove all four black veniremen in order to impanel a jury composed only of white persons.<sup>55</sup> Although the petitioner's counsel moved to discharge the jury before it was impaneled "on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws," the trial court judge refused to hear argument on the matter.<sup>56</sup> Instead, the judge held that "parties were entitled to use their peremptory challenges to 'strike anybody they want to'" and "reason[ed] that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself."<sup>57</sup> The Supreme Court of Kentucky later affirmed the trial court's determination.<sup>58</sup>

The Supreme Court of the United States reversed.<sup>59</sup> To address discriminatory uses of peremptory strikes, the Court created a three-part test to determine the intent of the attorney exercising a peremptory challenge. First, a defendant raising a *Batson* challenge must make a prima facie showing that the peremptory challenge was discriminatory.<sup>60</sup> To establish a prima facie case, defendants demonstrated that (1) the stricken venireman was a member of a racial minority, (2) opposing counsel used a peremptory strike to remove the individual, and (3) "the totality of the circumstances raises an inference that the strike was motivated by the characteristic in ques-

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<sup>53</sup> See *id.* at 87. Again, the emphasis on veniremen's rights would be further developed in *Batson's* progeny. See *Powers v. Ohio*, 499 U.S. 400, 415 (1991) ("To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.").

<sup>54</sup> *Batson*, 476 U.S. at 82.

<sup>55</sup> *Id.* at 83.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 84.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 93-94.

tion.”<sup>61</sup> After the prima facie showing, the burden shifted to the prosecutor to provide a race-neutral explanation for the challenge.<sup>62</sup> If a prosecutor provided a nondiscriminatory reason, the third and final step “would be for the trial court to determine whether the challenger had met his or her burden of proving that the peremptory challenges were in fact exercised because of racial prejudice.”<sup>63</sup>

*Batson*’s three-part test functionally parallels “Title VII [of the Civil Rights Act of 1964’s] *McDonnell Douglas* burden-shifting inquiry.”<sup>64</sup> Like that test, “determinations at steps one and two . . . ‘involve no credibility assessment’ because ‘the burden-of-production determination necessarily precedes the credibility-assessment stage.’”<sup>65</sup> In fact, the neutral reason offered at the second step “need not be persuasive, or even plausible, to advance *Batson* analysis” to the third step.<sup>66</sup> The reason only needs to be facially neutral and could focus on matters as trivial as having “long, unkempt hair, a mustache, and a beard”<sup>67</sup> to move forward. It is not until *Batson*’s final step that trial courts weigh credibility to determine if the moving party has carried his burden of persuasion.

### B. *Post-Batson Developments*

Although *Batson*’s second step remains unaltered, *Batson*’s progeny have expanded the prima facie showing required at the test’s first step. Specifically, although *Batson* initially applied only in criminal context and only allowed criminal defendants to challenge discriminatory strikes, the Supreme Court has since allowed more litigants and jurors to qualify for the test’s protection.

The Supreme Court first extended *Batson* to the civil context in *Edmonson v. Leesville Concrete Co.*<sup>68</sup> This case is largely significant because of its controversial expansion of the state action doctrine, which generally means that the Constitution only restrains the actions of federal, state, and local governments, but does not limit the actions

<sup>61</sup> Anna N. Martinez, *Striking Jurors Based on Sexual Orientation Is Discriminatory*, 91 DENV. U. L. REV. ONLINE 71, 72 (2014); see *Batson*, 476 U.S. at 96.

<sup>62</sup> See *Batson*, 476 U.S. at 94.

<sup>63</sup> Hoffman, *supra* note 45, at 834.

<sup>64</sup> Williams v. Pliker, 411 F. App’x 954, 955 n.1 (9th Cir. 2011) (citing Johnson v. California, 545 U.S. 162, 171 n.7 (2005)).

<sup>65</sup> See *Johnson*, 545 U.S. at 171 n.7 (2005) (quoting St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)).

<sup>66</sup> Elina Tetelbaum, Comment, *The Reverse-Batson: Wrestling with the Habeas Remedy*, 119 YALE L.J. 1739, 1742 (2010).

<sup>67</sup> Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam).

<sup>68</sup> See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991).

of private individuals and corporations.<sup>69</sup> In *Edmonson*, the Court held that because civil litigants exercise the traditional government power of selecting a jury when it exercises a peremptory strike, the private litigant is jointly participating as a state actor, and therefore these litigants are bound by the Equal Protection Clause's anti-discrimination mandate.<sup>70</sup>

The Court's decision in *Edmonson* paved the way for the Court's even more controversial extension of *Batson* in *Georgia v. McCollum*.<sup>71</sup> In *McCollum*, the Court held that *Batson*'s protections also prohibit defense counsel from using discriminatory strikes in criminal trials.<sup>72</sup> Justice Burger, citing *Lewis v. United States*,<sup>73</sup> warned of this exact extension in his dissent in *Batson*.<sup>74</sup> He wrote, "[t]he effect of the Court's decision . . . will be to force the defendant to come forward and 'articulate a neutral explanation' for his peremptory challenge . . . . This will surely do more than 'disconcert' litigants; it will diminish confidence in the jury system."<sup>75</sup> Justice Thomas lamented that the Court's decision in *McCollum* would make "black criminal defendants . . . rue the day that this Court ventured down this road."<sup>76</sup> Despite its controversy, *McCollum* represents a definitive shift toward the recognition of veniremen's rights: in addition to violating a criminal defendant's right to a fair trial, discriminatory peremptory strikes independently violate a potential juror's right to equal protection under the Fourteenth Amendment.

The Court later extended *Batson*'s prima facie showing to protect against discrimination on the basis of gender.<sup>77</sup> Although other cases have since expanded *Batson*'s first step, the Supreme Court most significantly broadened the prima facie showing in *J.E.B. v. Alabama ex*

<sup>69</sup> See *The Civil Rights Cases*, 109 U.S. 3, 21–22 (1883) (holding that the Thirteenth and Fourteenth Amendments did not protect citizens against discrimination by private actors so long as the state law did not require such action).

