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Peremptoary Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada

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NOTES AND COMMENTS

Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada

I. INTRODUCTION

A. *Peremptory Challenges: Eliminated or Regulated?*

In *Batson v. Kentucky*,[1] United States Supreme Court Justice Thurgood Marshall urged that only by eliminating peremptory challenges entirely could racial discrimination in the jury selection process be eliminated.[2] Before *Batson* and since, numerous commentators have written on the use of peremptory challenges in jury selection. Some praise this process,[3] while others, like Justice Marshall, call for its elimination.[4]

Those who would retain the peremptory challenge expound on its merits. First, peremptory challenges can immediately correct a trial judge's erroneous decision to refuse to grant a challenge for cause, thus saving appellate courts' time and permitting the trial judge greater latitude in accepting a juror's assertion of impartial-

1. 476 U.S. 79 (1986).

2. *Id.* at 102-03 (Marshall, J., concurring).

3. *See, e.g.*, James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528; Charles J. Morton, Jr., *Peremptory Challenges: Are Their Days Numbered?*, MD. B.J., Nov.-Dec. 1991, at 32; Michael A. Cressler, Comment, Powers v. Ohio: *The Death Knell for the Peremptory Challenge?*, 28 IDAHO L. REV. 349 (1991-92).

4. *See, e.g.*, Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Gerald A. Bunting & Lesley A. Reardon, *Once More into the Breach: The Peremptory Challenge After* Edmonson v. Leesville Concrete Co., 7 ST. JOHN'S J. LEGAL COMMENT. 329 (1991); Paul Murray, Holland v. Illinois *and* Powers v. Ohio: *The Discriminatory Effect of the Peremptory Challenge Evaluated from the Sixth and Fourteenth Amendments*, 13 CRIM. JUST. J. 335 (1992); Jeff Rosen, *Jurymandering: A Case Against Peremptory Challenges; Cover Story*, NEW REPUBLIC, Nov. 30, 1992, at 15; Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 27 CRIM. L. BULL. 216 (1991); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027 (1990-91).

ity.[5] Second, the peremptory challenge allows counsel to remove potential jurors whom counsel suspects are biased but who have not demonstrated sufficient bias to justify removal by challenge for cause.[6] Some potential jurors may be either unaware of or unwilling to reveal personal prejudices or predispositions. Proponents of the peremptory challenge argue that experienced lawyers have learned the characteristics of such jurors and should be allowed to use that knowledge to ensure a fair and impartial trial.[7] Third, the peremptory challenge allows defendants to remove jurors whom they dislike, for whatever reason. As a result, proponents of the challenge argue, the defendant is tried by jurors of his own choice and is, therefore, more likely to view the trial as fair, to accept the verdict, and to be more amenable to rehabilitation.[8] Finally, peremptory challenges allow the lawyers to select jurors before whom they feel comfortable trying the case. Proponents argue that this increases lawyer effectiveness and, consequentially, the effectiveness of the adversarial system in ascertaining the truth.[9]

On the other hand, those who would eliminate the peremptory challenge are quick to explain its faults. First, by exercising peremptory challenges, the prosecution and the defense each eliminate jurors thought to be partial to the other side. This interaction produces homogenous and unrepresentative juries through the elimination of extreme viewpoints in the community.[10] Second, peremptory challenges allow juries to become too defense-ori-

5. Gobert, *supra* note 3, at 529. *See also* Morton, *supra* note 3, at 35 (arguing that unless challenge for cause requirements are relaxed, the peremptory challenge will be retained).

6. Gobert, *supra* note 3, at 529.

7. *Id. See* REID HASTIE ET AL., INSIDE THE JURY 123 (1983) (explaining that great credence is given to ability of trial attorneys to detect minute traces of bias); Cressler, *supra* note 3, at 394 (arguing that peremptory challenge is an effective guarantee of an impartial jury); John R. Duer, Batson v. Kentucky: *Will "O'Batson" Be Next?*, 12 NAT'L BLACK L.J. 134, 147 (1991) (arguing that the lawyers themselves cannot ascertain whether or not this "sixth sense" about jurors is based on body language or other non-articulable criteria, or race or other constitutionally impermissible criteria).

8. Gobert, *supra* note 3, at 529.

9. *Id.* at 530.

10. JON VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 154 (1977). *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 232 (1989) (arguing that, after the exercise of peremptories, juries are composed of "left over" groups rather than the breadth of community).

ented.[11] Third, there is no principled justification for jury selection based on race, ethnic background, gender, age, clothing, class, or appearance—the grounds most often used to exercise peremptory challenges.[12] Finally, peremptory challenges consume time and money disproportionate to their value in a criminal justice system.[13]

B. Why Compare?

The voir dire/peremptory challenge system currently used in the United States is, at best, flawed. The system is costly and time-consuming,[14] and fails to guarantee impartial juries.[15] Nonetheless, the previously cited arguments for and against the peremptory challenge are powerful. In the face of this dilemma, it is useful to search the jury systems of other countries for possible guidance.

Both England and Canada have, for many years, used peremptory challenges in jury selection systems similar to our own. Furthermore, the use of the peremptory challenge, in these countries as well as the United States, was designed, from its inception, to

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11. Gobert, *supra* note 3, at 530 (citing CRIMINAL JUSTICE: PLANS FOR LEGISLATION, 1986, CMND 9658, at 15). "Defense-oriented" means a propensity to acquit rather than convict a defendant.

12. Rosen, *supra* note 4. *See* Bunting & Reardon, *supra* note 4, at 357 (arguing that it is difficult to reconcile an arbitrary act, the peremptory challenge, with a rationally-related test); Bray, *supra* note 4, at 557 (arguing that peremptory represents a blank check for discrimination).

13. Rosen, *supra* note 4.

14. *After 9 Months of Delays, U.S. Tries 3 for Sedition*, N.Y. TIMES, Jan. 12, 1989, at A24 (nine months between jury selection and opening arguments, millions of dollars already spent); Ronald Clark, *"Night Stalker" Trial Opens 34 Months After Arrest*, REUTERS, July 21, 1988, *available in* LEXIS, Nexis Library, Omni File (lawyers in *Ramirez* case expect jury selection to last six months); *Cost for Young Trial Expected To Soar*, UPI, June 9, 1986, *available in* LEXIS, Nexis Library, Omni File (second week of jury selection in murder trial completed, estimated costs of jury selection $1,000 a day); Ian Gray, *A Shameful—and Expensive—Logjam at Death's Door*, L.A. TIMES, Dec. 17, 1989, at M3 (jury selection in a capital case can increase trial cost by $200,000); *Juryselect*, UPI, Feb. 14, 1984, *available in* LEXIS, Nexis Library, Omni File (jury selection in Lancaster, California murder trial took 129 days and cost $500,000); *Lawyer Assails Investigators as Defense Opens in Sex Abuse Case*, N.Y. TIMES, July 15, 1987, at A23 (jury selection in McMartin preschool case took three months); *Norco*, UPI, July 24, 1982, *available in* LEXIS, Nexis Library, Omni File (jury selection in Norco bank robbery and murder trial took five months).

15. *See* Rosen, *supra* note 4 (arguing that communities can produce entire jury pools who are largely either supportive or suspicious of law enforcement, and that peremptory challenges are thus ineffective in producing impartial juries); Harris, *supra* note 4, at 1048 (suggesting that "impartiality stems from vigorous debate among various segments of the community" and that this is threatened when preemptory challenges eliminate certain segments).

serve certain values. Court opinions, statutes, floor debates of legislative bodies, scholarly writings, and history provide insight into these values. If the values underlying England and Canada's use of peremptory challenges are comparable to those underlying the use of peremptory challenges in the United States, then the United States could adopt the peremptory challenge regulation of England or Canada. If, however, the United States' system serves distinct American values different from English or Canadian values, then this may justify the cost, time, and possible shortcomings of the current American system.

This Comment uses six values to compare peremptory challenge regulation in the United States, England, and Canada: (1) the appearance of fairness to the public; (2) public participation in the criminal justice system; (3) the rights of the individual juror; (4) the appearance of fairness to the accused; (5) the need to get convictions; and (6) efficiency and cost. This Comment takes the position that, while common values underlie the regulation of peremptory challenges in England, Canada, and the United States, the hierarchy of these values differs among the three countries. The United States ranks these common values differently than either England or Canada, and thus would be ill-advised to adopt outright either of those countries' regulatory systems. This includes the outright abolition of peremptory challenges adopted in England. This Comment suggests, however, based on the English and Canadian experience, many less drastic alterations to peremptory challenge regulation in the United States.

This Comment begins with an overview of the different uses of the peremptory challenge in the United States, England, and Canada. Part II.B examines the history of the peremptory challenge: its English origin and its adoption in the United States and Canada. Part III analyzes the modern statutory and case law development of the peremptory challenge in the three countries, concentrating on the underlying values intended to be served by the peremptory challenge and each country's regulation of it. Part IV compares these values, assessing and contrasting those values common to all three countries. Part IV also proposes some changes to peremptory challenge regulation in the United States, based on the relative weight given to these values in current American jurisprudence. Finally, Part V proposes a way in the American system by which to accommodate competing values.

II. BACKGROUND

A. The United States, England, and Canada: Different Uses of the Peremptory Challenge

The United States, England, and Canada share the same common law tradition.[16] Embedded in this tradition is a criminal defendant's right to a fair and impartial jury trial by the defendant's peers.[17] Until recently, all three countries employed similar methods to insure this right. Those methods were: (1) formation of a jury pool or venire by the random selection of potential jurors from among citizens of the community;[18] (2) removal of a potential juror from the jury panel by a *challenge for cause* if either party could demonstrate before the court that the potential juror was unable to decide the case impartially,[19] both parties having unlimited challenges for cause;[20] and (3) the ability of both parties to remove a limited number of jurors from the jury panel without giving any explanation or justification whatsoever to the court by a *peremptory challenge*.[21]

While the initial selection of potential jurors and the exercise of challenges for cause are essentially the same in all three countries,[22] the regulation of the exercise of peremptory challenges is very different. The United States has concentrated on eliminating racial discrimination in the use of peremptory challenges.[23] Canada has recently equalized the number of challenges given to both sides.[24] England has eliminated the peremptory challenge entirely.[25]

Another difference between the countries is the extent to which potential jurors can be interrogated. Except for special cir-

16. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 161-62 (1982).
17. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 30 (1986).
18. Juries Act 1974, §§ 1-9 (Eng.), *reprinted in* 22 HALSBURY'S STATUTES 481, 481-87 (1991); Criminal Code, R.S.C., ch. C-46, §§ 626-631 (1985) (Can.); 28 U.S.C. §§ 1861-1869 (1988). *See* JOHN GUINTHER, THE JURY IN AMERICA 47-49 (1988) (criticizing the methods used in the United States to select potential jurors as being less than random).
19. Juries Act 1974, § 12 (Eng.), *reprinted in* 22 HALSBURY'S STATUTES 489 (1991); Criminal Code, R.S.C., ch. C-46, § 638 (1985) (Can.); 28 U.S.C. § 1866(c)(5) (1988).
20. *Id.* [all three citations applicable].
21. Criminal Code, R.S.C., ch. C-46, §§ 633-634 (1985) (Can.); FED. R. CRIM. P. 24(b) (U.S.). England no longer has peremptory challenges. *See infra* part III.C.1.
22. *See supra* notes 18-20.
23. *See infra* part III.C.
24. *See infra* part III.B.
25. *See infra* part III.A.

cumstances, under the English and Canadian legal systems, jurors cannot be questioned about their beliefs and prejudices during voir dire nor can they be investigated prior to trial.[26] This hinders the English and Canadian trial attorney in obtaining the information necessary to challenge for cause.[27] In contrast, in the United States, trial attorneys are allowed, depending on the rules of the jurisdiction, to either submit specific questions to the court which the judge then puts to potential jurors, or to question the potential jurors directly.[28] This enables the American trial attorney to formulate a factual basis for a challenge for cause or a "hunch" basis for a peremptory challenge. To develop these questions, prior to trial, an American attorney may, depending on client resources and the monetary or political value of the case, investigate attitudes in the community from which the jury will be drawn, construct psychological profiles of desirable and undesirable jurors, and even stage mock trials in an attempt to ascertain the characteristics of the juror most likely to return the desired verdict.[29]

Thus, the American system of extensive voir dire is significantly different from jury selection procedures in England and Canada. The American system of extensive voir dire adds time and expense to jury trials—a factor condemned repeatedly in the English Parliamentary debates on peremptory challenge regulation.[30] Nevertheless, American juries have more power and discre-

26. HANS & VIDMAR, *supra* note 17, at 31; Gobert, *supra* note 3, at 530. *But see* Patrick Nagel, *Alberta; Keegstra Claims He's Persecuted*, OTTAWA CITIZEN, Mar. 3, 1992, at A5. Defendant Keegstra, acting as his own lawyer in his new trial before Alberta Court of Queen's Bench, was allowed to question potential jurors about possible bias against him. Charged with promoting hatred against the Jewish race, he was given a new trial after an Alberta appeal court found Keegstra had been deprived of the right to a fair trial because of a flawed jury selection process. *Id.*

27. Gobert, *supra* note 3, at 530.

28. *See, e.g.*, FED. R. CRIM. P. 24(a) (court may permit attorneys to examine jurors or may itself conduct examination); CAL. CIV. PROC. CODE § 223 (West Supp. 1993) (court conducts examination of prospective jurors, may permit attorneys to supplement examination upon showing of good cause).

