70-4

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. [redacted]

SALLY M. REED,

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR APPELLANT

MELVIN L. WULF
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

RUTH BADER GINSBURG
Rutgers Law School
180 University Avenue
Newark, New Jersey

ALLEN R. DERR
817 West Franklin Street
Boise, Idaho 83701

PAULI MURRAY
504 Beacon Street
Boston, Mass. 02115

DOROTHY KENYON
433 W. 21st Street
New York, N. Y. 10011

Attorneys for Appellant

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No. 430

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—v.—

CECIL R. REED, Administrator, In the Matter of the Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of the State of Idaho is reported at 93 Idaho 511, 465 P.2d 635. The opinion of the District Court, Fourth Judicial District, is unreported. Copies of the opinions are set out in the separate Appendix, pp. 12a, 17a.[1]

[1] References to the separate Appendix are hereafter designated by the symbol "A."

Jurisdiction

The judgment of the Supreme Court of the State of Idaho was entered on February 11, 1970. A timely petition for rehearing was denied on March 24, 1970. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Idaho on June 16, 1970 (A. 25a). On June 24, 1970, Mr. Justice Douglas granted a timely application to extend appellant's time to file her jurisdictional statement to and including July 22, 1970. The Jurisdictional Statement was filed July 21, 1970, and probable jurisdiction was noted March 1, 1971.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *In re Gault,* 387 U.S. 1 (1967); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Levy* v. *Louisiana,* 391 U.S. 68 (1968).

Statutes Involved

Idaho Code, Sec. 15-312 provides:

> Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:
>
> 1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
>
> 2. The children.

3. The father or mother.

4. The brothers.

5. The sisters.

6. The grandchildren.

7. The next of kin entitled to share in the distribution of the estate.

8. Any of the kindred.

9. The public administrator.

10. The creditors of such person at the time of death.

11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Idaho Code, Sec. 15-314 provides:

Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

Question Presented

Whether Idaho Code, Sec. 15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females, denies appellant, a woman, the equal protection of the laws.

Statement of the Case[2]

Richard Lynn Reed, the adopted son of appellant, Sally M. Reed, and appellee, Cecil R. Reed, died intestate on March 29, 1967, in Ada County. According to the respective petitions of his mother, Sally M. Reed, and of his father, Cecil R. Reed, his parents were his only heirs at law.

Sally M. Reed, the appellant, as the decedent's mother, filed her petition for probate of his estate on November 6, 1967. Prior to the time set for the hearing on this petition Cecil R. Reed, the father, also petitioned for letters of administration.

The cause was heard on the petitions for administration of the respective parties, and the probate court entered its order appointing appellee, Mr. Reed. The probate court in entering its order noted that each of the parties was equally entitled to letters of administration under I.C. §15-312, but that Mr. Reed was entitled to a preference by reason of I.C. §15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females.

On April 23, 1968, Mrs. Reed appealed to the district court contending that I.C. §15-314 is unconstitutional as a violation of the Idaho Civil Rights Act (I.C. §18-7301 et seq.), the Fourteenth Amendment of the United States Constitution and Art. 1, §1 of the Idaho Constitution. The district court reversed the order of the probate court on

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[2] The Statement of the Case is taken verbatim from the opinion of the Supreme Court of Idaho, except for the elimination of one sentence not relevant here, and for minor modifications necessary to properly identify the parties.

the ground that I.C. §15-314 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and returned the case to the probate court for a determination, disregarding the preference set out by I.C. §15-314, of who is entitled to the letters of administration. Mr. Reed appealed to the Supreme Court of Idaho contending that the district court erred in holding I.C. §15-314 unconstitutional. The Idaho Supreme Court, reversing the district court, held I.C. Section 15-314 constitutional.

Summary of Argument

I

Idaho Code, Sec. 15-314, which provides that as between persons "equally entitled to administer [a decedent's estate], males must be preferred to females," denies appellant, an "equally entitled" woman, the equal protection of the laws.

The sex line drawn by Sec. 15-314, mandating subordination of women to men without regard to individual capacity, creates a "suspect classification" requiring close judicial scrutiny. Although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.

The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex-based discrimination. As other groups that have been assisted toward full equality before the law via the "suspect classification" doctrine, women are sparsely represented in legislative and policy-making chambers and lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. Absent firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

Prior decisions of this Court have contributed to the separate and unequal status of women in the United States. But the national conscience has been awakened to the sometimes subtle assignment of inferior status to women by the dominant male culture. In very recent years, both federal and state courts have expressed sharp criticism of lines drawn or sanctioned by governmental authority on the basis of sex. With some notable exceptions, for example, the case at bar, these lines have not survived judicial scrutiny. The time is ripe for this Court to repudiate the premise that, with minimal justification, the legislature may draw "a sharp line between the sexes," just as this Court has repudiated once settled law that differential treatment of the races is constitutionally permissible. At the very least the Court should reverse the presumption of rationality when sex-based discrimination is implicated and, rather than requiring the party attacking a statute to show that the classification is irrational, should require the statute's proponent to prove it rational.

Biological differences between the sexes bear no relationship to the duties performed by an administrator. Idaho's interest in administrative convenience, served by excluding women who would compete with men for appointment as an administrator, falls far short of a compelling state interest when appraised in light of the interest of the class against which the statute discriminates—an interest in treatment by the law as full human personalities. If sex is a "suspect classification," a state interest in avoiding a hearing cannot justify rank discrimination against a person solely on the ground that she is a female.

II

The sex line drawn by sec. 15-314, arbitrarily ranking the woman as inferior to the man by directing that the probate court take no account of the respective qualifications of the individuals involved, lacks a fair and substantial relation to a permissible legislative purpose. The judgment that "in general men are better qualified to act as an administrator than are women" rests on totally unfounded assumptions of differences in mental capacity or experience relevant to the office of administrator. To eliminate a woman who shares an eligibility category with a man when there is no basis in fact to assume that women are less competent to administer than are men, is patently unreasonable and constitutionally impermissible.

ARGUMENT

Introduction

By the explicit terms of Sec. 15-314 of the Idaho Code, appellant was denied the right to qualify as the administrator of her son's estate solely because of her sex. The issue in this case is whether, as appellant contends, mandatory disqualification of a woman for appointment as an administrator, whenever a man "equally entitled to administer" applies for appointment, constitutes arbitrary and unequal treatment proscribed by the fourteenth amendment to the United States Constitution.

In determining whether a state statute establishes a classification violative of the fourteenth amendment guarantee that those similarly situated shall be similarly treated, this Court has developed two standards of review. See *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969).

In the generality of cases a test of reasonable classification has been applied: Does the classification established by the legislature bear a reasonable and just relation to the permissible objective of the legislation? Under this general test, if the purpose of the statute is a permissible one and if the statutory classification bears the required fair relationship to that purpose, the constitutional mandate will be held satisfied. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920) ("But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

In two circumstances, however, a more stringent test is applied. When the legislative product affects "fundamental rights or interests," e.g., *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 667, 670 (1966) (poll tax in state elections), or when the statute classifies on a basis "inherently suspect," this Court will subject the legislation to "the most rigid scrutiny."[3] Thus, a statute distinguishing on the basis of race or ancestry embodies a "suspect" or "invidious" classification and, unless supported by the most compelling affirmative justification, will not pass constitutional muster. *Graham* v. *Richardson,* —— U.S. —— (June 14, 1971); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948).

It is appellant's principal position that the sex line drawn by Sec. 15-314 of the Idaho Code, mandating subordination of women to men without regard to individual capacity, creates a "suspect classification" for which no compelling justification can be shown. It is appellant's alternate position that, without regard to the suspect or invidious nature of the classification, the line drawn by the Idaho legislature, arbitrarily ranking the woman as inferior to the man

[3] *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944). Although the first case to develop the concept that classifications based on race are "suspect", *Korematsu* justified the detention of men and women solely because of their Japanese ancestry, on the basis of an espionage threat, when imminent foreign invasion was feared. With the glaring exception of *Korematsu,* "suspect" classifications have not survived this Court's rigid scrutiny. In retrospect, the extreme personal deprivation countenanced wholesale in *Korematsu* is recognized generally as having been grossly disproportionate to the national security interest at stake. See A. Girdner & A. Loftis, The Great Betrayal: The Evacuation of Japanese-Americans during World War II 16-32 (1969); B. Hosokawa, Nisei: The Quiet Americans 292-98 (1969).

by directing the probate court to take no account of the respective qualifications of the individuals involved, lacks the constitutionally required fair and reasonable relation to any legitimate state interest in providing for the efficient administration of decedents' estates.

In very recent years, a new appreciation of women's place has been generated in the United States.[4] Activated by feminists of both sexes, courts and legislatures have begun to recognize the claim of women to full membership in the class "persons" entitled to due process guarantees of life and liberty and the equal protection of the laws. But the distance to equal opportunity for women—in the face of the pervasive social, cultural and legal roots of sex-based discrimination[5]—remains considerable. In the absence of a firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

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[4] See, e.g., American Women, Report of the President's Commission on the Status of Women, and seven accompanying committee reports (1963); American Women 1963-1968, Report of the Interdepartmental Committee on the Status of Women, and four accompanying Task Force Reports of the Citizens' Advisory Council (1968); Kanowitz, Women and the Law: The Unfinished Revolution (1969); A Matter of Simple Justice, Report of President's Task Force on Women's Rights and Responsibilities (1970); P. Murray, The Rights of Women, in N. Dorsen ed., The Rights of Americans: What They Are—What They Should Be 521 (1971).

[5] In 1942, an incisive appraisal of the situation of women in the United States was made by the Swedish sociologist, Gunnar Myrdal, whose study was a source this Court relied on for information concerning race relations in *Brown* v. *Board of Education*, 347 U.S. 483, 494-95 n. 11 (1954). G. Myrdal, An American Dilemma 1073-78 (20th anniv. ed. 1962).

Currently, federal and state measures are beginning to offer relief from discriminatory employment practices.[6] Principal measures on the national level are the Equal Pay Act of 1963,[7] Title VII of the Civil Rights Act of 1964,[8] and Executive Orders designed to eliminate discrimination against women in federal jobs and jobs under federal contracts.[9] These developments promise some protection of the equal right of men and women to pursue the employment for which individual talent and capacity best equip them. But important as these federal measures are, their coverage is limited. Even in the employment area they cover only a small percentage of the nation's employers and less than half of the labor force.[10] They provide no

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[6] See generally 1969 Handbook on Women Workers, Women's Bureau Bulletin 294, Dept. of Labor [hereinafter Handbook].

It has long been the case that sex bias takes a greater economic toll than racial bias. For example, in 1966, the median wage or salary income of year-round, full-time workers was $7164 for white men, $4528 for nonwhite men, $4152 for white women, and $2949 for nonwhite women. Handbook at 137. In 1968 the median earnings of fully employed men workers were $7664; for fully employed women workers, median earnings were $4457. Background Facts on Women Workers in the United States, Women's Bureau, Dept. of Labor 4 (1970).

[7] 29 U.S.C. §206(d) (1964); see T. Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. Cin. L. Rev. 615 (1970).

[8] 42 U.S.C. §2000e (1964); see Developments in the Law—Title VII, 84 Harv. L. Rev. 1109, 1166-95 (1971); T. Barnard, The Conflict Between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved, 17 Wayne L. Rev. 25 (1971).

[9] Executive Order No. 11246, as amended by Executive Order No. 11375, 3 CFR 320 (Supp. 1967) (applicable to jobs under federal contracts); Executive Order 11478 (applicable to employment in the federal government).

[10] Equal Pay Act coverage is limited to employees covered by the minimum wage provisions of the Fair Labor Standards Act. Gov-

assistance at all in the many areas apart from employment, as in the case at bar for example, where women are relegated to second class status.

The experience of trying to root out racial discrimination in the United States has demonstrated that even when the arsenal of legislative and judicial remedies is well stocked, social and cultural institutions shaped by centuries of law-sanctioned bias do not crumble under the weight of legal pronouncements proscribing discrimination. Thus, just as the Equal Pay Act and Title VII have not ended discrimination against women even in the employment spheres to which they apply, sex-based discrimination will not disintegrate upon this Court's recognition that sex is a suspect classification. But without this recognition, the struggle for an end to sex-based discrimination will extend well beyond the current period in time, a period in which any functional justification for difference in treatment has ceased to exist.

