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## Constitutional Law—Sexual Orientation Recognized as Protected Class for Batson Challenges—Commonwealth v. Carter, 172 N.E.3d 367 (Mass. 2021)

Ian Luciano  
*Suffolk University*

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**CONSTITUTIONAL LAW—SEXUAL  
ORIENTATION RECOGNIZED AS PROTECTED  
CLASS FOR *BATSON* CHALLENGES—  
*COMMONWEALTH V. CARTER*, 172 N.E.3D 367  
(MASS. 2021)**

Peremptory strikes allow an attorney to dismiss a potential juror during jury selection without providing any justification.<sup>1</sup> However, in *Batson v. Kentucky*, the Supreme Court of the United States created a three-prong test to ensure that attorneys do not strike potential jurors from the venire for impermissibly discriminatory purposes.<sup>2</sup> An opposing party may raise a *Batson* challenge to have the court determine whether a potential juror was struck solely on the basis of their affinity with a protected class, thereby constituting an equal protection violation against that juror and a violation of a defendant's right to an impartial jury.<sup>3</sup> In *Commonwealth v. Carter*,<sup>4</sup> the Massachusetts Supreme Judicial Court ("SJC") addressed the question of whether such constitutional limits apply when a potential juror is peremptorily struck on the basis of their sexual orientation.<sup>5</sup> The SJC held that a peremptory strike based on a prospective juror's sexual orientation violates the

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<sup>1</sup> See *Peremptory challenge*, LEGAL INFO. INST., <https://perma.cc/FL5D-S2JT> (last updated Sept. 26, 2021) (defining peremptory strikes); see also MASS. GEN. LAWS ch. 234A, § 67B (authorizing peremptory strikes in civil trials); MASS. R. CRIM. P.20(c) (authorizing peremptory strikes in criminal trials).

<sup>2</sup> See 476 U.S. 79, 96-98 (1986) (establishing test to evaluate discriminatory peremptory strikes); *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (1979) (holding peremptory strikes based solely on potential juror's race are impermissible).

<sup>3</sup> See U.S. CONST. amend. XIV, § 2 (proclaiming no state shall deny people within its jurisdiction equal protections of laws); MASS. CONST. pt. 1, art. I (stating all men are equal and have essential rights); U.S. CONST. amend. VI, § 3 (stating all criminal defendants have right to impartial jury); MASS. CONST. pt. 1, art. 1 (guaranteeing right to impartial jury); *Batson*, 476 U.S. at 99 ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice."); *Soares*, 387 N.E.2d at 518 (explaining right to be tried by impartial jury is basic constitutional right). Peremptory strikes exercised against a potential juror solely based on their race is an equal protection violation. *Batson*, 476 U.S. at 99. *Batson* established a three-step process to determine whether a peremptory strike was racially discriminatory: (1) the objecting party must make a prima facie showing of racial discrimination, (2) the striking party must then rebut with a race-neutral justification, and (3) the court must then decide whether purposeful discrimination has occurred. *Id.* at 517-18.

<sup>4</sup> 172 N.E.3d 367 (Mass. 2021).

<sup>5</sup> See *id.* at 378 (addressing issue of whether sexual orientation is protected class in context of peremptory strike).

Equal Protection Clause of the Fourteenth Amendment and Articles 1 and 12 of the Massachusetts Declaration of Rights.<sup>6</sup>

Daniel Pinckney and Antwan Carter (hereinafter collectively referred to as “Carter”) were indicted for murder in the first degree and possession of a firearm without a license after a victim was shot eight times in a convenience store parking lot in February 2007.<sup>7</sup> Two jury trials were conducted and both resulted in mistrials due to deadlocked juries.<sup>8</sup> Prior to a third jury trial, the Commonwealth exercised a number of peremptory strikes against potential jurors.<sup>9</sup> In response, Carter raised several *Batson* challenges, one which alleged that the Commonwealth discriminated against a juror based on their sexual orientation.<sup>10</sup>

During jury selection, juror no. 202 was asked by the trial judge to clarify her household status as either “single, married, domestic partner, separated, divorced, or widowed.”<sup>11</sup> After the juror responded, “domestic partner,” the Commonwealth exercised a peremptory strike and Carter raised a *Batson* challenge, alleging that the juror was struck because she “may be considered gay.”<sup>12</sup> Carter’s challenge was dismissed by the trial judge who stated that sexual orientation was not recognized as a protected class in Massachusetts.<sup>13</sup> This third jury ultimately convicted Carter on both counts, and Carter appealed.<sup>14</sup> The SJC held that as a matter of first impression, sexual orientation was a protected class for purposes of *Batson* challenges.<sup>15</sup> Despite this novel ruling, the court further held that there was insufficient certainty regarding juror no. 202’s sexual orientation and therefore Carter had

<sup>6</sup> See *id.* at 379 (holding sexual orientation is protected class in context of peremptory strike).

<sup>7</sup> See *id.* at 373-74 (detailing charges against Carter).

<sup>8</sup> See *id.* at 372 (explaining procedural history).

<sup>9</sup> See *Carter*, 172 N.E.3d at 372 (detailing Commonwealth’s use of peremptory strikes during the third jury trial).