29. *See* Diane Burch Beckham, *The Art of the Voir Dire: Is It Really a Science? Community Surveys, Focus Groups Used More in Jury Selection*, N.J. L.J., July 5, 1990, at 5 (discussing current trends in desirable juror investigation).

30. *See, e.g.*, 106 PARL. DEB. H.C. (6th ser.) 467, 502 (1986) (Eng.) ("I do not want us to go down the road of the American courts in which four days are spent trying to swear in a jury, which gets around to every conceivable challenge."). *See also* HANS & VIDMAR, *supra* note 17, at 48 (lawyers in England and Canada seriously question the American emphasis on selecting a jury).

tion than English and Canadian juries, especially in sentencing.[31] This greater measure of discretion may justify the additional time and expense in the American system. Moreover, given the additional time and expense, Americans must believe that the extensive questioning of potential jurors, whether by the prosecution and the defense themselves, or by the court as their representative, is able to successfully ascertain prejudice in the potential juror.

As these factors indicate, the value of citizen participation in the criminal justice process underlies the American system. Citizens serving on American juries are given greater control over defendants than juries in England or Canada. This system is indicative of a historically-unique American characteristic—distrust of an all-powerful sovereign. Instead, Americans prefer to trust their fellow citizens, with certain safeguards in place to root out the most obvious prejudice. This trust, theoretically, also increases the citizen's interest in making certain that the criminal justice system functions well. Thus, while the value of citizen participation is present in the jury selection systems of England and Canada, citizen participation is more important in the jury selection procedure used in the United States.

B. The History of Peremptory Challenges in the United States, England, and Canada

1. English Origin

The jury system and the peremptory challenge originated in England during the Middle Ages. Initially, juries were composed of community members who were chosen to serve as jurors because they had actual knowledge of the facts of the case.[32] At first, although both parties could challenge for cause any proposed juror,[33] the Crown controlled the selection of the jury panel and held an unlimited number of peremptory challenges.[34] It must be remembered that during the Middle Ages, the Crown was both

31. HANS & VIDMAR, *supra* note 17, at 31-32. Depending on the jurisdiction, American juries may determine length of sentence and application of death penalty. Also, defendants have a right to a jury trial in many more cases in the United States than in either England or Canada.

32. LLOYD E. MOORE, THE JURY 37 (2d ed. 1988). "If it developed that the jurors testified under oath that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed." *Id.*

33. *Id.*

34. Broderick, *supra* note 4, at 371.

law-maker and law-enforcer. In this role, the Crown assumed responsibility for ensuring that the jury was composed of community members with sufficient first-hand knowledge of the facts. The Crown was expected to use its unlimited peremptory challenges to select the most competent jury.

As time passed, however, the jury evolved from a body of fact-knowers, that is, community members who knew the facts, to a body of fact-finders, community members who decided the case based only on the evidence presented at trial. This change in the jury precipitated the need for the jury to be impartial[35] or "indifferent."[36] As a body of fact-finders, it was important that the jury make decisions based on evidence presented in court, not on personal bias or even knowledge.[37] Hence, there was no longer any reason for the Crown to make certain that jurors have sufficient first-hand knowledge. Thus, in 1305, Parliament found that a jury essentially selected by the Crown was "obnoxious to justice"[38] and eliminated the Crown's peremptory challenges.[39]

Although what Parliament meant by the words "obnoxious to justice" is not facially obvious, the historical context provides some illumination. By 1305, the Magna Carta[40] had been signed. Parliament had initiated the political struggle to force the Monarchy to accept the rule of law—law to be created by Parliament. In this struggle, the Crown often perceived those who opposed its absolute power as its enemies. Obviously, if the Crown exercised unlimited peremptory challenges, juries would consist only of those jurors known to be sympathetic to the Crown regardless of the evidence. It can be hypothesized that, by eliminating the Crown's use of the peremptory challenge, Parliament sought to reduce the Monarchy's ability to convict its political enemies. Perhaps what Parliament really meant by the word "justice" was a decrease in the absolute power of the Monarchy.

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35. Gobert, *supra* note 3, at 528.

36. Reynolds v. United States, 98 U.S. 145, 154 (1878) ("A juror to be impartial must, . . . 'be indifferent as he stands unsworn.'" (quoting SIR EDWARD COKE, LITTLETON 155(b)).

37. Gobert, *supra* note 3, at 528.

38. VAN DYKE, *supra* note 10, at 147.

39. An Ordinance for Inquests (Challenge of Jurors), 1305, 33 Edw., ch. 4. "[I]f they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be enquired of according to the Custom of the Court. . . ." *Id.*

40. 9 Hen. 3, ch. 39 (1215).

Parliament's elimination of the Crown's peremptory challenges indicates the emergence of a value in English society. This value can be characterized as "democratization," or a willingness to spread the governing power among a larger group of individuals within a given populace. Along with an extension of power, democratization requires an extension of trust. The individuals to whom the power is extended are trusted to wield that power in a predictable manner. Thus, when Parliament eliminated the Crown's peremptory challenges, it trusted that the jurors who replaced the jurors sympathetic to the Crown would wield their power in a certain way. Parliament may have hoped that such jurors would refuse to convict defendants accused unfairly of "treason" against the Crown. Parliament probably did not expect such jurors to engage in wholesale acquittals.

Parliament's expectations were short-lived, however. Notwithstanding Parliament's finding that a jury essentially selected by the Crown was "obnoxious to justice," English jurists quickly circumvented Parliament's elimination of the Crown's peremptory challenges by creating the "standby."[41] A "standby" is a potential juror against whom the prosecutor initially assigns, without explanation, a challenge for cause.[42] The court then directs these jurors so assigned to "standby" until all other potential jurors in the panel have been examined by the parties. If the twelve-member jury is not selected from the panel of potential jurors, only then is the standby juror recalled, and only then is the prosecutor required to prove the challenge for cause previously assigned.[43] As it is almost always possible to select a twelve-member unchallenged jury, the Crown's standbys operate, for all practical purposes, exactly like the peremptory challenges eliminated by Parliament.[44]

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41. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 10 n.34 (1990). *See* JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 160, at 211-13 (1880).

42. Colbert, *supra* note 41, at 10 n.34. The English jurists apparently assumed that cause existed whenever the Crown wanted to challenge a juror. This assumption justified the practice of "standing by" jurors. VAN DYKE, *supra* note 10, at 148.

43. Colbert, *supra* note 41, at 10 n.34.

44. VAN DYKE, *supra* note 10, at 148. So rarely does the entire jury panel fail to produce 12 unchallenged jurors that, when a prosecutor (Mr. Jones) was asked in 1699 to "show cause" for the persons who were "standing aside," he replied, "I do not know, in all my practice of this nature, that it was ever put upon the king to shew [sic] cause; and I believe some of the king's counsel will say they have not known it done." Trial of Spencer Cowper, at Hertford Assizes, for the Murder of Mrs. Sarah Stout, 13 HOWELL'S STATE TRIALS 1106, 1108 (1699) (Eng.).

Although defendants challenged this practice on numerous occasions, such challenges were always unsuccessful.[45]

Conceivably, the English jurists created the standby out of a mistrust of the democratization of the English jury. Loyalty to the Crown was equated with adherence to the law.[46] A juror who was not sympathetic to the Crown was likely to be of a criminal nature, not unlike the defendant. Thus, democratization of juries meant that juries would be too defense-oriented. Most likely, the majority of English jurists believed that they conducted trials fairly, even though the Crown controlled jury selection. At the very least, the English jurists were confident that a Crown prosecutor would never standby a juror unless the Crown prosecutor reasonably believed that the juror could be challenged for cause successfully.[47] After all, the Crown prosecutor was bound to uphold the law.

Thus, the value that Parliament's legislation intended to promote, i.e. the "democratization" of juries, was seemingly subverted by the English jurists' confidence in the fairness of the Crown prosecutor as an officer of the court. The creation of the standby marks the beginning of a conflict between confidence in the fairness of the prosecutor as an officer of the court versus a suspicion of placing too much power in the prosecutor as representative of the sovereign.[48] This is a recurring value conflict in the peremptory challenge regulation of the United States, England, and Canada.[49]

Although Parliament eliminated the Crown's peremptory challenges in 1305, it left untouched the common law tradition that permitted criminal defendants to excuse potential jurors without

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45. *See, e.g.*, Anonymous, 1 Vent. 309, 86 Eng. Rep. 199 (information for forgery, prosecution allowed to standby without cause); Trial of Ford Lord Grey of Werk for Debauching the Lady Henrietta Berkeley, 9 HOWELL'S STATE TRIALS 127, 128-29 (1682) (Eng.) (although defense pressed prosecution to show cause, standby was allowed); Trials of James O'Coigly for High Treason, 26 HOWELL'S STATE TRIALS 1191, 1231-43 (1798) (Eng.) (defense made prodigious argument that prosecution show cause, but to no avail).

46. *See* HANS & VIDMAR, *supra* note 17, at 29 (partiality to the Crown was sanctioned by the courts).

47. VAN DYKE, *supra* note 10, at 148.

48. This conflict is significant. In a democracy, where the sovereign is the majority, the sovereign's control over jury composition may be seen as majority rule. When the sovereign controls jury composition, jury nullification of majority rule, i.e. law, is highly unlikely. When a democratic sovereign relinquishes some control over jury composition, the control relinquished may be wielded by the minority, or even an anti-majoritarian element. Thus, by relinquishing control of jury composition, the sovereign allows possible jury nullification.

49. *See infra* notes 143-47 and accompanying text.

cause.[50] Conceivably, this prompted William Blackstone to characterize the peremptory challenge as a *defendant's* privilege—"a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[51] Blackstone reasoned that the "law wills [that the defendant should not] be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike [because] a prisoner should have a good opinion of his jury."[52] Blackstone also proposed that if a challenge for cause proved "insufficient to set aside the juror, perhaps the bare questioning [of] his indifference may sometimes provoke a resentment."[53] Thus, Blackstone concluded, the defendant's ability to remove that juror on a peremptory challenge was necessary to "prevent all ill consequences"[54] of such resentment.

