

Bill of Rights in Action



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A JURY OF YOUR PEERS



When a U.S. citizen aged 18 or over receives a jury summons, like those pictured here, they are obligated to report for jury duty, unless they have a legally permissible excuse.

A jury of one's peers today in the United States refers to the right to a trial by an impartial jury chosen from a cross-section of the community. The Sixth Amendment to the U.S. Constitution guarantees this right. But this right has not always been protected when potential jurors were excluded because of their race, ethnicity, or gender.

Article III, Sec. 2, of the U.S. Constitution states that all crimes, except impeachment, "shall be by Jury, and such Trial shall be held in the State where the said crimes shall have been committed. . . ." However, this provision was for federal crimes only when enacted and did not apply to the states.

The Sixth Amendment, set forth in the Bill of Rights, expanded the right of federal criminal jury trials to be speedy, public, and decided by *impartial* jurors in the location where the alleged crime had been committed. The Seventh Amendment guaranteed a trial by jury in certain *civil court* cases.

A criminal case is one in which a defendant is accused of committing a crime (breaking a criminal law) and usually faces a punishment of jail or prison. A civil

case is any other dispute, including business, family, immigration, and landlord-tenant disputes.

After the Civil War, nearly all the fundamental rights in the Bill of Rights, including the right to a jury trial, were applied to the states by the newly enacted 14th Amendment. The Equal Protection Clause in the 14th Amendment prohibited any state "to deny to any person within its jurisdiction the equal protection of the laws."

How Jury Selection Works

Most criminal and civil trials in the U.S. today are conducted in state courts as the federal judicial system is much smaller. In addition, one can only bring a criminal or civil claim in federal court if there is a specific federal law that allows it. Most criminal and civil cases settle before trial, so only a small percentage of them ever reach a jury.

By tradition, criminal trials have 12 jurors, although some states have as few as six. Juvenile defendants and adults facing a maximum sentence of six months or less do not have a right to a jury trial. A defendant can

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Some Future Issues of Bill of Rights in Action Will Only Be Available Electronically!

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Potential jurors waiting to enter a courtroom for the jury selection process.

waive or give up his or her right to a jury trial if the prosecutor agrees.

The jury pool is the group of potential jurors who are supposed to represent a cross-section of the people living in the community where the trial is taking place. However, each jury pool and the jurors selected from it do not have to represent an exact proportion of a community's racial, ethnic, or gender makeup.

The juror-selection process involves the trial judge and sometimes attorneys on both sides of the case questioning the potential jurors from the jury pool. If the judge decides a potential juror is clearly biased for one side or the other so that he or she cannot be impartial, or is otherwise unqualified, the judge will dismiss the person *for cause*. The attorneys also try to determine if a potential juror seems to be biased for or against one side or the other, even if that juror is not so biased that he or she should be dismissed by the court for cause.

During the jury-selection process in criminal and civil trials, each attorney has a certain number of *peremptory challenges*, often called “strikes,” to dismiss a potential juror without having to state any reason. Sometimes, an attorney might perceive a bias that is not clear enough to cause the court to dismiss that juror for cause. For example, if the defense attorney in a criminal case thinks a potential juror is predisposed to believe a police officer instead of his client, the defense attorney can use a peremptory challenge and strike that person. But there are limits if attorneys are accused of challenging jurors because of their race, ethnicity, or gender.

An *impartial* jury is important because it will hear different versions of the facts during a trial from both the *prosecution* and the *defense* in a criminal case, and from the *plaintiff* and the *defendant* in a civil case. The jury, not the judge, judges the credibility of witnesses and decides the verdict.

In criminal cases, the prosecution attorneys represent the state. Defense attorneys represent accused defendants. The prosecution must prove to the jury that the defendant is “guilty beyond a reasonable doubt”

which means the jury can only convict a defendant if there is no reasonable explanation for the crime other than that the defendant did it.

In civil cases, the standard of proof is lower than “beyond a reasonable doubt.” It is usually “preponderance of the evidence,” meaning that the jury need only find that there is greater than a 50 percent chance that one side's claim is correct.

The U.S. Supreme Court recently held in *Ramos v Louisiana* that the U.S. Constitution requires a unanimous verdict in criminal cases, and that the 10-2 vote for conviction in that case was not enough.

