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THE DOUBLE STANDARD OF JUSTICE: WOMEN'S RIGHTS UNDER THE CONSTITUTION

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INTRODUCTION

Women frequently are subjected to different rules than are men, in the law as well as socially. There are still some federal and state laws that either treat men and women differently or apply only to one sex.¹ Government agencies sometimes administer laws designed to protect women from sex discrimination differently than those designed to protect blacks from racial discrimination.² Courts not only have approved laws distinguishing between men and women but generally have used a

* Office of Legal Counsel, Department of Justice. The views expressed in this article are those of the author. They are not presented as the views of the Department of Justice or any other government agency or official body.

1. Sex distinctions in laws and official practices have been documented elsewhere. See L. KANOWITZ, *WOMEN AND THE LAW* (1969); PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, *AMERICAN WOMEN* (1963); U.S. DEP'T OF LABOR, *WOMEN'S BUREAU, 1969 HANDBOOK ON WOMEN WORKERS* (1969); CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY* (1968); P. MURRAY, *ENGLISH AND AMERICAN STATUTES ON QUALIFICATIONS, EXEMPTIONS, AND EXCUSES OF JURORS WITH SPECIAL REFERENCE TO WOMEN* (1966).

2. One such example is the failure of the Federal Communications Commission to require station licensees to report their positive action programs for equal employment opportunity for women while requiring such reports of programs with respect to Negroes, American Indians, Spanish-Surnamed Americans and Orientals. *Nondiscrimination Broadcast Practices*, 23 F.C.C.2d 430 (1970). See also 35 Fed. Reg. 8825 (1970) where the FCC announced that its major enforcement efforts would be with regard to employment of those groups (and not women). The National Organization for Women (NOW) has petitioned the Commission to amend its report forms so as to include positive action programs for women. F.C.C. No. RM-1722, filed December 4, 1970. Similarly, regulations of the Department of Labor issued under Executive Order No. 11246 of September 24, 1965, as amended, concerning nondiscrimination in employment under government contracts require affirmative action programs to eliminate discrimination against minority groups. 35 Fed. Reg. 2568 (1970). In response to questions as to the applicability to affirmative programs for the employment of women, the Secretary of Labor stated he had "no intention of applying literally exactly the same approach to women in Order 4 [35 Fed. Reg. 2568 (1970)] which was designed for racial minorities." *Washington Post*, July 27, 1970, § B, at 1, col. 1. The Labor Department's Washington Plan of affirmative action programs for federally involved construction contracts also excludes women. 35 Fed. Reg. 19352 (1970). See also PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, *A MATTER OF SIMPLE JUSTICE*, 18-26 (1970).

Early interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1964), by the Equal Employment Opportunity Commission made clear that that agency did not at the time regard sex discrimination important. For example, the EEOC specifically allowed sex discrimination in job advertising. 30 Fed. Reg. 14928 (1965); 31 Fed. Reg. 6414 (1966). *But see* the current rule, 29 C.F.R. § 1604.4 (1970), discussed in Fuentes, *Federal Remedial Sanctions: Focus on Title VII*, 5 VAL. U.L. REV. 374 (1971).

different criterion for determining whether constitutional protections against sex discrimination have been violated than is used with respect to racial discrimination. Thus, a double standard of justice is applied to the classes of men and women and the classes of women and blacks.

The failure of the courts to interpret the equal protection and due process guarantees of the fifth and fourteenth amendments³ as prohibiting discrimination against women in the law has caused women to seek adoption of the Equal Rights Amendment: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."⁴ The single purpose of the proposed amendment is to require the equal treatment of men and women under the law and to restrain the courts from applying different rules to women under the Constitution. The problem of sex discrimination does not lie in any limited scope of the fifth and fourteenth amendments to protect women from discrimination in the law, but from the refusal of the courts to regard women as fully human "persons" under these amendments.⁵ As Representative Martha Griffiths explained on August 10, 1970, the first time in the 47 year history of the Equal Rights Amendment that it passed the House of Representatives:⁶

There never was a time when decisions of the Supreme Court could not have done everything we ask today. . . . The Court has held for 98 years that women, as a class, are not entitled to equal protection of the laws. They are not "persons" within the meaning of the Constitution.⁷

Advocates of equal rights for men and women regard proper interpretation of the existing constitutional protections against sex discrimination as meaning the same as the Equal Rights Amendment. This position was first stated by the President's Commission on the Status of Women in 1963:

Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the

3. U.S. CONST. amend. V prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV similarly prohibits the state governments from denying due process to any person and prohibits the denial "to any person within its jurisdiction the equal protection of the laws."

4. S.J. Res. 8, 92d Cong., 1st Sess. (1971).

5. Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 238 (1965).

6. H.J. Res. 264, 91st Cong., 2d Sess. (1970), reported at 116 CONG. REC. H7984-85 (daily ed. Aug. 10, 1970).

7. *Id.* at H7953.

ultimate value of the individual that it must be reflected in the fundamental law of the land. The Commission believes that this principle of equality is embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.⁸

For this reason, the Commission concluded that an additional amendment was not at that time needed, "[b]ut judicial clarification is imperative in order that remaining ambiguities with respect to the constitutional protection of women's rights be eliminated."⁹

This article first sets forth the judicial standards that have been applied with respect to sex discrimination cases under the fifth and fourteenth amendments, as compared to other types of class discrimination cases, and secondly, analyzes the effect the Equal Rights Amendment would have upon existing differences in treatment of men and women in the law.

UNEQUAL PROTECTION

Constitutional Tests for Class Distinctions

Two standards have been developed by the courts to determine whether laws differentiating between classes of persons violate constitutional guarantees of equal protection of the laws.¹⁰ One such standard is that the law is valid if the class distinction is based upon some "reasonable" ground. The other is that the class distinction is constitutional only if it is shown that the government has a "compelling interest" in making the class distinction. The reasonableness test has generally been applied with respect to laws treating women as inferiors or restricting their liberties. The stricter compelling state interest test has been applied with respect to racial classifications and situations involving fundamental constitutionally protected liberties.¹¹ There is, however, an additional distinction between the two standards: the burden is upon the person challenging a law to show that it is unreasonable; the burden is upon the state to show that it has a compelling interest.

The more lax reasonableness standard applied by the courts in equal protection cases is that the classification must be based on "some

8. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMEN 44 (1963).

9. *Id.* at 45.

10. The fifth amendment due process clause imposes restrictions on the federal government against discriminatory class legislation comparable to restrictions imposed on the states by the fourteenth amendment equal protection clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

11. For an analysis of constitutional standards under the equal protection clause see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection.”¹² Under the stricter standard, the mere showing of some rational basis for the classification is not sufficient to support its constitutionality. Racial classifications are subject to the stricter test since “[a]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect and . . . courts must subject them to the most rigid scrutiny.”¹³ Thus, in holding unconstitutional Virginia’s anti-miscegenation law, the Supreme Court found “no legitimate overriding purpose independent of invidious racial discrimination” to justify the classification.¹⁴ The showing of an overriding and compelling state interest is also required where the law affects fundamental individual liberties, such as freedom of religion,¹⁵ freedom of association,¹⁶ and the right to travel,¹⁷ to vote,¹⁸ to have offspring¹⁹ and to assert familial relationship.²⁰

Classifying Persons by Sex

The 98 years of inequality under the fourteenth amendment mentioned by Representative Griffiths²¹ dates back to the 1872 Supreme Court decision in *Bradwell v. Illinois*²² which upheld the refusal of the Supreme Court of Illinois to admit women to practice law. Three of the United States Supreme Court justices based their decision in part on religion:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .

. . . The paramount destiny and mission of woman are to

12. *Gulf, C. & S. Ry. v. Ellis*, 165 U.S. 150, 165-66 (1897). See also *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

13. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

14. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). See also *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

15. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

16. *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

17. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

18. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

19. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1962).

20. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

21. See note 7*supra* and accompanying text.

22. 83 U.S. (16 Wall.) 130 (1872).

fulfil the noble and benign offices of wife and mother. This is the law of the Creator.²³

That woman's place is ordained to be in the home is one of several assumptions that the courts have relied upon as justifying laws discriminating against women. The other assumptions are related to "woman's place" and are only slightly more sophisticated. They are, in essence:

1. Since women are the only humans who can give birth, they are reproductive instruments who may be specially restricted, protected or controlled by the law in the interest of preserving the race.

2. Since women have special responsibilities in homemaking (house-keeping) and child rearing, and men do not have such responsibilities, women's rights as citizens outside the home may be curtailed to allow them to do their home chores.

3. Since women as a class are generally inferior to men in physical strength, it is assumed that a woman has less endurance and must be limited in her activities outside the home to save her strength.

4. In some situations women (but not men) are a danger to morality and need to be supervised by men.

5. Men are in power; they have established their control, and it should stay that way.

As will be shown, the courts have relied on either one or a combination of these rationales in cases upholding laws distinguishing on the basis of sex, and frequently they are no more subtly stated than as set forth above.

The *Brandwell* case was decided under the privileges and immunities clause of the fourteenth amendment rather than under the due process or equal protection clauses. Two years later, the Supreme Court held in *Minor v. Happersett*²⁴ that the privileges and immunities clause did not confer on women citizens the right to vote. However, the Court stated specifically that "[w]omen and children are . . . 'persons' " under the Constitution²⁵ and reasoned that "[i]f the right of suffrage were one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men [would be] in violation of the Constitution of the United States."²⁶

The rule that the law may properly single out women for special

23. *Id.* at 141 (Bradley, J., concurring). See also *In re Lockwood*, 154 U.S. 116 (1894).

