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# COMMENT

## Affirmative Peremptory Juror Selection

Hans Zeisel\*

Tracey Altman, like so many of us, is distressed over the tendency of prosecutors systematically to remove distinguishable minorities from our juries. Until its recent overturn, the Supreme Court decision in *Swain v. Alabama*<sup>1</sup> fostered and secured this tendency. In her thoughtful note,<sup>2</sup> Altman suggests a way to arrest this trend: namely, that we replace our system of negative peremptory challenges with one in which the litigants affirmatively select the jurors they want. Since the recent overruling of *Swain*<sup>3</sup> will remove only the worst excesses of racial discrimination in the exercise of peremptory challenges, the idea of affirmative jury selection may retain its attractiveness. The following comment, therefore, pursues some of the implications of affirmative selection.

Rational peremptory juror selection is predicated on two conditions: that the prospective jurors form some kind of array that ranks them according to their desirability for trial, and that the lawyers know the shape of this array. If the trial goals of the two sides precisely oppose one another, the rank order of the jurors will be the same for both, albeit with the opposite sign. This ideal condition will be fulfilled if the litigants have complete foreknowledge of how each prospective juror would vote in the first ballot after trial.

That such differences in the predisposition of jurors exist is a fact firmly established by two pieces of research. The main evidence comes from a continuing naturally controlled experiment that monitors results in actual jury trials.<sup>4</sup> Additional evidence is provided by a special study conducted with the help of a quasi-experimental design.<sup>5</sup>

Knowledge of juror predispositions comes primarily from accumu-

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1. 380 U.S. 202 (1965).

2. Altman, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781 (1986) (student author).

3. See *Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

4. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

5. See Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978); see also notes 7-8 *infra* and accompanying text (describing experiment and its conclusions).

lated experience with actual jury trials. In the great majority of cases, the jurors, who have all seen and heard the very same evidence and the same instructions on the law, are divided at their tentative first ballot: Some vote guilty; some not guilty. What makes them differ must, therefore, lie in their personalities—the differing experiences, intelligence, and values they bring into the courtroom. These differences make them desirable jurors for one side and undesirable jurors for the other. The first ballot, in turn, controls the eventual verdict. In nine out of ten cases, the majority at the first ballot wins the verdict.<sup>6</sup>

The second requirement of a rational exercise of peremptory challenges—that the lawyers know whom they should challenge or try to retain—is less likely to be fulfilled in actual trial situations. In the above cited quasi-experiment, the peremptorily excused jurors in a dozen criminal trials were invited to stay in the courtroom and eventually vote as shadow jurors. That vote allowed us to learn whether peremptory challenges affect the verdict. It turned out that in some cases they do.<sup>7</sup> The experiment also allowed us to learn whether lawyers challenge the right jurors. It turned out that about half of the jurors they challenged would have helped them.<sup>8</sup>

The discussion that follows will therefore deal with two conditions: one that assumes perfect knowledge on both sides, and one in which the lawyers have only limited knowledge as to the desirability of the members of the jury venire. Finally, the special case of jury selection in capital trials will be considered.

We begin with the situation of perfect knowledge. Each of the following diagrams depicts a venire of twenty-four prospective jurors, ranked according to their desirability for the two litigating sides. At the two ends are the “most” and “least” desirable jurors. The labels, by definition, are reversed for the two sides.

In the traditional *voir dire* (as illustrated in Figure 1), if the lawyers know what is good for them, one lawyer will remove through peremptory challenges (indicated by an “X” in the diagram) the first six jurors on the left side, and the other lawyer will remove the six jurors on the right side. This selection will lead to the seating of the jurors in the center of the array. These jurors, farthest removed from the extreme positions, represent the best approximation to an unbiased jury.

In this and the following graphs, the jurors eventually seated are presented in solid black with an exclamation mark; the eliminated jurors are crossed out.

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6. H. KALVEN & H. ZEISEL, *supra* note 4, at 488.

7. Zeisel & Diamond, *supra* note 5, at 506-08.

8. *Id.* at 513-17.

