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THE LEGAL DIMENSIONS OF WOMEN'S LIBERATION: AN OVERVIEW

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Liberation means freedom. For a woman in American society today this means that she will no longer by virtue of her sex be placed in a societally subordinate role, that she will have her choice of life role, that she will no longer be channeled into a societally perceived role of "wife and mother." While many women will choose the "wife and mother" role, those women who do not must have the same opportunity to maximize their life chances as do men. By the same token, a woman who does choose the "wife and mother" role must not for that reason, be disadvantaged or made subordinate to her husband. Margaret Mead put it very well when she said:

> [S]ociety must also support fully women's right to remain unmarried, their right to a personal life without children, to a career alone or to a life of devotion to a small circle of others. . . .
>
> . . . The climate of opinion is turning against the idea that homemaking is the only form of feminine achievement. But the pendulum must not swing too far, forcing out of the home women whose major creative life is grounded in motherhood and wifehood. Finally, women can only be given real opportunity by being offered real choices, each one underwritten by fair laws and fair practice and a social climate that ensure that each life pattern will be considered a feasible and dignified one.[1]

It is the right of a woman to choose her life role that, in my opinion, constitutes the essence of women's liberation. When women are given

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1. Mead, *Epilogue*, in PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN 204 (M. Mead & F. Kaplan eds. 1965).

that choice a consequence may be that men are no longer channeled into the societally perceived role of "provider and patriarch," and in this article there will be some discussion of discrimination against men. However, the focus will be on the liberation of women and the relationship of the law to that liberation.[2]

LAW AND EQUALITY

In speaking of sexual inequality, Pauli Murray has observed:

> Sexual inequality is the oldest and most intransigent form of discrimination in human culture; indeed it has provided models for the subordination of other oppressed groups. As in the case of racial bias, the individual's status is defined at birth, and legal and social disabilities are imposed by virtue of visible, permanent physical characteristics which identify one's sex. For many purposes, law and social customs treat *all* women as a separate class inferior to that of men.[3]

Whether one agrees fully with Kate Millett's analysis of the nature of sexual politics,[4] it is difficult to dispute her contention that our society relates to women on the basis of their sex,[5] and that, "[the] entire culture supports masculine authority in all areas of life."[6] Stated simply, "[t]he major political, social, economic and religious institutions are firmly in the control of men."[7] This results from the initial channeling

2. In the past two years a great deal has been written on this subject, which makes it possible to take the overview approach I have adopted here. The pioneer work is L. KANOWITZ, WOMEN AND THE LAW (1969) [hereinafter cited as KANOWITZ]. Recent symposia on the law and women's rights include *Symposium: Women's Rights*, 23 HAST. L.J. 1 (1971); *Symposium—Women and the Law*, 5 VALPARAISO L. REV. 203 (1971). The equal rights amendment is treated in *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215 (1971); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter cited as Brown].

3. Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VALPARAISO L. REV. 237 (1971) (emphasis in original) [hereinafter cited as Murray]. The article also points out that women are treated as a separate class inferior to men, but that unlike a racial or ethnic minority, women are distributed throughout the entire population and share class characteristics with men. A detailed analysis of the relationship between sex and class is beyond the scope of the present article.

4. K. MILLETT, SEXUAL POLITICS (1970) [hereinafter cited as MILLETT]. Millett defines politics in terms of power relationships and analyzes sexual dominion from this perspective. For a criticism of her approach, see Howe, *The Middle-Class Mind of Kate Millett*, HARPERS Dec., 1970, at 110.

5. MILLETT, *supra* note 4, at 31.

6. *Id.* at 35.

7. Freeman, *The Legal Basis of the Sexual Caste System*, 5 VALPARAISO L. REV. 203, 207 (1971) [hereinafter cited as Freeman].

of women into the "wife and mother" role, from further channeling with regard to education and employment and from rank discrimination in all areas of life in which societal power is exercised. No useful purpose would be served here by repeating the now familiar and dreary figures showing the extent of employment and educational disparities.[8] Nor is it necessary to set out again in detail all the facets of sexual discrimination[9] or to consider the effect that such discrimination has upon the personality of women.[10] It is clear that women are the "second sex,"[11] that they are restricted in their choice of life role and that sexual inequality is a dominant feature of American society today.

Since law theoretically reflects societal values,[12] it is not surprising that American law has never reflected the value of sexual equality.[13] To the contrary, sex-based distinctions in law are pervasive and to a large extent serve to implement the societal determination that a woman's primary role is that of "wife and mother." As the Supreme Court said many years ago:

> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of the civil society must be adapted to the general constitution of things. . . .[14]

While we have come a long way from the time when women were put in the same category with children and incompetents[15] and when a married woman's property, and to some extent even her person, were considered legally subject to her husband's control,[16] it has still been assumed that women as a class may be dealt with on the basis of their sex, and that this sex-based distinction justifies placing women in a societally subordinate role. As the Supreme Court said only a decade

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8. *See generally* Murray, *supra* note 3.

9. For an interesting analysis of sex discrimination in litgation, see Nagel & Weitzman, *Women as Litigants*, 23 HAST. L.J. 171 (1971).

10. *See generally* Cavanaugh, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1971) [hereinafter cited as Cavanaugh].

11. S. DE BEAUVOIR, THE SECOND SEX (Bantam ed. 1970).

12. There is sometimes a distinction between a society's officially approved values, as reflected in the law, and its operational ones. This appears most clearly in the area of racial equality.

13. For an historical analysis see Freeman, *supra* note 7, at 208-25; Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VALPARAISO L. REV. 281, 284-98 (1971); KANOWITZ, *supra* note 2, at 151-54.

14. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872).

15. *See generally* H. CLARK, LAW OF DOMESTIC RELATIONS § 7.1 (1968).

16. This was reflected by the defense of coverture, discussed in KANOWITZ, *supra* note 2, at 88-92.

ago, "[W]oman is still regarded as the center of home and family life."[17] Because the law has so regarded her, it operates in many ways to force the woman into that role and to limit her ability to choose any other.

In this respect, the law stands as an impediment to social change, reinforcing the societal determination that woman is subordinate to man and that her primary role is that of "wife and mother." The very pervasiveness of sex-based distinctions, as well as their content (not to mention the fact that they are made by male legislators and judges)[18] bespeaks the value of male supremacy. As *Brown v. Board of Education*[19] recognized, racial segregation is not a process of mutual exclusion —there is a segregator and a segregatee. The purpose of racial segregation was to promote the doctrine of white supremacy.[20] So too, sex-based distinctions in law set off the "inferior" woman from the "superior" man and, therefore, are used to justify discrimination against the female. As Leo Kanowitz has so aptly observed:

> As long as organized legal systems, at once the most repected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote.[21]

Until men and women see each other in this light, women will continue to be discriminated against on the basis of their sex.

On the other hand, as we have seen in the racial area, the law can declare equality to be an officially approved societal value, and its process can then be used in in the struggle to make that value a reality. The law can operate as an instrument of social change both by imposing sanctions against discrimination and by attempting to alter institutional and individual behavior to conform to the value of equality. Therefore, women must seek from the law a complete turnabout. The law must be restructured to remove from it those sexual biases and sex-based distinctions that retard equality, and at the same time it

17. Hoyt v. Florida, 368 U.S. 57, 62 (1961).
18. For an illuminating analysis of judicial attitudes toward women as reflected in reported decisions, see Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. REV. 675 (1971) [hereinafter cited as Johnston].
19. 347 U.S. 483 (1954).
20. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967).
21. KANOWITZ, *supra* note 2, at 4.

must be affirmatively used to promote equality in all areas of American life. This does not mean, of course, that changes in the legal structure will radically change cultural norms or societal behavior patterns. Declaring sexual equality to be an officially approved societal value will not mean that overnight—or even in the foreseeable future—it will become an operational one. Here again, we see an analogy to the struggle for racial equality. At the same time that the Supreme Court was declaring racial equality to be an officially approved societal value and stating that racial distinctions were "odious to a free people whose institutions are founded upon doctrines of equality,"[22] the National Advisory Commission on Civil Disorders was observing that America consisted of "two societies, separate and unequal."[23] Indeed, it cannot be denied that despite all the Supreme Court decisions, civil rights legislation and "affirmative action" programs, a vicious racism still permeates most areas of American life.

But from the standpoint of the law and its relation to the struggle for equality, this is beside the point. Legal change alone cannot bring about social change. However, by making racial equality an officially approved value we have removed legal roadblocks and have created a framework within which social change can eventually take place. More importantly, the processes of the law can be used as a weapon—in conjunction with other weapons—in the struggle for racial equality. Likewise, if sexual equality is declared to be an officially approved societal value, the law will not, as it does now, perpetuate the subordinate position of women but to the contrary can be used affirmatively to help accelerate social change. No more can be asked of it.

This is the real significance of the proposed equal rights amendment.[24] It would represent a societal commitment to the value of sexual equality. As has been observed, "[a] profound national commitment to terminate sexual discrimination would provide a powerful impetus for legislative efforts, as well as for individual re-examination of behavior patterns that result in sexual bias."[25]

It would be possible, of course, for the Supreme Court, in its

22. Loving v. Virginia, 388 U.S. 1, 11 (1967).

23. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (Bantam ed. 1967).

24. As to the history of the equal rights amendment, see Brown, *supra* note 2, at 886-88. The principal congressional opposition was in the Senate. It was finally approved and sent to the states for ratification on Mar. 22, 1972. U.S. CODE CONG. & AD. NEWS 835 (Supp. No. 3, 1972).

25. Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216, 220 (1971) [hereinafter cited as Dorsen].

"awesome Marshallian function as an occasional national policy maker,"[26] to declare sexual equality an officially approved societal value by interpreting the equal protection clause of the fourteenth amendment to prohibit all discrimination on the basis of sex. It could say that: "Sexual distinctions, like racial distinctions, are odious to a free people whose institutions are founded upon doctrines of equality. In every respect the law must consider the woman to be the equal of the man." If the Supreme Court would take this position, an equal rights amendment might indeed be unnecessary.[27] But it has not yet done so. In the recent case of *Reed v. Reed*,[28] it finally held that sexual discrimination was within the equal protection clause but limited that holding to discrimination that was "arbitrary." Until the "inherently invidious" rationale is forthrightly applied to sex-based distinctions and until sexual discrimination is condeemned in the same manner as racial discrimination, it cannot be said that sexual equality is an officially approved societal value. From this standpoint an equal rights amendment is still necessary.

