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Striking Back Against Homophobia: 
Prohibiting peremptory strikes based on sexual orientation

Kathryn Ann Barry†

I. INTRODUCTION

Protection against sexual orientation discrimination in jury selection is long overdue. The courts must not allow prejudice to compromise the right to an impartial jury. In order to achieve justice, the legal system must prevent attorneys from using inappropriate characteristics, such as sexual orientation, to exclude members of sexual minorities from juries. Forbidding the use of peremptory strikes based on sexual orientation leaves room for lesbians, gay men, and bisexuals to be represented on juries. This representation is important because it may help counter homophobia on juries1 and may even lead heterosexual jurors to question some of their assumptions about homosexuality.2

Currently, the American legal system openly discriminates against lesbians, gay men, and bisexuals3 and many Americans condemn homophobia.4

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1. For a discussion of United States Supreme Court cases emphasizing the need to ensure that juries are drawn from a representative cross section of the community, and suggesting that this requirement is necessary to allow the respective biases of different jurors to “cancel each other out,” see People v. Wheeler, 22 Cal. 3d 258, 266-71 (1978). In Wheeler the court also noted that “the representative cross-section rule . . . prevent[s] further stigmatizing of minority groups.” Id. at 267 n.6.

2. For example, Gregory Herek argues that knowing someone who is openly lesbian or gay can “change a prejudiced person’s perception of homosexuality from an emotionally charged, value-laden symbolic construct to a mere demographic characteristic, like hair color . . . .” Gregory M. Herek, Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 149, 166 (Gregory M. Herek & Kevin T. Berrill eds., 1992). Similarly, William Eskridge describes a shift in Americans’ attitudes towards lesbian and gay individuals as “more Americans realized that they knew somebody who was gay.” William N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 FLA. ST. U. L. REV. 703, 771 (1997). Thus, having openly lesbian, gay, or bisexual individuals on juries may improve homophobic jurors’ attitudes about homosexuality.

sexuality. Thus, not only does the law often disfavor members of sexual minorities, but even when the court charges the jury with applying a neutral law, homophobic jurors may deny lesbian and gay litigants a fair trial. In 1998, a National Law Journal poll found that over seventeen percent of prospective jurors admitted they would not be fair or impartial in a trial where one of the parties was gay or lesbian. Moreover, some scholars argue that bias against lesbian or gay criminal defendants leads to trials where jurors convict the defendant of “being gay,” regardless of whether she committed the crime in question. In order to end sexual orientation prejudice and discrimination, the legal system will need to do more than simply prohibit peremptory strikes against lesbians, gay men and bisexuals; it must follow that prohibition with additional transformations in the legal status accorded lesbian, gay, and bisexual individuals. Nonetheless, without impartial juries the courts fail to offer justice to any litigants.

Last January, in People v. Garcia, a California state appellate court became the first court in the nation to prohibit the use of peremptory strikes based on a potential juror’s sexual orientation. The court thereby

(requiring that any member of the armed forces who “state[s] that he or she is a homosexual or bisexual, or words to that effect” be excluded under the “Don’t Ask Don’t Tell” policy; see also PATRICIA A. CAIN, RAINBOW RIGHTS 44 n.68 (2000) (writing that there have been unsuccessful attempts to enact federal protection against sexual orientation based employment discrimination every year since 1974). Lesbians and gay men are also denied the fundamental right to sexual privacy enjoyed by heterosexual Americans. Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (finding that there is no fundamental right to “homosexual sodomy”). Additionally, unlike heterosexuals, lesbians and gay men are not allowed to marry the partners they love. As of 1998, all fifty states and the District of Columbia have laws banning same-sex marriage. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 362-71 app. B3 (1999). Nonetheless, Congress passed the Defense of Marriage Act of 1996, to ensure that in the event that any state does legalize marriage, no other state will be required to recognize it. Defense of Marriage Act of 1996, 28 U.S.C. § 1738c (1996) and I U.S.C. § 7 (1996).

4. ESKRIDGE, supra note 3, at 9 (noting that “[g]ay equality is a shocking idea to most Americans”). For a general discussion of the stigmatization of lesbian, gay, and bisexual identities, see id. at 2-5.


6. People v. Garcia, 77 Cal. App. 4th 1269, 1279 n.7 (2000) (citing Peter Aronson, David E. Rovella & Bob Van Voris, Jurors: A Biased, Independent Lot, NAT. L.J., Nov. 2, 1998, at A1). Additionally, the Judicial Council of California recently conducted a study of sexual orientation and fairness in California courts: ACCESS & FAIRNESS ADVISORY COMM., JUDICIAL COUNCIL OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS (2001) [hereinafter SEXUAL ORIENTATION FAIRNESS]. The study found that fifty percent of all lesbian and gay court users feel that the courts fail to provide unbiased treatment for lesbians and gay men. Id. at 5. The report notes that “[i]n a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.” Id. A full thirty-nine percent of lesbians and gay men reported that their sexual orientation was used to question their credibility. Id.

