TABLE OF CONTENTS

INDEX TO CITATIONS

CASES

MISCELLANEOUS

In The
Supreme Court of the United States

October Term, 1975

No. 75-628

CURTIS CRAIG,
and
CAROLYN WHITENER,
d/b/a "The Honk and Holler,"
Appellants,

vs.

Hon. DAVID BOREN, Governor, State of Oklahoma,
et al.,
Appellees.

BRIEF OF APPELLANTS

COME NOW APPELLANTS, and for their Brief herein, respectfully argue and urge as follows:

THE DECISION HEREIN APPEALED

The decision whose reversal is sought herein is (or was) styled *Mark Walker, and Carolyn Whitener d/b/a "The Honk and Holler,"* v. *Hon. David Hall, Governor, State of Oklahoma, et al.*, United States District Court for the Western District of Oklahoma (three-judge panel), No. CIV-72-867, Memorandum Opinion and Judgement filed May 17, 1975, Motion for New Trial overruled July 14, 1975. The decision ("Memorandum Opinion") is reported at 399 F. Supp 1304. The decision, and the formal Judgement (not reported) are also reproduced as Appendices A and B, respectively, to the Jurisdictional Statement herein.

JURISDICTION

Jurisdiction to review the three-judge District Court decision below by direct appeal is conferred upon the Supreme Court by 28 U.S.C. 1253. Notice of Appeal was filed on August 11, 1975, and pursuant to extension of time allowed by Mr. Justice White, the Appeal herein was docketed on October 28, 1975.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes in issue in this Appeal are 37 Okla.Stat., 1971, Sec. 241, in conjunction with 37 Okla.Stat., 1975 Supp., Sec. 245. These statutory sections read as follows:

MINORS

> **§241. Sale, barter or gift to minor unlawful.** — It shall be unlawful for any person who holds a license to sell and dispense beer and/or any agent, servant, or employee of said license holder to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two-tenths (3.2) per cent of alcohol measured by weight. Provided, a parent as regards his own child or children, is excepted from the provisions of this Act.
>
> **§245. "Minor" defined.** — A "minor", for the purposes of Sections 241 and 243 of Title 37 of the Oklahoma Statutes, is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

It is contended that the foregoing statutory scheme, insofar as it purports to forbid the sale of 3.2% beer to or the purchase thereof by male persons 18 to 21 years of age, is void and unconstitutional as repugnant

to and violative of the Equal Protection of the Laws and the Due Process of Law Clauses of the Fourteenth Amendment to the Constitution of the United States, which read, in relevant part, as follows:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

The ultimate question herein is simply whether 37 Okla.Stat. 241, 245, is constitutional.

Posed in the framework of this case, however, the included questions relate to the evidentiary aspects of the sex-discrimination/civil-rights problem, chiefly: to what extent, if any, is "evidence" purporting to "prove" one sex's or the other's "inferiority" (or "difference," or whatever else we may want to call it) even judicially cognizable at all in Federal Equal Protection litigation; if such evidence is indeed cognizable at all, and is statistical in nature, what safeguards must be erected to protect against the obvious abuses inherent in and the inevitable misuses of such data; and finally, how *much* of a "statistical" inequality between males and females must be proven before a *statutory* inequality can claim an immunity to the obvious meaning and mandate of the Equal Protection guarantee?

STATEMENT OF THE CASE: BACKGROUND, HISTORY, FACTS

The history of this litigation in the Courts below, with the chief developments and chronology thereof, is already detailed in the Jurisdictional Statement, Part E,

"Statement of the Case," pp. 7-10, and need not be reproduced here. See also the District Court docket sheets (App., pp. 1-5), and the rest of the Appendix herein.

To understand the particular age-sex discrimination at bar, and the mentality and motives which led to the enactment thereof, some review of its legislative history is helpful. The original predecessor of the discrimination at bar appears to date from Oklahoma's very first Territorial Legislature, in 1890. Curiously, the "liquor" provisions thereof did *not* contain the discrimination. Section 3258 of the Statutes of Oklahoma, 1890 (Chapter 48, Liquors, Art. 1, Sec. 8), p. 655, prohibited the sale of liquor to "any minor, apprentice or servant under twenty-one years of age," and Section 2544 of the said 1890 Statutes (Chapter 25, Crimes and Punishment, Art. 57, Offenses Pertaining to Sale of Intoxicating Liquors, Sec. 4), p. 513, forbad the sale of liquor to "minors." Attention is invited to the seeming contrast between "any minor, apprentice or servant under twenty-one years of age" of Section 3258, supra, and simply "minors" of Section 2544. This contrast was more apparent than real, however, for it was Section 3966 of the 1890 Statutes (Chapter 64, Persons, Sec. 1), p. 752, which alone contained the [generalized] Territorial definition of "minors," to wit:

> "Minors are:
> First. Males under twenty-ones years of age.
> Second. Females under eighteen years of age."

Thus, since a female at 18 might be "under twenty-one years of age," she was not a "*minor* . . . under twenty-one years of age," and the sale of *any* liquor was therefore legal to a female upon the attainment of her 18th birthday, since, per Section 3966 quoted above,

females were fully adult at that point for virtually *all* civil majority purposes *in general.*

But why, then, was this generalized discrimination itself adopted? We may never know exactly the reasoning relied upon, as no "legislative history" materials on the background of Oklahoma's Territorial laws have been discovered to exist by either side to this lawsuit. [In fact, even today, the Oklahoma Legislature does not report and publish floor debates, committee and subcommittee hearings, and the like, as does the Congress.] However, it is doubtless fair to say that the Oklahoma Territory simply adopted the 18/21 female/male differentiation for the same reason or reasons that many States, especially in the Mid-West and the West, had adopted same in the Nineteenth Century (and in fact were retaining it until just the very past couple of years or so).

So far as can now be determined, we can only say that this archaic, Nineteenth Century scheme of 18 for women and 21 for men for civil majority, and whose last, dying vestiges are attacked herein, *probably* derived from Victorian and Frontier notions of "naturally" and/or "divinely" mandated and stereotyped sex roles in life and society for males, and females, 'respectively.' *Possibly* this discriminatory scheme reflected some sort of a "folk myth" that girls "matured" more rapidly than boys; and *possibly* again, it reflected a prejudice that boys were somehow deemed "entitled" to several more years of parent-supported and -financed education and training, whether formal or otherwise, than were girls. *Perhaps* also the intent was not as discriminatory as the actuality of these laws: *maybe* it simply reflected a sentiment that the male ought to be the breadwinner of the family, a responsibility then conceivably thought to

require at least 21 years of education, experience and maturity before the successful discharge thereof could reasonably be expected, whereas the female was thought of as "merely" the cook, housekeeper and bearer of children, which "lesser" obligations were arguably thought of as more easily dischargeable at a somewhat earlier age. Such, anyway, *appear* to be the "old notions" upon which the generalized age-sex discrimination underlying this case was founded, see *Stanton* v. *Stanton* (1974) 30 Utah 2d 315, 517 P.2d 1010, 1012, and *Jacobsen* v. *Lenhart* (1964) 30 Ill.2d 225, 195 N.E.2d 638, 640.

At any rate, by the time of Oklahoma's first major post-Statehood recodification in 1910, only one minor variation on the Territorial scheme had occurred. There was now just one sale-of-liquor-to-minors provision, to wit, Section 3607, Revised Laws of Oklahoma, Annotated, 1910 (Vol. I, Ch. 39, Intoxicating Liquors, Art. 3), p. 930, and it only referred to "minors," not to "minors . . . under the age of twenty-one." As before, this "Intoxicating Liquors" chapter itself still did *not* define "minors," but rather, it merely continued to adopt the *generalized* "minors" definition, of Section 879, R.L., 1910 (Vol. I, Ch. 12, Contracts, Art. 1), p. 238, which retained 18 for women and 21 for men as the ages for their civil majority in general.

The curiosity of the "*non*-intoxicating" alcoholic beverage in issue in this case was added to Oklahoma's laws shortly after Repeal (U.S. Const., Amend. XXI). House Bill 647, Fourteenth Legislature, Oklahoma Session Laws, 1933, Ch. 153 (enacted by popular referendum, Id., Ch. 70, pp. 124-126), defined as "non-intoxicating" any beverage (usually beer) whose alcohol content was 3.2% or less. Id., Sec. 1, p. 338. This statu-

tory designation of beverages containing 3.2% alcohol or less as "*non*-intoxicating" was to some extent necessary because the State Constitution, Art. 1, Sec. 7, and the "Prohibition Ordinance" thereto (1907), prohibited the sale of "intoxicating" liquors, but without defining the quantum of alcohol needed for a beverage to be deemed "intoxicating." [The 3.2% designation as the boundary of alcohol's "intoxicability" was upheld by the Oklahoma Supreme Court in *State ex rel. Springer* v. *Bliss* (1947) 199 Okla. 198, 185 P.2d 220.[1]]

In the current decennial revision of the Oklahoma code, the Oklahoma Statutes, 1971, non-intoxicating beverages are governed in Chapter 2 to Title 37 thereof. It is interesting to note that as late as this most recent, i.e., 1971, recodification, the "sale-to-minors" sections, 37 O.S. 1971, Sec. 241 (et seq), *still* did not themselves define "minors," but instead, as before, continued simply to employ Oklahoma's generalized "minors" definition, contained in Section 13 to Title 15 (Contracts) of the Oklahoma Statutes, 1971, and which was, also as

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[1]Just where the figure "3.2" came from is not entirely clear, but it probably reflected medical opinion that the average human body could metabolize alcohol in concentrations of 3.2% or less as fast as the normal rate of ingestion in conventional usage, and thereby forestall that *accumulation* of alcohol in the body that actually leads to intoxication. Language suggesting that 3.2% beer can intoxicate appears in the Oklahoma Criminal Court of Appeals decision of *Ashcraft* v. *State* (1940) 68 Okla.Cr. 308, 98 P.2d 60, but that is not strictly holding since the appellant therein had obviously been imbibing something considerably stronger than the proverbial "only two beers." In Oklahoma, the Supreme Court is the State's highest tribunal, *Dancy* v. *Owens* (1927) 126 Okla. 37, 258 Pac. 879, Okla.Const., Art. VII, Sec. 4, and the Criminal Court thereafter accepted the authoritativeness of the Supreme Court's pronouncement in *Springer-Bliss*, supra, see *State* v. *Manard* (1947) 85 Okla.Cr. 105, 185 P.2d 483.

before, the same 18 for women and 21 for men for civil majority in general.

But 18 for women and 21 for men was only the 1971 (and preceding) Statutes' *civil* adulthood age-sex discrimination in Oklahoma. Contrary thereto, however, for *criminal* purposes a male became an "adult" and hence prosecutable as a felon at 16, but a girl not until 18 (remaining till then only "civilly" processable as a mere juvenile or delinquent). 10 Okla.Stat., 1971, Sec. 1101(a).

