Constitutional Law - Husband and Wife - Wife Held Secondarily Liable for Necessary Expenses. (Marshfield Clinic v. Discher)

Theresa K. McLaughlin

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

In Marshfield Clinic v. Discher the Wisconsin Supreme Court completed the trilogy begun with Sharpe Furniture, Inc. v. Buckstaff and Estate of Stromsted v. St. Michael Hospital of Franciscan Sisters, concerning a husband's and wife's individual liability for debts incurred in the procurement of necessities. According to the sketchy facts, the plaintiff hospital brought an action against the widow of a former patient for medical expenses incurred during her husband's last illness. The trial court found that under the "necessaries doctrine," no cause of action existed since a wife had no liability for her husband's medical expenses. The Wisconsin Supreme Court granted certification from the court of appeals to determine the issue of the wife's liability, then reversed and remanded the case to the circuit court for further proceedings.

The court declined to abolish the common-law doctrine of necessaries despite a strong equal protection challenge and the court's acknowledgment of the expanding economic role of wives in the modern marriage. Instead the court modified the doctrine to impose secondary liability on the wife for the necessary debts of her husband in the absence of a contract to the contrary. This note will examine the traditional doctrine of necessaries, analyze Marshfield Clinic in the light of the most recent United States Supreme Court decisions concerning gender based classifications under the equal protection clause and briefly review the approaches of some other jurisdictions to the imposition of spousal liability.

1. 105 Wis. 2d 506, 314 N.W.2d 326 (1982).
2. 99 Wis. 2d 114, 299 N.W.2d 219 (1980).
3. 99 Wis. 2d 136, 299 N.W.2d 226 (1980).
4. The trial court was unaware of the Sharpe and Stromsted decisions and dismissed the case without making any findings. 105 Wis. 2d at 508, 314 N.W.2d at 327.
5. Specifically, the facts to be resolved were whether the plaintiff attempted to collect from the husband's estate and whether the plaintiff expressly agreed to look only to the husband for payment. Id at 509, 314 N.W.2d at 328.
I. Historical Background

The doctrine of necessaries, which has its roots deep in the common law, was essential to ameliorate the harshness of coverture. When a woman married, her legal personality merged into that of her husband and in a very real sense she ceased to exist. It would have been a senseless cruelty to impose economic liability for the purchase of necessary household and personal goods and services on one who could neither contract in her own name nor own property. Necessaries were variously defined to include clothes, furniture and other household items, legal representation and medical expenses. Married women’s acts removed some of the common-law disabilities, but the necessaries doctrine remained in force.

The husband thus has the sole duty of support, and, as a method of enforcing that duty, the common-law doctrine of necessaries mandated that he have the sole liability for his wife’s debts incurred in the purchase of necessary items with which he refused to provide her. Eventually, the need to establish the element of the husband’s wilful refusal to provide the necessary was abolished, and the creditor had only to show that the item was suitable for the purchaser in view of the husband’s means and the family’s social position in the community and that the item or service was reasonably needed at the time of purchase.

In 1971 the Wisconsin Legislature changed the child sup-

7. The seminal case in Wisconsin is Warner & Ryan v. Heiden, 28 Wis. 517 (1871).
13. See Annot., 15 A.L.R. 833, 843 (1921); Wis. STAT. § 6.015 (1921) (current version at Wis. STAT. § 766.15 (1981-1982)).
14. See H. CLARK, JR., supra note 8, § 6.3.
port and maintenance statutes to a gender neutral law\textsuperscript{16} which imposed the duty to support on both spouses rather than solely on the husband. Since the doctrine of necessaries "arises from and is ancillary to the duty to support,"\textsuperscript{17} it was clear that the doctrine should be modified to reflect the change in the support obligation.

