



The Best Method of Selecting Jurors

The process of selecting a jury from a panel of prospective jurors, or venire, is probably as varied as the number of judges presiding over those selections.¹ Yet, within these many procedures, two basic methods, the “struck jury” system and the “strike and replace” or “jury box” system (and their variations) are used in a substantial majority of federal and state jurisdictions. The authors believe that the “struck jury” system is the superior system for most jurisdictions. Favored by many judges, it has been cited as being the selection process that is theoretically capable of producing less bias in a jury than any other method.² The “struck jury” method also is recommended by the American Bar Association’s (ABA) *Standards Relating to Juror Use and Management*.³ In this article, we describe the “struck jury” technique and defend its use against a set of criteria for the voir dire process.

The legitimate purpose of voir dire is to assure that each member of the
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trial jury, including alternates, is both willing and able to impartially consider the issues in a particular case. This article does not address abuses of the voir dire process, such as the desire to pretry the case in voir dire, to develop rapport with the jury, or to introduce evidence which would be inadmissible in the trial—all of which require the attention of the trial judge. Nor does this article address the issue of who should conduct the voir dire of prospective jurors—the judge or the judge with the attorneys participating.⁴ It should be noted, however, that the current need to establish a basis for the exercise of peremptory challenges, or to establish a *Batson* challenge, provides a sound argument for permitting attorney questioning or allowing them to submit questions based on voir dire responses.⁵

The following goals of the voir dire process are consistent with the ABA standards.

- Elicit information necessary for the exercise of peremptory challenges. The depth of questioning necessary to elicit this is not easily defined.
- Ascertain information sufficient to establish a challenge for cause.
- Exercise of peremptory challenges in a way which is not demeaning to the prospective juror or which prejudices the jurors toward the parties.
- Presentation of information on prospective jurors which minimizes speculation or surprise on the part of the trial attorneys.
- Reduce the time necessary for the conduct of the voir dire without restricting the amount of information needed by the parties.⁶
- Respect the privacy of the prospective juror—a difficult task without resorting to the anonymous jury concept.⁷

The unique and distinguishing element of the “struck jury” (an admittedly pejorative term) is that a number of prospective jurors equal to the jury size plus the total number of peremptories allowed is presented to the parties for the exercise of their peremptories. These persons have been previously determined to be “cause free.” Either independ-

ently or alternatively, the parties “strike” names from a list to arrive at the mutually agreeable jury.

This could be accomplished as follows and is illustrated in Figure 1. The judge, clerk, bailiff, or computer randomly selects a number of prospective jurors equal to the jury, plus the number of allowable peremptory challenges, plus alternates who are seated in the jury box, adjoining chairs, or in a section of the courtroom. Additional prospective jurors are also present in the courtroom and are part of the jury panel. All panel members are administered the oath for examination on voir dire, presented with the introduction of the case and the usual questions, and admonished, along with other prospective jurors present, to consider the questions. Those challenged for cause are excused and replaced with other prospective jurors who, having heard the questions and introduction to the case, are asked to respond.⁸ A list of the “cause qualified” prospective jurors is given to the first party who exercises its first peremptory strike and passes the list to the other party who then exercises its first challenge.

The process of handing the list back and forth is repeated until all peremptory challenges have been exercised and a number equal to the jury plus alternates remains. It is suggested that counsel be requested to stipulate that the alternates be designated by random selection just prior to submitting the case to the jury for decision. By alternative stipulation, the parties may agree that prospective jurors whose names appear lowest on the list are the alternates. The alternates may or may not be designated at the time of empanelment of the jury.⁹

During this process of exercising the strikes, no physical movement of the jurors has taken place. One variation of passing the list is to provide each party with a list of the prospective jurors, on which they independently exercise their peremptory strikes. In this case, if both sides strike the same person, the first persons acceptable to both sides equal to the jury size comprise the jury. The next are the alternates.¹⁰

All those who have been peremptorily stricken are excused by the court, thus yielding the trial jury and alternates.