7. Eskridge, supra note 2, at 781-86 (discussing one case that ended in deadlock because a juror proclaimed he would “vote a homosexual guilty ‘until Hell froze over’” and another case where a conviction was affirmed despite the fact, in the words of the dissent, that the defendant was “charged with assault and convicted on proof of homosexuality”).

8. 77 Cal. App. 4th 1269, 1272 (2000) (writing that whether sexual orientation was a permissible basis on which to exclude jurors was “terra incognita” and that “[t]he terrain before us is as
increased the possibility that the perspectives of sexual minorities will be represented on juries and that lesbian, gay, and bisexual litigants will receive fair trials. The court recognized that lesbians and gay men face discrimination and persecution and that they have diverse backgrounds and experiences. Additionally, the court noted that denying sexual minorities the right to serve on juries will "inevitably damage the community."

While the court's opinion painted a more positive picture of lesbians and gay men than many opinions have, it was limited in three important ways. First, the court based its analysis almost exclusively on California law and failed to stress the importance of the U.S. Constitution. Thus, it is unlikely that courts outside of California will be able to successfully apply the reasoning in Garcia to protect the rights of other lesbians, gay men, and bisexuals. Second, while the press has described the holding in Garcia as forbidding the use of peremptory strikes to exclude persons from jury service based on sexual orientation, this may not be an accurate characterization of the court's decision. In dicta, the Garcia court noted that sexual orientation was not an issue in the underlying criminal case. Thus, one could argue that the court would permit exclusions based on sexual orientation in a case where sexual orientation is an issue in the underlying claim. Third, the Garcia court failed to offer any guidance on how the court should respond when an attorney strikes a juror solely because of the attorney's perception of the juror's sexual orientation.

9. While the prohibition on sexual orientation-based peremptory strikes also prevents attorneys from excusing jurors based on their heterosexual orientation, the Garcia court focused on the harm involved in excluding sexual minorities from jury service. Garcia, 77 Cal. App. 4th at 1276-79. Similarly, this article focuses on the need to prevent sexual orientation-based exclusions of lesbians, gay men, and bisexuals.

11. Id.
12. Id. at 1279.
13. Harriet Chiang, Ruling Protects Gay Juror Rights, S.F. CHRON., Feb. 3, 2000, at A1 (discussing the importance of the decision and quoting gay rights advocates as saying that "the decision...includes some of the most powerful language yet in recognizing the constitutional rights of gays and lesbians").
15. Of course, jurisdictions that have case law similar to that upon which Garcia was based may be able to rely on the court's decision.
16. See, e.g., State Won't Appeal Gay Juror Decision. RECORDER (San Francisco), Feb. 8, 2000, at 8 (writing that the Garcia decision "prohibits lawyers from removing jurors because of sexual orientation").
17. Garcia, 77 Cal. App. 4th at 1281 n.9 ("Nothing suggests sexual orientation could result in a specific bias in the burglary case before us here.").
18. See discussion infra Part II.B.2.
19. See discussion infra Part II.B.3.
Approximately six months after the court issued its decision in *People v. Garcia*, Governor Gray Davis of California signed into law Assembly Bill 2418, which codified and expanded the *Garcia* decision. The bill makes peremptory strikes based on sexual orientation illegal. While the bill cures some of the limitations in *Garcia* and offers several key legislative findings, it too fails to protect against strikes based on perceived sexual orientation.

Part II of this article introduces the legal background of peremptory challenges by discussing the constitutional requirement of an impartial jury and California's prohibition against using peremptory strikes to exclude jurors based on their membership in cognizable groups. Part III summarizes and analyzes the opinion in *People v. Garcia*. It looks at the shortcomings of the court's decision and suggests that legislative action was warranted. Finally, Part IV discusses Assembly Bill 2418, the bill that codified and extended the decision in *Garcia*. This article concludes that the legal system must protect against sexual orientation discrimination in jury selection. While California should expand its legislation to prohibit discrimination on the basis of perceived sexual orientation, other states should follow California's lead in passing protective legislation.

PART II: THE LEGAL BACKGROUND OF JURY PARTICIPATION

The U.S. Constitution requires that states provide defendants with a trial by an impartial jury. Generally, states are free to make decisions regarding how best to achieve impartiality. However, the Constitution requires states to exclude individuals who have a specific bias that will impair their ability to be impartial and it prohibits states from excluding potential jurors based on their membership in cognizable groups.

The courts allow attorneys to use peremptory strikes to exclude individuals from the jury when the attorney believes the juror will be biased but is unable to cite a persuasive reason. However, as the U.S. Supreme
Court explained, “Although peremptory challenges are valuable tools in jury trials, they ‘are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.’”27 The state is responsible for ensuring that each of its citizens receives a fair trial and the “sole purpose [of a peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact.”28 Through peremptory strikes, attorneys try to eliminate jurors who have individual biases that will affect the jurors’ ability to be impartial.

