PEREMPTORY STRIKES BASED ON (PERCEIVED?) SEXUAL ORIENTATION: JURY SELECTION AFTER *UNITED STATES V. WINDSOR*

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INTRODUCTION

> [TRIAL ATTORNEY]: He is gay.
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> THE COURT: How do you know that?
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> [TRIAL ATTORNEY]: . . . I listened to his answers. I watched his mannerisms. I believe him to be gay . . . .
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> . . . .
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> THE COURT: First, this gentleman does not fit into a category of persons protected by *Batson*. There is no way the Court can define whether or not he is gay. And I don't think it is appropriate to make a *Batson* challenge. This is a peremptory challenge, which is permissible.
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> [TRIAL ATTORNEY]: I base this on the following; the way he is—his affect; the way he projects himself, both physically and verbally indicate to me that he is gay. The place where he lives is potential evidence of that. His marital status is potential evidence of that. What he has done for a living is potential evidence of that . . . . I know we can't tell these things with certainty. I know it is common for people to point at people and say "these people are such and such." And you can't really know. The only way you can know is to inquire. *Sexual orientation is an impermissible excuse for excusing a juror*, and I believe the Court has a duty to make a record . . . .[1]

One can almost feel the trial attorney's frustration above as he attempts to "prove" to the court and establish on the record that a potential juror is gay and being struck from the jury because of that very characteristic. The trial judge, in refusing to be convinced, does raise an interesting question: How, or is there even a way, to define or prove whether or not a person is gay? And if there is a way to prove such a thing, why should *proving* a person's sexual orientation matter in a court of law? In the context of jury selection, proving or

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1. Johnson v. Campbell, 92 F.3d 951, 952 (9th Cir. 1996) (emphasis added).

establishing a person's sexual orientation on the record could potentially matter a great deal.

Gays and lesbians may not have been openly excluded from juries in the same manner as women and African Americans have historically been,[2] but this is so only because "[t]he machineries of discrimination against gay individuals were such that explicit exclusion of gay individuals was unnecessary—homosexuality was 'unspeakable.'"[3] Recently, however, public attitudes regarding LGBT issues have made a profound shift, and gays and lesbians have made significant political strides, particularly and most notably in the marriage-equality arena.[4] *United States v. Windsor*,[5] in which the U.S. Supreme Court ruled Section 3 (the section defining marriage as between "one man and one woman") of the Defense of Marriage Act ("DOMA") unconstitutional, was a particularly significant step towards equality for gay and lesbian persons.[6] Additionally, (or finally), the Supreme Court has recently agreed to hear oral argument on April 28, 2015, on the same-sex marriage issue in the case *Bourke v. Beshear*,[7] after which the Supreme Court should be expected to answer definitively the following: 1) whether or not states are required to issue marriage licenses to persons of the same sex and 2) whether or not a state must recognize a same-sex marriage which was lawfully licensed in another state.[8]

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2. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136, 146 (1994) (holding that peremptory strikes may not be based on gender) ("Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans."); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that counsel may not peremptorily strike jurors during voir dire based on a juror's race); *see also J.E.B.*, 511 U.S. at 136 ("[A]lthough blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later." (quoting Frontiero v. Richardson, 411 U.S. 677, 685 (1973))).

3. Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014) (citing Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 814 (2002)).

4. Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 410–11 (2014); *see* United States v. Windsor, 133 S. Ct. 2675 (2013) (holding Section Three—defining marriage as only between one man and one woman—of the Defense of Marriage Act ("DOMA") unconstitutional); Bostic v. Schaefer, 760 F.3d 352, 376–78, 378 n.8 (4th Cir. 2014) (applying strict scrutiny to sexual orientation and holding "that the fundamental right to marry encompasses the right to same-sex marriage").

5. 133 S. Ct. 2675 (2013).

6. *Id.* at 2695–96.

7. 135 S. Ct. 1041 (2015); Michael S. Rosenwald, *The Other Cases in the Landmark Supreme Court Hearing on Gay Marriage*, WASH. POST (Apr. 6, 2015), *available at* http://www.washingtonpost.com/news/local/wp/2015/04/06/the-other-cases-in-the-landmark-supreme-court-hearing-on-gay-marriage/.

