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THE DOUBLE BIND: UNEQUAL TREATMENT FOR HOMOSEXUALS WITHIN THE AMERICAN LEGAL FRAMEWORK

HEATHER C. BRUNELLI*

The American legal system has a checkered past with respect to equality of justice for minorities.1 The legal system has come a long way from the days when women were legally excluded from the profession of law2 and African Americans were considered property.3 However, today, there is another minority class that the American legal system openly discriminates against—homosexuals.4

In 1990, former associate justice of the United States Supreme Court Lewis F. Powell, Jr. stated that he thought he “probably made a mistake” when he cast the tie-breaking vote in the Supreme Court case Bowers v. Hardwick.5 In Hardwick, a majority of the Supreme Court refused to apply the constitutional right of privacy to homosexual relations between consenting adults.6 Hardwick was a due process challenge to a Georgia statute that made sodomy a crime punishable by up to twenty years in prison. In 1982, Hardwick was charged with the crime of sodomy when a police officer entered the bedroom of his

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1 See, e.g., Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404–05 (1857) (holding that a slave made free by being brought to a state without slavery does not become a citizen of the United States through this action, and is still property); Plessy v. Ferguson, 163 U.S. 537, 548 (1896) (holding that separate but equal was constitutional); Korematsu v. United States, 323 U.S. 214, 218–19 (1944) (holding the internment of Japanese Americans in internment camps during World War II constitutional).

2 See generally, e.g., In re Bradwell, 55 Ill. 535 (1869). This case was heard and determined on Sept. 1869, but was unavoidably omitted from its proper place in the report of cases from that term. It is available on Westlaw at 1869 WL 5503 (Ill) and on LEXIS at 1876 Ill. LEXIS 537.


6 See generally Hardwick, 478 U.S. 186.

7 See id. at 187–88.

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home where he and another adult male were engaged in oral sex.\(^8\) According to the Supreme Court, the issue in the case was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," and from that concluded that no such fundamental right exists.\(^9\) Despite the fact that the Georgia law applied equally to opposite sex sodomy, the Court refused to interpret the case as dealing with a broader right to sexual privacy between consenting adults.\(^10\) The Supreme Court's decision in this case has been widely criticized.\(^11\) Despite this criticism, *Hardwick* remains good law.\(^12\)

Due to the decision in *Hardwick*, states have been able to retain their statutes that make homosexual acts illegal.\(^13\) This fact can com-

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\(^10\) See *id. at 190.


\(^12\) While *Hardwick* has never been reversed or overruled, some decisions have limited its holding. See, e.g., *Watkins v. U.S. Army*, 837 F.2d 1428, 1438–39 (9th Cir. 1988) (noting that "nothing in Hardwick suggests that the state may penalize gays for their sexual orientation," and that "nothing in Hardwick actually holds that the state may make invidious distinctions when regulating sexual conduct").

plicate a homosexual person's experience in the courtroom. For example, a homosexual witness may be impeached for prior crimes involving moral turpitude if he or she has ever been convicted of homosexual sodomy.\footnote{14} In addition, consider a situation in which a homosexual has been accused of rape or sexual assault on a person of the same sex and then uses a defense of consent. This might be used against him or her in a prosecution for homosexual sodomy, even if he or she is acquitted of the rape or sexual assault charges.\footnote{15}

Not only do homosexuals face problems as witnesses and defendants, but they may also encounter difficulties when they are victims of crimes.\footnote{16} For example, many states have legal standards that classify a homosexual advance as sufficient provocation to incite a "reasonable man to lose his self-control and kill in the heat of passion, thus mitigating murder to manslaughter."\footnote{17} All of these problems stem from societal confusion about sexual orientation, which has its roots in our historically negative attitude toward homosexuality.\footnote{18} Just as with the unequal justice suffered by African Americans and women due to racism and sexism, the key to solving the problem of unequal justice for homosexuals lies in changing social attitudes.\footnote{19}

The jury is one of the most important parts of the American legal system.\footnote{20} Our juries are to be comprised of a fair cross-section of soci-

\footnote{14} See, e.g., Williams v. State, 316 So. 2d. 362, 363, 364 (1975) (where the court describes sexual relations between persons of the same sex as a crime involving moral turpitude which can be used to impeach a witness).

\footnote{15} See, e.g., United States v. Miller, 3 M.J. 292, 292-93 (1977) (defendant accused of rape confessed to the charge of sodomy in order to use a consent defense). A consent defense involves a claim that the "victim" of a rape or sexual assault consented to the sexual act, and if both the defendant and the victim are of the same sex this could open both of them up to charges of homosexual sodomy. See, e.g., GA. CODE ANN. § 16--6--2 (1996); TEX. PENAL CODE ANN. §§ 22.01(1), 21.06 (West 1994).


\footnote{17} See Mison, supra note 16, at 133.

\footnote{18} See infra Part I.

\footnote{19} Cf. infra Part I.

\footnote{20} See, e.g., U.S. CONST. amend. VI. The jury is so important that the Constitution of the United States guarantees a jury trial in criminal prosecutions. See id.
Jury bias against homosexuals and the common assumption of heterosexuality are the highest hurdles society faces in dealing with unequal justice for homosexuals. Such bias against a homosexual defendant can result in the person being convicted for being homosexual, rather than for the crime charged. A witness may not be believed because of his or her sexuality—an issue entirely irrelevant to whether or not they are telling the truth at trial—rather than for any reason related to his or her credibility. Further, jury bias against a homosexual victim can mean that an accused aggressor against this victim will be acquitted or may serve less time for that aggression simply because the jury perceived the victim as more deserving of what happened to him or her.

This Note will explore the problem of unequal justice for homosexuals by focusing on jury bias. Part I discusses the current social perceptions of homosexuality and the psychology of jury bias, and how the two can affect the treatment of homosexuals within our justice system. In Part II, this Note discusses how rape shield statutes can affect homosexual victims and defendants in rape and sexual assault cases differently than their heterosexual counterparts. Part III examines the use of the homosexual advance defense as mitigation for murdering a homosexual victim. Part IV then discusses how to deal with our current jury bias and whether there should be voir dire into jurors’ sexuality or views on homosexuality. Finally, this Note argues that unequal justice for homosexuals within our justice system is created by allowing jury bias to prevail and that utilizing voir dire to ascertain jury views about homosexuality may be the best hope in combating this injustice.

I. Social Perceptions and the Psychology of Juries

Federal law states that juries are to be made up of a fair cross-section of society with the hope that varying views will be repre-
sented. According to the text, it is important to understand how a jury reaches its conclusions and what views a jury represents to be effective in persuading a jury on issues important to the case.

Recent polls show that our country is fairly evenly divided over whether "homosexual relations between consenting adults" should be legal. If a jury truly is a representative cross-section of society, roughly half of the people on the jury would believe that homosexuality should be illegal. Therefore, when a defendant is homosexual, half the jury may already assume the person has done something illegal.

In addition to society's views on the legality of homosexuality, Americans are also divided on what they think of homosexuality in general terms. Although close to 50% of people reported in 1985 that they were not uncomfortable around gay men and lesbians, and in 1996, 56% of people reported they had a friend or acquaintance who was gay, 56% of people described themselves as not being a supporter of gay rights in a 1994 survey. Research shows however, that if a juror has a gay friend or relative, she is more likely to have a positive attitude toward gay men and lesbians, suggesting that much of juror

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25 See 28 U.S.C.A. § 1861 (1994); Williams v. State, 399 U.S. 78, 100 (1970) (stating that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence").


