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The Equal Rights Amendment:
The Contribution of Our Generation
Of Americans

HON. WALTER KARABIAN*

THE PINK BLANKET BURDEN

Sex discrimination starts young; and once it starts, it is ever-present. A young girl is taught to be quiet and submissive, to restrain herself rather than give vent to the nervous energy that is natural in all children. She is frequently told not to do something she sees her brother do because it's "unladylike, and a little lady would never do a thing like that." She soon learns that "one of the very worst things [she] can do, in society's eyes, is to express a desire to be—or to behave as though [she] were—a [boy]." At the same time a young girl begins to realize that almost everything worthwhile doing in life is unladylike and for boys only.

When she reaches school age, her fortunes take a turn for the

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worse. In elementary school a girl is taught to conform to a sexual stereotype of "inferiority, docility, and submissiveness." Moreover, she is taught that this "inferior status [is] . . . the natural order of things." Striking examples of this early encounter with institutionalized sex discrimination are school textbooks and readers. These books invariably portray men in numerous and diversified occupations, most of which are exciting and therefore attractive to school age children; whereas they typically picture women in a handfull of dull, demeaning jobs. The effect is obvious. "[T]extbooks and readers . . . convey restricted and damaging pictures of women, encourage girls to undervalue themselves, lower their aspirations, and deny their potential for achievement." Although California has recently passed legislation to eliminate this textual bias, the effectiveness of this legislation has yet to be shown.

Educational sex discrimination continues in high school, where boys are frequently directed through one curriculum, girls through another. "Girls are tracked into commercial courses to become the future secretaries and typists of the nation, while boys are channeled into college preparatory curricula to become the future managers and professionals." Women are truly taught a subservient sex role.

As if she were not hindered enough by her disabling high school experience, a woman may face stiffer entrance requirements when she attempts to gain admission to a college or university than a similarly situated male applicant. In the fall of 1968, 41% of all women entering four-year public colleges had high school grades of B+ or better, while only 18% of all men entering such schools had attained that level of scholastic achievement. In the fall of 1970 over 40% of all men between the ages of 18 and 21, and over 20% of those 23 to 24 years old, were enrolled in a college or university; on the other hand, the percentages of women in these
age groups enrolled in such institutions were but 29% and 9% respectively. Yet women, with a smaller college enrollment than men, attain significantly more bachelor of arts degrees.

Graduate school statistics are even more revealing. Women account for only 37% of all masters degrees, 13% of all doctorates, and but 4% of all professional degrees. Nor does this male domination of higher education appear to be yielding to present day pressures from the movement for women's rights. Women received fewer Ph.D.'s in 1971 than they did in 1930.

Several factors undoubtedly combine to produce this relative scarcity of women in higher education. Aside from societal brainwashing which discourages women from engaging in such pursuits, there are the unwilling parents who hesitate to pay for a daughter's education which "she'll never use anyway once she's married," the almost impossible task of finding a husband willing to work to support his wife while she seeks her degree (although many men seem to have little trouble finding wives willing to support them on a similar quest), and the great difficulty women encounter obtaining loans and scholarships. But perhaps the most significant deterrent is the job market that women face when they complete their educations.

When a young woman graduates from college and starts looking for a job, she is likely to have a frustrating and even demeaning experience ahead of her. If she walks into an office for an interview, the first question she will be asked is, "Do you type?"

Women in our society are concentrated in low-level, low-paying jobs. They rarely occupy managerial positions. Despite comprising 40% of the white collar work force, women occupy less

11. Id., at 5.
12. Id., at 5.
than 10% of all managerial and 14% of all professional positions.\textsuperscript{16} The median income for women is less than three-fifths that for men, and the gap is widening.\textsuperscript{17} It is no secret that women with college degrees make little more than men with 8th grade educations!\textsuperscript{18} The unemployment rate for women is virtually 50% higher than it is for men.\textsuperscript{19}

Vivid evidence of sex discrimination in employment practices can be found in our public elementary and secondary school systems. Despite the fact that women comprise 75% of all the teachers in such schools, they account for only 22% of the elementary school principals and only 4% of the high school principals. Nor does this discrimination vanish at higher levels. While 50% of all men who teach in colleges and universities go on to become full professors, only 10% of women instructors gain such tenure.\textsuperscript{20}

Job discrimination against women grows out of the myth that "woman's only important function, for which she is naturally made, is . . . that of wife and mother."\textsuperscript{21} This same myth produces the groundless beliefs that women work merely to supplement their husbands' incomes, that most women hold jobs only until they can find a husband and then quit, etc., etc.

These are incredible misconceptions. Contrary to popular opinion, most women work to survive, not for mere supplemental income. These are women without husbands, but often with children, and women with husbands making a poor wage.\textsuperscript{22} The statistics are startling. Over 40% of all women work,\textsuperscript{23} comprising

\textsuperscript{17} Senate Judiciary Comm., Equal Rights for Men and Women, supra note 10, at 5. See also 117 Cong. Rec. 22-36 (1971) (remarks of Senator Bayh): In 1969 51% of all working women, but only 16% of all working men, made less than $5,000 per year, while 35% of all working men, but only 5% of all working women, made more than $10,000 per year. And also Phillips, Women in Employment, 78 CASE & COM. 8 (No. 4, July-Aug. 1973): "... the median income of full-time working women is less than $500 per month." (hereinafter cited as Phillips).
\textsuperscript{18} Senate Judiciary Comm., Equal Rights for Men and Women, supra note 10, at 5; Phillips, supra note 17, at 8.
\textsuperscript{19} EEOC, supra note 15, at 1; 117 Cong. Rec. 22736 (1971) (remarks of Senator Bayh).
\textsuperscript{20} Senate Judiciary Comm., Equal Rights for Men and Women, supra note 10, at 5; Teaching Woman Her Place, supra note 2, at 1199.
nearly 40% of the total work force.\textsuperscript{24} Nearly half of these women workers are self-supporting.\textsuperscript{25} Almost one out of every four women in the labor force of this nation is raising one or more children on her own!\textsuperscript{26} Of these women workers who are married, more than 60\% have husbands who earn less than $7,000 a year, so that the family standard of living is dependent on the income of the working wife as well as that of the husband.\textsuperscript{27} It cannot be said that these women work solely for supplemental income; they work out of necessity.

