Nebraska Law Review

Volume 48 | Issue 1 Article 6

1968

Constitutional Aspects of Sex-Based Discrimination in American Law

Leo Kanowitz
University of New Mexico

CONSTITUTIONAL ASPECTS OF SEX-BASED DISCRIMINATION IN AMERICAN LAW

*Leo Kanowitz**†

> Our cases hold that people who stand in the same relationship to their government cannot be treated differently by that government. To do so . . . would be to treat them as if they were, somehow, less than people. MR. JUSTICE FORTAS, dissenting in *Avery v. Midland County*, 390 U.S. 474, 498, n. 2 (1968).
>
> The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. MR. JUSTICE FRANKFURTER in *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

Earlier articles in this series have demonstrated that American law, whether in the shape of legislation, court decisions or administrative action, continues in many instances to accord men and women different treatment solely because of sex.[1] Such differences in treatment have often been challenged in the courts as alleged violations of state or federal constitutional provisions. But, for the most part, these constitutional attacks have met with failure, leading to, among other things, persistent pressure for a federal constitutional amendment that would specifically prohibit legal discrimination based on sex (the so-called "equal rights" amendment).

In recent years—no doubt partly due to a general rekindling of interest in the status of women in society and the emergence of positive corrective legislation in the field—constitutional challenges of laws that discriminate on grounds of sex have increased. There are many indications in fact that reliance upon existing constitutional provisions as a basis for attacking many expressions of sex-based legal discrimination is no longer as fruitless an approach as it may have been in the past.

---

* Professor of Law, University of New Mexico. A.B., 1947, College of the City of New York, J.D., 1960, University of California, Berkeley; LL.M., 1967, Columbia University.

 This article is adapted from a chapter of a forthcoming book by Professor Kanowitz, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (to be published in the Spring of 1969 by The University of New Mexico Press).

[1] *See* Kanowitz, *Sex-Based Discrimination in American Law I: Law and the Single Girl*, 11 ST. LOUIS U.L.J. 293 (1967) [hereinafter cited as Kanowitz, *Law and the Single Girl*]; Kanowitz, *Sex-Based Discrimination in American Law II: Law and the Married Woman*, 12 ST. LOUIS U.L.J. 3 (1967) [hereinafter cited as Kanowitz, *Law and the Married Woman*]; 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) [hereinafter cited as Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*].

The purposes of the present article are, therefore, three: (1) To describe and analyze leading decisions that have disposed of constitutional attacks upon laws that discriminate on the basis of sex; (2) To discern the current developments in this area, including a forecast of the shape of things to come; and (3) To consider the desirability *vel non* of the proposed equal rights amendment.

OLD AND NEW CASES

In reviewing judicial decisions dealing with constitutional attacks upon sex-discriminatory laws, separate consideration of cases decided before and after 1963 seems advisable. For in that year, the Committee on Civil and Political Rights of the President's Commission on the Status of Women published its report which included the following recommendation:

> Notwithstanding doubts generated by some earlier decisions, the Committee believes [the]principle of equality [of rights under the law for all persons, male or female,] is implicit in the 5th and 14th amendments to the United States Constitution which guarantee to all persons due process and equal protection of the laws without arbitrary discrimination. It is confident, in the light of recent developments, that they will be interpreted by the courts today to give full recognition to this principle.
>
> The Committee... urges interested groups to give high priority to uncovering and challenging by court action [existing] discriminatory laws and practices....[2]

Since 1963, the increasing resort to constitutional challenge of a variety of sex-based discriminatory laws, many not having been challenged on constitutional grounds before, suggests that the committee's exhortation may have been heeded by interested groups and persons. The enactment in 1963 of the Federal Equal Pay Act and in 1964 of a prohibition against sex discrimination in employment in Title VII of the 1964 Civil Rights Act may also have stimulated attorneys and clients to consider constitutional attacks on a broad range of sex-based discriminatory laws. Finally, unlike the situation in prior years, a growing number of post-1963 decisions have either sustained such constitutional challenges or have included vigorous dissenting opinions urging that they should be sustained.

PRE-1963 CASES

Looking first, then, at the cases decided before 1963, we find that as a general rule differences in the legal treatment of the sexes had

---

[2] REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 36-37 (1963) [hereinafter cited as CCPR].

for many years survived a variety of challenges,[3] invoking the privileges and immunities clause,[4] the equal protection clause[5] and the due process clause[6] of the United States Constitution.

Thus, it had been held that a statute requiring a husband to consent to a wife's will, depriving him of more than two-thirds of her estate, did not violate the equal protection guarantee though the husband could make such disposition without the wife's consent;[7] that a law providing that only resident voters could protest the annexation of their property by a municipality was consistent with the equal protection guarantee though women, not privileged to vote at the time, could not protest such annexation;[8] that, prior to the adoption of the ninteenth amendment, since the right of suffrage was not one of the privileges of United States citizenship, a state could deny women the right to vote;[9] and that the states could constitutionally prevent women from selling intoxicating beverages[10] or from serving as jurors.[11] Even a state constitutional provision guaranteeing to "both male and female citizens" the equal enjoyment of "all civil, political and religious rights and privileges"[12] has been held not to prohibit a road poll tax imposed on men only, since sex-based classification had "always been made . . . and unless prohibited in express terms in the Constitution . . . is a

---

[3] Other discussions of the constitutional aspects of sex-based legal discrimination appear in Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723 (1935); Note, *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691 (1950); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 778-88 (1965); Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 235-42 (1965) [hereinafter cited as Murray and Eastwood].

[4] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art IV, § 2. *See also* U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

[5] "... [nor shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[6] "... [nor shall any State] deprive any person of life, liberty, or property, without due process of law...." *Id.; see also* U.S. CONST. amend. V. "...nor [shall any person] be deprived of life, liberty, or property, without due process of law...."

[7] In re Mahaffay's Estate, 79 Mont. 10, 254 P. 875 (1927).

[8] Carrithers v. City of Shelbyville, 126 Ky. 769, 104 S.W. 744 (1907).

[9] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[10] People v. Jemnez, 49 Cal. App. 2d 739, 121 P.2d 543 (1942); *In re* Carragher, 149 Iowa 225, 128 N.W. 352 (1910).

[11] Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931), *cert. denied*, 284 U.S. 684 (1932).

[12] UTAH CONST. art. IV, § 1.

natural and proper one to make."[13] Nor has a state constitutional command that "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession" been sufficient to prevent the state from barring a woman from "mixing" drinks in an establishment where she is neither the on-sale licensee nor his wife.[14]

The underlying social and legal attitudes of the courts in these cases are perhaps best illustrated by the concurring opinion of Mr. Justice Bradley in *Bradwell v. State*,[15] a United States Supreme Court case holding that women could constitutionally be denied a license to practice law on the mere grounds of their sex. In Justice Bradley's view:

> 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. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.... The para-

---

[13] Salt Lake City v. Wilson, 46 Utah 60, 69, 148 P. 1104, 1107 (1915). Only rarely in the past have some courts been moved to hold that a sex-based legal discrimination violated constitutional principles. Thus, though the principle of sex-based inequality of punishment for the same or similar crimes had been frequently sustained, (*see, e.g.*, *Ex parte* Gosselin, 141 Me. 412, 44 A.2d 882 (1945); *Ex parte* Brady, 116 Ohio St. 512, 157 N.E. 69 (1927); Platt v. Commonwealth, 256 Mass. 539, 152 N.E. 914 (1926); State v. Heitman, 105 Kan. 139, 181 P. 630 (1919), *Ex parte* Dunkerton, 104 Kan. 481, 179 P. 347 (1919)), the Indiana Supreme Court, as long ago as 1913, held as violative of the equal protection guarantee a statute prescribing different treatment for males and females *acquitted* of crime on the ground of insanity. Morgan v. State, 179 Ind. 300, 101 N.E. 6 (1913).

[14] People v. Jemnez, 49 Cal. App. 2d. 739, 121 P.2d 543 (1942); *cf.* Hargens v. Alcoholic Beverage Control App. Bd., — Cal. App. 2d —, — P.2d — 69 Cal. Rptr. 868 (1968). *But see* People v. Gardner, *reported at* 53 L.C. § 9015, wherein the Los Angeles Municipal Court, affirming a conviction on the basis of judicial precedents, at the same time expressed its view that the restriction on female bartenders was unconstitutional and urged defense counsel to perfect an appeal in the case. But in 1968, the California legislature adopted A.B. 1749 (Ch. 1144) which permits female employees to dispense beer or wine behind a bar of a licensee operating a bona fide public eating place, licensed only with an on-sale beer and wine license.

[15] 83 U.S. (16 Wall.) 130 (1872). The court also invoked the common law contractual disabilities of married women and the difficulties clients might have in enforcing contracts with a married woman attorney as an additional reason for upholding the State Court's barring of women from the practice of law.

> mount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[16]

Such candid expressions of belief in a divinely ordained order of things in which, when all is said and done, a woman's place was in the home, were rare, however, in constitutional litigation. But unfortunately for the later history of sex-based discriminatory laws, the 1908 decision of the United States Supreme Court in *Muller v. Oregon*,[17] and particularly some language in that case that was unnecessary to the decision, has often been invoked by the courts in upholding a wide variety of such laws.

The *Muller* case, perhaps known best for the introduction of the "Brandeis brief," concerned the validity of Oregon's law limiting the hours of work for female factory employees to ten a day. That law was challenged, by an employer who had been convicted of violating it, as contravening the due process and equal protection guarantees of the fourteenth amendment. In response to that attack, the Supreme Court first approved its earlier decision in *Lochner v. New York*[18] invalidating a New York law—which had provided that no worker, male or female, could be required or permitted to work in bakeries more than sixty hours in a week or ten in a day—on the ground that that law was not, "as to men a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal Constitution."[19]

In *Muller*, however, the Oregon statute, which was similar to the New York law in most respects except that it applied to female workers only, was upheld because of the discerned differences between the sexes. In the court's words:

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capa-

---

[16] *Id.* at 141-42. *See also In re* Lockwood, 154 U.S. 116 (1894) reaffirming the principle of the *Bradwell* case that the right to practice law in the State courts was not a privilege or immunity of a citizen of the United States and that a State court could construe its statutes to determine whether a woman was entitled to be admitted to practice law in that State. There is no indication that the equal protection clause was invoked in either case—although, given the Court's view on the role of women in society, it is likely that an argument based upon that clause would have been equally unsuccessful. *See* discussion of Muller v. Oregon on pp. 135-38 *infra*.

[17] 208 U.S. 412 (1908).

[18] 198 U.S. 45 (1905).

[19] 208 U.S. 412, 419 (1908).

> city for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. *This difference justifies a difference in legislation* and upholds that which is designed to compensate for some of the burdens which rest upon her.[20]

As suggested elsewhere in this article, there is a serious question whether the *Muller* case would be decided today in the same way. New constitutional standards that have since been evolved to test, for equal protection and/or due process purposes, a statutory abridgment of "basic" civil rights would perhaps require, for a *Muller*-type statute to survive today, a greater justification for the interference with the "basic" right to work than the Court found sufficient in that case. Indeed, it is possible that where they apply to women only, such statutes may in the future be required to be extended to men either by the Supreme Court itself, under the principles discussed below on pages 168 to 174, or by the Equal Employment Opportunity Commission, where Title VII of the 1964 Civil Rights Act applies.

But for the time being at least, *Muller* represents "good law." Aside from its holding, however, the case is of special importance for some language it contains. The Court in *Muller* simply could not resist giving expression to some old-fashioned male supremacist notions. While rising to a greater level of sophistication than Mr. Justice Bradley's observations in the *Bradwell* case, the words of Mr. Justice Brewer in *Muller v. Oregon* have continued to plague later constitutional litigation over a broad range of sex-based discriminatory laws. As he saw it:

> [H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved.... Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.... *Differ-*

---

[20] *Id.* at 422-23 (emphasis added). In the employment field, a number of State laws enacted in the early part of this century provided special protection to women, in recognition of the differences in the physical capacities of the sexes and of the general weaker bargaining position of women in the labor market. Here too, the Supreme Court has upheld such laws on the general ground that sex is a reasonable basis for classification, although in each instance factors other than the mere sex of the protected employees were present. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Radice v. New York, 264 U.S. 292 (1924); Bosley v. McLaughlin, 236 U.S. 385 (1915).

> *entiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.* It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection....[21]

From this language has been extracted the principle that "sex is a valid basis for classification," a principle that is often repeated mechanically without regard to the purposes of the statute in question or the reasonableness of the relationship between that purpose and the sex-based classification. The subsequent reliance in judicial decisions upon the *Muller* language is a classic example of the misuse of precedent, of later courts being mesmerized by what an earlier court had *said* rather than what it had *done*. For though *Muller* was concerned only with a protective labor statute which took account of the general physical differences between the sexes, it has been cited, as Murray and Eastwood point out, in cases upholding the exclusion of women from juries, differential treatment in licensing various occupations and the exclusion of women from state supported colleges.[22]

SOME ANALYTICAL APPROACHES

The problem with the formulation, "sex is an allowable basis for classification," is simply that it is too broad in its sweep. Granted that general physical differences between the sexes can be demonstrated, these should not automatically justify laws that distinguish between the sexes on the basis of non-physical differences, or those based upon physical differences that do not take into account the many technological developments that have substantially minimized or eliminated the practical significance of those differences, or those that do not make provision for the many individual men or women whose physical limitations and strengths do not conform to the general pattern.

---

[21] 208 U.S. 412, 421-22 (1908) (emphasis added).

