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Constitutional Law--Equal Protection in Jury Selection

Larry A. Newman
University of Kentucky

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purpose of avoiding the death penalty. The prosecuting attorney testified that he had never heard a better summation than that given by Sims.

In rejecting the *Wedding* approach to effective assistance of counsel the Court of Appeals for the District of Columbia stated:

The result of such an interpretation would be to give any . . . prisoner a hearing after his conviction in order to air his charges against the attorney who formerly represented him. It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear.¹³

As Judge Stewart said for himself and two others in a dissent in *Wedding*, "One fair trial is all the law prescribes for any man. Appellant has had his."¹⁴

Paul F. Guthrie

CONSTITUTIONAL LAW—EQUAL PROTECTION IN JURY SELECTION.—The petitioner, a nineteen-year-old Negro, was indicted for the rape of a seventeen-year-old white girl in Talladega County, Alabama. In this small county twenty-six per cent of the males over twenty-one are Negro, yet no Negro has sat on a petit jury for at least the last twelve years.¹ Eight Negroes were selected for the jury venire, two of whom were exempt from service, and the remaining six were excluded by the Alabama jury strike system,² the petitioner, therefore, upon conviction challenged the constitutionality of the state's trial

¹³ *Diggs v. Welch*, 148 F.2d 667, 669-70 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 889 (1945).

¹⁴ 394 S.W.2d at 109.

¹ The Supreme Court disagreed as to the period of exclusion. The majority accepted twelve years, 380 U.S. 202, 205, while the dissent accepted testimony that no living person could remember when a Negro sat on the petit jury. 380 U.S. 202, 231.

² The Alabama jury strike system, which was adopted in 1907, permits each opposing counsel to alternate in striking jurors without cause until twelve remain from the original petit jury venire of one hundred men less those jurors struck for cause. 380 U.S. 202, 210.

procedure. The Alabama Supreme Court affirmed the conviction.³ Certiorari was granted.⁴ *Held*: Affirmed. The majority, composed of Justices White, Clark, Stewart, and Brennan, held: (1) that a showing of evidence that an identifiable group which is underrepresented on the jury venire by as much as ten per cent over a twelve year period does not present a prima facie case of systematic discrimination and (2) that in a particular case, the prosecutor's use of the Alabama jury strike system to eliminate all members of the petitioner's race from the petit jury does not violate the fourteenth amendment. Justice Black concurred in the result only. Justice Harlan concurred in the disposition of the first two issues but refused to consider the third issue. The Chief Justice, Justice Goldberg, and Justice Douglas dissented. The remaining four Justices for the purpose of providing guidelines for future cases decided as dictum that a showing that no Negro has served on a petit jury in Talladega County for the past twelve years without evidence as to when, how often, and under what circumstances the prosecutor alone struck Negroes from the jury does not constitute a prima facie case of systematic exclusion. *Swain v. Alabama*, 380 U.S. 202 (1964).

This timely decision raises important consideration in three different areas: the constitutionality of disparity in representation, the peremptory challenge—equal protection conflict in a particular case and in a series of cases in the same county, and the "state action" doctrine.

The Constitutionality of Disparity in Representation

Justice White, speaking for the majority, rejected the petitioner's assertion that if a showing of complete and total exclusion of Negroes from grand and petit juries for a long period of time presents a prima facie case of purposeful discrimination,⁵ then a showing of a disparity of ten per cent over a twelve year period should likewise evince a prima facie case of discrimination. This argument is not new. In similar situations the Court has held that under the equal protection clause an accused, who is indicted by a grand jury or tried by a petit jury, is guaranteed the right to a trial by a jury from which members of his race or color have not been excluded,⁶ have not been tokenly included,⁷ or have not been limited to the same number

³ 275 Ala. 508, 156 So. 2d 368 (1963).

⁴ 377 U.S. 915 (1964).