Other popular beliefs concerning women workers turn out to be equally erroneous. Two examples adequately demonstrate this. The first is the notion that women work only until they can find a husband and that therefore they rarely remain on any job long enough to make it worthwhile for their employer to train them or to place them in positions of responsibility. This is clearly untrue. Over 60\% of all women workers are over 35 years of age,\textsuperscript{28} and over 50\% are already married.\textsuperscript{29} Moreover, the turnover rate of women employees is virtually identical to that of men.\textsuperscript{30} The second fallacy is the belief that due to childbirth and family responsibilities, women are absent from their jobs much more often than men. The fact is that men have a greater absenteeism rate than women even if the comparison includes days lost due to pregnancy!\textsuperscript{31}

The result of these misconceptions is sex discrimination in employment; and the consequences of this type of sex discrimination in the business world are clear. If a woman is to succeed, she

\textsuperscript{24} Id., at 1016; EEOC, supra note 15, at 1.
\textsuperscript{25} 117 CONG. REC. 22736 (1971) (remarks of Senator Bayh); Walker, Sex Discrimination in Government Benefit Programs, 23 HASTINGS L.J. 277, 281 (1971) (hereinafter cited as Walker).
\textsuperscript{26} Walker, supra note 25, at 281. It is startling to note that 45\% of all minority families headed by women live below the poverty line while only 16\% of all minority families headed by men so live. 117 CONG. REC. 22736 (1971) (remarks of Senator Bayh).
\textsuperscript{28} 117 CONG. REC. 22736 (1971) (remarks of Senator Bayh).
\textsuperscript{29} Id., at 22736; Walker, supra note 25, at 281.
\textsuperscript{30} 117 CONG. REC. 22736 (1971) (remarks of Senator Bayh).
\textsuperscript{31} Verbal Karate, Sisterhood is Powerful 557, 560 (R. Morgan ed. 1970); EEOC, supra note 15, at 4.
must be more talented, work harder, and sacrifice much, much more than a man.

One particular aspect of sex discrimination in employment demands particular attention. This is the area of protective labor legislation. Such laws were originally passed to protect women against exploitation in early industrial "sweat shops". However, the era of the sweat shop has long since passed. Today, protective labor legislation often has the effect of keeping women "in lower paying jobs or out of the labor force altogether" by making it more desirable for an employer to hire men than women.\textsuperscript{32} Rather than eliminating exploitation, protective labor laws foster it by funneling women into the lowest-paying jobs available, thereby creating a new form of exploitation.\textsuperscript{33} Such laws are obviously archaic; they ignore both the realities of employment in the 1970's and the personal abilities of the individuals in the classes they govern.

One type of protective legislation is of special significance. These are laws which require an employer to impose leaves of absence for pregnant employees without providing for job security or retention of accrued benefits and seniority.\textsuperscript{34} These legally imposed maternity leaves often require a female employee to remain off the job for months, during which time she receives neither unemployment insurance nor disability payments.\textsuperscript{35} The net result is that the family is deprived of a major source of income during precisely those months it needs that income most. And, as if the effects of such laws on the family were not severe enough, one has only to imagine the impact on women without husbands!

Government benefit programs "reflect and perpetuate the same social and financial inequities between men and women that exist in employment, echoing attitudes such as: women's place is in the home, housework is not valid employment, women are merely secondary workers, and wives are dependent appendages to their husbands."\textsuperscript{36}

Government benefits are often not as high for women and their


\textsuperscript{33} Issues, supra note 7, at 13.

\textsuperscript{34} Brown, supra note 32, at 929. Such leaves may be required under CAL. EDUC. CODE, § 13651.3 (West 1959).

\textsuperscript{35} E.g., CAL. UNEMPLOYMENT INS. CODE § 2626 (West 1972) deprives pregnant women of disability insurance until 28 days after delivery. See also CAL. UNEMPLOYMENT INS. CODE § 2626.2 (West Supp. 1974) which allows disability benefits where complications are involved, (e.g., c-sections).

\textsuperscript{36} Walker, supra note 25, at 277.
dependents as they are for men and their dependents. But even more significant is the additional burden the woman and her husband must frequently meet to successfully claim those benefits.

Under current [workmen's compensation] laws a wife or widow receives a benefit based on her husband's earnings without meeting any test of dependency. A husband or widower of a woman worker is entitled to a benefit only if he proves he receives one-half or more of his support from his wife.

These laws combine with the disability or death of the wife to produce a deleterious effect upon the family which depends upon her for over 40% of its total income. One out of every four families where the wife works falls in this category. There are numerous other situations in which the applicable benefit statute requires that the husband prove his dependency before receiving a government benefit or preference without requiring the wife to present similar proof. There are even statutes which provide benefits to wives, but deny them entirely to women's husbands in an identical position. Under these statutes a working man is secure in the knowledge that if some tragedy should strike him down, the government will help provide for his family; there is no such security for the working woman.

In each of the above instances, sex discrimination in government benefit programs is based upon the false assumption that women work merely to supplement their husbands' incomes and not to support themselves and their families. Nowhere is this more clearly demonstrated than in this nation's welfare program. Over 90% of all welfare families are headed by women, and the present welfare system does very little to provide these families with a

37. E.g., CAL. GOVT. CODE §§ 31620, 21622 (West 1968), 31676.1, 31676.11 (West Supp. 1974). See also Gruenwald v. Gardner, 590 F.2d 591 (2d Cir. 1968), cert. denied, 393 U.S. 982 (1968), which held that such different treatment of men and women in computing social security benefits was not in conflict with the Constitution.

