Women as Pilots

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Traditionally, becoming a commercial air pilot has been a realistic accomplishment only for men. Although women have successfully demonstrated their ability to fly aircraft when given the opportunity, insurmountable barriers have prevented them from making a career of it in the past. Only in the last decade have women encroached on many of the true male job bastions in the aviation field, including commercial passenger and Air Force pilot positions. Historical and sociological explanations for limits to females' success in the skies demonstrate the manner in which a developing occupation can unreasonably exclude a large portion of the population. Changes will inevitably be made, and conceivably women will aspire to and attain flight positions in the same way they have entered other older male-dominated professions. Whether the legal profession will have a leading role in the transition will soon be evident. Current sociological trends may well provide the impetus necessary to effect the change. By examining first the history of women in aviation, then the reasons for the discrimination, and finally the legal intervention in the area, one will be better able to predict the ultimate resolution of this social problem.

I. HISTORY OF WOMEN IN AVIATION

The exigencies of war caused women pilots to be recognized as a needed resource during the early 1940's. At first United States' authorities rejected the idea of women ferry pilots, but the British realized the advantages of such a program aimed at freeing male pilots for combat. Members of the British Royal Air Force were taught navigation by an American pilot, Louise Sacchi.1 Jacqueline Cochran of the United States, who had been assigned as a consultant to the commanding officer of the Ferry Command, went to England in 1942 to engage women in ferrying duties with the British Air Transport Auxiliary. Then in September, 1942, the

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1 Christian Sci. Monitor, June 23, 1971, at 6, col. 4 (eastern ed.).
United States organized the Women's Auxiliary Ferrying Squadron, composed of experienced women pilots, and a pilot training program for women which was directed by Cochran. The Women Airforces Service Pilots (WASPs) resulted from a merger of the two groups. Of the 1074 women accepted into the program, 900 remained when the WASPs were deactivated in 1944 after logging sixty million miles in the air. During the program, thirty-eight women lost their lives. The WASPs remained an independent civilian organization, and as such, were never subject to combat assignments.

Although women pilots in the United States were limited to noncombat positions, the Soviet Union acknowledged the capability and desire of many to participate in combat missions. It formed three Women's Air Regiments, one fighter and two bomber, in the early months of World War II. Ten such regiments could have been organized, as evidenced by the many letters that were received from applicants. The regiments were initiated through the efforts of Marina Raskova, a famous aviatrix, whose endeavors had resulted in many women joining air clubs before the war. She was a member of the women's crew that made a record nonstop flight of over 4000 miles from Moscow to the Far East in 1938. During this excursion, the plane had to make a forced landing when it ran out of fuel. Raskova, who had been ordered to bail out, survived a ten-day struggle through dangerous Far

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2 Exhibit entitled World War II Aviation, at Smithsonian Institution, National Air and Space Museum, Gallery 205, Washington, D.C. [hereinafter cited as Exhibit]. Cochran's other accomplishments include being the first woman to enter and win the Bendix Transcontinental Trophy Race, to break the sound barrier, and to ferry a bomber across the Atlantic. Ress, Sweet Explosion in the Air, 19 SPORTS ILLUSTRATED, July 8, 1963, at 16-17.

4 The WASPs were members of an experimental program and it was believed they would become part of the military once they proved themselves. Although they were so militarized that they were subject to court martial and had to carry firearms, they were never commissioned or given GI benefits. Eyre, WW II Women Pilots Seek Recognition, Dallas Times Herald, Oct. 31, 1976, § A, at 1, col. 1 (quoting Ziggy Hunter, former WASP flight instructor, and Betty Jane Buehner, former WASP). Some of the approximately 850 WASPs still living are bitter about the denial of Veteran's benefits. Rather, CBS Evening News, KDFW, Oct. 23, 1976.

5 Flerovsky, Women Flyers of Fighter Planes, 5 SOVIET LIFE, May, 1975, at 28.

6 Id.
Eastern taiga swamps. Naturally, her courage was an inspiration to many aspiring female pilots. The Russian's experience indicated that, when no special allowances were made, women could endure the physical exertion and tension of air battle without succumbing to fears or turning their backs when confronted with a life-or-death battle. The Soviet Union has continued to employ women as pilots of combat aircraft.

Marina Raskova and Jackie Cochran are examples of pioneer women aviatresses, but they are by no means alone in their contributions to the successes of women as pilots. Amelia Earhart has become a legendary heroine of our time. She was the first woman to cross the Atlantic as a passenger in a plane, but she is remembered for her achievements as a pilot. Her abortive attempts to fly around the world in 1937 remain a mystery to all aviation enthusiasts. Joan Merriam Smith and Jerrie Mock each independently accomplished this feat in 1964. Mock carries the honor of being the first woman to fly around the world. The late Joan Merriam claimed to have made the longest single solo flight around the world (27,750 miles) as of 1964. Jacqueline Auriol has made tremendous accomplishments in the field of aviation. She was an expert stunt pilot, but in 1949 she was involved in an aviation accident as a passenger during a test flight of a small aircraft. It left her disfigured, requiring more than sixteen operations to restore her facial features. Undaunted, she returned to flying and became the first woman to enter the highly dangerous occupation of

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7 Id. at 28-29.
10 63 NEWSWEEK, Mar. 30, 1964, at 20-21. Mock was the first to file with the Federal Aeronautique Internationale.
11 Merriam, supra note 9, at 82.
12 See Ress, supra note 2. Auriol passed the women's speed record back and forth between herself and Cochran seven times. The article attributes "greater hostility" toward women pilots by the French than by the Americans.
14 Id. at 260. There may have been as many as 22 operations in all. See Ress, supra note 2, at 17.
test pilot.\textsuperscript{15}