<sup>10</sup> See *id.* at 378 (discussing Carter’s *Batson* challenges). Carter also raised four race-based *Batson* challenges during jury selection in the third trial, all of which were dismissed by the trial judge. *Id.* at 374. The trial judge relied on the racial composition of the then-seated jury in dismissing Carter’s challenge. *Id.*

<sup>11</sup> See *id.* at 378 (detailing judge’s inquiry to juror).

<sup>12</sup> See *id.* (detailing Carter’s objection to Commonwealth’s peremptory strike). At the time Carter objected to the striking of juror no. 202, Carter also objected to the striking of juror no. 176 alleging that the Commonwealth struck that juror because they may have been gay, but the court did not inquire further as to juror no. 176 because the objection was untimely. *Id.* at 378 n.12.

<sup>13</sup> See *id.* (stating Massachusetts had only engaged in *Batson* inquiries on the basis of gender and race). The trial judge also noted that “domestic partner” may apply to either heterosexual or gay partners. *Id.*

<sup>14</sup> See *Carter*, 172 N.E.3d at 372 (describing guilty verdict and Carter’s subsequent appeal).

<sup>15</sup> See *id.* at 379 (concluding discrimination on basis of sexual orientation is equal protection violation).

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not met their initial burden of making a prima facie showing of discrimination.<sup>16</sup>

Peremptory strikes have long been considered “one of the most important of the rights secured to the accused” and key to “reinforcing a defendant’s right to trial by an impartial jury.”<sup>17</sup> Proponents for peremptory strikes argue that they allow parties to reject jurors whom they suspect are so partial against them that any subsequent trial would be unfair.<sup>18</sup> By removing those suspected of having extreme bias, parties can be confident that they are trying their case before a neutral jury from the venire.<sup>19</sup> In 1965, the Court in *Swain v. Alabama* refused to hold that racial discrimination of jurors constituted a violation of the Equal Protection Clause, instead holding that a party must demonstrate that racial discrimination occurred at a systemic level before the court could find such a constitutional violation.<sup>20</sup>

<sup>16</sup> See *id.* at 380-81 (explaining reason for recognizing sexual orientation as suspect class, but not holding in defendants’ favor). Although Carter had not satisfied the first step of *Batson* regarding the allegedly gay juror, the SJC vacated their convictions and remanded their cases because the trial judge erred in finding that Carter did not make a prima facie case of racial discrimination against at least one of the African-American jurors. *Id.* Because Carter had met their initial burden under the first step of *Batson*, the trial judge should have shifted the burden to the Commonwealth to provide a race-neutral justification for their peremptory strike. *Id.* at 377.

<sup>17</sup> See *Pointer v. United States*, 151 U.S. 396, 408 (1894) (“The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.”); *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (recognizing peremptory strikes reinforce constitutional right to trial by jury); Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1, 15 (2019) (describing importance of right to serve on jury). But see Order Amending Rules 18.4 And 18.5 Of The Rules Of Criminal Procedure, And Rule 47(e) Of The Rules Of Civil Procedure, at 3, Aug. 30, 2021 (eliminating peremptory strikes in Arizona altogether).

<sup>18</sup> See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (explaining peremptory strikes serve to eliminate extreme partiality on either side); *Greene v. United States*, 486 F. Supp. 199, 200 (W.D. Mo. 1980), judgment aff’d, 626 F.2d 75 (8th Cir. 1980) (describing peremptory strikes as “important release valve[s] for the criminal defendant.”). But see Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 853 (1997) (discussing reasons why peremptory strikes are inconsistent with fundamental precepts of impartial jury).

<sup>19</sup> See Paul Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges For Cause, And Peremptories*, 46 UCLA L. REV. 231, 281 (1998) (“[B]y allowing each side the ability to excuse jurors, peremptories promote a sense of fairness by giving the parties some degree of control over jury composition.”); *Swain*, 380 U.S. at 219 (describing essential function of peremptory strikes). Parties can be confident that their case will not be influenced by bias but rather be decided on the evidence presented. *Swain*, 380 U.S. at 219.

<sup>20</sup> See 380 U.S. 202, 221 (1965) (rejecting argument that striking juror because of race in individual case is equal protection violation). The Court in *Swain* was reluctant to allow parties to challenge the striking of individual jurors, concerned that all challenges could be subject to scrutiny such that the function of peremptory system would be diminished. *Id.* at 222. The Court held that there is a strong presumption in favor of the prosecutor exercising the peremptory strike that they are doing so in furtherance of achieving a fair and impartial jury. *Id.* The presumption could not be overcome by the defendant despite alleging that every Black juror on the venire was dismissed.

