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SIXTH AMENDMENT—RIGHT TO TRIAL BY JURY

Burch v. Louisiana, 99 S. Ct. 1623 (1979).
Duren v. Missouri, 439 U.S. 357 (1979).

During the past Term, the Supreme Court decided two cases involving the right to a jury trial in state criminal proceedings. In *Burch v. Louisiana*,[1] the Court held that a conviction by a nonunanimous six-person jury in a state criminal trial violated the right of the defendant to trial by a jury of his peers guaranteed by the sixth[2] and fourteenth[3] amendments. In *Duren v. Missouri*,[4] the Court held that the state interest in exempting all women from jury duty is insufficient to overcome a defendant's sixth amendment right to a jury selected from a fair cross section of the community.

Both *Burch* and *Duren* demonstrate how the Court is facing the challenge of changes it has permitted or required in the makeup of the constitutional jury which, under the common law, required twelve persons, unanimity, and the exclusion of women.[5] *Burch* indicates that further reductions in jury size and verdict composition will not be permitted; the line has been drawn at a minimum size of six persons, and a unanimous verdict is required when the number of persons on the jury is the minimum. *Duren*, on the other hand, does not change significantly a new doctrine regarding the sixth amendment right to a jury trial, the fair cross-section requirement, which had just been held applicable to women in a 1975 case.[6]

BURCH V. LOUISIANA

The two defendants in *Burch*, Burch and Wrestle, Inc., were convicted of exhibiting obscene motion pictures, a nonpetty offense. A poll of the jury following the verdict indicated that the jury had voted unanimously to convict Wrestle, Inc.[7] and had voted five-to-one to convict Burch.[8] The Louisiana constitution contained a provision authorizing conviction in this type of case by "a jury of six persons, five of whom must concur to render a verdict."[9] In affirming the defendants' convictions, the Louisiana Supreme Court noted that none of the United States Supreme Court's previous decisions precluded convictions by nonunanimous six-person juries and, therefore, such a conviction did not offend the United States Constitution.[10] The

[1] 99 S. Ct. 1623 (1979).

[2] U.S. CONST. amend. VI reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

[3] Duncan v. Louisiana, 391 U.S. 145 (1968). The sixth amendment right of trial by jury is applicable to the states by incorporation through the due process clause of the fourteenth amendment.

[4] 439 U.S. 357 (1979).

[5] *See generally* Thayer, *The Jury and Its Developments*, 5 HARV. L. REV. 295 (1892).

[6] Taylor v. Louisiana, 419 U.S. 522 (1975).

[7] 99 S. Ct. at 1625. The Court held that because a unanimous jury convicted Wrestle, Inc., it lacked standing to challenge the constitutionality of the Louisiana law allowing conviction by a nonunanimous jury.

[8] Burch received a sentence of two consecutive seven-month prison terms, which were suspended, and was fined $1,000. 99 S. Ct. at 1625.

[9] Article I, § 17 of the Louisiana Constitution provides:

> "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

Id. at 1624 n.1 (quoting LA. CONST. art. I, § 17).

[10] 360 So. 2d 831, 838 (La. 1978). The Louisiana court noted that since State v. Wrestle, Inc., 75 percent concurrence was enough for a verdict in Johnson v. Louisiana, 406 U.S. 356 (1972), then 83 percent concurrence ought to be within the *Johnson* limits. *Id.* (citing Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 56 n.300 (1974)). In addition the court stated that a six-person jury was of sufficient size to promote adequate group deliberation, to protect members from outside intimidation, and to provide a representative cross section of the community, as required by Williams v. Florida, 399 U.S. 78 (1970), regardless of whether the verdict was five-to-one. 360 So. 2d at 838.

court, thus, decided to "indulg[e] in the presumption of federal constitutionality which must be afforded to provisions of our state constitution...."[11]

On review, the United States Supreme Court did not dispute this reasoning of the Louisiana court—even though it overturned the conviction. The opinion by Justice Rehnquist stated that "this case lies at the intersection of ... [its] decisions concerning jury size and unanimity."[12] Hence, the Court reviewed its previous decisions on jury size and unanimity in order to reach its own conclusion as to the appropriate outcome.