The value that Blackstone articulated may be characterized as the appearance of fairness to the accused. When the criminal defendant is afforded more peremptory challenges than the prosecution, it is likely that the appearance of fairness to the accused ranks high in importance in that criminal justice system. For example, federal courts and many state courts in the United States give criminal defendants more peremptory challenges than the prosecution. In contrast, in Canada, the defense and prosecution are afforded an equal number of peremptory challenges, and, in England, peremptory challenges no longer exist. In questioning peremptory challenge regulation in the United States, one must consider whether or not it is appropriate to accord such high importance to the appearance of fairness to the accused.

Over the centuries, the British Parliament reduced the number of peremptory challenges available to the defense. By 1530, defendants were allowed only twenty, unless charged with high treason, in which case thirty-five peremptory challenges were permitted.[55]

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50. Broderick, *supra* note 4, at 372.
51. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.
52. *Id.* at *352-53.
53. *Id.* at *353.
54. *Id.*
55. For Abjurations and Santuarieis, 1530, 22 Hen. 8, ch. 14, § 6 (Eng.).

2. Early Use of Peremptory Challenges in Canada

When English colonists came to Canada, they brought the English use of peremptory challenges and standbys with them. As the Canadian colonies developed, local statutes were passed that differed from each other and from the English regulation of peremptory challenges and standbys. For example, New Brunswick, by legislation, restored the Crown's right to exercise peremptory challenges.[56] Conversely, in the colony of Upper Canada, statutes did not allow the Crown to use peremptory challenges, but legislation protected the Crown's right to order an unlimited number of jurors to standby.[57]

After the Canadian colonies joined to become a Confederation, the Criminal Procedure Act of 1869 attempted to consolidate these inconsistent pre-Confederation colonial statutes regulating peremptory challenges.[58] While this attempt at consolidation resulted in some confusion, by the time the Criminal Code of 1892 was introduced, Crown prosecutors had both a right to four peremptory challenges and an unlimited power to standby jurors.[59] In 1917, the Crown's standbys were limited to forty-eight.[60]

3. Early Use of Peremptory Challenges in the United States[61]

American colonial courts adopted, as common law, the English statutory right of a defendant to exercise peremptory chal-

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56. Alan W. Mewett, *The Jury Stand-by*, 30 CRIM. L.Q. 385, 385 (1987-88).

57. *Id.*

58. *Id.*

59. Criminal Code, R.S.C. ch. 29, § 668(9) (1892) (Can.), *cited in* Bain v. The Queen, 87 D.L.R.4th 449, 492 (1992); Mewett, *supra* note 56, at 385.

60. An Act To Amend the Criminal Code (respecting jurors), R.S.C. ch. 13, § 1 (1917) (Can.), *cited in* Bain v. The Queen, 87 D.L.R.4th 449, 492 (1992). The authorities are divided as to the reason underlying the limitation to 48 standbys. One commentator proposes that although in England, the Crown was allowed unlimited stand-asides, in Canada, the Crown was limited to 48 because it was difficult to gather sufficiently large jury panels to allow for unlimited stand-asides. Mewett, *supra* note 56, at 385. The majority opinion in *Bain* quotes a statement made by the Minister of Justice, Hon. C.J. Doherty, when the legislation limiting the stand-asides was being debated:

> Perhaps it may be more correct to say that the more you increase the number of men from whom the Crown can, by this process of elimination, select the twelve that it wants, the more you increase the opportunity for the Crown to find a jury exactly to its liking.

H.C. DEB., AUG. 9, 1917, AT 4309, *quoted in Bain*, 87 D.L.R.4th at 492.

61. United States Supreme Court Justices Antonin Scalia and John Paul Stevens, in *Holland v. Illinois*, 493 U.S. 474 (1990), advance disparate versions of the history of the peremptory challenge and its application to modern interpretation of the Sixth Amendment. Justice Scalia asserts repeatedly that both the prosecution and the defense

lenges.[62] The original drafters of the Sixth Amendment to the United States Constitution[63] proposed that it include "the right of challenge."[64] Nevertheless, this language was deleted by the Senate prior to ratification[65] because, according to one commentator, it was assumed that a right to an "impartial jury"[66] included a guarantee of the right to question and challenge jurors.[67] Despite this "assumption," in 1790, Congress passed legislation which afforded to American defendants the same number of peremptory challenges as those afforded by Parliament to defendants in England: thirty-five when charged with treason and twenty for all other capital crimes.[68]

The 1790 legislation made no mention of governmental use of either peremptory challenges or standbys.[69] Any prosecutorial use of standbys was controversial and there was significant protest against it.[70] While some states authorized the use of standbys by the prosecution,[71] most states eventually chose to authorize

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had the right to exercise peremptories at the time the United States Constitution was adopted. *Id.* at 481, 482 n.1. Justice Stevens contends that the exercise of peremptory challenges by the prosecutor was controversial during this period and "was a subject of debate throughout the 18th and 19th centuries. . . ." *Id.* at 518 n.15 (Stevens, J., dissenting).

62. VAN DYKE, *supra* note 10, at 148.

63. U.S. CONST. amend. VI.

64. GAZETTE OF THE U.S., Aug. 29, 1789, at 158.

65. *See* Holland v. Illinois, 493 U.S. 474, 518 n.15 (1990) (Stevens, J., dissenting) (citing 1 ANNALS OF CONGRESS 435 (Joseph Gales ed., 1789)).

66. U.S. CONST. amend. VI, *supra* note 63.

67. S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 297-99 (1973). James Madison stated: "Where a technical word ["impartial"] was used . . . , all the incidents belonging to it necessarily attended it. The right to challenge is incident to the trial by jury, and, therefore, as one is secured, so is the other." HANS & VIDMAR, *supra* note 17, at 37 (quoting James Madison, Virginia Ratification Debates). *Cf.* Patrick Henry's criticism of the failure to specifically include in the Sixth Amendment a defendant's right to exercise peremptory challenge, "If [the people] dare oppose the hands of tyrannical power, you will see what has happened elsewhere. They will be tried by the most partial powers, by their most implacable enemies, . . . with all the forms of a fair trial. . . . I would rather the trial by jury were struck out altogether." *Id.* (quoting Patrick Henry, Virginia Ratification Debates).

68. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 119 (1790).

69. *Id.*

70. Jon M. Van Dyke, *Peremptory Challenges Revisited*, 12 NAT'L BLACK L.J. 114, 119 (1991).

71. Appellate courts in Georgia, Florida, Louisiana, North Carolina, Pennsylvania, and South Carolina approved of the prosecutorial use of standbys in the early 19th century. *Id.* at 119 n.28.

prosecutorial use of peremptory challenges.[72] In 1827, Justice Story stated in dictum that a prosecutor had a right to the standby as part of common law inherited from England.[73] In 1856, however, the Court in *United States v. Shackleford*[74] held that Federal courts were not required to permit standbys and directed the courts to follow the law of the state in which they sat.[75] Even though *Shackleford*'s effect was contained because many states had already given prosecutors the use of peremptory strikes,[76] Congress passed a legislation in 1865 granting the Federal Government five peremptory challenges in capital and treason cases and two in non-capital felonies.[77]

The grant to state and Federal prosecutors of the power to exercise peremptory challenges represented a growing trust in government among Americans. One commentator has characterized the establishment of prosecutorial ability to peremptorily remove potential jurors as the "mistrust of government typical of the Revolutionary era . . . giv[ing] way to increasing acceptance of state power."[78] The significance of this development cannot be overlooked.

In England, the shift in political power from an absolute monarchy to a representative Parliament was slow. A similar process occurred in Canada. In the United States, however, the shift in political power occurred through rebellion. Prior to that rebellion, many American colonists had developed a deep mistrust of their English rulers and of government in general.[79] This mistrust is evidenced most strongly in America's written Constitution and Bill of Rights. Unlike England, which continues to this day to be gov-

72. New York did not grant prosecutorial use of the peremptory challenge until 1881; Virginia refused prosecutorial use until 1919. *Id.* at 119 n.27.

73. United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827).

74. 59 U.S. (18 How.) 588 (1856).

75. *Id.* at 590.

76. *See* VAN DYKE, *supra* note 10, at 150, 171 n.57. By 1856, 14 states permitted the prosecution to exercise peremptory strikes: Arkansas, Alabama, California, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Pennsylvania, and Tennessee. Others, such as Connecticut, passed comparable legislation soon after *Shackleford*. *See* Colbert, *supra* note 41, at 11 n.39 (discussing states' adoption of peremptory challenge during the 1800s).

77. Act Regulating Proceedings in Criminal Cases, ch. 86, § 2, 13 Stat. 500 (1865). The same statute gave defendants in capital or treason cases 20 peremptory strikes, and defendants in non-capital felony cases 10.

78. VAN DYKE, *supra* note 10, at 150.

79. *See id.* at 141 (noting that controversial trials became a focal point for political disputes during the American Revolution).

erned under an evolving, unwritten Constitutional base of shared political thought based on various historical developments, Americans demanded a written Constitution developed, in large part, to limit the power of government. After the Revolution, however, Americans began to look to the Government for protection of their property interests. This developing trust in government was reflected by granting that government greater power in criminal prosecutions.[80]

Further evidence of this growing confidence is seen in the 1887 Supreme Court decision in *Hayes v. Missouri.* In *Hayes*, the Supreme Court expressed the view that the state has a legitimate interest in removing some elements from the jury:

> The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In our large cities there is such a mixed population[;] there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure the[s]e competent and impartial jurors.[81]

Such language reflects the Supreme Court's confidence, likely unfounded, that the prosecution would use its peremptory strikes "fairly" to secure for the community only an impartial trial, not necessarily a conviction. This parallels the English jurists' similar trust that the Crown would use its standbys in a fair and objective manner.

The Supreme Court's language also evidences a deep distrust of the working classes and, probably, certain ethnic groups. Obviously, the Court feared jury nullification if too many jurors came from certain sections of the populace. This fear represents another value in the use of juries in a criminal justice system—getting convictions. When, in the perception of the politically powerful,[82] juries fail to convict defendants often enough and too many "criminals" escape punishment, the politically powerful perceive

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80. *Id.* at 150.

81. Hayes v. Missouri, 120 U.S. 68, 70-71 (1887). Three years later, the Supreme Court, in *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidated a state statute providing that only white males could serve as jurors.

82. The "politically powerful" may be the majority of voters in a populace or simply those capable of persuading legislators to take action.

the criminal justice system within which those juries operate as working improperly.[83] When the politically powerful segments of a society believe that too many criminals are "getting off," jury selection procedures, including peremptory challenges, will be changed to reflect the ascendance of the value of getting convictions.[84]

A further parallel to the English system is found in *Lewis v. United States*.[85] The Court in *Lewis* echoed Blackstone by ascribing two functions to the peremptory challenge.[86] First, the peremptory challenge guarantees the defendant a good opinion of his jury,[87] and second, the peremptory challenge protects the defendant from the possible resentment of jurors who had been unsuccessfully challenged for cause.[88]

The major difference between the English and American systems at this time was the balance of peremptory challenges/standbys between the government and the defendant. American legislation limited the government's peremptory strikes to a number less than those given to the defendant. In practice, this meant that the government had less control over the composition of the jury. In contrast, the English defendant had a limited number of peremptory strikes while the Crown was allowed to exercise unlimited standbys. Consequently, the Crown could control fully the composition of the jury.

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83. *See infra* notes 96-107, 115 and accompanying text (England's abolition of peremptory challenges based on government's perception of a need for more convictions).

