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Louisiana's Alimony Provisions: A Move Toward Sexual Equality

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into evidence, the court assumed that the statement was *not* admissible in order to find that, even if it had been improperly introduced, it had been harmless error. This hesitancy, however, was overborne in *State v. Castillo*.[80] The *Castillo* court, with no reluctance, cited *Innis* and approved the admission of defendant's incriminating statement into evidence.

It is submitted that the majority's definition of "interrogation" in *Rhode Island v. Innis* leaves too many questions unanswered. The reader is left without knowing what "subtle compulsion" is or how and when it may be used. He is left confused concerning the rationale behind the fifth and sixth amendment dichotomy; it is unclear why two distinct tests are applied to essentially similar factual situations. No guidance is provided in the opinion as to what words or actions *will* meet the *Innis* test of "interrogation." This writer suggests that the dictates, reasoning, and purposes of *Miranda* would be served more effectively by adoption of the definition of interrogation offered by Justice Stevens in his dissenting opinion: "In my view any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question, whether or not it is punctuated by a question mark."[81] By focusing on the perceptions of the "average listener," Justice Stevens' definition makes a "reasonable man" of the trier of fact, rather than requiring that he determine what a reasonable *policeman* should know. Applying this test to the instant case, one perhaps would reach a different result from that reached by the majority, a result more consistent with the dictates of *Miranda*.

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LOUISIANA'S ALIMONY PROVISIONS: A MOVE TOWARD SEXUAL EQUALITY

In a divorce proceeding the trial court ordered the husband to pay alimony to his wife. He appealed, contending that Civil Code article 148, the basis for alimony pendente lite, was unnecessarily gender-based and, therefore, unconstitutional under article I, section 3 of the Louisiana Constitution and under section 1 of the fourteenth amendment to the United States Constitution. The First Circuit

80. 389 So. 2d 1307 (La. 1980).

81. 100 S. Ct. at 1694 (Stevens, J., dissenting).

Court of Appeal reversed the award and held that article 148 unconstitutionally discriminates on the basis of gender. *Smith v. Smith*, 382 So. 2d 972 (La. App. 1st Cir. 1980).

The United States Supreme Court has not always employed a uniform level of scrutiny in analyzing the constitutionality of state statutes containing gender-based classifications. Before 1971, gender-based classifications were upheld unless the legislation was "patently arbitrary" and bore no rational relation to a legitimate governmental interest.[1] In fact, the Supreme Court consistently deferred to gender-based statutes that provided for the moral, physical, and economic protection of women.[2] Unfortunately, many of these statutes either reinforced the stereotype of women in a dependent role in the traditional family scheme or placed economic constraints on women under the veil of protection.[3]

For example, in 1908 in *Muller v. Oregon*[4] the United States Supreme Court held constitutional a statute fixing a maximum number of working hours for women. Three years earlier in *Lochner v. New York*,[5] the Court had invalidated a statute setting a maximum number of hours for bakers. Notably, the defendant in *Muller* argued that *Lochner* was controlling, but the Court rejected the argument. The Court's justification for its decision in *Muller* was protection of the weaker sex.[6]

The Court's protective attitude continued for more than sixty years after *Muller*. In 1948 in *Goesart v. Cleary*[7] the constitutionality of a Michigan law forbidding any female, except the wife or daughter of a male properietor, from acting as a bartender was upheld. Michigan's purported justification for the gender-based discrimination was the desirable social objective of the moral protection of women. This decision, in effect, was a bar, under the guise of protection, to the entry of females into an occupation. Inconsistently with the alleged purpose of the Michigan law, women were permitted to serve as waitresses in these same establishments.[8] The decision indicated that a gender-based statute would be validated if

1. Frontiero v. Richardson, 411 U.S. 677, 683 (1973).
2. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
3. Goesart v. Cleary, 335 U.S. 464 (1948).
4. 208 U.S. 412 (1908).
5. 198 U.S. 45 (1905).
6. 208 U.S. at 421-23.
7. 335 U.S. 464 (1948).
8. *Id.* at 467. The statute was to protect against "moral and social problems" which may arise. But the decision was illogical, since it allowed women to work as waitresses (without the husband's or father's being owner) where women could be exposed to the same "hazards" faced by a female bartender.

