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JURY SELECTION–SIXTH AMENDMENT RIGHT TO A FAIR CROSS SECTION OF THE COMMUNITY–A CHANGE IN EMPHASIS

Taylor v. Louisiana[1]

Taylor v. Louisiana, a recent Supreme Court decision, has been called a "landmark decision" by one New York court.[2] Whether such characterization is appropriate is the subject of this note. *Taylor* is not another in the line of "sex discrimination" cases and it is not an equal protection case; rather, it is a jury selection case of primary importance to criminal defense attorneys challenging a jury venire as being unrepresentative of the community, yet unable to prove it was rendered that way "on purpose." *Taylor v. Louisiana* seems to have taken us out of the "constitutional limbo"[3] wherein jury selection requirements have long lingered.

Taylor was indicted for aggravated kidnapping. He moved to quash the petit jury venire, alleging that women were systematically excluded from jury service by operation of Louisiana constitutional and criminal procedure provisions.[4] These provisions required that women, although otherwise eligible for jury service, take affirmative action indicating their desire to be placed on the jury venire by filing a statement to that effect with the clerk of the parish in which they resided. Defendant claimed the provisions deprived him of a "fair trial by a jury of a representative segment of the community,"[5] his federal constitutional right. His motion was denied. On appeal, the Louisiana Supreme Court upheld the constitutionality of the challenged provisions[6] on the authority of the Supreme Court decision in *Hoyt v. Florida,*[7] an equal protection case. Dissenting Justice Barham concluded that the challenged provisions deprived the defendant of his sixth and fourteenth amendment rights[8] under *Peters v. Kiff,*[9] a 1972 Supreme Court case which seemed to articulate a change in emphasis in assessing the composition of jury venire when the challenger was a criminal defendant.

The United States Supreme Court held that the Louisiana provisions violated the defendant's rights under the sixth amendment. The Court distinguished *Hoyt v. Florida* as a case dealing with different issues, and went on to make more explicit a criminal defendant's rights under the sixth amendment. The sixth amendment assures the criminal defendant the right

1. 419 U.S. 522, 95 S. Ct. 692 (1975).
2. People v. Prim, 47 A.D.2d 409, 366 N.Y.S.2d 726, 731 (1975).
3. Note, *The Congress, The Court and Jury Selection,* 52 VA. L. REV. 1069, 1117 (1966) (an excellent discussion of the practical problems and constitutional vagaries that have inhered in the jury selection decisions).
4. LA. CONST., art. VII, § 41 (1921); LA. CODE CRIM. PROC., art. 402 (1966), *superseded by* LA. SUP. CT. R. 25 (1975).
5. 95 S. Ct. at 695.
6. State v. Taylor, 282 So. 2d 491 (La. 1973).
7. 368 U.S. 57 (1961).
8. State v. Taylor, 282 So. 2d 491, 498 (La. 1973).
9. 407 U.S. 493 (1972).

to a jury trial.[10] Under *Peters v. Kiff*, if there has been an exclusion of a "large and identifiable segment of the community"[11] the criminal defendant could challenge the exclusion, despite the fact that he was not a member of the class allegedly excluded, on the grounds that the exclusion "deprived him of the kind of fact finder to which he was constitutionally entitled."[12] The Court in *Taylor* made explicit something which was presaged in *Peters*: the criminal defendant is "constitutionally entitled" to a jury venire drawn from a fair cross section of the community. Thus, the "fair cross section requirement," long held applicable to federal courts,[13] was imposed on the state systems as well.[14] More specifically, the Court held that women as a class may not be excluded from jury venires or be "given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male."[15]

The "landmark" aspect of *Taylor* is its adoption of a new constitutional standard by which to judge a jury venire. A defendant need no longer show "purposeful discrimination" in the selection of the venire, as had been required under an equal protection analysis;[16] rather, his task will be to show that the venire is not representative—*i.e.*, not a fair cross section of the community. The Court in *Taylor* intimated that the purpose or intent to discriminate is no longer in issue;[17] rather, the Court concentrated on the *consequences* of the jury selection system. The Court conceded that the Louisiana system did not disqualify or automatically exclude women from jury service. However, "in operation its conceded systematic impact"[18] was that very few women were called for jury service.

