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THE "EQUAL RIGHTS" AMENDMENT—
POSITIVE PANACEA OR NEGATIVE NOSTRUM?

Nature has given women so much power that the law has very wisely given them little.

Samuel Johnson.

[There is as much difference between a male and a female as between a horse chestnut and a chestnut horse.

Representative Emmanuel Celler.

You've come a long way, baby.

Contemporary television commercial.

From McSorley's Old Ale House, a New York City bastion of masculinity for 116 years where women have finally succeeded in being served,¹ to Rochester, where they shattered teacups in protest of inequality,² to Syracuse, where they dumped fifty children on city hall,³ to dozens of other cities across the country where thousands marched and rallied,⁴ women have been speaking out in protest over unequal "plight" in the world's most prosperous, democratic and egalitarian nation.

Awareness of the present movement for women's liberation has jarred most Americans with an earth-shattering suddenness, yet the current activism on the part of those proposing equality for women has vivid historical precedents, the basic beginnings dating well back into the cradle era of the Republic.⁵ Early in our history, for example, Abigail Adams wrote to her prestigious husband, John: "In the new Code of Laws which I suppose it will be necessary for you to make, I desire you would remember the ladies... Remember, all men would be tyrants if they could. If particular care and attention is not paid the ladies, we are determined to ferment a rebellion..."⁶ Though Mrs. Adams undoubtedly was writing with tongue in cheek, the acid in her pen gave indication of a movement in its infancy. When the descendants of those suffragists who finally won the right to vote in 1920⁷ held a Women's Rights Convention in Seneca Falls,

² Life, Sept. 4, 1970, at 16B.
³ Id.
⁴ Id.
⁵ For an excellent and comprehensive account of the women's rights movement from its infancy until 1920, see E. Flexner, Century of Struggle (1959).
⁶ Id. at 19, citing Adams, Familiar Letters, 149-50 (letter dated Mar. 31, 1977).
⁷ The right to vote was assured by ratification of the 19th Amendment to the United States Constitution by the 36th State, Tennessee, on August 18, 1920. See G. Coolidge, Women's Rights 159-66 (1966).
New York, in 1948, their demands for equal opportunities in jobs and education and for an end to all legal discrimination against females were much the same as they are today.

When the length of women's fight for equality and the simple reasonableness of many of their demands are considered, it is indeed a dismaying footnote that great inequities continue to exist in these times. These inequalities exist in employment, education, domestic life and in many other areas. Such inequities seem to stem from the attitudes of men, who as a group, continue to hold romantic and patronizing ideas about women, whom they feel should have only the stereotyped feministic qualities of instability, softness, intuition and gentleness. Men feel superior to women both mentally and physically and generally demand a much more regimented standard of behavior for them than they themselves would assent to. From a hopefully masculine standpoint it seems not unreasonable to feel that it is because of some of these outmoded male "hang-ups" that women are rebelling. It is truly hopeful that even the most extreme liberationists are not seeking wholesale reversals, sex-wise or otherwise, but are merely seeking human parity and the appreciation that accompanies it.

In 1872, Justice Bradley of the United States Supreme Court, commenting on the status of women, said: "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." In the 1970's the law of the Creator may be construed differently, as is implied by the recent House of Representative's approval of an amendment to the United States Constitution designed to assure equal rights to women.

The basic difference between the ideas of Justice Bradley and the 350 Congressmen who voted for the new amendment is indicative of the undeniable change wrought in the status of American women during the last several years. But the mere fact that a constitutional amendment is deemed necessary shows that many women are not

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8 See E. Flexner, supra note 5, at 71-77. This convention was organized and led by Lucretia Mott and Elizabeth Cady Stanton, two of the earlier and most famous American fighters for women's rights. For the convention, Mrs. Stanton drafted a "Declaration of Principles" which stated in part that, "we hold these truths to be self evident: that all men and women are created equal . . . ." Id. at 75. The women demanded the right to vote, as well as rights concerning education, employment opportunities and the ending of all discrimination against women.

9 Id.


12 Id. at H7944.
satisfied with their present legal status. Although some statutes look
with special favor upon the feminine gender\textsuperscript{13} many still reflect the
outmoded attitude that women are inferior to the male primate.\textsuperscript{14}

The purposes of this note are generally four-fold: (1) to list and
discuss a representative sample of laws which discriminate on the
basis of sex; (2) to analyze leading cases which have dealt with
laws which discriminate on the basis of sex; (3) to recognize current
trends and developments in this area; and (4) most importantly,
from this background to discern the desirability of the proposed Equal
Rights Amendment and to predict its effect upon present statutes and
case law in the event it becomes part of our Constitution.

1. The Equal Rights Amendment

A. Scope

On August 10, 1970, the House of Representatives ended 47 years
of footdragging by approving the proposed constitutional amendment
designed to give women legal rights commensurate with those of men.\textsuperscript{15}
The proposed amendment is as follows.

Article

Section 1. Equality of rights under the law shall not be denied
or abridged by the United States or by any State on account of sex.
Congress and the several states shall have the power, within their
respective jurisdictions, to enforce this article by legislation.

Section 2. This article shall be inoperative unless it shall have
been ratified as an amendment to the Constitution by the legislators
of three-fourths of the several states.

Section 3. This amendment shall take effect one year after date
of ratification.\textsuperscript{16}

As provided in the United States Constitution, any proposal to
amend the Constitution must be passed by the Senate and by the

\textsuperscript{13} E.g., alimony statutes, employment maternity leave statutes. These and
other such types of statutes will be treated later in this note.

\textsuperscript{14} E.g., maximum hourly and daily work restriction statutes for females,
statutes requiring special rest periods for women and other such "protective"
legislation will be discussed herein later. See note 72, supra and accompanying text.

\textsuperscript{15} The "Equal Rights" Amendment had been introduced into the House of
Representatives every year since 1923, but had never been voted upon until
August 10, 1970. The Senate, in contrast has voted on the amendment twice,
passing it in both 1950 and 1958 only to see it die in the House. CONC. Q., Aug. 14,
1970, at 2041.

\textsuperscript{16} The following provision has been added:
This article shall not impair the validity of any laws of the United States
which exempts a person from compulsory military service, or any other
laws of the United States, or of any state which reasonably promotes the
health and safety of the people. 29 Cong. Q. Rep. 1562-63 [July 23, 1971]
see also Courier-Journal, June 23, 1971 3A at 2 Col. 4.
legislature of three-fourths of the States.\textsuperscript{17} Even though the Senate on October 13, 1970, delayed early enactment of the House resolution by tacking on "riders,"\textsuperscript{18} the problem is before the public, Congress and the Courts as at no previous time in history.

If the proposed amendment finally becomes part of the Constitution it could radically change the lives of millions of Americans. Both supporters and foes agree that it could affect men as well as women.\textsuperscript{19} The main question would seem to be: Would the changes be for better or worse? The debate begins here.

One eminent constitutional authority, Professor Paul Freund of the Harvard Law School, claims that the amendment would, "[transform] every provision of the law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court..."\textsuperscript{20} This would come at a time when the overburdening of the judicial system with cases is approaching flood level. "The range of such potential litigation is too great to be readily foreseen," Freund declares, "but it would certainly embrace... diverse legal provisions."\textsuperscript{21}

Proponents tend to shun this argument, however, on at least two bases. Professor Thomas I. Emerson, a counterpart of Freund at Yale Law School, has opposed his fellow professor saying: "Courts are entirely capable of laying down the rules for a transitional period in a manner which will not create excessive uncertainty or undue disruption."\textsuperscript{22} Other proponents argue equally convincingly that the mere fact that there might be litigation should not deter the Congress from passing such a vital proposal and the states from ratifying it.

Representative Anderson of Illinois, espousing such a theory, quoted from the President's Task Force on Women's Rights and Responsibilities during debate on the amendment in the House of Representatives:

> It is ironic that the basic rights women seek through this amendment are guaranteed all citizens under the Constitution. The applicability of the 5th and 14th amendments in parallel cases involving racial bias has been repeatedly tested and sus-

\textsuperscript{17} U. S. Const. art. V.
\textsuperscript{19} See, e.g., 116 Cong. Rec. H7953-54 (remarks of Representative Griffiths), H7960-63 (remarks of Representative White).
\textsuperscript{20} Quote cited 116 Cong. Rec. H7962-63 (remarks of Representative Celler).
\textsuperscript{21} This assumption, however logical, may be combated with the fact that in 1967, Delaware repealed all of its restrictive legislation and the courts have not as yet felt any of these adverse effects. See 116 Cong. Rec. H7954 (remarks of Representative Griffiths); McPherson, \textit{That Sex Thing}, Courier-Journal (Louisville, Ky.), Sept. 24, 1970, § A at 9, col. 1.
\textsuperscript{22} McPherson, supra note 20 at col. 4.
tained, a process which has taken years and most millions of dollars.\textsuperscript{23}

Anderson then asked:

"Do members who oppose the equal rights of women amendment suggest that we should not have had those court cases; that we should not have spent those millions of dollars to test the validity of the fifth and 14th amendments?\textsuperscript{24}

Perhaps the most ardent foe of the amendment, Representative Emmanuel Celler of New York,\textsuperscript{25} dean of the House and Chairman of the powerful House Judiciary Committee (from whence the amendment was brought to a vote by means of the extremely rare "discharge petition" after languishing for 47 years),\textsuperscript{26} argued primarily that the amendment should be defeated because it would invalidate many state laws protecting women. This view was shared by Representative Martha Griffiths of Michigan, who led the House fight for passage of the Amendment. She felt, however, that such protective laws were generally undesirable and need to be invalidated.\textsuperscript{27}

It is perhaps an exaggeration to oppose the amendment solely on the ground of the ancient "opening of the floodgates" argument, as Professor Freund has done. This should, however, be a consideration. If a constitutional amendment were the only way to insure equal rights, the question would solve itself; but this is not the case. As will be discussed later there are many discernible trends, both judicial and statutory, which point toward solutions of most of our undesirable discrimination problems while not undermining that discrimination which might be beneficial. That a chaotic constitutional amendment might solve our problems is quite probable; that it is the best alternative is quite improbable.