In \textit{Sharpe Furniture, Inc. v. Buckstaff}\textsuperscript{18} the Wisconsin Supreme Court examined the nature of the husband's obligation to pay for his wife's necessary purchases made on credit and found it to be quasi-contractual, arising by law out of the legal relationship of marriage.\textsuperscript{19} It reaffirmed the validity of the doctrine of necessaries, opining that it "serves a legitimate and proper purpose in our system of common law."\textsuperscript{20}

In \textit{Estate of Stromsted v. St. Michael Hospital of Franciscan Sisters},\textsuperscript{21} decided on the same day, the court also looked to contract law to hold that a wife is secondarily liable, under an implied-in-law contract, for her own necessary purchases.\textsuperscript{22} However the creditor "seeking to recover under the rule of necessaries must proceed against the husband as the primarily responsible party. He may thereafter seek satisfaction from the wife as a party secondarily liable on the quasi-contractual obligation."\textsuperscript{23} Thus the hospital in \textit{Stromsted} seeking to recover from the wife's estate the ex-

If either spouse fails or refuses, without lawful or reasonable excuse, to provide for the support and maintenance of the other spouse or minor children, the other spouse may commence an action in any court having jurisdiction in actions for divorce to compel the spouse to provide such support and maintenance as may be legally required. See also Wis. Stat. § 52.055 (1981-1982), which provides that "any person who, without just cause, intentionally neglects or refuses to provide for the necessary and adequate maintenance of his or her spouse, shall be guilty of a misdemeanor and may be fined . . . ."

\textsuperscript{17} Sharpe Furniture, Inc. v. Buckstaff, 99 Wis. 2d 114, 124, 299 N.W.2d 219, 225 (1980) (Abrahamson, J., concurring). \textit{See also Paulsen, Support Rights and Duties Between Husband and Wife, 9 VAND. L. REV. 709, 735 (1956).}

\textsuperscript{18} 99 Wis. 2d 114, 299 N.W.2d 219 (1980).

\textsuperscript{19} \textit{Id.} at 118-19, 299 N.W.2d at 221-22.

\textsuperscript{20} \textit{Id.} at 119, 299 N.W.2d at 222.

\textsuperscript{21} 99 Wis. 2d 136, 299 N.W.2d 226 (1980).

\textsuperscript{22} \textit{Id.} at 143-44, 299 N.W.2d at 230.

\textsuperscript{23} \textit{Id.} at 144, 299 N.W.2d at 230.
penses of her last illness was required to first seek satisfaction from the husband. Completing the circle, the hospital in *Marshfield Clinic*, seeking to recover from the wife the expenses of the husband's last illness, was told to first seek satisfaction from his estate before moving against her.

II. THE EQUAL PROTECTION CHALLENGE

In *Marshfield Clinic* the Wisconsin Supreme Court addressed the equal protection implications of the gender based rule of liability not reached in *Sharpe* or *Stromsted*. Relying on five United States Supreme Court cases, the court adopted the middle tiered standard of review for classifications grounded on sex: "To satisfy a constitutional challenge, a gender based rule must serve important governmental objectives and the means employed must be substantially related to the achievement of those objectives."

The Wisconsin court then enumerated four important governmental objectives sought to be achieved by placing primary liability on husbands and secondary liability on wives for necessities:

The rule benefits families by making it more likely that they will obtain necessary and appropriate goods and services. It enables wives to obtain credit more easily. It also protects wives from economic hardship by placing primary liability on husbands. The rule also benefits the providers of goods and services by assuring them greater certainty of payment when they extend credit to families.

The court found that the substantial relationship prong of the standard was satisfied since the rule would result in the "extension of credit to those who in an individual capac-

---

26. See infra note 40.
28. *Marshfield Clinic*, 105 Wis. 2d at 510, 314 N.W.2d at 328.
ity may not have the ability to make . . . basic purchases.\textsuperscript{29}

Recognizing the fact that the United States Supreme Court has not upheld discriminatory treatment when men and women are similarly situated, the court employed labor statistics to demonstrate that since women earn substantially less than men,\textsuperscript{30} husbands and wives are not similarly situated in an economic sense. Thus, the court justified the imposition of primary liability on husbands because such a fixed rule would result in the extension of credit to wives. It further reasoned that the equal protection clause\textsuperscript{31} would not be offended since empirical data established that husbands and wives are not similarly situated economically.\textsuperscript{32}

It is well established that a rule which expressly discriminates on the basis of gender is subject to scrutiny under the equal protection clause.\textsuperscript{33} The fact that a rule discriminates

\textsuperscript{29} Id. at 509-10, 314 N.W.2d at 328 (quoting Sharpe Furniture, Inc. v. Buckstaff, 99 Wis. 2d 114, 119, 299 N.W.2d 219, 222 (1980)).

