Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles

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Dear God,

Are boys better than girls? I know you are one, but please try to be fair.

Love, Sylvia

This question recently appeared in a book called Children's Letters to God.¹ It reflects the loss of an elementary school girl's self-esteem, and is just one piece of evidence in the growing case against the sexual stereotyping and discrimination that occur daily in our schools.²

There are no subjects in our schools titled “Female Role Development” or “How to Be a Girl”. Yet through an intricate web of formal and informal educational processes, some subtle and some not so subtle, schools impose upon girls a restricting set of sexual stereotypes that discourage their aspirations and limit their sense of autonomy and self-image.³ This not only inhibits women in their employment potentiality, it more importantly violates their right to realize their individual potential as human beings. These latter allegations suggest the two basic theories upon which legal remedies for the victims of this invidious process may be predicate: denial of equal protection of the law, resulting in violation of the fundamental rights of education and employment; and violation of the due process right to essential individual liberties.⁴

This article will attempt to illuminate the insidious manner through which sex roles are imposed during the educational process, and

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¹. E. MARSHALL & A. SHERIFFS, CHILDREN'S LETTERS TO GOD (1966).
³. Id. Noted sociologist Talcott Parsons confirms this process: “The post-oedipal child enters the system of formal education clearly recognized as boy or girl; but beyond that his role is not yet differentiated. The process of education by which persons will effect and be selected for categories of roles is yet to take place.” The School Class as a Social System: Some of its Functions in American Society, 29 HARY. EDUC. REV. 4, 300 (1959) (emphasis added).
⁴. Several sources of legal relief will be discussed, but the primary basis of litigation in this area up to the present time has been the equal protection clause of the Fourteenth Amendment of the United States Constitution.
explore the damaging effects these stereotypes have on girls and women. The various cases which have already been brought in this area, and the equal protection analysis which they share, will then be outlined. Finally, a new due process argument will be introduced for consideration in future suits, along with exploration of other legal remedies available to alter the aspects of the educational process which have relegated women to second class status in our society.\(^5\)

As will be shown, the imposition of sex roles seriously undermines any opportunity for a young woman to develop a truly unique personality, free of restricting categories and preconceived notions of "what a woman is." She can never realize her full potential when so constrained in her view of what options are available to her.

**Evidence that Sexual Stereotyping Takes Place in American Schools**

An appropriate way to illustrate that the imposition of limiting sex roles\(^6\) does indeed take place in our schools is to examine two arguments generally put forth to counter the claim that the school's homogenization of women subverts their individuality and self-fulfillment.\(^7\) The first of these arguments is, simply, that there are scientific and biological explanations for the fact that differentiated roles have developed for men and women. The other line of reasoning asserts that in our society anyone, man or woman, is free to choose between the various alternatives equally available to all. These well accepted and seemingly logical notions must be examined closely in order to reveal that there is no basis in fact for either contention.

**Biology**

One early proponent of the biological line of argument is Justice Bradley, who promulgated the basic contention of this particular school of thought in an opinion holding that women could constitutionally be denied a license to practice law:

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5. It is important to note at the outset that the conditioning of personal and social ambition and motivation is present in the schools in much the same way with regard to perpetuation of class differences, but this area is of course outside the scope of this presentation.

6. Sex roles may be defined as assumed differences, social conventions or norms, learned behavior, attitudes and expectations which have been determined by cultural processes but have been defined to women as a development from the inherent nature of the female. Howe, *Sexual Stereotypes Start Early*, SATURDAY REVIEW, Oct. 16, 1971, at 77.

The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. 

This is the law of the creator.8

This case, and several later opinions which followed the same line of reasoning,9 seem to assert that the course by which the concept of sex-appropriate behavior develops is primarily determined by physical and physiological forces—the “inborn” differences between men and women.

There is, however, considerable support for the theory that the “physiological differences” which have long been used to justify oppressive legislation and distinct practices for women are relatively unimportant when compared with cultural and psychological factors in the evolution of the “female role.” Various writers and experimenters have, in fact, verified the proposition that social factors and pressures are more important than physiological considerations.10 For example, in a study with sports,11 one authority has stated:

One of the difficult things to distinguish in the developmental pattern and behavior of the prepuberal woman is how much is due to inherent biological make up and how much is due to imposed social custom. . . . We are still uncertain about any actual difference of general muscular bodily strength. . . . It seems likely

9. E.g., Muller v. Oregon, 208 U.S. 412 (1908) (noted differences in physical structure, strength and endurance of women, as well as the importance of their health to the future well-being of the race, in forbidding women to work more than ten hours per day); Goesaert v. Cleary, 335 U.S. 464 (1948) (also noted a different nature of men and women in preventing females from becoming licensed bartenders); Hoyt v. Florida, 368 U.S. 57 (1961) (noting women's family and home responsibilities in excluding women from jury duty). See also Brenden v. Independent School Dist., infra note 97, a sports case where the court emphasized that the basis of decision could be physiological differences, but in this particular case plaintiffs had “overcome their physiological disabilities.”
10. Concerning innate sexual differences, John Stewart Mill wrote that we could know nothing, since we have never known of a society in which either men or women lived wholly separately. Therefore, he reasoned, we cannot “know” what the pure “nature” of either sex might be: what we see as female behavior is the result of what he called the education of “willing slaves.” J.S. Mill, The Subjection of Women, in J.S. MILL & E.T. MILL, ESSAYS ON SEX EQUALITY 129, 141 (Rossi, ed. 1970). In discussing sex hormones in the development of sexual differences, Hamburg and Lunde write: “In the delivery room of many hospitals it is the custom to wrap the newborn baby in either pink or blue blanket, depending on the sex as determined by the genitalia. From this moment on the child's maleness or femaleness is constantly reinforced. It is difficult then to determine the extent to which the child's learning of his sex role may be influenced by underlying biological predispositions.” Sex Hormones in the Development of Sex Differences in Human Behavior, in E. MACCOBY, THE DEVELOPMENT OF SEX DIFFERENCES 15 (1966).
11. See text accompanying notes 121-30 infra.
though that . . . up to about the age of seven . . . the bodily strength of both is essentially equal. One wonders then how much the cultural influence of the special tasks and recreations assigned to little girls as compared to little boys gradually produces a difference in muscle strengths and muscle skills.\textsuperscript{12}

It is often stated that girls "mature" faster than boys, and just as commonly noted that in elementary school the girls normally do better than the boys as far as achievement, indicated by higher grades.\textsuperscript{13} This superficial observation, however, deserves a more detailed examination. Maturity is commonly identified with passive compliance with the school rules (\textit{i.e.}, being quiet when you are told, not talking back to the teacher, etc.). Girls are rewarded for silence, neatness, and conformity. They are reinforced for docile, passive compliance to school rules and norms.\textsuperscript{14} Rebellious behavior in boys is generally written off as one facet of their "immaturity," a reflection of the fact that they have a harder time adjusting than girls. Thus, through the teacher's bestowal and withdrawal of rewards, the elementary school directly reinforces the passivity of young girls.\textsuperscript{15}

Even more disturbing is the fact that this passive attitude can be translated into a decline of ability. One writer\textsuperscript{16} describes the first grader whose I.Q. is likely to increase as that student becomes more competitive, self-assertive, independent and dominant in interaction with other children. The children who show declining I.Q.'s during the next four years are children who are passive, shy, dependent—the very attitudes that schools help to create. Thus it appears that the way children are dealt with by the adults responsible for their care, and the social roles girls know they are preparing themselves for, have a bearing also on whether they will develop the characteristics that will be conducive to the growth of higher-level intellectual skills.\textsuperscript{17} These studies\textsuperscript{18} indicate, then, that girls are taught how to

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  \item \textsuperscript{12} Overstreet, \textit{Biological Make-up of Women}, in \textit{MAN AND CIVILIZATION: THE POTENTIAL OF WOMAN} 13 (Farber ed. 1963).
  \item \textsuperscript{13} Maccoby, \textit{Sex Differences in Intellectual Functioning}, in E. Maccoby, \textit{The Development of Sex Differences} 27 (1966).
  \item \textsuperscript{15} Iglitzin, \textit{A Child's Eye View of Sex Roles}, \textit{TODAY'S EDUCATION}, Dec., 1972, at 23.
  \item \textsuperscript{16} Maccoby, \textit{Women's Intellect}, in \textit{MAN AND CIVILIZATION: THE POTENTIAL OF WOMAN} 24, (Farber ed. 1963).
  \item \textsuperscript{17} See text accompanying notes 25-28 infra.
  \item \textsuperscript{18} Further evidence regarding the relationship between biology and learning supports the view that psychological sex is undifferentiated at birth, and that the individual becomes differentiated as masculine or feminine, psychologically, in the course
conceive of their role; they are not “naturally” passive, submissive, and maternal.\textsuperscript{19}

Public education as a primary agent for socialization serves to reinforce and perpetuate these culturally defined sex roles. Yet there is no biological evidence that can link the culturally imposed female role with any inherent characteristics of girls of elementary school age.\textsuperscript{20}

**Education and Achievement Motivation**

The second argument often advanced to deny that women are limited in their potential development by imposition of rigid sex roles, is the argument that an adult woman in a democratic society is free to choose any role she wants—the concept of “free will”. This contention overlooks an important fact, however; although society may not overtly control a woman’s alternatives, it can restrict her motivation until a broadly-based selection is practically impossible. One author describes this denial of motivation as part of the “nonconscious ide-
ology”—the subtle training of women to accept and internalize the idea of female inferiority.