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10. The sixth amendment right to a jury trial is applicable to the states. Duncan v. Louisiana, 391 U.S. 145 (1968).

11. 407 U.S. at 503.

12. Taylor v. Louisiana, 95 S. Ct. 695, 696 (1975).

13. Ballard v. United States, 329 U.S. 187 (1946); Thiel v. S. Pac. Co., 328 U.S. 217 (1946) (both decisions rendered in the Supreme Court's supervisory capacity over the federal courts); Glasser v. United States, 315 U.S. 60 (1942) (deals with sixth amendment).

14. As early as 1966, the Fifth Circuit held the fair cross section requirement applicable to the states. Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966); Davis v. Davis, 361 F.2d 770 (5th Cir. 1966); Billingsley v. Clayton, 359 F.2d 13 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966); Scott v. Walker, 358 F.2d 561 (5th Cir. 1966).

15. 95 S. Ct. at 701.

16. "Purposeful discrimination" means an intent to exclude or discriminate against a given class in the jury selection process. *See generally* Comment, *Attica, Jury Pool and Intent Requirement of the Equal Protection Clause*, 24 BUFF. U.L. REV. 347 (1975).

17. There was language in earlier Supreme Court cases that the absence of a purpose to discriminate might not always overcome the inference of discriminatory purpose which arose when there were few or no members of a cognizable class represented. *See* Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Smith v. Texas, 311 U.S. 128 (1940) (all dealing with the fourteenth amendment); Glasser v. United States, 315 U.S. 60 (1942) (dealing with the sixth amendment).

18. 95 S. Ct. at 695. *See also* State v. Parker, 462 S.W.2d 737 (Mo. 1971), where the court recognized that the *result* of Missouri's automatic exemption is "substantially the same" as the type used in Louisiana. The emphasis in *Taylor*

To better understand the significance of *Taylor,* it is imperative that there be some understanding of what the Court had previously done in the area of jury selection. Much of the difficulty in understanding previous Supreme Court decisions is the fact that the Court has assessed jury selection systems under two standards.[19] The first standard was the fair cross section standard which was applicable to the federal courts in the selection of both civil and criminal juries. The standard was articulated in early cases involving jury selection procedures which appeared to have a racially discriminatory impact[20] (an area of particular concern to the Supreme Court) and also when the Court was speaking in its "supervisory capacity"[21] over the federal courts, in the latter instance declaring what it felt to be good policy. Thus, the cases cited by the majority in *Taylor* are consistent with what has been termed the positive standard: the imposition of an affirmative obligation to assure the jury venire reflects a fair cross section of the community.

There was another line of cases, however, beginning with *Fay v. New York,*[22] in which the Court made clear that its declarations to the federal courts, rendered in its supervisory capacity, were declarations of "good policy" on the subject of jury selection procedures, but that such good policy was not constitutionally mandated.[23] Because at that time the sixth amendment was not applicable to the states (the sixth amendment standard in the federal courts being a fair cross section one) the Court adopted a second standard under an equal protection analysis to be applied when assessing state jury selection procedures. This standard was a negative one—*i.e.,* had there been purposeful discrimination, intentional exclusion, against a cognizable class? The emphasis was on the class discriminated against. The application of this standard was further confused by the fact that some state courts held that because the injury was to the class, if the defendant was not a member of the excluded class and could show no actual bias resulting from the exclusion, then he could show no injury and his conviction was upheld.[24]

Then, in 1972, the Court decided *Peters v. Kiff,*[25] in which the Court

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on the "result" of the jury selection system indicates the automatic exemption for women in Missouri may be subject to constitutional challenge. This issue is discussed *infra.*

19. Note, *The Congress, The Court and Jury Selection,* 52 VA. L. REV. 1069, 1119 (1966). *See also* United States v. Butera, 420 F.2d 564 (1st Cir. 1970). The decision attempts to reconcile the two standards and is almost a textbook example of how the federal courts approached jury selection challenges, although this court may have been more flexible than most. Challenging a jury venire after *Taylor* will probably operate under the procedure followed in this decision.

