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Constitutional Law - Equal Protection - Sex Discrimination in Sentencing Criminal Offenders Is Unconstitutional

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RECENT CASE

CONSTITUTIONAL LAW—EQUAL PROTECTION—SEX DISCRIMINATION IN SENTENCING CRIMINAL OFFENDERS IS UNCONSTITUTIONAL—After conviction on various gambling charges, defendant females in the six consolidated cases were all sentenced to indeterminate terms in the New Jersey Correctional Institution for Women. In New Jersey, male offenders convicted of the same crime receive a minimum-maximum term in the State Prison, and the sentencing judge has the discretion to fix the maximum limit of confinement within prescribed parameters.[1] When the defendant is a female, the judge is required to sentence her to an indeterminate term of up to five years in the Correctional Institution for Women, and the judge has no discretion to lower the maximum period of confinement.[2] The actual term of incarceration served by the female offender is entirely dependent upon the institution's board of managers,[3] while male offenders may earn earlier release through statutory "good-time" provisions[4] or by application to the State Parole Board.[5] No such release program is available for female prisoners. On appeal the New Jersey Supreme Court *held* that disparate sentencing based upon sex classifications violates the equal protection clause of the fourteenth amendment to the U.S. Constitution. Where the fundamental right of liberty is restrained, in conjunction with a classification system based upon sex,[6] a state statute is unconstitutional unless a compelling state

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1. N.J. STAT. ANN. § 2A: 164-17 (1971) provides that:
   All sentences to the New Jersey State Prison shall be for a maximum and minimum term. . . . The maximum term shall not be in excess of the maximum term prescribed by law for the offense for which the offender was convicted. The minimum term shall not be less than 1 year.

2. N.J. STAT. ANN. § 30:4-155 (Supp. 1973) states:
   The several courts in sentencing to the Correctional Institution for Women shall not fix or limit the duration of the sentence, except as otherwise provided for herein, but the time which the prisoner shall serve in the reformatory or on parole shall not exceed five years. . . .

3. N.J. STAT. ANN. § 30:4-155 (Supp. 1973) declares that: "[t]he term may be terminated by the board of managers in accordance with its rules and regulations."

4. N.J. STAT. ANN. §§ 30:4-92, -140 (1971).

5. N.J. STAT. ANN. §§ 30:4-123.1, -123.10, -123.12 (1971).

6. A similar disparity exists in North Dakota, although it involves a "males-only" requirement for commitment to the state farm, a minimum-security correctional institution for misdemeanants, pursuant to N.D. CENT. CODE § 12-51-01 (1960). Prisoners serving a custodial sentence at the state farm are deemed to have committed a misdemeanor offense,

interest is shown. The state's claim that females were better subjects for rehabilitation, although a longer confinement might be necessary for that purpose, was insufficient to justify the infringement upon liberty. *State v. Chambers*, 63 N.J. 287, 307 A.2d 78 (1973).

Only a few decisions as late as 1927 even peripherially considered the question of sex discrimination in sentencing.[7] Even those decisions did not reach the precise issue raised in modern cases, namely that certain classes of females are receiving potentially longer custodial sentences than similarly situated male offenders. In fact, early New Jersey statutes did not differentiate between males and females in sentencing, because the only state institution for confinement was the State Prison. However, as interest in prison reform began to grow, women were singled out by the legislature for special treatment. By 1910 a Reformatory for Women was established, and the indeterminate sentencing scheme initiated.[8] The commitment to "reform" was still riding high in 1946 when the Maine Supreme Court upheld an unequal sentencing statute. Citing a perceived legislative need for freedom to experiment within the broad area of prison reform,[9] the court validated a statute which provided that women could be incarcerated for potentially longer periods of time than men for similar offenses.[10]

In testing the constitutionality of a challenged statute, the judiciary has traditionally deferred to the legislative branch of government, upholding such action whenever a rational basis for the contested classification could be advanced.[11] But where a "fundamental" right has been infringd upon, or where classifications are based upon "suspect" criteria, a stricter test is applied. That standard is the compelling state interest test.[12] This stricter standard

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even though a felony sentence was possible under state law, according to the provisions of N.D. CENT. CODE § 12-51-07 (1960). No similar institution or sentencing system is provided for females.

7. State v. Heitman, 105 Kan. 39, 181 P. 630 (1919); Platt v. Commonwealth, 256 Mass. 539, 152 N.E. 914 (1926); *Ex parte* Brady, 116 Ohio St. 512, 157 N.E. 69 (1927); *Ex parte* Fenwick, 110 Ohio St. 350, 144 N.E. 269 (1924), *appeal dismissed sub nom.* Fenwick v. Myers, 275 U.S. 485 (1927). In all cases, the potential maximum term was the same for both sexes, only the indeterminate nature of the sentence for females was questioned, and upheld.