8. *Id.* ("1) Does the Fourteenth Amendment require a state to license marriage between two people of the same sex? 2) Does the Fourteenth

However the Supreme Court chooses to ultimately decide the same-sex marriage issue, gay and lesbian *venirepersons* specifically still have reason for concern and reason to fear discrimination.[9] Not only are there no legal prohibitions, in most jurisdictions,[10] against peremptorily striking jurors based on sexual orientation, but even if there were, there are also practical problems in that "LGBT identity is often not readily apparent."[11]

Assuming for the moment that gay and lesbian venirepersons should be protected by *Batson* from stereotyped-based thinking in jury selection, there is no escaping the fact that sexual orientation, unlike race or gender, is often not readily discernible, as the passage quoted above makes quite plain. What, then, should the ultimate inquiry be regarding discriminatory peremptory strikes based on sexual orientation? In other words, is the pertinent question whether the potential juror is in reality—in actual fact—gay, or does the ultimate inquiry turn on whether the attorney making the peremptory strike only *perceived* the potential juror to be gay, whether the potential juror was in fact or not?

I. THE *BATSON* FRAMEWORK

Before any of these questions can even begin to be answered, however, the cognizable group at issue—here, homosexual persons—has to be entitled to protection from discriminatory strikes based on the juror's sexual orientation under *Batson v. Kentucky*,[12]—the seminal U.S. Supreme Court case regarding prejudice and stereotyped-based thinking in the context of voir dire. Furthermore, in order to be entitled to *Batson* protection, the group has to be

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Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?").

9. Shay, *supra* note 4, at 411.

10. *But see* Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY J. GENDER L. & JUST. 157, 160, 160 n.21 (2001) (describing the California bill making peremptory strikes based on sexual orientation illegal); *see also* People v. Garcia, 92 Cal. Rptr. 2d 339, 347–48 (Dist. Ct. App. 2000) (acknowledging the history of discrimination and hostility toward homosexuals and holding that exclusion based on sexual orientation was comparable to exclusion for race or gender); *see id.* at 346 (citing Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility . . . .'")).

11. Shay, *supra* note 4, at 412, 445.

12. 476 U.S. 79 (1986). Note that, pre-*Batson*, the peremptory strike was constitutionally challenged in 1965, and ultimately upheld as validly "exercised without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

entitled to some form of higher level of scrutiny than rational basis review.[13]

The peremptory strike—a strike permitted as a "tool to create an impartial jury"—was traditionally one in which counsel was permitted to strike a member of the venire without needing to explain whatsoever the reasoning behind the strike.[14] Peremptory challenges were, and still are, subject to a statutory limitation, which varies according to jurisdiction.[15] It was not until 1986, when the Supreme Court issued its opinion in *Batson*, that the peremptory strike became significantly circumscribed.

In *Batson*, the prosecutor used peremptory challenges to strike all four black persons from the venire, and the defendant, a black man, was convicted of burglary and receipt of stolen goods by a jury composed entirely of white jurors.[16] The focus of the defendant's appeal, and the United States Supreme Court's opinion, was on the constitutionality of the jury selection. The Supreme Court ultimately held that using peremptory challenges to strike jurors based on race violated the Equal Protection Clause of the Fourteenth Amendment and provided the framework for challenging a peremptory strike under *Batson*.[17]

To challenge a peremptory strike under the Equal Protection Clause, the movant bears the burden of establishing a prima facie case of purposeful discrimination. The movant must prove that (1) the prospective juror is a member of a cognizable group, (2) counsel used the peremptory strike against the individual, and (3) an indication exists that the strike was motivated by the characteristic in question.[18] Once a prima facie case is established, the burden then shifts to the nonmovant to offer a neutral reason for the peremptory strike.[19] When the level of scrutiny to be applied to the

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13. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994) (explaining that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group of class of individuals normally subject to 'rational basis' review").

14. Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 963, 965 (1998). Note the difference between the peremptory strike and the "for cause" strike, which "demands that a party give a 'narrowly specified, provable and legally cognizable basis of partiality' for the strike." *Id.* at 963–64 (citing *Swain*, 380 U.S. at 220). Additionally, "[a] party may exercise an unlimited number of for cause challenges." *Id.* at 964.

