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## **A Yawning Black Abyss:\* Section 35 and the Equal Protection of Women in the Commonwealth of Massachusetts**

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*“The lack of DPH [(Department of Public Health)] publicly funded substance abuse treatment facilities has created a situation where people are using Section 35 as a means to access the MCI-Framingham publicly funded detox program.”<sup>1</sup>*

*“MCI-Framingham is not designed, equipped or staffed to serve as an acute treatment facility for substance abusers. . . . [W]omen should not be civilly committed to MCI-Framingham.”<sup>2</sup>*

*Since January 2010, more than 1,000 women spent at least one night at MCI-Framingham on a civil commitment for substance abuse.<sup>3</sup>*

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\* See *Women Suffer Too*, in ALCOHOLICS ANONYMOUS (2013), available at [http://www.aa.org/bigbook/online/en\\_pioneers3.pdf](http://www.aa.org/bigbook/online/en_pioneers3.pdf).

[The members of Alcoholics Anonymous] knew what to do about those black abysses that yawned, ready to swallow me, when I felt depressed or nervous. There was a concrete program, designed to secure the greatest possible inner security for us long-time escapist. The feeling of impending disaster that had haunted me for years began to dissolve as I put into practice more and more of the Twelve Steps.

*Id.* at 207.

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1. KATHLEEN M. DENNEHY, MASS. DEP’T OF CORR., GOVERNOR’S COMMISSION ON CORRECTIONS REFORM MAJOR RECOMMENDATION #13: DEDICATED EXTERNAL FEMALE OFFENDER REVIEW 27 (2005), available at <http://www.mass.gov/eopss/docs/doc/research-reports/gccr-13-review-final.pdf>.

2. MASS. DEP’T OF CORR. ADVISORY COUNCIL, FINAL REPORT 8 (2005), available at <http://www.mass.gov/eopss/docs/doc/doc-final-report.pdf>.

3. See MASS. DEP’T OF CORR., QUARTERLY REPORT ON ADMISSIONS AND RELEASES IN THE

## I. INTRODUCTION

In Massachusetts, an individual with a drug or alcohol problem may be confined against his or her will in a publicly funded detoxification facility.<sup>4</sup> Such a confinement is known as a civil commitment, and may occur (pursuant to chapter 123, section 35 of the Massachusetts General Laws (Section 35)) upon the petition of certain relatives of the individual or other official personnel, and after both an examination by a psychologist and a hearing before a district court judge.<sup>5</sup> A civil commitment may last up to ninety days.<sup>6</sup> When no beds are available at a publicly funded detoxification facility, an individual may nonetheless be detained in one of two facilities: Bridgewater State Hospital (BSH), if male; or the Massachusetts Correctional Institution at Framingham (MCI-Framingham), if female.<sup>7</sup> BSH is a state hospital specifically designed to provide “specialized care and treatment.”<sup>8</sup> MCI-Framingham is a state prison, “not designed, equipped or staffed to serve as an acute treatment facility for substance abusers.”<sup>9</sup>

This Article argues that the dichotomy created by Massachusetts’s civil commitment laws for alcoholics and substance abusers, which sentence men to a hospital and women to a state prison, is a violation of the equal protection of Massachusetts’s laws. The Massachusetts Constitution contains what is commonly referred to as the Massachusetts Equal Rights Amendment (MERA), which provides that: “Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”<sup>10</sup> The Massachusetts Supreme Judicial Court (SJC) has interpreted the MERA to mean that any law that invokes a sex-based classification is suspect and is constitutional only if it

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MASSACHUSETTS DEPARTMENT OF CORRECTION: SECOND QUARTER 2013, at 9 (2013), *available at* <http://www.mass.gov/eopss/docs/doc/research-reports/parole-admiss-rel-trends/ar-report-2013q2.pdf> (reporting 179 women civilly committed to MCI-Framingham in first two quarters of 2013 and 367 in 2012); MASS. DEP’T OF CORR., QUARTERLY REPORT ON ADMISSIONS AND RELEASES IN THE MASSACHUSETTS DEPARTMENT OF CORRECTION: FOURTH QUARTER 2012, at 10 (2013), *available at* <http://www.mass.gov/eopss/docs/doc/research-reports/parole-admiss-rel-trends/ar-2012q4-report.pdf> (reporting 367 women civilly committed to MCI-Framingham in 2012 and 232 in 2011); MASS. DEP’T OF CORR., QUARTERLY REPORT ON ADMISSIONS AND RELEASES IN THE MASSACHUSETTS DEPARTMENT OF CORRECTION: FOURTH QUARTER 2011, at 15 (2012), *available at* <http://www.mass.gov/eopss/docs/doc/research-reports/misc-reports/fourthqtr2011report.pdf> (reporting 232 women civilly committed to MCI-Framingham in 2011); MASS. DEP’T OF CORR., QUARTERLY REPORT ON ADMISSIONS AND RELEASES IN THE MASSACHUSETTS DEPARTMENT OF CORRECTION: FOURTH QUARTER 2010, at 15 (2011), *available at* <http://www.mass.gov/eopss/docs/doc/research-reports/admin-rel-4th-qtr2010-final.pdf> (reporting 237 women civilly committed to MCI-Framingham in 2010).

4. See MASS. GEN. LAWS ANN. ch. 123, § 35 (West 2013).

5. See *id.*

6. See *id.*

7. See *id.*

8. See *Bridgewater State Hospital*, MASS.GOV, <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/doc-facilities/bridgewater-state-hospital.html> (last visited Sept. 7, 2013).

9. MASS. DEP’T OF CORR. ADVISORY COUNCIL, *supra* note 2, at 8.

10. MASS. CONST. pt. I, art. I, *amended by* MASS. CONST. art. 106.

is narrowly tailored to achieve a compelling government interest.<sup>11</sup> This Article contends that based on the SJC's equal protection jurisprudence interpreting the MERA, the civil commitment law that sends men to a hospital and women to a prison is unconstitutional. Part II of this Article examines the history and evolution of the civil commitment law. Part III explains the commonly accepted equal protection jurisprudence under the Federal Constitution. Part IV examines the SJC's own sex-based equal protection jurisprudence. Part V argues that based on this jurisprudence, the civil commitment law is unconstitutional.

## II. SECTION 35: CIVIL COMMITMENT OF ALCOHOLICS AND SUBSTANCE ABUSERS

Massachusetts has a history of civilly committing alcoholics via statute dating back to the nineteenth century.<sup>12</sup> Indeed, sex-based division in the statutory scheme also has a history nearly as long: in the early twentieth century, alcoholic men were committed to a special hospital for alcoholics, while their female counterparts were detained in one of the state lunatic hospitals.<sup>13</sup> Today, this division endures, if in slightly different form. The modern incarnation of the civil commitment statute was enacted in 1970 and provides that men may be civilly committed to BSH, while women instead are eligible to be committed to MCI-Framingham.<sup>14</sup> This Part examines the statutory history of the civil commitment of alcoholics and substance abusers.

### A. Historical Precedent for Section 35

In 1885, the Massachusetts legislature enacted a law providing that “[w]hoever is given to or subject to dipsomania, or habitual drunkenness, whether in public or in private, may be committed to one of the state lunatic hospitals . . . .”<sup>15</sup> Such a commitment was predicated on the presiding judge's determination that the “dipsomaniac”<sup>16</sup> was not “of bad repute or of bad character, apart from his habits of inebriety.”<sup>17</sup> These commitments were

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11. See *Commonwealth v. King*, 372 N.E.2d 196, 206 (1977) (Commonwealth may not discriminate on the basis of sex unless such discrimination “further[s] a demonstrably compelling interest and limit[s] its impact as narrowly as possible consistent with [its] legitimate purpose”).

12. See Act of June 18, 1885, ch. 339, 1885 Mass. Acts 790 (establishing procedures for committing “dipsomaniacs”).

13. See Act of Apr. 11, 1901, ch. 282, 1901 Mass. Acts 203 (entitled “An Act relative to the commitment of women subject to dipsomania or inebriety”).

14. See MASS. GEN. LAWS ANN. ch. 123, § 35 (West 2013).

15. See § 1, 1885 Mass. Acts at 790.

16. See 4 THE OXFORD ENGLISH DICTIONARY 699 (2nd ed. 1989) (defining “dipsomaniac”). Dipsomania, from the Greek words for “thirst” and “madness,” gained popular usage in the mid-nineteenth century to describe those who drank with a seeming inability to stop. See *id.*

17. See § 1, 1885 Mass. Acts at 790.

indefinite and would last until “it appear[ed] probable that [the committed individual would] not continue to be subject to dipsomania or habitual drunkenness, or that his confinement therein [was no] longer necessary for the safety of the public or for his own welfare.”<sup>18</sup> The mechanics of the commitment procedure were otherwise applied from those preexisting procedures “relative to the commitment of an insane person to a lunatic hospital.”<sup>19</sup> The procedures relative to insane persons required a hearing before a judge and the testimony of medical personnel.<sup>20</sup>

Four years later, a special hospital for inebriates—the Massachusetts Hospital for Dipsomaniacs and Inebriates (MHDI)—was established.<sup>21</sup> At this time, the civil commitment procedure was modified so as to commit the inebriate to MHDI and not to a lunatic hospital.<sup>22</sup> Further, the period of commitment was limited to two years.<sup>23</sup> However, those committed who would “not continue to be subject to dipsomania or inebriety” or were otherwise provided for by “guardians, relatives or friends” were eligible for a revocable “permit to be at liberty.”<sup>24</sup>

Just two years after establishing commitment to MHDI, the legislature instituted the first sex-based division concerning these civil commitments. In 1901, the Massachusetts legislature amended the commitment laws to commit only male dipsomaniacs to MHDI—females would be committed to lunatic hospitals.<sup>25</sup> In 1915, the prohibition against women alcoholics and drug addicts being admitted to MHDI—a hospital specifically designed to help such patients—was lifted by statute, only to be implemented again in 1917.<sup>26</sup>

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18. Act of June 18, 1885, ch. 339, § 3, 1885 Mass. Acts 790.

19. *Id.* § 2.

20. See MASS. PUB. STAT., ch. 87, §§ 11-30 (1882) (setting forth commitment procedures for insane persons).

No person shall be so committed, unless in addition to the oral testimony there has been filed with the judge a certificate signed by two physicians, each of whom is a graduate of some legally organized medical college, and has practiced three years in the state . . . Each must have personally examined the person alleged to be insane, within five days of signing the certificate; and each shall certify that in his opinion said person is insane and a proper subject for treatment in an insane hospital, and shall specify the facts on which his opinion is founded.

