OUTING BATSON: HOW THE CASE OF GAY JURORS REVEALS THE SHORTCOMINGS OF MODERN VOIR Dire

KATHRYNE M. YOUNG†

ABSTRACT

Although scholarly attention has been devoted to the argument that Batson v. Kentucky should apply to gay and lesbian jurors, little or no attention has been paid to how these challenges would work in practice. This article is, foremost, a thought experiment about how peremptory challenges would function if Batson were applied to sexual orientation. I examine several scenarios to understand the practical implications of this change and conclude that it would be ineffective at best and socially appalling at worst. My analysis reveals a fundamental problem with the current peremptory system: it fails to take into account the complex nature of social identity and the psychological realities of human interaction and bias. The goal of equal protection, I suggest, would be better served if changes were made to the existing peremptory challenge system, such as reducing the number of challenges allowed and requiring a Batson-style explanation for every peremptory challenge exercised.

INTRODUCTION

Sexual orientation is sociologically unusual in its combination of concealability and stigmatization, and legally unusual in its unofficial reception of rational review “plus” in Constitutional decision-making. While some legal topics relevant to homosexuality, such as adoption and marriage, have garnered large amounts of scholarly and media coverage, sexual orientation tends rarely to be discussed in the criminal justice context. Perhaps this is because media images of police officers and criminal defendants are often male and hypermasculine, or because discussions of systemic inequality in the criminal justice system have long focused (and with good reason) on race and class.
But in fact, sexual orientation is often salient in criminal trials. Gay defendants and victims are harassed by police, gay couples are denied spousal privileges in evidence law, rape-shield statutes often work to the disadvantage of homosexual defendants, and in some jurisdictions, the so-called “gay panic” defense has been used to excuse or mitigate murders of homosexual victims on the grounds that defendants were psychologically traumatized by seeing same-sex sexual activity or by homosexual advances. Subtler biases may operate against gay witnesses, attorneys, and courtroom personnel. Therefore, sexual orientation is sometimes considered by defense and prosecution attorneys when selecting jurors for a criminal trial.

Because gays and lesbians are not a constitutionally protected class, most states allow attorneys to consider sexual orientation in deciding whether to strike a juror. Legal lines drawn on the basis of sexual orientation receive the lowest level of scrutiny; for constitutional purposes, homosexuality is technically treated more like shoe size than race—although, as many scholars have pointed out, the Supreme Court sometimes appears to treat sexual orientation with a slightly higher level of scrutiny than traditional rational
The vagaries of gays’ constitutional categorization have spurred speculation about the implications for jury selection. The governing case on voir dire, *Batson v. Kentucky*, rests on the proposition that it is unconstitutional to exclude prospective jurors from service on the basis of membership in a protected class (usually race or gender), and that crude stereotypes should not dictate juries’ composition. Some scholars, such as John J. Neal, argue that under *Batson*, it should also be illegal for a lawyer to exclude a juror from service because he or she is gay.

The bulk of this article is a thought experiment. I take seriously the proposition of treating sexual orientation as a suspect class for purposes of jury selection, and I attempt to tease out the implications of this prospective legal development. I argue that although the case for *Batson*’s application to sexual orientation is strong, in practice this would be problematic and ultimately prove unfaithful to the *Batson* Court’s vision. The problems I identify with this hypothetical application of *Batson* to sexual orientation suggest that the existing legal framework for jury selection may be insufficient to address the nuances of human interaction and psychological phenomena such as bias. I argue that fidelity to the Equal Protection Clause, and to the philosophy underlying *Batson* itself, demand reconceptualizing jury

9. The Supreme Court spelled out the rational review standard’s application to sexual orientation in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which it upheld a state law criminalizing homosexual behavior. However, in *Lawrence v. Texas*, 539 U.S. 558 (2003), it reversed a similar law, ostensibly using the same legal standard. Many practitioners and academics have concluded that sexual orientation actually receives rational review “plus”—a level of scrutiny greater than traditional rational review, but less rigorous than the intermediate scrutiny under which sex-based discrimination is analyzed. As several scholars have pointed out, invalidating laws in cases such as *Lawrence*, “under minimum rationality review is difficult to justify, given the extreme deference the Court has traditionally shown when applying that standard.” Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 Mich. L. Rev. 431, 437 (2005) (footnotes omitted). See also Pamela S. Karlan, *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 Sup. Ct. Rev. 159, 163 (2010) (“When it comes to gay rights, the Court’s approach has been more equivocal. On the one hand, in *Romer v. Evans* and *Lawrence v Texas*, a majority of the Justices recognized gay litigants’ claims for equal treatment and equal dignity under the law. On the other hand, in cases like *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston* and *Boy Scouts v Dale*, a majority of the Justices accorded First Amendment protection to groups that sought to exclude gay people from participating in their activities”).


selection to take into account the multilayered nature of human identity and social interaction.

In Part I, I describe the current legal framework for jury selection in the United States, explain how sexual orientation might arise in jury selection, then detail the case for applying *Batson* to sexual orientation. In Part II, I walk through the difficulties of *Batson*’s application using a handful of hypothetical situations in which sexual orientation would be salient. I also discuss the problem of “covering” in the voir dire context. In Part III, I suggest that the insights gleaned from this hypothetical exercise call into question the adequacy of the current peremptory challenge system to serve equal protection goals. I propose a handful of reforms to the jury selection process, including reducing the number of peremptory challenges allowed and requiring a *Batson*-style justification every time a peremptory is exercised.

I. SEXUAL ORIENTATION AND PEREMPTORY CHALLENGES

A. The Legal Framework

A petit jury’s composition is determined by whittling down the venire through a combination of for-cause and peremptory challenges.12 For-cause challenges, unlimited in number, excuse prospective jurors whose biases would clearly prevent them from judging a case fairly.13 Either party may bring a for-cause challenge, but they must be approved by the trial judge, and judges can dismiss jurors sua sponte on this basis as well.14 In contrast, peremptory challenges are limited in number,15 do not require the trial judge’s consent, and are exercised by only the parties in a case. Unlike for-cause challenges, their origin is statutory.16

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12. See Holland v. Illinois, 493 U.S. 474, 475 (1990) (holding that the requirement that jury venires represent a fair cross-section of the community has been found inapplicable to petit juries).


14. Id.

15. The number of peremptory challenges allowed in any given case will depend on factors such as the jurisdiction and the seriousness of the charge.