27 See Alan S. Yang. Attitudes Toward Homosexuality, PUB. OPINION Q., Fall 1997, at 477, 487. A 1994 New York Times/CBS News poll showed that 45% of respondents thought homosexuality should be legal and 46% thought it should not be legal. See id.

28 See id.

29 See, e.g., William N. Eskridge, Jr., Privacy Jurisprudence and the Apartheid of the Closet, 1964-1961, 24 FLA. ST. U. L. REV. 703, 786 (1997) (noting case where jury deliberated for forty hours and eventually deadlocked because one juror "would vote a homosexual guilty 'until Hell froze over'"). Consider Federal Rules of Evidence 608, 609 and 403 on the admissibility of specific instances of conduct. See FED. R. EVID. 403; FED. R. EVID. 608; FED. R. EVID. 609. Rule 608 excludes extrinsic evidence of prior bad acts. See FED. R. EVID. 608. Additionally, a witness may be examined about these prior acts only if probative of the truthfulness or untruthfulness of that witness. See FED. R. EVID. 608. It is also within the judge's discretion to exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice. See FED. R. EVID. 403. The purpose of these limitations is to guard against a jury convicting a defendant for the prior bad acts or for the propensity to commit a crime. See FED. R. EVID. 608 (Committee Notes).

30 See Yang, supra note 27, at 489, 491.

31 See id. at 489, 491, 493.
bias stems from an inability to identify with a homosexual lifestyle, due to a lack of exposure to such a lifestyle. 32

What does this mean once such people are sitting in a jury box? Psychological research on jury decision making suggests that most jurors:

construct relatively simple narratives or "stories" in order to make sense of the evidence presented in a trial; most jurors construct these stories very early in the attorney's opening statements; these stories then guide jurors' evaluation of the evidence during the cases in chief; and—most important for the present purposes—these stories generally arise from jurors' personal experiences regarding issues similar to those in the trial. 33

This means that jurors' "biases and personal experiences influence their perceptions of the evidence presented at trial." 34 Therefore, a juror's attitudes toward, and exposure to, homosexuality will affect jury deliberations. 35

Prosecutors and defense attorneys will use this information in selecting a jury in a case involving homosexuality. 36 Jury selection is big business. 37 Jury consultation firms can charge in the range of $100,000 for large trials. 38 Because trial attorneys know that the composition of a jury will have a great effect on the outcome of a trial, many are willing to pay high fees to engage consultants to help them select the jury. 39

33 Id. at 27 (citing to a study done by Pennington & Hastie, 1992).
34 Id.
35 See generally Sherrod & Nardi, supra note 32 at 25, 27, 33–36.
38 See id.
Opinions vary widely on what makes a good jury in any particular case. Attorneys historically have considered such criteria as occupation, gender, race and ethnicity, demeanor and appearance, wealth and social status, religion, marital status, and age. All the work of considering criteria and hiring consultants is done to find a jury that will be favorably disposed to the client's position in the case. This phenomenon is in direct conflict with the supposed purpose of the jury system: securing an impartial fact finder. There is no reason to believe, however, that attorneys will not engage in selecting a jury on the basis of what they believe each juror feels about homosexuality.

Once a jury is selected, the attorneys can use rules of evidence and legal defenses to manipulate jury biases in favor of their position. This creates a situation where an attorney can use an individual's sexuality, regardless of whether it is a valid issue in a case, to the detriment of that individual, creating one form of justice for heterosexuals and quite another sort for homosexuals.

II. RAPE SHIELD STATUTES AND HOMOSEXUALITY

A. The History and Policy of Rape Shield Statutes

Historically, rape prosecution was as much a trial of the alleged victim as it was of the defendant. Courts typically required a victim to

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42 See id. Much has been written on discrimination in jury selection and how it can work against the idea of fairness in our justice system. See generally, e.g., Edward S. Adams & Christian S. Lane, Constructing a Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection, 73 N.Y.U. L. REV. 703 (1998); Hiroshi Fukurai & Darryl Davies, Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae, 4 VA. J. SOC. POL’Y & L. 645 (1997).
43 See Lyud, supra note 36, at 231, 249; Peterson, supra note 36, at 641–42.
44 See infra Parts I.B, II.
46 For a more in-depth look at this subject, see generally Elizabeth J. Kramer, Note, When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape, 73 N.Y.U. L. REV. 293 (1998); Cindy Ellen Hill, Chicken-Hawk! Evidence of a Complainant’s Homosexuality Under Vermont’s Rape Shield Law, 22 VT. L. REV. 711 (1998).
refute a defense of consent by proof of "overwhelming force and utmost resistance."\textsuperscript{49} Men’s fear of the innocent man being unjustly accused of rape drove the common law.\textsuperscript{50} The testimony of rape victims was greatly distrusted due to fear that women would lie about the consensual nature of the sex "to blackmail men, to explain the discovery of a consensual affair, or because of psychological illness."\textsuperscript{51} The past sexual history of the alleged victim was relevant in rape trials where consent was the defense because courts considered it more likely that a woman who had consented to sex before would have consented to sex in the instance at issue.\textsuperscript{52} Therefore, courts further victimized victims of rape by permitting past sexual behavior or predispositions into evidence.\textsuperscript{53}

This allowance prohibited many rape victims from coming forward and reporting rapes.\textsuperscript{54} In response to this problem, many states and the federal courts passed rules of evidence that restrict the admissibility of evidence of a victim’s past sexual history.\textsuperscript{55} When drafting these so-called rape shield statutes, legislators had four major policy goals in mind: "[t]he need to increase the reporting of rape, the recognition of the lack of probative value of prior consensual acts, the lack of connection between chastity and truthfulness, and the need to reduce acquittals of guilty defendants."\textsuperscript{56} The committee note for the federal rule even states that "[t]he rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process."\textsuperscript{57} The committee also stated that the policy behind the rule was not just to protect the alleged victims’ privacy, but also to

\textsuperscript{49} See Jane E. Larson, “Even a Worm Will Turn at Last”: Rape Reform in Late Nineteenth-Century America, 9 YALE J. L. & HUMAN 1, 11 (1997).
\textsuperscript{50} See Estrich, supra note 48, at 1095.
\textsuperscript{53} See Kramer, supra note 47, at 303.
\textsuperscript{55} See Estrich, supra note 48, at 1111 n.63; FED. R. EVID. 412.
\textsuperscript{56} Kramer, supra note 47, at 303.
\textsuperscript{57} FED. R. EVID. 412 (Committee Note).
“encourage victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”

By acknowledging that prior sexual history is not relevant, the rape shield statutes recognized that just because a person has consented to sex with someone in the past, it does not mean that they consented to the instance of sexual behavior at issue in the trial. Rape shield laws were enacted to protect female victims of opposite-sex rape. Legislators did not intend to protect male victims, nor did they consider the consequences of these laws for defendants or victims in same-sex rape.

B. Application of Rape Shield Statutes to Homosexual Defendants and Victims

There is no easy way to apply rape shield statutes to instances where either the defendant or the victim is a homosexual. In an illuminating article about the consent defense in male-on-male rape, Cindy Ellen Hill considered the situation where a homosexual male engages the services of a male prostitute, and, after an argument about payment, the prostitute claims rape. In her hypothetical situation the defense is consent, but she suggests that “[i]n the absence of admission of evidence of one’s character as a homosexual, a typical jury would likely presume that there is no possibility whatsoever that a male complainant would consent to a sexual act with another male, whether or not for monetary compensation.” Absent the admission of evidence of the alleged victim’s prior sexual history, the jury will assume the victim is straight and that he would therefore never have consented to the act. Hill argues that information about this victim’s sexual history is not only relevant, but essential, for an accurate assessment of the situation by the jury.

