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Recent Trends

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RECENT TRENDS

PROHIBITION OF MARIJUANA USAGE

The controversy surrounding the weed-like marijuana plant continues.[1] Recent challenges to laws prohibiting the use and possession of marijuana have met with varied responses which are sometimes difficult to rationalize. *People v. Serra*[2] represents one successful challenge. That case involved a Michigan statute which created a presumption that possession of more than two ounces of marijuana implies an intent to distribute.[3] The defendants were charged with possession of marijuana with intent to deliver. This followed the seizure of several marijuana plants from their yard along with various containers of dried marijuana in their home. Affirming an appellate court dismissal of the charge, the Michigan supreme court held that the challenged statute violated both the privilege against self-incrimination and the defendants' rights to due process. According to the court, a presumption is a legislative determination that gives force of law to an otherwise ordinary inference. The presumption created by the statute in question differed from allowable presumptions because it "involve[d] an inference from the fact of possession to the fact of the possessors' *intent* rather than some fact which can be shown independent of the defendants' state of mind."[4] To rebut this inference the defendants were forced to choose between either foregoing their fifth amendment rights to remain silent or taking the risk that the jury would draw the inference encouraged by the statute. This forced choice gave rise to the constitutional infirmity. For good measure the Michigan court also found there to be no rational connection between the proven fact of possession and the presumed fact of intent to deliver.[5]

A Montana defendant found that state's supreme court less receptive than Michigan's in responding to his chanllenge to a statute which created a presumption that cultivation of marijuana is legally equivalent to the criminal sale of marijuana.[6] In *State ex rel. LeMieux v. District Court*[7] the Montana supreme court held that the "cultivation" of marijuana comes within the meaning of the word "sale." Therefore the court did not need to reach the question of whether there was a rational connection between the cultivation of the plant and the prohibited conduct of selling the product.

The Michigan decision in *Serra* can be rationalized by certain practical considerations. First, in 1973 the National Commissioners on Uniform State Laws recommended the decriminalization of possession of and distribution of small quantities of marijuana.[8] An evidentiary rule promulgated pursuant to the 1973 recommendations would create a presumption that possession of less than one ounce of marijuana would be intended for personal use.[9] The court

[1] There are several good histories of the American attempt to regulate marijuana. *See e.g.*, Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970). Recent additions to the literature in the field include Balme, *The Role of the Criminal Justice System with Respect to Marihuana and Hashish*, 1 CRIMINAL JUSTICE QUARTERLY 176 (1973); Bartels, *Better Living Through Legislation: The Control of Mind-Altering Drugs*, 21 KAN. L. REV. 439 (1973); *Drug Offenses and Decriminalization: A Symposium*, 3 HUMAN RIGHTS ___ (1973).

[2] ___ Mich. ___, 223 N.W.2d 28 (1974).

[3] MICH. COMP. LAWS ANN. § 335.341(2) (1971); MICH. STAT. ANN. § 18.1070(41)(2) (1971).

[4] ___ Mich. at ___, 223 N.W.2d at 32.

[5] The court stated that the degree of certainty necessary to sustain the presumed fact where statutory presumptions are at issue has not been firmly settled by the United States or Michigan high courts. ___ Mich. at ___, 223 N.W.2d at 35. Regardless of which test used, this court would have found the presumption involved invalid. *See generally* Turner v. United States, 396 U.S. 398 (1970) (presumed fact must flow from the proven fact beyond a reasonable doubt); Leary v. United States, 395 U.S. 6 (1969) (presumed fact must be more likely than not to flow from the proven fact on which it must depend); United States v. Romano, 382 U.S. 136 (1956) (mere presence at whiskey still insufficient to support presumption of possession).

[6] MONT. REV. CODES ANN. § 54-132 (Supp. 1971).

[7] ___ Mont. ___, 531 P.2d 665 (1975).

[8] UNIFORM CONTROLLED SUBSTANCES ACT § 409 (Supp. 1973), *cited in* ___ Mich. at ___, 223 N.W.2d at 30 n.4.

