BATSON IN TRANSITION: PROHIBITING PEREMPTORY CHALLENGES ON THE BASIS OF GENDER IDENTITY OR EXPRESSION

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While peremptory challenges upon the basis of race, ethnicity, and gender have been held unconstitutional, and peremptory strikes upon the basis of sexual orientation have been regarded as increasingly suspect after United States v. Windsor*, attorneys remain free to use peremptory challenges to remove potential jurors from the venire upon the basis of their gender identity or expression. The current state of affairs renders transgender and gender-nonconforming jurors vulnerable to court-sanctioned discrimination. This Note proposes that courts apply the trans-inclusive conception of sex discrimination that has gained traction in Title VII jurisprudence to the context of peremptory challenges. Because notions of sex discrimination have evolved to include discrimination on the basis of gender identity or expression, courts should apply heightened scrutiny to peremptory challenges that strike potential jurors upon these bases. And because prohibiting such peremptory challenges would otherwise accord with the judicial rationales that infused* Batson v. Kentucky*,* J.E.B. v. Alabama ex rel. T.B.*, and* SmithKline Beecham Corp. v. Abbott Laboratories*, courts should read* J.E.B. *to prohibit peremptory challenges upon the basis of gender identity or expression. Furthermore, this Note argues that merely barring peremptory challenges upon the basis of sexual orientation will fail to fully protect lesbian, gay, bisexual, and transgender jurors. While others have criticized the* Batson *framework as being ineffective in preventing discrimination in voir dire, this Note instead suggests that in light of* Batson*'s persistence, the courts should take what steps they can to protect transgender and gender-nonconforming jurors.*

INTRODUCTION

Much ink has been spilled over the potential extension of *Batson v. Kentucky*[1] to sexual orientation;[2] the treatment of lesbian, gay, and

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1. 476 U.S. 79 (1986).

2. See, e.g., Kathryn Ann Barry, Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation, 16 Berkeley Women's L.J. 157, 157–58, 173 (2001) (arguing other states should follow California's lead and pass legislation prohibiting peremptory strikes based on sexual orientation); Vanessa H. Eisemann, Striking a Balance of Fairness: Sexual Orientation and Voir Dire, 13 Yale J.L. & Feminism 1, 26

bisexual jurors;[3] and attitudes toward lesbian and gay identity in the courtroom.[4] Likewise, scholars have addressed at length the rights of transgender individuals in prisons,[5] in the workplace,[6] and in schools,[7] but only briefly in the jury box.[8] Perhaps the absence can be explained by the paucity of case law involving transgender or gender-nonconforming jurors.[9] However, as social acceptance increases, more individuals will feel

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(2001) ("A prospective juror's sexual orientation alone should not be a permissible basis for a peremptory strike without some other indication of bias.").

3. See generally Todd Brower, Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbian and Gay Men During Jury Service, 59 Drake L. Rev. 669, 672–95 (2011) (analyzing empirical studies of experiences of gay men and lesbians during jury service).

4. See Giovanna Shay, In the Box: Voir Dire on LGBT Issues in Changing Times, 37 Harv. J.L. & Gender 407, 413–25 (2014) (surveying trends in voir dire about LGBT issues and sexuality).

5. See, e.g., Susan S. Bendlin, Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?, 61 Clev. St. L. Rev. 957, 979–82 (2013) (concluding prisons should provide hormone therapy to incarcerated transgender inmates under Eighth Amendment mandate to offer adequate medical care); Whitney E. Smith, Note, In the Footsteps of *Johnson v. California*: Why Classification and Segregation of Transgender Inmates Warrants Heightened Scrutiny, 15 J. Gender Race & Just. 689, 704–27 (2012) (discussing equal protection rights of transgender prisoners and arguing transgender discrimination claims merit heightened standard of review).

6. See, e.g., Judy Bennett Garner & Sandy James, Employment Discrimination Against LGBTQ Persons, 14 Geo. J. Gender & L. 363, 370–72, 380–82 (2013) (summarizing treatment of Title VII claims based on gender identity and protections against gender identity discrimination in employment); Jason Lee, Note, Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII, 35 Harv. J.L. & Gender 423, 436–61 (2012) (analyzing gender-nonconformity, per-se, and constructionist approaches undergirding successful Title VII sex discrimination claims brought by transgender plaintiffs).

7. See, e.g., Zenobia V. Harris, Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights, 13 Scholar 149, 163–99 (2010) (discussing disability and freedom of expression claims brought by transgender students and nonlitigation strategies to challenge school dress code); Heather L. McKay, Note, Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren, 29 Quinnipiac L. Rev. 493, 504–44 (2011) (examining potential equal protection claims for transgender schoolchildren).

8. See Shay, supra note 4, at 451–56 ("As long as our system utilizes peremptory challenges, advocates should not be permitted to exercise them based on a juror's actual or perceived sexual orientation or transgender status." (emphasis omitted)).

9. This Note will use the terms "transgender" and "gender-nonconforming" as umbrella terms for noncisgender identities, including but not limited to "people who identify or live some or all of the time as a gender other than that assigned at birth, people with intersex conditions, transsexuals, genderqueers, transvestites, drag kings and queens, women displaying 'masculine' characteristics, men displaying 'feminine' characteristics, and 'anyone whose performance of gender calls into question the construct of gender itself.'" Sydney Tarzwell, Note, The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners, 38 Colum. Hum. Rts. L. Rev. 167, 167 n.1 (2006) (quoting Kate Bornstein, Gender Outlaw 121 (Vintage 1995)).

the freedom to come out as transgender or express their gender identities in ways that do not conform to traditional stereotypes. Accordingly, prohibiting peremptory strikes on the basis of sexual orientation will fail to fully protect lesbian, gay, bisexual, and transgender (LGBT) jurors.[10] This Note aims to fill a gap in existing scholarship by addressing the application of *Batson* to transgender and gender-nonconforming jurors.

Part I of this Note recounts the history of the peremptory challenge and the evolving application of *Batson*, provides a background on transgender terminology, and then examines three cases in which attorneys exercised peremptory challenges against transgender and gender-nonconforming jurors. Part II identifies a circuit split on whether heightened scrutiny applies to gender identity, analyzes new developments that highlight the growing trend of a trans-inclusive conception[11] of sex discrimination, and considers whether extending *Batson* to transgender and gender-nonconforming jurors fulfills the concerns animating *Batson* and *J.E.B. v. Alabama ex rel. T.B.*[12] Finally, Part III proposes that courts and legislatures apply the trans-inclusive model of sex discrimination under Title VII to the Equal Protection Clause, thus prohibiting peremptory strikes on the basis of gender identity or expression.[13]

This Note recognizes the importance of terminology, because such terms serve not only as descriptors of personal and social identities but also create legal categories through which individuals' access to rights are granted, impeded, or denied. These terms do not encompass the full range of lived experiences around gender, nor may they be appropriate in all circumstances, particularly in reference to an individual who uses other terms to self-identify. This Note intends such terminology to be read as inclusively as possible. For further discussion of transgender terminology, see infra section I.B.

10. See infra section III.C (discussing likelihood of attorneys using gender-expression-based peremptory strikes as permissible proxy to target lesbian, gay, and bisexual jurors).

11. See Michael J. Vargas, Note, Title VII and the Trans-Inclusive Paradigm, 32 Law & Ineq. 169, 170 (2014) (using similar terminology of "trans-inclusive model of Title VII" to discuss Title VII's transgender sex discrimination cases).

12. 511 U.S. 127 (1994).

13. This Note uses the phrase "on the basis of gender identity or expression" to indicate discrimination against transgender and gender-nonconforming individuals *because* (1) they identify as transgender, gender-nonconforming, or another noncisgender identity; (2) their behavior, expression, or appearance differs from traditional gender norms; or (3) others perceive them to identify, behave, or appear in such a way.

In short, this Note strives to avoid harmful distinctions between status and conduct that others may attempt to draw in order to exclude certain individuals from such protections. See Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1621–27 (1993) ("[I]f homosexual status is accorded constitutional protection by the courts . . . government actors will become more intent on justifying their discriminatory actions in terms of conduct rather than status.").

However, this Note also recognizes that many courts, legislatures, and advocates have used other terms, such as "gender identity," "gender expression," or even "sexual orientation" to protect transgender and gender-nonconforming individuals. See Nat'l Ctr. for Lesbian Rights, State by State Guide to Laws that Prohibit Discrimination Against

I. THE EVOLVING FRAMEWORK OF *BATSON* AND UNPROTECTED TRANSGENDER JURORS

Peremptory challenges safeguard a litigant's Sixth Amendment right to a fair, impartial jury—but at what cost? This Part examines the *Batson* framework and how courts have neglected to protect transgender and gender-nonconforming jurors. Section I.A considers the limitations imposed by *Batson* and its progeny, with a particular focus on the prohibition of gender-based peremptory challenges and the Ninth Circuit's recent extension of *Batson* to sexual orientation. Section I.B provides a primer on transgender identity and outlines preferred terminology. Finally, section I.C discusses three cases in which attorneys struck jurors on the basis of gender identity or expression. In order to consider how *Batson* might be extended to transgender and gender-nonconforming people, it is essential to review its origins and how the current system treats transgender jurors.

A. *Peremptory Challenges: A History*

1. *Peremptory Challenges Generally.* — During voir dire, attorneys may exercise a limited number of peremptory challenges to remove potential jurors without being required to state a reason.[14] While no constitutional right to peremptory challenges exists,[15] the Supreme Court has affirmed the peremptory challenge's function as protecting a litigant's right to an impartial jury, representative of a cross-section of the community.[16]

All jurisdictions allow peremptory challenges. The number of challenges permitted varies by the type of trial—civil or criminal—and the

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Transgender People 2 (2010), http://www.nclrights.org/wp-content/uploads/2013/07/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf [http://perma.cc/63RD-2AMC] (noting seven states and D.C. use "gender identity," six states use "sexual orientation," and one state uses "gender identity or expression" in nondiscrimination statutes to extend protections to transgender people).

14. Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . ." (quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976))).

In contrast, in federal courts, counsel may exercise challenges for cause against jurors who lack the ability to render a fair and impartial verdict. See Swain v. Alabama, 380 U.S. 202, 220 (1965) ("[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality . . . .").

15. See, e.g., Rivera v. Illinois, 556 U.S. 148, 157 (2009) ("[T]here is no freestanding constitutional right to peremptory challenges.").

16. See, e.g., *J.E.B.*, 511 U.S. at 163 (Scalia, J., dissenting) ("[T]he Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law."); *Batson*, 476 U.S. at 120–22 (Burger, C.J., dissenting) (noting "venerable tradition" of peremptory challenge as eliminating severe partiality and strengthening jury system).

jurisdiction.[17] Peremptory challenges are subject to constitutional limitations to ensure that attorney conduct comports with the Equal Protection Clause[18] and may otherwise be restricted by statute or precedent.[19]

2. *Race and the Origins of* Batson. — The Supreme Court first held that attorneys may not seek to exclude a juror on the basis of race in *Swain v. Alabama*.[20] In *Swain*, the Court built on the foundation laid in *Strauder v. West Virginia*[21]: While the Court noted that a black defendant lacked an affirmative right to have a jury contain members of his race, it nevertheless held that denying black venirepersons the opportunity to serve on a jury violates the Equal Protection Clause.[22]

The Court upheld this ruling in *Batson v. Kentucky*, holding that the state's exclusion of black individuals from the jury because of race violates the Equal Protection Clause.[23] Reasoning that such intentional discrimination violates the defendant's equal protection rights, the Court emphasized the role of the jury as "safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."[24] Moreover, the Court stressed that racial discrimination in voir dire visits significant dignitary harms upon both the struck juror, by questioning his competence based on his race,[25] and upon the entire community, by

17. Romualdo P. Eclavea et al., 47 Am. Jur. 2d Jury § 207 (2015); see also Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809, 827 (1997) ("Today, every state recognizes some form of peremptory challenges for both sides in criminal and civil cases.").

18. See infra sections I.A.2–I.A.4 (discussing prohibition of race- and gender-based peremptory challenges and potential extension to sexual orientation).

19. See Roger Allan Ford, Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts, 17 Geo. Mason L. Rev. 377, 381 (2010) ("[T]he number of peremptory challenges allocated to each side has never been consistent across jurisdictions or stable over time.").

20. 380 U.S. 202, 203–04 (1965).

21. Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (finding unconstitutional state statute barring black individuals from jury service).

22. *Swain*, 380 U.S. at 203–04 ("[A] State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.").

23. 476 U.S. 79, 85 (1986).

24. Id. at 86. In a series of cases, the Court extended the application of *Batson* to criminal defendants, civil litigants, and circumstances in which the party and the excluded juror do not share the same group characteristic. See Georgia v. McCollum, 505 U.S. 42, 59 (1992) (prohibiting use of racial peremptory challenges by criminal defendants); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (applying *Batson* to "private litigant's racially discriminatory use of peremptory challenges"); Powers v. Ohio, 499 U.S. 400, 402 (1991) (permitting objection to racial peremptory challenges even when challenging party and excluded juror do not share same racial identity).