[22] Murray and Eastwood, *supra* n. 3, at 237, citing Commonwealth v. Welosky, 276 Mass. 398, 414, 177 N.E. 656, 664 (1931), *cert. denied*, 284 U.S. 684 (1932) (jury exclusion); Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912); People v. Case, 153 Mich. 98, 101, 116 N.W. 558, 560 (1908); State v. Hunter, 208 Ore. 282, 288, 300 P.2d 455, 458 (1956) (licensing of occupations); Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App.), *cert. denied*, 359 U.S. 230 (1958) (exclusion of women from a state supported college).

The logical infirmities of the doctrine of "classification by sex" have been pointed out in a seminal article by Murray and Eastwood.[23] Suggesting that the doctrine has "implications comparable to those of the now discredited doctrine of 'separate but equal' " and should therefore also be declared unconstitutional, they have urged the substitution of a functional analysis as the proper test for determining whether laws treating the sexes differently are valid under the fifth and fourteenth amendments. They have also noted that:

> If laws classifying persons by sex were prohibited by the Constitution, and if it were made clear that laws recognizing functions, *if performed*, are not based on sex per se, much of the confusion as to the legal status of women would be eliminated.[24]

Thus, under the functional analysis, courts would no longer be able to uphold laws that distinguish between the sexes merely by repeating the *Muller* shibboleth that the general differences between the sexes "justifies a difference in legislation," since to do so would violate the fifth and fourteenth amendments, as the President's Commission on the Status of Women has urged the United States Supreme Court to reinterpret the application of those amendments to laws that classify on the basis of sex.[25] Nor would there be any need to adopt the proposed equal rights amendment, which provides that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,"[26] since the same, perhaps better, results could be achieved by reinterpreting the fifth and fourteenth amendments.

The functional analysis proposed by Murray and Eastwood appears to be a necessary first step for the development of tests to determine the constitutional validity of laws that, directly or indirectly, accord men and women different treatment in what appear to be highly similar circumstances. This analytical starting point not only rejects the shop-worn legal slogan, "sex is a reasonable basis for classification," that has produced so much judicial misunderstanding in the past, but also requires lawmakers (courts as well as legislatures) to carefully examine the differences between male and female characteristics as related to particular legislative goals.

---

[23] Murray and Eastwood, *supra* n. 3.

[24] *Id.* at 241.

[25] It is "desirable that there be early review by the U.S. Supreme Court of the validity under the Fifth and Fourteenth Amendments of laws and official practices discriminating against women so that the principle of equality will be firmly established in our constitutional doctrine." CCPR at 37.

[26] For further discussion of the proposed equal rights amendment and the "Hayden Rider," see p. 178 *infra.*

At the same time, it is unclear whether the suggested functional approach requires the recasting of present statutes and judge-made rules of law to eliminate any reference to sex, or whether such references to sex would not per se invalidate the rule or statute, with the functional inquiry being invoked merely to test their ultimate constitutionality. For example, would state statutes prescribing maximum working hours for women, but not for men, be *ipso facto* unconstitutional? Or would they be valid if, instead of referring to women as such, they declared that any *person* for whom more than eight hours of work in a day or 48 hours in a week would be harmful could not be required to work such excess hours, and perhaps created a presumption of harmfulness if that person were a woman? Or could the reference to sex remain in such statutes, with their constitutionality determined by the reasonableness of their application, via the functional analysis, to particular persons in specific circumstances?

The proposed test does not purport to be either the only or a complete approach to the constitutional analysis of sex-based discriminatory legislation. For one thing, there are many situations in which the general attributes of one sex or the other may themselves be the functions needing to be considered. For example, there can be very little argument with the proposition that, as a general rule, males are physically stronger than females. Legislation taking account of those differences will therefore continue to be constitutionally valid, provided that such legislation is not founded upon an exaggerated notion of the extent of those physical differences. Utah's fifteen-pound limitation upon the weights that women are permitted to carry on a job[27] may be so unreasonable an appraisal of women's general physical capacity as to violate the equal protection guarantee if, as is the case, a similar restriction does not also apply to men. By contrast, the fifty-pound limitation in California[28] may be *constitutionally* valid, though individual women will have little difficulty or suffer no harmful effects in lifting weights in excess of such limits.[29]

---

[27] "No female shall be required or permitted to lift any burden in excess of 30 pounds or carry any burden in excess of 15 pounds." *Industrial Commission of Utah, Welfare Regulations for Any Occupation, Trade or Industry*, effective September 14, 1937, cited in CCH LAB. L. REP. ¶ 45,525 (1968).

[28] CAL. LABOR CODE § 1251 (West 1955).

[29] *But see* Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, *supra* note 1, at 305, suggesting that Title VII of the 1964 Civil Rights Act may require employers covered by the Act to permit women employees to prove that they can, without harmful effects, lift weights in excess of a limit imposed by state law.

Moreover, because the right to work may be properly characterized as "basic," a state abridgment should be upheld only if it goes no further than is absolutely necessary to achieve the legislative purpose. For example, statutory weight-lifting restrictions, to survive constitutional challenges, may have to be worded or interpreted as establishing merely a presumption of women's inability to lift weights in excess of the limit without harmful effects, while providing them with the right to rebut that presumption. Nor is it inconceivable that in this era of great technological development where employees can, without too much effort or expense, furnish their employees with mechanical devices to assist them in lifting heavy weights, the failure of an employer to provide his employees with such devices may have to be taken into consideration in determining the constitutionality of a state weight-lifting restriction for women as applied to individual situations. Stated differently, the equal protection clause may be violated by a state statute that limits weights women may lift on a job (thus depriving them of equal opportunity for employment which because of Title VII's jurisdictional limitations cannot always be corrected by that statute) without at the same time requiring employers to furnish their employees, wherever feasible, with the tools that will assist them to lift what would otherwise be unmanageable weights.

Related to this last point and of crucial importance in the development of standards for testing the constitutionality of laws that appear to discriminate between the sexes is the *quantum* of justification that will be required to uphold sex-based discriminatory laws. Especially in the application of the fourteenth amendment's equal protection clause, there appear to have developed two distinct standards for testing legislative or court-made classifications, depending upon whether the classification merely circumscribes some general, institutional, economic activity or whether it restricts what —so far imprecisely—has come to be regarded as a "basic" civil right.

Closely analagous to the proposed distinction between "preferred" and "unpreferred" constitutional freedoms,[80] the developing differences in the constitutional law approach to "basic" civil rights and those which, for want of a better term, can perhaps be described as "non-basic" may have profound implications for the fate of sex-based discriminatory laws in the future.

---

[80] *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53, n. 4 (1938); *see also* Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956); Mason, *The Core of Free Government, 1938–40: Mr. Justice Stone and "Preferred Freedoms"*, 65 YALE L.J. 597 (1956).

Where a right, privilege, activity, etc. is properly characterized as being "non-basic," a rule of law that classifies people so as to restrict its exercise by one group while permitting it to be exercised by another will ordinarily be upheld under established constitutional principles, if there is *some* reasonable basis for the classification. But where a civil right that has been infringed by a rule is properly characterized as "basic" the "any rational basis" test for upholding it against an equal protection or due process challenge will not suffice. Under such circumstances the state will be required to sustain a much greater burden of justification to support the classification. Thus, in *Skinner v. Oklahoma*,[31] a state law requiring the sterilization of certain types of habitual criminals was subjected to "strict scrutiny"[32] in determining the reasonableness of the classification, since the right to bear children is "one of the basic civil rights of man."[33] Similarly, in *Loving v. Virginia*,[34] describing the right to be married as another basic civil right,[35] the Supreme Court rejected the contention that a miscegenation statute "should be upheld if there is any possible basis for concluding that [it serves] a rational purpose"[36] and instead, subjecting the racial classification of such a statute to the "most rigid scrutiny,"[37] held that it violated both the equal protection and due process clauses of the fourteenth amendment.

Admittedly, the *Loving* case is somewhat ambiguous as to whether its primary distinction for testing a classification against an equal protection attack is founded upon a racial as opposed to a non-racial classification or whether it proceeds from the "basic" civil right versus "non-basic" civil right dichotomy—although both tests may be appropriate depending upon whether an equal protection or due process challenge has been invoked. In either respect, however, the consequences for laws that discriminate on account of sex may be far-reaching. For if the distinction is in fact founded upon the racial classification, then it is difficult to oppose the observation made by the federal district court in *United States v. York*[38] that no reason exists "why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group."[39] On the other hand, if the differ-

---

31 316 U.S. 535 (1942).
32 *Id.* at 541.
33 *Id.*
34 388 U.S. 1 (1967).
35 *Id.* at 12.
36 *Id.* at 11.
37 *Id.*
38 281 F. Supp. 8 (D. Conn. 1968).
39 *Id.* at 14.

ences in the tests for equal protection purposes are between general economic regulations and statutes directly impinging on fundamental rights or personal liberties, as contended by Judge Hoffman of the Pennsylvania Superior Court, *Commonwealth v. Daniels*,[40] and suggested by Mr. Justice Douglas in *Levy v. Louisiana*[41] an overriding statutory purpose or compelling state interest would be required to justify laws having the latter effect, including many of those that subject males and females to different treatment in otherwise comparable situations.

Of course, the problem with a "basic" versus a "non-basic" distinction in determining the different burdens of justification that will support the imposition of a disability on one sex but not the other or according one sex a benefit withheld from the other is that, like the elaboration of the extent to which the fourteenth amendment's due process clause makes the Bill of Rights applicable to the states,[42] the result will inevitably depend upon a court's visceral rather than its cerebral behavior. One person's "basic" will frequently be another person's "non-basic." Be that as it may, this developing distinction appears to be one way of cracking the solid wall of Supreme Court decisions upholding a wide variety of laws that distinguish, often with some justification but without *compelling* reasons, between the sexes. Indeed, as Mr. Justice Douglas has observed in *Levy v. Louisiana*, the Court has "been extremely sensitive when it comes to basic civil rights . . . and [has] not hesitated to strike down an invidious classification *even though it had history and tradition on its side.*"[43]

The *Levy* case, which held that denying illegitimate children the right to recover for their mother's wrongful death violated the equal protection clause, has other important implications for the future of sex-based discriminatory laws. One potential danger in any constitutional challenge to a law that confers a benefit on one sex but withholds it from the other has been that, if the challenge succeeded, the benefit might be withdrawn. Under the authority of the *Levy* case, however, it would appear to be consistent with the Supreme Court's role as final interpreter of the equal protection

---

[40] 210 Pa. Super. 156, 232 A.2d 247 (1967).

[41] 391 U.S. 68, 70, (1968); *see also* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (concurring opinion): "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."

[42] *Cf.* various opinions in Adamson v. California, 332 U.S. 46 (1947).

[43] Levy v. Louisiana, 391 U.S. 68, 70 (1968) (footnotes omitted, emphasis added).

clause for it to *confer* the same benefit upon the sex from which it had been previously withheld. This is of particular importance in the field of protective labor legislation where, as I have suggested elsewhere,[44] litigants have sought to eliminate rather than to extend the discriminatory benefit.

Given these developing analytical approaches to the constitutionality of legal rules that by their terms or effects distinguish between the sexes, it would appear that each type of law would have to be separately examined to determine its individual fate. One important point should be borne in mind in this connection—and that is that though a particularly sex-discriminatory rule of law may survive a constitutional challenge, this will not preclude a legislature or court from altering a statute or judicial precedent, respectively, on the grounds of policy. But returning to the question of the constitutionality of such legal rules, the significant new fact is that many formerly sacred cows are standing on the brink of constitutional invalidation, and with only a slight amount of pressure, seem bound to topple. Without purporting to be an exhaustive exploration of the ability of all types of sex-discriminatory laws to satisfy emerging constitutional standards in this area, the following sections examine some of those types and attempt to forecast their ultimate fate if challenged on constitutional grounds.

ACTIONS FOR LOSS OF CONSORTIUM

Actions for loss of consortium have been described in an earlier article[45] as a variety of the rights of action allowed to persons who suffer indirect loss resulting from direct injuries inflicted upon persons to whom they bear a particular relationship. Though some jurisdictions permit suits for loss of consortium by wives as well as husbands where the opposite spouse has been negligently injured, the majority adhere to the common law rule allowing such causes of action to husbands but not to wives.

Former attacks—successful as well as unsuccessful—upon this sex-based discriminatory rule have almost always claimed that the particular version of the Married Woman's Property Act in the jurisdiction required the husband's right of action to be extended to the wife in a comparable situation. But in recent years, litigants have increasingly invoked constitutional arguments in challenging this type of discrimination.

---

[44] *See* Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, supra* note 1, at 305.

[45] *See* Kanowitz, *Law and the Married Woman, supra* note 1, at 49-50.

In *Owen v. Illinois Baking Corporation*[46] a federal district court in Michigan invalidated the discriminatory consortium rule on constitutional grounds without extensive discussion. Noting that "to grant a husband the right to sue on this right while denying the wife access to the courts in the assertion of this same right is too clearly a violation of fourteenth amendment equal protection guarantees to require citation of authority,"[47] the court, sitting in a diversity suit, rejected the forum state's substantive law which denied the right to sue for loss of consortium. Although its decision is laudable, the *Owen* case's unquestioned acceptance of the equal protection argument without analysis or consideration of opposing arguments, is rather surprising in view of the long history of separate treatment of the sexes in this area.

And basing its decision on only a slightly more extensive examination of the constitutional question, an Ohio Court of Common Pleas in *Clem v. Brown*[48] has also held that a state's rule permitting husbands but not wives to recover for loss of consortium deprives a wife of "equal protection of the law."[49]

The results in *Owen* and *Clem* were apparently approved in 1968 by the Wisconsin Supreme Court in *Moran v. Quality Aluminum Casting Co.*[50] In that case the Court indicated that the right to recover for loss of consortium should be extended to wives in the interest of logic and "justice,"[51] but based its actual decision to do this on a re-reading of Wisconsin's unique "equal rights" statute.[52]

By contrast, at least three courts have come to an opposite conclusion. The Supreme Court of West Virginia, in what appears to be the earliest reported case challenging the one-way consortium rule on equal protection grounds, sustained such discrimination in

---

[46] 260 F. Supp. 820 (W.D. Mich. 1966).

