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Jury Selection / Chapter 43 Bans Discrimination in Jury Selection Based on Sexual Orientation: Will It Really Prevent Attorneys from Excusing Unwanted Prospective Jurors?

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Chapter 43 Bans Discrimination in Jury Selection Based on Sexual Orientation: Will it Really Prevent Attorneys From Excusing Unwanted Prospective Jurors?

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Code Sections Affected
Code of Civil Procedure §§ 231.5 (new); 204 (amended).
AB 2418 (Migden); 2000 STAT. Ch. 43

Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to [group] distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[1]

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1. Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

I. INTRODUCTION

Ironically, in an era where the public eagerly tries to avoid jury service,[2] most attorneys do not prioritize a prospective juror's desire to fulfill her civic duty.[3] Instead, many attorneys relish their ability to remove prospective jurors from jury panels,[4] citing arbitrary and sometimes laughable reasons for doing so.[5] However, challenged jurors do not often share the sentiment of lawyers, and frequently become angry and frustrated upon dismissal from a jury panel.[6] Such frustration is especially common when an excused prospective juror is a member of an identifiable group, "distinguished on racial, religious, ethnic, or similar grounds,"[7] and he suspects that the dismissal from service was based solely on such membership.[8] Even more problematic is the fact that criminal defendants who are members of the same group as the excluded juror may be tried by juries deliberately deprived of representatives from their own community.[9] Unfortunately, members of the homosexual community have often been the victims of discriminatory jury selection procedures in California.[10] As a result, Chapter 43 is a legislative attempt

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2. *See* Morris B. Hoffman, *Peremptory Challenges: Lawyers Are from Mars, Judges Are from Venus*, 3 GREEN BAG 2d 135, 137 (2000) (suggesting that most people try to get excused from jury duty); *see also* Editorial, *Courting Gay Rights*, S.F. CHRON., June 28, 2000, at A24 [hereinafter *Courting Gay Rights*] (same).

3. *See* Hoffman, *supra* note 2, at 137 (commenting that attorneys often excuse jurors who are comfortable with serving on a jury).

4. *See id.* at 136 (claiming that, "[i]f you are a trial lawyer, you would sooner dispense with a few amendments to the Constitution than give up peremptory challenges").

5. *See, e.g.*, Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 281-82 (1998) (claiming that attorneys can excuse persons from jury service for reasons that "can be as individualized as counsel and can be stereotypical, peculiar, and capricious"); *see also infra* text accompanying notes 147-48 (explaining that permissible peremptory strikes include excusing a juror from service because she is a "wide-eyed blonde" or because she may resemble one of the attorney's relatives).

6. Hoffman, *supra* note 2, at 137.

7. *Infra* note 35 and accompanying text.

8. *See infra* text accompanying notes 101-02 (asserting that excluding gays from juries sends a message that they are not equal members of society and are unfit for jury service).

9. *See infra* Part II.B.2 (explaining that this practice is a violation of a defendant's equal protection rights).

10. CAROLE MIGDEN, AB 2418 JURORS-ELIGIBILITY, 1 (2000) [hereinafter MIGDEN, JURORS-ELIGIBILITY] (copy on file with the *McGeorge Law Review*).

to ensure that California's attorneys do not commit such discrimination during jury selection in the Golden State.[11]

Chapter 43 limits the use of challenges for cause and peremptory challenges by preventing the exclusion of homosexuals and other identifiable groups from jury service based solely on group membership.[12] Instead of tailoring its provisions to the homosexual community alone, however, the Legislature drafted Chapter 43 to include other identifiable groups as well, so that no individual community is afforded special treatment.[13] Supporters of Chapter 43 argue that the new law provides consistency between California statutory law and both state and federal constitutional provisions.[14] Advocates also claim that Chapter 43 prevents homosexuals from the stigma they suffer during jury selection.[15] Opponents, on the other hand, argue that attorneys should have the right to exclude homosexuals and other identifiable groups from jury service.[16] They claim that members of the homosexual community, specifically, may have predetermined biases in cases involving gay issues.[17] Furthermore, there may be significant consequences associated with limiting an attorney's use of peremptory challenges.[18]

In sum, even though Chapter 43 is intended to prevent discrimination in jury selection based on group bias, the new law is unlikely to change the ability of attorneys to remove unwanted prospective jurors from service.[19] Furthermore, because Chapter 43 fails to specify a remedy for courts to follow upon discovery of an improperly dismissed juror, unforseen consequences could undermine the very purpose behind Chapter 43's enactment.[20]

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11. *See infra* note 79 and accompanying text (explaining the reasons that Chapter 43 was enacted).

12. *See* CAL. CIV. PROC. CODE § 204 (amended by Chapter 43) (banning the exclusion of certain groups from jury service based on "occupation, race, color, religion, sex, national origin, economic status, or sexual orientation"); *see also id.* § 231.5 (enacted by Chapter 43) (omitting occupation and economic status from the above list, but banning the use of peremptory challenges to excuse members of the remaining groups based solely on group membership).

13. *See* CAROLE MIGDEN, AB 2418 QUESTIONS AND ANSWERS, 1 (2000) (copy on file with the *McGeorge Law Review*) [hereinafter MIGDEN Q & A] (noting that Chapter 43 includes other identifiable groups in its coverage because including only homosexuals would provide gays and lesbians with greater protection than other identifiable groups otherwise).

14. *Infra* Part IV.A.

15. *Infra* Part IV.A.

16. *Infra* Part IV.B.

17. *Infra* Part IV.B.

18. *Infra* Part IV.C.

19. *Infra* Part IV.D.1.

20. *Infra* Part IV.D.2.

II. LEGAL BACKGROUND

A. *The Voir Dire Process: Prior and Existing Law*

In a process commonly referred to as *voir dire*,[21] prospective jurors are examined by the court, and the attorneys for each side, in an attempt to uncover any potential predisposed bias.[22] During this examination, attorneys are permitted to exercise two types of challenges to remove prospective jurors from service: challenges for cause and peremptory challenges.[23]

Prior California statutory law forbade the exemption of prospective jurors from jury service only if such exemption was based solely on "occupation, race, color, religion, sex, national origin, economic status, or for any other reason."[24] Subject to these and one other limitation imposed by Chapter 43,[25] existing law provides that attorneys may still challenge prospective jurors "for cause" if such juror meets specific statutory criteria.[26]

Once all challenges for cause have been executed by each side, an attorney may further excuse certain jurors[27] that she believes to be biased without giving an explanation.[28] This lack of required explanation, in fact, is the very essence of the peremptory challenge.[29] However, unlike challenges for cause, each side's exercise

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21. *See* BLACK'S LAW DICTIONARY 1575 (6th ed. 1990) (defining "'voir dire'" as follows: "[t]o speak the truth. This phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors. Peremptory challenges or challenges for cause may result from such examination").

22. CAL. CIV. PROC. CODE § 222.5 (West Supp. 2000).

23. *Id.*

24. 1988 Cal. Stat. ch. 1245, sec. 2, at 4144 (enacting CAL. CIV. PROC. CODE § 204).

25. *See* CAL. CIV. PROC. CODE § 204 (amended by Chapter 43) (adding sexual orientation to the list of groups that may not be exempted from jury service).