38. A MATTER OF SIMPLE JUSTICE, supra note 27, at 11. See also CAL. LABOR CODE §§ 3501, 3502 (West 1971).


41. See p. 5 supra.

42. Phillips, supra note 17, at 8.
viable alternative to welfare. If a woman who single-handedly heads a family goes to work, she faces lower-paying jobs than her male counterpart and still incurs the expense of hiring someone else to care for her children. There is also a good chance that she will be unable to find any job at all. In the end her family winds up with less usable income than if the woman had remained at home on welfare. And yet there seem to be several obvious and straightforward ways to ease the plight of the fatherless family in a manner that is beneficial both to society and to the woman: make it possible for her to work. How? With government funded childcare centers, with tax relief for women (and men) who are forced to hire babysitters, and with federally funded training programs aimed at providing women as well as men with gainful employment. These measures appear so simple that it seems patently absurd they were not wholeheartedly invoked ten years ago.

But sex discrimination does not confine itself to the lower classes and to working women; a “typical, middle-class wife” who does in fact work solely to supplement her husband’s income also feels its heavy-handed effects. Under traditional community property law, the husband and wife create a community when they marry, a community in which they are supposed to have an equal interest; however, the community is that of the husband, and the wife is a part of it. Under California probate law a widow is required to probate her decedent husband’s share of the community property whether he dies testate or intestate, but a widower retains control of his wife’s share of the community property unless an adverse claim to that share arises under the wife’s will. And if a married woman wishes to enter into business for herself independent of her husband, she must seek a court decree!

Finally, what happens if a woman commits a crime? Regardless of age, she will probably receive a stiffer sentence than her male counterpart. If she is a juvenile, she may not even need

43. See pp. 4-5 supra.
44. See supra note 19. And yet, despite the fact that women constitute 50% of the unemployment labor force, they comprise less than ½ of the trainees in federally funded training programs. 117 CONG. REC. 22736 (1971) (remarks of Senator Bayh).
45. A MATTER OF SIMPLE JUSTICE, supra note 27, at 13, 15.
46. E.g., CAL. CIV. CODE §§ 5135, 5125, 5127 (West 1970).
47. CAL. PROB. CODE §§ 202-3 (West 1956). (Ed. note: S.B. 570, CAL. STATS. 1974, c. 11, effective Jan. 1, 1975, provides that community property will be treated equally when either spouse dies.)
49. ISSUES, supra note 7, at 10; Johnston and Knapp, supra note 1, at 726.
to commit a crime at all; she is five times as likely to be before the juvenile court for a non-criminal matter as a male juvenile. And once within the correctional system of the state, women will rarely be given useful vocational training; they will be taught domestic science, dressmaking, gardening and the like.

It is perhaps a significant comment on sex discrimination in our society that when a woman is born, the chances are she does not even know the name she will have most of her life. At marriage she takes her husband's name automatically. If she wishes to retain her maiden name, she must go through court proceedings to change her name back to the one she was born with. It is little wonder that the rights that are of greatest value in our society, the rights to a job, to a pension, to social security, to all the fringe benefits of any job, to an education, and the right to control your own future, "are either flatly denied to women or are different for women than for men."

**Statutory Advances**

Legislatures have continually held the historical belief that a woman's place is in the home, and the laws passed by such legislatures have faithfully reflected this view. Prejudice created the law; the law, then, in turn, nurtured the prejudice. A self-sustaining cycle was created. However, there appears to be a developing trend, especially in California, toward greater recognition of women's rights.

On the federal level there are three major statutory provisions which operate to eliminate sex discrimination in education and employment. First, the Equal Pay Act of 1963 requires each individual, regardless of sex, be paid wages identical to those paid all similarly situated employees performing the same tasks. Second,

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50. *Issues*, supra note 7, at 11.
Title IX of the Education Amendments of 1972 denies federal assistance to educational institutions which engage in sex discrimination. However, neither of these laws accomplish what it purports to. The Equal Pay Act can be circumvented with relative ease. Title IX contains enormous exceptions which include admission to all private schools and to those schools which are traditionally of one sex. Title IX is also weakened by its lack of an effective enforcement mechanism.

The third federal statutory measure designed to attack sex discrimination, and undoubtedly the most important, is Title VII of the Civil Rights Act of 1964. As originally enacted, Title VII prohibits sex discrimination in employment practices by employers, unions, and employment agencies that fall within the broad scope of the Act. However, Title VII was hindered by the weak enforcement procedures it originally contained. This weakness was remedied when the Act was amended in 1972. At the same time, the Act was expanded to include state and local governments. While the purpose and nature of this article preclude an extensive examination of Title VII in its entirety, there is one provision of the Act which demands closer attention.

Title VII permits what was at first considered a gaping exception: Sex discrimination is permitted where sex is shown to be a "bona fide occupational qualification (BFOQ)." However, the guidelines promulgated by the Equal Employment Opportunities Commission (EEOC) have narrowly defined this exception. Under these guidelines, which the courts have apparently accepted as their own, a BFOQ exception will be recognized only in instances

58. Id., § 1681 (a) (1) and (5); Ginsberg, supra note 23, at 1014.
68. E.g., Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 13-14, 485 P.2d 529, 537, 95 Cal. Rptr. 329, 339 (1971).
where a job requires a particular sex for the purposes of authenticity or genuineness. The overall effect, then, of Title VII is to require that each individual employee be judged by his or her own personal characteristics and capabilities rather than by a sexual stereotype in all but a very few situations.

On the state level California has its own versions of the Equal Pay Act and Title VII. In fact, article XX, section 18 of the California State Constitution provides that a person may not be disqualified because of sex from entering or pursuing a lawful business, vocation, or profession. However, California has struck a much more significant blow for women's rights with its sweeping revisions of the state community property laws. An examination of these new laws is heartening.

Under the old California community property law system, when they married, husband and wife created a community in which each supposedly had an equal interest. But this equality of interest was hardly a reality. The husband had the exclusive power to manage and control the community which he and his wife "shared". With few exceptions, he had the ability to do with the community property as he chose: to sell, buy, rent, exchange, invest, or whatever. When the husband chose the family residence, the wife was obliged to conform... by law!