there were some minimal "basis in reason" for the statute,[9] even though the Court recognized that the real desire behind the statute might be the "unchivalrous desire of male bartenders to try to monopolize the calling."[10]

In *Hoyt v. Florida*[11] in 1961, the Supreme Court upheld a Florida statute which provided that no woman should be taken for jury service unless she volunteered. The Court took the view that, as housewife, the "woman is still regarded as the center of home and family life."[12]

These cases show the length to which the Court would go to validate gender-based legislation in furtherance of a policy of protecting the female sex from the demands of the marketplace and from moral turpitude. In fact, "the Supreme Court did not invalidate a single statute on the ground of sex discrimination until 1971."[13] In that year a movement from the traditional rational relation requirement occurred in *Reed v. Reed*.[14] In *Reed* the Court began to increase the level of scrutiny employed in reviewing gender-based statutes. An Idaho statute giving preference to men over women in the same entitlement class in appointments as administrators of estates was held to violate the Equal Protection Clause.[15] In the words of the Court, giving "a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."[16] Although the state purpose of administrative convenience could have survived the rational relation test, the statute was not upheld. In equal protection analysis of gender-based classifications, *Reed* represented a dramatic shift to a higher level of scrutiny, but the

9. *Id.* at 466-67.

10. *Id.* at 467.

11. 368 U.S. 57 (1961).

12. *Id.* at 62. This is consistent with the language of the Court some eighty-nine years earlier. "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

13. *See* Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr*, 30 SYRACUSE L. REV. 639, 645 (1979).

14. 404 U.S. 71 (1971).

15. *Id.* For a discussion of the evolution of the intermediate scrutiny standard *see* Hull, note 13 *supra*; Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); Note, *Alimony Awards Under Middle-Tier Equal Protection Scrutiny*, 59 NEB. L. REV. 172 (1980).

16. 404 U.S. at 76-77. The Court had modified its test to require that a state have a substantial interest when legislating solely on the basis of gender.

decision did not go so far as to make gender a "suspect" classification, such as race,[17] fundamental rights,[18] alienage,[19] or national origin.[20]

In *Frontiero v. Richardson*[21] the Supreme Court continued to examine gender-based statutes with the higher scrutiny employed in *Reed*. The Court invalidated a statute providing that spouses of male members of the uniformed services be classified as dependents (for purposes of allowances and medical and dental benefits), but requiring female members to prove that they provided over one-half of family support for their spouses to obtain the same dependency status.[22] As in *Reed*, administrative convenience was held insufficient to justify the gender-based classification.[23]

The intermediate level of scrutiny introduced in *Reed* was more clearly articulated in *Craig v. Boren*.[24] A statute permitting females eighteen years of age and older to purchase 3.2% beer, while prohibiting males from purchasing until age twenty-one, was held to violate the Equal Protection Clause. The Court identified two steps in the new test. First, the legislation must serve an important governmental objective; and, second, the classification must be substantially related to the achievement of that objective.[25] In *Craig*, although an important state interest existed, *viz.*, the enhancement of traffic safety,[26] the evidence produced was insufficient to prove that the gender-based distinction achieved that objective.[27]

Several cases have given substance to the term "important governmental objective." In *Kahn v. Shevin*[28] the Court upheld a

17. Loving v. Virginia, 388 U.S. 1 (1967).

18. Griswold v. Connecticut, 381 U.S. 479 (1965).

19. Graham v. Richardson, 403 U.S. 365, 372 (1971).

20. Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

21. 411 U.S. 677 (1973).

22. *Id.*

23. 411 U.S. at 690-91. "Thus in *Reed*, the objectives of 'reducing the workload on probate courts' and 'avoiding intrafamily controversy' were deemed of insufficient importance to sustain use of an overt gender criterion. . . . Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender based classifications." Craig v. Boren, 429 U.S. 190, 197-98 (1976), *quoting* Reed v. Reed, 404 U.S. 71, 76-77 (1971).

24. 429 U.S. 190 (1976).

25. In articulating the intermediate scrutiny standard, the *Craig* Court stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

26. *Id.* at 199.

27. *Id.* at 200-04.

28. 416 U.S. 351 (1974).