I must confess that I find the opposition to the adoption of an equal rights amendment on the part of purported proponents of sexual equality[29] somewhat perplexing. Apart from arguing that the adoption of an equal rights amendment will wipe out desirable social legislation applicable only to women—a result which can easily be avoided, as I will disscuss subsequently—it is difficult to comprehend any valid objection to a constitutional amendment that would finally proclaim that there shall be sexual equality before the law. The basic objections have been summarized as follows: "Given the complexity of the problem, the amendment will act in unpredictable ways, cause confusion and foster excessive litigation."[30] But to say that the problem is "complex" is a value judgment that sex-based distinctions must continue to be made. There is nothing complex about saying that the law presently distinguishes between men and women in a variety of contexts, most of which serve to perpetuate the societally subordinate role of women, and that these distinctions must be eliminated. As for the amendment's "acting in unpredictable ways" and "causing confusion," I would ask,

26. Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 428 (1967).

27. *See* KANOWITZ, *supra* note 2, at 192-96. Prof. Kanowitz now favors the adoption of the amendment.

28. 404 U.S. 71 (1971).

29. *See, e.g.*, Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234 (1971) [hereinafter cited as Freund]; Kurland, *The Equal Rights Amendments Some Problems of Construction*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 243 (1971) [hereinafter cited as Kurland].

30. Dorsen, *supra* note 25, at 223.

"unpredictable and confusing to whom?" If the objective is full equality and the amendment is broadly interpreted to implement that objective in all respects, the results will be fairly predictable: sex-based distinctions and discrimination against women, overt and subtle, will be invalidated. As for "excessive litigation," I cannot perceive of litigation as being "excessive" so long as the underlying problem remains.

It is also argued that legislation and judicial decision will solve the problem,[31] and that even with a constitutional amendment, legislation and litigation on a case-by-case basis will still be necessary. This argument totally ignores the manner in which the legal process must be used to bring about social change. In terms of influencing the behavior of legislators and judges—of manipulating the system, so to speak[32]—it it desirable to have on one's side a constitutional amendment that proclaims sexual equality to be an officially approved societal value. Where male judges and legislators are being asked to act counter to ingrained notions of male supremacy,[33] it may take an explicit constitutional provision to convince them that this is what "the law" requires. It cannot be doubted that the existence of the equal rights amendment will make it easier to obtain favorable legislation and judicial decisions, and for a lawyer this should be sufficient reason to advocate its adoption.

In this analysis of the legal dimensions of women's liberation I will, as appropriate, deal with both the removal of present barriers to equality and affirmative action designed to promote such equality. As will be demonstrated, these objectives are interrelated. I see four aspects to the legal dimensions of women's liberation, which may serve to outline a functional basis for liberation as well. They relate to (1) a woman's control of her own body; (2) equality in the marriage relationship; (3) equality of employment opportunity and (4) treatment in all respects as an individual rather than on the basis of her sex.

A Woman's Control of Her Own Body

The woman must be liberated from the burden of unwanted pregnancy. The basic biological difference between men and women—the capacity of a woman's body to produce children—disadvantages a woman in her choice of life role. This disadvantage is aggravated by the fact that in this society, as in practically all others, the child care responsibility is

31. *See generally* Freund, *supra* note 29; Kurland, *supra* note 29. *See also* Mink, *Federal Legislation to End Discrimination Against Women,* 5 Valparaiso L. Rev. 397 (1971).

32. For a discussion of "manipulating the system," in the context of protecting first amendment rights, see Sedler, Book Review, 80 Yale L.J. 1070, 1083-86 (1971).

33. As to those attitudes, see Johnston, *supra* note 18, at 741-46.

assigned to the mother rather than to the father;[34] and here, though not in many other societies, alternative means of child care, such as the extended family system or public child care facilities, are the exception rather than the norm. A woman to be in all respects equal to a man must, as an initial proposition, have full control over her own body precisely because that body is capable of producing children. Thus, antiabortion laws or laws that limit the availability of any contraceptive measure[35] constitute an acute form of discrimination against women.

From the perspective of a woman, abortion must be viewed only as the equivalent of contraception. Despite our advanced technology we have not yet developed a contracptive that is fully safe, effective, acceptable and available. Therefore, unless a woman opts for celibacy or is incapable of having children, she must suffer the risk of unwanted pregnancy due to contraceptive failure or unavailability. The very things that make a wanted pregnancy a joy for a woman can make an unwanted one a horror. Yet, in the great majority of our states abortion is prohibited "unless necessary to preserve the life of the woman."[36] Ironically these laws were originally passed to protect women from the dangers of abortive surgery,[37] but have been retained long after abortion has become a simple medical procedure.[38] Only three states—New York, Hawaii and Alaska—have fully repealed their antiabortion laws and made abortion generally available on demand.[39] Most of the so-called

34. Millett contends this responsibility tends to arrest the woman's development at the level of biological experience. *Millett, supra* note 4, at 26.

35. In Griswold v. Connecticut, 381 U.S. 479 (1965), the constitutional right to privacy was held to prohibit a state from barring the access of married persons to contraceptive devices. Denying unmarried persons access to contraceptive devices was held unconstitutional in Eissenstadt v. Baird, 40 U.S.L.W. 4302 (U.S. Mar. 21, 1972). Four justices took the position that the statute was unconstitutional. Two other justices concurred on other grounds. Chief Justice Burger dissented on the ground that the state could constitutionally limit the prescribing of contraceptives to licensed physicians.

36. For an analysis of abortion laws prior to the most recent changes, see Lucas, *Laws of the United States*, in 1 ABORTION IN A CHANGING WORLD (R. Hall ed. 1970).

37. Most of the laws were passed at the turn of the century or shortly thereafter. At that time the danger from infection and the absence of antibiotics made the insertion of instruments into the uterine cavity a very dangerous procedure. For a general historical analysis of antiabortion laws, see Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

38. When effective antibiotics came into use, the danger from abortion was substantially eliminated. *See* Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections*, 56 N.Y. ST. J. MED. 3673 (1956). Today the mortality associated with abortion performed in a hospital at an early stage of gestation is seven times lower than that associated with pregnancy and childbirth. Tietze, *Morality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969).

39. *See, e.g.*, N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971).

"abortion reform" legislation still falls wide of the mark. What is involved is a woman's right to control of her own body; if she is to have that right, it cannot depend upon a legislative determination that the circumstances in which she seeks an abortion are "suitable."

In recent years antiabortion laws have been challenged on constitutional grounds, and the decisions are most illuminating. The "Draconian" laws, allowing abortion only "where necessary to preserve the life of the woman" have been challenged on grounds of vagueness and overbreadth, as well as on the "right of privacy" ground that a woman is entitled to control over her own body. The vagueness and overbreadth decisions have gone both ways,[40] with some courts fully upholding such laws on the ground that the state can prohibit abortion in order to protect the "right to life" of the unborn fetus.[41] In discussing the "right to life" argument —which ignores the fact that this was not the purpose of the statutes when enacted[42]—these courts seem to disregard the woman entirely. The question is framed in terms of whether the fetus has a "right to life," and when the court finds that such a "right" exists, it upholds the statute as a proper exercise of governmental power. Totally disregarded is the fact that the fetus can "live" and develop only at the expense of the now-living woman. Implicit in such reasoning is the assumption that because she is a woman and "got pregnant," the state can compel her to be an unwilling incubator and to "give life" to the unborn fetus. As one court observed, "those who dance must pay the piper,"[43] and if a woman "gets pregnant," she must pay the price.[44] To say that the unborn fetus is a "person" in this context means that the woman is not, for she is denied the very essence of personhood: control over her own body to prevent an unwanted organism from growing within it.[45]

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40. For cases invalidating such laws see Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *decision as to juris. postponed,* 402 U.S. 941 (1971); People v. Belous, 71 Cal.2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970). In United States v. Vuitch, 402 U.S. 62 (1971), the Supreme Court interpreted the District of Columbia statute prohibiting abortion "except where necessary for the preservation of the mother's life or health" to include mental health and found that, as interpreted, the statute was not unconstitutionally vague. No other issues were directly before the Court in that case.

41. *See* Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Rosen v. Louisiana State Bd. of Med. Examiners, 318 F. Supp. 1217 (E.D. La. 1970).

42. *See* Steinberg v. Brown, 321 F. Supp. 741, 750-51 (N.D. Ohio 1970) (dissenting opinion).

43. Steinberg v. Brown, 321 F. Supp. 741, 748 (N.D. Ohio 1970).

44. The court observed that the unwanted pregnancy was the quid pro quo for having engaged in the sexual act and "gambling and losing." It did not appear what price the man who engaged in the act would have to pay.

45. No right is held more sacred, nor is more carefully guarded . . . than the right of every individual to the possession and control of *his* own

When faced with such statutes, other courts, by analogizing abortion to contraception, have invalidated the statute on the ground that the state cannot have an interest in protecting all fetal life, "no matter how defective or intensely unwanted by its future parents." The furthest that any court has gone in recognizing a woman's right to control of her own body is the decision in *Doe v. Bolton*, now on appeal to the United States Supreme Court.[48] In *Doe*, the court invalidated in part Georgia's "abortion reform" law, which required approval of abortions by a hospital committee and which specified the grounds on which an abortion could be performed.[49] In invalidating the part of the statute specifying the appropriate grounds, the court stated:

> Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reaons for which an abortion may be legally obtained. . . .
>
> Rather than regulating merely the quality of the decision to have an abortion and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the constitutional right to privacy.[50]

However, the court sustained the part of the statute requiring approval by a hospital committee, saying that once conception took place, "[t]he decision to abort its development cannot be considered a purely private one."[51] Thus, the court makes the decision to have an abortion depend not upon the grounds established by the legislature, but upon the opinion of a hospital committee. The woman is still effectively denied control over her own body.[52]

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person, free from all restraint or interference of others unless by clear and unquestionable authority of law.

Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (emphasis added). Perhaps the Court's use of "his" is indicative of more than traditional preference of the masculine form.

