TABLE OF CONTENTS

INDEX TO CITATIONS

MISCELLANEOUS

SUMMARY

1. The State's implied "right-vs.-privilege" approach is constitutionally untenable. *Bell* v. *Burson* (1971) 402 U.S. 535, 539. Nor does the Twenty-First Amendment "repeal" with respect to intoxicants other applicable constitutional safeguards. *California* v. *LaRue* (1972) 409 U.S. 109, 115, 120; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.* (1964) 377 U.S. 324, at 331-332. *Goesaert* v. *Cleary* (1948) 335 U.S. 464, and *Cronin* v. *Adams* (1904) 192 U.S. 108, are presented for retirement.

2. The State in effect concedes that its statistics do not prove its case. In any event, its statistics are not properly even before the Court. *Weinberger* v. *Wiesenfeld* (1975) 420 U.S. 636, n. 16 at 648.

3. The sexual stereotyping relied on by the State in this case is simply the latest edition in a series of similar sterotypes already rejected by this Court.

4. Common sense, no less than simple justice, requires that the "plain English" of fundamental guarantees must prevail over legalistic obfuscation.

In The
Supreme Court of the United States

October Term, 1976

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.

REPLY BRIEF OF APPELLANTS

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

The State's brief advances essentially two arguments in defense of its beleagered statute: first, that in the area of intoxicants the States are simply under no constitutional limitations at all in enacting arbitrary and irrational discriminations on the basis of sex (or race? or religion? class, etc.?); and second, even if there be some constitutional limitation on the States' power to enact such discriminations, the State has proven so enormous a difference between males and females with regard to 3.2% beer as to justify the discrimination at bar. There is no merit to either argument.

1. Alcohol

The State's primary argument, as contained in its Proposition I, implies a "logical" extension of the Twenty-First Amendment: namely, that under that Amendment access to intoxicants is not a "right" but only a "privilege," wherefor the State Legislature is entitled to be as arbitrary, as irrational and as capricious as it chooses since, by hypothesis, no "rights" are being denied to anyone.

The infirmity of this "right-versus-privilege" approach is revealed by the very antiquity of the Victorian precedents relied on by the State. (State's brief, pp. 6-9).[1] That spurious doctrine has long since ceased to be a controlling (or even relevant) consideration in the constitutional analysis of State action, not only under the Due Process Clause,[2] but even more so for Equal Protection purposes. The idea under this latter guarantee is that even if some entitlement under State policy (whether by State constitution, statute, case-law, administrative

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[1]See also the Edwardian *Cronin* v. *Adams* (1904) 192 U.S. 108.

But Antiquity was never unanimous in its toleration of sexual discrimination. Lord Coke himself noted of that fountainhead of English liberty, Chapter 29 of Magna Carta ("Nullus *homo* liber capiatur, vel imprisonetur . . . aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae . . ."), that ". . . *homo* doth extend to both sexes, men and women . . ," and wherefor women ". . . are also comprehended within this Chapter." 2 Co.Inst. 45. [*Homo* is the Latin for "man" in the sense of "human being," *vir* being the term for "man" as "male adult."]

[2]See *Bell* v. *Burson* (1971) 402 U.S. 535, 539, and *Schware* v. *Board of Bar Examiners* (1957) 353 U.S. 232, 239; see also Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv.L.Rev. 1437 (1968).

regulation, de facto policy, or whatever) *be* less than Federally mandated, and hence not, perhaps, a "right" inherently or in the abstract, nevertheless, *once* the State confers that entitlement, however much as a matter of mere discretion, upon some favored segment of its population, *then* the Equal Protection Clause commands the benefit's simultaneous extension to all other similarly-situated segments of the State's population.

For example, the Federal Constitution does not actually require a State to provide a system of public education for anyone (e.g., Blacks and/or Whites). Nevertheless, said this Court in *Brown* v. *Board of Education* (1954) 347 U.S. 483,

> "Such an opportunity, ***where the state has undertaken to provide it,*** is a right which must be made available to all on equal terms."

Id., at 493 (emphasis added). Likewise, also, with the purely legislative (i.e., discretionary or gratuitous) election to provide a procedural mechanism for reviewing jury verdicts:

> "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

Griffin v. *Illinois* (1956) 351 U.S. 12, at 18.