<sup>70</sup> See *Edmonson*, 500 U.S. at 625–26.

<sup>71</sup> See *Georgia v. McCollum*, 505 U.S. 42, 48–55 (1992).

<sup>72</sup> See *id.* at 59.

<sup>73</sup> *Lewis v. United States*, 146 U.S. 370 (1892).

<sup>74</sup> See *Batson v. Kentucky*, 476 U.S. 79, 128–30 (1986) (Burger, C.J., dissenting).

<sup>75</sup> *Id.* at 129 (citation omitted).

<sup>76</sup> *McCollum*, 505 U.S. at 60 (Thomas, J., concurring in judgment). Compare *id.* at 61 (characterizing *Batson* as "securing representation of the defendant's race on the jury," which in turn would "help to overcome racial bias and provide the defendant with a better chance of having a fair trial"), with *id.* at 48 (majority opinion) (describing *Batson*'s protections as "'serv[ing] multiple ends,' only one of which was to protect individual defendants from discrimination" as *Batson*'s protections also "remedy the harm done to the 'dignity of persons' and to the 'integrity of the courts'" (citations omitted)).

<sup>77</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); see also *supra* note 25.

rel. *T.B.* in finding that gender-based strikes violated *Batson*. Specifically the Supreme Court explained in *J.E.B.* that “[p]arties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review” under the Equal Protection Clause but that groups subject to heightened scrutiny generally could not be removed without reason.<sup>78</sup> Although the ruling directly applied only to race and gender, *J.E.B.* was the first case to recognize that unregulated peremptory challenges permitted unconstitutional discrimination outside of race—leaving the door open for continued limitations on the peremptory challenge and expanding *Batson*’s protection to all veniremen who belong to groups “subject to heightened scrutiny” in future cases.<sup>79</sup>

Without the expansion of *Batson*’s prima facie requirements described above, *SmithKline Beecham Corp.*, a civil action where an attorney allegedly discriminated on the basis of sexual orientation, would have never satisfied the original test’s first step. But even assuming there is sufficient theoretical support to expand *Batson*,<sup>80</sup> *SmithKline Beecham Corp.* challenges the practical limitations of *Batson*’s three-part test. Specifically, as the Court has only recognized that *Batson* applies to “visible” characteristics (i.e., race and gender),<sup>81</sup> enforcing *SmithKline Beecham Corp.*’s mandate underscores the ineffectiveness of comparative juror analysis.

### C. Practical Considerations: Comparative Juror Analysis

Following the prima facie showing outlined above and after the nonmovant provides a neutral explanation for the peremptory strike, the third and final step in a *Batson* challenge is “for the trial court to determine whether the challenger ha[s] met his or her burden of proving that the peremptory challenges were in fact exercised because of . . . prejudice” against a class protected by heightened judicial scrutiny.<sup>82</sup> Prior to the Supreme Court’s decision in *Miller-El v. Dretke*, courts often used a process called “comparative juror analysis” in order to make this determination.

Comparative juror analysis is a process that allows trial courts to evaluate the credibility of the nonmovant’s neutral reason by compar-

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<sup>78</sup> *Id.* at 143.

<sup>79</sup> In finding that gender-based strikes violated *Batson*, the Supreme Court established that *Batson*’s outer limit protected only groups subject to heightened scrutiny. See *id.*

<sup>80</sup> See *supra* notes 21–23 and accompanying text.

<sup>81</sup> See *J.E.B.*, 511 U.S. at 129; *Batson v. Kentucky*, 476 U.S. 79, 84–88 (1986).

<sup>82</sup> Hoffman, *supra* note 45, at 833–34.

ing the treatment of similarly situated jurors.<sup>83</sup> For example, if a movant makes a prima facie *Batson* showing and the nonmovant claims to have struck the female juror “because she was a teacher” but two other male teachers were not struck, the nonmovant’s reasoning likely is a pretext for discrimination. In *Miller-El*, the Court explained that “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.”<sup>84</sup> This determination is a pure issue of fact and great deference is given to a trial court judge’s determination—particularly in light of the need to weigh the credibility of the neutral reason provided by the nonmovant.<sup>85</sup>

Before *Miller-El*, appellate courts used comparative juror analysis to review the validity of *Batson* challenges.<sup>86</sup> For example, five years before *Miller-El*, the Ninth Circuit explained that a nonmovant’s “motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge.”<sup>87</sup> More specifically, the opinion explained that “[p]eremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.”<sup>88</sup> That panel described comparative juror analysis as “a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.”<sup>89</sup> The usefulness of the approach is common sense: if the attorney exercising the strike provides that the juror’s employment is the reason that juror was removed, but other panelists with the same job who are not members of the protected class were not removed, the juror’s type of employment likely was not dispositive in the decision to strike the juror. “Clear error” would be easy to note on appeal.

However, if comparative juror analysis was *helpful* prior to 2005, it appears nearly mandatory at both the trial and appellate levels fol-

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<sup>83</sup> See *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

<sup>84</sup> *Id.*

<sup>85</sup> See *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (“On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.”); see also *Hernandez v. New York*, 500 U.S. 352, 364–65 (1991) (plurality opinion).

<sup>86</sup> See *McClain v. Prunty*, 217 F.3d 1209, 1220–22 (9th Cir. 2000).

<sup>87</sup> *Id.* at 1220 (citing *Caldwell v. Maloney*, 159 F.3d 639, 651 (1st Cir. 1998)).

<sup>88</sup> *Id.* at 1221.

