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The End of Peremptory Challenges: A Call for Change through Comparative Analysis

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The End of Peremptory Challenges: A Call for Change Through Comparative Analysis

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I. Introduction

Although the peremptory challenge system has been a part of the American legal landscape since 1790,[1] it has not gone without criticism. In his concurring opinion in *Batson v. Kentucky*, Justice Marshall denounced peremptory challenges altogether. He summarized the futility of the current United States approach to ending discrimination in jury selection. Marshall astutely stated that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge."[2] Justice Marshall stated simply that the goal of ending discrimination altogether "can be accomplished only by eliminating peremptory challenges entirely."[3]

The United States Supreme Court has limited the use of peremptory challenges when it comes to discrimination of protected classes. However, inherent in the United States practice of jury selection is the widespread use of stereotyping and discrimination.[4] This paper will propose that peremptory challenges be abolished in

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1. Law of April 30, 1790, c. 10, § 30, 1 Stat. 119 (1790).
2. 476 U.S. 79, 105 (1986).
3. *Id.* at 103.
4. *See id.* at 105; *see also* Miller-El v. Dretke, 537 U.S. 322, 346 (2003); J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 131 (1994).

the United States by analyzing the history of their use in the United Kingdom including the complete abolition of their use there.

II. History of Peremptory Challenges in England

Peremptory challenges in the United States grew out of the English common law system.[5] Therefore, a look into how the practice has evolved in England is of paramount importance. The first use of the peremptory challenge in England was by prosecutors during capital criminal cases between the years of 1250 and 1300.[6] One scholar, Paul H. Schwartz, explains that as jurors became more like fact-finders instead of their previous role as "fact-knowers," their impartiality became increasingly more important.[7] Schwartz theorized that the use of peremptory challenges "evolved as one safeguard of jury impartiality."[8] In the beginning of its practice, prosecutors could use their discretion to remove as many jurors as they saw fit.[9] Eventually, English defense counsel was allowed the use of peremptory challenges in order to level the playing field.[10] However, during the early years of the peremptory challenge, the defense was restricted to thirty-five challenges while the prosecution was still allowed an unlimited number.[11]

In 1305 in England, the use of peremptory challenges by the prosecution was abolished.[12] However, prosecutors were left with the option to "stand aside" certain jurors.[13] Standing aside a juror meant that the prosecutor was allowed to direct any number of potential jurors to go to the end of the line of jurors without having to articulate any reason. If enough potential jurors were excused making it so those potential jurors who were stood aside became the front of the line, they would be told to serve as jurors.

Eventually Parliament began to reduce the number of peremptory challenges available to the defense until it completely

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5. J. Shontavia Jackson, *Peremptory Challenge: Striking Down Discrimination in Arkansas's Jury Selection Process*, 59 ARK. L. REV. 93, 98 (2006).

6. *Id.*

7. Paul H. Schwartz, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C.L. REV. 1533, 1536 (1991).

8. *Id.*

9. Jackson, *supra* note 5, at 98.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 99.

abolished the practice in 1989.[14] The notes following the Criminal Justice Act of 1988's abolition of peremptory challenges explain that this was the final stage in a long process reducing the availability of peremptory challenges over hundreds of years.[15] In addition to abolishing peremptory challenges, when the Criminal Justice Act of 1998 was being passed, the Attorney-General drafted guidelines on the use of stand-asides and other times when individual would be "manifestly unsuitable" for jury selection.[16] The Attorney-General's guidelines explained that "[i]t 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."[17]

III. History of Peremptory Challenges in the United States

Nowhere in the Constitution, including Article III, Section 2's description of the powers of the judicial branch and the creation of the right to a jury in a criminal trial, does it specifically discuss the use of peremptory challenges.[18] Additionally, there is no recorded discussion during the Constitutional Convention or in the legislative debates prior to the Bill of Rights or Civil Rights Amendments that even mentions the right to peremptory challenges.[19]

In fact, the Supreme Court explicitly stated that there is no Constitutional right to peremptory challenges in its opinion in *Stilson*

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14. Criminal Justice Act, 1988, c. 33, § 118 (Eng.).

