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Equal Protection and Peremptory Challenges

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Equal Protection and Peremptory Challenges

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Overview

Racial discrimination in jury selection has been the subject of Supreme Court rulings for more than one hundred years. The due process and equal protection guarantees of the Fourteenth Amendment furnish a basis for federal courts to review state jury selection practices alleged to be discriminatory. Most often the Equal Protection Clause has served as the more effective of the two provisions in this area.

The juries that decide cases are formed in a three-step process. First, citizens are called to appear for jury duty. Second, from the pool of eligible jurors, some are eliminated “for cause.” This occurs when the judge, a prosecutor, or a defense lawyer excludes a particular juror because he or she has a connection to the defendant, the prosecutor, the victim, or the crime. Third, the two sides are permitted to remove a fixed number of potential jurors for any reason, including a hunch that they might not rule favorably for their side. For example, in many states, the prosecution and the defense can each “strike” twelve potential jurors. The theory behind peremptory challenges is that by giving both sides an equal opportunity to eliminate some possibly biased jurors, the resulting twelve-member jury is more likely to be impartial. However, this system has historically allowed prosecutors to eliminate all or nearly all of the black jurors from a trial involving a black defendant.

The Court adopted a major change in the law in 1986 with its decision in *Batson v. Kentucky*. Speaking for a 7-2 majority, Justice Lewis F. Powell Jr. said that prosecutors can be forced to justify why they had “struck” blacks from serving on a particular jury. If a defense lawyer sees a pattern of excluding blacks or other minorities, he or she can challenge the prosecutor's actions before the judge who is supervising the jury selection process. If the reason for excluding a juror has nothing to do with race, the prosecutor's decision should be upheld. If not, the judge must recall the excluded person and add him or her to the jury. Otherwise, the use of peremptory challenges solely on the basis of race represents a violation of the due process clause. In the years after *Batson*, the Court extended the Equal Protection coverage to include peremptory challenges on the basis of both race and gender.

-Adapted from David Savage, *A Fair Trial by Jury*, Guide to the U.S. Supreme Court, 701-75 (5th ed., 2011)

Disclaimer

This research guide is a starting point for a law student or an attorney to research the area of Equal Protection and Peremptory Challenges. This guide should not be considered as legal advice or as a legal opinion on any specific facts or circumstances. If you need further assistance in researching this topic or have specific legal questions, please contact a reference librarian in the Georgia State University College of Law library or consult an attorney.

About the Author

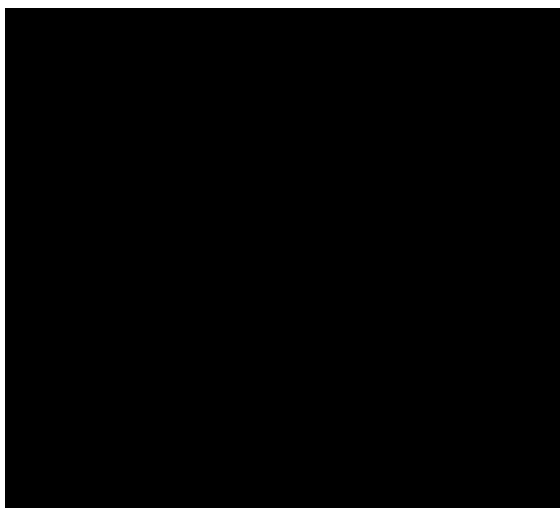
Andrew Hewitt is a third-year law student at Georgia State University College of Law. This guide was created as part of the spring 2012 Advanced Legal Research class.

Scope

This research guide focuses on the relationship between the Equal Protection clause of the 14th Amendment of the United States Constitution and the use of peremptory challenges in jury selection. Specifically, this guide looks at the development of Supreme Court case law in the post-*Batson v. Kentucky* era. Further, this guide examines peremptory challenges in terms of constitutional law and not in terms of practice and procedure. This guide does not cover jurisdictionally specific limitations on the use of peremptory challenges. Instead, this guide approaches the interplay between the Constitution and the historical problem of racial and gender discrimination through the use of peremptory challenges in the jury selection process.

