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# The Law Must Reflect the New Image of Women

By MARTHA W GRIFFITHS\*

**T**RADITIONALLY our society has viewed men as providers and women as homemakers; men as protectors and women as those in need of protection; men as leaders and women as followers. The law has reflected this view of women but the image no longer fits the facts.

Dramatic changes in American life style have created new roles and a new image for women. Today women are considerably more likely to finish high school and attend college than they once were. From 1960 to 1970, the percentage of white women, 20 to 29 years old, who completed high school or some college rose from 66 percent to 80 percent; among black women, the corresponding percentage climbed from 43 percent to 63 percent.<sup>1</sup> And during the same decade the number of women with some college education increased 160 percent, as compared to 100 percent for men.<sup>2</sup>

Today young women are not only better educated, but also more likely to live independently than they once were. From 1960 to 1970, the proportion of adult women living alone or with unrelated roommates jumped 50 percent—to 7.6 million, or about 10 percent of all adult women.<sup>3</sup> The number of women 20 to 34 years old in this category rose at the fastest rate, more than doubling.<sup>4</sup> By 1970 more than 10 percent of American families were headed by women<sup>5</sup> and during the same decade the proportion of women 20 to 24 years old who were single climbed from 28 percent to 36 percent.<sup>6</sup> Correspondingly, dur-

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1. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SOME FACTS ABOUT WOMEN IN THE UNITED STATES, table 13 (Apr. 1, 1971) [hereinafter cited as SOME FACTS ABOUT WOMEN].

2. Rosenthal, *For Women, a Decade of Widening Horizons*, N.Y. Times, Apr. 11, 1971, at 60, col. 4 [hereinafter cited as Rosenthal].

3. *Id.*

4. SOME FACTS ABOUT WOMEN, *supra* note 1, at table 8.

5. *Id.* at table 9.

6. *Id.* at table 5.

ing the 1960's the number of children born to women younger than 25 declined.<sup>7</sup>

Today women are also more likely to work outside the home than they once were. From 1960 to 1970 the percentage of adult women in the labor force jumped from 37 percent to more than 43 percent.<sup>8</sup> By 1970 women comprised 38 percent of the professional and technical labor force, as compared to 28 percent in 1950.<sup>9</sup>

In short, today the American woman is considerably more likely to finish high school, attend college, live alone, marry late, bear few children, and work outside the home than she was in 1960. This is the new image of women.

Women seek the full responsibilities and rights of citizenship, and the courts and the legislatures should aid them in their search. In areas of the law where progress has been made toward assuring the elimination of sex discrimination, such as the areas of employment and federal jury service, Congress has led the way in bringing about change. But much more federal and state legislation is needed. In addition, to set the legislative wheels in motion and to provide constitutional protection against sex discrimination, we need an equal rights amendment to the Constitution.

### **Congressional Efforts to Eliminate Sex Discrimination**

In areas of the law where progress has been made toward assuring the elimination of sex discrimination, Congress has taken the lead in bringing about change. Congressional involvement has been most notable in the areas of federal jury service and employment. The Civil Rights Act of 1957<sup>10</sup> and the Jury Selection and Service Act of 1968<sup>11</sup> have established more equitable selection standards for the former; the Equal Pay Act of 1963<sup>12</sup> and Title VII of the Civil Rights Act of 1964<sup>13</sup> provide broad protection against discrimination in the latter.

#### **Jury Service**

Court decisions reflect the influence of federal law in guaranteeing

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7. *Id.* at table 11.

8. Rosenthal, *supra* note 2, at 60, col. 5.

9. SOME FACTS ABOUT WOMEN, *supra* note 1, at table 14.

10. Act of Sept. 9, 1957, Pub. L. No. 85-315, 71 Stat. 634.

11. 28 U.S.C. §§ 1861-69 (Supp. V, 1970).

12. 29 U.S.C. § 206(d) (1964).

13. 42 U.S.C. §§ 2000e to e-15 (1964), *as amended*, 42 U.S.C. § 2000e(b) (Supp. V, 1970).

equal treatment for women in the selection of federal jurors. In *Ballard v. United States*<sup>14</sup> the Supreme Court reversed a California criminal conviction because women had been intentionally and systematically excluded from the jury panel. The Court rested its decision on Congress's intent to make the federal jury a truly representative cross-section of the community.