16. Stilson v. United States, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases...”); Gray v. Mississippi, 481 U.S. 648, 663 (1987) (“Peremptory challenges are not of constitutional origin.”). Justice Scalia has suggested that peremptory challenges may be required as an aspect of the Sixth Amendment’s impartial jury requirement, see Holland 493 U.S. at 482, but no majority opinion has so held.
Originally, the only constraint on attorneys' discretion in exercising peremptories was the number of challenges permitted.17 But in 1986, the Court held in Batson v. Kentucky that race-based challenges violated the Equal Protection Clause.18 Eight years later, it extended Batson to sex, holding in J.E.B. v. Alabama ex rel. T.B. that, "[g]ender, like race, is an unconstitutional proxy for juror competence."19 In order to bring a Batson claim, the opponent of a peremptory challenge first makes out a prima facie case of purposeful discrimination by showing: (1) the juror's membership in a suspect class; (2) the opposing side's use of peremptories to remove members of the class; (3) that the totality of the circumstances permits an inference of intentional discrimination.20 The last of these may be shown in several ways, including differential questioning between sexes or racial groups.21 During this first step, "litigants remain free to misuse peremptory challenges as long as the strikes fall below the prima facie threshold level."22 In Batson's second step, the burden shifts to the opposing party to articulate a race- or sex-neutral reason for the strike.23 The threshold at this stage in the process is low, requiring only a "clear and reasonably specific" explanation of "legitimate reasons"24 for the challenge. This justification need not be commonsensical, nor even plausible, for the second step of Batson to be met; as long as it is not facially discriminatory, the reason will be deemed race-neutral.25 Finally, in the third step of Batson analysis, the burden shifts back to the party who challenged his or her opponent's peremptory strike to show that the strike was purposely discriminatory. For example, an attorney might point out that the

17. In Swain v. Alabama, 380 U.S. 202, 220 (1965) overruled by Kentucky v. Batson, 476 U.S. 79 (1986), the Supreme Court wrote, "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."
21. See, e.g., Miller-El v. Dretke, 545 U.S. 231 (2005) (holding that historical patterns of race discrimination by Dallas prosecutors, comparison of questioning of blacks versus whites, and suspicious use of "jury shuffling" raised an inference of intentional discrimination). In Miller-El, the prosecution failed to satisfy Batson's second step, because no race-neutral reason was ever offered for the "shuffling." Id. at 233.
22. Id. at 267 (Breyer, J., concurring).
characteristics cited as reasons for the strikes are irrelevant to a person’s ability to serve as a juror,\textsuperscript{26} or that the stated reason for the strike applies equally to white jurors who were not stricken.\textsuperscript{27} It is in this third step that the plausibility of the justification offered at the second step becomes relevant, and the trial judge decides whether the opponent of the strike has met the burden of showing purposeful discrimination.\textsuperscript{28}

In \textit{J.E.B.}, the Court indicated that it would not extend \textit{Batson} to members of groups subject to rational basis review.\textsuperscript{29} As long as attorneys avoid exercising peremptory challenges on the basis of protected characteristics such as sex or race, they remain free to use stereotypes\textsuperscript{30} and hunches to fashion a jury.\textsuperscript{31}

\textbf{B. The Relevance of Sexual Orientation to Jury Selection}

One might imagine several situations in which an attorney would find it useful to know whether a prospective juror is gay. Sometimes sexual orientation is embedded within substantive issues. For

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\item United States v. Jenkins, 52 F.3d 743, 747 (8th Cir.1995).
\item Davidson v. Harris, 30 F.3d 963, 965 (8th Cir.1994).
\item Purkett 514 U.S. at 768.
\item Perhaps because of this largely unfettered discretion, peremptory challenges have spawned scholarship, lore, and a jury consultation industry. Jury selection guides offer predictions based on juror attributes, behavior, and affiliations. One 1993 guide advises that Lutherans and Methodists favor the prosecution in criminal cases, that Jews are liberal, and that Hindus, Buddhists and Muslims are “generally dangerous jurors as they have odd beliefs.” Daniel M. Hinckle, \textit{Peremptory Challenges Based on Religious Affiliation: Are they Constitutional?}, 9 BUFF. CRIM. L. REV. 139, 140 (2005) (citing CATHY BENNET & ROBERT B. HIRSCHHORN, BENNET’S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION §15:31 (1993)). See also Nancy S. Marder, \textit{Beyond Gender: Peremptory Challenges and the Role of the Jury}, 73 TEX. L. REV. 1041, 1080 (1995) (citing WARD WAGNER, JR., ART OF ADVOCACY: JURY SELECTION §1.04[9], at 1–24 (1988)) (detailing a 1988 trial manual that discusses the likely sympathies of different categories of women, and counsels, “If a female juror demands to be addressed as Ms. and not Miss, you probably should take heed”).
\item As will be discussed infra, some states limit the permissible categories of peremptories further, either statutorily or through state constitutions. \textit{Batson} has also been expanded to allow third-party challenges (those in which the juror and defendant are not the same race or gender), \textit{Powers v. Ohio}, 499 U.S. 400 (1991); challenges by the prosecution as well as the defense, \textit{Georgia v. McCollum}, 505 U.S. 42 (1992), and challenges in civil cases, \textit{Edmonson v. Leesville Concrete Co.}, 500 U.S. 614 (1991). A handful of cases suggest that in some circumstances, religious groups will be included in \textit{Batson} as well. See, e.g., \textit{United States v. Somerstein}, 959 F.Supp. 592 (E.D.N.Y. 1997).
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example, in a hate crime trial with a gay victim, the defense attorney might believe that a gay or lesbian juror would be unlikely to sympathize with the defendant, or would punish the defendant for his anti-gay attitudes. Sexual orientation can also become significant collaterally—that is, in some way relevant to the trial, but not to the evidence. For example, one criminal defense attorney in California believes that because she “presents” as stereotypically lesbian—wearing short, slicked hair and men’s suits and shoes—her opponents at the DA’s office strike jurors who also “appear” gay, on the theory that gay jurors might side with a defense attorney who shares their minority sexual orientation.

In federal court, and generally in state court as well, trial judges have broad discretion as to when questions about a juror’s attitudes regarding sexual orientation are proper. The main doctrinal guidance comes from two race-related cases: *Ham v. South Carolina* and *Ristaino v. Ross*. The Court found a due process violation in *Ham* when the trial judge refused to probe prospective jurors’ racial attitudes in a case where a black defendant claimed police framed him because of his civil rights activities. Three years later in *Ross*, the Court declined to find a similar violation where the crime was the cross-racial murder of a white security guard. That Court wrote, “the Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him.” The discretion given to trial judges is broad enough that a judge’s determination about whether to allow questioning regarding anti-gay attitudes, and which questions to allow, is almost never overturned. For example, in a Maine case where the defendant’s charge involved homosexual contact with a minor, the judge simply stated that evidence might come in that the defendant was gay, and asked the panel as a whole whether there any one of them would be unable to act impartially. No one stepped forward, and the trial judge denied the defense’s request to question jurors about anti-gay bias individually or in more depth. The appellate court held that this did not constitute an abuse of discretion. This case, and others,

34. Id. at 594.
36. See, e.g., *State v. Rulon*, 935 S.W.2d 723, 726 (Mo. Ct. App. E.D. 1996) (holding that the trial court did not abuse its discretion in asking only en masse questions about jurors’
suggest that the threshold for a case to be “inextricably bound” with issues of sexual orientation is quite high.

Trial judges also have a great deal of discretion over whether to dismiss a juror for cause, and may rely entirely on jurors’ own statements of impartiality. In State v. Miller, the defendant was a lesbian charged with murdering her girlfriend’s ex-boyfriend in a barroom altercation. A prospective juror stated that he was “one hundred percent” against homosexuality; another stated that he believed homosexuality was wrong and that homosexuals needed to be reformed. Despite these strong indications of bias, the Supreme Court of Appeals of West Virginia upheld the trial judge’s denial of the defendant’s motion to strike the jurors for cause, since both stated that they did not think homosexuals were more likely to commit crimes. Here, the court relied on Patton v. Yount: “The relevant test for determining whether a juror is biased is ‘whether the juror[ ] . . . had such fixed opinion that [he or she] could not judge impartially the guilt of the defendant.’” Miller endorses the dubious proposition that jurors can accurately assess their own biases, as well as predict the influence that these biases will have on their interpretation of evidence.

