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Sixth Amendment—Exemption of Women from Jury Duty Violates Constitution, Duren v. Missouri, 99 S. Ct. 664 (1979)

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—SIXTH AMENDMENT—EXEMPTION OF WOMEN FROM JURY DUTY VIOLATES CONSTITUTION. *Duren v. Missouri*, 99 S. Ct. 664 (1979). Petitioner was convicted of first degree murder and assault with intent to kill in connection with an attempted robbery of a United States Post Office in Jackson County, Missouri.[1] The trial court denied both his pretrial motion to quash the jury panel and his postconviction motion for a new trial.[2] Both motions alleged that Missouri's jury selection process systematically excluded women in violation of petitioner's sixth amendment right to a fair trial.[3] Missouri's constitutional jury duty provision[4] and implementing statute[5] allowed women to decline jury service solely on the basis of their gender. Aside from women, Missouri law also exempts doctors and nurses, lawyers, clergymen, school teachers, persons over sixty-five, and government workers from jury duty.[6] The Missouri Supreme Court on appeal upheld petitioner's conviction against the sixth amendment challenge.[7] On certiorari,[8] the United States Supreme Court reversed and *held:* Missouri's law allowing women to exempt themselves from jury duty on the basis of sex violates the sixth amendment right to a fair jury trial because the resulting jury venires fail to reflect a fair cross section of the community.[9]

According to 1970 census figures, women constitute 54% of the Jack-

1. State v. Duren, 556 S.W.2d 11, 13 (Mo. 1977) (en banc), *rev'd sub nom.* Duren v. Missouri, 99 S. Ct. 664 (1979).

2. 99 S. Ct. at 666-67.

3. *Id.* at 667. Petitioner also contended that the trial court erred by permitting joinder of the two charges against him in a single indictment and denying his motion for severance. 556 S.W.2d at 11. Petitioner did not appeal the Missouri Supreme Court's adverse determination of this issue.

4. MO. CONST. art. 1, § 22(b) provides: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

5. MO. ANN. STAT. § 494.031 (Vernon Supp. 1979) provides: "The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit: . . . (2) any woman who requests exemption before being sworn as a juror."

6. *Id.* at §§ 494.020- .031.

7. 556 S.W.2d at 13-18. The Missouri Supreme Court had exclusive appellate jurisdiction because the case involved a constitutional question.

8. The Court granted certiorari because of a possible conflict with Taylor v. Louisiana, 419 U.S. 522 (1975). 435 U.S. 1006 (1978) (No. 77-6067).

9. 99 S. Ct. 664 (1979).

son County Community.[10] In 1976 Jackson County sent questionnaires to 70,000 persons randomly selected from voter registration lists, informing women of their right to decline service. From questionnaires returned by those not claiming exemptions, the county constructed the 1976 jury wheel, which was about 29.1% female. Each week, the county summoned jury venires randomly selected from the jury wheel, and women were again notified of their option to decline service. During March 1976 when petitioner was tried, 29.5% of those summoned were women and 15.5% of those appearing were women. For the periods June through October 1975 and January through March 1976, 26.7% of those summoned were female as were 14.5% of those who appeared.[11] Although not authorized by statute, Jackson County presumed that women who failed to appear had chosen to exercise their option not to serve.[12]

Prior to 1968, challenges to state jury selection systems that excluded parts of the community on the basis of gender or race proceeded mainly under the fourteenth amendment equal protection clause.[13] Under equal protection analysis, courts required that jury systems that excluded women do so on a rational basis.[14] For example, in *Hoyt v. Florida*[15] the Court upheld a jury selection system that provided for jury duty for both genders, but further required women to register their desire to serve with the clerk of the trial court.[16] The Court found that

10. 556 S.W.2d at 15-16.

11. *Id.* at 16.

12. 99 S. Ct. at 667 & n.14.

13. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (unsuccessful equal protection challenge by a woman defendant to Florida's jury selection system, which excluded women); Brown v. Allen, 344 U.S. 443 (1953) (blacks unsuccessfully challenged state jury selection system based on property tax lists as discriminating against blacks in violation of equal protection clause); Smith v. Texas, 311 U.S. 128 (1940) (state jury selection system that excluded blacks held to violate equal protection guarantee); Strauder v. West Virginia, 100 U.S. 303 (1880) (same); *cf.* Carter v. Jury Comm'n, 396 U.S. 320 (1970) (mere absence of blacks from county jury commission does not prove denial of equal protection to blacks in selection of commissioners). *But see* Fay v. New York, 332 U.S. 261 (1947) (due process challenge to New York's exclusion of women from jury duty overruled). *See generally* Note, Taylor v. Louisiana: *Constitutional Implications for Missouri's Jury Exemption Provisions*, 20 ST. LOUIS U.L.J. 159, 162-67 (1975); 41 MO. L. REV. 446, 448-50 (1976); 43 U.M.K.C. L. Rev. 382, 383-84 (1975).