One way for the defense to get around the rape shield statute may be to offer the information of an alleged victim’s prior homosexual history.
ual acts as evidence of prior bad acts, since homosexual acts are illegal in many jurisdictions. However, in those same states, this may open up the defendant to later prosecution for homosexual acts, even if he is acquitted of the rape charge.

Whether this information is allowed into evidence through an exemption of homosexuals to the rape-shield statutes, as Hill would suggest, or through some other means, this argument poses a conundrum because it then reestablishes the problem meant to be addressed by rape shield statutes. As in opposite-sex rape, just because an alleged victim has consented to sex with persons of the same sex in the past, it does not mean that the alleged victim consented to this particular instance of sexual conduct. The whole purpose of the rape-shield statutes was to shield the victim from this jump in logic. Therefore, by creating an exception to the rape shield statutes to protect a homosexual defendant from the jury assumption of heterosexuality, Hill has simply moved the bias from the defendant to the victim.

It is juror bias against all homosexuals, victim or defendant, which is problematic. The additional problems that arise in sexual assault and rape cases where either the victim or the defendant is homosexual have much to do with juror biases and misconceptions and they have not been entirely corrected by rape shield statutes. Jurors are unlikely to believe that a man who is not gay would ever consent to sex with another man. This creates a problem for the defendant in a homosexual rape case who wants to use a consent defense, as Hill correctly points out, since no evidence of the victim’s homosexuality will be allowed into evidence under a rape shield statute. Jurors are equally likely, however, to be biased against anyone, victim or defendant, whom they perceive to be gay. Therefore, by allowing the homosexuality of a victim to be explored, the purpose of the rape shield statutes is thwarted, and additional juror bias against the homosexual

67 See id. at 721–22.
68 See supra note 15 and accompanying text; Sexual Orientation, supra note 46, at 1520.
69 See Hill, supra note 47, at 755.
70 See Kramer, supra note 47, at 304–05; FED. R. EVID. 412 (Committee Notes).
71 See Kramer, supra note 47, at 307.
72 See id.; FED. R. EVID. 412 (Committee Notes).
73 See Dodge, supra note 46, at 360–61.
74 See Hill, supra note 47, at 714; Kramer, supra note 47, at 297.
75 See Kramer, supra note 47, at 316.
76 See Hill, supra note 47, at 714.
77 See Dodge, supra note 46, at 360–61.
victim may manifest itself in a finding of not guilty because they did not want to favor the victim.\textsuperscript{78}

Some courts have permitted the admission of evidence that would allow jurors to be influenced by biases against homosexuals.\textsuperscript{79} For instance, one trial judge allowed into evidence a minor victim’s past homosexual acts with a nine-year-old boy in a civil trial against his music teacher for sexual abuse.\textsuperscript{80} Another court refused to apply the rape shield statute in a trial for sodomy.\textsuperscript{81} In that case, the court stated that a person who had consented to homosexual acts in the past “would be more likely to consent to the act in question than a person who had not previously done so.”\textsuperscript{82}

Other courts, however, have used the rape shield statutes to exclude evidence of past homosexuality.\textsuperscript{83} For instance, the Ohio Court of Appeals held that application of the rape shield statute did not violate the Constitution where the trial court did not allow evidence that the two victims of sexual assault—the stepsons of the defendant—had engaged in homosexual activity with each other.\textsuperscript{84} Another court was even more explicit in stating its reasons why rape shield statutes should apply.\textsuperscript{85} In \textit{People v. Hackett}, the defendant made an offer of proof to admit evidence of the complainant’s reputation for homosexuality to impeach his credibility and to support his defense of consent.\textsuperscript{86} The court responded that “there is no logical nexus between a complainant’s reputation for unchastity, whether it involves heterosexual or homosexual activity, and the character trait for truthfulness or untruthfulness.”\textsuperscript{87} The court further stated that “the fact that a per-

\textsuperscript{78} See Kramer, \textit{supra} note 47, at 310. For example, in one case the defense offered to show that the alleged victim of rape, in a same-sex rape case, had engaged or offered to engage in other homosexual acts and therefore had consented in this instance at issue. See Kvasnikoff \textit{v. State}, 674 P.2d 302, 304 (Alaska Ct. App. 1983). The judge did not allow this evidence into trial for fear that the jury might be confused as to whether they were trying the victim for being a homosexual or whether they were to determine what really happened on the night in question. See \textit{id}.

\textsuperscript{79} See Judge Rules Plaintiff’s Sexual History Relevant: Teacher Convicted of Abusing Boy May Introduce Evidence Victim Had Homosexual Relations, \textit{Peoria J. Star} (Illinois), Sept. 18, 1997, at B6 (reporting that the court ruled that prior homosexual relations of the victim of sexual abuse were relevant in a civil trial concerning the sexual abuse).

\textsuperscript{80} See \textit{id}. (stating that the judge claimed rape shield statute did not apply).

\textsuperscript{81} See \textit{State v. Dixon}, 668 S.W.2d 123, 125 (Mo. Ct. App. 1984).

\textsuperscript{82} \textit{Id}.


\textsuperscript{84} See \textit{id}. at 953, 954–55.


\textsuperscript{86} See \textit{id}. at 126.

\textsuperscript{87} \textit{Id}.
son is homosexual, standing alone, has little or no logical relevance between the excluded prior sexual acts evidence and the issues of consent or credibility."

Other courts have made it clear that they were trying to avoid jury bias by excluding such evidence. In one such case, the trial judge decided to keep out evidence of the victim’s homosexuality because of “the probability that its admission would create confusion of the issues, confusion in the jury’s mind as to whether they’re trying Mr. W.K. for being a homosexual, or whether they’re really looking at what happened on the night concerned.”

In the above cases, the defense wished to introduce evidence about the alleged victim to help prove a consent defense. However, this leaves unanswered questions about instances where the prosecution wishes to introduce evidence about the victim to refute a consent defense.

For example, consider People v. Kemblowski, where the prosecution in a male-on-female rape trial introduced evidence that the victim was a lesbian to prove there was no consent. The court held that the victim’s sexuality was not her “status,” as the prosecution argued, but rather pertained to her sexual activity and therefore was barred from admission by the rape shield statute. A different twist on this example is a case where the prosecution is allowed to introduce evidence that the victim is a lesbian, but by so doing allows the defense to introduce other evidence of the victim’s sexual history to refute the claimed lack of consent. One such case is State v. Williams, where the victim testified that she did not have sex with men because she was gay. The defense then presented a witness who testified that he had had sexual relations with the victim. The court found that excluding this evidence under the rape shield statute violated the defendant’s Sixth Amendment constitutional right to confront his accuser. The court felt that this evidence was “submitted for more than mere im-

88 Id.
90 Id.
91 See id.; Hackett, 365 N.W. 2d at 126.
93 See Kemblowski, 559 N.E.2d at 248.
94 See id. at 250.
96 See id. at 560.
97 See id. at 561.
98 See id. at 563.
peachment of a witness' credibility."99 Since the proffered evidence negated the implied establishment of an element of the crime charged, it should have been allowed.100