Twenty-one years later, in *Batson v. Kentucky*, the Supreme Court overruled *Swain* and held that the Equal Protection Clause forbids the challenge of individual jurors solely on account of their race.<sup>21</sup> The Supreme Court then established a three-step analysis for evaluating claims that a peremptory strike was impermissibly discriminatory: (1) the objecting party must make a prima facie showing of racial discrimination, (2) the striking party must then rebut with a race-neutral justification, and (3) the court must then decide whether purposeful discrimination has occurred.<sup>22</sup> The Supreme Court explained that this first step only requires the party raising a *Batson* challenge to produce sufficient evidence for a trial judge to draw a prima facie inference of racial discrimination.<sup>23</sup> The Court also clarified that while the second step of *Batson* shifts the burden to the striking party to articulate a race-neutral explanation, it “does not demand an explanation that is persuasive, or even plausible.”<sup>24</sup> While *Batson* established the framework for

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*Id.* The Court also rejected the defendant’s argument for systemic racial discrimination beyond their individual case; the defendant showed that their county had never had a Black citizen serve on a petit jury in either civil or criminal trials. *Id.* at 222-23.

<sup>21</sup> See *Batson*, 476 U.S. at 97-98 (holding exclusion of Black citizens in particular case violates Equal Protection Clause); see also *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (recognizing constitutional imperative of race neutrality in jury selection); *Prystash v. Davis*, 854 F.3d 830, 835 (5<sup>th</sup> Cir. 2017) (explaining non-Black defendant could challenge exclusion of Black jurors); *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass. 1979) (holding peremptory strikes based on race violates Massachusetts Declaration of Rights); MASS. CONST. pt. 1, art. I (stating all people are equal). The Court has clarified in subsequent cases that it does not matter whether a party is of the same race as the struck jurors. *Powers*, 499 U.S. at 402. In 1979, eight years before *Batson*, Massachusetts recognized that striking of individual jurors solely on account of their race was a violation of equal protection principles under the Massachusetts Declaration of Rights. *Soares*, 387 N.E.2d at 516.

<sup>22</sup> See *Batson*, 476 U.S. at 96-98 (creating test to determine if peremptory strike was based on impermissible discrimination).

<sup>23</sup> See *Johnson v. California*, 545 U.S. 162, 170 (2005) (explaining inference of discrimination is sufficient to meet first step of *Batson*); see also *Commonwealth v. Jones*, 77 N.E.3d 278, 292 (Mass. 2017) (“Peremptory challenges are presumed to be proper, but rebutting the presumption of propriety is not an onerous task.”). The first step of *Batson* does not require the objecting party to demonstrate that a peremptory strike “was more likely than not the product of purposeful discrimination.” *Johnson*, 545 U.S. at 170. But see, e.g., Julia Haigney, Note, *Beyond Comparison: Practical Limitations Of Implementing Comparative Juror Analysis In The Context Of Sexual Orientation*, 84 GEO. WASH. L. REV. 1075, 1089-91 (2016) (highlighting difficulties of satisfying first step of *Batson* in context of sexual orientation discrimination); Kathryn M. Young, Article, *Outing Batson: How The Case Of Gay Jurors Reveals The Shortcomings Of Modern Voir Dire*, 48 WILLIAMETTE L. REV. 243, 255-61 (2011) (discussing practical difficulties of applying *Batson* when struck juror is allegedly gay); WASH. GEN. R. 37(d) (codifying requirement for challenging party to articulate neutral reason for their challenge upon objection); Anna L. Tayman, Note, *Looking Beyond Batson: A Different Method Of Combating Bias Against Queer Jurors*, 61 WM. & MARY L. REV. 1759, 1780-81 (May 2020) (discussing application of Washington’s rule to peremptory strikes against queer jurors).

<sup>24</sup> See *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (explaining second step of *Batson* employs an extremely low standard of permissibility). The Court held that the prosecutor met their burden

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assessing objections to peremptory strikes, some jurisdictions have modified its application.<sup>25</sup>

Courts have extended *Batson*'s principles to apply to jurors struck on account of their ethnicity, nationality, or gender.<sup>26</sup> The protections afforded to potential jurors under *Batson* have also been extended to civil cases.<sup>27</sup> However, the Court has yet to extend *Batson* to jurors struck based on their perceived sexual orientation, despite the Court's recent trend of protecting other gay rights.<sup>28</sup> Both Carter and the Commonwealth acknowledged that the exclusion of a juror based on their sexual orientation is a

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when they explained that the African-American juror was struck not because of their race, but because of their long hair, moustache, and beard. *Id.* at 769.

<sup>25</sup> See, e.g., *United States v. Moore*, 28 M.J. 366, 368 (C.M.A 1989) (eliminating prima facie showing of discrimination requirement in military courts); WASH. GEN. R. 37(d) (requiring striking party to provide neutral explanation for peremptory strike upon objection); *State v. King*, 735 A.2d 267, 279 (1999) (stating Connecticut requires striking party to provide neutral explanation for strike after objection). But see *State v. Holmes*, 221 A.3d 407, 421 (Conn. 2019) (holding peremptory strike against black juror to be permissible because of race-neutral explanation); Chase T. Rogers & Omar A. Williams, *Report Of The Jury Selection Task Force To Chief Justice Richard A. Robinson*, CONNECTICUT JUDICIAL BRANCH, at 2, (Dec. 31, 2020), <https://perma.cc/FF2B-8JY5> (questioning effectiveness of *Batson* challenges in eliminating racial bias).

