Striking a Balance of Fairness: Sexual Orientation and Voir Dire

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INTRODUCTION

A criminal defendant’s Sixth Amendment right to be tried by an impartial jury is one of the ways the American justice system seeks to protect individuals’ due process rights.¹ Voir dire, the questioning of prospective jurors, is one of the means used to ensure at least the appearance of an impartial jury, even if voir dire does not always achieve the lofty goal of a truly impartial jury. Voir dire facilitates the fulfillment of a criminal defendant’s Sixth Amendment right by allowing parties to an action and their counsel to identify and exclude prospective jurors who may harbor biases against one of the parties involved. The federal common law defines an “impartial jury” as one drawn from a panel that accurately reflects that community and is selected with non-discriminatory criteria.²

In addition to protecting the parties’ right to a fair trial decided by an impartial jury, the voir dire system also encompasses a potential juror’s rights, such as the equal protection right to have the opportunity to serve as a juror³ and the right to a reasonable degree of privacy.⁴ The Supreme Court has held that discriminatory practices in jury selection raise doubts about the integrity of the entire jury system⁵ and also violate the equal protection rights of the excluded jurors.⁶ These overlapping, and sometimes conflicting rights of the parties and the prospective jurors all come into play when a litigant exercises a peremptory strike.

Once either the attorneys or the court finishes questioning each juror, a party may request the court strike the juror for cause if it is apparent the juror in unable to render a fair and impartial verdict or is otherwise unqualified. In addition, each party to the action is allowed a limited number of peremptory strikes, whereby attorneys may use their intuition as to which jurors may be unfavorable to their case.⁷

³. Id.
⁶. Id.

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Issues involving sexual orientation arise during voir dire in a variety of ways, and they raise additional controversies. First, a court may have to decide if and when counsel should be allowed to question venire members about possible bias regarding sexual orientation. Second, if the court determines that such questioning is appropriate, the judge must then decide the form, substance and extent of such questioning, taking into consideration the rights of the parties as well as the rights of the venire members. Third, if voir dire reveals a juror is gay, lesbian or bisexual,8 the court may have to decide if this information is a legal basis for a party to exercise a peremptory strike to remove that juror. In other words, a court may have to decide if and when a juror’s sexual orientation is sufficient grounds for a strike for cause or a permissible basis for a peremptory strike. This article seeks to address all of these controversies. It argues that a juror’s sexual orientation alone is never a proper basis for a peremptory strike. It argues sexual orientation should be treated the same as race, religion, ethnicity and gender for purposes of voir dire. This article also proposes several means by which trial judges can protect litigants’ rights to exercise peremptory challenges against prospective jurors who may decide a case based on personal biases regarding sexual orientation, and, at the same time, be sensitive to jurors’ need for privacy.

I. JUROR’S SEXUAL ORIENTATION AS A BASIS FOR A PEREMPTORY STRIKE

A. Historical Overview of Federal Common Law Limiting Peremptory Strikes

In the landmark case of Batson v. Kentucky,9 the Supreme Court focused on the rights of stricken jurors and held the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor from striking a juror simply because of his or her race. The Court held that a prima facie case of discrimination requires both the defendant and the stricken juror be members of a cognizable group. The Court later modified this holding in Powers v. Ohio10 to allow a white defendant to raise a third party equal protection claim on behalf of black prospective jurors who were stricken from the jury panel. Powers also states that a white criminal defendant may have the same due process claims as a non-white defendant when the prosecution uses discriminatory means to exclude a juror.11

The Supreme Court has focused on the harm to the individual juror as well as the harm to the community that results from the discriminatory use of peremptory challenges.12 It found that “[a]ll persons, when granted the

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8. Although much of the analysis in this paper may also apply to transgendered individuals, this paper focuses on issues of sexual orientation rather than gender identity solely because statutory law and caselaw has yet to tackle the rights of transgendered people in the area of voir dire.
11. Id.
opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.\(^\text{13}\) Such discrimination violates the principles of equal protection.\(^\text{14}\) In \textit{Powers}, the Court held a criminal defendant has standing to raise the third party equal protection claims of excluded jurors because "the discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice."\(^\text{15}\) Such standing was necessary because stricken jurors are unlikely to take it upon themselves to appeal their dismissal from a jury. Without third party standing, a criminal defendant is limited to either a Sixth Amendment or a due process claim which, depending on the circumstances, may have a lower likelihood of success than an equal protection claim.

The Court later extended the holdings of \textit{Batson} and \textit{Powers} to sex discriminatory peremptory challenges in \textit{Ballard v. United States}\(^\text{16}\) and \textit{J.E.B. v. Alabama ex rel. T.B.}\(^\text{17}\). Lower courts have held that peremptory challenges may not be used to exclude jurors solely because of their religion,\(^\text{18}\) national origin,\(^\text{19}\) or disability.\(^\text{20}\) In \textit{Edmonson v. Leeville Concrete Co.},\(^\text{21}\) the Supreme Court held that \textit{Batson} and its progeny apply in civil trials as well as criminal trials. In \textit{Georgia v. McCollum},\(^\text{22}\) it held that criminal defendants have the same restrictions on the use of peremptory strikes as the prosecution.

Early on, the Supreme Court expressed the rationale for prohibiting the exclusion of a particular category of citizens with respect to the category of sex:

\begin{quote}
The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.\(^\text{23}\)
\end{quote}

Following the same reasoning in \textit{Batson} and other cases dealing with peremptory strikes based on race, the Court ruled an impartial jury is one that

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\(^{14}\) \textit{Powers}, 499 U.S. at 410.
\(^{15}\) Id.
\(^{16}\) 329 U.S. 187 (1946).
\(^{17}\) 511 U.S. 127 (1994).
\(^{18}\) United States v. Greer, 939 F.2d 1076 (5th Cir. 1991). But see \textit{State v. Davis}, 504 N.W.2d 767 (Minn. 1993).
\(^{19}\) United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987) (holding that Italian-Americans are a cognizable group). But see United States v. Sgro, 816 F.2d 30 (1st Cir. 1987) (holding that Italian-Americans are not a cognizable group).
\(^{22}\) 505 U.S. 42 (1992).
has the possibility of including a variety of perspectives, without the intentional exclusion of any one in particular.\footnote{It is important to acknowledge that some attorneys use peremptory strikes in an effort to obtain a greater variety of perspectives, rather than to limit the diversity of a jury's members. See ABBE SMITH, "Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense, 76 FORDHAM L. REV. 523, 544 (1998).} A California court used the same reasoning to expand the limits on peremptory strikes to include sexual orientation as an impermissible basis for exclusion.

B. California's Extension of Limit on Peremptory Strikes to Include Sexual Minorities

The California Appellate Court is the first and only court to date to hold that jurors may not be stricken from a jury panel because of their sexual orientation. The recent case of \textit{People v. Garcia}\footnote{77 Cal. App. 4th 1269 (Cal. Ct. App. 2000).} held that a juror's sexual orientation cannot be the basis for a peremptory strike. It held sexual orientation must be treated the same as race, religion, ethnicity, and sex for purposes of voir dire in California courts.