All of these examples illustrate how courts have taken varied approaches in applying rape shield statutes in cases where either the defendant or the victim is a homosexual.101 The varied outcomes of the courts show that a homosexual victim of rape will not know when or if information pertaining to his sexuality will be allowed into evidence, thwarting one of the reasons for having rape shield statutes.102 The decisions also show that courts do not know the best way to deal with jury bias against homosexuals, resulting in unequal justice from one court to the next.103

III. HOMOSEXUAL ADVANCE DEFENSE TO MITIGATE MURDER TO MANSLAUGHTER104

Courts may use the homosexuality of a victim of a crime to lessen the punishment imposed on the offender, which suggests that homo-

99 Id.
100 See Williams, 487 N.E.2d at 563.
101 For other examples of how courts have dealt with this issue, see generally Latzer v. Abrams, 602 F. Supp. 1314 (E.D.N.Y. 1985) (confrontation rights violated by not allowing cross-examination of boy and his brothers with respect to sexual relations with other men); Laughlin v. State, 872 S.W.2d 848 (Ark. 1994) (attempt to cross-examine victim about sexual relations with his brother irrelevant and impermissible); People v. Murphy, 919 P.2d 191 (Colo. 1996) (rape shield precludes evidence of sexual orientation); People v. Koon, 713 P.2d 410 (Colo. Ct. App. 1985) (14-year-old boy's prior or subsequent sexual conduct irrelevant); People v. Sandival, 552 N.E.2d 726 (Ill. 1990) (defendant not allowed to introduce evidence that victim engaged in anal sex with another man to rebut victim's testimony); Kelley v. State, 586 N.E.2d 927 (Ind. Ct. App. 1992) (evidence of victim's alleged past sexual conduct was not admissible); Lucado v. State, 389 A.2d 398 (Md. Ct. Spec. App. 1978) (testimony as to victim's alleged lack of reputation as a homosexual did not relate to victim's chastity and should have been allowed); People v. Covich, 661 N.Y.S. 2d 369 (1997) (rape shield statute applicable to prevent testimony of 27-year-old homosexual encounter); Commonwealth v. Quartman, 458 A.2d 994 (Pa. Super. Ct 1983) (no constitutional violation in applying rape shield statute); State v. Lang, 403 S.E.2d 677 (S.C. Ct. App. 1991) (defendant prejudiced by not being permitted to enter evidence of victim's sexuality for purposes of attacking credibility).
102 See Fed. R. Evid. 412 (Committee Notes) (stating that the purpose of the rule is to safeguard alleged victims from invasion of privacy and to encourage victims to participate in legal proceedings against offenders).
103 See, e.g., Kvasnikoff v. State, 674 P.2d 302, 304 (Alaska Ct. App. 1983) (judge did not allow evidence of alleged victim's past homosexual relations for fear it would unduly prejudice the jury against the victim); State v. Lang, 403 S.E. 2d at 678 (holding that the defendant was prejudiced in not being able to enter evidence of victim's sexuality).
104 For a more complete discussion of this issue, see Dressler, supra note 16; Mison, supra note 16.
sexuals deserve less protection in our criminal justice system than heterosexuals. By not considering killing a homosexual to be murder, courts reinforce “the notion that homosexuality is culpable behavior and that gay men do not deserve the respect and protection of the criminal justice system.”

As Robert Mison points out in an article on the “homosexual advance theory,” courts which permit the use of this theory by a defendant allow a non-violent homosexual advance to constitute sufficient provocation to incite a reasonable man to “lose his self-control and kill in the heat of passion, thus mitigating murder to manslaughter.” It must be made clear that the homosexual advance argument is distinct from a self-defense argument. To use a self-defense argument, the defendant usually must show that he reasonably believed that the other person was using, or was about to use, unlawful physical force, or that the use of deadly force was necessary for self-defense against death. This is not the case with a homosexual advance defense. There, no actual or threatened physical force on the part of the victim is necessary.

Each defense has a different effect on the sentence as well. Self-defense is a full defense to a murder charge and allows the defendant to be found not guilty of any crime associated with the behavior in question. A homosexual advance defense is only used to miti-

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106 See id.
107 See id. at 133.
108 See id. at 144–46.
110 See Mison, supra note 16, at 140–41.
111 Cf. id. (elements of provocation may include the presence of heat of passion, extreme mental or emotional disturbance, or a sudden quarrel).
112 See, e.g., The Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County California, California Jury Instructions—Criminal § 5.12, Justifiable Homicide in Self-Defense (6th ed.) (1996) (hereinafter Self-Defense); The Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County California, California Jury Instructions—Criminal § 8.37, Manslaughter (6th ed.) (1996). Self-defense is an affirmative defense that, if proved, allows the defendant to be acquitted of any crime and possibly to go free. See Self-Defense, supra.
gate a murder charge to a manslaughter charge; the defendant will not go free.\textsuperscript{114}

For an example of this defense in practice, consider the case of \textit{Schick v. State}.\textsuperscript{115} In this case, the defendant, Schick, claimed that upon being propositioned by a man for sex, he kneed him in the stomach, hit him in the face and then, when the man fell to the ground, Schick “stomped him with his feet.”\textsuperscript{116} When Schick stopped hitting and kicking the man, he heard “gurgling noises” coming from the man’s chest and throat area.\textsuperscript{117} Then Schick took the man’s money and wallet and left the scene where the man later died.\textsuperscript{118} The jury found him not guilty of the charge of murder while attempting to commit robbery; however, Schick was found guilty of voluntary manslaughter.\textsuperscript{119}

Mison argues that:

The homosexual advance defense capitalizes on the social and individual responses of fear, disgust and hatred with regard to homosexuals. The accused asserts that the victim made a homosexual advance, which is presumably a terrifying and disgusting event. A variety of responses—including fear, anxiety, anger and hatred—then consumed the accused. These responses displaced all other possible reactions, including self-control, tolerance and compassion. Thus goaded into a heat of passion, the accused killed the homosexual victim.\textsuperscript{120}

For this theory to work, there must be a jury that will identify with this version of events.\textsuperscript{121}

Mison argues that the use of the “reasonable man” test is flawed in this instance because a “killing based simply on a homosexual advance reflects neither rational nor exemplary behavior,” which he views as essential for the reasonable man.\textsuperscript{122} In Mison’s idealized world, the reasonable man should not “possess prejudices and biases such as homophobia and heterosexism.”\textsuperscript{123} But Mison understands

\begin{enumerate}
\item \textsuperscript{115} 570 N.E.2d 918 (Ind. Ct. App. 1991).
\item \textsuperscript{116} See id. at 922.
\item \textsuperscript{117} See id.
\item \textsuperscript{118} See id. at 921–22.
\item \textsuperscript{119} See id. at 922.
\item \textsuperscript{120} Mison, \textit{supra} note 16, at 158.
\item \textsuperscript{121} See id.
\item \textsuperscript{122} See id. at 161.
\item \textsuperscript{123} See id.
that a homosexual advance defense creates a tension between the need for jury rationality and jurors' tendency to draw on unreasonable prejudice and bias.\textsuperscript{124}

In fact, homophobia is so widespread that a "fair cross-section of the community" is likely to produce a homophobic jury.\textsuperscript{125} Therefore, regardless of the constitutional restraints on how the jury pool is selected, most juries will be susceptible to homophobia when applying the homosexual advance defense.\textsuperscript{126}