California courts prohibit the use of peremptory strikes based on group bias, but allow peremptory strikes for specific bias.29 For example, in People v. Wheeler the California Supreme Court declared that when a party strikes jurors because of group biases that party “not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose . . . is to achieve an overall impartiality . . . .”30 The Wheeler court held that when an attorney makes a peremptory strike the court will presume that it is constitutionally valid.31 The opposing attorney may rebut this presumption by presenting evidence that the strike is based on group bias.32 The attorney challenging the strike explains her reasoning to the judge and then the court decides if she has successfully made a prima facie case of discrimination.33 If the court accepts the challenger’s evidence, the burden then shifts to the party making the strikes to give a nondiscriminatory reason for the exclusion of each group member he struck from the

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27. J.E.B., 511 U.S. at 137 n.7 (citing Georgia v McCollum, 505 U.S. 42, 57 (1992)).
29. People v. Wheeler, 22 Cal. 3d 258, 276-77 (1978). California courts have allowed attorneys to exclude members of the following groups: persons who are opposed to the death penalty, People v. Fields, 35 Cal. 3d 329 (1983) (allowing exclusion of persons who said they would automatically vote against the death penalty because they do not constitute a “cognizable group”); ex-felons and resident aliens, Rubio v. Superior Court, 24 Cal. 3d 93, 100 (1979) (plurality opinion) (finding statute excluding ex-felons and resident aliens from jury service constitutional); persons who have been state residents for less than one year, Adams v. Superior Court, 12 Cal. 3d 55, 60 (1974) (allowing the exclusion of persons who do not meet the one-year residency requirement because those persons’ interests could be represented by another group); members of certain religious groups, People v. Martin, 64 Cal. App. 4th 378, 384-85 (1998) (allowing the exclusion of a Jehovah’s Witness because of her religious belief against judging other people); persons over seventy years old, People v. McCoy, 40 Cal. App. 4th 778, 780 (1995) (permitting exclusion of persons over seventy because defendant failed to show that they are a cognizable and distinctive group); and battered women, People v. Macioce, 197 Cal. App. 3d 262, 282 (1987) (allowing exclusion of battered women because they, like any crime victim, will have a specific bias).
30. 22 Cal. 3d at 276. The court explained that bias results “when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds . . . .” Id.
31. Id. at 278.
32. Id. at 278-80. These motions are now commonly referred to as Wheeler motions.
33. See Id. at 280.
jury. If the striking attorney is unable to provide a reasonable and satisfactory explanation for each of the strikes, the court will dismiss all jurors previously selected, quash the remaining venire, and begin with a completely new group.

PART III: THE PEOPLE V. GARCIA

A. The Facts

During the voir dire in the burglary trial of Cano Garcia, before the final members of the jury had been selected, "it somehow became known that two members of the jury venire were lesbians. In fact, they both worked for the same gay and lesbian foundation." Upon discovering this information, the prosecuting attorney used peremptory strikes to excuse both of the women. In response, the defense counsel made a timely Wheeler motion, arguing that the prosecutor impermissibly excused the women based on their sexual orientation. Following a discussion at the bench, the judge announced, "Well, I am going to rule that sexual preference is not a cognizable group . . . . I don't think that your sexual preference specifically relates to them [sic] sharing a common perspective or common social or psychological outlook on human events." The judge explained that "[l]esbians or gay men vary in their social and psychological outlook on human events and I don't think fit into this protection. So I'm going to deny [defense counsel's] motion.

B. The Appellate Court Decision

On appeal, Garcia asked the court to determine "whether lesbians—and presumably gay males—constitute a cognizable class whose exclusion resulted in a jury that failed to represent a cross section of the community and thereby violated [his] constitutional rights." Because this issue was a pure question of law and the standard for overturning the trial court's decisions seems to favor the defense, the court reversed the conviction.

34. Id. at 281-82.
35. Id. at 282.
37. Id. at 1271 n.1.
38. Id. at 1271. In People v. Wheeler, 22 Cal. 3d 258 (1978), the California Supreme Court ruled that the California Constitution prohibits attorneys from excluding jurors on the basis of sex, race, ethnicity, or similar group bias. The court in Wheeler did not discuss sexual orientation specifically, but by protecting similar groups it left the door open for a court to include lesbians, bisexuals, gay men, or transgender persons under Wheeler protection. Id. at 276.
40. Id.
41. Id. at 1272.
ruling was *de novo*, the appellate court had broad discretion. The court held that lesbians and gay men do constitute a cognizable class.\(^{42}\)

In overturning the trial judge’s ruling, the appellate court clarified that *Wheeler* protection requires that members of the group share a common perspective but not a common personality.\(^{43}\) Explaining that the court did not need to determine that all members of the group see the world alike, the court wrote, “It cannot seriously be argued in this era of ‘don’t ask; don’t tell’ that homosexuals do not have a common perspective—‘a common social or psychological outlook on human events’—based upon their membership in that community.”\(^{44}\) The court described the common perspective shared by members of sexual minorities as the experience of being “exposed to or fearful of persecution and discrimination”\(^{45}\) and found “[t]hat perspective deserves representation in the jury venire, and people who share that perspective deserve to bear their share of the burdens and benefits of citizenship, including jury service.”\(^{46}\)

The court held that if the prosecutor excluded the two lesbians from the jury because of their sexual orientation, then that action violated Garcia’s right to trial by an impartial jury, as well as the excluded lesbians’ right to participate in the political process.\(^{47}\) The court remanded the case.\(^{48}\)

C. Shortcomings of the Garcia Decision

While the *Garcia* court determined correctly that potential jurors must not be excluded based on their sexual orientation, there were significant shortcomings in the court’s analysis. First, the court failed to stress the importance of the U.S. Constitution. Second, the court justified its decision to protect against sexual orientation discrimination because the underlying criminal case involved simple burglary and had nothing to do with sexual orientation. Third, the court failed to protect against discrimination on the basis of perceived sexual orientation, where there is no record of the potential juror’s actual sexual orientation.