24. 88 U.S. (21 Wall.) 162 (1874).

25. *Id.* at 174.

26. *Id.* at 170.

treatment was developed in connection with the enactment of special restrictions on the employment of women around the turn of the century.²⁷ Laws restricting the hours of work of both men and women were held violative of the fourteenth amendment due process right to liberty of contract for employment in *Lochner v. New York*.²⁸ In *Muller v. Oregon*,²⁹ the Supreme Court upheld the validity of an Oregon maximum hours law that applied only to women,³⁰ distinguishing it from *Lochner* on that ground:

Differentiated . . . from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.³¹

Since hours legislation for both sexes was upheld in 1917 in *Bunting v. Oregon*,³² the utility of the doctrine that sex is a reasonable basis for legislative classification in upholding the constitutionality of labor standards legislation was short-lived. The theory of legitimacy of sex differentiation, however, became entrenched in the law.³³

The justification in *Muller* for special restrictions applicable to women was, in essence, that women are inferior to men in physical endurance and that, since women are instruments of reproduction of the race, the state has a special interest in protecting their health. Thus, the Court stated:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy

27. See *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908).

28. 198 U.S. 45 (1905).

29. 208 U.S. 412 (1908).

30. See also *Miller v. Wilson*, 236 U.S. 373 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914), cases upholding hours restrictions for women employees.

31. 208 U.S. at 422.

32. 243 U.S. 426 (1917).

33. For summaries of selected cases involving sex discrimination, see PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE CIVIL AND POLITICAL RIGHTS COMMITTEE, Appendix B (1963).

mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.³⁴

The constitutionality of night work restrictions³⁵ and special minimum wage laws³⁶ for women was also upheld.

In *Truax v. Raich*,³⁷ the Supreme Court stated that the right to work in legitimate occupations without discrimination on grounds of race or nationality "is of the very essence of the personal freedom and opportunity that it was the purpose of the 14th Amendment to secure."³⁸ In that case, an Arizona law requiring employers to employ not less than 80 percent native-born citizens was held violative of the fourteenth amendment rights of an Austrian cook. In *Yick Wo v. Hopkins*,³⁹ a San Francisco ordinance administered to deny Chinese the right to operate laundries was found to be an unconstitutional denial of the right to learn a living. Similarly, in *Takahashi v. Fish and Game Commission*⁴⁰ a California statute forbidding issuance of commercial fishing licenses to aliens ineligible for citizenship was held to be violative of the rights of aliens to the equal protection of the laws.

However, in the same year as *Takahashi*, the Supreme Court ruled in *Goesaert v. Cleary*⁴¹ that a Michigan statute forbidding the licensing of any female to act as a bartender unless she is the wife or daughter of the male owner was not violative of the fourteenth amendment, justifying the discrimination primarily on moral grounds:

The fact that women may now have achieved the virtues that men have long claimed as their prerogative 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.⁴²

Bartending by women may "give rise to moral and social problems."⁴³ The fact that Michigan permitted women to serve as (lower paid) waitresses where liquor was dispensed was not thought by the Court to be

34. 208 U.S. at 421.

35. *Radice v. New York*, 264 U.S. 292 (1924).

36. *West Coast Hotel Co. v. Parrish*, 300 U.S. 397 (1937).

37. 239 U.S. 33 (1915).

38. *Id.* at 41.

39. 118 U.S. 356 (1886).

40. 334 U.S. 410 (1948).

41. 335 U.S. 464 (1948).

42. *Id.* at 466.

43. *Id.*

inconsistent inasmuch as there the "man's ownership provides control."⁴⁴ Control over women is proper, but the kind of restriction in *Yick Wo* (natural origin) was characterized as "the essence of slavery itself."⁴⁵

The validity of a Chicago ordinance prohibiting employment of women bartenders was recently challenged. The ordinance was similar to the law found constitutional in *Goesaert* except that female licensees as well as male licensees and their female relatives were exempt from the restriction. The Court of Appeals for the Seventh Circuit, in reversing the district court's dismissal of the case, stated that the additional exemption for female licensees might make the ordinance distinguishable from *Goesaert* in that the justification of masculine control was not present. Where there is a female licensee involved, "there would be no protective male in the background."⁴⁶ On remand, the district court held the ordinance void on its face as denying women property rights without due process of law.⁴⁷ A New Jersey court recently found it unnecessary to pursue the constitutional question raised in *Goesaert*, finding simply that a prohibition on women working as bartenders served no public purpose.⁴⁸ The legality of special drinking places for men has also been successfully attacked by women.⁴⁹

The moral danger of mixing women and liquor appears to have subsided. But "the woman's place is in the home" theme continues. As recently as 1961, the Supreme Court in *Hoyt v. Florida*⁵⁰ upheld the constitutionality of a Florida statute providing that no female be selected for jury service unless she has registered with the clerk of the circuit court her desire to be placed on the jury list:

Despite the enlightened emancipation of women from the 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,

44. *Id.* at 467.

45. 118 U.S. 356, 370 (1886).

46. *McCrimmon v. Daley*, 418 F.2d 366 (7th Cir. 1966).

47. *McCrimmon v. Daley*, 2 F.E.P. Cas. 971 (N.D. Ill. 1970).

48. *Paterson Tavern & Grill Owners Ass'n, Inc. v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970). *See also* *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950), where a New York court held that a bartenders union demand that women bartenders be excluded was unlawful.

49. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969). For a discussion of discrimination against women in public accommodations, see *Seidenberg, The Federal Bar v. The Ale House Bar: Women and Public Accommodations*, 5 VAL. U.L. REV. 318 REV. 318 (1971).

50. 368 U.S. 57 (1961).

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*.⁵¹

Women have "special responsibilities" in homemaking and child rearing, but the "housewife and mother" role is an occupation not protected by labor standards legislation. A housewife has no legal right to claim wages, only room and board (support), and even that, as a practical matter, is largely dependent on the sufferance of her husband. The fact that the work in many situations can be pleasant is irrelevant. It is labor with no legal right to remuneration, and it is foisted upon women as their proper function—to serve not only their husbands, but also, by rearing children, society.

Because women are legally recognized as a particular kind of servant class, the denial of equal civic rights such as jury service is regarded as justified. This concept does not represent a fair arrangement between the sexes; it is a dual discrimination against women. It has even been asserted that the special responsibilities of mothers may justify discrimination against women in employment under Title VII of the Civil Rights Act of 1964.⁵²

A more enlightened view of women's rights is reflected in the 1966 three-judge federal court decision of *White v. Crook*,⁵³ which held an Alabama statute barring women from jury duty unconstitutional. The court unequivocally applied the fourteenth amendment stating:

The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society. . . .

. . . The Alabama statute that denies women the right to serve on juries . . . violates that provision of the Fourteenth Amendment to the Constitution of the United States that forbids any state to "deny to any person within its jurisdiction

51. *Id.* at 62 (emphasis added).

52. *Phillips v. Martin Marietta Corp.*, 91 S. Ct. 496 (1971). For an analysis of this case, see Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of Law for Women*, 5 VAL. U.L. REV. 326 (1971). See also Fuentes *supra* note 2; Note, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 GEO. L.J. 221, 232-39 (1970).

53. 251 F. Supp. 401 (M.D. Ala. 1966).

54. *Id.* at 408.

the equal protection of the laws." The plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens—including women.⁵⁴

Similarly, in a fifth amendment case, the United States Court of Appeals for the Sixth Circuit reversed a conviction because the trial judge had dismissed women jurors from the panel on the ground that evidence in the case would require testimony concerning cancer of the male genitals :

It is common knowledge that society no longer coddles women from the very real and sometimes brutal facts of life. Women, moreover, do not seek such oblivion. . . .

The District Judge's desire to avoid embarrassment to the women jurors is understandable and commendable but such sentiments must be subordinated to constitutional or congressional mandates.⁵⁵

The reasoning in *White v. Crook* was rejected in a recent Mississippi decision:⁵⁶

The legislature has the right to exclude women *so they may continue their services as mothers, wives, and homemakers*, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.⁵⁷

Mississippi, however, no longer excludes women from jury service.⁵⁸

Courts have also held that women are entitled to equal treatment in the penalties they are subject to for conviction of crimes.⁵⁹ This progress, of course, affects comparatively few women. As of December 31, 1967, only 3.2 percent of the sentenced prisoners in federal and state institutions were women.⁶⁰

55. *Abbot v. Mines*, 411 F.2d 353, 355 (6th Cir. 1969).

56. *State v. Hall*, 187 So. 2d 861 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966).

57. *Id.* at 863 (emphasis added).

58. MISS. CODE ANN. § 1762 (Supp. 1968).

59. Longer prison terms for women than for men convicted of the same crimes have been declared unconstitutional. *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968). See also *Morgan v. State*, 179 Ind. 300, 101 N.E. 6 (1913); *State v. Walker*, 326 Mo. 1233, 34 S.W.2d 124 (1930).

60. U.S. DEPT OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS 1967, at 10 (1969). On March 15, 1970, five percent of the adult prisoners confined in county and city jails were women. U.S. DEPT OF JUSTICE, 1970 NATIONAL JAIL CENSUS 1 (1971).