Despite the obvious expertise of many women pilots, sex barriers continue to prevent major inroads into private general aviation,\textsuperscript{16} commercial aviation,\textsuperscript{17} and the military. Women first participated to a significant degree by entering into the use of private planes for business and recreational purposes. Nevertheless, the number of women involved is still grossly disproportionate to the number of men. In 1965, out of 350,000 licensed pilots in the United States, only two percent were women.\textsuperscript{18} As early as 1930, a group of women pilots known as the Ninety-Nines, Inc. had as its stated purpose: "To provide a close relationship among women pilots and unite them in any movement that may be for their benefit or for that of aviation in general." By 1965 there were 2500 pilot members of the organization.\textsuperscript{19}

It has taken more than courageous prototypes to coax many women into flying. The desire to be able to safely maneuver a plane in the event of emergency, the lure of excitement, the increased comfort of flying, and the changing psychological image of pilots motivated women to take up flying as a hobby. One successful campaign, the Pinch Hitters, encouraged women to learn to fly even if they had no intention of becoming avid pilots. The practical benefits included preparation to take over the controls in midair in the event the pilot became incapacitated and an understanding sufficient to eliminate the fear of flying and to overcome resentment of a spouse's preoccupation with aviation.\textsuperscript{20} Another device implemented by the small aircraft manufacturers to lure

\textsuperscript{15} Id. at 266. See Ress, supra note 2, at 17.

\textsuperscript{16} General aviation includes business/commercial flying, personal transportation/proficiency flying and sport flying.

\textsuperscript{17} Commercial, in this sense, means charter and passenger aviation.

\textsuperscript{18} However, only 15\% of the U.S. population had ever been in a plane. Buegeleisen, \textit{Abbott's Rib}, 77 FLYING, Aug., 1965, at 35. Today, roughly 45\% of the U.S. population (or 63 million adult Americans) have never flown on a commercial airliner, according to Gallup statistics quoted by the Air Transport Association of America. \textit{Action Line}, Dallas Times Herald, Feb. 25, 1977, § A, at 2, col. 1. In 1976, one flying school reported that 85 to 90\% of its students were men, but more females were enrolling every day. McGinnis, \textit{Flight Instruction: Patience, Persistence Pay Off}, Dallas Times Herald, Sept. 19, 1976, § G (Advertising Supplement), at 6, col. 1.

\textsuperscript{19} Bach, \textit{The Invisible 99's}, 77 FLYING, Aug., 1965, at 39-40. Amelia Earhart was the 99's first president.

\textsuperscript{20} Bryant, \textit{Last Weekend I Learned to Fly}, 61 SCI. DIGEST, Jan., 1967, at 62-63.
women into planes was to manufacture them with "more luxurious interiors, sporty paint designs, spacious cabins, and larger luggage compartments."\textsuperscript{21} Fashion shows featured outfits for women pilots to reduce the goggles, scarf, and helmet image.\textsuperscript{22}

The success of the advertising gimmicks encouraging female fliers has a direct correlation to the involvement of women in commercial aviation, since women have had to obtain their pilot's licenses through their own initiative and without the aid of government training programs.\textsuperscript{23} Despite the World War II ferry pilot experience, it was very difficult for women to enter even the cargo transport business. Being a woman held back highly experienced Louise Sacchi\textsuperscript{24} from becoming an overseas ferry pilot. The barriers resulted in her establishing her own aircraft ferry business through which she averaged thirty-one Atlantic crossings per year. With 15,000 flight hours, she holds an Airline Transport Rating (ATR), the same as required for airline captains.\textsuperscript{25} One woman began court proceedings against an airline in 1968 after having been denied a position as a transport pilot for over two years simply because she was a woman, although she had excellent flight credentials.\textsuperscript{26} In 1972, the Federal Aviation Agency acknowledged that there was only one woman commercial pilot in the United States, Barbara J. Barrett. As a first officer, she helped shuttle cargo planes all over the world.\textsuperscript{27}


\textsuperscript{23} In the last twenty years, the Air Force alone has trained 65,000 men pilots. Scott, \textit{Air Force Begins Training Women Pilots}, Dallas Times Herald, Aug. 24, 1976, § B, at 6, col. 2.

\textsuperscript{24} See note 1 \textit{supra} and accompanying text.


\textsuperscript{26} Jan Dietrich had approximately 10,000 flying hours. She was an FAA examiner, flew DC-7's and four-engine jets, had met the qualifications for becoming an astronaut, and held the following licenses: Commercial, Multi-Engine, Instrument Rating, Sea Plane, Flight Instructor, and Airline Transport Pilot Rating. The Equal Employment Opportunity Commission did not consider her precluded from maintaining her action despite her height of 5'3'' (the minimum height requirement was 5'6''), because at no time prior to its investigation was this given as a reason for failure to hire. Dietrich v. World Airways, Inc., [Aug., 1968-Apr., 1969 Emp. Prac. Transfer Binder, New Developments] LAB. L. REP. (CCH) § 8035, at 6063-64 (N.D. Cal. Oct. 25, 1968). As of 1973, she was a jet pilot for a corporation. McCullough, \textit{The 13 Who Were Left Behind}, 2 Ms., Sept., 1973, at 41, 45.

Women are better represented on nonscheduled lines, charter lines, and charter services. Their effectiveness as "drawing cards" for the business has led companies actually to seek out their services. Beryl Young was a charter pilot before attaining her present prestigious position as Australia's first official state government pilot. Male passengers were usually amazed when she climbed into the pilot's seat, but none ever left the plane.

For whatever reason, novelty or ability, women have been a boon to charter flights, but this business advantage has not motivated commercial passenger airlines actively to recruit women pilots. Although the airlines denied having any official restrictions against women, they were accepting male copilots and flight engineers with 400 to 600 flight hours and yet considering women with 10,000 to 40,000 hours of flying time as "taboo." In 1965, when much was being written about the pilot shortage (prior to the influx of military pilots due to Vietnam), no mention was made of coping with the problem by bringing in women.

