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The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women

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Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification

Proposed Amendment to the United States Constitution¹

Introduction

American society has always confined women to a different and, by most standards, inferior status. The discrimination has been deep and pervasive. Yet in the past the subordinate position of more than half the population has been widely accepted as natural or necessary or divinely ordained. The women's rights movement of the late nineteenth and early twentieth centuries concentrated on obtaining the vote for women; only the most radical of the suffragists called into question the assumption that woman's place was in the home and under the protection of man. Now there has come a reawakening and a widespread demand for change. This time the advocates of women's rights are insisting upon a broad reexamination and redefinition of "woman's place."

Historically, the subordinate status of women has been firmly entrenched in our legal system. At common law women were conceded few rights. Constitutions were drafted on the assumption that women did not exist as legal persons. Courts classified women with children and imbeciles, denying their capacity to think and act as responsible adults and enclosing them in the bonds of protective paternalism. Over the last century, it is true, the legal status of women has gradually improved. Common law rules have been altered in many states and some additional rights conferred by legislation. A marked advance was made in 1920 with the adoption of the Nineteenth Amendment granting suffrage to women. Since then, there has been other progress. But the development has been slow and haphazard. Major remnants of the common law's discriminatory treatment of women persist in the

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1. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

laws and institutions of all states. In addition, efforts during the past century to protect working women have created a new set of laws which turn out to discriminate against women rather than secure equality.²

In the present legal structure, some laws exclude women from legal rights, opportunities, or responsibilities. Some are framed as legislation conferring special benefits, or protection, on women. Others create or perpetuate a separate legal status without indicating on their face whether the position of women ranks below, or above, the position of men. Many of the efforts to create a separate legal status for women stem from a good faith attempt to advance the interests of women. Nevertheless, the preponderant effect has been to buttress the social and economic subordination of women.

Our legal structure will continue to support and command an inferior status for women so long as it permits *any* differentiation in legal treatment on the basis of sex. This is so for three distinct but related reasons. First, discrimination is a necessary concomitant of any sex-based law because a large number of women do not fit the female stereotype upon which such laws are predicated. Second, all aspects of separate treatment for women are inevitably interrelated; discrimination in one area creates discriminatory patterns in another. Thus a woman who has been denied equal access to education will be disadvantaged in employment even though she receives equal treatment there. Third, whatever the motivation for different treatment, the result is to create a dual system of rights and responsibilities in which the rights of each group are governed by a different set of values.

2. For accounts of the legal status of women in English and American history, see E. FLEXNER, *CENTURY OF STRUGGLE* (1959); L. KANOWITZ, *WOMEN AND THE LAW* (1969) [hereinafter cited as KANOWITZ]; A. KRADITOR, *UP FROM THE PEDESTAL* (1968); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U.L. REV. 723 (1935); Note, *Sex, Discrimination and the Constitution*, 2 STAN. L.REV. 691 (1950). On the prevalence of discrimination in the American legal system today see, in addition to the above materials, PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, *AMERICAN WOMEN* (1963) AND REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS (1963); CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY (1968), REPORT OF THE TASK FORCE ON HEALTH AND WELFARE (1968), REPORT OF THE TASK FORCE ON LABOR STANDARDS (1968), and REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES (1968); THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, REPORT: A MATTER OF SIMPLE JUSTICE (1970); WOMEN'S BUREAU, U.S. DEPT. OF LABOR, *HANDBOOK ON WOMEN WORKERS* (1969) [hereinafter cited as 1969 HANDBOOK]; Cavanagh, "*A Little Dearer than His Horse*": *Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1971); Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORN. L. REV. 262 (1970). Recent developments are reported in THE SPOKESWOMAN and WOMEN'S RIGHTS LAW REPORTER.

History and experience have taught us that in such a dual system one group is always dominant and the other subordinate. As long as woman's place is defined as separate, a male-dominated society will define her place as inferior.

The structured legal and social discrimination against women is now being challenged by the demand for women's liberation. This movement for equality is made possible by relative affluence, broader educational opportunities for women, and mechanization of industry. It has been given impetus by the weakening of family ties, the growing participation of women in the labor force, increasing life expectancy, and widespread concern about over-population. It accompanies more enlightened and flexible attitudes towards relations between the sexes. And it is allied with the struggles of minorities, youth, and other forces seeking new ways of life, and new ways for people to relate to one another, in a world that has so plainly failed to live up to its possibilities. As a result of these and other factors the movement for equality in the status of women seems on the verge of a major breakthrough.

Nevertheless, it is only recently that widespread discussion has begun about what changes in the legal structure are necessary to achieve a unified system of equality.³ This article undertakes to contribute to this discussion by exploring in detail some of these necessary changes. We consider first methods by which the legal structure can be changed, reaching the conclusion that a new constitutional amendment is necessary (Part I). We then trace the development in Congress of proposals for such a constitutional amendment (Part II). Thereafter we discuss the constitutional framework of the Equal Rights Amendment: its underlying principles and their place in the general structure of the Constitution (Part III). We then explore some aspects of the transition period after ratification (Part IV), and finally, we describe the anticipated operation of the Amendment in four significant areas: protective labor legislation, domestic relations law, criminal law, and the military (Part V).

3. An early and suggestive analysis of legal discrimination against women can be found in Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). In March, 1970, the Citizens' Advisory Council on the Status of Women, in a memorandum prepared by Mary Eastwood, articulated the outline of a coherent theory of the Equal Rights Amendment; see CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION* (1970). Since then, an increasing amount of national attention and scholarly writing has been focused on the Amendment. See *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

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I. The Need for a New Constitutional Amendment

There are three methods of making changes within the legal system to assure equal rights for women. One is by extending to sex discrimination the doctrines of strict judicial review under the Equal Protection Clause of the Fourteenth Amendment. A second is by piecemeal revision of existing federal and state laws. The third is by a new constitutional amendment. These alternatives are not, of course, mutually exclusive. The basic question is what method, or combination of methods, will be most effective in eradicating sex discrimination from the law.

A. *Extension of the Equal Protection Clause*

In past years many proponents of equal rights for women believed that the goal could be achieved through judicial interpretation of the Equal Protection Clause, as applied to both state and federal governments.⁴ Thus the President's Commission on the Status of Women argued in 1963 that "the principle of equality [could] become firmly established in constitutional doctrine" through use of the Fourteenth and Fifth Amendments, and concluded that "a constitutional amendment need not now be sought." At the present time that viewpoint has been abandoned by active supporters of women's rights.⁵ This shift in position is fully justified. An examination of the decisions of the Supreme Court demonstrates that there is no present likelihood that the Court will apply the Equal Protection Clause in a manner that will effectively guarantee equality of rights for women. More important, equal protection doctrines, even in their most progressive form, are ultimately inadequate for that task.

The Supreme Court's approach to women's rights has been char-

4. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." And the Fifth Amendment Due Process Clause has been construed to embody an equivalent protection against action by the federal government; *see, e.g.,* *Bolling v. Sharpe*, 347 U.S. 497 (1954). Both provisions will hereafter be referred to as the "Equal Protection Clause."

5. The 1963 position of the President's Commission on the Status of Women is stated in *AMERICAN WOMEN*, *supra* note 2, at 44-45. Two leading advocates of women's rights who switched from judicial interpretation to the amendment as the preferred route of change are Dr. Pauli Murray, a member of the Committee on Civil and Political Rights of the President's Commission on the Status of Women, and Professor Leo Kanowitz, author of *WOMEN AND THE LAW* (1969). See their testimony before the Senate Committee on the Judiciary on the Equal Rights Amendment in September, 1970, *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., at 161, 427 (1970). Other discussion comparing the treatment of sex discrimination through judicial interpretation and amendment of the Constitution can be found in Note, *supra* note 3, 84 HARV. L. REV. 1499, and *Equal Rights for Women*, *supra* note 3, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215.

acterized, since the 1870's, by two prominent features: a vague but strong substantive belief in women's "separate place," and an extraordinary methodological casualness in reviewing state legislation based on such stereotypical views of women. The result has been that the Court has never found a sex-based classification to violate the Equal Protection Clause; moreover, it has rendered this cumulative judgment with an off-handedness and tolerance for inconsistency which contrast sharply with its approach to discrimination in the areas of race, national origin, and poverty.

The Supreme Court's conception of women's "separate place" is rooted in its nineteenth-century decisions denying women such elementary civil rights as voting and the opportunity to practice law, on the grounds that these rights were not among the "privileges and immunities" of United States citizenship and hence were subject to exclusive state regulation.⁶ In his well-known concurrence in *Bradwell v. Illinois*, the decision which approved the exclusion of women from the legal profession, Justice Bradley stated:

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.⁷

The question for the Supreme Court in the voting and practice of law cases was not whether women, as compared to similarly situated or qualified men, were being denied a right or privilege in violation of the Equal Protection Clause. The question was not even formulated in these terms, much less considered, because men and women were seen as occupying separate spheres of social life.

The idiom of due process also generally perpetuated the belief in woman's separate place. In *Muller v. Oregon*,⁸ one of the first cases to consider at length the constitutional position of women, the Supreme Court accepted the argument made in the famous Brandeis brief (largely prepared by Josephine Goldmark) that women required special protection in employment which could not, under the liberty-

6. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (voting); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) and *In re Lockwood*, 154 U.S. 116 (1894) (admission to the bar).

7. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) at 141.

8. 208 U.S. 412 (1908).

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of-contract doctrine of *Lochner v. New York*,⁹ be extended to men. Strictly speaking, the Court in *Muller* was only holding that the fixing of maximum hours for women by the state was not arbitrary or unreasonable under the Due Process Clause of the Fourteenth Amendment. It did not address itself to whether women were entitled to equal rights with men under the Equal Protection Clause. But the Court's long recitation of the inferior physical capacities and social position of women, its grouping of all members of the sex into one classification regardless of individual differences, and its conclusion that "she is properly placed in a class by herself" had far-reaching consequences for equal protection law.¹⁰

Muller has been widely utilized by federal and state courts to sustain not only factory legislation applicable only to women against due process objections, but also many kinds of sex-based laws against equal protection challenges.¹¹ The basic belief that women were different and that this justified different treatment under law became accepted doctrine, and when the claim for women's rights was at last raised directly under the Equal Protection Clause in 1948, the Court simply applied the style and content of its earlier decisions to the equal protection area as well. In *Goesaert v. Cleary*¹² several women challenged a Michigan statute providing that no female could be licensed as a bartender unless she was "the wife or daughter of a male owner," chiefly on the grounds that the exception was arbitrary and irrational. Justice Frankfurter, speaking for the Court, thought the question "need not detain us long." In putting it to rest he casually answered the broader and much more significant question of whether the state

9. 198 U.S. 45 (1905).

10. 208 U.S. at 422. It should be noted that the employer in the case did argue for the invalidity of the statute because "it does not apply equally to all persons similarly situated, and is class legislation." 208 U.S. at 418. But this argument was addressed to the point that the law applied only to certain kinds of establishments and did not cover other kinds where women were employed. It did not raise any issue of women's rights under the Equal Protection Clause. Nor did the Court consider this to be the issue.

11. Cases following *Muller* which sustained employment legislation applicable only to women against due process challenges include *Radice v. New York*, 264 U.S. 292 (1924), and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *contra*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (overruled in *West Coast Hotel v. Parrish supra*). For cases relying on *Muller* to sustain state exclusion of women from overtime work, juries, saloons, occupations, and public universities against equal protection challenges, *see, e.g.*, *Ward v. Littrell*, 292 F. Supp. 162 (E.D. La. 1968) (women's equal protection challenge to state maximum hours laws denied), and cases cited in Note, *supra* note 3, 84 HARV. L. REV. at 1504 n.46. *But see* *Mengelkoch v. Industrial Welfare Comm'n*, 437 F.2d 563 (9th Cir. 1971), *reversing in pertinent part* 284 F. Supp. 950, 956 (C.D. Cal. 1968) (holding that an equal protection challenge to California's maximum hours law for women posed a "substantial constitutional question" requiring the convening of a three-judge district court under 28 U.S.C. § 2281).

12. 335 U.S. 464 (1948).

could distinguish at all between men and women in licensing bartenders:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.¹³

Having reaffirmed the doctrine of woman's separate place, Justice Frankfurter had no difficulty finding a "basis in reason" for the Michigan statute: the legislature might believe that "moral and social problems" would be less when no females except wives and daughters of male bar owners were permitted to be bartenders.¹⁴ The *Goesaert* case thus employed the "reasonable classification" test in considering challenges to sex-based legislation under the Equal Protection Clause; the plaintiff had the burden of overcoming a strong presumption that the sex classification was valid and showing that it was in some way "arbitrary" and "unreasonable." In announcing such a passive standard of equal protection review,¹⁵ the Court delegated to state legislatures almost complete discretion in their treatment of women's basic rights—a discretion which was considered intolerable, at the time *Goesaert* was decided, with regard to many other groups in the population.¹⁶

While Justice Frankfurter's off-hand dismissal of women's basic civil right to engage in an occupation might seem outrageous today,¹⁷ the

13. *Id.* at 465-66.

14. *Id.* at 466-67. Justices Rutledge, Douglas, and Murphy dissented, but solely on the narrow issue that the statute discriminated against female bar owners; they did not mention the broader equal protection question. Compare the treatment of the rights of women bartenders in *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

15. For a general discussion of the "reasonable classification" test under the Equal Protection Clause, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments—Equal Protection*]; another discussion of *Goesaert* can be found in Note, *supra* note 3, 84 HARV. L. REV. at 1503-04.

16. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (strict review of burdens imposed on basis of race and national origins); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (strict review of state law infringing man's right of procreation); *Kotch v. Board of River Port Pilot Comm'rs.*, 330 U.S. 552, 564 (1947) (Rutledge, J., dissenting) (strict review of exclusion of persons from occupation on basis of lineage).

17. See the California Supreme Court's discussion of *Goesaert v. Cleary* and *Muller v. Oregon* in *Sail'er Inn, Inc. v. Kirby*, — Cal. 3d —, 485 P.2d 529, 539 n.15, 95 Cal. Rptr. 829, 339 n.15 (1971). Cf. *McCrimmon v. Daley*, 2 FEP CASES 971, 972 (N.D. Ill. 1970); Paterson

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Supreme Court has never seriously re-examined its assumption of woman's separate place and the equal protection doctrines that flow from it. In *Hoyt v. Florida*,¹⁸ the most recent Supreme Court case to give extended consideration to women's constitutional rights, the Court upheld a Florida statute which excluded women from jury service unless they voluntarily applied. Justice Harlan's opinion for the Court followed closely the reasoning of *Goesaert*, and even harkened back to Justice Bradley's concurrence in *Bradwell v. Illinois* almost ninety years before.

[W]e [cannot] 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. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.¹⁹

Supporters of equal rights for women in the 1960's relied heavily on the possibility that the Supreme Court would at last reject its assumption of woman's separate place and the related reasonable classification test, and apply to sex differentiation cases the standards of strict scrutiny that had evolved in equal protection theory. One such standard is the "fundamental interest" test. Under this formula, if a fundamental right is at stake, differential classification and treatment is permissible only if the government affirmatively demonstrates the most compelling reasons.²⁰ A second standard of strict scrutiny is the "suspect classification" formula developed in cases reviewing the

Tavern & Grill Owners Ass'n v. Borough of Hawthorne, 57 N.J. 180, 183-86, 270 A.2d 628, 630-31 (1970). For discussion of these and other cases concerning occupational exclusions of women, see note 111 *infra*.

18. 368 U.S. 57 (1961).

19. *Id.* at 61-62. Chief Justice Warren and Justices Black and Douglas concurred in an ambiguous opinion which indicated that they were not passing on the constitutional issue. In two earlier cases the Court had indicated that the exclusion of women from juries was constitutionally permissible; see *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (dictum), and *Fay v. New York*, 332 U.S. 261, 290 (1947); *but cf.* *Ballard v. United States*, 329 U.S. 187, 193-94 (1946). The Court has agreed to hear the issue of exclusion of women from state juries again in *Alexander v. Louisiana*, *cert. granted*, 401 U.S. 396 (1971) (No. 5944).

20. On the "fundamental interest" test see *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Kramer v. Union Free School District*, 395 U.S. 621, 626-30 (1969). For discussion see *Developments—Equal Protection*, *supra* note 15, at 1120-23, 1127-31; Note, *supra* note 3, 34 HARV. L. REV. at 1506-07.

state laws based on racial distinctions. The rule here is that any classification based on race is strongly suspect, "bears a heavy burden of justification," and "will be upheld only if it is necessary, not merely rationally related, to the accomplishment of a permissible state policy."²¹

The fundamental interest and suspect classification doctrines operate to cancel the normal presumption of constitutionality and to put a heavy burden on the government to justify the differential treatment. They are therefore more powerful weapons against discrimination than the "reasonable classification" test. Yet both doctrines are seriously deficient as instruments for achieving equal rights for women. The fundamental interest test applies only where the particular right claimed to be infringed is a "fundamental" one, and the Court has been torn with disagreement over what kinds of rights and interests are embraced within this category of special constitutional protection.²² Hence the fundamental interest test might not be applied to many important areas in which women are treated differently from men, such as the right to work overtime or to obtain damages for loss of consortium. The suspect classification test provides a potential basis for more comprehensive protection against sex discrimination; under its operation, sex-based classifications would be considered "suspect" and subjected to strict judicial scrutiny. But because this doctrine allows the government to justify even a suspect classification by "compelling reasons," it would permit some classifications based on sex to survive.²³ Thus this standard too would not guarantee an effective

21. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1965). See also *Loving v. Virginia*, 388 U.S. 1, 11 (1967). While the suspect classification doctrine has been used most frequently in reviewing racial classifications, it has also been applied to legislative distinctions based on national ancestry and alienage. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); cf. *Hernandez v. Texas*, 347 U.S. 475 (1954). For discussion see *Developments—Equal Protection*, *supra* note 15, at 1087-1120, 1124-27; Note, *supra* note 3, 84 HARV. L. REV. at 1507-16. The California Supreme Court recently overturned a state statute excluding most women from bartending on the grounds that

classifications based upon sex should be treated as suspect. . . . Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to the ability to perform or contribute to society.

Sail'er Inn, Inc. v. Kirby, — Cal. 3d —, 485 P.2d 529, 539-40, 95 Cal. Rptr. 329, 339-40 (1971). The suspect classification doctrine was also used in striking down heavier criminal penalties for women than for men in *United States ex rel. Robinson v. York*, 281 F. Supp. 8, 14 (D. Conn. 1968), discussed in note 246 *infra*.

22. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971), *id.* at 338 (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471 (1970), *id.* at 508 (Marshall, J., dissenting); *Kramer v. Union Free School District*, 395 U.S. 621 (1969), *id.* at 634 (Stewart, J., dissenting); *Shapiro v. Thompson*, 394 U.S. 618 (1969), *id.* at 655 (Harlan, J., dissenting).

23. As is pointed out in Note, *supra* note 3, 84 HARV. L. REV. at 1509-13, the number

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system of equality which, as we shall argue, demands the elimination of all such classifications.²⁴

The theoretical problems of achieving equal rights for women through judicial interpretation of the Equal Protection Clause are matched by serious practical difficulties. Whatever hopes were held in the 1960's that the Supreme Court would adopt stricter standards in sex differentiation cases have been undermined by its recent decision in *Williams v. McNair*.²⁵ *Williams* involved a challenge to sex segregation in the state university system of South Carolina. Under state law all the universities in that system admit both male and female students except two: the Citadel, primarily a military school, is open only to men, and Winthrop College, "a school for young ladies," permits only women to be regular degree candidates. A group of males challenged the sex restriction of Winthrop College on equal protection grounds. A three-judge court dismissed their suit, applying the reasonable classification test and finding that the classification was not "without any rational justification."²⁶ The Supreme Court, without hearing argument and without opinion, affirmed.²⁷ This summary disposition of the case, even more peremptory than in *Goesaert*, suggests that the Court is not about to impose strict standards of review in sex classification cases.²⁸

Nor does a strong movement for the application of stricter equal protection standards seem to be emerging from decisions in the lower

and kind of sex-based classifications which would be upheld under a suspect classification standard depend on the burden of justification which the Court requires the state to bear. If the Court requires the state to demonstrate a "perfect match" between the category "woman" and the legislative purpose (such as preventing job-related injuries), few (if any) sex-based laws would survive constitutional review. If, on the other hand, the Court adopts a "balancing" approach, and weighs the extent of legislative "mismatch" against the administrative inconvenience of abolishing the law, the results would be far more favorable to sex-based classifications. See *id.* at 1511-12.

24. See pp. 888-92 *infra*.

25. 401 U.S. 951 (1971), *aff'g* 316 F. Supp. 134 (D.S.C. 1970).

26. 316 F. Supp. 134, 138 (D.S.C. 1970).

27. 401 U.S. 951 (1971).

28. The Court is continuing, however, to examine sex classifications in certain contexts. It recently granted review in cases which raise issues of sex discrimination in connection with child custody, *In re Stanley*, 45 Ill. 2d 132, 256 N.E.2d 814 (1970), *cert. granted sub nom.* *Stanley v. Illinois*, 400 U.S. 1020 (1971) (No. 5750); administration of estates, *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635 (1970), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 430); and exclusion of women from jury venire lists, *State v. Alexander*, 255 La. 941, 233 So. 2d 891 (1970), *cert. granted sub nom.* *Alexander v. Louisiana*, 401 U.S. 936 (1971). The Court has also agreed to review two cases involving the imposition on women of their husbands' debts in community property states. See *Perez v. Campbell*, 421 F.2d 619 (9th Cir. 1970), *cert. granted*, 400 U.S. 818 (1970) (No. 5175) (challenging the suspension of an Arizona woman's driver's license and car registration for debts arising from an accident while her husband was driving the community car); *Mitchell v. Commissioner*, 430 F.2d 1 (5th Cir. 1970), *cert. granted sub nom.* *United States v. Mitchell*, 400 U.S. 1008 (1971) (No. 798) (woman's liability for husband's federal income tax).

federal and state courts. In recent years some federal and state courts have struck down legislation or other official action establishing more severe criminal penalties for women than for men, providing for total exclusion of women from jury service, discriminating in the admission of women to the principal state university, excluding most women from bartending, approving the refusal to serve women at a bar, and disallowing suits by women for loss of consortium.²⁹ On the other hand, federal and state courts have also upheld differences in social security benefits, exclusion of women from juries, exclusion of women from compulsory service in the military, differences in the age of majority, and incapacity to sue for loss of consortium.³⁰ Some of the language used in the decisions is more sympathetic to women's rights than that of the Supreme Court. But most of it follows the same nineteenth century view of women's status and function in society. There are no signs of theoretical or practical developments that would sweep the Supreme Court in a bold new direction.

On this state of affairs one cannot say that the possibility of achieving substantial equality of rights for women under the Fourteenth and Fifth Amendments is permanently foreclosed. But the present trend of judicial decisions, backed by a century of consistent dismissal of women's claims for equal rights, indicates that any present hope for large-scale change can hardly be deemed realistic.

29. Collections of judicial decisions on the validity of sex-based laws may be found in PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS, Appendix B, 47-77 (1963); KANOWITZ, *supra* note 2, at 149-92; Crozier, *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U.L. REV. 723 (1935); Note, *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691 (1950); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778 (1965). The cases referred to in the text as striking down discriminatory laws include: United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968), and Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) (criminal penalties); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (jury service); Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) (admission to university); Sail'er Inn, Inc. v. Kirby, — Cal. 3d —, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion from bartending), discussed in note 21 *supra*; Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969) and 317 F. Supp. 593 (S.D.N.Y. 1970) (service at bar); Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (loss of consortium). Cf. Mengelkoch v. Industrial Welfare Comm'n, 437 F.2d 563 (9th Cir. 1971), discussed in note 11 *supra*.

30. The cases referred to in the text as upholding discriminatory laws include: Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), *cert. denied*, 393 U.S. 982 (1968) (social security benefits); State v. Hall, 187 So. 2d 861 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966) (jury service); United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968) and United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970) (Selective Service); Jacobson v. Lenhart, 30 Ill. 2d 225, 195 N.E.2d 638 (1964) (age of majority); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969) (consortium).

B. *Piecemeal Revision of Existing Laws*

Over the years, some proponents of women's rights have thought sex discrimination could be ended most effectively if legislatures prepared women and men gradually for equality by a series of step-by-step reforms. There is no constitutional obstruction to the elimination of discrimination in our legal system by the piecemeal revision or repeal of existing federal and state laws. However such suggestions unrealistically assume a delicacy and precision in the legislative process which has no relationship to actual legislative capability. More importantly, the process is unlikely to be completed within the lifetime of any woman now alive. Such a method requires multiple actions by fifty state legislatures and the federal congress, by the courts and executive agencies in each one of these jurisdictions, and by similar government authorities in numerous political subdivisions as well. This government machinery would have to be mobilized to repeal or modify the statutes and practices in scores of different areas where unequal treatment now prevails. To be comprehensive such efforts would require a tremendously expensive, sophisticated, and sustained political organization, both nationally and within every state and locality. Campaigns to change the laws one by one could drag on for many years, and perhaps in some areas never be finished.

Even if it were possible to mobilize the nation's political machinery, legislative change alone would fail to provide an adequate foundation for the attainment of full legal equality for women. Any plan for eliminating sex discrimination must take into account the large role which generalized belief in the inferiority of women plays in the present scheme of subordination. As noted above, there is need for a single coherent theory of women's equality before the law, and for a consistent nationwide application of this theory. This is scarcely possible through legislative change alone, for the creation of basic policy would be divided among multiple federal, state, and local agencies.³¹ Moreover, so long as they believe the laws against discrimination are subject to derogation at the option of the current legislature, many individuals and institutions will not undertake wholeheartedly the far-reaching changes which genuine sex equality requires. An un-

31. For a discussion of the limits of Congressional power to prohibit sex discrimination in areas traditionally reserved to the states, such as inheritance, domestic relations, and criminal law, see Note, *supra* note 3, 84 HARV. L. REV. at 1516-18.

ambiguous mandate with the prospect of permanence is needed to assure prompt compliance.

In essence, piecemeal legislative reform is what has been going on for the past century. Considered realistically, this approach, at least by itself, simply lacks the breadth, coherence, and economy of political effort necessary for fundamental change in the legal position of women.

C. *The Case for a Constitutional Amendment*

If expansion of the Equal Protection Clause and piecemeal legislation will not result in effective action, there remains the third alternative: a new constitutional amendment. Passage of a new amendment is a serious and difficult step, but we believe that it is a sensible, necessary means of achieving equal rights for women. A major reform in our legal and constitutional structure is appropriately accomplished by a formal alteration of the fundamental document. Claims of similar magnitude, such as the right to be free from discrimination on account of race, color, national origin, and religion, rest on a constitutional basis. The amending process is designed to elicit national ratification for changes in basic governing values, and those who feel that the Supreme Court has gone too far in recent years in effectuating constitutional change through interpretation should especially welcome the amending process.

Many of the reasons why piecemeal legislation is inadequate are also positive advantages in proceeding by amendment. The major political action—passage and ratification of the Amendment—can be accomplished by a single strong nationwide campaign of limited duration. Once passed, the Amendment will provide an immediate mandate, a nationally uniform theory of sex equality, and the prospect of permanence to buttress individual and political efforts to end discrimination. The political and psychological impact of adopting a constitutional amendment will be of vital importance in actually realizing the goal of equality. Discriminatory laws, doctrines, attitudes and practices are set deep in our legal system. They are not easily dislodged. The expression of a national commitment by formal adoption of a constitutional amendment will give strength and purpose to efforts to bring about a far-reaching change which, for some, may prove painful.

There are likewise strong reasons for developing a consistent theory and program for women's equality under the aegis of an independent Equal Rights Amendment, rather than by judicial extension of the

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Equal Protection Clause. An amendment that deals with all sex discrimination, and only sex discrimination, corresponds roughly to the boundaries of a distinct and interrelated set of legal relationships. As already noted, woman's status before the law in one area, such as employment, relates both practically and theoretically to her status in other areas, such as education or responsibility for family support. Coming to grips with the dynamics of discrimination against women requires that we recognize the indications of, the excuses for, and the problems presented by women's inferior status. An understanding of these dynamics in any one field informs and enlightens understanding of sex bias elsewhere in the law. This is because, in the past, the legal and social systems have been permeated with a sometimes inchoate, but nevertheless pervasive, theory of women's inferiority.

Moreover, the achievement of equality under the law for women presents its own special problems. These problems differ in many ways from those involved in eliminating discrimination in other spheres where equal protection theory has been applied. They are closest to those which are raised in the area of race discrimination. Yet even here there are significant differences. Women are not residentially segregated from men. The socio-economic connections which link different aspects of sexism are not necessarily the same as those that link the many facets of racism. Women are a majority, not a minority; thus, changes in the status of women may affect most of the population, rather than a small part. Furthermore, without a constitutional mandate, women's status will never be accorded the special concern which race now receives because of the history of the Fourteenth Amendment. For these reasons it is important to have a constitutional amendment directed to this specific area of equality, out of which a special body of new law can be created.

The adoption of a constitutional amendment will also have effects that go far beyond the legal system. The demand for equality of rights before the law is only a part of a broader claim by women for the elimination of rigid sex role determinism. And this in turn is part of a more general movement for the recognition of individual potential, the development of new sets of relationships between individuals and groups, and the establishment of institutions which will promote the values and respect the sensibilities of all persons. Adoption of an Equal Rights Amendment would be a sign that the nation is prepared to accept and support new creative forces that are stirring in our society.