In *Kirstein v. Rector and Visitors of the University of Virginia*,⁶¹ a federal court held that the exclusion of women-plaintiffs from the University of Virginia at Charlottesville "denied their constitutional right to an education equal with that offered men at Charlottesville and that such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment."⁶²

However, in other recent cases approving sex discrimination in computing social security benefits and in imposing obligations for military service, courts have harped back to woman's physical weakness and her "place" in the home as supplying justification for the difference in treatment. Thus, in finding beneficial treatment of women in computing amounts of retirement benefits constitutionally valid, the Court of Appeals for the Second Circuit stated that the objective of the difference was "to reduce the disparity between the economic and physical capabilities of a man and a woman."⁶³ There is some logic in the reference to the economic inferiority of women workers, but the reference to "physical capabilities" of retired male and female workers would seem to cut the other way since women live longer, *i.e.*, are physically stronger, not weaker. Even if it were possible to balance out discriminations against men and women by sex, giving benefits to one sex in one area and to the other in a different area, there is no certainty that the perfect balance between the classes of men and women would result in *individual* justice which presumably is the goal. Only the elimination of sex distinctions in the law can accomplish this.

In *United States v. St. Clair*,⁶⁴ involving a challenge under the fifth amendment to the constitutionality of the Military Selective Service Act of 1967,⁶⁵ the court stated:

In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history

61. 309 F. Supp. 184 (E.D. Va. 1970).

62. *Id.* at 189. *But see* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 91 S. Ct. 976 (1971); Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.), *appeal dismissed & cert. denied*, 364 U.S. 517 (1960), *rehearing denied*, 364 U.S. 944 (1961); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958), *appeal dismissed & cert. denied*, 359 U.S. 230, *rehearing denied*, 359 U.S. 999 (1959). For an analysis of sex separation in public schools as sex discrimination, see Barnett, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 311-17 (1970).

63. Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968).

64. 291 F. Supp. 122 (S.D.N.Y. 1968). *See also* United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970).

65. 50 U.S.C. App. §§ 451, 453 (1964).

that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning.⁶⁶

Military service, like jury service, is a right and obligation of citizenship. The Supreme Court has stated that "the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."⁶⁷ Similarly, in *White v. Crook*, the Court stated that "jury service is a form of participation in the processes of government, a responsibility and right that should be shared by all citizens, regardless of sex."⁶⁸ *White v. Crook* and *United States v. St. Clair* are distinguishable. In the former case, the Alabama law totally excluded women from jury service, whereas in *St. Clair* women were not totally excluded from military service and could volunteer.⁶⁹ In addition, women challenged their exclusion from the jury law in *White v. Crook*, whereas the attack on the Military Selective Service Act was made by a man, but it is not likely that it would have made any difference if it had been a woman in view of the Court's nostalgic view of women keeping the home fires burning.

Mengelkoch v. Industrial Welfare Commission

Perhaps the most extreme example of applying a double standard of justice to women is the district court decision in *Mengelkoch v. Industrial Welfare Commission*.⁷⁰ The case challenged the constitutionality under the fourteenth amendment and the consistency with Title VII of the Civil Rights Act of 1964⁷¹ of California's maximum hours law for women.⁷² The suit was a class action brought by employees of North American Aviation, Inc. (now North American Rockwell Corporation). The women sought an injunction against the California Industrial Welfare Commission to prevent enforcement of the hours restriction, alleging that the effect of the law was to deny women the opportunity to work at higher paid and supervisory jobs that might

66. 291 F. Supp. at 124-25.

67. *United States v. Schwimmer*, 279 U.S. 644 (1929). The case involved the exclusion of a 49 year old woman pacifist under the immigration laws because of her refusal to bear arms. The court noted that despite her own ineligibility for military service by reason of age and sex she might influence others.

68. 251 F. Supp. 401, 408 (M.D. Ala. 1966).

69. 291 F. Supp. 122, 125. Cf. *Hoyt v. Florida*, 368 U.S. 57 (1961).

70. 284 F. Supp. 950, 956 (C.D. Cal.), *vacated*, 393 U.S. 83, *rehearing denied*, 393 U.S. 993 (1968), *rev'd & remanded*, 437 F.2d 563 (9th Cir. 1971).

71. 42 U.S.C. § 2000e (1964).

72. CAL. LABOR CODE § 1350 (West Supp. 1971).

occasionally require overtime work and to deny them additional premium overtime pay.

The complaint was filed in October, 1966. A three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 which requires that an action to enjoin state officials from enforcing a state law on the ground that such law is unconstitutional be heard by a three-judge district court. A year and a half later in May, 1968, the three-judge court dissolved itself, stating it lacked jurisdiction because there was no substantial constitutional issue. Since the constitutionality of state hours restrictions on women had been upheld by the Supreme Court in *Muller v. Oregon*⁷³ and *Miller v. Wilson*⁷⁴ and by the California courts in *Ex parte Miller*,⁷⁵ the three-judge court reasoned that the question of constitutionality was foreclosed. The case was returned to a single judge who then dismissed the case, invoking the doctrine of abstention.⁷⁶

Since state courts have no jurisdiction in Title VII cases (federal courts have exclusive jurisdiction),⁷⁷ the effect was that women simply could not pursue their remedies under the federal statute. This would read "sex" out of Title VII as effectively as if it were repealed. A direct appeal was taken to the Supreme Court pursuant to 28 U.S.C. § 1253. The court vacated the three-judge order and remanded the case for entry of a fresh decree from which a timely appeal could be taken to the Ninth Circuit, holding that where a three-judge court dissolves itself, the appeal lies to the appropriate court of appeals.⁷⁸ The appellants had argued that the three-judge court's dissolution after deliberating the question for over a year in effect denied the injunction⁷⁹ and resulted in a decision on the merits of whether the state law was constitutional so that a direct appeal would lie under 28 U.S.C. § 1253.⁸⁰ The Supreme Court, however, treated the case as one involving the threshold question of whether a three-judge court should be convened (whether the constitutional question was insubstantial). Threshold questions of

73. 208 U.S. 412 (1908).

74. 236 U.S. 373 (1915).

75. 162 Cal. 687, 127 P. 427 (1912).

76. A case challenging the constitutionality of Louisiana's hours laws was similarly dismissed by the district court but was not appealed. *Ward v. Luttrell*, 292 F. Supp. 162, 165 (E.D. La. 1968).

77. 42 U.S.C. § 2000e-5(f) (1964).

78. 393 U.S. 83, *rehearing denied*, 393 U.S. 993 (1968).

79. Jurisdictional Statement at 2, *Menkelkoch v. Industrial Welfare Comm'n*, 393 U.S. 83 (1968).

80. 28 U.S.C. § 1253 provides for a direct appeal to the Supreme Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

jurisdiction under the three-judge statute are appealable to the court of appeals rather than to the Supreme Court.⁸¹

The Court of Appeals for the Ninth Circuit reversed and remanded the case to the three-judge court holding that a determination that *Muller* and *Miller* require rejection of new attacks on the constitutionality of the hours restriction "is not so obvious and beyond reasonable debate that the constitutional attack must be regarded as insubstantial."⁸²

The court of appeals opinion in *Mengelkoch* strikes a blow at the continued viability of *Muller*, noting several distinguishing factors:

1. That the relevancy and importance of some of the conditions discussed in *Muller* "today may not be the same;"⁸³

2. That in *Muller* the primary issue was whether restricting work hours of women was a "wise" exercise of the police power under the due process clause standards applied then and that the constitutional attack was by the employer, not the women employees;⁸⁴

3. "In *Muller* the statute was upheld in part because it was thought to be a necessary way of safeguarding women's competitive position. Here the statute is attacked on the ground that it gives male employees an unfair economic advantage over females."⁸⁵

4. By emphasizing differences of the sexes, the Supreme Court in *Muller* was able to uphold the statute despite its decision in *Lochner v. New York*.⁸⁶ This emphasis is no longer necessary.⁸⁷

The court, however, took pains to make clear it was not prejudging the substantive issue of constitutionality but only showing that the constitutional issue was not insubstantial and that the three-judge court therefore had jurisdiction to decide the case.⁸⁸

It took from October, 1966, to January, 1971, for the federal courts to determine that a three-judge district court has jurisdiction to hear Mrs. Mengelkoch's complaint that the California hours restriction on women workers violates their rights to equal protection of the laws under the Constitution and their right to pursue remedies afforded by a federal civil rights law. In the meantime, decisions in cases brought by other women under Title VII of the Civil Rights Act of 1964⁸⁹ have

81. See Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964), for a discussion of the three-judge statute.

82. 437 F.2d 563 (9th Cir. 1971).

83. *Id.* at 566-67.

84. *Id.* at 567.

85. *Id.*

86. *Id.*

87. See notes 27-45 *supra* and accompanying text.

88. 437 F.2d at 569.

89. 42 U.S.C. § 2000e (1964).

generally established that special restrictions on women workers are inconsistent with and superseded by that Act.⁹⁰

Sex as a Prohibited Classification

Arguments have been made in sex discrimination cases that laws classifying persons by sex should be subjected to the stricter standard of constitutionality as opposed to the more lax reasonableness test and that the state should be required to show a compelling interest in the classification.⁹¹ In *United States ex rel. Robinson v. York*,⁹² a federal district court held unconstitutional a Connecticut law requiring longer prison terms for women than for men convicted of the same crimes. The court recognized that

[w]hile the Supreme Court has not explicitly determined whether equal protection rights of women should be tested by this rigid standard, it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group.⁹³

Nevertheless, the court in dictum went out of the way to approve the rationale of cases upholding sex classification in employment and jury service.⁹⁴ It is doubtful that the law in question in *Robinson* could be upheld under any test no matter how lax.

Even under the stricter compelling state interest standard, there is no assurance that it would be applied to strike down legal discrimination against women in the same way as have laws discriminating on the basis of race. Regardless of the test applied, as Professor Kanowitz has noted, "the result will inevitably depend upon a court's visceral rather than its cerebral behavior."⁹⁵

The Supreme Court stated in *Harper v. Virginia Board of Elections*:

[T]he Equal Protection Clause is not shackled to the political

90. See Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U.L. REV. 326 (1971); Ross, *Sex Discrimination and 'Protective' Legislation*, published in *Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., at 392 (1970).

