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Women and the Equal Protection Clause

Eric R. Gilbertson

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Frailty, thy name is woman.

Shakespeare, Antony *Act I, Scene 2*

OR IS IT? Members of women's movements and advocates of current feminist thought would have us think otherwise. Today, perhaps even the most confirmed male "chauvinist" would be hard pressed to deny that Western culture has, historically, advanced what might most delicately be termed a "protective" view of this allegedly oppressed majority. Be that as it may, whether the product of a benign, paternalistic fondness, or a latent, all-pervading attitude of sexual supremacy, such pejorative concepts as the "dumb broad" stereotype may no longer be safely employed in mixed company.

The stance of the law in this respect, as with other social trends, has generally reflected the current attitudes that dominate the society it governs. Yet, as late as 1969, we still had judges on the appellate level taking judicial notice of the female's lesser capacity for sexual arousal, the sexual behavior of "the vast majority of women in a civilized society," and the "normal" behavior of a married woman in the presence of her husband in their bedroom;[1] all in a puritanically paternalistic fashion. This, and other absurd judicial pronouncements may have been what prompted one controversial attorney to observe that "all ostriches do not have feathers and a beak." [2]

Equal Protection???

Opponents of legislation designed specifically to insure to women an equal status before the law most often point to the "equal protection" clause of the Fourteenth Amendment as rendering the same unnecessary. The essence of the protection afforded by this provision is, of course, the prohibition against the arbitrary and unreasonable classification of persons and groups, so as to grant or deny rights or privileges without rational justification.[3]

The rule has long provided that as long as a classification is reasonable and in keeping with a valid legislative purpose, it does not violate

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* Of the Ohio Bar; Law Clerk to Justice Robert M. Duncan of the Ohio Supreme Court.

[1] Youngstown v. DeLoretto, 19 Ohio App.2d 267, 281; 251 N.E.2d 491 (1969).

[2] Kunstler, A New Challenge to Our Court System; The Spirited Lawyer Representing Political Defendants, 16 Student Lawyer J. 4, 6 (Dec. 1970).

[3] *See generally,* Walters v. St. Louis, 347 U.S. 231 (1954); New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1937); Southern Ry. Co. v. Greene, 216 U.S. 400 (1909).

the mandates of the constitution.[4] Where problems have arisen, however, is in the judicial determination of what legislation can, justifiably, classify women as a distinct group; and do so on a rational, enlightened basis. A study of these decisions must, sadly, conclude that women have indeed been the subjects of, what has been at best, overprotection, and at worst, repression.

Examples of protective regulation are most obvious in the area of occupational legislation. Minimum wage laws have been enacted for the benefit of women only, yet have been held not violative of the equal protection rights of men.[5] Further, legislation restricting the number of hours that an employer can allow, much less compel a woman to work, have also been upheld as a valid exercise of the police power.[6]

The not altogether unexpected rationale and justification for the distinctions drawn was perhaps best expressed by the late Chief Justice Hughes in *West Coast Hotel v. Parrish,*[7] when he wrote that nothing "could be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers."

The same benevolent instincts were expressed in the case of *W. C. Ritchie v. Wayman,*[8] when that court stated:

> As weakly and sickly women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the state take such measures as may be necessary to protect its women from the consequences induced by long, continuous manual labor. . . .

The public interest in "its women" was protected; chivalry perhaps was not dead.

The United States Supreme Court, per Justice Brewer, took a somewhat less restrained view of the "fair sex" in *Muller v. Oregon,*[9] a case whose dictum would make today's feminist cringe. There, in upholding a ten hour restriction on a woman's workday, the court noted that a woman's physical structure and performance of maternal functions place her at an obvious disadvantage in the "struggle for subsistence." Going further, they took judicial notice that "history discloses that woman has has always been dependent upon man," and that

> while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and

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[4] *See generally, e.g.,* American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900); Allied Stores of Ohio Inc. v. Bowers, 358 U.S. 522 (1959); Safeway Stores Inc. v. Oklahoma Retail Grocers Association, 360 U.S. 334 (1959).

