



10-1974

## Edwards v. Healy

Lewis F. Powell Jr.

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DISCUSS

Note

~~Also~~ also  
note the  
La. State case  
& hear  
together

La.'s jury statute according  
women the privilege of not serving  
on jury held denial of E/P & D/P  
— CA 5 (3 J/ct) ignoring Hoyt v.

Fla (1961) which upheld — w/o dissent —  
an identical Fla statute.

Also, standing ~~vs~~ issues  
are involved.

PRELIMINARY MEMORANDUM

January 4, 1974

List 3, Sheet 1

No. 73-759

EDWARDS (Gov., Louisiana), et al,

v.

HEALY, et al.

Appeal from 3 J USDC (E.D. La)

(Wisdom, D.J. Rubin, D.J. West)

Federal/Civil

Timely

The Louisiana Constitution and implementing statutes provide that no  
woman shall be drawn for jury service unless she has first filed in state courts  
a written declaration of a desire to serve. A 3 J USDC declared these provisions  
unconstitutional and enjoined Appellants from enforcing them. The Court conceded

A note  
may be  
unavoidable

Owens



that its ruling was in conflict with Hoyt v. Florida, 368 U.S. 57 (1961).

1. State Provisions Involved.

La. Const. Art 7, § 4:

"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 such service."

LSA-R.S. 13:3055 (Civil cases):

"A woman shall not be selected for jury service unless she has previously filed with the clerk of the court of the parish in which she resides a written declaration of her desire to be subject to jury service."

La. Code of Crim. Pro. Art 402:

"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."

2. Hoyt v. Florida, 368 U.S. 57 (1961)

This case involved an attack by a criminal defendant, a woman, on a

Florida statute essentially identical to the La. provisions at issue here:

... provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.

The court upheld the statute under the Fourteenth Amendment. (Harlan plus 5; C.J. Warren, Black, Douglas concurring). There were no dissents.

The Court recognized that the Fourteenth Amendment reaches beyond

racial exclusions from jury service to include those which single out any class of persons for different treatment not based on some reasonable classification.\* <sup>in Hoyt</sup> The Court found the classification before it to be reasonable.

"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. We cannot say that it is 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 unless she herself determines that such service is consistent with her own special responsibilities.

. . . .

[ Legislatures could reasonably conclude that] the family responsibilities of a prospective female juror were serious enough to warrant an exemption.\* \*

In the second part of its opinion, the Court found the substantial disproportion of men to women on jury lists had no constitutional significance. "In the administration of jury laws proportional class representation is not a constitutionally required factor." Arbitrary state efforts to exclude women had to be shown, and this showing had not been made. The 3 Justices in

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\* The Court noted in passing that what was at issue was really an exemption that could be overcome, rather than an exclusion. However, it recognized that the two could have the same effect in operation. 368 U.S. at 61.

\*\* The Court also relied on the fact that a number of states shared the Florida approach. It cited, among others, Louisiana. Louisiana may now stand alone in utilizing this approach.



concurrence joined only this second part of the opinion. They~~were~~ unable to conclude that the state was not making a good faith effort to have women perform jury service.

3. The 3 J USDC Opinion. This case was tried on stipulated facts. The stipulation appears as the appendix to the motion to affirm. Jury commissioners of St. Tammany Parish and Washington Parish declared that they enforce the above La. provisions. Fifty-three percent (53%) of the population eligible for jury service in those Parishes is female. In St. Tammany Parish no more than 10% of the persons in the general venire or jury wheel<sup>e</sup> are female. The clerk of court of Washington Parish stipulated his willingness to testify that no more than two women in that Parish have requested eligibility for jury service and that only on one occasion has a woman been included in a petit jury venire.

(a) Standing. Three purported classes brought this suit -- all women in the above Parishes (alleged denial of right to serve and of opportunity to appear before juries with female representatives); all men in the above Parishes (alleged subjection to more onerous jury service); and an intervening class composed of female litigants in civil cases before state courts (alleged deprivation of juries of their peers). The 3 J USDC pretermitted the question whether the first 2 classes had standing. It was dubitante on this question. But it held that the third class had standing. This gave "justiciability to the entire case."\* It was unnecessary to resolve whether the intervenors could

\* This apparently means that the Court believed it could reach all the claims of the above 3 classes.

Three  
alleged  
classes  
brought  
suit

Only one  
held to  
have  
standing

challenge the above provision for criminal cases. (The intervenors were solely civil litigants). Since this class attacked the state constitutional provision on which both statutes were based, "the issue of the entire scope of jury selection in all kinds of cases appears to be inescapably involved."

(b) Merits. The court disowned Hoyt and "the venerable dictum in Strauder v. West Virginia, 1879, 100 U.S. 303, 310, unchallenged for eighty years, that a State may constitutionally confine jury duty 'to males' ".

The court saw those cases as "eroded" by Reed v. Reed, 404 U.S. 71 (1972) and Frontiero v. Richardson, 93 S. Ct. 1764 (1973). The court saw the minimum requirement of the Equal Protection clause to be that dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated with respect to the objectives of the legislature. Here men and women are similarly situated with regard to jury service but dissimilarly treated. Thus, there was an equal protection violation with regard to jury service. Furthermore, there was an equal protection violation with regard to the composition of the juries before which the female intervenors tried or were to try their cases. Although the prejudice was "subtle" and "intangible" (because it could be overcome if women took the steps required of them to volunteer), it was nevertheless "real and meaningful."

The court also found a deprivation of due process under Peters v. Kiff, 92 S. Ct. 2163 (1972). Exclusion of any well-defined class from jury service offends a number of constitutional values -- equal protection; privilege of



participation in administration of justice; stigmatization; etc. The court quoted from Peters:

"Moreover, we are unwilling to make the assumption that the exclusion of Negroes has a relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and the varieties of human experience . . . ."

The court saw the "exclusion" of women from juries as the removal of "qualities of human nature and the varieties of human experience. . . ."

(c) Relief Granted. At first the 3 J USDC granted only declaratory relief. That does not, of course, give this Court jurisdiction. However, a week later the Court amended its judgment to declare that the Appellants (the Governor, several judges, and some state court personnel) "are hereby enjoined from enforcing the constitutional and statutory provisions declared to be unconstitutional." J.S. 28 ("Amended Judgment"). Three days later the court stayed its own injunctive order "until the defendants' appeal to the Supreme Court is disposed of." J.S. 32.

4. Appellants' Contentions. In 2 pages and without explication, Appellants say that the USDC erred in allowing the intervenors to represent the first two classes (all women and all men in the two Parishes at issue). They question whether the intervenors had standing even as to their own claims. Finally, they say the court abused its discretion in "overruling" Hoyt.

5. Appellees' Contentions. Appellees concede Hoyt. But, say they, we've come a long way, baby. "Hoyt represents the last occasion when this Court



tolerated a legislative judgment based on gross generalizations concerning woman's place in man's world." Appellees cite Reed and Frontiero. They say that by 1970 Louisiana was the only state to retain "volunteers only" legislation on jury service by women. Appellants suggest that the Court summarily overrule Hoyt without oral argument.

6. Discussion. Query whether the USDC correctly allowed the intervenors (female civil litigants, alleging deprivation of a jury of their peers) to carry the entire load ultimately delivered in the opinion? On another point: the court presumes without elaboration that a "volunteers only" exemption scheme amounts to a de facto exclusion. Practically speaking, this is probably true, as the figures in the stipulation indicate. However, one might have expected a word or two on this.

Even though it evoked no dissents a scant 12 years ago, Hoyt reads as though it comes from another era. If sex classifications provoke strict scrutiny, Frontiero, it is of course questionable whether the justifications relied on in Hoyt are sufficiently compelling. In light of Hoyt and of subsequent cases, summary action either way may not be appropriate here.

December 17, 1973

Motion to affirm

Owens

3 J USDC op in JS App.



No. 73-759, Edwards v. Healy.

This memorandum, dictated after reading the decision of the three-judge district court -- and scanning the briefs in the case -- is intended as a memory "jog", and is in no sense a definitive memorandum or indication of my views.

\* \* \* \* \*

This case, on appeal from a three-judge district court in Louisiana, involves the validity of the Louisiana constitutional and statutory provisions which exempt women from service on juries unless they file a written declaration of their desire to serve.

The suit is a class action one seeking a declaration that the exemption violates the equal protection and due process clauses. No issue of fact is involved, as the parties stipulated the facts. See Appendix, pp. 82-84, 111-12, 120, 165.

Although three separate classes of suitors filed a complaint, the district court found that only the third class (which intervened) has standing to sue. This class is composed of female litigants in civil cases pending in the state court.

In Hoyt v. Florida, 368 U.S. 57 (1961), the Court upheld the constitutionality of a Florida statute almost identical to Louisiana law. The district court below recognized this, but relied on Reed v. Reed and Frontiero v. Richardson for the view that Hoyt v. Florida (and the old case of Strauder v. West Virginia) has been eroded. The district court also relied on Peters v. Kiff, and concluded -- without finding that women constitute a "suspect classification", that there is no rational basis to support Louisiana law.

The brief filed on behalf of the Governor and State of Louisiana is third rate in every respect. It confuses the compelling state interest test with the rational basis test, and adds nothing in the way of analysis to Hoyt.