*Id.* § 13.

21. See Act of June 5, 1889, ch. 414, 1889 Mass. Acts 1123 (establishing MHDI). In 1905, the MHDI was renamed Foxborough State Hospital, and then Norfolk State Hospital in 1914. See Act of May 12, 1905, ch. 400, § 1, 1905 Mass. Acts 341 (renaming MHDI “Foxborough State Hospital”); Act of May 22, 1914, ch. 558, § 1, 1914 Mass. Acts 488 (renaming Foxborough State Hospital “Norfolk State Hospital”).

22. See § 7, 1889 Mass. Acts at 1125.

23. See *id.* § 8.

24. See *id.*

25. See Act of Apr. 11, 1901, ch. 282, 1901 Mass. Acts 203. The 1901 Act explicitly stated that it “shall not be construed to authorize the commitment of women to the Massachusetts hospital for dipsomaniacs and inebriates.” *Id.* § 1.

26. See Act of Mar. 17, 1915, ch. 73, § 1, 1915 Mass. Acts 60, 60-61 (allowing admittance of women to

Finally, in 1918, the Massachusetts legislature reversed the laws a third time, allowing women to be committed to the hospital for dipsomaniacs (by then called Norfolk State Hospital).<sup>27</sup> The 1918 provision also called for the immediate transfer thereto of “all female persons who [were] inmates of state hospitals for the insane and were committed thereto under [the prior legislation].”<sup>28</sup>

The civil commitment statute, which by 1918 had expanded to provide for the commitment of those “addicted to the intemperate use of narcotics or stimulants,” remained largely the same for several decades.<sup>29</sup> In 1956, two important changes in the civil commitment legislative scheme were implemented. First, the statute ceased using the terms “dipsomaniac” and “inebriate,” and instead used the term “alcoholic” in their place.<sup>30</sup> Second, the civil commitment procedure—while allowing for both males and females to be committed to any designated state hospital or other private licensed institution—for the first time allowed male alcoholics to be committed to BSH and female alcoholics to MCI-Framingham.<sup>31</sup>

### *B. The Making of the Modern Statute*

The modern incarnation of Section 35 emerged with the reworking of the civil commitment statute in 1970. The new law only provided for the commitment of alcoholics, defining such a person as one “who chronically or habitually consumes alcoholic beverages to the extent that (1) such use substantially injures his health or substantially interferes with his social or economic functioning, or (2) he has lost the power of self-control over the use of such beverages.”<sup>32</sup>

As defined, alcoholics could be committed upon the petition of a police officer or physician only.<sup>33</sup> Further, the law required a hearing to be held immediately before a district court judge, at which the person-to-be-committed was afforded the right of representation of legal counsel and the opportunity to present testimony.<sup>34</sup> The judge was also required to order an examination by a

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hospitals for dipsomaniacs); Act of Mar. 14, 1917, ch. 69, § 1, 1917 Mass. Acts 65 (prohibiting admittance of women to hospitals for dipsomaniacs).

27. See Act of Apr. 12, 1918, ch. 139, § 1, 1918 Mass. Acts 112, 112-13.

28. See *id.* § 2.

29. The inclusion of those addicted to narcotics or stimulants occurred in 1914. See Act of May 22, 1914, ch. 558, § 1, 1914 Mass. Acts 488. In 1941, sedatives were added to the existing list of alcohol, narcotics, and stimulants, the habitual use of which was grounds for commitment. See Act of Oct. 16, 1941, ch. 655, § 2, 1941 Mass. Acts 929.

30. See Act of Sept. 28, 1956, ch. 715, § 11, 1956 Mass. Acts 749, 752.

31. See *id.* § 10.

32. See Act of Sept. 1, 1970, ch. 888, § 35, 1970 Mass. Acts 830, 855.

33. See *id.*

34. See *id.*

qualified physician.<sup>35</sup>

If, after such a hearing, the court found that the person was in fact an alcoholic as defined by law, and there was a “likelihood of serious harm” as result of the person’s alcoholism, the judge was permitted to commit the person for a maximum of fifteen days.<sup>36</sup> The law generally permitted commitment for purposes of inpatient care at any approved public or private facility, although it allowed commitment to BSH for males and MCI-Framingham for females, “provided that there [were] no suitable facilities available elsewhere in which the superintendent [could] offer adequate and appropriate care and treatment and [the superintendent] agree[ed] to admit such person . . . .”<sup>37</sup> Further, the law required these two institutions to “house[] and treat[] [the committed person] separately from convicted criminals.”<sup>38</sup> For those to be committed elsewhere, the law required the Department of Mental Health to maintain a roster of available public and private facilities, as well as the number of beds available “for the care and treatment of alcoholism” within those facilities.<sup>39</sup>

The next two decades saw significant expansions in the legislative civil commitment scheme. In 1973, the commitment law was amended to permit certain “nonofficial” persons to petition to have another committed, thereby allowing spouses, blood relatives or guardians of the person-to-be-committed, in addition to police officers and physicians, to make petitions for commitment.<sup>40</sup> In 1985, the commitment period was extended to thirty days.<sup>41</sup> In 1987, the population of persons who could be committed was expanded beyond alcoholics to “substance abusers,” which the statute defined as “a person who chronically or habitually consumes or ingests controlled substances to the extent that (1) such use substantially injures [sic] his health or substantially interferes with his social or economic functioning, or (2) he has lost the power of self-control over the use of such controlled substances.”<sup>42</sup>

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35. *See id.*

36. *See* § 35, 1970 Mass. Acts at 855. Likelihood of serious harm is defined as:

(1) a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person’s judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

*Id.* § 1.

37. *See id.* § 35.

38. *See* Act of Sept. 1, 1970, ch. 888, § 35, 1970 Mass. Acts 830, 855.

39. *See id.*

40. *See* Act of Aug. 17, 1973, ch. 643, § 1, 1973 Mass. Acts 642, 643.

41. *See* Act of Jan. 7, 1985, ch. 475, § 1, 1984 Mass. Acts 988, 989.

42. *See* Act of Nov. 17, 1987, ch. 500, 1987 Mass. Acts 886. The 1987 amendment also added court officials to the list of persons who could petition for the commitment of another. *See id.* In 1989, qualified

In the twenty-five years since the 1987 amendments, the law has changed in two material ways. First, in 2010 the definition of substance abuser was amended to include persons “who intentionally inhale[] toxic vapors.”<sup>43</sup> Second, effective July 2012, commitment periods were extended to up to ninety days.<sup>44</sup>

### C. Section 35 Today

Today, the Commonwealth of Massachusetts permits the civil commitment of alcoholics and substance abusers through the operation of Section 35.<sup>45</sup> An alcoholic is defined in the statute as a person “who chronically or habitually consumes alcoholic beverages to the extent that (1) such use substantially injures his health or substantially interferes with his social or economic functioning, or (2) he has lost the power of self-control over the use of such beverages.”<sup>46</sup> Similarly, a substance abuser is defined as a person

who chronically or habitually consumes or ingests controlled substances or who intentionally inhales toxic vapors to the extent that: (i) such use substantially injures his health or substantially interferes with his social or economic functioning; or (ii) he has lost the power of self-control over the use of such controlled substances or toxic vapors.<sup>47</sup>

A judge may commit such persons upon the petition of a police officer; court official; physician; or spouse, blood relative, or guardian of the alcoholic/substance abuser.<sup>48</sup> Upon receipt of this petition, there is a hearing, which includes competent medical testimony.<sup>49</sup> If the judge finds the person is an alcoholic or substance abuser, and there is a likelihood of serious harm as a result of his alcoholism or substance abuse, the judge may order that the individual be committed to a public or private facility for the purpose of inpatient care.<sup>50</sup>

As the law stands today, when no beds are available at publicly licensed detoxification facilities, judges may send alcoholics and substance abusers to either BSH, for males; or MCI-Framingham, for females.<sup>51</sup> The law requires,

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psychologists were added to list of persons who could examine individuals pursuant to Section 35. *See* Act of Sept. 5, 1989, ch. 352, 1989 Mass. Acts 682, 683.

43. *See* Act of Aug. 10, 2010, ch. 292, 2010 Mass. Acts 1199.

44. *See* Act of Oct. 27, 2011, ch. 142, § 18, 2011 Mass. Acts 691, 705.

45. *See* MASS. GEN. LAWS ANN. ch. 123, § 35 (West 2013).

46. *See id.*

47. *Id.*

48. *See id.* (establishing who may petition to civilly commit alleged alcoholics or substance abusers).

49. *See* ch. 123, § 35 (explaining court procedures after petition made).

50. *See id.* (providing judge’s options after hearing completed).

51. *See* MASS. GEN. LAWS ANN. ch. 123, § 35 (West 2013) (allowing committed persons to be sent to

as it has for several decades, that any person civilly committed to those institutions be kept separate from any criminal population housed therein.<sup>52</sup>

BSH is a hospital specifically designed to provide specialized care and treatment.<sup>53</sup> MCI-Framingham, on the other hand, is a state prison, lacking the facilities to provide the same care and treatment offered at BSH.<sup>54</sup> As a report from a state panel organized by former Commissioner of the Massachusetts Department of Correction, Kathleen Dennehy noted in 2005, “MCI-Framingham is not designed, equipped or staffed to serve as an acute treatment facility for substance abusers, much less as the primary such facility for women in the state. The substance abuse program at MCI-Framingham is not funded, approved or licensed by DPH.”<sup>55</sup>

Given the Section 35 requirement that civil and criminal commitments be maintained separately, “unless a criminal charge is attached [to a civil commitment], [a] civilly committed woman will receive only basic detox services and is ineligible for participation in the full treatment program [offered at MCI-Framingham].”<sup>56</sup> It also seems that criminal charges are being appended to civil commitments solely for the purpose of giving the committed women access to the MCI-Framingham programs.<sup>57</sup> The 2005 panel reported: “It . . . appears that minor criminal charges, i.e. shop lifting, are being attached more frequently [to civil commitments] because . . . civilly committed women are only eligible for MCI-Framingham’s [rehabilitation/detoxification programs] if a criminal charge is attached.”<sup>58</sup>

Hundreds of women have been, and continue to be, committed to an institution that, as the state admits, is not appropriate for, or equipped to handle,

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correctional institutions under certain conditions). There is, in addition, at least some published suggestion that women are being committed to MCI-Framingham despite the availability of beds at detoxification facilities when such women are believed to require “higher level security” due to “medical issues” or “behavior.” See Hon. Rosemary B. Minehan & Hon. R. Marc Kantrowitz, *Commitment to the Department of Public Health*, in 53 MASS. PRAC., MENTAL HEALTH L. § 13.22 (2012) (“In some instances, the committed woman’s medical issues or behavior indicate that a higher level of security is needed, usually resulting in a commitment to a Level IV facility or to MCI Framingham.”).