Infamous Philadelphia D.A. Training Video

This is a clip from an infamous and highly controversial training video for new trial attorneys in the Philadelphia district attorney's office. The video highlights the historical problem of racial discrimination in jury selection.



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Primary Sources

Constitutional Amendments

[United States Constitution 14th Amendment:](#)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the 14th Amendment contains the Equal Protection Clause: "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The 14th Amendment Equal Protection Clause applies only to state governments, however, the requirement of equal protection has been read to apply to the federal government as a component of 5th Amendment due process.

Helpful Definitions

The term "preemptory challenge" refers to the right to reject a potential juror during jury selection without giving a reason.

[According to Black's Law Dictionary:](#)

peremptory: final, absolute, not requiring any shown cause; arbitrary

challenge: a party's request that a judge disqualify a potential juror or an entire jury panel

peremptory challenge: one of a party's limited number of challenges that need not be supported by any reason, although a party may not use such a challenge in a way that discriminates on the basis of race, ethnicity, or gender

striking a jury: the selecting of a jury out of all the candidates available to serve on the jury

-Source: Black's Law Dictionary, Second Pocket Edition (2001)

Cases - Supreme Court

The following are the central Supreme Court decisions regarding the relationship between the Equal Protection clause and the use of peremptory challenges. When available, a link to a case's oral argument has been provided.

- *Batson v. Kentucky*, 479 U.S. 79 (1986)

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0476_0079_ZS.html

Batson, a black man, was on trial charged with second-degree burglary and receipt of stolen goods. During the jury selection, the prosecutor used his peremptory challenges to strike the four black persons on the venire, resulting in a jury composed of all whites. *Batson* was convicted on both of the charges against him.

The issue before the Court was whether the prosecutor's use of peremptory challenges to exclude the four blacks from the jury violate *Batson's* Sixth and Fourteenth Amendment rights to a fair jury trial and his Fourteenth Amendment right to equal protection of the laws.

Holding: the prosecutor's actions violated the Sixth and Fourteenth Amendments of the Constitution. Without identifying a "neutral" reason why the four blacks should have been excluded from the jury, the prosecutor's actions were in violation of the Constitution.

- Link to audio of oral argument for *Batson v. Kentucky*

http://oyez.org/cases/1980-1989/1985/1985_84_6263#argument

- *J.E.B. v. Alabama ex rel. T.B.* 511 U.S. 127 (1994)

<http://www.law.cornell.edu/supct/html/92-1239.ZS.html>

Alabama, acting on behalf of *T.B.* (the mother), sought paternity and child support from *J.E.B.* (the putative father). A jury found for *T.B.* In forming the jury, *Alabama* used its peremptory strikes to eliminate nine of the ten men who were in the jury pool; *J.E.B.* use a peremptory challenge to strike a tenth man in the pool.

The issue before the Court was whether the use of peremptory challenges to exclude jurors solely because of their gender a violation of the equal protection clause of the Fourteenth Amendment.

Holding: The Constitution's guarantee of equal protection bars the exclusion of potential jurors on the basis of their sex, just as it bars exclusion on the basis of race. As a consequence, "[P]arties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias."

- Link to audio of oral argument for *J.E.B. v. Alabama ex rel. T.B.*

http://oyez.org/cases/1990-1999/1993/1993_92_1239

- *Strauder v. West Virginia*, 100 U.S. 303 (1879)

http://www.law.cornell.edu/supct/search/display.html?terms=Strauder%20v.%20West%20Virginia&url=/supct/html/historics/USSC_CR_0100_0303_ZO.html

A West Virginia law declared that only whites may serve on juries.

The issue before the Court was whether the state law barring blacks from jury service violate the Equal Protection Clause of the Fourteenth Amendment.

Holding: The law violates the equal protection clause because to deny citizen participation in the administration of justice solely on racial grounds "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

- *Georgia v. McCollum*, 505 U.S. 42 (1992)

http://www.law.cornell.edu/supct/search/display.html?terms=Georgia%20v.%20McCollum&url=/supct/html/historics/USSC_CR_0505_0042_ZO.html

Three white defendants were charged with assaulting two black individuals. Before the criminal trial, the prosecution moved to bar the defense from using its peremptory challenges to eliminate black people from the juror pool. The trial judge denied the prosecution's motion.

