

Fall 1974

Equal Rights Amendment: Its Meaning and Its Impact on Missouri Law

Tony K. Vollers

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Tony K. Vollers, *Equal Rights Amendment: Its Meaning and Its Impact on Missouri Law*, 39 Mo. L. REV. (1974)

Available at: <https://scholarship.law.missouri.edu/mlr/vol39/iss4/4>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Comments

THE EQUAL RIGHTS AMENDMENT: ITS MEANING AND ITS IMPACT ON MISSOURI LAW

I. INTRODUCTION

On March 22, 1972, the Senate of the United States passed the proposed Equal Rights Amendment (hereinafter ERA).¹ The House of Representatives had previously passed the resolution on October 12, 1971.² Presently, the legislatures of the fifty states are considering whether or not to ratify the proposed amendment,³ and thereby, make it the twenty-seventh amendment to the United States Constitution.⁴ The topic of this comment will be the meaning and scope of the ERA together with its probable impact on Missouri law.

In terms of text, the amendment is short and simple. It decrees that:

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

This amendment shall take effect two years after the date of ratification.⁵

Despite the simplicity of its language, the purpose of the ERA is significant. The ERA is intended to rid the law of classifications based on stereotypes of the female and male sexes. Classifications which discriminate against one sex will be permitted only if they are based on the actual characteristics of individuals.⁶ Thus, it would permit classifications based on *characteristics* that are often associated with women (*e.g.*, status as child raiser or lesser physical strength). However, the ERA forbids classifications which use sex as a shorthand terminology for these characteristics.

That a characteristic is found more often in one sex than in the other does not justify different treatment of the sexes under the law.⁷ For example, it is probably true that there are more men who can lift fifty pounds without great difficulty than there are women who can do the same. However, the ERA would invalidate legislation forbidding an employer to require a woman employee to lift fifty pounds, unless it also forbade an employer to require a man to do the same thing.⁸ The legislation could

1. 118 CONG. REC. 9598 (1972).

2. 117 CONG. REC. 35815 (1971).

3. Currently, 33 state legislatures have ratified the amendment.

4. Article Five of the United States Constitution requires that three-fourths of the state legislatures ratify an amendment to make it a part of the Constitution.

5. H.R.J. Res. 208, 92d Cong., 2d Sess.

6. S. REP. NO. 689, 92d Cong., 2d Sess. 11 (1972); H.R. REP. NO. 359, 92d Cong., 1st Sess. 7 (1971) (minority views). The minority views of the dissenting members of the committee are relevant to our inquiry into the meaning of the amendment, because the resolution as it was reported by the House Judiciary Committee was rejected by the full House. 117 CONG. REC. 35813 (1971).

7. H.R. REP. NO. 359, 92d Cong., 1st Sess. 6 (1971) (minority views).

8. *Id.*

forbid an employer to require anyone who cannot do so without great difficulty to lift fifty pounds, so long as that aptitude was determined by the employer on an individual basis, rather than a sexual basis.

The philosophical basis of the amendment is that every individual, whether man or woman, should be allowed to develop to his fullest potential without being subject to legal restrictions and burdens imposed under a stereotyped view of the potentialities of his or her sex.⁹ Proponents of the ERA regard any restrictions or benefits placed on one sex for the stated purpose of promoting the health and safety of the members of that sex, as efforts to create a degree of legal supremacy not found in nature.¹⁰

To encapsulate all of this into a phrase familiar to the legal profession would be to say that, under the ERA, sex becomes a "suspect" classification.¹¹ Currently, under fourteenth amendment equal protection, the prevailing view is that the state need only show a rational basis to sustain classifications based on sex.¹² The drafters of the ERA obviously intend that sex classifications will be subject to a more stringent standard of judicial review.¹³ Probably, the test under the ERA will be similar to that of the equal protection clause with respect to laws which on their face discriminate against race or nationality.¹⁴

9. *Id.* at 7.

10. *Id.* at 5.

11. Brown, Emerson, Falk and Freedman (hereinafter referred to as "Emerson"), *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889 (1971); Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment*, 22 DRAKE L. REV. 505, 511-12 (1973).

Some opponents of the amendment believe that it imposes an absolute standard so that all classifications based on sex will be invalid. See the letter submitted to the committee by Professor Freund in *Hearings on H.R.J. Res. 208 Before the House Comm. on the Judiciary*, 92d Cong., 1st Sess., at 610 (1971).

12. See *United States v. St. Clair*, 291 F. Supp. 122, 125 (S.D.N.Y. 1968). The majority opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), asserts that classifications based on sex are now "suspect" classifications. However, only four justices joined in this opinion. The remainder were unwilling to accept such a change in the law.

In *Kahn v. Shevin*, 94 S. Ct. 1734 (1974), six of the justices clearly held that a rational basis was sufficient justification for sex discrimination in economic matters, distinguishing *Frontiero* as involving only "administrative convenience" as attempted justification. The district courts are so interpreting *Kahn v. Shevin*: *Kohr v. Weinberger*, 43 U.S.L.W. 2066 (E.D. Pa. July 26, 1974); *Crawford v. Cushman*, 43 U.S.L.W. 2053 (D. Vt. July 12, 1974); *Edwards v. Schlisinger*, 43 U.S.L.W. 2009 (D.D.C. June 19, 1974).

13. One of the major reasons for the creation of the ERA and the efforts to secure its ratification is that the courts have, in the past, declined to treat classifications based on sex as "suspect" classifications under the equal protection clause. Emerson, *supra* note 11, at 875-82.

14. S. REP. NO. 689, 92d Cong., 2d Sess. 12 (1972); H.R. REP. NO. 359, 92d Cong., 1st Sess. 7 (1971) (minority views).

The most explicit test for deciding whether a "suspect" classification is invalid under the equal protection clause was utilized in *Loving v. Virginia*, 388 U.S. 1 (1967). The Court stated that such a classification must be shown to be necessary to the accomplishment of some permissible state objective independent of the objective of racial discrimination. *Id.* at 11.

There are two exceptions to the ERA's general prohibition against sex classifications. The ERA would permit reasonable classifications based on physical characteristics that are truly unique to one sex, since such classifications would be concerned with the attributes of individuals rather than with those of a stereotype.¹⁵ It appears from the legislative history of the amendment that the term "physical characteristics" is to be regarded literally.¹⁶ Thus, certain sociological and psychological characteristics commonly but incorrectly attributed to all women (*e.g.*, incapacity to engage in business or make investments, the inclination or tendency to become homemakers, or other characteristics which actually result from social conditioning and classifications) do not come within this exception.

A second exception to the prohibition appears to be laws which require or permit separation of the sexes for purposes which are protected by the constitutional right to privacy.¹⁷ Examples of laws fitting into this category are laws requiring or permitting separate restrooms, and laws permitting or requiring separate dormitories or barracks for women.¹⁸ If the courts do not agree with the proponents of the amendment that *Griswold v. Connecticut*¹⁹ compels the right to be separated from the opposite sex for certain purposes, it is unclear whether the ERA would continue to permit such separation.