II. The Development in Congress of the Current Proposal

The call for an Equal Rights Amendment is not new in 1971. The Amendment has been introduced in every Congress since 1923, and has been given serious consideration on four occasions: 1946, 1950, 1953, and 1970. The Congressional debates and action on those occasions suggest that while there has often been strong support for an amendment to secure equal rights for women, there has also been doubt and disagreement about the concept of "equality" and about the Amendment's consequent impact on existing laws and institutions. To some extent, this confusion or failure to state clearly the meaning and effect of the Amendment may have been due to political rather than intellectual considerations. In a virtually all male Congress, at a time when consciousness in this country about women's rights was low, the proponents may have wisely refused to be too explicit about the laws and institutions the Amendment would reach. Whatever the reason, however, the debates reveal recurring uncertainty about two questions in particular: how absolute is the Amendment's central principle that "equality of rights shall not be denied or abridged by the United States or by any State on account of sex;" and should the Amendment explicitly exempt certain kinds of laws from its basic principle?³²

The absoluteness of the Amendment's substantive provisions (which have remained unchanged since 1943) was questioned when the Senate first debated the Amendment in 1946. Although the proponents stood for unified treatment of men and women in the majority of cases, they wanted to create some exceptions. As Senator Pepper said, "[s]ome of us want this record beyond any question of doubt to be distinct that we believe that this amendment . . . would not deprive the legislatures or the Congress of the power to make reasonable classifications in the protection of women."³³ However, the proponents were unable to translate this policy into concrete guidelines which could distinguish "reasonable" from "unreasonable" classifications.

The question of whether exceptions should be explicitly written into the Amendment was raised when the Senate next debated the Amendment in 1950 and 1953. On both occasions Senator Hayden succeeded

32. This section deals with a few central theoretical issues which have persisted throughout the debates on the Amendment; it is not a detailed account of the formal legislative history of the Amendment. References to the resolutions, hearings, reports, and debates on the Amendment are given in a table in an Appendix to this article.

33. 92 CONG. REC. 9313 (1946).

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in amending the Equal Rights Amendment to provide that “[t]he provisions of this article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex.”³⁴ Senator Hayden felt that women, in order to be equal, needed more and different “rights” than men possessed. He defined “rights” of women to mean only the benefits and privileges of citizenship; the duties of citizenship, in contrast, women could not be expected to perform. The proponents of the Equal Rights Amendment failed to counter this conception of a dual legal system with an alternative view that men and women should have equality on the same terms. As limited by Senator Hayden’s resolution, the Equal Rights Amendment passed the Senate in both 1950 and 1953, but the House did not follow up on the Senate’s action.³⁵

The related issues of absoluteness and exceptions which were prominent in the earlier debates arose again in the very different theoretical and political context of 1970. The work and support of the Citizens’ Advisory Council on the Status of Women, and other organizations, provided the Amendment’s sponsors in the 91st Congress with a more coherent approach than had previously been articulated. Representative Martha Griffiths and Senators Birch Bayh and Marlow Cook presented the Amendment as a broad mandate for the unified treatment of women and men; the only qualifications of the principle, they suggested, would be based on compelling social interests, such as the protection of the individual’s right of privacy and the need to take into account objective physical differences between the sexes.³⁶ There was some disagreement among the proponents, however, about the concrete impact of the Amendment on existing laws, particularly the Selective Service Act, and in this area the traditional debate about absoluteness and exceptions reappeared. Representative Griffiths said in the House that under the Equal Rights Amendment women would be required to serve in the Armed Forces, though, as is true of men, only in positions for which they were fitted.³⁷ Senator Bayh, sensing strong opposition in the Senate to the drafting of women, argued that the Amendment

34. 96 CONG. REC. 738 (1950).

35. In 1950, Senator Kefauver proposed that equal rights be attained through legislation rather than amendment. He offered a bill which would have created a commission to survey the laws and report to Congress, which would then take action. The standard which he had in mind for the formulation of laws would have permitted protective legislation and other special laws for women to stand. The bill was defeated, 18-65. 96 CONG. REC. 724, 758-61, 872 (1950).

36. 116 CONG. REC. 7948, 7953 (daily ed. Aug. 10, 1970); 116 CONG. REC. 17631-36, 17639-51 (daily ed. Oct. 9, 1970).

37. 116 CONG. REC. 7953-54 (daily ed. Aug. 10, 1970).

would allow Congress to exempt women from military service on the ground of "compelling reasons" of public policy.³⁸ Senator Sam Ervin was not convinced, and successfully offered an amendment, in the tradition of Senator Hayden's limitations, providing: "This article shall not impair, however, the validity of any law of the United States which exempts women from compulsory military service."³⁹ Although the Equal Rights Amendment had passed overwhelmingly in the House, acceptance of the Ervin amendment in the Senate effectively blocked final passage during the 91st Congress.⁴⁰

The long and frustrating history has left many points in uncertainty. All the issues have never been raised in any one year, and while there may have been consensus on a point in one debate, it often vanished when the issue was discussed again years later. The articulation of a clear and cohesive position on the meaning and impact of the proposal, which would furnish a basis for legislative debate and provide a guide to future interpretation, has not emerged from prior Congressional consideration of the Equal Rights Amendment. We turn, therefore, to a consideration of the basic legal principles which the Amendment, as presently conceived, must be deemed to establish in our constitutional structure.

III. The Constitutional Framework

The Equal Rights Amendment embodies fundamental principles which are derived from the purposes the Amendment is designed to achieve, the operational conditions necessary to attain those objectives, and the existing context of constitutional doctrine. It is not possible here to do more than examine these principles in a general and preliminary way. They can be fully developed only by the usual process of constitutional adjudication.⁴¹

38. 116 CONG. REC. 17341 (daily ed. Oct. 7, 1970); 116 CONG. REC. 17792 (daily ed. Oct. 12, 1970).

39. 116 CONG. REC. 17780-81 (daily ed. Oct. 12, 1970).

40. It is interesting to note that this issue, which proved so decisive and destructive of the Amendment in 1970, had been discussed and considered settled among the proponents in the 1950 debate. Senator Cain, a supporter, had said that the Amendment would mean that women would be drafted and assigned jobs based on their individual capacities and the needs of the country. 90 CONG. REC. 760-61 (1950). With a war just behind them and the specter of an atomic one facing them, Congress could foresee a need for women in the armed forces. Now the idea of compulsory military service for women seems outrageous to some senators.

41. Discussions of the legal foundations of equal rights for women which we have found particularly helpful, and upon which we have attempted to build in this article, include Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN,

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A. *The Basic Principle*

The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. The law does, of course, impose different benefits or different burdens upon different members of the society. That differentiation in treatment may rest upon particular characteristics or traits of the persons affected, such as strength, intelligence, and the like. But under the Equal Rights Amendment the existence of such a characteristic or trait to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic or trait. Likewise the law may make different rules for some people than for others on the basis of the activity they are engaged in or the function they perform. But the fact that in our present society members of one sex are more likely to be found in a particular activity or to perform a particular function does not allow the law to fix legal rights by virtue of membership in that sex. In short, sex is a prohibited classification.

This principle is already widely accepted with respect to many activities. To take an example, virtually everybody would consider it unjust and irrational to provide by law that a person could not be admitted to the practice of law because of his or her sex. The reason is that admission to the bar ought to depend upon legal training, competence in the law, moral character, and similar factors. Some women meet these qualifications and some do not; some men meet these qualifications and some do not. But the issue should be decided on an individual, not a group, basis. And in such a decision, the fact of being male or female is irrelevant. This remains true whether or not there are more men than women who qualify. It likewise would remain true even if there were no women who presently were qualified, because women potentially qualify and might do so under different conditions of education or upbringing. The law owes an obligation to treat females as persons, not statistical abstractions.

What is true of admission to the bar is true of all forms of legal rights. If we examine the various areas of the law one by one most of us will reach the same conclusion in each case. Sex is an inadmissible category by which to determine the right to a minimum wage,

THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION (1970); and the testimony of several witnesses in *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

the custody of children, the obligation to refrain from taking the life of another, and so on. The law should be based on the right to a living wage for each person, the welfare of the particular child, the protection of citizens from murder, and not on a vast overclassification by sex.

This basic principle of the Equal Rights Amendment derives from two fundamental judgments inherent in the decision to eliminate discrimination against women from our legal system. First, the Amendment embodies the moral judgment that women as a group may no longer be relegated to an inferior position in our society. They are entitled to an equal status with men. This moral decision implies a further practical judgment—that such an equal status can be achieved only by merging the rights of men and women into a “single system of equality.” By this we mean that the decision to eliminate women’s historically inferior social position requires the prohibition of sex classification in the law. We reject an alternative conception of “equality”—that women’s separate place should be “upgraded” in social status and material rewards. As already noted, such a dual system, in which women would have a different but “equal” status, has proven to be illusory. There is no reason to suppose that the present inferior status of women would materially change through adoption of a constitutional amendment which attempted to maintain a dual system of sex-based rights and responsibilities.

Second, the basic principle of the Equal Rights Amendment flows from the set of moral and practical judgments that have been made with respect to the fundamental rights of the individual in our society. Classification by sex, apart from the single situation where a physical characteristic unique to one sex is involved (as will be discussed in the next subsection), is always an overclassification. A permissible legislative goal is always related to characteristics or functions which are or can be common to both sexes. But in a classification by sex all women or all men are included or excluded regardless of the extent to which some members of each sex possess the relevant characteristics or perform the relevant function. Such a result is in direct conflict with the basic concern of our society with the individual, and with the rights of each individual to develop his or her own potentiality. It negates all our values of individual self-fulfillment.

To achieve the values of group equality and individual self-fulfillment, the principle of the Amendment must be applied comprehensively and without exceptions. Arguments that administrative efficiency

or other countervailing interests justify limiting the Amendment contradict its basic premises.

First, the decision to protect the value of individual self-fulfillment embraces the judgment that efficiency in government operations is not a sufficient reason to ignore individual differences. In other words, the government cannot rely upon the administrative technique of grouping or averaging where the classification is by sex. There are some situations where it is permissible for the law to operate on the basis of groups or averages. For example, individuals can be classified by age—under 21 or over 65—even though there are individual differences as to maturity or senility.⁴² In such cases individual rights are sacrificed to administrative efficiency. But the Equal Rights Amendment makes the constitutional judgment that this is not acceptable where the factor of sex is concerned. Here, whatever the price in efficiency, the classification must be made on some other basis.⁴³

Examples of this judgment appear frequently in our law today. Thus the assertion that some women leave jobs to marry or to move with their husbands does not constitute ground for discrimination on account of sex in government employment under Executive Order 11478, or in private employment under Title VII of the Civil Rights Act of 1964.⁴⁴ A balance of values has been struck. The decision has been made not to penalize all women because of a behavior pattern characteristic of some women. And any greater efficiency in a classification based on sex, rather than on an individual basis, has been excluded as a justifying factor. The Equal Rights Amendment makes the same judgment, but on a broader scale and in constitutional terms.⁴⁵

Second, the Equal Rights Amendment embodies the moral and practical judgment that the prohibition against the use of sex as a basis for differential treatment applies to all areas of legal rights. To the extent that any exception is made, the values sought by the Amendment are undercut; women as a group are thrust into a subordinate status

42. *But see Note, Too Old To Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150 (1970).

43. It seems highly probable that, as to most characteristics which the law takes into account, the differences within each sex are greater than the differences in average between the sexes. The justification for the Equal Rights Amendment, however, stands without regard to this factual assumption.

44. Executive Order 11478, 3 C.F.R. 133 (1969 Comp.), 42 U.S.C. § 2000e (Supp. V, 1969); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1964).

45. For discussion of the problem as it arises in the determination of insurance rates based on statistical differences between men and women, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1172-76 (1971) [hereinafter cited as *Developments—Title VII*].

and women as individuals are denied the basic right to be considered in terms of their own capacities and experience. And, as noted above, the interrelated character of a system of legal equality for the sexes makes a rule of universal application imperative. No one exception, resulting in unequal treatment for women, can be confined in its impact to one area alone. Equal rights for women, as for races, is a unity.

A third, equally decisive consideration leads to the same conclusion. There is no objective basis available to courts or legislatures upon which differential treatment of men and women could be evaluated. As already pointed out, such judgments can be made only in terms of a dual system of rights, the rights of women being grounded in one set of values and the rights of men in another. Not only is such a system inevitably repressive of one group, but it affords no standard of comparison between groups. For example, in *Hoyt v. Florida*⁴⁶ the Supreme Court accepted a value system for women which viewed them as "the center of home and family life," and undertook to be "fair" to women by excusing them from jury service, a "benefit" not given to men. Upon what basis can it be said, however, that this outcome puts men and women upon a level of "equality"? Nor did the Court, in making that decision, attempt to weigh the countless other legal differentiations between the sexes in order to strike an overall balance of "equality."

Fourth, the judgment as to whether differential treatment is justified or not would rest in the hands of the very legislatures and courts which maintain the existing system of discrimination. The process by which they make that judgment involves the same discretionary weighing of preferences as has resulted in the present inequality. This is true whether the standard of judging is "reasonable classification," "suspect classification," or "fundamental interest." There is no reason to believe that such a decision-making apparatus will end up in a substantially different position from what we have now. Only an unequivocal ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment.

From this analysis it follows that the constitutional mandate must be absolute. The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor. This at

46. 368 U.S. 57 (1961). This case is discussed at p. 879 *supra*.

least is the premise of the Equal Rights Amendment. And this premise should be clearly expressed as the intention of Congress in submitting the Amendment to the states for ratification.

It is argued that this position is naive, impractical, and leads to absurd results. Various examples of supposedly outlandish consequences are given. Most of these examples, such as those relating to public toilet facilities, are dramatic but are diversions from the major issues. On the central problems—property rights, marriage and divorce, the right to engage in an occupation, freedom from discrimination in employment and education—the burden of persuasion is on those who would impose different treatment on the basis of sex. Before a judgment on the feasibility of the Equal Rights Amendment can be made, however, it is necessary to pursue the legal analysis somewhat further.

B. *Laws Dealing with Physical Characteristics Unique to One Sex*

The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex. This principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. In this situation it might be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not, however, deny equal rights to the other sex. So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.

This subsidiary principle is limited to *physical* characteristics and does not extend to psychological, social or other characteristics of the sexes. The reason is that, so far as appears, it is only physical characteristics which can be said with any assurance to be unique to one sex. So-called “secondary” biological characteristics and cultural characteristics are found to some degree in both sexes. Thus active or passive attitudes, or interests in literature or athletics, like degrees of physical strength or weakness, appear in members of each sex. Differences in

treatment attributable to such shared traits must be based upon their existence in the individual, not upon a classification by sex.

Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the Equal Rights Amendment as demonstrating its nonviability. Thus not only would laws concerning wet nurses and sperm donors be permissible, but so would laws establishing medical leave for childbearing (though leave for *childrearing* would have to apply to both sexes). Laws punishing forcible rape, which relate to a unique physical characteristic of men and women, would remain in effect. So would legislation relating to determination of fatherhood.

Application of this subsidiary principle raises questions which should be carefully scrutinized by the courts. For one thing, while differentiation on the basis of a unique physical characteristic does not impair the right of a man or a woman to be judged as an individual, it does introduce elements of a dual system of rights. That result is inevitable. Where there is no common factor shared by both sexes, equality of treatment must necessarily rest upon considerations not strictly comparable as between the sexes. This area of duality is very limited and would not seriously undermine the much more extensive areas where the unitary system prevails. But the courts should be aware of the danger.

The danger is increased by the possibility of evasion in the application of the subsidiary principle. Unless that principle is strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights. It is possible to identify at least six factors that a court would weigh in determining whether the necessary close, direct, and narrow relationship existed between the unique physical characteristic and the provision in question.

These factors can be explained most easily in terms of a hypothetical case: a government regulation to reduce absenteeism at policy-making levels by barring women from certain jobs. Such a regulation might be defended by the government as being based on a unique

physical characteristic of women, namely, the potential for becoming pregnant, and the consequent need for leaves of absence for child-bearing.⁴⁷ In considering whether to sustain this rule, a court would weigh the following factors on the basis of factual evidence presented by the party attempting to justify the regulation:

First, the proportion of women who actually have the characteristic in question. In this case, the issue would be the number of women eligible for the jobs who were actually capable of becoming pregnant.

Second, the relationship between the characteristic and the problem. In this example, the court would inquire about the proportion of women who were likely actually to become pregnant and also choose to bear the child; the length of time most women would require for childbearing; and the extent to which a leave of this duration would actually interfere with an important governmental function.

Third, the proportion of the problem attributable to the unique physical characteristic of women. Here the court would consider the fact that only a small proportion of the total problem of long-term absenteeism and job transfer was caused by pregnancy; it would inquire into the proportion which was attributable to other factors, such as military duty, political disagreements, childrearing, job mobility, and disability due to illness or accidents, all of which cause absenteeism among workers of both sexes.

Fourth, the proportion of the problem eliminated by the solution. Here it would seem clear that the solution of not hiring women would eliminate absenteeism caused by pregnancy, but as indicated in the third factor, this would only be a small proportion of the overall problem of absenteeism.

Fifth, the availability of less drastic alternatives. "Less drastic" in this sense may mean first, less onerous to the person being restricted; second, more limited in the number of persons or opportunities affected; or third, not based on sex at all, or "sex neutral." To determine whether less drastic alternatives were available to deal with the problem, the court would inquire into the feasibility of individualized procedures for screening out those who were likely to be absent, and the possibility of alternative devices such as job pairing and substitution.⁴⁸

47. The possibility that a woman who became a mother might leave the workforce altogether for *childrearing* is not based on a unique physical characteristic of women, and therefore would not even be considered in relation to the unique physical characteristics tests.

48. One commentator has suggested that at least in the First Amendment area, the doctrine of "less drastic means" has little viability beyond traditional legal assumptions about the impact of vague criminal statutes. See Note, *Less Drastic Means and the*

Sixth, the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution. Here the question would be the seriousness of the harm and dislocation that would actually result if an employee in one of the covered positions were absent for the length of time necessary for childbearing. The problem as thus measured would be balanced against the costs of the solution, in this case the continuation of sexual stereotyping and overbroad discrimination that would be caused by excluding all women from the jobs covered by the regulation.

How the courts would balance each of these factors is difficult to predict in advance of actual adjudication, although in the example given it is obvious that the combined weight of the overbroad classification by sex and the marginal relationship of the unique physical characteristic of pregnancy to the problem of absenteeism would require invalidation of the regulation. In any case, all of these considerations are of the kind that courts constantly deal with in similar cases where reliance upon a legitimate factor is used to achieve illegitimate ends. And however the borderline cases are resolved, the margin of error is not likely to be so large as to jeopardize the basic principle.

C. *Classifications Based on Attributes Which May Be Found in Either Sex*

Classifications are a necessary part of lawmaking and the Equal Rights Amendment does not, of course, require an end to all classifications based on recognition of the differences among people. The Amendment forbids the use of sex as a basis for legal differentiation, but it permits the legislature to continue to classify on the basis of real differences in the life situations and characteristics of individuals. It is important to keep in mind the nature and uses of these legitimate classifications as well as to note the possibility of their being employed to evade or nullify the prohibition against sex classification.

As pointed out above, classifications based upon sex necessarily include members of one sex who should not be covered, or exclude

First Amendment, 78 YALE L.J. 464, 472-74 (1969). On the other hand, the U.S. Court of Appeals for the District of Columbia Circuit has used the concept of less drastic means in reviewing the problems of confinement in mental institutions; see *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969), and *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966). See also the development of judicial concepts of "job validation" of tests under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and cases discussed in *Developments—Title VII*, *supra* note 45, at 1120-1140.

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members of the other sex who should be covered, by a given law. Unfortunately, legislatures have traditionally used sex classifications as shorthand for other classifications which, although they are more precise, are also somewhat more difficult to administer. Because sex classifications were acceptable, they were often employed merely because members of one sex actually or apparently predominated in the smaller group to whom the law was really directed, whether or not a narrower more equitable classification was practicable. This common practice reinforced the pre-existing majority of one sex in the regulated or protected activity; for example, if only women can get extensive leaves for childrearing, it becomes economically impossible for men to stay home to care for children while their wives work. Hence sex classifications begin to seem both natural and essential to sound legislation in many areas of public concern.

Elimination of sex classifications by the Equal Rights Amendment, however, does not prohibit the legislature from achieving legitimate purposes by other methods of classification. In 1965, Pauli Murray and Mary Eastwood proposed the substitution of realistic "functional" classifications for sex classification. They argued that:

If laws classifying persons by sex were prohibited by the Constitution, and if 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.⁴⁹

This analysis need not be limited to literal "functions." It also applies to classifications based on prior education and training, experience, skills, or other measurable traits and abilities. The term "functional classifications" can thus be used to refer to all non-sex-based classifications.

A legislature taking this approach would make laws which reflected and related to the changing reality of individual lives and potentials, regardless of sex, instead of legislating women into conformity with each other, and pretending that all men are different from all women in terms of a given legislative purpose. For example, a legislature could use a non-sex-based classification to provide job retraining to the class of individuals who had been absent from the labor force for a specified number of years, for whatever reason. The functional basis would allow both men and women in that situation to get necessary encouragement to re-enter the labor force, unlike a blanket sex preference which would

49. Murray & Eastwood, *supra* note 3, at 241.

unfairly select out for special treatment individuals of one sex to the exclusion of the other. Likewise, a rule allowing workers to take sick leave when any member of their household was sick would be an appropriate functional classification. Unlike a rule allowing such leave only to mothers, which denies parents the opportunity to choose which of them will stay home, the functional rule is neutral, allowing workers to choose whether they wish to follow traditional sex-roles or share childrearing and other familial responsibilities. A system of functional classification may thus be utilized in ways which achieve important social objectives without discriminating against individuals on account of their sex.

On the other hand such classifications, though formulated without explicit sex reference, may in practice fall more heavily on one sex than the other. This opens the possibility that non-sex-based classifications can be used to circumvent the Equal Rights Amendment. The fact that women's life situations, on the average, are different from those of men, partly or largely because of past discrimination, makes such an outcome more than a remote possibility. For example, today most women have little choice about whether or not to give up full-time jobs outside the home in order to care for any children they bear, at least while the children are young. This lack of choice is one important reason why women predominate among the housekeepers and childrearing of our society. Consequently, to use a modified form of our previous example, a law might prohibit adults with primary responsibility for child care from working in managerial jobs, on the grounds that the function of caring for children was inconsistent with substantial occupational responsibility. Such a law or government regulation would constitute a serious evasion of the Equal Rights Amendment. Its practical effect would be to exclude the majority of women and very few men in certain age groups from a whole range of relatively well-paid jobs which most people consider desirable.

The problem of formally neutral laws which may have a discriminatory impact arises under any law which attempts to eradicate discrimination based upon a single prohibited factor in a context where many other factors may legitimately be taken into account. The same issues have consistently appeared in the enforcement of laws prohibiting discrimination because of race, religion, national origin, and labor organizing activity. The courts have responded by looking beyond the adoption of the "neutral" classification into the realities of purpose, practical operation, and effect. Where the classification is seen to be a

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subterfuge, or to nullify the objectives of the anti-discrimination law, the courts have not hesitated to strike it down. As one court has stated:

A procedure may appear on its face to be fair and neutral, but if in its application a discriminatory result ensues, the procedure may be constitutionally impermissible.⁵⁰

And recently the Supreme Court, in holding a North Carolina literacy test invalid under the Voting Rights Act of 1965, said:

From this record we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.⁵¹

In applying these principles to the Equal Rights Amendment the courts would follow standards similar to those set forth in the preceding section with respect to laws which propose to base differentiation upon a unique physical characteristic of one sex. Of those standards, only one would be different for functional classifications. Since a functional classification is necessarily limited to those individuals who actually perform a given task or share a given characteristic, the first question—the proportion of women who actually have the characteristic in question—would not be asked by the reviewing court. However, unlike unique physical characteristic classifications, in which by definition some or all of one sex and none of the other are included, the extent of the disproportion between the numbers of women and the numbers of men included in a functional class may vary. A given functional classification may include 100,000 women and 10 men, or a disproportion of 10,000 to 1, while another may affect 45,000 women and 40,000 men, or a disproportion of 9 to 8. The first classification

50. *Penn. v. Stumpf*, 308 F. Supp. 1238, 1244 (N.D. Cal. 1970).

51. *Gaston County v. United States*, 395 U.S. 285, 296-97 (1969). Other cases invalidating ostensibly neutral classifications which operated to discriminate against the right of blacks to vote include *Lane v. Wilson*, 307 U.S. 263 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Pupil assignment laws, under which assignment of students to schools is ostensibly based upon non-racial factors, have not been allowed to operate so as to maintain segregation of races in the school system. See *Green v. County School Board*, 391 U.S. 430 (1968); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1965), *cert. denied*, 389 U.S. 840 (1967). For rejection of an ostensibly neutral classification which abridged freedom of religion, see *Sherbert v. Verner*, 374 U.S. 393 (1963). On "neutral" classifications which operate to discriminate against blacks in employment, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Generally on the problem see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970).

would obviously be a more likely vehicle for perpetuating sex inequality than the second, and the presence of this factor would thus go far to weight the balance against the law.

Protection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment. Past discrimination in education, training, economic status and other areas has created differences which could readily be seized upon to perpetuate discrimination under the guise of functional classifications. The courts will have to maintain a strict scrutiny of such classifications if the guarantees of the Amendment are to be effectively secured.

D. *The Privacy Qualification*

The Equal Rights Amendment must take its place in the total framework of the Constitution and fit into the remainder of the constitutional structure. Of particular importance for our purposes is the relation of the new amendment to the constitutional right of privacy.

In *Griswold v. Connecticut*⁵² the Supreme Court recognized an independent constitutional right of privacy, derived from a combination of various more specific rights embodied in the First, Third, Fourth, Fifth and Ninth Amendments. This constitutional right of privacy operates to protect the individual against intrusion by the government upon certain areas of thought or conduct, in the same way that the First Amendment prohibits official action that abridges freedom of expression. Thus in the *Griswold* case the right was held to invalidate a Connecticut statute which prohibited the use of contraceptives even by married couples and thereby infringed upon intimate relationships in marriage and the home. The position of the right of privacy in the overall constitutional scheme was not explicitly developed by the Court. Presumably the point at which the right of privacy cuts off state regulation will be determined by a test which balances the two interests at stake. Or it may be that the right of privacy, where found to be applicable, will be held to afford an absolute protection against government intrusion. In either event laws or other official action implementing the Equal Rights Amendment would have to be applied in a manner that was consistent with individual privacy under the constitutional guarantee.⁵³

52. 381 U.S. 479 (1965).

53. The balancing test for the right of privacy is used by Mr. Justice Goldberg in

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The exact scope of the right of privacy was likewise not spelled out by the Court in the *Griswold* case. Yet it is clear that one important part of the right of privacy is to be free from official coercion in sexual relations. This would have a bearing upon the operation of some aspects of the Equal Rights Amendment. Thus, under current mores, disrobing in front of the other sex is usually associated with sexual relationships. Hence the right of privacy would justify police practices by which a search involving the removal of clothing could be performed only by a police officer of the same sex as the person searched.⁵⁴ Similarly the right of privacy would permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters of prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces.

In such situations, the facilities provided for the sexes would have to be equal in quality, convenience and other respects. Likewise an employer could not refuse to hire women because he did not want to build or remodel rest rooms for them. Failure to provide separate facilities for one sex would not be permissible when the presence of such facilities is related to the exercise of some other right, such as the right to be free of discrimination in employment. Moreover, the separation of facilities for reasons of privacy would not mean that individuals or groups would be foreclosed from making flexible and various arrangements for the common use of facilities such as bathrooms. In the same way, hospitals could allow patients to choose a ward with individuals of the same sex or of both sexes. Such noncoerced decisions, springing from individual values and preferences in areas of private conduct, would not be affected by the Amendment.

It is impossible to spell out in advance the precise boundaries that the courts will eventually fix in accommodating the Equal Rights Amendment and the right of privacy. In general it can be said, however, that the privacy concept is applicable primarily in situations which involve disrobing, sleeping, or performing personal bodily functions in the presence of the other sex. The great concern over these matters expressed by opponents of the Equal Rights Amendment seems not only to have been magnified beyond all proportion but

his concurring opinion, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). For discussion of the full protection or absolute approach see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, 544-550 (1970).

54. The constitutional right of privacy in the search situation was recognized in *York v. Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

to have failed to take into account the impact of the young, but fully recognized, constitutional right of privacy.

It should be added that the scope of the right of privacy in this area of equal rights is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time—are indeed now changing—and in that event the impact of the right of privacy would change too.

E. *Separate-But-Equal, Benign Quotas, and Compensatory Aid*

In the field of equal protection law, particularly as it deals with discrimination on account of race, various other questions of constitutional interpretation have been presented for judicial determination. The most important of these are the separate-but-equal doctrine, the benign quota, and compensatory aid. Similar issues might arise under the Equal Rights Amendment.