\textit{Garcia} was a burglary case with no element of sexual orientation in either the prosecution's or the defense's case. However, it became apparent during voir dire that two members of the jury panel were lesbians.\footnote{Id. at 1271.} The prosecution used two of its peremptory strikes to exclude the two lesbians. The trial court overruled the defense's objection\footnote{Id. at 1272.} and required no explanation from the prosecutor for its decision to strike the two lesbian jurors. On appeal, the defense argued that the prosecution impermissibly struck the two women because of their sexual orientation.\footnote{Id. at 1272.}

The \textit{Garcia} court held that sexual minorities (limited in the case to gay, lesbian and bisexual people) constitute a cognizable group that must be included if a venire is to be a "representative cross-section"\footnote{Rubio v. Superior Court, 24 Cal. 3d 93, 97 (1979).} of the community. According to the California Supreme Court, a "cognizable group" is one whose members "share a common perspective arising from their life experience in the group" or a "common social or psychological outlook on human events."\footnote{Id. at 98.} The \textit{Garcia} court found that in "this era of 'don't ask; don't tell,'" gay, lesbian and bisexual people share a common perspective and social outlook because of their history of persecution.\footnote{Garcia, 77 Cal. App. 4th at 1276.} With this finding, the court rejected the Attorney General's argument that not all gay men and lesbians share a common perspective because not all have suffered the same discrimination.\footnote{Id. at 1276-77.}
held that the variety of experiences of gay politicians, Hollywood celebrities, writers, and average gays and lesbians does not negate their common experience of being a sexual minority.\textsuperscript{34}

Under California law, a "cognizable group" must also have a unique perspective that cannot be represented by individuals not in the group.\textsuperscript{35} The \textit{Garcia} court found that no other group can adequately represent the perspective of gay and lesbian people. It reasoned that only certain religious and racial minorities have suffered such "pernicious and sustained hostility" and "immediate and severe opprobrium."\textsuperscript{36} The court emphasized that the community at large has an interest even greater than the individual defendant in having the perspective of sexual minorities represented in jury panels.\textsuperscript{37} In addition, it held that to deprive gay and lesbian people from the civic duty of jury service is to "deprive them of part of their membership in the community [and] . . . inevitably damage the [general] community as well."\textsuperscript{38} The fact that gay and lesbian people are not always recognizable did not faze that court at all. Indeed, the court acknowledged that race and national origin are also difficult to determine at times, but discrimination based on those characteristics is likewise prohibited.\textsuperscript{39} Finally, the court rejected the argument that the number of sexual minorities is not a large enough to be a "cognizable group," noting that one's membership in a religious or national group with very few members would still constitute an impermissible basis for exclusion from a jury.\textsuperscript{40}

In a vein similar to \textit{Batson} and its progeny, the \textit{Garcia} court held that systematic exclusion of sexual minorities "would send an intolerable message" that people may be presumed unqualified for jury service because of their sexual orientation.\textsuperscript{41} Under California law, prospective jurors may not be excluded from the jury panel because of their race, ethnicity, gender or similar group membership.\textsuperscript{42} Citing \textit{People v. Wheeler},\textsuperscript{43} and the federal prohibition of the discriminatory use of peremptory strikes,\textsuperscript{44} the court held that a systematic exclusion of the perspective of sexual minorities would also violate the criminal defendant's right to a jury panel drawn from a representative cross-section of the community under both state law and the federal Constitution.\textsuperscript{45}

\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Rubio}, 24 Cal. 3d at 98.
\textsuperscript{36} \textit{Garcia}, 77 Cal. App. 4th at 1279 (citing \textit{Rowland v. Mad River Local Sch. Dist.}, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari)).
\textsuperscript{37} \textit{Id.} at 1279.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.} at 1280.
\textsuperscript{40} \textit{Id.} at 1281.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{People v. Wheeler}, 22 Cal. 3d 258 (1978).
\textsuperscript{43} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 1275.
The California Assembly codified the *Garcia* holding. It proposed AB 2418 on February 24, 2000 and passed the bill on May 4, 2000.\(^{46}\) Codification is a positive step in demonstrating California’s refusal to sanction the exclusion or discrimination of people based on sexual orientation. The legislation extends the *Garcia* ruling to civil cases, as well as criminal cases. In addition, a state statute prohibiting the exclusion of jurors based on their sexual orientation may potentially bind federal courts in California.\(^{47}\)

However, codification of *Garcia* may not be fully sufficient to prevent discrimination on the basis of sexual orientation. Neither *Garcia* nor AB 2418 prohibit an attorney from striking prospective jurors who associate with or are related to a gay, lesbian, or bisexual person. The California Assembly and the legislatures of other states should consider enacting a statute that would prevent attorneys from presuming bias and exercising peremptory strikes not only when a prospective juror acknowledges that he or she is gay, lesbian or bisexual, but also when a prospective juror acknowledges an association with someone representing a sexual minority.\(^{48}\) Of course, if a juror indicated that he or she harbors an actual bias, there is certainly a basis for a peremptory strike and probably a strike for cause. Part II discusses how Courts should go about determining actual bias.

C. The Future of Federal Law Limiting Peremptory Strikes Against Sexual Minorities

Although the federal legislature has not gone to the same lengths as the California legislature to set a precedent of intolerance for discrimination on the basis of sexual orientation,\(^{49}\) the Supreme Court has acknowledged widespread discrimination on the basis of sexual orientation in *Romer v. Evans*,\(^{50}\) and it has

\(^{46}\) Cal. Civ. P. § 231.5
\(^{47}\) Whether AB 2418 binds federal courts depends on whether limits on voir dire are considered substantive or procedural. This issue is governed by the *Erie* doctrine, named for *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and is outside the scope of this paper.
\(^{48}\) Discrimination on the grounds that a person associates with a member of a protected group is prohibited by other antidiscrimination law. For example, Title VII prohibits discrimination in employment premised on an interracial relationship. Defenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581,589 (5th Cir. 1998), en banc hearing reversed on other grounds in Williams v. Wal-Mart Stores, Inc., 169 F.3d 215 (5th Cir. 1999); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) (holding a white man could bring a claim under Title VII against an employer who allegedly refused to hire plaintiff because of his interracial marriage); Taylor v. Western and Southern Life Ins. Co., 966 F.2d 1188, 1199 (7th Cir. 1992) (holding employer discriminated against employee on the basis of race due to the plaintiff’s interracial marriage). See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988, 994-995 (6th Cir. 1999) (holding discharge of white employee allegedly because his child was biracial was violation of Title VII); Fiedler v. Marumscn Christian School, 631 F.2d 1144 (4th Cir.1980) (holding a parochial school violated the constitutional rights of a white student when it expelled her for her relationship with a black student). Additionally, 42 U.S.C. § 1981 provides a cause of action to a white spouse who alleges that he was discriminated against in employment because of his marriage to a nonwhite. Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 114 (5th Cir.1986).
\(^{50}\) 517 U.S. 620 (1996).
held that a state (and its agents) cannot systematically deny sexual minorities equal protection of the law solely based on animus.\(^5^1\) Although the *Romer* Court fell short of designating lesbian, gay and bisexual persons worthy of heightened scrutiny under the equal protection clause, it did identify, in the context of lesbian, gay and bisexual persons, many of the factors that contribute to a group being designated a discrete and insular minority for the purposes of heightened scrutiny under the Equal Protection Clause. There is powerful dicta in the *Romer* opinion that suggests that gay, lesbian and bisexual people should have certain protections and enjoy a degree of heightened scrutiny, including protection against being excluded from jury service because of their sexual orientation.

Indeed there is precedent in the federal courts, in addition to the California courts, for interpreting *Batson* and its progeny to prohibit sexual orientation discrimination in voir dire. In the same year *Romer* was decided, the Ninth Circuit assumed arguendo in *Johnson v. Campbell*\(^5^2\) that criminal defendants may be able to make a *Batson*-like challenge if the prosecution uses peremptory strikes to exclude gay jurors. The court did not rule on the issue because it held the plaintiff did not establish a prima facie case of discrimination as nothing in the record indicated that the excluded juror was gay. At trial, the plaintiff's counsel simply stated his impression that one of the stricken jurors was gay.\(^5^3\) In addition, the Ninth Circuit was disinclined to find a prima facie case of discrimination because it believed the defense had no motive to exclude gay jurors as long as the case did not involve any issues of sexual orientation and none of the parties or witnesses were gay.\(^5^4\) Although *Johnson* does not provide any precedent limiting the use of peremptory strikes against sexual minorities, it does indicate that at least the Ninth Circuit may be willing to entertain the idea in the future.