[5] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[6] Ex Parte Miller, 162 Cal. 687, 124 P. 427 (1912); W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N.E. 695 (1910); Commonwealth v. Riley, 218 Mass. 387, 97 N.E. 367 (1912); Mueller v. Oregon, 208 U.S. 412 (1908); Withey v. Bloem, 163 Mich. 419, 128 N.W. 913 (1910).

[7] *Supra,* n. 5.

[8] W. C. Ritchie & Co. v. Wayman, *supra,* n. 6.

[9] Mueller v. Oregon, *supra,* n. 6.

> the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother.[10]

Conceding that "doubtless there are individual exceptions," still, "looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality." [11] Should this kindly Judge ever seek to address a "ban the bra" rally today with these words, he would likely be made to wish his parents had never met.

Albeit, whether for the insured safety of the unborn, the suppression of unscrupulous businessmen, or the benign sympathy for women expressed in *Muller,* women were, for then at least, safe. The powers that be (or were, as the case may be), supported by the courts, have historically been particularly protective in shielding "their women" (how's that for more latent paternalism) from the evils of the Devil's own brew —demon rum!!

It has long been held that the denial of liquor licenses to women did not violate their rights under the equal protection clause. The reasoning usually followed the view that, since the regulation of liquor traffic is a power absolute in the state, such licenses are not granted as a matter of right to anyone.[12] Women could thus be excluded without further excuse, as could, supposedly, anyone. The courts have also upheld bans on the employment of females in establishments selling liquor,[13] and prohibitions against the employment of any woman who was not closely related to the holder of the license,[14] who might be near to render the "protective oversight" required by a woman in a bar.[15] The grounds of these such restrictions have usually been based on a judicial determination that:

> the legislature may . . . have concluded that it would be an unwholesome influence upon the women themselves, the general public, and upon our young people, to permit women to act as bartenders.[16]

In *Goesaert v. Cleary,*[17] a case upholding a Michigan statute barring the licensing of women as bartenders when such women were not the

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[10] *Id.* at 421, 422.

[11] *Id.* at 422.

[12] Blair v. Kilpatrick, 40 Ind. 312 (1872); In Re Carragher, 149 Iowa 225, 128 N.W. 352 (1910).

[13] Cronin v. Adams, 192 U.S. 108 (1904); People v. Case, 153 Mich. 98, 116 N.W. 558 (1908); Ex Parte Hayes, 98 Cal. 555, 33 P. 337 (1893).

[14] People v. Jemnez, 49 Cal. App. 2d Supp. 739, 121 P.2d 543 (1942); Fitzpatrick v. Liquor Control Commissioner, 316 Mich. 83, 25 N.W. 2d 118 (1946); Grilli v. City of Hoboken, 21 N.J. 574, 122 A. 2d 881 (1956); Goesaert v. Cleary, 335 U.S. 464 (1948); Anderson v. St. Paul, 226 Minn. 186, 32 N.W.2d 538 (1948).

[15] Goesaert v. Cleary, *supra,* n. 14 at 466, Grilli v. City of Hoboken, *supra,* n. 14.

[16] People v. Jemnez *supra,* n. 14 at 545.

[17] Goesaert v. Cleary, *supra* n. 14.

wife or daughter of the male proprietor of the bar, Justice Frankfurter, in a moment of candor, penned these immortal words:

> The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the state from drawing sharp lines between the sexes, certainly, in such matters as the regulation of liquor traffic.[18]

Writhing members of today's movement will not be placated to any degree by his further observation that "since the line . . . drawn is not without reason, *we cannot give ear to the suggestion* that the real impulse behind this legislation was an unchivalrous desire of male bartenders to monopolize this calling." [19] Doubtless, the three dissents to this opinion will be of little comfort to disturbed feminists, whose arguments the majority "could not give ear to."

It may even be felt in some quarters that even such enlightened decisions as one striking down a prohibition against women becoming taxicab drivers,[20] or one decreeing that women may not be excluded from all public employment by mere virtue of their being married [21] will not compensate, or appease women for the above setbacks, or for those cases holding that women may be prohibited from working in restaurants between given hours,[22] or upholding a State's denial of the right to practice law by reason of sex.[23] One Supreme Court decision on this latter point relegated the power to the State in question to determine whether or not the word "person," as used in its statute, was to be defined so as to include women in the practice of law. The practice, it was noted, was not a privilege or immunity of citizenship,[24] and could thus be wantonly granted or denied; again, with no further justification.