Florida statute providing a property tax exemption for widows but not for widowers. The law was designed to cushion the financial impact of spousal loss "upon the sex for which that loss imposes a disproportionately heavy burden."[29] This gender-based discrimination was allowed in order to compensate women for their economic disadvantage. In *Schlesinger v. Ballard*[30] gender-based discrimination was allowed to mitigate lack of opportunity. The Supreme Court reviewed a Navy regulation which established lower standards for women for discharge resulting from lack of promotion. The Court found that the regulation properly compensated for the lack of opportunity that women faced.[31] In *Califano v. Webster*[32] the Court identified rectification of past economic discrimination as an "important" purpose. In *Califano* the Court sanctioned a Social Security Act provision which allowed women to calculate benefits on a more favorable basis than men in order to compensate for economic disabilities suffered by women.[33] These cases illustrate the type of state interest which the Supreme Court considers as a governmental objective "important" enough to uphold a statute which classifies solely on the basis of gender.

Since *Craig*, the appropriate standard of review for statutes containing gender-based classifications has been intermediate scrutiny. The challenged legislation, therefore, must bear a close and substantial relationship to an important governmental objective.

The 1979 United States Supreme Court decision in *Orr v. Orr*[34] illustrates the application of the intermediate scrutiny test to an Alabama statute providing alimony to wives only.[35] The Supreme Court noted three state interests which could be advanced as possible justification for the gender bias of the Alabama law. First, the state may desire to allocate responsibility within the family by establishing a dependent role for the wife. The Court did not

29. *Id.* at 355.

30. 419 U.S. 498 (1975).

31. *Id.* at 508. The Court found that "female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Id.*

32. 430 U.S. 313 (1977).

33. *Id.* at 317-20. "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." *Id.* at 317.

34. 440 U.S. 268 (1979).

35. In authorizing the imposition of alimony obligations on husbands but not wives, the Alabama statutory scheme "'provides that different treatment be accorded . . . on the basis of . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.'" *Id.* at 278-79, *quoting* Reed v. Reed, 404 U.S. 71, 75 (1971). "The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny." 440 U.S. at 279.

recognize the legitimacy of this interest and stated: "[T]he 'old notion' that 'generally it is the man's primary responsibility to provide a home and its essentials' can no longer justify a statute that discriminates on the basis of gender."[36]

The second state objective recognized by the Court was the desire that financial assistance be provided to needy spouses with the assumption that the female will always be the needy spouse. Although provision for needy spouses was an important state objective consistent with *Kahn*, *Ballard*, and *Webster*,[37] a question arose as to whether the gender-based classification was substantially related to the achievement of that objective.[38] In Alabama a provision for individual case hearings for the examination of the financial circumstances of both spouses eliminated justification of the use of sex as a proxy for need.[39] The provision in question in *Orr* was found not to meet the objective of providing for the financial protection of needy spouses, since no alimony benefits were provided to needy males.[40]

The Court also considered a third state objective—correction for past discrimination. The relevant question was whether past discrimination had left the woman "'*not* similarly situated with respect to opportunities' in that sphere."[41] This question was also resolved by the provision for individual hearings. Financial aid could be provided to the needy spouse unable to care financially for himself or herself. A gender-neutral statute would provide for the husband who was unable to support himself, as well as for the wife.[42] After *Orr*, when a state's compensatory and ameliorative purposes can be served as well by a gender-neutral classification as by a

36. 440 U.S. at 279-80, *quoting* Stanton v. Stanton, 421 U.S. 7, 10 (1975). "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15.

37. See text at notes 28-33, *supra*.

38. *Reed* "has provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification." 429 U.S. 190, 198 (1976). *Reed* would require that the gender-based categorization rest "'upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" 404 U.S. at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

39. 440 U.S. at 281.

40. *Id.*

41. *Id.*, *quoting* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

42. The Court noted that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored." *Id.* at 283 (citation omitted).

gender-based grouping, the state "cannot be permitted to classify on the basis of sex."[43]

The wording of Louisiana's alimony provisions prior to 1979 was similar to that of the Alabama statute examined in *Orr*. Civil Code article 148 provided for alimony pendente lite. Before the 1979 amendments the article read:

> If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband.[44]

In Louisiana, article 148, in conjunction with article 120, provides the statutory basis for alimony pendente lite.[45] The purpose of article 148 is "the enforcement of the husband's obligation of support of his wife as it exists under Article 120 of the Civil Code, which continues during the pendency of a suit for separation from bed and board or for divorce. . . ."[46] Article 120 requires the husband to provide his wife with whatever is needed for the "conveniences of life," and article 148 is provided to enforce this obligation of support.

