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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

[redacted]

SALLY M. REED,

Appellant,

v.

CECIL R. REED, Administrator, In the matter of the Estate of Richard Lynn Reed, deceased

JOINT BRIEF OF AMICI CURIAE

AMERICAN VETERANS COMMITTEE, INC.,
By: PHINEAS INDRITZ
1333 Connecticut Avenue, N.W.
Washington, D.C. 20036

NOW LEGAL DEFENSE AND EDUCATION FUND, INC.,

By: MARTHA W. GRIFFITHS
1536 Longworth House
Office Building
Washington, D.C. 20515

LEO KANOWITZ
School of Law
University of New Mexico
Albuquerque, N.M. 87106

SYLVIA ROBERTS
P.O. Box. 3081
Baton Rouge, Louisiana 70821

PHINEAS INDRITZ
1333 Connecticut Avenue, N.W.
Washington, D.C. 20036

MARGUERITE RAWALT
1600 North Joyce Street
Arlington, Va. 22202

FAITH SEIDENBERG
1404 State Tower Building
Syracuse, New York 13202

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JOINT BRIEF OF AMICI CURIAE

AMERICAN VETERANS COMMITTEE, INC.
NOW LEGAL DEFENSE AND EDUCATION FUND, INC.

INTEREST OF THE AMICI CURIAE

The American Veterans Committee, Inc. (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World War I, World War II, Korean Conflict and Vietnam Conflict, and who have associated themselves, regardless of race, color, religion, sex, or national origin, to promote the democratic principles which they fought to preserve. AVC was founded in 1943 and its membership includes both men and women who participate in AVC's affairs in full equality.

The NOW Legal Defense and Education Fund, Inc. is the legal-aid arm of the National Organization for Women, Inc. (NOW), a nationwide organization of men and women who have associated themselves, regardless of race, color, religion, sex, or national origin, "to bring women into full participation in the mainstream of American society NOW, exercising all the privileges and responsibilities therein truly equal partnership with men." One of NOW's objectives is "to isolate and remove patterns of sex discrimination, to ensure equality of opportunity in employment and education, and equality of civil and political rights and responsibilities on behalf of women, as well as for Negroes and other groups." (NOW's Statement of Purpose at Organizing Conference, Oct. 29, 1966.)

This case starkly presents for decision by this Court the issue whether a statute can constitutionally deny to women, solely because of their sex, a right which is granted to all others and the exercise of which is not materially relevant to the functional or structural differences of sex.

Arbitrary sex discriminations in our legal system resulting from ancient prejudices, assumptions and stereotypes

have lingered on despite the mandate of the 14th Amendment's Equal Protection Clause. This is largely because various courts, like the Idaho Supreme Court in this case, have mechanically accepted the idea that since the common law treated men and women differently and since "men and women are not identical," any difference in the legal classification of men and women is constitutional no matter how irrelevant to the function of sex.[1] See footnote 12, *infra.* But such an approach has failed to recognize that their rights as "persons" are protected by the Equal Protection Clause from any discrimination not necessitated by the difference of sex.[2]

We believe that discriminations based on sex are, in most instances, as unjustifiable and as unconstitutional as the discriminations based on race which this Court has so roundly condemned. For the reasons stated below, we contend that the sex discrimination perpetuated by sections 15-312 and 15-314, Idaho Code, violate the Equal Protection Clause of the 14th Amendment.

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[1] Oliver Wendell Holmes, later a Justice of this Court, perceptively noted, in his classic *The Common Law,* p. 5 (1881):

> "A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains."

See also Roscoe Pound, "Mechanical Jurisprudence," 8 Colum. L. Rev. 605 (1908).

[2] The continuance of sex discrimination in our legal system and the widely felt need to remedy the resulting injustices have stimulated a national demand for a constitutional amendment declaring that "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." *91st Cong.:* H. J. Res. 264, S.J. Res. 61; *92nd Cong.:* H.J. Res. 208, 231, 35; S.J. Res. 8, 9. The history of the drive for this Amendment reflects dissatisfaction with the slow pace of judicial attack on sex discriminatory laws, not belief that this Court lacks power to do so under the 14th Amendment. See Hearings cited in footnote 6, *infra.*

THE ISSUE

Does section 15-314 of the Idaho Code—which specifies that "males must be preferred to females" as between several petitioners for letters of administration who are in the same preference class of entitlement to administer an estate—deny equal protection of the laws to a woman whose petition for letters of administration is denied, in favor of a male petitioner of the same preference class, solely because of that statute?

THE FACTS

Richard Lynn Reed, the adopted son of appellant Sally M. Reed and appellee Cecil R. Reed, died in March 1967, in Idaho. He left no will. His parents were his only heirs-at-law. Sally, as the decedent's mother, filed her petition for probate of his estate in November 1967. Before the time set for hearing on the petition, Cecil, the father, also petitioned for letters of administration. The probate judge appointed the father as administrator. His order noted that Cecil and Sally were equally entitled to letters of administration, because they were both in class 3 under section 15-312, Idaho Code (1948 ed.).[3] However, he ruled that

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[3] "Section 15-312. *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.
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.

[continued]

the father was entitled to preference because another section (15-314) provides that, as between persons "equally entitled to administer" an estate, "males must be preferred to females."[4]

On Mrs. Reed's appeal, Judge Donaldson of Idaho's Fourth Judicial District Court reversed the probate court's order. He held that section 15-314 violated the Equal Protection Clauses of both the U.S. Constitution (14th Amendment) and the Idaho Constitution (Art. I, section 1), and remanded the matter to the probate court to determine "which of the two parties is best qualified to serve as administrator or administratrix of the estate."

On appeal by the father, the Idaho Supreme Court upheld the constitutionality of section 15-314 and reversed the district court. *Reed v. Reed,* 93 Ida. 511, 465 P.2d 635 (1970).

SUMMARY OF ARGUMENT

The mandatory priority which section 15-314, Idaho Code, gives to men over women when several persons of the same preference class apply for appointment as administrator of an estate is purely sex-based—"simply that and nothing more." Its discrimination is greatly similar to race discrimination:—Both are based on the assumption that women (racial groups) are inferior, and on a status thrust upon them by birth which they cannot change. Both lack necessary, fair, substantial and rational relationship to the objec-

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[Footnote 3 continued]

"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." [Prob. Prac. 1864, section 52; R.S., R.C., & C.L., section 5351; C.S., section 7487; I.C.A., section 15-312; am. 1943, ch. 162, section 1, p. 340.]

