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Constitutional Law- Sixth Amendment- Systematic Exclusion of Women from Jury Service Violates the Sixth and Fourteenth Amendments. Taylor v. Louisiana, 95 S. Ct. 692 (1975).

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CONSTITUTIONAL LAW—Sixth Amendment—Systematic Exclusion of Women from Jury Service Violates the Sixth and Fourteenth Amendments. *Taylor v. Louisiana*, 95 S. Ct. 692 (1975).

Appellant, a male, was convicted in a Louisiana state court of aggravated kidnapping.[1] Prior to his trial, he had moved to quash the petit jury venire on the ground that women had been systematically excluded from it. Under the Louisiana Constitution[2] and criminal procedure statutes,[3] a woman could not be selected for jury service unless she had filed a written declaration with the court clerk of her desire to serve on a jury.[4] The trial court denied appel-

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1. LA. REV. STAT. ANN. § 14:44 (1974). The defendant was sentenced to death but his motion in arrest of judgment attacking the death penalty as cruel and unusual punishment was granted in accordance with the opinion of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), and the trial court was instructed to impose a life sentence. State v. Taylor, ___ La. ___, 282 So.2d 491, 498 (1973).

2. LA. CONST. art. VII, § 41 (1955) read as follows: "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." Effective January 1, 1975, this provision was repealed. The Constitution now provides: "(A) A citizen of the state who has reached the age of majority is elligible to serve as a juror within the parish in which he is domiciled. The Legislature may provide additional qualifications. (B) The Supreme Court shall provide by rule for exemption of jurors." LA. CONST. art. V, § 33. (Special Pamphlet: The Const. of the State of La. 1974, West 1974).

3. The Code provided: "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service." LA. CODE CRIM. PRO. art. 402 (1966). The provision has been repealed as of January 1, 1975. All exemptions from jury service shall now be as provided by rules of the Louisiana Supreme Court pursuant to the State Constitution. LA. CODE CRIM. PRO. art. 403 (Supp. 1975).

4. At the time of appellant's challenge, Louisiana was the only state which granted an automatic exemption to women. LA. CONST. art. VII, § 41 (1974); LA. CODE CRIM. PRO. art. 402 (1974). Florida and New Hampshire had been the only other states to hold such provisions and such were repealed in 1967. Fla. Laws 1967 ch. 67-154, § 1-2, *amending* FLA. STAT. ANN. § 40.01(1) (1967); N.H. Laws 1967, § 100:1, *modifying* N.H. REV.

lant's motion.[5] The Supreme Court of Louisiana affirmed, determining that the statutory provisions were "neither irrational nor discriminatory"[6] and thus did not violate either the Federal Constitution or federal law.[7] The United States Supreme Court reversed, declaring the Louisiana jury selection procedure unconstitutional.[8]

STAT. ANN. § 500:1 (1968). Presently several states allow women in the jury pool but grant them an exemption based solely on their sex. ALA. CODE tit. 33, § 21 (Supp. 1973) (for good cause shown); GA. CODE ANN. § 59-112(6)(D) (Supp. 1974); MO. ANN. STAT. § 494.031(2) (Supp. 1975) (before jury sworn); R.I. GEN. LAWS. ANN. § 9-9-11 (1970); TENN. CODE ANN. § 22-108 (1955). The New York Legislature has recently repealed N.Y. JUDICIARY LAW § 599(7) (McKinney 1968), which gave a statutory exemption based solely on sex. It is now provided that all women must appear in person before the court in order to claim an exemption. This action was taken in an attempt to comply with the Supreme Court decision in *Taylor*. 173 N.Y.L.J. 1, 3, cols. 1-2 (Feb. 11, 1975). Eleven other states allow an exemption from jury service where family responsibilities or care of children under a certain age would interfere. CONN. GEN. STAT. ANN. § 51-218 (1960); FLA. STAT. ANN. § 40.01(1) (1974); MASS. ANN. LAWS ch. 234, § 1 (1974) (exemption is given to parents or persons having custody of a child under 15 years of age); NEB. REV. STAT. § 25-1601.02 (1964); N.J. STAT. ANN. § 2A:69-2(g) (Supp. 1974); OKLA. STAT. ANN. tit. 38 § 28 (Supp. 1974); TEX. REV. CIV. STAT. art. 2135(2) (Supp. 1974); UTAH CODE ANN. § 78-46-10(14) (1953); VA. CODE ANN. § 8-208.6(26) (Supp. 1974); WYO. STAT. ANN. § 1-80 (1959).