91. Brief for Appellant at 14-15, *Mengelkoch v. Industrial Welfare Comm'n*, 437 F.2d 563 (9th Cir. 1971); Brief for Human Rights for Women as Amicus Curiae at 18-20, *Rosenfeld v. Southern Pacific Co.*, 3 F.E.P. Cas. 130 (9th Cir. 1971); Brief for Plaintiffs at 24-25, *Kirstein v. Rector & Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970).

92. 281 F. Supp. 8 (D. Conn. 1968).

93. *Id.* at 14.

94. *Id.* at 13. The court relied upon *Hoyt v. Florida*, 386 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948); and *Muller v. Oregon*, 208 U.S. 412 (1908).

theory of a political era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.⁹⁶

It is suggested that any differentiation based on sex should no longer be tolerated under the equal protection clause and that courts turn their attention in a given case to the issues of whether there is a *differentiation*, and, if so, whether the differentiation is based on *sex*. These latter issues are discussed in connection with the interpretation of the proposed Equal Rights Amendment.

Women constitute a political class in part because the law has made them so by treating the class differently. The fact that women are integrated into all economic classes and that many women do not serve the function of homemaking and childrearing has not been deemed relevant. The entire class of women is treated differently from the class of men for some purposes on the basis of those functions.

It is difficult to reconcile laws classifying persons by the permanent class of their birth with the basic democratic concept that "all men are created equal."⁹⁷ Classifications that treat persons differently simply because they were born into a class are antithetical to democracy because the individual is permanently condemned to legal restrictions by virtue of a status over which he or she has no control. In this respect, sex, race, national origin and legitimacy differ from other classifica-

95. Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 142 (1968). See also Berg, *Title VII: A Three-Years' View*, 44 NOTRE DAME LAW. 311, 344 (1969). The concept of "benign" discrimination to make up for past damage to a class of course would be fraught with danger if applied to women. *Recent Developments—Equal Protection*, 82 HARV. L. REV. 1065, 1104-20 (1969). Any permitted difference in treatment as between men and women is likely to "protect" away women's liberties. It has even been suggested that discrimination against women in employment is benign if the purpose of restricting women is for their own "protection." Moewe, *The Case for Benign Sex Discrimination*, 44 LOS ANGELES BAR BULL., 337, 340-41 (1969).

96. 383 U.S. 663, 669 (1966) (emphasis in original).

97. DECLARATION OF INDEPENDENCE. The fact that the founding fathers did not have women or blacks in mind does not negate the applicability of the principle to those classes. It may be noted, however, that Abigail Adams had women in mind and is quoted as writing to her husband John:

Remember: all men would be tyrants if they could. . . . If attention is not paid to the ladies, we shall foment a rebellion and will not hold ourselves bound by any laws in which we have no voice or representation.

LENGYEL, *FOUR DAYS IN JULY* 123 (1958).

tions.⁹⁸ For example, the *age* of a person changes; so might his religion, economic status or citizenship. If classifications by birth were prohibited, attention would shift from the question "can government discriminate between men and women by this rule" to the question "does the rule under attack, though superficially neutral, result in different treatment of the sexes?"

To interpret constitutional guarantees of equal protection as prohibiting all distinctions in the law based on permanent birth castes is particularly necessary where the class that is treated differently lacks power, as in the case of women. There are no women on the Supreme Court. Only one of 97 United States Court of Appeal judgeships is filled by a woman⁹⁹ and only four of the 402 federal district court judges are women.¹⁰⁰ Only one woman is in the Senate¹⁰¹ and only 12 of 435 members of the House of Representatives are women. The President, Vice President and the Cabinet are all males. As the Supreme Court stated in *Muller*:

[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior strength, and this control in various forms, with diminishing intensity, has continued to the present.¹⁰²

Masculine control (or raw power) was similarly given by the Oregon Supreme Court as partial justification for barring women from participating in wrestling competitions:¹⁰³

We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominantly masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to

98. Compare Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723 (1935). The author states that "[o]nly permanent and natural classes are open to those deep, traditional implications which become attached to classes regardless of the actual qualities of the members of the class." *Id.* at 727-28. Certain mental or physical defects may be permanent from birth, but these are conditions not classes. Therefore, special legislation to protect them would not be forbidden under this rule.

99. Shirley Hufstедler, Ninth Circuit Court of Appeals.

100. Sarah Hughes, Northern District of Texas; Constance Baker Motley, Southern District of New York; June Green, District of the District of Columbia; Cornelia Kennedy, Eastern District of Michigan.

101. Senator Margaret Chase Smith of Maine.

102. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

103. *State v. Hunter*, 208 Ore. 282, 300 P.2d 455 (1956). The reader should not be distracted by the subject matter of the case. It is the concept which might be applied in any sex discrimination case that is important.

to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman.¹⁰⁴

Men make, enforce and interpret the laws that apply to women. *As a class*, women are still under the control of men and dependent, for the most part, on male judges to define the degree of protection against discrimination afforded by the Constitution.

Disappointed with the court's interpretations of the fourteenth amendment, women have sought, albeit unsuccessfully, congressional approval of the Equal Rights Amendment in the hopes that the more restrictive language of the amendment will restrain the judiciary from approving sex discrimination in the law. But unless women play a greater role in all forms of government, there is no assurance that their lack of equal status under the law will not continue indefinitely despite new constitutional mandates. Although women have the ultimate political power of the vote, suffrage has not brought about great improvement in women's legal position. As one feminist has quipped, "If we gave the dog the vote it wouldn't change anything." The reasons why women have not brought themselves into self determination are what the women's liberation movement basically is about.

THE EQUAL RIGHTS AMENDMENT

Language and History

For nearly a half-century women have sought congressional approval of a constitutional amendment to guarantee equal rights under the law. As introduced in 1923, the Equal Rights Amendment read: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."¹⁰⁵ The language was partially changed in 1943 because it was thought the above language might be interpreted to require geographic uniformity.¹⁰⁶ Modified, the proposal read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." It has since been introduced in that form.¹⁰⁷

When it became apparent that the amendment would not be approved by the Senate after it had already passed the House in the 91st Congress,

104. *Id.* at 284, 300 P.2d at 457.

105. S.J. Res. 21, 68th Cong., 1st Sess., 65 CONG. REC. 150 (1923).

106. S. REP. No. 267, 78th Cong., 1st Sess. (1943).

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

Senator Birch Bayh offered a substitute amendment: "Neither the United States nor any State shall, on account of sex, deny to any person within its jurisdiction the equal protection of the laws."¹⁰⁸ As stated by Senator Bayh, the purpose of the language, which was taken from the fourteenth amendment, was in part to "make absolutely clear that the Congress and the country do not agree with the implications of the Supreme Court's decisions in this area."¹⁰⁹ Senator Bayh also stated that his substitute proposal would "prevent the kind of restrictive interpretation and disruptive application which the critics have feared."¹¹⁰ Because the substitute was designed as a compromise and would afford something less than absolute equality, it was not supported by the women's movement and the amendment died a quiet death in the 91st Congress.

Numerous hearings have been held on the Equal Rights Amendment from 1924 to 1970.¹¹¹ The Equal Rights Amendment has frequently been reported favorably by the Senate Judiciary Committee.¹¹² It passed the Senate in 1950¹¹³ and 1953,¹¹⁴ but it was saddled with an obviously killing rider providing that the amendment not "be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon persons of the female sex." As noted above, it passed the House of Representatives in 1970.¹¹⁵

The Equal Rights Amendment was originally introduced in 1923 at the instigation of the National Woman's Party. This organization has been the most persistent group in continuously pressing for congressional approval of the amendment since that time.¹¹⁶

108. 116 CONG. REC. S18076 (daily ed. Oct. 14, 1970).

109. *Id.* A resolution simply expressing the sense of Congress that the right to equal treatment under the law without differentiation based on sex is protected by the fifth and fourteenth amendments might have been more appropriate.

110. *Id.*

111. See S. REP. No. 267, *supra* note 106, at 2, for a history of congressional hearings on the Equal Rights Amendment. See also *Hearings on S.J. Res. 61 & 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (Sept. 1970); *Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (May 1970); *Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 84th Cong., 2d Sess. (1956); *Hearings on Proposing an Amendment to the Constitution Relative to Equal Rights for Men and Women Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. (1948).

112. See, e.g., S. REP. No. 1558, 88th Cong., 2d Sess. (1964); S. REP. No. 2192, 87th Cong., 2d Sess. (1962); S. REP. No. 303, 86th Cong., 1st Sess. (1959); S. REP. No. 1150, 85th Cong., 1st Sess. (1957).

113. 96 CONG. REC. 972-73 (1950).

114. 99 CONG. REC. 8954-55 (1953).

115. 116 CONG. REC. H7985 (daily ed. Aug. 10, 1970).

116. This persistence is not surprising in view of the origin and history of the National Woman's Party. Its founder and honorary national chairman, Alice Paul,

The stepped-up interest in the amendment in 1970 was probably the result of 1) increased publicity of the women's liberation movement in the popular press which had the effect of making the potential political power of women felt by Congress and 2) the endorsement and support of the amendment by two official bodies, the Citizens' Advisory Council on the Status of Women¹¹⁷ and the President's Task Force on Women's Rights and Responsibilities.¹¹⁸

The Citizens' Advisory Council published a *Memorandum on the Proposed Equal Rights Amendment to the United States Constitution* in March, 1970.¹¹⁹ The *Memorandum* contains a five-point analysis¹²⁰ by which to determine the effect of the Equal Rights Amendment on various laws differentiating on the basis of sex. An elaboration of that analysis in light of issues raised in connection with the 1970 Senate hearings and the debate in the 92d Congress is set forth below.