Before the *Orr* decision the Louisiana Supreme Court applied the traditional rational relation test to alimony cases.[47] In the 1976 case of *Williams v. Williams*,[48] the court held that the gender-based wording of article 148 did not "discriminate arbitrarily, capriciously, or unreasonably against males."[49] The court reasoned that the legislature enacted article 148 to compensate for the husband's control of the community as head and master.[50] Similarly, the court had

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43. *Id.*

44. LA. CIV. CODE art. 148 (as it appeared prior to 1979 La. Acts, No. 72).

45. LA. CIV. CODE art. 120 states: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."

46. McMath v. Masters, 198 So. 2d 734, 737 (La. App. 3d Cir. 1967), *quoting* Smith v. Smith, 217 La. 646, 652, 47 So. 2d 32, 34 (1950). *See* Murphy v. Murphy, 229 La. 849, 87 So. 2d 4 (1956); Scott v. Scott, 174 So. 2d 193 (La. App. 2d Cir. 1965).

47. *See* Comment, *Alimony and Equal Protection: A Search for Rational Relationships*, 22 LOY. L. REV. 1036 (1976); Note, *Alimony Pendente Lite: One-Way Street Under Louisiana Civil Code Article 148*, 22 LOY. L. REV. 1086 (1976).

48. 331 So. 2d 438 (La. 1976).

49. *Id.* at 441.

50. *Id.* at 441. The alimony pendente lite provision would compensate for the fact that in Louisiana the wife did not have control of the property; and the provision would correct the fact that upon separation the wife did not have access to income with which to support herself.

upheld the gender-based reading of Louisiana's permanent alimony provision.[51]

The reasoning of the majority in *Williams* was subject to criticism, since Louisiana courts "have consistently required husbands to pay alimony pendente lite long after the community has been partitioned and the wife is in complete control of her portion of the community."[52] Accordingly, there was "no relationship between the wife's right to claim alimony pendente lite and her inability to control community funds."[53] By 1979 the *Williams* decision was open to challenge on additional grounds. The head and master rule had been repealed because of its probable unconstitutionality in light of the *Orr* decision.[54] And, most importantly, the Louisiana Supreme Court had decided to adopt the intermediate scrutiny standards when considering statutes that classify solely on the basis of gender.

After the United States Supreme Court declared the Alabama alimony statute unconstitutional,[55] the Louisiana Supreme Court followed by declaring unconstitutional article 160, Louisiana's permanent alimony provision.[56] This article, which provided alimony for wives only, was declared unconstitutional as violative of the Equal Protection Clause.[57] Article 160, as amended in 1979, contains no gender bias.[58]

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51. LA. CIV. CODE art. 160 (as it appeared prior to 1979 La. Acts, No. 72) stated: "If the wife who has obtained the divorce has not sufficient means for her maintenance, the Court may allow her in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income . . . ." The Louisiana Supreme Court had upheld the constitutionality of article 160 in *Loyacano v. Loyacano*, 358 So. 2d 304 (La. 1978). After *Orr* the case was remanded by the United States Supreme Court to be considered in light of the *Orr* decision. *See* Loyacano v. Loyacano, 375 So. 2d 1314 (La. 1979). *See* Lovell v. Lovell, 378 So. 2d 418 (La. 1979) (Louisiana Supreme Court found that this wording of article 160 was unconstitutional before amended).

52. 331 So. 2d at 442.

53. *Id.*

54. 1979 La. Acts, No. 709. *See* Bilbe, *Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime*, 19 LOY. L. REV. 373 (1973).