The few courts that have taken opposite approaches to the permissibility of questioning jurors about sexual orientation, or to exercising for-cause strikes against openly biased jurors, have based their decisions mostly on state statutes or constitutions. The first bias against homosexuals, and declining the defense’s request to conduct individual, more detailed questioning, where the defendant had allegedly murdered his homosexual lover, because sexual orientation was not so “inextricably bound up with the conduct of the trial” as to create a constitutional right to voir dire on the subject).
such case was in 2000, when the California Court of Appeals found that the California Constitution and the U.S. Constitution prohibited peremptory strikes on the basis of sexual orientation. That court reasoned that the U.S. Supreme Court “had not yet . . . established whether [heightened] scrutiny is a sine qua non of Batson error or merely a common characteristic.”44 It found that gays and lesbians were a cognizable group that had suffered historical prejudice—the sort of group that Batson was intended to protect.45 (This argument is discussed in greater depth in the next section.)

Numerous problems, then, may arise for a gay litigant. For one, existing doctrine may slant juries toward an anti-gay bias. Under Ham and Ross, the Court encumbers gay and lesbian litigants with potentially biased jurors, and makes it difficult to root out anti-gay sentiments. At the same time, because of Batson’s inapplicability to sexual orientation, the side opposing a gay litigant is empowered to dismiss the jurors (gays and lesbians) who might most effectively guard against anti-gay arguments behind the jury room’s closed doors. If a gay litigant knows that her sexual identity—or that of an attorney or witness on whom she tends to rely—will come out at trial, she is largely powerless to ensure that this factor won’t hurt her case.46 A gay litigant may be forced to choose between letting her

45. The Garcia court also left open the possibility that strikes could be “based on sexual orientation where the case in some way involves issues pertaining to lesbians, gay men, or bisexuals.” Kathryn Ann Barry, Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation, 16 BERKELEY WOMEN’S L. J. 157, 168 (2001) (reviewing Garcia). This loophole was closed by the California legislature a year later. Cal. C.C.P. § 231.5 (2006) (“A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the . . . juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds”). Sexual orientation was added in 2001. See Assembly Bill No. 2418, Regular Sess., at 1 (Cal. 2000). Other courts, state and federal, have declined to follow Garcia’s lead. See, e.g., Lawler v. MacDuff, 335 Ill. App. 3d 144, 153 (Ill. App. 2d 2002) (“A classification that is not subject to some form of heightened scrutiny provides no . . . strong reason” for interfering with “the venerable right to peremptory challenges”); United States v. Ehrmann, 421 F.3d 774, 782 (8th Cir. 2005) (writing in dicta, “we seriously doubt Batson and its progeny extend federal constitutional protection to a venire panel member’s sexual orientation,” and deciding the case based on the government’s “legitimate, nondiscriminatory reasons for striking the panel member”).
46. This problem is particularly salient in certain regions of the country, where jurors’ belief that homosexuality is immoral may overshadow other issues at trial. For example, 74 percent of Americans who identify as “Evangelical Christians” say that they believe homosexuality is morally wrong. Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation, KAISER FAMILY FOUNDATION, 1, 6 http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-
sexual orientation come out and risking juror bias, or hiding it and sacrificing a significant portion of the narrative that would explain her side of the case.\textsuperscript{47}

A jury's possible predisposition against gay litigants exacerbates another problem some gay litigants face: if they go to trial, they risk being involuntarily "outed." Suppose a lesbian defendant wants to keep her sexual orientation private for fear it will bias jurors against her. Suppose the prosecution's key witness is a female ex-lover of the defendant. The prosecution may ask for voir dire about sexual orientation bias. Depending how the questions are asked, the prosecution may "out" the defendant as early as the voir dire stage.\textsuperscript{48} A litigant's desire to avoid this may turn his sexual orientation into a bargaining chip. For example, a prosecutor may be able to strong-arm a defendant into a plea bargain if the defendant wants to keep his sexual identity private, and the prosecutor implies that it will be revealed at trial.\textsuperscript{49}

\textbf{C. The Constitutional Case for Applying Batson to Sexual Orientation}

Analogizing between sexual orientation and race is often—and is perhaps inherently—problematic, tending to force generalizations that trivialize or misapprehend both sets of struggles. Nonetheless, these sorts of comparisons can be useful in understanding the implications of state action against different minority groups.

\textsuperscript{47} For example, a defendant might not call his ex-boyfriend as an alibi witness if he knows that the prosecution is aware of the former couple's past. Because the nature of their relationship would be relevant to bias, the prosecution could legitimately bring it up on cross-examination, outing the defendant. A related situation occurred in \textit{State v. Murray}, 375 So. 2d 80 (La. 1979), in which the Louisiana Supreme Court upheld the prosecutor's right to question prospective jurors about the victim's homosexuality in order to determine whether jurors could fairly weigh the victim's testimony.


\textsuperscript{49} Prosecutors have extremely broad discretion in plea bargaining. They are allowed to promise virtually anything that is within their power and inside the scope of their duties. For example, prosecutors are permitted to make a plea contingent on which charges will be brought against a person's partner or spouse, even for a completely unrelated crime. \textit{See, e.g.}, United States v. Pollard, 959 F.2d 1011 (DC Cir. 1992). The example I suggest above is distinct from other plea bargain strategies because the prosecutor's bargaining chip is the defendant's identity.
Suppose that in *State v. Miller*, discussed above, the defendant had been black, and that instead of statements about homosexuals, the jurors had said that the “African-American lifestyle” was “100 percent immoral,” and that blacks needed to be “reformed.” It is difficult to imagine a judge who would not strike that juror for cause under *Yount*. Legally, of course, the two groups receive different levels of scrutiny. But the difference in the way racist answers and anti-gay answers are treated during voir dire suggests that anti-gay sentiment is implicitly accepted as a “valid” perspective for jurors to bring, even in evaluating the testimony of a gay witness or the culpability of a gay defendant.

*Batson*’s relevance to sexual orientation is further demonstrated by the Court’s reasoning in *J.E.B.*: “Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory . . . . [P]otential jurors . . . have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.” Although *Batson* was decided on equal protection grounds, nothing in the decision dictates that it should apply only to groups receiving heightened scrutiny. Indeed, we might wonder whether it is “rational” to let the state exercise peremptory challenges against anyone simply because of a group identity.

Even if *Batson* should not apply to all groups that receive rational review, the language of *J.E.B.* suggests that it should at least apply to “group stereotypes rooted in . . . historical prejudice.” It is hardly disputable that gays have been subject to such prejudice in the United States. Over 20 years ago, Justice Brennan wrote, “homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is ‘likely . . . to reflect deep-seated prejudice rather than

51. *See also State v. Witherspoon*, 82 Wash. App. 634, 919 P. 2d 99 (1996) (reversing defendant’s conviction because the trial judge denied the defendant’s motion to strike a juror for cause who admitted to being a “little bit prejudiced” because he had been exposed to media that portrayed “a lot of black people who are dealing drugs;” like the *Miller* jurors, the *Witherspoon* juror promised to presume the defendant’s innocence).
53. *Id.* I do not discuss the “state action” requirement, since it is so easily met—it is inherent in the state’s role in overseeing jury selection, and automatically applies to all peremptory challenges, regardless of who exercises them. *McCollum*, 505 U.S. at 51.
... rationality."

