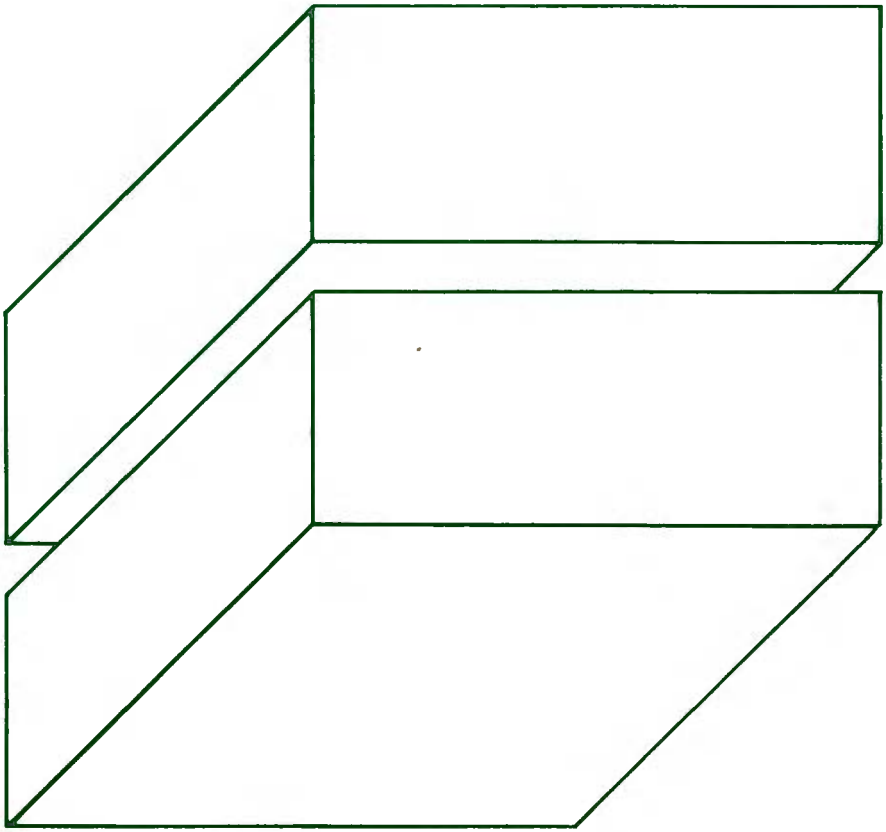
Statement on the Equal Rights Amendment

United States Commission on Civil Rights



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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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The statement was prepared under the overall direction of Carol A. Bonosaro, Director of the Women's Rights Program Unit.

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1. Introduction

On March 22, 1972, the United States Congress approved the Equal Rights Amendment (ERA) to the Federal Constitution and sent it to the States for ratification. The proposed amendment states:

> Sec. 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.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Sec. 3. This amendment shall take effect two years after the date of ratification.[1]

Ratification of the ERA would for the first time extend to women a clear and full status of equal citizenship under the Constitution. Of course, the text of the ERA makes no mention of either sex, and the principle of equality it expresses is as much for men as it is for women. It is, as Rep. Barbara Jordan has testified, "about human values."

> The Equal Rights Amendment is a mandate for change. It is a standard by which to measure our future legal and social constructs. It is about equality and freedom and the pursuit of happiness.[2]

Equal rights amendments, substantially identical to the one currently proposed, have been introduced in nearly every Congress since 1923. The process has been a natural outgrowth of the ratification of the 19th amendment, which extended the right to vote to women.[3] It gained impetus from the recognition that, in the face of extensive evidence of gender-based discrimination, the courts have not interpreted the equal protection guarantees of the 5th and 14th amendments to the Constitution to require strict judicial scrutiny of classifications based upon sex.[4]

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[1] H.R.J. Res. 208, 92d Cong., lst sess., 86 Stat. 1523 (1971).

[2] Written statement submitted by Rep. Barbara Jordan to the Subcommittee on Civil and Constitutional Rights, House Committee. on the Judiciary, May 18, 1978.

[3] National Commission on the Observance of International Women's Year, ". . . *To Form a More Perfect Union. . .* " 374 (1976) (hereinafter cited as *More Perfect Union*); *see* J. Hole and E. Levine, *Rebirth of Feminism* 54 (1971).

[4] *See* discussion *infra,* ch. 2. *See* also Minor v Haspersett 88 U.S. (21 Wall) 162, 168 (1874).

Throughout its long history in Congress, the proposed ERA was acted upon favorably by several congressional subcommittees and committees and was subject to many hearings and intensive debate.[5] However, it never passed both Houses unamended until the 92d Congress, when the House of Representatives voted overwhelmingly for the ERA by 354–24 on October 12, 1971, and the Senate followed suit by a vote of 84–8 on March 22, 1972.[6] Finally, 49 years after it was first introduced and with the benefit of extensive committee hearings, reports, and congressional debate, the proposed ERA was sent to the State legislatures for ratification.

The objectives of the Equal Rights Amendment were made clear by its congressional proponents and expressed in the majority report of the Senate Judiciary Committee:

> The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or of women. The Amendment thus recognizes the fundamental dignity and individuality of each human being. The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected.[7]

The basic principle of the ERA, in short, is not that men and women are the *same,* but that the law cannot treat them differently solely because of their sex.

This principle of equal justice before the law has led to lengthy and often emotional debate since Congress sent the ERA to the State legislatures for ratification. Much of this debate has departed totally from the subject of sex equality and the legal status of women, with some opponents of the constitutional amendment charging that it would endanger our form of government, threaten major religious institutions, or require women to leave the home and find jobs, men and women to share "coed bathrooms," and the States to recognize homosexual marriages.[8]

Such changes will *not* result from the Federal Equal Rights Amendment, which courts will interpret with the benefit of a lengthy legislative history that clearly refutes these arguments. Indeed, such changes have not resulted from the equal rights provisions patterned after the Federal ERA that have been added to State constitutions.[9]

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[5] S. Rep. No. 92–689, Senate Committee on the Judiciary, 92d Cong., 2d sess., 4–5 (1972) (hereinafter cited as *Senate Report*).

[6] 117 Cong. Rec. 35815 (1971); 118 Cong. Rec. 9598 (1972).

[7] *Senate Report, supra,* at 2.

[8] See J. Herbers, "Equal Rights Amendment is Mired in Confused and Emotional Debate," *New York Times,* May 28, 1978, at 1.

[9] *See* discussion *infra,* ch. 3. Fourteen States have added equal rights provisions to their constitutions since 1970: Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Virginia, and Washington. Nine of these closely

These arguments have persisted, however, although they are clearly refuted by the facts.

Despite the delay in final ratification, public opinion polls have shown that the ERA has strong national support. A recent Gallup poll reported that 58 percent of the American public supports ratification and only 31 percent are opposed.[10] Even in Missouri, one of the States that has not as yet ratified the amendment, a *St. Louis Globe-Democrat* poll in 1977 showed that 60 percent of the voters favored ratification and only 27 percent were opposed.[11]

As of this date, 35 States (representing 72 percent of the U.S. population) have ratified the Equal Rights Amendment, 3 short of the number required to make it part of the Federal Constitution. The joint resolution with which Congress submitted the ERA to the State legislatures set 7 years as the period within which ratification should be completed.[12]

On August 15, 1978, however, the House of Representatives approved a 39-month extension of the March 22, 1979, deadline.[13] The Senate approved the extension on October 6, 1978.[14]

Testifying in support of the then proposed extension, Civil Rights Commission Chairman Arthur Flemming and Commissioner Frankie Freeman stated that the ERA is as relevant and important today as it was in 1973 when the Commission first supported its ratification. At that time, the Commission concluded:

> the Equal Rights Amendment will provide a needed constitutional guarantee of full citizenship for women, and will assure the rights of both women and men to equal treatment under the laws. Ratification of the ERA is an important appropriate means of alleviating sex discrimination—just as the adoption of the 13th and 14th Amendments was vital to the cause of racial equality. . .[and] is an essential step toward meeting this nation's stated goal of equal opportunity for every citizen.[15]

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resemble the Federal amendment: Colorado, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, and Washington. Utah and Wyoming adopted constitutional provisions regarding sex equality near the end of the 19th century.

[10] "Poll Finds 58% Favor Rights Proposal. . .," *New York Times,* July 16, 1978.

[11] *See St. Louis Globe-Democrat,* Dec. 28, 1976, at A–4.

[12] The amendment was proposed by joint resolution:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress. . . . H.R.J. Res. 208, 92d. Cong., 1st sess., 86 Stat. 1523 (1971).

[13] 124 Cong. Rec. H 8665 (daily ed. Aug. 15, 1978).

[14] 124 Cong. Rec. S 17318 (daily ed. Oct. 6, 1978).

[15] U.S. Commission on Civil Rights, *Statement of the U.S. Commission on Civil Rights on the Equal Rights Amendment* (1973).

The purpose of this statement on the Equal Rights Amendment is to reaffirm the Commission's belief that attainment of full, equal rights for women and men requires ratification of the proposed amendment. The need for the ERA is at least as great today as it was when Congress proposed the amendment to the States in 1972. Measured by any standard, gender lines have not been erased, and the history of unequal treatment of men and women has not been adequately redressed under existing law.[16] Moreover, as a result of experiences under State constitutional amendments virtually identical to the proposed Federal amendment, it is even clearer now than it was in 1972 that the ERA is the appropriate remedial action to address this inequality and assure women and men equal justice before the law.[17]

In the light of this knowledge, and pursuant to its jurisdiction to study discrimination on the basis of sex, the Commission firmly endorses the addition of the Equal Rights Amendment to our Federal Constitution.

[16] *See* discussion *infra,* ch. 2.
[17] *See* discussion *infra,* ch. 3.

2. The Need for the Equal Rights Amendment

Discrimination on the basis of sex continues to be a major national problem almost 7 years after Congress proposed the Equal Rights Amendment. A recent Civil Rights Commission review of statistical measurements of equality provides clear documentation of continuing and serious problems of sex-based inequality in employment, education, and housing.[1] These inequities exist despite the passage of Federal and State legislation to combat certain forms of sex discrimination. While this statement is not an exhaustive survey of all the areas in which change is needed, the examples discussed dispel the myth that women already have equality under law.