The amendment, by its terms, limits its application to the activities of the federal and state governments. The same body of law governing the coverage of the fourteenth amendment equal protection clause would also govern the coverage of the ERA; the application of the ERA will be limited to situations involving "state action."²⁰ Consequently, in the area of sex

15. H.R. REP. NO. 359, 92d Cong., 1st Sess. 7 (1971) (minority view). The familiar example of such a classification is maternity benefits for those who become pregnant and have children. The capacity to become pregnant is a physical characteristic unique to women.

See Emerson, *supra* note 11, at 895-96. This article suggests the following factors in determining whether a legislative classification directed at a particular problem permissibly relates to physical characteristics truly unique to one sex:

- (a) The proportion of the sex who actually have the characteristic;
- (b) the relationship between the characteristic and the problem;
- (c) the portion of the problem attributable to the unique physical characteristics of that sex;
- (d) the proportion of the problem eliminated by the solution;
- (e) the availability of less "drastic" alternatives; and
- (f) the importance of the problem ostensibly being solved as compared with the costs of the least drastic solution.

16. The Senate rejected a provision in the ERA permitting laws to make distinctions between the rights and responsibilities of men and women based on physiological or *functional* differences. 118 CONG. REC. 9538 (1972).

17. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Supreme Court held that a state statute prohibiting the use of contraceptives as it applies to married women violated their constitutional right of privacy.

The Senate rejected a provision that the ERA would not invalidate any laws which secure privacy to men or women, 118 CONG. REC. 9537 (1972).

18. Section 292.160, RSMo 1969, requires employers who employ both men and women to provide separate restrooms.

19. 381 U.S. 479 (1965).

20. H.R. REP. NO. 359, 92d Cong., 1st Sess. 7 (1971) (minority view).

discrimination in employment, the amendment will not prohibit sex discrimination by private employers. Sex discrimination in the private sector is barred by other federal and state legislation.²¹

If the ERA is ratified and the various state legislatures and Congress fail to revise legislation within the two year period provided by the ERA, courts will face a perplexing problem. Once a law is found to violate the ERA, a court will have to decide whether to invalidate that law or to extend the coverage of the law to the sex not previously covered. For laws not involving criminal penalties, the courts will be free to utilize either alternative. As a guide for statutory laws, the courts should observe the legislative history of the statute in question (if available) to ascertain what the legislature would have done if faced with the same problem.²² With respect to case law which offends the ERA, the courts will have to resort to their own judicial ingenuity and look at the reasons and principles on which the case law rule rests. Criminal statutes which violate the ERA will have to be invalidated by the courts. The courts have declared that they will always strictly construe a criminal statute so as to avoid creating crimes not expressly defined on the face of the statute.²³

If ratified, the ERA would undoubtedly result in a number of changes in laws and regulations which affect our lives. The remainder of this comment will focus on those areas of Missouri law which would be affected by the amendment and suggest legislative and judicial alternatives which would comply with the amendment.

21. Title VII of the Civil Rights Act of 1964 bars employment discrimination based on sex by employers of fifteen or more persons. 42 U.S.C. § 2000e(b) (Supp. III, 1973). §§ 296.010(2), .020, RSMo 1973 Supp., bar sexual discrimination for all employers in the state employing six or more persons.

22. Emerson, *supra* note 11, at 913-16. The Senate Judiciary Committee report, relying on a survey of prior equal protection and Title VII cases, puts forth the rather simplified rule that laws which restrict one sex's activity should be nullified, while those which extend a meaningful protection or benefit to one sex should be expanded to include the other sex. S. REP. No. 689, 92d Cong., 2d Sess. 11 (1972). In *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Supreme Court faced this issue without explicitly recognizing it as an issue.

In *Reed*, the Court reversed and remanded the reinstatement of a probate court order which had appointed a male as an administrator of an estate on the basis of a statutory preference for males. The result of this action was to require the probate court to designate an administrator on the basis of factors other than sex.

In *Frontiero*, the Court reversed a lower court's dismissal of the female armed service member's complaint which sought an order directing the Secretary of Defense to provide her with dependency benefits, even though she had been unable to show that her husband was, in fact, dependent upon her. Conceivably, the Court could have held that all servicemen and servicewomen must actually prove that their spouses were dependent upon them; but, because of the obvious administrative burden which would result, the Court chose to give the plaintiff the benefit of the same presumption that was already available to servicemen.

23. This approach was recognized in *State v. Wilbur*, 462 S.W.2d 653 (Mo. 1971). See S. REP. No. 689, 92d Cong., 2d Sess. 11 (1972).

II. IMPACT OF THE EQUAL RIGHTS AMENDMENT ON MISSOURI LAW

A. *Protective Labor Legislation*

The area of protective labor legislation can be divided into two parts: (1) special benefits legislation and (2) legislation excluding women or men from various occupations and work activities. In passing on the validity of such legislation under the ERA, the courts will find a helpful source of precedent in the body of cases deciding the validity of such legislation under Title VII of the Civil Rights Act of 1964.²⁴ Title VII bars sexual discrimination in employment by employers of fifteen or more persons in an "industry affecting commerce."²⁵ Though Title VII applies to a limited class of employers, it would be safe to assume, for our purposes, that if a statutory classification were found to be invalid under Title VII, it would also be invalid under the ERA. For example, prior to 1973, a Missouri statute²⁶ prohibited women from working more than nine hours a day or more than fifty-four hours a week in most places of employment. The statute clearly discriminated on the basis of sex and was found not to be a defense to a violation of Title VII.²⁷ Such a statute would violate the ERA because this limitation on a woman's right to work cannot reasonably be based on any physical characteristic unique to women.

1. Special Benefits Legislation

Section 29.150, RSMo 1969, provides that in every place of work in which unclean work is performed and which employs women, a place to wash and dress shall be provided for such women. Section 292.170, RSMo 1969, provides that every place employing women shall provide seats in which the women may sit when their job does not require them to be on their feet, and requires that during such times the women shall be allowed to sit. These statutes probably violate the ERA, because there is no legitimate justification for extending these privileges only to women.²⁸ The mere fact that more women than men may need such statutory benefits is an insufficient justification for the statutes in that some men also need such benefits.

Assuming that a court would deem these statutes violative of the ERA, it would be faced with the more difficult issue of whether to nullify these statutes or extend their benefits to men.²⁹ To extend the benefits to men would, perhaps, comply more closely with the general purposes of such legislation.³⁰ However, it could be argued that such an extension would

24. 42 U.S.C. § 2000e-2 (Supp. III, 1973).

25. *Id.*

26. § 290.040, RSMo 1969.

27. *Vogel v. Trans World Airlines*, 346 F. Supp. 805 (W.D. Mo. 1970).

