Valparaiso University Law Review

Volume 5
Number 2 *Symposium on Women and the Law*

*pp.*203-236

Symposium on Women and the Law

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Valparaiso University Law Review

Volume 5 SYMPOSIUM ISSUE, 1971 Number 2

THE LEGAL BASIS OF THE SEXUAL CASTE SYSTEM

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Introduction

The prerequisite for developing public policy on any social concern is to understand the realities of the status quo: who benefits; who has the power to make or stifle changes; what alterations in general social conditions have happened or are happening which facilitate change; how can reality be made to reflect the concerns of policy? When the position of whole groups of people is at issue, the questions must also be asked: what is the exact nature of their role in society; how far reaching are changes in their role on other social institutions?

To provide a basis for answering these questions about women, this article proposes an idea alien to our American value structure—that in a society which espouses equality, there exists a situation of institutionalized inequality. Of all the models that have been proposed to explain the relative position of men and women, it is suggested that the most appropriate is that of *caste*. Caste not only accurately describes the historic situation but also explains the difficulty in altering an egregious violation of our ideas of freedom and equality. Caste systems are composed of interdependent units. Thus, mere assimilation is impossible; to alter one unit is to alter all. However, change is not impossible, particularly when there is a contradiction between the caste system and other social values.

This article focuses on the role of law as a tool of public policy as it has been used both to enforce the sexual caste system and to break it down. At this point in history there is the opportunity—indeed, the necessity—to not just improve the status of women but to challenge the entire sexual caste system and the ideas of female inferiority on which it is based. There is an opportunity to choose between our egalitarian values and our institutionalized inequality.

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Of the various ways of attacking the sexual caste system, this article is concerned with two—law and social movements—as both are indispensable for effective social change. Law can change the functions through which people relate to each other. Social movements can change the interpretations of those relations. It is only by working together that either law or social movements can significantly alter the web of human relationships and the structure of our society.

THE NATURE OF CASTE

The application of caste to American society is not new. For years it has been argued that black/white relations are best described as a caste system.[1] Similarly, the position of women has been compared to that of Negroes for over 100 years. With the exception of Hacker's tentative early probings,[2] it was not until recently that people began connecting the two ideas and seriously proposing that male/female relationships are also caste-like in nature.

Admittedly, such an application depends on how caste is defined. Many hold that caste describes only entire sociocultural systems, and thus, "Brahmanic Indian society represents the only caste system in the world."[3] This limited definition ignores the similarities that Indian society shares with other systems of rigid stratification and, therefore, curtails the insights to be gleaned from such a comparison. If there were available a plethora of graded terms to adequately describe places along a spectrum of similar social phenomena, the word caste could be reserved for the Indian case. Unfortunately, there are not. Social science has yet to analyze societies from the perspective of these kinds of social rigidities sufficiently to have coined such terms. Therefore, it is necessary to adopt Berreman's broad description of a "caste system" as one in which "a society is composed of birth-ascribed hierarchically ordered . . . groups . . . entail[ing] differential evaluation, differential rewards, and differential association."[4] In other words, a caste system is one of closed, ranked, interdependent groups in which the members of each group have unequal "access to goods, services, prestige and well-being."[5]

When this definition is applied to the respective position of men and women in American society, the similarities are striking. There is no

1. *See* Berreman, *Caste in India and the United States,* 66 AM. J. SOCIOLOGY 120 (1966).

2. See Appendix.

3. *E.g.,* Cox, *Race and Caste: A Distinction,* 50 AM. J. SOCIOLOGY 360 (1945).

4. Berreman, *The Concept of Caste,* in 2 INT'L ENCY. OF SOCIAL SCI. 333, 334 (D. Sills ed. 1968).

5. Berreman, *Rejoinder,* 66 AM. J. SOCIOLOGY 512, 513 (1961).

question that membership in one's sex group is ascribed at birth and permanent. The "hierarchy of evaluations and rewards" is also evident upon cursory examination.

Access to income. Only 61 percent of all women over age 14 have income of their own as compared to 92 percent of all men, and the female median income is less than a third that of males. Those who work full-time earn only 58 percent that of men despite the fact that their median education is slightly higher.[6]

Occupational specialization. Occupational segregation is illustrated by even the most casual examination of sex-separated ads in a daily newspaper. However, more statistical evidence is also available. Edward Gross applied a "segregation index" to the detailed list of occupations for every census between 1900 and 1960, testing for both race and sex segregation of jobs. The ratio for sex was 68.4, meaning that 68.4 percent of workers of both sexes would have to change jobs to equalize the distribution. The ratio for race was 46.8. He also found that the amount of sex segregation has not changed by more than a few percentage points since 1900.[7] Furthermore, 49 percent of all adult women are not defined as workers because they are full-time "housewives," and this occupation is not deemed part of the labor force.

Prestige. Many studies have been conducted which reveal that the activities of men are rated higher than identical ones done by women,[8] that male occupations are deemed more prestigious than female ones,[9] that men are paid more than women doing identical work and that men and boys in general are described as being more proficient and possessing more desirable personality traits.[10] After all, most women are or will be "only housewives."

Self-esteem. Ratings for men are almost inevitably higher than for women, particularly in the adolescent and young adult stages of life when major decisions are made about the future. Women will view themselves as unable to perform activities stereotyped as "male."[11] A caste system

6. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, HANDBOOK ON WOMEN WORKERS 132 (1969).

7. Gross, *Plus Ca Change . . .? The Sexual Structure of Occupations Over Time,* 16 SOCIAL PROBLEMS 198 (1968).

8. Goldberg, *Are Women Prejudiced Against Women?* TRANSACTION, April, 1968, at 28.

9. B. BARBER, SOCIAL STRATIFICATION 101-08 (1957).

10. Terman & Tyler, *Psychological Sex Differences,* in MANUAL OF CHILD PSYCHOLOGY 1080 (L. Charmichael ed. 1954).

11. Horner, *Women's Will to Fail,* PSYCHOLOGY TODAY, Nov., 1969, at 36. *See also* M. Horner, Sex Differences in Achievement Motivation and Performance in Competitive and Non-Competitive Situations, 1970 (unpublished doctoral dissertation, University of Michigan).

always has debilitating psychological consequences on the lower caste since one must learn to *believe* that one is inferior in order to survive in such a system. This belief often becomes a self-fulfilling prophecy as it creates a type of personality structure which fosters low self-esteem and inaccurate perceptions of reality. It is typical of all minority groups and of women.[12]

Behavior. High caste members have the right to demand deference from low caste members both as an acknowledgement of superior position and to increase personal self-esteem.[13] The myth of chivalry to the contrary, the fetch-and-carry work of personal service is performed primarily by women and often without pay. High and low caste behavior have their corresponding personality characteristics. "Ideally, the high caste person is paternalistic and authoritarian, while the low-caste person responds with deferential, submissive, subservient behavior."[14] In a forthcoming study Henly shows that nonreciprocal first-naming of another, initiation of personal touch, use of undignified postures and other nonverbal cues are rights of the more powerful in any interaction.[15] Deference is indicated by acknowledging but not reciprocating those actions. Men more frequently than women engage in such "dominance" behavior and do so in situations in which reciprocation would be deemed unseemly.[16]

Sexual privileges. The "double standard" is too well known to need comment.

Restricted contact. Both men and women spend the bulk of their lives associating primarily with members of their own sex. From self-segregated childhood playgroups to single sex occupations, contact with members of the opposite sex other than one's family is usually restricted to formal, structured relationships in which the man is usually dominant, *e.g.,* boss-secretary, professor-student. Role segregation, however, can enforce a caste system as easily, if not more so, than physical segregation. If roles are defined as reciprocal, and people are trained to learn only their accepted social role, not only are they more dependent upon members of other castes for the everyday conduct of their lives, but they are also prevented from the conscious comparison which would make inequities evident.