In Federal statutes alone, the Civil Rights Commission has identified over 800 sections of the U.S. Code containing examples of substantive sex bias or sex-based terminology that are inconsistent with a national commitment to equal rights, responsibilities, and opportunities.[2] "The cumulative effect," as Civil Rights Commissioner Freeman has pointed out, "is to assign women, solely on the basis of their sex, to a subordinate or dependent role."[3]

Current Status of Women

Family Law

A woman's rights during marriage, as well as after—whether the marriage ends as a result of death or divorce—have traditionally been those of a second-class citizen. Many State laws still reflect their roots in the English common law view of the married woman as the property of her husband.[4]

Some of the more oppressive aspects of this discrimination have been removed over the past century, so that a married woman can now own property, enter into contracts, be granted custody of her children, and, in most cases, keep her own earnings.[5] However, laws covering marriage continue to deny women equal rights.[6]

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[1] U.S., Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978) (hereinafter cited as *Social Indicators*).

[2] U.S., Commission on Civil Rights, *Sex Bias in the U.S. Code* (1977) (hereinafter cited as *Sex Bias in the U.S. Code*).

[3] Freeman, testimony Before Subcommittee on Civil and Constitutional Rights of House Judiciary Committee (May 19, 1978).

[4] *See,* Crozier, *Marital Support,* 15 Boston Univ. L. Rev. 28 (1935); W. Blackstone, *Commentaries on the Laws of England* 442.

[5] *See, e.g.,* Ill. Ann. Stat. ch. 68, §§, 6, 9 (Smith-Hurd 1959); Me. Rev. Stat. Tit. 19, §§161–63 (West 1965).

[6] *See generally,* B. Brown, A. Freedman, H. Katz, A Price, *Women's Rights and the Law: The Impact of the ERA on State Laws* 97–202 (1977).

Marital property laws illustrate the persistence of sex bias against women. In Georgia, for example, a married couple's home belongs only to the husband, even when it has been paid for by the wife.[7] In other States, the husband is given the right to manage and control marital property without the wife's consent, again, even if it was purchased with the wife's earnings.[8] In Wisconsin, the earnings of a married woman "accruing from labor performed for her husband, or in his employ, or payable by him" are not considered her separate property and are subject to her husband's control.[9]

The same bias is evident in laws that deny a woman the right to sue a third party who has injured her husband and thereby deprived her of his services. A husband, similarly deprived, can sue.[10]

The married woman who chooses to be a full-time homemaker has the least legal and economic protection of all, since many States do not recognize her labor as having economic value.[11] This is repugnant to the view of marriage as a partnership between the husband and the wife, with both performing different but equally important roles, each having economic significance.[12]

The lack of economic value accorded a woman's contributions to a marriage is demonstrated in the case of a Nebraska farm couple who worked the land together for 33 years.[13] When the husband died in 1974, his wife learned that in the Federal Government's eyes the farm belonged entirely to him. Unless she could prove that she helped to pay for its purchase or improvement, she would be liable for a $25,000 inheritance tax. Her years of work, even the joint title, was no proof. Had the wife died first, her husband would have had to pay no tax.[14]

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[7] L. McGough, *The Legal Status of Homemakers in Georgia* (Nat'l Comm'n on the Observance of IWY, 1977).

[8] Louisiana law describes the husband as the "head and master" of the community property and grants him the right to full management and control. La. Stat. Ann. Civ. Code Art. 2404 (West 1971). The constitutionality of the "head and master" law was upheld by the Louisiana Supreme Court. Corpus Christi Parish Credit Union v. Martin, 358 S.2d 295 (1978), *cert. denied,* 47 U.S.L.W. 3246 (1978). The legislature recently has amended this law, but the changes are not effective until 1980. La. H. Bill 1569 (enacted on July 12, 1978).

Male management principles also survive in two common law property States. D'Ercole v. D'Ercole, 407 F. Supp. 1377, 1380 (D. Mass. 1976); Rauchfuss v. Rauchfuss, 234 S.E.2d 423 (N.C. App. 1977). *See also,* C. Slaughter, *The Legal Status of Homemakers in Mississippi* (Nat'l Comm'n on the Observance of IWY, 1977).

[9] Wisc. Stat. Ann. 246.05 (1975).

[10] *See, e.g.,* Bates v. Donnafield, 481 P. 2d, 347 (Wyo. 1971) *See generally,* Brown et al., *Women's Rights and the Law, supra,* at 118.

[11] *Real Women, Real Lives—Marriage, Divorce, Widowhood* 17–19 (Wisc. Gov. Comm'n on the Status of Women, 1978) (hereinafter cited as *Real Women, Real Lives*).

[12] *See, e.g., Report of the President's Commission on the Status of Women* 47 (1963). Of course, not *all* homemakers are women, and sometimes the laws that disadvantage homemakers deny fair treatment to men.

[13] *See More Perfect Union, supra,* at 13–14.

[14] For a discussion of Federal inheritance and gift taxes imposed on property transfers between spouses, *see, e.g.,* S. Cunningham, *The Legal Status of Homemakers in Nebraska* 13 (Nat'l Comm'n on the Observance of IWY, 1977). Changes in Federal tax laws in 1976 and 1978 may have eased the burden on the Nebraska woman described in the text, but did not eliminate the unequal treatment of

In most States, when a marriage ends, distribution of the marital property follows a similar rule. Until a recent successful challenge under the Pennsylvania State ERA, a woman in that State was faced with the legal presumption that all the household articles acquired during the marriage—such as the stove, the TV, and even her jewelry—belonged to her husband, unless she could prove that she paid for them.[15] While States like New York do not have such an explicit presumption, the result is often the same because one's legal rights to property generally are determined by proof of actual economic contribution or of receipt as gift. Most homemakers who earn no wages cannot establish such proof.[16]

Sex-based roles and presumptions also affect a married woman's ability to get credit.[17] This is true even under the Federal Equal Credit Opportunity Act (enacted to make credit available without discrimination on the basis of sex or marital status); since creditors may consider State marital property laws in determining creditworthiness.[18]

Similar hardships face the homemaker under the social security program. Since she has no independent entitlement to benefits, if she becomes disabled, she and her dependents have no right to social security, even though her services are lost to her family.[19] Because the program does not recognize the economic value of her contribution to the family, she will not receive benefits under her husband's coverage if she is widowed before the age of 50 unless she has minor or disabled children in her care. This is true even if she is disabled and cannot work.[20]

The only economic "right" the married woman has traditionally had is the theoretical "right to support during a marriage." The significance of this "right" and the potential effect of the ERA on it have been primary targets of distortion by ERA opponents trying to argue that the amendment will strip away women's rights. In fact, the legal duty of a husband to support his wife is largely unenforceable. It is little more

homemakers and their wage-earning spouses.
Similar inequities sometimes result under State tax laws. *See, e.g.,* Ore. Rev. Stat. §118.010 (2)(a)(1974); Rhode Island Gen. L. Ann. §44–22–7 (6).

[15] DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174 (1975). *See* discussion *infra,* ch. 3, "Domestic Relations."

[16] *See, e.g.,* J. Goodman, *Legal Status of Homemakers in New York* 16 (Nat'l Comm'n on the Observance of IWY, 1977); S. Sousa and M. Tracey, *Legal Status of Homemakers in Rhode Island* 14 (Nat'l Comm'n on the Observance of IWY, 1977). *See, generally,* A. Bingman, "The Impact of the ERA on Marital Economics," *Impact ERA: Limitations and Possibilities* 116–25 (ed. Calif. Comm'n on the Status of Women, 1976).

[17] *Id.* at 118.

[18] 15 U.S.C. §1691d(b)(Supp. 1978); 12 C.F.R. 202.5 (l) (1977).

[19] *See* Department of Health, Education, and Welfare, *Report of the HEW Task Force on the Treatment of Women under Social Security* (1978). *See also, Sex Bias in the U.S. Code, supra,* at 36 (1977). Women who are wage earners also are disadvantaged in several ways under the social security program.

[20] 42 U.S.C. §402(b) and (e) (1974) as amended (1978 supp.).

than myth, since courts will not interfere in an ongoing marriage to ensure adequate support either for the wife or for the children.[21]

Laws governing support and alimony during separation and after divorce are similarly illusory in the benefits they appear to confer upon women.[22] The reality is that only 14 percent of divorced wives were awarded alimony in 1975 and that fewer than half were able to collect their payments regularly.[23] Similar enforcement problems exist for collecting child support. A study tracing child support payments over 10 years showed that 62 percent of male parents failed to comply fully with court-ordered child support payments in the first year after the order, and 42 percent did not make even a single payment. By the 10th year, 79 percent were making no payments at all.[24]

Support laws are so poorly enforced that most separated and divorced women have no choice but to work outside the home or turn to welfare. A study in Jefferson County, Alabama, revealed that the average amount of support ordered for a woman and two children was $80 per month, substantially less than the amount she would receive under welfare.[25] In Rhode Island, because support payments are so erratic, they are not counted as income when applying for credit.[26]

As discussed in chapter 3, women in traditional homemaker roles who are so poorly protected by current laws have much to gain under the Equal Rights Amendment. The amendment would prohibit explicit sex-based statutes and common law doctrines associated with family law. Even laws neutral on their face, but that affect one sex more harshly than the other, would have to be reexamined.

This does not mean, however, that the ERA will alter family structure. It will not force women out of the home or downgrade the roles of mother and homemaker. "Indeed, it would give new dignity to these important roles. By confirming equality under the law, by upholding woman's right to choose her place in society, the Equal Rights Amendment can only enhance the status of traditional women's occupations. For these would become positions accepted by women as equals, not roles imposed on them as inferiors. . . ."[27]

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[21] *See, e.g.* McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953); Commonwealth v. George, 358 Pa. 118, 56 A.2d 228 (1948). *See* Paulsen, *Support Rights and Duties,* 9 Vanderbuilt L. Rev. 709, 719 (1956).

[22] *Real Women, Real Lives, supra,* at 43–45.