⁵ *Norris v. Alabama*, 294 U.S. 587, 591 (1934).

⁶ *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880).

⁷ *Smith v. Texas*, 311 U.S. 128 (1940).

each time,⁸ solely because of their race or color. However, the Court, in its wisdom, has not gone so far as to require a pro rata share of members of the accused's race or color on the jury venire.⁹ In *Swain* the Court once again refused to play the numbers game,¹⁰ for it does not want to assume the role of the super-selector of jurors for the nation's trial courts. This is a particularly sound policy because an application of an inflexible numerical formula would unnecessarily restrict the state's power over its administration of justice inasmuch as the states would lose their control over both intentional acts of discrimination and good faith efforts which result in discrimination. However, this does not mean that the Court will never intervene. In *Speller v. Allen*¹¹ the Court stated that they would not overrule the discretion of the trial court "so long as the source of the jury list reasonably reflects a cross section . . ." ¹² of the community.

The Peremptory Challenge—Equal Protection Conflict

Unlike other jury selection cases, the state, in *Swain*, has a statutory privilege to discriminate, not in a racial manner, but by selecting only a group of individuals, given their attendant affiliations, who are least likely to be biased.¹³ However, this procedure is subject to the limitations imposed by the equal protection clause. Although all the Justices would reverse the case if the statutory privilege so clearly abused the rights guaranteed by the fourteenth amendment, they disagree as to whether or not there is a supremacy question. Both the majority and the dissent base their approaches on their own concepts of federalism, the proper relationship of the individual to the state, the need for judicial protection of the rights of individuals, the purpose and function of the peremptory challenge, and the role of the equal protection clause in state trial procedures. Since this is not a proper case in which all could agree whether the state or the individual should prevail, both the majority and the dissent adopt different evidentiary procedures to reach their results.

⁸ *Cassel v. Texas*, 339 U.S. 282 (1949).

⁹ *Thomas v. Texas*, 212 U.S. 278 (1909).

¹⁰ *Speller v. Allen*, 344 U.S. 443 (1953), upheld selection with underrepresentation of twenty-one per cent which was obtained by taking the persons who paid the highest amount of property tax first; *Brown v. Allen*, 344 U.S. 443 (1953), upheld underrepresentation of six to nine per cent on grand jury and five to seven per cent on petit jury venire which was selected by use of I.B.M. machines.

¹¹ *Speller v. Allen*, *supra* note 10, at 474.

¹² *Ibid.*

¹³ *Swain v. Alabama*, 380 U.S. 202, 219 (1964).

With respect to this conflict in a particular case, the Court has never before decided the question, although it did deny certiorari to review a District of Columbia case which held constitutional the exclusion of nineteen Negroes from a petit jury through the use of the peremptory challenge.¹⁴ The *Swain* Court had little difficulty in disposing of this point. In reliance upon past decisions, the Court reasoned that systematic exclusion could not be proved on the strength of one case.¹⁵ However, the Court did not satisfactorily reconcile the conflict when the peremptory system has the effect of eliminating all Negroes from serving on any petit jury in a given county for at least twelve years. First, the majority's approach at the outset was to state that the appellate briefs were inadequate as to when, how often, and under what circumstances the prosecutor alone was responsible for excluding Negroes from the jury over the period in question.¹⁶ Justice Goldberg, speaking for the dissent, in the absence of adequate facts, was willing to take judicial notice of the 1961 *Report* of the United States Commission on Civil Rights, "Justice 103," which cited instances of much discrimination in the selection of juries, in order to place the issue before the bench. Second, because the state controls the allegedly discriminatory machinery, the dissent applied the same evidentiary procedure used in the selection of jury venire cases. The petitioner has the burden to show the state's discrimination except when he presents a prima facie case by showing the complete and total exclusion of Negroes from all grand or petit jury service for a long period of time.¹⁷ Justice Goldberg defined the elements necessary to establish a prima facie case in accordance with the test set out in *Hernandez v. Texas*.¹⁸ The majority made a valid distinction in rejecting the applicability of the jury-venire-evidence test to the petit jury in stating that the basis of selection is different. While in venire selections the jury commissioners emphasize the qualifications of individuals without regard to race membership, in the seating of jurors the court places great emphasis on any common relationship the juror may have with the

¹⁴ *Hall v. United States*, 168 F.2d 161 (D.C. Cir. 1948), cert. denied, 334 U.S. 853, reh. denied, 335 U.S. 839 (1948).