<sup>89</sup> *Id.* at 1220–21 (quoting *Turner v. Marshall*, 121 F.3d 1248, 1251–52 (9th Cir. 1997)).

lowing the Court's decision in *Miller-El*.<sup>90</sup> In *Boyd v. Newland*,<sup>91</sup> the Ninth Circuit held that “[w]ithout engaging in comparative juror analysis, [the Court is] unable to review meaningfully whether the trial court’s ruling . . . was unreasonable in light of Supreme Court precedent.”<sup>92</sup> Although the same circuit had favored comparative juror analysis prior to *Miller-El*, this shift in language supports a new reliance on the technique to determine if a peremptory strike violates *Batson*’s protections.<sup>93</sup> This is consistent with the rationale provided in *Miller-El* itself, in which the Court discussed how “side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve” are “[m]ore powerful than . . . bare statistics.”<sup>94</sup>

The inadvertent effect of *Miller-El*’s holding is the widespread substitution of comparative juror analysis for *Batson*’s third prong.<sup>95</sup> Unlike the original *Batson* test, this substitution ties the hands of trial court judges by over-encouraging the use of one method to determine if the movant has met his burden of persuasion. This substitution is dangerous on two levels: (1) comparative juror analysis assumes that the judge is able to ascertain all panelists’ race, gender, or membership in a protected class and (2) it usurps the judge’s decisionmaking authority in choosing how to assess factual credibility. Part II highlights these dangers by addressing the ways in which panelists’ race, gender, or membership in a protected class may not be clear in the context of sexual orientation.

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90 Although the Ninth Circuit held that failure to perform formal comparative juror analysis is not “a kind of structural error . . . with prejudice presumed,” it also upheld the reasonableness of the trial court’s determinations on what appears to be the trial court’s informal comparative juror analysis. See *Murray v. Schriro*, 745 F.3d 984, 1004 (9th Cir. 2014) (affirming the trial court’s finding that *Batson*’s third prong had not been satisfied when the only two Hispanic veniremen were struck based on (1) one juror’s family members’ interactions with law enforcement and (2) the second juror was an acquaintance of the prosecutor). Even more ironically, although the plain language of the case says that comparative juror analysis is not required, the Ninth Circuit actually used the methodology on review. See *id.* at 1007–09. Therefore, despite the decision’s plain language, *Murray* supports the assertion that the practice is seen as nearly mandatory post-*Miller-El*, as appellate courts rely on comparative juror analysis when reviewing trial courts’ findings at *Batson*’s third step.

91 *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006).

92 *Id.* at 1149.

93 Compare *McClain*, 217 F.3d at 1220, with *Boyd*, 467 F.3d at 1149. See text accompanying *supra* note 89.

94 *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

95 See, e.g., *Lee v. Comm’r, Ala. Dep’t of Corr.*, 726 F.3d 1172, 1224 (11th Cir. 2013); *United States v. Charlton*, 600 F.3d 43, 54 (1st Cir. 2010); *United States v. Collins*, 551 F.3d 914, 921–22 (9th Cir. 2009); *Boyd*, 467 F.3d at 1149; see also *Bennett v. Gaetz*, 592 F.3d 786, 791 (7th Cir. 2010).

## II. COMPARATIVE JUROR ANALYSIS APPLIED TO SEXUAL ORIENTATION

In *SmithKline Beecham Corp.*, the Ninth Circuit dodged the question of how to effectuate *Batson* challenges in the context of LGB veniremen. Again, this is because Abbott never provided a neutral reason for exercising the challenged peremptory strike and therefore the *Batson* challenge succeeded at its second step.<sup>96</sup> However, with the Ninth Circuit's precedent established, it is unlikely that future litigants will make the same mistake and fail to provide at least facially neutral reasons for challenged peremptory strikes. But once a facially neutral reason is put forth, how would the trial court assess the credibility of the determination?

As Section I.C explained, the *Miller-El*-infused *Batson* test suggests that comparative juror analysis must be used to compare the struck juror to nonstruck jurors who share an “equally applicable” reason (e.g., that teachers make bad jurors). But—assuming not all veniremen have indicated their sexual orientation—courts would be left with two options: (1) ask all jurors to disclose their sexual orientation or (2) abandon the use of appellate courts' near-mandatory method of review. Section II.A addresses the nonvisible nature of sexual orientation and the threshold challenge of using *Batson* when the struck juror has not indicated his sexual orientation. Section II.B then turns to the challenge faced by applying *Batson*'s framework even when the struck juror's sexual orientation is known. Even if *Batson* is not extended to sexual orientation, Section II.C explains how comparative juror analysis already falls short in the context of race, as not all individuals clearly identify as “black” or “white”—and because attorneys may make incorrect assumptions about persons based on visible characteristics alone.

### A. *The Threshold Hurdle: Protection When Sexual Orientation Is Unknown*

In *SmithKline Beecham Corp.*, the trial judge initially reacted that *Batson* could not apply to sexual orientation because “there is no way for us to know who is gay and who isn't here, unless somebody happens to say something.”<sup>97</sup> This is because, unlike gender and race, sexual orientation cannot be determined by visual characteristics alone.<sup>98</sup>

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<sup>96</sup> *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 475, 478 (9th Cir. 2014).

<sup>97</sup> *SmithKline Beecham Corp.*, 740 F.3d at 475.

<sup>98</sup> One recent scientific study does suggest that “Gaydar,” the colloquial term for “the

This difference between sexual orientation and other *Batson*-protected traits becomes immediately relevant in asserting a *Batson* challenge. For example, if the juror has not self-identified his sexual orientation, how can a court determine if the strike was based on this orientation at all?<sup>99</sup> This difficulty would likely be raised at *Batson*'s first step, as a movant would need to prove membership in a protected class in order to make a prima facie showing.<sup>100</sup> But, even if this threshold question could be resolved, ambiguity would also exist at *Batson*'s third prong: without knowing the categorical identity of the struck juror, it would be impossible to tell if he was treated differently than other members of the venire.<sup>101</sup>

The ultimate question then becomes whether the fact that a venireman has not disclosed his sexual orientation during voir dire means that he is barred from protection under *Batson*. Even though this orientation is “nonvisible,” an attorney may still strike with discriminatory animus based on stereotypes about sexual orientation, including: vocal pitch, hairstyle, and clothing.<sup>102</sup> This process is called categorization, and is considered “a normal cognitive process . . . whereby [persons] assign perceived group attributes to individuals.”<sup>103</sup> But *Batson*'s first step is not flexible enough to allow for such assump-

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ability to accurately glean others' sexual orientation from mere observation,” is based on facial differences between people of different sexual orientations. Joshua A. Tabak & Vivian Zayas, Opinion, *The Science of 'Gaydar'*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/03/opinion/sunday/the-science-of-gaydar.html>. However, even if this study is correct, it yielded only sixty percent accurate results—where “chance guessing would yield [fifty] percent accuracy.” *Id.*

<sup>99</sup> See *Batson v. Kentucky*, 476 U.S. 79, 94–96 (1986).