5. ___ La. at ___, 282 So. 2d at 497.

6. *Id.*

7. *Id.* at ___, 282 So. 2d at 498. One justice dissented and argued that the provisions violated the sixth and fourteenth amendments, citing Peters v. Kiff, 407 U.S. 493 (1972).

8. Taylor v. Louisiana, 95 S. Ct. 692 (1975). A companion case, Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), was argued with Taylor but an opinion has not yet been issued by the Court. 43 U.S.L.W. 3221 (U.S. Oct. 22, 1974). Healy was a civil case brought as a class action suit which included three district groups: (1) all females in named Louisiana parishes, (2) all males in named Louisiana parishes, (3) all female litigants in pending civil state court cases. 363 F. Supp. at 1112. They sought a declaration to have LA. CONST. art. VII, § 41 (1955) and statutes both civil and criminal that granted an automatic exemption from jury service for women declared unconstitutional. Both LA. CODE CRIM. PRO. art. 402 (1966) (granting an automatic exemption from jury service for women in criminal cases) and LA. REV. STAT. ANN. § 13:3055 (1968) (granting an

The Court held that the presence of a fair cross section of the community is an essential requirement of an individual's right to jury trial[9] and that this right is contravened by the exclusion of women from jury panels.[10]

Early common law juries were exclusively composed of males.[11] It was not until 1898 that this tradition was broken in the United States when Utah became the first state to allow women to serve as jurors.[12] Although many state statutes permit women to qualify for jury service, they nevertheless grant them an automatic or qualified exemption from such service.[13] Statutes such as that challenged in *Taylor* automatically excluded women from jury panels unless they volunteered.[14]

In upholding such statutes, courts have frequently relied upon the Supreme Court's dictum in *Strauder v. West Virginia:*[15]

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automatic exemption from jury service for women in civil cases) were identical in their language used to exempt women from service. The three judge district court in *Healy* declared these provisions unconstitutional as depriving litigants of due process of law and depriving female litigants of the right to equal protection of the law. 363 F. Supp. at 1117. Taken together *Taylor* and *Healy* placed the issue of the proper composition of civil and criminal juries squarely before the Supreme Court. This Note will only discuss cases which are concerned with the composition of criminal juries.

9. 95 S. Ct. at 697; *see* Duncan v. Louisiana, 391 U.S. 145 (1968).

10. 95 S. Ct. at 699.

11. 3 W. BLACKSTONE COMMENTARIES 352 (1775). A limited exception to this rule allowed women to serve on a jury in cases where a woman pleaded pregnancy in an action to exclude the next heir, *id.* at 362, or where a woman under the sentence of death requested a stay of execution until her child was born. 4 *id.* at 394. In each instance a jury of women was impaneled to try the question of whether the woman was pregnant.

12. UTAH CODE ANN. § 78-46-8 (1953). Mississippi and South Carolina became the last states in the Union to enact legislation granting women the right to serve as jurors. MISS. CODE ANN. § 13-5-1 (1972). *See generally* Crozier, *Constitutionality of Discrimination Based on Sex,* 15 B.U.L. REV. 723 (1935); Note, *Twelve Good Persons and True: Healy and Taylor,* 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 561 (1974); Note, *Jury Service for Women,* 12 U. FLA. L. REV. 224 (1959).

13. *See* note 4 *supra.*

14. *Id.*

15. 100 U.S. 303 (1880). *Strauder,* the first case of jury discrimination

> We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.[16]

Strauder presented the Court with its first opportunity to rule on discrimination in jury selection. The Court held that a state statute which limited jury service to whites violated the fourteenth amendment.[17] However, the Court characterized the fourteenth amendment as protecting an individual only against discrimination by race or color.[18]

Since *Strauder,* the majority of Supreme Court decisions have considered challenges to jury selection systems designed to exclude blacks.[19] The theory of the jury as a "cross section" of the community developed from these latter decisions. The *Taylor* Court has now expressly determined that this theory is a fundamental aspect

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heard by the Supreme Court, was one of three cases concerned with the exclusion of blacks from juries. Virginia v. Rives, 100 U.S. 313 (1880) (no blacks on venire-challenge denied without more); *Ex parte* Virginia, 100 U.S. 339 (1880) (judge charged with intentional exclusion of blacks from jury list), *see* Tucker, *Racial Discrimination in Jury Selection in Virginia,* 52 Va. L. Rev. 736 (1966).