The wife's control over the community property, on the other hand, was almost nonexistent. The wife's separate earnings were hers to do with as she wished, provided she didn't make a gift of them to anyone or dispose of them without adequate consideration. However, she retained this limited power over her own

69. 29 C.F.R. § 1604.1 (1971). See also 29 C.F.R. § 1604.2 (1973); and Oldham, supra note 66, at 81, 84.
earnings only so long as she kept them separate from the property of the community. Once her earnings became commingled, they became community property . . . i.e., the husband's property. 78

But the most debilitating of all the old community property statutes was that which provided that the community property was not liable for the contracts of the wife made after marriage unless the husband gave his written pledge that the community backed the wife's promise. 79 The net effect of this statute was to make it virtually impossible for a married woman to obtain credit. Unless she carefully maintained her own earnings and property apart from that of her husband and the community, the wife had nothing of her own to provide as security for her contractual obligations. No reasonable business could be expected to extend credit to a woman under such circumstances.

The new California community property law system, which takes full effect January 1, 1975, eliminates these blatant inequalities. It extends to the wife the same powers of management and control over the community property that previously rested solely with the husband. 80 It removes from the wife the legal obligation to conform her residence to that of her husband. 81 Furthermore, it extends to each married woman the ability to deal with her own separate earnings equal to that of her husband's ability with respect to his own earnings. 82

But most importantly, the new system makes the community liable for the post-marital contracts of the wife as well as for those of the husband. 83 The purpose of this legislation is clear. It is an attempt to enable women to obtain credit under the same circumstances as men. This intent is doubly emphasized by additional statutory provisions which make it unlawful to deny credit to a woman whenever credit would not be denied to a man under similar circumstances. 84

California's new community property system is not a guarantee of total sexual equality. But it is a start; hopefully one which will be followed vigorously.

78. Id.
84. CAL. CIV. CODE §§ 1812.30-.31 (West Supp. 1974).
THE EMERGENCE OF WOMEN AS PERSONS IN THE EYES OF THE COURTS

Throughout most of the past two centuries, courts have followed the lead of the legislatures, adopted the same erroneous assumptions, and accordingly failed to recognize the basic rights of women.85

Historically, the subordinate status of women has been firmly entrenched in our legal system. At Common Law women were conceded few rights. Constitutions were drafted on the assumption that women did not exist as legal persons. Courts classified women with children and imbeciles, denying their capacity to think and act as responsible adults and enclosing them in the bonds of protective paternalism.86

When called upon to interpret the fifth and fourteenth amendments of the United States Constitution,87 the courts of this nation have invariably held true to form in denying women judicial relief from sex discrimination.88 However, in the past five years there has been a trend toward court recognition of women's rights. While these decisions can hardly be said to constitute a wave of enlightenment, they do represent encouraging breakthroughs.

In Weeks v. Southern Bell Telephone and Telegraph Co.,89 the Fifth Circuit Court of Appeals followed EEOC guidelines in adopting a narrow interpretation90 of the BFOQ exception to Title VII of the Civil Rights Act of 1964.91 In so doing, the court found that a job which required women to lift in excess of 30 pounds in violation of state law did not constitute a job within the BFOQ exception.92 Therefore, an employer could not disregard individual capabilities of female applicants and reject women solely on the basis of sexual stereotypes.

.... Title VII rejects.... romantic paternalism .... and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to

85. See p. 12 supra. See also Ginsberg, supra note 23, at 1015.
86. Brown, supra note 32, at 872.
87. CITIZENS' ADVISORY COUNCIL, supra note 8, at 5.
89. 408 F.2d 228 (5th Cir. 1969).
90. Id., at 232-5. See also p. 14 supra and supra note 69.
92. 408 F.2d 228, 234-5 (5th Cir. 1969).
determine whether the incremental increase in remuneration for strenuous, dangerous, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on an equal footing.93

The Ninth Circuit Court of Appeals reached a similar result in Rosenfeld v. Southern Pacific Co.94 There the court found that women could not be excluded under the BFOQ exception from "arduous" jobs which would force women to work excessive hours and lift weights in excess of 50 pounds, both in violation of California state labor laws.95 The court stressed that each employee must be judged on his or her individual abilities.96 But more importantly, the court expressly held that state protective legislation, based on stereotyped characteristics generally attributed to one sex, which prohibits employers from hiring women to perform tasks in violation of such legislation does not constitute a bona fide occupational qualification.97

As promising as the Weeks and Rosenfeld decisions were, they did not deal with sex discrimination on a constitutional level. That task was left to the California Supreme Court in the landmark decision Sail'er Inn, Inc. v. Kirby.98

In Sail'er Inn several employers hired women bartenders in violation of a California statute which prohibited women from tending bar except in certain narrow situations.99 These employers sought a mandate to prevent the Department of Alcoholic Beverage Control from revoking their liquor licenses. The California Supreme Court found that the statute was in conflict with article XX, section 18 of the state constitution which prohibits the disqualification of any person "because of sex, from entering or pursuing" any lawful profession.100 The state statute was therefore invalid. The court also found that the statute was in conflict with Title VII of the 1964 Civil Rights Act,101 and that it must therefore

93. Id., at 256.
94. 444 F.2d 1219 (9th Cir. 1971).
95. CAL. LABOR CODE §§ 1350, 1350.5 (West 1971) prohibit an employer from working female employees more than 48 hours per week or more than eight hours in any twenty-four hour period; CAL. LABOR CODE § 1251 (West 1971), prohibits an employer from requiring or permitting a female employee from lifting any object weighing fifty pounds or more. It is significant to note that, as a result of the Rosenfeld opinion, the California State Welfare Commission no longer enforces those laws.
96. 444 F.2d 1219, 1225 (9th Cir. 1971).
97. Id., at 1221.
98. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
100. 5 Cal. 3d 1, 9-10, 485 P.2d 529, 533-4, 95 Cal. Rptr. 329, 333-4 (1971).
yield to the federal law under the supremacy doctrine. In so finding, the California court followed EEOC guidelines in narrowly interpreting the BFOQ exception to Title VII and in denying a claim for such an exception.