Elementary schooling, as a primary means of socialization, is one of the principal arenas in which the stereotypes of women are transmitted. The school, in short, must share a significant portion of the responsibility for the diminished aspirations of its female students. Whenever girls are taught inferiority, docility, and submissiveness, they are robbed of their self-esteem and their achievement motivation.

Several studies by educational sociologists bear out the hypothesis, revealing that children in the primary grades already display behavioral and achievement orientation patterns consistent with sex role expectancy norms. One such study found that “a girl’s long train-

22. For example, a husband might argue “But my wife is perfectly happy just being a housewife—nothing gives her more pleasure than to cook and sew for me.” The tragedy is that he is probably correct! “Such, indeed, is the power of a non-conscious ideology!” Id. at 99.
23. See Serrano v. Priest, 5 Cal. 3d 584, 609-10, 487 P.2d 1241, 1259, 96 Cal. Rptr. 601, 619 (1971): “[E]ducation is unmatched in the extent to which it molds the personality of the youth of society. . . . [P]ublic education actually attempts to shape a child’s personal development in a manner chosen not by the child or his parents, but by the State.”
24. This phenomenon was acknowledged by the 1968 report of the Presidential Council on the Status of Women. The Education Committee was concerned about the loss of potential talent after reviewing statistics of female participation in higher education. It noted: “Low aspirations of girls are the result of complex and subtle forces. They are expressed in many ways—even high achievement—but accompanied by docility, passivity, or apathy. The high motivation found in the early school years often fades into a loss of commitment and interest, other than in the prospect of early marriage.” The Committee found some of the reasons for this loss of motivation are the stereotypes of women in our culture and in the lingering ideas of female inferiority. PResidential Council on the Status of Women, American Women (1968). In the fall of 1968, only 40 percent of the entering college freshmen were women. The lag in female participation in higher education is even more noticeable at the graduate level. Women earned one out of every three B.A. and M.A. degrees, and only one in ten of the doctorates. The Committee also notes that among the top 10 percent high school seniors, there are twice as many girls as boys with no college plans.
25. As an example of this phenomenon, in one study elementary school girls were more likely to try solving a puzzle by imitating an adult, whereas the boys were more likely to use their own initiative and search for a novel solution. McDavid, Imitative Behavior in Preschool Children, 73 Psych. Monographs 1, 7 (1959). Another researcher conducted experiments to test creativity in elementary school children. In a “Products Improvement Test” he asked children to “make toys more fun to play with.” In the first grade, many boys refused to try the nurse’s kit, protesting that it was not a proper “boy’s” toy. “By the third grade, however, boys excelled girls even on the nurse’s kit, probably because by this time girls have been conditioned to accept toys as they are and not to manipulate and change them.” E. Torrance, Education and the Creative Potential 22 (1963).
ing in passivity and dependence appears to exact [a high] toll from her overall motivation to achieve, to search for new and independent ways of doing things, and to welcome the challenge of new and unsolved problems.26

Later experiments with other pupils further verified what has been called "the inhibiting effects of sex role conditioning." In working with third, fourth and fifth graders in science, "girls were quite reluctant to work with these science toys and frequently protested 'I'm a girl; I'm not supposed to know anything about things like that.' "27 One study28 startlingly revealed that girls improve their mathematical performance if problems are reworded so they deal with cooking and gardening, even though the abstract reasoning required for their solutions remains the same. The tremendous impact on motivation of elementary school girls, then, is painfully obvious.

Schools and "Female Inferiority":

Even more tragic than the effect on motivation is the effect that sex role conditioning has on young girls' self-esteem and sense of worth. To illustrate: In 1959, a researcher conducting experiments with science toys29 reported to parents and teachers in one school his findings of higher achievement by boys than girls. Subsequently he asked for their cooperation in trying to change the girls' attitudes. In 1960, when he retested the children using science toys similar to those in the previous tests, the girls participated willingly and performed as well as the boys in explaining new ideas about uses for toys. In one significant respect, however, nothing had changed; the boys' contributions were more highly valued by both sexes than the girls' contributions, despite the fact that boys and girls had scored equally.30

26. BEM, supra note 7, at 92.
27. E. TOrRANCE, REwarding CRxATvE BEachOR 107 (1965).
29. E. TOrRANCE, REwarding CRxATvE BEachOR 107-12 (1965). Paul Torrance, professor of educational psychology at the University of Minnesota, was the researcher of this experiment. Subjects of the study were pupils enrolled in the fourth, fifth and sixth grades of a university elementary school during two school years, 1958-59 and 1959-60. Twenty-five children were enrolled in each grade, with an approximately equal division between males and females. Each group was given 25 minutes in which to explore and experiment to discover what could be done with the toys and why they function as they do. Finally, each subject was asked to rank each member of their group according to the value of their contribution to the group's success. In both years, although in 1960 the performance of girls was not significantly different from that of boys, the contribution of boys was more highly valued than that of girls.
30. Id. at 109.
Thus, as children progress through school, their opinions of boys apparently grow increasingly positive and their opinions of girls increasingly negative.\footnote{In two studies conducted in 1971-72 dealing with sex stereotyping, school children from three suburbs of Seattle were questioned. The first study involved 290 fifth graders (141 boys, 149 girls); the second involved 147 fifth graders (80 boys, 67 girls). Of these children, 3.6 percent of the boys felt women should be mayors, while only 2 percent of the girls felt women were suited for that job. Iglitzin, \textit{A Child's Eye View of Sex Roles}, \textit{TODAY'S EDUCATION}, Dec. 1972, at 23.} Both sexes are learning that boys are worth more. Although girls get higher grades throughout school than do boys, they are less likely to aspire to college work.\footnote{Among the top 10 percent of high school seniors, there are twice as many girls as boys with no college plans. See text accompanying note 24 supra.} Early in her school career, a girl's vision of occupations open to her are often limited to four: teacher, nurse, secretary, or mother.\footnote{E. Torrance, \textit{Rewarding Creative Behavior} 119-22 (1965). Torrance also conducted a study of occupations “off limits” for sexes, concluding that “at least by the time children reach fourth grade, and perhaps earlier, they have come to perceive certain occupational goals as being off limits for them because of their sex.” \textit{Id.} at 122. Among others, engineering, law, space travel, mechanics, professional athletics, and carpentry were almost excluded by girls in their choice of occupational goals. \textit{See also} note 30 supra & text accompanying notes 36-51, 131-37 infra for a further explanation of how sex role conditioning in the schools leads to such limited occupational aspirations for girls.} Boys of a corresponding age do not share this restricted perspective of job possibilities. By the ninth grade, 25 percent of the boys—but only 3 percent of the girls—are considering careers in science or engineering.\footnote{Flanagan, Project Talent (unpublished manuscript) cited in Kagan, \textit{Acquisition and Significance of Sex Typing and Sex Role Identity}, in \textit{1 REV. OF CHILD DEV. RESEARCH} 157 (M. Hoffman & L. Hoffman eds. 1964). The low aspirations of girls at this age are reinforced through treatment by school counselors in terms of expectations which are stereotyped. They contribute to the problem by taking a narrow view of the career possibilities open to girls, guiding them into “suitable” occupations, such as nursing, teaching, or secretarial studies while failing to make them aware of any vocations which may be more suitable to their interests and potentiality for success. This process is described in \textit{Penn. Dep't of Educ. Joint Task Force Report: Sexism in Education} 8 (1972) [hereinafter cited as \textit{Sexism in Education}]. “Emphasis is placed on the importance of a strong educational foundation for males based on the mind set that males especially need to seek the highest level of potential educational attainment in order to prepare for the highest level of job opportunities available to them. Female educational needs are looked upon with less urgency based upon the traditional image of a female's life: school, marriage, family.” School counselors may argue they are supposed to facilitate “adjustment,” not prescribe goals which are inconsistent with the maximum potential for realization. But in doing so they are actually contributing to the vicious pattern which keeps women “in their place” with no chance of escape.} This disparity in occupational aspirations caused by the elementary school's rigidly conceived notion of women has direct correlation with the stark
reality of adult employment patterns. According to recent statistics, women constitute only 9 percent of all the scientists, 7 percent of doctors, 3 percent of lawyers, 1 percent of engineers. Nine out of ten elementary teachers are women, yet eight out of ten of the same schools have male principals.

