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Carol A. Chase

Colleen P. Graffy

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A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings

CAROL A. CHASE* & COLLEEN P. GRAFFY** ***

I. INTRODUCTION

The Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[1] To ensure this impartiality, the U.S. jury selection process allows two types of challenges against prospective jurors: challenges for cause and peremptory challenges.

Challenges for cause are used to eliminate prospective jurors from the jury panel for lack of impartiality.[2] To successfully challenge a juror for cause, the party must state the specific reason for

* Associate Professor of Law, Pepperdine University School of Law.

** Barrister of the Middle Temple; Assistant Professor of Law and Resident Director, Pepperdine University School of Law, London, England.

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1. U.S. CONST. amend. VI.

2. *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL THEORIES, TACTICS, TECHNIQUES 272 (1991).

the challenge, and the court must find the challenge warranted.[3]

In contrast, peremptory challenges give parties the right to eliminate a limited number of jurors without stating a specific reason.[4] Although the U.S. Supreme Court once referred to the peremptory challenge as "'one of the most important'" rights in the U.S. system of justice,[5] the Court has more recently recognized the potential for abusing the peremptory challenge.[6] Accordingly, the Court has proscribed the use of peremptory challenges for an improper purpose, such as excluding jurors based on race[7] or gender.[8] In his concurring opinion in *Batson v. Kentucky*,[9] U.S. Supreme Court Justice Thurgood Marshall noted that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[10]

Indeed, it is now evident that trial attorneys primarily use peremptory challenges to "stack the deck" and seat a favorable, rather than an impartial, jury. Attorneys exercise peremptory challenges in order to "de-select" jurors who, while not biased, appear difficult to persuade. These peremptory challenges, which are often based on ethnic, religious, cultural, or socioeconomic factors, reflect the prejudices and biases of the attorneys, the parties, and often the costly jury consultants retained to assist in the jury selection process. These prejudices and biases go largely unchecked because attorneys are not required to justify a peremptory challenge. For example, if the court required prosecutors to disclose that they routinely exercise peremptory challenges to exclude young black males, but not all blacks, from jury panels because of their perception that young black males as a group are sympathetic to criminal defendants, an uproar would undoubtedly

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3. *See id.* at 273-74.

4. *See id.* at 279.

5. Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

6. *See Batson*, 476 U.S. at 79; J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

7. *See Batson*, 476 U.S. at 84.

8. *See J.E.B.*, 511 U.S. at 127; *see also* discussion *infra* Part II.B.

9. 476 U.S. at 79.

10. *Id.* at 107 (Marshall, J., concurring).

ensue. Attorneys often exercise peremptory challenges based on generalizations that few courts would permit if disclosure was necessary.

This Article discusses the use of peremptory challenges in the United States and proposes a more effective system of jury selection. Part II reviews some of the criticisms against peremptory challenges. Part III examines the jury selection process in England, where peremptory challenges were gradually abolished. Finally, Part IV proposes a jury selection process that eliminates peremptory challenges and relies entirely on challenges for cause to guarantee an impartial jury.

II. PEREMPTORY CHALLENGES: IMPEDIMENTS TO JUSTICE

Although nothing in the U.S. Constitution directly concerns parties' rights to challenge jurors, the guarantee of a trial by an impartial jury necessarily contemplates the need to strike jurors who cannot act impartially. All parties have the right to challenge an unlimited number of jurors for cause.[11] Generally, challenges for cause are based on actual or implied jury bias or prejudice or on a lack of juror qualifications.[12] Although there is no limit to the number of challenges for cause, courts are generally wary of granting such challenges.[13] This wariness is largely a product of the availability of peremptory challenges, which parties usually exercise after they have exhausted all of their challenges for cause.[14] Because an attorney who loses a challenge for cause may nevertheless peremptorily challenge the juror, judges are generally relieved of their responsibility to make difficult decisions concerning a juror's bias or prejudice.

The constitutional guarantee of a trial by an impartial jury

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11. *See, e.g.*, 28 U.S.C. § 1870 (1995); United States v. Annigoni, 96 F.3d 1132, 1138 (9th Cir. 1996).

12. *See* HAYDOCK & SONSTENG, *supra* note 2, at 272. Actual bias or prejudice refers to an expressed bias or prejudice, and implied bias refers to a bias that arises from a relationship between a juror and a party or witness. Lack of juror qualifications generally refers to a juror's failure to meet standard criteria, such as citizenship, lack of a felony criminal record, or absence of a physical or mental disability that would impede jury service. *See id.*; *see also* discussion *infra* Part IV.A.

13. *See* HAYDOCK & SONSTENG, *supra* note 2, at 274.

14. *See id.* at 275; *see also* discussion *infra* Part III.E.

provides parties with the right to challenge jurors for cause,[15] but not the right to peremptorily challenge jurors.[16] Peremptory challenges were used in colonial America as a part of English common law.[17] Initially recognized as a trial right for criminal defendants in serious cases,[18] the peremptory challenge is now generally available to both the prosecution and the defense.[19]

Unlike challenges for cause, which must be based on logical reasons why the potential juror is biased, prejudiced, or unqualified to serve in a particular case, peremptory challenges are often inspired by hunches, intuition, or "shots in the dark."[20] As a partisan, a lawyer uses peremptory challenges not to select an impartial jury, but rather to select a jury that will be partial to his client's cause.

Five main problems surround the use of peremptory challenges. First, attorneys who exercise peremptory challenges aim to select a jury that is *biased* in favor of their client. This motive hinders, rather than advances, the guarantee of a trial by an impartial jury. Second, the exercise of peremptory challenges is largely based on the attorney's biases and prejudices toward persons of a particular race, religion, gender, age, educational background, socioeconomic status, and other associations. Such exercise has led to discrimination against classes of potential jurors, which may profoundly affect both parties' ability to obtain a trial by an impartial jury. Although the U.S. Supreme Court has issued rulings

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15. *See* Barnes v. State, 429 So. 2d 1114, 1120 (Ala. Crim. App. 1982); *cf.* United States v. Apodaca, 666 F.2d 89, 94 (5th Cir. 1982).

16. *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986); Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled in part by Batson*, 476 U.S. at 79.

17. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977). For a review of the historical use of the peremptory challenge, as well as a federal district court judge's indictment of the peremptory challenge, see Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 374-99 (1992). Ironically, England has abolished peremptory challenges. *See* discussion *infra* Part III.

18. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 112, 119 (1790).

19. *See, e.g.*, FED. R. CRIM. P. 24(b) (providing 20 peremptory challenges for each side in capital cases, 10 peremptory challenges for the defense and 6 for the prosecution in non-capital felony cases, and 3 peremptory challenges for each side in misdemeanor cases).

20. *See* MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 55 (1978).

in the past decade to curb the use of peremptory challenges as an instrument of racial or gender discrimination, those rulings have not had their anticipated effect.[21] The third main problem with peremptory challenges is that their availability has led to extensive and intrusive voir dire examination of potential jurors, and thus, increased the duration of jury trials. Fourth, the use of challenges has raised the cost of jury trials due to the use of expensive jury "experts" who assist attorneys in identifying jurors most likely to favor one side or the other. Finally, the mere existence of peremptory challenges permits the courts to avoid deciding whether a juror is truly biased or prejudiced because the attorney may still exercise a peremptory challenge if the judge denies a challenge for cause.

A. Attorneys Use Peremptory Challenges in an Effort to Create a Biased Jury

Although the constitutional guarantee of a trial by an impartial jury remains the focus of challenges for cause, it is not the goal of peremptory challenges. U.S. Supreme Court Justice Byron White noted that the intended function of the peremptory challenge was "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[22] In practice, however, peremptory challenges allow attorneys to do what the Constitution could never allow: to de-select jurors whom they perceive as unfavorable to their client based on their biases and prejudices. Although attorneys initially used peremptory challenges as a shield against biased jurors,[23] such challenges are now used to shape a jury that is most likely to engender bias in favor of the exercising attorney's client.

Although trial attorneys cherish peremptory challenges, empirical evidence does not substantiate the argument that they are necessary or useful in securing a fair trial. According to one English survey, when defense attorneys exercised their peremptory strikes, the conviction rate was actually seven percent higher than

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21. *See infra* notes 50-53 and accompanying text.

22. Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

23. *See id.*

when they did not do so.[24] In another study involving twelve U.S. federal criminal trials, the peremptorily excused jurors remained in the courtroom as "shadow jurors."[25] At the end of the trial, the shadow jurors were also asked to vote on the case. They produced essentially the same proportion of guilty votes as the actual jurors in the case.[26] The authors of the federal study concluded that the overall performance of attorneys in striking biased potential jurors was "not impressive."[27]

Peremptory challenges thus constitute a device that attorneys use to achieve a biased jury rather than an impartial jury. In the final analysis, however, the peremptory challenge does not even appear to achieve the results hoped for by its staunchest defenders. Accordingly, there is no reason to retain this device as a means of guaranteeing a trial by a fair and impartial jury.

B. The Peremptory Challenge Has Become a Tool of Discrimination

Even supporters of peremptory challenges recognize that such challenges permit jurors to be eliminated for "imagined partiality"[28] and that attorneys exercise these challenges with no basis in fact.[29] Former U.S. Supreme Court Chief Justice Warren Burger acknowledged that an attorney's reasons for using peremptory challenges are usually irrelevant to the subject matter of the court action, but instead, are based on potential jurors' race, religion, nationality, occupation, or other affiliations.[30] Additionally, Chief Justice Rehnquist has acknowledged that peremptory challenges are usually based on "seat-of-the-pants instincts" that may be "crudely stereotypical" and in many cases are "hopelessly mis-

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24. *See* James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528, 531.

25. *See* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 492 (1978).

26. *See id.* at 513-18.