Scholars, courts, and legislatures have discussed this history of discrimination in detail. Although empirical evidence suggests that Americans are gradually becoming less prejudiced against gays and lesbians, there remains a strong strain of anti-gay sentiment, particularly in certain regions of the country, and especially surrounding issues such as adoption and marriage. The deeply-rooted fears, stereotypes, and hostilities surrounding gays and lesbians are evident throughout pop culture, from rap music to sporting events. Portrayals of lesbians are less common than portrayals of gay men, and those that exist are very often cast in opposition to "traditional" femininity; the few that

54. Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.), see also People v. Garcia, 77 Cal. App. 4th 1269, 1279 (Cal. Ct. App. 4th 2000) ("Outside of racial and religious minorities, we can think of no group which has suffered such "pernicious and sustained hostility" and such "immediate and severe opprobrium" (ibid.) as homosexuals" (internal citations omitted)).

55. See, e.g., In re Marriage Cases, 49 Cal. Rptr. 3d 675, 756 (Cal. Ct. App. 2006) ("[T]he record of discrimination against lesbians and gay men is long and well known. In western culture since the time of Christ the prevailing attitude has been 'one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment'" (quoting RICHARD A. POSNER, SEX AND REASON 291 (1992))); Martin Bauml Duberman, Reclaiming the Gay Past, 16 REV. IN AM. HIST. 515 1988; Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1226 (Cal. 2005) (discussing the legislative history of the Domestic Partners Act of 1993, CAL. FAM. CODE § 297 (West 2006), which talked about the "longstanding social and economic discrimination" experienced by gays and lesbians).


57. See Kaiser Family Foundation Study, supra note 47.

58. For example, in 2008, over half of California voters chose to amend the state constitution to remove the right of gays and lesbians to marry (the California Supreme Court upheld the decision the following year). See John Schwartz, California High Court Upholds Gay Marriage Ban, N.Y. TIMES, May 26, 2009, Available at http://www.nytimes.com/2009/05/27/us/27marriage.html?scp=1&sq=Proposition%208%20california&st=cse.

59. For example, Eminem, one of the most popular rap artists in America, frequently uses the offensive term "faggot" to refer to homosexuals, as well as directing it toward straight men as a general insult. For a discussion of the uses and social implications of homosexuality in Eminem’s rap, see Richard Kim, Eminem—Bad Rap? THE NATION, (March 5, 2001) http://www.thenation.com/doc/20010305/kim.


61. MSNBC’s “The Rachel Maddow Show” is illustrative: Maddow, an out and self-proclaimed “butch” lesbian (and possibly the only out lesbian in mainstream political commentary) is "femmed up" with makeup and plunging necklines. Even though there's
deviate are often satirized or heavily stereotyped. Furthermore, merely suggesting, in public, that a person is homosexual is not considered a neutral mistake, as would likely be the case if someone erroneously suggested that a person was a member of most other groups subject to rational review. Instead, suggesting that a public figure is gay can be considered a form of defamation. The strong language of J.E.B., coupled with the history of prejudice and discrimination against homosexuals in the United States, and the extent to which homosexuality continues to carry a stigma, suggests that peremptory challenges exercised against gays and lesbians because of their sexuality should not go unchecked.

II. THE PROBLEMS WITH EXTENDING BATSON TO SEXUAL ORIENTATION

A. The Practical Impact of Batson Challenges Based on a Juror’s Gay (or Seemingly Gay) Identity

Imagine that the U.S. Supreme Court extends Batson to sexual orientation. In voir dire situations where a juror says, point blank, that she is homosexual, the situation is uncomplicated: a Batson challenge would be brought just as in the racial context. However, the nature of sexual orientation, particularly its concealability, makes it unlikely that most situations would be so straightforward. And even when sexual orientation comes up directly in the course of questioning, gay and lesbian jurors may choose not to make their sexual preferences public. The California Judicial Council Study virtually no way that the “femmed-up” Maddow could be mistaken for male, she is popularly considered “androgynous,” or even “butch.” This reception of Maddow demonstrates how limited the spectrum of gender expression is for women in mainstream media. Displays of affection, especially kissing, on prime-time television shows often occur between women the viewer knows to be heterosexual, or as a one-time event. See More Lesbian Kisses on TV - Between Straight Women, AFTER ELLEN (Oct. 26, 2004) http://www.afterellen.com/TV/102004/lesbiankisses.html.

62. See JUDITH HALBERSTAM, FEMALE MASULINITY (1998). In Chapter 6, “Looking Butch: A Rough Guide to Butches on Film,” Halberstam explores the history of butch women in both mainstream and independent cinema. She writes that although there are different embodiments of “butchness” on film, “Ultimately... butches from the 1940’s to the present have shared certain visual markers (guns, cigars, trousers, aggressive sexualities) and have often shared narrative fates (death, dishonor, disgrace)” Id. at 230.

found that in situations where sexual orientation arose, more than half of gay and lesbian court users preferred not to “out” themselves. This decision tends not to exist with regard to race or sex, which are often (though certainly not always) more readily apparent.

Many sexual orientation challenges raised under *Batson* would likely occur in situations where one or both attorneys believe that a juror is homosexual, but where the juror herself has not said so. It is in this context that *Batson* becomes most problematic, as illustrated by the scenarios below.

First, suppose that a juror is a “gay-acting” male in a case where the defense attorney is also “gay-acting.” Suppose the prosecutor uses a peremptory challenge to strike the juror, believing that he will be overly receptive to the defense’s case because (he assumes) the juror and defense attorney share the same sexual orientation. Suppose the defense attorney correctly perceives the reason for the strike, and wants to bring a *Batson* claim. Under the first step of *Batson*, the opponent of a peremptory challenge makes out a prima facie case of purposeful discrimination by showing the juror’s membership in a suspect class; that is, the defense attorney must show that the juror is gay.

There are a few ways, short of asking a juror directly about his or her sexual orientation (the direct approach will be considered below), in which the juror’s membership in a suspect class could be established. For one, the defense attorney could argue that the totality of the circumstances demonstrates that the juror is gay. It is unapparent how this discussion would take shape. The defense attorney could argue that known facts about the juror—appearance, demeanor, and a decade with the same “roommate”—all raise an inference that the juror is gay. The prosecutor would then try to

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65. Such labels, of course, are deeply problematic: they are based on stereotypes, often implicitly accept and reinforce a binary typology of gender, vary tremendously based on age, race, and region, and are patently offensive. I use the term, knowing that it is fraught with difficulties, in large part because evidence suggests that many people, whether homosexual or not, are accurately able to judge others’ sexual orientation. See Nalini Ambady, *et al.*, *Accuracy of Judgments of Sexual Orientation from Thin Slices of Behavior*, 77(3) J. OF PERSONALITY &SOC. PSYCH., 538-47 (1999); Kerri L. Johnson *et. al.*, *Swagger, Sway, and Sexuality: Judging Sexual Orientation From Body Motion and Morphology*, 93(3) J. OF PERSONALITY AND SOC. PSYCH., 321-34 (2007).

combat the inference by pointing out ways the juror didn’t seem gay, and thus was not a member of the class in question. The judge would be put in the awkward position of determining whether the juror was, in fact, gay. The process is clearly offensive. Even done in camera, it would be based on crude stereotypes, and invite insulting, unseemly debate and speculation among the parties.

