Catholic University Law Review

Volume 32
Issue 4 *Summer 1983*

Article 12

1983

A Fair Cross Section and Distinctiveness in the Jury Selection Plan for the District of Columbia

Shaheda Sultan

A FAIR CROSS SECTION AND DISTINCTIVENESS IN THE JURY SELECTION PLAN FOR THE DISTRICT OF COLUMBIA

In criminal prosecutions the United States Constitution guarantees the right to an indictment and trial by an impartial jury.[1] The Supreme Court[2] and Congress[3] have unequivocally declared that an essential component of this right is that selection of grand and petit juries be made from a representative cross section of the community.

The fair cross section requirement means there is a constitutional entitlement to a jury drawn from a *venire* constituting a fair cross section of the community.[4] It does not mean that each *jury panel* must be made up of representatives of all groups in the community.[5] In accordance with the Jury Selection Act's mandate, the United States District Court for the District of Columbia established and adopted the "Modified Plan for the United States District Court for the District of Columbia for the Random Selection of Grand and Petit Jurors" (D.C. Plan).[6] Both the Jury Selection

---

1. U.S. CONST. amend. V provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger . . . [nor be] deprived of life liberty, or property without due process of law. . . .

Amend. VI provides in relevant 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 . . . ."

2. For an example of Supreme Court acceptance of the fair cross section requirement, see Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

3. In the Federal Jury Selection and Service Act of 1968 (Jury Selection Act) Congress stated: "[A]ll litigants in Federal court entitled to a 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. §§ 1861-1874 (1976 and Supp. V 1981).

4. *Taylor*, 419 U.S. at 526.

5. Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946).

6. The D.C. Plan establishes a jury commission for selecting potential jurors. The first step in the selection process is to compile a source list from voter registration and motor vehicle registration lists. From this pool, a master list of approximately 50,000 names is compiled using a constant quotient. The number of names is then reduced to 10,000 in the same manner and this constitutes the working list. Questionnaires are mailed to the persons on the working list to determine if any are disqualified, exempt, or qualified to be excused and have requested to be excused from any jury service. The names of persons in these

Act and the D.C. Plan apply to the Superior Court of the District of Columbia.[7]

The D.C. Plan provides that nurses, clergymen, teachers, attorneys, physicians, and dentists in active practice are excused from jury service upon request.[8] The excuse provision is predicated upon a specific finding by the District Court that jury service by such groups would entail undue hardship or extreme inconvenience.[9] This occupational excuse provision of the D.C. Plan was challenged in D.C. Superior Court by various criminal defendants on two grounds. First, the excuse provision violates the fifth and sixth amendment rights to be indicted and tried by jurors chosen from a fair cross section of the community. Second, it violates the requirements and intent of the Jury Selection Act.[10] Although the D.C. Superior Court ruled on this question some time ago,[11] upholding the D.C. Plan, the District of Columbia Court of Appeals addressed the question for the first time in *Sweet v. United States*,[12] and affirmed the lower court's decision.

The exact question presented in *Sweet* has not been addressed by the Supreme Court, but similar questions in prior Supreme Court cases provide the applicable framework and a sketchy rationale for the *Sweet* decision. In *Taylor v. Louisiana*,[13] the Supreme Court reversed a conviction because the Louisiana jury selection system violated the fair cross section requirement of the sixth amendment.[14] The system provided that a woman could only be selected for jury service if she filed a written notice of her willingness to serve on a jury.[15] Without specifically disqualifying women from jury service, the Louisiana jury selection system had the effect of

---

categories are crossed off the list and the remaining names go on the qualified juror wheel for service on a grand jury or petit jury. *See* Obregon v. United States, 423 A.2d 200, 203 (D.C. 1980), *cert. denied*, 452 U.S. 918 (1981).

7. D.C. CODE ANN. § 11-1902 (1981).

8. The D.C. Plan also provides for excuse upon request for persons over the age of 70 years, persons who have served as grand or petit jurors in the District of Columbia within the previous four years, persons required to care at home for young children or disabled persons, and persons self-employed in a one-person business. Other categories, such as members of the Armed Forces in active service and members of the fire and police departments, are totally *exempted*, as opposed to *excused* upon request, by § 1863(b)(6) of the Jury Selection Act. 28 U.S.C. § 1863(b)(6) (1976 and Supp. V 1981).

9. 28 U.S.C. § 1863(b)(5) (1976 & Supp. V 1981). *See infra* note 38.

10. *See supra* notes 1 & 3.

11. United States v. Sutton, Daily Wash. L. Rep., Jan. 21, 1980, at 117, col. 3 (D.C. Super. Ct. Dec. 5, 1979). For the holding and reasoning in *Sutton*, see *infra* notes 29-43 and accompanying text.