It has been asserted by opponents of the amendment that "at one fell swoop this amendment would wipe out all those protective laws that we, after arduous toil, sought to put on the statute books."¹²¹ It is true that the Equal Rights Amendment would be largely self-implementing and in "one fell swoop" would require equal treatment of men and women under the law. But it would not wipe all the unequal laws off the books. Some laws which apply to one sex only would be rendered unconstitutional by the amendment; others would be extended to the other sex.

The language of the amendment parallels that of the fifteenth and nineteenth amendment except that those amendments refer to "[t]he

led the suffrage campaign which culminated in adoption of the nineteenth amendment. The suffragists' tactics included peaceful demonstrations and picketing. Some of the women who were arrested in the summer of 1917 "for obstructing traffic" were tried and sentenced to prison. When they went on a hunger strike to protest their brutal treatment in prison, they were painfully and forcibly fed. In an effort to break the spirit of their leader, Miss Paul was held incommunicado in a psychopathic ward for a week. For a history of the suffragists' experiences as political prisoners, see IRWIN, UP HILL WITH BANNERS FLYING: THE STORY OF THE WOMAN'S PARTY 269-99 (1964). In 1971, Alice Paul continues as the spearhead in the drive for passage of the Equal Rights Amendment.

117. Established by Executive Order No. 11126 of November 1, 1963, 3 C.F.R. 791 (Supp. 1963), the Council consists of 20 members appointed by the President.

118. The Task Force is an ad hoc group set up in October, 1969 to review the status of women and make recommendations to the President. See PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE (1970).

119. Reprinted at *Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., at 369-90 (1970). Representative Griffiths also had the *Memorandum* reprinted at 116 CONG. REC. E2588 (daily ed. March 26, 1970).

120. *Hearings on S.J. Res. 61*, *supra* note 119, at 384-86.

121. Remarks of Representative Celler, 116 CONG. REC. H7961 (daily ed. Aug. 10, 1970).

right of citizens of the United States to vote" instead of "[e]quality of rights under the law." Under the fifteenth and nineteenth amendments, state voting laws were not wiped off the books; they were extended to apply to Negroes and women, respectively.¹²² Instead of the right to vote, the Equal Rights Amendment is concerned with the right to equal treatment in the law without differentiation because of sex.

The five-point guide for determining the constitutionality of laws that distinguish on the basis of sex could likewise be utilized in cases brought under the fifth and fourteenth amendments. The battle for the Equal Rights Amendment, whether or not it ever becomes a written part of the Constitution, may serve to encourage proper interpretation of existing constitutional equal protection guarantees.

It is of course assumed that there is no such thing as "good discrimination" based on sex and that complete legal equality of men and women is desirable. If these assumptions are not valid, if it is desirable that the law treat men and women differently, then women must be represented in government in proportion to their population so that they have equal power to make the laws that apply to them and to determine when the law should be unequal.¹²³ The only third alternative is for women to accept their lot as a subspecies and to be ruled by a superior class.¹²⁴

Interpretation of the Equal Rights Amendment—The 5-Point Guide

1. Laws That Confer a Benefit, Privilege or Obligation of Citizenship on One Sex: Strike the Words of Sex Identification and Extend the Benefit, Privilege or Obligation to Both Sexes

122. *Neal v. Delaware*, 103 U.S. 370, 389 (1880); *Graves v. Eubank*, 205 Ala. 174, 87 So. 587, 588 (1921).

123. Proportional representation in government might be initiated by adoption of the following constitutional amendment:

Section 1. One Senator from each state shall be a woman and the other shall be a man. As near as may be, one half the Senators elected at each election shall be female and the other half shall be male. The three Classes of Senators shall be further divided into six Classes, to effectuate this Article.

Section 2. The Supreme Court of the United States shall consist of not less than one half women Judges.

Section 3. The Congress shall have power to enforce the provisions of this Article by appropriate legislation.

124. The extreme view that women are a subspecies is expressed by the National Socialist White People's Party (formerly the American Nazi Party) as follows:

The halls of Congress are actually ringing with the serious debate on legislation designed to make women equal. And perhaps we shouldn't be surprised at this foolishness, because it is simply a logical extrapolation of the liberal fantasy that all featherless bipeds are, or should be "equal," and that racial, sexual, and other differences are nature's mistakes which can be legislated away.

Pierce, *Weekly Telephone Recording*, Arlington, Va. (1970).

(a) *Protective labor laws.* Minimum wage laws and laws requiring meal periods, rest periods or seating facilities for women but not for men workers¹²⁵ confer a legal right on women workers. To give men equality of rights under the amendment, any man denied such rights guaranteed to women could invoke the amendment to extend these benefits to men. It should be noted, however, that most minimum wage laws apply to men as well as to women.¹²⁶

(b) *Social security and other social benefits laws.* Social security and other types of public insurance which confer greater benefits on one sex than the other would have to be equalized by giving the greater benefit to both sexes. The additional cost involved is the measure of the extent to which the law presently discriminates against one sex and gives a special preference to the other.

One contingency for eligibility for a husband's insurance benefit under the Social Security Act is that he must have received at least one-half his support from his wife, but no such contingency is required for a wife to secure benefits.¹²⁷ As a matter of the principle of equal rights, the benefits are equalized upward; as a matter of policy, perhaps the assumption in the law that all married women are economically dependent on their husbands should be removed by legislation. Thus, wives of individuals included under the Act would be subjected to the same contingencies that are presently applied to husbands of included individuals.

(c) *Alimony.* State laws that authorize courts to award alimony only to women in effect authorize courts to confer benefits to women but not to men.¹²⁸ The effect of the Equal Rights Amendment on these laws would be to authorize award of alimony to men. As a practical matter, alimony is sometimes awarded instead of child support so that the mother instead of the father pays the federal income tax.¹²⁹

(d) *Child support.* Children are legally entitled to support from both mother and father¹³⁰ despite the common assumption that the father is the breadwinner. The law pertaining to child support applies only where there is marital dissolution. Where the marriage is intact, it does not matter what the law says. In many families both parents contribute

125. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 265, 274-75.

126. *Id.* at 265.

127. 42 U.S.C.A. §§ 402(b)(1), 402(c)(1)(C) (1970).

128. In at least 12 states, courts may award alimony to either husband or wife. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 287.

129. INT. REV. CODE OF 1954, §§ 61, 71, 215.

130. See COUNCIL OF STATE GOV'TS, RECIPROCAL STATE LEGISLATION TO ENFORCE THE SUPPORT OF DEPENDENTS 20 (1964).

to the financial support of the family. In some, the mother devotes full time to homemaking and child care in lieu of a financial contribution. None of these arrangements would in any way be affected by the amendment.

In the case of divorce, separation or desertion, the mother is most frequently granted, or left with, custody of the children. There is no escape from her responsibility for providing food, shelter, medical care, education and upbringing for her children. She must rely on the law and, perhaps to a greater degree, on the father's goodwill for some financial assistance for the children. Women generally bear the greater burden of supporting and raising children and the Equal Rights Amendment, although requiring equality of obligations, would not make that burden heavier. It would not preclude requiring one parent to make child support payments while the other parent makes her (or his) contribution in the form of care and upbringing.

(e) *Child custody.* In a few states, the law gives the mother preference in child custody matters.¹³¹ The presumption that men are not as fit to raise the next generation is, of course, unfair.¹³² As against third parties seeking custody, the Equal Rights Amendment would extend legal preferences now accorded to women to fathers as well.

(f) *Divorce grounds.* The same grounds for divorce are generally available to either party to the marriage. Exceptions in some states are "non-support" available to the wife,¹³³ or pregnancy of the wife without knowledge of the husband at the time of the marriage, available to the husband.¹³⁴ Under the amendment, the right to support from a spouse would extend equally to both spouses; it is possible that non-support might in some circumstances be available to the husband. However, in a case where the wife works as housekeeper for her husband, such contribution should be a defense to a divorce action brought by the husband on non-support grounds.

131. The Women's Bureau states that at least 8 states give the mother preference if the child is of tender years and the father preference "if the child is of an age to require education or preparation for labor or business." U.S. DEPT OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 287.

132. The Supreme Court has agreed to review a case challenging an Illinois law allowing the natural mother to have custody of an illegitimate child but requiring the natural father to either adopt or seek permission to become legal guardian of the child. *In re Stanley*, 45 Ill. 2d 132, 256 N.E.2d 814 (1970), *cert. granted*, 91 S. Ct.584 (1971).

133. Arkansas and North Dakota allow a husband to obtain a divorce on grounds of the wife's failure to support in certain circumstances. ARK. STAT. ANN. § 34-1202 (1962); N.D. CENT. CODE §§ 14-05-03, 14-05-07 (1960).

134. For a listing of grounds for divorce by state as of December 1, 1969, see Steele, *The Legal Status of Women* in THE BOOK OF THE STATES 309, 404-05 (Council of State Gov'ts ed. 1970).

Where pregnancy of the wife at marriage is a grounds for divorce by the husband, expectant paternity of the husband would be equally available to the wife seeking divorce. Because of problems of proof, this extension of divorce grounds to the wife would probably have practical application only where the husband subsequently acknowledges his paternity of another woman's child.¹³⁵

(g) *Community property control.* In seven of the eight community property states,¹³⁶ the husband has control of the community property including property and income contributed by the wife.¹³⁷ In Texas, however, each spouse manages and controls that community property he or she would have owned if single. Where the property contributed by the two spouses is mixed or combined, it is jointly controlled unless the spouses agree to a different arrangement.¹³⁸

Under the Equal Rights Amendment, the husband's power in the seven other states to manage the community property would extend to the wife as well, *i.e.*, it would be jointly managed unless otherwise agreed upon. The legislatures of those states could, of course, provide for other nondiscriminatory management of community property such as that provided in the Texas law.