But the California court did not stop there and proceeded to tackle the equal protection arguments advanced by the petitioners head on. The court first examined the standards traditionally applied to test classifications under the Equal Protection Clause of the fourteenth amendment. The court explained that classifications are subject to strict judicial scrutiny where members of a class are being denied a fundamental right or where the classification itself is suspect. The court then proceeded to hold that the right to work was a fundamental right.

The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness ... Limitations on this right may be sustained only after the most careful scrutiny.

Having found that the statute denied a fundamental right to the members of the class it governed, the California Supreme Court had no need to go any further before applying the strict scrutiny standard. Nevertheless, the court did go on and became “the first state court of last resort to hold that sex is a suspect classification.” The language of the court stresses that the individual must be judged by personal capabilities and characteristics, not by sexual stereotypes.

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (Citation omitted.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members.

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102. 5 Cal. 3d 1, 10-15, 485 P.2d 529, 534-8, 95 Cal. Rptr. 329, 334-8 (1971).
103. Id., at 13-14, 485 P.2d at 537, 95 Cal. Rptr. at 337.
104. U.S. Const. amend. XIV, § 1.
105. 5 Cal. 3d 1, 16, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971).
106. Id., at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339.
107. Id., at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341; Johnston and Knapp, supra note 1, at 690.
108. 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).
Having found the right to work a fundamental right and sex a suspect classification, the court applied the strict scrutiny standard to the California statute and found it in conflict with the Equal Protection Clauses of the fourteenth amendment of the United States Constitution and article I, sections 11 and 21 of the California Constitution. Since the state failed to establish a compelling state interest which required the continued existence of the state statute in the face of this conflict, the statute was unconstitutional and therefore invalid.

Sail'er Inn is a remarkable opinion. Perhaps the most remarkable aspect of the opinion is the simplicity and clarity of its reasoning. But a landmark court decision is only as significant as its effects. To be sure, Sail'er Inn serves notice on the California legislature that, in the future, sex classifications will be subjected to intense judicial examination before being allowed to stand. But more importantly, Sail'er Inn serves as a challenge to the Supreme Court of the United States to re-examine its own position on the validity of sex classifications.

In Reed v. Reed the Supreme Court was given an opportunity to answer that challenge when the Court was called upon to review an Idaho statute which provided that as between persons equally qualified to administer estates males must be preferred to females. The Court held that this statute violated the Equal Protection Clause of the fourteenth amendment.

The Equal Protection Clause . . . [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

The Court found that the purpose of the statute was judicial expediency and held that sex discrimination for such a purpose was the "very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the fourteenth amendment . . . ."

109. Id., at 22, 485 P.2d at 543, 95 Cal. Rptr. at 345.
110. Id., at 20-22, 485 P.2d at 541-3, 95 Cal. Rptr. at 341-3.
111. Id., at 22, 485 P.2d at 543, 95 Cal. Rptr. at 343.
112. Johnston and Knapp, supra note 1, at 690.
116. Id., at 75-6.
117. Id., at 76.
The test espoused by the Supreme Court in Reed was one of reasonableness. The Court made it clear that a purely arbitrary statutory provision would not be tolerated. However, at the same time the Court also seemed to imply that if the state could demonstrate a legitimate or reasonable purpose for the discrimination, and apparently expediency is not such a reasonable purpose, the statute would be maintained. Therefore, while the Reed decision opened a door through which statutory sex discrimination could be challenged, it placed the burden of that challenge heavily upon the shoulders of women, the victims of the discrimination.

Nonetheless, under the influence of Reed and Sail'er Inn several state practices fostering sex discrimination have been declared unconstitutional. An example of this is La Fleur v. Cleveland Board of Education. There the Sixth Circuit Court of Appeals was faced with a local school board rule imposing involuntary unpaid maternity leaves of absence five months prior to and at least three months after delivery. The state interest asserted to support this rule was “continuity of classroom instruction and relief of burdensome administrative problems.” Citing both Reed v. Reed and Sail'er Inn, Inc. v. Kirby the court held that the school board rule was an “arbitrary and unreasonable” way to accomplish the state purpose because it singled out women and pregnancy without touching other types of illnesses and disabilities. The statute was therefore unreasonable and in conflict with the Equal Protection Clause of the fourteenth amendment.

A statutory sex classification came up before the United States Supreme Court again in Frontiero v. Richardson. In that case a female military officer challenged two federal statutes which permitted “a serviceman to claim his wife as a ‘dependent’ without regard to whether she is in fact dependent upon him for any part of her support”, while requiring a service-woman to prove her husband “is in fact dependent upon her for over half of his support” before claiming him as a dependent for benefit purposes. Eight Justices agreed that the statutes, in so far as they provided for

118. 465 F.2d 1185 (6th Cir. 1972).
119. Id., at 1187.
different treatment for women than for men, were in conflict with the Due Process Clause of the fifth amendment of the federal Constitution and were therefore unenforceable as to those provisions which discriminated on the basis of sex. Only Justice Rehnquist dissented.\textsuperscript{123}

While there was no majority opinion in the decision, Justices Douglas, White, and Marshall did join in Mr. Justice Brennan's plurality opinion. That opinion, which echoes the reasoning of the California Supreme Court in \textit{Sail'er Inn, Inc. v. Kirby},\textsuperscript{124} held that

\begin{quote}
... classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.\textsuperscript{125}
\end{quote}

In so holding, Justice Brennan described \textit{Reed v. Reed}\textsuperscript{126} as a "departure from 'traditional' rational basis analysis with respect to sex-based classifications" which the Court was extending only slightly by labelling sex a suspect classification in the case at hand.\textsuperscript{127} Justice Brennan also found support for his opinion in the recent passage of the Equal Rights Amendment by Congress.\textsuperscript{128}

Mr. Justice Stewart concurred in a one sentence opinion citing \textit{Reed}.\textsuperscript{129}