1. *Separate-But-Equal*

The separate-but-equal doctrine in race relations was established in *Plessy v. Ferguson* in 1896 and abandoned in *Brown v. Board of Education* in 1954. It has been suggested that a similar principle might be acceptable in sex relations in those situations, such as separate dormitory facilities in a university or separate toilet facilities in public buildings, where separation carries no implication of inferiority for either sex. A broader application of the doctrine is also conceivable, as in the field of education.⁵⁵

Under the analysis here proposed, however, the separate-but-equal doctrine would have no place in the Equal Rights Amendment. It would simply operate to perpetuate a dual system of equality, different but not equal. Essentially the separate-but-equal doctrine is a device for keeping one group in a subordinate position. This is particularly true where the separated group, by virtue of past subordination, starts from a generally weaker position, with fewer opportunities, less training, and fewer material and institutional resources. Experience has shown, furthermore, that in practice separate-but-equal is rarely in fact equal.

55. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education*, 347 U.S. 483 (1954). The suggestion concerning dormitories and toilet facilities is made in Murray & Eastwood, *supra* note 3, at 240. On the application of the separate-but-equal doctrine to universities, see *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184, 187-88 (E.D. Va. 1970).

The question of separate facilities for personal living is more appropriately solved by application of the privacy doctrine. Use of the privacy principle not only focuses attention on the real issue but avoids the necessity of determining whether different treatment imposes or implies inferiority. In all other contexts—such as public education and employment—the separate-but-equal doctrine is open to the same objections when employed in connection with sex relations as it is in race relations.

It should be noted that the Equal Rights Amendment applies only to government action, both state and federal. Separation of the sexes in the private sector is not foreclosed. Hence separate social, recreational, cultural or other facilities, so long as they do not affect areas of public concern, are available for those who wish to create them. As to facilities provided or subsidized by the government, however, the separate-but-equal doctrine is wholly inconsistent with the principles and objectives of the Equal Rights Amendment.⁵⁶

2. *Benign Quotas and Compensatory Aid*

In the area of equal rights for women, as in other areas of equal rights, problems may arise of assuring equality in practice as well as in legal theory. The question then becomes whether or not the government can take sex into account in acting affirmatively to support the system of equal rights.

In the field of race relations various methods for taking affirmative action to secure actual, as well as theoretical, equality have been employed. One is the benign quota. As used in attempting to maintain integrated housing projects, this device establishes a quota for each race on the theory that once the percentage of one race gets beyond a "tipping point" members of the other race will not enter or stay in the project. Quotas have also been utilized in other areas, such as employment and education, to assure that a minimum number of the minority group will receive work or training. Other kinds of affirmative action consist of some form of compensatory aid. This involves special assistance to members of one race in order to give them the education, training or other help that will put them more quickly on a level of equality with the other race. The benign quota may result in denial of benefits to individual members of either group on account

56. Drawing the line between the public and private sectors involves the concept of "state action," discussed at pp. 905-07 *infra*.

of their race; compensatory aid may deny benefits to members of the majority group on account of race.

The Supreme Court has not passed on the constitutional issues raised by these devices. It is not improbable, however, that in the field of race relations they will be sustained. In equal protection theory, while classification by race would be "suspect," it is not totally prohibited. And where the courts determine that the purpose of the differentiation is to benefit members of the minority race, rather than impose a status of inferiority, they are likely to find there are "compelling reasons" for the special treatment.⁵⁷ Such an approach would not be permissible under the Equal Rights Amendment. For reasons already stated, the guarantee of equal rights for women may not be qualified in the manner that "suspect classification" or "fundamental interest" doctrines allow.

This does not mean, however, that the government would be powerless to take measures designed to assure women actual as well as theoretical equality of rights. Authority to remedy the effects of past discriminations as well as to implement the provisions of the Equal Rights Amendment is available and unquestioned. Thus the courts have power to grant affirmative relief in framing decrees in particular cases. As in racial desegregation cases, such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against. Similar remedial measures, on a broader scale, could also be the subject of legislative action. This form of affirmative action may appear, paradoxically, to conflict with the absolute nature of the Equal Rights Amendment. But where damage has been done by a violator who acts on the basis of a forbidden characteristic, the enforcing authorities may also be compelled to take the same characteristic into account in order to undo what has been done. This form of relief is a common feature of laws seeking to eliminate discrimination, whether the restriction imposed be absolute or not.⁵⁸

Similarly, the federal government under implementing powers granted by the Equal Rights Amendment, and the states under their general police powers, could enact legislation dealing with the various

57. Generally on the validity of benign classifications to secure greater equality in race relations, see Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Kaplan, *Equal Justice in An Unequal World: Equality for the Negro—The Problem of Equal Treatment*, 61 NW. U.L. REV. 363 (1966); *Developments—Equal Protection*, *supra* note 15, at 1105-20.

58. With respect to the power to afford affirmative relief in framing judicial remedies, see *Swann v. Charlotte-Mecklenburg Board of Education*, 91 S. Ct. 1267 (1971).

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economic and social conditions that underlie and support the present system of inequality.⁵⁹ In addition, functional classifications in which members of one sex predominate but which include members of the other sex who are similarly disadvantaged can legitimately be used to support a system of equal rights.

The precise form these measures would take cannot be delineated in advance of the event. This is an area in which remedies must be fitted to particular problems as they appear.

F. *State Action*

The Equal Rights Amendment as proposed provides that equality under the law shall not be denied or abridged "by the United States or by any State." Like the Fourteenth and Fifteenth Amendments, therefore, the legal effect of the Amendment is confined to "state action." How does this much-debated and increasingly complex concept apply in the context of women's rights?

Constitutional doctrines pertaining to state action have developed mainly in the area of race discrimination. They are intricate and confusing, but in essence they embody two concepts. One is that the existence of state action depends upon the nature and degree of state involvement. This may range all the way from a direct criminal prohibition of certain conduct to the maintenance of conditions in the society that permit private activity to exist; from direct action to apparent inaction; from de jure to de facto responsibility. The second is that state action depends upon the function being performed. The activity out of which the claim for equal protection arises may range from a clearly governmental operation, such as the election of public officials, to purely personal relationships, such as a private social gathering. Both the "state involvement" and the "public function" concepts lead in the same direction and ultimately to the same conclusion: "state action" takes place in the public sector of society and not in the private sector.⁶⁰

The Supreme Court has not decided whether the "state action" required is the same for all kinds of constitutional rights involved, or even whether it is the same for all kinds of claims made under

59. On the analogous power of Congressional implementation conferred by the enforcement clause of the Fourteenth Amendment, see *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *United States v. Guest*, 383 U.S. 745 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1971).

60. Cf. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967).

the Equal Protection Clause. In other words it is not clear whether the same showing of "state action" is necessary to assert a right under the Equal Protection Clause as under due process or freedom of speech guarantees; or whether "state action" is identical in cases alleging discrimination on account of race as discrimination on account of religion, wealth, nationality or politics. In general it may be assumed, however, that while the basic principles for determining state action remain the same, the relevant factors may apply differently in different situations.

So far as the Equal Rights Amendment is concerned the problem would be to determine what should be held part of the public sector, in which different treatment on account of sex is forbidden, and what is part of the private sector, in which different treatment is allowed. In some areas the factors relevant to that determination would tend toward a broad application of state action. Thus in the areas of voting (already covered by the Nineteenth Amendment), employment (including the right of representation by the collective bargaining agent), and education, the public character of the function would lead to the requirement that the state assume extensive responsibility. There are other areas where the private sector would extend more broadly and the scope of "state action" would be correspondingly diminished. Such would be the case as to social, recreational and fraternal associations; facilities such as hotels, restaurants and theaters; and the right to dispose of property by will. Here the public effects of sex differentiation are less significant and a wider realm of individual choice is acceptable.

The application of the state action concept under the Equal Rights Amendment has been most widely discussed in connection with the area of education. There is no doubt that the Equal Rights Amendment would eliminate differentiation on account of sex in the public schools and public university systems. The decision of the Supreme Court in *Williams v. McNair*, noted previously,⁶¹ could not stand. The question has been raised, however, as to how the Amendment would affect private schools and universities. The courts have so far consistently ruled that even the large private universities are not within the sphere of state action.⁶² The decision of the Supreme Court in

61. *Williams v. McNair*, 401 U.S. 951 (1971); see discussion at p. 881 *supra*.

62. See *Guillory v. Administrators of Tulane University*, 203 F. Supp. 855 (E.D. La.), *vacated*, 207 F. Supp. 554, *aff'd* 306 F.2d 489 (5th Cir. 1962); *Greene v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *remanded*, 412 F.2d 1129 (D.C. Cir. 1969); *Grossner v.*

Walz v. Tax Commission of the City of New York,⁶³ upholding tax exemption for religious institutions, indicates that state-conferred tax exemptions alone would not bring private schools and universities into the state action realm. Thus it appears that, in the absence of special factors, under present court decisions on state action private educational institutions would remain within the private sector, not subject to the constitutional requirements of the Equal Rights Amendment.⁶⁴

The current state of the law on state action in the field of education, however, will be subject to further development as the goals of the Equal Rights Amendment are pressed upon the courts. It would seem clear that the basic principles of state action would, as a general proposition, require that the state eliminate male domination from the educational system. What this would demand in specific instances cannot be spelled out in detail at this point. To the degree that large private institutions, functioning in a quasi-public capacity, provide a significant share of the education which counts most heavily toward achievement in our society, they will be required to operate without discrimination against women. The public sector in education would never be construed to embrace all private schools or colleges. Nevertheless, under present conditions, the Equal Rights Amendment will operate to expand the area in which different treatment of the sexes is impermissible in the area of education.

In general, it may be said that the concept of state action would be rigorously applied up to the point necessary to achieve the objectives sought by the Equal Rights Amendment. In the long run, as discrimination against women disappeared, however, it would be desirable for the public sector, in which state action prevailed, to diminish, and the private sector, in which individual preferences were recognized, to expand.

G. *Other Matters of Interpretation and Wording*

Several other questions of interpretation, as to which no serious problems arise, remain to be noted. One is the meaning of the word

Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1969); *Powe v. Miles*, 294 F. Supp. 1269 (W.D.N.Y.), *modified*, 407 F.2d 73 (2d Cir. 1968).

63. 397 U.S. 664 (1970).

64. Of course, significant government aid, financial or otherwise, would involve state action. See, e.g., *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). See also *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970).

"rights" as used in the Amendment. The proponents have always made it clear that the exercise of rights entails the performance of duties and that the term "rights" includes all forms of privileges, immunities, benefits and responsibilities of citizens. By 1971, even the Amendment's opponents grant this, abandoning Senator Hayden's distinctions.

Consensus has also been reached on the meaning of the enforcement clause of the Amendment. In 1943, the Senate Judiciary Committee used the language of the Eighteenth Amendment, that "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."⁶⁵ The committee intended that this provision be construed as limiting Congressional authority in implementing the Amendment to that already provided by some existing federal constitutional power. Such is not, however, the intention of the present proponents. And the ambiguity has been clarified in the resolution introduced in this session by Representative Griffiths.⁶⁶ The enforcement provision is now similar to that in the Thirteenth, Fourteenth, and Fifteenth Amendments, and reads: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."⁶⁷ The states, not operating under a system of delegated powers, need no further grant of authority to implement the provisions of the Amendment.

There remains the question whether the present wording of the substantive provisions of the Amendment, which has been stable since 1943, can be clarified or improved. There is no persuasive reason to make any change. In the first place, the present language states the central idea succinctly. Its wording is similar to other constitutional amendments establishing and protecting fundamental rights, notably the Fourteenth, Fifteenth, and Nineteenth. Like them, the Equal Rights Amendment states a general principle rather than spelling out the concept of equal rights in detail. This permits development of more specific doctrines through constitutional litigation and adaptation of the basic mandate to unforeseen situations and new conditions, a process which has proved generally successful throughout our history.

Second, a search for more appropriate wording in the constitutions of other countries has not yielded positive results. Provisions granting

65. S. REP. NO. 267, 78th Cong., 1st Sess. at 1 (1943).

66. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). Many resolutions embodying the Equal Rights Amendment have been introduced in the House of Representatives in the 92d Congress. They vary in their provisions on ratification, effective date, and enforcement. However, the version proposed by Representative Griffiths is the one which has received the endorsement of most of the proponents of the Amendment.

67. H.R.J. Res. 208, 92d Cong., 1st Sess. § 2 (1971).

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equal rights for women do occasionally exist. Thus, Article 3, Section 2 of the Constitution of the German Federal Republic provides: "Men and women are equal before the law." This formulation, however, does not seem preferable to the Equal Rights Amendment.

Finally, use of this wording does not bind proponents to older, unacceptable theories sometimes advanced in previous debates. On the contrary, the responsibility rests upon the present Congress to attach to the Amendment the meaning it now intends.

H. *Summary*

We believe that the Equal Rights Amendment, broadly construed in the manner set forth above, furnishes a viable structure for achieving equality of rights for women. The basic proposition—that differences in treatment under the law shall not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation—is founded in the fundamental values of our society. Most of the objections which have been addressed to the absolute form of the Amendment are answered by the fact that the Amendment is inapplicable to laws dealing with unique physical characteristics of one sex or by application of the constitutional right of privacy. Such other objections as have been advanced simply run counter to the major premises upon which the concept of equal rights for women stands. Furthermore, they must fall before the intransigent fact that no system of equal rights for women can be effective which attempts to litigate in each case the judgment whether the differentiation is "reasonable" or "justified" or "compelled." As a matter of constitutional mechanics, therefore, the law must start from the proposition that all differentiation is prohibited.

IV. Problems of Transition

The Equal Rights Amendment provides for a two year period after ratification before it goes into effect. This time will give the states and the federal government an opportunity to conform their laws to the mandate of the Amendment. Some opponents of the Amendment claim that this attempt to revise laws and practices will prove hopelessly confusing and difficult. Undoubtedly the transitional problems are important and will entail the expenditure of much thought and energy. But they are often far overstated. Technically, reviewing

state laws to discover those which violate sex equality and reformulating them to satisfy the Equal Rights Amendment is easily within the competence of our legislative and judicial institutions. This task ought, however, to be entrusted wherever possible to persons who are sensitive to the existence of sex discrimination and who are fully committed to extirpating it wherever it appears.

A. *Legislative Revision*

Given a desire to comply with the Amendment, legislative revision of existing laws is quite feasible. In the first place, legislatures will have received a broad national mandate from the Congress, and will have begun to discuss these issues when ratifying the Amendment. Momentum and guidance normally unavailable to them will be provided by the simultaneous action of many states on the same project. Calling upon the legislatures to make changes in such an atmosphere will be far different from relying on them, without an Amendment, to revise all their laws. Moreover, broad changes in important and complex areas of legislation have been successfully carried out under such circumstances in the past. When the Social Security Act⁶⁸ was passed in August, 1935, every state found it necessary to enact an unemployment compensation statute—a form of legislation with which we had had no experience whatever in this country—and to establish a complex system of administration. Yet all this was substantially accomplished in less than eighteen months. Many states have revised their commercial laws and adapted the Uniform Commercial Code to fit their needs. Connecticut and Illinois recently recognized the need for change in their criminal laws and enacted new penal codes.⁶⁹ These revisions of large bodies of legislation (and related judicial precedent) have been effected without causing widespread uncertainty or confusion.

Second, the amount of work involved is limited by the fact that the Equal Rights Amendment affects only state action. Furthermore, some of the changes in official policy will be accomplished by administrative agencies, most of which have full power to conform their practices to the Amendment, by regulation or otherwise, without going to the legislature for new authorization.

68. Ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U.S.C.).

69. CONN. GEN. STAT. ANN. PENAL CODE, 1969 Public Act No. 828 (effective Oct. 1, 1971); Criminal Code of 1961, ILL. ANN. STAT. ch. 38, §§ 1-99 (Smith-Hurd 1964).

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The procedures for accomplishing law revision vary throughout the country, according to the institutions and practices of the different states. Most states, however, have some official body, often a committee of the legislature, called the Law Reform Commission or the Legislative Council, which oversees statutory change. These commissions normally operate between sessions of the legislature and are the traditional instrument for reforming state law. They would normally be expected to be involved in the changes required by the Equal Rights Amendment.

In implementing the Equal Rights Amendment, however, it is particularly important that the group primarily responsible for the work include the Amendment's principal constituency, the women of the state. Two factors should thus be taken into account by governors in appointing a group to manage the review. One is the need for legal talent and familiarity with the areas of law requiring change. The other is the necessity that the group be responsive to women from all sectors of the community, for they are the ones whose needs and preferences are paramount in the revision process. This is not to suggest that these two components will be completely distinct in composition and role. Many of the lawyers involved ought to be women, and the representatives of community groups will aid in all aspects of the project.

In creating their commissions, the states can draw on a wide range of institutional resources. The state university law school, equipped to do research and drafting, will probably be the institution most often consulted and chosen to oversee the task. In some states, the Commission on the Status of Women would be an appropriate starting point. Such commissions, with women members, exist in every state, and an Interstate Association keeps the groups in contact. The State Association of Women Lawyers, the National Conference of Law Women, and the State Bar Association are other sources of legal skills. Likewise, groups such as the American Civil Liberties Union, Women's Equity Action League, and the National Organization of Women could provide advice and research in many states.⁷⁰

The group given main responsibility for the legal study should include women from community groups such as the local chapter of the National Welfare Rights Organization, the League of Women Voters,

70. This list of groups and organizations is of course only suggestive. As the women's movement continues to burgeon, more and more organizations are gaining experience for the task of law reform through lobbying and litigating for women's rights under present laws.

women in union locals, and the state Democratic and Republican women's clubs. As members or close consultants to the working body, these women would take part in policy decisions regarding the new laws. They would also serve as conduits for the opinions and ideas of other women in the state.

On a national scale, several groups might offer aid to the states in their work. The Citizens' Advisory Council on the Status of Women, created by Executive Order in 1963,⁷¹ has done much work on the Equal Rights Amendment. Its research would be a source of ideas and information for the state groups on the form and substance of new legislation. The Council of State Governments, mainly an information-sharing association, could also prove helpful by circulating data about action which the various states are taking to bring their laws into compliance with the Amendment. The National Conference of Commissioners on Uniform State Laws could draft uniform laws in some of the areas in which major change will have to be made. Their Uniform Marriage and Divorce Law, for example, already follows the principles of the Equal Rights Amendment, and many states might want to adopt that law instead of doing their own rewriting.

As the Uniform Marriage and Divorce Law shows, the task of revising state laws and practices is not one which must be undertaken as a totally new and fresh project. Much work has already been done. The Model Penal Code goes a long way toward removing sex discrimination from the criminal law. In virtually every legal area affected by the Amendment there has been some experience, some thinking, or some work in progress. The job that remains is to mould and complete the materials already partially created to suit the needs of the particular states.

Even after such good faith efforts have been made (or in cases of failure to complete the revision), there remain other problems of transition. The new legislation, or old law in areas in which the legislature did not act, will inevitably raise questions of construction and application. These matters the courts will be called upon to resolve.

B. *The General Rules for Judicial Application of the Equal Rights Amendment*

To the extent that Congress and the state legislatures have expressly indicated the impact the Equal Rights Amendment is meant to have

71. Exec. Order No. 11126, 3 C.F.R. 791 (1963 Comp.).

on existing law, that legislative history will govern later judicial interpretation. However, in many instances there may be no clear legislative mandate available, and the courts will have to determine the impact of the Amendment in light of its general legislative history and settled principles of constitutional adjudication. The doctrines developed by the courts for this task have given them broad authority to make sensible and practical adjustments in conforming current laws to the requirements of the constitutional mandate. Thus, the courts have the power to construe legislation to avoid unconstitutionality or even to avoid constitutional doubts; they may hold certain sections or applications of a law to be separable from others in order to save parts of the law; they may extend the scope of a statute to reach those wrongfully excluded; or they may invalidate the law *in toto*. The considerations governing the use of these various methods of construction have not always been made explicit in judicial opinions. Nevertheless patterns emerge from an examination of the cases, and it is possible to predict with considerable accuracy what the courts will do in most situations.⁷²

In cases challenging statutes under the Equal Rights Amendment the courts will be faced with essentially two alternatives: either to invalidate the statute or to equalize its application to the two sexes. If the latter alternative is selected, there may sometimes be a question as to the proper basis for equalization. However, the more difficult problems posed in the application of other constitutional doctrines, such as vagueness or chilling effect, are unlikely to arise here.⁷³

In determining the impact of a constitutional provision upon a non-conforming statute, courts look primarily to the legislative intent behind the statute in question. Whether the statute falls completely or is modified in some way depends upon the court's assessment of what the legislature itself would have done had it known that all or part of its original enactment would be invalid. Of course, such legislative intent is often not easily ascertained. Where legislative history is scant, or lacking altogether, there is little for courts to rely on ex-

72. For more detailed discussion of problems of statutory construction when constitutional questions are involved, see J. SUTHERLAND, *STATUTORY CONSTRUCTION* (3d ed. F. Horack ed. 1943) [hereinafter cited as SUTHERLAND]; Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 *YALE L.J.* 599 (1962); Stern, *Separability and Separability Clauses in the Supreme Court*, 51 *HARV. L. REV.* 76 (1937) [hereinafter cited as Stern]; Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 *COLUM. L. REV.* 633 (1953); Note, *The Effect of an Unconstitutional Exception Clause on the Remainder of a Statute*, 55 *HARV. L. REV.* 1030 (1942).

73. For reasons why vagueness and chilling effect problems are unlikely to arise, see notes 78 & 85 *infra*.

cept their own judgment about what the legislature must have intended. Then, too, the further question arises as to which legislature's intent is relevant—the one which passed the bill originally, an amending legislature, if any, or the one currently in session.⁷⁴

In these circumstances, critics have charged that legislative intent and the policy judgment of the reviewing court are nearly indistinguishable. However that may be, the courts have tended to structure their judgment in terms of certain standard factors which are thought to provide at least rough guides to probable legislative intent and, equally important, to rational results in adjusting statutes to constitutional requirements. Since several of these factors are often present in one case, it is useful to describe the factors briefly and then, by way of illustrating their operation, analyze selected cases.

The first of these interpretive factors is a practical consideration of the *importance* of the legislation and the *feasibility* of retaining it in the altered form required by the constitutional mandate. If the challenged statute deals with a subject of major significance, the court will attempt to find a saving construction, even if that requires a strained interpretation of the statutory language on its face. On the other hand, if the saving construction produces a result which is not workable as a practical matter, or requires drastic changes in other areas to be viable, the court will be inclined to strike down the statute. For example, a court would be most unwilling to invalidate a revenue law or a voting qualifications statute, because taxes and voting are crucial to the political system. However, it might refuse to extend a law prohibiting night work for women to cover men, because such extension of coverage would not be feasible without fundamental changes in industrial organization, and because the subject matter is one that could readily await legislative action.⁷⁵

Second, the courts are influenced by the *proportional difference* between what the original enactment was designed to cover relative

74. For the maxim that, assuming any legal effect can be given to the remaining provisions of the statute, legislative intent is determinative, see *Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924). See also Note, *supra* note 72, 53 COLUM. L. REV. at 642. For the proposition that the amending legislature's intent may be relevant, see Note, *supra* note 72, 55 HARV. L. REV. at 1033.

75. See Note, *supra* note 72, 55 HARV. L. REV. at 1032 n.20, 1033 nn.21 & 22, citing cases concerning tax statutes from which exceptions were removed, e.g., *State ex rel. Bolens v. Frear*, 148 Wis. 456, 134 N.W. 673 (1912), *appeal dismissed*, 231 U.S. 616 (1914); *State ex rel. v. Baker*, 55 Ohio St. 1, 44 N.E. 516 (1896), demonstrating the importance of when the legislature will be able to meet and enact a new statute; *State ex rel. Wilmot v. Buckley*, 60 Ohio St. 273, 54 N.E. 272 (1899); *Anderson v. Wood*, 152 S.W.2d 1085 (Tex. 1941), indicating the significance of an existing law of similar substance, *McLaughlin v. Florida*, 379 U.S. 184, 195-96 (1965), also deals with this latter issue.

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to how much it can or must constitutionally include. This factor may be reflected either in terms of the number of persons who would be added or excluded relative to the original number, changes in geographical area covered, the number of original provisions which remain, or other indices of the percentage of the statute added or subtracted. Thus if the class added by construction is small in comparison with the classes already included, the court will generally assume that the legislature would prefer the statute to stand despite a minor change and will probably extend the law to conform with the new constitutional mandate. If the proportion is reversed, the court might, by invalidating the law, refer the matter back to the legislature for decision.⁷⁶

A third factor which strongly influences the courts is whether the statute in question is *civil* or *criminal*. Courts have long observed a maxim that penal laws are to be strictly construed. To avoid judicial creation of new crimes beyond those established by the legislature, courts will refuse to extend a criminal law to cover groups of people implicitly or explicitly excluded on the face of the law. In other words, the courts will not presume that the legislature, faced with the problem of unconstitutionally under-inclusive penalties, would have chosen to extend them to a new group.⁷⁷ As one court put it, in the process of invalidating an entire penal statute:

By striking out the exemption as unconstitutional, it leaves subject to criminal prosecution those the Legislature expressly intended should be exempt.

As to them it would be making that a crime which was never intended should be. The exemption renders it impossible to enforce the legislative will.⁷⁸

76. See Note, *supra* note 72, 55 HARV. L. REV. at 1030 n.3, citing 22 CALIF. L. REV. 228 (1934), and 1030 n.6, 1031 n.7 and cases cited therein. State statutes which exclude non-citizens from benefits are usually interpreted to extend benefits to them, while statutes which impose burdens on them are almost invariably struck down, to avoid unconstitutionality under the Privileges and Immunities Clause of Article IV § 2. The fact that the number of non-citizens burdened by a statute or excluded from a benefit-conferring act is usually small in proportion to the number of citizens may account for these results, although this is not stated explicitly in the cases. See Note, *supra* note 72, 55 HARV. L. REV. at 1034 n.40, 1035 nn.41-44; *Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Cal. 26, 192 Pac. 1021 (1920), *appeal dismissed* 225 U.S. 445 (1921) (workman's compensation benefit privilege extended to nonresidents).

77. See for discussion and authorities, 3 SUTHERLAND, Ch. 56, esp. §§ 5604-5606, at 44-67; 2 SUTHERLAND § 2418, at 196-97; *cf.* Stern, *supra* note 72, at 88 nn.56-58, 89 nn.59-61; Note, *supra* 72, 55 HARV. L. REV. 1030, 1031, n.11; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 515-23 (1926) (citing cases). *Contra*, *McCreary v. State*, 72 Ala. 480 (1889); *cf.* *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942) (dictum). See discussion at p. 919 *infra*.

78. *State v. Gantz*, 124 La. 535, 543, 50 So. 524, 526 (1909). Judicial revision of criminal statutes often raises a problem in addition to the one discussed. If a court,

The three factors discussed so far are the principal ones which guide the courts in determining legislative intent when the legislative history of the statute or the constitutional provision itself does not explicitly resolve the issue. There are two additional considerations which may influence judicial resolution of a constitutional challenge, but they operate with less force and clarity.

The first is related to the criminal-civil distinction. If a saving construction has the effect of extending a *burden* to a previously excepted class, the courts are somewhat less likely to adopt it than if the new construction extends a *benefit* previously denied those excepted. Thus a statute prohibiting women from being bartenders would be stricken down rather than extended to men; but a law giving only mothers of illegitimate children a right to custody would be extended to fathers.⁷⁹ There are two kinds of ambiguities, however, in the benefit-burden analysis, both of which may make it difficult for courts to appraise the benefits and burdens involved. First, a law may have a variable impact within the covered classification. Thus, a law providing a lower age of termination of parental support and control for women than men, or a law setting maximum hours for female workers, provides benefits to some of the class covered by the law (those who want to be free of parental supervision and those who do not want to be forced to work long hours) and burdens to others (those who want to be supported through college by their parents and those who want to earn high overtime wages). Second, a law which provides a benefit to one class may entail a cost to another class. Thus, a law providing overtime pay for female employees may be intended to benefit them but also burdens the employer. Where the burden falls on the general public, as in the case of a benefit supported by tax funds, the court may be inclined to ignore the burden or cost aspect of the equation and extend the benefit to improperly excluded classes. But where the burden is borne by private

to avoid unconstitutional overbreadth, must read specific words of exception into a statute, the statute may be unconstitutionally vague as well. As the Supreme Court stated in *Smith v. Cahoon*, 284 U.S. 553, 564 (1931):

Either the statute imposed upon the appellant obligations to which the State had no constitutional authority to subject him, or it failed to define such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes.

This problem is acute where the saving construction of the court, in "discovering" an implicit exception, raises the possibility that there may be other exceptions of a similar nature as yet hidden. Since the Equal Rights Amendment deals with the inclusion or exclusion of either of two well-defined groups, this problem is unlikely to arise.

79. See Note, *supra* note 72, 55 HARV. L. REV. at 1031-32, 1034-35, and cases cited at 1035 nn.42-44.

individuals or groups the court may react differently.⁸⁰ For these reasons the benefit-burden dichotomy will often require further analysis.

The final consideration, which is probably the most frequently mentioned by judges, is actually the least important. In a series of cases dating back at least to *United States v. Reese*⁸¹ in 1875, courts have claimed that they lack the power to add words to statutes, although they possess the power to excise words or to interpret them freely. Several commentators have rightly been critical of this semantic distinction on the ground that the answer to the question of what the legislature would have wanted to happen is not contingent on whether the result requires the addition or removal of words.⁸² An examination of the cases in which courts have refused to reach a given result for methodological reasons suggests that alternative bases exist for most of these decisions, including hostility on the part of the court to the substantive policy embodied in the challenged statute.⁸³ In other words, semantic considerations appear to play more of a role in the courts' description of what they are doing than in the actual results. This factor can therefore be largely ignored as a basis of decision, although it may tip the scales one way or another in an unusually close case.⁸⁴

The factors outlined above do not exhaust all the possibilities. But they do suggest the principal guidelines for judicial determination of "legislative intent." Since these factors sometimes militate against each other in particular cases, judicial interpretation of the Equal Rights Amendment can only be predicted if the relative weights accorded each are taken into account. The way in which these considerations operate in the actual process of judicial decision can best

80. See, e.g., *Burrow v. Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted at 54 HARV. L. REV. 1078 (1941). *But cf.* *Butte Miners' Union No. 1 v. Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P.2d 148 (1941), noted at 55 HARV. L. REV. 1052 (1942).