The initial jury trial decision considered by the Court was *Duncan v. Louisiana*[13] which applied the sixth amendment to the states. Two Terms later in *Williams v. Florida*,[14] the Court considered the question of whether or not twelve-person juries were constitutionally required. In its opinion the Court delineated the history of the right to a jury trial and concluded that the twelve-person requirement was a historical accident which was not frozen into the Constitution by its framers.[15] In reaching this conclusion, the *Williams* Court relied on empirical data but admitted that there were only a few studies available, mostly in the civil area.[16]

Because the Court reversed a long line of cases requiring a twelve-person jury and because it had relied heavily upon a small amount of empirical data, Justice Harlan in his dissent[17] could not understand how the Court had reached its decision. Justice Harlan strongly urged that the term "jury" should be interpreted in light of the common law, the principles and history of which were known to the framers of the Constitution.[18] Justice Harlan also felt it was obvious that a jury of twelve provided a greater safeguard against the prosecutor and the judge which was the purpose of the jury trial.[19]

According to the *Williams* Court, the essential purposes of the jury were, first, interposition of the commonsense judgment of a group of laymen between the defendant and the judge and prosecutor. Second, the purpose of the jury was to provide community participation and shared responsibility resulting from the group's determination of guilt or innocence.[20] The Court then held that these purposes would be fulfilled by a jury of sufficient size to promote adequate group deliberation, to protect members from outside intimidation, and to provide a representative cross section of the community.[21] The *Williams* Court held that a jury of six persons sufficiently satisfied these purposes and, therefore, did not violate a defendant's constitutional right to a jury trial.

Following the *Williams* approach in a 1972 case,[22] the Court again inquired into the purpose of the jury through a historical analysis of that institution. A plurality in *Apodaca v. Oregon*,[23] held that the common-law-jury requirement of a *unanimous* verdict was not constitutionally required and therefore the ten-to-two conviction in *Apodaca* was affirmed.[24] The plurality felt that the essential purpose of the jury still was served despite the absence of a unanimity requirement, because even though a unanimity requirement would produce hung juries in some situations where nonunanimous juries would convict or acquit, the interest of the defendant in having the judgment of his peers interposed between himself and the prosecutor and judge was served equally as well.[25]

After the *Williams* and *Apodaca* decisions, the Court became unwilling to legitimize other state variations of the constitutional requirements of a jury trial.[26] The Court had already held that the sixth amendment required neither a twelve-person jury nor conviction by a unanimous vote. In doing so, the Court had consistently protected what it perceived to be the general purpose and essential functioning of the jury.[27] After these cases were decided, many commentators analyzed the reasoning behind the Court's relaxation of jury requirements and attempted to determine the empirical relationship between the changes in the jury and the quality of the verdicts they render.[28]

[11] 360 So. 2d at 838.
[12] 99 S. Ct. at 1627.
[13] 391 U.S. 145 (1968).
[14] 399 U.S. 78 (1970).
[15] *Id.* at 89–90, 100.
[16] *Id.* at 101.
[17] *Id.* at 117 (Harlan, J., dissenting).
[18] *Id.* at 117, 124.
[19] *Id.* at 126.
[20] 399 U.S. at 100.
[21] *Id.*
[22] Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion). Justices Douglas, Brennan, Marshall, and Stewart vigorously dissented stating that unanimity of the jury was a constitutional requirement. *Id.* at 414–15 (Douglas, Brennan, Marshall, and Stewart, JJ., dissenting).
[23] 406 U.S. at 404.
[24] *Id.* at 413–14.
[25] *Id.* at 410–11.
[26] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978).
[27] *See* Apodaca v. Oregon, 406 U.S. at 410–12; Williams v. Florida, 399 U.S. at 100.
[28] *See* Ballew v. Georgia, 435 U.S. at 231 n.10, for a list of these scholarly studies.