84. Several new crime control bills are currently pending in the United States Congress, all of which would reduce the number of peremptory challenges accorded defendants from 10 to 6, thereby equalizing, in federal cases, the number of peremptory challenges available to the defense and prosecution. Inherent in this proposed change is the belief that reducing the defendant's control over jury selection will increase convictions and, thus, deter crime. *See* H.R. 688, 103d Cong., 1st Sess. (1993); S. 6, 103d Cong., 1st Sess. (1993) ("[t]o prevent and punish sexual violence and domestic violence, to assist and protect the victims of such crimes, to assist State and local efforts, and for other purposes"); H.R. 2217, 103d Cong., 1st Sess. (1993); H.R. 2847, 103d Cong., 1st Sess. (1993); S. 8, 103d Cong., 1st Sess. (1993) ("[t]o control and prevent crime"); H.R. 2872, 103d Cong., 1st Sess. (1993) ("[t]o prevent and punish crime, to strengthen the rights of crime victims, to assist State and local efforts against crime, and for other purposes"); S. 1356, 103d Cong., 1st Sess. (1993) ("[t]o restore order, deter crime, and make our neighborhoods and communities safer and more secure places in which to live and work").

85. 146 U.S. 370 (1892).

86. *Lewis*, 146 U.S. at 376.

87. "[T]he law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike." *Id.*

88. *Id.*

The difference between the American and English systems produced juries that served different values. The American jury was selected by a system that allowed for greater diversity in the jurors chosen. The defense, in exercising its peremptory challenges, was likely to reject jurors whose economic class and background were such that they were thought to be unsympathetic to the defendant. Regardless of whether such judgments were justified, they produced a diversity of input into the American criminal justice system. The American system also allowed a broader expanse of the populace to directly participate in the legal system governing themselves and their neighbors. This served to strengthen civic responsibility and involvement among citizens, another value of jury systems.

Of course, getting a conviction can be more difficult when the defense is afforded a large amount of jury control. Defense-oriented juries can disregard the law and refuse to convict a defendant even when the evidence of guilt is compelling. In a representative democracy, when laws are presumably made according to the will of the majority of the populace, jury nullification of such laws is counter-majoritarian. By allowing the Crown greater control of the jury composition, the English system, on the other hand, better served the value of getting convictions.

III. Modern Development of Peremptory Challenge Regulation

A. England

As of January 5, 1989, criminal defendants in England could no longer exercise peremptory challenges.[89] On the same date, the Crown's use of the standby was severely curtailed.[90] As a result, random selection now forms most English juries. The vehicle mandating this change was the Criminal Justice Act of 1988.[91] Like all legislation, the Criminal Justice Act was enacted to promote specific values. The events leading up to the passage of the Act, and the Parliamentary debates preceding that passage, elucidate these values.

89. Gobert, *supra* note 3, at 528.

90. Attorney General's Guidelines on the Exercise by the Crown of Its Right of Standby, *reprinted in* [1988] 3 All ER 1086, 1086.

91. Criminal Justice Act, 1988, ch. 33 § 118(1) (Eng.).

Before the criminal defendant's right to exercise peremptory challenges was eliminated by the Criminal Justice Act of 1988, it was diminished by two preceding Acts. The Juries Act of 1974 reduced to seven the number of peremptory challenges available to the defendant in felony trials.[92] The Juries Act was amended in 1977, further reducing the number of peremptory challenges available to the criminal defendant to three.[93] The Crown's use of standbys, a creation of the judiciary and never legislated, remained unlimited.

In March of 1986, the Secretary of State for the Home Department presented to Parliament a White Paper[94] announcing the Government's plans to introduce a new Criminal Justice Bill during the next session of Parliament.[95] The Government's stated objectives, relevant to this Comment, in enacting the new Bill were as follows:

> (a) To ensure that the courts have an adequate range of powers to enable them to punish the most serious offenders with the right measure of severity and to enable less serious offenders to be dealt with effectively in the community.
> (b) To ensure that the court system and its related services operate as efficiently and as effectively as possible.[96]

The White Paper proposed that a criminal defendant's right to exercise the peremptory challenge be either abolished or further limited.[97] According to the Government, this was necessary because defendants were using the peremptory challenge "as a means of getting rid of jurors whose mere appearance is thought to indicate a degree of insight or respect for the law which is inimical to the interests of the defence."[98] The Government maintained that this use of peremptory challenges was especially significant when multiple defendants pooled their peremptory challenges, and alleged

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92. Juries Act, 1974, ch. 23, § 12 (Eng.).

93. Criminal Law Act, 1977, ch. 45, § 43 (Eng.).

94. CRIMINAL JUSTICE: PLANS FOR LEGISLATION, 1986, CMND 9658 [hereinafter CMND 9658]. White Paper is another name for Command Paper.

95. *Id.* at 3.

96. *Id.*

97. *Id.* at 15-16 (proposing that alternatives to the abolition of the peremptory challenge were further reductions in the number of challenges available to the criminal defendant, especially in multi-defendant cases). *See also* Samuel J. Cohen, *The Regulation of Peremptory Challenges in the United States and England*, 6 B.U. INT'L L.J. 287, 306-07 (1988) (detailing alternatives).

98. CMND 9658, *supra* note 94, at 15.

that "[a]n entire jury can thereby be replaced . . . if the defendants can settle upon a common object."[99]

In order to obtain empirical evidence to support these assertions, the Government commissioned a Crown Prosecution Service survey on the effect of peremptory challenges.[100] Unfortunately for the Secretary of State for the Home Office, the survey results did not support the assertions made in the White Paper. This survey found that, in both single-defendant and multiple-defendant trials, the conviction rate was six to eight percent higher in trials in which peremptory challenges were exercised than in trials in which no peremptory challenges were exercised.[101] No evidence of widespread pooling of peremptory challenges in multi-defendant cases was found to support the Government's claim of this practice.[102] In the face of these results, the Home Secretary countered that "no argument can be based either way on that set of statistics," but admitted that the Government's case for the abolition of peremptory challenges was based on "logic and common sense" rather than on statistical evidence.[103]

The paramount value, then, driving the Government's efforts to abolish the peremptory challenge, was the need to get the "right

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99. *Id. See also* Gobert, *supra* note 3, at 530 (alleging government feared defense oriented juries).

100. CMND 9658, *supra* note 94, at 16. The survey began in December 1985. Initially, only cases conducted by the Director of Public Prosecutions were surveyed. Coverage was extended during 1986 to cases handled by the new Crown Prosecution Service in metropolitan counties, excluding London. In October 1986, the survey was extended to include all of England, and this coverage continued until the survey's completion in December 1986. Julie Vennard & David Riley, Home Office Research and Planning Unit, *The Use of Peremptory Challenge and Stand by of Jurors and Their Relationship to Trial Outcome*, 1988 CRIM. L. REV. 731, 734. *See also* Gobert, *supra* note 3, at 531 (discussing survey).

101. Vennard & Riley, *supra* note 100, at 737. In single-defendant trials, the conviction rate was 49.6% when no peremptory challenges were exercised, as opposed to 55.6% when they were. In multi-defendant trials, conviction rate was 59.9% when no peremptory challenges were exercised, as opposed to 68.1% when they were. *Id.* As Vennard and Riley point out, however, the defense may have been more likely to challenge jurors when the prospects of acquittal were weakest. *See id.* Peremptory challenges were used most frequently in inner London (three times the equivalent rates in the metropolitan counties), and the Crown standby and challenge for cause were used infrequently in all parts of the country. *Id.* at 738.

102. *Id.* Peremptory challenges were used in approximately one-third of multi-defendant cases as compared to one-fifth of single-defendant cases. The maximum allowable number of peremptory challenges were used by the defense in six percent of all single-defendant trials, and the maximum allowable number of peremptory challenges were used in one percent of multi-defendant cases. *Id.* at 736.

103. 113 PARL. DEB., H.C. (6th ser.) 972, 996-97 (1987).

result," namely, convictions. Even without any statistical basis, the Government feared that guilty defendants were escaping punishment by manipulating jury selection through their use of peremptory challenges.[104] While the White Paper acknowledged that the peremptory challenge served some values,[105] the Government clearly thought that these values were subordinate to crime control.

After the Criminal Justice Bill promised in the White Paper was introduced in Parliament, it became clear that not everyone agreed with the Government. During the Parliamentary debates, four arguments were made in support of retaining peremptory challenges. First, peremptory challenges could be used to increase demographic representation absent from a jury.[106] Second, elimination of peremptory challenges would create pressure to expand the use of the challenge for cause.[107] Third, peremptory challenges advance defendant confidence in the jury.[108] Fourth, contrary to

104. *See id.* at 986. Mr. Jessel, supporter of the Home Secretary, argued that defendants use peremptory challenges to obtain a bias towards acquittal and that this "is not fair to the general public who want to be protected against vicious and violent crime." *Id.*

105. CMND 9658, *supra* note 94, at 14-15 (acknowledging that peremptory challenges, on occasion, serve the following values: promote defendant's confidence in jury, save time and embarrassment when used as a substitute for challenge for cause, and can adjust demographic composition of jury for fairer hearing).

106. *See, e.g.*, 106 PARL. DEB., H.C., (6th ser.) 467, 479 (1986) (arguing that the exercise of peremptory challenges could increase the chances of appropriate racial or gender mix on jury); 113 PARL. DEB., H.C. (6th ser.) 972, 974 (1987) (arguing that use of peremptory challenges helps to adjust the balance of jurors when an imperfect system has produced an unequal balance); *id.* at 978 (explaining that peremptory challenges do not alter jury to make it convict or acquit, but can alter it to make it more representative).

107. *See, e.g.*, 106 PARL. DEB., H.C. (6th ser.) 467, 496 (1986) (arguing that elimination of the peremptory challenge will result in forcing courts to rule on whether potential jurors can be challenged on the basis of race, gender, occupation, etc., causing embarrassment and inefficiency); *id.* at 502 ("I do not want us to go down the road of the American courts in which four days are spent trying to swear in a jury, which gets around every conceivable challenge."); *id.* at 505 ("It will strip away the privacy of jurymen."); 113 PARL. DEB. H.C. (6th ser.) 972, 974 (1987) (arguing that jurors are more likely to feel aggrieved if challenged for cause rather than peremptorily excused); *id.* at 979-80 (arguing that jurors who appear to be illiterate, asleep, frivolous, labile, drunk, or drugged will be difficult to remove and/or insulted when challenged for cause).

108. *See, e.g.*, 106 PARL. DEB., H.C. (6th ser.) 467, 505 (1986) ("If a black defendant cannot have at least some black jurymen if he wants them, if a woman cannot have at least some women, or if a young person cannot have at least some youngish people on the jury, how can we believe that there will be confidence in the jury system by those whose cooperation, after all, is absolutely vital for the process of a criminal trial?"); 113 PARL. DEB., H.C. (6th ser.) 972, 975 (1987) ("If [the accused] is sent to prison—and we seem to be sending more people to prison than any other nation—it is important that when he is in prison he should feel that he had a fair trial with an opportunity to be fully represented and

the Government's assertions, defendants generally do not misuse peremptory challenges nor do they gain advantage by exercising them.[109]

Other ministers made the following arguments in favor of the elimination of peremptory challenges. First, the exercise of peremptory challenges derogates the randomness of jury selection that is the essence of the jury system.[110] Second, the wholesale removal of potential jurors about whom the defendant knows nothing beyond their name and appearance undermines public confidence in the jury system.[111] Third, in cases where multiple defendants are being tried together, it is wrong in principle that the composition of the jury can be radically altered by the defense.[112] Fourth, unlike criminal justice during the time of Blackstone, the system is no longer heavily tilted against the defense.[113]

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to express himself."); *id.* at 992-93 (explaining that peremptory challenge is defendant's safety valve against jurors who may have been put there by prosecution to secure a conviction and that a system of justice does not work as long as there is bitterness in any accused person who thinks the system is rigged against him).

109. *See, e.g.*, 106 PARL. DEB., H.C. (6th ser.) 467, 504 (1986) (arguing that the idea that guilty people are acquitted wholesale because defendants are tailoring juries is contrary to experience of those who practice in criminal courts); 113 PARL. DEB., H.C. (6th ser.) 972, 973, 979 (1987) (pointing out that statistics fail to indicate misuse by or advantage to defense). *But see* 113 PARL. DEB., H.C. (6th ser.) 972, 986-88 (statements of Mr. Jessel & Mr. Bruinvels) (asserting that current low conviction rate was due to misuse of peremptory challenge by defendants).