12. Freeman, *The Social Construction of the Second Sex,* in ROLES WOMEN PLAY (M. Garskof ed. 1971).

13. J. DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN 174 (1957).

14. Berreman, *supra* note 1, at 124.

15. Henly, *Power, Sex, and Nonverbal Communications: The Politics of Touch,* 49 SOCIAL ISSUES —— (1971).

16. *Id.*

Institutional power. The major political, social, economic and religious institutions are firmly in the control of men.

Many more areas of similarity could be listed between the caste systems of India, the American racial situation and that existing between the sexes in all societies. As used here they describe a de facto caste system. Those who prefer to use caste in its original, limited meaning maintain that only de jure caste systems can legitimately meet the definition. But it should be learned from American history that the difference between de facto and de jure is often more semantical than meaningful. A de facto caste system, like de facto segregation, differs only in subtlety from its de jure counterpart.

Nevertheless, the sexual caste system is not solely de facto. Its rules and restrictions have been enshrined in the legal system since time immemorial and still serve as mechanisms of social control to maintain each sex in its ascribed place. In fact, one can trace the history of caste systems in Western culture by looking at the legal rules; there have almost always been separate bodies of law applying to the different castes. The middle ages saw separate application of the law to the separate estates. In the early years of this country certain rights were reserved to those possessing a minimum amount of property.[17] Today, nobility of birth or amount of income may affect the treatment one receives from the courts, but it is not expressed in the law itself. For the past 150 years, the major caste divisions have been along the lines of age, sex and ethnic origin; these have been the categories for which special legislation has existed.

Frequently, members of the lower castes are lumped together, and the same or similar body of special law applied to all. Much of the current restrictive labor legislation applies to "women and minors."[18] When a legal status had to be found for Negro slaves in the seventeenth century, the "nearest and most natural analogy was the status of women."[19]

Thus, the de jure basis of the sexual caste system, as that of other caste systems, is to be found in the law. The codified rules of society and the judicial opinions which interpret and justify them have traditionally provided ample support for the inequitable system that remains in force today.

17. *See, e.g.,* S. PADOVER, TO SECURE THESE BLESSINGS 243-47 (1970).
18. *See, e.g.,* ILL. REV. STAT. ch. 93, § 27 (1969).
19. G. NYRDAL, AN AMERICAN DILEMMA 1073 (1944).

THE POSITION OF WOMEN IN ANCIENT AND COMMON LAW

The sexual caste system is the longest, most firmly entrenched caste system known to Western civilization. Only one other caste has as long a tradition of separate law—that of children. Here an interesting irony emerges. Children have never been entitled to the rights of adults. This has been tolerated in part because their status as dependents is temporary. But for women, the status of childhood has been permanent. There is a long standing legal tradition reaching back to early Roman law which defines women as perpetual children. This tradition, known as the "Perpetual Tutelege of Women,"[20] has not been systematically recognized, but the definition of women as minors who never grow up, who must always be under the guidance of a male, has been carried down in modified form to the present day. Many vestiges of it can still be seen in the legal system and its judicial opinions.

Roman law was an improvement over Greek society. In that cradle of democracy only men could be citizens in the *polis*. In fact, most women were slaves, and most slaves were women.[21] In ancient Rome both the status of women and slaves improved slightly as they were incorporated into the family under the rule of *patria potestas* or power of the father. This term designated not so much a familial relationship as a property relationship. All land was owned by families, not individuals, and was under the control of the oldest male. Women and slaves could not assume proprietorship and in fact frequently were considered to be forms of property. The woman had to give any income she might receive to the head of the household and had no rights to her own children, to divorce or to any life outside the family. The relationship of women to man was designated by the concept of *manus*[22] under which the woman stood. Women had no rights under law—not even legal recognition. In any civil or criminal case she had to be represented by the *pater* who accepted legal judgment on himself and in turn judged her according to his whims. Unlike slaves, women could not be emancipated[23] but could only go from under one hand to another. This was the nature of the marital relationship.[24] At marriage a woman was "born again" into the household of the bridegroom's family and became the "daughter of her husband."[25]

20. H. MAINE, ANCIENT LAW 135 (1905).
21. A. GOULDNER, ENTER PLATO 10 (1965).
22. *I.e.*, hand.
23. *I.e.*, removed from under the hand.
24. Thus, the modern practice "to ask a woman's father for her *hand* in marriage."
25. For a more complete discussion of this concept, see N. FUSTEL DE COULANGES, THE ANCIENT CITY 42-94 (1873).

Although later practice of Roman law was much less severe than the ancient rules, some of the more stringent aspects were incorporated into Canon Law and from there passed to the English Common Law. Interpretation and spread of the law varied throughout Europe, but it was through the English Common Law that such legal conceptions of women were made a part of American legal tradition.

Even here history played tricks on women. Throughout the sixteenth and seventeenth centuries tremendous liberalizations were taking place in the common law attitude toward women. This was particularly true in the American colonies where rapidly accelerating commercial expansion often made it profitable to ignore old social rules. Many women owned their own businesses or were able to act as attorney in their husband's place when necessary. According to one authority:

> The new legal rights which married women acquired to a greater or lesser degree throughout the colonies evolved out of the revised concept of the institution of marriage which resulted from the Protestant Revolution and out of the different economic and social conditions of colonial America.[26]

When Blackstone wrote his soon-to-be-famous *Commentaries on the Laws of England,* however, he chose to ignore these new trends in favor of codifying the old common law rules. Published in 1765, his work was used in Britain as a textbook, but in the United States it became a legal Bible. Concise and readable, it was frequently the only treatise to be found in law libraries in the United States until the middle of the nineteenth century, and novice attorneys rarely delved past its pages when seeking the roots of legal tradition.[27]

It is in the Common Law that the caste distinctions between the sexes can most clearly be seen. Their roles are defined as separate and reciprocal. This is particularly clear in the marital law, and, indeed, this law was so explicit and that regarding single women so nonexistent that one would gather that the Common Law could not imagine the existence of women in the unmarried or never-married state. Single women were presumed to have the same rights in private law as single men. But when a woman married, these rights were lost, suspended under the feudal doctrine of "coverture." As Blackstone described: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage,

26. R. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 126 (1959). *See generally id.* at 126-28.

27. M. BEARD, WOMAN AS FORCE IN HISTORY 108-09 (1946).

or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything."[28]

As a result of this doctrine a married woman incurred many substantive and procedural disabilities. These were alleviated in part for women with property by the development of the "equitable trust" in the chancery courts—a device which had previously been associated with the protection of infants and idiots.[29] But the early American legal system frequently lacked chancery courts; they usually had limited equity jurisdiction, and such relief was never a real possibility for women of limited financial means or education.[30]

Blackstone had given short shrift to equity law, and the multitude of American attorneys that read the law from his pages applied the doctrine of coverture rather than that of equity. Thus when Edward Mansfield wrote the first major analysis of *The Legal Rights, Liabilities and Duties of Women* in 1845, he still found it necessary to pay homage to Blackstone:

> It appears that the husband's control over the person of his wife is so complete that he may claim her society altogether; that he may reclaim her if she goes away or is detained by others; that he may use constraint upon her liberty to prevent her going away, or to prevent improper conduct; that he may maintain suits for injuries to her person; that she cannot sue alone; and that she cannot execute a deed or valid conveyance without the concurrence of her husband. In most respects she loses the power of personal independence, and altogether that of separate action in legal matters.[31]

American Codifications of the Sexual Caste System

Domestic Law

Legal traditions die hard—even when they are mythical ones. Therefore the bulk of the activities of feminists in the nineteenth century were spent chipping away at the legal nonexistence that Blackstone had defined for women. Despite the passage of Married Woman's Property Acts and much other legislative relief during the nineteenth century, the core idea of the Common Law remains. This was rather succinctly put as recently as 1966 by Justice Black when he defined cover-

28. 1 W. Blackstone, Commentaries *444.
29. M. Radin, Handbook of Anglo-American Legal History 524 (1936).
30. L. Kanowitz, Women and the Law 39 (1969).
31. E. Mansfield, The Legal Rights, Liabilities and Duties of Women 273 (1845).

ture as resting "on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean . . . that the one is the husband."[32] It is a good example of how codification of custom also results in codification of customary prejudice.