[4]"Section 15-314. *Preferences.*—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." [Prob. Prac. 1864, section 53; R.S., R.C., & C.L., section 5352; C.S., section 7488; I.C.A., section 15-314.]

tive of the statute. In both cases, the discrimination is imposed on "easily identifiable groups" which are grossly underrepresented in the decision-making processes, are easy targets of both public and private discrimination, and have a history of unduly slow progress toward legal and political equality in the face of considerable resistance; and the resulting legal distinctions have prolonged the inferiority status of both groups and, in fact, have reinforced it.

Any law imposing such discrimination is constitutionally suspect and subject to the most rigid scrutiny. Even if it were enacted pursuant to a valid state interest, it bears a heavy burden of justification and will be upheld only if it is necessary, not merely rationally related, to the accomplishment of a permissible state policy.

Uncritical acceptance of the notion that "sex *per se* is a valid basis for classification" has caused many courts to disregard the truism that a woman is a "person" entitled to the guarantee of Equal Protection. However, there is a growing judicial recognition that sex discrimination imposed by law is, in most instances, as unconstitutional as is race discrimination.

None of the rationalizations offered by the Idaho Supreme Court can constitutionally justify section 15-314. The assertion that the state law helps to avoid hearings to determine qualifications of competing applicants does not justify the invidious and arbitrary discrimination it imposes on women. Hearings will still be required not only to determine basic qualifications but also whenever the competing applicants are all male or all female. The discrimination is applied only against women when a male applicant seeks appointment. The asserted justification for the statute is thus so much more tenuous than many other justifications for invidious discrimination heretofore rejected by this Court as to be really fictional. It is plain that it would not be accepted if the statute had involved priority as between white and Negro applicants. It should not be accepted

here where the necessary and rational relationship between the distinction (sex or race) and the permissible statutory objective is equally lacking.

The Idaho court's assumption that women are less qualified than men to act as administrator is inconsistent with the principle that constitutional rights must be protected for each person rather than averaged between groups. In addition, its assumption is contradicted by Census data showing that women are not so inferior in education, business experience, participation in civic matters, and talent. Furthermore, none of the precedents cited by the Idaho court support the constitutionality of the sex discrimination in sec. 15-314.

Therefore, the decision below should be reversed, so that the probate court can determine which of the applicants "is best qualified to serve as administrator or administratrix of the estate."

ARGUMENT

I.

A WOMAN IS A "PERSON" ENTITLED TO EQUAL PROTECTION OF THE LAWS AGAINST INVIDIOUS DISCRIMINATION BASED ON SEX.

We start with the truism that a woman is a "person" within the protection of the 14th Amendment. That Amendment forbids any State to "deny to any person . . . the equal protection of the laws," which, as this Court pithily put it 85 years ago, "is a pledge of the protection of equal laws." *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). This Court has recognized the applicability of the Equal Protection Clause to a woman in various types of cases not specifically involving sex discrimination. *E.g.*, cases involving racial discrimination: *Sipuel v. Board of Regents,* 332 U.S. 631 (1948) (Negro woman); *Brown v. Board of Education,* 347 U.S. 497 (1954) (Negro girl); *Adickes v. Kress Co.,* 398 U.S. 144 (1970) (white woman with Negroes);

and even discriminatory state taxation: *Hillsborough v. Cromwell,* 326 U.S. 620 (1946) (wealthy Doris Duke Cromwell). But there has been far less recognition that invidious sex discrimination also violates the Equal Protection Clause.

A. A sex characteristic is rarely a proper basis for legislative distinctions. There must, in addition, be a necessary and material relation between the legislative distinction and the legitimate objective of the legislation.

We agree, of course, that sex is a significant and fundamental difference between men and women. However, that difference does not provide a valid basis for making legal distinctions between men and women if the legal distinctions are not directly and materially related to the physical characteristics unique to one sex. Thus, a law relating to wet nurses, or regulating or restricting the donation of sperm, or concerning the provision of obstetrical services or voluntary maternity benefits, or punishing forcible rape, or imposing paternity responsibilities, or regulating certain homosexual acts, or permitting employers to discriminate on the basis of sex when they employ persons to model male, or female, clothing–would not violate the Equal Protection Clause simply because the law relates to one sex. This is because that law relates to a characteristic that is unique to one sex.

Where the law makes distinctions that are not based on characteristics obviously unique to one sex, however, the Equal Protection Clause demands that the government justify the distinction as having a necessary relationship to a valid legislative objective. The relationship must be necessary, not simply conceivably possible. Indeed, even if a particular characteristic or activity is found more often, *but not always,* in one sex, to treat all members of that sex differently than all members of the other sex would violate the Equal Protection Clause.

The emphasis upon sex alone as the basis for the legal distinction ignores the fact that the characteristics or activity being legislated on are the same despite the sex of the individuals, and applies a sex distinction to a situation where sex is irrelevant to the legitimate purpose of the legislation. This is precisely what happens in a racial discriminatory law—race is made the basis for the distinction in treatment despite the fact that the activity being legislated on is the same for persons of all races. In such cases, this Court has not hesitated to strike down such laws because the distinction (race) has had no rational bearing on that activity.

The guarantee of Equal Protection against invidious discrimination of race, or sex, rests upon a principle which was articulated with great precision by the Equal Employment Opportunity Commission in its regulations on sex discrimination in employment under Title VII of the Civil Rights Act of 1964 (29 Code of Fed. Reg. 1601.1(a)(ii): "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." See *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234-236 (C.A. 5, 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 717-718 (C.A. 7, 1969).

The fact that there are many sex-based distinctions in American laws, customs and practices does not mean that biologic differences between the sexes give *carte blanche* constitutional immunity to every governmentally-imposed sex discrimination. On the contrary, a law with sex-based distinctions—which disregard individual abilities and capacities and are not rationally related to the factor of sex—results in the invidious discrimination which is condemned by the 14th Amendment's guarantee of "Equal Protection of the Laws."