It was not until 1973 that a woman was employed on a scheduled commercial passenger carrier in the United States. The first to join some 35,000 males in the occupation was Emily Howell of Frontier Airlines. Also in 1973, Bonnie Tiburzi was hired at the age of twenty-four by American Airlines, becoming the first woman pilot on a major American passenger service. She was one of 240 new pilots, the first pilots to be hired by the airline since 1966, because the larger carrying capacity of modern planes resulted in fewer flights, requiring fewer pilots. At the time, the company had no other women applicants. She was laid off in January, 1974, along with nine out of the ten 1973 classes, as a result of the fuel crisis. Recalling of pilots from September, 1975, to March, 1976, resulted in her return to her pilot position. American began inter-

28 Appel, supra note 8.
30 Appel, supra note 8.
32 It is not known when women were first hired as air taxi pilots. Therefore, the discussion of "scheduled commercial passenger carriers" does not include air taxis.
viewing again in July, 1976, and has two new women pilots who entered training in Dallas in the fall of 1976. American reports only about five or six women applicants out of a total of 1500 for pilot positions. Aeroflot, the Soviet Airline, has long been thought to have several women pilots on scheduled passenger planes flying domestic routes. In 1969, the Scandinavian Airlines System (SAS) became the first carrier in the western world to hire a woman pilot.

The markedly limited success of women in advancing to careers as pilots has directly affected the United States space program, where the first seventy-three astronauts have all been men. In the early years the National Aeronautics and Space Administration (NASA) refused to consider the use of any but skilled test pilots in the space capsules, because space-consuming automatic equipment would be required if all astronauts were not pilots. The Soviet Union, on the other hand, successfully employed a non-pilot, Valya Tereshkova, in one of its early space missions. The United States' insistence on pilots, of course, severely narrowed the field of eligible women.

In 1959, Jacqueline Cochran assisted the physician responsible for medically screening candidates for the Mercury training program in selecting twenty-five of the most prestigious U.S. women pilots to undergo the same rigorous physical examinations as the men did. "In the opinion of the scientists evaluating the test results, women were as capable and as suitable as men for spaceflight; in some ways, more suitable." The fact that they weighed and consumed less represented potential savings to the space program and would mean smaller vehicles. They proved "to be more radiation-resistant, less prone to heart attacks, and more durable in the face of loneliness, heat, cold, pain, and noise," and comfortable at

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38 Telephone interview with Bob Bisbee, Director of Ground Skills at American Airlines, in Dallas, June 14, 1977. The figures for women reflect the ones who reached the final evaluation stage.
37 Id.
40 See note 2 supra and accompanying text.
42 Id. at 43.
temperatures sixteen to twenty-six degrees higher than the men. With no explanation, NASA cancelled all further testing of women in July, 1961. No waiver was allowed for the jet test requirements in spite of the fact that women were not eligible to enter the program necessary to qualify. In July, 1962, two days of Congressional hearings resulted in the decision that the “good ladies” would have to be patient.

Patience has not hastened the acceptance of a woman astronaut, but at least more testing has begun. In 1971, NASA utilized the services of Sheila Scott, a renowned British aviatrix, in studying her attention level and central nervous system activities during solo flight from equator to equator across the North Pole. The American Piper Aztec plane had less room than an Apollo cockpit, and there was, of course, no weightlessness to relieve fatigue or mission control to guide her path. The mental acuity tests were to provide a good indicia of how women might perform in space. A 1973 five-week test performed on twelve female nurses at the NASA Ames Research Center in California found that the effect of weightlessness and reentry forces was approximately the same for these women as for men. The project anticipates the use of women in the space shuttle. There will be less strenuous demands made on these astronauts and a greater number will be needed. Another reason advanced for the future employment of women on space flights is that treks to Mars would take up to one year and “sexual diversion” will be desired. In proposing this somewhat unorthodox rationale at a space medicine conference in Nice, NASA administrator Chuck Berry admitted that the women would be “fully-operational crew members,” not merely present for sexual

43 Id. at 44.
44 Id. at 41.
45 Id. at 43.
46 Id. at 43-45. The disillusioned trainees, including Jane Hart, the wife of a U.S. Senator, made comments such as the following: “It is inconceivable . . . that outer space should be restricted to men only, like some sort of stag club,” and “millions for chimps, but not one cent for women!”
purposes.\textsuperscript{50} Presently NASA has 4500 applications, one-third of which are from women. They will be hiring "mission specialists," technicians trained to run the experiments on shuttle spacecraft, by late 1977. Women are encouraged to apply and "take their chances."\textsuperscript{51}

The military is also making strides toward admitting women into pilot programs. In 1973, eight women were receiving military flight training in the Navy.\textsuperscript{52} The Army began pilot training for females in the summer of 1975.\textsuperscript{53} 1976 marks the turning point for the Air Force, which is presently training its first ten women pilot candidates. The trend toward full integration of women is a result of the cessation of the draft and the need for volunteers. The law, however, still prohibits women from flying combat missions.\textsuperscript{54}

II. REASONS FOR THE DISCRIMINATION

The resistance that has prevented women from achieving an equal status in this seventy-three year-old occupation can be traced to psychological, sociological, and physical factors. At its inception, flying was considered a risky, dangerous sport. The attitude stressing male exclusiveness is best characterized by the following quote from an article by a psychology professor: "Aviation is, by and large, a masculine activity, and the woman who enters this arena does so at the risk of becoming a second-rate aviator or a less feminine female."\textsuperscript{55} He buttressed his conclusion with Freudian "phallic symbol" analysis, emphasizing the symbolic nature of sleek cars and airplanes. He pointed out that Freud regarded dreams of flying as being sexually erotic. The plane's controls, such as the throttle, were viewed as masculine symbols. Further discussion in-