\textbf{B. Possible Effects}

It would appear that the effects could be sweeping whenever (and

\textsuperscript{23} 116 CONG. REC. H7967 (remarks of Representative Anderson).
\textsuperscript{24} Id.
\textsuperscript{25} Representative Celler strenuously opposed the amendment in debate in the House. See e.g., 116 CONG. REC. H7948-49 (remarks of Representative Celler).
\textsuperscript{26} Representative Celler is a veteran of 48 years in the House. TIME, supra note 1, at 10.
\textsuperscript{27} Celler has headed the House Judiciary Committee since 1949, except for 1953-54, the years of Republican majorities. CONG. Q., supra note 15.
\textsuperscript{28} The discharge petition is a seldom-used device to allow a majority in the House to bring to the floor legislation blocked by a legislative committee or the Rules Committee. For a brief, but succinct, discussion of this device see CONG. Q., Id. at 2041.
\textsuperscript{29} 116 CONG. REC. H7976 (remarks of Representative Broomfield). It had been 22 years since the Committee had even held hearings on the amendment. TIME, supra note 1, at 10.
to whatever) the amendment might be applied. Some possible results, which will be discussed at length later, are:

1. **Protective labor laws**—Labor laws applying only to women might be ruled unconstitutional. AFL-CIO spokesmen have argued that protective legislation is needed to shield women from exploitation. Mrs. Griffiths and her allies contend, however, that many laws, e.g., those barring women from working overtime, simply keep women out of better paying jobs and in reality do not protect them. Where real protection is involved, it would seem that states could comply with the amendment by broadening the provisions of their laws to include men too.

2. **The military draft**—The amendment would probably make women subject to military conscription. As to what this would mean in a practical setting is confusing. It would seem highly likely that if women were drafted their inherent physical conditions would tend to restrict most of them to desk jobs rather than to actual field participation. However, as Representative Shirley Chisholm of New York has said, “[A] robust woman could be more fit . . . than a weak man.” Surely great confusion could be wrought in this area.

3. **Domestic law**—It is also likely that laws concerning alimony, child support, custody, divorce grounds, maternity, unequal marrying ages, and bastardy would be affected drastically by the proposed amendment. Notwithstanding the inequality in these areas, it is the female who largely benefits.

4. **Retirement plans**—Laws involving unequal retirement ages for men and women under Social Security or private plans could be challenged under the Equal Rights Amendment. Likewise, statutes which provide for survival benefits for one sex and not the other could be held invalid.

5. **Criminal law**—Laws which provide for unequal sentences in certain crimes depending upon sex would likely be ruled void. Also, laws involving sex offenses, prostitution and abortion could be held unconstitutionally discriminatory.

6. **Juries**—Statutes which allow exemptions to women and not to men, or which require women to affirmatively declare they wish to be jurors before they may be considered, could conceivably be invalidated.

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31 TIME, supra note 1, at 10-11.
32 See e.g., CAL. LABOR CODE § 1350 (West 1937).
33 See, Louisville Courier-Journal, Supra note 30; 116 CONG. REC. H7953-54 (remarks of Representative Griffiths), H7969 (remarks of Representative Heckler).
34 116 CONG. REC. H7978 (remarks of Representative Chisholm). It is interesting to point out in this context that the Israeli and Viet Cong armies routinely use women as combat soldiers. See TIME, supra note 1, at 11.
It is the above mentioned areas to which the remainder of this note will be addressed in depth.

II. EMPLOYMENT

Why do women desire equal rights in the area of employment? It would seem that "hard, cold cash" is the compelling reason.\(^3\) In order to demonstrate this, employment will be broken down into several illustrative areas showing "gaps" that exist today.

A. The Earnings Gap

That men do earn considerably more on the average than women\(^3\) may come as no shock. Yet the fact that the gap has been widening rather than closing over the last few years may be cause for surprise. For example, in 1958 the median earnings per year per full-time woman worker was $3,102; for males the median was $4,927 a difference of $1,825.\(^3\) In contrast, the difference in 1962 was $2,348\(^3\) and in 1968, $3,207.\(^3\)

B. The Opportunity Gap

The main reason for the difference in earning between male and female workers seems to stem from the difference in jobs they are likely to hold. More than 60 percent of the total number of women working today are employed as clerical, service and sales people, or as household workers,\(^4\) all of which can logically be considered lower paying jobs. In contrast, only 21 percent of the male workers hold these same types of jobs.\(^4\) To further illustrate the disparity, it is interesting that about 70 percent of all male workers are employed as professional and technical workers, managers, proprietors, craftsmen, foremen or factory workers,\(^4\) all of which one may assume to pay better wages.

So it is that women, who comprise 51 percent of the nation's population\(^5\) and hold 40 percent of the jobs,\(^6\) on the average earn

\(^4\) In 1970 it is estimated that the average male high school graduate earned $9,100, as compared to $5,280 for the average female high school graduate. 116 Cong. Rec. H7964 (remarks of Representative Green).
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Id.
\(^14\) See supra note 1, at 10.
\(^15\) 116 Cong. Rec. H7980 (remarks of Representative Koch, citing Testimony Submitted by the Women's Rights Committee of New York University (Continued on next page)
42 percent less than men. Though these figures may not overly surprise the average male, they should lead him down the seldom trod path of thoughtfulness.

C. The Overtime Gap

Where women are limited in the number of hours they may work it is reasonable to believe that men will generally possess the vast majority of jobs where overtime pay is common. In 23 states and the District of Columbia women are limited by "protective" laws to an eight-hour working day or to 48 hours a week or both. Two states set a maximum workweek of only 40 hours for women. Such laws can serve to "reject," rather than "protect," trapping women who are in lower echelons by, denying both pay and opportunity, as choice supervisory positions might often require a great deal of overtime work.

D. The Qualifications Gap

Statistics indicate that even a good education does not guarantee the average female a salary which can be favorably compared to a man's. For instance, in 1970 a typical female who had had four years of college training was earning about $7,930 per year, while a typical male with merely an eighth-grade education was averaging only $800 per year less. The typical male college graduate at this same time, in contrast, was earning $13,300 per annum.

E. The Unemployment Gap

Data from the United States Department of Labor show that while overall unemployment rates for both men and women have dropped in the last decade, the average rate for women has been 5.7 percent, while that for men has been 4.3 percent. Also, from a nearly even rate in 1960, the unemployment rate for women had by 1969 risen to over 167 percent of that the rate for men.

(Footnote continued from preceding page)

SCHOOL OF LAW FOR HEARINGS CONDUCTED BY THE HOUSE SUBCOMMITTEE ON EDUCATION, June 30, 1970 [hereinafter cited as N.Y.U. REPORT].

47 Oregon and South Carolina. Id.
49 Id.
50 Id.
52 4.7% for women, as compared to 2.8% for men. Id.
F. The Experience Gap

That women are at a disadvantage in the labor market can also be traced to the fact that there are more female newcomers to the labor force than males; thus they are low in the seniority ranks. Another Department of Labor report says that since 1948 the female labor force has increased by about 13.8 million women while the male force has risen by only 6.9 million.53

G. The Professional Gap

Statistics also tend to indicate that few women are entering the lucrative professional fields. Females in this nation constitute only nine percent of all professionals.54 This includes eight percent of all those in the “scientific” professions,55 about 3.5 percent of all attorneys,56 and only one percent of all engineers.57 An interesting item is that women constitute only 6.7 percent of those in the medical profession in the United States, while their counterparts in the Soviet Union make up 60 percent of the total.58 Also, while a moderate professional salary might be about $15,000, only 0.4 percent of all women in this country have incomes exceeding this amount.59

The implications of the above statistics can be further illustrated by a study of women faculty, as compared with men, at 39 representative law schools in the United States.60 The distribution amounts to 1,625 male faculty members as opposed to an anemic number of 35 females,61 a ratio of over 46 to one. Of these 35 women, nine were classified in librarian positions while only seven were of professional rank.62 Thus our nation’s law schools, the supposed bastions of equal protection and fairness, have made a dubious mark in the area of women’s rights. But—and this would come as no consolation to women’s liberationists—the law schools are not alone by any means.