In *Ballew v. Georgia*,[29] the Court was faced with still another state modification of the composition of the jury. The *Ballew* Court studied the empirical research to determine the actual effects of the changes it had permitted in *Williams* and *Apodaca* and to decide whether further changes might be detrimental to a defendant's constitutional right to trial by jury.[30] The *Ballew* Court acknowledged that the collection of data does "not draw or identify a bright line below which the number of jurors would not be able to function as required by the standards enunciated in *Williams*. On the other hand, they raise significant questions about the wisdom and constitutionality of a reduction below six."[31] Hence, the Court agreed that there was a positive correlation between group size and the quality of both group performance in arriving at a fair and accurate decision and group productivity in producing accurate findings of fact and correctly applying the commonsense of the community to those facts.[32]

The Court in *Ballew* cited a number of studies which explained the specific effects on group performance and productivity when the size of the group was reduced.[33] For example, "[t]he smaller the group, the less likely are members to make critical contributions necessary for the solution of a given problem."[34] Also, "[b]ecause most juries are not permitted to take notes, ... memory is important for accurate jury deliberations."[35] The smaller the number of jurors, the less likely it is that there will be members of the jury who remember each of the important pieces of evidence or argument.[36] Moreover, "[t]he smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result."[37] Particularly critical, the Court noted, is the jury's function of "counter-balancing" various biases in bringing to bear the commonsense of the community to the facts of any given case.[38] Almost every study cited in the *Ballew* opinion indicated that six-person juries do not perform as well in these capacities as twelve-person juries.[39] Therefore, even though the Court still held to the view that the Constitution did not command twelve-person juries, it felt that any further reduction below six persons, even if the verdict was unanimous, would impair a defendant's right to trial by jury.

These same doubts regarding the functioning of a six-person jury, instigated by the empirical studies, led the Court to conclude in *Burch* that when a six-person jury is used, unanimity of verdict must be required despite the holding in *Apodaca* that unanimity is not required when a twelve-person jury is utilized.[40] The Court supported this decision with the fact that of all the states that use six-person juries in trials of nonpetty offenses, only two, Louisiana and Oklahoma, permit a nonunanimous verdict.[41] Moreover, the Court found that alleged state benefits through reduction in time and expense of administering its system of criminal justice through the use of nonunanimous six-person juries was "speculative at best"[42] and an insufficient justification for their use.[43] Hence, all of the Justices agreed that the six-person jury must be unanimous.[44]

Analysis of *Burch*

Since the Court first applied the constitutional right to trial by jury to the states in *Duncan*, it has endeavored to elucidate what this right involves. The *Duncan* Court explained that the purpose of a jury trial is to provide, "an accused with the right to be tried by a jury of his peers, [giving] ... him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[45]

The *Williams* Court explained that this purpose of the jury is attained by the participation of the community in determinations of guilt by the application of the commonsense of laymen who, as jurors, consider the case.[46] The *Williams* Court concluded that the sixth amendment mandated a jury only of sufficient size to promote group delib-

[29] 435 U.S. 223 (1978).
[30] *Id.* at 231–32.
[31] *Id.*
[32] *Id.* at 232–33.
[33] *Id.*
[34] *Id.* at 233.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 234.
[39] *Id.* at 233; *see* Thomas & Fink, *Effects of Group Size*, 60 Psych. Bull. 371, 373 (1963).
[40] Burch v. Louisiana, 99 S. Ct. at 1627–28.
[41] *Id.* at 1628 n.12.
[42] *Id.* at 1628.
[43] *Id.*
[44] Justices Brennan, Stewart, and Marshall concurred for the same reasons that they felt a twelve-person jury must be unanimous. It follows logically that they would conclude that a six-person jury must be unanimous. But they would not have remanded the case for retrial as they believed that the obscenity statute under which the defendants were convicted was overbroad and therefore unconstitutional. *Id.* at 1629 (Brennan, Stewart, and Marshall, JJ., concurring in part and dissenting in part).
[45] Duncan v. Louisiana, 391 U.S. at 156.
[46] Williams v. Florida, 399 U.S. at 100.

eration, to insulate members from outside intimidation, and to provide a representative cross section of the community.[47]

The major significance of *Burch*, therefore, is that the Court has now determined that it must draw the line somewhere regarding the size of the group convicting an accused to preserve the substance of the jury trial right.[48] Although the Court cited no empirical data concerning the importance of unanimity, it recognized that reductions in the size of the common-law jury have gone far enough and that a requirement of unanimity for a six-person jury prevents an imperfect jury system from becoming more unrepresentative, unfair, and inaccurate.