46. Doe v. Scott, 321 F. Supp. 1385, 1391 (N.D. Ill. 1971).

47. 319 F. Supp. 1048 (N.D. Ga. 1970).

48. It was argued, together with Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) on Dec. 13, 1971. 40 U.S.L.W. 3300.

49. GA. CODE ANN. § 26-1202(a) (1971). The grounds related to physical and mental health, fetal deformity and sexual assault. Like most of the "abortion reform" statutes it is based on MODEL PENAL CODE § 230.3(2) (Prelim. Official Draft 1962).

50. 319 F. Supp. at 1055-56.

51. *Id.* at 1055.

52. *See also* Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), where the court upheld a similar statute's prescription of grounds. In the recent case of

It is difficult to predict what the Supreme Court will do. Indeed, it may dispose of the case without reaching the merits.[53] The judicial behavior in these cases—as it appears from the opinions and from my own observations in litigating one[54]—persuades me that the notion that a woman has the right to the control of her own body, while it may seem elementary to advocates of women's liberation, is a difficult one for male judges and legislators to accept fully.[55] I will not speculate on the reasons, psychological and otherwise, for this reluctance; it is enough to recognize that it exists. Unless the Supreme Court in its role as "occasional national policymaker" holds that antiabortion laws are unconstitutional as violative of a woman's right to privacy, a long, difficult struggle remains

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YWCA v. Kugler, 40 U.S.L.W. 2617 (D.N.J. Feb. 29, 1972), invalidating a New Jersey statute prohibiting the performing of an abortion "without lawful justification" on vagueness and right to privacy grounds, the court went far in recognizing the importance of a woman's right to control her own body and in discrediting the so-called "right to life" argument. As paraphrased by the editors of *Law Week*, the court stated:

> Finally the contention that the state has a compelling interest in preserving the life of the embryo or fetus invites "judicial resolution of philosophic, and religious dimensions as to whether an embryo or fetus is a human being from the moment of its conception." It is simply concluded that this great conflict is "beyond the competence of judicial resolution." It is noteworthy that the New Jersey legislature has not afforded the embryo or fetus the rights of a living person. It has never abrogated the common law rule that self-abortion prior to quickening is not a criminal offense. Until the recent decision holding the death penalty unconstitutional in New Jersey a pregnant woman could be executed prior to quickening. A wrongful death action for a still-born fetus is not maintainable in the state and a fetus must be born alive to invoke the rights that have been statutorily created for its benefit.

Id. at 2618-19. In another recent case, Poe v. Menghini, 40 U.S.L.W. 2665 (D. Kan. Mar. 10, 1972), the court invalidated the provision of a Kansas "abortion reform" statute that required the approval of three physicians, on the ground that, since the approving physicians did not have to be specialists, the requirement did not advance any legitimate state interest. Moreover, the statute, in the court's view, sought "to subordinate the attending physician's judgment to that of two other physicians without any showing that it effectively advances a legitimate state interest." *Id.* at 2666. Interestingly enough, the "grounds for abortion" provision was not challenged in that case.

53. In both cases the question of jurisdiction was postponed, and in both cases it is the plaintiffs who are appealing from the refusal of the three-judge court to grant injunctive relief. The Supreme Court could hold that the refusal to grant injunctive relief is not reviewable on direct appeal or that the lower court properly refused injunctive relief, and either way would avoid having to deal with the substantive questions.

54. Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971), reversed in part the district court's dismissal and remanded the case for consideration before a three-judge district court. The case is now pending in the Eastern District of Kentucky.

55. In oral argument in *Crossen*, I was asked the question, "Does a married woman have the right to an abortion if her husband objects?" The notion that a husband has a proprietary interest in his wife's body dies hard.

ahead.[56]

Because I consider a woman's right to control over her own body basic to any concept of sexual equality, I have discussed it first. And yet, as the above discussion indicates, it is far from clear that such a right will ever be fully recognized. It has not even been suggested, for example, that the equal rights amendment would invalidate antiabortion laws as a form of discrimination against women. Until the risk of unwanted pregnancy is eliminated, the woman will not be free from the biological burden of her sex and, therefore, will not be fully equal to the male in terms of her choice of life role.

Equality Within the Family

The second aspect of the legal dimensions of women's liberation relates to the law of marriage and the family. This area of law must be reformed to recognize that roles and responsibilities within the family should depend upon individual choice rather than upon sex. I am not sure that this question can be fully separated from the broader question of sexual freedom and repression, alternative life styles and societal-versus-individual responsibility for the care and support of children. But to the extent that it can, and to the extent that the nuclear family represents the basic societal means by which men and women join together legally, the law must not, as it now does, perpetuate the dependency role of the woman in the marriage relationship. That role is reflected all the way from laws requiring her to take her husband's name[57] to those making her and the children legally dependent upon the husband for support.[58] This is also the area where the disadvantages to men resulting from the dependency role of women appear most clearly—as any divorced man making alimony or child support payments will attest. At the same time it must be recognized that, whether because of "past channeling" or "free choice," many women will opt for the "wife and mother" role, and if a woman does so, she should not thereby be disadvantaged or forced into a perpetual position of dependency.

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56. As a practical matter, with the legalization of abortion in New York, antiabortion laws fall most heavily on poor women. It is also easier for a woman of means to obtain a therapeutic abortion where this is permitted. *See generally* Charles & Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection?*, 23 Hast. L.J. 147 (1971).

57. In practically all states the women is required to take her husband's name. Kanowitz, *supra* note 2, at 42-46. *See also* Hughes, *And Then There Were Two*, 23 Hast. L.J. 233 (1971).

58. *See* Slater v. Slater, 327 Mich. 569, 42 N.W.2d 742 (1950); Forman v. Forman, 127 N.Y.S.2d 17 (Dom. Rel. Ct. 1959) (child support is primarily the father's obligation).

The basic reform which would significantly advance this objective would be to make all the income and property of married people community property, irrespective of who earned the income or acquired the property. Under a community property system, each partner contributes his or her efforts within the home or outside, or by a combination of both, to the well-being of the marital enterprise. Each partner thereupon has the right to share equally in the wealth acquired by their joint efforts.[59] While eight states have community property systems,[60] as they are now constructed these systems generally serve to perpetuate male domination, since the husband is the manager of the community. In effect, the working wife is at a greater disadvantage than she would be in a separate property state, because she loses control of even her own earnings.[61] In Texas and Washington, each spouse has sole management and control over his or her separate earnings, although they continue to be community property.[62] A better solution to insure full equality would be to provide for joint management over all property, so that all decisions would have to be mutual ones.

Under a true system of community property, in which the management would be entrusted to the partners jointly, many of the dependency problems which accompany the present legal structure of marriage could be eliminated. The contribution of the woman, if she chooses to stay at home and take care of the children, would legally be considered the equivalent of the man's.[63] Secondly, the community property system would be more conducive to an arrangement by which both partners would share the household and child care responsibilities equally or by which the wife would be the sole "breadwinner." It would enable the parties to make their own arrangements concerning the contribution of each to the marital enterprise, would equalize those contributions and would eliminate any notion of "head of the household." This approach would also render unnecessary any equalization of responsibility for support of each other and the children,[64] since the responsibility for support would be placed

59. *See* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1-3 (2d ed. 1971).

60. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

61. *See* Brown, *supra* note 2, at 946-48. The authors note that the adoption of the equal rights amendment would render invalid community property laws that favor the husband.

62. *Id.* For a discussion of the operation of the community property system in California, see Grant, *How Much of a Partnership Is Marriage?*, 23 HAST. L.J. 249 (1971).

63. This would obviate the necessity of compensating a woman for housework, as some advocates of equality have proposed.

64. In most states the wife is liable for the support of the husband only if he

on the marital enterprise. Upon divorce the property would be divided equally,[65] and there would no longer be any question of alimony.[66]

Viewing marriage as a partnership in this manner should eliminate other features of the present system, such as requiring the woman to take the husband's name[67] and domicile[68] or providing that upon divorce the wife is presumptively entitled to the custody of the children[69] while the husband is liable for their support.[70] Each partner would be able to keep his or her respective name, or if they were required to choose a common name it would not necessarily be that of the husband.[71] Whenever it might be advantageous to acquire separate domiciles, neither party would be precluded from doing so.[72] In the event of divorce, if the parties could not agree on custody and support arrangements, the court would make a decision with reference to the circumstances of the particular persons involved, not on the basis of predetermined sex roles. There would also be no justification for providing different grounds for divorce on the basis of sex[73] or different ages at which males and females could marry.[74]

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is incapacitated or indigent and for the support of the children only if the husband fails to provide it. As to the effect of the equal rights amendment on liability for support, see Brown, *supra* note 2, at 944-46.

65. The partnership notion, unlike the "reward" notion behind alimony, would reject anything other than an equal division, regardless of "fault."

66. The equal rights amendment would not require that alimony be abolished but that it be available without regard to sex. Brown, *supra* note 2, at 951-52.

67. It has been contended that the equal rights amendment would not permit a legal requirement or even a legal presumption that a woman took her husband's name at the time of the marriage. *Id.* at 940.

68. A married woman generally acquires her husband's domicile by operation of law, and he has the power to choose the common domicile. In only four states can she acquire a separate domicile for all purposes. Most states allow her to acquire a separate domicile if she is living apart" for cause," and all states allow her to acquire a domicile for divorce purposes. KANOWITZ, *supra* note 2, at 46-52. As to the effect of the equal rights amendment on choice of domicile, see Brown, *supra* note 2, at 941-43.

69. The equal rights amendment would prohibit such sex-based presumptions. *Id.* at 953.

70. This is merely the continuation of his duty of support while the marriage is subsisting.

71. *See* Brown, *supra* 2, at 940-41. In Forbush v. Wallace, 40 U.S.L.W. 3428 (U.S. Mar 6, 1972), the Supreme Court summarily affirmed the unreported decision of a three-judge court upholding the constitutionality of an unwritten regulation of the Alabama Department of Public Safety which requires a married woman to use her husband's surname in applying for a driver's license and an Alabama common law rule requiring the wife to take her husband's name.

72. In contemporary society it is not unrealistic for married persons to live in different states and still maintain a viable relationship. This appears most clearly when they maintain separate homes on different sides of a state line which divides a functional socioeconomic and mobility area.