Justices Powell, Burger, and Blackmun joined in a separate concurring opinion which emphasized three major points. First, since the statutes under examination provided for sex discrimination merely to achieve administrative convenience, the \textit{Reed} decision was sufficient precedent to support a finding that the classification was unreasonable and in violation of the Due Process Clause of the fifth amendment. Second, it was therefore unnecessary to "characterize sex as a suspect classification" for the purposes of this decision. Third, the Court should refrain from characterizing sex as a suspect classification at this time because in so doing the Court would be "pre-empting" a major political decision, the ratification of the Equal Rights Amendment, which should be decided by the various state legislatures, not by the Court.\textsuperscript{130}

\begin{footnotes}
\item 123. 411 U.S. 677, 691 (1973).
\item 124. Pp. 19-22 supra.
\item 125. 411 U.S. 677, 688 (1973).
\item 126. Pp. 22-3 supra.
\item 128. 411 U.S. 677, 687-8 (1973).
\item 129. \textit{Id.}, at 691.
\item 130. \textit{Id.}, at 691-2.
\end{footnotes}
The specific effects of *Frontiero* are unclear. It is certain that four Supreme Court Justices now consider sex a suspect classification. But since three, and probably four, of the other Justices found it unnecessary to reach such a conclusion to strike down the challenged statutes, the position of a majority of the Court is still unknown. However, it appears safe to assume that were a situation to present itself in which a statute providing for sex discrimination could be struck down only by finding sex a suspect classification, one of these four concurring Justices would do so.\(^{130a}\)

Several lower courts have accepted this assumption.

In *Smith v. City of East Cleveland*\(^{131}\) a federal district court in Ohio applied *Frontiero* to city police hiring standards which required all applicants to be at least five feet eight inches in height and weigh 150 pounds. Since these standards had the effect of excluding nearly all women and were not demonstrably related to job performance, the court found that the city hiring standards were in conflict with the Equal Protection Clause of the fourteenth amendment.\(^{132}\)

An even more significant decision was handed down by another federal district court in *Healy v. Edwards*.\(^{133}\) There the court was faced with a Louisiana constitutional provision and its accompanying statute which exempted women from jury service unless they

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\(^{130a}\) NOTE: Shortly after this article was submitted for publication, the Supreme Court handed down its decision in *Kahn v. Sherin*, 94 S. Ct. 1734 (1974), in which a Florida statute giving widows, *but not widowers*, a $500 exemption from property taxation was upheld. The majority opinion in that case strongly implied that the Fourteenth Amendment permits *affirmative* state action to remedy the effects of past sex discrimination. However, two things must be pointed out which may diminish the effect of this decision. First, the statute in question dealt with taxation, an area in which the states have traditionally had broad discretion in making classifications. *Kahn v. Sherin*, 94 S. Ct. 1734, 1737. Second, the Justices who joined in the majority opinion comprised an unlikely combination: Chief Justice Burger, Justices Douglas, Stewart, Powell, Blackmun and Rehnquist. Justices Brennan, Marshall and White dissented, asserting positions that may be more reconcilable with *Frontiero* v. Richardson, 411 U.S. 677 (1973), than that in the majority opinion. Undoubtedly, Mr. Justice Douglas would have joined the ranks of the dissenters had the state statute discriminated against women rather than for them. Whether any of the opinioning Justices in the majority opinion would have made a similar shift in position is unclear.


\(^{132}\) Id., at 1144.

filed a written declaration of their desire to serve. After holding that all litigants, especially female litigants, had sufficient standing to challenge the provisions, the court examined the United States Supreme Court decision in Hoyt v. Florida, which had upheld the constitutionality of an almost identical Florida statute in 1961. The court concluded that the Reed and Frontiero decisions had destroyed the basis for the Supreme Court's holding in Hoyt and that the district court would therefore be justified in refusing to follow the Hoyt opinion. Guided by Reed and Frontiero the court then found that since women were just as qualified to serve as jurors as men were, the Louisiana statute violated the fourteenth amendment Equal Protection rights of all female litigants. The court also found that since the statute produced juries almost exclusively male, such juries were not “truly representative of the community,” and litigants, both male and female, were thereby denied Due Process of Law, also in violation of the fourteenth amendment.

Similar reasoning can be found in Bowen v. Hackett and Ballard v. Laird. In Bowen a federal district court struck down as violative of the Equal Protection Clause those portions of Rhode Island's unemployment compensation and temporary disability insurance laws which required women to prove the total dependency of children for whom they claimed dependency allowance increments, without requiring similar proof from men. In so holding, the court observed that the argument that the statute “recognized that in most cases the main support of minor children is the father, is but another phrasing of the argument of administrative convenience” which was rejected in Reed and Frontiero. In like fashion, another district court in Ballard v. Laird held that a federal statutory scheme which gave female naval officers preferential treatment by guaranteeing them 13 years of active commissioned service without granting male officers an equivalent guarantee was in conflict with the Due Process Clause of the fifth amendment.

137. FLA. STAT., § 40.01(1) (1959).
139. Id., at 1113-4.
140. Id., at 1115-6.
amendment. The court followed Reed and Frontiero in holding that the statutory scheme constituted an "invidious discriminatory practice" which could not survive judicial scrutiny because there did not exist a sufficient government interest to support it. Fiscal expense was not such a compelling government interest as "to justify infringement of due process."146

Finally, in Aiello v. Hansen147 a federal district court in California invalidated a state unemployment insurance statute148 which exempted pregnancy-related work loss from the coverage of the state disability insurance program until 28 days after the termination of the pregnancy. The court felt that it was unnecessary to determine whether sex discrimination was suspect, but found that the statute was invalid under the standards developed in the Reed decision.149 The logic of the decision is illuminating. The court first determined that the purpose of disability insurance is to compensate for wages lost by disabled and therefore unemployed individuals.150 The court then found that pregnancy-related disability creates economic hardship identical to that suffered by workers suffering from other disabilities, thereby implying that the classification was arbitrary because it had no basis for differentiation.151 Finally the court held that the state interest in preserving the "fiscal integrity" of the program could not be accomplished by discriminating against pregnancy-related disabilities because such discrimination does not have a "fair and substantial relation to the object of the legislation."152 If the state wished to preserve the program fiscally, it would have to place a ceiling on all claims or employ some other cost-saving method which would not arbitrarily exclude a certain type of disability.153 The statute as it stood was unconstitutional.153a