55. Orr v. Orr, 440 U.S. 268 (1979).

56. Lovell v. Lovell, 378 So. 2d 418 (La. 1979). The *Lovell* decision "establishes a new principle of law by overruling clear past precedent . . . ." *Id.* at 422. This ruling would have created a gap in the law, but had no practical effect in terms of absence of a permanent alimony provision, since article 160 had been amended by Act 72 of 1979 to correct for gender bias. Thus, the revised article 160 became effective, filling the gap in the law. The *Lovell* court stated that the decision would not be applied retroactively. *Id.*

57. *Id.* at 420-21.

58. LA. CIV. CODE art. 160 presently provides: "When a spouse has not been at fault and has not sufficient means for support, the court may allow that spouse, out of the property and earnings of the other spouse, alimony which shall not exceed one-third of his or her income."

In *Smith v. Smith*[59] the constitutionality of article 148 was again challenged. The *Smith* court, applying the intermediate scrutiny test, declared article 148 unconstitutional and overruled *Williams*.[60] The first circuit also considered the husband's obligation of support. Until this decision article 120 was used to determine the level of support due with respect to alimony pendente lite. The *Smith* decision broke with prior jurisprudence and instead applied article 119 as the basis of the husband's obligation to his wife.[61] Article 119 establishes the obligation of each spouse to provide the other with necessities,[62] whereas article 120 requires the husband alone to provide conveniences to his wife.[63] Clearly, the term "conveniences" represents a higher level of support than "necessities."

The *Smith* court's decision to employ article 119's provision for mutual support was consistent with the constitutional standard applicable under the intermediate scrutiny test. "Article 119 evidences a legislative intent that . . . either spouse must come to the assistance of the other, if the other is in need . . . ."[64]

In *Smith* the first circuit recognized the constitutional difficulties with applying article 120 to males only. However, as other circuits are free to apply article 120 to determine the male's obligation of support and article 119 to determine the female's obligation, males could still be required to provide a higher level of support than females. If other circuits continue to apply article 120 through article 148, then the 1979 revision of article 148 will be meaningless, because alimony pendente lite will remain gender-based.

The *Smith* decision makes it clear that the focal point of the question of the constitutionality of alimony pendente lite in Loui-

59. 382 So. 2d 972 (1980).

60. *Id.* at 974. LA. CIV. CODE art. 148 presently reads: "If the spouse has not a sufficient income for maintenance pending suit for separation from bed and board or for divorce, the judge may allow the claimant spouse, whether plaintiff or defendant, a sum for that spouse's support, proportioned to the needs of the claimant spouse and the means of the other spouse." Interestingly, this constitutional challenge raised in *Smith* came after the Louisiana Legislature had revised article 148, but before the revision became effective. Thus the first circuit considered article 148 in its pre-amendment form.

61. 382 So. 2d at 974. The court realized that a gap in the law was created by holding article 148 unconstitutional, since there were no other specific provisions for alimony pendente lite. However, the court referred to Civil Code article 21 as a mechanism for filling this gap, because it allows the judge to decide according to equity when there is no express law. LA. CIV. CODE art. 21.

62. LA. CIV. CODE art. 119 states: "The husband and wife owe to each other mutually, fidelity, support and assistance." The court employed article 119 to determine the level of support due by the husband to his wife.

63. *See* note 45, *supra*.

64. 382 So. 2d at 974.

siana rests on the constitutionality of article 120. To meet the requirements of the intermediate scrutiny test, article 120 must serve an important state interest, and the statute's gender bias must relate substantially to that interest. The identifiable state interests which could be advanced to support this gender-based classification are identical to those presented in *Orr*: 1) to keep the female in a dependent role, 2) to provide aid to the needy spouse with gender as a proxy for needy, or 3) to compensate for past discrimination.

Regarding the first enumerated interest, the notion that "'generally it is the man's primary responsibility to provide a home and its essentials'" can no longer justify a statute that discriminates on the basis of gender.[65] Since 1971, the United States Supreme Court consistently has rejected this objective as an "important" state interest. Secondly, although women *may* be more likely to be without "conveniences," so that article 120 would be providing for the "needy spouse" in most cases, gender is an inappropriate proxy for need.[66] The financial circumstances of individuals can be considered in individual hearings without additional administrative cost, eliminating any justification for gender as a proxy. Third, correction for past discrimination, if a spouse was not similarly situated with respect to opportunities, can also be resolved by individual hearings. Given that Louisiana provides for individual hearings, no statutory necessity exists for requiring males to pay a higher level of support than females pay. In a gender-neutral reading, alimony can be awarded on the basis of actual necessity, whether the spouse be a needy male or a needy female.