27. *See id.* at 517; *see also* Rodger L. Hochman, Comment, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1397-98 (1993).

28. *Swain*, 380 U.S. at 220.

29. *See* Batson v. Kentucky, 476 U.S. 79, 121 (1986) (Burger, C.J., dissenting).

30. *See id.* at 123 (Burger, C.J., dissenting).

taken."[31]

Some of the contradictory "advice" offered by trial attorneys, including Clarence Darrow, on exercising peremptory challenges reveals that such challenges are unsuitable as a tool of justice:

> "Avoid all women in all defense cases," (Darrow); "Women are sympathetic and extraordinarily conscientious," (Goldstein); "Females are good for all defendants except attractive female defendants," (Katz and Karcher). On emotionalism—"Ethnically high to low, Irish, Jewish, Italian, French, Spanish, and Slavic," (Goldstein); "Take smiling jurors, especially if they smile at the attorney," (Darrow); "Be wary of smiling jurors who are trying to disarm attorneys," (Harrington & Dempsey); "Presbyterians are too cold; Baptists are even less desirable . . . [K]eep Jews, Unitarians, Congregationalists, and agnostics," (Darrow); "Information on religion is not usually helpful," (Appleman).[32]

Interestingly, some jury experts and consultants have followed such "seat-of-the-pants" advice that trial attorneys have offered. For example, the social psychologists who conducted jury selection research for the Harrisburg Seven defense eventually offered this criterion: "Certain religious categories—e.g., Episcopalians, Presbyterians, Methodists, and fundamentalists—warranted exclusion from the jury and Catholics, Brethren, and Lutherans warranted inclusion."[33] Following Darrow's "take smiling jurors" advice, another jury expert has advised that a prospective juror "who leans forward toward counsel, smiles and whose legs are not crossed is suggesting that they [sic] are friendly and responsive to counsel's questions."[34] A psychologist compiling data from the Berrigan Brothers and Vietnam Veterans Against the War trial concluded, "Women in the North were more likely than men to be open-minded toward the antiwar defendants, but in the South were less

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31. *Id.* at 138 (Rehnquist, J., dissenting).

32. James Morton, *Jury Selection*, 137 NEW L.J. 561, 562 (1987); *see also* MELVIN M. BELLI, SR., 3 MODERN TRIALS §§ 51.67-51.68 (2d ed. 1982) (stating that "a male juror is more sound than a woman juror" and describing women as, among other things, "the severest judges of their own sex" and "more acutely opinionated" than men).

33. Eugene I. Pavalon, *Jury Selection Theories*, TRIAL, June 1987, at 26, 29.

34. Ralph W. Gallagher, *The Use of a Consultant in Voir Dire*, TRIAL DIPL. J., Winter 1984, at 24, 26.

open-minded than men."[35]

While a person may not be offended to hear that attorneys decide to accept or reject jurors merely because they smile (depending upon whose hunch they choose to follow), it is both offensive and violative of the constitutional guarantee of equal protection to exercise peremptory challenges solely based upon race[36] or gender.[37] It is equally offensive, though it has not yet been held to violate the Constitution, to allow attorneys to exercise peremptory challenges solely based upon ethnic origin, religion, or other associations, which, in the absence of actual or implied bias, are irrelevant to the selection of an impartial jury.

In *Batson v. Kentucky,*[38] the U.S. Supreme Court recognized that the exercise of peremptory challenges against potential jurors of the same racial group as the defendant may be constitutionally infirm.[39] *Batson* held that exercising peremptory challenges based on race was a denial of the defendant's right to equal protection,[40] and therefore, unconstitutional. In *Georgia v. McCollum,*[41] the Court held that racially based peremptory challenges by either the defense or the prosecution violate the Constitution. While *Batson* was chiefly concerned with the use of racially motivated challenges as a violation of the defendant's equal protection rights, *McCollum* focused on the right of potential jurors to racially neutral jury selection procedures.[42] More recently, in *J.E.B. v. Alabama ex rel. T.B.*,[43] the Court held that the exercise of peremptory challenges based solely upon gender violates the Equal Protection Clause.[44] Although the holding in *J.E.B.* is limited to gender-based discrimination, the Court has hinted that its holding may be extended to

35. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 83 (1986).

36. *See* Batson v. Kentucky, 476 U.S. 79, 84 (1986).

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

38. 476 U.S. at 79.

39. *See id.* at 89.

40. *See id.* at 96-98.

41. 505 U.S. 42 (1992).

42. *See id.* at 58-59.

43. 511 U.S. 127 (1994).

44. *See id.* at 129. One Justice recognized that, even if there is support for the validity of stereotypes underlying gender-based peremptory challenges, the challenges remain constitutionally infirm. *See id.* at 147-48 (O'Connor, J., concurring).

peremptory challenges based upon national origin and religion.[45]

Under *Batson*, a defendant may establish a prima facie case of discrimination by showing: (1) the defendant is a member of a cognizable racial group;[46] (2) the group's members have been excluded from the defendant's jury;[47] and (3) the circumstances surrounding the case raise an inference that the exclusion was based on race.[48] The prosecution must offer neutral, i.e., non-racially

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45. *See id.* at 143.

46. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986). Federal courts of appeals have held that whites and American Indians constitute cognizable racial groups for *Batson* purposes. *See* Roman v. Abrams, 822 F.2d 214, 227-28 (2d Cir. 1987) (whites); United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989) (American Indians); United States v. Bedonie, 913 F.2d 782, 795 (10th Cir. 1990) (American Indians). Federal courts of appeals have held, however, that young adults and African-American males do not constitute cognizable racial groups for *Batson* purposes. *See* United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987) (young adults); United States v. Jackson, 983 F.2d 757, 762 (7th Cir. 1993) (young adults); United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993) (per curiam) (young adults); United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986) (per curiam) (African-American males). Federal courts of appeals disagree whether Italians constitute a cognizable racial group for *Batson* purposes. *Compare* United States v. Angiulo, 847 F.2d 956, 984 (1st Cir. 1988) (holding that Italian-Americans are not a cognizable group for *Batson* purposes), *with* United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (dictum) (holding that Italian-Americans are a cognizable racial group for *Batson* purposes).

47. *See Batson*, 476 U.S. at 96.

48. *See id.* Federal courts of appeals have found a prima facie case of discrimination in some cases. *See* United States v. Alvarado, 923 F.2d 253, 255 (2d Cir. 1991) (prosecutor challenged four of seven minority member of venire and three of six minority members of jury); Splunge v. Clark, 960 F.2d 705, 708-09 (7th Cir. 1992) (prosecutor asked only African-Americans whether race would influence decision); United States v. Chinchilla, 874 F.2d 695, 699 (9th Cir. 1989) (prosecutor challenged all Hispanic jurors in jury pool); United States v. Joe, 8 F.3d 1488, 1499 (10th Cir. 1993) (in the prosecution of a Native American defendant, the prosecutor used a peremptory challenge to strike the only Native American juror); *see also* United States v. Joe, 928 F.2d 99, 102 (4th Cir. 1991) (holding that a finding of a prima facie case of discrimination was not automatically foreclosed even when members of the defendant's racial group were seated on the jury). Federal courts of appeals have found no prima facie case of discrimination in other cases. *See* Pemberthy v. Beyer, 19 F.3d 857, 872 (3d Cir. 1994) (prosecutor used peremptory challenges to exclude both Latin and non-Latin Spanish-speaking prospective jurors); United States v. Lane, 866 F.2d 103, 106-07 (4th Cir. 1989) (prosecutor used peremptory challenges to exclude one prospective African-American juror and one prospective African-American alternate, but prosecutor accepted two African-American jurors while still having peremptory challenges to strike them); United States v. Branch, 989 F.2d 752, 754-55 (5th Cir. 1993) (prosecutor used a peremptory challenge to exclude one of two African-American prospective jurors and left the other on the jury panel); United States v. Hatchett, 918 F.2d 631, 637 (6th Cir. 1990) (jury was 25% African-American and venire was 20% African-American); United States v. Cooper, 19 F.3d 1154, 1159-60 (7th Cir.

motivated, explanations for its peremptory challenges only after a criminal defendant establishes a prima facie case of purposeful racial discrimination in the prosecution's exercise of peremptory challenges.[49]

Although the Court has recognized that peremptory challenges may be used to unlawfully discriminate during the jury selection process, *Batson* and its progeny offer little to stem the unlawful discrimination. A recent empirical study reveals that it is relatively easy to establish a prima facie case of unlawful discrimination in the jury selection process, but that it is much more difficult to prevail on the challenge.[50] For example, while criminal defendants are successful in establishing a prima facie *Batson* violation 60.61% of the time, they ultimately succeed only 15.87% of the time.[51] Thus, it appears that *Batson* respondents usually succeed in providing a satisfactory neutral explanation for their peremptory challenges, even if the real motivation for exercising their challenges is racially based.

1994) (prosecutor's challenges of two African-American venire members when four African-Americans remained on jury after both parties exhausted peremptories and government accepted several other African-American venire members stricken by defense); United States v. Gordon, 974 F.2d 97, 100 (8th Cir. 1992) (prosecutor used only two of six peremptory challenges to strike African-American jurors and three African-Americans remained on the jury after both parties exercised their challenges); United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994) (prosecutor used a peremptory challenge to strike the only African-American potential juror when prosecutor's questions and statements during jury selection failed to support inference of purposeful discrimination, prosecutor's other peremptory challenges did not suggest general pattern of discrimination against racial minorities, and challenged juror was not treated differently than other prospective jurors similar in relevant aspects except race); United States v. Hartsfield, 976 F.2d 1349, 1355-56 (10th Cir. 1992) (jury ultimately selected contained five jurors having Hispanic last names and two alternates having Hispanic first or last names); Tukes v. Dugger, 911 F.2d 508, 518 (11th Cir. 1990) (prosecutor exercised only one peremptory challenge against an African-American juror, attempted to bring more African-Americans onto jury by taking African-American venire members out of order, and agreed not to use peremptory strike against additional African-American venire members).