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

21. *See* note 13 and accompanying text *supra.*

22. 332 U.S. 261 (1947).

23. *Id.* at 287.

24. Note, *The Congress, The Court and Jury Selection,* 52 VA. L. REV. 1069, 1115 n.240 (1966), where the author notes that *"Fay's* wandering, dictum-filled majority opinion invited such readings and inhibited the development of the law in this area." *See also* State v. Taylor, 356 Mo. 1216, 205 S.W.2d 734 (1947).

25. 407 U.S. 493 (1972).

allowed a criminal defendant to challenge a jury venire as being unrepresentative, even though he was not a member of the excluded class and could prove no purposeful discrimination. The Court focused on the exclusion rather than on the intent to exclude and said that the "exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[26] Chief Justice Burger in dissent articulated the change in emphasis: the language of *Peters* was the language of due process. He noted that the majority opinion:

> refrains from relying on the Equal Protection Clause, [and] concludes that if petitioner's allegations are true, he has been denied due process of law. The opinion seeks to equate petitioner's position with that of a defendant who has been tried before a biased tribunal or one lacking the indicia of impartiality.[27]

It is in light of that background that *Taylor v. Louisiana* must be assessed. The language of the Court is the language of due process and due process requires more than a mere lack of intent to discriminate or exclude (the negative equal protection standard); rather, it requires an affirmative obligation to choose jury venires from a fair cross section of the community.[28]

That the Supreme Court had a choice whether to continue to term the issue involved in challenging jury venires in terms of "purposeful discrimination" or explicitly adopt a new "fair cross section requirement" for the states, is evident by the fact that the Court decided to issue an opinion in *Taylor* at all. The Court had before it a federal case, *Healy v. Edwards*,[29] dealing with the same Louisiana provisions (as they affected civil juries), in which the district court had held such provisions unconstitutional as a violation of equal protection. The district court in *Healy*

26. *Id.* at 503-504.

27. *Id.* at 509. The *Peters* Court cited *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). 407 U.S. at 501 *See* Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), in which the court noted that in jury selection cases equal protection and due process considerations tend to merge. Equal protection requires that the state refrain from making unreasonable classifications; due process requires scrutiny of those excluded from jury service. Exclusions go "to the fairness of the trial. The 'very integrity of the fact-finding process' depends on impartial venires representative of the community as a whole." *Id.* at 723. *See also* Note, *The Congress, The Court and Jury Selection,* 52 VA. L. REV. 1069, 1129 (1966).

28. The *Taylor* Court said: "[A] jury's being chosen from a fair cross section of the community is fundamental to the American system of justice." 95 S. Ct. at 697. *See* Note, *The Congress, The Court and Jury Selection,* 52 VA. L. REV. 1069, 1109-10 (1966), where the author points out that there is more than a semantic distinction between the equal protection rule that prohibits purposeful discrimination and one that requires a jury venire to be drawn from a fair cross section of the community, now the requirement under *Taylor*. The former standard is basically a restriction on action, while the latter imposes an affirmative obligation to reach a desired result. The distinction may be subtle, but it is at the heart of the *Taylor* decision.

29. 363 F. Supp. 1110 (E.D. La. 1973), *vacated and remanded as moot,* 95 S. Ct. 2410 (1975).

confronted directly the earlier Supreme Court decision, *Hoyt v. Florida* (to which the Louisiana Supreme Court referred in *Taylor*[30]), which had upheld the constitutionality of a system which operated identically to Louisiana's. In *Hoyt* the Court, applying the traditional tests of equal protection, held that the "exemption"[31] afforded women was based on a "reasonable classification" and was grounded in some "rational foundation."[32]

The court in *Healy* held that the basis of sexual classification in *Hoyt* no longer rested on a "rational foundation" because the difference in treatment of women jurors, being grounded in a stereotype of women as guardians of the home, was based on criteria wholly unrelated to the objective of the jury selection statutes.[33] It decided *Hoyt v. Florida* was no longer binding.[34]