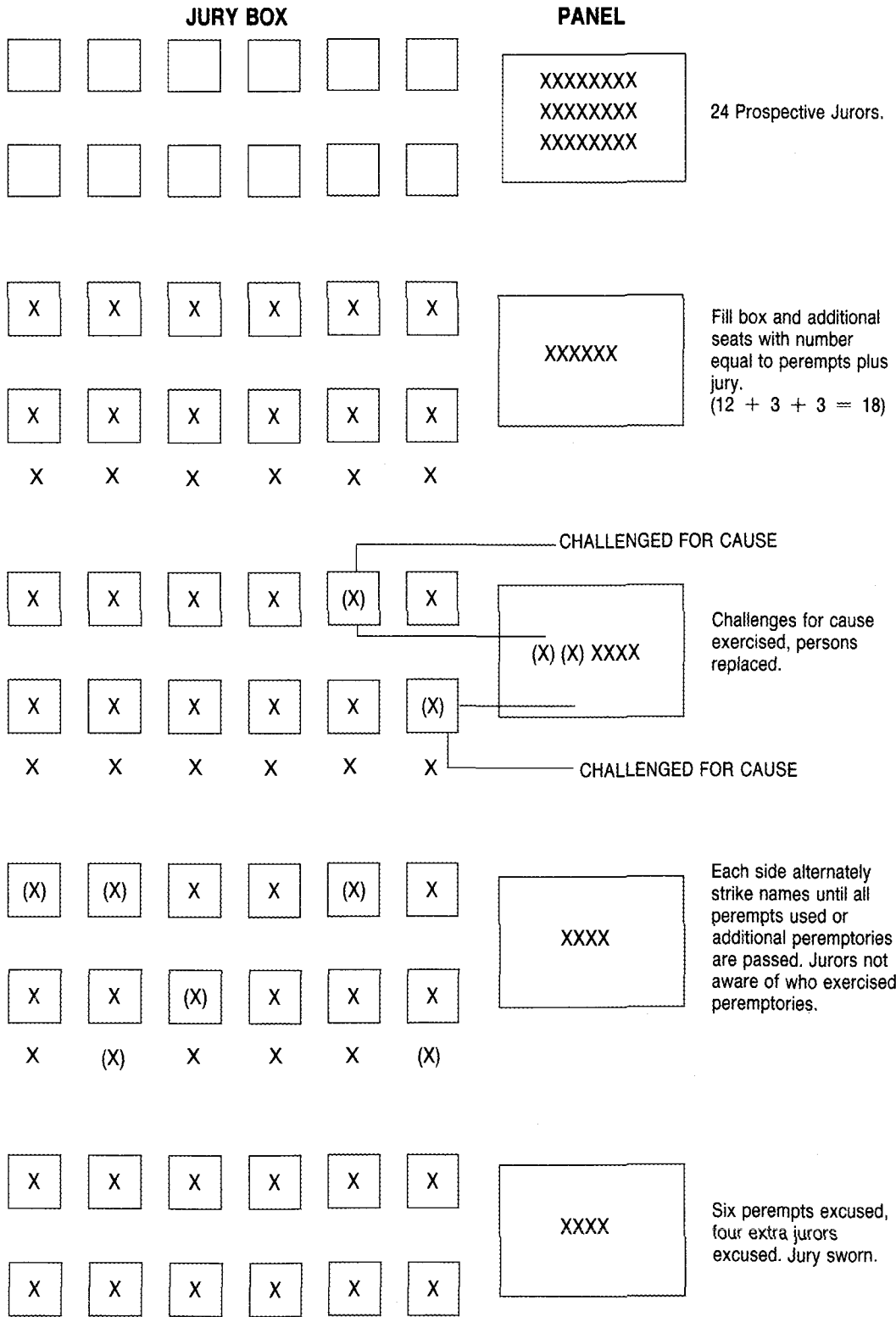
In this process, the prospective jurors are not aware of which party “struck” them. There is none of the embarrassment of individuals stepping down with a replacement drawn from the remainder of the panel. The parties see the entire array of prospective jurors for this jury, and there will be no further surprises. Challenges need not be held back for future replacements. This gamesmanship of holding back peremptories is the reason that the theoretical studies have concluded that the “struck jury” produces the least biased jury.

With the potential for a “*Batson* challenge,” the “struck jury” method provides the advantage that
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Figure 1

STRUCK JURY METHOD
12-Person Jury/ 3 Perempts per Side



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the judge can, in camera, examine the strikes exercised, discuss this with the parties, and enter a record of his findings. If a strike is disallowed, the strike can be changed to resolve the challenge. Since none of the prospective jurors are aware of this change, no prejudice is established and the voir dire process continues. The alternative is to dismiss the panel and request a new panel. In some courts, this can be readily provided; in others, this could present a significant delay in the trial process.