15. General Note, Criminal Justice Act, 1988, c. 33, § 118 (Eng.).

16. *Id.; see also* 1 Archbold: Pleading, Evidence and Practice in Criminal Cases 526-27 (P.J. Richardson et al. eds., Sweet and Maxwell 1992)(stating that "(5) the circumstances in which it would be proper for the Crown to exercise its right to stand by a member of a jury panel are: (a) where a jury check authorized in accordance with the Attorney-General's Guidelines on Jury Checks reveals information justifying exercise of the right to stand by . . . or (b) where a person is about to be sworn as a juror who is manifestly unsuitable and the defense agree that, accordingly, the exercise by the prosecution of the right to stand by would be appropriate").

17. 1 Archbold: Pleading, Evidence and Practice in Criminal Cases 526-27, *supra* note 16 (stating that "[t]he enactment by Parliament of section 118 of the Criminal Justice Act 1988 abolishing the right of defendants to remove jurors by means of peremptory challenge makes it appropriate that the Crown should assert its right to stand by old on the basis of clearly defined and restrictive criteria. Derogation from the principle that members of a jury should be selected at random should be permitted only where it is essential.").

18. U.S. CONST. art. III, § 2.

19. William T. Pizzi and Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1414 (2001).

v. United States.[20] The Court in *Stilson* had the responsibility of determining whether the trial court counting one peremptory challenge against another defendant was a violation of the Constitution.[21] Stating that the lower court did not violate the Constitution, the Court stated that "there is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."[22]

Instead of being granted as a Constitutional right, a Congressional bill in 1790 introduced peremptory challenges to the United States federal jury selection process.[23] The Act of 1790 first granted twenty peremptory challenges to defendants in trials for certain capital felonies and thirty-five peremptory challenges to defendants in treason trials.[24] Through time, the right to peremptory challenges by defendants and the prosecution for crimes not covered by the Act of 1790 became law through judicial decisions.[25] By 1870, almost all states granted both the defense and the prosecution the discretion to use a specific number of peremptory challenges without ever having to state a reason.[26] For example, the California statute regarding peremptory challenges states that a "challenge to an individual juror may be taken orally or may be made in writing, but no reason need be given for a peremptory challenge, and the court shall exclude any juror challenged peremptorily."[27]

The current version of the federal statute, Rule 24 of the Federal Rules of Criminal Procedure, states that both sides are entitled to a certain number of peremptory challenges depending on the offense being prosecuted.[28] For example, both sides have the right to use twenty peremptory challenges if the prosecution is seeking the death penalty.[29] On the other hand, in a felony case where the crime is punishable by imprisonment of more than one year and the

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20. Stilson v. U.S., 250 U.S. 583, 586 (1919).
21. *Id.* at 585.
22. *Id.* at 586.
23. *Batson,* 476 U.S. at 120.
24. Eric N. Einhorn, Note, *Batson v. Kentucky and J.E.B. v. Alabama Ex. Rel. T.B.: Is the Peremptory Challenge Still Preeminent?,* 36 B.C.L. REV. 161, 167 (1994).
25. *Id.*
26. *Id.*
27. CAL. CIV. PRO. § 226.
28. FED. R. CRIM. P. 24(b).
29. FED. R. CRIM. P. 24(b)(1).

prosecution is not seeking the death penalty, the prosecution has the potential to utilize six peremptory challenges and the defendant or defendants jointly are allowed ten peremptory challenges. The court may allow additional peremptory challenges when there are multiple defendants and also may allow co-defendants to exercise challenges jointly.[30]

Although Rule 24 provides guidance on how many challenges can be made, it is silent on how and when they are to be used. Instead, the specifics of the right to peremptory challenges including when they are considered unconstitutionally discriminatory have been discussed extensively in subsequent caselaw. The first Supreme Court case discussing the right to peremptory challenges was *Strauder v. West Virginia*.[31] The Court in *Strauder* held:

> [i]n the composition or selection of jurors by whom an accused is to be indicted or tried, persons of the accused's race or color may not be excluded by law solely because of their race or color so that by no possibility can any person of the accused's race sit upon the jury.[32]

Simply put, *Strauder* was the first case to connect the Fourteenth Amendment's Equal Protection Clause to the use of peremptory challenges, creating a right to not be discriminated against based on race during the jury selection process.[33]

Although the Court in *Strauder* explained that using race as a reason for a peremptory challenge was unconstitutional, the Court did not articulate a workable standard.[34] The Court merely stated that peremptory challenges could not be used to create a situation where there was *no* possibility for a defendant to have a juror of their own race.[35]

Next, in *Swain v. Alabama,* the Supreme Court explained that peremptory challenges were justifiably discriminatory and could be used to exclude "any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes."[36] In *Swain*, an African-American man was convicted of

30. FED. R. CRIM. P. 24(b).
31. Strauder v. West Virginia, 100 U.S. 303 (1880).
32. *Id.* at 305.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Swain,* 380 U.S. 202, 202 (1963).

sexual assault in Alabama and sentenced to death.[37] The jury that convicted the defendant had no African-American jurors despite the eligible jury pool being 26 percent black.[38] The Court explained simply that "[a]n imperfect system for the selection of juries is not equivalent to purposeful discrimination based on race."[39]

In 1985, over a hundred years after the Supreme Court's decision in *Strauder,* the Court in *Batson v. Kentucky* finally articulated a standard.[40] *Batson* was the first time a party actually invoked the Fourteenth Amendment's Equal Protection Clause to challenge peremptory challenges.[41] Defendant Batson, an African American, was indicted by a grand jury for second-degree burglary and receipt of stolen goods.[42] During voir dire, the prosecutor struck the only four African Americans on the panel.[43] The all-white jury panel that was eventually chosen convicted Batson on all charges.[44] The Court found that the use of peremptory challenges in that case violated the Fourteenth Amendment.[45] The standard that the court finally articulated included a three-step test used to determine when a defendant's constitutionally protected Equal Protection rights were being violated.[46]

The first step in the *Batson* test requires the challenger to show a prima facie case of purposeful discrimination.[47]

Next, the Court shifts the burden onto the prosecution to give a race neutral reason for the challenged juror strikes.[48]

The Supreme Court later clarified the second part of the test in *Hernandez v. New York.*[49] The Court in *Hernandez* refused to find that peremptory challenges that had a disparate impact on specific racial groups would be invalid per se. The Court held that, "[a] neutral explanation in the context of our analysis here means an

37. *Swain,* 380 U.S. 202, 203.
38. *Id.* at 205.
39. *Id.* at 209.
40. 476 U.S. 79 (1986).
41. *Id.*
42. *Id.* at 82.
43. *Id.* at 82-83.
44. *Id.* at 83.
45. *Id.* at 98-100.
46. *Id.* at 93-95.
47. *Id.* at 93-94.
48. *Id.* at 94.
49. 500 U.S. 352 (1991).

explanation based on something other than the race of the juror . . . the issue is the *facial* validity of the prosecutor's explanation."[50] In other words, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Last, according to the test from *Batson*, the trial judge decides whether the defendant has established purposeful discrimination.[51]

Thereafter, the Supreme Court provided lower courts with guidance on how to determine purposeful discrimination through its decision in *Miller-El v. Dretke*.[52] In *Miller-El*, the Court directed lower courts by stating that "a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination."[53]

In its opinion the Court emphasized the problem with discriminatory peremptory challenges:

> When the government's choice of jurors is tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication.[54]

Although, the Court refused to abolish peremptory challenges, the Supreme Court has increasingly accepted its potential as a tool for discrimination in the courtroom.[55]

Even after the series of cases limiting the use of peremptory challenges, there are still certain unresolved issues surrounding their use. In 1994, in *J.E.B. v. Alabama,* the Court extended the rule to prohibit discrimination based on gender as well as racial discrimination.[56] Additionally, California state courts are starting to expand protection to sexual orientation discrimination as well.[57] The California Supreme Court in *Rubio v. Superior Court* held that a defendant's constitutionally protected right to trial by a jury drawn

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50. 500 U.S. at 360 (emphasis added).