26. *See id.* § 229 (West Supp. 2000) (noting that existing California law provides that a prospective juror may be excused "for cause" if she shows evidence of any of the following: close affinity (within the fourth degree) to any party; having any type of familial, business or fiduciary relationship to any party; having served as a juror or witness in a previous trial involving the same parties or the same cause of action; having a specific interest in the action (excluding an interest as a taxpayer); having a predetermined opinion on the merits of the case based upon knowledge of material facts; having bias; being a party to another action set for trial in the same court; or in a criminal case, having beliefs which would preclude such juror from finding a defendant guilty where the death penalty may be imposed).

27. *See id.* § 226(c) (West Supp. 2000) (stating that, "[a]ll challenges for cause shall be exercised *before* any peremptory challenges may be exercised") (emphasis added).

28. *See id.* § 226(b) (West Supp. 2000) (indicating that peremptories are challenges made by attorneys excusing jurors from a jury panel for which no reason need be given); Swain v. Alabama, 380 U.S. 202, 220 (1965) (same); John F. McEldowney, *Stand by for the Crown: An Historical Analysis*, 1979 CRIM. L. REV. 272, 274 (1979) (same); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 762 (1992) (same); *see also* BLACK'S LAW DICTIONARY 1136 (6th ed. 1990) (defining peremptory challenges in part as, "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge"). *But see* People v. Wheeler, 22 Cal. 3d 258, 274, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 901 (1978) (conceding that although no reason must be stated in the exercise of a peremptory challenge, "it does not follow therefrom that it is an objection for which no reason need *exist*").

29. *See supra* note 28 and accompanying text (defining "peremptory challenges").

of peremptory challenges is limited to a certain number.[30] Once that number is exhausted, the remaining jurors on the panel must be seated and sworn.[31]

B. *Jury Selection Procedures: Constitutional Concerns Expressed in Case Law*

Beyond the statutory restrictions placed upon jury selection procedures in California, both state and federal case law have also addressed the issue of improper exclusion of prospective jurors from jury service.[32] California courts have emphasized that excluding prospective jurors who are members of "cognizable groups" violates both the state and federal Constitution's "fair cross section" requirement.[33] The United States Supreme Court, however, has based its decisions in this arena on violations of the Fourteenth Amendment's Equal Protection Clause.[34]

1. *California Case Law: "Fair Cross Section" Violations*

Discrimination in jury selection based solely on a potential juror's membership in a "cognizable group" has been forbidden by California case law for over two decades.[35] In *People v. Wheeler*,[36] the California Supreme court held that when potential jurors are excluded from service simply because of their membership in a particular group, such bias "violates [a defendant's] right to trial by a jury drawn from a representative cross-section of the community."[37] The court pointed out that this "cross-section" requirement is implicit in both the state and federal

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30. *See* CAL. CIV. PROC. CODE § 231(a)-(b) (West Supp. 2000) (explaining that in California, for criminal cases punishable by death or life imprisonment, each side is limited to twenty peremptory challenges); *id.* (noting that for all other criminal offenses each side is limited to ten peremptory challenges, except those offenses punishable by incarceration for ninety days or less, where each side is limited to six peremptories); *see also id.* § 231(c) (West Supp. 2000) (limiting peremptory challenges in California civil cases to six for each side).

31. *Id.* § 231(e) (West Supp. 2000).

32. *See infra* Part II.B.1 (discussing some California case law that has addressed this issue); *infra* Part II.B.3 (same); *see also infra* Part II.B.2 (discussing federal case law that has addressed this issue).

33. *Infra* Part II.B.1.

34. *Infra* Part II.B.2.

35. *See Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902 (holding that potential jurors may not be excluded from jury service, "merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds," but failing to specify a test to determine whether a group falls within the definition of "identifiable"). The court used the term "cognizable" interchangeably with "identifiable" throughout the case. Recognizing that it set out no test for determining which groups qualify as "cognizable," the court explained that, "[b]ecause there can be no doubt that the blacks in the present case constitute a cognizable group for such purpose, we have no occasion to explore the point further at this time." *Id.* at 280 n. 26, 583 P.2d at 764, 148 Cal. Rptr. at 905.

36. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

37. *Id.* at 276-77, 583 P.2d at 762, 148 Cal. Rptr. at 903.

constitutions,[38] and simply is a means of composing a fair and impartial jury.[39] Specifically, the cross-section requirement necessitates that jurors be drawn from a "body truly representative of the community."[40] Therefore, the court reasoned that when potential jurors are excused by attorneys based on group bias,[41] the resulting jury pool is not an accurate sample of the community at large; and thus, the entire jury selection process is constitutionally deficient.[42]

Although the *Wheeler* case clarified that discrimination against "cognizable groups" in jury selection is unconstitutional, the court left the term undefined.[43] Therefore, in a second case, *Rubio v. Superior Court*,[44] the California Supreme court created a two-part test for determining what groups fall within the "cognizable" realm.[45] First, the group's members "must share a common perspective arising from their life experience in the group," and, second, "no other members of the community [may be] capable of adequately representing the perspective of the group assertedly excluded."[46]

2. *The United States Supreme Court: Equal Protection Violations*

Subsequent to the California cases discussed above,[47] the United States Supreme Court similarly applied the "cognizable group" concept in holding that race is an

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38. *See id.* at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900 (asserting that even though the United States and California Constitutions do not specifically contain the "fair cross-section"' language, both the Sixth Amendment of the Federal Constitution and Article One, section sixteen, of the California Constitution require that juries be drawn from a fair cross-section of the community). *But see* 28 U.S.C.A. § 1861 (West 1994) (using *specific* language referring to the fair 'cross-section' requirement, stating that, "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section of the community* in the district or division wherein the court convenes") (emphasis added).

39. *See Wheeler*, 22 Cal. 3d at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896 (stating that one of the many beliefs underlying the fair cross-section requirement is that "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"). The court also pointed out that the fair cross-section rule "serves other essential functions in our society, such as legitimizing the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups." *Id.* at 267 n. 6, 583 P.2d at 755, 148 Cal. Rptr. at 896; *see also* People v. Garcia, 77 Cal. App. 4th 1269, 1277, 92 Cal. Rptr. 2d 339, 344 (2000) (arguing that the purpose of the cross-section requirement is to produce jurors with diverse viewpoints); Teri Sforza, *Jurors Can't Be Barred for Sexual Orientation: The Ruling Stems From an O.C. Burglary Trial*, ORANGE COUNTY REG., Feb. 2, 2000, at B04 (same).

40. Smith v. Texas, 311 U.S. 128, 130 (1940).

41. *See Wheeler*, 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902 (1978) (defining "group bias" as "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 . . . and peremptorily strikes all such persons for that reason alone").

42. *Id.* at 271-72, 583 P.2d at 758, 148 Cal. Rptr. at 899.

43. *Supra* note 35 and accompanying text.

44. 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

45. *Id.* at 97-98, 593 P.2d at 598, 154 Cal. Rptr. at 737 (indicating that although the process of defining a "cognizable group" began in a previous 1974 case, the test is clarified by the *Rubio* court).

46. *Id.* at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737.