The *Orr* Court concluded that when a state's purposes are served as well by a gender-neutral classification, the state will not be permitted to classify on the basis of gender.[67] "A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."[68] Application of the rationale of the *Orr* Court to Louisiana's alimony provisions suggests that article 120 is unconstitutional in its gender-based requirement of a higher obligation of support due by husbands.

Article 120 also can be constitutionally challenged on its specification of a duty to follow. Article 120 requires that "the wife is bound to live with her husband and to follow him wherever he

65. Orr v. Orr, 440 U.S. 268, 279-80 (1980), *quoting* Stanton v. Stanton, 421 U.S. 7, 10 (1975).

66. 440 U.S. at 281.

67. *Id.* at 282-83.

68. *Id.*

chooses to reside."[69] There is no reciprocal requirement for the male. This element of article 120 is relevant in suits for separation from bed and board. Should the wife leave and the husband refuse to follow, the wife opens herself to a fault judgment on the ground of abandonment.[70] The only apparent state interest is the desire to promote the traditional family, but the only person who has the burden of maintaining the traditional family scheme is the woman; the article allows the husband essentially total flexibility and control in determining the family's domicile. *Orr* is expressly critical of this type of gender-based provision.[71]

The Louisiana Supreme Court's decision in *Craig v. Craig*[72] also has implications for the constitutionality of article 120. The *Craig* court held article 39 unconstitutional[73] as it applies to the venue requirements of Code of Civil Procedure article 3941,[74] because it arbitrarily, capriciously, and unreasonably discriminates on the basis of sex[75] insofar as article 39 enables the husband but not the wife to establish a separate domicile. The effect of *Craig* is to give the wife the right to leave the matrimonial domicile in order to get a separation or divorce. Prior to *Craig*, in cases in which the husband was not at fault, the wife could not establish a separate domicile apart from her husband in order to bring an action for separation from bed and board. The wife's domicile was considered to be the same as her husband's even when the wife chose an independent household. Thus article 39, prior to *Craig*, reflected the notion of a gender-based duty to follow. By declaring article 39 unconstitutional, the court recognized the difficulty of requiring a gender-based duty to

69. LA. CIV. CODE art. 120. *See* note 45, *supra*.

70. In Louisiana, the wife is presently allowed to leave the matrimonial domicile without being subject to a fault judgment under Louisiana Civil Code article 138(5) in cases where she has "lawful cause." "Lawful cause" has been interpreted to be broader than requiring the wife to have grounds to seek a fault judgment for separation under article 138 or divorce under article 139. Sykes v. Sykes, 321 So. 2d 805 (La. App. 4th Cir. 1975). Of course, the wife could not obtain a judgment for separation or divorce unless she proves fault under article 138 or 139 or she meets the requirements of R.S. 9:301.

71. 440 U.S. at 280.

72. 365 So. 2d 1298 (La. 1978).

73. LA. CIV. CODE art. 39 states: "A married woman has no other domicile than that of her husband; the domicile of a minor not emancipated is that of his father, mother, or tutor; a person of full age, under interdiction, has his domicile with his curator."

74. LA. CODE CIV. P. art. 3941 states: "An action for an annulment of marriage, for a separation from bed and board, or for a divorce shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile."

75. 365 So. 2d at 1300-01.

follow in cases where the wife seeks a separation from the husband who is not at fault.[76]

Thus article 120 can be challenged constitutionally on two grounds: first, Louisiana's provision for individual case hearings for examining the financial circumstances of the spouses eliminates any need to have a generalized statute which requires a higher level of support from husbands. No substantial relation to the "important" objective of providing for the needy spouse exists by utilizing this procedure in the alimony context. Second, by requiring that wives alone have a duty to follow, article 120 establishes a gender-based classification with no apparent "important" state interest to justify this differential treatment.