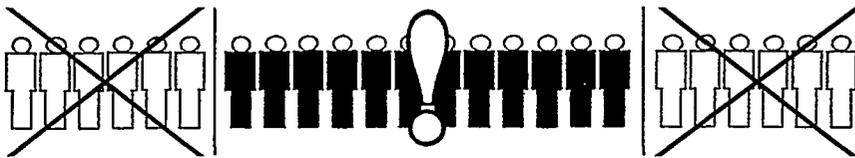


Figure 1

*Traditional Negative Selection: Each Side Has Six Challenges*

The affirmative selection process, in contrast, would result in the seating of the jurors at the two ends of the array, the ones *most* prejudiced in favor of each side. It would eliminate the twelve jurors in the center of the array, the desirable best approximation to the impartial jury.

As Figure 2 illustrates, each lawyer would see on the bench the six jurors he considered most undesirable, as well as the six most desirable jurors.

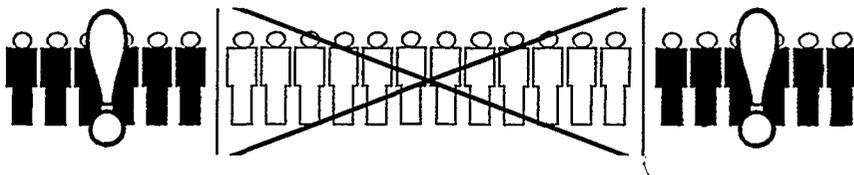


Figure 2

*Affirmative Selection: Each Side Has Six Challenges*

Compared to negative selection, then, affirmative selection produces juries whose members are farther apart from one another. The resulting imbalance, as Tracey Altman has pointed out, increases the likelihood of hung juries.<sup>9</sup> For our purposes, we will measure the distance between the jurors' ranks by the standard deviation of the scores of the twelve jurors selected.<sup>10</sup> In the perfect negative selection example (Figure 1), the jurors ranked 7 through 18 show a standard deviation of 3.0 ranks. In the case of affirmative selection (Figure 2), the jurors ranked 1 through 6 and 19 through 24 will have a standard deviation of 7.3 ranks. To allow each side to select twelve jurors affirmatively would not help. Presented with these two groups of twelve, comprising the entire venire of twenty-four jurors, the judge would be

9. See Altman, *supra* note 2, at 808-10.

10. The standard deviation, usually designated by the Greek letter sigma, is a more complicated relative of the mean deviation, which simply averages the distances of each member of the group from the mean distance of all members. The standard deviation first squares these deviations from the mean, then adds them up, then divides them by the number of members in the group, and finally takes the square root of that ratio

$$\left( \Sigma = \sqrt{\frac{\sum d^2}{N}} \right).$$

obliged to select six jurors from each group of twelve. And since random selection would be the only fair way of selecting them, the twelve sitting jurors would be but a half-size replica of the unexpurgated venire of all twenty-four jurors.

Another possibility is to allow each side to select eighteen jurors affirmatively, and to oblige the court to accept the twelve jurors on whom both sides agreed. As Figure 3 shows, however, the result of this selection mode would merely duplicate Figure 1, the traditional negative selection process that stops when the proper jury size of twelve is reached.



Figure 3

*Affirmative Selection: Each Side Has Eighteen Challenges*

Consider now the model in which the lawyers *believe* they know the rank order for all jurors, but in fact know it only for a few jurors, and what the lawyers believe they know about the remaining jurors is unrelated to their true rank order. Specifically, we will assume that both sides know the three jurors at the two extremes, but do not know the rank order of the eighteen jurors in the middle. In that case, the traditional negative selection method will produce a random selection from the eighteen jurors ranked 4 through 21 (as illustrated in Figure 4).

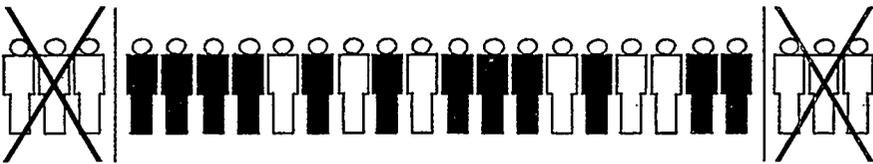


Figure 4

*Traditional Negative Selection with Imperfect Knowledge*

In the case of affirmative selection (Figure 5), the jury will consist of the six jurors ranked 1, 2, 3, 22, 23, and 24 plus six jurors selected randomly from the jurors ranked 4 through 21.