51. 476 U.S. at 97.

52. 545 U.S. 231 (2005).

53. *Id.* at 240.

54. *Id.* at 238 (citing Powers v. Ohio, 499 U.S. 410, 412 (1991) and Georgia v. McCollum, 505 U.S. 42, 49 (1992)).

55. *See Miller-El*, 545 U.S. at 231.

56. 511 U.S. 127 (1994).

57. *See, e.g.,* People v. Garcia, 77 Cal. App. 4th 1269 (2000).

from a cross section of the community is violated when any "cognizable group" within that community is excluded from the jury panel.[58] Then, in *People v. Garcia*, California Court of Appeals for the Fourth District determined that lesbians and gay men met the two requirements in *Rubio* regarding cognizable groups.[59]

Some critics have argued that the extension of *Batson* into gender and sexual orientation discrimination ostensibly kills the peremptory challenge process by hindering it so extensively. Justice Scalia's dissent in *J.E.B.* urged the Court to stop expanding the protected classes that could make *Batson* challenges.[60] He explained that the requirement for a facially neutral explanation by the prosecution makes the peremptory lose its "whole character."[61] Scalia argued that the right of peremptory challenge is "an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."[62]

Scholar Eric N. Einhorn, agreeing in part with Scalia's dissent in *J.E.B.,* argues that the current application of *Batson* takes attorney credibility into consideration when they offer the race neutral explanation instead of the real reason for the peremptory strike.[63] Thus, according to Einhorn, the Supreme Court's holding in *Batson* is little more than an "illusory protection."[64]

What Scalia and scholars like Einhorn have in common is their criticism of *Batson* and its progeny, not the use of peremptory challenge as an institution. Perhaps instead of criticizing the case law that attempts to curb the discriminatory effects of peremptory challenges, the solution may lie in the total abolition of the peremptory challenge system.

IV. Reformation of the Peremptory Challenge System

Reformation of the peremptory challenge system is simply not enough. *Batson* and its progeny raise some important questions about the future of peremptory challenges. "Recent rulings on the U.S. Supreme Court and appellate courts on the abuse of peremptory

58. 24 Cal. 3d 93, 97 (1979).
59. 77 Cal. App. 4th 1269, 1276 (2000).
60. J.E.B. v. Ala. ex rel. T.B., 511 U.S. at 161-62 (1994)(Scalia, J., dissenting).
61. *Id.*
62. *Id.* at 162.
63. Einhorn, *supra* note 24, at 187.
64. *Id.*

challenges recognize what trial judges and lawyers have always known – that discrimination in selecting jurors has been practiced systematically for decades, with the knowledge and acquiescence of the courts."[65] The Supreme Court could continue to limit the types of rationales allowed for striking potential jurors. Or, following the guidance of Justice Marshall, the United States could abolish its use altogether. After analyzing the abolition of the peremptory challenges system in England, it seems that their abolition is a more meaningful solution to discrimination in jury selection than merely reforming the practice.

V. Peremptory Challenges Should Be Abolished

Just as they were abolished in England, peremptory challenges should also be abolished in the United States. England abolished the practice of peremptory challenges, through the Criminal Justice Act of 1988, which took effect in 1989. In relevant part, it states simply that, "[t]he right to challenge jurors without cause in proceedings for the trial of a person on indictment is abolished."[66] Many of the reasons why England abolished the use of peremptory challenges mirror problems that are present in the United States today. The successful abolition of peremptory challenges in England supports the argument that peremptory challenges should also be permanently removed from the United States jury selection processes.