This core idea indicates that husbands and wives have reciprocal—not equal—rights. The husband must support the wife and children, and she must render services to the husband in return. Thus, the woman is legally required to do the domestic chores[33] and to provide marital companionship.[34] Her first obligation is to him. If the husband moves out of town, she cannot obtain unemployment compensation if she quits her job to follow him; he can divorce her on grounds of desertion if she does not move with him.[35] He must maintain her, but the amount of support beyond subsistence is at his discretion.[36] She has no claim for direct compensation for any of the services rendered.[37] One writer pointed out the similarity of this situation to that of the racial caste during the days of slavery.

> Clearly . . . that economic relationship between A and B whereby A has an original ownership of B's maintenance, is the economic relationship between an owner and his property rather than that between two free persons. It was the economic relationship between master and slave, and it is the economic relationship between a person and his domesticated animal. In the English common law the wife was, in economic relationship to the husband, his property. . . . The financial plan of marriage law was founded upon the economic relationship of owner and property.[38]

This basic relationship remains in force today. The "domesticated animal" has acquired a long leash, but the legal chains have yet to be broken. The rights of "femme coverts" are still limited by their sex and their marital status as common law practices, assumptions and attitudes still dominate the law.

While property, real and personal, possessed by women prior to the marriage now remains her separate estate,[39] that acquired during the

32. United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).
33. J. MADDEN, PERSONS AND DOMESTIC RELATIONS 292 (1931).
34. *Id.*
35. KANOWITZ, *supra* note 30, at 46-52.
36. *See* McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953).
37. *See generally* S. BRECKINRIDGE, THE FAMILY AND THE STATE 109-10 (1934).
38. Crozier, *Marital Support*, 15 B.U.L. REV. 28, 28-29 (1935).
39. KANOWITZ, *supra* note 30, at 59.

marriage may come under the husband's control. In seven of the eight community property states the husband is defined as the head of the community and as such has control of community property.[40] In only four of these states, California, Idaho, Texas and Washington, does the wife even control her own earnings.[41]

In common law states each spouse has a right to manage his own income and property. However, unlike community property states, this principle does not recognize the contribution made by a wife who works only in the home. Although the wife generally contributes domestic labor to the maintenance of the home far in excess of that of her husband and, indeed, is required to by the rules of Common Law, she has no right to an allowance, wages or an income of any sort.[42] Nor can she claim joint ownership upon divorce.[43]

Marriage incurs other disabilities as well. Four states require a married woman to obtain a court order before establishing an independent business.[44] Eleven states place special restrictions on the right of a married woman to contract.[45] In three states, a married woman cannot become a guarantor or surety.[46] In only five states does she have the same right to her own domicile.[47]

Similar to the domicile regulations, rules concerning names are most symbolic of the theory of the husband's and wife's legal unity. Legally, every married woman's surname is that of her husband, and no court will uphold her right to adopt a different name.[48] Pragmatically, she can use another name only so long as her husband does not object.

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40. ARIZ. REV. STAT. § 25-211 (1956); CAL. CIV. CODE § 5125 (West 1970); IDAHO CODE ANN. § 32-912 (1948); LA. CIV. CODE ANN. art. 2402 (West 1965); NEV. REV. STAT. § 123.230 (1957); N.M. STAT. ANN. § 57-4-3 (Repl. 1962); WASH. REV. CODE ANN. § 26.16.030 (1961). Texas provides for joint management of community property. *See* ch. 888, § 5.22 [1969] Texas Laws.

41. CAL. CIV. CODE § 5124 (West 1970); IDAHO CODE ANN. § 32-912 (1948); WASH. REV. CODE ANN. § 26.16.130 (1961); Family Code, ch. 888, § 5.22 [1969] Texas Laws.

42. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 2 (1968).

43. *Id.*

44. CAL. CODE CIV. PROC. §§ 1811-21 (West 1955); FLA. STAT. ANN. §§ 62.38-46 (1941); NEV. REV. STAT. §§ 124.010-.050 (1957); PA. STAT. ANN. tit. 48, §§ 41-48 (Repl. 1965).

45. Alabama, Arizona, California, Florida, Georgia, Idaho, Indiana, Kentucky, Michigan, Nevada, North Carolina and Texas. *See* United States v. Yazell, 382 U.S. 341, 351 n.23 (1966).

46. ALA. CODE tit. 34, § 74 (1958); KY. REV. STAT. § 404.010(2) (1970).

47. ALASKA STAT. § 25.15.110 (1965); ARK. STAT. ANN. §§ 34-1307 to 1309 (Repl. 1962); DEL. CODE ANN. tit. 13, § 1702 (1953); HAWAII REV. STAT. § 572-4 (1968); WIS. STAT. ANN. § 246.15 (Supp. 1970).

48. KANOWITZ, *supra* note 30, at 41-46.

If he were legally to change his name, hers would automatically change, although such would not necessarily be the case for the children.[49] "In a very real sense, the loss of a woman's surname represents the destruction of an important part of her personality and its submersion in that of her husband."[50]

The long arm of the Common Law has influenced guardian rights as well as marital obligations. Under its rules the father was the preferred natural guardian of a minor child and upon separation could deny the mother the right to see her child.[51] Neither parent is given preference in 42 states if there is a contest over custody in case of separation, but the remaining eight follow traditional assumptions concerning the roles of men and women.[52] The mother is preferred if the child is "of tender years" and the father if the child is old enough to require an education.[53]

Although *White v. Crook*[54] declared that "[j]ury service is . . . a responsibility and a right that should be shared by all citizens, regardless of sex,"[55] women serve on the same grounds as men in only 28 states.[56] The common law tradition mandated that juries be composed exclusively of men except in certain situations involving a pregnant woman, and many states still exempt women on special sex-related grounds. It has only been in the last few years that the last three states to totally exclude women from state juries (Alabama, South Carolina and Mississippi) have changed their policies, and only since 1957 that service on federal juries has been equalized for men and women.[57]

Labor Legislation

The most frequent modern application of public policy to women has been in the area of labor legislation. Under Common Law there was no restrictive legislation on the employment of women. Such legislation was not needed since custom and prejudice alone sufficed to keep the

49. *Id.*
50. *Id.* at 41.
51. *See* MADDEN, *supra* note 33, at 372-79.
52. ALASKA STAT. § 20.05.060 (1962); GA. CODE ANN. § 49-102 (Supp. 1970); LA. CIV. CODE ANN. art 256 (West 1952); N.M. STAT. ANN. § 32-1-1 (1953); N.C. GEN. STAT. 33-2 (Repl. 1966); OKLA. STAT. ANN. tit. 30, § 11 (1955); TEX. PROB. CODE ANN. § 109 (Supp. 1969).
53. *See* U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 6, at 287-88.
54. 251 F. Supp. 401 (M.D. Ala. 1966).
55. *Id.* at 408.
56. See 116 CONG. REC. S17352-53 (daily ed. Oct. 7, 1970) for a compilation of jury statutes.
57. The previous federal statute determined competence to serve as a juror by the law of the state in which the district court is held but was amended in 1957. *See* 28 U.S.C. § 1861 (1964).

occupations in which women might be gainfully employed limited. As women acquired education and professional skills in the wake of the Industrial Revolution, they increasingly sought employment in fields which put them in competition with men. In some instances men gave way completely, and the field became dominated by women who lost prestige, opportunities for advancement and pay in the process. The occupation of secretary is the most notable.[58]

In most cases men quickly made use of economic, ideological and legal weapons to reduce or eliminate their competition. Collective bargaining agreements, law and tradition were enlisted to maintain the caste barriers in employment.[59] Although somewhat ahead of his time, the policy was explicitly stated by President Strasser of the International Cigarmakers Union in 1879 when he stated: "We cannot drive the females out of the trade, but we can restrict this daily quota of labor through factory laws."[60] Some labor legislation had been passed in the twenty years prior to the Civil War, but it generally was not sex specific and usually contained a "joker." These laws were only valid "where there is no contract or agreement to the contrary" between employer and employee.[61]

The first effective law, enacted by Massachusetts in 1874, limited employment of women and children to 10 hours a day.[62] By 1900, 14 others states had such laws, and today virtually every state has some form of "protective" labor legislation.[63] At the time they were passed, the laws were lauded by most on the grounds that women needed "protection." This theory had the effect of establishing a new judicial philosophy because such protection had not previously been considered within the purview of the law. The philosophy was first articulated by a Pennsylvania Court when it upheld an hours law on the basis of the physical inferiority of women and their special grouping on account of potential motherhood.