Very recent history has taught us that, where racial discrimination is concerned, this Court's refusal in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), to declare the practice unconstitutional, reinforced the institutional and political

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ernment (federal, state, local) employees, executive, administrative and professional persons, teachers, most domestic and migrant workers are not covered. Many of the exempt industries and positions are heavily populated with female workers. See T. Murphy, *supra,* 39 U. Cin. L. Rev. at 619-20. Title VII excludes employers of 24 or fewer employees, private membership clubs, educational institutions and federal, state and local governments. It has been estimated that 92% of all employers, and 60% of all employees are excluded from Title VII coverage. See E. R. Larsen, 42 U.S.C. Section 1981 as a Remedy for Racial Discrimination in Employment, 4 Clearinghouse Review 572, 573 (1971) (percentages based on Department of Labor statistics).

foundations of racism, made it more difficult eventually to extirpate, and postponed for fifty-eight years the inevitable inauguration of a national commitment to abolish racial discrimination.

As an example of the slow awakening of the national conscience to the more subtle assignment of inferior status to women, this Court a generation ago came close to repeating the mistake of *Plessy* v. *Ferguson.* See *Goesaert* v. *Cleary,* 335 U.S. 464 (1948). Fortunately, the Court already has acknowledged a new direction, see *United States* v. *Dege,* 364 U.S. 51, 54 (1960), and the case at bar provides the opportunity clearly and affirmatively to inaugurate judicial recognition of the constitutionally imperative claim made by women for the equal rights before the law guaranteed to all persons.

In sum, appellant urges in Point I of this brief that designation of sex as a suspect classification is overdue, is the only wholly satisfactory standard for dealing with the claim in this case, and should be the starting point for assessing that claim. Nonetheless, as developed in Point II of this brief, it should be apparent that the reasonable relation test also must yield a conclusion in favor of the appellant. Surely this Court cannot give its approval to a fiduciary statute that demands preference for an idler, because he is a man, and rejects a potentially diligent administrator solely because she is a woman. In addition to the argument based on the traditional reasonable relation test, Point II formulates a modification of that test, appropriate in the event this Court, contrary to appellant's primary position, would delay recognition of sex as a suspect classification. The proposed modification would reverse the presumption of rationality when sex is implicated and,

rather than requiring the party attacking a statute to show that the classification is irrational, would require the statute's proponent to prove it rational.

I.

The sex-based classification in Section 15-314 of the Idaho Code, established for a purpose unrelated to any biological difference between the sexes, is a "suspect classification" proscribed by the fourteenth amendment to the United States Constitution.

A. *Sex as a Suspect Classification.*

Commanding a preference for men and the subordination of women, Section 15-314 of the Idaho Code reflects a view, prevalent in the law a generation ago that, with minimal justification, the legislature could draw "a sharp line between the sexes." *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948). Similarly, it was once settled law that differential treatment of the races was constitutionally permissible. *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). Today, of course, a classification based on race, nationality or alienage is inherently "suspect" or "invidious" and this Court has required "close judicial scrutiny" of a statute or governmental action based upon such a classification. *Graham* v. *Richardson,* —— U.S. —— (June 14, 1971). The proponent of a measure creating "classifications constitutionally suspect" must establish an "overriding statutory purpose," *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964), and bears "a very heavy burden of justification." *Loving* v. *Virginia,* 388 U.S. 1, 9 (1967).

It is only within the last half-dozen years that the light of constitutional inquiry has focused upon sex discrimina-

tion. Emerging from this fresh examination, in the context of the significant changes that have occurred in society's attitudes,[11] is a deeper appreciation of the premise underlying the "suspect classification" doctrine: although the legislature may distinguish between individuals on the basis of their ability or need, it is presumptively impermissible to distinguish on the basis of congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized. Such conditions include not only race, a matter clearly within the "suspect classification" doctrine, but include as well the sex of the individual.[12]

The kinship between race and sex discrimination has attracted increasing attention. A capsule description of the close relationship between the two appears in *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?,* 84 Harv. L. Rev. 1499, 1507-1508 (1971) (original footnotes retained but renumbered):

> The similarities between race and sex discrimination are indeed striking.[1] Both classifications create large, natural classes, membership in which is beyond

[1] See A. Montagu, Man's Most Dangerous Myth 181-84 (4th ed. 1964); G. Myrdal, An American Dilemma 1073-78 (2d ed. 1962).

[11] See E. Dahlstrom ed., The Changing Roles of Men and Women (1967); A. Montagu, Man's Most Dangerous Myth 181-84 (4th ed. 1964); G. Myrdal, An American Dilemma 1073-78 (2d ed. 1962); Watson, Social Psychology: Issues and Insights 435-56 (1966); P. Murray & M. Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232, 235-42 (1965).

[12] See *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954) ("The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.").

the individual's control;[2] both are highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions. Historically, the legal position of black slaves was justified by analogy to the legal status of women.[3] Both slaves and wives were once subject to the all-encompassing paternalistic power of the male head of the house.[4] Arguments justifying different treatment for the sexes on the grounds of female inferiority, need for male protection, and happiness in their assigned roles bear a striking resemblance to the half-truths surrounding the myth of the "happy slave".[5] The historical patterns of race and sex discrimination have, in many instances, produced similar present day results. Women and blacks, for example, hold the lowest paying jobs in industry, with black men doing slightly better than white women.[6] . . .

The factual similarities between race and sex discrimination are reinforced by broader concerns. Through a process of social evolution, racial distinctions have become unacceptable. The old social consensus that race was a clear indication of inferiority has yielded to the notion that race is unrelated to ability or performance. Even allegedly rational attempts at racial classification are now generally re-

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[2] See Crozier, Constitutionality of Discrimination Based on Sex, 15 Boston U.L. Rev. 723, 728 (1935). See also Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women 79 (1963).

[3] G. Myrdal, *supra,* note 1 at 1073.

[4] *Id.* at 1073-75.

[5] See A. Montagu, *supra,* note 1 at 181.

[6] See N.Y. Times, Jan. 31, 1971, § 1, at 50, col. 3.

jected outright. The burden of showing that these attempts are based on something other than prejudice is enormous.

There are indications that sex classifications may be undergoing a similar metamorphosis in the public mind. Once thought normal, proper, and ordained in the "very nature of things," sex discrimination may soon be seen as a sham, not unlike that perpetrated in the name of racial superiority. Whatever differences may exist between the sexes, legislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women. In view of the damage that has been inflicted on individuals in the name of these "differences," any continuing distinctions should, like race, bear a heavy burden of proof. One function of the fourteenth amendment ought to be to put such broad-ranging concerns into the fundamental law of the land.[7]

[7] *Cf.* Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1174 n. 61 (1969) (as the truth of the proposition that biological differences between the sexes correlate with performance is drawn into question, all sexual classifications become more suspect).

Dr. Pauli Murray recently synopsized scholarly commentary on the same point in *The Negro Woman's Stake in the Equal Rights Amendment,* 6 Harv. Civ. Rts. Civ. Lib. Law Rev. 253, 257 (1971) (original footnotes retained but renumbered):

The relationship between sexual and racial prejudice is confirmed by contemporary scholarship.[1] The

[1] See, e.g., S. De Beauvoir, THE SECOND SEX 116, 297-98, 331, 714-715 (5th ed. H. Parshley trans. 1964); H. Hays,

history of western culture, and particularly of ecclesiastical and English common law, suggests that the traditionally subordinate status of women provided models for the oppression of other groups. The treatment of a woman as her husband's property, as subject to his corporal punishment, as incompetent to testify under canon law, and as subject to numerous legal and social restrictions based upon sex, were precedents for the later treatment of slaves. In 1850, George Fitzhugh, one of the foremost defenders of slavery in the United States analogized it to the position of women and children.[2] And in 1944, a justice of the North Carolina Supreme Court noted "the barbarous view of the inferiority of women which manifested itself in civil and political oppression so akin to slavery that we can find no adequate word to describe her present status with men except emancipation." [3]

Race and sex are comparable classes, defined by physiological characteristics, through which status is fixed from birth. Legal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the pro-

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THE DANGEROUS SEX 178-79, 283 (1964); A. Montagu, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE, Ch. 9 (4th ed. 1964); G. Myrdal, AN AMERICAN DILEMMA, App. V. (1944); A. Watson, SOCIAL PSYCHOLOGY: ISSUES AND INSIGHTS, Ch. 12 (1966); Crozier, *Constitutionality of Discrimination Based on Sex,* 15 B.U.L. REV. 723, 727-28 (1935); Hacker, *Women as a Minority Group,* 30 SOCIAL FORCES 60 (1951).

[2] Fitzhugh, Slavery Justified by a Southerner, in E. McKitrick, SLAVERY DEFENDED 37-38 (1963).

[3] *State* v. *Emery,* 224 N.C. 581, 596, 31 S.E.2d 858, 868 (1944) (Seawell, J. dissenting).

scribed class to a dominant group. Both classes have been defined by, and subordinated to, the same power group—white males.

When biological differences are not related to the activity in question,[13] sex-based discrimination clashes with contemporary notions of fair and equal treatment. No longer shackled by decisions reflecting social and economic conditions or legal and political theories of an earlier era, see *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 669-70 (1966),[14] both federal and state courts have been

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[13] "To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation; its benefits are geared to the performance of a special service much like veterans' legislation. When the law . . . regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status." P. Murray & M. Eastwood, Jane Crow and the Law: Sex Discrimination and Title VII, 34 Geo. Wash. L. Rev. 232, 239 (1965).

The "separate restroom" canard continues to be invoked as justification for perpetuation of "a sharp line between the sexes." E.g., Amending the Constitution to Prohibit State Discrimination Based on Sex, 26 The Record of the Association of the Bar of the City of New York 77, 80 (1971). This Court's recognition of the fundamental right to personal privacy in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), indicates that separate restrooms are not in jeopardy. The basic interest shared by members of both sexes in personal privacy surely justifies, and may even require, separation of the sexes in restrooms, sleeping quarters in prisons and other public institutions, separate living quarters for male and female members of the Armed Forces, police practices by which the search of a woman can be conducted only by another woman, and the search of a man only by another man. See T. Emerson, In Support of the Equal Rights Amendment, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 225, 231-32 (1971).

[14] "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of funda-

intensely skeptical of lines drawn or sanctioned by governmental authority on the basis of sex. Absent strong affirmative justification, these lines have not survived constitutonal scrutiny.

A recent decision of the California Supreme Court, *Sail 'er Inn, Inc. et al.* v. *Edward J. Kirby, Director, et al.*, 3 CCH Employment Practices Decisions ¶8222 (May 27, 1971), explicitly denominated sex a suspect classification and, consequently, held unconstitutional a California statute similar to the Michigan statute upheld by this Court in *Goesaert* v. *Cleary*, 335 U.S. 464 (1948). The California Supreme Court described the factors upon which its conclusion rested in the following terms [3 E.P.D. ¶8222, pp. 6756-6757 (footnotes omitted)]:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: *Developments in the Law—Equal Protection, supra,* 82 Harv. L. Rev. 1065, 1173-1174.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. (See *Karczewski* v. *Baltimore and Ohio Railroad Company* (1967), 274 F. Supp. 169, 179.) Where the relation

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mental rights [citations omitted]. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." (Emphasis in original.) See also n. 16 p. 22 *infra.*

between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. (See Note: *Developments in the Law—Equal Protection, supra,* 82 Harv. L. Rev. 1065, 1125-1127.) Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.

See also *Mengelkoch* v. *Industrial Welfare Commission,* 437 F.2d 563 (9th Cir. 1971) (maximum hours law ap-

plicable to women only presents substantial federal constitutional question which must be heard and decided by three judge federal district court); *Abbott* v. *Mines,* 411 F.2d 353 (6th Cir. 1969) (holding unconstitutional exclusion of women from jury in civil case concerning cancer of male genitals); *Kirstein* v. *Rector and Visitors of University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (women entitled to equal access with men to state university's "prestige" college);[15] *White* v. *Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court) (Alabama's exclusion of all women from jury service violates fourteenth amendment);[16] *Cohen* v. *Chesterfield County School*

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[15] Cf. *Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), affirmed without opinion, —— U.S. —— (March 8, 1971) (females only admission policy for state supported college does not violate male students' right to equal protection where no showing was made of any feature rendering all female facility more advantageous educationally than state supported institutions to which males are admitted). *Kirstein* and *Williams* are not in conflict. Pairing the two, they reflect the opinion of distinguished academicians. See C. Jencks & D. Reisman, The Academic Revolution 298 (1968):

> . . . we do not find the arguments against women's colleges as persuasive as the arguments against men's colleges. This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense.

See also Note, The Constitutionality of Sex Separation in School Desegregation Plans, 37 U. Chi. L. Rev. 296 (1970).

[16] "The argument that the Fourteenth Amendment was not historically intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society." 251 F. Supp. at 408.