The issue before the Court was whether the Equal Protection Clause prohibits a criminal defendant's use of peremptory challenges to discriminate against potential jurors on the basis of race.

Holding: the exercise of peremptory challenges in a racially discriminatory manner not only violates the rights of potential jurors, but also undermines the integrity of the judicial system. Since the Court also determined that a peremptory challenge did constitute state action, it found the use of peremptory challenge for the purpose of racial discrimination to be a breach of the Equal Protection Clause.

- Link to audio of the oral argument for *Georgia v. McCollum*

http://oyez.org/cases/1990-1999/1991/1991_91_372

- *Powers v. Ohio*, 499 U.S. 400 (1991)

http://www.law.cornell.edu/supct/search/display.html?terms=powers%20v.%20ohio&url=/supct/html/historics/USSC_CR_0499_0400_ZO.html

Under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

- Link to the audio of the oral argument for *Powers v. Ohio*

http://oyez.org/cases/1990-1999/1990/1990_89_5011

- *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991)

<http://supreme.justia.com/cases/federal/us/500/614/case.html>

The Court held that jurors in civil cases cannot be excluded because of their race. The Court found that the jury is a quintessential governmental body. Thus: "since the peremptory challenge is used in selecting the jury . . . [the] injury allegedly caused by [the] use of peremptory challenges [in a civil case] is aggravated in a unique way by the incidents of governmental authority since the courtroom is a real expression of the government's constitutional authority, and racial exclusion within its confines compounds the racial insult inherent in judging a citizen by the color of his or her skin." 500 U.S. at 618-620.

- Link to the audio of the oral argument for *Edmonson v. Leesville*

http://oyez.org/cases/1990-1999/1990/1990_89_7743

- *Snyder v. Louisiana*, 552 U.S. 472 (2008)

<http://supreme.justia.com/cases/federal/us/552/06-10119/>

The Court reversed the murder conviction and death sentence of a black man who had been tried by an all-white jury. Prosecutors had used peremptory challenges to exclude all five blacks from the jury. Justice Samuel A. Alito Jr. faulted the trial judge, whom he said had “committed a clear error” by allowing the prosecutor to exclude qualified black jurors.

- Link to the audio if the Oral Argument for Synder v. Louisiana
http://oyez.org/cases/2000-2009/2007/2007_06_10119

The Central Case: Batson v. Kentucky

In *Batson v. Kentucky*, James Batson, an African American, had been prosecuted and convicted of burglary before an all-white jury in Louisville. The prosecutor had used peremptory challenges to remove the blacks in the jury pool. Batson's lawyer objected to the all-white jury, but the trial proceeded, and the Kentucky Supreme Court upheld the conviction.

In the U.S. Supreme Court's reversal of the conviction, Powell said such discrimination against black jurors and a black defendant violates the Equal Protection Clause of the Fourteenth Amendment. “The core guarantee of equal protection ... would be meaningless,” he wrote, if prosecutors can exclude blacks from juries for secretly held racial reasons. “The harm from discriminatory jury selection [can] touch the entire community ... [and] undermine public confidence in the fairness of our system of justice,” Powell wrote. In a concurring opinion, Justice Thurgood Marshall said that the Court should have gone further and outlawed peremptory challenges entirely. Chief Justice Warren Burger and soon-to-be chief justice William H. Rehnquist dissented, questioning whether eliminating jurors through peremptory challenges violated the guarantee of equal protection of the laws.

Thereafter, the phrase “*Batson* challenge” came to be heard often in courtrooms and in legal opinions discussing jury selection. The underlying premise of *Batson*—that racial bias in jury selection corrupts the integrity of the judicial system—was subsequently extended to apply in other trial contexts.