To a degree, prohibiting sexual orientation discrimination bias in the jury selection process is purely an academic exercise. A skilled attorney can always offer a non-discriminatory reason for exercising a peremptory strike, and the likelihood of having enough gay, lesbian, or bisexual potential jurors on a given panel to establish a pattern is minimal. Nevertheless, anecdotal data indicates a

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\(^{51}\) *Id.* The *Romer* Court did not hold that sexual minorities are a protected class or that laws that discriminate against them are subject to heightened scrutiny. Obviously, without such a ruling from the Supreme Court, gay, lesbian and bisexual people do not enjoy the same federal precedent as women and racial, religious and ethnic minorities. In contrast, a minority of states include sexual orientation as a protected classification for such purposes as employment and housing. For a list of states, cities, and counties that prohibit various forms of discrimination based on sexual orientation, see http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217. There are also some states, such as Ohio, however, which have not recognized these protections. However, to illustrate the point that the nation is still quite divided on the issue, the Ohio Court of Appeals ruled, in a 1991 case, that there was no error in refusing to order the state to explain its rationale when it exercised a peremptory challenge against a gay juror because there is no case holding that gay persons are a cognizable group for purposes of equal protection analysis. State v. Spitler, 599 N.E.2d 408, 414 (Ohio App. 1991).

\(^{52}\) 92 F.3d 951 (9th Cir. 1996).

\(^{53}\) *Id.* at 952.

\(^{54}\) *Id.* at 952-53.
substantial number of potential jurors experience anti-gay bias in some form. The incidents they experience undermine the goal of fairness and the integrity of the jury system. Increased legislation may, at the very least, assure jurors and litigants that the judiciary does not sanction such incidents.

II. OBTAINING AN IMPARTIAL JURY THROUGH VOIR DIRE

In addition to guaranteeing a jury will be drawn from a venire that fairly represents the community, the Sixth Amendment guarantees criminal defendants the right to exclude jurors who may be biased. "[T]he Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict," but criminal prosecutors and civil litigants also share the right to strike prospective jurors whom they suspect may be biased against their case. Parties to a lawsuit have long been permitted to exercise peremptory challenges against jurors who do not manifest overt bias, allowing attorneys to use intuition to determine which jurors might be disinclined to find in their favor. The right to strike prospective jurors without cause is subject only to the limitation imposed by the Equal Protection Clause.

Although a party's Sixth Amendment right to make peremptory challenges to obtain an impartial jury may appear to conflict with jurors' equal protection rights, this is not necessarily so. The Supreme Court's prohibition of peremptory strikes based on racial, religious, ethnic or sex-based stereotypes helps the parties by requiring attorneys to focus on venire members' attitudes about relevant issues rather than on assumptions about their attitudes. As the Garcia court stated, "Commonality of perspective does not result in identity of opinion. That is the whole reason exclusion based upon group bias is anathema. It translates into an automatic bias. Its analysis was similar to the U.S. Supreme Court's reasoning that while women and racial minorities share a common perspective, the representation of which (or at least the equal potential for representation) is essential to ensure a jury represents a cross-section of the

55. See Sexual Orientation Subcommittee of the Access and Fairness Advisory Committee, Sexual Orientation Fairness in the California Courts [hereinafter SOFC] available at http://www.courtinfo.ca.gov/program/access/reports.htm. The study found gay and lesbian court users, including attorneys, witnesses, and litigants, as well as jurors, had significantly more negative perceptions of fairness in the California courts. Twenty-two percent of gay and lesbian court users felt threatened because of their sexual orientation in general, and thirty-eight percent felt threatened when sexual orientation became an issue. See id. at 5. In illustration of these negative experiences, one respondent in the study stated, "I was a jury prospect but it was evident that the defense lawyer didn't want gays on the jury. One of his questions to me during selection was: Mr. X, would you say you have more straight friends or gay friends? I was discharged." Id., app. C. at 19.

58. Id. at 89.
community, that common perspective may not be used to infer bias where none exists. 60

Like people who share a common race, ethnicity or religion, sexual minorities may share some general experiences but may also be quite varied in their attitudes. When an attorney decides to make a peremptory strike based on nothing more than stereotypes, the attorney may do a disservice. 61 The attorney may be better off asking prospective jurors about relevant issues rather than guessing what their attitudes might be. For example, while the Catholic Church opposes abortion, many individual Catholic people do not; while the poor in America are overwhelmingly racial minorities, many individual African Americans are wealthy and may be more sympathetic to corporate litigants. Similarly, while many gay communities align themselves with feminist and multi-cultural organizations, many individual gay, lesbian, and bisexual people oppose the goals of such organizations. Therefore, when an attorney is determining which juror may not be impartial, presuming certain attitudes of the specific individuals on the jury panel based on characteristics like race, religion and sexual orientation is less effective than asking questions likely to reveal impartiality.

Unfortunately, actual bias against a party may not be revealed simply by asking jurors whether they can be impartial. Jurors are invariably reluctant to admit that they are biased and cannot render an impartial verdict. An attorney conducting voir dire may be better able to determine bias by asking open-ended questions and engaging the venire persons in conversation. 62 However, judges will often exercise discretion to limit many open-ended questions in open court in the interest of time 63 and in an effort to avoid juror boredom and/or resentment. 64 Also, many trial attorneys resist asking open-ended questions for fear that an unexpected answer may negatively impact other prospective jurors or may fluster or offend an inarticulate or self-conscious venire person. 65

Even though attorneys conducting voir dire may wish to know prospective jurors’ and their acquaintances’ sexual orientation under the premise (correct or not) that sexual orientation provides some insight into a juror’s attitudes about

60. Compare Ballard, 329 U.S. at 193-194 ("[A] distinct flavor is lost if either sex is excluded.") with J.E.B., 511 U.S. at 141-142 ("All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.").

61. I acknowledge that attitudes towards women and various minorities may be subtle issues in cases, such as when jurors must chose between different witness’ accounts of an event. Although judges may not be inclined to allow voir dire on attitudes towards women and minorities in such cases, such questioning would be ideal to truly gage jurors’ ability to consider all evidence in an impartial manner.


63. Id. at 31.

64. E.g., Gacy v. Welborn, 994 F.2d 305, 315 (7th Cir. 1993) (holding that a trial judge’s refusal to ask open-ended questions regarding anti-gay bias was not an abuse of discretion).

65. Id.
various other matters, the purpose of voir dire is “not to afford individual analysis in depth to permit a party to choose a jury that fits into some mold the party believes appropriate for his or her case.” The purpose of voir dire is limited to excluding jurors who are biased against a party, not those who simply do not favor a party. Despite the use of jury experts who assist counsel in obtaining a jury partial to their side (as opposed to an impartial jury), most litigants cannot afford to sponsor such extensive social science research.

Although the Garcia court stated that attorneys should not ask venire persons to indicate their sexual orientation, it did not seem to realize that more banal questions do effectively ask for that information. Questions about marital status and cohabitation do reveal the sexual orientation of venire persons who live with their same-sex “spouses” or life partners. Those who do not wish to indicate their sexual orientation are forced to either perjure themselves or indicate to the court that the question is personal in nature and request a hearing. A juror’s right to request a hearing if she or he does not wish to answer a question in open court is discussed below.

A. The Mechanics of Voir Dire

In the majority of federal courts, it is the judge who conducts voir dire, or at least most of it. Proponents of judge-conducted voir dire argue that it prevents attorneys from abusing voir dire by using it to argue their case and woo jurors, and it is more time efficient. Even when the judge does all the questioning, attorneys may still submit questions to the judge for voir dire. Some courts allow attorneys to give venire persons a supplemental juror questionnaire in addition to the standard qualification questionnaire.

In some state courts, the attorneys conduct voir dire. Some studies indicate that this less formal interview method elicits more honest responses from prospective jurors. In addition, attorneys are able to evaluate venire persons’ nonverbal responses better if they are conducting voir dire. What is more, there is a risk that a judge may inadvertently and non-verbally express some bias

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66. Sexual orientation may be used to predict certain traits just as race, age, sex, and socioeconomic status is used to predict traits. One author suggests that Hispanics tend to be passive during deliberations, Chinese people tend to go along with the majority, young people do not award high damages, Black people tend to favor civil plaintiffs and criminal defendants, people tend to be less forgiving of their own sex, and women react more to pain and suffering. Wenke, supra note 62, at 77-79, 87-89.