Kathryn Ann Barry suggests prohibiting strikes based on the appearance of sexual orientation, rather than on sexual orientation itself. She argues that “prohibiting strikes based on perceived sexual orientation creates an opportunity for an attorney to challenge her opponent’s peremptory strikes if she . . . has no evidence of the juror’s actual sexual orientation.” While the logic of her argument is sound, Barry’s approach would cause the same problem—but here, it becomes slightly more metaphysical; instead of arguing that a juror “seems” to be gay, in order to fulfill the first step of Batson, an attorney would have to prove that the challenged juror seems to “seem” gay. We might imagine an exchange along the following lines, after a defense attorney suggests that a prosecutor struck a juror for “seeming to be” a lesbian:

Prosecutor: She doesn’t seem gay to me, Your Honor. That didn’t even cross my mind.

Defense attorney: Oh, come on. Short hair, no wedding ring, baggy jeans, and she plays in two adult softball leagues.

Prosecutor: I didn’t look at her jeans. But she’s carrying a purse. That doesn’t seem very homosexual.

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67. This analysis supposes that the argument would not take place in open court. If it did, the problems are tenfold—having one’s own traits dissected for hints about sexual orientation would be at best frustrating and at worst traumatic, even for the thickest-skinned juror.

68. As it is, twenty-nine percent of gays and lesbians who have contact with the California court system “in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without their approval.” JUDICIAL COUNSEL STUDY, supra note 65, at 20. Alternatively, the judge could reject the Batson claim out of hand at the outset—but doing so would necessitate the same kind of reliance on stereotypes, absent some other, very obvious reason the juror was stricken.

69. Barry, supra note 46, at 171.
Defense attorney: It's not a purse, it's a messenger bag. Your Honor, whether she's gay or straight, she's a walking stereotype.

This kind of exchange is absurd and insulting. The attorney who brought the challenge would have to argue either that the juror does not appear to be a lesbian, or that other "legitimate reasons" existed for the strike—characteristics, the attorney would have to argue, that are unassociated with homosexuality. The trial judge would then be saddled with the task of separating the traits which contribute to the juror's "seeming" homosexuality from those which do not—an uncomfortable proposition fraught with guesswork and prejudice, in addition to extreme disrespect to the juror.

Another approach to fulfilling the first step of Batson would be to question a challenged juror directly about her sexual orientation, allowing a juror to speak for herself. But this creates other problems. First, in jurisdictions where attorneys, not judges, conduct voir dire, it would likely be incumbent upon the attorney opposing a strike to make the inquiry. That is, in order to defend a juror's equal protection rights, an attorney might have to ask a juror whether she's a lesbian (a question unlikely to endear the attorney to the juror, regardless of the answer). Anticipating this reaction, the attorney may just avoid the claim.70 Furthermore, depending on the juror's circumstance, public questioning could subject him or her to professional, personal, or physical harm—in addition to discomfort, embarrassment, and irritation at having a roomful of strangers speculate about the sex of her romantic partners.

Vanessa Eisemann has argued that prospective jurors should be questioned about their sexual orientation in camera, as is done in some jurisdictions with sensitive topics, such as sexual abuse: "[i]f 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."71 Although this approach shows more respect for jurors' privacy than requiring them to answer in open court, Eisemann's assessment seems overly optimistic. Most obviously, many gay jurors would not be "at ease" answering questions about

70. Of course, a trial judge could modify procedures such that the court conducted voir dire questioning on this particular point.
71. Eisemann, supra note 49, at 27.
their sexual orientation in a judge’s chambers. Moreover, in camera questioning sends the implicit message that homosexuality is cause for shame, secrecy, or embarrassment. For many prospective jurors, this implication would be even more offensive than an involuntarily “outing” in open court. (It is also easy to imagine that some straight jurors might be offended that the attorneys in a case mistook them for gay.) And, as John Neal has written, “The stigmatizing effects of possibly being dismissed from jury service because of one’s private affairs are not diminished simply because such questioning occurs behind closed doors.”

It is worth noting, too, that the message voir dire about sexual orientation sends may be partly contingent on the substantive issues in a trial. It might make more sense to a juror if she was asked about her sexual orientation in an anti-gay hate crime case than in a standard drunk-driving case. Especially since many jurors are likely to be asked about their feelings toward homosexuality in an anti-gay hate crime case, an individual juror may not feel singled out. On the other hand, in such a case it may be particularly obvious to the juror—and to other prospective jurors—that an attorney is making assumptions based on a juror’s apparent sexual orientation, which may undermine the integrity of the selection process.

Another possible approach is questioning every juror, presumably in camera, about her sexual orientation. Not only would this tactic prove administratively unwieldy, but concealing voir dire from the public eye is not ideal for ensuring accountability and openness. “[B]y the Court allowing the public to view voir dire, the public is better able to contemplate whether the system is prejudicial.” Regardless of whether questioning takes place in chambers or in open court, forcing jurors to answer questions about their sexual orientation is likely to upset all jurors.

Alternatively, jurors could be asked to disclose their sexual orientation in a written questionnaire given prior to voir dire, sometimes called a Supplemental Juror Questionnaire, or SJQ. Empirical evidence suggests that SJQs can sometimes be very

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72. See Neal, supra note 29, at 1112.
73. Though, to reiterate, it is my position that the juror’s own sexual orientation would be a proper subject for questioning in neither situation.
74. Neal, supra note 29, at 1110.
useful.\textsuperscript{75} However, one drawback is that such questionnaires are no more “open” than in camera questioning, and thus further conceal the already opaque processes of jury selection from the public. SJQs have also drawn criticism for being too intrusive—since boilerplate questionnaires tend to be overbroad\textsuperscript{76}—and for compromising jurors’ privacy, since in some jurisdictions, questionnaires are public record.\textsuperscript{77} Even if the jurors’ names, addresses, and birthdates are removed, enough information may be present on a questionnaire to identify a particular juror. Joseph A. Colquitt writes, “The information may find its way into the ‘digital dossier’ of the juror, and this dossier may be available to employers, creditors, family members, investigators, the media, or members of the public.”\textsuperscript{78}

Privacy may be especially important to jurors who live and work in one of 33 states in which they have little or no legal recourse if they are fired because of their sexual orientation.\textsuperscript{79} Moreover, SJQs are not available in every jurisdiction. They are currently used in just over half of state courts (and only in particular counties within those state courts), and in even fewer federal districts.\textsuperscript{80}

Finally, as mentioned above, a gay juror may not state her sexual orientation in voir dire, but may give other answers that lead attorneys to believe that she is a lesbian. If \textit{Batson} was applied to sexual orientation, but attorneys were neither permitted to inquire about jurors’ sexual orientation directly, nor permitted to engage in the bizarre “seeming to seem like a lesbian” dialogue discussed above, \textit{Batson} would offer protection only to jurors who happened to state, in the course of answering other questions, that they are gay or lesbian. As Barry points out, the Ninth Circuit faced this issue in \textit{Johnson v. Campbell}:

\begin{itemize}
\item \textsuperscript{76} Joseph A. Colquitt, \textit{Using Jury Questionnaires; (Ab)using Jurors}, 40 CONN. L. REV. 1, 21 (2007).
\item \textsuperscript{77} \textit{Id.} at 42.
\item \textsuperscript{78} \textit{Id.} at 26.
\item \textsuperscript{79} Employment Overview, NATIONAL CENTER FOR LESBIAN RIGHTS. \url{http://www.nclrights.org/site/PageServer?pagename=issue_employment_overview} (last viewed February 11, 2010).
\item \textsuperscript{80} List of Supplemental Voir Dire Questionnaires Granted, NATIONAL JURY PROJECT \url{http://www.njp.com/assets/SJQListGranted.pdf} (last updated Jan. 25, 2008).
\end{itemize}
[T]he plaintiff’s attorney thought the defense exercised its peremptory challenge to exclude a juror because the defense believed the juror was gay. Plaintiff’s council challenged the exclusion but had no record of the juror stating his sexual orientation. The court denied the challenge, refused to ask the juror about his sexual orientation, and stated, “there is no way the Court can define whether or not he is gay.”