73. As to sex-based distinctions in regard to grounds for divorce, see the discussion in KANOWITZ, *supra* note 2, at 95-98. As to the interpretation of such laws under the equal rights amendment, see Brown, *supra* note 2, at 950-51.

74. Such laws and their effect under the equal rights amendments are discussed in *id.* at 938-39.

The focus then would be on the marital enterprise, on the equality of the parties within that enterprise, and on their right to assume responsibilities for its well-being without regard to sex. Doubtless, in the foreseeable future—if for no other reason than past channeling—the man would continue to be the "primary breadwinner" in most families. But the law would allow alternative choices and insure that neither party would be prejudiced because of the role that he or she[75] plays within that enterprise. Affirmative legislation would be necessary to bring this about, and it has been contended that Congress could enact such legislation rather than leaving it up to each state.[76] In any event, significant changes in the present law of the family are necessary to insure equality in the marriage relationship and to maximize the opportunity of each partner for choice of life role.

Equality of Employment Opportunity

As pointed our previously, discrimination against women is rampant at all levels and in all kinds of employment[77] and extends to educational and training opportunities as well.[78] Because of initial channeling and denial of access to specialized education and training, many women lack the ability to perform anything other than "menial" or "service" jobs. Yet even those women who have managed to obtain education and training are subject to outright discrimination and frequently have to work outside of their field or at jobs for which they are overqualified.[79] Indeed, it has been demonstrated that sex bias in employment takes a greater economic toll than racial bias.[80] As Kate Millett has observed, "[i]n modern capitalist countries women also function as a reserve labor force, enlisted in times of war and expansion and discharged in times of peace and recession."[81] In a society where personal power is related to economic

75. The use of the phrase "he or she" is intended to avoid the use of the masculine form as a reference to both men and women. But is there not something sexist about putting "he" first? In the "he-she" context, it could be justified upon alphabetical precedence, but this would not suffice in the "his-her" context.

76. This would be so at least to the extent that present law perpetuates discrimination. *See* Freund, *supra* note 29, at 235.

77. *See generally* Murray, *supra* note 3. As to the operation of the income tax upon working women, see Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers,* 21 Buffalo L. Rev. 49 (1971).

78. Inequality is particularly acute in higher education. Murray, *supra* note 3, at 247-58.

79. *Id.* at 268-70.

80. *Id.* at 238.

81. Millett, *supra* note 4, at 40. Millett also contends that in socialist countries the female labor force is generally in the lower ranks despite a high incidence of women in such professions as medicine.

power,[82] the economic situation of women must be substantially improved if they are in any sense to become liberated.[83]

In this area we see an interesting legal paradox. When women began to enter the labor force in the wake of the Industrial Revolution and began to compete for jobs with men, it was soon recognized they needed "protection."[84] It was assumed that, since her proper role was that of "wife and mother," a woman would work only until she could marry and have children or in order to supplement family income.[85] Therefore, so-called "protective employment legislation" was enacted in a number of states to channel women into "safe and ladylike" occupations and to take account of their physical "weakness" so as to preserve them for the "wife and mother" role. Thus we find laws placing limits on weights that women could lift,[86] restricting the number of hours they could work,[87] providing for rest periods and physical facilities for women[88] and excluding them from jobs "detrimental to their health and morals," such as mining or bartending.[89] It should be pointed out that some of these laws were genuinely beneficial, such as those requiring minimum wages or premium pay for overtime.[90]

Although some state courts held these early laws to be unconstitutional,[91] others upheld them on the ground that they were necessary to preserve women for the "wife and mother" role. As one court observed:

> Surely an act which prevents the mothers of our race from being tempted to endanger their life and health by exhaustive employment can be condemned by none save those who expect to profit by it. . . . Adult females are a class as distinct as minors, separated by natural conditions from all other laborers, and are so constituted as to be unable to endure physical exertion and ex-

82. *See* Cavanaugh, *supra* note 10, at 269-71.

83. While widows as a class may have a certain amount of wealth, they often have little control over it because of restrictions imposed upon its use. Our concern, of course, is with the personal freedom that employability and control over income brings.

84. For a discussion of the early history of "protective" employment legislation, see Freeman, *supra* note 7, at 213-15.

85. In some states the same legislation applied to women and child laborers.

86. The present laws are cited in Fuentes, *Federal Remedial Sanctions: Focus on Title VII*, 5 VALPARAISO L. REV. 374 (1971).

87. *Id.* at 383 n.53.

88. *Id.* at 383 nn.57 & 58.

89. *Id.* at 383 nn. 51 & 52.

90. *Id.* at 383 nn.55 & 56.

91. *See, e.g.*, Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895).

> posure to the extent and degree that is not harmful to adult males.[92]

In *Muller v. Oregon*,[93] the Supreme Court put its stamp of approval on these laws at a time when it was invalidating similar protective legislation applicable to men.[94] In so doing, it reinforced the notion that women may be dealt with as a class on the basis of their sex because of their "weakness" and societal subordination to men. The Court stated:

> History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.[95]

The practical effect of these laws has been to limit a woman's employment opportunities in comparison with those of men, and it is difficult to believe that this was not recognized at the time of their enactment.[96] Concerned women early realized that such laws would have this effect. Indeed, a plank of the National Women's Party platform stated that: "[W]omen shall no longer be barred from any occupation, but every occupation open to men shall be open to women, and restrictions upon the hours, conditions, and remuneration of labor shall apply alike to both sexes."[97]

The uneven operation of these laws compounds the discrimination. As has been observed:

> When states forbid women from tending bar, can anyone seriously propose that women are being protected? If anyone is being protected, it would appear to be male bartenders. Similar

92. Commonwealth v. Beatty, 15 Pa. Super. 5 (1900).
93. 208 U.S. 412 (1908).
94. *See* KANOWITZ, *supra* note 2, at 152-54.
95. 208 U.S. at 421-22.
96. In 1879 the President of the International Cigarmakers Union stated: "We cannot drive the females out of the trade, but we can restrict this daily quota of labor through factory laws." *Quoted in* A. HENRY, THE TRADE UNION MOVEMENT 129 (1923).
97. E. BAKER, PROTECTIVE LABOR LEGISLATION 432 (1925).

> explanations suggest themselves regarding the prohibition of night work by women. Women have not campaigned to obtain this 'protection'—and for a very good reason. They in fact do night work all the time. Nurses, telephone operators, airline clerks and scrub women have not been protected from night work. Weight laws also are of doubtful protection for women. Only a few states apply weight limits to all jobs, and these are set so low that, if literally applied, they would prohibit women from doing any serious labor—including carrying an unborn child. . . .
>
> When the labor laws that apply only to women are examined closely, it becomes clear that they do not provide a coherent system of meaningful protection. Nor do they deal with the real problem for women—exploitation by being funneled into the lowest-paying jobs.[98]

The end result of much of the so-called "protective" legislation has been to legitimatize discriminatory employment practices against women, thereby further locking them into their societally subordinate position.

While these laws have not generally been repealed, in more recent years Congress and some state legislatures have moved in the direction of equalizing employment opportunities, or more accurately, of reducing the disparities under which women must compete for jobs and be employed. The Equal Pay Act of 1963,[99] while perhaps enacted to assure that women's wages would not undercut those of men,[100] at least represented a commitment to equality once a woman is able to obtain a "man's job." It has been argued that "equal pay was irrelevant without equal job opportunity," because given a choice between men and women, employers would only choose women if they could be hired for lower wages.[101] Most of the litigation in this area has revolved around what constitutes "substantially equal work," and on the whole the courts have interpreted the Act realistically to protect women from this kind of discrimination.[102]

Far more significant in its potential for eliminating employment discrimination is title VII of the Civil Rights Act of 1964,[103] which

98. Dorsen, *supra* note 25, at 222-23.
99. 29 U.S.C. § 206(d) (1970).
100. *See* Freeman, *supra* note 7, at 226-27.
101. *Id.* at 227.
102. *See* Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VALPARAISO L. REV. 326 (1971) [hereinafter cited as Berger].
103. 42 U.S.C. § 2000e *et seq.* (1970).

prohibits discrimination on the basis of sex except where sex is a "bona fide occupational qualification reasonably necessary to the normal occupation of that particular business or enterprise."[104] It is questionable, however, whether the enactment of title VII was intended to represent a real societal commitment to the concept of sexual equality in employment. Much of the legislative history indicates that the prohibition against sex discrimination was introduced by opponents of title VII for the purpose of killing it altogether.[105] But this does not matter. It is now the declared policy of Congress—an officially approved societal value—that there shall be no sex discrimination in employment, and the behavior of the Equal Employment Opportunity Commission and the courts in sex discrimination cases indicates that this policy has been taken very seriously. In particular the Commission or the courts could have seized on the "bona fide occupational qualification" exception to authorize continuation of many sexually discriminatory employment practices, but they have not done so. To the contrary, they have held that women cannot be dealt with as a class on the basis of their sex, that traditional male-female stereotypes and notions of "chivalry" (male superiority) cannot be used to deny employment to any person, that a woman cannot be denied a job on the ground that it is "strenuous" or "dangerous" and that suitability for a particular job must be determined on the basis of individual qualificiation rather than by sex.[106]

The leading case establishing these principle is *Weeks v. Southern Bell Telephone & Telegraph Co.*,[107] where the court held that sex could not be a requirement for the position of telephone switchman. Although the court talked in terms of "reasonable cause to believe . . . that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved,"[108] it went on to prohibit the use of stereotypes in determining whether sex could be a bona fide occupational qualification. It would no longer be permissible to assume that all women would be unable to lift weights or do heavy work, and any woman who expressed interest was to be given the chance. Nor could women be "protected" from "strenuous" or "unromatic" jobs, for as the court observed, "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power

104. 42 U.S.C. § 2000e-2(e)(1) (1970).

105. *See* KANOWITZ, *supra* note 2, at 103-05.

106. On the importance of individual qualification in relation to the constitutional right to "work for a living," see Berger, *supra* note 102, at 350-52.

107. 408 F.2d 228 (5th Cir. 1969).