Of particular relevance to this Equal Protection "right-versus-privilege" contention is the matter of the age at which a young person is deemed to become an "adult," either in general, or for some particular purpose. No court has held that the enjoyment of adulthood

at some specific age is an inherent (or "Due Process") "right" of the young person. Instead, the defining of "adulthood" is generally a matter left to the broad discretion of the Legislature.[3] But once the Legislature determines, whether as a matter of mere discretionary grace or otherwise, to confer the benefits of majority upon some favored segment of its young people, the Equal Protection Clause then requires (and accomplishes) the conferring of those benefits upon all other similarly-situated young persons in the State. This right to the *equal* enjoyment of adulthood, while maybe not "inherent" in the Due Process sense and only "derivative" from some State "privilege" enjoyed by the favored, is still a *Federal* right of constitutional proportions because of the Equal Protection Clause. See, explaining this very point, *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973), footnote 7 at 465 F.2d, p. 52.

And most relevant for our purposes in the instant Appeal is the *unanimous* rule of law (but for the lower decision herein) that "similarly-situated" young people, for the purpose of the equal enjoyment of adulthood at the same age, *does* mean, inter alia, "irrespective of the *sex*" of the young people! *Stanton* v. *Stanton* (1975) 421 U.S. 7, *Bassett* v. *Bassett* (Okla.App., 1974) 521 P.2d 434, *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, and the remaining host of "age-sex" pronouncements collected at pp. 15-16 of the Appellants' main brief herein.

However, it is not only the State's conclusion from its implied "right-vs.-privilege" theory that is fallacious; the State's primary assumption, that the Twenty-First Amendment somehow reduces the enjoyment of 3.2%

[3]One exception might now be with respect to voting. U.S. Const., Amend. XXVI (1971).

beer from a "right" to a [mere] "privilege," is itself no less erroneous.

Let us but examine the Amendment itself. First of all, its limitation to "intoxicating liquors" reduces the Amendment to limited relevance in this case since the 3.2% beverage herein is *non*-intoxicating. 37 Okla.Stat. 163.1 (see fn. 1, and surrounding text, pp. 6-7, to Appellants' brief-in-chief).

Second, the Amendment's authorization to the States is to regulate the "transportation or importation" of intoxicants, which scarcely can be "construed" to mean the discrimination in the personal, private consumption thereof on such un-American bases as race, creed, color, sex, etc. Obviously, the "transportation or importation" language was inserted in the Amendment to insure, once the Eighteenth Amendment was repealed, that the situation engendered by *Leisy* v. *Hardin* (1890) 135 U.S. 100 did not by inadvertance reoccur.

In other words, what the Seventy-Second Congress which drafted the Twenty-First Amendment (in 1933) intended was (1) to repeal the Eighteenth Amendment, and (2) to allow the States broad powers of *economic* regulation over intoxicants without the traditional Commerce Clause, and even Fourteenth Amendment pitfalls that had impeded legislative attempts at economic regulation in the past, as per *Leisy* v. *Hardin,* supra (Commerce Clause), and, e.g., *Lochner* v. *New York* (1905) 198 U.S. 45 (Fourteenth Amendment). Therefore, until these antecedent "interstate commerce" and "substantive due process" precedents were overruled in the late 'Thirties and afterwards, it was necessary, in those very early days of the Twenty-First Amendment, to take the attitude that neither these older economic-regulation precedents, nor, by extension, their underlying Com-

merce Clause and Fourteenth Amendment provisions, applied to State liquor legislation, and *that* is the background, and the explanation, for the out-of-context *dictum* quoted by the State from the *economic* case of *State Board* v. *Young's Market Co.* (1936) 299 U.S. 59, 64 ("A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth").

However, as the years rolled on and the "old" economic-regulation decisions *did* get overruled, so also waned the necessity for judicially "protecting" the States in their legislation over intoxicants from the rest of the Constitution:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."

Hostetter v. Idlewild Bon Voyage Liquor Corp. (1964) 377 U.S. 324, at 331-332. Likewise too with the theory that the Twenty-First Amendment had "repealed" not only the Eighteenth Amendment, but the Fourteenth as well:

> "These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking."

> "This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution."