12. 449 A.2d 315 (D.C. 1982).

13. 419 U.S. 522 (1975).

14. *Id.* at 531.

15. *Id.* at 523-24. This meant that although 53% of those qualified to serve on juries were women, only 10% of those on the jury wheel were women. Even more striking is the

systematically excluding women from jury venires. The Court decided "women are sufficiently numerous and distinct from men" and, therefore, their systematic exclusion from jury venires transgressed the fair cross section requirement.[16]

In *Duren v. Missouri*,[17] the Supreme Court, interpreting the "numerous and distinct" language of *Taylor*, enunciated a three-part test for establishing a prima facie violation of the fair cross section requirement. The *Duren* Court stated that in order to succeed

> 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.[18]

The Missouri jury selection system, at issue in *Duren*, excused women from jury service upon request. The Court held that the defendant had shown a prima facie violation and the state had not rebutted the defendant's prima facie case by showing that the "attainment of a fair cross section [is] incompatible with a significant state interest."[19] Therefore, the system violated the fair cross section requirement.

The Ninth Circuit is the only federal court of appeals to have addressed the question of occupational excuse provisions.[20] The court upheld the provisions for two reasons. First, the defendants had not shown that the district court's finding of undue hardship or extreme inconvenience was clearly erroneous.[21] Second, the defendants had failed to satisfy the second prong of the *Duren* test, that the groups are underrepresented.[22] Although the court did not discuss the first prong of the *Duren* test, distinctiveness, it did note "a surface incongruity"[23] in the state's position that the groups are distinctive enough to be excused from jury service and

---

fact that "during the period from Dec. 8, 1971 to Nov. 3, 1972, 12 females were among the 1,800 persons drawn to fill petit jury venires in St. Tammany Parish." *Id.*

16. *Id.* at 531-32. The Court also quoted Ballard v. United States, 329 U.S. 187, 193-94 (1946): "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both . . . a flavor, a distinct quality is lost if either sex is excluded." *Id.*.

17. 439 U.S. 357 (1979).

18. *Id.* at 364.

19. *Id.* at 368.

20. United States v. Goodlow, 597 F.2d 159 (9th Cir.), *cert. denied*, 442 U.S. 913 (1979).

21. *Id.* at 161.

22. *Id.* at 162.

23. *Id.* at 162 n.1.

yet are not distinctive enough for purposes of the cross section requirement. With only the skeletal *Duren* test and these rather unhelpful cases as a guide, the District of Columbia Court of Appeals ruled, for the first time, on the issue of automatic excuses for members of particular occupational groups in *Sweet v. United States*.[24]

In *Sweet*, appellant was indicted by a grand jury and challenged the District of Columbia Plan before trial by filing a motion to dismiss the indictment.[25] Instead of having an evidentiary hearing on the motion, the parties agreed to adopt the record on this issue made in *United States v. Sutton*[26] before the same judge.[27] The trial court denied the motion to dismiss the indictment for the reasons given in *Sutton*.[28]

The *Sutton* trial court, in applying the *Duren* test, found the automatic excuse provisions legal. The *Sutton* court decided there was underrepresentation of members of the six occupations in the pool from which jury panels are selected.[29] The trial court also found the systematic exclusion prong of the test had been satisfied since the underrepresentation was "due to systematic exclusion of persons in those occupations from jury service."[30] The trial court reasoned that the automatic excuse, obtained by merely checking a box on the questionnaire, encourages avoidance of jury service and, therefore, the underrepresentation was inherent in the system.[31]

The *Sutton* court held that the distinctive group prong of the test was not satisfied, however, since the members of the six occupations were not shown to be a distinctive group in the community.[32] The trial court conceded that "[t]here is no bright beam of Constitutional light defining a 'distinctive group' " and that "[t]he criteria for determining distinctiveness are evolving."[33] The court, therefore, looked at language from decisions in

24. 449 A.2d 315 (D.C. 1982).

25. The indictment included rape while armed, kidnapping while armed, assault with intent to commit sodomy while armed, armed robbery, assault with a dangerous weapon, and unauthorized use of a vehicle. *Id.* at 317.

26. Daily Wash. L. Rep., Jan. 21, 1980, at 117.

27. Judge Sylvia Bacon.

28. 449 A.2d at 322 n.13.

29. The members of the six occupations are automatically excused from jury service if they check a box on the jury questionnaire. Judge Bacon considered the underrepresentation "significant" and "substantial." Daily Wash. L. Rep., Jan. 21, 1980, at 121-22.

30. *Id.* at 121-22. The underrepresentation results from the system by which the qualified juror wheel is constructed.

31. *Id.* at 122.

32. *Id.* at 121.