67. Schlinsky v. United States, 379 F.2d 735, 738 (1st Cir. 1967).

68. Garcia, 77 Cal. App. 4th at 1280 (“[N]o one should be allowed to inquire about [a juror’s sexual orientation].”).

69. V. Hale Starr & Mark McCormick, Jury Selection §10.0.1 (2d ed. 1993).

70. Id. at §10.0.2.


73. Starr, supra note 62, §10.0.2.
while conducting voir dire.\textsuperscript{74} The jurors know the attorneys favor their own clients and are less likely to be influenced by bias expressed during voir dire conducted by the attorneys. In some courts, the judge conducts preliminary voir dire and counsel ask more specific questions.

Questions may be put to venire persons in written form on a juror questionnaire; collectively, when a judge or attorney asks the panel as a group (also called "general voir dire"); or individually ("individual voir dire"). Usually, when jurors are verbally asked a question, they must answer out loud, on the record, and before the other prospective jurors. However, when a question is sensitive or potentially embarrassing, the court has discretion to close voir dire from the press,\textsuperscript{75} seal the record, or even ask the questions outside the presence of the other prospective jurors. Such measures may encourage jurors to be more forthcoming.

B. Revealing Bias While Ensuring that Jurors are Not Excluded Based on Sexual Orientation

Even if an attorney does not specifically ask jurors to reveal their sexual orientation, asking jurors if they are affiliated with any gay communities, patronize gay businesses, or are members of gay organizations is, practically speaking, the same as asking their sexual orientation. Although it is certainly possible that a heterosexual juror may be involved with gay organizations and communities, it is considerably less likely, and other questions may still reveal the juror to be heterosexual. The problem, then, is how attorneys can win a \textit{Batson}-like motion in a state court, claiming a juror is being excluded because of sexual orientation, if the juror reveals involvement in a gay community, or has gay family members or acquaintances, but does not explicitly state he or she is gay. Although the attorney moving to strike may not presume bias simply from sexual orientation, the attorney may try to argue that involvement in gay communities and organizations indicates a pro-gay bias. In a contrasting but analogous situation, an attorney representing a gay client may try to exclude jurors who reveal that they are especially active in their church or in religiously affiliated organizations under the presumption that such involvement, rather than simply the religious affiliation, implies bias against gay people.

Cases dealing with racist or anti-Semitic bias provide a useful analogy and establish some precedent. In \textit{U.S. v. Greer},\textsuperscript{76} the Fifth Circuit affirmed a trial judge's refusal to exclude Hispanic and Jewish jurors for cause and refusal to require the jurors to reveal whether they were Jewish.\textsuperscript{77} The defendants, several white supremacists, were convicted of conspiracy to injure, oppress, threaten and

\textsuperscript{74} Id.
\textsuperscript{75} Id. at § 11.2.8. Some states, however, do not allow the press to be excluded from the jury selection process.
\textsuperscript{76} 939 F.2d 1076 (5th Cir. 1991).
\textsuperscript{77} Id. at 1084.
intimidate black and Hispanic people patronizing a public park. The defendants were also convicted of conspiracy to deprive Jewish people of their right to own property by vandalizing a synagogue and Jewish owned businesses and firing a gun into synagogue windows. The defendants argued that because all black, Hispanic, and Jewish people were the intended victims of the crimes, they should have all been excluded from the jury. The circuit court disagreed. It held that the only intended victims of the crimes were black and Hispanic people who happened to have been denied entry into the park by the defendants at the time the defendants decided to assault them. Likewise, the only intended Jewish victims were those who suffered a loss of property. Therefore, the court reasoned that the Hispanic and Jewish jurors could not be struck for cause, and the defense could not use peremptory challenges against them without running afoul of Batson and its progeny. The court held that the trial judge properly allowed each juror to be questioned individually for bias, in a manner reasonably calculated to identify any actual or intended victims of the alleged crime, and the trial judge was not required to ask the Jewish jurors to identify themselves.

Despite Greer’s positive outcome, prohibiting the systematic exclusion of black, Hispanic and Jewish jurors, and the court’s refusal to presume bias, the strength of its precedent is diminished by poor reasoning. After all, one of the rationales of hate crime legislation is that hate crimes do not simply hurt the victim but hurt all people with the same characteristics as the victim. Hate crimes are subject to heightened penalties because they create fear in the hearts and minds of a whole category of people. Under this rationale, the defendants in Greer had the stronger argument for excluding the Jewish and Hispanic jurors. The defendants sought to intimidate and threaten all black, Hispanic and Jewish residents of Dallas, not just those who had the misfortune of suffering directly from their crimes. Therefore, the Hispanic and Jewish members of the jury should have been excluded because of their connection, albeit an indirect one, to the charged crimes.

The Greer court relied on the Fourth Circuit’s holding in Person v. Miller. The defendants in Miller were members of the Carolina Knights of the Ku Klux Klan. They were convicted of violating a court order prohibiting them from operating a paramilitary organization. Miller argued on appeal that the trial court should have allowed him to exclude all prospective black jurors because they were the beneficiaries of the court order in question, even though the jurors had not shown actual bias. The Miller court held the situation did not invoke

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78. Id. at 1081.
79. Id.
80. Id. at 1084.
81. Id. at 1085.
82. 854 F.2d 656 (4th Cir. 1988).
83. Id. at 658.
84. Id. at 664.
the doctrine of implied bias. In determining whether to apply the doctrine of implied bias, the court ruled it was not "highly unlikely that the average [black] person could remain impartial under the circumstances." The court found no abuse of power when the district court refused to excuse for cause a black juror who admitted to being a member of the NAACP because of the juror's repeated assertions that he was able to render a fair and impartial verdict on the evidence. In spite of the possibility that the entire black community had a stake in the outcome of the trial, the circuit court held that black prospective jurors "have no greater interest in vindicating the court's authority than any other member of the general public." The reasoning in Miller is stronger than in Greer because it focused on the issue of actual bias rather than avoiding the issue of whether the defendants were victims of the crimes in question. The Miller court went directly to the heart of the matter by inquiring whether the jury was impartial and by refusing to presume black jurors could not be impartial in a case involving white supremacists. The Miller court correctly held the defense simply could not infer bias solely because of a prospective juror's race.

An attorney may ask jurors directly or indirectly whether they believe they can be impartial under the circumstances of the case, as the trial court did in Miller. Although jurors may harbor unconscious bias or feel uncomfortable admitting a conscious bias, they may be more cognizant of their duty to render an impartial verdict after affirming to the court their professed ability to do so. During voir dire, counsel and/or the court may inform the prospective juror of the major facts and issues in the case. If there is a possibility the issue of sexual orientation will arise during the trial, counsel may feel it is important to reveal to the venire members that one or more parties or witnesses is gay, or that there is some issue related to sexual orientation in the case. Counsel or the judge may formulate one or more questions in an attempt to reveal whether any venire member would be unable to decide the case based solely on the evidence presented and without being influenced by personal feelings about homosexuality.

C. Determining Actual Bias Through Direct Questioning

The court has broad discretion as to the number and substance of voir dire questions. A verdict will not be overturned based on a trial judge's decisions relating to voir dire unless there is a clear abuse of power. Therefore, it is very difficult to successfully appeal a judge's decisions regarding voir dire. However, federal law requires trial judges to allow direct questioning with regard to bias.

when there is a “reasonable possibility” that jurors will be influenced by such bias.\textsuperscript{90} In \textit{Ham v. South Carolina},\textsuperscript{91} the Supreme Court held a trial judge’s refusal to allow voir dire concerning jurors’ racial bias violated the black defendant’s due process rights and was a reversible error.\textsuperscript{92} The defendant’s “basic defense at trial was that law enforcement officers were ‘out to get him’ because of his civil right activities, and that he had been framed on the drug charge.”\textsuperscript{93} To this day, the federal judiciary has not yet ruled on whether \textit{Ham} applies to civil cases as well. Lower courts have struggled with how far to extend the \textit{Ham} ruling in criminal cases, and a few have considered applying the ruling when sexual orientation is an issue in the case or when the defendant or a witness in a case is gay, lesbian or bisexual.\textsuperscript{94} Although a thorough analysis is beyond the scope of this paper, the principles of due process probably do require that civil litigants be allowed to question jurors regarding racial and similar forms of bias. It is essentially up to the trial attorneys to convince the judge that the possibility of bias warrants voir dire questioning on the issue. Courts have varied in their receptivity depending on the circumstances of the case.