52. See ch. 123, § 35 (mandating civil and criminal populations be kept separate); see also *Devlin v. Commonwealth*, 986 N.E.2d 882, 885-86 (Mass. App. Ct. 2013) (ruling that Commonwealth “lack[s] discretion” under Section 35 to allow mingling of civil commitment and criminal populations in institutions housing and treating them).

53. See *supra* note 8 and accompanying text.

54. See DENNEHY, *supra* note 1, at 23 (indicating MCI-Framingham lacks proper facilities to adequately treat alcoholics and substance abusers).

55. *Id.*

56. *Id.* at 24.

57. See *id.* at 27 (observing frequent attachment of minor criminal charges to civil commitments).

58. DENNEHY, *supra* note 1, at 27. Women civilly committed to MCI-Framingham—rather than DPH facilities—are not DPH clients, instead they “are the sole responsibility of [the Department of Correction].” See *id.* at 25; see also *Commonwealth v. Pavao*, No. BRRCR2002-1489, 2003 WL 21543824, at \*1 (Mass. Super. Ct. July 2, 2003) (“The probation officer also sought that [the female defendant] be held without bail pending a probation surrender hearing because the Probation Department understands that MCI Framingham will not provide treatment unless a person civilly committed under section 35 is also being held without bail.”).

such commitments.<sup>59</sup> Meanwhile, their male counterparts are committed to a state hospital that is properly equipped. This practice violates the principles of equal protection afforded under the Massachusetts Declaration of Rights, as explained by the SJC. Because the SJC's equal protection jurisprudence is borrowed in part from the jurisprudence used to examine equal protection under the Federal Constitution, the next Part examines the latter.

### III. EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that neither federal nor state governments “shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>60</sup> In effect, these amendments prohibit government actors from discriminating against classes of people, which is essentially a direction that all persons similarly situated should be treated alike.<sup>61</sup> However, not all discrimination is prohibited, and those laws that discriminate based on certain characteristics are more harshly scrutinized by a reviewing court than those that discriminate on some other ground.<sup>62</sup>

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59. See DENNEHY, *supra* note 1, at 23 (“MCI-Framingham is not designed to serve as a public acute treatment center for alcoholism and substance abuse . . .”). In 2005, women civilly committed to MCI-Framingham averaged a stay of seventeen days at the facility “without substance abuse treatment, [and] before being transferred to a community detox bed.” See *id.* at 25. By 2012, the average length of stay had increased to 29 days. See MASS DEP'T OF CORR., PRISON POPULATION TRENDS 2012, at 44 (2013), available at <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpop trendsfinal-2012.pdf>.

60. See U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Fifth Amendment makes the Fourteenth Amendment's restrictions (which apply on their face only to the states) applicable as against the federal government. See U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (applying Fourteenth Amendment equal protection analysis to Fifth Amendment claim). The *Bolling* Court observed the following with respect to equal protection and the Fifth Amendment:

The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

*Bolling*, 347 U.S. at 499.

61. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.” (internal quotation marks omitted)); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”).

62. See *Windsor v. United States*, 699 F.3d 169, 195-96 (2d. Cir. 2012) (Straub, J., concurring), *aff'd*, 133 S. Ct. 2675 (2013).

When the subject of unequal treatment is a member of a class that historically has been the object of discrimination, or government conduct employs a classification—*inter alia*, race, alienage,

Classifications that are subject to greater scrutiny are called “suspect classifications,” and include those premised on: race,<sup>63</sup> national origin,<sup>64</sup> religion,<sup>65</sup> alienage,<sup>66</sup> sex,<sup>67</sup> and parental marital status.<sup>68</sup> All other classifications are nonsuspect. Laws discriminating based on suspect classifications are subject to one of two levels of judicial review: strict scrutiny or intermediate scrutiny.<sup>69</sup> Laws discriminating based on nonsuspect classifications are subject only to rational basis scrutiny.<sup>70</sup> This Part examines the three levels of review, their application to sex-based equal protection claims, and the similarly situated requirement.

### A. Level of Review

#### 1. Rational Basis Scrutiny

Rational basis scrutiny is the most permissive of the three levels of scrutiny.

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nationality, sex, and illegitimacy—closely associated with inequality, “the Supreme Court has required a higher degree of justification than a rational basis, either strict or intermediate scrutiny.”

*Id.* (quoting *Able v. United States*, 155 F.3d 628, 631-32 (2d Cir. 1998)).

63. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (“[A]ll governmental uses of race are subject to strict scrutiny . . . .”); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny’ . . . .”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (characterizing racial classifications as immediately suspect).

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

*Korematsu*, 323 U.S. at 216.

64. See *City of Cleburne*, 473 U.S. at 440 (“[A] statute [that] classifies by . . . national origin. . . . [is] subjected to strict scrutiny and will be sustained only if [it is] suitably tailored to serve a compelling state interest.”).

65. See *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (holding religious classification subject to strict scrutiny).

66. See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (“[A]liens as a class ‘are a prime example of a discrete and insular minority . . . .’” (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971))); *Graham*, 403 U.S. at 372 (“[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”).

67. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge . . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

68. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“[I]ntermediate scrutiny . . . generally has been applied to discriminatory classifications based on . . . illegitimacy.”).

69. See *Windsor v. United States*, 699 F.3d 169, 195-96 (2d Cir. 2012) (Straub, J., concurring) (explaining strict and intermediate scrutiny as higher degree of justification), *aff’d*, 133 S. Ct. 2675 (2013).

70. See *Ayala-Sepulveda v. Municipality of San German*, 727 F. Supp. 2d 67, 76 (D.P.R. 2010) (“Under equal protection jurisprudence, governmental classifications that target non-suspect classes are subject to rational basis review.” (citing *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008))).

When a court reviews a law under this rubric, the law will be upheld if it is rationally related to a legitimate government interest.<sup>71</sup> Evidence of the legitimate government interest is not required, rationality is presumed, and the reviewing court is free to assume any state of facts that would sustain the law.<sup>72</sup>

## 2. *Strict Scrutiny*

Strict scrutiny is the harshest of the three levels of scrutiny. When a court reviews a law under this framework, the law will be upheld only if the discrimination therein is necessary to achieve a compelling government purpose.<sup>73</sup> For a law to be “necessary to achieve” the desired purpose, it must be narrowly tailored to do so.<sup>74</sup> Laws that discriminate on the grounds of race,<sup>75</sup> national origin,<sup>76</sup> religion,<sup>77</sup> or alienage<sup>78</sup> are all subject to strict scrutiny

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71. *See* *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981) (discussing rational basis standard and justification for allowing legislation discriminating based on nonsuspect class).

Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.

*Id.* The Court’s rational basis standard has consistently given states broad deference for legislation dealing with reasonable, nonsuspect classifications. *See* *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (concluding city ordinance valid so long as “rationally related to a legitimate state interest”); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (recognizing rational basis scrutiny affords states wide scope of discretion).

[T]he Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

*McGowan*, 366 U.S. at 425-26.

72. *See* *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

*Id.*

73. *See* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[Strict scrutiny] means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

74. *See supra* note 73.

75. *See* *Grutter*, 539 U.S. at 326-27 (applying strict scrutiny to collegiate admissions procedures considering racial and ethnic status); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying strict scrutiny to analysis of laws preventing interracial marriage); *Korematsu v. United States*, 323 U.S. 214, 219 (1944)

review.

### 3. *Intermediate Scrutiny*

Intermediate scrutiny falls between rational basis and strict scrutiny review, and requires that the challenged law be substantially related to an important government interest.<sup>79</sup> This level of review is used to examine those laws that discriminate on the bases of sex<sup>80</sup> and parental-marital status.<sup>81</sup>

#### *B. Level of Review for Sex Discrimination Cases*

Until 1971, laws that discriminated on the basis of sex were subject only to rational basis review.<sup>82</sup> In the 1971 case of *Reed v. Reed*, however, the Supreme Court invalidated a law due to its discrimination toward women, and in doing so, applied a heightened level of scrutiny.<sup>83</sup> In *Reed*, an Idaho law provided for a preferential list of categories of persons (parents, spouses, etc.) who could be appointed to administer the estate of a person who died intestate.<sup>84</sup> The law called for males to be given preference as administrators in the event of competing applicants from the same category.<sup>85</sup> In striking down the law, the Court moved away from rational basis review for sex

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(upholding race-based exclusion order because of pressing public need during war time).

76. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (holding laws discriminating based on national origin subject to strict scrutiny).

77. See *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (indicating religion constitutes suspect classification subject to strict scrutiny).

78. See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (“[S]tatutes that treat aliens differently from citizens require[] a greater degree of precision.”); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (noting laws discriminating against “discrete and insular” minorities such as aliens require strict scrutiny).

79. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The State must show ‘at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

80. See generally *Virginia* 518 U.S. 515; *Craig*, 429 U.S. 190.

81. See generally *Clark v. Jeter*, 486 U.S. 456 (1988).

82. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 69 (1961) (upholding law establishing different jury service rules for sexes); *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding law prohibiting certain females from bartending); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (upholding minimum wage law for women); *Radice v. New York*, 264 U.S. 292, 298 (1924) (upholding law prohibiting women from restaurant employment during certain hours); *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding maximum hours law for women employed in laundries); *Ex parte Lockwood*, 154 U.S. 116, 118 (1894) (upholding law excluding women from practice of law); *Minor v. Happersett*, 88 U.S. 162, 177-78 (1874) (upholding exclusion of women from right to vote); *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding law prohibiting women from obtaining license to practice law).

83. See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding intestate statute favoring males over females violates Fourteenth Amendment’s Equal Protection Clause).