110. *See, e.g.*, 106 PARL. DEB., H.C. (6th ser.) 467, 474 (1986) (statement of Home Secretary); 113 PARL. DEB., H.C. (6th ser.) 972, 973 (1987) (argument set forth by Home Secretary); *id.* at 982 (arguing that, if one believes in trial by jury of 12 of one's fellow citizens, one must accept that they should be 12 of one's fellow citizens chosen at random, and that there should be no ability to attempt to manipulate jury in favor of defense); *id.* at 983-84 (arguing that peremptory challenges actually preserve random nature of jury). *But see, e.g.*, 113 PARL. DEB., H.C. (6th ser.) 972, 973-74 (1987) (pointing to studies showing that selection of jurors is far from random; Irish, Asians, West Indians, and women are under-represented on juries). *Cf.* 113 PARL. DEB., H.C. (6th ser.) 972, 995 (1987) (statement of Home Secretary) ("[I]f we are to try to reflect the defendant's world, peremptory challenge is a very blunt engineering tool with which to do it. If the objective is to secure a delicate balance on the jury, or to make sure that the jury is fully representative, the whole system is faulty and peremptory challenge will not put it right.").

111. *See, e.g.*, 106 PARL. DEB., H.C. (6th ser.) 467, 474 (1986) (statement of Secretary of State for Home Department); *id.* at 510 ("demeaning and degrading to the fair face of British justice for members of the bar to treat jurors rather like auctioneers at cattle markets").

112. *Id.* at 474.

113. *See, e.g.*, *id.* at 480; 113 PARL. DEB., H.C. (6th ser.) 972, 973 (1987) (statement of Home Secretary) (arguing that defense right to peremptory challenge gives defendant a substantially favorable "tilt").

Some members of Parliament found the abolition of peremptory challenges also objectionable because nothing in the proposed legislation addressed the Crown's right to standby jurors.[114] Thus, they proposed two amendments designed to regulate the right of the Crown to standby jurors. One amendment proposed that the Crown be required to support motions to standby jurors with cause.[115] The other amendment would have limited the number of standbys available to the Crown to three.[116] Supporters of these amendments argued that they were necessary to equalize the prosecution and the defense if peremptory challenges were to be eliminated.[117]

The arguments for retention of peremptory challenges and the adoption of amendments to limit the use of standbys were defeated.[118] Parliament abolished peremptory challenges in the Criminal Justice Act of 1988[119] and enacted no legislation regulating standbys. A few months after the passage of the Criminal Justice Act of 1988 and prior to the date of its effect,[120] the Attorney General issued a guideline directing Crown prosecutors not to use the standby,[121] except when both the Crown prosecutor and the defense agree that the juror is "manifestly unsuitable."[122] The principle underlying the guidelines, as stated therein, was that members of a jury should be generally selected at random from the panel[123] and that the prosecution should not use its right of standby

114. 113 PARL. DEB., H.C. (6th ser.) 972, 993 (1987).

115. Cohen, *supra* note 97, at 308 n.122 (citing CRIMINAL JUSTICE BILL AMENDMENTS, STANDING COMM. F, 359-60 (Feb. 26, 1987); CRIMINAL JUSTICE BILL AMENDMENTS, STANDING COMM. F, 19 (Dec. 16, 1986)).

116. *Id.*

117. *Id.* at 308 n.124 (citing PARL. DEB., H.C., STANDING COMM. F, 816 (28th Sitting, Mar. 3, 1987)).

118. *Id.* (citing 113 PARL. DEB., H.C. (6th ser.) 1006-07 (1987); PARL. DEB., H.C., STANDING COMM. F, 866 (29th Sitting, Mar. 3, 1987)).

119. Criminal Justice Act, 1988, ch. 33, § 118(1) (Eng.).

120. Criminal Justice Bill was passed by the House of Commons on July 28, 1988, and became effective on January 5, 1989. Cohen, *supra* note 97, at 308; Gobert, *supra* note 3, at 528.

121. ATTORNEY GENERAL'S GUIDELINES ON THE EXERCISE BY THE CROWN OF ITS RIGHT OF STANDBY, *supra* note 90, § 3.

122. *Id.* § 5, at 1086-87. An example is where a juror selected to try a complex case is found to be illiterate. *Id.* As might be expected, opponents of the Criminal Justice Bill considered these guidelines to be overly vague. Cohen, *supra* note 97, at 314 (citing PARL. DEB. H.C., STANDING COMM. F, 825, 827 (28th Sitting, Mar. 3, 1987)).

123. ATTORNEY GENERAL'S GUIDELINES ON THE EXERCISE BY THE CROWN OF ITS RIGHT OF STANDBY, *supra* note 90, § 2.

to influence the overall composition of the jury or to gain a tactical advantage.[124]

The Attorney General's guideline reserved from its directive, however, cases involving terrorist activities and national security.[125] In all other cases, investigation of jurors is limited to a routine check of criminal records.[126] In national security and terrorist activity cases, further investigation of jurors can be conducted to ascertain the existence of two reasons for the Crown's exercise of a standby.[127] First, to find out whether the potential juror, either voluntarily or under duress, will likely make improper use of sensitive evidence revealed *in camera*, and second, to discover whether the

> juror's political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors.[128]

Based on the reasons above, the Attorney General may personally authorize exercise of a Crown standby against the suspect potential juror.[129]

The passage of the Criminal Justice Act of 1988, the Parliamentary debates and committee reports preceding its passage, and the Attorney General's guidelines issued subsequent to its passage indicate that, while the value of the public appearance of fairness is important to England's regulation of peremptory challenges, it is not paramount. Particularly telling is the Attorney General's specific exception for national security and terrorist cases, when a potential juror may be excluded from the jury due to political beliefs. It appears from this exception that when political stakes are high, the value of obtaining a conviction supersedes the value of diverse community input into the criminal justice system. Under the English system, in cases involving "terrorist activities and national security," a randomly-selected jury is not trusted to do justice.

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124. *Id.* § 1.

125. ATTORNEY GENERAL'S GUIDELINES ON JURY CHECKS §§ 4, 9, *reprinted in* [1988] 3 All ER 1087, 1087-88.

126. *Id.* §§ 2-3, at 1087.

127. *Id.* §§ 3-4.

128. *Id.* § 5.

129. *Id.* § 9.

Nevertheless, a 1982 interview study with English barristers[130] from Cardiff, Wales, conducted by Valerie P. Hans, indicates that this could be an inaccurate assessment of the value hierarchy underlying English peremptory challenge regulation. The majority of the barristers surveyed "expressed the belief that the jury should be drawn at random and stated that they rarely used their right to challenge."[131] One barrister who had been practicing for nine years stated:

> The jury system is, or in any event is intended to be, as I understand it, a trial by your peers selected at random from all walks of life. And I think it's wrong that a person should try and engineer a better jury for himself, by exercising the right of challenges.[132]

Other barristers indicated that they trusted jurors to do their job and that they believed that jurors, cognizant of the responsibility placed upon them, would do their best to discard any personal prejudice. Thus, the barristers stated, questioning jurors about their biases or beliefs was not only a waste of time but "basically improper."[133] These barristers' remarks indicate, then, an English point-of-view that fairness is best achieved by a randomly-chosen group of twelve people who try their best to impartially weigh the evidence and come to a verdict.

B. Canada

Until recently, Canadian Crown prosecutors had both a right to four peremptory challenges and a right to order forty-eight jurors to standby,[134] while criminal defense attorneys had a right to twenty, twelve, or four peremptory challenges, depending on the offense.[135] Although the Law Reform Commission of Canada had recommended twelve years earlier that Crown standbys be abol-

130. Generally speaking, a barrister is a lawyer who represents a client's case in litigation before a court of law. A solicitor is a lawyer who performs legal "office" or "desk" work, such as drafting contracts. In England, a lawyer practices as either a barrister or a solicitor, but not both. In Canada, a practicing lawyer may perform as either. The terms barrister and solicitor are not used in the United States. GERALD L. GALL, THE CANADIAN LEGAL SYSTEM 188 (1990).

131. HANS & VIDMAR, *supra* note 17, at 48.

132. *Id.* (citing Hans (1983), unpublished data).

133. *Id.* at 48-49.

134. Criminal Code, R.S.C., ch. C-46, § 634(1)(2) (1985) (Can.) (previously R.S.C., ch. C-34, § 563(1)(2) (1970) (Can.)); *see also supra* notes 59-60 and accompanying text.

135. Criminal Code, R.S.C., ch. C-46, § 633 (1985) (Can.) (previously R.S.C., ch. C-34, § 562 (1970) (Can.)).

ished and that both the prosecutor and the accused be accorded the same number of peremptory challenges,[136] these recommendations were not enacted. On January 23, 1992, the Canadian Supreme Court decision in *Bain v. The Queen*[137] radically curtailed the jury selection power of the Crown prosecutor and commanded the Canadian Parliament to rectify the imbalance between the Crown and the accused. The values that motivated these changes are found in both the *Bain* decision and the Parliamentary debates preceding the subsequent legislation.

In *Bain v. The Queen*, in a 4-3 decision, the Canadian Supreme Court held that Section 634(2) of the Canadian Criminal Code, which allowed the Crown to stand-by forty-eight jurors, violated Section 11(d) of the Canadian Charter of Rights and Freedoms.[138] In the majority opinion, Justice Stevenson stated the essence of the holding as follows:

> Section 11(d) of the Canadian Charter of Rights and Freedoms requires that an accused person receive a fair trial by an independent and impartial tribunal. However, to find a Charter infringement, it is not necessary to find that juries are actually partial. The informed observer's perception that the system of selecting jurors impairs impartiality is sufficient.[139]

Thus, the Canada Supreme Court, in *Bain v. The Queen*, found the value of the appearance of fairness to the public all important.[140]

The three dissenting justices in *Bain* argued that "[t]he stand-aside[141] provisions of the Criminal Code [did] not infringe the right to a fair trial by an independent and impartial tribunal as guaran-

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136. LAW REFORM COMMISSION OF CANADA, THE JURY IN CRIMINAL TRIALS: WORKING PAPER 27, 53-55 (1980).

137. — S.C.R.— (1992), 87 D.L.R.4th 449 (1992).

138. *Id.* at 450. The Canadian Charter of Rights and Freedoms, enacted in 1982, has been compared to the American Bill of Rights:

> [T]he drafters of the *Charter* either rejected or modified many of the elements found in the American *Bill of Rights*. Significantly, the elements of the American experience which were rejected or modified by Canadian drafters were those constitutional provisions which required judges to vindicate particular substantive values. Those features of the American constitution which required judges to police the integrity of the political process were imported, largely unchanged, into the Canadian *Charter*. Moreover, certain distinctively Canadian elements were included in the *Charter*; these elements were directed towards protecting communitarian and democratic values.

PATRICK MONAHAN, POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA 99 (1987).

139. *Bain*, 87 D.L.R.4th at 450.

140. *See infra* part IV.A.