In \textit{U.S. v. Click},\textsuperscript{95} the Ninth Circuit affirmed the trial judge’s refusal to allow voir dire on the issue of bias regarding sexual orientation when the defendant was, or at least appeared to be, gay. The trial judge did not allow the line of questioning, stating it was “improper because it would unnecessarily call attention to [the defendant’s] effeminate mannerisms” and because sexual orientation was not part of the defense’s case.\textsuperscript{96} In contrast, the Maine Supreme Court stated in \textit{State v. Lovely},\textsuperscript{97} “It is axiomatic that a juror who admittedly harbors anti-homosexual prejudice should be subject to inquiry at the trial of an individual who is or may be perceived to be a homosexual.”\textsuperscript{98}

Courts have also been forced to determine whether a juror who expressed disapproval of homosexuality can be stricken for cause in a case that involves

\begin{itemize}
  \item \textsuperscript{90} Ham v. South Carolina, 409 U.S. 524, 527 (1973).
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id. at 525.
  \item \textsuperscript{94} The following cases provide some examples of the ways that the Ham ruling has been applied: Hernandez v. State, 357 Md. 204, 742 A.2d 952 (1999) (limiting the form of voir dire questions a criminal defendant may put to a jury panel regarding racial and ethnic bias); State v. Rulon, 935 S.W.2d 723, 726 (Mo.App. E.D. 1996) (assuming the Ham ruling applies to anti-gay prejudice and holding a question asking jurors if they would be prejudiced by the defendant’s homosexual relationship with the victim was constitutionally sufficient); U.S. ex rel. Gacy v. Welborn, 1992 WL 211018, *12-*16 (N.D.III. 1992) (holding the trial court’s asking each juror whether the juror could “put aside” any feeling the juror might have about homosexuality and decide the case impartially was constitutionally sufficient); Harlee v. District of Columbia, 558 A.2d 351, 354 (D.C. 1989) (holding Ham does not require questions to the jury panel as to “prejudices involving men” and “sex crimes with little girls”); U.S. v. Chapin, 515 F.2d 1274, 1289 (D.C. Cir.1975) (holding the trial court did not err by refusing to ask potential jurors questions concerning the voter registration); Hamling v. U.S., 418 U.S. 87, 140 (holding the trial court’s failure to ask specific questions as to the possible effect of educational, political, and religious biases did not reach the level of a constitutional violation as illustrated in Ham).
  \item \textsuperscript{95} 807 F.2d 847 (9th Cir. 1986).
  \item \textsuperscript{96} Id. at 850.
  \item \textsuperscript{97} 451 A.2d 900 (Me. 1982).
  \item \textsuperscript{98} Id. at 902.
issues of sexual orientation. In *Baker v. State*, a Georgia appellate court affirmed the conviction of a gay man even though some of the jury members “expressed religious belief in opposition to homosexuality” because “no juror responded that he or she could not be fair and impartial.” The court held that “[a] belief in God’s ultimate judgement does not automatically preclude a person from fairly and impartially sitting in judgment of others based on the laws of the commonwealth.”

In *Gacy v. Welborn*, the Seventh Circuit affirmed a trial judge’s ruling that defense counsel limit voir dire to direct questioning regarding anti-gay bias. The defense requested open-ended questions about each potential juror’s views about homosexuality. The circuit court stated its concern that such open-ended questions would consume too much time and risk offending some jurors or make them flustered, resentful, or anesthetized. The court added that the real issue was whether the jurors were biased, regardless of their personal views about homosexuality. A Pennsylvania appellate court also expressed this view when it affirmed a jury’s conviction even though the trial judge only allowed the defendant to ask jurors “whether the defendant’s homosexuality would prejudice him or her” and “restricted questions probing the jurors’ personal viewpoints on the morality of homosexuality.”

Yet, other trial courts have given counsel greater leeway in questioning prospecting jurors about their biases. In *State v. Rulon*, a Missouri appellate court reviewed the extent of voir dire in a criminal case. The trial judge permitted the defense attorney to ask who among the venire persons shared the view that “homosexuality is against God’s law.” The judge also permitted the defense attorney to ask if the venire persons could “follow man’s law” instead, and if they would give “different weight to the defendant’s testimony because he [was] gay.” Although the defendant had no issue with any particular juror, he argued the trial judge should have allowed even more extensive questioning on the issue of anti-gay bias. The appellate court felt that the defense had ample information to detect bias.

Although the limited voir dire allowed in cases like *Baker v. State* and *Gacy v. Welborn* may leave gay rights advocates unsettled, direct questioning about bias rather than open-ended questions may be the best option to avoid improper assumptions of bias. Here lies the tension between a litigant’s right to exercise a
peremptory strike against a juror the litigant believes (however subjectively) may be unfavorable to her case, and a juror’s right to not be presumed biased on account of membership in a minority group.\textsuperscript{112} It is also important to acknowledge the argument that it is more important to protect the rights of criminal defendants whose life and liberty is on the line than to protect the dignity of a prospective juror.\textsuperscript{113} While I favor tipping the balance in favor of ensuring criminal defendants feel they are being tried by an impartial jury, the public’s confidence in the jury system is also of utmost importance. Regardless, the same standard must apply no matter who the litigants are and who is on the jury panel. If we believe that a gay juror can be impartial in the criminal case of a gay-basher, we must also give the same credence to people who have religious convictions against same-sex relationships if they promise to be impartial and judge a gay defendant based solely on the laws of the land.

D. Individual Voir Dire as a Means to Detect Bias: A Case Study of Massachusetts Common Law

Individual voir dire may be a better way to ferret out bias against (and for) homosexuality then general voir dire (where questions are posed to the entire jury panel) because prospective jurors are likely to be more honest and open when they are questioned individually, apart from other venire members. As one court noted, “Collective questioning on sensitive issues may not elicit a response from some jurors who would respond in private.”\textsuperscript{114} Some states limit trial judges’ discretion in voir dire somewhat by requiring that prospective jurors be questioned individually, rather than as a group, if counsel requests individual voir dire regarding bias of a particularly sensitive nature.

Massachusetts is one state that imposes such a limitation on trial judges’ discretion during voir dire. Although no state has held that issues of sexual orientation are so sensitive that a party has an absolute right to individually question prospective jurors,\textsuperscript{115} this section explains that states should, upon counsel’s request, require individual voir dire of jurors concerning attitudes about sexual orientation for the same reasons they require it in other circumstances. Massachusetts and Maine\textsuperscript{116} are the only states that have addressed the issue of individual rather than general voir dire concerning anti-gay bias. This section focuses on Massachusetts because it is the only state whose courts have addressed the issue more than one time and also because Massachusetts law requires individual voir dire in arguably analogous circumstances.

\textsuperscript{112} “The problem is that we do not live in a color-blind – or for that matter, gender-blind – society and citizens, no matter how well-intended, do not suddenly abandon racist or sexist attitudes when summoned for jury duty.” Smith, supra note 24, at 540. The same reasoning applies to anti-gay bias.

\textsuperscript{113} Id. at 542.