So, what we had as late as 1971 in Oklahoma were absolutely conflicting "permanent irrebutable presumptions of fact" that the young female was, for *civil* purposes, deemed to be three years more mature than the male, yet for *criminal* purposes, the young male was deemed to be two years more mature than the female. Thus, as a "civil" adult and hence "competent" to run her own life under 15 O.S., 1971, 13, the female at 18 could, in addition to buying all the 3.2% beer her car would carry, also legally marry (43 O.S. 3), enter contracts (15 O.S. 14), convey land (16 O.S. 1), grant deeds of trust (46 O.S. 31), buy, possess, and smoke cigarettes (21 O.S. 1241-1244), enter and loiter in pool halls (21 O.S. 1103(2)), purchase concealable weaponry in unlimited amounts (21 O.S. 1273), and Heaven knows what else; yet the young man, suffering under the tutelage of infancy, could do none of these things until three years later. In fact, about the only thing the young man 18-21 *could* do legally on his own was to enlist (or be drafted) into the Armed Forces (which in those days carried a risk far disproportionate to the degree of maturity which Oklahoma was willing to concede *he* had, but which was freely acknowledged as possessed by his like-aged sister or girlfriend).

However, to back up several years in age, the young boy of 16 or 17, as a "criminal" adult and hence

fully "accountable" for his misconduct "like a man," 10 O.S. 1971, 1101(a), could easily get ten years in the Penitentiary for sharing his marijuana cigarettes with his like-aged (but criminally "immature") girlfriend (63 O.S. 2-401(B)(2)), ten years for getting caught in a penny-ante poker game with her (21 O.S. 941), five years for making "orthodox" love to her (21 O.S. 1120), ten years for "unorthodox" love with her, (21 O.S. 886), another ten for asking her in writing about it (21 O.S. 1021), and so on — yet the like-aged female, though doing the identical (or even worse) acts, nevertheless enjoyed a relative immunity under a presumption she was still "incapable of knowing right from wrong," 10 O.S. 1112(b), and could get *at most* up to only two years in a home for wayward and fallen girls. Nor does the difference in "time" tell the whole story: The 16-18 year old boy, as an "adult felon," also lost his right to vote (Okla.Const., Art. III, Sec. 1), to bear arms (21 O.S. 1283), to run for public office (26 O.S. 162), enjoy other State employment (51 O.S. 24.1), or sit on a jury (38 O.S. 28); he also became excluded for life from numerous commercial endeavors and careers, and he even suffered certain Federal disabilities, such as enlistment into the Armed Forces, 10 U.S.C. 504 — all of which the *criminally* "immature" and hence *non*-felon girl was exempt from, 10 O.S. 1127(b), along with (to protect her "innocence") a right to *privacy* in the proceedings against her, 10 O.S. 1111, 1125, 1127(a), 1506. And then, as the ultimate absurdity, once the 17 year old girl would be caught, say, selling heroin to a 15 year old boy (so that *both* were juveniles), the *criminal* age-sex discrimination *lapsed*, whereupon our familiar 18/21 *civil* discrimination came *back* into play as the *release* ages for females and males, respectively, 10 O.S. 1139(b), meaning, in effect, that our 17-year-old female dope

pusher would get *one* year in reform school (to 18), but the 15-year-old male dope possessor (actually her victim) *six* years (to 21)! One truly wonders just where in this age-sex madhouse Oklahoma might have tried to pigeonhole the young transexual, hermaphrodite, or congenitally nonsexed person (and indeed, at what age such unfortunates might even today be allowed to purchase their 3.2% beer).

But to re-emphasize the point of reviewing the Oklahoma's various and conflicting age-sex discriminations existing as late as 1971: (1) they were all generalized discriminations, broken down only as far as the broad categories of "civil" and criminal," but not otherwise directed towards any specific problem in particular, such as alcohol; (2) they had already existed in Oklahoma for decades, and, in the case of the civil discrimination, even before the very invention of the automobile; (3) the very contradiction between the civil and the criminal discriminations' order of the two sexes' attainment of "adulthood" belies any assertion that the Legislature even *could* have "found" that one sex "matures" earlier or more rapidly than the other; or (4) if it should be claimed that the Legislature *did* make such a "finding," it would inescapably have to appear that the Legislature had done so on the basis of evidence and data which were available to it long before 1971.

Such, anyway, was the status of Oklahoma's varying age-sex irrationalities as late as 1971, and of which the instant discrimination is about the last survivor. However, several juridical events occurred in later 1971 and early 1972 which shook this incoherent scheme to its foundations, namely, the Supreme Court's decision in *Reed* v. *Reed*, 404 U.S. 71 (November, 1971), the ratification of the Twenty-Sixth Amendment (July, 1971), and

most directly in point, the Tenth Circuit's decision in *Lamb* v. *Brown,* 456 F.2d 18 (March 16, 1972), which held Oklahoma's *criminal* age-sex discrimination, 10 O.S. 1971, Sec. 1101(a), supra, unconstitutional as violative of Equal Protection. Within a matter of about two weeks from the *Lamb* decision the Oklahoma Legislature had amended 10 O.S. 1971, Sec. 1101(a), supra, to make 18 the juvenile/adult cut-off age for both sexes for criminal purposes. House Bill 1705, Oklahoma Session Laws, Ch. 122, p. 143, April 4, 1972 (codified as the present 10 O.S. 1975 Supp., Sec. 1101(a)); and almost contemporaneously therewith the Legislature, which logically had also been deliberating the unquestioned unconstitutionality of Oklahoma's *civil* age-sex discrimination too, 15 O.S. 1971, Sec. 13, supra, adopted this same age of 18 for Oklahoma's civil majority (for both sexes) as well. Senate Bill 515, Oklahoma Session Laws, 1972, Ch. 221, pp. 332 et seq (April 7, 1972), now codified primarily as 15 O.S. 1975 Supp., Sec. 13.

However, due to Fundamentalist opposition to any legislative action combining the twin anathemas of "sex equality" with "beer," a specific exception in Senate Bill 515, supra, had to be made to preserve the 18/21 female/male discrimination for non-intoxicating liquors. This reservation is codified as 37 Okla.Stat., [1972, 1973, 1974, and] 1975 Supp., Sec. 245, which is precisely the statute squarely challenged in this instant Appeal.[2]

[2]A 1973 legislative attempt to equalize the age-sex reservation for beer also failed because of sectarian opposition. The principal preacher appearing to oppose age-sex equalization for beer testified that its retention was necessary to preserve young men from the "pool, beer, and girls" syndrome. See article, "Committee Votes to Adjust Legal Beer-Buying to Age 19," Tulsa Tribune, Tuesday, February 13, 1973, page one (although the exposure of young women to pool, beer and *men* did not appear to pose any theological problems.)

The discrimination obviously could not and cannot be defended on *these* bases, but the succession of the asserted and ostensible "legislative policies" that *were* claimed for it throughout this litigation is instructive. The original policy claimed was the "earlier female maturation" theory, see the Motion to Dismiss, App., 19. In the Appellees' (hereinafter "the State") brief to the Tenth Circuit, App., 22, the *sole* purpose advanced was asserted conclusorily to relate "to the health, safety, and welfare of all the citizens of Oklahoma." App., 23. Orally, however, the State urged the "must have been" argument (that *surely* there "must have been" *some* legitimate purpose for it, or *surely* the Legislature wouldn't have enacted it), although when pressed the State finally conceded that it simply "didn't know" its original purpose as the relevant historical materials had unfortunately been lost. The Answer urged a "greater potential for causing harm" since young males "consume 3.2% beer in a greater quantity than females," App., 32, although in the Pre-Trial Order the State claimed no more than "that the rationale for the sexual differentiation at bar *appears* to be that youthful males present a graver driving-while-intoxicated problem than do youthful females," App., 35 (emphasis added). Finally, at trial, the asserted justification was declared to be that young males "drive more, drink more and commit more alcohol-related offenses," App., 43, whereupon the State proceeded to put on a case which expanded the issues considerably beyond the driving-while-intoxicated limitation of the Pre-Trial Order, App., 52.

So, in the final analysis, we see that our lingering, moribund discrimination at bar was in its inception based precisely on the very "old notions" and "demonstrated facts of life" condemned in *Stanton* v. *Stanton*, 421 U.S. at 10, 14, and *Lamb* v. *Brown*, 456 F.2d at 20.

The discrimination never related directly to 3.2% beer at all until 1972, and it was retained with that specific orientation then only because of blatantly sectarian influences in the Legislature.

The Appellants' evidence consisted essentially of expert testimony which clearly established that there is absolutely *no* scientific (including psychiatric and sociological as well as physiological) justification for the discrimination in question; and the State relied exclusively on statistical data (published *after* the statute's 1972 reenactment) which it claims is relevant to justifying the instant age-*sex* discrimination as indicating that the "average" young male's sobriety rate may be as much as one or two percent less than the "average" young female's — but which data the State expressly confessed would be insufficient to justify a like age-*racial* discrimination, App., 97-98.

A detailed examination of the evidence upon which the District Court sustained the instant discrimination is offered in Proposition II to this Brief.

SUMMARY OF ARGUMENT

1. The instant age-sex discrimination is squarely *contra* to this Court's authoritative pronouncement thereon in *Stanton* v. *Stanton*, 421 U.S. 7, and to every other extant ruling on the subject, *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434, *Harrigfeld* v. *District Court* (1973) 95 Idaho 540, 511 P.2d 822, *Tang* v. *Ping* (N.D., 1973) 209 N.W. 2d 624, and *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18. See also *Frontiero* v. *Richardson* (1973) 411 U.S. 677, and *Reed* v. *Reed* (1971) 404 U.S. 71.

2. The sex-equality principle is in no sense "diluted" in the context of alcohol. *White* v. *Fleming* (7th

Cir., 1975) 522 F.2d 730; *Women's Liberation Union* v. *Israel* (1st Cir., 1975) 512 F.2d 106; *Sai'ler's Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529. *Goesaert* v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108, are presented for overruling.

3. The State's statistics prove nothing: they are mere arrest, not conviction, statistics; they do not reveal the actual number of respective young adults involved with alcohol; they do not appear to relate to the 3.2% alcohol in issue herein; their averages are unweighted and "stacked"; but even accepting them they "prove" nothing more than a *de minimis* difference in the male-female sobriety rates, suggesting "experimental error" or "random deviation" rather than any innate or organic difference.

4. The discrimination is wholly irrational with respect to its asserted purpose of restricting 3.2% alcohol to responsible young adults, in that it bars the soberest of the males therefrom, while allowing access thereto to the drunkennest of the females. In any event it accomplishes nothing more than requiring a male to purchase his beer in a two-step transaction, while allowing the female to buy hers in a one-step transaction.