The crux of this case is that although Idaho may constitutionally regulate the appointment of administrators of estates, it may not make a distinction between men and

women which is not rationally related to the duties or functions of an administrator.

The 14th Amendment prohibits the State from making arbitrary and unreasonable classifications in connection with an activity the State may otherwise regulate.

This Court has often ruled that the "ultimate test of validity" of a classification is whether it has a fair and substantial relation to the object which the legislature seeks to accomplish—whether the statute has a rational basis—"whether the differences . . . are pertinent to the subject with respect to which the classification is made." *Asbury Hospital v. Cass County,* 326 U.S. 207, 214 (1945); *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580, 583 (1935); *McLaughlin v. Florida,* 379 U.S. 184 (1964); *Rinaldi v. Yeager,* 384 U.S. 304, 308-309 (1966); *Baxtrom v. Herold,* 383 U.S. 107, 111, 115 (1966). When a law singles out a distinct class of persons "for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." *Hernandez v. Texas,* 347 U.S. 475, 478 (1954).

More than 70 years ago, this Court emphasized, in *Gulf, C. & S. F. Ry. Co. v. Ellis,* 165 U.S. 150, 155 (1897), that a classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." And this Court admonished that "arbitrary selection can never be justified by calling it classification." (*Ibid.* at 159). In order to be valid under the Equal Protection Clause "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud,* 354 U.S. 457, 465 (1957); *Smith v. Cahoon,* 283 U.S. 553, 567 (1931). ". . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

This Court has repeatedly ruled that where a statutory classification adversely affects the rights of a person, the "classification which might invade or restrain them must be closely scrutinized and carefully confined," *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966), and that the State must carry the burden of proving that the classification is rationally related to the objective of the statute. *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965); *Bates v. Little Rock,* 361 U.S. 516, 524-527 (1960); *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964); *Shelton v. Tucker,* 364 U.S. 479, 489 (1961). The State does not carry that burden by simply "a showing of equal application among the members of the class defined by the legislation;" in addition, "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964); *Carrington v. Rash,* 380 U.S. 89, 93 (1965). In making such determination, this Court has applied the severe standard of "necessary" to a statute which "trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld *only if it is necessary, and not merely rationally related,* to the accomplishment of a permissible state policy." *McLaughlin v. Florida, supra,* at 196. (Emphasis supplied).

B. Sex and race discrimination are greatly similar and deserve similar constitutional treatment.

Most of the sex distinctions now present in many statutes are as irrelevant to the legislative purpose of the statute as were the governmental racial distinctions which this Court held unconstitutional in the past two decades.[5]

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[5] For example, *Oyama v. California,* 332 U.S. 633 (1948) (land ownership by U.S. citizen of Japanese ancestry); *Shelley v. Kraemer,*

[continued]

There is great similarity between racial and sex discriminatory statutes. Each type generally reflects the ancient canards about the "inferiority" of women and Negroes (or oriental, or other proscribed race). See, e.g., Gunnar Myrdal, *An American Dilemma,* Appendix 5, pp. 1073-1078 (1944); H. M. Hacker, "Women as a Minority Group," 30 Social Forces 60 (Oct. 1951) (reprints available from U.S. Women's Bureau). Both women and racial minorities are "easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez v. Texas,* 347 U.S. 475, 478 (1954). Both are grossly under-represented in Federal, State and local formal decision-making processes. Thus, both are easy targets of both public and private discrimination. Secondly, the history of both women and racial minorities has been marked by unduly slow progress toward legal and political equality, often in the face of considerable resistance from the dominant group. Thirdly, the resulting legal distinctions have prolonged the inferiority status of both groups and, in fact, have reinforced it.

The special significance of both racial and sex discrimination imposed by law is that each is based on a status which was thrust upon the person without his or her volition and which he or she is powerless to change. It is fundamentally unfair, and therefore unjustifiable under the Equal Protection Clause, to impose a discrimination upon a person solely because of his or her inherited characteristics such as race, color, national ancestry or sex, unless there is a necessary, substantial and rational relationship between such a distinction and the legitimate purpose of the statute.

[Footnote 5 continued]
334 U.S. 1 (1948) (racial land covenants); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948) (right of persons of Japanese ancestry to work); *Sweatt v. Painter,* 339 U.S. 629 (1950) (exclusion of Negro from law school); *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950) (racial segregation in university classroom); *Brown v. Board of Education,* 347 U.S. 483 (1954) (racial discrimination in public schools); *Reitman v. Mulkey,* 387 U.S. 369 (1967) (racial discrimination in housing).

The long course of race litigation has rendered the courts sensitive to the fact that race generally lacks such necessary and rational relationship and hence is an invalid statutory distinction. *Ray v. Blair,* 343 U.S. 214, 226, footnote 14 (1952) (". . . a requirement of color, as we have pointed out before, is not reasonably related to any legitimate legislative objective."); *Loving v. Virginia,* 388 U.S. 1 (1967).

The principle, however, is not limited to race. For example, the same principle has been applied to the status of illegitimate birth where the statute "created an insurmountable barrier" which prevented the child from suing for the death of the mother. *Levy v. Louisiana,* 391 U.S. 68 (1968); *cf. Labine v. Vincent,* ___ U.S. ___ (No. 5257, March 25, 1971) (upholding a statute denying an illegitimate child inheritance rights in the father's estate because the father, who had opportunity to do so, had not legitimated the child as required by state law). Another example of the same principle is *Robinson v. California,* 370 U.S. 660 (1962) which held that punishing a person solely because of his involuntary status, i.e., illness, is cruel and unusual punishment violating the 8th and 14th Amendments.

It is this principle—that it is fundamentally unfair to legislate against a person solely because of his or her birth —which underlies the doctrine that "legal restrictions which curtail the civil rights of a single racial group" are "constitutionally suspect", *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954), and are subjected to "the most rigid scrutiny". *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Takahashi v. Fish & Game Comm.,* 334 U.S. 410, 420 (1948).

Because sex and race discrimination are so similarly based and motivated, they deserve similar constitutional scrutiny and treatment. *Cf. Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942) (invalidating sterilization statute because it "made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.")

