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Constitutional Perspectives on Sex Discrimination in Jury Selection

Elizabeth M. Schneider
Brooklyn Law School, liz.schneider@brooklaw.edu

Rhonda Copelon

Nancy Stearns

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I. INTRODUCTION

The jury is the seat of substantial power in American society. It is, in theory, the voice of the people. Jury service has been called "a duty as well as a privilege of citizenship which cannot be shirked on a plea of inconvenience or decreased earning power,"[1] and exclusion from jury service has been called an "assertion of . . . inferiority."[2] Despite the democratic rhetoric, however, jury service has been reserved for white males.

Sex discriminatory treatment of women is deeply embedded in the jury system. Historically, the jury in both England and the United States was limited to "free and lawful men."[3] By 1968, all state provisions disqualifying women from juries had been repealed,[4] but the last remaining affirmative registration system for women was not invalidated until 1975 by the Supreme Court in an opinion which finally recognized the serious constitutional implications of exclusion of women from jury service.[5]

Although women are no longer excluded from juries, automatic exemptions discourage a large number of women from serving. In some cases, the exemption is based purely on sex; in others, it is based on having custody and/or care of a child or other dependent person.[6] Such specialized treatment is based on the sex stereotyped assumption that woman's proper and all-consuming role is as homemaker and child rearer.[7] Jury service is thus rationalized as a special burden for women, regardless of whether it would entail any special hardship.

Sex differentiated treatment frequently results in gross or substantial underrepresentation of women sitting on juries, thus denying litigants their fifth and sixth amendment rights to a fair and impartial jury drawn from a cross section of the community. Regardless of whether categorical exemptions produce so severe an underrepresentation of women on the jury as to run afoul of this principle,[8] such exemptions also deny equal protection of the laws to potential women jurors and women in general. The exemptions violate equal protection in that they apply an unwarrantedly lenient standard to women. As such they perpetuate the sex stereotyped presumptions that women's societal function is primarily domestic and women's participation in this important civic institution is unnecessary, or, at best, less valuable and acceptable than men's.

The authors believe that any automatic and categorical excuse afforded women on the basis of their sex or status as mothers is unconstitutional and detrimental to the achievement of women's equal status in society. We believe that real unavailability because of child care can be adequately accounted for within the traditional structure of the discretionary hardship excuse, which requires an individualized showing of undue burden.[9]

If existing equal protection principles were to be correctly applied by the courts to the question of women's jury service, sex based categorical treatment and sex neutral exemptions which have a sex disparate impact would be invalidated. But given the capriciousness of the Supreme Court on questions of sex stereotyped treatment,[10] it may be that only the passage of the equal rights amendment will assure women equal and individualized treatment in this important civic institution.

***The authors are affiliated with the Center for Constitutional Rights.*

[1]Thiel v. Southern Pacific Co., 328 U.S. 217, 224-25 (1946).

[2]Carter v. Jury Commission of Greene County, 396 U.S. 320, 330 (1970), *quoting* Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

[3]Miller, *The Woman Juror*, 2 ORE. L. REV. 30 (1922) [hereinafter cited as Miller].

[4]The last state to repeal its provision disqualifying women from jury service was Mississippi, in 1968. The present statute provides no special exemption for women. MISS. CODE ANN. § 13-5-23 (1972).

[5]Taylor v. Louisiana, 95 S.Ct. 692 (1975).

[6]*See* text accompanying notes 11-19 *infra*.

[7]*See* Hoyt v. Florida, 368 U.S. 57, 62 (1961). *See also* text accompanying notes 43-54 *infra*.

[8]*See* Swain v. Alabama, 380 U.S. 202, 209 (1965), *citing* Cassell v. Texas, 339 U.S. 282, 286-87 (1950), for the statistically questionable proposition that underrepresentation by 10% is insufficient to support a claim of purposeful discrimination.

[9]Even a sex neutral child care exemption would have a sex discriminatory impact since women are still identified as and perform as the primary child rearers in our society.

[10]*Compare* Kahn v. Shevin, 416 U.S. 351 (1974), *with* Ballard v. Schlesinger, 419 U.S. 498 (1975), *and* Weinberger v. Wiesenfeld, 95 S.Ct. 1225 (1975).

II. State and Federal Jury Selection Systems

A. Exemptive Provisions

Although jury service is required of all citizens throughout the United States in both state and federal courts, all judicial systems employ various kinds of exemption or excuse to relieve certain persons or classes of persons from jury duty. Exemptions or excuses are either categorical in nature, based on a person's occupation or status,[11] or require an individualized showing of hardship.[12]

In the vast majority of federal districts and in two-fifths of the states women are exempted automatically on the basis of presumed hardship, whereas men are excused only upon an individualized showing. This categorical treatment takes three different forms:[13]

1. Categorical exemptions for women

Four states excuse women solely on the basis of their sex, setting up no presumptions of hardship whatever.[14]

2. Child care exemptions for women

Five states and more than two-thirds of the federal districts grant automatic excuses to women merely on the showing of legal custody or care of a child.[15] The requisite age of the child for the child care excuse varies substantially from state to state and from federal district to federal district, ranging from five years to majority. In federal jurisdictions the age may even vary from district to district within one state.[16]

3. Sex neutral child care excuses

Finally, three states and five federal districts grant categorical excuses or exemptions for child custody or care on a sex neutral basis.[17] Although neutral on their face, these provisions will predictably be disproportionately exercised by women because women are still largely the primary childrearers in our society.

In contrast to these states and the majority of federal districts, thirty-one states and six federal districts

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[11]These exemptions vary widely in the different systems, but generally include such groups as public officials, police, clergy, attorneys, physicians, dentists, teachers—if actively engaged in the practice of their profession. Though a narrow class of these exemptions may be mandatory and therefore disqualify the potential juror (*e.g.*, police, fire-fighters), in general the categorical exemption is optional and may be claimed or waived by the prospective juror. As the Supreme Court noted in *Taylor v. Louisiana*, 95 S.Ct. 692, 700 (1975), exemption is permissible for "occupations the uninterrupted performance of which is critical to the community's welfare."