The Supreme Court in *Taylor* indicated that in so far as discrimination between men and women jurors is based solely on sex and upon the stereotyped notion of women as homebodies, *Hoyt* is no longer good law.[35] The difference in treatment is no longer founded upon a reasonable basis. However, the Court did not decide that issue directly because the focus in *Taylor* was not on the women jurors so much as on the criminal defendant. This is the significance of the Court's decision to decide *Taylor* and declare *Healy* moot.[36]

It is this problem of constitutional semantics which led Justice Rehnquist to dissent. He objected to the majority's dismissal of *Hoyt v. Florida* as a case dealing with different issues, when in fact it presented the identical problem.[37] His assessment is correct in one sense. *Hoyt* and *Taylor* dealt *in fact* with criminal defendants challenging the same type of jury selection system. However, their similarity ended *in fact.* The issues involved were different because the defendants sought protection

30. State v. Taylor, 282 So. 2d 491, 497 (La. 1973).

31. 368 U.S. at 60-61. The Court held that women were not excluded from service, but were granted the privilege of not having service imposed.

32. *Id.* at 62-63. The rational foundation was the woman's presumed place as center of the home, and the reasonable basis for the classification was to aid in efficient administration of the jury selection system.

33. 363 F. Supp. at 1113.

34. *Id.* at 1117. The *Healy* court relied on Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), both equal protection cases regarding sex discrimination. *See* National Organization for Women, N.Y. Chapter v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974), which referred to the *Healy* decision as "brilliant," but questioned the soundness of the holding and refused to hold New York's women's exemption unconstitutional.

35. 95 S. Ct. at 701. Thus, the rational foundation is lacking. *See* note 32 and accompanying text *supra.*

36. *See* text accompanying, note 29 *supra.* Presumably, the equal protection argument will continue to be relied on in civil cases. It is highly doubtful, however, that jury commissioners would compile two lists of jurors, one to meet the higher "fair cross section" standard required for criminal cases, and another which exhibits significant exclusions. Indeed, such an attempt would provide ample evidence of an intent to exclude the class which would make even an equal protection challenge successful.

37. 95 S. Ct. at 703.

under different constitutional provisions. The Court in *Taylor* stated explicitly that *Hoyt* did not involve a defendant's sixth amendment right to a jury drawn from a fair cross section of the community,[38] and furthermore that such right could not be overcome "on merely rational grounds."[39] Thus the change of claimed constitutional protection resulted in a change of standard. Had the Court decided to hear *Healy,* the facts would have been different, but the issue, equal protection, and the test, rational grounds, would have remained the same as in *Hoyt v. Florida.*

Even after *Taylor,* however, problems abound for the criminal defendant challenging a jury venire. A major question is whether the "impact" of the jury selection system will be any easier to prove than "purposeful discrimination." The specific factual situation in *Taylor,* and earlier Supreme Court decisions regarding the makeup of jury panels, can go far to limit the new standard.[40]

In determining the impact of a jury selection system, the focus has been on the exclusion, or underrepresentation, of a class. The class under consideration in *Taylor* was women. It was a class that constituted 53 percent of the population of St. Tammany Parish. The class was represented by no more than 10 percent on the jury rolls (or about 40 percent underrepresentation). There are probably few classes which can claim such "gross disproportion"[41] between the number of members of the class in the community and the number of members on the jury venire.

The first problem in challenging a jury venire as unrepresentative is to determine whether a "class" exists. In *Hernandez v. Texas*[42] the Court announced that the existence of a class is a question of fact, and found that Americans with Spanish surnames (Mexican-Americans) constituted a class. The attitude of the community itself as to whether certain persons constitute a class was emphasized. The size of the group allegedly discriminated against is also a factor. Previous cases have found the following to be cognizable classes: wage earners,[43] non-theists, [44] common laborers,[45] students,[46] less-educated,[47] old people,[48] and young people.[49]