The use of the homosexual advance theory by courts perpetuates the abuse against homosexuals within our criminal justice system.\textsuperscript{127} By allowing the jury to decide if the homosexual advance should mitigate the charge from murder to manslaughter, the court opens the door to juror bias against homosexuals.\textsuperscript{128} Without this mitigating defense, jurors would not have the same opportunity to allow homosexuality into their deliberations since they only would be asked if the prosecution had proven that the defendant's actions satisfied all the elements of the charge of murder.\textsuperscript{129}

Mison explained the effect of allowing homosexual advance defenses to tap into jury bias:

When defendants who kill in response to homosexual advances are not convicted of murder, courts and juries reinforce the notion that homosexuality is culpable behavior and that gay men do not deserve the respect and protection of the criminal justice system.\textsuperscript{130}

One should not get the impression that all courts allow the homosexual advance defense in all instances.\textsuperscript{131} Courts clearly draw the

\begin{footnotes}
\item[124] See id.
\item[125] See Mison, supra note 16, at 162.
\item[126] See id. at 162–63.
\item[127] See id. at 177–78.
\item[128] See id. at 167.
\item[129] See, e.g., The Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County California, California Jury Instructions—Criminal §§ 8.10, Murder (6th ed.) (1996).
\item[130] Mison, supra note 16, at 174.
\item[131] See generally, e.g., State v. Skaggs, 586 P.2d 1279 (Ariz. 1978) (declining to require manslaughter instruction); Commonwealth v. Halbert, 573 N.E.2d 975 (Mass. 1991) (holding that lower court did not err in refusing to instruct the jury on voluntary manslaughter); Commonwealth v. Medeiros, 479 N.E.2d 1371 (Mass. 1985) (holding that the defendant was not entitled to manslaughter instruction); State v. Volk, 421 N.W.2d 360 (Minn. Ct. App. 1988) (holding that the defendant was not entitled to instruction on heat of passion manslaughter).
\end{footnotes}
line in some cases where the homosexual advance defense has no basis in fact. In Commonwealth v. Medieros, the Supreme Judicial Court of Massachusetts found that a manslaughter instruction was unnecessary. The victim, Lawrence, made a homosexual advance toward Medieros, the defendant. Medieros warded off the advance by striking Lawrence. Lawrence then allegedly struck the defendant as he was attempting to leave Lawrence’s apartment and the defendant struck him back, causing him to fall onto the bed. The defendant then climbed on top of Lawrence and struck him twice more on the head. At this point Lawrence was unconscious, his face was bloody, and he was foaming at the mouth. The defendant then put a pillow over Lawrence’s face and loosely looped a rope around his neck. The court said that even assuming the victim’s advances constituted reasonable provocation, they were not enough to warrant an involuntary manslaughter instruction.

The Court of Appeals of Minnesota came to a similar result in State v. Volk. Volk was convicted of second degree murder after the trial court refused to give a manslaughter instruction. Volk allegedly was hitchhiking with his friend Hamilton, who testified that they planned to pose as prostitutes, pick up a homosexual man, and rob him. They encountered the victim, Traetow, at a store and he invited them into his car and to his apartment. Traetow was found dead in his apartment with his hands and legs taped. Castro, a

132 See Skaggs, 586 P.2d at 1284. In this case the victim made a homosexual advance toward Skaggs, who rebuffed it, telling the victim he was not attracted to men. See id. at 1281. The victim then suggested they enter into a relationship together and Skaggs replied that the victim should wait in the trailer because he was going to do him a “big favor.” See id. Skaggs then went out to his truck and obtained a pistol, returned to the mobile home and shot the victim twice in the head and once in the chest. See id. Skaggs was convicted of murder. See id. at 1280.
133 See Medieros, 479 N.E.2d at 1374–75.
134 See id. at 1374.
135 See id.
136 See id.
137 See id.
138 See Medieros, 479 N.E.2d at 1374.
139 See id.
140 See id. at 1376.
141 See 421 N.W.2d 360, 365 (Minn. Ct. App. 1988).
142 See id. at 362, 364.
143 See id. at 362.
144 See id.
145 See id.
friend of Volk, testified that Volk had told him what happened.\textsuperscript{146} Volk allegedly hit Traetow over the head with a liquor bottle, and then he and Hamilton bound Traetow and carried him into the bedroom.\textsuperscript{147} When Hamilton went out to the car to search for money, Traetow freed himself and attacked Volk.\textsuperscript{148} Volk wrestled with Traetow and then shot him twice.\textsuperscript{149}

Volk argued that he was intoxicated, exhausted from travel, revolted by Traetow’s homosexual advance, and surprised by Traetow’s attack.\textsuperscript{150} The court found that, “there was no provocation sufficient to elicit a heat of passion response.”\textsuperscript{151} The court further found that a “person of ordinary self-control under like circumstances would simply have left the scene.”\textsuperscript{152}

Finally, in the clearest case of insufficient provocation, the Supreme Judicial Court of Massachusetts again found no reason to give a voluntary manslaughter instruction to the jury.\textsuperscript{153} In \textit{Commonwealth v. Halbert}, the defendant claimed that he was provoked by the victim’s homosexual advance, which consisted of the victim’s putting his hand on the defendant’s knee and asking, “Josh, what do you want to do?”\textsuperscript{154}

Here, the court framed the issue as follows: “[W]ould the victim’s nonthreatening physical gesture and verbal invitation have provoked a reasonable person into a homicidal rage?”\textsuperscript{155} The court ignored the defendant’s history of sexual abuse as having no bearing on a “reasonable man” standard because it is an objective, and not a subjective, standard.\textsuperscript{156} The victim’s question was neither insulting nor hostile, and it was not a salacious invitation.\textsuperscript{157}

Another case, \textit{Commonwealth v. Carr}, is notable for its interesting slant on the homosexual advance defense.\textsuperscript{158} There, Carr’s defense

\textsuperscript{146} See Volk, 421 N.W. 2d at 362.
\textsuperscript{147} See \textit{id}.
\textsuperscript{148} See \textit{id}.
\textsuperscript{149} See \textit{id}.
\textsuperscript{150} See \textit{id} at 365.
\textsuperscript{151} Volk, 421 N.W. 2d at 365.
\textsuperscript{152} \textit{Id}.
\textsuperscript{154} See \textit{id} at 978–79.
\textsuperscript{155} \textit{Id} at 979.
\textsuperscript{156} See \textit{id}.
\textsuperscript{157} See \textit{id}.
was that he shot two women in the head in the heat of passion caused by the serious provocation of their nude homosexual lovemaking.\textsuperscript{159}

In response, the court stated:

The sight of naked women engaged in lesbian lovemaking is not adequate provocation to reduce an unlawful killing from murder to voluntary manslaughter. It is not an event which is sufficient to cause a reasonable person to become so impassioned as to be incapable of cool reflection. A reasonable person would simply have discontinued his observation and left the scene; he would not kill the lovers.\textsuperscript{160}

The court compared its result with \textit{Volk}, but in this instance, the "homosexual-advance" was not even directed at the defendant.\textsuperscript{161} He was merely a third party observer of homosexual behavior, and the court refused to extend the doctrine to such defendants.\textsuperscript{162}