81. 92 U.S. 214 (1875).

82. See, e.g., Stern, *supra* note 72, at 94-97.

83. See the discussion in *id.*, at 102. Cases reflecting hostility on the part of the Court to the substantive policy involved in the statute include *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *United States v. Reese*, 92 U.S. 214 (1875), discussed in Stern, *supra* note 72, at 99. An example of a different "alternative basis" is *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514 (1906), where the Court cast its decision in methodological terms perhaps to avoid reaching another constitutional issue on which it was divided. See Stern, *supra* note 72, at 102 n. 116.

84. One indication of the accuracy of this analysis is the frequency with which the same courts follow the rule against addition of words on some occasions and violate it on others, avoiding open conflict with the *Reese* line of cases by neglecting to discuss the methodology implicit in their result. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), and Stern, *supra* note 72, at 80-82, 96.

be seen from a brief examination of cases in areas most comparable to the Equal Rights Amendment.⁸⁵

In several cases arising under the Fifteenth Amendment, state voting statutes which discriminated on their face against blacks were automatically extended to cover blacks as well as whites.⁸⁶ In those cases, the number added by the court was small in proportion to the number of people already included; in addition voting statutes are of prime importance to the operation of government and the inclusion of the new group did not raise administrative problems. Under the Nineteenth Amendment, prohibiting denial of the right to vote on account of sex, the same result was reached even though a large number of new voters (potentially over 50 per cent) was added to the rolls.⁸⁷ In these cases the subject matter—voting—was clearly the dominant factor. Courts are unwilling to invalidate such laws, thereby leaving the state without a statute on voting qualifications and procedures. Even when the number added by the change is large in comparison to the number covered by the original enactment, the importance of the law requires extension rather than invalidation.

The equal protection decisions probably provide the closest analogies to the cases likely to arise under the Equal Rights Amendment. Dealing with discrimination against specified classes of individuals, they have usually resulted in the extension of benefits to the previously excluded group. For example, in *Sweatt v. Painter*⁸⁸ and *McLaurin v. Oklahoma State Regents*⁸⁹ the right of access and treatment substantially identical to that accorded white students in state institutions of higher education was extended to black students. Such extension of benefits has not been limited to cases involving racial discrimination.

85. In this survey we do not discuss statutes challenged on First Amendment grounds. Where statutory language has been found to be overinclusive on First Amendment grounds, a court will ordinarily refuse to limit the enactment to its constitutional applications in order to preserve the statute. The explanation is that a limiting construction will not eliminate the vice of the statute, which is that the over-broad language on its face will chill the exercise of protected First Amendment freedoms. Analogous Equal Rights Amendment cases are unlikely to arise, for it is the direct rather than the chilling effect of statutes which will be called into question. Similarly, we will not discuss challenges on grounds of vagueness, since the extension required in Equal Rights cases is likely to involve well-defined groups.

86. *Neal v. Delaware*, 103 U.S. 370 (1880); *Ex parte Yarborough*, 110 U.S. 651 (1884); *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

87. See *Leser v. Garnett*, 258 U.S. 130, 136 (1922); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937); *Graves v. Eubank*, 205 Ala. 174, 87 So. 587 (1921); *Foster v. Mayor & Council of College Park*, 155 Geo. 174, 117 S.E. 84 (1923); *Matter of Cavellier*, 159 Misc. 212, 215, 287 N.Y.S. 739, 742 (1936).

88. 339 U.S. 629 (1950).

89. 339 U.S. 637 (1950).

In *Levy v. Louisiana*⁹⁰ the right to recover wrongful death benefits was extended to illegitimate children, and in *Shapiro v. Thompson*⁹¹ the right to receive welfare benefits was extended to cover residents who had recently moved from another state. Extension in these cases was consistent with the general principles of construction discussed above: the statutes were civil, their subject matter was important, and the number of people added to the coverage of the law was small in comparison to the number already included. But even when the number of people affected is large, a statute involving an important civil benefit or duty is often extended. In *White v. Crook*,⁹² the Alabama statute excluding women from jury duty was held to violate the Fourteenth Amendment; it was not struck down, but instead the right and duty of serving was extended to women.

On the other hand, when the discrimination is part of a criminal law, the coverage of the law is rarely if ever extended.⁹³ Thus, a criminal law providing special penalties for interracial cohabitation was struck down rather than extended to all cohabitation in *McLaughlin v. Florida*.⁹⁴ And the courts have invalidated state laws providing greater criminal penalties for women than for men, rather than extending the increased penalties to men.⁹⁵ Since persons prosecuted under a law are unlikely to urge that the law be extended to cover those discriminatorily excluded, and since individuals not prosecuted cannot urge this result, it might seem that the alternative of extension is not even before the court. However, in *Skinner v. Oklahoma*, a law which arbitrarily selected one class of habitual offenders for sterilization was remanded to the Oklahoma Supreme Court because, as Justice Douglas said,

It is by no means clear whether, if an excision were made, this particular constitutional difficulty might be solved by extending on the one hand or contracting on the other . . . the class of criminals who might be sterilized.⁹⁶

Apparently, the Oklahoma Supreme Court did not feel it could take upon itself the decision to extend the penalty to a class of offenders

90. 391 U.S. 68 (1968).

91. 394 U.S. 618 (1969).

92. 251 F. Supp. 401 (M.D. Ala. 1966).

93. See authorities cited in note 77 *supra*.

94. 379 U.S. 184 (1964).

95. U.S. *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968).

96. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942) (citations omitted).

not included by the legislature, and therefore invalidated the law by failing to take action on remand.

Taken as a whole, the principles used by the courts have operated to produce results that are probably what the legislature would have done had it known of the new constitutional mandate. While no one can say that the outcome of every issue will be the same in every state, it can be said with some assurance that the courts have the powers, doctrines and experience to handle Equal Rights Amendment cases without wholesale invalidation of viable laws or other absurd results. The main problem which we have discovered is the necessity for state legislatures to direct particular attention to their criminal laws, as the courts are least likely to correct defects in this area.

V. The Amendment in Operation

The theory of the Equal Rights Amendment, described above in Part III, will provide a framework for deciding whether laws and governmental practices are constitutional under the Amendment. The criteria for judicial application, discussed in Part IV(B), will function as ground rules guiding judges in implementing a decision that an existing law is unconstitutional. However, for most of those who are deciding whether or not to support the Equal Rights Amendment, it will not be enough to know the general theory underlying the Amendment. They will want to know how the Equal Rights Amendment will affect legal rights and responsibilities in important areas of their lives. They will want to assure themselves that the changes will not produce absurd or chaotic results, and that there will be a reasonable degree of predictability. This is so especially since the debate over the Equal Rights Amendment has been waged largely in terms of its impact on particular laws or institutions.

Many of the important changes which the Equal Rights Amendment will require are easy to predict and will serve to correct instances of clearcut sex discrimination in the law. Some of these changes are mentioned here simply to remind readers that, once the theory of the Equal Rights Amendment has been agreed on, much of its application will be obvious and direct. States with jury laws which make special exceptions or exemptions for women will no longer be able to discriminate on the basis of sex. For example, states which grant jury service exemptions to women with children will either extend the exemption to men with children or abolish the exemption altogether. The few state laws which still require women to comply with

special qualifications to do business will be invalidated, as will laws which prohibit women from acting as trustees or executors. Age differentials on the basis of sex will be equalized: the age of majority will be the same for men and for women, and the child labor laws and juvenile court laws will cover young people until the same age, regardless of sex. Similarly, legal retirement ages will be equalized for men and women: where the permissive retirement age is lower for women, the chance to retire early will be extended to men; but where the compulsory retirement age is lower for women, women will be permitted to continue working until the same age as men. Men and women will be considered for admission to all state universities on an equal basis. Government benefit programs which currently discriminate on the basis of sex will be available to men and women alike: manpower training programs will be required to accept young women on an equal basis with young men, and Social Security will be required to provide the relatives of working women with the same benefits it provides to the families of working men. Women will have the same right to sue for loss of a spouse's consortium that men now have.

In the remainder of the article, we explore the operation of the Equal Rights Amendment with respect to four important areas: protective labor legislation, domestic relations law, criminal law, and the military. These areas have been chosen because they appear to have raised the most serious doubts in the minds of some people. Each involves practices or sets of legal relationships which have been based on sex discrimination and sex differentiation for so long that untangling the effects of sex inequality requires more than an instant's consideration. In addition, many of the issues raised in the discussion of these subjects resemble problems that will arise in other areas. Thus, discussion of their resolution suggests the shape of the impact of the Equal Rights Amendment in other contexts.

In discussing the operation of the Equal Rights Amendment, we have not undertaken a comprehensive justification of the Amendment's beneficial effects. Other writers have explored the harms caused by the law's current discrimination and the benefits which will flow from their elimination by the Equal Rights Amendment.⁹⁷

97. See the materials cited in note 2, *supra*. See also B. BOWMAN ET AL., *WOMEN AND THE LAW: A COLLECTION OF READING LISTS* (April 1, 1971) (available from Box 89, Yale Law School, New Haven, Conn. 06520); L. CISLER, *WOMEN: A BIBLIOGRAPHY*, (6th ed. 1970) (available from the author, 102 West 80 St., New York, N.Y. 10024), an excellent guide to the fast increasing body of literature on women's social, political and economic

We have not generally repeated the observations of these writers. Rather, we have concentrated on analyzing the legal changes which the Equal Rights Amendment mandates. It may be noted in passing, however, that the authors believe that fears about the socio-economic impact of the Equal Rights Amendment are based upon unrecognized sex bias, sexual stereotypes which do not take account of the actual capacities and circumstances of most men and women, and failure to consider the comprehensive impact of an absolute theory of legal equality.

A. *Protective Labor Legislation*

The impact of the Equal Rights Amendment upon so-called protective labor legislation applicable only to women has been and remains a source of major controversy. In past years many individuals and groups favorable to equal rights for women refused to support the Amendment because of fear that it would deprive working women of important gains achieved only after hard-fought battles in the late nineteenth and early twentieth centuries. Most of the labor groups currently opposing the Amendment invoke the same argument. Within recent years, however, two important developments have put these issues in a very different light. One is the realization that, whatever the original design, under present conditions legislation of this nature has on the whole proved to be more repressive than protective for women. The other is that Title VII of the Civil Rights Act of 1964,⁹⁸ which prohibits discrimination in employment on account of sex, has already largely eliminated such legislation or extended its protection to men. State legislative officials themselves, often explicitly in response to Title VII, are hastening this process of change.

While there are many types of labor laws applicable to women only, basically they may be grouped into three broad categories: (1) laws conferring supposed benefits, such as minimum wages, a day of rest, a meal or rest period, and the provision of chairs for rest periods; (2) laws excluding women from certain jobs, such as mining or bartending, or from employment in any job before and after childbirth; and (3) laws restricting women's employment under certain conditions, such as at night, more than a maximum number of hours, or in jobs

status; and FEMALE STUDIES I (S. Tobias ed. 1970) and FEMALE STUDIES II (F. Howe ed. 1970) (collections of college reading lists available from KNOW, Inc., P.O. Box 10197, Pittsburgh, Pa. 15232).

98. §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-15 (1964), as amended, (Supp. V, 1970).

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requiring the lifting of weights above a set limit. The tables on the following pages show the pattern of these laws as of 1968, and significant changes by state governments and federal courts as of April 1971.⁹⁹

Evidence has been accumulating in recent years that these "protective" laws for women actually provide little real protection.¹⁰⁰ The uneven coverage, wide variation among states, proliferation of exceptions for jobs for which coverage seems most appropriate, and outright exclusion of women from many lucrative occupations demonstrate a lack of protective function. The conclusion that the laws serve primarily as an excuse for employers and unions to keep women in lower paying jobs, or out of the labor force altogether, is supported by the increasing number of women's lawsuits challenging these restrictions. Moreover, any sex-based law has an inevitably discriminatory impact, because a large number of women do not fit the female stereotypes on which the laws are predicated.¹⁰¹ These women are unfairly denied the higher wages and other benefits of traditionally "male" jobs. To the limited extent that the laws do provide bona fide protection, men are discriminatorily denied benefits.

Title VII of the Civil Rights Act of 1964 confirms the judgment that sex is not a desirable basis for employment rights and practices. Title VII provides that it shall be an "unlawful employment practice" for an employer engaged in an industry affecting interstate commerce, who has twenty-five employees or more, to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁰² Similar unlawful employment practices by labor unions and employment agencies are also forbidden. The Act establishes the Equal Employment Opportunity Commission (EEOC) as the agency charged with administration of

99. Table I is adapted from S. Ross, *Sex Discrimination and "Protective" Labor Legislation*, printed in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., pt. 1, at 592, 595-96 (1970). The table is based on data from WOMEN'S BUREAU, U.S. DEPT OF LABOR, *SUMMARY OF STATE LABOR LAWS FOR WOMEN* (1969). Table II is adapted from a memorandum prepared by Catherine East, Executive Secretary of the Citizens' Advisory Council on the Status of Women, April 16, 1971.

100. See generally, *Developments—Title VII, supra* note 45, at 1186-95.

101. See S. Ross, *supra* note 99, *passim*, and cases cited in notes 106, 109, 126, 127, and 132 *infra*. See also the position of the Equal Employment Opportunity Commission (EEOC) on state protective legislation for women embodied in its regulations, 29 C.F.R. § 1604.1(b)(2) (1970), set out at p. 933 *infra*. A contrary analysis appears in Jordan, *Working Women and the Equal Rights Amendment*, TRANS-ACTION, Nov. 1970, at 16.

102. § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1964).

TABLE I
STATE LABOR LAWS AS OF DECEMBER 1968

| <i>Type of Law</i> | <i>A. State "Benefit" Laws</i> | |
|--|---|--|
| | <i>Number Applicable to Women Only</i> | <i>Number Applicable to Men and Women</i> |
| Minimum Wage | 7 3 (not in operation) | 29; D.C.*; P.R.*; Federal Fair Labor Standards Act |
| Day of Rest Prescribed | 14; D.C. | 7; P.R.; also 28 "Sunday blue laws" which achieve the same result. |
| Meal Period (20 minutes to one hour) | 20; D.C.; P.R. | 3 |
| Rest Period (10 minutes for each half day of work) | 12; P.R. | 0 |
| Chairs to be provided | 44; D.C.; P.R. | 1 |
| | <i>B. State Exclusionary Laws</i> | |
| Occupations (total exclusion from) | 26—including: 17-Work in or about mines 10-Bartending 1-Work in retail liquor stores 11-Other occupations | 0 |
| Childbirth (employment before and after prohibited) | 6; P.R. | - |
| | <i>C. State Restrictive Laws</i> | |
| Weight limits (work requiring lifting more than set amount—ranging from 15 to 50 pounds—is prohibited) | 10; P.R. | 0 |
| Hour limits (work over the limit—with desirable premium pay rates for overtime—is prohibited) | 38; D.C. (3 of the 38 states cover both men and women in some industries; only women in others) | 3 |
| Nightwork (either prohibited or regulated) | 18; P.R. | 0 |

* D.C.—District of Columbia; P.R.—Puerto Rico.

Equal Rights for Women

TABLE II
SIGNIFICANT CHANGES IN STATE PROTECTIVE LAWS SINCE 1966

A. Changes by State Legislatures and State Officials

Repealed hours laws

| | |
|----------|------------|
| Arizona | New Jersey |
| Delaware | New York |
| Montana | Oregon |
| Nebraska | Vermont |

Extended weightlifting law to men

Georgia

Rulings by Attorneys General that state laws are superseded by Title VII or state Fair Employment Laws

| | |
|-----------------------------------|--------------|
| District of Columbia | Oklahoma |
| Illinois | Pennsylvania |
| Kansas (by Commissioner of Labor) | Rhode Island |
| Massachusetts | South Dakota |
| Michigan | Washington |
| | Wisconsin |

Exemption from hours laws of those covered by Fair Labor Standards Act or comparable standards

| | |
|-------------|----------------|
| California* | North Carolina |
| Kansas | Tennessee |
| Maryland | Virginia |

Exemption from hours law if employee voluntarily agrees

New Mexico

No prosecutions now because of uncertainty as to effects of Title VII

North Dakota

B. Changes by Court Decisions

Hours Laws (cases cited note 132 infra.)

| | |
|---------------|--------------|
| California | Missouri |
| Illinois | Ohio |
| Massachusetts | Pennsylvania |

Weight Laws (cases cited note 127 infra.)

California
Ohio
Oregon

* Exemption only partial.

these provisions. Remedy for violation is through conciliation by the Commission or, that failing, court action.¹⁰³

103. See § 703(b), 42 U.S.C. § 2000e-2(b) (employment agencies); § 703(c), 42 U.S.C. § 2000e-2(c) (labor organizations); § 705(a), 42 U.S.C. § 2000e-4(a) (creation of the EEOC); §§ 706(a)-(k), 42 U.S.C. §§ 2000e-5(a)-(k) (procedures for preventing and remedying violations).

The task of interpreting the prohibitions upon sex discrimination embodied in Title VII has not yet been completed by the courts. The statute's basic proscription against sex discrimination is absolute on its face. The statute does, however, include one significant qualification: the provisions do not apply "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise."¹⁰⁴

The precise meaning of "bona fide occupational qualification," or bfoq, has not yet been determined. The EEOC has adopted a narrow construction, saying that preference in employment to one sex is permissible only "[w]here it is necessary for the purpose of authenticity or genuineness," as in the case of actors or actresses.¹⁰⁵ The federal courts have recently tended toward equally strict interpretations, although often framing somewhat different tests than the EEOC.¹⁰⁶ Whatever the eventual interpretation of Title VII, however, the significant point here is the powerful impact Title VII has had on state protective labor legislation. Employers otherwise bound to comply with state legislation embodying different treatment for women than for men are now required to conform to the overriding federal legislation which forbids any discrimination on grounds of sex. Although the reasoning used to strike down state legislation under Title VII differs considerably from the Equal Rights Amendment standard of allowing differentiation only on the basis of unique physical characteristics of one sex or the other, the bfoq test, as narrowly construed, is much like the Equal Rights Amendment in practical effect.¹⁰⁷ The

104. § 703(e), 42 U.S.C. § 2000e-2(e) (1964).

105. 29 C.F.R. § 1604.1(a)(2) (1970).

106. See, e.g., *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), reversing in pertinent part 277 F. Supp. 117 (S.D. Ga. 1967), in which the Fifth Circuit ruled that a company regulation imposing a weightlifting limit of 30 pounds only on women was not a bfoq under Title VII. The court defined the standard for allowing sex-based regulations under the bfoq exception as: "an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." 408 F.2d at 235. But see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), rev'g 411 F.2d 1 (5th Cir. 1968), in which the Supreme Court implied, without deciding, that the bfoq exception might be considerably broader.

107. Both Title VII and the Equal Rights Amendment operate to invalidate discriminatory state laws. However, when extension rather than invalidation is involved, they operate in somewhat different ways. Title VII affects state laws only indirectly, as a consequence of its regulation of discrimination in private employment. Therefore, when a court attempts to reconcile Title VII with state law by extending the regulation in question to cover the improperly excepted group, the state law is not actually revised; instead, an additional federal duty is imposed on covered employers. The Equal Rights Amendment, in contrast, would operate directly on state law, and changes, whether invalidation or extension, would apply to all subsequent cases. However, the Equal Rights Amendment

consequence is that Title VII gives us a preview of the manner in which the Equal Rights Amendment would displace concepts of "protective" legislation with principles of equal rights. In this area, indeed, the transition is already far along. Therefore, we now turn to a closer examination of laws and cases under the three categories of state protective legislation set out in Table I.

1. *Laws Conferring Benefits*

Even laws providing benefits such as a minimum wage and a required rest period have operated to discriminate against either women or men, and sometimes both. Men are discriminated against whenever they are denied the benefits of such laws. Women are sometimes discriminated against when, for example, they are put on a schedule which includes the required rest periods, while men are not; this arrangement is then used to justify paying women less and limiting them to certain jobs.¹⁰⁸ These discriminations would no longer be possible, of course, if both men and women workers were covered by the benefit-conferring laws.

Title VII cases which have considered such laws have held that the employer could conform to both the state requirements and Title VII by extending the benefits to workers of both sexes.¹⁰⁹ Hence invalidation of the state law has been unnecessary. Where Title VII has not already operated, the courts would probably reach a similar result under the Equal Rights Amendment. Most of the laws which confer benefits may be extended to more workers with little extra burden on the employer, and with little disruption of industrial organization.¹¹⁰ The courts are therefore likely to presume that the legisla-

will not otherwise affect discrimination in private employment, unless Congress chooses to enact affirmative legislation under the Amendment's enforcement clause.

108. See S. Ross, *supra* note 99, at 595; *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969), where one of the grounds relied on by the employer to deny a particular job to women was a union contract requiring two ten-minute rest periods for women.

109. See, e.g., *Potlatch Forests Inc. v. Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970) (state overtime wage requirement extended to men). *But cf. Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971).

110. See *Developments—Title VII*, *supra* note 45, at 1189. The heaviest economic burden to employers might arguably be caused by the extension of state minimum wage and overtime premium pay coverage to men. However, even the economic cost of this extension is likely to be small. First, it is unusual for men to be paid less than women within a particular establishment or occupation, both because men tend to have higher status or more skilled jobs, and because men are often paid more for the same work. See, e.g., WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS, Tables 66, 74, at 150-61 [hereinafter cited as 1969 HANDBOOK]. The extent of wage discrimination against women is indicated by the enforcement and litigation experience under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1964), which prohibits wage

tures would prefer to have these laws remain in effect, on an equalized basis, rather than be completely invalidated.

2. *Exclusionary Laws*

Laws which exclude women from certain occupations or from all employment under certain circumstances are always discriminatory rather than beneficial and neither could nor should be extended to men. Exclusionary statutes, when carefully scrutinized, provide the best examples of two kinds of laws: those whose only apparent purpose is to protect men's jobs, and those which seem to assume not only that women are too weak to protect their own interests but also that they are too stupid or careless to do so. These laws, which are gradually being struck down under Title VII and would also be expected to fall under the Equal Rights Amendment, are discussed below under two classifications: occupational exclusions and compulsory maternity leave regulations.

a. *Occupational Exclusions.* Laws which exclude women from specified occupations—and, in some states, a bewildering variety of occupations are included—impose a burden on some women without helping any others. Presumably women who do not want to be bartenders or miners will not apply for such jobs, while women who do want to work in the covered occupations, some of which are highly remunerative, are excluded merely because of their sex. Courts have recently begun to invalidate laws of this kind on the grounds of conflict with Title VII and the Fourteenth Amendment.¹¹¹ Extension

differentials between workers of opposite sexes holding jobs of equal skill, effort, and responsibility under similar conditions. Since the Equal Pay Act went into effect in 1964, approximately 50,000 employees, mainly women, have recovered \$17 million in back wages. See 1 BNA MANPOWER INF. SERV. CURRENT REPORTS, no. 18, May 20, 1970, at 7; cf. THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, REPORT: A MATTER OF SIMPLE JUSTICE 10 (1970). Second, by 1969, nearly four out of every five non-supervisory workers in private employment were covered by the federal Fair Labor Standards Act, which, under the relevant 1966 amendments, requires a minimum hourly wage of \$1.60 and time and a half for all hours in excess of forty hours a week in most covered occupations. 1969 HANDBOOK at 254; see 29 U.S.C. §§ 203, 206-07 (Supp. V, 1970), amending 29 U.S.C. §§ 203, 206-07 (1964). Third, only ten states of forty-one with minimum wage laws limited coverage to women or to women and minors, and only five of the eighteen jurisdictions which provide premium pay rates for overtime limit their coverage to women or to women and minors. 1969 HANDBOOK at 266-67.

111. The only cases thus far reported have concerned laws excluding women from bartending jobs, sometimes with exceptions for female liquor licensees or close female relatives of the licensee. See, e.g., *McCrimmon v. Daley*, 2 FEP CASES 971 (N.D. Ill., Mar. 31, 1970), on remand from 418 F.2d 366 (7th Cir. 1969) (invalidating a Chicago municipal ordinance under Title VII and the Fourteenth Amendment Due Process Clause); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (invalidating a municipal ordinance as an unnecessary and unreasonable exercise of police power, and criticizing, *inter alia*, *Goesaert v. Cleary*, 335 U.S. 464 (1948)); *Sail'er Inn, Inc. v. Kirby*, — Cal. 3d —, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (in-

to men would mean the elimination of certain occupations altogether, and thus it would not be a feasible outcome. Furthermore, it is difficult to imagine an occupational hazard which is based on a physical characteristic unique to one sex; if the occupation is dangerous, it is dangerous to both sexes. Under the Equal Rights Amendment, courts are thus not likely to find any justification for the continuance of laws which exclude women from certain occupations. Legislatures which are concerned with real hazards in certain jobs will have to enact sex-neutral protections.

b. *Compulsory Maternity Leave Regulations.* Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits, are similarly exclusionary. Seven jurisdictions have enacted such restrictions into law; the stage of pregnancy at which mandatory leave is imposed varies between three weeks to four months before expected delivery.¹¹² None of these laws provides for any compensation by either state or employer, or job security, during the compulsory leave period, except that of Puerto Rico, which requires the employer to pay one-half salary during leave for temporary disabilities, including eight weeks compulsory leave for pregnancy, and provides job security during the required absence.¹¹³ In addition to state laws, many state agencies have more restrictive regulations for their own employees; school board regulations are particularly significant, since a large number

validating a state law on the grounds that sex is a suspect classification under the Fourteenth Amendment Equal Protection Clause); *contra*, Krauss v. Sacramento Inn, 2 FEP CASES 733 (E.D. Cal. June 15, 1970) (upholding California statute as reasonable under the Twenty-First Amendment, despite passage of Title VII, and citing, *inter alia*, Goesaert v. Cleary, *supra*).

112. See 1969 HANDBOOK 276-77. The jurisdictions are Connecticut, Massachusetts, Missouri, New York, Vermont, Washington, and Puerto Rico. The statutory prohibition on employment lasts until three to six weeks after childbirth. *Id.* The standard in the state of Washington is established by minimum wage orders, some of which provide that special permission may be granted for continued employment upon employer's request and with a doctor's certificate. In addition, the Oregon Mercantile and Sanitation and Physical Welfare Orders recommend that an employer should not employ a female at any work during the six weeks preceding and the four weeks following the birth of her child, unless recommended by a licensed medical authority. *Id.*

113. In addition, thirty-seven states and the District of Columbia disqualify women from collecting unemployment insurance during a specified period before and/or after childbirth, whether or not pregnancy is the reason for their unemployment. 1969 HANDBOOK 52-54. Cf. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES, *supra* note 2, at 25-30, 44-46. On the other hand, Rhode Island's general temporary disability program provides cash benefits for unemployment due to maternity leave for a fourteen-week period around childbirth, and New Jersey's program provides cash payments for disabilities existing during the four weeks before and the four weeks following childbirth. However, New York and California, the only other states with state temporary disability programs, do not include disabilities based on pregnancy except in special circumstances. *Id.* at 44-46.

of women workers teach school. These regulations commonly require leaves to commence much earlier in pregnancy than the state laws discussed above.¹¹⁴

Under the Equal Rights Amendment, it will probably be argued in defense of these laws and state regulations that they deal with unique physical characteristics of women. It is true that the state may regulate conditions of employment for women in a physical condition unique to their sex, but the kind of regulation imposed would be subject to careful judicial review, utilizing the kinds of standards set forth previously in Part III.¹¹⁵ Two recent federal court decisions provide a preview of the kind of close scrutiny which the Equal Rights Amendment will require. One struck down a compulsory maternity leave regulation under Title VII; the other reached the same result under the Equal Protection Clause of the Fourteenth Amendment. Both courts recognized that compulsory maternity leave provisions are not genuinely protective either of women's health or of their employment rights.¹¹⁶

In *Schattman v. Texas Employment Commission*,¹¹⁷ a woman chal-

114. See, for statistics on women's employment as teachers, 1969 HANDBOOK 90. A survey conducted by the National Education Association showed that in 1965-1966, a large number of school systems required maternity leave to begin between the fourth and sixth month of pregnancy, and extend until three or more months after childbirth. RESEARCH DIV'N, NATIONAL EDUCATION ASSOC., LEAVES OF ABSENCE FOR CLASSROOM TEACHERS 1965-66 20-26 (1967). See also speech by Jacqueline G. Gutwillig, Chairman, Citizens' Advisory Council on the Status of Women, to Conference of Interstate Association of Commissions on Status of Women, St. Louis, Mo., June 19, 1971.

