Hastings Constitutional Law Quarterly

Volume 2
Number 1 *Winter 1975*

Article 2

1-1-1975

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Jury Service Is A Fundamental Right

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The courts of California, along with those of about a dozen other states and the federal courts, require a year's residence in the state before a person can serve as a juror.[1] This requirement was recently challenged in *Adams v. Superior Court*,[2] and the California Supreme Court by a four to three vote upheld the statute against all constitutional claims. The dissenting opinion,[3] written by Justice Stanley Mosk and joined by Justices Sullivan and Tobriner, successfully responds to most of the arguments made in Justice William Clark's majority opinion. The dissent presents a persuasive argument why the residency requirement should be struck down as a discrimination against a cognizable class, the class of recent immigrants to the state, and implicitly as an infringement of the right to travel, a fundamental right.

The dissent does not, however, respond to one important assertion made by Justice Clark, that the right to serve on a jury is not a fundamental right[4] and hence that discrimination in the selection of jurors is governed not by the "strict scrutiny, compelling state interest test," but rather by the much less strict "some rational basis" test. This assertion, if accepted as correct, has important implications for future challenges to jury selection procedures and thus deserves some response. My reading of U.S. Supreme Court opinions leads me to the opposite conclusion, that questions of jury selection must be governed by the stricter "compelling state interest" test, both (a) because the right to be considered equally for jury service is a fundamental right, just like the right to vote, from the perspective of the citizen and (b) because the right to an impartial and representative jury is a fundamental right

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1. CAL. CODE CIV. PROC. § 198 (West 1954).
2. 12 Cal. 3d 55, 524 P.2d 375, 115 Cal. Rptr. 247 (1974).
3. *Id.* at 63, 524 P.2d at 380, 115 Cal. Rptr. at 252 (Mosk, J., dissenting).
4. *Id.* at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251.

from the perspective of the accused who is guaranteed that right by the Sixth Amendment.

The U.S. Supreme Court created the idea of "fundamental rights" in order to protect certain very special rights from any discrimination that is not absolutely essential. Those rights declared to be "fundamental" are those that are preservative of other rights, such as the right to vote, or are so basic to freedom that the Court has felt they must be protected against all statutory incursions. The Court specifically declared in the context of equal protection litigation (and due process decisions using equal protection concepts) that our fundamental rights include (1) the right of a criminal defendant to due process and a fair trial,[5] (2) first amendment rights to freedom of speech,[6] (3) the right to vote,[7] (4) the right to travel,[8] and (5) the right to privacy.[9] A classification scheme that affects any of these rights must fall, unless the government can show a compelling state interest to justify the discrimination.

In the recent *Adams* case, California's one year residency requirement was attacked with the argument that jury service is also a "fundamental right" and hence that discrimination against recent immigrants to the state must fall, unless the state can produce a "compelling state interest" to justify its statute. Justice Clark rejected this challenge with the following reasoning:

> While trial by jury is constitutionally implanted in our system of justice, an individual's interest in serving on a jury cannot be held a fundamental right. The guarantee of the Sixth Amendment is primarily for the benefit of the litigant—not persons seeking service on the jury; and even though lawfully qualified, a citizen may not demand to serve on a jury. At most, the citizen is entitled to be considered for jury service. His interest in becoming a juror is clearly secondary to the interests of the litigants in securing an impartial jury, as shown by the traditional exclusion of prospective jurors for cause or upon peremptory challenge. Jury service is commonly viewed more as a combination of duty and privilege than as a right, sanctions being imposed for failure to appear.[10]

5. Argersinger v. Hamlin, 407 U.S. 25 (1972); Mayer v. City of Chicago, 404 U.S. 189 (1971); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

6. Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972).

7. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

8. Shapiro v. Thompson, 394 U.S. 618 (1969).

9. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

10. 12 Cal. 3d at 61, 524 P.2d at 379, 115 Cal. Rptr. at 251.

This conclusion ignores all the recent U.S. Supreme Court decisions involving the jury. Although it is true that "a citizen may not demand to serve on a jury," a citizen may certainly demand to be considered equally along with all other citizens when jurors are being selected. The U.S. Supreme Court unanimously recognized the right of citizens to bring actions claiming discrimination in the selection of jurors in the case of *Carter v. Jury Commission*, where Justice Potter Stewart wrote for the Court:

> Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds *than it may invidiously discriminate in the offering and withholding of the elective franchise.*[11]

The analogy of jury service to the vote is important because the right to vote has been explicitly viewed as "fundamental" in a number of recent cases,[12] and hence all allegations of discrimination regarding the vote are governed by the "strict scrutiny, compelling state interest" test. Both jury service and the vote are essential democratic links between the government and the people that must be protected against any legislative or bureaucratic action.