¹⁵ *Swain v. Alabama*, 380 U.S. 202 (1964).

¹⁶ *Id.* at 227.

¹⁷ *Patton v. Mississippi*, 332 U.S. 463, 466 (1947).

¹⁸ *Hernandez v. Texas*, 347 U.S. 475, 480 (1947), "Where discrimination is said to occur in the selection of veniremen by state jury commissioners, proof that Negroes constitute a substantial segment of the population, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time constitute(s) prima facie proof of the systematic exclusion of Negroes from jury service."

accused.¹⁹ Third, the majority found that the history of the peremptory challenge supported the fact that it provides the necessary function of guaranteeing a fair trial to both the defendant and the state.²⁰ The dissent, on the other hand, found that the same history indicates that it was primarily used for the protection of the defendant.²¹ Thus, the above mentioned approaches demonstrate the apparently irreconcilable positions of the Justices. The majority, whose primary interest is to assure justice *in the individual trial*, fears the destruction of the peremptory challenge by requiring the state to show cause on appeal for any given exclusion, whereas the dissent, whose major concern is the development of a control policy to stop what it considers unconstitutional exclusion of Negroes from juries, fears the continuance of state discrimination *in a long series of trials* in violation of the equal protection clause.²²

A New Twist to the State Action Doctrine

In an attempt to undercut the dissent's position, the majority reasoned that Justice Goldberg's *prima facie* test alleging "state action" applies only to situations where state officers are wholly responsible for the systematic discrimination.²³ To assert that the prosecutor's and the petitioner's counsel's discrimination against Negroes cannot violate the fourteenth amendment, is to deny the existence of the basic concept of the equal protection clause—permissible private discrimination contradistinguished from impermissible state discrimination. In equal protection cases the dispositive question has always been whether the supporting action of the state converts private discrimination into impermissible "state action." In contrast the *Swain* majority asserted that private discrimination converts, otherwise impermissible "state action" into permissible action by the state. This approach runs counter to the recent trend in "state action" cases. In *Burton v. Wilmington Parking Authority*²⁴ the Supreme Court held that where the state's inaction permits a private restaurant

¹⁹ *Swain v. Alabama*, 380 U.S. 202, at 226-227 (1964). Hence, if the defendant is a Mexican, the majority asserts that it is necessary that the state have the right to exclude all Mexican jurors first without the requirement to show cause.

²⁰ *Id.* at 219.

²¹ *Id.* at 242.

²² The dissent did not argue that the verdict should be reversed because the twelve men, who were selected by the allegedly unconstitutional means, did not try the case fairly.

²³ 380 U.S. at 227. The prosecutor gave uncontroverted testimony that he not only excluded Negro jurors first, but that he cooperated in advance with defendant's counsel many times to strike Negroes first. 380 U.S. at 224-25.

²⁴ 365 U.S. 715 (1961).

under state lease on public property to discriminate against Negroes, the state is involved significantly enough to violate the fourteenth amendment.²⁵ Certainly, upon detached reflection, the majority would not permit the state to jointly discriminate against the Negro in the public courtroom if the discrimination is done in an unconstitutional manner.