49. *See Batson*, 476 U.S. at 97.

50. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 460 (1996) (examining published decisions of federal and state courts involving *Batson* challenges from April 30, 1986, the date that *Batson* was decided, through the end of 1993).

51. *See id.* Although prosecutors had a much higher success rate than defense attorneys in establishing a *Batson* prima facie case (100%) and ultimately prevailing on a *Batson* challenge (84.62%), prosecutors made only 14 *Batson* challenges, while defense attorneys made 460 challenges. *See id.*

In summary, courts have recognized that parties use peremptory challenges as a tool for unlawful discrimination. Indeed, one federal district court judge recently barred the use of peremptory challenges in her courtroom as "an obvious corruption of the judicial process."[52] Unfortunately, their use continues, and current attempts to correct this problem are far from ideal. Despite the time and scarce resources expended after jury selection to determine whether unlawful discrimination has infected the jury selection process, courts often do not find impermissible discrimination. When a court does find a *Batson* violation, voir dire must begin anew, consuming more time and resources. As one jurist has noted, because a prima facie *Batson* violation may be defeated fairly easily by a neutral, i.e., non-racially motivated, explanation for challenging the juror, "*Batson* and its progeny have proven to be less an obstacle to discrimination than a roadmap to it."[53] Rather than attempting—at the expense of time and scarce resources—to ferret out unlawful discrimination in the use of peremptory challenges, it would be more efficient and consistent to eliminate them. Elimination of peremptory challenges would be the best way to ensure that racial, gender, or other offensive forms of discrimination do not infect the U.S. jury selection process.

C. Peremptory Challenges Waste Too Much Time

The constitutional guarantee of a trial by an impartial jury requires an individual examination of potential jurors in order to identify and purge jurors warranting a challenge for cause. Voir dire is essential to this process. When aimed at discovering grounds on which to challenge jurors for cause, voir dire is usually relatively brief and primarily case-specific. When attempting to formulate "hunches" upon which peremptory challenges will be based, however, attorneys often require potential jurors to endure lengthy and wide-ranging voir dire examination.

An extreme example of lengthy voir dire driven by the availability of peremptory challenges took place in *People v. Simpson*.[54] The jury selection process in *Simpson* lasted several months.[55] The

52. Minetos v. City University of New York, 925 F. Supp. 177, 183 (S.D.N.Y. 1996).
53. People v. Bolling, 591 N.E.2d 1136, 1145 (N.Y. 1992) (Bellacosa, J., concurring).
54. No. BA097211, 1994 WL 521797 (Super. Ct., L.A. County Sept. 26, 1994).
55. Jury selection began in September 1994 and concluded in December 1994.

jurors initially had to complete a seventy-nine page questionnaire containing 294 written questions.[56] The questions included inquiry into the juror's favorite subject in school (question 39);[57] the name of a person whom the juror greatly admired and the reason why (question 145);[58] religious affiliation and frequency of worship (question 201);[59] book preferences (question 244);[60] leisure time interests, hobbies, and activities (question 252);[61] and whether the juror voted in the 1994 primary election (question number 204).[62]

Of course, answers to these and other questions give attorneys more information about the individual juror. Use of this information in deciding against whom to exercise peremptory challenges, however, depends upon each attorney's biases and prejudices. Thus, it is not uncommon for attorneys to use the same information to support differing, even opposite, conclusions. For example, the lead prosecutor in the *Simpson* case, which involved issues of domestic violence, apparently concluded that black females who had experienced domestic violence would be favorable to the prosecution.[63] She assumed that they would be fed up with domestic violence and would therefore identify with the victim.[64] A jury consultant in the same case arrived at the opposite conclusion and decided that black females who had been exposed to domestic violence would feel that it was "not a big deal" and would be more forgiving toward the defendant.[65]

In light of the research showing that attorneys are not particularly effective in exercising peremptory challenges, it is not surprising that different people arrive at opposite predictions of juror behavior based upon the same information. It is very difficult to justify, however, retaining a system that expends a considerable

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56. *See* ROBERT J. WALTON & F. LAGARD SMITH, TRIAL OF THE CENTURY: YOU BE THE JUROR 15 (1994).

57. *See id.* at 18.

58. *See id.* at 23.

59. *See id.* at 27-28.

60. *See id.* at 30.

61. *See id.* at 31.

62. *See id.* at 28.

63. *See* VINCENT BUGLIOSI, OUTRAGE: THE FIVE REASONS WHY O.J. GOT AWAY WITH MURDER 94 (1996).

64. *See id.*

65. *See id.*

amount of time prying into the private lives and innermost feelings of jurors merely so that attorneys can use–or misuse–the information in exercising peremptory challenges. If peremptory challenges were eliminated, voir dire could be streamlined to focus only on the discovery of jurors' actual bias or prejudice toward the parties.

D. Peremptory Challenges Contribute to the Increasing Cost of Litigation

Both the significant expenditure of time in gathering information upon which attorneys will base their peremptory challenges and the preparation for the exercise of such challenges increase litigation costs. One obvious cost, which both litigants represented by retained counsel and taxpayers bear, is the attorney's hourly fee.

In recent years, trial attorneys have routinely employed "jury experts." One service that jury experts offer is advice on jury selection. The prosecution's jury expert in *Simpson* conducted several fifteen-person "focus group" sessions to "put some meat and flesh on statistics" to be used in jury selection.[66] The jury expert in *Simpson* donated services to the prosecution; usually, however, the litigants bear this substantial cost. In addition, litigants must pay the daily $50 fee of each "focus group" member[67] and the additional fees of experts who compile and interpret the results. It is not uncommon, therefore, for jury expert fees to reach thousand of dollars simply for jury selection.

There is no empirical evidence that reveals whether attorneys who use jury experts are more successful than unaided attorneys in exercising peremptory challenges. Notably, however, the lead defense trial counsel in *Simpson* credited his jury expert for the successful verdict in that case.[68] It is perverse that the U.S. system of justice, which elevates a trial by an impartial jury to a constitutional right, now encourages attorneys to employ costly jury experts in an attempt to "stack the deck" with jurors who are favorably disposed toward their clients.[69] The elimination of

66. *See id.*

67. *See id.* at 96.

68. *See id.* at 95.

69. We recognize that jury consultants offer many valuable services to trial attorneys,

peremptory challenges would further the interests of justice by refocusing jury selection on challenges for cause and reducing the cost of jury selection.

E. The Existence of Peremptory Challenges Permits Judges to Abdicate Their Responsibility in Striking Jurors for Cause

Judges are generally very reluctant to grant challenges for cause.[70] Trial judges know that they do not need to make the tough judgment call on whether a juror is actually biased because an attorney unhappy with the ruling on a challenge for cause can subsequently exercise a peremptory challenge to strike the juror. Thus, attorneys do not strenuously argue their challenges for cause, and judges do not carefully scrutinize the challenges to determine whether cause actually exists. Indeed, the U.S. Supreme Court has held that an erroneous denial of a challenge for cause is effectively unreviewable,[71] giving trial judges additional comfort in the knowledge that their decisions, even if erroneous, cannot be reversed.

Eliminating peremptory challenges would still leave attorneys the challenge for cause as a tool for impaneling an impartial jury. Clearly, eliminating peremptory challenges would have the added benefit of forcing judges to actually determine the existence of bias for which jurors should be stricken, while minimizing the striking of jurors merely based on racial, ethnic, religious, gender, and other stereotypes.

III. THE ENGLISH SYSTEM OF JURY SELECTION

> [A] system of peremptory challenge is being used to introduce a bias, but a bias towards acquittal. That may be fair to defendants who may be guilty but want to be acquitted, but it is not fair to the general public who want to be protected against vicious and violent crime.[72]

Although this quotation mirrors some of the current concerns sur-

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including advice on how to present evidence most effectively.

70. *See* HAYDOCK & SONSTENG, *supra* note 2, at 274.

71. *See* Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

72. HANSARDS, H.C. DEB. col. 986 (Mar. 31, 1987). Luke Hansard and his family printed the Official Report of Parliamentary Debates for the British Houses of Parliament from 1774-1892—the equivalent of the *Congressional Record* in the United States—and the official report of proceedings and debates is now known by this name.

rounding the debate on jury reform in the United States, it comes from a debate that took place in England almost ten years ago, which led to the abolition of peremptory challenges.[73] The history of peremptory challenges reflects a balancing act between the prosecution and the accused that parallels the development of the jury system in England.

Currently in England, the defendant does not have a right to peremptory challenges, and challenges for cause are rare because barristers may obtain only limited information on potential jurors.[74] The prosecution has a limited right to "stand by" for the Crown[75] and may challenge for cause on the same basis as the defense. Therefore, voir dire does not exist in England's legal system.

This Part of the Article reviews the historical development of peremptory challenges and challenges for cause in England. It then details the fierce debate that surrounded the government's decision to abolish the use of peremptory challenges. Finally, this Part discusses the consequences and conclusions that one may draw from the current English system of jury selection.

A. Historical Development

At the beginning of the twelfth century, a "presenting" or grand jury would indict an accused individual.[76] The presenting jury would decide which mode of proof the accused could use to defend himself.[77] At the time, the defendant's choices were compurgation,[78] ordeal,[79] jury,[80] or battle.[81]

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73. *See* Criminal Justice Act, 1988, ch. 33 (Eng.).

74. Only the jurors' names and addresses are available. *See* MICHAEL ZANDER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 222 (1993).

75. *See infra* text accompanying notes 91, 154-154.