Not all courts refuse to give manslaughter instructions in these situations.\textsuperscript{163} In one such case, the defendant claimed that he went with the victim to the victim's trailer where the victim told him a party was taking place.\textsuperscript{164} No one was in the trailer when they arrived and the victim made a homosexual advance which the defendant refused.\textsuperscript{165} A struggle ensued, and the defendant stabbed the victim with a kitchen knife.\textsuperscript{166} The trial judge found that:

the defendant had acted under a strong provocation; that the defendant's criminal conduct was the result of circumstances unlikely to recur; that the character and attitudes of the defendant indicated that he was unlikely to commit another crime; and that the defendant was particularly likely to comply with the terms of the period of probation.\textsuperscript{167}

The defendant was convicted of voluntary manslaughter and sentenced to a seven-year term, which was ultimately lowered to four years.\textsuperscript{168} This case illustrates how, when there is a possible physical ad-

\textsuperscript{159} See id. at 1363.
\textsuperscript{160} Id. at 1364.
\textsuperscript{161} See id. at 1364–65, 1363.
\textsuperscript{162} See id.
\textsuperscript{163} See, e.g., People v. Saldivar, 497 N.E.2d 1138 (Ill. 1986).
\textsuperscript{164} See id. at 1339.
\textsuperscript{165} See id.
\textsuperscript{166} See id.
\textsuperscript{167} Id. at 1140.
\textsuperscript{168} See Saldivar. 497 N.E.2d at 1141, 1145.
vance, some courts will still allow mitigation to manslaughter even where there is nothing in the record to show that a reasonable person would have been scared of a sexual assault.\textsuperscript{169}

These cases show that courts are divided on what set of circumstances warrants a homosexual advance manslaughter instruction for the jury.\textsuperscript{170} Judges are as susceptible to homophobia as the general jury pool.\textsuperscript{171} In one notable example of judicial homophobia, a Texas judge is quoted as saying that:

\begin{quote}
[t]hese two guys that got killed wouldn’t have been killed if they hadn’t been cruising the street picking up teen-aged boys. I don’t much care for queers cruising the streets picking up teen-aged boys. I’ve got a teen-age boy, . . . [I] put prostitutes and gays at about the same level. I’d be hard put to give somebody life for killing a prostitute.\textsuperscript{172}
\end{quote}

This judge then sentenced the defendant to only thirty years imprisonment, instead of the maximum term of life, for killing two gay men.\textsuperscript{173}

The problems created by allowing homosexual advance defenses to go to juries are similar to the problems associated with homosexuality in the context of rape cases.\textsuperscript{174} In rape cases, “juries have a tendency to weigh the conduct of the victim in judging the guilt of the defendant.”\textsuperscript{175} Although certainly not a perfect answer to the problem, at least in a rape prosecution the victim can rebut the defendant’s claims, which is not true in a homosexual advance case where the victim whose actions are attacked is dead.\textsuperscript{176} This gives rise to the potential problem that in every murder case where the victim is ho-

\textsuperscript{169} See id. at 1139.

\textsuperscript{170} See, e.g., State v. Skaggs, 586 P.2d 1297, 1284 (Ariz. 1978) (finding voluntary manslaughter instructions unnecessary); Saldivar, 497 N.E.2d at 1140, 1145 (allowing a mitigation for provocation); Schick v. State, 570 N.E.2d 918, 922 (Ind. Ct. App. 1991) (allowing conviction for voluntary manslaughter); Commonwealth v. Medeiros, 479 N.E.2d 1371, 1376 (Mass. 1985) (refusing to allow involuntary manslaughter instruction); Commonwealth v. Halbert, 573 N.E.2d 975, 976 (Mass. 1991) (affirming trial judge’s refusal to give manslaughter instruction); State v. Volk, 421 N.W.2d 360, 365 (Minn. Ct. App. 1988) (affirming that there was no reason to give manslaughter instruction).

\textsuperscript{171} See, e.g., Rick Moore, Justice is Not Blind for Gays, SAN DIEGO UNION, Jan. 10, 1989, at B7; Panel to Examine Remarks by Judge on Homosexuals, N.Y. TIMES, Dec. 21, 1988, at A16.

\textsuperscript{172} Panel to Examine Remarks by Judge on Homosexuals, supra note 171.

\textsuperscript{173} See id.

\textsuperscript{174} See supra Part II.

\textsuperscript{175} Mison, supra note 16, at 171.

\textsuperscript{176} See id.
mososexual, the defendant can claim a homosexual advance defense without anyone to rebut the claim that the advance ever even happened. 177

IV. JURY VOIR DIRE ON THE ISSUE OF SEXUALITY

Controversial issues are just beginning to surface in many jurisdictions about whether there should be voir dire concerning jurors' attitudes toward homosexuality or concerning jurors' sexuality and exactly how such information, once obtained, should be used. 178 In some instances, sexual orientation is the subject matter before the jury, not just a peripheral issue due to the fact that one of the parties happens to be homosexual. 179 For example, many states and the federal government have enacted hate crime legislation providing for enhanced punishment for crimes against homosexuals. 180 Also, some state or local civil rights laws provide remedies for discrimination on the basis of sexual orientation. 181 Therefore, in a case where sexual orientation is a central issue before the jury, voir dire of the jury on their attitudes toward homosexuality may affect whether the attorneys select an impartial jury. 182 It is less clear whether the jury should be questioned on attitudes toward homosexuality when sexual orientation is not a central issue in the case, but where one party is homosexual. 183 Considering that jury bias against homosexuals can play a crucial role in the outcome of a case where either the defendant or the victim is a homosexual, it would seem that jury voir dire could effectively be used to fight this bias. 184

This section will explore what the constitutional requirement of a "fair cross-section" of the community means. It will then discuss whether or not it is permissible or required that courts question jurors

178 See Lynd, supra note 36, at 246, 236; see generally United States v. Click, 807 F.2d 847 (1987) (9th Cir. 1986); Commonwealth v. Plunkett, 664 N.E.2d 833 (1996).
179 See Lynd, supra note 36, at 236-37.
180 See id.; see also 18 U.S.C.A. § 3A1.1 (1999) (increasing penalty if act found to be a hate crime); TEX. PENAL CODE ANN. § 12.47 (West 1997) (increasing penalties if the crime committed because of bias or prejudice).
182 See Lynd, supra note 36, at 236.
183 See id. at 238.
184 See supra Parts II, III; Lynd, supra note 36, at 236.
about their views on homosexuality. Finally, it will discuss the issue of whether a court may inquire as to an individual juror’s sexuality.

A. Constitutional Requirements in Jury Make-up

As previously discussed in Part I, federal law demands only that an impartial jury be drawn from a fair cross-section of the community.\(^{185}\) The Sixth Amendment requires an impartial jury in all criminal prosecutions.\(^{186}\) The Supreme Court has interpreted that requirement to mean that an “impartial jury” is simply one where the jury will conscientiously apply the law and find the facts.\(^{187}\) Regarding the composition of jury venire, an impartial jury involves a fair cross-section requirement.\(^{188}\) The Supreme Court has never required a “jury of your peers.”\(^{189}\) Therefore, there is no right to have a jury made up of other homosexuals if the defendant is a homosexual, just as there is no right to have a jury made up of African Americans if the defendant is African American, or of women if the defendant is a woman.\(^{190}\) In \textit{Taylor v. Louisiana}, the Supreme Court stated that there is a check on the arbitrary power of the jury if the community is represented, but “[t]his prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.”\(^{191}\)

This decision suggests that there could be a prohibition on systematic exclusion from jury venires based on sexual orientation because lesbians and gay men could be considered a distinctive group.\(^{192}\) However, it should not be inferred that a particular jury must contain homosexual jurors, but only that the pools and panels from which


\(^{186}\) U.S. CONST. amend. VI.