25. See *Batson*, 476 U.S. at 87 (noting juror competence depends on "assessment of individual qualifications and ability impartially to consider evidence," not race).

weakening the public's faith in the judicial system and thus destabilizing the rule of law.[26]

The Court set out the necessary requirements to establish a prima facie case of purposeful racial discrimination in jury selection.[27] A defendant must establish (1) "that he is a member of a cognizable racial group," (2) "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race," and (3) "that these facts and any other relevant circumstances raise an inference that the prosecutor used [peremptory challenges] to exclude the [venireperson] from the petit jury on account of their race."[28] Once the defendant has established a prima facie case, the burden shifts to the prosecutor to articulate a neutral reason for the exclusion.[29]

In barring attorneys from striking potential jurors on the basis of race, *Batson* laid the cornerstone for the principle that discrimination has no place in voir dire. But it was not until 1994 that the Court laid the foundation for protecting transgender and gender-nonconforming jurors in *J.E.B. v. Alabama ex rel. T.B.*[30]

3. *Gender.* — In *J.E.B. v. Alabama ex rel. T.B.*, the Court extended *Batson*'s reach to peremptory challenges on the basis of gender.[31] The Court grounded its reasoning in the historical exclusion of women from juries[32] and the numerous stereotypes mobilized by courts and legislatures alike to justify that exclusion.[33] The Court noted that due to a history of sex discrimination, gender-based classifications are subject to heightened scrutiny and require "an exceedingly persuasive justification" in order to survive.[34]

In considering whether gender discrimination in the selection of the jury furthers the state's interest in a fair and impartial trial, the Court

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26. Id. at 99 ("[P]ublic respect for our . . . justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

27. Id. at 96–97.

28. Id. at 96.

29. Id. at 97.

30. 511 U.S. 127 (1994).

31. See id. at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

32. See id. at 131 ("States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment . . . .").

33. See id. at 132–34 ("Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere.").

34. See id. at 135 ("[T]his Court consistently has subjected gender-based classifications to heightened scrutiny in recognition . . . that government policies . . . may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas."' (citation omitted) (quoting Schlesinger v. Ballard, 419 U.S. 498, 506–07 (1975) and Craig v. Boren, 429 U.S. 190, 198–99 (1976))).

rejected the respondent's argument that likely sympathy for the out-of-wedlock father in a paternity action justified excluding male jurors.[35] Rather, the Court emphasized that gender discrimination in jury selection poses harm to the parties, the community, and the excluded jurors.[36] When exercised by state actors, peremptory challenges on the basis of gender stereotypes "reinforce prejudicial views of the relative abilities of men and women" and thereby undermine judicial legitimacy and respect for the rule of law.[37] Furthermore, such challenges injure excluded individuals by marking them as unfit to participate in important decisions within the courtroom.[38]

The Court sought to allay concerns that *J.E.B.* would eradicate the peremptory challenge by noting that attorneys may exercise such challenges against individuals belonging to groups or classes subject to rational basis review.[39] The Court further cabined the reach of its ruling, allowing that in some cases, "strikes based on characteristics . . . disproportionately associated with one gender could be appropriate."[40]

In spite of these assurances, some judges and commentators mourned *Batson* and *J.E.B.* as striking the deathblow against the much-heralded peremptory challenge.[41] Others have criticized such glum predictions as premature and overstated.[42] And as recently as 2014, at

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35. See id. at 137–38 ("We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991))).

36. See id. at 140 ("Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.").

37. Id.

38. See id. at 142 (characterizing gender-based peremptory challenges as signaling that "certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree").

39. See id. at 143 ("Parties still may remove jurors . . . ; gender simply may not serve as a proxy for bias. Parties may . . . exercise their peremptory challenges to remove . . . any group or class of individuals normally subject to 'rational basis' review." (citing Clark v. Jeter, 486 U.S. 456, 461 (1988); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439–42 (1985)).

Examples of groups or classifications who are subject to rational basis review include disabled persons, prisoners, vegetarians, and alcoholics, among others. George Blum et al., 16B Am. Jur. 2d Constitutional Law § 868 (2015).

40. See *J.E.B.*, 511 U.S. at 143.

41. See, e.g., id. at 163 (Scalia, J., dissenting) ("In order . . . not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law."); Stacey L. Wichterman, *J.E.B. v. Alabama ex rel. T.B.*: Gender-Based Peremptory Challenges on Trial, 16 N. Ill. U. L. Rev. 209, 237 (1995) ("[*J.E.B.*] may signify the end of peremptory challenges.").

42. See Hoffman, supra note 17, at 809 ("[R]eports of the death of the peremptory challenge have been greatly exaggerated . . . ."); William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 Am. Crim. L. Rev. 1391, 1439 n.233 (2001) ("[C]ritics

least one federal court has sought to expand *Batson* to a new classification—sexual orientation.[43]

4. *Sexual Orientation?* — In the wake of *United States v. Windsor*, the seminal case holding that the federal government's refusal to recognize the marriages of same-sex couples violated the Due Process Clause,[44] the Ninth Circuit held that peremptory strikes on the basis of sexual orientation are impermissible in *SmithKline Beecham Corp. v. Abbott Laboratories*.[45] *SmithKline* began as a dispute over a licensing agreement and the pricing of HIV medications between two pharmaceutical companies.[46] In an exchange between the district judge and Juror *B* during voir dire, Juror *B* referred to his "partner," and both Juror *B* and the judge used male pronouns to refer to Juror *B*'s partner.[47] After questioning Juror *B*, Abbott's counsel used its first peremptory strike against him.[48] SmithKline Beecham's counsel raised a *Batson* challenge, alleging that Abbott had improperly struck Juror *B* because he was or appeared to be gay, the litigation involved an AIDS medication, and the HIV rate among gay men is well known.[49] The trial judge questioned whether *Batson* applied to sexual orientation and ultimately allowed the strike, stating that if Abbott struck other gay men, she would reconsider her ruling.[50]

The Ninth Circuit reviewed the *Batson* challenge de novo and found that Abbott had struck Juror *B* on the basis of sexual orientation.[51] Subsequently, the court turned to the question of whether *Batson* permitted peremptory strikes on the basis of sexual orientation.[52] In determining the standard of review, the Ninth Circuit interpreted the factors put forth by *Windsor* to establish heightened scrutiny for sexual orientation classifications.[53] The court then considered whether sexual orientation-based peremptory challenges implicate the same concerns that *Batson* sought to alleviate. The court held that *Batson* applies to peremptory challenges on the basis of sexual orientation due to the exclusion of gay

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of the peremptory challenge have been predicting its demise for decades, buoyed with each extension of *Batson*.").

43. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486 (9th. Cir. 2014) (holding, in light of *Windsor*, *Batson* prohibits peremptory strikes based on sexual orientation).

44. 133 S. Ct. 2675, 2695 (2013) (striking down section 3 of Defense of Marriage Act for defining marriage as limited to union between man and woman in violation of Fifth Amendment for purposes of federal recognition).

45. See *SmithKline*, 740 F.3d at 486 ("*Batson* applies to peremptory strikes based on sexual orientation.").

46. Id. at 474 (discussing nature of dispute).

47. Id. (summarizing record's account of this exchange).

48. Id. at 474–75 (discussing questions Abbott's counsel asked juror).

49. Id. at 475.

50. Id.

51. See id. at 476–79.

52. See id. at 479, 484.

53. See id. at 480–84.

men and lesbians from institutions of self-governance[54] and the pervasive stereotypes about the group.[55]

Nevertheless, peremptory strikes on the basis of sexual orientation remain legal in most states.[56] While some predicted that the Supreme Court might find that sexual orientation classifications merit heightened scrutiny in *Obergefell v. Hodges*,[57] the recent case challenging the constitutionality of four states' same-sex marriage bans under the Equal Protection and Due Process Clauses, it ultimately remained silent on the issue.[58] In the aftermath of *Obergefell*, however, other courts may follow in the Ninth Circuit's footsteps[59] and apply heightened scrutiny to sexual orientation classifications.[60] As legislatures increasingly recognize the rights of transgender individuals, some courts may take *Batson* a step further to include peremptory challenges on the basis of gender identity

54. See id. at 484–86 (discussing purge of lesbian and gay employees from federal government in 1950s, employment discrimination perpetuated by licensing boards and state and local governments, and immigration statute barring entry on basis of sexual orientation).

55. See id. at 486 (acknowledging stereotypes of gay men and lesbians as rich, promiscuous pedophiles and carriers of HIV and other sexually transmitted diseases, and noting how "[s]trikes based on preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate these stereotypes").

56. See Andy Birkey, Discrimination Against LGBT Jurors Remains Legal, Am. Indep. Inst., http://americanindependent.com/215836/discrimination-against-lgbt-jurors-remains-legal [http://perma.cc/E4YS-QA9L] (last visited Sept. 19, 2015) ("While California has . . . banned jury discrimination based on sexual orientation, most other states have not.").

Currently, only California, Colorado, Minnesota, and Oregon bar peremptory challenges on the basis of sexual orientation. See Cal. Civ. Proc. Code § 231.5 (West 2006) (barring peremptory challenges on basis of sexual orientation); Colo. Rev. Stat. § 13-71-104(3)(a) (West 2014) (prohibiting sexual orientation-based peremptory challenges); Minn. Stat. Ann. § 593.32 (West Supp. 2015) (same); Or. Rev. Stat. § 10.030(1) (2013) (same); People v. Garcia, 92 Cal. Rptr. 2d 339, 346–48 (Ct. App. 2000) (holding gay men and lesbians "cannot be discriminated against in jury selection").

57. See, e.g., David Cruz, Symposium: Unveiling Marriage Equality?, SCOTUSblog (Jan. 17, 2015, 6:13 AM), http://www.scotusblog.com/2015/01/symposium-unveiling-marriage-equality [http://perma.cc/H8TH-E3NZ] (noting Supreme Court opinion may adopt argument that state bans prohibiting marriage of same-sex couples discriminate on basis of sexual orientation and should be subject to strict or heightened scrutiny).

58. Marcia Coyle & Tony Mauro, Marriage Ruling Historic, but Not Final Word on Gay Rights, Nat'l L.J. (June 29, 2015), http://www.nationallawjournal.com/id=1202730710519/Marriage-Ruling-Historic-But-Not-Final-Word-on-Gay-Rights [http://perma.cc/H3KV-UYRE] ("The high court's decision Friday in *Obergefell v. Hodges* did not resolve the level of scrutiny to apply in future litigation over alleged sexual-orientation discrimination . . . .").

59. See *SmithKline*, 740 F.3d at 480–81 (finding heightened scrutiny for sexual orientation with regards to equal protection).

60. See Ian Millhiser, Here Is the Single Most Important Word in Today's Historic Marriage Equality Opinion, Think Progress (June 26, 2015, 12:02 PM), http://thinkprogress.org/justice/2015/06/26/3674356/single-important-word-todays-historic-marriage-equality-opinion [http://perma.cc/SE8G-6SRG] (arguing Kennedy's reference to immutability and history of discrimination "likely clears the path for a follow up decision establishing that the rights of gay men, lesbians and bisexuals extend far beyond the marital context").

or expression.[61] But in order to consider this possibility, it is necessary to outline some basic precepts and terminology on transgender identity.

B. *Transgender Identity*

As social understanding and acceptance of transgender and gender-nonconforming people has grown, language used to describe members of these groups has correspondingly shifted over time. However, in exploring the judicial treatment of transgender individuals, this Note cites court decisions that use outdated slurs to describe transgender and gender-nonconforming individuals. Therefore, this section foregrounds the analysis in section I.C with a brief survey on identity and terminology and dispels common misconceptions about sexual orientation and gender identity.[62]

Transgender individuals are "people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth."[63] Gender identity, as opposed to one's biological sex assigned at birth, constitutes a person's *inner* feeling of being a man, a woman, or another gender.[64] By contrast, gender expression describes how an individual conveys or represents their gender identity to others, including, but not limited to "behavior, clothing, hairstyles, voice or body characteristics."[65] The term "transgender man" refers to "a transgender individual who . . . identifies as a man"; concurrently, the term "transgender woman" refers to "a transgender individual who . . . identifies as a woman."[66] "Transgender" is generally considered to be an umbrella term,[67] but is occasionally conflated with the older term "transsexual," which refers to "people whose gender identity is different from their assigned sex at birth who seeks [sic] to transition

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61. See infra section II.C (detailing arguments for *Batson*'s application to transgender and gender-nonconforming jurors).

62. I am obligated to acknowledge that I am a queer, cisgender woman writing about terminology and lived experiences that are not my own. Where possible, I have sought to incorporate the works of transgender activists, authors, and organizations. My descriptions of the identities and experiences of the transgender community should never be taken as more authoritative than or as authoritative as those made by transgender individuals.

63. Transgender Terminology, Nat'l Ctr. for Transgender Equal. 1, http://transequality.org/sites/default/files/docs/resources/TransTerminology_2014.pdf [http://perma.cc/FYL7-K2YK] [hereinafter NCTE, Transgender Terminology] (last updated Jan. 2014).

64. See id.

65. Id.

66. Id. These definitions vary. See, e.g., GLAAD Media Reference Guide—Transgender Issues, GLAAD, http://www.glaad.org/reference/transgender [http://perma.cc/85M9-9TJM] [hereinafter GLAAD, Transgender Issues] (last visited Oct. 14, 2015) (defining transgender man as person who was "assigned female at birth but identif[ies] and live[s] as a man").

67. See GLAAD, Transgender Issues, supra note 66 ("Unlike transgender, transsexual is not an umbrella term." (emphasis omitted)).

from male to female or female to male"[68] or those "who have permanently changed—or seek to change—their bodies through medical interventions (including but not limited to hormones and/or surgeries)."[69] Many transgender individuals do not prefer the term because they view it as clinical.[70]

Gender-nonconforming individuals are people who have a gender expression that differs from social stereotypes and expectations.[71] Transgender and gender-nonconforming individuals are not synonymous.[72] People may express their genders in nonconforming ways without identifying as transgender.[73]

Transgender and gender-nonconforming individuals are often grouped under the umbrella of the lesbian, gay, bisexual, and transgender community due to similar histories of discrimination,[74] as well as social, academic, and psychological conflation of sexual orientation and gender identity.[75] Gender identity and sexual orientation are distinct aspects of identity that can, but do not always, overlap.[76] Some transgender individuals are heterosexual, while others identify as gay, lesbian, bisexual, asexual, or queer, among other orientations.[77] Likewise, some lesbian, gay, bisexual, and asexual individuals identify as gender-nonconforming or genderqueer.[78] As the next section will demonstrate, when counsel exercise peremptory strikes against transgender and gender-nonconforming jurors, stereotypes that conflate gender identity, gender expression, and sexual orientation are often at work.