In conclusion, *Swain* appears to add little to the development of the body of law in jury selection cases, other than the approaches taken by the Justices. However, *Swain v. Alabama* if it is to mean anything, points out the Court's inability to apply the 1880 doctrine of *Strauder v. West Virginia*²⁶ to the 1966 pressures for non-discriminatory selection of jurors. The *Strauder* Court held that only an accused, who has a member of his race or color discriminated against in the selection of the jury, solely because of his race or color, is denied equal justice under the law.²⁷ Since *Strauder* is outdated,²⁸ it unnecessarily divided the Court into irreconcilable positions. It forced the dissent to destroy a sound trial procedure in order to protect the Negro from future total exclusion from petit juries. Assuming that the peremptory challenge does have real value, in this respect the real injustice is not when a Negro is excluded from trying a Negro, but when Negroes are excluded from trying Caucasians solely because of their race. In the latter case the peremptory challenge should not be permitted to shield unconstitutional "state action," for there is no common interest between Negro and Caucasian which justifies the striking of Negroes without cause. Yet, *Strauder* denies standing to a Caucasian to present this issue before the Court. Under a broader *Strauder* theory reconciliation through accommodation is possible. In criminal cases in which a Negro injures a Caucasian, the burden of proof that the state used its jury strike system in an unconstitutional manner should remain on the petitioner. But in cases in which a Caucasian injures a Caucasian or a Negro injures a Negro, the petitioner's showing of complete and total exclusion from a petit jury for a reasonable period of time should present a prima facie case of state discrimination. Then the state should have to show that it has not used its peremptory challenge apparatus in violation of the fourteenth amendment. In the absence of a strong showing of empirical data which conclusively demonstrates that members of one race are less able to serve as

²⁵ See, *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963), for further development of the concept of state involvement to a significant extent.

²⁶ 100 U.S. 303 (1880).

²⁷ *Id.* at 310.

jurors than members of another race in a particular case, *Strauder* should be extended either by statute or judicial interpretation to prevent states from infringing upon the prospective Negro juror's fourteenth amendment right not to be discriminated against because of race in the selection of juries.

Larry A. Neuman

FAMILY LAW—CHILD CUSTODY—PROMISCUITY.—A mother who had been granted a divorce on the grounds of cruel and inhuman treatment was awarded custody and control of her two infant children. Thereafter, the mother secured employment and immediately became attracted to a co-worker. After a short courtship, she became pregnant, whereupon the newly-found paramour divorced his wife to marry her. However, a week before his divorce was to be granted, the mother and lover began to live together as man and wife, keeping the two children. When this situation was brought to the attention of the father of the children, he attempted to have the couple arrested for adultery; however, they moved to Virginia to avoid prosecution. In Virginia, they entered into a marriage, which was void because the lover's divorce was not final. The couple later legally married on the same day the divorce decree was finalized. Armed with this evidence, the father of the two children secured a judgement from the Harlan Circuit Court transferring the custody and control of his two children to himself. The decision was appealed to the Court of Appeals. *Held*: Reversed. *Jones v. Sutton*, 388 S.W.2d 596 (Ky. 1965).

In its efforts to determine in whose custody and control the welfare of the children could better be served, the court declared the following to be the proper interpretation of promiscuity: "Promiscuity is not an isolated incident of sexual relations with one particular person, but denotes an indiscriminate grant of physical favors to persons of the opposite sex without any requirement of love."¹ In holding that appellee had not proved appellant to be a promiscuous woman, the court stated further: "We have held in many cases that although the mother has been indiscreet with a man she married shortly after her divorce, such indiscretions do not necessarily brand

²⁸ The original purpose of *Strauder* was to use the equal protection clause to prevent states from denying a Negro a fair trial by his peers. 100 U.S. 303, 309. In a pluralistic society "peers" no longer means just a member of the accused's race. In any given case if the accused can show that he was denied a fair trial by his peers as a result of the exclusion of a member of any race from

¹ *Jones v. Sutton*, 388 S.W.2d 596, 598 (Ky. 1965).
his jury, he should have the standing to appeal the decision.