\textsuperscript{116} State v. Lambert, 528 A.2d 890 (Me. 1987).
Massachusetts General Law, chapter 234, section 28 provides:

For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, . . . the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called.\textsuperscript{117}

Section 28 essentially requires that prospective jurors be individually questioned outside the presence of other jurors when there is a risk that jurors may decide a case based on "extraneous" issues. The Supreme Court of Massachusetts has held that section 28 applies in cases of sexual offenses against minors,\textsuperscript{118} interracial murder,\textsuperscript{119} interracial rape,\textsuperscript{120} and when a criminal defendant seeks to use the defense of insanity.\textsuperscript{121} However, the Massachusetts Supreme Court has not yet decided to extend the requirement of individual voir dire (when requested) to cases involving homosexuality and/or gay, lesbian, or bisexual parties or witnesses.\textsuperscript{122}

The Massachusetts Supreme Court held prospective jurors should be individually questioned about racial bias in murder and rape cases. In such cases, the record need not specifically show a risk that jurors might be influenced by racial prejudice. Upon announcing the ruling, the court simply stated, "[A]s a matter of law interracial rape cases present a substantial risk that extraneous issues will influence the jury and hence are within [the scope of section 28]."\textsuperscript{123} In a later case, the court added, "We have no doubt that [a case involving] a black defendant . . . charged with sexual offenses against a white child . . . is equally likely to inflame racial prejudice . . . ."\textsuperscript{124}

\textsuperscript{117} MASS. GEN. LAWS chi. 234, 28 (2000)
\textsuperscript{118} Commonwealth v. Flebotte, 630 N.E.2d 265 (Mass. 1994) (on request, in cases involving sexual offenses against a minor, individual voir dire is required as to whether the juror had been a victim of childhood sexual offense); Commonwealth v. Hobbs, 434 N.E.2d 633 (Mass. 1982) (on request, individual voir dire is required in cases involving interracial sexual offenses against children).
\textsuperscript{120} Commonwealth v. Sanders, 421 N.E.2d 436 (Mass. 1981) (overruled in part on other grounds by Ramirez, 555 N.E.2d 208 (Mass. 1990)).
\textsuperscript{121} Commonwealth v. Seguin, 656 N.E.2d 1229 (Mass. 1995).
\textsuperscript{123} Sanders, 421 N.E.2d at 438.
Massachusetts also requires trial judges to allow individual voir dire concerning their experiences with sexual offenses against a child because state courts have recognized prospective jurors may be disinclined to admit such experiences in open court. In Commonwealth v. Flebotte, the Massachusetts Supreme Court announced the requirement and stated, “adult victims of childhood sexual offenses may be reluctant to come forward from a venire and discuss such a private and highly emotional event with a judge; they may be embarrassed about it, they may feel it would not affect their objectivity, or they may just not want to discuss it.” The facts of Flebotte differed from those in the interracial rape and murder cases because the possible bias was revealed “during jury deliberations, [when] the foreman notified the judge that one juror mentioned that he had been the victim of a childhood sexual offense.” Therefore, the state supreme court had some evidence to support its contention that prospective jurors may be reluctant to reveal experiences with childhood sexual offenses.

In Commonwealth v. Seguin, the Massachusetts Supreme Court again announced a “prospective rule:”

[T]he judge shall inquire individually, in some manner, whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible.

As in Flebotte, the Seguin court’s only justification for the mandate was the fact that during voir dire, “some potential jurors identified themselves as opposed to the use of that defense [of insanity], and some potential jurors stated that the defendant must have been insane to do what he did.” The court provided no additional reasoning beyond the venire persons’ rejection or skepticism of the defense of insanity.

In Commonwealth v. Plunkett, the Massachusetts Supreme Court suggested section 28 may be applicable when sexual orientation is an issue in the case, although the court decided the case on other grounds. The court stated that on remand, “the trial judge need not, but may, conduct individual voir dire concerning the possible effect on each juror of evidence that the victim [in a criminal case] was a homosexual or bisexual.” The court’s only professed
reason for not requiring individual voir dire regarding anti-gay bias was its wish to not break with the traditional view that voir dire be left to the trial judge's discretion,\textsuperscript{134} despite the court's acknowledgement that "[t]he subject of juror attitudes toward homosexuality may be important in a case such as this,"\textsuperscript{135} The court added, "[t]he subject requires careful attention, but we are not prepared to mandate an individual voir dire in the circumstances of this case."\textsuperscript{136} However, the fact that eight of the approximately eighty venire members came forward in response to the questions about anti-gay bias posed to the entire panel\textsuperscript{137} may have convinced that court that, at least in the Plunkett trial, general voir dire concerning homosexuality was sufficient to remove biased jurors. The court did not consider the possibility that more than eight of the venire members were either unconsciously biased or chose not to admit their bias in open court.\textsuperscript{138} The court also failed to consider that individuals may be more likely to reveal socially unacceptable ideas or embarrassing information when no action, rather than an affirmative action, is required.\textsuperscript{139}

Nine years before the Massachusetts Supreme Court decided Plunkett, it ruled on the same issue in Commonwealth v. Boyer.\textsuperscript{140} The defendant in Boyer, a gay man, argued that section 28 mandated individual voir dire "because the defendant was in a class (i.e., homosexuals) against whom jurors might hold 'preconceived opinions.'" The trial judge denied the defendant's motion to individually ask prospective jurors several questions regarding their attitudes about homosexuality,\textsuperscript{141} and the Massachusetts Supreme Court held that this

\footnotesize{\textsuperscript{134} Id. at 838.}
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} One prospective juror stated, "I have two homosexual sons and would be biased." Id. at n.4. The majority of those who were excused for bias expressed negative attitudes toward homosexuals. Id.
\textsuperscript{138} It is possible that more than one venire member had a gay child or other close relations who were gay but were uncomfortable stating so in open court. Although I would argue that this information would not be grounds for removing such a juror for cause nor a permissible basis for a peremptory strike, such a juror may have admitted bias if questioned individually.
\textsuperscript{139} See Starr & McCormick, supra note 69, §11.2.1. The author describes a case where two thirds of the venire persons did not raise their hands when asked "How many of you have never had an experience with sexual abuse?" In comparison, when a different panel was asked to raise their hands if they had had an experience with sexual abuse, no one raised their hands, and only two people came forward at the end of voir dire to inform the court of additional information they had chosen not to state during questioning. See also David Suggs and Bruce D. Sales, Juror Self Disclosure in Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245, 260 (1981); JURY TRIAL INNOVATIONS, §III-1, at 68 (G. Thomas Munsterman et al., eds., 1997).
\textsuperscript{140} 507 N.E.2d 1024 (Mass. 1987). Between the decisions of Boyer and Plunkett, two intermediate appellate courts also held that individual voir dire was not required when questioning jurors about bias regarding sexual orientation. Commonwealth v. McGregor, 655 N.E.2d 1278 (Mass. 1995); Commonwealth v. Proulx, 612 N.E.2d 1210, 1211 (Mass. 1993). The Supreme Court of Massachusetts also heard the issue in Commonwealth v. Shelly, 409 N.E.2d 732, 740 (Mass. 1980). As in Boyer, the Shelly court required "some basis for finding a substantial risk that extraneous issues would influence the jury" before requiring individual voir dire concerning anti-gay bias. Id. at 740. The court reasoned that since "no avowed homosexuals testified" in the case, there was little risk that "'preconceived opinions toward the credibility of' homosexuals would . . . have influenced the jury" even though there was evidence that the defendant was gay. Id. at 740.
\textsuperscript{141} Defendant's counsel wished to inform jurors that the defendant was a homosexual and individually ask them the following questions: "Do you have feelings about homosexuals that might make it difficult for you to be impartial in deciding this case? Do you believe that homosexuality should be illegal? Are you a member of a religion that regards homosexuality as a sin? If so, might your religious beliefs influence you in
ruling was within the trial judge’s discretion. Though the court conceded that “bias against homosexuals may exist among some people,” it held that “[t]here was no basis in the record to require the judge to determine that there was a substantial risk of extraneous influences on the jury.” It stated that only questions “aimed at ‘revealing racial bias or any similarly indurated and pervasive prejudice’” are required by Massachusetts’ constitution, and that “[a]bsent some reason to suspect that jurors may be so prejudiced . . . a judge is warranted in relying upon his final charge to the jury to purge any bias from the jurors prior to their deliberations.”

Essentially, the court resisted applying section 28 to issues of sexual orientation, preferring to limit its mandate of individual voir dire to issues of race. The court did not expand on why it demanded “some basis in the record” indicating that the jurors in the Boyer trial may have been affected by anti-gay bias, nor did it explain what sort of evidence would have been sufficient to prove such bias. After all, the parties in cases involving interracial rape, interracial murder, or sexual offenses against a child are not required to provide a basis in the record showing there is a substantial risk that jurors may decide such cases based on the “extraneous influence” of either racial bias or exposure to sexual offenses against a child. The Boyer court did not indicate why it refused to presume anti-gay bias is as likely as racial bias to influence a juror’s decision or that anti-gay bias is a prejudice as “similarly indurated and pervasive” as racial prejudice.