[23] *More Perfect Union, supra,* at 16.

[24] L. Weitzman, *Legal Regulation of Marriage: Tradition and Change,* 62 Cal. L. Rev. 1169, 1195 (1974).

[25] J. Crittendon, *The Legal Status of Homemakers in Alabama* 11 (Nat'l Comm'n on the Observance of IWY, 1977).

[26] Sousa and Tracey, *The Legal Status of Homemakers in Rhode Island* 17 (Nat'l Comm'n on the Observance of IWY, 1977). In some instances, this practice may be successfully challenged under the Equal Credit Opportunity Act, *see* Reg. B, 12 C.F.R. 202.6(b)(5)(March 1977).

[27] Rep. Florence Dwyer, 117 Cong. Rec. 35319 (1971).

Women in the Labor Force

Women who work outside the home continue to be disadvantaged by sex-role stereotypes and gender lines that affect employment opportunities and achievements. These women, too, stand to gain under the Equal Rights Amendment. Despite recent legislative reform and efforts to enforce Federal and State antidiscrimination laws, sex bias in employment persists.

While the labor market has provided increased job opportunities for women in recent years, most of the openings have been in clerical and service areas traditionally dominated by women. Indeed, occupational segregation by sex increased substantially between 1970 and 1976.[28] Not only are the jobs held by women different from those held by men, but the evidence is that they are valued less by society.[29]

In professional and technical fields, women are overrepresented in jobs that are lower on the career ladder than men in the same industries: women are teachers more often than principals, bookkeepers more often than comptrollers.[30] Even within a traditional woman's field, clerical occupations, women are more likely to be employed in lower paying positions as typists, stenographers, secretaries, and file clerks, while men tend to be employed as administrative assistants, a higher paying clerical occupation.[31] In general, the jobs in which women are concentrated pay lower salaries than those paid in traditionally male-dominated positions, even when these positions involve equivalent skill, effort, and responsibility.[32]

Even when adjustments are made for education and occupation, women earn less than men. In 1976 a woman who attended 4 years of college was earning about as much as a man with 8 years of elementary school education.[33] On the average, in 1976 women clerical workers earned $4,200 less than male clerical workers, and saleswomen earned $6,900 less than salesmen.[34] In public employment, the median income for women working full time was $9,215 in 1975, while the median income for men was $13,118.[35]

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[28] *Social Indicators, supra,* at 39–45. For example, a higher proportion of employed women were clerical or service workers in 1970 than in 1960. U.S. Department of Commerce, *A Statistical Portrait of Women in the U.S.* at table 8–1 (1976).

[29] *Social Indicators, supra,* at 45.

[30] Women's Equity Action League, "Women and Work: The Unequal Paycheck," 7 *WEAL Washington Report* 6 (April 1978). *See generally,* U.S. Department of Labor, *1975 Handbook on Women Workers* 88–92 (1975).

[31] U.S., Commission on Civil Rights, *Women and Poverty* 7 (1974).

[32] *See, e.g.,* U.S. Department of Labor, *Women and Work* 1–7 (1977).

[33] U.S., Bureau of Census, *Income and Poverty Statistics of Families and Persons in the United States 1976* at table 7 (P–60 No. 107, Advance Report).

[34] U.S., Department of Labor, *U.S. Working Women: A Databook* 34 (table 36) (1977) (hereinafter cited as *U.S. Working Women*).

[35] U.S., Bureau of the Census, *Money Income in 1975 of Families and Persons in the U.S.,* table 55 (Current Population Reports Series, P–60 No. 105).

Although women of all races consistently earn less than majority-group men, the earnings gap between minority women and majority men is even more pronounced. In 1975, American Indian, Alaskan Native, black, Mexican American, and Puerto Rican women averaged less than $5,000 a year in earnings, not even half of the average $11,427 earnings of majority men.[36] These differences persisted even when occupation, age, education, State of residence, and time worked were taken into account.

Indeed, the earnings gap between men and women in public and private employment has *increased* . In 1956, before the enactment of Federal equal employment legislation, women's average earnings were 63 percent of men's. Twenty years later, they had fallen to 60 percent of men's earnings.[37] For minority women, the earnings gap is greater still.[38]

In 1963 Congress began the task of improving the legal status of working women with passage of the Equal Pay Act, which, as amended, broadly prohibits sex discrimination in wages paid in public and private employment.[39] A ban on sex discrimination was included in Title VII of the Civil Rights Act of 1964 and has been expanded to cover workers in public as well as private employment.[40]

But the task of reforming the law is unfinished at both the Federal[41] and State levels. Some employees, such as those who work for the Congress, still are not covered by laws prohibiting sex and other forms of discrimination in employment.[42] Express sex bias also persists in our Nation's laws. For example, a 17-year-old girl who wants to work for a contractor with the Federal Government cannot, but a 17-year-old boy can.[43] Although such a restriction may have been intended as "protective" legislation, surely if working conditions are unsound for young women, they are unsound for young men as well and should be corrected.

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[36] *Social Indicators, supra,* at 54.

[37] *Compare* U.S. Department of Labor, *1975 Handbook, supra,* at 131 *with* U.S. Commission on Civil Rights, *The State of Civil Rights* 2 (1977).

[38] *See, U.S. Working Women, supra,* at table 53. *See also* G. Borjas, Discrimination in HEW: Is the Doctor Sick or Are the Patients Healthy? (unpublished paper, Center for the Study of the Economy and the State, Chicago, Ill., 1978), which showed white males employed in one Federal agency earned about 23 percent more than white females in 1977 and 31 percent more than black females.

[39] 29 U.S.C. §206(d) (1974).

[40] 42 U.S.C. §§2000e—20003–16 (1974). Some State legislatures also have enacted broad fair employment practices laws.

[41] The U.S. Commission on Civil Rights has reported elsewhere on the persistent enforcement problems with respect to Federal equal employment laws. *See, e.g., The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977).

[42] Employers of fewer than 15 employees also are not covered by Title VII. 42 U.S.C. §20003e(b) (1974).

[43] 41 U.S.C. §35: *see also,* 30 U.S.C. §187, which flatly prohibits hiring women to work in certain mineral mines on federally-owned lands. For a review of State protective labor laws, *see* Brown et al., *Women's Rights and the Law, supra,* at table 6.1.

Other laws and government programs restrict job opportunities for women in ways that are less direct, but no less damaging. For example, the automatic preference given veterans in public employment is a program that few women can take advantage of, owing primarily to the history of sex discrimination that has restricted their opportunities in the military.[44] In this context, bias clearly breeds bias. This is apparent in Federal civil service test results. Women are 41 percent of those who pass the college-level test, but only 27 percent of those who are hired. Veterans, on the other hand, are only 20 percent of those who pass the test, but 34 percent of those who are hired.[45]

Finally, recent court decisions have narrowed the application of equal opportunity laws such as Title VII. For example, the Supreme Court has exempted certain discriminatory seniority systems from Title VII,[46] has allowed an employee's "womanhood" to disqualify her from a job,[47] and has upheld the denial of disability benefits and accrued sick pay to employees disabled by pregnancy.[48] Lower courts, moreover, are largely failing to apply Title VII standards at all to academic employment.[49]

In general, courts have not brought to sex discrimination cases "those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . 'Sexism'. . .is as easily discernible in contemporary judicial opinions as racism ever was."[50]

The Equal Rights Amendment will be an important legal and symbolic weapon to counter sex-based discrimination in employment, particularly meaningful to minority women, who participate in the labor force at a higher rate than majority women.[51] It will help to

[44] For a review of sex discriminatory provisions regarding the armed forces, *see Sex Bias in the U.S. Code, supra,* at 19–33; ACLU, "Women and the Military," *Notes from the Women's Rights Project* 6 (1977); veterans preference programs exist at both the Federal and State levels.

[45] The White House, Proposed Modification of Veteran's Preference Fact Sheet 2 (1978). The result of this bias is seen in the case of a Dallas woman who applied for a Federal air traffic controller job. She scored a perfect 100 percent on the civil service examination, but because of job preferences automatically given to veterans, she was ranked 147th on the job roster. A. Otten, "Congress and the Veterans Lobby," *Wall Street Journal,* July 26, 1978, at 12. The House of Representatives recently voted to retain existing veterans preference standards by adopting an amendment to H.R. 11280, Civil Service Reform Act of 1978. 124 Cong. Rec. H9401 (daily ed. Sept. 11, 1978).

[46] International Brotherhood of Teamsters v. United States, 413 U.S. 324 (1977).

[47] Dothard v. Rawlinson, 433 U.S. 321 (1977). *See* P. Ogg, *Title VII: Are Exceptions Swallowing the Rule?* 13 Tulsa L. J. 108 (1977).

[48] General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Workers disabled by pregnancy, however, cannot be denied accumulated seniority. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In the 1978 session, Congress amended Title VII to require that pregnancy, childbirth, and related medical conditions be treated the same as other disabilities under employer programs. Act of Oct. 31, 1978, Pub. L. No. 95–555, 92 Stat. 2076–77 (to be codified in 42 U.S.C. §2000e).

[49] *See, e.g.,* Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977). *See generally,* Vladeck and Young, *Sex Discrimination in Higher Education,* 4 *Women's Rights L. Rep.* 59 (1978).

[50] Johnston and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U. L. Rev. 675, 676 (1971).

[51] *U.S. Working Women, supra,* at 44.

complete the Federal and State efforts to erase the sex bias in laws that have limited employment opportunities only for women.[52] It will, at a minimum, give government workers already protected against job-related sex discrimination under Federal civil rights statutes a stricter standard for the review of their claims[53] and extend such protection to congressional workers who are not already covered. In addition, the ERA will provide an impetus for more effective and vigilant enforcement of antidiscrimination laws. Finally, the courts will be governed by the provisions of the Equal Rights Amendment as they decide cases raising problems of sex-based discrimination.

Criminal Law

Criminal law is another area in which women and men are treated differently because of their sex. This treatment has most often been disadvantageous to women, as both victims and offenders.[54]

In some jurisdictions, definitions of criminal behavior and legal defenses reflect sex-based notions. In Alabama, for example, if a husband finds his wife in the act of adultery and immediately kills her, he is not guilty of murder, but of the lesser crime of manslaughter.[55] However, the same defense is not available to a wife.

