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Sex Discrimination--Another Shibboleth Legally Shattered

Joan M. Krauskopf

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Cultural revolutions have a way of sneaking up on us lawyers. The militant young women's lib advocate, the mature woman trying to support her family, and the aged matron keeping up with current events may each approach the lawyer asking questions about topics never studied in law school. The young woman wants to know if she must take her husband's surname if she marries. The female breadwinner thinks she and 50 other women in her department are paid less because they are women and wants to know what she can do about it. The matron wonders what her lawyer thinks of the equal rights amendment. These people are not ahead of their times. The civil rights aspect of the sexual revolution has arrived in the law books. The passage of both the Equal Rights Amendment and the Equal Employment Opportunities Enforcement Act of 1972 in March, 1972, should have removed any lingering doubts. A brief survey of some types of legal problems and the main sources of legal remedies may be of interest to Missouri practitioners plagued with these pesky questions.

I. THE PROBLEM

A. Public Discrimination

Discrimination on the basis of sex may be classified as either public or private; either source of treating one sex differently from the other may lead to legal conflicts. Public discrimination includes actions of governmental representatives and statutory and case law that treat persons differently on the basis of sex. A classic example of public discrimination (by

*Lecturer in Law, University of Missouri–Columbia School of Law. Member Ohio, Colorado, and Missouri bars; B.A., Ohio University 1954; J.D., Ohio State University College of Law 1957.
3. This survey article makes no attempt to exhaust all such laws, but rather gives illustrative examples. For other analyses, see: L. Kanowitz, Women and the
case law) which has been largely corrected by statute is the doctrine that prevented a married woman from contracting or from controlling property and money in her own name at law. The Married Women’s Property Acts passed during the 1800’s ended most of these limitations. However, in many states residual limitations on the married woman’s power remained. For example, in California the husband is declared head of the household and is given the basic power to manage the community property, and in Florida a woman could not operate her own business without court approval. Missouri law does not limit a wife’s power to contract; however, it follows the common law view that a wife’s domicile follows that of her husband.

In the domestic relations area, many states follow the dichotomy of Missouri law which requires that a license to marry may not issue without the consent of the parent to a woman under 18 years old or to a man under 21 years old. Some advocates of women’s rights assert that this distinction implies that there is no suitable goal in life for which a young woman should be urged to prepare herself other than marriage. Men may find the same law discriminatory since they must wait three years longer to marry without permission. The view that men and women do not merit different treatment in this respect is reflected by provisions in proposed Missouri legislation based on the Uniform Marriage and Divorce Act that 18 be the age for both sexes to be able to marry without parental consent. The limitation that alimony may only be paid to the ex-wife is also a discrimination on the basis of sex that the proposed legislation would change. Placing the obligation to support children on the father, even though the mother may be more capable of supporting them, clearly discriminates against men.

A questionable area of law concerns the married woman’s use of her maiden surname rather than her husband’s surname. Although the


4. KANOWITZ 40.
5. CAL. CIV. CODE § 156 (West 1954).
7. KANOWITZ 57.
10. KANOWITZ 11.
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statement has often been made that a married woman is legally required to assume her husband's name, the decided cases may not bear this out. A recent analysis concludes that there is only one reported case in which the wife had never chosen to use her husband's name for any purpose, and it held that this was permissible. In that case the court held that in Ohio the custom was not compelled, and that it had never been legally required in England. Missouri courts have not dealt with this precise problem. Statutes provide for a change of name court proceeding, but do not require that the proceeding be utilized. By implication, this legislation might permit a husband whose wife has used his name to prevent her from changing it either formally or informally by showing that the change would prejudice him. The divorce statutes also require the court, upon request of the wife being divorced, to change her name to her maiden name or any previous husband's name. However, nothing implies that she must have changed her name at the time she originally married.

Married Women's Property Acts did not directly affect tort law. Discrimination exists in states which allow a husband a cause of action for loss of consortium, but deny a comparable action to the wife. The wife's action is recognized in Missouri so long as it is joined with the husband's own action against the tort-feasor.