<sup>26</sup> See *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (concluding potential jurors cannot be struck solely on account of gender); *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (acknowledging Latino ethnicity as cognizable group protected by *Batson*); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (recognizing challenge against Indian juror would be equal protection violation if proven); *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass. 1979) (recognizing broad protections against bias during jury selection). Massachusetts prohibits the exclusion of jurors based on their group affiliation regarding "sex, race, color, creed or national origin." *Soares*, 387 N.E.2d at 516.

<sup>27</sup> See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (holding *Batson* also applies in civil context); U.S. CONST. amend. XIV, § 2 (stating no state shall deny people within its jurisdiction equal protections of laws); *Cf.* U.S. CONST. amend. VI § 1 ("The Sixth Amendment guarantees the rights of *criminal* defendants") (emphasis added). The Sixth Amendment does not guarantee the right to a fair and impartial jury in civil cases. U.S. CONST. amend. VI § 1. Thus, any purposeful discrimination against a potential juror would be impermissible only through the Equal Protection Clause. U.S. CONST. amend. XIV, § 2. If a potential civil juror is struck on account of impermissible discrimination, the civil litigant suffers no injury, but may still argue for an equal protection violation through third-party standing. *Edmonson*, 500 U.S. at 629.

<sup>28</sup> See *United States v. Blaylock*, 421 F.3d 758 (8th Cir. 2005) (concluding the *Batson* court did not intend to extend "constitutional protection to the sexual orientation of venire persons"), cert. denied, 546 U.S. 1126 (2006). But see *United States v. Windsor*, 570 U.S. 744, 769-70 (2013) (holding Fifth Amendment protects rights for gay couples to get married); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding statute banning sodomy is unconstitutional violation of personal liberty); *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015) (incorporating right for gay couples to get married). The gay community has historically been a "politically unpopular group," but the Court followed many states in recognizing that same-sex couples have the right to be married. *Windsor*, 570 U.S. at 769-70; *cf.* *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (rejecting notion Massachusetts Constitution tolerates prejudice against right for same-sex couples to marry). Massachusetts was the first state to legalize same-sex marriage when it held that the Massachusetts Constitution prohibited the denial of marriage licenses to gay couples. *Goodridge*, 798 N.E.2d at 968.

violation of equal protection principles, resting their conclusion on the notion that sexual orientation is inexplicably intertwined with sex, a recognized protected class.<sup>29</sup> As a result, both parties urged the SJC to follow California and Nevada in becoming the third state to extend *Batson* to sexual orientation.<sup>30</sup> Despite the Commonwealth's agreement that sexual orientation should be a protected class for purposes of peremptory strikes, it nevertheless argued that Carter had still failed to make a *prima facie* showing of discrimination against the struck juror and therefore did not meet their burden under *Batson*'s.<sup>31</sup>

In *Commonwealth v. Carter*, the SJC held that sexual orientation is a protected class for purposes of a *Batson* challenge.<sup>32</sup> To justify its novel holding, the SJC recognized the pernicious discrimination that has permeated the LGBTQ+ community both historically and in modern times.<sup>33</sup>

<sup>29</sup> See Brief for Appellant at 44, *Commonwealth v. Carter*, 172 N.E.3d 367 (2021) (No. SJC-11517) 2020 WL 9160840, at \*17 (contending sexual orientation is protected class); Brief for Appellee at 34, *Commonwealth v. Carter*, 172 N.E.3d 367 (2021) (No. SJC-11518), 2021 WL 1339312, at \*13 (acknowledging sexual orientation should be a protected class); see also *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741-42 (2020) (recognizing individual's sex inextricably plays role in discharging homosexual employee).

<sup>30</sup> See *Morgan v. State*, 416 P.3d 212, 228 (Nev. 2018) (holding *Batson* applies to challenges based on sexual orientation); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 341 (Cal. App. 4th 2000) (holding juror cannot be excluded based on sexual orientation); CAL. CIV. PROC. CODE § 231.5 (enacting law forbidding discrimination against potential jurors based on sexual orientation); see also *Williams v. State*, 228 A.3d 822, 842 (Md. Ct. Spec. App. 2020) (noting exclusion of juror because of sexual orientation is unconstitutional); *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 489 (9th Cir. 2014) (holding *Batson* applies to challenges based on sexual orientation); James Lobo, Comment, *Behind The Venire: Rationale, Rewards And Ramifications Of Heightened Scrutiny And The Ninth Circuit's Extension Of Equal Protection To Gays And Lesbians During Jury Selection In SmithKline v. Abbott*, 56 B.C. L. REV. E. SUPP. 106, 122 (2015) (concluding holding in *SmithKline* to extend *Batson* to sexual orientation was correct); Kristal Petrovich, Note, *Extending Batson To Sexual Orientation: A Look At SmithKline Beecham Corp. v. Abbott Labs.*, 2015 U. ILL. L. REV. 1681, 1709 (2015) (arguing other federal circuits should extend *Batson* to sexual orientation). Following the holding in *Garcia*, California became the first state to forbid discrimination against jurors based on sexual orientation when it codified the holding in *Garcia*. CAL. CIV. PROC. CODE § 231.5. The reasoning of *SmithKline Beecham* swayed the Nevada Supreme Court to become the first state supreme court to recognize sexual orientation as a cognizable class protected for *Batson* challenges. *Morgan*, 416 P.3d at 224. The Maryland Special Court of Appeals laid the foundation for Maryland to formally recognize sexual orientation as a protected class by noting that exclusion of a juror on that basis would violate both the Maryland and United States Constitutions. *Williams*, A.3d at 842.