108. *Id.* at 235. For a criticism of this language, see Berger, *supra* note 102, at 357-58.

to decide whether or not to take on unromantic tasks."[109] As *Weeks* indicates, the courts have clearly rejected the notion that a woman can be denied a job she seeks merely because it is not a "woman's job."[110] By the same token, customer preference cannot be relied on to justify sex discrimination; thus, males as well as females are entitled to be employed as airline stewardesses.[111] Although the courts have not been explicit, it seems clear that the bona fide occupational qualification exception will be limited, as the EEOC has proposed, to "job situations that require specific physical characteristics necessarily possessed by only one sex."[112] Thus, sex would be a bona fide occupational qualification only where the job was representational or sexual in nature, such as an actor or actress, a model, a topless/bottomless waitress or waiter or a restroom attendant.

Similarly, the courts have invalidated "sex-plus" criteria for employment; consisting of sex, plus a purportedly neutral factor that in effect discriminated against women.[113] In *Phillips v. Martin Marietta Corp.*,[114] for example, the company refused to accept employment applications from mothers with preschool children, contending that this was not discrimination on the basis of sex.[115] The Supreme Court, in a brief per curiam decision, held that it was discriminatory, since such a rule was not applicable to men with preschool children.[116] Likewise, an airline could not require that stewardesses be unmarried where male flight attendants and other employees were not required to be unmarried.[117] Discrimina-

109. 408 F.2d at 236.

110. The elimination of the notion of "men's jobs" and "women's jobs" is the logical corollary of saying that job entitlement is a matter of individual qualification.

111. Diaz v. Pan American Airlines, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

112. The EEOC guidelines are set forth in 29 C.F.R. § 1604.1 (1970). They were expressly followed in Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring).

113. The term "sex-plus" was coined by Circuit Judge John R. Brown of the Fifth Circuit, dissenting from the court's refusal to rehear en banc the decision of its panel in Philips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir.), *rehearing denied*, 416 F.2d 1257 (5th Cir. 1969). He observed that, "If 'sex-plus' stands, the Act is dead." 416 F.2d at 1260.

114. 400 U.S. 542 (1971), *rev'g* 411 F.2d 1 (5th Cir. 1969).

115. It emphasized that between 75 and eighty per cent of its employees were women.

116. However, the Court indicated that the existence of conflicting family obligations, "if demonstrably more relevant to job performance for a woman than for a man," could arguably be a basis for a bona fide occupational qualification. 400 U.S. at 544. It was this indication that prompted Justice Marshall's concurrence; he argued that the exception should apply only to jobs of a purely representational nature. *Id* .The case was remanded but subsequently dismissed by stipulation. It is doubtful if the required showing could ever be made, given the manner in which the courts are interpreting the exception.

117. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*,

tion as a result of pregnancy would also constitute discrimination on the basis of sex, since only women can become pregnant. Discharging a pregnant woman, married or unmarried or requiring her to take compulsory maternity leave, has thus been held to be violative of title VII.[118] So too, it would be discriminatory to deny a woman the opportunity to use sick leave for pregnancy purposes, since a male would be entitled to sick leave when he was recovering from a hernia or prostate operation.

Sex discrimination may also result from the invocation of purportedly neutral requirements, not reasonably related to the job in question, that in practice operate unevenly upon women. In *Griggs v. Duke Power Co.*,[119] the Supreme Court held that educational and aptitude requirements could not be applied where they had a substantially disproportionate impact on blacks, unless the requirements could clearly be shown to be job-related.[120] The same rationale should invalidate height and weight requirements which cannot be related to business necessity, where their effect is to exclude women.[121] A New York state court recently held, for example, that a height requirement for baseball umpires could not be applied to deny the position to a woman, since it was not job-related and "operated inherently to discriminate against women."[122]

The point I would emphasize is that the "bona fide occupational qualification" exception has not been relied on by the courts to perpetuate sex-based employment distinctions. The courts have read title VII and

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404 U.S. 991 (1971); Lansdale v. Air Line Pilots Ass'n, 437 F.2d 454 (5th Cir. 1971). It is, of course, clear that the enactment of title VII invalidated the widespread practice of denying employment to a married woman unless she could show that she was the sole support of her family, the so-called "breadwinner" rule. *See* Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184 (W.D. Pa. 1971).

118. Doe v. Oesteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357 (D. Kan. 1971). In Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971), a "pregnant schoolteacher" rule requiring the taking of a leave of absence at the end of the fifth month of pregnancy was held to be a denial of equal protection actionable under 42 U.S.C. § 1983 (1970). A contrary result was reached in LeFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971).

In Schattman v. Texas Empl. Comm'n, 40 U.S.L.W. 2614 (5th Cir. Mar. 1, 1972), *rev'g*, 330 F. Supp. 328 (W.D. Tex. 1971), the Fifth Circuit rejected a challenge on equal protection grounds to a state agency's policy of terminating the employment of pregnant employees two months before their expected delivery date. The court took the position that the agency could not be expected to evaluate the condition of each employee and that the maternity policy was rationally related to a permissible state purpose.

119. 401 U.S. 424 (1971).

120. Post-*Griggs* developments are discussed in Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ*, 23 HAST. L. J. 55 (1971) [hereinafter cited as Oldham].

121. The EEOC has taken this position. *Id.* at 73.

122. New York State Div. of Human Rights v. New York-Pa. Professional Baseball League, 36 App. Div. 2d 364, 320 N.Y.S.2d 788 (1971). *See* Oldham, *supra* note 120, at 84-85.

related state antidiscrimination laws[123] as establishing equality of employment opportunity as an officially approved value and have implemented that value by striking down many forms of sex discrimination.[124] These laws,[125] therefore, represent an important weapon for women in their struggle for equality of employment opportunity.

This brings us back to the legal paradox reflected in the existence both of "protective" employment legislation and prohibitions against employment discrimination on the basis of sex. What is presented is not merely a conflict between differing laws, but a conflicting societal judgment—which appears most clearly when the laws are seen in their historical context—as to the proper role of women in society. If the proper role of the woman is that of "wife and mother," she needs "protective" legislation to preserve her for that role; not by mere coincidence, she must not be able to compete too successfully with men who must perform the "breadwinner" role. On the other hand, if a woman is to have her choice of life role, she is entitled to the same employment opportunities as a man in all respects. Since "protective" legislation has operated to limit her employment opportunities, it is inconsistent with the thrust of antidiscrimination legislation.

The conflict between protective legislation and equal employment opportunity has been litigated in the context of whether title VII or a state antidiscrimination law preempts or supersedes protective legislation. However, the conflict has also been raised in the context of whether the adoption of the equal rights amendment would invalidate state protective laws, and riders have been proposed that would prevent it from having that effect.[126] The problem, however, is more complex. Some protective laws represent genuinely beneficial social welfare legislation, and working women are understandably reluctant to give up this protection. At the same time the existence of these laws has resulted in discrimination against women because employers prefer to hire men who are not entitled to such protection. It is necessary, therefore, to distinguish between

123. As of May, 1971, 29 states and the District of Columbia prohibited employment discrimination on the basis of sex. WOMEN'S BUREAU, LAWS ON SEX DISCRIMINATION IN EMPLOYMENT 3-9 (1971).

124. For a discussion of significant EEOC decisions in this area, see Oldham, *supra* note 120, at 81-84.

125. In appropriate cases the Equal Pay Act may also be used effectively. As to the use of both the Equal Pay Act and title VII and their interrelationship, see KANOWITZ, *supra* note 2, at 132-43; Berger, *supra* note 102, at 371-72.

126. *See* Brown, *supra* note 2, at 886-88. The "Hayden rider," adopted by the Senate in 1950 and 1953, would have applied to all "rights, benefits, or exemptions conferred by law upon persons of the female sex." 96 CONG. REC. 870 (1950); 99 CONG. REC. 8974 (1953).

different kinds of "protective" legislation and to insure that while such legislation will not be used to justify discrimination, beneficial legislation will not be abrogated in the process.[127] This result can be accomplished by invalidating those laws that directly deny employment opportunities to women and by extending the other "protective" laws to men.

These laws fall into three general categories: (1) laws excluding women from certain jobs, such as mining or bartending; (2) laws restricting women's employment under certain conditions, such as night work and overtime prohibitions and weight-lifting limitations and (3) laws providing benefits for women but not for men, such as minimum wages or premium pay for overtime.[128] The exclusionary laws should be invalidated in their entirety, since by their terms they discriminate against women. In *Paterson Tavern & Grill Owners Association, Inc. v. Hawthorne*,[129] the New Jersey Supreme Court held that a local ordinance prohibiting female bartending was not "a necessary and reasonable exercise of the police power"[130] in light of modern conditions. Since the decision rested on that ground, it was not necessary for the court to consider whether the ordinance was a denial of equal protection or in conflict with title VII or the state's own antidiscrimination law.[131] In *Krauss v. Sacramento Inn*,[132] however, a federal court held that California's statutory prohibition against female bartending was not pre-empted by title VII since the twenty-first amendment gave the states plenary power to regulate the sale of liquor within their borders. The plaintiff in that case did not challenge the prohibition as violative of equal protection. Since, as the court reasoned, the states had plenary control over the sale of liquor, title VII could not apply to the prohibition. Yet in *Sail'er Inn, Inc. v. Kirby*,[133] the California Supreme Court disagreed, holding that the twenty-first amendment was not applicable

127. It is significant that some cases seeking to invalidate these protective laws as in conflict with title VII have been initiated by employers. As to interpretation of these laws by state agencies in light of title VII and related state laws, see the discussion in Kennedy, *Sex Discrimination: State Protective Laws Since Title VII*, 47 NOTRE DAME LAW. 514 (1972) [hereinafter cited as Kennedy].

128. *See* Brown, *supra* note 2, at 922. Prior to the enactment of title VII, Indiana repealed its hours restriction; after title VII, nine other states followed suit. Two of these states repealed their "benefits for women" laws as well. Some other modifications have also occurred. *See* Kennedy, *supra* note 127, at 525. *See generally* Barnhard, *The Conflict Between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved?*, 17 WAYNE L. REV. 25 (1971).

129. 57 N.J. 180, 270 A.2d 628 (1970).

130. *Id.* at 186, 270 A.2d at 631.

131. N.J. STAT. ANN. § 10:1-1 (1960).

132. 314 F. Supp. 171 (E.D. Cal. 1970).