As would be expected, the American Civil Liberties Union represents appellees and its brief



notes the almost total absence of women from juries (see stipulation), and argues that Louisiana law violates the requirement that no identifiable group be excluded from jury service, a requirement essential to equal protection of the laws to the members of that group both as litigants and as potential jurors. See Carter v. Jury Commissioners, 396 U.S. 320 (1969). The appellees' brief also argues that a "gender-based classification stigmatizes all women, even those who do not wish to serve."

A long and excessively wordy brief has been filed by the Center for Constitutional Rights. Also the American Bar Association has filed a brief attacking the validity of the Louisiana law.

\* \* \* \* \*

My recollection is that we have this case on the list for special summer study. In any event, the issue is fairly clear cut.



MEMORANDUM

TO: Mr. Justice Powell

DATE: October 1, 1974

FROM: Penny Clark

No. 73-759 Edwards v. Healy  
No. 73-776 Schlesinger v. Ballard  
No. 73-5744 Taylor v. Louisiana

These three cases were grouped together for memorandum treatment because each involves the validity of a gender classification. One is a man's challenge to a sex-differentiated aspect of the Navy's promotion system. The other two cases are challenges to Hoyt v. Florida, 368 U.S. 57 (1961), and the Louisiana practice of calling women for jury service only if they volunteer. I have attempted to outline an approach to sex discrimination that will harmonize with your opinions on equal protection, with special attention to the role the Court should play in this controversial area.

I. YOUR OPINIONS ON EQUAL PROTECTION

The opinions you have written, in chronological order, are: Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); James v. Strange, 407 U.S. 128 (1972); McGinnis v. Royster, 410 U.S. 263 (1973); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (concurring opinion); In re Griffiths, 413 U.S. 717 (1973); Cleveland Board of Education v. LaFleur,

414 U.S. 632, 651 (1974) (concurring opinion). Although the opinions vary, in that some use the classic two-tier review and others avoid it, they outline a consistent framework of equal protection principles.

A. Strict Scrutiny

1. Fundamental Rights. You have not applied the "fundamental rights" branch of strict scrutiny, but the opinion in Rodriguez limits it by holding that the doctrine applies only to rights that are "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34. As Justice Marshall notes in dissent, id. at 100 n. 59, this limitation relegates the "fundamental rights" doctrine to a small corner of equal protection law. When a state classification intrudes on the exercise of a fundamental constitutional right, it will frequently be invalid under the clause that guarantees that right, without resort to the equal protection clause. In any event, the "fundamental rights" doctrine has no special role to play in sex discrimination.

2. Suspect Classifications. In Rodriguez you outlined the factors that govern the determination whether a particular class should be labeled "suspect" for purposes of equal protection law: whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. at 28. In In Re

Griffiths, you followed the Court's precedents declaring alienage a suspect classification, but in Frontiero you resisted the plurality's haste to declare sex a suspect classification.

In re Griffiths outlines the analysis that applies to legislation that discriminates against a suspect <sup>classification:</sup> the state must have a constitutionally permissible and substantial purpose, and the classification must be necessary to achieve it.

B. "Lower-Tier" Review

Your opinions have departed from the classic pattern of "rational basis" review, as stated in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Your first equal protection opinion, Weber v. Aetna Casualty & Surety Co., held that the equal protection clause requires "that a statutory classification bear some rational relationship to a legitimate state purpose." 406 U.S. at 172. This Statement was taken by Justice Rehnquist, id. at 181, and by Gerald Gunther (among others), <sup>1</sup> as a sign that the Court



would make more active use of the equal protection clause.

Your subsequent opinions have elaborated on Weber. The basic question is "whether the challenged distinction rationally furthers some legitimate, articulated state purpose." McGinnis, 410 U.S. at 270. Answering this question requires two stages of inquiry: identifying the state interest, and deciding whether the classification promotes it. As to the first stage, McGinnis refused to supply an "imaginary" basis to uphold a statutory distinction, id. at 277, but your opinion in LaFleur deviated slightly from the McGinnis suggestion that the state's purpose must be articulated, stating that the classification "must at least rationally serve some legitimate articulated or obvious state interest." 414 U.S. at 653 n. 2 (emphasis added). From McGinnis comes also the proposition that the state's primary purpose is not controlling for equal protection analysis; a secondary purpose may also sustain the classification. Finally, there is the obvious requirement that the state's purpose be constitutionally permissible. This requirement is usually implicit in the use of the word "legitimate", but at times it emerges more clearly. For instance, James v. Strange recognized the state's legitimate interest in recouping the costs of providing counsel for indigent defendants, but invalidated the harsh treatment of criminal defendants because the state's scheme smacked of "punitiveness and discrimination." 407 U.S. at 141-42. Your opinion in LaFleur hinted that a school board's desire to

to keep children from seeing pregnant teachers would not support the mandatory maternity leave program. 414 U.S. at 653. And Weber, of course, refused to let the state discriminate against illegitimate children in order to punish their wayward parents. 406 U.S. at 175-76.

The second stage of the inquiry--whether the classification in fact promotes the state's purpose--is more subjective. In Rodriguez you rejected the contention that the classification must fall if better alternatives can be found, 411 U.S. at 51. Nonetheless, exploration of alternatives is sometimes helpful in deciding whether the characteristics of the class correspond to the state's purpose. If the classification is "irrationally overinclusive", as in LaFleur, it may be impermissible even though the state's purpose is fully operative with respect to some members of the designated class.

Dealing with overinclusive classifications is perhaps the most difficult problem in "lower-tier" equal protection review. Classifications almost inevitably include some persons whose individual characteristics do not fit the legislature's underlying purpose. But at least in "lower-tier" review, the Court has not demanded a perfect correlation. Dandridge v. Williams, 397 U.S. 471, 485 (1970). In some areas, particularly in tax and "social welfare" schemes, the Court has been very tolerant of this overinclusiveness. In others, particularly the illegitimacy cases, Reed v. Reed, 407 U.S. 1 (1971), and the "irrebuttable presumption" cases, it has



found the interests of the aberrant individuals to outweigh the state's reasons for proceeding by classification. The prime examples are Vlandis v. Kline, 412 U.S. 441 (1973), and Stanley v. Illinois, 405 U.S. 645 (1972), although both are disguised as due process cases. Chief Justice Burger's opinion last term in Jimenez v. Weinberger, 416 U.S. \_\_\_, 94 S.Ct. 2496 (1974), is one of the few such cases premised on equal protection. The state interest regularly asserted in these cases to justify an overinclusive classification is administrative convenience, because individualized determinations are often the only alternative to classifications. Justice White views the problem in terms of the importance of the individual interest:

[I]t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

Vlandis v. Kline, 412 U.S. at 459 (White J., concurring).

This rationale explains Stanley, and perhaps Vlandis, but it does not explain Reed or Jimenez, both of which appear to turn on the sensitivity of the classification rather than the importance of the individual interest. In Reed the woman's interest in administering her son's estate was relatively minor; in Jimenez the children's interest in Social Security payments was greater, but the case is too close to Dandridge to allow distinctions based on the nature of the interest.

The difference in interests and hardships does, however, seem to explain the Court's continuing use of a "minimum rationality" test for taxation and (perhaps) welfare classifications. You alluded to such cases in Rodriguez, 411 U.S. at 40-41, and quoted a 1940 case that required "hostile and oppressive discrimination" to overcome a tax classification's presumption of constitutionality. The Court applied the same test in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), and referred to it again in Kahn v. Shevin, 416 U.S. \_\_\_\_, 94 S.Ct. 1734 (1974).

## II. SEX DISCRIMINATION

Reed and Frontiero have already taken discrimination against women out of the "minimum rationality" standard of review. They also have implicitly overruled the Court's earlier cases <sup>that</sup> considered sex a permissible classification, whatever the legislative purpose. Professor Kurland, suggesting an approach to the Equal Rights Amendment, anticipated the Court's current stance on sex discrimination:

The mere fact that there are two sexes should not be reason in itself for distinguishing between them in legislation. On the other hand, the mere fact that a distinction was drawn between them ought not suffice to invalidate the law.

Kurland, The Equal Rights Amendment: Some Problems of Construction, 6 Harv. Civ. Rts.-Civ. Lib. L. Rev. 243, 249-50 (1971). What the Court has not yet decided is what reasons will justify gender distinctions and what role the Court

should play in the movement toward sexual equality.

Four members of the Court, of course, would declare gender a "suspect classification."<sup>2</sup> The great bulk of current law review commentary also argues (or assumes) that "suspect" status should be accorded to ~~general~~<sup>gender</sup> classifications.<sup>3</sup> The issue is usually approached in doctrinaire fashion. Aided by philosophical essays comparing the status of women to that of Negroes, the equal rights proponents contend that "suspect" status is appropriate: women have been the victims of discrimination and oppression, they are a discrete and highly visible class (some even try to argue that women are an "insular minority"), and they<sup>4</sup> traditionally have had little voice in the political process. What is seldom explicit in these discussions is the ultimate goal behind labeling sex a suspect classification: the abolition of all, or virtually all, distinctions between the sexes. One of the leading articles on this point of view would concede only a limited role for sex in legislation: laws dealing with physical characteristics unique to one sex. Under this umbrella the authors would place rape laws, laws relating to determination of fatherhood, and few others. Brown, Emerson, Falk, & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 893-96 (1971). Others (though few are bold enough to express moderate views in print) have a more limited goal: the elimination of "those vestigial laws that work



an injustice to women, that are exploitative or impose oppressive discriminations on account of sex." Freund, The Equal Rights Amendment Is Not the Way, 6 Harv. Civ. Rts.-Civ. Lib. L. Rev. 234 (1971).