115. See the discussion at p. 895 *supra*.

116. The legislative purpose of compulsory maternity leave legislation is not entirely clear; the central obscurity is the failure to specify what and who is being "protected," and why the legislature thinks the protection is necessary. Assuming that the primary purpose of such laws is to protect women's health, they can only be rationalized if one accepts as true the proposition that pregnant women, in contradistinction to all other workers, are unable or unwilling to seek or to heed medical advice about the safety and desirability of their continued performance of their jobs in light of the temporary change in their physical condition. Alternative explanations are available, however, and we are not in a position to say which of the possibilities is the actual legislative justification. One can suppose, for example, that the legislature was trying to design genuinely protective legislation and failed to think through fully the operative effect of lengthy compulsory leave without job security either in terms of women's rights as workers or in terms of the relationship between physical health and income and employment rights. Another possibility is that the legislators were willing to sacrifice women's roles as workers, which they considered relatively unimportant, to the supposed demands of pregnancy and motherhood, without much investigation either of medical evidence or alternative legislation with less impact on women's rights as independent adults. Or perhaps male legislators were acting on the basis of Victorian beliefs about the impropriety of women who are "in the family way" appearing in public at all. Since denying pregnant women the right to work when they are medically able and willing to work means that they cannot support themselves, this type of legislation, whatever its ostensible purpose, embodies an unrealistic assumption that all pregnant women have men to support them during their forced confinement.

117. 3 FEP CASES 311 (W.D. Tex. Mar. 4, 1971), 3 FEP CASES 468 (W.D. Tex. April 16, 1971).

lenged the imposition of compulsory leave in her seventh month of pregnancy. Following the *Weeks* doctrine that Title VII prohibits sex-based employment practices unless the employer can demonstrate a strong factual basis for the policy in terms of safety and efficiency,¹¹⁸ the court found no such evidence supporting compulsory maternity leave from the plaintiff's desk job.

This decision parallels an application of the Equal Rights Amendment's tests for regulations purporting to deal with unique physical characteristics. The maternity leave regulation in the *Schattman* case would satisfy only the most elementary of the unique physical characteristics tests: that the sex-based classification (i.e. pregnant women) be based in fact on a physical characteristic unique to one sex. The regulation would fall, however, if the state could not show the existence of a "problem" of legitimate legislative concern (such as the danger of job-related injuries to pregnant women) and a sufficiently close relationship between the problem and the physical characteristic in question. The state made neither showing in the *Schattman* case; if it *had* demonstrated a job-related problem which was tied to the condition of being seven months pregnant, the court might then have considered whether the regulation imposed was the least drastic solution to the problem demonstrated, and have balanced the importance of the problem against the costs of the least drastic solution.¹¹⁹

A similar state regulation was struck down in *Cohen v. Chesterfield County School Board*,¹²⁰ in which a female teacher challenged a school board regulation imposing maternity leave at least four months prior to the expected birth of her child. The district court reviewed the supposed medical and administrative reasons for the school board's policy, and found them to have no empirical basis or persuasive force. The argument that mandatory leave was justified by frequent "incapacitation" at that stage of pregnancy was found to be medically incorrect; the idea that pregnant teachers had to be protected from such

118. See the discussion in note 106, *supra*.

119. The definition of the "problem," whether by explicit legislative history or by judicial interpretation, is central to setting the standards by which the legislation is to be judged. The more narrowly defined the problem is, the easier it is for the party defending the legislation to prove that the measures the law imposes solve a significant proportion of the problem. On the other hand, a narrow definition might cast doubt on the legislation under other tests, such as the importance of the problem to be solved or the adequacy of measures to select those contributing to the problem from the larger group with the unique physical characteristic. Although the focus of judicial scrutiny would thus shift from one factor to another depending on the definition of the "problem," the burden of proof on those defending the law would remain nearly the same.

120. 39 U.S.L.W. 2686 (E.D. Va. May 17, 1971). *Contra*, *La Fleur v. Cleveland Board of Education*, 39 U.S.L.W. 2686 (N.D. Ohio May 12, 1971).

physical hazards of employment as "pushing with resulting injury to the fetus" was found to be entirely speculative, as was the allegation of increased inefficiency on the job, such as inability to perform duties during fire drills.¹²¹ The court concluded that "[b]asically, the four month requirement . . . was arbitrarily selected," and that "since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor."¹²² More broadly, the court held that "pregnancy, though unique to women, is like other medical conditions, and the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the Equal Protection Clause of the Fourteenth Amendment."¹²³

This decision, if cast in terms of the Equal Rights Amendment standards, would be similar to the *Schattman* decision discussed above: the state was unable to make an elementary showing of a job-related problem linked to the physical characteristic at issue. In addition, the court made two other findings that parallel the application of Equal Rights Amendment standards. First, the court held that in its relation to employment, pregnancy was only a small part of the larger problem of temporary disabilities which could not constitutionally be dealt with separately. Second, the imposition of compulsory leave was found to be impermissible where a rule letting a woman and her doctor decide when optional leave should commence would meet any medical need for leave and would be less onerous to pregnant women. In other words, the regulation discriminatorily selected out a small sex-linked part of a larger problem, and imposed a more drastic solution than was necessary. A court operating under the Equal Rights Amendment might also find that a sex-neutral rule, allowing any temporarily disabled worker and his or her doctor to determine the duration and timing of leave, would also be an available less drastic alternative.

3. *Laws Restricting Conditions of Employment*

Other types of laws cannot so easily be categorized as imposing either benefits or burdens on covered workers. In this category are most weightlifting limits, maximum hours laws, and night work prohibitions. As one commentator noted, "the reality is that such laws simply do not accomplish their aim—real protection,"

121. 39 U.S.L.W. at 2686.

122. *Id.*

123. *Id.* at 2687 (citations omitted).

[because] sex as a criterion cannot predict with sufficient accuracy who needs what protection. If injury due to lifting weights is a problem the answer is to find out what every *individual* can safely lift with modern techniques and then forbid employers to fire individuals who refuse to lift weights above [their personal] limit. If some men and some women don't want to work overtime and unions want to protect the right not to work overtime, laws should be passed forbidding employers to fire those who refuse overtime, but those men and women who *do* want overtime pay should not be penalized because of the desires of those who do not want it.¹²⁴

The same considerations apply to night work prohibitions. Night work is often better paid and may be more convenient for some women, including those whose husbands could care for the children at this time, or who wanted to work at night while going to school in the daytime. On the other hand some workers, both male and female, would consider it a benefit to be exempted from such assignments.

After an initial period of uncertainty, the EEOC took a strong position in 1969 against labor laws which impose restrictions only on women's employment. EEOC regulations now state:

The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupation qualification exception.¹²⁵

The courts have also dealt with the impact of Title VII upon laws of this ambiguous kind. While we cannot here analyze all the cases, we select a few typical decisions which illustrate the trends in these areas, and compare the Title VII developments to anticipated results under the Equal Rights Amendment.

a. *Weightlifting.* Several important court decisions on weightlifting have concerned company or union regulations rather than state laws. The principles involved in reviewing these private regulations under

124. S. Ross, *supra* note 99, at 597.

125. 29 C.F.R. § 1604. 1(b)(2) (1970) (issued Aug. 19, 1969).

Title VII, however, are similar to those that would be used in reviewing state legislation under the Equal Rights Amendment. The great majority of decisions, whether dealing with state laws or industry regulations, have either invalidated weightlifting restrictions *in toto* or extended them on an individualized basis to cover both men and women. Since most of the limits are low, between fifteen and forty pounds, it would clearly not be feasible merely to extend the laws as presently written to cover men. If courts reached this result, no factory workers could ever lift even moderately heavy weights, and great changes would be necessary in many plants. Some courts have given employers the option of instituting an individualized testing program, as long as it is applied equally to both sexes.¹²⁶

A more common result in weightlifting cases is complete invalidation, leaving all workers with no protection against employer pressure to engage in the lifting of heavy weights.¹²⁷ Under such circumstances the legislature would be free to enact individualized testing requirements, to set higher absolute limits applicable equally to both sexes, or to require employers to provide mechanical aids for the lifting of weights above a certain limit.

Under the Equal Rights Amendment employers, unions and state officials may defend weightlifting regulations for women on the grounds that a unique physical characteristic is involved, just as they argue that sex is a bfoq under Title VII for jobs requiring weightlifting. Although the theories and standards under Title VII cases and regulations differ from the Equal Rights Amendment standards set forth earlier,¹²⁸ proponents of weightlifting regulations who have been unable to meet the burden of proof for a bfoq will also probably be unable to satisfy the unique physical characteristics tests under the Amendment. If, under Title VII, one cannot prove by factual evidence that "all or substantially all women are unable to perform a given job safely and

126. See, e.g., *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), reversing in pertinent part 272 F. Supp. 332 (S.D. Ind. 1967).

127. See, e.g., *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd* — F.2d — (9th Cir. 1971); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Local 246, Utility Workers Union v. Southern Cal. Edison Co.*, 320 F. Supp. 1242 (C.D. Cal. 1970); *Ridinger v. General Motors Corp.*, 39 U.S.L.W. 2548 (S.D. Ohio Mar. 24, 1971) (overturning state laws); *Cheatwood v. South Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969) (overturning a company regulation). *Contra*, *Godbrandson v. Genuine Parts Co.*, 297 F. Supp. 134 (D. Minn. 1968) (upholding a company-imposed limit of 40 pounds).

128. See the general discussion of judicial review under the Equal Rights Amendment of laws based on unique physical characteristics at p. 895 *supra*, and the specific discussion of the *Schattman* and *Cohen* cases at pp. 930-32 *supra*.

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efficiently,"¹²⁹ one almost certainly cannot prove by factual evidence that average weightlifting differences between men and women are caused by a unique physical characteristic possessed by all or some women and no men.¹³⁰ There is little reason to doubt, therefore, that courts will invalidate weightlifting regulations for women under the Equal Rights Amendment as well as under Title VII.

b. *Maximum Hours Laws.* Maximum hours laws vary as to the kind and quantity of limits imposed. Some states restrict women workers to a certain number of hours per day as well as per week. These laws are to be distinguished from state laws and union contracts which, while imposing no absolute maximum limit on the number of hours worked in any day or week, do require that all hours worked past a fixed number be compensated at premium rates, usually time and a half or more. A few such premium pay laws cover women only. These are easily extended.

Overtime work at premium pay, guaranteed by state and federal laws or union contracts, is a common feature of many male workers' jobs. Indeed overtime is often necessary for these workers to maintain their standard of living from week to week. Under the maximum hours laws, female workers who wish to work overtime are discriminatorily denied this added source of income. On the other hand, even under premium pay laws and regulations, there are many male and female workers who would prefer to be able to refuse overtime work and still retain their jobs.¹³¹

129. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

130. Dr. Rudolph Bono, team physician and surgeon for the New York Giants, was recently quoted as saying,

Muscle mass for muscle mass, there is *no* physiological difference between males and females. Pound for pound, their muscles can be developed to the same degree of proficiency. Men grow bigger because male hormones increase the size of the body, but the tissues for both sexes are still the same. So if a man and a woman were equal in size, she could develop as well as he could. Most women, of course, don't try for muscular physiques because they don't want to become freaks, so the boys start lifting weights early in life while the girls keep femininity in mind.

In other words, it's a social and emotional limitation that women face in sports, not a physical one. . . . In Russia the athletes don't care about femininity and you should see the muscles on some of those girls.

Schoenstein, *Can You Really Go Play With The Boys?*, SEVENTEEN, June 1971, at 28.

131. Night work prohibitions, which exist in eighteen states and Puerto Rico, 1969 HANDBOOK 275, have an effect parallel in some respects to maximum hour limitations and in other respects to exclusionary laws. They are like the former when they prevent women from being assigned to certain shifts or jobs during the course of employment and like the latter when they exclude women from certain nighttime occupations altogether. Although it is difficult to see what difference the occupation makes to any supposed legislative justification for these laws, the coverage of only a few occupations is common, e.g. N.Y. LABOR LAW § 173 (McKinney 1965). No cases have yet reached the courts under Title VII. It would be expected, however, that night work laws would be invalidated under either Title VII or the Equal Rights Amendment.

The trend of court decisions under Title VII is to invalidate maximum hours laws which apply only to women.¹³² This result would also be predicted from principles of statutory construction under the Equal Rights Amendment. The extension of maximum hours laws to cover men would drastically change many work situations. Individualization by judicial fiat is even more difficult than in the weightlifting cases because there are many alternative ways to protect workers from having to work overtime against their will. Hence, while a law protecting both men and women from coerced overtime is desirable, the courts are likely to leave the matter to legislative decision, meanwhile equalizing both sexes under the Equal Rights Amendment by invalidating the law. This would seem to be one area, therefore, in which legislative attention between ratification and the effective date of the Amendment would be important.

4. Summary

The operation of Title VII to date thus foreshadows how, in one important area, the Equal Rights Amendment would function. In general, labor legislation which confers clear benefits upon women would be extended to men. Laws which are plainly exclusionary would be invalidated. Laws which restrict or regulate working conditions would probably be invalidated, leaving the process of general or functional regulation to the legislatures. The courts have already reached these results in a number of cases arising under Title VII. The Equal Rights Amendment would accelerate this trend, providing a new incentive to legislatures and unions to develop and implement programs of genuine protection for workers of both sexes.

B. Domestic Relations Law

Given the traditional social and economic view that woman's place was in the home, it is not surprising that laws affecting domestic relations have defined women's rights and duties with great specificity.

132. See *Kober v. Westinghouse Electric Co.*, 3 FEP CASES 326 (W.D. Pa. Mar. 29, 1971); *Ridinger v. General Motors Corp.*, 39 U.S.L.W. 2548 (S.D. Ohio Mar. 24, 1971); *Garneau v. Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971); *Vogel v. Trans World Airlines, C.A. 1706-3* (W.D. Mo. Sept. 25, 1970, as amended by order of Jan. 19, 1971); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd* — F.2d — (9th Cir. 1971). Cf. *Mengelkoch v. Industrial Welfare Comm'n.*, 437 F.2d 563 (9th Cir. 1971). All of these cases were brought by factory workers and clerical workers against state laws with the exception of *Grabiec*, which was a request for declaratory judgment by two companies caught between the state hour law and the demands of women employees (backed by the EEOC and court decisions) for overtime and promotions.

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At common law, a woman who married became a legal non-person—a *femme couverte*.¹³³ Upon marriage, she lost virtually all legal status as an individual human being and was regarded by the law almost entirely in terms of her relationship with her husband. Statutory developments in the nineteenth and early twentieth centuries tended to frame a more dignified but nevertheless distinct and circumscribed legal status for married women. At the present time domestic relations law is based on a network of legal disabilities for women, supposedly compensated by a corresponding network of legal protections. The law in this area treats women, by turns, as mental incompetents and as more mature persons than men of the same age; as valuable domestic servants of their husbands and as economic incompetents; as needing protection from their husbands' economic selfishness and as needing no protection from their husbands' physical abusiveness. In many respects, such as name and domicile, the law continues overtly to subordinate a woman's identity to her husband's.

Much of the national discussion about women's status has focused on marriage and divorce laws, and rightly so, because the issues involved are important to people personally, and because women's domestic role has traditionally been considered their primary one. Unquestionably, the trend in marriage and divorce law is in the direction of treating the spouses equally or on the basis of their individual capacities. Progressive present-day models for change in the area of family law eliminate virtually all differentiation on the basis of sex.¹³⁴ Thus, in most instances, the effect of the Equal Rights Amendment on marriage and divorce law will be to move the law more directly, more forcefully, and more expeditiously in the direction it is already going.

In considering the following discussion of the impact of the Equal Rights Amendment on some aspects of domestic relations law, the reader should keep in mind the law's limited power to predetermine and control the nature of intimate personal relationships. In the realm of marriage and the family, social customs, economic realities, and individual preferences have a far greater influence on behavior than the

133. Blackstone said, "By marriage, the husband and wife are one person in law: . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything; and is therefore called, in our law-French a *feme-couvert*; *foemina viro co-operta*; is said to be *covert baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage." 1 W. BLACKSTONE, COMMENTARIES *442.

134. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT (Final Draft, 1970).

law. This is not to say that the law does not play an important role in shaping and channeling these other forces, but rather to point out that a change in the law—insofar as the change leaves room for choice, as do the possibilities suggested below—will not result in immediate widespread change in what are essentially social customs. Furthermore, it is important to remember that the impact of the marriage and divorce laws varies according to the economic class of the family. In preparing this section, we have been limited by the dearth of academic research about the differential impact of domestic relations law according to economic class.¹³⁵

1. *Laws Affecting the Act of Marriage*

The statutory requirements for a lawful marriage are generally very simple. They include in most states a valid license, a waiting period before issuance of the license, a medical certificate, proof of age, parental consent for parties below the age of consent, and a ceremony of solemnization. Of these, only age requirements for marriage with and without parental consent involve widespread discrimination on the basis of sex.¹³⁶ A 1967 survey of state marriage laws by the United States Department of Labor showed that only ten states set the same minimum age for marriage (age below which marriage, even with parental consent, is prohibited) for men and women. Only eighteen states set the same age of consent (age at which marriage is permitted without parental consent) for both men and women.¹³⁷ In every state with an age differential, the minimum age for men was one to three years higher than the minimum age for women.¹³⁸

135. Examples of such studies include W. Gellhorn, *A Study on the Administration of Laws Relating to The Family in The City of New York*, in SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK (1954); R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS (1969) [hereinafter cited as LEVY].

136. In general the requirements for physical examination before marriage apply equally to men and women. In Washington, however, only men are required to answer questions about contagious venereal disease. WASH. REV. CODE § 26.04.210 (Supp. 1970). Such a distinction is based on the Victorian fiction that only men will engage in premarital intercourse. The underlying health reasons for requiring men to be examined apply equally to women. Although physical examination is presumably for protection of the new spouse, the requirement of examination for venereal disease is a useful public health measure. It obviously should not be struck down where it applies unequally to men and women, but rather extended to women, as it already has been in most states.

137. See CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY, APPENDIX B at 62 (1968) [hereinafter cited as REPORT ON FAMILY LAW]. The states which set the same age of consent are: Connecticut, Florida, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia and Wyoming. See, e.g., KY. REV. STAT. § 402.210 (1969); PA. STAT. ANN. tit. 48, § 1-5(c) (1965).

138. The original basis for this differential was the presumption that women reached

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Since the minimum marriage age in all states is now well above the normal age of puberty, physical capacity to bear children can no longer justify a different statutory marriage age for men and women. Instead, there seem to be two current rationales for the higher marriage age for men. One is that, mentally and emotionally, women mature earlier than men. Maturity is such a relative and subjective concept that a court could never use it as a test for an inborn characteristic distinguishing all women from all men. Furthermore, mere estimates of emotional preparedness founded on impressions about the "normal" adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids. The other rationale for the age difference is that men should not be distracted during adolescence from education and other preparation for earning a living. This rationale is obviously untenable: the law should give as much encouragement to women to prepare themselves to earn a living as it gives to men.¹³⁹

Under the Equal Rights Amendment, a court challenge to the age differential would most likely be made by a man suing to require issuance of a license to him at the lower women's age. Faced with such a challenge to the state law a court would have to find, for the reasons just discussed, that the marriage age differential did not meet the strict criteria of the unique physical characteristics tests required by the Equal Rights Amendment. Once it had concluded that a state could not constitutionally set one marriage age for men, and one for women, a court would be able to increase the marriage age for women upward to match the age for men, on the theory that the state should be equally solicitous of a woman's training as a man's. Or a court might find that the legislature had pegged the age for men unreasonably high and revise the marriage age for men downward to correspond to the marriage age for women. A legislature reconsidering laws about the minimum age for marriage, either before or after a court challenge, would have to set a single age for men and women after weighing the policy considerations underlying the age limit. These considerations might indicate the higher age, the lower age, or an age in between the two.¹⁴⁰

puberty earlier than men. The common law ages of consent—14 for males, 12 for females—represented estimates of the ages when children became physically capable of producing children. KANOWITZ, *supra* note 2, at 10.

139. For a decision sustaining legislative judgment about age of majority differentials under current constitutional doctrines, see *Jacobson v. Lenhart*, 30 Ill. 2d 225, 195 N.E.2d 638 (1964).

140. The considerations which should shape a legislature's judgment in setting a minimum marriage age are outlined in LEVY, *supra* note 135, at 24-25. The drafters of the Uniform Marriage and Divorce Act chose the lower "women's" ages of 18 for mar-

2. *Merger of the Woman's Legal Identity into Her Husband's*

a. *Name Change.* The requirement that a woman assume her husband's name at the time she marries him is based on long-standing American social custom. It is also firmly entrenched in statutory and case law.¹⁴¹ In some states statutes indicate that a married woman must not only take but keep her husband's name.¹⁴² Women who continue to use their maiden names after marriage may encounter resistance from the Internal Revenue Service, voting registrars, motor vehicles departments, or any number of non-governmental sources.

The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name. Thus, common law and statutory rules requiring name change for the married woman would become legal nullities. A man and woman would still be free to adopt the same name, and most couples would probably do so for reasons of identification, social custom, personal preference, or consistency in naming children. However, the legal barriers would have been removed for a woman who wanted to use a name that was not her husband's.

Some state legislatures might decide there was a governmental interest, such as identification, in requiring spouses to have the same last name. These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both.¹⁴³ Similarly, statutes which now permit the judge in a divorce case to use discretion in determining whether to allow a woman to resume her maiden name or to take a new name would be extended under the Equal Rights Amendment to cover all men, or at least men who had

riage without parental consent and 16 for marriage with consent. UNIFORM MARRIAGE AND DIVORCE ACT § 203(1).

141. KANOWITZ, *supra* note 2, at 42.

142. *See, e.g., IOWA CODE ANN. § 674.1 (1950)*, permitting a court to change the name of "any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female . . ."

143. The West German federal government has recently proposed legislation along these lines. Part of a large-scale reform of family and divorce legislation, "the bill breaks an ancient tradition of male priority in family names. It will permit marriage partners to adopt the wife's maiden name if they choose or to use it in combination with the husband's surname." Binder, *Bill in Bonn Encourages German Penchant for Double Names*, N.Y. Times, May 20, 1971, at 2, col. 3.

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changed their names at marriage. Moreover, any state coercion regarding an individual's choice of name might still be open to attack under developing constitutional principles of due process and privacy.

In a state where both spouses were required to have the same last name, the children would simply take their parents' name. If the state had no requirement that husband and wife take the same name, it could either require that parents choose one of their names for their children, or it could decide to have no rule at all. The Amendment would only prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's.

b. *Domicile*. The location of a person's domicile affects a broad range of legal rights and duties, including the place where he or she may vote, run for public office, serve on juries, receive free or lowered tuition at a state school, be liable for taxes, sue for divorce, and have his or her estate administered. The common law rule for determining the wife's domicile was simple: the domicile of the wife merged in that of her husband; moreover, she had the duty to follow him if his choice was a reasonable one, and her refusal to do so was considered desertion.¹⁴⁴ Legislative or judicial changes have modified this blanket rule in most states for some purposes, most commonly for divorce jurisdiction. However, only three states—Alaska, Arkansas, and Wisconsin—permit a woman to have a separate domicile from her husband for all legal purposes.¹⁴⁵

A court suit challenging discriminatory domicile rules could arise after a woman had been denied some right or benefit because her husband's domicile had been imputed to her.¹⁴⁶ In such a suit a court would have to hold that the Equal Rights Amendment requires rules governing domicile to be the same for married women as for married men. Extending women's dependent status to men would simply create a circular situation with each spouse's domicile dependent on the other's. Thus, equal treatment of men and women for purposes of domicile implies giving married women the same independent right to choice of domicile as married men now have. A court would probably resolve the inequality by striking down whatever statute or portion of

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144. J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 146 (1931).

145. ALASKA STAT. ANN. § 25.15.110 (1962); ARK. STAT. ANN. §§ 34-1307 to -1309 (1962); WIS. STAT. ANN. § 246.15 (Supp. 1970).

146. See also *Clarke v. Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966), in which a man wanted to adopt his wife's domicile to get the benefit of lower tuition at the state university.

a statute sets out a special rule for married women. It would leave standing the general domicile law which would automatically be extended to married women. For similar reasons, a court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment.¹⁴⁷ A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home, unless the state also permitted the wife to sue for divorce if her husband unjustifiably refused to accompany her in a move.

These results would cause little disruption and would be beneficial to those women who are now adversely affected by the domicile law. Professor Kanowitz concludes that the domicile rule

has become useless as an influence within the family. Its most important practical effects are to deprive wives of certain governmental benefits they would otherwise have and to create technical legal difficulties for third parties. The cases in which the issue is raised typically do not involve the resolution of a dispute between spouses in an ongoing marriage. . . . Its retention serves only to evoke bygone images of the husband as master and the wife as obedient servant.¹⁴⁸

With respect to children, the traditional rule is that the domicile of legitimate children is the same as their father's.¹⁴⁹ Even those states which permit a married woman to have a separate domicile from her husband appear to retain this rule with respect to the child's domicile.¹⁵⁰ The Equal Rights Amendment would not permit this result.

147. See Annot., 29 A.L.R.2d 474 (1953), citing cases from 29 states which held that a wife's refusal to follow her husband to a new domicile is desertion by her and grounds for divorce proceedings.

148. KANOWITZ, *supra* note 2, at 52. See also H. CLARK, DOMESTIC RELATIONS 151 (1968), who concludes,

Therefore, the correct principle is that the wife is able to acquire a separate domicile of choice whenever she lives apart from her husband, regardless of the circumstances.

149. MADDEN, *supra* note 144, at 453. Illegitimate children follow the domicile of their mothers.

150. The law on children's domicile is confused because the states have failed to integrate the statutes removing women's civil disabilities with those which determine children's domicile. Thus the provisions of Arkansas law defining a woman's domicile as independent from that of her husband, ARK. STAT. ANN. §§ 34-1307 to -1309 (1962), enacted in 1941, did not affect Arkansas' adherence to the common law rule "that the last domicile of the deceased father of an infant constitutes his legal domicile. . . ." Bell v. Silas, 223 Ark. 694, 268 S.W.2d 624 (1954). The impact of Wisconsin's 1965 law titled "Women to have equal rights," WIS. STAT. ANN. § 246.15 (Supp. 1970) on the law of children's domicile has not yet been judicially determined. The most recent Wisconsin case on the subject, Town of Carlton v. State Dept. of Public Welfare, 271 Wis. 465, 74 N.W.2d 340 (1956), followed the traditional rule, embodied in Wisconsin's public assistance statute, that "the domicile of a minor child . . . is that of its father." 271 Wis. at 469. Cf. ALASKA STAT. ANN. § 25.15.110 (1962) (removing women's civil disabilities) as

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Either by legislative action or judicial determination, a state would have to devise a sex-neutral basis for determining the child's domicile. The most reasonable domicile would be the place the child actually lives most of the time. If the family lives together but one of the parents is domiciled in a separate place, the child's domicile should be the place of family residence. If the parents live apart, then the child's domicile should be the domicile of the parent with whom he or she lives most of the time. Alternatively, the state could allow the child to determine his or her own domicile on the basis of where he or she actually lives or works, if apart from both parents.

3. *Rights of Husbands and Wives Inter Se*

The reluctance of courts to interfere directly in an ongoing marriage relationship is a standard tenet of American jurisprudence.¹⁵¹ As a result, legal elaboration of the duties husbands and wives owe one another has taken place almost entirely in the context of the breakdown of the marriage—either voluntary breakdown through separation, desertion, or divorce, or involuntary breakdown through incapacitation or death. Any legal changes required by the Equal Rights Amendment are thus unlikely to have a direct impact on day-to-day relationships within a marriage, because the law does not currently operate as an enforcer of a particular code of relationships between husband and wife.

a. *Rights of Consortium.* One of the law's most comprehensive efforts to define the rights and obligations of the partners to a marriage relationship occurs in personal injury actions, after one or the other spouse has been seriously incapacitated. In order to instruct the jury as to the proper standards for awarding damages, the judge must define what benefits the plaintiff should have expected from his or her now incapacitated spouse. At common law these standards were rigidly defined and totally male-oriented. A man had a right to recover damages for loss of his wife's services when she was injured by intentional or negligent action. In time, a husband's rights of consortium were defined to include love, affection, companionship, society, and sexual relations. A woman, by contrast, had no right to sue for loss of her husband's services, since in theory, he provided none.¹⁵²

compared with ALASKA STAT. ANN. § 25.05.040 (1962) (giving fathers preference in child custody).

151. This reluctance received a constitutional foundation in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

152. This background is reviewed in *Karczewski v. Baltimore & Ohio R.R.*, 274 F. Supp. 169, 171 (N.D. Ill. 1967).

The Equal Rights Amendment would not permit men to have a greater right than women to recover for loss of their spouse's services and companionship. Courts in many states have already extended to women the right to sue for loss of consortium, although some courts continue to uphold this differential between men's and women's rights.¹⁵³ The Equal Rights Amendment would settle the current uncertainty and disagreement among the states by requiring them all to grant women the same right to sue that men now have.

More fundamentally, however, the Equal Rights Amendment would prohibit enforcement of the sex-based definitions of conjugal function, on which the discriminatory consortium laws are based. Courts would not be able to assume for any purpose that women had a legal obligation to do housework, or provide affection and companionship, or be available for sexual relations, unless men owed their wives exactly the same duties. Similarly, as discussed more fully below, men could not be assigned the duty to provide financial support simply because of their sex.

b. *Allocation of The Duty of Family Support between Husband and Wife.* In all states husbands are primarily liable for the support of their wives and children, although the details of this liability and the possible defenses vary. A wife may be liable for supporting her husband in many states, but generally only if the husband is incapacitated or indigent. In most states the mother is liable for support of the children only if the father refuses or fails to provide for their support.¹⁵⁴

Criminal nonsupport laws are the legal system's most heavy-handed technique for enforcing the husband's current duty of support. Nonsupport was not an indictable offense at common law.¹⁵⁵ But criminal

153. See cases collected in *Karczewski v. Baltimore & Ohio R.R.*, 274 F. Supp. 169, 172 n.2 (N.D. Ill. 1967), and *Gates v. Foley*, 247 So. 2d 40, 42 n.1 (Fla. 1971). The first case to extend the right to sue for loss of consortium to women was *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950). Cases striking down the traditional discrimination against women on the grounds that it denied equal protection of the laws include *Owen v. Illinois Baking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966) and *Karczewski v. Baltimore & Ohio R.R.*, *supra*. *Contra*, *Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968).