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> The assertion of whether vocal pitch can be an indicator of sexual orientation is a complicated question:

Overall, the results . . . indicate that no statistically significant difference was found for the listeners' perceptions of the sexuality of the speaker for either variable in either setting. In other words, the listeners judged the speaker as having the same sexuality whether his pitch range was wide or narrow or whether his sibilants were long or short. For all three groups, changing either the pitch range or sibilant duration or both had no effect on listeners' judgments of the speaker across all 10 affective scales.

Erez Levon, *Hearing “Gay”: Prosody, Interpretation, and the Affective Judgments of Men's Speech*, 81 AM. SPEECH 56, 68 (2006); see Erez Levon, *Categories, Stereotypes, and the Linguistic Perception of Sexuality*, 43 LANGUAGE IN SOC'Y 539, 559–61 (2014). However, combined with other characteristics, litigants may stereotype jurors and make assumptions regarding their sexuality.

<sup>103</sup> Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160 (2005).



tions about sexual orientation—instead, the burden of production requires a showing of *membership* in a protected class.<sup>104</sup>

To some, this may make the goal of prohibiting discrimination on the basis of sexual orientation in jury selection “purely an academic exercise.”<sup>105</sup> To others, like opponents of HERO, requiring jurors to disclose their sexual orientation seems like an obvious solution.<sup>106</sup> But requiring jurors to disclose their sexual orientation raises serious constitutional and ethical issues.<sup>107</sup> Alternatives to asking veniremen for their sexual orientation directly are also problematic. This practice would require the movant to “argue that the totality of the circumstances demonstrates that the [struck] juror is gay.”<sup>108</sup> To do this, the movant “could argue that known facts about the juror—appearance, demeanor, and a decade with the same ‘roommate’—all raise an inference that the juror is gay.”<sup>109</sup> Assuming the nonmovant provided a neutral reason for the strike, “[t]he judge would be put in the awkward position of determining whether the juror was, in fact, gay. . . . Even done *in camera*, it would be based on crude stereotypes and invite insulting, unseemly debate and speculation among the parties.”<sup>110</sup> On the other hand, without such knowledge, persons who do not disclose their sexuality are left without *Batson’s* protections. This predicament may not be fully resolvable—as potentially forcing a juror to “out” himself seems too high a price to survive *Batson’s* first step.

Overall, these problems also highlight preexisting problems in *Miller-El’s* acceptance of comparative juror analysis—namely, that the process assumes that all persons have a “categorical identity” which is easily identifiable to the public.<sup>111</sup> This problem will be further explored in Section II.B, which addresses how to evaluate *Batson’s* third step when a struck juror’s sexual orientation is known.

<sup>104</sup> See *supra* note 61 and accompanying text.

<sup>105</sup> Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 7 (2001).

<sup>106</sup> See *supra* notes 30–31 and accompanying text.

<sup>107</sup> In addition to the ethical concerns raised by forcing all jurors to reveal their sexual orientation, such a requirement would likely implicate the First Amendment’s protection against “compelled speech.” See Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 544–45 (2012).

<sup>108</sup> Kathryn M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 256 (2011).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 257 (emphasis added).

<sup>111</sup> See *infra* Part III.

*B. When Sexual Orientation Is Known, Practical Difficulties Remain*

Even when a venireman discloses his sexual orientation, practical difficulties remain. Specifically, unlike when sexual orientation is unknown, a prima facie showing under *Batson* is possible because the movant can show: (1) the stricken venireman is a member of a protected group, (2) the opposing counsel struck the venireman, and (3) the totality of the circumstances likely provides “an inference that the strike was motivated by the characteristic in question.”<sup>112</sup> Assuming that the nonmovant provides a neutral reason for the strike, satisfying *Batson*’s second step, the court would face the difficult problem of assessing the credibility of the neutral reason offered, a process made particularly difficult following the Supreme Court’s endorsement of comparative juror analysis in *Miller-El*.<sup>113</sup>

Unlike cases involving race or gender where the Supreme Court has applied *Batson*’s comparative juror analysis to determine whether a litigant’s “proffered reason for striking a . . . panelist” who is a member of a protected group also applies “to an otherwise-similar” panelist who is not a member of the protected group and “who is permitted to serve,”<sup>114</sup> cases involving alleged discrimination on the basis of sexual orientation cannot rely on data regarding “otherwise-similar” panelists because each venireman’s sexual orientation is not visually apparent.<sup>115</sup> For example, if a movant makes a prima facie *Batson* showing and the nonmovant claims to have struck a female juror “because she was a teacher” but two other male teachers were not struck, the nonmovant’s reasoning may be found to be a pretext for discrimination. But, if a movant makes a prima facie *Batson* showing and the nonmovant claims to have struck a gay juror “because she was a teacher” but two other teachers were not struck, the trial court would be left at an impossible impasse. To know whether the “otherwise-similar” teachers have been treated differently, the court would need to know each juror’s sexual orientation. But, unless a panelist discloses his or her own sexual orientation, courts would be forced to inquire and potentially “out” jurors to conduct a thorough comparative juror analysis, raising the same ethical and constitutional problems outlined in Section II.A.