[12]The individualized hardship excuse may be either expressly provided for by statute or implicit in the power of the courts to excuse those individuals for whom jury service would be unduly burdensome.

[13]Until the decision in *Taylor v. Louisiana* 95 S.Ct. 692 (1975), a fourth system, upheld in *Hoyt v. Florida*, 368 U.S. 53 (1961), requiring women to affirmatively register for jury service was permissible.

[14]Ala. Code tit. 30 § 21 (Supp. 1973); Ga. Code Ann. § 59-124 (1965); Mo. Const. art. I, § 22(b) (1970); Tenn. Code Ann. §§ 22-101, 22-108 (1955); D.C. Code Encycl. Ann. § 11-2303(c) (1966).

A fifth state, New York, has only recently repealed its blanket exemption for women. Ch. 4, [1975] N.Y. Acts 1641 (Feb. 5, 1975), *repealing* N.Y. Judiciary Law § 599(7) (McKinney 1968).

In addition, there are miscellaneous excuses or exemptions granted only to women. Fla. Stat. Ann. § 40.01 (1974) (pregnant women); Mass. Gen. Laws Ann. ch. 234 § 1A (1974) (women exempted, at judge's discretion, upon representation that she would "be embarrassed by hearing the testimony or discussing same in the jury room").

In Nebraska and Rhode Island women are called for jury service only after there have been facilities provided for them. Neb. Rev. Stat. § 25-1601 (1974); R.I. Gen. Laws Ann. § 9-9-11 (1974).

[15]*A. State*

Conn. Gen. Stat. Ann. § 51-218 (1960) (care of children under 16); Fla. Stat. Ann. § 40.01 (1974) (children under 18); Okla. Stat. Ann. tit. 38, § 28 (Supp. 1974) (minor children); Tex. Rev. Stat. Ann. art. 2135(2) (Supp. 1974) (children under 10); Utah Code Ann. § 78-46-10(14) (Supp. 1973) (minor children).

In Wyoming, a woman may be excused "when household duties or family obligations require her absence." Wyo. Stat. Ann. § 1-80 (Supp. 1973).

B. Federal

Under five years (1): P.R. *Under seven years* (48): W.Va., N; W.Va.,S; Alaska; Cal.,C; Canal Zone; Colo.; Fla.,S; Fla., M; Fla.,N; Ga.,N; Ga.,M; Ga.,S; Idaho; Ill.,E; La.,E; La., W; La.,M; Minn.; Miss.,S; D.C.; Nebr.; Nev.; N.Y.,N; N.Y., S; N.Y.,W.; N.C.,W; N.D.; Ohio,N; Ohio,S; Okla.,N; Okla., S; Okla.,W; Ore.; Pa.,M; Pa.,W; S.D.; Tenn.,M; Tenn.,W; Tex.,N; Tex.,S; Tex.,W; Tex.,E; Utah; Va.,W; V.I.; Wash., E; Wisc.,W; Wyo. *Under twelve years* (7): Cal.,E; Conn.; Ga.,W; Md.; S.C.; Va.,E; Wisc.,E. *Under thirteen years* (1): N.Mex. *Under fourteen years* (3): Cal.,S; Ill.,N; Ind.,S. *Under fifteen years* (1): Colo. *Under sixteen years* (6): Ariz.; Kan.; Me.; N.Y.,E; Pa.,E; R.I. *Below high school* (1): Mont. *Children of tender years* (1): Cal.,N.

Six districts use a somewhat stricter standard, as for example Wash.,W., which only grants an excuse where the woman does not have adequate domestic assistance to help with care of her child. *See also* Ill.,S; Ind.,N; Mich.,W; Mo., W; and Mo.,E.

[16]In California, for example, the requisite age of the children varies in the four federal districts: N.D. (tender years); C.D. (10 years); E.D. (12 years); S.D. (14 years).

[17]*A. State*

N.J. Rev. Stat. Ann. § 2A:69-2(g) (Supp. 1975) (minor children); Mont. Rev. Code Ann. § 93-1304 (Supp. 1974) (children—no age specified); Va. Code Ann. § 8-208.6(26) (Supp. 1975) (16 years or younger).

B. Federal

Ky.,W; Mass.; Mich.,E; N.H.; N.J. (This provision also relates to care or custody of another person unable to care for himself or herself due to illness or physical or mental disability.)

have neither special treatment for women nor special excuses for child care.[18] In these states and federal districts, a woman or man who demonstrates that s/he would be truly burdened by jury service because of child care or other responsibilities can apply for an individualized hardship excuse.[19]

B. Impact on Jury Venires

There is presently very little statistical evidence concerning the impact of these various systems on jury venires. Available evidence, however, shows that the various sex based exemptions and excuses operate to reduce the number of women serving on juries to varying degrees. The affirmative registration system struck down in *Taylor v. Louisiana*[20] produced enormous disparity bordering on complete exclusion; by contrast to their 53 percent of the population, women comprised only 10 percent of the total jury lists and 0.66 percent of the resulting venires.[21] New York State's recently repealed blanket exemption for women appears to have consistently produced a pool consisting of less than 20 percent women.[22] In Alabama, the blanket exemption for women has produced venires which are 16 percent female;[23] in Tennessee, it has resulted in venires on which women represented only 0.9 percent of the pool.[24]

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Available statistics suggest that the sex based child care exemptions also substantially reduce, though not as dramatically, the number of women in the jury pool. In *United States v. Briggs*,[25] the evidence showed that approximately 27 percent of women drawn for service availed themselves of the automatic exemption for women with custody of a child under 10 years. Significantly, 48.8 percent of the women claiming the excuse were either employed or actively seeking employment and therefore were not occupied full-