76. The Fifth Amendment to the U.S. Constitution currently requires grand jury indictments for major crimes. *See* U.S. CONST. amend. V. Although this requirement has never been applicable to the individual states, most states have grand juries. Interestingly, the grand jury no longer exists in England. *See* Alexander v. Louisiana, 405 U.S. 625 (1972).

77. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 321 (7th ed. 3d prtg. 1982).

78. The accused would follow a set form of words to take an oath denying the charges. *See id.* at 305. If the accused could not get compurgators to back his denial under oath, the oath would "burst" and he would lose. *See id.*

79. Trial by ordeal was based on the belief that God would intervene to show who

After compurgation was discredited as a means of proving innocence[82] and trial by ordeal was abolished,[83] the petty jury evolved as the method for determining guilt or innocence. In most cases, members of the presenting jury that returned the indictment, or indictors, also had to sit on the petty jury and determine the accused's guilt or innocence. As a result, a guilty verdict was virtually guaranteed, although there were occasional exceptions.[84] Additionally, judges were free to determine what portion of the petty jury would be composed of members of the presenting jury.[85]

Gradually, conflict evolved between the accused and the Crown regarding jury composition. People soon recognized that it was unfair to have a member of the presenting jury or a personal enemy of the accused on the petty jury. In 1302, an accused knight could successfully dismiss from his jury both members who had comprised the original presenting jury and members who were not knights on the ground that they were not his peers.[86] He could also object to individual knights once they were called.[87]

The Crown, which desired convictions and thus favored including members of the presenting jury on the petty jury, contested this early form of challenges to juror members. In 1340, Justice Parning warned that "if indictors be not there it is not well for the king."[88]

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had right on his or her side. *See id.* at 310. Examples of trial by ordeal include carrying a red hot iron, surviving a fire, or placing a hand or arm in boiling water. *See id.*

80. Trial by jury was available only upon payment and only when a private person accused the defendant of the crime. *See* LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 51 (2d ed. 1988).

81. The option of battle was available only when a private person accused the defendant of a crime, because the defendant clearly could not do battle with the Crown; however, there were exceptions. *See id.* In 1226, an old woman accused of a serious crime was excused from battle due to her physical condition, and instead, was granted a jury trial. *See id.*

82. *See* 1 HOLDSWORTH, *supra* note 77, at 323.

83. The Lateran Council abolished trial by ordeal in 1215. *See* MOORE, *supra* note 80, at 50.

84. *See id.* The view was that if members of the petty jury who were on the presenting jury found the accused not guilty, they had contradicted themselves and should be punished by fine or imprisonment. *See id.*

85. *See id.*

86. *See id.*

87. *See* 1 HOLDSWORTH, *supra* note 77, at 324.

88. *Id.* at 325.

Despite Parning's exhortation, resentment against the inclusion of indictors on the jury grew such that, by 1351-1352, no indictor could sit on the jury if the accused "challenged [him] for this cause."[89] The petty jury thereby extracted itself completely from the grand or presenting jury, a form that is recognized today in the U.S. grand and petit jury systems.

Nevertheless, agents of the Crown continued to choose the panel from which the jury was selected. Where death was a possible penalty, the Crown permitted the accused to challenge thirty-five jurors for any reason; however, the Crown itself had an unlimited number of challenges. This favoritism to the Crown ended in 1305,[90] and henceforth, the Crown could only challenge for cause. This advantage for the accused was fleeting and was soon neutralized, however, because the prosecution developed the technique of "standing by" for the Crown that is still used today. While a jury is being impaneled, the prosecutor may ask a juror or jurors to "stand by" and wait until the rest of the panel has been called. "Standing by" differs from peremptory challenges by the defense in that, if all of the potential jurors are eliminated, the Crown must draw from the "stand by" jurors to complete the jury selection or show cause to dismiss them.[91]

The number of permissible peremptory challenges by the defense was reduced to twenty by 1509 and then to seven in 1948.[92] The Criminal Law Act 1977[93] further reduced the number of permissible peremptory challenges to three.[94] As this ancient right diminished over the years, it was balanced with new rights to provide the defendant with the opportunity for a fair and just trial.[95]

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89. *Id.*

90. *See id.*

91. In 1870, the courts determined that the panel of jurors could include every juror in the building, including jurors on other cases, so it would be a rare case indeed that would require the prosecution to show cause. *See* THE JURY UNDER ATTACK 147 (Mark Findlay & Peter Duff eds., 1988); *see also infra* text accompanying notes 153-154.

92. *See* THE JURY UNDER ATTACK, *supra* note 91, at 146.

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

94. *See id.* § 43.

95. Early rules weighing against the accused that were abolished included: (1) Jurors could not eat, drink, or separate from each other until they had given their verdict, *see* 1 HOLDSWORTH, *supra* note 77, at 318-19, (2) Until *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), the jury could be punished for reaching a verdict contrary to the direction of the court or the evidence, *see* Gobert, *supra* note 24, at 531; (3) The accused could not call

B. The Debate to Abolish Peremptory Challenges

The debate to abolish peremptory challenges arose as a result of a lead article in the London newspaper, *The Times*, that condemned their use.[96] Toby Jessel, a member of the British Parliament, seized upon the article and used it during the traditional debate that followed the Queen's Speech.[97] Jessel noted:

> [T]here is one serious gap in this important part [on law and order] of the Gracious Speech—there is no mention of the growing and systematic abuse of the right to challenge jury-men and women. Trial by jury in criminal courts is now being disrupted so that there are far too many acquittals. This is undermining the work of the police in the promotion of law and order. The Government and Parliament must grasp this nettle, and grasp it soon.[98]

Reading from *The Times*, he continued:

> A pin-striped suit, an old school or regimental tie, a prominently displayed copy of the Daily Telegraph seem to provide a virtual guarantee that the bearer will be excluded from the jury . . .
>
> Today peremptory challenge seems to be used by defence counsel in an endeavour to achieve as far as possible a jury composed of people believed by the defence to be likely to be hostile to the prosecution and sympathetic to the defendant.
>
> . . . .
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> [T]he right to peremptory challenge . . . ought now to be abolished.[99]

The next day, Jessel pressed the new Home Secretary, Douglas Hurd, M.P., to comment on the belief that abuse of peremptory challenges was handicapping police efforts to prevent and deter crime.[100] Hurd was also under considerable pressure from Opposi-

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witnesses, but the Crown could, and the accused could not have an attorney, *see* MOORE, *supra* note 80, at 55.

96. Editorial, *No Challenge,* TIMES (London), June 13, 1985, at 11.

97. The Prime Minister actually writes this annual address, which the Queen reads during the opening of Parliament. It sets forth the government's agenda for the year, similar to the U.S. President's State of the Union Address.

98. HANSARDS, H.C. DEB. col. 91 (Nov. 6, 1985) (statement of Toby Jessel).

99. *Id.* (statement of Toby Jessel).

100. *See* HANSARDS, H.C. DEB. col. 130 (Nov. 7, 1985) (statement of Toby Jessel).

tion Party members who were using mounting crime statistics to criticize the government's record on law and order.[101] Hurd responded that the Attorney-General was arranging for the new Crown Prosecution Service to conduct a survey "so that we have a basis of fact upon which we can consider whether action is needed."[102]

Two months after the debate on peremptory challenges, the Fraud Trials Committee, chaired by Lord Roskill, published its report,[103] which included a chapter on jury composition. The Committee concluded that peremptory challenges were weakening the principle of random selection, which was already eroding due to exclusions and releases.[104] In the Committee's view, "the public, press, and many legal practitioners now believe that this ancient right is abused cynically and systematically to manipulate cases toward a desired result."[105]

The Committee proceeded to recommend, with one dissenting opinion,[106] that the right of peremptory challenge and the prosecution's right to "stand by" for the Crown should be abolished in any fraud case.[107] Although the Committee retained the challenge for cause according to existing principles, it suggested that the validity of the challenge might be determined in the judge's chambers to avoid possible embarrassment to the juror in question.[108] To assist attorneys seeking to make valid challenges for cause, the Committee recommended the disclosure of jurors' occupations.[109]

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101. *See id.* (statement of Douglas Hurd).

102. *Id.* (statement of Douglas Hurd).

103. FRAUD TRIALS COMMITTEE REPORT, 1986, Cmnd. 1522.

104. *See id.* ¶ 7.37.

105. *Id.*

106. Walter Merricks, a defense solicitor, argued to wait for the Crown Prosecution Service study that the government had commissioned. *See supra* text accompanying note 102. He opposed abolishing the right of peremptory challenge. "While difficult to defend on strict logic, it was but one feature of a complex and not wholly logical system in which the checks and balances had evolved over a long period, and should be disturbed only after a wide-ranging examination of the consequences." FRAUD TRIALS COMMITTEE REPORT, *supra* note 103, ¶ B4.

107. *See* FRAUD TRIALS COMMITTEE REPORT, *supra* note 103, ¶ 7.38.

108. *See id.*

109. *See id.* In England, it is practice to give only the names and addresses of jurors. *See supra* note 74.

Two months after the Fraud Trials Committee Report, the government published its White Paper[110] on Criminal Justice.[111] The Paper stated that the traditional rationale for the peremptory challenge was to "enable the defendant to have confidence in the jury even where he could not assign specific reasons for his objection."[112] It also noted the potential advantages of the peremptory challenge: "Sometimes it may be merely a substitute for a challenge for cause, saving time and perhaps avoiding embarrassment, in cases where cause could quite readily be shown."[113] Further, the Paper acknowledged that the peremptory challenge could be an effective tool in "adjust[ing] the composition of a jury in terms of age, sex or race, in a way thought to secure the defendant a better chance of a fair hearing" and to remove a juror with a suspected bias against the defendant.[114]

Giving rise to concern, however, was the peremptory challenge's primary use "as a means of getting rid of jurors whose mere appearance [was] thought to indicate a degree of insight or respect for the law [that was] inimical to the interests of the defence" and its use in multi-defendant cases in which it appeared that defendants were pooling their challenges to replace entire juries.[115] The Paper condemned this action as contrary to the interests of justice and offensive to the individual juror and recommended that any forthcoming bills should abolish peremptory challenges.[116]

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110. A Command Paper, which Her Majesty's Command theoretically presents, is a government publication for the Parliament's consideration. Each Command Paper is distinguished by the color in which it is bound: a white paper contains statements of government policy to be introduced, a green paper represents government plans intended for discussion, and a blue book contains reports of committees or commissions. *See* Marilyn J. Berger, *A Comparative Study of British Barristers and American Legal Practice and Education*, 5 NW. J. INT'L L. & BUS. 540, 542 n.13 (1983).