To be sure, using *Batson* to safeguard the equal protection rights of gay and lesbian jurors would be an improvement over the current total absence of any real protection under the federal Constitution. But as a practical matter, applying *Batson* in its current form to sexual orientation, would be glaringly inadequate to safeguard these jurors’ equal protection rights.

B. Voir Dire and the Problem of Gay Covering

Peremptories exercised on the basis of sexual orientation may also encourage “covering,” which Kenji Yoshino describes as a phenomenon in which members of certain groups, such as gays and racial minorities, adopt modes of behavior in order to seem less exceptional, but which obscure and erode their own identities. During voir dire, some gays and lesbians might try to alter their behavior in order to receive fair treatment during jury selection. If a gay man worries that his attire, voice, or mannerisms are stereotypical enough to “out” him, he might wear more conservative clothing, speak with a lower voice than usual, or keep his hands in his pockets while answering questions to prevent himself from gesturing. He may also control the content of his answers to make himself appear straight—for example, referring to his live-in boyfriend as his “roommate” or omitting a gay rights advocacy group from his list of volunteer activities.

Certainly, we all edit details about ourselves to facilitate situation-appropriate, and cognitively coherent, self-presentation. But concealing a core aspect of one’s identity—especially one heavily

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81. Barry, *supra* note 46, at 170 (quoting Johnson v. Campbell, 92 F.3d 951 (9th Cir. 1996)).

82. For more explanation and discussion of this phenomenon, see Kenji Yoshino, *Covering*, 111 Yale L.J. 769 (2002).

83. See, *e.g.*, ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).
stigmatized within society—can be psychologically harmful, and is particularly problematic in the context of an institution so emblematic of civic participation. That some gays and lesbians might choose to cover in other situations (e.g., before a job interview with a conservative business) makes it no more acceptable that they would feel pressured to do so in the voir dire context.

Empirical evidence suggests that concerns about “gay covering” in the courtroom are well-founded. A study conducted by the Judicial Council of California shows that bias against gays is pervasive in California courts. Twenty percent of homosexual court employees reported hearing “derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.” Of gay and lesbian jurors who participated in voir dire, about half were asked if they were married, and most reported responding “incompletely” to the question. Additionally, where the respondent’s sexual orientation was raised as an issue (which, somewhat disconcertingly, was equally likely to occur regardless of whether sexual orientation was related to the substance of a case), more than a third of gay and lesbian court users “felt threatened in the court setting because of their sexual orientation.”

Gay jurors’ inclination to conceal their sexual orientation may be further exacerbated by the history of homosexual exclusion from petit juries, most notoriously in the 1979 trial of Dan White for the murder of openly gay Supervisor Harvey Milk. During jury selection the

84. Deborrah E. S. Frable, et al., Concealable Stigmas and Positive Self-Perceptions: Feeling Better Around Similar Others, 74 J. OF PERSONALITY & SOC. PSYCH. 909, 919 (1998) (reporting results from a study of Harvard University undergraduates which found that those with concealable stigmas—gays and lesbian students, bulimic students, and students whose families made less than $20,000 per year “reported lower self-esteem and more negative affect than both those whose stigmas were visible and those without stigmatizing characteristics.” Abstract.).

85. JUDICIAL COUNSEL OF CALIFORNIA, supra note 65, at 19.
86. Id. at 20. Unfortunately, the study does not explain what the investigators meant by “incompletely,” nor, presumably, was the phrasing perfectly clear to respondents. In context, it appears to mean that they either claimed to be single, and neglected to mention a same-sex relationship in which they were involved, or said that they were in a relationship but neglected to mention the sex of their partner.
87. Id. at 21.
88. Id. Remember, too, that this is in California—which, though no perfect bastion of sexual orientation equality (as demonstrated by Proposition 8’s passage in 2008), is nonetheless a state in which we might imagine gay and lesbian jurors would feel less threatened than in many other states.
defense systematically used its peremptory challenges against every juror who mentioned during voir dire that he or she was homosexual.\textsuperscript{89} Not only was the verdict widely criticized as far too lenient, but popular commentary attributed the leniency directly to the use of peremptories against gay jurors.\textsuperscript{90} During the “White Night Riots” that followed, protestors chanted, “All-straight jury; No surprise; Dan White lives; And Harvey Milk Dies!”\textsuperscript{91} In Massachusetts in 1996, peremptory strikes of gays and lesbians became so prevalent that “Massachusetts’ highest court told judges . . . to watch for bias against homosexuals when picking a jury in cases where a person’s sexual preference may be an issue.”\textsuperscript{92}

Allowing peremptories to be used against prospective jurors on the basis of their sexual orientation encourages “covering” among those who want to be treated fairly in the jury selection process, and contributes to a system in which gays and lesbians become “invisible” in the jury venire. Covering is problematic for several reasons. For one, it may cause prospective jurors to conceal information that is legitimately relevant to jury selection. It also creates a penalty for citizens who do not conceal core aspects of their identities when they set foot in a courtroom. This dynamic has negative psychological consequences for gays and lesbians\textsuperscript{93} and is antithetical to the jury’s role as a civic institution.

The complications associated with covering further evidence the need for regulation of peremptory challenges against gay and lesbian jurors.\textsuperscript{94} At the same time, they underscore the problems with modes of voir dire that try to “out” jurors—even if these modes are designed with gay jurors’ well-being in mind.


\textsuperscript{90} Id. at 233-34.

\textsuperscript{91} RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK 328 (1982).

\textsuperscript{92} John Ellement, Judges Warned of Anti-Gay Juror Bias, BOSTON GLOBE May 14, 1996, at Metro/Region 23.

\textsuperscript{93} See Frable et al., supra note 85 (finding that the harmful effects of concealable stigmas were assuaged only by the visibility of similarly situated others).