[47] *Id.* at 821.

[48] 3 Ohio Misc. 167, 207 N.E.2d 398 (1965).

[49] *Id.* at 171, 207 N.E.2d at 400. *See also* Umpleby v. Dorsey, 10 Ohio Misc. 288, 227 N.E.2d 274 (1967), in which a second Ohio Court of Common Pleas followed the *Clem* case.

[50] 34 Wis. 2d 542, 150 N.W.2d 137 (1967). *See also* Black v. United States, 263 F. Supp. 470, 480, n.33 (1967).

[51] Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 551, 150 N.W.2d 137, 141 (1967).

[52] WIS. STAT. ANN. § 246.15 (Supp. 1968), *formerly* § 6.015 (1963), provides in part: "Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, *and in all other respects.*" (emphasis supplied).

1962 on the ground that it had existed at common law and that the state constitution preserved the common law[53]—a rather questionable holding since even state constitutional provisions may be invalid if they violate provisions of the United States Constitution.[54] And in 1966, the Supreme Court of Tennessee expressly rejected the result in *Owen* and *Clem v. Brown*, holding that the Tennessee rule allowing a husband but not a wife recovery for loss of consortium "does not work a 'discrimination' [and is] no more than a practical and logical classification."[55]

Similarly, the United States Court of Appeals for the Seventh Circuit applying Indiana law in a diversity action in 1968, rejected the equal protection argument in this area, emphasizing the danger of double recovery for loss of the husband's earnings in his own suit and in the wife's consortium suit if the latter were allowed.[56] Impliedly recognizing that a husband could also recover for loss of his wife's earnings in his own consortium suit, the court nevertheless upheld this discrimination against an equal protection challenge on the grounds that "Since 87.8% of married men are employed and only 34.4% of wives are employed Indiana could infer that more often in a wife's suit than a husband's, the jury would award her duplicating damages for some of the same elements of injury."[57]

This is indeed strange reasoning. For one thing it overlooks the ease with which Indiana could require both causes of action to be joined in one suit, as has been done by other jurisdictions,[58] thus avoiding any possibility of double recovery. Indeed, a reasonable argument can be made that the equal protection principle *requires* a state to establish such a procedural requirement if its purported justification for discriminating between the sexes would thereby be eliminated[59]—much as employers *may* be required to provide labor-saving machinery to their employees to avoid discriminating be-

---

[53] Seagrave v. Legg, 147 W. Va. 331, 337-38, 127 S.E.2d 605, 608 (1962).

[54] *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967), invalidating a state constitutional provision, adopted by a majority vote of the electorate, on the grounds that it violated the United States Constitution; *see also* American Fed'n. of Labor v. Watson, 327 U.S. 582 (1946).

[55] Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966). The United States Supreme Court denied certiorari in *Krohn* on March 20, 1967, 386 U.S. 970 (1967), which does not, of course, mean that the Supreme Court approves the result in that case. Rather it signifies, at best, that less than four members of the Court were willing to review it. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 489-97 (1953).

[56] Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968).

[57] *Id.* at 850.

[58] *See, e.g.*, Ekalo v. Constructive Serv. Co. of America, 46 N.J. 82, 215 A.2d 1 (1965).

[59] *See* p. 150 *infra*.

tween the sexes on the basis of their general physical differences.[60] But even if this argument were rejected, the quantitative difference between employed husbands and wives is not great enough to justify, constitutionally, such differences in treatment. If the danger to be avoided is that of double recovery, then qualitatively the risk is just as serious if it can occur in 34.4% of the cases as it would be in 87.8% of the cases—unless we are to grant the possibility that being "slightly" pregnant is somehow fundamentally different from being "very" pregnant, as far as the fact of pregnancy is concerned. Finally, nowhere in its opinion does the court consider the possibility that the disparity in husbands' and wives' employment rates may be the result of past discriminatory practices which, because not previously prohibited by law, can be regarded as law-approved. To the extent this is a factor, the court's approach once more justifies a present discrimination by relying on a past practice without discerning the discriminatory features of the latter—a common analytical failing where sex-based legal discrimination is in question.

Even where the constitutional attack has not been directly successful, it seems to have stimulated at least one state supreme court, Maryland's, to develop a new theory permitting a wife to recover for the loss of her husband's consortium where such recovery had not been allowed before. In *Deems v. Western Maryland Railway Co.*,[61] that court found it "unnecessary to decide whether the equal protection clause compels a holding that the wife shall have a separate cause of action for loss of her husband's consortium due to injuries sustained by him because of the negligence of a third party,"[62] by holding that in the future when "*either* husband or wife claims loss of consortium by reason of physical injuries sustained by the other as a result of the alleged negligence of the defendant, that claim can only be asserted in a joint action for injury to the marital relationship."[63] Avowedly skirting "a possible conflict between the present law and the federal constitution,"[64] the *Deems* result, which will affect suits seeking recovery for husbands' as well as wives' loss of consortium, proceeds upon a "legal entity" theory of the marriage relationship.

Though having the effect of equalizing the spouses' positions with respect to rights of action for loss of consortium, the result in *Deems* would have been more satisfactory had it been squarely based upon the equal protection argument. For the "legal entity"

---

[60] *See* p. 140 *supra.*
[61] 247 Md. 95, 231 A.2d 514 (1967).
[62] *Id.* at 106-07, 231 A.2d at 520.
[63] *Id.* at 115, 231 A.2d at 525.
[64] *Id.* at 113, 231 A.2d at 524.

theory is too reminiscent of, and in fact derived from, the discredited medieval concept of the legal unity of husband and wife.[65]

A similar process seems to have also occurred in New York. Noting that in that state "it is rare, if not unknown, to try a husband's action separately from his wife's negligence action" and that if this should occur, "motions to consolidate would quickly resolve that difficulty," the New York Court of Appeals, in *Millington v. Southeastern Elevator Co.*[66] has "on the basis of policy and fairness"[67] overruled prior law by extending to wives the right to sue for loss of consortium. The equal protection attack on the prior sex-based discriminatory rule that had also been made in that case was thereby avoided although the court intimated that had it not altered the rule on policy grounds, it would have been persuaded on the constitutional point by the decision of the United States Supreme Court in *Levy v. Louisiana.*[68]

As noted earlier, the *Levy* case held that if a state allows a woman's "legitimate" children to recover for her wrongful death and conscious pain and suffering it could not deny this remedy to her "illegitimate" children. In *Millington,* while not deciding the point, the New York Court of Appeals noted that such "reasoning would seem applicable here since it is concluded that there is no basis for the existing discrimination."[69]

Though the *Millington* decision did not rule on the equal protection argument, the extent to which the *Levy* case will influence future cases in this field is of some moment. The meaning of *Millington's* reference to *Levy* is somewhat unclear. For one thing, if, as the court had already decided, there was "no basis for the existing discrimination," this would have been a sufficient reason for invalidating such a rule (denying to wives but permitting husbands the right to sue for loss of consortium) on either policy or constitutional grounds. Perhaps the only significance to the reference to the *Levy* case in *Millington* is to point out that on *Levy's* authority, invalidation on constitutional grounds would have been appropriate, but that in line with the established policy of avoiding constitutional decisions whenever possible, this was being done in *Millington.* On the other hand, the reference to *Levy* may have been made to dispel any doubts that the granting or withholding of causes of action could be subject to equal protection restrictions.

---

[65] *Id.* at 107, 231 A.2d at 521.
[66] 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).
[67] Id. at —, 239 N.E.2d at 903, 293 N.Y.S.2d at 313.
[68] 391 U.S. 68 (1968).
[69] Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, —, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305, 312 (1968).

One difficulty attorneys will have to overcome if they attempt to rely upon *Levy* in seeking to invalidate the discriminatory consortium rule on equal protection grounds is the Supreme Court's observation in that case that "He [the illegitimate child] is subject to all the responsibilities of a citizen, including the payment of taxes *and conscription under the Selective Service Act.* How under our constitutional regime can he be denied correlative rights which other citizens enjoy?"[70] Since women are not presently subject to military conscription,[71] the question arises whether this would distinguish the sex-based discriminatory consortium rule from the invalidated distinction between the rights of legitimate and illegitimate children to sue for wrongful death.

Neither in the Supreme Court decision itself nor in any of the lower court decisions in *Levy*[72] does the sex of the five illegitimate children, on whose behalf the suit was brought, appear. However, even if all five were male, it would seem that the conscription point would not render the *Levy* case inapposite to the consortium issue. Aside from the fact that use of the word "He" in reference to illegitimate children in general is a grammatical and legalistic conceit probably intended to embrace members of both sexes (a tradition that is not without its own sex-discriminatory implications), the allusion to military conscription can be interpreted as containing the implied qualification, "unless otherwise reasonably exempted from such a requirement."

Whether the total exemption of women from the obligation of military service is reasonable may be the subject of considerable debate. If the functional analysis is employed, then, recognizing the general physical differences between the sexes and the physically exacting demands of many military tasks, much of the present exemption can be seen as not being based on sex (despite the reference in the law to males as such) but rather to the functions that must be performed. But many tasks within the military are not of such a nature and often merely duplicate civilian jobs—such as typist, clerk, automobile driver,—which can be performed by women as well as men. To the extent, therefore, that *Levy*'s reference to military conscription is crucial, reliance upon that case to successfully attack the unequal consortium rule on equal protection grounds may be inappropriate as long as the present scheme of military conscription law remains unaltered.

---

[70] Levy v. Louisiana, 391 U.S. 68, 70 (1968) (emphasis supplied).

[71] Universal Military Training and Service Act, 50 U.S.C. § 453 (1964).

[72] Levy v. State, 192 So. 2d 193 (La. Ct. App. 1966), *cert. denied*, 250 La. 25, 193 So. 2d 530 (1967).

Significantly, the handful of cases that have dealt with the equal protection attack on the rule denying wives but allowing husbands the right to sue for loss of consortium have, regardless of their outcome, tended to dispose of the equal protection question in summary fashion. Either they have held that a prohibited discrimination was so patent that citation of authority was not even needed[73] or they have indicated with equally little discussion that the constitutional challenge was without merit.[74]

Having said all that, how *should* the discriminatory consortium rule fare when challenged, as it inevitably will be, in the United States Supreme Court? It is submitted that the Court should invalidate this sex-based discriminatory rule on equal protection grounds by extending the right of action to married women where it presently is accorded only to married men, rather than by removing such right from the latter.[75] But the manner in which the Court does this, or more precisely its rationale for such a decision, will be of crucial importance for the future of other sex-based discriminatory legal rules.

In line with developing equal protection standards the Court will first have to decide whether the right to sue for loss of consortium is a "basic" or "non-basic" right—since, if it is properly classified as "basic," the burden of justifying the distinction between the sexes will be much greater than otherwise.[76] In this connection the fact that the sex-based classification with respect to the right to sue for loss of consortium has "history and tradition on its side,"[77] will not prevent the Court from either categorizing such right as "basic" or from striking it down if the classification is invidious.[78]

---

[73] Owen v. Illinois Baking Corp., 260 F. Supp. 820-21 (W.D. Mich 1966).

[74] Seagrave v. Legg, 147 W. Va. 331, 336, 127 S.E.2d 605, 608 (1962). *See also* Casey v. Manson Constr. and Eng'r. Co., — Ore. —, —, n.7, 428 P.2d 898, 906, n.7, (1967). Perhaps the most extensive consideration of the matter thus far appears in the *Krohn* case which rejected the constitutional challenge. Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966). That is not saying too much, however, since the only reasons advanced by the Tennessee Supreme Court for its decision in *Krohn* were the unelaborated statement that "many and obvious differences between what, by legal logic, is recoverable by the male spouse for injury, on the one hand, and the female spouse on the other, may be conceived of." *Id.* at 43, 406 S.W.2d at 168-69, and the resulting conclusion that the Tennessee rule was therefore based on a "practical and logical classification", *id.* at 43, 406 S.W.2d at 169, rather than working a "discrimination." *Id.*

[75] This has been done on policy grounds in some jurisdictions. *See e.g.*, Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785 (1916).

[76] *See* p. 141 *supra.*

[77] Levy v. Louisiana, 391 U.S. 68, 70 (1968).

[78] *Id.*

It is submitted that the right to sue for loss of consortium is no less basic than the right to sue for wrongful death in the *Levy* case—though in both cases, the right has either not always nor does not now exist in all American jurisdictions. Indeed, this may be the ultimate significance of the reference to *Levy* in the *Millington* case.[79]

Should the right to recover for loss of consortium come to be regarded, therefore, as "basic"—thus subjecting the classification to "rigid scrutiny"[80]—the burden upon any party seeking to sustain the sex-based classification in this area would be great. A reasonable argument can be made moreover that, to satisfy this burden, it is insufficient *merely* to show that existing differences between the situation of the sexes are extensive—as, for instance, that the likelihood of double recovery is greater when wives sue for loss of consortium than when such actions are brought by husbands.[81] For to the extent that it lies within the power of the state, by legislation or court decision, to mitigate the effects of such differences, its failure to do so should be taken into account in passing upon the constitutionality of the unequal consortium rule. Were such a principle adopted in this area, the claim that double recovery is a more serious danger when wives, as opposed to husbands, are allowed to sue for loss of consortium, would not be a constitutional justification for the discrimination—since the states that make such a distinction could, and in a basic sense would *have to*, restructure their procedural rules to require husband-wife joinder when either seeks to recover for negligent invasion of consortium.