5. Since the full equality between the sexes has become a positive rule of law, and is no longer a question of controvertible fact, it was erroneous for the District Court even to have entertained an attempt to "disprove" the said equality.

PROPOSITION I

THE DECISION BELOW IS SO TOTALLY CONTRARY TO ALL THE MODERN RULINGS ON THE SUBJECT, TO INCLUDE THE AUTHORITATIVE PRONOUNCEMENTS OF THIS HONORABLE

COURT, THAT IT SAFELY MAY AND SHOULD BE SIMPLY REVERSED, WITHOUT ANY NEED FOR A DETAILED AND EXHAUSTIVE REVIEW OF ITS BELABORED REASONING AND TENUOUS EVIDENCE.

All the modern authorities (or at least those still extant) fully support the Appellants' prayer for reversal. Most in point, of course, is this Honorable Court's pronouncement in *Stanton* v. *Stanton* (1975) 421 U.S. 7, that statutory schemes allowing the rights of adulthood to females at 18 while withholding same from males to 21 are in obvious contravention of Fourteenth Amendment Equal Protection. And *Stanton* v. *Stanton* was, of course, but a corollary of this Court's previous pronouncements that statutory discriminations based on the mere sex of the citizens are, with but rare exceptions, categorically unconstitutional. *Frontiero* v. *Richardson* (1973) 411 U.S. 677, *Reed* v. *Reed* (1971) 404 U.S. 71; see also *Weinberger* v. *Wiesenfeld* (1975) 420 U.S. 636, and compare *Taylor* v. *Louisiana* (1975) 419 U.S. 522.

So well established has this principle become in recent years, in fact, that it would be next to impossible even to cite, let alone discuss, the expanding plethora of *lower*-court decisions reciting the same obvious principles. Appellants will therefore content themselves with the mere enumeration of some of those voiding *age*-sex discriminations in particular, not only the "conventional" ones of 18 for women and 21 for men, *Harrigfeld* v. *District Court* (1973) 95 Idaho 540, 511 P.2d 822, *Tang* v. *Ping* (N.D., 1973) 209 N.W.2d 624, *Phelps* v. *Bing* (1974) 58 Ill.2d 32, 316 N.E.2d 775, but also several variations thereon, *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, *Patricia A.* v. *City of New York* (1972) 31 N.Y.2d 83, 286 N.E.2d 432, and *Ex Parte Matthews*

(Tex.Cr., 1973) 488 S.W.2d 434; see also *Radcliff* v. *Anderson* (10th Cir., 1975) 509 F.2d 1093 (en banc), cert. den. ___ U.S. ___, 44 L. Ed.2d 95, 95 S. Ct. 1667 (holding *Lamb* v. *Brown*, supra, retroactive).

One particular irony of the instant Appeal is that even Oklahoma *itself* has now held the pre-1972 version of the instant discrimination unconstitutional! *Bassett* v. *Bassett* (Okla. App., 1974) 521 P.2d 434, paraphrasing, at 436, almost *verbatim* the Supreme Court's epochal language in *Frontiero* v. *Richardson*, supra, 411 U.S. at 686-7 — and in a way that implies a *retroactive* voiding of Oklahoma's mostly-repealed 18/21 female/male discrimination. Thus, but for the fortuitous circumstance of their having elected the Federal forum below, the Appellants would by now have won their case a year or so ago!

Nor can the fact that the instant discrimination involves alcohol be a basis for "distinguishing" *Stanton* v. *Stanton* and *Bassett* v. *Bassett*. The modern cases have all reached the contrary conclusion, even in the State courts, *Sailer's Inn, Inc.* v. *Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529, *Peterson Tavern & Grill Owners' Assn.* v. *Borough of Hawthorne* (1970) 47 N.J. 180, 270 A.2d 628, *Commonwealth* v. *Burke* (Ky., 1972) 481 S.W.2d 52, cf. *Brown* v. *Foley* (1947) 158 Fla. 734, 29 So.2d 870, as well as in the Federal, *White* v. *Fleming* (7th Cir., 1975) 522 F.2d 730, affirming 374 F.Supp. 267 (E.D. Wisc., 1974), *Women's Liberation Union* v. *Israel* (1st Cir., 1975) 512 F.2d 106, affirming 379 F. Supp. 44 (D.R.I., 1974), *Daugherty* v. *Daley* (N. D. Ill., 1974) 370 F. Supp. 338 (three-judge court), and see also *McCrimmon* v. *Daley* (7th Cir., 1969) 418 F.2d 366, and *Seidenberg* v. *McSorley's Old Ale House* (SDNY, 1970) 317 F.Supp. 593. In fact, the District Court's tone was

so uncertain on this "alcohol" point that it is not entirely clear that *Stanton, Lamb, Bassett* and the others *were* distinguished on the Twenty-First Amendment basis. Significantly, the District Court avoided even the citation of such seemingly relevant decisions (at least from the *in*equality standpoint) as *Goesaert* v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108.

What the District Court *did* do, however, was to "distinguish" *Stanton* v. *Stanton, Lamb* v. *Brown* and similar cases on the asserted basis that those decisions were decided as abstract questions of pure law, whereas *this* case turned on the *facts* — that is, that while *Stanton, Lamb*, et al. had voided age-sex discriminations which depended on no more that *factually-unsupported* "old notions" and "facts of life," 421 U.S. at 10, 14, and 456 F.2d at 20, in *this* case the State officials actually "proved" the unfavored sex's "inferiority" with respect to the subject-matter of the discrimination (or "demonstrated a difference," or whatever we may want to call it). And just what *was* this male "inferiority" that was "proven" by the "factual evidence?" Essentially, the District Court "found" that whereas some 99+% of the *female* young adult population presently appears to be free from socially-objectionable involvement with alcohol, nevertheless, by "contrast," it is "only" 98% of the youthful *male* population that appears free therefrom; and after ten belabored, tortured pages of printed opinion text in the Federal Supplement, plus eight pages of a veritable telephone-book of statistical appendices, the District Court concluded that this *less than two percent* "proven" difference suffices to avoid the "pure law" decisions in *Stanton, Lamb,* etc., and to uphold the discrimination at bar on the basis of the "factual" stereotype of the *entirety* of the male sex as set and depicted

by the *offending two percent* thereof. Contra, *Stanley* v. *Illinois* (1972) 405 U.S. 645, *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, *Turner* v. *Dept. of Employment* (1975) _____U.S._____, 46 L.Ed. 2d 181, 96 S.Ct. 249, and see *Leary* v. *United States* (1969) 395 U.S. 6, 32-54.

The only historical example Appellants can offer that parallels the situation at bar is that of the *racial* equality decisions of the Ninteen-Fifties, chiefly *Brown* v. *Board of Education* (1954) 347 U.S. 483, and the "massive resistance" that followed, both in as well as out of the courts. For a long time the legal theory persisted in the South that *Brown* had been rendered on the basis of a "pure" or an "abstract" question of law (or mostly "law" with "inadequately-developed facts"). Therefore, the segregationist forces concentrated *inter alia* on an effort to "educate" the Federal Judiciary, and even, it was hoped, the Supreme Court itself, pursuant to an evidentiary demonstration to develop a "record" of "scientific facts," "expert testimony," and "social data and statistics," upon which a lower Federal court could make a segregation-favoring "finding of fact" that would either be "binding" on the Supreme Court under some rule relating to limitations on the appellate review of judically-found facts, or which might even convince the Court that its *Brown* v. *Board of Education* decision had been based on misconceptions of biological truth, and was therefore more dictum than holding.[2.5]

The most celebrated of these "factual" or "statistical" attempts to overcome (or "distinguish") *Brown* was

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[2.5] See *Challenge to the Court,* Social Scientists and the Defense of Segregation, 1954-1966, by I. A. Newby (Revised Edition, 1969, Louisiana State University Press, Baton Rouge, La.), esp. Ch. 8, "Efforts to Reverse the Brown Decision," pp. 185-212.

Stell v. *Savannah-Chatham County Board of Education* (S.D.Ga., 1963) 220 F.Supp. 667. An examination of that decision reveals an astonishingly close parallel to exactly how the District Court in this case has purported to avoid the unmistakable mandate of *Stanton* v. *Stanton* and related pronouncements. The short shrift given to *Stell*[3] should likewise dictate the outcome to this virtually identical case. The time has passed for avoiding on such bases the Supreme Court's most solemn pronouncements on fundamental guarantees of justice and equality in the racial, the sexual and related contexts. American men and women can no longer accept for their Equality guarantee anything less than "the pledge of the protection of equal laws," *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 369, and *certainly* not when the very "statistics" being relied on to "nullify" the Equal Protection Clause "prove" no more than the mere *percertage or two* differentiation which the instant "data" are said to disclose.

In fact, not only is the flat rejection of the "statistics" approach to "factually demonstrate" some group's "inferiority" (however expressed) now constitutionally mandated as a matter of law, such rejection is also

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[3]After a couple of mesne reversals, 318 F.2d 425 and 333 F.2d 55 (5th Cir., 1963-64), certiorari was denied, sub nom. *Roberts* v. *Stell*, 379 U.S. 933, 13 L.Ed.2d 344, 85 S.Ct. 322 (1964), despite the fervent urgings of a number of Southern attorneys general to accept *Stell* as a vehicle for reexamining *Brown*. An attempt to evade the appellate mandate, 255 F.Supp. 83, 255 F.Supp. 88 (S.D.Ga. 1966), was again reversed, 387 F.2d 486 (5th Cir., 1967), and so ended the chief effort to "relitigate" *Brown* from an "evidentiary" standpoint. A similar celebrated "evidentiary" attempt to "disprove" *Brown's* factual premises was buried in *Jackson Municipal Separate School District* v. *Evers* (5th Cir., 1966) 357 F.2d 653, and finally abandoned upon the denial of certiorari, 384 U.S. 961, twelve years after *Brown*.

necessary as a sound judicial pre-emptive measure to preserve our courts from evermore getting drawn into the "statistics" quagmire that has engulfed *this* litigation, as will be amply depicted in the Appellants' next and regrettably but unavoidably exhaustive Proposition.

PROPOSITION II

THE "STATISTICS" ADDUCED BY THE STATE ARE TOTALLY INCOMPETENT, UNDER ALL THEORIES OF MATHEMATICS AND LAW, TO RELIABLY TELL US ANYTHING ABOUT THE BEHAVIOUR PATTERNS OF ANY SEX OR AGE GROUP INVOLVED HEREIN, WITH RESPECT TO 3.2% ALCOHOL, OR ANYTHING ELSE.

Turning now to the Record, we see little or no dispute over the authenticity of the items adduced, the chief controversy being essentially as to whether any of these items are judicially cognizable, and if so which ones, and then, of course, the interpretation placed thereon.

