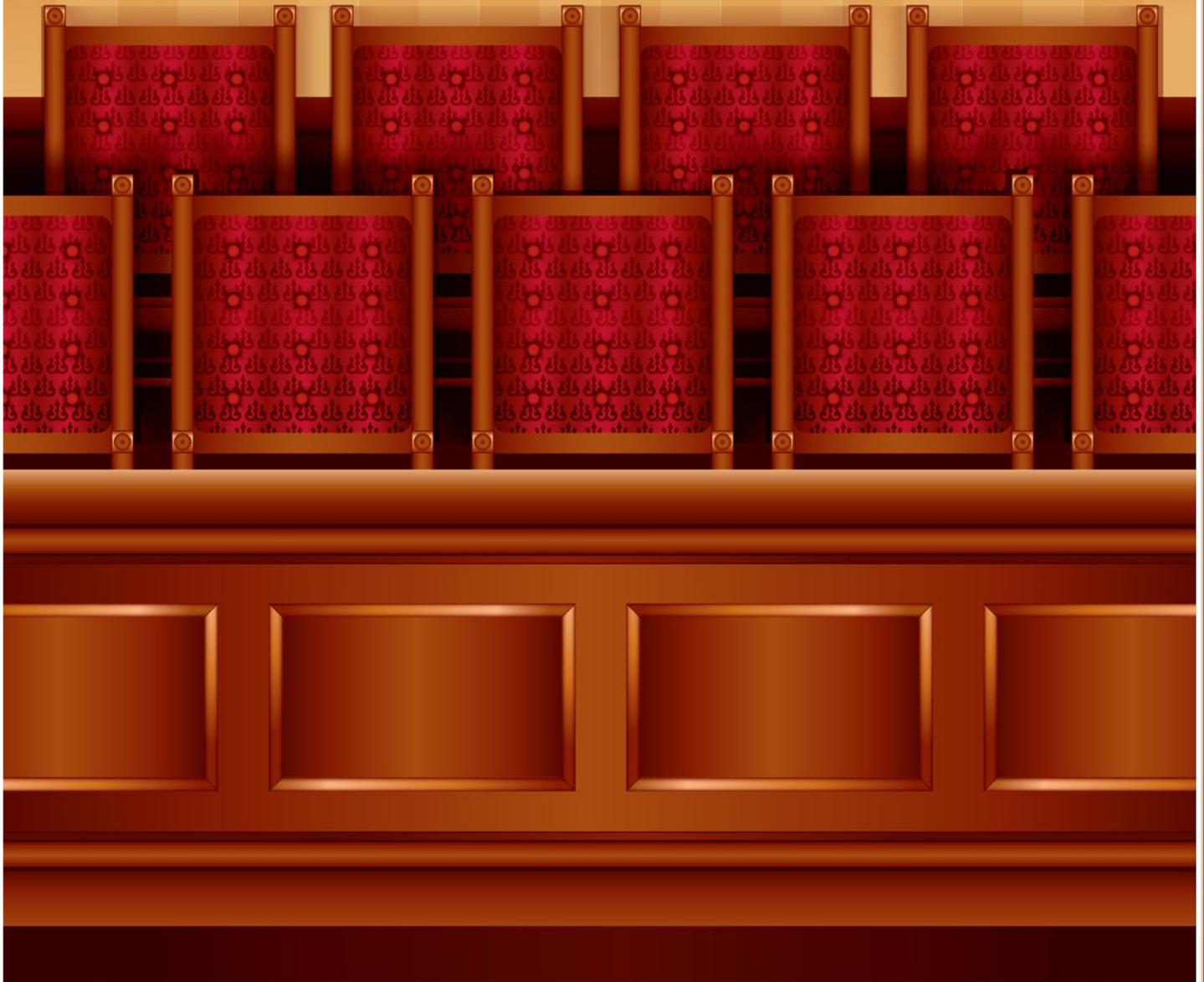


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## ACHIEVING DIVERSITY ON THE JURY:

JURY SIZE AND THE PEREMPTORY CHALLENGE



**Shari Seidman Diamond**

Shari Seidman Diamond is a Research Professor at the American Bar Foundation and is Howard J. Trienens Professor of Law and Psychology at Northwestern University School of Law. A leading empirical researcher on the jury process and legal decision-making, she has published extensively in both law reviews and behavioral science journals (<http://www.americanbarfoundation.org/uploads/faculty/6/diamondvita.dec09.pdf>). Her publications on juries have been cited by the U. S. Supreme Court, as well as by other federal and state courts. She has taught at the University of Chicago, Harvard, and the University of Illinois at Chicago, served as editor of the *Law & Society Review*, and was president of the American Psychology-Law Society. As a member of the ABA's American Jury Project, she helped draft the Principles for Juries and Jury Trials adopted in 2005. She currently serves on the Seventh Circuit Committee on Pattern Criminal Jury Instructions.