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<sup>112</sup> Martinez, *supra* note 61, at 72; see *Batson v. Kentucky*, 476 U.S. 79, 94–96 (1986).

<sup>113</sup> See *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

<sup>114</sup> *Id.*

<sup>115</sup> See *supra* Section II.A.

Outrageously, “outing” all jurors as a routine part of voir dire seems reasonable to some litigants. In January 2015, HERO opponents moved to be able to ask all veniremen their sexual orientation during voir dire, claiming that LGB jurors would be inherently biased against their position and therefore they should have the opportunity to strike them.<sup>116</sup> Although that judge denied the request, similar voir dire requests have been granted in other cases, including those involving hate crimes on gay men.<sup>117</sup> This potential outcome is particularly troublesome because voir dire is publicly held and “sensitive information revealed by prospective jurors” is not always sealed.<sup>118</sup> Instead, jurors are only able to request private hearings to answer specific questions—a practice that inherently “call[s] attention to [the juror] and . . . implicitly indicate[s] that [he or] she has something to hide.”<sup>119</sup> Moreover, even if this request is granted, the practice still requires veniremen to “out” themselves to the judge and the litigants—something that may ostracize veniremen and discourage selected jurors from the beginning of trial.<sup>120</sup>

Even if the moral and constitutional problems associated with “outing” veniremen were insufficient to cause alarm, statutory authority may soon intervene to prohibit similar requests. Since the January 2015 HERO case, the LGBT Bar Association has lobbied Congress to introduce bipartisan legislation to ban jury discrimination.<sup>121</sup> If passed, this legislation would prevent asking jurors about their sexual orientation in voir dire—a permanent (albeit welcome) block to conducting comparative juror analysis for the newly protected group.

### C. Comparative Juror Analysis and the Modern Concept of Race

Despite the practical difficulty in implementing *SmithKline Beecham Corp.*'s mandate, the solution is not to limit *Batson*'s protections to exclusively race and gender. Specifically, the difficulty applying *Batson* predates the Ninth Circuit's decision in *SmithKline Beecham Corp.* To understand these difficulties fully, this Note turns

<sup>116</sup> See *supra* note 30.

<sup>117</sup> Eisemann, *supra* note 105, at 23–24 (citing *Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992)).

<sup>118</sup> *Id.* at 22.

<sup>119</sup> *Id.* at 23.

<sup>120</sup> In one case, a trial court judge “only asked one prospective juror to privately reveal her sexual orientation . . . . However, in that case, the judge’s decision to conduct private voir dire outside the presence of the parties and their counsel was cause for reversal because it interfered with the defendant’s right to intelligently exercise a peremptory strike.” *Id.* at 24 (citing *People v. Bici*, 621 N.Y.S.2d 666 (1995)).

<sup>121</sup> See *supra* note 32 and accompanying text.

to *Batson*'s central and undisputed protection: peremptory strikes exercised on the basis of racial discrimination. Until this Section, this Note has largely assumed that race is apparent—an assumption that may seem satisfactory (or even reasonable) to many. However, comparative juror analysis also fails in this context because (1) it does not articulate how to treat persons who may be multiracial and who still may be struck for discriminatory reasons and (2) the methodology fails to articulate whose perspective is considered (e.g., if a multiracial person identifies as “white,” but the litigants identified the person as “black”).

This inquiry is not “purely academic.” Between 2000 (the first year that the U.S. Census Bureau collected information on multiracial individuals) and 2010, the number of persons in the United States who identified as multiracial “jumped by 32 percent.”<sup>122</sup> The option to self-identify as multiracial generally has been well received by scholars because it is grounded in the principle of self-determination.<sup>123</sup> As Lise Funderburg notes, “[i]t’s a step toward fixing a categorization system that, paradoxically, is both erroneous (since geneticists have demonstrated that race is biologically not a reality) and essential (since living with race and racism is).”<sup>124</sup>

Although several theories address the fluid state of race that exists in America today, central among them is self-identification. For example, elective race theory recognizes that “[m]ultiracials, phenotypically ambiguous persons, and racial liminals weigh numerous factors when they decide to racially identify in a particular way.”<sup>125</sup> A person’s identification may change based on “context and life circumstances.”<sup>126</sup> But comparative juror analysis does not permit for such a distinction. For example, although a person could theoretically identify as multiracial on a juror questionnaire, if that individual is struck, to whom is their treatment compared: persons “of color,” other multiracial persons who may have little in common with them, or persons with whom they identify in that context?

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<sup>122</sup> Lise Funderburg, *The Changing Face of America*, NAT'L GEOGRAPHIC (Oct. 2013) <http://ngm.nationalgeographic.com/2013/10/changing-faces/funderburg-text>. Although not addressed by this Note, a similar argument could be made about discrimination on the basis of sex, as many individuals identify outside the gender binary. Jessica Bennett, *She? Ze? They? What's In a Gender Pronoun*, N.Y. TIMES (Jan. 30, 2016), [http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html?\\_r=0](http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html?_r=0).

<sup>123</sup> See Funderburg, *supra* note 122.

<sup>124</sup> *Id.*

<sup>125</sup> Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1529 (2014).

<sup>126</sup> *Id.*

Moreover, comparative juror analysis does not address strikes that may be exercised “incorrectly” based on an attorney’s assumptions about a person whose race may be visibly ambiguous. For example, during one voir dire, a prosecutor struck five persons—Ceglio, Cantwell, McConaghy, Kellegher, and Ferolito—all with “Irish or Italian Roman Catholic[ ]” surnames.<sup>127</sup> Assuming a prima facie showing was made and a neutral reason was offered for the strikes, comparative juror analysis mandates comparing the treatment of these persons with nonstruck persons to see if the reasons were pretextual.<sup>128</sup> But what if the assumption turned on faulty grounds and one juror with an Irish-sounding surname actually identified as a separate race (or as a member of a separate protected class): could a litigant then succeed in his challenge?