[18]ARIZ. REV. STAT. ANN. § 21-202 (Supp. 1974); ARK. STAT. ANN. § 39-112-39-114 (Supp. 1973); CAL. CIV. CODE § 201 (1972); COLO. REV. STAT. ANN. § 17-71-111 (1973); DEL. CODE ANN. tit. 10, § 4504 (1974); HAWAII REV. STAT. § 609-3 (1968); IDAHO CODE § 2-211 (Supp. 1975); IND. CODE § 33-4-5.5-73 (1975); IOWA CODE ANN. § 607.2 (Supp. 1975); KAN. STAT. ANN. § 43-117 (1973); KY. REV. STAT. ANN. § 29.035 (1969); ME. REV. STAT. ANN. tit. 14 § 1211 (1974); MD. ANN. CODE art. CJ §§ 8-209,210 (1974); MICH. STAT. ANN. § 27A-1307(2) (1975); MINN. STAT. ANN. § 593.02 (Supp. 1975); MISS. CODE ANN. § 13-5-23 (1972); NEV. REV. STAT. § 6.020 (1973); N.H. REV. STAT. ANN. §§ 500-A:19, A:21 (Supp. 1973); N.M. STAT. ANN. § 19-1-2 (Supp. 1973); N.C. GEN. STAT. ANN. § 9-6 (Supp. 1974); N.D. CENT. CODE §§ 27-09.1-10,11 (1974); OHIO REV. CODE ANN. § 2313.12 (Supp. 1974); ORE. REV. STAT. § 10.040 (1973); PA. STAT. ANN. tit. 17 § 130.11 (Supp. 1975); S.C. CODE ANN. § 38-104 (Supp. 1974); S.D. COMP. LAWS ANN. § 16-13-11 (Supp. 1974); VT. STAT. ANN. tit. 12, App. VII R. 27,28 (1973); WASH. REV. CODE ANN. § 2.36.080 (Supp. 1974); W.VA. CODE ANN. § 52-1-2 (1966); WIS. STAT. ANN. § 255.02 (1971. The new Louisiana Constitution no longer provides for registration for women nor any special exemption. Exemptions are to be determined by the court. LA. CONST. art. V, § 33 (1975). Also, New York has recently repealed its blanket exemption for women, and at present there are no special exemptions for women. *See* note 14 *supra*.

[19]The absence of a codified exemption, however, does not preclude the possibility that such hardship excuses, discretionarily granted, may amount in practice to categorical treatment.

[20]95 S.Ct. 692 (1975).

[21]*Id.* at 695.

In Queens County, New York, which also maintained an affirmative registration system, only 3.4% of the jury pool was female. THE DEPARTMENTAL COMMITTEE FOR COURT ADMINISTRATION, APPELLATE DIVISION, FIRST & SECOND DEPARTMENTS, NEW YORK STATE SUPREME COURT, THE JUROR IN NEW YORK CITY: A SURVEY OF ATTITUDES AND EXPERIENCES 105 (1973).

[22]*See* Dekosenko v. Brandt, 62 Misc. 2d 895, 313 N.Y.S.2d 827 (S.Ct. 1970), *aff'd*, 26 App. Div.2d 796, 318 N.Y.S.2d 915 (1st Dept. 1971); People v. Attica Brothers, 79 Misc.2d 492, 359 N.Y.S.2d 699 (1974) (because of women's unqualified right to seek exemption, the jury clerks deliberately selected more names of men than women from the jury lists).

[23]*See* Penn v. Eubanks, 360 F. Supp. 699 (M.D. Ala. 1973).

[24]*See* Stubblefield v. Tennessee (Crim. App., Henry Co., Sept. 1973), *appeal dismissed*, 95. S.Ct. 820 (1975).

[25]Affidavit of J. Schulman of May 6, 1973 in support of defendant's motion to dismiss, United States v. Briggs, 366 F. Supp. 1356 (N.D. Fla. 1973).

time with child care responsibilities.[26] The evidence also showed a substantial impact on the representation of younger women. Of all potential women jurors between the ages of 20 and 29, 43.3 percent claimed the child custody exemption.[27]

No statistics have yet been compiled on the impact of the sex neutral child care exemptions. Likewise, formal data has not yet been collected on the extent to which the individualized hardship excuse is employed by men and women to seek excuse by reason of child care responsibilities. It appears, however, that at least where personal appearance is required in order to apply for an individualized hardship excuse, very few women even seek excuse for child care.[28]

III. Judicial Treatment of Sex Based Jury Selection Systems

The history of judicial treatment of sex based discrimination in jury selection systems reveals that, despite early recognition that jury service is an important aspect of citizenship, jury selection has been an area in which male judges and legislators have been particularly myopic in viewing women's role. Undoubtedly because of the historic importance given to the American jury, women's participation in the institution has been consistently minimized.

Whether by outright exclusion or by disparate treatment based on the notion that "woman is still regarded as the center of home and family life,"[29] sex discrimination in jury selection systems has been justified primarily on the ground that, for women, jury service is an interference with domestic responsibilities, the uninterrupted performance of which is more important to society than her participation on the jury. From *Strauder v. West Virginia,* in which the Supreme Court stated in dicta that a state may constitutionally confine jury service to males,[30] until the recent *Taylor* decision, the courts have continually viewed women on the basis of gross, stereotyped assumptions. They have refused to treat discrimination against women's jury service seriously, let alone scrutinize it with the care required, given the impact of this discrimination on litigants, women as a class and society as a whole.

A. Historical Overview

The English common law jury was limited to "free and lawful" men.[31] This common law rule prevailed in the United States until the late 1800s. The Constitution provided no obstacle to maintaining this system. Challenges to the exclusion of women under the fourteenth amendment were precluded by dicta in *Strauder v. West Virginia.*[32] The Supreme Court's refusal to bring women's jury service within the purview of the Constitution effectively continued until 1975.