The motives for the legislation are unclear, yet they are allowed to go virtually unquestioned. Motives notwithstanding, the restrictions and classifications they were based on were allowed to stand.

Restrictions on Public Involvement and Behavior

Patent discrimination may also be historically traced through the statutory exclusion of women from the polls and jurybox. It required the passage of the nineteenth amendment to the United States Constitution to grant suffrage to women, since even the equal protection clause

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[18] *Id.* at 466.

[19] *Id.* at 467.

[20] State ex rel. v. McCune, 27 Ohio N.P. (n.s.) 77, 6 Ohio L. Abs. 185 (1928).

[21] In Re Opinion of the Justices, 303 Mass. 631, 22 N.E.2d 49 (1939).

[22] People v. Gobeo, 6 N.Y.S.2d 937 (1938).

[23] In Re Lockwood, 154 U.S. 116 (1894); see also Bradwell v. State, 83 U.S. 130 (1872).

[24] In re Lockwood, *supra* n. 23.

of the fourteenth amendment was held not to have made the right to vote co-extensive with citizenship.[25]

The nineteenth amendment did not, however, grant women the right to sit in the jurybox.[26] It has been ruled that women had no *constitutional* right at all to sit on juries. Should the states, however, in their generosity, see fit to so allow them, the courts found that the constitution would not prohibit such action.[27]

In defense of this stance, a Florida court reasoned that men would not be *less* fair to women defendants by denying them equal protection of the laws. Quite the contrary, they noted, "The spirit of chivalry, and of deep respect for the rights of the opposite sex, have not yet departed from the heads and hearts of the men of this country." [28]

A 1961 Supreme Court decision also upheld an absolute exemption from jury duty for women so desiring it,[29] again, finding some reasoned grounds for the discrimination by virtue of the differing life functions of the sexes. In most recent times, however, only two states have remained stalwart in continuing the exclusion of women from their juries; Mississippi,[30] and South Carolina.[31] In 1966, a Federal District Court ruled that a similar statute in Alabama[32] *was* unconstitutional as violative of the fourteenth amendment.[33] The highest court in Mississippi though, has ruled at late as 1967 that that State's ban was not unconstitutional; and an appeal therefrom was dismissed.[34]

The reasoning set forth for such exclusion suffers from what might politely be termed vagueness. Perhaps the legislative and judicial philosophy reflected the now questionable wisdom of that best-loved thinker of the women's liberation movement, Schopenhauer, who once wrote, concerning women;[35]

> The weakness of their reasoning faculty also explains why women show more sympathy for the unfortunate than men, . . . and why, on the contrary, they are inferior to men as regards justice, and less honorable and conscientious.

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[25] Minor v. Happersett, 88 U.S. 162 (1847).

[26] In Re Grilli, 110 Misc. 45, 179 N.Y.S. 795 (1920); State v. James, 96 N.J. 132, 114 A. 553 (1921); State v. Mittle, 113 S.E. 335 (S. Car. 1922), diss. 260 U.S. 705 (1922); Strauder v. W. Virginia, 100 U.S. 303, 310 (1879).

[27] Fay v. New York, 332 U.S. 261, 289 (1946); State v. James, *supra,* n. 26; Strauder v. West Virginia, *supra,* n. 26.

[28] Hall v. State, 136 Fla. 644, 187 S. 392, 401 (1939).

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

[30] Miss. Code Ann. § 1762 (1942, Recomp. vol. 1956).

[31] S.C. Code § 38-52 (1952).

[32] Ala. Code Tit. 30 § 21 (1940, Recomp. vol. 1958).

[33] White v. Crook, 251 F. Supp. 401 (N.D. Ala. 1966).

[34] Reed v. State, 199 S.2d 803 (Miss. 1967), dis. 390 U.S. 413 (1968).

[35] Schopenhauer's famous essay: On Women (philosophical essay).