This view that husbands have a special prerogative when it comes to their wives also is reflected in the laws of those States that do not recognize a charge of forcible rape as a crime when committed by a husband against his wife, regardless of the circumstances and degree of coercion involved.[56]

Explicit sex lines similarly are found in prostitution laws. Traditionally, prostitution was defined as a "woman's act," with no attempt to penalize the men who paid or were paid for it.[57] Although many jurisdictions have revised these laws to cover men as well as women, "less than half explicitly penalize the patrons of prostitution, and many of those that do impose less stringent penalties against patrons than prostitutes."[58]

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[52] *See*, Brown et al., *Women's Rights and the Law, supra,* at 223–25 (description of State reform efforts).

[53] *Cf.* P. Ogg, "Title VII. . .," *supra*.

[54] In some instances, however, men have received harsher treatment in the criminal justice system. *See generally* Brown et al., *Women's Rights and the Law, supra,* at 45–96.

[55] *See* Farr v. State, 304 So.2d 898, 902 (Crim. App. Ala. 1974); Warren v. State, 34 Ala. App. 447, 41 So.2d 201 (1949).

[56] As of 1977 rape statutes in 27 States provided for the husband's immunity. *See, e.g.,* Cal. Penal Code §261 (West Supp. 1976); La. Rev. Stat. Ann. §14.41 (West Supp. 1976). *See generally, The Marital Rape Exemption,* 52 N.Y.U. L. Rev. 306 (1977). As an example of lesser protection given men under criminal laws, approximately 25 States do not protect any male victims of sexual assault in their forcible rape statutes. *See* Brown et al., *Women's Rights and the Law, supra,* at 46.

[57] For example, the Alaska statute defining prostitution refers specifically to "females." Alaska Stat. §11.40.210 (1970). *See generally,* Brown et al., *Women's Rights and the Law, supra* at 66.

[58] *Id.* at 67. *See, e.g.,* Ill. Ann. Stat. ch. 38, §11–14, 11–18 (Smith Hurd 1977); Kan. Stat. Ann. 21–3512, 21–3515.

Sex-based definitions of criminal behavior also permeate the juvenile justice system, which often subjects girls and boys to differing definitions of delinquent behavior and to different sentences. In general, more girls are detained for "status" offenses such as promiscuity or truancy, while boys are arrested for delinquent acts such as theft.[59] On the average, girls are institutionalized for less serious conduct than boys and for longer periods of time.[60]

Sentencing and parole statutes and practices further illustrate the persistent sex-based discrimination in criminal law. In some States, laws still mandate indeterminate sentences for women, while men receive set minimum and maximum terms.[61] This disparate treatment stems from the sex-based presumption that "women, including women offenders, are more malleable than men and thus more amenable to reform and rehabilitation. In practice, this means that a woman offender remains in custody until the prison administration finds she has been 'corrected' while a man who has been imprisoned 'does time' for some set period. . . ."[62] The result may be that the female offender is incarcerated far longer or far shorter than a man convicted of the same offense; in either case, the comparative time in prison may bear no relationship either to the crime or to rehabilitation.

Once in prison, there is further evidence of different treatment for male and female offenders. Women generally receive far less vocational training or job placement assistance, and the training that is offered in women's prisons tends to be sex stereotyped, tracking women into lower paying jobs.[63]

Commenting on the sex bias throughout the criminal justice system, Commissioner Freeman has noted its particular bearing on minority women. "Given the conditions in which many minority people live and how these conditions breed crime, and given the greater likelihood of arrest and conviction of minority people, the double jeopardy in which

[59] American Bar Association Commission on Correctional Facilities and Services, "Women in Detention and Statewide Jail Standards," 7 *Clearinghouse Bulletin* 1, 7–8 (March 1974), reports that 70 percent of female youths are detained for status offenses while only 23 percent of male youths are detained for such offenses. *See also* P. Cohen, "A Double Standard of Justice," 10 *Civil Rights Digest* 10 (Spring 1978); Female Offender Resource Center, *Survey of Educational and Vocational Programs in State Juvenile Correctional Institutions* (American Bar Association, 1975).

[60] U.S., Department of Justice, Law Enforcement Assistance Administration, Office of Juvenile Justice and Delinquency Prevention, *Little Sisters and the Law* (1977). According to this study, girls have longer average confinements than boys even though the vast majority of the boys (82 percent) were criminal offenders and nearly half of the girls were status offensers (p. 16). *See also,* R. Vinter and R. Sarri, *Time Out: A National Study of Juvenile Correction Programs* (National Assessment of Juvenile Corrections, University of Michigan, 1976).

[61] Brown et al., *Women's Rights and the Law, supra,* at 83. *See, e.g.,* Conn. Gen. Stat. Ann. §18–65.

[62] Brown et al., *Women's Rights and the Law, supra,* at 83.

[63] *See, e.g.,* Crisman, Position Paper on Women in Prisons 2 (unpublished report, ACLU Nat'l Prison Project 1976); Haft, "Women in Prisons: Discriminatory Practices with Some Legal Solutions," 8 *Clearinghouse Review* 1 (1974). *See generally,* U.S. Commission on Civil Rights, Information Sources: Women in Prison (1975).

minority women are placed by actions which discriminate on the basis of sex is apparent."[64]

The Equal Rights Amendment would require neutralizing the distinctions that penalize perpetrators and/or protect victims of crime differently depending on their sex. This does not mean that any criminals will go unpunished, but rather that men and women will be judged by the acts they commit, not by their sex.

Education

In describing the need for the Equal Rights Amendment in 1972, congressional proponents pointed to the field of education as evidence of the persistent pattern of sex discrimination.[65] Despite Federal and State legislation prohibiting such discrimination in educational programs and institutions, many discriminatory patterns persist. Education is an important route for personal advancement; therefore, its opportunities must be open to our daughters as well as to our sons.

Yet, in elementary and secondary schools, girls still are steered away from mathematics, science, and the training needed for the better paying fields currently dominated by men. In the 3 years from 1972 to 1975, the proportion of girls in technical education rose less than 1 percentage point, from 10 percent to 11 percent. The increase was about the same—from 12 percent to 13 percent—in trades and industrial occupations.[66]

In a recent case, when a ninth-grade girl who had won awards in geometry and science wanted to go to a public high school that offered advanced courses and superior facilities in these fields and for which she was qualified by all objective standards, she was turned down because the school was for boys only.[67] Susan Vorchheimer took her case all the way to the Supreme Court, where she was turned down again.[68] The Court has not yet recognized such sex-based segregation as a form of sex discrimination nor is it likely to do so while the ERA is pending.[69]

Inequality is widespread in school sports, a traditional training ground for leadership and a route to higher education through athletic scholarships. For every one girl playing high school sports, schools are

[64] *Extending the Ratification Period for the Proposed Equal Rights Amendment* : Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 95th Cong., 1st and 2d sess., 337 (1977–78) (testimony of Frankie Freeman, Commissioner, U.S. Commission on Civil Rights).

[65] S. Rep. No. 92–689, Senate Committee on the Judiciary, 92d Cong., 2d sess., 8 (1972).

[66] Bureau of Occupational and Adult Education, Comparative Analysis of Vocational Education Enrollment by Sex in Fiscal Year 1972 and 1975 (unpublished report, U.S. Office of Education).

[67] *See* A. Novick and D. Griffiths, *Sex-Segregated Public Schools: Vorchheimer v. School District of Philadelphia and the Judicial Definition of an Equal Education for Women,* 4 Women's Rights L. Rep. 79 (1978).

[68] Vorchheimer v. School District of Philadelphia, 400 F. Supp. 326 (E.D. Pa. 1975), *rev'd,* 532 F.2d 880. (3d Cir. 1976). *aff'd mem by an equally divided Court,* 430 U.S. 703 (1977).

[69] Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (concurring opinion).

still providing teams and equipment that advantage two-and-a-half times as many boys.[70] At the college level, budgets for women's sports are still only 10 to 15 percent of men's.[71]

Women are less likely than men to complete 4 or more years of college. When minority women are compared with white men, the disparity is particularly pronounced.[72]

College-level discrimination is perhaps most severe among the ranks of faculty and college administrators. Women are only 25 percent of full-time faculty; they are clustered at the lower professional ranks, and their status has been described as "sliding slowly downhill."[73] College administration is still a male-dominated field; as of May 1977 only about 1 percent of all presidents of 4-year colleges and public and private universities were women.[74]

Federal legislation to address these problems includes Title IX of the 1972 Education Amendments, which broadly prohibits sex-based discrimination in education programs financed by the Federal Government.[75] However, two extensive reviews of Title IX show it has failed to have much effect.[76] The outcome of the July 1978 deadline for compliance by secondary and postsecondary schools with the athletics provisions of the regulations remains to be seen. The Department of Health, Education, and Welfare (the Federal agency chiefly responsible for Title IX enforcement) took 3 years to issue the regulations necessary to enforce Title IX, and other agencies with enforcement responsibilities still have no regulations at all more than 6 years after Title IX became law.[77]

Even after HEW's delayed response, a court order was necessary to trigger even minimal administrative enforcement of this statute.[78] The

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[70] National Federation of State H.S. Association, *1977 Sports Participation Survey* (1977).

[71] Margot Polivy, attorney for the Association for Intercollegiate Athletics for Women, quoted in "Comes the Revolution," *Time*, June 26, 1978.

[72] *Social Indicators, supra*, at 14–16.

[73] *On Campus with Women* (Association of American Colleges, June 1978), citing figures from *No Progress This Year: Report on the Economic Status of the Profession, 1976–77* (American Association of University Professors). See Suzanne Howard, *But We Will Persist: A Comparative Research Report on the Status of Women in Academe* (American Association of University Women, 1978).

[74] A.W. Astin, Data Pertaining to the Education of Women: A Challenge to the Federal Government (unpublished paper, 1978).