[9] *See* ___ Mich. at ___, 223 N.W.2d at 31 n.5.

may have felt that the legislature's intention would be to follow the Uniform Act, even though the legislature had deviated from the Uniform Act with this presumption under challenge. Additionally, viewing the challenged Michigan statute in light of the Uniform Act may have convinced the court of the statute's infirmity.

Secondly, denying the prosecutor the use of the "evidentiary crutch" created by the presumption is not likely to impede appropriate prosecutions. Where a large amount of marijuana is involved, the inference of intent to sell is there for the jury to draw without the aid of the legislature. Strikinng the presumption shifts the burden of going forward with the evidence of intent to the prosecution. As the court suggests,[10] the prosecutor, rather than the defendant, could put on expert witnesses and acquaintances of the defendant in order to show the requisite intent.

The Montana decision is more difficult to rationalize. Dissenting Justices Haswell and Daly found that the statute did indeed create a presumption of sale from mere cultivation and that this presumption was clearly unconstitutional under *Tot v. United States*.[11] Using a "plain meaning" test, the word "sale" would encompass such acts as *delivery* or *disposition* or *exchange*.[12] Only by judicial torture of the word "sale" can "cultivation" be considered a synonym.[13] The court would have been on sounder ground had it cited to evidence showing that most cultivators in fact sell the plants once they are grown.

One consistently unsuccessful method of challenging marijuana regulations is to attack as irrational the state's classification of the cannabis plant and its various products as a narcotic. At least five state courts have recently been presented with and rejected this argument.[14] The supreme court of Missouri in *State v. Burrow*[15] adds that state's court to the list of the unconvinced. The Missouri statute challenged in this case put marijuana in the same class as the so-called hard drugs of heroin, opium and morphine. The penalty for violating the law was not less than five years nor more than life imprisonment for simple possession or sale.[16] The sale of hallucinogenic drugs is listed in a separate statute which provides for a considerably less severe punishment.[17] Defendant Burrow, convicted of the sale of four ounces of marijuana to a police officer, sought to overturn his sentence of five years by attacking the statutory scheme on equal protection grounds. Burrows argued that the scientific community is in virtual agreement that marijuana is not a narcotic[18] and that its effects are both very different and "milder." Since the evil toward which the statute is directed at eliminating is the "high" or euphoria produced by the drug and its associated abuses, drugs which produce similar "highs" should be classed together and those that produce different effects should be classed separately. To do otherwise would "lay an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other [which is] as an invidious discrimination [as selecting] a par-

[10] ___ Mich. at ___, 223 N.W.2d at 34.

[11] 319 U.S. 463 (1943). A federal statute provided that mere possession of a pistol coupled with a prior criminal conviction create a presumption that the pistol had been acquired in interstate commerce. In holding that the statute violated due process, the Court determined that there must be a rational connection between the fact proved and the fact presumed. *See* Leary v. United States, 395 U.S. 6 (1969).

[12] WEBSTER'S NEW INTERNATIONAL DICTIONARY 2203 (2d ed. 1945).

[13] The reader interested in an exploration of this form of judicial reasoning can profit by reading L. FULLER, LEGAL FICTIONS (1967).

[14] Warren v. State, 52 Ala. App. 35, 288 So. 2d 817 (1973); State v. Wadsworth, 109 Ariz. 59, 505 P.2d 230 (1973); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965); Borras v. State, 229 So. 2d 244 (Fla. 1969); Reyna v. State, 434 S.W.2d 362 (Tex. Crim. 1968).

[15] 514 S.W.2d 585 (Mo. 1974).

[16] Mo. REV. STAT. § 195.017 (Supp. 1973). The penalties are for possession of not more than 35 grams and for the delivery of not more than 25 grams.

[17] Illegal sale of hallucinogenic substances is punishable by imprisonment in the penitentiary for from two to ten years, or by confinement in the county jail for a term of not more than one year, or by a fine of not more than $1,000 or by both fine and confinement. Mo. REV. STAT. § 195.270 (Supp. 1973).