A. Both English and American Jury Selection Systems Seek Impartiality, but Both Are Plagued by Unequal Representation and Bias

In the United States, as was true in England, peremptory challenges do not require any expressed rationale and create an open invitation for bias and unequal representation in jury selection. Because of this characteristic of the peremptory challenge, scholars in both countries expressed valid concerns about peremptory challenges as a vehicle for discrimination. Those concerns have been reinforced by realities of voir dire in the United States. In the United States, "inequities in the jury system and in jury selection have challenged

65. H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 378, 383 (Robert E. Litan ed., 1993).

66. Einhorn, *supra* note 24, at 167.

the ideal of a representative jury and a fair trial by one's peers."[67] Despite a requirement that jury be composed of one's peers, "racial and ethnic minorities are consistently underrepresented in the vast majority of both federal and state courts."[68]

Judge Robert A. Wenke's "The Art of Selecting a Jury" expresses the reality of how peremptory challenges are used to skew the jury towards the side exercising their right.[69] The book explains the results of a group of experienced trial attorneys rating which juror characteristics matter the most in order of importance. According to Judge Wenke, the top-ten list was as follows: (1) personal characteristics, (2) occupation, (3) personality, (4) race, (5) physical signs, (6) nationality, (7) body language, (8) sex, (9) age and (10) marital status. "The Art of Selection a Jury" continues by explaining that "[t]hese lawyers described the first four categories as 'extremely important', the next five as important' and last, 'marital status,' as 'of some consequence.'"[70] In fact, the book devotes an entire chapter to racial stereotypes and another to age, sex and marital status stereotypes.[71] Some of the advice from the book includes the explanation that "[m]iddle aged and younger Blacks tend to believe that the law and the police aren't always right," "Mexican-Americans tend to be passive," and "[w]omen are more likely than men to vote for the plaintiff."[72] After *Batson* and its progeny, many of these guidelines seem not only arbitrary, but some are unquestionably outright unconstitutional.

It appears as though these types of abuse were the motivating factors the English Parliament found to finally abolish the practice altogether in 1988. For instance, in a 1982 interview study conducted by Valerie P. Hans with English barristers from Cardiff, Wales, the majority of the barristers surveyed "expressed the belief that the jury should be drawn at random and stated that they rarely used their

67. US 90th Congress Senate Report No. 981 (1967) and US 90th Congress Report No. 1076 (1968).

68. HIROSHI FUKURAI, EDGAR W. BUTLER, & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 3 (Springer, 1st ed. 1993)(citing H.R. Rep. No. 1076 (1968).

69. ROBERT A. WENKE, THE ART OF SELECTING A JURY 64-65 (Parker & Son, Inc. 1979).

70. *Id.* at 64.

71. *Id.* at 76, 84.

72. *Id.*

right to challenge."[73] According to the Guardian newspaper in London, "[t]he right of peremptory challenge was abolished in the Criminal Justice Act 1988 on the ground that it was being abused by a small number of London defence lawyers who used it to eliminate intelligent jurors."[74] Defense counsel was seen as abusing the peremptory challenge right in a series of criminal trials in the 1980s that received a lot of publicity.[75] The notes following the passage of the Criminal Justice Act of 1988 state that the political movement to abolish peremptory challenges came "following the acquittal of the defendants in the 'Cyprus Secrets' trial (where defendants had effectively pooled their peremptory challenges)."[76] In the Cyprus spy trial, the defense challenged seven jurors, and the entirely young, male jury acquitted all seven defendants.[77]

The English Parliament refused to simply limit the rationales for peremptory challenges, as is the case in the United States, opting instead to remove them entirely. An article from the Guardian perceptively asked, "if special rules were allowed for black defendants, would not other minorities – homosexuals, Freemasons, alcoholics, militant feminists – be able to argue that they too should be given special treatment?"[78] This is the type of question that should be asked in the United States as well.