\textsuperscript{50} Id.
\textsuperscript{51} CBS Evening News, \textit{supra} note 38. For pilot positions, the applicant needs at least 1000 hours of flight time.
\textsuperscript{52} McCullough, \textit{supra} note 49.
\textsuperscript{54} The statutory language is as follows: "[W]omen may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." 10 U.S.C. \textsection 6015 (1970); "Female members of the Air Force . . . may not be assigned to duty in aircraft engaged in combat missions." 10 U.S.C. \textsection 8549 (1970).
\textsuperscript{55} Horowitz, \textit{For Men Only?}, 77 \text{FLYING}, Aug., 1965, at 30-31.
volved man’s aggressiveness and self-destructiveness. If his psychological analysis has any validity at all, it becomes frightening to imagine a pilot so involved with his plane that he imagines it to be a projection of his own being aimed at carrying out his intense desire to risk his life. It would appear much safer to fly with women who, as a group, have been known to “fly by the book” and take fewer risks. Neither do women demonstrate the attendant problem of drinking and flying. Rather, they show excellent safety records, display good judgment, and earn more ratings. The near compulsive care women exhibit in flying may stem from a desire to prove themselves in a male-dominated avocation.

If men have a psychological attraction for flying, it has long been thought that women have a similar aversion to aviation. This feminine attitude was attributed to the mother instinct—that women had a strong belief that they must survive in order to care for the children. Thus, mothers would not take unnecessary risks. Supposedly, fear and distrust of the airplane, as well as a desire to conserve monetary resources, kept women on the ground.

Either motivation (the compulsion or repulsion to flying) is directly attributable to the role models and early education of children. By the time a girl reaches the fourth grade, she perceives certain occupational goals as “off-limits” because she is a female. Among these are law and space travel. The textbooks have traditionally emphasized that female achievement is a rarity. Children read that “from the very beginning, Amelia Earhart was different from other girls.” It is not surprising that girls come to accept that “they may become legal secretaries, but rarely lawyers; sec-

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50 Id. at 32-33.
52 Id. (an editorial opinion). Ratings are awarded based on achievement in specialized areas. See note 26 supra.
53 See Buegeleisen, supra note 18, at 36.
54 See note 57 supra.
55 E. TORRANCE, REWARDING CREATIVE BEHAVIOR, 119-22 (1965), quoted in Comment, Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles, 24 HASTINGS L.J. 1191, 1198 n.33 (1973). Only three percent of the nation’s lawyers were women as of 1969. 35 U.S. DEP’T OF COMM., STATISTICAL ABSTRACT OF U.S. 69, 158, 527 (1972), and 1969 U.S. DEP’T OF LABOR, HANDBOOK ON WOMEN WORKERS 99, 100, quoted in Comment, id. at 1199.
56 Comment, id. at 1202 n.50, (quoting N.O.W. N.Y. CITY CPT., REP. ON SEX BIAS IN PUBLIC SCHOOLS 40, 73-74 (1971)).
ondary school teachers, but rarely university professors; airline stewardesses, but never pilots." It takes an exceptional upbringing to overcome many of these stereotypes. Bonnie Tiburzi, the American Airlines pilot, acknowledged that she had "a strong father and two brothers" and "just considered herself one of the boys." Even if few women, as suspected by some, would choose to be airplane pilots, they should have the "unfettered right to decide."

Stereotypes have not only affected the choice of vocations, but have also influenced the expectations of the customers. Anticipated passenger resistance contributed to the delay in acceptance of women pilots. One airline company acknowledged that public reaction was one of the factors which they considered in contemplating hiring a female. It was thought that passengers needed a "father figure" in order to be truly comfortable. Yet, surprisingly, no passenger complaints were forthcoming when the first female pilots were hired.

A major source of resistance was attributed to the wives of crewmen. One of the concerns was the lodging accommodations. One pilot once found she had been assigned a double room with a male crew member. The extra expense is actually not relevant, since pilots generally are provided single rooms. The problem of emotional involvement between fellow crew members ("cockpit courting") could result in discharge of an employee if the "emotional baggage" interfered with job duties. However, this concern

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66 June Douglas, a flight instructor and inspector, expressed her belief 10 years ago that the public was not ready for women pilots and that it would probably be a long time before there would be any. Appel, supra note 8.


68 Schweider, Emily Howell: The Airlines' First Lady, 93 FLYING, Nov., 1973, at 50, 55. There was some resistance at first from fellow pilots, but not from passengers.

69 Klemesrud, supra note 27.

70 Schweider, supra note 68.
has not prevented airlines from employing all-male crews in conjunction with all-female flight attendants. An Equal Employment Opportunity Commission (EEOC)\textsuperscript{71} decision considered the yielding to employees' spouses' preferences to be without merit because it renders ineffective Congress' expressed will in regard to the equalization of employment opportunities. Important to the decision was the fact that there was no evidence of employment difficulties as a result of mixed gender assignments, nor was there any creation of excessive personnel turnover. It would be permissible to set "reasonable standards of conduct equally applicable to male and female and to take proper action to insure adherence."\textsuperscript{72} Then infractions could be dealt with on an individual basis.

In addition to the potential for romantic involvements, another aspect of employee relationships was advanced as a reason for excluding women. It was thought that a woman would be incapable of exerting authority over her crew. The possibility of resentment by male copilots and flight engineers was a source of concern, because the captain of an airplane must maintain crew discipline and must exercise control over the plane's entire operations. It was also suggested that stewardesses would object to taking orders from a female captain. A special degree of diplomacy was stressed as essential to a woman in such a position.\textsuperscript{73} Today this rationale has little force, as women have proved themselves quite capable of occupying supervisory jobs.

Two interrelated sociological barriers are the cost of private flying lessons and the exclusion of women from military training programs. During the pilot shortage of the mid-sixties one of the recommended solutions was to offer remuneration closer to military pay to induce military pilots to fly commercially.\textsuperscript{74} By the early 1970's most commercial pilots had gained their flying experience in the military as a result of Vietnam.\textsuperscript{75} This is a significant advantage when one considers that basic flying instruction in the


\textsuperscript{73} See Appel, supra note 8.

\textsuperscript{74} 81 AV. WEEK & SPACE TECH., Oct. 5, 1964, at 34.