111. *See generally* CRIMINAL JUSTICE: PLANS FOR LEGISLATION, 1986, Cmnd. 9658.

112. *Id.* at 14.

113. *Id.* at 15.

114. *Id.*

115. *Id.*

116. Other possibilities included reducing the number of peremptory challenges from three to two or one, which would reduce a defendant's chances of blocking a majority verdict, and limiting peremptory challenges in multi-defendant cases. *See* Criminal Justice Act, 1967, ch. 80, § 17 (Eng.). Where defendants did not pool their challenges, however, there was concern that the reduction of peremptory challenges would curtail an individual defendant's rights. *See id.*

To the government's acute embarrassment, the much-awaited Crown Prosecution Service survey[117] did not provide the anticipated results. During the debate on the Criminal Justice Bill, Chris Smith, a Labour Party member of Parliament, was able to use the survey results to great effect against the government: "The evidence does not substantiate the case that peremptory challenge gives a substantial tilt in favour of the defendant."[118] The results revealed that in both single-defendant and multi-defendant trials, the use of challenges could not be linked to a lower likelihood of conviction.[119] In fact, higher conviction rates resulted when peremptory challenges were used (60%) than when they were not used (53%).[120] Smith concluded, "The evidence of the survey is absolutely crystal clear. There is no tilt in favour of the defendant where peremptory challenge is exercised."[121]

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117. *See supra* text accompanying note 102.

118. HANSARDS, H.C. DEB. col. 973 (Mar. 31, 1987) (statement of Chris Smith).

119. *See id.* (statement of Chris Smith).

120. *See id.* (statement of Chris Smith).

121. *Id.* (statement of Chris Smith). The survey results also showed that there was a considerable difference in the use of peremptory challenges in trials in London as opposed to other parts of the country: the rate was three times higher in inner London than in metropolitan counties. *See* Julie Vennard & David Riley, *The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Final Outcome*, 1988 CRIM. L. REV. 731, 735. The peremptory challenge was used almost twice as often in multi-defendant cases than in single-defendant cases, but there was no evidence of the widespread pooling of challenges in multi-defendant cases that had come under so much criticism. *See id.* The higher rates of challenges in London both for single and multi-defendant cases might have reinforced the perception of widespread abuse.

PERCENTAGE OF TRIALS INVOLVING ONE OR MORE PEREMPTORY CHALLENGES		
Crown Prosecution Service Region	Single-defendant trials	Multi-defendant trials
Inner London	32%	47%
Metropolitan Counties	.10%	16%

See id. tbl. 1.

NUMBER OF PEREMPTORY CHALLENGES USED PER DEFENDANT				
Number of Defendants	Peremptory Challenges Per Defendant			
	0	>0 to 1	>1 to <3	3 (maximum)
1	80%	8%	6%	6%
2	71%	18%	10%	1%
3	62%	23%	14%	1%
4 or more	46%	46%	8%	0%

In response to Smith's statistics, Hurd observed that the statistics did not actually reveal anything about the effects of the peremptory challenge because the survey did not include information about the nature of the cases where the peremptory challenge was used.[122] For example, if peremptory challenges were used because the defendant's case was fairly hopeless, this use would corrupt the statistics.[123] Hurd's tongue-in-cheek confession that he had "come to understand the deep affection in which peremptory challenge was held" was followed with the emphatic observation that he did "not mean that it [was] held in affection by the public [but by] the practitioners in the courts [and in the Commons who were] advanc[ing] the case again [that] evening."[124]

One such individual, Nicholas Budgen, M.P., a Conservative Party member and criminal barrister, recalled standing in the robing room[125] at a quarter to ten in the morning and saying to fellow barristers, "Right-ho chaps, let's get on with rigging the jury. We shall object to anybody who gets into the jury box wearing a suit or who is seen near the *Financial Times* or *The Daily Telegraph*."[126] This comment did nothing to assuage fears that defense counsel

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See id. at 736 tbl. 3.

Briefly, where there was one defendant, peremptory challenges were used 20% of the time. *See id.* Where there were four or more defendants, peremptory challenges were used 54% of the time. *See id.*

122. *See* HANSARDS, H.C. DEB. col. 996 (Mar. 31, 1987) (statement of Douglas Hurd).

123. I have never based the case on statistics or on anecdote. I have based the case on what I believe to be principles of logic and common sense.

> . . . .
>
> We used to have 35 peremptory challenges. Then it was reduced to seven. No doubt, the profession was keen that nothing should be done and thought that there was magic in the word "seven," yet it was reduced to three. Obviously, through the years Parliament has believed that, as the system as a whole becomes fairer to the defendant, this tilt in favour of the defendant is no longer necessary. We propose a strengthening of the jury system. This is a strengthening of the random principle which lies at the heart of the jury system. It is the slow, organic conclusion of a process which has been going on for a long time.

Id. cols. 996-999 (statement of Douglas Hurd).

124. *Id.* cols. 994-995 (statement of Douglas Hurd). Membership in the House of Commons is not necessarily a full-time job. Many members are also practising barristers.

125. Barristers' court attire consists of a wing collar, bands, a wig, and a gown, and thus, a robing room is an essential feature of any court where robes are required.

126. HANSARDS, H.C. DEB. col. 983 (Mar. 31, 1987) (statement of Nicholas Budgen). Lord Mansfield recounted his own practice as a defence barrister of challenging to get onto the jury "'a layabout lot of unemployed males.'" Sean Enright, *Reviving the Challenge for Cause*, 139 NEW L.J. 9 (1989).

were wrongly interfering with the random nature of juries and manipulating the system to secure acquittal. Budgen proceeded to conclude, "[This system] does not work. While at the age of [twenty-eight] I used to think it was all a tremendously clever and logical wheeze, now as an unsuccessful middle-aged man I bow before the mystery of the jury system."[127]

The failure of the Crown Prosecution Service survey to identify any link between the use of peremptory challenges and acquittal rates appeared to back the "mystery of the jury system" conclusion. Supporters of the peremptory challenge still felt, however, that if the outcome was indeed "hit-or-miss," the peremptory challenge should be maintained so that the defendant would at least perceive the process as fair.

Regardless of whether the peremptory challenge actually resulted in acquittal, a second argument against it was that it derogated from the principle that jury selection should be random. During the parliamentary debate, Jessel quoted from Gilbert and Sullivan's *Trial by Jury*[128] to colorfully express his belief that twelve individuals could be randomly selected and rise to the challenge of unbiased verdicts.[129] In Jessel's view, a barrister . . . has no need to rely solely on his power of oration, his forensic skill or his legal knowledge. He has a fourth weapon—[the ability] to tamper with the composition of the jury."[130] Jessel concluded, "Trial by jury in

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127. HANSARDS, H.C. DEB. col. 983 (Mar. 31, 1987) (statement of Nicholas Budgen).

128. GILBERT & SULLIVAN, TRIAL BY JURY, *reprinted in* A TREASURY OF GIILBERT & SULLIVAN (1941).

129. [T]he usher enjoining the jury to be free from bias . . . . sings:

"With stern judicial frame of mind
From bias free of every kind,
This trial must be tried."

The verse begins:

"Now, Jurymen, hear my advice—
All kinds of vulgar prejudice
I pray you set aside . . . ."

A little later the judge speaks of his early career at the Bar and sings:

"All thieves who could my fees afford
Relied on my orations
And many a burglar I've restored
To his friends and his relations."

HANSARDS, H.C. DEB. col. 984 (Mar. 31, 1987) (statement of Toby Jessel).

130. *Id.* cols. 984-985 (statement of Toby Jessel).

Crown courts has become distorted."[131]

The subsequent debate centered around the infamous Cyprus Spy Trial.[132] Alex Carlile, M.P., rose to his feet and demanded, "[W]hat is the Hon. Gentleman's evidence that trials have become distorted as a result of the use of peremptory challenge? I defy him to produce any evidence."[133] With a flourish, Jessel rose to produce such evidence. He had obtained a copy of an account of a meeting that had taken place among counsel before the Cyprus Spy Trial and read it.[134] It revealed exactly what opponents of peremptory challenges had argued: defense counsel were pooling their peremptory challenges in order to manipulate the composition of the jury in hopes of securing an acquittal.[135]

The Speaker of the House intervened to quell the ensuing uproar that followed the reading of the revealing document: "Order. The Hon. Gentlemen, who are distinguished barristers, would not get away with this sort of behaviour in court."[136] When Jessel regained the floor, he continued by stating:

> Juries are supposed to be selected at random. The right of challenge existed to try to have an unbiased jury so that, if a juryman was thought to be biased, the defendant could remove that juryman. Now, a system of peremptory challenge is being used to introduce a bias, but a bias towards acquittal. That may be fair to defendants who may be guilty but want to be acquit-

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131. *Id.* col. 985 (statement of Toby Jessel).