> Surely an act which prevents the mothers of our race from being tempted to endanger their life and health by exhaustive employment can be condemned by none save those who expect

58. *See* E. BAKER, TECHNOLOGY AND WOMEN'S WORK (1964); R. SMUTS, WOMEN AND WORK IN AMERICA (1959).

59. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); C. BIRD, THE INVISIBLE SCAR (1966); KANOWITZ, *supra* note 30, at 101.

60. *Quoted in* A. HENRY, THE TRADE UNION WOMEN 24 (1915).

61. A. HENRY, WOMEN AND THE LABOR MOVEMENT 129 (1923).

62. Ch. 221 § 1, [1874] Mass. Laws.

63. *See* Berger, *Equal Pay, Equal Employment and Equal Enforcement of the Law for Women*, 5 VAL. U.L. REV. 326, 360 (1971).

> to profit by it. . . . Adult females are a class as distinct as minors, separated by natural conditions from all other laborers, and are so constituted as to be unable to endure physical exertion and exposure to the extent and degree that is not harmful to adult males.[64]

At the time other state courts were ruling these laws unconstitutional. The Illinois Supreme Court declared in 1895 that the new law was "not the nature of the things done, but the sex of the persons doing them."[65] This was discrimination against both factories and women and therefore was untenable. Women have "the natural right to gain a livelihood [as every other citizen] . . . . Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex."[66] There was "no reasonable ground . . . for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow."[67]

In the long run "protection" won out and eventually had the effect of "protecting" men from female competition as the President of the Cigarmakers Union had proposed. It has been used to deny overtime pay, promotions and employment opportunities for many years.

An examination of the state labor laws reveals complex, confusing and inconsistent chaos. Seven states have minimum wage laws which apply only to women and minors; three states require that overtime be paid to women and minors only; adult women are prohibited from working in specified occupations or under certain working conditions considered hazardous in 26 states; in ten states women cannot work in bars. Limitations are made in ten states on the amount of weight that can be lifted by a woman. These maximums range from 15 to 35 pounds (the weight of a small child). Other laws prohibit night work in 18 states, and require special facilities such as seats, lunchrooms, dressing rooms, restrooms, toilets and meal periods in 45 states. Laws restricting the number of hours a woman may work—generally nine per day and 48 per week—are found in 38 states.[68]

Sex Offenses

American codifications of the criminal law also solidified the dual

64. Commonwealth v. Beatty, 15 Pa. Super 5 (1900).
65. Ritchie v. People, 155 Ill. 98, 111, 40 N.E. 454, 458 (1895).
66. *Id.* at 112, 40 N.E. at 458.
67. *Id.* at 114, 40 N.E. at 459.
68. *See* Berger, *supra* note 63, at 360.

legal status of women. Some of the earliest sex discriminatory legislation was directed against prostitutes. For many years this legislation did not prohibit prostitution, but it did severely restrict the freedom of "women of disreputable character."[69] Such women were required to live in certain areas of town, register with the local police and not appear on the street during certain hours. The big crackdown against prostitutes did not come until during World War I when there was fear that soldiers would contract venereal disease.[70] There was also a rise in the number of abortion laws at this time. Originally abortion was illegal only when performed without the husband's consent, and the only crime was a "wrong to the husband in depriving him of children."[71] Abortion was considered to be only a church offense punishable by religious penalities.[72]

THE CONSTITUTIONALITY OF THE SEXUAL CASTE SYSTEM

The natural assumption is that the Constitution applies to women the same as to anyone else. Yet there is a long and arduous history of judicial decisions which have held that legal discrimination on the basis of sex is not unconstitutional. In that doctrine lies the basis for all laws just discussed. On reflection, this doctrine is only logical since the Court has also said that the legal background of the Constitution is the English Common Law and that constitutional interpretations should be in harmony with its principles.[73] The common law doctrine of the legal nonentity of women has been used to justify sex discrimination since the English legal system was first brought to American shores. The rights and liberties which the Common Law gave to English men, which the Constitution sought to insure, were not given to English women. Advancement in the position of women has been at the expense of the Common Law and without the assistance of the Constitution. Nonetheless, women have been bombarding the courts with cases demanding constitutional equality for well over a century. The primary effort has been attempts to broaden the fifth and fourteenth amendments to prohibit sex discrimination.

The Supreme Court has consistently held that "sex is a valid basis

69. *See* R. PERKINS, CRIMINAL LAW 393 (2d ed. 1969); KANOWITZ, *supra* note 30, at 15-18.

70. G. GOULD & R. DICKENSON, DIGEST OF STATE AND FEDERAL LAWS DEALING WITH PROSTITUTION AND OTHER SEX OFFENSES (1942).

71. B. DICKENS, ABORTION AND THE LAW 15 (1966).

72. Guttmacher, *Abortion—Yesterday, Today and Tomorrow*, in THE CASE FOR LEGALIZED ABORTION NOW 4 (A. Guttmacher ed. 1967).

73. Smith v. Alabama, 124 U.S. 465 (1888); Moore v. United States, 91 U.S. 270 (1876).

for classification."[74] The principle of "reasonableness," as the basis of legitimate public policy, replaced the Common Law as the authority for discrimination. The acceptance of the "reasonableness" of sex discrimination did not come about immediately. Several state courts had decided that such classification was not in fact permissible.[75] Yet, the overall weight of public policy has favored the *Muller* rationale until very recently.

Behind this rationale has stood a set of attitudes toward women which are at the very core of the sexual caste system: that somehow women were not only different from men, but that one could legitimately judge individual women primarily as members of a group. Most of the seminal cases used language which did not talk about the rights of individual persons under the Constitution, but the rights of "the sex." The judges have not talked about the rights of citizens, but the rights of "women as citizens." The Constitution no where mentions the rights of "women as citizens" or even differentiates between different rights of different citizens, but judicial opinion has established such a differential. Whether drawing on Common Law, public policy or social institutions, the judicial interpretations of the law have provided additional cement for the sexual caste system.[76] In considering the judicial opinions, one must note the language of the decision as well as the particular holding.