150. Id., at 797.
151. Id.
152. Id., at 798.
153. Id., at 799.
153a. NOTE: After this article was submitted for publication, the United States Supreme Court reversed the district court's decision. The Court did not find the statute to be in violation of the right to equal protection. According to the majority, per Mr. Justice Stewart, "The state is
As the above cases demonstrate, judicial relief from sex discrimination can indeed be obtained under the present federal and state laws and constitutions. But court decisions which depend upon broad interpretations of vague constitutional and statutory language are limited by the judges who hand them down; and judges must reflect their own social and cultural upbringing. They are restrained by the “strictures of their own conditioning.” Each time a court decision is won by an advocate for equal rights, a prior battle must already have been won in the minds of the judges rendering that decision. When that prior battle is lost or not fought at all, the attempt to gain court recognition of women’s rights is doomed to failure. Only a definitive denunciation of sex discrimination which demands a uniform judicial approach can remove this heavy burden from those who seek their equal rights under the Constitution.

THE WHY AND WHEREFORE OF THE EQUAL RIGHTS AMENDMENT

In 1848 in Seneca Falls, New York, this nation’s movement for women’s rights was begun by several hundred men and women with the Seneca Falls Declaration of Rights and Sentiments. Nonetheless, today, more than 125 years later, sex discrimination is still very much alive and flourishing in this country. While...
it may be possible to gain sexual equality through piecemeal legislation and random court decisions, such methods have proven to be much too haphazard and to require much too much time to be acceptable.\footnote{156}{SENATE JUDICIARY COMM., EQUAL RIGHTS FOR MEN AND WOMEN, supra note 10, at 6; Hearings, supra note 15, at 16 (testimony by Rep. Griffiths, May 5, 1970); 116 CONG. REC. 35452 (1970) (remarks of Senator Bayh).}

It appears that sex discrimination, like race discrimination, can be dealt with effectively only through a broad and permanent national commitment, a Constitutional amendment.\footnote{157}{Johnston and Knapp, supra note 1, at 738-741.}

The Equal Rights Amendment is such a commitment. It provides:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.\footnote{158}{U.S. CONST. amend. XXVII, proposed (March 22, 1972).}

Critics of this amendment argue that it is unnecessary, that the present Constitution is sufficient to eliminate sex discrimination, or that piecemeal legislation can accomplish the task more swiftly and precisely. These criticisms are unsound. When the Constitution was adopted in 1789, women were not considered equal to men; therefore, the Constitution was not drafted to apply to women.\footnote{159}{Hearings, supra note 14, at 22 (testimony by Margaret C. Leonard, Vice Chairman for the Nat'l Women's Party, May 6, 1970), 2B (testimony by Jean Witter, Chairman, E.R.A. Comm., Nat'l Organization of Women, May 5, 1970).}

Nor had this attitude changed significantly by the time of the adoption of the fourteenth amendment. Hence, each time a court grants Constitutional rights to women, it is extending the words of the Constitution beyond their original meaning. While the United States Supreme Court has shown little hesitation to make such extensions, history serves as a great source of judicial inertia. Even if the ERA is unnecessary because it merely repeats guarantees found elsewhere in the Constitution, its adoption would do
A truth does not become a falsehood by being spoken a second time.

As for piecemeal legislation, the delays inherent in that approach have already been noted. The ERA would fulfill the “need for a single coherent theory of women's equality before the law, and for a consistent nationwide application of this theory,” something piecemeal legislation cannot do. But more importantly, the Equal Rights Amendment would serve as a great symbol of this nation's commitment to ending sex discrimination. Not only would it provide a much needed impetus to state legislatures, but it would also encourage individual citizens to re-examine their own behavior patterns which result in sexual bias. Again, piecemeal legislation is unable to accomplish such a feat.

Pervasive discrimination against women is deeply entrenched in the United States. To change this pattern will require a broad national commitment to the ideal of equality between the sexes under law. When one examines the historical and legal context in which sex discrimination has flourished, the need for a constitutional amendment to reverse the process becomes almost self-evident.

Even the President's own Task Force on Women's Rights and Responsibilities has recommended this nation make such a commitment in order to eliminate sex discrimination.

But what will the Equal Rights Amendment do? What will be its effects? While it is clear the ERA will have no application to personal conduct, since the amendment applies only to federal, state, and local governments, it will define a legal system under which “each person will be judged on the basis of individual merit” and not on the basis of sexual stereotypes. However, this produces different results in different situations.

Under the ERA when a court is called upon to judge a statute which provides for sex discrimination on the basis of sexual stereotypes, it will have two choices: either invalidate the entire statute or extend the coverage of the statute to both sexes. Where

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160. ISSUES, supra note 8, at 11.
161. P. 31 supra.
162. Brown, supra note 33, at 883.
164. ISSUES, supra note 8, at 11-12.
165. Id., at 10.
166. A Matter of Simple Justice, supra note 20, at III.
167. Ginsberg, supra note 24, at 1019.
168. Citizens' Advisory Council, supra note 8, at 11; Brown, supra note 32, at 713.
the statute "serves only to restrict, deny or limit the freedoms or rights of one sex," the court will undoubtedly invalidate the entire statute.\textsuperscript{169} In fact, the Constitutional prohibition against ex post facto laws will require this invalidation in the case of a criminal statute.\textsuperscript{170} Therefore laws in this category must be revised by the legislatures. On the other hand, laws which confer a benefit may be extended rather than invalidated. In determining whether a statute should be extended, a court must consider the feasibility of such an extension, whether it follows or destroys the legislative intent in enacting the statute originally, and whether the extension includes a small or a large class within its coverage.\textsuperscript{171} Admittedly there is a reluctance on the part of courts in general to judicially extend the coverage of a statute, but there is also ample precedent for such extensions.\textsuperscript{172}