\textsuperscript{30} Marshfield Clinic, 105 Wis. 2d at 512, 314 N.W.2d at 329.

\textsuperscript{31} U.S. Const. amend. XIV, § 1.

\textsuperscript{32} Marshfield Clinic, 105 Wis. 2d at 514, 314 N.W.2d at 330 (where the court observed that although women who work full time earn about 60% as much as men, the average contribution of the working wife to the family's income is approximately one-quarter due to the number of wives who work in part time jobs).

\textsuperscript{33} See generally Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331 (1982) (statute invalidated which denied males entrance to state-supported nursing school); Michael M. v. Sonoma County Super. Ct., 450 U.S. 464 (1981) (statute holding men alone criminally liable for statutory rape does not violate equal protection); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (state law invalidated which gave husbands the unilateral right to dispose of jointly owned community property); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (workers' compensation statute granting benefits to widows but not to widowers unless they can establish incapacity or dependence violates equal protection); Califano v. Wescott, 443 U.S. 76 (1979) (Social Security Act provision granting benefits to families with dependent children when father is unemployed but not when mother is unemployed held unconstitutional); Orr v. Orr, 440 U.S. 268 (1979) (statute under which husbands but not wives might be required to pay alimony violates equal protection); Califano v. Webster, 430 U.S. 313 (1977) (disparate method for calculating social security old-age benefits for men and women upheld as being compensatory); Califano v. Goldfarb, 430 U.S. 199 (1977) (Social Security provision allowing benefits to widowers only if they were receiving half their support from their wives unconstitutional); Craig v. Boren, 429 U.S. 190 (1976) (law prohibiting beer sales to males under 21 and females under 18 violates equal protection); Stanton v. Stanton, 421 U.S. 7 (1975) (statute setting majority age of women at 18 and of men at 21 unconstitutional); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Social Security provision granting survivors' benefits to widows but not to widowers violates right to equal protection); Schlesinger v. Ballard, 419 U.S. 498 (1975) (statute allowing female naval officers a longer period of time to achieve promotion before being subject to mandatory discharge held constitutional as being part of a statutory...
against men does not immunize it from scrutiny. Furthermore, a gender based classification may not be used as a proxy for a more germane method of classification.

In *Orr v. Orr* the United States Supreme Court invalidated an Alabama statute which authorized courts to impose alimony payments on husbands but not on wives. The Court acknowledged that the assistance of needy spouses is a legitimate governmental objective. It would not, however, accept gender as a proxy for an individual determination of which spouse was in fact needy. The Alabama statute worked the "perverse result" of relieving the financially secure wife from the obligation of paying alimony to a needy husband. This is clearly analogous to the Wisconsin rule of spousal liability should the wife be the dominant wage earner. Although she admittedly is secondarily liable, her responsibility for necessary debts would not be triggered until her husband's assets were exhausted.

It is interesting to note that two of the four objectives enumerated by the Wisconsin court expressly speak of aiding women. It would seem that satisfying an equal protection test by articulating a purpose favorable to one class and then announcing a rule which would further that objective could only be the result of circular reasoning. The rule would always be substantially related and yet equal protection might be grossly offended. Although strict scrutiny is not employed when classifications are made on the basis of sex, the court should perhaps have looked more carefully

---

35. *Id.* at 280-81. See also *Craig v. Boren*, 429 U.S. 190, 204 (1976).
37. *Id.* at 280.
38. *Id.* at 282.
39. *Marshfield Clinic*, 105 Wis. 2d at 510, 314 N.W.2d at 328.
40. One of the earliest decisions addressing an equal protection challenge to a gender based classification was the plurality decision of Justice Brennan in *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court invalidated the classification by employing strict scrutiny, finding that "sex, like race and national origin, is an immuta-
at its avowed objective. In invalidating a state statute that excluded males from enrolling in a state supported professional nursing school, the United States Supreme Court said:

Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.\footnote{Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3336 (1982).}

