Louisiana Law Review

Volume 8 | Number 4
Symposium on Legal Medicine
May 1948

Constitutional Law - Denial of Equal Protection - Discrimination in Selection of Juries

Sanders R. Cazedessus

Repository Citation
Sanders R. Cazedessus, *Constitutional Law - Denial of Equal Protection - Discrimination in Selection of Juries*, 8 La. L. Rev. (1948)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol8/iss4/9

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

sibility of a widespread, organized effort to accumulate extensive tracts of land and thereby hold mineral interests in perpetuity without user. A preservation of the land policy of the state would seem to dictate an effort to arrest any trend towards such a movement before it could gain momentum.

MARJORIE C. KARSTENDIEK

CONSTITUTIONAL LAW—DENIAL OF EQUAL PROTECTION—DISCRIMINATION IN SELECTION OF JURIES

In the recent case of *State v. Perkins*,[1] a negro was convicted of aggravated rape of a white woman. On appeal he contended that members of the negro race had been arbitrarily and systematically excluded from jury service solely because of race and color.[2] The general venire list, containing the names of five negroes, had been selected from the rolls of registered voters which contained the names of approximately thirty-four thousand white persons, and five hundred forty negroes.[3] One negro had served on the grand jury, and one had been included on the petit jury panel. It was held that appellant had been granted an opportunity to have members of his race serve upon the grand and petit juries, and had thus been afforded his full constitutional rights.[4]

Since the emancipation of the negro, the question of exclusion of negroes from juries has been considered numerous times by the United States Supreme Court.[5] Prior to the decision of *Pierre v.*

1. 211 La. 993, 31 So. (2d) 188 (1947).

2. Exclusion from grand or petit jury service because of race or color is forbidden by the equal protection clause of the Fourteenth Amendment to the United States Constitution, by an Act of Congress of March 1, 1875 (18 Stat. 336-337, 8 U. S. C. A. § 44 [1940]), by Article I, Section 2, of the Louisiana Constitution of 1921, and by Article 172 of the Louisiana Code of Criminal Procedure of 1928.

3. In the 1940 census the population of the parish was 54,744 or 62% white and 33,634 or 38% colored. The 1940 literacy figures were not available, but the 1930 census showed the colored population to be 43.1% of which 20.7% were illiterate, while only 1% of the whites were illiterate.

4. Chief Justice O'Niell dissented tersely, on the ground that ". . . the selecting of the general venire list entirely from the roll of registered voters is not, in the circumstances of this case, a correct method of selection." 211 La. 993, 1007, 31 So. (2d) 188, 193 (1947).

5. For example: Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567 (1880); Smith v. Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082 (1896); Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839 (1900); Thomas v. Texas, 212 U. S. 278, 29 S. Ct. 393, 53 L. Ed. 512 (1909); Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935); Pierre v. Louisiana, 306 U. S. 354,

Louisiana[6] the Louisiana Supreme Court took the view that if negroes were not represented on juries, it was not because of discrimination, but because the jury commissioners themselves being white, would, in the selection of veniremen, naturally tend to select white men whom they knew to be good and true in preference to black men whom they did not know.[7] In the *Pierre* case the United States Supreme Court held that systematic exclusion of negroes from juries constituted a denial of equal protection of the laws. Louisiana courts have made a conscientious effort to secure compliance with the requirements of that decision.[8] In *State v. Anderson*[9] a murder conviction of a negro defendant was reversed by the Louisiana Supreme Court because the evidence established a prima facie case of systematic discrimination over a period of thirty-one years, during which time no negro ever served on a jury, and only one negro's name was placed on the general venire.[10] The second trial was held under more favorable circumstances. Fifteen per cent of the general venire list was colored;[11] three negroes were on the grand jury panel of twenty, and one served; twenty negroes were on the petit jury panel of fifty, and six were drawn although none served. As a result of these precautions the conviction was upheld.[12]

Although the assertion is repeatedly made that percentages and proportions are not in themselves proof of discrimination, there are a number of cases in which virtually nothing else but percentage discrepancies were shown.[13] In general these are cases in which the number of negroes serving was extremely small in proportion to

---

59 S. Ct. 536, 83 L. Ed. 757 (1939); Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940); Hill v. Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559 (1942); Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945); Patton v. Mississippi, 92 L. Ed. 164 (U. S. 1947).