84. See *id.* at 72-73.

85. See *id.* at 73.

discrimination cases and instead used a heightened, though not strict, level of scrutiny.<sup>86</sup>

Five years later in *Craig v. Boren*, the Supreme Court first applied the intermediate scrutiny that remains the Court's accepted standard of review for laws that discriminate on the basis of sex.<sup>87</sup> In *Craig*, a challenge was made against an Oklahoma law that allowed women, but not men, to purchase low-alcohol beer at the age of eighteen (men were not permitted to buy any alcohol until the age of twenty-one).<sup>88</sup> In striking down the law, the Supreme Court declared that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>89</sup> The stated governmental interest at issue in *Craig v. Boren* was traffic safety.<sup>90</sup> The Court, however, found the link between traffic safety and the statutory discrimination to be unduly tenuous, observing that

the statistics broadly establish that .18% of females and 2% of males [between the ages of eighteen and twenty-one] were arrested for [drunk driving]. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device.<sup>91</sup>

Intermediate scrutiny for sex classifications has been used by the Supreme Court for reviewing sex classifications since *Craig*.<sup>92</sup> Such scrutiny is not

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86. See *id.* at 75-77.

87. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny standard).

88. See *id.* at 192.

89. *Id.* at 197 (stating intermediate scrutiny standard).

90. See *id.* at 201-02.

91. *Craig*, 429 U.S. at 201.

92. See *AT&T Corp. v. Hulteen*, 556 U.S. 701, 726 (2009) (Ginsburg, J., dissenting) ("Commencing in 1971, the Court had shown increasing awareness that traditional sex-based classifications confined or depressed women's opportunities."); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("For a gender-based classification to withstand [heightened] scrutiny, it must 'serve important governmental objectives,' and 'the discriminatory means employed must be substantially related to the achievement of those objectives.'" (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996))); *United States v. Morrison*, 529 U.S. 598, 620 (2000) ("As our cases have established, state-sponsored gender discrimination violates equal protection unless it 'serves important governmental objectives' and 'the discriminatory means employed are substantially related to the achievement of those objections.'" (quoting *Virginia*, 518 U.S. at 533)); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998) ("[H]eightedened scrutiny . . . normally governs gender discrimination claims."); *Virginia*, 518 U.S. at 531-33.

Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action. . . . The burden of justification is demanding and it rests entirely on the State. . . . The justification . . . must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

*Virginia*, 518 U.S. at 531, 533 (internal quotation marks omitted).

applicable, however, unless a court finds that the law is discriminating against *similarly situated* men and women.

### C. *Similarly Situated*

Because the heightened scrutiny applied to sex classifications is only applicable when a law treats similarly situated men and women differently, the question of what it means to be similarly situated can be—and is—used as a threshold inquiry by courts to prevent the application of intermediate scrutiny to laws that discriminate between the sexes.<sup>93</sup> The relative situation of the sexes, however, was first used in sex-discrimination cases as a tool to illustrate the very protections afforded by the Equal Protection Clause.

For example, in *Reed*, where the Supreme Court invalidated an Idaho statute giving a preference to males in the appointment of administrators of estates, the Court noted that

[t]he objective of [the statute] clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective.<sup>94</sup>

In *Frontiero v. Richardson*, where the Court struck down a statute that treated differently the spouses of male and female service members, it pointed out that “any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands ‘dissimilar treatment for men and women who are similarly situated . . . .’”<sup>95</sup> In *Califano v. Goldfarb*, the Court invalidated a portion of the Social Security Act that benefited widows, but not widowers, noting that the portion “disadvantages women contributors to the social security system as compared to similarly situated men.”<sup>96</sup>

Generally, “[t]o be ‘similarly situated,’ groups need not be identical in makeup, they need only share commonalities that merit similar treatment.”<sup>97</sup> As some commentators have noted, “[i]n most gender discrimination cases, courts simply take for granted that men and women are similarly situated.”<sup>98</sup>

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93. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940))); *Reed v. Reed*, 404 U.S. 71, 75 (1971) (“[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.”).

94. *Reed*, 404 U.S. at 77.

95. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Reed*, 404 U.S. at 77).

96. See *California v. Goldfarb*, 430 U.S. 199, 208 (1977).

97. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993).

98. Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and*

Nevertheless, courts use the similarly situated analysis as a threshold inquiry to bar sex-based equal protection claims in two contexts. First, courts examining situations that turn on the biological differences among men and women will find that men and women are not similarly situated. As such, courts may take into account “the special problems of women,” and/or other biological differences between the sexes.<sup>99</sup>

Second, courts have used the similarly situated consideration as a threshold question to bar equal protection claims premised on the differing quality of prison facilities and programs offered to inmates of differing sexes. Instead of assuming that male and female prisoners—who are usually incarcerated in sex-specific institutions—are similarly situated, courts have commonly taken into account factors such as population size, likelihood of violence, length of inmate stay, and security level to determine that male and female inmates are not similarly situated for purposes of an equal protection claim.<sup>100</sup>

As explained in the next Part, the SJC has also adopted this similarly situated analysis as a threshold inquiry in equal protection cases involving sex discrimination between male and female inmates. This adoption, however, is an anomaly in the SJC’s equal protection jurisprudence, because the court has

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*the Requirement of “Similarly Situated,”* 51 N.Y.L. SCH. L. REV. 595, 596 (2007).

99. See *Nguyen v. INS*, 533 U.S. 53, 63 (2001) (“Fathers and mothers are not similarly situated with regard to the proof of biological parenthood.”); *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (upholding statutory rape law because women bear burdens of teen pregnancy); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (invalidating adoption law requiring consent of unwed mother but not father because no “profound difference between . . . affection and concern of mothers and fathers for their children”); *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (“[M]others and fathers of illegitimate children are not similarly situated. . . . [because] [u]nlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown.”). See generally *Giovanna Shay, Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011).

100. See *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 612 (8th Cir. 1997) (holding male prisoners housed in multiple institutions and female prisoners housed in one not similarly situated for purposes of access to programs and services based on prison demographics differences); *Keevan v. Smith*, 100 F.3d 644, 648-50 (8th Cir. 1996) (considering number of male and female inmates, average sentence duration served by males and females, number of male and female inmates assigned highest security classification, and crimes committed by male and female inmates); *Women Prisoners v. District of Columbia*, 93 F.3d 910, 925 (D.C. Cir. 1996) (considering population sizes, security levels, types of crimes, length of sentences, and special characteristics); *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 732 (8th Cir. 1994) (considering parental role of females, likelihood of abuse for male and female inmates, and likelihood of violence for male and female inmates); *Timm v. Gunter*, 917 F.2d 1093, 1103 (8th Cir. 1990) (considering number and age of inmates, types of crimes committed, length of sentences, and frequency of violent incidents); *Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (considering different housing schemes for male and female inmates, average time served by gender, special characteristics of female inmates, and contrary characteristic that male inmates more likely to be violent/predatory), *aff’d*, 69 F.3d 280 (8th Cir. 1995). But see *Pitts v. Thornburgh*, 866 F.2d 1450, 1451 (D.C. Cir. 1989) (holding male and female inmates convicted of nonfederal crimes similarly situated in determining whether locations of their prisons violated equal protection where female prison far removed from prisoners’ families); *Glover v. Johnson*, 35 F. Supp. 2d 1010, 1015 (E.D. Mich. 1999) (holding male and female inmates similarly situated for purposes of equal protection claims), *aff’d*, 198 F.3d 557 (6th Cir. 1999); *Glover v. Johnson*, 478 F. Supp. 1075, 1078 (E.D. Mich. 1979) (holding relative population sizes of male and female inmates not bar to equal protection requirements).

generally presumed men and women to be similarly situated for purposes of an equal protection claim.

#### IV. EQUAL PROTECTION UNDER THE MASSACHUSETTS CONSTITUTION

In the early twentieth century, when faced with a sex-based classification, the SJC adopted the contemporary equal protection standards employed by the federal courts under the U.S. Constitution. With the adoption of the MERA in 1976, however, the SJC broke from the federal courts' jurisprudence and adopted strict scrutiny review for sex-discrimination cases. Since then, the SJC has struck down many laws for their failure to meet such scrutiny (though recently the SJC has adopted the similarly situated threshold inquiry for related claims). This Part explains the SJC's jurisprudence on sex-based equal protection claims.

##### A. Pre-MERA

Richard G. Riley was in 1911 the superintendent of the Davol Mills in Fall River, Massachusetts.<sup>101</sup> In that year, he was convicted under a statute that made it a crime to employ women "in labor in manufacturing and mechanical establishment" in excess of fifty-six hours per week or ten hours per day.<sup>102</sup> Riley challenged his conviction and the constitutionality of the statute.<sup>103</sup> In upholding the law's validity, the SJC employed a rational basis review of the statute:

A classification of employment of women . . . to manufacturing and mechanical establishments of this character is within the legislative power. Such a classification is sustained as valid when it can be ascertained to rest upon some sound principle, and to be not arbitrary in its nature. There is a legislative right of reasonable selection among various businesses and industries for the operation of laws general in their application on the basis chosen, and so long as this selection is not arbitrary, whimsical, unnecessary or unreasonable, it

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101. See *Commonwealth v. Riley*, 97 N.E. 367, 368 (Mass. 1912), *aff'd*, 232 U.S. 671 (1914).

102. See *id.*; see also Act of June 18, 1909, ch. 514, § 48, 1909 Mass. Acts 723, 739.

No child and no woman shall be employed in laboring in a manufacturing or mechanical establishment more than ten hours in any one day, except as hereinafter provided in this section, unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week; and, in no case, shall the hours of labor exceed fifty-eight in a week; and if any child or woman shall be employed in more than one manufacturing or mechanical establishment, the total number of hours so employed shall not exceed fifty-eight in any one week.

§ 48, 1909 Mass. Acts at 739.