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68. NCTE, Transgender Terminology, supra note 63, at 1.

69. GLAAD, Transgender Issues, supra note 66.

70. See NCTE, Transgender Terminology, supra note 63, at 1.

71. Id.

72. See GLAAD, Transgender Issues, supra note 66.

73. Id.

74. See generally William N. Eskridge, Jr., Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946, 82 Iowa L. Rev. 1007, 1009–11 (1997) (recounting history of state discrimination against lesbian, gay, bisexual, and transgender people).

75. Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Calif. L. Rev. 1, 12–16 (1995) (discussing conflation of sex, gender, and sexual orientation).

76. Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People, 11 Mich. J. Gender & L. 253, 270 (2005) ("Gender identity is who one is. Sexual orientation is to whom one is attracted.").

77. See Joanne Herman, Some Transgender People Are Not Gay, Huffington Post (June 30, 2011, 10:31 AM), http://www.huffingtonpost.com/joanne-herman/some-transgender-people-a_b_886692.html [http://perma.cc/VN73-PSYN] (last updated Aug. 29, 2011, 5:12 AM) (offering examples of lesbian transgender author and straight transgender celebrity).

78. See GLAAD, Transgender Issues, supra note 66 (defining "genderqueer").

C. *Unprotected Transgender Jurors*

Federal courts have repeatedly failed to protect transgender and gender-nonconforming jurors during voir dire.[79] This section will examine three cases involving potential jurors struck on the basis of their gender identity or gender expression,[80] with a particular focus on the exchanges during voir dire and the appellate courts' analyses.

1. Goodman v. Lands End Homeowners Ass'n of Hilton Head, Inc. — Two vacationers who sustained injuries after walking off a seawall and falling to the beach below brought suit against a homeowners' association in *Goodman v. Lands End Homeowners Ass'n of Hilton Head, Inc.*[81] Lands End Homeowners Association's (Lands End) counsel exercised peremptory challenges to remove three black veniremen from the jury during voir dire.[82] When the district court inquired whether Lands End's counsel had race-neutral reasons for the challenges, the latter claimed that the third venireman "would not be a good juror . . . because he was very effeminate."[83] The district court briefly grappled with counsel's reasoning, expressing doubts as to its justifiability.[84] However, the district court ultimately concluded that it could not deny a peremptory strike made "'because [Lands End's counsel] doesn't like the way that juror appears from a masculine vs. feminine standpoint,'" and therefore, counsel's reasoning was "'*sufficient*'" to justify the peremptory strike.[85] The jury later found Lands End not liable for the Goodmans' injuries.[86]

On appeal, the Goodmans challenged Lands End's use of peremptory challenges.[87] They argued that the peremptory challenge violated the third venireman's equal protection rights and their own right to an impartial jury representing a fair cross-section of the community.[88] The Fourth Circuit articulated a highly deferential standard of review, noting that it would only overturn the district court's finding that Lands End had offered a race-neutral explanation if the Fourth Circuit found it to be clearly erroneous.[89] In rejecting the Goodmans' argument that Lands

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79. See Birkey, supra note 56 ("Federal courts have consistently declined to prohibit attorneys from openly discriminating against LGBT people during jury selection.").

80. In the first two cases, *Goodman* and *Carter*, the pertinent jurors were struck ostensibly on the basis of race, and counsel offered gender nonconformity as the reasonable, neutral explanation for the strike. See infra sections I.C.1–I.C.2.

81. See Goodman v. Lands End Homeowners Ass'n of Hilton Head, Inc., No. 91-2542, 1992 WL 91890, at *1 (4th Cir. May 6, 1992).

82. Id.

83. Id.

84. Id. at *3.

85. Id. at *3 (emphasis added by *Goodman*) (quoting J.A. at 36–37).

86. Id. at *2.

87. Id. at *1–2.

88. Id. at *2.

89. See id. at *3 (setting out standard of review).

End's proffered reason for striking the third venireman—his effeminacy—was pretextual, the Fourth Circuit concluded that while the district court may have disagreed with Lands End's reason for striking the juror, the district court never made a finding of pretext.[90] The Fourth Circuit held that this finding was not clearly erroneous.[91]

The factual record in *Goodman* is sparse, leaving many questions as to the third venireman's identity. It is possible that he was gay, bisexual, transgender, or heterosexual and gender-nonconforming. Nevertheless, Lands End's peremptory challenge on the basis that the third potential juror was "very effeminate" implicates, at minimum, issues of gender expression. To be effeminate is to be "[w]omanish, unmanly, enervated, feeble[,] self-indulgent, voluptuous[,] unbecomingly delicate or over-refined."[92] By claiming that the third venireman would not be a good juror on the basis of his effeminacy, Lands End's counsel found him defective by reason of his inadequate masculinity. The counsel's actions suggest that a man who did not comport with traditional norms of masculinity—as measured by counsel—was not qualified to serve on the jury. His feminine appearance—marking him as a transgressor of social norms—was impermissibly used as a proxy to measure his sympathy for the injured Goodmans, and as a cover for defense counsel's racially motivated reasons for striking him in the first place.[93]

2. Carter v. Duncan. — In *Carter v. Duncan*, Jimmy Lee Carter stood charged with committing petty theft with a prior conviction and being an ex-felon in possession of a firearm and ammunition.[94] During voir dire, the prosecutor used a peremptory challenge to remove five potential African American jurors, including a transgender woman named Chris Lewis.[95] The record indicates that "'on the day [Lewis] appeared in court for jury duty he [sic] dressed as a woman,"[96] and that the Petitioner's

90. Id.

91. Id.

92. "Effeminate, *adj.* and *n.*," Oxford English Dictionary, http://www.oed.com/view/Entry/59701?rskey=Yd7Xd3&result=1&isAdvanced=false#eid [http://perma.cc/8549-WDH3] (last visited Oct. 14, 2015).

93. *Goodman* predated the Supreme Court's extension of *Batson* to gender-based peremptory challenges; if the case occurred after *J.E.B. v. Alabama ex rel. T.B.*, the Fourth Circuit may have ruled differently. Jennifer Gerarda Brown, Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny, 85 Minn. L. Rev. 363, 415 (2000).

94. Carter v. Duncan, No. C 02-0586SBA(PR), 2005 WL 2373572, at *1 (N.D. Cal. Sept. 27, 2005).

95. Id. at *5; see also Patrick DePoy, A Jury of Your Peers—The Right to a Jury Trial Free from Discrimination, Am. Civil Liberties Union (June 19, 2012, 3:17 PM), https://www.aclu.org/blog/jury-your-peers-right-jury-trial-free-discrimination [https://perma.cc/K8KS-DFNP] (describing Chris Lewis as transgender woman).

96. *Carter*, 2005 WL 2373572, at *5 n.5 (quoting Resp't Ex. B-2, at 11).

Where the court or record misgenders a transgender individual, this Note will insert "sic" after the incorrect pronoun to indicate the error. Being misgendered refers to the experience of being "assigned a gender that does not match one's identified gender."

brief describes her as a "'cross dresser/transvestite.'"[97] After the trial court asked the prosecutor to offer a race-neutral reason for dismissing Lewis, the prosecutor offered a number of reasons grounded in stereotypes about transgender people:[98]

> I believe that people who are either transexuals [sic] or transvestites—I don't know what the proper term is—traditionally are more liberal-minded thinking people, tend to associate more with the defendants because, obviously, they have been either ridiculed before or are feeling in a position of being in a microscope all the time and are outcasts which lends themselves to associating more with the defendant.[99]

The prosecutor continued in this vein of stereotyping by claiming that "'cross-dressers . . . tend to be more anti-government.'"[100] He likewise alleged that Lewis's unmarried status and lack of children, "'probably explained by [her] cross-dressing status,'" signaled a lack of stake in the community and a lack of experience holding responsibility.[101] Throughout his response, the prosecutor repeatedly misgendered Lewis.[102]

The court asked the prosecutor to confirm that he had dismissed Lewis because "[she] was a cross-dresser or transvestite," and the prosecutor did so.[103] The court subsequently asked defense counsel whether "transvestites [or] cross-dressers" comprise a cognizable group for a

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Julia Serano, Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity 164 (2007).

97. *Carter*, 2005 WL 2373572, at *5. "Transvestite" refers to "a person and esp[ecially] a male who adopts the dress and often the behavior of the opposite sex esp[ecially] for purposes of emotional or sexual gratification." Transvestite, Merriam-Webster's Collegiate Dictionary 1265 (10th ed. 1994). Today, its usage is generally discouraged. See Alex Edelman, Show-Me No Discrimination: The Missouri Non-Discrimination Act and Expanding Civil Rights Protections to Sexual Orientation or Gender Identity, 79 UMKC L. Rev. 741, 744 n.33 (2011) ("[T]he term transgender, rather than transsexual or transvestite, is, to the author's knowledge, the widely (although by no means universally) preferred term for reference . . . ."); see also GLAAD, Transgender Issues, supra note 66 (instructing media not to use "transvestite" unless "someone specifically self-identifies that way").

98. *Carter*, 2005 WL 2373572, at *15.

99. Id. (quoting RT 426–29).

100. Id. (quoting RT 426–29).

101. Id. (quoting RT 426–29).

102. See id. (referring to Lewis as "Mr. or Ms. Lewis" and "he or she" before stating "I'm going to refer to her as 'she' because I believe she was holding herself out to be that today"). Julia Serano and other transgender activists have characterized misgendering as a form of violence. See, e.g., Serano, supra note 96, at 185 ("Considering how big of a social faux pas it is . . . to misgender someone, and how apologetic people . . . become upon finding out that they have made that mistake, it is difficult to view . . . the deliberate misgendering of transsexuals[] as anything other than an arrogant attempt to belittle and humiliate trans people.").

103. *Carter*, 2005 WL 2373572, at *16.

Wheeler motion,[104] noting that if the answer was no, the court intended to deny the motion.[105] The defense counsel argued that society conflates "transvestites and homosexuals."[106] The court denied the motion, finding that the prosecutor's reasoning to exclude Lewis on the basis of being a "transvestite" was reasonable and that Lewis was not excluded on the basis of her race.[107]

After unsuccessfully appealing his conviction, Carter filed a federal habeas corpus petition.[108] On appeal, Carter argued that the prosecutor improperly exercised a peremptory strike against Lewis on the basis of sexual orientation.[109] The petitioner relied upon *People v. Garcia*, a case that had not been published at the time of the trial that held that discrimination on the basis of sexual orientation in jury selection violates the California Constitution.[110] The district court rejected this argument, noting the absence of information in the record about Lewis's sexual orientation and the wide discretion given to prosecutors in jury selection.[111] Moreover, the court stated that "there is no federal law holding that either cross-dressers or transvestites constitute a protected class within the meaning of *Batson*."[112]

As in *Goodman*, the court accepted gender nonconformity as a permissible, race-neutral reason to strike a black juror. However, in this case, it was not an ordinary lawyer, but a federal prosecutor who trafficked in stereotypes about transgender and gender-nonconforming people in order to make the case that individuals like Ms. Lewis have no place sitting on a jury.

3. Commonwealth v. Smith. — In *Commonwealth v. Smith*, during voir dire, the prosecutor first attempted to challenge a juror of unknown gender for cause because the juror "had some 'identification issues,' seemed to be a man dressed as a woman, and appeared to have breasts."[113] The defense argued that the prosecution had attempted to challenge a juror for cause on the basis of sexual orientation, and the

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104. A *Wheeler* motion refers to the California motion to challenge discriminatory peremptory challenges that predates *Batson*. See People v. Wheeler, 583 P.2d 748, 764 (Cal. 1978).

105. *Carter*, 2005 WL 2373572, at *16.

106. Id.

107. Id.

108. Id. at *1.

109. Id. at *17.

110. Id. (citing People v. Garcia, 92 Cal. Rptr. 2d 339, 343 (Ct. App. 2000)).

111. Id.

112. Id. at *18. California later codified *People v. Garcia* by passing legislation that bans the use of peremptory challenges on the basis of sexual orientation. See Cal. Civ. Proc. Code § 231.5 (2006) (barring peremptory challenges on basis of sexual orientation in California).

113. Commonwealth v. Smith, 879 N.E.2d 87, 95 (Mass. 2008).

court denied the challenge.[114] The prosecutor subsequently exercised a peremptory challenge, prompting the following exchange:

> DEFENSE COUNSEL: "Your Honor, I'd like to put on the record that I'm beginning to see a pattern on the basis of the Commonwealth with the exclusion of a homosexual, white male. So I want to put that on the record as well."
>
> THE JUDGE: "Okay. You've put it on the record."
>
> . . .
>
> THE PROSECUTOR: "Just so I may be crystal clear, there's absolutely no pattern. I don't even know of any even homosexuals that have been before us."
>
> "This particular gentleman was dressed, in my opinion, like a female and he has breasts and so forth. And, frankly, I was just looking at this from . . . common sense . . . .
>
> "This guy has a lot of identification issues, and I don't—"[115]

On appeal, Smith alleged that the trial judge erred in allowing the prosecutor to exercise a peremptory challenge against a juror alleged to be gay or transgender in violation of the Equal Protection Clause, article 12 of the Massachusetts Declaration of Rights,[116] and his own right as a defendant to a fair, impartial, representative jury.[117] The Massachusetts Supreme Judicial Court noted the novelty of the legal issue but failed to reach that question because it stated that the record lacked "the necessary factual foundation."[118]

The court went on to discuss the ambiguity of the record, noting the confusion and disagreement over the contested juror's identity, with the defense counsel objecting to the supposed use of a peremptory challenge on the basis of sexual orientation and the prosecutor maintaining that his challenge was on the basis of the juror's transgender identity and appearance.[119] The court concluded that the defendant's equal protection claim failed because the trial judge was unable to draw an inference that intentional discrimination occurred due to a number of factors: (1) the lack of clarity in the record as to the juror's "sex, transgendered [sic] status, and sexual orientation," (2) the ambiguity surrounding the rationale motivating the prosecutor's peremptory challenge, and (3) the defense counsel's failure to object.[120]

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114. Id.