141. "Stand-aside" is an alternative term for "standby."

teed by § 11(d) of the Charter."[142] The dissenting justices reasoned that:

> While a jury should be impartial, representative, and competent, the well-informed observer will know that mere random selection of jurors is not in and of itself a guarantee of a jury that fosters these three qualities. A well-informed observer would also be aware of the different roles of the accused and the Crown in the jury selection process. . . . Nothing more is expected of the accused than trying to avoid conviction and punishment by asserting his rights according to law. . . . The Crown Attorney, on the other hand, is not expected to seek conviction above everything else. Crown counsel has special duties as a public officer and plays a central role in the proper functioning of the judicial system. . . . [T]he Crown prosecutor in the jury selection process has a duty to ensure that the jury presents the three characteristics of impartiality, representativeness and competence. . . . The *Criminal Code* as it presently stands does not sufficiently provide for other mechanisms to ensure impartiality, representativeness or competence of jurors. . . . Accordingly, a well-informed observer would not hold a reasonable apprehension of bias from the mere fact that there exists a disparity in the number of recourses against jurors. Such an observer would see in this disparity a reflection of the asymmetry between the role of the accused, which is limited, going almost to self-preservation in nature, and the role of the Crown Attorney, who must conscientiously discharge the *quasi*-judicial duties incumbent on his public office and who, accordingly, requires some flexibility in the means available to him.[143]

This conflict between the Justices in *Bain* is reminiscent of the conflict between the English Parliament in 1305 and the English jurists of that time who originally created the Crown's use of the standby.[144] When the English Parliament in 1305 eliminated the Crown's peremptory challenges, the value that Parliament's legislation intended to promote was "justice" in the form of diminishing the absolute power of the Crown and increasing the power of the defendant. This value was subverted by the English jurists' confidence that a Crown prosecutor would never standby a juror without a reasonable suspicion of prejudice. This same contest between

142. *Bain*, 87 D.L.R.4th at 451 (Gonthier, J., McLachlin and Iacobucci JJ. concurring, dissenting).

143. *Id.* at 451-52.

144. *See supra* notes 41-49 and accompanying text.

confidence in the fairness of the prosecutor as an officer of the court versus a suspicion of placing too much power in the prosecutor as representative of the sovereign reoccurred in *Bain* almost seven hundred years later. While a similar contest was present in early United States Supreme Court decisions on peremptory challenges,[145] the conflict was resolved in *Batson v. Kentucky*.[146] The most recent United States Supreme Court decision, *Georgia v. McCollum*,[147] has extended a limited duty of fairness as an officer of the court to the criminal defense attorney.[148]

As a result of the decision in *Bain*, the Canadian Parliament enacted legislation that repealed the Crown's use of the standby and accorded the Crown prosecutor and the accused an equal number of peremptory challenges.[149] These provisions were not contested during the Parliamentary debates, although one member of the House of Commons, Mr. Ian Waddell, suggested that the provisions did not go far enough. The legislation became effective on June 23, 1992.

The Parliamentary debates illuminate the values underlying the enactment of the legislation. Speaking to the House of Commons in favor of the proposed legislation, the Parliamentary Secretary to Minister of Justice and Attorney General of Canada, Mr. Rob Nicholson, stated that the legislation "would enhance the ap-

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145. *See supra* notes 78-81 and accompanying text.

146. 476 U.S. 79, 88 (1986) ("The Constitution requires . . . that we . . . consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.'"). *Cf.* Swain v. Alabama, 380 U.S. 202, 222 (1965):

> In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court.

Id. at 222.

147. — U.S. — (1992), 112 S. Ct. 2348 (1992).

148. *See McCollum*, 112 S. Ct. at 2358 ("Defense counsel is limited to 'legitimate, lawful conduct,'" *quoting* Nix v. Whiteside, 475 U.S. 157, 166 (1986). *See also infra* notes 183-93 and accompanying text.

149. An Act to amend the Criminal Code (jury), 40-41 Eliz. II, ch. 41, §§ 634, 641 (1992) (Can.), *reprinted in* 15 C. Gaz. pt. III, Aug. 21, 1992, at 1065. The statute accords both parties 20 peremptory challenges where the accused is charged with high treason or first degree murder, 12 peremptory challenges where the accused is charged with any other offense for which the accused may be sentenced to imprisonment for a term exceeding five years, and 4 peremptory challenges where the accused is charged with any other offense. *Id.* § 634.

pearance of fairness in the jury selection process."[150] In espousing the institution of the jury in general, Mr. Nicholson pointed to the following values:

> The jury provides the primary opportunity for many Canadians to participate in our justice system and at first hand to see the criminal justice system at work. . . . [J]ury selection provisions [must] . . . reinforce the confidence that Canadians have in a fair and impartial criminal justice system.[151]

The embodiment of the values espoused above, public participation and public confidence in the fairness of the criminal justice system, is apparent in both the enacted legislation and the *Bain* majority opinion. During the House of Commons debates, Mr. Ian Waddell raised two additional value issues. First, Mr. Waddell suggested that, because the Government enjoyed vast resources and power far superior to the accused, the Crown should not be given any challenges at all.[152] Mr. Rob Nicholson, Parliamentary Secretary to Minister of Justice and Attorney General of Canada, countered this suggestion by asserting that abolishing the ability of the Crown attorney to reject certain jurors would be going too far, as the Crown represents the interests of the people of Canada.[153] As Mr. Waddell himself expected, his suggestion was not accepted.[154] Inherent in both Mr. Waddell's suggestion and Mr. Nicholson's statement, however, is the value of fairness to the parties in an adversarial system, albeit, from different viewpoints. The difference in the viewpoints is based on the extent to which one perceives government as truly representative of the interests of the people.

The second value issue raised by Mr. Waddell was racial discrimination in jury selection. Echoing American peremptory challenge jurisprudence, Mr. Waddell argued that the proposed legislation did not go far enough in that it still allowed the parties to exercise peremptory challenges in a discriminatory manner.[155]

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150. H.C. DEB., May 5, 1992, at 10,099.

151. *Id.*

152. *Id.* at 10,102 (asserting that because the government makes the law, sets the penalty for breaking the law, controls the police who apprehend those who break the law, chooses the judges who sit in the court that is administered by the government, and brings the charges against the accused, a truly equal system would accord challenges only to the accused).

153. H.C. DEB., June 12, 1992, at 11,893.

154. H.C. DEB., May 5, 1992, at 10,103; H.C. DEB., June 12, 1992, at 11,893, 11,895.

155. H.C. DEB., June 12, 1992, at 11,895. Mr. Waddell pointed to cases in which aboriginal people and black people were totally excluded from juries by the use of peremp-

Another Member of the House of Commons, Mr. David Kilgour, supported Mr. Waddell's argument by stating that the proposed legislation did not solve the central problem—"that juries do not reflect the demographics . . . of the communities they should represent."[156]

The "representative" jury was espoused by Mr. Waddell and Mr. Kilgour to promote the values of appearance of fairness to the public as well as appearance of fairness to the parties. These same values formed the basis of the Ontario Court of Appeal's decision in *The Queen v. Pizzacalla*.[157] In *Pizzacalla*, the appellant, a barber, had been convicted of three counts of sexual assault in the form of improper touching of three women employed in his shop. During jury selection, the Crown prosecutor used twenty-three standbys, twenty of which he frankly admitted were used to exclude men from the jury. The Crown prosecutor put his position clearly on the record before the trial judge:

> This is a case involving sexual harassment in the workplace. In my experience, I was of the view that I might encounter a man or more than one man who felt that, somehow, a person in the workplace has the right to fondle, touch, make passes at, or otherwise touch people in the workplace.[158]

As a result the appellant was tried by a jury composed entirely of women. On appeal, the Crown agreed that "the manner in which Crown counsel exercised the right to stand aside jurors gave 'the appearance that the prosecutor secured a favorable jury, rather than simply an impartial one.'"[159] The Ontario Court of Appeal granted a new trial based on the Crown prosecutor's frank admission and the Crown's concession, on appeal, of "partiality." The Ontario Court of Appeal, however, pointedly stated in its opinion that "we are not, of course, saying that a jury composed entirely of women, or of men, cannot render an impartial verdict in a case involving an accused person of the opposite sex."[160]

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tory challenges. *Id.* at 11,896-98. He cited an inquiry which found that, throughout the entire history of the province of Nova Scotia, no aboriginal person had ever been on a jury, and a different inquiry that had recommended that peremptory challenges and standbys be eliminated and only challenges for cause be allowed. *Id.* at 11,896.

156. *Id.* at 11,898.

157. No. 25/89, 1991 Ont. C.A. LEXIS 324 (Nov. 15, 1991).

158. *Id.* at 2.

159. *Id.* at 3 (citations omitted).

160. *Id.*

Thus, while the *Bain* decision makes clear that the appearance of fairness is an important value in the Canadian regulation of peremptory challenges, as yet, non-representative juries are not *per se* unfair. Additionally, as the statements of Mr. Waddell and Mr. Kilgour during the Parliamentary debates indicate, Canada shares with the United States problems of racially discriminatory jury selection and juries that fail to represent the demographic characteristics of the communities they represent. Nonetheless, Parliament has thus far declined to take action on these issues and the Canadian Supreme Court has not addressed them.

C. The United States

The 1992 United States Supreme Court decision, *Georgia v. McCollum*,[161] provides the most useful vehicle to understand the development of peremptory challenge regulation in the United States. Not only is *Georgia v. McCollum* the most current thinking to date of the United States Supreme Court on the subject, but the decision also reveals an evaluation and prioritization of the values underlying the American jury system. As the line of United States Supreme Court decisions preceding *Georgia v. McCollum* has been well-documented, only a brief overview is provided here.

Strauder v. West Virginia:[162] The Court held invalid a West Virginia statute which provided that only white men could serve on juries. The Court held further that, although defendants have no right to a petit jury composed of members of their own race, defendants do have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.[163]

Swain v. Alabama:[164] The Court found that the use of peremptory challenges over a period of time to systematically remove prospective African-American jurors in criminal trials of African-American defendants might violate the Equal Protection Clause of the Constitution.[165]

Batson v. Kentucky:[166] The Court held that a defendant who is a member of a racially cognizable group may establish a violation of the Equal Protection Clause of the Constitution in his own trial.

161. — U.S. —, 112 S. Ct. 2348 (1992).
162. 100 U.S. 303 (1880).
163. *Id.* at 305, 310.
164. 380 U.S. 202 (1965).
165. *Id.* at 223-24.
166. 476 U.S. 79 (1986).

The defendant must show that the prosecution is using peremptory challenges to eliminate jurors of his own race. Once this is shown, the burden shifts to the prosecution to show that the jurors were struck for neutral reasons. If the prosecution fails to carry this burden, the violation is established and the exercise of that specific peremptory challenge is prohibited.[167]

Powers v. Ohio:[168] The Court held that a criminal defendant may object to the race-based exercise of peremptory challenges by the prosecutor whether or not the defendant and excluded juror are of the same race.[169]

Edmonson v. Leesville Concrete Co.:[170] The Court held that the Equal Protection Clause of the Constitution prohibits civil litigants from exercising peremptory challenges in a racially discriminatory manner.[171]

Georgia v. McCollum:[172] The Court held that the Equal Protection Clause of the Constitution prohibits a criminal defendant from exercising peremptory challenges in a racially discriminatory manner.[173]

In *Georgia v. McCollum*, three defendants, all white, had been charged with beating and assaulting two African-Americans.[174] Before the jury selection began, the prosecution moved to prohibit the defense from exercising its peremptory challenges in a racially discriminatory manner.[175] The prosecution asserted that if a statistically representative panel was assembled for jury selection, eighteen of the potential forty-two jurors would be African-American, and that because the defense was allowed twenty peremptory challenges, the defense would be able to remove all African-American jurors from the jury.[176] The trial court denied the motion, holding that "'[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner.'"[177] The Georgia Supreme Court affirmed.[178]

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167. *Id.* at 95-97.
168. 499 U.S. —, 111 S. Ct. 1364 (1991).
169. *Id.* at 1366.
170. 500 U.S. —, 111 S. Ct. 2077 (1991).
171. *Id.* at 2087.
172. — U.S. —, 112 S. Ct. 2348 (1992).
173. *Id.* at 2359.
174. *Id.* at 2351.
175. *Id.*
176. *Georgia v. McCollum*, — U.S. —, 112 S. Ct. 2348, 2351 (1992).
177. *Id.* at 2352.