47. *Supra* Part II.B.1.

impermissible criterion for excluding prospective jurors from jury service.[48] In *Batson v. Kentucky*,[49] the Court held that excluding prospective jurors based solely on racial grounds violated the Equal Protection clause of the United States Constitution.[50] The Court reasoned that racial discrimination in jury selection deprived a similarly situated defendant of the protection a jury trial is intended to provide.[51] A jury panel is intended to be composed of one's peers—namely, those who are of the same societal status as the defendant.[52] Therefore, the deliberate exclusion of prospective jurors of the same racial composition as the defendant fails to protect such a defendant against racial discrimination in jury deliberations.[53] As the Supreme Court once noted, "[i]t is well known that prejudices often exist against particular [races] in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those [races] the full enjoyment of that protection which others enjoy."[54] However, not every jury must include members of the defendant's race,[55] nor must representatives of each societal group serve on every jury.[56] Rather, the *Batson* Court explained that prospective jurors may not be purposefully excluded from jury service based solely on a juror's race if the jury selection process is to have constitutional validity.[57]

Shortly after *Batson*, the United States Supreme Court forbade gender discrimination in jury selection as well.[58] In *J.E.B. v. Alabama ex rel. T.B.*, the Court extended the *Batson* rationale to gender, stating that, "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants . . . by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings."[59] The Court also discussed the need to remedy the centuries of past discrimination suffered by women through their complete exclusion from the judicial process.[60] Mainly, the Court reasoned that prospective jurors

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48. *Infra* notes 49-52 and accompanying text.

49. 476 U.S. 79 (1986).

50. *Id.* at 84.

51. *Id.* at 86.

52. *See id.* (explaining the idea behind a jury trial); *see also* Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (same).

53. *See Batson*, 476 U.S. at 86-87 (quoting the reasoning of Strauder v. West Virginia which stated that "[t]hose on the venire must be 'indifferently chosen,' to secure the defendant's right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice'").

54. *Strauder*, 100 U.S. at 309.

55. *Batson*, 476 U.S. at 85; *see* Lynd, *supra* note 5, at 240 (explaining that no party to a trial is entitled to a particular jury composition).

56. *Batson*, 476 U.S. at 85-86 n. 6; *see also* Lynd, *supra* note 5, at 240 (explaining that juries do not need to have a particular composition).

57. *Batson*, 476 U.S. at 86.

58. *Infra* text accompanying notes 59-62.

59. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994).

60. *See generally id.* at 131-38 (explaining the various activities in which women were excluded from participation throughout the history of the United States).

should not automatically be "presumed unqualified" for jury service simply because of their gender.[61]

3. People v. Garcia: *The Homosexual Community Is a "Cognizable" Group*

In a recent California case, the homosexual community was also held to constitute a "cognizable group" under the *Wheeler* and *Rubio* standards.[62] In *People v. Garcia*,[63] the court determined that the gay community fulfills the first part of the *Rubio* test, because they share a "common perspective" as a result of their life experience as homosexuals.[64] The court noted that:

> 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. They share a history of persecution comparable to that of Blacks and women.[65]

Furthermore, the court went on to explain that homosexuals also share a common perspective because they have spent their lives as part of a minority group, fearful of being stigmatized by society.[66]

Once the court established that the gay community shares a common perspective, the court explained why that perspective cannot be represented by any group other than the homosexual community.[67] The court reasoned that the second part of the *Rubio* test is satisfied because the past discrimination suffered by homosexuals is only comprehendible by members of their own community.[68] To illustrate its point, the court cited a 1998 poll showing that 17.1% of prospective jurors admitted a bias toward homosexuals that would preclude them from being fair if chosen as part of a jury venire where one of the parties was gay or lesbian.[69] These statistics are significantly higher than those measuring bias against African-Americans and women.[70] Thus, the court concluded that the gay community suffers

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61. *Id.* at 142.
62. *Garcia*, 77 Cal. App. 4th at 1281, 92 Cal. Rptr. 2d at 347.
63. 77 Cal. App. 4th 1269, 92 Cal. Rptr. 2d 339 (2000).
64. *Id.* at 1276, 92 Cal. Rptr. 2d at 344.
65. *Id.*
66. *Id.*
67. *Infra* text accompanying notes 68-71.
68. *Garcia*, 77 Cal. App. 4th at 1279, 92 Cal. Rptr. 2d at 346.
69. *Id.* at 1279 n.7, 92 Cal. Rptr. 2d at 346; *see also* Lynd, *supra* note 5, at 273 (indicating that at least one court has dismissed jurors for cause because they demonstrated actual bias by admitting that they could not be fair to a homosexual victim).
70. *See Garcia*, 77 Cal. App. 4th at 1279 n.7, 92 Cal. Rptr. 2d at 346 (asserting that within the same pool of prospective jurors "only 4.8 percent did not think they could be fair to African-Americans, and 5 percent did not think they could be fair to women").

an insurmountable level of discrimination, supplying them with a unique perspective that deserves representation on a jury venire.[71]

III. CHAPTER 43

The enactment of Chapter 43 is a legislative attempt to codify an entire body of state and federal case law holding that members of identifiable groups may not be excluded from jury service on the basis of group membership alone.[72] Credited with instigating Chapter 43's creation are two recent court decisions:[73] *People v. Garcia*[74] and *Wade v. Terhune*.[75] First, because the landmark *Garcia* decision was made by the Fourth District California Court of Appeals, it is only applicable to Orange County.[76] Therefore, Assemblymember Carole Migden believed that its holding needed codification in order to establish state law uniformity.[77] Secondly, Migden argued that Chapter 43's enactment was particularly necessary because the federal court in *Terhune* claimed that California state courts were not adequately applying the law under *Batson*.[78] Therefore, even though both federal and state case law already forbid exclusion of prospective jurors based solely on group bias, Chapter 43's supporters believed that statutory action was necessary in order to send courts a clear legislative message that discrimination against identifiable groups during jury selection is unacceptable.[79]

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71. *Id.* at 1279, 92 Cal. Rptr. 2d at 346.

72. *See* MIGDEN Q & A, *supra* note 13, at 2-3 (explaining that Chapter 43 codifies *Wheeler*, *Batson*, and all of the other cases that led up to the *Garcia* decision); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2418, at 6 (June 14, 2000) (same).

73. *Infra* text accompanying notes 76-78.

74. 77 Cal. App. 4th 1269, 92 Cal. Rptr. 2d 339 (2000).

75. 202 F.3d 1190 (2000).

76. Jenifer Warren, *California and the West: New Law Bars Anti-Gay Bias in Jury Selection*, L.A. TIMES, June 28, 2000, at A3.

77. *Id.*

78. *See* MIGDEN Q & A, *supra* note 13, at 2 (stating that

> California State courts are not sufficiently enforcing *Batson* and consequently, Californians are being kept off of juries because of occupation, race, color, religion, sex, national origin, or economic status . . . [C]ourts need guidance in code on assuring that no prospective juror is kept off a jury due to [any of these reasons]. [Chapter 43] attempts to provide that guidance);

see also Terhune, 202 F.3d at 1196-97 (stating that since 1994 "the California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits"). The *Terhune* court went on to explain that under *People v. Wheeler*, the constitutional standard was defined as mandating a showing of "strong likelihood" that jurors were excused based on group bias, whereas the standard under *Batson v. Kentucky* requires a showing of a "reasonable inference." *Id.* at 1195-96. *Batson*, however, is the controlling case law. *Id.* at 1197.