8. N.J. LAWS ch. 72 (1910).

9. Reform of the penal structure in North Dakota was being attempted by the enactment of N.D. CENT. CODE § 12-51-01 (1960), providing for "a correctional institution for *male* violators of the law" (emphasis added), named the state farm. This institution was primarily for the commitment of first offenders, to insulate them from possible corrupting influences presented by hardened inmates of the State Prison.

10. *Ex parte* Gosselin, 141 Me. 412, 44 A.2d 882 (1945), *appeal dismissed sub nom.* Gosselin v. Kelley, 328 U.S. 817 (1946).

11. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

12. Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). Cox's two elements are:

> (1) the relative invidiousness of the particular differentiation, such as between men of different races, farmer and city-dweller, rich and poor, literate and illiterate, or men and women, [and]

of analysis has been applied where such fundamental rights as privacy,[13] voting,[14] interstate travel,[15] criminal appeals,[16] and procreation[17] have been interfered with, or where classifications based upon race,[18] alienage,[19] to some extent wealth,[20] and perhaps sex[21] have been established.

The approach used by the New Jersey Supreme Court in the instant case is not so easily categorized. While stating that "certain classifications by their very nature are inherently suspect . . . ," the court stopped short of declaring sex a suspect criterion for legislative classification. Instead, application of the compelling state interest test seems predicated upon a finding that because the fundamental right of liberty is impaired, a classification based upon sex cannot be tolerated. Evidencing what Gerald Gunther calls "an undercurrent of resistance to the sharp difference between deferential old and interventionist new equal protection . . .",[22] Justice Marshall, dissenting in *Dandridge v. Williams*,[23] has advanced a similar method of analyzing equal protection challenges. In deciding whether or not strict scrutiny is to be applied, Marshall would use a "multifactor, sliding-scale" approach, in effect balancing the value of the right infringed upon with the discriminatory characteristics of the classification under challenge.[24] Where the interrelationship of these two gradients produces results deemed too restrictive, the strict scrutiny standard would apply. Such a discriminatory scheme is involved in the instant case, where the fundamental right of liberty is on one gradient, and the classification based upon sex on the other.[25] Hence, the compelling state interest

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(2) the relative importance of the subject with respect to which equality is sought, such as the vote, the defense of a criminal prosecution, or civil litigation.

Id. at 95.

13. Roe v. Wade, 410 U.S. 113 (1972).
14. Dunn v. Blumstein, 405 U.S. 330 (1972).
15. Shapiro v. Thompson, 394 U.S. 618 (1969).
16. Douglas v. California, 372 U.S. 353 (1963).
17. Skinner v. Oklahoma, 316 U.S. 535 (1942).
18. Brown v. Board of Educ., 347 U.S. 483 (1954); Strauder v. West Virginia, 100 U.S. 303 (1879).
19. Takahashi v. Fish Comm'n., 334 U.S. 410 (1948).
20. Harper v. Board of Elections, 383 U.S. 663 (1966).
21. Frontiero v. Richardson, 411 U.S. — (1973).
22. Gunther, *In Search of Evolving Doctrine On a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 17 (1972) [hereinafter cited as *Evolving Doctrine*].
23. 397 U.S. 471 (1970).
24. *See generally Evolving Doctrine, supra* note 22 at 17-18.
25. A similar discriminatory classification is found in the case of State v. Iverson, Crim. File No. 9138 (Dist. Ct. N.D., March 29, 1973). In that case, two women convicted under the state's narcotic laws were sentenced to the State Farm, but administrative officials transported them to a South Dakota facility for confinement, pursuant to contracts entered into between that state and North Dakota, under legislative authority to so contract. At a hearing ordered by Judge Ralph Maxwell of the First Judicial District Court in Fargo, Cass County, North Dakota, the following exchange occurred between Judge Maxwell and Walter Fiedler, Director of Institutions for the State of North Dakota:

THE COURT: As I understand it, Mr. Fiedler, the reason then that these defendants were not taken into the State Farm is because they were women?

THE WITNESS: As the warden explained, Your Honor, it is open barracks,

test was applied.

In analyzing the question of whether or not a classification is violative of the equal protection clause, it is also helpful to examine the benefits which flow from the statute and concurrently review any burdens which may fall upon the selected class.[26] Looking at the statutory scheme utilized in New Jersey for determining sentences of convicted offenders, it appears that the burden of confinement falls more heavily upon the class of female offenders. Since there is no countervailing benefit asserted by the state, the classification must fall.[27] Furthermore, because certain benefits relating to early release and review of sentences are available only to males, and no similar process is applicable to female inmates, the statute also fails to insure equal treatment in completing the sentence.[28] Such disparity of treatment cannot survive strict scrutiny, and the sentencing scheme, as applied to females, is unconstitutional.[29]

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there is no place to keep them except among the male inmates.

