The Catholic Lawyer

Volume 12
Number 1 *Volume 12, Winter 1966, Number 1*

Article 11

Belief in Supreme Being as Requirement for Jury Service Declared Unconstitutional

RECENT DECISIONS

Belief in Supreme Being as Requirement for Jury Service Declared Unconstitutional

The appellant, a Buddhist convicted of murder, alleged that the Maryland constitutional provision[1] requiring a belief in the existence of God as a qualification for jury service was unconstitutional. He asserted that, since Buddhists do not believe in God, they were excluded from the jury which convicted him, thereby depriving him of his constitutional guarantees of due process and equal protection of the law. The Maryland Court of Appeals reversed the conviction, *holding* the requirement that a juror express a belief in God as a qualification for jury service is unconstitutional. *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965).

Each state may prescribe the qualifications required for jury service, as provided in its statutes and constitutional provisions.[2] However, this power of determining standards is not absolute, because a state is prohibited from discriminating in the selection of jurors.[3]

Perhaps the most extensively litigated area of discrimination in jury service has

[1] MARYLAND CONST. art. 36. This article provides *inter alia*: "[N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come." This article was construed to mean that one is not competent as a juror if he does not believe in the existence of God. State v. Mercer, 101 Md. 535, 61 Atl. 220 (1905). Prior to the instant case there apparently were no Maryland cases challenging the constitutional validity of this provision.

[2] *E.g.,* Duggar v. State, 43 So. 2d 860 (Fla. 1949); People v. Mol, 137 Mich. 692, 100 N.W. 913 (1904).

[3] American Sugar Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900).

been that directed at Negroes.[4] The issue was first directly dealt with by the United States Supreme Court in *Strauder v. West Virginia*.[5] A state statute providing that no Negro was eligible for jury service was challenged by a Negro defendant. It was held discriminatory, in violation of the due process and equal protection clauses of the fourteenth amendment, since it excluded any member of the defendant's race from the jury which tried him.[6] Similarly, convictions were reversed, although the statutes were non-discriminatory, when the methods actually used in selecting jurors resulted in the systematic exclusion of members of the defendant's race.[7] In addition to those cases where members of defendant's *own* race had been excluded from the jury, a defendant may challenge the exclusion of *any* race from jury service. For example, an interesting situation developed in Georgia when a Caucasian claimed that his constitutional rights were denied because Negroes were systematically excluded from jury service.[8] The court upheld this contention, noting that the exclusion of any group denies the defendant "the type of jury to which the law entitles him."[9]

Discrimination against a certain class of persons in the community was held unconstitutional in *Hernandez v. Texas*.[10] The test utilized by the Court required that the complainant establish that there was a distinct class of persons in the community, and that this class had been systematically excluded in the selection of the juries.[11] This does not mean, however, that every jury must contain representatives of all groups—economic, social, religious, racial—in the community, since such complete representation would be impossible. It does preclude *systematic* and *intentional* exclusion of such groups in jury selections.[12]

While the Supreme Court of the United States has not ruled on the constitutionality of a religious test for the selection of jurors, it has invalidated such a test as a prerequisite for public office. In *Torcaso v. Watkins*,[13] Article 37 of the Maryland Constitution, requiring that a public officer affirm his belief in the existence of God as a prerequisite to taking office, was struck down as unconstitutional.[14] The Court stated:

> neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass

[4] *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Hale v. Kentucky, 303 U.S. 613 (1938); Strauder v. West Virginia, 100 U.S. 303 (1879).

[5] 100 U.S. 303 (1879).

[6] Strauder v. West Virginia, *supra* note 4, at 310.

[7] Cassell v. Texas, *supra* note 4; Hill v. Texas, *supra* note 4; Hale v. Kentucky, *supra* note 4.

[8] Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

[9] *Id.* at 62, 137 S.E.2d at 715.

[10] 347 U.S. 475 (1954). Mexicans constituted the class allegedly discriminated against in *Hernandez*.

[11] *Id.* at 480.

[12] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

[13] 367 U.S. 488 (1961).

[14] In striking down this provision, the Court noted that among the religions in this country which do not teach what would be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, and Secular Humanism. *Id.* at 495 n.11.