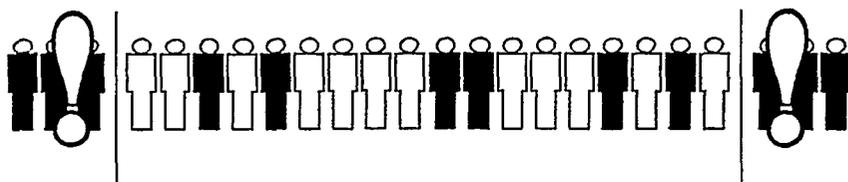


Figure 5  
*Affirmative Selection with Imperfect Knowledge*

The standard deviation of the negatively selected jury will be 4.8 ranks; for the affirmatively selected jury, it will be 5.2 ranks.

There is one other consideration that should affect this discussion. Suggesting reforms of the peremptory challenge system in criminal trials is bound to raise the question: What about civil trials? Although the numbers may differ, the system in both criminal and civil trials is essentially the same.

In civil as in criminal cases, the ranking of the array will be determined by whatever salient factor or factors affect juror attitudes in the particular case. The same venire will assume a different rank order depending on the case at issue; a rape case may produce a different rank order than a robbery. In civil cases, the variety of determining factors may be even greater.

There is one rare jury task, however, in which the main determining factor hardly changes from case to case; after a finding of guilty in a capital trial, the jury is asked to decide whether the death penalty should be imposed. This capital sentencing task is unlike any other our juries are asked to perform. And jurors are asked to make this far-reaching decision without any real guidance from the court. As a result, their discretion is unlimited. This means that the decision is left to the individual juror's sense of justice. That sense, in turn, is guided primarily by the juror's attitude toward the death penalty. Jurors who favor the death penalty are more likely to impose it in any given case than jurors who have reservations about capital punishment.

Since the law can offer little guidance as to which decision in a given case is the correct one, the Supreme Court has suggested that it be left to the community's sense of justice. In *Witherspoon v. Illinois*,<sup>11</sup> the Court developed this rationale in some detail: The decision on whether or not to impose the death penalty allows for much discretion, which the Court wants to be guided by the community's sense of justice. The law, therefore, entrusts this task to the jury as the representative of that community. But if persons with reservations about the death penalty are systematically removed from a jury, that jury no longer reflects society's sense of justice.<sup>12</sup>

11. 391 U.S. 510 (1968).

12. *Id.* at 518-23. There is also uncontested and probably incontrovertible evidence that

The Court in *Witherspoon* thus suggests that jurors with reservations about the death penalty are an integral part of the community, whose sense of justice should be represented on the jury. The following paradigm represents the dichotomy that governs jury selection in capital trials.

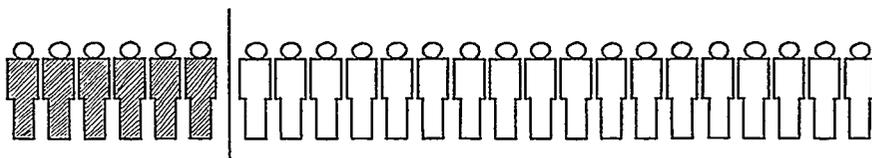


Figure 6  
*Typical Jury Venire in Capital Trials*

In this depiction of the typical jury venire (Figure 6), three-fourths of the jurors have no reservations about the death penalty, and one-fourth have such reservations, because this division closely mirrors their present share in the population. The latest Gallup Poll showed some 73 percent of our adult population to be in favor of the death penalty.

Under traditional negative selection procedures (Figure 7), the prosecutor will remove the six jurors with reservations. The defense lawyer will remove six of the remaining eighteen jurors, all of whom favor the death penalty. Further, the ample number of challenges available to the prosecutor in capital cases will also enable him to remove the jurors with reservations from among replacement jurors.