The Appellants' evidence consisted chiefly of the expert testimony of a practicing psychiatrist holding a baccaleaureate in biology and chemistry as well as an M.D. degree, App. 73-74, and a professor of biological psychology at the Oklahoma University Medical School's Center for Alcohol-Related Studies, App., 112-113. They testified in essence that there is absolutely no scientific basis whatsoever for the discrimination in question, whether viewed from the standpoints of structural anatomy, biology, chemistry, endocrinology, neurology, medicine, psychology, psychiatry, sociology, or whatever, App., 85-86; that the effect of alcohol upon the human species is independent of the sex of the individual and

that there are absolutely no differences in particular between males and females 18 to 21 years of age with regard to either maturity, intelligence, or any related quality (with particular reference to alcohol). App., 75-86, 121. The only *caveats* expressed were that males, being more muscular, could for that reason be viewed in a general sense as more "active" than females, App., 92, 94-96; that females, being somewhat smaller and having somewhat lesser body fluid than males, could for that reason be viewed in a general sense as possibly more affectable by equivalent amounts of alcohol than males, App., 83, 85, 107, 114-121, 151-174; that young men might possibly have a greater socially-induced but not innate, App., 108-109, "interest" and "curiosity" in alcohol (as well as a number of other things) than young women, App., 93-94; that in later life (from about the fifth decade on) App., 106 there appear to be more males than females who seek clinical help for alcohol-related problems; but that in any event the actual proportions of either sex having any real problems with alcohol are extremely minimal, App., 100-101; and that the view of modern science is that there is no essential difference between the sexes with respect to the intake and handling of alcohol, App., 142-147, 150.

The State stipulated to the expert qualifications of the Appellants' expert witnesses, App., 75, 113-4, and offered no experts of its own. Except for the *caveats* above enumerated, the cross-examination of the expert witnesses elicited nothing to impeach their testimony-in-chief that the discrimination in issue is totally devoid of *any* basis in scientific fact.

So, the discrimination before us must stand, if at all, *solely* on the strength of the State's "statistics," and on the validity of the inferences which the District

Court drew therefrom; and, until sexual Equal Protection litigants can be authoritively assured of the *im*propriety of even the *offer* of "statistical" data to "prove" one sex's or the other's "inferiority," the instant Appellants will have no alternative but to urge a detailed scrutiny of *precisely* those "statistics" in this case.

Let us begin with State's Exhibit 1, summarized in relevant part in the appendix to the District Court's decision, 399 F.Supp. at 1314, and Jurisdictional Statement at A22. This was an extract of State-wide arrest data in Oklahoma in 1973, and is selected for the focal point of our study as the exhibit purporting to be the most in point, and also because the State's other exhibits were merely cumulative thereto.

The first reason why the District Court should have rejected the offer of this Exhibit outright, or certainly declined to be swayed thereby, is, as stated, that the Exhibit only discloses *arrest*, not *conviction*, data.[4] That is, since arrests are nothing more than glorified *accusations* or *allegations*, and since under American law an *individual* man (or woman) cannot be deemed guilty of anything until convicted thereof,[5] it is likewise impermissible for a court of law even to speculate, let alone conclude anything about some group's *collective* guilt from "data" merely reflecting a number of *arrests* for some offense or another within that group. What *could* have been relevant in this case might have been the *conviction* data for the sex(es) in question, assuming, of

[4] In fact, the State's Exhibit 2 even bears the legend, "Includes those released without having been formally charged." App., 60; 399 F.Supp. at 1315, J.S. at A23.

[5] See *Schware* v. *Board of Bar Examiners* (1957) 353 U.S. 232, 241-243.

course, that the convictions were duly shown to have been counselled, *Argersinger* v. *Hamlin* (1972) 407 U.S. 25, *Berry* v. *Cincinnati* (1973) 414 U.S. 29, for it is well-established law that the absence of counsel so vitiates "the very integrity of the fact-finding process," *Linkletter* v. *Walker* (1965) 381 U.S. 618, 639, that convictions not affirmatively shown to have been counselled, *Carnley* v. *Cochran* (1962) 369 U.S. 506, 516, cannot be tolerated as evidence of actual guilt, even for *collateral* purposes, see *Loper* v. *Beto* (1972) 405 U.S. 473, cf. *United States* v. *Tucker* (1972) 404 U.S. 443, and *Burgett* v. *Texas* (1967) 389 U.S. 109. Nor can the State's plaintive plea about the "administrative inconvenience" involved in sifting the actual convictions from its arrest tabulations, App., 46-47, 59, any longer pass Federal muster in Equal Protection litigation, *Reed* v. *Reed*, 404 U.S. at 76, *Stanley* v. *Illinois* 405 U.S. at 656, *Frontiero* v. *Richardson*, 411 U.S. at 688-691, and *Cleveland Board of Education* v. *LaFleur*, 414 U.S. at 646-648. Neither may a court of law take the raw arrest data and by some sort of a "judicial notice" approach simply guess at a magic percentage and suppose that the convictions are equal to the product of arrests times this "judicially-noticed" magic percentage, *Ohio Bell Telephone Co.* v. *Public Utilities Comm.* (1937) 301 U.S. 292.

In short, absent some tenuous type of "judicial notice," speculation, or outright guesswork, there was (and is) absolutely *no* basis in the instant Record (or more precisely, Exhibit 1) for any court to reach a quantitative conclusion as to the number of young males who *actually* committed some type of alcohol-related offense in Oklahoma in 1973. Nor any basis for determining the number of such females. Therefore, under *any* theory of the law of evidence or of judicial review,

it was absolutely erroneous for the District Court even to have admitted the State's Exhibit 1 into evidence, let alone to have *concluded* therefrom, even in part, that young males are more objectionable in their response to alcohol than young females.

Let us now move to the next fatal defect in these "statistics," again using Exhibit 1 as our base example. Even *assuming* that the male arrests reflected therein *were* convictions, we still can't tell whether they depict a greater male than female malinvolvement with alcohol for the simple reason there is absolutely *no* elucidation in this (or any other) Exhibit that the arrests even necessarily relate to *different individuals*. That is, adding up (from 399 F.Supp. at 1314, J.S. A22) the figures of 152+107+168=427 (18-21 year old male DWI's), and maybe adding thereto 340+321+305=966 (18-21 year old male Public Drunks), for a total of 1,393 male alcohol-related arrests in Oklahoma in 1973, does this latter "datum" mean that 1,393 young men got arrested *one* time apiece in 1973? Or that 139.3 young men got arrested *ten* times apiece? Or simply that *one* male on a perpetual drunk throughout 1973 got himself arrested therefor 1,393 times? Since the Exhibit doesn't enlighten us, we can either just take a wild guess, as apparently the District Court did, or, we can simply *admit* that we just don't know and can't determine the crucial datum of how many *individual* young males (or females) actually were arrested in 1973. Failing that, there is likewise no basis, other than by rank supposition, for concluding that there were necessarily even *more* individual males at all than individual females so arrested that year.

But passing over these threshold problems, the next pitfall in considering the materiality of these "data"

is that they do not even disclose whether the arrests in question derive from consumption of the precise beverage actually in issue herein, to wit: 3.2% beer (as opposed to the stronger liquors). That is, since Oklahoma's age-sex discrimination relates *only* to alcohol in concentrations of 3.2% or less, with *no* sexual discriminations regarding alcohol in higher concentrations,[5.5] the "factual" justification for such a scheme must necessarily be that there indeed do exist data which factually demonstrate (1) a *different* male-female response to alcohol in concentrations of 3.2% or less, and (2) an *identical* male-female response to alcohol in concentrations greater than 3.2%. So, the question is, is there anything in Exhibit 1 (or elsewhere herein) that indicates that the arrest data relied on derive exclusively (or even primarily) from the assertedly sexually-differentiable 3.2% beverages, and do *not* derive from the assertedly sexually-neutral stronger ones? No. So far as Exhibit 1 and the others disclose, *all* the arrests might just as easily derive from the "hard" liquor as from the 3.2% variety. In fact, the *legal* presumption *must* be that the arrests disclosed in the State's Exhibits 1 et al. *do* relate exclusively to "hard" liquor, for *only* those actually *intoxicate*, the lesser 3.2% variety having been found by both Legislature and People of Oklahoma to be *non*-intoxicating, 37 O.S. 1971, Sec. 163.1, and judicially determined to mean just exactly that in *State ex rel. Springer* v. *Bliss* (1947) 199 Okla. 198, 185 P.2d 220.[6] If, indeed, any of these arrests do derive from 3.2% beer, it is most probably the

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[5.5]For "intoxicating" liquors, i.e., those with more than 3.2% alcohol, the age is 21 for both sexes. Okla. Const., Art. XXVII, Sec. 5 (1959); 37 O.S. 1971, Sec. 537(a)(1).

[6]See fn. 1, supra, p. 7.

female arrests depicted that do so, since, due to the "natural and proper timidity and delicacy" of their sex, see *Bradwell* v. *Illinois* (1873) 16 Wall. 130, 141 (concurring opinion), it is the girls who would be the ones most likely to opt for the softer refreshment. [Nor does the reference to "beer" in the State's Exhibit 3 disturb the foregoing analysis, as that Exhibit likewise makes no indication whether the "beer" referred to therein is the 3.2% variety, or the stronger type.]

But *assuming* the initial difficulties, that arrests equal convictions, that each conviction was of a different male, and that all these 1,393 instances of demonstrated drunkenness derived exclusively from 3.2% beer, let us now move into an area where "statistics" can start proving truly insidious. Let us concentrate on the DWI statistics[7] of our Exhibit 1: 427 for the young men, versus only 14+2+8=24 for the young women. By ignoring all the previous difficulties, do we not then "show" that young males are clearly more dangerous in their DWI propensities than young women? Not necessarily. We can't be sure, because we don't know and haven't been told, how much actual driving young men do in comparison to young women. The seeming driving-while-*intoxicated* "imbalance" might very well be in direct proportion to the basic male-female *driving* imbalance. For example, if some statute allowed females to get hunting licenses at age 18, but prohibited males therefrom till 21, and the basis asserted therefor was a greater male "recklessness" surfacing in the gun-and-outdoors environment, certainly we would not be satisfied as to the factual existence of such a greater male "recklessness" merely by having our attention invited to data

[7]The Record herein is devoid of any indication whether Curtis Craig is possessed or either automobile or driver's license.

disclosing that an infinitely greater number of 18-21 year old male infantrymen suffered gunshot wounds in Vietnam than such 18-21 year old female infantrymen, since an equally logical explanation of such a statistical imbalance might be that there were just more young male infantrymen in Vietnam to get injured than like-aged female ones. Or, to take an example somewhat closer to the evidence herein, say, regarding the mere traffic injury data of the State's Exhibits 4 and 5 (399 F.Supp. 1320-1, J.S. A30-31), let us assume that men are involved in ten times as many accidents as women, but do *twenty* times as much driving as women. It might be technically accurate, then, to say that men cause ten times as many accidents as women (assuming "are involved in" means "cause"), but a more truthful analysis would obviously be that men as drivers are only *half* as reckless women.