H. The Retirement Gap

The social security laws of the United States are a good example of the express preference of one sex over the other. Under current

53 Id. at 36.
54 116 Cong. Rec. H7964 (remarks of Representative Green).
55 Id.
56 Id.
57 Id.
58 Id.
59 Id. at H7980 (remarks of Representative Koch).
61 Id. at H7983.
62 Id.
social security legislation a woman may retire with full benefits at age 62 whereas a man cannot retire with the same full benefits until age 65.\textsuperscript{63} Almost all of our social security programs are based upon differences between men and women, and give women some special advantage.\textsuperscript{64}

On the other hand, though a woman may spend her life paying into the social security system, but if she lives with a husband until retirement age she loses the benefits of these payments she had made for years.\textsuperscript{65} Likewise when a married woman pays into the system for years and dies, her widower may receive nothing from her payments.\textsuperscript{66} In the Congress of the United States today, women members contribute to a retirement fund that pays pensions to the widows of Congressmen, but would pay no benefits to the surviving husband of a Congresswoman.\textsuperscript{67}

Government does not have a monopoly on such sex discrimination regarding pension plans; similar such preferential treatment is found in industry. For instance, Illinois Bell Telephone has recently been sued in federal court and charged with discrimination in the firm's retirement policy which allows women to retire at 55 years of age while men must wait until they are at age 60 to draw full benefits.\textsuperscript{68}

One can perceive without great difficulty the effect that the proposed amendment could have upon these and similar laws and company policies which prefer pension and retirement benefit payments to one sex over the other. That equality would be served by an invalidation of those laws is certain, but it seems that women would often be "stepping down" to this equality.

Whether the Equal Rights Amendment becomes a reality remains to be seen. As of now, however, the statistics point uniformly in one direction: It is still a "man's world"—economically speaking.

\section*{III. State Protective Laws}

In the latter part of the nineteenth and early part of the twentieth centuries, many states, led by Massachusetts in 1879,\textsuperscript{69} enacted labor


\textsuperscript{64} 116 Cong. Rec. H7961 remarks of Representative White).

\textsuperscript{65} Id. at H7974 (remarks of Representative Broyhill).

\textsuperscript{66} Id.


laws for the protection of women workers. This state legislation has had the effect of excluding many women from certain jobs by "protecting" them. Such exclusions have been accomplished by enforcing maximum weight-lifting limits for women, maximum hours legislation for women and the absolute disqualification of women from certain work areas.

A. Federal Remedial Legislation

Legislation remedying women's inferior legal status has been slow in development. The nineteenth amendment guaranteed women the right to vote but it did not achieve the political and civil equality that was sought by proponents of women's rights. The Equal Pay Act of 1963 was enacted to eliminate widespread wage discrimination against women, but, at least until 1967, the differential in income between men and women had widened. Finally the Civil Rights Act of 1964, which will be discussed later, was enacted partially to prohibit discrimination in employment on the basis of race, color, religion, national origin or sex.

B. Early Case Law

Constitutional case law in the area of women's rights has been perhaps as stagnant as remedial legislation has been slow. In a line of cases starting with Muller v. Oregon in 1908, classification on the basis of sex has been upheld by the Supreme Court. The Court in Muller reasoned that because of the traditionally dependent role, inferior strength, lack of assertiveness and society's need to protect women, protective legislation was justified. The Muller case con-

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70 For a listing of various types of state protective laws see 116 Cong. Rec. H7955-59.
71 See note 124 infra.
72 See note 125 infra.
73 See note 129 infra.
74 U.S. Const. amend. XIX.
75 See Note, Classification on the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 780 (1965).
79 See note 92 infra.
81 208 U.S. 412 (1908). It is interesting to note that Muller is the case in which the famous "Brandeis brief" originated. See Kanowitz, Constitutional Aspects of Sex-Based Discrimination in American Law, 48 Neb. L. Rev. 131, 135 (1968). [hereinafter Kanowitz]
82 208 U.S. at 421.
cerned the validity of Oregon's law limiting women's hours of employment to ten a day, the plaintiff arguing that it violated the 14th Amendment's due process and equal protection clauses. The determination by the Court was that if one was born male, the right to contract in labor relations is part of the liberty of individuals that is protected by the fourteenth amendment. The corollary to this rule seems to be that such liberty is not absolute, and a state may restrict many aspects of the individual's power to contract in relation to employment if one is a female. The apparent justification for this distinction was based on this declaration:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not... the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present.\textsuperscript{83}

That the sole justification of \textit{Muller} is the belief that woman is inferior to man becomes even more apparent from the following:

The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor... and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.\textsuperscript{84}

The belaboring of quotations from this early, but landmark, case hopefully is justified to demonstrate the eloquent legal expressions which have steadfastly been used to justify sexual discrimination against women. Professor Leo Kanowitz, a learned scholar on the subject of women's rights, maintained in a recent article that statutes allegedly protecting women—but in reality discriminating against them because of their failure to extend said "protection" to include men—will today require a much greater justification for interference with woman's basic right to work. He further maintains that \textit{Muller v. Oregon} would probably not be decided the same way today.\textsuperscript{85}

\textit{Radice v. New York},\textsuperscript{86} a case factually similar to \textit{Muller}, held a

\textsuperscript{83} Id.
\textsuperscript{84} Id. at 422-23.
\textsuperscript{85} Kanowitz, \textit{supra} note 81, at 136.
\textsuperscript{86} 264 U.S. 292 (1924).
New York statute prohibiting employment of women in restaurants between the hours of 10:00 p.m. and 6:00 a.m. was not contrary to the freedom of contract. As in Muller, New York justified the law as a health measure. The Court seemed impressed with the state legislature's findings that a lost night's sleep cannot be made up fully by day-time sleep, especially in large cities. [The legislation had considered the delicate nature of the female and decided the injurious consequences would hurt women much more than men]. Radice is a good illustration of the legal "razzle-dazzle" that courts have used through the years to justify protective legislation. It is somewhat unfortunate that this legislation is not altogether to protect women from hazards to their health, but often acts to protect the less delicate male from competition with females.

Perhaps the ultimate position adopted by the Supreme Court in sex-discrimination legislation is found in Goesaert v. Cleary, decided in 1948. This case held a statute restraining women's rights to tend bar was not in contravention of the fourteenth amendment. The fact that the statute allowed wives and daughters of male owners of liquor establishments to do so was not deemed sufficient evidence for an equal protection violation. Nor was the fact that waitresses were allowed to serve liquor to patrons and thus be exposed to the unwholesome influence of a bar considered persuasive. The result in Goesaert, however, is not as important as the Court's reasoning in reaching it. The Court applied the "any rational basis" test for equal protection purposes, stating that since the legislature's decision is not without a basis in reason, the Court would not listen to arguments that the legislature had had unchivalrous or other ulterior motives. This opinion as a whole gives rise to the feeling that the Court, relying on Goesaert in the future, would validate any possible justification for a distinction between men and women.

The fifth and fourteenth amendments are in the center of the equal rights controversy. Most of the adversaries in debates over the proposed amendment agree that the fourteenth amendment should have served to give women the protection they now desire via the new amendment. Representative Griffiths, who led the House fight for passage of the amendment, has stated: "I agree the 14th Amend-

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87 335 U.S. 464 (1948).
88 Id. at 467.
90 Mrs. Griffiths offered H.R.J. Res. 264 (The Equal Rights Amendment proposal) to the House of Representatives for consideration, as well as strongly (Continued on next page)
ment could do what the equal rights amendment would do, but what opponents are ignoring is that the 14th hasn't done it. The Supreme Court of the United States has never admitted the 14th Amendment applies to women.91 This argument seems plausible in light of history. A hundred years of equality enunciated under the Constitution for the Blacks in America brought little actual progress. It took the passage of affirmative legislation—the Civil Rights Act of 196492 and the Voting Rights Act of 196593—to force action to achieve this principle of equality among races. Likewise, it took passage of equal pay for equal work,94 the 19th Amendment providing the right to vote,95 and the inclusion of sex in the 1964 Civil Rights Act96 to force action to achieve equality for women in those specific areas of concern. The seeming default of the judicial system to grant equal protection of the laws to women is one of the reasons the proposed Constitutional amendment passed the House.

There is little doubt today that the Muller, Radice, Goesaert line of cases is still good law, not having been reversed by the Supreme Court, and that sex, insofar as constitutional law is concerned, is an allowable basis for classification.97 However, the belief among legal scholars is that these holdings would not stand if the Court were to decide the same cases today.98 The question, then, would seem not to be whether the fourteenth amendment is broad enough to include sex discrimination within its prohibitions, but rather when will the courts so hold. Yet the belief that the courts may never do so on fourteenth amendment grounds may be precisely the reason that proponents are backing the new, more explicit amendment.