\textsuperscript{94} This kind of pervasive bias against gays and lesbians in the court system suggests that grounds may exist for a fair cross-section claim. Fair cross-section claims’ application to sexual orientation merits an article of its own, but it’s worth noting the possibility that such a claim might succeed if a homosexual litigant could show that state action (here, the day-to-day operation of the jury selection process) deterred gays and lesbians from showing up to jury duty—and becoming part of the venire—at all.
III. REFORMING PEREMPTORY CHALLENGES

A. The Marshall Argument: Eliminating Peremptory Challenges

In his *Batson* concurrence, Justice Thurgood Marshall argued that the only way to purge discrimination (in that case, racial) from jury selection was to eliminate peremptory challenges altogether. Even if attorneys genuinely believed that they were not racist, he said, subconscious biases were sure to enter into the process; therefore, even the most progressive attorneys' "gut" impulses are likely to be influenced by prejudice. Justice Marshall's fear has borne out in the social psychological literature. Jennifer Eberhardt and others have found that subconscious anti-black sentiments are often present even for people who do not consciously hold racist beliefs, and that these sentiments can affect even split-second judgments. Such "intuitive" judgments are at the crux of jury selection; a thin line exists between a stereotype and a hunch. Eberhardt's findings suggest that even if attorneys don't believe that they are striking jurors on the basis of socially stigmatized characteristics, unconscious processes are at play. For example, a prosecutor may genuinely believe that he is striking a black juror because the juror said he trusts police "some of the time." But unbeknownst to the prosecutor, she might not have stricken a white juror who made an identical statement. Unless unstricken white jurors had, in fact, made the exact same statements (that is, unless the proffered justification for a strike applied equally to jurors of two races, but jurors of just one race were stricken), the peremptory would probably survive a *Batson* challenge. It is not at all clear that the *Batson* majority contemplated the extent to which unconscious biases could be at work. Psychological and sociological research has shed more light on the nature of bias in the last quarter-century or so.

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95. *Batson*, 476 U.S. at 102-03.
96. *Id.* at 106.
since *Batson* was handed down; it is time for the voir dire process to incorporate the accepted social science literature on the subject.

Justice Marshall went further than subconscious biases, however. He predicted that *Batson* might not protect against conscious biases either, since the threshold for overcoming a *Batson* challenge is so easy to reach. He wrote, “Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” Echoing Justice Marshall’s concern, Akhil Reed Amar has suggested that barring a prejudice that would impair the juror’s ability to decide a case fairly, the first twelve people in the box should comprise the jury. One way to read Amar’s argument (though he ultimately suggests eliminating most for-cause challenges as well) is that peremptory challenges serve no legitimate purpose as long as for-cause challenges are working as they should; if for-cause challenges eliminate biased jurors from the venire, there is no legitimate role left for peremptories. After all, parties have no constitutional right to eliminate prospective jurors who would make perfectly good jurors but hold beliefs the parties do not prefer. They are merely guaranteed the right to a fair and impartial jury.

Furthermore, peremptories may send a negative message to citizens by denying some members of the community access to participation in an important civic enterprise, and by permitting exclusions based on physical appearance and demographics. Nancy Marder has argued that “[s]uch prejudging of individuals based on a stereotype about group identity is inconsistent with democratic ideals such as equality and fairness.” Certain types of people are famously likely to be excluded: those who express willingness to dissent, who possess advanced degrees, or who have histories of political activism, for example. But these individuals, and the viewpoints they bring, are part of a community’s composition. Their exclusion means that the jury will not accurately reflect the values of the people who comprise the jurisdiction. Indeed, this was Great Britain’s primary justification for eliminating its peremptory challenge system in 1988.

102. *Id.* at 1041.
There is, of course, a fine line between biases and community values. After all, the “values” held by the members of a particular jurisdiction might include racist beliefs about people who share the defendant’s ethnic background. Perhaps the distinction, albeit imperfect, is between a perspective that will prevent a defendant from being tried fairly, such as prejudgment that gay people are sinners, and an attribute that is simply assumed to be correlated with such a perspective, such as membership in the Republican Party.

Despite the flaws that plague peremptory challenges, they are unlikely to be eliminated anytime soon. For one, since defense attorneys and prosecutors alike generally enjoy the ability to shape their prospective juries, it is unclear who would campaign for removal of peremptories. Moreover, peremptories perform some important functions. For one, they help weed out jurors who would otherwise impede fair deliberations. Relying solely on for-cause challenges for this purpose may be unwise, considering appellate courts’ extreme reluctance to second-guess trial judges’ decisions about for-cause challenges. Peremptories allow a “second check” on the trial judge’s decision. For example, if a judge won’t excuse a juror who says that homosexuality makes her “sick,” a gay defendant’s attorney will probably use a peremptory challenge to strike the juror. The same goes for a prosecutor who wants to strike a “loose cannon” who she believes disrespects the system and would impede deliberations. Entrusting attorneys to exercise some degree of control over the petit jury composition makes sense because they know the case intimately, and can anticipate which biases are likely to come into play in a particular trial. Peremptories provide a backstop when judges are inadequately familiar with a case, or are simply too stingy with for-cause challenges.

Some jurisdictions strictly limit the scope of voir dire. United States District Court Judge Nancy Gertner has written that these limitations include requiring judges, not attorneys, to conduct voir dire, which is likely to result in questions that are less searching. Voir dire may become watered down to the point that it becomes “a civics lesson admonishing [jurors] to announce their fairness rather than an opportunity for them to disclose their biases.”

In addition to ensuring that petit juries are not, in fact, biased, it may also be important to the integrity of the justice system that the jury \textit{seems} unbiased. As Tom Tyler and others have found in numerous experimental settings, procedural justice is "a key element in explaining support for legal authorities."\textsuperscript{104} This research suggests that if a criminal defendant believes that he was treated fairly, he will be less likely to re-offend. Empirical evidence indicates that people are most likely to perceive that a system is fair when they believe that the \textit{procedures} it follows are fair. This finding holds true in both high-stakes and low-stakes situations, and regardless of whether the outcome itself is substantively favorable.\textsuperscript{105} A defendant who has no control over jury selection may be less psychologically invested in the process itself. Barbara Babcock has made a similar argument, writing that peremptory challenges increase defendants' perceptions of fairness: "[t]he ideal that the peremptory serves is that the jury not only should be fair and impartial, but should \textit{seem to be so} to those whose fortunes are at issue."\textsuperscript{106}

\textbf{B. The Need for Reform: Re-Thinking Peremptory Challenges}

Examining voir dire in the context of sexual orientation suggests that \textit{Batson} and its progeny should be reconceptualized to account for the manifold ways that bias can surface and operate in jury selection, as well as the potential—and perhaps inevitable—use of invidious strikes to eliminate jurors based on their membership in historically disfavored groups.\textsuperscript{107} \textit{Batson} may be somewhat useful, albeit imperfect, in the context of race- and sex-based challenges. But even though its application to gays and lesbians would be historically and constitutionally sound, it would provide little real protection for gays and lesbians—particularly in circumstances where group membership is not explicitly divulged during voir dire. In this penultimate section,

\begin{footnotesize}
\begin{enumerate}
\item Tom R. Tyler, \textit{The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience}, 18 LAW & SOC’Y. REV. 51, 70 (1984).
\item Barbara Allen Babcock, \textit{Voir Dire: Preserving “Its Wonderful Power.”} 27 STAN. L. REV. 545, 552 (1975) (emphasis added). But, while Babcock's concern is no doubt legitimate, the Tyler argument applies to jurors as well: encountering what they perceive as unfair biases decrease jurors' faith in the system.
\item We might imagine other historically disadvantaged groups who receive no form of heightened scrutiny. One example is obese people. \textit{See generally} William Delong, \textit{Obesity as a Characterological Stigma: The Issue of Responsibility and Judgments of Task Performance}, 73 PSYCHOL. REP. 963 (1993).
\end{enumerate}
\end{footnotesize}
I propose a couple of ways to reform jury selection that, while imperfect, would capture many advantages of the current peremptory system while minimizing the disadvantages and maximizing widespread participation in jury service.