In view of *Strauder,* jury service for women was not even a possibility until ratification of the nineteenth amendment in 1920, since eligibility for jury service in many states depended on the right to vote. Even after ratification, which should have automatically extended jury service in those states which made electors eligible for jury service, five state courts refused this logical step.[33] Reasoning that the nineteenth amendment (as compared with the fifteenth amendment)[34] "conferred the suffrage on an *entirely new class of human beings,*" one state court refused to interpret the word "person" in the jury statute to include women, even in the face of statutes making all "persons" qualified to vote.[35]

In *Ballard v. United States,*[36] where the exclusion

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[26]*Id.* at 6. *See also* Petitioner's Brief for Certiorari, Marshall v. Gavin, No. 74-190 (filed Aug. 28, 1974).

[27]*Id.* at 10 n.25.

Statistics are not available on the ultimate proportion of men and women in the jury pool studied. The permissibility of such categorical exemptions should not turn, however, on whether substantial statistical imbalance between men and women results. See text accompanying notes 63-68 *infra.*

[28]The authors of this paper attempted to determine the number of women seeking excuse for child care in preparing for a jury challenge in *State v. Joan Little.* The system does not record the reason for excuse. However, the fact that very few women under 35 years of age sought hardship excuses suggests that the care of young children is infrequently claimed as a hardship.

[29]Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[30]100 U.S. 303 (1879).

[31]*See generally,* Clark, *Twelve Good Persons and True:* Healy v. Edwards *and* Taylor v. Louisiana, 9 Harv. Civ. Rts.-Civ. Lib. L. Rev. 561 (1974) [hereinafter cited as Clark]; Miller, *supra* note 3.

There were only two exceptions to the English rule: When a woman pleaded pregnancy, a writ permitted a jury of twelve matrons to examine the woman if 1) she was subject to capital punishment and wanted a stay of execution until the birth of her child; or 2) she wanted the disposition of her husband's estate postponed until the birth of a child she claimed to be carrying. However, even in these cases, the examination was performed in the presence of twelve men as well.

[32]100 U.S. 303, 310 (1879). *See* text accompanying note 30 *supra;* Clark, *supra* note 31, at 564.

[33]*See* cases cited in Babcock, Sex Discrimination and the Law: Causes and Remedies (1974) at 67 n.28.

Six more courts declined to extend the right to service by analogy to the right to vote. *Id.* at 68 n.29.

[34]*See* Neal v. Deternan, 103 U.S. 370 (1881).

[35]*See* Commonwealth v. Welosky, 276 Mass. 399, 177 N.E. 656, *cert. denied,* 289 U.S. 684 (1932).

[36]329 U.S. 187 (1946).

of women from federal juries was held to violate federal statute,[37] the Supreme Court described in dicta the impact of excluding women in terms which evinced the first sensitivity to the seriousness of their absence and suggested that women's jury service might be accorded constitutional protection. The hope was extinguished in *Fay v. New York,*[38] where the New York exemption, which the Court characterized as allowing women to "volunteer" for jury service,[39] passed the due process test.[40] The Court relied heavily on the historical disqualification of women, which continued well after enactment of the fourteenth amendment, to conclude that women's representation on state juries does not derive from a constitutional right to equal status but rather from "a changing view of women in our public life."[41]

Hoyt v. Florida[42] was the next women's challenge heard by the Court. By this time, few state statutes remained which disqualified women. The battleground had shifted from disqualification to unequal treatment. At issue in *Hoyt* was the constitutionality of Florida's affirmative registration provision for women which dictated that women would be summoned to serve only if they specially registered with the clerk. The Supreme Court rejected the constitutional challenge on the basis that:

> [D]espite 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 for men, woman is still considered as the center of home and family life.[43]

To disguise the exclusionary impact of the Florida provision, the Court completely distorted the statistical information.[44] *Hoyt* thus reconfirmed in 1961 that women's participation is utterly insignificant to the representativeness of the jury;[45] it also established the "modern" rationale for exclusionary practices—the primacy of home and family.[46]

The stereotyped assumptions which *Hoyt* enshrines have been invoked by most lower state and federal courts to sustain other exclusionary or "beneficent" systems, including Mississippi's previous statutory disqualification.[47]

New York's blanket exemption for women was upheld in *Dekosenko v. Brandt,* despite a showing that women were less than 20 percent of the available pool.[48] The judge's mocking comments demonstrate the stigmatizing impact on women of the optional exemption:

> Plaintiff [a female litigant] is in the wrong forum. Her lament [that women were insufficiently represented on the jury] should be addressed to the "Nineteenth Amendment State of Womanhood" which prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems with her landlord.[49]

The "lament" fared no better in federal court. But in *Leighton v. Goodman*[50] the court chose to extol woman's industriousness in the home to justify her exemption:

> Granted that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24-hour a day task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies. Although some women now question this arrangement, the state legislature has permitted the exemption in order not to risk disruption of this basic family unit. Its action was far from arbitrary.[51]

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[37]The Act of March 3, 1911, ch. 231, prescribed that federal grand jurors have the same qualifications as those required by the highest court of the state in which the federal court was sitting. Thus, women were absent from federal juries where disqualified by state law. As of 1945, 17 states disqualified women. *See* Fay v. New York, 332 U.S. 261, 289 n.31 (1947).

In *Ballard* the Court invalidated the jury because of the federal court's refusal to follow California law, which permitted women to serve.

Women's participation on federal juries depended on their status under state law until the 1957 Civil Rights Act made women independently eligible to serve on federal juries. It was not until the 1968 Jury Service and Selection Act, 28 U.S.C. § 1861 *et seq.* (1970), that sex discrimination in federal jury selection was affirmatively prohibited.

[38]332 U.S. 261 (1947).

[39]*Id.* at 277-78.

[40]In *Fay,* the Court did not even attempt to apply the fourteenth amendment's equal protection clause, then narrowly construed, to test the women's exemption. *Compare* Murphy, J., dissenting, *id.* at 296-300.