[18] The Missouri court noted that the defendant presented "considerable authority in support" of this proposition. 514 S.W.2d at 590. There are many excellent scientific treatises on the classification of marijuana. *See, e.g.*, L. GRINSPOON, MARIHUANA RECONSIDERED (1971).

ticular race or nationality for oppressive treatment." [19]

In rejecting this argument the *Burrow* court found that the medical evidence is not nearly complete or unanimous in the rejection of marijuana's classification as a hard drug,[20] and that the prevelance of the use of the drug justified the more severe penalty.[21] The court cited no authority for this position.[22]

Another frequently losing argument used in attacking convictions under laws concerning marijuana is that the federal statute prohibiting the possession of marijuana[23] applies to only one of three species of marijuana, *cannabis sativa L.* However, the federal district court of the western district of Wisconsin, in *United States v. Lewallen*,[24] has recently held that the government's failure to prove that the defendant possessed *cannabis sativa L.* warranted a reversal of his conviction. Striking a blow for judicial individualism the judge noted that he was aware of scientific treatises and expert botanical taxonomists that do not support his finding.[25] However, no such testimony was offered in his court. The court also recognized that all species of marijuana, including *cannabis sativa L., cannabis indica Lam.* and *ruderalis Jan.* contain the euphoria producing agent tetrahydrocannabinol. But he found the legislative history unclear as to whether it was the "high" itself or the particular plant type which was to be prohibited. Indeed, ignoring the decisions of three circuit courts of appeals,[26] the district judge found that the congressional intent was clear that marijuana of a type other than *cannabis sativa L.* was not prohibited.[27] Since there is no reliable biochemical or spectrographic method for distinguishing between the various species of marijuana other than to view the growing plant itself,[28] the decision in *Lewallen* could present a severe set-back to marijuana prosecutions. However, the overwhelming verdict from other circuits is that the Controlled Substances Act[29] applies equally to all species of marijuana.[30] Since it is the

[19] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). A per curiam decision by the Illinois supreme court in People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971), accepted a similar argument. There the court held that the Illinois Narcotic Drug Act, which provided for a mandatory ten year minimum sentence on first conviction of a marijuana offense rather than under the Drug Abuse Control Act which provided for a maximum jail term of one year on first conviction, violated equal protection. The *Burrow* court noted that the Illinois legislature had changed the treatment of marijuana offenders before the case was decided, making the constitutional argument superfluous.

[20] The court cites to no authority except Chief Justice Underwood's dissent in People v. McCabe, 49 Ill. 2d 338, 352-53, 275 N.E.2d 407, 414 (1971). The *Burrow* court either was not made aware of or chose to ignore overwhelming evidence to the contrary. For an excellent layman's guide to the most recent scientific developments regarding marijuana see Brecher, *Marijuana: The Health Questions—Is Marijuana as Damaging as Recent Reports Make It Appear?* 40 CONSUMER REPORTS 143 (1975).

One noted authority has suggested that rather than concentrating on what the drug is, we should be concerned with the behavioral consequences resulting from use. *Contemporary Problems of Drug Abuse: A National Symposium for Law and Medical Students,* 18 VILL. L. REV. 787, 820 (1973).

[21] The court heard no evidence on how widespread the use of the various classified drugs actually was. Apparently, it took judicial notice of the fact. 514 S.W.2d at 592.

[22] Some of the questions involving statutory classifications may be answered in Delp v. Ohio, ___ Ohio ___, ___ N.E.2d ___ (1974), *petition for cert. filed,* 43 U.S.L.W. 3374 (U.S. Dec. 26, 1974) (No. 810).

[23] 21 U.S.C. § 841(a)(1) (1970).

[24] 385 F. Supp. 1140 (W.D. Wis. 1974).

[25] Botanists now generally agree that there is but one species, cannabis sativa, and many unstable varieties or races which are, in effect, ecotypes, *i.e.,* hemp seems . . . to differ from or approach the characteristic type in response to the conditions under which it is growing. GRINSPOON, *supra* note 18, at 35. Other authority can be cited to show the existence of three types. *Compare* Schultes, *Random Thoughts and Queries on the Botany of Cannabis,* in C. JOYCE & S. CURRY, THE BOTANY AND CHEMISTRY OF CANNABIS 11-38 (1970), *with* Schultes, Klein, Plowman & Lockwood, *Cannabis: An Example of Taxonomic Neglect,* 23 HARV. BOTANNICAL MUSEUM LEAFLETS 325 (1974). *See also* R. SCHULTES & A. HOFFMAN, THE BOTANY AND CHEMISTRY OF HALLUCINOGENS 58 (1973).