The dissent in \textit{Marshfield Clinic} suggested that the actual objective was the protection of needy spouses.\footnote{Marshfield Clinic, 105 Wis. 2d at 524, 314 N.W.2d at 335 (Abrahamson, J., dissenting in part).} If this is correct, then the question remains as to whether a more germane method of classification exists which would further the objective. The dissent advocated a case-by-case determination which would presumably place liability on the spouse best able to bear it.\footnote{Id at 532, 314 N.W.2d at 339.} The majority rebutted this suggestion claiming that such a procedure "would cause more problems than it would solve" by creating uncertainty on the part of the creditor as to which spouse should be liable for the debt.\footnote{Id at 514, 314 N.W.2d at 330.}

If one accepts the dissent's proposition that a more germane method of classification is that the spouse with the greater assets or the spouse who is the dominant wage earner should be primarily liable for necessary debts, then the sole remaining objective is one of administrative convenience. The United States Supreme Court has not looked with favor upon administrative convenience as the sole justification for a gender based rule.\footnote{See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (plurality opinion). See also Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977).} For example, at issue in \textit{Wengler v.}
Druggists Mutual Insurance Co.\textsuperscript{46} was a workers' compensation statute which granted death benefits to widows of wage earners but not to widowers unless the widower could establish incapacity or actual dependence on his wife's earnings. The Court acknowledged that empirical data could be found to prove that husbands were more likely to be the primary supporters of their families,\textsuperscript{47} but still refused to uphold the classification. Administrative inconvenience was deemed an insufficient justification for the conclusive presumption of dependency of the wife in order to avoid individualized determinations. "[T]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."\textsuperscript{48}

The Wisconsin rule of spousal liability creates an even more troublesome problem. In \textit{Wengler} the classification in favor of the payment to the wife was benign.\textsuperscript{49} However, the offensive presumption concerning the male could be cured by a showing of incapacity or dependency.\textsuperscript{50} In Wisconsin the presumption is conclusive. There is no administrative procedure by which the male who is in fact dependent wholly or substantially on his wife's earnings can be relieved of primary liability. It belongs to him due to the chance circumstance of being male.

The majority in \textit{Marshfield Clinic} placed emphasis in \textit{Schlesinger v. Ballard}\textsuperscript{51} as authority for the proposition that gender based classifications do not offend the equal protection clause when the sexes are not similarly situated.\textsuperscript{52} The challenged statute in \textit{Schlesinger} allowed a longer period of time for female officers in the Navy to achieve promotions

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{46} 446 U.S. 142 (1980).
\item \textsuperscript{47} \textit{Id}. at 148.
\item \textsuperscript{48} \textit{Id}. at 152 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).
\item \textsuperscript{49} \textit{Id}. at 147. The Supreme Court, however, found the rule offensive to both sexes. It discriminated against a working woman whose spouse would not be entitled to benefits based on her earnings. \textit{See also} Califano v. Goldfarb, 430 U.S. 199, 208 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975).
\item \textsuperscript{50} \textit{Wengler}, 446 U.S. at 144-45.
\item \textsuperscript{51} 419 U.S. 498 (1975).
\item \textsuperscript{52} \textit{Marshfield Clinic}, 105 Wis. 2d at 515, 314 N.W.2d at 331 (citing Schlesinger v. Ballard, 419 U.S. at 508).
\end{itemize}
\end{footnotesize}
before being subject to mandatory discharge than to their male counterparts. In upholding the statute, the Court found that the unequal treatment was part of a statutory scheme whereby female officers were not permitted assignment to aircraft combat missions or to vessels other than hospital ships and transports. Thus, the fact that the opportunity for promotion was less for females than for males justified granting females a longer period of time to achieve promotion.3

There is no corresponding justification in Marshfield Clinic — no statute to which the court can point which economically disables females or financially enhances the male's position which would warrant the primary-secondary dichotomy imposed on the basis of sex. Instead, the court employed statistical data, a device which the United States Supreme Court has viewed with disfavor in equal protection cases: "[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."4

III. OTHER JURISDICTIONS

In Marshfield Clinic the Wisconsin Supreme Court considered and rejected the solutions reached by other jurisdictions5 in their deliberations concerning the abrogation or modification of the common-law doctrine of necessaries.6

A. The New Jersey Rule: Primary Liability on the Spouse Incurring the Debt

In Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum7 the New Jersey Supreme Court examined the modern marriage and the "evolving interdependence" of each spouse on the other and held that marriage is a partnership in which the assets of one partner should be available to

pay for the other's necessary debts. "However, a judgment creditor must first seek satisfaction from the income and other property of the spouse who incurred the debt. If those financial resources are insufficient, the creditor may then seek satisfaction from the income and property of the other spouse."  

