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Case Comment

The Doctrine of Necessaries & Wisconsin's Attempt to Modify the Doctrine to Conform to the Equal Protection Clause

Marshfield Clinic provided medical services to Theodore Discher for several months prior to his death. The clinic received no payment for its services. The clinic filed suit against the deceased's widow, Agnes Discher, for payments for medical services rendered to the deceased. The clinic did not allege an attempt to collect from the deceased's estate, nor did it show the estate to be without assets. The trial court dismissed Marshfield Clinic's complaint on the ground that no cause of action existed to hold a wife liable for the necessary medical expenses of her husband.¹ The Wisconsin Supreme Court remanded the case to the trial court to determine whether the clinic made attempts to collect from the deceased's estate, or whether any collection attempts would have been futile.² The court held that the state's common law doctrine of necessities as modified in *Sharpe Furniture, Inc. v. Buckstaff*³ and *Estate of Stromsted*⁴ remained a valid gender classification under the equal protection clause of the United States Constitution.⁵ *Marshfield Clinic v. Discher*, 105 Wis. 2d 506, 314 N.W. 2d 326 (1982).

The common law doctrine of necessities allows a wife to purchase "necessary" items using her husband's credit without his permission if he has not fulfilled his duty of support.⁶

In *Sharpe Furniture, Inc.* and *Estate of Stromsted*, two cases decided together in 1980, the Wisconsin Supreme Court modified the common law rule to hold wives liable for necessities along with

1. *Marshfield Clinic v. Discher*, 105 Wis. 2d 506, 507, 314 N.W. 2d 326, 327 (1982) [hereinafter cited as *Marshfield Clinic*]. The trial court did not know of the decisions in *Sharpe Furniture, Inc. v. Buckstaff*, 99 Wis. 2d 114, 299 N.W.2d 219 (1980) [hereinafter cited as *Sharpe*], and *Estate of Stromsted*, 99 Wis. 2d 136, 299 N.W.2d 227 (1980) [hereinafter cited as *Stromsted*], which altered the common law doctrine by imposing liability on wives for necessities.

2. *Marshfield Clinic*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982).

3. *Sharpe*, 99 Wis. 2d 114, 299 N.W.2d 219 (1980).

4. *Stromsted*, 99 Wis. 2d 136, 299 N.W.2d 227 (1980).

5. U.S. Const. amend. XIV.

6. *Warner & Ryan v. Heiden*, 28 Wis. 517, 519 (1871) [hereinafter cited as *Warner & Ryan*]. See text accompanying notes 13-20.

husbands. The court, however, placed primary liability on husbands; wives were secondarily liable.⁷ In *Marshfield Clinic*, the court reiterated its holding in *Sharpe* that modern society still needs the necessities doctrine.⁸ The court acknowledged, however, that the United States Supreme Court's equal protection rulings regarding gender classifications demanded that husbands not bear sole liability for necessities. The court considered several possible modifications to the common law doctrine, but found the best alternative to be the gender based rule of the *Sharpe* and *Stromsted* cases.⁹ The court decided that placing primary liability on husbands and secondary liability on wives best balanced the economic position of women in present day society,¹⁰ creditors' interests, and the objectives of Wisconsin's neutral support law.¹¹

On a record "almost totally devoid of facts,"¹² the Wisconsin Supreme Court found its modified common law doctrine of necessities constitutional under the equal protection clause. This Comment examines the Wisconsin Supreme Court's justification for upholding a gender based rule in light of the United States Supreme Court's standard for gender discrimination. It contrasts the Court's *Marshfield Clinic* rule with the traditional rationales underlying the common law doctrine and suggests that a case by case approach is a better alternative to the Wisconsin court's inflexible rule.

The Common Law Doctrine of Necessaries

The common law doctrine of necessities developed as a wife's remedy for enforcing her husband's duty of support.¹³ Under the early English common law, when a man and woman married, the legal identity

7. *Stromsted*, 99 Wis. 2d at 144-46, 299 N.W.2d at 230-31.

8. *Sharpe*, 99 Wis. 2d at 119, 299 N.W.2d at 222.

9. *Marshfield Clinic*, 105 Wis. 2d at 513-14, 314 N.W.2d at 330.

10. "Although many more married women are now working than were in the past, they still contribute less to the typical family income than do their husbands." *Id.* at 511, 314 N.W.2d at 329. The court cites labor statistics from *Monthly Labor Review* to support this assertion. See text accompanying notes 104-08.

11. Wisconsin's support law reads:

(1) If either spouse fails or refuses . . . to provide for the support and maintenance of the other spouse . . . , the other spouse may commence an action in any court having jurisdiction in actions for divorce to compel the spouse to provide such support and maintenance as may be legally required. . . .

Wis. Stat. § 767.08(1) (1981).

12. *Marshfield Clinic*, 105 Wis. 2d at 508, 314 N.W.2d at 327.

13. H. Clark, *Domestic Relations*, § 6.3 (1968); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 Vand. L. Rev. 709, 735 (1956). See also 41 Am. Jur. 2d, *Husband and Wife* §§ 329-34, 348-70 (1968).

of the wife merged into that of her husband.¹⁴ The United States Supreme Court noted in 1910:

At common law, the husband and wife were regarded as one,—the legal existence of the wife during coverture being merged in that of the husband; and, generally speaking, the wife was incapable of making contracts or acquiring property or disposing of the same without the husband's consent.¹⁵

The doctrine developed in the United States at a time when most husbands were wage earners and most wives contributed to the marriage by working in the home.¹⁶ A husband had a duty to support his wife by providing for her needs.¹⁷ If a husband neglected his duty of support, his wife's remedy was to go to the local merchant and pledge her husband's credit to buy "necessary" items.¹⁸ The husband would be liable for the "necessaries."¹⁹ In 1871, the Wisconsin Supreme Court first made the doctrine part of the state's common law:

The husband is under legal obligations to support his wife, and nothing but wrongful conduct on her part can free him from such

14. Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 Va. L. Rev. 857, 858-60 (1943). See also 2 F. Pollock & F. Maitland, *The History of the English Law* 399-405 (2d ed. 1899).

15. *Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910). As one commentator wrote: "In the English common law the wife was, in economic relationship to the husband, his property. . . . The financial plan of marriage law was founded upon the economic relationship of owner and property." Crozier, *Marital Support*, 15 B.U.L. Rev. 28, 28-29 (1935).

16. Sayre, *supra* note 14, at 862-63.

17. Paulsen, *supra* note 13, at 709-10.

18. The term obviously included food, clothing, and shelter required by the wife; but it is much broader than this. . . . A necessary is something needed rather than merely desired by the wife; but what she needs is dependent to some extent upon what she has become accustomed to, and what her husband may reasonably be expected to supply.

Brown, Duty of Husband to Support Wife, 18 Va. L. Rev. 823, 830-31 (1932). Thus, it has been held that a fur coat is a necessary. *Jordan Marsh v. Hedler*, 238 Mass. 43, 130 N.E. 669 (1921). The term necessities takes into account a family's socio-economic status and lifestyle: "that is to say, those things might properly be deemed necessities in the family of a man of generous income or ample fortune which would not be required in the family of a man whose earnings were small and saved nothing." *De Brauwere v. De Brauwere*, 203 N.Y. 460, 464, 96 N.E. 722, 723 (1911). Medical services are necessary expenses. *Luther Hospital v. Garborg*, 71 Wis. 2d 460, 238 N.W.2d 529 (1976) [hereinafter cited as *Luther Hospital*].

19. The remedy stems from the marriage relationship and is quasi-contractual: "[I]t is an obligation imposed by law without, and usually against, the husband's consent." *Brown, supra* note 18, at 827. The duty does not arise out of a wife acting as agent for her husband. Thus, husbands cannot relieve themselves of liability for necessities by giving notice to merchants that the wife is not acting for the husband. As long as the husband has the duty to support his wife, he must pay for the necessities she purchases. *Id.*, at 827-28.

obligations. If he fails to provide her with suitable and proper necessities, any third person who does provide her therewith, may maintain an action against him for the same.²⁰

In practice, the doctrine of necessities proved a difficult remedy.²¹ The doctrine placed the burdens of proof on the merchant. The merchant needed to show the item purchased was a "necessary" item.²² This could involve a protracted inquiry into the family's financial background.²³ The merchant also had to show the husband had not already provided the item.²⁴ Merchants were reluctant to extend wives credit in spite of the

20. *Warner & Ryan*, 28 Wis. at 519 (1871) (citing 1 Bishop on Marriage and Divorce § 553 (4th ed. 1864)).

21. The courts often left the standard of living up to the husband's discretion: "His niggardliness gives her no cause of action, and he is entitled to almost unbounded discretion as to expenditures and style of living." Crozier, *supra* note 15, at 33-34.

One of the oft-cited examples of "niggardliness" by a husband to his wife is McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953). The couple had been married 33 years. The wife worked as a housewife and raised chickens on the farm until the time of the suit, when, because of illness, she could no longer do the labor. The husband had over \$115,000 in bonds and certificates, yet maintained the home frugally.

From the beginning of married life of the parties the defendant supplied only the barest necessities and there was no change thereafter. He did not even buy groceries until the last 3-4 years before the trial, and neither did he buy clothes for the plaintiff.

Id. at 240, 59 N.W.2d at 343 (Yeager, J., dissenting). The house had no kitchen sink, bathroom, bathing facilities or inside toilet. It was heated by coal furnace for which the wife did the scooping. The lower court gave judgment for the wife, allowing her to use her husband's credit to buy furniture and appliances and make improvements and repairs on the house. Alternatively the husband "was permitted, in agreement with plaintiff, to purchase a modern home elsewhere." *Id.* at 227, 59 N.W.2d at 336-37. The husband was ordered to buy a new car and to pay the wife \$50 a month as a personal allowance. The Nebraska Supreme Court reversed the lower court, saying in part:

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.

Id. at 238, 59 N.W.2d at 342.

22. *Simpson Garment Co. v. Schultz*, 182 Wis. 506, 196 N.W. 783 (1924) [hereinafter cited as *Simpson*]. In *Simpson*, the court gave the requirements for showing that items were necessities: (1) that the items fit the "family's social position in the community in which they live, and in view of the [husband's] financial ability to pay for them, and (2) that the articles sold were reasonably needed by the wife or member of the family . . . at the time of the sale." *Id.* at 509-10, 196 N.W. at 784.

23. "Had there been a dispute as to his annual income or annual household expenses, proof of other necessary household expenses would have been admissible upon the question of his financial ability to pay for necessities of the quality bought." *Id.*

24. The husband need only pay for the items once. If the husband has already supplied the articles or supplied the wife with the money to purchase the articles, he has fulfilled his duty of support. *Saks & Co. v. Bennett*, 12 N.J. Super. 316, 79 A.2d 479, 480 (Super. Ct. App. Div. 1951).

husbands' liability under the doctrine.²⁵

Despite these problems, the doctrine benefits families and creditors. The doctrine is still a remedy for needy wives:

In a credit-oriented society, the most important single aspect of a wife's financial rights during marriage is the ability to obtain credit. Through the use of credit, she may effectively enforce her husband's duty to support—which is otherwise totally unenforceable—by purchasing needed items and deferring payment for them, or obtaining unsecured loans to make such purchases.²⁶

The expanded concept of what constitutes a necessary²⁷ allows wives to purchase items beyond what is "necessary" to live. More than providing a remedy for failure to provide living necessities, the doctrine allows wives a form of control over their husbands' income. A wife may purchase items which would be considered "necessaries" in light of her husband's income and the family's socio-economic status in the community.²⁸ Although a wife may not directly handle her husband's income, she may direct the income by purchasing items for the family on her husband's credit. In *Sharpe*,²⁹ the wife purchased a sofa for which her husband refused to pay. The Wisconsin court held that the item met the requirements of a necessary.³⁰ In Wisconsin where a wife has no direct control over her husband's income,³¹ the doctrine of necessities provides her with indirect control.³²

The doctrine of necessities allows wives to obtain credit for necessities. In separate property states, the ability of wives without assets to obtain credit is severely limited. A wife without assets will not be able to obtain credit based on her own creditworthiness; rather, credit will only

25. H. Clark, *supra* note 13, at 192.

26. Bingaman, *The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights*, 3 *Pepperdine L. Rev.* 26, 29 (1975).

27. *See supra* note 18.

28. Need is still a factor, but the doctrine in Wisconsin qualifies need to mean what is "reasonably needed." *Simpson*, 182 *Wis. at 510*, 196 *N.W.* at 784.

29. *Sharpe*, 99 *Wis. 2d 114*, 299 *N.W.2d 219* (1980).

30. [W]e are satisfied that ample evidence supported the trial court's conclusion that the Henredon sofa was a legally necessary item. The Buckstaff's are a prominent family and their socio-economic standing justifies a finding that the sofa at issue here was a suitable and proper item for their household. With reference to the element of reasonable need, we note that the sofa has been in use in the Buckstaff home since its delivery. Such continued use gives rise to an inference of reasonable need.

Id. at 123, 299 *N.W.2d* at 224.

31. *Rasmussen v. Oshkosh Savings and Loan Association*, 35 *Wis. 2d 605*, 151 *N.W.2d 730* (1967). *See text accompanying notes 126-29.*

32. Bingaman, *supra* note 26, at 29. Although such control is dependent on the court's discretion, the Wisconsin court gave a liberal interpretation to "reasonable need." *Sharpe*, 99 *Wis. 2d* at 123, 299 *N.W.2d* at 224.

be extended based on her husband's creditworthiness.³³ Normally, such credit transactions require the husband's signature, making him, not her, liable.³⁴ In some retail transactions, however, merchants will allow wives credit: "[R]etail merchants, . . . under certain circumstances, will open accounts for the wife alone for the purchase of 'necessaries.'" ³⁵ Even when spouses agree on the purchase of an item, circumstances may prohibit a husband's presence at a credit transaction. The doctrine enables the wife to make retail credit transactions without her husband's presence.

The doctrine especially benefits needy wives in pre-divorce situations. The doctrine of necessities remains in effect as long as the husband has the duty of support.³⁶ In situations where the husband and wife have separated and are awaiting a divorce decree, the duty of support remains in effect.³⁷ A wife without marketable skills will need her husband's support until she can adequately supply her own needs. In pre-divorce situations, husbands and wives may feel bitter toward each other and a husband may withhold support payments. The doctrine provides a wife in this situation with relief from her husband's neglect.³⁸

Creditors benefit from the doctrine, also. In cases of emergency

33. The Equal Credit Opportunity Act, 15 U.S.C. § § 1691—1691 (f) (1976), prohibits discrimination on the basis of sex or marital status in the extension of credit. 15 U.S.C. § 1691(a)(1) (1976). The regulations specifically provide that:

[A] creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

12 C.F.R. § 202.7(d)(1) (1982).

Discrimination does not include inquiring into an applicant's marital status, however, "if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of creditworthiness. . . ." 15 U.S.C. § 1691(b)(1) (1976).

A creditor is permitted to get information about an applicant's spouse if:

- (i) The spouse will be permitted to use the account; or
- (ii) The spouse will be contractually liable upon the account; or
- (iii) The applicant is relying on the spouse's income as a basis for repayment of the credit requested;

12 C.F.R. § 202.5(c)(2) (1982).

The Act prohibits creditors from taking marital status into account if the applicant is creditworthy by herself/himself. The Act does not make the necessities doctrine useless because the law allows the applicant to rely on her/his spouse's income and assets for the extension of credit. Wisconsin specifically incorporates the Equal Credit Opportunity Act into its laws. Wis. Stat. § 422.301 (1979-1980).

34. Bingaman, *supra* note 26, at 31.

35. *Id.*

36. *Luther Hospital*, 71 Wis. 2d at 461-62, 238 N.W.2d at 530-31 (1976).

37. *Id.*

38. *Id.*

medical care, for example, the doctrine allows hospitals to provide medical care to wives without waiting for their husbands to arrive to arrange financing.³⁹ Emergency situations become frustrating and potentially harmful events if patients must arrange financing before receiving care. In medical care situations, both families and creditors benefit.

The roles of husband and wife have changed since the doctrine of necessities was first adopted from the English common law.⁴⁰ Women participate more as wage earners within the family unit.⁴¹ Despite the change in the economic roles of husband and wife, the law has lagged behind. In many states, family law continues to view the husband as the wage earner and household head.⁴² In the last half of the Nineteenth

39. See *supra* note 18.

40. Several commentators note the changes in family patterns. The "typical" family had the husband as the family decisionmaker and breadwinner, and the wife as the homemaker. "The new marriage, American style, has two earners, mutually dependent on their combined sources of income, the wife earning less than the husband." Glendon, *Modern Marriage Law and its Underlying Assumptions: The New Marriage and the New Property*, 13 Fam. L.Q. 441, 448 (1979). The customary roles of men and women in marriage are merging: either spouse may determine her/his role in the marriage. Clark, *The New Marriage*, 12 Willamette L. J. 441, 443 (1976) (hereinafter cited as *New Marriage*). As early as 1943, legal commentators noted the trend toward wage earning wives:

The husband's duty to support his wife does not seem to meet the factual pattern of the present day when, in so many marriages of young people, both the husband and wife work for separate and independent employers, so that there is a monetary contribution to the marriage by both husband and wife, and a mutual obligation on the part of the both of them seems more accurately descriptive of what actually takes place. Thus a duty by husband and wife to contribute to the marriage in ways appropriate under the varying circumstances [for each] becomes a more accurate legal formula for the present marriage pattern, than do the common law concepts of husband's duty to support and wife's duty to render services.

Sayre, *supra* note 14, at 857-58.

41. *Husbands and Wives as Earners: An Analysis of Family Data*, Monthly Lab. Rev., Feb. 1981, at 46; *Marital and Family Patterns of Workers: An Update*, Monthly Lab. Rev., May 1982, at 53.

42. See, e.g., *In re Dupont*, 19 B.R. 605 (1982) (interpreting the New York necessities doctrine as following the old common law of placing the liability for necessities solely on the husband).

[H]owever liberal the western world may think itself to be, and may indeed be with respect to the general social position of women, it remains true that there is more straight feudalism in the law of husband and wife in modern American Law, through the common law, than perhaps in any non-common law country. To put it bluntly, we are backward in this matter, and a reconsideration of our technique seems reasonable.

Sayre, *supra* note 14, at 859. Although this was written in 1943, there is still a great need to modernize family law. As the lone dissenter, Judge Abrahamson, points out in *Marshfield Clinic*, the Wisconsin Supreme Court created a cause of action against a wife where none existed before, yet did not change a 1967 ruling that "the female homemaker has no rights,

Century and the first few decades of the Twentieth Century, states legislated reforms attempting to give wives equal status in marriage with their husbands.⁴³ These reforms, however, generally did not relieve husbands of their independent duty of support or liability for necessities. For example, Married Women Acts gave women the right to contract and to own property separate from their husbands' control.⁴⁴ These acts, however, did not make wives liable for any financial contribution they made to the family income and, thus, did not relieve husbands of their independent duty to support their wives.⁴⁵ Family Expense Statutes appeared to make both husbands and wives responsible for family expenses. But most of these statutes did not place personal liability on the wife. Rather, a wife's property became liable for family necessities. To the extent the wife had no property, she had no liability.⁴⁶ Moreover, any loss to the wife was temporary. The husband still bore the ultimate duty of support and the wife could receive reimbursement from him for any loss she suffered.⁴⁷ In reality, these reforms did not change the husband's independent duty of support.

In a few states, legislative action did result in placing liability for necessities on wives as well as husbands. Statutes placed liability on wives for necessities when the husband was unable to support the

even secondary, to determine how the earnings of the husband shall be spent." 105 Wis. 2d at 531, 314 N.W.2d at 338 (Abrahamson, J., dissenting).

Under the influence of State Equal Rights Amendments and of recent decisions under the Equal Protection Clause . . . duties of support are no longer imposed upon the husband, but are shared by both husband and wife to the extent of their abilities, which means that in practice it is impossible to determine the extent of those duties until litigation defines them.

New Marriage, *supra* note 40, at 450.

Today, for the first time, large numbers of persons are aware of what only a few have long known: that the principles developed to protect marriage and family as an institution are the most sex discriminatory in all of law. When legal rights and duties are dependent upon the sex of an individual without regard to the relevance of sex to the objects of those rights and duties, sex discrimination is being used unjustly as a legal tool. This is exactly what the common law has done with regard to support obligations between husband and wife.

Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 Ohio St. L.J. 558 (1974).

43. Clark, *supra* note 13, at 222.

44. *Id.*

45. *Jersey Shore Medical Center-Fitkin Hospital v. Baum*, 84 N.J. 137, 417 A.2d 1003 (1980) [hereinafter cited as *Jersey Shore*]. For a Wisconsin case which holds the same, see *Jewell v. Schmidt*, 1 Wis. 2d 241, 250, 83 N.W.2d 487, 491-92 (1957).

46. Crozier, *supra* note 15, at 35-50; Krauskopf & Thomas, *supra* note 42, at 571-72.

47. *Spalding v. Spalding*, 361 Ill. 387, 198 N.E. 136 (1935).

family.⁴⁸ A few states imposed personal liability on wives in addition to husbands through Family Expense Statutes.⁴⁹ More recently, states have imposed reciprocal liability for necessities upon husband and wife.⁵⁰ Wisconsin followed the trend of reform by amending its support law to make both husband and wife responsible for the support of the family.⁵¹ The state's doctrine of necessities, however, remained unchanged until *Sharpe* and *Stromsted* modified the rule.

Equal Protection Standard for Gender Discrimination

Prior to 1971, the Supreme Court granted broad deference to legislatures in gender discrimination cases. In equal protection cases, the Court applied two standards.⁵² The Court used the first standard in gender discrimination cases. This test was the minimum-scrutiny, "rational relation" test.⁵³ The "rational relation" test used by the Court granted broad deference to a legislature's classifications. Although purporting to require a rational connection between legislative classifications and objectives, the Court upheld classifications if the state provided even a remote justification.⁵⁴ The "rational relation" test looked at the ends desired by the legislature and presumed them constitutional.⁵⁵ If the ends were unclear or improper, but the Court could hypothesize a set of facts which could justify the statute, the Court would uphold the statute.⁵⁶

48. Neb. Rev. Stat. § 42-201 (1978); Nev. Rev. Stat. § 123.110 (1981). In *Swogger v. Sunrise Hospital, Inc.*, 88 Nev. 300, 496 P.2d 751 (1972), the court interpreted § 123.110:

As a general rule, the separate property of the wife is not liable for the debts of her husband, NRS 123.210, nor are her earnings so liable, NRS 123.040. An exception to that rule appears in NRS 123.110 which provides that "the wife must support the husband out of her separate property when he has no separate property and they have no community property and he, from infirmity, is not able to or competent to support himself." This duty to support necessarily runs to the benefit of creditors who supply necessities of life to the infirm, impecunious husband.

Id. at 301, 496 P.2d at 752.

49. See, e.g., *Frost v. Parker*, 65 Iowa 178, 21 N.W. 507 (1884); *Carson Pirie Scott & Co. v. Hyde*, 39 Ill. 2d 433, 235 N.E.2d 643 (1968).

50. See, e.g., Minn. Stat. § 519.05 (1981).

51. Wis. Stat. § 767.08(1) (1981). The statute was changed in 1971 from imposing the obligations of support solely on husbands to imposing obligations on the "spouse." 1971 Wis. Laws, ch. 220, § 4.

52. Gunther, *The Supreme Court 1971 Term—Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

53. *Hoyt v. Florida*, 368 U.S. 57, 61-65 (1961).

54. Gunther, *supra* note 52, at 21.

55. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (race discrimination).

56. Gunther, *supra* note 52, at 33.

The second standard applied by courts in equal protection cases involved a "stricter scrutiny."⁵⁷ The Court under this standard granted minimal deference to a legislative classification:

[C]lassifications could pass muster only if they were *necessary* to implement *overwhelming or compelling* governmental interests. Such a test has been applied when the interest being infringed by the classification itself is regarded as "suspect." The Supreme Court to date has held that classifications based on race, national origin and alienage are "suspect."⁵⁸

The "stricter scrutiny" standard required an intensive look at the connection between legislative means and ends.

In 1971, with *Reed v. Reed*,⁵⁹ the Supreme Court began rigorously examining gender classifications. Without reaching the "stricter scrutiny" standard, the Court required that "legislative means . . . substantially further legislative ends."⁶⁰ The Court no longer gave great deference to the legislative classification to the extent of creating reasons for the statute if the legislature could not supply a justifiable purpose. Rather, the Court focused on the means adopted. The Court required the legislature to advance an actual purpose related to the means.⁶¹

The Court purported to decide *Reed* under the "rational relation"

57. *Id.* at 8.

58. Kanowitz, 'Benign' Sex Discrimination: Its Troubles and Their Cure, 31 Hastings L. J. 1379, 1382-83 (1980). The Court held race a suspect classification in *Loving v. Virginia*, 388 U.S. 1 (1967). National origin was held a suspect classification in *Korematsu v. United States*, 323 U.S. 214 (1944). Alienage was declared a suspect classification in *Graham v. Richardson*, 403 U.S. 365 (1971). The "strict scrutiny" analysis has also been applied to legislation infringing on "fundamental rights," for example, the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), and the right to interstate travel, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

59. 404 U.S. 71 (1971). *Reed* involved an Idaho statute which preferred male relatives as administrators of decedent's estates over female relatives of the same degree of relations, for example, fathers over mothers. The Court held that the state objective of reducing the workload of the probate courts, which would have to determine the better administrator by an added hearing, by a mandatory preference of males over females is an impermissible "arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.* at 76. Persons in any of the enumerated classes were similarly situated yet women were treated differently than men. *Id.* at 77. Although the Court claimed to be applying the same standard as before, the "actual intensity of scrutiny was at variance with the articulated standard." Gunther, *supra* note 52, at 36.

60. Gunther, *supra* note 52, at 20.

61. [Such scrutiny] would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge reasonableness of questionable means on the basis of materials that are offered to the court, rather than resorting to rationalization created by perfunctory judicial hypothesizing. *Id.* at 21.

test while in fact it applied a more rigid scrutiny. The Court formally articulated the new standard in *Craig v. Boren*:⁶² "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁶³ The standard was more rigid than the "rational relation" test, yet not as rigid as the "strict scrutiny" test. It was an "intermediate" level of scrutiny.

The Court used the "intermediate" standard to overturn gender classifications in cases like *Orr v. Orr*.⁶⁴ In *Orr*, the Court considered an Alabama statute⁶⁵ which stated that husbands, but not wives, may be required to pay alimony upon divorce. One of the purposes advanced for the law by the Alabama Court of Civil Appeals was the "goal of compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce."⁶⁶ The Court held that the state's compensatory purpose need not be expressed in a gender based statute. The purpose could be accomplished as well by a gender neutral statute.⁶⁷

62. 429 U.S. 190 (1976) [hereinafter cited as *Craig*].

63. *Id.* at 197. *Craig* involved an Oklahoma statute which prohibited the sale of 3.2% beer to males under age twenty-one and to females under age eighteen. The state argued, on the basis of statistics, that the statute enhanced traffic safety. The Court considered the statistical evidence weak:

Suffice it to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired, the relationships between gender and traffic safety becomes far too tenuous to satisfy *Reed's* requirement that the gender based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under *Reed*, Oklahoma's 3.2% beer statute invidiously discriminates against males under eighteen-twenty years of age.

Id. at 204. The Court "openly adopt[ed] for the first time a judicial standard of review based on intermediate scrutiny. . . ." L. Tribe, *American Constitutional Law* 1066 (1978).

64. 440 U.S. 268 (1979) [hereinafter cited as *Orr*].

65. Ala. Code § 30-2-53 (1975). The Alabama Supreme Court interpreted the statute in *Davis v. Davis*, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966) ("The statutory scheme is to provide alimony only in favor of the wife.").

66. *Orr*, 440 U.S. at 280. The state asserted that its purpose was to reinforce the wife's role as homemaker. *Id.* at 279-80. The Court expressly rejected this purpose, saying: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)). The Court acknowledged that "assisting needy spouses" is an important governmental objective. *Id.* at 280.

67. *Orr*, 440 U.S. at 282-83. "A gender based classification which, as compared to a gender neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Id.* The Court followed *Orr* with *Wengler v.*

Under the new intermediate level of scrutiny, the Court upheld gender based statutes which compensated women for past discrimination. In *Kahn v. Shevin*,⁶⁸ the Court upheld a Florida statute granting widows a \$500 property tax exemption. Widowers did not receive the tax benefit. The state objective of "cushioning the financial impact of spousal loss upon the sex for which the loss imposes a disproportionately heavy burden"⁶⁹ was held to be constitutionally sound. In *Schlesinger v. Ballard*,⁷⁰ the Court upheld a statute which automatically dismissed a male naval officer who had been passed over for promotion twice, while women were discharged only after serving thirteen years without a promotion. The Court reasoned that male naval officers had greater opportunity for promotion through service at sea or participation in combat, opportunities denied female officers. Congress could constitutionally mandate different rules for discharge because male and female naval officers were not similarly situated.⁷¹

In certain situations, the U.S. Supreme Court will uphold a gender classification which serves "important governmental objectives."⁷² It has permitted gender classifications in some cases to compensate women for

Druggists Mutual Insurance Co., 446 U.S. 142 (1980), in which the Court held unconstitutional a Missouri worker's compensation statute which automatically granted widows death benefits but required widowers to prove their dependence on their wives' earnings or their mental or physical incapacity. The Missouri Supreme Court, in upholding the statute, presumed widows to be more in need of compensation than widowers. The U.S. Supreme Court held the state did not meet its burden of justifying the gender discrimination. Further, the state presented no evidence as to how a gender neutral statute would compare with a gender based one. 446 U.S. at 151-52.

68. 416 U.S. 351 (1974).

69. *Kahn* [hereinafter cited as *Kahn*], 416 U.S. at 355. The Court rationalized that "financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. . . . While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." *Id.* at 353.

70. 419 U.S. 498 (1975) [hereinafter cited as *Schlesinger*].

71. *Schlesinger*, 419 U.S. at 508. In 1981, the Court upheld two gender classification statutes while overturning one statute. The Court upheld California's statutory rape law which made men criminally liable for the act of sexual intercourse with minor females, even though California has no similar law making women criminally liable for the act of sexual intercourse with minor males. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Court held the Military Selective Service Act constitutional. This Act authorized the President to require registration of males but not females for potential conscription including possible combat duty. The Court overturned a Louisiana statute which allowed husbands to dispose of jointly held property without their wife's consent in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

72. *Craig*, 429 U.S. at 197.

past discrimination.⁷³ Nevertheless, the compensatory statute must be based on a legitimate gender dissimilarity requiring compensatory action.⁷⁴

Jurisdictions Which Have Imposed Liability on Wives Under the Common Law Doctrine of Necessaries

Since the U.S. Supreme Court applied the "intermediate scrutiny" standard to gender classifications, several courts have modified the common law doctrine to impose liability for necessities on wives as well as husbands.⁷⁵ Of these courts, the Supreme Courts of Wisconsin and New Jersey concluded that under the equal protection clause it was improper to impose liability solely on the husband for necessities.⁷⁶ Courts have used three different variations of the common law doctrine in placing liability on wives.

In *Jersey Shore Medical Center-Fitkin Hospital v. Baum*,⁷⁷ the Supreme Court of New Jersey held wives equally liable with husbands for family necessities. Relying on *Orr v. Orr*,⁷⁸ the New Jersey court held the

73. "Benign" sex discrimination purportedly compensates women for past discrimination by presently granting women benefits which are withheld from men. Kanowitz, *supra* note 58, at 1384.

74. *Schlesinger*, 419 U.S. at 508.

75. *Stromsted*, 99 Wis.2d 136, 299 N.W.2d 227 (1980); *Jersey Shore*, 84 N.J. 137, 417 A.2d 1003 (1980); *Manatee Convalescent Center, Inc. v. McDonald*, 392 So.2d 1356 (Fla. Dist. Ct. App. 1980) [hereinafter cited as *Manatee Convalescent Center, Inc.*]; *Memorial Hospital v. Habaj*, 430 N.E.2d 412 (Ind. Ct. App. 1982) [hereinafter cited as *Memorial Hospital*]. The Maryland Court of Appeals eliminated the doctrine of necessities in *Condore v. Prince George County*, 289 Md. 516, 425 A.2d 1011 (1981), relying on the Maryland equal rights amendment rather than the equal protection clause of the U.S. Constitution. The court reasoned the state constitution would allow the court to either "equalize the burdens as between husbands and wives" or eliminate "the necessities doctrine in its entirety." 289 Md. at 533, 425 A.2d at 1019. Because the expansion of the doctrine resulted in the creation of a cause of action against the wife, the court decided to leave the creation of a cause of action to the legislature. 289 Md. at 530-32, 425 A.2d at 1018-19. The dissent argued for the expansion of the doctrine to wives and acknowledged "the interest against extinguishing a remedy for support which other courts have concluded should be retained." 289 Md. at 552, 425 A.2d at 1029 (Rodowsky, J., dissenting).

76. *Marshfield Clinic*, 105 Wis. 2d at 511, 314 N.W.2d at 329; *Jersey Shore*, 84 N.J. at 141, 417 A.2d at 1005, 1008-10. In *Manatee Convalescent Center, Inc.*, the Florida District Court of Appeal relied on the Florida legislature's passage of reciprocal duties of support and maintenance statutes to imply a "sex-neutral burden of support. . . ." 392 So. 2d at 1357. In *Memorial Hospital*, the Indiana Court of Appeals recognized the changing role of women and fashioned a gender neutral doctrine of necessities which expressed the current status of women and the court's partnership view of marriage. 430 N.E.2d at 415-16.

77. *Jersey Shore*, 84 N.J. 137, 417 A. 2d 1003 (1980) (a hospital sued a widow for \$25,000 in necessary hospital and medical expenses of the deceased husband).

78. 440 U.S. 268 (1979).

common law doctrine of necessities unconstitutional because it disadvantages husbands.⁷⁹ The New Jersey court adopted the reasoning of the United States Supreme Court:

The basis of the decision in *Orr* was that the female is no longer "destined solely for the home and rearing of the family, and only the male for the marketplace and the world of ideas". . . . In holding that the alimony statute violated equal protection, the Court rejected the "old notion" that the man is solely responsible to provide a home and its essentials. Although our focus is not on a statute, but a common law rule, the same reasoning that led to invalidation of an alimony statute in *Orr* now requires modification of the common law rule to achieve a fairer distribution of the cost of necessities incurred by either spouse in the course of their marriage.⁸⁰

The court adopted a partnership view of marriage.⁸¹ Both spouses are liable for the necessary expenses of the family. The marriage partners can determine for themselves which spouse is to pay their debts. The court felt this view conforms to the reasonable expectations of the marital partners and their creditors in that the resources of both spouses will be available for family expenses.⁸²

The New Jersey court, however, did not impose unqualified liability on both spouses. The court expressed concern that, absent agreement, holding one spouse liable for the other's debts would be too harsh. The court reasoned:

[I]n the absence of an agreement, the income and property of one spouse should not be exposed to satisfy a debt incurred by the other spouse unless the assets of the spouse who incurred the debt are insufficient.⁸³

Therefore, the court held that creditors must first seek payment from the spouse who incurred the debt before attempting to collect from the other spouse.⁸⁴ This provides some protection to spouses who have not expressly consented to the debt.⁸⁵ The rule also benefits creditors. Creditors who have the foresight to contract for recovery against both spouses maintain their advantage over creditors who do not so contract.⁸⁶

79. *Jersey Shore*, 84 N.J. at 146-47, 417 A. 2d at 1008.

80. *Id.* (citations omitted).

81. *Id.* at 151, 417 A.2d at 1010.

82. *Id.*

83. *Id.* See also *id.* at 149, 417 A.2d at 1009 ("Neither equity nor reality justifies imposing unqualified liability on one spouse for the debts of the other or exempting one spouse from the liability for the necessary expenses of the other.").

84. *Id.* at 151, 417 A.2d at 1010.

85. *Id.* This is the rule followed by the Indiana court in *Memorial Hospital*, 430 N.E. 2d at 416.

86. *Jersey Shore*, 84 N.J. at 151, 417 A.2d at 1010.

The New Jersey court fashioned a gender neutral rule which weakened the primary policy of the doctrine of necessities. It debilitated the protection of needy spouses by placing primary liability on the spouse who incurs the debt. For example, a wife who is a homemaker, having no income or assets, may purchase necessities by pledging the family's credit. The primary liability, however, remains with her rather than with her income-producing spouse. Under the old common law doctrine, it was the failure of the husband, who had the duty of support, to provide the necessary items to his wife which allowed the needy wife to purchase necessities by pledging her husband's credit. Under the New Jersey rule, the failure of the income-producing spouse to provide support to the other spouse results only in secondary liability. The dependent spouse is primarily liable. The New Jersey rule benefits creditors more than needy spouses.

The Wisconsin Supreme Court modified the common law rule in *Sharpe*⁸⁷ and *Stromsted*,⁸⁸ two cases decided the same day. In *Sharpe*,⁸⁹ the court held the common law doctrine of necessities played a vital role in modern society. The rule "encouraged the extension of credit to those who in an individual capacity may not have the ability to make . . . basic purchases."⁹⁰ The court held that a husband remains liable for necessities furnished the wife.⁹¹ The issue of a wife's liability for family necessities arose in *Stromsted*.⁹² The *Stromsted* court noted that the

87. *Sharpe*, 99 Wis. 2d 114, 299 N.W.2d 219 (1980).

88. *Stromsted*, 99 Wis. 2d 136, 299 N.W.2d 227 (1980).

89. In *Sharpe*, a retail furniture store allowed a wife to purchase a sofa on credit. When no payment was made, the furniture company brought suit to recover against both the husband and wife. The Wisconsin court followed the rationale that the doctrine of necessities is imposed "by virtue of the legal relationship of marriage. It arises as an obligation placed on [the husband] as a matter of public policy." 99 Wis. 2d at 118, 299 N.W.2d at 221-22. The court rejects the theory of a wife acting as the agent of her husband as the basis of the doctrine. For further discussion of the agency issue, see Paulsen, *supra* note 13, at 713, 735.

90. *Sharpe*, 99 Wis. 2d at 119, 299 N.W.2d at 222.

91. This case involved the situation for which the doctrine of necessities was created. The court imposed primary liability on the husband and left the issue of a wife's obligation for *Stromsted*. According to the concurring opinion in *Sharpe*, the same result would have been reached under the common law, the new rule of the Wisconsin court under *Sharpe* and *Stromsted*, and a gender neutral case by case approach. The concurring judge preferred to leave any modification of the old common law rule to a fact situation which would have conflicted with the common law. *Sharpe*, 99 Wis. 2d at 124-25, 299 N.W.2d at 224-25 (Abrahamson, J., concurring). Such a conflict occurred in *Marshfield Clinic*.

92. In *Stromsted*, a hospital filed suit against the estate of a woman for medical services received by her. The wife's estate argued the husband was liable under the doctrine of necessities. The hospital argued that it had a contractual agreement with the wife. A wife is free to contract under Wisconsin law. Wis. Stat. § 766.15 (1981). Had there been an express or "implied-in-fact" contract with the wife, the husband would not have been liable. *Stromsted*, 99 Wis. 2d at 143-46, 299 N.W.2d at 230-31. The dissent in *Marshfield Clinic*

gender neutral Wisconsin support law requires wives to share with their husbands the legal duty to support the family.⁹³ The court reasoned that this duty extends to liability for family necessities. On the basis of the neutral support statute, the court held the wife liable for family necessities "in a manner similar" to a husband.⁹⁴

The court, however, limited the liability imposed on wives. The liability for family necessities lay primarily with the husband and secondarily with the wife.⁹⁵ Labor statistics indicate married women, as a group, account for only twenty-six percent of a family's income.⁹⁶ Because wives account for a smaller percentage of family income, the court imposed on them a lesser responsibility to pay for family necessities:

We therefore deem it appropriate to fix the quasi-contractual obligation for necessities in light of the general income-producing patterns of the contemporary family. We note that during the past five years, although married women have made substantial gains in the labor force, as a general matter they remain behind their marriage partners as an income-producing element of the family. The husband, as the typically principal income-producer of the family, must be viewed as having primary liability for the necessities of his household.⁹⁷

The court found the division of liability between husband and wife mandated by economic reality.

A Florida court ordered the least complicated modification of the doctrine in *Manatee Convalescent Center, Inc. v. McDonald*.⁹⁸ The court held a wife liable for the necessary medical expenses of her husband.⁹⁹ The court noted the Florida legislature's "movement . . .

points to the contractual relationship as a factor in determining liability under a gender neutral case by case analysis. *Marshfield Clinic*, 105 Wis. 2d at 522, 314 N.W.2d at 334 (Abrahamson, J. concurring in part, dissenting in part).

93. *Stromsted*, 99 Wis. 2d at 143-44, 299 N.W.2d at 230. Wis. Stat. § 767.08 (1981).

94. *Stromsted*, 99 Wis. 2d at 143, 299 N.W.2d at 230.

95. *Id.*, 99 Wis. 2d at 144, 299 N.W.2d at 230.

96. *Id.*, 99 Wis. 2d at 145, 299 N.W.2d at 230-31 n.7 (citing *Labor Force Participation of Married Women*, Monthly Lab. Rev., June 1977, at 33, and information obtained independently from the Office of Special Labor Force Studies, Bureau of Statistics, Dep't of Labor, Washington, D.C.).

97. *Stromsted*, 99 Wis. 2d at 144-45, 299 N.W.2d at 230-31.

98. *Manatee Convalescent Center, Inc.*, 392 So. 2d 1356 (Fla. Dist. Ct. App. 1980).

99. *Id.* (convalescent center sued a wife to collect expenses of her husband's hospitalization).

toward equality of the sexes. This has been notable in the area of maintenance and support, traditionally seen as a duty only of the male partner to the marital contract."¹⁰⁰ The Florida court expressly left open the question of how liability should be apportioned; the court simply ordered the doctrine enforced against wives as under the common law it was enforced against husbands.¹⁰¹ The Florida approach maintains flexibility. The court has the family's entire assets before it instead of just the husband's. The court may apportion the liability according to the family resources, and its own sense of justice. The court can directly order the wage earning spouse to pay the debt.

The Marshfield Clinic Court's Analysis

The only issue that the court in *Marshfield Clinic* decided was the constitutionality of the modified doctrine of necessities under the equal protection clause.¹⁰² The court held that the common law rule of necessities as modified in *Sharpe* and *Stromsted* satisfied the "intermediate scrutiny" test and was constitutional.¹⁰³ The court emphasized two governmental objectives served by the modified doctrine. The first objective focused on benefits to families. Families benefited by obtaining credit for necessary items more easily. A wife may obtain necessities without her husband's presence to verify her creditworthiness.¹⁰⁴ Further, the modified doctrine of *Marshfield Clinic* protects wives

from economic hardship by placing primary liability on husbands. This is significant because . . . wives have made substantial economic gains in the past decade, but substantial economic disparities still persist between husbands and wives.¹⁰⁵

As it did in *Stromsted*, the court relied heavily on labor statistics to justify placing primary liability on husbands. The court cited statistics which reported that only about one-half of all wives work outside the home. Of those working, approximately one-third work part-time.¹⁰⁶ On the average, wives earned only about one-quarter of a family's income.¹⁰⁷ The court found that these statistics indicate that the *Sharpe* and *Stromsted* rule is the fairest method of apportioning liability. The rule imposes

100. *Id.* at 1357.

101. *Id.* at 1359 n.1.

102. *Marshfield Clinic*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982).

103. *Id.* at 509-10, 314 N.W.2d at 328.

104. *Id.* at 510, 314 N.W.2d at 328.

105. *Id.*

106. *Id.* at 511-13, 314 N.W.2d at 329-30 (citing *Marital and Family Patterns of the Labor Force*, Monthly Lab. Rev. Oct. 1981, at 36-37).

107. *Marshfield Clinic*, 105 Wis. 2d at 512, 314 N.W.2d at 329 (citing *Working Wives' Contribution to Family Income in 1977*, Monthly Lab. Rev., Oct. 1979, at 62-63).

secondary liability on the wife because the average wife earns a small fraction of a family's income.¹⁰⁸

The *Marshfield Clinic* rule places primary liability on husbands regardless of their economic means. The court finds support for its gender based rule in "benign" discrimination¹⁰⁹ cases decided by the United States Supreme Court. The Wisconsin court justifies the rule by recognizing the dissimilar economic position of husbands and wives.¹¹⁰ Relying on the statistics, the court finds the gender based classification "reflects the demonstrable fact that men and women are not similarly situated"¹¹¹ with respect to income and earning capacity.¹¹² The Wisconsin court noted that the United States Supreme Court recognized the job market still favors males despite changing laws, and upheld classifications designed to give women added compensation for unequal treatment in the past.¹¹³ In *Kahn v. Shevin*, the United States Supreme Court upheld a statute which granted benefits to women but not men on the basis of statistics which indicated a dissimilarity in the economic position of males and females.¹¹⁴

The second governmental objective that the doctrine of necessities serves is the protection of creditors. The Wisconsin court argued that its new rule better assures merchants of payment for credit extended to purchase necessities.¹¹⁵ It preserves judicial resources and creditors' time. It directs creditors to proceed first against the husband, then "to the extent that the husband is unable to satisfy his obligation . . . the creditor may seek satisfaction from the wife."¹¹⁶ Under the new rule, according to the court, creditors avoid investigating and establishing the husband's and wife's respective income and earning capacity. Such evidence would be required under a gender neutral approach to determine from which spouse the creditor can collect. The *Marshfield Clinic* rule requires creditors to seek payment from the husband first. The court argued that such a fixed rule is "essential in the commercial world."¹¹⁷

The Disadvantages of the Marshfield Clinic Rule

At first glance, the majority's rule seems to propel the common law

108. *Marshfield Clinic*, 105 Wis. 2d at 513, 314 N.W.2d at 330.

109. See *supra* note 73.

110. *Marshfield Clinic*, 105 Wis. 2d at 516, 314 N.W.2d at 331.

111. *Id.* at 515, 314 N.W.2d at 331. (citing *Schlesinger*, 419 U.S. at 508).

112. *Id.* at 516, 314 N.W.2d at 331.

113. *Id.* at 515, 314 N.W.2d at 331.

114. *Kahn*, 416 U.S. 351, 353-54 (1974).

115. *Marshfield Clinic*, 105 Wis. 2d at 510, 314 N.W.2d at 328.

116. *Stromsted*, 99 Wis. 2d at 145, 299 N.W.2d at 231.

117. *Marshfield Clinic*, 105 Wis. 2d at 514, 314 N.W.2d at 330.

doctrine of necessities into modern society. It appears to provide for liability for both the husband and wife as required under the equal protection clause. It reflects economic reality by making wives, who do not generally contribute as much income to the family as husbands, only secondarily liable. Finally, creditors know that if they lend money to a spouse for necessities, they need not worry which spouse has the obligation to pay. The creditor is directed to seek satisfaction from the husband first.

These apparent advantages are of minimal value. The court's concern for unemployed wives would be better served by a gender neutral case by case approach which imposes liability based on each spouse's actual income. Creditors do not save time with the *Marshfield Clinic* rule. Creditors must still delve into a family's financial background to prove that the item purchased is "necessary."

The majority's rule creates a cause of action against wives where none existed before. The court acknowledged that the equal protection clause requires imposition of liability on wives.¹¹⁸ The *Marshfield Clinic* rule, however, imposes liability on wives in some cases where "[t]he court should not be imposing any liability on [them] at all."¹¹⁹ In families where the wife is not a wage earner, the court creates a cause of action against her even though she has no assets to pay the liability. In this situation the majority's rule diverges from the original rationale of the doctrine. The common law doctrine was set up to provide a remedy for housewives who have no assets of their own to purchase necessities. The *Marshfield Clinic* rule imposes a legal obligation to pay for necessary items on the wife who has no assets and who purchases the necessities by pledging her husband's credit.¹²⁰ In such cases, the wife should be free from liability because she has no ability to pay.

Practically, the absence of assets shields dependent spouses. Creditors cannot collect from someone who owns nothing: "[I]n the real world, the female homemaker may escape liability because a creditor may tire and give up after suing the husband."¹²¹ Nevertheless, the government objectives of benefiting creditors can be accomplished without the imposition of a strict rule of liability.¹²² In *Orr v. Orr*,¹²³ the United States

118. *Id.* at 509-10, 514-16, 314 N.W.2d at 328, 330-31.

119. *Id.* at 530, 314 N.W.2d at 338 (Abrahamson, J., dissenting).

120. *Id.* at 530-32, 314 N.W.2d at 338-39 (Abrahamson, J., dissenting); *Stromsted*, 99 Wis. 2d at 149-50, 299 N.W.2d at 233 (Abrahamson, J., dissenting).

121. *Marshfield Clinic*, 105 Wis. 2d at 530, 314 N.W.2d at 338 (Abrahamson, J., dissenting).

122. The majority reasons that the wife should be secondarily liable because she 'shares with her husband the legal duty of support of the family.' Yet, the law of support which underpins the doctrine of necessities is not itself a hard and fast rule. The statutory duty of support is allocated between the marital partners on the basis of a number of factors.

Stromsted, 99 Wis. 2d at 149, 299 N.W.2d at 232 (Abrahamson, J., dissenting).

123. 440 U.S. 268 (1979).

Supreme Court held that states cannot discriminate on the basis of sex if a gender neutral method will achieve the same goals with the same degree of proficiency.¹²⁴ The policies behind the doctrine of necessities can be better advanced with a gender neutral case by case approach.

Moreover, even the fact of secondary liability carries with it disadvantages. The few creditors who choose to obtain judgments against wives adversely affect the wives' economic future for many years unless the judgments are discharged. To have the judgments discharged by judicial decree involves a separate court action. Under a case by case approach, the court would take into account the financial background of a husband and wife in determining liability. If the family assets are such that neither spouse can pay a judgment, a discharge of liability could be effected at the same proceeding. In cases of medical necessities, for instance, the discharge in liability is significant.¹²⁵

The Wisconsin court created a cause of action against the wife without providing any reciprocal court action to allow her access to a family's resources. The dissent recalled the court's decision in *Rasmussen v. Oshkosh Savings and Loan Association*¹²⁶ where the court held:

The general rule in separate property states in which the husband and wife may own property separately from the other is that the excess left after paying the joint expenses of the husband, the wife, and the family remains the property of the husband, and does not automatically constitute a gift to the wife.¹²⁷

The common law in Wisconsin held a husband's wages were his property. As the dissent commented: "The female homemaker has no rights, even secondary, to determine how the earnings of the husband shall be spent. . . . The majority denies the wife control over the 'family income or assets' but makes her liable for family necessities."¹²⁸ A wife is disadvantaged because although not controlling any of the family's income, she is potentially liable for the debts of her husband. Further, because of the husband's control over his earnings, a wife will be liable for any necessary items she purchases by pledging her husband's credit. The court has created a creditor's remedy rather than aiding dependent spouses.¹²⁹

124. *Id.* at 282-83.

125. See, e.g., *Jersey Shore*, 84 N.J. 137, 417 A.2d 1003 (1980).

126. 35 Wis. 2d 605, 151 N.W.2d 730 (1967).

127. *Id.* at 610, 151 N.W.2d at 732.

128. *Marshfield Clinic*, 105 Wis. 2d at 531-32, 314 N.W.2d at 338 (Abrahamson, J., dissenting).

129. The dissent in *Stromsted* noted that the doctrine "has never been an effective or

The court's rule benefits only the stereotypical family depicted by the statistics. The majority believes that the typical family consists of a husband working full time and a wife contributing at most a small amount to the family's income. In that situation, the husband is the primary wage earner and also bears the primary liability for necessities. The wife is the secondary wage earner and bears only a secondary liability for necessities. The wife acts as a surety for any obligations remaining unpaid after the husband's assets have been exhausted. The husband normally pays for the necessities. If the family purchases something the husband cannot afford himself, his wife pays the excess with her wages. This is the situation envisioned by the rule. The wife has some liability but also some assets to help cover her liability. The court's typical family, however, is less in need of the remedy of the doctrine of necessities because neither spouse is totally dependent on the other. The wife's income may not be adequate to cover items considered necessary under the expanded definition of necessities. Yet, the wife will not be helpless as she will be able to purchase the minimally necessary items, like food and clothing.

In situations where the wife earns as much or more than her husband, the husband is needlessly disadvantaged by the court's rule. A wife would have the resources to pay for the necessities she buys. Primary liability, however, still remains with the husband. When the wife is the primary wage earner, the husband is the spouse with fewer resources. Yet, he still bears primary liability for necessities.¹³⁰ In this situation, the husband should bear little or no liability. The majority's rule marginally benefits only the families in which the husband is the primary wage earner and the wife is the secondary wage earner. In all other situations, the rule does not conform to the original rationale of the doctrine. It either benefits the spouse who is not in need of a remedy or places the primary liability on the spouse who has fewer resources.¹³¹

Moreover, placing primary liability on the husband perpetuates the idea of separate duties. Encouraging set roles inhibits the freedom to change roles. A husband will be reluctant to take a domestic role if he

satisfactory means of enforcing the right of support and has always, in reality, been more of a benefit to the creditor than to the needy spouse," 99 Wis. 2d at 150 n.2, 299 N.W.2d at 233 n.2 (Abrahamson, J., dissenting). Nevertheless,

without any knowledge of the financial circumstances of the Stromsteds or of their relation with the creditor . . . , the court designates the husband primarily liable and the wife secondarily liable. It is the creditor's neglect which is remedied by the court in this case, not the neglect of one marital partner in the Stromsted marriage to support the family.

Id. at 149, 299 N.W.2d at 232 (Abrahamson, J., dissenting).

130. *Marshfield Clinic*, 105 Wis. 2d at 529-30, 314 N.W.2d at 337-38 (Abrahamson, J., dissenting).

131. *Id.*

knows he will remain liable for necessities. At an earlier time, a different rule for each spouse more accurately reflected reality. Family roles were more often assigned according to sex. Today, family roles are not as firmly determined by gender. Both men and women can choose to be wage earners or homemakers. Maintaining a gender based rule changes nothing. In effect, it perpetuates gender based family roles.

The Case by Case Analysis

In *Sharpe*, *Stromsted* and *Marshfield Clinic*, the lone woman on the court objected to the imposition of a gender based rule.¹³² Although Justice Abrahamson agreed that the doctrine of necessities should be retained, she disagreed with the majority's rule. She preferred a case by case analysis.¹³³

A gender neutral case by case approach would apportion the liability for necessities more equitably. A court procedure which included a determination of the husband's and wife's respective ability to pay would cause liability to shift to the spouse who was able to pay. Liability would be placed on the spouse not fulfilling his or her duty of support. The needy spouse who purchased necessities would not incur liability. Further, the liability would be apportioned like the determination of support under the Wisconsin statute. Under the support statute, the court views the financial background of both husband and wife in order to determine which spouse will make support payments.¹³⁴ The liability for necessities should track the duty of support.

The majority declares such analysis unduly burdensome. The majority formulates its rule to aid creditors. Creditors are told to seek payment from the husband first; he bears primary liability. In actual practice, creditors gain little from the rule. They must still delve into the family's financial background to prove the item purchased was a "necessary."¹³⁵ Information regarding which spouse earns income is part of the information required to determine whether the item is a necessary. For example, in *Sharpe*,¹³⁶ the court inquired into the husband's job and

132. *Sharpe*, 99 Wis. 2d at 123, 299 N.W.2d at 224 (Abrahamson, J., concurring); *Stromsted*, 99 Wis. 2d at 146, 299 N.W.2d at 231 (Abrahamson, J., dissenting); *Marshfield Clinic*, 105 Wis. 2d at 517, 314 N.W.2d at 332 (Abrahamson, J., dissenting).

133. *Marshfield Clinic*, 105 Wis. 2d at 532, 314 N.W.2d at 339 (Abrahamson, J., dissenting).

134. Wis. Stat. § 767.08(1) (1981). A disadvantage of granting the courts discretion to determine who should make support payments is that it permits them to impose their attitudes about gender relations on the parties. The only remedy for a dissatisfied party is a costly appeal. Nevertheless, the Wisconsin legislature leaves the determination of who should make support payments to the court's discretion.

135. *Marshfield Clinic*, 105 Wis. 2d at 527, 314 N.W.2d at 336 (Abrahamson, J., dissenting).

136. *Sharpe*, 99 Wis. 2d 114, 299 N.W.2d 219 (1980).

the socio-economic standing of the family in order to determine whether a sofa was a necessary.¹³⁷ Since the majority's rule does little to conserve judicial resources, the court should not impose a gender based rule in place of a gender neutral approach.

The case by case approach embodies the idea of a partnership marriage. Both the Wisconsin court and the New Jersey court claimed to adopt the partnership as the family model.¹³⁸ Yet, both courts adopted rules that disadvantaged the economically weaker partner either directly¹³⁹ or indirectly.¹⁴⁰ In the case by case approach, the spouses are free to arrange their finances and pay their obligations according to their needs and desires. One spouse can become the homemaker and can rely on the other spouse for support. If the spouse does not provide support, the law will not impose liability upon the spouse with fewer resources for resorting to the doctrine of necessities to make up the deficiency. The spouse with fewer resources is protected. Under a gender neutral case by case approach, the spouse with fewer resources is not completely exempt from liability. A spouse is responsible to the family unit for the income s/he earns. Neither has an advantage over the other. The strict Wisconsin rule ignores a wife's liability until a husband's assets are exhausted. Under a case by case approach, both spouses bear liability in relation to their ability to pay.

The doctrine of necessities should focus liability on the family, not on the individuals within the family unit.¹⁴¹ The rule, by assigning a stereotypical role to each spouse, becomes a legal fiction.¹⁴² The law should not assign roles to spouses. Rather, it should fix mutual obligations according to contribution.¹⁴³ The family is obliged to pay for necessities. The law should allow the family the freedom to be organized according to the desires of the spouses, yet require that the family unit meet its legal responsibilities to its members and to others.

137. *Id.* at 123, 299 N.W.2d at 224.

138. *Marshfield Clinic*, 105 Wis. 2d at 531, 314 N.W.2d at 338 (Abrahamson, J., dissenting); *Jersey Shore*, 84 N.J. at 147, 151, 417 A.2d at 1008, 1010.

139. *Jersey Shore*, 84 N.J. 137, 417 A.2d 1003 (1980); *see also* text accompanying note 86.

140. *Marshfield Clinic*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982); *see also* text accompanying notes 130-31.

141. Sayre, *supra* note 14, at 875.

142. Krauskopf and Thomas cite a study by Professors Jacobs and Angell in 1928. The study determined that in more than half of the families, "the spouses acted jointly in determining important family expenditures. This was true, even though under the law of New York the wife had no legal right in her husband's earnings, apart from her right of support". Krauskopf & Thomas, *supra* note 42, at 597 n.148 (citing Jacobs & Angell, *A Research in Family Law* 469 (1930)).

143. *Id.* at 597-98.

Conclusion

The rule adopted by the Wisconsin court is not an adequate remedy for dependent spouses. The doctrine of necessities originated as a remedy for needy wives to purchase necessities. Needy wives were wives who were dependent on their husbands for support. When the support was withheld, the wife was in need of a remedy. The court's rule benefits only one type of family, that is, the family in which the husband works full time and the wife brings in a supplemental income. In this situation, the spouse with fewer resources is unlikely to be in need of a remedy to purchase necessities. Where the family has one completely dependent spouse, the rule is unsuitable. If the wife is truly dependent, she should not even bear a secondary liability. If the husband is dependent, then the primary liability should be on the income-producing wife. The case by case approach provides a gender neutral, flexible method of supplying a remedy to dependent spouses for the purchase of necessities. Because the doctrine of necessities is better served with a gender neutral case by case approach, the Wisconsin rule is an unconstitutional gender classification.¹⁴⁴

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144. *Orr*, 440 U.S. at 283.

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