Thus, a single juror who votes against the other jury members could prevent a verdict, resulting in a *hung jury* and possibly a new trial. Some jurisdictions require a unanimous verdict in civil jury trials while others do not.

The judge decides the sentence in most criminal cases when there is a guilty verdict. However, in death penalty cases, the jury typically decides whether capital punishment is appropriate in a second trial following a determination of guilt in the first trial.

Exclusion of Jurors Because of Their Race

Even after the 14th Amendment was ratified, Southern states passed laws allowing only white males to serve on juries. In 1880, the U.S. Supreme Court ruled in *Strauder v. West Virginia* that states that passed laws excluding Black people from juries because of their race violated the Equal Protection Clause. The Court declared Black people a *protected class* under the 14th Amendment.

Southern states persisted in passing laws that still discriminated against African Americans. For example, in order to vote, Black people often had to pass purposely tough reading tests that were not required of white people. Potential jurors were then chosen from all-white voter lists.

Exclusion of Jurors Because of Their Ethnicity

In 1951, Pete Hernandez, a Mexican-American man, was indicted for murder by an all-white grand jury in Jackson County, Texas, and convicted by an all-white trial jury. He was sentenced to 99 years in prison.

Hernandez's lawyers appealed to the highest court of Texas. They argued that Mr. Hernandez was racially white but ethnically Mexican American. They pointed out that no Mexican-American jurors had been chosen from jury pools in Jackson County for 25 years, even though nearly 15 percent of the county's population consisted of persons of Mexican or other Latin American ancestry.

The Texas high court affirmed Hernandez's conviction, saying that Mexican Americans were “white” and not a protected class under the 14th Amendment. Hernandez appealed to the U.S. Supreme Court.

Hernandez v. Texas (1954)

Chief Justice Earl Warren wrote the unanimous 9-0 decision in favor of Hernandez. Warren wrote that the 14th Amendment does not only apply to issues of discrimination between white people and Black people. Warren found that Hernandez belonged to a “distinct class” that had long suffered discrimination in Jackson County. Warren cited examples of segregation of Mexican Americans in Jackson County, including in schools, restaurants, and even the county courthouse restrooms where Hernandez was tried.

Warren concluded that, whether intentionally or not, the fact that no Mexican-American juror had been selected in the county for 25 years was proof enough of systematic discrimination against the ethnic group to which Hernandez belonged.

The unanimous Supreme Court ruled that, like African Americans, Mexican Americans and all other groups that could prove discrimination because of their ancestry or nationality were protected classes under the 14th Amendment’s Equal Protection Clause.

Pete Hernandez was retried with a more representative jury that again found him guilty. He was sentenced to 20 years in prison.

Exclusion of Jurors Because of Peremptory Challenges

After the *Hernandez v. Texas* decision in 1954, excluding jurors because of their race or ethnicity seemed to be finished. But some lawyers still tried to find a way around this ruling using the long tradition of peremptory challenges.

In 1965, the U.S. Supreme Court in *Swain v. Alabama*, enabled lawyers to use their peremptory challenges to exclude persons just because of their race. The Court ruled that unless a Black defendant could prove a state or county systematically discriminated against African Americans, prosecutors could use their peremptories to strike Black jurors.

Batson v. Kentucky (1986)

James Batson, a Black man, was charged with burglary in Kentucky. During jury selection, the prosecutor used peremptory challenges to exclude all four Black members of the jury pool for Batson’s trial jury. An all-white jury then convicted Batson, and the judge sentenced him to 20 years in prison.

Batson appealed to the Kentucky Supreme Court, which affirmed the conviction because he failed to prove a systematic exclusion of African Americans from Kentucky juries. Batson appealed to the U.S. Supreme Court.

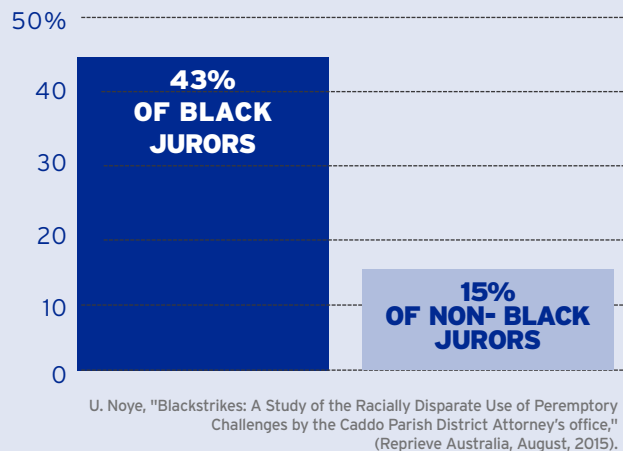
Justice Lewis Powell wrote the 7-2 majority decision for Batson. Powell first noted that the defense lawyers had made a reasonable challenge to the prosecutor that he had used his peremptories to exclude persons from Batson’s jury solely “on account of their race.”