6. Pierre v. Louisiana, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757 (1939), noted in (1939) 1 LOUISIANA LAW REVIEW 841.

7. State v. Turner, 133 La. 555, 63 So. 169 (1913).

8. See discussion of testimony to this effect in State v. Perkins, 211 La. 993, 31 So. (2d) 188 (1947).

9. 205 La. 710, 18 So. (2d) 33 (1944), discussed in (1946) 6 LOUISIANA LAW REVIEW 660.

10. The court relied on Hill v. Texas, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559 (1942). In that case the Court found a prima facie case of discrimination because for sixteen years no negro had been called for grand jury service, although some few had been called for petit jury service. The population figures were 16,605 negroes out of a total of 398,564, and literacy among negroes ran as high as 92½%.

11. 1940 census showed 12,986 white, 4,421 negro.

12. 206 La. 986, 20 So. (2d) 288 (1944), cert. denied 324 U. S. 868, 65 S. Ct. 913, 89 L. Ed. 1423 (1945), discussed in (1946) 6 LOUISIANA LAW REVIEW 660.

13. The latest example of this is Patton v. Mississippi, 92 L. Ed. 164 (U. S. 1947).

the number available,[14] and in which this unbalanced status had been shown to have existed for a number of years.[15] As either of these factors (proportion and time) is diminished so as to bring the number of negroes serving nearer to a fair proportion or to shorten the period of time, the value of numbers and percentages as proof decreases until an unknown point is reached where they become merely convenient manifestations of discrimination which must be otherwise proved.

The importance of the time factor is brought more sharply into focus when we consider that in no case has the United States Supreme Court reversed a conviction where the charge of discrimination was directed solely at the particular venire involved. Where convictions have been reversed, exclusion of negroes had been shown over periods of years ranging upward from eight years.[16] It is not suggested that it may not be possible to show discrimination on only a single venire, but rather that attempts to do so have been singularly unsuccessful. These considerations may throw some light on what is meant by "systematic exclusion."

As to the other variable factor (proportionate percentages) it is at once apparent that in order to be termed a "prima facie case of discrimination" there must have been virtually total exclusion of negroes.[17] This must be qualified to the extent that not every total exclusion amounts to discrimination.[18] It is possible to have no negro representation at all without there being discrimination, because one is not entitled of right to have members of his race serve as jurors.[19] Between the extremes of total exclusion amounting to discrimination and mathematically proportionate representation there are infinite variations, about which the most that can be said is that each case must be decided on its own facts. The problem simmers down to one of proof. Thus a greater disproportion in

14. Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940).

15. Hale v. Kentucky, 303 U. S. 613, 58 S. Ct. 753, 82 L. Ed. 1050 (1938).

16. Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940).

17. Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

18. Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497 (1906); Thomas v. Texas, 212 U. S. 278, 29 S. Ct. 393, 53 L. Ed. 512 (1909).

19. Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497 (1906). Historically interesting is the case of Respublica v. Mesca, 1 U. S. 73, 1 Dall. 73, 1 L. Ed. 42 (1783) in which the Court reluctantly granted to four Italians a jury *de medietate linguae* on the precedent of one unreported case and an English statute of the year 1353. Such a jury may no longer be granted since the Act of Congress of 14th April 1834, § 149.

one case may be more readily explained by the state than a lesser disproportion in another case.[20]

A few valid reasons why negroes have not served on petit juries which have been used successfully to explain their absence are their economic status,[21] disbelief in capital punishment,[22] illness or physi-incapacity,[23] and the exercise by the state of its powerful weapon of peremptory challenges.[24] Further possible reasons are illiteracy and mere failure to appear due to distrust of the white man's legal machinery. All these things may be used to explain what appears to be disproportionate absence of negroes.