103. See *Riley*, 97 N.E. at 387.

cannot be pronounced unconstitutional.<sup>104</sup>

In sustaining the sex-based classification, the SJC did not differentiate between the equal protection rights provided by the Massachusetts Declaration of Rights and those provided by its federal counterpart.<sup>105</sup> In 1912 (the year of the *Riley* decision), Article I of the Massachusetts Declaration of Rights provided that: “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”<sup>106</sup>

Just months after the *Riley* decision, however, the SJC made clear that the Declaration of Rights, including Article I, is a source of equal protection rights separate (if not distinct) from the Federal Constitution. In the spring of 1912, the Massachusetts Senate considered a bill that would have insulated trade unions and union officials from tort actions premised upon acts committed by, or on behalf of, a trade union.<sup>107</sup> As was its constitutional right, before voting on the law, the Senate ordered the SJC to opine on the constitutionality of the proposed statute.<sup>108</sup>

The SJC advised the Senate that the legislature would exceed its lawful powers in enacting such a statute, and acknowledged for the first time that the Massachusetts Declaration of Rights provides substantive rights of equal protection apart from those provided by the Fourteenth Amendment to the U.S. Constitution.<sup>109</sup> Although the phrase “equal protection” does not appear in the Declaration of Rights, the SJC noted that “[a]bsolute equality before the law,” such as that demanded by the Fourteenth Amendment, is a “fundamental principle of [the Massachusetts] Constitution,” as evidenced by its various articles taken as a whole.<sup>110</sup> Specifically citing Articles I, X, XI, and XXX of the Declaration of Rights,<sup>111</sup> the SJC continued:

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104. *Id.* at 370.

105. *See id.*

106. MASS. CONST. pt. I, art. I, amended by MASS. CONST. art. 106.

107. *See Op. of the Justices*, 98 N.E. 337, 337 (Mass. 1912).

108. *See id.*; *see also* MASS. CONST. pt. II, ch. III, art. II, amended by MASS. CONST. art. LXXXV (“Each branch of the legislature . . . shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”).

109. *See Op. of the Justices*, 98 N.E. at 337.

110. *See id.*

111. *See* MASS. CONST. pt. I, arts. X-XI, XXX. Article X states:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this

Frequent expressions to this effect are found in various articles. For example, it is said that “all men are born free and equal”; that “each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws”; that “every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character”; and that the several departments of government are separated “to the end it may be a government of laws and not of men.”<sup>112</sup>

Thus, the SJC explicitly found in the Declaration of Rights a source for equal protection rights. This recognition, however, would not have changed the result in *Riley*. At the time of the *Riley* decision, sex-based classification laws

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commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: *provided, however*, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

MASS. CONST. pt. I, art. X, *amended by* MASS. CONST. art. XXXIX. Article XI states:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

MASS. CONST. pt. I, art. XI. Article XXX states:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. pt. I, art. XXX.

112. *Op. of the Justices*, 98 N.E. at 337; *see* *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1269 (Mass. 2011) (“This court traditionally has located a right to equal protection under art. I . . .”); *Simon v. Justices of Mun. Court.*, 112 N.E. 608, 609 (Mass. 1916).

[A]rticles 1, 10, 11, and 30 of the Declaration of Rights . . . in general guarantee to every individual equality before the law, the protection of life, liberty and property according to standing laws, recourse to law for injuries to person, property and character, and the strict separation of government into the three departments of executive, legislative and judicial.

*Simon*, 112 N.E. at 609.

were subject only to rational basis review under the Federal Constitution, which was the same standard employed by the SJC in *Riley*.<sup>113</sup> In the years prior to the ratification of the MERA, the SJC continued to employ the contemporary federal standard of review when expounding on the rights of equal protection vis-à-vis sex discrimination.

In 1939, the SJC issued an advisory opinion regarding six laws that would have limited or excluded the employment of married women in public service.<sup>114</sup> At that time, the federal standard of review for sex-based classifications was rational basis review.<sup>115</sup> Although the classification at issue in this advisory opinion was between married and unmarried women, rather than between men and women, the SJC noted that either brand of discrimination was subject only to rational basis review, declaring: “Women married or unmarried are members of the State. Subject only to constitutional limitations and valid statutory limitations they share with other citizens the duties and privileges of citizenship. And like other citizens they are entitled to the benefit of the constitutional guaranties against arbitrary discrimination.”<sup>116</sup> The SJC determined, however, that the law failed to pass even this lenient level of review.<sup>117</sup>

The SJC did not issue another opinion expounding on sex-based classifications under the equal protection afforded by the Massachusetts Constitution until 1975. By then, the Supreme Court had adopted a heightened level of scrutiny for laws employing sex-based distinctions in *Reed* and *Frontiero*, and again, the SJC followed suit.<sup>118</sup> In *Commonwealth v. MacKenzie*, the SJC considered a criminal law that punished men who fathered a child with women to whom they were not married, but did not similarly

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113. See *Muller v. Oregon*, 208 U.S. 412, 419 (1908) (upholding maximum hours law for women employed in factories); see also *Commonwealth v. Riley*, 97 N.E. 367, 393-94 (Mass. 1912) (applying rational basis standard), *aff'd*, 232 U.S. 671 (1914).

114. See generally *Op. of the Justices*, 22 N.E.2d 49 (Mass. 1939).

115. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (upholding minimum wage law for women); *Radice v. New York*, 264 U.S. 292, 298 (1924) (upholding law prohibiting women from restaurant employment during certain hours).

116. *Op. of the Justices*, 22 N.E.2d at 59.

117. *Id.* at 60.

[W]e are of opinion that it cannot be found that married women as a class are so lacking—either absolutely or relatively as compared with unmarried women as a class—in qualifications for employment in all branches of the public service that the exclusion of married women as a class from public employment of every nature on the ground of lack of qualifications therefor would be reasonable.

We are further of the opinion that . . . no ground having a substantial relation to the public welfare can be found for excluding married women as a class from employment in the public service.

*Id.* at 60-61.

118. See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

punish the mothering women.<sup>119</sup> In ruling that the law's distinction in criminal penalties between men and women was unconstitutional, the SJC adopted the heightened scrutiny of federal jurisprudence:

The judicial scrutiny required in cases involving distinctions based solely on sex is stricter than that required under traditional equal protection standards. The application of this stricter standard of review has led the Supreme Court to reject many sex-based classifications. A sex-based classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>120</sup>

The SJC invalidated the statute on the grounds that there was "no permissible legislative goal which rationally is achieved by making a father, but not a mother, guilty of conceiving a child out of wedlock."<sup>121</sup> A year after the *MacKenzie* decision, Massachusetts adopted its Equal Rights Amendment.

### B. *The MERA*

The MERA has its origins in the movement for a Federal Equal Rights Amendment (FERA) to the U.S. Constitution. The FERA, designed to afford equal protection rights to women, was conceived in 1923, and was eventually passed by both houses of Congress in 1972.<sup>122</sup> Section 1 of the FERA states: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>123</sup>

Although thirty-five states ratified the amendment, the minimum of thirty-eight needed to make it law was never achieved.<sup>124</sup> However, from the outgrowth of this movement, a number of states, including Massachusetts, appended equal rights amendments to their own state constitutions.<sup>125</sup> The

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119. See *Commonwealth v. MacKenzie*, 334 N.E.2d 613, 614 (Mass. 1975).

120. *Id.* at 614-15 (quoting *Reed*, 404 U.S. at 76).

121. *Id.* at 615.

122. See SHARON WHITNEY, *THE EQUAL RIGHTS AMENDMENT: THE HISTORY AND THE MOVEMENT* 11, 39 (1984); see also 118 Cong. Rec. 9598 (1972).

123. WHITNEY, *supra* note 122, at 34 (providing full text of proposed FERA).

124. See *id.* at 81.

125. See *id.* at 50. With respect to state equal rights amendments, "[f]ourteen states added equal rights provisions to their constitutions between 1971 and 1976: Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Virginia, and Washington. (Wyoming and Utah have had such provisions in their constitutions since the 1890s . . .)." *Id.* Additionally,

[e]ighteen states have adopted constitutions or constitutional amendments providing that equal rights under the law shall not be denied because of sex. Although a few of these provisions were included in nineteenth century state constitutions, most of them are of more recent vintage, having been adopted between 1970 and 1978, a period roughly coextensive with the pendency of the

MERA was introduced in Massachusetts in 1972, and two consecutive constitutional conventions (i.e., joint votes of the Massachusetts House and Senate) in 1973 and 1975 subsequently passed it.<sup>126</sup> Massachusetts's voters ratified the MERA in November 1976.<sup>127</sup> The MERA nullified Article I to the Declaration of Rights and provided the following in its place:

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.<sup>128</sup>

With the ratification of the MERA, discrimination on the basis of sex was strictly prohibited by the text of the Declaration of Rights.

### C. Sex Discrimination Jurisprudence Under the MERA

#### 1. The SJC's Initial Reactions

The SJC's first comment on the MERA's effect came in a 1977 challenge to a bank's disbursement of funds from a public trust. In *Ebitz v. Pioneer National Bank*, a bank was the trustee of a public charitable trust established pursuant to the will of a testator who "directed that the fund[s] be used to aid and assist worthy and ambitious young men to acquire a legal education."<sup>129</sup> A group of female law students, who were denied access to the funds on the grounds of their sex, challenged the trustees' denial of their applications.<sup>130</sup> Although the SJC resolved the case by interpreting "young men" to mean "young men or women," it noted that "[i]f some ambiguity should remain [regarding the definition of "young men"], we think the declared policy of the Commonwealth [pursuant to the MERA] regarding equal treatment of the sexes should lead us to resolve it in favor of the [female law students]."<sup>131</sup>

Later that same year in an advisory opinion, the SJC considered the effect of

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Federal Equal Rights Amendment . . . .

Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 908-09 (1997).

126. See COMM. TO RATIFY THE MASS. STATE EQUAL RIGHTS AMENDMENT, A REPORT ON THE HISTORY AND IMPACT OF THE MASSACHUSETTS STATE EQUAL RIGHTS AMENDMENT 23 (1975).