### **Emily Dolan**

Emily Dolan, a graduate of Indiana University, recently completed a Masters degree in Social Sciences at the University of Chicago, where her thesis research focused on the functioning of juries.

# Achieving Diversity on the Jury:

## Jury Size and the Peremptory Challenge

ABF Research Professor Shari Diamond is one of the country's leading experts on the jury system. In her research, Diamond attempts to understand the functioning of the jury by analyzing it from many different angles, drawing insights from comprehensive empirical analyses.

Readers familiar with Diamond's work will recall the groundbreaking Arizona Filming Project, where, along with collaborator Mary R. Rose, Diamond is mapping the behavior of jurors in 50 actual civil trials held in Pima County, Arizona. Diamond and Rose have published several articles on how these jurors talk about evidence, how they evaluate expert testimony, how they understand jury instructions, and how they reach their decisions, and are working on a book that will further describe and analyze their findings. In a recent article, however, Diamond shifts focus to examine also the structural and procedural factors that affect the compositions of juries. In "Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge," (*Journal of Empirical Legal Studies*, 2009) Diamond and co-authors Destiny Peery, Francis J.

Dolan, and Emily Dolan, use an unusual data set of 277 civil jury trials in Cook County, Illinois to examine the effects of peremptory challenges and jury size on the diversity of juries.

“The perceived fairness of the jury system depends in part on its ability to reflect a cross-section of the community,” the authors state. Indeed, the Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to trial by a jury drawn from the community within which the alleged crime took place (the Seventh Amendment also guarantees trial by jury in civil cases). In a heterogeneous nation such as the United States, in many jurisdictions a true cross-section of the community would be ethnically and/or racially diverse. Thus, the authors decided to focus on the “influence of jury selection and jury size on minority representation” on juries.

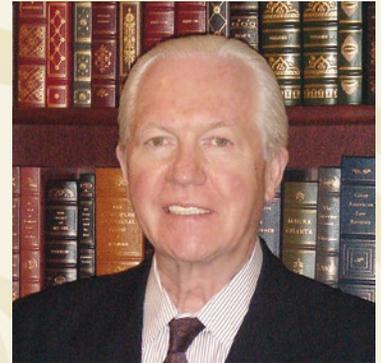
Diamond was able to draw on a rich body of new empirical evidence, thanks to a fruitful collaboration with the Hon. Francis J. Dolan, a now-retired judge in the Circuit Court of Cook County, Illinois. Over the course of six years on the bench in a high-volume civil courtroom, Judge Dolan systematically collected and digitized data on 277 trials in his call, involving both large and small juries. Thanks to Judge Dolan’s innovative efforts—which he undertook initially to meet a practical managerial need rather than to develop a research

project—the researchers were able to analyze the effects on jury composition of jury size and the peremptory challenge.

### THE SHRINKING JURY

As they report on their research, Diamond and co-authors begin by examining the issue of jury size. The Sixth and Seventh Amendments call for “a jury” in criminal and civil trials but say nothing explicit about its size. Over the years, the matter has been debated, with defenders of the 12-person jury maintaining that the Constitution’s silence on the matter meant that the Framers accepted the 12-person jury as “an implicit part of what it meant to be a jury.” Though the Supreme Court confirmed this interpretation in the 1930 case of *Patton v. United States*, in 1970, in the case of *Williams v. Florida*, the Court shifted its opinion and ruled that juries consisting of six members were constitutional. Without citing any empirical evidence to support its opinion, the Court wrote, “the difference between the 12-man and six-man jury in terms of the cross-section of the community represented seems likely to be negligible.” The implication of this opinion was, as Diamond and co-authors state, “according to the Court...six- and 12-member juries would not differ in representativeness or decision-making behavior.”