Also operating to keep negroes off venire lists as well as petit juries is the well-known fact that very few of them are registered voters. In *Patton v. Mississippi*,[25] a state statute made qualification as a voter one of the prerequisites of jury service. The validity of that provision was not discussed by the writer of the opinion, but it was assumed to be a reasonable requirement. In the *Perkins* case,[26] the action of the jury commissioners in confining their selection to the list of registered voters was attacked and upheld.[27] The first impression of such a statutory requirement, in view of the fact that negroes are conspicuously absent from lists of registered voters, is that here is indeed an ingenious method of excluding negroes from jury service; and for a greater reason, the action of jury commissioners in so limiting their selection without the sanction of such a statute appears to be discriminatory. It is suggested, however, that such a practice is objectionable only where an attempt is made

20. Compare Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, (1940) (During eight years the names of eighteen negroes were placed on the lists. Thirteen appeared as last on the list, while the others were toward the end of the list and unlikely to be used. Held discriminatory.) with State v. Dorsey, 207 La. 928, 22 So. (2d) 273 (1945) discussed in (1946) 6 LOUISIANA LAW REVIEW 660 (Only one negro was on the grand jury panel of 75 while the population figures were 344,775 whites to 149,034 negroes. It was pointed out that many negroes had asked to be excused, because, being day laborers, they could not afford to miss work. Held not discriminatory.).

21. State v. Dorsey, 207 La. 928, 22 So. (2d) 273 (1945), discussed in (1946) 6 LOUISIANA LAW REVIEW 660.

22. State v. Anderson, 206 La. 986, 20 So. (2d) 288 (1944), cert. denied 324 U. S. 868, 65 S. Ct. 913, 89 L. Ed. 1423 (1945), discussed in (1946) 6 LOUISIANA LAW REVIEW 660.

23. Ibid.

24. Ibid.

25. 92 L. Ed. 164 (U. S. 1947).

26. 211 La. 993, 31 So. (2d) 188 (1947).

27. In Williams v. Mississippi, 170 U. S. 213, 18 S. Ct. 583, 42 L. Ed. 1012 (1898) the Court discussed a state law which required persons to be registered voters in order to serve as jurors. Held such laws are not discriminatory, and ". . . it has not been shown that their actual administration was evil, only that evil was possible under them."

to limit the *number* of negroes on venires proportionately to the number of registered negro voters, and that it is not only unobjectionable but is praiseworthy where the device is used to improve the *quality* of the veniremen.

The decision in the *Perkins* case is illustrative of the above principles. While the selection of veniremen was confined to the list of registered voters, appellant did not show that this list was used to limit the number of negroes serving. Also appellant failed to show *systematic* exclusion, whereas the state showed that negroes had served recently.

Does the rule against discrimination apply to negroes alone? The Fourteenth Amendment and the ancillary statute of March 1, 1875,[28] were admittedly adopted solely for the protection of negroes, but their provisions are broad enough to include any race or color. Under those provisions, courts have considered and rejected claims of discriminatory exclusion of Japanese[29] and of Indians.[30] Claims of discrimination because of nationality (as distinguished from race or color) have been made by Italians,[31] Mexicans,[32] and Creoles;[33] also group discrimination has been urged by Catholics,[34] Socialists,[35] and wage earners.[36] In only one of these cases, however, was the charge of discrimination upheld.[37] The recent case of *Fay v. New York*[38] considered the charges of two labor union officials that in

28. 18 Stat. 336-337 (1875), 8 U. S. C. A. § 44 (1940).

29. In re Shibuya Jugiro, 140 U. S. 291, 11 S. Ct. 770, 35 L. Ed. 510 (1891) (habeas corpus not the proper method of presentation before the Supreme Court); Honda v. People, 111 Colo. 279, 141 P. (2d) 178 (1943) (issue not raised timely). In both cases, although the basis for the holding was as indicated, the courts indicated that the charges of discrimination were without merit.