THE COURT: Well, the reason they weren't taken there is because they were women, is that correct?

THE WITNESS: Yes. We have no facilities for women, and the Legislature provided us funds to contract out of state.

THE COURT: Apparently then if I were to order them today again into your custody or into the custody of the warden, they would again be transported to Yankton [South Dakota] for confinement, is that correct?

THE WITNESS: I would consult with the Attorney General and abide by his decision.

THE COURT: What is your position, Mr. Fiedler?

THE WITNESS: I certainly feel they would be much better off at Yankton than they would be at the State Farm.

THE COURT: Then you would take the position that—
THE WITNESS: I think I would transfer them again.
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THE COURT: But if I committed two men, you would have accepted them at the State Farm?

THE WITNESS: Yes. We have facilities for men there.

26. *See* Rosenblum v. Griffin, 89 N.H. 314, 197 A. 701 (1938).

27. *But see* Wark v. State, 266 A.2d 62 (Me. 1970) (Behavioral differences justify potentially longer sentences for males convicted of escape than that imposed upon female escapees).

28. In North Dakota, N.D. CENT. CODE § 12-51-07 (Supp. 1973) provides that a felony conviction will be treated as a misdemeanor once the offender has been committed to the State Farm. No such special institution is available for the benefit of a female defendant. The only possibility for such a reduction in degree of the offense is N.D. CENT. CODE 12-01-07 (1960), which declares that sentences to county jails, for both males and females, will be thereafter treated as misdemeanors. However, county jail incarceration is deemed by many an unacceptable alternative to the rehabilitative programming that a minimum-security correctional institution can provide.

29. In State v. Iverson, Crim. File No. 9138 (Dist. Ct. N.D., March 29, 1973), Judge Maxwell concluded that:

> Because they were women, they were not housed in the institution to which they were committed as they would have been if they had been men. Instead under the undisputed testimony, they were manacled together and hauled to a distant place where again, according to undisputed testimony, they were to live with felony convicts and to sup with lunatics. The detriment incident to being sent to and held in a place remote from North Dakota courts, from their lawyers, their families and friends is obvious, and these have been alluded to in previous sessions in these cases. *These added pains and penalties were to be theirs because, and only because they are female rather than male persons* (emphasis added).
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Chambers presents the modern view in two respects. First, by implication the court applies a more realistic method of testing the constitutionality of statutes challenged on equal protection grounds. That method is the sliding-scale approach, analyzing the interaction between the legislative classification and the right involved. This approach allows a pragmatic look at factors clearly interrelated when considering equal protection questions, rather than demanding that a ruling be based upon a finding of either a suspect classification or upon the infringement of a fundamental right. Second, the court implicitly strikes down any statutory scheme that would subject females to more restrictive custodial sentences than males in similar circumstances. Although females as a class may be more receptive to proffered rehabilitation programs, that alone is not sufficient to justify longer periods of incarceration. Furthermore, no additional rehabilitative purpose has been advanced to justify this, or any other, sexually-based discriminatory sentencing scheme.

The type of sentencing disparity presented in the instant case is not the only one that confronts the courts today. In North Dakota, males eligible for sentencing under a special statute have the degree of their offense reduced from a felony to a misdemeanor upon commitment to the state farm.[30] Some states contract[31] with neighboring jurisdictions for the care and custody of female convicts, but men are confined solely within the sentencing state itself. There is little likelihood that these "males-only" benefits can be sustained as fulfilling a compelling state interest. Therefore, they appear vulnerable to an equal protection challenge.[32]

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> It is discrimination both arbitrary and invidious, and in my opinion plainly prohibited by the spirit and letter of the Fourteenth Amendment and the statutes passed in implementation of that amendment.***
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> So far my efforts to assure the defendants equal treatment have been stymied by the action of administration officials. These officials in their testimony in court today have not evinced a great concern about the constitutional aspects of the case. . . . To them it appears that the costs involved and the inconveniences involved are of greater concern than the Constitution.

30. N.D. CENT. CODE § 12-51-07 (Supp. 1973); N.D. CENT. CODE § 12-01-07 (1960).

31. N.D. CENT. CODE § 54-21-25 (Supp. 1973).

32. The issue became moot in the *Iverson* case when the judge, perhaps bowing to the state's practicality argument, resentenced the two female defendants to terms in the Cass County jail. In doing so, however, Judge Maxwell did make it clear that only the absence of clear authority deterred him from again imposing a state farm sentence on the women. Only an action to which the administrative officials themselves were parties would have conferred such authority upon Judge Maxwell. He considered that placing such a burden upon the defendants and their attorneys would be unfair, as they would then be "pitted alone against all the resources of the state, ..." The question is: How else can the issue be effectively raised?