\(^{42}\) See id.

\(^{43}\) *Id.* at 1277 (“Commonality of perspective does not result in identity of opinion. That is the whole reason exclusion based upon group bias is anathema. It stereotypes. It assumes all people with the same life experience will, given a set of facts, reach the same result.”).

\(^{44}\) *Id.* at 1276.

\(^{45}\) *Id.*

\(^{46}\) *Id.*

\(^{47}\) *Id.*

\(^{48}\) *Id.* at 1282. Since the trial court simply denied the *Wheeler* motion, the prosecutor was not given an opportunity to explain his reasons for excluding the women. If, on remand, the prosecutor convinces the court that he had other nondiscriminatory reasons for excluding each woman, Garcia’s conviction will stand. If the prosecutor is unable to meet this burden, a retrial will be ordered. *Id.* at 1282-83.
1. The Court Failed to Rely on the U.S. Constitution

The Garcia court based its holding almost entirely on California state law, despite the possibility for supporting its reasoning with case law interpreting both the Sixth and Fourteenth Amendments of the U.S. Constitution.

The Sixth Amendment of the U.S. Constitution guarantees the right to a trial by jury and requires that the jury be impartial. The U.S. Supreme Court has interpreted impartiality to require a jury drawn from a representative cross section of the community. The Court has warned that "tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial." The Court has also explained that "[r]estricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." As mentioned previously, courts allow peremptory strikes to aid the court in ensuring that the jurors are impartial, but prohibit attorneys from using peremptories to strike jurors because of their membership in cognizable groups. For example, courts have found that excluding blacks and women from juries violate the Sixth Amendment's impartiality requirement.

49. The Garcia court relied heavily on People v. Wheeler, 22 Cal. 3d 258, 276-77 (1978), which held that peremptory strikes may be used to strike a person from the jury based on an individual bias, but not based on that juror's membership in a cognizable group that the attorney thinks will tend to be biased. The court also relied upon Rubio v. Superior Court, 24 Cal. 3d 93, 97-98 (1979), which recognized cognizable groups where (1) a group has members who share a common perspective based on their life experiences and (2) no other members of the community could adequately represent members of the excluded group.

50. U.S. CONST. amend. VI. Impartiality is required in both criminal and civil jury trials. As the court noted in Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946), "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."

51. See, e.g., Smith v. Texas, 311 U.S. 128, 130 (1940) (writing that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," and finding a constitutional violation where, although state laws did not condone racial discrimination in the selection of the jury, the system allowed the jury commissioners undue flexibility which was used to discriminate against blacks). See supra notes 24-25 and accompanying text.


54. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (explaining that the only purpose of a peremptory challenge is "to permit litigants to assist the government in the selection of an impartial trier of fact"). But cf. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (arguing that a better way to maintain a fair and unbiased jury would be "by eliminating peremptory challenges entirely"). See supra notes 24-25 and accompanying text.

55. See supra notes 24-25 and accompanying text.

56. See, e.g., Peters v. Kiff, 407 U.S. 493, 505 (1972) (holding that when blacks are arbitrarily excluded from a jury, even the conviction of a white man must not stand); People v. Fuentes, 54 Cal. 3d 707, 721 (1991) (reversing the outcome in a death penalty case where the trial court did not require the prosecutor to justify the exclusion of black jurors); People v. Snow, 44 Cal. 3d 216, 226 (1987) (holding that once defendant makes out a prima facie case of exclusion from the jury based on race, the prosecutor must explain reasons for the exclusion of each black juror or
In *Garcia*, the appellate court failed to stress the importance of the impartiality requirement of the Sixth Amendment in its analysis.\(^5\) Using peremptory strikes to challenge individuals on the basis of their sexual orientation is unfair to the litigants who are denied a jury drawn from a representative cross section of the community. By striking lesbians, gay men, and bisexuals, attorneys are effectively preventing litigants from having their trials judged by a group that includes perspectives of all cognizable groups in the community. Furthermore, this exclusion sends the message that the perspectives of sexual minorities are not valued and indeed should not be represented on juries.\(^5\) Thus, striking lesbians, gay men, and bisexuals because of their sexual orientation undermines the jury system, prevents representation of a cross section of the community, and cannot be squared with the constitutional concept of a jury trial.