C. Civil Rights Act of 1964

It is the contention of this note that courts are already including sex discrimination within the constitutional prohibitions in employment areas, and that such decisions are a result of the passage of the

(Footnote continued from preceding page)

endorsing its passage during the ensuing debates. See 116 Cong. Rec. H7953 (motion offered by Representative Griffiths), H7948, H7953-54 (remarks of Representative Griffiths).

91 McPherson, supra note 20, at col. 3.
95 U.S. Const. amend. XIX.
98 E.g., Murray & Eastwood, supra note 97.
Civil Rights Act of 1964. This being true, it would seem that the validity of the arguments for the proposed amendment would be superfluous [insofar as discrimination in employment via state protective laws is concerned].

The Civil Rights Act of 1964 concerns primarily the ending of discrimination against Blacks in employment, voting and their use of public facilities and accommodations. It constitutes an important step in the realization of equal rights. Extending earlier trends in social legislation, it is probably the most comprehensive civil rights legislation passed by Congress.

Title VII of the Civil Rights Act of 1964 is directed primarily toward discrimination in employment. Of all the provisions within the Act, it alone deals with sex-based discrimination. Title VII states:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Title VII further provides that any person who feels he has been discriminated against by an employer because of one or more of the above mentioned practices may file a charge with the Equal Employment Opportunity Commission [hereinafter referred to as EEOC], which, if it finds reasonable cause to believe the charge, will attempt to solve the problem through mediation with the parties. If the EEOC is not successful in its mediation efforts, it so advises the charging party who may then sue in United States District Court for damages.

The most significant provisions of the Act are: Title I (voting), 42 U.S.C. § 1971 (1964); Title II (public accommodations), 42 U.S.C. 2000a to a-6 (1964); Title III (public facilities), 42 U.S.C. §§ 2000b to b-3 (1964), and; Title VII (employment), 42 U.S.C. §§ 2000e to e-15 (1964).


Id., See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).


To be an employer under the Act a person must employ 25 or more persons. 42 U.S.C. § 2000e(b) (1964).


42 U.S.C. § 2000e-5(e) (1964). It is clear that the EEOC has little actual power to force compliance with the Civil Rights provision. A movement

(Continued on next page)
The legislative history—or lack of it—is interesting in regard to deriving congressional intent in enacting the sex discrimination provisions of the Civil Rights Act. Originally the Act in no way mentioned sex. At least some authorities believe that the opponents of the entire Act added the sex provision in an attempt to jumble the bill and facilitate attempts to halt its enactment.\textsuperscript{110} The prospects for enactment of legislation prohibiting sex discrimination were not bright in 1964.\textsuperscript{111} If the sex provision had been presented separately from, rather than being added to, the act, death would have been assured.\textsuperscript{112} Representative Edith Green of Oregon, a strong advocate of women's rights, said in 1964 that if the legislation had been considered “by itself, and . . . brought to the floor with no hearings and no testimony . . . [it] would not [have] receive[d] one hundred votes.”\textsuperscript{113} Just one day before the Act was passed,\textsuperscript{114} Representative Howard Smith of Virginia, an opponent of the original Civil Rights Bill,\textsuperscript{115} amended the bill to include sex as another prohibited basis for discrimination in employment.\textsuperscript{116} Representative Smith claimed absolute seriousness in offering the amendment,\textsuperscript{117} but his motives nonetheless may be suspect. The debates over the Act had continued for four months and many southern congressmen and their allies had made efforts to block its ultimate enactment,\textsuperscript{118} and when the debate and the overriding congressional feeling\textsuperscript{119} at the time the amendment was offered are considered, it is evident that the prevailing motive was to prevent passage of the basic Act itself rather than a regard for women's rights.\textsuperscript{120}

\textsuperscript{110} Kanowitz, supra note 110, at 310-13.
\textsuperscript{111} Id. at 310.
\textsuperscript{112} Kanowitz, supra note 110, at 310.
\textsuperscript{113} 110 Cong. Rec. 2720 (1964) (remarks of Representative Green).
\textsuperscript{114} February 8, 1964.
\textsuperscript{115} Kanowitz, supra note 110, at 310.
\textsuperscript{116} 110 Cong. Rec. 2577 (1964).
\textsuperscript{117} Id.
\textsuperscript{118} Kanowitz, supra note 110, at 311.
\textsuperscript{119} When the Civil Rights Act of 1964 first took shape in committee in 1963, the primary intention was the elimination of racial discrimination. See Hearings on H.R. 7152, as Amended by Subcommittee No. 5, Before the Committee on the Judiciary, 88th Cong., 1st Sess., sec. 4, pt. IV, at 2652-62 (1963) (statement of the Attorney General). Furthermore, there was no consideration of such an amendment by any committee. Berg, supra note 102 at 78. It is also interesting to note that no organization in this country even petitioned Congress to add "sex" to Title VII. Note, supra note 75, at 791.
\textsuperscript{120} See Kanowitz, Sex-Based Discrimination in American Law I: Law and the Single Girl, 11 St. Louis U. L.J. 293 (1967); Note, supra note 75, at 791.
To attempt to decide any case, then, upon the legislative intent behind the sex provisions of Title VII would be somewhat fallacious.\(^{121}\) It seems to be well settled that when legislation is adopted by Congress—especially that as important as the Civil Rights Act—and such legislation is the object of a suit, counsel must infer some legislative intent in order to carry out the policy of the legislature in passing the law. It would be erroneous in this case, however, to attribute to the Congress any motive as glorious as that of prohibiting employment discrimination based upon sex, in light of the sex provision's dubious history. Without any specific mandate from the lawmakers except the wording of the Act itself, one must be satisfied that a national agency (the EEOC) and the courts have been given responsibility for developing workable principles vis-à-vis the employment of women, and that national policy is now in opposition to sex discrimination in employment.

\section*{D. Protective Laws and the EEOC}

At first glance it seems justified to predict that Title VII would have far-reaching effects on the employment opportunities of women, and it may. There are serious problems, however, in its interactions with specific laws in most states which purport to "protect" female employees by withholding their rights to various types of jobs on the basis of sex. Several cases have been decided recently which tend to bear this out,\(^{122}\) and it is likely that in the near future federal courts will be faced with many problems involving this conflict. A great majority of states have such laws to protect women in the field of employment.\(^{123}\) Common to these laws are provisions which limit the amount of weight which may be lifted by women,\(^{124}\) prescribe

\(^{121}\) The same statement might be made concerning the proposed amendment if it is passed and ratified, at least insofar as the legislative intent in the House is concerned. The Amendment was not discussed in any Committee of the House prior to its adoption and total debate on the floor lasted only an hour. One of Representative Celler's main arguments against passage of the amendment resolution was that it had not been examined in his Judiciary Committee. It is not unreasonable to speculate that Representative Celler's motives may be analogized to Representative Smith's cited in the text, during debate on the 1964 Civil Rights Act. It is also interesting to note that since the proposed amendment had been in the House Judiciary Committee for 47 years, Celler could hardly maintain, in all fairness, that the Committee had no time to consider it.


\(^{123}\) For an exhaustive survey of state protective laws, the states in which they are found and some of their effects see 116 Cong. Rec. H7955-59.

maximum daily or weekly hours for women,125 prohibit the employment of females in certain occupations,126 restrict employment before or after childbirth,127 limit night work for women128 and confer special benefits on them.129

It is with such types of laws as the above that Title VII of the Civil Rights Act of 1964 conflicts, since most of these laws restrict women from certain jobs, while Title VII plainly prohibits discrimination in employment on the basis of sex.130 The reason these laws have not been completely obliterated by Title VII under the supremacy clause131 of the Constitution is that Title VII itself provides an exception to the general prohibition against sex discrimination, called the "bona fide occupational qualification" exception.132 This exception states:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice ... to hire ... on the basis of ... sex ... where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. ... 133

From this it is clear that if an employer discriminates on the basis of sex when there is no legitimate reason, he is guilty of violating Title VII, e.g., if he hires a male dishwasher in preference to a female dishwasher solely because of sex. If, however, an employer hires


128 In 18 states night-work for adult females is prohibited and/or regulated in specific occupations of industries: California, Connecticut, Illinois, Kansas, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and Wisconsin. Id. at H7958.


131 U.S. Const. art. XI, § 2.


133 Id.
only males as attendants for a men's locker room, then sex might legitimately be a bona fide occupational qualification and the discrimination therefore lawful. The only possible means, then, of conforming state protective laws to Title VII is to find that the employment practices required by them qualify for the bona fide occupational qualification exception.

As has been stated, the EEOC was set up to administer the Civil Rights Act of 1964. To this Commission has been delegated the duty to determine what bona fide occupation qualifications are, a difficult task indeed due to the lack of any clear legislative guidelines. What, then, does the EEOC consider a bona fide occupational qualification? Generally speaking, when the EEOC adopted its "Guidelines on Discrimination Because of Sex" it did so with the inference that state protective legislation would be abrogated and that it would interpret the bona fide occupational qualification exception narrowly in sex discrimination cases. Subsequent decisions by the EEOC would appear to bear this out. In the maximum hours and weight-lifting areas of state protective laws, the position of the EEOC has been that there is no justification for treating women differently in these areas, and therefore these statutes do not operate as bona fide occupational qualifications. The practical effect of this policy then, is that Title VII preempts this field from the states by way of the supremacy clause.