28. S. REP. No. 689, 92d Cong., 2d Sess. 14-15 (1972).

29. See text accompanying notes 22-23.

30. S. REP. No. 689, 92d Cong., 2d Sess. 15 (1972) suggests that these benefits should be extended to men. Where statutes have been invalidated under Title VII, the courts have differed in their resolution of this issue. Compare *Potlach Forests, Inc. v. Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), *aff'd* 465 F.2d 1081 (8th Cir. 1972) (the court extended the benefits to men) with *Home-makers, Inc., Los Angeles v. Division of Indus. Wel.*, 356 F. Supp. 1111 (N.D.

create a hardship for many employers that could not have been intended by the legislature. Moreover, section 292.210, RSMo 1969, provides a criminal penalty for failing to comply with these statutes. Thus, an extension of the coverage of these statutes would create crimes not expressly set forth in these statutes.

2. Laws Excluding Women or Men from Certain Occupations or Work Activities

Certain Missouri statutes exclude women from specified occupations.³¹ The purpose behind these statutes is to protect women from being forced to work at a job which many women would be incapable of performing well, or which might be detrimental to their health. However, some women would be able to perform these jobs as satisfactorily as men. The argument that a certain job would be detrimental to their health undoubtedly pertains to some men also.³² Since the classifications are based on a stereotyped view of women rather than distinguishing physical characteristics, they would be invalid under the ERA. The courts would probably nullify, rather than expand these statutes, since the expansion of coverage to men would terminate the named occupations completely.

Sections 216.225, .375, RSMo 1969, are examples of statutory exclusion of men from an occupation. They require that the state prison for women be under the immediate supervision of a woman superintendent. The ERA would invalidate these statutes also, because there is insufficient justification for classification on the mere basis of sex.

A Missouri statute also prohibits an employer from requiring a female employee to clean any part of a machine while it is in motion, and from requiring her to work between the fixed transverse part of a machine, except one operated by her.³³ However protective of health and safety this statute is, men need such protection as much as do women. Due to insufficient basis for the classification, this statute would be invalid under the amendment. In view of its purpose, to protect and to promote safety, a court might determine it preferable to expand such protection to men, rather than eliminate it for both sexes.

3. Maternity Leaves

Many employers, public and private, impose maternity leaves on their pregnant female employees. Such leaves usually require them to give notice

Cal. 1973) (the court refused to extend the benefits to men because to do so would be an exercise of legislative power).

31. *E.g.*, § 293.060, RSMo 1969 (women should not be employed in or about mines except in a clerical capacity); § 564.680 RSMo 1969 (girls under the age of 18 are not to be employed as telegraphic messengers); § 71.200, RSMo 1969 (authorizes cities of 5,000 or more to appoint women as members of their police forces, prescribe their duties, and provide for their compensation).

In regard to § 71.200, RSMo 1969, it should be noted that statutes granting authority to municipalities are usually strictly construed by the courts. *See City of Springfield v. Cloose*, 356 Mo. 1239, 1252, 206 S.W.2d 539, 546 (En Banc 1947). Thus, the statute may be read as prohibiting cities of less than 5,000 people from hiring women as police officers.

32. S. REP. No. 689, 92d Cong., 2d Sess. 15 (1972).

33. § 292.040, RSMo 1969.

of their pregnancy, and to leave their job at some fixed time period before the expected date of birth. Frequently, the employers prohibit her from returning to work until several weeks after the delivery.

Prior to 1973, Missouri legislation required a minimum maternity leave which prohibited a pregnant woman from working within three weeks of the date of birth and for three weeks thereafter.³⁴ Such requirements have been challenged as violations of the equal protection clause³⁵ and Title VII of the Civil Rights Act.³⁶ Perhaps, for this reason the statute was repealed in 1973. Recently, the Supreme Court ruled that maternity leaves which require a pregnant woman to leave her job as a public school teacher at the fourth or fifth months of pregnancy, rather than when she and her physician decide that she is no longer able to work, violate the due process clause of the fourteenth amendment.³⁷

Section 288.040, RSMo 1969, precludes a pregnant woman from obtaining unemployment benefits for a period of time ranging from three months before childbirth until four weeks thereafter. Since the ability to work is one of the general requirements for eligibility for unemployment benefits,³⁸ it appears that the statute creates a conclusive presumption that pregnant women are unable to work during the aforementioned period. In view of the maternity leave cases,³⁹ this statute may also violate the due process clause. Although pregnancy is a characteristic unique to women, not all pregnant women are incapable of working within such fixed periods. Thus, this statute would also run afoul of the ERA. Any man is permitted to show that he is willing and able to work to obtain unemployment benefits. Therefore, since a pregnant woman is precluded from doing this, the statute discriminates on the basis of sex. The basis for this distinction in treatment does not meet the strict standards imposed by the amendment, and thereby violates the ERA.⁴⁰ This statute could be revised to satisfy both the due process requirements and the ERA by simply eliminating any presumption

34. § 290.060, RSMo 1969.

35. *Cohen v. Chesterfield Cty. School Bd.*, 39 U.S.L.W. 2686 (E.D. Va. 1971). This case was combined with another case and affirmed by the Supreme Court in *Cleveland Bd. of Educ. v. LaFleur*, _____ U.S. _____, 949 S. Ct. 791 (1974). However, the affirmance was on the grounds that fixed period maternity leaves violate the due process clause. In his concurring opinion, Justice Powell agreed with the district court that mandatory fixed period maternity leaves violate the equal protection clause.

36. *Schattmen v. Texas Employ. Comm'n*, 330 F. Supp. 328, 329 (W.D. Tex. 1971), *rev'd*, 459 F.2d 32 (5th Cir. 1972), *cert. denied* 409 U.S. 1107 (1973). The district court decision was reversed on the ground that an agency of a state government was not a "person" who could be an employer under Title VII. Title VII was amended in 1972 to include governmental agencies and political subdivisions within the definition of a person who could be an employer under the act. Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, *amending* 42 U.S.C. § 2000e(a) (Supp. III, 1973).

37. *Cleveland Bd. of Educ. v. La Fleur*, _____ U.S. _____, 94 S. Ct. 791 (1974).

38. § 288.040(1)(2), RSMo 1969.

39. *Cleveland Bd. of Educ. v. LaFleur*, _____ U.S. _____, 94 S. Ct. 791 (1974).

40. See notes 11-14 and accompanying text *supra*.

and permitting the Unemployment Commission to make findings in each individual case as to the applicant's ability to work.