127. See *id.*

128. MASS. CONST. art. 106; see *supra* note 106 and accompanying text (providing original text of Article I).

129. See *Ebitz v. Pioneer Nat'l Bank*, 361 N.E.2d 225, 226 (Mass. 1977).

130. See *id.* (alleging bank rejected applications because only male applicants eligible for consideration).

131. *Id.* at 227.

the MERA on the standard of review applicable to sex-classification cases, in light of the fact that the pre-MERA *MacKenzie* decision had already elevated the review to something akin to intermediate scrutiny.<sup>132</sup> Although the court expressed no definite opinion, it remarked that “[i]t can be argued persuasively that, by adopting [the MERA], the people of Massachusetts have expressed their intention that the strict scrutiny required by the United States Constitution in discrimination cases involving other fundamental First Amendment rights should be now applied to distinctions based on sex.”<sup>133</sup> Just four months after issuing this advisory opinion, the SJC adopted strict scrutiny review for sex discrimination cases under the MERA in *Commonwealth v. King*.<sup>134</sup>

## 2. *Commonwealth v. King and Strict Scrutiny*

Diane King had been convicted of three counts of prostitution and two counts of common night walking in the summer of 1975.<sup>135</sup> Each conviction came pursuant to a Massachusetts statute prohibiting prostitution that stated “[c]ommon night walkers, both male and female, . . . [and] prostitutes, . . . may be punished by imprisonment in a jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.”<sup>136</sup>

King and two other women convicted under this statute challenged the law’s constitutionality on several grounds, including as-applied to them by reason of discriminatory enforcement of the law.<sup>137</sup> The defendants claimed that although the prostitution statute was on its face neutral as to sex, the Commonwealth nonetheless enforced it only as against women.<sup>138</sup> King and the other women argued that the government, as a matter of policy and practice, prosecuted female prostitutes but not their male counterparts, and by doing so violated their (i.e., the defendants’) right to the equal protection of the laws.<sup>139</sup> The defendants were unsuccessful in this challenge for want of sufficient evidence, offering in support of their claim only the testimony of a single police officer that he had never arrested a male prostitute and that it was the policy of the Boston Police Department vice squad to arrest only female prostitutes.<sup>140</sup> Although this evidentiary insufficiency allowed the SJC to affirm the defendants’ convictions, because of the recent ratification of the MERA, the court elaborated on “the standards which derive from this amendment [that

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132. See Op. of the Justices to the Senate, 366 N.E.2d 733, 735 (Mass. 1977).

133. *Id.* at 736.

134. See *Commonwealth v. King*, 372 N.E.2d 196, 206 (Mass. 1977).

135. See *id.* at 199-200 (detailing background of plaintiff’s allegations).

136. *Id.* at 200 n.4 (quoting MASS. GEN. LAWS ch. 272, § 53 (1973)).

137. See *id.* at 203.

138. See *King*, 372 N.E.2d at 203.

139. See *id.* at 203.

140. See *Commonwealth v. King*, 372 N.E.2d 196, 204-05 (Mass. 1977).

would] apply to cases involving sex-based classification.”<sup>141</sup>

Noting that the MERA groups sex “with other prohibited bases for discrimination which are [already] subject to strict judicial scrutiny”—i.e., race, color, creed, and national origin—the SJC concluded that “the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination.”<sup>142</sup> As such, each challenged law discriminating on these bases should be scrutinized at the same level—that is, one “at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications.”<sup>143</sup> This level of scrutiny, as described by the *King* court, prohibits the Commonwealth from discriminating on the basis of sex unless such discrimination “further[s] a demonstrably compelling interest and limit[s its] impact as narrowly as possible consistent with [its] legitimate purpose.”<sup>144</sup>

Ten days after issuing the *King* opinion, the SJC, in yet another advisory opinion, further explained to the state House of Representatives the rationale behind requiring strict scrutiny of sex-based classifications under the MERA.<sup>145</sup> The House had sought the SJC’s opinion on the constitutionality of a proposed bill prohibiting sex discrimination in the public schools that would have added to the MERA the following statement: “[T]he provisions of this section shall not be construed so as to authorize the participation of girls with boys in the following contact sports teams: football and wrestling.”<sup>146</sup>

In its response, the SJC reiterated its adherence to (and explained the logic behind) a strict scrutiny standard in light of the MERA.<sup>147</sup> The court again cited the context in which the MERA was ratified—a time when sex discrimination laws were subject only to intermediate scrutiny—and held that “[t]o use a standard in applying the Commonwealth’s equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.”<sup>148</sup> The SJC concluded that the proposed statute was unconstitutional because “[a] prohibition of all females from voluntary participation in a particular sport

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141. *Id.* at 206. The SJC had only weeks earlier avoided the question of MERA standards in its 1977 *Opinion of the Justices to the Senate*, stating: “We need not decide at this time whether strict scrutiny and the related ‘compelling State interest’ tests are to be applied for the determination whether the bill here in question would violate the constitutional guaranty of sexual equality established by the Amendment.” *Op. of the Justices to the Senate*, 366 N.E.2d 733, 736 (Mass. 1977) (considering proposed bill restricting high school’s “Girl Officers Regiment” only to female students).

142. *King*, 372 N.E.2d at 206.

143. *Id.*

144. *Id.*

145. *See Op. of the Justices to the House of Representatives*, 371 N.E.2d 426, 428 (Mass. 1977) (concluding strict scrutiny required to maintain purpose of MERA).

146. *Id.* at 427.

147. *See id.* at 428.

148. *Id.*

under every possible circumstance serves no compelling State interest.”<sup>149</sup> The court then added its first comment on the separate-but-equal paradigm for sex-based discrimination stating, “[W]e decline to express a view whether it would be permissible under [the MERA] if equal facilities were available for men and women in a particular sport which was available separately to each sex.”<sup>150</sup>

### 3. Potential Validity of Separate but Equal

The SJC soon ruled on another sex-based absolute prohibition in the form of a rule of the Massachusetts Interscholastic Athletic Association (MIAA).<sup>151</sup> As the body charged with regulating the competitive sports among “[v]irtually all public secondary schools in the Commonwealth,” the MIAA had promulgated a rule that “[n]o boy may play on a girls’ team.”<sup>152</sup> In its decision on the constitutionality of this rule, the SJC provided its first post-MERA analysis of potential government interests in sex-based exclusions.<sup>153</sup> The MIAA offered three independent justifications for its actions, arguing that the rule: merely codified recognized biological differences in the sexes; was necessary to protect the players’ safety; and was necessary to prevent the swamping by boys of girls’ teams.<sup>154</sup>

The SJC was not convinced, however, and found none of these interests sufficiently compelling to justify the MIAA’s attempt to enforce a “complete sex barrier.”<sup>155</sup> Although cognizant that “biological circumstance does contribute to some overall male advantages,” the SJC ruled that such “differences are not so clear or uniform as to justify a rule in which sex is sought to be used as a kind of ‘proxy’ for a functional classification.”<sup>156</sup> The court dismissed the safety interest on the grounds that girls are not any less exposed to injury playing on a predominantly male team than on one with only a few male players, and in any event, that girls are as entitled as boys to take such a risk.<sup>157</sup> Finally, the SJC found both protecting girls’ teams from being overrun by boys was not a compelling interest, and neither was a total ban a sufficiently narrow solution.<sup>158</sup> To the extent girls’ teams were in danger of being besieged by boys, the MIAA’s sweeping prohibition ignored “less

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149. *Op. of the Justices to the House of Representatives*, 371 N.E.2d at 430.

150. *Id.*

151. *See* Attorney Gen. v. Mass. Interscholastic Athletic Ass’n, 393 N.E.2d 284, 285 (Mass. 1979). Months prior to the MIAA decision, the SJC ruled that the MERA included women among the “generic group affiliations which may not permissibly form the basis for juror exclusion.” *Commonwealth v. Soares*, 387 N.E.2d 499, 516 (Mass. 1979).

152. *Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d at 285-86.

153. *See id.* at 293-96.

154. *See id.*

155. *See id.* at 296.

156. *Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d at 293.

157. *See* Attorney Gen. v. Mass. Interscholastic Athletic Ass’n, 393 N.E.2d 284, 293-94 (Mass. 1979).

158. *See id.* at 294-95.

offensive and better calculated alternatives [that] appear[ed] to exist and ha[d] not been attempted.”<sup>159</sup> One such narrower alternative suggested by the court was the creation of a parallel boys’ team in the same sport.<sup>160</sup> This suggestion assumed the validity of “instances . . . of ‘separate but equal’ teams.”<sup>161</sup>

#### 4. *Lowell v. Kowalski and a Sufficient State Interest*

A year after the 1979 MIAA case, the SJC identified for the first time a state interest sufficiently important so as to allow for a sex-based classification in *Lowell v. Kowalski*.<sup>162</sup> Nonetheless, the court struck down an absolute sex-based distinction—this time on the grounds that the law was insufficiently narrow.<sup>163</sup>

The distinction at issue was one created by the Commonwealth’s statutory scheme governing the inheritance rights of nonmarital children.<sup>164</sup> Under the challenged law, a nonmarital child’s right to inherit from her father differed from the child’s right to inherit from her mother.<sup>165</sup> A nonmarital child was considered an heir to her mother, and could therefore inherit from and through the mother in the same manner as could a marital child.<sup>166</sup> However, a nonmarital child was treated as the equal to a marital child of her father only if her parents had subsequently married and the father (a) acknowledged paternity, or (b) was otherwise adjudged to be the child’s father.<sup>167</sup>

Despite recognizing that to differentiate an individual’s right to inheritance as between her parents was “[c]learly . . . to establish a classification based on sex,” the SJC nonetheless held that the government’s interest in doing so was sufficiently compelling.<sup>168</sup> Reasoning that “because the possibility of fraud is

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159. *Id.* at 294.

160. *See id.* at 295-96.

161. *Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d at 296. The MIAA would subsequently adopt new rules allowing for mixed-sex teams where no team existed for one sex or the other. Students playing on mixed-sex teams would “participate in the regional and state tournaments of their own gender in the sports of cross country, spring track, winter track, skiing, individual golf, and individual tennis.” *Thomka v. Mass. Interscholastic Athletic Ass’n*, No. 051028, 2007 WL 867084, at \*1 n.5 (Mass. Super. Ct. Feb. 12, 2007), *aff’d in part, vacated in part*, 952 N.E.2d 462 (Mass. App. Ct. 2011). This rule was challenged by a female golfer who argued that because the MIAA offered only a “boys’ individual championship in the fall season” (and both a girls’ and boys’ championship in the spring season) the rule violated the MERA as applied to her and other girls who played during the fall season. *See id.* at \*1-2. The superior court judge agreed, ruling that “by providing [females] only one individual and one team championship annually, whereas male golfers have two such championships annually[,] . . . [the MIAA] demean[ed] the athletic competitiveness and dedication of female golfers who participate in the fall season.” *Id.* at \*8.

162. *See Lowell v. Kowalski*, 405 N.E.2d 135, 139 (Mass. 1980) (concluding state has compelling interest in distinguishing between sexes for inheritance statute).

163. *See id.* (deciding statutory pattern not properly confined to fulfillment of interest).

164. *See id.* at 137-38.

165. *See id.*

166. *See Lowell*, 405 N.E.2d at 137-38.

167. *See id.* at 138.