115. Id. at 95–96.

116. "Article 12 of the Massachusetts Declaration of Rights proscribes the use of peremptory challenges 'to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community.'" Id. at 96 (quoting Commonwealth v. Soares, 387 N.E.2d 499, 515 (1979)).

117. Id. at 90, 95.

118. Id. at 96.

119. See id. at 96–97.

120. See id.

4. *Observations.* — Three important insights follow from these cases. First, given the lack of *Batson* recourse for groups subject to rational basis review, parties may have been less likely to challenge opposing counsel's peremptory strikes on the basis of gender identity or expression—or opposing counsel's mobilization of gender nonconformity as a nonpretextual, race-neutral reason to strike a person of color—and even less likely to appeal the lower court's finding that such an exercise was permissible.[121] Second, both courts and litigants may be prone to conflate sexual orientation and gender identity discrimination, often due to a lack of detail and clarity in the record, but sometimes due to sheer ignorance.[122] Litigants may conflate sexual orientation and gender identity discrimination strategically, as in *Carter v. Duncan* and *Commonwealth v. Smith*, in order to make a stronger claim that opposing counsel's exercise of the peremptory strike was impermissible under state law or recent precedent that bars peremptory challenges on the basis of sexual orientation.[123] Finally, the paucity of such reported cases does not mean that transgender jurors do not face discrimination during jury selection. Rather, for the reasons stated above, such discrimination is often masked or never addressed.

In some cases, transgender individuals may never even make it to the venire box. States commonly draw jury pools from voter rolls or licensed driver lists,[124] but an estimated 124,000 transgender individuals lack updated identification documents or records.[125] Moreover, for courts in thirty-one states and federal courts, a felony conviction acts as a lifetime bar to jury service,[126] and transgender individuals have often have disproportionate contact with the criminal justice system, as a result of factors

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121. However, today, some parties may try to invoke recent transgender cases, or even Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), in an attempt to bring such claims within *J.E.B.* See sections II.A.3, II.B.1 (discussing cases in which courts have applied heightened scrutiny to gender identity classifications).

122. See, e.g., supra note 109 and accompanying text (discussing defendant Carter's appeal challenging prosecutor for striking Lewis on basis of sexual orientation); supra note 114 and accompanying text (discussing defense's characterization of peremptory strike exercised against Smith as based on sexual orientation).

123. See supra notes 109–110 and accompanying text (discussing defendant Carter's use of recent case law barring peremptory strikes on basis of sexual orientation); supra note 116 and accompanying text (noting appeal based upon violation of Massachusetts law).

124. Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, Nat'l Ctr. for State Courts, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report 13 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx [http://perma.cc/6FP5-JMC3].

125. Jody L. Herman, Williams Inst., Univ. of Cal. L.A. Sch. of Law, The Potential Impact of Voter Identification Laws on Transgender Voters 4 (2012), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Voter-ID-Apr-2012.pdf [http://perma.cc/7ETC-VXNZ].

126. Brian C. Galt, The Exclusion of Felons from Jury Service, 53 Am. U. L. Rev. 65, 67 (2003).

including homelessness, discrimination, poverty, targeting by law enforcement, and other discrimination.[127] But as social acceptance of and legal protections for transgender people increase, more transgender individuals will be called for jury service and therefore vulnerable to discrimination during voir dire.

II. EXTENDING *BATSON* TO TRANSGENDER JURORS

This Part adopts the Ninth Circuit's line of inquiry in *SmithKline*[128] to determine whether peremptory challenges on the basis of gender identity or expression violate the Equal Protection Clause. Section II.A discusses the growing circuit split on the level of scrutiny merited by gender identity classifications, and section II.B examines recent cases treating gender identity discrimination as sex discrimination. Section III.C asks whether peremptory challenges on the bases of gender identity or expression violate the Equal Protection Clause.

A. *What Standard of Review Applies to Gender Identity Discrimination?*

In clarifying the scope of *Batson*, the Supreme Court stated that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."[129] Therefore, determining the appropriate standard of review for gender identity classifications is central to the inquiry.

When faced with an equal protection claim, the level of scrutiny applied by the court depends on whether the challenged government action creates a suspect classification. Courts apply strict scrutiny to government actions that target groups who belong to a "suspect class."[130] Among other criteria, historical discrimination, immutability, political powerlessness, and disparate treatment not based on actual ability may give rise to suspect classification.[131] Recognized suspect classes include

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127. See Nat'l Ctr. for Transgender Equality, A Blueprint for Equality: Prison and Detention Reform, http://www.transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_for_Equality2012_Prison_Reform.pdf [http://perma.cc/GF47-E7PD] [hereinafter NCTE, Prison and Detention Reform] (last visited Nov. 29, 2015) (noting nearly sixteen percent of transgender people and twenty-one percent of transgender women have been incarcerated).

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

129. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 (1994).

130. See, e.g., Wright v. Incline Vill. Gen. Improvement Dist., 665 F.3d 1128, 1141 (9th Cir. 2011) ("We apply strict scrutiny if the governmental enactment 'targets a suspect class . . . .'" (quoting United States v. Hancock, 231 F.3d 557, 565 (9th Cir. 2000))).

131. See Frontiero v. Richardson, 411 U.S. 677, 684, 686–87 (1973) (Brennan, J., plurality opinion) (noting criteria in sex discrimination context).

race, national origin, and alienage.[132] Courts apply heightened scrutiny to quasi-suspect classes, such as gender[133] or legitimacy of birth.[134]

This section canvases three approaches that courts have applied when considering which standard of review applies to transgender plaintiffs alleging discrimination: (1) rejecting gender identity as an independent suspect classification; (2) narrowly construing sex discrimination to exclude gender identity; and (3) grouping gender identity under sex discrimination.

1. *No Independent Suspect Classification for Transgender Individuals.* — Several courts have held that transgender individuals do not constitute a suspect class. The Ninth Circuit first addressed the question in *Holloway v. Arthur Anderson & Co.*, which involved a transgender plaintiff who brought a Title VII claim.[135] In holding that transsexuals do not constitute a suspect class, the Ninth Circuit rejected both immutability and discrete and insular minority arguments.[136] Two courts arrived at similar conclusions in the context of Medicaid reimbursements for gender transition surgery.[137] Courts have likewise rejected suspect classification for transgender individuals in cases involving § 1983 claims brought by transgender prisoners.[138] Most recently, the District Court for Hawaii held that transgender individuals do not constitute a suspect class in *Kaeo-Tomaselli v. Butts*, a case involving a transgender or intersex plaintiff who alleged

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132. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

133. See United States v. Virginia, 518 U.S. 515, 555 (1996) ("[A]ll gender-based classifications today warrant heightened scrutiny." (internal quotation marks omitted)).

134. See, e.g., Gomez v. Perez, 409 U.S. 535, 537–38 (1973) (holding state exclusion of illegitimate children from right of action for wrongful death of parent violates Equal Protection Clause).

135. 566 F.2d 659, 659–61 (9th Cir. 1977) (describing facts giving rise to case).

136. See id. at 663 ("[T]ranssexuals are not necessarily a 'discrete and insular minority,' nor has it been established that transsexuality is an 'immutable characteristic determined solely by the accident of birth' like race or national origin." (citations omitted)).

137. See Ravenwood v. Daines, No. 06-CV-6355-CJS, 2009 WL 2163105, at *11 (W.D.N.Y. July 17, 2009) ("Plaintiff does not claim membership in any suspect or quasi-suspect class . . . . Plaintiff asserts that she has been denied equal protection on the basis of her diagnosis, and acknowledges that her claim is subject to rational basis review."); Casillas v. Daines, 580 F. Supp. 2d 235, 246 (S.D.N.Y. 2008) (noting plaintiff's failure to "assert membership in any suspect classification" and acknowledgement "that the claim is governed by a rational basis standard").

138. See Braninburg v. Coalinga State Hosp., No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012) ("[I]t is not apparent that transgender individuals constitute a 'suspect' class."); Jamison v. Davue, No. CIV S-11-2056 WBS DAD P., 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012) (noting rational basis, not suspect classification, applies to transgender individuals); cf. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (recognizing right of inmates, including transgender prisoners, to be free of cruel and unusual punishment under Eighth Amendment).

that a landlord's refusal of her request for accommodation violated the Fair Housing Act.[139]

If one adopts the reasoning that transgender individuals do not constitute a suspect class, rational basis review applies,[140] and peremptory challenges on the basis of gender identity or expression are permissible.[141] However, several courts have declined to follow the above decisions,[142] some decisions have been abrogated,[143] and others have faced significant scholarly criticism.[144]

The argument that transgender individuals constitute a suspect class, according to the *Carolene Products* factors,[145] has been made,[146] but fully

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139. See Kaeo-Tomaselli v. Butts, Civ. No. 11-00670 LEK/BMK, 2013 WL 399184, at *1, *5 (D. Haw. Jan. 31, 2013) ("Plaintiff puts forth no evidence that her status as a hermaphrodite, or transgender female, qualifies her as a member of a protected class. Nor has this court discovered any cases in which transgendered individuals constitute a 'suspect' class.").

140. See Clark v. Jeter, 486 U.S. 456, 461 (1988) ("At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose."); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–42 (1985) (noting for classifications not involving race, national origin, or alienage, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

141. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 (1994) ("Parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.").

142. For a discussion of successful Title VII claims brought by transgender plaintiffs, see infra sections II.A.3, II.B.1.

143. New York recently joined Washington State, Oregon, California, Colorado, Illinois, Vermont, Massachusetts, and Connecticut in requiring health insurance providers to cover medically necessary treatment for transgender healthcare. See N.Y. State Dep't of Fin. Servs., Insurance Circular Letter No. 7 Re: Health Insurance Coverage for the Treatment of Gender Dysphoria (2014) (Dec. 11, 2014), http://www.dfs.ny.gov/insurance/circltr/2014/cl2014_07.pdf [http://perma.cc/LKV7-HQQF] ("An issuer may not deny medically necessary treatment otherwise covered by a health insurance policy solely on the basis that the treatment is for gender dysphoria."); see also Anemona Hartocollis, Insurers in New York Must Cover Gender Reassignment Surgery, Cuomo Says, N.Y. Times (Dec. 10, 2014), http://www.nytimes.com/2014/12/11/nyregion/in-new-york-insurance-must-cover-sex-changes-cuomo-says.html?_r=0 (on file with the *Columbia Law Review*).

144. See, e.g., Daniella Lichtman Esses, Note, Afraid to Be Myself, Even at Home: A Transgender Cause of Action Under the Fair Housing Act, 42 Colum. J.L. & Soc. Probs. 465, 502–07 (2009) (interpreting Fair Housing Act to include cause of action for transgender discrimination); Tarzwell, supra note 9, at 181–89 (criticizing Eighth Amendment jurisprudence for failure to address transgender prisoners' needs).

145. See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting "discrete and insular minorities" are suspect classes meriting heightened scrutiny).

146. See, e.g., Lisa Mottet, Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People, 19 Mich. J. Gender & L. 373, 423 n.201 (2013) (contending transgender individuals satisfy suspect class requirements); cf. Silpa Maruri, Note, Hormone Therapy for Inmates: A Metonym for Transgender Rights, 20 Cornell J.L. & Pub. Pol'y 807, 813–15, 825–27 (2011) (rejecting arguments for treatment

exploring the strengths and weaknesses of the argument is beyond the scope of this Note.[147]

2. *Sex Discrimination: A Biological, Trans-Exclusive View.* — Given the general unwillingness of courts to grant suspect classification to transgender individuals on the basis of their gender identity or expression, many transgender plaintiffs have strategically brought claims alleging discrimination on the basis of sex or gender.[148] Such quasi-suspect classifications are subject to heightened scrutiny. But whether a court accepts such a transgender plaintiff's claims hinges on the court's interpretation of sex discrimination. Initially, courts seemed inclined to construe "sex" narrowly to exclude claims brought by transgender individuals.

In *Holloway*, the Ninth Circuit concluded that Congress intended to use the "traditional" definition of sex in its prohibition of sex discrim-

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of transgender identity as suspect classification through disability or gender bases as problematic or unlikely).

147. However, it is possible to concede the suspect class argument, because transgender individuals do not have to constitute an independent suspect class to be subject to heighted scrutiny. For a discussion of the argument that transgender and gender-nonconforming individuals fall under an existing classification subject to heightened scrutiny, see infra sections II.A.3, II.B.