79. *See* Carole Migden, *Governor Davis Signs Migden Bill to Codify Decision Calling Lesbians and Gays "Cognizable" Group*, News Release 209, June 27, 2000, at 1 (copy on file with the *McGeorge Law Review*) (quoting Assemblymember Carole Migden stating that Chapter 43 "'assures that no one will be denied the right of serving on a jury and assures that all segments of society have a place in the jury box'"); Letter from Wendy Taylor, Legislative Advocate, California Attorneys for Criminal Justice, to Assemblymember Carole Migden, at 1 (Apr. 19, 2000) [hereinafter Taylor Letter] (copy on file with the *McGeorge Law Review*) (asserting that Chapter 43 sends a message that discrimination in jury selection will not be tolerated); Letter from Barry Broad and Shane Gusman,

Specifically, Chapter 43 focuses on ensuring that homosexuals are not deprived of the right to serve on juries.[80] Prior to Chapter 43, the California Code of Civil Procedure protected *some* cognizable groups from automatic exemption from jury service, but did not expressly protect individuals from exemption based solely on sexual orientation.[81] Even worse, the code provided a legal loophole to the above statute by failing to specifically ban such discrimination in an attorney's use of peremptory challenges.[82] With the enactment of Chapter 43, the Legislature proposes a solution to these problems.[83] First, Chapter 43 adds sexual orientation to the list of unacceptable reasons for automatically exempting a potential juror from jury service.[84] Secondly, the new law bans attorneys from using peremptory challenges to exclude prospective jurors based solely on such person's membership in a "cognizable" group.[85]

Chapter 43 also attempts to assure that California law is consistent with both state and federal constitutional provisions.[86] For example, the Legislature declared that because gays and lesbians are considered a "cognizable segment of the community,"[87] they must be included in the jury pool in order to preserve "the constitutional concept of [a] jury trial."[88] In other words, when homosexuals are excluded from jury service, the panel is deprived of exposure to unique

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California Public Defenders Association, to All Members of the Senate Judiciary Committee, at 1 (May 23, 2000) [hereinafter Broad Letter] (copy on file with the *McGeorge Law Review*) (same); Letter from Francisco Lobaco, Legislative Director, and Valerie Small Navarro, Legislative Advocate, American Civil Liberties Union, to Assemblymember Carole Migden, at 1 (Apr. 19, 2000) (copy on file with the *McGeorge Law Review*) (same); Letter from Eric-Joseph C. Astacaan, Legislative Advocate, California Alliance for Pride and Equality, to Assemblymember Carole Migden, at 1 (Apr. 18, 2000) (copy on file with the *McGeorge Law Review*) (same); Letter from Karen Jo Koonan, National Jury Project, to Assemblymember Carole Migden, at 1 (Apr. 13, 2000) [hereinafter Koonan Letter] (copy on file with the *McGeorge Law Review*) (same); Don Thompson, *Law Establishes Gay-Juror Rights: Davis Signs Landmark Legislation That Bars Panelists from Being Removed Solely Because of Sexual Orientation*, ORANGE COUNTY REG., June 28, 2000, at A04 (same); Overmyer, *A Fair and Impartial Jury*, SACRAMENTO BEE, June 21, 2000 [hereinafter Overmyer Article] (same).

80. *See* 2000 Cal. Legis. Serv. ch. 43, sec. 1(5), at 138 (declaring that the gay community, "deserve[s] to bear their share of the burdens and benefits of citizenship, including jury service").

81. *See* CAL. CIV. PROC. CODE § 204 (West Supp. 2001) (amended by Chapter 43) (listing occupation, race, color, religion, sex, national origin, and economic status as the classifications for which potential jurors may not be exempted from jury service but neglecting to include sexual orientation).

82. *See* MIGDEN, JURORS-ELIGIBILITY, *supra* note 10, at 1 (explaining that there was no prior code provision pertaining to this issue before the passage of Chapter 43).

83. *See infra* notes 84-85 (explaining the proposed solutions).

84. *See* CAL. CIV. PROC. CODE § 204 (amended by Chapter 43) (adding sexual orientation to the existing list banning the exclusion of potential jurors based on occupation, race, color, religion, sex, national origin, and economic status).

85. *See id.* § 231.5 (enacted by Chapter 43) (listing "race, color, religion, sex, national origin, sexual orientation, or similar grounds" as impermissible grounds for a peremptory strike); *see also* MIGDEN Q & A, *supra* note 13 (explaining that Chapter 43 covers all cognizable groups rather than covering only homosexuals because gays and lesbians would have more protection than other cognizable groups otherwise).

86. *Infra* text accompanying notes 87-89, 92.

87. 2000 Cal. Legis. Serv. ch. 43, sec. 1(3), at 138.

88. *Id.*, sec. 1(2), at 138.

perspectives,[89] which conflicts with both the state and federal constitutional requirement of drawing potential jurors from a "fair cross-section" of the community.[90] Additionally, Chapter 43 addresses the equal protection concerns expressed in federal case law.[91] By precluding exclusion of homosexual prospective jurors based on group bias alone, Chapter 43 seeks to ensure that homosexual defendants are not denied their equal protection right of having a jury composed of similarly situated persons.[92]

Unfortunately, however, Chapter 43 does not provide a specific remedy upon discovery that a juror is being excused from a panel based solely on impermissible bias.[93] Instead, courts are expected to apply case law in order to determine the appropriate remedy.[94] Although Chapter 43 does not codify the Legislative intent regarding this matter, apparently lawmakers intend for courts to seat the improperly excused juror in the event an attorney gives an inadequate explanation for the prospective juror's dismissal, rather than excuse the entire panel.[95]

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89. *See id.*, sec. 1(1), (3), at 138 (explaining that because homosexuals share "a common perspective based upon their membership in that community," removing them from the jury pool prevents, "qualities of human nature and varieties of human experience" from being considered).

90. *See supra* note 38 and accompanying text (listing both the California and federal constitutional sources of the "fair cross-section" requirement).

91. *See supra* Part II.B (discussing the *Batson* and *J.E.B.* decisions); *see also infra* text accompanying note 92 (explaining how Chapter 43 addresses the equal protection issue).

92. *See* CAL. CIV. PROC. CODE § 204 (amended by Chapter 43) (adding sexual orientation to the list of impermissible grounds for excluding a prospective juror); *id.* § 231.5 (enacted by Chapter 43) (creating a list, including sexual orientation, of impermissible reasons for excusing a prospective juror from jury service); *see also supra* Part II.B (discussing that the exclusion of jurors belonging to the same identifiable group as a defendant violates such defendant's equal protection rights).

93. *See* MIGDEN Q & A, *supra* note 13, at 3 (commenting that Chapter 43 fails to provide a remedy once improper dismissal of a prospective juror is discovered).

94. *See id.* at 2-3 (claiming that *Batson* and *Wheeler* discuss different remedies for improper dismissal of a prospective juror). Assemblymember Migden claims that the remedy under *Batson* is to seat the juror; whereas, *Wheeler* "has been interpreted to provide that the court must throw out the entire panel and start over in jury selection." *Id. See also Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906 (asserting that upon discovery of the fact that an attorney has improperly excused a juror from a venire, the remedy is to excuse the entire jury panel selected thus far). *But see Batson*, 476 U.S. at 99 n. 24 (commenting in the majority opinion that

> we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against . . . jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire).

95. *See* MIGDEN Q & A, *supra* note 13, at 3 (quoting Assemblymember Carole Migden stating that instead of specifically providing a remedy within Chapter 43's provisions, courts can "rely on case law . . . allowing the juror to be seated").