15. *Id.*

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

17. *Id.* at 89–98.

18. *Id.* at 94–96.

19. *Id.* at 94, 97. Note that the Ninth Circuit has found that when counsel makes a peremptory strike against a homosexual juror and proceeds to claim that he had "no idea whether [a juror] is gay or not" and this claim is "in the face of clear evidence in the record to the contrary," this will not constitute a neutral reason for the peremptory strike. In other words, feigned ignorance will not be persuasive, much less sufficient, to defeat a *Batson* challenge. Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 477–78 (9th Cir. 2014).

cognizable group—of which the individual juror is a member—is rational basis review, the nonmovant cannot lose this step unless she literally fails to provide any reason for the strike.[20] Finally, the court must determine whether the strike was impermissible under the Equal Protection Clause.[21] The court uses the level of scrutiny associated with the cognizable group under the Equal Protection Clause, a level undecided in challenges regarding sexual orientation.[22]

Because the level of scrutiny any group receives is dispositive in terms of receiving *Batson* protection, a brief discussion of *United States v. Windsor* and its (non)discussion regarding the appropriate level of scrutiny for sexual orientation is in order.

II. *UNITED STATES V. WINDSOR* AND HEIGHTENED(?) SCRUTINY

The Supreme Court in *Windsor* declined to explicitly state the level of scrutiny it was applying in ruling that Section 3 of DOMA was unconstitutional.[23] However, the Ninth Circuit's reading of *Windsor* reasoned that the Supreme Court implicitly applied heightened scrutiny to sexual orientation.[24] In so doing, the Ninth Circuit was the first to issue a "circuit-level decision [applying] the holding in *Windsor* to secure the rights of LGBT citizens against discrimination . . . "[25] and the first circuit court to extend *Batson* protection to sexual orientation.

III. THE SMITHKLINE BEECHAM CORP. V. ABBOTT LABORATORIES[26] CASE

In *Smithkline Beecham Corp. v. Abbott Laboratories*, the Ninth Circuit case alluded to above, the litigation revolved around the

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20. *J.E.B.*, 511 U.S. at 143.

21. *Batson*, 476 U.S. at 89.

22. *But see infra* Part II (discussing *United States v. Windsor*'s implicit application of heightened scrutiny to sexual orientation).

23. *See* United States v. Windsor, 133 S. Ct. 2675 (2013); *see also id.* at 2706 (Scalia, J., dissenting) ("[I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."); Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 917 (E.D. La. 2014) ("As to standard of review, *Windsor* starkly avoids mention of heightened scrutiny.").

24. *See Smithkline Beecham Corp.*, 740 F.3d at 480–84. Many other courts have interpreted *Windsor* in the same way. *See, e.g.* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014) (applying heightened scrutiny to sexual orientation after the *Windsor* opinion).

25. Anna N. Martinez, *Striking Jurors Based on Sexual Orientation is Discriminatory*, 91 DENV. U. L. REV. ONLINE 71, 71 (2014), http://www.denverlawreview.org/storage/online-article-pdfs/2014/Striking%20Jurors%20Based%20on%20Sexual%20Orientation%20is%20Discriminatory_Final-Format.pdf (footnote omitted).

26. 740 F.3d 471 (9th Cir. 2014).

pricing of an HIV medication—specifically whether Abbott, the defendant, was manipulating the market in order to drive business to Abbott and away from the competition, Smithkline.[27] During voir dire, one juror ("Juror B") identified himself as a gay man by referring to a male partner on several occasions and stating that he had friends with HIV.[28] Abbott made its first peremptory strike against Juror B—the only "self-identified gay member of the venire"—and Smithkline's counsel immediately raised a *Batson* challenge.[29] After much discussion, the trial court judge ultimately allowed the strike and Smithkline appealed, arguing that Abbott unconstitutionally used a peremptory strike to exclude a juror on the basis of his sexual orientation.[30]

