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1. NOTE: Striking Batson Gold at the End of the Rainbow?: Revisiting Batson v. Kentucky and Its Progeny in Light of Romer v. Evans and Lawrence v. Texas, 91 Iowa L. Rev. 1091

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NOTE: Striking Batson Gold at the End of the Rainbow?: Revisiting Batson v. Kentucky and Its Progeny in Light of Romer v. Evans and Lawrence v. Texas

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LexisNexis Summary

… ABSTRACT: Two recent Supreme Court cases concerning gay rights as evaluated under the Fourteenth Amendment call into question whether the Court should extend protection from the discriminatory use of peremptory challenges to sexual orientation, even if sexual orientation is currently evaluated under a rational-basis standard. … However, since peremptory challenges allow for invidious discrimination toward certain groups, this Note argues that the Court's recent interpretation of the Fourteenth Amendment in the context of sexual orientation calls into serious doubt whether the discriminatory use of peremptory challenges toward members of the gay and lesbian community can even withstand a rational-basis review. Further, it argues that the discriminatory use of peremptory challenges toward members of the gay and lesbian community could be avoided by respecting the privacy interest of a prospective juror's sexual orientation during voir dire, because this too comports with the Court's recent interpretation of gay rights. … ″ A peremptory challenge is the process by which a party may remove a potential jury member from the case without giving reason, as long as that party does not remove the potential jury member because of his or her race, gender, or ethnicity. … Although the traditional Batson claim has required the affected individual to belong to a class afforded at least heightened scrutiny (i.e., race and gender), the Romer analysis is encouraging to a Batson claim based on invidious discrimination toward gay and lesbian jurors. …

Highlight

ABSTRACT: Two recent Supreme Court cases concerning gay rights as evaluated under the Fourteenth Amendment call into question whether the Court should extend protection from the discriminatory use of peremptory challenges to sexual orientation, even if sexual orientation is currently evaluated under a rational-basis standard. To date, the Court has only held unconstitutional the discriminatory use of peremptory challenges when at least heightened-scrutiny analysis applies. However, since peremptory challenges allow for invidious discrimination toward certain groups, this Note argues that the Court's recent interpretation of the Fourteenth Amendment in the

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context of sexual orientation calls into serious doubt whether the discriminatory use of peremptory challenges toward members of the gay and lesbian community can even withstand a rational -basis review. Further, it argues that the discriminatory use of peremptory challenges toward members of the gay and lesbian community could be avoided by respecting the privacy interest of a prospective juror's sexual orientation during voir dire, because this too comports with the Court's recent interpretation of gay rights.

Text

[*1093]

I. Introduction

"Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." [1]

Andy, an ambitious partner in a large law firm, is suspected of having AIDS after a colleague discovers lesions on Andy's body. [2] After an investigation into Andy's background, the firm discovers Andy is gay. In an effort to protect the firm's reputation amongst its high-paying corporate clients, the firm undertakes a fraudulent campaign to remove Andy. Upon the firm's execution of that plan, Andy brings a wrongful termination claim. At the commencement of the jury trial, Andy and his attorney want to probe the jury panel to find possible jurors who are either sympathetic to or prejudiced against the gay community, as the case will inevitably involve sensitive issues concerning Andy's sexual orientation. Likewise, the firm and its attorneys want to eliminate any jurors who are sympathetic to Andy's position and possibly want to retain any jurors who hold an animus toward the gay community.

On the other side of the country, Dan White, a former member of the San Francisco Board of Supervisors, is charged with double murder. [3] Because Mr. White opposed gay-rights initiatives while serving in his capacity as a supervisor, [4] the defense wants to eliminate any juror who is sympathetic to the gay and lesbian community. After securing a jury composed of no gays or lesbians, Mr. White is convicted of two counts of voluntary manslaughter, which is greatly reduced from the two counts of first-degree murder for which he was charged. [5]

The judicial system affords Andy, the firm, and Mr. White the right, during voir dire proceedings, to eliminate, without cause, a certain number of jurors that each party feels will hinder his or her case. Such elimination comes in the form of a peremptory challenge.

Voir dire simply "refers to the jury-selection phase of a trial." [6] A peremptory challenge is the process by which a party may remove a potential jury member from the case without giving reason, as long as that party does not remove the potential jury member because of his or her race, gen-

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[1] Powers v. Ohio, 499 U.S. 400, 407 (1991).

[2] The following scenario is loosely based on the movie Philadelphia. Philadelphia (Columbia TriStar Home Entm't 1993).

[3] People v. White, 172 Cal. Rptr. 612, 612 (Cal. Ct. App. 1981).

[4] Mike Weiss, Double Play: The San Francisco City Hall Killings 42-44 (1984).

[5] White, 172 Cal. Rptr. at 615. Among other things, this case is infamously known as the "Twinkie Defense" case. Id. In essence, it was alleged that Mr. White claimed that his consumption of Twinkie cakes caused him impaired judgment. Michael David Weiss, Critique of Pure Punishment, 19 Am. J. Crim. L. 71, 72 n.8 (1991).

[6] Black's Law Dictionary 1605 (8th ed. 2004).

der, or [*1094] ethnicity. [7] To date, either party to litigation may remove, without cause, a potential jury member because of his or her sexual orientation.

One may wonder how often the issue of sexual orientation really comes into play during voir dire. With the proliferation of hate-crime statutes [8] and litigation concerning gay and lesbian rights, the issue becomes of great importance. In fact, it is often stated that a trial is won or lost during voir dire. [9]

This Note discusses recent Supreme Court cases, [10] although not decided in the realm of peremptory challenges, which concern issues important to gay and lesbian rights. It then discusses the application of those cases to Batson v. Kentucky[11] and the use of peremptory challenges. Part II of this Note discusses the history of peremptory challenges under common law and their adoption by the United States. [12] Further, Part II of this Note reviews the history leading up to the landmark case of Batson v. Kentucky[13] and the cases that follow it.

In Part III, this Note discusses the Supreme Court's interpretation of sexual orientation as analyzed under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. [14] Part IV of this Note examines sexual orientation in the jury process and whether gay and lesbian jury [*1095] members have a protected privacy interest during voir dire. [15] This Note concludes that because of the Court's decisions in Romer v. Evans [16] and Lawrence v. Texas, [17] sexual orientation should be protected from the discriminatory use of peremptory challenges, and

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[7] Id. at 245. The purposes behind peremptory challenges are that: (1) "the law wills not that [the defendant] should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike," and (2) if a party's challenge for cause fails, that party should be afforded the right to strike that potential juror in order to prevent any resentment stemming from a failed challenge for cause. Lewis v. United States, 146 U.S. 370, 376 (1892). This Note does not discuss in depth for-cause challenges to the removal of potential jury members.