> laws or impose requirements which aid all religions as against non-believers . . . .[15]

Therefore, the Maryland religious test for public office unconstitutionally invaded the appellant's freedom of religion and could not be enforced against him.

In holding that portion of Article 36 of the Maryland Constitution[16] which prescribed a religious test for jury service unconstitutional, the Court in the principal case discussed those cases in which the United States Supreme Court had held that a defendant is denied equal protection of the laws if he is tried by a jury from which members of his *race* have been systematically excluded. The Court indicated that there was no valid distinction between racial discrimination and discrimination on the basis of religious belief or the lack thereof.[17] In addition, it was indicated that in view of the *Torcaso* decision, the requirement as to a belief in God for grand and petit jurors would also be invalid.[18] As a result of the strong presumption that public officers properly perform their functions, it was reasoned that because of article 36, judges made a belief in God a condition to service as a juror.[19] The Court of Appeals took judicial notice of the fact that it was the practice in the state not only to question jurors as to their belief in God, but also to so question prospective jurors before placing them on the jury lists.[20]

On the other hand, the dissenting judge argued that the requisite proof of discrimination had not been presented. The dissent noted that the record was devoid of proof that residents otherwise qualified had been excluded because they were non-believers.[21]

The majority indicated that prior cases which required proof of discrimination did not involve statutes which were discriminatory on their face. Where discrimination results from practice rather than from statutory mandate, the courts have placed the burden of proof on the one questioning such procedures.[22] But, where the exclusion is dictated by statute or constitutional provision, there is prima facie discrimination. The state would have to overcome this by clear proof of non-exclusion to satisfy the court, and here no such proof was proffered.[23]

The Court held that the principle enunciated in the case should not be applied retroactively, except in those cases where conviction had not been finalized.[24] Sev-

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[15] *Id.* at 495. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 240 (1963) (concurring opinion).

[16] It should be noted that the Maryland provision as to jurors was unique among the state constitutions. In fact, ten states specifically provide in their constitutions that a belief in God is not a prerequisite to jury service. ARIZ. CONST. art. II, § 12; CAL. CONST. art. I, § 4; MO. CONST. art. I, § 5; N.D. CONST. art. I, § 4; ORE. CONST. art. I, § 6; TENN. CONST. art. I, § 6; UTAH CONST. art. I, § 3; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 11; WYO. CONST. art. I, § 18.

[17] Schowgurow v. State, 240 Md. 121, ——, 213 A.2d 475, 480 (1965).

[18] *Id.* at ——, 213 A.2d at 479.

[19] *Ibid.*

[20] *Ibid.*

[21] *Id.* at ——, 213 A.2d at 485-86.

[22] *Id.* at ——, 213 A.2d at 481.

[23] *Id.* at ——, 213 A.2d at 482.

[24] *Ibid.* There are presently two habeas corpus proceedings before the United States District Court for the District of Maryland questioning the validity of the Court of Appeals' rejection of retroactive application in *Schowgurow*. We were informed of these cases by Morton A. Sacks, Assistant Attorney General of Maryland, in a letter of Nov. 19, 1965.

eral reasons were given for so ruling: (1) to avoid deciding whether only a member of an excluded class could raise the constitutional question; and, (2) if so, to avoid the question as to which convicted defendants were non-believers at the time of trial.[25] The Court justified its position of merely prospective application by weighing the protection of individual rights against the good of society, and concluded that the social good outweighed the individual rights involved.

As soon as the decision was rendered, all criminal and some civil trials in Maryland were stayed. Grand and petit juries were dismissed, and jury commissioners sent out new questionnaires on which the inquiry concerning the belief in God was deleted.[26] No juries will be available until these forms are processed. How much time this will take is, as yet, undetermined, but it has been estimated that it will require two years to complete all the extra clerical and trial work that has been created.[27]

One question presented by the decision in the instant case was whether the right to re-indictment could be effectively waived. A subsequent decision of the court of appeals has answered the question in the affirmative. In *Smith v. State,*[28] a unanimous court rejected the defendant's contention that since the procedure for determining grand jury members was unconstitutional, it was not the proper subject of an affirmative waiver. It would appear, therefore, that the state will proceed with the trials of those defendants who waived the re-indictment.