This Note takes the position that the suspect classification argument is less likely to be successful for two reasons. Foremost, the Court has been reluctant to extend suspect class status to new groups. See, e.g., Mark Strasser, Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise, 64 Temp. L. Rev. 937, 937 (1991) ("In recent years, the Supreme Court has become increasingly unwilling to recognize that additional groups . . . merit suspect or quasi-suspect status . . . ."). Moreover, the Court has not even recognized sexual orientation as a suspect or quasi-suspect class. See Susannah W. Pollvogt, Marriage Equality, *United States v. Windsor*, and the Crisis in Equal Protection Jurisprudence, 42 Hofstra L. Rev. 1045, 1051 (2014) (noting Supreme Court's "reluctance" to apply suspect classification analysis to sexual orientation). In *Obergefell v. Hodges*, the Court at least noted the historical discrimination faced by lesbian and gay individuals. See 135 S. Ct. 2584, 2596 (2015) (recounting criminalization of same-sex intimacy, exclusion from military and government employment, immigration ban, and police targeting gay men and lesbians have faced); cf. Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

By contrast, the Court has only mentioned transgender individuals once to date, when it recognized a transgender plaintiff's Eighth Amendment claim. While the case established important rights for transgender prisoners, the description it offered of the transgender plaintiff was not flattering and pathologized transgender individuals. See Farmer v. Brennan, 511 U.S. 825, 829 (1994) (portraying plaintiff as "one who has '[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,' and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change" (quoting Am. Med. Ass'n, Encyclopedia of Medicine 1006 (1989))).

148. See infra notes 162–171 and accompanying text (surveying sex discrimination claims brought by transgender plaintiffs).

ination in Title VII.[149] To support its narrow reading, the court claimed to have interpreted the plain meaning of the statute and cited prior courts' readings of the statute's purpose "to place women on an equal footing with men."[150] The Eighth Circuit adopted a similar narrow interpretation of "sex" in *Sommers v. Budget Marketing, Inc.*[151] In *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit explicitly rejected the district court's finding that Title VII protects transsexual plaintiffs, stating that a broader reading of the statute "would take [the court] out of the realm of interpreting and reviewing and into the realm of legislating."[152] The Seventh Circuit went further than its sister circuits in explaining why a plain meaning construction of "sex" excludes gender-identity discrimination: "The words of Title VII do not outlaw discrimination against a person who has a *sexual identity disorder*, i.e., a person born with a male body who *believes* himself to be female . . . ."[153] The Seventh Circuit's exclusion of transgender individuals from Title VII protection turned on its misunderstanding of gender identity. Several lower courts have adopted the same narrow interpretation of "sex" as "biological sex."[154]

But the validity of this approach has been called into question. Foremost, most of these decisions predate social understandings of transgender identity. Indeed, at the time, the American Psychiatric Association still classified transgender identity as a disorder.[155] The Seventh Circuit's description of transgender identity as a "sexual identity

149. See Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977) ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind.").

150. Id. ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate." (footnote omitted)).

Bizarrely, the Ninth Circuit cited congressional failure "to *amend* the Civil Rights Act to prohibit discrimination based on 'sexual preference'" as justification for its narrow interpretation. Id. at 662. The court's conflation of sexual orientation with gender and gender identity was likely not unusual for its time. See supra section I.B (discussing social, academic, and psychological conflation of sexual orientation and gender identity).

151. See 667 F.2d 748, 750 (8th Cir. 1982) (citing absence of congressional intent to protect "transsexuals" and failed attempts to amend law to include discrimination on basis of "sexual preference" in holding Title VII's protections do not encompass discrimination on basis of "transsexualism").

152. 742 F.2d 1081, 1086 (7th Cir. 1984).

153. Id. at 1085 (emphasis added).

154. E.g., Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630, at *3 (N.D. Ind. Aug. 3, 2007); Kastl v. Maricopa Cty. Cmty. Coll. Dist., No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *6 (D. Ariz. Aug. 22, 2006), aff'd on other grounds, 325 F. App'x 492 (9th Cir. 2009); Sweet v. Mulberry Lutheran Home, No. IP02-0320-C-H-/K, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003); Oiler v. Winn-Dixie La., Inc., No. Civ.A 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002).

155. See Camille Beredjick, DSM-V to Rename Gender Identity Disorder "Gender Dysphoria," Advocate (July 23, 2012, 8:00 PM), http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria [http://perma.cc/4MV2-4YCL].

disorder"[156] and the Ninth Circuit's discussion of the contested definition of transsexuality reflect a pathological conception of transgender people that drastically diverges from the modern understanding.[157] Moreover, these decisions have sustained vigorous scholarly criticism for using canons of construction to mask prejudice, ignoring the remedial-purpose canon of statutory construction, and reinforcing stereotypes about gender norms.[158] Furthermore, some courts have rejected this narrow interpretation of "sex" after *Price Waterhouse v. Hopkins*, which held that sex stereotyping constitutes sex discrimination under Title VII.[159]

Narrow interpretations of sex discrimination exclude transgender individuals from relief in some cases, and access to heightened scrutiny review in others. While the above courts may have relied on congressional intent, their decisions were grounded in a biological definition of "sex" that excluded transgender individuals and ironically bolstered gender stereotypes, such as the idea that only women who were assigned female at birth are "real" women. As discussed in the next section, this approach has been increasingly rejected.

3. *Reaching Heightened Scrutiny Through a Trans-Inclusive View of Sex Discrimination.* — After *Price Waterhouse v. Hopkins*, courts have repeatedly found that sex discrimination embraces gender identity discrimination, particularly in the context of Title VII. *Price Waterhouse* did not involve a transgender plaintiff; rather, a cisgender woman brought a Title VII suit after an accounting firm refused her admission as a partner.[160] The Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[161] This holding has prompted a number of courts to conclude that protections against sex discrimination include gender identity discrimination.

First, in *Schwenk v. Hartford*, the Ninth Circuit found that a prison guard's sexual assault of a transgender prisoner constituted discrimina-

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156. *Ulane*, 742 F.2d at 1085.

157. See Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 n.3 (9th Cir. 1977) ("Psychiatric judgments about male-to-female transsexuals have [included] . . . the opinion that a request for a sex change is a sign of severe psychopathology . . . .").

158. See, e.g., Anastasia Niedrich, Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections, 18 Mich. J. Gender & L. 25, 42–44 (2011) (criticizing Seventh Circuit in *Ulane* for "shroud[ing] itself in textualism . . . [and] cloak[ing] itself in originalism"); Richard F. Storrow, Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination, 55 Me. L. Rev. 117, 125 (2003) ("This categorical denial of claims alleging discrimination based on transsexualism appears inconsistent with the broad remedial purposes of antidiscrimination legislation.").

159. See 490 U.S. 228, 250–52 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

160. See id. at 231–32 (summarizing events leading to case).

161. Id. at 250.

tion on the basis of gender under the Gender Motivated Violence Act (GMVA) and Title VII.[162] Next, in *Rosa v. Park West Bank & Trust Co.*, the First Circuit used *Price Waterhouse*'s theory of sex stereotyping to note that if the bank's refusal to give a loan application to a male plaintiff was because he was dressed in women's clothing, the plaintiff would have a sex discrimination claim under the Equal Credit Opportunity Act.[163] Subsequently, in *Smith v. City of Salem*, the Sixth Circuit addressed a transgender woman's Title VII and § 1983 claims.[164] The court found that under *Price Waterhouse*'s theory of sex stereotyping, the plaintiff had sufficiently pled claims of gender stereotyping and sex discrimination.[165] Moreover, the court noted that the trans-exclusive approach to Title VII sex discrimination claims "has been eviscerated by *Price Waterhouse*."[166] The court likewise found that the plaintiff had successfully brought an equal protection claim under § 1983 for impermissible sex-based employment discrimination.[167]

The District Court for the District of Columbia followed suit in *Schroer v. Billington*, in which a transgender woman sued the Library of Congress under Title VII and the Equal Protection Clause for terminating her employment offer after she revealed her gender dysphoria.[168] While the court did not address the equal protection claim and stated that the plaintiff failed to assert a claim for sex stereotyping, it did not wholly dismiss relief for transgender plaintiffs under Title VII.[169] A few years later, in *Glenn v. Brumby*, the Eleventh Circuit held that the plaintiff, a transgender woman fired from her position at the Georgia General Assembly's Office of Legislative Council (OLC), had suffered sex discrim-

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162. See 204 F.3d 1187, 1200–03 (9th Cir. 2000) ("The GMVA does parallel Title VII . . . . [B]oth statutes prohibit discrimination based on gender as well as sex.").

163. See 214 F.3d 213, 215–16 (1st Cir. 2000) ("[If] the Bank may treat, for credit purposes, a woman who dresses like a man differently than a man who dresses like a woman . . . [the plaintiff] may have a claim.").

164. See 378 F.3d 566, 572–78 (6th. Cir. 2004).

165. Id. at 572. Smith's complaint detailed facts preceding her suspension: presenting and dressing more femininely at work and informing her supervisor that she planned to transition, which were followed by criticisms by her co-workers for her lack of masculinity, and the supervisors' schemes to compel Smith's resignation by forcing her to undergo multiple psychological evaluations. Id.

166. Id. at 573.

167. Id. at 576–78 ("The facts Smith has alleged to support his [sic] claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983.").

168. 424 F. Supp. 2d 203, 205–07 (D.D.C. 2006).

169. The court stated: "A transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if . . . she has been discriminated against because of a failure to act or appear . . . feminine enough . . . but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions." Id. at 211.

ination under § 1983 and the Equal Protection Clause.[170] More significantly, the Eleventh Circuit became the second circuit to hold that sex discrimination under the Equal Protection Clause encompasses discrimination against transgender individuals for failure to conform to gender norms.[171]

As these cases illustrate, while several courts have adopted a biological, trans-exclusive conception of sex discrimination, after *Price Waterhouse*, courts have increasingly adopted a trans-inclusive approach. Courts have found sex discrimination to encompass discrimination on the basis of gender identity and gender expression in a variety of contexts, including Title VII, GMVA, Equal Credit Opportunity Act, and § 1983 claims, demonstrating the argument's growing prominence and an increased judicial understanding of transgender identity.

B. *Discrimination on the Basis of Gender Identity Is Sex Discrimination: Recent Developments*

This section discusses how the judicial interpretation of sex discrimination has shifted from a narrow, biological, trans-exclusive definition to a conception inclusive of gender identity and expression. Section II.B.1 discusses how the seminal decision of *Macy v. Holder* crowns the recent developments in the context of Title VII. Section II.B.2 applies the notion of gender identity discrimination as sex discrimination from its original context in Title VII to the Equal Protection Clause.

1. *Recent Developments in Title VII.* — While the circuit split remains, courts have increasingly held that discrimination on the basis of gender identity constitutes sex discrimination under Title VII.[172] In particular, *Macy v. Holder* demonstrates how far legal recognition of gender identity discrimination has progressed.[173]

Mia Macy applied for a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) position at a crime laboratory.[174] After Macy informed the investigator responsible for conducting her background check that she was currently transitioning from male to female, she was told that the

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170. See 663 F.3d 1312, 1320–21 (11th Cir. 2011) ("[The supervisor] advanced no other reason that could qualify as a governmental purpose, much less an 'important' governmental purpose, and even less than that, a 'sufficiently important governmental purpose' that was achieved by firing Glenn because of her gender non-conformity.").

171. Id. at 1320 ("We conclude that a government agent violates the Equal Protection Clause's prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.").

172. See supra section II.A.3 (discussing cases in which courts adopted trans-inclusive interpretation of sex discrimination).

173. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

174. Lisa Mottet, Movement Analysis: The Full Impact of the EEOC Ruling on the LGBT Movement's Agenda, Nat'l Gay & Lesbian Task Force 3, http://www.thetaskforce.org/downloads/reports/reports/eeoc_movement_analysis.pdf [http://perma.cc/F88X-L2ZK] [hereinafter Mottet, Movement] (last visited Sept. 20, 2015).

position was no longer available.[175] Macy brought a complaint alleging that ATF had discriminated against her on the basis of her sex, gender identity, and sex stereotyping.[176] The Equal Employment Opportunity Commission (EEOC) held that gender identity discrimination constitutes sex discrimination for the purposes of Title VII.[177]

Macy sets a dramatic precedent for transgender rights. The full Commission decided the case, which is a rarity in EEOC cases.[178] Moreover, the Commission grounded its ruling in Supreme Court precedent, *Price Waterhouse v. Hopkins*, a landmark sex discrimination case, as well as precedent from five circuits.[179]

Macy has already had ripple effects in the EEOC and the Department of Justice (DOJ). The EEOC recently brought two historic suits on behalf of transgender employees, alleging sex discrimination.[180] The EEOC cited the lawsuits as "part of the EEOC's ongoing efforts to implement its Strategic Enforcement Plan (SEP)" which "includes 'coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply' as a top Commission enforcement priority."[181] Moreover, Attorney General Eric Holder issued a memo stating that the DOJ would no longer argue that Title VII's protections against sex discrimination did not cover gender identity discrimination, including discrimination on the basis of transgender status.[182] Rather, he announced that "[t]he most straightforward reading of Title VII is that discrimination 'because of . . . sex' includes discrimination . . . because the employee is transitioning, or has transitioned."[183]

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175. Id.

176. *Macy*, 2012 WL 1435995, at *3.

177. Id. at *11 ("[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and . . . therefore violates Title VII.").

178. See Mottet, Movement, supra note 174, at 3 & n.5 ("The vast majority of cases decided by the EEOC are not brought to the commissioners for approval.").

179. *Macy*, 2012 WL 1435995, at *7 ("Since *Price Waterhouse*, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex' in many scenarios involving individuals who act or appear in gender-nonconforming ways . . . [and] in scenarios involving transgender individuals."). For a discussion of the cases cited by the Commission holding that sex discrimination encompasses gender identity discrimination, see section II.A.3.

180. Press Release, EEOC, EEOC Sues Detroit Funeral Home Chain for Sex Discrimination Against Transgender Employee (Sept. 25, 2014), http://www.eeoc.gov/eeoc/newsroom/release/9-25-14d.cfm [http://perma.cc/G8YS-ZHTG]; Press Release, EEOC, EEOC Sues Lakeland Eye Clinic for Sex Discrimination Against Transgender Employee (Sept. 25, 2014), http://www.eeoc.gov/eeoc/newsroom/release/9-25-14e.cfm [http://perma.cc/U4ZC-FXZH] [hereinafter EEOC, Lakeland Press Release].