[8] See Paul R. Lynd, Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories, 46 UCLA L. Rev. 231, 237-38 n.19 (1998). Lynd lists a number of jurisdictions that have hate-crime statutes:

Cal. Lab. Code 1102.1 (West Supp. 1998); Conn. Gen. Stat. Ann. 46a-81a to -81r (West 1995); D.C. Code Ann. 1-2512, 1-2515, 1-2519 (1992 & Supp. 1998); Haw. Rev. Stat. 378-2 (Supp. 1997); Mass. Gen. Laws Ann. ch. 151B, 4 (West Supp. 1998); Mass. Gen. Laws Ann. ch. 272, 92A (West 1990); Minn. Stat. Ann. 363.01 (West 1991 & Supp. 1998); N.H. Rev. Stat. Ann. 354-A:1-17 (Supp. 1997); N.J. Stat. Ann. 10:5-4 to -12 (West Supp. 1998); R.I. Gen. Laws 28-5-7 (Supp. 1997); Vt. Stat. Ann. tit. 3, 961, 963 (1995); Vt. Stat. Ann. tit. 9, 4502, 4503 (1993); Vt. Stat. Ann. tit. 21, 495 (Supp. 1997); Wis. Stat. Ann. 106.04, 111.31 (West 1997); Wis. Stat. Ann. 230.18 (West 1987).

Id.

[9] See Williams v. Bagley, 380 F.3d 932, 978 (6th Cir. 2004) (discussing how, in capital offenses, "the case often is won or lost at voir dire").

[10] See infra Part III.

[11] 476 U.S. 79 (1986).

[12] See infra Part II.

[13] 476 U.S. 79 (1986).

[14] See infra Part III.

[15] See infra Part IV.

[16] 517 U.S. 620 (1996).

[17] 539 U.S. 558 (2003).

courts should afford gays and lesbians a privacy interest during voir dire questioning. [18]

II. The History of Peremptory Challenges

Peremptory challenges have a long history tracing back to England. However, the legal system in America has deviated from the original English law concerning peremptory challenges.

A. Common Law Peremptory Challenges and America's Adoption of Peremptory Challenges

The peremptory challenge dates back at least to the time of King Edward. [19] During this time, the Crown allotted thirty-five peremptory challenges to any defendant charged with a felony. [20] The King established that the Crown or prosecutor, not the defendant, had to show cause when removing a potential jury member from the case. [21] But English common law indicated otherwise. In essence, the Crown's challenges were unlimited, and only upon the failure to impanel a full jury was the Crown required to establish cause. [22] This practice by the Crown became known as "to stand aside." [23]

[*1096] It was established that the King could challenge any juror, and that challenged juror would "stand aside" to wait until every other juror had been either established as a jury member or peremptorily struck. [24] Only if there was a deficiency in the number of jurors would the King be required to show cause for those jurors struck or "standing by." [25] Further, if the court failed to impanel a full jury, then the prosecution would be required to establish cause for the jurors properly standing by "in the order they stood on the panel." [26]

1. Statutes Pertaining to Peremptory Challenges

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[18] See infra Part V.

[19] The English law during that time stated:

> He that challengeth a Jury or Juror for the King, shall shew the Cause … That from henceforth notwithstanding it be alleged by them that sue for the King, that the Jurors of those Inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that Cause; but if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be Inquired of, according to the Custom of the Court … .

1305, 33 Edw. 1, stat. 4 (cited in Trial of O'Coingly's Case, 26 How. St. Tr. 1191, 1232 (1798)).

[20] William Blackstone, 4 Commentaries 347. During the reign of King Henry, the King changed the number of peremptory challenges allotted to the defendant from thirty-five to twenty. 22 Hen. 8, c. 14, 6 (1530) ("And that no person arraigned for any petit treason, murder or felony, be from henceforth admitted to any peremptory challenge above the number of XX."). However, three years later the King made no exceptions to the number of peremptory challenges allotted to the defendant. 25 Hen. 8, c. 3, 2 (1533).

[21] 22 Hen. 8, c. 14, 6 (1530).

[22] Trial of O'Coingly's Case, 26 How. St. Tr. at 1242. See generally Trial of Lord George Gorden, 21 How. St. Tr. 485 (1781) (indicating that the Crown could challenge at-will).

[23] For a discussion of the "stand aside" system under common law, see Justice Burger's dissenting opinion in Batson v. Kentucky, 476 U.S. 79, 119-20 (1986).

[24] Regina v. Geach, 9 Car. & P. 499, 499, 173 Eng. Rep. 929, 929 (1844).

[25] Id.

[26] Mansell v. Regina, 8 El. & Bl. 54, 96-97, 120 Eng. Rep. 20, 36 (1857).

The Sixth Amendment to the United States Constitution guarantees a trial by an impartial jury. [27] Interestingly, however, the Constitution does not guarantee the use of peremptory challenges or that Congress enact them in order to facilitate the system of impaneling an impartial jury. [28]

But, in 1790, the first Congress declared that in proceedings concerning treason, a court had to give each defendant thirty-five peremptory challenges. [29] In other felony proceedings punishable by death, the defendant had to be allowed twenty peremptory challenges. [30]

[*1097] Later, Congress gave the states the power to adopt rules necessary for the ″designation and empanelling of juries″ in any proceeding involving criminal or civil actions. [31] Thus, if a given state allowed the government to stand aside, the federal courts would adhere to the state's law. [32] There is some indication that, in 1790, Congress never intended to adopt the old English common law system in its entirety, especially in regard to the Crown's (government's) use

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[27] U.S. Const. amend. VI (″In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … .″). It is not the purpose of this Note to explore Sixth Amendment challenges as applied to the exclusion of gays and lesbians from the jury venire. The Sixth Amendment only requires, implicit within the terms ″impartial jury,″ that a fair cross-section of the community be included in the list of possible jurors. Taylor v. Louisiana, 419 U.S. 522, 527-28 (1975). The Supreme Court has further held that ″″we have never invoked the fair-cross-section principle … to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.'″ Holland v. Illinois, 493 U.S. 474, 482-83 (1990) (quoting Lockhart v. McCree, 476 U.S. 162, 173 (1986)); see also Duren v. Missouri, 439 U.S. 357, 364 (1979) (announcing the three elements that establish a violation of the fair-cross-section requirement: (1) that the excluded individual be from a ″″distinctive' group″; (2) that the method of drawing such ″distinctive″ members does not result in a relational percentage of those members in the community; and (3) that there be systematic exclusion). Thus, because jury venires are often drawn from voter registration lists within the community, and because such registration probably does not require one to mark his or her sexual orientation, it is difficult to find systematic exclusion of gays or lesbians from the jury venire. As a result, this Note will not concern itself with Sixth Amendment challenges.

[28] Stilson v. United States, 250 U.S. 583, 586 (1919).

[29] Act for Regulating the Military Establishment of the United States, ch. 10, 30, 1 Stat. 119, 199 (1790).