Board, Civ. Action No. 678-79-R, E.D. Va. (Richmond Division), May 17, 1971 (regulation requiring female teacher to leave in the fifth month of her pregnancy violates her right to equal protection); *Seidenberg* v. *McSorleys' Old Ale House,* 317 F. Supp. 593 (S.D.N.Y. 1970), 308 F. Supp. 1253 (S.D.N.Y. 1969) (exclusion of women patrons from liquor licensed place of public accommodation violates fourteenth amendment); *Mollere* v. *Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969) (declaring unconstitutional requirement that unmarried women under 21 live in state college dormitory when no such requirement was imposed on men); *United States ex rel. Robinson* v. *York,* 281 F. Supp. 8 (D. Conn. 1968) (differential sentencing laws for men and women constitute "invidious discrimination" against women repugnant to the equal protection of the law guaranteed by the fourteenth amendment);[17] *Owen* v. *Illinois Baking Corp.,* 260 F. Supp. 820 (W.D. Mich. 1966) (wife constitutionally entitled to same right as husband to recover for loss of consortium); *Paterson Tavern & Grill Owners Ass'n* v. *Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Commonwealth* v. *Daniel,* 430 Pa. 642, 243 A.2d 400 (1968) (differential sentencing laws for men and women held unconstitutional);[18] *In re Estate of Legatos,* 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband violates equal

[17] Accord, *Liberti* v. *York,* 28 Conn. Supp. 9, 246 A.2d 106 (1968).

[18] See also *Commonwealth* v. *Stauffer,* 214 Pa. Super. 113, 251 A.2d 718 (1969) (differential in condition of sentence—men to jail, women to penitentiary—declared unconstitutional).

protection guarantee); *Matter of Shpritzer* v. *Lang,* 17 A.D.2d 285, 289, 234 N.Y.S.2d 285, 289 (1st Dept. 1962), *aff'd,* 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of sex); *Wilson* v. *Hacker,* 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

The trend is clearly discernible. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another condition of birth, and merits no greater judicial deference. Each exemplifies a "suspect" or "invidious" classification.[19]

B. *Women as a Disadvantaged Second Sex.*

While the characteristics that make a classification "suspect" have not been defined explicitly by this Court, compare *Sail'er Inn* v. *Kirby, supra,* a series of cases delineates as the principal factor the presence of an unalterable identifying trait which the dominant culture views as a badge of inferiority justifying disadvantaged treatment in social, legal, economic and political con-

[19] It is not urged here that extensive compensatory treatment is needed to redress past discrimination against women. Cf. Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1104-1119 (1969). *Gruenwald* v. *Gardner,* 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968), however, indicates that in special situations compensatory treatment may be appropriate.

Although women are not a numerical minority, the impact of sex-role stereotyping is illustrated graphically by their lack of political power. At all levels of government, few women hold elected or appointed office. See Handbook 118-26.

texts. Although the paradigm suspect classification is, of course, one based on race, this Court has made it plain that the doctrine is not confined to a "two-class theory." *Graham* v. *Richardson,* —— U.S. —— (June 14, 1971); *Hernandez* v. *Texas,* 347 U.S. 475, 478 (1954); *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943); see *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410 (1948); *Oyama* v. *California,* 332 U.S. 633 (1948). Rather, interpretation has been dynamic, as is appropriate to fundamental constitutional principle. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 669-70 (1966); *White* v. *Crook,* 251 F. Supp. 401, 408 (M.D. Ala. 1966) (three-judge court).

American women have been stigmatized historically as an inferior class and are today subject to pervasive discrimination. As other groups that have been assisted toward full equality via the suspect classification doctrine, women lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. This section synopsizes attitudes toward women traditional in the United States and the principal areas in which the law limits the opportunities available to women for participation as full and equal members of society.

" 'Man's world' and 'women's place' have confronted each other since Scylla first faced Charybdis." [20] A person born female continues to be branded inferior for this congenital and unalterable condition of birth.[21] Her position in this country, at its inception, is reflected in the expression of the author of the declaration that "all men are created

[20] E. Janeway, Man's World Woman's Place: A Study in Social Mythology 7 (1971).

[21] See C. Bird, Born Female: The High Cost of Keeping Women Down (1968).

equal." According to Thomas Jefferson, women should be neither seen nor heard in society's decision-making councils:

> Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men. Quoted in M. Gruberg, Women in American Politics 4 (1968).

Alexis de Tocqueville, some years later, included this observation among his commentaries on life in the young United States:

> In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways which are always different. American women never manage the outward concerns of the family, or conduct a business, or take a part in political life. . . . Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classics Series, Galaxy ed., p. 400 (1947).[22]

During the long debate over women's suffrage the prevailing view of the partition thought ordained by the Creator was rehearsed frequently in the press and in legislative chambers. For example, an editorial in the New York Herald in 1852 asked:

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[22] Cf. Ibsen's observation on the society of his day:

> A woman cannot be herself in a modern society. It is an exclusively male society with laws made by men, and with prosecutors and judges who assess female conduct from a male standpoint. Quoted in Meyer, *Introduction to* H. Ibsen, A Doll's House at 9 (M. Meyer transl. 1965).

> How did women first become subject to man as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and, therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed . . . . Quoted in A. Kraditor, Up From the Pedestal: Selected Writings in the History of American Feminism 190 (1968).

And a legislator commented during an 1866 debate in Congress:

> It seems to me as if the God of our race has stamped upon [the women of America] a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life. They have a higher and holier mission. It is in retiracy [sic] to make the character of coming men. Their mission is at home, by their blandishments and their love to assuage the passions of men as they come in from the battle of life, and not themselves by joining in the contest to add fuel to the very flames. . . . It will be a sorry day for this country when those vestal fires of love and piety are put out. Quoted in E. Flexner, Century of Struggle 148-49 (1970 ed.), from Congressional Globe, 39 Cong., 2d Sess., Part I, p. 66.

The common law heritage, a source of pride for men, marked the wife as her husband's chattel, "something better than his dog, a little dearer than his horse." [23] Blackstone explained:

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[23] Alfred Lord Tennyson, Locksley Hall (1842).

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover,* she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence of her husband, her *baron,* or lord; and her condition during her marriage is called her *coverture.* 1 Blackstone's Commentaries on the Law of England 442 (3d ed. 1768).[24]

Prior to the Civil War, the legal status of women in the United States was comparable to that of blacks under the slave codes, albeit the white woman ranked as "chief slave of the harem."[25] Neither slaves nor married women had the legal capacity to hold property or to serve as guardians of their own children. Neither blacks nor women could hold office, serve on juries, or bring suit in their own names. Men controlled the behavior of both their slaves and their wives and had legally enforceable rights

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[24] An earlier formulation of the same thesis was set out in The Lawes Resolutions of Womens Rights (London, 1632):

> Man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus, Humber or the Thames, the poor rivulet looseth its name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soon as she is married, is called *covert,* in Latin, *nupta,* that is, *veiled,* as it were, clouded and overshadowed, she hath lost her streame. . . . To a married woman, her new self is her superior, her companion, her master. Quoted in E. Flexner, Century of Struggle 7-8 (1970 ed.).

[25] Comment attributed to Dolly Madison, in H. Martineau, Society in America, Vol. 2, p. 81 (1842, 1st ed. 1837).

to their services without compensation. See pp. 15-19, *supra*. See also L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969). As Gunnar Myrdal remarked, the parallel was not accidental, for the legal status of women and children served as the model for the legal status assigned to black slaves:

> In the earlier common law, women and children were placed under the jurisdiction of the paternal power. When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment—linking together women, servants, mules and other property—could be invoked, as well as a great number of other passages of Holy Scripture. An American Dilemma 1073 (2d ed. 1962).

In answer to feminist protests, the legal disabilities imposed on women were rationalized at the turn of the century much as they were at an earlier age. Blackstone set the pattern:

> [E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England. 1 Blackstone's Commentaries on the Laws of England 445 (3d ed. 1768).

Grover Cleveland echoed this rationale, arguing that although women were denied the vote, the statute books were full of proof of the chivalrous concern of male legislators for the rights of women. Would Woman Suffrage Be Unwise?, 22 Ladies' Home Journal 7-8 (October 1905). Quoted in A. Kraditor, Up from the Pedestal: Selected Writings in the History of American Feminism 199-203 (1968).

American women assessed their situation from a different perspective. At the Women's Rights Convention in Seneca Falls, New York, in 1848, a declaration of women's rights was drafted which included the following sentiments:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her....
>
> He has compelled her to submit to laws, in the formation of which she had no voice.
>
> * * * * *
>
> He has taken from her all right in property, even to the wages she earns.
>
> * * * * *
>
> .... In the covenant of marriage, ... the law gives him power to deprive her of her liberty and to administer chastisement.
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> * * * * *
>
> .... He closes against her all the avenues to wealth and distinction which he considers most honorable to himself....
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> * * * * *
>
> He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.
>
> History of Woman Suffrage, Vol. I, at 70-75 (E. C. Stanton, S. B. Anthony & N. J. Gage eds. 1881).

Men viewing their world without rose-colored glasses would have noticed in the last century, as those who look will observe today, that no pedestal marks the place occupied by most women. At a women's rights convention in Akron, Ohio, in 1851, Sojourner Truth, an abolitionist and former slave, responded poignantly to the taunts of clergymen who maintained that women held a favored position and were too weak to vote:

> The man over there says women need to be helped into carriages and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages or over puddles, or gives me the best place —and ain't I a woman?
>
> Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me—and ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have born thirteen children, and seen most of 'em sold into slavery, and when I cried out with my mother's grief, none but Jesus heard me—and ain't I a woman?
>
> E. Flexner, Century of Struggle 90-91 (1970 ed.).

Of course, the legal status of women has improved since the nineteenth century. The Married Women's Property Acts, passed in the middle of the nineteenth century, opened the door to a measure of economic independence for married women. See L. Kanowitz, Women and the Law: The Unfinished Revolution 40-41 (1969). The nineteenth amendment gave women the vote in 1920, after almost three-quarters of a century of struggle.[26] But woman's place as

[26] See E. Flexner, Century of Struggle (1970 ed.); W. O'Neill, Everyone Was Brave: The Rise and Fall of Feminism in America (1969); L. Noun, Strong-Minded Women (1969).

subordinate to man is still reflected in many statutes regulating diverse aspects of life. A small sample of those statutes is contained in the Appendix, *infra,* pp. 69-88. Some of the areas in which women receive less favored treatment than men are summarized below.

1. Male as head of household

It remains the general rule that a wife's domicile follows that of her husband. The Idaho provision is typical:

> The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto. Idaho Code sec. 32-902 (1947).

Thus the law subordinates a woman's work and home preference to her husband's. If the two are in fact living apart, the attribution of husband's domicile to wife may nullify her right to vote, to run for public office, or to serve as administrator of an estate.[27] A 1968 survey of the laws of all of the states revealed only five that permit a married woman to establish a separate domicile for all purposes, eight that permit a separate domicile for eligibility for public office, six that permit a separate domicile for jury service, eight that recognize a separate domicile for probate, nine that permit a separate domicile for taxation, and eighteen that permit a separate domicile for voting. Report of the Task Force on Family Law and Policy to the Citizens' Advisory Council on the Status of Women 47-49 (1968).

The social custom in the United States that upon marriage a woman takes her husband's surname, and ceases

[27] E.g., Idaho Code sec. 15-317(1).

to be known by her maiden name, is supported by laws and decisions that deal harshly with a woman who seeks to retain her separate identity. See Kanowitz, Women and the Law: The Unfinished Revolution 41-46 (1969). For example, in *Bacon* v. *Boston Elevated Ry.,* 256 Mass. 30, 152 N.E. 35 (1926), a married woman who retained her car registration in her maiden name was declared a "nuisance on the highway" and therefore barred from maintaining an action for injuries occasioned when her car was struck by a train. A federal decision of the same order is *In re Kayaloff,* 9 F. Supp. 176 (S.D.N.Y. 1934), holding that a married woman should not be granted a naturalization certificate in her maiden name, although in her career as a musician she was well-known by that name. For voting purposes the married woman, but not the married man, may be required to indicate marital status. N.J.S.A. 19:31-3(b)(1) (married woman shall prefix her name by the word "Mrs.", single women, by the word "Miss"). Cf. *Rago* v. *Lipsky,* 327 Ill. App. 63, 63 N.E.2d 642 (1945) (lawyer admitted to practice in state and federal courts and United States Supreme Court in her maiden name denied the right to register to vote in that name).

The common law system of separate ownership of property by each spouse, effective in most states, fails to accord adequate recognition to the contribution to the family made by a wife who works only in the home. By accepting a "woman's place" and relieving her husband of the burdens of child and home care, she foregoes the opportunity to acquire earnings and property of her own. In community property states, in which marriage is regarded in theory as an economic partnership, management and control generally vest exclusively in the husband. See Report of the

Task Force on Family Law and Policy to the Citizens' Advisory Council on the Status of Women 16 (1968); President's Commission on the Status of Women, Report of the Committee on Civil and Political Rights 16 (1963) (recommending complete reappraisal of the law governing matrimonial property in all jurisdictions).[28] And although Married Women's Property Acts were passed over a century ago, numerous anachronistic limitations on the contractual capacity of women survive. See L. Kanowitz, Women and the Law: The Unfinished Revolution 55-69 (1969).