IV. ANALYSIS OF CHAPTER 43

A. *The Right to a Fair Trial versus The Right to Serve as a Juror: Does Chapter 43 Confuse Priorities?*

Perhaps the most obvious argument posed by Chapter 43's supporters is that the new statutes provide consistency between California law and constitutional provisions.[96] First, supporters contend that Chapter 43 will ensure defendants of their constitutional right to an impartial jury drawn from a fair cross-section of the community.[97] For example, by banning the exclusion of members of cognizable groups from jury service based on group membership alone, Chapter 43 reduces the likelihood that such discrimination will not occur.[98] Additionally, Chapter 43 allows defendants the opportunity to secure their equal protection rights by providing that prospective jurors belonging to the same identifiable group as the defendant may not be excluded from jury service based solely on group membership.[99]

Supporters of Chapter 43 also argue that the new law finally addresses the stereotypes suffered by the gay community.[100] First of all, when homosexuals are denied the opportunity to serve on juries, a message is sent that gays are not equal members of society.[101] Such exclusion also perpetuates the stereotype that gays and

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96. *Infra* text accompanying notes 97-98.

97. *See* Taylor Letter, *supra* note 79, at 1 (indicating that Chapter 43 will "help ensure that juries consist of a true cross-section of the community and further secure to defendants their right to an impartial jury"); *Courting Gay Rights*, *supra* note 2, at A24 (arguing that Chapter 43 will provide diversity among jurors); *see also supra* text accompanying note 38 (explaining that the cross-section requirement is rooted in both the California and United States' Constitutions).

98. *See* CAL. CIV. PROC. CODE § 204 (amended by Chapter 43) (noting that once the initial jury pool is compiled, Chapter 43 prevents attorneys from automatically excluding members of cognizable groups from jury service based solely on group membership); *id.* § 231.5 (enacted by Chapter 43) (banning attorneys from using peremptory challenges to exclude members of identifiable groups from jury service based on group bias alone).

99. *See supra* note 92 and accompanying text (explaining Chapter 43's provisions preventing discrimination based on group bias); *see also supra* text accompanying notes 50-57 (explaining that excluding members of the same cognizable group as a defendant is inconsistent with the equal protection provisions of the Constitution); Broad Letter, *supra* note 79, at 1 (claiming that "[d]iscrimination in the juror selection process erodes [the] right [to a fair and impartial jury] by depriving the defendant of a whole class of potential jurors based on certain characteristics they share").

100. *See infra* text accompanying notes 101-02 (giving examples of stereotypes suffered by the gay community, such as being considered unequal members of society and being considered unfit for jury service).

101. *See Garcia*, 77 Cal. App. 4th at 1279, 92 Cal. Rptr. 2d at 346 (claiming that exclusion of gay jurors deprives them of their community membership); Lynd, *supra* note 5, at 239 (quoting editorial columnist Brian James, stating that "'[i]f gays can be systematically excluded from A Jury of Your Peers, then we're not really peers. We're not equal citizens under the law'"); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1046 (1995) (stating that "jury service . . . signifies the political acts of belonging to a community and participating as a full and equal citizen"); Letter from Steve Birdlebough, Friends Committee on Legislation of California, to Assemblymember Sheila Kuehl, at 1 (Apr. 24, 2000) [hereinafter Birdlebough Letter] (copy on file with the *McGeorge Law Review*) (claiming that homosexuals should have the same rights as other community groups with respect to jury service); Letter from Tom Benbrook, Advocacy Chair, Ventura County Parents, Families and Friends of Lesbians and Gays, to Assemblymember Carole Migden, at 1 (Mar. 20, 2000) [hereinafter Benbrook Letter] (on file with the *McGeorge Law Review*) (same); Koonan Letter, *supra* note 79, at

lesbians are unfit to serve on juries.[102] However, because jury duty is a civic responsibility,[103] homosexuals deserve to contribute to decisions that will undoubtedly affect them as citizens.[104] Otherwise, there is a danger that continued exclusion from jury service will lessen the gay community's willingness to accept jury verdicts.[105] Thus, Chapter 43 is necessary not only because it broadens the jury pool to include homosexuals,[106] but also because it manifests the view of lawmakers that "[n]o Californian should be deprived of the opportunity to share in our system of justice simply because they are gay or lesbian."[107]

In spite of the overwhelming support of Chapter 43, the new law is not without criticism.[108] For example, the Committee on Moral Concerns defines the homosexual community as a "politically charged, activist minority fighting to advance a sexual lifestyle that has never been accepted in American history."[109] Therefore, the Committee argues that homosexuals should be excluded from certain jury trials because the group may have a "chip on its shoulder."[110] In sum, the Committee contends that because the jury system is designed to ensure that defendants will receive a fair trial, it should not be used to glorify the rights of jurors.[111]

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1 (referring to jury service as a "right" that homosexuals have). *But see* Georgia v. McCollum, 505 U.S. 42, 61-62 (1992) (Thomas, J., concurring) (arguing that we need to be cognizant of the fact that jury selection is intended to provide defendants with fair and impartial juries and not to glorify the rights of jurors); Letter from Art Croney, Executive Director/Lobbyist, Committee on Moral Concerns, to Assembly Judiciary Committee, at 1 (Apr. 20, 2000) [hereinafter C.M.C. Letter] (on file with the *McGeorge Law Review*) (same).

102. *See* Jennifer L. Reichert, *Gay and Lesbian Jurors Are A Cognizable Group, Appeals Court Rules*, TRIAL, Apr. 2000, at 99 [hereinafter Reichert Article] (quoting a gay rights advocate stating that "a lot of [people] . . . see gay and lesbian people as criminals who are psychologically unfit for most roles in society").

103. *See Garcia*, 77 Cal. App. 4th at 1279, 92 Cal. Rptr. 2d at 346 (claiming that jury duty is a civic responsibility); *Courting Gay Rights*, *supra* note 2, at A24 (same); Chris Burnett, *Lawmaker Says Gay-Rights Bills Will Wait a Year*, SACRAMENTO BEE, June 28, 2000 (same).

104. *See* Warren, *supra* note 76, at A3 (declaring that supporters of Chapter 43 believe that the new law sends a message that homosexuals have a valuable contribution to make to civic life); Reichert Article, *supra* note 102, at 99 (same).

105. *See Garcia*, 77 Cal. App. 4th at 1274-75, 92 Cal. Rptr. 2d at 342-43 (suggesting that if certain groups are excluded from jury service, public confidence in the fairness of verdicts is lessened); Marder, *supra* note 101, at 1091 (same); *see also* Hoffman, *supra* note 2, at 138 (claiming that many jurors who are excused from service "are leaving our courtrooms with the feeling that the rest of the trial process must be just as bizarre and irrational as jury selection").

106. *Courting Gay Rights*, *supra* note 2, at A24.

107. *See* Burnett, *supra* note 103 (quoting Governor Gray Davis).

108. *Infra* text accompanying notes 109-11, 113-15.

109. C.M.C. Letter, *supra* note 101, at 1.

110. *Id.*; *see also* Warren, *supra* note 76, at A3 (quoting Art Croney, Executive Director of the Committee on Moral Concerns, expressing this same sentiment when asked to comment on Chapter 43). *But see* Overmyer Article, *supra* note 79 (rejecting the Committee's argument in stating that it is "precisely the kind of view that must not be allowed to poison the jury selection").