14. Taylor v. Louisiana, 419 U.S. 522, 534 (1975); Hoyt v. Florida, 368 U.S. 57, 60 (1961); *cf.* Hernandez v. Texas, 347 U.S. 475, 478 (1954) (overturning conviction on equal protection grounds of a person of Mexican descent who alleged that persons of similar descent were systematically excluded from jury panel).

15. 368 U.S. 57 (1961).

16. *Id.* at 58.

the state legislature reasonably could have concluded that compulsory jury duty would so severely impinge upon women's duties in the home that they should be allowed to choose whether to serve.[17]

After 1968, the focus of challenges to state jury trial practices shifted to the sixth amendment guarantee to an impartial jury trial in criminal prosecutions[18] as a result of the Court's decision in *Duncan v. Louisiana*[19] that the due process clause of the fourteenth amendment requires application of the sixth amendment to the states.[20]

Thus, a criminal defendant, in *Taylor v. Louisiana*,[21] challenged on sixth amendment grounds a state jury selection system similar to that upheld in *Hoyt*.[22] Although more than 53% of persons eligible for jury duty were female, women constituted less than 10% of the jury wheel during the year of Taylor's trial.[23] Relying on cases decided under the sixth amendment,[24] the equal protection clause,[25] and the Supreme

17. *Id.* at 62-63.

18. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

19. 391 U.S. 145 (1968).

20. *Id.*

21. 419 U.S. 522 (1975).

22. *Id.* at 533-34. LA. CONST. art. VII, § 41 (repealed effective Jan. 1, 1976) provided:

> The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service.

Id. LA. CODE CRIM. PRO. ANN. art. 402 (West 1967) (repealed effective Jan. 1, 1976) provided: "A woman shall not be selected for jury service unless she has previously filed with the clerk of the court of the parish in which she resides a written declaration of her desire to be subject to jury service."

23. 419 U.S. at 524.

24. *See* Ballew v. Georgia, 436 U.S. 962 (1978) (cross section requirement of sixth and fourteenth amendments requires a six-person jury for state criminal trials); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (plurality opinion) (holding federal requirement of unanimous verdict in criminal trials is not mandatory in state criminal trials, but asserting, in dictum, that representation of cross section of community is mandatory); Williams v. Florida, 399 U.S. 78, 100 (1970) (holding federal requirement of twelve-person jury is not required by the sixth and fourteenth amendments in state criminal trials, but asserting, in dictum, that the sixth amendment requires "a fair possibility for obtaining a representative cross section of the community"); Glasser v. United States, 315 U.S. 60, 83-87 (1942) (selection of women for jury duty from members of the League of Women Voters who had attended a class on jury duty biased in favor of prosecution held to violate basic element of sixth amendment that jury be representative of the community).

25. *See* Peters v. Kiff, 407 U.S. 493, 500 & n.9 (1972) (white person has standing to challenge state jury selection process on equal protection ground that blacks were excluded); Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970) (blacks can seek injunctive relief against state that excludes them from jury service); Brown v. Allen, 344 U.S. 443, 466-74 (1953) (state jury selection system based on property tax lists sustained against challenge that it discriminated against blacks in viola-

Court's supervisory powers over federal courts,[26] the *Taylor* Court found that selection of petit juries from a fair cross section of the community was a fundamental element of the sixth amendment jury trial guarantee.[27] Distinguishing *Hoyt* on grounds that it involved only an equal protection challenge,[28] the Court held that a systematic exclusion of women that results in jury pools not reasonably representative of the community violates the sixth amendment.[29] The Court tempered its holding by noting that states remain free to provide narrowly drawn exemptions from jury duty in cases of hardship and to those whose occupation, in the interest of the welfare of the community, demands uninterrupted attention,[30] because such exclusions are not likely to disturb the representative nature of the jury pool.[31] The *Taylor* Court concluded by promulgating the *Taylor* fair cross section test: "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[32]

In *Duren v. Missouri*[33] the Court found that the Missouri Supreme Court incorrectly distinguished the *Taylor* decision.[34] The Court restated the fair cross section test as requiring a threefold prima facie showing: (1) the group allegedly excluded is a distinctive group in the

tion of equal protection clause); Smith v. Texas, 311 U.S. 128 (1940) (exclusion of blacks by state jury selection system violates equal protection clause).