Secondly, Powell wrote that the trial judge should have held a hearing on the defense challenge to the

PERCENTAGE OF JURORS STRUCK BY RACE

of 8,318 qualified jurors

Based on data collected from more than 300 felony jury trials in Caddo Parish, Louisiana, between 2003 and 2012.



prosecutor at the time the prosecutor made the challenge. The burden then would have shifted to the prosecutor to give neutral reasons for excluding the African Americans from Batson’s jury. An example of a neutral reason would have been that the juror was not excluded for his race but because he had prior negative experiences with the police that could give him a bias.

Powell concluded that peremptory challenges that excluded African Americans only because of their race violated the Equal Protection Clause. Later Supreme Court decisions extended the “Batson challenge” to ethnic groups that had been victims of discrimination. From then on, persons in protected classes only had to show discrimination against jurors in their own trials, not in jury pools generally.

James Batson decided not to risk a retrial and pleaded guilty. The court sentenced him to five years in prison.

The Batson challenge has been criticized by some because the “neutral explanations” given by attorneys for excluding jurors because of their race or ethnicity have almost always been accepted by trial judges. Supreme Court Justice Thurgood Marshall, in agreeing with the majority decision in *Batson*, commented, “The decision today will not end racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.”

Justice Marshall believed that it is often difficult for judges to determine if the racially neutral reason offered to strike a potential juror was true or just a convenient excuse for wanting to strike Black jurors. (Of course, if there were several other African Americans in the jury, and the prosecutor did not seek to strike them, this would suggest that the prosecutor’s racially neutral reason was truthful.)

In a 2016 case, *Foster v. Chapman*, the Supreme Court reviewed the 1987 death penalty conviction of an African-American defendant. The Supreme Court read internal documents from the prosecutor's office that revealed the prosecutor's plan to use peremptory challenges to exclude Black jurors. This contradicted the "neutral explanation" the prosecutor presented to the judge for excluding them, a clear violation of the Equal Protection Clause.

Exclusion of Jurors Because of Their Gender

Until well into the 20th century, many states barred or restricted women from serving on juries. Even shortly after women gained the right to vote in 1920, only 18 states and the Territory of Alaska allowed women on juries. In 1961, Alabama became the last state to stop barring female jurors.

J. E. B. v. Alabama (1994)

In a civil case, the state of Alabama, acting on behalf of T.B., the mother of a minor child, was suing J.E.B., the alleged father, for *paternity* and child support. (The court used initials to protect the privacy of the plaintiff mother and male defendant.) During jury selection, Alabama used its peremptory challenges to remove 9 out of 10 potential male jurors and J.E.B. used one of his peremptory challenges to remove the last male in the pool. The trial jury ended up all-female. The defense raised a *Batson* challenge, arguing that it should be extended to forbid gender-based peremptory challenges. But the trial judge rejected this. The jury found J.E.B. to be the father and the judge ordered child support.

J.E.B. appealed to the U.S. Supreme Court, claiming he was discriminated against because of his gender when Alabama excluded 9 out of 10 male jurors solely on the basis of their gender. Alabama claimed that it acted reasonably when it used its peremptories. It believed that male jurors were more likely to be sympathetic to a man in a paternity case, while women would be more favorable to the mother.

In a controversial decision, Justice Harry Blackmun wrote the 6-3 majority opinion in favor of the male defendant, J.E.B., rejecting Alabama's arguments because they were based on "group stereotypes rooted in, and reflective of, historical prejudice."

Blackmun concluded that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender." He also said that it was improper for Alabama to assume that a person will be biased in a particular case simply because of the person's gender.

In a dissent to the *J.E.B. v. Alabama* decision, Justice Antonin Scalia warned against the elimination of all peremptory challenges, an important right of the accused. He wrote, ". . . the Court imperils a practice that had been considered an essential part of fair trial since the dawn of [English] common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions."