[30] Id. However, in 1865, Congress finally gave the government five peremptory challenges in cases concerning capital punishment or treason, whereas the defendant was entitled to twenty peremptory challenges. Act Regulating Proceedings in Criminal Cases, ch. 86, 2, 13 Stat. 500, 500 (1865). For all other offenses, Congress gave the government two peremptory challenges and the defendant ten. Id. Seven years later, Congress gave the government one additional peremptory challenge, raising it to three for felony cases not concerning punishment by death or treason. Amendment to Act to Regulate the Diplomatic & Consular Systems of the United States, ch. 333, 2, 17 Stat. 282, 282 (1872). In all other criminal and civil cases, Congress gave either party, whether charged jointly or severally, three peremptory challenges. Id. In 1911, Congress gave the government six peremptory challenges (one additional) for cases concerning punishment by death or treason, whereas the defendant still retained twenty peremptory challenges. Ch. 10, 287, 36 Stat. 1164, 1166 (1911).

Today, Congress has designated by statute that each party will have three peremptory challenges for civil cases, and it is up to the judge's discretion to grant additional challenges when the parties are joint or severable. 28 U.S.C. 1870 (2000).

For criminal cases punishable by death, Congress has given both the government and defendant(s) twenty peremptory challenges. Fed. R. Crim. P. 24(b)(1). Additionally, in all other felony cases where the punishment is more than one year, the government has six peremptory challenges, while the defendant(s) have ten. Fed. R. Crim. P. 24(b)(2). And for misdemeanors concerning punishment by fine or imprisonment for one year or less, or both, Congress has given each party three peremptory challenges. Fed. R. Crim. P. 24(b)(3). In all instances, the judge may allow additional peremptory challenges when the defendants are joint or severable. Fed. R. Crim. P. 24(b).

[31] Amendment to Act to Establish the Judicial Courts of the United States, ch. 47, 5 Stat. 394, 394 (1840) (emphasis added).

[32] See United States v. Shackleford, 59 U.S. (1 How.) 588, 589 (1855) (stating that the fact that Congress, in 1790, gave the defendant a certain number of peremptory strikes does not necessarily mean that the English common law, which allowed the government peremptory strikes, was also incorporated within the Act of 1790).

of peremptory challenges. [33]

2. Early American Case Law Pertaining to Peremptory Challenges

Although in 1790 Congress prescribed by statute the number of peremptory challenges afforded the defendant, [34] at least one state followed the law as laid down during the time of King Edward. This state allotted defendants thirty-five peremptory challenges, even if the crime charged was not treason. [35] The reason was that peremptory challenges were ″a privilege highly esteemed, and anxiously guarded, at the common law.″ [36] Even further, some states, after Congress gave the government a qualified right to [*1098] peremptory challenges, [37] still adhered to the ″stand aside″ system under common law. [38]

B. Peremptory Challenges and Jury Composition Prior to Batson v. Kentucky

The impetus for restricting modern-day peremptory challenges stems from the 1879 case Strauder v. West Virginia. [39] Strauder stands for the proposition that a state denies equal protection to a black defendant when the defendant is tried before a jury in which members of the defendant's race have been purposefully excluded from participating. [40] At issue in Strauder was a West Virginia statute, which made only white males eligible for jury duty. [41] The decision in Strauder did not conclude that members of the same race as the defendant would be better able to judge the defendant, but only that it was a denial of equal protection to give a defendant a jury in which members of the defendant's race were not allowed to participate. [42] Although Strauder never raised the issue of peremptory challenges, it did discuss the detrimental impact of purposefully denying participation in jury service based on a group characteristic. [43]

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[33] Id. Thus, peremptory challenges were only available to defendants and not the government. But see Sawyer v. United States, 202 U.S. 150, 158-59 (1906) (indicating that the English common law's allowance of peremptory strikes by the government has survived in certain states since formation).

[34] Act for Regulating the Military Establishment of the United States, ch. 10, 30, 1 Stat. 119, 119 (1790).

[35] United States v. Johns, 4 U.S. (1 Cranch) 412, 414 (1806).

[36] Id.

[37] Act Regulating Proceedings in Criminal Cases, ch. 86, 2, 13 Stat. 500, 500 (1865).

[38] See Sawyer v. United States, 202 U.S. 150, 158-59 (1906) (stating that North Carolina, South Carolina, and Pennsylvania still adhered to the ″stand aside″ system).

[39] 100 U.S. 303 (1879).

[40] Id. at 310; see also 18 U.S.C. 243 (1948) (″No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude … .″). For purposes of this Note, it is doubtful that 243 applies to sexual orientation. However, there may be an argument that members of the gay and lesbian community fall within the phrase ″previous condition of servitude.″ Id. Although taken literally this phrase applies to slavery, a more broad definition may encompass the struggles of the gay and lesbian community in fighting for equal treatment. Such struggles could be evidenced by the facts of Romer v. Evans alone, in which the state of Colorado singled out the gay and lesbian community for unequal treatment in the application of its laws concerning discrimination. See generally Romer v. Evans, 517 U.S. 620 (1995).

[41] Strauder, 100 U.S. at 305.

[42] Id. at 310.

[43] Id. at 309.

Swain v. Alabama[44] addressed the issue of peremptory challenges and jury composition. Enshrining peremptory challenges as if they were an historical landmark, the Supreme Court refused to find a violation of the Equal Protection Clause when the state used peremptory challenges to strike every black member from a jury panel. [45] The Court found a lack of state action, which is required for the Fourteenth Amendment to apply, because [*1099] ″defense counsel participated in the peremptory challenge system, and indeed generally [had] a far greater role than any officers of the State.″ [46]

The Court noted that there might be an equal protection violation if the defendant proved that the State had systematically excluded black jury members with its use of peremptory challenges over a certain period of time. [47] This was most likely a heavy burden on the defendant, since voir dire proceedings were probably not recorded. [48] Of particular note, the Court stated, ″nor is the constitutional command forbidding intentional exclusion [of jury members] limited to [the black community]. It applies to any identifiable group in the community which may be the subject of prejudice.″ [49]

C. Recognizing the Discriminatory Use of Peremptory Challenges in Batson v. Kentucky

More than twenty years later, in Batson v. Kentucky, the Supreme Court resurrected the notion that, when using its peremptory challenges, the government had to establish cause in certain circumstances. [50] The Court held that it was a violation of equal protection when the government peremptorily struck a black juror based solely on that juror's race. [51]

In discussing its decision, the Court noted that not only were the defendant's Fourteenth Amendment rights in jeopardy when the State purposefully excluded jurors based on race, but the State also ″unconstitutionally discriminated against the excluded juror.″ [52] The Court also noted how purposeful exclusion in the jury selection process reached beyond the actual parties and excluded juror(s) to encompass the community at large. [53] The Court stated that such purposeful exclusion [*1100] ultimately caused the community to feel that the justice system had acted arbitrarily. [54]

The holding of Batson can be summarized as follows: (1) ″The defendant initially must show

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[44] 380 U.S. 202 (1965).

[45] Id. at 221.

[46] Id. at 227.

[47] Id.