The reasons that we rely so heavily on the jury are "to prevent oppression by the Government,"[13] and "to maintain a link between contemporary community values and the penal system."[14] These functions can be performed by the jury only if the jurors are selected without discrimination of any sort, so that the jurors are in fact representatives of "contemporary community values" capable of preventing "oppression by the government." Thus the selection of jurors must be protected by a standard as strict as that protecting the exercise of the vote. When the U.S. Supreme Court applied the "compelling state interest" test to residency requirements that restricted the right to vote to persons who had lived in the state for more than one year, the Court declared, by a six to one vote, that the residency requirement was unconstitutional.[15]

A second reason why discrimination in the selection of jurors is subject to "strict scrutiny" by the Court is that the defendant or litigant has a "fundamental" right to trial by an impartial and representative

11. 396 U.S. 320, 330 (1970) (emphasis added).

12. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

13. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

14. Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

15. Dunn v. Blumstein, 405 U.S. 330 (1972).

jury. In *Reid v. Covert*,[16] a case rejecting the government's assertion that the wife of an American serviceman accused of killing her husband overseas could be tried by a military court-martial, Justice Hugo Black said for a plurality of the Court:

> Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by *an independent jury picked from the common citizenry is not a fundamental right.*[17]

More recently in *Duncan v. Louisiana*,[18] the case in which the Supreme Court ruled that the Sixth Amendment required that the states grant jury trials to all persons facing a possible non-petty penalty, Justice Byron R. White wrote for the Court that the right to trial by jury is among those "*fundamental* principles of liberty and justice which lie at the base of all our civil and political institutions."[19] Later in the opinion, Justice White wrote that "[b]ecause we believe that trial by jury in criminal cases is *fundamental* to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right to jury trial in all criminal cases which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee."[20]

These governing standards were articulated in an even more explicit fashion in *Taylor v. Louisiana*[21] (decided after *Adams*), the case in which the Supreme Court declared unconstitutional Louisiana's statute limiting jury service among women to those who volunteered for jury duty. Writing for an 8-1 majority, Mr. Justice White stated that the requirement that juries be composed of a "fair cross section" of the community is "fundamental to the jury trial guaranteed by the Sixth Amendment,"[22] and he then rejected Louisiana's argument that jury service would interfere with the "distinctive role in society" of women by stating that "*[t]he right to a proper jury cannot be overcome on merely rational grounds.*"[23] A higher standard of review must be imposed because a "fundamental right" is at stake.

The California Supreme Court's decision in *Adams* seems to be particularly incorrect because that case involved two "fundamental rights," the right to travel as well as the right to jury service. Courts

16. 354 U.S. 1 (1957).
17. *Id.* at 9 (emphasis added).
18. 391 U.S. 145 (1968).
19. *Id.* at 148 (emphasis added).
20. *Id.* at 149 (emphasis added).
21. — U.S. —, 43 U.S.L.W. 4167 (Jan. 21, 1975).
22. *Id.* at —, 43 U.S.L.W. at 4170 (emphasis added).
23. *Id.* at —, 43 U.S.L.W. at 4171 (emphasis added).

have used in recent years the compelling state interest test to strike down statutes requiring four-month residency for therapeutic abortions,[24] one-year residency to become a state or municipal employee,[25] one-year residency for persons seeking to be licensed as lawyers,[26] and one-year residency for receipt of indigent hospitalization benefits.[27] The decision of the California Supreme Court upholding a residency requirement restricting access to seats in our jury boxes is thus hard to accept.

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24. *See* Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated on other grounds*, 410 U.S. 950 (1973).

25. State v. Wylie, 516 P.2d 142 (Alaska Sup. Ct. 1973); Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P.2d 801 (1973).

26. Smith v. Davis, 350 F. Supp. 1225 (S.D. W. Va. 1972); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (using a rational relation test); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D. N.C. 1970).

27. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971); *see also* Corr v. Westchester, 33 N.Y.2d 111, 350 N.Y.S.2d 401 (1973); *but see*, Sosna v. Iowa, — U.S. —, 43 U.S.L.W. 4125 (U.S. Jan. 14, 1975) (where the court upheld a one-year residency requirement for divorce).