[41]*Id.* at 290.

[42]368 U.S. 57 (1961).

[43]*Id.* at 62.

[44]*See id.* at 69.

[45]The Court in *Hoyt* specifically declined to overrule *Strauder. Id.* at 60.

[46]*See* note 44 *supra.*

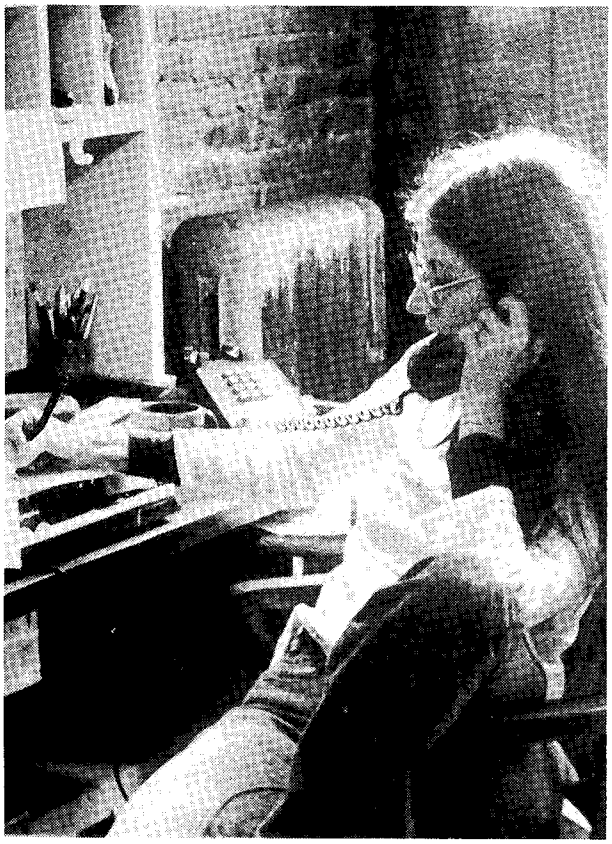
[47]*See* State v. Hall, 187 So.2d 861 (Miss. 1966).

[48]62 Misc.2d 895, 313 N.Y.S.2d 827 (S.Ct. 1970), *aff'd,* 26 App. Div.2d 796, 318 N.Y.S.2d 915 (1st Dept. 1971). Since the *Taylor* decision, the New York State legislature has repealed the blanket exemption for women.

[49]313 N.Y.S.2d at 830.

[50]311 F. Supp. 1181 (S.D.N.Y. 1970).

[51]*Id.* at 1183.



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Leighton, decided in 1970, reflects the extent to which the courts conveniently, and self servingly, presume women to be indispensable not only to the child rearing function but also to the maintenance of the home and family generally. Thus, the notion that the state has an interest in encouraging and maintaining women in the role of serving the family justifies devices which discourage women from jury participation.[52] *White v. Crook*[53] is the earliest federal court decision to find a state disqualification of women from jury service to be a denial of equal protection.

Since the Supreme Court's recognition of equal protection for women under the fourteenth amendment in *Reed v. Reed*[54] and *Frontiero v. Richardson,*[55] some courts have found that special treatment of women's jury service violated equal protection.[56] However, prior to *Taylor,* other courts had not found *Reed* and *Frontiero* sufficient authority to invalidate sex based distinctions.[57] For this reason, *Taylor* takes on major importance.

B. Taylor v. Louisiana: Its Implications

In *Taylor,* the Supreme Court for the first time held that exclusion of women from jury venires deprives a criminal defendant of the sixth amendment right to trial by an impartial jury drawn from a fair cross section of the community.[58] Although *Taylor* has limitations which derive from its sixth amendment context, it is a milestone in that it rejects the sex stereotyped myth of women's domesticity theretofore employed to sustain exclusionary selection systems.

The limitation of the *Taylor* holding derives from two factors: (1) the challenger was a male defendant; and (2) the affirmative registration system at issue produced a virtual exclusion of women.[59]

Finding that Taylor had standing as a defendant,[60]

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[52]*See also* Archer v. Thayer, 213 Va. 633, 194 S.E.2d 707 (1973), wherein the Virginia Supreme Court upheld the constitutionality of an exemption for women who have legal custody and are responsible for a child up to the age of 16 or for a person having a mental or physical impairment requiring continuous care based on its "reasonable recognition . . . that women are usually the persons who perform such service."

[53]251 F. Supp. 401 (M.D. Ala. 1966).

[54]404 U.S. 71 (1971).

Only one sex discrimination challenge to a federal jury selection system prevailed during this period. In United States v. Zirpolo, 450 F.2d 424 (3rd Cir. 1970), the jury commissioner's practice of drawing twice as many men as women from the list was invalidated because it violated the federal law and limited women's representation on the jury lists to 30%. Significantly, in United States v. Butera, 420 F.2d 564 (1st Cir. 1970), the court held that a jury list comprised of only 36% women raises prima facie an inference of discrimination. The inference, however, was negatived by a finding of good faith.

[55]411 U.S. 677 (1973).

[56]*See* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973); Penn v. Eubanks, 360 F. Supp. 699 (M.D. Ala. 1971).

In *Healy v. Edwards,* the district court expressly refused to follow *Hoyt v. Florida,* stating that "[w]hen today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma." 363 F. Supp. at 1117.

[57]Marshal v. Holmes, 365 F. Supp. 613 (N.D. Fla. 1974), *aff'd without opinion,* 495 F.2d 1371 (5th Cir. 1974), *cert. denied sub nom.* Marshall v. Gavin, 95 S.Ct. 825 (1975); Nat'l Organization for Women—N.Y. Ch. v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974).

[58]95 S.Ct. 692, 694 (1975).