The short answer is likely not. Although *Batson* and its progeny speak to a “totality of the circumstances” test, without comparative juror analysis, appellate courts “are unable to review meaningfully whether the trial court’s ruling at either step one or step three of *Batson* was unreasonable.”<sup>129</sup> Despite these challenges, at least some of the shortcomings of comparative juror analysis can be easily remedied.

### III. PROPOSAL

Since *Batson*, dissenting Justices of the Court have decried limitations on the unfettered use of peremptory challenges as unfair to litigants. But as the majority opinion in *Batson* itself suggests, the decision actually “enforces the mandate of equal protection and furthers the ends of justice.”<sup>130</sup> With the *Miller-El*-infused *Batson* test failing to protect against discriminatory peremptory challenges even when sexual orientation is disclosed, a new solution is needed to ensure “the mandate of equal protection” and that the “ends of justice” are realized.<sup>131</sup>

In an effort to resolve this apparent conflict, Section III.A discusses a proposal to change *Batson*’s third prong to focus more on discriminatory intent, instead of comparative juror analysis. Section III.B then addresses why other solutions do not adequately protect either litigants’ or jurors’ rights.

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<sup>127</sup> Commonwealth v. Carleton, 641 N.E.2d 1057, 1058 (Mass. 1994).

<sup>128</sup> See *supra* Section I.C.

<sup>129</sup> Boyd v. Newland, 467 F.3d 1139, 1149 (9th Cir. 2006).

<sup>130</sup> *Batson* v. Kentucky, 476 U.S. 79, 99 (1986).

<sup>131</sup> See *id.*

### A. *Returning to Batson's Third Prong*

*Batson v. Kentucky* stands for the notion that peremptory strikes cannot be used to discriminate in ways that the Equal Protection Clause otherwise prohibits.<sup>132</sup> For this reason, this Note proposes largely deferring to trial judges to rule on *Batson* challenges but discourages the use of comparative juror analysis. Although this solution does not directly address situations where the struck juror's sexual orientation is unknown, it provides a significant step forward in addressing strikes used to exclude jurors who do disclose their sexual orientation. Moreover, by discouraging the use of comparative juror analysis, trial judges are more likely to consider *Batson* challenges holistically—which could reveal instances where attorneys have guessed a juror's sexual orientation and then used that hunch to effectuate a discriminatory peremptory challenge.

Prior to *Miller-El v. Dretke*'s substitution of comparative juror analysis,<sup>133</sup> *Batson*'s third and final step “would be for the trial court to determine whether the challenger had met his or her burden of proving that the peremptory challenges were in fact exercised because of racial prejudice.”<sup>134</sup> No fixed mechanism for reaching this decision was required. Instead, the Supreme Court emphasized its “confidence” in trial court judges, who were more “experienced in supervising *voir dire*,” to decide when strikes had occurred on discriminatory grounds.<sup>135</sup> Respecting this intent, this proposal also advocates for giving trial court judges flexibility in ruling on *Batson* challenges.

Instead of prescribing a singular means to determine if a discriminatory strike has been exercised, allowing trial judges to use a flexible standard has two distinct advantages over comparative juror analysis: (1) it allows review for nonvisible traits and (2) it permits the trial court to undertake a holistic review of *voir dire* in line with *Batson*'s original intent.

First, as discussed in Parts I and II, comparative juror analysis should be discouraged because the *Miller-El*-infused version of *Batson* does not protect against discrimination of nonvisible traits. A flexible approach to *Batson*'s third prong puts the decision of how strikes are reviewed in the trial judge's hands. For example, the particularities of a given case may suggest considering a “pattern” of discriminatory strikes or “the prosecutor's questions and statements during *voir dire*

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<sup>132</sup> See *id.* at 84.

<sup>133</sup> *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

<sup>134</sup> Hoffman, *supra* note 45, at 834.

<sup>135</sup> *Batson*, 476 U.S. at 97.

examination and in exercising his challenges”—means to evaluate discrimination suggested by the Court in *Batson* itself.<sup>136</sup>

One recent case is particularly illustrative of the benefits of a flexible standard as opposed to comparative juror analysis. In *Hall v. Thomas*,<sup>137</sup> following a prima facie *Batson* showing, the prosecution provided that he struck a juror because she was opposed to the death penalty.<sup>138</sup> The defense argued that this reason for a peremptory challenge was pretextual and “ask[ed] the Court to look at the [jury] questionnaires, pointing out that in [the struck] juror[’s] questionnaire, ‘[she] stated that she strongly agreed that any person who intentionally kills another should get the death penalty; since they took a life.’”<sup>139</sup> On review,<sup>140</sup> simply rereading the struck juror’s questionnaire was sufficient to prove pretext.<sup>141</sup> But comparative juror analysis would not be helpful—the treatment of other jurors was only tangentially related to the defense’s *Batson* challenge and the prosecution’s proffered explanation for the strike.

Moreover, comparative juror analysis could actually do more harm than good in a scenario like *Hall*. For example, if no other jurors had allegedly expressed opposition to the death penalty, comparative juror analysis would have produced a false negative. This is because the struck juror (“Juror A”) would be compared against only the jurors who also “expressed opposition” to the death penalty.<sup>142</sup> If Juror A had been the only one to express these doubts, a judge using comparative juror analysis would conclude that Juror A was not treated differently from that “larger” pool on the basis of race or sex, and therefore, the strike was not exercised in a prohibited manner.

It is easy to imagine how an attorney could manipulate this process to discriminate using peremptory challenges. For example, if a juror (“Juror B”) mentioned being gay during voir dire and an attorney struck Juror B for that reason, the attorney need only provide a reason that no other juror provided for the strike. This would create a “pool of one” (who, for example, was opposed to the death penalty) independent of sexual orientation—which in turn, would support a neutral reason for the strike.<sup>143</sup> But what is particularly concerning in

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<sup>136</sup> *Id.*

<sup>137</sup> *Hall v. Thomas*, 977 F. Supp. 2d 1129 (S.D. Ala. 2013).