4. Missouri Fair Employment Act

Finally, certain provisions of the Missouri's fair employment act⁴¹ are of doubtful validity under present law and under the ERA. Subdivision eight provides, in part, that it shall not be unlawful to differentiate in compensation, terms, privileges, or conditions of employment on the basis of sex. It further provides that any pension, retirement, profit sharing, welfare, or death benefit plan is not an unlawful employment practice although it provides for the retirement of female employees at a younger age than male employees. It also provides for differences in annuity, death, and survivor's benefits between widows and widowers of employees. It is curious that this section exempts from the coverage of the statute such forms of sex discrimination in employment. Retirement plans which require women to retire at an earlier age than men have been found to violate Title VII of the Civil Rights Act.⁴² But because Title VII applies only to employers of 15 or more persons, employers who have less than 15 employees will not be violating either Title VII or the Missouri fair employment act. However, such a provision in an employer's retirement plan may violate the equal protection clause of the fourteenth amendment. *Frontiero v. Richardson*⁴³ suggested that dependent benefit plans which provide for different eligibility requirements between men and women may violate equal protection if the requisite "state action" is present.⁴⁴ Although the Missouri Act does not require such discrimination, it may be viewed as "encouraging" or "persuading" private employers to discriminate in this manner. Thus, in view of some of the broader notions of state action utilized by the Supreme

41. § 296.020, RSMo 1969.

42. 42 U.S.C. § 2000e (1972); *Bartmess v. Drewry U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971).

43. 411 U.S. 677 (1973). A federal statute provided that a male serviceman could claim his wife as a dependent for purposes of increased allowances and medical benefits without actually showing that she was, in fact, dependent on her husband. However, a woman had to prove that her husband, in fact, received over half his support from her in order to obtain these benefits. The court found that this differentiation in treatment denied equal protection of the law under the due process clause of the fifth amendment. *But see Kahn v. Shevin*, 94 S. Ct. 1734 (1974), holding that a "rational basis" was sufficient justification for discrimination based on sex. In *Kohr v. Weinberger*, 43 U.S.L.W. 2066 (E.D. Pa. July 26, 1974) the court applied *Kahn* in upholding a provision of the Social Security Act which permitted women to use a shorter period of years than men in computing "average monthly wages." The court held that because of past discrimination against women in the job market the provision was reasonable and constitutional.

44. This decision raised doubts about the validity of a portion of the Missouri workmen's compensation statute. Section 287.240, RSMo 1969, in defining those dependents who are entitled to an award of death benefits, presumes that a surviving wife is a dependent of her husband, but generally requires a showing that a surviving husband was dependent upon his decedent wife.

However, *Kahn v. Shevin*, 94 S. Ct. 1734 (1974) indicates that this statute is valid if there is a reasonable justification, greater than administration convenience, for the distinction between the sexes.

Court in recent years,⁴⁵ the provision may violate the equal protection clause. The ERA would also invalidate such provisions but would require greater justification for discrimination than the "rational basis" now required by the courts for classifications based on sex.

B. Domestic Relations Law

The ERA will have a significant effect on Missouri's domestic relations law. Although the new divorce reform act⁴⁶ has introduced a considerable degree of equality into this area, the ERA would impose some additional changes.

Though the divorce reform act has moved Missouri toward greater equality between the sexes in marriage dissolutions, the beginnings of the marital relationship are marked with inequality under the law. Section 451.090, RSMo 1969, permits females to marry without the consent of their guardians at age 18. In contrast, males are not permitted to marry without the consent of their guardians until age 21. Even though such a differentiation may be based on the general view that women mature, physically and mentally, at an earlier age than men, this *tendency* is not true in all cases. Under the strict test of the ERA, such differentiation in treatment would not be permitted. As a result, the courts or the legislature would have to settle on one age of consent for men and women. Of course, making the age of majority 18 would have this effect.

Once married, a wife suffers some legal disabilities. Though the married women's property acts⁴⁷ have alleviated some of the common law disabilities concerning property rights, in some other respects, married women are presently no better off than they were at common law.⁴⁸ For some purposes a married woman has no legal identity apart from that of her husband. This particular "merger" takes two forms: (1) The legal domicile of a married woman is that of her husband unless she establishes a separate residence for the purpose of initiating dissolution proceedings or is otherwise justified in leaving her husband;⁴⁹ and (2) the very strong custom and possible law that a married woman assumes the surname of her husband upon marriage.

45. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), a state constitutional provision prohibited restrictions on an individual's right to sell his property to whomever he chose. The Court held that the mere fact that this provision encouraged private racial discrimination was sufficient to constitute state action under the fourteenth amendment.

46. §§ 452.300-.415, RSMo 1973 Supp.

47. See § 451.250-.290, RSMo 1969.

48. At common law, a married woman was incapable of entering into a contract or engaging in business without her husband's consent. 2 F. POLLOCK & F. MAITLANE, *THE HISTORY OF ENGLISH LAW* 403 (1st ed. 1895). Conversely, a married man was liable for his wife's debts and torts incurred during coverture. *Id.* at 402.

The best illustration of this legal unity was the proposition that a husband could not make a direct conveyance of property to his wife, since it would only result in a trust in himself for the benefit of his wife. *Rutledge v. Rutledge*, 177 Mo. App. 469, 119 S.W. 489 (St. L. Ct. App. 1909).

49. *Walton v. Walton*, 6 S.W.2d 1025 (St. L. Mo. App. 1928); *Hairs v. Hairs*, 222 Mo. App. 941, 300 S.W. 540 (K.C. Ct. App. 1927).

The objectionable feature about the first form of "merger" under the ERA is not that one spouse is conclusively presumed to have the same residence as the other spouse, but instead, that it is always the wife who is subject to this presumption. Assuming that the state can show an interest in requiring a married couple to have only one legal residence, the test should be based on some legitimate classification other than sex.

It is unclear in Missouri whether the custom that a married woman assumes her husband's surname rises to the status of being a law.⁵⁰ Section 527.270, RSMo 1969, admonishes circuit courts to grant a change of surname only if it would be proper and not detrimental to the interests of any other person. The ERA probably would not permit either a requirement or a presumption that a married woman assumes her husband's surname. As discussed in regard to legal domicile, the State probably could require that a married couple assume a common name. If that statute did not grant any preference for the surname of either spouse, it would be valid under the amendment.

1. Rights of Husband and Wife Inter Se

Prior to the enactment of Section 451.250 and 451.290, RSMo (1969),⁵¹ and their predecessors, a woman, upon entering marriage, lost most of the ownership and control of her property.⁵² However, these statutes pre-

50. At common law it was only a custom. MacDougall, *Married Women's Common Law Right To Their Own Surnames*, 3 WOMEN'S RIGHTS LAW REPORTER 2, 4 (Winter-Spring 1972-73). American cases are split as to whether a married woman's surname, by law, becomes that of her husband. Compare *Stuart v. Board of Super. of Elect.*, 295 A.2d 223 (Md. 1972); *State ex rel. Krupa v. Green*, 114 Ohio App. 497, 177 N.E.2d 616 (1961), with *Wilty v. Jefferson Parish Exec. Comm.*, 156 So. 2d 800, 802 (La. 1963); *Kelle v. Crab Orchard Rural Fire Prot. Dist.*, 83 N.W.2d 51, 54 (Neb. 1957).

Section 452.100, RSMo 1969, authorized the court to change the wife's surname to that of her maiden name or any other prior surname when the wife obtained the divorce. No provision was made for the case where the wife was the defendant in the divorce proceeding. Thus, under the old "fault" conception of divorce, it could be argued that a wife could change her surname *only* when her husband failed to fulfill his marital obligations and, thereby, lost the right to require his wife to retain his surname.