The EEOC's position is sound. It should go without saying that much of the state protective legislation is contrary to Title VII. Given this assumption, it must be remembered that the EEOC is only a policy and guideline-making, conciliatory and mediating agency and thus its opinions, no matter how correct and persuasive, have no actual binding effect. The question remains as to whether the courts will adhere to this sound reasoning and policy.

E. Current Case Law

There is a definite and discernible trend in current cases toward implementation of the narrow sex discrimination policies of the EEOC. If this trend continues it will no doubt cast the validity of state protective laws in doubt. Perhaps the most widely cited case in this

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135 29 C.F.R. § 1604 (1968).
136 Id. at § 1604.1(a) (1968).
139 Id.
area is that of *Bowe v. Colgate Palmolive Company*. Though *Bowe* itself did not deal with a state protective law per se, its analogy to such laws and the possible application of the decision to them demands that it be discussed within the protective law context. In this case the plaintiffs were women who were employed by Colgate at a plant in Indiana. Colgate restricted females to jobs requiring the lifting of no more than 35 pounds. This restriction, however, was not mandated by an Indiana protective weight-lifting statute, but was a company policy based upon certain protective laws on the job. The Circuit Court held on these facts that Colgate could maintain its 35 pound requirement as a guideline for *all* employees, but that each worker has to be considered on an individual basis, and broad class stereotypes based upon sex cannot be for use in deciding who is to get a certain job, *i.e.*, each worker able to show an ability to perform the strenuous work would be allowed to apply for the position and receive equal consideration.

Perhaps the facet of *Bowe* that is most important is the intimation by the Court that the state protective laws upon which Colgate based its 35-pound limit are no longer valid precedent, but are preempted by Title VII. If this perceptive reasoning is accepted by other jurisdictions, perhaps a valuable guideline upon which states with protective laws may base remedial legislation will have been established. Further, this might persuade states to facilitate legislative changes before the courts force the changes upon them.

Another important case continuing the seeming trend toward the EEOC's interpretation of what constitutes a bona fide occupational qualification is that of *Rosenfeld v. Southern Pacific Company*, decided prior to *Bowe*, which was based upon the refusal of Southern Pacific to allow the plaintiff to take a position to which she, by virtue of her seniority, was qualified above any other applicant. The criteria upon which the company based its refusal were California's wage and hour laws. The court held that this protective legislation did not constitute a bona fide occupational qualification and thus violated Title VII by discriminating against women on the basis of sex. The court further held that the laws were contrary to the supremacy clause and thus void.

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141 416 F.2d 711 (7th Cir. 1969).
142 For a general discussion of the variances among weight-lifting maximums in the states that have such statutes see 416 F.2d at 717-18.
144 CAL. LABOR CODE §§ 1251, 1350 (West 1945).
145 It should be mentioned that the court in *Rosenfeld* went on to state that the protective laws were discriminatory because the standards set by the statute

(Continued on next page)
A continuation in the trend is found in a 1969 case, *Richards v. Griffith Rubber Mills*. In the *Richards* case the plaintiff was denied a position for which she had the requisite seniority because a clause in the union contract required that all female workers receive two ten-minute rest breaks, and a state protective provision limited the amount of weight a female employee could lift to 30 pounds. The court discussed the aged landmark of *Muller v. Oregon* but finally held that Title VII now requires that persons be judged as individuals and not grouped on the basis of sex. The court stated that even if the protective laws could be held valid under the equal protection clause of the 14th Amendment such laws were no longer permitted because of the Civil Rights Act of 1964 via the supremacy clause. Clearly a trend is forming.

*Weeks v. Southern Bell Telephone and Telegraph Company* is a case with facts much the same as the previous cases. It concerned a Georgia regulation which prevented an employer from requiring any employee to lift any weight which might cause undue strain. Though this statute was much more liberal than the one in *Richards*, the court found that it was vague and that the company did not prove a bona fide occupational qualification. In its opinion the court stated that it gave great weight to the interpretation of a bona fide occupational qualification by the agency charged with its administration—the EEOC. The court then further declared:

Title VII rejects... romantic paternalism as unduely Victorian and instead vests individual woman with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renge on that promise.

(Footnote continued from preceding page)

were too low. That the court partially based its opinion on this is somewhat disappoiting in that it seems to leave the door open to allow women to be limited in weights they may lift. It is preferable—perhaps hopeful—to think that the court intended by its language to abrogate such discrimination. Either way, *Rosenfeld* is a decided step forward, albeit the size of the step is debatable.

147 This provision was mentioned in the text of the case only as “Manufacturing Order No. 8” of the Wage and Hour Commission of Oregon. *Id.* at 340.
148 *Id.*
149 408 F.2d 223 (5th Cir. 1969).
150 The defendant relied upon Rule 59 promulgated pursuant to GA. CODE § 54-192(d) (1945). *Id.* at 232.
151 *Id.* at 235.
152 *Id.* at 236.
The reasonable conclusion to be derived from this opinion is that all weight legislation restricting women more than men is discriminatory under Title VII and thus void. That the bona fide occupational qualification exception should be so narrowly construed is a necessity to insure the maximum effectiveness of the reform tendencies of the Civil Rights Act of 1964.

The preceding line of cases seems to establish a definite trend toward displacement of state protective laws by Title VII, where they cannot be shown to be a bona fide occupational qualification. It must be remembered, however, that these cases are lower federal cases and cannot be said to be the law of the land as yet. Another case, however, Phillips v. Martin Marietta Corporation,\textsuperscript{153} has given some indication as to how the Supreme Court feels on the subject. In Phillips, like Bowe, a case not dealing directly with a state protective law but with issues closely analogous to this area, the issue revolved around whether Martin Marietta Corporation could refuse to consider a woman with pre-school children for a certain position while at the same time considering for the same position men with pre-school children. The EEOC found that this constituted sex discrimination but failed in its efforts to reach conciliatory agreement between the parties. When Mrs. Phillips then sued the corporation, it took the position that its practice of not hiring women with pre-school age children was not in itself discrimination based solely on sex, and that the plaintiff had to prove that women as a group were treated unfairly, rather than merely women with pre-school age children. The plaintiff felt, however, that where an otherwise valid disqualification standard is applied discriminately to only one sex, as here, then there is a definite violation of the Act.

Despite the definitely more persuasive argument of the EEOC-backed plaintiff and the court's own admission that there was probably discrimination against women in the case,\textsuperscript{154} the holding in the Fifth Circuit was ultimately in favor of the defendant corporation. The court in an exercise of judicial falderal said: "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on . . . sex . . . . 155 and further declared that the court must study the additional criterion along with the classifications listed in the act (i.e., sex) to determine if there is discrimination based on sex.\textsuperscript{156} In its ultimate

\textsuperscript{153} 91 S. Ct. 496 (1971). For a more detailed discussion of the facts and analogous cases see 411 F.2d 1 (5th Cir. 1969).
\textsuperscript{154} Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969).
\textsuperscript{155} 411 F.2d at 3-4.
\textsuperscript{156} 411 F.2d at 3-4.
holding the court stated that Congress intended that discrimination in such a case should not be classified as sex discrimination. This is unsound in light of the complete lack of any legislative intent concerning the sex provisions when the 1964 Civil Rights Act was passed, as has been discussed.

The Supreme Court, in reviewing *Phillips*, found that the Court of Appeals had erred in reading the Civil Rights Act of 1964 as permitting one hiring policy for women and another for men—each having pre-school age children. If such family obligations [pre-school children] were shown to be more relevant to a woman's job performance than a man's, there could arguably be a basis for distinction under the Act. The Court, then, vacated the summary judgment for Martin Marietta determining that the record was inadequate to decide if the condition in question was a bona fide occupational qualification. It is apparent that the Court has used *Phillips* as a timely vehicle by which to indicate its position when a case concerning a purely protective law reaches it.

Based upon the preceding discussion of the effects of the Civil Rights Act of 1964 on state protective laws and other employment discrimination cases it is contended here that the proposed Equal Rights Amendment to the Constitution is not needed to any great degree. The trend is clear: Federal Courts are, on a case-by-case basis, progressively superceding discriminatory state protective legislation via Title VII and the Supremacy Clause. It would be superfluous, then, to pass and ratify such an amendment unless there are overriding needs elsewhere that demand it. It is further submitted that some vital and needed protective legislation such as maternity leave for women and health provisions would be abolished along with the unfair legislation. The direction of this note must, then, turn to other fields of law in order to discern whether the proposed amendment is needed and what effects it might have on these areas.