2. Women and the role of motherhood

The traditional division within the home—father decides, mother nurtures—is reinforced by diverse provisions of state law. For example, several retain general statutes reflecting the common law rule that father is sole guardian of the children. See Appendix, *infra* pp. 74-76. More particularized provisions include the Washington rule that father, not mother, is qualified to sue for the wrongful death of a legitimate child. Wash. Code sec. 4.24.010. In Idaho, the father presumptively may make a testamentary guardianship appointment for a child, while the mother may do so only if the father is dead or incapable of consent. Idaho Code sec. 15-1812.

If the parents separate, mother generally gets custody preference when the child is of tender years. But if the child is older, and needs preparation for the world, prefer-

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[28] Enlightened by the matrimonial property systems effective in the Scandinavian countries, Texas had amended its law to provide for joint management of community property. Texas Rev. Civ. Stats. art. 4621. But cf. *Perez* v. *Campbell*, 421 F.2d 619 (9th Cir. 1970), reversed, 401 U.S. —— (1971).

ence may go to father. E.g., Mont. Rev. Code Ann. sec. 91-4515 (1947).

Most states permit girls to marry without parental consent at an earlier age than boys.[29] The differential, generally three years, reflects two presumptions: (1) the married state is the only proper goal of womanhood; (2) men need more time to prepare for bigger, better and more useful pursuits. L. Kanowitz, Women and the Law: The Unfinished Revolution 11 (1969).

3. Women and criminal law

As of 1970, women served on juries on the same basis as men in only 28 states. See note 50, *infra*. Differential treatment for women in the remaining states takes a variety of forms. Some states automatically exempt women on the basis of their sex alone; others exempt women, but not men, who have child care responsibilities; and some exempt women based on the nature of the proceeding or inadequate courthouse facilities. See L. Kanowitz, Women and the Law: The Unfinished Revoluation 28-31 (1969).

In most states, only a woman can be prosecuted as a "prostitute" and only her conduct, not her male partner's, is criminal. L. Kanowitz, *supra* at 16-18; G. Mueller, Legal Regulations of Sexual Conduct 50 (1961).

Special treatment of female juvenile offenders is another example of the double standard in operation. In New York, for example, a child can be declared a "person

[29] See Table on State Marriage Laws as of December 1, 1969, in Hearings on S.J. Res. 61, Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 728 (1970).

in need of supervision" [30] for acts that would be non-criminal if committed by an adult. New York Family Court Act sec. 712(b). While there may be sound reasons for this special category for juveniles, there can be no constitutional justification for New York's treatment of young women as "persons in need of supervision" until age 18, while boys are subject to the statute only until age 16. In addition to the age differential, the statute discriminates against girls in a manner less apparent but no less real. A charge of ungovernability against a girl occurs most frequently as a promiscuity-control device. A study of 1500 cases decided by a New York juvenile court judge revealed that he "refused to treat any form of sexual behavior on the part of boys, even the most bizarre forms, as warranting more than probationary status. The Judge, however, regarded girls as the cause of sexual deviation in boys in all cases of coition involving an adolescent couple and refused to hear the complaints of the girl and her family; the girl was regarded as a prostitute." Reiss, Sex Offenses: The Marginal Status of the Adolescent, 25 Law and Contemporary Problems 310, 316 (1960).

While a very young woman is considered dangerous for her sexuality, in adult life she is considered far less passionate than the adult man. At least this appears to be the view of states that allow the defense of "passion killing" only to the wronged husband. Texas Penal Code 1220; Utah Code sec. 76-30-10 (4).

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[30] A person who is a "habitual truant . . . incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority."

4. Women and employment

Current tax law presents a significant disincentive to the woman who contemplates combining a career with marriage and a family. If a wife's earnings approach those of her husband, the Internal Revenue Code counsels divorce, for the couple will retain more if they live together without benefit of a marriage license. See B. Richards, Single v. Married Income Tax Returns under the Tax Reform Act of 1969, 48 Taxes 301 (1970). And if a father or mother goes off to work as a divorcee, he or she may be entitled to a child care deduction regardless of income. For a married pair, both working, however, the deduction is available only if joint adjusted gross income of the couple remains close to the subsistence level. Internal Revenue Code sec. 214. See A Matter of Simple Justice: Report of the President's Task Force on Women's Rights and Responsibilities 15 (1970). Moreover, the size of the deduction ($600) renders it of scant assistance even to the few who qualify for it.[31]

Despite the tax disincentive, married women are entering the labor force in increasing numbers. In the two decades between 1947 and 1967, the percentage of women in the labor force increased by 70%, from an average of 24% to an average of 41%. Married women constitute a majority of full-time women workers. Report of the Task Force on Labor Standards to the Citizens' Advisory Council on the Status of Women 6-7 (1968). This development is particularly remarkable in view of the deplorable shortage of child care facilities. During World War II,

[31] For a person who works 40 hours a week, 50 weeks a year, and spends an hour each work day traveling to and from the place of employment, the $600 amount represents a deduction of less than 30¢ an hour for baby sitting expenses.

when women workers were essential to the economy, provision was made for the care of some 1,600,000 children. By 1967, although more women were in the labor force, only 200,000 children were accommodated. Dept. of Health, Education and Welfare, Children's Bureau, Childcare Arrangements for the Nation's Working Mothers 1 (1969). Although the dire need for commitment of substantial resources to development of childcare facilities is beginning to be appreciated,[32] progress has been slow. For example, in New York City, day care services may not be provided for children under the age of two. New York City Health Code, sec. 47.07(a)(1).[33] Moreover, an explanatory note to this section states:

> [I]t is recognized that as an ultimate goal, it is not desirable to permit children under three years of age in a day care service, and many services now have a policy of not admitting such children. . . .

In April 1971, 42.7% of all women sixteen years of age or older were in the labor force[34] as compared to 28.9% in March 1940.[35] But wage statistics are indicative of the pervasive sex discrimination still characteristic of the labor market. The wage or salary income for full-time

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[32] E.g., S. 1512, currently before the Senate Committee on Labor and Public Welfare; H.R. 6748, currently before the House Committee on Education and Labor.

[33] Art. 53 of the New York City Health Code authorizes day care of no more than two children under the age of two in a private household. Certificates of approval for such private household care may be issued only to a woman. Sec. 53.07(d).

[34] Dept. of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1971 at 34-35.

[35] Handbook 10.

year-round women workers dropped from 63.9% of male workers' salaries in 1956 to 58.2% in 1968.[36]

The disparity in earnings is often discounted by men who accept the myth that women are secondary workers seeking employment only to enjoy some consumer luxuries. But in fact, almost 60% of all employed women work in order to provide primary support of themselves or others or to supplement the incomes of husbands who earn under $5,915 a year.[37]

Within occupational categories, women are paid less for the same jobs. For example, in 1968 the median salary for all scientists was $13,200. For women scientists, the median salary was $10,000.[38] The median wage for a full-time male factory worker in 1968 was $6,738. His female counterpart earned only $3,991.[39] Differences in work experience, job tenure and training do not account for these large gaps. Cf. McNally, Patterns of Female Labor Force Activity, Industrial Relations 204 (May 1968).

Women at work remain heavily concentrated in a small number of sex-stereotyped occupations. In 1968, about one-quarter of all employed women worked in only five occupations: secretary-stenographer, household worker, bookkeeper, elementary school teacher, and waitress. Over a third of all employed women held clerical jobs; 70% of

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[36] Dept. of Labor, Women's Bureau: Fact Sheet on the Earnings Gap 1 (Feb. 1970) [hereinafter Fact Sheet on the Earnings Gap].

[37] Dept. of Labor, Women's Bureau: Why Women Work 1 (Jan. 1970).

[38] Fact Sheet on the Earnings Gap 2.

[39] *Ibid.*

all clerical positions were filled by women.[40] Two-thirds of the female labor force would have to change jobs to achieve an occupational distribution corresponding to that of men. Indeed, the index of occupational segregation by sex is approximately the same now as it was in 1900. See E. Gross, Plus ça change . . . ? The Sexual Structure of Occupations Over Time, 16 Social Problems 198, 202 (Fall 1968).

Beyond doubt, the status of women in the labor force is separate and unequal. The consequence for the nation is severe: almost two-thirds of this country's adult poor are women. See A Matter of Simple Justice: Report of the President's Task Force on Women's Rights and Responsibilities 24 (1970). Compare *id.* at 21:

> Without any question, the growing number of families on Aid to Families with Dependent Children is related to the increase in unemployed young women. For many . . . the inability to find a job means . . . having a child to get on welfare. Potential husbands do not earn enough to support an unemployed wife.
>
> The stability of the low-income family depends as much on training women for employment as it does on training men . . . .
>
> The task force expects welfare rolls will continue to rise unless society takes more seriously the needs of disadvantaged girls and young women.

While this brief survey offers merely a sample of the legal and economic realities of woman's inferior status, it should suffice to indicate a compelling need for correction. Strict scrutiny of classifications disadvantaging the "sub-

[40] Handbook 87-103.

missive majority,"[41] the "majority" so sparsely represented in legislative and policy-making chambers, should speed the day when emancipated men accept Mill's thesis:

> That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.
>
> John Stuart Mill, The Subjection of Women (1869)[42]

C. *Muller, Goesaert and Hoyt.*

Three decisions of this Court bear particularly close examination for the support they appear to give those who urge perpetuation of the treatment of women as less than full persons within the meaning of the Constitution: *Muller* v. *Oregon,* 208 U.S. 412 (1908); *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Hoyt* v. *Florida,* 368 U.S. 57 (1961).

A landmark decision of this Court responding to turn of the century conditions when women labored long into the night in sweatshop operations,[43] *Muller* v. *Oregon,* 208

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[41] F. Seidenberg, The Submissive Majority: Modern Trends in the Law Concerning Women's Rights, 55 Cornell L. Rev. 262 (1970).

[42] In World's Classics Series, Three Essays by J. S. Mill 427 (1966).

[43] For historical perspective, see E. Baker, Protective Labor Legislation 101, 149-277, 444-456 (1925); E. Flexner, Century of Struggle: The Women's Rights Movement in the United States 203-15 (1970 ed.).

U.S. 412 (1908),[44] has been misinterpreted by some as an impediment to appellant's position. Recently, in a perceptive opinion, the Court of Appeals for the Ninth Circuit focused on the different societal climate and legal setting in which *Muller* was decided, and demonstrated that the equal protection issue presented here was not at all involved in that case. *Mengelkoch* v. *Industrial Welfare Commission,* 437 F.2d 563 (9th Cir. 1971).

The issue in *Muller* was the constitutionality of a state statute prohibiting employment of women "in any mechanical establishment, factory, or laundry" for more than ten hours a day. Muller, a laundry owner, was prosecuted for violating the statute and was convicted. Muller contended in this Court that the statute abridged freedom of contract in violation of the fourteenth amendment, that it was class legislation, and that it was an invalid exercise of the police power because it lacked a reasonable relation to public health, safety or welfare. 208 U.S. at 417-18. He relied principally upon *Lochner* v. *New York,* 198 U.S. 45 (1905), which had struck down only three years earlier a state statute limiting employment (of men as well as women) in bakeries to ten hours each day and sixty hours each week.

To distinguish *Lochner,* the Court was required to rely upon differences in the station occupied by men and women in the society of that day. Interwoven in the opinion are two themes: (1) recognition of the intolerable exploitation of women workers ("in the struggle for subsistence she is

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[44] *Muller* was followed in several cases presented in much the same societal climate and legal setting: *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); *Miller* v. *Wilson,* 236 U.S. 373 (1915); *Riley* v. *Massachusetts,* 232 U.S. 671 (1914).

not an equal competitor with her brother" (208 U.S. at 422)); (2) concern for the health of the sex believed to be weaker in physical structure but assigned the role of bearing the future generation ("the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race" (208 U.S. at 421)). Accepting as historic fact man's domination of woman, the Court stressed that women must "rest upon and look to [man] for protection" and, somewhat inconsistently, that she requires aid of the law "to protect her from the greed as well as the passion of man." 208 U.S. at 422.

Putting *Muller* in its proper place, the Ninth Circuit, in *Mengelkoch* v. *Industrial Welfare Commission,* 437 F.2d 563 (1971), presented three reasons for its lack of precedential value in a case such as the one at bar.

First, it was the Muller Court's task to determine "whether the state, in exerting its police power to the end of establishing maximum hours of labor for women, acted with the wisdom which, in those days, it was thought was required by the Due Process Clause. That kind of inquiry is no longer made by the federal courts. *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963)." 437 F.2d at 567.