A jury of one's peers continues to be defined. Current federal law prohibits jurors from being excluded from jury service "on account of race, color, religion, sex, national origin, or economic status." In 2021, the House of Representatives passed a bill that would add a person's status as lesbian, gay, bisexual, or transgender (LGBT) to that list. Some jurisdictions already prohibit exclusions of LGBT people. But to expand the exclusion nationwide, the Senate would need to pass the bill, too, and the president would need to sign it into law.

WRITING & DISCUSSION

1. Should we do away with all peremptory challenges? Why or why not?
2. Do you agree with the U.S. Supreme Court decision in *Ramos v. Louisiana* that requires a unanimous verdict in criminal cases? Why or why not?
3. Should we do away with juries and leave it up to the judge to decide criminal cases? How about civil cases? Why or why not?

ACTIVITY: What Should the Judge Do?

The Supreme Court has ruled that potential jurors cannot be excluded solely because of their race, ethnicity, or gender (male or female). In small groups, decide what you think the trial judge in the following jury selection cases should do.

1. A gay man is being sued civilly by a straight man for not paying what is owed under a contract. During jury selection, a potential juror says that he is gay and that he can be an impartial juror. The plaintiff's lawyer uses a peremptory challenge to exclude him. What should the judge do?
2. A woman is charged criminally with stealing money from her own workplace. A potential juror is a businessman who is going through a divorce with his wife. He says he can be impartial in this trial, but the defense attorney fears that he will be biased against his client. The defense attorney uses a peremptory challenge to exclude him. What should the judge do?
3. A man is charged with murder, carrying a potential death-penalty sentence. During jury selection, a jury pool member says he is personally opposed the death penalty. He is willing to serve on the trial jury to determine guilt or innocence, but not to serve on the jury at the sentencing phase of the trial. The prosecutor asks the judge to exclude him for cause. What should the judge do?
4. A woman who is a Christian church member is being sued for civil trespassing. During jury selection, the plaintiff's lawyer uses peremptory challenges to exclude all Christians, even though some say they can be impartial jurors. What should the judge do?

Standards Addressed

A Jury of Your Peers

California History-Social Science Standard 12.2: Students evaluate and take and defend positions on the scope and limits of rights and obligations as democratic citizens, the relationship among them, and how they are secured. (1) Discuss the meaning and importance of each of the rights guaranteed under the Bill of Rights and how each is secured. . . . (3) Discuss the individual's legal obligations to obey the law, serve as a juror, and pay taxes.

California History-Social Science Standard 12.5: Students summarize landmark U. S. Supreme Court interpretations of the Constitution and its amendments. (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the . . . equal protection of the law clauses of the Fourteenth Amendment. (4) Explain the controversies that have resulted over changing interpretations of civil rights. . . .

California History-Social Science Framework, Ch. 17, p. 434: As this course progresses, students will learn about the responsibilities they have or will soon have as voting members of an informed electorate. They consider the following question: What rights and responsibilities does a citizen have in a democracy? . . . They will learn that all citizens deserve equal treatment under the law, safeguarded from arbitrary or discriminatory treatment by the government. . . .

National Civics Standard 18: Understands the role and importance of law in the American Constitutional system and issues regarding the judicial protection of individual rights. High School (4): Knows historical and contemporary illustrations of the idea of equal protection of the laws for all persons (e.g., Fourteenth Amendment . . .). High School (5): Understands how the individual's rights to life, liberty, and property are protected by the trial and appellate levels of the judicial process and by the principal varieties of law (e.g., constitutional, criminal, and civil law). High School (8): Knows historical and contemporary instances in which judicial protections have not been extended to all persons and instances in which judicial protections have been extended to those deprived of them in the past.

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About Constitutional Rights Foundation

Constitutional Rights Foundation is a non-profit, non-partisan educational organization committed to helping our nation's young people to become active citizens and to understand the rule of law, the legal process, and their constitutional heritage. Established in 1962, CRF is guided by a dedicated board of directors drawn from the worlds of law, business, government, education, and the media. CRF's program areas include the California State Mock Trial, Expanding Horizons Internships, Civic Action Project, Cops & Kids, teacher professional development, and publications and curriculum materials. Learn more at www.crf-usa.org.

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