It is therefore reasonable to conclude that while female physiology may account for some portion of the psychological differences between the sexes, that portion is far outweighed by the sex role ideology imposed on girls in the public school system. The end result is that few women emerge from childhood with the motivation to seek out roles beyond those dictated by society. Aside from the general means by which sexual stereotypes are imposed, however, there is one specific ingredient of the classroom that deserves special attention: the books that children read.

The Special Role of Textbooks in Sexual Stereotyping

As we have seen, girls have certain roles imposed upon them from every facet of the school environment. Textbooks, however, have a special function in the socialization process of the schools since they convey an aura of official approval. They are approved by state officials, purchased with state money, and used in schools which are attended under state compulsion. They are presented to children within the context of authority, the classroom. Through textbooks our society is saying, "This is what we would like you to be."

This expectation is presented to children at a time when most


36. NATIONAL EDUCATION ASSOCIATION, PROFESSIONAL WOMEN IN PUBLIC SCHOOLS 67 RESEARCH BULLETIN No. 3 (1971). It should be noted here that the sex discrimination in filling supervisory and administrative positions in educational institutions not only harms the teachers but reinforces the occupational stereotypes that young girls learn all through the educational process.

The Sadkers pose the question "how does this imbalance in the school staffing pattern affect the elementary school girl?" They conclude that "[i]t would be hard to misinterpret the relationship. The teacher is the boss of the class; the principal is the boss of the teacher. And the principal is a man. Associations are formed in the child's mind. When a woman functions professionally, she takes orders from a man; the image of female inferiority and subservience comes across." Sadker, supra note 2, at 43. It appears, then, that equality in employment can help rectify one traditional area of indoctrination—the pattern of authority that emerges from the teacher-principal hierarchy.

37. A biological explanation falls short of explaining the characteristics that have allowed Soviet females to become one-third of the engineers and three-fourths of the physicians in the Soviet Union. See N. DODGE, WOMEN IN THE SOVIET ECONOMY 244 (1966).

38. The effect of expectations has been documented by two studies. The Mil-
have not yet achieved a critical perspective on themselves and their backgrounds. That which is officially espoused inevitably becomes a norm or an ideal in the mind of a child.

Since it can be demonstrated that expectations play an important role in the development of school children, what exactly are the expectations children perceive through their school textbooks? Several thorough studies have been made across the country examining the content of children's textbooks and readers. One unmistakable conclusion emerges: If you are a girl, you are inferior. One report observes that "not only are the books a powerful influence in stunting a girl's growth but are giving her the subliminal message that she is an inferior, secondary person." Another group reports that "these books are a major tool in the socialization of our children. They do a great deal of damage in preventing the full development of individual potential in girls because of the strict sexual stereotyping conveyed."

Textbooks create, for the girls mentioned therein, patterns of dependence, passivity and domesticity. While boys travel, rescue girls, go places with father, and fantasize about being president, girls tend to hold dolls, lose things (which boys inevitably find), and help mother around the house. That is, she is passive and domestic when she is present at all. A New Jersey study revealed that 72 percent of

gram experiments, designed to test the extent of obedience to authority, required subjects to shock a helpless victim with increasing voltage under the pretext that the psychologist was studying the effect of punishment on learning. Thus, adult subjects were forced by the experimenter's expectations alone to believe in prescribed ways even when their natural abilities and desires would have urged otherwise. If adults were susceptible to this kind of behavior patterning, obviously children would be even more vulnerable to the power of an adult. Milgram, *Behavioral Study of Obedience*, 67 J. Abnorm. & Soc. Psych. 371-78 (1963). This was substantiated by a study in which it was demonstrated that teacher expectations significantly determine student behavior and attitudes. Teachers were supplied with inaccurate I.Q. scores for pupils in their classroom. At the end of the year when the children were retested, their scores reflected the teachers' inaccurate expectations. R. Rosenthal & L. Jacobson, *Pymalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development* (1968).


40. *Dick & Jane as Victims, supra note 39, at 6.*


42. *Dick & Jane as Victims, supra note 39, at 2.*
the stories were boy-centered. A disproportionately small number of female characters perform heroic or admirable tasks.

Just as girls are characterized as passive and ineffectual, "[t]he adult female role portrayed is so limited and constricting as to be totally devoid of any inspiration for the young girl reader and perpetuates the idea . . . that generally females are essentially second class citizens whose place is subordinate to that of males. . . ."48 In a review of the various studies, one writer sums up the image of the adult woman: "Mother, generally, is as bland as if she had a pre-frontal lobotomy—an aproned, perennially cheerful cookie baker about to hand wash a mountain of dishes."44

The occupational outlook expressed in textbooks is equally restrictive. The New Jersey study found men employed in 147 different jobs and women in only 25.46 The New York study offered boys a model in 130 exciting jobs, including astronaut and explorer.46 There is a notable absence of women politicians, editors, doctors, engineers and lawyers, even though increasing numbers of women are successfully entering these fields. In fact, women have so few jobs of interest in these stories that they might as well just stay at home with their children.

In summary, demeaning images are portrayed by both the number and type of jobs held by women in children's textbooks. In 144 books studied, the New Jersey group found only three instances of working mothers.47 A comparison of this statistic with that of the United States Office of Labor Statistics, which states that 39 percent of all working women have children under age eighteen,48 makes it apparent that a markedly unrealistic and constricting role of the adult woman has been portrayed. The lack of adult female role models in these books not only makes choosing a career difficult for a little girl growing up, but conveys the subtle message that it is perhaps not even feminine or acceptable for her to choose one. This presentation creates a serious problem, because books exert a great influence, particularly in the early grades where they are read thoroughly and reviewed constantly.49

The biographical sections of textbooks do not deviate from the

43. Id. at 10.
45. DICK & JANE AS VICTIMS, supra note 39, at 40, 73-74.
46. N.O.W. REPORT, supra note 39.
47. DICK & JANE AS VICTIMS, supra note 39, at 7.
49. See W. DURR, READING INSTRUCTION: DIMENSIONS & ISSUES 22 (1967).
established pattern. Very few famous women appear; the mere fact of omission gives the reader the impression that only men are capable of becoming famous and doing creative, important work. Where women do become something, they are considered odd: "[F]rom the very beginning, Amelia Earhart was different from other girls."50

Examination of social studies texts reveals the situation remains unalleviated as the girl grows older. A thorough study of the most popular history texts began with the premise that "the story of our past is a potent means of transmitting cultural images and stereotypes."51 The study's query was, "Are the stereotypes which limit girls' aspirations present in high school history texts?" The conclusion was yes. Most works were marred by sins of omission and commission; texts omitted many women of importance, while simultaneously minimizing the legal, social and cultural disabilities they faced. The authors tended to depict women in a passive role, rarely showed them fighting for anything, and created the impression that women are content with their role in society.

It is therefore readily apparent that textbooks and readers, which play important roles in education, convey restricted and damaging pictures of women, encourage girls to undervalue themselves, lower their aspirations, and deny their potential for achievement. Boys and girls thus receive quite different educations, resulting in situations where girls are confined, restricted, repressed and ultimately damaged by the school experience.

The question remains, however, what is the legal significance of sexual discrimination in the educational process? This note now turns to an analysis of cases dealing with sexist practices in education,52 and to an examination of the basic legal principles upon which relief can be founded.

The Traditional Approach: Equal Protection

Every case concerning sexual stereotyping in public schools has basically relied upon an equal protection analysis, alleging violation of the equal protection clause of the Fourteenth Amendment. A brief outline of the most common line follows.

50. N.O.W. REPORT, supra note 39.
52. The broad principle that actions of school officials fall within the ambit of constitutional protection was stated in Board of Education v. Barnette, 319 U.S. 624 (1943). The court struck down the compulsory flag salute as unconstitutional and noted: "The 14th Amendment, as now applied to the States, protects the citizen against the State itself and all its creatures—Boards of Education not excepted." Id. at 637.
As stated in *Kirstein v. Rector and Visitors of the University*, the "plain effect of the Equal Protection Clause of the Fourteenth Amendment is to 'prohibit prejudicial disparities for all citizens—including women.' Two standards of review are applied by the courts in resolving claims of denial of equal protection. The first is the standard which is most deferential to the legislature; a measure will be upheld if it bears a "reasonable relationship" to a permissible legislative objective. Under this standard of review, the opponent of the measure carries the burden of establishing the absence of reasonable relationship. When, on the other hand, the statute utilizes "suspect criteria," or where legislation affects "fundamental rights," the state must establish a "compelling state interest" for the measure, and must prove that the law's distinctions are necessary to further its purpose. In the area of litigation based upon sexual stereotyping in public schools, the burden of proving the absence of a reasonable state purpose is almost impossible for the plaintiffs to overcome. It is therefore critical to the success of such cases for the presence of a suspect classification or a fundamental interest to be established.