Numerous kinds of statutory limits on employment opportunity exist in the various states. Some states forbid women to be employed in jobs requiring lifting of certain weights—some as light as 10 pounds. Most states have had statutes limiting the number of hours women may work. Until 1972 Missouri statute forbade employment of a woman more than

15. Carlson, Surnames of Married Women and Legitimate Children, 17 N.Y.L.F., 552 (1971). The author purports to distinguish the few decided cases on the ground that none involved a woman who chose to retain her maiden name for all purposes. Recently, in the case of Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), a federal district court decided that Alabama common law required a married woman to use her husband's surname. The Supreme Court summarily affirmed the decision that such a requirement does not violate equal protection of the laws. Forbush v. Wallace, 92 S. Ct. 1179 (1972).
16. Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961). The court said: It is only by custom, in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father. The State of Ohio follows this custom but there exists no law compelling it. Id. at 501, 177 N.E.2d at 619.
18. See Kanowitz 44.
23. See CCH, supra note 22.
9 hours a day or 51 hours a week. Some states deny a woman opportunity to work for a period preceding or following childbirth by forbidding employment during that time. Missouri law forbids employment during three weeks preceding and following birth. Other limits upon opportunity to work in Missouri include a statutory prohibition of women working in and around mines except in a clerical capacity, and a prohibition of women cleaning mill machinery or working between transversing parts of moving machinery.

Examples of rules of state instrumentalities that discriminate would include public school policies which deny pregnant women the opportunity to teach, or which limit enrollment in certain courses to only girls or to only boys. Anti-nepotism policies such as that of the University of Missouri may well operate to discriminate against women. The policy that closely related individuals should not both be employed by the University ordinarily forecloses the wife from job opportunities.

In political affairs, the classic example of discrimination on the basis of sex was the denial of the opportunity to vote to women. The nineteenth amendment to the United States Constitution remedied this after a long

24. § 290.040, RSMo 1969 (repealed 1972). The Attorney General had ruled that this section was superseded by federal legislation to the extent it was applicable. 28 Mo. Att'y Gen. Op. No. 231 (Nov. 11, 1971).
25. § 290.060, RSMo 1969.
26. Id. § 293.060.
27. Id., § 292.040.
28. The employment of any person who is related by blood or marriage as closely as the second degree to any employee of the University is discouraged, but where such a person is needed to perform University services and appears to be the best qualified person available, such a person may be employed by the University . . . [exceptions to permitting the latter employment include] Prospective employee is related . . . to administrative superior, . . . prospective full-time employee is related to a full-time University employee in the department to which he will be assigned if employed . . .
University of Mo.-Columbia, Faculty Handbook 18 (Sept., 1971). This part of the rule should be distinguished from rules reflecting the nepotism prohibitions of the Missouri Constitution or statutes which are aimed at preventing administrators from employing relatives. See Mo. Const. art. VII, § 6; §§ 75.740, 163.101, 168.126, 182.050, .190, .291, RSMo 1969.
29. See Murray, Economic and Educational Inequality Based on Sex: An Overview, 5 Valp. L. Rev. 237 (1971). The board of the Columbia chapter of the Civil Liberties Union, in a letter written to Chancellor Schooling (of the University of Missouri—Columbia campus) on December 2, 1971, stated: Although anti-nepotism rules do not generally specifically forbid the employment of women, it is our contention that with the present social structure of families and their implied expectancies of male-female roles, the present rule results in de facto discrimination against women.
In April, 1971, the Council of the American Association of University Professors adopted a statement urging discontinuation of anti-nepotism policies, because they discriminate against relatives on a basis not related to their academic competence. The statement was endorsed by the Board of Directors of the Association of American Colleges in June, 1971. Am. Ass'n U. Prof. Bull., Summer, 1971, at 221.
30. U.S. Const. amend. XIX.
struggle. Some states limit jury duty to men. On the other hand, the Missouri Constitution still provides that a woman must be excused from jury duty if she requests exemption. Peculiar provisions of Missouri statutes are those which give cities over 5,000 population and St. Louis the power to appoint women to the police force. If smaller cities do not have such power women are clearly discriminated against.