26. *See* Ballard v. United States, 329 U.S. 187 (1946) (reversing federal conviction in which women were excluded from jury duty despite federal statutory design to make juries represent fair cross section of community and despite state law allowing women jurors).

27. 419 U.S. at 528.

28. *Id.* at 533-35.

29. *Id.* at 537-38.

30. *Id.* at 534 (citing Rawlins v. Georgia, 201 U.S. 638 (1906)).

31. 419 U.S. at 534.

32. *Id.* at 538.

33. 99 S. Ct. 664 (1979).

34. *Id.* at 666. The Missouri Supreme Court distinguished *Taylor* on two bases. First, the Louisiana system impaired the right of women to serve by automatically excluding by gender unless they took affirmative steps to be included. Missouri law left the right to serve untouched, and granted women the additional privilege of being excused if they so desired. 556 S.W.2d at 15. Second, "the *results* of Louisiana's jury selection scheme contrast sharply with those of the selection process in [*Duren*]." *Id.* (emphasis in original).

The United States Supreme Court countered that fair cross section analysis depends not on the right of excluded groups to serve on juries, but on the absence of a fair cross section of the community from the wheel, pool, or venire from which the jury is selected. 99 S. Ct. at 668; *see* Taylor v. Louisiana, 419 U.S. 522, 538 (1975). In addition, the Court noted that a deviation from 54% to 14.5% representation of the group allegedly excluded from jury venires is still symptomatic of a systematic exclusion. 99 S. Ct. at 669.

community; (2) the distinctive group is not represented on jury pools in a fair and reasonable proportion to its number in the community; and (3) the underrepresentation is caused by the systematic exclusion of the group through the jury selection process.[35]

The Court found that petitioner met this burden. First, *Taylor* established that women are sufficiently distinct from men so that their exclusion from the courtroom, marked by the loss of "a flavor, a distinct quality," satisfied the first prong of the test.[36] Second, the Court noted that while over half the community was female, women represented only about 15% of the relevant venire. This "gross discrepancy" mandated the conclusion that women had not been fairly represented in proportion to their number in the community.[37] Third, a consistent pattern of underrepresentation for a period of nearly a year demonstrated that the system itself caused the exclusion.[38] The jury selection process notified women of their option not to serve at each step of the process, and, if they did not appear when summoned, the state presumed that they had exercised their privilege.[39] A continuing drop from 54% women in the community to 26.7% of those summoned to 15% of those who appeared amounted to a systematic exclusion of women due to the jury selection process.[40]

Satisfied with petitioner's prima facie showing, the Court looked to the state to prove that the improper jury venire was attributable to an aspect of the jury selection process that "manifestly and primarily advanced" a "significant state interest."[41] The state first argued that the discrepancy could be attributed to exemptions other than the one provided for women, such as those for school teachers, persons over sixty-

35. 99 S. Ct. at 668.

36. *Id. See* 419 U.S. at 531-32.

37. 99 S. Ct. at 669. The Missouri Supreme Court felt constrained to note several "evidentiary gaps" in petitioner's statistics: (1) nothing demonstrated static gender distribution from 1970-76; (2) census figures did not include 18- to 21-year-olds; (3) proof that percentages of each gender on voter registration lists reflected their actual proportion in the community was absent; and (4) "[T]hose who claimed exemption could do so for a wide array of reasons other than the fact of their sex. For example, school teachers and government workers, whose jobs typically attract substantial numbers of women may decline to serve." 556 S.W.2d at 15-16.

The Supreme Court, characterizing the above analysis as "speculation," 99 S. Ct. at 669 & n.22, found petitioner's statistics sufficient to facilitate fair cross section analysis. *Id.* at 669 & nn.22-24.

38. 99 S. Ct. at 669.

39. *Id. See* notes 10-12 *supra* and accompanying text.

40. 99 S. Ct. at 669.