<sup>31</sup> See Brief for Appellee at 37-38, *Commonwealth v. Carter*, 172 N.E.3d 367 (2021) (No. SJC-11518), 2021 WL 1339312, at \*15-16 (arguing Carter had not met their burden under first step of *Batson*).

<sup>32</sup> See *Commonwealth v. Carter*, 172 N.E.3d 367, 380-81 (Mass. 2021) (holding Carter did not establish *prima facie* showing of discrimination).

<sup>33</sup> See *id.* at 379 (discussing past discrimination of homosexual individuals); see also *Obergefell*, 576 U.S. at 661 (describing history of treating homosexuality as mental illness); *Lawrence*, 539 U.S. at 571 ("The condemnation [against homosexual conduct] has been shaped by religious

Additionally, the SJC followed the Supreme Court's reasoning in *Bostock* by acknowledging how "sexual orientation is 'inextricably bound up with sex.'"<sup>34</sup> Agreeing with both the Commonwealth and Carter, the SJC recognized the impossibility of discriminating against an individual based on their sexual orientation without also discriminating against that individual based on sex, a well-established protected class.<sup>35</sup> Lastly, the SJC discussed the lack of correlation between a juror's sexual orientation and their ability to serve as an impartial juror.<sup>36</sup> By removing a juror solely on account of their sexual orientation, the defendant's constitutional right to a fair and impartial jury is violated.<sup>37</sup>

Despite the SJC's formal recognition of a new protected class, the court dismissed Carter's *Batson* challenge.<sup>38</sup> Applying the three-step analysis introduced in *Batson*, the majority found insufficient facts in the record to determine the struck juror's sexual orientation.<sup>39</sup> The SJC noted that meeting the first step of *Batson* may present difficulties for a party asserting discrimination based on sexual orientation, recognizing the concealability of

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beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."); *Bostock*, 140 S. Ct. at 1737 (exemplifying modern discrimination against homosexual and transgender people). Examples of previous discrimination against homosexual individuals include prohibition from most government employment, serving in the military, exclusion from immigration laws, being targeted by police, and burdening their right to be with one another. *Obergefell*, 576 U.S. at 661.

<sup>34</sup> See *Carter*, 172 N.E.3d at 379 (quoting *Bostock*, 140 S. Ct. at 1742) (recognizing inseparable tie between sexual orientation and sex). In *Bostock*, the Supreme Court considered whether sexual orientation was a cognizable group in the context of employment discrimination where a Georgia county employee was discharged after it was revealed that he had joined a gay recreational softball league. *Bostock*, 140 S. Ct. at 1737-38.

<sup>35</sup> See *Carter*, 172 N.E.3d at 380 (applying *Bostock* to jury selection context); Brief for Appellant at 44, *Commonwealth v. Carter*, 172 N.E.3d 367 (2021) (No. SJC-11517), 2020 WL 9160840, at \*17 (contending sexual orientation is a protected class); Brief for Appellee at 34, *Commonwealth v. Carter*, 172 N.E.3d 367 (2021) (No. SJC-11518), 2021 WL 1339312, at \*13 (acknowledging sexual orientation should be protected class). "[F]or a prospective juror to be challenged based on sexual orientation, the challenging party must inherently rely on the person's perceived sex and the gender norms associated therewith." *Carter*, 172 N.E.3d at 380.

<sup>36</sup> See *Carter*, 172 N.E.3d at 380 (describing irrelevance of one's sexual orientation to serve as neutral juror).

<sup>37</sup> See *id.* (quoting *Commonwealth v. Williams*, 116 N.E.3d 609, 621 (Mass. 2019) (describing constitutional violation against defendant if peremptory strike is discriminatory); MASS. CONST. pt. 1, art. 1 (guaranteeing right to impartial jury); US. CONST. amend. VI, § 3 (stating all criminal defendants have right to impartial jury)).

<sup>38</sup> See *Carter*, 172 N.E.3d at 380-381 (dismissing Carter's *Batson* challenge based on sexual orientation).