The Inferiority of Classifications

First, one might ask whether such a constitutional differential is in fact an inferiority. While no court has expressed this belief concerning sex discrimination, such an implied inferiority has often been noted when the difference is based on race. Not only did *Brown v. Board of Education*[77] rule that separate was inherently unequal, but other cases have asserted the constitutional implications of such a doctrine. In particular, in *Strauder v. West Virginia,* the Court declared that the exclusion of Negroes from juries is "practically a brand upon them affixed by the law, an assertion of their inferiority."[78] *Strauder* is especially relevant because the constitution of the jury is a situation in which race and sex discrimination were not only directly comparable but were the only forms of discrimination legally permitted. In *Strauder* the court said that "[the fourteenth amendment] was designed to assure to the

74. Muller v. Oregon, 208 U.S. 412, 422 (1908).
75. Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895).
76. *See* Crozier, *Constitutionality of Discrimination Based on Sex,* 15 B.U.L. REV. 723 (1935).
77. 348 U.S. 886 (1954).
78. 100 U.S. 303 (1880).

colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons . . . ."[79] But the court added without a sign of hesitation or doubt that the amendment did not prohibit such exclusion of women and that their lack of participation on the jury did not violate the Constitution. To this day women do not serve on all juries on the same basis as men. If a jury is composed of peers and women are not included equally, it would seem to follow that they are not considered to be the equal of men before the law and the Constitution. It also follows that in 22 states no woman defendant ever gets a trial by her peers as guaranteed by the Constitution.

One would hope that by now the precedent of *Strauder* would have been applied to sex discrimination, and women would be admitted to the jury on the same basis as men. Instead, the Court has declared that discrimination on the basis of race is prohibited and that on the basis of sex is permissible. Jury cases provide excellent examples of contradictory thinking:

> The General Assembly is at liberty to impose the burden of jury service on some and relieve others of the obligation, provided the classification is not in derogation of the 14th Amendment to the Constitution of the United States or of our own Constitution. . . . Of course, to single out the members of one race for jury duty and exclude those equally qualified of another would be an unwarranted discrimination of which members of the excluded race could rightfully complain when called upon to answer or go to trial on an indictment in the courts. . . . But classification on the basis of sex, applicable alike to all races, is after the manner of the common law and has preexisted throughout the history of the State.[80]

It should be noted that this attitude has been changing. In 1966 a three-judge federal court in Alabama held that the state law excluding women from jury service violated the rights of women under the fourteenth amendment:

> The Alabama statute that denies women the right to serve on juries . . . violates that provision of the Fourteenth Amendment to the Constitution of the United States that forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." The plain effect of this con-

79. *Id.* at 306.
80. State v. Emery, 224 N.C. 581, 586, 31 S.E.2d 858, 862 (1944).

> stitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citzens—including women.[81]

A later Mississippi case, however, declined to apply the Alabama precedent.[82]

Legislative Intent and Reasonable Classifications

There have been two reasons behind the failure to apply the fourteenth amendment to sex discrimination. The first was the legislative intent of the enacters of the amendment. Although the provisions of the amendment did not specify race or sex, the courts ruled for a long time that race and only race was in the minds of the legislators when it was passed. "We doubt very much whether any action of a state not directed by way of discrimination against negroes as a class or on account of their race will ever be held to come within the purview of this provision."[83] This opinion has since been controverted.[84] In the meantime, a second reason for denying the full effect of the amendment to women found favor: that sex is a valid basis for classification. The change from the first premise to the second was succinctly stated in a 1961 Supreme Court decision wherein a woman convicted by an all male jury of murdering her husband challenged a Florida law stating that women were not required to serve on juries unless they registered such a desire with the clerk of the circuit court:

> We of course recognize that the Fourteenth Amendment reaches not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which "single

81. White v. Crook, 251 F. Supp. 401, 408 (M.D. Ala. 1966).

82. State v. Hall, 187 So. 2d 861 (Miss. 1966). Mississippi has since amended its statute to allow women to serve on juries on the same basis as men. MISS. CODE ANN. § 1762 (Supp. 1970).

83. Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872).

84. See Hernandez v. Texas, 347 U.S. 475 (1954):

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws as written or as applied, single out that class for different treatment not based on some reasonable classification the guarantees of the Constitution have been violated. The fourteenth amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

Id. at 478.

> out" any class of persons "for different treatment not based on some reasonable classification."
>
> . . . .
>
> In neither respect can we conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. . . .
>
> . . . .
>
> This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. . . . There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced.[85]

To get the full flavor of the classification argument and probe at the attitudes which underlie the judicial maintenance of the sexual caste system, it is necessary to look at some of the seminal cases on sex discrimination. Though many of them are old, their presumptions continue to exist.

The *Slaughter House Cases*[86] are a good place to begin. In 1872 the Court heard a group of New Orleans butchers who were challenging Louisiana's state-granted slaughtering monopoly. The plaintiffs made a fourteenth amendment argument which, in a sharply divided opinion, was rejected. With this as a precedent, it should not be surprising that the very next day the first major fourteenth amendment sex case was decided against women. In *Bradwell v. Illinois*,[87] the Court held that the privileges and immunities clause did not preclude the state from prohibiting women admission to the bar solely on the basis of sex. What was surprising, however, was the drastic change of opinion of Justice Bradley. In the *Slaughter House Cases* he had dissented on the grounds that:

> If my views are correct with regard to what are the privileges

85. Hoyt v. Florida, 368 U.S. 57, 59-62, 68 (1961).
86. 83 U.S. (16 Wall.) 36 (1872).
87. 83 U.S. (16 Wall.) 130 (1872).

> and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.
>
> . . . .
>
> In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives these citizens of the equal protection of the laws, contrary to the last clause of the section.[88]

In *Bradwell,* Justice Bradley apparently was not able to see that barring an entire half of the population from the lawful employment of practicing law was also an abridgement of their privileges; a monopoly of all men was apparently quite different from a monopoly of men in the butchering business. He not only joined the Court's rather uncontroversial opinion upholding the monopoly of men but wrote a concurring opinion which very explicitly stated the caste assumptions of society and concluded that they had to be incorporated into the law.

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views, which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[89]

88. 83 U.S. (16 Wall.) at 122 (Bradley, J., dissenting).

89. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring). *See also Ex parte* Lockwood, 154 U.S. 116 (1893).

In 1872 Francis and Virginia Minor filed suit against a St. Louis registrar, one Reese Happersett, who refused to permit Mrs. Minor to register to vote. Minor argued that if "all persons born or naturalized in the United States and subject to the jurisdiction thereof" were citizens then the privileges and immunities clause precluded states from disenfranchising women. Perhaps if *Bradwell* had been decided before Minor filed suit, Minor would not have taken the case to the Supreme Court. But in 1872, feminists thought they saw a prime opportunity to obtain suffrage without a constitutional amendment.[90] However, the attempt backfired. In a unanimous opinion written by Chief Justice Waite, the Court held that the possession of citizenship did not confer the right to vote.[91] For women, this had the same effect that *Plessey v. Ferguson*[92] had for Negroes—establishing that women were second class citizens with less legal rights than other citizens. It was now made explicit what had previously only been implicit in the legal system. The language of the *Bradwell* decision that "women's place was in the home" promulgated the idea of "separate but equal" and *Minor v. Happersett* established that separate was not very equal. It was to plague women for many years to come.