41. *Id.*

five, and government workers.[42] Assuming arguendo that those exemptions would justify failure to achieve a fair cross section, the Court found that the state had not proved that the exemptions caused the disproportion. Mere speculation without actual proof of causation could not satisfy the state's burden of proof.[43] Second, the state in oral argument[44] advanced an interest in safeguarding the woman's responsibility to her home and family life, but, just as in *Taylor*,[45] the Court deemed the justification insufficient because more narrowly drawn exceptions could protect this interest.[46]

Justice Rehnquist in dissent argued that the Court's fair cross section test was no more than a disguise for equal protection analysis aimed not at petitioner's sixth amendment rights, but at women's rights to serve on juries.[47] A further problem in applying the fair cross section

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42. *Id.* at 670; *see* MO. ANN. STAT. § 494.031 (Vernon Supp. 1979).

43. 99 S. Ct. at 670.

44. Record at 28 (Nov. 2, 1978).

45. *Taylor* overruled Hoyt v. Florida, 368 U.S. 57 (1961), which held that the maintenance and protection of the family were rational reasons under the equal protection clause for exempting women from jury duty. *See* note 15 *supra*. The Missouri Supreme Court previously had relied on the reasoning in *Hoyt*. *See* State v. Wright, 476 S.W.2d 581 (Mo. 1972); State v. Davis, 462 S.W.2d 798 (Mo. 1971); State v. Parker, 462 S.W.2d 737 (Mo. 1971). *But see* State v. Smith, 467 S.W.2d 6 (Mo. 1971).

46. 99 S. Ct. at 670.

Many states excuse women from jury duty when family responsibility or care of a child under a certain age interferes. *See, e.g.*, FLA. STAT. ANN. § 40.01(1) (West Supp. 1979) (mothers with children younger than 15 may request exemption); GA. CODE ANN. § 59-112(b) (Supp. 1978) (housewife with child aged 14 or younger may be excused); MASS. ANN. LAWS, Ch. 234, § 1 (Michie/Law Co-op 1974) (exemption given to parents or person having custody of a child under 15 years of age); N.J. STAT. ANN. § 2A:69-2(g) (West 1952) (exemption given to any person with actual care and custody of minor child); OKLA. STAT. ANN. tit. 38, § 28A (West Supp. 1978) (exemption to all persons with custody of minor children if such person's absence would result in hardship); R.I. GEN. LAWS § 9-9-11 (1920) (amended 1976); TEX. REV. CIV. STAT. ANN. art. 2135 (2) (West Supp. 1978-1979) (exemption given all females who have legal custody of a child aged under 10 years); UTAH CODE ANN. § 78-46-10(14) (1953) (exemption for a citizen who has active care of a minor child); VA. CODE § 8.01-341.1(B) (1977) (exemption given any person who has legal custody of, and is necessarily and personally responsible for, a child sixteen years of age or younger who requires continuous care during normal court hours).

47. 99 S. Ct. at 672 & n.* (Rehnquist, J., dissenting). After noting similarities between equal protection and fair cross section analysis, Justice Rehnquist tried to show from a historical point of view how the equal protection doctrine had infected fair cross section analysis. *Id.* at 672 n.* The equal protection proposition that blacks are no less qualified to serve on juries than whites, derived from Strauder v. West Virginia, 100 U.S. 303, 309 (1879), provided the foundation for the majority's holding that women are no less qualified than men to serve on juries. 99 S. Ct. at 672 n.* (Rehnquist, J., dissenting). From this, Justice Rehnquist queried, if "men and women are essentially fungible for purposes of jury duty, . . . how [does] underrepresentation of either sex on

test, in Justice Rehnquist's view, lies in determining what representation in jury wheels of the alleged excluded group is "fair and reasonable" in proportion to the number of those persons in the community.[48] From *Taylor*, and now *Duren*, it is clear that less than 15% of a majority grouping will constitute a prima facie violation. The result, however, remains unclear when the excluded group is less than a majority of the community or when there is a smaller aberration from proportional representation on jury wheels.[49] Justice Rehnquist thus predicted that state legislatures, because of this uncertainty and a desire to insulate the validity of future criminal convictions, would abolish all exemptions from jury duty.[50]

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the jury or the venire [infringe] a defendant's right to have his fate decided by an impartial tribunal?" *Id.*

At oral argument, defendant's counsel asserted that there was an "indefinable something" that does make a difference from a defendant's point of view. *Id.* Justice Rehnquist, however, questioned how that analysis meshed with the Court's conclusion that petit juries need not mirror the community even though jury wheels, pools, and venires must be fairly representative of the community. *Id. See* note 15 *supra* and accompanying text. He opined that if impartiality, the requirement of the sixth amendment at issue, is not lost when women are "*underrepresented* on the petit jury, it is certainly not lost when [they are] *underrepresented* on the jury venire." 99 S. Ct. at 673 n.* (Rehnquist, J., dissenting) (emphasis in original). He concluded, therefore, that the majority could not have been concerned with defendant's sixth amendment rights. *Id.*