As the number of constitutional challenges to the sex-based discriminatory consortium rule multiply, the likelihood that the United States Supreme Court, the final arbiter of federal constitutional disputes, will agree to review lower state or federal court decisions in this area will also increase. When that is done, it is hoped that the Court will once and for all declare this inequality violative of both the equal protection and due process clauses of the United States Constitution's fourteenth amendment, and that it will do so along the lines suggested herein. For if the Court were to do this, not only would it in one fell swoop invalidate on constitutional grounds most, if not all, the unequal consortium rules in every American jurisdiction, but it would also broaden the conceptual

---

[79] *See* p. 147 *supra*. Even on the assumption that the right to sue for loss of consortium involves an area of economic activity, rather than a "basic civil right," at least one court has held that the discriminatory consortium rule violates the equal protection guarantee, since it is entirely without basis in reason. Karczewski v. Baltimore & O. R.R., 274 F. Supp. 169 (1967).

[80] *See* p. 147 *supra*.

[81] *See* p. 141 *supra*.

foundation for successful constitutional challenges of a great variety of other sex-based discriminatory laws and official practices.

STATUTORY SEX-BASED DIFFERENCES IN SENTENCING FOR THE SAME CRIME

In *Commonwealth v. Daniels*,[82] the Pennsylvania Superior Court was confronted with an equal protection challenge to the sentencing provisions of the State's Muncy Act[83] which, like statutes in some other states,[84] requires women to be sentenced differently (and generally more severely), than men upon conviction of the same crime. Specifically, the Muncy Act provides that any *female* pleading guilty to or being convicted for a crime punishable by imprisonment for more than a year must be sentenced to confinement in the State Industrial Home for Women and that the sentence "shall be merely a general one . . . and shall not fix or limit the duration thereof."[85]

In *Daniels* the trial court had first sentenced the woman defendant, who had been convicted of robbery, to a one-to-four-year term in the Philadelphia County Prison. Thirty-one days later the court vacated the original sentence on the grounds that the Muncy Act provided the exclusive basis for sentencing women under these circumstances. Pursuant to the terms of the Act the court then resentenced the defendant to the State Industrial Home for Women without fixing a maximum or minimum term of imprisonment. One effect of this indeterminate sentence was that the defendant could now be required to serve the maximum term for the crime of robbery, ten years, as opposed to her original maximum four year sentence. In addition, under the demonstrated parole practices of the Muncy authorities, defendant would have to serve a minimum of three years at that institution, whereas, had her original sentence —one that could have been imposed on a male convicted of the same crime—been valid, she would have been eligible for parole in one year.

In a divided opinion in *Daniels*, the Pennsylvania Superior Court held the Muncy Act did not violate the equal protection clause because of a discerned reasonable connection between the classification by sex and the purposes of the legislation. In the court's opinion:

---

[82] 210 Pa. Super. 156, 232 A.2d 247 (1967).

[83] PA. STAT. ANN. tit. 61, § 566 (1964).

[84] *See* statutes upheld in Ex parte Gosselin, 141 Me. 412, 44 A.2d 882 (1945); Ex parte Brady, 116 Ohio St. 512, 157 N.E. 69 (1927); Platt v. Commonwealth, 256 Mass. 539, 152 N.E. 914 (1926); State v. Heitman, 105 Kan. 139, 181 P. 630 (1919).

[85] PA. STAT. ANN. tit. 61, § 566 (1964).

> The legislature reasonably could have concluded that indeterminate sentences should be imposed on women as a class, allowing the time of incarceration to be matched to the necessary treatment in order to provide more effective rehabilitation. Such a conclusion could be based on the physiological and psychological makeup of women, the type of crime committed by women, their relation to the criminal world, their roles in society, their unique vocational skills and pursuits, and their reaction as a class to imprisonment, as well as the number and type of women who are sentenced to imprisonment rather than given suspended sentences. Such facts could have led the legislature to conclude that a different manner of punishment and rehabilitation was necessary for women sentenced to confinement.[86]

In addition, the superior court in *Daniels*, one judge dissenting, suggested that the legal-factual premises of defendant's equal protection argument were also in error. That is, her assumption that a man would have been sentenced to a maximum term of four years as opposed to her maximum of ten years was "invalid . . . [since the court could not] speculate as to what the sentence would have been had the person robbing the bar in question been a male."[87]

The weakness of the court's reasoning in this last point was underscored by Judge Hoffman's dissent, which in effect emphasized that the sex-based discrimination rested not on what *would*, but rather upon what *could*, occur in the sentencing process. For under the terms of the Muncy Act, all "women sentenced for offenses punishable by imprisonment for more than one year *must* be sentenced to the maximum permissible term. Men, on the other hand, *may* be sentenced to lesser terms."[88] The Act, in Judge Hoffman's view, therefore constituted "an arbitrary and invidious discrimination against women offenders as a class."[89] Because personal liberties or fundamental rights were involved here, the "any rational basis" formula for testing the Muncy Act against the equal protection challenge would not do. Instead, to sustain the Act, the state "must show a subordinate interest that is compelling."[90] Therefore:

> To justify such discriminatory treatment, the Commonwealth must demonstrate more than the fragmentary and tenuous theories presented to us. Absent any *compelling* psychological, statistical, or scientific data, we cannot, nor should we, sanction a legislative scheme which is patently arbitrary and manifestly unfair.[91]

It is perhaps to the credit of the majority opinion in *Daniels* despite its tendency to repeat the oft-encountered error of justifying

---

[86] 210 Pa. Super. 156, 160-61, 232 A.2d 247, — (1967).
[87] *Id.* at 161, 232 A.2d at —.
[88] *Id.* at 162, 232 A.2d at —. (Hoffman, J., dissenting).
[89] *Id.*
[90] *Id.* at 163, 232 A.2d at —.
[91] *Id.* at 164, 232 A.2d at — (emphasis added).

rank discriminations on the mere difference of sex alone—that it did not resort to the homilies of the past that confinement in a State Industrial Home for Women or a comparable institution partakes more of the nature of treatment than of punishment.[92] That approach would appear to have been put to a lasting rest by the Supreme Court's decision in *In re Gault*[93] suggesting that confinement by any other name is still confinement. But the problem with the Superior Court's view is that in the name of the legislature's general and undifferentiated right to classify on the basis of sex, women could be subjected to the severest kind of disadvantage—not in the areas of employment opportunities, property rights, divorce grounds, but in the fundamental right to personal liberty. If any area cries out for judicial redress on the basis of the fourteenth amendment command, this is one.

Indeed, shortly after the above was written, the Pennsylvania Supreme Court reversed the lower court in the *Daniels* case.[94]

Apparently[95] not adopting Judge's Hoffman's detailed analysis of the constitutional aspects of the question, the Pennsylvania Supreme Court simply held in *Daniels* that "an arbitrary and invidious discrimination exists in the sentencing of men to prison and women to Muncy, with resulting injury to women,"[96] and that no "reasonable and justifiable difference or deterrent [is discernible] between men and women which would justify a man being eligible for a shorter maximum prison sentence than a woman for the commission of the same crime, especially if there is no material difference in their records and the relevant circumstances."[97]

---

[92] *See, e.g.*, Ex Parte Carey, 57 Cal. App. 297, 305, 207 P. 271, 274 (1922). "The state... has undertaken to take forcible charge of this class of unfortunates [women convicted of prostitution] and extend to them a home, education, assistance, and encouragement in an effort, otherwise hopeless, to restore them to lives of usefulness. The state combines both altruism and self-preservation." In the same case, the court disposed of the claim that sentencing to the State Farm for Women was, under the circumstances, "cruel and unusual punishment," by noting that "the detention provided for in the statute is not, within the purview of the constitution, punishment at all." *Id.* at 302, 207 P. at 273.

[93] 387 U.S. 1 (1967).

[94] Commonwealth v. Daniels, 430 Pa. 642, 293 A.2d 400 (1968).

[95] At this writing only fragments of the Pennsylvania Supreme Court's opinion in Daniel are available in 37 U.S.L.W. 2063 (Pa. July 1, 1968) and I have assumed that the portions of the opinion excerpted therein contain its essential rationale.

[96] Commonwealth v. Daniels, 430 Pa. 642, —, 243 A.2d 400, 403 (1968).

[97] *Id.* at —, 243 A.2d at 404.

Significantly, however, the Pennsylvania Supreme Court did not reject the fundamental allowability of classification by sex, as in the employment area, since "there are undoubtedly significant biological, natural and practical differences between men and women [justifying such classification] under some circumstances. . . ."[98]

Additional movement in the same direction came in early 1968 in a federal district court decision in *United States ex rel Robinson v. York*[99] striking down as violative of the equal protection guarantee a Connecticut statute[100] allowing "women to be sentenced for longer terms than it or any other statute permits for men found guilty of committing identical offenses. . . ."[101] In *Robinson* the state had argued that the statute in question, unlike statutes dealing with incarceration in penal institutions, was an expression of the state's attempt to provide for "women and juveniles a special protection and every reformative and rehabilitative opportunity,"[102] and that a longer term of imprisonment for women in such an institution was therefore justified. Relying upon the remarks of Mr. Justice Fortas in the *Gault* case, however, the court in *Robinson* rejected this euphemistic distinction between penal and reformatory institutions, noting that in Connecticut, "the predominant criterion for judgment imposed on those convicted of violating its criminal laws continues to be punishment,"[103] and holding that the statute as applied to the sentences of the female petitioner in the case "constituted an invidious discrimination against her which is repugnant to the equal protection of the laws guaranteed by the fourteenth amendment."[104]

More important than the result in *Robinson*, however, is the method by which the court reached it. Significantly, great reliance was placed upon the Supreme Court's decision in *Loving v. Virginia*.[105] While noting that in *Loving* the strict standards the Supreme Court had enunciated for upholding a classification against an equal protection challenge had been directed toward a *racial* classification, the court nevertheless applied the same standards in *Robinson* because it could see no reason "why adult women, as one of the specific groups that compose humanity, should have a lesser

---

98 *Id.* at —, 243 A.2d at 403.

99 281 F. Supp. 8 (D.C. Conn. 1968).

100 CONN. GEN. STAT. ANN. § 17-360 (1960).

101 281 F. Supp. at 12.

102 *Id.* at 14.

103 *Id.* at 15.

104 *Id.* at 17.

105 388 U.S. 1 (1967).

measure of protection than a racial group."[106] As a result, the statute "which singles out adult women convicted of misdemeanors for imposition of punishment for longer terms than may be imposed on men, must be supported by *a full measure of justification* to overcome the equal protection which is guaranteed to them by the fourteenth amendment."[107]

It is important to note also that the opinion in *Robinson*, as well as that of the Pennsylvania Supreme Court in *Daniels*, did not criticize or reject earlier Supreme Court decisions in which sex-based classifications had been upheld. In particular, approving reference was made in *Robinson* to *Muller v. Oregon*[108] upholding an Oregon statute limiting women's working hours to 10 a day, *Goesart v. Cleary*[109] upholding Michigan's rule preventing most women from becoming licensed bartenders, and *Hoyt v. Florida*[110] sustaining Florida's exclusion of women from jury duty unless they affirmatively volunteer to serve. In *Robinson* the court noted that those earlier Supreme Court decisions had each determined that the classifications drawn in the respective statutes were reasonable in the light of their purposes.

> Thus, in *Muller* the Court took account of the differences in physical structure, strength and endurance of women, as well as the importance of their health to the future well being of the race, in sustaining the work hour limitation.... It noted a woman's family and home responsibilities in upholding the jury duty exemption in *Hoyt*... and acknowledged in *Goesart* that the Michigan legislature might legitimately be avoiding the "moral and social problems" which it believed could be produced by females tending bar in saloons....[111]

As for the sex-based distinction inherent in the Connecticut statute, however, the *Robinson* opinion observed that nothing "in the different nature of men and women noted by the Supreme Court in the *Mueller*, *Goesart*, and *Hoyt* cases suggests any reasonable or just relation between the misdemeanors involved here and the inequality in potential punishments permitted by section 17-360."[112]

In sum, the *Robinson* decision reiterated the classic test for determining whether a statutory classification can withstand an equal protection attack, that the classification and the purpose of the statute must be reasonably related, but held that the burden of showing

---

106 281 F. Supp. at 14.
107 *Id.* (emphasis added).
108 208 U.S. 412 (1908).
109 335 U.S. 464 (1948).
110 368 U.S. 57 (1961).
111 281 F. Supp. at 13 (citations omitted).
112 *Id.* at 16.

such a reasonable connection was heavier on the state where the classification was of women as a group and resulted in a deprivation of personal liberty than it might have been perhaps in the area of economic regulation and the classification was not based upon one's condition at birth. The state not having satisfied this burden in *Robinson*, the immediate release of the petitioner was ordered.[113] While *Robinson* seemed to approve of the Supreme Court decisions in *Hoyt*, *Goesart* and *Muller*, such approval was by no means necessary to its decision. It is possible to read the *Robinson* court's reference to those earlier cases as saying merely that, even if they were still "good law," they did not require the sentencing classification to be upheld, where the absence of any reasonable relation between the purposes of the statute and the classification was so clear. For, as discussed elsewhere in this series though the earlier Supreme Court decisions may still be "good law" in that the Supreme Court has not overruled them, the Court may have ample reason for doing so, at least in respect to the *Hoyt* and *Goesart* situations, if not in regard to the economic regulation involved in the *Muller* case. Indeed, notwithstanding the *Robinson* court's apparent approval of those earlier decisions, its analysis of the discriminatory legislation involved in the Connecticut statute may also be pertinent to a reconsideration of those earlier Supreme Court cases upholding a variety of sex-based discriminatory laws.