132. Defense barristers challenged seven jurors, and it was believed that the barristers had acted together in pooling their peremptory challenges. *See* Enright, *supra* note 126, at 90. An outcry ensued when the jury, all young and male, acquitted all seven defendants. *See id.*

133. HANSARDS, H.C. DEB. col. 985 (Mar. 31, 1987) (statement of Alex Carlile).

134. Robin Simpson's point was that we wanted a young, working-class jury. Michael Hill made the comment that he really wanted an anti-establishment jury and that we were better off to have a young middle-age middle-class jury. Robert Harman pointed out that there was a dichotomy of views that we will just take what we get. John Alliot's view was that we couldn't improve on fate. Gilbert Gray indicated that if the jury is not too well educated and is of too low an intelligence, they may take more note of the Judge and therefore we ought to go for people who were young, not unsmart but no women. Victor Durand chimed in by saying that if the jury were young they may be unpatriotic. John Alliott indicated that we ought to pool resources as far as any challenges were concerned that Michael Hill pointed out that we ought to challenge one, two, three, by one counsel and so on with another Counsel [sic] until we achieved a joint policy.

Id. (statement of Toby Jessel).

135. *See id.* (statement of Toby Jessel).

136. *Id.* col. 986 (statement of the Speaker of the House).

ted, but it is not fair to the general public who want to be protected against vicious and violent crime.[137]

Parliament approved the Criminal Justice Bill of 1988,[138] which contained the provision abolishing peremptory challenges,[139] and it became law on January 5, 1989.

C. Challenges for Cause

The debate on the Criminal Justice Bill raised concerns about the effect on jury selection of the abolition of peremptory challenges. Carlile predicted, "If we remove the right of peremptory challenge so that all jury challenges by the defence have to be challenges for cause, we shall open up a hornet's nest of practical problems that will beset the courts for years to come."[140] He also feared that, if Parliament eliminated the peremptory challenge, "[the] very American system which [we] dread so much will develop."[141] Ivan Lawrence cautioned against abolishing peremptory challenges if the result would be lengthy challenges for cause or "tailoring a jury [as] in the United States."[142] Jury selection in England usually startles visiting U.S. attorneys because it takes only a matter of minutes. Challenges for cause may be made either "to the array or the polls for some definite reason assigned and proved."[143] A challenge to the array, though rare, occurs when

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137. *Id.* (statement of Toby Jessel).

138. *See* Criminal Justice Act, 1988, ch. 33 (Eng.).

139. *See id.* § 118.

140. HANSARDS, H.C. DEB. col. 979 (Mar. 31, 1987) (statement of Alex Carlile).

141. *Id.* col. 980 (statement of Alex Carlile).

142. *Id.* col. 993(statement of Ivan Lawrence).

> Tailoring a jury is what they do in the United States. Tailoring a jury is when a juryman is asked to stand up and say where he lives, how old he is, where he worships, what he thinks about blacks and young people. That is what goes on in American courts, and as a result it takes a day or two to choose a jury. It takes five minutes in an English court. More time can be spent tailoring a jury when jurors can be challenged for cause than trying a case.
>
> If our trials, instead of lasting one, two or three days, start lasting one, two or three weeks because we have challenges for cause instead of the three peremptory challenges, where have we gained? Where will our system of justice be if cases come on more slowly because the queue is even longer?

Id. Ironically, peremptory challenges, rather than challenges for cause, "tailor" juries in the United States.

143. ARCHBOLD: PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES § 4-152 (Stephen Mitchell & P.J. Richardson eds., 43d ed. 1988); *see also* Juries Act, 1974, ch. 23, § 12 (Eng.).

a barrister takes exception to the entire jury impaneled "on the ground that the person responsible for summoning the jurors in question is biased or had acted improperly."[144] In contrast, a challenge to the polls is a challenge to individual jurymen.[145] A challenge to the polls may be made on statutory grounds, such as ineligibility or disqualification, or on common law grounds.

There are four common law grounds that are still known by their Latin titles: (1) *propter honoris respectum,* a challenge on the ground that "a peer or lord of parliament is sworn on a jury for the trial of a commoner"; (2) *propter defectum,* a challenge on the ground that an individual lacks the requisite qualification; (3) *propter delictum,* a challenge "on the ground of infamy" or past criminal conviction; and (4) *propter affectum,* a challenge "on the ground of some presumed or actual partiality."[146]

The first three common law grounds are also statutory grounds for a challenge. The fourth, *propter affectum,* deals with the complex issue of bias. Richard Buxton defines bias in this context as "whether the individual juror will be able to, and will, be loyal to his oath to give a true verdict *according to the evidence.*"[147] Buxton classifies bias into three headings: (1) connection with the case or the parties, (2) knowledge of the accused's character, and (3) general hostility.[148] If there is either a connection or knowledge, bias is essentially assumed; however, if there is hostility, bias is not assumed, but must be established.[149]

Before defense counsel may cross-examine a juror about possible bias, he must lay a foundation of fact showing a prima facie case in support of his challenge.[150] The only information known about the juror, however, is his or her name and address.[151] Because it is extremely difficult to make a successful challenge for cause on the basis of such meager information, such challenges are

144. Juries Act, 1974, ch. 23, § 12(6) (Eng.); *see also* ARCHBOLD, *supra* note 143, § 4-151.

145. *See* ARCHBOLD, *supra* note 143, § 4-151.

146. *See id.* §§ 4-160 to 4-161.

147. Richard Buxton, *Challenging and Discharging Jurors,* 1990 CRIM. L. REV. 225, 229-30.

148. *See id.* at 230-32.

149. *See id.*

150. *See* R. v. Chandler, 48 Crim. App. 143 (1964) (Eng.).

151. *See supra* note 74.

rarely used in English courts. Examples abound of judges who have never seen a challenge for cause and counsel who have only rarely witnessed it.[152]

The prosecution still has the right to "stand by" for the Crown even though the Fraud Trials Committee recommended that it be abolished along with the right of peremptory challenge.[153] The "stand by," though technically a challenge for cause, is really both a challenge for cause and a peremptory challenge.[154] If the prosecution asks a potential juror to "stand by," the juror is effectively off the jury. It is only when there are no more jurors from which to select that the prosecution must evaluate the jurors standing by and either show cause or accept them onto the jury.

In its 1988 guidelines, the Attorney General addressed the imbalance created by preserving the prosecution's right to "stand by" while abolishing the defense's right to peremptory challenge. The guidelines indicated that the right to "stand by" should be used "only sparingly and in exceptional circumstances. It is generally accepted that the prosecution should not use its right in order to influence the overall composition of a jury or with a view to tactical advantage."[155] The guidelines also provided that "the Crown should assert its right to stand by only on the basis of clearly defined and restrictive criteria,"[156] but that it would be proper for the Crown to exercise its right in connection with jury vetting[157] or where a juror is "manifestly unsuitable and the de-

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152. One experienced barrister could recall only two cases:

> The first was in the film, *Brothers in Law*, when Ian Carmichael successfully challenges a juror on the grounds that she is his mother. The second was a case at the Old Bailey [the Central London Criminal Court] when a barrister said to his co-defender that he must challenge a juror on the grounds that he had been to bed with her. The second barrister looked up and said "I'll do it for you: so have I." And if that sounds apocryphal, it took place in Court 6 at the Old Bailey and for a suitable donation I will disclose the names of the barristers.

Morton, *supra* note 32, at 561.

153. *See supra* text accompanying notes 106-107.

154. Beginning in 1305, the prosecution could no longer use the peremptory challenge, but the prosecution used the challenge for cause almost to the same effect. *See* 1 HOLDSWORTH, *supra* note 77, at 325.

155. *Juries: Guidelines on Prosecution's Right of Stand-by and Jury Checks*, 138 NEW L.J. 358, 358 (1988).

156. *Id.*

157. Jury vetting is allowed only in exceptional circumstances, broadly defined as: "(a)

fence agree[s]."[158]

Jury selection is currently based on the principle of random selection, not on gender, race, or ethnic origin.[159] A judge has discretion to request that a person not serve as a juror when he is manifestly unsuitable, for example, because he is illiterate.[160] A judge does not, however, have the discretion to prevent persons from various sections of the community from serving.[161]

Mirroring the concerns underlying the *Batson* case and its progeny, the Royal Commission on Criminal Justice (Royal Commission) recommended that the defense or the prosecution should be able to argue in exceptional cases that the jury should contain up to three people from ethnic minority communities[162] and that one or more of the three should come from the same ethnic minority as the defendant or the victim.[163] The Race Relations Committee of the General Council of the Bar asked for the Criminal Bar Association's view. A Criminal Bar Association Subcommittee issued a report,[164] which noted that the concept of a multi-racial jury appeared to be based on the belief that a randomly selected jury could not be relied upon to give a true verdict.[165] The Subcommittee argued that there was no evidence to substantiate this belief or to show that randomly selected juries failed to act impartially and without prejudice.[166] In addition, the

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cases in which national security is involved and part of the evidence is likely to be heard in camera, and (b) terrorist cases." *Id.* at 359.

158. *Id.* at 358. A colleague defending a recent case that required references to site plans and documents was in a quandary as to what to do about a blind man on the jury panel. If he challenged the man for cause, he sensed that it would make other members of the jury hostile. Consequently, he asked the prosecutor to use his right to stand by to dismiss the man. The prosecution refused, perhaps sensing the same result or perhaps strictly following the Attorney General's guidelines. Ultimately, they were both right; the other jury members assisted the blind man through the documents and elected him as foreman.

159. *See* Regina v. Ford, [1989] 3 W.L.R. 762, 765-67.

160. *See id.*

161. *See id. Ford* involved a police officer's racial motives. The judge refused to agree to a multi-racial jury, and an appeal against conviction was dismissed. *See id.* at 762-63.

162. *See* ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 1993, Cmnd. 2263, ¶ 222.

163. *See id.* ¶ 223.