Second, in *Mengelkoch,* as in *Muller,* a state statute limiting hours of work for women only was challenged on constitutional grounds, but the basis of the challenge, and the identity of the challenger put the two cases at opposite poles. As the Ninth Circuit explained:

> In our case, the constitutional attack against a state statute is mounted, not by an employer, but by an employee. The employee, Velma Mengelkoch, unlike the

> employer in *Muller,* does not question the state's police power to legislate in the field of hours of labor. Unlike *Muller,* she invokes the Equal Protection Clause, and she does so not to preserve the right of employers to employ women for long hours, but to overcome what she regards as a system which discriminates in favor of male employees and against female employees. In *Muller,* the statute was upheld in part because it was thought to be a necessary way of safeguarding women's competitive position. Here the statute is attacked on the ground that it gives male employees an unfair economic advantage over females. 437 F.2d at 567.

Here, as in *Mengelkoch,* the challenger is a woman and she invokes the equal protection clause to shield her against discrimination. Of course, the second point made by the Ninth Circuit in *Mengelkoch* applies with even greater force to the case at bar. Perhaps the California legislature, decades ago when it originally enacted the legislation at issue in *Mengelkoch,* was motivated by an intent to protect women against "the greed as well as the passion of man." [45] The Idaho statute here at issue lacks even that ostensible justification. It was not designed to protect women. On the contrary, it is explicit in its deliberate subordination of women to men for expediency's sake.

Third, the *Muller* Court, unprepared to overrule *Lochner* barely three years after it was decided, had to place men and women in different categories in order to escape its

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[45] *Muller* v. *Oregon,* 208 U.S. 412, 422 (1908). But see E. Baker, Protective Labor Legislation 101, 444-56 (1925); M. Wade, ed., Writings of Margaret Fuller 124 (1941): As the friend of the Negro assumes that one man cannot by right hold another in bondage, so would the friend of Woman assume that Man cannot by right lay even well-meant restrictions on Woman.

prior holding. As the Ninth Circuit pointed out, "the right of states to prescribe maximum hours of labor by employees, including male employees, has been recognized since at least *Bunting* v. *Oregon,* 243 U.S. 426 (1917)." 437 F.2d at 567. And in 1940, in *United States* v. *Darby,* 312 U.S. 100, this Court completely repudiated the reasoning responsible for the *Lochner* decision. Thus, the critical issue in *Muller*—whether half a loaf would be allowed to state legislatures after the full loaf was denied by the Court —long ago lost all vitality.

In sum, *Muller* was a product of social conditions and constitutional theory peculiar to an earlier era in this nation's history. It is entirely irrelevant to the issue presented here, whether sex-based classifications are "suspect." The wholly different constitutional perspective, the difference in the nature of the claims, and the magnitude of the disparity between present day social and cultural norms and those prevailing at the time of *Muller,* require the conclusion that *Muller* has no bearing at all on the issue at bar.

While *Muller* reflects the law in mid-passage from *Lochner* to *Darby, Goesaert* v. *Cleary,* 335 U.S. 464 (1948) hardly exemplifies a first step toward enlightened change. It was retrogressive in its day and is intolerable a generation later. Unlike *Muller, Goesaert* was not intended to assist women "in the struggle for subsistence" or to safeguard women's competitive position. The statute at issue in *Goesaert,* although it allowed women to serve as waitresses in taverns, barred them from the more lucrative employment of bartender. In contrast to the protective motive apparently present in *Muller,* the actual motivation behind the statute in *Goesaert* was said by the appellant

to be "an unchivalrous desire of male bartenders to try to monopolize the calling." 335 U.S. at 467. E. Baker, Protective Labor Legislation 444-56 (1925).

The majority opinion in *Goesaert* reflects an antiquarian male attitude towards women—man as provider, man as protector, man as guardian of female morality. While the attitude is antiquarian, unfortunately it is still indulged even by persons who would regard as anathema attribution of inferiority to racial or religious groups. But however much some men may wish to preserve Victorian notions about woman's relation to man, and the "proper" role of women in society, the law cannot provide support for obsolete male prejudices or translate them into statutes that enforce sex-based discrimination.

Although recognizing that society had advanced beyond the Victorian age, Mr. Justice Frankfurter stated for the *Goesaert* majority, "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." 335 U.S. at 466. But only six years later, this Court explicitly relied upon "sociological insight" and contemporary "social standards" in declaring racial segregation unconstitutional. *Brown* v. *Board of Education,* 347 U.S. 483, 489 n. 4, 493, 494-95 n. 11 (1954).[46]

Perhaps the *Brown* decision led Mr. Justice Frankfurter to reconsider the position he expressed in *Goesaert.* In any

[46] Had the *Goesaert* majority taken a less static view of the Constitution as it relates to women's rights, it might have used the occasion, much as the *Brown* court did, to clear away old debris. E.g., *Bradwell* v. *Illinois,* 83 U.S. 130 (1872) (equal protection clause does not preclude a state from barring women from the practice of law).

event, in 1960, he refused to rely on "ancient doctrine" concerning the status of women. In *United States* v. *Dege,* 364 U.S. 51 (1960), he buried the historic common law notion that husband and wife are legally one person. Writing for the Court, he declared, "we . . . do not allow ourselves to be obfuscated by medieval views regarding the legal status of women and the common law's reflection of them." 364 U.S. at 52. Precedent from an earlier age was appraised by Mr. Justice Frankfurter as expressing a view of womanhood "offensive to the ethos of our society." 364 U.S. at 53. Sounding the death-knell as well of *Goesaert's* disregard of "sociological insight or shifting social standards," he quoted Mr. Justice Holmes and applied the quoted wisdom to the case before him:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, Collected Legal Papers, 187 (1920), reprinting The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

For this Court now to act on Hawkins's formulation of the medieval view that husband and wife "are esteemed but as one Person in Law, and are presumed to have but one Will" would indeed be "blind imitation of the past." It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country. 364 U.S. at 53-54.

Unfortunately, Mr. Justice Frankfurter's observation in *Dege* does not correspond to contemporary reality. As this case and the statutes set out in the Appendix, *infra,* illustrate, the law-sanctioned subordination of wife to husband, mother to father, woman to man, is not yet extinguished in this country.

A federal court deciding a closely related issue, and two state courts deciding the identical issue, found scant difficulty in dispatching *Goesaert.*

In *Seidenberg* v. *McSorleys' Old Ale House,* 317 F. Supp. 593 (S.D.N.Y. 1970), Judge Mansfield declared a tavern owner's exclusion of women patrons inconsistent with the fourteenth amendment. In answer to the argument that *Goesaert* was controlling, he stated:

> Nor do we find any merit in the argument that the presence of women in bars gives rise to "moral and social problems" against which McSorleys' can reasonably protect itself by excluding women from the premises. Social mores have not stood still since that argument was used in 1948 to convince a 6-3 majority of the Supreme Court that women might rationally be prohibited from working as bartenders unless they were wives or daughters of male owners of the premises. 317 F. Supp. at 606.

In *Paterson Tavern & Grill Owners Ass'n* v. *Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970), the New Jersey Supreme Court considered a local ordinance which, like the statute in *Goesaert,* denied women the right to tavern employment behind the bar. Indicative of the change in social norms to which Judge Mansfield referred in *Seidenberg* v. *McSorleys' Old Ale House,* the New Jersey

case presented this interesting difference in party line-up: The plaintiffs were a male tavern owner who wished the freedom to select a woman bartender, and an association of tavern owners. The New Jersey Supreme Court ruled that in the light of current customs and mores, "the municipal restriction against female bartending may no longer fairly be viewed as a necessary and reasonable exercise of the police power." 57 N.J. at 186, 270 A.2d at 631. It concluded, reminiscent of this Court's expressions in *United States* v. *Dege*:

> While the law may look to the past for the lessons it teaches, it must be geared to the present and towards the future if it is to serve the people in just and proper fashion. In the current climate the law may not tolerate blanket municipal bartending exclusions grounded solely on sex. 57 N.J. at 189, 270 A.2d at 633.

Finally, the California Supreme Court in *Sail 'er Inn Inc.* v. *Kirby, supra* at p. 6758, said of *Goesaert*: "Although *Goesaert* has not been overruled, its holding has been the subject of academic critisism . . . and its sweeping statement that the states are not constitutionally precluded from 'drawing a sharp line between the sexes' has come under increasing limitation."

In sum, *Goesaert's* sanction of "a sharp line between the sexes" and its "blind imitation of the past" have rendered it a burden and an embarrassment to state and federal courts; enlightened jurists politely discard it as precedent, refusing "to be obfuscated by medieval views regarding the legal status of women." It should be plain that no one would now mourn its formal burial.

Hoyt v. *Florida,* 368 U.S. 57 (1961), completes the trilogy of cases invoked most frequently to justify second class status for women. In *Hoyt,* this Court sustained a Florida statute limiting jury service by women to those who registered with the court a desire to be placed on the jury list.[47] That case, although it harks back to the stereotyped view of women rejected in *United States* v. *Dege,* 364 U.S. 51 (1960), is readily distinguishable. Unlike the situation now before the Court, in which a woman's disqualification is mandated whenever a male contender appears, in *Hoyt,* the Court "found no substantial evidence whatever in this record that Florida has arbitrarily undertaken to exclude women from jury service." 368 U.S. at 69. Underscoring the point, the three concurring Justices stated their inability to find "from this record that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground of sex." 368 U.S. at 69.

While the *Hoyt* holding offers no support at all for a statute of the Idaho Code sec. 15-314 genre, in which discrimination on the ground of sex is undisguised, this Court included language in the opinion that has been turned against women who seek to realize their full potential as individual human beings:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, *woman is*

[47] Despite the *Hoyt* decision, the Florida statute was amended to call women for jury service on the same basis as men; the statute now limits its special female exemptions to pregnant women and women with children under the age of eighteen who affirmatively request exemptions. Fla. Stat. Ann. §40.01, as amended, Laws 1967, c. 67-154, §1.

> *still regarded as the center of home and family life.* We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. 368 U.S. at 61-62. (Emphasis supplied.)

While an image of woman, first and predominantly as keeper of the hearth, might have been expected from jurists writing at the turn of the century, it is disquieting to find the antiquated stereotype repeated so late in the day. Even in times past, when the absence of family planning and effective birth-control devices restricted options for most women, many by choice or fortune did not play the role of mother-wife. Today, of course, scientific developments have placed the choice and timing of parenthood within the realm of individual decision. Even for those who suspend or curtail economic activity to care for offspring, the period devoted to child-rearing is limited. In these days of longevity, most women, for the larger part of their lives, are not preoccupied with child care functions.[48]

The brief reversion to stereotype in the *Hoyt* opinion has had unfortunate consequences. For example, in a 1970

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[48] "Women today live 25 years longer than they did at the turn of the century; half of today's women are married by the time they are 21; and the average mother has her last child enter school when she is 30. When her youngest child enters school today's mother has 40 years of life yet ahead. The challenge to women to use those years in fulfilling ways, and society's need for mature judgment and talent have never been greater." California Women, Report of the Advisory Commission on the Status of Women 5 (1971).

decision a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemption for women. As a result of this exemption, women constituted less than twenty percent of the available jury pool. In his published opinion, the judge relied on *Hoyt* to explain to the complainant that she was "in the wrong forum." Less chivalrous than this Court, but more accurately reflecting the impact of the stereotype, the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems. . . ." *DeKosenko* v. *Brandt,* 313 N.Y.S. 2d 827, 830 (Sup. Ct. 1970). Nothing was said of the likelihood that many men would find other pursuits preferable to jury service were they offered automatic exemption.

Although *Hoyt* no doubt has impeded full recognition throughout the country that jury duty is a responsibility shared equally by all citizens, male and female alike,[49] the majority of states either treat women and men on the same basis, or relieve women only when family duties in the particular case require exemption.[50] For example recognizing the contemporary reality that among today's young

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[49] See *Alexander* v. *Louisiana,* 255 La. 941, 233 So. 2d 891 (1970), cert. granted, March 1, 1971.

[50] The Library of Congress Legislative Reference Service, American Law Division, reported to the Senate on June 10, 1970, the results of a search of the laws of the fifty states concerning women as jurors on state juries. At the time of the survey, 26 states provided no female exemptions and two states exempted all "persons" responsible for the care of children. The remaining states displayed a range of female exemptions, from the Ohio provision exempting nurses and nuns (Page's Ohio Rev. Code Ann. §2313.34) to the Louisiana provision excluding all women who do not file with the

parents, child care functions are often shared, the New Jersey statute provides exemption for any "person" who has the actual physical care and custody of a minor child. N.J.S.A. 2A:69-1, 2(g). See also Rev. Codes of Montana §93-1304(12) (exemption for "person" caring directly for one or more children).