Section 452.100, RSMo 1969, was repealed with the enactment of the divorce reform act. The new act does not make any provision allowing a married woman to change her name upon divorce, but considering the specific authority of § 527.270, RSMo 1969, a change of surname upon dissolution of the marriage is undoubtedly permitted. In *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972), the district court held that a statute in effect requiring a married woman to use her husband's surname had a rational basis and did not violate the equal protection clause.

51. These statutes give a married woman the power to transact business and convey property independently.

52. The title to the wife's personal property passed to the husband when he reduced it to his possession. 2 F. POLLOCK & F. MAITLAND, *supra* note 48, at 402. As for the wife's real property the husband automatically had the right to the rents and profits, and upon the birth of a live child, the right to possession. *Id.* at 405. The wife had to resort to certain equitable devices to retain any control over her property. 41 C.J.S. *Husband and Wife* §§ 229-31 (1944). See Kantowitz, *Sex Based Discrimination in American Law (Part Two): Law and the*

cluded many potential violations of the ERA.⁵³ One possible remaining problem is a judicial presumption that the household goods of a family belong to the husband.⁵⁴ Although the wife could rebut this presumption by showing her ownership, such a presumption would be invalid under the ERA. The new divorce reform act precludes granting the household goods to the husband because of such a presumption.⁵⁵ Section 442.050, RSMo 1969, continues to be effective, however, and probably violates the ERA. This statute allows a married woman to convey her real estate by a power of attorney authorizing its conveyance, but only if she executes and acknowledges the power jointly with her husband.

Another problem that remains despite the married women's property acts is the law regarding control of the marital household. This area of the law remains unchanged from common law days. For example, when the married women's property acts were enacted, the legislature allowed the husband to retain the primary right to claim the homestead exemption from attachment and execution.⁵⁶ Thus, the legislature acknowledged the husband's position as the legally recognized head of the household. As the head of the household, the husband may, within reason, determine where the marital unit will reside regardless of the wife's desires.⁵⁷ If the wife refuses to go along with the husband, then she has deserted him and may suffer the consequences.⁵⁸ In addition, the husband, at least where he supplies the major part of the household's income, has the exclusive right to determine the standard of living for the household. This is true no matter how unreasonable that standard of living is in regard to the income of the

Married Woman, 12 St. L.L.J. 3, 6 (1967). Also, the wife's services and earnings during the marriage belonged to her husband. 41 C.J.S., *supra* at § 17.

53. Section 451.250, RSMo 1969, provides that a married woman has the same legal status with respect to her property as a *femme sole* (single woman). See Keyser (Parts One and Two), *Legal Status of Women in Missouri*, 1 St. L. L. Rev. 1 (1915). The wife is accorded equal ownership of property held in the entirety. *Schwind v. O'Halloran*, 346 Mo. 486, 142 S.W.2d 55 (1940); Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 35 (1951). One case went so far as to hold that a wife could sue her husband for conversion due to his sale of property held in the entirety. *Ray v. Ray*, 336 S.W.2d 731, 734 (Spr. Mo. App. 1960). Moreover, with the abolition of dower and curtesy in Missouri, neither spouse has any sort of inter vivos interest in the other spouse's property. § 474.110, RSMo 1969. Currently, the law only affords a spouse the right, upon the death of the other spouse, to elect a statutory share, rather than take under the other spouse's will. § 474.160, RSMo 1969.

54. 41 C.J.S., *supra* note 52, at § 17.

55. Section 452.330, RSMo 1973 Supp., provides that all property acquired during the marriage by either spouse is "marital property" which shall be divided between the spouses as the court deems just. The factors involved in dividing the marital property include: (1) The contribution of each spouse to the acquisition of the marital property; (2) the value of the property set apart for each; and (3) economic circumstances of the parties.

56. § 451.290, RSMo 1969. The homestead exemption is provided by § 513.475, RSMo 1969. The statute gives the head of the household the right of asserting the exemption. The husband is also considered to be the head of the family for the purpose of claiming the person property exemptions provided by § 513.435, RSMo 1969. *In re Diehl*, 53 F. Supp. 703 (E.D. Mo. 1944).

57. *Campbell v. Campbell*, 281 S.W.2d 314, 317 (Spr. Mo. App. 1955).

58. *Easley v. Easley*, 266 S.W.2d 28, 31 (St. L. Mo. App. 1954).

household. The courts refuse to intervene in disputes over the standard of living for a family while the wife remains living with the husband.⁵⁹ Also, as head of the household the husband has a right to receive the wife's services.⁶⁰

The ERA would invalidate much of the husband's legal control over the household. However, it is difficult to predict how the courts or the legislature will resolve the problem of who is to control the household. The State must demonstrate some interest in order to justify any requirement that one spouse or the other be the legally recognized head of the household, and it is doubtful that this can be done. Perhaps the best solution would be to leave the question of family management to the persons involved or to custom.

2. Duty of Support

At common law the wife was said to enjoy a right to be supported by her husband.⁶¹ Moreover, she was relieved of the primary responsibility of supporting any children of her marriage—that responsibility being assigned to the husband also.⁶² There was, however, in Missouri no corresponding duty to support the husband,⁶³ regardless of his circumstances.⁶⁴

The married women's property acts had no effect on the duty to support, even though they eliminated a major part of the basis for imposing this duty.⁶⁵ In Missouri, even when a wife was more financially capable of supporting herself and her children than her husband, he was not relieved of his duties of support.⁶⁶ Moreover, upon dissolution of the marriage, these same rules applied to the statutory duty to pay alimony,⁶⁷ at least where the wife was not at fault.

The new Missouri divorce reform act does not completely abrogate the common law rules as to the duty of support, but it does create some inroads into that doctrine. Section 452.335, RSMo 1974 Supp., authorizes the court to grant a maintenance (alimony) order to *either* spouse in a dissolution (divorce) or legal separation proceeding. Section 452.315, RSMo 1974 Supp., allows the court to award temporary maintenance to *either* spouse, and Section 452.355 RSMo 1974 Supp. permits the court to award attorney's fees and court costs to *either* spouse.

The ERA would require the courts or the legislature to go only one step further. That is, the general duty to support should be imposed on both the marital partners throughout the course of the marriage, but fi-

59. *Hoynes v. Hoynes*, 218 S.W.2d 823, 829 (St. L. Mo. App. 1949).

60. *Tryon v. Casey*, 416 S.W.2d 252, 260 (K.C. Mo. App. 1967); *Greer v. McCrory*, 192 S.W.2d 431, 442 (K.C. Mo. App. 1946); 41 C.J.S. *Husband and Wife* § 17 (1944).

61. *In Re Wood's Estate*, 288 Mo. 588, 232 S.W. 671 (En Banc 1921).

62. *O'Brien v. O'Brien*, 485 S.W.2d 674, 677 (St. L. Mo. App. 1972).