Judging from the results of the empirical studies published since the *Williams* decision, it appears that the result in *Burch* was the only one possible. The Court has repeated a number of times that the essential purpose of the jury is its interposition of the commonsense judgment of the community between the accused and his accusers.[49] But in *Apodaca* the plurality held that unanimity did "not materially contribute to the exercise of this commonsense judgment."[50] However, six years after *Apodaca*, the Court in *Ballew* decided that effective and accurate jury deliberation was an important element of the right to a jury trial.[51] If a jury is allowed to reach a verdict with only five members agreeing, it seems clear that there needs to be less deliberation than if all six members had to agree. It follows logically from *Ballew*, where the Court held that agreement by a five-member jury did not afford a defendant his constitutional right to a jury trial,[52] that agreement by five members of a six-person jury would not afford a defendant his constitutional right to a jury trial.

Duren v. Missouri

In *Duren*,[53] the defendant alleged that his sixth amendment right to trial by jury had been infringed because the jury selection process in Jackson County systematically excluded women and, therefore, the venires were not made up of a fair cross section of the community.[54] The decision in *Duren* was not surprising since the Missouri statute exempting women from jury service was similar to the Louisiana statute declared unconstitutional in a 1975 case.[55] Additionally, the statistical facts presented by the defendant in *Duren*, when compared to the statistics in the previous case, evidenced similar under representation of women on jury venires, even though the percentage of women on the jury venires in *Duren* was greater than the percentage of women in the venires in the previous case.[56]

The defendant in *Duren* established that 54 percent of the adult inhabitants of Jackson County were women.[57]

> He also [established] . . . that for the periods June–October 1975 and January–March 1976, 11,197 persons were summoned, and 2,992 of these or 26.7%, were women. Of those summoned, 741 women and 4,378 men appeared for service. Thus, 14.5% (741 out of 5,119) of the persons on the postsummons weekly venires during the period in which the defendant's jury was chosen were female.[58]

The defendant alleged that this underrepresentation of women was caused by the automatic statutory exemption from jury service.[59]

Even though the Missouri Supreme Court questioned the defendant's statistical presentation,[60] it

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[47] *Id.*

[48] Burch v. Louisiana, 99 S. Ct. at 1627.

[49] *See* Ballew v. Georgia, 435 U.S. at 229; Apodaca v Oregon, 406 U.S. at 410; Williams v. Florida, 399 U.S. at 100; Duncan v. Louisiana, 391 U.S. at 156.

[50] Apodaca v. Oregon, 406 U.S. at 411.

[51] *See* Ballew v. Georgia, 435 U.S. at 232–34.

[52] *Id.* at 245.

[53] 439 U.S. 357 (1979).

[54] *Id.* at 360. The jury selection process began with an annual mailing of a questionnaire to approximately 70,000 persons randomly selected from voter registration lists. The questionnaire contained a list of occupations and additional categories which were the basis for either disqualification or exemption from jury service under Missouri law. There was also a paragraph to women informing them that if they chose not to serve they should fill out and return the questionnaire.

Next, all of the names of those who received questionnaires, excluding those returned questionnaires which indicated a disqualification or exemption, were placed in the jury wheel. Then summonses were mailed weekly to prospective jurors drawn randomly from the jury wheel. The summons had a paragraph similar to that of the questionnaire advising women who wished to claim the exemption to return the summons. Under Missouri law, women could claim an exemption at any time before being sworn as a juror.

[55] Taylor v. Louisiana, 419 U.S. 522 (1975). One commentator predicted the Missouri statute's ultimate unconstitutionality. *See* Comment, *The Female Exemption from Jury Service in Missouri*, 43 U. Mo. Kansas City L. Rev. 382, 389 (1975).

[56] *Compare* Duren v. Missouri, 439 U.S. at 362–63, *with* Taylor v. Louisiana, 419 U.S. at 524.

[57] Duren v. Missouri, 439 U.S. at 362.

[58] *Id.* at 362 (footnotes omitted).