I think it a safe observation that one might be ill advised to carry a sign with the above ascribed words on it on any street today; yet the invidious discrimination it underlies has shown remarkable durability.

The legislated conduct of women seemed designed to hold them up as paragons of virtue, often prohibiting their mere presence in dens of iniquity which catered to the liquor trade.[36] One, "interesting" Kentucky case[37] upheld a remarkable ordinance which forbade women from remaining in saloons longer than five minutes absent the showing that such woman was of good repute, sober and orderly, and in the place with the consent of her husband or parent.

On a more optimistic note, the Kentucky courts *have* struck down a statute prohibiting women from loitering, or standing around within fifty feet of a liquor selling establishment.[38] That should bring sighs of relief from conscientious women everywhere.

Still another sage court boldly reasoned that since males cannot be prostitutes (everyone knows that!), a law to place such "fallen women" in a special home designed for their rehabilitation did not violate their then dubious rights to equal protection.[39] Lest any wayward girls fall into the trap of such evil life, another attempt was made to keep them, while under the age of twenty-one, from entering Chinese hotels and restaurants. This, in the eyes of the courts *was* too much.[40] The reason—it discriminated against Chinese!

The justification for such restrictions, again, seems vague even when viewed with an eye towards the inhibitions of society in times past. The only real conclusion to be drawn is that, in fact, equal protection was a sham. The courts were prone to uphold the legal enforcement of virtues on women for no better reason than the fact that they were indeed different. The classification of women with regard to these matters could have had no other basis.

McSorely's Old Ale House—A Turning Point??

The absurdity of many of the judicial positions documented above had given rise to the considered speculation[41] that a dramatic change in judicial philosophy with regard to this issue was in the offing. After all, keeping one's head in the sand for too long could only result in suffocation. Such a turnabout, or, if you please, an awakening, may have had its

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[36] *Supra* n. 13.

[37] Commonwealth v. Price, 123 Ky. 163, 94 S.W. 32 (1906).

[38] Gasteneau v. Commonwealth, 108 Ky. 473, 56 S.W. 705 (1900).

[39] Ex Parte Carey, 57 Cal. App. 297, 207 P. 291 (1922).

[40] In Re Opinion of the Justices, 207 Mass. 601, 94 N.E. 558 (1911).

[41] Kanowitz, Constitutional Aspects of Sex-Based Discrimination in American Life, 48 Neb. L. Rev. 131, 182 (Nov. 1968).

genesis in the New York Federal District Court case of *Seidenberg v. McSorely's Old Ale House Inc.*[42]

The 114 year old traditional practice by that establishment of serving only male patrons was successfully challenged, on constitutional grounds, by members of a women's liberation group. In the first opinion rendered, Judge Tenney overruled the defendant's motion to dismiss, holding that first, an action seeking an injunction against such practices was authorized under section 1983, Title 42 of the U.S.C.A.,[43] and second that the granting of a liquor license by the state was sufficient to establish enough "state action" in that establishment to subject its actions to the *constitutional* prohibition against unreasonable discrimination.

In a subsequent decision on the plaintiff's motion for summary judgment,[44] Judge Mansfield granted the relief sought, holding that:

> Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separation.[45]

Though holding the public accommodations sections of the 1964 Civil Rights inapplicable to women, the court nonetheless found that discrimination by sex was wholly unwarranted in this area and further was prohibited without any statute by the equal protection clause. State action in the granting and renewing of the liquor license made this conduct public, rather than private, and thus within the purview of the constitutional provisions. By way of response to the Supreme Court's holding in *Goesaert,*[46] the Judge simply noted that "social mores have not stood still . . . since 1948." [47]

This is an extension of the concept of what is sufficient state action to warrant such constitutional limitations to be sure. What is important, however, is the failure of the court to find any reasonable grounds upon which women, in these times, can be justifiably excluded from a bar. Not too big a victory perhaps, but larger when examined in light of past holdings. The application of this reasoning to statutes, the like of which were previously upheld, would indeed be a gratifying departure from precedent.

Lest we become too enthused, however, with this apparent new enlightenment in the courts, we ought to be sobered by the realities of

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[42] 308 F. Supp. 1253 (S.D.N.Y., 1969).