Louisiana's alimony pendente lite provision can be reconciled in any one of three ways. First, Louisiana courts could declare article 120 unconstitutional and follow the *Smith* court in applying article 119 to determine the support due by one spouse or the other without regard to gender. Second, the courts could rule that the revisions to article 148 impliedly amend article 120 to define a level of support due by both spouses. However, this approach would be contrary to the express wording[77] of the article and would not

76. 365 So. 2d at 1298. In *Craig*, article 39 was held unconstitutional "insofar as it enables the husband, but not the wife, to establish a separate domicile and there bring an action for . . . separation . . . or divorce." *Id.* at 1301. The court clearly restricted its decision, such that article 39 was only unconstitutional as it applied to article 3941 of the Code of Civil Procedure. *Id.* at 1301 n.6. Despite this restriction, the decision narrows the duty to follow to a degree. Admittedly most of the legislative notion is intact after *Craig*, but the decision marks an erosion of the doctrine and may presage full judicial disapproval of the gender-based duty to follow.

77. In considering gender-based statutes, two judicial approaches are available to correct the constitutional difficulties raised in equal protection analysis. Equal protection requires that there be no discrimination. "Nothing in the *constitution* compels one result over the other." *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Louisiana Constitutional Law*, 39 LA. L. REV. 807, 810 (1979) (emphasis added). Discrimination may be removed by extending the statute to the excluded gender or by invalidating the statute, leaving a gap in the law.

Extending the statute to the excluded class would be consistent with the legislative intent of providing alimony to the needy spouse. Refusal to amend impliedly the gender-based article is "more disrespectful to the legislature" than refusal to apply the statute. *Id.* at 811. Further, most of the cases before the United States Supreme Court have extended the benefit to the deprived class rather than invalidate the statute. *Id.*

The Civil Code contains articles on interpretation that would support invalidation of gender-based statutes that are found unconstitutional. Louisiana Civil Code article 13 declares that when a law "is clear and free from all ambiguity, the letter of it is not to be disregarded . . . ." The wording of article 120 is clear. The husband is to provide conveniences to his wife. No reciprocal wording exists in article 120. Moreover, according to Civil Code article 23, when new laws contain "provisions contrary to or irreconcilable with those of the former law," then the former law is impliedly *repealed*. Thus,

resolve the problem of requiring the wife to "follow" the husband; and enforcement of this requirement on a non-gender basis applicable to both parties would create the absurdity of each spouse's having to follow the other.[78] Moreover, the legislature has not revised the statute. By holding that an implied amending has occurred through the enactment of article 148, the court would circumvent the legislative function.[79] The third alternative is for the legislature to amend article 120 should the legislators determine that "conveniences," rather than "necessities," be provided during separation. The wording could require either spouse to provide to the other whatever is required for the conveniences of life in proportion to his or her means and condition. With respect to the "duty to follow," the article could be revised to require each spouse to receive the other without any duty to follow.

The *Smith* court declared Louisiana's gender-based alimony provision unconstitutional. Breaking with prior jurisprudence, the first circuit applied article 119 rather than article 120 to determine the duty of support owed by a spouse for purposes of alimony pendente lite. The reciprocal obligation owed by the spouses in article 119 is constitutionally sound in light of the *Orr* decision. By contrast, the constitutionality of article 120 is open to question. The application of article 120 through article 148 weakens the structure of Louisiana's alimony provisions, and the application of article 120 to fault judgments conflicts potentially with Louisiana's provision for separation from bed and board on the ground of abandonment. Other Louisiana courts should follow the first circuit and apply article 119 to provide alimony pendente lite until the question of the constitutionality of article 120 is resolved. Further legislative revision or judicial action will be required to establish sexual equality in Louisiana's alimony scheme.

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if the contrary part of article 120 is impliedly repealed, then it cannot become broader to be more inclusive than was originally contemplated by the legislature. LA. CIV. CODE art. 23.

78. Here the husband could move to one town, requiring the wife to follow. Had the wife not wanted originally to move, she could then move back, requiring the husband to follow, and so on, *ad absurdum*.

79. In *Loyacano*, Justice Calogero stated: "I would not usurp the legislative function by grafting onto our law a constitutionally permissible alimony provision. I believe that function should and will be performed by the legislature." Loyacano v. Loyacano, 358 So. 2d at 317 (La. 1978) (Calogero, J., dissenting). In his dissent Justice Calogero was addressing the constitutionality of article 160 before its revision.