The various opinions in the *Daniels* and *Robinson* cases are of extreme importance for a number of reasons. For one thing, they undermine earlier cases in other jurisdictions upholding sex-based discrimination in sentencing rules and practices.[114] They also represent a significant breakthrough, as does *White v. Crook*,[115] in the realm of jury service, and some of the consortium cases discussed in the last section,[116] in the undifferentiated "sex is a reasonable basis for classification" approach that has held sway for so long in this area. What is more important is that their analytical approach —emphasizing the greater burden of justification to sustain an un-

---

[113] It has been noted that because the decision in *Robinson* was issued in a *habeas corpus* proceeding, it applied only to that case and did not invalidate the statute for all present and future inmates. Office of Economic Opportunity, *Law In Action* 4 (1968). However, if the lower court decision, which has been appealed by the state, is upheld, the Connecticut Attorney General could release other inmates held under similar circumstances. At least 43 of the 118 present inmates of the State Farm, it has been reported, could benefit from the *Robinson* decision. *Id.*

[114] The constitutionality of such statutes has been upheld in the cases cited, *supra* note 84.

[115] 251 F. Supp. 401 (N.D. Ala. 1966).

[116] *See* p. 143 *supra.*

equal deprivation of a "basic" civil right or analogizing a female group to a racial group—creates the possibility of successfully attacking, on constitutional grounds, a variety of other sex-based discriminiatory rules and practices. In their own way, this handful of decisions may be the early heralds of a new day in the general treatment of men and women in American law and life.

CONSTITUTIONAL ATTACK UPON SEX-BASED VARIATIONS IN THE AGE OF MAJORITY AND RELATED CONCEPTS

The sex-based disparities in minimum age requirements for marriage and for achieving adult status described in an earlier part of this series[117] are subject to constitutional attack in a variety of contexts. The United States Supreme Court has indicated in separate cases, for example, that: 1) marriage is one of the "basic civil rights of man";[118] and 2) the condition of being a juvenile does not deprive a person of certain constitutional protections.[119] The time may therefore come when a male, who under state law may not marry without parental consent before the age of 21, though females in that state may do so at 18, will challenge that type of rule—perhaps successfully—as a violation of the equal protection and due process guarantees of the United States Constitution.[120]

The rights to contract, to convey property, or generally to deal with one's business affairs, while perhaps not rising to the level of a "basic civil right," are nevertheless fundamental in modern American society. Although distinctions drawn between young and older persons may be permissible, the constitutional validity of sex-based discrimination between young persons themselves is more questionable. Thus we may also see in the near future constitutional challenges by males of state statutes prescribing an 18 year old general age of majority for females and a 21 year age for males.[121]

For a lower age of majority for one sex as compared with the other may be either a benefit or a burden, depending upon the circumstances. It is a benefit, in a very real sense, in permitting a

---

117 Kanowitz, *Law and the Single Girl, supra* note 1, at 300-06.

118 Loving v. Virginia, 388 U.S. 1, 12 (1967).

119 In re Gault, 387 U.S. 1, 28 (1967).

120 Professor Foster has already suggested that *Loving*, the antimiscegenation case, "opens up new areas and issues for attacks upon the constitutionality of particular regulations of the marriage relationship, Foster, *Marriage: A "Basic Civil Right of Man,"* 2 FAMILY L.Q. 90, 93 (1968), but apparently does not include sex-based age discrimination as one of the potential areas. As suggested above, however, this result might be achievable by combining the decisions in *Loving* and *Gault*.

121 *See, e.g.*, ILL. ANN. STAT. ch. 3, § 131 (Smith-Hurd 1961).

young person to engage in unfettered buying and selling and other facets of commercial life. Where males are prevented by law from engaging in such activities for longer periods than females, an equal protection attack, based upon the irrationality of the classification, may be available—especially when one recalls the general reverse age differential in sexual matters.[122]

That a lower age of majority can also be a burden is illustrated by the 1964 Illinois case of *Jacobson v. Lenhart*.[123] In Illinois the statutory age of majority for most purposes is twenty-one for all males and eighteen for all females.[124] An extension of that rule distinguishes between the sexes in defining the disability of minority during which a general statute of limitations will be tolled. Specifically, Section 22 of the Illinois Limitations Act provides with respect to personal actions:

> If the person entitled to bring an action... is, at the time of the cause of action accrued, within the age of twenty-one years, or if a female, within the age of eighteen years, or insane, or mentally ill, or imprisoned on a criminal charge, he or she may bring the action within two years after the disability is removed.[125]

Thus, a 17 year old male injured as a result of another's negligence, for example, will not be barred from suing for such injury until he has reached the age of 23. By contrast, a female must sue before reaching the age of 20, unless the limitation period is tolled by another type of disability, such as insanity, mental illness or imprisonment on a criminal charge.

In the *Jacobson* case, the female plaintiff had been injured, allegedly as a result of defendant's negligence, when she had just turned 18. She brought suit at age 22. Suit by a male under the same circumstances would not have been barred, but in her case, as a result of the statute, it was. To her contention that the sex-based age differential for tolling the limitation period was unconstitutionally "arbitrary, discriminatory and without relation to the apparent purpose of the statute,"[126] the Court first stated the traditional formula for testing alleged violations of the equal protection guarantee: "A classification of a group of persons is not arbitrary if there is a sound basis in reason and principle for regarding one class of individuals as a separate and distinct class for the purposes

---

[122] Kanowitz, *Law and the Single Girl, supra* note 1, at 312-20.

[123] Jacobson v. Lenhart, 30 Ill.2d 225, 195 N.E.2d 638 (1964).

[124] ILL. ANN. STAT. ch. 3, § 131 (Smith-Hurd 1961).

[125] ILL. ANN. STAT. ch. 83, § 22 (Smith-Hurd 1961).

[126] 30 Ill.2d at 226, 195 N.E.2d at 639.

of the particular classification."[127] Then repeating a century old comment upon the general differentiation in the ages of majority of males and females that "in the opinion of the legislature, females at the age of eighteen possess as much discretion as males at the age of twenty-one, and are then fitted to attain their majority . . . ,"[128] the Court concluded that "legislative and judicial recognition that females mature physically, emotionally and mentally before male persons, [is] . . . a reasonable basis for the classification, and therefore that any change in the rule should be made by the legislature rather than the courts."

The problem with the court's reasoning in *Jacobson* is its acceptance as an undifferentiated fact that females acquire "discretion" earlier than males. For "discretion" is not fungible. In each case it is important to ask, "discretion for what?" Certainly, if the reference is to "discretion" with regard to one's business affairs—which, after all, is what is involved in not permitting one's cause of action to be barred by a statute of limitations—the mores and practices of a society that has traditionally encouraged males and discouraged females from actively participating in this area cannot be ignored. Against that social background, a legislative determination that females achieve "discretion" earlier than males as applied to this specific area of conduct is not merely a matter about which reasonable people may differ, but stands out as an arbitrary and unreasonable classification prohibited by the equal protection clause of the United States Constitution.

To the extent that contracts entered into during minority can be disaffirmed by a minor, state laws prescribing different ages of majority for males and females also appear vulnerable to constitutional attack—notwithstanding the specific result in the *Jacobson* case. For the right to disaffirm is clearly a benefit. When it is conferred on one sex and arbitrarily withheld from another, though the latter is similarly situated, it would appear to violate fundamental constitutional rights. As *Levy v. Louisiana* demonstrates, moreover, correction of this inequity can take the form of conferring the benefit upon the sex from which it has been withheld rather than removing it from the latter.

In sum, whether achieving the age of majority be regarded as a benefit or a burden, unequal rules for males and females in this area, wherever they exist, appear to be vulnerable at this date to due process and equal protection attacks. Equalization of treatment in this area, as in others discussed in this article, should go a long

---

[127] *Id.* at 227, 195 N.E.2d at 640.
[128] *Id.* at 228, 195 N.E.2d at 640.

way toward eliminating unfair social, as well as other legal, disparities between the sexes in American life.

OBSCENE OR VULGAR LANGUAGE IN THE PRESENCE OF WOMEN

In one area in which legal consequences differ if women rather than men are in the factual setting, the first amendment guarantees of free speech and expression, in addition to the previously discussed constitutional provisions, may be implicated. This is the area of permissible utterances in the presence of women.

Arizona Criminal Code section 13-377 is typical of many statutes on the subject. It provides, in part, that a person who "in the presence of or hearing of any woman or child, or in a public place, uses vulgar, abusive or obscene language, is guilty of a misdemeanor . . . ."[129]

The interpretative problems raised by the words "vulgar, abusive or obscene language" are not unlike those that have bedeviled

---

[129] ARIZ. REV. STAT. ANN. § 13-377 (1956). Interestingly, this statute was involved in the landmark United States Supreme Court decision extending certain procedural safeguards to Juvenile Court delinquency proceedings, In re Gault, 387 U.S. 1 (1967). In that case, Gerald Gault, a 15 year old boy, had been adjudged and committed as a juvenile delinquent for having allegedly made obscene and lewd telephone calls "of the irritatingly offensive, adolescent, sex variety", *Id.* at 4, which, had they been made by an adult, would have constituted a misdemeanor pursuant to the above cited section of the Arizona Criminal Code. Since ARIZ. REV. STAT. ANN. § 8-201(6) (1956) defines a "delinquent child" as including "(a) A child who has violated a law of the State or an ordinance or regulation of a political subdivision thereof," a finding that Gerald had violated that law was necessary for a determination of delinquency on that ground. The "law" which the juvenile violates must of course be one that is constitutionally valid. If, as is suggested in the text, serious constitutional questions are raised by this and similar laws, an alternative or additional approach in *Gault* might have been to seek reversal of Gerald Gault's adjudication of delinquency by challenging that provision of the Arizona Code. This point was not briefed in *Gault*, however, either by the appellant or by any of the *amici curiae* (Legal Aid Society and Citizens' Committee for Children of New York, Inc.; Ohio Association of Juvenile Court Judges; and the American Parents Committee)—a failure probably explained by the parties' preoccupation with the procedural due process questions and by the possible validity of the statute as applied to the particular facts of the *Gault* case. For a reasonable distinction might be drawn between "obscene" utterances made *to* a person and those made in a person's *presence*—although distinctions drawn between the sex of the hearers would still appear vulnerable to equal protection challenge.

the courts in the pornography cases,[130] and are beyond the scope of the present work. Nevertheless, one can't help noting that arriving at objective standards for ascertaining whether particular words are "vulgar, abusive, or obscene," even in a geographically-limited community, may be extraordinarily difficult.

Important for present purposes, however, are the expressed and implied classifications of situations in which the utterance of the same words may or may not violate the statute. Thus, if they are spoken "in a public place" (a formulation that is not itself free of interpretive difficulty) the statute is violated regardless of the sex or age of the hearers. (That someone must have heard the words is implied by the statute, since a finding that the words had in fact been spoken could not otherwise be made.) By contrast, consequences will differ with the age or sex of the hearer if the objectionable words are uttered in a non-public place.

Thus, provided that the statute survives constitutional attacks on the grounds of vagueness or uncertainty in the meaning of "vulgar, abusive or obscene," the speaking of particular words in the presence or hearing of children will constitute a misdemeanor. The same will be true if they are uttered in the presence or hearing of women. But, applying the maxim of *expressio unis, exclusio alterius*, it is clear that no matter how "vulgar, abusive or obscene" particular words may be, their utterance in the presence of men in a non-public place will not *per se* subject the speaker to any criminal penalties.

Several features of this statute are noteworthy in the present context. First, the utterance of such words in the *hearing* of women, though not in their *presence* is punishable. Though this formulation may have been designed to cover the situation in the *Gault* case itself—in which a telephone is used to communicate the offensive words—its literal terms appear to permit prosecution of a person who uses such words without knowledge that they are being overheard by members of the female sex.

Second, the juxtaposition of women and children as the persons to be spared the ordeal of hearing obscene, vulgar or abusive words is reminiscent of the common-law's time-honored practice of treating women like infants or, at times, idiots.[131] Designating children to be insulated from certain kinds of speech or literature may be a

---

[130] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966); Roth v. United States and Alberts v. California, 354 U.S. 476 (1957).

[131] Kanowitz, *Law and the Married Woman, supra* note 1, at 8.

reasonable classification in exercising the police power.[132] The same cannot be said of adult women, however, unless, that is, one first accedes to Justice Frankfurter's comments in *Goesaert v. Cleary*,[133] a case involving only the power of the state to prohibit women from selling alcoholic beverages, that the States may draw "a sharp line between the sexes,"[134] and that "the Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards,"[135] and then extends those comments to an area involving the preferred freedoms of speech and expression. Similarly, while the Supreme Court has, on the basis of its view that women are "still regarded as the center of home and family life,"[136] decided that a state may let women, and not men, choose whether to serve on a jury, such a role within the family and home bears no reasonable relationship to a statute penalizing speakers of vulgar or obscene words in the presence or hearing of women but not of men.

The only possible explanation of such statutes is that once more they express social attitudes that women are essentially of a different species than men, that they are brittle objects to be spared the reality of every day living, and that they are in a fundamental sense second-class citizens—all of which raise serious questions concerning the ability of such laws to withstand attacks on due process and equal protection grounds.

For what must be emphasized here is that these words are not regarded in the statute as inherently evil, wicked or punishable—as evidenced by the failure to make a criminal offense their utterance in the private presence of men. The statute simply reflects a legislative determination that women, because of notions about their brittleness, their delicacy, in a word, their "otherness"—are to be sheltered from this aspect of speech and expression. Here, as in other areas, women as well as men may ultimately have become the "victims" of such protection—so inextricably is it linked to numerous social and legal rules keeping the sexes from relating to one another primarily as people.

All this is not to suggest of course that the gates of social living be opened to a flood of four-letter words in daily speech—although it may be observed that much of our emotional responses to these

---

[132] *See, e.g.*, Ginsberg v. State of New York, — U.S. — (1968); *but cf.* Interstate Circuit, Inc. v. City of Dallas, — U.S. — (1968).