[43] The Civil Rights Act of 1964, under which civil actions were authorized against any person, acting under color of state action, who denies another constitutional rights. 24 U.S.C.A. 1343 (3&4) establishes jurisdiction in civil courts to entertain such actions.

[44] Serdenberg v. McSorely's Old Ale House Inc., 317 F. Supp. 593 (S.D.N.Y., 1970).

[45] *Id.* at 606.

[46] Goesaert v. Cleary, *supra,* n. 14.

[47] *Supra* n. 44 at 606.

other rulings which demonstrate that the whole area can only most optimistically be termed one in a state of flux.

In *DeCrow v. Hotel Syracuse Corp.*, both a state[48] and federal[49] court ruled that since the Civil Rights Act of 1964[50] does not prohibit sex discrimination in public accommodations, a hotel bar may continue to refuse service to unescorted women. There, however, state action was not alleged by the plaintiffs. It might also be noted that while the fifth circuit Federal Court of Appeals did prohibit the New Orleans police from preventing a white woman from patronizing a bar with a predominantly Black clientele through the use of a vagrancy ordinance (as had been their custom with regard to this matter), it did so on the grounds that this was racial discrimination, not sexual, and was thus covered by the 1964 Act.[51] That this practice of exclusion was imposed only upon white *women* was not deemed salient by the court.

Another series of cases was concerned with the exclusion of prospective students at state funded colleges and universities by reason of sex. The most progressive view is that expressed in *Kirsten v. University of Virginia.*[52] That case held that the exclusion of women from the University's Charlottesville campus, the one recognized as the best academically of that State's supported schools, violated their rights to the equal protection of the law. The court then went on to approve that school's three year plan for phasing into a totally nondiscriminatory admissions policy.

Another decision held, however, that ". . . the constitution does not require that a classification 'keep abreast of the latest' in educational opinion."[53] In so finding, a Federal District Court in South Carolina upheld the admission policies of that State's publicly supported Winthrop College, which had refused the admission of the plaintiffs, who were, incidently, men, to its student body. This classification was justified, noted the court, because that school's curriculum was designed to be "specially helpful to female students," who apparently needed to develop different skills from their male counterparts. In attempting to distinguish their case from *Kirsten,* the court interpreted the reasoning of the latter to hinge on the fact that the school to which those plaintiffs sought admission was allegedly superior to the ones they could otherwise have attended.

It is unclear whether or not in so holding, that court implicitly approved a "separate but equal" program for males and females; but if so,

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48 59 Misc. 2nd 383, 298 N.Y.S.2d 859 (1969).

49 288 F. Supp. 530 (N.D.N.Y., 1968).

50 42 U.S.C.A. §§ 2000a (a), 2000e-3(b) (1964).

51 *Id.*

52 309 F. Supp. 184 (E.D. Va., 1970).

53 Williams v. McNair, 316 F. Supp. 134, 137 (D., S. Car., 1970).

they might take note that *Plessey v. Ferguson*[54] is no longer recognized as authoritative constitutional law.

Two fairly recent Texas cases held, in a similar discouraging fashion, that women could be properly excluded from the Agricultural and Mechanical College of Texas, also a state supported institution.[55] Thus, it would appear that the results of this particular question must remain uncertain, with no higher court rendering an actual decision on point. If a guess is to be ventured, however, the state's right to restrict admissions at its schools on the basis of sex appears to be on solid footing.

Confusion Lingers

Other rights remain unvested, at least with any degree of certainty, in female citizens. The right to seek civil redress for the loss of the consortium of one's spouse, for example, is still not clearly within the purview of the equal protection guarantees. Though Ohio,[56] for example, and many other states have recognized this right as one of a constitutional magnitude, other jurisdictions[57] still refuse to accept this view.

Equal employment opportunity within the private sector has not been held to be within the domain of constitutional rights, but rather has been guaranteed, on paper at least, by provisions of the 1964 Civil Rights Act.[58] Casual observation reveals that earlier writers were correct in predicting that little drastic change would result from this provision.[59] Were the state action aspects of the *Seidenberg* decision extended, private employment discrimination would also become a problem of constitutional significance, and perhaps more substantive progress would result.