154. The support laws also favor male children in seven states, since the right to support is terminated when the child reaches the age of majority, 39 AM. JUR. *Parent and Child* §§ 35, 40 (1942), and this age is set higher for males than for females. The following statutes set age of majority at 18 for females and 21 for males: ARK. STAT. ANN. § 57-103 (1947); IDAHO CODE ANN. § 32-101 (1963); NEV. REV. STAT. § 129.010 (1963); N.D. CENT. CODE § 14-10-01 (1960); OKLA. STAT. ANN. tit. 15 § 13 (1966); S.D. COMP. LAWS ANN. § 26-1-1 (1967); UTAH CODE ANN. § 15-2-1 (1953). The implicit premise of these laws—that girls will be or should be married by the time they are 18 and no longer dependent on parents' support—is obviously improper under the Equal Rights Amendment. The considerations involved in equalizing the ages would be the same as for the minimum marriage age, discussed at pp. 938-39 *supra*.

155. R. PERKINS, CRIMINAL LAW 604 (1969).

statutes in all but three states now penalize a man's desertion or non-support of his wife, and all American jurisdictions set criminal penalties for nonsupport of young children.¹⁵⁶ While these laws typically penalize either parent who fails to provide support for a minor child, the duty of interspousal support is placed solely on the man.¹⁵⁷

The child-support sections of the criminal nonsupport laws would continue to be valid under the Equal Rights Amendment in any jurisdiction where they apply equally to mothers and fathers. However, the sections of the laws dealing with interspousal duty of support could not be sustained where only the male is liable for support. Applying rules of narrow construction of criminal laws, courts would have to strike down nonsupport laws which impose the duty of support on men only. Legislatures might decide not to re-enact any husband-wife criminal nonsupport laws. Criminal sanctions against the husband are widely recognized as poor compensation for a wife's unpaid domestic labor and discriminatory treatment against her in the labor market; a legislature might choose to use its resources for a more direct attack on these problems. Alternatively, a state legislature could adopt a law which makes no distinctions on the basis of sex, like the Model Penal Code's nonsupport provision.¹⁵⁸

With regard to civil enforcement of support laws, courts could take a more flexible approach. The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex. However, a court could equalize the civil law by extending the duty of support to women. With regard to child support this is already the rule in Iowa, where father and mother are under the same legal duty to support the children.¹⁵⁹

Alarmists claim that the Equal Rights Amendment would change the institution of the family as we know it by weakening the husband's duty of marital support in an ongoing marriage. This concern is based on a misunderstanding of the role laws about support actually play. Many courts flatly refuse to enter a support decree when the husband and wife are living together. In most such cases the husband, as head of the family, is free to determine how much or how little of his property his wife and children will receive.¹⁶⁰

156. See, e.g., MODEL PENAL CODE § 207.14, Comment 2 at 189 (Tent. Draft No. 9, 1959).

157. E.g., UNIFORM DESERTION AND NONSUPPORT ACT, 10 Uniform Laws Annotated 1 (1922).

158. "A person commits a misdemeanor if he persistently fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child, or other dependent." MODEL PENAL CODE § 230.5 (Proposed Official Draft, 1962).

159. *Picht v. Henry*, 252 Iowa 559, 107 N.W.2d 441 (1961).

160. CLARK, *supra* note 148, at 185-86.

The Equal Rights Amendment would *not* require mathematically equal contributions to family support from husband and wife in any given family. A functional definition of support obligations, based on current resources, earning power, and nonmonetary contributions to the family welfare, would be permissible and practical under the Equal Rights Amendment, so long as the criteria met the tests of reasonable classification described above in Part III(C).¹⁶¹ If husband and wife had equal resources and earning capacity, neither would have a claim for support against the other. However, if one spouse were a wage earner and the other spouse performed uncompensated domestic labor for the family, the wage-earning spouse would owe a duty of support to the spouse who worked in the home. Creating in each spouse equal liability for support might give creditors an advantage in some instances where they would not currently be able to reach the wife's resources. If this extra liability created hardship for families, the legislature could make rules limiting the extent of creditors' access to a family's resources.

c. *Ownership of Property.* The law has attempted to recognize women's contribution to the family by giving each spouse an interest in property acquired during the marriage. Two different systems have been adopted in the United States for distributing property rights within a family—the community property system and the common law system. In both systems the woman's right matures primarily upon separation or death of her spouse. As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment.

(1) *Community Property.* In the eight community property states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—property acquired by each spouse during the marriage is owned in common by both husband and wife.¹⁶² This system is sometimes championed by advocates of women's rights because it gives a housewife who earns no independent income a legal share in the family property.¹⁶³ However, in all the community states, except Texas

161. See the discussion at p. 899 *supra*.

162. Property acquired by gift, bequest, devise, or descent is generally excepted and becomes the separate property of the spouse by whom it was acquired, as is property owned by either spouse at the time of marriage. MADDEN, *supra* note 144, at 131-32.

163. But for an attack by a women's rights organization on one aspect of the community property system, see brief amicus curiae submitted in *Perez v. Campbell*, 421 F.2d 619 (9th Cir. 1970), *cert. granted*, 400 U.S. 818 (1970), *leave to file brief amicus curiae granted*, 400 U.S. 989 (1971) (challenging the suspension of an Arizona woman's driver's license and car registration for debts arising from an accident while her husband was driving the community car). See also *Mitchell v. Commissioner*, 430 F.2d 1 (5th Cir.

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and Washington, the husband has power of management and control over the community property; and in some states he can assign, encumber or convey the property without his wife's consent.¹⁶⁴ Thus, in some of the community property states a working wife may be put in the position of a woman before passage of the Married Women's Property Acts: she may lose control of her own earnings to her husband.¹⁶⁵

Under the Equal Rights Amendment, laws which vest management of the community property in the husband alone, or favor the husband as manager in any way, would not be valid.¹⁶⁶ In the absence of new legislation, the courts would leave decisions about disposition of the community property to be made jointly by husband and wife. This would be consistent with the general judicial preference to allow married couples to work matters out between themselves.

Legislatures might prefer to follow the example of the recent amendment of the Texas community property law. The new Texas law provides that

each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person.¹⁶⁷

Rather than leaving decisions about the community property to husband and wife together, this rule would give the spouse who had earned or been given property the power to dispose of it. This rule obviously favors the wage-earning spouse, who in most instances under current conditions will be the man. Thus it would require scrutiny as a rule neutral on its face, which falls more heavily on one sex than the

1970); *cert. granted sub nom.* United States v. Mitchell, 400 U.S. 1008 (1971) (woman's liability for husband's federal income tax).

164. MADDEN, *supra* note 144, at 135.

165. Washington and Texas give the wife control over her earnings. WASH. REV. CODE ANN. 26.16.140 (1961); TEXAS REV. CODES ANN., Family Code, tit. 1, § 5.22 (Pamphlet, 1969). California has modified the rule to allow the wife to spend her earnings "for valuable consideration" without the husband's consent. CAL. CIV. CODE § 171c (West 1954), reenacted as CAL. CIV. CODE § 5124 (West 1970). In four states, the wife's earnings are separate only if she is living separately. ARIZ. REV. STAT. ANN. § 25-213(c) (1956); IDAHO CODE ANN. § 32-909 (1963); NEV. REV. STAT. § 123.180 (1963); N.M. STAT. ANN. 57-3-7 (1962). See also LA. CIV. CODE ANN. Art. 2399 (West 1952).

166. Similarly, laws which give the husband greater testamentary power over the community property would also fall. For example, in New Mexico, if the wife dies first the husband gets all the community property, but if the husband dies first, the wife has a legal right to bequeath only half the community property, the rest to be distributed as the husband decrees in his will. N.M. STAT. ANN. §§ 29-1-8 (1953), 29-1-9 (Supp. 1969). This law would clearly violate the Equal Rights Amendment. The inequality could be resolved either by giving the wife all the community property if the husband dies first, or by limiting the surviving husband's share to one half the community property as the wife's share is now limited. The latter is more consistent with the practice in the common law states.

167. TEXAS REV. CODES ANN., Family Code, tit. 1, § 5.22 (Pamphlet, 1969).

other.¹⁶⁸ The Texas law also states that property of one spouse which is mixed or combined with property of the other spouse is subject to the joint control of husband and wife unless they agree otherwise. This part of the law would certainly be valid under the Equal Rights Amendment.

(2) *Common Law Ownership*. The other forty-two states have a common law basis for distributing marital property. However, Married Women's Property Acts in every state have modified the harsh common law principles that gave the husband complete control over his wife's property and the products of her labors. With certain exceptions these statutes give a woman the right to control property she owned before marriage as well as property she earns or receives by gift or devise during marriage.¹⁶⁹ Except for qualifications relating to the right of a surviving spouse to inherit, therefore, each spouse now owns his or her separate property free of legal control of the other spouse.

The Married Women's Property Acts did not automatically abolish the common law estates of dower and curtesy, but today most states have abandoned these cumbersome devices for protecting the interests of widows and widowers, and others have modified them substantially. In their place, the states have substituted other forms of protection of a marital share of the property of one or both spouses. All states except North Dakota and South Dakota give the woman a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate.¹⁷⁰ The widow's allowance or family allowance, homestead, and limitation on gifts to charity are other devices to protect a surviving spouse against complete disinheritance.

Where these devices give the surviving husband rights equal to the surviving wife, they would be valid under the Equal Rights Amendment.¹⁷¹ In the many states, however, where the wife still has a protected position, the discriminatory laws would either be invalidated or

168. See the discussion in Part III (C), at p. 899 *supra*. The Texas law creates a situation similar to the rule in common law jurisdictions concerning control of property, and would be upheld if the common law system were upheld.

169. In a few states a married woman must still get her husband's permission to convey her own land. I POWELL, REAL PROPERTY ¶ 118 (1949). An occasional court grants the husband control of the family home, even if the wife owns the property, by virtue of his position as head of the household. KANOWITZ, *supra* note 2, at 59. The uncompensated value of a housewife's labor is not considered property under these statutes.

170. See W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 21-24 (1960).

171. The Uniform Probate Code, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, gives a "surviving spouse" an elective share of one-third in the decedent's estate. UNIFORM PROBATE CODE § 2-201.

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extended. Where a legal device has proved to be a useful protection, legislatures would probably be inclined to extend its coverage to men, but where the technique has provided little real protection, the legislature could take the opportunity for review provided by the Equal Rights Amendment to revise or repeal the law.

d. *Grounds for Divorce.* Professor Leo Kanowitz points out that "there is almost an air of unreality about the enumeration of specific grounds of divorce found in the statutes of all the states."¹⁷² This is because the great mobility of middle class Americans permits them to go to a state which has liberal grounds for divorce, or abroad, when they want to dissolve a marriage. In addition, a high proportion of couples seeking divorce agree to allege as fictions the requisite grounds for divorce. Furthermore, divorce laws have typically been written in terms that make sense only to an ongoing marriage, permitting divorce if, and only if, a fundamental element of the marriage compact has been violated.

Recognizing these factors, as well as the unreasonableness of permitting divorce only for certain limited and specific reasons, proponents of legislative reform recommend evaluating the overall health of the marriage rather than pinning particular guilty action on one or the other of the spouses. The Uniform Marriage and Divorce Act, adopted by the National Conference of Commissioners on Uniform State Laws, provides for a decree of separation or divorce to be granted upon a finding that "the marriage is irretrievably broken."¹⁷³ California currently permits divorce on a finding of irreconcilable differences between the parties.¹⁷⁴ North Carolina, Ohio, and the District of Columbia permit a divorce after voluntary separation for a year.¹⁷⁵ Nevertheless, the statutory grounds for divorce which remain in effect in most states are of concern because they still control in contested divorce situations, because they affect the economic and personal relations of the parties even in consent divorces, and because there is evidence that they cause a disproportionate amount of difficulty to poor people.¹⁷⁶

In the past many grounds for divorce were highly sex discriminatory; today only a few apply solely to one sex or the other. These are non-

172. KANOWITZ, *supra* note 2, at 95.

173. UNIFORM MARRIAGE AND DIVORCE ACT § 302.

174. CAL. CIV. CODE § 4506(1) (West 1970).

175. N. C. GEN. STAT. § 50-6 (1966); OHIO REV. CODE § 3105.01(B) (Baldwin 1960); D. C. CODE ANN. § 16-904(a) (1967). *See also* the Citizens' Advisory Council's recommendation that lapse of time be the only substantial requirement for divorce. REPORT ON FAMILY LAW 36-37.

176. LEVY, *supra* note 135, at 79.

age,¹⁷⁷ pregnancy by a man other than husband at time of marriage,¹⁷⁸ nonsupport,¹⁷⁹ alcoholism of husband if and only if accompanied by wasting of his estate to the detriment of his wife and children,¹⁸⁰ wife's unchaste behavior (without actual proof of adultery),¹⁸¹ husband's vagrancy,¹⁸² wife's absence from state for ten years without husband's consent,¹⁸³ wife's refusal to move with husband without reasonable cause,¹⁸⁴ wife a prostitute before marriage,¹⁸⁵ husband a drug addict,¹⁸⁶ indignities by husband to wife's person,¹⁸⁷ and wilful neglect by husband.¹⁸⁸

Except for nonsupport and pregnancy, all the sex discriminatory grounds for divorce listed above are anachronisms, surviving in only one or two states, and are not deserving of extended discussion here. In each instance, a court could invalidate such a provision without doing any serious harm to the overall structure of the state's divorce law. On the other hand, the court could also extend the law to the opposite sex without risking serious criticism that it was usurping legislative authority. Even without the pressure of the Equal Rights Amendment, these provisions are likely to be dropped or extended to the opposite sex in the course of divorce law reform.

Of the thirty states which allow a woman a divorce for nonsupport, only two—Arkansas and North Dakota—give a husband whose wife has failed to support him a cause of action.¹⁸⁹ This disparity is a reflection of the sex bias in support laws, described above.¹⁹⁰ Like the duty of

177. See the discussion of differential age of consent at pp. 938-39 *supra*.

178. A ground for divorce in at least thirteen states: Alabama, Arizona, Georgia, Iowa, Kentucky, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Tennessee, Virginia, and Wyoming. See, e.g., N.C. GEN. STAT. § 50-5(3) (1966); VA. CODE ANN. § 20-91(7) (Cum. Supp. 1970).

179. A ground for divorce in thirty states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Idaho, Indiana, Kansas, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming. REPORT ON FAMILY LAW 66. See, e.g., CAL. CIV. CODE ANN. § 105 (West 1954); MASS. GEN. LAWS ANN. ch. 208, § 1 (1969).

180. Kentucky only. KY. REV. STAT. § 403.020(3)(a) (1960). The husband can get a divorce for his wife's alcoholism without any qualifications.

181. Kentucky only. KY. REV. STAT. § 403.020(4)(c) (1960).

182. Missouri and Wyoming. MO. ANN. STAT. § 452.010 (1949); WYO. STAT. ANN. § 20-38, *Ninth* (1957).

183. New Hampshire only. N.H. REV. STAT. ANN. § 458-7, XII (1955).

184. Tennessee only. Wife must remain wilfully absent for two years. TENN. CODE ANN. § 36-801(8) (1955).

185. Virginia only. VA. CODE ANN. § 20-91(8) (Cum. Supp. 1970).

186. Alabama only. ALA. CODE tit. 34 § 20(6) (1959).

187. Tennessee only. TENN. CODE ANN. § 36-802 (1955).

188. Montana only. MONT. REV. CODES ANN. § 21-115 (1967).

189. ARK. STAT. ANN. § 34-1202, *Ninth* (Cum. Supp. 1969); N.D. CENT. CODE § 14-05-07 (1960).

190. See the discussion at p. 945 *supra*.

support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only, or else extended to the wife where the husband was without resources and the wife had the financial capacity to support him.

The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics tests. As with paternity laws, the argument can be made that the ease of identifying the mother of a child, as opposed to the difficulty of identifying the father, is a kind of unique physical characteristic which justifies different rules regarding the relationship of mothers and fathers to illegitimate children. However, no reason exists for distinguishing between the duties and obligations of the mother and the father when the father of an illegitimate child has acknowledged paternity or has been adjudged the father in a paternity proceeding. Furthermore, the divorce laws are not based primarily upon the physical act of giving birth but upon other considerations. The laws derive, at least in major part, from the fact that any child born of a woman during marriage is presumed to be her husband's child. Whether the husband claims the child or not, the law imposes on him the duty to support the child and gives the child his name. In this respect the law places an unequal burden on the husband, for his wife receives no corresponding obligations to support or nurture any children her husband may conceive. Since the Equal Rights Amendment would require men and women to bear equal responsibility for the support and nurture of their children, it eliminates most of the justification for giving men alone this ground of divorce. The Equal Rights Amendment would permit resolution of the disparity either by giving a woman a claim for divorce if, at the time of marriage, she did not know that her husband had impregnated another woman, or by abolishing the ground altogether.

e. *Alimony*. Alimony following divorce involves issues similar to those discussed above in connection with support laws. However, a different set of laws and rules is involved. In jurisdictions where fault is still central to divorce proceedings, alimony awards are closely linked to the judicial determination of fault.¹⁹¹ More than one-third of the states authorize divorce courts to grant alimony to either spouse, but

191. The functions and purposes of alimony are summarized in CLARK, *supra* note 148, at 441-42.

the remaining jurisdictions permit alimony awards to the wife only.¹⁹²

The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives. This result is consistent with the recommendations of Robert Levy to the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, who concludes,

[T]he distinction [permitting alimony for wives but not husbands] is an historical idiosyncrasy; there is no principled reason for maintaining the distinction between husbands and wives; almost all recent commentators and official studies of divorce-property doctrines have recommended that the distinction be abolished.¹⁹³

Alimony laws could be written to grant special protection to a spouse who had been out of the labor force for a long time in order to make a non-compensated contribution to the family's well-being. Similarly the laws could provide support payments for a parent with custody of a young child who stays at home to care for that child, so long as there was no legal presumption that the parent granted custody should be the mother.¹⁹⁴ In short, as long as the law was written in terms of parental function, marital contribution, and ability to pay, rather than the sex of the spouse, it would not violate the Equal Rights Amendment.

The maintenance provisions of the Uniform Marriage and Divorce Act serve as an example of the kind of law which would be valid under the Equal Rights Amendment. The Act provides for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for his reasonable needs and is unable to support himself through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the parent not seek employment outside the home. The amount and duration of payments for maintenance are to be determined after the court considers the financial resources of the party seeking maintenance, the time necessary to acquire sufficient training to enable the party to find appropriate employment, the standard of living established during the marriage, the duration of the marriage, the age and physical and emotional condition of the spouse seeking

192. See REPORT ON FAMILY LAW 7.

193. LEVY, *supra* note 185, at 147.

194. See for an example of this assumption, Family Law Committee, Connecticut Bar Association, *Proposal for Revision of the Connecticut Statutes Relative to Divorce*, 44 CONN. BAR J. 411 (1970). Section 18 provides that when assessing alimony, "in the case of a mother to whom the custody of minor children has been awarded, the desirability of the mother securing employment" should be a consideration. *Id.* at 429 (emphasis added).

maintenance, and the ability of the spouse from whom maintenance is sought to meet his or her own needs while making maintenance payments.¹⁹⁵

f. *Custody of Children.* At common law the father, if living, was the natural guardian of his child and as such was nearly always entitled to custody of the children in case of separation or divorce.¹⁹⁶ Some states, including California and Utah, changed this by statute which prefers the mother if the child is young.¹⁹⁷ Others, including Missouri, Florida, Minnesota, New York, and Colorado, give both spouses equal right to custody of the children.¹⁹⁸ In most states there is no statute favoring one parent or the other; rather, preference for the mother or father exists as a result of judicially created presumptions in favor of the mother for girls and young children and in favor of the father for older boys.¹⁹⁹

The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent. Given present social realities and subconscious values of judges, mothers would undoubtedly continue to be awarded custody in the preponderance of situations, but the black letter law would no longer weight the balance in this direction.

4. Summary

The present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles for men and women with respect to family life. Changing social attitudes and economic experiences are already breaking down these rigid stereotypes. The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex. Most of the legal changes required by the Amendment would leave couples free to allocate privileges and responsibilities between themselves according to their own individual

195. UNIFORM MARRIAGE AND DIVORCE ACT, §§ 308(a)-(b).

196. See MADDEN, *supra* note 144, at 456-57; CLARK, *supra* note 148, at 584. The father could be deprived of custody only when he was shown to be corrupt or to be endangering the child.

197. CAL. CIV. CODE ANN. § 4600(a) (West 1970); UTAH CODE ANN. § 30-3-10 (1953).

198. MO. STAT. ANN. § 452.120 (1952); FLA. STAT. ANN. § 61.13 (West 1969); MINN. STAT. ANN. § 518.17 (1969); N.Y. DOM. & REL. LAW § 70 (McKinney 1964); COLO. REV. STAT. 46-1-5(7) (1967).

199. See CLARK, *supra* note 148, at 585. In ninety per cent of custody cases the mother is awarded the custody. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101, 102 (1962).

preferences and capacities. By and large these changes could be made by courts in the process of adjudicating claims under the Amendment. In any area where the legislature felt that sudden extension of the law to men and women alike would cause undue hardship, it could pass new legislation basing marital rights and duties on functions actually performed within the family, instead of on sex.

C. *Criminal Law*

The Equal Rights Amendment will not affect most criminal laws because statutory definitions of criminal activity make men and women equally liable for most offenses; that is, men and women can commit and be punished for most crimes equally.²⁰⁰ However, in the area of sexual activity the norm changes. Sex differentiation and sex discrimination pervade laws about overt sexual behavior and behavior with sexual overtones, reflecting the confluence of social stereotypes about gender and sexuality.²⁰¹ Many of the laws, such as seduction laws, statutory rape laws, and laws prohibiting obscene language in the presence of women, embody a stereotype of women as frail and weak-willed in relation to sexual activity. Others, such as the prostitution and "manifest danger" laws, display a contradictory social stereotype: women who engage in certain kinds of sexual activity are considered more evil and depraved than men who engage in the same conduct. The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social stereotypes. Courts would generally strike down these laws rather than extend them to men because of the rule of strict construction of penal laws, described above.²⁰² Legislatures, of course, would be able to extend or re-enact any laws about sex offenses to apply equally to men and to women. A few types of criminal statutes, most notably rape laws, may be justified as deriving their sex bias from physical realities. Here the courts would closely scrutinize the laws to determine whether they fall within the scope of the exception for unique physical characteristics.

200. The Equal Rights Amendment would forbid sex discriminatory enforcement just as the Fourteenth Amendment forbids enforcement which discriminates on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). However, such attacks involve very difficult problems of proof and are not discussed here. See, for a discussion of the recent rapid rise in the crime rate of women, and of changing law enforcement attitudes toward women offenders, Roberts, *Crime Rate of Women Up Sharply Over Men's*, N.Y. Times, June 13, 1971, at 1, col. 1.

201. The proportion of all women arrested who are arrested for sex offenses, including forcible rape and prostitution, is nearly four times the proportion of all arrested men. F.B.I., U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 124 (1967).

202. See the discussion in Part IV(B), at p. 915 *supra*.

1. *Sexual Assaults*

Rape laws undoubtedly raise one of the most difficult problems under the Equal Rights Amendment because they deal with such a serious offense and because, though apparently simple, they involve two very different kinds of sex distinction. As most commonly defined in the laws of the states, as well as in the Model Penal Code, rape is the forcing of sexual intercourse by a man on a woman, without her consent.²⁰³ This definition involves two kinds of sex differentiation: only a man can be found guilty as a perpetrator of rape, and only a woman can be the victim of rape.²⁰⁴ These distinctions are usually not made explicit in the language of the statutes, but their interpretation is central to the treatment of rape laws under the Equal Rights Amendment.

Insofar as rape is defined as penetration into the vagina by the penis, courts could uphold forcible rape laws which limit liability to men as based on a unique physical characteristic of men.²⁰⁵ Laws which define rape as forced sexual intercourse could also be sustained if a court defined sexual intercourse as an act done only by a man and a woman together, and if the statute clearly and appropriately defined women as the sole victims of rape.²⁰⁶ Using the criteria described in Part III for determining whether a law bears the necessary close relationship to a unique physical characteristic,²⁰⁷ a court could conclude that, on

203. See, e.g., MODEL PENAL CODE § 213.1 (Proposed Official Draft, 1962).

204. The language of some rape statutes suggests that either a man or a woman may be guilty of rape. Even these statutes, however, generally preclude the possibility of charging a woman with rape by defining sexual intercourse as the penetration of a man's penis into a woman's vagina, or, in some cases, her mouth or anus. Furthermore, a Yale Law Journal study in 1952 found no reported case in which a woman had been convicted of rape as a principal. See Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55 n.2 (1952). For the general rule that rape can be committed by a male only, see 75 C.J.S. *Rape* § 6 (1952).

In all states, both by common law and statute, only women can be victims of forcible rape; see 75 C.J.S. *Rape* §§ 1, 2, 7 (1952). Forcible sexual assault on an adult male is not defined as rape. Many states have enacted additional laws penalizing nonconsensual sexual assaults on men, but none of these laws bears the extreme penalties of the standard rape laws. A few states severely penalize sexual relations with children of both sexes, but force is not an essential element of those statutes; they are discussed at p. 939 *infra*, in conjunction with statutory rape.

205. Statutes which define rape as "penetration" mostly fail, with Victorian delicacy, to specify what instruments of penetration are included. The common law antecedents of the rape statutes, as well as contemporary case law, indicate that courts have limited the application of rape laws to penetration by a man's penis. However, penetration of a woman's vagina may be made by many instruments other than a man's penis, and with equally devastating consequences for the victim's psyche. Whether or not pregnancy has resulted from the rape is immaterial under current laws; similarly, sterility is not a defense for a man accused of rape. Thus a court might conclude there is no rational reason for differentiating such assaults, of which women are as capable as men, and hold the rape laws invalid unless they extend to women assailants as well as men.

206. The MODEL PENAL CODE, § 213.1 (Proposed Official Draft, 1962) adopts this definition of rape.

207. See the discussion in Part III(B), at p. 895 *supra*.

balance, the law should be sustained. Among other things, the court might find that rape is an extremely traumatic event for the victim; that most men are capable of penetration, and therefore, rape; that a major proportion of sexual assaults consist of sexual intercourse forced by men; that penetration by a man's penis carries with it the possibility of unwanted pregnancy for the victim and forcible penetration carries high danger of injury to the victim; that a criminal penalty is an appropriate way of deterring rape; and that, accompanied by procedural and substantive rights, the law is sufficiently narrow and specific in its scope to be upheld.

Similarly, insofar as a court could find that the rape laws are intended to give special protection from assault to women's vaginas, it could sustain the laws even though their protection is limited to women. A court would conduct an inquiry analogous to that described above for determining whether, under the unique physical characteristics tests, the rape laws could properly be limited to female victims. All or nearly all women's genitals differ from all or nearly all men's genitals in that they can be penetrated in an act of sexual assault against the victim's will. Rape laws could thus be sustained as a legislative choice to give one part of the body (unique to women) special protection from physical attack. By contrast, the statutes which include penetration "per anum and per os" in the definition of rape, could not justifiably be limited to female victims because no physical characteristic unique to women is being protected by these laws. A court could choose between invalidating these broader rape laws or else limiting them to penetration of a woman's genitals. In the case of such a serious offense, courts would probably choose to retain the central and valid portion of the law and invalidate only the part referring to "penetration per anum and per os." Alternatively, the legislature could extend the laws to cover the designated assaults on all persons, regardless of sex.

Rape is only one of a number of nonconsensual sexual acts which are penalized throughout the United States.²⁰⁸ Laws governing

208. A few states still have statutes which extend the concept of "sexual assault" to the use of obscene or insulting language in the presence of a woman. For instance, Alabama penalizes

any person who in the presence or hearing of any girl or woman, uses abusive, insulting, or obscene language.
ALA. CODE, tit. 14, § 11 (1958). See also MICH. COMP. LAWS ANN. § 750.337 (1968); ARIZ. REV. STAT. § 13-377 (1956). A variation on the same theme is a Georgia libel law which forbids anyone to utter or circulate "any defamatory words or statements derogatory to the fair fame or reputation for virtue of any virtuous female," GA. CODE ANN. § 26-2104 (1953). Such laws, based on a stereotyped view that women are morally pure, yet morally fragile, rather than on any unique physical characteristic of women which actually distinguishes them from men, would be invalidated under the Equal Rights Amendment.

such offenses are based on two related sets of concerns. The first is that unwanted sexual contact may be imposed on a person in ways ranging from physical force and threats to more subtle coercion in the form of deception and abuse of positions of trust and authority. The second range of concerns is that particular groups in the population may be especially susceptible to such sexual coercion. By merging these two aspects of the problem of sexual assault, traditional laws provide highly uneven and irrational coverage permeated by sex discrimination.