(h) *Inheritance rights.* To the extent that sex distinctions in laws pertaining to inheritance and administration of decedents' estates remain,¹³⁹ the higher benefits would apply to both sexes.

In upholding the constitutionality of an Idaho statute providing that "of several persons claiming and equally entitled to administer [decedents' estates], males must be preferred to females,"¹⁴⁰ that state's highest court noted that it could be argued that the law discriminated against women on the basis of sex. The court explained, however, that "[n]ature itself has established the distinction and this statute is not designed to discriminate, but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer."¹⁴¹ It is doubtful that expediency should justify discrimination against

135. For an enlightened view of divorce grounds, see Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAMILY L.Q. 75 (1969). See also CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 34-38 (1968).

136. Property acquired by either spouse during the marriage is jointly owned, *i.e.*, "community property" of the spouses in Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington.

137. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 290.

138. Ch. 888, § 1 [1969] Texas Laws (effective 1970).

139. See U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 125, at 290-92.

140. IDAHO CODE ANN. § 15-314 (1948).

141. Reed v. Reed, 93 Idaho 511, 465 P.2d 635 (1970), *prob. juris. noted*, 91 S. Ct. 917 (1971).

women. The drawing of lots and flipping of coins are also efficient methods of decision-making and certainly preferable to the admittedly arbitrary discrimination in the Idaho law.

(i) *Consortium*. In some jurisdictions, only the husband has a right to sue for loss of consortium where his spouse is injured. Consortium is the right to the spouse's services.¹⁴² Once lost, the wife's services have sudden economic value—to the husband. Under the Equal Rights Amendment, the right to sue for loss of consortium would be extended to the wife in case of actionable injury to her husband.¹⁴³

(j) *Jury service*. The Women's Bureau has summarized the state laws on jury service as follows:

In 28 States women serve under the same terms and conditions as men, with the same qualifications, disqualifications, and exemptions. In 22 States and the District of Columbia, women may be excused on grounds not available to men. Of these, 11 States permit a woman to be excused solely on the basis of her sex. An additional 10 States . . . and Puerto Rico permit women to claim an exemption because of child care or family responsibilities. Rhode Island further provides that women shall be included for jury service only when court house facilities permit. In 1967 Florida and New Hampshire removed their requirement that women register before they may be considered for jury service. Louisiana is now the only state with this requirement.¹⁴⁴

Since jury service is a right and obligation of citizenship,¹⁴⁵ the obligation to serve imposed upon men would be extended to women. In order to extend full rights to women, *impediments to selection* would be nullified by the amendment. Preconditions that women register or that the court-house facilities are appropriate or a rule encouraging non-service by reason of sex would therefore be void. *Excuses* from jury service, (other than excuse for being a woman) such as for hardship, child care or family responsibilities, should be regarded as an individual privilege

142. For an analysis of the law pertaining to consortium see Kanowitz, *Sex-Based Discrimination in American Law: Law and the Married Woman*, 12 ST. LOUIS U.L.J. 3, 49-50 (1967); Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 143-51 (1968).

143. A property interest in another person entitling one to sue for its loss seems repugnant to concepts of individual liberty and perhaps should be abolished altogether.

144. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 125, at 284. A District of Columbia law allowing women to be excused because of sex was repealed in 1968. Pub. L. No. 90-274, § 103, 82 Stat. 62. See 28 U.S.C.A. § 1862 (Supp. 1970).

145. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966).

and extended to men in like circumstances. Thus, with respect to jury service, the goal would be equal rights to be selected and equal rights in the excuses allowed in individual hardship cases.¹⁴⁶

(k) *Military service.* The Military Selective Service Act of 1967, as amended, makes only men liable for compulsory military service.¹⁴⁷ In the House debate on the Equal Rights Amendment on August 10, 1970, Representative Griffiths pointed out that women would under the amendment be equally subject to the draft but "would not be required to serve—in the Armed Forces—where they are not fitted any more than men are required to so serve. The real effect . . . would probably be to permit both sexes to volunteer on an equal basis, which is not now the case."¹⁴⁸

Women have served in the armed forces for nearly 30 years.¹⁴⁹ There are presently more than 40,000 women in military service.¹⁵⁰ In 1967 special restrictions placing a ceiling on the rank to which women in military service could be promoted were removed,¹⁵¹ and there are now two women generals.¹⁵² Differences in treatment between men and women in military service parallel those in civilian life. As one woman officer stated:

[M]ilitary women have generally fallen into the same patterns of employment that prevail in the private sector—that is, a concentration in the jobs traditionally classified as "women's work" and in the lower skill/grade levels. To date, top level management and executive positions are, for all practical purposes, closed to military women except those directly involved with women's programs.¹⁵³

The practice of discharging women who become pregnant (but not

146. This discussion relates to state juries; federal law prohibits discrimination based on sex in federal jury service. 28 U.S.C.A. § 1862 (Supp. 1970).

147. 50 U.S.C. App. §§ 451, 453 (1964). The present induction authority terminates July 1, 1971. 50 U.S.C. App. § 467 (1964). Whether or not the authority is continued, the draft issue cannot be avoided.

148. 116 CONG. REC. H7953 (daily ed. Aug. 10, 1970). See also S. REP. No. 1558, 88th Cong., 2d Sess. 2-3 (1964).

149. Holm, *Women and Future Manpower Needs*, DEFENSE MANAGEMENT J., Winter, 1970, at 6, 10.

150. Turner, *Women in Military Services*, DEFENSE MANAGEMENT J., Winter, 1970, at 12.

151. Pub. L. No. 90-130, 81 Stat. 374.

152. Gen. Elizabeth Hoisington, Director of the Women's Army Corps and General Anna Mae Hays, Chief of the Army Nurse Corps. Col. Jeanne M. Holm, Director of Women in the Air Force, is on the list of nominees for promotion to general.

153. Holm, *supra* note 149, at 10. It may be noted that "KP" and latrine duty, the traditional army punishments, are also traditional "women's work."

discharging expectant fathers) also parallels discriminatory practices of some private employers.¹⁵⁴

The number of women volunteers allowed in the military is also limited. For example, the authorized strength of the Women's Army Corps is prescribed by the Secretary of Defense and is currently limited to approximately one percent of that of the regular army.¹⁵⁵ In 1967, the President's National Advisory Commission on Selective Service recommended that opportunities be made available for more women to serve in the armed forces, thereby reducing the number of men who must be called involuntarily.¹⁵⁶

Before the end of World War II, consideration was given to drafting women nurses.¹⁵⁷ However, the end of the war in Europe lessened the need for drafting nurses and the proposal was not pressed. Not all nurses are women, of course, but there are not enough male nurses to eliminate the necessity of assigning women nurses to the front. The Office of Public Affairs, Department of Defense, reports that as of January 1, 1971, the number of women, including nurses, serving in Vietnam was a little over 800.

Women are not required to train for or to serve in combat. To the extent that the exemption of women from combat duty increases the chances of such duty for men in service, it should be regarded as discriminating against men. However, in upholding the constitutionality of excluding women from the draft, a federal district court in *United States v. Cook* stated that

[w]hile each of the sexes has its own innate characteristics, for the most part physical strength in a male characteristic, and so long as this is so, the United States will be compelled to establish and maintain armed forces of males which may at least physically be equal to the armed forces of other nations, likewise composed of males, with which it must compete.¹⁵⁸

Men as a class have greater muscular strength than women as a class, but big men as a group are also stronger than little men. Moreover, private employers under Title VII of the Civil Rights Act of 1964¹⁵⁹

154. *Id.*

155. See 10 U.S.C.A. § 3215 (Supp. 1970); 32 C.F.R. § 580.4 (1970).

156. REPORT OF THE PRESIDENT'S NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE 11, 16 (1967).

157. H. REP. No. 194, 79th Cong., 1st Sess. (1945).

158. 311 F. Supp. 618, 622 (W.D. Pa. 1970).

159. 42 U.S.C. § 2000e (1964).

are not allowed to exclude women from work requiring weight lifting.¹⁶⁰ Equal responsibility simply requires that people be treated as individuals and not classified by sex.

The Senate attached an amendment to the proposed Equal Rights Amendment in the 91st Congress that would have allowed Congress to exempt women from military service.¹⁶¹ In expressing opposition to the draft exemption rider, the Citizens' Advisory Council on the Status of Women pointed out that there are benefits, as well as disadvantages, in serving in the armed forces :

The opportunities for education and training afford our young people advantages for upward mobility instead of being locked into any particular economic stratum

. . . The young women of this country should not be denied the opportunity for complete training for the defense of themselves and their families, and for the preservation of their homes and their country.¹⁶²

A group of young women of draft age also expressed opposition to the draft exemption rider. George Washington University Women's Liberation issued a statement during the Senate debate on the amendment in the 91st Congress :

Sex exemption from the draft is a negation of our ability to face the most onerous self-determination question of our time. We are not asking to be spared from making critical decisions. If the passage of the Equal Rights Amendment means that both men and women will be subject to involuntary induction, we claim the right to answer for ourselves.

For long enough we have been given an easy out solely because we are females. We did not ask for this easy out, and we will accept it no longer. Neither will we have our credibility diminished, our need for equal rights demeaned by senators who seek to deny us this equality with the tactic of fear.¹⁶³

160. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

161. 116 CONG. REC. S17895 (daily ed. Oct. 13, 1970).