181. See EEOC, Lakeland Press Release, supra note 180.

182. Memorandum from Eric Holder, Attorney Gen., to U.S. Attorneys & Heads of Dep't Components 2 (Dec. 15, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf [http://perma.cc/C2JG-25T8].

183. Id.

In addition to representing a significant policy shift, this memo allows the DOJ to file Title VII claims on behalf of transgender plaintiffs against state and local public employers.[184] The trans-inclusive approach to sex discrimination under Title VII has thus gained significant traction.[185]

2. *Applying Title VII's Trans-Inclusive Theory of Sex Discrimination to the Equal Protection Clause.* — Admittedly, little case law directly considers whether transgender individuals can successfully file sex discrimination

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184. See Press Release, Dep't of Justice, Office of Pub. Affairs, Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims (Dec. 18, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination [http://perma.cc/KUR2-8EH4].

185. *Macy* marked the beginning of a wave of recent transgender victories under the Affordable Care Act, Title IX, Medicare, and Executive Order 11246. Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

In 2012, the Department of Health and Human Services (HHS) issued a statement clarifying that the Affordable Care Act's prohibition against sex discrimination "extends to claims of discrimination based on gender identity." See Letter from Leon Rodriguez, Dir., Dep't of Health & Human Servs., Office for Civil Rights, to Maya Rupert, Fed. Policy Dir., Nat'l Ctr. for Lesbian Rights (July 12, 2012), http://www.scribd.com/doc/101981113/Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services [http://perma.cc/RZ8P-H5CZ].

In *Student v. Arcadia Unified School District*, the Department of Education and the DOJ's Civil Rights Division announced a joint resolution stating that sex discrimination under Title IX includes gender identity discrimination. See Arcadia Unified Sch. Dist., OCR Case Number 09-12-1020, DOJ Case Number 169-12C-70 (2013), http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Resolution_agreement_07.24.2013.pdf [http://perma.cc/MLZ9-4W2G] [hereinafter Arcadia Resolution] ("'Gender-based discrimination' is a form of sex discrimination, and refers to differential treatment or harassment of a student based on the student's sex, including gender identity, gender expression, and nonconformity with gender stereotypes, that results in the denial or limitation of education services, benefits, or opportunities.").

In May 2014, the HHS lifted the ban on Medicare coverage for transgender healthcare. See Transsexual Surgery, NCD 140.3, Decision No. 2576 (Dep't of Health & Human Servs. May 30, 2014) [hereinafter HHS Medicare Decision] (appellate decision), http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf ("National Coverage Determination (NCD) denying Medicare coverage of all transsexual surgery as a treatment for transsexualism is not valid under the 'reasonableness standard' the Board applies . . . [and] its provisions are no longer a valid basis for denying claims for Medicare coverage of transsexual surgery . . . .").

On July 21, 2014, President Obama amended Executive Order 11246 to prohibit federal contractors from engaging in employment discrimination on the basis of sexual orientation or gender identity and amended Executive Order 11478 to protect transgender federal government workers. Pete Baker, President Calls for a Ban on Job Bias Against Gays, N.Y. Times (July 21, 2014), http://www.nytimes.com/2014/07/22/us/politics/obama-job-discrimination-gays-executive-order.html (on file with the *Columbia Law Review*). The Executive Order has a significant reach, applying to 30,000 companies employing twenty-eight million workers—that is, one-fifth of the American workforce. Jennifer Epstein, Obama Signs LGBT Executive Order, Politico (July 21, 2014, 11:04 AM), http://www.politico.com/story/2014/07/obama-signs-lgbt-protection-federal-workers-contractors-109174.html [http://perma.cc/3BJH-238W].

claims under the Equal Protection Clause.[186] Thus, the Title VII cases holding that "sex" encompasses gender identity may only be relevant if the theory can be applied to equal protection jurisprudence. This subsection will address various claims that the broader Title VII protections should not be applied to the Equal Protection Clause.[187] Such arguments rest on the faulty premise that the law may protect transgender individuals from discrimination in the workplace but not in the jury box, rely on narrow canons of construction that would exclude already-protected groups, and ignore how the expansion of sex discrimination jurisprudence parallels the gradual development of race discrimination.

Foremost, it is important to note that transgender litigants typically raise employment discrimination claims on the basis of gender under Title VII, rather than the Equal Protection Clause, because the former applies to private and public employers, whereas the latter can only be enforced against government actors.[188] Regardless, a number of courts have noted that discrimination claims, whether brought under Title VII or under the Equal Protection Clause, utilize the same analytic framework and are subject to the same standards of proof.[189] Refusing to include transgender jurors under the Equal Protection Clause's prohibition on sex discrimination based on the lack of case law adopting that theory is circular: Courts *should not* consider "sex" under the Equal Protection Clause to include gender identity or expression because courts *have not* held that the Equal Protection Clause's bar on sex discrimination includes gender identity or expression discrimination.

Some may contend, however, that employment discrimination and the jury selection discrimination targeted by *Batson* are not merely governed by different laws but pertain to different arenas. Such detractors would concede that discrimination against transgender workers on the basis of gender identity or expression cannot be tolerated, per Title VII precedent, but claim that attorneys may systematically exclude trans-

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186. Cf. Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) (holding transgender woman successfully brought sex discrimination claim under Equal Protection Clause using § 1983); Smith v. City of Salem, 378 F.3d 566, 578 (6th Cir. 2004) (same).

187. The focus on Title VII is due to the fact that the majority of the precedent cited supra section II.A.3 derives from Title VII case law.

188. See David S. Kemp, Sex Discrimination Claims Under Title VII and the Equal Protection Clause: The Eleventh Circuit Bridges the Gap, Justia Verdict (Mar. 19, 2012), http://verdict.justia.com/2012/03/19/sex-discrimination-claims-under-title-vii-and-the-equal-protection-clause [http://perma.cc/BUW9-DKV5] (distinguishing Title VII claims from Equal Protection claims).

189. See Bryant v. Jones, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009) ("We . . . note that discrimination claims, including hostile work environment claims, brought under the Equal Protection Clause, 42 U.S.C. § 1981, or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, are subject to the same standards of proof and employ the same analytical framework."); Tademy v. Union Pac. Corp., 520 F.3d 1149, 1170 (10th Cir. 2008) (employing same logic as *Jones* court); Cross v. Alabama, 49 F.3d 1490, 1507–08 (11th Cir. 1995) (same).

gender individuals from voir dire simply because they are transgender. But why is gender identity discrimination more acceptable in the public courtroom than in the private workplace, particularly when the former receives the government's sanction by virtue of the court's approval of the strike?[190] If discrimination in the courtroom appears more tolerable simply because no court has yet deemed it illegal, then the argument rests on a shaky foundation of formalism.[191] In short, such claims rely on a similar, circular logic that, if accepted, would never permit courts to apply interpretations from one body of antidiscrimination law to another.[192]

Alternatively, some may argue that the Title VII precedents should not be applied to the Equal Protection Clause because the latter's enactors did not intend to protect transgender and gender-nonconforming individuals, nor did they remotely consider such groups in their deliberations. But such arguments rely upon the same narrowing canons of construction, namely plain meaning and legislative intent. Courts once marshaled these canons in reasoning that Title VII protections do not apply to transgender employees, an outdated interpretation held by a dwindling minority of courts.[193] In the same vein, some may contend that Title VII precedent should not apply to the Fourteenth Amendment's narrower purview, given that Congress enacted Title VII to supplement the Equal Protection Clause[194] and that Title VII offers broader protections in terms of enforcement[195] and protected classes.[196] Purveyors of

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190. See SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486 (9th Cir. 2014) ("Strikes based on preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate these stereotypes. The Constitution cannot countenance 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'" (footnote omitted) (quoting J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 (1994))).

191. Courts once found race-based segregation in schools to comport with the Equal Protection Clause. See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (rejecting "separate but equal" doctrine announced in *Plessy v. Ferguson*).

192. In *Bowers v. Hardwick*, the Court held that there is no "fundamental right to engage in homosexual sodomy." 478 U.S. 186, 191 (1986). Yet seventeen years later, the Court largely relied on liberty and privacy arguments from contraception and abortion cases in overturning *Bowers* in *Lawrence v. Texas*. See Lawrence v. Texas, 539 U.S. 558, 564–67 (2003) (delineating development of privacy right through various cases, including *Griswold*, *Eisenstadt*, *Roe*, and *Carey* and criticizing *Bowers* Court for "[h]aving misapprehended the claim of liberty there presented to it").

193. For an analysis of decisions holding that Title VII does not extend to transgender plaintiffs, see supra sections II.A.1–II.A.2.

194. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974) ("The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

195. See Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977) ("Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike."). By contrast, the Equal Protection Clause only applies to federal and state actors. See Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954) (holding Equal

such originalist arguments, including constructions based on plain meaning and legislative intent, are unlikely to find that transgender individuals merit *any* constitutional protection.[197]

Moreover, such a constricted view of sex discrimination jurisprudence does not comport with the gradual expansion of the conception of "race" under the Fourteenth Amendment. In the early years after the Fourteenth Amendment's ratification, courts strictly construed its provisions to protect only freed slaves.[198] Later, in *Strauder v. West Virginia*, the Court shifted course and stated that other plaintiffs could bring Fourteenth Amendment claims.[199] Likewise, sex discrimination jurisprudence has expanded to reflect our expanding conception of gender and its diverse expressions.[200] Therefore, courts may extrapolate from the relevant trans-inclusive Title VII precedent to protect transgender and gender-nonconforming jurors.

C. *Gender Identity and Expression and Equal Protection Analysis*

This section examines the applicability of *Batson*'s protections to transgender and gender-nonconforming jurors. As Judge Reinhardt noted in *SmithKline*, "In *J.E.B.*, the Court did not state definitively whether heightened scrutiny is sufficient to warrant *Batson*'s protection or merely necessary."[201]

Section II.C.1 discusses the systematic exclusion of transgender individuals from institutions of self-governance. Section II.C.2 notes that while transgender individuals have never been de jure excluded from juries, unlike women or black venirepersons, they have been subject to de facto exclusion due to pervasive social discrimination. Section II.C.3 argues that permitting peremptory challenges on the basis of gender identity and expression would harm potential jurors, litigants, and the community by "perpetuating the very stereotypes that the law forbids."[202]

Protection Clause applies not only to state but also to federal government through Fifth Amendment).

196. Title VII prohibits discrimination and retaliation based on race, color, religion, sex, and national origin. See 42 U.S.C. § 2000e-2(a) (2012).

197. See Editorial, There He Goes Again, N.Y. Times (Jan. 4, 2011), http://www.nytimes.com/2011/01/05/opinion/05wed3.html (on file with the *Columbia Law Review*) (describing Justice Antonin Scalia's remarks that reach of Fourteenth Amendment does not include protecting women against sex discrimination).

198. See McKay, supra note 7, at 534–35 (describing how Supreme Court found protection of freed slaves as "'one pervading purpose'" of Fourteenth Amendment (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872))).

199. Id. at 535 ("[T]he Court changed its original position by announcing its readiness to validate Fourteenth Amendment claims brought by plaintiffs other than freed slaves . . . .").

200. Id. at 536–37 (discussing gradual expansion of sex discrimination theory).

201. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (citing J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136 & n.6, 143 (1994)).

202. Id. at 486.

1. *Systematic Exclusion*. — The Supreme Court "did not require that, to warrant the protections of *Batson*, women's experiences had to be identical to those of African Americans."[203] Instead, the Court based its reasoning on the "actual experiences" of each group.[204] Accordingly, courts must examine the circumstances of transgender individuals.[205] Like lesbian, gay, and bisexual individuals, transgender individuals have been "systematically excluded from institutions of self-governance."[206] Until very recently, transgender individuals lacked protection from employment discrimination in the federal government.[207] In thirty-two states, state employees may still be fired for being transgender. Transgender teachers have been fired or suspended from public schools after announcing their intent to transition.[208] Transgender individuals have historically been and continue to be excluded from open military service; the repeal of "Don't Ask, Don't Tell" only applied to lesbian, gay, and bisexual soldiers.[209] An estimated 15,500 transgender individuals currently serve in the military, subject to discharge if they disclose their status or seek gender transition surgery.[210] And as the next section dis-

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203. Id.

204. See id. (naming history of exclusion and enduring gender-based stereotypes as grounds for applying *Batson* to peremptory strikes exercised against women).

205. Cf. id. ("Here also we must reason from the unique circumstances of gays and lesbians . . . .")

206. Id. (noting exclusion of gay men and lesbians).

207. See Baker, supra note 185 (describing President Obama's amendment of Executive Order 11246 and Executive Order 11478 to prohibit federal government and federal contractors from engaging in employment discrimination on basis of gender identity).

208. E.g. Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, at *1–2 (D.N.J. Sept. 10, 1975) (recounting events leading to transgender plaintiff's lawsuit after dismissal from her position as public school music teacher following her transition); Texas School Suspends Teacher for Being Transgender, Al Jazeera Am. (Apr. 9, 2014, 7:30 PM), http://america.aljazeera.com/articles/2014/4/9/texas-school-suspendsteacherforbeingtransgender.html [http://perma.cc/Q39X-HF5P].

209. Gary J. Gates & Jody L. Herman, Williams Inst., Univ. of Cal. L.A. Sch. Of Law, Transgender Military Service in the United States 1 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf [http://perma.cc/Y423-QPAT].

The Ninth Circuit has upheld the exclusion of transgender individuals from the military. See Leyland v. Orr, 828 F.2d 584, 586 (9th Cir. 1987) (affirming discharge of transgender woman from Air Force Reserves on grounds of physical unfitness because sex change surgery "invariably impairs the evaluee's ability to perform" due to potential health problems).