63. *State ex rel. George v. Mitchell*, 230 S.W.2d 116, 120 (Spr. Mo. App. 1950).

64. Some states impose a duty, by statute, upon the wife to support the husband while he is incapacitated. 41 C.J.S. *Husband and Wife* § 16 (1944).

65. *Tryon v. Casey*, 416 S.W.2d 252, 260 (K.C. Mo. App. 1967).

66. *Broemmer v. Broemmer*, 219 S.W.2d 300, 304 (St. L. Mo. App. 1949).

67. *Laweing v. Laweing*, 21 S.W.2d 2, 3 (Spr. Mo. App. 1929).

financial support should be imposed on the basis of a partner's ability to contribute to the family income. A partner's obligation could be served by responsibility for taking care of the household. The United States Senate Committee on the Judiciary envisioned this arrangement:

Where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of his or her duties.⁶⁸

Similarly, the legislature could use this basis for assessing the primary duty of supporting the children of the marriage. The imposition of the duty of support on this basis could reach familiar results and should obviate the argument that the ERA will impair the family as a basic social unit and as an institution for child raising.⁶⁹

Various Missouri statutes enacted before Missouri's divorce reform act contain provisions pertaining to the enforcement of the duty of support owed to the wife.⁷⁰ Presumably, some of these provisions are modified by the new divorce reform act to include a husband who is entitled to support from his wife which was assessed by the court in a legal separation or a dissolution proceeding. Those provisions which relate to the enforcement of the duty of support where there has been no legal separation or dissolution would probably, under the ERA, be extended to a husband who is entitled to support from his wife.

3. Child Custody

Current child custody law discriminates against men in the awarding of the custody of children, born both in and out of wedlock. For children born during the course of marriage, section 452.375, RSMo 1973, purports to give the husband and wife equal footing in the process of deciding the custody of children upon dissolution of the marriage.⁷¹ However, the statute may not affect the Missouri case law rule that, all other things being equal, the mother should have custody of a child during his tender years.⁷² In theory, the ERA would abolish this case law preference. However, since the best interests of the child are the governing factor in making the cus-

68. S. REP. NO. 689, 92d Cong., 2d Sess. 17 (1972).

69. Ryman, *A Comment on Family Property Rights and the Proposed 27th Amendment*, 22 *DRAKE L. REV.* 505, 510-11, 515 (1973).

70. § 452.180, RSMo 1969, providing for separate maintenance for an abandoned wife; § 452.140, RSMo 1969, providing that none of a husband's property shall be exempt from execution in a proceeding executed by a wife for maintenance; § 452.190, RSMo 1969, permitting a court to sell a husband's property to provide for the support of the wife; § 452.210, RSMo 1969, allowing the court to authorize holders of husband's personalty to pay the same over to the wife; and § 452.220, RSMo 1969, entitling a wife to the proceeds of earnings of minor children.

71. It was held that the predecessor of the present statute, § 452.120 RSMo 1969, only established the mother's legal *capacity* to be the child's legal guardian. *In Re Krauthoff*, 191 Mo. App. 149, 166, 177 S.W. 1112, 1118 (K.C. Ct. App. 1915). At common law, the father alone was the natural guardian of his children. *See Wells v. Wells*, 117 S.W.2d 700 (St. L. Mo. App. 1938).

72. *Schneider v. Schneider*, 248 S.W.2d 59 (St. L. Mo. App. 1952); *Brake v. Brake*, 244 S.W.2d 786 (Spr. Mo. App. 1951).

tody determination, courts enjoy wide discretion in the matter. Thus, it seems unlikely that many courts facing custody decisions would disregard the traditional view as to the superiority of maternal love and maternal society. So long as the courts are careful not to couch the language of their opinions in terms of a general preference for the care of a mother in a child's tender years, the ERA might have nominal impact on these decisions.

In Missouri, the mother is the only natural guardian of a child born out of wedlock.⁷³ So long as the mother is fit⁷⁴ she is entitled to the custody and care of the child, apparently, to the exclusion of the father. Moreover, section 474.060, RSMo 1969, when viewed in light of the common law,⁷⁵ permits only the mother to inherit from or through her illegitimate child. Conversely, the child can only inherit from or through its mother. Although the father now has an obligation to support the child,⁷⁶ the validity of limiting his other rights or duties is now doubtful.⁷⁷ Such differential treatment of the parents would almost certainly fail under the ERA. Although the "no inheritance rule" with respect to the father could be supported on the ground that it is frequently difficult to establish the paternity of an illegitimate child,⁷⁸ such a reason is probably insufficient to overcome the heavy burden which the state would face under the ERA in justifying a law which discriminates against one parent on the basis of sex. Under the ERA, the father should be permitted to inherit from an illegitimate child. As for the child's custody, the solution is not as easy. Simply to say that both parents are entitled to custody would be unacceptable, because the parents may be uninclined to live together and have joint custody. On the other hand, to say that neither parent is to have automatic legal custody of the child will leave his legal situation undetermined, and may do so permanently if neither parent bothers to institute custody proceedings. Perhaps, a statutory provision awarding the mother automatic legal custody on its birth, but affording the father a right to commence proceedings to determine whose custody would be in the best interests of the child, would survive the requirements of the ERA.

C. Criminal Law

Various criminal statutes will be affected by the ERA. If the amendment is ratified, the legislature should give immediate attention to certain parts of Missouri criminal law. If a criminal statute is found to violate the ERA, the courts will probably nullify it rather than extend its coverage to include the other sex.⁷⁹ Consequently, unless the legislature acts within the

73. § 475.025, RSMo 1969.

74. See *In Re R.D.H.S.*, 370 S.W.2d, 661 (St. L. Mo. App. 1963).

75. At common law, an illegitimate child could not inherit from either parent and *vice versa*, 10 C.J.S. *Bastards* §§ 24, 29 (1938).

76. *R. v. R.*, 431 S.W.2d 152 (Mo. 1968).

77. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

78. Such an argument was made in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171 (1972). The Court struck down a Louisiana statute which denied illegitimate children the right to share in workmen's compensation benefits where the legitimate children had already exhausted the maximum benefits.

79. See text accompanying notes 22-23 *supra*.

two year time limitation, it will find certain criminal statutes invalidated by the courts.

1. Crimes by Force Against Women

Sections 559.260 and 559.270, RSMo 1969, provide that any one forcibly ravishing any woman; or without her consent, administering any liquid or substance which reduces her resistance and ravishes her, is guilty of rape. The crime of rape involves two points of sexual discrimination: (1) Only men can commit the crime of rape;⁸⁰ and (2) only women can be victims of the crime of rape.⁸¹ It seems unlikely that a court would ever nullify these statutes on this basis. Some commentators suggest that the limitation of the crime to women victims is a possible classification based on unique physical characteristics of women. Arguably, the element of forcible penetration involved in the act of rape makes the classification a permissible one.⁸² Another justification is that the rape statutes protect women from an unwanted exposure to the possibility of an illegitimate pregnancy.