C. There is growing judicial recognition that sex discrimination imposed by law is unconstitutional.

Lack of systematic study of sex-based discriminations is perhaps the principal reason why the courts have been less vigorous in recognizing that irrational governmentally-imposed discrimination is as great an evil, and as unconstitutional, when it is sex-based as when it is race-based. It is only since the mid-sixties that the nation has begun to examine the extent of sex discrimination in our laws and practices and its grievous impact upon the rights and welfare of people (principally women, and in some instances men).[6]

Nevertheless, there is already a considerable body of judicial decisions invalidating various forms of sex discrimination

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[6] See, for example, Kanowitz, *Women and the Law* (1969);

American Women, Rept. of President's Commission on the Status of Women, and reports of its seven Committees on: Civil and Political Rights; Education; Federal Employment; Home and Community; Private Employment; Protective Labor Legislation; Social Insurance and Taxes (1963);

Reports, Interdepartmental Committee and Citizens Advisory Council on the Status of Women (1963-64, 1965, 1966, 1963-68);

Reports, National Conferences of Commissions on the Status of Women (1965, 1966, 1968, 1971);

Reports, Task Forces to Citizens Advisory Council on Status of Women on: Family Law and Policy; Health and Welfare; Labor Standards; Social Insurance and Taxes (1968);

A Matter of Simple Justice, Rept., President's Task Force on Women's Rights and Responsibilities (April 1970);

Hearings, *The Equal Rights Amendment,* S.J. Res. 61, 91st Cong., Senate Subcommittee on Constitutional Amendments (May 1970); Hearings, *Discrimination Against Women,* Section 805 of H.R. 16098, 91st Cong., House Special Subcommittee on Education (July 1970); Hearings, *Equal Rights 1970,* S.J. Res. 61 and 231, 91st Cong., Senate Judiciary Committee (Sept. 1970); Hearings, House Judiciary Committee, H.J. Res. 208, 231, 35; and H.R. 916, 92nd Cong. (March-April 1971).

on the ground that the Equal Protection Clause is violated by:

—A statute requiring that women convicted of crime be sentenced to longer term than men convicted of the same crime: *Commonwealth v. Daniel,* 430 Pa. 642, 243 A.2d 400 (1968); *United States ex rel. Robinson v. York,* 281 F. Supp. 8 (D.C. Conn. 1968) (adults); *United States ex rel. Sumrell v. York,* 288 F. Supp. 955 (D.C. Conn. 1968) (minors); *Liberti v. York,* 28 Conn. Sup. 9, 246 A.2d 106 (1968).

—A statute requiring imprisonment of women in penitentiaries for a crime that would put a man into only a local county jail: *Commonwealth v. Stauffer,* 214 Pa. Super. 113, 251 A.2d 718 (1969).

—A statute punishing women, but not men, for engaging in the same immoral conduct: *City of Portland v. Sherrill,* No. M-47623, Circ. Ct. Multnomah County, Ore. (Jan. 9, 1967).

—A statute barring women from serving on state juries: *White v. Crook,* 251 F. Supp. 401, 408 (D.C. Ala. 1966).

—The refusal by a licensed tavern owner to admit women patrons: *Seidenberg v. Old McSorleys' Ale House,* 308 F. Supp. 1253, 1260 (D.C. N.Y. 1969); *Ibid.,* 317 F. Supp. 593 (1970).

—A statute barring women police officers from taking exam for promotion to police sergeant: *Shpritzer v. Lang,* 17 App. Div. 2d 869, 234 N.Y. Supp. 2d 285, 291 (1962), *aff'd.* 13 N.Y. 2d 744, 241 N.Y. Supp. 2d 869, 191 N.E. 2d 919 (1963).

—A statute imposing inheritance taxes on property when devised by husband to wife, but not when devised by wife to husband: *In Re Estate of Legatos,* 1 Calif. App. 3d 657, 81 Calif. Rptr. 910 (1969).

—Judicial refusal to recognize a woman's right to sue, as a man may, for loss of consortium resulting from tortious injury to the spouse: *Owen v. Illinois Baking Co.,* 260 F. Supp. 820, 822 (D.C. Mich. 1966); *Karczewski v. Baltimore & Ohio R.R. Co.,* 274 F. Supp. 169 (D.C. N.D. Ill. 1967); *Millington v. Southeastern Elevator Co.,* 22 N.Y. 2d 498,

239 N.E. 2d 897 (1968); *Cf. Miskunas v. Union Carbide Corp.*, 399 F.2d 847, 850 (C.A. 7, 1968), *contra, cert. den.* 393 U.S. 1066 (1969).

—The refusal by the University of Virginia to admit women as students: *Kirstein v. Rector and Visitors of University of Virginia,* 309 F. Supp. 184 (D.C. Va. 1970); *Cf. Williams v. McNair,* 316 F. Supp. 134 (D.C. S. Car. 1970), aff'd. ____ U.S. ____ (No. 1133, O.T. 1970, March 8, 1971) (upheld South Carolina statute limiting its Winthrop College to women students).

Although there have been a number of earlier decisions by this Court which rejected 14th Amendment challenges to certain forms of sex discrimination, none of them justifies the invidious discrimination perpetrated by section 15-314, Idaho Code.

For example, *Bradwell v. State,* 16 Wall. (83 U.S.) 130 (1873) and *In re Lockwood,* 154 U.S. 116 (1894) held that States may deny women the right to practice law, and *Minor v. Happersett,* 21 Wall. (88 U.S.) 162 (1874) upheld a Missouri statute restricting voting to male citizens. This Court's opinions in those cases discussed only the Privileges and Immunities clause. But if the challenge had been based on the Equal Protection Clause it would have fared no better, in view of the philosophy so plainly expressed by Justices Bradley, Field and Swayne in the *Bradwell* case (p. 141) as follows:

> ". . . . the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . . The paramount destiny and mission of woman are to fulfill the

noble and benign offices of wife and mother. This is the law of the Creator."[7]

Decisions like *Bradwell, Lockwood,* and *Minor* would certainly not be repeated today. When this Court on February 23, 1971, prevented Arizona from denying to Mrs. Sara Baird, a person with the requisite qualifications of legal learning and moral character, the right to practice law (*Baird v. State Bar of Arizona,* ___U.S.___, No. 15), this Court cited *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957) which held that the Equal Protection clause protects such right. See also *Konigsberg v. State Bar of California,* 353 U.S. 252, 262 (1957). And in *Gray v. Saunders,* 372 U.S. 368, 379 (1963), this Court stated that the Equal Pro-

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[7]The Bradley-Field-Swayne philosophy of sex which dominated the *Bradwell, Lockwood* and *Minor* decisions is, indeed, quite reminiscent of, and essentially the same as, the race philosophy of *Plessy v. Ferguson,* 163 U.S. 537 (1896) which spawned more than 50 years of judicial sanction for race discrimination before it was overruled in the 1950's. This Court said in *Plessy:*

> (p. 544): "The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."
>
> (p. 544): "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . ."
>
> (p. 550): Segregation of white and colored people is "a reasonable regulation" with respect to which the State "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."
>
> (p. 551): "The [plaintiff's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences . . . ."

tection Clause requires equality in voting rights as between men and women and forbids a State from giving greater weight to votes by men than to votes by women.