[75] 20 U.S.C. §§1681–86 (1976). In addition to applying only to federally-financed schools, the statute has several exceptions. Institutions and the activities expressly exempted include: (1) admissions to elementary and secondary schools, private undergraduate colleges, and public colleges that have been single sex from the beginning; (2) military training schools; (3) religious schools where compliance with Title IX would be inconsistent with religious tenets; and (4) Boys State/Girls State 20 U.S.C. §1681(a). In addition, Federal regulations promulgated under Title IX expressly exempt such activities as the "Y," Boy Scouts, Girl Scouts, and Campfire Girls. 45 C.F.R. §86.11 (1977).

[76] *See* Project on Equal Education Rights ("PEER"), *Stalled at the Start* (1977); American Friends Service Committee, *Almost as Fairly* (1977).

[77] The HEW regulations became effective June 4, 1975. *See* PEER, *Stalled at the Start, supra* . With respect to other agencies, *see* National Advisory Council on Women's Educational Programs, *The Unenforced Law: Title IX Activity by Federal Agencies Other Than HEW* (1978).

[78] *See* consent order in Adams v. Califano, No. 3095–70 and WEAL v. Califano, No. 74–1720 (D.D.C. Dec. 29, 1977).

administrative enforcement process itself has failed to result in clear and consistent rulings; has included withdrawal of rulings when they became the center of controversy; and in 6 years has reached a final decision in less than 500 complaints of sex discrimination of a total of 1,400 pending—an average of less than one complaint per investigator per year.[79] Indeed, for the 10 months preceding June 1977, HEW stopped making decisions on Title IX almost completely and did not even answer mail dealing with the act.[80]

Individuals turning to the courts for relief under Title IX have met with further resistance. In fact, their right to go to court at all under Title IX has been questioned.[81]

The Federal Equal Rights Amendment will provide an independent basis with which to challenge sex bias in education programs that directly or substantially involve government action. Unlike Title IX, Federal funding will not be required to trigger its application. The right of a student or teacher to go to court when faced with sex-based discrimination will be clear. Ratification of the ERA can be expected to prompt more effective enforcement of antidiscrimination laws concerning education. It will be a clear mandate of the highest order that sex bias is not acceptable in our Nation's schools.

Moreover, the symbolic effect of the Equal Rights Amendment on our children's education cannot be overestimated. It will assure that the study of the Constitution finally will include the principle that women and men are equal before the law.

Existing Constitutional Guarantees

The 5th and 14th amendments have never been interpreted to prohibit *all* discrimination against women as a class. Indeed, before 1971, even the sharpest sex-based classifications survived constitutional review, usually justified as "preferential" to women. Gender lines upheld by the Supreme Court have included those that kept women off juries,[82] barred them from occupations ranging from attorney[83] to bartender,[84] and before the 19th amendment, denied them the right to

[79] National Coalition for Women and Girls in Education, Statement by Dot Ridings et al. 1 (June 26, 1978).

[80] PEER, *Stalled at the Start, supra,* at 8.

[81] The only Federal appellate court to decide so far whether private parties have an implied right to sue private universities under Title IX held that such right does not exist. Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1977) (on rehearing), *cert. granted,* 46 U.S.L.W. 3799 (June 27, 1978). Another Federal appellate court recently has held that such a right can be implied under Title IX with respect to public schools. De la Cruz v. Tormey —F.2d— (9th Cir. Sept. 13, 1978). As to employment discrimination in educational institutions, recent district court decisions have held that Title IX does not apply at all, thereby limiting the statute's scope to students. *See, e.g.,* Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), on appeal to the Sixth Circuit.

[82] Hoyt v. Florida, 368 U.S. 57 (1961).

[83] Bradwell v. Illinois, 83 U.S. 130 (1872).

[84] Goesaert v. Cleary, 335 U.S. 464 (1948).

vote.[85]

The Court signaled a new direction in *Reed v. Reed,* a 1971 decision that struck down an Idaho statute which gave men preference over women in administering the estates of deceased relatives.[86] Following *Reed,* the Court in *Frontiero v. Richardson* [87] declared unconstitutional a statute that gave automatic fringe benefits to wives of men in the uniformed services, while requiring husbands of servicewomen to prove dependence.

Despite this new willingness to reject sex-biased laws, the Court consistently has stopped short of declaring sex a "suspect" classification, as it has done with race and national origin. The explanation for this hesitancy offered by Justice Powell in *Frontiero* underscores the importance of ratification of the ERA:

> There is another, and I find compelling, reason for deferring a general categorizing of sex classification as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.[88]

Supreme Court rulings in sex discrimination cases following *Frontiero* have been uneven. The Court has upheld sex-based classifications against equal protection challenges in some cases,[89] while invalidating them in others.[90] In one case challenging sex-segregated schools (*Vorchheimer v. School District of Philadelphia*), it was unable to reach any decision at all.[91] The effect in *Vorchheimer* was to let stand the lower court's opinion allowing sex-segregated schools.[92]

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[85] Minor v. Happersett, 88 U.S. 162 (1874).

[86] 404 U.S. 71 (1971). *See generally,* R. Ginsburg, "From No Rights, to Half Rights, to Confusing Rights," 7 *Human Rights* 13 (1978).

[87] 411 U.S. 677 (1973).

[88] Frontiero v. Richardson, *supra,* 411 U.S. at 691–2 (Justice Powell, concurring, joined by Justice Blackmun and Chief Justice Burger.)

[89] *See, e.g.,* Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding Navy rule guaranteeing female officers more years than male before mandatory discharge for lack of promotion; no consideration given ways men were advantaged by this differential); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding exclusion of widowers from tax exemption granted to widows; the exception saved the widow who owned real property the sum of $15 annually and was granted to only two other classes of people: the blind and the totally disabled); Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding a State statute that excluded women disabled by pregnancy from a workers' income-protection insurance plan.).

[90] *See, e.g.,* Califano v. Goldberg, 430 U.S. 199 (1977) (invalidated social security provision requiring widowers to prove they had been dependent on their wife's income while automatically qualifying widows for survivors' benefits); Craig v. Boren, 429 U.S. 190 (1976) (invalidating State law that allowed 18-year-old girls to purchase beer but made boys wait until they were 21); Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (invalidating social security provision that denied widowed fathers who wished to take care of their children the same benefits available to widowed mothers).

[91] Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd mem by an equally divided Court* 430 U.S. 703 (1977).

[92] *See generally,* A. Novick and D. Griffiths, Sex-Segregated Public Schools. . ., *supra, and* discussion *supra* in "Education," ch. 2.

In the recent *Bakke* decision, Justice Powell, writing the deciding opinion, explained why the Court "has never viewed [gender-based classifications] as inherently suspect or comparable to racial or ethnic classifications for the purpose of equal-protection analysis." Discrimination against women, Justice Powell states in *Bakke,* is not "inherently odious" when compared to the "lengthy and tragic history" of racial bias.[93] Such a comparison of victims of discrimination surely is neither required nor appropriate, and Justice Powell himself recognizes elsewhere in his *Bakke* opinion that "the kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within judicial competence. . . ."[94] Moreover, Justice Powell's summary of the Supreme Court's view of sex-based classifications is further evidence that the Court has failed to recognize and understand the history and invidious nature of sex discrimination in this country.

The Court's record in the 7 years since *Reed* has included some remarkable gains. But as Columbia law professor Ruth Ginsburg has commented: "the 1970's break with tradition is hardly clear and clean. The Court's performance is characterized by vacillation, 5–4 decisions and a tendency to shy away from doctrinal development."[95] Indeed, the unsettled issue of the ERA itself seems to be causing the Court to move less forcefully in striking down gender-based discrimination.

Ratification of the Equal Rights Amendment will set a standard for review of sex discrimination claims that clearly goes beyond current interpretations of the 5th and 14th amendments in such cases. The ERA standard would prohibit sex-based classifications, except where the constitutional right to privacy or physical characteristics unique to one sex are concerned.[96] The amendment will provide a firm root for the doctrine of equal protection for women and men under the law. The application of this principle of equality is discussed in chapter 3.

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[93] Regents of the University of California v. Bakke, 438 U.S.—, 98 S. Ct. 2733, 2755 (1978).

[94] *Id.* at 4903. For a discussion of parallels between race and sex discrimination, *see* G. Myrdal, *An American Dilemma,* 1073–78 (1962 ed.).

[95] R. Ginsburg, "From No Rights. . .," *supra,* at 47.

[96] See Brown et al., *Women's Rights and the Law, supra,* at 15–19.

3. Effect of the Equal Rights Amendment

The current status of women's rights underscores the continuing need for the ERA as a solid and permanent constitutional basis for achieving sex equality under the law. The fundamental legal principle to be established by the Equal Rights Amendment is that the law "must deal with the individual attributes of the particular person and not with stereotypes. . .based on sex."[1]

The amendment will apply to any law, policy, or practice in which the government is directly or substantially involved.[2] Legislative history and a growing body of law defining "government action" with respect to other constitutional provisions make clear that the ERA will not affect private conduct that the government does not normally regulate.[3] Purely social relationships between men and women and the very private decisions of an individual to be a full-time homemaker, for example, will be outside the purview of the ERA.[4]

The extensive legislative history indicating what congressional proponents intended the proposed amendment to accomplish is an important source for understanding its effect. Congressional reports and debates undoubtedly will be relied upon by the courts as a guide in interpreting the Equal Rights Amendment.[5]

A second source for understanding and anticipating the effects of the ERA comes from the experience in the 14 States that since 1970 have enacted provisions in their own constitutions prohibiting discrimination based on sex.[6] Taking the Federal Government's lead, these States already have mandated equal rights under law for women and men within their borders. The experience of these "ERA States" in conforming their laws and policies to this mandate provides an

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[1] *Senate Report, supra,* at 12.

[2] *See* sec. 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." (emphasis added)

[3] *See, e.g., Senate Report, supra,* at 12. The equal protection clauses of the 5th and 14th amendments similarly apply only to government action, and a substantial body of case law has developed on this issue. *See, e.g.,* Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 905–06 (1971).

[4] *Senate Report, supra,* at 11.

[5] The Senate Judiciary Committee report represents the views of the proponents on both the House and Senate Judiciary Committees. *See* Citizen's Advisory Council on the Status of Women, *Interpretation of Equal Rights Amendment in Accordance with Legislative History* (1974).