With a few notable exceptions, laws which punish sexual intercourse per se as a constructive assault rest on the premise that the female party is incapable of giving meaningful consent.²⁰⁹ Best known among these are the statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law, frequently sixteen.²¹⁰ Other laws, covering more specific situations, prohibit men from having sexual intercourse with female wards, patients, and students.²¹¹ A related series of laws explicitly prohibit men from obtaining women's consent to sexual intercourse through misrepresentation, deception, or fraud.²¹²

These laws suffer from a double defect under the Equal Rights Amendment. First, they single out women for special protection from sexual coercion, even where men in similar circumstances are equally in need of protection; in this sense the laws are "underinclusive."²¹³

209. The few statutes which declare young or helpless males incapable of consent are: COLO. REV. STAT. ANN. § 40-2-25(1)(k) (1963) (intercourse with male under 18 solicited by female); ILL. ANN. STAT. ch. 38, §§ 11-4 and 11-5 (Smith-Hurd 1964) (indecent liberties with a child and contributing to the delinquency of a child, regardless of sex); IND. ANN. STAT. § 10-4203 (1956) (intercourse with male over 14 knowing he is epileptic, imbecile, feeble minded or insane); KY. REV. STAT. § 435.100 (1970) (carnal knowledge of male child under 18); MICH. COMP. LAWS ANN. §§ 750.339-340 (1968) (debauching a male under 15); WASH. REV. CODE ANN. § 9-79.020 (1961) (sexual intercourse with male under 18).

210. See, e.g., 44 AM. JUR. *Rape* § 17 (1942). Some states make an exception for intercourse with women who are not virgins, e.g., FLA. STAT. § 794.05 (1961).

211. See, e.g., MICH. COMP. LAWS ANN. §§ 750.342, 750.341 (1968) (prohibiting intercourse with female wards and patients in mental institutions); D.C. CODE ENCYCL. ANN. § 22-3002 (1967) (penalizing male teachers who have sexual intercourse with any woman currently their student).

212. Seduction laws penalize men for inducing unmarried women to engage in sexual conduct by a promise, usually of marriage. See, e.g., N.J. STAT. ANN. §§ 2A: 142-1, 142-2 (1969). Michigan, like many other states, makes it a crime for a person to entice a woman under 16 away from her parents or guardian for purposes of prostitution, concubinage, sexual intercourse, or marriage. MICH. COMP. LAWS ANN. § 750.13 (1968).

213. See, e.g., the report of the Carroll County, Maryland, grand jury calling for legislation "to prevent mental and physical harm to unsuspecting, unprepared adolescents by forced, coerced or seduced sexual activity which may warp the development of such children as useful citizens to society." The report was prompted by evidence presented to the grand jury that two women elementary school teachers had seduced boys 11 and 12 years old. The grand jury concluded that the Maryland criminal code provided no statute under which the teachers could be indicted and called for state legislation "giving

To be sure, the singling out of women probably reflects sociological reality: in this society, young women, who learn both that marriage is the most important goal for them and that they may pursue it only passively, are undoubtedly more susceptible than young men to the lures of persons who want to take sexual advantage of them. Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard, and requires such statutes to be framed in terms of the general human need for protection rather than in terms of crude sexual categories.

Second, traditional laws protecting all women of a particular age or status against sexual assault are "overinclusive" to the extent that they punish sexual activity when unwanted penetration of the vagina is not involved. It might be argued that statutory rape laws and other laws which render a woman's consent inoperative should be sustained on the same theory that forcible rape laws are upheld: that the legislature wished to give special protection to young women's genital organs.²¹⁴ However, it is unlikely that such claims could withstand close court scrutiny under the unique physical characteristics tests. In particular, a court would be unable to find a close correlation between the activity being regulated (consensual sexual intercourse) and the justifying physical basis (susceptibility of the vagina to unwanted penetration).²¹⁵

male juveniles equal protection under the laws." Washington Post, Jan. 2, 1971, at 3, col. 2. The Royal Commission on the Status of Women in Canada has reached a similar conclusion. Its recent Report recommended "that the Criminal Code be amended to extend protection from sexual abuse to all young people, male and female, and protection to everyone from sexual exploitation either by false representation, use of force, threat, or the abuse of authority." REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA ch. 9, par. 42, at 374 (1970).

214. It is true that statutory rape may involve breaking the hymen, but very few states consider the victim's chastity material to the question of guilt. Moreover, statistical reports show that few statutory rape complainants are virgins. See Schiff, *Statistical Features of Rape*, 14 J. FOR. SCI. 102 (1969).

215. The law in most states presumes that a sixteen year old girl can consent to marriage (with her parents' approval), and, by implication, to sexual relations, while an unmarried girl of sixteen is legally presumed to be incapable of giving consent to a single act of sexual intercourse. However, there are no physical differences between the sexual acts involved. As discussed at pp. 938-39 *supra*, the minimum marriage age is not based on a unique physical characteristic of women. Therefore, the statutory rape law, which also deals with consensual sexual relations, cannot be justified as based on such a unique characteristic. There are, of course, social and psychological differences between marital and extramarital sexual relations, and the state may recognize them through sex-neutral legislation about extramarital sexual intercourse involving either young men or young women.

Even if it found noncoerced sexual intercourse rarely physically harmful to post-pubescent girls, a court might find that sexual intercourse is physically dangerous to girls who have not reached puberty. Upon finding such a fact situation, the court would conclude that the class of women victims is defined too broadly. If it made such a determination, a court could limit the operation of the statutory rape laws to pre-pubescent children. In the alternative, the court could strike down the law altogether because of its overbreadth and because it fails to base its sex difference upon a unique physical characteristic of women.

If invalidated, some of the laws, such as the seduction laws, which derive from outdated standards of courting and morality, would probably not be resuscitated. Upon reexamination, legislatures might decide that the existing kidnap laws or other unlawful restraint laws already penalize any serious offensive deception or decoying, and that further penalties would be duplicative. Legislatures would be free, however, to extend the laws against sexual coercion to protect men as well as women. This is particularly likely where sexual relations with pre-adolescent children are involved.²¹⁶

A slightly different problem is raised in states which set penalties for sexual activities initiated by women, as well as by men, but where different laws, standards of guilt, and penalties apply depending on whether the actor is a woman or a man. Michigan, for example, prohibits women from engaging in sexual intercourse with boys younger than fifteen.²¹⁷ But the law requires that the defendant actually knew the boy was under fifteen (the statutory rape law does not require actual knowledge of the girl's age), and the penalty is a maximum of five years, as compared with the lifetime maximum for statutory rape.²¹⁸ Aside from the forcible rape laws, whose special coverage can be justified on the basis of physical characteristics unique to men and women, the Equal Rights Amendment would require sexual assault laws to provide equal standards of guilt and penalties for men and women offenders.²¹⁹

216. Some states already have laws that protect all children, regardless of sex. For example, Illinois has merged its statutory rape law into laws prohibiting indecent liberties with any child or contributing to any child's sexual delinquency. ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd Supp. 1971) and ch. 38, § 11-5 (Smith-Hurd 1964).

217. MICH. COMP. LAWS ANN. § 750.339 (1968).

218. Compare MICH. COMP. LAWS ANN. § 750.339 with § 750.520 (1968).

219. Where a state has mirror-image statutes which penalize men and women for the same conduct, by the same standards, and with the same penalties, the laws could be upheld under the Equal Rights Amendment. For example, Michigan's identical laws prohibiting acts of "gross indecency" between two men and between two women would

Considering the variety of laws regulating nonconsensual sexual activity, ranging from rape to sexual contact, it is surprising to realize that all of them can be reduced to a few basic elements: the touching of or with genitals, by means of force or deception, and, in the case of young people, the touching of genitals by an older person. The current sexual offense laws are highly duplicative, both of one another, and of general penal laws against kidnap, assault, and battery. The great degree of overlap in these laws, as well as the many distinctions without differences, provide a fertile field for confusion; they also encourage overcharging and extreme penalties. Moreover, the particular situations with which many of the laws deal evoke strongly emotional reactions and foster legislative mandates of higher penalties than the actual act usually merits. For instance, rape is singled out from other sexual offenses and classified with murder for the purposes of sentencing. This classification helps neither the accused²²⁰ nor the victim.²²¹ Moreover, it tends to reduce the seriousness of other forms of sexual assault besides actual intercourse, which may well be equally disturbing for the victim.

The Model Penal Code has undertaken to bring together the confusing disparity of sexual offenses into a few categories structured in terms of the nature of the act, the vulnerability of the victim, and the coerciveness of the situation.²²² The Equal Rights Amendment would require legislatures in all states to reformulate at least some

not have to be invalidated; a court would not require the formality of rewriting a statute such as this, where, in effect, it already covers men and women alike. See MICH. COMP. LAWS ANN. §§ 750.338, 750.338(a) (1968).

220. The Fourth Circuit recently held that Maryland's death penalty for rape was so excessively disproportionate as to violate the Eighth Amendment's guarantee against cruel and unusual punishment. *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970).

221. Between 1960 and 1967 the number of forcible rapes known to law enforcement officials increased 61 per cent. In contrast, the proportion of forcible rapes solved by arrest of the offender decreased annually between 1965 and 1967. UNIFORM CRIME REPORTS, *supra* note 201, at 12-13.

In conjunction with the severe penalties for forcible rape, the defense of consent has developed. The existence of the consent defense (which is unique to rape) has the effect of putting the complainant on trial, for she will usually be subjected to a relentless defense examination, in an attempt to impugn her character and suggest that she actually consented to sexual attack. The consent defense and corresponding trial tactics thus have the effect of deterring women from making complaints about rape attacks; the Federal Bureau of Investigation estimates that forcible rape "is probably the most underreported crime by victims to police." UNIFORM CRIME REPORTS, *supra* note 201, at 13. As a result, some women's rights advocates have argued that women would actually be better protected if rape were prosecuted simply as aggravated assault.

222. MODEL PENAL CODE §§ 213.0-.06 (Proposed Official Draft, 1962). For instance, the Model Penal Code's crime of "sexual assault" prohibits offensive "touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying sexual desire of either party." MODEL PENAL CODE § 213.4 (Proposed Official Draft, 1962).

of their laws. While legislatures could very simply bring the laws into line with the Amendment by substituting the word "person" every time the words "female," "male," "man" or "woman" appear, hopefully they would be encouraged to re-evaluate, rationalize, and simplify this crazy-quilt area of criminal law.

2. *Consensual Sexual Relations*

Criminal laws in every state penalize some sexual liaisons, even though both partners are fully responsible for their conduct and engage in the acts voluntarily and privately. As with nonconsensual sexual conduct, legislatures have frequently linked the definition of these crimes to the sex of one or both partners.

Statutes prohibiting sodomy generally sweep in alike men and women, married and unmarried persons, heterosexuals and homosexuals.²²³ As a result, most of these statutes would not violate the Equal Rights Amendment, prohibiting as they do certain acts regardless of the identity of the actor or the circumstances of the act. A few states, however, limit liability under their sodomy statutes to males.²²⁴ Like rape, the definition of sodomy can be limited to penetration by the penis. Where sodomy is defined in this way, such that females are incapable of committing it, laws restricted to males may be sustained under the Equal Rights Amendment. However, a statute which defined sodomy more broadly, to include all oral-genital contact, would violate the Amendment if it were restricted to males.

A few adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment. Roman law defined adultery as sexual intercourse with another man's wife.²²⁵ Some states reflect this one-sided view by failing to define intercourse between a married man and a single woman as adultery.²²⁶ In Massachusetts and Oregon, an unmarried woman cannot be punished for

223. "Sodomy" is used here, as it is used in many statutes, to include both oral-genital contact and anal intercourse. In some states it also includes mutual masturbation, sexual relations with animals, and sexual contact with dead bodies.

224. See, e.g., 81 C.J.S. *Sodomy* § 1 (1953).

225. M. PLOSCOWE, *SEX AND THE LAW* 146 (1951).

226. In Indiana, adultery is defined as intercourse between a man and a married woman, while intercourse with an unmarried woman is defined as the lesser offense of fornication. *Warner v. State*, 202 Ind. 479, 175 N.E. 661 (1931). A similar discrepancy is apparent in the "unwritten law defense," which survives in some states for men. The unwritten law defense permits a man to argue in complete defense to a homicide prosecution that the man he killed was, at the time of the homicide, in the act of sexual intercourse with his wife; it is, in other words, a license to men to murder in the face of adultery. No state gives women who kill their husbands' lovers a corresponding defense. TEX. PENAL CODE, Art. 1220 (Vernon's 1961); N.M. STAT. ANN. § 40A-2-4 (1953); UTAH CODE ANN. § 76-30-9(4) (1953).

relations with a married man, although an unmarried man is criminally liable if he participates in an adulterous relationship with a married woman.²²⁷ Discrepancies like these in the liability of men and women derive from social attitudes toward the relative offensiveness of extramarital activity by men and by women. The singling out of married women's extramarital activity harks back to concepts of a married woman as the property of her husband, although common law justifications focused on the fact that a married woman's liaison might produce offspring who would have her husband's name and whom her husband would have the duty to support.²²⁸ However, the core idea in adultery is that extramarital intercourse *per se* threatens the marriage relationship. If this is the case, a court could not permit a state to set stricter penalties for a woman's extramarital activity than for a man's.

Following the rule of narrow construction of criminal statutes, courts will most likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike.²²⁹ This is especially likely since statutes regulating consensual sexual activity are also open to attack under the constitutional right to privacy in intimate sexual matters.²³⁰ However, a legislature intent on retaining criminal penalties for sodomous or adulterous conduct could easily bring the laws into line with the Equal Rights Amendment by extending them to apply equally to men and women.

3. Prostitution

At common law and still today in most parts of the United States, prostitution is, by definition, a crime committed only by women.²³¹ Even statutes neutral on their face turn out to be enforced only against

227. Both married men and married women are liable for extramarital sexual intercourse. ORE. REV. STAT. § 167.010 (1969); MASS. GEN. LAWS, ch. 272 § 14 (1932).

228. R. PERKINS, CRIMINAL LAW 377 (2d ed. 1969).

229. Cf. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970) in which a federal court invalidated Texas's entire sodomy law because of its overbreadth in extending to acts between husband and wife. The decision was vacated by the United States Supreme Court *sub nom.* *Buchanan v. Wade*, 91 S. Ct. 1222 (1971), and remanded for consideration in the light of *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971).

230. See *Griswold v. Connecticut*, 388 U.S. 479 (1965). At least two states have already repealed their laws against consensual homosexual relations. See ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1964); CONN. GEN. STAT. REV. §§ 53a-65, -75 to -77 (Supp. 1969) (effective Oct. 1, 1971).

231. See "Prostitution," BLACK'S LAW DICTIONARY 1386 (4th ed. 1951); 73 C.J.S. *Prostitution*, § 1 (1951); *Eisner v. Commonwealth*, 375 S.W.2d 825, 827 (Ky. 1964). *But cf.* D.C. CODE ENCYCL. ANN. § 22-2701 (1967). At least one state still imposes special punishment on young women who are considered "in manifest danger of falling into habits of vice." No corresponding provisions are made for young men. See CONN. GEN. STAT. ANN. §§ 17-

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women offenders.²³² Prostitution laws have been the focus of much heated controversy about the proper role of law in regulating moral or sexual behavior, and many people believe prostitution should not be criminalized at all.²³³ But more narrowly, prostitution laws have been attacked as discriminating against women. Two kinds of sex bias are written into the majority of prostitution laws: first, women who sell access to their own sexual conduct are penalized, whereas men who do the same thing are not; and, second, the prostitute, who under current psychosocial conditions is usually a woman, is penalized, whereas the patron, who is usually a man, is not.²³⁴

Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment. There is no unique physical characteristic of women which would justify outlawing prostitution when it is done by women, and not when it is done by men. Earlier beliefs that women are the carriers of venereal disease because of their sex have no scientific basis. Ideas that women who sell access to their bodies are social problems, whereas men who do the same thing are not, derive their only rationality from a social double standard which may not enter into legislative or judicial determinations under the Equal Rights Amendment. Even in the absence of the Equal Rights Amendment, recent reforms of prostitution laws have extended the coverage to men. Thus, the Model Penal Code refers to a person guilty of prostitution as "he or she."²³⁵ The New York Penal Code contains a section explicitly stating that both men and women may be guilty of prostitution.²³⁶ With the impetus of the Equal Rights Amendment, other state legislatures can be expected to move in this direction.

If prostitution laws were redefined to cover male prostitutes, then the courts would be unlikely to find a *per se* violation of the Equal Rights Amendment in the fact that prostitution laws penalize the

379, 18-65. Connecticut's statutes survived constitutional attack in *State v. Mattiello*, 4 Conn. Cir. 55, 225 A.2d 507 (1967), *appeal dismissed*, 395 U.S. 209 (1969).

232. S. Harmon, *Attitudes Toward Women in The Criminal Law Process* 5 (1970) (unpublished paper on file at Yale Law School Library).

233. Compare A. FLEKNER, *PROSTITUTION IN EUROPE* (especially at 11-14) (1914), with REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION [The Wolfenden Report] (1957). If the newly articulated constitutional right to privacy receives expanded interpretation, *see* discussion in Part III(D) at p. 900 *supra*, all regulation of prostitution, other than public health measures, may be ruled unconstitutional.

234. Men may be punished as entrepreneurs for trafficking in women or keeping a house of ill fame. They are seldom prosecuted for mere patronage of a prostitute. KANOWITZ, *supra* note 2, at 16-17.

235. MODEL PENAL CODE § 251.2 (Proposed Official Draft, 1962).

236. N.Y. PENAL LAW § 230.10 (McKinney 1967).

"seller" but not the "buyer." In general, regulating the conduct of the seller and not the buyer is a rational governmental choice, although in the case of prostitution such a choice may not make sense, even in terms of effective deterrence.²³⁷ Nevertheless, prostitution laws which penalize only the seller would be subject to judicial scrutiny as classifications which fall more heavily on one sex than the other.²³⁸ Thus, to sustain its laws, a state would bear a heavy burden of demonstrating the rationality of regulating only the seller and not the buyer in a prostitution transaction. Reformed penal laws have already begun to regulate patrons as well as prostitutes.²³⁹ It is likely, and desirable, that legislatures, in removing the sex bias from their laws, will follow this lead.

Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so it would require invalidation of laws specially designed to protect women from being forced into prostitution. In addition to many state laws of this type, the federal White Slave Traffic Act (Mann Act) prohibits the transportation in interstate commerce of

any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral purpose.²⁴⁰

Related sections of the Act also prohibit persuading, inducing, enticing, or coercing a woman to travel in interstate commerce for the above purposes.²⁴¹ Cases interpreting the Mann Act have held that a woman may be found guilty as a principal under the Act; in some circumstances she may even be convicted of agreeing to transport herself in

237. The recidivism rate for prostitution is so high that prostitution has been called "life on the installment plan." Lukas, *City Revising its Prostitution Controls*, N.Y. Times, Aug. 14, 1967, at 1, col. 2. Compare the Soviet Union's success at deterring prostitution by posting publicly the names, addresses and places of employment of the customers of prostitutes. KANOWITZ, *supra* note 2, at 17.

238. In its published statistics, the Federal Bureau of Investigation classifies "commercialized vice" together with prostitution. Even so, 30,866 women were arrested for prostitution or commercialized vice as compared with 8,878 men. This figure is particularly striking in light of the fact that the total number of men arrested in 1967 was seven times greater than the total number of women arrested. UNIFORM CRIME REPORTS, *supra* note 201, at 124.

239. See N.Y. PENAL LAW § 230.05 (McKinney 1967); CONN. GEN. STAT. ANN. PENAL CODE § 84, 1969 Public Act No. 828 (effective Oct. 1, 1971). However, New York's law penalizing the patrons of prostitutes has only rarely been enforced. Speech by Elizabeth Schneider, Yale Law School, April 29, 1971.

240. 18 U.S.C. § 2421 (1964).

241. 18 U.S.C. §§ 2422-23 (1964).

interstate commerce.²⁴² However, it is no crime to transport a man or boy in interstate commerce for the purposes set forth in the statute. Congress could easily bring the Mann Act into conformity with the Equal Rights Amendment by substituting the word "person" for the words "woman or girl" in the statute.

As prostitution laws are redefined to cover male as well as female prostitutes, a court faced with a challenge to the Mann Act might also be inclined simply to extend this law to apply to the transportation of men for illicit purposes. Under current conditions, such an extension would not subject a large number of additional people to criminal liability. However, this would disregard the legislative history and body of court decisions interpreting Congressional intent, which have placed great emphasis on the weakness of women. As late as 1960, the Supreme Court declared:

'A primary purpose of the Mann Act was to protect women who are weak from men who are bad.' *Denning v. United States*, 247 F. 463, 465. It was in response to shocking revelations of subjugation of women too weak to resist that Congress acted. See H.R. Rep. No. 47, 61st Cong., 2d Sess., pp. 10-11. As the legislative history discloses, the Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves.²⁴³

Given this background, a court might feel that extending the law to cover men would be expanding criminal liability further than Congress intended. Here, as with other criminal laws, a court would probably resolve doubts about congressional intent by striking down the law.

4. *Indeterminate Sentencing*

In addition to separate substantive law for men and women, some states have special sentencing provisions for women. These laws in effect require or permit judges to place women in a separate correctional status in which the lengths of their sentences are determined not by the judge but by correctional authorities within the limits set by statute. When women are placed in such a status, they may be subjected to longer sentences than those provided for in the substantive statute, thereby creating higher maximum penalties for women than for men convicted of the same crime.

²⁴². *United States v. Holte*, 236 U.S. 140 (1915); *but cf. Gebardi v. United States*, 287 U.S. 112 (1937).

²⁴³. *Wyatt v. United States*, 362 U.S. 525, 530 (1960).

In *United States ex rel. Robinson v. York*²⁴⁴ and *Commonwealth v. Daniel*,²⁴⁵ two indeterminate sentencing laws were successfully attacked under the Fourteenth Amendment as denying women equal protection of the laws.²⁴⁶ However, similar laws remain on the books in a number of states.²⁴⁷ Such laws, if not invalidated under the Fourteenth Amendment, would be invalidated under the Equal Rights Amendment. In general, the special laws for sentencing of women are in the form of separate additional sentencing statutes. Thus, if a court invalidated the special law for women, it would simply leave women subject to the standard sentencing laws. This was the result in *Robinson* and *Daniel*.

5. Summary

Courts faced with criminal laws which do not apply equally to men and women would be likely to invalidate the laws rather than extending or rewriting them to apply to women and men alike. As a result, legislatures would need to devote attention to revising their penal laws in order to bring them into conformity with the Equal Rights Amendment. While necessary, this should not be an unduly burdensome requirement. Proposals for reform, like the Model Penal Code, already provide models for many new laws that would eliminate impermissible sex discrimination.²⁴⁸ States such as New York, Connecticut, and Illinois, which have already reformed their criminal laws, would need to make only a few changes to bring them into line with the Equal Rights Amendment. Other states, whose laws regulating sex offenses are holdovers from Victorian or even Puritan times, may wish to revise their

244. 281 F. Supp. 8 (D. Conn. 1968).

245. 430 Pa. 642, 243 A.2d 400 (1968).

246. In *Robinson*, the court ordered the petitioner released because she had already served the statutory maximum sentence for breach of the peace and resisting arrest. The court stated that to hold her for the full three years permitted under the sentencing law for women offenders would have denied her the equal protection of the laws. In *Daniel*, appellants' cases were sent back for resentencing because the court held that Pennsylvania's law requiring judges to impose the statutory maximum on all women sentenced to the State Correctional Institution at Muncy violated the Equal Protection Clause.

247. *E.g.*, ME. REV. STAT. ANN., tit. 34, § 802 (men); §§ 853-54 (women) (Supp. 1970). Disparities also exist in the juvenile laws of several states. For instance, in New York a court can order incorrigible, ungovernable, or habitually disobedient women to be held in custody until they are 20, if they are adjudged "persons in need of supervision" (PINS); whereas, boys can be held under the PINS statute only until age 18. Since most of the commitments under the PINS law stem from activity which could not result in criminal conviction, the law imposes on women two years of extra liability for non-criminal activity. N.Y. FAMILY COURT ACT, §§ 712, 756 (McKinney 1963).

248. A few sections of the Model Penal Code are sex biased, and would be invalid under the Equal Rights Amendment; *see, e.g.*, MODEL PENAL CODE § 213.3(1)(d) (seduction).

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sex discriminatory criminal statutes as part of a broader modernization effort.

D. *The Military*

The Armed Forces have always been one of the most male-dominated institutions in our society. Only men are subject to involuntary conscription. Various regulations of the Armed Forces restrict the access of women to the military, and indeed place an absolute limit on the number permitted to serve. Women with dependent children may not enlist, while men in the same situation may do so. Certain grounds for discharge apply only to women. Numerous other forms of differential treatment pervade the military services.

It is not difficult to explain why the military is structured in this way. In the past, physical strength was essential to military success. Weapons were heavy, long marches on foot were frequent, and hand to hand fighting was common. Women were considered in most respects to be weaker than men. Women were also handicapped by pregnancy. Lack of effective contraceptive methods meant that they were frequently, if not constantly pregnant, and disease and death were not uncommon accompaniments to childbirth. Men were therefore a more reliable and mobile group. Sociological factors reinforced this "division of labor." Women were considered too delicate to be exposed to battle and its attendant pain and discomfort. They were trained to be passive, dependent and without initiative. For men, on the other hand, armed struggle was seen as a catalyst of maturity, a symbol of aggressive masculinity, a test which would "separate the men from the boys."²⁴⁹ Women who wished to fight had to disguise themselves as men.

In this country women have served in the Armed Forces with full military status only since World War II, when the need for personnel and the existence of many civilian-type jobs in the military made the utilization of women appear feasible to the Armed Forces. A Women's Auxiliary Army Corps with civilian status was created in 1942. It proved administratively unworkable, and in 1943 the Army took women under its direct command.²⁵⁰ After World War II, Congress

249. See, e.g. E. HEMINGWAY, *A FAREWELL TO ARMS* (1929); *FOR WHOM THE BELL TOLLS* (1940); N. MAILER, *THE NAKED AND THE DEAD* (1948); *WHY ARE WE IN VIETNAM?* (1967).

250. For a history of the creation of the Women's Army Corps (WAC) and its activities in World War II, see M. TREADWELL, *U.S. ARMY IN WORLD WAR II: SPECIAL STUDIES: THE WOMEN'S ARMY CORPS* (1954).

decided to keep the women's arm of the services at reduced size. The Women's Army Corps is now permitted to total only two per cent of the full strength of the services.²⁵¹

While many people look upon such restrictions on women's military service as relieving them of an unadulterated burden or evil, others feel that it would be advantageous for women to receive the training and benefits that accompany military service in this country. No one can doubt that military service has tremendous disadvantages, chief among them the danger of loss of life and the requirement of learning to kill others. Yet there are also benefits afforded the individuals who serve. The Armed Forces furnish in-service vocational and specialist training, medical care, and benefits for dependents. Veterans receive educational scholarships and loans, preference in government employment, pensions, insurance, and medical treatment.²⁵²

More subtle factors involve the effect of military service on one's self-image and on the way he or she is viewed by others. For large segments of the population, service is taken to prove that an individual has sacrificed for his or her country. He or she deserves to be taken seriously in return. As Professor Norman Dorsen has said:

[W]hen women are excluded from the draft—the most serious and onerous duty of citizenship—their status is generally reduced. The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect a belief that men who have fought for their country have a special qualification or right to wield political power and make political decisions. Women are in no position to meet this qualification.²⁵³

Having served or being liable to serve also tends to make an individual sensitive to and concerned about the country's foreign policy. Those who must carry out the decisions made in the upper echelons

251. 10 U.S.C. § 3209, which limited the authorized strength of the WAC to 2% of the authorized strength of the Regular Army, was amended in November, 1967, to permit the Secretary of Defense to determine the limit. 10 U.S.C. § 3209(b) (Supp. IV, 1967). The 2% maximum is maintained by regulation, 32 C.F.R. § 580 (1971).

252. On veterans' benefits generally, see 38 U.S.C. §§ 1 to end (1964) as amended in part (Supp. V, 1969); 50 U.S.C. App. § 459 (Supp. V, 1969); 38 C.F.R. (1970). 38 U.S.C. §§ 310-58, 410-23, and 501-62 deal with pensions; 38 U.S.C. §§ 601-44, with hospitalization and provision of medical services; 38 U.S.C. §§ 701-88, with insurance; and 38 U.S.C. §§ 1601-1791, with educational benefits for veterans and their families. Preference in federal governmental employment is governed by 5 U.S.C. §§ 2108, 3306, 3309-17, 3351, 3363, 7501, 7511-12 (Supp. V, 1969).

253. *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. On the Judiciary*, 91st Cong., 2d Sess. 320 (1970).

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of the government will be interested in participating in the political process and trying to prevent the formulation of policies which involve unjustified killing and destruction, and unnecessary risk of injury and death.²⁵⁴

Under the present system few women enter the military and receive these benefits and lessons. Partly as a result, the social stigma and ridicule evoked by the idea of a woman in the military persist. Until women are required to serve in substantial numbers, stereotypes about their inability to do so will be perpetuated.

The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military.²⁵⁵ Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women. Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment²⁵⁶ will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination.