[48] The Supreme Court seems to have believed that the prosecutor would voluntarily offer information regarding whether there had been systematic exclusion of black jurors through the use of peremptory challenge, ″especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter.″ Id. at 227-28.

[49] Swain, 380 U.S. at 204-05 (emphasis added) (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

[50] 476 U.S. 79, 93 (1986).

[51] Id. at 100.

[52] Id. at 87 (″As long ago as Strauder, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.″ (citing Strauder v. West Virgina, 100 U.S. 303, 308 (1879))).

[53] Id. (″The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.″).

[54] Id. (″Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.″).

that he is a member of a racial group capable of being singled out for differential treatment," [55] and "the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"; [56] (2) "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate'"; [57] and (3) "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." [58] The Court also stated that it was up to the trial judge to consider all "relevant circumstances" offered by the defendant, including "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." [59]

However, the initial burden always rests on the defendant to establish the existence of purposeful discrimination. [60] Further, the defendant can meet this burden through a showing of disparate impact. [61] Thus, if the defendant can establish that all black jurors were excluded in a given situation, there is an "inference of discriminatory purpose." [62] If this condition is satisfied, the defendant has met his or her burden, and the government must come forth with a neutral criterion upon which exclusion was based. [63]

The Court noted that, although this new process to the peremptory challenge undermines the historical use of such a challenge, the government's explanation for such a challenge does not need to rise to the level of a for-cause challenge. [64] However, the government's explanation cannot rest on the idea that, because the juror is of a certain race, he or she will be more partial to the defendant. [65]

[*1101] Batson is very similar to other equal protection cases the Court has decided. For instance, where the State impermissibly and unequally applies a law to a certain protected class of individuals, the law will be reviewed under strict-scrutiny analysis. [66] Under such an analysis, the State must have a "compelling governmental interest" for applying the law unequally, and the means to achieving that state interest must be narrowly tailored. [67]

Thus, in Batson, upon a showing by the defendant that the State had treated members of the black community differently when using its peremptory challenges, a similar form of strict-scrutiny analysis applied. The State had to come forward with a compelling justification for the narrowly tailored challenge. Under most circumstances, the State's compelling interest would be

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[55] Batson, 476 U.S. at 94 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

[56] Id. at 96.

[57] Id. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[58] Id.

[59] Id. at 96-97.

[60] Batson, 476 U.S. at 93.

[61] Id.

[62] Id. at 93-94.

[63] Id. at 94.

[64] Id. at 97.

[65] Batson, 476 U.S. at 97.

[66] See Palmore v. Sidoti, 466 U.S. 429, 430-32 (1984) (finding that strict scrutiny applied when the State impermissibly awarded custody to the father in a custody proceeding because the mother remarried an African-American).

[67] Id. at 432-33.

the impaneling of an impartial jury. [68] Any justification based on race alone is not narrowly tailored to meet that impartial-jury interest, because voir dire proceedings provide an avenue for revealing bias among jurors. [69] Further, under no circumstance is invidious discrimination toward a certain group allowed under equal protection analysis. [70] The holding of the Batson Court comports with this understanding of equal protection by requiring the State to offer a neutral explanation for applying the law discriminatorily. [71]

After the ruling in Batson, one might wonder if the Court sounded the death knell for peremptory challenges. However, it is important to keep in mind that under the old common law system, the government always had to offer a reason for excluding a juror when a full jury was not impaneled. Thus, while the Court's decision seemed like a drastic deviation from the [*1102] modern-day use of peremptory challenges, Batson in fact did nothing short of or beyond what the old system had already established.

D. Recognizing the Conditions and Classes in Post-Batson v. Kentucky Cases

After Batson, it was inevitable that the Court would face an onslaught of cases involving the issue and scope of peremptory challenges. The issues presented in these cases ranged from whether a plaintiff had standing to bring a Batson claim to whether gender and religious affiliation were protected classes.

1. Standing to Bring a Batson Claim

In Powers v. Ohio, the Court addressed the issue of whether a white defendant had standing to raise a Batson claim when the government systematically excluded black jurors. [72] The Court answered this issue in the affirmative; [73] however, of particular importance is what the Court echoed from its Batson decision. [74] In evaluating the issue of standing, the Court stated that it is often not the case that a juror who has been discriminated against in the jury-selection process will bring a separate suit for such a claim. [75] Because of this, the Court found it necessary to let

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[68] See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 137 n.8 (1994) (stating that "what [the State] fails to recognize is that the only legitimate interest it could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury"). The Court went on to state that "this interest does not change with the parties or the causes. The State's interest in every trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner." Id. These statements by the Court are of monumental significance to this Note, because under traditional equal protection analysis, the State's interest in using peremptory challenges is confined to the context of securing an impartial jury. This issue will be explored in Part IV.

[69] See id. at 143-44 (stating that "voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently").

[70] Romer v. Evans, 517 U.S. 620, 633 (1996).

[71] Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) ("The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.").

[72] Powers v. Ohio, 499 U.S. 400, 404 (1991).

[73] Id. at 415.

[74] See Batson, 476 U.S. at 87 (indicating that there is a distinct violation of the juror's constitutional rights when he or she is purposefully discriminated against).

[75] Powers, 499 U.S. at 414. It took nearly half a century after the adoption of the Fourteenth Amendment for a juror to bring a separate claim for racial discrimination in the jury-selection process. See generally Carter v. Jury Comm'n, 396 U.S. 320 (1970).

the defendant raise the issue in order to vindicate the juror's right. [76] The Court found that there are two distinct injuries from purposeful discrimination under a Batson violation: (1) the defendant's injury and (2) the excluded juror's injury.

Further, the rationale of Batson, which considered the need to protect the integrity of the judicial system in the eyes of the public and the opportunity to fulfill the civic duty of jury service, carried over to Powers. [77] However, Powers chipped away at an important rule from the Batson holding. Under Batson, the defendant had to be a member of a racial class capable of being singled out for discrimination. [78] In Powers, the defendant was white. After Powers, it would seem that any defendant can raise a Batson claim as long as the juror falls under a protected class.

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2. Recognizing Batson Claims in Civil Proceedings

Although state action may have been lacking in Swain v. Alabama, [79] despite the fact that the government was a party to the suit, the Court nonetheless decided in Edmonson v. Leesville Concrete Co. that a party to a civil action could raise a Batson claim. [80] The Edmonson Court found sufficient state action for the Fourteenth Amendment to apply based on the sole fact that the court system, a government entity, facilitated voir dire and other actions in a civil proceeding. [81] The Court noted that ″peremptory challenges have no significance outside a court of law.″ [82] Without the assistance and authority of the court, a private party would not be able to use peremptory challenges. [83]

The Court concluded that ″the fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised.″ [84] Further, the Court stated that, although the Powers case was decided within the criminal law context, its holding also applies to civil trials. [85] Thus, a private litigant also has standing to raise a Batson claim.

