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Denial of Loss of Consortium to Wife as Violation of Fourteenth Amendment Right of Equal Protection

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RECENT DECISION

DENIAL OF LOSS OF CONSORTIUM TO WIFE AS VIOLATION OF FOURTEENTH AMENDMENT RIGHT OF EQUAL PROTECTION

The plaintiff's husband was injured in an explosion while in the defendants' building. In a federal diversity action, the plaintiff sought compensatory and exemplary damages for loss of her husband's "society, services, companionship, and consortium." The district court held that under Indiana law a wife cannot recover for loss of consortium of her negligently injured husband and granted the defendants' motion to dismiss. Before the Court of Appeals for the Seventh Circuit the plaintiff argued that the Indiana rule violates the equal protection clause of the fourteenth amendment because it denies a wife a cause of action in a situation where a husband possesses one. The court of appeals affirmed the judgment, adhering to prior Indiana decisions and expressly rejecting the constitutional argument. The classification based upon sex was deemed justifiable, since double recovery could result if a wife received compensation for loss of services and her husband recovered for lost earnings. A dissenting opinion decried the patent discrimination inherent in the judicially conceived notion that a husband may maintain a cause of action for loss of his wife's services but a wife has no comparable action for loss of her husband's services due her as a result of coverture. After examining the historical basis for the discrimination and its anachronistic presence in modern society, the dissenting judge concluded that the majority's decision denied the plaintiff equal protection of the law. *Miskunas v. Union Carbide Corporation*, 399 F.2d 847 (7th Cir. 1968).

Until recently, the controversy over whether a wife should be allowed to bring an action for loss of consortium due to a negligently inflicted injury to her husband had been almost untouched by specific reference to constitutional questions. The Court of Appeals of the District of Columbia in the leading case of *Hitaffer v. Argonne Co.*[1] and other

1. 183 F.2d 811 (D.C. Cir. 1950). In *Hitaffer* the court of appeals held that a wife had a cause of action for loss of consortium due to a negligent injury to her husband. Until this ruling, wives had been universally denied the right to recover when injuries to their husbands were occasioned by negligence. *Hitaffer* was overruled by the same court only as to the remedy under section 5 of the Longshoremen and Harbor Workers Act, 33 U.S.C. § 905 (1964). See Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 914 (1957).

courts which adopted its reasoning[2] successfully overcame arguments disfavoring recovery without placing primary reliance on constitutional language.[3] Instead, courts resorted to point-by-point rebuttals which "pierced the thin veils of reasoning"[4] which had separated a wife from a cause of action for loss of consortium due to a negligent injury to her husband. Recognition was accorded the fact that a wife's cause of action

2. Cases which follow *Hitaffer* include: Luther v. Maple, 250 F.2d 916 (8th Cir. 1958); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Cooney v. Moomaw, 109 F. Supp. 448 (D.C. Neb. 1953); Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961); Bailey v. Wilson, 100 Ga. App. 405, 111 S.E.2d 106 (1959); Gordy v. Powell, 95 Ga. App. 822, 99 S.E.2d 313 (1957); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Shepherd v. Consumers Co-op. Ass'n., 384 S.W.2d 635 (Mo. 1964); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); Hayes v. Swenson, 14 Pa. D. & C.2d 708 (1958); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Alum. Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

Cases which reject *Hitaffer* include: Copeland v. Smith Dairy Prod. Co., 288 F. Supp. 904 (N.D. Ohio 1968); Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Deshotel v. Atchison, T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958); Franzen v. Zimmerman, 127 Colo. 381, 256 P.2d 897 (1953); Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952); Baird v. Cincinnati, N.O. & T.R.R., 368 S.W.2d 172 (Ky. 1963); LaEace v. Cincinnati, N. & C. Ry., 249 S.W.2d 534 (Ky. 1952); Coastal Tank Lines v. Canoles, 207 Md. 37, 113 A.2d 82 (1955); LaRocca v. American Chain & Cable Co., 23 N.J. Super. 195, 92 A.2d 811 (1952); Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 151 N.E.2d 898, 176 N.Y.S.2d 354 (1958); Nelson v. A.M. Lockett & Co., 206 Okl. 334, 243 P.2d 719 (1952); Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 240 A.2d 822 (1968); Garrett v. Reno Oil Co., 271 S.W. 764 (Tex. Civ. App. 1954); Ash v. S.S. Mullen, Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953); Nickel v. Hardware Mutual Cas. Co., 269 Wis. 647, 70 N.W.2d 205 (1955).

Cases which permit a wife to bring a cause of action on the basis of equal protection include: Karczewski v. Baltimore & O. Ry., 274 F. Supp. 169 (N.D. Ill. 1967); Owen v. Illinois Baking Co., 260 F. Supp. 820 (W.D. Mich. 1966); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Deems v. Western Maryland Ry., 247 Md. 95, 231 A.2d 514 (1967); Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968); Umpleby v. Dorsey, 39 Ohio Op. 2d 450, 227 N.E.2d 274 (1967); Clem v. Brown, 32 Ohio Op. 2d 477, 207 N.E.2d 398 (1965).