D. *The Discrimination Against Women Mandated by Sec. 15-314 Is Not Justified by Any Compelling State Interest.*

If, as appellant urges, sex-based classification is declared "suspect," this Court must next consider whether a compelling state interest justifies the discrimination embodied in Sec. 15-314 of the Idaho Code.

Section 15-314 is the direct descendant of Sec. 52 of the Idaho Probate Practice Act adopted by the First Territorial Legislature in 1864. The current provision incorporates the language of its 1864 predecessor without change. S.L. 1864, sec. 53, p. 335; Rev. Stats. 1887, sec. 5352; Idaho Code Ann. 1901, vol. 3, sec. 4042. Idaho does not publish legislative committee reports or debate proceedings; consequently, no legislative history is available. Indeed, no source for discovering legislative intent exists apart from the decisions by the courts below in this case, the only Idaho case directly in point.[51]

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court clerk a written declaration of desire to be subject to jury service (L.S.A. R.S. 13:3055). Hearings on S. J. Res. 61 before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

[51] Section 15-314 has been cited in *Miller* v. *Lewiston Nat'l Bank,* 18 Idaho 124, 108 Pac. 901 (1910); *Miller* v. *Mitcham,* 21 Idaho 741, 123 Pac. 941 (1912); *Chandler* v. *Probate Court,* 26 Idaho 173, 141 Pac. 635 (1914). None of these cases dealt with the issue at bar.

The Supreme Court of Idaho justified the statute in these terms:

> By I.C. §15-314, the legislature eliminated [an area] of controversy, i.e., if both a man and woman of the same class seek letters of administration, the male would be entitled over the female . . . . This provision of the statute is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed.
>
> Philosophically it can be argued with some degree of logic that the provisions of I.C. 15-314 do discriminate against women on the basis of sex. However, nature itself has established the distinction and this statute is not designed to discriminate but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer. . . . (A. 21a).
>
> It is our opinion that the state has a legitimate interest in promoting the prompt administration of estates and that the statute in question promotes this interest by curtailing litigation over the appointment of administrators. . . . (A. 23a).

Thus, the Idaho Supreme Court explained as a time and decision saving device its tolerance of a patent legislative discrimination against women. The decision below contrasts dramatically with decisions on kindred matters rendered by the West German Federal Constitutional Court, a high court created with the model of the United States Supreme Court in close view. In a leading case, several wives and mothers challenged under the equal pro-

tection principle of the post-World War II West German Constitution, provisions of the German Civil Code (Bürgerliches Gesetzbuch §§1628, 1629 par. 1) declaring "if parents are unable to agree, father decides," and mandating preference to the father as representative of the child. Both Code provisions were declared unconstitutional. BVerfGE 10, 59 (July 29, 1959). While the Idaho Supreme Court was content to rely on considerations of expediency and the legislature's evident conclusion "that in general men are better qualified to act as administrators than are women," the West German Federal Constitutional Court focused on the superior norm. The differences in life styles alleged to exist, and the interest in saving time and sparing court facilities, it declared, are hardly so decisive as to override the fundamental constitutional guarantee of equal protection. The Court expressly rejected the notion that the legislature may introduce discriminations "of women, Jews, members of some political party or religious association" under "reasonable" circumstances. In a subsequent case concerning preference to sons over daughters in agrarian inheritance law, the West German Federal Constitutional Court relegated to the scrap heap of history legal distinctions based on the assumption that men are better equipped than women to manage property. BVerfGE 15, 337 (March 20, 1963).[52]

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[52] Cf. United Nations Charter preamble, Art. 1, para. 3 (calling for respect for human rights and fundamental freedoms for all persons without distinction as to race, sex, language or religion). For a progress report indicating a pace more rapid than that of the United States, see The Status of Women in Sweden: Report to the United Nations (1968). See also The Emancipation of Man, address by Mr. Olof Palme, Swedish Prime Minister, at the Women's National Democratic Club, Washington, D. C., June 8, 1970: The public opinion is nowadays so well informed that if a politician should declare that the woman ought to have a different role than the man and that it is natural that she devotes more time to the children he would be regarded to be of the Stone Age.

No doubt promotion of expeditious administration of estates and curtailment of litigation are bona fide state interests. But it is equally plain that the end of expediency cannot be served by unconstitutional means. Surely this Court would find offensive to the Constitution, to "the ethos of our society," and to common sense a fiduciary selection statute that preferred whites to blacks or Christians to Jews. A statute preferring men to women should fare no better. If sex is a "suspect classification," a state interest in avoiding a hearing cannot justify rank discrimination against a person, solely on the ground that she is a female.

Convenience, simplicity and curtailment of litigation, while grand virtues in the administration of public affairs, do not supersede the fundamental right of individuals to even-handed application of governmental action. Thus, such obviously convenient state measures as restricting the ballot to "two old, established parties" (*Williams* v. *Rhodes,* 393 U.S. 23 (1968)), and denying welfare payments to persons with less than a year's residency in the state (*Shapiro* v. *Thompson,* 394 U.S. 618 (1969)), did not survive this Court's scrutiny under the equal protection clause.

Williams v. *Rhodes* and *Shapiro* v. *Thompson* involved justifications more substantial than expedition. Yet the several reasons offered by the states in those cases, even in combination, were found insufficient to overcome the heavy burden required by this Court.

In *Shapiro* v. *Thompson,* the state sought to justify its one-year waiting period on seven grounds: (1) as a protective device to preserve the fiscal integrity of the state public assistance programs (394 U.S. at 627); (2) to discourage the influx of poor families in need of assistance

(394 U.S. at 629); (3) to discourage the influx of indigents who would enter the state solely to obtain larger benefits (394 U.S. at 631); (4) to facilitate planning of the welfare budget; (5) to provide an objective test of residency; (6) to minimize the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; (7) to encourage early entry of new residents into the labor force. 394 U.S. at 634.

In *Williams* v. *Rhodes,* the state asserted that its restrictive election legislation (1) promoted a two-party system in order to encourage compromise and political stability (393 U.S. at 31-32), (2) avoided election of plurality candidates (393 U.S. at 32), (3) allowed those who disagree with the major parties and their policies "a choice of leadership as well as issues" (393 U.S. at 32), and (4) avoided confronting voters with a choice so confusing that the popular will could be frustrated (393 U.S. at 33).

While any of these reasons might be considered "rational," this Court concluded that, even taken together, they were not "compelling." In contrast to the relatively serious reasons asserted to save the Connecticut, Pennsylvania and District of Columbia statutes in *Shapiro* v. *Thompson,* and the Ohio law in *Williams* v. *Rhodes,* the justification advanced here by the Idaho Supreme Court—administrative convenience—falls far short of a "compelling" state interest when appraised in light of the interest of the class against which the statute discriminates—an interest in treatment as full human personalities.[53] As

[53] The convenience argument, with more significant consequences to the fisc than are present in this case, was appropriately dispatched in *Mollere* v. *Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969) (declaring unconstitutional requirement that

this Court said in *Williams* v. *Illinois,* 399 U.S. 235, 245 (1970), "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."

Moreover, even the vaunted convenience afforded by Idaho Code sec. 15-314 is largely illusory. Hearings are avoided only in those cases where an eligible female applicant is challenged by an equally eligible male applicant. But if, for example, four sisters individually sought letters of administration,[54] the court would have to hold a hearing to select an administrator; if three brothers and one sister each sought appointment, the court would have to hold a hearing—even though the female applicant would be eliminated from the competition.[55] In any situation in which two or more applicants of the same sex from a class of equal eligibles separately seek letters of administration, a hearing must be held so that the court may issue letters of administration "to the party best entitled thereto." Idaho Code sec. 15-323.

The fact that not all women are denied the right to a hearing or presumed less than competent to administer an

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unmarried women under 21 live in state college dormitory when no such requirement was imposed on men) and *In re Estate of Legatos,* 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband, violates equal protection).

[54] Idaho Code sec. 15-315 permits the appointment of joint administrators, an expedient measure fully consistent with constitutional principle.

[55] Without regard to Idaho Code sec. 15-314, the sister would be excluded by Idaho Code sec. 15-312 which ranks brothers in class 4 and sisters in class 5. The subordination of sisters to brothers is as unjustified and as unconstitutional as the discrimination challenged here.

estate highlights the invidious discrimination inherent in the statute. A woman may compete on terms of equality whenever her challenger is another woman. If no male equally eligible opposes, the woman will be appointed. Through this device of law-mandated subordination of "equally entitled" women to men, the dominant male society, exercising its political power,[56] has secured women's place as the second sex.

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[56] Although women were granted the vote over fifty years ago, the legacy of their disenfranchisement is still apparent. Elected or appointed office in this country remains, with sparse exceptions, a male preserve. See Handbook 118-26.

For the levity with which even the judiciary treats women's lack of representation, see *State* v. *Hunter,* 208 Ore. 282, 287-88, 300 P.2d 455, 457-58 (1956):

> We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominantly masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute. . . . It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. . . . [I]s it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?

At the time Idaho Code section 15-314 was originally enacted, 1864, women in Idaho lacked the right to vote for members of the legislature.

II.

The statutory classification based on the sex of the applicant established in Section 15-314 of the Idaho Code is arbitrary and capricious and bears no rational relationship to a legitimate legislative purpose.

If the Court concludes that sex is not a suspect classification, appellant urges application of an intermediate test. Attributable in part to decisions of this Court, see pp. 41-53 *supra,* women continue to receive disadvantaged treatment by the law. In answer to the compelling claim of women for recognition by the law as full human personalities, this Court, at the very least, should reverse the presumption of a statute's rationality when the statute accords a preference to males. Rather than require the party attacking the statute to show that the classification is irrational, the Court should require the statute's proponent to prove it rational.

Yet, the discrimination embodied in section 15-314 of the Idaho Code is so patently visible that the statute is readily assailable under the less stringent reasonable-relationship test. The mandatory preference to males lacks the constitutionally required fair and substantial relation to a permissible legislative purpose and therefore must be held to violate the equal protection clause.[57] *F. S.*

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[57] Contrast with the wholly irrational discrimination embodied in section 15-314 of the Idaho Code, the Louisiana succession statute upheld by this Court in *Labine* v. *Vincent,* 401 U.S. —— (1971). Finding that it was permissible for the Louisiana legislature to distinguish for inheritance purposes between legitimate and illegitimate children, the Justice who cast the deciding vote stressed the different quality of the male parent's relation to legitimate and illegitimate children: "[I]t is surely entirely reasonable for the Louisiana legislature to provide that a man who has entered into

Royster Guano Co. v. *Virginia,* 253 U.S. 412, 415 (1920); *Gulf, Colorado & S. F. Ry.* v. *Ellis,* 165 U.S. 150, 155 (1897).

The Idaho Supreme Court held the sex-based classification of section 15-314 reasonable on the ground that "the legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women." Conceding that "there are doubtless particular instances in which [the legislature's evident conclusion] is incorrect," the Idaho Supreme Court was "not prepared to say that [the conclusion] is so completely without a basis in fact as to be irrational and arbitrary" (A. 22a).[58]

Declaring that "nature itself has established the distinction," (A. 21a), the Idaho Supreme Court seemingly justified the discrimination challenged here by finding it "rational" to assume the mental inferiority of women to men. This assumption, particularized in the judgment that "men

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a marital relationship thereby undertakes obligations to any resulting offspring beyond those which he owes to the products of a casual liaison. . . ." (Harlan, *J.*, concurring opinion.) By parity of reasoning, it is surely entirely unreasonable for Idaho to provide that a female person who bears the very same relationship to the decedent as does a male person ranks, automatically, as the inferior human being.

[58] The Idaho Supreme Court observed that "other courts construing similar provisions have also held that the preference is mandatory" (A. 19a-20a). To support this observation, it cited a solitary 1901 California case, *In re Coan's Estate,* 132 Cal. 401, 64 P. 691. That case is no longer law. California long ago repealed its male preference provision. See California Probate Law secs. 422, 423. If the Idaho Supreme Court wished to determine California's present view, it might have consulted *In re Estate of Legatos,* 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband, violates equal protection).

are better qualified to act as an administrator than are women" demands swift condemnation of this Court. In the Idaho District Court, where the argument was made in terms of the supposed greater "business experience" of men, Judge Donaldson responded, "The Court feels that this statement has no basis in fact in this modern age and society" (A. 14a), and promptly declared section 15-314 unconstitutional. At a time when assumptions concerning the physical inferiority of women no longer go unquestioned,[59] the Court surely cannot countenance distinctions based on totally unfounded assumptions of differences in mental capacity, or "experience" relevant to the office of administrator.[60]

Despite the massive discrimination that women still face in the job market, their participation in the business world is increasing dramatically. In 1969, 30,512,000 women over the age of sixteen were at work, and comprised 37.8% of

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[59] See, e.g., *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Rosenfeld* v. *Southern Pacific Co.*, —— F.2d —— (9th Cir. 1971); *Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); Note, The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals, 59 Georgetown L. Rev. 221 (1970).