A number of criminal statutes treat the sexes differently. A few states have had statutes calling for a heavier punishment for the same criminal act when performed by a woman. Those who ardently criticize sex differentiation in law assert that there is no justification for making only the female participant in the crime of prostitution a law violator, or in limiting the crime of statutory rape only to men. Nearly all the organized women's rights groups have attacked the criminal abortion laws as discriminatorily infringing upon the right of women to the control of their own bodies.

B. Private Discrimination

Private discrimination, especially in relation to employment, is the type of discrimination most likely to generate legal conflicts. The dimensions of the economic issue of sex discrimination in employment are immense. The work pattern of women in the United States has changed significantly in recent years with the result that the influence of women in the work force and the economy has grown steadily. Eighty-five percent of single women in their late twenties work. Forty-one percent of married women living with husbands were employed in 1970, up from only 16% in 1940. Nearly 40% of the total work force in this country is made up

32. Mo. Const. art. I, § 22 (b). Cf. State v. Smith, 467 S.W.2d 6 (Mo. 1971), which held systematic and purposeful exclusion of women from the venire to be an infringement of the defendant's rights.
33. §§ 71.200, 210, 84.265, RSMo 1969.
40. J. Kreps, supra note 38, at 19.
of women. Many women allege that they are discriminated against without justification in regard to all aspects of employment. The fact that only 1% of the engineers, 3% of the lawyers, and 7% of the physicians in this country are women is attributed in part to discrimination against women within these professions. Statistics comparing earnings of women against those of men with comparable educational standing in comparable occupations reveal a wide earnings discrepancy: the overall median income of women is only 59% that of men in similar occupations with similar education. In selected occupations the discrepancy is even greater: physicians' and dentists' office attendants, 53%; cashiers, 53%; musicians and music teachers, 29%. Even in the occupations where large numbers of women are hired, their median income is significantly less than that of men: dietitians, 68%; librarians, 77%; elementary teachers, 85%; payroll and time-keeping clerks, 73%; stenographers, 70%. Claims are legion that women are not advanced in rank, not placed in administrative positions, and not given the whole panoply of employment rewards that men with similar abilities would receive.

In response to assertions that the discrepancy in wages and the hesitancy to advance in rank is justified by the high rate of drop out from employment by women, women claim that the differential is too great to be explained by that factor. In addition, census figures reveal that more women who enter the work force remain in it than previously. The drop from employment during the peak child bearing years is not as great as it once was, and the return to employment is increasingly higher. The movement toward more day care centers and for maternity leaves is expected to decrease even more the temporary drop from the job market. Perhaps the most crucial claim of women is that the fact that a larger number of women do leave employment does not justify denying employment rewards to a particular woman on the assumption that she will do so. Many of these women want to know what their legal rights are, and what they can do about alleged unjustified differential treatment.

44. Id.
II. Remedies: Constitutions

A. Equal Protection

In 1872 the United States Supreme Court began a long train of decisions which upheld state legislation treating women differently from men. Bradwell v. Illinois\(^4\) involved a woman who sought to be admitted to the practice of law in Illinois. Illinois denied admission to the bar to married women. Mrs. Bradwell asserted that her rights under the privileges and immunities clause of the fourteenth amendment were violated. The Court upheld the state’s closing of the legal profession to women; its reasoning was so broad that the same result would surely have occurred even if violation of the equal protection guarantee of the fourteenth amendment had been charged. The court accepted the stereotyped concept of woman as mother and homemaker, and asserted that government need not provide for anyone who was an exception to this stereotype. Justice Bradley, concurring, spelled it out:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.\(^4\)