[6] Alas. Const. art I, §3 (1972); Const. Colo. art. II, §29 (1973); Conn. Const. art I, §20 (1974); Hawaii Const. art. 1, §§4,21 (1972); Ill. Const. art. I, §18 (1970); Md. Decl. of Rts. art. 46 (1972); Mass. Const. art. I (1976); Mont. Const. art. II, §4 (Supp. 1977); N.H. Const. Pt. 1, art. 2d (1974); Const. of New Mex. art. II, §18 (1973); Purdon's Pa. Const. Ann. art. I, §28 (1971); Tex. Const. art. I, §3a (1972); Va. Const. art. I, §11 (1971); Wash. Const. art. 31, §§1, 2 (1972). In addition, Utah and Wyoming adopted constitutional provisions regarding sex equality at the turn of the century, bringing the total number of States with equal rights provisions to 16. The Utah and Wyoming provisions, however, have resulted in little modern-day application and are unrelated in their legislative history to the proposed Federal ERA.

important model for ERA implementation on a national level. Despite some dire predictions of the potential effect of the Equal Rights Amendment on the "fabric" of the Nation, the State experience has been one of substantial strides toward equality.

The value of the State experience in predicting the Federal amendment's effect is enhanced by the fact that many States have drawn heavily on the Federal legislative history in interpreting and implementing their own provisions.[7] This source for understanding the Federal ERA's effect was not available when Congress adopted the Equal Rights Amendment in 1972. It confirms that the ERA is an appropriate measure to remedy the lengthy history and persistent reality of sex-based discrimination.

ERA Implementation: Overview

Statutory Reform through the Legislative Process

The proposed Federal Equal Rights Amendment will "take effect two years after the date of ratification," allowing the States and the Federal Government ample time to bring their laws, policies, and practices into conformance with the ERA. At both the State and Federal levels, lawmakers already have undertaken comprehensive reviews of existing statutes to bring them into compliance with the principle of sex equality. This is particularly clear in several ERA States, where the most successful attempts have been facilitated by a statewide task force or commission appointed to oversee the legislative conformance process.[8]

The orderly legislative review followed in State ERA jurisdictions indicates that the necessary changes do not produce the chaos predicted by ERA opponents. The first step in this review process is identifying laws that contain discriminatory sex-based language[9] or that, while neutral on their face, affect women and men differently.[10]

A great majority of the statutes have needed merely cosmetic changes, as where, for example, the pronoun "he" or "his" was used generically and sex-neutral language was substituted. The remaining

[7] For a detailed discussion of the State ERA implementation process, *see* Brown et al., *Women's Rights and the Law*, *supra*.

[8] *See, e.g.*, State of Connecticut, General Assembly, Office of Legislative Research, *The Potential Impact of the Proposed Equal Rights Amendment on Connecticut Statutes*, No. 15 (March 1973); G.A. Gherardini, Illinois Legislative Council, Methods of Implementing the Equal Rights Amendment (mimeographed, January 1973); Governor's Commission to Study Implementation of the Equal Rights Amendment, *Annual Legislative Analysis, ERA Commission Sponsored Bills* (Annapolis, Md., May 1976).

[9] In some cases, sex-based terminology may not be discriminatory (e.g., "All men and women who are citizens") or may be inconsequential to the constitutional mandate of the ERA (e.g., "the keeping of female cats").

[10] *See* Brown et al, *Women's Rights and the Law*, *supra*, at 16–19. Examples of laws neutral on their face that may have a disparate effect on members of one sex include those pertaining to homemakers, discussed *supra*, ch. 2, "Family Law."

statutes—those requiring more fundamental, substantive reform—have been addressed in an attempt to harmonize the underlying social policy of the statute with the principle of sex equality.

A review of the Federal ERA's legislative history indicates that it is intended to require changes in all sex-based statutes, unless the gender lines are based on unique physical characteristics or are deemed necessary to protect other constitutional rights such as privacy.[11] Examples of explicit gender lines that must be sex-neutralized under the Equal Rights Amendment are found in laws that on their face:

- Limit opportunities for one sex only, such as laws that prohibit women from working in particular jobs;[12] place quotas on the number of women in the military, with its concomitant benefits such as inservice training and GI loans and mortgages;[13] limit employment benefits for working women and their dependents;[14] or limit the right of married women to control their own property.[15]
- Confer supposed benefits (often illusory) on women only, such as alimony upon divorce only for wives[16] or minimum wages or rest periods only for female employees.[17]
- Make age distinctions on the basis of sex, such as setting different ages for employment[18] or marriage[19] for males and females.

With respect to statutes that draw gender lines on the basis of unique physical differences, the ERA's legislative history makes clear that they are exempt from the otherwise absolute prohibition against gender-based distinctions. Thus, laws that regulate sperm banks or provide programs for prenatal care will not be invalidated under the ERA.[20] However, since the physical characteristics involved must be *unique,* this category of laws is narrow. It does not include, for example, assumptions about women or men because of statistical groupings, such as those used by insurance companies in pension plans.[21] Further, to

[11] *See Senate Report, supra,* at 12 and 17; K. Davidson et al., *Sex-Based Discrimination* 111–12 (1974).
[12] *See, e.g.,* 30 U.S.C. §187 (1970); Ohio Rev. Code Ann. §4107.43 (1973).
[13] 10 U.S.C. §8208 (1975). *See generally,* Binkin and Bach, *Women in the Military* (Brookings Institute, July 1977).
[14] *See, e.g.,* Ga. Code Ann. §114–413, 414; Idaho Code §§72–410 (1973); Mo. Ann. Stat. §287.240 (Vernon 1972).
[15] *See* La. Civ. Code Art. 2404, 2334 ("head and master law"). Revisions in this law were adopted in July 1978, but will not become effective until 1980. *See* La. House Bill No. 1569.
[16] *See, e.g.,* Me. Rev. Stat. Ann. Tit. 19 §721(1965); Nevada Rev. Stat. §125.150 (1975) (husband eligible to receive alimony only if disabled).
[17] *See, e.g.,* La. Rev. Stat. Ann. §§23–333 (1964). Wyo. Stat. Ann. Tit. 27 §27–218 (1967).
[18] *See, e.g.,* 41 U.S.C. §35.
[19] *See* Brown et al, *Women's Rights and the Law, supra,* at 100.
[20] Brown et al., *The Equal Rights Amendment. . ., supra,* at 893–96.
[21] In Manhart v. City of Los Angeles, —U.S.—, 46 U.S.L.W. 4347 (1978), Title VII's ban on sex discrimination in employment was relied on to invalidate the use of sex-based actuarial tables for setting rates in employer-operated pension plans. However, plans that are not employer operated are beyond the reach of Title VII and, therefore, can continue to use sex-based rates. Where these plans or practices are regulated by the government, so that the "state action" requirement is satisfied, the ERA can be relied upon to challenge them.

survive ERA scrutiny, laws dealing with unique physical characteristics must be narrowly drawn and serve compelling state interests.[22]

In addition, laws providing for the separation of males and females—for example, in public restrooms or dormitories—would not be invalidated under the Equal Rights Amendment, because privacy is a right protected by the Constitution.[23] Although ERA opponents like to characterize this as uncertain and suggest that the amendment *will* require sex-integrated restrooms, the legislative history of the ERA clearly refutes this argument, as does the experience of States with ERA provisions.[24]

Finally, congressional debate and experience under State ERA provisions make clear that the ERA does not inhibit a State from prohibiting homosexual marriage.[25]

Once it is determined that a particular law must be sex neutralized under the ERA, States and the Federal Government have considerable flexibility in deciding *how* to end the impermissible sex bias. They may either extend the law in question to cover women and men equally or nullify it entirely. As the Senate report on the ERA stated:

> it is expected that laws which are discriminatory and restrictive will be stricken entirely as the court did. . .[with] a law banning women from a certain occupation. On the other hand, it is expected that those laws which provide a meaningful protection would be expanded to include both men and women as for example minimum wage laws.[26]

In some States, such as New Mexico, simple language changes and fundamental substantive reform were completed shortly after passage of the State ERA. Not surprisingly, ERA conformance, as with any comprehensive legal change, has not occurred overnight in every State with an equal rights amendment. This transition period is what

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[22] *See* Brown et al., *The Equal Rights Amendment. . ., supra,* at 894. The strict scrutiny to be given classifications allegedly based on unique physical characteristics may produce different results when applied, for example, to laws establishing medical leave for childbearing and those concerning income protection plans for workers disabled by pregnancy. The former relate closely to the reproductive function and serve the public interest in maternal and infant health. In contrast, as far as employment is concerned, disabilities related to pregnancy are no different from other temporary disabilities, since both involve a temporary inability to work. It is arguable that the employer has no unique interest in maternal and child health distinct from its interest in the health and well-being of all employees. *See* brief *amici curiae* of Women's Law Project and American Civil Liberties Union, General Electric Co. v. Gilbert, U.S. Supreme Court, October Term, 1975.

[23] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). While opponents of the ERA often link it with reproductive freedom for women, it is clear that the ERA is not necessary to establish the right of women to such freedom. The right to choose between abortion and childbirth already has been delineated by the Supreme Court as protected under the Constitution's right to privacy. See Roe v. Wade, 410 U.S. 113 (1973).

[24] *Senate Report, supra,* at 12.

[25] *See, e.g.,* comments of Sen. Birch Bayh, 118 Cong. Rec. 9331 (1972); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

[26] *See, Senate Report, supra,* at 15.

Congress anticipated in providing for the 2-year grace period before the Equal Rights Amendment would take final effect.

Judicial Application and Interpretation

The experience under State equal rights amendments has not included extensive litigation, particularly in those States where comprehensive legislative reform answered most questions about the ERA's meaning. Where State courts have decided cases that raised ERA issues, however, they have tended to adhere closely to the legislative history of the Federal Equal Rights Amendment in interpreting their State amendments.

