Bending Toward Justice

by Judge J. Frederic Voros, Jr., Presiding Judge, Utah Court of Appeals

Twice in the last month — once in a law office and once in an art museum — I saw a print of a 1963 painting by Norman Rockwell. He called it “The Problem We All Live With.” It depicts a six-year-old girl walking to school. Two deputy U.S. marshals walk ahead of her, two behind. The girl, dressed in a white dress and carrying her schoolbooks, is African-American. Her name is Ruby Bridges.

The school was William Frantz Elementary in New Orleans. Rockwell shows the girl and the marshals but not the protesters. They were throwing things and shouting. We can all imagine the hateful things they shouted. But the girl walked on. One of the marshals later recalled, “She showed a lot of courage. She never cried. She didn’t whimper. She just marched along like a little soldier.”

White parents kept their children home from school and teachers refused to teach. For over a year Ruby’s teacher, Barbara Henry, taught Ruby one-on-one “as if she were teaching a whole class.” But not that first day. Amid all the commotion, Ruby spent the day in the principal’s office. On the second day, a white Methodist minister named Lloyd Anderson Foreman walked his five-year-old daughter through the angry mob. Later more white children began to attend, some teachers returned, and protests subsided.

Ruby’s family paid a price for daring to claim the promise of equality. Her father lost his job, their local grocery store refused to sell to them, and her sharecropping grandparents lost their land. But the Bridges family also had allies. Neighbors hired her father, protected their house, and walked behind the marshals’ car on the way to school. Fifty years later, Ruby Bridges and the minister’s daughter, Pam Foreman Testroet, met again at a Frantz Elementary School reunion — sisters in the struggle to transform American democracy.

Paving the way for the integration of Frantz Elementary School was the United States Supreme Court’s decision in Brown v. Board of Education, 347 U.S. 483 (1954). A unanimous Court held that racially segregated public schools denied black Americans equal protection of the law under the Fourteenth Amendment to the United States Constitution.

That amendment, adopted in 1868, states in part, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” As Justice Harlan wrote for the Court in 1896, that amendment declares, “All citizens are equal before the law.” Gibson v. Mississippi, 162 U.S. 565, 591 (1896).

But equality under the law is easier to promise than to deliver; Constitutional promises are not self-executing. Equality must be won one battle at a time — some fought by soldiers at places like Gettysburg and Cold Harbor, some fought by civilians at places like the Edmund Pettus Bridge and William Frantz Elementary School. But these battles have indeed transformed American democracy.
Only 6% of Americans were entitled to vote in the election of 1789; really, only landed white men could be said to be “equal before the law.” But thanks to the Reconstruction Amendments, African Americans, female Americans, and gay Americans can now claim a measure of equality under the Constitution. So far the history of America has borne out the words often attributed to Dr. Martin Luther King, “The arc of the moral universe is long, but it bends toward justice.”

But battles remain to be fought – the mass incarceration of young black men comes to mind. Realizing the promise of equality, more fully transforming American democracy, will require many more Americans with the courage and moral conviction of Ruby Bridges.

**Gender Discrimination and the 14th Amendment: Equality Under the Law**

*by Judge Michele Christiansen, Utah Court of Appeals*

*At the heart of the United States Constitution’s guarantee of equal protection lies the simple command that the government must treat all citizens as competent and worthy individuals, not simply as a stereotype.*

— Justice Sandra Day O’Connor

It was only 145 years ago, in 1873, that the United States Supreme Court issued its infamous decision rejecting female lawyer Myra Bradwell’s bid for a law license. Bradwell sought to challenge the Illinois law that barred women from obtaining law licenses and argued that her right to a livelihood was protected by the United States Constitution. The Court observed that the “difference in the respective spheres and destinies of man and
woman” prevented women like Bradwell from assuming an equal place beside men in the workforce because “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” Bradwell v. State, 16 Wall. 130, 141 (1873). The Court’s decision treated Bradwell not as an equal citizen under the law, but instead limited Bradwell’s ambitions to practice law alongside her husband due to a characteristic over which she had no control — her sex. Bradwell’s challenge to the Illinois law was based on the Fourteenth Amendment to the United States Constitution. Just five years before the decision in Bradwell’s case, on July 28, 1868, the Fourteenth Amendment to the United States Constitution was ratified by the required three-fourths of the states. The Equal Protection Clause of that amendment provides that, “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Thus, the plain language of the Equal Protection Clause imposes a duty on state actors to treat similarly-situated individuals alike. However, using equal protection constitutional principles to protect against gender discrimination has been a relatively recent idea, and the recognition of American women as equal citizens and possessors of constitutionally-protected rights has only slowly evolved over the course of our country’s history.