The United States Supreme Court reversed the state court decision.[179] The majority opinion addressed four issues, three of which explore values pertinent to this Comment: (1) whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed in *Batson*; (2) whether the exercise of peremptory challenges by a criminal defendant constitutes state action; and (3) whether the constitutional rights of a criminal defendant nonetheless preclude the extension of *Batson* and its prodigy to the exercise of peremptory challenges by a criminal defendant.[180]

In addressing the first concern, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed in *Batson*, the Court identified these harms as (1) the indignity suffered by the potential juror by being subjected to open and public racial discrimination, and (2) the undermining of public confidence in the integrity of the criminal justice system.[181] The majority opinion found that these harms are directly related; namely, the former gives rise to the latter.

> "[T]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.". . . Selection procedures that purposefully exclude African-Americans from juries undermine . . . public confidence . . . . "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."[182]

Thus, the Court answered affirmatively that a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner does inflict the harms addressed in *Batson*. By finding a causal relationship between open racial discrimination against a potential juror and the undermining of public confidence in the criminal justice system, the United States Supreme Court in *McCollum*, like the Canadian Supreme Court in *Bain*, underlined the importance of the public appearance of fairness within a criminal justice system.

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178. *Id.*

179. *Id.* at 2359.

180. *Georgia v. McCollum*, — U.S. —, 112 S. Ct. 2348, 2353 (1992).

181. *Id.* at 2353-54.

182. *Id.* at 2353 (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986), and Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991)) (citations omitted).

The next question addressed by the Court in *McCollum* was whether the exercise of peremptory challenges by a criminal defendant constitutes state action.[183] There is no direct analogy to this issue in the English and Canadian systems of peremptory challenge regulation. England chose to abolish peremptory challenges largely because enough members of Parliament believed that defendants utilized them to obtain favorable verdicts.[184] Furthermore, the concept of the criminal defendant as a "state actor" is foreign to English jurisprudence.[185] The Canadian Supreme Court in *Bain* never addressed state action because the right impinged in *Bain*—the right of an accused person to receive a fair trial by an independent and impartial tribunal—is not framed in the Canadian Charter of Rights and Freedoms as a prohibition against state action.[186] The United States Supreme Court prohibition on the use of peremptory challenges in a racially discriminatory manner, however, is based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The language of the Equal Protection Clause provides that "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the

183. *McCollum*, 112 S. Ct. at 2354.

184. *See supra* notes 97-99, 103-05, 113 and accompanying text.

185. The following excerpt from the Parliamentary floor debates on the abolition of the peremptory challenge in England is illustrative.

> Mr. Mark Carlisle: So long as the right of peremptory challenge exists, it is the responsibility and duty of defence counsel, if they consider that it is in their client's interest, to use it. . . .
>
> Mr. Budgen: One of the mysteries of this system is that all of us have used the right of peremptory challenge to try to rig juries in our favour but, more often than not, it does not work that way. . . .
>
> Mr. Carlisle: The delight of my hon. Friend is the honesty of the language that he uses. As he said, he has attempted to use the peremptory challenge to rig juries in favour of those whom he has represented.
>
> Mr. Lawrence: It would not be an abuse.
>
> Mr. Carlisle: It would not be an abuse. It is the duty of defence counsel, so long as that power exists, to use it in what he believes are in the interests of his client.

113 PARL. DEB., H.C. (6th ser.) 972, 981-82 (1987).

186. Section 11(d) of the Canadian Charter of Rights and Freedoms reads: "Any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d). While the Canadian Supreme Court in *Bain* based its decision solely on Section 11(d) of the Charter, Sections 15 and 28 of the Charter provide for equal protection and equal benefit of the law and equality before and under the law, regardless of race, national or ethnic origin, color, religion, sex, age, or mental or physical disability. *Id.* at §§ 15, 28. These Sections are also not framed in terms of state action, but, as yet, they have not been used to regulate the use of peremptory challenges.

laws. . . ."[187] Thus, in *McCollum*, before the criminal defendant could be prohibited from using peremptory challenges in a racially discriminatory manner, the United States Supreme Court had to find that the exercise of peremptory challenges by a criminal defendant constituted state action.

One year prior to its decision in *McCollum*, the United States Supreme Court, in *Edmonson v. Leesville Concrete Co.*,[188] found that the exercise of peremptory challenges by civil litigants constituted state action.[189] The majority in *McCollum* built upon the *Edmonson* decision, finding as follows:

> The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body . . . . [W]hen "a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality."[190]

While the Court acknowledged that criminal defendants exercise peremptory challenges to increase their chances of acquittal, it found that this personal motive did not conflict with a finding of state action.[191]

The Court's finding of state action in *McCollum* was criticized by four out of the nine Justices. Justice O'Connor, who dissented in *Edmonson* as well as in *McCollum*, argued that the unique and clearly antagonistic relationship between the government and a criminal defendant precludes any finding of state action on the part of the criminal defendant.[192] In contrast, nothing in the jurisprudence of either England or Canada indicates any predilection towards designating any actions of a criminal defendant as that of a state actor. This designation is a uniquely American designation, one that was required by the language of the Fourteenth Amendment of the United States Constitution if the Court was to achieve the resulting decision. As will be explained below, the designation

187. U.S. CONST. amend. XIV, § 1 (emphasis added).

188. 500 U.S. —, 111 S. Ct. 2077 (1991).

189. *Id.* at 2086.

190. Georgia v. McCollum, — U.S. —, 112 S. Ct. 2348, 2356 (1992) (citation omitted) (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2085 (1991)).

191. *Id.* at 2356-57.

192. *Id.* at 2363 (O'Connor, J., dissenting).

of a criminal defendant as a state actor for the purpose of exercising peremptory challenges was propelled by an underlying hierarchy of values.[193]

The Court in *McCollum* addressed this hierarchy of values in considering the final issue of the case: whether the rights of a criminal defendant nonetheless precluded the extension of *Edmonson* to the exercise of peremptory challenges by a criminal defendant.[194] The Court first noted that "peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial."[195] Second, the Court noted that it had "recognized that 'the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts.'"[196] The Court, however, finally concluded that

> "if race stereotypes are the price for *acceptance of a jury panel as fair*," we affirm today that such a "price is too high to meet the standard of the Constitution" . . . . [I]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.[197]

Whether the phrase "acceptance of a jury panel as fair" applies to the public's acceptance or the defendant's acceptance is ambiguous.[198] These are, of course, two very different perceptions and values. Nonetheless, given the language of the Court when it initially discussed the harms identified in *Batson*, i.e., the undermining of public confidence in the integrity of the criminal justice system,[199] it is logical to assume that the Court is speaking of the

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193. Whether this hierarchy of values was already present due to the Court's decision in *Batson* or whether the Court in *McCollum* decided to place one value above another is irrelevant to this Comment.

194. *Id.* at 2357-58. If *Edmonson* was extended to criminal defendants, criminal defendants would be bound by *Batson* in their exercise of peremptory challenges, and would be required to show a neutral reason guiding the exercise of peremptory challenges in what appeared to be a racially discriminatory way.

195. Georgia v. McCollum, — U.S. —, 112 S. Ct. 2348, 2358 (1992).

196. *Id.* (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088).

197. *Id.* (emphasis added) (citation omitted).

198. The original textual context in *Edmonson*, while still ambiguous, is as follows:

> It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a juror's impartiality without using skin color as a test.

Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991).

199. *McCollum*, 112 S. Ct. at 2353-54.

defendant's "acceptance of a jury panel as fair."[200] The Court thus elevates the value of the appearance of fairness to the public above the value initially espoused by Blackstone, that a defendant have a good opinion of his jury.[201]

The United States Supreme Court, then, engaged in a balancing test and ranked the value of the appearance of fairness to the public above the value of the appearance of fairness to the defendant.[202] To achieve this result, the Court stretched, on a disputable basis, the state action requirement of the Equal Protection Clause of the Fourteenth Amendment.[203] The Court's willingness to stretch the Equal Protection Clause to further the value of the appearance of fairness to the public clearly indicates the hierarchy of values in the American jury system and peremptory challenge regulation.

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200. *Id.* at 2358 (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991)).

201. *See supra* notes 50-54 and accompanying text.

202. Justice Scalia characterized this balancing as "promoting the supposedly greater good of race relations in the society as a whole (make no mistake that this is what underlies all of this)," over "the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair." *McCollum*, 112 S. Ct. at 2365 (Scalia, J., dissenting). Justice Thomas characterized this balancing as "exalt[ing] 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." *Id.* at 2360 (Thomas, J., concurring). These characterizations accord no credence to the majority opinion's discussion that the exercise of peremptory challenges in a racially discriminatory manner undermines public confidence in the criminal justice system. *See id.* at 2353-54 (discussing the likelihood of undermining public confidence).

203. As Justice O'Connor stated in *McCollum*:

> From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see. Rather than squarely facing this fact, the Court, as in *Edmonson*, rests its finding of governmental action on the points that defendants exercise peremptory challenges in a courtroom and judges alter the composition of the jury in response to defendants' choices . . . . *Dodson* makes clear that the unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State, whatever is the case in civil trials.

Id. at 2363 (O'Connor, J., dissenting). *Cf.* H.C. DEB., (Can.), May 5, 1992, at 10,102 (statement of Mr. Ian Waddell). During a debate on a new bill regulating peremptory challenges in Canada after the *Bain* decision, Mr. Waddell suggested that the Crown not be given any challenges at all. *See supra* note 152 and accompanying text.

IV. Comparison of Values Served by Peremptory Challenge Regulation and Recommendations for Regulation in the United States

The use of the peremptory challenge in selecting a jury was designed, from its inception, to serve certain values. Court opinions, statutes, floor debates of legislative bodies, scholarly writings, and history are the sources that define these values. Developing case law as well as legislation reveal that these values are not static, but have changed or at least shifted in their hierarchy, since peremptory challenges were first used.[204] This Comment uses six values to compare peremptory challenge regulation in the United States, England, and Canada: (1) the appearance of fairness to the public; (2) public participation in the criminal justice system; (3) the rights of the individual juror; (4) the appearance of fairness to the accused; (5) the need to get convictions; and (6) efficiency and cost.

A. Appearance of Fairness to the Public

The public appearance of fairness and the resulting public confidence in the criminal justice system have emerged as the paramount value in peremptory challenge regulation in both the United States and Canada.[205] The preeminence of this value has produced, thus far, different results in peremptory challenge regulation in the two countries. In Canada, the accused and the Crown have been accorded an equal number of peremptory challenges.[206] In the United States, neither the prosecution nor the defense may exercise peremptory challenges in a racially discriminatory manner.[207]

Public appearance of fairness is also an important, if not paramount, value in peremptory challenge regulation in England. The abolition of the peremptory challenge in England was based, in part, on the belief that random selection of jurors yields the highest appearance of fairness to the public.[208] Nonetheless, the repeated references to crime-control concerns by both the Government and its supporters in Parliament suggest that the need to get convic-

204. These changes have, of course, been criticized. *See* Georgia v. McCollum, 112 S. Ct. at 2365 (Scalia, J., dissenting) (criticizing destruction of an "ages-old right").

205. *See supra* notes 139-40, 198-202 and accompanying text.

206. *See supra* note 149 and accompanying text.

207. *See supra* part III.C.

208. *See supra* notes 110-11 and accompanying text.

tions was likely of superior importance to the value of public appearance of fairness.[209] Of course, when crime incidences soar, higher conviction rates can be interpreted by the public as an appearance of "fairness." The English Government almost certainly had this in mind when it proposed the abolition of the peremptory challenge.

In contrast, Canadian and American case law gives no indication that the need for convictions is a basis of peremptory challenge regulation in these countries. Canadian and American case law is focused on the appearance of fairness in the process, not the result.[210] Thus, the preeminent value basis for peremptory challenge regulation in the United States and Canada appears to be different from that in England. Accordingly, because of this differing value basis, the United States should find the values supporting the abolition of peremptory challenges in England ill-suited to the goals that the United States seeks to accomplish by its regulation of the peremptory challenge.