\(^{189}\) See Toni M. Massaro, \textit{Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures}, 64 N.C.L. REV. 501, 548–50 (1986). \textit{But see} Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (“The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine . . . .”).

\(^{190}\) See Batson v. Kentucky, 476 U.S. 79, 79 (1986) (citing Strauder, 100 U.S. at 305 (“[A] defendant has no right to a ‘petit jury composed in whole or in part of persons of his own race.’ ”)). The court limits this holding by stating that the Equal Protection Clause “forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.” \textit{See id.} at 97. \textit{See also} Massaro, \textit{supra} note 189, at 535–36, 537, 556–57.

\(^{191}\) See 419 U.S. 522, 530 (1975).

\(^{192}\) See Lynd, \textit{supra} note 36, at 241.
jurors are drawn cannot systematically exclude homosexuals.\textsuperscript{193} As long as there is no systematic exclusion from the jury pool the Sixth Amendment’s “fair cross section” requirement is met.\textsuperscript{194}

**B. Can or Must a Court Ask Jurors About Their Views on Homosexuality?**

The United States Court of Appeals for the Ninth Circuit has concluded that the court does not have to inquire into jurors’ attitudes toward homosexuality.\textsuperscript{195} In a notable case, the homosexual defendant, Click, challenged his conviction for bank robbery on the basis that the court erred in refusing to question prospective jurors on bias against homosexuals during voir dire.\textsuperscript{196} The court held that the trial judge has wide latitude in conducting voir dire, and that the conviction would only be reversed if there was an abuse of discretion.\textsuperscript{197} The Ninth Circuit also stated that it is an abuse of discretion to fail to ask questions reasonably sufficient to test jurors for bias; the court may refuse questions that are “tied to prejudice only speculatively.”\textsuperscript{198}

The court found that although the attorney could have asked questions regarding effeminate mannerisms, it was not an abuse of discretion to fail to do so.\textsuperscript{199} The trial court could have found that the questions were improper because they would unnecessarily call attention to Click’s effeminate mannerisms.\textsuperscript{200}

In cases where the courts have asked jurors about their views on sexual orientation, it is uncertain whether courts can ask these questions to the group in general or whether questioning must be done on an individual basis.\textsuperscript{201} In one case where the defendant was using the homosexual advance theory to mitigate his murder charge to manslaughter, the judge told the jury that the evidence might indicate that the victim was homosexual or bisexual.\textsuperscript{202} The judge asked the venire generally: “[I]s there anything about that circumstance which

\textsuperscript{193} See id.
\textsuperscript{194} See id. at 241–42.
\textsuperscript{195} See United States v. Click, 807 F.2d 847, 848 (9th Cir. 1987).
\textsuperscript{196} See id. at 848, 849.
\textsuperscript{197} See id. at 850.
\textsuperscript{198} See id. at 850 (quoting United States v. Jones, 722 F.2d 528, 529 (9th Cir. 1983)).
\textsuperscript{199} See id.
\textsuperscript{200} See Click, 807 F.2d at 850.
\textsuperscript{201} See, e.g., Commonwealth v. Plunkett, 664 N.E. 833, 837 (Mass. 1996) (holding that questions to the venire collectively were sufficient); State v. Dishon, 687 A.2d 1074, 1082 (1997) (holding that if individual voir dire occurs without the defendant present, when he specifically requested to be present, his rights were violated).
\textsuperscript{202} See Plunkett, 664 N.E.2d at 838.
would interfere with anyone’s ability to be fair and impartial? . . . Is there anything about that circumstance that would bias or prejudice anyone against either the prosecution or defense?”

Eight people out of the approximately eighty members of the venire came forward in response. The Supreme Judicial Court of Massachusetts characterized most of the responses as expressing a bias against homosexuals. Responses included:

“In my reasoning, the gentleman who was supposedly murdered did something that caused the murder.”
“I probably wouldn’t be fair at all because I just don’t like [homosexuals].”
“I have a bias against homosexuals.”
“I just can’t stand them.”
“I find it very hard to understand unnatural acts and I don’t know if it would prejudice me one way or the other.”

The judge excused each of the eight jurors who came forward in response to his questions. The Supreme Judicial Court conceded that the subject of juror attitudes toward homosexuality might be important in a case such as this, but it was not willing to mandate an individual voir dire in the circumstances of this case. The court felt that it should leave the question of an individual voir dire of the jurors to the discretion of the trial judge.

In an interesting counterpoint to that case, the New Jersey Superior Court has ruled that a defendant must be present during voir dire of individual jurors when the questions asked about their views on homosexuality are central to the case. The court limited the decision to only those cases where the defendant specifically asked to be present during the individual questioning. In one case, the trial judge asked the entire venire whether “the fact that the case involved homosexuality and an attitude towards homosexuals would prevent them from rendering a fair and impartial verdict.” After defense
counsel exhausted his peremptory challenges, the judge brought the voir dire into his chamber to question each juror individually. The judge denied the request of the defendant to be present at the voir dire for "reasons of security." In chambers,

[the jurors were asked whether they could put [their personal views toward homosexuality] aside and decide the case based upon the evidence. The jurors indicated that they could. The judge also inquired whether the jurors had any relatives, friends or co-workers whom they believed to be homosexual. In addition, the jurors were asked whether they would weigh the testimony of a homosexual in the same manner as that of any other person. All of the jurors indicated that they would. Most of the jurors were also asked if they could give defendant a fair trial if it were revealed that he was homosexual or bisexual. The jurors indicated that they would.

The Superior Court ruled that this was a violation of the defendant's rights since homosexuality was "the central theme of the prosecution's case." The victim of the crime was homosexual and there was evidence that the defendant was bisexual. The court based its decision on the fact that the subject of voir dire was at the heart of the case, and "it was important that defendant be present so that he could have formed his own impressions of the jurors' demeanor and visceral reactions when they responded to the questions about homosexuality." Apparently the court felt that potential jury bias surrounding the issue of homosexuality was so important that the conviction of manslaughter was overturned.

As to the issue of whether a general question to the venire as a whole or individual voir dire is required, the Supreme Judicial Court of Maine has answered that general questions are sufficient to safeguard against anti-homosexual bias in the jury. The court recognized that "the existence of anti-homosexual bias in our society re-

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213 See id.
214 See id.
215 Dishon, 297 N.J. Super. at 1080.
216 See id. at 1082.
217 See id.
218 See id.
219 See id. at 1082–83.
quires voir dire directed at such prejudice if the evidence might suggest that the defendant is homosexual. The court reasoned:

The presiding justice squarely addressed the potential for anti-homosexual bias by asking the array whether evidence of the defendant’s homosexuality would affect any potential juror’s ability to decide the case fairly and impartially based solely on the evidence provided in the courtroom and the court’s instruction as to the applicable law. This was followed by a general question to elicit from the prospective jurors if there was “any reason” any one of them felt unable to act fairly and impartially. No [sic] one of the prospective jurors responded affirmatively to either question.

The court thereafter reasoned that the trial judge had not abused his or her discretion by not pursuing the matter further. The court also disregarded the argument made by the defendant that jurors would hesitate to admit bias in open court. The Supreme Judicial Court argued that “questions asked by the court did not contain a potential for such undue embarrassment to a potential juror as to require individual voir dire.”