[26] United States v. Honneus, 508 F.2d 566 (1st Cir. 1974); United States v. Gaines, 489 F.2d 690 (5th Cir. 1974); United States v. Rothberg, 480 F.2d 534 (2d Cir.), *cert. denied,* 414 U.S. 857 (1973), *aff'g* 351 F. Supp. 1115 (E.D.N.Y. 1972); United States v. Moore, 446 F.2d 448 (3d cir. 1971), *aff'g* 330 F. Supp. 684 (E.D. Pa. 1970).

[27] "This statute is not vague; it applies to cannabis sativa L. and to nothing else." 385 F. Supp. at 1143.

[28] United States v. Walton, ___ F.2d ___ (D.C. Cir. 1975).

[29] 21 U.S.C. § 802(15) (1970).

[30] *See* note 26, *supra.*

euphoric effects of the plant's use which are the object of the prohibition and since no lay person could distinguish between one species of marijuana and another, the decisions which reject the "one species prohibited" argument are probably better reasoned. To agree with the *Lewallen* decision could result in further constitutional problems. The government would incarcerate persons who obtain a cannabinol high from *sativa L.* but not prosecute those who obtain the same high from another species. Additionally, since no lay person could tell the difference between the species, due process notice requirements would not be met.[31]

From these decisions one can conclude that the courts make poor vehicles for change in drug laws. Judicial integrity and principled decision-making are threatened by laws which are either not enforced or strangely interpreted. If the substantive offense of the use of marijuana is to be modified or eliminated, it can only be done at the legislative level. Recent developments suggest that such a change may be forthcoming.[32] While the debate continues as to the possible adverse medical effects of marijuana use, the adverse legal and social consequences of a marijuana arrest and conviction make it a dangerous drug indeed.

Abduction to Obtain Jurisdiction

The second circuit has once again confronted and approved an old-fashioned type of lawlessness in law enforcement—the international kidnapping of a person accused of a crime, and his forcible abduction into the jurisdiction whose law has allegedly been violated.[33] In order for a court to gain jurisdiction of a criminal matter, it must have the presence[34] in court of the accused. In *Lujan v. Gengler*[35] the second circuit held that it had such jurisdiction, despite the extenuating circumstances. The defendant, an Argentine citizen indicted in the United States on conspiracy charges involving the importation of heroin, was successfully lured into Bolivia by American narcotics agents where Bolivian police, paid by the American agents, arrested him. He was later placed on board a plane bound for New York City.

Conceding that the arrest warrant was enforced in an unconventional manner, the court, speaking through Judge Kaufman, nevertheless held that a court's jurisdiction is unaffected by the manner in which a defendant is brought before it. Absent any allegations of government conduct amounting to torture or brutality, there is no cause for the court to divest itself of jurisdiction or to dismiss the indictment.

Only last May the second circuit's reversal of the conviction in *United States v. Toscanino*[36] had indicated that the exclusionary rule, usually applied to evidence obtained in violation of the fourth amendment,[37] would also be applied to defendants illegally brought into the jurisdiction. Prior to *Toscanino* it was settled doctrine under the rule announced in *Ker v. Illinois*[38] and later affirmed in *Frisbie v. Collins*,[39] that the government's power to prosecute a defendant was not impaired by any illegality in the method used to acquire control over him.[40] In *Ker*, the defendant was kidnapped in Peru by an Illinois Pinkerton agent who failed to present the proper extradition papers. After a trial in Illinois, the defendant sought to have his conviction reversed. The Supreme Court held that under these circumstances, due process of law was satisfied as long as a person present in court is convicted after a fair trial in accordance with constitutional procedural safeguards. The Court has

[31] The court in United States v. Walton, ___ F.2d ___ (D.C. Cir. 1975), held that the 1970 Controlled Substances Act's proscription of *cannabis sativa L.* applies to all marijuana. It also noted the equal protection and due process problems with a decision of the *Lewallen* type. *Id.* at ___.