\textsuperscript{75} See N.Y. Times, supra note 33; Feaver, Flying Routine Calls for Constant Monitoring, Wash. Post, Jan. 26, 1975, § A, at 11, col. 5.
Dallas-Fort Worth area, for instance, costs $900 to $1500 with the average falling between $1200 and $1300. Thus, the expense necessary for women to bridge the educational gap is a major cause of the disproportionate participation in aviation.

The most vigorously propounded rationale for limiting woman's entry into the position of airline pilot is the physiological differences between male and female. The adherence to traditional classification of women as frail creatures prompted airlines to rationalize their preference for male pilots on the basis of the long hours required (up to sixteen hour stretches). Legislation to protect women from overwork was permitted in the 1908 Supreme Court case, *Muller v. Oregon.* This deferential approach to protective legislation has been somewhat altered by the federal enactment of the Civil Rights Act of 1964. One airline company was denied a summary judgment because its alleged reliance on a state statute prohibiting the employment of women in excess of fifty-four hours per week left unresolved questions of fact. The determinative issues would be whether the statute was applied to protect the plaintiff or whether the denial of overtime work was imposed to discriminate against women. Such broad legislation will inevitably be erased from the books.

Another gender-related reason for exclusion has been the possibility of pregnancy. It was argued that during pregnancy leave essential skills would fade. This is quite inconsistent, however, with the history of long-term pilot layoffs. Pilots are routinely recalled without fear that they will be unable to perform. The retention factor was another concern, since some airlines contended that pregnancy precluded women from being considered as long-term employees. The notion was that once they had small children, women would leave the work force to become homemakers. Pregnancy was also blamed for a disproportionate amount of lost

70 See McGinnis, supra note 18.
77 See Appel, supra note 8.
78 208 U.S. 412 (1908).
81 Schweider, supra note 68, at 96.
82 See id.
working time. Yet overall, the experience of the WASPs was that women ferry pilots lost less time due to physical reasons than male pilots.

The courts have addressed the issue of differential treatment due to pregnancy. A 1974 Supreme Court case, *Cleveland Board of Education v. LaFleur,* held that a school board's maternity regulations requiring termination from employment five months before due date and prohibiting return to employment for three months after delivery violated the Due Process Clause of the fourteenth amendment. In effect, the rules penalized a female for deciding to have a child and encroached on the protected "freedom of personal choice in matters of marriage and family life." Regulations requiring termination at a later date might be justified if there were "widespread medical consensus about the 'disabling' effect of pregnancy . . . during [the] latter days," or if there were no other reasonable methods to avoid the commencement of labor while on the job. In addition to the due process remedy, the Supreme Court acknowledged in a footnote that in 1972 EEOC promulgated guidelines that a "mandatory leave or termination policy for pregnant women presumptively violates Title VII [the Civil Rights Act of 1964]."

Despite this trend, a recent case sustained an airline policy requiring a stewardess to discontinue flying upon knowledge of pregnancy. The susceptibility of pregnant women to "fatigue, fainting, morning sickness, nausea, and back strain" and the possi-
bility of spontaneous abortion during the first trimester were persuasive factors in the court’s opinion. The differential treatment toward pregnant employees in the air transportation industry was linked to the airlines’ duty to “perform their services with the highest possible degree of safety in the public interest.” In the court’s words, “in case of doubt, the doubt must be resolved in favor of the passengers.” Interestingly, the following analogy was drawn:

It is just as probable that a pregnant stewardess may be confronted with a sudden incapacity associated with her pregnancy as a sixty-year-old pilot with an unexpected heart attack—either or both would jeopardize the safety of the passengers. It is, therefore, probable that women pilots will be forced out of work when they first become aware of pregnancy. The details for treatment of pregnancy leave for pilots were to be worked out by the Air Line Pilots Association.

Unlike pregnancy, strength is a necessary characteristic of a pilot which does affect both male and female. The Federal Aviation Academy took the stance that the strength requirements were above those that a woman could handle. However, the smaller muscular structure of the WASPs had “no bearing on their ability to fly even the heavier aircraft.” A maximum of 180 pounds of foot pressure is required to keep a large jet straight during takeoff.

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94 Id. at 5501.
95 Id. The danger emphasized was that an incapacitated stewardess would be unable to evacuate the plane in the event of an emergency within ninety seconds. The court deferred consideration of the airline’s exclusion of pregnancy from sick leave and disability coverage until General Electric Co. v. Gilbert, — U.S. —, 97 S. Ct. 401 (1976) was handed down. The controversial holding was that failure to cover pregnancy-related disabilities does not violate Title VII of the Civil Rights Act of 1964.
96 Schweider, supra note 68, at 55.
97 McCullough, supra note 41, at 44.
98 Exhibit, supra note 2. In the opinion of Dr. Rudolph Bono, N.Y. Giant’s team physician and surgeon, “muscle mass for muscle mass, there is no physiological difference between males and females. . . . So if a man and a woman were equal in size she could develop as well as he could.” He points to the Russian female athletes who are very muscular (presumably because they place less emphasis on femininity) as evidence of his conclusion. Schoenstein, Can You Really Go Play with the Boys?, SEVENTEEN, June, 1971, at 28, quoted in Brown, Equal Rights Amendment: A Constitutional Basis for Equal Rights, 80 YALE L.J. 871, 935 n.130 (1971).
in the event it loses power on an outboard engine. The mechanical advantage of the leg and joint combination makes this an easy task for a person weighing 125 pounds. American Airlines tests the strength of its applicants in an airplane simulator. As the first woman commercial passenger pilot, Emily Howell's strength was not tested since it was presumed she could handle any difficulties.