While questioning jurors en masse about biases might have a chilling effect on jurors’ willingness to be forthright, there might not be much of a difference between en masse and face-to-face with an imposing judge in individual voir dire. Neither process may root out all biases held by jurors, but such questioning, although not a perfect solution, could help to alleviate the problem of jury bias against homosexuals.

C. Can a Court Ask Individual Jurors About Their Sexual Orientation?

It may be excessive to require or allow jury voir dire into the sexuality of members of the jury because it may not be probative of bias and it could be an invasion of the jurors’ privacy interest. The
Supreme Court has remained silent on this issue. In *United States v. Barnes*, the Second Circuit Court of Appeals upheld the district court's refusal to ask jurors their racial and ethnic backgrounds or religious affiliations. The Second Circuit considered these inquiries unnecessary since "[w]hatever prejudice may be shared by members of any ethnic group as to black persons would have been uncovered by the questioning about attitudes toward blacks." Therefore, to be able to ask a juror about his or her sexuality, two conditions must exist. First, it must be clear that sexual orientation-related bias might bear on deliberations. An attorney can easily establish this requirement in a case where sexual orientation is an element of a statutory complaint, such as in a prosecution for perpetrating a hate crime against a homosexual or a state civil rights action based upon discrimination due to sexual orientation. In instances where a defendant or a victim is a homosexual, jury bias may affect the outcome of the case, but asking jurors about their own sexuality does not appear to be constitutionally acceptable.

The second condition, that less intrusive questioning would be insufficient to disclose jury bias, would also preclude most instances

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229 See id. at 257 & n.131 (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 514 (1984) (Blackmun, J., concurring) ("We need not decide, however, whether a juror called upon to answer questions posed to him in court during voir dire, has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer those questions.").
230 See id. at 257–58.
231 Id. at 257–58.
232 See id. at 258.
233 See id.
234 See id.
235 See id. supra note 36, at 261.
237 See generally United States v. Barnes, 604 F.2d 121 (2nd Cir. 1979). *Barnes* holds that voir dire on the ethnic background of jurors is not required where prejudice shared by members of an ethnic group as to black persons would have been uncovered by the questions about attitudes toward blacks. See id. at 140.
of asking jurors' their sexual orientation. It appears to be an invasion of privacy to ask about the jurors' own sexuality when any bias against homosexuals could be discovered by simply questioning jurors about their attitudes toward homosexuals.

It seems clear that questioning jurors about their own sexual orientation constitutionally infringes on a juror's right to privacy. In addition, it would be just as effective to simply inquire into attitudes about homosexuality. However, there is no reason to believe that jurors would answer these inquiries truthfully or accurately. What makes a person homosexual or bisexual or straight has not been clearly defined. Also, not all persons who consider themselves to be homosexual are ready or willing to admit as much publicly. Asking jurors such questions could anger them, especially since jurors are generally already unenthusiastic about serving.

A trial lawyer must therefore use both challenges for cause and peremptory challenges in an attempt to seat the least biased jury. A challenge for cause "removes those jurors who either admit to actual bias or those who admit to circumstances from which the law will infer an overwhelming potential for bias." Therefore, questioning jurors about their attitudes toward homosexuality would allow a trial lawyer to use challenges for cause to eliminate any juror who admits to a bias. Asking a juror his or her sexual orientation would not warrant the same result. Most courts will not imply a bias sufficient to warrant for-cause challenges when they are based simply upon sexual orientation.

238 See Lynd, supra note 36, at 265.
239 See id. at 265-67 (describing juror privacy interest).
240 See id. at 265.
241 See id. at 270.
242 See id at 267.
243 See Lynd, supra note 36, at 267.
244 See id. at 268-69.
245 See id. at 270.
247 Id. at 271. For a more complete discussion of how to use challenges for cause and peremptory challenges, see id. at 270-87.
248 See, e.g., Commonwealth v. Plunkett, 664 N.E.2d. 833, 838 (Mass. 1996) (trial judge struck jurors for cause after they admitted bias or ambivalence toward homosexuals).
249 See Lynd, supra note 36, at 274.
250 See id. at 276-78.
Attorneys exercise peremptory challenges without stating reason for excluding that juror.\textsuperscript{251} The use of peremptory challenges has been limited when racial or gender discrimination allegedly motivates the challenge.\textsuperscript{252} This limitation suggests the same reasoning could be extended to prohibition of peremptory challenges based on sexual orientation, but this has not yet been the case.\textsuperscript{253} Therefore, although questioning jurors about their sexual orientation and then excluding them from the jury on the basis of their answers would be allowable, it is only a reasonable tactic to use when the challenging party \textit{wants} to retain a biased jury by excluding all homosexuals from the jury, and is useless for a party wishing to have an unbiased jury.\textsuperscript{254}

The questioning of jurors about their sexual orientation is clearly problematic. Such inquiry could infringe on jury privacy rights,\textsuperscript{255} is not a good indicator of jury bias,\textsuperscript{256} could anger or embarrass jurors,\textsuperscript{257} and will only allow the use of peremptory challenges.\textsuperscript{258} Therefore, allowing jury voir dire on the subject of jurors' sexual orientation is probably unnecessary, and possibly damaging, to the questioning party's case.

CONCLUSION

In the United States today, a homosexual individual cannot expect the same quality of justice that similarly situated heterosexual persons might receive.\textsuperscript{259} Many Americans remain confused about how to deal with different sexual orientations.\textsuperscript{260} As a result, many

\textsuperscript{253} See Lynd, supra note 36, at 282.
\textsuperscript{254} See Lynd, supra note 36, at 232–33 (discussing People v. White, 172 Cal. Rptr. 612 (Ct. App. 1981)). There is a suggestion that, in a noted trial of a man accused of killing a homosexual politician in San Francisco, deliberate efforts were made by the prosecutor to exclude all lesbians and gay men from the jury. See id.
\textsuperscript{255} See supra note 237–40 and accompanying text.
\textsuperscript{256} See supra note 241–42 and accompanying text.
\textsuperscript{257} See supra note 244–45 and accompanying text.
\textsuperscript{258} See supra note 248–50 and accompanying text.
\textsuperscript{260} See generally Yang, supra note 27.
members of society hold biases against homosexuals, which carries over to the jury box.

The justice system has yet to implement tools to fight this bias, as it has done in certain instances for race or gender bias. Therefore, jury bias against homosexuals is used to the disadvantage of homosexuals in a broad variety of circumstances. In cases where a defendant or a victim in a sexual assault case is homosexual, rape shield statutes can be used against them. Homosexuality of a murder victim can be used to mitigate the crime to manslaughter if the defendant claims that a homosexual advance caused him to lose his control and kill in the heat of passion.

We need to examine how our laws uphold the systemic bias against homosexuals to allow laws to be fairly applied. We must consider how rape shield statutes will affect all people, not just heterosexual people. We must also discredit and eliminate such backwards legal theories as the homosexual advance defense.

The best way to combat this bias may be to uniformly allow the questioning of jurors about their attitudes toward homosexuality. An unbiased jury will not allow evidence of sexuality of the victim or defendant to affect the outcome of the case. They will not care if the defendant in a rape case is gay or if the murder victim made a homosexual advance. Questioning jurors on bias may help, but it will never be able to uncover all biases in order to produce unbiased juries in all cases. Only across-the-board societal change will ever create a truly equal justice for homosexuals within our judicial system, but, until that day, searching out bias and removing it from the jury can only help.

262 See supra Part II.
263 See supra Part III.