The systematic and intentional exclusion of women, like the exclusion of a racial group, . . . or an economic or social class . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme.<sup>15</sup>

By the Civil Rights Act of 1957, Congress entitled women to sit on all federal juries even where they were ineligible under state law. The act provided that "Any citizen of the United States who has attained the age of twenty-one years . . . is competent to serve as a grand or petit juror . . ." <sup>16</sup> On the basis of this act, the United States Court of Appeals for the Third Circuit recently invalidated a jury selection procedure which discriminated on the basis of sex.<sup>17</sup> Potential jurors had been drawn from a list of 350 names, 246 of which were always men and only 104 of which were women. The court found unacceptable any exclusion of women from federal jury service, regardless of whether that exclusion is "total, as in *Ballard*, or only partial, as here . . . . Any deliberate interference—irrespective of purpose—with a random jury selection from a list of all qualified citizens cripples the cross-section ideal."<sup>18</sup>

The drive to insure equal female representation on federal juries culminated in the Jury Selection and Service Act of 1968.<sup>19</sup> Faced with evidence of continued discrimination against women in the selection of federal jurors, Congress expressly prohibited the exclusion of women as a group from federal jury service.<sup>20</sup>

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14. 329 U.S. 187 (1946).

15. *Id.* at 195 (citations omitted). In 28 U.S.C. § 411 (1940) Congress had required that federal jurors have the same qualifications as those of the highest court in the state, and California law made women eligible for jury service.

16. Act of Sept. 9, 1957, Pub. L. No. 85-315, § 152, 71 Stat. 638, *as amended*, 28 U.S.C. § 1861 (Supp. V, 1970).

17. *United States v. Zirpolo*, Nos. 18,137-18,142 (3d Cir. Feb. 18, 1971). Although *Zirpolo* was decided after Congress explicitly prohibited sex discrimination in the selection of federal jurors, see note 15 & accompanying text *supra*, that prohibition did not apply because the cause of action in *Zirpolo* arose prior to 1968.

18. *Id.*

19. 28 U.S.C. §§ 1861-69 (Supp. V, 1970).

20. *Id.* § 1862.

Unlike those who challenge the exclusion of women from federal juries, however, those who challenge the exclusion of women from state juries may not rely on the federal jury statute, but must depend on the equal protection clause of the Fourteenth Amendment. And not until 1966, twenty years after *Ballard*, did any court find unconstitutional the exclusion of women from state jury service. In *White v. Crook*<sup>21</sup> a federal district court in Alabama struck down an Alabama statutory provision which excluded all women from jury service.

Unfortunately, the decision in *White v. Crook* remains the exception rather than the rule. In *Hoyt v. Florida*,<sup>22</sup> for example, the United States Supreme Court held that Florida's automatic exemption of women from jury service, waivable only by affirmative registration for such service, did not violate the Fourteenth Amendment. The Court remained true to the traditional image of women:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.<sup>23</sup>

And in a recent appeal from a Louisiana criminal conviction, the Supreme Court of Louisiana refused even to consider the charge that women had been systematically excluded from the jury.<sup>24</sup> Without giving reasons for its refusal, the court flatly stated that the objection to the jury selection procedure was "clearly without substance," citing *Hoyt v. Florida* for support.<sup>25</sup>

### Employment

Congressional efforts to eliminate sex discrimination have also concentrated on the area of employment. By the Equal Pay Act of 1963<sup>26</sup> Congress amended the Fair Labor Standards Act<sup>27</sup> to require equal pay for equal work, regardless of the sex of the worker. The equal pay provisions forbid an employer to discriminate on the basis of sex by paying employees of one sex at rates lower than he pays employees of the opposite sex for doing equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar

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21. 251 F. Supp. 401 (M.D. Ala. 1966).

22. 368 U.S. 57 (1961).

23. *Id.* at 61-62.

24. *State v. Alexander*, 255 La. 941, 233 So. 2d 891 (1970), *cert. granted*, 401 U.S. 936 (1971).

25. *Id.* at 950, 233 So. 2d at 894.

26. 29 U.S.C. § 206(d) (1964).