3. The Defense's Use of Peremptory Challenges in Criminal Trials

Until 1992, peremptory-challenge cases looked at only the State's discriminatory use of peremptory challenges. However, in Georgia v. McCollum, the Supreme Court addressed the issue of whether a criminal defendant could use peremptory challenges in a discriminatory manner toward black jurors. [86]

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[76] Powers, 499 U.S. at 415.

[77] Id. at 409.

[78] Id. at 416.

[79] 380 U.S. 202, 227 (1965).

[80] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614-15 (1991).

[81] Id. at 624.

[82] Id. at 620.

[83] Id. at 621.

[84] Id. at 626.

[85] Edmonson, 500 U.S. at 629.

[86] 505 U.S. 42, 44 (1992).

First, the Court stated that Batson's rationale of protecting the integrity of the judicial system, as viewed by the community, and preserving the dignity of potential jurors from racial discrimination also applied to the case of a defendant's discriminatory challenge. [87] Second, the Court noted that, like in Edmonson, there was sufficient state action for the Fourteenth Amendment to apply. [88] In support of this second point, the Court stated that the defendant in a criminal proceeding, much like a private litigant in a civil [*1104] proceeding, gains assistance from the state in using and administering peremptory challenges, and thus there is state action. [89]

The Court further found that the State has standing to challenge a defendant's discriminatory use of a peremptory challenge. [90] The same rationale from Powers carried over to the State's claim to have standing, in part because it is the rare instance that a juror will vindicate his or her own rights. [91] In sum, the McCollum Court held that a criminal defendant may not use peremptory challenges in a manner that discriminates based on race. [92]

4. Recognizing Gender as a Protected Class Against the Discriminatory Use of Peremptory Challenges

Finally, in addition to treating race as a class protected against the discriminatory use of peremptory challenges, the Supreme Court protects gender. [93] In J.E.B. v. Alabama ex rel. T.B., the Court addressed the issue of whether it is permissible for a State to use its peremptory strikes to exclude male members from a jury. [94]

While the issue in J.E.B. involved discrimination against male jurors, the Court evaluated the long historical plight of women and their lack of participation in the democratic process. [95] Although the Court did not apply strict-scrutiny analysis, as it did in Batson, it did apply heightened scrutiny, which is typical of gender-based classification claims. [96] Under such scrutiny, the state must proffer ″″an exceedingly persuasive justification'″ for the discrimination, and the means to achieving that justification must substantially further the end. [97]

The Court noted that, in using peremptory challenges, the State's only interest was ″securing a fair and impartial jury.″ [98] The Court went on to reject the State's justification that male jurors are more sympathetic toward males and that their exclusion assists in impaneling an impartial jury.

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[87] Id. at 49.

[88] Id. at 54-55.

[89] Id.

[90] Id. at 57.

[91] McCollum, 505 U.S. at 57.

[92] Id. at 59.

[93] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); see also Di Donato v. Santini, 232 Cal. App. 3d 721, 738 (Cal. Ct. App. 1991) (finding gender to be a protected class three years prior to J.E.B.).

[94] J.E.B., 511 U.S. at 129.

[95] Id. at 131-36.

[96] Id. at 136.

[97] Id. (quoting the test from several cited equal protection cases).

[98] Id. at 137 n.8 (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991)); see also supra note 68 (highlighting the importance of the Court's elucidation of the interest at stake).

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[*1105] In its rationale, the Court noted that it would not accept a justification that the Fourteenth Amendment purposefully eradicates. [100] The Court stated, ″intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.″ [101]

Similar to its previous cases concerning Batson challenges, the Court mentioned the harm done to the community and its perception of the judicial system. [102] The Court also stated that permitting the discriminatory use of peremptory challenges sends a message that certain members of society are unqualified to decide important issues and undertake a civic duty. [103]

5. Failing to Recognize Religious Affiliation as a Protected Class Against the Discriminatory Use of Peremptory Challenges

To date, the Supreme Court has refused to review whether religious affiliation is a protected class in the context of peremptory challenges. [104] In refusing to grant certiorari for a religion-based Batson claim, Justice [*1106] Ginsburg clarified the lower court's finding that religious affiliation is not as self-evident as race and gender, and, therefore, the Court should not give it the same protection. [105] In essence, a juror's religious belief is not readily cognizable without prob-

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[99] J.E.B., 511 U.S. at 138-42.

[100] Id. at 139 n.11.

[101] Id. at 130-31 (emphasis added).

[102] Id. at 140 (″The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.″). On this same issue the Supreme Court stated:

The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the ″deck has been stacked″ in favor of one side.

Id.

After the Dan White trial, which was discussed in the introduction to this Note, many gay and lesbian individuals took to the streets of San Francisco protesting the exclusion of gay and lesbian jurors from the trial. See Lynd, supra note 8, at 234 (discussing the riots that ensued after the White trial and the animosity the gay community felt toward the judicial system). The Court's concern for the community's perception of the judicial system, especially in cases concerning issues of rape, paternity, etc., and the discriminatory use of peremptory strikes toward women in those cases, also calls for concern over the discriminatory use of peremptory challenges toward members of the gay and lesbian community, especially in cases concerning hate crimes toward members of the gay and lesbian community. Thus, the same logic should carry over to the context of the invidious use of peremptory challenges toward the gay and lesbian community.

[103] J.E.B., 511 U.S. at 142.

[104] Davis v. Minnesota, 511 U.S. 1115, 1115-16 (1992); see also United States v. Clemmons, 892 F.2d 1153, 1156 (3d Cir. 1989) (upholding a conviction in a case where the prosecutor offered evidence that he had struck an ethnic juror not based on the juror's race, but rather based on the religious affiliation of the juror). The Supreme Court ultimately denied a review of that case. Clemmons v. United States, 496 U.S. 927 (1990).

[105] Davis, 511 U.S. at 1115 (Ginsburg, J., concurring).

ing him or her during voir dire - such questioning could readily be controlled by the court. [106] However, Justice Thomas argued in his strong dissent that all classes afforded heightened scrutiny will inevitably be analyzed under Batson after the Court added gender to the list. [107] As this Note will examine, both Justice Ginsburg's concurrence and Justice Thomas's dissent call into question whether sexual orientation should be a protected class under the Batson analysis. [108]

III. Sexual Orientation Under Equal Protection and Due Process

Thus far, the Supreme Court has refused to hold sexual orientation to heightened-scrutiny analysis. Instead, the Court reviews sexual orientation under a rational-basis standard. As the following case indicates, invidious discrimination by state actors toward members of the gay and lesbian community fails even rational-basis review.

A. Romer v. Evans

In Romer v. Evans, [109] the Supreme Court struck down an amendment to the Colorado Constitution that explicitly denied gays and lesbians equal protection from discrimination. [110] The Court based its decision on a rational-basis standard of review and a finding of invidious discrimination. [111] The Court found that the ″sheer breadth [of the amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.″ [112]

The primary rationales offered by the State for the legislation were ″freedom of association″ and ″conserving resources to fight discrimination against other groups.″ [113] In response to these rationales, the Court commented that ″the breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them … . It [*1107] is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests … .″ [114] In addition to finding a lack of rational relation between the state interest and the means of achieving that interest, the Court further found that the amendment was nothing short of invidious discrimination against members of the gay and lesbian community: ″We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.″ [115]

Although the traditional Batson claim has required the affected individual to belong to a class afforded at least heightened scrutiny (i.e., race and gender), [116] the Romer analysis is encourag-

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[106] Id.