**Sex As a Suspect Classification**

The first component of the equal protection analysis is that the "strict scrutiny" approach is required because sex is a suspect classification, just as race is. One writer observes the similarity between race and sex as classifications in our society:

They are large, permanent, unchangeable, natural classes. No other kind of class is susceptible to implications of innate inferiority. . . . This is the only kind of class prejudice which can be reached by laws aimed not toward guarding against the unjust effect of the prejudice in the particular case but toward a general upholding of the dignity and equality, the legal status, of the class.

Sex, like race, is an accident of birth, carrying no real justification for distinctions based on inherent differences—the only differences are

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58. Id. at 727-28 (emphasis added).
apparently culturally acquired and reinforced by items of discrimina-
tion like legislative classifications based on sex.\textsuperscript{59}

Although the Supreme Court has not directly held sex to be a
suspect classification, the Court did suggest acceptance of the stricter
standard in \textit{Reed v. Reed}\textsuperscript{60} by striking down a state statute which
discriminated against women in administration of estates. The Court
ultimately was not compelled to choose between the two standards,
since it found the mandatory preference for males did not serve \textit{any}
legitimate state interest and thus was invalidated in any case under
the lesser standard of review.\textsuperscript{61} Subsequently, in \textit{Eisenstadt v. Baird},\textsuperscript{62}
Justice Brennan affirmed this interpretation, and noted that the Court
had not rejected the contention in \textit{Reed} that sex be regarded as a
suspect classification: application of the strict standard was not con-
sidered simply because the statute in question had even failed to satisfy
the more lenient standard.\textsuperscript{63}

Some courts have ruled on the classification of sex as a suspect
criteria, most notably in \textit{United States ex rel. Robinson v. York}\textsuperscript{64}
and in \textit{Sail'er Inn, Inc. v. Kirby}.\textsuperscript{65} \textit{York} held invalid differential
treatment of women in sentencing procedures, and found no reason
"why adult women, as one of the specific groups that compose human-
ity, should have a lesser measure of protection than a racial group."\textsuperscript{66}
In \textit{Sail'er Inn}, the California Supreme Court held unconstitutional a
statute prohibiting women from tending bar\textsuperscript{67} because it violated the
equal protection provisions of the state and federal constitutions.
The proper standard for reviewing the state's classification was held
to be a strict scrutiny standard of review, because the statute limited
the fundamental right to work, \textit{and} because classifications based upon
sex should be treated as suspect. The court recognized that

\textsuperscript{59} See text accompanying notes 10-19 \textit{supra}.
\textsuperscript{60} 404 U.S. 71 (1971). The Court observed that the challenged statute "pro-
vides that different treatment be accorded to the applicants on the basis of their sex;
it thus establishes a classification subject to \textit{scrutiny} under the equal protection clause." \textit{Id}. at 75 (emphasis added).
\textsuperscript{61} This point was well-argued in an amicus brief in a school pregnancy case,
submitted by Suzanne Martinez of the Youth Law Center: Brief for Youth Law
Center as Amicus Curiae at 12, \textit{Willis v. Richmond Unified School Dist.}, Civ. No.
C-72-560 RFP (1972).
\textsuperscript{62} 405 U.S. 438 (1972).
\textsuperscript{63} \textit{Id}. at 447 n.7.
\textsuperscript{64} 281 F. Supp. 8 (D. Conn. 1968).
\textsuperscript{65} 281 F. Supp. 8, 14 (D. Conn. 1968).
\textsuperscript{66} \textit{Id}. at 447 n.7.
\textsuperscript{67} The statute in question, \textit{CAL. BUS. & PROF. CODE} § 25656 (West 1964)
prohibited women from tending bar except when they are licensees, wives of licensees
or are, singly or with their husbands, sole shareholders of the corporation holding the
license.
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 is that the characteristic frequently bears no relation to ability to perform or contribute to society. 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. Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Education As a Fundamental Interest

Another way to bring a legislative practice under the “strict scrutiny” test is to establish that it interferes with a “fundamental interest”. For the purposes of cases in this area, that interest is education.

The rights of students to receive an education and to enjoy equal educational opportunities with their fellow students have repeatedly been recognized as rights both fundamental in and vital to American society. As long ago as 1923, the Supreme Court recognized education and acquisition of knowledge as matters of supreme importance. In Brown v. Board of Education the Supreme Court noted, “[t]oday, education is perhaps the most important function of state and local governments. Such an [educational] opportunity is a right which must be made available to all on equal terms.”

The status of education as a fundamental interest under the federal constitution was recently determined by the United States Supreme Court in San Antonio Independent School District v. Rodriguez, a school financing case. Although the Court reaffirmed the importance of education, it refused to find that education is a fundamental right.
Rodriquez has established that strict scrutiny is not required to protect the educational interest under the federal constitution, but state constitutions may also be a source of protection. For example, the New Jersey Supreme Court held in Robinson v. Cahill, a school financing case decided subsequent to Rodriquez, that education is a fundamental interest under the New Jersey Constitution. Other courts may be able to find similar avenues for establishing strict scrutiny of practices which interfere with an educational interest. Once the opportunity to attend public school has been extended to a student, he or she should be protected against invidious disparities in the quality and extent of educational opportunities found within that school.

Employment As a Fundamental Interest—California Provisions

The right to work is another interest which is particularly relevant in cases dealing with sexual stereotyping in school curricula. The fundamental nature of this right was enunciated by the California Supreme Court in Sail’er Inn, Inc. v. Kirby:

The California legislature accords statutory recognition to the right to work by declaring the opportunity to seek, obtain, and hold employment without discrimination a civil right. Limitations on this right may be sustained only after the most careful scrutiny.

As article XX, section 18 of the California Constitution was interpreted by the court, it does not permit exceptions based upon popular notions of what is a proper, or fitting, occupation for persons of either sex.

which the Court has applied strict scrutiny all involved legislation which “deprived,” “infringed,” or “interfered” with the free exercise of some fundamental personal right or liberty, and the opinion distinguished the Texas financing situation as an effort to extend public education. Id. It could be argued that sexual stereotyping is indeed a practice which “deprives” and “interferes” with the education of women in public schools, and thus should still be examined under a strict scrutiny approach.

76. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
77. Id. at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339 (footnotes omitted). Accord, Purdy & Fitzpatrick v. California, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969): “[T]he state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation.” Id. at 579, 456 P.2d at 654, 79 Cal. Rptr. at 86.

California Constitution article XX, section 18 states: “A person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation or profession.”

78. 5 Cal. 3d at 9, 485 P.2d at 533, 95 Cal. Rptr. at 333. Accord, Matter of Maguire, 57 Cal. 604 (1881): “As we understand the section [article XX, § 18], it does establish, as the permanent and settled rule and policy of this State, that there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession permitted by law to be entered on and pursued by those sometimes designated as the stronger sex.” Id. at 608 (emphasis added).
The tremendous impact that the educational process has on a woman as far as what employment opportunities are open to her—not only in so far as the actual occupational training she receives but also in terms of what she as an individual is led to think is proper in terms of a job for women—has been previously documented. Obviously, many factors in addition to education influence women in individual circumstances. A court's task in the assessment of a particular complaint is to determine why an individual woman is limited in her occupational choice. The reality of the overall situation must not be obscured by individual cases, however. The educational process is the underlying basis for the employment predicament of American women, and as such must be substantially altered.

The type of sex role indoctrination a girl receives in school greatly affects her basic right to work; the role training results in a pattern of career training which is discriminatory in a most insidious manner to women. Many occupations are effectively ruled out for them at an early age. The Report of the President's Task Force on Women's Rights and Responsibilities accurately describes the plight of women: "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image."

Discrimination against women in one area, then, has led to discriminatory patterns in another. As a result, the woman denied equal access to education will be similarly disadvantaged in employment.

Thus, where vital rights to employment are impaired solely on the basis of sex, such discriminatory treatment can only be justified by a clear and unequivocal showing that the discrimination is necessary to promote a compelling state interest.

Case Law—Sexual Discrimination in Schools

In recent years, courts have held in several instances that sexual discrimination in education constituted invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. These cases dealt with sexist practices in four basic educational areas: admissions, exclusion of pregnant women, sports, and curriculum determinations.

79. See text accompanying notes 100-106 infra.
80. See text accompanying notes 32, 44 & 45 supra.
82. See Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065, 1120 (1969) for an interesting explanation of how the courts' decisions are made on the basis of the interaction of "suspect distinctions" and "fundamental rights."
The issue of admissions was considered in *Bray v. Lee*, where the district court struck down discriminatory admissions standards for female applicants to Boston Latin School, an elite academic high school. The requirement that female applicants achieve higher scores than male applicants on admissions examinations was held to be in violation of the equal protection clause, despite the fact that the defendant school board sought to justify its discriminatory treatment of female applicants on the grounds that equal admission standards for male and female students would overtax the physical facilities of the school. The court's decision was that "female students seeking admission to Boston Latin School have been illegally discriminated against solely because of their sex, and that discrimination has denied them their constitutional right to an education equal to that offered to male students at the Latin School."85

Another example of the "double standard" exists in the cases challenging school policies where pregnant women are excluded from attending regular classes, even after they have had the baby. *Farley v. Reinhart* was an action under the Federal Civil Rights Act challenging a school district policy which provided that female students who had borne children would be excluded from attendance.