Section 559.280, RSMo 1969, prohibits the forcing of a woman, against her will, to marry any person; or, by menace or by duress, to cause the woman to be defiled. The failure of the statute to include in its coverage male victims⁸³ is an apparent violation of the ERA. The justifications advanced to save the rape statutes are inapplicable to this statute.⁸⁴ Therefore, it may well be invalid under the amendment.

The Proposed Criminal Code for Missouri would make the crime of rape sex-neutral.⁸⁵ Under the Proposed Code, a woman can be guilty of rape and a man can be the victim of a rape.⁸⁶ However, the Proposed Code fails to provide a sex-neutral substitute for section 559.280, RSMo 1969, so that statute would be in jeopardy without further legislative attention.

2. Nonforcible Sexual Relations

Missouri has several statutes intended to protect women under certain ages from sexual intercourse under varying circumstances.⁸⁷ All of these

80. *State v. Oliver*, 333 Mo. 1231, 64 S.W.2d 118 (1933).

81. Section 559.260, RSMo 1969, defines forcible rape as "[F]orcibly ravishing any woman . . ." Sodomy is a crime in Missouri. § 563.230, RSMo 1969. However, it does not carry the same penalty as does rape, even though it is committed without the consent of the victim.

82. Emerson, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 955-56 § n.205 (1971).

83. A classic example of a violation of this statute with respect to a male victim would be the "shotgun" wedding.

84. The portion of the statute forbidding the use of menace or duress to defile a woman may be valid under the rationale which justifies the rape statutes, but the other portion of the statute which prohibits the use of force to cause a woman to marry someone against her will does not stand up under this rationale, because sexual intercourse is not an element of the crime.

85. PROP. NEW MO. CRIM. CODE § 11.030(1), Comments (1973).

86. *Id.*

87. § 559.260, RSMo 1969 (any person having carnal and unlawful knowledge of any female under the age of sixteen shall be guilty of rape); § 559.290, RSMo 1969 (any person who shall take a female under the age of eighteen from a parent or guardian for the purposes of prostitution or concubinage, or any

statutes share the discriminatory features of the rape statutes. Only men can violate these statutes and only women are protected by them. Thus, the question confronting the courts will be whether or not these statutes can fit within the unique physical characteristics exception to the ERA. If not, they are invalid under the amendment.

The courts might sustain section 559.260, RSMo 1969, which makes any person having carnal and unlawful knowledge of a female under the age of sixteen guilty of rape. The basis for sustaining this statute could be that the statute protects females below the age of sixteen from an exposure to the possibility of pregnancy. Dut to the age of the victims, they lack the capacity to consent. However, this same justification is inapplicable to the remainder of the statutes dealing with nonforcible sexual relations, because they are not directed at preventing pregnancy. For example, section 559.300, RSMo 1969, provides that any person over the age of seventeen who shall have carnal knowledge of any sixteen to eighteen year old female of previously chaste character shall be guilty of a felony. By its terms this statute limits criminal liability to those over the age of seventeen. If its purpose is to protect females in this age group from pregnancy, this limitation is irrational. Similarly, the other statutes in this area contain limitations which are not necessary if the sole purpose of the statutes is to protect young women from a pregnancy to which they could not validly consent.⁸⁸

The Proposed Criminal Code, if adopted, would bring Missouri's criminal statutes into compliance with the ERA. Although it does retain some prohibitions⁸⁹ against sexual relations with under-age persons, either sex is a potential victim or offender.⁹⁰ Thus, these provisions are sex-neutral.

3. Prostitution and Related Statutes

Section 563.010, RSMo 1969, prohibits prostitution and solicitation for the purposes of prostitution. Only a woman, however, can be a prostitute.⁹¹

parent or guardian who consents to the same shall be punished not exceeding five years); § 559.300, RSMo 1969 (any person over the age of seventeen who shall have carnal knowledge of any female between the ages of sixteen and eighteen and of previously chaste character shall be guilty of a felony); § 559.310, RSMo 1969 (prohibits the seduction of any female of good repute under the age of twenty-one by promise of marriage); § 559.320, RSMo 1969 (prescribes a penalty of up to five years for a guardian of a female under the age of eighteen or any other person into whose care such a female has been confided who has carnal knowledge of her while she is in his care).

88. § 559.290, RSMo 1969 (does not require the occurrence of sexual intercourse); § 559.310, RSMo 1969 (limits its coverage to seduction by promise of marriage and to females of good repute); § 559.320, RSMo 1969 (limits its coverage to sexual intercourse while the female is in the care and custody of the offender).

89. PROP. NEW MO. CRIM. CODE §§ 11.030(b), .040(1), .050(1), .090(1) (1973).

90. See PROP. NEW MO. CRIM. CODE § 11.030, Comments (1973).

91. *St. Louis v. Green*, 190 S.W.2d 634, 635 (St. L. Mo. App. 1945).

Sections 563.020-.100, RSMo 1969, prohibit various activities related to prostitution (*e.g.*, receiving the earnings of a prostitute, interstate or intrastate transportation of a woman for purposes of prostitution, and permitting a female

There is little apparent justification under the ERA's unique physical characteristics exception for defining prostitutes to include only women.⁹² Thus, the legislature will have to give immediate attention to these statutes if the ERA is ratified.

The Proposed Criminal Code for Missouri attempts to render the area of prostitution sex-neutral. A man can be a prostitute,⁹³ and the engaging or attempt to engage (patronizing) a prostitute would be a crime.⁹⁴ However, the Proposed Criminal Code treats prostitution and patronizing as separate crimes, and prescribes a lower penalty for patronizing.⁹⁵ This difference raises a difficult problem under the ERA. Although each crime is sex-neutral on its face, the most common result will be that a man will receive a lesser punishment for his role in the same illegal transaction than will the woman. The legislative history of the ERA fails to suggest whether it is intended to invalidate laws which on their face are sex-neutral, but which, in fact, have a greater impact on one sex.

4. Miscellaneous Criminal Laws Which Will Be Affected by the Amendment

Section 559.400, RSMo 1969, makes it a misdemeanor for anyone to slander a female by falsely charging or accusing her of incest, fornication, adultery or whoredom in the presence of others. Due to the failure of this statute to extend similar protection to men, it would violate the amendment. Since it is a criminal statute, a court would have no choice but to nullify the statute.⁹⁶

Section 559.170, RSMo 1969, prohibits a mother from drowning, burying or otherwise concealing the body of her child for the purpose of concealing the fact of its birth. The ERA would probably invalidate this statute, because no one can be convicted under the statute as a principal or an accessory, unless the mother participates in the crime.⁹⁷ Thus, the father of the child, acting alone, could conceal the body of the child and not violate this statute. The Proposed Criminal Code for Missouri extends this statute to apply to anyone who conceals the body of the child,⁹⁸ which would satisfy the ERA.