[107] Id. at 1116 (Thomas, J., dissenting).

[108] Id.; see also Vanessa H. Eisemann, Striking a Balance of Fairness: Sexual Orientation and Voir Dire, 13 Yale J.L. & Feminism 1, 26 (2001) (arguing that sexual orientation should be analyzed under Batson).

[109] 517 U.S. 620 (1996).

[110] Id. at 635.

[111] See id. at 632 (noting that the Colorado amendment ″fails, indeed defies, even this [rational-basis] conventional inquiry″).

[112] Id.

[113] Id. at 635.

[114] Romer, 517 U.S. at 635.

[115] Id.

[116] J.E.B. v. Alabama ex rel. T.B., 511 U.S 127, 136 (1994).

ing to a Batson claim based on invidious discrimination toward gay and lesbian jurors. [117] Of particular importance is what the Court stated in its decision of J.E.B. v. Alabama ex rel. T.B., where the Court found gender to be a class protected from the discriminatory use of peremptory challenges. [118]

In J.E.B., the Court noted that its ruling did not eliminate the purpose of peremptory challenges; any party could still use such challenges toward groups or individuals that are typically ″subject to ″rational basis' review.″ [119] Oddly enough, in support of this rational-basis proposition, the Court cited City of Cleburne v. Cleburne Living Centers, Inc. [120]

In Cleburne, the Court found that mental disability is not a suspect class calling for heightened scrutiny. Instead, the Court concluded that mental disability falls under rational-basis review. [121] At issue in Cleburne was a city zoning ordinance that prohibited a home for the mentally disabled from operating within the city. [122] The Court concluded that the city's zoning scheme elicited no rational basis, but rather evidenced invidious discrimination toward mentally disabled individuals as a group. [123] As such, the Court struck down the zoning scheme, as it could not even withstand rational-basis analysis. [124]

[*1108] Thus, from the Court's citation of Cleburne for the proposition that groups falling under rational-basis review may still be subject to the discriminatory use of peremptory challenges, there is a strong argument that in certain circumstances the invidious use of peremptory challenges toward members of the gay and lesbian community, which fall under rational-basis review, [125] should be banned under the same reasoning as Cleburne. One may take from the Court's citation of Cleburne that where peremptory challenges are used in an invidious manner toward groups falling under rational-basis review, such challenges should not survive.

B. Lawrence v. Texas

In Lawrence v. Texas, the Court invalidated a Texas sodomy law that made it illegal for same-sex couples, but not opposite-sex couples, to engage in acts of sodomy. [126] Ultimately, the Court based its decision on due-process grounds as applied to a gay defendant because the law invaded the defendant's fundamental right to privacy. [127]

In Justice O'Connor's concurrence in Lawrence, she indicated that the case should have been de-

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[117] See infra Part IV (arguing that even under traditional Batson analysis there is no rational justification for invidiously excluding a juror based on sexual orientation).

[118] J.E.B., 511 U.S. at 146.

[119] Id. at 143 (″Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ″rational basis' review.″).

[120] Id. (citing City of Cleburne v. Cleburne Living Centers, Inc., 473 U.S. 432, 439-42 (1985)).

[121] Cleburne, 473 U.S. at 441-42.

[122] Id. at 435.

[123] Id. at 450.

[124] Id.

[125] See supra Part III.A (discussing the Supreme Court's review and standards of evaluating discrimination based on sexual orientation).

[126] 539 U.S. 558, 564 (2003).

[127] Id. at 570.

cided under equal-protection analysis. [128] As peremptory challenges are evaluated under an equal -protection analysis, [129] Justice O'Connor's concurrence lends support to a Batson claim based on sexual orientation. [130] Further, the majority noted that, had the facts of the case been different (i.e., the sodomy law was discriminatorily applied more often to gay couples than to heterosexual couples), equal-protection analysis might have been the proper method for evaluating the case. [131]

[*1109] While the Court decided Lawrence on due-process grounds, it pointed out that ″equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.″ [132] Finally, besides containing strong dicta for the equal protection of members of the gay and lesbian community, the Lawrence decision ultimately stands for the proposition that members of the gay and lesbian community have a fundamental right to privacy in their lives. [133]

IV. Sexual Orientation in the Jury Process and Under Batson Analysis

The Supreme Court's rationale in Batson should carry over to protect sexual orientation from the discriminatory use of peremptory challenges.

A. Overview of Cases Addressing Sexual Orientation as Applied to Voir Dire

Voir dire is the process by which attorneys probe for potential biases particular jurors might have against their clients. In cases where the sexual orientation of a client may be a factor, an attorney most likely will probe for bias against or for members of the gay and lesbian community in general. The proper method of probing for this bias can become a sensitive issue, especially where a particular juror is asked point-blank whether he or she is gay or lesbian. Under such circumstances, this is an invasion into the private life of a potential juror. Courts are split on the issue of whether such point-blank questioning should be allowed.

For instance, in the Dan White trial, which this Note discussed in Part I, the trial judge refused to allow the defense counsel to inquire as to whether or not potential jurors were gay or lesbian.

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[128] Id. at 579 (O'Connor, J., concurring).

[129] Batson v. Kentucky, 476 U.S. 79, 93 (1986).

[130] See People v. Garcia, 92 Cal. Rptr. 2d 339, 344 (Cal. Ct. App. 2000) (finding gays and lesbians to be a class protected from the discriminatory use of peremptory challenges based on state law).

[131] Lawrence, 539 U.S. at 575. Lawrence involved ″a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.″ Id. at 560. The Supreme Court stated, ″were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.″ Id. at 575. In essence, the Court feared that Texas would do an end-run around an equal-protection holding by making it flat-out criminal to engage in acts of sodomy, no matter whether such acts were conducted in private between members of the same sex or of opposite sexes. One may wonder, had the Texas statute been worded differently so as to penalize opposite-sex couples, and had that statute been applied discriminatorily to same-sex couples, would the Supreme Court have decided the case on equal-protection grounds and found sexual orientation to be a protected class?

[132] Id. at 575. It is not the contention of this Note that by making this statement, the Court is implying that a ruling on due-process grounds also indicates that Lawrence would be upheld on equal-protection grounds. However, it is significant that the Court made this statement, for as this Note argues in Part IV, a court should recognize a substantive due process right to privacy during voir dire. If state actors invade such a right, then opposing counsel should be able to raise a Batson challenge as applied to equal protection. A Batson challenge is appropriate if the Court's decision in Lawrence is supposed to advance both interests: privacy and equal protection in the law.

[133] Id. at 569.