However, there has been a recent push to allow transgender individuals to serve openly in the military. See, e.g., Sunnivie Brydum, U.S. Transgender Military Ban Could End in May, Advocate (Aug. 26, 2015, 11:41 AM), http://www.advocate.com/transgender/2015/08/26/us-transgender-military-ban-end-may [http://perma.cc/YD83-6R27] (discussing Department of Defense memo and Pentagon working group on logistics for policy's repeal).

210. Gates & Herman, Transgender Military Service, supra note 209, at 1.

cusses, the exclusion of transgender individuals has not been limited to institutions of self-governance.

2. *Historical Exclusion from Juries.* — Transgender individuals have not been excluded from juries by law like women and black venirepersons, but such discrimination is not always so explicit. Like lesbian, bisexual, and gay persons,[211] transgender and gender-nonconforming individuals historically have been reluctant to openly identify as such due to the fear of social discrimination. Starting in the mid-nineteenth century, numerous jurisdictions criminalized cross-dressing.[212] Courts did not begin to invalidate these laws until the late 1970s and 1980s.[213]

Many transgender individuals remain reticent to come out. Transgender workers in states that lack protection from employment discrimination are often forced to present as the wrong gender to avoid losing their jobs.[214] Many transgender employees postpone their transitions or conceal their gender or transition in order to avoid discrimination in the workplace.[215] Being out as transgender to one's medical provider can likewise increase the risk of discrimination.[216] Coming out can also result in familial rejection.[217] Transgender individuals also face evictions and denials of housing.[218] Being transgender or gender-nonconforming in

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211. SmithKline, 740 F.3d at 485–86 ("Gays and lesbians may not have been excluded from juries in the same open manner . . . but our translation of the principles that lie behind *Batson* and *J.E.B.* requires that we apply the same principles to the unique experiences of gays and lesbians.").

212. See I. Bennett Capers, Cross Dressing and the Criminal, 20 Yale J.L. & Human. 1, 8 (2008) (describing nationwide movement toward legislation "explicitly prohibiting cross dressing" from 1850 to 1870).

213. See id. at 10 (noting judicial efforts to begin invalidating ordinances criminalizing "vagrancy" as being too vague).

214. See Jaime M. Grant et al., Nat'l Ctr. for Transgender Equal. & Nat'l Gay & Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 60 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [http://perma.cc/J75J-JJ67) ("Thirty-two percent . . . of respondents reported being forced to present in the wrong gender to keep their jobs. Our question did not specify whether they were required to do so by their employer, or they felt forced to because of fear of discrimination.").

215. Id. at 63 (noting fifty-seven percent of respondents reported delaying their gender transition and seventy-one percent reported hiding their gender or gender transition to avoid employment discrimination and workplace abuse).

216. Id. at 75–76 ("Medical professionals' awareness of their patient's transgender status increased experiences of discrimination among study participants up to eight percentage points depending on the setting . . . ." (emphasis omitted)).

217. Id. at 88 ("Fifty-seven percent . . . of respondents experienced family rejection. Relationships ended for 45% of those who came out to partners. Twenty-nine percent . . . of those with children experienced an ex-partner limiting their contact with their children. Courts limited or stopped relationships with children for 13% of respondents . . . ." (emphasis omitted)).

218. Id. at 106 ("19% [of respondents were] denied a home or apartment and 11% [of respondents were] evicted because they were transgender or gender non-conforming." (emphasis omitted)).

public poses risks of harassment, denial of service, and even violence.[219] Scores of transgender women of color have been murdered for living openly.[220]

The paucity of peremptory strikes based on gender identity and the recency of the three cases in which courts permitted counsel to exercise peremptory strikes on the basis of gender identity or expression reflect the fact that just as "[b]eing 'out' about one's sexuality is . . . a relatively recent phenomenon,"[221] so too is being "out" about one's gender identity. Even with growing acceptance of transgender individuals, polling indicates that only sixteen percent of Americans personally know or work with someone who is a transgender person,[222] as compared to eighty-seven percent of Americans who personally know or work with someone who is gay.[223] Given the prevailing discrimination faced by transgender individuals, it is unsurprising that many fear living openly and have remained closeted.

3. *Perpetuating "the Very Stereotypes that the Law Forbids."* — Furthermore, *Batson* is concerned with protecting jurors, the parties, and the larger community from the risk that peremptory strikes on the basis of an

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219. Id. at 124 ("Over half (53%) of respondents reported being verbally harassed or disrespected in a place of public accommodation. Forty-four percent . . . of respondents reported being denied equal treatment or service . . . . Eight percent . . . of respondents reported being physically attacked or assaulted in places of public accommodation." (emphasis omitted)).

220. See Nat'l Coal. of Anti-Violence Programs, Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2013, at 8 (2014), http://www.avp.org/storage/documents/2013_ncavp_hvreport_final.pdf [http://perma.cc/ZH7W-FTXW] ("More than half of 2013's homicide victims were transgender women of color.").

In 2015, at least twenty-one transgender women have been killed as a result of anti-trans bias; their names (and ages at death) are as follows: Zella Ziona (21), Kiesha Jenkins (22), Keyshia Blige (33), Jasmine Collins (32), Tamara Dominguez (36), Elisha Walker (20), Kandis Capri (35), Ashton O'Hara (25), Shade Schuler (22), Amber Monroe (20), K.C. Haggard (66), India Clarke (25), Mercedes Williamson (17), London Chanel (21), Kristina Gomez Reinwald (46), Penny Proud (21), Taja Gabrielle DeJesus (36), Yazmin Vash Payne (33), Ty Underwood (24), Lamia Beard (30), and Bri Golec (22). See, e.g., Mitch Kellaway & Sunnivie Brydum, These Are the U.S. Trans Women Killed in 2015, Advocate (July 27, 2015, 5:00 AM), http://www.advocate.com/transgender/2015/07/27/these-are-trans-women-killed-so-far-us-2015?page=full [http://perma.cc/8G5V-GHNP] (last updated Dec. 18, 2015, 7:00 PM) (describing circumstances of victims' deaths). The gender identity of one further victim, Papi Edwards (20), "has been disputed in press reports and among family members and activists." Id.

221. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014).

222. Press Release, GLAAD, Number of Americans Who Report Knowing a Transgender Person Doubles in Seven Years, According to New GLAAD Survey (Sept. 17, 2015), http://www.glaad.org/releases/number-americans-who-report-knowing-transgender-person-doubles-seven-years-according-new [http://perma.cc/3J62-G7N2].

223. See Bruce Drake, How LGBT Adults See Society and How the Public Sees Them, Pew Research Ctr. (June 25, 2013), http://www.pewresearch.org/fact-tank/2013/06/25/how-lgbt-adults-see-society-and-how-the-public-sees-them [http://perma.cc/3YD9-BE7W].

identity characteristic may perpetuate "the very stereotypes that the law forbids."[224]

Transgender and gender-nonconforming individuals are subject to pervasive stereotypes.[225] Stereotypes of transgender women depict them as sex workers,[226] men who fetishize dressing up in women's clothing,[227] and sexual predators or perverts.[228] Other stereotypes portray transgender individuals as violent,[229] crazy or unstable,[230] gay,[231] dishonest or deceitful,[232] caricatures of masculinity or femininity,[233] and inauthentic men and women.[234]

Allowing peremptory challenges based on gender identity and expression "would send the false message that [transgender and gender-nonconforming individuals] could not be trusted to reason fairly on

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224. *SmithKline*, 740 F.3d at 486.

225. See Dean Spade, Documenting Gender, 59 Hastings L.J. 731, 776–77 (2008) (noting "stereotypes about transgender people as imposters or as sexual predators").

226. Id. at 757 ("The cultural stereotype that transgender women are prostitutes may contribute to this profiling and to the arrest of transgender women who are not engaged in prostitution.").

227. See Nat'l Ctr. for Transgender Equal., Understanding Transgender: Frequently Asked Questions About Transgender People 6 (2009), http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf [http://perma.cc/3967-EFMR] ("People used to believe that crossdressing was a purely sexual fetish.").

228. See Richard M. Juang, Transgendering the Politics of Recognition, *in* Transgender Rights 242, 249 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds. 2006) (acknowledging "long-standing stereotype of transsexual women as secret sexual predators").

229. See Malic White, End of Gender: "Transsexual Killer" Strikes Again, Bitch Media (Apr. 26, 2012, 10:47 AM), http://bitchmedia.org/post/end-of-gender-transsexual-killer-strikes-again-sevigny-transphobia [http://perma.cc/YSP2-5LHY] (analyzing "transsexual killer" trope in films).

230. See Shannon Price Minter & Deborah H. Wald, Protecting Parental Rights, *in* Transgender Family Law: A Guide to Effective Advocacy 63, 76 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012) (noting "common false stereotype . . . that transgender people are . . . mentally unstable").

231. See Stephanie Beryl Gazzola & Melanie Ann Morrison, Cultural and Personally Endorsed Stereotypes of Transgender Men and Transgender Women: Notable Correspondence or Disjunction?, 15 Int'l J. Transgenderism 76, 82 (2014) ("Across all groups, transgender men and women were described as gay or lesbian based on the gender assigned to them at birth.").

232. See Minter & Wald, supra note 230, at 76.

233. See Juliet Jacques, What Sort of Woman Do I Want to Be?, Guardian (Feb. 9, 2011, 5:30 PM), http://www.theguardian.com/lifeandstyle/2011/feb/09/transgender-women-femininity [http://perma.cc/LS7U-9XR2] (referencing "stereotype that persists about trans women . . . criticising us for conforming to conservative models of femininity").

234. See Gay-Straight All. Network & Transgender Law Ctr. & Nat'l Ctr. for Lesbian Rights, Beyond the Binary: A Toolkit for Gender Identity Activism in Schools 6 (2004), http://www.nclrights.org/wp-content/uploads/2013/07/beyond_the_binary.pdf [http://perma.cc/7VDN-3VCX] [hereinafter TLC & NCLR, Beyond the Binary] (debunking myths about transgender people, including notion that "[t]ransgender women are not 'real' women and transgender men and [sic] not 'real' men").

issues of great import to the community or the nation."[235] Such challenges, based on "preconceived notions of the identities, preferences, and biases" of transgender and gender-nonconforming people would "reinforce and perpetuate these stereotypes."[236]

III. THE FUTURE OF PEREMPTORY STRIKES AND TRANSGENDER JURORS

Section III.A proposes a judicial reading of *J.E.B.*'s prohibition against gender-based peremptory strikes to include those on the basis of gender identity or expression.[237] Section III.B alternatively recommends legislative solutions to protect transgender and gender-nonconforming jurors. Section III.C explains why a ban on peremptory challenges based on sexual orientation will fail to protect lesbian, gay, bisexual, *and* transgender jurors. Section III.D addresses concerns that the proposed solution is too minimal, given the flawed, ineffectual framework of *Batson*.

A. *An Inclusive Interpretation of* J.E.B.

1. *Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression.* — In light of the mounting decisions that adopt the trans-inclusive approach to sex discrimination and the evolving legal and social understanding of transgender identity,[238] courts should interpret *J.E.B.* to prohibit peremptory challenges on the basis of gender identity or expression. The Court's failure to consider the phenomenon of strikes against transgender jurors does not bar such a reading of *J.E.B.* in order to fulfill the purposes of *Batson*.[239]

First, courts should find that heightened scrutiny applies to gender identity classifications. Numerous courts have already held sex discrimination to encompass gender identity discrimination in multiple contexts, including employment,[240] education,[241] and credit.[242] Moreover, the executive branch and administrative agencies have likewise adopted a trans-inclusive definition of sex discrimination in employment and

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235. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486 (9th Cir. 2014).

236. Id.

237. For a discussion of why this Note uses the phrase "based on gender identity or expression," see supra note 13.

238. See supra section II.B (discussing cases in which courts have adopted trans-inclusive interpretation of sex discrimination).

239. See supra notes 202–206 and accompanying text (discussing Ninth Circuit's conclusion that experiences of group one seeks to include under *Batson* does not have to perfectly mimic experiences of previously protected group under *Batson*).

240. See supra sections II.A.3, II.B.1 (discussing trans-inclusive approach to Title VII).

241. See Arcadia Resolution, supra note 185, at 1 (agreeing to premise that sex discrimination under Title VII includes gender identity or expression discrimination).

242. See supra note 163 (discussing First Circuit Equal Credit Opportunity Act case).

healthcare.[243] The EEOC's recent decision in *Macy v. Holder* signifies the growing acceptance of this trend. While few courts have directly addressed sex discrimination and transgender individuals under the Equal Protection Clause,[244] likely due to the limited purview of the Equal Protection Clause,[245] Title VII and the Equal Protection Clause share parallel purposes of prohibiting discrimination. Therefore, courts should look to this growing approach and apply heightened scrutiny to such classifications.

Furthermore, prohibiting peremptory challenges on the basis of gender identity or expression would fulfill the judicial rationales that animated *Batson*, *J.E.B.*, and *SmithKline*. Like women and black, lesbian, gay, and bisexual individuals, transgender individuals have been systematically excluded from important institutions of self-governance[246] and have faced a de facto exclusion from jury participation.[247] The risks of reinforcing transphobic stereotypes—and thereby undermining judicial legitimacy and public respect for the rule of law—are great.[248] Allowing such peremptory strikes would stamp transgender individuals with a mark of inferiority that they, "for no reason other than gender [identity or expression], are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."[249]

Failing to ban peremptory challenges on the basis of gender expression would render the protection of transgender jurors illusory. Many transgender individuals lack the resources or desire to medically transition.[250] If courts were to restrict gender identity protections to individuals who have transitioned or individuals who are currently transitioning, transgender individuals who have not taken steps deemed adequate to constitute transition would lack protection. At voir dire, questions of whether an attorney challenged a transgender juror on an

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243. See HHS Medicare Decision, supra note 185, at 1 (lifting ban on Medicare coverage of transgender healthcare); Epstein, supra note 185 (discussing executive order prohibiting gender identity discrimination in employment).