IV. CRIMINAL LAW

A. Unequal Sentencing

In the realm of criminal law, women are often treated differently than men. One such example is that of states imposing higher

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penalties on a woman who commits a certain crime, such as prostitution, than on a man who is a party to the same crime. The constitutionality of such dispositionate penalties for women has been recently challenged in two important cases.

In *Commonwealth v. Daniels*, a woman first sentenced to a term of from one to four years for a crime was later resented to up to ten years on the basis of Pennsylvania's Muncy Act, which provided that a female imprisoned for a crime of more than one year must be sentenced to the State Industrial Home for Women and that the sentence should be general and unlimited in duration up to a maximum point. Thus, under the Act, for a crime with a usual sentence of from one to ten years, a man might have been sentenced from one to four years whereas a woman would get an indefinite term of up to ten years. The Superior Court affirmed the trial court in *Daniels*, stating that longer imprisonment of females is reasonable because of “the physiological and psychological make-up of women . . .” This statement did not convince the Pennsylvania Supreme Court, however, as that court held that women are entitled to the equal protection clause of the 14th Amendment, and that the sentence of ten years for women as opposed to four years for men is unconstitutional. The court declared that, “an arbitrary and invidious discrimination exists in the sentencing of men to prison and women to [the] Muncy [Act], with resulting injury to women.”

It is interesting to note that the Pennsylvania Supreme Court in *Daniels* did not completely reject the validity of any discrimination based upon sex, such as in the employment area, stating that there are “significant . . . differences between men and women under some circumstances.” The wisdom and perception of the judiciary is sometimes overwhelming.

In a case analogous to *Daniels*, United ex rel. Robinson v. York, a United States District Court, in Connecticut, held a Con-

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“fallen into the trap of assuming that the [Civil Rights Act] permits ancient commands about the proper role of women to be the basis for discrimination.” *Id.* at 498.

158 See, e.g., statutes upheld in *Ex parte Gosselin* 44 A.2d 882 (Me. 1945); *Platt v. Commonwealth*, 152 N.E. 914 (Mass. 1926); *Ex parte Brady*, 157 N.E. 69 (Ohio 1927).


163 *Id.* at 403.

164 *Id.*


The Robinson and Daniels opinions are important for at least two reasons. First, they cast doubt upon the constitutional validity of earlier cases in other jurisdictions which upheld sex discrimination as being constitutional in sentencing for crimes.\footnote{See, e.g., note 158 supra.} The decisions also seem to indicate a trend, in the criminal law area, disfavoring the theory that sex is a legitimate classification criterion. By their holdings, these cases also seem to continue the general trend, as evidenced by decisions in the employment areas, that the equal treatment for men and women in America may be approaching reality within the judicial system without the aid of a constitutional amendment.

\textbf{B. Prostitution}

Another area of criminal law in which the law often discriminates against women is that of prostitution. All states make prostitution illegal,\footnote{See, e.g., note 158 supra.} and public opinion within the United States has long been opposed to prostitution.\footnote{E.g., KRS § 436.075 (1942).} Yet in most states males cannot be directly punished for availing themselves of the services of a prostitute.\footnote{See George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717 (1962).} If, however, their acts fall within a broad penumbra of other normally criminal areas, \textit{e.g.,} fornication,\footnote{See Kanowitz, supra note 120, at 310.} lewdness\footnote{E.g., KRS § 436.070 (1942).} or solicitation,\footnote{E.g., KRS §436.075(2) (1942).} they may be sanctioned indirectly. The inequity arises because not all states have such crimes as fornication, lewdness and solicitation,\footnote{See Kanowitz, supra note 120, at 311.} and even in states which do have such statutes, loose interpretations have often caused the release of the male customer.\footnote{Id. at 311.} Perhaps even more important is the fact that though male participants in the act of prostitution may legally and theoretically be punished in many states for connected immoral acts, lower officials often "wink" at such participation and prosecution rarely occurs.\footnote{Id.} It is reasonable to perceive from these assertions that women are bearing the burden
for a criminal offense which involves men as well. It is equally reasonable to predict that the new Equal Rights Amendment, if passed and ratified, would in all likelihood abrogate existing state laws which punish women for prostitution and not men. This would be only just, for equality demands that the consequences of a criminal act should either be taken from women or added indiscriminately to men when both are involved in the act.

C. Statutory Rape

In the area of statutory rape, it is often found that it is men who are discriminated against rather than women. For instance, most states provide statutory penalties for carnal knowledge by a male of a female under a certain age, but whereas only a few states provide punishment for an adult woman who has sexual relations with a boy under a certain youthful age. In an early California case, the court stated that the goals of the laws on statutory rape are the protection of society, of the family and of minors. It can be reasoned that these goals still apply in current statutory rape statutes. The majority of statutory rape statutes, then, do not completely meet the goals upon which they are based because of their discrimination between males and females. It is not to be denied that a woman can be as much of an influence upon the morals of a young boy as a man upon those of a young girl. It is submitted that these discriminatory statutes would ultimately be made unconstitutional by the proposed amendment.

D. Abortion

On first impression, sex discrimination in criminal abortion laws is not readily recognizable. It may be argued that regulation of abortion does not prefer one sex over the other since punishment is usually applicable to anyone who performs an abortion or procures a female for an abortion, as well as the woman on whom it is performed. Nevertheless, sex discrimination is intrinsically present in these laws. An instance exemplifying this discrimination occurs when a woman, because of fear and anxiety due to social problems, decides the pregnancy must be aborted. Most physicians, unwilling to break laws which make abortions illegal, will refuse to operate, thus forcing the woman to submit to an illegal abortion, which is frightening.

178 Kanowitz, supra note 120, at 313.
179 49 P. 915 (Cal. 1896).
180 E.g., KRS § 436.020 (1942).
and often fatal as well.\textsuperscript{181} Thus restrictive abortion laws force women to have them illegally and therefore, rather than protecting the health of women, constitute a present threat to their health. The inequality arises when the male involved with the woman desires to have the abortion consummated. Though men are often subject to criminal prosecution for their involvement in helping procure the abortion, the criminal abortion statutes have not caused \textit{them} to be killed or internally maimed at the hands of an unskilled and unsanitary butcher. The inequality of the law, then, is apparent, if not in the inequity of the statutes per se, at least in their practical effects. However, the breezes of change have begun to stir in a few instances signaling at least a glow of hope for abortion reform. California’s Supreme Court in \textit{People v. Belous}\textsuperscript{182} recently held that an abortion statute\textsuperscript{183} was unconstitutionally vague in its criterion that abortions could only be procured when there was substantial risk of impairing the health of the mother\textsuperscript{184} and stated, albeit dictum, that:

\begin{quote}
The fundamental right of the woman to choose whether to bear children follows from the Supreme Court’s and this Court’s repeated acknowledgment of a “right of privacy” or “liberty” in matters related to marriage, family, and sex…. That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right.\textsuperscript{185}
\end{quote}

The United States Supreme Court refused, without comment, to review the opinion of the California Court.\textsuperscript{186}

In a recent opinion, \textit{U. S. v. Vuitch},\textsuperscript{187} the Supreme Court held that a District of Columbia abortion statute was constitutionally clear and the Court stated that prosecutors in the District are still free to bring charges under the law, which forbids abortions except by physicians when the mother’s life or health is at stake. However, the prosecution must prove that the operation was performed without a medical judgment having been made. This interpretation, which seems to include mental health as well as physical health, definitely

\textsuperscript{181}It is estimated that there are 10,000 deaths a year caused by illegal abortions, due not so much to the operation itself but to the barbaric means used to induce these abortions. See Truinger, \textit{Abortion: The New Civil Right}, 56 \textit{Women L.J.} 99 (1970). Furthermore, it is interesting to note that illegal abortions rank as the largest single cause of maternal death each year. Fisher, \textit{The Case For Abortion: A Plea For Unrestrictive Laws}, 56 \textit{Women L.J.} 95, 96 (1970).


\textsuperscript{183}CAL. PENAL CODE § 274 (1872) as amended by CAL. HEALTH & PUBLIC SAFETY CODE §§ 25, 950-54 (West 1967).

\textsuperscript{184}CAL. HEALTH & PUBLIC SAFETY CODE § 25,952(c)(1) (West 1967).

\textsuperscript{185}458 P.2d at 199-200, 80 Cal. Rptr. 354, — (1969).

\textsuperscript{186}90 S. Ct. 920 (1969).

\textsuperscript{187}No. 84 (U.S. Apr. 21, 1971).
gives physicians great leeway and places the burden where it should be—on the prosecution.

While the Court has failed to settle the questions of privacy and freedom of choice in this area, it did agree recently to consider the question later.\textsuperscript{188} If the apparent liberal trend continues, a great upheaval in state abortion laws could then be at hand.

A breakthrough in State laws, based on new statutes in Alaska, Hawaii and New York, is being witnessed around the country.\textsuperscript{189} None of these three states now specify any grounds for abortion and leave the decision solely to the woman and physician involved\textsuperscript{190} as opposed to the other states which require necessity to preserve life or similar grounds.\textsuperscript{191}

The legal arguments that the fetus can inherit property and recover for tortious injury cannot logically be absolute,\textsuperscript{192} and must be balanced against the rights of the mother and the probable future of the child. The physically or mentally impaired, unwanted and unloved child faces a bleak life.