Another major decision that has obstructed women was made over 30 years later and at the time was marked by some feminists as a victory. *Muller v. Oregon*[93] in 1908 provided the legal basis for protective legislation and used language which was seized upon to extend the doctrine of sex as a basis for legislative classification to remote and unrelated subjects. At the turn of the century a heated struggle over the responsibility of the states for the welfare of the workers was being waged. Working conditions, hours, minimum wages, health and fire hazards were all major concerns of labor.[94] Labor received a major setback in 1905 when the Supreme Court invalidated a New York law that no male or female worker could be required to work in bakeries for more than sixty hours a week or ten hours a day.[95] The Court ruled that it was an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with and void under the federal Constitution.[96]

Three years later the Court upheld an almost identical Oregon

90. E. FLEXNER, CENTURY OF STRUGGLE 66 (1968).
91. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).
92. 163 U.S. 537 (1896).
93. 208 U.S. 412 (1908).
94. FLEXNER, *supra* note 90, at 214.
95. Lochner v. New York, 198 U.S. 45 (1905).
96. *Id.* at 62-63.

statute that applied to females only.[97] The language of the Court deserves to be quoted at length:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal place with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her

97. Oregon Sess. Laws [1903] 148.

> benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of the body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, in influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.[98]

With this precedent, the drive for protective legislation became distorted into a push for laws that applied to women only—on the principle that half a loaf was better than none. While this policy was also favored by male labor leaders who saw the "protection" of women only as a way to limit compteition, it is safe to say that the Supreme Court contributed significantly to the proliferation of state protective laws for women only. The Court has long since rejected the thinking in the *Lochner* case that prevented protective legislation for men,[99] but it has expanded *Muller* to further restrict the activities of women. *Muller* was concerned only with protecting women from strenuous labor, but it has been cited in support of excluding women from juries,[100] different treatment in licensing occupations[101] and the exclusion of women from state supported colleges.[102] According to Kanowitz, "[t]he subsequent reliance in judicial decisions upon the *Muller* language is a classic example of the misuse of precedent, of later courts being mesmerized by what an earlier court had said rather than what it had done."[103]

Some lower court decisions, however, have begun to challenge this doctrine. It has been opposed before but always in a dissenting opinion. The Alabama jury case is one such instance; others have occurred since the passage of Title VII. The courts are once again gingerly moving toward a decision that sex-based legislation is not valid. The Fifth Circuit, therefore, has refused to adopt a "stereotyped characterization" that few or no women can safely lift 30 pounds:

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98. Muller v. Oregon, 208 U.S. 412, 421-22 (1908).
99. *See* United States v. Darby, 312 U.S. 100 (1940).
100. Commonwealth v. Welosky, 276 Mass. 398, 414, 177 N.E. 656, 664 (1931).
101. Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912); People v. Case, 153 Mich. 98, 101, 116 N.W. 558, 560 (1908); State v. Hunter, 208 Ore. 282, 285, 300 P.2d 455, 458 (1956).
102. Allred v. Heston, 336 S.W.2d 251 (Tex. Civ. App. 1960).
103. KANOWITZ, *supra* note 30, at 154.

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.[104]

FEDERAL LEGISLATION

The key characteristic of caste systems is the interdependence of the constituent elements. It is difficult to alter one element without altering the whole system of which it is a part. A caste system involves more than social structures; the attitudes which derive from and maintain the structures are equally if not more important in their effects on human beings. Thus, castes are much more than rigidified classes; they involve a peculiar pattern of human relationships and a peculiar state of mind. Classes are economic divisions and imply that mobility is possible, but castes are social divisions, and mobility is nonexistent. While one's class is defined by job or income, caste is defined by much more. Its basis may differ from society to society; race, sex, age, language, religion and culture are all possible criterion of differentiation. But economic consequences usually flow from membership in a caste, not vice versa. One displays the attributes of a caste because one is a member of it, but one is a member of a class because one displays its attributes.

Thus, it is possible, though not inevitable, that caste and class systems can exist in the same society, and people can be members of both. In some kinds of societies class and caste coincide, but in America they do not. This means that the particular manifestations of a particular woman's situation will differ from class to class, and the sexual caste system cannot be attacked in a singular manner. A public policy that wishes to break down the sexual caste system must have different tools for the same problem. The kinds of policies developed to deal with class inequities will not be adequate to deal with those of caste. The former are primarily economic in nature; the latter cannot be so limited.

The failure to realize this distinction has governed most public policy attempts that have attacked the sexual caste system. In the last ten years the federal government has developed a recognizable, if reluctant, interest in prohibiting sex discrimination, but following the traditional

104. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969).

form, this interest has been essentially in the area of economic disparities. Equal pay and equal job opportunity have been the primary concerns, and even these concerns have often been superficial.

The federal government has not been the leader in this concern. By 1963 a number of states had equal pay acts;[105] federal action, however, generated an even greater passage of similar laws by many more states and, in this sense, can be said to have catalyzed a local as well as national concern with the economic problems of women.[106] There have been three major federal attempts to deal with the sexual caste system in the last ten years: the 1963 Equal Pay Act,[107] Title VII of the 1964 Civil Rights Act[108] and Executive Order 11375.[109]

The Equal Pay Act came about more out of a concern for men than for women, and its effect on the sexual caste system in negligible. First proposed in 1868, equal pay did not become an issue until World War I when many women moved into jobs formerly held by men. Since it was socially expected for women to work for less money than men, the two to four million women suddenly added to the work force created a concern that they would depress the wage rates and that men would be forced to work at the lower rates after the war. Several actions were taken by the Government of which the March, 1918 report by the War Labor Conference Board is typical: "If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work."[110] This phenomena repeated itself in World War II and the first major equal pay bill with broad coverage was debated in 1945.[111]

Throughout all the early agitation for equal pay, the major concern of Congress and the supporting unions was the "prevention of women's wages from undercutting the wages of men."[112] Women's unions and feminists supported equal pay out of dedication to principle and feelings of working class solidarity but always with the proviso that there be training programs for "working girls" to avail women of the same

105. *See* KANOWITZ, *supra* note 30, at 102 n.16.
106. *See* Mink, *Federal Legislation to End Discrimination Against Women*, 5 VAL. U.L. REV. 397 (1971).
107. 29 U.S.C. § 206(d) (1964).
108. 42 U.S.C. §§ 2000e et seq. (1964) (prohibiting sexual discrimination in various types of employment).
109. 3 C.F.R. 320 (1967), which amended Exec. Order No. 11246, 3 C.F.R. 339 (1965), by adding sex to the types of discrimination prohibited by all holders of federal contracts.
110. U.S. Dep't of Labor, Women's Bureau, Action for Equal Pay, Jan., 1966.
111. S. 1178, 79th Cong., 1st Sess. (1945); 91 CONG. REC. 6411 (1945).
112. Baker, *supra* note 58, at 412.

opportunities as men to earn decent wages.[113] For the most part, they never achieved decent wages because male unions continued to exclude women from membership and apprenticeship programs while employers, when faced with a choice between male and female employees, chose women only if they would work for lower wages. Then as now, equal pay was irrelevant without equal job opportunity.

Providing equal job opportunity is the intention of Title VII of the 1964 Civil Rights Act, but its means of carrying out this intention involve little more than a stated prohibition against job discrimination by employers, employment agencies, unions or joint labor-management apprenticeship committees. Even a perfunctory glance at Title VII reveals that it is intended to create more of an appearance than a reality. The Act states the admirable goal of eliminating employment discrimination while providing absolutely no viable means for doing so.[114] This "forked tongue" approach is reminiscent of the first protective legislation to institute the ten-hour day among factory workers passed in the first half of the nineteenth century. It too stated a policy of concern in order to pacify the striking workers while providing many loopholes and few enforcement mechanisms to calm the irate manufacturers.[115] As it finally emerged from Congress, the basic principles upon which Title VII relies to eliminate discrimination in employment are individual initiative on the part of the discriminatee and good will on the part of the discriminator. The principles are not likely to be useful in enforcing any policy decision, certainly not attempts to break down a caste situation.

In attempting to carry out its stated functions, Title VII suffers from a high degree of structural schizophrenia. It provides little substantive power and then distributes this power in such a way that it will do the least good for those who are victims of discrimination. On the one hand it creates the Equal Employment Opportunity Commission as its main regulatory agency.[116] It then proceeds to emasculate it. To affect employment discrimination directly, the Commission may only listen to and conciliate complaints, file amicus curiae briefs if the unconciliated complainant should go to court and recommend that the Attorney General prosecute the most serious cases.[117]

Originally, as proposed by the Kennedy Administration, the Equal Employment Opportunity Commission (EEOC) was modeled after the

113. *Id.*; HENRY, *supra* note 61; E. ABBOTT, WOMEN IN INDUSTRY (1910).
114. *See* 42 U.S.C. § 2000e-2 (1964).
115. A. HENRY, THE TRADE UNION WOMAN 14-15 (1915).
116. 42 U.S.C. § 2000e-4 (1964).
117. *Id.* §§ 2000e-4(f)(5), (6); *id.* § 2000e-5(a).