The next serious challenge to a state’s power to treat men and women differently came in the famous case of Muller v. Oregon.\(^5\) The case was an outgrowth of the social welfare movement to protect workers against “exploitations” by employers. After legislation limiting the hours that an employer could require employees to work had been declared an unconstitutional infringement on employers' rights, the reform movement succeeded in passing legislation limiting only the hours that women could

\(^{48}\) 83 U.S. (16 Wall.) 130 (1872). Mrs. Bradwell's interesting career as editor and publisher of the Chicago Legal News and the Illinois session laws, and her eventual admission to the Illinois bar as an honorary member were detailed in Myra Bradwell, CHI. LEGAL NEWS, Feb. 1894, at 200-06, 286.


\(^{50}\) 208 U.S. 412 (1908).
work. It was this legislation that was upheld in Muller v. Oregon as having a "rational" or "reasonable" basis, and, therefore, not infringing the equal protection rights of women. The fame of the case is because it heralded nearly free regulation of economic matters by the states. So long as a "rational" basis for the legislation could be shown, it would be valid. In the economic sphere almost anything served as a rational basis. In Muller itself, a stereotyped notion of woman supplied the justification:

The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

History discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection. . . .51

Constitutional challenges to the status of women were largely quiescent during the roaring twenties, the depression years, and World War II. Women were given the vote by amendment. During the depression women probably suffered equally with men, and surely during the war they were encouraged to work and serve the war effort equally with men. Perhaps it was the experience of postwar employment discrimination, rapidly followed by the civil rights movement, that caused some women to stir. The year 1948 marked the beginning of a noticeable trend toward assertion of equality and demand for legal protection in the courts. In that year

51. Id. at 421-22.
the Supreme Court again upheld discriminatory legislation against a claim of denial of equal protection as guaranteed by the fourteenth amendment. Michigan law forbade a woman to tend bar unless she was the wife or daughter of the bar owner. In face of assertions that the real motivation for this statute was to keep bartending safe from female competition, the Court found a "rational" basis in the need to protect women from physical dangers of bartending. The Court, with no real consideration of the equal protection issue, stated:

Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards . . . .

Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.53

Although three justices dissented, this decision, 40 years after Muller v. Oregon, applying the rational basis test in such a cavalier fashion, foreclosed the constitutional route as a viable means of attacking economic discrimination by a state.

The next attack was on the political front. It came in 1961 in Hoyt v. Florida, a case which challenged as a denial of equal protection a Florida statute that freed women from jury duty unless they specifically requested to be put on the jury list, but which put men on the list without request. The court upheld the statute. The test? Rational basis. The evidence? The stereotyped notion that a woman's place is in the home, and an unstated assumption that jury duty would interfere with this role more than with the male breadwinner's role. The Court stated:

In neither respect can we conclude that Florida's statute is not "based on some reasonable classification . . . ." Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family.55

In January, 1969, the Supreme Court refused to act against discrimi-

53. Id. at 465-66.
55. Id. at 61-62.
nation claimed to be violating rights to equal protection when it denied certiorari in *Miskunas v. Union Carbide Corp.* The circuit court had held that it was permissible for a state which recognized an action in the husband for loss of consortium to deny a comparable action to the wife. In spite of arguments that double recovery could be avoided by requiring joinder, as is done in Missouri, the court held that fear of possible double recovery was justification enough for the differential treatment. The court stated that courts would not set aside a discriminatory rule as violating equal protection "if any state of facts reasonably may be conceived to justify it."

A little noted but significant decision of the Supreme Court was its March, 1971 per curiam affirmance, without opinion, of the decision in *Williams v. McNair.* The lower court had applied a rational basis test to uphold denial of admission of men to a state college for women. The court held that segregation by sex in certain state colleges did not violate equal protection of the laws so long as there was a rational basis for the discrimination. The court justified its finding of a rational basis with this language:

[T]he Constitution does not require that a classification "keep abreast of the latest" in educational opinion, especially when there remains a respectable opinion to the contrary; it only demands that the discrimination not be wholly wanting in reason, . . .