The height requirement is probably the greatest single limitation. A standard of 5'6" is the minimum allowed by many airlines. They justify this policy by emphasizing the limited adjustability of the pilot's seat in terms of forward/backward and up/down movement. The aim is to be able to simultaneously fully actuate the brake and rudder, fully operate and rotate the control wheel, and still be able to see the course indicator and above the glareshield. Also, it is necessary to reach certain switches above the seat. Yet, a 5'2" subject is able to rotate the control wheel in a DC-9 aircraft while maintaining the design eye reference point. According to an engineer who served as the chairman of McDonnell-Douglas' cockpit committee, the "extreme lower limit of pilot height considered during the development of the DC-9 was 5'2". In fact, government regulations for such aircraft as the DC-9 and the Fairchild 227 mandate that they be designed to accommodate individuals ranging from 5'2" to 6'0" in the pilots' seats so that there is "full and unrestricted movement of each control without interference from either the cockpit structure or the flight crew's clothing when seated with the seat belt fastened."

A cutoff of 5'6" disqualifies automatically eighty-seven percent of the American female population aged eighteen to seventy-nine.

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89 Telephone interview with Bob Bisbee, Director of Ground Skills at American Airlines, in Dallas, Tex., Sept. 23, 1976.


102 See Interview, supra note 99.

103 Post-Trial Submission, supra note 101 (quoting Wilfred E. Pearce, McDonnell-Douglas Senior Staff Engineer).

104 14 C.F.R. § 25.777(c) (1976).
as compared to twenty percent of the males. The Air Force requirement of 5'4\textsuperscript{105} eliminates sixty-five percent of the women; 7.5\% of the men.\textsuperscript{107} It seems feasible to use engineering efforts to produce planes suitable for smaller pilots, thus helping women and some racial minorities.\textsuperscript{108} Perhaps all the factors, other than stature, are traceable to our western culture. Women's "secondary place" has affected her aspirations and indirectly even her size (by stressing femininity and discouraging body-building). The expectations for women have been defined by the stereotypes. It will take time to overcome much of the cultural resistance, but the legal process may hasten the demise of the discrimination.

III. LEGAL INTERVENTION

Until the Equal Rights Amendment is ratified, the primary tool available to remedy employment discrimination by reason of sex is the Civil Rights Act of 1964 (Title VII).\textsuperscript{109} The opportunity

\textsuperscript{105} 47 S. CAL. L. REV. 585, 588 n.13 (1974), based on the percentile groupings found in \textit{National Center for Health Statistics, Public Health Service, U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, Vital Health Statistics, Weight, Height and Selected Body Dimensions of Adult, United States 1960-1962}, at 27, Table 2 (Series 11, No. 8) (hereinafter cited as \textit{Statistics}). Thirty-one percent of American females are below 5'2" compared to only two percent of the males.


\textsuperscript{107} \textit{Statistics}, supra note 105. A physical characteristic that the women have an edge on, in addition to those mentioned in the discussion of astronauts, is their greater kinesthetic sensitivity, making them smoother pilots than men. See Buegeleisen, \textit{supra} note 18, at 36.

\textsuperscript{108} For example, a 5'7" minimum height excludes 32\% of all American males, 95\% of all American females, approximately 70\% of the Spanish-surnamed American males, approximately 80\% of the Japanese American males, and about 60\% of the Chinese American males. See \textit{Statistics}, supra note 105, at 589 n.16.

\textsuperscript{109} 42 U.S.C. § 2000e \textit{et seq.} (1970 & Supp. IV 1974). The pertinent provisions for the purpose of this discussion are as follows:

\begin{itemize}
  \item [(a)] It shall be an unlawful employment practice for an employer
  \item [(1)] to fail or refuse to hire or to discharge any individual, or otherwise 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;
  \item [\ldots] (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees \ldots on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particu-
women have to assert their rights to equal employment treatment is the result of an "afterthought" in legislation designed to prevent discrimination with regard to race, color, religion, or national origin. The late Representative Smith, Chairman of the House Committee on Rules,10 offered the sex amendment in a "spirit of satire and ironic cajolery."11 To support it, he quoted from a letter concerning the protection of the "right" of spinsters to have a "nice husband and family." After hasty debate and no hearings the amendment was adopted by a vote of 168 to 133.18 The effect of the inclusion of women has produced social repercussions beyond the vision of many women in the early 1960's. The change wrought in all sectors of the economy, and particularly the effect on the airline industry, can be viewed with hindsight as completely predictable. In Representative William Hathaway's words, still relevant after ten years, "the airlines must learn that they are not operating flying bunny clubs, but just another form of transportation."113

The easy case to decide under Title VII is one in which there is a different hiring policy for men and women. In Phillips v. Martin Marietta Corp.,114 the Supreme Court decided that it was impermissible in the absence of a business necessity to refuse to hire women with preschool age children while employing men with such children. A different problem is present where a job requirement has a disproportionate impact on the minority. The Court held in Griggs v. Duke Power Co.115 that the requirement of a high school diploma or the passing of intelligence tests must be eliminated if it cannot be shown to be related to job performance. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as

10 Smith was a man not recognized as a civil rights enthusiast. Vaas, Title VII: Legislative History, 7 B.C. IND. & COM. L. REV. 431, 441-42 (1966).
11 Id.
111 Id.; see 110 CONG. REC. 2577-84, 2718, 2720-21 (1964).
113 400 U.S. 542 (1971).
'built-in headwinds' for minority groups and are unrelated to measuring job capability.'

The "touchstone," as the Court termed it, is business necessity. The Guidelines on Discrimination Because of Sex promulgated by EEOC set up situations that do not warrant the application of a bona fide occupational qualification (BFOQ) defense. These include assumptions about women's employment characteristics, stereotyped characterizations, and co-worker, employer, client, or customer preference. Thus, the assertion by the airlines that passengers need a "father figure" in the cockpit is not a business necessity permitting the exclusion of women. Sex is a BFOQ when it is necessary to lend authenticity as in the case of an actress.