In analyzing *Windsor*, the Ninth Circuit reasoned that because "the 'strong presumption' in favor of the constitutionality" of the Defense of Marriage Act ("DOMA") was "[n]otably absent" from the Supreme Court's analysis, it was clear that "*Windsor*'s balancing is not the work of rational basis review."[31] Even Justice Scalia, in his dissenting opinion in *Windsor*, agreed: "[T]he Court certainly does not apply anything that resembles [the] deferential framework [of rational basis review]."[32]

Furthermore, instead of conceiving of any hypothetical justification for DOMA, *Windsor* looked first to the law's "design, purpose, and effect."[33] Even though one amicus brief to the Supreme Court offered five distinct rational bases for the law,[34] these reasons were not the basis of the Court's actual inquiry: "Unlike in rational basis review, hypothetical reasons for DOMA's enactment were not a basis of the Court's inquiry."[35] In other words, the Ninth Circuit concluded that "*Windsor*'s careful consideration of DOMA's actual purpose and its failure to consider other unsupported bases [was] antithetical to the very concept of rational basis review."[36] Based on this reading of *Windsor* as applying heightened scrutiny to sexual orientation, and the history of significant discrimination that gay and lesbian individuals have

27. *Id.* at 474.
28. *Id.*
29. *Id.* at 474–75.
30. *Id.* at 475.
31. *Id.* at 483.
32. United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting).
33. *Id.* at 2689 ("Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is valid under the Constitution.").
34. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28–48, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *24–48.
35. *Smithkline Beecham Corp.*, 740 F.3d at 481.
36. *Id.* at 482 (citing *Windsor*, 133 S.Ct. at 2693).

experienced, the Ninth Circuit extended *Batson* protection to sexual orientation.[37]

IV. THE PROBLEM WITH THE "COGNIZABLE GROUP" PRONG OF *BATSON* FOR SEXUAL ORIENTATION

Even if heightened scrutiny applies to sexual orientation, and even if *Batson* protection is extended to sexual orientation, one practical problem remains: How does an attorney establish a prima facie case of discrimination if she cannot "prove" that a potential juror is a member of a "cognizable group"? In other words, because sexual orientation, unlike race and gender, is not readily perceivable, how does an attorney making a *Batson* challenge establish that juror's sexual orientation? Must the juror explicitly state on the record, "I am gay"? Or will inferences based on answers given during voir dire (the "totality of the circumstances") be enough?

I argue that, rather than "prove" a juror's sexual orientation, the proper goal in jury selection and in applying *Batson* to sexual orientation should be to recognize a *discriminatory motive*, or an inference of discrimination, on the part of the attorney making the peremptory strike. For there to exist any inference of a discriminatory motive on the part of the attorney making the strike, *some* evidence indicating a juror's sexual orientation, circumstantial or otherwise, would have to have already arisen at some point during voir dire.[38] As the Ninth Circuit stated in *Smithkline*, "[a] *Batson* challenge would be cognizable only once a prospective juror's sexual orientation was established, voluntarily and on the record. Therefore, applying *Batson* to strikes based on sexual orientation creates no requirement that prospective jurors reveal their sexual orientation."[39] The only problem with this reasoning is the "established, voluntarily and on the record" requirement, which

37. *Id.* at 484–86.

38. *See id.* at 477 ("Juror B and the judge referred to Juror B's male partner several times during the course of voir dire and repeatedly used masculine pronouns when referring to him. Given the information regarding Juror B's sexual orientation that was adduced during the course of voir dire, counsel's statement [that he did not know that Juror B was gay] was far from credible."); Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 234, 246–47 (1998) (describing defense counsel's strategy to indirectly elicit information regarding potential jurors' sexual orientation to exclude gay and lesbian jurors during voir dire for the infamous trial of Dan White, who assassinated Harvey Milk, "the most significant gay political leader in history up to that time.") ("The [Dan White] case thus bears significance not only for bringing the issue of juror sexual orientation to the surface, but also for demonstrating that information concerning jurors' sexual orientations can be gleaned even if the trial court *prohibits* direct questioning on the subject." (emphasis added)).