The most significant development has been a standard of review in sex discrimination cases that clearly exceeds the standard applied by Federal courts in such cases under the 14th amendment. Most ERA States have used the same legal test that Federal courts now apply to race but not to sex classifications: distinctions between the sexes are automatically considered "suspect," and the State can justify such classifications only by showing that it has a compelling interest in the legislative purpose and that the sex distinction is essential to achieving that goal.[27]

In Pennsylvania, the State courts have moved beyond even the "suspect classification" test and adopted standards approaching the "absolute ban" against sex discrimination set out in the legislative history of the Federal ERA.[28] Since adoption of the State ERA in 1971, the high court of Pennsylvania has struck down all gender-based laws that have come before it or has fashioned sex-neutral alternatives through careful judicial construction.[29]

Relying on Federal legislative history, State courts have also adopted limited exceptions to the mandate against statutory gender lines and discriminatory government actions. For example, basic privacy and morality issues have been carefully handled by the courts. The New Mexico Supreme Court dismissed an ERA challenge to a State university rule against coed visitation in the dormitories, recognizing that this rule derived from accepted standards of privacy and social

[27] *See, e.g.,* People v. Ellis, 57 Ill. 2d 127, 130, 311 N.E. 2d 98, 10 (1974), in which the Illinois Supreme Court stated:

> In contrast to the Federal Constitution, which, thus far, does not contain the Equal Rights Amendment, the [Illinois] constitution of 1970 contains section 18 of article I, and in view of its explicit language, and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights and requires us to hold that a classification based on sex is a "suspect classification" which to be held valid must withstand "strict judicial scrutiny." *Id* at 101.

[28] "The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities." Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (Pa. Sup. Ct. 1974).

[29] *See* Brown et. al., *Women's Rights and the Law, supra,* at 24–27, table 2.1.

mores and had neither the intent nor the effect of invidious discrimination between men and women.[30] The Washington courts have refused to hold that their State ERA requires validation of homosexual marriage otherwise unrecognized under State law.[31] Also, sex-based definitions of rape have been upheld against State ERA challenges under the "unique physical characteristics" doctrine.[32]

Substantive Reform under State ERAs

Domestic Relations

One of the primary areas of substantive law reform under State ERAs has been in domestic relations. This is an area of law traditionally riddled with gender-based definitions of rights and responsibilities that embody deeply imbedded stereotypes about women and men. This also is an area that ERA opponents frequently point to for examples of how the Equal Rights Amendment would damage the "special status" of women under the law and within society at large.

Foremost, ERA opponents have warned that ratification of the amendment would result in the repeal of laws obligating men to support their families.[33] In none of the ERA States, however, have laws requiring husbands to support dependent wives and children been repealed.[34] Nor have these laws been rewritten to require a "fifty-fifty" breakdown in the financial responsibilities of men and women during marriage or at the time of divorce. Instead, legal standards for support in these States now look to the actual needs and capabilities of each family member, not simply to the gender of the individual.[35] This result is consistent with the legislative history of the Federal ERA.[36]

For example, the Texas Family Code now provides that "each spouse has the duty to support his or her minor children."[37] The Texas Court of Civil Appeals has ruled consistently that the ERA:

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[30] Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (Sup. Ct. 1975).

[31] Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); *see also,* Opinion of the Colorado Att. Gen., Apr. 24, 1975.

[32] People v. Green, 514 P.2d 769 (Colo. 1973); People v. Medrano, 321 N.W.2d 97 (Ill. App. Ct. 1974); Brooks v. Maryland, 330 A.2d 760 (Md. Ct. of Spec. App. 1975); Finley v. State of Texas, 527 S.W.2d 553 (Tex. Ct. of Crim. App. 1975); and State v. Young, 523 P.2d 946 (Wash. App. Ct. 1974).

[33] *See* discussion, *supra,* ch. 2, "Family Law."

[34] Although Pennsylvania does not require a husband to support a dependent wife after divorce, this is totally unrelated to the State ERA, since Pennsylvania has not provided for alimony for men *or* women for more than 100 years. In 1977 the Maryland Court of Appeals struck down a criminal desertion statute that only applied to the desertion of wives by their husbands. Coleman v. State, 37 Md. App. 322 (1977). The Maryland Legislature immediately reenacted this criminal remedy for nonsupport in sex-neutral form. *See* H.B. 1170 (1978).

[35] Indeed, as of 1976, only six States still had laws charging fathers with sole responsibility for the support of children after divorce: Georgia, Idaho, Maine, Nevada, South Dakota, and Wyoming. *See* Brown et al., *Women's Rights and the Law, supra,* at 152–55. Only 15 States still have alimony statutes phrased in terms of the "husband's" responsibility. *Id.* at 130–34.

[36] *See Senate Report, supra,* at 17.

[37] *Texas Family Code Ann.* §4.02 (1975).

> does not require that the parents make mathematically equal contributions for the support of their children. It only provides that each parent has the equal obligation, in accordance with his or her ability, to contribute money or services which are necessary for the support and maintenance of his or her children.[38]

The Pennsylvania Supreme Court also has ruled that the "equal obligation" of men and women to support their families under the ERA does not mean mathematical equality in dollars and cents. In fact, courts in Pennsylvania must count in the balance not only the differing capabilities of each spouse to earn money outside the home, but the economic value of the services being provided by the homemaker spouse as well.[39] Recently, the Superior Court of Pennsylvania ruled that the ERA did not require any direct financial contribution to child support by a mother who felt it necessary to be at home with her young children.[40] Her services at home were valued, as were the financial contributions of the supporting father.

Of course, there are women who have been charged with the support of their husband or children under sex-neutral family support laws. When the public distortions of these cases are set aside, however, the equity of the court decisions becomes clear.

For example, countless editorials and debates about the dangers of the ERA have referred to the Pennsylvania case of *Buonocore v. Buonocore,* [41] which charged the noncustodial mother with child support. But under the facts of the *Buonocore* case, this was quite fair. In 1973 Agnes Buonocore moved out of the marital home, leaving her husband and their two minor children. A year later, after she had shown no interest in taking custody of the children and had contributed nothing toward their support, her husband sued her for a contribution to child support. At that time she was earning a net weekly salary equivalent to her husband's, whose expenses included raising two young children. The Superior Court of Pennsylvania upheld an award of $30 a week support against Mrs. Buonocore, an award that certainly would not have been newsworthy if she had been a man.

Another case—this one from Maryland—that underscores the fairness of the "mutual responsibility" doctrine of the Equal Rights Amendment is *Tignor v. Tignor* .[42] At the time the marriage dissolved, Mr. Tignor sued Mrs. Tignor for support, since he is blind and had relied on his wife's financial support during the marriage. This extra

[38] Friedman v. Friedman, 521 S.W.2d 111, 115 (Tex. Ct. of Civ. App. 1975); *see also,* Cooper v. Cooper, 513 S.W.2d 229, 234 (Tex. Ct. of Civ. App. 1974).
[39] See Conway v. Dana, 218 A.2d 324 (Pa. Sup. Ct. 1974); Green v. Freiheit, Vic. No. 1015 (Fam. Div., 1st Jud. Dist., October Term 1973).
[40] Wasiolek v. Wasiolek, 380 A.2d 400 (Pa. Sup. Ct. 1977).
[41] Com. ex. rel. Buonocore v. Buonocore, 340 A.2d 579 (Pa. Sup. Ct. 1975).
[42] Tignor v. Tignor, Div. No. 12601 (Md. Cir. Ct., Anne Arundel County, 1974).

information clarifies the court's willingness to require Mrs. Tignor to continue supporting her husband after the marriage ended.

The growing recognition of "mutual family responsibility" in ERA States has brought with it needed confirmation of a married woman's economic rights in the marital partnership. In Maryland and Pennsylvania, for example, courts have relied on the ERA to abolish the common law presumption that all household goods belong to the husband.[43]

One of these cases, *DiFlorido v. DiFlorido,* involved a woman who sought on divorce to recover a portion of the personal property, jewelry, household furniture, and other effects accumulated by the couple during their 10-year marriage. Since Pennsylvania had a legal presumption that all household goods belonged to the husband, Mr. DiFlorido challenged his wife's right to receive any portion of the marital effects. The Supreme Court of Pennsylvania declared the one-sided presumption unconstitutional, ruling for the first time that both spouses should share equally in the distribution of marital assets. Pointing to the ERA, the court noted: "we cannot accept an approach that would base ownership of household items on proof of funding alone, since to do so. . .would fail to acknowledge the *equally important* and often substantial nonmonetary contributions made by either spouse."[44]

Massachusetts also has changed its marriage dissolution laws under the State ERA to provide for consideration of the value of the contributions of the homemaker in making an equitable distribution of marital property at divorce.[45] Another important change in Massachusetts law is the sex neutralization of its "homestead protection." Previously, as "head of household," a man could protect his family homestead against debts of up to $30,000. After a woman, who was the sole support of a dependent husband and child, was turned down under this law, the obvious sex bias and inequity of this result prompted the legislature to extend homestead rights to women as part of their State ERA implementation process.[46]

Adoption of the ERA also has equalized marital property laws in States with "community property" systems. In New Mexico, before adoption of the ERA in 1972, the husband's rights to control over the income and assets of the marriage were exclusive. A married woman could not even sign a stock-option agreement with her own employer or advertise the family washing machine for sale without her husband's

[43] Bender v. Bender, Civ. No. 152, September Term (Filing May 10, 1978, Md. Ct. of App.); DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. Sup. Ct. 1975).
[44] DiFlorido v. DiFlorido, *supra,* 331 A.2d at 179 (emphasis in original).
[45] Mass. Code Ann. ch. 209, §32, as amended by ch. 609 of L. 1977.
[46] Mass. Code Ann. ch. 188, as amended by ch. 791 of L. 1977.

consent. Now, husband and wife share equally in the management of the community property.[47] One direct benefit of shared management for a homemaker in New Mexico is that she can establish credit in her own name on the basis of her half-control of the community assets.

Employment

The steps taken by various ERA States to sex neutralize the allocation of worker's compensation benefits illustrate a State's flexibility in determining its route for achieving sex equality. Traditionally, many workers' compensation systems automatically awarded survivor's or dependent's benefits to the families of male workers, on the presumption that wives and children were dependent on the husband's income. The family of a female worker, on the other hand, usually had to present proof that they had depended on her income in order to collect survivor's or dependent's benefits. This stereotype not only penalized male survivors and minor dependents, but also directly discriminated against women workers by undercutting the value of their wage-earning years to their families.