Using the rational of Griggs, once sex discrimination has been shown by the disproportionate impact of a job requirement (even if it does not expressly exclude women), the employer may resort to a BFOQ defense. He or she will have the burden of proving the application of the exception. It must be shown that the requirement is necessary to insure the selection of employees who are able to perform the work. The woman refused a job as a pilot because of her height must overcome the business necessity defense.

In 1971 an EEOC decision found reasonable cause to believe a violation of Title VII had occurred in the imposition of a height requirement of 5'6" for the position of airline purser without a showing of business necessity. The courts have also disfavored arbitrary height requirements. Braniff was successful at the district level in Pond v. Braniff Airways, Inc., brought by a woman who alleged discrimination in the carrier's refusal to hire her as a Customer Service Agent, a position requiring the lifting of baggage and freight. Though she was an incumbent employee, a male non-Braniff applicant with a height of 6'4" was hired. The court found

110 Id. at 432.
111 Id. at 431; see note 109 supra.
113 29 C.F.R. § 1604.2(a)(2) (1972). This does not mean that stewardesses must be female because the airlines or passengers prefer genuinely attractive hostesses to entertain them. See generally Diaz v. Pan American Airlines, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).
114 Weeks v. Southern Bell, 408 F.2d 228 (5th Cir. 1969).
that the 5'8" height requirement was not used to exclude the plaintiff, but rather that the man was chosen because he could perform the job better. This approach prompted one commentator to advise plaintiff's attorneys to avoid "at all costs" one-to-one comparisons since they "obscure the discriminatory impact of height and weight requirements."\(^1\)

The Fifth Circuit Court of Appeals reversed the decision in *Pond*, setting out what it considered to be the correct legal standards.\(^2\) It warned that an employer's explanations for hiring a male may be "simply a ruse disguising true discrimination."\(^3\) It was pointed out that "potentially valid and seemingly plausible business explanations as to such actions [may] in fact mask a true intent to discriminate."\(^4\) The lack of objective determination of physical abilities may be evidence of the employer's bad faith or of an impermissible criterion.\(^5\) One unique aspect of the case is that Braniff's defense was based on *no* discrimination at all. The appellate court thought that this was very close to relying on a BFOQ without bearing the burden of proving it.\(^6\) Although the court has narrowly construed the BFOQ defense,\(^7\) the carrier may still be able to prove on remand that a height of 5'8" (or being a male) is a BFOQ\(^8\) (necessary to enable the employee to reach the latches of the cargo bin doors).\(^9\)

The minimum height requirements for pilots are now being contested. One consent decree resolved the parties' dispute by substituting a practical test for the height standard as a pilot selection device.\(^10\) In the case of *Boyd v. Ozark Air Lines, Inc.*,\(^11\) the evi-

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\(^2\) Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974).

\(^3\) Id. at 166.

\(^4\) Id.

\(^5\) Id.

\(^6\) Id. at 167.

\(^7\) Id. at 167 n.13.

\(^8\) Id. at 167.

\(^9\) Id. at 163.


dence established that the defendant’s 5’7” height requirement eliminated 11.24% of the active fliers who are male and 74.19% of those who are female. This disparate impact on women coupled with the defendant’s failure to employ any women as pilots caused the burden to shift to the airlines to establish a height requirement as both job-related and a business necessity. The court held that a certain height is a business necessity, but ordered the defendant to lower the requirement to 5’5” to lessen the disproportionate impact on women. The airline’s minimal control over cockpit design and the prohibitive cost of testing each applicant in a simulator were additional facts which the court used to support setting some standard as the remedy.

Airlines stress that a height requirement is necessary to insure that applicants can reach certain switches, exercise rudder control, and maintain their field of vision. In addition, they may still assert that height is directly related to strength, despite the fact that a separate test for strength is conducted. The court in a case involving qualifications for law enforcement officials, an area where height is frequently an issue, acknowledged that height is somewhat related to strength, but refused to accept that a “person below an arbitrarily defined level would invariably lack the necessary strength to perform the required tasks.” A case using a rational relationship standard under the Equal Protection Clause (not covered by Title VII) upheld a 5’8” height requirement for police officers because the psychological advantage of height provided rational support. Both strength relativity and psychological factors are much more tenuous than the airlines’ defense of a direct relationship between height and ability to maneuver an airplane. No one could seriously advocate that anyone should be permitted to fly a passenger jet regardless of whether he or she could see out or reach the pedals. Nevertheless, it must be shown that the minimum height requirement is not arbitrary. It should be exactly that point

134 See Interview, supra note 99.
135 See Callis, supra note 123, at 743.
137 Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975).
at which persons with average leg and torso proportion could adequately perform the functions necessary to safely pilot the plane in question. If one particular plane requires a taller person,\textsuperscript{138} then perhaps a shorter employee could be certified to fly all other planes. Going a step further, affirmative action by the aircraft manufacturers could eliminate some of the problem by providing greater adjustability within the cockpit.\textsuperscript{139} It is at least possible that the present design was implemented because it fits the American male height median of approximately 5'8".\textsuperscript{140} Faced with the desire of equally capable women to fly, the carriers, in order to alleviate discrimination, could demand that the aircraft suppliers alter the planes produced in the future and perhaps even those presently in service. This would seem more equitable than an occasional waiver of the height requirement for an exceptionally qualified female while at the same time rigidly imposing it against minorities, other females, and the atypical short white male applicant.

The airlines have an excellent prototype for the feasibility of social change in their history of flight attendants. Beginning in the 1920's only males were hired as cabin attendants. This was justified by the nature of the trips in slow aircraft, the predominance of adventure-seeking male passengers, and the physical labor required.\textsuperscript{141} On May 15, 1930, Boeing Air Transport Co. hired the first stewardesses on a commercial flight. Despite initial opposition from pilots,\textsuperscript{142} the trend toward all-female cabin crews caught on. Factors encouraging this shift included the attempt to make passenger business self-supporting through increased emphasis on passenger comfort, service, and reassurance; the elimination of some of the physical tasks; and the scarcity of qualified males due to the military demands of World War II. As larger proportions of women, children, and "first-time" travellers boarded the planes,  

\textsuperscript{138}American raised its flight attendant minimum height requirements one inch because Boeing 747's and DC-10's are larger and require greater reaching capacity. Telephone interview with a spokesman for American Airlines' personnel division, in Dallas, Sept. 21, 1976.