A number of states followed



### Hon. Francis J. Dolan (Ret.)

Hon. Francis J. Dolan (Ret.) has spent more than 37 years in the legal profession, as a member of the judiciary, as a private sector practitioner and practicing in public service law. Judge Dolan began his legal career in the Corporation Counsel’s Office of the City of Chicago. For twenty years he was owner and principal of Frank J. Dolan & Associates, where he engaged in general business and commercial litigation, representing corporate clients in state and federal courts. From 2001 until 2008 he served on the Civil Jury Trial Section of the First Municipal District of Cook County, Illinois. Judge Dolan now practices alternative dispute resolution as principal of Judicial Conflict Resolution, Inc., based in Chicago, IL.

### Destiny Peery

Destiny Peery is a Ph.D./J.D. student at Northwestern University, specializing in psychology and law. She earned her undergraduate degree from the University of Minnesota, and in 2004 spent eight weeks at the American Bar Foundation as a Summer Research Diversity Fellow, where she was mentored by Shari Diamond.

Florida's lead and reduced jury sizes, "particularly in civil cases, primarily in the interest of reducing costs," the authors note. Subsequent studies in the 1970s, though, criticized the Court's decision, citing statistical theory and evidence from simulation studies. As Diamond, et al. note, however, "neither statistical theory nor the simulation method...could directly test whether the screening process that potential jurors go through during jury selection modifies the impact of jury size on jury representativeness." A 1997 study did include a field study comparing eight- and 12-person juries, and found only a marginal difference in the representation of minorities on the juries. However, the mathematical difference between eight and twelve and six and twelve would seem to predict a greater chance of disparities between six and twelve person juries, which were not examined in the 1997 research. Thus, the researchers hoped to fill the evidence gap with their large-scale empirical study of six and twelve person juries.

### THE PEREMPTORY CHALLENGE AND THE CALL FOR ITS ELIMINATION

Diamond and co-authors next turn to consider the history of the peremptory challenge—an attorney's request that a juror be removed without assigning any reason—and calls for its elimina-

tion. In the United States peremptory challenges have been used in federal criminal trials since 1790 and in civil cases since 1872. Currently, every state provides the right to peremptory challenges in both civil and criminal trials, though the number of challenges permitted varies widely. As the authors explain, during the Civil War and Reconstruction, as Congress and the Supreme Court invalidated the exclusion of blacks from jury venires, attorneys began to challenge jurors on the basis of race, in an effort to create all-white juries. The Supreme Court did not confront the issue of race-based peremptory challenges until 1965 in *Swain v. Alabama*, "ruling," the authors state, "that the Equal Protection Clause prohibited state prosecutors from racially discriminating in their use of peremptory challenges." *Swain* had little practical effect, however, as the standard of proof of racial discrimination it required was extremely demanding. In a subsequent case, *Batson v. Kentucky* (1986) the Court "developed a series of procedures designed to prevent the exercise of race-based peremptory challenges." Though the procedures introduced in *Batson* have had some success, the authors state, "*Batson* and its progeny, like *Swain*, have failed to achieve race-neutral exercise of peremptory challenges, prompting some scholars and other court observers to argue that peremptory challenges should be abolished."

Despite this criticism, the authors note that, "little empirical work has been done to assess the potential role of race in jury selection in civil cases." In the research leading to their article, the authors analyzed Judge Dolan's database, seeking to "compare how peremptory challenges were exercised on whites and minorities, as well as to control for competing and potentially confounding influences on peremptory challenges, like socioeconomic status." Judge Dolan's data allowed the researchers to analyze the effects of both jury size and the peremptory challenge on the composition of the same juries.

The analysis was guided by the following questions:

- 1) How does jury selection affect jury composition? Specifically, how do excuses for cause and peremptory challenges by plaintiffs and defendants affect minority representation on the civil jury?
- 2) Once jury selection is complete, how does jury size affect the representation of minorities on the jury? Specifically, following jury selection do six-member juries have less minority representation than 12-member juries?

3) How do jury size and peremptory challenges compare in their effects on minority representation?

**THE DATA: PRACTICAL SOLUTIONS LEAD TO A RESEARCH TREASURE-TROVE**

Between 2001 and 2007 now-retired judge Hon. Francis J. Dolan kept detailed records on the juries and case characteristics for the majority of the 300 trials over which he presided in his civil trial courtroom in the First Municipal District of the Circuit Court of Cook County, Illinois. Judge Dolan began collecting the data in response to the practical problems he confronted in the management of his high-volume courtroom, which averaged 550 new cases per year. In order to stay ahead of the flow of cases, maximize the efficiency of his courtroom, and better understand the characteristics of his call, Judge Dolan recorded data on the demographics of over 6,000 persons questioned during voir dire and serving on juries, on the monetary amounts awarded by jury verdicts and through arbitration, duration of trial proceedings, and many other case characteristics. All information was recorded in digital format, allowing for real-time reporting on cases, as well as database searches and statistical analysis.