Missouri case law relating to criminal activity has established at least one rule which violates the ERA, *i.e.*, the doctrine of implied coercion. This doctrine provides that when a wife commits a criminal act in the presence of her husband, there is a rebuttable presumption that she does so under the coercion of her husband. If coerced, she normally is not re-

under age 18 to enter a bawdy house). Although both men and women can be punished under these statutes, they also discriminate on the basis of sex because only women can be prostitutes.

92. A distinction may be made between *selling* sexual intercourse and *buying* sexual intercourse.

93. PROP. NEW MO. CRIM. CODE §§ 12.010(2), (4) (1973).

94. PROP. NEW MO. CRIM. CODE §§ 12.010(3), (3)(b) (1973).

95. Compare PROP. NEW MO. CRIM. CODE § 12.020(2) with § 12.030(2), and see §§ 3.010(1)(f)-(g) (1973).

96. See text accompanying notes 22-23 *supra*.

97. State v. Baker, 297 Mo. 249, 248 S.W. 956 (1923).

98. PROP. NEW MO. CRIM. CODE §§ 3.110(1)-(2) (1973).

sponsible for her activity.⁹⁹ This presumption rests on a highly stereotyped view of women, and ignores individual characteristics; thus, it undoubtedly violates the ERA. The courts would undoubtedly nullify this law rather than extend the presumption to men since the latter solution would result in a presumption that each coerced the other.

D. Succession and Other Related Laws

The majority of Missouri's succession and succession-related laws are non-discriminatory in regard to sex. Either spouse has the right to a forced share, the homestead allowance and exempt property. Also, both spouses are entitled to the various exemptions under the state inheritance tax law.

However, section 474.140, RSMo 1969, establishes certain conduct which will bar a spouse from his or her inheritance rights. This statute bars the statutory inheritance rights of a wife who "after being ravished consents to her ravisher"¹⁰⁰ In contrast, the husband's statutory inheritance rights are barred only if he cohabits with another woman or deserts his wife. Since this statute provides for unequal treatment of men and women, it will have to be modified to satisfy the ERA.

Other Missouri statutes¹⁰¹ provide the wife with an insurable interest in the life of her husband, and further provide that any policy taken out on his life for her benefit will be free from the claims of his creditors or representatives. The purpose of these statutes was to ease the common law rule that a married woman's assets were subject to her husband's debts.¹⁰² However, under the present law a married woman's assets are generally no longer subject to her husband's debts.¹⁰³ Therefore, sections 376.530, .560, RSMo 1969, no longer serve their original purpose. Since the statutes discriminate superficially, the courts will probably nullify them as violating the ERA.

Section 376.550, RSMo 1969, affords an unmarried woman an insurable interest in her brother or father's life. The purpose of this statute is to protect women who are financially dependent on their fathers or brothers.¹⁰⁴ However beneficial this statute may be, it conflicts with the ERA since there is insufficient reason for affording this protection to women only.¹⁰⁵ Since unmarried men are not usually financially dependent on their parents or brothers and sisters, it would not serve the purposes of this statute to extend this benefit to men. Accordingly, a court would probably also nullify this statute under the amendment.¹⁰⁶

99. *State v. Ready*, 251 S.W.2d 680 (Mo. 1952).

100. § 474.140, RSMo 1969.

101. §§ 376.530, .560, RSMo 1969.

102. *See State v. Mitchell*, 230 S.W.2d 116, 130 (Spr. Mo. App. 1950).

103. § 451.250(1), RSMo 1969. *But see* § 451.250(2), RSMo 1969.

104. At common law, the wife had no insurable interest in the life of her husband. *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419 (1871).

105. The Senate rejected a provision which excluded laws extending protections or exemptions to wives, mothers or widows from the coverage of the ERA. 118 Cong. Rec. 9523 (1972).

106. *See* text accompanying note 22 *supra*.

E. *Rights and Duties of State Citizenship*

Subsequent to ratification of the nineteenth amendment to the United States Constitution granting women the right to vote, women have enjoyed the same political rights as men.¹⁰⁷ However, they do not share all the same civic duties.

Two examples of this in Missouri are service in the state militia and jury duty. Women are exempt from compulsory service in the state militia just as they are from compulsory service in the United States armed forces.¹⁰⁸ Similarly, women may be exempted from compulsory jury duty.¹⁰⁹

These exemptions were intended to spare women who are homemakers and mothers from the hardships of being taken away from their wifely and maternal duties and responsibilities.¹¹⁰ However, under the ERA, these statutes are overbroad. Not all women are homemakers and mothers. Thus, exemptions for *individuals* who take care of a household and who have the job of raising children would be perfectly valid under the amendment, but exemption could not be provided merely on the basis of sex.

The ERA would require not only that women be subject to compulsory military service on the basis of individual ability, but also that they enjoy equality of opportunity to share the benefits of military service.¹¹¹ Responsibilities, exemptions, and opportunities would depend upon needs and abilities.¹¹²

F. *Single Sex Schools and Organizations*

The state and federal governments now provide direct and indirect benefits to private schools and organizations in the form of direct financial aid and tax benefits. Those schools and organizations that continue to limit their admissions and membership to one sex may lose such benefits with passage of the ERA. Though such organizations may not themselves be "state actors," governmental support of such discriminatory activities would be a sufficient degree of state involvement to violate the amendment.¹¹³

107. *E.g.*, Mo. CONST. art. VII, § 10 provides that no person shall be disqualified from holding public office in this state because of sex.

108. Section 41.050, RSMo 1969, provides that all citizens of the state between the ages of eighteen and sixty-four are potential members of the militia. However, §§ 41.050, .060, RSMo 1969, exempt those citizens who are exempt from service in the United States armed services. 50 U.S.C. §§ 453-454(a) (1971) impose a duty of military service on *male* citizens and residents between the ages of eighteen and twenty-six.

109. Mo. CONST. art. I, § 22(b). *See also* § 494.031, RSMo 1969. Women can be excused from the jury panel on their request.

110. *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961); *United States v. St. Clair*, 291 F. Supp. 122, 124-25 (S.D.N.Y. 1968).

111. S. REP. No. 689, 92d Cong., 2d Sess. 13-14 (1972).

112. For a more elaborate discussion of the effect of the ERA on military service, *see* Emerson, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, *supra* note 11, at 967-78; Comment, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533 (1973).

113. *See* Gallagher, *Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges*, 18 ST. L.U.L.J. 41 (1973).

III. CONCLUSION

Although the ERA's affect on Missouri law would be considerable, most of the problems can be remedied. With the exception of governmental support of private schools and organizations which limit their enrollment or membership to one sex, sex-neutral laws can be enacted which will achieve the same purposes as their sexually discriminatory predecessors.

This comment takes no position regarding the social desirability or non-desirability of the ERA. It can be argued that the amendment should be ratified, because it will have minimal effect on current laws while insuring equal rights for women. On the other hand, it can be argued that the amendment is unnecessary since a little extra legislative effort would cure sexual discrimination in our statutory and case law. The ultimate question of the ERA's ratification however will have to rest on broader grounds of social and political policy.

TONY K. VOLLERS