\textsuperscript{139}Consider the engineering feats in minimizing the size of space capsules.

\textsuperscript{140}See Statistics, supra note 105.


\textsuperscript{142}See Binder, supra note 63, at 1101.
the airlines sought to provide courteous personalized service as well as to carry out the mechanical duties of serving meals and beverages. In the airlines' judgment, stewardesses were better motivated to supply the non-mechanical functions.\(^{143}\) By 1967 only four percent of the 23,000 flight attendants were men.\(^{144}\)

The pattern of employment was drastically altered by the landmark decision, *Diaz v. Pan American World Airways, Inc.*\(^{145}\) The lower court had found that passengers preferred stewardesses to stewards. The testimony of a noted psychiatrist, Dr. Eric Berne, convinced the court that basic psychological reasons explained the preference.\(^{146}\) Its finding that a female-only policy was nondiscriminatory was reversed on appeal. The Fifth Circuit Court of Appeals stressed that the word "necessary" in the BFOQ exception\(^{147}\) meant a business necessity, not business convenience, was required. "Only when the essence of the business operation would be undermined\(^{148}\) by the inclusion of both sexes can discrimination based on sex be valid. The primary function of the airline is only to transport passengers safely. Thus, nonmechanical functions are merely tangential and may only be considered in determining an individual's, not the group's, ability to perform. The impracticality of finding qualified males would not justify the discrimination against all males.\(^{149}\)

Long-standing stereotypes were, thus, banished by the legal re-


\(^{144}\)Id. at 564.

\(^{145}\)42 F.2d at 385 (5th Cir. 1971).

\(^{146}\)311 F. Supp. at 565. The unique environment of the plane, a "sealed enclave," creates apprehension, boredom, and excitement. In Dr. Berne's opinion, females are psychologically better suited to relieve anxiety. He further postulated that male passengers would feel more masculine around a stewardess, and women would welcome her attention and conversation, while at the same time consider a steward intrusive.


\(^{148}\)442 F.2d at 388.

\(^{149}\)Id.
course of which one man availed himself. His case, ironically, is the leading one women cite in their attack on male-only jobs. There are still less than ten percent male flight attendants on eighteen airlines. As all who have flown commercially can attest, the impact of the decision is significant enough to make men visible as a subclass of attendants. Of 1500 applications for flight attendant positions at TWA, one out of four is from a male.

Other victories have been won by stewardesses. Flight attendants have been subjected to sex discrimination in the form of age, marriage, and pregnancy policies; height and cosmetic weight regulations. Judicial resolution has not been the only, or even the primary, means of equalization. In 1968, following an EEOC finding that termination of stewardesses upon their reaching a certain age (usually in the mid-thirties) or upon marriage was a result of the fact that only women were employed in the job, American Airlines voluntarily withdrew its restriction on maximum age and marital status. United Air Lines followed suit and announced the withdrawal of its nonmarriage rule. The unions have used grievance procedures, arbitration, and negotiations through collective bargaining sessions to stamp out marital restrictions. Sprogis v. United Air Lines, Inc. is the leading case dealing with marriage rules. So successful have these efforts been that fifty-one percent of current flight attendants are married.

The changes in age composition are also drastic. Whereas a career as a flight attendant used to be of a two to three year duration, now many are staying in their positions for six years or

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151 Id.
152 In fact, a glance at EEOC and court decisions involving sex discrimination will illustrate that the airlines have had more than their share of litigation.
154 Binder, supra note 63.
155 444 F.2d 1194 (7th Cir. 1971). But see Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir. 1977), which held a no-marriage policy in effect when there were no male flight attendants was not discrimination based on sex. Cases striking down no-marriage rules were distinguished on the basis that married males in those cases were not required to resign.
The average age is now twenty-eight. In a recent hiring session, TWA selected a woman in her fifties for a final interview (only 175 out of 1500 were offered in-depth interviews). United recently retired a flight attendant at the age of sixty-five. Although Pan American has not hired since 1973, they estimate eighty-five of their currently employed stewardesses are mothers. The "glorified waitresses" may, to the dismay of the male chauvinists, soon be replaced by a closer approximation of a cross-section of the working public performing similar services.

In a sense, the occupation of flight attendant has come full circle—from men only to women only to an equal place for both. Pilots have a long way to go to minimize past discrimination. Various efforts have been made to hasten the progress. Recall the Ninety-Nines, Inc. who seek to benefit women pilots. Individuals have led campaigns to have airlines accept women pilots. In 1964, the Women's Advisory Committee on Aviation (WACA) was formed to organize experienced women pilots for the purpose of advising the FAA. In 1972, when airlines refused to accept applications from women, the American Newspaper Women's Club honored six of the top women fliers to further the goal of "breaking down barriers for those women who want to become pilots of commercial airlines." The club pledged to write all the airlines pressing them to consider women's applications.

These civic endeavors should be lauded for their public statement pointing to the need for change. More needs to be done to help women penetrate the very traditional male occupations. It is here that society's complacency does the most damage. The reader should evaluate his or her own feelings to see if there are any irrational lingerings that suggest "a man better be in the cockpit on my next flight." A survey of history amply demonstrates that

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127 N.Y. Times, supra note 150.
128 See Conlan, supra note 156.
130 See Bach, supra note 19.
131 See McCullough, supra note 41, at 44. Bernice Steadman is one such person.
132 77 FLYING, Aug., 1965, at 19.
134 Id.
women pilots are as capable as men. The acceptance by the military will help alleviate the training deficit. Once the height barrier is overcome through litigation or engineering accomplishments, more and more women will be announcing, "This is your captain speaking."