[59] *Id.* at 360.

[60] State v. Duren, 556 S.W.2d 11, 15–16 (Mo. 1977), *rev'd*, 439 U.S. 357 (1979).

held, assuming arguendo that his statistics were valid, that the number of females in the jury wheel and those appearing were well above the constitutional standards established in *Taylor v. Louisiana*.[61] However, the United States Supreme Court in *Duren* stated that it granted certiorari because of its concern that the decision of the Missouri Supreme Court was, in fact, inconsistent with its decision in *Taylor*.[62]

In *Taylor* the Court had summarized the development of the sixth amendment fair cross-section requirement.[63] "[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[64] Concluding that even though women were not allowed to serve as jurors when the Constitution was written, the Court decided that women were a distinctive group in the community and, therefore, it was "no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male."[65]

After *Taylor* several questions remained unanswered. The Missouri Supreme Court, for example, concentrated upon the words of the Court that the constitutional defect in *Taylor* was that the criminal "jury venires are almost *totally* male."[66] Since the Missouri wheel contained between 29 to 30 percent women whereas the wheels in *Taylor* contained only 10 percent women, the Missouri court concluded that its jury composition was well above acceptable constitutional standards.[67] Indeed, *Taylor* left unclear exactly what percentages a defendant would have to prove to establish underrepresentation on jury venires so as to establish a violation of the fair cross-section requirement of the sixth amendment.

The Court in *Duren* attempted to clarify these ambiguities. First, Justice White's opinion for the Court set up a tripartite test to establish a prima facie violation of the fair cross-section requirement. To establish a prima facie violation, the defendant must show:

> (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 underrepresentation is due to systematic exclusion of the group in the jury selection process.[68]

The Court, however, did not explain what it meant by "distinctive." This question has already produced confusion in the lower courts. In the year since the *Duren* decision was handed down, some lower courts have struggled with the word "distinctive" and have resorted to other lower court cases for definitions of "distinctive" or "cognizable."[69] One lower court has interpreted "distinctive" to mean a group larger than many of the small minorities in the population.[70]

Similarly, the Court did not explicitly explain part two of the prima facie test. It is still not clear what representation by the "distinctive" group will be considered fair and reasonable. However, it is now clear that the way to establish this second element of the prima facie test is through a statistical presentation comparing the percentage of the group in the community to the percentage of the group on jury venires.[71]

Just as with the first two, the Court did not explain part three of the prima facie test. But, *Duren* suggests that if a defendant can prove that the underrepresentation of the group occurred in every weekly venire for a significant period of time, then he or she will probably have established systematic exclusion.[72]

After the Court listed the prima facie test, it proceeded to analyze the *Duren* facts in light of the tripartite test. In each part of its analysis the Court in *Duren* relied on *Taylor* for support. Regarding the distinctive nature of the group excluded, the Court stated explicitly that "*Taylor* without doubt estab-

[61] 556 S.W. 2d at 16–17.

[62] 439 U.S. at 363.

[63] The early cases first discussing what is now termed the fair cross-section requirement spoke in terms of juries which were representative of the community. Most of these cases involved the exclusion of racial groups. *See* Taylor v. Louisiana, 419 U.S. at 526–30; Carter v. Jury Comm'n, 396 U.S. 320 (1970); Brown v. Allen, 344 U.S. 443 (1953); Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940).

[64] Taylor v. Louisiana, 419 U.S. at 538.

[65] *Id.* at 537.

[66] *Id.* (emphasis added).

[67] State v. Duren, 556 S.W.2d at 15–17.

[68] Duren v. Missouri, 439 U.S. at 364.

[69] *See* United States v. Goodlow, 597 F.2d 159, 162 (9th Cir. 1979); United States v. Hanson, 472 F. Supp. 1049 (D. Minn. 1979).

[70] United States v. Hanson, 472 F. Supp. at 1053. The court questioned whether Indians, which constituted 1.8 percent of the population were a "distinctive" group under *Duren*. The court concluded that they were not.

[71] Duren v. Missouri, 439 U.S. at 364–65.