Another example of an earlier decision which, we believe, would not be repeated today is *Gosselin v. Kelley,* 328 U.S. 817 (1946). It "dismissed for want of a substantial Federal question" an appeal from *Ex parte Gosselin,* 141 Me. 412, 44 A.2d 882 (1945) wherein the Maine Supreme Court upheld a state statute authorizing imprisonment for 3 years of a woman convicted of a misdemeanor (intoxication in a public place), whereas the maximum term for a man convicted of the same crime would not have exceeded 2 years.[8] Compare the *Daniel, Robinson, Sumrall, LIberti, Stauffer,* and *Sherrill* decisions cited above.

Section 15-314, Idaho Code, can get no comfort from this Court's decisions upholding statutes prohibiting employers from employing women for more than a certain number of hours per day,[9] or for night work,[10] or in certain occupations.[11] Most of these decisions were based on

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[8]Maine has since amended its laws, so as to eliminate the disparity of sentences for men and women. Me. R.S., 1964 ed., Title 34, sections 802 and 853, as amended, Me. Pub. Laws, 1967, ch. 391, sections 12 and 18.

[9]*Muller v. Oregon,* 208 U.S. 412 (1908); *Riley v. Massachusetts,* 232 U.S. 671 (1914); *Miller v. Wilson,* 236 U.S. 373 (1915); *Bosley v. McLaughlin,* 236 U.S. 385 (1915).

[10]*Radice v. New York,* 264 U.S. 293 (1924).

[11]*Goesaert v. Cleary,* 335 U.S. 464 (1948). This decision, upholding a statute denying a bartender license to all women except the wife and daughters of the male owner of a liquor shop, rested largely on the unfettered scope long allowed to legislative regulation of liquor sales. Its effect has been weakened or undermined by more recent decisions, changes in laws and practices, and new insights into the invidious effects of sex prejudice and discrimination and their lack of consistency with the constitutional guarantee of "the protection of equal laws." See *Seidenberg v. Old McSorleys' Ale House, supra; Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970); Title VII of Civil Rights Act of 1964 (42 U.S.C. 2000e-2); *McCrimmon v. Daley,* 418 F.2d 366, 369-371 (C.A. 7, 1969); *Phillips v. Martin Marietta Corp.,*____U.S.____, 39

[continued]

the supposition that the different treatment prescribed for women would be beneficial to them. Now, however, there is widespread belief that those laws and decisions were based on erroneous assumptions and therefore resulted in invidious discrimination. Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *Geo. Washington L. Rev.* 232 (Dec. 1965); Hearings, Equal Employment Opportunity Commission (May 2 and 3, 1967); Hearings on Equal Rights Amendment cited in ftnt. 6 *supra; Mengelkoch v. Industrial Welfare Comm.*, ___F.2d___, 39 U.S. Law Week 2419 (C.A. 9, Jan. 11, 1971).

In any event, none of this Court's decisions has expressly postulated that sex *per se* is a sufficient basis for legislative classification treating women differently, or more restrictively, than men.[12] Rather, the opinions in those cases went

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[Footnote 11 continued]
U.S. Law Week 4160 (Jan. 25, 1971) (holding that sex discrimination in employment is invalid if not rationally related to the factor of sex).

[12] *Muller v. Oregon, supra,* footnote 9, has been often cited for the proposition that "sex *per se* is a valid basis for classification" without regard to the purposes of a particular law or the reasonableness of the relation between that purpose and the sex-based classification. Justice Brewer there said (at pp. 421-422):

> [H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved . . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights . . . . *Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.* It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an
>
> [continued]

to considerable lengths to define the pertinancies of the classifications to valid and reasonable objectives which the legislatures sought to accomplish. They were based on findings or assumptions that there then was, in fact, such rational and pertinent realtionship and threfore that the statute comported with the standards by which legislative classifications must be measured and tested under the Equal Protection Clause. No reasonable and rational relationship exists between the sex classification and any valid legislative objective concerning the appointment of the administrator for an estate.

II.

SECTION 15-314, IDAHO CODE, PERPETUATES AN INVIDIOUS AND UNJUSTIFIABLE DISCRIMINATION AGAINST WOMEN, SOLELY BECAUSE OF THEIR SEX, AND THEREFORE IS INVALID UNDER THE EQUAL PROTECTION CLAUSE.

The Idaho Supreme Court, acknowledging that the 14th Amendment "prohibits classifications which are arbitrary and capricious" (465 P.2d at 637), sought to justify the sex distinction in section 15-314 on three grounds. None of them has merit.

[Footnote 12 continued]

> absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection . . . (Emphasis added).

But the *Muller* decision was much narrower than Justice Brewer's words. It upheld the Oregon maximum hours law for women only on the basis of its assumption that the law protected women in a situation where the court found no other protection available and believed that the physical differences between men and women was rationally related, at that time, to the purpose of the statute. See Kanowitz, *Women and the Law*, p. 153-154 (1969).

A. The argument that the sex classification in section 15-314 serves the purpose of avoiding hearings to determine qualifications of competing applicants for appointment as administrator does not justify the invidious and arbitrary discrimination it perpetrates against women.