Justice Rehnquist's analysis misconstrued the issue. The reason the Court conceded that perfect representation of the community on petit juries was not mandated by the sixth amendment was a recognition of the practical impossibility of such representation. There are more than 12 "distinct groups" in the community. Furthermore, the ability of counsel to strike jurors during voir dire adds a further variable to petit jury selection not applicable to selection of jury wheels, pools, and venires. Because of the greater number of people in jury wheels, pools, and venires, one could expect them to more closely mirror the community. A gross discrepancy in a group's representation on wheels, pools, and venires reduces defendant's opportunity to select a petit jury reflecting a fair cross section of the community. This loss of opportunity caused by a state's jury selection system impinges upon a defendant's sixth amendment right to an impartial jury. *See* 99 S. Ct. at 666; notes 10-18 *supra* and accompanying text.

48. 99 S. Ct. at 674 (Rehnquist, J., dissenting).

49. Eventually the Court either will insist that women be treated identically to men for purposes of jury selection . . . , or in some later sequel to this line of cases will discover some peculiar magic in the number 15 that will enable it to distinguish between such a percentage and higher percentages less than 50.

Id. at 673-74.

50. *Id.* at 674.

Justice Rehnquist concluded his opinion by noting that the real losers in the Court's *Duren* decision were the people of Missouri "seeking the incarceration of those convicted of serious crimes after a fair trial." *Id.* at 674. His attempt to blame the court for this result, however, is not justifiable. A recent editorial appearing in the St. Louis Post-Dispatch, Jan. 31, 1979, § C, at 2, col. 4 (reprinted from The Kansas City Star), indicated that the blame should lie with the Missouri Legislature. The editorial noted that three states with statutes similar to Missouri's—Alabama, Rhode Island, and New York—saw the writing on the wall after the *Taylor* decision and amended

Justice Rehnquist's fears are unfounded. Indeed, doctors and nurses, for example, are probably a "distinct" group in the community, and a prima facie fair cross section violation caused by their exemption probably would not be difficult to prove. Justice Rehnquist's analysis also ignores the state's opportunity to justify aberrations from a fair cross section by showing a significant state interest served by the exemption in question.[51]

As the Court's dictum implies,[52] such a showing in the case of most "reasonable exemptions" should not be difficult.[53] Although most occupational and age exemptions could result in prima facie fair cross section violations,[54] the Court probably will find these exemptions to "manifestly and primarily" advance significant state interests.

TORTS—JUDICIAL IMMUNITY—STATE COURT JUDGE HAS ABSOLUTE IMMUNITY IN § 1983 ACTION. *Stump v. Sparkman*, 435 U.S. 349 (1978). Respondent's mother filed a petition to have respondent (then a fifteen-year-old girl) sterilized, alleging that respondent was "somewhat retarded" and had begun to associate with, and on several occasions had stayed out overnight with, "older youth or young men."[1] Peti-

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their statutes to avoid losing their convictions. *Id.* Missouri and Tennessee, TENN. CODE ANN. § 22.108 (1975), neglected to change the women's exemption provisions in their statutes. Thus, only the Missouri Legislature should be blamed for putting "the destiny of Missouri in the hands of the nation's highest court instead of the elected officials." St. Louis Post-Dispatch, Jan. 31, 1979, § C, at 2, col. 4 (reprinted from the Kansas City Star).

51. *See* notes 25-31 *supra* and accompanying text.

52. 99 S. Ct. at 671.

53. Justice Rehnquist's analysis reveals his belief that at least one common exemption does serve significant state interests:

> Doctors and nurses, though virtually irreplacable in smaller communities, may ultimately be held by the Court to bring their own "flavor" or "indescribable something" to a jury venire. [*See* note 32 *supra*]. If so, they could then be exempted from jury service only on a case-by-case basis, and would join others with skills much less in demand whiling away their time in jury rooms of countless courthouses.

Id. at 675 (Rehnquist, J., dissenting).

54. For example, it would seem likely that most doctors and people over sixty-five exercise their rights not to serve. Assuming that they do, their representation on jury venires, pools, and wheels is probably grossly disproportionate to their size in the community.

1. Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement (Ind., DeKalb Cir. Ct., filed July 9, 1971), *reprinted in* Stump v. Sparkman, 435 U.S. 349, 351 n.1 (1978).