27. *Id.* §§ 201-19.

working conditions.<sup>28</sup> Moreover, an employer who is paying a wage rate differential in violation of the equal pay provisions may not reduce the wage rate of any employee in order to comply with these provisions.<sup>29</sup>

In *Shultz v. Wheaton Glass Co.*,<sup>30</sup> a decision awarding almost one million dollars in back pay and interest to about 2000 women workers, the United States Court of Appeals for the Third Circuit characterized the Equal Pay Act as follows:

The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.<sup>31</sup>

In addition to requiring equal pay for equal work, by Title VII of the Civil Rights Act of 1964<sup>32</sup> Congress prohibited discrimination in hiring, in firing, and in terms, conditions, and privileges of employment where such discrimination is based on race, color, religion, sex, or national origin. Although Title VII contains an exception to this basic prohibition permitting an employer to hire and employ employees on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,"<sup>33</sup> Congress intended this exception to be narrow indeed.

The case of *Phillips v. Martin Marietta Corp.*,<sup>34</sup> which came before the Supreme Court this year, presented the question of whether an employer violates Title VII by refusing to hire women who have pre-school age children while hiring men with children of the same age. Remanding the case to the lower court for fuller development of the record and for further consideration, the Supreme Court suggested that "[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for [applying the BFOQ exception]."<sup>35</sup> As Justice Marshall stated in his concurring opinion, "the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper

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28. *Id.* § 206(d)(1).

29. *Id.*

30. 421 F.2d 259 (3d Cir. 1970).

31. *Id.* at 265.

32. 42 U.S.C. § 2000e-2 (1964).

33. *Id.* § 2000e-2(e)(1).

34. 400 U.S. 542 (1971).

35. *Id.* at 544.

role of women to be a basis for discrimination."<sup>36</sup> By means of Title VII, Congress intended to free women from discrimination in employment, not to give legislative sanction to age-old prejudices.

The difference between judicial treatment of so-called protective labor legislation before and after the enactment of Title VII best shows the act's effectiveness. Beginning with its 1908 decision in *Muller v. Oregon*,<sup>37</sup> the Supreme Court has consistently ruled that state protective legislation for women is constitutional.<sup>38</sup> Upholding an Oregon statute which limited the working hours of women but not men, the Court in *Muller* based its decision on the following view of women:

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. . . . [S]he is so constituted that she will rest upon and look to him for protection . . . her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.<sup>39</sup>

In upholding the Oregon maximum hours law, the Supreme Court "protected" women from the opportunity to earn overtime pay and from entry into the higher-paying jobs which require overtime.

Like maximum hours legislation, minimum wage legislation which applies only to women primarily protects not women, but men's jobs. In *West Coast Hotel Co. v. Parrish*<sup>40</sup> the Supreme Court upheld a Washington law which fixed a minimum wage for women but not for men. As the four dissenting justices recognized, the statute in effect denied women "the right to compete with men for work paying lower wages which men may be willing to accept."<sup>41</sup>

In contrast to the Supreme Court's consistent affirmation of the constitutionality of state protective legislation, since the enactment of

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36. *Id.*

37. 208 U.S. 412 (1908).

38. See *Radice v. New York*, 264 U.S. 292 (1924); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914).

39. 208 U.S. at 421-22.

40. 300 U.S. 379 (1937).

41. *Id.* at 412 (Sutherland, J., dissenting).

Title VII courts repeatedly have held protective legislation which applies only to women to be invalid for conflicting with Title VII.<sup>42</sup>

### The Need for More Federal Legislation

Although Congress has done much to eliminate sex discrimination in employment by passing the Equal Pay Act and Title VII, more federal legislation is still needed. Legislation should be passed which will strengthen existing equal employment law, and action should be taken to eliminate sex discrimination from other areas of the law.

One immediate remedy for some of the inadequacies of current legislation would be passage of the proposed Women's Equality Act of 1971.<sup>43</sup> It would extend equal pay provisions of the Fair Labor Standards Act (FLSA)<sup>44</sup> to executive, administrative, and professional employees. Presently, all employees subject to a minimum wage under the FLSA are covered—more than 45 million persons—but almost one-half of the nation's work force has no equal pay protection.