16. 100 U.S. at 310.

17. *Id.*

18. *Id.* at 310. In Neal v. Delaware, 103 U.S. 370 (1880) the principle of *Strauder* was extended to cover not merely the statutory exclusion of blacks from juries but also the discriminatory administration of ostensibly fair jury selection laws to achieve the same result.

19. Whitus v. Georgia, 385 U.S. 545 (1967) (segregated tax returns); Eubanks v. Louisiana, 356 U.S. 584 (1958) (judges interviewed perspective jurors); Avery v. Georgia, 345 U.S. 559 (1953) (segregated jury tickets); Hill v. Texas, 316 U.S. 400 (1942) (jury commissioner's failure to seek out blacks); Bush v. Kentucky, 107 U.S. 110 (1882) (blacks excluded by law); Neal v. Delaware, 103 U.S. 370 (1880) (blacks presumed to be incompetent to serve as jurors); *See also* Kuhn, *Jury Discrimination: The Next Phase,* 41 S. CAL. L. REV. 235, 235 n.4 (1970). Since the first jury discrimination cases the Supreme Court has considered only four cases regarding the exclusion of women from juries. Hoyt v. Florida, 368 U.S. 57 (1961); Fay v. New York, 332 U.S. 261 (1947); Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60 (1942); *see* Alexander v. Louisiana, 405 U.S. 625 (1972) (Douglas, J., concurring).

of the sixth amendment right to jury and is violated by the systematic exclusion of women.[20]

In *Smith v. Texas,*[21] petitioner, a black convicted of rape, asserted that blacks were severely underrepresented on his and prior grand juries[22] because of intentional and systematic exclusion. In reversing his conviction, the Court declared that a jury must be composed of a cross section of the community: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[23]

Smith was followed by a series of cases challenging the composition of federal court grand and petit juries.[24] *Glasser v. United States*[25] was the first decision to apply the "cross section" concept to the exclusion of women from juries:

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20. 95 S. Ct. at 697-98.

21. 311 U.S. 128 (1940).

22. The fifth amendment right to an indictment by a grand jury has not been made applicable to the states as part of the due process clause of the fourteenth amendment. Hurtado v. California, 110 U.S. 516 (1884). However, "[o]nce the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias." Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970); Strauder v. West Virginia, 100 U.S. 303 (1880). The standards for selection are essentially the same as those for a petit jury. Pierre v. Louisiana, 306 U.S. 354 (1939).

23. 311 U.S. at 130.

24. Congress had provided that jurors in federal court have the same qualifications as those of the highest court of law of the state. Act of Mar. 3, 1911, ch. 231, § 275, 36 Stat. 1164. The federal code was revised in 1948 but still retained the provision disqualifying those incompetent to serve as a grand or petit juror by the law of the state in which the district court is held. Act of June 25, 1948, ch. 646, 62 Stat. 951 (1948), *as amended*, 28 U.S.C. § 1861 (1970). By the Civil Rights Act of 1957, Congress entitled women to sit on all federal juries even if they would be ineligible under state law. Act of Sept. 9, 1957, Pub. L. No. 85-315, § 152, 71 Stat 638, *as amended,* 28 U.S.C. 1861 (1970).

25. 315 U.S. 60 (1942). *Glasser* was the first decision involving a challenge to a federal grand jury based on the exclusion of women from the panel. The Court upheld the all male grand jury as being properly composed but only because of the short period of time that had elapsed between the enactment of an Illinois statute granting women the right to serve on a jury and the time of empaneling the grand jury. *Id.* at 65.

> [T]he jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class . . . . Officials . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.[26]

In *Thiel v. Southern Pacific Co.*,[27] the Supreme Court expressly applied the "cross section" standards of *Glasser*. Petitioner alleged that the federal jury commissioner had intentionally excluded daily wage earners from the jury list; this created a majority representation of one class—businessmen. Noting that jury service is a duty as well as a privilege,[28] the Court continued:

> The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups . . . . Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[29]

The Court considered it immaterial that five members of the excluded laboring class served on the petit jury:[30] "The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection."[31]

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26. *Id.* at 86.