The difference between the two camps is more than a matter of goals. They also differ in their perception of the judicial role. The activist groups see the courts as the primary protectors of equality. They want the courts, and this Court especially, to take the lead in eliminating sex discrimination. They want a Brown v. Board of Education<sup>5</sup> for women. What they often overlook are the differences between racial discrimination and sex discrimination, and the limits on the judiciary's role in the latter area.

Although there may be some parallels between racial discrimination and discrimination against women, there are fundamental differences. Women have never been an isolated class. Although society has given women a distinct and, in some respects, inferior role, women have participated in the discrimination. Nor have women been completely isolated from the political process. Although they were long excluded from the process itself, they have always had ready access to its participants. The chief difference is that many sex-based distinctions were written to protect women. The protectionist laws have often been misguided, many are anachronistic, and large numbers of women now consider them insulting, but special laws for women were never intended

to eliminate contact between the sexes. The discrimination has had its psychological effects, but they are different, both in kind and degree, from Jim Crow apartheid.

The most critical difference between racial discrimination and sex discrimination is that many women still want and need the special protection of sex-based distinctions. It might be reasonable to take the special protection away from women of my generation, who have had much the same educational and career opportunities that men have had. Equal pay laws could take up the slack. But many women were denied the opportunity to prepare themselves for equality. They want and need laws that give them economic protection, and it would be unwise, if not unjust, to take their protection away in the name of equality.

For these reasons, the movement toward legal equality for women requires political solutions. Until recently, special laws for women accurately reflected the nation's social structure. As the social structure changes, the laws will also change. But only legislation can accommodate the demand for equality with the continuing need for special protection. The laws governing family property and support arrangements are a good example of the limits on the judicial process. Proponents of full sexual equality insist that the aims of property and support laws can be achieved by rewriting statutes in sex-neutral fashion. But a federal court cannot declare that a state statute requiring a man to support his



children should be construed to impose a support obligation on a spouse who earns money. The court is limited to two alternatives: it can nullify the entire statute because it discriminates against men, or it can hold that the statute must apply to both fathers and mothers. The former result would leave children without an enforceable right to support; the latter could be unjust to women who have relied on their special legal status in choosing not to develop job skills. It may ultimately be desirable to reshape society so that both parents share the responsibility for supporting their children, but the courts are unsuited to the task.

Finally, there is an essential irony in the activists' arguments. They begin by asking for "suspect classification" status, on the ground that the history of discrimination against women requires that courts give them extraordinary protection from the majoritarian political process. The same groups, however, would use the suspect classification doctrine to strike down laws that discriminate against men. There is surely no reason to give men extraordinary protection from the majoritarian political process. Since men have controlled the political process all along, they have imposed these discriminations on themselves. The only justification for striking down laws that benefits women is an analogy to the still questionable proposition that the Constitution is color-blind. But the analogy has serious flaws. The history of the fourteenth amendment can be mustered to support a

judicial judgment that equal treatment for the races demands that the law avoid all racial distinctions. There is no explicit support in the Constitution for the proposition that all sexual distinctions are verboden; that proposition depends on an essentially social judgment. And that social judgment falls outside the usual role of the courts under the equal protection clause.

Despite the objections to giving sex "suspect" status under the equal protection clause, the usual role of the courts can accommodate a standard of review that offers more protection than the old standard of minimum rationality. Reed and Frontiero have begun the process by committing the Court to a more careful review of sex distinctions. True, neither case purported to overrule Goesaert v. Cleary, 335 U.S. 464 (1948), which approved "drawing a sharp line between the sexes" without investigating the reasons behind it, or Muller v. Oregon, 208 U.S. 412 (1908), which suggested that woman's "habits of life" could be invoked in support of almost any sexual distinction. But Reed disapproved a sexual classification in an area where any other classification would have been accorded only minimum review. For example, Oregon's probate statute provided that the children of the deceased would be given preference over the parents. There is no doubt that the Court would have passed quickly over a parent's claim of discrimination. Nor can it be said that preference for men over women was wholly arbitrary; statistical information

would no doubt sustain the state's contention that men as a class have more administrative experience than women as a class. Although the Court did not say so explicitly, the import of the opinion is that sexual distinctions must be supported by something more than assumptions about the respective roles of men and women. The result in Frontiero follows the same principle, rejecting the assumption that married women have no dependents because their husbands can be expected to support themselves.

Such an interpretation of Reed and Frontiero is consistent with the Court's proper role in preventing discrimination against disfavored groups. Even though the discrimination against women has not been as pernicious or pervasive as the discrimination against racial minorities, it is historical fact. Women are just now beginning to enjoy an active role in the political process. Some sex-based laws have excluded women from job markets; other have either encouraged or tolerated discrimination against women in the private sector. There is <sup>no</sup> reason to tolerate deliberate discrimination against women. Moreover, the changing role of women in society demands that the courts be increasingly sensitive to laws that draw sexual distinctions. Assumptions about women's behavior may no longer correlate with fact, and legislation based on those assumptions may be irrationally overinclusive.

The touchstone of review should be injury to women. The equal protection clause should not strike down laws that offer



women protection. Frequently such protection can be viewed as compensation for past discrimination. Kahn v. Shevin is a good example of this kind of legislation, and the proper response to it. ~~and~~ Schlesinger v. Ballard is an even stronger case (to be discussed fully in a later section). Laws that give women special privileges in the area of marital wealth are not strictly compensatory, but they can be viewed as legitimate protection for those women who were denied opportunities for self-sufficiency. Protective labor legislation presents special problems. Some protective laws offer legitimate protection to women workers. Thus, a law prohibiting employers from requiring women to lift specified weights could be sustained. Other protective laws are economic discrimination in disguise. For instance, one state had a law that prohibited women from taking jobs that required them to lift more than 15 pounds.<sup>6</sup> Some states have laws that<sup>7</sup> prohibit giving women overtime work, even at premium pay.<sup>8</sup> Other states still bar women from particular occupations. Title VII may effect changes in these laws. Insofar as they require job discrimination against women, the EEOC has ruled that employers cannot follow them.<sup>9</sup> They will nonetheless pose difficult problems on equal protection review. If their effect is to protect women without excluding them from economic benefits, they should be upheld. But if their major effect is to keep women out of the job market or to preserve jobs for male workers, they should be invalidated. For those laws that

effect both discrimination and protection, the best approach may be to compare the harm of excluding willing women from certain jobs, with the harm of taking protection away from those who want it.

Other laws that protect women are subject to challenge only by men. For example, the selective service laws work a clear discrimination against men, but no women can claim injury as a victim of their discrimination. Some women may perceive insult in being excluded from "first-class citizenship," but I should hope something more would be required for standing, and de minimis principles ~~are~~ can properly be invoked. The draft is such a touchy issue that the Court would be well advised to avoid the question if possible. But if the Court is forced to take a case on the question, it would be far better (symbolically) to hold that the equal protection clause was not designed to protect the political majority from itself than to rely on generalizations about the respective roles of men and women.

When there is no pretense of protection and ~~the~~ discrimination is apparent on the face of the law, there will seldom be a legitimate reason for making a sexual distinction. Stanton v. Stanton, No. 73-1461 (appeal pending; on the discuss list for the October<sup>7</sup> conference), presents a clear case of discrimination against women without any pretense of protection. The case is a mother's suit for child support. Appellant and appellee were divorced in 1960. The divorce decree required appellee to pay \$100 per month for each minor child's support.

The daughter turned 18 in 1971, and appellee stopped contributing to her support. Utah courts require child support only through the period of minority, and 15-2-1 Utah Code Ann. defines the period of minority:

The period of minority extends in males to the age of 21 years and in females to that of 18 years; but all minors obtain thier majority by marriage.

The Utah Supreme Court rejected appellant's contention that this statute was unconstitutional when applied to deprive females of support at age 18. It justified the distinction on the ground that "it is a salutary thing for [the male] to get a good education and/or training before he undertakes [the] responsibilities" of providing a home for his family. Females, the court said, "tend generally to mature physically, emotionally and mentally before boys, and . . . they generally tend to marry earlier." The earlier age of marriage, of course, cannot support the distinction, since marriage ends the support obligation in any event. The only distinction left is the notion that the state should give males an enforceable source of support up to the age of 21 so that they can educate themselves, while the female is left on her own at age 18 because she has a lesser need for education. Pardon my outrage. This kind of assumption about behavioral differences between men and women, and especially the assumption that women do not have to support themselves, is at the heart of economic discrimination against women. Moreover, the assumption that women do not need education may no longer have a factual basis.



In 1973 52.3 percent of all women between the ages of 18 and 64 were in the labor force, and a substantial percentage of them were the sole source of support for themselves and their children.

The Utah Supreme Court gave another reason for leaving the discrimination intact: if both males and females must be governed by the same age rules, the court would have no basis for choosing 21 rather than 18. This could be a significant problem in other states, but in Utah it is nothing short of specious. Another Utah statute, 78-45-2 Utah Code Ann., imposes an obligation of support on both parents for children of both sexes up to the age of 21. Even if the Utah courts have not applied this latter statute to post-divorce support obligations, it provides a solid guide to the Utah legislature's wish that both males and females should be given parental support up to the age of 21. The existence of this statute makes Stanton an ideal case for resolving the question of sex discrimination in support obligations. I recommend that you note the appeal and reverse.