So to get back to the seeming male-female DWI "imbalance" of Exhibit 1, does that "imbalance" show that the "average" young man is any greater a DWI risk than the young woman? The answer is, we simply can't tell from the Exhibit, since the underlying male-female *driving* (whether intoxicated or not) proportion is not stated. *Some* indication of this latter datum however, might be indirectly gleaned from the State's Exhibits 3 and 8. In Exhibit 3, the "Omec" study, which purports to be the tabulated result of a random roadside survey conducted in Oklahoma City in 1972 and 1973, as part of Table 3 thereof, 399 F.Supp. at 1316, J.S. A25, we see, under "Number of Participants," 243 + 238 = 481 males under 20 polled during 1972 and '73, respectively, as against only 70+68=138 like-aged young women in the same years. So, if this assertedly random roadside sampling is an indication of the sexual proportions of drivers actually on the road, it would appear that about 78% of the drivers under 20 are male. And in Exhibit 8,

the Federal study, App., 209-210, it appears that the percentage of female-driven vehicles drops from around 26% during daylight to a minuscule 6 percent at night. But this does not tell the whole story, for the *individual* (or "average") male driver appears to drive considerably more each year than the female, as tabulated in the just-cited Table 1 to the Omec study, 399 F.Supp. at 1316, J.S. A25, where we see, under "Average Miles Driven," 15,670 + 16,794 = 32,464 miles for males under 20 in 1972-3, as opposed to 10,471 + 10,456 = 20,927 miles for females under 20 in the same years, or a ratio of more than one and a half times as much driving per individual (or "average") male than female. And from the text of these studies, see paragraph 1, 399 F.Supp at 1315, J.S. A24, it would also appear that these data do *not* include commercial and industrial vehicles, which certainly constitute a significant percentage of the total, have greater annual mileages, and which are almost totally male-driven. Thus, while it is impossible to derive a precise figure from the State's vague data herein, it would appear fair to say that men do *at least* 90 per cent of the overall driving in this Country, or at any rate, so much as to render the *seeming* DWI "imbalance" of Exhibit 1 totally unreliable as a basis for sustaining a legal inference that the average male driver presents any especially graver DWI threat than the average female driver.

So much, then, for the slippery questions subsumed usually under the heading of "weighted" versus "unweighted" averages. Let us now move from the insidious to the truly treacherous, and take a cold, hard look at the basic integrity and even *honesty* of these statistics, and ask ourselves whether they were even *gathered* in a fair manner. Let us take the example of the *third*

category of the "statistics" in Exhibit 1 (and 2), which after due reflection the District Court deemed it more prudent *not* to reproduce in its opinion, namely, "Liquor Laws" (contained on Exhibits 1 and 2, and testified to at App., 52-53, 59-60). This "Liquor Laws" heading was a "catch-all," App., 53, 59, that included *everything* that was neither Public Drunk nor DWI, and specifically included the "working-in-a-beer-joint-by-a-minor" law, 37 O.S. 1971, Sec. 243, and assorted municipal "possession-of-beer-by-a-minor" ordinances — wherein "minors" are *defined* as males under 21 and females under 18, so that when females 18, 19 and 20 possessed beer or worked in bars, such occurrences did *not* end up in the tabulations as violations, but when males 18, 19 and 20 possessed beer or worked in bars, they *did*. App., 54-55, 60-61. *Naturally* there would be more "violations" under "Liquor Laws" for the young men than young women in such circumstances. And incredibly, the District Court below ruled this only went to the "weakening" of those lines of Exhibits 1 and 2, but not to their admissibility! App., 55. Appellants *strenuously* urge that the admission of such an exhibit was constitutional as well as legal error of the highest order, error so gross, Appellants urge again, as to cast the gravest doubt on the validity of *all* the District Court's rulings on and treatment of the State's exhibits. And, while the District Court later *did* omit any reference to these "Liquor Laws" items in its published opinion, the fact that though "weakened" they were still *admitted* constitutes *per* se a "reasonable possibility that the evidence complained of might have contributed" to the decision, *Fahy* v. *Connecticut* (1963) 375 U.S. 85, 86-7, cf. *Chapman* v. *California* (1967) 386 U.S. 18, 22-24.

Mathematically speaking, the error ("fallacy") of the "Liquor Laws" exhibits is known as "assuming that

which was to be proven." Thus, let us say, we are to prove that discriminating between males and females 18-21 for liquor is constitutional. To establish that (according to the District Court's reasoning), we need only prove factually that males and females 18-21 react differently to alcohol. The specific basis selected to prove this is to show that more males than females 18-21 commit alcohol-related offenses. Chosen to prove that are the two specific offenses of "possession of beer by a minor" and "working in a bar by a minor," and sure enough, we find *lots* more males 18-21 committing *these* two particular offenses than females 18-21. Therefore, Q.E.D., the statutory discrimination is valid? *Wrong.* The fallacy occurs when the specific offenses of "possession by a *minor*" and "working by a *minor*" are selected as representative of showing more 18-21 male violations of *general* liquor offenses than female, because the statistics reflecting the arrests for these "minor" offenses are "stacked" against the male 18-21 by those offenses' very *definition* of "minors," although it was the validity of *precisely* that definition of "minors" that was *thereafter* to be proven from the *initial* raw data. As stated, to "prove" the validity of a questioned statute by evidence *generated* (or "stacked") by the very *pre*-existence of the statute which in contemplation of the Constitution *could* not pre-exist without some contemporaneously pre-existing factual basis as well, is precisely to "prove" the statute's validity through the fruits of a pre-assumption of its validity. A racial analogy might be to enact a law denying some ethnic group meaningful educational opportunities, thereby blighting the group's children's intellectual and academic development, then compiling "statistics" showing the group's "deficit" in scholastic achievement, and then using that deficit as a basis for perpetuating the statute. One truly wonders

how far the State might have gotten in defending, with the District Court's rationale, Oklahoma's former *criminal* age-sex discrimination, 10 O.S. 1971, Sec. 1101(a), discussed supra, pp. 8-10, 11, and later voided in *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, if instead of urging "the demonstrated facts of life," the State would have adduced "statistics" showing that within the 16 and 17 year old age group, the boys were committing "crimes," but girls were only committing mere "acts of delinquency." Surely the Tenth Circuit would not have overruled an objection to such "data" as going merely to the "weakening" but not the *admissibility* thereof to show a greater teenaged male than female "crime" rate sufficient to retain the antecedent scheme of prosecuting boys as felons at 16, while continuing to process girls as mere delinquents till 18.

Let us next consider the "stacking" of the data herein by means a little more subtle or covert than by an express statutory mandate. Take, for example, the typical police attitude of "selectively" singling out the youthful male for disproportionately closer scrutiny and harsher enforcement of various laws. This very prejudice itself (in the original sense of "*praejudicium*") inevitably leads to a self-perpetuating vicious cycle based on "assuming that which was to be proven," as follows: the police [first] *assume* that young males as a class are "rowdy" and deserving therefor of a little extra surveillance and strictness — which is naturally interpreted by the youths as harrassment — which leads to confrontations — then arrests — which then provide the "statistics" which reinforce and reperpetuate the community's prejudice that young males are as a class "naturally" rowdy, and therefore require the imposition of specialized statutory penalties just on them. A racial

analogy might be a higher "vagrancy" arrest rate for Negroes than for Caucasians in some backwoods Mississippi crossroads; but rather than proving an innate Negro "shiftlessness," such arrest would far more likely just reflect a prejudice by the local police that since Negores are in fact *already* more "shiftless" than Caucasians, they therefore just need a little more arresting for it.

Or, to take an example of police prejudice reflected by the very statute at bar, let us briefly follow a couple comprised of a similarly-situated young man and young woman 18-21. The young man, thirsting for some refreshing 3.2% beer, invites his girlfriend out. He drives her to the Honk and Holler, where the girlfriend goes in and purchases the twain's beer. Because of social convention the young man then drives himself, girlfriend and beer to some pastoral locale, where the twain then consummates its bacchic rites, to include an injudicious overindulgence in the beer (on a non-discriminatory basis). But on returning his girlfriend home, the young man somehow attracts a patrolman's curiosity. The young man is routinely arrested, but the girl is simply told to get on home (or else is chivalrously taken there by the officer himself).

Actually *proving* prejudice in the "stacking" of law-enforcement data is, of course, an imprecise science. However, Oklahoma itself has openly acknowledged the existence of "selective" law enforcement in the State, see *Hayes* v. *Municipal Court* (Okla.Cr., 1971) 487 P.2d 974, 980, and no one would dispute the fact that the "public drunk" and related laws are now fulfilling the same "catch-all" and "selective enforcement" traps formerly afforded by the "vagrancy" and the "loitering" laws, *Papachristou* v. *Jacksonville* (1972) 405 U.S. 156,

168-171, *Hayes* v. *Municipal Court*, supra. Nor can there be any doubt as to Oklahoma's past discriminatory policies of singling out youthful males for selectively oppressive punishment: these policies were institutionalized for decades in 10 O.S. 1971, Sec. 1101(a), discussed supra, pp. 8-10, 11. Given these uncontroverted facts, then, how can *any* credence be placed on the statistical "differentiation" allegedly disclosed by the State's arrest data? They obviously reflect nothing more than local police practices in arresting young males more often than young females, for the same offenses, because of a self-perpetuating "sugar and spice" mythology.

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Before continuing with this general discussion of discriminatory statistics, let us quickly review the State's other exhibits. Exhibit 2 was the Oklahoma City version of the State-wide Exhibit 1, and need not be discussed in detail, other than to note that to some undetermined degree Exhibit 2's data are probably included in Exhibit 1's. Exhibit 3, the "Omec" study, was the roadside survey referred to supra, pp. 27-28. One initial defect of this Exhibit is its broad categories of persons "Less Than 20 Years." Since both sexes can get driver's licenses at 16 in Oklahoma, 47 O.S. 1971, Sec. 6-103(1), it is evident that this "under 20" category must include persons 16, 17, 18 and 19 years of age, while the discrimination at bar relates only to persons 18, 19 and 20. For anything disclosed in Exhibit 3, *all* of its "under 20" examinees could have been only 16 and 17. Its Table 1, 399 F.Supp. at 1316, J.S. A25, curiously reflects rather *similar* drinking habits for young males and females, and it reveals only *two* young persons, male or female, that in both years together had a blood-alcohol content high enough (.10 and .11 per cent) to be deemed "under the influence" by Oklahoma's standard (of .10%, 47 O.S.