27. 328 U.S. 217 (1946).

28. *Id.* at 224. *But see* Penn v. Eubanks, 360 F. Supp. 699 (M.D. Ala. 1973); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (both cases holding jury service to be a right and obligation).

29. 328 U.S. at 220 (citation omitted).

30. *Id.*

31. *Id.* at 225. Ballard v. United States, 329 U.S. 187 (1946), was decided in the term following *Thiel,* and held that women may not be excluded from federal grand juries which permitted them to serve. In considering women as a class the Court considered that "[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both . . . . To insulate the court room from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." *Id.* at 193-94. "The systematic and

In *Fay v. New York*[32] there were a number of challenges to the New York grand jury system, including the alleged systematic exclusion of women from the venires. In affirming the lower court's conclusion that appellant did not produce sufficient evidence supporting his allegations, the Supreme Court implied that the exclusion of women is not constitutionally significant.[33] *Fay* thus frustrated attempts to apply the "cross section" standard to state juries and provided authority for later courts to ignore the exclusion or underrepresentation of women.[34]

Hernandez v. Texas[35] marked a distinct expansion of the rule espoused in *Strauder;* it provided the basis for expanding the cover-

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intentional exclusion of women, like the exclusion of a racial group or an economic or social class deprives the jury system of the broad base it was designed by Congress to have in our democratic society." *Id.* at 195 (citations omitted). *But see* United States v. Haynes, 69 F. Supp. 424 (W.D. La. 1947).

32. 332 U.S. 261 (1947).

33. "It would . . . take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life . . . . [W]oman jury service has not so become a part of the textual or customary law of the land that one convicted of a crime must be set free by this Court if his state has lagged behind . . . in recognizing the rights and obligations of womanhood. *Id.* at 289-90.

34. Hoyt v. Florida, 368 U.S. 57 (1961); National Organization for Women v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974); Leighton v. Goodman, 311 F. Supp. 1181 (S.D.N.Y. 1970); *see* Note, *The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1111 (1966) [hereinafter cited as *Jury Selection*]. In 1953 the Supreme Court, in Brown v. Allen, 344 U.S. 443 (1953), again recognized the federal cross section theory while considering the exclusion of blacks from jury venires, but hesitated to place all the demands of that concept upon the states. The Court implied that there may be a need for reasonable compliance: "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." *Id.* at 474.

35. 347 U.S. 475 (1954).

age of the equal protection clause to all "cognizable"[36] groups or classes.[37] Petitioner in *Hernandez* asserted that the exclusion of Mexican-Americans from the grand and petit juries deprived him, as a member of that class, of the equal protection of the laws as guaranteed by the Constitution. In upholding petitioner's claim, the Court asserted that the fourteenth amendment does not apply solely to discrimination by race or color.[38]

> When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.[39]

In terms of women's service to the community, the theme had always been that "the woman's place is in the home." Such a position was expressly asserted by the Supreme Court in *Hoyt v.*

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36. For a determination of what constitutes a "cognizable" class or group, see United States v. Guzman, 337 F. Supp. 140, 143 (S.D.N.Y. 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973); Hopkins v. State, 19 Md. App. 414, 311 A.2d 483 (Md. Ct. of Spec. App. 1973).

37. Smith v. Yeager, 465 F.2d 272, 275 (3rd Cir. 1972) (all economic classes); Labat v. Bennett, 365 F.2d 698, 727 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967) (day laborers).

38. *Hernandez* used the traditional equal protection analysis of determining the reasonableness of the classification created by any acts or statutes. Two standards have been developed by the courts to determine whether a law that differentiates between distinct groups is violative of equal protection. The first standard holds the law to be valid if the class distinction is based on reasonable grounds and requires the complainant to prove the distinction. *See generally* Eastwood, *The Double Standard of Justice; Women's Rights Under the Constitution*, 5 VALPARISO L. REV. 281, 283 (1971); 82 HARV. L. REV. 1065 (1969). The second standard requires a compelling state interest to uphold the law as against class distinctions. The first standard has been applied to laws treating women as inferior or in restricting their liberties. Muller v. Oregon, 208 U.S. 412 (1908); *see* Goesaert v. Cleary, 335 U.S. 464 (1948). The second standard is stricter and requires a compelling state interest with regard to situations of racial classifications or those involving fundamental constitutional liberties. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