California v. *LaRue* (1972) 409 U.S. 109, at 115 and 120. See also *Moose Lodge No. 107* v. *Irvis* (1972) 407 U.S. 163, at 178-179, and *Hornsby* v. *Allen* (5th Cir., 1964) 326 F.2d 605, 609-610.

Thus, there is *nothing*, either in the wording of the Twenty-First Amendment, its legislative history, or its subsequent judicial development, to suggest that under the guise of their broad economic (and to a lesser extent their "morals") powers over alcohol the States are at liberty to discriminate regarding the sale thereof on the basis of such historically invidious criteria as race, creed, color, etc. In fact, the State has even *confessed* it may not enact an age-*racial* discrimination regarding 3.2% beer like that at bar (e.g., Caucasians at 18 and Negroes at 21)! Appendix, pp. 97-98. Upon what, then, does the State claim blanket justification to erect the instant *sexual* discrimination? On nothing — except for the inevitable refrain from that blight upon our American jurisprudence, *Goesaert* v. *Cleary* (1948) 335 U.S. 464, which the District Court most astutely avoided even *citing*, and which has been tactfully ignored (or "distinguished") by *every* modern case on the alcohol/sex-equality subject as an embarrassment which everyone would rather forget. See, e.g., the alcohol/sex-equality cases collected at pp. 16-17 of the Appellants' brief-in-chief. Attention is also respectfully invited to the excellent article, "The Effect of the Twenty-First Amendment on

State Authority to Control Intoxicating Liquors," 75 Col.L.Rev. 1578, 1595-1610 (1975).

The State tacitly perceives that the Twenty-First Amendment does not afford the State a *blanket* authority to discriminate on the basis of sex with regard to intoxicants. Therefore, the State retreats to its second argument, being that of its "proof" of the "rationality" of this specific sexual discrimination in particular on the basis of the "evidence" adduced. This second argument, however, is in substance a Fourteenth, not a Twenty-First Amendment, contention.

2. *Sex and Statistics*

The State proffers its "evidentiary" argument in what appears to be the hopeful stance of a more-or-less "traditional" Fourteenth Amendment analysis: that a statutory discrimination ("classification") is presumptively valid, and "rationality" is inferred for it if any conceivably legitimate purpose for the law can be imagined, and if there exists some minimal scintilla of evidentiary or judicially-noticeable nexus between the means employed and the goal imagined. To establish that tenuous linkage between the legislative end (reducing vehicular accidents) and the statutory means (banning 3.2% beer sales to 18-21 year old males), the State relies almost exclusively upon Oklahoma Department of Public Safety statistics.[4] Earlier, the State had conceded that these

[4]Compare the recent experience-based report of the New Jersey State Police Information Director. When New Jersey lowered its legal drinking age from 21 to 18 in 1973, opponents warned that drunken driving by young persons would create a major hazard. It hasn't. New York Times, May 6, 1976, p. 41, col. 1. See also New York Times, December 31, 1973, p. 38, col. 1 (New Jersey accident figures for the 18-21 age group for the year immediately prior to and the year immediately following lowering the drinking age from 21 to 18 "just about balance out").

statistics are not "specifically on point." Appendix, p. 67. This time around, the State acknowledges that the data may not even be on point at all, as the State first considers it merely "unfortunate" that the Department's statistics "do not show the levels of intoxication, *if any*, of those killed or injured" (State's brief at 22, emphasis added), and then candidly recognizes that, so far as its statistics show, accidents involving young people may be wholly the result of "inexperience in driving" (State's brief, at 22). Surely this "proof," as the State presumes to denominate it, establishes no difference whatever in 3.2%-beer-related behavior between 18-21 year old males and females. See State's brief, at 32. Indeed, the sole clear and direct evidence of alcohol's influence on young people was introduced by the Appellants. That evidence, ironically a University of Oklahoma Medical Center study, demonstrates that "females were physically no more able, and in some instances were less able, than males to handle comparable alcohol dosages." 399 F.Supp. at 1311, Juris. Stmnt. at A-13.