38. *Id.* at 699.
39. *Id.* at 700.
40. *See* cases cited in Taylor v. Louisiana, 95 S. Ct. at 701-702. *See also* Swain v. Alabama, 380 U.S. 202 (1965); Hoyt v. Florida, 368 U.S. 57 (1961); Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945); Thomas v. Texas, 212 U.S. 278 (1909). All these cases held that proportional representation is not required under the fourteenth amendment.
41. Taylor v. Louisiana, 95 S. Ct. 692, 695 (1975) ("grossly disproportionate").
42. 347 U.S. 475 (1954).
43. Thiel v. S. Pac. Co., 328 U.S. 217 (1946); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966).
44. State v. Madison, 240 Md. 265, 213 A.2d 880 (1965).
45. Simmons v. State, 182 So. 2d 442 (Fla. App. 1966).
46. People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (Sup. Ct. 1974) (accepting without comment the classification "students" as a class).
47. United States v. Butera, 420 F.2d 564, 571 (1st Cir. 1970) (the class was composed of persons having completed eight grades or less). *But see* Fay v. New York, 332 U.S. 261, 297 (1947), which has never been expressly overruled, and

Finding a class may not always be easy. For example, there is a decided split of authority as to whether young people constitute a class. Some courts feel that "young people" is too amorphous, too lacking in boundaries, to be termed a class.[50] However, the First Circuit in *United States v. Butera*[51] found that, "though admittedly ill-defined,"[52] there was such a class as young people. The court approached the question of class pragmatically and found that it would impose "unnecessary and unrealistic inflexibility"[53] on defendant's proof to require that he prove the existence of a well-defined class or one bounded by strict parameters.

The widespread use of voter registration lists as the primary source of names for jury venires makes finding an excluded class quite difficult. A few members of every class (except non-voters)[54] will be represented. The use of voter registration lists has been consistently upheld as the best source for compiling a fair cross section of the community,[55] sometimes by pointing to a saving statutory provision charging jury commissioners with an affirmative duty to supplement voter registration lists that appear unrepresentative.[56]

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which upheld the former New York provision for "blue ribbon" juries. These juries were drawn out of the general jury pool through the use of personal interviews, intelligence tests, literary tests, and tests to measure the understanding of English. The Court noted that the fair application of such tests would "hardly act with proportional equality on all levels of life."

48. King v. United States, 346 F.2d 123, 124 (1st Cir. 1965) (the court did not deny that old people constituted a class, but found that the exclusion of persons over 70 did not affect the representation of that class).

49. United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970). *Contra,* United States v. Allen, 445 F.2d 849 (5th Cir. 1971); United States v. Kuhn, 445 F.2d 179 (5th Cir. 1971); United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1968), *cert. denied,* 394 U.S. 934 (1969). *See generally* Note, *The Constitutionality of Excluding Young People from Jury Service,* 29 WASH. & LEE L. REV. 131 (1972).

50. Cases cited note 49 *supra.*

51. 420 F.2d 564 (1st Cir. 1970).

52. *Id.* at 570.

53. *Id.* at 571.

54. For the proposition that those persons who do not register to vote are not to be considered a cognizable class, see United States v. Caci, 401 F.2d 664 (2d Cir. 1968), *vacated on other grounds,* 394 U.S. 310 (1969); Grimes v. United States, 391 F.2d 709 (5th Cir.), *cert. denied,* 393 U.S. 825 (1968); Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied,* 374 U.S. 829 (1963).

55. Cases cited note 54 *supra. See also* Kemp v. United States, 415 F.2d 1185 (5th Cir. 1969); Camp v. United States, 413 F.2d 419 (5th Cir.), *cert. denied,* 396 U.S. 968 (1969); Simmons v. United States, 406 F.2d 456 (5th Cir.), *cert. denied,* 395 U.S. 982 (1969); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966); United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966). *See* State v. Parker, 462 S.W.2d 737, 738 (Mo. 1971). Sections 494.225, 495.060, RSMo Supp. 1976, deal generally with choosing jurors but no longer specify the use of voter registration lists. Sections 496.030 (St. Louis Co.), 497.130 (Jackson Co.), RSMo Supp. 1976, provide that in compiling juror lists access may be had to any public records.