Citing *Orr v. Orr* the court held that the common-law doctrine of necessaries "runs afoul of the equal protection clause" since it grants benefits to wives who may not in fact need them. The court recognized labor statistics which established that wives earn substantially less than their husbands, but deemed that an "insufficient reason to retain a gender based classification that denigrates the efforts of women who contribute to the finances of their families and denies equal protection to husbands."

The majority in *Marshfield Clinic* denied that its rule denigrated the efforts of women and criticized the *Jersey Shore* holding as unfairly burdensome on wives whose assets are considerably less than their husbands. It is interesting to note, however, that New Jersey gave its rule only prospective application, believing that the parties had the right to rely on prior law. The Wisconsin court did not address this issue. However, it is obvious from the remand instructions that the rule is retrospective, giving creditors who have supplied husbands with necessary goods and services more than they bargained for.

Indiana followed the New Jersey rule labelling the doctrine of necessaries an "anachronistic issue . . . analogous to the current status of the black bear in Indiana. Although once a viable and life-influencing force in our society, it is today merely of historical interest, existing only in museums,

---

59. *Id.*
60. 440 U.S. 268 (1976).
62. *Id.* (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)).
63. *Marshfield Clinic*, 105 Wis. 2d at 513-14, 314 N.W.2d at 330.
64. *Jersey Shore*, 84 N.J. at __, 417 A.2d at 1010-11.
65. *Marshfield Clinic*, 105 Wis. 2d at 509, 314 N.W.2d at 328.
works of history, and active imaginations." The court, however, applied the rule retrospectively even though the issue raised was a wife's liability for her own medical debts, not her husband's. Additionally, some states have adopted this position by statute.

**B. Joint and Several Liability**

In 1966 Mississippi adopted joint and several liability as between the spouses for debts incurred in the procurement of necessaries in the absence of a contract to the contrary. The court noted the "clearly discernible nation-wide trend, of both state and federal legislation, to expand rather than to restrict the economic and personal emancipation of women and their ever increasing participation in business and professional affairs."

The New Jersey court considered this alternative but felt that the immediate exposure of the assets of one spouse for debts incurred by the other spouse would be "equality with a vengeance." The Wisconsin court summarily dismissed the theory by noting that the imposition of joint and several liability would seem "very unfair if applied to the facts of this case."

Florida appears to be heading in the direction of joint and several liability. In *Manatee Convalescent Center v. McDonald*, an action against a wife for her husband's medical expenses, the court found most compelling the fact that the Florida Legislature, like Wisconsin's, had changed the support and maintenance statutes to gender neutral statutes. Thus, it held prospectively that a wife is liable for the neces-

67. Id. at 413.
68. Id.
70. Cooke v. Adams, 183 So. 2d 925 (Miss. 1966).
71. Id. at 926.
72. Jersey Shore, 84 N.J. at ___, 417 A.2d at 1009.
73. Marshfield Clinic, 105 Wis. 2d at 513, 314 N.W.2d at 330. See also Estate of Stromsted v. St. Michael Hosp. of Franciscan Sisters, 99 Wis. 2d 136, 144, 299 N.W.2d 226, 230 (1980).
74. 392 So. 2d 1356 (Fla. Dist. Ct. App. 1980).
75. Id. at 1357. See also Note, Equal Protection and Spousal Debt: Novel Application of Necessaries Doctrine, 11 STETSON L. REV. 173, 177 (1981).
saries of her husband, but left open the question of whether the assets of the spouse incurring the debt must be insufficient before the other spouse's liability is triggered.76

C. Equal Rights Amendments to State Constitutions

Sixteen states have adopted equal rights amendments to their state constitutions.77 Maryland and Pennsylvania have considered the effect of those amendments78 on the doctrine of necessaries but have come to different conclusions. The Maryland court found the doctrine clearly violative of its equal rights amendment79 but felt that reciprocal application, while not offensive, should be a legislative decision.80 It therefore totally excised the doctrine from Maryland common law and held that "neither the husband nor the wife is liable, absent a contract, express or implied for necessaries . . . ."81 Pennsylvania, on the other hand, has ruled that its equal rights amendment mandated reciprocal application of the doctrine.82

IV. CONCLUSION

As a result of the Marshfield Clinic, Sharpe and Stromsted decisions, a provider of goods and services who extends credit for the purchase of a necessary will know with certainty that he must seek satisfaction of the debt from the husband first and then the wife. However, this rule is not as crystallized as it appears.