The State also calls attention to *Papachristou* v. *Jacksonville* (1972) 405 U.S. 156, 168-169 and fn. 15, as an "excellent example of use by this Court of arrest data." State's brief, at 30. The very excellence of that example highlights the infirmity of the State's heavy reliance on mere arrests in this case. Far from using that data, as does the State here, to argue "where there's smoke, there's fire," this Court in *Papachristou* pointed to the nationwide incidence of arrests for "vagrancy" and "suspicion" as evidencing not the validity of those arrests, but rather the invalidity of the underlying laws and ordinances which had been thus employed in so invidious a manner "that even-handed administration of the law is not possible." Id., 405 U.S. at 171. Cf. Appellants' main brief, at 31-33.

Nor does the State attend to the context in which statistics were used in ***Kahn*** v. ***Shevin*** (1974) 416 U.S. 351. Compare the State's brief at 24 with Note, 89 Harv.L.Rev. 95 (1975). Despite the Court's sensitivity to the insidious impact of sex-based classifications, it indicated in ***Kahn*** that, in certain limited instances, such classifications might survive constitutional review if in design and operation they genuinely remedy past discrimination. However, the Court has made it plain that a classification publicly billed as "compensatory" will not escape close analysis should it in fact reflect and reinforce familiar stereotypes. See ***Weinberger*** v. ***Wisesnfeld*** (1975) 420 U.S. 636, and Note, supra, 89 Harv.L.Rev. at 99-103. In any event, in hypothesizing justifications for Oklahoma's 3.2% beer law, the State does not seriously suggest that the instant discrimination (or monopoly) in purchasing such beer affords any "rectificatory" or "cushioning" benefit to girls presently 18-21 years of age for the effects of economic or social discrimination suffered by now much older women in decades past (as by, e.g., letting today's young women drown in 3.2% beer their sorrows over their mothers' and grandmothers' plight?).

But the chief difficulty in the State's frantic hypothesizing about for some plausible purpose for its statute — at least from the standpoint of simple historical veracity — lies in the tellingly *retroactive* nature of its statistical justificationing: namely, the inescapably fictitious imputation to the 1890 and 1972 Legislatures of familiarity with data totally non-existent when the discrimination was originally enacted, and then re-enacted. See, e.g., Appendix, at 46-47. Indeed, what the State has *actually* proven in this case is that the *now*-claimed justification is clearly the one thing that the Oklahoma

Legislature absolutely could not have considered when it passed the instant discrimination! Thus, the obvious artificiality of the State's finally-selected hypothesizing renders it fatally counter to the rule of *Weinberger* v. *Wiesenfeld*, supra, fn. 16, 420 U.S. at 648.

3. *The Familiar Clichés*

The generalization which the State indulges and which its proof is alleged to support — that boys "drive more, drink more, and commit more alcohol-related offenses" (Appendix, at 43) — should have a familiar ring to this Court. Such generalizations have been rehearsed time and again. "Wives are typically dependent," urged the Solicitor General in *Frontiero* v. *Richardson* (1973) 411 U.S. 677; "men typically have more business experience than women," claimed the husband in *Reed* v. *Reed* (1971) 404 U.S. 71; "most unwed fathers do not want custody of their children," insisted the State Attorney General in *Stanley* v. *Illinois* (1972) 405 U.S. 645; "girls tend to marry earlier," asserted the father in *Stanton* v. *Stanton* (1975) 421 U.S. 7. Lower courts are daily treated to arguments of similar quality. See, e.g., *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78, 82 ("females are more rehabilitation-prone than males"). These arguments "coincide with the role-typing society has long imposed." *Stanton* v. *Stanton*, supra, 421 U.S. at 15. For that very reason some appearance of empirical support can no doubt be presented for any of the propositions recited. But laws designed for a land of male and female stereotypes are inherently invidious. They have all the earmarks of self-fulfilling prophecy. Toleration for such laws under the Equal Protection principle impedes society's adjustment to conditions of latter Twentieth-Century life in which functional justification no longer exists for "the role-typing . . . long imposed." See generally Chafe, The American Woman

(1972); Janeway, Man's World, Woman's Place (1971); Maccoby & Jacklin, Psychology of Sex Differences (1974).

The problem presented by this case is clearly "ripe for action." Cf. State's brief at 31. Oklahoma's 18-21 year old men, whose 3.2% beer may be purchased for them by their like-aged female counterparts, should not be branded "reckless" or "dangerous" by the Legislature. Nor should 18-21 year old girls be stamped "settled" or "quiescent." The 'distinction' peculiar to Oklahoma is "worse than obsolete; it is laughable." Reasoned application of the Equal Protection principle should put it swiftly "out of its misery." See brief of the Amicus Curiae, at 21, fn. 23.