[134] However, in People v. Hendricks, a high-profile case where the defendant sought out and murdered members of the gay community, the court allowed both the prosecution and the defense to ask jurors in camera whether they were gay or lesbian. [135]

In another case concerning a hate crime toward two gay men, which ultimately ended in death for one of them, the court allowed defense counsel to inform prospective jurors that they may be asked their sexual orientation and that each juror could request a private interview concerning [*1110] questions about his or her sexual orientation. [136] Beyond this, other courts have refused to allow counsel to even question potential jury members during voir dire concerning their possible biases toward members of the gay and lesbian community. [137]

In Press Enterprise Co. v. Superior Court of California, the Supreme Court held that a trial judge may not close certain portions of voir dire from the public in order to preserve the privacy of potential jurors without particular reasons for doing so. [138] This ruling is important because it allows the community to gain confidence in the judicial system, something about which the Batson Court was concerned. [139]

In essence, by the Court allowing the public to view voir dire, the public is better able to contemplate whether the system is prejudicial. What is of concern is that this ruling allows the public to delve into the private lives of prospective jurors, possibly revealing a juror's sexual orientation.

B. Application of Romer and Lawrence to the Jury-Selection Process and Peremptory Challenges

The decision in Romer indicates that invidious discrimination toward members of the gay and lesbian community will not pass rational-basis review. Although the Court requires at least heightened -scrutiny analysis to apply to a Batson claim, there is no reason why the invidious discrimination toward a gay or lesbian juror should not be reviewed, even if it is under the rational-basis standard. Further, the decision from Lawrence implicates at least a privacy interest that protects gay and lesbian jurors from having to reveal their sexual orientations.

1. The Need to Recognize a Privacy Interest

This Note takes the position that under no condition should counsel be allowed to ask a juror point -blank whether he or she is gay or lesbian. Lawrence v. Texas stands for the proposition that the State may not penalize an adult individual for engaging in homosexual acts with another

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[134] Randy Shilts, The Mayor of Castro Street: The Life and Times of Harvey Milk 308 (1982).

[135] Lynd, supra note 8, at 248 (quoting Randy Shilts, Violence and Gays - A Turn of the Tide, S.F. Chron., Dec. 10, 1981, at 29).

[136] Id. at 252 (citing Katy Butler, "Gay Bashing" Trial: Jurors May Be Asked Sexual Orientation, S.F. Chron., Oct. 29, 1985, at 3).

[137] See United States v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (finding that a judge's refusal to allow counsel to explore jurors' attitudes toward gays and lesbians during voir dire was proper); State v. Lambert, 528 A.2d 890, 892 (Me. 1987) (finding no abuse of discretion when the trial judge refused to allow counsel to further examine jurors for bias against acts of homosexuality or gays and lesbians in general); Commonwealth v. Boyer, 507 N.E.2d 1024, 1028 (Mass. 1987) (finding that a trial judge is not required to allow counsel to probe individual jurors during voir dire for bias toward gays or lesbians).

[138] 464 U.S. 501, 513 (1984).

[139] Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[*1111] consenting adult within the sanctity of his or her home. [140] The Lawrence decision clearly rested on the privacy interest of the individual. [141]

When a jury member is asked to disclose his or her sexual orientation in public, and then counsel peremptorily strikes that person on that basis, the situation is closely analogous to the one in Lawrence. In Lawrence, an individual was sanctioned for engaging in private conduct. Likewise, when an attorney strikes a jury member for disclosing his or her private life or conduct, that jury member is prevented from serving his or her civic duty. Although Lawrence involved the penalization of an act and not the removal from jury service, the Court clearly noted that the stigmatizing effects of the State's actions weigh heavily on an individual. [142] To be dismissed from jury service because of disclosure of private matters must also weigh heavily on a particular juror, for it possibly tells the juror that he or she is unfit to participate in civic activities due to his or her sexual orientation. [143]

Further, it would seem that in all aspects of an attorney's point-blank questioning, there is sufficient state action to invoke the Fourteenth Amendment. The mere fact that a judge allows such questioning, and thus that the court facilitates the attorney in such questioning, evidences state action. The Supreme Court in both Edmonson v. Leesville Concrete Co. [144] and Georgia v. McCollum [145] found that an attorney is a state actor when he or she receives assistance and authority from the court in conducting various stages of the trial. When a judge gives an attorney the authority to conduct such point-blank questioning, this action surely rises to the level of state action necessary to invoke the Fourteenth Amendment and the principles of Lawrence. [146] Further, the party opposing such questioning should have [*1112] standing to raise the privacy interest of prospective jurors, for it may be unlikely that they will raise such issues themselves. [147]

Even in situations where a judge permits an attorney to ask, in camera, whether a prospective juror is gay or lesbian, the non-public questioning does not diminish the privacy interest of that pro-

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[140] 539 U.S. 558, 578 (2003).

[141] Id. ("The petitioners are entitled to respect for their private lives.").

[142] Id. at 575 (noting the societal effects of being convicted for engaging in private acts that some may feel are repulsive).

[143] Note that in J.E.B. v. Alabama ex rel. T.B., in discussing the exclusion of jurors based on gender, the Court stated that it sends the message "to all those in the courtroom, and all those who may later learn of the discriminatory act, … that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." 511 U.S. 127, 142 (1994). In Powers v. Ohio, the Supreme Court stated that "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard." 499 U.S. 400, 413-14 (1991). Likewise, by excluding a person from jury service because of his or her sexual orientation, the court sends a message to others that this person is unqualified to make decisions in the community.

[144] 500 U.S. 614, 622 (1991) ("It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist.").

[145] 505 U.S. 42, 51 (1992).

[146] An example is provided in Edmonson v. Leesville Concrete Co., where the Court stated that "if peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation." Edmonson, 500 U.S. at 628. Further, the Edmonson Court stated, "finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds." Id.

[147] See Powers, 499 U.S. at 414 (finding that the defendant had standing to raise the constitutional rights of prospective jurors, because it is unlikely jurors will raise their own claims in a separate action).

spective juror and does not avoid state action. 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. Further, in situations where an attorney distributes a questionnaire informing prospective jurors that they may have an in camera meeting in order to disclose their sexual orientation, other jurors and the community will surely realize why a certain juror was dismissed after having such a meeting. [148]

Refusing to allow attorneys to ask prospective jurors point-blank whether they are gay or lesbian, in certain circumstances, might prevent the discriminatory use of peremptory challenges against members of the gay and lesbian community. For if an attorney does not know whether a particular juror is gay or lesbian, then under circumstances where this information is not disclosed, an attorney cannot peremptorily strike that juror on that basis alone. Further, if the interest served by peremptory challenges is to secure an impartial jury, [149] direct questions concerning bias, rather than the sexual orientation of the individual, will serve this purpose.