33. *Id.* at 122.

the Ninth and Tenth Circuits for guidance.[34] These cases, however, provide no definition; the vague, tautological language in the cases indicates that a group is distinctive when the group is cohesive, its interests cannot be properly represented by other groups, and some attribute makes the group identifiable.[35] The *Sutton* court concluded that the evidence did not establish that persons in the six occupations "have a cohesiveness of attitude or a community of interest which is not represented by others in society."[36] The court was not persuaded that ethical codes, the ability to withhold judgment, and concern for client welfare and social service make persons in the six occupations a distinctive group.[37]

The court also held that the D.C. Plan did not violate the Jury Selection Act since section 1863(b)(5) of the Jury Selection Act authorizes automatic excuses for members of occupational groups.[38] The United States District Court's finding of hardship and inconvenience was considered to be "in accord with conventional wisdom" and with jury selection plans in many other states.[39]

Judge Bacon upheld the plan, saying "the letter of the law is met."[40] Nonetheless, she criticized the law. In her view, the "traditional justification"[41] for excusing these persons from jury service is not applicable today.[42] She was also unable to find a hardship, an inconvenience, or a

34. United States v. Potter, 552 F.2d 901 (9th Cir. 1977); United States v. Test, 550 F.2d 577 (10th Cir. 1976).

35. "[T]he essence of the cognizability requirement is the need to delineate an identifiable group, which in some objectively discernible and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the grand jury panel . . . . [T]he presence of some internal cohesion is significant." 552 F.2d at 904.

36. Daily Wash. L. Rep., Jan. 21, 1980, at 122.

37. *Id.* The court noted, however, that members of these occupations were previously treated distinctively. They used to be *exempt* from jury service whereas now they are merely *excused* upon request. *Id.*

38. Section 1863(b)(5) provides:

> [s]uch plan shall— . . . (5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

28 U.S.C. § 1863(b)(5) (1976 and Supp. V 1981).

39. Daily Wash. L. Rep., Jan. 21, 1980, at 122.

40. *Id.* at 123.

41. Judge Bacon did not identify the traditional justification but may have been referring to the idea that an uninterrupted performance of "particular occupations" was "critical to the community welfare." 419 U.S. at 534. *See also infra* note 61.

42. Daily Wash. L. Rep., Jan. 21, 1980, at 117.

community need to justify the automatic excuse. Judge Bacon urged the United States District Court to "abolish occupational exemptions . . . unless there is an individual showing of substantial hardship."[43]

The appellate court in *Sweet* agreed with the holding of the trial court that the distinctive group prong of the *Duren* test had not been satisfied.[44] The court also agreed that a Supreme Court definition of a distinctive group did not exist. Therefore, the appeals court gleaned from *Taylor* and *Duren* that a distinctive group should possess at least two characteristics. First, "a distinctive group must possess a unique 'perspective on human events' . . . not shared by other segments of society."[45] Second, "a 'distinctive' group must be one of large size."[46] The trial court discussed the first characteristic, but did not mention the second.[47]

The *Sweet* court did not decide whether the occupational group was sufficiently large[48] because its holding was based on appellant's failure to prove that the occupational group had a singular outlook on human events.[49] Appellant's inability to establish a prima facie violation of the fair cross section requirement defeated the constitutional challenge.

Appellant's statutory challenge to the D.C. Plan was also rejected by the *Sweet* court. Appellant argued that service as jurors does not subject members of these occupations to undue hardship.[50] The *Sweet* court held, however, that there was a reasonable basis for this finding since the United States District Court might reasonably have decided that members of the occupational group would suffer financial hardship if they were not excused from jury service.[51]

Furthermore, section 1863(b)(5)[52] expressly permits excuse of categories of persons in particular occupations without requiring a showing of indi-

---

43. *Id.*

44. 449 A.2d at 325.

45. *Id.* at 324 (citations omitted).

46. *Id.*

47. *See supra* note 37 and accompanying text.

48. The group constitutes 4.45% of the District of Columbia's population. 449 A.2d at 325.

49. The evidence showed that other groups in society shared the perspective of the members of the occupational group. *Id.* at 324.

50. *See also supra* notes 21, 38 & 39 and accompanying text.

51. "[M]embers of all of these occupational groups would have difficulty finding adequate temporary substitutes or would incur extra work or financial losses even if substitutes were obtained." 449 A.2d at 326. In a footnote, the *Sweet* court emphasized that these were the types of "objective criteria" that should be used in making such findings. *Id.* at 326 & n.23.