National Labor Relations Board and possessed "cease and desist" powers common to the NLRB and various state Fair Employment Practices Commissions.[118] By the time it had survived the House Judiciary Committee, this power had been reduced to a provision requiring the EEOC, if conciliation failed, to bring civil suit for the defendant unless it felt such a case was not in the public interest.[119] The final Senate version, as agreed upon by the House, removed even this modicum of power and put the burden of bringing suit on the individual complainant.[120]

The result is that Title VII's enforcement agency, the EEOC, is itself without power. The only meaningful authority lies in the individual who alone can initiate investigation or civil suit, the courts who alone can make binding decisions and impose sanctions and the Attorney General who is the only government representative that can bring suit under Title VII. Yet, even in this situation, the Attorney General is not required to act on the recommendation of the EEOC; furthermore, the cases to be prosecuted can be selected independent of Title VII's creation. The Attorney General must have "reasonable cause" to believe that there is a "pattern or practice of resistance to the full enjoyment of any of the rights secured."[121]

As the EEOC itself realizes, most people are either ignorant of Title VII and the processes involved, or if aware, hesitant to file complaints because of fear of reprisal, a reluctance to solicit intervention from a seemingly remote federal agency, and the desire to avoid the time consuming and potentially costly process involved in a legal suit.[122] Relying on the individual's initiative and resources to confront the discriminatory practices of the major corporations governed by Title VII does little more than give those individuals most outraged at their experience a means of venting their spleen. According to one expert, "as the experience of all the anti-discrimination commissions has shown, most victims of discrimination never complain to them. To reach the great bulk of discriminatory practices, commissions must take the initiative themselves."[123]

The only way this difficulty can even partially be overcome is by the existence of active, functional organizations working in the interest

118. *See* 109 CONG. REC. 13244-49 (1963).
119. *Compare* 110 CONG. REC. 1518 (1964) *with* S. REP. No. 867, 88th Cong., 2d Sess. (1964).
120. *See* 110 CONG. REC. 12593-12600 (1964).
121. 42 U.S.C. § 2000e-6 (1964).
122. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, THIRD ANNUAL REPORT 16 (1968).
123. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION (1966).

of the different "minority groups" mentioned in the Act. Individuals rarely have the resources or the tenacity to confront corporations. Only organizations with the political motivation to see the gain for the group inherent in the individual complaint are capable of bringing action. For most of the "minorities" listed in the Act, such organizations do not exist or are not sufficiently viable to undertake this task.

This need reveals the pluralist assumptions about the structure of the political system that are implicit in the Act. Government is not prepared to enforce its own law; rather, it must wait until organized interests force it to do so. Since those interests which are the most organized are the most likely to be in violation of the law—and those individuals who are their victims least likely to be organized as interests —this practice insures that social policy will have a minimal effect on social structure. Implicit in the law itself is the requirement that there be active social movement and active social movement organizations which will mobilize support for the victims of employment discrimination. Thus, the enforcement mechanisms themselves serve as a barometer of social pressure. As political consciousness and organization of a particular minority group grows, so does its ability to prosecute complaints in the courts. But when this organization begins to falter, or where it has not yet developed, the status quo practices can regain possession of the field.

If individual initiative is the prerequisite for bringing the machinery of the EEOC into operation, employer good will is the necessary ingredient for resolving the conflict. Since the EEOC's teeth were pulled out one by one as the bill went through the legislative process, nothing but soft gums are left. In the final version, the most potent weapon given to the EEOC after it has investigated and found reasonable cause to believe discrimination exists is to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[124] Nor can any of this limited process be made public to avail informal social sanctions if conciliation fails.[125] This sweetness and light approach is not only absurd in theory but also has proved useless in the states many times over. By 1964 it was quite evident, upon the basis of the experience of states and municipalities having civil-rights legislation, that the reliance upon administrative techniques of persuasion and conciliation to secure voluntary compliance with prohibitions against discrimination in employment were almost

124. 42 U.S.C. § 2000e-5(a) (1964).
125. *Id.*

certainly doomed to failure.[126]

The results of the EEOC's lack of enforcement powers are clearly evident in its lack of results. Of the 50,000 cases wherein the EEOC has found "reasonable cause" that there is discrimination, only about half have been successfully conciliated.[127] This accomplishes nothing for the numerous people who have never filed complaints, let alone those whose complaints were not resolved. Of the 500 cases which have been brought to the courts, less than a handful have been ajudicated.[128] As one authority stated: "individual lawsuits, without the aid of other enforcement techniques, are not an adequate way of dealing with the widespread violations of law existing in the civil-rights field."[129] As it occurred, the idea of equal employment opportunity was successfully hamstrung on its tenuous trip through Congress. While it is recognized that such an agency alone could never have adequately solved the problems of employment discrimination, the EEOC was not even given the minimal tools for the task. With its limited powers and lack of initiative, the EEOC is more of a social service than a federal enforcement agency.

Caste and Public Policy

Caste is a form of institutionalized inequality. Incorporating as it does the entirety of people's lives, it also gives the impression of a permanent institutionalization. But changes in the social conditions which contributed to a caste system can lead to its destruction. Thus, urbanization and industrialization are undermining both the Indian and the American racial caste systems which were thought by many to be permanently ensconced.

Urbanization and industrialization are also destroying the basis of the sexual caste system. Strongly differentiated sex roles were rooted in the division of labor; their basis has now been torn apart by modern technology. Their justification was rooted in the subjection of women to the reproductive cycle; this has been destroyed by modern pharmacology. The history of the Industrial Revolution has been one of ascription giving way to achievement as the prime means of defining human beings. In this change, women were once left behind, still judged by their ascribed qualities, *i.e.*, their sex, rather than their individual qualities. Now this too is beginning to give way.

126. *See* J. Witherspoon, Administrative Implementation of Civil Rights 138-214 (1968).

127. Equal Employment Opportunity Comm'n, *supra* note 122.

128. *Id.*

129. Witherspoon, *supra* note 126, at 11.

However, a situation of fluidity poses dangers as well as potentials. If specific attention is not paid to rooting out the basis of caste, the hierarchy of values on which it rests reassert themselves in new and insidious ways. "Protective" legislation exemplifies such a short-sighted approach. The legislation was intended by many to help women, to facilitate their participation in the industrial work force by making them less vulnerable to exploitation. The tragic irony of *Muller* was that it was a progressive attempt to secure a real equality of right for women in the unequal struggle for subsistence.[130] The rationale of the decision was to equalize the bargaining position of women in industry; the long range reality was to hamper it. What was heralded as a complete legal victory was in reality a pyrrhic victory because the basic nature of caste was never challenged.

The lesson that "protective" legislation teaches is that law which specifies caste will inevitably reinforce caste. Sex specific legislation will become sex restrictive. The first need of public policy is to abolish such sex specific legislation because it provides the de jure basis of the caste system. The easiest and most thorough way of accomplishing this is the passage of the Equal Rights Amendment. The Amendment would at one and the same time sweep away the legal dead wood of the sexual caste system while proclaiming public support of true equality for all citizens.

Beyond its housecleaning and symbolic functions, however, the use of the Equal Rights Amendment is quite limited because it can only remove sex per se as a barrier. The women who will benefit most directly from this are those who can most easily adopt male life styles and responsibilities. The hierarchy of values which dictates that the functions primarily performed by men are more valuable than those performed by women will remain unchanged, as will the differential reward that accompany these functions. A position of inequality so long maintained is not removed solely by an expressed legal neutrality. To ignore the caste system is to reinforce it. To fail to recognize the pervasiveness of its structural and psychological aspects is to totally preclude their alteration. Therefore, several additional approaches are needed.

