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Sex Discrimination: Ad Hoc Review in the Highest Court

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Although Louisiana has no express regulation of lie detectors, the newly adopted Constitution may provide a remedy to employees and others injured by private lie detector use. A constitutional right against "invasions of privacy" is now explicitly mandated by Section V of the Declaration of Rights of the Constitution and at least one commentator has suggested that this protection is applicable to private action.[51]

Absent a state statute strictly prohibiting employer use of lie detectors, the practical remedies afforded by the law to an individual employee are few. No federal law exists on point and only fourteen states have protective laws, many of which exempt from coverage vast sections of the working force. While unions may effectively bar the use of the device through collective bargaining agreements, a great number of American workers are not affiliated with labor unions. Thus, the legal setting is ripe for legislative action which would reconcile the rights of employer and employee with respect to the lie detector. The proposal rejected by the 1974 legislature would have so reconciled this conflict in favor of the privacy of the individual worker; it is hoped that a similar proposal will be enacted soon.

James P. Lambert

SEX DISCRIMINATION: AD HOC REVIEW IN THE HIGHEST COURT

Since its landmark decision in *Reed v. Reed*[1] in 1971, the United States Supreme Court has been reluctant to explain the extent to which the equal protection clause dictates the design of legislation employing sex-based classifications. In three recent cases,[2] the Court has continued its seemingly ad hoc approach to sex discrimination claims, insuring further inconsistencies in lower court review of such claims. Although the challenged statutes were upheld in each in-

our recognition of the results as admissible evidence." *See also* ARK. STAT. ANN. § 71-2225 (1967).

51. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 22-23 (1974).

1. 404 U.S. 71 (1971). Until *Reed*, the Court gave sex discrimination claims only passing review. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (statute exempting women from jury duty upheld); Geosaert v. Cleary, 335 U.S. 464 (1948) (denial of bartending license to women upheld); Muller v. Oregon, 208 U.S. 412 (1908) (upheld maximum hour law for women); Minor v. Happersatt, 88 U.S. (21 Wall.) 162 (1874) (statute denying women the vote upheld); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (statute denying women admission to the bar upheld).

2. Schlesinger v. Ballard, 95 S. Ct. 572 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974).

stance, the changing composition of the Court's majority indicates that certain of its members are not yet committed to a particular stance.[3]

Developments in the law of sex discrimination cannot be isolated from developments in the area of equal protection generally. Application of the Court's new strict scrutiny analysis hinges upon finding a suspect classification or a fundamental right. Otherwise, the traditional minimum scrutiny standard is appropriate.[4] The cases indicate that suspect classes are "discrete and insular minorities"[5] incapable of wielding legislative influence and "subjected to . . . a history of purposeful unequal treatment."[6] Such classes possess highly visible, distinctive characteristics readily conducive to stigmatization.[7] Additionally, the defining traits of a suspect classification are essentially congenital, immutable, and beyond the individual's control.[8] Females possess all of the foregoing indicia of suspectness, excepting ostensibly the "discrete and insular minority" requirement. However, the marked disparity between the sexes in accessibility to available

3. In *Kahn*, Brennan, White and Marshall dissented. In *Geduldig* and *Schlesinger*, Brennan, Marshall and Douglas dissented.

4. Early equal protection challenges to legislation were decided under the "minimum rationality" test which required only that the statutory classification be reasonable, not arbitrary (Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911)), and have a rational relationship to the legislature's objective. *See* Rinaldi v. Yeager, 384 U.S. 305, 308 (1966); McLaughlin v. Florida, 379 U.S. 184, 191 (1964). A statute was upheld if any set of facts could be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 426 (1961). The precarious protection afforded individual rights under this test spurred the Warren Court's development of the "strict scrutiny" test applicable to statutes involving classifications considered suspect or interests deemed fundamental. Shapiro v. Thompson, 394 U.S. 618 (1969). Under this test a statute must serve a "compelling state interest" (Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-94 (1964)) that could not be achieved by more precisely tailored legislation. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972). In the absence of suspect classifications or fundamental interests, the mere rationality standard remained applicable. *See* McGowan v. Maryland, 366 U.S. 420 (1961). For a more detailed description of the two-tiered model, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

5. In a famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), Justice Stone stated: "[P]rejudice against discrete and insular minorities may . . . call for a . . . more searching judicial inquiry."

6. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972).

7. *Developments* 1127 n.5; Note, 26 STAN. L. REV. 155, 162 (1973).

8. *Developments* 1126-27; Note, 26 STAN. L. REV. 155, 163 (1973). In *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 19 (1972), Justice Powell also suggested that in order to be labeled suspect, a disadvantaged class must be objectively identifiable. In his dissent, Justice Marshall disagreed with this requirement. *Id.* at 93.

channels of political influence reduces the female's real political power to that of a discrete minority.

Nevertheless, the Court has refused to designate sex as suspect, and its apparent belief that minimal scrutiny is also inappropriate has rendered the two-tiered model particularly unsuited for deciding cases involving alleged sex discrimination. In response to the model's failure to adequately cover cases involving near-suspect classifications such as sex, the Court began to "acknowledge substantial equal protection claims on minimum rationality grounds"[9] in such cases by requiring that the means used "in fact" work a substantial furtherance of the legislature's objective.[10] However, as a consequence of the Court's use of traditional equal protection language in reaching results not in accord with a minimum rationality approach, some lower courts felt compelled to construct a new "intermediate model" by infusing new meaning into the traditional phraseology.[11]

In *Reed v. Reed*,[12] the Court invalidated a statute giving a mandatory preference to males over females when both were equally qualified as administrators of a decedent's estate. Although the Court recognized that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy,"[13] it nonetheless concluded:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of a hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.[14]

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9. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for the Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972).

10. Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971). *See also* James v. Strange, 407 U.S. 128, 140-41 (1972); Jackson v. Indiana, 406 U.S. 715, 723-30 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-76 (1972). Under this method of review, the reasonableness of the legislature's means is determined empirically by evidence offered to the Court, and not by "perfunctory judicial hypothesizing." *Gunther, supra* note 9, at 21. The result is a degree of judicial scrutiny situated between the strict scrutiny and mere rationality tests.

11. *E.g.*, Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973). *But see, e.g.*, Schattman v. Texas Employment Comm'n, 459 F.2d 32, 40 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); Wiesenfeld v. Secretary of Health, Educ. & Welfare, 367 F. Supp. 981, 988 (D.N.J. 1973).

12. 404 U.S. 71 (1971).

13. *Id.* at 76.

14. *Id.*

To invalidate the legislation under the traditional test was clearly incongruous with the Court's ascription of "some legitimacy" to the statute; thus, the Court must have in fact applied more than minimal scrutiny. Because of the apparent inconsistency, some lower courts concluded that *Reed* mandated the use of the "intermediate model" in sex discrimination cases,[15] while others failed to discern a departure from the traditional standard.[16]

Two years later, the Court attempted to clarify *Reed* in *Frontiero v. Richardson*.[17] In *Frontiero*, a female Air Force officer challenged a federal statute requiring a female member of the armed services to demonstrate that her spouse was dependent upon her for one-half of his support in order to obtain increased benefits available to male members without a similar showing. In a plurality opinion announcing an eight-to-one judgment invalidating the statute, four Justices declared sex a suspect classification, finding "at least implicit support for such an approach"[18] in *Reed*. While also basing their decision on *Reed*, the other Justices supporting the result considered it unnecessary to label sex as suspect.[19]

The discordance of opinion in *Frontiero* caused a further splintering of lower court opinion on sex discrimination. A number of lower courts interpreted *Frontiero* as requiring strict scrutiny of sex-based classifications.[20] Some courts continued to employ the intermediate

15. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972).

16. Robinson v. Board of Regents, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972). A third view of *Reed v. Reed* was taken by a federal district court which declared that "sex legislation is automatically suspect." Monell v. Department of Social Services, 357 F. Supp. 1051, 1053 (S.D.N.Y. 1972). Even before *Reed*, however, one federal and one state court had taken the position that sex is inherently suspect. U.S. *ex rel* Robinson v. New York, 281 F. Supp. 8 (D. Conn. 1968); Sail'er Inn Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

17. 411 U.S. 677 (1973).

18. *Id.* at 682.