111. C.M.C. Letter, *supra* note 101, at 1. Members of the Supreme Court have also expressed this view. *See, e.g.*, *McCollum*, 505 U.S. at 61-62 (Thomas, J., concurring) (asserting that limiting a defendant's use of peremptory challenges in jury selection confuses priorities because in doing so, "we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death"); *J.E.B.*, 511 U.S. at 150 (O'Connor, J., concurring) (quoting the same language of Justice Thomas' concurring opinion in *Georgia v. McCollum* and indicating agreement). *But see Garcia*, 77 Cal.

B. *Do Homosexual Jurors Have Predetermined Biases in Cases Involving Gay Issues?*

The Traditional Values Coalition also presents arguments in opposition to Chapter 43.[112] First, the Coalition claims that Chapter 43 "seeks to merely add weight" to the homosexual community by classifying them as a cognizable group.[113] The Coalition further asserts that Chapter 43 is unnecessary because it simply adds a group's sexual preference to an existing list of classifications.[114] The Coalition's most contested argument, however, is that if sexual orientation was an issue involved in a trial, Chapter 43 allows excused homosexual prospective jurors to claim discrimination "when in fact they obviously had a predetermined position on the subject of sexual orientation in mind."[115]

According to Chapter 43's advocates, the latter argument posed by the Traditional Values Coalition is supported by flawed reasoning.[116] In response to the Coalition's statement that homosexual jurors have a predetermined view regarding sexual orientation, Assemblymember Carole Migden points out that under this reasoning "a[n] African American male would have to be excluded from the Rodney King jury."[117] As the *Garcia* court explained, there is no correlation between homosexuality and individual viewpoint.[118] Otherwise, the same argument could be made that heterosexuals are equally unfit to serve on juries where one of the parties is also heterosexual.[119] If courts followed the Coalition's reasoning on this issue, the

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App. 4th at 1279, 92 Cal. Rptr. 2d at 346 (indicating that jury service is a community right); Marder, *supra* note 101, at 1046 (same); Birdlebough Letter, *supra* note 101, at 1 (same); Benbrook Letter, *supra* note 101, at 1 (same); Koonan Letter, *supra* note 79, at 2 (same).

112. *See infra* text accompanying notes 114-15 (explaining why the Traditional Values Coalition is opposed to Chapter 43). *But see* MIGDEN Q & A, *supra* note 13, at 3 (claiming that the Coalition is opposed to Chapter 43 simply "because they are homophobic").

113. Letter from Rev. Louis P. Sheldon, Chairman, Traditional Values Coalition, to Assemblymember Sheila Kuehl, at 1 (Apr. 17, 2000) [hereinafter Sheldon Letter] (copy on file with the *McGeorge Law Review*); *see also* Letter from Helene Schneider, President, Santa Barbara Women's Political Committee, to Senator Jack O'Connell, at 1 (May 11, 2000) (on file with the *McGeorge Law Review*) (expressing support for Chapter 43 while simultaneously admitting that the new law "expands lesbian rights").

114. Sheldon Letter, *supra* note 113, at 1.

115. *Id.*; *see also Wheeler*, 22 Cal. 3d at 292, 583 P.2d at 771-72, 148 Cal. Rptr. at 913 (Richardson, J. dissenting) (indicating that the ideal jury is not necessarily composed of all elements of society in an effort to balance biases, but rather, "individual prejudices [may] so control the jurors that they are incapable of viewing the issues before them dispassionately. Such disharmony may make a unanimous verdict an impossibility from the outset thus rendering the criminal trial a futile exercise"). *But see infra* text accompanying notes 117-20 (refuting the Coalition's argument).

116. *Infra* text accompanying notes 117-20.

117. MIGDEN Q & A, *supra* note 13, at 3.

118. *See Garcia*, 77 Cal. App. 4th at 1276, 92 Cal. Rptr. 2d at 344 (contending that "[c]ommonality of perspective does not result in identity of opinion"); *see also* Lynd, *supra* note 5, at 274 (quoting People v. Viggiani, 431 N.Y.S. 2d 979, 982 (1980) claiming that homosexuals are "'as diverse in their opinions as their numbers'"); *id.* at 256 (arguing that heterosexuals are actually more likely to discriminate against homosexuals than vice versa).

119. Lynd, *supra* note 5, at 275, 278.

entire voir dire process would be a fruitless endeavor because each and every citizen would automatically be presumed unqualified.[120]

Even if there is some validity to the last argument posed by the Traditional Values Coalition, Chapter 43's advocates also point out that members of cognizable groups can still be excused from juries based on actual bias.[121] For example, if a homosexual prospective juror conveys during voir dire that she cannot be impartial in a case involving gay issues, then the juror may permissibly be excused from the jury panel for demonstration of actual bias.[122] The problem with this argument, however, is that it fails to recognize that excuses based on actual bias are challenges for cause rather than peremptories.[123] Thus, the argument impliedly acknowledges that in the absence of evidence indicating that a homosexual prospective juror has actual bias in a case involving gay issues, Chapter 43 forbids an attorney from using a peremptory challenge to excuse such a juror, unless the lawyer is able to state an acceptable reason for believing the juror is biased.[124] As a result, parties may be forced to retain unwanted and possibly biased jurors on a jury panel.[125]

C. Possible Consequences of Limiting Peremptory Challenges

Arguments opposed to limiting the use of peremptory challenges emphasize that such practice could produce dangerous results.[126] Opponents contend that lawyers may be less inclined to excuse jurors believed to be biased simply out of fear of being unable to explain a reason for the challenge.[127] Even worse, if a lawyer unsuccessfully tried to remove such a juror, and the juror sought to be excused is made aware of that attempt, the juror is much less likely to be sympathetic to the challenging lawyer's case.[128] In either predicament, the result could be particularly

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120. *Id.*

121. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2418, at 6 (June 7, 2000).

122. *Id.*

123. *See* CAL. CIV. PROC. CODE § 225 (West Supp. 2000) (indicating that there are three types of challenges for cause: general disqualification, implied bias, and *actual* bias) (emphasis added); *see also* Lynd, *supra* note 5, at 273 (demonstrating one court's "for cause" removal of jurors who claimed they could not be impartial to a homosexual victim).

124. *See Garcia*, 77 Cal. App. 4th at 1282, 92 Cal. Rptr. 2d at 348-49 (requiring, upon remand, that the prosecutor explain his peremptory challenges to the court in order to determine their validity); *see also supra* note 72-76 (indicating that Chapter 43, in part, codifies the *Garcia* decision).

125. *See, e.g.*, *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) (suggesting that lawyers may have to allow biased jurors to be seated on jury panels because of counsel's inability to provide an adequate reason for excusing the juror).

126. *See infra* text accompanying notes 127-31 (explaining the dangerous results that may occur).

127. *See J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) (suggesting that forcing attorneys to express reasons for peremptorily excusing a prospective juror from service is potentially problematic because lawyers sometimes base peremptory challenges on "experienced hunches and educated guesses"); *see also* Marder, *supra* note 101, at 1086 (same).