Examples of laws which would be invalidated are: criminal statutes which provide for longer or potentially longer sentences—whether by statutory mandate or through indeterminate sentencing procedures—for one sex than for the other;\textsuperscript{173} state laws which prohibit married women from entering into a business independent of their husbands without court approval; entrance requirements in state educational institutions which demand higher grades of women than of men; and government benefit programs which deny or reduce benefits to individuals solely because of their sex. Examples of legislation which would probably be extended under the amendment are: interspousal support requirements; many state protective labor laws; and community property laws which vest control in the husband but not in the wife.\textsuperscript{174} Unique examples of those statutes which will require judicial legislating are those

\textsuperscript{169} \textsc{Citizens' Advisory Council}, \textit{supra} note 8, at 11; \textsc{Brown}, \textit{supra} note 32, at 916.
\textsuperscript{170} \textsc{Brown}, \textit{supra} note 32, at 915.
\textsuperscript{171} \textsc{Id.}, at 914-15.
\textsuperscript{172} \textit{E.g.}, \textsc{Potlatch Forest v. Hays}, 318 F. Supp. 1368 (E.D. Arkansas, W.D. 1970), where premium overtime pay for men was raised to the higher level required by the statute to be paid to women when the Arkansas law was challenged under the Equal Pay Act (29 U.S.C. § 206(d)); \textsc{Bowe v. Colgate-Palmolive Co.}, 416 F.2d 711 (7th Cir. 1969), where weight-lifting restrictions were extended to men; and \textsc{Bowen v. Hackett}, 361 F. Supp. 854 (1973), where military service guarantees were extended to men.
\textsuperscript{173} \textsc{Brown}, \textit{supra} note 32, at 965-966.
\textsuperscript{174} Note that California has already taken steps to meet this demand pp. 14-16 \textit{supra}.
laws which contain age limitations. Age limitations which restrict the freedom of one sex longer than that of the other will be reconstructed so that the lower age will apply to both sexes. On the other hand, age limitations which confer a benefit to one sex for a longer period than to the other will be reconstructed so that the higher age will apply.175

Assuredly a great deal of legislative and judicial activity will be required by the ratification of the ERA; every new Constitutional amendment demands such activity to implement and to clarify its exact meaning. Under the third section of the ERA itself, legislative revision will be given a two year grace period before the amendment takes effect. In addition, such revision will be taking place on a nationwide scale so that state legislatures can look to each other and to undoubtedly innumerable law review articles for guidance and assistance.176

Opponents of the principle for which the Equal Rights Amendment stands raise three major arguments against ratification. First, men and women would be compelled by the ERA to share the same toilet and sleeping facilities. This is patently absurd. No court in this nation would so interpret the Equal Rights Amendment. In Griswold v. Connecticut177 the Supreme Court recognized a general Constitutional right to privacy. Undoubtedly, this decision would be extended to permit and also to require separate facilities for the carrying out of personal functions . . . even under the ERA.178

Second, law pertaining to rape and childbearing will be unconstitutional. This is also an erroneous conclusion. Laws, such as those forbidding forcible rape or pertaining to childbearing, which can only apply to one sex, no matter how the legislature phrases such laws, because they directly concern physical characteristics found solely in one sex, will remain intact under the ERA.179 It is only those laws, providing for different treatment of individuals because of characteristics which are not unique to one sex, which are merely disguised forms of invidious sex discrimination that the Equal Rights Amendment will forbid. An example of this latter type of statute is that provision of the unemployment code of a

175. CITIZENS' ADVISORY COUNCIL, supra note 8, at 13.
177. 381 U.S. 479 (1965).
178. SENATE JUDICIARY COMM., EQUAL RIGHTS FOR MEN AND WOMEN, supra note 10 at 7; CITIZENS' ADVISORY COUNCIL, supra note 8 at 14, Brown, supra note 32, at 900-02.
179. CITIZENS' ADVISORY COUNCIL, supra note 8, at 13; Brown, supra note 32, at 894.
state which allows a woman to claim benefits because she is forced to refrain from working in order to raise the family children, but which denies such benefits to a man in an identical situation.

The third objection raised is that women would become subject to the draft. And why not??!!! There is no reason why the duty of defending this country should fall solely on the shoulders of its male citizens. In this highly technological age, most military jobs do not require the Spartan physical attributes demanded by the battlefield. Under the ERA women would not be required to serve where they are not physically suited to the job any more than men are required to do so today. All the Equal Rights Amendment demands is that each individual be judged on his or her own individual capabilities and characteristics. Moreover, the trade skills learned in the service, which would open up many new job areas to women in civilian life, and the government benefits which accrue to all service personnel would help eliminate sex discrimination in our society as a whole.

The Equal Rights Amendment is not a cure-all, a panacea for every "invidious" effect of sex discrimination in this nation. Prejudices will linger long after it is ratified and its implementing legislation passed. But the ERA will "provide protection for those who are most abused, and . . . begin the process of evolutionary change by compelling the insensitive majority to re-examine its unconscious attitudes."

The amendment will not eradicate, immediately upon passage, all the unduly discriminatory habits and customs of this country. No amendment or statute could immediately solve the whole problem of unfair discrimination based on sex. The bulk of the prejudice and unfairness against women does not stem from the command of specific statutes. It comes from socially engrained ideas about

181. Of course, military regulations containing unnecessary and arbitrary physical requirements, such as one which would require all military personnel above the rank of lieutenant to be five feet ten inches in height and weigh at least 170 pounds, which operate to exclude virtually all women from certain positions in the military because of their sex and without regard to the demands of the position or the ability of an individual woman to meet those demands, would be invalid under the ERA.
the "proper role of women."

... this amendment will go a long way toward providing the kind of dignity and legal status to which every American is entitled. It would prod the courts into taking long-overdue action.184

The ratification of the Equal Rights Amendment is a beginning, a symbol of the commitment of this nation to equality and freedom for each and every individual. After all, that is what this country is all about.