1975 Supp., Sec. 756(c)), far too slight a sampling to extrapolate any meaningful inferences therefrom.

Exhibits 4 and 5 were traffic accident data for 1972 and 1973 in Oklahoma (published, respectively, the following years). A higher male than female casualty rate is disclosed for both drivers and passengers, but these data too are totally worthless for the purposes at bar since they do not disclose *alcohol* involvement vel non, nor even the basic *fault* in the accidents, which could very well have been due in most or all instances to the *other* drivers (e.g., the "typical woman driver," possibly a young one with several 3.2% beers too many?). Also inhering in these data is, again, the problem of not knowing the ratio of actual driving done by males as opposed to females, thereby leaving us wholly unable to evaluate whether or not the seeming male/female injuries "imbalance" actually implies any higher male propensity for "recklessness" and the like. Appellants are further astonished that the District Court deemed the higher male *passenger* injury rate worthy of consideration and citation in support of the discrimination at bar. 399 F.Supp. at 1309-10, J.S., A10-11. *That* statistic could very well derive from the men's having let their wives or girlfriends do the driving.

Exhibit 6, App., 182-184, contains FBI compilations of Nation-wide arrest data for 1972 and arrest trends over 1967-1972, for the categories of DWI, Liquor Laws, and Public Drunk, therefor constituting the Nationwide version of Exhibits 1 and 2 for Oklahoma and Oklahoma City, and therefore also subject to the same criticisms. Exhibit 7, App., 185-207, was a conglomeration of charts and tabulations for the DWI problem in Minnesota during 1971, offered as cumulative to the Oklahoma data, which it was, and likewise subject to essentially the same

objections. Exhibit 8, App., 208-227, was an HEW compilation of again similar data.

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Refocussing our attention back on Exhibit 1 now, let us at this point accept as valid the 1,393 arrests of males 18-21 versus 126 of females. This seeming 11-to-1 imbalance looks truly awesome, doesn't it? Well, once again, not necessarily. Accepting those figures as absolute truth, and then taking the data from the 1970 Census, App., 178, of 69,688 males 18-21 year old males in Oklahoma, and 68,507 such females, we see that the young male drunkenness percentage is about 2.00% (1,393 arrests ÷ 69,688 males 18-21), and the female figure 0.18% (126 arrests ÷ 68,507 females 18-21), or roughly the 11-to-1 ratio previously noted — but an alternative way of expressing these *identical* data is that the male *non*-drunkenness ratio is 98.00%, versus the female *non*-drunkenness ratio of 99.82%, which is another way of stating, and from the State's own evidence, that the male-female *sobriety* ratios differ by *less than two percent!* Indeed, with but a slight juggling of the State's figures, we see that for the offense of DWI, there were *more* young men *non*-DWI (69,688 − 427 DWI arrests = 69,261) than young women non-DWI (68,507 − 24 DWI arrests = 68,483), and likewise more *non*-Publicly Drunk young men (69,688 − 966 Public Drunk arrests = 68,722) than non-Publicly-Drunk young women (68,507 − 102 Public Drunk arrests = 68,405). The superiority of the male over the female for these two activities can be expressed as ratios, of 1.01 for DWI (69,261 non-DWI males ÷ 68,483 non-DWI females), and 1.005 for Public Drunk (68,722 non-Publicly-Drunk males ÷ 68,405 non-Publicly-Drunk females), which when converted to percentages reveal the young male to be 101% more reliable in the

DWI context than the female, and 100.5% more reliable regarding Public Drunkenness.

So, from *identical* raw figures we have, with minimal juggling and manipulation, "proven" three absolutely contradictory revelations about young males' and females' response(s) to alcohol: (1) that the male gets about 11 times drunker than the female; (2) that the sobriety rate differential between the sexes is so slight as to be negligible, and (3) that the male is over 100% more reliable with alcohol than the female! This very fact, that from one set of raw data we can readily "prove" that males are inferior to females, equal to females, and superior to females in their capacity to handle alcohol, *actually* proves something quite different, namely, that there is absolutely *nothing* that cannot *somehow* be "proven" with "statistics." Indeed, the very use of "statistics" as just demonstrated herein fully verifies the observation of Disraeli, that "There are three kinds of lies: lies, damned lies, and statistics."[8] And, if with "statistics" juggled about like those at bar the District Court could accept as "proven" the legal as well as the factual "inferiority" of the White, adult, male, Protestant Anglo-Saxon Appellant Curtis Craig herein, then *whose* Equality can ever be safe in this Country?!!

But to continue with the puzzle at bar: which of the three proffered jugglings of the basic data herein reflect the "truth"? Just to show *we* aren't cheating, let us confine our ensuing discussion to the 11-or-so-to-1 drunkenness ratio of Oklahoma's young adulthood (of 2.00% for the males and .18% for the females), and the less-than-two-percent-differential *non*-drunkenness ratios

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[8]Quoted on the frontispiece of an enlightening little monograph entitled *How to Lie with Statistics*, by Darrell Huff, W. W. Norton & Co., Inc., New York, 1954.

(of 98.00%, male, vs. 99.82%, female). With the one, there might appear to be some arguable difference in alcohol response; with the other, obviously not. [The racial analogy might be in a community of 100,00 Caucasians and 100,000 Negroes, wherein no Caucasians and ten Negroes are arrested for "vagrancy" in some given year. Which "statistic" tells us the truth about Negro "shiftlessness" — the datum that the Negro shiftlessness rate is "infinitely" (i.e., ten divided by zero) greater than the Caucasian? Or that the Black-White *non*-shiftlessness ratios are virtually *identical*?]

Appellants submit that choosing between "drunk vs. non-drunk," or "shiftless vs. non-shiftless" is an erroneous posing of the alternative(s). The proper question, when we are considering the "stereotyping" of a certain group so as to justify a *conclusive* inference, from so many of the members of the group suffering some deleterious propensity, that membership in the group is *per se* a valid basis for the collective denial of some entitlement enjoyed by others, is simply whether the stereotype advanced is *factually true*, which means: is in actual fact the deleterious propensity truly so universally common among all the members of a certain group as to render rational, under the relevant constitutional standard, a conclusive presumption that any single, randomly-selected individual member of the group must surely himself exhibit his group's common failing as well?[9]

Or, alternatively, is the deleterious propensity *not* so widespread among all the members of the group as to

[9] An alternative formulation stating the same thing would be whether the deleterious propensity is in fact so widespread throughout the group that the probability of any single, randomly-selected individual member of the group *not* displaying the propensity would be neglible.

render rational (in the constitutional sense) the conclusive presumption that any single, randomly-selected individual member of the group would necessarily exhibit the said propensity himself?

Therefore, the way to answer the question of choosing the "deleterious" versus the "non-deleterious" percentages as representative or characteristic is to determine which one of the two more fairly typifies the group *as a whole*, for it is the typification vel non of the group as a whole which is at issue in the stigmatization vel non of the group as a whole. Thus, if the deleterious quality can be shown by honest and competent statistics to be possessed by a *hundred* percent of the group, then the statutory categorization of the entire group would make some degree of common sense. As the percentage of group members actually suffering the deleterious propensity begins to drop below 100%, however, we start getting increasingly uneasy about the *en masse* stigmatization, for common sense tells us we are hurting an ever-expanding proportion of *innocent* individuals not *in fact* displaying the characteristic. At a point *no later than* when the percentage of group members displaying the characteristic in question drops below 50% the voice of conscience tells us that it is the *non*-deleterious percentage that must now dictate our view of the group, since as a factual matter it is the *non*-deleterious majority that now more truly represents the group as a whole, which "as a whole" characteristic is the sole legitimate justification for any *conclusive* categorization of a group.

So, in determining whether it is the seeming 11-to-1 male-female drunkenness inbalance, or the $\pm$ 1.82% *non*-drunkenness differential which more fairly reflects the alcohol response of Oklahoma's young adulthood, we

merely examine which datum more widely applies to the subject population was a whole. In this case, the 11-to-1 figure applies to .18% of the female and 2.00% of the male population 18-21, or about 1.09% of the total; whereas the $\pm$ 1.82% figure applies to 99.82% of the female and 98.00% of the male population, or about 98.91% of the total. Obviously, the $\pm$ 1.82% differential figure better reflects the situation as the whole, just as, to restrict our view to just the males, the 98% sobers represent their sex far more accurately than do the 2% drunks.

This approach of not condemning the multitude for the sins of the few is reflected in the previous "permanent irrebutable presumption of fact" decisions by this Honorable Court. For instance, even though many, perhaps "most" (i.e., more than 2%) of unwed fathers may be unfit as parents, to condemn all unwed fathers as unfit was held irrational from the factual viewpoint in *Stanley* v. *Illinois* (1972) 405 U.S. 645, 654. The percentage of Servicewomen *not* their families' breadwinners does not appear in the *Frontiero* v. *Richardson* decision, 411 U.S. 677 (1973), but again it was surely in excess of the instant 2%. Likewise with the proportion of women in their last trimester of pregnancy: not all are physically incapacitated, but clearly more than 2% are. *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, *Turner* v. *Dept. of Employment* (1975) ____ U.S. ____, 46 L.Ed.2d 181, 96 S.Ct. 249. Even where it was a percentage *differential* between male and female (rather than a portion out of one or the other) that was in issue, *Reed* v. *Reed* (1971) 404 U.S. 71 struck down a statute premised on the fact that women may generally be somewhat less educated or experienced than men to some unstated degree (but still more than $\pm$ 1.82%). Compare *Leary* v. *United States* (1969) 395 U.S. 6, Part II of which invalidated a statutory

presumption that all marijuana is imported in view of the "significant percentage," id., at 46, (surely > 2%) that is domestic.

Clearly, therefore, our "statistical" view of the male sex's ability to handle alcohol must be governed by its 98% sobriety rate; and our view of the male-female response differential must likewise be governed by the $\pm$ 1.82% datum.

* * *

The essential fallacy underlying this whole "statistical" approach, as a matter of fact as well as of law, lies in the illusion it creates of an "average" male or female. But human beings are not "continuous" or fungible; they are "quantized" as individuals. There is absolutely *no* basis for saying that any *one* male, or female, possesses a particular characteristic, or even possesses it to any set degree, simply because of some percentage of other individuals that may possess that quality — at least not until the percentage approaches 100%, or what is known as a "direct" or a "one-to-one" relationship.[10] This point can be exemplified by the very datums we have been discussing: they do *not* mean that any *individual* male, upon drinking an equal amount of alcohol with a female, is going to end up 1.82% less sober than the female, any more than that an individual male consuming an equal amount of alcohol will end up *eleven times* drunker than she! But misimpressions just like this often get formed when one talks of the "average" man or woman.[11]

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[10]For instance, it could be rational to presume (though certainly not *irrebutably*) that an individual man possesses a prostrate gland.

[11]The Galactic Ghoul's report that the "average" Earthling is "half male and half female" might help illustrate the point.