[60] While the office of administrator may not constitute "employment" within the meaning of federal and state anti-discrimination laws, it does require work and carries a fee. It would be strange indeed if state appointments of fiduciary officers were exempt from the standards of nondiscrimination declared national policy and imposed on private employers. See *Schattman* v. *Texas Employment Commission*, Civ. Action A-70-CA-75, W.D. Texas (Austin Division), order denying motion for relief from judgment, April 16, 1971 ("Private employers can hardly be expected to comply voluntarily with the law when the state . . . operates in open disregard of the national policy of nondiscrimination.").

all workers.[61] The comparable figures thirty years ago were 13,783,000 and 25.4%.[62] About 42% of all women over the age of sixteen work full-time the year round.[63] In 1969, 58.9% of all married women living with husbands worked.[64] The Department of Labor has projected that by 1980 there will be 37,000,000 working women, twice as many as there were in 1950, and that for the first time there will be as many female professionals and technical workers as female blue-collar workers.[65]

A similar trend is apparent in education. In 1967, women comprised 40.5% of the undergraduate student population in four year institutions of higher learning and 29.7% of the graduate population.[66] In the same year, women earned 40.3% of the bachelor's degrees, 34.7% of the master's degrees, and 11.9% of the doctorate degrees.[67]

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[61] Dept. of Labor, Women's Bureau: Background Facts on Women Workers in the United States 5 (1970) [hereinafter Background Facts].

[62] Handbook 10.

[63] Handbook 3.

[64] Background Facts 8. The Labor Department reported that in 1970, four out of every 10 husbands in the United States had wives who were employed. The ratio of working wives compared with an overall figure of 3 out of 10 a decade ago. See New York Times, January 31, 1971, p. 45.

[65] See New York Times, November 11, 1970, p. 32, col. 1 (report of Secretary of Labor James D. Hodgson news conference presenting major conclusions of Department of Labor Study, "United States Manpower in the Nineteen-Seventies").

[66] Handbook 188.

[67] *Id.* at 191. On obstacles confronting women in academic life and measures proposed at one institution "to create a climate in which prejudice against women, or apathy toward their presence . . . will be hard to maintain," see Report of the Committee on the Status of Women in the Faculty of Arts and Sciences (Harvard University 1971).

Close to 3,000,000 women were enrolled in institutions of higher learning in 1967, representing a 10% increase over 1966 and a 53% increase over 1963.[68]

In April, 1971, 4,500,000 women were employed as professional or technical workers compared to 6,706,000 men; 1,440,000 women were employed as managers, officials or proprietors, compared to 7,150,000 men.[69] In 1968, 10,000 women worked as accountants, 20% of the total; 12,500 were employed as bank officers, 10% of the total; 8,100 were employed as lawyers, 3% of the total; 6,500 worked as mathematicians, 10% of the total; and 7,650 were engaged as statisticians, 33% of the total.[70]

In 1970, 2,226 women passed the federal service management intern examination, 38% of the total.[71] Women employed by the federal government as category III employees in 1969 included 5,481 in accounting and budget, 12% of the total; 5,621 in legal and law-related areas, 23% of the total; 6,686 in business and industry, 14% of the total.[72] As of April 1971, 13,000 women were serving as officers in the Armed Forces.[73]

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[68] *Id.* at 187.

[69] Dept. of Labor, Bureau of Labor Statistics: Employment and Earnings 44 (May 1971). Cf. M. Hennig, What happens on the way up, The MBA 8-10 (March, 1971).

[70] Dept. of Labor, Bureau of Labor Statistics: Occupational Outlook Handbook Bulletin No. 1650, pp. 28, 789, 230, 127, 129 (1970-71 ed.).

[71] Civil Service Commission, Bureau of Recruiting and Examining, Program Development Division (unpublished data).

[72] Civil Service Commission, Bureau of Manpower Information Systems: Study of Employment of Women in the Federal Government 137, 141 (1969).

[73] Office of the Assistant Secretary of Defense, Manpower and Reserve Affairs (unpublished data).

Any legislative judgment that "men are better qualified to act as an administrator than are women" is simply untenable in view of these statistics, revealing what the Department of Labor describes as "a major change in American life style."[74] Moreover, although the Idaho Supreme Court did not provide any enlightenment on the specific functions an administrator performs for which "men are better qualified," the standard responsibilities are evident: receiving payments from creditors, paying out debts, paying state and federal taxes if any, preserving the assets of the estate, and finally paying out the net estate to the lawful heirs. Except for the occasional millionaire who dies intestate, the responsibilities are hardly onerous. They can be handled satisfactorily by most people who have completed secondary school education.[75]

Moreover, the extent to which "business experience" is needed for performance of the duties of an administrator is questionable. The Idaho Code, like most statutes relating to administration, confers very limited authority upon the administrator and empowers the court to supervise the estate closely during the entire period of administration. Thus the administrator must hire an appraiser for the estate. Idaho Code sec. 15-401, 402. No claims can be allowed without court approval. Idaho Code sec. 15-607. Distribution of the estate is strictly prescribed. Idaho Code sec. 15-1301–15-1308. Furthermore, the criteria for disqualification of an administrator set out in Idaho Code sec. 15-317 provide no support whatever for treating "business

[74] See New York Times, November 11, 1970, p. 32, col. 3.

[75] As of March 1968, apart from those who went on to higher eduction, 38.2% of the female population had completed four years of high school while only 30.6% of the male population were high school graduates. Handbook 178.

experience" as a characteristic of the competent executor. Any resident above the age of majority who has not been convicted of an infamous crime, and who is not mentally defective, a drunk, a wastrel, a spendthrift, or a cheat, is presumptively competent.[76]

In any event, it is not unlikely that more women than men have the kind of "business experience" most relevant to the duties of an administrator. Women who do not work outside the home often handle most if not all the financial affairs of their family unit. Managerial responsibility, including the settlement of accounts and the preservation of property, is a central part of their daily occupation. As preparation for the duties of an administrator, experience in household management surely is not inferior to experience in such typically male occupations as truck driver, construction worker, factory worker, or farm laborer.[77]

Finally, as developed in the preceding section (*supra*, pp. 53-58), Idaho's interest in prompt administration of estates and curtailment of litigation is barely served by section 15-314. The male preference system operates in

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[76] The primary criterion reflected in the Idaho statutes is not worldly experience but the degree of kinship to the decedent. Preference is given to the person with the greatest interest in the estate on the reasonable assumption that he or she will be motivated to preserve the property with due care during the period of administration.

[77] If the Idaho legislature was in fact motivated by the misguided assumption that men are better qualified than women to administer an estate, the scheme it adopted would delight Lewis Carroll. Within a family unit, the death most likely to occur first is the father's. But when husband predeceases wife, Idaho Code sec. 15-312 provides that in appointing an administrator, first priority goes to the widow.

relatively few cases. In most situations in which more than one applicant from a class of equal eligibles separately seek letters of administration, hearings must be held. Indeed, and quite appropriately, the Idaho Code invites hearings by providing that "any person interested" may challenge the competency of the administrator. Idaho Code 15-322.[78]

To eliminate women who share an eligibility category with a man, when there is no basis in fact to assume that women are less competent to administer than are men, is patently unreasonable and constitutionally impermissible. A woman's right to equal treatment may not be sacrificed to expediency.

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[78] Recently, this Court reasserted the fundamental principle that "a State must afford to all individuals a meaningful opportunity to be heard." *Boddie* v. *Connecticut,* 401 U.S. —— (1971).

CONCLUSION

For the reasons stated above, the decision of the Idaho Supreme Court should be reversed and Sec. 15-314 should be declared unconstitutional.

Respectfully submitted,

MELVIN L. WULF
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

RUTH BADER GINSBURG
Rutgers Law School
180 University Avenue
Newark, New Jersey

ALLEN R. DERR
817 West Franklin Street
Boise, Idaho 83701

PAULI MURRAY
504 Beacon Street
Boston, Mass. 02115

DOROTHY KENYON
433 W. 21st Street
New York, N. Y. 10011

Attorneys for Appellant

Attorneys for Appellant gratefully acknowledge the invaluable assistance provided in preparation of this brief by Ms. Ann Freedman, J.D., Yale Law School, 1971; Ms. Janice Goodman, J.D., New York University School of Law, 1971; Professor Eva Hanna Hanks, Rutgers Law School (Newark); Ms. Mary Kelly, J.D., New York University School of Law, 1971; Ms. Diane Riegelman, 3rd year student, Rutgers Law School (Newark).

APPENDIX

APPENDIX

Section 15-314 of the Idaho Code, and the justification offered for it by the Idaho Supreme Court, assume, Orwellian fashion, this fundamental principle: *All people are equal, but male people are more equal than female people.* Lawmakers in other states similarly ascribe inferior status to the female sex. This appendix presents only a small sample of current legislative prescriptions, kin to Section 15-314 of the Idaho Code.

1. *Persons entitled to administer the estate of a person dying intestate: mandatory preference to males*

a) *District of Columbia*

D.C. Code Ann. § 20-334 (1937): Persons entitled to administer; order of preference

(a) The Probate Court may grant letters of administration of the estate of a person dying intestate to one or more of the following persons, according to the order of preference indicated:

(1) where there is a surviving spouse and a child or children, to the surviving spouse or to the child, or one or more of the children qualified to act as administrator;

* * * * *

(3) where there is no surviving spouse, or child, or grandchild to act, the father shall be preferred; and, where there is no father, the mother shall be preferred;

* * * * *

(5) males shall be preferred to females in equal degree;

* * * * *

(9) a *feme sole* shall be preferred to a married woman in equal degree;

* * * * *

b) *Nevada*

Nev. Rev. Stat. § 139.060 (1969): Males preferred to females; whole blood and half blood.

When there shall be several persons claiming and equally entitled to the administration, males shall be preferred to females, and relatives of the whole blood to those of the half blood.

c) *South Dakota*

S.D. Code Ann. § 30-9-3 (1967): Males preferred in appointment—Relatives of whole blood.

Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of whole blood to those of the half blood.

2. *Persons entitled to administer the estate of a person dying intestate: brothers must be preferred to sisters*

a) *Arizona*

Ariz. Rev. Stat. Ann. § 14-417 (1956): Appointment of administrator; order of preference

(A) Administration of the estate of a person dying intestate shall be granted to one or more of the following persons, and in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.

2. The children.

3. The father or mother.

4. The brothers.

5. The sisters.

6. The grandchildren.

* * * * *

b) *Idaho*

Idaho Code § 15-312 (1948): Priorities in right of administration.

Administration of the estate of a person dying intestate must be granted to someone or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

2. The children.

3. The father or mother.

4. The brothers.

5. The sisters.

6. The grandchildren.

* * * * *

c) *Nevada*

Nev. Rev. Stat. § 139.040 (1969): Order of priority of right to letters; priority of nominee.

1. Administration of the estate of a person dying intestate shall be granted to some one or more of the persons

hereinafter mentioned, and they shall be respectively entitled in the following order:

(a) The surviving husband or wife.

(b) The children.

(c) The father or the mother.

(d) The brother.

(e) The sister.

(f) The grandchildren.

* * * * *

d) *South Dakota*

S.D. Code Ann. § 30-9-1 (1967): Persons entitled to administer—Order of preference.

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

(1) The surviving husband or wife, or some competent person whom he or she may request to have appointed;

(2) The children;

(3) The father or mother;

(4) The brothers;

(5) The sisters;

(6) The grandchildren.

* * * * *

e) *Wyoming*

Wyo. Stat. Ann. § 2-93 (1957): Persons entitled to administer.

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed;

2. The children;

3. The father or mother;

4. The brothers;

5. The sisters;

6. The grandchildren.

* * * * *

3. *Persons entitled to administer the estate of a person dying intestate: mandatory disqualification of married women*

a) *Utah*

Utah Code Ann. § 75-4-5 (1953): Competency of married women.

When objection is made by any person interested in an estate, a married woman must not be appointed administratrix. When an unmarried woman appointed adminis-

tratrix marries, the court may, upon the motion of any such interested person, revoke her authority and appoint another person in her place.

4. *Parental power; guardian of minor child or property of minor child: mandatory preference to father*

a) *Alabama*

Ala. Code tit. 21, § 3 (1958): Father entitled to preference; guardian's control of ward.

When the minor has an estate in his own right, a guardian must be appointed for him; and his father, if a suitable and proper person, and willing to give bond and qualify as guardian, is entitled to a preference. * * *

b) *District of Columbia*

D.C. Code § 21-107 (1967): Preferences in appointment of guardian of estate

In appointing a guardian of the estate of an infant * * * the court shall give preference to—

(1) the father, if living; or

(2) if he is dead, then to the mother, if living; or

(3) if the infant is a married female, to her husband—

when in the judgment of the court the parent or husband is a suitable person to have the management of the infant's estate.

c) *Georgia*

Ga. Code Ann. § 74-108 (1933): Parental power.