168. *See Lowell v. Kowalski*, 405 N.E.2d 135, 139-40 (Mass. 1980).

usually greater with respect to claims against the estate of a deceased man than against the estate of a deceased woman,” the court found the purpose of avoiding such fraud to be compelling.<sup>169</sup> The court determined, however, that the statute was unconstitutional as written because it was not “as narrow in its impact as is possible” consistent with its purpose.<sup>170</sup> The statute’s requirement of intermarriage denied inheritance rights to a child even in cases where paternity was conceded.<sup>171</sup> The *Lowell* court opined that in such a case, the “possibility of fraud is wholly absent,” and the purpose of the law is negated.<sup>172</sup>

### 5. *Sexual Harassment*

The SJC next broadened the substantive protections of the MERA by applying it to sexual harassment claims in the private employment context. In 1987’s *O’Connell v. Chasdi*, the plaintiff brought claims of assault and battery, intentional infliction of emotional distress, and violations of the Massachusetts Civil Rights Act (MCRA) all premised on her supervisor having made sexual advances toward her during an overseas business trip.<sup>173</sup> The SJC ruled that sexual harassment of the kind that violated the MCRA (i.e., “a work environment pervaded by harassment or abuse” and “resulting [in] intimidation, humiliation, and stigmatization”) also violated the rights secured by Article I of the Massachusetts Declaration of Rights.<sup>174</sup>

### 6. *Brackett v. Civil Service Commission and Affirmative Action*

The SJC did not further explicate the substantive limitations of the MERA until 2006 in *Brackett v. Civil Service Commission*.<sup>175</sup> In *Brackett*, white male

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169. *See id.* at 140.

170. *See id.*

171. *See id.*

172. *Lowell*, 405 N.E.2d at 141. The Appeals Court of Massachusetts was faced with this very situation (i.e., a nonmarital child who was acknowledged by the father prior to the father’s death) in *Paquette v. Koscotas*, 421 N.E.2d 483 (Mass. App. Ct. 1981).

*Lowell v. Kowalski* . . . held that an illegitimate child whose father acknowledged her as such is entitled to share in the distribution of his estate. That the decedent acknowledged [the plaintiff nonmarital child] as his child[] was stipulated by the parties’ statement of agreed facts and that agreement obviates any further inquiry by us for other evidence of acknowledgement. Under the principles of *Lowell v. Kowalski*, [the plaintiff is] . . . entitled to the status of next of kin of the decedent and [the plaintiff] qualified for appointment as administratrix of her father’s estate.

*Paquette*, 421 N.E.2d at 484.

173. *See O’Connell v. Chasdi*, 511 N.E.2d 349, 349-50 (Mass. 1987). The plaintiff alleged that her boss repeatedly made physical advances toward her—placing his hand on her knee, hugging her, stroking her hair and face, and attempting to hold her hand—and when she denied his advances, he threatened her job. *See id.*

174. *See id.* at 353 (internal quotation marks omitted). The SJC had previously extended the MCRA to cover sexual harassment claims in *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination*, 508 N.E.2d 587, 590-91 (Mass. 1987).

175. *See generally* *Brackett v. Civil Serv. Comm’n*, 850 N.E.2d 533 (Mass. 2006). In 2000, a

police officers employed by the Massachusetts Bay Transportation Authority (MBTA) challenged, on equal protection grounds, the MBTA's affirmative action certification plan, under which they (the white male police officers) were bypassed for promotion.<sup>176</sup> As is common to virtually all sex-based affirmative action cases, the MBTA's claimed interest was in addressing the ongoing effects of past gender discrimination.<sup>177</sup> Based on statistical evidence in the administrative record, the SJC held that "gross statistical disparities between the number of women who were qualified to be police officers in Massachusetts and the number of women who were hired for positions in the MBTA police department constituted prima facie evidence of a past practice of

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Massachusetts superior court used the MERA to grant a preliminary injunction against a school that attempted to exclude a female-identifying male student who wished to wear make-up and female shirts and fashion accessories. See *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*2-3 (Mass. Super. Ct. Oct. 11, 2000). In *Doe v. Yunits*, the court ruled that the gender-neutral dress code was in fact discriminatory on the basis of sex, granting the preliminary injunction because the MERA did not "allow the stifling of [the] plaintiff's selfhood merely because it causes some members of the community discomfort," and reiterating that, "[o]ur constitution neither knows nor tolerates classes among citizens." *Id.* at \*7 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896)). In 1982 the SJC noted, without making a rule on, the potential unconstitutionality of a Massachusetts statute that treated unmarried parents differently from married parents. See *In re New Bedford Child & Family Serv. to Dispense with Consent to Adoption*, 432 N.E.2d 97, 103 (Mass. 1982). Also in 1982, the SJC passed on the consideration of the MERA's effect on a tax exemption for an educational institute that admits only a single sex to its degree-granting program. See *Trs. of Smith Coll. v. Bd. of Assessors*, 434 N.E.2d 182, 184 (Mass. 1982). In 1986, the Appeals Court of Massachusetts, in a case similar to *Commonwelath v. King*, affirmed the dismissal of prostitution charges where the defendant made the requisite showing of selective enforcement under the MERA. See *Commonwealth v. An Unnamed Defendant*, 492 N.E.2d 1184, 1188 (Mass. App. Ct. 1986). In 2002, the Massachusetts Appellate Division struck down another facially-discriminatory statute with little discussion. Chapter 209, section 7 of the Massachusetts General Laws provided that

[a] married woman shall not be liable for her husband's debts, nor shall her property be liable to be taken on an execution against him. But a married woman shall be liable jointly with her husband for debts due, to the amount of one hundred dollars in each case, for necessaries furnished with her knowledge or consent to herself or her family, if she has property to the amount of two thousand dollars or more.

*Pioneer Valley Postal Fed. Credit Union v. Soja*, 2002 Mass. App. Div. 193, 193 n.2 (2002). The appellate division ruled that a later-enacted and inconsistent statute impliedly repealed the one in question. See *id.* at \*2. However, the court also noted that the statute had "not been amended since 1910, before women acquired the right to vote, [and it] is repugnant to . . . the Equal Rights Amendment to the Constitution of the Commonwealth. [The court came] to this conclusion irrespective that the result operates against a women [sic], since on its face, the statute cannot pass constitutional legitimacy." *Id.* The SJC's often-discussed same-sex marriage decision of *Goodridge v. Department of Public Health* did not implicate the substantive rights provided by the MERA. See generally *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Although *Goodridge* rested on equal protection grounds, the majority opinion held that the marriage law did not survive the rational basis test and never reached the question of whether the law created a classification based on sex. See *id.* at 961. In a concurring opinion, Justice Greaney expressed his opinion that the law did create such a classification, and noted that justices in Hawaii and Vermont reached the same conclusion. See *id.* at 970-71 (Greaney, J., concurring) ("As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex.").

176. See *Brackett*, 850 N.E.2d at 539.

177. See *id.* at 550.

discrimination,” and that remedying such discrimination was a sufficiently compelling interest.<sup>178</sup>

The SJC also held that the state’s promotion plan was narrowly tailored in addressing this interest.<sup>179</sup> In doing so, the court, for the first time under the MERA, adopted a four-factor test to determine whether a remedial measure is sufficiently narrow: “The extent to which (i) the beneficiaries of the order are specially advantaged; (ii) the legitimate expectancies of others are frustrated or encumbered; (iii) the order interferes with other valid state or local policies; and (iv) the order contains (or fails to contain) built-in mechanisms that limit its duration.”<sup>180</sup> The SJC held that the MBTA’s plan was sufficiently narrow to remedy the past hiring discrepancies.<sup>181</sup>

### 7. *DuPont v. Commissioner of Corrections and the Similarly Situated Problem*

Seven months later in *DuPont v. Commissioner of Correction*, the SJC issued another MERA decision, which for the first time in the state’s jurisprudence raised the issue of whether men and women are similarly situated in a given equal protection case.<sup>182</sup> While serving a sentence in the state’s maximum-security prison (the Massachusetts Correctional Institution at Cedar Junction (MCI-Cedar Junction)), Michael Kevin DuPont was found guilty of a “major” violation of prison rules, and as a result, was sentenced to serve eighteen months in the Department of Correction departmental disciplinary unit (DDU).<sup>183</sup> DuPont challenged this punitive process as violative of his equal protection rights on the grounds that MCI-Framingham (at that time the only state prison for women) did not employ a DDU for female prisoners.<sup>184</sup>

The SJC did not analyze DuPont’s equal protection claim, holding instead that the Commonwealth’s male and female prison populations were not similarly situated.<sup>185</sup> The SJC adopted a federal formulation of the similarity analysis stating, “[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. The ‘relevant aspects’ are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary.”<sup>186</sup>

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178. *See id.*

179. *See id.* at 552.

180. *See Brackett*, 850 N.E.2d at 550-51 (Mass. 2006) (quoting *Bos. Police Sup. Officers Fed’n v. Boston*, 147 F.3d 13, 23 (1st Cir.1998)).

181. *See Brackett v. Civil Serv. Comm’n*, 850 N.E.2d 533, 552 (Mass. 2006).

182. *See Dupont v. Comm’r of Corr.*, 861 N.E.2d 744, 752 (Mass. 2007).

183. *See id.* at 746.

184. *See id.*

185. *See id.* at 754-55.

186. *DuPont*, 861 N.E.2d at 753 (quoting *Barrington Cove Ltd. P’ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001)).

The court's holding of dissimilarity between male and female prisoners rested on "the very real differences between prisons housing men and those housing women within the Massachusetts prison system;" primarily, "the elevated level of volatility present in male prisons, as reflected in the violent makeup of their populations."<sup>187</sup> The court also noted that: female prisoners are all housed in a single institution, yet males are housed according to security classification; female inmates, on average, serve shorter sentences than their male counterparts; a significantly greater percentage of male inmates are serving sentences for violent crimes than are female inmates; and historically male prisoners have engaged in significantly more "institutionally threatening" behavior (e.g., riots, gang violence, and armed assaults on correction officers) than have female inmates.<sup>188</sup>

Effectively, the SJC, following some federal courts, avoided the MERA's requisite heightened scrutiny by evaluating with a less-exacting standard the relative situation of the sexes.<sup>189</sup> As the next Part explains, the men and women subject to Section 35 are similarly situated, and accordingly, the statute should be subjected to heightened scrutiny, which it cannot withstand.