133. —Cal. 3d—, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

to the employment of persons in liquor establishments and, therefore, the statutory prohibition was preempted by title VII.[134] It was also held that the prohibition constituted arbitrary discrimination on the basis of sex in violation of the fourteenth amendment's equal protection clause[135] and of a state constitutional provision to the effect that a person may not be disqualified because of sex from entering or pursuing a lawful profession.[136]

The concept of female inferiority reflected in exclusionary employment laws is totally inconsistent with the premises of title VII, and under the *Weeks* doctrine sex cannot be a bona fide occupational qualification for a job such as bartending or mining. Preemption of such laws under title VII is clear,[137] and the unsoundness of the twenty-first amendment argument advanced in *Krauss* is amply demonstrated by the decision in *Sail'er Inn.* Moreover, the total exclusion of women from particular jobs is the kind of arbitrary discrimination on the basis of sex that was condemned in *Reed.* Adoption of the equal rights amendment would certainly invalidate such laws, but, as the above discussion indicates, they can also be invalidated under existing statutory and constitutional provisions as presently interpreted.[138] So too, laws requiring compulsory maternity leave without providing for job security or retention of accrued benefits have the same effect as exclusionary laws and likewise constitute discrimination on the basis of sex.[139] The state is justified in "protecting" pregnant women and new mothers only when continuation of employment would jeopardize the well-being of the particular woman, and it cannot provide that she loses her employment for these reasons while a temporarily disabled male employee does not.[140]

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134. The court reasoned that the purpose of the twenty-first amendment was merely to allow the states to retain prohibition, and that, in any event, title VII did not interfere with the state's power to regulate the flow of alcohol as a commodity in interstate commerce. *Id.* at —, 485 P.2d at 535-36, 95 Cal. Rptr. at 335-36.

135. It treated sexual classifications as at least "marginally suspect" and could find no compelling state interest in preventing females from tending bar. *Id.* at —, 485 P.2d at 543, 95 Cal. Rptr. at 343.

136. CAL. CONST. art. XX, § 18. *See also* McCrimmon v. Daley, 2 Fair Empl. Prac. Cas. 971 (N.D. Ill. 1970), holding that a municipal ordinance prohibiting employment of women as bartenders was in violation of the fourteenth amendment's due process clause. In Longacre v. State, 448 P.2d 832 (Wyo. 1968), the court held that such a prohibition was impliedly repealed by the state's anti-discrimination law.

137. *See* Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971).

138. *See* Brown, *supra* note 2, at 928-29.

139. *Id.* at 929-32. The rationale is the same as that prohibiting employer discrimination on the basis of pregnancy.

140. A proper approach would be to allow pregnant women and new mothers, like any other temporarily disabled employees, to determine the duration and timing of their leave. *Id.* at 932. *But see* Schattman v. Texas Empl. Comm'n, 40 U.S.L.W. 2614 (5th Cir. Mar. 1, 1972).

Laws providing benefits for women but not for men, such as minimum wages or overtime for women, need not be invalidated but can be extended to cover men as well. Thus, in *Potlatch Forests, Inc. v. Hays*,[141] the court held that there was no conflict between a state law requiring overtime pay for women and the provisions of title VII, since the employer could comply with both by paying overtime rates to men. Since these laws clearly appear to be intended to confer a benefit upon women, and since many of them were originally enacted at a time when it was assumed that similar legislation covering men would be unconstitutional, it should be presumed that the legislatures would prefer to have these laws remain in effect as extended. If the legislature wants to remove the protection, it can do so subsequently. The equal rights amendment should be construed in the same way with respect to its effect on such laws.[142]

The more difficult question concerns laws which restrict the conditions of employment, such as those limiting the amount of weight a woman can lift or prohibiting overtime work. It is clear in cases covered by title VII that these laws cannot be relied upon by employers to deny employment to women.[143] As the EEOC has stated, "[s]uch . . . laws . . . have ceased to be relevant to our technology or to the expanding role of the female worker in our economy."[144] The implication is that such laws are abrogated by title VII, and presumably women as well as men can be required to work overtime or to lift any amount of weight.[145]

It is here that some further consideration is necessary. While many women as well as men want to obtain overtime work, others do not, and the removal of this restriction will mean that women workers will be compelled, as men now are, to work overtime in order to keep their jobs.[146] Similarly, while some of the weight-lifting restrictions

141. 318 F. Supp. 1368 (E.D. Ark. 1970).

142. *See* Brown, *supra* note 2, at 927-28. *See also* KANOWITZ, *supra* note 2, at 183-88.

143. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1081 (S.D. Ohio 1971); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971); Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

144. 29 C.F.R. § 1604.1 (1970).

145. This is most evident where the plaintiff is an employer who, as a result of the decision, is relieved of compliance with the state laws. *See* Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1971).

146. As to abuses of overtime work by employers, see the discussion in KANOWITZ, *supra* note 2, at 124-26.

may be unreasonably low,[147] others are not, and it is questionable whether any employee should be required to lift unreasonable weights. Other "protective" legislation, such as that requiring rest breaks or comfort facilities can be of equal benefit to male employees. It is precisely the possibility of loss of these benefits that has been of great concern to working women, and the desire to retain this kind of "protective" legislation cannot be viewed solely as a "sexist plot" to keep women in a subordinate position. To the contrary, it illustrates the matter of class differences in the struggle for equality which has emerged in the debate over the equal rights amendment. As the Women's Liberation Labor Committee of Los Angeles has contended, "Equal Rights does not mean equal exploitation,"[148] and the Committee has proposed an addition to the amendment which would provide that "Rights, benefits or exemptions now conferred by law upon persons of the female sex shall be extended to persons of the male sex."[149]

I would agree with this approach, although I am not sure that the problem should be dealt with in exactly this manner. In order to protect workers of both sexes from exploitation, laws restricting the conditions of employment should generally be extended to men. I would not include unreasonably low weight-lifting limitations and would deal with the problem of overtime work by providing that no employee can be required to work overtime against his or her wishes.[150] The main point is that the desire for equality of employment opportunity should not be used to abrogate genuinely beneficial legislation and allow for worker exploitation.

The affirmative provisions of title VII and related state anti-discrimination laws represent an important vehicle for achieving equal employment opportunity for women. It should also be clear that sex discrimination in employment on the part of governmental units and public bodies, even if not covered by title VII or state laws,[151] is prohibited by the fourteenth amendment's equal protection clause in the same manner as is racial discrimination.[152] Equality of employment

147. *See* Brown, *supra* note 2, at 934.

148. Women's Liberation Labor Comm. of Los Angeles, Statement on The Equal Rights Amendment (mimeo).

149. *Id.*

150. *See* KANOWITZ, *supra* note 2, at 126-27.

151. Title VII has recently been amended to include state and local governmental units and educational institutions. Pub. L. No. 92-261 (Mar. 23, 1972).

152. *See* Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971). In Johnson v. Cincinnati, 450 F.2d 796 (6th Cir. 1971), it was held that the exemption of state and local governments under title VII did not bar an action under 42 U.S.C. § 1983 (1970). Sex discrimination is proscribed by executive order

opportunity has become an "officially approved" value, and the law's sanctions may be used effectively to help bring it about. The behavior of the courts in this area has clearly been on the side of equality, and a momentum has been established by which the remaining aspects of employment discrimination may, legally at least, be eliminated. This does not mean, of course, that the concept of "male" and "female" jobs is going to disappear overnight or that the cumulative effect of years of channeling and outright discrimination will not seriously restrict employment opportunities for a great number of women for some time. But a start has been made, and women are now in a much better position, with the law and its sanctions on their side, to obtain equality of employment opportunity.

LEGAL DISTINCTIONS ON THE BASIS OF SEX

Finally, all remaining sex-based distinctions in law must be eliminated. A sex-based distinction in law may be defined as one that makes a difference in treatment depend on the class or categorical basis of sex,[153] and, as stated at the outset, these distinctions are pervasive. Not all of these legal distinctions are disadvantageous to women—immunity from the draft is a clear example of one that is not—but many are. Some on their face would appear to be trivial; others are quite significant. But it is the existence of such distinctions, reinforced by legal sanctions and justification, that serves to perpetuate the societally subordinate role of women. As has been observed:

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

with respect to federal employment, employment by federal contractors and subcontractors and on federally assisted construction projects. Exec. Order No. 11,478, 3 C.F.R. § 133 (1969), 42 U.S.C. § 2000e, note (1970); Exec. Order No. 11,246, *as amended* by Exec. Order No. 11,375, 3 C.F.R. § 320 (1967), 42 U.S.C. § 2000e, note (1970).

153. KANOWITZ, *supra* note 2, at 4.

> equal treatment there. Third, whatever the motivation for different treatment, the result is to create a dual system of rights and responsibilities in which the rights of each group are governed by a different set of values. History and experience have taught us that in such a dual system one group is always dominant and the other subordinate. As long as woman's place is defined as separate, a male-dominated society will define her place as inferior.[154]

The basic premise of sexual equality, then, is that sex is not a permissible factor in determining the legal rights of women or of men, and that the treatment of any person by the law may not be based upon that person's sex.[155]

When the proposition is stated in this way, two imaginary horribles are usually posited: sexually integrated rest rooms and women's being drafted into the armed forces. To allay these fears, it should be stated that equality before the law does not mean that men and women will have to perform their bodily functions within view of each other. If legal "authority" is needed to support such an obvious point, it can be found in the constitutional right to privacy.[156] With respect to the draft, there is no reason why women should be deprived of the "supreme and noble duty of contributing to the defense of the rights and honor of the nation,"[157] that is represented by involuntary conscription.[158] Whether or not they have the "right" to perform combat service is perhaps another matter, but it should be observed that the overwhelming majority of male draftees do not perform combat service either. With the draft supposedly coming to an end in 1973, the problem may be a minor one. Finally, equality does not prohibit different treatment on the basis of physical characteristics unique to one sex,[159] and, again to allay great

154. Brown, *supra* note 2, at 873-74 (emphasis in original).
155. *Id.* at 889-90.
156. *Id.* at 900-02.
157. The Selective Draft Law Cases, 245 U.S. 366, 390 (1918).
158. The courts have disagreed, at least when male draftees have resisted induction on the basis that they were being discriminated against on the basis of sex. *See* United States v. Fallon, 407 F.2d 621 (7th Cir.), *cert. denied,* 395 U.S. 908 (1969); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United states v. Clinton, 310 F. Supp. 333 (E.D. La. 1970); United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968). For the view that the equality principle requires that women be subject to the draft, see Hale & Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment,* 23 HAST. L.J. 199 (1971). Women should in any event be entitled to be admitted to military academies and schools, since they now can serve in the armed forces on a voluntary basis.
159. *See* Brown, *supra* note 2, at 893-94.