52. *See supra* note 38.

vidual hardship.[53] The *Sweet* court relied in part upon the legislative history of the Jury Selection Act to support the D.C. Plan.[54]

Both the trial and appellate courts rejected the constitutional challenge to the D.C. Plan because the occupational group was not shown to be distinctive. Both courts attempted unsuccessfully to define the indefinite statements concerning distinctiveness contained in prior law.[55]

In *Taylor v. Louisiana*, the Supreme Court, in determining that women constituted a distinct group, mentioned a vague reason for its conclusion: "a flavor, a distinct quality . . . is lost if either sex is excluded" from jury venires.[56] The *Duren* Court, although it formulated and applied the distinctive group prong of the test, merely quoted *Taylor* for the proposition that women are a distinctive group.[57] The *Duren* Court did not define or elaborate on the analysis that should be used in determining distinctiveness for other groups. Due to this hazy concept of distinctiveness, other courts have treated the distinctive group as synonymous with the large, conspicuous, easily identifiable group. For example, the groups delineated along racial, ethnic, or economic lines generally have been treated as distinctive.[58] On the other hand, groups demarcated by residence in a particular area, age, or education, generally have not been considered distinctive.[59]

Against this background, the decision and the reasoning in *Sweet* are consistent with prior law since the occupational group is not large, conspicuous, or easily identifiable.[60] Nevertheless, the *Sweet* decision does not

---

53. 449 A.2d at 326.

54. *Id.* The legislative history mentions doctors and ministers as appropriate occupational groups for excuse upon request. *See* H.R. REP. No. 1076, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1792, 1800.

55. *See supra* notes 16, 35 & 36 and accompanying text.

56. *See supra* note 16. Dissenting, Justice Rehnquist denounced the majority's approach and noted an inconsistency:

> This smacks more of mysticism than of law. The Court does not even purport to practice its mysticism in a consistent fashion—presumably doctors, lawyers, and other groups, whose frequent exemption from jury service is endorsed by the majority, also offer qualities as distinct and important as those at issue here.

419 U.S. at 542.

57. 439 U.S. at 364.

58. Swain v. Alabama, 380 U.S. 202 (1965) (blacks); Hernandez v. Texas, 347 U.S. 475 (1954) (Hispanics); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (wage earners); Smith v. Texas, 311 U.S. 128 (1940) (blacks).

59. United States v. Foxworth, 599 F.2d 1 (1st Cir. 1979) (residence in a particular area); United States v. Potter, 552 F.2d 901 (9th Cir. 1977) (age); United States v. Ross, 468 F.2d 1213 (9th Cir.), *cert. denied*, 410 U.S. 989 (1973) (education); *contra* United States v. Butera, 420 F.2d 564 (1st Cir. 1970) (holding the less educated are a distinct group, as are persons between the ages of 21 and 36 years).

60. However, United States v. Goodlow, 597 F.2d 159 (9th Cir. 1979), which dealt with

clarify or define the distinctive group concept. Indeed, under the *Sweet* court's analysis, even those groups that have been considered distinctive may not be distinctive. For example, women, blacks, or Hispanics, regardless of age, education, or socioeconomic background, would not be expected to "possess a unique perspective on human events . . . not shared by other segments of society" *on all issues*.[61]

Courts still appear to be groping for a means of determining distinctiveness. The responsibility for that, however, cannot be laid at the door of the *Sweet* court, which made a good faith attempt at applying an otherwise illusory test. Until a more workable description of distinctiveness is formulated, lower courts will probably continue to hand down decisions like *Sweet*, if the group is not defined by race, sex, religion, or economic status. This will be more likely to happen where the issue is excuse upon request and not a total bar to serving on a jury, since these holdings do not result in an egregious or extreme injustice.

Shaheda Sultan

---

the same issue as *Sweet*, points out an apparent inconsistency. *See supra* note 23 and accompanying text.

61. *See supra* note 45 and accompanying text. The *Sweet* decision is also consistent with dicta in *Taylor* and *Duren*. The *Taylor* Court noted:

> The states are free to grant exemptions from jury service to . . . those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare . . . . It would not appear that such exemptions would pose substantial threats that the remaining pool of jurors would not be representative of the community.

419 U.S. at 534. The *Duren* Court commented: "[M]ost *occupational and other reasonable exemptions* may inevitably involve some degree of overinclusiveness or underinclusiveness . . . ." 439 U.S. at 370 (emphasis added).

Another reason for the *Sweet* holding may be that the occupational excuse provision of the D.C. Plan is apparently included, with some variations, in most of the jury selection plans in the 94 federal judicial districts. W. GERWIN, W. STECKLER, & E. WEST, REPORT OF SUBCOMMITTEE ON THE OPERATION OF THE JURY SYSTEM TO EXAMINE "EXCUSE AND EXEMPTION PROVISIONS" IN DISTRICT COURT JURY PLANS (1974) (available through the Administrative Office of the United States Courts). However, that report was written some time ago and Judge Bacon noted a trend toward abolishing such provisions. Daily Wash. L. Rep., Jan. 21, 1980, at 117.