162. Statement on Bayh Substitute and Ervin Amendment to the Equal Right Amendment, Citizens' Advisory Council Release, October 29, 1970. No amount of private karate lessons, currently in vogue in the women's movement, can match the training provided by the military at taxpayers' expense.

163. G.W. [George Washington University] Women's Liberation, *The Equal Rights Amendment and the Draft*, Nov. 13, 1970.

2. Laws That Restrict or Deny Freedom or Opportunities to One Sex: Rendered Unconstitutional

(a) *Prohibitive or restrictive labor laws.* Prohibited occupations for women under state laws are basically of two types: working in mines or other specified hazardous occupations and bartending.¹⁶⁴ Obviously, no one can be forced into any occupation, and the nullification of all laws closing certain work to women would not force or encourage any woman into any line of work. It would only permit women to make their own decisions without state interference. Laws prohibiting women from working in certain jobs are an obvious restriction upon their liberty and would be rendered void by the Equal Rights Amendment.

Laws in a few states still limit the weights which women can lift.¹⁶⁵ Such laws violate the rights of women to equal employment opportunity under Title VII of the Civil Rights Act of 1964.¹⁶⁶ Irrespective of Title VII, such laws also limit the freedom of a woman to choose certain types of work and would deny women equal rights under the amendment.

It might be argued that weight lifting laws confer a benefit upon women workers by protecting them from having to lift heavier objects, and therefore, the "benefit" could be extended to men workers under the amendment. The amounts of the restrictions range from 10 to 50 pounds.¹⁶⁷ If these restrictions were imposed upon men as well as women, some jobs simply could not be performed.¹⁶⁸ If the law applied to housewives, most would have to quit.

The same is true of hours restrictions, still on the books in most of the states, and laws prohibiting night work by women in certain occupations.¹⁶⁹ To extend such restrictions on hours to men workers would require drastic changes in the operation of most businesses and would cause an abrupt reduction in national output. A constitutional requirement of equality of the sexes does not carry with it any correlative requirement that industry restructure, no matter how desirable that ultimately might be.

(b) *Domicile limitations.* One's domicile or legal residence can determine in which state one may vote, run for public office, serve on juries, pay taxes or have one's estate administered. The traditional rule has been that by operation of law a married woman's legal domicile

164. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 277-78.

165. *Id.*

166. See notes 159-60 *supra* and accompanying text.

167. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 277-78.

168. See Murray & Eastwood, *supra* note 5, at 248-53.

169. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 271.

automatically is that of her husband and is determined by him regardless of her intentions or where she lives. In five states married women have the right to establish their own domicile.¹⁷⁰ In addition to these five, three states allow a married woman to establish her own domicile for purposes of running for public office, two for purposes of jury service, three for probate purposes and thirteen for voting.¹⁷¹ The Equal Rights Amendment would have the effect of removing remaining restrictions on the freedom of married women to establish their own domicile.

(c) *Other restrictions on married women.* The Women's Bureau of the Department of Labor reports that in three states a married woman does not have the legal capacity to become a surety or a guarantor,¹⁷² and in four states she may not go into business for herself without court sanction.¹⁷³ These remaining legal disabilities imposed upon married women would be nullified by the amendment.

3. Laws Making Age Distinctions on the Basis of Sex: Equalize Up or Down

Different ages specified for men and women or boys and girls in the same law would be equalized under the Equal Rights Amendment. Where the two different ages specified in the law are ages at which a right terminates, the *higher* age would apply to both sexes. This would be consistent with the rationale of extending the rights, benefits and privileges accorded to one sex under the law to the other sex.¹⁷⁴ Where the ages are those at which limitations or disabilities are terminated, the limitations are nullified with respect to persons between the two ages by applying the *lower* age to both sexes.¹⁷⁵

In a few western states the age at which a child's right to parental support terminates is 18 for girls and 21 for boys.¹⁷⁶ Under such laws, boys between the ages of 18 and 21 have a right which girls do not have, and the effect of the amendment would be to extend that right to girls and make the cut off age 21 for all children.

Similarly, some laws provide the juvenile court jurisdiction may

170. Alaska, Arkansas, Delaware, Hawaii and Wisconsin. CITIZENS' ADVISORY COUNCIL OF THE STATUS OF WOMEN, *supra* note 135, at 44-59; U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 284-85.

171. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 1, at 284-85.

172. Georgia, Idaho, Kentucky. *Id.* at 292.

173. *Id.*

174. See notes 125-63 *supra* and accompanying text.

175. See notes 163-73 *supra* and accompanying text.

176. The Council of State Governments lists Arkansas, Idaho, Nevada, North Dakota, Oklahoma, South Dakota, and Utah as having such laws. COUNCIL OF STATE GOV'TS, *supra* note 130, at 21-25.

extend to girls at a higher age than boys.¹⁷⁷ Under the amendment the advantages accorded to one sex would be extended to the other by applying the higher age of juvenile court jurisdiction to both sexes.

In some states the age at which marriage can be contracted with parental consent and the age below which parental consent is required for marriage is higher for boys than for girls.¹⁷⁸ By contrast, some child labor laws provide a higher age for girls than for boys. The right to marry¹⁷⁹ and the right to engage in labor¹⁸⁰ are restricted for persons between the two ages—boys in the case of marriage and girls in the case of the child labor laws. The restriction would be removed by the amendment, and the lower age applied in both cases.

4. Laws Which Involve Difference in Sexual or Reproductive Capacity

(a) *Maternity.* Since men do not bear children, a law which applies to pregnancy and childbirth and which refers only to women is not making a sex classification. Despite its terminology, the law would apply in the same way and have the same effect if it referred to people.¹⁸¹ Thus, if a law provided for cash benefits for the birth of a child, it would not be violative of the Equal Rights Amendment. It is important to note, however, that special maternity benefits laws are virtually non-existent.¹⁸² If there were such laws, they of course would have to be reasonably related to the protection of pregnancy and childbirth and not designed to place women at a competitive disadvantage in the labor force.

The Citizens' Advisory Council on the Status of Women has adopted the following statement on "Job-Related Maternity Benefits:"

Childbirth and complications of pregnancy are, for *all job-related purposes*, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society.¹⁸³

The Council noted, however, that of the six jurisdictions which have government-sponsored temporary disability insurance programs, only New Jersey and Rhode Island require that the benefits under these laws

177. Such a law in Oklahoma was recently upheld as not violative of boys' rights to equal protection of the laws under the fourteenth amendment. *Johnson v. State*, 476 P.2d 397 (Okla. Crim. App. 1970).

178. Steele, *supra*, note 134, at 403.

179. *Loving v. Virginia*, 388 U.S. 1 (1967).

180. *Truax v. Raich*, 239 U.S. 33 (1915).

181. See Murray & Eastwood, *supra* note 5, at 240.

182. See CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES 44-46 (1968).

183. Citizens' Advisory Council on the Status of Women, Statement of Principles, Oct. 29, 1970.

be available for temporary absence from work for a normal delivery.¹⁸⁴

The exclusion of childbirth from a state temporary disability insurance program is in the nature of a "reverse benefit" or a detriment. If the special exclusion were reasonably related to *discouraging* pregnancy and childbirth (and if that were its true purpose which, of course, it is not), perhaps it would not be violative of the Equal Rights Amendment. The reason for the absence from work due to the worker's temporarily being disabled, whether due to childbirth, injury, surgery or other temporary physical incapacity, is of no concern to the employment. To single out absence for the particular reason of childbirth bears no employment purpose other than to discriminate against certain women workers. Though superficially neutral in that the law acts to exclude childbirth and not women, it results in treating some women workers differently than men workers who are absent from work due to temporary disability. In the guise of discouraging childbirth, the women are punished as workers.

Laws prohibiting women from working for certain periods before and after childbirth¹⁸⁵ discriminate against women because the true aim and effect is to regulate the women's employment and not to regulate or give "benefits" for pregnancy or childbirth. There is no comparable compelled period of absence from work for men who, for example, are temporarily disabled because of surgery.

In sum, singling out childbirth for special treatment does not discriminate on the basis of sex even though the law refers only to women because men cannot give birth. But if in referring to childbirth the law goes beyond to spheres other than the reproductive difference between men and women (*e.g.*, employment), the law must treat women who give birth the same as men are treated in respect to the area of regulated employment (*e.g.*, absence from work for temporary disability).

Similarly, women and girls could not be discriminated against in pursuing education because of childbirth. The expulsion or segregation of girls in public schools who have become mothers, but not boys who have become fathers, would be inconsistent with the Equal Rights Amendment. Just as laws prohibiting women from working for certain periods before (or after) childbirth regulate women's employment, not the childbirth, exclusion of pregnant girls from public schools regulates their education, not their pregnancy. The reproductive differences in the

184. *Id.* at 3. See also CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *supra* note 182.

185. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *supra* note 182, at 32.

sexes are not relevant to employment and education and in these areas men and women must be treated the same.

A criminal abortion statute is an example of a law which is limited on its face to the reproductive function. As such, it does not involve a direct question of denial of equality but of denial of other human rights beyond the scope of this article. It may be noted, however, that the abortion issue is not unrelated to the equality issue because the same underlying bases for court decisions denying equality of the sexes (women as reproductive instruments of the state, as dangerous to morality, and properly under the control of men) are *implicit* in the abortion laws.

(b) *Homosexuality*. It was suggested at the Senate Judiciary Committee hearings on the Equal Rights Amendment in September, 1970, that "[i]f the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation."¹⁸⁶ This is not the case. The amendment would affect only laws in which the difference in treatment is based on sex and not those where the difference is based on sexuality. It would not affect laws distinguishing as between homosexuality and heterosexuality. It would, however, require that male and female homosexuals be treated the same and that male and female heterosexuals be treated the same.