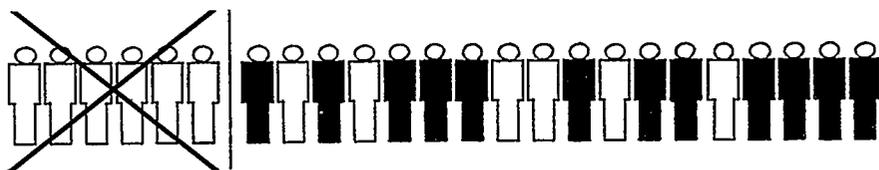


Figure 7  
*Traditional Jury Selection in Capital Trials*

Note that the situation is not symmetrical. There is no way for the defense to eliminate all jurors without reservations; there are simply too many of them. Thus, effectively prevented from making use of the important primary division between jurors with and without reservations, the defense is reduced to basing its selection upon secondary,

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a jury from which the jurors with reservations have been removed is more likely to vote with the prosecution on the issue of guilt. In *Lockhart v. McCree*, 106 S. Ct. 1758 (1986), the Court, for poorly explained reasons, accepted this evidence only *arguendo*, and then held that such a bias did not violate the defendant's constitutional right to an impartial jury.

less salient juror characteristics from among the remaining jurors who all favor the death penalty.<sup>13</sup>

It is worth spelling out here the seldom discussed procedural precondition that enables the prosecutor to remove all jurors with reservations. The pertinent voir dire examination of prospective jurors—whether conducted by the court or by the lawyers—typically begins with the question: “Is there anybody among you who has reservations about the death penalty?” The jurors who answer affirmatively are then further questioned as to whether their reservations are so extreme that under *Witherspoon* (and now under *Wainwright v. Witt*<sup>14</sup>) they qualify for removal for cause. The jurors whose reservations are not that extreme, identified as they are by the preceding examination, are then easily and automatically removed by the prosecutor’s peremptory challenges.

The courts could remedy this situation by limiting voir dire examination concerning jurors’ attitudes toward the death penalty, and allowing only such questions as are necessary to reveal whether a juror warrants removal for cause. The courts could prohibit all questions designed to identify the jurors with reservations who do not warrant such removal. So far, the courts have failed to order such a restructuring of the voir dire in capital trials.

In view of a prosecution practice that violates the Court’s pronounced need for community representation in capital trials, affirmative jury selection offers a possible alternative in such cases. To facilitate its acceptance, one might think of a compromise system that combines affirmative and negative selection: One-half of each party’s challenges could remain negative, while the other half could be made affirmative. This mode of jury selection conceivably might also solve the present iniquities arising from the fact that one jury now decides the issue of guilt as well as the sentence, although the juror disqualifications for those two decisions are not identical.

There is authority for treating capital trials differently from ordinary criminal trials, specifically with respect to the rules governing voir dire.<sup>15</sup> And there is venerable ancient precedent for the proposed solution of combining affirmative and negative jury selection. In the year 7 B.C., the Roman emperor Augustus issued an edict concerning the selection of jurors in capital cases in the city of Cyrene on the Lybian coast (the modern Shahhat):

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13. That this paradigm is a true reflection of the reality of juror selection in capital trials has been shown convincingly by an important empirical study. See Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982).

14. 469 U.S. 412 (1985).

15. The Court has often expressed special concern for procedural fairness in capital trials. See, e.g., *Turner v. Murray*, 106 S. Ct. 1683 (1986); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring); *id.* at 77 (Harlan, J., concurring); *Williams v. Georgia*, 349 U.S. 375, 391 (1955).

A Greek under indictment shall be given the right to decide, the day before the prosecution opens its case, whether he wants his jurors to be all Roman or half Greeks; and if he chooses half Greeks, then the balls shall be checked for equal weight [to prevent cheating] and the names shall be written on them, and from one urn the names of the Romans and from the other those of the Greeks shall be drawn until a total of twenty-five is obtained in each group. Of these the prosecutor may, if he wishes, dismiss one from each group, and the accused three out of the total, provided he does not dismiss either all Romans or all Greeks.<sup>16</sup>

Doesn't it all sound very modern?

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16. 2 ROMAN CIVILIZATION 37 (N. Lewis & M. Reinhold eds. 1966).