[133] 335 U.S. 464 (1948).

[134] *Id.* at 466.

[135] *Id.*

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

words is entirely irrational.[137] The point is that, objectionable or not, it is wrong, unreasonable, and probably unconstitutional, to punish those who would utter them in the hearing of women but not of men.[138]

Somewhat instructive of legislative and judicial attitudes in this regard is the language of Justice Jones of the Mississippi Supreme Court in *State v. Hall*,[139] rejecting for Mississippi the decision of *White v. Crook*[140] in which a three-judge federal court had held that Alabama's exclusion of women from jury service violated the equal protection clause. In the *Hall* case, Justice Jones offered the following reason, among others, for sustaining Mississippi's jury exclusion rule for women:

> The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.[141]

To "protect" women from "filth, obscenity" and the like, however, is also to protect them from certain aspects of the reality of

---

137 American society tolerates the expression "sexual intercourse," but its hackles are raised by a four letter equivalent whose linguistic roots can be traced to an earlier Anglo-Saxon word, and which is etymologically related to and sounds like a Danish word currently in use as the socially acceptable word to express the idea of sexual intercourse.

138 A related legal doctrine was once embodied in a Texas statute, TEX. REV. CR. STAT. art. 1248 (1925), repealed by TEX. ACTS 1927, ch. 274. As characterized in State v. Grugin, 147 Mo. 39, 46, 47 S.W. 1058, 1064 (1898), the former Texas Statute reduced "a homicide to manslaughter where insulting words are used to or concerning a female relative, [if] the killing ... occurs as soon as the parties meet after the knowledge of the insult." This statute was enacted to counteract the common law rule that "provocative words are not recognized as adequate provocation to reduce a willful killing to manslaughter...." R. PERKINS, CRIMINAL LAW 49 (1957). Similarly, in State v. Grugin, the Missouri Supreme Court held that in some circumstances *"words do amount to a provocation in law,"* relying on cases from other jurisdictions which, like the principal case itself, involved words suggesting that a female relative of the accused was unchaste or had committed adultery. "In this connection," noted the court in *Grugin*, "it must not be forgotten what a high estimate the *men* of all nations have placed on the chastity of their women and on the inviolability of their persons." 147 Mo. 39, 53, 47 S.W. 1958, 1065 (1898). (Emphasis supplied). By contrast, no cases appear in which homicide by a female has been reduced to manslaughter though perpetrated in response to words impugning the chastity or indicating adulterous conduct of close male relatives.

139 187 So. 2d 861 (Miss. 1966).

140 251 F. Supp. 401 (1966).

141 187 So. 2d at 863.

everyday life, to perpetuate as a matter of law, ancient chivalric notions which have often served as a mask for men's economic and sexual exploitation of women. The point that must be emphasized here is that any constitutional doubts that might attend such obscenity statutes if they were applied without regard to the sex of the hearers are intensified when they apply to women hearers only. It is submitted that such statutes can be invalidated as violating both the free speech guarantees of the first amendment and the equal protection clause of the fourteenth amendment, and that when the courts have an occasion to invalidate them for these reasons, the respect that men and women bear toward one another as fellow human beings will be enhanced rather than diminished.

WOMEN IN EMPLOYMENT

Recent federal and state legislation, where applicable, requires women to be paid equally as well as men for performing equal work and prohibits the withholding of employment opportunities —with respect to hiring, promotion and other working conditions— on the basis of sex.[142] Elsewhere, I have examined potential loopholes in these laws and ways of closing them, as well as their effect upon various state "protective" laws applying to women only—particularly those prescribing maximum working hours and maximum weight-lifting restrictions or barring women from certain kinds of employment. That it would be consistent with the past practices of the Equal Employment Opportunity Commission in administering Title VII of the 1964 Civil Rights Act and of the United States Department of Labor in administering the Equal Pay Act of 1963 for those agencies and the courts to reconcile those Acts with various state "protective" laws by requiring that, whenever feasible, the latter be applied to men as well as to women was also suggested. For in this manner, the Congressional goal of furthering equality of the sexes could be implemented without sacrificing important past social gains in the employment sphere.

But, as mentioned in that discussion,[143] the inequality of employment opportunity created by state "protective" laws for women has also been the subject of attack on equal protection grounds. The rejection of such an attack, on the basis of "settled precedents," in *Mengelcoch v. Industrial Welfare Commission of California*,[144] has in fact precipitated an effort to procure review of the constitutional

---

[142] *See* Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, supra* note 1, at 305.

[143] *Id.* at 323.

[144] Mengelcoch v. Industrial Welfare Commission, *reported at* CCH EMPL. PRACT. GUIDE ¶ 9129 (D.C. Cal. 1968).

arguments in the United States Supreme Court.[145] There are also many situations to which the jurisdictional reach of Title VII and the Equal Pay Act do not extend.[146] In those instances a constitutional challenge would appear to be the principal if not the exclusive way of seeking to end the discriminatory effects of such legislation. For these reasons, an examination of the constitutional law aspects of such legislation is appropriate here.

STATUTES IMPOSING WEIGHT-LIFTING RESTRICTIONS ON WOMEN OR BARRING THEM FROM CERTAIN TYPES OF EMPLOYMENT

In discussing the possibilities of attacking on constitutional grounds various statutes and official practices according men and women different treatment in the employment sphere, one must take as a starting point the decision of the United States Supreme Court in *Goesart v. Cleary.*[147] That case held that it was not a violation of the fourteenth amendment's equal protection clause for the state of Michigan to prohibit women, who were not wives or daughters of male owners of liquor establishments, to act therein as bartenders.

More important than the result in *Goesart,* however, was the court's rationale in reaching it. In effect, the court in *Goesart* applied the "any rational basis" test for equal protection purposes. Indeed, this was intimated in Justice Frankfurter's remark that "Since the line [the legislators] have drawn *is not without a basis in reason,* we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[148]

But, as noted earlier, there has developed in equal protection and due process litigation *two* tests whose application to a particu-

---

[145] On October 28, 1968, the Supreme Court decided that it was without jurisdiction to entertain the appeals in *Mengelcoch* in that case's present posture, leaving open the possibility that it would hear the case should it come to the Court from the court of appeals. Mengelcock v. v. Industrial Welfare Commission, — U.S. — (1968).

[146] Since July 2, 1968, persons having fewer than 25 employees, though they are engaged in industries "affecting" commerce have not been covered by Title VII of the 1964 Civil Rights Act. Coverage of the FLSA's equal pay provisions, added by the Equal Pay Act of 1963, is subject to the FLSA's numerous exemptions, 29 U.S.C. § 213, as well as that Act's stricter requirements with respect to "interstate commerce." *See, e.g.,* 29 U.S.C. § 206(a) and (b), and minimum dollar amounts in sales or business volume for most enterprises, in the case of enterprise coverage as opposed to individual employee coverage. *Id.* § 203(a).

[147] 335 U.S. 464 (1948).

[148] *Id.* at 467. (emphasis supplied).

lar case will depend upon whether the statute or official practice abridges a right that is properly characterized as "basic" or "non-basic."[149] In *Goesart*, however, the Court did not even begin to explore the possibility that the right involved in that case—the right to procure a job—might be properly placed in a "basic" category, thus subjecting the state statute to the "most rigid scrutiny" and in effect placing a greater burden of justification on the party seeking to have the validity of the statute upheld than would ordinarily exist.

It is submitted that the right of Americans to procure employment is fundamental, and is to be distinguished from general business activities which can constitutionally be regulated on an "any rational basis" showing.[150] Certainly the right to procure a job—or more precisely the right to have government not impede the opportunity to freely negotiate a job with an employer, unless in furtherance of some absolutely *overriding* state policies—would appear to be just as fundamental as the right to marry, characterized as basic in *Loving v. Virginia*.[151] Indeed, a reasonable argument can be made that the right to be free of unwarranted governmental interference with the opportunity to work is more basic than the right to marry, since personal decisions to marry or not will often be affected by the financial circumstances of the prospective groom or bride. Were this view adopted, it would not be sufficient for equal protection standards that a legislature had some reasonable basis for barring women from the occupation of bartending, wrestling or mining—especially when one recalls that in individual cases the

---

149 *See* pp. 140-41 *supra*.

150 The premise that the "right to work" is basic does not mean that any state or federal legislation having the effect of limiting job opportunities would be *ipso facto* invalid. It would simply signify that the burden of justification, as I have called it, would be greater than otherwise. Thus it would be possible to continue to sustain the validity of the National Labor Relations Act's implied authorization of union shop agreements, see proviso to § 8(a)(3) of the Act, on the ground that the general requirements of labor peace and the maintenance of satisfactory working conditions and wages satisfies this greater burden. It should also be noted that the N.L.R.A. does not *require* union shop agreements, but merely permits them. Where they exist, they are the products of private contractual arrangements between employers and labor organizations. By analogy with the principles of Shelley v. Kraemer, 334 U.S. 1 (1948), however, state action would be present in suits to enforce such agreements, and in such situations their alleged unconstitutionality could be raised. As indicated in the text, however, holding that the right to procure a job is "basic" would not invalidate legislation or court action in aid of various union security arrangements.

151 388 U.S. 1 (1967).

actual impact of such legislation is to impose a condition of perpetual unemployment on particular women. If the impact of various state "protective" statutes upon the "right to work" is seen in this light, then it is entirely possible that legislatures now have an obligation to do precisely what, in *Goesart v. Cleary*, Justice Frankfurter declared was beyond their responsibility, namely, "to reflect sociological insight, or shifting social standards."[152] This approach is implicit in the Court's recent utterance in the *Levy* case that the fact that history and tradition was on its side would not *per se* validate discriminatory legislation.[153]

That the right to work is basic in our society has in fact been recognized by the Supreme Court itself. In *Truax v. Raich*,[154] the Court struck down as an equal protection violation an Arizona statute prohibiting employers from employing more than 20% of its work force from among aliens. In a statement that is relevant herein for a number of reasons, the Court noted:

> It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.[155]

In sum, the Court would be properly performing its role as final interpreter of the United States Constitution were it to overrule the *Goesart* case and to invalidate, as equal protection violations, any state statutes *categorically* denying women the opportunity to earn their living in any calling they choose to pursue, without regard to their individual capacities, needs and talents.

In effect, the suggestions made earlier as to the role and responsibility of the Equal Employment Opportunity Commission in invalidating such laws under the command of Title VII of the 1964 Civil Rights Act whenever they come within its jurisdictional reach would be equally applicable to the courts when faced with constitutional challenges to such statutes. At the very least, to withstand equal protection challenges, such statutes would have to be modified so as merely to create presumptions of women's inability to perform

---

[152] 335 U.S. 464, 466 (1948).
[153] 391 U.S. 68, 70 (1968).
[154] 239 U.S. 33 (1915).
[155] *Id.* at 41.

particular jobs, while according them reasonable opportunity, by physical examinations, physician's certificates of fitness or otherwise, to overcome such presumptions. The same principles would apply to the various weight-lifting limitations in state statutes, as suggested in my earlier discussion of the effects of Title VII upon such laws or regulations.

HOURS LIMITATIONS

Recognizing the effect the state hours limitations for women have upon their employment opportunities and that their official denial or infringement constitutes the violation of a "basic civil right" is central to any attempt to deal with the constitutional aspects of such limitations. With this background, it is possible that the appeal in the *Mengelcoch*[156] case, unless refused by the Supreme Court on the grounds of insubstantiality of the federal questions presented therein, could very well be decided by the Court holding that such limitations violate the equal protection clause in that they cannot withstand the "rigid scrutiny" and the great burden of justifications required for state interferences with *basic* civil rights.

To hold such laws to be invalid, however, without doing anything more would confront the Court with the same type of agonizing dilemma that has faced the EEOC; that is, in the name of achieving equality of treatment for men and women in this area, it could find itself abrogating a useful piece of social legislation which, though incomplete, had represented a step in the direction of social progress. It is submitted, however, that, once again like the EEOC, the Supreme Court has available to it the means of preserving equality without sacrificing progress, and that specifically, it can do this by extending on the basis of existing constitutional principles the protection of such laws to men where they presently apply to women only.

At the outset it should be recognized that the constitutional-extension approach recommended with respect to hours limitations has been deliberately not recommended in the previous discussion of statutes imposing weight-lifting limitations or absolutely barring women from certain occupations. By contrast, the "extension" approach is also urged with respect to state minimum wages for women only discussed in the next section.

The principal reason for advocating such an approach in the hours limitations and minimum wages areas, but not to weight-lifting limitations and statutory employment bars is that if it were

---

[156] *See* note 145, *supra.*

adopted in the latter two situations, large sections of industry would simply come to a grinding halt. For example, if the Court were to decide (assuming it has the constitutional authority to do so) that the way to remove the inequality inhering in a rule that bars only women from the occupation of mining would be to extend the bar to men, it would simply mean that mining would not be carried on in the states with such laws—hardly a tolerable result. Similarly, if it should hold that a state's 50 lb. weight-lifting limitation were to be extended to men, it would once more mean that certain objects would simply not get lifted in the course of that state's industrial life—hardly more tolerable than the last result.

Perhaps, these effects on industry merely demonstrate that with respect to such statutes or regulations the states would be able to satisfy the greater burden of justification in abridging the basic civil right of employment in this manner. Although, rather than completely validating such legislation, the Court could require that the laws be recast to permit individual women to establish that they can perform the work without harmful effects. In addition, as suggested earlier, constitutional considerations may require the states to supplement such statutes with others requiring employers to install labor-saving machines, where they are available, to minimize the physical strain attendant upon lifting excessively heavy objects.