244. Cf. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding transgender woman successfully brought equal protection sex discrimination claim under § 1983).

245. See Kemp, supra note 188 (discussing reasons for preference for Title VII claims).

246. See supra section II.C.1 (detailing historical and current exclusion of transgender people from government employment and military service).

247. See supra section II.C.2 (discussing persistent phenomenon of closeted transgender individuals).

248. See supra section II.C.3 (enumerating stereotypes of transgender people).

249. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 142 (1994).

250. See TLC & NCLR, Beyond the Binary, supra note 234, at 6 ("Some transgender people take hormones and/or have surgery. However . . . many transgender people do not take either of these steps. Some feel comfortable with their bodies the way they are. For others, hormones and surgery are inaccessible because they may be too expensive and/or require parental permission.").

impermissible basis would devolve into side trials on the adequacy of the juror's transition.

By reading *J.E.B.* to include peremptory challenges on the basis of gender identity or expression, courts can shield transgender jurors from state-sanctioned transphobia and ensure that all juries truly consist of a pool of one's peers. Concerns that extending *Batson* might forcibly out closeted transgender jurors in order to protect them[251] can be addressed through updated courtroom procedures.[252]

2. *The Specter of* Purkett v. Elem. — Gender expression protections do face significant obstacles. For one, attorneys may exercise peremptory challenges based on classifications subject to rational basis review.[253] Moreover, in *Purkett v. Elem*, the Court held that a prosecutor's explanation for his peremptory challenge of a black male juror—namely, that the juror had long, unkempt hair, a mustache, and a beard, which appeared "suspicious" to the prosecutor—was sufficiently race-neutral and satisfied the prosecution's burden of stating nondiscriminatory reason for the strike.[254]

The Court's logic that neither beards nor long, unkempt hair are "'peculiar to any race'" could equally be applied to peremptory challenges striking a transgender juror for nonconformance with gendered stereotypes of appearance.[255] Numerous courts have subsequently upheld peremptory challenges on the basis of demeanor,[256] body language,[257]

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251. One's identity as a transgender person is not always discernable. See Shay, supra note 4, at 445 ("LGBT identity often is not readily apparent . . . ." (footnote omitted)). While protections for transgender individuals have improved in many jurisdictions, transgender jurors who successfully pass as cisgender men or women may not want to risk being outed in the jury box, particularly in rural areas where they could be subject to ostracization, discrimination, and violence. Id. at 445.

252. See id. at 444–56 (2014) (discussing voir dire privacy concerns and their solutions, including updated juror questionnaires and conducting voir dire in private rooms).

253. *J.E.B.*, 511 U.S. at 143 ("Parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.").

254. Purkett v. Elem, 514 U.S. 765, 766 (1995).

255. Id. at 769.

256. See, e.g., State v. Tucker, 512 S.E.2d 99, 102 (S.C. 1999) ("[C]ounsel may strike venire persons based on their demeanor and disposition.").

257. See, e.g., Hernandez v. New York, 500 U.S. 352, 356–57 (1991) (upholding peremptory strike based on juror's hesitancy); United States v. Ferguson, No. 92-5571, No. 92-5587, 1993 U.S. App. Lexis 22373, at *1, *10 (4th Cir. Sept. 1, 1993) (holding juror's habit of staring at prosecutor was valid reason for peremptory strike).

facial hair,[258] and wardrobe,[259] but *Elem* has been roundly criticized as unworkable and undermining the purpose of *Batson*.[260]

Courts should nevertheless read *J.E.B.* to prohibit peremptory challenges on the basis of gender expression, because such challenges are grounded in impermissible gender stereotypes. Such a prohibition will prevent creative attorneys from using clothing, hairstyle, or body language as proxies for impermissible gender-based classifications. Moreover, doing so will undermine *Elem*, which represents an aberration in the Supreme Court's precedent of protecting the right to jury service without the specter of discrimination.

B. *Legislative Solutions*

Congress should also amend 28 U.S.C. § 1862 to bar exclusion from federal juries on account of gender identity or gender expression, thus guaranteeing equal participation in the important civic duty of jury service for all.[261] In the absence of such action, state legislatures should pass analogous legislation. A growing number of states prohibit gender identity discrimination in housing, healthcare, education, employment, and public accommodations.[262] Barring such juror discrimination would be consistent with these states' general treatment of transgender individuals as a protected class. But the state-by-state solution presents two disadvantages: the achievement of protection for transgender jurors would likely be both gradual and fragmented.[263] And as protections from

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258. See *Elem*, 514 U.S. at 766.

259. See United States v. Clemons, 941 F.2d 321, 323 (5th Cir. 1991) (holding prosecutor's reason for striking juror because he dressed "like a rock star" was race-neutral).

260. See, e.g., Nancy S. Marder, *Batson* Revisited, 97 Iowa L. Rev. 1585, 1595 (2012) ("If *Batson* encouraged a charade, *Elem* created a farce."); Michelle Mahony, Note, The Future Viability of *Batson v. Kentucky* and the Practical Implications of *Purkett v. Elem*, 16 Rev. Litig. 137, 169 (1997) ("The result of allowing *any* reason, however silly or superstitious, to justify peremptorily striking a minority juror renders the entire procedure announced in *Batson* a sham.").

261. A similar bill, introduced in the House of Representatives in 2012 and reintroduced in 2013, would amend 28 U.S.C. § 1862 "by inserting 'sexual orientation, gender identity,' after 'sex.'" Juror Non-Discrimination Act of 2013, H.R. 312, 113th Cong. (2013). An analogous bill, the Jury Access for Capable Citizens and Equality in Service Selection (ACCESS) Act was reintroduced in the Senate and subsequently approved by the Senate Appropriations Committee as part of the 2014 financial services appropriations bill. Jury ACCESS Act, S. 38, 113th Cong. (2013). Its most recent iteration, the Equality Act of 2015, was introduced in the House and the Senate on July 23, 2015. Equality Act of 2015, H.R. 3185, 114th Cong. (2015); Equality Act of 2015, S. 1858, 114th Cong. (2015).

262. See Movement Advancement Project, Equality Maps: Non-Discrimination Laws, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [http://perma.cc/6CPU-XTU4] [hereinafter MAP, Equality Maps] (last updated Oct. 15, 2015) (permitting user to view LGBT protections by issue nationally or by individual state).

263. Cf. Tara Siegel Bernard, Fired for Being Gay? Protections Are Piecemeal, N.Y. Times: Your Money (May 31, 2013), http://www.nytimes.com/2013/06/01/your-money/

discrimination on the basis of sexual orientation increase, some may begin to question why banning discrimination on the basis of gender identity or expression is necessary.

C. *Why Barring Discrimination on the Basis of Sexual Orientation Is Not Enough*

The Ninth Circuit recently held that sexual orientation discrimination is subject to heightened scrutiny and that peremptory strikes on the basis of sexual orientation violate the Equal Protection Clause.[264] Numerous courts have held that state bans on the marriage of same-sex couples constitute unconstitutional sexual orientation discrimination. Commentators have speculated that after *Obergefell*, lower courts, and eventually the Supreme Court, will clarify the appropriate level of scrutiny for sexual orientation classifications.[265] Given the possibility that sexual orientation classifications may soon be subject to heightened scrutiny, and therefore peremptory strikes on the basis of sexual orientation rendered impermissible, some may question the necessity of additional protections for transgender jurors.

Sexual orientation and gender identity/expression are distinct categories of identity.[266] Because courts and legislatures have generally recognized the distinction between sexual orientation and gender identity,[267] if gender identity discrimination in peremptory challenges is not specifically prohibited, transgender jurors will remain vulnerable.[268] Furthermore, in the absence of gender expression protections, even lesbian, gay, and bisexual jurors may remain susceptible to peremptory challenges by proxy. Through their dress, speech, and mannerisms, many lesbian, gay, and bisexual individuals are perceived as gender-

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protections-for-gays-in-workplace-are-piecemeal.html (on file with the *Columbia Law Review*) (discussing how lack of federal protections for workplace discrimination on basis of sexual orientation and "patchwork of state and local laws" make employees vulnerable).

264. For an extended discussion of *SmithKline*, see supra section I.C.4.

265. See supra notes 59–60 and accompanying text (discussing how *Obergefell* may prompt lower courts to revisit sexual orientation and equal protection jurisprudence).

266. See supra notes 75–76 and accompanying text (explaining interaction of sexual orientation and gender identity).

267. See MAP, Equality Maps, supra note 262 (providing database allowing user to view sexual orientation and gender identity discrimination protections by state); see also supra sections I.C.2–I.C.3 (discussing *Lewis* and *Smith* cases, in which courts found it significant whether challenged juror was gay or transgender).

268. In 2007, Representative Barney Frank removed protections for transgender individuals from the proposed Employment Non-Discrimination Act (ENDA) legislation in a controversial effort to increase the chance that ENDA would pass and prohibit workplace discrimination on the basis of sexual orientation. Parker Marie Molloy, Op-Ed: Putting the 'T' in ENDA: I'm a Transgender Woman and I Deserve Employment Protection, Talking Points Memo Cafe (Nov. 8, 2013, 6:00 AM), http://talkingpointsmemo.com/cafe/putting-the-t-in-enda-i-m-a-transgender-woman-and-i-deserve-employment-protection [http://perma.cc/QP7V-U7M8] (recounting 2007 controversy).

nonconforming.[269] In the wake of the Court's pronouncement that the race-neutral explanation offered by the strike's proponent need not be "persuasive, or even plausible,"[270] attorneys have strategically used other categories as substitutes for the impermissible proxies of race, ethnicity, and gender in order to defeat *Batson* challenges.[271] Therefore, attorneys will continue to use peremptory challenges on the basis of gender identity or expression as a permissible alternative. Without specific precedent or legislation barring peremptory challenges on the basis of gender identity or expression, transgender *and* lesbian, gay, and bisexual jurors will be subject to the risk of removal via peremptory challenge.

D. *The End of Peremptory Challenges?*

Some may conclude that the proposed solution does not go far enough in fixing the flawed *Batson* system. That critique speaks to a question of strategy, rather than of aim. *Batson*'s critics and this Note agree that *Batson* has not prevented discrimination against potential jurors from running rampant in voir dire.[272] Many commentators have thus called for the elimination of peremptory challenges.[273] Unfortunately, courts have not shown willingness to take up this charge.[274] At the same time, attorneys overwhelmingly support the exercise of peremptory challenges.[275] Given the improbability of *Batson*'s profound alteration or abolition in the near future, courts and legislatures should protect transgender and gender-nonconforming jurors.

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269. Cf. Sarah E. Valentine, Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child, 2008 Mich. St. L. Rev. 1053, 1078 ("Society often equates gender nonconformity with sexual orientation . . . .").

270. Purkett v. Elem, 514 U.S. 765, 768 (1995).

271. See, e.g., Kevin R. Johnson, *Hernandez v. Texas*: Legacies of Justice and Injustice, 25 Chicano-Latino L. Rev. 153, 193 (2005) (discussing language proficiency as proxy for race); Melynda J. Price, Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection, 15 Mich. J. Race & L. 57, 88 (2009) (discussing religious beliefs as proxy for race in death penalty cases); supra sections I.C.1–I.C.2 (discussing use of jurors' gender nonconformity in *Goodman* and *Carter* as proxy for race).

272. For a discussion of the use of proxies for protected classes, see supra section III.C.

273. See, e.g., Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 166–68 (2010) (endorsing Justice Marshall's view that only eliminating peremptory challenges will end discrimination in jury selection); Raymond J. Broderick, Why the Peremptory Challenge Should Be Abolished, 65 Temp. L. Rev. 369, 371 (1992) (calling peremptory challenge "offensive to both the federal Constitution and basic concepts of justice").

274. See supra note 42 and accompanying text (discussing continuing vitality).

275. See, e.g., Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, 74 Fordham L. Rev. 1683, 1685–86 (2006) (citing recent jury reform efforts that maintained peremptory challenge as evidence of lawyers' "unwavering support"); Caren Myers Morrison, Negotiating Peremptory Challenges, 104 J. Crim. L. & Criminology 1, 5 (2014) ("American lawyers like peremptory challenges." (emphasis omitted)).

CONCLUSION

Thus far, courts have failed to protect transgender and gender-nonconforming jurors. As more transgender and gender-nonconforming individuals live openly at younger ages, such strikes will likely become an increasingly common phenomenon. And given the disproportionate criminalization and incarceration of transgender and gender-nonconforming people—particularly transgender people of color[276]—the participation of transgender and gender-nonconforming jurors is particularly needed to ensure that defendants receive a trial by a jury of their peers that represent a fair "cross-section of the community."[277]

Courts should hold that *J.E.B.*'s prohibition on gender-based peremptory challenges encompasses gender identity or expression. By adopting a trans-inclusive view of sex discrimination, courts may apply heightened scrutiny to peremptory challenges on the basis of gender identity or expression. Given the historical exclusion of transgender individuals from institutions of self-governance and the risk of reinforcing transphobic stereotypes, courts should find that proscribing peremptory challenges on the basis of gender identity or expression fulfills the tenets of *Batson*. Extending *J.E.B.*'s reach will not weaken the peremptory challenge, but rather allow courts to realize the promise of the Equal Protection Clause.

276. NCTE, Prison and Detention Reform, supra note 127.

277. Glasser v. United States, 315 U.S. 60, 86 (1942).