84. *Contra*, Berkelman v. San Francisco Unified School Dist., Civil No. C-71-1875 LHB (N.D. Calif., filed Dec. 18, 1972). This was a suit involving Lowell High School in San Francisco, an academic high school similar in stature to Boston Latin, on almost exactly the same factual situation. At Lowell a higher grade point average was required of girls than boys for admission. In the words of Ralph Kaver, assistant superintendent of the district, the higher standard for girls was "to keep girls from overrunning Lowell." Associated Press dispatch, San Francisco, September 18, 1972. Although the school district came forth with the same excuses "justifying" their discriminatory policies held inadequate in *Bray* and other cases, the court nevertheless upheld the discriminatory practice.
87. Some states have acted against such discrimination by statute. Michigan, for example, passed a state law to prevent just such an exclusion from school because of pregnancy. *Mich. Comp. Laws § 388.391* (Supp. 1972).
at their regular schools. The court's decision found that the "classification based on motherhood or sex bears no reasonable relationship to the objectives of education," and was therefore an irrational classification in violation of the equal protection clause. In *Ordway v. Hargraves*, the court ordered that an unmarried pregnant woman be allowed to attend regular classes, since the judge found "no educational or other reason to justify her segregation and to require her to receive a type of educational treatment which is not the equal of that given to all others in her class."

As previously noted, girls and boys are generally separated into different groups for different kinds of activities, and the sports field is no exception. Even in kindergarten, while both sexes are physically capable of the same kind of play, there are culturally imposed distinctions in the kind of play allowed them by the schools. This separation is continued throughout the educational process; most states have athletic association requirements that girls and boys are not allowed to play on the same school teams. Boys' athletic programs, however, characteristically receive far more money, larger coaching staffs, and more time and prestige than do the girls' programs.

The cases challenging discriminatory treatment of girls in athletic programs are perhaps the best examples of how sex stereotyping pervades both the school and the judicial environment. One such case is *Hollander v. Connecticut Interscholastic Athletic Conference, Inc.* A high school girl sued the athletic conference for a permanent injunction forbidding defendant from enforcing any sexually discriminatory rule or regulation in track events that discriminated against a team or individual. The court held the plaintiff unentitled to relief, explaining that women didn't need the "character" imparted by sports events.

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89. *Id.*


93. "With boys vying with girls . . . the challenge to win, and the glory of achievement, at least for many boys, would lose incentive and become nullified. Athletic competition builds character in our boys. *We do not need that kind of character in our girls, the women of tomorrow.*" *Id.* at 8 (emphasis added).

The decision in *Brown v. Wells*, 288 Minn. 468, 181 N.W.2d 708 (1970), upon which the court relied involved quite a different athletic rule than the type involved in *Hollander*. In *Brown* the rule was designed to secure equality to teams in disadvantaged areas by requiring that for a student to be eligible for competition in the state high school league he (or she?) may not participate on an independent hockey team and receive the advantage of additional training. The *Brown* court held that where there was room for two opinions on a school board rule, the rule would be upheld as
Other courts have held that refusal to allow girls to compete with boys is in fact based upon a rational distinction. In *Gregorio v. Board of Education*, the court rejected a complaint against the exclusion of a woman high school student from the male school tennis team, even though no such athletic opportunities were provided for girls. Plaintiff claimed she was deprived of a chance to win a scholarship, and that her right to learn was impaired. The preliminary injunction was denied, and the appeals court ultimately found the rule and classification were neither arbitrary nor unreasonable. This decision seemed to rest on the reasons defendant put forth to justify the rule, which included the psychological impact on boys from head to head competition.

*Brenden v. Independent School District* declared that a similar rule violated the equal protection clause, but only as applied to two

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95. With regard to this allegation, it seems that these sports cases could be argued by analogy to *Kirstein*, text accompanying note 52 *supra*. There the court found that women could not be denied admission to Charlottesville College because the same educational opportunities were not available to them elsewhere. Among their reasons was the fact that a “prestige” factor existed at Charlottesville. It could be argued that the same “prestige” factor exists among the boy's athletic teams at a given school, and the opportunity to be on such a team cannot be denied to girls where “no comparable team exists” at that school.

96. An article in the Washington News, March 11, 1971, cited in 1 Women's Rts. Law Rptr. 39 (1971), discussed the psychological impact on boys as a justification for refusal to admit women on men's tennis teams. Among the revealing comments of various “experts”: “Mixed doubles in tennis can do less damage to a young girl's body than to an adolescent boy's ego.” “A high school boy, beaten at a game of tennis by a girl his own age, would feel castrated.” “While it's difficult for an adolescent boy to take a beating from a male peer, he learns to accept and even overcome it. But if he should take a real wallop from a girl his age, why then, we very often see a true withdrawal from sports altogether, and a variety of psychosomatic disorders that he'll develop to keep from returning to the game.” Many of these “justifications” have been accepted by the courts. See text accompanying notes 93-94 *supra*. But never do the courts even passingly consider the psychological impact on girls.

girls already proficient in the sports involved. The court took great pains to note that sex can be a reasonable basis for classification because the biological differences between men and women prevent the great majority of women from competing on an equal level with men. The two girls in *Brenden*, however, were deemed to have “overcome” these physiological disabilities.\(^9\) From this reasoning it would seem to follow that if physical training were emphasized for men and women equally from the beginning of their school careers, then these “disabilities” could be overcome, and both sexes would be able to compete on a regular basis in grammar school as well as high school and college.\(^9\)

A recent federal case indicates what will hopefully be the trend in sports cases. In *Reed v. Nebraska School Activities Association*,\(^10\) the court rejected many of the tired arguments normally put forth to justify discriminatory sports rules, and held that denial of an opportunity to try out for the school golf team solely on the basis of sex denied equal protection.\(^10\) Although the *Reed* court used the “rational relationship” test, it also held that the interest of a female student who wished to participate on the team as an opportunity to enhance her reputation as an athlete outweighed the state’s interest in not allowing her to participate.\(^10\)

An additional area where discrimination in schools occurs with frequency is in curriculum determination. Different expectations for girls and boys have been prevalent for so long that it is generally assumed that boys must take shop and girls must study home economics. Such curriculum requirements would certainly be considered discriminatory if two racial groups were compelled to take different courses, but sexual discrimination has become so ingrained in American mores that such discrimination has tended to go unquestioned even when glaringly apparent. Although students are not always clearly aware of it, they have been trained to feel that household work is for girls, mechanical tasks for boys. This theme, as previously discussed, has been reiterated to them from the time they opened their first reader.\(^10\)

\(^9\) Id. at 1233.

\(^9\) The two women in the *Brenden* case had participated in sports outside of school, thus permitting them to overcome the lack of training provided by the schools and to reach a level of proficiency at least equal to male students. Id. at 1226.


\(^10\) Id. at 261-62.

\(^10\) Id.
The few cases which are based on curriculum stereotyping challenge school rules prohibiting girls from taking shop classes, or compelling them to take home economics. Very often, however, courses not formally limited to a single sex, such as higher mathematics or secretarial skills classes, become de facto one sex courses through formal and informal counseling and subtle discouragement or encouragement. It is this subtle stereotyping process which also explains why Woodworking I will not suddenly be filled equally with both sexes even after court victories. The problem cannot be solved permanently by simply requiring schools to "open up" shop classes—or law school doors—because women's motivation in that direction has been effectively eroded.

Sex tracking cases argue that denial of access to particular classes on the basis of sex is unconstitutional as a denial of equal protection. One successful sex-tracking case was Sanchez v. Baron, where a high school women's liberation group protested exclusion of women from shop classes. They argued that the board of education policy constituted a denial of their Fourteenth Amendment rights by arbitrarily channeling women, controlling their education and, therefore, limiting their options in careers and life roles. In a narrow decision, the court admitted only the named plaintiff to the metalshop class and did not use the opportunity to change the discriminatory system for more than one individual.

In Robinson v. Washington a high school senior had been denied her diploma for failing to satisfy a home economics requirement. A class action was filed to challenge the regulation's constitutionality on the grounds that no such requirement existed for male students. In an order denying plaintiff's request for a three judge court, it

from living in and experiencing the process of schooling, functioning as a subtle forge in which awareness of male and female roles is shaped. Included in this category are room chores ("boys are stronger"), different dress standards, and a basic part of the curriculum of any kindergarten class, where a little girl begins to understand the adult role awaiting her—the doll corner. See generally Barry, A View From the Doll Corner, 1 WOMEN'S J. OF LIBERATION 29 (1969).