#### V. SECTION 35 VIOLATES THE EQUAL PROTECTION RIGHTS OF THE WOMEN OF THE COMMONWEALTH

Under the SJC's jurisprudence since the adoption of the MERA, Section 35 operates as an impermissible denial of the equal protection of the laws. There is no question that Section 35 is discriminatory on its face, and should be subject to strict scrutiny by the court. Although the state may be able to establish a sufficient state interest in separate facilities for men and women who are civilly committed, the established facilities are unequal. Additionally, men and women subject to civil commitment are similarly situated, thus making the equal protection challenge a viable one.

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187. *Id.*

188. *See DuPont v. Comm'r of Corr.*, 861 N.E.2d 744, 753-54 (Mass. 2007).

189. *See id.* at 753. Chief Justice Marshall (joined by Justice Greaney) wrote a concurring opinion in which she criticized the majority for undertaking the similarly situated analysis with less than strict scrutiny. *See id.* at 757 (Marshall, J., concurring) (noting majority fails to "look beyond justifications of disparate government action purportedly based on objective data").

The question is not whether DuPont is a bad actor in a bad environment, and "female prisoners" as a group are better people in a better environment, but whether DuPont and *any* female prisoner who committed the same major offense as he did, thereby threatening public safety and prison security, are similarly situated for purposes of these severe disciplinary sanctions.

*Id.* at 758 (Marshall, J., concurring).

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*A. Similarly Situated*

Section 35 male and female detainees are similarly situated. First, Section 35 implicates none of the biological differences between men and women. For example, the reproductive differences between the sexes play no part in the underlying causes of substance abuse or its treatment.<sup>190</sup> Neither are alcoholism nor substance abuse conditions predominantly afflicting one sex rather than the other.<sup>191</sup> As a result, and as the SJC has presumed in all but one case, the men and women subject to the Section 35 procedures are similarly situated.

The rationale of the single case (*DuPont*) in which the SJC held the sexes were not similarly situated is not applicable to the Section 35 individuals. In *DuPont*, the SJC examined the situation of individuals *already* housed in institutions.<sup>192</sup> By contrast, the men and women subject to Section 35 are all in the same situation—before being committed, they were free members of society. Additionally, they are all subject to the same commitment standard irrespective of sex: they either drink or use drugs to the extent that that such use substantially injures their health, or substantially interferes with their social or economic functioning; or they have lost the power of self-control over the use of such substances.<sup>193</sup> Furthermore, even after a commitment order, they are all eligible to be committed to DPH licensed beds.<sup>194</sup> Only after those beds are full and there are no other options does the discriminatory policy take effect. Because of this, male and female Section 35 detainees are similarly situated.

The result is the same even when the *DuPont* formulation is employed. In *DuPont*, the court distinguished male and female inmate populations on three grounds: male prisoners are grouped according to security classifications, whereas females are all housed together; male prisoners generally serve longer prison sentences than do female prisoners; and male prisoners are more prone to violence than are female prisoners.<sup>195</sup> None of these factors distinguish male Section 35 detainees from their female counterparts.

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190. See *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (holding “mothers and fathers of illegitimate children are not similarly situated [because] . . . [u]nlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown.”).

191. See MASS. BUREAU OF SUBSTANCE ABUSE SERVS., SUBSTANCE ABUSE TREATMENT ANNUAL REPORT: FY 2011 ALL ADMISSIONS, at 1 (2011), <http://www.mass.gov/eohhs/docs/dph/substance-abuse/large-cities/statewide-fy2011.pdf> (reporting 30,066 women admitted for substance abuse treatment, approximately thirty percent of all 2011 admissions); MASS. BUREAU OF SUBSTANCE ABUSE SERVS., SUBSTANCE ABUSE TREATMENT ANNUAL REPORT: FY 2010 ALL ADMISSIONS, at 1 (2010), <http://www.mass.gov/eohhs/docs/dph/substance-abuse/large-cities/statewide-fy2010.pdf> (reporting 30,555 women admitted for substance abuse treatment, approximately thirty percent of all 2010 admissions).

192. See *DuPont*, 861 N.E.2d at 752-54.

193. See MASS. GEN. LAWS ANN. ch. 123, § 35 (West 2013).

194. See *id.*

195. See *DuPont v. Comm’r of Corr.*, 861 N.E.2d 744, 753-54 (Mass. 2007).

First, Section 35 detainees are detained because their alcohol or drug abuse may result in serious harm.<sup>196</sup> The statute makes no other distinction such as type of potential harm, or any history of violence on the part of the detainee.<sup>197</sup> Second, Section 35 detainees are not grouped according to security classification.<sup>198</sup> Section 35 detainees occupy a bed at a DPH licensed facility and only when those beds are filled do the men and women get divided between BSH and MCI-Framingham, respectively.<sup>199</sup> Third, Section 35 detainees are all eligible for the same ninety-day stay.<sup>200</sup>

As such, under any reading of SJC jurisprudence on sex-based discrimination claims—whether under *DuPont*, or the more common presumption of similar situations—the men and women subject to Section 35 procedures are similarly situated, and any equal protection claim must be reviewed under the standards of the MERA.

*B. Section 35 is Discriminatory on its Face and,  
Subject to Strict Scrutiny, Cannot Survive*

On its face, Section 35 establishes separate treatment for those who are to be civilly committed depending on whether the individual is male or female.<sup>201</sup> When no other detox beds are available, the statute allows for men to be sent to BSH and for women to be sent to MCI-Framingham.<sup>202</sup> As the SJC has held in every case since the ratification of the MERA, because this law creates two classes of individuals, and the two classes are created solely on the grounds of sex, the MERA requires a reviewing court to subject this law to strict scrutiny.<sup>203</sup> As such, the law must be narrowly tailored to achieve a compelling government purpose.<sup>204</sup>

Historically, the SJC has held only two government purposes compelling enough to pass strict scrutiny: avoidance of fraud and addressing the ongoing effects of past discrimination.<sup>205</sup> Whatever the purpose of Section 35's gender

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196. See ch. 123, § 35.

197. See *id.*

198. See *id.*

199. See MASS. GEN. LAWS ANN. ch. 123, § 35 (West 2013).

200. See *id.*

201. See *id.*

202. See *id.*

203. See *Brckett v. Civil Serv. Comm'n*, 850 N.E.2d 533, 551 (Mass. 2006) (concluding MBTA's promotion plan satisfied strict scrutiny analysis); *O'Connell v. Chasdi*, 511 N.E.2d 349, 353 (Mass. 1987) (explaining proscription on sexual harassment directed toward protected class); *Lowell v. Kowalski*, 405 N.E.2d 135, 140 (Mass. 1980) (holding statutory classification not narrowly tailored in impact); *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 295-96 (Mass. 1979) (explaining rules based on gender classification subject to close examination); *Commonwealth v. King*, 372 N.E.2d 196, 206 (Mass. 1977); see also *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*3 (Mass. Super. Ct. Oct. 11, 2000).

204. See *supra* note 11 and accompanying text.

205. See *Brckett*, 850 N.E.2d at 551 (holding addressing past discrimination constitutes compelling government interest); *Lowell*, 405 N.E.2d at 140 (holding avoidance of fraud amounts to compelling

divide, it is neither to prevent fraud, nor to address any ongoing discrimination. The likely purpose of such a divide is the safety of the detained individuals. In the same way that men and women are sent to differing prisons for safety reasons after being criminally sentenced, so too might the two sexes be divided for purposes of Section 35 commitments. In this way the state may justify the exclusion of women from BSH.

Such a rationale, however, is at odds with the SJC's repeated disfavoring of "complete sex barriers."<sup>206</sup> Twice the SJC noted that these barriers were not narrowly tailored to address a compelling government interest.<sup>207</sup> In both instances the SJC was reviewing the separation of boys and girls in athletics.<sup>208</sup> Although these matters may seem less compelling than the governing of addicts and alcoholics, the SJC's reasoning warrants mentioning because in each instance the SJC hinted that in certain circumstances a separate-but-equal arrangement may be permissible, even under the stringent MERA.<sup>209</sup>

Assuming that the separate-but-equal arrangement is narrowly tailored enough to achieve the compelling interest of detainee safety, Section 35 still fails to pass the equal protection analysis. MCI-Framingham is not equal to the treatment facility at BSH. BSH is a hospital specifically designed to provide specialized treatment.<sup>210</sup> MCI-Framingham is a prison, which the state has conceded, "in regards to civilly committed women . . . is not designed, equipped or staffed to serve as an acute treatment facility for substance abusers, much less as the primary such facility for women in the state."<sup>211</sup> Indeed, unless a criminal charge is attached to the civil commitment order, civilly committed women are not eligible for MCI-Framingham's rehabilitation/detoxification programs.<sup>212</sup> These shortcomings are in sharp contrast to BSH, which is a hospital set up specifically to house individuals such as those civilly committed for alcohol and substance abuse.

Thus, even assuming the permissibility of a separate-but-equal arrangement, the current Section 35 arrangement violates the protections guaranteed by the

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government interest).

206. See *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 295-96 (concluding more appropriate, less offensive measures exist than complete sex barrier).

207. See *id.* (banning boys from girls' interscholastic teams not narrowly tailored to interest supporting exclusion); *Op. of the Justices to the House of Representatives*, 371 N.E.2d 426, 428 (Mass. 1977) (opining prohibiting females from contact sports under every circumstance serves no compelling interest).

208. See *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 295-96 (examining ban on boys playing on girls' interscholastic teams); *Op. of the Justices to the House of Representatives*, 371 N.E.2d at 426 (examining proposed bill prohibiting girls' participation in contact sports).

209. See *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 295-96 (noting possible difference in treatment of athletic teams equally available for boys and girls); *Op. of the Justices to the House of Representatives*, 371 N.E.2d at 429-30 (declining to opine on permissibility of separately available sports of each sex).

210. See *supra* note 8 and accompanying text.

211. DENNEHY, *supra* note 1, at 23.

212. See *id.* at 24.

MERA. There is little room under the SJC's past MERA jurisprudence to come to any other conclusion.

#### VI. CONCLUSION

The dichotomy created by Massachusetts's civil commitment laws for alcoholics and substance abusers, which sentences men to a hospital and women to a state prison, violates the equal protection of the Commonwealth's laws. The MERA provides that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." The SJC has interpreted the MERA to mean that any law invoking a sex-based classification is suspect, and is only constitutional if it is narrowly tailored to achieve a compelling government interest. Based on this jurisprudence interpreting the MERA, the civil commitment law that sends men to a hospital and women to a prison is unconstitutional.