1. *A geater concern for the social functions performed primarily by females but in a manner that does not reinforce the caste assumptions.* This would require a form of functional differentiation which would treat people as individuals, not as members of a class. Such an approach would distinguish people on the basis of achieved or chosen character-

130. *See* Muller v. Oregon, 208 U.S. 412, 422 (1908).

istics rather than on the basis of ascribed caste. Murray and Eastwood amply describe how law should treat people as individuals:

> What is needed to remove the present ambiguity of women's legal status is a shift of emphasis from women's class attributes (sex per se) to their *functional* attributes. The boundaries between social policies that are genuinely protective of familial and maternal functions and those that unjustly discriminate against women as individuals must be delineated.
>
> . . . .
>
> To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation; its benefits are geared to the performance of a special service much like veteran's legislation. When the law distinguishes between the "two great classes of men and women," gives men a preferred position by accepted social standards, and regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status.[131]

This functional differentiation has the advantage of not only abolishing caste law but doing so in a manner which does not assume that all women are like all men. In so far as there are functional differences, these would be allowed for without preemptorially assuming that all women or men are functionally identical.

> [I]f it were made clear that laws recognizing functions, *if performed*, are not based on sex per se, much of the confusion as to the legal status of women would be eliminated. Moreover, this may be the only way to give adequate recognition to women who are mothers and homemakers and who do not work outside the home—it recognizes the intrinsic value of child care and homemaking. The assumption that financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world is all too common. Underlying this assumption is the unwillingness to acknowkedge any value for child care and homemaking because they have not been ascribed a dollar value.[132]

131. Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 239 (1965).

132. *Id.* at 241.

2. *Extensive corrective legislation like that suggested by the 1963 Report of the President's Commission on the Status of Women,*[133] *the 1970 Report of the President's Task Force on Women's Rights and Responsibilities,*[134] *and the forthcoming 20th Century Fund Task Force Report on Women and Employment.*[135] These recommendations are primarily concerned with the economic and educational problems women face. They also provide for the equalization of public and private benefits where there is structural discrimination, *e.g.*, provision of hospital coverage for pregnancies of spouses of employees but not for employees themselves. To have any real value these laws must have an effective enforcement mechanism, not just a declaration of policy.

3. *Recognition of the extensiveness and subtlety of any caste system and the need for a comprehensive program to eradicate it.* Simply prohibiting discrimination is not enough. Public policy must find ways of engaging in affirmative action to dismantle the structure of inequality. Social, employment, educational, tax and housing patterns are geared to fit the needs of the average working man with a stay-at-home wife and will have to be altered to fit the needs of both men and women who do not fit this pattern. The reevaluation is particularly necessary in light of the developing concern with over-population because present social institutions channel women into motherhood as the most easily available and socially acceptable occupation. If women are to be told that they should no longer devote the major portion of their lives to raising children, they must be provided with alternative forms of employment which adequately utilize their talents. Public policy will have to enter areas previously unentered. For example, the image of women perpetrated by the media strongly reinforces the sexual caste system. Perhaps image structuring is out of the purview of legal concerns, but it must still be changed. The role of the family in maintaining the sexual caste system is another area that has not been adequately analyzed although the tax system alone is one of its strongest supporters. At the very least, government money can be provided for research into the multitude of problems created by dismantling a caste system. Additionally, new and creative programs will be needed: to encourage all women to educate themselves thoroughly and find socially useful functions; to fight the double bind which imposes social costs to those who deviate across their caste lines

133. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN (1963).

134. PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE (1970).

135. The Report will be released during Fall, 1971, and may be obtained from the 20th Century Fund, 41 East Seventieth, New York, New York 10021.

even when the society encourages such deviation; to combat feelings of group self-hatred; to refute the process of selective perception that permits many to say that women are simply "unqualified" for a job without examining the salience of the qualifications; to establish social responsibility for children by a means less burdensome to the individual parents; to attack the role segregation within the family that makes home maintenance the sole responsibility of women; and to deal with the many other objective problems that members of subject castes face that never hamper the lives of white males.

4. *Recognition of the limits of the law and the need for cooperation with social movement organizations of the lower castes.* To meet many of the above needs requires a change in the manner in which people think as well as the way they act. When psychological attitudes about oneself and others are lodged firmly in historical tradition, they are altered only when people who hold them experience crises. Crises give traditionally oriented people new experiences, new bases of understanding and new urgency for altering their anachronistic approaches.

The best mechanism for changing these attitudes is a *social movement.* By its very nature a social movement is constituted to attack attitudes, just as the law attacks practices. It is a mobilizer of public opinion, a changer of morals, a renovator of perspective, a creator of conflict and a source of coercion. Social movements may also provide a source of ideas concerning the subtle workings of a caste system on which public policy can draw. To do this effectively, however, a reordering of functions must occur. Currently, Title VII is dependent upon the assistance of social movement organizations to enforce the law. This should not be their role; the law should be capable of enforcing itself. Rather, Title VII should provide assistance to movement organizations in carrying out their functions of mobilizing and altering public opinion. This is not entirely a new or radical idea. Government agencies have a long tradition of cooperating with the people whose interests they affect. Unfortunately, the bulk of that tradition has been that those who are regulated affect the manner in which they are to be regulated. A more proper relationship is where the benefactor of the regulation is able to make the decisions. That change of emphasis may be both new and radical.

None of these suggestions will be acted upon easily. They are not proposed with that belief in mind, but they are possible. A caste system is much more difficult to eradicate than any other form of social structure, but its destruction is not impossible, particularly during times of extreme social change such as those which currently exist. A clear understanding of the nature of the problem is required as is dedication and commitment.

Superficial solutions like those provided in the nineteenth cenury lead only to a reinforcement of the system, not its eradication. Above all, a great deal of ingenuity and sensitivity is needed to tease out of our biased conceptual framework the threads which tie the system together and to plan programs which will weave them into a new pattern of greater benefit to all.

APPENDIX

CASTELIKE STATUS OF WOMEN AND NEGROES*

NEGROES	WOMEN
1. High Social Visibility	
a. Skin color, other "racial" characteristics.	a. Secondary sex characteristics.
b. (Sometimes) distinctive dress—bandana, flashy clothes.	b. Distinctive dress, skirts, etc.
2. Ascribed Attributes	
a. Inferior intelligence, smaller brain, less convoluted, scarcity of geniuses.	a. Ditto.
b. More free in instinctual gratifications. More emotional, "primitive" and childlike. Imagined sexual prowess envied.	b. Irresponsible, inconsistent, emotionally unstable. Lack strong super-ego. Women as "temptresses."
c. Common stereotype "inferior."	c. "Weaker."
3. Rationalizations of Status	
a. Thought all right in his place.	a. Woman's place is in the home.
b. Myth of contented Negro.	b. Myth of contented woman—"feminine" woman is happy in subordinate role.
4. Accommodation Attitudes	
a. Supplicatory whining intonation of voice.	a. Rising inflection, smiles, laughs, downward glances.

* Hacker, *Women as a Minority Group*, 30 SOCIAL FORCES 60, 65 (1951).

b. Deferential manner.	b. Flattering manner.
c. Concealment of real feelings.	c. "Feminine wiles."
d. Outwit "white folks."	d. Outwit "menfolk."
e. Careful study of points at which dominant group is susceptible to influence.	e. Ditto.
f. Fake appeals for directives; show of ignorance.	f. Appearance of helplessness.

5. Discriminations

a. Limitations on education—should fit "place" in society.	a. Ditto.
b. Confined to traditional jobs—barred from supervisory positions. Their competition feared. No family precedents for new aspirations.	b. Ditto.
c. Deprived of political importance.	c. Ditto.
d. Social and professional segregation.	d. Ditto.
e. More vulnerable to criticism.	e. *E.g.,* conduct in bars.

6. Similar Problems

Roles not clearly defined, but in flux as result of social change. Conflict between achieved status and ascribed status.