In Davis v. Minnesota, where the Court refused to grant certiorari for a religion-based Batson claim, Justice Ginsburg noted the Minnesota Supreme Court's observation that religion is not as evident as the characteristics of gender and race, making it difficult to determine if an attorney discriminatorily used a peremptory strike based on religion. [150] Further, Justice Ginsburg noted that the revelation of religion can be controlled by the judge during voir dire. [151] Often sexual orientation will not be evident unless an attorney asks prospective jurors if they are gay or lesbian. In order to avoid the revelation of a prospective juror's sexual orientation, a judge [*1113] should refuse to allow attorneys to question prospective jurors regarding their sexual orientations.

2. Invidious Discrimination and Romer's Analysis

This Note posits that the invidious use of peremptory challenges toward prospective jurors who are gay or lesbian is unconstitutional. [152] In Romer v. Evans, the Court held that an amendment to the Colorado Constitution explicitly forbidding gays and lesbians protection from discrimination was unconstitutional as applied under the Equal Protection Clause. [153]Colorado's proffered reasons for excluding gays and lesbians from protection were the need to direct its attention toward other groups who may be discriminated against and to allow freedom of association. [154] The

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[148] Lynd, supra note 8, at 252 (citing Butler, supra note 136, at 3).

[149] See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 137 n.8 (1994) (stating that the only state interest in the use of peremptory strikes is to secure an impartial jury).

[150] 511 U.S. 1115, 1115-16 (1994) (Ginsburg, J., concurring).

[151] Id.

[152] For a review of state law, both statutory and judge-made, that affords protection to sexual orientation against the discriminatory use of peremptory challenges, see Cal. Crim. Proc. Code 204 (West Supp. 2004) (stating that ″no eligible person shall be exempt from service as a trial juror by reasons of … sexual orientation″); Cal. Crim. Proc. Code 231.5 (West 2004) (stating that ″[a] party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her … sexual orientation″). One New York state court has even gone so far as to state, ″to say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case, merely because of their homosexuality is tantamount to a denial of equal protection under the U.S. Constitution.″ People v. Viggiani, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. 1980).

[153] 517 U.S. 620, 635 (1996).

[154] Id.

Court refused to accept this as a legitimate state interest in applying rational-basis review. [155] Further, the Court noted that the amendment was ″born of animosity toward the class of persons affected.″ [156]

Peremptory challenges can be used to single out a particular person belonging to a particular group, much like the amendment to Colorado's Constitution in Romer. Further, at all times, the court is sufficiently entangled with the peremptory challenge to invoke state action.

If the Equal Protection Clause is to have any force at all, it should be available to any person who claims a wrong, even if rational basis is the standard of review. [157] Sticking to the spirit of Romer, the impermissible [*1114] singling out of a gay or lesbian juror through the application of a peremptory challenge without protection would appear to be a violation of equal protection, even under Romer's rational-basis standard.

The Court articulated in J.E.B. v. Alabama ex rel. T.B. that at all times the State's legitimate interest in using peremptory challenges is to secure an impartial jury. [158] Thus, if there is evidence that a party to litigation is using peremptory challenges in a discriminatory manner toward gay or lesbian jurors, what would be the related means to achieving that exclusion under rational-basis review? Gays and lesbians in general are biased? Gays and lesbians are unfit to make civic decisions? Any hypothetical means analysis would seem impermissible even under Romer's rational-basis standard. If anything, such means would result in invidious discrimination toward gays and lesbians as a group. [159] This the law cannot allow under an equal-protection analysis. [160] Further, such action clearly flies in the face of Batson's rationale, which was to build confidence within the community concerning the justice system.

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[155] Id.

[156] Id. at 634. The Supreme Court noted that ″Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that my be claimed for it.″ Id. Compare the Court's aforementioned statement to what the Court articulated in Edmonson v. Leesville Concrete Co. when it discussed the injury suffered by impermissible use of peremptory strikes: ″The injury to excluded jurors would be the direct result of governmental delegation and participation.″ 500 U.S. 614, 628 (1991). In both situations, the government was facilitating an injury based on a group characteristic.

[157] See Romer, 517 U.S. at 633 (″Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.″). But see J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143 (1994) (stating that peremptory strikes of groups normally falling under rational-basis review are permissible). It seems paradoxical that the Court in Romer allowed gays and lesbians to seek redress from a state law discriminating against them, but that they could not seek redress when a discriminatory use of peremptory challenge was used against them.

[158] 511 U.S. at 137 n.8 (stating that ″what [the State] fails to recognize is that the only legitimate interest it could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury″).

[159] In Swain v. Alabama, the Supreme Court stated these important words: ″Nor is the constitutional command forbidding intentional exclusion limited to Negroes. It applies to any identifiable group in the community which may be the subject of prejudice.″ 380 U.S. 202, 204-05 (1965) (quoting Hernandez v. Texas, 347 U.S. 475, 478 (1954)). In Romer v. Evans, the Supreme Court made it clear that gays and lesbians as a group were subject to prejudice under Colorado's Constitution. 517 U.S. 620, 635 (1996). This prejudice comports with Swain's language. Swain, 380 U.S. at 204-05. Other statements made by the Court support the proposition that the discriminatory use of peremptory challenges toward members of the gay and lesbian community should be found unconstitutional. See Georgia v. McCollum, 505 U.S. 42, 43 (1992) (″Removing a juror whom the defendant believes harbors racial prejudice is different from exercising a peremptory challenge to discriminate invidiously against jurors on account of race.″); Edmonson, 500 U.S. at 629 (″Exclusion of a juror on the basis of race severs that relation in an invidious way.″); Edmonson, 500 U.S. at 631 (″Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror.″). Although the Court made these statements in the context of race, the harm to the juror is the same, regardless of whether the discrimination is based upon race, gender, or sexual orientation.

[160] Romer, 517 U.S. at 635.

V. Conclusion

The Supreme Court's analysis of peremptory challenges has undergone numerous changes - changes that have continued to etch away at the [*1115] foundation of peremptory challenges since their adoption in the United States. After Batson, the Court made it evident that state action permeates the use of peremptory challenges and possibly the whole jury selection process. Such state action invokes the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Although the Court has consistently required at least a heightened-scrutiny analysis in order to bring a Batson claim, the Fourteenth Amendment should be available whenever individuals belonging to a certain group have suffered discrimination, even if that group is evaluated under rational-basis review.

Peremptory challenges offer an opportunity for an attorney to discriminate against individuals falling within certain groups. If this were not the case, Batson would never have come into being. Where there is such evidence of discriminatory use toward members of the gay and lesbian community, courts should allow parties to litigation or the individual jurors themselves to challenge or bring a claim against such discriminatory uses.

Lawrence provides an understanding in which the juror's privacy interest in avoiding the revelation of his or her sexual orientation renders it impermissible for a party to scrutinize sexual orientation during voir dire. This avenue may also prevent the discriminatory use of peremptory challenges against the gay and lesbian community from even becoming an issue. However, if one detects such uses, Romer clearly provides an analysis under which the invidious use of peremptory challenges against gays and lesbians should be held unconstitutional, even under a rational-basis standard.

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