56. *See* 28 U.S.C. § 1863(a), (c) (1970). *See also* Maddox v. State, 233 Ga. 874, 213 S.E.2d 654 (1975), where the court explained that given the entire Georgia juror selection scheme, if a jury venire was improperly constituted it was not due to the women's exemption provision, but rather to a violation by the jury commissioner of his statutory duty to supplement the jury venire list to assure that it represented a fair cross section of the community. The court had in

Once a class is defined, how underrepresented do the members have to be before one can charge that the jury venire does not reflect a fair cross section of the community? In *Taylor* women were underrepresented by approximately 40 percent. The Court called this "grossly disproportionate"[57] and held that the Louisiana jury selection system "operates to exclude"[58] women. Whether a violation of the sixth amendment occurs only when a jury selection system results in *gross* disproportion between members of the class in the community and those on the jury rolls, such that the system operates virtually to exclude such class, is the question most surely to be asked after *Taylor.*

If the answer is yes, the *Taylor* decision is not as significant as might appear at first glance. Prior to *Taylor,* under the equal protection analysis discussed earlier, the Court had adopted a "shifting the burden" rule.[59] This rule provided that if the defendant could show a significant statistical disparity[60] between the number of persons in a class in the community and on the jury venire, then the burden would shift to the jury commissioners to explain the discrepancy. Failure to explain would give rise to a presumed "intent to discriminate and exclude" the class, and testimony of lack of intent to exclude was insufficient to rebut the presumption.[61] If *Taylor* requires a "gross disproportion," then the procedure employed to challenge the jury venire would not appear much different than when intent was presumed. However, if the answer is that gross disproportion is not required, then *Taylor* becomes very significant because by substituting an affirmative standard, a lesser degree of disproportion will be tolerated before the jury venire is rendered "unrepresentative."

The Court has suggested caution in utilizing "mathematical standards"[62] for demonstrating systematic exclusions. Nevertheless, it can be

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fact affirmed a lower court decision declaring a jury venire improperly constituted on the above theory, the venire having a 91.2 percent underrepresentation of women. Gould v. State, 131 Ga. App. 811, 207 S.E.2d 519 (1974), *aff'd,* 232 Ga. 844, 209 S.E.2d 312 (1975).

57. 95 S. Ct. at 695.

58. *Id.*

59. As early as 1935, the Court allowed the use of statistical evidence to demonstrate exclusion of a class. Norris v. Alabama, 294 U.S. 587 (1935). For some time, however, the Court would not allow statistical evidence alone to shift the burden to the state to show no intent to discriminate, so long as there was any representation of the class at all. *See* Swain v. Alabama, 380 U.S. 202 (1965); Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945). Later it allowed the burden to shift to the state if the plaintiff could show a "significant statistical disparity" between representation of a class in the community as opposed to the jury venire. *See* Alexander v. Louisiana, 405 U.S. 625 (1972); Tourner v. Fouche, 396 U.S. 346 (1970); Whitus v. Georgia, 385 U.S. 545 (1967). *See generally* Comment, *Attica, Jury Pool and Intent Requirement of the Equal Protection Clause,* 24 BUFF. U.L. REV. 347, 348-52 (1975).

60. Comment, *Attica, Jury Pool and Intent Requirement of the Equal Protection Clause,* 24 BUFF. U.L. REV. 347, 350 (1975). The author bemoans the fact that the Supreme Court has never adequately defined, even in the most approximate terms, what percentage of disparity must exist to be significant.

61. Eubanks v. Louisiana, 356 U.S. 584 (1958).

62. Alexander v. Louisiana, 405 U.S. 625, 630 (1972).

argued that not only should a criminal defendant not have to prove gross disproportion of the number of members in the class on the jury venire as opposed to in the community, but that he should not have to prove as large a percentage of disparity as under the equal protection cases. Under the equal protection analysis the statistics were basically used to determine whether a number of members of a cognizable class could have been excluded any way other than on purpose.[63] After *Taylor* the statistics will be used to determine whether the jury venire represents a reasonable fair cross section of the community. In determining whether a jury venire satisfies the fair cross section standard, less statistical disparity should be tolerated than when the focus was on prohibited activity—*i.e.*, discrimination by jury commissioners.

Such argument finds support in *Peters v. Kiff,* where the Court said that given the "great potential for harm latent in an unconstitutional jury selection system, and the strong interest of a criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few."[64]

In any event, the use of statistical evidence will likely become increasingly important because the focus of inquiry is on the result of the jury selection system rather than on the intent of the jury commissioners.