164. Criminal Bar Association Sub-Committee, Report on Multi-Racial Juries (1996) (on file with author).

165. *See id.* ¶ 3.1.

166. *See id.*

Royal Commission proposed to adjust jury composition on the basis of skin color and race, not race alone.[167] The Criminal Bar Association Subcommittee challenged the assumption that jurors with different color skin would somehow create the impression of a fairer trial.[168] Finally, the Subcommittee wrestled with how to assess a person's skin color, acknowledging that "between the two extremes of colour there are endless variants."[169] Eventually, the Subcommittee concluded that it was sympathetic to the reasoning that supported the Royal Commission's recommendation, but that no change should be made to the fundamental principle composing the heart of the criminal justice system: random jury selection.[170]

In conclusion, the fears and concerns expressed during the debate surrounding the abolition of the peremptory challenge never came to fruition. Challenges for cause did not increase, jurors did not suffer embarrassment due to challenges for cause, and defendants were not robbed of a sense of justice. Barristers adjusted, and many were surprised to discover that their long-held perception of the perfect jury composition was wrong.[171] The "mystery of the jury system" seems to prevail. The English experience balanced the importance of cost, speed, intrusion of privacy, the value of the principle of random selection, and public perception of justice against the weight of the defendant's sense of fairness and perception of justice. The conclusion seems to be that other means secure defendants' rights. The days of indictors on a defendant's jury are long gone, and so too are the days of "rigging

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167. *Id.*

> The white South African Boer would not be able to have any juror of the same race as himself but the black South African would. No Jewish victim of an anti-semitic attack would have a Jew on the jury but a black victim of a race attack could have three jurors from a multi-racial background.

Id. ¶ 3.2.

168. "The proposition seems to assume that the trial of a West Indian is to be seen as 'fairer' if a Sikh and an Arab are on the jury." *Id.* ¶ 3.3.

169. *Id.* ¶ 3.5.

> How would the Greek or the Oriental be classed, would someone of mixed race count as half a racially-balanced juror, Who would decide if the native of Mexico was 'black' or 'white.' Any investigation of the individual juror would be seen as an intrusion into his or her personal background.

Id.

170. *See id.* ¶ 4.1.

171. A common perception was that it was not helpful to the defense to have female jurors in sex crime cases, but anecdotal evidence now claims the opposite.

the jury" through peremptory challenges.

IV. REASON AND COMMON SENSE FAVOR ABANDONING PEREMPTORY CHALLENGES AND RELYING SOLELY UPON CHALLENGES FOR CAUSE

Both critics and supporters of peremptory challenges agree that challenges for cause are unrealistically narrow, both in definition and application.[172] Under a well-defined and "truly applied" system of challenges for cause, peremptory challenges would be neither necessary nor useful in furthering the constitutional guarantee of a trial by an impartial jury.

A. Defining Challenges for Cause

Unlike England, the jury selection process in the United States yields quite a bit of information about potential jurors, making it much easier for attorneys to formulate challenges for cause.[173] Each jurisdiction in the United States permits striking a juror for cause. Some jurisdictions, such as California, Indiana, Iowa, and Ohio, specifically enumerate "good causes" that justify striking a juror.[174] Such causes include a juror's relationship to the defendant, and whether the juror has been or will be a witness in the case.[175] Other jurisdictions, such as Louisiana, take a broader approach and permit challenges, for example, if a "juror is not impartial, whatever the cause of his partiality."[176]

Challenges for cause recognized in the various U.S. jurisdictions may be divided into three categories: juror incapacity, actual

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172. *See* discussion *supra* Part II.E.; *see also* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 355 (1982); Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 235 n.244 (1978); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 243 (1968).

173. When jurors are called to sit on the panel, they are asked to state, among other things, their occupation, marital status, and education.

174. *See* CAL. CIV. PROC. CODE § 229 (West Supp. 1996); IND. CODE ANN. § 35-37-1-5 (West 1996); IOWA CODE ANN. § 813.2 (West 1995); OHIO REV. CODE ANN. § 2945.25 (Banks-Baldwin 1996).

175. *See* CAL. CIV. PROC. CODE § 229 (listing 8 challenges for cause); IND. CODE ANN. § 35-37-1-5 (listing 15 challenges for cause); IOWA CODE ANN. § 813.2 (listing 16 challenges for cause); OHIO REV. CODE ANN. § 2945.25 (listing 16 challenges for cause).

176. LA. CODE CRIM. PROC. ANN. art. 797(2) (West 1996).

bias or prejudice, and implied bias or prejudice. An ideal scheme for defining challenges for cause would be similarly divided, having as its overarching principle the seating of a jury that can absorb the presented evidence and that can determine the case in a fair and impartial manner.

1. Juror Incapacity

Juror incapacity can usually be easily discovered by written questionnaire or brief voir dire examination. There are two situations in which a person may be found to be incapacitated as a juror. The first situation is when he or she cannot perform a juror's functions. Jurors are disqualified, for example, if they have a physical or mental disability,[177] if they are unable to understand English,[178] or if they are unable or unwilling to follow the law.[179] The second situation arises when the person fails to meet the statutory criteria for jury service, such as minimum age,[180] citizenship,[181]

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177. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4509(b)(5) (1995) ("[i]ncapable, by reason of physical or mental disability, of rendering satisfactory jury service"); GA. CODE ANN. § 15-12-163(b)(3) (1995) ("that he is incompetent to serve as a juror because of mental illness or mental retardation, or that he is intoxicated"); IND. CODE ANN. § 35-37-1-5(a)(8), (13) ("[t]hat the person is a mentally incompetent person . . . . That, from defective sight or hearing, ignorance of the English language, or other cause, the person is unable to comprehend the evidence and the instructions of the court"); IOWA CODE ANN. § 813.2, rule 17 (5)(c) ("[u]nsoundness of mind, or such defects in the faculties of the mind or the organs of the body as render the juror incapable of performing the duties of a juror"); N.C. GEN. STAT. § 15A-1212(2) (1995) ("[i]s incapable by reason of mental or physical infirmity of rendering jury service"); OHIO REV. CODE ANN. § 2945.25(H) ("[t]hat he is a chronic alcoholic, or drug dependent person"); OKLA. STAT. ANN. tit. 22, § 658(3) (West 1996) ("[u]nsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror"); TEX. CODE CRIM. P. ANN. art. 35.16(a)(4)-(5) (West 1996) ("[t]hat he is insane . . . [t]hat he has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service").

178. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4509(b)(4); GA. CODE ANN. § 15-12-163(b)(6); IND. CODE ANN. § 35-37-1-5(a)(13); OHIO REV. CODE ANN. § 2945.25(N); OKLA. STAT. ANN. tit. 22, § 658(2).

179. *See, e.g.*, IND. CODE ANN. § 35-37-1-5(a)(3); LA. CODE CRIM. PROC. ANN. art. 797(4); MO. REV. STAT. § 494.470(2) (1996); MONT. CODE ANN. § 46-16-115(2)(h)-(i) (1994); OHIO REV. CODE ANN. § 2945.25(C); TEX. CODE CRIM. P. ANN. art. 35.16(b)(1).

180. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4509(b)(2); GA. CODE ANN. § 15-12-163(b)(2); N.Y. CRIM. PROC. LAW § 270.20 (McKinney 1996).

181. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4509(b)(1); GA. CODE ANN. § 15-12-163(b)(1); IND. CODE ANN. § 35-37-1-5(a)(9); TEX. CODE CRIM. P. ANN. art. 35.16(a)(1).

and absence of felony convictions.[182]

2. Actual Bias or Prejudice

Similar to juror incapacity, actual bias or prejudice is easily discovered during voir dire by asking direct questions, such as "Have you formed an opinion as to the guilt or innocence of the defendant?" Actual bias or prejudice refers to an expressed bias or prejudice in favor of or against one of the parties. All U.S. jurisdictions recognize that actual bias or prejudice constitutes good cause to challenge a prospective juror. In some jurisdictions, the relevant statutes merely disqualify "[p]ersons biased or prejudiced in favor of or against either of the parties."[183] Other jurisdictions' statutes disqualify potential jurors who have a "formed or expressed opinion as to the guilt or innocence of the defendants"[184] or possess "a state of mind . . . evincing enmity or bias toward the defendant or the state."[185]

3. Implied Bias or Prejudice

Implied bias or prejudice is the broadest of the three challenges for cause. The difficulty in determining the existence of implied bias or prejudice may lead to lengthy juror voir dire. Implied bias or prejudice is found when a juror's relationship or past experience with the defendant or prosecution would prevent the juror from impartially judging the evidence or deciding the case solely upon the presented evidence. While all U.S. jurisdictions recognize implied bias as a ground for disqualifying jurors, jurisdictions vary significantly as to the type of relationship or past experience from which bias may be implied. For example, although a family relationship to the defendant is commonly recognized as

182. *See, e.g.*, DEL. CODE ANN. tit. 10, § 4509(a)(6); GA. CODE ANN. § 15-12-163(b)(5); IOWA CODE ANN. § 813.2, rule 17(5)(a); N.C. GEN. STAT. § 15A-1212(7); OKLA. STAT. ANN. tit. 22, § 658(1); TEX. CODE CRIM. P. ANN. art. 35.16(a)(2).

183. *See, e.g.*, ARIZ. REV. STAT. ANN. § 21-211(4) (West 1995); *see also* LA. CODE CRIM. PROC. ANN. art. 797(2) ("The juror is not impartial, whatever the cause of his partiality."); MONT. CODE ANN. § 46-16-115(2)(j); N.D. CENT. CODE § 29-17-35(2) (1992); OHIO REV. CODE ANN. § 2945.25(B); TEX. CODE CRIM. P. ANN. art. 35.16(a)(9).

184. *See, e.g.*, IND. CODE ANN. § 35-37-1-5(a)(2); N.Y. CRIM. PROC. LAW § 270.20(1)(b).

185. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(j) (West 1995); N.Y. CRIM. PROC. LAW § 270.20(1)(b).

yielding an implied bias,[186] some jurisdictions imply bias only if the relationship is within the third degree,[187] whereas others extend it to relationships within the fourth,[188] fifth,[189] or even sixth[190] degree. Other relationships from which bias may be implied include: guardian-ward,[191] employer-employee,[192] landlord-tenant,[193] debtor-creditor,[194] any fiduciary relationship to the defendant, or a person alleged to have been injured by the defendant.[195] Bias may also be implied in the following situations: when a juror is related to or is a client of an attorney involved in the case,[196] when a juror has been an adverse party to the defendant in a civil action,[197] or when the prospective juror has previously served on a jury in a case arising out of the subject matter of the pending action.[198]

Some jurisdictions recognize grounds for challenges that are arguably too weak to support a finding of implied bias without additional facts. For example, Colorado implies bias when a juror is an attorney or is a compensated employee of a public law en-

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186. *See, e.g.*, CAL. CIV. PROC. CODE § 229(a) (West Supp. 1996).

187. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(b); TEX. CODE CRIM. P. ANN. art. 35.16(b)(2). "Degree" refers to the separation in relationship. For example, mother-daughter is the first degree and grandmother-granddaughter is the second degree.

188. *See, e.g.*, ARIZ. REV. STAT. ANN. § 21-211(3); IOWA CODE ANN. § 813.2, rule 17(5)(d) (West 1995); MO. ANN. STAT. § 494.470(1) (West 1996).

189. *See, e.g.*, IND. CODE ANN. § 35-37-1-5(a)(4); OHIO REV. CODE ANN. § 2945.25(D) (Banks-Baldwin 1996).

190. *See, e.g.*, N.C. GEN. STAT. § 15A-1212(5) (1995).

191. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(c); IOWA CODE ANN. § 813.2, rule 17(5)(e); MONT. CODE ANN. § 46-16-115(2)(b) (1994); N.D. CENT. CODE § 29-17-36(2) (1992).

192. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(c); IOWA CODE ANN. § 813.2, rule 17(5)(e); MONT. CODE ANN. § 46-16-115(2)(b); N.D. CENT. CODE § 29-17-36(2).

193. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(c); IOWA CODE ANN. § 813.2, rule 17(5)(e); MONT. CODE ANN. § 46-16-115(2)(b); N.D. CENT. CODE § 29-17-36(2).

194. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(c); IOWA CODE ANN. § 813.2, rule 17(5)(e); MONT. CODE ANN. § 46-16-115(2)(b); N.D. CENT. CODE § 29-17-36(2).

195. *See* COLO. REV. STAT. ANN. § 16-10-103(1)(i).

196. *See, e.g.*, GA. CODE ANN. § 15-12-163(b)(4) (1995); MO. REV. STAT. § 494.470(1) (1996); OHIO REV. CODE ANN. § 2945.25(M) (Banks-Baldwin 1996).

197. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(d); IOWA CODE ANN. § 813.2, rule 17(f); MONT. CODE ANN. § 46-16-115(2)(c); N.C. GEN. STAT. § 15A-1212(4) (1995); N.D. CENT. CODE § 29-17-36(3).

198. *See, e.g.*, COLO. REV. STAT. ANN. § 16-10-103(1)(e); IND. CODE ANN. § 35-37-1-5(a)(5)-(6) (West 1996); IOWA CODE ANN. § 813.2, rule 17(5)(g)-(j); LA. CODE CRIM. PROC. ANN. art. 797(5) (West 1996); MONT. CODE ANN. § 46-16-115(d)-(g).

forcement agency.[199] Ohio implies bias when a juror or a juror's spouse is a party to any pending action that involves an attorney in the current action.[200] While some relationships, such as husband-wife or parent-child, are close enough to justify a finding of implied bias, other relationships are more attenuated and do not support such a finding. The ultimate test may be whether the relationship between the juror and the party or attorney is such that the court can reasonably conclude that the relationship would influence the juror in arriving at a verdict. A distinction needs to be drawn between factors that may make a juror merely more skeptical toward a particular position and factors that will predispose a juror to favor one of the parties unwaveringly despite proof of facts to the contrary. Attorneys must carefully articulate their basis for implying bias or prejudice in order for the court to determine whether implied bias or prejudice exists.

B. A Proposed Standard

Of all the state rules and statutes governing challenges for cause in the United States, Louisiana's Code of Criminal Procedure article 797 comes closest to defining challenges for cause consistent with the constitutional ideal of impaneling an impartial jury.[201] The Louisiana provision contains five separate subparts, each directed at disqualifying jurors who cannot serve due to incapacity, bias, or prejudice.[202]

The first subpart provides that a juror may be challenged for cause on the ground that "[t]he juror lacks a qualification required by law."[203] This provision preserves the state's ability to set minimum age, citizenship, physical capacity, and mental capacity requirements, and to eliminate felons from the jury panel. If a prospective juror fails to meet these legislatively mandated standards, the juror must not be allowed to serve.

The second subpart concerns actual bias and disqualifies a juror who "is not impartial, whatever the cause of his partiality."[204]

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199. *See* COLO. REV. STAT. ANN. § 16-10-103(1)(k).
200. *See* OHIO REV. CODE ANN. § 2945.25(K).
201. *See* LA. CODE CRIM. PROC. ANN. art. 797.
202. *See id.*
203. *Id.* art. 797(1).
204. *Id.* art. 797(2).

Significantly, the statute further provides: "An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence."[205] Thus, an opinion on the guilt or innocence of the defendant is not sufficient to support a challenge for cause. The court must inquire further to ascertain the firmness of the prospective juror's opinion. The guiding principle is the constitutionally mandated provision of an impartial jury, which would require exclusion of jurors who have well-settled opinions as to the guilt or innocence of the defendant.

The third subpart addresses implied bias by approving a challenge for cause when "[t]he relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict."[206] The mere existence of a relationship is not sufficient to support a challenge for cause. Rather, the court must undertake an inquiry sufficient to determine whether the relationship will "influence the juror in arriving at a verdict." Similar to the second subpart, the goal is the constitutionally mandated provision of an impartial jury.

The statute's final two subparts set forth grounds for challenging a juror for cause that appear to be more absolute than the actual bias and implied bias provisions. The fourth subpart provides for disqualifying a juror who "will not accept the law as given to him by the court."[207] Obviously, a juror who has indicated that he or she will not follow the court's instructions cannot be qualified to serve on a jury, and no additional inquiry is needed.

Finally, the fifth subpart provides that a "juror [who] served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense" may be challenged for cause.[208] The concern of this subpart is that the juror may possess information that will not be presented to the

205. *Id.*
206. *Id.* art. 797(3).
207. *Id.* art. 797(4).
208. *Id.* art. 797(5).

jury, possibly because it is inadmissible, but that the juror may improperly rely upon and communicate to other jurors in the course of deliberation. Similar to the fourth subpart, disqualification of jurors under this provision appears absolute, and no additional inquiry is needed. It would be wise, however, to expand this ground for cause to include prospective witnesses in the action and others with first-hand knowledge of the facts involved in the case.

In conclusion, a clear definition of cause is needed. Similar to Louisiana's statute, the definition must absolutely disqualify jurors who fail to meet statutory criteria, who refuse to follow the law, and who have previously sat in judgment of the defendant or have first-hand knowledge of the facts involved in the action. In addition, the definition must provide for a challenge based upon actual or implied bias or prejudice that requires an inquiry focused upon juror impartiality. As the Louisiana statute implicitly recognizes, facts suggesting the existence of bias or prejudice, actual or implied, do not necessarily mean that a juror cannot be impartial. Rather, attorneys must be able to convince the court of specific reasons why a juror cannot be impartial in order to dismiss the juror for cause.

C. The Court's Ruling on Challenges for Cause Must Be Reviewable

Unlike peremptory challenges, challenges for cause are ineffective to remove jurors unless the court finds that cause exists to remove a juror. Although the existence of peremptory challenges effectively renders judicial decisions on challenges for cause unreviewable,[209] abolishing peremptory challenges would not prohibit review of the denial of challenges for cause.

As noted previously, challenges for cause must be made with the constitutionally mandated goal of seating an impartial jury. The only way that attorneys will be able to strike unqualified, biased, or prejudiced jurors is by exercising the challenge for cause. Therefore, failure to permit appellate review of the *denial* of a challenge for cause would eviscerate the guarantee of a trial by an impartial jury.

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209. *See supra* note 71 and accompanying text.

V. CONCLUSION

Many commentators have debated the merits and shortcomings of the jury selection process, but few have discussed an obvious solution: if challenges for cause were clearly defined and vigorously applied, there would be no need for peremptory challenges and all of their unsavory baggage. If an attorney is unable to articulate why a person is unfit to be seated on the jury, based on logical substantive reasoning, then the person should be allowed to serve on the jury.

If the U.S. system relied upon challenges for cause, sensibly and fairly administered, and abandoned peremptory challenges as wasteful sorcery promoting unjust discrimination, the United States would come much closer to selecting fair and impartial juries. Although all bias may not be identified and eliminated,[210] the focus of jury selection must be shifted away from the use of hunches, prejudices, and preconceptions in order to obtain a "favorable" jury. It must move toward reliance upon the ability of attorneys to discern and articulate their grounds for exercising challenges for cause and reliance upon a neutral court to rule carefully upon those challenges. Only then can the United States expect to assemble the fair and impartial juries that the Constitution guarantees.

210. Under both the current system and the proposed system, a truly biased juror may deceive the parties and be seated on a jury. Additionally, most people have some predispositions toward or against one party's position. It is the job of the trial attorney, by effective presentation of evidence, to overcome those predispositions.