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A State's Juvenile Statute Which Contains an Age-Sex Disparity Must Be Supported by a Purpose Which Is Reasonable Rather Than Arbitrary and Invidious.

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sured against the contract and yet precludes declaratory relief until occurrence of the contingency against which damages under quantum meruit recovery is *not* to be measured. By overruling *Tracy*,[46] *Fracasse* seems to contradict itself in allowing quantum meruit recovery but implying that such recovery is to be measured against the contract. *Fracasse* is also silent on recovery of damages on breach of contract, and the question of whether recovery is to be limited solely to quantum meruit is not answered. Lastly, by citing *Brown* as authority in refusing declaratory relief, the court has also raised the possibility that quantum meruit will exceed the value of the contract, a finding which would not be wholly contradictory to the holding.[47] Its controversial and seemingly contradictory holdings indeed make *Fracasse v. Brent* a landmark case limiting an attorney's recovery for breach of contract to quantum meruit only after the occurrence of the contingency in the breached contract.

Sean P. Martinez

EQUAL PROTECTION—YOUTHFUL OFFENDERS—A STATE'S JUVENILE STATUTE WHICH CONTAINS AN AGE-SEX DISPARITY MUST BE SUPPORTED BY A PURPOSE WHICH IS REASONABLE RATHER THAN ARBITRARY AND INVIDIOUS. *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972).

This case arose out of the conduct of Danny Ray Lamb, then seventeen years of age, who was tried and convicted in Oklahoma as an adult for the crime of burglary of an automobile, a felony in Oklahoma. Lamb's conviction became final upon the Oklahoma Supreme Court's review.[1] It was Lamb's contention both in the state courts and in his subsequent federal habeas corpus application that he should have been proceeded against as a juvenile. He argued that the pertinent Oklahoma juvenile statute[2] was unconstitutional in that it allowed females under eighteen the benefits of being proceeded against in juvenile court, while denying those benefits to males over sixteen.

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[46] *Id.* at 16.
[47] *Id.* at 16.

[1] Lamb v. State, 475 P.2d 829, 830 (Okla. 1970): "As we view the situation the statute exemplifies the legislative judgment of the Oklahoma State Legislature, premised upon the demonstrated facts of life; and we refuse to interfere with that judgment."

[2] OKLA. STAT. ANN. art. 10, § 1101(a) (Supp. 1971).
(a) The term "delinquent child" means
(1.) Any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this Act; or
(2.) A child who has habitually violated traffic laws or ordinances.

The petitioner's habeas corpus application was granted in the United States Court of Appeals for the Tenth Circuit. HELD—*Writ Granted.* A statute allowing females under the age of eighteen benefits of juvenile court proceedings while limiting the same benefits to males under the age of sixteen, violates the equal protection clause of the United States Constitution.

The initial obstacle facing the courts when confronted with a state statute alleged to violate the equal protection clause, might properly be deemed a presumption that a state legislature acts in the interest of the general public's welfare and should be given wide discretion. In addition it should be given the benefit of every conceivable circumstance which might suffice to characterize the classification of persons under a statute as reasonable rather than arbitrary and invidious.[3] This presumption and the related problem of whether a state can constitutionally enact criminal statutes that classify individuals for certain treatment was dealt with at length in *U.S. ex rel. Robinson v. York.*[4] There, a Connecticut statute[5] was involved which singled out adult women convicted of misdemeanors for imposition of punishment by imprisonment for longer terms than could be imposed on men. The court pointed out that "wide discretion is allowed the state's legislature to establish reasonable classifications in promoting the safety and welfare of those within its jurisdiction."[6]

This deference to legislative classifications can also extend to classifications based on sex. The United States Supreme Court has upheld such classifications in an Oregon statute forbidding women to work more than ten hours per day,[7] a Michigan rule preventing most females from becoming licensed bartenders,[8] and a Florida statute excluding women from jury duty unless they affirmatively volunteer to serve.[9] However, in each of these cases the classification rested on "some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . . [and was not] . . . made arbitrarily and without any such basis."[10] Although *Lamb* was the first successful argument resulting in an unconstitutional holding of a juvenile statute based on sex, there have been other attacks on state

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3 McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed.2d 222 (1964).

4 281 F. Supp. 8 (D. Conn. 1968).

5 CONN. GEN. STAT. ANN. § 17-360 (1949), *as amended* CONN. GEN. STAT. ANN. § 18-65 (Supp. 1972-73).

6 United States *ex rel.* Robinson v. York, 281 F. Supp. 8, 13 (D. Conn. 1968).

7 Muller v. Oregon, 208 U.S. 412, 28 S. Ct. 324, 52 L. Ed. 551 (1908).

8 Goesart v. Cleary, 335 U.S. 464, 69 S. Ct. 198, 93 L. Ed. 163 (1948). MICH. STAT. ANN. § 18.990 (1) (1971).

9 Hoyt v. Florida, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed.2d 118 (1961). FLA. STAT. ANN. § 40.01(1) (1959), *as amended* FLA. STAT. ANN. § 40.01(1) (Supp. 1972-73).

10 Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155, 17 S. Ct. 255, 257, 41 L. Ed. 666, 668 (1897); *cf.* Baxstrom v. Herold, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed.2d 620 (1966).

statutes alleging violations of the equal protection clause of the fourteenth amendment. In disposing of the equal protection contention, one court recognized that women's rights have increased steadily in the past century and that the time might very well be ripe to repeal the statute in question.

> [T]he constitutionality of that statute does not turn on whether the state legislature would be well advised to amend it, or even upon the existence of some discrimination. It turns upon whether the classification based upon sex constitutes such an invidious discrimination that it is patently arbitrary and utterly lacking in any rational justification.[11]

The state of Maryland has recently produced some litigation that sheds light on the areas of denial of equal protection and due process as applied to juvenile statutes. In one such case the plaintiffs, residents of Baltimore, were both sixteen years old at the time of their offense of drunkenness and disorderly conduct, and due to the local law of Baltimore both were prosecuted as adults in the criminal courts.[12] The applicable state law of Maryland at the time of the offenses excepted Baltimore from the general statewide juvenile age limit of eighteen years.[13] Juvenile court jurisdiction over sixteen and seventeen year olds therefore existed in all areas of Maryland except Baltimore. The plaintiffs in this suit contended that the hiatus created by excepting Baltimore from the general state law was a denial of the equal protection and due process clauses of the fourteenth amendment to the United States Constitution. The court agreed and declared that portion of the Maryland statute and the Baltimore law unconstitutional insofar as it exempted Baltimore from the uniform juvenile age requirement of eighteen years.[14]

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11 *E.g.*, Leighton v. Goodman, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970). A male prospective juror attacked a New York statute which grants exemption from jury duty to women. The court held the statute to be within the bounds of legislative discretion and thus no violation of equal protection.

12 Long v. Robinson, 436 F.2d 1116 (4th Cir. 1970). The suit was brought seeking to enjoin the enforcement of, and to have declared invalid, the provisions of the Public Local Laws of Baltimore setting a juvenile age limit of sixteen years, and a Maryland statute (MD. ANN. CODE art. 26 § 71 [1966]) excepting Baltimore from the general statewide juvenile age limit of eighteen (18) years. *See* 316 F. Supp. 22 (D. Md. 1970) for a full development of the facts.

13 MD. ANN. CODE art. 26, § 71 (1966).

14 Long v. Robinson, 316 F. Supp. 22, 27 (D. Md.), *aff'd*, 436 F.2d 1116 (4th Cir. 1970).

> Hence, while it must be assumed that there was reasonable ground for the legislature in 1902 to fix the age of juveniles at under sixteen, and while there may be good grounds for fixing the juvenile age at sixteen statewide, the evidence, intrinsic and extrinsic, is that there is no justification for a differentiation in age between the City and the Counties. Briefly, the proposed repeals of the exemption of Baltimore City from the otherwise State-wide provision are recognition that the *original justification, if there were one,* either no longer existed, or was ceasing, and that a phaseout was proposed. Further, the testimony on behalf of plaintiffs and defendants clearly showed there was *no real distinction* between sixteen and seventeen year old residents of

In *Lamb* the United States Court of Appeals for the Tenth Circuit accepted jurisdiction[15] of Lamb's habeas corpus application and held that even though state legislatures are to be given wide discretion in the establishment of reasonable classifications effected by their criminal statutes, there was nothing presented by Oklahoma to show a logical constitutional justification for the discrimination inherent in the Oklahoma statute. In the *Lamb* holding, the court justified its decision on several grounds while refusing to say that Oklahoma's statute was unconstitutional per se. The court left open the possibility that a similar statute or even the particular statute in question could be valid if adequate reasons were shown to characterize the disparity in classification of minor males and females as reasonable rather than arbitrary and invidious. The state's answer that the "demonstrated facts of life" were sufficient to justify the classification disparity failed the "reasonableness" test and the statute was thus unconstitutional as a violation of the equal protection clause. The *Lamb* decision thus seems to reject the idea that males sixteen or seventeen years old have a "fundamental right" to be treated on an equal footing with females of like age in the same circumstances.[16] By requiring that a legislature show only a classification that is "reasonable rather than arbitrary and invidious,"[17] the state is relieved of the burden of showing a "compelling state interest"[18] as the basis for the classification disparity.

Baltimore City and the Counties. The place of arrest, rather than the inherent or acquired characteristics of the offenders is purely fortuitous, but determinative. (Emphasis added.)

Accord, Greene v. State, 273 A.2d 830, 832 (Md. Ct. Spec. App. 1971), in which the court cited REPORT OF THE LEGISLATIVE COUNCIL SPECIAL COMMITTEE ON JUVENILE COURTS, JAN. 1966 (Report of the Rasin Committee):

If a differentiation of individuals is necessary, as it surely is, it should be made on the basis of facts about the individual, and not on the basis of assumption about a huge and diverse group such as the youthful population of a city. Whatever differentiation is needed may be made by a court, either by the device of waiver to the adult criminal court, or by the nature of the disposition following an adjudication of delinquency. The patent unfairness and unjustified inequality which results from the present disparity undermines a basic value of our legal system.

[15] The court took jurisdiction of the case on the theory that there was no federal interference with state court prosecutions because the Oklahoma Supreme Court had previously ruled on the same federal constitutional issues. "A state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of federal constitutional rights." Baker v. Carr, 369 U.S. 186, 236, 82 S. Ct. 691, 720, 7 L. Ed.2d 663, 692 (1962).

[16] Shapiro v. Thompson, 394 U.S. 618, 638, 89 S. Ct. 1322, 1333, 22 L. Ed.2d 600, 617 (1968):

Traditionally, the test for whether a classification satisfies equal protection is whether there is a reasonable basis for it. However, where a "fundamental right" is involved, the constitutionality of the classification must be judged by the stricter standard of whether it promotes a "compelling state interest."

See, e.g., Napper v. Wyman, 305 F. Supp. 429, 431 (S.D.N.Y. 1969); *accord,* Morales v. Schmidt, 340 F. Supp. 544 (E.D. Wis. 1972).

[17] McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed.2d 222 (1964).

[18] Shapiro v. Thompson, 394 U.S. 618, 638, 89 S. Ct. 1322, 1333, 22 L. Ed.2d 600, 617 (1968).

The subsequent litigation of *Lamb* has produced some interesting, if not striking, results in the Oklahoma criminal courts. In the first case to follow *Lamb*, the Oklahoma Court of Criminal Appeals in *Schaffer v. Green*[19] faced the problem of what statute, if any, governs male youthful offenders sixteen and seventeen years old. The court found such a statute, the pertinent parts of which provided:

> All persons are capable of committing crimes, except those belonging to the following classes: 1. Children under the age of seven years. 2. Children over the age of seven years, but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, they knew its wrongfulness.[20]

The court expressed dismay over the possible harshness of such a law, but emphasized that there is no constitutional authority for the court to exercise legislative authority when constitutional legislation exists.[21] The real import of the *Schaffer* decision, as far as it concerns the sixteen or seventeen year old male in Oklahoma, was summed up by Judge Simms:

> The opinion of this court . . . erases any question concerning the validity of any conviction had upon a male child of the age of sixteen (16) or seventeen (17) without a juvenile hearing prior to the opinion of the Court of Appeals, 10th Circuit, and as well, any conviction had on males sixteen or seventeen between the 10th Circuit opinion and the date of this opinion.[22]

By taking the position that the majority adopted in *Schaffer*, the

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19 496 P.2d 375, 377 (Okla. Crim. App. 1972). Since the statutory provisions defining the term "delinquent child" in 10 OKLA. STAT. ANN. § 1101(a) were found to be unconstitutional, the court first resorted to 10 OKLA. STAT. ANN. § 1101 A. The court found this statute to be unconstitutional also for essentially the same reasons that were set forth in *Lamb*, as the statute presented the identical discrimination. In recognizing the dilemma of having no modern juvenile statute to apply, the court noted that:

> [T]he responsible leglislative leadership of both the House and the Senate of the Oklahoma State Legislature have galvanized into action, during the closing days of the session, to fill the legislative void created by Lamb v. Brown, but during the interim, it becomes the Court's responsibility to determine if any prior legislative enactment is still effective defining the age and classifications of persons responsible for criminal acts as adults, and those not responsible, to fill the Constitutional requirements of the 14th Amendment of the Federal Constitution; notwithstanding how primitive and punitive the terms may be.

20 OKLA. STAT. ANN. art. 21, § 152 (1951).

21 Schaffer v. Green, 496 P.2d 375 (Okla. Crim. App. 1972). The Oklahoma Legislature has passed an emergency measure to alleviate this situation. ENROLLED HOUSE BILL NO. 1705, *amending* 10 OKLA. STAT. ANN. § 1101 (1971). This bill became law at 4 p.m. April 4, 1972 and defined the term "child" to mean any person under the age of eighteen years.

22 *Id.* at 381 (concurring opinion). In a dissenting opinion, Judge Brett took the position that the amended OKLA. STAT. ANN. art. 10, § 1101 A (Supp. 1970) need not be declared unconstitutional. His conclusion was that the court should hold "that males under eighteen years of age who are charged with the commission of a crime, are—like females—juveniles . . . ." *Id.* at 382.

Oklahoma court effectively precluded any collateral attacks based on *Lamb's* holding by males sixteen or seventeen years old either on a conviction or in mandamus proceeding seeking to be classified as juveniles under jurisdiction of the juvenile courts.[23]

The net effect of the holdings in *Lamb* and *Schaffer* was to leave the Oklahoma Children's Code devoid of any age definition of "child" or "delinquent child" or any legally established age at which a person must have a hearing in the juvenile division of the district court before being certified for adult proceedings.[24] By resorting to Okla. Stat. Ann. art. 10 § 1112(b) (1958),[25] the court concluded that the test to be applied in ascertaining whether a child should remain under the provisions of the Children's Code or be certified to be proceeded against as an adult is the test of knowing right from wrong and accountability. Buttressing this test, reliance was also placed on Okla. Stat. Ann. art. 21, § 152 (1966),[26] "the only other remaining nondiscriminatory, and therefore constitutional, statute within the entire Code pertaining to the age of presumed accountability."[27] This is the statute applied in *Schaffer* making possible criminal responsibility for children over the age of seven where knowledge of the wrongfulness of the act can be shown. Thus, Oklahoma juveniles who committed "criminal acts" between March 16, 1972 (date of *Lamb* decision striking down Oklahoma's juvenile provisions as violating equal protection clause) and 4 p.m. April 4, 1972 (effective date of subsequent legislative enactment that makes eighteen the maximum age for both sexes) are in a unique but unenviable position.[28] Those over the age of seven who knew the wrong-

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[23] Schaffer v. Green, 496 P.2d 375 (Okla. Crim. App. 1972); *see* Williams v. State, 471 S.W.2d 64 (Tex. Crim. App. 1971).

[24] Freshour v. Turner, 496 P.2d 389, 391 (Okla. Crim. App. 1972).

[25] The statute provides:

> If a child is charged with delinquency as a result of an offense which would be a crime if committed by an adult, the court, after full investigation and a preliminary hearing, may in its discretion continue the juvenile proceeding, or *it may certify such child capable of knowing right from wrong, and to be held accountable for his acts,* for proper criminal proceedings to any other division of the court which would have trial jurisdiction of such offense if committed by an adult. (Emphasis added.)

[26] All persons are capable of committing crimes, except those belonging to the following classes:

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> (2.) Children over the age of seven but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, *they know its wrongfulness.* (Emphasis added.)

[27] Freshour v. Turner, 496 P.2d 389, 393 (Okla. Crim. App. 1972). Dissenting, Judge Brett renewed his contention in *Schaffer* that

> [T]his Court not only had the power to administer the law, but also has the duty to say what the law is when a "legislative void" occurs, as referred to by the majority decision in *Schaffer.* . . . I refuse to believe that appellate judges are expected to sit equipped with "blinders" as an obstruction to sight or discernment, as were army mules. Nor are we so bound by the doctrine of "stare decisis" that we must close our eyes to the realities of life as they presently exist. *Id.* at 393.

[28] *Id.*

fulness of their acts will be tried as adults, and there is a presumption of such knowledge for all such youthful offenders over the age of fourteen.

To determine what effect *Lamb* and *Schaffer* will have on the general field of juvenile law requires a determination of which statutes are subject to attack on the grounds set forth in the Oklahoma cases. The juvenile laws of Texas will be considered in detail as representative of general juvenile law.

> The basic juvenile delinquency law is article 2338-1 of the Revised Civil Statutes. The Sixtieth Legislature made basic changes in this law by making the purpose of the Law more specific, by making the definitions of "child" and "delinquent" more concise, by making the jurisdiction of the Juvenile Court more specific, by adopting a system whereby children over fifteen may be transferred to a Criminal District Court for Crminal proceedings . . . and by changing Article 30 of the Penal Code to conform to these changes.[29]

The only portions of the Texas juvenile law that are likely to be affected by the Oklahoma decisions are Tex. Rev. Civ. Stat. Ann. art. 2338-1, § 3 (1967) and Tex. Penal Code Ann. art. 30, § 2 (1967). Article 2338-1, § 3, provides in pertinent part:

> In this act, unless the context requires a different definition . . . the word "child" means any female person over the age of ten years and under the age of *eighteen* years and any male person over the age of ten years and under the age of *seventeen* years. The term "delinquent child" means any child who; (a) Violates any penal law of this state of the grade of felony; or . . . . (Emphasis added.)

Article 30 of the Penal Code was amended in 1967 to conform to article 2338-1, § 3, of the Texas Revised Civil Statutes and provides:

> No male under *seventeen* years of age and no female under *eighteen* years of age may be convicted of an offense except perjury unless the juvenile court waives jurisdiction and certifies the person for criminal proceedings. (Emphasis added.)

From these two statutes, the assumption seems to be warranted that the same reasoning that applied in *Lamb* would also be applicable in Texas.

It should be reemphasized that the *Lamb* holding was a result of the state's inability to show any logical constitutional justification or purpose for the disparity in the age classification between sixteen-eighteen year old males and sixteen-eighteen year old females. In addition, *Lamb* requires only that the legislative enactment be "reasonable rather than

[29] Billings, *The New Juvenile Delinquent Law*, 31 TEX. B.J. 203 (1968).

arbitrary and invidious" in its classification of individuals subject to its statute. Had the *Lamb* court found that a sixteen or seventeen year old male's right to be classified the same as a female of like age was a "fundamental right," then presumably the burden would have been cast on the state to show a "compelling state interest" in order to justify its classification disparity.[30]

It seems apparent that the considered judgment and intent of the Texas Legislature was to retain the age-sex disparity in establishing at what age a minor should remain within the jurisdiction of the juvenile court, notwithstanding any waiver exercised by the juvenile court officers. Evidencing this conclusion is the fact that not only was the objectionable portion of the juvenile act retained in the 1967 amendment, but it was also included in article 30 of the Penal Code. Research of the subject reveals no clue as to the legislative purpose for the classification disparity, with the exception of broad statements not pertaining specifically to age-sex disparity.[31] Thus, it will be interesting to note what arguments will be advanced by the state to support the classification disparity as "reasonable rather than arbitrary and invidious."

The inequities created by such an age-sex disparity are harsh indeed,[32] but there appears to be an easy solution to this whole area in the form of a constitutional amendment. In fact such an amendment is at present ready for submission to the people of Texas in November 1972, which could quite possibly render the present Texas juvenile statute unconstitutional. This proposed amendment provides: "Equality under the law shall not be denied or abridged because of *sex*, race, color, creed,

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[30] Shapiro v. Thompson, 394 U.S. 618, 638, 89 S. Ct. 1322, 1333, 22 L. Ed.2d 600, 619 (1968).

[31] *In re* Dendy, 175 S.W.2d 297, 303, 304 (Tex. Civ. App.—Amarillo 1943), *aff'd sub. nom.*, Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

> The basic conception of this delinquency Act is not one of custodial protection of the child for its own good, and incidentally for the protection of society.
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> It is our opinion that it contemplates a co-operative attempt on the part of all officers of the court in seeing that the best interests of the child is protected in such cases and that he is given every possible advantage for proper training for good citizenship.

[32] For example, consider what might happen under the present statutes if a 17 year old girl sells marihuana to her 17 year old male companion. The boy is subsequently caught and convicted of possession but confesses that the girl sold him the contraband. Under present statutes, the boy is subject to the jurisdiction of the district courts and faces a possible penalty of from two years to life for a first offense. TEX. PENAL CODE ANN. art. 725b § 23(a) (Supp. 1972). The girl being under 18 at least has a good chance of remaining within the jurisdiction of the juvenile court. TEX. REV. CIV. STAT. ANN. art. 2338-1 § 6(b) (1971):

> If a child is charged with violation of a penal law of the grade of felony and was fifteen years of age or older at the time of the commission of the alleged offense, the juvenile court may, within a reasonable time after the alleged offense, waive jurisdiction by following the requirements set out in subsections (c) through (j) of this section, and transfer the child to the appropriate district court or criminal district court for criminal proceedings.