Considering the definite liberal trend exemplified by the cases and statutes cited, it is submitted that it would be more desirable and practical to utilize the case-by-case method as a vehicle for abortion reform rather than to rely upon a radical and disruptive panacea such as the proposed constitutional amendment.

V. Domestic Law

A. Divorce Grounds

Sex discrimination in various state statutes concerning grounds for divorce is very common.\textsuperscript{193} A typical example is the Alabama statute which provides that a husband may obtain a divorce from his wife when the wife was pregnant at the time of their wedding without his knowledge or collusion.\textsuperscript{194} Other states have similar laws\textsuperscript{195} but none allow a wife to divorce her husband if he has caused another woman, not his wife, to become pregnant prior to the marriage.

\begin{footnotesize}
\begin{enumerate}
\item[190] Id. at 5.
\item[191] Id. at 6.
\item[192] W. PROSSER, LAW OF TORTS § 56 (3d ed. 1964).
\item[193] See Kanowitz, Sex-Based Discrimination in American Law II: Law and the Married Woman, 12 ST. LOUIS U. L.J. 3, 63-67 (1967), for an in-depth discussion of this area.
\item[194] ALA. CODE tit. 34, § 21 (1958).
\item[195] E.g., GA. CODE ANN. § 30-102(5) (1952).
\end{enumerate}
\end{footnotesize}
One instance in which a woman is preferred over her husband is found in Alabama where a wife may obtain a divorce from her drug-addicted husband, but the husband may not divorce his wife for the same reason. Likewise, in Kentucky a husband can divorce his wife on the grounds of her mere drunkenness, while she must show the additional factor that her husband's inebriation was accompanied by the wasting of his estate in detriment to the family's well-being before being granted a divorce on this ground.

These examples show instances of the discrimination that is being practiced in the family law divorce area by virtue of some statutes, as well as showing the absurdity of requiring "grounds" for divorce. It could be reasonably expected that such laws as these would be voided by passage and ratification of the proposed Equal Rights Amendment.

B. Family Support Laws

The universal rule in all the states is that the husband is obligated to support his family. In most jurisdictions a husband's willful failure to do so constitutes a crime. No matter how morally justified this might be when practical circumstances are considered, there is still patent discrimination in relation to the statutes which adhere to this universal rule. No longer would support be primarily a man's responsibility if the proposed equal rights amendment became law. It could well become the responsibility of the parent most able to support the child or determination could be made upon the comparative abilities of the parents. Thus, considering the changing role of women in society, the Equal Rights Amendment could well abrogate those existing support laws which place the burden upon the father.

C. Alimony

In the same position as family support payment statutes are those which place upon the divorced male the responsibility to make alimony payments to his former spouse.

It is now the general rule that in the absence of fault on the part of the woman, or on the showing of less fault than the male

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196 See Kanowitz, supra note 196, at 67.
197 KRS § 403.020(4)(b) (1962).
198 KRS § 403.020(3)(a) (1962).
200 Paulsen, supra note 199, at 739.
201 E.g., ALA. CODE tit. 34, § 90 (1919); N.Y. DOMESTIC RELATIONS LAWS § 32 (McKinney 1949).
202 E.g., KRS § 403.060 (1942).
spouse a woman may be awarded alimony.\textsuperscript{203} The usual justifications for such awards are based upon a desire by the state to continue its basic family support policies; to prevent the woman from becoming a public welfare charge, or to punish the man for misconduct during marriage.\textsuperscript{204} Statutes which follow this general approach will doubtlessly go the way of many support statutes if the new amendment becomes operative. The ultimate solution by the states in such cases would have to be in the form of abolishing all alimony, which is unlikely, or forcing divorced women to pay alimony to their former husbands where the woman is working and the man 'has no estate of his own'—the standard often applied to decide whether a woman should receive alimony.\textsuperscript{205}

\textbf{D. Child Custody}

Many courts now give custody of minor children to the mother unless she is found to be unfit.\textsuperscript{206} Kentucky, as an example, follows this rule to clarify its custody statute.\textsuperscript{207} In \textit{Thiesing v. Thiesing},\textsuperscript{208} the Kentucky Court of Appeals stated that where there is nothing tending to show the wife is wanting in any quality needed for the raising of children, custody should be awarded to her.\textsuperscript{209} Likewise, in \textit{Stafford v. Stafford} \textsuperscript{210} the Court stated that custody of a child under natural principles should be given to the mother as long as there is no strong reason to deny her such custody.\textsuperscript{211} The discrimination is apparent in these cases, and it is readily foreseeable that if the Equal Rights Amendment is passed and ratified, practices and policies like these could be challenged by fathers all over the United States.

\textbf{E. Loss of Consortium}

At early common law, although a husband could recover for the loss or impairment of the consortium of his wife, the wife could not likewise recover for the loss or impairment of her husband's consortium.\textsuperscript{212} This common law rule has now been modernized in some jurisdictions to allow women the same right of recovery for such

\begin{footnotesize}
\begin{enumerate}
\item[203] Kanowitz, supra note 193, at 44.
\item[204] Id.
\item[205] See, e.g., KRS § 403.060 (1942).
\item[207] KRS § 403.070 (1942).
\item[208] 26 S.W. 718 (Ky. 1894).
\item[209] Id.
\item[210] 155 S.W.2d 220 (Ky. 1941).
\item[211] Id. at 222.
\item[212] See Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 540 (Mo. 1963).
\end{enumerate}
\end{footnotesize}
loss as men, but the denial of such rights remains in most states. It is reasonable to assume that, where women are still denied the right to sue for the loss of consortium, the proposed amendment would overrule the statutes and cases upon which the states base such practices.

In the area of family law it can readily be predicted that the Equal Rights Amendment could, if given strict interpretation by the courts, cause a great upheaval in the laws and practices of many states. Resolving the inherent conflicts among the traditional role of the female, the American theory of equality for all, and the practical consideration within our changing society is manifestly difficult and not within the scope of this note. It does seem necessary to say, however, that in theory all citizens should be equal; but in these domestic areas, as in others previously mentioned, women are often "more equal" than men. Women should consider whether they wish to risk the loss of such benefits derived from this inequality by advocating the passage of the new amendment. This is a complex area where women may gain a drab equality while losing a decidedly advantageous inequality.

VI. The Draft

It is the opinion of Representative Griffiths that women would be subject to military service equally with men should the amendment be passed and ratified. Opponents of the amendment hold the same view but foresee results differing from those predicted by the amendment's proponents. Those who oppose the amendment seem to have visions of American women driving tanks, much as Russian women did during the last World War, or bearing rifles, as Cuban females do even today. Representative Dennis seemed to echo his colleagues opposing the amendment when he stated before the House during the debates on the amendment:

Conscription is objectionable enough... where men are concerned, but I can think of no more far-reaching social change, nothing more likely to destroy the family unit, nothing so likely to threaten to transform us into a national socialist type of state, than to conscript American women into the Armed Forces.

215 E.g., 116 Cong. Rec. H7960 (remarks of Representative Dennis).
217 Id.
I wonder, indeed, whether anybody here really wants this. I wonder whether we have thought the thing through.\textsuperscript{218}

Proponents of the amendment "pooh-pooh" these arguments. Representative Green points out that women already serve in the military and do not serve in the field, and in practice they would not be required to do anything for which they are not capable.\textsuperscript{219} She also sees a boon to women in that the amendment would presumably allow them entrance into the military academies.\textsuperscript{220}

Representative Shirley Chisholm goes even further, declaring that since men are oppressed by the draft, women should also be required to serve and defend the country.\textsuperscript{221} In citing further non-detrimental effects Mrs. Chisholm alluded to the vocational aspects of military affiliation stating before the House: "Since October 1966, 246,000 young men who do not meet the normal mental or physical requirements for military service have been given opportunities for training and correcting physical problems. This opportunity is not open to their sisters."\textsuperscript{222}

There is, then, agreement on all sides that the Equal Rights Amendment would profoundly effect the military system in that females as well as males would have to be drafted. While agreeing with this broad assumption, it is submitted that in practical application the amendment would have little real effect on the draft situation. Assuming the amendment is someday passed by Congress, in all likelihood it would probably take many months to be ratified by the necessary three-fourths of the states, and a year after ratification to take effect. But who is to say that there will even be a draft by the time the amendment would go into effect? It is the avowed policy of the Nixon Administration to abolish the draft by 1972.\textsuperscript{223} This timetable would seem to be nearly the same for both the prospective operative date of the amendment and the abolition of the draft, assuming both take place. The hypothesis is thus clear: If there is no draft both sexes will be equally not drafted—the amendment would have no real effect.\textsuperscript{224} As a second proposition, it would seem apparent that the physical differences between men and women would render women less likely to meet physical standards for initiation into the

\textsuperscript{218} 116 CONG. REC. H7960 (remarks of Representative Dennis).
\textsuperscript{219} Time, supra note 1, at 11.
\textsuperscript{220} Id.
\textsuperscript{222} Id.
\textsuperscript{223} 116 CONG. REC. H7977 (remarks of Representative Chisholm).
\textsuperscript{224} See N.Y. Times, July 24, 1970, at 63, col. 3; July 30, 1970, at 13, col. 3.
\textsuperscript{224} This hypothesis disregards a possible later reinstatement of the draft.
rigors of basic training, a venture which equality would seem to demand.