[32] *White House Announces Its New Perspectives on Pot*, 16 BNA Crim. L. Rep. 2183 (1974).

[33] The most infamous example of such a kidnapping in modern times is the Israeli abduction of Adolf Eichman in 1960. The account is retold in M. Pearlman, The Capture and Trial of Adolf Eichman (1963).

[34] Constructive presence may be sufficient; trial *in absentia* is possible. *See* Drope v. Missouri, ___ S.W. 2d ___ (Mo. 1975).

[35] 510 F.2d 62 (2d Cir. 1975).

[36] 500 F.2d 267 (2d Cir. 1974). *See also Recent Cases*, 88 Harv. L. Rev. 813 (1975).

[37] U.S. Const. amend. IV.

[38] 119 U.S. 436 (1886).

[39] 342 U.S. 519 (1952). *See The Supreme Court, The 1951 Term*, 66 Harv. L. Rev. 89, 126 (1952).

[40] Legal extradition is of course the usual method for obtaining a fugitive from justice. The Constitution so provides. U.S. Const. art. IV, § 2.

never abandoned the *Ker* principle,[41] and it has been widely reasserted by the circuits.[42]

In *Toscanino*[43] the Second Circuit, presented with particularly egregious police conduct, grafted the due process considerations of *Rochin v. California*[44] and the exclusionary rule of *Mapp v. Ohio*[45] on to the jurisdictional question. Toscanino had alleged (and the court accepted as true) that paid agents of the United States had forcibly abducted him from Uruguay. He was held incommunicado for seventeen days in Brazil during which time the agents alternatively interrogated and tortured him.[46] All this occurred under the direction of the Department of Justice, Bureau of Narcotics and Dangerous Drugs. He was not formally arrested until his arrival in New York.

The court held that if a defendant proves this type of allegation, the government should, as a matter of fundamental fairness, be obligated to return him to his *status quo ante*. The court was unable to reconcile the decisions in *Ker* and its progeny with the policy of discouraging official lawlessness as manifested by *Mapp* and *Rochin*.[47] The defendant's presence in the court was analogized to the "fruit of the poisonous tree" [48] and dismissal of the case against him was, in the court's view, warranted in order to deter future police misconduct. The court, relying on its supervisory powers over the administration of the criminal justice system, refused to become an "accomplice in the willful disobedience of law." [49]

The most expansive argument in *Toscanino* was the court's assertion that the *Ker-Frisbie* doctrine had been so weakened by the *Rochin*, *Mapp* and *Russell*[50] cases that it would not apply where a defendant had been brought into the court's jurisdiction in violation of a treaty.[51] Therefore, judicial scrutiny of illegal police conduct was necessary and dismissal to prevent any beneficial effects from illegal police conduct was justified. The court also analogized the criminal law jurisdiction to that of civil law, where it is well settled that the defendant who is lured into another state by fraud or forced against his will should not be subject to the jurisdiction of the courts of that state.[52]

While *Toscanino* clearly includes more due process considerations into the *Ker-Frisbie* doctrine, other than merely a fair trial, *Lujan* makes it equally clear that jurisdiction will be divested only in light of shocking governmental conduct. The treatment of the defendant Lujan failed to meet this test. The Second Circuit held that divestiture of jurisdiction is only applicable in those cases that present egregious factual situations involving torture, brutality or some form of an official protest to the violation of an extradition treaty by a foreign government. Lujan's arrest and abduction was merely illegal, involving none of these added considerations. There were no allegations of shocking treatment. There was no protest given by the Argentine government.

The *Lujan* limitation on *Toscanino* is reasonable. First, violation of a treaty should not, in and of itself, clothe the defendant with any immunity from prosecution. International kidnapping violates the sovereignty of the nation from which the defendant was taken. The

[41] *See* Frisbie v. Collins, 342 U.S. 519 (1952).