But when it comes to hours limitations or minimum wages, extension of the protection to male employees, where it presently applies to women only, would not have such drastic consequences. Industry would go on. It would simply mean that the cost to employers *might* be increased, an interference that has been constitutionally allowed when effected by either state or federal action. The question remains whether it is within the constitutional authority of the United States Supreme Court, if it holds that the present hours limitations violate the equal protection clause because they apply to women workers only, to decree that henceforth these laws, where they exist, must also be applied to men.

The suggestion that the Supreme Court should do this might strike some readers as advocating the nakedest kind of federal judicial interference with the state's legislative processes. In their eyes it is "bad" enough for the Court to hold, as it has frequently done, that a particular law enacted by a state is unconstitutional and therefore must cease to exist. But it would be altogether a different process for the Court to hold, as has been suggested herein, that the law as it stands is invalid, but that rather than being abrogated, it would remain in force with the additional feature that, despite its specific limitation to women, it would now be allowed to apply also

to men—a group that the legislature had not intended to benefit in enacting the legislation in question. In fact, the argument would run, had the members of these legislatures realized that such laws would be declared unconstitutional for applying only to women, they might have preferred no protective laws at all to having them apply equally to members of both sexes.

But, it is submitted, that this result is not as unthinkable as might first appear, and that, indeed it is consistent with what the Court has done, properly, in a number of other situations. Moreover, the manner of construing such statutes may mitigate what, at first blush, would appear to be legislative usurpation by the Supreme Court should it devise a solution similar to the one recommended herein.

For one thing, as I have suggested elsewhere,[157] the 1905 decision in *Lochner v. New York*, invalidating hours limitation for *both* sexes and the 1908 decision in *Muller v. Oregon*, sustaining similar legislation for women only had much to do with influencing the states to enact such laws only for women, on the principle that half a loaf was better than none. In effect, it was the past conduct of the Supreme Court itself which largely, if not entirely, accounted for the proliferation of state protective laws applying to women only. But the Supreme Court, in *United States v. Darby*,[158] rejected in 1940 the thinking that had led it to invalidate the New York protective hours law in the *Lochner* case. Indeed, there can be little doubt that the Court, were it faced today with the same set of facts confronting it in the *Lochner* case, would uphold such a statute. Unfortunately, because of inertia or other reasons having nothing to do with the merits, the states did not react to the *Darby* case by enacting new laws extending the previous women-only protections to men. Part of the explanation for this inaction probably involves a lack of sensitivity to the effects such one-sided laws had on women's employment opportunities. It is also possible that these effects had not been forcefully brought to their attention by citizen participants in the states' political processes.

In sum, therefore, since the Supreme Court itself can be regarded as being largely responsible for the fact that the states had enacted many protective laws in the labor sphere for women only, it should be regarded as an act of atonement for the Court itself to hold, as suggested, that such laws are invalid as they presently

---

[157] *See* Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, supra* note 1, at 305.

[158] 312 U.S. 100 (1941).

stand and that the remedy—unless the states should act to repeal such laws *in toto*—would be to "extend" them to men also.[159]

This result could be facilitated, moreover, were the Supreme Court to construe such laws, as it can logically do in the light of their historical background, as not simply according the protection to women only, but rather as signifying that the protection is accorded to all persons, except males. Rather than being a semantic manipulation, this construction would be consistent with what probably was the intention of many state legislatures when they enacted such laws, though, by their terms, they applied only to women. Having been informed by the Supreme Court in the *Lochner* and *Muller* cases that despite their desire to provide such protection to both sexes, they could constitutionally do so only with regard to women, it is not unreasonable to *read* their subsequently enacted laws in the manner suggested above.

Were the statutes providing maximum hours protection for women only interpreted as suggested, that is, that in fact they provide such protection to all persons except men, a determination by the Court that such statutes violate equal protection standards for the reasons suggested earlier, and that the appropriate remedy would be to invalidate the *exclusion* of men would be entirely consistent with what the Court has previously done. In effect, the Court would be telling the states, "Whether you enact maximum hours legislation or not is entirely up to you. But if you do, then you must do so impartially without regard to sex."

Is this not in essence what the Court did in *Brown v. Board of Education*[160] and its progeny? Didn't the Court in those cases tell the states, in effect, "Whether you have a system of public education is up to you. But if you do, you must administer it without regard to race."

Perhaps an even closer analogy can be found in the Court's re-

---

159 *Cf.* United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), in which the Supreme Court held that Congress, in enacting the Sherman Act, asserted its power over the business of insurance notwithstanding that it failed to do so expressly and despite the fact that the Supreme Court, starting with Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869) had repeatedly held that the business of insurance was not in commerce. Again it must be emphasized that this recommendation in the text is limited to the maximum hours and minimum wage areas, and that different considerations would dictate alternative approaches with respect to statutes barring women from certain types of employment or imposing weight-lifting restrictions.

160 347 U.S. 483 (1954).

cent decision in *Levy v. Louisiana*.[161] As mentioned earlier, that decision held that a denial to illegitimate children of a right to recover for wrongful death of their mother, where her legitimate children could recover for the same wrong, violated the equal protection guarantee. But the Court's remedy for such a violation was not to remove from the legitimate children the right to recover for their mother's wrongful death, but rather to extend this right to her illegitimate children. Is this not a direct analogue to what has been urged above with respect to maximum hours legislation (and minimum wage legislation below)? That it is within the Court's power and consistent with precedent for it to hold that the invalidity of such legislation being applied to women only must be cured by extending its coverage to men also, rather than by removing it from women. Couldn't the state have urged in *Levy* that "were we aware that we would be required to extend this protection (the right to sue for a mother's wrongful death) to a group that we had originally excluded—illegitimate children—we would rather not have accorded such protection to any children, legitimate or otherwise."

To be sure, one might argue that the Louisiana statute in *Levy*, at least as interpreted by that state's Supreme Court, clearly *excludes* illegitimates, whereas the state maximum hours laws *confers* benefits on women only. But it is no accident that the maxim, *expressio unius, exclusio alterius*, has become a commonplace in American statutory construction. Nor does the fact that the U.S. Supreme Court in *Levy* overruled a state court's interpretation of a statute distinguishing *Levy* from the maximum hours legislation considered herein. For the Supreme Court in *Levy* did not reverse the state court simply because it disagreed with the latter's interpretation of the statute—a course that would have been beyond the court's own constitutional authority. Rather, it held that it is *unconstitutional* for the state Supreme Court to so interpret the statute. The result would have not been different had the Louisiana legislature been explicit on this point when it enacted the statute, thus removing the need for state court interpretation of its meaning.

Even some state courts, exercising their power to entertain federal constitutional challenges to state laws, have achieved similar results. Thus, in *Clem v. Brown*, an Ohio Court of Common Pleas, holding that the state's rule permitting husbands but not wives to

---

[161] *See* note 41, *supra*; *see also* Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 79 (1968), holding as violative of the equal protection guarantee a state's denial to mothers of illegitimate children of the right to sue for the latters' wrongful death while providing such relief for mothers of legitimate children.

recover for loss of consortium deprives a wife of "equal protection of the law"[162] remedied this inequality by extending the right to wives rather than by removing it from husbands. Similarly, the decision of a federal district court in Michigan in *Owen v. Illinois Baking Corporation*[163] was one more example of a federal district court curing what it regarded as a constitutionally infirm one-way consortium rule by extending the right to sue to married women.

As long ago as 1871, the United States Supreme Court held that a state could not limit the right to sue on a cause of action created under state law so as to deprive the federal courts of the power to entertain such suits if jurisdiction was otherwise present.[164] Commenting upon this case in 1961, the Court of Appeals of the Fourth Circuit noted that: "Wisconsin sought to limit her wrongful death action, *which she could have repealed entirely*, to her own courts. The limitation was held not be be binding upon federal courts sitting in Wisconsin, which, when adjudicating a cause of action arising under the Wisconsin statute, should ignore the limitation."[165] Though the result in the earlier case was dictated by the requirements of Article III of the United States Constitution, conferring the Judicial Power upon the United States, rather than by the equal protection clause of the fourteenth amendment, it is another illustration of the Court's past practice of implementing constitutional provisions by extending a state-created benefit beyond the limits intended by the state, while recognizing that the state could, if it wanted, remove the benefit from all.

In short, there would appear to be ample precedent for the United States Supreme Court, when confronted with a constitutional challenge to state hours limitations (or minimum wage requirements) for women only, to require such protections to apply to men as well. If, in response to such a Supreme Court ruling, some states decide to repeal various protective laws altogether, that would be a course of conduct entirely within their competence —although their decision to do so or not would be obviously subject to a variety of political pressures within their own borders. Certainly, that would be no worse than a determination by the Court that such existing laws for women only must, in effect, be repealed, by holding them invalid without doing anything more.

But the importance of a Supreme Court ruling along the lines suggested above is that it would relieve the states of exerting any

---

[162] 3 Ohio Misc. 167, 207 N.E.2d 398 (1965).
[163] 260 F. Supp. 820 (W.D. Mich. 1966).
[164] Railway Company v. Whitton, 80 U.S. 270, 286 (1871).
[165] Markham v. City of Newport News, 292 F.2d 711 (4th Cir. 1961). (emphasis supplied).

new initiative to extend the previous protection to men also. It would in fact impose upon them the burden of repealing such laws, should they decide to pursue that course. Since that would also require state initiative, since state initiative in any sphere may be often more difficult to develop than tolerance of the status quo, and since many forces within the states would oppose such initiatives, the likelihood that significant numbers of states would respond to such Supreme Court rulings by repealing existing protective legislation is not too great.[166]

But the most important consideration of all is that were the Supreme Court to follow the course of conduct suggested herein, it would not only undo the harmful effects of some of its prior decisions permitting various types of sex discrimination, but would do so in a manner that would preserve important social gains of the past. Were this to occur, the fears of many who have opposed the "equal rights" amendment because of what they saw as its threat to existing legislation that, though only partial in not applying to men, was nevertheless needed, would be allayed. For the course of action urged herein would achieve as much or more than what could be achieved under the equal rights amendment, without undoing much that is worthy of preservation.

MINIMUM WAGE LAWS APPLICABLE TO WOMEN ONLY

Although in a few states[167] and under the federal Fair Labor Standards Act,[168] minimum wage laws apply to all employees regardless of sex, in the majority of states such laws apply only to women or to women and minors, but not to adult males.[169] The

---

166 *See, e.g.*, the Uniform Time Act of 1966, 15 U.S.C. § 260 (1966) *et seq*, establishing uniform dates for the commencing and ending of daylight saving time in all states and jurisdictions where it is observed. At the same time, the Act allows each state through enactment of state law to exempt itself on a statewide basis from the daylight savings time provisions of the Act. 15 U.S.C. § 260a. In enacting this legislation in this manner, Congress appeared to be cognizant of the phenomenon discussed in the text. It could have merely adopted a joint resolution extolling the virtues of a uniform daylight savings time system, and exhorting the states to enact such laws. But that would have required the exercise of state initiative. In effect, what Congress then did was to say to the states that if you do not think you can live with this uniform system, then you must exert the initiative to opt out.

167 *See, e.g.*, IND. ANN. STAT. § 40-134 (1965 Repl.).

168 29 U.S.C. § 201 *et seq.* (1965).

169 See U.S. DEPT. OF LABOR, WOMEN'S BUREAU, ANALYSIS OF COVERAGE AND WAGE RATES OF STATE MINIMUM WAGE LAWS AND ORDERS *passim* (Bulletin 291, August 1, 1965).

tendency of this sex-based disparity in minimum wage coverage to foster inequality of employment opportunity or in actual wages is probably not as great as in some other unequal laws in the employment sphere. For one thing, wage minima prescribed by these laws are often unrealistically low and do not achieve the level of going wage rates dictated by the principle of supply and demand. In most cases, moreover, male employees command real wages in the labor market far in excess of the state minima, so that males have not been aware, and have therefore not complained, of being the objects of discrimination.

But males are occasionally paid less than the minimum wage rates prescribed for women in their states.[170] Where the enterprise or individual employee is subject to the jurisdictional reach of Title VII of the 1964 Civil Rights Act or the Equal Pay Act of 1963, this disparity can be corrected by requiring the state minimum wage law to be extended to men also. This has been required by both the Department of Labor and the EEOC,[171] and in effect represents an incorporation of the state statute by reference into the federal law, with their equal pay and equal opportunity principles then causing the extension.

In situations which are not affected by Title VII and the Equal Pay Act, however, males will occasionally be the victims of discrimination when, as a result of state law, they receive lower wages than women employed on the same or similar work. And—also occasionally—women may find in such situations, that employers are provided with an incentive for hiring only males since presumably lower wages could be paid.

The question that must then be faced is whether either or both situations, where they occur beyond the reach of the federal legislation, can be corrected on the basis of constitutional principles. Specifically, is there constitutional warrant, or more precisely any constitutional prohibition against, the United States Supreme Court requiring states that presently prescribe minimum wages for women to extend their laws to men? It is submitted that, as in the case of state hours legislation for women only, state laws prescribing minimum wages for women only should be declared by the Supreme Court to be in violation of the equal protection clause of the United State's Constitution's fourteenth amendment. Furthermore, it would be consistent with the Supreme Court's previous actions in a number of areas to remedy such unconstitutionality by holding that

---

[170] *See* Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, supra* note 1, at 305 n. 124.

[171] *Id.* at 333 n. 125.

such laws, until and unless repealed, also apply to men, rather than merely that they are invalid and can be ignored by employers.