4. Conclusion: Common Justice or Commoner Sense?

It is difficult to say whether it is one's sense of logic, or sense of justice, that is more offended by the situation at bar. For example, the statistics herein, and their transparent manipulation to "prove" the State's case, are ludicrous enough from the mathematical or the coldly intellectual standpoint. But is not our sense of justice equally alarmed at the spectre that the judicial ratification of such statistical maneuverings might be merely the forerunner of similar "justifications" for far more serious, even sinister, erosions of Equal Protection? Likewise, it is also difficult to say whether it is one's common sense, or common justice, that is the more offended over the incongruity of recognizing sufficient maturity in the young man at 18 so as to allow him to vote, conduct business, sire and support a family, and serve in the Armed Forces, but then to dismiss him as too "immature" or "irresponsible" to enjoy the same diluted beverage that his mere dependent may freely purchase in unlimited amounts.

Consider but one of the foregoing activities normally associated with full manhood, that of service in the

Armed Forces. Not only is the American male at 18 deemed man enough to die for Democracy, 10 U.S.C. 505(a), but, to aid him in implementing the Pattonian definition of military patriotism as consisting not so much in dying for one's country as in making the other guy die for his, our young man of 18 is entrusted by the Nation with the possession and employment of modern weaponry of simply unimaginable lethality. Indeed, not only does the Nation trust the American male at 18 with the mere possession and use of such weaponry, to some extent we, the People, even trust him with the command authority to deploy and execute that awesome power of life and death over vast numbers of human beings, for at 18 the young man is also eligible for *commissioning,* not only in the Federal service, 10 U.S.C. 591(b) and Army Regulation 135-100, para. 1-4, but even in Oklahoma's own militia as well, 44 Okla.Stat. 43! Thus, is it our common sense or our common justice that is more outraged when we tell our young patriot that we trust him with the dread powers of life and death in his defense of our Democracy, but that we do not trust him with a cold can of *non*-intoxicating 3.2% beer? That itself is illogic, injustice and injury enough; but then to tell him that in addition his combat-*disqualified* girlfriend[5] *can* be trusted with such beer is nothing less than *insult!*[6]

[5]The U.S. Army prohibits the assignment of female soldiers and officers ("WACs") to combat, or to combat-type units and positions. Army Regulation 10-6, paras. 2-45, 2-46; Army Regulation 611-201, Ch. IV; Army Pamphlet 140-4, para. 3.

[6]One can well imagine, under the present law, the spectacle outside the PX package store at Fort Sill, Oklahoma, of a 20-year-old First Lieutenant of artillery — maybe even a battery commander, with all the power and responsibility that that entails — idling his jeep while his 18-year-old WAC clerk-typist PFC runs in to purchase her CO's six-pack for him! Cf. Appellants' main brief, pp. 45-47.

It is well to the credit of their maturity and their faith in the American way that the young men involved in this case, rather than agitating, demonstrating, or simply defying the instant law, have instead "passed the hat" to obtain the advice and guidance of counsel, and then to institute the present orderly, sober petition to the relevant organs of government for a proper redress of grievances. What they seek, of course, is not so much the beer itself. Rather, they seek nothing more — and nothing less — than that just plain ol' American-as-apple-pie, plain-English *Equality* which but for the present statute and the decision below the commonest of citizens would have assumed was safely beyond any and all conceivable dispute, debate, discussion, or even doubt.

The Appellants therefore pray this Honorable Court to vindicate that most fundamental of their rights as American citizens — Equal Justice Under Law.

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, by first class mail fully prepaid, three copies of this Reply Brief of Appellants on counsel for all Appellees herein, to wit: on the Hon. Larry Derryberry, Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attn: Mr. James Gray, Assistant Attorney General; and on counsel for the Amicus Curiae herein, to wit: on Professor Ruth Bader Ginsburg, Columbia University School of Law, 435 West 116th Street, New York, New York; all this 28 day of September, 1976.

All Parties required to be served have been served.

Fred Gilbert

FREDERICK P. GILBERT
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