-DAVID G. SAVAGE, *A Fair Trial by Jury*, GUIDE TO THE U.S. SUPREME COURT 701-15 (5th ed., 2011)

Batson and Sexual Orientation

In *Johnson v. Campbell*, the Ninth Circuit Court of Appeals addressed, but did not rule on, the issue of whether the Equal Protection clause extends to peremptory challenges on the basis of a sexual orientation.

[The Appellant] Johnson contends that the district court erred by refusing to question a juror about his sexual orientation when Johnson made a *Batson* objection to the defense's peremptory challenge of the juror. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We need not decide the question whether a challenge based on sexual orientation falls within the rule of *Batson*; we assume for purposes of decision that it does. We nevertheless reject Johnson's appeal, because he did not offer facts or circumstances that created an inference of purposeful discrimination. The district court therefore did not err in declining to question the juror about his sexual orientation.

Johnson v. Campbell, 92 F.3d 951, 951 (9th Cir. 1996)

The Supreme Court has yet to rule on the issue of a *Batson* challenge on the basis of sexual orientation.

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Secondary Sources

Books on Equal Protection and Constitutional Law

- Equal Protection by Francis Graham Lee; Donald Grier Stephenson (Editor)
ISBN: 1576078507
Publication Date: 2003-11-17General overview of Equal Protection doctrine in American jurisprudence
- The Supreme Court, Race, and Civil Rights by Abraham L. Davis; Barbara L. Graham
ISBN: 0803972199
Publication Date: 1995-07-25Overview of key Supreme Court cases dealing with race and civil rights
- Constitutional Law by Erwin Chemerinsky
Call Number: KF4550 .C427 2006
ISBN: 073555787X
Publication Date: 2006-07-26THE guide for understanding constitutional law and the evolution of Supreme Court jurisprudence
- Summaries of the Leading Cases on the Constitution by Joseph Francis Menez; John R. Vile; Paul Charles Bartholomew
ISBN: 0742532763
Publication Date: 2004-01-13Provides summaries of important equal protection Supreme Court cases
- The U.S. Supreme Court by Thomas T. Lewis

ISBN: 9781587653636

Publication Date: 2007-02-01 Multi-volume set on the United States Supreme Court

- Constitutional Law by Ides

ISBN: 9780735588257

Publication Date: 2009-11-17 Provides a very straight forward and easy to comprehend outline of constitutional law doctrine

Treatise on Constitutional Law

Treatise on Constitutional Law: Substance and Procedure, Fourth edition

Paid Access: WestLaw and WestLawNext provide up-to-date coverage

GSU Law Library: KF4550 .R63 2007

Content Highlights:

This treatise provides scholars, practitioners, judges, and officials with an up-to-date analysis and synthesis of federal constitutional law. Provides extensive coverage on the Equal Protection clause.

CQ Supreme Court Collection

Blends historical analysis with timely updates and expert commentary of Supreme Court decisions, biographies of Supreme Court justices, Supreme Court institutional history, and the U.S. Constitution.

Users can access information by topic, justice, and case name.

Access: <http://library.cqpress.com/scc/>

Corpus Juris Secundum

Corpus Juris Secundum (C.J.S.) is an encyclopedia of United States law as developed by cases, including both federal and state cases. Legal topics are organized alphabetically in an index. This source provides clear information on various segments of American law, including footnotes citing to cases. The links below are a few useful and comprehensive outlines of constitutional restrictions on peremptory challenges. The articles can be found on either Westlaw or LexisNexis.

Peremptory challenges

50A C.J.S. Juries § 427 Nature of Peremptory Challenge

50A C.J.S. Juries § 429 Challenge as a Substantial Right

Prohibited Use of Challenges for Discriminatory Purposes

50A C.J.S. Juries § 454. Groups Based on Race or Ethnicity

50A C.J.S. Juries § 455. Groups Based on Gender

50A C.J.S. Juries § 456. Groups Based on Religion, Age, and Other Factors

Journal & Law Review Articles

Emily C. Jeffcott and Mikal C. Watts, What's Required to Remedy Juror Discrimination? A Brief Discussion on Batson and Its Available Remedies, 13 Scholar 615 (2011).