[59]Stipulations were entered in the case which acknowledged that 53% of the persons eligible for jury service in the judicial district were women, that only 10% of the persons on the jury wheel in the parish were women, that during a year period only 12 women out of 1800 persons were drawn to fill petit jury venires and that the discrepancy between women eligible for jury service and those actually included in the venires was the result of the operation of the affirmative registration system.

[60]The Court dealt with the standing question by analogy to Peters v. Kiff, 407 U.S. 403 (1972), which recognized the standing of a white criminal defendant to challenge his conviction because of the systematic exclusion of blacks from

the Court focuses exclusively on his claim that his constitutional right to a trial by a jury drawn from a fair cross section of the community was denied. The Court holds that because "women are sufficiently numerous and distinct from men," the sixth amendment is violated "if, they are systematically eliminated from jury panels."[61] The Court stated:

> [I]t is no longer tenable to hold that women as a class may be excluded or given automatic exemption based solely on sex if the consequence is that criminal jury venires are almost totally male.[62]

This passage expressly directs the invalidation of the few remaining blanket women's exemptions, which almost inevitably produce a substantial diminution of women.[63] Notwithstanding the clear direction of *Taylor,* however, judicial interpretation has been equivocal.[64]

Moreover, the Court's reasoning suggests the importance, if not necessity, of showing a significant disparity between women in the population and women on the jury venire to prove a defendant's sixth amendment claim. It thus seems very unlikely that courts will treat *Taylor* as sufficient authority to invalidate the widely used sex discriminatory exemptions where the exemption does not substantially dilute women's participation on the jury.[65]

Taylor, however, has important implications for application of equal protection principles to eliminate various forms of exemption which discourage and trivialize women's participation on juries, since it explodes the stereotyped myth that women are serving families which would disintegrate under the weight of their being subject to jury service. In this regard the decision parallels the approach dictated by the Court in *Reed.*[66] Citing Labor Department statistics on women and women with children in the labor force, which demonstrate the extreme overbreadth of the stereotypic presumption, the Court concludes that "they certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex *and their presumed role in the home.*"[67]

Taylor also echoes *Reed* in holding that administrative convenience is an unacceptable rationale for sex based differential treatment. The Court defines two broad categories of permissible exemption: (1) "individuals in case of special hardship or incapacity"; and (2) "those engaged in particular occupations, the uninterrupted performance of which is critical to the community's welfare."[68] The Court rejects as "untenable" the proposition that "it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties."[69] The decision then points to individualized hardship treatment as the appropriate means of sorting out those who need exemption because of child care:

> [I]t may be burdensome to sort out those [women] who should not be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.[70]

Thus, although the *Taylor* Court restricts its opinion to the impermissibility of categorical treatment for sixth amendment purposes, its reasoning lays the groundwork for invalidation under the *Reed* test of equal protection of all sex discriminatory exemptions, regardless of their impact on the venire.[71]

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jury service. Similarly, in *Taylor,* the Court held that a male criminal defendant can object to the exclusion of women from his jury because "there is no rule that claims such as Taylor's be made only by those defendants who are members of the group excluded from jury service." 95 S.Ct. at 695.

[61]The Court thus seems to have resolved the issue of whether women as a group constitute a cognizable class. The language of the Court makes clear its conclusion that women as a group constitute a class—a "large distinctive group" which is "numerous and distinct"—for the purpose of jury selection. Although lower courts had so held previously, and the federal jury selection statute, 28 U.S.C. § 1861 *et seq.* (1970), mandates this position, the Supreme Court had not squarely ruled on this issue before. *See* United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1970); United States v. Butera, 420 F.2d 564 (1st Cir. 1970). *See also,* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966).

[62]95 S.Ct. at 701.

[63]*See* Part II *supra.*

[64]*See, e.g.,* People v. Prim, ___ App. Div. 2d ___, 366 N.Y.S. 2d 726 (1975); People v. Walker, N.Y.L.J., May 30, 1975 at 20, col. 7.

[65]*See* Part II *supra.*

[66]*Reed* was the first time the Court invalidated a sex based classification on equal protection grounds. The Court struck down an Idaho statute which preferred male relatives over female relatives as administrators of estates, holding arbitrary the mandatory preference to members of one sex over the other.

[67]95 S.Ct. at 700 n.17 (emphasis added).

[68]*Id.* at 700.

[69]*Id.*

[70]*Id.*

[71]In *Taylor,* the Court refuses to unequivocally overrule *Hoyt.* The Court attempts to distinguish *Hoyt* on the basis that the defendant there did not raise the fair trial question seized upon in *Taylor,* but dealt only with the rational basis of sex based distinctions. This distinction is clearly specious as *Hoyt* invoked both due process and equal protection claims. Moreover, as discussed in the text, the rejection in *Taylor* of

IV. Application of Equal Protection Principles to Jury Composition

A. Categorical Treatment Violative of Women's Rights

When a group such as women is excluded from jury service—either directly by disqualification or indirectly by exemption—three levels of injury result. The first and most obvious is the injury to the litigant. Closely related is the harm to the community at large and to our judicial system.[72] The third and rarely recognized level of injury is to the members of the excluded class.