128. *See J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) (noting that some courts exercise peremptory challenges in open-court, where prospective jurors can witness the proceedings).

damaging to a criminal defendant.[129] Opponents also point out that, in geographic areas where a cognizable group is particularly prevalent, it could simply be coincidental if members of the group are peremptorily excused.[130] In this scenario, group bias may indeed have nothing to do with the decision to excuse a particular juror. However, if the excusing attorney is unable to explain an appropriate reason for dismissal, a criminal defendant rightfully convicted could have her case overturned simply because a member of a cognizable group was excused from a jury panel.[131]

Opponents of limiting the peremptory challenge also argue that having to specify a reason for excusing a member of a cognizable group defeats the entire purpose of the challenge.[132] This is because peremptories, by definition, do not require attorneys to specify reasons for excusing a prospective juror.[133] Thus, opponents contend that by requiring attorneys to disclose reasons for dismissal, "we make the peremptory challenge less discretionary and more like a challenge for cause."[134]

On the other hand, even though Chapter 43 limits an attorney's use of peremptory challenges,[135] some commentators argue that lawyers cannot accurately predict how prospective jurors will rule on a given case anyway,[136] so any harm is minimal at most.[137] For example, in demonstrating an array of thoughts that may

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129. *See id.* at 162 (Scalia, J., dissenting) (claiming that "[t]he loss of the real peremptory will be felt most keenly by the criminal defendant").

130. *See* Lynd, *supra* note 5, at 249 (describing the high odds of having many homosexuals in a San Francisco jury pool).

131. *See, e.g., Garcia*, 77 Cal. App. 4th at 1282, 92 Cal. Rptr. 2d at 349 (indicating that upon remand to the trial court, if the excusing attorney is unable to articulate acceptable reasons for excusing two lesbian women removed from the jury panel, Cano Garcia is entitled to a new trial); *see also* Richard Marosi, *State Court Rules Jurors Can't Be Excluded for Sexual Orientation*, L.A. TIMES, Feb.2, 2000, at A3 (claiming that such a limitation on peremptory challenges can create new grounds for appeals for defendants rightfully convicted of crimes).

132. *See J.E.B.*, 511 U.S. at 161-62 (1994) (Scalia, J., dissenting) (declaring that "the peremptory challenge system . . . loses its whole character when (in order to defend against 'impermissible stereotyping' claims) 'reasons' for strikes must be given").

133. *See supra* note 28 and accompanying text (defining peremptory challenges).

134. *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring). *But see Batson*, 476 U.S. at 111 (O'Connor, J., concurring) (failing to mention any disagreement with the majority's opinion that peremptory challenges are not undermined by requiring reasons to be stated in their exercise against African-American jurors); *id.* at 98-99 (indicating the majority's view that peremptories are not undermined by the court's decision).

135. CAL. CIV. PROC. CODE § 231.5 (enacted by Chapter 43).

136. *See* Hoffman, *supra* note 2, at 139 (asserting that "[v]irtually every important study done in this area . . . has demonstrated that lawyers, and even their highly paid jury consultants, are no better at detecting hidden juror bias than a monkey throwing a dart"); *see also* Marder, *supra* note 101, at 1080 (claiming that studies show that lawyers are not accurate predictors of jury bias).

137. Marder, *supra* note 101, at 1124 (declaring that with each restriction that is added to the use of peremptory challenges, "we believe that we have 'solved' the problem of . . . discrimination during jury selection even though all we have done is to limit the way in which it can be discussed").

enter an attorney's mind when trying to determine how to exercise peremptory challenges, Judge Morris Hoffman explained:

> [p]eremptory challenges are a combination of psychiatry and palm reading, which probably overlap greatly. . . . We just love to judge people, and we love to predict the unpredictable. "You're fair; you're not. You think you are so smart trying to hide your bias, but I detected it. You're with us; you're against us. You're a sniveling liberal panty waist who will award any sad-eyed claimant a million dollars per tear; you're a hard-hearted conservative who wouldn't throw his own mom a life preserver.[138]

In furtherance of this view, a 1991 study shows that "on average, attorneys guessed that they had correctly predicted jurors' verdicts for 71.9% of the jurors they had examined," when, in fact, they were correct only 45.4% of the time.[139]

D. Will Chapter 43 Really Change Anything?

1. Attorneys May Still be Able to Remove Unwanted Jurors from Jury Panels Despite Chapter 43

Chapter 43 may fail to be effective in changing the discriminatory use of peremptory challenges because even though courts will likely prevent attorneys from directly asking whether a juror is gay, attorneys still have ways of acquiring the information; and, therefore, excluding the juror because of it.[140] For example, attorneys can formulate questions designed to elicit responses from prospective jurors indicating membership in an "undesirable" group.[141] If an attorney desires to exclude homosexuals from the jury venire, she can permissibly ask questions regarding who a juror lives with,[142] whether or not the juror has supported any gay rights causes,[143] or whether the juror has any gay friends.[144] Furthermore, in the course of voir dire questioning, the juror could inadvertently offer information as to his homosexuality.[145] If a juror was excused based on his admission or response to

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138. Hoffman, *supra* note 2, at 140.

139. Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 689 (1991).

140. *Infra* text accompanying notes 142-49.

141. *Infra* text accompanying notes 142-49.

142. *See State Won't Appeal Ban on Removing Gay Jurors*, L.A. TIMES, Feb. 8, 2000, at A20 (pointing out that attorneys can evade the peremptory challenge ban by inquiring about a prospective juror's living partners); Harriet Chiang, *Ruling Protects Gay Juror Rights/ Dismissals Can't Be Based on Sexual Orientation, State Court Says*, S.F. CHRON., Feb. 3, 2000, at A1 (same); Lynd, *supra* note 5, at 247 (same).

143. Lynd, *supra* note 5, at 247.

144. *Id.*

145. *See id.* (stating that a juror in the Dan White trial admitted to being gay when asked if he had any gay friends).

any of these types of questions, the attorney could provide a pretextual reason for excusing the juror.[146] Even absurd reasons, such as explaining to the court that "the juror resembles [my] stupid Uncle Cletus,"[147] or that the juror is a "wide-eyed [blonde]"[148] are permissible peremptory strikes.[149]

On the other hand, Chapter 43 may motivate courts to bar attorneys from asking the above types of questions,[150] thereby decreasing the likelihood of discrimination in jury selection. As the *Garcia* court noted, "[n]o one should be 'outed' in order to take part in the civic enterprise which is jury duty. The whole point is that no one can be excluded because of sexual orientation. That being the case, no one should be allowed to inquire about it."[151] Even though this statement specifically bans direct questioning of a person's sexual orientation, it also arguably supports the notion that questions regarding whether a juror supports gay rights causes or has gay friends impliedly solicit a response from a juror as to her own sexual orientation and, therefore, should be impermissible.[152]

2. *Chapter 43's Failure to Specify a Remedy Could Be Problematic*

Because Chapter 43 fails to provide a specific remedy upon finding that an attorney has improperly excused a prospective juror from service,[153] inconsistent results may surface[154] when courts attempt to resolve the issue through the application of case law.[155] For example, if a court applies the *Wheeler* remedy, both the inappropriately dismissed juror and the entire jury panel are excused, beginning jury selection anew.[156] This remedy is problematic because dismissing the entire venire prolongs jury selection procedures, inevitably compiling higher financial

146. *See* Marder, *supra* note 101, at 1123-24 (claiming that attorneys may alter their reasons for peremptorily excusing a juror based on which reasons courts deem acceptable); *see also Wheeler*, 22 Cal. 3d at 293, 583 P.2d at 772, 148 Cal. Rptr. at 914 (Richardson, J. dissenting) (arguing that questioning an attorney as to why she excused a prospective juror is a fruitless endeavor because pretextual reasons are easy to provide).