Interestingly, the *Garcia* court focused on the California Constitution, which makes no mention of 'impartiality,' and declares only that "[t]rial by jury is an inviolate right and shall be secured to all."\(^6\) The California Supreme Court did not interpret the state constitution to require impartiality until 1978 in *People v. Wheeler*.\(^6\) Justice Mosk, writing for the court, stated, "we now make explicit what was implicit . . . in this state the right to trial by a jury drawn from a representative cross section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution."\(^6\) Thus, the decision in *Garcia* could be supported equally and independently by the federal and state constitutions. Moreover, stressing the support of the Sixth Amendment would have increased the likelihood that courts outside of California could rely on *Garcia* in prohibiting peremptory strikes based on sexual orientation.

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57. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 360 (1979) (overturning automatic exemption for women who request not to serve on juries); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (finding unconstitutional a process whereby women are excluded from jury service unless they volunteer); *Glasser v. United States*, 315 U.S. 60 (1942) (holding that a state may not register only women who are members of the League of Women Voters for jury service).

58. See *Garcia*, 77 Cal. App. 4th at 1274. Though the court did not stress the Sixth Amendment in its analysis, it did mention that the decision was based in part on the Sixth Amendment of the Federal Constitution, as well as Article I, section 16 of the California Constitution. *Id.*

59. Cf. Jennifer Warren, *California and the West: New Law Bars Anti-Gay Bias in Jury Selection*, L.A. TIMES, June 28, 2000 at A3, available at 2000 WL 2255336. Jenny Pizer, the managing attorney for Lambda Legal Defense and Educational Fund, said that prohibiting strikes based on sexual orientation sends a "positive statement that gay people are everywhere, that we are inseparably part of communities and that society is diminished if we are excluded." *Id.*

60. CAL. CONST. art 1, § 16.

61. 22 Cal. 3d at 272.

62. *Id.*
In addition to the Sixth Amendment, the Garcia court could have used the Fourteenth Amendment to support its decision. The Fourteenth Amendment of the U.S. Constitution guarantees equal protection under the laws. The U.S. Supreme Court invoked the Fourteenth Amendment when it prohibited the exclusion of black Americans from juries in 1879. Then, in 1954, the Court in Hernandez v. Texas held that Mexican Americans were also included under the Fourteenth Amendment and therefore must not be excluded from jury service. Finally, in 1994, the Court in J.E.B. v. Alabama ex rel T.B. ruled that courts must not allow individuals to be excluded from juries based on their sex because “[sex], like race, is an unconstitutional proxy for juror competence and impartiality.” These cases illustrate that the Fourteenth Amendment prohibits various incarnations of discrimination in jury selection. Thus, the Garcia court could have relied, at least in part, on the Fourteenth Amendment in articulating its prohibition against exercising peremptory strikes based on sexual orientation.

In J.E.B., the Court reasoned that peremptory challenges based on sex are prohibited because they “ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women,” thus harming the excluded jurors and denying them equal protection of the laws. The same reasoning supports a finding that sexual orientation is an impermissible characteristic on which to base a peremptory strike. Under Romer v. Evans, the Fourteenth Amendment’s guarantee of equal protection of the laws includes equal protection for lesbians, gay men, and bisexuals. The court could have applied the reasoning in J.E.B. regarding the exclusion of women to the exclusion of lesbians in Garcia. In doing so the court could have emphasized that allowing peremptory challenges based on sexual orientation serves to perpetuate invidious, archaic, and overbroad stereotypes about lesbians, gay men, and bisexuals. Further, it suggests that lesbians, gay men, and bisexuals, unlike heterosexuals, will not be fair and impartial on a jury even when there is

63. U.S. Const. amend. XIV, § 1 (stating that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws”).
64. Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (holding that a law excluding blacks from juries because of their race is a denial of equal protection).
65. 347 U.S. 475, 478 (1954) (writing that the Fourteenth Amendment guarantee of equal protection goes beyond race-based discrimination and is violated any time a distinct group is singled out for differential treatment, because the Fourteenth Amendment is not “directed solely against discrimination due to a ‘two-class theory’”).
66. J.E.B., 511 U.S. at 129. One might argue that the Fourteenth Amendment protected women’s right to serve on juries earlier than 1994. However, although the Court previously held that excluding women from jury service violated the constitution, its decision was based on the Sixth Amendment, and it mentioned the Fourteenth Amendment only in passing. E.g., Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).
68. Id. at 142 (arguing that being stricken from jury selection “denigrates the dignity of the excluded juror”).
no cause to strike them. As the Garcia court noted, in addition to perpetuating stereotypes, allowing peremptory strikes based on sexual orientation harms the excluded jurors. Courts that permit such strikes participate in discrimination that stigmatizes lesbians, gay men, and bisexuals and denies the perspective of sexual minorities representation in jury venires. The J.E.B. Court noted that perpetuating stereotypes and allowing state-sanctioned discrimination in the courtroom leads to an "inevitable loss of confidence in our judicial system." Conversely, by forbidding peremptory strikes based on sexual orientation the court would prevent the continuation of state-sanctioned discrimination and might further a sense of confidence in the justice system.