Cases which deny recovery and reject the equal protection argument include: Lunow v. Fairchance Lumber Co., 389 F.2d 212 (10th Cir. 1968); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 970 (1967); Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1967).

3. A stock supply of defenses reappear in consortium cases, some more persuasive than others. Among the less compelling is the assertion that the wife had no right to recover at common law and the lifting of the disabilities of coverture created no new rights. Opponents also argue that courts must await legislative action, the wife's action is too remote to warrant protection, and the wife is owed no services by the husband. The fear of double recovery due to an overlap in a husband's action for decreased ability to support and a wife's action for loss of services is resounded in *Miskunas*. The foregoing arguments may be found in their classic form in Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960) and Deems v. Western Maryland Ry., 247 Md. 95, 231 A.2d 514 (1967).

4. Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950).

for loss of consortium is no more remote than a husband's, that consortium involves not only a loss of services but also intangibles which are not subjects of double recovery, and that schemes are available to prevent any overlap in damages.[5] Furthermore, a wife was given a separate legal existence when her disabilities under the common law were removed; the courts averred that with these new legal interests came the right to have them protected. Finally, the courts were unwilling to abolish the husband's action for loss of consortium in order to prevent possible double recovery and inequality. To completely discard the remedy would be to use a sledge-hammer approach, since the law has long recognized loss of consortium as a compensable wrong.[6]

INDIANA AND THE MODERN TREND

In Indiana, a husband has the right to bring an action for loss of consortium due to a negligent or intentional injury to his wife,[7] but a wife may bring an action only if her husband is injured because of a third party's intentional act.[8] The recent trend outside of Indiana has been to permit wives to bring an action for loss of consortium resulting from negligence.[9]

Consortium includes services, society, sexual intercourse, and conjugal affection of the spouse. Generally, the invasion of the consortium interest involves two elements, pecuniary loss and injury to intangibles;[10] however, in Indiana, pecuniary loss is not an indispensable element in recovery.[11]

Although the majority in *Miskunas* discounted the plaintiff's contention that the Indiana rule violated the equal protection clause of the fourteenth amendment, the dissenting opinion of Judge Schnackenburg and two district court opinions applying Indiana law indicate that the constitutional argument may be both a compelling and winning one for a wife. In *Owen v. Illinois Baking Co.*[12] the plaintiff was awarded 5,000 dollars by a federal district court in Michigan for her loss of the consortium of her husband who had been injured in an accident in Indiana caused by the defendant's negligence. Sitting in a diversity action the

5. See notes 70 and 71 *infra.*

6. For a history of consortium, see Comment, *A Consideration of the Problems in Consortium Recovery*, 30 IND. L. J. 276, 277 (1955).

7. Burk v. Anderson, 232 Ind. 77, 109 N.E.2d 407 (1952).

8. Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933).

9. See Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 240 A.2d 822 (1968) wherein the court alludes to the "clear trend." See *Recent Developments*, 13 VILL. L. REV. 418, 419 n.13 (1968). For a list of cases which accept and reject *Hitaffer*, see note 2 *supra.*

10. Comment, *supra* note 6, at 277.

11. *E.g.*, Adams v. Main, 3 Ind. App. 232, 235, 29 N.E. 792, 793 (1892).

12. 260 F. Supp. 820 (W.D. Mich. 1966).

court permitted the wife to recover despite Indiana law, on the ground that to deny recovery would be to deny her equal protection under the fourteenth amendment.

A larger verdict was recovered by a wife in *Karczewski v. Baltimore & O.R.R.*[13] for her loss of the consortium of her husband as a result of an automobile and train collision occurring in Indiana caused by the defendant's negligence. The Illinois district court found no sufficient reason to support the difference in treatment accorded husband and wife in Indiana on the consortium issue.[14] Other recent decisions have also utilized the equal protection argument to the wife's advantage.[15]

Furthermore, some courts have spoken broadly in terms of giving the wife the "same" right as the husband, without specific reference to the equal protection clause.[16] Although the fourteenth amendment is not specifically mentioned, the language used by these courts to extend a cause of action to the wife embodies equal protection concepts[17] and bolsters the constitutional argument. Representative is *Montgomery v. Stephan*:

> The gist of the matter is that in today's society the wife's position is analogous to that of a partner, neither kitchen slattern nor upstairs maid. . . . Legally, today the wife stands

13. 274 F. Supp. 169 (N.D. Ill. 1967).

14. *Id.* at 175.

15. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Deems v. Western Maryland Ry., 247 Md. 95, 231 A.2d 514 (1967); Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968); Umpleby v. Dorsey, 39 Ohio Op. 2d 450, 227 N.E.2d 274 (1967); Clem v. Brown, 32 Ohio Op. 2d 477, 207 N.E.2d 398 (1965). *Hitaffer*, though an earlier case, speaks in terms of a husband and wife having "equal rights in the marriage relation which will receive equal protection of the law." 183 F.2d 811, 816 (D.C. Cir. 1950). Cases which specifically reject the equal protection argument include: Lunow v. Fairchance Lumber Co., 389 F.2d 212 (10th Cir. 1968); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 970 (1967); Seagraves v. Legg, 147 W.Va. 331, 127 S.E.2d 605 (1967).

16. Moran v. Quality Alum. Casting Co., 34 Wis. 2d 542, 551, 150 N.W.2d 137, 141 (1967): "Both logic and the interest of justice require that, if a husband is to be accorded the right to recover for loss of consortium of the wife injured through the negligent acts of another, a wife also should be accorded the same right where she sustains a loss of consortium of the husband." *Moran* was later modified as to procedure by Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 157 N.W.2d 595 (1968). See also Cooney v. Moomaw, 109 F. Supp. 448, 450 (D. Neb. 1953); Yonner v. Adams, 53 Del. 229, 251, 167 A.2d 717, 728 (1961); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 532-33, 77 S.E.2d 24, 32 (1953); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

17. The fourteenth amendment forbids any state to deny equal protection of the laws to any person within its jurisdiction; its purpose is to insure that everyone stands before the law on equal terms and enjoys the same rights as others in a like situation. Frost v. Corporation Comm'n of State of Okla., 278 U.S. 515 (1929). See note 16 *supra* for cases where unspecific language was employed but where fourteenth amendment objectives were achieved.

> on a par with her husband. Factually, as we well know, her position is no less than that of an equal partner. The precedents of the older cases are not valid precedents. They are violative of women's statutory rights and constitutional safeguards.[18]

In a recent New York case[19] in which a wife was allowed to recover for loss of consortium resulting from negligence the constitutional question was raised, but the court did not pass on its merit, reaching its decision instead on the "basis of policy and fairness."[20] Although no reference was made to the fourteenth amendment, the result achieved and the policy arguments used suggest that equal protection standards may have a tacit influence on some courts.

CHANGING ROLES: FROM "SERVANT" TO "PARTNER"

The foundation of the equal protection argument for extending the action for loss of consortium to the wife is an awareness of the changing legal relationships between spouses. The majority in *Miskunas* relied on *Goesaert v. Cleary*[21] in which the Supreme Court sanctioned a classification by sex and declared that the Constitution does not require the legislature to have sociological insight. Nonetheless, it is clear that a court, in determining whether a classification is discriminatory, is not confined to past notions of equality but should be aware that what is considered equal treatment under the fourteenth amendment does change.[22]

Comparisons formerly made between wives and chattels and ser-

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18. 359 Mich. 33, 48-49, 101 N.W.2d 227, 234-35 (1960).

19. Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

20. *Id.*

21. 335 U.S. 464, 466 (1948). *Goesaert* dealt with a statute enacted by the Michigan legislature prohibiting women from bartending. The Court upheld the constitutionality of the statute and recognized the moral and social purposes behind it. As the dissent points out in *Miskunas*, the problem of consortium was not created by a statute barring a wife from recovery; nor does it deal with the problems of employment. In any event, it is questionable whether discrimination in employment is justifiable; sweeping generalizations on the weaker sex are probably more chivalrous than rational in the modern context. See notes 58 and 64 *infra*.

22. *Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The Supreme Court struck down a state poll tax, declaring it a violation of the equal protection clause since it made affluence a voting standard. Previously, in Breedlove v. Suttles, 302 U.S. 277 (1937), the Court sanctioned the poll tax as a prerequisite for voting, reflecting older arguments that such a tax promoted civic responsibility and induced a more highly selective voting populace. By 1966, these arguments gave way to an equalitarian outlook; the Court stated at 669:

> Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

vants indicate that at common law, the wife found her social and legal position bluntly inferior.[23] A married woman was without the legal capacity to bring an action on her own. She had no right to sue for the loss of her husband's consortium since she was not entitled to any services from him. The husband alone possessed any cause of action for interference with the marital relation. Behind this allocation of rights was the fiction of the legal unity of husband and wife, her legal existence having been merged into his upon marriage.[24] Women's Emancipation Acts removed the disability to sue,[25] and the fiction of merged identity was eroded to the extent that a wife was allowed to bring an action for loss of consortium due to intentional interference with the marriage relationship.[26]

The fiction that a woman loses her individual identity upon marriage has been dispelled by the partnership view of marriage. A Presidential Commission has noted that "marriage as a partnership in which each spouse makes a different but equally important contribution is increasingly recognized as a reality in this country and is already reflected in the laws of some other countries."[27] Sweden, for example, has been credited with initiating a marriage code which provides for equal roles and mutual responsibilities in the marital relationship.[28] In 1920, the Swedish male's guardianship over his wife was revoked, both partners assuming financial obligations to support each other and their children.[29] Despite opposition by traditionalists who foresee neuterdom as the ultimate result of political and social equality of the sexes, Swedish legislators have recently enacted a law which permits husbands, as well as wives, to obtain leaves of absence from some types of employment in order to stay at home with the children. In addition, a woman may keep her maiden name when she marries, or a husband may in certain cases assume his wife's name.[30]

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23. "The inferior hath no kind of property in the company, care, or assistance of the superior . . . and therefore the inferior can suffer no loss or injury." 3 W. BLACKSTONE, COMMENTARIES 143 (2d Amer. Ed. 1799).