Presumably, the court, in fashioning its procedural rule,

76. Manatee, 392 So. 2d at 1359 n.1.
77. ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, § 3; ILL. CONST. art. I, § 18; MD. CONST. declaration of rights art. XLVI; MASS. CONST., pt. I, art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. I, art. II; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. arts. I & IV.
80. Id.
81. Id.
has retained the common-law definition of necessaries. But how is the creditor to know whether or not the item is a necessary? The husband’s ability to pay, the family’s social position and the fact that the item is reasonably needed at the time of purchase must all be taken into account. In Sharpe the court found all of these elements present in a fact situation involving the purchase of a $621.50 Henredon sofa by the wife. But what if the husband was not able to pay although the other two elements were present? What if the wife were the dominant wage earner? Should the creditor proceed against her or has the element of the husband’s means been overruled sub silentio? Because of the court’s assertion that it was fixing its rule “in light of the general income-producing patterns of the contemporary family,” the husband’s ability to pay would seem to be no longer an element.

Another area of uncertainty results from the fact that the doctrine of necessaries is only triggered in the absence of an express agreement to the contrary. What constitutes such an agreement remains unresolved. In Sharpe the wife signed the order for the sofa by which she agreed to make the monthly payments. Furthermore, the husband had advised the local credit bureau that he would not be responsible for credit extended to his wife. Apparently, the court was not persuaded that the wife’s contract constituted such an express agreement and held the husband primarily liable. It will be interesting to see whether later cases develop a different standard for husbands and wives concerning the elements of an express agreement to look only to one spouse for satisfaction of the debt.

84. Sharpe, 99 Wis. 2d at 123, 299 N.W.2d at 224.
86. Marshfield Clinic v. Discher, 105 Wis. 2d 506, 509, 314 N.W.2d 326, 328 (1982); Stromsted, 99 Wis. 2d at 146, 299 N.W.2d at 231; Sharpe, 99 Wis. 2d at 120, 299 N.W.2d at 222.
87. Sharpe, 99 Wis. 2d at 115-16, 299 N.W.2d at 220.
88. Id. at 116, 299 N.W.2d at 220.
89. Id. at 120, 299 N.W.2d at 222.
It does appear that the court's decision in *Marshfield Clinic* was sincerely motivated by a desire to ameliorate the position of women. But does it really have that effect? There can be no recognition of rights without a corresponding acknowledgment of responsibilities. The court advanced one reason for the economic disparity between men and women as "a socialized tendency for women to choose lower paying jobs." A rule placing primary liability on husbands would seem to further such a tendency. Under that theory, if the husband is to be primarily liable, then males should have the higher paying jobs. The United States Supreme Court has said:

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection. . . . Where . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

The Wisconsin Supreme Court, in not fully bringing the doctrine of necessaries into line with the gender neutral maintenance and child support statutes, has clearly gone against legislative intent. There was no recognition by the court that for the last several years the Wisconsin Legislature has been grappling with marital property reform legislation which would ameliorate the problem. Furthermore, as the foregoing discussion indicates, the gender based Wisconsin rule of spousal liability for necessaries is on precarious constitutional footing. The court says that the primary liability of husbands is subject to a standard of review stricter than mere rationality and that this treatment is justified by empirical data. Yet the overriding concern seems to be with administrative convenience. The court should either have

---

90. *Marshfield Clinic*, 105 Wis. 2d at 515, 314 N.W.2d at 330.
92. See supra note 16.
93. See also Wis. S.B. 105 (1983); Wis. A.B. 200 (1983) (both providing for community property system by which spouses would be jointly and severally liable for necessary debts).
94. See supra text accompanying notes 24-54.
awaited the outcome of the proposed legislation or have fashioned a truly gender neutral rule which would have complemented the mutual duty of each spouse to support the other.

THERESA K. McLAUGHLIN