Ultimately, the entire "statistics" approach to discrimination becomes an argument by the proponents thereof that they are not really discriminating against the target race, sex, or whatever, as such, but against some deleterious characteristic said to be possessed by the target group, and that membership in that group is merely an "index" of the individual group-member's high probability of exhibiting that characteristic. Thus, in the *Stell* v. *Savannah-Chatham* litigation discussed ante, pp. 18-19, the segregationists made the ostensible claim that they were not segregating Negroes *qua* Negroes, but that "uneducability" was what actually was being segregated, with the Negroes' race as merely the (or an) "index" thereof. Id., 220 F.Supp. at 668, But, whenever a "less drastic alternative" to determining "uneducability" is proposed, see *Dunn* v. *Blumstein* (1972) 405 U.S. 330, 343, such as the administration of say, some impartial and racially-neutral examination to determine such "uneducability" of a particular, individual Negro before relegating him off the "slow" school track, the discriminators' response invariably degenerates into some sort of an "administrative inconvenience" plea, that the individualized test proposed would be "impractical" to give, and that the individual's ethnicity must be retained as the criterion because of the superior bureaucratic ease and efficiency in administering same. Of course, whenever we hear *that* argument, we *know* we're listening to double-talk.

So too with the situation at bar. The only conceivable defense to the instant discrimination at bar is that it does not discriminate against males as such, but rather it discriminates against alcoholic irresponsibility by certain members of Oklahoma's young adulthood, and merely uses the individual young adult's sex as the index

of that irresponsibility. But if that is the reason for the discrimination, would it not make far better sense, as well as better justice (say under the "less drastic alternative" doctrine) to administer some type of individualized, sexually-neutral testing to determine this alcoholic irresponsibility? And would not such an individualized program, in addition to lifting the unfair burden to the *responsible* 98% of the male sex, also enhance the asserted public policy by identifying the *ir*responsible *females* (who can presently purchase 3.2% beer in unrestricted amounts) and thereby drying up that hitherto-uncontrolled female irresponsibility? Well, yes, but, no, the State tells us, because (surprise!) the inconvenience in administering such a fair, just, sensible and basic-policy-furthering program might tend to be bothersome to the bureaucracy. 399 F.Supp. at 1313, J.S. A18-19.[12] The discrimination at bar therefore justifies itself in

[12] Such a sexually-neutral test might simply be for the young adult to present himself at any local law-enforcement agency having a "drunkometer" device, consuming within a fixed time a number of cans of 3.2% beverage corresponding to his body weight, and then testing on the breathalyzer his result blood-alcohol concentration. If it's under a certain level, he passes, and the agency certifies the results to the highway department (Department of Public Safety) for placing a "3.2% endorsement" on his driver's license. The Department would be the logical agency to handle such a program, as it already has the mechanism for administering large numbers of tests and license-issuances; it would also be the logical choice as driver's licenses are universally used as ID cards in Oklahoma, and also because the DWI danger is the chief asserted concern over the young drinking adult. A further advantage to doing this through the Department would be its means for handling revocations as well (as is presently done in the case of DWI's). This may not be the most accurate testing program possible, but as a "less drastic alternative" to the present discrimination it does not appear so intolerably "burdensome" as the State would have us believe.

the final analysis not by pretending to be the *accurate* way to predict the young adult's response to alcohol, but rather, just the *easy* way.

This revelation, taken with the State's frank concession that data equivalent to those adduced herein in the ethnic context would clearly not suffice to justify an age-*racial* discrimination like that at bar, App. 97-98,[13] adequately disposes of whatever else might remain of the "statistics" herein.

PROPOSITION III

THE DISCRIMINATION AT BAR ABSOLUTELY FAILS TO SATISFY EVEN THE MINIMAL CRITERIA OF THE TRADITIONAL TEST FOR MERE RATIONALITY.

Statistics aside, the instant discrimination clearly fails to satisfy even the most minimal of traditional Equal Protection tests, namely, that of the "rational relationship."

Under the first criterion of this test, it is not sufficient for validity that the statute discriminate between two groups that are "different." By definition, *any* two groups will somehow be different, and certainly males and females are "different." The legal question is not, therefore, mere "difference," but whether the two groups are "similarly circumstanced," see *Reed* v. *Reed* (1971) 404 U.S. 71, 76, and by that is meant whether they are similarly circumstanced with respect to the particular legislative policy asserted to be the basis for the discrimination.

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[13]This concession does not mean, of course, that data revealing ethnic (and religious) differentiations with respect to alcohol response do not exist. See App., 209.

While the *real* purpose for the discrimination at bar is theological, see ante, pp. 5-6, 11, let us posit what necessarily has to be its asserted purpose, namely, to deny access to 3.2% beer to those members of the 18-21 year old age bracket who behave irresponsibly with respect to alcohol. The means employed to achieve that end is our discrimination of allowing all females but no males in the said age bracket to purchase 3.2% beer. The factual basis underlying the choice of the sexual determiner as the mechanism for identifying the irresponsible members of the State's young adulthood is declared to be that 99+% of the female members thereof appear to display the desired responsibility with respect to alcohol, as opposed to "only" 98% of the males. *Assuming* all the foregoing to be true, let us now apply the "similarly circumstanced" test with respect to the following three pairings of young males and females.

1. Responsible males and responsible females. This category includes, as stated, 98% of the males and some 99% of the females. If the purpose for the discrimination is declared to be to bar irresponsible young adults from 3.2% beer, then the responsible males and the responsible females are clearly "similarly circumstanced" with respect to that objective, since, by definition, the individual members of *both* sexes in this category are responsible, whereas the discrimination is declared to be a means of getting at only the irresponsible young adults. Since, however, the discrimination treats *dis*similarly males and females who obviously are similarly circumstanced with respect to the asserted purpose for the discrimination, the discrimination is therefore "irrational" with respect to the males in this "responsible" category.

2. Irresponsible males and irresponsible females. This category comprises at best but a tiny minority of either sex, but the State maintains that these minuscule minor-

ities do exist. If, then, the purpose for the discrimination is again declared to be to bar irresponsible young adults from 3.2% beer, then the irresponsible males and the irresponsible females too are clearly "similarly circumstanced" with respect to that objective, since, by definition, both sexes in this category are irresponsible, and the discrimination is declared to be a means at getting at such irresponsible young adults. But again, however, the discrimination treats *dis*similarly males and females who obviously are similarly circumstanced with respect to the asserted purpose for the discrimination. The discrimination is for this category "irrational" also.

3. Responsible males and irresponsible females. This pairing presents the ultimate absurdity. If we indulge the fiction that the purpose of the statute is a roundabout way of saying *ir*responsible young adults should not have access to 3.2% beer, then the responsible males and irresponsible females herein are *not* "similarly situated" all right. But the statute in this circumstance yields a result just exactly the *opposite* to the statute's asserted purpose. It is difficult to conceive of a situation more clearly demonstrative of *any* statute's irrationality.

Next let us consider whether the statute is even *effective* in relationship to its intended (or asserted) purpose, for if the statute is not serving any useful function other than to insult Oklahoma's young manhood, its continued existence becomes irrational as a matter of law.

Assuming once again the asserted syllogism that the statute is not directed at males *qua* males, but at youthful alcoholic irresponsibility, and that legislating against males is just a "paraphrase" for legislating against this target irresponsibility, assuming all that, does this statutory scheme even so much as *pretend* to accomplish

its asserted goal? Absolutely not. The statutes, taken together (generally, 37 Okla.Stat., Ch. 2), do *not* prohibit the young man from *acquiring* or *possessing* 3.2% beer, or for that matter even *consuming* it. Indeed, by the very wording of Section 241 *parents* may furnish it to their young adult sons absolutely without restriction as to amount, time, or place.[14]

In fact, the *only* expressly stated *prohibition* in the statutes is limited solely to *sales* by *licensed vendors.* 37 O.S. 1971, Sec. 163.11(3), 217, 242, and 244. There is therefore absolutely *no* sanction imposed against, say, the young man's older brother, younger sister, or *anyone* else (than a licensed vendor) furnishing him his beer in whatever amounts he may desire. In the campus context of the instant case, all our instant young Appellant needs to legally consume 3.2% in unlimited quantities is his *girlfriend* (to run in and get it for him)![15]

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[14] Which might raise an Equal Protection problem in itself, between young adult men having "strict" parents versus those with "indulgent" parents; is there some theory for thinking that sons of "indulgent" parents are more trustworthy with 3.2% beer than sons of "strict" ones?

[15] This very fact has led to some satirical comment that the discrimination in question derives its continued vitality not so much from a Fundamentalist as from a *matriarchist* conspiracy: comprised of middle-aged mothers with an overabundance of comely daughters of the nubile ages who would have but scanty prospects for "dates" without the discrimination in question, but whose prospects therefor are being materially enhanced by their legal monopoly amongst 18-21 year olds for the purchase of beer, and because of which statutorily-vested monopoly the thirsty young men of the same age group have no choice but to invite said comely girls out, so that they (the girls) can *inter alia* purchase the very beer which will in turn further materially enhance their mating prospects.

Thus, the statutory discrimination at bar, while a humiliating annoyance, actually achieves nothing more than requiring the young man to accomplish his beer-buying in *two* steps (i.e., by using an intermediary), whereas the young woman is permitted to accomplish hers in *one* (herself). As the State's own data herein might tend to suggest, this insulting but insubstantial alternative "pathway" to be traversed by the young man in his quest for his 3.2% beer does not appear to be enjoying any conspicuous degree of success towards its asserted goal of cutting down on youthful alcoholism, male or female. It is in actual fact totally ineffective for any purpose, other than, of course, to stigmatize the young male with the State's "badge of inferiority," cf. *Jones* v. *Alfred H. Mayer Co.* (1968) 392 U.S. 409, 439, 431, and *Brown* v. *Board of Education* (1954) 347 U.S. 483, 494.

The discrimination is therefore irrational in all senses, the traditional included, as it bears absolutely no true relationship towards its *asserted* goal.

PROPOSITION IV

THE JURIDICAL EQUALITY OF MALE AND FEMALE AMERICAN CITIZENS IS A POSITIVE RULE OF LAW; THE DISTRICT COURT THEREFORE ERRED IN EVEN ENTERTAINING THE STATE'S OFFER TO "DISPROVE" THIS JURIDICAL EQUALITY AS THOUGH IT WERE A MERE QUESTION OF FACT SUBJECT TO AN "EVIDENTIARY" ATTACK.

In the final analysis, law in any enlightened society must reflect truth. But in this imperfect world or ours, truth can never hope to be anything better than what

is *perceived* as truth, and in a democracy, the judiciary itself will ultimately reflect society's perception of truth. Therefore, as society's perceptions of truth evolve, so do the judiciary's, and the law pronounced thereby.