Other age differentials on the basis of sex may not present the same problems. Many states prescribe different ages for marriage, for making contracts or buying liquor, or for jurisdiction in juvenile courts. All such classifications should be subjected to a "legitimate state interest" test. Some will be based on fact (for instance, different ages for driver licensing based on teenagers' safety records). Others

may be based on the same assumption that the Utah Supreme Court employed. If the age differential discriminates against women, it should not stand unless it is based on fact or an assumption that accords with fact.

In summary, I would recommend using the "legitimate state interest" formula in sex discrimination cases, with a few special touches. First, laws that protect women or give them special treatment should be sustained. Most will be supported by a legitimate state interest in protecting the victims of past discrimination. Because of this principle, a man's challenge to legislation that favors women will seldom succeed. If the law cannot be viewed as compensatory, the man's challenge should be tested by a "minimum rationality" standard because there is no reason to give him special protection from the majoritarian political process.

Second, laws that use sex as a classifying device without good reasons (preferably factual) should fall under Reed. Third, laws that discriminate against women will usually be invalid under the "legitimate state interest" standard. Legislative assumptions about women's proper role should be viewed with grave suspicion. And finally, laws that discriminate against some women and protect others should be analyzed with an eye toward reaching a rough accommodation of the opposing interests.

## III. THE CASES

Schlesinger v. Ballard

Lt. Ballard is a Navy lieutenant. He was an enlisted man for 7 years before he was commissioned, and he has been an officer for about 10 years. Because he had been up for promotion twice without being selected, Lt. Ballard was scheduled for discharge in June 1972 under the Navy's "up or out" program. He brought this suit to enjoin the discharge, contending that he was the victim of sex discrimination because a female lieutenant could not be discharged under the same circumstances, but would be entitled to a 13 year tenure as an officer. If Lt. Ballard could claim the same 13 years, he could opt for retirement rather than discharge.

A three-judge district court was convened. It first issued a temporary restraining order to block Ballard's discharge. Then, after nearly a year had passed, it issued a permanent injunction under which Ballard has remained in the Navy. If he can hang on until February, he will have accumulated nineteen and one-half years of service, a tenure that would ordinarily entitle him to retirement benefits. The Navy says it does not know whether the time under injunction will count toward retirement if this Court reverses the lower court after February.

The district court's opinion is dismal. The court made no attempt to put the discharge statute in context, but



characterized it solely as a fiscal device to weed out a surplus of Navy officers. Taking this narrow view of the legislative purpose, the court could find no rational basis for giving women officers a longer tenure. The court also held that sex was a suspect classification under Frontiero and that the Frontiero rule applies both to laws that favor men and laws that favor women.

The government deserves part of the blame for the district court's superficial opinion. At the beginning it gave the court very little information about the promotion system. When the court's opinion came out, the government apparently realized for the first time that it risked losing the case. It then filed two affidavits and a motion for a "new trial." This motion was denied. Appellee here argues that the affidavits offered after the case was decided are not properly before this Court unless the district court abused its discretion in denying the motion for new trial. Technically he is correct, but the problem is subject to a large fudge-factor. Virtually all the material in the post-decision affidavits is subject to judicial notice. It largely consists of statutory materials, the history of the women's program in the Navy, and statistics on the number of officers in various categories. The only material in the affidavits that is not clearly subject to judicial notice appears on pages 24A and 25A of the appendix. This, too, may be subject to an expanded standard of judicial notice. But, in any event, it is not essential to resolution of the case.

The discharge statutes in issue are 10 U.S.C. § 6382(2) and 10 U.S.C. § 6401. They are part of a complex statutory system governing promotions in the Navy. I will describe it as briefly as possible.

*different  
categories  
officers*

The Navy maintains separate promotion lines for each of several categories of officers. There is one promotion line for Reserve officers, another for officers in each staff corps (e.g., JAG, Medical Corps, Nurse Corps), and another for "line" officers. <sup>(2)</sup> Separate promotion lines are maintained for male and female officers in each category except four of the staff corps. <sup>(10)</sup> Each year the Secretary of the Navy convenes a selection board for each rank in each category. 10 U.S.C. §§ 5701, 5702, 5704. From a list of eligible officers, the selection board makes recommendations for promotion on the basis of merit. By statute, a lieutenant must serve four years in that rank before he is eligible for promotion, §§ 5751(a)(4), 5752(a)(3), but the time-in-grade requirement for men was <sup>(11)</sup> suspended by executive order during the Vietnam conflict. The number of lieutenants that can be promoted in a given year depends on the number of vacancies in the rank of lieutenant commander. §§ 5756, 5760(a), 5762(d), 5763. The maximum number of male lieutenant commanders is set by statute. §§ 5442, 5447(a). The number of women officers is set by the Secretary. § 5452.

After calculating the number of promotions available in a given year, the Secretary establishes a "promotion zone"

with reference to anticipated personnel needs over a 5-year period. § 5764(a), (d). The "promotion zone" is a section of the list of officers eligible for promotion, arranged in order of seniority. It does not affect promotion eligibility; officers below the zone are still eligible for selection. Its only function relates to the "up or out" program: it designates those officers who will be deemed to have "failed of selection" if they are not chosen for promotion. § 5776.

The chief operative provision of the "up or out" program is 10 U.S.C. § 6382, which applies to all male line officers, to male officers in a staff corps other than the Nurse Corps, and to many female staff corps officers. Subsection (a), which applies to lieutenants, provides:

Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps . . . shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander . . . for the second time. However, if he so requests, he may be honorably discharged at any time during that fiscal year.

Subsection (c) provides for severance pay, to be calculated with reference to length of service, but not to exceed two years' basic pay.

Women lieutenants appointed under § 5590 (this includes all women line officers and some women staff corps officers) are subject to involuntary discharge under § 6401:

Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of



lieutenant . . . shall be honorably discharged on June 30 of the fiscal year in which--

- (1) she is not on a promotion list; and
  - (2) she has completed 13 years of active commissioned service in the Navy . . .
- ← However, if she so requests, she may be  
 ← honorably discharged at any time during that  
 ← fiscal year.

Separation pay is 24 times the officer's monthly basic pay, but it may not exceed \$15,000. Lieutenants in the Nurse Corps (both male and female) are subject to § 6396, which is identical to § 6401 except for the amount of separation pay.

There are two differences between § 6382 (a), on the one side, and §§ 6401 and 6396, on the other. The most obvious difference is the time factor. A male lieutenant is not guaranteed a 13-year tenure under § 6382(a). If the time-in-grade requirements were not under suspension, however, the average tenure of a male lieutenant who had twice failed of promotion would be 13 years: he would spend 3 years as ensign, 3 years as a lieutenant (j.g.), and 6 years as a lieutenant before being placed in a promotion zone the first time. § 5768. One more year, making a total of 13, would pass before his second failure of selection. The inequality is therefore the result of an acceleration of promotions made necessary by the Vietnam conflict.

The second difference is that neither § 6401 nor § 6396 requires that the officer have "failed of selection" before involuntary discharge. The reason for this difference is historical. Until 1967 neither Nurse Corps officers nor women

line officers were covered by the "failure of selection" statute, and the Secretary was not authorized to establish promotion zones for women line officers. Act of Aug. 10, 1956, ch. 1401, § 5776, 70A Stat. 361. Instead, women officers were subject to forced retirement after specified time periods or at specified ages, without regard to the number of times they had been eligible for promotion. Moreover, their promotional opportunities were severely limited. Commander was the highest rank that could be occupied by a woman line officer, and the number of women who could be promoted to commander or lieutenant commander was limited by statute. In 1967 Congress removed almost all of these restrictions. Pub. L. 90-130, 81 Stat. 374. The purpose of Pub. L. 90-130 was to authorize permanent appointments of women to the rank of captain (Navy) and to bring women's promotions under the general standards that governed men's promotions. S. Rep. No. 676, 90th Cong., 1st Sess., at 2. The bill established the promotion zone system for women and Nurse Corps officers and brought them under the "failure of selection" concept. It is not entirely clear from the legislative history why Congress did not go the full distance and convert the 13-year "selection-out" period of §§ 6396 and 6401 into a "twice-failed" provision. Both the House and Senate Reports acknowledge that the 13-year provision were being retained, noting that they "closely parallel present provisions with respect to male officers except that the discharge of male officers probably occurs about 2 years

earlier." S. Rep. No. 676, *supra*, at 12; H. Rep. No. 216, 90th Cong., 1st Sess., at 17. The only other direct reference to the 13-year provision hints obliquely at the reason for retaining it. The House Report describes a severe crunch in the Navy promotion lines:

A particularly severe problem of promotion stagnation exists among WAVE officers in the Navy. The present grade limitations on promotion of WAVE officers to the grades of commander-lieutenant commander have so reduced the vacancies that the Navy will be forced to discharge most regular WAVE lieutenants when they reach their 13th year of service if relief is not provided.

. . . The Navy estimates that without legislative relief, the attrition among women line lieutenants will average 50 percent or more over the next 5 years. The Navy considers such heavy attrition unacceptable.

H. Rep. No. 216, supra, at 6. Unfortunately, it is not clear that retaining the 13-year provision would have been expected to save more women lieutenants than immediate adoption of a "twice failed" system. No woman officer would have been considered as having twice failed until two years after the new system went into effect. It is possible that the lines for promotion were so jammed up that making room at the top would not have opened enough lieutenant commander positions by the second year. <sup>13</sup> On the other hand, keeping the 13-year system would save the younger lieutenants from rapid attrition but it could have forced out older lieutenants prematurely if promotions to lieutenant commander came too slowly.