[42] United States v. Cotten, 471 F.2d 744 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1974); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); United States v. Caramian, 468 F.2d 1370 (5th Cir. 1972); Devine v. Hand, 287 F.2d 687 (10th Cir. 1961); United States *ex rel.* Langer v. Ragen, 237 F.2d 827 (7th Cir. 1956); Chander v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); Sheehan v. Huff, 142 F.2d 81 (D.C. Cir.), *cert. denied*, 322 U.S. 764 (1944).

[43] 500 F.2d 267 (2d Cir. 1974).

[44] 342 U.S. 165 (1952).

[45] 367 U.S. 643 (1961).

[46] The torture allegedly included sensory deprivation, intravenous feeding, fingers pinched with metal pliers, fluids forced into anal passages and electric shock administered to earlobes, toes and genitals.

[47] The analysis adopted by the court was first suggested in Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953).

[48] *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV. 579, 599 (1968).

[49] 500 F.2d at 276.

[50] United States v. Russell, 411 U.S. 423, 430–31 (1973) (entrapment).

[51] The court found that the actions there violated the United Nations Charter, the Charter of the Organization of American States, and the United States-Uruguay extradition treaty.

[52] J. BEALE, CONFLICT OF LAWS, §§ 78.3, 78.4 (1935).

standing to complain belongs exclusively to that government. Second, to redress the loss of any rights, the defendant may institute a civil suit for damages.[53] Moreover, the threat of such damage suits (although remote as a practical matter), coupled with the inadmissibility of any evidence discovered as a result of the illegal arrest will provide the same deterrance as would a blanket rule divesting jurisdiction. Third, the criminal law is intrinsically different from the civil law (where the plaintiff is not allowed to profit from his wrongdoing) because of the state's overriding interest in bringing fugitives to justice. In the criminal area, only brutal or shocking police conduct should be subject to the *Toscanino* remedy.[54] Despite the *Lujan* clarification, the essential force of *Toscanino* continues. There remains the same treatment of the defendant whose presence was brutally obtained as of evidence illegally obtained—the court will exclude them both.[55]

Sex-Based Classifications

The intricacies of the equal protection clause [56] and the "spectrum of standards" [57] for reviewing alleged discrimination continue to cause difficulty for courts faced with deciding attacks on statutes imposing sex-based classifications. Equal protection may be invoked to ensure that a statutory classification which results in different treatment for groups otherwise similarly situated bears an adequate relationship to the purposes the classification is intended to serve. Once a court has determined that a classification discriminates on the basis of sex, it must then decide what standard of review is appropriate to test that discrimination. Whether sex has joined the group of statutory classifications which require strict judicial scrutiny is not yet clear.[58] A review of several recent cases exposes the difficulty the courts are having with this type of challenge.

In *State v. Devall*[59] the Louisiana supreme court upheld a "females only" prostitution statute[60] against a female defendant's challenge that the failure to ban men from practicing indiscriminate sexual intercourse for pay violated the equal protection clause. The court conceded that a man could not violate the statute by accepting compensation for his sexual favors. However, in reversing the trial court's determination that the statute does unconstitutionally discriminate, the state supreme court apparently chose the traditional "old" equal protection test of minimal rationality.[61]

Under the minimal rationality test a court will not set aside a classification if any reasonable set of facts may be conceived to justify it.[62] Empirical realities need not dictate the particular solution chosen nor is the over- or under-inclusiveness of the classification scrutinized. The Louisiana court, applying this test, reasoned that the legislature was free to exclude male prostitution from the coverage of

[53] Brooks v. Blackledge, 353 F. Supp. 955, 957 (W.D. N.C. 1973) (dictum).

[54] The second circuit's interpretation of the *Ker-Frisbie* doctrine was adopted by the northern district of Illinois in the recent decision of United States v. Marzano, 388 F. Supp. 906 (N.D. Ill. 1975). There the court denied a motion to suppress made by the defendants in the Purolator vault theft who alleged that they were returned to the United States from the Cayman Islands in violation of the American-British extradition treaty. Citing *Lujan*, the district court limited *Toscanino* to instances of brutal police conduct.

[55] *But see* United States v. Cotton, 471 F.2d 744 (9th Cir. 1973). Defendant, illegally arrested by Vietnamese officials and turned over to United States officials, was flown in chains back to the United States to face charges of theft of government property. The court rejected the defendant's argument that the same analysis which supports the exclusionary rule supports dismissal of the charges, stating that the remedy is not an ouster of jurisdiction.