19. Justice Powell, joined by Justices Burger and Blackmum, stated that *Reed* "did not add sex to the narrowly limited group of classifications which are inherently suspect." *Id.* at 692 (concurring opinion). Justice Stewart concurred on the grounds that the statute "works an invidious discrimination." *Id.* at 691. Due to the considerable administrative convenience that the questioned statute affords the government, it is evident that this statute, as in *Reed*, did possess "some legitimacy." Hence, "despite their silence on the matter, Justices Stewart and Powell used stricter scrutiny than the traditional standard warranted." Comment, 5 LOYOLA U.L.J. (Chi.) 285, 295 (1974).

20. Duncan v. General Motors Corp., 499 F.2d 835 (10th Cir. 1974); Fortin v. Darlington Little League, Inc., 376 F. Supp. 473 (D.R.I. 1974); Johnston v. Hodges,

test of *Reed*,[21] while others found a choice between the *Reed* and *Frontiero* standards unnecessary due to the failure of the particular statute under review to satisfy either standard.[22] Lastly, despite *Reed* and *Frontiero*, a number of lower courts continued to adhere to the traditional test.[23]

In upholding a for-widows-only property tax exemption in *Kahn v. Shevin*,[24] the Court again refused to denominate sex as suspect. Requiring that the Florida statute bear only a "fair and substantial relation"[25] to its purpose, the Court found a rational basis for the statute in its reduction of the economic disparity between the sexes.[26] Writing for the majority, Justice Douglas cited as supportive of the result the traditionally "large leeway" allowed states in designing their taxation systems.[27]

Employing a strict scrutiny approach in his dissent, Justice Brennan agreed that the statute served a compelling governmental interest[28] of "ameliorating the effects of past economic discrimination against women."[29] Nonetheless, he felt the statute should fall due to the state's failure to prove that this compelling interest "could not be achieved by a more precisely tailored statute,"[30] since the inclu-

372 F. Supp. 1015 (E.D. Ky. 1974); Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973); Wiesenfeld v. Secretary of Health, Educ. & Welfare, 367 F. Supp. 981 (D.N.J. 1973); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285 (Fam. Ct. 1973); Bassett v. Bassett, 521 P.2d 434 (Okla. App. 1974); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1974). *See also* Junior Chamber of Commerce v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974); Held v. Missouri Pac. R.R., 373 F. Supp. 996 (S.D. Tex. 1974).

21. Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Ore. 1974).

22. Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973).

23. White v. Fleming, 374 F. Supp. 267 (E.D. Wis. 1974); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Penn. 1973); Warshafsky v. Journal Co., 63 Wis. 2d 130, 216 N.W.2d 197 (1974).

24. 416 U.S. 351 (1974).

25. "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' Reed v. Reed, 404 U.S. 71, 76, quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415." *Id.* at 355.

26. *Id.*

27. *Id.* The repeated citing of statistics by the court in *Kahn* provides some evidence that the Court was using the methodology of intermediate scrutiny.

28. *Id.* at 359.

29. *Id.* at 360 (Brennan, J., dissenting).

30. *Id.*

sion of wealthy widows in the exempted class resulted in statutory overinclusiveness to a degree violative of equal protection. In a separate dissent, Justice White found the statute not only overinclusive, but also underinclusive in denying the exemption to women who are not widows. White further suggested that if the statutory purpose were viewed as simply the amelioration of past discrimination in general, the classification would be underinclusive for ignoring "all those widowers who have felt the effects of economic discrimination."[31]

Just two months after *Kahn*, the Court in *Geduldig v. Aiello*[32] upheld a provision of the California disability insurance program which precluded payment of benefits to female employees for disabilities accompanying normal pregnancy. In his majority opinion, Justice Stewart pointed to the exclusion of normal pregnancy as promoting the legitimate state interests in "maintaining the self-supporting nature of its insurance program . . . distributing the available resources in such a way as to keep benefit payments at an adequate level . . . [and] maintaining the contribution rate at a level that will not unduly burden the participating employees."[33] Stewart further declared that the equal protection clause permits a state to attack certain problems "one step at a time,"[34] and so long as a social welfare program is "rationally supportable,"[35] the Court will uphold it.