24. The legal fiction of single identity of husband and wife follows the religious conception of one flesh in marriage. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 670 (1930). Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

25. Indiana enacted its Married Women's Act on March 25, 1879: "A married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character the same as if she were sole. . . ." Ch. 67, § 6 [1879] Ind. Laws 160-61. IND. ANN. STAT. § 38-115 (Burns 1949 Repl.).

26. Holmes v. Holmes, 133 Ind. 386, 32 N.E. 932 (1893) (alienation of affection); Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891) (enticement).

27. THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION, AMERICAN WOMEN 69 (1965).

28. B. LINNÉR, SEX AND SOCIETY IN SWEDEN 1-16 (1967).

29. *Id.* 1.

30. *Id.* 2.

The goals of radical Swedish thinkers include steps toward complete equality and a breakdown of the concept of the patriarchal family unit: raising boys and girls in the same way, supervising children collectively, reorganizing housework, shortening working hours to allow parents to share equally in housework and employment, and abolishing the idea of the male as the provider.[31] Sweden may represent an isolated extreme with respect to marriage roles and concepts of equality, although it does serve as a model of what a partnership view of marriage could entail. However, the relevance of allusion to the Swedish experience, the desirability of which need not be defended herein, lies in its potential for throwing into bold relief some of the groundless distinctions extant in American society—in this instance, inequality of spouses before the courts.

If consortium is viewed in the light of the partnership theory of matrimony, the relational interest protected by the action is shared equally by the spouses. The rights and obligations of both spouses with respect to conjugal society, comfort, and companionship arising out of the marriage contract are equal and separate.[32] Two distinct individuals are affected by the injury of one; the injury is not suffered by an amorphous "entity." Loss of affection, sexual relations, and companionship are suffered by individuals and not by a family unit; the common law concept of a husband who brings a cause of action to recover for injuries to the family[33] is inapplicable where there is a real, identifiable injury to individuals within that unit.[34] That the law affords redress for more than mere physical harm and that therefore men are compensated for this

31. *Id.* 8.

32. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961).

33. Green, *Protection of the Family Under Tort Law,* 10 HASTINGS L.J. 237 (1959).

34. If the injury is viewed as one to the family unit, the husband would be a representative sent to court to recover for the consequences of any injury to himself and the family. Green suggests that a jury automatically considers all of the plaintiff's family obligations, the ability of the defendant to pay, and values incident to marriage. *Id.* Thus, when a husband brings an action to recover for personal injuries inflicted on him negligently, damages will also cover any of the wife's interests in the relationship. The solution which Green proposes is to recognize realistically that the jury does account for a group of interests when a family is involved in order to prevent further litigation. However, a wife is presently allowed to bring an action for loss of consortium where her husband has been injured intentionally; the law does not regard the husband as the family representative but recognizes the wife as the party whose interest has been injured.

It may be noted that the Court of Appeals of Maryland has extended the right to bring an action to the wife but has retained the medieval concept of the suspension of the wife's legal existence. The court recognizes an "inseparable mutuality of ties" which makes the marriage relation a "factual entity." An injury to this interest is held to have created a single cause of action in which both spouses must be parties. Maryland thus achieves the modern result of providing a remedy while maintaining its adherence to some now less fashionable conceptions. Deems v. Western Maryland Ry., 247 Md. 95, 107, 231 A.2d 514, 521.

identifiable injury despite the difficulty of expressing such damages in pecuniary form seems proper, although one might conclude otherwise,[35] and, as most courts are finally noting, "[i]f negligent injury to the wife raises a cause of action in consortium for the husband, equal protection requires a similar cause of action for the wife for negligent injury to her husband."[36]

EMPHASIS ON EQUALITY

The constitutional argument in consortium actions is even more compelling when viewed against the background of Supreme Court rulings in which the utilization of the equal protection concept has shifted from control over economic legislation to concern with social policy in areas of civil rights and criminal law. Activism of the Court, measured on a spectrum with economic policy at one extreme and civil rights at the opposite, has undergone striking change since the New Deal era. Prior to the 1930's, the Court generally declined invitations to protect substantive individual liberties and to interfere with social problems resulting from discriminatory state laws.[37] Instead, the Court pictured itself as a supervisor of the other branches of the government and as the protector of the existing economic order of the nation;[38] repeatedly, the Court substituted its own judgment on economic policy for that of the state legislatures, arming itself with due process and equal protection arguments.[39] Since the New Deal, however, the Court has not reviewed

35. For the "handful of cases" which deny an action for loss of consortium resulting from a negligent injury to both husband and wife, see cases cited in Deems v. Western Maryland Ry., 247 Md. 95, 114, 231 A.2d 514, 519 (1967).

