University of Baltimore Law Forum

Volume 9
Number 2 *Spring 1979*

Article 9

1979

air Representation vs. Systematic Exclusion

J. Michael Earp

inspection was authorized by statute; (2) to advise him of the lawful limits of the inspection; and (3) to assure him that the person demanding entry is an authorized inspector. The dissenters felt that these functions added little to the protection already afforded by statute. In fact, they concluded that the warrant was "essentially a formality." 436 U.S. at 334. The dissenters accepted the Secretary's argument that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private contract. Justice Stevens would apply this rationale to any business regardless of the nature of its business. Yet it would make a mockery of the Fourth Amendment to limit its application, in the administrative law contest, to only private residences. Such a reading would pave the way to a challenge by business establishments on equal protection grounds under the Fifth Amendment's Due Process clause. The majority avoids such a confrontation by universally applying the Fourth Amendment to administrative searches of residences as well as businesses.

Fair Representation vs. Systematic Exclusion

by J. Michael Earp

The Supreme Court in *Duran v. Missouri*, 99 S.Ct. 664 (1979) overturned a Missouri defendant's first degree murder conviction in holding that a "systematic exclusion of women [which] results in jury venires averaging less than 15% females violates the Constitution's fair-cross-section requirement." 99 S.Ct. at 666. The decision, delivered by Justice White, represents a further progression in the *Whitus* to *Castenda*[1] line of cases establishing and defining the meaning of a fair trial under the Sixth and Fourteenth Amendments.

In *Taylor v. Louisiana* 419 U.S. 522 (1975) the Supreme Court had ruled that a jury selection system which automatically excluded all women unless they chose to register for jury service violated a defendant's Sixth and Fourteenth Amendment rights in that "petit juries must be drawn from a source fairly representative of the community." 419 U.S. at 538. The Missouri statute[2] here involved, however, did not, *ab initio*, automatically exclude women from the jury selection process but rather provided them with blanket exemptions, if they chose to exercise their exemption privilege.

The present case arose when petitioner Duren's convictions for first degree murder and first degree robbery were affirmed by the Supreme Court of Missouri after the lower court had denied both a pretrial motion to quash his petit jury panel and a post-conviction motion for a new trial. Duren claimed that his right to trial by a jury chosen from a fair-cross-section of his community was denied because of the Missouri statute granting women an automatic exemption from jury service upon their mere request to be exempt. The statute provided for either disqualification or exemption from jury service for several listed occupations and other categories, including men over 65 and women. A further exemption for women resulted in practice, because a prospective woman juror was allowed to claim her exemption at any time prior to being sworn in as a juror and was treated as having claimed the exemption if she failed to appear for jury service on the day for which she was summoned. Other prospective jurors were required either to make written or personal application to the court for an exemption or be subject to contempt of court sanctions if they did not appear for jury service. The effect of the statute, established by statistical evidence undisputed at the trial level, was that when Duren's trial began only 15.5% of those on the weekly venires were women.

On appeal, the Missouri Supreme Court affirmed the convictions, holding that the number of females summoned and appearing in the jury selection process were well above acceptable constitutional limitations. *State v. Duren*, 556 S.W.2d 11 (1977). The state court questioned the adequacy of the statistical evidence presented by the petitioner and found that the petitioner had failed to show unequivocally that the low percentage of women appearing for jury service was the result of the automatic exemption for women and not some other cause.

The Supreme Court, in reversing the Missouri Supreme Court, based its decision on *Taylor* which held, as stated previously, that "petit jurors must be drawn from a source fairly representative of the community." 419 U.S. at 538. To establish a prima facie violation of the fair-cross-section requirement, the Court held that three standards must be demonstrated by the person challenging the selection process:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this representation is due to systematic exclusion of the group in the jury selection process.

99 S.Ct. at 668. The Court, in the present case, found that the petitioner had successfully met his burden for each of the three standards.

[1] *Castaneda v. Partida*, 430 U.S. 482 (1977); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Turner v. Fouche*, 396 U.S. 346 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); and *Whitus v. Georgia*, 385 U.S. 545 (1967), all dealt with the jury selection process, although none are precisely analogous.

[2] Missouri Revised Statutes §494.031(2) (Supp. 1978). See also Missouri Const. Art. 1, §22(b).

The first requirement, that the group allegedly excluded is a distinctive group in the community, was fulfilled by the *Taylor* decision, which found women sufficiently numerous and distinct from men such that the Sixth Amendment's fair-cross-section requirement cannot be satisfied where they are systematically eliminated from jury panels. 419 U.S. at 531.

The second requirement, that the representation of the group in jury venires is not fair and reasonable in relation to the group's proportional representation in the community, was demonstrated by petitioner's statistical evidence. Petitioner showed that over half (54%) of the adults in the relevant community were women, and therefore jury venires consisting of approximately 15% women were not reasonably representative of the community. The Court, however, left open the question as to when a particular discrepancy between the representation within the community and that within the venire fails to be a fair and reasonable representation.

The final requirement in establishing the prima facie violation, is that the petitioner must show the underrepresentation was due to the systematic exclusion of the distinctive group from the jury selection process. The petitioner fulfilled the third requirement by showing that the large disparity in representation occurred over a lengthy period, spanning nearly one year, rather than merely on sporadic occasions. Thus, "the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized." 99 S.Ct. at 669.

> The resulting disproportionate and consistent exclusion of women from the jury wheel and venire stage was. . .due to the system by which juries were selected . . .[by] the operation of Missouri's exemption criteria . . .Women were therefore systematically underrepresented within the meaning of *Taylor*.

99 S.Ct. at 670.

The Supreme Court carried its inquiry one step further. After the defendant established his prima facie fair-cross-section violation, the burden shifted to the State to justify the infringement of Constitutional rights by showing that the "attainment of a fair-cross-section is in some way incompatible with a significant state interest." 99 S.Ct. at 671. In its brief, the State of Missouri failed to establish any substantial justification for the statutory exemption of women from the jury selection process. During oral argument respondent's counsel surmised that the only state interest advanced was the protection of the role played by many women in home and family life. Though the Court recognized an important state interest in having family members available for the care of children, it felt the state could more appropriately limit its exemption to endure a fair-cross-section challenge by not exempting broad categories of persons from jury service.

The State of Missouri having failed, in the eyes of the Supreme Court, to show any significant state interest advanced by a jury selection process which resulted in a disproportionate exclusion of a distinctive group, women, fell short of its required burden. The Court, therefore, reversed and remanded the Missouri Supreme Court holding.

Justice Rehnquist filed a lone dissent in which he opined that the only winners in the present decision are those like the petitioner, now freed of his first degree murder conviction; the losers are the other members of the community. Although Justice Rehnquist certainly overstates his position,[3] the Court has indeed left open the question of when a jury is or becomes fairly and reasonably representative of the community, leaving the way open for subsequent challenges on behalf of those convicted by allegedly constitutionally unrepresentative juries.[4]

[3] What of the right of women to be fairly represented in jury venires? That the petitioner even has standing in the present case to challenge a jury selection process in which he is not a member of the excluded group is established by *Duncan v. Louisiana*, 391 U.S. 522 (1975).

[4] The comparable Maryland statute, the MD. CTS. & JUD. PROC. CODE ANN. (1974) Title 8, would in all probability not be subject to a similar line of attack. §8-103 provides that "A citizen may not be excluded from service as a grand or petit juror. . .on account of . . .sex. . ." Of course challenges with respect to other possibly excluded classes are not foreclosed by any of the above discussion.