The proposed act would also extend the coverage of Title VII. Although Title VII generally covers employers of more than 25 employees, teachers and employees of state and local governments are specially excepted.<sup>45</sup> The Equality Act would insure equal employment opportunity in the hiring of state and local government employees<sup>46</sup> and would remove the exemption of educational institutions from equal em-

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42. *E.g.*, *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Kober v. Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Garneau v. Raytheon Co.*, 3 FAIR EMP. PRAC. CAS. 215 (D.C. Mass. Mar. 1, 1971); *Utility Workers Local 246 v. Southern Cal. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970); *Caterpillar Tractor Co. v. Grabcic*, 317 F. Supp. 1304 (S.D. Ohio 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). *See also* *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (employer weightlifting policy, rather than state law, violates Title VII); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (same); *Potlatch Forests, Inc. v. Hays*, 2 Fair Emp. Prac. Cas. 1034 (E.D. Ark. 1970) (state overtime law not inconsistent with Title VII, since employer may be required to eliminate discrimination by paying overtime to male employees); *Jones Metal Prods Co. v. Walker*, 25 Ohio App. 2d 141, 267 N.E.2d 814 (1971) (state lunch break and maximum hours laws not inconsistent with Title VII, since if Title VII were interpreted to require employers to provide similar benefits to male employees or to limit their hours of employment, state statutes would not prevent employer from doing so). *But see* *Gudbrandson v. Genuine Parts Co.*, 297 F. Supp. 134 (D. Minn. 1968) (state weightlifting law not in violation of Title VII).

43. H.R. 916, 92d Cong., 1st Sess. (1971).

44. 29 U.S.C. § 206(d) (1964).

45. 42 U.S.C. §§ 2000e(b), 2000e-1 (1964).

46. H.R. 916, 92d Cong., 1st Sess. at 14 (1971).

ployment opportunity laws.<sup>47</sup>

Additionally, the Women's Equality Act would give greater power to the Equal Employment Opportunity Commission, the agency created to enforce Title VII's prohibition of discrimination. The commission may now seek to achieve compliance with Title VII only through negotiation and conciliation, sadly inadequate enforcement tools. Authority to bring suit is vested solely in the attorney general.<sup>48</sup> However, since July, 1965, when Title VII became effective, the attorney general has filed suit to correct an instance of sex discrimination only once.<sup>49</sup> And that one suit was settled by a consent decree which failed to address the issue of back pay. The proposed Women's Equality Act would give the Equal Employment Opportunity Commission cease and desist powers<sup>50</sup> to complement the attorney general's unused complaint procedure.

But, as mentioned earlier, this shoring-up of existing measures will not be sufficient. There is also a pressing need for new legislation attacking sex discrimination wherever present in federal law. For example, Congress should insure that social security benefits be available on an equal basis to both men and women. At present, when a wife dies, only a husband who supplied less than half of the family's income

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47. *Id.* at 15.

48. 42 U.S.C. § 2000e-6 (1964).

49. *United States v. Libbey-Owens-Ford Co.*, Civ. No. C-70-212 (N.D. Ohio), filed July 20, 1970, *consent decree filed* Dec. 7, 1970. In contrast to its lack of sex discrimination suits, the Justice Department has filed more than 50 suits challenging instances of racial discrimination. Since almost one-fifth of the complaints received by the Equal Employment Opportunity Commission during the fiscal year 1970 were complaints of sex discrimination, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FIFTH ANNUAL REPORT 53 (1971), the Justice Department's failure to bring sex discrimination suits under Title VII is most puzzling.

50. H.R. 916, 92d Cong., 1st Sess. at 20 (1971). In addition to the purposes of H.R. 916 discussed above, the bill *inter alia* has the following purposes: "to confer jurisdiction upon the district courts of the United States to provide for injunctive relief against sex discrimination in public accommodations . . . to authorize the Attorney General to institute suits to eliminate sex discrimination in public facilities and public education . . . to extend the jurisdiction of the Civil Rights Commission to include sex discrimination . . . to prevent sex discrimination in federally assisted programs . . . to prohibit sex discrimination in the sale, rental, or financing of housing or in the provision of brokerage services . . . to authorize the Secretary of Health, Education, and Welfare to make matching grants to States for the establishment of commissions on the status of women . . . to require the Secretary of Health, Education, and Welfare to make recommendations to equalize the treatment of the sexes under the Social Security Act, the Internal Revenue Code, and the Family Assistance Act; and to require the Commissioner of Education to conduct a survey and report to Congress on the denial of equal educational opportunity because of sex and make recommendations to eliminate such denial."