36. Clem v. Brown, 32 Ohio Op. 2d 477, 480, 207 N.E.2d 398, 402 (1965).

37. The Court's language in Plessy v. Ferguson, 163 U.S. 537, 552 (1896) illustrates its refusal to curtail racial discrimination: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." Prior to *Plessy*, the Court in Strauder v. West Virginia, 100 U.S. 303 (1880), extended political equality to Negroes by striking down a state statute which excluded the race from grand and petit juries. The Court declared that the fourteenth amendment ". . . was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." *Id.* at 306. Although *Strauder* could be interpreted as an attempt by the Court to champion Negro rights, which would undercut its subsequent avowal in *Plessy* not to adjudicate social equality, it has been distinguished by some authorities on the grounds that the Court sought political, rather than social equality. In 1886, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court breathed life into the concept of equal protection by holding unconstitutional a city ordinance which in operation discriminated against Chinese. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ." *Id.* at 369.

38. *E.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902); Cotting v. Kansas City Stock Yards, 183 U.S. 79 (1901); Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897).

39. B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 54 (1942).

state legislative policy in economic areas,[40] but has allowed the states to formulate economic policy without substantial interference; the Court has invalidated only one statute concerning economic regulation on the basis of equal protection.[41] Those cases in which the Court has declined to invalidate state action which discriminates against women may be understood in this context.[42]

Since the New Deal, the Court has shown increasing concern with the opposite end of the spectrum—individual liberties and civil rights. The relative premium placed on civil rights may result from the growing concern with social welfare which the past three decades have witnessed, and from the Court's confidence in the ability of state legislatures to understand and manage economic matters without interference. With this orientation, the Court has assumed an activist role in equalizing the rights of individuals, particularly with regard to racial discrimination in housing, education, transportation, voting, public accommodations and jury duty,[43] using the equal protection clause to invalidate legislation which arbitrarily distinguishes between whites and blacks. In criminal procedure, the Court has generally relied on the due process clause, although the equal protection clause has seen use in some recent cases.[44] To cite additional examples, the equal protection clause has been relied upon to protect aliens from discriminatory state legislation,[45] to determine apportionment for voting purposes,[46] and to extend equality to those who cannot protect their own rights.[47] Viewed as a whole, the areas which

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Between 1899 and 1937, 401 decisions held state legislation unconstitutional, as the Court extended judicial control into areas such as labor legislation, price regulation, and entry into business.

40. *E.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Railway Express Agency v. New York, 336 U.S. 106 (1949); Tigner v. Texas, 310 U.S. 141 (1940).

41. Morey v. Doud, 354 U.S. 457 (1957).

42. See the discussion of *Goesaert supra* note 21 and *infra* note 58. See also Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968).

43. *E.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (segregation on intrastate buses); Brown v. Board of Educ., 347 U.S. 483 (1954) (school desegregation); Smith v. Texas, 311 U.S. 128 (1940) (jury duty); Nixon v. Herndon, 273 U.S. 536 (1927) (white primary).

44. *E.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *Griffin* held that both the due process and equal protection clauses require that all indigent defendants be furnished a transcript, since appellate review in Illinois was available only if a bill of exceptions or report of the trial proceedings was presented to the appellate court. See also Smith v. Texas, 311 U.S. 128 (1940), a case involving equal protection and the right to serve on a jury.

45. *E.g.*, Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948).

46. *E.g.*, Baker v. Carr, 369 U.S. 186 (1962).

47. Baxstrom v. Herold, 383 U.S. 107 (1966), and Skinner v. Oklahoma, 316 U.S. 535 (1942) provide illustrations of the application of equal protection doctrines to the insane and the criminal. Another example of the extension of equal protection is Levy v. Louisiana, 391 U.S. 68 (1968), where a Louisiana statute which denied to illegitimate

the Supreme Court has entered represent examples of social inequality and individual oppression.