Florida,[40] where the Court denied petitioner's challenge to a Florida jury selection statute[41] almost identical to that later declared unconstitutional in *Taylor*. Relying on the language in *Fay*, the *Hoyt* Court emphasized that the fourteenth amendment requires only that a jury be "indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions."[42] The Court recognized women[43] as a "cognizable" class. However, it found that the automatic exemption granted to such class was based on a reasonable classification and applied in a reasonable manner.[44] The Court retreated to the "race or color" rule of *Strauder* in finding that the statute was applied in a reasonable manner:

> This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice . . . ."[45]

Such reasoning appears to be infected with the idea of the woman as "the center of home and family life."[46] The rationale is that there can be no discrimination because it is not "constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service . . . ."[47]

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39. 347 U.S. at 478.

40. 368 U.S. 57 (1961). "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Id.* at 61-62. Hoyt has been expressly overruled by Taylor v. Louisiana, 95 S. Ct. at 701. *See* 36 TULANE L. REV. 858 (1962).

41. FLA. STAT. ANN. § 40.01(1) (1959). "[T]he name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court desire her to be placed on the jury list."

42. 368 U.S. at 59, *citing* Fay v. New York, 332 U.S. 261, 284-85 (1900).

43. 368 U.S. at 60.

44. *Id.* at 61-62.

45. *Id.* at 68 (citation omitted).

46. *Id.* at 62.

47. *Id.* The Court recognized that Florida is not alone in its philosophy,

In a different view of women's rights, a three-judge federal court, in what may be considered a precursor of *Taylor*, declared unconstitutional an Alabama statute which absolutely barred women from jury duty.[48] In *White v. Crook*[49] the court logically reasoned:

> Jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of sex . . . . The time must come when a state's complete exclusion of women from jury service is recognized as so arbitrary and unreasonable as to be unconstitutional.[50]

Although *White* is not based on the same facts as *Hoyt*,[51] it represents the first holding that the absolute exclusion of women by the operation of a state statute violates the equal protection clause.[52]

The only states with exclusion statutes identical to those in *White*

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as seventeen other states and the District of Columbia granted an absolute exemption based solely on sex. *Id.* n.6. Further, three states do not allow women the right to serve as a juror. *Id.* n.5. *See also* note 13 *supra*.

48. ALA. CODE tit. 30, § 21 (Supp. 1957), *as amended*, (Supp. 1969).

49. 251 F. Supp. 401 (M.D. Ala. 1966). *Contra,* Williams v. South Carolina, 237 F. Supp. 360, 370-71 (E.D.S.C. 1965) (exclusion of women not unconstitutional); State v. Hall, ___ Miss. ___, 187 So. 2d 861, *appeal dismissed,* 385 U.S. 98 (1966) (rejecting the reasoning of *White* and holding such absolute exclusion to be constitutional in the interest of continuing a woman's services as a mother, wife and/or homemaker).

50. 251 F. Supp. at 408-09.

51. ___ Miss. ___, 187 So. 2d at 870 (Ethridge, C.J., dissenting). The crucial distinction between *White* and *Hoyt* in a factual context was that *White* involved a challenge to an Alabama statute that totally excluded women from any form of jury service. In *Hoyt* a Florida statute did not exclude women from jury service but only gave them an automatic exemption from such service. *See* notes 40 & 47 *supra*.

52. Congressional legislation concerning the exclusion of women also reached its culmination at this time with the enactment of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1970). With regard to federal juries the Act declared: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861 (1970). With regard to women the Act declared that "No citizen shall be excluded from service . . . on account of . . . sex . . . ." *Id.* § 1862.

subsequently repealed them.[53] Nevertheless several states, by means of the jury selection methods employed in the local courts, continued to include only token numbers of women in their venires.[54] Lower federal courts, asserting that the aim of the law is to obtain jurors truly representing a "cross section" of the community, responded unfavorably.[55]

The Supreme Court, in *Duncan v. Louisiana*,[56] made the sixth amendment right to a trial by jury[57] applicable to the states.[58] It found that the purpose of a jury was to prevent oppression by the government. Affirming this purpose the Court, in *Williams v. Florida*,[59] reasoned:

> [The] essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation . . . . To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community.[60]

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53. *See* note 11 *supra*.