As a whole, it seems apparent that the Equal Rights Amendment would subject both sexes equally to the draft and thus force America a step further up the road of equality. But once again, the question unanswered is whether the equality gained by the woman is worth the price she would have to pay?

VII. JURY ASSIGNMENTS

At common law, the right to trial by jury meant trial by a jury composed exclusively of males. This practice has been severely limited through the years, but is still prevalent in many states as a practical matter, although no states now expressly exclude women from juries.

Insofar as the constitutionality of excluding women from juries is concerned, the Supreme Court has not directly spoken since 1879 when in *Strauder v. West Virginia* it stated as dictum that a state may constitutionally confine jury duty to males. In 1961 the Court in *Hoyt v. Florida* did uphold the constitutionality of a Florida statute which, while not denying women the right to serve on juries, did not require them to do so unless they made their desire known to an appropriate official. The Court, it seems, skirted the big issue of discrimination in deciding this case and thus missed its chance to rewrite jury law.

The Florida statute is only an example of many state laws which do not exclude women from jury duty per se, but exempt them on the basis of sex alone because they have children, or because they do not specifically appear to volunteer for service. These types of statutes tend to discriminate between men and women in that they

227 As of 1962 only 21 states permitted women to serve on juries on the same basis as men. See REPORT OF THE COMM’N OF CIVIL & POLITICAL RIGHTS TO THE PRESIDENT’S COMM’N ON THE STATUS OF WOMEN 13, table 1 (1963) [hereinafter cited as CCPR].
228 In 1963 the last three states to do so, Alabama, Mississippi and South Carolina, revised their statutes to allow women to serve on juries. See Ala. Code tit. 80 § 21 (1968); Miss. Code Ann. § 1762 (1968); S.C. Code § 38-52, (1968).
229 100 U.S. 303 (1879).
232 CCPR Report, supra note 227, at 13, table 1. For a list of various state jury exemptions allowable to women see Note, Jury Service for Women, 12 Fla. L. Rev. 224 (1959).
exempt women where men are not similarly exempted. The fact is obvious that neither men nor women ever mob the courthouse to apply for jury service and to require women, because of sex or any other criterion, to register in person for jury duty is tantamount to exclusion. The same is true for automatic exemption for women. These exemptions tend to force inequitable burdens upon plaintiffs or defendants as well as deny equal treatment to would-be women jurors.

The effect of the Equal Rights Amendment could be very interesting in the realm of jury service. This is once again an area in which women are often granted concessions that men are not. Laws that permit women to be excused from jury service for some sex-related reason either make women second-class citizens, or citizens of a "V.I.P." nature, depending upon one's point of view. It is contended here that women might lose a valuable asset in many states (assuming that people do not generally like to serve on juries) in exchange for "stepping down" to equality.

VIII. CONCLUSION

It is concluded from the above material that adoption of the proposed Equal Rights Amendment to the United States Constitution would not be advantageous at this time.

It is true that there is gross sex discrimination and inequality in the area of employment and state protection laws. Further, these inequities demand an immediate remedy and it must be conceded that the amendment would be such a remedy. It would wipe the slate clean of such discriminatory laws, socially good or evil, in one "full sweep." This might create a case, however, where the medicine not only kills the unhealthy cells, but the healthy ones as well. Many protective laws do discriminate against women and have the effect of keeping them from more lucrative positions purely on arbitrary sex grounds. Others, however, such as those providing for separate restroom facilities, sanitary conditions, extra rest periods and maternity leave, do protect women and are beneficial to society. Such laws, which are considered good, would be abolished along with those considered bad. It has been shown that there is a definite trend toward holding unreasonable discrimination based on sex void under Title VII of the Civil Rights Act of 1964, and there is no reason to feel that with the further enlightenment of the courts and the American people

that this trend will not be extended on an orderly case-by-case basis. By this method reasonable discrimination may be saved, whereas unreasonable discrimination will be abolished. American law is based upon orderly, restrained processes. Therefore, the enactment of an amendment to the Constitution where it is not drastically needed (because of alternate forces already at work) would seem to be ill-considered.

The unique situation within the domestic area further adds impetus to the arguments against the new amendment. In virtually every facet of this area, it is women who derive the main benefits from inequalities within the law. That the laws are unequal in many instances is obvious—but who is complaining? Certainly many bedraggled males complain of alimony or support payments and because “she has the kid and I can't see him except on Sunday.” It is submitted that in the general interest of family welfare this is the way it should normally be. The reasons are obvious: To insure proper income from a definite source for children; to insure divorced women who are ill-prepared to work a proper sustenance; to keep welfare rolls at a minimum; and to insure children of broken homes that they will have a mother, when she is morally fit. The effect of the amendment upon such family and society-oriented laws would be drastic, and it is contended here that in the best interests of society the amendment is not needed.

In the realm of criminal law the questions as to the practical effect of the proposed amendment are generally more nebulous and debatable. It cannot be denied that the amendment would probably eliminate existing laws which discriminate between men and women as to length of sentence for commission of the same crime. Here, however, the trend in the courts is already towards holding such statutes unconstitutional.

Likewise, in the abortion area, three states in 1970 greatly liberalized their laws to permit abortions at the discretion of expectant women and their physicians. Case law is also expanding in this area as witnessed by the cases discussed previously and others. That the amendment would even effect the majority of the existing, more conservative, abortion statutes is highly debatable. Assuming, however, that it would, it seems more prudent to wait and observe the trends that are being formed before radicalizing our constitutional law with a new amendment.

Another problem is that the Equal Rights Amendment, if adopted, would be the first constitutional amendment to grant to the states, as well as the Congress, authority to implement the amendment by appropriate legislation. The situation is further complicated by
Katzenbach v. Morgan, which states that the Supreme Court will uphold any congressional statute enacted to vindicate the 14th Amendment rights if it can perceive a basis for such action by Congress. It is presumed that the Court would likewise have to uphold any state statute if it can perceive a basis by which such statute vindicates rights granted by the Equal Rights Amendment. The questions which would be raised concerning the supremacy clause and our ideas of federalism are difficult to perceive, let alone answer.

As a final argument it is deemed justifiable to involve a question of a mere academic or hypothetical nature. It seems reasonable to declare that the proposed amendment, instead of granting freedom and equality to one group, would actually replace one restriction on freedom with another. The legal restriction which might replace state protective laws, for instance, is meant to enforce equality. But, necessarily, both the amendment and the protective laws restrict some individual freedom, and it seems neither can enforce equality. Whereas past laws kept an employer from hiring a woman he wanted to hire (e.g., as a bartender), the amendment might allow him to do so. Likewise, wherever in the past a woman might not have been able to take a certain job, now an employer might be forced to hire her. If the old law was bad, why is the new better? In theory both involve compulsion where freedom should exist.

In a theoretical sense the above is perhaps argumentatively invalid when considered in light of fairness and public policy. If there has to be restriction of one group over another, the sentiment of the nation today would likely be for the woman employee over the "selfish" employer, much the same as it would be for the hungry black man over the biased restaurant owner. In practical effect, however, any change in discriminatory employment laws, whether by the amendment or by orderly case law transition, would probably not be effective. The employer who now hires a female because she is available at lower pay than a man will not raise her pay; he will abolish her position, if the chance presents itself, and replace her with a man once he has to pay her a man's salary. It is very obvious that women are more likely to be fired and less likely to be hired once equality in employment is definitely the law.

Those who desire equality for women should adhere to the admonition that: "Only a single-minded fanaticism could fail to see and to insist upon the fact that men and women are different in many important respects; that as far as biological science can presently

predict they will remain different, and the use of the Constitution as a means of conjuring away biological inequalities is both an insult to that document and disregard of fact";\textsuperscript{235} or, as Representative Emmanuel Celler so appropriately declared, "You know, as a matter of fact, there is only one place where there is equality—and that is in the cemetery."\textsuperscript{236}

It should not be necessary to reiterate the fact that many of our existing discriminatory laws cannot be rationally justified in light of the changes in society which are constantly taking place. But corrective measures must be based upon a realistic view of facts as they actually exist and not upon a glorious, instant cure-all. A very complicated situation should in no wise be dealt with in terms of a single abstract panacea.

\textit{Mark Stephen Pitt}

\textsuperscript{235} \textit{Hearings on S.J. Res. 61 before a Subcommittee on the Judiciary, 79th Cong., 1st Sess., at 82 (1945).}

\textsuperscript{236} \textit{116 Cong. Rec. H7949 (remarks of Representative Celler).}