Over time, Judge Dolan found the comparative data on monetary

awards particularly useful in helping opposing parties, all of whom had gone through mandatory non-binding pre-trial arbitration, reach settlements. Acutely aware of his responsibilities to all persons in his courtroom, including the citizens who give their time to serve as jurors, Dolan found the jury demographics data helped him better understand the role of the community in the resolution of cases. Judge Dolan summarized some of the findings from his data in a manual, “Judicial Case Management of Civil Jury Trials: Marshaling Information on Cases, Trials and Juries with a Modest Use of Information Technology,” (2008), which he hopes will be useful in encouraging fellow judges to embrace information technology and the possibilities it offers for judicial administration. The second product to come out of Dolan’s trial database, after the manual, was the collaboration with Diamond, Peery and Emily Dolan.

Of the 277 cases in the database, the majority involved low-impact motor vehicle collisions “with alleged soft-tissue injuries and/or subrogation claims for property damage by insurance companies.” The remainder involved “a variety of other tort claims, actions for breach of contract, and other miscellaneous claims.” The case sample included 89 six-person juries and 188 12-person juries. (All cases were tried by six-person juries unless either party demanded a 12-

person jury and paid additional court costs.) Lawyers for the plaintiff and the defense were each allotted a maximum of five peremptory challenges, with additional challenges permitted if an alternate juror was to be chosen or if there were multiple parties on a side. The original venire included slightly more females than males, and the mean juror age was 43.1 years. As the authors note, “the racial/ethnic composition of the venire was 63.3 percent white, 25.0 percent black, 8.1 percent Hispanic, 3.4 percent Asian or other, and 0.2 percent unknown.”

As each jury was formed, the judge collected data on age, sex, race, and zip code of each prospective juror as he or she underwent questioning. Age and zip code data were obtained from the juror cards prospective jurors had filled out before arriving at court. The judge recorded sex and race based on his observations of the individuals.

Race, of course, is a contested category, the authors note, so the judge’s observations were checked against statistics from the 2000 US Census. The residential pattern of Cook County, Illinois, from which the venire was drawn, is highly racially segregated. The authors “computed the percentage of blacks, Hispanics and whites in each of the 170 zip codes represented by jurors who went through jury selection in the courtroom and correlated that percentage with the percentage of individuals

from those groups residing in that zip code according to the 2000 US Census...the results indicate substantial consistency between the percentage in the courtroom, as determined by the judge's observations, and the percentage in the Census zip code data..." To estimate juror socioeconomic status, the authors obtained the median family income from the 2000 Census for the zip code where each juror lived.

The data collected from the 277 trials were so robust that the authors were able to use it to examine several aspects of jury formation. Specifically, they were able to "examine the operation of jury selection, measure directly how the exercise of peremptory challenges by plaintiffs' and defendants' attorneys affects jury composition in civil cases, and examine how the results of jury selection played out on six- and 12-member juries."

## A CLOSER LOOK AT JURY SELECTION

Over the years, critics of the peremptory challenge have held that, despite safeguards, the practice allows for racial and other forms of discrimination in jury selection. Indeed, Diamond and co-authors did find systematic patterns of selection in the peremptory challenges in the trial data they examined. When the peremptory challenges were analyzed, the authors found that "plaintiffs

removed fewer blacks, fewer females, and wealthier jurors...defense attorneys removed more blacks and poorer jurors." In particular they found that the defense excused 25.3 percent of available black males and 21.5 percent of available black females, but only 13.4 percent of available non-black males and 15.4 percent of non-black females.

Yet, when looked at together, the patterns of peremptory challenges of the plaintiff and defense balanced each other out. As the authors found, "overall, despite patterns of excuse that were systematically related to racial characteristics that attorneys are legally prohibited from using as a basis for peremptory challenge, the pool of available jurors remained essentially unchanged by peremptory challenge. Countervailing patterns of excuse produced the equilibrium." However, their subsequent analysis of the effect of jury size on jury composition produced very different findings.