104. Sex tracking refers to a particular curricular pattern imposed for girls, designed to train them for certain occupations and boys for others. See text accompanying note 107 infra.


106. Bonnie Sanchez went on to win the Van Wyck Junior High top prize for metalwork in 1970. A. Grant West, Women's Lib or Exploding the Fairy Princess Myth, SCHOLASTIC TEACHER, November 1971 (Jr./Sr. High ed.) at 12.

was ruled that plaintiff's claim lacked substantiality. The decision states, "It is difficult for this judge to perceive how irreparable harm or any harm results to girl high school students from this Board rule."\footnote{108}

A related case in the area of curriculum determinations is Hobson v. Hansen.\footnote{109} It involved a school segregation suit brought in the District of Columbia on behalf of black and poor children generally in attendance at the District's public schools. One of the court's principal findings dealt with racial discrimination via a school tracking system which resulted in minority groups occupying the lower tracks. The "tracking" involved was the placement of students in differing curriculum levels (tracks) according to the school's assessment of an individual student's ability to learn. The court's inquiry was triggered by the fact that track enrollment correlated with race, and the court found that the students, rather than being classified according to "capacity to learn", were "in reality being classified according to their racial status or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability."\footnote{110}

The court held that the tests employed to place students were culturally biased against the minority students, and ordered the tracking system abolished because children of minority status were restricted to the lower tracks, where, in turn, they were trained for "blue collar" jobs.

The Hobson tracking was, at least, neutral on its face; tracking according to sex, however, is based openly on classifications which "have nothing to do with innate ability."\footnote{111} Women, moreover, are not given the benefit of any "ability determination" test, whether appropriate or not. Quite simply, there is no attempt to assess individually the abilities or potentials of girls; all girls take home economics, none take shop.\footnote{112} Hobson notes that tracking decisions were made early in the child's education—about fourth grade.\footnote{113} Sex tracking

\begin{itemize}
  \item \footnote{108. \textit{Id.} at 2. Displaying an all too familiar attitude, the court commented that "a judge who enjoys food is hard put to make a decision in this type of a case. Perhaps he wears his prejudice on his sleeve or in the area of his belt." \textit{Id.} at 1.}
  \item \footnote{110. \textit{Id.} at 514 (emphasis added).}
  \item \footnote{111. Sex tracking does not purport to be neutral—it is, by its very nature, based on invidious distinctions. "[A] court will not treat lightly a showing that educational opportunities are being allocated according to a pattern that has unmistakable signs of invidious discrimination." \textit{Id.} at 513.}
  \item \footnote{112. The Court discussed the self-fulfilling prophecy phenomenon inherent in misjudgments of placing children according to tests. \textit{Id.} at 484. A similar phenomenon occurs when women are placed in certain classes for which they are "best suited", thus reinforcing the idea that "girls can't do mechanical things."}
  \item \footnote{113. 269 F. Supp. at 446.}
\end{itemize}
occurs at least that early, possibly from the minute the girl steps through the schoolroom door.

One analysis of Hobson suggests that “a court animated by the permissive spirit of the ‘rational relationship’ standard would probably allow the tracking system to stand,” since the tests, although biased, did measure factors relevant to a student’s academic performance, such as present ability to read. The writer suggests that the Hobson court implicitly invoked a balancing test, and concluded that the societal benefits derived from the system of tracking did not outweigh the detriments imposed upon the affected children. Although the court could have let tracking stand because it prepared students to fill the roles traditionally held by them in society, it did not.

Similarly, although it could be argued that there is a rational purpose behind training women for the role they have traditionally filled in society, the “societal benefit” is a benefit only when measured by a male-dominated society which seeks to perpetuate the culturally determined role of women. Since schools are a primary instrumentality in conveying and enforcing this set of expectancy patterns on girls subjected to the public education system, that system must become responsive to the current needs of women in our society. Neither the public nor the courts should accept the justification of “that’s the way it’s always been.”

Imposition of Sex Roles As a Violation of Substantive Due Process

The inadequacy of judicial remedy to deal with the full scope of the problem of sexual stereotyping in schools has been evident in the preceding discussion. Something subtle yet pervasive happens to girls in the classrooms of America, something more damaging and less susceptible to legal attack than the tangential loss of subsequent employment opportunity. The process of sex role socialization violates a woman’s basic human right of individuality and self fulfillment. The quality of the roles to which women are assigned is not as important as the fact that schools consign a large part of the population

115. Id. at 1520.
117. As William Hodes has noted, as long as judges are predominantly men, and the social pressures are not yet great enough to force change, there will probably always be a rationalizing “rhyme or reason” available to the judicial hand. Hodes, A Disgruntled Look at Reed v. Reed From the Vantage Point of the Nineteenth Amendment, 2 WOMEN’S RTS. LAW RPRTR. 9, 11 (1972).
118. See text accompanying notes 14-52 supra.
to a certain role solely on the basis of sex, much the same as it has done to minority children. The tremendous effect of instilling in women an innate sense of inferiority cannot be minimized; to analogize to the Court's opinion in Brown v. Board of Education, the separation of children solely because of sex "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone."110

To rephrase the problem, women are taught to accept their inferior status in society as being the natural order of things. Real alternatives for women do not exist in the classroom. The adult woman has been conditioned throughout her life to thought patterns and behavior which have limited her view of the world and her role in it. It is difficult for a woman to maintain her individuality in the face of classroom-induced orthodoxy—her unique identity is rendered irrelevant, her essential liberty deadened.

It is, therefore, the entire indoctrination process that courts must begin to examine. Although equal protection analysis may go far in individual situations, such a piece by piece approach does not resolve the crux of the problem. The difficulty is not so much that women are discriminated against in schools, because the imposition of sex roles goes far beyond such limits in its destructive effect. Schools impose an inferior image of women simply by the process of education itself, not just by denying individual admission, or by a particular class. It thus appears that in addition to the equal protection analysis, a due process attack upon the educational process is also appropriate. It should be noted, however, that the evidentiary burden which the school authorities would have to meet in due process cases is far less substantial than the nearly impossible "compelling interest" burden of equal protection analysis.120

The concept of essential individual liberty is not restricted to those rights specifically enumerated in the Constitution.121 As suggested in Griswold v. Connecticut,122 the due process clause itself establishes

120. This difference must be taken into account in determining the legal theory on which a case should proceed. If the due process analysis is chosen, then a school district need only demonstrate that its practices are reasonably related to a legitimate state interest and are not arbitrarily applied. Under equal protection analysis, however, the burden will be on the schools to justify its discrimination by a compelling state interest. Such an interest can almost never be proven, since the proponent must show that the means they have chosen are absolutely necessary to achieve the governmental objective. (See, e.g., In re Antazo 30, 3 Cal. 3d 100, 111, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970).
121. U.S. Const. amend. IX.
122. 381 U.S. 479, 486 (1965).
a sphere of personal liberty for every individual. This sphere, however, has been greatly contracted for women through the process of restrictive education. Under due process analysis, the question is whether the interference by the government is in furtherance of any legitimate government purpose. There is a line of cases which suggest that the proper role of the school is not that of indoctrinator; they appear to stand for the right of individuality versus state imposed orthodoxy.

As early as 1923, the Court did not hesitate to condemn under the due process clause restrictions upon the freedom of students to learn. In that year, Meyer v. Nebraska held unconstitutional an act of the state of Nebraska making it a crime to teach subjects in any language other than English to pupils who had not passed the eighth grade. The Court recognized the legislative desire to foster a homogeneous population, but specifically rejected that purpose. “That the state may do much . . . to improve the quality of its citizens . . . is clear; but the individual has certain fundamental rights which must be respected.” The next section of the opinion makes it clear that the Court was very concerned with the rights of individuals vis-à-vis state imposed orthodoxy. Justice McReynolds proceeded to discuss Plato’s ideas of child rearing apart from the parent, and Sparta’s attempt to “submerge the individual and develop ideal citizens” by entrusting their education to official guardians.

It thus appears that the state exceeds its bounds of authority when it attempts to impose its orthodoxy on its young citizens through the schools. The state, however, is doing just that when it imposes as truth its stereotypic view of women. Such action violates each child’s right to perceive and subsequently realize his or her own individual potential without regard to socially enforced sexual stereotypes. Justice McReynolds in Meyer expressed this nation’s repudiation of the principle that a state might so conduct its schools as to “foster a homogeneous people.”