[56] U.S. Const. amend. XIV.

[57] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

[58] One student has written that much of the confusion in the area of sex discrimination has been encouraged by the absence of clear guidance from the Supreme Court. Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 Cal. L. Rev. 1532 (1974). This work also provides a concise explanation of the various equal protection tests. *Id.* at 1537–41.

[59] ___ La. ___, 302 So. 2d 909 (1974).

[60] "Prostitution is the practice by a female of indiscriminate sexual intercourse with males for compensation." La. Rev. Stat. § 14:82 (1950).

[61] ___ La. at ___, 302 So. 2d at 912, *citing* Goesart v. Cleary, 335 U.S. 464 (1947) (Michigan statute which provided that no woman could obtain a bartender's license unless she was the wife or daughter of the male owner held not to violate equal protection). The *Goesart* decision is of questionable continued validity in light of more recent cases. *See* Sail 'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

[62] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

the statute on the basis that it did not constitute a significant social problem. Absent a showing that the sex-based distinction involving prostitutes is merely a pretext designed to effect an invidious discrimination against members of one sex,[63] the Louisiana legislators were free to make the classification.[64]

In a carefully reasoned dissent, Chief Justice Sanders noted that male prostitution does indeed exist in Louisiana.[65] Reasoning that prostitution laws are meant to prevent the spread of venereal disease, to shield citizens from annoyance and to control related crimes (such as illicit drugs, gambling and organized crime), the dissent found that male prostitution contributes to these evils on par with female prostitution. The dissent would have found the statute violative of equal protection, thereby concluding that the sex classification bears no rational relation to the objectives of the legislature.[66]

Devall demonstrates the importance of which standard of review the court decides to use. Because the more lenient rational basis test was used the state's classification was upheld.[67] The court could have found sex to be a "suspect classification" and applied a more rigorous standard. Under this second standard, strict judicial scrutiny is given to a classification based on any suspect criterion, such as race[68] or alienage.[69] Fundamental interests, such as voting[70] and the rights of the criminal defendant[71] have also been recognized as requiring heightened judicial scrutiny. To be upheld under this standard of review, the classification must serve a *compelling* interest, and it must be shown that the classification is necessary in order to fulfill this interest. Had the *Devall* majority found sex to be a suspect classification, the statute would have fallen.

A District of Columbia trial court, finding sex to be a suspect classification, has struck down a city ordinance[72] (aimed at massage parlors) as violative of the equal protection clause. In *Geisha House, Inc. v. Wilson*[73] the court found that there was no compelling interest in prohibiting members of one sex from administering massages to the other. Because the sex-based classification is suspect,[74] the court insisted upon the least intrusive means to accomplish the goals of the statute. The court indicated that a statute which prevented employment of persons with records of past criminal sexual conduct, or which would require licensing of individual masseuses or masseurs, or which regulated the dress of customers would have been more favorably received.[75] The strict

[63] The Louisiana court here confuses the tests under equal protection. Since the classification was deemed not suspect, the proper question was whether the statute was rational or irrational. Invidiousness is relevant only in suspect classification standards. It is possible that the court meant that a statute with a bad motive is irrational. The opinion, however, is unclear.

[64] Other state supreme courts that have upheld unisex prostitution statutes include Indiana, Wilson v. State, 258 Ind. 3, 278 N.E. 2d 569 (1972), *cert. denied*, 408 U.S. 928 (1973), and Wisconsin, State v. Mertes, 60 Wis. 2d 414, 210 N.W.2d 741 (1973). An Arizona rape statute applicable only to male defendants with female victims was recently upheld against an equal protection challenge. State v. Kelly, 111 Ariz. 181, 526 P.2d 720 (1974). The court applied a rationality test to find that the legislature need not protect males from female rapists.

[65] — La. at —, 302 So. 2d at 913. The dissent cites to a valuable and exhaustive study in Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AMER. CRIM. L. REV. 373, 396 (1973).