Sex discriminatory jury selection schemes have been considered almost exclusively from the perspective of the criminal defendant or the civil litigant. Lower courts have tended to deny standing to nonlitigants, both women and men, who bring affirmative civil actions challenging unequal treatment on the basis of sex in jury selection systems.[73] The general assumption seems to be that nonlitigants cannot be harmed by the system of jury exemptions.[74] Even in *Healy v. Edwards,*[75] where the court recognized that affirmative registration denies equal protection to potential women jurors,[76] it questioned the standing of nonlitigants to raise this issue.[77] It is not surprising, therefore, that when the merits of challenges to jury plans have been reached, analysis has focused primarily on whether the litigant was afforded a jury composed of a "fair cross section" of the community.[78]

By contrast, in affirmative challenges to racial exclusion from juries the Supreme Court has squarely recognized the harm to the excluded class as well as to the litigant.[79] The harm underlying class standing was explained in *Carter v. Jury Commission of Greene County:*[80]

> Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries under a system of racial exclusion. . . . Whether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise. . . . The exclusion of Negroes from jury service because of their race is "practically a brand upon them**, an assertion of their inferiority**."[81]

Moreover, in *Peters v. Kiff,*[82] a suit challenging the criminal conviction of a white male defendant on the ground that blacks had been systematically excluded from the jury, the Court took cognizance of the interests of the excluded class affected by discriminatory treatment:

> [T]he exclusion of negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the "privilege of participating equally . . . in the administration of justice," 100 U.S., at 308, and it stigmatizes the whole class, *even those who do not wish to participate,* by declaring them unfit for jury service and thereby putting "a brand upon them, af-

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the stereotypal myth about women's unavailability and the administrative convenience rationale renders the scheme irrational under *Reed.*

[72]*See* Ballard v. United States, 329 U.S. 187, 195 (1946), where the Court said:

> The systematic and intentional exclusion of women . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

[73]*See, e.g.,* Nat'l Organization for Women—N.Y. Ch. v. Goodman, 374 Supp. 247 (S.D.N.Y. 1974), an action for a declaratory judgment that the automatic jury exemption for women is unconstitutional. A female nonlitigant eligible for an automatic exemption from jury service and a male nonlitigant claiming substantial responsibility for the care of small children were denied standing. *But see* Ford v. White, 430 F.2d 951 (5th Cir. 1970).

The authors of this article are of the view that equal protection challenges to sex based child care exemptions lodged by men are ill-advised in the jury context. When a man with child care responsibilities is awarded an exemption the result is extension of the categorical treatment we seek to eliminate.

[74]*See, e.g.,* Nat'l Organization for Women—N.Y. Ch. v. Goodman, 374 F. Supp. 247, 250 (S.D.N.Y. 1974).

[75]363 F. Supp. 1110 (E.D. La. 1973).

[76]*Id.* at 1114.

[77]*Id.* at 1112. The court declined to decide the question of whether the male and female nonlitigant plaintiffs had standing, since the presence of intervenor female litigants rendered the case justiciable. *Id.* The court did note that the female litigant plaintiffs could properly raise the equal protection issue that applied to women as a class. *Id.* at 1114.

[78]*See, e.g.,* Taylor v. Louisiana, 95 S.Ct. 692 (1975).

[79]Carter v. Jury Commission of Greene County, 396 U.S. 326 (1970); Turner v. Fouche, 396 U.S. 345 (1970). *See also,* Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Ford v. White, 430 F.2d 951 (5th Cir. 1970); Salary v. Wilson, 415 F.2d 467 (6th Cir. 1969); Billingsley v. Clayton, 359 F.2d 13 (5th Cir.), *cert. denied,* 385 U.S. 841 (1966); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

[80]396 U.S. 326 (1970).

[81]*Id.* at 329-30 (footnotes omitted, asterisks in the original).

[82]407 U.S. 493 (1972).

fixed by law, an assertion of their inferiority."[83]

The lower courts' rejection of women's standing to seek affirmative relief from sex discriminatory jury exemptions, and their avoidance of the merits of such claims in light of equal protection principles, is clearly contrary to the precedents of *Carter* and *Peters*. This stance is also inconsistent with the Supreme Court's characterization of jury service as a privilege, important to those who serve as well as those who are served by it.

The courts' excuse for not recognizing the standing of prospective women jurors is that the exemption system allows women the option of serving.[84] This approach deliberately ignores the impact on the class. When women receive special treatment in the jury system, they are effectively told that it is not important for them to share equally in the administration of justice. The implication is that their basic "civil responsibility" is to "provid[e] a home for the entire family."[85]

Thus, a person need not actually be excluded from the jury to be "stigmatize[d] . . . [as] unfit for jury service."[86] An automatic excuse from jury service constitutes the same badge of inferiority. Women are no longer totally excluded as unfit from the exclusive and powerful club of the jury. Rather, they are given automatic excuses to avoid service on the basis of their sex and/or motherhood and are told that although they can no longer be barred, they really needn't join, because their presence is not necessary to the good functioning of the club.

The opportunity to avoid jury duty, which might otherwise be considered a benefit, is here only a more subtle badge of inferiority and therefore a deprivation of equal rights.

B. No Justification for Differential Treatment of Women in the Jury System

The exemptions from jury service accorded women[87] are grounded in the assumption that women are occupied with fulltime child care or homemaking duties or both. While this assumption may once have been valid, it does not coincide with today's reality.[88]

Labor Department statistics indicate that 54.2 percent of all women between the ages of 18 and 64 are in the labor force, and that 45.7 percent of women with children under the age of 18 work outside the home.[89] As the Court in *Taylor* so aptly stated, these statistics "certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex and their presumed role in the home."[90] They also make it patently clear that at least half the women entitled to claim exemption for child care or custody do not need the excuse.

Surely, if a woman is able to work outside her home, she is available for jury service. On the basis of the statistical evidence of workforce participation of mothers of young children alone, it can be estimated that approximately half of the women who are now entitled to claim exemption for child care do not need the excuse.[91] Added to this number is the multitude of women who are the mainstay of voluntary charitable and community organizational work. Finally, many mothers who do not work outside the home but could make alternative arrangements for child care could serve on juries without experiencing particular hardships. Instead, they are invited to excuse themselves when their situation does not require or warrant it.[92]

The jury exemptions accorded women or women with children because of a presumption of hardship are therefore grossly overinclusive. Moreover, they cannot be justified on the ground of administrative convenience, since the Supreme Court in *Taylor* squarely rejected that argument in terms which echo its holding in *Reed*.[93]

Clearly real hardship or inconvenience to the community or to the individual juror should be recognized as a valid basis for excusal from jury duty. Where the prospective juror is indispensable to the care of another person relief from service is appropriate. So the dependency of a small child *may* be such a circumstance justifying a hardship excuse.