<sup>39</sup> See *id.* (explaining record failed to provide sufficient facts regarding juror's perceived sexual orientation). The only fact on the record to potentially support Carter's challenge was the struck juror's statement that their household status was "domestic partner". *Id.* at 378. Because the trial judge noted that "domestic partner" could refer to heterosexual or gay persons, there was insufficient information for the SJC to hold that Carter had met their burden under *Batson*'s first step. *Id.*



one's sexuality in comparison to other protected classes such as race and gender.<sup>40</sup> Despite this difficulty, the SJC chose to keep *Batson*'s three-step analysis intact as applied to sexual orientation.<sup>41</sup>

Like other jurisdictions that have addressed the issue, the majority in *Carter* was correct to conclude that sexual orientation should be considered a protected class.<sup>42</sup> An attorney exercising a peremptory challenge against a gay juror considers two factors—the juror's sex and the juror's attraction to another individual of the same sex—and since the juror's sex is connected to the juror's sexual orientation, discrimination based on sexual orientation is possible.<sup>43</sup> However, unlike race and gender, an individual's sexual orientation is not outwardly identifiable.<sup>44</sup> Therefore, absent a voluntary admission from a potential juror of their sexual orientation, it would be impossible for a court to determine a juror's sexuality with certainty unless the court allows further inquiry.<sup>45</sup> Given the court's inability to determine

<sup>40</sup> See *id.* at 381, n.15 (noting concealability of sexual orientation may make application of *Batson* difficult); see also Young, *supra* note 23, at 261 (“[A]s a practical matter, applying *Batson* in its current form to sexual orientation, would be glaringly inadequate to safeguard these jurors’ equal protection rights.”); Petrovich, *supra* note 30, at 1709 (suggesting practical difficulties of extending *Batson* to sexual orientation may be difficult to overcome); Tayman, *supra* note 23, at 1775-77 (outlining practical difficulties of applying *Batson* to “invisible identities”).

<sup>41</sup> See *Carter*, 172 N.E.3d at 379 (concluding *Batson* procedure applies to sexual orientation).

<sup>42</sup> See *id.* at 380-81 (holding sexual orientation is protected class for purposes of *Batson* challenges); see also *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 489 (9th Cir. 2014) (holding *Batson* applies to challenges based on sexual orientation); *Morgan v. State*, 416 P.3d 212, 228 (Nev. 2018) (holding *Batson* applies to challenges based on sexual orientation); CAL. CIV. PROC. CODE § 231.5 (codifying holding in *Garcia*); Lobo, *supra* note 30, at 122 (concluding holding in *SmithKline* to extend *Batson* to sexual orientation was correct); Petrovich, *supra* note 30, at 1709 (“Other federal circuits should follow the decision made by the Ninth Circuit and extend *Batson* to apply to discriminatory uses of peremptory challenges based on sexual orientation.”).

<sup>43</sup> See *Carter*, 172 N.E.3d at 379-80 (describing dynamics of juror's sex coming into consideration when discriminating based on sexual orientation); *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1742 (2020) (describing inextricable ties between sexual orientation and sex); see also *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994) (holding peremptory strikes solely on account of sex are impermissible). The same reasoning would extend to transgender persons and other gender identities, where an attorney would have to consider both the individual's sex and the sex with which the individual identifies. *Bostock*, 140 S. Ct. at 1742-43.

<sup>44</sup> See *People v. Garcia*, 92 Cal. Rptr. 2d 339, 341 (Cal. Ct. App. 2000) (stating sexual orientation unlikely to be volunteered even if juror is heterosexual); Tayman, *supra* note 23, at 1774 (“How could [the trial judge] know that the striking attorney really relied on the juror's sexuality, when it was possible that the attorney did not know the man was gay?”); Young, *supra* note 23, at 255 (discussing how concealability of juror's sexual orientation complicates *Batson* challenge); see also Petrovich, *supra* note 30, at 1705-06 (discussing issues with identifying juror's sexual orientation). The issue of concealability is further complicated when a juror is themselves uncertain about their sexual orientation. Petrovich, *supra* note 30, at 1706. There is a wide range of sexual preferences, and one's perception of what constitutes homosexuality (or any other sexual orientation) may not be the same as another's. *Id.*

<sup>45</sup> See *SmithKline Beecham Corp.*, 740 F.3d at 478 (concluding struck juror revealed himself as homosexual during *voir dire*); *Garcia*, 92 Cal. Rptr. 2d at 340 (noting two lesbian jurors' sexual

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whether a juror is affiliated with a cognizable group, it is impossible for a challenging party to make a prima facie case of discrimination.<sup>46</sup> As a result, the majority has placed parties raising a *Batson* challenge on account of a juror's perceived sexual orientation at a unique and significant disadvantage.<sup>47</sup>

In his concurrence, Justice Lowy noted that *Batson* is unworkable in its current form as applied to sexual orientation, and suggested that *Batson*'s first step should be eliminated when such challenges are raised.<sup>48</sup> Rather than applying the traditional *Batson* three-step analysis, the majority should have followed Justice Lowy's approach.<sup>49</sup> A number of alternative

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orientation became known during trial); Lobo, *supra* note 30, at 119 (“[A] *Batson* Challenge against one of these discriminatory strikes could invite a barrage of inquiries that could thrust a juror's sexuality into the center of a court hearing.”)

<sup>46</sup> See *Carter*, 172 N.E.3d at 380-81 (dismissing *Carter*'s *Batson* challenge because record did not establish juror was homosexual); *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (“To establish such a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.”) (citation omitted); Lobo, *supra* note 30, at 118-19 (“[I]n order for an attorney to make a discriminatory peremptory strike based on sexual orientation, he or she would have to know (or presume to know) that person's sexual orientation.”)