B. As in England, the Practice of Peremptory Challenges is not Constitutionally Mandated and is in Fact Potentially Unconstitutional in the United States

In his concurring opinion in *Batson*, Justice Marshall stated, "this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the Constitutional guarantee of impartial jury and fair trial."[79] It has never been asserted that the right

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73. Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in The United States, England and Canada*, 16 LOY. L.A. INT'L & COMP. L. J. 201, 224 (1993)(citation omitted).

74. Michael Zander, *Commentary: In Search of Colour-Blind Justice*, The Guardian (London), Aug. 15, 1989.

75. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 822 (1997).

76. General Note, Criminal Justice Act, 1988, c. 33, § 118 (Eng.).

77. Sean Enright, *Reviving the Challenge for Cause*, 139 NEW L.J. 9 (1989).

78. Zander, *supra* note 74.

79. 476 U.S. at 108.

to peremptory challenges is a constitutional one. On the contrary, it can be argued that the practice is actually constitutionally prohibited.

Many scholars agree with the notion that if the per se constitutionality of the practice were challenged, peremptory challenges would be found to violate the Equal Protection Clause. One scholar, David Zonana, explains that "[p]eremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial."[80] According to Zonana, the Equal Protection Clause does not allow this type of arbitrary classification. Even *Batson* and barring racial discrimination in peremptory challenges will not stop the reality that the practice is inherently arbitrary. Zonana argues that the Court "should have ruled that a procedure that decreases the impartiality of juries, pigeonholes individuals in an insulting manner, and excludes them from civic participation has no place in our court system."[81]

Although England has no formal constitution, it has a comparable history of equal rights protections and civil rights legislation.[82] As the United States deals with the consequences of racial inequities through enforcement of the Equal Protection Clause of the Fourteenth Amendment, England is avoiding the problems of unequal representation and violations of civil rights laws through total abolition of the peremptory procedure.

As the English jury pools became more heterogeneous, the juries did not. Thus, the juries were not representative of the general population and there was a need for some way to make the juries more diverse. "[T]he institutional reason most commonly advanced for the 1989 elimination of the English peremptory challenge was the increasing diversity of the English venire, and the threat to that diversity posed by the peremptory challenge."[83] In the United States we have an extraordinarily diverse jury pool and thus the concerns that the English had are very similar to our own.

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80. David Zonana, *Discriminatory Use of Peremptory Challenges,* 105 HARV. L. REV. 255, 265-266 (1991).

81. *Id.*

82. *Id.*

83. Hoffman, *supra* note 75, at 868.

C. *Not Only Are Peremptory Challenges Theoretically Offensive, They Are Practically Inefficient Hurdles in an Already Overburdened Judicial System*

Peremptory challenges are expensive and time-consuming. Each prospective juror must spend at least a day in court, be paid the required fee, and lose the equivalent of productive work time. For example, in the District Court for the Western District of Wisconsin, the average jury service is three days per service.[84]

The right to peremptory challenges was only exercised in approximately 22 percent of all cases in England. However, the Secretary of State for the Home Department's White Paper explains one of the purposes for the abolition of peremptory challenges was to "ensure that the court system and its related services operate as efficiently and as effectively."[85] It is important to note that with only 22 percent of their cases involving peremptory challenges, England still recognized that peremptory challenges create inefficiency in the court system and that this problem could best be solved through their abolition.

In a financially limited legal system, which the United States has, the potential for racial discrimination becomes higher and higher. This is an important argument based on the realities of the current judicial climate for an end to peremptory challenges.

D. *Improved Public Perception of the Verdict and Greater Confidence in the Verdict Come With the Abolition of the Peremptory Challenge System*

When jury panels are more representative, the public will have greater confidence in the verdicts they render and perceive the verdicts as more just overall. In modern jury trials, extensive voir dire and peremptory challenges are used in a strategic manner by lawyers which often results in less qualified individuals on the juries. "These trends are disturbing in that they arguably weaken the jury in its ability to act as an accurate finder of fact."[86]

In England, according to the White Paper by the Attorney

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84. Jury Duty General Information, www.wisc.edu/legal/juryduty.pdf.