Another decision involving the rights of the individual against

123. “While this Court has not attempted to define with exactness the liberty thus guaranteed [by the due process clause] . . . without doubt, it denotes . . . the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added).
124. 262 U.S. 390 (1923).
125. Id. at 401.
126. “[T]heir ideas touching the relations between the individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution. Id. at 402.
127. Id. at 402. See also, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), where it was held: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children.”
the state came down in 1943, in the case of West Virginia State Board of Education v. Barnette. Barnette expressly overruled a prior decision, Minersville School District v. Gobitis. Gobitis had held it was within the province of school authorities to attempt to foster a sentiment of national unity among children in the public schools by requiring all school children to salute and pledge the American flag. Following Gobitis, the West Virginia legislature amended its statutes to require all schools to conduct courses in history, civics, and the Constitution of the United States “for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism”. Recognizing that the public schools were dealing with the formative period in a citizen’s development, the board of education required that the flag salute become a regular part of the school program, and any failure to conform was considered “insubordination”.

With a challenge to the compulsory flag salute before it, the Barnette Court pointed out that to enforce the rights of citizens is not to choose weak government over strong. To the contrary, the Court said:

It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity . . . . Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.

It is apparent that the court recognized the importance of protecting children from indoctrinative methods: Although acknowledging that boards of education have highly discretionary functions, it carefully pointed out that all such functions must be performed within the limits of the Bill of Rights. “That they are educating the young for citizenship is reason for scrupulous protection of the Constitutional freedoms of the individual, if we are not to strangle the free mind at its source.” Finally, Justice Jackson addressed himself directly to the issue of state imposition of orthodoxy on an individual:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism . . . . or other matters of opinion . . . . We think the action of the local authorities in compelling the salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is

128. 319 U.S. 624 (1943).
129. 310 U.S. 586 (1940).
130. Id. at 597-598.
132. Id. at 626.
133. Id. at 637 (emphasis added).
134. Id. at 637 (emphasis added).
Clearly, it is difficult to argue that the sexual stereotyping and role reinforcement that occur in our classrooms do not "invade the spirit" of women and subtly inject the concept of a "woman's place" firmly into her mind.

Building upon *Barnette*, later cases have advanced the principle that the federal constitution imposes some minimal limits upon the embodiment of a popular orthodoxy in the curriculum. *Keyishian v. Board of Regents* stated that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," and these freedoms do "not tolerate laws that cast a *pall of orthodoxy* over the classroom." Similarly, in the famous *Tinker* decision upholding the rights of students to wear armbands in school to protest the Vietnam War, the Court proclaimed that "[i]n our system, students may not be regarded as closed circuit recipients of only that which the State chooses to communicate."

Imposition of orthodoxy in the classroom was further castigated in *Epperson v. Arkansas*, which struck down a law prohibiting the teaching of Darwinian theory in the schools. Black's concurring opinion in *Epperson* is enlightening, because he stated that he would have difficulty in locating a constitutional issue when a state law eliminated a particular subject from a curriculum, but implied that a clearly unconstitutional case would exist if a law espoused only *one particular theory as true*. Justice Black's comment applies with substantial force to women's role in society—as set forth by the schools in textbooks, curriculum determinations, and the other less overt policies. The traditional role of woman is never questioned, and no alternatives are put forth as true. It is submitted that there is little difference between espousing only one theory of creation and only one role for "the creator."

The fact that no law forbids teaching the equality of women does not alter the situation; that is, the state is responsible for the

135. *Id.* at 642 (emphasis added).
137. *Id.* at 603.
139. *Id.* at 511. *But see Cal. Educ. Code § 13556.5*: "Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, patriotism and a true comprehension of the rights, duties, and dignity of American citizenship, including kindness toward domestic pets . . . and to instruct them in manners and morals and the principles of a free government."
view it has chosen to issue to its students via official textbooks and curriculum choices, and in those sources only one theory is given as true. In the words of Judge Skelly Wright, 141 "[t]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." 142

Such an approach—employing the due process clause to battle sexual discrimination—is an alternative to prior piecemeal efforts by the courts, and one which they might consider in attempts to arrest the destructive process of the imposition of sex role orthodoxy upon the girls in our schools.

Relief

The difficulties inherent in application and implementation of appropriate remedies in this area are obvious. This factor probably accounts for the initial reluctance of some courts to become involved in areas, such as education, which are outside their expertise. It should be noted, therefore, that once the courts have determined that the schools are in fact engaged in harmful stereotyping, they can issue a decree that this practice is unlawful and must be discontinued—a cease and desist order. Subsequent implementation of remedies will then be up to the local legislatures or boards of education, according to federally issued guidelines. In the segregation decisions, for example, after courts ordered integration, boards of education have complied on the basis of guidelines set down not by the courts but by the Department of Health, Education and Welfare. Similarly, courts could simply order that the sex stereotyping in schools cease. Then it will be the obligation of local boards of education to comply with guidelines set down by an agency more familiar with the problem than the court, probably the Department of Health, Education and Welfare. Such guidelines are, in fact, being developed at the present time under Title IX of the Education Amendments of 1972. 143 Such guidelines would provide the courts with an opportunity to order that

142. See Emerson & Haber, The Scopes Case in Modern Dress, 27 U. Chi. L. Rev. 522 (1960), for an interesting proposition to remedy the situation of increasing governmental control of communication through public schools, and the decreasing opportunities for nongovernmental communication to offset this influence. The authors suggest that "what is needed is a new theory of the requirements imposed by the First Amendment. Possibly such a theory may be found in the concept of balanced presentation. Essentially the obligation of the government must be to present a fairly balanced exposition of various relevant theories and points of view, and of alternatives open for action. Only through enforcing a concept of this nature can individual members of society develop their full potential." Id. at 527.
an unlawful practice be terminated and that relief be granted, but would leave the specific remedy to be delineated by a competent agency and administered locally.\textsuperscript{144}

Title IX of the Education Amendments of 1972 provides that “\textit{[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance}”\textsuperscript{145} with certain enumerated exceptions.\textsuperscript{146} Such wording seems to provide broad coverage for women teachers and students who participate in federally funded educational programs in elementary or secondary schools.\textsuperscript{147} The enforcement of this legislation is the responsibility of the federal agency administering the funds, and compliance may be effected by a withdrawal of funds or nonreimbursement for costs incurred in a particular program whenever a finding has been made that the funding agency's regulations concerning sex discrimination have not been followed. The Office for Civil Rights of the Department of Health, Education and Welfare is currently preparing guidelines for enforcement, and it is anticipated that the guidelines will cover sex segregated classrooms, among other sex role reinforcing practices.\textsuperscript{148}

The passage of the Equal Rights Amendment (E.R.A.)\textsuperscript{149} would be of great significance in the elimination of sex role stereotyping in our schools. The basic proposition of the E.R.A. is that differences in treatment under the laws shall not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation. Thus, sex would be a prohibited classification, and there is little doubt that the E.R.A. would eliminate differentiation on account of sex in

\textsuperscript{144} \textit{See, e.g., Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).}

\textsuperscript{145} \textit{Education Amendments of 1972, tit. IX, § 901(a), 86 Stat. 376.}

\textsuperscript{146} \textit{These exceptions include admissions in regular public schools, to religious or military institutions, or traditionally one-sex colleges. Id.}

\textsuperscript{147} \textit{Almost all elementary and secondary schools receive federal funds in one form or another, thus bringing almost all schools under coverage of this Title. See G. Kahn, \textit{Statistics of Local Public Schools 56} (1971) (Dept. of Health, Education & Welfare Pub. No. OE 72-12); San Francisco Unified School District, \textit{Description of State and Federally Funded Projects 1972-73} (departmental report).}

\textsuperscript{148} \textit{Sinowitz, \textit{Legislation for Women in Education, Today's Education} 29, 30 (December, 1972).}

\textsuperscript{149} \textit{Proposed Equal Rights for Men and Women Amendment to the Const., 6 U.S.C.A. Const. (Supp. 1973) [hereinafter referred to as E.R.A.]. Section one of the proposed amendment reads as follows: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”}
the public schools.\footnote{Emerson, Falk, & Freedman, \textit{The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women}, 80 \textit{Yale L.J.} 871, 906 (1971).} In a speech discussing the Amendment,\footnote{Address by E. Duncan Kountz, \textit{ERA & Upward Mobility for Women}, ERA Ratification Assembly in Wash. D.C., May 10, 1972, reprinted in 118 \textit{Cong. Rec.} 6041 (daily ed. June 7, 1972).} the director of the Department of Labor's Women's Bureau noted that as a matter of policy many school systems currently maintain separate vocational courses for boys and girls, but the passage of the Equal Rights Amendment would require that all educational opportunities in the public schools be open to both girls and boys.