Although the issue is not relevant to the amendment, the interest of the state in recognizing heterosexual marriages is their capacity for reproduction and child raising. This element is not present in homosexual relationships. Any challenge to legal distinctions as between heterosexuals and homosexuals would have to be brought under the fourteenth amendment.

(c) *Rape*. Forcible rape is sexual intercourse with a female not the wife of the assailant by force and without her consent. During 1969, there were approximately 36,470 reported forcible rapes, a rate of 35 for every 100,000 women in the United States.¹⁸⁷ The *rate* has almost doubled—up 93 percent since 1960.¹⁸⁸ According to the Federal Bureau of Investigation, rape "is probably one of the most under reported crimes due primarily to fear and/or embarrassment on the part of the victims."¹⁸⁹

186. Statement of Paul A. Freund, *Hearings on S.J. Res. 61 & 231 Before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess., at 74-75 (1970).

187. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT' OF JUSTICE, UNIFORM CRIME REPORTS—1969, at 11 (1970).

188. *Id.* at 12.

189. *Id.* at 11.

The F.B.I. crime figures include only actual offenses established by police investigation.¹⁹⁰

A reported study of 100 consecutive rape cases in Dade County, Florida, showed that 38 of the victims suffered physical injury (only gross injuries were counted).¹⁹¹ In 58 of the cases, only one male assailant was involved; in 42 there were from two to ten assailants.¹⁹² In 45 of the cases, the assailants were not apprehended. Nineteen were determined by the police after investigation to be "unfounded." Of the remaining 36, ten were found guilty of rape or a lesser crime.¹⁹³

From 1930 to 1968 there were 455 executions for rape.¹⁹⁴ The Court of Appeals for the Fourth Circuit recently held that execution is a cruel and unusual punishment for all but the most aggravated types of rape and therefore violative of the eighth amendment.¹⁹⁵ No useful purpose is served in punishing rape more severely than other forms of assault that inflict comparable injury on the victim. The more severe penalties do not appear to add to the protection of women. The Model Penal Code treats both rape and aggravated assault as felonies in the second degree.¹⁹⁶

It has been suggested that rape laws do not classify by sex because their application would not be any different if the prohibition applied to persons rather than to men and accordingly would not be constitutionally objectionable.¹⁹⁷ This assumes, however, that a woman or women could not force sexual intercourse on a man without his consent. If that is possible, then the Equal Rights Amendment would affect rape laws as follows: A man accused of rape could not be punished more severely than a woman who performed the same elements of the crime. She would be prosecuted under other applicable statutes, such as aggravated assault, kidnapping, maiming or burglary. Thus, in those states where the rape penalty is more severe than those criminal statutes that could be invoked to prosecute women who performed such acts upon men, the maximum

190. *Id.* at 12.

191. Schiff, *Statistical Features of Rape*, 14 J. FOR. SCI. 102, 106-07 (1960).

192. *Id.* at 105.

193. *Id.* at 109.

194. 405 of those convicted were black (398 in the South and 7 in Missouri). U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT 1930-1968, at 10-11 (1969).

195. *Ralph v. Warden*, 8 Crim. L. Rptr. 2193 (4th Cir. 1970).

196. MODEL PENAL CODE §§ 211.1, 213.1 (Proposed Official Draft, 1962).

197. Murray & Eastwood, *supra* note 5, at 240. It was thought that the specification of a female victim in the law would make it impossible for a woman to commit rape. However, the essence of the statute is to prohibit forcible heterosexual attack (unless the particular law also applies to homosexual attacks). Focusing attention on the victim's gender seems too easy an out, and equal justice would seem to prohibit such a narrow and literal disposition of the question.

rape penalty would be reduced to the level of that in the applicable non-rape criminal statute. This would accomplish equal treatment of men and women accused of the same elements of the crime. What the crime is called does not matter.

The elements in the crime of statutory rape, sexual intercourse with a girl under a certain age not the wife of the assailant, would be comparable to those involved in seduction by a woman of a boy under the same age. The law assumes that children do not have capacity to consent; absence of consent is not part of such crimes. Unlike forcible rape, where other criminal statutes would apply even if the rape laws were repealed, if the statutory rape statute does not apply to both men and women and there is no statute applicable to women involving the same criminal elements,¹⁹⁸ the legislature would have to amend the law to apply to women or the state could punish the rape only if it were forcible. The net effect if the law were not amended, therefore, would be to remove the presumption in the law that a girl under the specified age (the range is 14 to 21)¹⁹⁹ is incapable of consenting to intercourse.

(d) *Prostitution*. As a matter of morality there probably should be no difference in treatment under the law as between a prostitute and her customer, but laws punishing prostitution generally punish only the woman.²⁰⁰ The receipt of payment for sexual services, however, differs from giving payment; therefore, the prostitute and her customer are not comparable. The customer does not violate the same law as the prostitute because one element of the crime is not present, and accordingly, equal treatment of prostitute and customer would not be required by the Equal Rights Amendment. However, since it is possible for a man to sell his sexual services to a woman, as in the case of statutory rape, the appropriate legislative bodies would have to amend the law to apply to both sexes or women could no longer be punished for prostitution.²⁰¹

5. Separation of the Sexes: Forbidden Except Where Necessary to Protect the Right to Privacy and Does Not Deny Individual Rights and Liberties

The Citizens' Advisory Council Memorandum on the Equal Rights Amendment²⁰² states that legally required separation of the sexes, to be

198. Kanowitz states that only a few states provide penalties for a woman who engages in sexual intercourse with a young boy. Kanowitz, *Law and the Single Girl*, 11 ST. LOUIS U.L.J. 293, 312 (1967).

199. *Id.*

200. *Id.* at 310.

201. The propriety of punishing prostitution perhaps needs to be reassessed.

202. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, THE PROPOSED

consistent with the amendment, must meet two requirements: 1) the separation must not deny individual rights and liberties and 2) the government must show that the reason for the separation is to protect the right of privacy.²⁰³

Whether the generally unnatural and artificial condition of sex segregation is consistent with equal rights depends, in part, upon whether separate can be equal. In addition to the few remaining sex segregated systems of public higher education,²⁰⁴ some public schools in the South have segregated by sex in connection with racial desegregation plans.²⁰⁵ In *Brown v. Board of Education*, the Supreme Court held that "in the field of public education the doctrine of 'separate but equal' has no place."²⁰⁶ The Court's reasoning in *Brown* regarding the effect of separate educational facilities on Negro children is equally applicable with respect to the effect sex separation has upon girls:

To separate them from others of similar age and qualification solely because of their race [sex] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.²⁰⁷

In addition, sex separation reinforces artificial, exaggerated and meaningless distinctions between the sexes that further stereotype and limit both sexes.

It has been suggested that

[t]he constitutional right of privacy would prevail over other portions of the Constitution embodying the laws of the society in its collective capacity.

. . . [T]he right of privacy would permit, perhaps require, separation of the sexes in public restrooms, segregation by sex in sleeping quarters of prisons or similar public institutions, and a certain segregation of living conditions in the Armed Forces.²⁰⁸

EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION: A MEMORANDUM 14 (1970).

203. Although the Council *Memorandum* does not state that the right to privacy is the exclusive potentially acceptable reason for separation, no other is mentioned nor has any other been suggested by women who support the amendment.

204. For example, Virginia and South Carolina. See note 62 *supra* and accompanying text.

205. See Barnett, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. CHI. L. REV. 296, 297 (1970).

206. 347 U.S. 483, 495 (1954).

207. *Id.* at 494.

208. Statement of Thomas I. Emerson, *Hearings on S.J. Res. 61 & 231, supra* note 186, at 298.

Presumably, individual privacy is affected more in these situations where the sexes are mixed than where all are of the same sex because of greater heterosexual interest and therefore greater invasion of the right to be left alone. While these particular examples do not appear to present problems, there is danger that the right of privacy, if used to justify segregation of the sexes, would be the new technique for discriminating against women.

Privacy is inherently *individual* and not class oriented. Just as the right of an individual to be protected by government from harm may not be used to justify class discrimination,²⁰⁹ the individual right of privacy should not justify governmentally enforced segregation where the separation affects the individual's right to equal treatment without differentiation by reason of sex. In other words, the rule should be that government has an obligation to construct its facilities so that integration of the sexes does not cause invasion of individual privacy, not that government can segregate the sexes if necessary to avoid invasion of privacy. Thus, in constructing university dormitories, protecting privacy by segregating sleeping quarters and bathrooms does not warrant segregating students in facilities for eating, studying and social activities. The desired goal is to construct facilities to protect individual privacy from interference by anyone, regardless of sex.

CONCLUSION

The Equal Rights Amendment would not change the law. It would only require equality. Whether the amendment is literally added to the Constitution or read into existing provisions through interpretation, courts must no longer base approval of sex distinctions in the law on the "woman's place is in the home" or any variant of that assumption. Nor should the law make any distinction as between persons based on their class by birth.

Finally, who can speak for women, many of whom are too satisfied and/or oppressed to make their views known? Certainly not men, and certainly not the "authorities"—judges, legislators, lawyers, doctors, psychiatrists, writers, sociologists—regardless of their sex. This does not mean that every issue is "up for grabs" with the "degree" of equality decided by the loudest or most prestigious. The power of an individual to give up the right to equal treatment under the law is non-delegable.

209. "[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). See also *Cooper v. Aaron*, 358 U.S. 1, 16 (1958).