[72] *Id.* at 366.

lished that women 'are sufficiently numerous and distinct from men' such that 'if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied.'"[73]

The Court then held that the defendant had satisfied the second prong of the prima facie test of demonstrating unfair representation of the group on juries by his statistical presentation.[74] The Court simply stated that such a gross discrepancy between the actual percentage of women in the community (54 percent) and the percentage of women on jury venires (15 percent) required the conclusion that women are not fairly represented in the venires, the source from which petit juries were drawn in Jackson County.[75] As Justice Rehnquist noted in dissent, however, it is still not clear from the Court's opinion what percentages of representation on jury venires will be acceptable in the future to satisfy the fair cross-section requirement.[76]

The defendant also established that the same large discrepancy occurred in every weekly venire. This led the Court to conclude that the underrepresentation of women was systematic, and that it was inherent in the particular jury selection process utilized. The defendant, therefore, had established the third and final part of his prima facie case.[77]

In the last section of his opinion, Justice White explained that *Taylor* permits the state to rebut the defendant's prima facie case if it is able to prove a significant interest in the jury-selection process which results in the disproportionate exclusion of a distinctive group.[78] However, Justice White pointed out that the state interest in safeguarding the important role of women in the home and family life was an insufficient justification for the disproportionate exclusion of women from jury venires.[79]

Once a defendant makes a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community and the state has satisfied its burden of showing that the attainment of a fair cross section was incompatible with a significant state interest, the state must then further demonstrate that those exemptions which would justify failure to achieve a fair cross section caused the underrepresentation complained of.[80]

Justice White reiterated what the Court had said in *Taylor* about exemptions from jury service which would be constitutionally permissible: "[I]t is unlikely that reasonable exemptions, such as those based on special hardship, incapacity, or community needs, 'would pose substantial threats that the remaining pool of jurors would not be representative of the community.'"[81] This should allay fears about the "slippery slope" effect that the *Duren* decision may have. Justice Rehnquist in his dissent postulated that the *Duren* decision will cause states to abandon occupational-based classifications for the purposes of jury service. He predicted that doctors and nurses will be forced to serve on juries in the future even though they may be irreplaceable in the community.[82]

In his dissent Justice Rehnquist further opined that the Court was really concerned with the "distinctive" group's right to serve on a jury rather than the defendant's right to a jury selected from a fair cross section of the community.[83] He attempted to substantiate this statement by the fact that *Taylor* relied on equal protection cases and that the analysis the Court used in *Taylor* and *Duren* sounds like an equal protection analysis.[84]

Indeed, Justice White noted that the only distinction between the Court's sixth amendment fair cross-section analysis and its equal protection cases is that there is no need to prove discriminatory purpose under a sixth amendment challenge.[85] It follows that the proof is much easier here than in an equal protection challenge.

The Court could have responded more directly to Justice Rehnquist's dissent. It is possible that the Court was truly concerned with a defendant's right to a jury selected from a fair cross section of the community. In analyzing this type of challenge the Court appears to have borrowed from its equal protection analysis omitting the need to prove discriminatory purpose. The Court may have seen this as a way of giving additional protection to a

[73] *Id.* at 364 (quoting Taylor v. Louisiana, 419 U.S. at 531).

[74] 439 U.S. at 365–66.

[75] *Id.*

[76] *Id.* at 374 (Rehnquist, J., dissenting).

[77] 439 U.S. at 366–67.

[78] *Id.* at 367–68. This interest must be more than simply rational.

[79] *Id.* at 369. Justice White mentioned certain state interests which could justify exemptions from jury service. One such interest was to insure that those members of the family responsible for the care of children are permitted to remain at home, regardless of whether they are male or female. *Id.*

[80] *Id.*

[81] Duren v. Missouri, 439 U.S. at 370 (quoting Taylor v. Louisiana, 419 U.S. at 534).

[82] 439 U.S. at 377 (Rehnquist, J., dissenting).

[83] *Id.* at 371 n.*.

[84] *Id.* at 371.

[85] 439 U.S. at 368 n.26.

criminal defendant challenging a jury selection process under the sixth amendment in the form of an easier burden of proof.

Analysis of *Duren*

In addition to the Court's failure to sufficiently answer the equal protection—sixth amendment confusion pointed out by Justice Rehnquist, there were a number of questions left open by the *Duren* decision.