Given this trend, a wife's equal protection argument for consortium recovery is compelling; here too is a situation where individuals are treated unequally and in discriminatory fashion, and therefore require judicial protection. Moreover the Supreme Court has recently invoked the equal protection clause to invalidate a discriminatory denial of a tort damage remedy. In refusing to countenance abridgment of an illegitimate offspring's right to bring a wrongful death action for the death of a parent the Court asserted in *Levy v. Louisiana*,[48] "[w]e have been extremely sensitive when it comes to basic civil rights [citation omitted] and have not hesitated to strike down an invidious classification even though it had history on its side. [citations omitted]. The rights asserted here involve the intimate familial relationship between a child and his own mother."[49] Viewed against the backdrop of this overriding relational interest, classification based on legitimacy was seen to be unjustifiably arbitrary, and the analogy to the consortium cases would scarcely seem to require belaboring.[50]

A lower Ohio court in *Umpleby v. Dorsey*[51] premised its decision to allow a wife to recover for loss of consortium caused by negligence on recent Supreme Court cases:

> The due process of law which now requires the state court to free the confessed killer, robber, and rapist, where denied, cannot permit a state court rule requiring a law-abiding citizen to lose in a state court because of the sole fact that she is a woman.[52]

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children the right to recover for wrongful death of their mother was held to represent "invidious" discrimination. See also Kellett, *The Expansion of Equality*, 37 S. CAL. L. REV. 400 (1964).

48. 391 U.S. 68 (1968).

49. *Id.* at 71.

50. Justices Harlan, Black and Stewart dissented on the ground that the biological distinction drawn was no less rational than any other means of attempting to measure "the degree of love or economic dependence that may exist between two persons." 391 U.S. at 80. Such reasoning would actually appear to affirm the propriety of permitting a wife to maintain a consortium action. For a summary of the majority's discussion of the classification used see text at note 72 *infra*. The interested reader will be amused, if not enlightened by the dissenters' analogy to a state's denial of privileges to a corporation which has failed to observe the proper formalities of incorporation and by their citation of the animosity between King Lear and Edmund as evidence of a traditionally observed hostility which would justify a legal distinction.

51. 39 Ohio Op. 2d 450, 227 N.E.2d 274 (1967).

52. *Id.* at 452, 227 N.E.2d at 275. However, the district court in Copeland v. Smith Dairy Prod. Co., 288 F. Supp. 904 (N.D. Ohio 1968) did not follow earlier Ohio rulings in *Clem* and *Umpleby* which permitted a wife to recover, but instead denied a cause of action in accordance with Ohio Supreme Court decisions, such as Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915). Apparently, the district court

Although such backlashing is appealing to a wife who raises the constitutional question, an equal protection argument can be built on sounder reasoning.

In addition, the courts might well be influenced by recent federal legislation which reflects the modern trend of protecting individual rights and according equal rights to women. For example, the Fair Labor Standards Act,[53] as amended by the Equal Pay Act of 1963, requires equal pay for equal work, without discrimination based on sex. The Civil Rights Act of 1964,[54] as amended, includes sex as well as race, color, religion, and national origin as proscribed bases of classification in most matters covered by the Act.

Classification Based on Sex

At the matrix of the constitutional argument is a classification question. The court in *Karczewski,*[55] dealing with the distinction between the sexes in consortium actions, identified the protected class as all married persons:

> [e]ach has an equal interest in the elements of the marital relationship which are protected by the action for loss of consortium. To deny it to wives is a classification without reason, and is consequently a violation of the Equal Protection Clause of the Fourteenth Amendment.[56]

A closer look at the rationale given for discrimination explodes the long-revered myth that the wife's interest in the marital relation and her contribution to that bond somehow do not warrant the same protection

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felt that the lower Ohio courts which handed down *Clem* and *Umpleby* did not apply Ohio law which denies a wife a cause of action for loss of consortium when the injury has been occasioned by negligence. The ruling in *Smith* was recognized as Ohio law, the district court leaving questions concerning equal protection and consortium recovery for the Ohio Supreme Court.

53. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964). See also the U.S. Civil Serv. Comm'r., Federal Personnel Manual ch. 713-6—713-8 (1963) which set a policy of non-discrimination in federal employment.

54. 78 Stat. 253 (1964), 42 U.S.C. § 2000(e) (1964).

It may be noted that discrimination on the basis of sex is not prohibited by section 201(a) of the Act which governs public accommodations. DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968) recently upheld the right of a proprietor to exclude women from a bar.

The Supreme Court has remanded a case to a lower federal court which charges a California statute with violating the Federal Civil Rights Act. The statute restricts the work hours of women but not men, thereby allegedly denying equal opportunities for overtime. Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968).

Indiana enacted a Civil Rights Act in 1961 to prevent discrimination in employment and otherwise against persons "because of race, religion, color, national origin, or ancestry," but did not include "sex." Ind. Ann. Stat. § 40-2307 (Burns 1965 Repl.).