54. Ford v. White, 430 F.2d 951 (5th Cir. 1970). A companion case was decided concurrently, Raiford v. Dillon, 430 F.2d 949 (5th Cir. 1970). *See also* United States v. Butera, 420 F.2d 564 (1st Cir 1970).

55. *See* note 34 *supra*. Such cases were decided with implied reference to decisions concerning tokenism and the black. "Token systematic inclusion of Negroes is only a facet of the overall problem of systematic exclusion; both are condemned by Federal and State cases." Billingsley v. Clayton, 359 F.2d 13, 17 (5th Cir. 1966). *See also* Cassell v. Texas, 339 U.S. 282 (1950) (17 blacks served in 6 years); Pierre v. Louisiana, 306 U.S. 354 (1939) (one black within memory).

56. 391 U.S. 145 (1968).

57. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.

58. But it is permissible with the Supreme Court's principle of federalism that the states should be permitted greater latitude in fashioning their jury selection procedures. The result, however, must be suitable to produce a representative cross-section of the community. 344 U.S. at 474; *see* Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970).

59. 399 U.S. 78 (1970).

60. *Id.* at 100. *See also* Apodaca v. Oregon, 406 U.S. 404, 410 (1972) asserting the importance of a "group of laymen representative of a cross section of the community."

Taylor concluded that the sixth amendment right to a jury requires a jury composed of a "cross section" of the community.[61] Specifically, it held unconstitutional a statute automatically exempting women from venires.[62] In considering whether a rational basis existed to exempt women from jury service, the Court in *Taylor* noted the changing status of women from the time of *Hoyt* to the present.[63] The Court pointed out that "the unmistakable import of this Court's opinions, at least since 1941 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[64] The Court further reasoned[65] that if "the fair

61. 95 S. Ct. at 697.

62. *Id.* at 701; *see* notes 2 & 3 *supra*. The Supreme Court has never ruled on the constitutionality of statutes absolutely exlcuding women from juries, and no such statutes currently exist. The *Taylor* reasoning clearly indicates that such statutes are also unconstitutional. 95 S. Ct. at 700.

63. The Supreme Court, while declaring unconstitutional the jury exemption statutes of Louisiana, relied on a strong fundamental rights analysis but also utilized a statistical analysis to overrule the social justification for a woman's exemption from jury service. In Hoyt v. Florida, 368 U.S. 62 (1968) the state had argued that state interest was based on the assumption that the "woman is still regarded as the center of home and family life" along with a consideration of administrative convenience. *Id.* at 62-63. Louisiana relied on this argument in upholding it's exemption statutes as constitutional. State v. Taylor, ____ La. ____, 282 So.2d at 497. The Supreme Court in *Taylor* acknowledged the statistics compiled by the Department of Labor with regard to the percentage of women participating in today's modern work force. 95 S. Ct. at 700 n.17. The Court reasoned that although "these statistics perhaps speak more to the evolving nature of the structure of the family unit in American society than to the nature of the role played by women who happen to be members of a family unit, they certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home." *Id.*; *see* Weinberger v. Wiesenfeld, 43 U.S.L.W. 4398, 4396 n.11 (U.S. Mar. 19, 1975).

64. 95 S. Ct. at 697.

65. The *Taylor* Court relied on Ballard v. United States, 329 U.S. 187 (1946), as authority for the distinctiveness between the male and female sexes. *See* note 30 *supra*. *See also* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973). "[Females'] absence from jury panels is significant not because all women act alike, but because they contribute a distinctive

cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn."[66] The Court con-

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medley of views influenced by differences in biology, cultural impact and life experience, indespensable if the jury is to comprise a cross-section of the community." *Id.* at 1115.