147. *Garcia*, 77 Cal. App. 4th at 1280, 92 Cal. Rptr. 2d at 347.

148. *J.E.B.*, 511 U.S. at 161 (Scalia, J., dissenting).

149. *See id.* (noting that the majority opinion fails to explain what types of reasons for peremptorily excusing a juror are valid and acceptable).

150. *See* Lynd, *supra* note 5, at 247 (discussing the Dan White trial and noting that the judge allowed defense counsel to ask these exact questions during voir dire).

151. *Garcia*, 77 Cal. App. 4th at 1280, 92 Cal. Rptr. 2d at 347.

152. *See id.* (suggesting that inquiry designed to discover a person's sexual orientation is impermissible).

153. *See supra* text accompanying note 93 (noting that Chapter 43 does not provide a specific remedy for improper dismissal of jurors).

154. *See supra* note 94 (explaining that *Batson* and *Wheeler* do not necessarily provide the same remedy).

155. *See supra* text accompanying note 94 (explaining that courts are expected to follow case law to determine the appropriate remedy).

156. *See supra* note 94 (noting that *Wheeler* has been interpreted to indicate that the entire jury panel must be dismissed upon discovery of a juror who has been improperly excused).

costs to the litigants as well as the general public.[157] The *Batson* Court, however, did not indicate a preference for a specific remedy, but did point out the possibility of following the remedy set out in *Wheeler* by simply seating the inappropriately excused juror.[158] Even though the Legislature may have intended courts to follow the latter remedy,[159] the failure to specify such an intent essentially undermines the entire purpose behind codifying the cases leading up to Chapter 43's creation[160] in the first place.[161] This is because the Legislature claims to have codified Chapter 43 in an attempt to give guidance to courts who were inadequately applying case law.[162] That being the argument, the Legislature ironically presumes that California courts will adequately follow either of the remedies noted by the *Batson* decision, once inappropriate juror dismissal is discovered.[163]

V. CONCLUSION

Regardless of whether practitioners agree with Chapter 43's provisions, one cannot overlook the fact that the new law was designed with good intentions.[164] Because the homosexual community and other cognizable groups have suffered the consequences of discriminatory jury selection procedures in California for several years,[165] Chapter 43 is an admirable attempt to stop such group bias from infecting courtroom procedure in the future.[166]

However, despite the legislative intent underlying its enactment, Chapter 43 was not universally celebrated among the new law's commentators.[167] Supporters contend that Chapter 43 makes California statutory law consistent with

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157. *See Wheeler*, 22 Cal. 3d at 288, 583 P.2d at 769, 148 Cal. Rptr. at 910 (1978) (Richardson, J. dissenting) (contending that the provided remedy makes "the present lengthy process of voir dire . . . lengthier still"); *see also J.E.B.*, 511 U.S. at 149 (O'Connor, J. concurring) (suggesting that requiring attorneys to explain their reasons for peremptories in the first place already prolongs jury selection procedures); *id.* at 162 (Scalia, J., dissenting) (same).

158. *See supra* note 94 (explaining that *Batson* case specifically declined to specify a preferred remedy in its holding, but noting that *Batson* has been construed to mean that the inappropriately excused juror may be seated).

159. *See supra* note 95 and accompanying text (suggesting that courts should be seating the juror, rather than excusing the entire panel).

160. *See supra* note 72 (stating that Chapter 43 codifies *Wheeler*, *Batson*, and all of the other cases leading up to the *Garcia* decision).

161. *See supra* note 78 and accompanying text (indicating that Chapter 43 is an attempt to give legislative guidance because California courts in the past have inadequately followed the law under the *Batson* decision with respect to improper peremptory strikes).

162. *Supra* note 78 and accompanying text.

163. *See* CAL. CIV. PROC. CODE § 204 (amended by Chapter 43) (failing to specify a remedy for courts to follow upon discovery of an inappropriately dismissed juror); *id.* § 231.5 (enacted by Chapter 43) (same); *see also* MIGDEN Q & A, *supra* note 13, at 3 (suggesting that the Legislature intended to rely on case law with respect to the remedy for improper juror dismissal).

164. *See supra* text accompanying note 79 (asserting that Chapter 43 was enacted to eliminate discriminatory jury selection procedures).

165. *Supra* text accompanying note 10.

166. *Supra* text accompanying note 79.

167. *See supra* Part IV.A (discussing the opposing concerns to Chapter 43); *see also supra* Part IV.B (same).

constitutional provisions.[168] Advocates further argue that Chapter 43 simultaneously attempts to eliminate group bias committed against cognizable groups.[169] Opponents, on the other hand, dispute these asserted benefits, claiming that Chapter 43 prioritizes a juror's right to serve on a jury panel over a defendant's right to a fair trial.[170] Furthermore, opponents claim that if a trial involves gay issues, homosexual jurors will have predetermined views, rendering them incapable of bein gimpartial.[171] Chapter 43's adversaries further maintain that the new law undermines the essence of the preemptory challenge by further limiting its use;[172] and that attorneys should have the right to excuse any unwanted juror from a jury venire.[173]

Ironically, much of the debate surrounding Chapter 43's enactment may ultimately prove pointless because the new law will likely fail to serve its purported goals.[174] Attorneys may still remove unwanted prospective jurors from jury panels simply by asking certain questions,[175] or by explaining their peremptory strikes with pretextual reasons.[176] Furthermore, the Legislature's omission of a specific remedy for courts to follow upon discovery of an improperly excused juror still leaves California courts with uncertainty as to the proper procedure to follow thereafter.[177] In sum, although there is a respectable sentiment underlying Chapter 43's creation,[178] the Legislature missed its opportunity to ensure that the new law would be followed as designed, by failing to codify its intent.[179]

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168. *See supra* Part IV.A (arguing that Chapter 43 addresses fair-cross section as well as equal protection concerns).

169. *Supra* Part IV.A.

170. *Supra* text accompanying note 111.

171. *Supra* Part IV.B.

172. *See supra* Part IV.C (claiming that peremptory challenges, by definition, do not require attorneys to state a reason for excusing a juror, so Chapter 43 should not place limits on how peremptory challenges should be used).

173. *Supra* Part IV.B.

174. *See supra* note 78 and accompanying text (claiming that one of Chapter 43's goals was to provide guidance to courts); *see also supra* text accompanying note 79 (contending that Chapter 43 was also enacted to eliminate discriminatory jury selection procedures).

175. *See supra* text accompanying notes 142-44 (noting that attorneys can ask prospective jurors whether they have any gay friends, whether they have supported any gay rights causes, or who they live with).

176. *See supra* text accompanying notes 147-49 (providing examples of pretextual reasons attorneys can give and still be allowed to excuse a prospective juror).

177. *See supra* note 84 and accompanying text (explaining that Chapter 43 requires courts to apply case law rather than setting out a specific remedy).

178. *See supra* note 78 and accompanying text (claiming that Chapter 43 was partly enacted to provide guidance to courts); *see also supra* text accompanying note 79 (explaining that Chapter 43 was also enacted to prevent future discrimination in jury selection).

179. *See supra* text accompanying note 95 (explaining that the Legislature likely intended the remedy for violating Chapter 43 to be that the improperly excused juror should be seated).