A second question raised by *Schowgurow* was answered in *Hays v. State,*[29] which affirmed the right of a defendant to raise the issue of the constitutionality of the jury for the first time on appeal. As a result of this decision, it appears that those defendants whose cases are on appeal or within the period allowed for appeal or certiorari will have to be re-indicted and retried.

The decision in the instant case raises the possibility that that portion of Article 36 of the Maryland Constitution which requires that a *witness* express a belief in God will also be held unconstitutional. It should be noted that in practice the witness in Maryland is given the choice of taking an oath which is based on a belief in God, or an affirmation simply attesting to the truth of his testimony.

In view of these alternative means of qualifying a witness, it would appear that the practice is at variance with the state's constitutional requirement. It remains to be seen whether the courts will sanction the practice and hold that the requirement of article 36 in regard to witnesses is unconstitutional.

Since the instant case was decided on the basis of a previous Supreme Court decision, it is unlikely that the constitutional question will be appealed. This is perhaps unfortunate, for, if given the opportunity,

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[25] Subsequent to its decision in *Schowgurow,* the Maryland Court of Appeals decided in State v. Madison, —— Md. ——, 213 A.2d 880 (1965), that a believer as well as a non-believer may avail himself of the right to object to the use of article 36 in the selection of his jury.

[26] N.Y. Herald Tribune, Oct. 24, 1965, p. 34, col. 1.

[27] *Ibid.*

[28] See N.Y. Times, Dec. 1, 1965, p. 27, col. 3.

[29] *Ibid.*

the Court, in affirming, might very well expand on its decision in *Torcaso,* and might outlaw religious tests not only for public officials but also for jurors and witnesses. Such a decision, establishing a national standard, would prevent state decisions from remaining as controlling authority.

The fact that the Maryland provision remained in effect for so long is indicative of how religious beliefs are used to judge a man's qualifications for public service. The courts should be quick to assert that religion is not an acceptable standard by which the state should judge a man's capacity.

Claim of Relational Right of Privacy Denied

The widow and son of Alphonse (Al) Capone and the administratrix of his estate brought an action against the producers, the sponsor and the broadcasting company which telecast several programs purportedly based on the life of the deceased. The estate claimed a property right in the name, likeness and personality of Capone, while the wife and son asserted an invasion of their right of privacy, even though they were not mentioned in the telecast. In affirming the decision of the district court, the United States Court of Appeals *held* that the estate had no protectible property right in the name, and, that under Illinois law, living relatives of a decedent are not entitled to recover under a "relational right" of privacy. *Maritote v. Desilu Prods., Inc.,* 345 F.2d 418 (7th Cir. 1965).

Although the right of privacy is now recognized and protected,[1] it has been held that a deceased person has no such right.[2] However, there is some conflict[3] as to whether there exists a "relational right" of privacy, *i.e.,* a right of the living relatives of the decedent to be protected from unwarranted publications or disclosures concerning the deceased person's life. The prevailing opinion is that the right of privacy is personal, not relational, and that it does not survive the decedent.[4] This conclusion follows from the failure of the courts to recognize a right of privacy when the party claiming the right is not mentioned in the course of the alleged invasion,[5] and from the historical policy against survival of defamation actions.[6]

[1] See generally Warren & Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193 (1890); *The Right of Privacy,* 11 CATHOLIC LAW. 335 (1965).

[2] Ravellette v. Smith, 300 F.2d 854, 857 (7th Cir. 1962); Schuyler v. Curtis, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895).

[3] *Compare* Coverstone v. Davies, 38 Cal. Rep. 2d 315, 322-23, 239 P.2d 876, 881 (1952), *with* Smith v. Doss, 251 Ala. 250, 253, 37 So. 2d 118, 121 (1948).

[4] *E.g.,* Coversone v. Davies, 38 Cal. Rep. 2d 315, 239 P.2d 876 (1952); Bradley v. Cowles Magazines, Inc., 26 Ill. App. 2d 331, 168 N.E.2d 64 (1960).

[5] Bradley v. Cowles Magazines, Inc., *supra* note 4.

[6] See Green, *The Right of Privacy,* 27 ILL. L. REV. 237, 247-48 (1932).