Women may still be more favorably treated in excusing themselves from jury service,[60] as again it has recently been reaffirmed that states may not be compelled to allow them to serve, and that their not serving would not deprive a defendant of the equal protection of the laws.

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54 163 U.S. 537 (1896).

55 Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App., 1960), cert. den. 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d (Tex. Civ. App., 1958), cert. den. 359 U.S. 230 (1958).

56 Clouston v. Remlinger Oldsmobile, Cadillac Inc., 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970).

57 E.g. see Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th cir. 1968) holding valid Indiana's prohibition against a wife's recovery of damages for loss of consortium of her husband.

58 42 U.S.C.A. 2000(e) (1964) For a detailed discussion of this section see Kanowitz, Sex Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L. J. 305 (1968).

59 See Murray and Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Washington L. Rev. 232, 256 (Dec. 1965); consider also however, Shpritzer v. Lang, 32 Misc.2d 693, 224 N.Y.S.2d 105; modified 17 A.D.2d 285, 234 N.Y.S.2d 285; aff. 13 N.Y.2d 744, 241 N.Y.S. 869 (1962) ruling unconstitutional an ordinance prohibiting the promotion of a policewoman to the rank of sergeant.

60 Leighton v. Goodman, 311 F.Supp. 1181 (S.D.N.Y. 1970), citing Hoyt v. Florida, *supra* n. 29; DeKosenko v. Brandt, 63 Misc.2d 895, 313 N.Y.S.2d 827 (1970); see also *supra* n. 30-34.

Women may also properly be treated with favor in the computation of social security benefits.[61]

The view, in the courts, of women as dainty and delicate creatures may have suffered one setback when a Federal Court of Appeals held that women may *not* be excluded altogether from juries in federal cases, even when the subject of the proceedings was of a rather unpleasant, undelicate nature.[62] We have recently, however, reaffirmed the view that public policy may, indeed, intervene when the "fair sex" does overstep its bounds and attempt to enter the less feminine occupations. An appellate court in New York, in so doing, upheld the denial of a license to a woman who was seeking to become a professional wrestler[63] in that state.

Still another illustration of the confusion is the distinction between cases holding valid or invalid differing degrees of penalty for the same crimes; when the degree depends on the sex of the offender. Encouragement may be drawn from decisions holding that Connecticut statutes which subject female[64] and minor female[65] offenders to a special farm for indefinite sentences, while their male counterparts can be subjected to shorter definite sentences, are unconstitutional. In the same vein, though, Maine courts have upheld that State's statute prescribing a greater penalty for male prison escapees than female escapees; finding some sort of rationale in the type of confinement they were respectively subjected to.[66]

Conclusion

If a drastic change is occurring in the courts' view of what is a reasonable classification on the basis of sex, that change has not yet solidified enough to indicate a positive direction. To prevent too much optimism, courts may periodically issue a decision or two reflecting some sardonic aspect of Schopenhauer's philosophy about women. Exemplary is a 1970 Idaho decision[67] holding that a statute may, without justification other than mere administrative expediency, give preferential treatment, all other factors being equal, to *men,* in the selection of an administrator for an estate.

Thus, while the decisions in *Seidenberg* and a few other cases yield hope that judicial heads some day will be lifted out of the sand, for the present we dare not glibly say: "you've come a long way, baby!"

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[61] Gruenwald v. Gardner, 390 F.2d 591 (2nd cir. 1968), cert. den. 393 U.S. 982 (1968).

[62] Abbott v. Mines, 411 F.2d 353 (6th cir. 1969) holding that the automatic exclusion of all women jurors from a case involving medical malpractice in which the plaintiff was suffering from cancer in the penis and groin was reversible error.

[63] Calzadilla v. Dooley, 29 App. Div.2d 152, 286 N.Y.S.2d 510 (1968).

[64] United States ex rel. Robinson v. York, 281 F.Supp. 8 (D.Conn. 1968).

[65] United States v. Sumrell, 288 F.Supp. 955 (D.Conn. 1968).

[66] Wark v. State, 266 A.2d 62 (Me. 1970).

[67] Schopenhauer *supra,* n. 35.