<sup>138</sup> *Id.* at 1151.

<sup>139</sup> *Id.* at 1155.

<sup>140</sup> *Hall*’s review was grounded in a writ of habeas corpus. *Id.* at 1142–43.

<sup>141</sup> *See id.* at 1156.

<sup>142</sup> *See supra* Section I.C.

<sup>143</sup> *See supra* Section I.C.

the context of discrimination based on sexual orientation is that even if the attorney repeated this discriminatory tactic with Juror C, who also mentioned being gay during voir dire, the judge would be left at a difficult impasse. Even with the only two panelists who disclosed their sexual orientation now struck, the judge does not know the sexual orientation of the other jurors, raising the problems outlined in Section II.A.

Giving flexibility to trial judges is therefore important because it permits the trial court to undertake a holistic review of voir dire in line with *Batson's* original intent. *Batson* is relevant not only for its antidiscrimination stance, but also because it reduced the burden for defendants who wished to challenge a prosecutor's strike.<sup>144</sup> In *Snyder v. Louisiana*,<sup>145</sup> the Supreme Court reemphasized this determination, holding that *Batson's* third prong requires only a finding of whether a peremptory strike was "motivated in substantial part by discriminatory intent."<sup>146</sup> This "substantial part" test relies on trial judges to use their best judgment to evaluate the credibility of the reasons proffered for the strike,<sup>147</sup> and should therefore allow judges to use reasonable means necessary to tailor their inquiry on a case-by-case basis.

Moreover, granting deference to trial judges on how to evaluate *Batson's* third prong is consistent with the standard of review used to evaluate *Batson* challenges on appeal. As the Court has repeatedly held, "*Batson's* treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases."<sup>148</sup> Deference to the trial judge makes "particular sense" because the trial judge is best suited to answer whether counsel's "[n]eutral explanation for a peremptory challenge should be believed."<sup>149</sup> As in other contexts, credibility may derive from a variety of factors and "are within the

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<sup>144</sup> Compare *Swain v. Alabama*, 380 U.S. 202, 222 (1965) (holding that a defendant must prove purposeful discrimination on the part of a state to challenge a peremptory strike), with *Batson v. Kentucky*, 476 U.S. 79, 93–94 (1986) (finding that a defendant's showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose is sufficient to challenge a peremptory strike).

<sup>145</sup> *Snyder v. Louisiana*, 552 U.S. 472 (2008).

<sup>146</sup> *Id.* at 485.

<sup>147</sup> See *id.*

<sup>148</sup> *Hernandez v. New York*, 500 U.S. 352, 364 (1991) (plurality opinion); see also *Snyder*, 552 U.S. at 477 ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.").

<sup>149</sup> *Hernandez*, 500 U.S. at 365.



special province of the factfinder.”<sup>150</sup> This determination supports granting additional flexibility to trial judges than the *Miller-El*-infused *Batson* test allows.

### B. Other Solutions Are Inadequate

The *Batson* test faces criticism from many angles, supporting the conclusion that the Ninth Circuit’s decision in *SmithKline Beecham Corp.* only highlights known problems with the test. Interestingly, critics on both sides of the *Batson* debate agree that current limitations on peremptory challenges slow the judicial process, as litigants fight extensively in “collateral litigation” to determine if their adversaries had used peremptory challenges improperly.<sup>151</sup> This disadvantage is particularly significant because, as one commentator noted, “[i]f the actual *Batson* process during jury selection is often fairly quick and informal—one lawyer objects, the judge directs the other lawyer to respond—the appellate process can drag on for years.”<sup>152</sup> Nevertheless, despite *Batson*’s legal complications post-*SmithKline Beecham Corp.*, extreme positions, such as eliminating peremptory strikes or eliminating *Batson*’s protections, are not the answer.

#### 1. Eliminating Peremptory Strikes Is Too Extreme

The call to eliminate peremptory challenges is hardly new. Advocates for abolishing peremptory strikes argue that the practice is always based on limited demographic information and, therefore, its exercise is inherently discriminatory. For example, Justice Marshall and Justice Breyer both argued that the only way to “‘end the racial discrimination that peremptories inject into the jury-selection process’ . . . [is to] ‘eliminat[e] peremptory challenges entirely.’”<sup>153</sup> Justice Breyer expressed particular concern that the use of race- and gender-based stereotypes seems more “organized” and “systematized” than before.<sup>154</sup> For example, new technological developments, such as “JuryQuest” software (which became available the same year as *Miller-El*), compare demographic variables to past jury outcomes and other data to suggest how attorneys should use their peremptory

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<sup>150</sup> *Wright v. Florida*, 474 U.S. 1094, 1096 (1986) (Blackmun, J., dissenting) (citation omitted).

<sup>151</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 162 (1994) (Scalia, J., dissenting).

<sup>152</sup> Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 28 (2014).

<sup>153</sup> *Miller-El v. Dretke*, 545 U.S. 231, 266–67 (2005) (Breyer, J. concurring) (citing *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring)).

<sup>154</sup> *Id.* at 270.

challenges.<sup>155</sup> Specifically, “the software compares seven demographic variables—age, sex, race, education, occupation, marital status, and prior jury service—to a massive database of survey questionnaires and prior jury outcomes.”<sup>156</sup>

Advocates for banning peremptory strikes also point to Great Britain’s ban to support that “fair [jury] trials based largely on random jury selection” can continue without the challenge.<sup>157</sup> Specifically, they argue that jury impartiality is based on two commitments: drawing potential jurors from broad jury pools and the ability to exclude individual jurors who indicate a bias during voir dire.<sup>158</sup> As the latter can be accomplished through traditional “for cause” strikes, there simply is “no need, and no temptation, for any protections above and beyond the challenge for cause.”<sup>159</sup>

These advocates argue that by eliminating peremptory strikes altogether, litigants still are able to remove jurors “for cause” if they believe impaneling those jurors will cause harm. But, what if a defendant who faces a life sentence genuinely believes one juror is looking at him “funny”? Is there really an Equal Protection Clause “harm” sufficient to strike the juror?