30. Morris v. State, 62 Okla. Cr. 337, 71 P. (2d) 514 (1937) (full-blood); State v. Walters, 61 Idaho 341, 102 P. (2d) 284 (1940) (quarter-breed). Discrimination not proved in either case.

31. State v. Guirlando, 152 La. 570, 93 So. 796 (1922).

32. Miera v. Territory, 81 Pac. 586 (N. M. 1905); Sanchez v. State, 147 Tex. Cr. Rep. 436, 181 S. W. (2d) 87 (1944); Salazar v. State, 193 S. W. (2d) 211 (Tex. Ct. Cr. App. 1946).

33. State v. Laborde, 120 La. 136, 45 So. 38 (1907). Also State v. Manuel, 133 La. 571, 63 So. 174 (1913) (exclusion of those who speak French).

34. Juarez v. State, 102 Tex. Cr. Rep. 297, 277 S. W. 1091 (1925) (remanded for further hearing on the issue).

35. Ruthenberg v. United States, 245 U. S. 480, 38 S. Ct. 168, 62 L. Ed. 414, (1917).

36. Mamaux v. United States, 264 Fed. 816 (C. C. A. 6th, 1920) (wage earners); Thiel v. Southern Pacific Co., 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (daily wage earners) State v. Krieger, 33 So. (2d) 58 (La. 1947) (white manual laborers). Cf. Rawlins v. Georgia, 201 U. S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906) (lawyers, ministers, doctors, dentists, and railway engineers and firemen).

37. Thiel v. Southern Pacific Co., 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946).

38. 67 S. Ct. 1613, 91 L. Ed. 1517 (U. S. 1947).

the selection of the jury there had been discrimination against laborers and women. The latter charge was summarily dismissed because women were not required by law to serve,[39] discrimination against them was not proved, and also defendants were not members of the excluded class.[40] The Court found that the charge of discrimination against laborers had not been proved. Although the Court has expressly left the door open for the consideration of charges of discrimination which fall outside the race or color category,[41] it has indicated that it will be extremely reluctant to grant relief in cases other than those covered by the 1875 Act of Congress.[42]

SANDERS R. CAZEDESSUS

PRIVATE RIGHTS OF WAY

Private rights of way may be obtained by imposition of law[1] or by voluntary contract,[2] depending upon the purpose for which the right of way is sought. The right obtained may consist of (1) full ownership of the land underlying the right of way (2) a predial servitude of passage (3) a right of way which does not conform to the legal requirements of either full ownership or a predial servitude.

The owner of an estate which is completely surrounded by other lands has the right to claim a legal servitude of passage across a neighbor's land to the nearest public road,[3] for everything necessary

39. Nor are they required to serve in Louisiana, La. Const. of 1921, Art. VII, § 41. For a discussion of the problem as regards women jurors, see Fenberg, Matilda, Jury Service for Women (1947) 33 Women Lawyers Journal 45.

40. Cf. State v. Dierlamm, 189 La. 544, 180 So. 135 (1938) (relief denied to white man who objected that all negroes were excluded); and Haraway v. State, 203 Ark. 912, 159 S. W. (2d) 733 (1942) (relief denied to negro who objected that all white persons were excluded).

41. 67 S. Ct. 1613, 1625 (U. S. 1947).

42. The purpose of the statute as a whole is stated as follows: "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, Be it enacted . . . . Section 4 of the statute, dealing with exclusion of jurors, is confined in terms to prohibiting disqualification 'on account or race, color, or previous condition of servitude.'"

1. Art. 699 et seq., La. Civil Code of 1870.

2. Art. 709 et seq., La. Civil Code of 1870.

3. Art. 699, 702, La. Civil Code of 1870. La. Act 54 of 1896 [Dart's Stats. (1939) § 8736]. Article 699 states that the owner of enclosed lands may claim a right of passage to the nearest public road, railroad, tramroad, or water course.