during the wife's lifetime may draw on his wife's social security.<sup>51</sup> But any wife, even the independently wealthy, may claim her husband's benefits.<sup>52</sup> The question of whether a surviving spouse should be entitled to claim the deceased spouse's social security benefits logically might rest on an evaluation of the surviving spouse's need, but for it to rest on the surviving spouse's sex is irrational. To correct this inequity, I have introduced in the Ninety-second Congress two bills which would eliminate the special dependency requirement for entitlement to widower's social security benefits.<sup>53</sup>

In addition to denying a self-supporting widower the right to his deceased wife's social security benefits, the present social security law negates a working wife's contributions to social security in another way. A working wife pays into social security on exactly the same basis as her working husband. But a working wife may not draw on both her husband's entitlement and her own unless hers is less than one half of his.<sup>54</sup> Moreover, the husband of a working wife may not draw on her entitlement unless his is less than one half of hers<sup>55</sup> and the husband shows that at least half of his support came from his wife.<sup>56</sup> If both husband and wife have worked at fairly low incomes, they may have paid as much or more in social security taxes than the man who was the sole family earner and paid at the top base, but they will draw less than the amount going to that man and his nonearning wife. To correct this unfairness, I have introduced in the 92d Congress a bill which would permit the payment of social security benefits to a married couple on their combined earnings record.<sup>57</sup>

Similarly, benefits which accompany federal employment or military service should not be conferred or denied on the basis of sex. Benefits should be available on the same basis to the family of a female employee as they are to the family of a male employee. Therefore, I have introduced in the Ninety-second Congress bills to provide for the treatment of the husbands, widowers, and children of female federal employees on an equal basis with the wives, widows, and children of male federal employees with respect to: (1) compensation for employees' work injuries,<sup>58</sup> (2) annuities available to the surviving spouses of deceased

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51. 42 U.S.C. § 402(f) (1964).

52. *See id.* § 402(e).

53. H.R. 3288 & 3289, 92d Cong., 1st Sess. (1971).

54. 20 C.F.R. § 404.313(a)(4) (1971).

55. *Id.* § 404.316(a)(4).

56. *Id.* § 404.316(a)(3).

57. H.R. 3289, 92d Cong., 1st Sess. (1971).

58. H.R. 3626, 92d Cong., 1st Sess. (1971).

foreign service employees;<sup>59</sup> and (3) preference eligible employment benefits available to spouses of deceased and disabled veterans, cost-of-living allowances in foreign areas, and regulations generally.<sup>60</sup> In addition, I have introduced bills to make medical care, dental care, and allowances available to the dependents of female members of the uniformed services on the same basis that they are available to the dependents of male members;<sup>61</sup> and to make veterans' benefits available to the husbands and widowers of female veterans on the same basis that they are available to the wives and widows of male veterans.<sup>62</sup>

Tax law is another area of federal law which fails to reflect the new image of women. Although the Internal Revenue Code per se does not discriminate between men and women, it does permit a child care deduction for a family with an income of less than \$6,000 per year.<sup>63</sup> Deductions for child care should be available to all. In addition, the expense of employing domestic help should be deductible. We allow deductions for business employees, thus in effect helping to pay the salaries of the employed.<sup>64</sup> But we refuse to help pay the wages of those who are employed as domestics, most of whom are women. If the expense of employing domestic help were deductible, women employed as domestics would receive higher pay, and their social security would be paid because their employers would insist.

### The Importance of An Equal Rights Amendment

Because sex discrimination is so deeply and extensively ingrained in our legal system, federal legislation alone cannot assure its elimination. An equal rights amendment to the Constitution is needed. In its essential language, the amendment which has been proposed provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>65</sup> Congress should approve this proposal and send it to the states for ratification.

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59. H.R. 3627, 92d Cong., 1st Sess. (1971).