Two state court cases since *Taylor* indicate the way statistical evidence will be used in assessing the representativeness of the jury venire in light of the fair cross section requirement. Both cases dealt with jury selection statutes granting to women "automatic exemptions" upon request, solely on the basis of their sex. These exemptions required that a woman take affirmative action to have her name *removed* from the jury list. In *People v. Moss*[65] there was considerable discussion of statistics, and the court provided in its opinion a chart of the disparity between male and female jurors available on the final jury venire. It pointed out that initially jurors were called equally from both sexes, and yet the statistics showed that five times more men than women were actually summoned for jury duty. The statistics were used to show that once a woman was informed of her right to automatic exemption, the likelihood that she would be a willing participant in the administration of justice declined markedly. The court found that this was "clearly"[66] a result of the automatic exemption provision and that, furthermore, it was impossible for the clerk to attain a fair cross section of the community because of the operation of this exemption over a long period of time. The court thus held the automatic exemption provision unconstitutional under *Taylor.*[67]

63. Finkelstein, *The Application of Statistical Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338, 350 (1966).

64. 407 U.S. at 504.

65. 80 Misc. 2d 633, 366 N.Y.S.2d 522 (Sup. Ct., Kings Co. 1975).

66. *Id.* at 636, 366 N.Y.S.2d at 526.

67 *Contra,* New York v. Sibila, 81 Misc. 2d 80, 365 N.Y.S.2d 133, 134 (Co. Ct., Nassau Co. 1975), where the court saw little similarity between the 26 to

In *Maddox v. State*[68] the Georgia Supreme Court upheld a similar automatic exemption provision for women. The court reasoned that because over 33 percent of the jurors on the grand jury venire, and over 36 percent of the jurors on the traverse (petit) jury venire, were female, the Georgia system did not fall into the type forbidden by *Taylor*.[69] The emphasis on statistical evidence in *Moss* and *Maddox* was apparent and indicative of the kind of reasoning most likely to occur in analyzing a jury selection system under *Taylor*.

Even if a defendant can point to a distinct class, and can show that the class is underrepresented significantly on the jury venire, there are still some unresolved issues. The *Taylor* Court cited favorably a number of earlier decisions dealing with state jury selection systems. *Brown v. Allen*[70] granted to the states relative freedom in choosing the proper source of jury lists so long as the source "reasonably reflects a cross-section of the population . . . ."[71] In *Taylor* the Court explicitly reaffirmed that freedom.[72]

The Court also cited favorably *Rawlins v. Georgia*,[73] which upheld "occupational exemptions" for lawyers, ministers, doctors, dentists, railway engineers, and firemen. The Court in *Taylor* said that the states were free to continue to grant exemptions to individuals for "special hardship" or "incapacity" or "to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare."[74]

Viewed in light of the policy behind *Taylor*, the protection of a criminal defendant's sixth amendment rights, the rationale behind granting automatic exemptions to *all* dentists, ministers, and railway engineers is difficult to understand. It is certainly debatable whether the performance of all these individuals, of all doctors and all dentists, is "critical to the community's welfare."[75] It would be equally reasonable to say that what

33 percent representation of women in Nassau County and the 10 percent representation of women in Tammany Parish, the district under consideration in *Taylor*. The court denied defendant's motions challenging the jury venire, stating that he had "failed to establish a systematic exclusion." The language resounds of equal protection, indicating that the court may have misconceived the import of *Taylor*, although the result reached may have been consistent with the rationale behind the *Taylor* decision. *See also* New York Governor's memorandum upon signing the repeal of New York's women's exemption provisions, *amending* NEW YORK JUDICIARY LAW §§ 507 (7), 599 (7), 665 (7) (McKinney 1975), stating that, although the provisions operated differently from the ones considered in *Taylor*, they were "basically similar" and that there was "virtually no doubt" they would "eventually be declared unconstitutional under the *Taylor* decision." Governor's Memoranda, Approval of Bills, Jury-Duty Exemptions, MCKINNEY'S SESSION LAWS OF NEW YORK, at 1731 (1975).

68. 233 Ga. 874, 213 S.E.2d 654 (1975).