These changes will require a radical restructuring of the military's view of women, which until now has been a narrow and stereotypical one. Until recently, only unmarried women were generally allowed to serve, and when married women were permitted, their dependents received none of the benefits that men's families receive. A woman was presumed to be the second worker in her family rather than the one responsible for its support, and benefits were therefore assumed

254. See, e.g., the account of the protest marches of the Vietnam Veterans Against the War, N.Y. Times, April 25, 1971, § 4, at 1, col. 1; the discussions of anti-war organizing in the Armed Forces by Gabriel Kolko in The Liberated Guardian, April 15, 1971, at 10, col. 3; and in A. STAPP, UP AGAINST THE BRASS (1970).

255. Although this is true of the Amendment under the theory and form proposed here, in Congress the resolution has often been amended to exempt the draft from its coverage. In 1950 and 1953, the Equal Rights Amendment was passed by the Senate only after it was altered to permit laws which made reasonable classifications to protect women. This phrase was intended to include the draft as one such law. In 1970, Senator Ervin proposed an amendment to the resolution, which was accepted by the Senate, specifically exempting women from the draft. See the discussion at pp. 886-88 *supra*. And in July, 1971, the House Judiciary Committee reported out the Equal Rights Amendment with a similar amendment.

256. On the draft, see 50 U.S.C. App. §§ 453, 454(a) (Supp. V, 1969); on the service academies, see *Hearings on S.J. Res. 61 Before a Subcomm. of the Senate Comm. on the Judiciary* 574 (1970). Cases upholding the exclusion of women from state military schools include *Allred v. Heaton*, 336 S.W.2d 251 (Tex.), *cert. denied*, 364 U.S. 517 (1960); *Heaton v. Bristol*, 317 S.W.2d 86 (Tex. 1958), *cert. denied*, 359 U.S. 230 (1959). 32 C.F.R. §§ 888.4 (1970), 580 (1971) set out differential enlistment standards.

to be unnecessary. Any woman who became pregnant or adopted a child was discharged. Women, being excluded from many benefits, were thus a particularly economical source of labor. These rules also effectively prevented women from rising in the ranks and becoming officers, for they would have to be willing to forego marriage and children in order to do so. They were therefore denied the exercise of leadership skills and were viewed as inferior, deserving the subordinate tasks to which the military's discriminatory rules consigned them. Women were also seen as less flexible and less valuable workers than men, incapable of serving in many positions. They were assigned to "women's work" as clerks and secretaries, nurses, or technicians. Many interested in training in fields such as photography were denied access to the programs.²⁵⁷

This view of women has begun to change. But it is happening slowly in some services and not at all in others. The Equal Rights Amendment will greatly hasten this process and will require the military to see women as it sees men—as a diverse group of individuals, married and unmarried, with and without children, possessing or desiring to acquire many different skills, and performing many varied kinds of jobs. The impact of the Amendment will now be examined in detail with regard to four important areas: the draft, grounds for discharge, assignment and training, and in-service conditions.

1. *The Draft*

The Military Selective Service Act of 1967 governs the conscription of citizens into the Armed Forces.²⁵⁸ The Act explicitly applies only to men in requiring registration and induction for training and service in the Army, Navy, Marines, Coast Guard, and Air Force.²⁵⁹ Men have several times challenged the Act, claiming that it violates constitutional rights of due process and equal protection by discriminating on the basis of sex. The courts have consistently rejected this contention.²⁶⁰

Under the Equal Rights Amendment the draft law will not be invalidated. Recognizing the concern of Congress with maintaining the Armed Forces, courts would construe the Amendment to excise

257. For complaints about such treatment, see, for example, *The Bond: The Voice of the American Servicemen's Union*, April 19, 1971, at 8, col. 1.

258. 50 U.S.C. App. §§ 451 *et seq.* (Supp. V, 1969).

259. 50 U.S.C. App. §§ 453, 454 (Supp. V, 1969).

260. See, e.g., *United States v. Cook*, 311 F. Supp. 618 (W.D. Pa. 1970); *United States v. Clinton*, 310 F. Supp. 333 (E.D. La. 1970); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968).

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the word "male" from the two main sections of the Act, dealing with registration and induction, thereby subjecting all citizens to these duties. A woman will register for the draft at the age of eighteen, as a man now does. She will then be classified as to availability for induction and training. If she meets the physical and mental standards, and is not eligible for any exemptions or deferments, she will join men in susceptibility to induction. The statute declares that no one may be inducted until shelter, water, heating and lighting, and medical care are available.²⁶¹ The military will clearly have sufficient time during the period after ratification to make the minor adaptations, such as the expansion of gynecological services, necessary to comply with the statute. This is particularly true since the eligibility of women will not necessarily entail an increase in the number of persons inducted.

The Secretary of Defense has the power to set the standards of physical and mental fitness which all inductees must meet.²⁶² A general intelligence test is used to determine mental qualification, and a physical examination is given to check the general state of health of the individual.²⁶³ Under the Equal Rights Amendment, all the standards applied through these tests will have to be neutral as between the sexes. Moreover, even after the mental and physical standards have been made uniform for both sexes, they will have to be scrutinized carefully to assure that they are related to the appropriate jobs and functions and do not operate so as to disqualify more women than men. Such a result would raise the possibility that the test, though neutral on its face, was in fact being used to discriminate against women.²⁶⁴ Achieving this goal of uniform, nondiscriminatory standards will require some changes.

First, height standards will have to be revised from the dual system which now exists. At present, men from 5'0" to 6'8" tall are permitted to serve as enlisted personnel in the Army and Air Force; the range in the Navy and Marine Corps is from 5'0" to 6'6". For male officers, the range of permissible height is from 5'0" to 6'8" in all services

261. 50 U.S.C. App. § 454(a) (1964).

262. *Id.*

263. See Medical Fitness Standards for Appointment, Enlistment, and Induction. C 15, AR 40-501 *et seq.*, reprinted in SSLR 2201.

264. See the discussion at p. 899 *supra*, concerning criteria to be applied in reviewing functional classifications. Under Title VII of the 1964 Civil Rights Act, physical and mental tests with regard to employment have come under scrutiny as a possibly discriminatory device. The Equal Employment Opportunity Commission and the courts have held that such tests must be validated or proved to be closely job-related before they can be used, if they fall more heavily on a protected group of applicants or employees. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). See also the discussion in *Developments—Title VII*, *supra* note 45, at 1120-40.

except the Army, where the minimum is 5'6". Women in all services and in all ranks may be from 4'10" to 6'0" tall.²⁶⁵ Under the Equal Rights Amendment, the same minimum and maximum will have to be applied to both sexes. Persons, male and female, up to 6'8" (or 6'6") would be accepted, if these remain the maximum limits. For enlisted personnel, the services could retain their current minimum for men of 5'0" as the uniform standard, or adopt the lower 4'10" minimum for both sexes. But if the Army retains its 5'6" minimum for officers, it would effectively exclude many women, and the minimum would therefore have to be shown to be closely job-related in order to stand.²⁶⁶

The height-weight correlations for the sexes will also have to be modified.²⁶⁷ At most heights there is a large area of overlap between the normal weight for men and women. For persons above or below this range, an evaluation based on the health of the individual will be made. Since every inductee receives a comprehensive physical examination, this will entail little extra burden.

The same principles will have to be applied to the intelligence test. At present men and women take different tests for enlistment;²⁶⁸ under the Amendment, both will take the same test. Similarly, the required minimum score will be the same for both sexes. If the test currently used for men is administered to women, and it is shown that women on the whole score lower on it, it will have to be demonstrated that the questions do test general intelligence and are not taken solely from areas of factual knowledge with which most men and few women in this society are trained to be familiar.

Most of the deferments and exemptions from military service could easily be adapted to a sex-neutral system. Women ministers, conscientious objectors, and state legislators will be treated as the men in those categories now are. Women doctors and dentists will be subject to call under the conditions governing medical and dental specialists. However, some provisions will have to be extended or stricken. The dependency deferment now provides that "persons in a status

265. Medical Fitness Standards, *supra* note 263, C 25, AR 40-501, 2-21, reprinted in SSLR 2209.

266. *Cf.* New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League, 320 N.Y.S.2d 788 (Sup. Ct. App. Div. 1971), holding that high minimum height and weight requirements for professional baseball umpires unjustifiably excluded women in violation of state and federal law.

267. Medical Fitness Standards, *supra* note 263, C 25, AR 40-501, 2-22 & App. III, Tables I & II, reprinted in part in SSLR 2209, 2222.

268. 32 C.F.R. § 888.2(f) (1970).

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with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable" may be deferred.²⁶⁹ It also states that the President may provide for the deferment of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. This has been interpreted to mean that a married person with a child will generally be deferred.²⁷⁰

There are several permissible alternatives to these deferment provisions under the Equal Rights Amendment. Deferment might be extended to women, so that neither parent in a family with children would be drafted. Alternatively, the section could provide that one, but not both, of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female, would be deferred. A third possibility would be to grant a deferment to the individual in the couple who is responsible for child care. The couple could decide which one was going to perform this function, and the other member would be liable for service. In a one-parent household Congress would probably defer the parent.

Each of these alternatives carries very different and significant policy implications for family structure and population growth. Given current draft calls, and the belief that having both parents present is beneficial for the children, it is likely that both parents will be deferred. However, Congress can choose any of the above policies, for they do not discriminate between men and women.

The Selective Service Act exempts from the draft the sole surviving son of a family which has lost a member, male or female, in the service of the country.²⁷¹ Under the Equal Rights Amendment this exemption for men only cannot stand, for it will mean drafting women when men in identical circumstances are excused. The reasons for the exemption are twofold. One is the feeling that once a family has lost a member, or several members, it cannot be asked to bear a final loss. The other concern is that the family name and line be preserved. The second reason for the exemption will no longer be permissible, because it results in discrimination against women. But

269. 50 U.S.C. App. § 456(h)(2) (Supp. V, 1969).

270. *United States v. Brunier*, 293 F. Supp. 666 (D. Ore. 1968).

271. 50 U.S.C. App. § 456(o) (1964). This provision exempts the sole surviving sons of families "where the father or one or more sons or daughters . . . were killed in action or died in the line of duty. . . ." Under the Equal Rights Amendment, the law will have to be extended to cover all female family members lost in military service.

the first reason does justify extending the exemption to women, for the purpose is to spare a family its last child subject to induction. Thus the sole surviving child will be exempt.

The computation of the draft quota for a given area is based on the actual number of men in the area liable for training but not deferred after classification.²⁷² When the Equal Rights Amendment becomes operative the number of women available will be included in the pool of available registrants.

The Selective Service Act provides for the administration of the draft system by local and appeal draft boards.²⁷³ The Act explicitly states that no citizen shall be denied membership on any board on account of sex.²⁷⁴ However, women are now only a small percentage of total draft board membership. Black registrants have challenged their induction on similar facts, claiming that they cannot be legally inducted by a board which is disproportionately white or which has no black members. None of these claims has met with success.²⁷⁵ The chances that women will be excused from induction because of the sexual imbalance on the boards is therefore small. Adoption of the Equal Rights Amendment, however, will undoubtedly stimulate the appointment of greater numbers of women to draft boards.

It is possible that an all volunteer army will be established in the United States in the foreseeable future. In that event, equalization of the draft becomes of academic interest only. Even if the volunteer system were approved, however, the draft would probably remain in effect for some years. More important, under either system of recruitment the Equal Rights Amendment will require a change in the status of women in the military and the conditions under which they serve.

2. *Grounds for Discharge*

In addition to the grounds for discharge applicable to both sexes, several grounds apply only to women. One such rule requires that a married or unmarried woman who becomes pregnant must be discharged. Another requires that a woman with dependent children

272. 50 U.S.C. App. § 455(b) (1964).

273. 50 U.S.C. App. § 460(b)(3) (Supp. V, 1969).

274. *Id.*

275. See, e.g., *United States v. Brooks*, 415 F.2d 502 (6th Cir. 1969), *cert. denied*, 397 U.S. 969 (1969); *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982, *rehearing denied*, 396 U.S. 871 (1969); *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1968).

cannot serve.²⁷⁶ Men, married or single, who father children or have dependent children are not discharged for such reasons.

Several women have recently brought suits challenging these and similar military regulations on equal protection grounds.²⁷⁷ Under the pressure of litigation the Air Force has modified some of its rules.²⁷⁸ Whatever the outcome of this litigation, however, these policies will have to be reexamined and reformulated when the Amendment is passed. If the rules continue to require discharge of women with dependent children, then men in a similar situation will also have to be discharged. Since this will make it almost impossible to have any career officers, such a rule is unlikely to be adopted. The nondiscriminatory alternative is to allow both men and women with children to remain in the service and to take their dependents on assignments in non-combat zones, as men are now permitted to do.

Rules requiring discharge because of pregnancy will also change. The Army has recently provided that married women who plan to remain in the service with their children may receive a three and a half month leave to bear the child.²⁷⁹ Such a leave is related to a unique physical characteristic of women, and if shown to be directly related to the physical condition of pregnancy, can be applied to women only.

Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children. This is required because once the Army has allowed married women to continue to serve when they have children, it is clear that pregnancy and childbearing alone are not incompatible with military service. A rule excluding single women who become pregnant would thus not be based on physical characteristics, but rather would rest on disapproval of extramarital pregnancy. Such standards must be applied equally to both sexes. Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently

276. 32 C.F.R. §§ 714.1(d)(3) (1968); 888.5 (1970).

277. See the challenges reported in *N.Y. Times*, Aug. 26, 1970, at 44, col. 7; *N.Y. Times*, Oct. 18, 1970, at 49, col. 1; *N.Y. Times*, Nov. 29, 1970, at 26, col. 1; *N.Y. Times*, Dec. 31, 1970, at 8, col. 2; *N.Y. Times*, Jan. 3, 1971, at 24, col. 1.

278. See *N.Y. Times*, Sept. 29, 1970, at 46, col. 1; *N.Y. Times*, Sept. 30, 1970, at 87, col. 4.

279. See *N.Y. Times*, April 21, 1971, at 11, col. 1.

against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact. To avoid these problems, the Armed Forces can treat both sexes similarly by permitting single people to father or bear children, and by regulating only the unique physical characteristic of pregnancy.

All people who have children will be treated equally by the Armed Forces in terms of child care. The military may want to provide day care; if it does not, it may allow a parent to be discharged to take care of his or her child if he or she cannot provide for adequate care while on active duty.

3. *Assignment and Training*

All men who are drafted receive four to six months of basic training. All draftees are eligible for combat duty. The men are assigned to one of five broad areas of duty—administration, intelligence, training and tactics, supply, or combat. They are assigned and organized along two different but overlapping systems of classification. One is a numerical system, and the other is a functional one. "Corps" is the general name for the functional units, such as the Army Engineer Corps or the Army Nurse Corps, though the term "corps" is also used to designate a numerical grouping of two to five divisions. Although the members of a functional corps are physically dispersed in job assignments, the corps keeps separate records, and promotions and assignments are routed through its office. Almost all of the women in the Army are members of the Army Nurse Corps or the Women's Army Corps. Although the Army Nurse Corps is organized along job lines, the WAC has no unifying principle except that its members are women. It thus stands as a symbol of the unwillingness of the Army to abandon distinctions based on sex. Under the Equal Rights Amendment the WAC would be abolished and women assigned to other corps on the basis of their skills.

Women are only partially integrated into the training and assignment procedures applicable to men. They receive some basic training but it does not equip them for combat duty. They serve mainly in administrative and clerical jobs or as medical technicians.

Whether women ought to serve in combat units has provoked lengthy debate. Before discussing the arguments raised against it, it is important to place the problem in perspective. Some public debate has implied that hundreds of thousands of women will be affected by such a requirement. This is not true. Combat soldiers make up

only a small percentage of military personnel. Even in combat zones many jobs of logistic and administrative support are no different or more difficult than the work done in non-combat zones. Thirty years ago, women were found capable of filling over three-quarters of all Army job classifications,²⁸⁰ and there is no reason to prevent them from doing these jobs in combat zones. The issue of assigning women to actual combat duty, therefore, involves a relatively small segment of total military assignments.

Opponents of the Amendment claim that women are physically incapable of performing combat duty. The facts do not support this conclusion. The effectiveness of the modern soldier is due more to equipment and training than to individual strength. Training and combat may require the carrying of loads weighing 40 to 50 pounds, but many, if not most, women in this country are fully able to do that.²⁸¹ And women are physically as able as men to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations. In order to screen out those of both sexes incapable of combat service, it will be permissible to administer a test to measure ability to do the requisite physical tasks. Those who pass, or who will foreseeably be able to do so after training, will receive combat training. The test will have to be closely related to the actual requirements of combat duty. There will be many women able to pass such a test.

Another frequent objection to women in combat service is based on speculation about the problems that will arise in terms of discipline and sexual activity. No evidence has been found that participation by women will cause difficult problems. Women in other countries, including Israel and North Vietnam, have served effectively in their armed forces. There is no reason to assume that in a dangerous situation women will not be as serious and well disciplined as men.

Finally, as to the concern over women engaging in the actual process of killing, no one would suggest that combat service is pleasant or that the women who serve can avoid the possibility of physical harm and assault. But it is important to remember that all combat is dangerous, degrading and dehumanizing. That is true for all participants. As between brutalizing our young men and brutalizing our young women there is little to choose.

280. M. TREADWELL, *supra* note 250, at 92-93.

281. *See, e.g.*, *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 758-59 (M.D. Ala. 1969).

4. *In-service Conditions*

Women in the Armed Forces receive the same pay and are ranked the same as men. Most service and veterans' benefits are the same for both sexes. On the other hand the rules on dependents' allowances, in-service housing and medical benefits discriminate against women. Male officers are provided quarters on base, or a basic quarters allowance for their dependents if they live off base; male officers also receive a dependents' allowance based on their grade and the number of dependents, regardless of any money the officer's wife may earn. The husband of a female officer, however, is not recognized as a dependent unless he is physically or mentally incapable of supporting himself and is dependent on his wife for more than half of his support.²⁸² These discriminations are now under attack in a suit against the Air Force.²⁸³ Should they not be stricken down, the Equal Rights Amendment will require that result. Women will receive housing, allowances, and medical benefits on the same basis as men.

Living conditions in the service will be changed by adoption of the Equal Rights Amendment to the extent that they separate men and women for functions in which privacy is not a factor. Officers' clubs, enlisted mens' clubs, and other social organizations and activities on military bases will be open to women as well as men. Athletic facilities will also have to be made available to women personnel. Eating facilities will likewise be integrated by sex. Sleeping quarters could remain separate under the privacy exception to the Amendment.

5. *Summary*

The Equal Rights Amendment will result in substantial changes in our military institutions. The number of women serving, and the positions they occupy, will be far greater than at present. Women will be subject to the draft, and the requirements for enlistment will be the same for both sexes. In-service and veterans' benefits will be identical. Women will serve in all kinds of units, and they will be eligible for combat duty. The double standard for treatment of sexual activity of men and women will be prohibited.

Changes in the law, where necessary to bring the military into compliance with the Amendment, will not be difficult to effect. The statutes governing the military will be amended by Congress, and

282. Provisions on basic pay are at 37 U.S.C. §§ 201-09 (Supp. V, 1969). Housing and other allowances are dealt with by 37 U.S.C. §§ 401-427 (Supp. V, 1969).

283. See the report in the *N.Y. Times*, Dec. 25, 1970, at 18, col. 6.

the services can revise their own regulations. If these changes are made promptly, no disruption in the functioning of the military need result.

The drafting of women into the military will expose them to tasks and experiences from which many of them have until now been sheltered. The requirement of serving will be as unattractive and painful for them as it now is for many men. On the other hand, their participation will cure one of the great inequities of the current system. As long as anyone has to perform military functions, all members of the community should be susceptible to call. When women take part in the military system, they more truly become full participants in the rights and obligations of citizenship.

VI. Conclusion

The transformation of our legal system to one which establishes equal rights for women under the law is long overdue. Our present dual system of legal rights has resulted, and can only result, in relegating half of the population to second class status in our society. What was begun in the Nineteenth Amendment, extending to women the right of franchise, should now be completed by guaranteeing equal treatment to women in all areas of legal rights and responsibilities.

We believe that the necessary changes in our legal structure can be accomplished effectively only by a constitutional amendment. The process of piecemeal change is long and uncertain; the prospect of judicial change through interpretation of the Fourteenth Amendment is remote and the results are likely to be inadequate. The Equal Rights Amendment provides a sound constitutional basis for carrying out the alterations which must be put into effect. It embodies a consistent theory that guarantees equal legal rights for both sexes while taking into account unique physical differences between the sexes. In the tradition of other great constitutional mandates, such as equal protection for all races, the right to freedom of expression, and the guarantee of due process, it supplies the fundamental legal framework upon which to build a coherent body of law and practice designed to achieve the specific goal of equal rights.

The call for this constitutional revision is taking place in the midst of other significant developments in the movement for women's liberation in this country. The movement as a whole is in a stage of ferment and growth, seeking a new political analysis based upon greater understanding of women's subordination and of the need for new directions. The resulting political discussion has brought forth many possibilities,

including changes in work patterns, new family structures, alternative forms of political organization, and redistribution of occupations between sexes. A number of feminists have argued for increased separation of women from men in some spheres of activity or stages of life. Dialogue and experimentation with many forms of social, political and economic organization will undoubtedly go on as long as the women's movement continues to grow.

Underlying this wide-ranging debate, however, there is a broad consensus in the women's movement that, within the sphere of governmental power, change must involve equal treatment of women with men. Moreover, the increasing nationwide pressure for passage of an Equal Rights Amendment, among women both in and out of the active women's movement, makes it clear that most women do not believe their interests are served by sexual differentiation before the law. Legal distinctions based upon sex have become politically and morally unacceptable.

In this context the Equal Rights Amendment provides a necessary and a particularly valuable political change. It will establish complete legal equality without compelling conformity to any one pattern within private relationships. Persons will remain free to structure their private activity and association without governmental interference. Yet within the sphere of state activity, the Amendment will establish fully, emphatically, and unambiguously the proposition that before the law women and men are to be treated without difference.

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APPENDIX LEGISLATIVE HISTORY OF THE EQUAL RIGHTS AMENDMENT

| Year | Cong. | Sess. | Joint Resolutions | Hearings (Committees on the Judiciary) | Committee Reports | Debate | | Votes |
|------|-------|------------|----------------------------------|--|--|---------------|-------------------|-------|
| | | | | | | Cong. Rec. | Page | |
| 1923 | 68th | 1st | S.J. Res. 21 | | | 65 | 150 | |
| 1925 | 69th | 1st | S.J. Res. 11 | | | 67 | 486 | |
| 1927 | 70th | 1st | H.R.J. Res. 310; S.J. Res. 64 | | | 69 | 931 | |
| 1929 | 70th | 2d | | On S.J. Res. 64 Sen. Subcomm. | | | | |
| 1929 | 71st | 1st | S.J. Res. 52 | | | 71 | 2312 | |
| 1931 | 71st | 3d | | On S.J. Res. 52 Sen. Subcomm. | | | | |
| 1931 | 72d | 1st | H.R.J. Res. 197 | | | 75 | 1755 | |
| 1932 | 72d | 1st | | On H.R.J. Res. 197 House Comm. On S.J. Res. 1 Sen. Subcomm. | | 77 | 49 | |
| 1933 | 73d | 1st | S.J. Res. 1 | | | | | |
| 1935 | 74th | 1st | H.R.J. Res. 238 | | | 79 | 5079 | |
| 1937 | 75th | 1st | S.J. Res. 65 | | | 81 | 884 | |
| 1938 | 75th | 2d & 3d | | On S.J. Res. 65 Sen. Subcomm. | S. Rep. No. 1641 (not printed) | 83 | 5684, 6289 | |
| 1939 | 76th | 1st | S.J. Res. 7 | | | 84 | 70 | |
| 1941 | 77th | 1st | S.J. Res. 8 | | | 87 | 40 | |
| 1942 | 77th | 2d | | | S. Rep. No. 1921 (not printed) S. Rep. No. 267 | 88 | 4033 | |
| 1949 | 78th | 1st | S.J. Res. 25 | | | 89 | 257, 271, 5017 | |

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| Year | Cong. | Sess. | Joint Resolutions | Hearings (Committees on the Judiciary) | Committee Reports | Debate Cong. Rec. | Page | Votes |
|------|-------|-------|---------------------------------|--|--------------------------------------|-------------------|---|--|
| 1945 | 79th | 1st | H.R.J. Res. 42 | On H.R.J. Res. 1, 42 etc. House Comm. | H.R. Rep. No. 907 | 91 | 59, 7505, 9254 | |
| 1946 | 79th | 2d | | | S. Rep. No. 1013 | 92 | 1900, 2142, 9223-29, 9293-97, 9303-35, 9397-9405 | 38/35 (Sen.) |
| 1947 | 80th | 1st | H.R.J. Res. 49; S.J. Res. 76 | | | 93 | 157, 1264 | |
| 1948 | 80th | 2d | H.R.J. Res. 397 | On H.R.J. Res. 49, H.R. 1972, etc. House Subcomm. | H.R. Rep. No. 2196; S. Rep. No. 1208 | 94 | 218, 5555 | |
| 1949 | 81st | 1st | S.J. Res. 25 | | S. Rep. No. 137 | 95 | 2887, 4246, 5810, 6599, 13297, 14722 | |
| 1950 | 81st | 2d | | | | 96 | 626, 704, 733-44, 758-62, 809-13, 826, 828-34, 861-73 | 51/31 (Sen.) (Hayden Amend.); 18/65 (Sen.) (Kefauver Amend.); 63/19 (Sen.) (ERA, as amended). |
| 1951 | 82d | 1st | S.J. Res. 3 | | S. Rep. No. 356 | 97 | 1003 | |
| | | | | | | | 901, 5663 | |

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| Year | Cong. | Sess. | Joint Resolutions | Hearings (Committees on the Judiciary) | Committee Reports | Cong. Rec. | Debate Page | Votes |
|------|-------|-------|-------------------|---|-------------------|------------|--|---|
| | | | | | | | | |
| 1953 | 83d | 1st | S.J. Res. 49 | | S. Rep. No. 221 | 99 | 1386, 4313 8884-85, 8951-74, 9118 84 49,1339, 11088 | 58/25 (Sen.) (Hayden Amend.); 73/11 (Sen.) (ERA, as amended). |
| 1954 | 83d | 2d | H.R.J. Res. 399 | | | 100 | | |
| 1955 | 84th | 1st | H.R.J. Res. 1 | | | 101 | | |
| 1956 | 84th | 2d | S.J. Res. 39 | On S.J. Res. 39 Sen. Subcomm. | S. Rep. No. 1991 | 102 | 8018, 8339, 8537 | |
| 1957 | 85th | 1st | S.J. Res. 80 | | S. Rep. No. 1150 | 103 | 5073, 9593, 15999, 16681 | |
| 1959 | 86th | 1st | S.J. Res. 69 | | S. Rep. No. 303 | 105 | 3529, 5729, 8555, 10603, 19099, 19634 | |
| 1963 | 88th | 1st | S.J. Res. 45 | | | 109 | 2390, 2405- 06, 2712, 5385-87, 8263 | |
| 1964 | 88th | 2d | | | S. Rep. No. 1558 | | | |

APPENDIX CONTINUED

| Year | Cong. | Sess. | Joint Resolutions | Hearings | | Debate | Votes |
|------|-------|-------|-----------------------------------|-------------------------------|-------------------|--|-------|
| | | | | (Committees on the Judiciary) | Committee Reports | | |
| 1965 | 89th | 1st | S.J. Res. 85 | | 111 | 11386, 12682, 14007, 14687, 16621, 17367-68, 23788 | |
| 1967 | 90th | 1st | S.J. Res. 54 | | 113 | 9796, 20919, 23012, 33613 | |
| 1969 | 91st | 1st | H.R. J. Res. 264; S.J. Res. 61 | | 115 | 393, 2082 | |

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| Year | Cong. | Sess. | Joint Resolutions | Hearings (Committees on the Judiciary) | Committee Reports | Debate | | Votes |
|------|-------|-------|-------------------|---|-------------------|------------|-----------------|-----------------|
| | | | | | | Cong. Rec. | Page | |
| 1970 | 91st | 2d | | On S.J. Res. 61 | Discharge | 116 | 7948-85 | 350/15 (House); |
| | | | | Sen. Subcomm.; | Petition, | | (Aug. 10); | 36/33 (Sen.) |
| | | | | On S.J. Res. 61 | House of | 1729-35 | (Ervin Amend.); | |
| | | | | & 231, | Rep. | (Oct. 6); | 50/20 (Sen.) | |
| | | | | Sen. Comm. | | 17335-63 | (Baker Amend.). | |
| | | | | | | (Oct. 7); | | |
| | | | | | | 17485-91 | | |
| | | | | | | (Oct. 8); | | |
| | | | | | | 17629-57 | | |
| | | | | | | (Oct. 9); | | |
| | | | | | | 17745-58, | | |
| | | | | | | 17779-94 | | |
| | | | | | | (Oct. 12); | | |
| | | | 17815-16, | | | | | |
| | | | 17892-95, | | | | | |
| | | | 17923-50 | | | | | |
| | | | (Oct. 18); | | | | | |
| | | | 18075-78 | | | | | |
| | | | (Oct. 14) | | | | | |
| | | | 233 | | | | | |
| | | | (Jan. 26); | | | | | |
| | | | 17 | | | | | |
| | | | (Jan. 25). | | | | | |
| 1971 | 92d | 1st | H.R.J. Res. 208; | On H.R.J. Res. 208 | | 117 | | |
| | | | S.J. Res. 8 | House Subcomm. | | | | |