Faced with the need to sex neutralize these benefit plans, ERA States have taken different approaches. Washington now has automatic presumptions of dependency for the families of both male and female workers, while Maryland and Virginia require some proof of actual dependency by any spouse or children before benefits can be assigned.[48] Thus, two different social and fiscal policies can both lead to successful ERA conformance.

In Pennsylvania, a number of official opinions of the attorney general, issued pursuant to the State ERA, have had a significant effect on employment opportunities for women. For example, girls can no longer be prevented from working as newspaper carriers,[49] and women have the right to be barbers and cut men's hair.[50] Height requirements for certain public jobs, such as the State police, have been reexamined under the State ERA.[51] In addition, the attorney general has ruled that the State will deny liquor licenses to public establishments that discriminate in the employment of, or refuse to serve, women.[52]

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[47] New Mexico Stat. Ann. §57–4A–8 (1953), *as added by* L. 1973, ch. 320, §10, *as amended by* L. 1975, ch. 246, §6. See New Mexico Commission on the Status of Women, *The New Mexico Equal Rights Amendment* (1978).

[48] *Compare* Washington Rev. Code Ann. §51.32.050 (1962) *with* Md. Ann. Code, art. 101 §36 (1964) *and* Va. Code Ann. §65.1–65, 66 (1950).

[49] Pa. A.G. Op. No. 71 1971).

[50] Pa. A.G. Op No. 69, No. 75 (1971).

[51] Pa. A.G. No. 57 (1973).

[52] Pa. A.G. Op. No. 55 1974).

Criminal Law

In criminal law, there also have been positive results under State ERAs. The primary statutes called into question because of sex-based definitions have been prostitution and rape laws.

No ERA State has legalized prostitution. Rather, all but Alaska are now operating under sex-neutral statutes, in compliance with the ERA. Connecticut's new statute is a particularly good example of conformance to both the legal and social policy implications of sex equality.[53] Both prostitutes and patrons are defined sex neutrally and risk the same criminal penalties, thereby equalizing the effect of these laws on individual women and men. Moreover, third parties who promote or profit from prostitution are subject to even stricter penalties, depending on the level of coercion involved and the age of the prostitute.

Similarly, most ERA States have neutralized their rape statutes so that both men and women are protected against sexual assaults of all varieties. In addition, many of these States have redefined their rules of evidence and standards of proof in rape cases to do away with sex-biased and unfair evidence rules.[54]

In achieving these reforms, State courts have not overturned criminal convictions of *any* type as a result of an ERA challenge.[55] Rather, courts have upheld valid convictions, while neutralizing any underlying sex-based provisions related to sentencing or age differences.[56]

Since 1970, Illinois, Texas, and New Mexico[57] have amended their juvenile justice statutes to apply equally to male and female minors, and Pennsylvania has amended sex-based sentencing laws.[58] In addition, Massachusetts, New Mexico, and Pennsylvania have begun steps to give women access to the greater range of programs available at male correctional facilities in ways that do not jeopardize the security or privacy rights of individual inmates.[59]

Education

State ERAs also have promoted positive reform of education. In a number of States, effective ERA challenges have been raised to State and local rules or regulations limiting the participation of girls in athletics programs of public schools.[60] These cases have involved

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[53] Conn. Gen. Stat. Ann. §53a–82 and §53a–83 (Rev. 1975).

[54] *See, e.g.,* Mont. Rev. Code Ann., §94–5 502 to 504 (1969), *as amended* by L. 1973, ch. 513, §1 and L. 1975, ch. 2, §1 and ch. 129, §1. *See generally,* Brown et al., *Women's Rights and the Law, supra* at 58–59.

[55] *See* no. 32, ch. 3, *supra*.

[56] Brown et al., *Women's Rights and the Law, supra* at 33–34.

[57] Ill. Ann. Stat., ch. 37, §702–2 (1972); Tex. Fam. Code, §51.02 (1975); N.M. Stat. Ann., §42–7–5 (1975 Supp.).

[58] *See* Commonwealth v. Butler, 328 A.2d 851 (Pa. 1974), for a history of Pennsylvania's sentencing laws.

[59] *See* Note, *The Sexual Segregation of American Prisons,* 82 Yale L.J. 1229 (1973); Brown et al., *Women's Rights and the Law, supra,* at 90–91 n. 2.

[60] *See e.g.,* Commonwealth v. Pennsylvania Interscholastic Athletic Association, 334 A.2d 839 (Commonwealth Ct. 1975) (striking down bylaws prohibiting competition between boys and girls in

contact sports such as football that are exempted by regulations under Title IX (the Federal law against sex discrimination in education). The result has been to open up competition for athletically inclined girls in sports formerly available to boys only.

In Massachusetts, a special trust established to provide financial aid to young men attending law school has now been opened to women as well, as a result of the State ERA.[61] Here again, Title IX would not have reached such sex bias unless the trust was financed with Federal funds.

In another case, involving different standards for access to housing at a State university, a Texas court struck down the school's rule prohibiting female students from choosing housing off campus. The court also extended to male students the right to have on-campus facilities made available to them.[62]

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interscholastic sports); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 885 (Sup. Ct. 1975) (striking down regulation prohibiting girls from playing on high school football team); Mora v. St. Vrain Valley Sch. Dist., Civ. No. 75-3182-1 (Boulder County, Colo., Dist. Ct., Dec. 3, 1975) (temporary restraining order issued against rule forbidding girls to practice or play with boys' basketball team).

[61] Ebitz v. Pioneer National Bank, 361 N.E.2d 225 (Mass. 1977).

[62] Texas Woman's Univ. v. Chayklintaste, 521 S.W.2d 949 (Tex. Civ. App. 1975). In another Texas case involving a public school regulation forbidding long hair for male students, the court of civil appeals in Houston interpreted the State ERA as a "suspect classification" analysis, but refrained from applying any judicial standard to the regulation on the ground that the court should not interfere in the daily rulemaking of the schools. Mercer v. Board of Trustees, North Forest Ind. Sch. Dist., 538 S.W.2d 201 (Tex. Civ. App. 1976).

4. Summary and Conclusion

Ratification of the Equal Rights Amendment continues to be essential to the attainment of equal rights for women and men under the law. In Federal statutes alone, the Commission has identified over 800 sections of the U.S. Code containing examples of substantive sex bias or sex-based terminology that are inconsistent with a national commitment to equal rights, responsibilities, and opportunities. State laws are replete with provisions that assign women, on the basis of their sex, to an inferior role.

Measured by any standard, women continue to be disadvantaged by gender-based laws and practices, despite the enactment of equal opportunity laws. As workers, they are victims of an earnings gap that is even wider today than it was in 1956. As wives, they are still subject to laws that deny them an equal partnership in marriage. As students, they are often steered away from both the education needed to break into the better paying jobs dominated by men and the sports programs that have been traditional training grounds for leadership and the route to a college education through athletic scholarships. Further, women endure a criminal justice system that too often judges them by their sex and not by the acts they commit or by which they are victimized. This reality must dispel the myth that women have achieved equality under law.

It is clear that existing constitutional guarantees will not mandate the changes that are needed. Judicial interpretation of these guarantees has allowed sex bias to survive. The Supreme Court has persisted in its view that sex-biased laws and classifications are more easily justified under the Constitution than are race-biased laws. As Justice Powell recently explained in *Regents of California* v. *Bakke,* the Supreme Court has never extended the full scrutiny of the 14th amendment to sex discrimination claims because the Court does not see such discrimination as inherently odious when compared to the lengthy and tragic history of race discrimination. But such a comparison of victims surely is neither appropriate nor required. The treatment of challenges to sex-based discrimination under existing law reflects the perpetuation of stereotypes and myths about women in American society, as well as a failure to recognize and understand the lengthy struggle of women to secure equal rights under the law.

Thus, the need for the Equal Rights Amendment to signal that sex discrimination is no longer acceptable in our Nation's laws, policies, and practices is even more clear today than it was in 1972 when Congress first approved the amendment and sent it to the States for ratification. Evidence also abounds that the ERA is an appropriate remedial measure to meet that need. Recent experiences under State

equal rights provisions substantially similar to the Federal ERA have confirmed that it will prompt the changes necessary to provide men and women with status as equal persons under the law.

These experiences show substantial strides toward equality of men and women under the law. For example, State ERA provisions have been relied on to develop legal standards for marital support and property rights that look to the actual needs and capabilities of each spouse, rather than merely to his or her sex. In applying these standards, recognition has been given under State ERAs to the economic value of the contribution provided by the homemaker spouse—an important step in securing legal and economic rights for the married woman who chooses to be a full-time homemaker.

State ERAs have been successfully relied on to neutralize criminal laws so that individuals are treated according to their acts and not their gender. These State constitutional provisions also have helped to expand educational opportunities for females. Finally, the application of State ERAs to sex-based discrimination in employment has prompted changes to do away with gender-based presumptions and classifications. Notably, the different ways States have acted to neutralize sex-based provisions in State workers' compensation systems indicates the flexibility available for States to determine their own paths to equality.

The orderly and nonchaotic way in which this progress has been made under State amendments is proof that the equal rights principle as a constitutional mandate can and does work in a way that strengthens our society.

Although these State experiences also suggest that reform of the laws is possible on a State-by-State basis, such a route is both plodding and haphazard and offers no guarantees of ever reaching completion. As Congress recognized in 1972, "only a constitutional amendment can provide the legal and practical basis for the necessary changes."[1] The ERA will provide on a national basis an unmistakable mandate of the highest order for equal rights under law. It will give women a clear route to seek redress against sex bias, provide impetus for the enforcement of existing antidiscrimination laws and the completion of legislative reform, and give the courts a clear basis for dealing with sex-based discrimination.

Reaffirming a position first taken in June 1973, the Commission believes that the Equal Rights Amendment should be ratified. Accordingly, we urge State legislatures that have not yet approved the ERA to consider it on its merits. We are confident that such

[1] *Senate Report, supra,* at 11.

consideration can only result in ratification and the long-awaited guarantee to women and men of equal justice under the law.

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