39. *Smithkline Beecham Corp.*, 740 F.3d at 487.

seems to conflict directly with the "no requirement that prospective jurors reveal their sexual orientation."[40]

Because of this relatively murky reasoning, the true inquiry should involve two questions: 1) Is there an inference of discrimination based on sexual orientation on the part of the attorney making the peremptory strike, *whether or not the juror has stated definitively what his or her sexual orientation is*; and 2) Is the attorney making the strike proffering a reason for the strike that is pretextual—in other words, is the reason for the strike a valid one (e.g., one based on actual bias), or is the reason proffered a mere pretense? The trial court (and, if applicable, the reviewing court) should endeavor to consider each explanation for a peremptory strike within the context of the trial or voir dire as a whole, because "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[41]

CONCLUSION

Although many courts read *Windsor* as applying heightened scrutiny to sexual orientation, the opinion is, unfortunately, far from clear.[42] For this reason, the Supreme Court's ultimate decision in the same-sex marriage cases, and the analysis it conducts, could be critical to combating discrimination based on sexual orientation in the jury selection context. Based on the questions certified to the court in *Bourke v. Beshear*, it seems that the Court—assuming, for the moment, that it decides in favor of same-sex marriage—could come out in one of three ways: 1) the Court could decide the issues based solely on the fundamental right to marry, addressing the level of scrutiny *only* in terms of when a fundamental right is implicated,[43] and leaving the level of scrutiny as applied to sexual

40. *Id.*

41. Hernandez v. New York, 500 U.S. 352, 363 (1991) (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

42. *See supra* Part II; *see also infra* note 42.

43. *See* Bostic v. Schaefer, 760 F.3d 352, 376–77 (4th Cir. 2014) (discussing Loving v. Virginia, 388 U.S. 1 (1967), Zablocki v. Redhail, 434 U.S. 374 (1974), and Turner v. Safley, 482 U.S. 78 (1987)) ("These cases do not define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to marry.' Instead, they speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right. The Supreme Court's unwillingness to constrain the right to marry to certain subspecies of marriage meshes with its conclusion that the right to marry is a matter of 'freedom of choice,' . . . that 'resides with the individual[.]' If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed." (citations omitted)); *see also id.* at 375 ("Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny.").

orientation open for interpretation;[44] 2) the Court could decide that sexual orientation is entitled to some form of heightened scrutiny and make this finding an explicit one, in addition to implicating the fundamental right to marry; or 3) the Court could state explicitly that sexual orientation is entitled only to rational basis review while still holding that same-sex couples enjoy the same fundamental right to marry as heterosexual couples.

All but the third of these possible outcomes would weigh strongly in favor of extending *Batson* protection to sexual orientation—it would only be an explicit statement from the Court that rational basis review applies to sexual orientation that would be fatal for extending *Batson* protection to this group of individuals that has historically been subject to significant discrimination, prejudice, and hostility. Ultimately, protection from discriminatory peremptory strikes—*Batson* protection—can only be extended to sexual orientation if the cognizable group (here, gays and lesbians) are entitled to some form of higher scrutiny than rational basis review. While that level of scrutiny is currently rather ill-defined, it might not remain so for much longer. However the Supreme Court decides to rule in *Bourke v. Beshear*, to allow the continuance of peremptory strikes "exercised on the basis of sexual orientation [would] continue [the] deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals."[45] The same-sex marriage battle might be the one attracting the most attention in terms of LGBT rights, but the war is far from over and far from won if such vestiges of discrimination—even in the smaller, isolated context of jury selection—are allowed to remain legally condoned in our justice system.

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44. *See* Wolf v. Walker, 986 F. Supp. 2d 982, 1010 (W.D. Wis. 2014) ("Despite the lack of an express statement from the Supreme Court, some courts and commentators have argued that the Court's analyses in *Romer* and especially *Windsor* require a conclusion that the Court, in practice, is applying a higher standard than rational basis [to sexual orientation]."). *But see* DeBoer v. Snyder, 772 F.3d 388, 414–15 (6th Cir. 2014) (noting that premising the *Windsor* decision "on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally to include same-sex couples . . . would divest the States of their traditional authority over this issue . . . ."); Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014) ("The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny . . . .").

45. *Smithkline Beecham Corp.*, 740 F.3d at 485.