66. 95 S. Ct. at 699. Whether the exclusion of women from venires violates the sixth amendment cross-section requirement was not before the Court for the first time in *Taylor*. The issue had been challenged in Alexander v. Louisiana, 405 U.S. 625 (1972), but the Court decided the case on other grounds. In *Alexander*, petitioner, a black, challenged the grand jury selection procedures as discriminatory against blacks, and also against women, because of the Louisiana statutory exemptions. Justice Douglas, while admonishing the Court for not deciding the challenge to the exclusion of women, *id.* at 634, considered the issue in a concurring opinion, and reached the same conclusion as the majority in *Taylor*. Justice Douglas concluded that *Hoyt* must be overruled. He rejected the rationale of *Hoyt* primarily by a statistical analysis, *id.* at 639, of the circumstances of the cases in conjunction with a social view of the woman's role in society today. *Id.* at 641-44. That a "woman's place is in the home," or that a woman is by "her nature" ill suited for a particular task, are no longer sufficient as a legislative purpose in exempting women from service, and such being "[c]lassifications based on sex are no longer insulated from judicial scrutiny . . . ." *Id.* at 641. *See* Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969), holding that "[i]t is common knowledge that society no longer coddles women from the very real and sometimes brutal facts of life." *Id.* at 355. The Louisiana absolute exemption for women had been held unconstitutional by a lower federal court in Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973). While expressly overruling Hoyt, *id.* at 1117, the court relied upon Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971), as a basis of woman's rights under the equal protection clause. *Reed* invalidated an Idaho statute which gave preference as estate administrators to males. The Court concluded that by ignoring the individual qualifications of particular applicants, the challenged statute provided a "dissimiliar treatment for men and women who are . . . similarly situated," *id.* at 77, and thus violated the equal protection clause. Significantly, the Court directed it's scrutiny toward the general purpose of the legislation—reducing the administrative workload—and not toward the purpose of the classification itself as had the Court in *Hoyt*. *Id.* at 76-77. In *Frontiero*, there was a challenge to statutes that considered spouses of servicemen automatically to be dependents while spouses of servicewomen must prove dependence for more than one half of their sup-

cluded that because of *Duncan*, the right of women to sit on state juries is a fundamental right which "cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical purposes to be excluded from jury service."[67]

Justice Rehnquist, the lone dissenter, was primarily concerned with reversing a conviction without a showing of prejudice in the manner the jury was selected.[68] However, he ignored the recent Supreme Court decision in *Peters v. Kiff*.[69]

In *Peters*,[70] a white defendant challenged the exclusion of blacks

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port. Four Justices declared that sex was a "suspect classification" under the equal protection clause, 411 U.S. at 692, arguing that a classification based on sex should be subject to strict judicial scrutiny, and states should prove a compelling state interest to uphold the statutes.

67. 95 S. Ct. at 699-700.

68. *Id.* at 702 (Rehnquist, J., dissenting).

69. 407 U.S. 493 (1972). Justices Rehnquist and Blackmun joined in the dissenting opinion of Chief Justice Burger. *Id.* at 507-13. In considering the exclusions from juries because of race, the dissenters viewed the real issue to be that such illegallity does not necessarily void a criminal conviction absent any demonstration of prejudice. Justice Rehnquist was the sole dissenter in *Taylor*. Justice Rehnquist also questioned whether the right to a jury composed of a fair cross-section of the community is a "fundamental" right under *Duncan v. Louisiana*, 391 U.S. 145 (1968). He utilized Williams v. Florida, 399 U.S. 78 (1970) and Apodaca v. Oregon, 406 U.S. 404 (1972), as authority that the test of a "fundamental" right is a "sturdy test, one not readily satisfied by every discrepancy between federal and state practice." 95 S. Ct. at 703. Yet he fails to recognize that both cases imply that the right to a jury composed of a fair cross section of the community is applicable to the states under the due process clause of the fourteenth amendment.

70. 407 U.S. 493 (1972). The decision of *Peters* laid to rest the same class rule which had pervaded the state and lower federal courts since *Strauder*. Such rule did not allow a person with regard to the selection of a jury to claim discrimination against a race or class of which he is not a member without showing actual prejudice. Salisbury v. Grimes, 406 F.2d 50 (5th Cir. 1969) (a white may not challenge the exclusion of a black); Woodruff v. Breazeale, 291 F. Supp. 130 (N.D. Miss. 1967), *aff'd*, 401 F.2d 997 (5th Cir. 1968); Haraway v. State, 203 Ark. 912, 159 S.W.2d 733 (1942) (black cannot complain of absence of white); *cf.* State v. Koritz, 227 N.C. 552, 43 S.E.2d 77, *cert. denied*, 332 U.S. 768 (1947), and State v. Brunson,

from the jury.[71] The Court held that "a criminal dependant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law."[72] The *Peters* Court further stated:

> [E]xclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases . . . . It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. . . . In light of the great potential for harm latent in an unconstitutional jury-selection system . . . 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.[73]

Although it is impossible to determine what a jury under a proper selection system would decide, the state must suffer the consequences.[74]

The ramifications of *Taylor* have already been felt in New York. Prior to *Taylor,* a New York statute exempted women from jury service solely because of their sex.[75] This statute had repeatedly been upheld as constitutional.[76] The New York statute required a

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227 N.C. 558, 43 S.E.2d 82 (1947), *rev'd,* 333 U.S. 851 (1948). These companion cases both charged that blacks were excluded from the jury selection. Koritz was white while Brunson was black. The denial of certiorari of Koritz could be reasoned as a cause of the same class rule. *But cf.* Mayfield v. Steed, 345 F. Supp. 806 (E.D. Ark. 1972), *aff'd,* 473 F.2d 691 (8th Cir. 1973) (per curiam).

71. Petitioner's challenge involved a pre-*Duncan* jury challenge. At that time there was no right to a trial by jury under the sixth amendment. 407 U.S. at 500.

72. *Id.* at 504.

73. *Id.* at 503-04; *accord* Fay v. New York, 332 U.S. at 299 (Murphy, J., dissenting).

74. 407 U.S. at 504. *See* Eubanks v. Louisiana, 356 U.S. 584 (1958). "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for [the State] may indict and try him again by the procedure which conforms to the constitutional requirements. But no State is at liberty to impose upon one charged with a crime a discrimination in its trial procedure which the Constitution, and an Act of Congress . . . forbid." *Id.* at 589, *quoting* Hill v. Texas, 316 U.S. 400, 406 (1942).

75. N.Y. JUDICIARY LAW § 599(7) (McKinney 1968).

76. Fay v. New York, 332 U.S. 261 (1947); United States v. Caci, 401

woman to affirmatively claim her exemption; in Louisiana, the exemption was automatic. Any woman who wished to serve on a New York jury was required to file a declaration to that effect with the clerk of the court.[77]

In light of *Taylor*,[78] one New York state court found that the New York exemption statute was unconstitutional because it caused an underrepresentation of women on juries.[79] The New York Legislature then amended its exemption laws to coincide with *Taylor*, striking women from the list of those expressly exempted.[80] Today, all women in New York are required to appear in person when called for jury service.[81] They will only be exempted on the authority of a judge who may excuse or postpone jury service upon personal or written application.[82] This legislative action may serve as a model for similar changes in the five states still granting an exemption from jury service based solely on sex.[83]

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F.2d 664 (2d Cir. 1968); National Org. for Women v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974).

77. *See* notes 2 and 3 *supra*.

78. The Court, in *Taylor*, was careful to emphasize that its decision does not infringe on the rights of states to exempt individuals in an occupation critical to the public welfare or in cases of hardship or incapacity. 95 S. Ct. at 701-02. The Court reaffirms this position by citing its decisions in Carter v. Jury Comm'n, 396 U.S. 320 (1970); Brown v. Allen, 344 U.S. 443 (1952); Rawlins v. Georgia, 201 U.S. 638 (1906).

79. People v. Moss, 173 N.Y.L.J. 19, col. 3 (County Ct. Feb. 4, 1975). Moss declared the operation of the N.Y. JUDICIARY LAW § 599(7) (McKinney 1968) to be unconstitutional as it prevents a panel of jurors from fairly representing a cross section of the community. The court documents its findings with a series of statistical charts considering the makeup of juries in Kings County over the past five and one-half years, which delineate the substantial underrepresentation of women on the jury panels. *Contra*, People v. Moore, 173 N.Y.L.J. 18, col. 2 (County Ct. Feb. 5, 1975); People v. Tabb, 173 N.Y.L.J. 16, col. 1 (County Ct. Feb. 5, 1975); People v. Hunn, 173 N.Y.L.J. 17, col. 8 (County Ct. Feb. 5, 1975).

80. N.Y. Sess. Laws ch. 4, § 00 (McKinney 1975).

81. *Id. See also* 173 N.Y.L.J., Feb. 11, 1975, at 1, col. 1-2.

82. N.Y. Sess. Laws ch. 4, § 00 (McKinney 1975).

83. *See* note 9 *supra*.