For one, it may be useful to simply limit the number of peremptory challenges available to attorneys. This limitation would have several advantages. Foremost, it would make the jury more closely resemble the venire from which it is drawn, making juries a more representative civic institution. It would also and send a message to jurors that their diverse perspectives are valuable. As explained above, this implicit message is likely to increase jurors’ feelings that the system is legitimate—a belief correlated with greater faith in the justice system and greater willingness to follow the law. Finally, limiting peremptories may place greater weight on trial judges to think about exercising for-cause challenges. Over time, peremptory challenges may have made it less important for judges to exercise for-cause challenges, since problematic jurors tend to get booted through peremptories anyway. Limiting peremptories may give for-cause challenges more teeth.

My second proposition is more unusual, and more logistically complicated—though ultimately, it might prove more effective than the first. Instead of being required to offer an explanation for a peremptory strike only if a Batson challenge is raised, an attorney should be required to offer an explanation for every peremptory strike she exercises; that is, every peremptory would be immediately subjected to Batson’s third step. Requiring attorneys to give a reason for every peremptory challenge would at least be an effort toward ensuring that generalizations made on the basis of group membership do, in fact, meet rational review.\(^{108}\) One of the reasons that rational review is usually an easy standard to meet is that a distinction survives the analysis as long as it is rationally related to any conceivable state purpose. But the Supreme Court in J.E.B. made it clear that in the context of peremptory challenges, “the only legitimate interest [a state] could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury.”\(^{109}\) This

\(^{108}\) Of course, race and gender could still continue to receive heightened scrutiny under this analysis.

\(^{109}\) J.E.B., 511 U.S. at 137 n.8 (emphasis added) (citing Edmonson, 500 U.S. at 620 (“[The sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact.”)).
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seems to give a state less leeway than in a typical rational review case. But under the current system, there is no mechanism for ensuring that peremptories are being exercised for this legitimate purpose.

An example of the way this proposal might operate is illustrated in the New York case of People v. Green.110 There, an attorney used a peremptory challenge against a deaf juror. The trial judge asked about the reason for the strike, and the attorney replied that it was because of the juror’s deafness, not because of any doubt that the juror would be able to communicate through a translator. The court held that the peremptory challenge violated the juror’s Fourteenth Amendment equal protection rights. Even though people with disabilities are not a suspect class, they receive rational review, and a person’s disability bears no rational relation to her abilities to serve as a juror.111

The current practice of allowing an attorney to exclude a person from jury service, without explanation, based on prejudice, animus, or whim (except in the limited cases where heightened scrutiny applies) takes seriously neither the “rational” nor the “review” aspects of rational review. Under the “justification-for-every-challenge” approach, a peremptory challenge on the basis of any attribute or group membership would violate equal protection unless it satisfied the state’s sole legitimate interest. As in current Batson situations, it would be up to the trial judge to decide whether the claimed basis for the challenge was pretextual. If so, the judge would then determine whether the actual reason for the challenge was rationally related to the state’s interest in assembling a fair and impartial jury. For example, if an attorney’s stated reason were a prospective juror’s homosexuality, dismissal of the juror would not survive rational review unless the attorney could show that the juror’s sexual orientation was linked to his ability to serve as a juror. This proposition would seem dubious even in a trial where the evidence directly involved issues of sexual orientation. If an attorney’s stated reason for challenging a juror was, on the other hand, that the juror had been convicted of drunk driving, then the attorney could argue that the juror’s past conviction might show an unwillingness to follow the law. This justification would probably stand, as it bears some rational relation to the state’s interest in an impartial jury.

111. Id. at 669.
In some cases, the rational review analysis would depend on a case’s substance. For example, in a hate crime case against a gay victim, an attorney might argue that the shared sexual orientation of juror and victim would make the juror less likely to be impartial. As flimsy as this explanation may be (especially considering that heterosexuals, too, have sexual orientations that affect their worldviews), a judge might conceivably decide that it is rationally related to creating an impartial jury. On the other hand, she may also say that the explanation of bias is a pretext for striking the juror on the basis of sexual orientation—a factor which itself bears no rational relation to the juror’s ability to hear the case fairly.

The last example in the paragraph above illustrates that although the approach proposed here would offer increased protection for gays and lesbians, persons with disabilities, obese people, and other groups that receive rational review, it is doubtlessly imperfect, and may not have enough “teeth” to be perfectly effective. Still, it may be a workable reform for precisely this reason: it would not entail a radical departure from precedent, merely requiring judges to apply existing constitutional framework with greater care and frequency.

While attorneys would be barred from quietly eliminating jurors based on whims, superstition, or private animus, requiring a justification for every peremptory would not limit their ability to use challenges to ensure an impartial jury. As Abbe Smith has convincingly argued, until attorneys are prevented from using these kinds of stereotypes, they will continue to rely on group generalizations in order to give their clients a jury that is skewed as far as possible in the client’s favor. The reliance on stereotypes seriously undermines the ideal of a fair cross-section. It also fails to take into account the complex nature of stereotypes, ignoring the multiple layers of stereotyping that can exist. For example, consider two jurors: Juror 1 is an obese, masculine-presenting, disabled, lower-class white lesbian; Juror 2 is a conventionally attractive white women in a skirt and blouse. If Juror 1 is struck instead of Juror 2, Batson, in its current form, provides no remedy unless the attorney opposing the challenge can convince the trial judge that Juror 1 was struck because of her gender. Of course, to some extent, this one-dimensional understanding of bias is endemic to many areas of law in which varying levels of scrutiny are applied. It is, however,

112. Smith, supra note 2, at 113-15.
particular invidious in the context of a civic institution intended to judge and represent a community.

It would be naïve to suggest that this reform would be a panacea. Just as occurs under Batson now, some attorneys would still conceal prejudicial motivations for striking jurors, and some prejudices would continue to affect jury composition. Indeed, if they had to justify every peremptory challenges, some attorneys would no doubt become very skilled at doing so. However, judges would become more experienced in recognizing pretext as well. The approach I suggest strives to recognize the legitimate goals of peremptory challenges while upholding equal protection guarantees in the jury selection context—guarantees that, as this article has detailed, may be particularly salient in the case of sexual orientation.

CONCLUSION

Gays and lesbians in the court system face special obstacles and biases, the effect of which can be magnified by discriminatory practices in jury selection. Some scholars have argued that Batson challenges should apply to peremptory strikes based on a juror’s sexual orientation. But while this position is persuasive as a doctrinal matter, it is less persuasive as a practical one. As the examples in this article illustrate, simply importing Batson challenges from the race and gender context to the sexual orientation context might facially satisfy the concerns of Batson and J.E.B., but its implementation would be highly impractical and create new problems. It would not engender equality for gay jurors, and would likely cause them frustration and embarrassment.

Examining sexual orientation in the context of jury selection also gives us broader insight about the shortcomings of the modern voir dire regime, specifically its inability to grapple with the subconscious and multifaceted realities of human bias. I have proposed that in addition to limiting peremptories, one possible way to reform voir dire is to require attorneys to disclose their reasons for every peremptory challenge they exercise, explaining how their exclusion of each juror is rationally related to the purpose of selecting a fair and unbiased jury. This approach may serve as a starting point for making jury selection more transparent, and making juries more truly represent the populations from which they are drawn.