fears, it may be assumed that most athletic competition can continue to be sexually segregated.[160]

Having disposed of these so-called objections, it is submitted that there can be no justification for sex-based distinctions in law except to serve the notion of male supremacy.[161] Sex-based distinctions, like racial ones which are designed to maintain white supremacy, should be declared "inherently invidious" and unsupportable except upon a showing of compelling governmental justification, which, as a practical matter, means not at all.[162] The clear thrust of the equal rights amendment would be to invalidate these distinctions. The same result, however, could be reached if the interpretation suggested above were put upon the fourteenth amendment's equal protection clause.[163]

In *Reed,* the Supreme Court had the opportunity to declare such classifications invidious, but declined. The case involved a challenge to one of those "minor" sex-based distinctions, an Idaho law relating to the administration of decedents' estates, which provided: "Of several persons claiming and equally entitled to administer males must be preferred to females."[164] As the petitioner pointed out in her brief to the Supreme Court: "The statute and the justification offered for it by the Idaho court assume, Orwellian fashion, this fundamental principle: 'All people are equal, but male people are more equal than female people.' "[165] The Court held only that the equal protection clause prohibited "arbitrary" distinctions on the basis of sex, thereby implying that some distinctions might not be arbitrary. The distinction drawn by the Idaho statute was arbitrary, in the view of the Court, since it was based solely on sex and had nothing to do with the purpose of the provision, which was to eliminate hearings on questions of who was entitled to administer. The Court stated:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause

160. But women should not be barred from participation where competition is on an individual basis, such as in horse racing or golf.

161. *See* Brown, *supra* note 2, at 890.

162. The only "invidious" racial classification that has ever been sustained was that requiring the relocation of all Japanese-Americans during World War II. See Korematsu v. United States, 323 U.S. 214 (1944).

163. *See* KANOWITZ, *supra* note 2, at 154-60.

164. IDAHO CODE §§ 15-312, -314 (1947). These statutes have been repealed, effective July 1, 1972. IDAHO CODE §§ 15-312, -314 (1971 Supp.).

165. Brief for the Appellant at 69.

> of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.[166]

The Court could have added that a clear alternative was available to achieve the legislative objective, such as making the choice by lot rather than by sexual classification, and that the failure to employ that alternative demonstrated the arbitrariness of the sex-based distinction.

While *Reed* approached sex-based distinctions in terms of "arbitrariness" rather than treating them as "inherently invidious," the practical effect of the decision—depending on how it is applied by the lower courts and ultimately by the Supreme Court—may be substantially the same as if the Court had come down fully on the side of sexual equality.[167] Whenever a sex-based distinction is purportedly related to the accomplishment of a legitimate governmental objective, as in *Reed,* it can generally be demonstrated that a neutral nonsexual alternative classification that would better accomplish the objective was readily available. *This being so, to mandate the choice solely on the basis of sex and to deal with the problem in terms of sexual preference is clearly "arbitrary."*

To illustrate, in *Miskunas v. Union Carbide Corp.,*[168] the Seventh Circuit upheld the constitutionality of denying an action for loss of consortium to a married woman on the ground that in such actions there was the possibility of double recovery. According to the court, since married men were employed at at rate two and one-half times that of married women, the state could "justifiably discriminate in this respect between the spouses," and "could infer that more often in a wife's suit than in her husband's, the jury would award her duplicating damages for some of the same elements of injury."[169] However, the objective of of preventing double recovery could be easily achieved by requiring joinder of the consortium claim with the spouse's claim for his or

166. 404 U.S. at 76-77.

167. In Forbush v. Wallace, 40 U.S.L.W. 3428 (U.S. Mar. 6, 1972), the Court affirmed without opinion an unreported decision of a three-judge court upholding a requirement that a woman use her married name on a driver's license. I do not think that this action should be taken as indicating anything other than that the Court did not want to deal with the question at this time.

168. 399 F.2d 847 (7th Cir. 1968).

169. *Id.* at 850. The possibility of double recovery existed because the husband could recover for lost earnings, and the loss of consortium claim purportedly could overlap. Lower federal courts had held the Indiana rule involved violative of equal protection and, therefore, had allowed the wife to maintain the action. Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169 (N.D. Ill. 1967); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966).

her personal injuries. Since a neutral, nonsexual alternative would accomplish this objective, according to *Reed*, "the choice in this context may not lawfully be mandated on the basis of sex." Likewise, in *Leighton v. Goodman*,[170] a male called for jury service challenged a New York statute allowing women to claim exemption from jury service. In upholding the statute, the court took the position that the distinction was not arbitrary, since, "[g]ranted that some women pursue business careers, the great majority constitute the heart of the home, where they are busily engaged in the 24-hour day task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demands their full energies," and therefore, "[t]he state legislature has permitted the exemption in order not to risk disruption of the basic family unit."[171] However, since not all women are "homemakers," and since some men may be, the legislature could just as easily have provided for exemptions for persons having child care and family responsibilities. The sex-based distinction includes women who do not come within the legislative objective, and possibly excludes some men who do, and for this reason is arbitrary.[172]

The under- and overinclusiveness of such sex-based classifications represent class judgments without regard to individual circumstances. They are administratively unnecessary because a neutral classification exists, and thus their over- and underinclusiveness cannot be justified as an unavoidable consequence of rational classification to achieve a legitimate legislative goal. Therefore, even if it is granted that no compelling state interest is necessary because the classification is not "invidious," a close connection between the legislative goal and the classification used is necessary to foreclose attainment of the impermissible objective of making distinctions solely on the basis of sex. To hold otherwise is to allow deliberate and unnecessary stifling of personal liberties under the guise of attaining a legitimate governmental purpose.

Even more arbitrary, and presumably condemned under the *Reed* rationale, is differential treatment or denial of benefits solely on the

170. 311 F. Supp. 1181 (S.D.N.Y. 1970).

171. *Id.* at 1183.

172. The matter of excluding all women from juries except for volunteers was before the Supreme Court this term in Alexander v. Louisiana, 40 U.S.L.W. 4365 (U.S. Apr. 3, 1972), *rev'g* 255 La. 941, 233 So. 2d 891 (1970). However, the majority of the Court did not reach the question, holding that the petitioner had made out a prima facie case of racial discrimination, which was not rebutted. Mr. Justice Douglas did reach the question in his concurrence and took the position that the practical exclusion of women from the jury deprived the defendant of due process. In Hoyt v. Florida, 368 U.S. 57 (1961), the Court had upheld such a system on the ground that woman vas still "the center of home and family life." *Id.* at 62.

basis of sex where no legitimate governmental objective is served by making the distinction. The clearest examples are the exclusion of women from juries[173] or the imposition of different sentences for a crime depending upon the sex of the offender.[174] It is likewise arbitrary to discriminate between the recipients of governmental benefits solely because of their sex. For example, in *Duley v. Caterpillar Tractor Co.*,[175] the court was faced with a workmen's compensation statute that denied recovery for the death to the husband of a working woman unless he could show that he had been totally dependent upon her for support. The wife of a working male was entitled to recover for his death without qualification. Here the discrimination is purely on the basis of sex without regard to individual circumstances and does not even plausibly relate to the accomplishment of a legitimate governmental objective. Either there should be an absolute right to recovery, or dependency should be a requirement in all cases. The sex of the deceased worker is logically irrelevant either way. In *Duley,* the court upheld the statute simply on the ground that it was reasonable to distinguish on the basis of sex. Clearly, this holding is inconsistent with the "arbitrariness" rationale of *Reed.* Equally arbitrary is the allowance of social security benefits to a wife or widow based on the husband's earnings without regard to dependency, while a husband or widower is entitled to benefits only if he proves that he received at least half of his support from his wife.[176] Again, the distinction is based solely on sex, and men and women as classes are treated differently without regard to individual circumstances. It is no answer to say that more women are dependent upon men than men are upon women. If dependency is the criterion, it can be applied without regard to sex. If it is not, it is patently dis-

173. This was held unconstitutional in White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966), but was upheld in State v. Hall, 197 So. 2d 861 (Miss. 1966), *appeal dismissed,* 385 U.S. 98 (1956). All jury exclusion laws have now been repealed.

174. Disparate sentences imposed against women were invalidated in United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968), and Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968). In Reed v. Page, 40 U.S.L.W. 2631 (10th Cir. Mar. 11, 1972), the court held unconstitutional an Oklahoma statute that defined "juveniles" for purposes of juvenile court jurisdiction as males under the age of sixteen or females under the age of eighteen. It observed that it had "not been presented with a logical constitutional justification for the discrimination." *Id.* However, in Wark v. State, —Me.—, 266 A.2d 62 (1970), *cert. denied,* 400 U.S. 52 (1970), the court upheld the imposition of heavier sentences upon males for the offense of prison break. See the discussion of these cases in Johnston, *supra* note 18, at 726-31. For a discussion of the effect of the equal rights amendment on sexual offenses and disparate sentencing, see Brown, *supra* note 2, at 954-67.

175. 44 Ill. 2d 15, 253 N.E.2d 373 (1969).

176. *See* PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 11 (1970).

criminatory to impose the requirement on one sex alone. Likewise, denial of disability benefits for pregnancy and treating pregnancy differently from other disabilities for purposes of unemployment compensation, job eligibility and the like constitute arbitrary discrimination on the basis of sex, since a disability unique to women is singled out from other disabilities.[177]

Although the Supreme Court did not fully invalidate all sex-based distinctions in *Reed,* the "arbitrary distinction on the basis of sex" test that the Court formulated in that case can be employed effectively, in my view, to eliminate much of the discrimination that now exists due to sexual classification. It is patently arbitrary to classify solely on the basis of sex where no legitimate governmental objective can be accomplished by the classification, and the effect is simply to treat women, and in some cases, men, differently because of their sex. Where the purported purpose of the distinction is the accomplishment of a legitimate governmental objective, and that objective could be accomplished on the basis of neutral, nonsexual criteria, the failure to use such criteria renders the sex-based distinction arbitrary. Whether the lower courts and ultimately the Supreme Court will interpret *Reed* in this manner is, of course, an open question. Certainly the equal rights amendment would require the invalidation of all sex-based distinctions that result in discrimination,[178] and the uncertainty over the full thrust of *Reed* points up the necessity of its adoption at the present time.