Despite this ambiguity, Congress probably thought retention of the 13-year provision would be better than immediate adoption of a twice-failed system, and it probably believed the Navy would lose fewer women lieutenants over the short run. The Department of Defense <sup>had</sup> told the Armed Services committees that it was ~~then~~ planning a major overhaul of the military officer promotion systems. That plan is now pending in Congress as H.R. 12405, 93rd Cong., 2d Sess. The bill would establish an integrated promotion system for male and female officers, making both subject to discharge following the second failure of selection.

There is one other difference between the program for attrition of male lieutenants and that applicable to female lieutenants. As in most other promotion categories for male officers, the number of male lieutenants is limited by statute, and the number of promotion opportunities for lieutenants (j.g.) is limited by the number of vacancies in the lieutenant ranks. § 5756. But the women's selection board may recommend all eligible lieutenants (j.g.) for promotion to lieutenant without regard to vacancies. § 5760(b). Consequently, retaining male lieutenants for a 13-year tenure would force increased attrition of lieutenants (j.g.) under § 6382(b), which is identical to § 6382(a). Retaining women lieutenants, on the other hand, would not be as likely to require whole-sale discharge of lieutenants (j.g.) <sup>14</sup> and instead might further the Navy's efforts to increase the number of women officers.

When seen in this context, Lt. Ballard's claim of sex discrimination is very weak. First, the lines are not drawn solely on the basis of sex. Twenty-seven female staff corps lieutenants are subject to the provisions of § 6382(a); seventy-six male Nurse Corps lieutenants are given the advantage of a 13-year tenure. As to line lieutenants, the category in which there is no crossover between the systems, it is clear that the Navy is legitimately attempting to increase the number of women. This program is not invidiously discriminatory, since its purpose is to overcome the effects of past discrimination against women, both in recruiting and promotion. In this respect Ballard's case parallels Kahn v. Shevin.

It is even stronger than Kahn v. Shevin in another respect. Lt. Ballard is complaining of only one aspect of a complex system. He is claiming for himself the one provision that favors female lieutenants over male lieutenants. In the context of the entire system, he has not suffered discrimination. On the contrary, he has been on the favored side in every other respect. There is no indication, outside the integrated staff corps, that male and female officers compete for the same slots. Female officers are still ineligible for combat duty and most sea duty, § 6015, and would therefore be disadvantaged in head-to-head competition with male officers. Consequently, the dual promotion system is itself justified by a legitimate governmental interest, at least as to an attack launched by a male officer.

The Louisiana Jury Cases

Article VII, § 41, of the Louisiana Constitution provides 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." Article 402 of the Louisiana Code of Criminal Procedure implements this provision in criminal cases and until July 1972 La. Rev. Stat. 13:3055 implemented the constitutional exemption in civil cases. The 1972 legislature repealed 13:3055 and enacted a voluntary exemption for women with children under 16 and other women whose absence from the home would cause family hardship. A similar exemption was added to the code of criminal procedure, but art. 402 was not repealed. Apparently these statutory changes were designed to accompany a constitutional amendment that would have repealed the women's exemption, but the constitutional referendum was defeated in the November 1972 election. The record suggests that the repeal of 13:3055 has not affected the "volunteers-only" system. Appellees in Edwards v. Healy suggest that the special hardship exemptions for women have been applied only to those who had already volunteered for jury service.

In April 1974 the people of Louisiana approved a new constitution. It does not contain any special exemptions for women, but simply authorizes the Louisiana Supreme Court to provide for juror exemptions by rule. The current draft of



juror rules makes no distinctions on the basis of sex. The new constitution will take effect on January 1, 1975. No other state has a "volunteers-only" jury exemption for women like that of the current Louisiana constitution.

Both Taylor and Edwards v. Healy arose in St. Tammany Parish, which, together with Washington Parish, comprises the 22nd Judicial District.<sup>15</sup> Women constitute about 53 percent of the population of the two parishes. In St. Tammany Parish women's names are only 10 percent of the total in the jury wheel, and during the twelve-month period from December 1971 to December 1972, only 13 of the 1850 persons drawn for petit jury service were women. In Washington Parish no more than two women have ever volunteered for jury service, and on only one occasion has a woman been included in a petit jury venire.

#### Taylor v. Louisiana

Taylor was convicted of aggravated kidnapping in St. Tammany Parish in April 1972. The petit jury venire was all male. Taylor moved to quash the venire on the ground that it would violate his due process right to a jury selected from a cross-section of the community, but his motion was denied. The trial court sentenced him to death, but Furman v. Georgia was announced while his appeal was pending, and the Louisiana Supreme Court ordered the sentence reduced to life imprisonment. It rejected his other claims, including the challenge to the "volunteers-only" jury exemption for women.

Taylor argues on appeal that Hoyt v. Florida, 368 U.S. 57 (1961), should be overruled. He does not try to claim special prejudice from the absence of women jurors; on the contrary, his brief seems intent on hiding the facts of the case. According to the Louisiana Supreme Court opinion, Taylor forced his way into a car containing two women and a child. Armed with a butcher knife, he made them drive to a deserted spot, where he robbed them and raped one of the women. He released them after they promised not to report the crime.

Edwards v. Healy

This case began as a class action for a declaratory judgment and injunction against the women's jury exemption. They attacked art. VII, § 41, of the state constitution, art. 402 of the code of criminal procedure, and 13:3055 (though it had already been repealed). There were <sup>two</sup> ~~two~~ classes of plaintiffs: (1) jury-eligible women in St. Tammany Parish who had never been called to serve; and (2) jury-eligible men in St. Tammany Parish. The women claimed that the exemption stigmatized them, made it difficult for them to serve on juries, and diminished the likelihood that they would have juries with female representation if they should ever be involved in a trial. The men claimed that they were doubly burdened with jury service because women were exempted. The three-judge district court did not rule on the standing of these two classes, but indicated that their standing was doubtful

because the two groups together represented almost the entire body politic of the two parishes. The court granted standing instead to a class of <sup>11</sup> intervenors, represented by two women who engaged in civil litigation in St. Tammany and Washington Parishes. And, having ruled that the intervenors could challenge the exclusion of women from their soon-to-be-convened juries, the district court proceeded to declare the exemption unconstitutional in both civil and criminal litigation. It held that the exemption denied equal protection to women litigants and denied due process to all litigants. The court held that Hoyt was no longer binding because it had been undermined by Reed and Frontiero. Then it issued an injunction in the names of all plaintiffs (but, curiously, omitting the names of the intervenors) against the application of the constitutional and statutory provisions. The judgment has been stayed pending this appeal.

#### Federal Law of Jury Exclusion

The federal constitutional law of jury exclusion is complex. There is, first of all, a limited use of equal protection principles, originating in Strauder v. West Virginia, 100 U.S. 303 (1879). Strauder was a Negro's challenge to his conviction under a West Virginia law that excluded Negroes from juries. The Court held that trying Strauder before an all-white jury violated the equal protection clause. The Court reasoned that excluding prospective Negro jurors from



*2 analysis  
subject  
race*

participation in the administration of justice resulted in a denial of equal protection to Negro defendants. Because white defendants would never be tried by a jury from which members of their race were excluded, the Negro defendants suffered a comparative disadvantage, stemming primarily from the danger of racial prejudice. The Court noted two limitations on its holding: (1) a defendant had no right to a jury composed in whole or in part of persons of his own race, but only to a jury "selected and impanelled without discrimination against his race or color, because of race or color"; and (2) the fourteenth amendment does not prevent the state from prescribing juror qualifications such as gender, property ownership, citizenship, age or education.

In Hernandez v. Texas, 347 U.S. 475 (1954), the Court applied Strauder to the systematic exclusion of Mexican-Americans. Chief Justice Warren's opinion for a unanimous Court outlined a framework for the equal protection principle. First, the defendant must be a member of the excluded class. Second, the excluded class must be a distinct group that suffers community prejudice. Third, there must be prima facie evidence of systematic exclusion. In finding that Mexican-Americans constituted a distinct, disadvantaged class, the Court summarized evidence in the record showing that Mexican-Americans were the victims of discrimination similar to that suffered by Negroes.

The equal protection principle has a much narrower scope outside the area of racial and ethnic prejudice. In Fay v. New York, 332 U.S. 261 (1947), involving New York's use of "blue-ribbon" juries in difficult criminal cases, the Court held that "[t]he inquiry under [the equal protection] clause involves defendants' standing before the law relative to that of others accused." Id. at 285. Since there was no evidence that blue-ribbon juries returned more guilty verdicts than regular juries, or that they were "organized to convict," the Court held there was no violation of equal protection.

yes  
Blue ribbon juries  
substantive  
under  
2/11  
analysis

The due process limits on jury selection procedures are not so well delineated. Before the sixth amendment was applied to the states, the Court held that the <sup>federal</sup> right to jury trial embodied the concept of the jury as a "body truly representative of the community." Glasser v. United States, 315 U.S. 60, 85-86 (1942). Five years later in Fay v. New York, the Court conspicuously applied a different standard to a state court jury. Acknowledging that the fourteenth amendment did not require jury trial in state criminal proceedings, the Court held that if the state provided a jury, due process required that it be "neutral," that is, the state could not use a system of exclusions to impanel a jury before which defendants would have no chance of a decision on the evidence. Such a proceeding would fall under the prohibition of "sham" trials. 332 U.S. at 288. Neither the exclusion of women nor the disproportionate representation of working-class defendants

on the blue-ribbon jury was a violation of due process under this standard. Though it retained the rule that racial exclusions were "presumptive constitutional violations," ~~the~~ <sup>the</sup> Court held that other exclusions must be "such as to deny a fair trial before they can be labeled as unconstitutional." Id. at 293.