The other predominant jury selection method is the "strike and replace" or "jury box" method, as illustrated in Figure 2.¹¹ In this process, a number of prospective jurors equal to the jury size are randomly selected from the panel present in the courtroom and seated in the jury box. These prospective jurors are examined for cause and replaced, if necessary, with other panel members, then examined for cause. One party is then asked to exercise a peremptory challenge. The challenged person steps down, and another prospective juror takes his/her place.¹² This "strike and replace" continues until both sides have waived any remaining peremptory strikes or until the strikes have been exhausted. The strategy is to hold back on challenges, for the replacement may be more "needing" of a challenge than those previously selected.

Of the many variations seen in the courts, some conduct voir dire with groups of six persons using the struck jury concept ("California six pack") or in groups of four (Illinois). Once the group is accepted, no further challenge is permitted. In another method observed in Maryland and Massachusetts, persons selected from a large "cause free" group are accepted or rejected as they step forward to fill the jury box. Some judges permit further strikes at a later time of those previously accepted while some do not. The differences in all these variations represent interesting and curious strategies for the parties.

Comparing the previously set forth six goals of the voir dire process, the "struck jury" system is superior in terms of reduced juror movement, thereby minimizing embarrassment to jurors, little gamesmanship, and less possibility of bias or prejudice due to the obvious stepping down based on a party's challenge. The various methods are equivalent in terms of their ability to elicit information.

The issue as to which method is less time consuming is the only issue which might favor the "strike and replace" method. If few peremptories are usually exercised, and if the time to examine a prospective juror is the same, then the "strike and replace" method is faster since fewer persons need to be questioned. However, if most or all peremptory challenges are routinely used, then the "struck jury" method is preferred, for the break in the con-

tinuity of the stepping down and replacement time is greater.

If the time to question prospective jurors is extreme, then these savings in time are marginal. In that case, the other benefits are still felt to favor the struck jury method.¹³

In the previously cited cross-jurisdiction study and in the opinion of those having observed trials in many courts, the jury selection or voir dire process is the most variable portion of jury trial procedure. Typical voir dire times range from less than a half hour in some courts, to days in others. Proponents of each believe the system produces competent juries. The writers conclude, for the reasons set forth, that the "struck jury" system offers unique and worthwhile benefits and deserves serious consideration by those courts that have not yet had an opportunity to experience this jury selection method.

1. In New York, judges need not be present for the selection of civil juries and in Pennsylvania, judges are not present for voir dire in many courts. (No statutory authority. Rule 1105, 1006 of Rules of Criminal Procedure require presence of judge.)

2. *The Voir Dire Examination, Juror Challenge, and Adversary Advocacy*, by Gordon Bermant and John Shapard, Federal Judicial Center, Washington, D.C., Federal Judicial Center, November 1978.

3. *Standards Relating to Juror Use and Management*, 1983, Standard 7, at 68-74 (ABA, Chicago, Illinois).

4. Hans, Valerie, *The Conduct of Voir Dire; A Psychological Analysis*, 11 Justice System Journal 40, (No. 1, Spring 1986).

5. *Striking Jurors Under Batson*, Gerald F. Uelman, *Criminal Justice*, Fall 1987.

6. The authors acknowledge that no study has correlated existent bias on the jury with the degree or length of voir dire; however, judges and jurors find some aspects of voir dire to be repetitive and boring. In a recent cross-jurisdiction study, voir dire took up to 9 to 18 percent of the civil trial time and 20 to 37 percent of the criminal trial time. *On Trial, The Length of Civil and Criminal Trials*, Dale A. Sipes, National Center for State Courts, Publication R-104, 1988.

7. *U.S. v. Thomas*, 757 F.2d 1359.

8. We combine challenges for cause with excusal on the judge's own initiative as a causal challenge.

9. Some courts randomly select the alternates from the jury at the conclusion of testimony to avoid the "second-class jurors" situation.

10. See *U.S. v. Ricks*, 802 F.2d 731. If the list contains more names than the jury plus strikes, the judge should advise the parties whether the court will consider the names at the top, bottom, etc., to comprise the jury.

11. See *U.S. v. Blovin*, 666 F.2d 796.

12. One variation is to ask for "next challenges," then each side sends a note or ballot to the judge. One is blank, preventing the prospective jurors from knowing which party was responsible for their being excused.

13. One suggested way to reduce questioning time, and to assure the oral participation of every prospective juror, is to ask each person to stand and respond to some questions appearing on a chart or slide at the beginning of the voir dire process. In many courts, this quickly provides verbal "clues" to the parties and enables the attorneys to present follow-up questions that are specific in nature.

Figure 2

STRIKE AND REPLACE (BOX METHOD)
12-Person Jury/ 3 Perempts per Side