60. H.R. 3628, 92d Cong., 1st Sess. (1971). The House passed H.R. 3628 on August 2, 1971. 117 CONG. REC. H7640 (daily ed. Aug. 2, 1971).

61. H.R. 2580, 92d Cong., 1st Sess. (1971).

62. H.R. 3965, 92d Cong., 1st Sess (1971).

63. INT. REV. CODE of 1954, § 214.

64. *Id.* § 162(a).

65. H.R.J. Res. 208. 92d Cong., 1st Sess. § 1 (1971). On October 12, 1971, the House passed the amendment by a vote of 354 to 23. 117 CONG. REC. H9392 (daily ed. Oct. 12, 1971). During the 91st Congress in August 1970 the equal rights amendment passed the House by the overwhelming vote of 350 to 15. However, during the 91st Congress the amendment never reached a final vote in the Senate.

The equal rights amendment would create a firm national policy against sex discrimination, thereby requiring changes in federal law which, if attempted without unifying impetus and direction, might take decades. Moreover, it would assure the elimination of sex discrimination more completely than federal legislation ever could, for, unlike federal legislation, the equal rights amendment would directly require state legislatures to revise discriminatory state laws. Unequal treatment of men and women in all areas of state law would have to be modified in accordance with the national policy of sex equality developed under the equal rights amendment. States could no longer confer or deny rights and responsibilities on the basis of sex.<sup>66</sup>

In addition, the amendment would provide constitutional protection against sex discrimination. The Fourteenth Amendment to our Constitution already provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause would seem to forbid state action which discriminates between men and women, but the Supreme Court has not found such action unconstitutional.<sup>67</sup> The equal rights amendment would guarantee constitutional protection against sex discrimination.

While the Supreme Court has been unwilling to depart from the traditional image of women, other courts have held sex discrimination to be unconstitutional. Judicial disagreement over the constitutionality of laws governing the selection of state jurors already has been discussed.<sup>68</sup> Disagreement over the unconstitutionality of state action which discriminates on the basis of sex also surrounds the issues of excluding members of one sex from state-supported universities and excluding women from certain occupations.

Just eleven years ago, in *Allred v. Heaton*<sup>69</sup> the Texas Court of Civil Appeals held that the exclusion of women from Texas A. & M., the third largest state-supported university in Texas, did not violate the equal protection clause of the Fourteenth Amendment. And one of the

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66. For discussions of the need for and the legal effects of the equal rights amendment see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216 (1971); Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225 (1971).

67. *But see* Morehead v. New York *ex rel.* Tiplado, 298 U.S. 587 (1936) (distinguished in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (overruled by *West Coast, supra*).

68. See text accompanying notes 21-25 *supra*.

69. 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960).

plaintiffs in *Allred* sought a degree offered at no other college or university in Texas. To support its decision, the court noted the history of Texas A. & M. as a men's school and the existence of 17 other state-supported colleges and universities in Texas, all of which were open to women. The court also relied on the status of Texas A. & M. as a military school, apparently ignoring the lower court's finding that "about 3500 students of [Texas A. & M.] are now not required to study to be connected with military or air training."<sup>70</sup>

In contrast to *Allred v. Heaton*, in 1970 a federal district court in Virginia held in *Kirstein v. Rector and Visitors of University of Virginia*<sup>71</sup> that the Fourteenth Amendment's equal protection clause forbids Virginia to "deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state."<sup>72</sup> Like Texas A. & M., the University of Virginia at Charlottesville had a long history as a men's school. And like Texas, Virginia supported numerous other colleges and universities which were open to women.

The Supreme Court refused to review the decision in *Allred v. Heaton* and the University of Virginia did not appeal the *Kirstein* decision.<sup>73</sup> But this year the Supreme Court reaffirmed the trend of its past thinking. In *Williams v. McNair*<sup>74</sup> the Federal District Court of South Carolina held that the exclusion of men from state-supported Winthrop College did not violate the Fourteenth Amendment's equal protection clause. Although the district court rested its decision on the merit of the theory that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex,"<sup>75</sup> the court did not suggest that Winthrop College had in fact engaged in "educational specialization." In fact, the court found the argument of the male plaintiffs weak because it failed to suggest "that there is any special feature connected with Winthrop that will make it more advantageous educationally to them

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70. *Id.* at 253.