<sup>47</sup> See *Carter*, 172 N.E.3d at 381 n.15 (acknowledging potential complications for challenging party in meeting burden under step one of *Batson*); Tayman, *supra* note 23, at 1775-78 (discussing problems associated with *Batson*'s application to sexual orientation); Petrovich, *supra* note 30, at 1708 (critiquing *Garcia* for lack of guidance to overcome obstacles posed by concealable sexual orientation).

<sup>48</sup> See *Carter*, 172 N.E.3d at 385 (Lowy, J., concurring) (noting concern for prima facie requirement being unworkable for challenges based on sexual orientation).

<sup>49</sup> See *id.* at 389-90 (concluding elimination of *Batson*'s first step would better protect interests of LGBTQ+ community); see also *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989) (eliminating prima facie requirement when *Batson* challenge is raised in military courts); *State v. King*, 735 A.2d 267, 279 n.18 (Conn. 1999) (“[A]fter the party contesting the use of the peremptory challenge has raised a *Batson* claim, the party exercising the challenge must proffer a race-neutral explanation for its decision to strike the venireperson from the jury array.”); WASH. GEN. R. 37(d) (codifying requirement for challenging party to articulate neutral reason for challenge upon objection). But see *State v. Holmes*, 221 A.3d 407, 421 (Conn. 2019) (holding peremptory strike against black juror was permissible because of race-neutral explanation); Rogers, *supra* note 25, at 2 (noting concern for effectiveness of *Batson* challenges in eliminating racial bias). In Connecticut, courts first require a neutral explanation from the striking party upon a *Batson* challenge being raised. *King*, 735 A.2d at 281. However, the ultimate burden of persuasion remains with the challenging party, who then gets an opportunity to rebut. *Id.* In essence, Connecticut has switched the first and second steps of *Batson*, eliminating the need for the objecting party to rebut the striking party's neutral explanation, although it would often be in their best interest to persuade the trial judge under the third step. *Id.* However, the Connecticut Supreme Court recently ordered a jury selection task force to investigate the effectiveness of *Batson* challenges in ensuring a diverse and fair jury pool after concern that the current procedures are ineffective. Rogers, *supra* note 25, at 2. This study was prompted by a recent decision to uphold the conviction of a Black defendant despite his contentions that a prosecutor improperly exercised a peremptory strike against a Black juror, leaving him with an all-white jury. *Holmes*, 221 A.3d at 207. While Connecticut's version of

approaches have been considered to address the shortcomings of *Batson* when applied to sexual orientation.<sup>50</sup> First, direct inquiry of a juror's sexual orientation would likely resolve any ambiguity, but such questioning is inappropriate where a prospective juror maintains a privacy interest in not being required to disclose highly personal information to the court.<sup>51</sup> Second, a *prima facie* showing of discrimination could be made by allowing attorneys to rely on the same stereotypes the striking party may have relied on, but such an approach would essentially amount to a court endorsement of the same discrimination it seeks to eradicate.<sup>52</sup> Lastly, a court relying solely on information volunteered by a juror would be problematic where the striking party relies on gay stereotypes to presume a juror's sexual orientation, but the objecting party does not.<sup>53</sup>

With no suitable alternative approach to applying the first step of *Batson*, the only conceivable way of enforcing these new protections is to eliminate the first step altogether.<sup>54</sup> By immediately requiring the striking

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*Batson* challenges is unique, there is still concern that impermissible discrimination remains unchecked through the use of peremptory strikes. Rogers, *supra* note 25, at 2.

<sup>50</sup> See *SmithKline Beecham Corp.*, 740 F.3d at 476 (inferring striking attorney feared gay juror to be bias against HIV drug manufacturer); Haigney, *supra* note 23, at 1090 (listing common stereotypes used to assume individual is homosexual); Lynd, *supra* note 19, at 246-47 (discussing how attorneys circumvent "[non]-readily identifiable" nature of sexual orientation using stereotypes); see also *Carter*, 172 N.E.3d at 386 (Lowy, J., concurring) (discussing other approaches to modify *Batson* to better eliminate discrimination against concealable identities); Young, *supra* note 23, at 256-61 (analyzing shortcomings of potential solutions when applying *Batson* to sexual orientation).

<sup>51</sup> See *Carter*, 172 N.E.3d at 386 (Lowy, J., concurring) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 514 (1984) (Blackmun, J., concurring)) ("[I]nquiring directly into the sexual orientation of members of the venire, either through the jury form, in camera, or via some other way — can be rejected outright as an intolerable intrusion into privacy interests . . ."); Young, *supra* note 23, at 258-59 (discussing problems with direct questioning of prospective juror). Additionally, an attorney having to directly ask a juror if they are homosexual will likely not endear the attorney to the juror. Young, *supra* note 23, at 258. Even if direct questioning is conducted in a judge's chambers, the implicit message is sent that one's sexual orientation is something to hide. *Id.* It is also conceivable that this approach will lead to attorneys offending jurors whom they mistakenly suspect to be homosexual. *Id.*

<sup>52</sup> See *Carter*, 172 N.E.3d at 387 (Lowy, J. concurring) ("[T]his [approach] would appropriately frame the analysis around the striking party's perceptions of the juror's sexual orientation, [but] it would also do more harm than good.") (alteration in original); Young, *supra* note 23, at 258 (rejecting proposition judge may rely on stereotypes).