## THE EFFECTS OF JURY SIZE ON JURY COMPOSITION

If jury members were randomly selected from the venire, sampling theory would predict that smaller (six-person) juries would be less representative of the overall composition of the venire than larger (12-person) juries. But, of course, as the authors note, "jurors selected to decide a case...are *not* randomly sampled."

Throughout the voir dire process they may be dismissed for cause or by peremptory challenge.

Diamond and co-authors examined the composition of each jury in the sample. They found, most strikingly, that jury size had a significant impact on the number of African Americans on a jury, with fewer African Americans on the smaller juries. As the authors state, "while 28.1 percent of the six-member juries lacked even one black juror, only 2.1 percent of the 12-member juries were entirely without black representation...more than half (58.3 percent) of the six-member juries had one or fewer black jurors, while fewer than one in five (17.8%) 12-member juries were in that category. Nor is the underrepresentation simply proportional, which would occur if juries of both sizes were equally likely to have one in six black jurors (i.e., 1 in 6, 2 in 12). Instead, 58.3 percent of six-member juries had one-sixth or fewer black jurors, while 37.7 percent of 12-member juries had one-sixth or fewer black jurors."

The authors point out that a random draw of jurors from a venire that was 25% African American, as was the population in the venire studied, would produce a 0.455 probability of obtaining two or more jurors of color on a jury of six, while the probability would be 0.842 of obtaining two or more such jurors on a jury of twelve. In the actual juries under study the

proportions were 0.417 and 0.822 respectively. This result, varying only slightly from random chance, shows that “the choices exercised by the parties during voir dire, even though systematically related to race, did not affect the probabilities of minority representation,” the authors state. The authors’ earlier finding that peremptory challenges on both sides tended to cancel each other out held up regardless of jury size. The authors conclude that, “these robust effects answer the question of whether we can generalize from statistical sampling theory for predictions about the effects of jury size postselection: we can.”

If the peremptory challenge has only a miniscule effect on the representation of minorities on the jury, in spite of a pattern of “systematic relationships between juror race and the side excusing the juror,” what effects does it actually have, and what is its actual function?

## ACHIEVING IMPARTIAL AND REPRESENTATIVE JURIES

The authors argue that the peremptory challenge functions as a “safety valve” that allows the litigants to remove a juror whom the judge has not removed for cause. Judges may have a hard time evaluating a juror’s response to questions; if a juror claims to be able to be fair, the judge may have to evaluate “imperfect cues”—

such as hesitation. “The availability of the peremptory challenge enables a litigant to remove a juror who would not evoke an excuse for cause from a judge unless the juror explicitly ‘confessed’ to an inability to be fair, a safety valve that should not lightly be ignored,” the authors state. Furthermore, even if peremptory challenges fail to weed out “jurors who would find it difficult to decide the case based on the evidence, those challenges still play a role in ensuring that litigants feel that they have been treated fairly.” Thus, the peremptory challenge contributes to litigants’ perception that the system is fair.

Further empirical research is needed to identify whether there is an optimal number of peremptory challenges. A large number of peremptory challenges “makes a race-based challenge pattern more available to an attorney who chooses that strategy,” the authors note, but it also makes such a pattern more detectable. On the other hand, “retaining a limited number of peremptory challenges for litigants to exercise without having to prove juror bias to the judge can strike the balance between respecting citizen promises to be fair and providing litigants with both fairness and the appearance of fairness,” the authors state. To evaluate the optimal number of peremptory challenges researchers will need to “examine challenge behavior and effects in jurisdictions with more peremptory

challenges and lower percentages of minorities in the jury pool,” the authors note.

In the meantime, however, the authors conclude that their research demonstrates one solution to the problem of jury representativeness. As they state, “while so much attention has been directed toward remedying peremptory challenge, a far more powerful source has been undermining the representativeness of juries...the 12-member jury produces significantly greater heterogeneity than does the six-member jury. If increasing diversity in order to better represent the population is a goal worth pursuing for the U.S. jury, the straightforward solution—the key—is a return to the 12-member jury.”

Diamond, Peery, Dolan and Dolan report on this research in “Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge,” *Journal of Empirical Legal Studies*, Vol. 6, Issue 3, September 2009. 

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IF YOU ARE INTERESTED IN SUPPORTING RESEARCH ON THE JURY OR OTHER IMPORTANT ABF INITIATIVES, PLEASE CONTACT LUCINDA UNDERWOOD AT 312.988.6573.

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