Eliminating peremptory strikes falls short because it fails to recognize an important purpose of the peremptory strikes: enhancing the legitimacy of a court’s ruling via litigant participation in jury selection. Specifically, the peremptory challenge was “designed to give the litigants some control over the jury selection process and thereby enhance the acceptability of that jury’s verdict for the litigants and the public.”<sup>160</sup> In this way, the challenge’s greatest virtue is that it gives litigants the opportunity to “approve” of the individuals that decide the outcome of their case,<sup>161</sup> an ability that is particularly powerful in criminal trials where both the judge and the litigant’s adversaries are the government itself.

## 2. *Limitations on Strikes Are Necessary*

On the other side of the ideological spectrum, critics like Chief Justice Burger and Justice Scalia believe that limiting peremptory

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<sup>155</sup> Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 391–92 (2010).

<sup>156</sup> *Id.* at 392.

<sup>157</sup> *Miller-El*, 545 U.S. at 272 (Breyer, J., concurring).

<sup>158</sup> See Hoffman, *supra* note 45, at 847.

<sup>159</sup> *Id.* at 848.

<sup>160</sup> Morrison, *supra* note 152, at 46.

<sup>161</sup> See *id.* at 46–47.

challenges also vitiates their purpose.<sup>162</sup> These critics believe that the *Batson* test drastically limits the effectiveness of peremptory challenges as “lawyers . . . abandon challenges for which they have no reasons, which . . . is tantamount to abandoning the peremptory challenge.”<sup>163</sup> However, these criticisms fall short because they fail to address the negative consequences of discriminatory challenges.

Specifically, Justice Scalia repeatedly argued that “[s]ince all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection.”<sup>164</sup> But this argumentation fails to acknowledge the very basis of the Equal Protection Clause’s protection. As *United States v. Carolene Products Co.*’s<sup>165</sup> footnote four famously recognizes, some “discrete and insular” minorities may be universally mistreated.<sup>166</sup> In the context of jury selection, if both litigants view gay, lesbian, or bisexual persons as inherently untrustworthy, the group could be systematically excluded without recourse. There would be no balancing out “in the wash” because neither litigant would fight to exclude straight jurors.<sup>167</sup> Taken to its logical conclusion, such a system could allow the exclusion of LGB jurors (or any minority group) from jury service as a whole.

Additionally, when jurors are removed for discriminatory reasons, their perceptions of a neutral, nondiscriminatory justice system are greatly reduced, something that is particularly concerning if they find themselves as jurors or even litigants in a future case.<sup>168</sup> Similarly, although American society has become more diverse and more tolerant, the risk of peremptory challenges being disproportionately exercised against women and minorities remains. For example, racial disparities still “remain in virtually every quality-of-life measure in-

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<sup>162</sup> See Underwood, *supra* note 49, at 760 n.159; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 159 (1994) (Scalia, J., dissenting).

<sup>163</sup> Underwood, *supra* note 49, at 760 n.159.

<sup>164</sup> *J.E.B.*, 511 U.S. at 159 (Scalia, J., dissenting).

<sup>165</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>166</sup> See *id.* at 152 n.4.

<sup>167</sup> Technically, without a private cause of action for struck jurors, this is already true for race and gender because a litigant must *move* to challenge the discriminatory strike. Nonetheless, there is value, albeit more symbolic than practical, to knowing that it is “wrong” to exclude on discriminatory grounds. See Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 484 n.151 (1997) (“It is, of course, possible to argue that a statute has a purely symbolic role.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 220 n.12 (1986) (Stevens, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003))).

<sup>168</sup> See *Batson v. Kentucky*, 476 U.S. 79, 129 (1986) (Burger, C.J., dissenting).

cluding health, income, education, and housing.”<sup>169</sup> Moreover, because studies suggest that there may be merits to gendered and racial assumptions, “an attorney might rationally (albeit unconstitutionally) consider [membership in a protected class] when assembling a sympathetic jury.”<sup>170</sup> Therefore, although the limitations placed on peremptory challenges may infringe on their unfettered use, the *Batson* test remains valuable because it ensures that juror’s rights are protected and that citizens are not excluded from an important civic duty on unconstitutional grounds.

The modern *Batson* test is necessary because it ensures that limited peremptory challenges remain a right of litigants while still honoring the guarantees of the Equal Protection Clause. Specifically, attorneys are still able to “act on only limited information or hunch[es]” during voir dire to strike jurors—so long as those decisions are not based on specific characteristics subject to heightened scrutiny under the Equal Protection Clause.<sup>171</sup>

#### CONCLUSION

*SmithKline Beecham Corp.* took an important step in recognizing that *Batson*’s protections apply to peremptory strikes exercised on the basis of sexual orientation. But the Ninth Circuit’s decision left much unanswered as well. Once *Batson* applies to LGB veniremen, the Ninth Circuit’s opinion provides no guidance as to how to effectuate its mandate. This is particularly complicated since the Court’s decision in *Miller-El*, which favors comparative juror analysis at *Batson*’s third prong.

This Note advocates maximizing deference to trial courts in order to determine how to make credibility determinations under *Batson*. By preserving *Batson*’s intent, litigants are still able to remove veniremen for almost any reason and are still able to have a hand in selecting the “impartial jury” guaranteed by both the Sixth and Seventh Amendments. But, importantly, *Batson* and its progeny protect the rights of citizen-jurors who can no longer be struck for their race, gen-

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<sup>169</sup> 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, 1083–84 (2011) (citations omitted).

<sup>170</sup> *Id.* at 1084–85.

<sup>171</sup> *See Batson*, 476 U.S. at 123 (Burger, C.J., dissenting).

der, or sexual orientation. Although the system is not perfect, returning to the original *Batson* test is the most effective solution because it allows both litigants and veniremen to leave voir dire feeling satisfied.