The Plunkett decision only cited the Boyer decision once, in support of the proposition that traditionally the trial judge has discretion to decide whether questions are asked of prospective jurors collectively or individually. The Plunkett court gave no indication that the Boyer holding definitively decided the issue of whether questions concerning anti-gay bias fall within the scope of section 28. Its statement, “The subject requires careful attention, but we are not prepared to mandate an individual voir dire in the circumstances of this case,” implies that the Massachusetts Supreme Court may be willing to mandate individual voir dire, upon request, in a future case involving issues of sexual orientation. Because the reasons the court has professed for requiring individual voir dire in other circumstances apply equally to the risk of juror bias regarding sexual orientation, Massachusetts courts should expand the scope of section 28 to include questions concerning such bias.

deciding the defendant’s guilt or innocence? Do you believe that homosexuals are more likely to engage in illegal sexual acts than other people?” *Id.* at 1026 n 2.

142. *Id.* at 1026.

143. *Id.* at 1027.

144. *Id.* at 1026 (quoting Commonwealth v. Rhoads, 379 Mass. 810, 821 (1980)).


146. *Id.* (“To accept the defendant’s contention in this case would be tantamount to ruling that individual voir dire is required in every case involving charges of crimes of a sexual nature against an avowed homosexual. We are not inclined to go so far.”)

Sexual Orientation and Voir Dire

The reasons the Massachusetts Supreme Court provided for requiring individual voir dire in cases involving interracial murder and rape, sexual offenses against a minor, and the defense of insanity are equally applicable to cases involving sexual orientation issues. The Supreme Court of Massachusetts has indicated that "homosexuals might constitute a class"\textsuperscript{148} under section 28 even though it has not held that the class of homosexuals suffer prejudice sufficient to warrant the application of section 28. Despite the Boyer court's refusal to acknowledge it, prejudice against sexual minorities is certainly as pervasive as racial bias; and there is probably as much if not more of a risk that jurors will be influenced by that bias. Similar to the reasoning in Flebotte, individual voir dire is appropriate in cases involving sexual orientation because jurors may be embarrassed to come forward to reveal they are gay or that they have a close friend or relative who is gay. Furthermore, based on the reasoning in Seguin, there can be no doubt that prospective jurors hold a variety of different opinions about homosexuality which may influence their deliberations in a case involving some issue of sexual orientation.

Although case law in Massachusetts provides the best precedent for requiring individual voir dire concerning prejudice regarding issues of sexual orientation, the rationale applies with equal force in other state courts and in federal courts. Individual voir dire provides additional assurance the parties will receive a fair trial, and it saves prospective jurors from revealing embarrassing information or unpopular ideas in open court. The following section focuses on this second idea, exploring various ways to protect juror privacy while preserving the rights of the parties and the public's right to an open trial.

III. JUROR PRIVACY

A. Federal Law on Juror Privacy

Although not formally a rationale for protecting jurors' reasonable expectations of privacy, the hope that citizens will not begrudge jury service has motivated some judges to uphold juror's demands for privacy.\textsuperscript{149} Just as some prospective jurors may resist answering confidential questions about their religion, political affiliations, and organizational memberships,\textsuperscript{150} some jurors may find questions about their sexual orientation and the sexual orientation of their family members and friends to be overly intrusive.\textsuperscript{151} Though some may

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149. Sinclair v. United States, 279 U.S. 749, 765 (1929) (stating that if prospective jurors know they may be "shadowed" by investigators, "they will either shun the burdens of service or perform it with disquiet and disgust"); United States v. Barnes, 604 F.2d 121, 140 (stating that "prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed").
151. Gay and lesbian court participants in California, including jurors, attorneys, litigants, and witnesses, report they believed their sexual orientation was raised as an issue almost as often when it did not pertain to the case as when it did. See SOFC, supra note 55, at 5. When the gay and lesbian potential jurors were asked if
not take offense to such questions if they understand that the questions are relevant to the case,\textsuperscript{152} others may harbor shame or fear that prevents them from fully discussing issues of sexual orientation in open court.

The Supreme Court considered the issue of juror privacy in \textit{Press Enterprise v. Superior Court}.\textsuperscript{153} \textit{Press Enterprise} involved a newspaper's petition for writ of mandate to compel the release of closed voir dire proceedings and to vacate the order closing voir dire from the public in a high profile case involving the rape and murder of a teenage girl.\textsuperscript{154} Voir dire included some questions regarding the prospective jurors' experience with rape. Counsel on both sides of the criminal trial agreed that "release of the transcript would violate the jurors' right of privacy," especially because the jurors answered voir dire questions "under an 'implied promise of confidentiality.'"\textsuperscript{155} Nevertheless, the Supreme Court held that the transcripts must be released to the public absent "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."\textsuperscript{156} Despite the private nature of some of the voir dire questions, the Court held that the trial court was required "to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard" before closing the voir dire proceedings.\textsuperscript{157}

The Court did not completely forsake jurors' rights to privacy. It stated that the trial judge:

should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge \textit{in camera} but with counsel present and on the record.\textsuperscript{158}

However, the Court stopped short of holding that all embarrassing or sensitive information revealed by prospective jurors during voir dire should be sealed. It stated that only "those parts of the transcript reasonably entitled to privacy" and "such parts . . . as necessary to preserve the anonymity of the individuals sought to be protected"\textsuperscript{159} should be sealed. Thus, the \textit{Press Enterprise} ruling does not guarantee that a juror can refuse to answer a question she finds too personal, nor does it guarantee that a juror's answer to a personal question will remain

\textsuperscript{152} STARR \& MCCORMICK, supra note 69 §§ 10.2.3-10.2.5.
\textsuperscript{154} Id. at 503.
\textsuperscript{155} Id. at 504.
\textsuperscript{156} Id. at 510.
\textsuperscript{157} Id. at 511.
\textsuperscript{158} Id. at 512.
\textsuperscript{159} Id. at 513.
Sexual Orientation and Voir Dire confidential. It simply allows a juror to request a private hearing to determine whether her privacy interests outweigh the need for the attorneys and the public to know the answer to the question.

In its ruling, the Court failed to recognize that simply by requesting a hearing, the juror has already called attention to herself and has implicitly indicated that she has something to hide. In addition, even if the juror’s answer to a private question remains sealed, revealing the answer to the judge, the parties, and their attorneys may be significantly more of a disclosure that the juror would like. The practical result may be that jurors with experiences most relevant to determining bias have the greatest incentive to remain silent or perjure themselves during voir dire. The Court also took for granted a juror’s ability to express her privacy concerns to a trial judge and demand privacy rights without representation. In its *Press Enterprise* ruling, the Court may have put an unfair burden on jurors, people who are not represented by counsel, by requiring that they make an affirmative request for a hearing and then present their own case without preparation at that hearing.

Consider a closeted gay, lesbian, or bisexual person living in a rural environment with a small population. Being forced to admit that his or her sexual orientation in a closed hearing could subject that person to a host of negative consequences. Even having to admit that she or he is a member of an organization that advocates gay rights or that she or he has contributed money to a gay rights organization may incite suspicion. In a sparsely populated area where venire members, attorneys, and the judge may know each other, the local newspapers would not be needed for such information to quickly become public. Even questions asking whether prospective jurors have ever been victims of sexual orientation discrimination may reveal information that prospective jurors would like to keep private.

Yet, if a judge were to refuse to allow a defendant in criminal cases to inquire into prospective jurors’ biases (assuming sexual orientation was an issue in the case), it might arguably be a violation of that defendant’s Sixth Amendment right to an impartial jury. A defendant charged with gay bashing has just as much interest in knowing jurors’ biases for and against gay people as a gay criminal defendant. However, as discussed above, inquiring into the jurors’ sexual orientation may not be necessary to determine bias. Voir dire beyond direct questions regarding bias is usually not necessary.