A different analysis is called for with respect to the constitutionality of segregation on the basis of sex. It has long been recognized that it is a violation of the fourteenth amendment's equal protection clause to discriminate against a person because of race, as by denying benefits or requiring differentiated treatment.[179] However, it was not until *Brown* and its progeny that racial segregation was equated to discrimination and held to be violative of equal protection.[180] It may be now asked whether segregation on the basis of sex is "arbitrary" or whether it would abridge

177. *See* Walker, *Sex Discrimination in Government Benefit Programs,* 23 HAST. L.J. 277, 282-86 (1971). The constitutionality of the pregnancy exclusion was upheld in Clark v. California Empl. Stabilization Comm'n, 166 Cal. App. 2d 326, 332 P.2d 716 (Dist. Ct. App. 1958).

178. *See* Brown, *supra* note 2, at 920-21.

179. *See, e.g.,* Buchanan v. Warley, 245 U.S. 60 (1917); Strauder v. West Virginia, 100 U.S. 303 (1880).

180. The psychologist generally defines segregation as "a form of discrimination that sets up spatial boundaries of some sort to accentuate the disadvantage of members of an out-group." G. ALLPORT, THE NATURE OF PREJUDICE 52 (Anchor ed. 1958). At least after *Brown* the law recognized this elementary truth with respect to racial segregation.

"equality of rights under the law" within the meaning of the equal rights amendment.

We are assuming, of course, that the state can require sexually segregated rest rooms and the like in order to protect an individual's right of privacy. But may it constitutionally maintain sexually segregated schools or facilities open to the public? In *Kirstein v. Rector & Visitors,*[181] the court, finding that the University of Virginia was superior to any of the other state-supported schools, held that women were being discriminated against by being denied admission. However, the court refused to consider whether the maintenance of sexually segregated institutions of higher education was itself unconstitutional.[182] In *Williams v. McNair,*[183] the court held that a male was not denied equal protection by being refused admission to Winthrop, an all-female institution in South Carolina, since there were other state-supported institutions of equal quality that he could attend.[184] The effect of that decision is to uphold the "separate but equal" doctrine in higher education as it applies to sex: the state can limit attendance in certain schools to members of one sex.[185] The court in *Williams* expressly upheld the maintenance of sexually segregated schools on the ground that there was "a respectable body of educators who believe that 'a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex.' "[186]

This reasoning demonstrates the correlation between sexually segregated education and male supremacy. The curriculum of Winthrop College is described as fitting young women "for teaching, . . . stenography, typewriting, telegraphy, bookkeeping, drawing, . . . designing, engraving, sewing, dressmaking, millinery, art, needlework, cooking, housekeeping and such other industrial arts as may be suitable to their sex and conducive to their support and usefullness."[187] By establishing separate schools for women the state is helping to channel them into their societally perceived role of "wife and mother" and to insure that they will continue to be societally subordinate to men. It can be argued

181. 309 F. Supp. 184 (E.D. Va. 1970).

182. *Id.* at 187. It held that the plaintiffs lacked standing to raise the issue and that, in any event, the record was insufficient. This point is discussed in Sedler, *Standing, Justiciability and All That,* —— VAND. L. REV. —— (1972).

183. 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.,* 401 U.S. 951 (1971).

184. The other institutions were integrated, except for the Citadel, a military institution limited to males.

185. A different question might have been presented if all the institutions of higher education had been segregated.

186. 316 F. Supp. at 137.

187. *Id.* at 136 n.3.

that the state has no more interest in segregating and channeling people on the basis of sex than it has in segregating them on the basis of race and that it is no more a justifiable objective of the state to promote male supremacy than it is to promote white supremacy.[188] This view would require not only the admission of any person to a particular school without regard to sex, but also, if the *Brown* rationale is to apply fully, the dismantling of all sexually segregated educational institutions.[189] As its per curiam affirmance of *Williams* indicates, the Supreme Court is not yet ready to deal with sexual segregation in education.

In *Seidenberg v. McSorleys' Old Ale House, Inc.*,[190] it was held that the state could not sanction sexual segregation in public facilities such as alehouses. The court found that the regulation of alcoholic beverage establishments in New York was so extensive that the action of McSorleys' in refusing to serve women was "state action." With respect to the discrimination itself, the court stated:

> In the case before us no difference between men and women, as potential customers of the defendant, has been offered as a rational basis for serving the one and not the other. It may be argued that the occasional preference of men for a haven to which they may retreat from the watchful eyes of wives or womanhood in general to have a drink or pass a few hours in their own company, is justification enough; that the simple fact that women are not men justifies defendant's practice. The answer is that McSorleys' is a public place, not a private club, and that the preferences of certain of its patrons are no justification under the Equal Protection Clause. Such preferences, no matter how widely shared by defendant's male clientele, bear no rational relation to the suitability of women as customers of McSorleys'.
>
> Nor do we find any merit in the argument that the presence of women in bars gives rise to 'moral and social problems' against which McSorleys' can reasonably protect itself by excluding women from the premises. . . . Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity

188. An analysis of the decision and a comparison with racial segregation appears in Johnston, *supra* note 18, at 723-36.

189. *Cf.* Green v. County School Bd., 391 U.S. 430 (1968) ("freedom of choice" in racially segregated schools).

190. 317 F. Supp. 593 (S.D.N.Y. 1970).

will no longer justify sexual separatism. . . .[191]

It should be noted that discrimination on the basis of sex with respect to public accommodations is not prohibited by title II of the Civil Rights Act of 1964[192] or by most state antidiscrimination laws.[193] However, it can be argued that the failure to prohibit such discrimination, at least on the state level, is unconstitutional as an "encouragement to private discrimination."[194] In any event, the denial of access to public facilities on the basis of sex is a further reminder of the societal subordination of women and is inconsistent with the principle of sexual equality.

Still another question to be considered is whether past discrimination against women can be taken into account so that, in effect, women are given preference over men. In *Gruenwald v. Gardner,*[195] the court upheld the constitutionality of the provisions of the Social Security Act allowing women to retire at age 62 with full benefits while denying men that privilege until they reached age 65.[196] The court found that the purpose of the distinction was "to reduce the disparity between the economic and physical capabilities of a man and a woman,"[197] noting that women as a class earn considerably less than men as a class and that the average monthly payments to men retiring at age 62 still exceeded those of women retiring at that age. However, title VII has been interpreted as invalidating retirement plans which allow women to retire at an earlier age or with more favorable benefits than men.[198] It is permissible, of course, to consider past racial discrimination in fashioning affirmative action that will eliminate the present effects of that discrimination.[199] And it is likely that the sex-based distinction involved in *Gruenwald* would not be considered arbitrary under the *Reed* rationale, since it is responsive to past discrimination based on sex. The issue here is similar to that presented with respect to com-

191. Id. at 605-06.

192. 42 U.S.C. § 2000a *et seq.* (1970).

193. *See generally* Seidenberg, *The Federal Bar v. The Ale House Bar: Women and Public Accommodations,* 5 VALPARAISO L. REV. 318 (1971).

194. *See* Reitman v. Mulkey, 387 U.S. 369 (1967). In Taylor v. Richardson, No. 2270 (E.D. Ky., Feb. 22, 1972), the court held that the exemption of barbers beauticians from the state's public accommodations law constituted such "encouragement."

195. 390 F.2d 591 2d Cir. 1968).

196. 42 U.S.C. §§ 415(b)(2)(A), (3)(A), (3)(C) (1970).

197. 390 F.2d at 592.

198. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), *cert. denied* 404 U.S 939 (1971); Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454 (D.N.J. 1970).

199. As illustrative of the affirmative action that can be ordered to alleviate the present effects of past racial discrimination in employment, see Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

pensatory programs designed to eliminate the cumulative effect of racial discrimination, and it is equally troublesome. I would only note that it may not necessarily be discriminatory to give certain preferences to women to eliminate the effects of past discrimination which have been practiced upon them.

With or without the equal rights amendment, sex-based distinctions in law and discrimination and segregation on the basis of sex must be eliminated. In the eyes of the law, male people must no longer be considered "more equal than female people." When the law itself stops distinguishing between people on the basis of their sex, it may be hoped that the other institutions of society will follow suit.

Conclusion

As stated at the outset of this article, liberation means freedom. If women are to have the freedom to choose their life role and to maximize their "life chances," the law must do a complete turnabout. It must make sexual equality an officially approved societal value and must remove from within itself those sexual biases and distinctions which continue to reinforce and perpetuate the societally subordinate role of women. At the same time it must be used affirmatively as an instrument of social change to end the discrimination and inequality that now exist throughout American society.

In the final analysis it is not really possible to talk about women's liberation any more than it is possible to talk about black liberation. If the liberation of blacks will be the liberation of whites, so too will the liberation of women be the liberation of men. As Leo Kanowitz has pointed out so well:

> By relegating women to special tasks, by perpetuating ancient myths about the alleged physical and psychological limitations of women, we American men have subjected ourselves to an awesome burden. For the doubtful joys of feeling superior to women, we have paid a terrible price. Not only have we suffered with respect to uneven laws in the field of support obligations within the family, child support and custody awards in divorce proceedings, and the frequent lack of protective labor legislation where such legislation exists for women, but our insistence that men and only men are entitled to be society's doers and shakers had led to our dying from eight to ten years earlier, on the average, than the women of our country. Perhaps even more important it that, because of

> arbitrary social and legal distinctions, both men and women are often prevented from relating to one another as people, as fellow members of the human race.[200]

Women's liberation means human liberation and the freedom of men and women to relate to each other as human beings rather than as sexual stereotypes. And perhaps, when this is so, "The emergent truth about men and women may be rather richer than we dare to hope."[201]

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200. 116 CONG. REC. 31,533 (daily ed. Sept. 14, 1970) (remarks of Prof. Leo Kanowitz).

201. Cavanaugh, *supra* note 10, at 287.