The Idaho court pointed out (a) that section 15-312, which classifies the persons entitled to appointment as administrator, is a rational classification because it is based generally on "their relationship to a decedent" and is "in accord with the law as to the intestate succession of property in Idaho";[13] and (b) that since the court generally appoints only one administrator, "the court is faced with the issue of which one should be named." (465 P.2d at 637-38). The court then stated:

> ". . . . By I.C. section 15-314, the legislature eliminated two areas of controversy, *i.e.*, if both a man and a woman of the same class seek letters of administration, the male would be entitled over the female, the same as a relative of the whole blood is entitled over a relative of the same class but of only the half blood. 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. section 15-314 do discriminate against women on the basis of sex. How-

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[13] Although the Idaho court's statement, citing Idaho Code section 14-103 governing succession to property, is generally correct, it is surprisingly incorrect insofar as concerns the specific issue of sex discrimination here involved. Section 14-103 places brothers and sisters in the same class for receiving intestate property, as is generally true in most jurisdictions (23 Am. Jur. 2d 793, "Descent and Distribution", section 48). But section 15-312 discriminates against sisters by putting brothers in class 4 and sisters in class 5. We believe this discrimination is as unjustifiable, and as unconstitutional, as the discrimination perpetrated by the section (15-314) involved in this appeal.

> ever 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. This is one of those areas where a choice must be made and the legislature by enacting I.C. section 15-314 made the determination.
>
> "The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women . . . ."

The foregoing rationale not only misapprehends the issue, but is also quite misleading. The fact that the court must make a choice between competing applicants for appointment as administrator, does not *ipso facto* authorize making that choice by an arbitrary and discriminatory classification.

Furthermore, the sex discriminatory classification made in section 15-314 does not go very far "to alleviate the problem of holding hearings by the court to determine eligibility to administer." *First,* the court must in every case make the determinations required under section 15-317, Idaho Code, which provides:

> "15-317. *Disqualifications.*—No person is competent to serve as administrator or administratrix who is:
>
> "1. Not a bona fide resident of the state;
>
> 2. Under the age of majority;
>
> 3. Convicted of an infamous crime;
>
> 4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity."

Second, whenever petitions for appointment are filed by two or more persons of the same class, each of whom meets the competency requirements of section 15-317, and they are either all male, or all female, the court must determine which petitioner is better qualified for appointment. Such determinations will in most cases require "holding hearings by the court." The only instance in which the "problem

of holding hearings" is "alleviated" by section 15-314 is where all applicants are clearly competent and female applicants are competing with male applicants. It is apparent that the objective of avoiding hearings which is supposedly sought by section 15-314 is a highly fictional objective, except where its effect is to discriminate against women on the basis of sex. Thus, the discrimination "is defined wholly in terms" of sex—"simply that and nothing more." *Shelley v. Kraemer,* 334 U.S. 1, 10 (1948).

Even if the supposed objective of avoiding hearings provides "some remote administrative benefit to the State," *Carrington v. Rash,* 380 U.S. 89, 96 (1965), such "benefit" does not justify the invidious discrimination it inflicts on women without regard to their qualifications to administer an estate. That supposed objective, indeed, is much more tenuous and farfetched than most of the various kinds of legislative justifications that have been often urged by those defending racially discriminatory statutes and uniformly rejected by this Court. For example:

—*Oyama v. California,* 332 U.S. 633 (1948). The state statute created the presumption that a conveyance of land, financed by an alien father whose Japanese ancestry made him ineligible to hold it and recorded in the name of his citizen son, violates the state law prohibiting ownership of land by aliens. This Court held that such presumption, applicable only to conveyances by persons of Japanese ancestry, violates the Equal Protection Clause despite the asserted need to prevent evasion of State law concerning alien ownership of land.

—*Takahashi v. Fish and Game Comm.,* 334 U.S. 410 (1948). The State statute barred resident aliens of Japanese ancestry, but not other aliens, from working as commercial fishermen. This Court held the statute violates the Equal Protection Clause despite the asserted needs to conserve fish in coastal waters and to protect State citizens engaged in commercial fishing from the competition of Japanese aliens.

—*Buchanan v. Warley,* 245 U.S. 60, 81 (1917). The racial zoning statute violated the Equal Protection Clause despite the asserted need to maintain "purity of the races" and "preservation of the public peace."

—*Shelton v. Tucker,* 364 U.S. 479 (1960). A statute requiring teachers to file annual affidavits listing all organizational associations violated the 14th Amendment despite the State's asserted need to inquire into the fitness and competency of state employees.

—*McLaughlin v. Florida,* 379 U.S. 184, 193 (1964). The statute forbidding unmarried interracial couples, but not couples of the same race, from occupying the same room at night violated the Equal Protection Clause despite the State's asserted need to control illicit extramarital and premarital promiscuity.

—In 1968, this Court ruled that a Louisiana statute which denied a civil cause of action to illegitimate children for the wrongful death of their mother (*Levy v. Louisiana,* 391 U.S. 68), and to a mother for the wrongful death of her illegitimate children (*Glona v. American Guarantee Co.,* 391 U.S. 73), while allowing such cause of action when the children are legitimate, creates invidious and irrational discrimination which violates the Equal Protection Clause. In both cases, this Court rejected the argument that the statute can be justified on the State's purpose to "discourage bringing children into the world out of wedlock" and this prevent "sin." (at pp. 70 and 75).

It has been the consistent practice of this Court, particularly where a statute restricts or discriminates against a person's constitutional rights rather than simply applying to business classifications, to "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the" restriction or discrimination. *Schneider v. State,* 308 U.S. 147, 161 (1939); *Thornhill v. Alabama,* 310 U.S. 88, 96 (1940). On such weighing and appraisal, it is plain that the alleged purpose of avoiding a hearing to determine whether a man or a woman is more qualified to

administer an estate does not justify the discrimination against women that is perpetrated by section 15-314, Idaho Code. Could anyone suppose, if section 15-314 had given priority of appointment as administrator to white persons over Negroes, that this Court would uphold the statute because it alleviates the problem of holding hearings to determine their respective qualifications as administrator?

B. The legislative determination that women are less qualified than men to act as administrators is constitutionally insufficient to justify section 15-314.

The Idaho court's statement—that the legislature "evidently concluded that in general men are better qualified to act as an administrator than are women"—instead of shielding the statute against the withering condemnation of the 14th Amendment, simply lays bare the statute's fatal weakness as an "arbitrary and invidious" discrimination which necessarily violates the Equal Protection Clause. This Court has uniformly and repeatedly held that the right to be free from irrational governmentally-imposed discrimination is a "personal" right, not one to be merged with those of all others of the same class and balanced against the claims of those in a different group, where the differences between the groups are not rationally related to the statutory objective. *Henderson v. United States,* 339 U.S. 816, 825-826 (1950); *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948); *Mitchell v. United States,* 313 U.S. 80, 97 (1941); *Buchanan v. Warley,* 245 U.S. 60, 80 (1917); *McCabe v. Atchison, T. & S. F. Ry. Co.,* 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 351 (1938).

Can there be any doubt that this Court would summarily strike down this statute if it had given priority to white persons over Negro persons, even though it is still probable that this country has more white persons than Negroes qualified to act as administrators of estates?

The Idaho Supreme Court admitted that classifying all men as "better qualified to act as an administrator than are [all] women" "may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, [but] we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary." 465 P.2d at 638. That approach to the constitutional guarantee of Equal Protection is a total distortion of the policy manifested in the 14th Amendment. It lumps all women into an inferior class, and deprives them of equality of rights whenever there is competition from a man, notwithstanding the fact that the particular woman who applies for appointment as administrator may be better qualified, and notwithstanding the fact that her sex has absolutely nothing to do with her ability to administer the estate.

Indeed, the Idaho court's rationalization that sec. 15-314 reflects the legislature's concern about who is "better qualified" is simply a fictional after-thought to avoid the searing scrutiny of the Equal Protection clause. *First,* sec. 15-314 does not disqualify a woman when she alone, or other women too, petition for appointment as administratrix. It is only when a male appears that the Idaho court talks about who is "better qualified"—and then it refuses to ascertain whether the particular woman or the particular man applying for appointment is in fact "better qualified". *Second,* sec. 15-312 (to which sec. 15-314 is essentially an appendage) establishes preference classes based on family relationships that are in no way relevant to "qualifications" to administer an estate. *E.g.,* a barely qualified brother or grandchild would be preferred to a highly qualified cousin or creditor. Thus, the whole statutory structure is based on status (and sex discrimination), not legislative concern about who is "better qualified."

But the Idaho Court's statement is not even factually accurate. It is not true that all men, or even most men, are better qualified than women to act as administrator, or that there are only "particular instances" in which women are equally, or better, qualified.

For example, the following data from the *Statistical Abstract of the United States 1970* (91st ed., U.S. Census Bureau) shows that women in this country (and in Idaho) are not as inferior in ability as the Idaho statute assumes:

UNITED STATES

Citation	Date of Data		Men	Women
Table 316 page 213	April, 1970	Persons in civilian labor force, 16 years and over	50,667,000	31,960,000
same	same	Percentage of their sex	75.4	43.2
T. 157, p. 109	1969	Median school years completed by persons 25 years and over	12.1 years	12.1 years
T. 198, p. 131	1968	Bachelors and first professional degrees conferred in 1968	392,830	278,761
T. 555, p. 368	1968	Voters in 1968 elections	38,014,000	40,951,000
T. 684, p. 456	1970	Owners of publicly issued common and preferred stock	15,689,000	15,161,000
T. 509 & 510, p. 333	1962	Persons having $60,000 or more gross assets	2,538,643	1,594,564
T. 599, p. 400	1969	Federal employees in occupation of:		
		–accounting and budget	59,618	54,803
		–legal and kindred	24,234	21,302

In April, 1970, 4,431,000 women worked in professional and technical jobs and 1,301,000 as managers, officials and proprietors (T. 334, p. 225). In 1969, there were 39,506 women on active military duty, of whom 13,183 held officer rank (T. 386, p. 257). In 1968, there were 27,833 women scientists on the National Register of Scientific and Technical Personnel (T. 808, p. 525).

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Citation	Date of Data		Men	Women
T. 186, p. 125	1969	Public high school graduates in 1969	5,924	5,863
T. 196, p. 129	1969	Students enrolled in higher education in Idaho	16,939	10,850

C. The judicial precedents on sex discrimination cited by the Idaho court do not constitutionally justify the discrimination in section 15-314.

The Idaho court cited an anonymous law review Note and seven state court opinions as precedent for the validity of classifications "discriminating on the basis of sex." None of these supports the constitutionality of section 15-314.

(1) *Note,* 2 Stanford L. Rev. 691 (1950) ("Sex Discrimination and the Constitution"). —As the Idaho court correctly stated this Note showed that States have upheld governmental classifications based on sex in a variety of situations. But the court does not mention that the Note pointed out (a) that the Equal Protection Clause requires the state to give equal treatment to all persons unless it has a reasonable basis for differentiation; (b) that to be constitutionally valid a sex-based legislative differentiation must be rationally related to matters in which the sex of the individual is a material factor; and (c) that many sex classifications are invalid (e.g., the Note emphasized, at pp. 724-725, that a sex classification limiting jury service to men "seems as arbitrary as one based on race" since neither sex nor race "has any conceivable connection with the jury function.")

(2) *Craig v. Lane,* 60 Ida. 178, 89 P.2d 1008 (1939). —This case is a striking example of how sex discrimination produced a shocking injustice. Mrs. Craig, a married woman, signed a surety bond to support her son's appeal in his law suit against Lane. Lane moved to dismiss the appeal on the ground that a married woman could not sign a surety agree-

ment except one solely for her benefit or in connection with her separate property. Despite Mrs. Craig's affidavit that the bond was for her benefit and that she intended to be bound thereby, the Idaho court ruled that the bond was defective and dismissed the son's appeal. The court stressed that at "common law a married woman had no right to contract generally," and ruled (at p. 1009) that the Federal constitution "gave a married woman no rights in addition to those she had at the time of its adoption," citing *Minor v. Happersett,* 21 Wall. 162, which held that the 14th Amendment did not entitle women to vote. Thus, in the name of "protection of a married woman's separate property", the court simultaneously denied the woman the right to help her son, and destroyed his right of appeal in a litigated case. The decision is clearly erroneous in holding that married women have no constitutional rights. But even if it were correct as to married women it is no precedent for the sex discrimination in section 15-314, which does not involve the status of marriage. *Cf.* Idaho Code, section 15-317, which allows a married woman to be an administratrix.