Until majority, the child shall remain under the control of the father, who is entitled to his services and the proceeds of his labor.

Ga. Code Ann. § 49-102 (Supp. 1970): Natural guardian; bond.

The father, if alive, unless otherwise provided herein, is the natural guardian; if the father is dead or if the father is not domiciled with the mother, the parent having custody of the child is the natural guardian. * * *

d) *Louisiana*

La. Civ. Code Ann. art. 264 (1952): Of the Tutorship by the Effect of the Law—Male preference

In case there shall be more than one ascendant in the same degree, in the direct line, but of different sexes, the tutorship shall be given to the male.

La. Civ. Code Ann. art. 266 (1952): Of the Tutorship by the Effect of the Law—Grandmother

The grandmother of the minor is *the only woman* who has a right to claim the tutorship by the effect of the law, but she is not compelled to accept it. (Emphasis added.)

e) *New Mexico*

N.M. Stat. Ann. § 32-1-1 (1953): Parents natural guardians of children—Guardianship of property.

The father, and, in case of his death or abandonment of his family, the mother, shall be the natural guardians of their children, and shall have the care of their persons and education; * * *

N.M. Stat. Ann. § 32-1-2 (1953): Preferred right of father or mother to serve as guardian.

In all cases where application is made either to the probate or the district courts of this state for the appointment

of a guardian for the care and management of the estate of any minor the father of such minor, and in case of his death or abandonment of his family, the mother of such minor, or in case of the divorce or legal separation, the parent having custody of such minor, shall have the preferred right to be appointed as such guardian unless such parent shall waive such right or unless it shall be shown that such parent is not a fit and competent person to be appointed as such guardian.

f) *North Dakota*

N.D. Cent. Code Ann. § 30-10-13 (1960): When father or mother entitled to guardianship.

If the father of a minor is living and is competent to transact his own business and is not otherwise unsuitable, he is entitled to the guardianship of the minor. In case of his death, the mother, if a competent and proper person, is entitled to the guardianship.

5. *Married women's right to engage in independent business: special qualifications imposed*

a) *California*

Cal. Civ. Proc. Code § 1811 (Deering 1966): Who may become sole trader.

A married woman may become a sole trader by the judgment of the superior court of the county in which she has resided for six months next preceding the application.

Cal. Civ. Proc. Code § 1812 (Deering 1966): Notice: How given and what to contain

A person intending to make application to become a sole trader must publish notice of such intention in a newspaper

published in the county, or if none, then in a newspaper published in an adjoining county, pursuant to Gov't Code Section 6064. The notice must specify the day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband.

Cal. Civ. Proc. Code § 1813 (Deering, Supp. 1971): Petition, what to contain and when filed

Ten days prior to day named in the notice, the applicant must file a verified petition, setting forth:

1. The justification for application.

2. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

3. That the application is not made to defraud, delay, or hinder any creditor or creditors of the husband of the applicant.

Cal. Civ. Proc. Code § 1814 (Deering 1966): May have five hundred dollars of community or husband's property

The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband, not exceeding five hundred dollars.

Cal. Civ. Proc. Code § 1817 (Deering 1966): Decree, when it must be

If the facts sustain the petition, the court must render judgment, authorizing the applicant to carry on, in her own name and on her own account, the business specified in the notice and petition.

b) *Massachusetts*

Mass. Gen. Laws Ann. ch. 209, § 10 (1955): Separate Business Certificate.

If a married woman does or proposes to do business on her separate account, she shall cause to be recorded in the clerk's office of the city or town where she does or proposes to do such business a certificate stating her name and that of her husband, the nature of the business and the place where it is or is proposed to be carried on * * * If such certificates are not so recorded by either husband or wife, the personal property employed in such business shall be liable to be attached as the property of the husband and to be taken on execution against him, and the husband shall be liable upon all contracts lawfully made in the prosecution of such business in the same manner and to the same extent as if such contracts had been made by him.

c) *Nevada*

Nev. Rev. Stat. § 124.010 (1957): Right of married woman to conduct business under her own name as sole trader.

Any married woman shall have the right to carry on and transact business under her own name, and on her own account, by complying with the regulations prescribed in this chapter.

Nev. Rev. Stat. § 124.20 (1957): Application to conduct business in wife's own name: Notice, hearing and order.

1. Any married woman residing within this state, desiring to avail herself of the benefit of this chapter, shall give notice thereof by advertising in some public news-

paper published in the county in which she has resided for 4 successive weeks preceding her application. * * *

2. The notice shall set forth: * * *

3. * * *

If it appear to the court that a proper case exists, it shall make an order, which shall be entered on the minutes, that the applicant be authorized to carry on, in her own name and on her own account, the business, trade, profession or art named in the notice. The insolvency of the husband, apart from other causes tending to prevent his supporting his family, shall not be deemed to be sufficient cause for granting the application.

* * * * *

Nev. Rev. Stat. § 124.030 (1957): Rights and liabilities of sole traders.

After the order has been duly made and recorded, as provided in NRS 124.020, the person named shall be entitled to carry on the business in her own name, and the property, revenues, moneys and credits so invested shall belong exclusively to the married woman, and shall not be liable for any debts of her husband. The married woman shall be allowed all the privileges, and be liable to all legal process, now or hereafter provided by law, against debtors and creditors, and may sue and be sued alone, without being joined with her husband. But nothing contained in this chapter shall be deemed to authorize a married woman to carry on business in her own name when the same is managed or superintended by her husband.

d) *Pennsylvania*

Pa. Stat. Ann. tit. 48, § 41 (1965): Wives of absent mariners declared feme sole traders; actions; execution

Where any mariners or others are gone, or hereafter shall go, to sea, leaving their wives at shop-keeping, or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and are hereby declared to be, as feme sole traders, and shall have ability and are by this act enabled, to sue and be sued, pleaded and be impleaded at law, in any court or courts of this province, during their husbands' natural lives, without naming their husbands in such suits, pleas or actions: * * *

Pa. Stat. Ann. tit. 42, § 42 (1965): Married women to have rights of feme sole traders on husband's desertion

Whensoever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a feme sole trader, * * * and be subject as therein provided, and her property, real and personal, howsoever, acquired, shall be subject to her free and absolute disposal during life, or by will, without any liability to be interfered with or obtained by such husband, and in case of her intestacy shall go to her next of kin, as if he were previously dead.

Pa. Stat. Ann. tit. 48, § 43 (1965): Proceedings to declare wife a feme sole trader

That creditors, purchasers and others, may with certainty and safety, transact business with a married woman under the circumstances aforesaid, she may present her

petition to the court of common pleas of the proper county * * *

Pa. Stat. Ann. tit. 48, § 44 (1965): Wife not supported by, or living apart from, husband to be declared feme sole trader

Whenever a husband and wife reside together under the same roof, and the husband has failed to support his wife or family for a period of five years or more, although there is no desertion, or whenever a husband and wife live apart and separate for one year or more, and all marital relations between them have ceased, and the husband, for one year or more, has not supported his wife, nor their child or children, if any they have, from the time of the separation of the husband and wife, and the wife and child, or children, if any there are, are maintained either by the wife, by the joint efforts of the wife and children, by the children, or from the income of the wife's separate estate, then, in either such case, the wife may petition the court of common pleas of the county in which she resides to be decreed a feme sole trader; * * *

6. *Limitations on capacity of married woman to become surety or guarantor*

a) *Georgia*

Ga. Code Ann. § 53-503 (Supp. 1970): Wife feme sole as to her separate estate; binding separate estate.

The wife is a feme sole as to her separate estate, unless controlled by the settlement. Every restriction upon her power in it must be complied with. The wife may not bind that portion of her separate estate which is composed of tangible personal property by any contract of suretyship

or by any assumption of the debts of her husband. The sale of any portion of her separate estate which is composed of tangible personal property to a creditor of her husband in extinguishment of his debts shall be absolutely void.

b) *Kentucky*

Ky. Rev. Stat. Ann. § 404.010(2) (1969): Effect of marriage on wife's property; separate estate; subjection of estate to debts.

A married woman shall never be the joint maker of a note or a surety on any bond or obligation of another, other than her husband, without the joinder of her husband with her in making such contract unless her separate estate has been set apart for that purpose by mortgage or other conveyance. * * *

7. *Women and children: birds of a feather*

a) *California*

Cal. Pen. Code § 415 (Deering 1960): Disturbing the peace: Horse racing or shooting in unincorporated town: Profanity: Punishment.

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, by tumultuous or offensive conduct, * * * or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor * * *

Cal. Pen. Code § 880 (Deering 1961): Infants and married women may be required to give security.

Infants and married women, who are material witness(es) against the defendant, may be required to procure sureties for their appearance, as provided in the last section. [Enacted 1872]

8. *Marriageable age: men, but not women, require time for education and preparation for labor or business*

a) *Alabama*

Ala. Code tit. 34, § 4 (1958): What minor incapable of marriage.

A man under the age of seventeen, and a woman under the age of fourteen years are incapable of contracting marriage.

Ala. Code tit. 34, § 10 (1958): When consent of parents and bond required.

If the man intending to marry be under twenty-one, and the woman under eighteen years of age, and have not had a former wife or husband, the judge of probate must require the consent of the parents or guardians of such minors to the marriage * * *

b) *New Jersey*

N.J. Stat. Ann. § 37:1-6 (1968): Consent of parents or guardian of minor; when required.

A marriage license shall not be issued to a minor under the age of twenty-one years, if a male, or under the age of eighteen years, if a female * * *

c) *Wisconsin*

Wisc. Stat. Ann. § 245.02 (Supp. 1970): Marriageable age; who may contract

(1) Every male person who has attained the full age of 18 years and every female person who has attained the full age of 16 years shall be capable in law of contracting marriage if otherwise competent.

* * * * *

9. *Domicile; head of family: home is where he makes it*

a) *California*

Cal. Gov't Code § 244 (Deering, Supp. 1971): Determination of place of residence.

In determining the place of residence the following rules are to be observed:

* * * * *

(d) The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child, provided that when the parents are separated, the residence of the parent with whom an unmarried minor child maintains his place of abode is the residence of such unmarried minor child.

(e) The residence of the husband is the residence of the wife, provided that a married woman who is separated from her husband may establish her own residence.

b) *Georgia*

Ga. Code Ann. tit. 79, § 403 (1933): Feme covert.

The domicile of a married woman shall be that of her husband, except in two cases: 1. Of voluntary separation and living apart. 2. Of a pending application for divorce. In either case her domicile shall be determined as if she were a feme sole.

c) *Idaho*

Idaho Code Ann. § 32-902 (1948): Head of family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

d) *Louisiana*

La. Civ. Code art. 39 (1952): Married women; minors and interdicts

A married woman has no other domicile than that of her husband; * * *

La. Civ. Code art. 120 (1952): Obligation of living together

The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obligated to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

e) *Montana*

Mont. Rev. Code Ann. § 21-113 (1947): Husband may select home.

The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

Mont. Rev. Code Ann. § 36-102 (1947): Rights of husband as head of family.

The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

Mont. Rev. Code Ann. § 83-303 (33) (1947): Residence, rule for determining.

Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

* * * * *

5. The residence of the husband is presumptively the residence of the wife.

* * * * *

f) *New Mexico*

N.M. Stat. Ann. § 57-2-2 (1953): Rights of husband.

The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

g) *North Dakota*

N.D. Cent. Code § 14-07-02 (1960): Head of family.

[The husband] may choose any reasonable place or mode of living and the wife must conform thereto.

N.D. Cent. Code § 54-01-26 (Supp. 1969): Residence—Rules for determining.

Every person has in law a residence. In determining the place of residence the following rules shall be observed:

* * * * *

4. The residence of the father during his life, and after his death, the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children;

5. The residence of the husband is presumptively the residence of the wife except in the case of establishing residence for voting purposes;

* * * * *

h) *Ohio*

Ohio Rev. Code Ann. § 3103.02 (Page's 1960): The head of the family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

i) *Oklahoma*

Okla. Stat. Ann., tit. 32, § 2 (1958): Husband head of family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

j) *Wisconsin*

Wisc. Stat. Ann. § 49.10 (Supp. 1970): Legal settlement; how determined

(1) A wife has the settlement of her husband, if he has any within the state, but if he has none, she has none. A wife living separate from her husband shall, if criminal proceedings have been instituted under § 52.05, or support proceedings commenced under § 52.10, begin to acquire legal settlement in her own right as of the date of instituting the criminal proceedings or commencing the support proceedings.

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