71. 309 F. Supp. 184 (E.D. Va. 1970).

72. *Id.* at 187. The court went on to observe that "Unquestionably the facilities at Charlottesville do offer courses of instruction that are not available elsewhere. Furthermore, . . . there exists at Charlottesville a 'prestige' factor that is not available at other Virginia educational institutions." *Id.*

73. At the time *Kirstein* was decided, the University of Virginia had agreed to a plan under which women eventually would be admitted at Charlottesville on an equal basis with men.

74. 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

75. *Id.* at 137.

than any number of other State-supported institutions."<sup>76</sup> By suggesting that the policy of sex discrimination would have been less justified if Winthrop had engaged in education specialization, the court contradicted its conclusion that the theory of educational specialization justified Winthrop's policy of sex discrimination. Since the Supreme Court affirmed *Williams v. McNair*<sup>77</sup> without opinion, it is impossible to know whether or not the Court would find the exclusion of the members of one sex from a state-supported university constitutional under all circumstances.

Like the exclusion of the members of one sex from state-supported universities, the exclusion of women from occupations<sup>78</sup> is a muddy area of constitutional law. In *Goesaert v. Cleary*,<sup>79</sup> decided in 1948, the Supreme Court upheld a Michigan statute which provided that no woman could be licensed as a bartender unless she was the wife or daughter of the male tavern owner. The Court found no denial of equal protection. In fact, the Court commented that Michigan could deny bartender licenses to all women:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes . . . .<sup>80</sup>

In spite of *Goesaert*, during the past two years several municipal ordinances prohibiting the employment of women as bartenders have been struck down as unconstitutional. In *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*<sup>81</sup> the Supreme Court of New

76. *Id.* at 138.

77. 401 U.S. 951 (1971).

78. Through 1969, seventeen states prohibited by law the employment of women in or about mines. Nine states prohibited the employment of women as bartenders. And eleven states prohibited the employment of women in miscellaneous other places or occupations, or under certain conditions. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 277-78.

79. 335 U.S. 464 (1948).

80. *Id.* at 465-66.

81. 57 N.J. 180, 270 A.2d 628 (1970); *accord*, *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (striking down a California female bartender statute); *McCrimmon v. Daley*, 2 FAIR EMP. PRAC. CAS. 971 (N.D. Ill. 1970) (Chicago ordinance prohibiting the employment of women as bartenders violates due process clause of fourteenth amendment & Title VII of Civil Rights Act of 1964); *Jarosak v. City of Minneapolis*, [1969-1970 Transfer Binder] 63 Lab. Cas. ¶ 9457 (Minn. Dist. Ct. 1969) (similar ordinance violates due process and equal protection clauses of fourteenth amendment).

Jersey struck down a municipal ordinance which prohibited taverns from employing female bartenders, holding that "in the light of current customs and mores, the municipal restriction against female bartending may no longer fairly be viewed as a necessary and reasonable exercise of the police power."<sup>82</sup> The court noted that although early New Jersey decisions had upheld prohibitions against female bartenders, those cases "arose in a different social and moral climate when judges, along with others, entertained Victorian ideas as to women and their proper place in the scheme of things."<sup>83</sup>

Unfortunately, many judges still entertain "Victorian ideas as to women and their proper place in the scheme of things." And so do many legislators. To initiate and coordinate the revision of all laws and official practices that discriminate on the basis of sex, and to provide for constitutional protection against sex discrimination, we need an equal rights amendment to the Constitution.

### Conclusion

In sum, the law must reflect the new image of women. Today women do not function solely as homemakers and protected followers. Today women are providers, protectors, and leaders. No longer should legal rights and responsibilities be denied on the basis of sex.

Legislatures have enacted laws designed to eliminate sex discrimination in some areas, especially in employment and federal jury service. But much more legislation, both state and federal, is needed. Most importantly, to set the legislative wheels in motion and to guide the legislative effort, we need an equal rights amendment to the Constitution. The Constitution should protect against discrimination on the basis of sex.

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82. 57 N.J. at 186, 270 A.2d at 631.

83. *Id.* at 183, 270 A.2d at 630.