The preeminence of the value of public appearance of fairness comes, however, at a price. While American prohibition on the exercise of race-based peremptory challenges may promote the value of the public appearance of fairness in the courtroom, this measure is ineffective. If allowing the prosecution or the defense to exercise a peremptory challenge on the basis of race undermines public confidence in the criminal justice system, it follows that allowing them to exercise a peremptory challenge on the basis of gender, ethnic background, age, class, or appearance is equally damaging. Thus, the surviving grounds upon which a peremptory challenge can be exercised is on some inarticulable "hunch" of juror impartiality that does not amount to the level of challenge for cause and that is not based on race, gender, ethnic background, age, class, or appearance.[211] Given this prospect, the randomly-se-

209. *See supra* notes 96-99 and accompanying text.

210. *See supra* notes 141-42, 203-05 and accompanying text.

211. *See* HASTIE, *supra* note 7, at 149 ("[T]he relationship is weak between the background characteristics of jurors, such as demography, personality, and general attitudes, and their verdict preferences in typical felony cases. However, the jurors' world knowledge concerning events and individuals involved in the facts of the case does effect their verdict decisions."). Thus, an attorney could develop a reliable "hunch," based purely on a potential juror's world knowledge, that would not amount to a challenge for cause on the basis of impartiality, nor be based on immutable characteristics such as race, gender, ethnic background, etc. It is this kind of "hunch" that conceivably could form a legitimate basis for a "neutral reason" peremptory challenge.

lected jury would appear to become increasingly more attractive, even though the underlying values for its American adoption differ from those espoused by the English. The randomly-selected jury, however, negates the value of the original underlying purpose of the peremptory challenge, namely, Blackstone's idea that a defendant should feel good about his jury so that its verdict is more acceptable to him.

Nevertheless, as the Parliamentary debates in both England and Canada reveal, peremptory challenges cannot remedy a jury venire that fails to represent a cross-section of the community in which the crime was committed. If, as the English believe, randomly-selected juries provide the fairest form of trial by jury, then the random selection must be made from a venire representative of the community in which the offense was committed. Public appearance of fairness would depend on whether such representation is actually achieved.[212]

B. Public Participation in the Criminal Justice System

All three countries acknowledge the value of public participation in the adjudication of public offenses. In the United States, however, this value is accorded more importance, as evidenced by the greater number of jury trials and the greater control accorded to juries in sentencing. Historically, Americans, more than the English or Canadians, have mistrusted the power of the sovereign. As a hedge against this power, Americans have, instead, trusted juries to ascertain and enforce justice. As long as this value retains a high level of importance in the United States, extensive voir dire and regulated peremptory challenges also have value. After all, when greater control is entrusted to the jury, greater care in its selection is appropriate. Thus, peremptory challenges that are based on the potential juror's world knowledge and life experience may be necessary.

212. Through the media, the public knows immediately the race and/or ethnic backgrounds of jurors, and sometimes their occupations. Based on this information, the public makes judgments as to whether the composition of a jury fairly reflects the composition of the community in which the crime took place. If too great a disparity exists between the perceived composition of a jury and the perceived composition of the community, many members of the populace will believe that the composition of the jury unfairly affected the verdict, and the public appearance of fairness diminishes. *See generally* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 So. Cal. L. Rev. 1533 (1993).

C. Rights of the Individual Juror

In all three countries, no one has a vested "right" to be a juror in a specific trial. Peremptory challenge regulation in both England and the United States does, however, seek to protect the individual juror from embarrassment and humiliation. In particular, the United States acknowledges the right of the individual juror to be shielded from the public stigma of racial discrimination.

In England, prior to the elimination of peremptory challenges, it was argued that peremptory challenges saved individual jurors from embarrassment. If peremptories were eliminated, trial lawyers would make more challenges for cause and judges would be required to rule on alleged juror bias much more often.[213] The basis for the challenge for cause must be stated in open court for the record.[214] If the judge rules that the juror is unfit to sit in judgment on the case, the judge discounts the juror's claim of impartiality or, putting it more bluntly, declares the juror to be at least mistaken if not a liar.[215] The dismissed juror may feel embarrassed, humiliated, and even resentful of the legal system in general.[216]

The value of appearance of fairness to the public, however, in all three countries, is superior to the value of the right of the potential juror to be shielded from embarrassment not based on an immutable characteristic.[217] Thus, the argument in favor of retaining peremptory challenges to shield potential jurors from embarrassment due to dismissal for cause cannot prevail if peremptory challenges appear unfair to the public. In the United States, however, the right of a juror not to be excluded from a jury based on race is entwined with the public appearance of fairness.

To better safeguard the right of a juror not to be embarrassed in open court, challenges for cause should be made *in camera* or, at least, outside the presence of the jury. If peremptory challenges are progressively restricted, it is likely that challenges for cause will increase. Americans, like the English, value highly the individual juror's dignity. A challenge for cause made *in camera* would protect the privacy of the individual juror. On the other hand, the public would be denied any opportunity to assess the fairness of

213. Gobert, *supra* note 3, at 535.
214. *Id.*
215. *Id.*
216. *Id.*
217. *But see* Justice Thomas' concurrence in Georgia v. McCollum, — U.S. —, 112 S. Ct. 2348, 2353-54 (1992).

the process. For this reason, given the preeminence of the value of public appearance of fairness, challenges for cause should be made in the courtroom while the jury is absent. In this way, the individual juror is spared embarrassment, and, if the challenge for cause is denied, the juror need never know it was made and thus has no basis to resent the party making it.[218]

D. Appearance of Fairness to the Accused

Despite the legacy of Blackstone, none of the three countries rank this value as supreme. England negated this value completely when it abolished the peremptory challenge. In his final argument before Parliament, the Home Secretary stated, "[T]he Government's case is that peremptory challenge is not effective in creating a jury which reflects the defendant's world."[219] In England, the accused must depend upon the "random selection" of the jurors and the challenge for cause to feel that the system has "done right by him."

Canada seems to rank this value higher than either England or the United States. The Canadian Supreme Court, in *Bain v. The Queen*, held that the peremptory challenges accorded the prosecution and the defense must be equalized. Additionally, Canada has yet to restrict how peremptory challenges are exercised, so long as the prosecution never admits to attempting to control the composition of the jury.

While the United States Supreme Court continues to give lip service to this value, given the primacy of the value of public appearance of fairness, value of the appearance of fairness to the accused seems destined to lose importance in the American criminal justice system. The ability to remove a potential juror for no reason other than a hunch that he will ultimately vote against the defendant seems diametrically opposed to the public appearance of fairness. Unless a case can be made that the American public recognizes a "fairness" value in allowing the defendant to remove from the jury a certain number of potential jurors so that the defendant feels good about his fact-finders, verdict-deciders, and, in some cases, sentencers, it appears that in the United States, ap-

218. *See* Steinberg, *supra* note 4, at 227 (proposing challenge for cause be made outside presence of jury).

219. 113 PARL. DEB., H.C. (6th ser.) 972, 998 (1986).

pearance of public fairness ultimately trumps the appearance of fairness to the accused.[220]

If, however, the peremptory challenge, even in its restricted form, functions to insure that the defendant is tried by a jury capable of understanding him, then the peremptory challenge promotes the public appearance of fairness as well as the appearance of fairness to the accused in a way that a randomly-selected jury cannot. There are, in the United States, citizens, and perhaps even some communities as a whole, who feel that the American criminal justice system "tilts" against minorities and, in particular, the minority defendant.[221] These members of the American populace may feel that the appearance of fairness to the defendant is a value deserving of greater importance. In any event, while this value is still alive in the United States, it has been diminished in recent Supreme Court decisions.

To reflect the current hierarchy of values in the United States, the number of peremptory challenges accorded both the prosecution and the defense should be reduced. By reducing the number of peremptory challenges, the parties will be less capable of dramatically altering the composition of an entire jury, thus enhancing the public appearance of fairness.[222] The defendant, nonetheless, will still retain the sense that he is able to remove at least some jurors incapable of understanding his side of the case. The legislature should reduce the exact number of peremptory challenges gradually and study the effects of each reduction to determine the optimum number of peremptory challenges to be accorded each side.

E. Getting Convictions

The value of getting convictions at the hands of a jury appears to have driven England's abolition of the peremptory challenge. Mention of this value is absent from peremptory challenge regulation in Canada and the United States. While at least one American

220. *See* Bray, *supra* note 4, at 560 (arguing that by expanding the challenge for cause, prospective juror partiality will be uncovered, allowing defendants to feel good about their juries).

221. Rosen, *supra* note 4.

222. *See* Van Dyke, *Peremptory Challenges Revisited*, *supra* note 70, at 133 (written prior to the United States Supreme Court's decision in *Georgia v. McCollum*, arguing that the number of peremptory challenges should be reduced, but that the defendant should be accorded more than the prosecution).

commentator has argued that defense-oriented, or anti-crime control, juries exist in America, as yet, this value has had no influence on peremptory challenge regulation in the United States.

The English reason for abolition of peremptory challenges, namely, crime control, is insufficient to support the abolition of peremptory challenges in the United States. While a legislature may enact harsher penalties for crime and a city council may vote to hire more law enforcement personnel, few Americans believe that jury composition is related to high crime rates. In fact, except for when the composition of a jury fails to accurately represent a cross-section of the community injured by the crime, most Americans believe in the effectiveness of juries.

Americans, as a whole, do believe that there is too much violent crime, especially in urban areas, and that society and victims as well as defendants have rights in the adjudication of crime. To best serve these beliefs, the Canadian system which gives an equal number of peremptory challenges to both the defense and the prosecution, should be adopted throughout the United States.

F. Efficiency/Cost

Certainly, no country exists where the values of efficiency and cost are unimportant. The issue is prioritization of this value. Both England and Canada are extremely wary of the inefficiency and expense of jury selection in the United States.[223] Perhaps for this reason, jury trials are much less common in either of these two countries than in the United States. In any case, although the United States is increasingly more concerned about the cost and inefficiency of its criminal justice system, at present, this value is given a higher priority in England and Canada than in the United States.

V. CONCLUSION

One commentator has proposed a plan for the revision of peremptory challenges that appears to accommodate both the value of

223. 106 PARL. DEB., H.C. (6th ser.) 504-05 (1986).

> Mr. Lawrence: I am sure that the road down which the United States has progressed is specifically one that would not be attractive to this or any other Government. The spectacle in a United States court of juries being challenged for one, two, or three days, to process a trial that takes half a day or a day, is preposterous. Apart from that, it is extremely expensive and very demanding on the time of the jurymen. . . . Therefore, the example of the United States is particularly bad and should be held up as a dreadful warning to all of us here.

public appearance of fairness and the value of the appearance of fairness to the accused.[224] Under this plan, after voir dire and after exercising their challenges for cause, both prosecution and defense would submit to the court a list of preferred jurors, ranking them in order of preference. The number of names on each list would correspond to the number of jurors on a petit jury in that jurisdiction. Regardless of the order of preference, the court would place on the jury those persons whose name appeared on both lists, as the appearance of those persons' names on both lists indicates that both the prosecution and the defense accept those persons as impartial jurors. The jurors whose names appeared on only one list would then be subject to removal by a party if, to the court's satisfaction, the removing party provided a neutral reason justifying the removal. The court would alternate between the prosecution and defense in considering these challenges, and the number of successful strikes available to each side would be determined by law, just as the number of peremptory challenges is currently determined by law. After both sides exhausted these "neutral reason" strikes, the court would randomly select among the remaining persons the number needed to complete the jury.

Coupled with the other recommendations in this Comment, this system would provide a fair means to select a jury that the defendant feels is capable of understanding him. Under this system, the value of the public appearance of fairness and the value of the appearance of fairness to the accused could be reconciled and accommodated in a way not possible under a system of purely random selection. While not retaining the peremptory challenge in its historical form, this system would inculcate the values historically promoted by the peremptory challenge as well as the values deemed most important in current American peremptory challenge jurisprudence.

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224. Harris, *supra* note 4, at 1062-63.

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