[66] Other courts have agreed that unilateral prostitution statutes violate equal protection. *See e.g.*, State v. Fields, — P.2d — (Alaska 1973). A constitutional attack on prostitution laws in general is set out in Rosenbleet & Priente, *supra* note 65, at 376.

[67] Reversals of state action under this standard are traditionally scarce. *See* Morey v. Doud, 354 U.S. 457 (1957).

[68] Korematsu v. United States, 323 U.S. 214 (1944).

[69] Graham v. Richardson, 403 U.S. 365 (1971).

[70] Dunn v. Blumstein, 405 U.S. 330 (1972).

[71] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[72] D.C. CODE ANN. § 43-2311 (1967) prohibits any female from administering a massage to any male or any male from administering any massage to any female in an establishment licensed under the statute.

[73] 16 BNA CR. L. REP. 2048 (D.C. Super. Ct. Sep. 25, 1974).

[74] [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of the particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility....

Frontiero v. Richardson, 411 U.S. 677, 686 (1973), *cited in* Geisha House, Inc. v. Wilson, 16 BNA CR. L. REP. at 2050.

[75] The court further found that the statute, by creating a presumption that the illicit activity occurred only in licensed establishments, was irrational.

scrutiny of sex-based classifications has also resulted in the overturning of Pennsylvania's discriminating sentencing procedure for female defendants.[76]

A third standard of review in equal protection decisions, labelled by one commentator as the "newer equal protection," [77] is demonstrated by the eastern district of Pennsylvania's decision in *Colorado Springs Amusement, Ltd. v. Rizzo*.[78] An ordinance similar to the one considered in *Geisha House,* forbidding employees in massage parlors from tending to persons of the opposite sex, was held to be in violation of the equal protection clause. Even though the court conceded that the city of Philadelphia had a valid interest in prohibiting illicit sexual behavior, the court scrutinized the means employed in the ordinance to achieve that goal and found it to be overly restrictive.[79] The court did not apply the "sex as a suspect classification" test which automatically would have meant the unconstitutionality of the statute.[80]

This third approach exemplified by the *Colorado Springs* decision seems most in step with recent Supreme Court decisions involving sex-based classifications.[81] This, in practice, becomes a sliding scale test where both the interests affected by the legislative classification and the particular characteristics of the class are compared with the interests of the state in maintaining the particular regulating scheme as a means by which it reaches its goals.[82] Under this test, a statute which draws a distinction by sex would be valid provided that the court could ascertain the existence of a substantial and rational link between the classification and the asserted state purpose.[83] The contours of this standard, however, are as yet undetermined.

It is difficult to reconcile the decisions in *Devall* with those in *Geisha House* and *Colorado Springs Amusement.* Until the Supreme Court announces a clearer standard for review of equal protection challenges to sex classifications, confusion in the lower courts will remain.

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[76] *See* Commonwealth v. Butler, ___ Pa. ___, 328 A.2d 851 (1974).

[77] Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

[78] 387 F. Supp. 690 (E.D. Pa. 1974).

[79] The court, using a due process analysis, also found a "fundamental right" to operate a massage parlor. Under this analysis, the state's failure to demonstrate a compelling interest in the manner in which it chose to regulate the activity was fatal. However, in light of the decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), it is doubtful whether there are "fundamental rights" beyond those explicitly announced in the Constitution.

[80] According to one leading constitutional authority, use of the suspect classification has been strict in theory and fatal in fact. Gunther, *supra* note 77, at 8.

[81] *See, e.g.,* Geduldig v. Aiello, 417 U.S. 484 (1974); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Reed v. Reed, 404 U.S. 71 (1971).

[82] *See* Gunther, *supra* note 77.

[83] Four Supreme Court justices in Frontiero v. Richardson, 411 U.S. 677 (1973), found sex to be a "suspect classification." In Reed v. Reed, 404 U.S. 71 (1971), the sex-based classification required a "fair and substantial relation" between the distinction drawn and the purpose for which it was drawn. In Geduldig v. Aiello, 417 U.S. 484 (1974), the Court found that a statute, which singled out pregnancy as the only significant disability not covered by the state-wide insurance program, was not a sex-based classification.