Minimum wage laws applying to women only have been the subject of considerable constitutional litigation in the state and federal courts.[172] While the state courts originally upheld such laws against a variety of constitutional attacks[173] the United States Supreme Court in 1923 held in *Adkins v. Children's Hospital*[174] that a state law prescribing minimum wages for women violated the fifth amendment's prohibition against the taking of liberty or property without due process of law. In effect, the Court in *Adkins* distinguished the *Muller* case by emphasizing the connection between the hours limitation for women workers upheld there and the general *physical* differences between the sexes.[175] More important, however, was the Court's recognition that the adoption of the nineteenth amendment and the general emancipatory trend for women in the law prevented her being "given special protection or be[ing] subject to special restraint in her contractual relationships."[176] In the Court's eyes, because of its view of the principle of freedom of contract, minimum wage legislation for women tended to be regarded as a special restraint rather than a special protection.

But fourteen years later, the *Adkins* case was overruled by the United States Supreme Court in *West Coast Hotel Co. v. Parrish*.[177] Upholding a Washington statute that resembled in its essential respects the one invalidated in *Adkins*, the *Parrish* decision rejected the earlier case's view that liberty of contract was, as a result of the due process clauses of the fifth and fourteenth amendments, constitutionally inviolable. In *Parrish*, the Court recognized that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[178] Relying on earlier cases[179] that had been ignored in *Adkins* the Court noted that it had been previously recognized that the employment relationship could be regulated by the state in the exercise of the police power. It is important to note that the cases relied on by the Court in *Parrish* were all cases that made no distinction between

---

172 Cases are collected at 39 A.L.R.2d 740 (1955).

173 *See, e.g.*, Holcombe v. Creamer, 231 Mass. 99, 120 N.E. 354 (1918); Williams v. Evans, 139 Minn. 32, 165 N.W. 495, *petition for rehearing denied*, 166 N.W. 504 (1917).

174 261 U.S. 525 (1923).

175 *Id.* at 552-53.

176 *Id.* at 553.

177 300 U.S. 379 (1937).

178 *Id.* at 391.

179 *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1898).

the sexes insofar as the constitutionality of the states' regulation of the employment relationship was concerned.[180]

There was no reason why the result in *Parrish* could not have rested on the above grounds alone. Indeed, a few years later, the Supreme Court, in *United States v. Darby* sustained the federal Fair Labor Standards Act which prescribed minimum wages for both men and women. Significantly, the Court in *Darby* noted:

> Since our decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, it is no longer open to question that the fixing of *a minimum wage* is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment.[181]

Thus the Court in *Darby* believed that what had been significant in *Parrish* was the upholding of *a* minimum wage and not a minimum wage for *women*. If one looks at what the Court *did* in *Parrish* rather than what it *said*, it will be seen at once that this is in fact what occurred.

But the *Parrish* case appears to stand in the way of any argument urging the unconstitutionality as violating the equal protection clause of a minimum wage law applicable only to women. For one thing, though *Parrish* in fact overruled *Adkins* simply on the basis of a revised view of due process requirements as related to the "liberty to contract" concept the Court in *Parrish* somehow felt impelled to emphasize that this was a statute applying only to women and that the state had an interest in their "health . . . and their protection from unscrupulous and overreaching employers."[182] It is submitted that, in the light of what it had previously said and done in that case, this discussion was entirely unnecessary to the result in *Parrish*. For another thing, the Court noted,[183] in response to one of Justice Sutherland's dissenting observations,[184] that:

> The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The 'legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.[185]

The problem with the Court's reasoning here was that it took no account whatsoever of the positive harm done by this particular

---

[180] *See* cases cited in *Parrish*, 300 U.S. at 393.
[181] 312 U.S. at 125 (emphasis supplied).
[182] 300 U.S. at 398; *see also id.* at 394-99.
[183] *Id.* at 400.
[184] *Id.* at 411-12.
[185] *Id.* at 400.

legislation in placing some women at a disadvantage to men insofar as employment opportunity was concerned or with respect to the harm occasionally suffered by male employees who might be impelled to bid for jobs at lower wage rates in order to compete successfully against women for available jobs.[186]

That the Court ignored these possible effects of such legislation is probably explained by its implied assumption that it was faced with an "either-or" situation. Either it would sustain the legislation as applied to women only or else it would have to invalidate the law. That it could constitutionally exercise its power by sustaining the law as not being in violation of the due process clause of the fourteenth amendment while at the same time, in order to make it conform to the equal protection clause of that amendment, requiring it to apply to men also, did not—and in the light of constitutional precedents of the period probably could not—occur to the Court. But as demonstrated in the preceding section dealing with state hours limitations, it would be consistent with what the Court has done in the last twenty-five years were it to take this position today. Certainly were the attack on such laws, because of their impact on employment opportunities, based on equal protection grounds, the Court could determine that they cannot stand as presently applied because, infringing a basic civil right—the right to work—they cannot sustain the great burden of justification required to support such laws. But, as suggested earlier, the cure for such invalidity would not be to abrogate the laws but to interpret them as also applying to men. Among other ways to such a result would be for the Court to hold, as it has often done in the past, that if a law can be construed as being either constitutional or unconstitutional, the former construction will prevail.[187]

THE "EQUAL RIGHTS" AMENDMENT?

The preceding pages in this article have demonstrated that, despite a period of relative desuetude in this area, existing provisions of the United States Constitution, and principally the equal protection and due process guarantees expressed or implied in the fifth and fourteenth amendments, have been increasingly invoked in the state courts and the lower federal courts to successfully challenge a wide variety of laws and official practices that continue to work an arbitrary discrimination between the sexes.[188] As some of these cases make their way to the Supreme Court, the Court, influ-

[186] All this, of course, without taking into consideration the effect upon this area of effective and extensive representation by trade unions.

[187] *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Porter v. Investors Syndicate, 286 U.S. 461 (1932).

[188] Not all the recent developments in this area have been examined in this article. *See, e.g.*, Clarke v. Redeker 259 F. Supp. 117 (S.D.

enced by the reasoning of the opinions below and perhaps more responsive to the present sociological climate surrounding the question of women's legal status than it has been in the past, may drastically revise its prior approach to determining the kind and extent of official sex discrimination that is allowable. In a fundamental sense, the 1963 prophecy of the U.S. President's Commission on the Status of Women appears to be in the process of fulfilling itself.

It was a belief in the eventual revision of the Supreme Court's approach to the question of sex discrimination in the law that led the President's Commission to withhold any recommendation with respect to the proposed "equal rights" amendment.[189] That amendment has for many years attracted a substantial number of proponents, however, and there are undoubtedly many persons who, even today, believe that its adoption is a necessary step toward achieving full legal equality between the sexes. Whether such a belief is warranted is the subject of the present section.

The crucial language of the proposed equal rights amendment to the United States Constitution states that: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Proposals of this sort have been introduced in each Congress since 1923,[190] and were introduced in the 90th Congress.[191]

In 1950 and 1953 the Senate approved the proposed amendment, but with the "Hayden Rider" added on the floor.[192] That "rider" provided that the amendment "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon persons of female sex."

In evaluating the amendment and rider, therefore, there are three possible results. One is to recommend adoption of the amend-

---

Iowa 1966), rejecting the claim of a male student at the University of Iowa School of Law that he was unconstitutionally discriminated against by a University regulation which had the effect of according resident status, and thus lower tuition fees, upon non-resident females who married resident males, while not according this privilege upon non-resident males, such as himself, who married resident females. *See also* Matter of Shpritzer v. Lang, 17 A.D.2d 285, aff'd 13 N.Y.2d 744 (1962), holding that policewomen, otherwise eligible, were not barred by reason of their sex, from competing for promotion to the position of sergeant. *Cf.* Schimmel v. City Civil Service Commission of the City of New York, *reported at* CCH EMPL. PRACT. GUIDE ¶ 9029 (1966).

189 *See* p. 132 *supra.*

190 CCPR 32.

191 *See* S.J.Res. 54, 90th Cong., introduced March 13, 1967, and H.R.J.Res., 22, 90th Cong., introduced January 10, 1967.

192 CCPR 32.

ment alone, another is to recommend adoption of the amendment together with the rider, and the third is to recommend, if not the rejection of the amendment and/or rider, at least an abatement of any efforts to secure their adoption.

For reasons to be explained below, it is this final alternative that is urged herein.

Given the premises and outlook that have been expressed throughout this series, it is abundantly clear that the amendment with the rider attached can, in no event, be acceptable. To qualify the amendment's requirement of equality with the command that certain special legal privileges enjoyed by women "now or hereafter" shall not be impaired is not to require equality at all. It is of course one thing to say that *some* of these existing legal privileges and benefits may continue to be held valid under the various evolving standards for testing differences in treatment of various identifiable social and human groups. It is quite another thing to say that any privilege previously conferred or to be conferred in the future upon women only is to be automatically validated. Rather than expressing the principle of equality, the amendment with the rider would in effect create a situation in which women would be "more equal" than men. Indeed, if as has been suggested herein, certain existing legal benefits and privileges accorded to women only may, unless extended to men also, violate existing constitutional provisions, then the adoption of the amendment with the rider would raise a serious question as to its validity in the light of the existing fifth and fourteenth amendments to the United States Constitution.[193]

If a principal villain in this area is the status of "otherness" that a male dominated society has imposed on women, the adoption of the amendment with the rider would constitute the granting of a blank check to the legislatures to perpetuate if not aggravate existing inequalities.

Of course, the comments that have just been made have been addressed to the potential effects of the amendment with the rider, and are by no means intended to impugn the motives of its sponsor or of those senators who have supported the rider. In all likelihood, support of the rider has been motivated principally by a fear that the adoption of the amendment without the rider would lead to the abrogation of useful social legislation, such as the minimum wage

---

[193] In a rough sense, a similar problem was implied in the determination in Baker v. Carr, 369 U.S. 186 (1962) of the relationship between the fourteenth amendment's equal protection clause and the "guaranty clause," U.S. CONST. art. IV § 4.

and maximum hours laws for women only.[194] But, as has been demonstrated herein, the principle of equality of treatment without regard to sex can be implemented without sacrificing these important social gains of the past. This can be done by the device of extending, wherever feasible, such laws to men also. As has been shown, the court can do this alone—although legislatures, provided they wanted to take the initiative to do so, *could* subsequently repeal such laws, a not too likely event in the light of our social and political history.

What, then, of the amendment alone, that is, without the rider? At first blush there is a certain beguiling panacea—like quality about the amendment for those who are dedicated to the quest for equal dignity between the sexes. It would seem that, were the amendment adopted, it would be capable of achieving this goal in one fell swoop. Indeed, there occasionally have even been intimations in some judicial opinions that sex discrimination in the law could not be constitutionally invalidated "unless prohibited in express terms in the Constitution. . . ."[195]

But it is submitted that were the amendment adopted, it would have little or no effect upon existing constitutional doctrine in the area of sex discrimination. Then, as now, the crucial factor will continue to be the responsiveness of the judiciary to the social impulse toward equality of treatment without regard to sex. For example, pursuant to a functional analysis, a court could hold, even after the adoption of the proposed amendment, that a law exempting women from strenuous military service is not one that denies or abridges any right (of men) on account of sex, but is rather one that is reasonably based upon the general physical (functional) differences between the sexes. Similar results *could* also be obtained in many other areas in which men and women are presently accorded different legal treatment.

Many proponents of the amendment appear to be motivated by a belief that the United States Supreme Court and lower state and federal courts have in the past held existing provisions of the United States Constitution, in particular the fifth and fourteenth

---

194 *See, a.g.*, 1945 tesitmony of Frank Donner for the CIO, that the equal rights amendment "can have no other effect but of repealing protective labor laws for women written into our statute books only after years of bitter struggle. In exchange for an illusory and doctrinaire equality it discards advantages which have taken years to accumulate." *Hearings on the Equal Rights Amendment before the Subcomm. of the Senate Judiciary Comm.* 79th Cong., 1st Sess., 81 (1945).

195 Salt Lake City v. Wilson, 46 Utah 60, 63, 148 P. 1104, 1107 (1915) (construing a *state* constitutional provision).

amendments, inapplicable to women. The fact is, however, that the courts have not done this at all. Instead, they have generally held that the existing constitutional provisions do apply to women, but that within the limits of those provisions, women in many situations constitute a class that can reasonably be subjected to separate treatment. It is submitted that the adoption of the equal rights amendment would not fundamentally change the picture. While the proposed amendment states that equality of rights shall not be abridged on account of sex, sex classifications could continue if it can be demonstrated that though they are expressed in terms of sex, they are in reality based upon function. On the other hand, under existing constitutional provisions, particular classifications of men and women that cannot be shown to be based upon function, are vulnerable to attack—as has already been demonstrated in some lower state and federal courts with respect to discriminatory laws in the realm of jury service, differences in punishment for identical crimes, right to sue for loss of consortium, and the like.

Of course, the presence of the amendment in the Constitution would not be entirely without special effects. In order to achieve the results suggested in the preceding paragraphs, the judiciary would have to overcome the specific language of the amendment. But the point that must be stressed is not only that this would not be impossible of achievement, but that judges could in fact do this very easily, adopting the analytical approach (functional analysis) mentioned earlier.

If adoption of the equal rights amendment would have little impact upon existing constitutional law doctrine in the area of sex discrimination, proponents of equality of legal treatment for men and women will find that, as a tactical matter, their energies will be better spent in other activities directed toward this goal. Every day spent in working for the amendment is a day that is taken away from informing the American public of the continued areas of unequal treatment, or from participating in the presently growing number of challenges to such treatment based on existing constitutional provisions.

Given the recent legal developments in the area of sex discrimination, there is every indication that great changes are in the offing, and that, in the tradition of the common law, such changes will take place with respect to specific, discreet situations, rather than with a potentially destructive and self-defeating blunderbuss approach. The need is for greater numbers of people of both sexes, lawyers and non-lawyers alike, to begin turning their attention to the legal problems in this area and toward devising new approaches, only a few of which have been suggested herein, to their solution.