For many years, the prevailing notion was that state and federal governments could withhold from women the same opportunities afforded to men. As recognized by the Supreme Court in Frontiero v. Richardson, these notions contributed to our nation’s “long and unfortunate history of sex discrimination.” It was not until the middle of the twentieth century that the Supreme Court began to apply equal protection principles to strike down government practices of racial discrimination and became receptive to arguments about the applicability of equal protection principles to gender discrimination. While duly enacted legislation is generally presumed valid and federal courts are not meant to be agents of social change, the Constitution requires courts to consider state action that makes suspect distinctions between similarly-situated groups of people with varying levels of skepticism.

The level of scrutiny applied to an equal protection claim is relevant because it often affects the outcome of the case; the more rigorous the scrutiny of the governmental action, the more likely that state action is to be ruled unconstitutional. Courts traditionally analyze alleged equal protection violations using one of the following three standards of review: strict scrutiny, intermediate scrutiny, or rational basis review. Since 1971, the Supreme Court has held that laws or government policies that draw distinctions on the basis of gender are subject to heightened intermediate judicial scrutiny.

Of course, this does not mean that no law can discriminate or make classifications, only that a law cannot discriminate on an improper basis. To be sure, the sexes are not alike in every regard and the Supreme Court has upheld differential treatment of men and women based on relevant sex-specific biological differences. “‘inherent differences’ between men and women . . . remain cause for celebration,” U.S. v. Virginia, 518 U.S. 515, 533 (1996). Thus, the Equal Protection Clause cannot and should not be read in a way that requires absolute equality for everyone, but rather can be legitimately applied in a way to provide both genders freedom from discrimination, as one’s gender bears no relation to one’s ability to perform or contribute to society. As Justice Ginsburg stated in U.S. v. Virginia, the Court has repeatedly recognized that equal protection requires that both genders have “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” Id. at 516. As equal members of society, women’s contribution to our communities, schools, businesses, and courts can be accomplished through the application of the same qualities that male citizens have undertaken for years — intelligence, hard work, patience, and a commitment to integrity, honesty and fair dealing — and shouldn’t be limited because of stereotypical notions. Fortunately, the Supreme Court has recognized that generalizations about women no longer justify denying them equal opportunities. Myra Bradwell would be proud.
A Primer for Young People – Due Process in Juvenile Court

by Judge Michael F. Leavitt, Fifth District Juvenile Court

The clock on the car’s dashboard reads “12:17” as you pull into the driveway. Once again, you have violated your twelve o’clock curfew. “Dad is gonna be so mad,” you mutter as you scramble out of the car to get inside. As you open the front door, your father is seated in his easy chair with reading glasses perched on the end of his nose and book in hand.

“You are late,” he says. “Again.”

“But, Dad, I can explain…”

He cuts you off. “Not another word. You’re grounded for a week.”

And just like that, in a matter of seconds, you were charged, tried, and sentenced for failure to obey curfew without a chance to even state your case.

When young people are charged with allegations that would be crimes if committed by adults, they often have to come to juvenile court to answer to those allegations. Many assume that their encounter with the juvenile court judge will be just like dad in the middle of the night. Not so. While parents (unfortunately!) are not bound to the due process provisions of the United States and Utah Constitutions, juvenile courts are. That means that when young people attend juvenile court, they have the right to have a judge hear them out, to explain themselves, and even require a prosecutor to prove beyond a reasonable doubt that they violated the law.

It has not always been that way. Before 1967, juvenile courts were extremely informal. To focus on rehabilitation, rather than punishment, the prevailing belief was that informality allowed courts the flexibility to find out about a child and determine how to best send them down a law-abiding path to a successful adulthood. As such, proponents asserted that this did not necessarily require a formal trial, notice of possible consequences, or the right of the juvenile to talk to an attorney.

Good intentions, but the informality often led to unfair results.

This became evident in the United States Supreme Court landmark decision, In re Gault. Back in 1964, Gerald Gault was a fifteen-year-old boy living in Arizona who was arrested, along with a buddy, for making an “obscene” phone call to a neighbor. At the time he was picked up, Gerald’s parents were at work and no one attempted to notify them of his arrest. He was taken to youth detention where his mother, after her own investigation as to his whereabouts, discovered him later that evening.

The next afternoon, Gerald, his mother and brother appeared before the judge in his chambers. Only the judge and two probation officers were present. Mrs. Cook, the recipient of the infamous phone call, was not. The court placed no one under oath; nor did the court record or transcribe the proceeding. According to later testimony from those present, the judge questioned Gerald about the call. The judge claimed Gerald admitted to making it, while his mother later testified that he only admitted to dialing a phone number and handing the phone to his friend. After the informal discussion, the judge decided to “think about it” and sent Gerald back to detention where he remained for five days. Upon release, he was allowed to return home, but was informed to return to court a few days later.

At the next hearing, the judge heard further statements about whether Gerald was involved in making the call. There remained a disagreement about what he actually said or did. In spite of this, the judge sentenced Gerald to be removed from his home and placed in the State Industrial School until he turned twenty-one years old.