55. Karczewski v. Baltimore & O. Ry., 274 F. Supp. 169 (N.D. Ill. 1967).

56. *Id.* at 179-80.

as her spouse receives.[57] Within the class of married persons are subclasses of husbands and wives; any classification which a legislature or court makes, such as those who may bring consortium actions and those who may not, must be reasonable and not arbitrary, and must rest on some ground of difference which bears a fair relation to the subject.[58] In a consortium action where the injury to the plaintiff's spouse was caused by negligence, the courts have neatly paired recovery with husbands and non-recovery with wives, an arbitrary classification since there is no reasonable connection between an individual's sex and loss of consortium. Public policy and individual attitudes loom large in what is deemed a rational rather than an arbitrary classification. Although classification according to sex is not unconstitutional per se,[59] some courts have concluded that it has no rational basis in consortium recovery.[60] On the other hand, the Supreme Court of Tennessee[61]

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57. The assumption that financial support of a family by the husband-father is a gift from the male sex to the female sex, and, in return, the male is entitled to preference in the outside world is all too common. Underlying this assumption is the unwillingness to acknowledge any value for child care and homemaking because they have not been ascribed a dollar value.
Eastwood and Murray, *Jane Crow and The Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 241 (1965).

58. A city ordinance prohibiting the employment of women as bartenders was held to be based on a reasonable classification and therefore was held not a denial of equal protection in Anderson v. City of St. Paul, 226 Minn. 186, 32 N.W.2d 538 (1948). The need for a male bartender to promote order on the premises and public policy against the presence of women in bars were set forth as reasons underlying the classification. On the other hand, the dissenter found the classification unreasonable, since the attitude towards women in bars had changed and there was no proof that a female bartender could not control her customers. The Supreme Court of Idaho in State v. Burke, 79 Idaho 205, 312 P.2d 806 (1957) held that a statute restricting bartender licenses to males was not unconstitutional. The dissent, however, attacked the law as arbitrary and discriminatory, since the legislature could not enact a law prohibiting a class from engaging in work open to all others because of sex. A similar ordinance was held unconstitutional in Brown v. Foley, 158 Fla. 734, 29 So. 2d 870 (1947). Also see note 21 *supra* for a discussion of *Goesaert*. The Supreme Court of the United States in *Goesaert* was in accord with the foregoing state decisions, upholding the constitutionality of a similar statute which banned women from the occupation of bartending. In State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956), the court upheld the constitutionality of a statutory ban against female wrestling, based on the promotion of general welfare and good morals. However, the Supreme Court of New York in Shpritzer v. Lang, 32 Misc. 2d 679, 224 N.Y.S.2d 105 (Sup. Ct. 1962) struck down an administrative code provision prohibiting a woman policeman from advancing to sergeant as unconstitutional because the classification was arbitrary. Among the more novel recent developments on this point is the securing of licenses by female jockeys. Louisville Courier Journal, Nov. 22, 1968 at 8B.

59. Shpritzer v. Lang, 32 Misc. 2d 693, 224 N.Y.S. 2d 105 (Sup. Ct. 1962).

60. For example, in Umpleby v. Dorsey, 39 Ohio Op. 2d 450, 227 N.E.2d 274 (1967), the Common Pleas Court stated at 451: "This distinction bears no relation to fact, and today is not even recognized by legal fiction. It is the essence of arbitrary discrimination and the antithesis of equal protection." See also Karczewski v. Baltimore & O. Ry., 274 F. Supp. 169, (N.D. Ill. 1967); Clem v. Brown, 32 Ohio Op. 2d 477, 207 N.E.2d 398, 401 (1965); Brown v. Glenside Lumber & Coal Co., 429 Pa. 601, 240 A.2d 822 (1968) (dissenting opinion).

denied a wife recovery because of the "many and obvious" reasons for the "practical and logical classification,"[62] but failed to elaborate.

Equal protection of the law implies that all litigants who are similarly situated may apply to courts for relief under like conditions, without discrimination, and with like protection. Sex, like age, race, and color, is easily identifiable and has been dubbed a "natural" classification; such differences may lead to instant discrimination, and the rationale used to single out such a group must be closely scrutinized. In the face of a changing social attitude toward women, differences in physical structure, the need to protect health and welfare, and the homemaker role are no longer sufficient defenses of a classification based upon sex.

While in the past male-dominated courts and legislatures justified restrictions on women by viewing special treatment as protective of motherhood and health,[63] modern social phenomena such as the working mother and family planning have played havoc with traditional notions of womanhood and propriety. The reversal of judicial attitude toward the "weaker sex" is ironic; instead of discriminating in order to protect women from the vicissitudes of a male world, the courts now face—as the current challenge of maximum working hours for women[64] well illustrates—the task of destroying such "protective" treatment in order to establish equality between the sexes under the fourteenth amendment.

The court in *Miskunas*[65] theorized that since only 34.4 per cent of wives are employed (as compared with 87.8 per cent of married men), the chances for double recovery would be too great in a wife's action for loss of consortium. Because a wife cannot recover for her own unpaid services, her husband could recover for loss of household services in his consortium action without fear of double recovery. Double recovery might result, however, if a wife were allowed to recover for loss of her husband's services, since those damages might be duplicated in the

61. Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied*, 386 U.S. 970 (1967).

62. *Id.* at 43, 406 S.W.2d at 168.

63. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Upholding a state statute which authorized the establishment of minimum wages for women and minors, the Court characterized its action as "protective" of a state policy which sought to alleviate the weaker bargaining position of women. An earlier example is Muller v. Oregon, 208 U.S. 412 (1908), where the Court upheld regulation of working hours for women. The "Brandeis brief" furnished the Court with data justifying special treatment for women. Also see note 58 *supra*.

64. Compulsory shorter working hours for women may now be a violation of the 1964 Federal Civil Rights Act, 78 Stat. 253 (1964), 42 U.S.C. § 2000(e) (1964). The Supreme Court has decided not to rule yet on this question, but has sent a case in which it arises back to the district judge. Mengelkoch v. Industrial Welfare Comm'n, 284 F. Supp. 956 (C.D. Cal. 1968). Compare Muller v. Oregon, 208 U.S. 412 (1908).

65. 399 F.2d 847, 850 (7th Cir. 1968).

husband's action for lost earnings.[66] On this basis the court concluded: "In view of the possibility of double recovery if the wife were given a consortium action, . . . this case involves a permissible classification rather than an impermissible discrimination."[67]

The court apparently deemed 34.4 per cent insignificant; but in fact, this figure reflects a modern change from rural to urban life which converted unpaid family services into paying jobs outside the home for a substantial number of married women.[68] It is difficult to determine how much greater than 34.4 per cent the figure must be in order to make the classification unreasonable. The loss of a wife's services, if she works outside the home, includes more than the traditional household tasks; her "services" to the family may in some instances be equal to or greater than the husband's. If a working husband may bring an action, a working wife should have the same right, since double recovery is no more likely in one case than the other. Equal treatment demands either abolishing the cause of action of both spouses or allowing a wife the same right of action as her husband. Some courts have exploded the "double recovery bogey"[69] by requiring husband and wife to bring a joint action,[70] or by subtracting any duplication in damages.[71] Furthermore, in a companion case to *Levy v. Louisiana*,[72] the Supreme Court has refused to uphold denial of a mother's cause of action for the wrongful death of her out-of-wedlock child despite the argument that availability of such suits might serve as an inducement to assert motherhood fraudulently in order to collect damages. The Court's averment that a burden of proof problem of this nature is preponderated by compelling

66. *Id.*

67. *Id.*

68. In 1900, five million women workers comprised eighteen per cent of the labor force in the United States. In 1965, twenty-four million women worked, making one out of every three workers a female. Most women who make up this figure are married. In 1962, more than sixty per cent of working women were married, compared with twenty-five per cent in 1920. In addition, eight out of ten women have paid employment outside of the home at some time during their lives. THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION, AMERICAN WOMEN 20-47, 84 (1965).

69. Dini v. Naiditch, 20 Ill. 2d 406, 427, 170 N.E.2d 881, 891 (1960).

70. When the suit of the physically injured spouse is tried with the joint action for injury to the marital relationship, the jury should be instructed . . . as to the particular matters for which compensation is to be made to the physically injured spouse in his or her separate action . . . and the matters to be considered only in fixing the damages in the joint action.

Deems v. Western Maryland Ry., 247 Md. 95, 114, 231 A.2d 514, 525 (1967).

71. "Any conceivable double recovery, however, can be obviated by deducting from the computation of damages in the consortium action any compensation given her husband in his action for the impairment of his ability to support." Dini v. Naiditch, 20 Ill. 2d 406, 427, 170 N.E.2d 881, 891 (1960).

72. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

social concern for intimate relational interests[73] would seem quite pertinent to the double recovery fear in consortium actions.

In addition, the distinction made by some courts between intentional and negligent injuries is puzzling. Courts which deny the wife an action for loss of consortium where her husband has been negligently injured allow the wife's action if the injury was intentional. Since the character of the injury does not alter the "threat" of double recovery, it is difficult to perceive how such a distinction alters the underlying classification issue.

Indiana's Constitution specifically provides that the legislature shall not grant to any citizen or class privileges which do not belong equally to all citizens, upon the same terms.[74] Although Indiana by statute does not specifically deny recovery to the wife for loss of consortium where her husband has been negligently injured, court decisions are to be regarded as actions of the state and are subject to attack on constitutional grounds.[75] Since Indiana courts have interpreted the Married Women's Act as not including a cause of action for loss of consortium where a husband's injury was occasioned by negligence, the State constitution would seem to be violated if the classification is invalid.

CONCLUSION

A reconsideration of the equal protection argument in consortium recovery must be made; blind adherence to precedent cannot suffice as the basis for denying recovery to a wife in a situation in which her spouse is invited to seek relief. Rather than rejecting the constitutional question, courts must examine past decisions which upheld the distinction and, forsaking outdated rationale, extend equal protection under the law to women in actions for loss of consortium arising out of negligent injuries to their spouses.

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73. See text at notes 48-50 *supra.*
74. IND. CONST. art. I, § 23.
75. Shelley v. Kraemer, 334 U.S. 1, 17 (1948).