In another dissent on strict scrutiny grounds, Justice Brennan viewed the Court's decision as threatening a return to "traditional" equal protection analysis in the review of sex discrimination claims.[36] He noted that although the statute excludes a "gender-linked disability peculiar to women,"[37] men are entitled to full compensation for all disabilities suffered, including those that solely or primarily affect their sex.[38]

In the more recent case of *Schlesinger v. Ballard*,[39] the Court approved a statute guaranteeing female, but not male naval officers thirteen years of commissioned service before a mandatory discharge for want of promotion. In concluding that the disparity of "opportuni-

31. *Id.* at 362 (White, J., dissenting).
32. 417 U.S. 484 (1974).
33. *Id.* at 496.
34. *Id.* at 495, *quoting* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).
35. *Id.*
36. *Id.* at 503.
37. *Id.* at 501.
38. *Id.*
39. 95 S. Ct. 572 (1975).

ties for professional service"[40] supplied a "complete[ly]"[41] rational basis for the statute, the Court once more failed to specifically identify the test being used. Again writing for the majority, Justice Stewart emphasized that "the primary business of armies is to fight" and that "the responsibility for determining how best our armed forces shall attend to that business rests with Congress and with the President."[42]

Relying on the legislative history and structure of the statute in his dissent, Justice Brennan concluded that the intent of Congress was not to compensate women for the inequities attending Naval career advancement programs.[43] Finding no other legitimate legislative purpose[44] for the challenged classification, Brennan claimed that the Court had gone "far to conjure up a legislative purpose which *may* have underlain"[45] the statute. He further contended that after *Frontiero* it could no longer be argued that the Court must bow to Congress when equal protection claims concern military-related statutes.[46]

The Court's continued use of old equal protection language while applying both minimal and intermediate levels of scrutiny makes possible two differing interpretations of the *Kahn-Geduldig-Schlesinger* trilogy. Since all three cases utilize traditional language and achieve a traditional result, they may be viewed as reversing the active review posture assumed in *Reed*. Conversely, it may be argued that the Court was using intermediate scrutiny in each case and that the three statutes involved simply passed the test due to the Court's usual deference to legislative and executive judgments in the areas of taxation,[47] social welfare,[48] and military administration.[49] Thus, by failing to explicitly identify the test used, these decisions will likely

40. *Id.* at 577.

41. *Id.* at 578.

42. *Id.* Although the result of this case comports with traditional analysis, the Court's use of such terms as "complete rationality" (*id.*), and its reliance on the "demonstrable fact that male and female line officers . . . are not similarly situated" (*id.* at 577), indicates an intermediate approach.

43. *Id.* at 579.

44. *Id.*

45. *Id.*

46. *Id.* at 583.

47. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1972); Allied Stores v. Bowers, 358 U.S. 522 (1958); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940); Madden v. Kentucky, 309 U.S. 83 (1940).

48. Dandridge v. Williams, 397 U.S. 471 (1970).

49. In *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) the Court stated: "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

perpetuate, if not increase, the divergence in lower court treatment of sex-based classifications.

Even though the Court fails to clearly indicate its present position on sex discrimination, one message of these recent cases is unmistakeable—sex, at least for the present, is not suspect. Perhaps a majority of the Court wishes to decide sex discrimination cases on an ad hoc basis, withholding a final resolution of the issue of suspectness until the country reaches its decision on the Equal Rights Amendment.[50] Justice Powell expressed this view in his concurrence in *Frontiero*:

> It seems to me that the reaching out to preempt by judicial action a major political decision which is currently in the process of resolution does not reflect appropriate respect for the duly prescribed legislative processes.[51]

For the present, a more precise articulation of the components of the intermediate model, if indeed the Court is employing one, is needed to provide more definite guidelines for the lower courts. A definitive explication of the applicability of the test to sex-based classifications would significantly subdue the confusion stemming from the *Kahn*, *Geduldig*, and *Schlesinger* decisions.

Victor Lynn Marcello

EMPLOYMENT AT WILL—LIMITATIONS ON EMPLOYERS' FREEDOM TO TERMINATE

A married female employee sued her employer for damages for breach of an oral contract of employment which was terminable "at will" by either party. Hostility on the part of the plaintiff's foreman resulting from her refusal to go out with him was alleged by plaintiff to be the cause of her dismissal. Affirming the trial court, the New Hampshire supreme court held the employer liable for damages, reasoning that a termination by the employer of an at will employment contract "which is motivated by bad faith or malice or based on

50. The ERA provides: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section 3. This amendment shall take effect two years after the date of ratification." S.J. Res. 8, 92d Cong., 2d Sess., 118 CONG. REC. 9598 (1972); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35815 (1971). The states have until March 22, 1979, to ratify the amendment.

51. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring).