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Understanding the Minnesota Judiciary: Judicial Decision Making

Legal Memorandum: Minnesota's Adultery Statutes, Minn.Stat. §609.30

In Minnesota, there is a very old, and constitutionally questionable, law that prohibits a married woman from having sexual intercourse with a man not her husband. Under this adultery statute both the woman and the man can be criminally punished if they engage in such conduct. Significantly, it is not a crime for a married man to have intercourse with an unmarried woman.

The adultery statute is vulnerable to a constitutional challenge on equal protection grounds. The 14th Amendment to the US Constitution says that no person shall be denied equal protection of the laws by any state. Although the Minnesota Constitution does not expressly provide for equal protection of the laws for its citizens, the Minnesota courts have ruled that "Equal protection is an inherent but unenumerated right found and confirmed in Minnesota's state constitution." *Hawes v. 1997 Jeep Wrangler*, 602 N.W.2d 874, 880 (Minn. App. 1999). Like the federal constitution's Equal Protection Clause, Minnesota's constitution requires that the law treat people in similar circumstances similarly. *Murphy v. Commissioner of Human Services*, 765 N.W.2d 100, 106 (Minn. App. 2009)

The 14th Amendment guarantees that all individuals are given fair treatment in their exercise of fundamental rights and requires that distinctions based on impermissible criteria be eliminated. The 14th Amendment also requires that similar individuals be treated in a similar manner. Courts apply this amendment to control acts of the legislative branch. Whenever fundamental rights are restricted, courts require that the law must promote an overriding or "compelling interest" to be valid.

The starting point for analyzing a law under the equal protection clause is for the court to determine if the persons being treated differently are in fact "dissimilar." Although men and women are biologically different, that difference does not mean that sex-based classifications in the law are always valid. To be valid, there must be a legitimate governmental purpose for treating men and women differently.

When the law creates differing consequences based on one's sex, courts require the law to have a "substantial relationship" to an "important government interest." If this interest is established, the courts will further decide whether the difference is necessary, or "narrowly tailored" to meet the government's interest.

For many decades after the passage of the 14th Amendment, states continued to pass, and courts upheld, legislation that reflected traditional beliefs about sex-defined roles and provided distinct differences for men and women. As a practical matter, men and women were not viewed as being equals under the law. In the 1970s, the US Supreme Court began to

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look closely at suits challenging differences in rights and benefits based on one's sex. In *Craig v. Boren* (1976) the Court reviewed an Oklahoma law that allowed women to buy beer at 18 but restricted men until age 21. The state argued that concerns about traffic safety justified the difference based on an assumption about the relative levels of responsible driving by men and women. The statistical evidence did not support that conclusion. The court found the relationship between traffic safety and the gender classification too tenuous. There was no evidence supporting a belief that a person's sex made the person more likely to become a drunken driver. The classification was based on a stereotypical perception of teenage males and females. The court concluded that the law was not "substantially" related to an important state interest.

Other reasons that Minnesota's adultery statute may be vulnerable to challenge include the fact that there have been no reported decisions involving prosecutions under that law for over eighty years. A defendant could be expected to argue that the long-standing failure to enforce the law should ban prosecution. The theory is one of reliance on government inaction. Another possible rationale for attack would be on selective-prosecution grounds in that the conduct is rarely prosecuted and it would be unjust to prosecute one woman when others are not prosecuted for the same conduct.