(3) *State v. Hunter,* 208 Ore. 282, 300 P.2d 455 (1956) —This case upheld the conviction of a woman for violating a state statute prohibiting women (but not men) from "participating in wrestling competition and exhibition". The court did not seek to examine whether there was a factual and rational basis to forbid this activity by women only. Instead, it ruled (p. 457): "It is axiomatic that the Fourteenth Amendment to the U.S. Constitution does not protect those liberties which civilized states regard as properly subject to regulation by penal law." Such negation of the 14th Amendment simply disregarded this Court's numerous decisions applying the Equal Protection Clause (not to mention the Due Process Clause) to penal laws. *McLaughlin v. Florida,* 379 U.S. 184 (1964); *Loving v. Virginia,* 388 U.S. 1 (1967). Indeed, the Oregon court's blindness to sex discrimination is revealed by its cavalier statement, after noting that the legislature which enacted the statute was "predominantly masculine": "Obviously it intended that there

should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman." (at pp. 457-458).

(4) *Patterson v. City of Dallas,* 355 S.W. 2d 838 (Tex. Civ. App. 1962) involved an ordinance prohibiting any person from administering massage to a person of the opposite sex in a massage establishment, but exempted chiropracters, physical therapists and nurses operating under a doctor's direction. On the basis of evidence that there had been many lewd acts committed by operators of massage parlors, and that the ordinance was enacted to curb that evil and contained appropriate exceptions for massages for medical purposes, the court upheld the ordinance as a reasonable effort to protect public health and morals. The ordinance applied to both men and woman alike, and was based on a rational relationship to a legitimate legislative objective. Hence, it in no way supports the irrelevant sex discrimination perpetrated in section 15-314.

(5) In *State v. Hollman,* 232 S. Car. 489, 102 S.E. 2d 873 (1958), a man convicted of criminal assault contended on appeal that women had been excluded from the petit jury. The court held (p. 878) that the point "not having been argued on appeal" is "deemed abandoned," and that it was "devoid of merit" because the exclusion of women from the jury "does not violate the Fourteenth Amendment." The latter dictum is certainly not good law today. See *White v. Crook,* 251 F. Supp. 401, 408 (D.C. Ala. 1966).

(6) *Eskridge v. Div. of Alcoholic Bev. Control,* 30 N.J. Super. 472, 105 A.2d 6 (1954) upheld the conviction of a bartender for violating an ordinance prohibiting service of liquor to women over a bar except when seated at tables. The court held (p. 8) that the state's power over sale of intoxicating beverages "is plenary. 'It is a subject by itself, to the treatment of which all the analogies of the law appropriate to other topics cannot be applied.' " However, the Idaho Supreme Court cited the *Eskridge* decision without mentioning that fifteen years later the New Jersey courts virtually overturned it, holding that such ordinance is "an

unreasonable exercise of the police power" and therefore could not validly "limit the rights of women." *Gallegher v. City of Bayonne,* 106 N.J. Super. 401, 256 A.2d 61, 62-63 (1969), *aff'd per curiam,* 55 N.J. 159, 259 A.2d 912 (1969); see also *Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne,* ftnt. 11, *supra.* In any event, even if we assume that the regulation of liquor sales is unrestricted by constitutional limitations of equal protection (*Cf. Goesaert v. Cleary, supra,* and *Seidenberg v. Old McSorleys' Ale House, supra*), it is plain that the *Eskridge* case in no way supports sex discrimination in appointing the administrator of an estate.

(7) *State v. Emery,* 224 N. Car. 581, 31 S.E. 2d 858 (1944). This decision (2 judges dissenting) upset a man's conviction by a jury composed of 10 men and 2 women, on the ground that the state constitution referred to juries of "good and lawful men" and thus made women ineligible for jury service. This decision would not be good law today. *White v. Crook, supra,* p. 14.

(8) *In re Mahaffay's Estate,* 79 Mont. 10, 254 Pac. 875 (1927). This decision ruled that a State statute limiting the power of a married woman to dispose by will of more than 2/3 of her estate without her husband's consent was neither superseded by the married women's statutes nor invalidated by the 14th Amendment, even though the husband could make such a testamentary disposition without his wife's consent. The court held (a) that the legislature has unlimited power to condition the right of testamentary disposition and (b) that the "essential differences which have always been recognized between a married man and a married woman" in connection with disposition of property have been "so long acquiesced in . . . that we must presume it is based upon such substantial differences and conditions as to make it natural and reasonable." (pp. 878-879). As to holding (a), compare *In re Estate of Legatos,* p. 14, *supra.* As to holding (b) ("it-has-always-been-that-way"), this Court stated in *Levy v. Louisiana,* 391 U.S. 68, 71 (1968): "However that might be, we have been extremely

sensitive to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. *Brown v. Board of Education,* 347 U.S. 483; *Harper v. Virginia Board of Elections,* 383 U.S. 663, at 669." See also *Moragne v. State Marine Lines,* 398 U.S. 375 (1970) which overturned an ancient doctrine barring suits under general maritime law for wrongful death caused by violation of maritime duties because it "had little justification except in primitive English legal history" (at p. 379); and *Loving v. Virginia,* 388 U.S. 1 (1967) which held miscegenation laws unconstitutional even though they had been long established, and adhered to with emotional fervor, in at least 30 states.

CONCLUSION

The Idaho Supreme Court's decision in this case simply echoes the obsolete Bradley-Field-Swayne philosophy about the inferiority of women, a philosophy that no longer has vitality under the Equal Protection Clause. The irrational and irrelevant sex discrimination imposed by sections 15-312 and 15-314 is plainly unconstitutional. The decision of the Idaho Supreme Court should be reversed, so that the probate court can determine which of the applicants "is best qualified to serve as administrator or administratrix of the estate."

Respectfully submitted,

PHINEAS INDRITZ
Attorney for:
AMERICAN VETERANS COMMITTEE, INC.

MARTHA W. GRIFFITHS
PHINEAS INDRITZ
LEO KANOWITZ
MARGUERITE RAWALT
SYLVIA ROBERTS
FAITH SEIDENBERG,
Attorneys for:
NOW LEGAL DEFENSE AND EDUCATION FUND, INC.

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