First, one question regarding the consistency of the Court's decision was raised by Justice Rehnquist. As noted in his dissent, if the purpose of a jury is the interposition of the commonsense judgment of a group of layman between the accused and his accuser, it accomplishes nothing to require a fair cross section on the venires and then not require the jury itself to be made up of a fair cross section of the community.[86]

Indeed, the Court has indicated in one case that it believes the achievement of an impartial verdict requires that the jury represent a fair cross section of community attitudes toward capital punishment.[87] The state, in that case, was not allowed to challenge for cause all prospective jurors who were opposed to capital punishment. The Court held that a defendant's sixth amendment right to trial by jury prohibited the exclusion of an entire group with certain ideas from the jury.[88] Following this reasoning, the focus of *Duren* should have been on the percentage of women on the jury panel. However, the Court has never found a sixth amendment right to a panel representing a fair cross section of the community

The Court in *Duren* pointed out that there are some exemptions to jury representation which are constitutionally permissible.[89] Another question remains, however, whether *any* exemptions can be justified in light of a defendant's sixth amendment right to a jury venire selected from a fair cross section of the community. The reasons behind these exemptions must therefore be balanced against the benefits accruing to a defendant from the fair cross-section requirement of the sixth amendment.

Doctors and nurses are commonly exempted from jury service because the jobs they perform are more important to society than the benefit of having them serve on juries. One argument against exempting doctors and nurses is that they bring an important unique perspective to the jury. On the other hand, in a community which does not have an adequate supply of doctors and nurses, it may be more beneficial to society as a whole to allow them exemptions from jury service. However, perhaps this benefit to society can be accomplished in another way which would not totally exempt doctors and nurses. This alternative solution would entail individual exemptions depending on the particular fact situation. For example, if a doctor practices in a small community where his absence in order to serve on a jury would probably be detrimental to the community's health care, this doctor should be exempt from jury service. The argument against this type of case by case exemption process is that the cost to the state may be high. But, if total exemption of these groups causes jury panels to be unrepresentative of the community, then a cost argument does not appear to be a significant enough state interest to justify group exemptions.

The *Duren* Court opined further that states may provide reasonable exemptions as long as the jury lists or panels are fairly representative of the community. This statement is internally contradictory. If an entire group is exempted from jury duty then obviously the jury panels will be less representative. In addition the more groups that are exempted, the less representative the jury panels become. Hence, it appears difficult to justify total exemptions for any group.

Conclusion

Both sixth amendment jury cases decided last Term indicate that the Court is willing to give more expanded rights to a defendant faced with a jury trial. In *Burch* the Court emphasized that the cutting away from the common law requirements of a jury—twelve persons and unanimity—has come to a conclusion and that the Court may be heading toward a rebuilding of the jury; however, it is doubtful that we will see a twelve-person unanimous jury requirement in the forseeable future. *Burch* does leave some questions unanswered such as whether or not juries composed of less than twelve but more than six persons require unanimous verdicts. However, *Burch* is helpful because it

[86] *Id.* at 371n.* (Rehnquist, J., dissenting).

[87] Witherspoon v. Illinois, 391 U.S. 510 (1968).

[88] *Id.* at 522

[89] The Court stated that an exemption for th e members of the family responsible for the care of children would probably be constitutional. Also mentioned by the Court were exemptions based on special hardship, incapacity, or community needs. Duren v. Missouri, 439 U.S. at 370.

draws the line at the minimum constitutional requirements for jury size and verdict based on the proper purposes and the essential functioning of the jury in our constitutional system.

Duren, on the other hand, seems to contribute little to the *Taylor* fair cross-section requirement for jury venires. Although *Duren* does set out the prima facie test explicitly, it still leaves a number of questions unanswered. It is unclear what groups will be considered "distinctive" in the future so as to invoke a constitutional violation if the group is systematically excluded from jury venires. It is also uncertain whether the Court will eventually apply the fair cross-section requirement to the juries themselves and not just the venires from which they are chosen. The sixth amendment right to a jury trial is still a developing area which needs additional analysis by the Court.