In Hoyt v. Florida, 368 U.S. 57 (1961), the Court again refrained from applying the cross-sectional principle, as such, to state juries. Mrs. Hoyt was convicted of killing her philandering husband with a baseball bat. She appealed, claiming that Florida's "volunteers-only" system had resulted in systematic exclusion of women from her jury. She claimed that women jurors would have been more sympathetic to her defense of temporary insanity.

In an opinion by Justice Harlan, the Court formulated a new standard for state jury exclusions. Instead of delineating separate principles of equal protection and due process as in Fay v. New York, the Court spoke simply of the fourteenth amendment. Citing Hernandez v. Texas and Fay v. New York, the Court held that the fourteenth amendment requires "that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions." This principle was not restricted to exclusions based on race or color, but applied as well to "all other exclusions which 'single out'

Harlan's rule in Hoyt uses language different from the representative of community test - but may not mean anything different.



any class of persons 'for different treatment not based on some reasonable classification.'" 386 U.S. at 59-60. The Court held that an exemption could be the source of an impermissible exclusion, saying, "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation." Id. at 61.

It is not clear what constitutes a "reasonable" classification. In federal cases, the Court had held that the "general principles underlying jury selection" prohibited excluding a substantial portion of the community on grounds that were irrelevant to their capacity to serve on juries. Eligible jurors could be excused only for significant hardship. Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24 (1946) (exclusion of men working for a daily wage). The Court had also held that the exclusion of women, where they were eligible to serve, violated the cross-sectional principle. Ballard v. United States, 329 U.S. 187, 193-94 (1947) (Douglas, J.). But both Thiel and Ballard were federal cases, and the Court relied on federal statutes and its power to supervise federal courts. Justice Frankfurter, dissenting in Thiel, suggested an outline of principles for jury selection. Trial by jury presupposes "a jury drawn from a pool representative of the community and impartial in the specific case." Since

Fed  
male

race is unrelated to a person's fitness as a juror, Negroes cannot be excluded solely because of race. But a group can be excluded for reasons not relevant to their fitness if there are "competing considerations of public interest." 328 U.S. at 227. An early opinion by Justice Holmes had indicated that a state could exclude certain occupational groups from jury service if it believed that "it was for the good of the community that their regular work should not be interrupted." Rawlins v. Georgia, 201 U.S. 638, 640 (1906).

Although the use of terms like "arbitrary" and "reasonable" suggests that the state's exemption is to be judged on equal protection standards, Justice Harlan's analysis in Hoyt seemed to invoke the "good of the community" standard. Because "woman is still regarded as the center of home and family life," the Court held that the state, "acting in pursuit of the general welfare, [could] conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." 368 U.S. at 62. The Court recognized that Florida could have achieved this objective more narrowly by exempting only those women with family responsibilities, but held that the broad exemption was justified by the state's interest in avoiding the administrative burden of ruling on each claim of exemption. Id. at 63. The Court also concluded that the "volunteers-only" system was permissible, either as a means of fully effectuating the exemption by relieving women

of the necessity of claiming it, or as a means of avoiding the administrative burden of processing individual claims of exemption. Having decided that the exemption was based on a reasonable classification, the Court held that the Constitution was not offended by the underrepresentation of women in Florida's jury pools.

Now that the Court has held that the sixth amendment applies to the states, Duncan v. Louisiana, 391 U.S. 145 (1968), there is pressure to hold that all the "essential attributes" of trial by jury in federal courts apply to the states. See Peters v. Kiff, 407 U.S. 493, 500 (1972) (opinion of Marshall, J.). The concept of a jury drawn from a cross-section of the community was recognized as fundamental in Glasser, and the representative function of the jury was emphasized in Duncan. Id. at 156. The Court's opinion in Williams v. Florida, 399 U.S. 78, 100 (1970) (White, J.), and Justice White's plurality opinion in Apodaca v. Oregon, 406 U.S. 404, 412-413 (1972), also suggest that cross-sectional representation is fundamental to the concept of jury trial. According to appellees in Edwards v. Healy, these recent developments require the Court to overrule Hoyt and substitute Ballard in its place. But I am not convinced that the Hoyt <sup>framework</sup> ~~rule~~ varies greatly from the federal standard. Ballard reached a different result, but it rests at least as much on statutory grounds as on the conclusion that an all-male jury pool is not a cross-section



of the community. The Hoyt rule that a jury must be indiscriminately drawn from those eligible in the community, without any arbitrary exclusions, could be read as an alternative description of the federal rule that a defendant is entitled to a jury drawn from a cross-sectional pool, with the addition of a rule allowing exemptions on competing considerations of public interest. If Hoyt's "reasonableness" standard is read to coincide with the "public interest" standard for exemptions, the difference between the two is slight.<sup>18</sup> Nonetheless, Duncan and its progeny bring the Hoyt problem into sharp relief. The reasonableness of a state's decision to protect its women from jury service must be judged in light of a criminal defendant's right to a jury drawn from a representative pool. Ballard's declaration that the sexes are not fungible is a strong statement of the interest that opposes the state's concern for women. The major shortcoming of Hoyt is that it dismisses the defendant's interest too easily.

We should not get into diversionary analysis as to standing

In the interest of keeping legal principles clear, I think it is important to avoid the concept of standing in the due process cases. The issue is not whether a male defendant has standing to raise the women's claim that they are discriminatorily excluded from juries. (Justice Marshall's opinion in Peters v. Kiff, 407 U.S. 493 (1972), notwithstanding). It is whether a defendant, male or female, has a due process right to a jury selected without systematic exclusion of women.

Sex discrimination principles do not govern the resolution of the question, unless the "reasonableness" concept of Hoyt is held coextensive with equal protection analysis. The question is not merely whether there is a legitimate state interest in exempting women from jury duty, but whether that interest is strong enough to justify giving defendants a jury that does not represent a cross-section of the community. To that extent, the equal protection <sup>cases are</sup> ~~may be~~ instructive. The reasonableness of the exemption may depend on whether the exemption is irrationally overinclusive, or whether it is based on unsupported generalizations about women's behavior.

Louisiana asserts only one interest in support of the broad exemption for women: "the state interest in the general welfare of its citizens and women as the center of home and family life." State's brief (Taylor) at 6. It contends that the jury exemption is part of an attempt "to regulate and provide stability to the state's own idea of family life." Id. at 12. The state does not suggest how jury service is inconsistent with family stability or women's family responsibilities. Taylor and the appellees in Edwards v. Healy offer statistics to indicate that the state's all-inclusive exemption is irrationally overinclusive. If the state's concern is for mothers, it has overlooked the fact that 59 percent of its adult female population have no children under the age of 18. By the time of decision in Edwards, Louisiana had already provided a special exemption for mothers of children under 16.



That would surely cover any concern that children would be left untended while their mothers served on juries. The state has also ignored the fact that of those women who do have children under 18, over a third are in the labor force rather than at home. Appellant's brief (Taylor) at 9. Moreover, the "volunteers-only" system may aggravate the overinclusiveness of the classification. If the state called women for jury service but allowed them to claim an exemption after being called, it would probably get more women jurors than the small number who think to volunteer.

The exemption might also be found unreasonable because it is grounded on an overbroad generalization about women's lifestyles. Reed and Frontiero both rejected classifications based on assumptions about women - in Reed that they had less business experience than men, and in Frontiero that they did not have dependent husbands. Both assumptions would probably have accorded with statistical fact, but neither was held adequate to support a law that disadvantaged women. Strictly speaking, this aspect of Reed and Frontiero does not apply to jury exemption cases,<sup>as</sup> there is no disadvantage to the women who choose not to volunteer for jury service, but the new suspicion of generalizations about women should temper the Court's evaluation of Louisiana's asserted interests.

Reed and Frontiero have one other impact on Hoyt. The Hoyt Court held that the breadth of the exemption and the choice of a "volunteers-only" system could be justified by



the state's desire to avoid the administrative burdens of either a "family responsibilities" exemption or a system that required women to claim their exemptions individually. Reed and Frontiero have circumscribed the impact of administrative inconvenience in discrimination cases, and they are persuasive here. Besides, Louisiana disclaims reliance on administrative convenience. State's brief (Taylor) at 11-12. There is also a suggestion that requiring women to claim an exemption when <sup>called would be more efficient than</sup> having to cull their names out of the lists that are used as a source for jurors.

19

If the Court overrules Hoyt in the context of Louisiana's "volunteers-only" system, the decision will cast doubt on the "opt-out" systems used in five or six states, including Virginia. These states give women an absolute exemption but <sup>require</sup> them to claim it individually. Since the major fault of the "volunteers-only" system is its overinclusiveness with respect to the state's interests, the "opt-out" states should probably fare no better. Still, if the "opt+out" system produces a higher proportion of women on jury venires, it could be upheld on the ground that the exemption does not cause substantial exclusion of women. This is simply the converse of Hoyt's holding that an exemption would be invalid if it caused an unreasonable or arbitrary exclusion.