**B. Means of Questioning to Protect Jurors’ Privacy About Their Sexual Orientation**

Courts have used a variety of tactics to determine bias while still attempting to ensure juror privacy. One method is for the judge to ask jurors about their

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sexual orientation in a private voir dire in chambers. The court utilized private voir dire in *Hendricks v. Vasquez*, a case in which the defendant was charged with murdering gay men. While private voir dire assures greater privacy and may induce a more honest response, the court should not use the more intimate setting merely to determine jurors’ sexual orientations. Questions calculated to detect real bias are usually more appropriate for voir dire purposes. In *People v. Bici*, the judge only asked one prospective juror to privately reveal her sexual orientation because she mentioned that she had gay friends during voir dire in open court. However, in that case, the judge’s decision to conduct private voir dire outside the presence of the parties and their counsel was cause for reversal because it interfered with the defendant’s right to intelligently exercise a peremptory strike.

Private voir dire on sensitive issues may also be useful to illicit bias if there is reason to believe that jurors may be reluctant to admit bias in open court, even outside of the presence of other jurors during individual voir dire. In *State v. Van Straten*, a Wisconsin appellate court approved the trial judges’ decision to privately question potential jurors, four at a time, in extensive detail about prejudices they might have developed as a result of pretrial publicity. The trial court feared that media coverage about the defendant’s sexual orientation, HIV status, and an allegation that he had attempted to spray AIDS infected blood on prison staff may have left some prospective jurors unable to consider the evidence regarding the burglary charge in a fair and impartial manner. Despite the fact that four prospective jurors admitted irreconcilable prejudice during voir dire by the court and were excused for cause, the defendant argued that the voir dire process poisoned the jury against him. The appellate court disagreed.

The use of an anonymous jury could remedy the fears of placing jurors in the predicament of either lying about their sexual orientations (or about their relationship with gay family members or friends) or risking adverse ramifications of revealing the information while still protecting parties’ rights to inquire about possible bias. Courts usually keep the identities of jurors unknown only when there is evidence that the jurors could be in danger. However, an

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162. 974 F.2d 1099 (9th Cir. 1992).
163. In *Hendricks*, the judge directly asked jurors to reveal their sexual orientations, but the trial judge apparently determined that several gay venire members were capable of being impartial because the final jury panel included gay jurors. *Id.*
165. Lynd, supra note 161, at 254.
166. *Id.*
168. *See also* *People v. Viggiani*, 431 N.Y.S.2d 979 (1980). In that case, outside of the presence of the other jurors, a juror revealed that he was gay. The appeals court in New York ruled that there was no error in allowing the juror to remain on the jury even though a victim/witness was gay and there might have been some testimony attacking gay people. *Id.* at 982.
argument could be made that in certain situations, jurors should be anonymous if voir dire requires extensive questioning into private matters such as one’s sexual orientation or connection with other gay people. Anonymous juries are not necessarily shielded from each other, though. While the names and addresses of the members of an anonymous jury are sealed, there is no guarantee that anonymity will protect the privacy rights of jurors who live in small communities if they are forced to reveal their sexual orientation during voir dire.

Less dramatic than the use of an anonymous jury, the use of a supplemental juror questionnaire (an “SJQ”) to elicit sensitive information may be an effective means to ensure juror privacy. Prospective jurors may be more forthcoming about their attitudes toward gay, lesbian, and bisexual people when asked to write their answers on a confidential form. Assuming that jurors respond to SJQs honestly, a written response serves the same purpose as individual voir dire without consuming as much court time as individually questioning jurors privately. SJQs may ask prospective jurors to indicate whether they agree or disagree with commonly held beliefs, or the questions can be open-ended. As with voir dire, the trial judge has discretion regarding the form, substance, and number of questions asked on an SJQ.

If a court utilizes as SJQ, the judge and the litigants ought to be careful not to destroy the jurors’ confidence by questioning jurors further on the record about their written answers. In the murder trial of John O’Connell, a gay man killed by four gay bashers, the court asked jurors to check a box on the juror questionnaire if they did not want to be asked publicly about their sexual orientation. However, in open court, the jurors were asked if they belonged to any gay organizations or had any gay relatives. Presumably, the trial judge did not consider the possibility that a prospective juror who did not want to be questioned about his or her sexual orientation would feel the same about being questioned regarding memberships with gay organizations or gay family members.

In State v. Lambert, voir dire included a confidential questionnaire consisting of questions concerning personal involvement with sexual abuse, though questions regarding anti-gay bias were asked in general voir dire to the whole panel. This case illustrates how trial attorneys and judges can utilize a variety of means to elicit prejudice. Although the reviewing court in Lambert held that the trial judge has discretion to conduct voir dire as he sees fit, this article argues that some of that discretion should be limited when it comes to questioning jurors about attitudes regarding sexual orientation and other sensitive issues.

170. STARR & MCCORMICK, supra note 69, at §§ 11.01-11.03.
171. SJQs are usually sealed, and the courts usually limit who has access to them. Id. at §11.8.10.
172. Lynd, supra note 161, at 254.
173. Id. at 253.
175. Id. at 891-92.
In contrast to these cases, the judge presiding over the murder trial of Dan White, the man who murdered Harvey Milk and the mayor of San Francisco, refused to allow counsel on both sides the right to inquire into the sexual orientations of the jurors. It is not clear whether the decision was intended to protect juror privacy. Nevertheless, the defense counsel used peremptory challenges to strike anyone he thought was gay, based on questions calculated to determine sexual orientation in an indirect fashion, and the result was a jury free of gay members. The lack of gay jurors is commonly thought have been a significant factor in the jury's decision to give a relatively light sentence for one of the most famous murders inspired by anti-gay hatred. The White murder trial illustrates the need for judges to be sensitive to jurors' concerns of privacy, but not allow privacy to be a cloak for discrimination that prevents a fair trial and results in a loss of public confidence in the jury system.

It is plausible that jurors may be more willing to admit bias with regard to issues of sexual orientation on a confidential questionnaire or in chambers than in a courtroom. However, the dearth of information regarding jurors' willingness to admit bias and/or reveal private information in various settings precludes any definite assertions on the subject. Yet, there is evidence that individual questioning is more likely to reveal more accurate information than in group questioning. Therefore, whether voir dire on a private or sensitive matter takes place on a questionnaire, in chambers, or in the courtroom, trial judges should, at the very least, allow individual questioning rather than questions posed to the entire panel, with the option to answer questions outside the presence of the other jurors. This is probably the best way to obtain truthful information while giving jurors some sense of privacy even when their privacy interests do not warrant sealing their answers in the record.

CONCLUSION

Sexual orientation should be treated like race, religion, ethnicity, and gender for the purposes of voir dire. A prospective juror’s sexual orientation alone should not be a permissible basis for a peremptory strike without some other indication of bias. Although, as a general matter, jurors are reluctant to admit bias, attorneys should not be permitted to presume bias regarding sexual orientation just as they are not permitted to presume racial bias. Because the purpose of voir dire is to reveal juror bias, it is appropriate that voir dire questions be limited to those that are likely to serve that purpose rather than those calculated only to reveal private information. Admittedly, any limit on voir dire and the use peremptory strikes creates a tension with a party's right to exercise a strike based on intuition. However, parties' efforts to strike potentially unfavorable jurors must be balanced against the public's interest in the integrity

176. Id. at 247-48.
177. Id.
of the jury system — including the principle that classes of citizens will not be presumed unqualified for jury service.

In order to ensure that bias is revealed and that jurors’ privacy is respected, voir dire concerning prejudice regarding sexual orientation and other sensitive matters should be conducted individually and outside the presence of other jurors. Such constraints on voir dire not only help to ensure that prospective jurors are not excluded because of a presumption of bias, but also ensure that voir dire does not needlessly expose jurors to embarrassment or to a loss of reasonable privacy. If jurors feel at ease answering voir dire questions honestly and completely, the end result will only aid parties’ abilities to intelligently exercise peremptory strikes in a manner that obtains impartial juries and bolsters the public’s confidence that the jury system is working.