This Article explains the essential steps to presenting a Batson challenge within various circuits. Provides a thorough analysis of recent circuit court Batson jurisprudence

Benjamin Hoorn Barton, Religion-Based Peremptory Challenges After Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis, 94 Mich. L. Rev. 191 (1995)

Argues that under Batson, J.E.B., the First Amendment, and the Equal Protection Clause, religion-based peremptory challenges are unconstitutional.

Leah M. Provost, Excavating from the Inside: Race, Gender, and Peremptory Challenges, 45 Val. U. L. Rev. 307 (2010)

Analyzes the approaches courts have used when determining whether equal protection tolerates race-gender-based peremptory challenges. Advocates that states should prohibit race-gender-based challenges and proposes a model state statute easing the burden for litigants objecting to allegedly discriminatory peremptory strikes.

Deana Kim El-Mallawany, Johnson v. California and the Initial Assessment of Batson Claims, 74 Fordham L. Rev. 3333 (2006)

Examines Batson v. Kentucky's three-step analysis for ferreting out the discriminatory use of peremptory challenges and the cases interpreting each of the three steps in the Batson framework. Also focuses on Johnson v. California, contrasting the Supreme Court's approach with the Ninth Circuit's conclusion that sexual orientation Batson challenges are covered under equal protection.

Jury Selection - Batson Challenges, 122 Harv. L. Rev. 346 (2008)

Explores the impact of Synder v. Louisiana on the Supreme Court's Batson jurisprudence.

Jeffrey Bellin & Junichi P. Semitsu, Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075 (2011)

The authors conducted a survey of all federal published and unpublished judicial decisions issued in this first decade of the new millennium (2000-2009) that reviewed state or federal trial court rejections of a Batson challenge. In light of this study the authors conclude that Batson is easily avoided through the articulation of a purportedly race-neutral explanation for juror strikes. As a result, there is no reason to believe that Batson is, as the Court suggests, achieving its goal of eliminating race-based jury exclusion.

Protecting Both Ethnic Minorities and the Equal Protection Clause: The Dilemma of Language-Based Peremptory Challenges, 1997 B.Y.U. L. Rev. 101 (1997)

Analyzes the validity of peremptory strikes based solely on language ability under the Equal Protection Clause.

Nancy S. Marder, Beyond Gender: Peremptory Challenges and the Roles of the Jury, 73 Tex. L. Rev. 1041 (1995)

Author argues in favor of eliminating peremptories.

Additional Law Review and Journal Articles:

Deborah Ramirez, Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity, 1998 U. Chi. Legal F. 161, 165-166

Jeffrey Abramson, Two Ideals of Jury Deliberation, U. Chi. Legal F. 125 (1998)

Hiroshi Fukurai & Darryl Davies, Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae, 4 Va. J. Soc. Pol'y & L. 645 (1997)

Nancy J. King, Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in jury Selection, 68 N.Y.U. L. Rev. 707 (1993)

Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677 (1995)

Elissa Krauss & Martha Schulman, The Myth of Black Juror Nullification: Racism Dressed up in Jurisdictional Clothing, 7 Cornell J.L. & Pub. Pol'y 57 (1997)

Books on Discrimination in Jury Selection

- Jury Discrimination by Christopher Waldrep
Call Number: KFM7142 .W35 2010
ISBN: 9780820330020
Publication Date: 2010-07-15Traces the origins of Americans' ideas about trial by jury and provides a detailed historical analysis of jury discrimination the South
- White but Not Equal: Mexican Americans, Jury Discrimination, and the Supreme Court by Ignacio M. Garcia
Call Number: KF224.H468 G37 2009
ISBN: 9780816527502
Publication Date: 2008-12-15Examines important Supreme Court cases involving discrimination against Mexican Americans
- Race in the Jury Box by Hiroshi Fukurai; Richard Krooth
Call Number: KF9680 .F85 2003
ISBN: 0791458377
Publication Date: 2003-08-01Focuses on the racially unrepresentative jury as one of the remaining barriers to racial equality and a recurring source of controversy in American life. Because members of minority groups remain underrepresented on juries, various communities have tried race-conscious jury selection, termed "affirmative jury selection.
- Race and the Jury by E. W. Butler; R. Krooth; Hiroshi Fukurai
Call Number: KF8979 .F84 1993
ISBN: 0306441446
Publication Date: 1992-03-01A penetrating analysis of the institutional mechanisms perpetuating the related problems of minorities' disenfranchisement and their underrepresentation on juries