<sup>53</sup> See *Carter*, 172 N.E.3d at 387-88 (Lowy, J. concurring) (explaining limitations of approach). The attorney raising a *Batson* challenge is at a significant disadvantage where they may only rely on volunteered information to make a *prima facie* showing of discrimination, even if the striking party furtively relied on other stereotypes. *Id.* at 387.

<sup>54</sup> See *Carter*, 172 N.E.3d at 389 (Lowy, J., concurring) (concluding elimination of first step of *Batson* is best modification for sexual orientation analysis). But see Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, at 3, Ariz. Sup. Ct. Order R-21-0020 (Aug. 30, 2021) (removing peremptory strikes altogether in Arizona); *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J. concurring) (arguing

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party to provide a neutral explanation, a juror is spared the potential humiliation of having the issue of their sexual orientation put in the spotlight.<sup>55</sup> Justice Lowy's approach also comes with limitations because it merely shifts the initial burden to the striking party to articulate a non-discriminatory explanation for their strike, which may be problematic where "[s]ome trial lawyers 'have become extremely adept at offering such neutral rationales, even when the true motive for a challenge is [discriminatory].'"<sup>56</sup> The ultimate burden of persuasion should remain with the objecting party, and an additional consideration may be to allow the objecting party an opportunity to rebut a striking party's neutral explanation.<sup>57</sup> Nonetheless, eliminating the first step of *Batson* would remove a significant hurdle for stopping discrimination in jury selection and serve as a step in the right direction toward providing a workable test for future *Batson* challenges.<sup>58</sup>

In *Commonwealth v. Carter*, the SJC addressed the issue of whether sexual orientation is a cognizable group for purposes of *Batson* challenges

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elimination of peremptory strikes altogether is only way to "end the illegitimate use of the peremptory challenge."); Hoffman, *supra* note 18, at 853 (articulating reasons why peremptory strikes are inconsistent with fundamental precepts of impartial juries). The Arizona Supreme Court made a landmark decision to eliminate peremptory strikes altogether effective January 1, 2022. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, at 3, Ariz. Sup. Ct. Order R-21-0020 (Aug. 30, 2021).

<sup>55</sup> See *Carter* 172 N.E.3d at 386-87 (rejecting approach to directly question juror about their sexual orientation); Wojcik, *supra* note 17, at 41 ("[T]he law should prohibit strikes based on a potential juror's actual or perceived sexual orientation or gender identity.") (emphasis in original); Young, *supra* note 23, at 258 (highlighting problems with directly questioning a juror about their sexual orientation). "[D]epending on the juror's circumstance, public questioning could subject him or her to professional, personal, or physical harm—in addition to discomfort, embarrassment, and irritation at having a roomful of strangers speculate about the sex of her romantic partners." Young, *supra* note 23, at 258.

<sup>56</sup> See Wojcik, *supra* note 17, at 18 (highlighting ability of seasoned attorneys to mask discriminatory nature of peremptory strike). Immediately shifting the burden of providing a neutral explanation for a strike will likely result in some *Batson* challenges being sustained where the attorney may not be able to articulate a reason, but skilled attorneys can articulate a facially neutral response despite discriminatory intent. *Id.*

<sup>57</sup> See *State v. King*, 735 A.2d 267, 279 (Conn. 1999) (explaining modification of *Batson* analysis under Connecticut law). Connecticut follows a similar approach to Justice Lowy's, where a striking party unable to articulate a neutral reason for their strike in the face of a *Batson* challenge would result in the challenge being sustained. *Id.* However, Connecticut goes one step further to allow the objecting party to rebut any seemingly neutral explanation for a peremptory strike, thus leaving the burden of persuasion on the objecting party to show "by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination . . . ." *Id.*

<sup>58</sup> See *Carter*, 172 N.E.3d 388-89 (Lowy, J., concurring) (quoting *Commonwealth v. Sanchez*, 151 N.E.3d 404, 429 (2020)) ("[I]f the challenging party cannot [provide a neutral explanation], then the second prong will have accomplished exactly what the courts intended the *Batson* inquiry to accomplish – discovering and eradicating discriminatory use of peremptory challenges, whether implicit or purposeful.") (alteration in original); *Batson*, 476 U.S. at 95 ("[T]he ultimate issue is whether the State has discriminated in selecting the defendant's venire . . .").

against peremptory strikes. The SJC was correct to hold sexual orientation is a protected class that deserves recognition under equal protection principles like race and sex. Although a step in the right direction, extending *Batson* to sexual orientation alone is insufficient to protect the rights of jurors and litigating parties. The invisible nature of one's sexual orientation makes it difficult for future parties to make a prima facie showing of discrimination under *Batson*'s first step. To better achieve the goal of preventing impermissible discrimination, the SJC should eliminate the first step of *Batson* altogether when the alleged discrimination is based on a juror's perceived sexual orientation.

*Ian Luciano*