Problems Raised by These Cases

Overruling Hoyt would raise a serious practical problem in criminal cases. It is likely, if not certain, that every inmate of the Louisiana prisons was convicted by a jury <sup>(or indicted by a grand jury)</sup> chosen from a venire composed almost entirely of males. It would be unthinkable to make Louisiana retry them all. The state should be allowed to rely on decisions as recent as Hoyt. There are at least two methods of keeping the prison doors shut: requiring a suggestion of prejudice in individual cases, or ruling that the decision will not be given retroactive effect.

The first alternative has the advantage of letting the Court affirm Taylor's conviction, since Taylor's brief makes no claim of special prejudice. There are seeds of such a requirement in the cases involving nonracial jury exclusions, in particular, Fay v. New York. There the Court hinted that the exclusion of working-class jurors, even if unreasonable, would not require reversal unless it could have affected the outcome of the case. 332 U.S. at 292-93. The Court distinguished the racial cases, in which it had never required a showing of prejudice, on two grounds: first, a federal statute prohibited jury exclusions on account of race, and second, there is no reason to assume the existence of hostility between other classes of jurors and defendants. Both of these distinctions are still valid, and a "possible

"prejudice" rule could be applied in cases of nonracial exclusion without affecting the per se rule in racial cases.

The major drawback of using a "possible prejudice" rule to limit the effect of overruling Hoyt is the danger of precipitating hundreds of federal habeas petitions. It is not clear that failure to <sup>20</sup>object to the venire would constitute a federal waiver under Fay v. Noia. If it does not, the federal courts would have to make a factual inquiry in every case.

The other alternative, nonretroactivity, would leave untouched all convictions except Taylor's. To my surprise, I found persuasive precedent for a nonretroactive rule. In DeStefano v. Woods, 392 U.S. 631 (1968), the Court held <sup>21</sup>that Duncan v. Louisiana and Bloom v. Illinois were not retroactive. The ruling on Bloom is almost directly analogous to the Louisiana case. Even though a nonrepresentative jury may be thought to have an effect on the integrity of the factfinding process, the use of a "volunteers-only" exemption for women was firmly established in law, and invalidating all convictions under the former practice would have substantial adverse effects on the administration of justice. See id. at 634-35.

Edwards v. Healy raises two substantial questions that do not appear in Taylor: (1) whether Strauder's equal protection principle should be applied to women, and (2) whether due process governs the composition of juries in civil cases. It may be possible to avoid both questions on mootness grounds.



The new constitution will take effect on January 1.<sup>22</sup> The state supreme court has proposed jury exemption rules that make no gender distinctions. Unless it changes those rules before final adoption, this case will be moot as of January 1. The Court could either hold the case until then or give it an anticipatory dismissal, as in DeFunis v. Odegaard, 94 S.Ct. 1704 (1974), ~~when~~ <sup>once</sup> the Supreme Court's rules are finalized.

The equal protection rationale of Strauder and progeny holds the most promise for civil cases, since it does not require due process supervision over state civil juries. The Court has already held, albeit obliquely, that racial exclusion is invalid in both civil and criminal juries. ~~The Court has already held, albeit obliquely, that racial exclusion is invalid in both civil and criminal juries.~~ Carter  
23  
v. Jury Commission of Greene County, 396 U.S. 320 (1970). The rationale of Strauder - comparing the position of Negro litigants to that of white litigants - would apply to civil cases as well as criminal, and there is no reason to suppose that the potential for racial prejudice is diminished, although its consequences are less severe.

The only equal protection claim involved in the Edwards appeal is that of the women litigants. Appellees have not pressed their earlier contention that the "volunteers-only" system denies all women an equal opportunity to participate in the administration of justice. The contention had no merit; since any woman may participate equally by volunteering,

no woman is excluded from jury service. Their claim that the burden of volunteering was itself a denial of equal protection is also weak. Apparently all that is required is a letter to the court clerk. If the burden were substantial, such as a requirement that the woman appear in person to volunteer, it might constitute a denial of equal protection. But no such claim is made on appeal. Appellees have also abandoned the contention that men are doubly burdened with jury service because women are excluded.

An uncritical eye could find parallels between racial exclusion and exclusion of women, and Hernandez supplies a ready framework. But women are not quite as disfavored as Negroes or Mexican-Americans, and there is less reason to presume that male jurors will be harsher to female litigants than to male litigants. All <sup>that</sup> appellees offer in support of their contention is a study that showed juries composed predominantly of one sex tended to give larger judgments to litigants of their own sex. This is too weak to support a Strauder extension.

24

The three-judge court glossed over the due process problem. It held:

Similarly, it is unnecessary to search the limits of the Constitution for a right to jury trial in civil cases. "Once 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 from racial bias," Carter v. Jury Commission of Greene County, 1970, 396 U.S. 320, 330, . . . and, we add, every other type of unconstitutional discrimination.

This Court has adhered to its early cases holding that the seventh amendment does not require juries in state civil trials. Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54 (1919); Walker v. Sauvinet, 92 U.S. 90 (1875). It is no solution to say that if a state chooses to provide juries in civil cases it must follow federal standards governing their composition. The issue, as I see it, is whether due process limits the composition of civil juries.

Although this Court has held that the right to jury trial in criminal cases encompasses the right to a jury drawn from a representative pool, Glasser v. United States, 315 U.S. 60, 85-86 (1942), it has not enshrined the same principle as a constitutional limit on civil jury trial<sup>in federal cases.</sup> In Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), the Court reversed a civil judgment because daily wage earners had been left off the jury lists. Although it declared that the "American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community," and spoke of "the democratic ideals of trial by jury," id. at 220, the Court based its holding on federal statutes and its "power of supervision over the administration of justice in the federal courts," id. at 225, rather than the seventh amendment.

But even if the requirement of a cross-sectional jury is considered a fundamental part of the seventh amendment, it would not follow that due process requires the same in state



civil cases. The function of the jury in criminal cases, as outlined in Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968), is "to prevent oppression by the Government." But in most civil cases the jury is simply a mechanism for settling private disputes. Due process would probably require an impartial jury, just as it requires an impartial factfinder in many state administrative proceedings, Goldberg v. Kelly, 397 U.S. 254, 271 (1970), but impartiality in this context probably means nothing more than an absence of actual bias or prior involvement in the ~~in the~~ case. The requirement of cross-sectional representation is not essential for impartiality.

#### Recommendations

In Schlesinger v. Ballard, I would reverse<sup>on</sup> the ground that § 6401, in the context of the entire promotion system, does not discriminate against male lieutenants.

In Taylor v. Louisiana I would overrule Hoyt v. Florida on the ground that Duncan requires closer attention to the principle of cross-sectional representation in state criminal cases, and that, by analogy, recent cases on sex discrimination render the exemption irrationally overinclusive in light of the state's claimed interest. I would include in the opinion a strong suggestion that the case will be applied only to trials occurring after the date of decision.

In Edwards v. Healy I would hold the case until the new jury rules are finalized. Then I would vacate the judgment and remand for dismissal on ground of mootness, thus avoiding the constitutional questions.

## FOOTNOTES

1. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). See also Getman, The Emerging Constitutional Principle of Sexual Equality, 1972 Sup. Ct. Rev. 157, 162-63.

2. Frontiero v. Richardson, 411 U.S. 677 (1971) (opinion of Brennan, J.).

3. E.g., Getman, supra.

4. See Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507-08 (1971). Unlike several other articles, this one acknowledges that the parallel is not perfect.

5. One of the best statements of this view appears in Professor Kanowitz's book:

Not only do legal norms tend to mirror the social norms that govern male-female relationships; they also exert a profound influence upon the development and change of those social norms. Rules of law <sup>that</sup> treat of the sexes per se inevitably produce inevitably produce far-reaching effects upon social, psychological and economic aspects of male-female relationships beyond the limited confines of legislative chambers and courtrooms. As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote.

L. Kanowitz, Women and the Law: The Unfinished Revolution 4 (1969).



6. This Utah law has now been repealed. Twenty-five pounds may be the lowest weight-lifting limit now extant. Ohio Rev. Code § 4107.43 (1974).

7. E.g., Ohio Rev. Code § 4107.46 (1974). This statute prohibits hiring women to work more than 48 hours per week, or 8 hours per day, or 6 days per week. There are a number of exceptions listed, including professional positions. Women may work in more than one job, but only if the aggregate hours of work do not exceed 8 per day or 48 per week.

8. Again, Ohio is the chief villain. Women may not work in any of the following jobs: crossing watchman, section hand, bell hop, night-time taxi driver, or meter reader. They may not be employed in blast furnaces, smelters, mines or quarries (except as office workers), in shoeshine parlors, or in drinking establishments with exclusively male customers. They may not work in delivery service on vehicles over 1 ton capacity, or on freight or baggage elevators that do not have automatic doors. They may not be employed for baggage handling, freight handling, or handling heavy materials with hand trucks. Ohio Rev. Code § 4107.43 (1974).

9. 29 C.F.R. § 1604.2(b) (1973). The EEOC takes the position that state protective laws cannot be used as a defense to an otherwise established unlawful employment practice, or as a basis for a bona fide occupational qualification. Courts have followed this ruling. E.g., Rosenfeld v. Southern Pacific Ry., 444 F.2d 1219 (9th Cir. 1971).

10. These four staff corps are the Medical Corps, the Dental Corps, JAG, and the Medical Service Corps. The difference between these and other staff corps ~~is~~ <sup>is</sup> that women may be appointed directly into these corps. 10 U.S.C. §§ 5574, 5578, 5578a, 5579. Other staff corps nominally exclude women, §§ 5575, 5576, 5577, but the general statute authorizing women officer appointments authorizes indirect appointments of women, § 5590. All women who are appointed under § 5590 are placed in a promotion line for female officers only.