However, the J.E.B. Court, in dicta, wrote that "[p]arties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." The Court has yet to hold that lesbians, gay men, and bisexuals are subject to heightened or strict scrutiny. Declining to base its decision on the Fourteenth Amendment, the Garcia court noted that race and sex:

are the only two classifications the Supreme Court has recognized as prohibited bases for exclusion of jurors under the equal protection clause. It has not yet dealt with an equal protection challenge which did not involve the "strict" or "heightened" scrutiny . . . so it has not yet been established whether such scrutiny is a sine qua non of Batson error or merely a common characteristic.

In doing so, the Garcia court missed a valuable opportunity to invoke protections afforded by the Fourteenth Amendment of the U.S. Constitution. The Garcia court was wise not to base its decision entirely on the Fourteenth Amendment, since the Supreme Court has not recognized lesbians, gay men, and bisexuals as a group who receive more than

70. The court will automatically strike "for cause" any juror who says she or he will not be able to be fair and impartial. See, e.g., Swain v. Alabama, 380 U.S. 202, 220 (1965). For a detailed discussion of the implications of using sexual orientation as a basis on which to make a for-cause strike, see Paul R. Lynd, Juror Sexual Orientation: The Fair Cross-Section Requirement. Privacy, Challenges for Cause, and Peremptories, 46 UCLA L. REV. 231, 269-80 (1998).
72. 511 U.S. at 140.
73. Id. at 143.
74. However, at least two U.S. Supreme Court Justices have argued that heightened or strict scrutiny should apply to classifications based on sexual orientation. See Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan & Marshall, JJ., dissenting) (writing that discrimination based on sexual orientation "raises significant constitutional questions under both prongs of our settled equal protection analysis"). Additionally, some scholars have argued that, in Romer v. Evans, 517 U.S. 620 (1996), the Court applied a higher level of scrutiny to classifications based on sexual orientation. See Eskridge, supra note 3, at 208-09 (writing that in Romer, the Court "said nothing about whether sexual orientation is a suspect classification," but gave the rational basis test "sharper teeth"); see also Lynd, supra note 70, at 285-86 (arguing that Romer "signaled that equal protection includes lesbians and gay men in a substantive manner" and suggesting that "the rational basis review applied in Romer may not be the final word on the standard of review for sexual orientation classifications").
However, as discussed previously, the court could have invoked the support of the case law interpreting the breadth of the Fourteenth Amendment's protections. Relying on the Fourteenth Amendment offers the same benefits provided by relying on the Sixth Amendment: it increases the likelihood that courts in other jurisdictions will be able to use Garcia in addressing sexual orientation discrimination.

2. The Court Failed to Prohibit Strikes Based on Sexual Orientation in All Cases

Most of the Garcia decision focused on the fact that excluding lesbians and gay men on the basis of their sexual orientation violates the California Constitution. However, the court also suggested that one factor in its ruling was that "[n]othing suggests sexual orientation could result in a specific bias in the burglary case before us here." This language is open to unfavorable interpretation. With a single troubling sentence, the court left room for peremptory strikes based on sexual orientation where the case in some way involves issues pertaining to lesbians, gay men, or bisexuals. A court could interpret Garcia to allow peremptory strikes based on potential jurors' sexual orientation alone when, for example, one of the litigants or attorneys was openly lesbian, gay, or bisexual or if the trial involved anti-gay motivated violence. Thus, even if a lesbian juror says she can be fair and impartial and she has no specific experiences that would allow the court to strike her for cause, the attorneys would be free to exercise a peremptory strike against her simply because she is a lesbian.

Excluding gay, lesbian, and bisexual jurors based on their sexual orientation is problematic regardless of the underlying claim in the case. In Peters v. Kiff, the U.S. Supreme Court warned that the exclusion of cognizable groups will result in removing "from the jury room qualities of human nature and varieties of human experience . . . depriving the jury of a perspective on human events that may have unsuspected importance in any case." Additionally, the Wheeler court explained that it is:

76. See supra note 74.
77. See supra text accompanying notes 64-72.
78. 77 Cal. App. 4th at 1275.
79. Id. at 1281 n.9.
80. Such an interpretation is problematic, in part, because when sexual orientation is an issue in the underlying claim lesbian and gay court users report high levels of unfair treatment, even in California courts. See SEXUAL ORIENTATION FAIRNESS, supra note 6, at 5. Moreover, while hate-motivated violence is a phenomenon with ancient roots, legislation prohibiting anti-gay violence is a recent creation. Gregory M. Herek & Kevin T. Berril, Introduction, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, supra note 2, at 1, 1-8. In order to enforce hate crimes legislation, lesbian, gay, and bisexual persons must not be excluded from juries based on their sexual orientation.
unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in [cognizable] groups; and hence . . . the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.  

Since homophobic persons will inevitably end up on juries, it is problematic to exclude lesbians, gay men, and bisexuals. In a sense, the goal of the representative cross section requirement is not to prevent any person who may have a bias from serving on a jury; rather, it is to make certain that different biases will be represented and thereby “cancel each other out.”

