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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. 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. 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.

In Commonwealth v. Carter, 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. The SJC held that a peremptory strike based on a prospective juror’s sexual orientation violates the

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1 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).


3 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. 1 (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.


5 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.  

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. Two jury trials were conducted and both resulted in mistrials due to deadlocked juries. Prior to a third jury trial, the Commonwealth exercised a number of peremptory strikes against potential jurors. In response, Carter raised several Batson challenges, one which alleged that the Commonwealth discriminated against a juror based on their sexual orientation.

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.” 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.” Carter’s challenge was dismissed by the trial judge who stated that sexual orientation was not recognized as a protected class in Massachusetts. This third jury ultimately convicted Carter on both counts, and Carter appealed. The SJC held that as a matter of first impression, sexual orientation was a protected class for purposes of Batson challenges. Despite this novel ruling, the court further held that there was insufficient certainty regarding juror no. 202’s sexual orientation and therefore Carter had

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6 See id. at 379 (holding sexual orientation is protected class in context of peremptory strike).
7 See id. at 373-74 (detailing charges against Carter).
8 See id. at 372 (explaining procedural history).
9 See Carter, 172 N.E.3d at 372 (detailing Commonwealth’s use of peremptory strikes during the third jury trial).
10 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.
11 See id. at 378 (detailing judge’s inquiry to juror).
12 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.
13 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.
15 See id. at 379 (concluding discrimination on basis of sexual orientation is equal protection violation).
2022] Sexual Orientation as Protected Class for Batson Challenges 285

not met their initial burden of making a prima facie showing of discrimination.16

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.”17 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.18 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.19 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.20

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16 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.

17 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).


19 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.

20 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. 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. 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. 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.” While *Batson* established the framework for

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21 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 (5th 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.

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


24 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
assessing objections to peremptory strikes, some jurisdictions have modified its application.\footnote{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).}

Courts have extended Batson’s principles to apply to jurors struck on account of their ethnicity, nationality, or gender.\footnote{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.}

The protections afforded to potential jurors under Batson have also been extended to civil cases.\footnote{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.}

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.\footnote{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.}

Both Carter and the Commonwealth acknowledged that the exclusion of a juror based on their sexual orientation is a
violation of equal protection principles, resting their conclusion on the notion that sexual orientation is inexplicably intertwined with sex, a recognized protected class.29 As a result, both parties urged the SJC to follow California and Nevada in becoming the third state to extend Batson to sexual orientation.30 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.31

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

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30 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.


33 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.’” 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. Lastly, the SJC discussed the lack of correlation between a juror’s sexual orientation and their ability to serve as an impartial juror. By removing a juror solely on account of their sexual orientation, the defendant’s constitutional right to a fair and impartial jury is violated.

Despite the SJC’s formal recognition of a new protected class, the court dismissed Carter’s *Batson* challenge. Applying the three-step analysis introduced in *Batson*, the majority found insufficient facts in the record to determine the struck juror’s sexual orientation. 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 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.

See *Carter*, 172 N.E.3d at 379 (quoting *Bostock*, 140 S. Ct. at 1742) (recognizing inextricable 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.

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.

See *Carter*, 172 N.E.3d at 380 (describing irrelevance of one’s sexual orientation to serve as neutral juror).

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).

See *Carter*, 172 N.E.3d at 380-381 (dismissing Carter’s *Batson* challenge based on sexual orientation).

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.\footnote{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] 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”).} Despite this difficulty, the SJC chose to keep Batson’s three-step analysis intact as applied to sexual orientation.\footnote{See Carter, 172 N.E.3d at 379 (concluding Batson procedure applies to sexual orientation).}\footnote{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.”).}

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.\footnote{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.} 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.\footnote{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.} However, unlike race and gender, an individual’s sexual orientation is not outwardly identifiable.\footnote{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} 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.\footnote{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} Given the court’s inability to determine
whether a juror is affiliated with a cognizable group, it is impossible for a challenging party to make a prima facie case of discrimination. 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.

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. Rather than applying the traditional Batson three-step analysis, the majority should have followed Justice Lowy’s approach. A number of alternative
approaches have been considered to address the shortcomings of Batson when applied to sexual orientation. 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. 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. 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.

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. 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.

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 “[n]on-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).

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.

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).

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 futilely relied on other stereotypes. Id. at 387.

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.\(^{55}\) 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].’”\(^{56}\) 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.\(^{57}\) 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.\(^{58}\)

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

\(^{55}\) 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.

\(^{56}\) 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.

\(^{57}\) 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.

\(^{58}\) 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 protects 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.

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