69. GA. CODE ANN. § 59-106 (Supp. 1975), contains its own fair cross section requirement.

70. 344 U.S. 443 (1953).

71. *Id.* at 474.

72. 95 S. Ct. at 701.

73. 201 U.S. 638 (1906).

74. 95 S. Ct. at 700.

75. *Id.* at 704. Justice Rehnquist in dissent noted that the Court's analysis

is critical is the uninterrupted performance of the services rather than the individual contribution of any particular doctor, dentist, or railway engineer, especially in light of the Court's explicit recognition that community participation in the administration of justice is critical to the fairness of the criminal justice system.[76]

Missouri is one of two states that continues to provide an automatic exemption to women based solely on sex.[77] This provision has been upheld repeatedly[78] on the ground that the classification is reasonable and thus does not violate equal protection. The Missouri courts have relied on the reasoning (if not always the authority) of *Hoyt v. Florida.* After *Taylor,* however, a closer look at the operation of the women's exemption provision is in order. A 1971 study[79] of jury venires in Missouri reported that only 19 of 28 circuit judges believed their jury venires were representative (a "true cross section") of their districts.[80] On the specific question of the ratio of men to women, 14 districts had less than 10 percent underrepresentation of women, while three districts had between 30 and 50 percent underrepresentation.[81] Whether it is the operation of the women's exemption which produces this result needs to be ascertained.[82] The court's reasoning in *People v. Moss*[83] is persuasive that over a long term, the granting of the exemption would frustrate a clerk's attempts to get a fair cross section. Certainly a challenge to the constitutionality of the automatic

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of a defendant's sixth amendment rights would not seem to permit automatic occupational exemptions. *See* UNIFORM JURY SELECTION AND SERVICE ACT. Section 1 of the Act is a Declaration of Policy. After stating that all persons have a right to a jury drawn from a fair cross section of the community, the declaration continues: "and that all qualified citizens have the opportunity in accordance with this Act to be considered for jury service in this state and *an obligation to serve as jurors when summoned for that purpose.*" (Emphasis added). Furthermore, section 10 provides: "No qualified prospective juror is exempt from jury service." Section 11 provides that an individual may be excused for undue hardship, extreme inconvenience, or public necessity, but only for so long as the court deems the reason for the excuse to be operative. The Commissioners' Comments to section 11 make clear that "business and professional groups within the community should not be permitted to avoid jury service." Four states have adopted the Act. COLO. REV. STAT. §§ 13-71-101 to 13-71-121 (1973); IDAHO CODE §§ 2-201 to 2-221 (Supp. 1975); IND. CODE §§ 33-4-5.5-1 to 33-4-5.5-22 (1974); N.D. CENT. CODE §§ 27-09.1-01 to 27-09.1-22 (1974). *See also* American Bar Association, *Standards Relation to Trial by Jury* § 2.1 (b) (Approved Draft 1968).

76. 95 S. Ct. at 698.

77. Mo. CONST. art. 1, § 22 (b); § 494.130, RSMo Supp. 1976; TENN. CODE ANN. §§ 22-101, 22-108 (1955). Since *Taylor v. Louisiana,* New York, Rhode Island, and Georgia have repealed women's exemptions. Currently, there is a House Joint Resolution before the Missouri legislature calling for an election to repeal the Missouri constitutional provision. H.J.R. #79.

78. State v. Davis, 462 S.W.2d 798 (Mo. 1971); State v. Parker, 462 S.W.2d 737 (Mo. 1971); Parker v. Wallace, 431 S.W.2d 136 (Mo. 1968); State v. Andrews, 371 S.W.2d 324 (Mo. 1963); State v. Ready, 251 S.W.2d 680 (Mo. 1952); State v. Taylor, 356 Mo. 1216, 205 S.W.2d 734 (1947).

79. Haws, *Jury Selection in Missouri,* 27 J. Mo. B. 398 (1971).

80. *Id.* at 401.

81. *Id.* at 405, table 406.

82. *Id.* at 410.

83. 80 Misc. 2d 683, 366 N.Y.S.2d 522 (Sup. Ct. Kings Co. 1975).