The law allows exclusions based on specific biases where an individual has an experience relating to the case that may affect her impartiality. Simply being lesbian, gay, or bisexual, like being an black, Latino, or female, does not make a person biased. To allow the exclusion of all sexual minorities from a trial simply because the case involves issues relating to sexual orientation would be to deny justice to the jurors, the litigants, and the community.

3. The Court Failed to Prohibit Strikes Based on Perceived Sexual Orientation

In Garcia, the court knew that the excluded jurors were lesbians. As a result, it was not necessary for the court to offer any guidance on what to do when an individual is excused from the jury because of an attorney’s perception that the individual is lesbian, gay, or bisexual. The Garcia court acknowledged that “[s]exual orientation is not something likely to be volunteered . . . and it is even less likely to be the subject of inquiry by court or counsel.” Because courts are reluctant to ask jurors about their sexual orientation and jurors are unlikely to offer such information, an attorney may have a hard time making the necessary record of the excluded juror’s sexual orientation and may find it impossible to win a Wheeler motion on sexual orientation.

There are two possibilities when an attorney exercises a peremptory challenge based on her perception that the potential juror is lesbian, gay,

83. See supra notes 6-7 and accompanying text.
84. See, e.g., People v. Macioce, 197 Cal. App. 3d 262, 279-80 (1987) (upholding the exclusion of two battered women from the jury in a case in which a battered woman murdered her abusive husband by stabbing him in the back).
85. 77 Cal. App. 4th at 1271.
86. Id. at 1273.
87. See SEXUAL ORIENTATION FAIRNESS, supra note 6, at 19 (“Fifty-six percent of gay and lesbian court users in a context in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened because of their sexual orientation.”).
or bisexual: the attorney’s assessment of the juror’s sexual orientation may be right, or it may be wrong. Prohibiting peremptory strikes based on perceived sexual orientation will prevent attorneys from excluding heterosexual jurors who the attorney mistakenly identifies as lesbian, gay, or bisexual. It also will prevent the striking of jurors who do not state their sexual orientation on the record but whom the striking attorney correctly identifies as lesbian, gay, or bisexual. This article is most concerned with the second possibility. While striking a juror is inappropriate in either situation, it is the exclusion of lesbian, gay, and bisexual jurors that causes harm and prevents the perspective of cognizable groups from being represented on juries.

Given that the court is unlikely to know a potential juror’s sexual orientation, it is important to protect against strikes made on the basis of perceived sexual orientation even though this protection may be somewhat over-inclusive. On appeal in Garcia, the Attorney General expressed concern that the recognition of lesbians and gay men as a cognizable class would lead to questioning jurors regarding their sexual orientation, thereby violating jurors’ privacy. But the court did not “perceive a great problem lurking with regard to inquiring of jurors about their sexual orientation.” The court explained, “It simply should not be done . . . . No one should be ‘outed’ in order to take part in the civic enterprise which is jury duty.” The court wrote that because attorneys are prohibited from excluding anyone due to her or his sexual orientation, no one should be allowed to ask about it.

If strikes based on perceived sexual orientation were prohibited, the court would not need to inquire into the potential juror’s sexual orientation. Nor would the court need to decide if the juror was, in fact, gay. This would solve the problem the Ninth Circuit faced in Johnson v. Campbell. In that case, the 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.” Prohibiting strikes based on perceived sexual orientation creates

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88. 77 Cal. App. 4th at 1279-80 (describing the Attorney General’s contention that sexual orientation is not “a public matter a prospective juror should be required to declare”).
89. Id. at 1280.
90. Id.
91. Id.
92. 92 F.3d 951, 952 (9th Cir. 1996).
93. Id. The attorney attempting the challenge explained that he believed the juror to be gay for a number of reasons, including his mannerisms, the way he projected himself, where he lived, his marital status, and his job. The attorney explained that “you can’t really know. The only way you can know is to inquire . . . . I believe the Court has a duty to make a record.” Id.
94. Id.
an opportunity for an attorney to challenge her opponent’s peremptory strikes if she believes the strikes were based on sexual orientation but has no evidence of the juror’s actual sexual orientation. Such a challenge should shift the burden to the striking attorney to articulate a nondiscriminatory reason for the peremptory.  

Protecting against peremptory strikes on the basis of real or perceived sexual orientation would allow the court to protect jurors’ privacy while ensuring that an individual is not excluded from the jury because an attorney believes him or her to be gay or lesbian. Without protection of perceived orientation, the Garcia decision creates a problem.

PART IV: THE CALIFORNIA LEGISLATURE CODIFIED AND EXPANDED GARCIA BY PASSING ASSEMBLY BILL 2418

While the decision in Garcia offered new protection against sexual orientation discrimination, legislative action was necessary to extend this protection to all Californians, not just those under the jurisdiction of the Fourth Appellate District. The legislature’s action is likely to be beneficial for two additional reasons. First, in Assembly Bill 2418, the legislature clarified that discrimination on the basis of known sexual orientation is impermissible regardless of whether the case involves issues of sexual orientation. Second, the legislature made several findings that, along with Governor Davis’ statements, provide an opportunity for lawmakers to cite Assembly Bill 2418 in support of additional anti-discrimination legislation for lesbians, bisexuals, and gay men.