At no point was Gerald given the right to talk to an attorney, the right to hear evidence from his accuser or ask her questions, or even have prior notice that he might be removed from his parents’ custody for the remainder of his childhood.

Ultimately, Gerald’s case made it all the way to the United States Supreme Court. There, the Court held that “due process has a role to play” in juvenile courts. It held that children have the right to notice of the allegations in advance of a hearing or trial with an opportunity to prepare. They have the right to have an attorney present and the right to confront witnesses and cross-examine them, and they have the right not to testify against themselves.
In the spirit of *Gault*, Utah law includes additional requirements to ensure that juveniles enjoy fundamental fairness in delinquency cases. They have the right to call their parents and an attorney immediately if they are arrested. They have the right to have their parents present at all proceedings (even if you do not want them there). Juvenile courts are required to release juveniles being held in detention to their parents unless specific findings are made justifying continued detention. In fact, just this year, the Utah Legislature amended the Juvenile Court Act, establishing additional legal requirements for juvenile courts to consider before placing or keeping young people in detention or removing them from their parents’ custody.

Ultimately, the law cannot require mom or dad to listen to your explanation for being late, whether it be a flat tire, falling asleep at your friend’s house, or your cellphone battery dying. But if you find yourself in juvenile court, the Fourteenth Amendment requires your juvenile court judge to listen and consider the excuse. Just make it a good one.

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**Lady Justice and the Equal Protection Clause**

*by Judge Paul C. Farr, Third District Justice Court*

One evening while eating dinner with my family, I was surprised when one of my children informed me that I was “the man.” This comment was not in the “you are awesome” sense of the phrase. Rather, its connotation was “you represent the oppressive governmental system that holds us down.” Oddly enough, I was unaware that as a judge, I might be thought of in that way. I had previously heard of “the man,” although I had never personally met him. As I reflected for a bit, I recalled in my youth that I too had occasionally manifest some resentment for “the man.” Here I was, sitting in my kitchen, realizing that I had become “the man.”

I graduated from high school in a small Utah farming community, attended local colleges, and graduated from law school (the first in my family to do so). In 2010, after ten years of law practice, I was appointed to the judiciary as a justice court judge. Just as happens to the many other judges, I put on the black robe and became a representative of the judicial system or as my children put it, “the man.”

Judicial systems are often represented by a statue known as Lady Justice. In one hand Lady Justice holds a scale, representing her duty to weigh the merits of each side of a case in order to reach a decision. In the other hand she holds a sword, representing her authority to act or impose judgment. Perhaps Lady Justice’s most important feature is a blindfold, which represents the concept that justice is blind. Lady Justice weighs the merits of a case and imposes judgment that is blind to the individual characteristics of the parties before her.

Consider this key language of the Fourteenth Amendment to the U.S. Constitution: “nor shall any state…deny to any person within its jurisdiction the equal protection of the laws.” In both the creation and enforcement of the law all people are to be treated equal, without regard to individual characteristics. Generally, a legislature may not create a law that treats different categories of people differently. For example, a law that sets a speed limit at 50 mph for right-handed individuals but 70 mph for those that are left-handed would violate the Equal Protection Clause. Similarly, a judge may not apply the law differently to different categories of people. For example, when on trial for theft if a judge afforded all right-handed defendants the right to be represented by an attorney but denied that right to those that were left-handed, that would violate the Equal Protection Clause (as well as other constitutional rights).

These important rights are applied in Utah courts on a daily basis. In 2016 there were 646,488 cases filed in Utah’s different courts. As indicated below, these cases were presided over by 244 judges, magistrates and commissioners (all grouped below as judges, including those that serve part-time).

- Utah Supreme Court: 5 judges, 585 cases
• Utah Court of Appeals: 7 judges, 946 cases
• Utah District Courts: 83 judges, 171,620 cases
• Utah Juvenile Courts: 33 judges, 30,434 cases
• Utah Justice Courts: 98 judges, 428,809 cases
• Utah Federal District Court: 18 judges (including 3 bankruptcy judges and 6 senior judges), 2,443 civil/criminal cases and 11,651 bankruptcy cases

Each of these courts and judges play different roles. However, all are responsible for ensuring equal protection of the laws for all individuals appearing before them. It is critical to the public’s confidence in our judicial system that judges always “wear” Lady Justice’s blindfold so that justice may truly be blind and that all may receive equal protection under the law.

It is an honor to serve the people of Utah as a judge. It is my goal, as I am sure it is the goal of most judges, to apply the law as written by the legislature (the people’s representatives), to apply the law equally, consistently and fairly, and to treat everyone that comes into court with the professionalism and respect due every member of our community. In doing my part, I envision the day when my children view me not as “the man,” but as the blindfolded lady with a sword!