11. Exec. Order No. 11,437, 3 C.R.F. 754 (Supp. 1967-1970).

12. I.e., the four "integrated" staff corps listed in note 10, supra.

13. Congress provided for this problem in the Nurse Corps by ~~allowing delay of discharge under a "twice-failed" standard~~ <sup>delaying implementation of the</sup> <sup>and allowing individual exceptions.</sup> It is unclear why a similar provision could not have taken care of the problem with women line officers.

14. Women lieutenants (j.g.) are forced out after 7 years. § 6402.

15. St. Tammany and Washington Parishes are in the "toe" of the Louisiana "boot," north of Lake Pontchartrain. Slidell and Bogalusa are the largest towns in the two parishes.

16. Actually the narrow holding was that Strauder was entitled to remove his prosecution to the federal courts under a statute that authorized removal by a person who could not enforce any right secured to him by a law providing

for "equal civil rights." As a preliminary step of the analysis, the Court held that excluding Negroes from jury service was a denial of equal protection to Negro defendants.

17. For instance, the Court noted that Mexican-Americans had been placed in segregated schools, that at least one restaurant in town displayed a sign that said "No Mexicans Served," and that Mexican-American participation in business and community affairs was slight. 347 U.S. at 479-80.

18. Federal juror exemptions are governed by 28 U.S.C. § 1863(b)(6). Local jury plans may exempt "groups of persons or occupational classes" only on the ground "that their exemption is in the public interest." At a minimum, the plan must provide exemptions for members of the Armed Forces, members of fire and police departments, and "public officers" of federal and state government. Section 1863(b)(5) requires jury plans also to specify groups or classes whose members will be excused from service, on individual request, on grounds of undue hardship or extreme inconvenience.

19. The state has furnished the Court a transcript of the debates over jury exemptions at its recent constitutional convention. Delegate A. Landry explained the current system:

Now in order to secure jurors, it is necessary for the jury commissioners to get up a list of individuals and it is usually selected, not selected, but it is taken from telephone books, from lists of high schools giving the list of names of persons who have reached the age of eighteen. You have to take it from the city directories. You have to take a list from, in my parish, from



the water district, which is all the water meters in the parish, and also all of the registered voters of the parish, which means you have approximately fifteen to twenty thousand names in the large hopper. You cannot separate the women from the men and then, when you draw a criminal jury, you must draw them at random. In my parish, I use the capsule type of drawing where the jury commissioners do not even know what name they are drawing. Only last week, in order to supplement the jury venire list, we had to draw over fourteen hundred names to put in six hundred and fifty names in the jury venire list, because women kept cropping up.

20. The issue is whether the Fay v. Noia "intentional relinquishment of a known right" standard should apply to a claim that could have been raised but would have been futile at the time. This Court has never decided what waiver standard applies to a defendant's collateral attack on a conviction (not a guilty plea) on the ground of racial exclusion from his grand jury. Tollett v. Henderson, 411 U.S. 258, 260 n. 1 (1973); Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). Circuit courts that apply the "intentional relinquishment" standard to racial cases have held that failure to object to the venire or the grand jury is not an automatic waiver. McNeil v. North Carolina, 368 F.2d 313 (4th Cir. 1966); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966). That reasoning would apply a fortiori to a right, unknown to anyone at the time of conviction, to a jury selected without exclusion of women. The heart of the dilemma is retroactivity.

21. 391 U.S. 194 (1968).

22. Unless, that is, the Court accepts the appeal in Bates v. Edwards (motion for docketing to be discussed at October 7 Conference) in which several Louisiana citizens claim that the constitutional convention violated Baker v. Carr because the governor appointed 27 at-large delegates out of a total of 132. The other 105 delegates were elected by the voters in established state legislative districts.

23. Carter was a declaratory judgment suit brought by jury-eligible Negroes who complained that they had been systematically excluded from jury lists. The Court allowed their suit, without distinguishing between civil and criminal juries. 396 U.S. at 329-30.

24. Appellees undercut even this contention by suggesting that male jurors tend to favor attractive young female litigants. Appellees' brief at 17. There is good reason to suppose that the opposite would also obtain: some women jurors might be unduly harsh <sup>to</sup> ~~on~~ attractive young female litigants. The stereotype of the jealous woman is not entirely fallacious.



Hold  
until  
Jan 1 when  
new Court  
becomes  
effective

This is appeal from 3 J/Ct involving  
class action by various women's groups asserting  
sex discrimination resulting from exclusion of  
women from ~~the~~ jury ~~panels~~ in civil cases. One or more  
of women was actually in a civil litigation.

If we reach merits, I do not view this as  
a sex discrimination case. Women may serve on  
juries if they wish. Issue <sup>may be</sup> whether Fed Court  
requirement (7<sup>th</sup> amend) of jury trial in civil cases  
applies to state civil cases. We have never so held.  
The ~~real~~ real issue is whether 14<sup>th</sup> amend (due process  
- fundamental fairness?) requires civil jury panels  
to be representative of community?

Vick - Asst A/G of La.  
Argues mootness - New Court,  
~~See~~ supplemental memo (typed) -  
& esp. Exhibits I & II. The latter  
is draft order of La S/Ct.

It is clear from action & recorded  
intention of Court. Convention

(This Asst A/G made a  
miserable "argument" - indeed  
apart from talking about  
mootness, he made no  
argument at all. La. wasted  
its money paying his expenses  
to come to Washington



Miss. Ginsburg (for appellee)

Argues no mootness.

\*Juries must be drawn from  
a panel representative of community.

Relies on D/P & E/P clauses.

Vacate & Remand to determine whether moot.

The Chief Justice

~~Passed.~~  
Passed.

Douglas, J. Affirm

Not moot now,  
Would not hold it  
Sees no difference  
bet. civil & criminal  
~~cases~~ cases.

Brennan, J.

Affirm <sup>but willing to</sup> ~~hold for mootness~~  
Can't rely on 7<sup>th</sup> amend  
or on Duncan.

Decision below simply  
decides that due process under  
14<sup>th</sup> amend requires a jury  
& one that is representative.

Stewart, J.

Vacate or Moot  
~~or~~ or Remand for  
reconsideration.

White, J.

~~or~~ Hold or Remand  
for mootness  
Can't agree with  
Brennan as to  
civil cases.

Does not approve of  
rationale of court  
below.

But women are  
discriminated vs by  
not allowing them  
to serve.

In any event would  
~~Hold or Remand~~  
~~on this~~

Marshall, J.

Vacate & Remand  
to consider mootness

Blackmun, J.

Vacate & Remand

I'm ready this Term  
to adopt middle tier  
analysis - expressly.

If we reach an E/P  
issue, would find  
law discriminatory.  
But is moot.

Powell, J.

Hold or Vacate  
& Remand to consider  
mootness.

Rehnquist, J.

Vacate & Remand  
on Mootness.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 17, 1974

MEMORANDUM TO THE CONFERENCE

It now appears that before Edwards v. Healy, No. 73-759, will become moot, there will have to be further legislative action in Louisiana, apparently expected in January. Healy should be held, but I doubt that there is any good reason to hold up Taylor, No. 73-5744, which I am recirculating today.

  
B.R.W.

*Salley - Write similar note*

Supreme Court of the United States  
Washington, D. C. 20543

*to*

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 2, 1975

RE: No. 73-759 Edwards v. Healy

Dear Byron:

I agree with your proposed Per Curiam in the  
above.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 2, 1975

MEMORANDUM FOR THE CONFERENCE

Re: No. 73-759 - Edwards v. Healy

Although until lately of the contrary view, counsel for appellants now suggest that the jury selection and exemption statutes of Louisiana relevant to the issue argued before us have either been repealed or superseded -- as contemplated by the new constitution -- by the recent Supreme Court rule providing for jury selection without discrimination based on sex. I would suggest, however, that we let the District Court consider mootness first and that the following per curiam would be sufficient:

"The judgment of the District Court for the Eastern District of Louisiana is vacated and the case is remanded to that court to consider whether in the light of recent changes in the state constitutional, statutory and other rules applicable to this case the cause has become moot."

  
B.R.W.



June 2, 1975

No. 73-759 Edwards v. Healy

Dear Byron:

Please join me in your Per Curiam.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

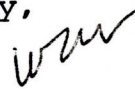
June 2, 1975

Re: No. 73-759 - Edwards v. Healy

Dear Byron:

The per curiam which you propose in your note of June 2nd is all right with me.

Sincerely,



Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 2, 1975

Re: No. 73-759 - Edwards v. Healy

Dear Byron:

I agree.

Sincerely,



Mr. Justice White

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 2, 1975

No. 73-759 - Edwards v. Healy

Dear Byron,

I agree with the Per Curiam you propose  
in this case.

Sincerely yours,

P.S.  
✓

Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 3, 1975

Re: No. 73-759 -- Edwards v. Healy

Dear Byron:

I agree with your proposed per curiam.

Sincerely,

*J.M.*  
T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 4, 1975



Re: 73-759 - Edwards v. Healy

Dear Byron:

I join you in your proposed per curiam.

Regards,

A handwritten signature in black ink, appearing to be "W.B. White", is written below the "Regards," text.

Mr. Justice White

Copies to the Conference



[illegible]