85. Home Office, Criminal Justice: Plans for Legislation, 1986, CMND 9658, at 3 [hereinafter Home Office Command].

86. Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 449 (1997).

General, the same problems were present in their jury selection process. The White Paper explained that the peremptory challenge process became more of a "means of getting rid of jurors whose mere appearance is thought to indicate a degree of insight or respect for the law which is inimical to the interests of the defense."[87]

VI. Discussion of Criticisms

Some scholars, such as Neil Vidmar, argue that the differences in the juror selection process and other juror procedures between the United States and England are large enough to prevent the successful abolition of peremptory challenges in the United States.[88] Vidmar cites the differences in the procedure for challenges for cause and cites the fact that the English system allows for majority verdicts instead of the United States' requirement for unanimous decisions.[89] He sees these differences as being significant enough to make the abolition of peremptory challenges in the United States less effective than they are in England.[90]

However, the reality is that both countries were experiencing the same problems with unequal minority representation and bias in juries. England abolished the peremptory challenge to correct those problems. Procedural differences do not remove the adverse discriminatory effects of the peremptory system. In any jury system that seeks to represent society and attempts to create a panel of peers, peremptory challenges are inherently discriminatory. The fact that unanimous decisions are not required in the United States should not prevent abolishment because maintaining the challenge for cause effectively eliminates outliers. However, the importance of eliminating peremptory challenges from voir dire in the United States may require consideration of abolishing the requirement for unanimous jury decisions.[91]

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

87. Home Office Command, *supra* note 85, at 15.

88. *Forward*, 62 Law & Contemp. Probs. 1, 1, 4 (Spring 1999).

89. *Id.*

90. *Id.*

91. Abolishing the requirement of unanimity is beyond the scope of this discussion, but there is certainly an argument that the entire process needs reformation and that the peremptory challenge problem is simply the tip of the iceberg.

argues that, "[t]he English reason for abolition of peremptory challenges, namely, crime control, is insufficient to support the abolition of peremptory challenges."[92] There are two relevant points that should be addressed concerning her arguments.

First, the reason England abolished the peremptory challenge was not merely to support crime control, but also to create a jury selection system that was not biased and reflected a cross-section of society in an increasingly diverse society. Her position also denies the reality that the Crown's use of the standby was severely curtailed. Heinz herself conceded that "[a]s a result, random selection now forms most English juries."[93]

Second, Heinz herself explains that the composition of a jury failing to accurately represent a cross-section of the community is a genuine concern of the American public.

If England sought to abolish peremptory challenges to more fairly represent society in jury selection, and the American public is in favor of this outcome, it seems like mirroring the English approach is a reasonable option. On the other hand, Heinz advocates for the United States to adopt the Canadian system, which gives an equal number of peremptory challenges to both defense and the prosecution. However, this call for reform does not address the inherently discriminatory system and instead gives equal power to both sides to discriminate. In the words of District Court Judge Morris B. Hoffman, "[t]wo sets of partial jurors do not an impartial jury make."[94]

VII. Conclusion

The United States, not unlike England, has struggled with finding a solution to the discriminatory realities of the largely lawyer run jury selection process. Both systems began the same, but have evolved in notably different ways. While courts in the United States figured out ways to lessen the inherently discriminatory effects of peremptory challenges, England has abolished the practice altogether. Simple reforms to the use of peremptory challenges are not only insufficient, but can even lead to an increased use of discrimination in jury selection. Whether or not the English system

92. Heinz, *supra* note 73, at 217.
93. *Id.*
94. Hoffman, *supra* note 75, at 865.

should be the model for the system of jury selection in the United States, a serious reconsideration of voir dire is urgently necessary.