Decisions by this Honorable Court illustrate this evolution of law through changing social perceptions of truth. Taking race as an example, in an age when society believed that the aborigines of Africa were members of an inferior race, this Court rendered *Dred Scott* v. *Sandford* (1856) 19 How. 393, 407. Half a century later, the begrudging attitude that Negroes were educable, but only minimally, was reflected in *Plessy* v. *Ferguson* (1896) 163 U.S. 537; but as the Twentieth Century progressed in America, Nation and Court alike began to hold grave doubts as to the outlook of previous generations, as per *Shelley* v. *Kraemer* (1948) 334 U.S. 1. Finally, enlightened perception of the essential equality-in-fact of all Humanity's races was acknowledged by this Court in *Brown* v. *Board of Education* (1954) 347 U.S. 483, and within a decade therefrom this ultimate broadening in society's viewpoint had been transformed from a perception of fact to a positive rule of law, such that "evidentiary" attempts to "disprove" same were no longer even maintainable in the Federal Courts, as exemplified by the eventual outcome to the *Stell* v. *Savannah-Chatham* litigation, discussed ante, pp. 18-19, cf. *Loving* v. *Virginia* (1967) 388 U.S. 1, 8.

So generally with the sexual equality question too. In an age when muscle was the measure of a man, this Honorable Court reflected what society *thought* it "knew" about the 'other' sex's "weaknesses," *Bradwell* v. *Illinois* (1873) 16 Wall 130, *Cronin* v. *Adams* (1904) 192 U.S. 108, and so long as even enlightened opinion retained that view, so did the Court, *Muller* v. *Oregon*

(1908) 208 U.S. 412. Then, with the ratification of the Nineteenth Amendment (itself reflecting a change in society's perception of factual truth) came a period of uncertainty and vacillation; contrast *Adkins* v. *Children's Hospital* (1923) 261 U.S. 525, 552-3, with the ever-embarrassing *Goesaert* v. *Cleary* (1948) 335 U.S. 464.

The present era was ushered in by *Reed* v. *Reed* (1971) 404 U.S. 71, which was cautious in tone, announced no really new constitutional doctrine, listened to much evidence, but still made no express proclamation of fact. Since *Reed*, of course, both this Court and virtually all lower ones have grappled with numerous sexual inequalities in a variety of circumstances. The experience of the past half-decade, both in and out of court, teaches us that the sexes can be and indeed are vastly more equal in their innate capabilities than had previously been supposed, and as we have become more familiar with this area and seen how various equalizing statutes and decisions have worked out quite well in actual practice without the chaos that might have been feared, our suspicions of fact as to the essential equality of the sexes have been reflected legally as a presumption that the "typical" sexual discrimination is unjustified.

A suspected equality-in-fact, but as yet one heretofore unstated judicially. Perhaps "suspected" is already obsolete; "believed" would be a more accurate contemporary term, a belief growing into a faith of what the actual truth will eventually be perceived to be. But until judicially acknowledged, that undeniable equality-in-fact in the sexual context is not the positive rule of law it is in the racial.

The instant case, however, can serve to accomplish that transformation from fact to law quite well, for several reasons. One is, that there is a competent record

herein, fully reciting the unanimous opinion of modern science as to the equality-in-fact between the sexes. Second, this case poses a discrimination squarely in terms of the "inferiority" of the unfavored sex, unlike some other cases (e.g., Lt. Frontiero's difficulty in getting the allowance she sought was not because of any sentiment that female officers are less capable in their jobs than males).

But this case calls forth for the transformation from fact to law for a third, more compelling reason: the utter failure of the *State* to establish a true or innate differential between the sexes. To understand the significance of this, let us recall, as stated, that this discrimination squarely erects a presumption of inferiority. But this case has also been pending for over three, long years, in the *Frontiero - Reed* "handwriting-on-the-wall" era, within a Circuit that had already voided Oklahoma's criminal age-sex discrimination (*Lamb* v. *Brown*, 456 F.2d 18); and the State *has* made the "evidentiary" effort as a desperate means for avoiding the mandate in *Stanton* no doubt because the subject-matter of the discrimination at bar, *beer*, is an item uniquely calculated to evoke any State Attorney General's most vigorous efforts!

Despite all the warnings, however, the lengthy pendency of this case, and the obvious motivation incumbent upon the State to save this discrimination if no other, the State, as we have seen, has done no more than to put on a case which it *confessed* would be insufficient to salvage an age-*racial* discrimination! App., 97-98. The *scientific* portion of the State's case is conspicuous by its absence.[16] Hence, the "statistics," which as the

[16]Ironically, the Plaintiffs' Exhibit 2, App., 151-177, which experimentally refutes any male "inferiority" regarding alcohol, was produced at the State's own Oklahoma University Medical School.

State itself surely realizes have wholly failed to indicate the critical inferiority.

Let's face facts. If after all this time, warning, effort and motivation the State's sexual supremacists have been unable to make a case for sexual *in*equality-in-fact, that can only mean that the case for it just doesn't exist — and never did. Since "scientific sexism" has now had its day in court herein, and has been found lacking, and since no other litigants have come to this Court in the years since *Reed* and *Frontiero* with any other such attempt, we should without further delay forthrightly accept our perceived truth as established, and close out this era just preceding with the proclamation that sex equality having now become a positive rule of law, further burdenings of the Courts with "evidence" to "prove" the contrary will no longer be necessary (i.e., *allowed).* Recall again the ultimate outcome of the *Stell* v. *Savannah-Chatham* litigation, discussed earlier herein. Surely any doubt as to the wisdom of elevating sex-equality from the factual to the juridical can be resolved upon consideration of the spectre of *repeated* "Propositions II" becoming standard features in sex-equality litigation coming before this Court. In fact, to make the long-overdue announcement of sexual equality-in-fact's having attained "positive-rule-of-law" status might considerably ease the Court's sex discrimination caseload in general. To quote the late Senator Dirksen, "It is an idea whose time has come."

* * *

While no rational man doubts the essential truthfulness of sexual equality-in-fact any more, neither can he be totally blind to the fact that there are organic differences between the sexes that have no analogy between the races. These may be fewer than previously

thought, and lesser in intensity, but they are evidently just enough to hinder sexual discriminations from becoming *totally* analogous to racial ones. Hence, sex is as yet still not quite as "suspect" as is race.

Counsel would be less than candid to urge that this case is the one to *force* resolution of "suspectness." This discrimination is clearly void under whatever test we might apply, suspect, rational, or *any*thing in between. But consider anyway: if race is suspect, and the only reason sex is not is because of the organic differences between the sexes that have no analogy between the races, then almost as by definition sexual discriminations between the sexes *not* founded on organic differences, such as the case at bar, *may* safely be termed suspect. Surely the time has come when sexual discriminations, such as ours, bearing *no* conceivable relationship to any differences between the sexes, and especially those framed squarely as "badges of inferiority," again like that at bar, should be decreed suspect with all available speed and minimum of deliberation. Indeed, not only would the ends of substantive justice be furthered thereby, such a suspect designation for *these* sexual discriminations would then leave the Courts considerably more time to ponder the truly troublesome ones. Certainly there is no need for relatively minor discriminations (to some extent like ours) dragging out for over three years up and down the ladder and around, when just one word would clear the air. Recall how the mandate in *Stanton* seems not to have gotten understood in this case! So pray, let us hear it.

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No Bicentennial Brief is complete without its mention of Equality, and perhaps that's where we should have started all this. It seems so simple that even a

school-boy can understand it. "The pledge of the protection *of equal laws.*" *Yick Wo* v. *Hopkins* (1886) 118 U.S. at 369. What's fair for one is fair for all. What's sauce for the gander, etc. Does Equality mean Equality, or does it mean double-talk for something else? Whatever the Appellant Craig has gotten in this case, he has *not* gotten Equality! So back, for a moment, to the Declaration of Independence's Equality, bypassing the Fourteenth Amendment's for a moment. The Equality of the Founding Fathers was not posited on any assumed equality-in-fact between all individual citizens; it was the expression of a political equality of men before the law they themselves would make. That some might be wise, or some foolish, or some sober and others drunken, was (and is) immaterial: all were to derive the same benefit from their new creature, the American government. To tie juridical equality to individual merit would render equality absolutely unworkable, and surely we will not maintain that the Second Continental Congress could have been blind to such a truth. So if American political and legal equality applies despite *individual* inequalities-in-fact, there is absolutely no basis for denying it because of *collective* inequalities-in-fact either. Yet that is precisely what happened below. Given the District Court's reasoning, and the fact that males *over* 21 seem to have had a slight alcohol problem also, would the District Court have been just as willing to uphold a statute barring males from access to 3.2% beer to age 31, 51, or 101? Or barring males from access to alcohol altogether, all based on some minute collective inferiority-in-fact? It would seem *Goesaert* has come full cycle! Let us therefore conclude our inquiry into the question of the collective inequality-in-fact in the sex discrimination context with the following authority:

". . . an individual female cannot constitutionally be given more severe sentencing treatment for the same offense than that by law accorded males as a class on the basis of any characteristics thought *or even proved* to be applicable to females generally, or as to most of them.

"I would therefore join in the decision of the court *even if the record here justified the factual conclusion* that most female offenders, or female offenders generally, are better subjects for rehabilitation than males, or less recidivist, or that a longer period of detention would promote the chances for rehabilitation of female offenders generally as opposed to male offenders generally."

Conford, J., concurring specially in *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78, at 85 (emphasis added).

Appellants respectfully urge that the foregoing concurrence be adopted by the Highest Court in the Land as the correct expression of the law applicable to the alleged situation at bar.

CONCLUSION

The 18/21 discrimination at bar would clearly be void were it age-*racial* (e.g., allowing Caucasians to purchase 3.2% beer at 18 but Negroes not till 21), or age-*religious* (Protestants at 18 and Catholics at 21), age-political (Republicans vs. Democrats), age-right-handed/lefthanded, or age-whatever, and certainly no less so simply because of some slight percentage differential that will *inevitably* exist between *any* two groups. The instant age-*sex* discrimination, obviously, is equally void.

WHEREFORE, premises considered, Appellants respectfully pray this Honorable Court to reverse the District Court's decision that 37 Okla.Stat 241, 245 is constitutional, and to remand this Cause to the District Court with instructions to issue appropriate writs of injunction to enjoin any and all further and future efforts and attempts at enforcing the prohibition contained therein against the sale of 3.2% alcoholic beverages to male persons 18 to 21 years of age.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frederick P. Gilbert, a member of the Bar of this Honorable Court and counsel of record for the Appellants herein, do hereby certify that I served three copies of this Brief of Appellants upon counsel for all Appellees herein, to wit: upon the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, by mailing the same to him at his office in the State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General, this _____ day of February, 1976, with first class postage thereon fully prepaid.

All Parties required to be served have been served.

FREDERICK P. GILBERT
Attorney for Appellants