But the state's legitimate interest in providing relief from jury service could be satisfied by condi-

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[83] *Id.* at 499 (elipsis in the original, emphasis added).

[84] *See, e.g.*, Nat'l Organization for Women—N.Y. Ch. v. Goodman, 374 F. Supp. 247, 250 (S.D.N.Y. 1974).

[85] Leighton v. Goodman, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970).

[86] Peters v. Kiff, 407 U.S. 493, 499 (1972).

[87] *See* Part II *supra* for a discussion of these various exemptions.

[88] Taylor v. Louisiana, 95 S.Ct. 692 (1975) at 700 n.17, *citing* UNITED STATES DEPT. OF LABOR, WOMEN IN THE LABOR FORCE (Oct. 1974). Additionally, in families with children between the ages of 6 and 17, 67.3% of mothers who were widowed, divorced or separated and 51.2% of mothers whose husbands were present were in the work force. Even in families with children under 3 years old where the husband was present, 31% of women were in the work force. *Id. citing* UNITED STATES DEPT. OF LABOR, MARITAL AND FAMILY CHARACTERISTICS OF THE LABOR FORCE, Table F (March 1974).

[89] 95 S.Ct. at 700 n.17.

[90] *Id.* at 700.

[91] *Id.* at 700 n.17.

[92] *See* Affidavit of J. Schulman of May 6, 1973 in support of defendant's motion to dismiss, United States v. Briggs, 366 F. Supp. 1356 (N.D. Fla. 1973). *See also* text accompanying note 25 *supra*.

[93] 95 S.Ct. at 700.

tioning excuse on an individualized showing of true hardship.[94] This burden could be met by a showing that the prospective juror—male or female—is *in fact* engaged in daily caretaking responsibilities and that adequate alternative arrangements, taking into account the young child's needs, are unavailable.

This is the only effective nondiscriminatory solution.[95] It is consistent with the hardship standard generally applied to prospective jurors. It is neutral without sacrificing the flexibility necessary to encompass a young child's special needs for continuous care and any special difficulties entailed in finding alternative care. Indeed, the fact that 30 states, the District of Columbia and six federal districts provide no categorical exemption for women attests to the workability of a neutral and discretionary hardship system.[96]

Theoretically, ratification of the ERA is not necessary to invalidate all categorical exemptions based on women's historic domestic or child rearing function. The piercing of the stereotype and of the administrative convenience rationales by the *Taylor* Court in the sixth amendment context is mandated by the equal protection principles outlined in *Reed.*

V. Impact of the Equal Rights Amendment

According to the legislative history, the ERA should absolutely prohibit all classifications based on sex which are not founded on a single sex characteristic.[97] Thus ratification of the ERA would mandate invalidation of both the categorical exemptions for women and the sex based child care exemptions, regardless of their statistical impact on the venires. Finally, under the ERA the Court should invalidate the facially neutral child care exemption, since it is likely to be exercised overwhelmingly by women and it continues an unwarranted standard of presumed hardship.[98]

Notwithstanding that proper application of existing principles would invalidate all exemption schemes which can be invoked exclusively or predominantly by women, it is questionable whether the Court will accept an opportunity to adjudicate the constitutionality of categorical treatment where it does not substantially dilute women's representation on the juries. Though strict scrutiny is not necessary to invalidate such treatment, the refusal of a majority of the Court to declare sex a suspect classification in *Frontiero* symbolizes the Court's reluctance to reach beyond the less than gross discrimination and give clear direction to the lower courts.[99] It is, therefore, speculative whether the Court will exercise its certiorari or appellate jurisdiction to invalidate the narrower and apparently neutral child care exemptions.[100]

The irresponsibility and capriciousness of the judiciary on questions of sex discrimination heretofore suggests that the ERA will be politically and practically necessary to the elimination of the full range of discriminatory categorical treatment of women in jury selection systems.

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[94]If properly enforced, this procedure would discourage women who do not need an excuse from seeking it. *See* note 28 *supra.*

[95]*See* note 9 *supra.*

[96]*See* notes 18-19 and accompanying text *supra.*

[97]*See* Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 896-900 (1971).

[98]The Supreme Court has not yet had an occasion to test the constitutionality under *Reed* of a facially neutral law having a sex disparate impact. There is no reason, however, why apparently neutral rules in the sex discrimination context should be subject to less scrutiny than explicit sex based classifications. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). This is particularly true where the rule relates to traditionally female functions or attributes such as child rearing. *See, e.g.,* Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd,* 507 F.2d 611 (5th Cir. 1975). Title VII's testing of discriminatory neutral rules by a narrow business necessity justification is instructive and, moreover, should be applicable to jury service, since it is a form of employment by state and local governments.

[99]The Court's willingness to uphold certain forms of discriminatory treatment of women as "beneficent" flows directly from the majority's refusal to treat sex as suspect. *See* Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); *but cf.* Weinberger v. Weisenfeld, 95 S.Ct. 1225, 1233 (1975). While it would torture logic and reality to uphold as remedial the categorical jury exemptions, which perpetuate rather than mitigate women's second class citizenship, the majority's refusal to acknowledge pregnancy based classifications as sex discriminatory in Geduldig v. Aiello, 417 U.S. 484 (1974), demonstrates the Court's deliberate refusal to tackle the fundamental bases of second class citizenship for women.

[100]In Marshall v. Holmes, 375 F. Supp. 613 (N.D. Fla. 1973), *aff'd,* 495 F.2d 1371 (5th Cir. 1974), *cert. denied sub nom.* Marshall v. Gavin, 420 U.S. 907 (1975), for example, the lower court opinion rejected a challenge to the federal jury plan's automatic excuse of women with children under 18 on the ground that the right of women to serve was not in issue. 375 F. Supp. at 617-18.