Books on Jury Selection

- Jury Selection 4th Ed. by V. Hale Starr; Mark McCormick
Call Number: KF8979 .S82 2009
ISBN: 0735515727
Publication Date: 2009 Overview of the entire jury selection process
- Scientific Jury Selection by Joel D. Lieberman; Bruce Dennis Sales
Call Number: KF8979 .L54 2007
ISBN: 1591474272
Publication Date: 2006-08-15 An extensive look at the scientific method to jury selection

American Jurisprudence 2d

American Jurisprudence (Am. Jur. 2d) is an encyclopedia of American law published by West and has numerous volumes which are regularly updated with pocket part supplements with more recent law. The links below and their accompanying descriptions are a few useful and comprehensive outlines of peremptory challenges. The articles can be found online on either Westlaw or LexisNexis.

47 Am. Jur. 2d Jury § 213. Prohibition of Race-Based Peremptory Challenge

47 Am. Jur. 2d Jury § 214. Prohibition of Gender-Based Exclusion of Prospective Jurors

47 Am. Jur. 2d Jury § 215. Prospective Juror's Membership in Cognizable or Distinctive Group as Impermissible Basis for Exercise of Challenge

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Multimedia and Internet Sources

NPR: All Things Considered

Study: Blacks Routinely Excluded From Juries

June 20, 2010

NPR story on racial discrimination in jury selection.

- Audio Link
<http://www.npr.org/templates/story/story.php?storyId=127969511>
- Transcript Link
<http://www.npr.org/templates/transcript/transcript.php?storyId=127969511>

Websites

Juries Blog

website link: <http://juries.typepad.com/juries/batson/>

This blog provides information on current cases involving Batson challenges and racial and gender discrimination in jury selection.

Equal Justice Initiative - Illegal Racial Discrimination in Jury Selection: A Continuing Legacy

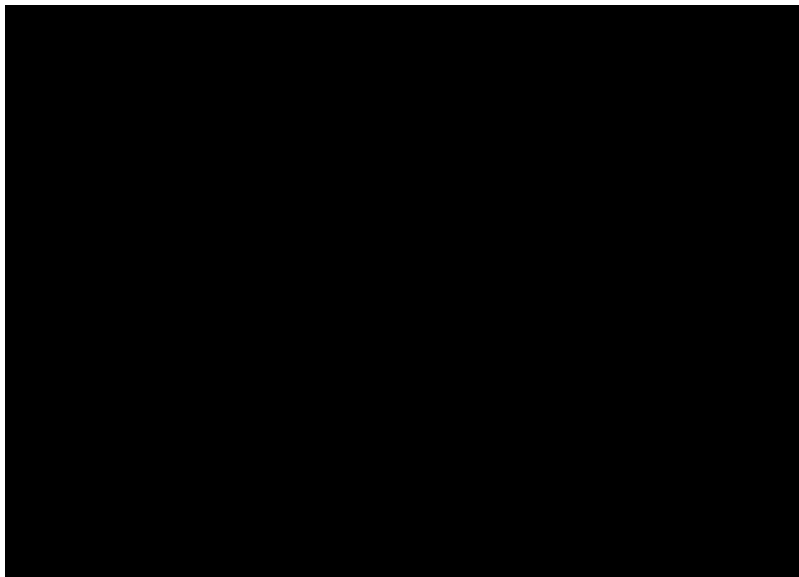
Website link: <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>

This EJI report traces the history of racial discrimination in jury selection in America.

Illegal Racial Discrimination in Jury Selection: A Continuing Legacy

Illegal Racial Discrimination in Jury Selection: The Earl McGahee Case

ACLU: African-Americans Excluded from Capital Juries



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