A. The Legislature Prohibited Discrimination on the Basis of Known Sexual Orientation

In Assembly Bill 2418, the legislature decreed that whatever the nature of the case, it is impermissible to strike a juror on the basis of his or her sexual orientation alone. If a juror has a specific bias, she or he may be struck despite membership in a cognizable group, but being a member in

95. This burden will be light for an attorney who has a nondiscriminatory justification for the strike. Indeed, applying this rule to Johnson would probably not have changed the result. As the Ninth Circuit pointed out, the juror in question had recently participated in a similar trial and thus the defense attorney had “an obvious neutral reason for the challenge.” Id. at 953. However, the court would increase confidence in the justice system by allowing the prosecuting attorney to challenge the strike and requiring the defense attorney to provide a neutral explanation.

96. Immediately after the appellate court ruling, the Attorney General announced his decision not to appeal the case to the California Supreme Court. State Won’t Appeal Gay Juror Decision, RECORDER (San Francisco), Feb. 8, 2000, at 8. Thus legislative action was necessary to ensure that the protection applied throughout California.


98. See id.
such a group alone is not sufficient to justify a peremptory strike. Thus, the bill cures an important defect in the *Garcia* decision. The bill prevents attorneys from excluding jurors based on sexual orientation even when sexual orientation is an issue in the underlying claim. Assembly Bill 2418 does not, however, add perceived sexual orientation to the list of cognizable classes protected by the courts, and so, like *Garcia*, it is limited in its ability to cure sexual orientation discrimination. The bill does leave room for protections for additional groups defined by "similar grounds." Thus, the bill codifies the case law currently prohibiting discrimination in jury selection and explicitly leaves room for further expansions of that protection.

**B. Findings and Statements that Support Additional Anti-Discrimination Legislation**

The legislative findings accompanying Assembly Bill 2418 substantially echo the court's reasoning, including statements that lesbians and gay men constitute a "cognizable segment of the community, sharing a common perspective based upon their membership in that community" and that this common perspective stems from "having spent their lives in a sexual minority, either exposed to, or fearful of, persecution and discrimination." Additionally, the legislature found that this "perspective deserves representation in the jury venire, and people who share that perspective deserve to bear their share of the burdens and benefits of citizenship, including jury service."

When Governor Davis signed the bill he explicitly recognized the problem of sexual orientation discrimination, including the routine elimination of sexual minorities from the pool of potential jurors because of their sexual orientation. Further, he said that discrimination on the basis of sexual orientation "is wrong" and "violates America's notion of

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99. Section 3 of Assembly Bill 2418 adds section 231.5 to the Code of Civil Procedure, which now reads: "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 race, color, religion, sex, national origin, sexual orientation, or similar grounds." Cal. Assemb. B. 2418.

100. *Id.*

101. *Id.* As discussed above, individual privacy concerns prevent most judges from asking jurors about their sexual orientation and many jurors may be reluctant to say they are lesbian, gay, or bisexual unless they are asked. *See supra* notes 86-87 and accompanying text. Thus, the legislature's failure to protect against discrimination on the basis of perceived sexual orientation is problematic. There may be many cases where one of the attorneys excludes a lesbian, gay, or bisexual juror because of the attorney's perception of the juror's sexual orientation but there is no record to support a Wheeler motion. *See supra* notes 86-91 and accompanying text.


103. *Id.* at § (1)(a)(4).

104. *Id.* at § (1)(a)(5).


106. *Id.*
justice and fair play and has no place in California or in our courtrooms." Governor Davis commented on the stigma attached to denying gays and lesbians the opportunity to participate in the justice system and recognized the important contributions gays and lesbians make to California’s civic life. He called jury service “one of our most fundamental civic responsibilities” and stated that the bill “will help to free California’s jury selection process of unfair prejudice and damaging stereotypes.”

Advocates for sexual minorities can use the California legislature’s findings in Assembly Bill 2418, as well as Governor Davis’ statements after signing the bill, to argue for more comprehensive protection against sexual orientation discrimination. For example, advocates can argue against housing discrimination based on sexual orientation because the legislature states that sexual minorities deserve their share of the benefits of citizenship. Since the findings were made by the state legislature and reinforced by Governor Davis, they may carry significant political and social weight.

V. CONCLUSION

As openly lesbian, gay, and bisexual individuals gain political recognition, and sexual orientation gains legal protection, there will be more court battles involving sexual orientation. At the same time, many Americans still report antagonistic feelings toward lesbians and gay men, and studies confirm that homophobia is widespread among American jurors. Thus, the need to strengthen protections to allow sexual minorities to participate fully in the judicial process and in jury service will increase. Spurred by the appellate court’s decision in Garcia, the California legislature became the first in the country to forbid sexual orientation discrimination in jury selection. While the California legislation is not perfect, it can serve as a useful starting point for other states in their attempts to prohibit sexual orientation discrimination in jury selection.