One other possible means of attacking sexual stereotyping in the schools has been suggested: The Nineteenth Amendment. It has been argued that the legislative intent behind this amendment granting women the right to vote was to make women full members of the society.\footnote{56 \textit{Cong. Rec.}, 10775 (Sept. 26, 1918) (remarks of Mr. Randall) 58 \textit{Cong. Rec.} 83 (May 21, 1919) (remarks of Mr. Nelson).} One writer holds the view that the Nineteenth Amendment approach would automatically make sex a suspect classification, and all that would be required would be to show the discrimination itself.\footnote{Emerson, Falk, & Freedman, \textit{The Equal Rights Amendment: A Constitu- tional Basis for Equal Rights for Women}, 80 \textit{Yale L.J.} 871, 906 (1971).} This would be similar to the Thirteenth Amendment approach redis- covered by the Court in \textit{Jones v. Alfred H. Mayer Co.}\footnote{392 U.S. 409 (1968). There the Court found that the Thirteenth Amendment gave Congress the power to eliminate racial discrimination by appropriate legislation, holding that even private action could be regulated.} Under this approach all that would be needed is to show that a certain practice discriminates against women as a class, or using the words of \textit{Jones}, that it is a “badge and indicia” of the pre-1920 status of second-class citizenship, in order to find corrective power in the courts.

One final path is the enactment of state legislation prohibiting discrimination in public schools based upon sex. Such laws have been passed in Massachusetts,\footnote{Mass. Gen. Laws Ann. ch. 76 § 5 (Supp. 1971).} Illinois\footnote{Ill. Ann. Stat. ch. 122 §§ 34-18 and 10-22.5 (Smith-Hurd Supp. 1971).} and New York.\footnote{N.Y. Unconsol. Laws ch. 275 (McKinney 1972) (adding new § 3201-a to Educ. Law).} Such enactments, with their wide scope, could be utilized in striking down the various sexist practices found in our schools, and would be a much less limited source of relief than the traditional equal protection analysis employed by the courts.\footnote{Rather than reaching only one selected sexist practice at a time, such legisla- tion would outlaw all sexually discriminatory practices.} California has not yet enacted such a statute, but it has at least
taken a step in the right direction. The problem of textbooks is one area of education where the California legislature has seen fit to act, and such action may obviate the necessity in California for legal attacks on the harmful effects of textbooks used by the school systems. This recent enactment is a revision of the Education Code section on instructional materials, prescribing proper content for school textbooks. It states that materials shall be adopted for use in the schools only when they "accurately portray the cultural and racial diversity of our society including . . . the contributions of both men and women in all types of roles, including professional, vocational and executive roles." It proscribes adoption of any textbook which contains "any matter reflecting adversely upon persons because of their race, color, creed, national origin, ancestry, sex or occupation."

Although this legislation is cause for some hope, its implementation remains to be seen. It is noteworthy that the code section which this new enactment supersedes indicates that it similarly required textbooks to contain "accurate portrayals of members of racial minority groups." The most cursory examination of current textbooks in use in California schools, however, reveals a totally inadequate response to this requirement. White faces are merely painted black, and black children remain largely on the periphery of the stories. Generally,


160. Other states have passed legislation even broader than this California enactment (see notes 155-57 infra).


162. Id., § 9243 (emphasis added).

163. Cal. Stat. 1968, ch. 917, § 5, at 1724 (repealed 1972). Civics and history textbooks; portrayal of ethnic groups' contribution. "The Board shall, when adopting textbooks . . . include only such textbooks which correctly portray the role and contribution of the American Negro and members of other ethnic groups . . . ."

the content has remained basically unchanged. The inadequacy of the response to prior legislative requirements illustrates the necessity of developing alternative ameliorative methods to insure that the legislative intent is carried out, in order to guarantee that women's roles in children's texts will be qualitatively changed.

It seems that such change could readily be achieved within the statutory scheme provided under the newly enacted sections 9404 and 9405 by construing and interpreting these sections as follows. The development of criteria for evaluating the texts under section 9404 is of the utmost importance because of the statute's vague language. Since representatives of the various ethnic and minority groups are to be a part of a taskforce to advise the Curriculum Materials Commission in development of the criteria under section 9405, and since section 9462 provides that involvement of parents and other members of the community be promoted, it seems only logical to have women and other minority groups actually develop and oversee the criteria and selection process themselves, providing the most democratic means for dealing with this important problem. This construction, combined with the enforcement potentialities of section 9481 (permitting the state board of education to acquire materials in ways other than direct purchase from the manufacturer), could allow the argument


166. Cal. Stat. 1972, ch. 929, § 2 at 1847 (West Cal. Leg. Serv.) (enacted as CAL. EDUC. § 9404): "The commission [Curriculum Development and Supplemental Materials Commission] shall . . . b) Develop criteria for evaluating instructional materials submitted for adoption so that the materials adopted shall adequately cover the subjects in the indicated grade or grades and which comply with the provisions of Article 3 (commencing with Section 9240) of Chapter 1 of this division. Such criteria shall be public information and shall be provided in written or printed form to any person requesting such information.

167. Id. § 9405: "The commission may, in order to fulfill its duties pursuant to § 9404, appoint task forces or committees of subject matter experts to assist and advise them. Each task force or committee appointed by the commission shall include classroom teachers . . . and representatives of the various ethnic groups and of the various types of school districts."

168. Id. § 9462: "District boards shall provide for substantial teacher involvement and shall promote the involvement of parents and other members of the community in selecting instructional material."

169. Id. § 9481: "The state board may acquire instructional materials included in any list adopted by the board for use in elementary schools, by any one or more of the following means determined by the board to be in the best interests of the state: a) Purchase them directly from the publisher or manufacturer. . . . b) Compile them, or cause them to be compiled and manufacture them . . . . f) Arrange for the printing of textbooks by the Department of General Services. . . . the state board may use any one or combination of the foregoing means in order to acquire all or any part of the instructional materials system."
that the state should cease dealing with the established textbook companies and should leave the writing and compilation of textbooks in the hands of the people directly involved and concerned: women and members of minority groups who compose the community. There is, in fact, a New York group who do publish their own nonsexist school books,\textsuperscript{170} and there are several other sources for nonsexist materials,\textsuperscript{171} demonstrating that publication of good quality, unbiased materials can in fact be accomplished by non-professionals.\textsuperscript{172} This approach would be an avenue towards compliance with the new code section which should be considered by California school systems.

Aside from textbooks, however, the California legislature has not yet acted to change other discriminatory and damaging processes which pervade the educational system.

\textsuperscript{170} Feminist Press, State University of New York, College at Old Westbury, Box 334, Old Westbury, New York 11568.

\textsuperscript{171} Other Sources of Non-Sexist Literature:
Complete bibliographies available from:
- National Organization of Women
  45 Newbury Street
  Boston, Massachusetts 02116
  $0.10 each: grammar, jr. high, high school, adult
- Feminists on Children's Media
  \textit{Little Miss Muffit Fights Back}
P.O. Box 4315
Grand Central Station
New York, N.Y. 10017
$0.40
- Task Force on Sexism in Schools
- Feminist Resources for Elementary and Secondary Schools
  Valley Women's Center
  200 Main St.
  Northampton, Massachusetts 01060
  $0.25

Publications available from:
- Feminist Press
  \textit{(supra, note 65)}
- Lollipop Press
  P.O. Box 1171
  Chapel Hill, North Carolina 27514
- China Books and Periodicals
  2929 24th Street
  San Francisco, California 94110
  (carries books from China which depict boys and girls in roles that are traditionally sex-typed in the United States)
- Feminist Book Mart
  162-11 9th Avenue
  Whitestone, N.Y. 11357

\textsuperscript{172} Of course it must be noted that these lay groups must work along with reading diagnosticians, especially on early readers, to insure they will be designed to meet the needs of those learning to read.
What is to Be Done?

The Citizens Advisory Council on the Status of Women\textsuperscript{173} issued a memorandum calling for review of local public school systems, and their targets summarize the areas discussed in this analysis which serve to impose sex roles:

1) schools restricted to one sex
2) courses of study in coed schools restricted to one sex
3) the per capita expenditure of funds by sex for physical education courses, physical education extra-curricular activities, and other extra-curricular areas
4) textbooks and library books
5) school activities, such as safety squads, room chores
6) promotion of teachers

It appears that several factors, some subtle and some not, combine to prevent women from realizing full equality. It is not enough to equalize hiring practices and opportunities for adult women; we must nurture the concept of women's equality at the earliest ages, because the heart of the problem lies in the development of a strong concept of self which women as a class are now generally denied. Education should direct and inspire the individual to make the highest use of his or her particular abilities.

It has been the intention of this note to illustrate the situation currently existing in the schools and its effect on children and adults, and to outline possible means of legal action for girls and women who are becoming aware of their injury by the pervasive problem presented by sex role indoctrination in the schools. Hopefully, men will become aware that role imposition also injures them; as long as women continue to be pushed into one mold men just as surely are cast into another.

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\textsuperscript{173} Gutwillig, (chairperson), \textsc{Citizens Advisory Council on the Status of Women}, \textit{Need for Studies of Sex Discrimination in Public Schools} 1 (June 1972).  
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