It is conceded that recognized pedagogical opinion is divided on the wisdom of maintaining "single-sex" institutions of higher education but it is stipulated that there is a respectable body of educators who believe that "a single sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex."

For those who hoped that the Court would begin to treat sex discrimination as it had racial discrimination by placing upon the states a heavy burden of justification for differential treatment of the two sexes, this affirmance should have ceased their daydreaming. That schools, the battleground against racial discrimination, can justifiably segregate to better concentrate (in the opinion of a respectable body of educators) upon areas of primary interest to only one sex, portends that no sexual discrimination by a state which is justifiable in the opinion of a respectable portion of knowledgeable people will violate the equal protection clause.

In light of this long history of not holding any state sex discriminatory legislation invalid, *Reed v. Reed,* decided November 22, 1971, seems a

56. 399 F.2d 847 (7th Cir. 1968), cert. denied, 399 U.S. 1066 (1969).
57. Id. at 850.
59. Id. at 137.
60. KANOWITZ 158.
61. 92 S. Ct. 251 (1971).
landmark decision. The Supreme Court, for the first time held that a state statute treating women differently from men was unconstitutional as a violation of equal protection. The Idaho statute which was declared invalid provided that if a man and woman were equally qualified to administer the estate of a deceased person, then the man was to be preferred. Though the opinion is sketchy, two aspects are clear. First, the Court continued to apply the rational basis test, and reiterated that states may treat different classes of persons differently if there is a reasonable basis for the classification. Second, the Court did not utilize the stereotyped notion that a woman's place is in the home to supply the needed rational basis. The Court found the different treatment arbitrary. If the Court had followed the approach in *Hoyt v. Florida*, decided 10 years previously, it may well have assumed that administering estates would detract in a socially unacceptable manner from a woman's role as the center of family life. The significance of the case lies in the possibility it reveals that the Court in the future will actually require evidence (even if only the opinion of a respectable body of persons), rather than finding a rational basis for sex discrimination in the canards and shibboleths, concepts and stereotypes that are being questioned in today's culture. The decision seems to belie the notion that the party attacking the legislation has the burden of showing no rational basis. Perhaps the crux of the Court's holding that the distinction was arbitrary is that in matters of sex differentiation the state will have to present some evidence to overcome the attacking party's bald assertion that there is no discernible difference between men and women in relation to the object of the legislation.

This discussion has concentrated on the United States Constitution as interpreted by the Supreme Court, because it is the ultimate forum for asserting unconstitutionality of state action. The practitioner would do well, however, to consider what the possibilities are for redress in the lower federal courts or in his own state courts. For example, the Supreme Court of California, in striking down legislation denying women the right to tend bar, held such legislation to be a denial of equal protection under both the California and United States Constitutions. The court required a substantial showing of justification rather than the rational basis test of the United States Supreme Court. An outstanding example of a lower federal decision which declared a discriminatory practice to be a violation

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64. See *Stanley v. Illinois, 92 S. Ct. 1208 (1972); In re Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967).* Apparently the only argument raised in *Reed* was the state's attempt to justify the classification as an expedient means of decision-making by the probate judge. See the discussion in *92 S. Ct. at 254*. Expediency as justification was rejected in *Stanley v. Illinois, supra*.
65. *Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 3, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).*
of equal protection is *Seidenberg v. McSorley's Old Ale House, Inc.*66 The court climbed the hurdle of state action by holding that state action was involved in the granting of a license to dispense beer, and in regulation of the holders of this type of license. The court then held that the defendant-bar did not have a basis in reason for its refusal to serve women.

### B. Equal Rights Amendment

What is the relationship between these constitutional decisions and the Equal Rights Amendment which is now before the states for ratification? The version finally passed by Congress on March 22, 1972 is worded:

> Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.67

For 50 years various women's groups sponsored legislation leading toward the passage of an amendment to the United States Constitution which would guarantee equal treatment of the sexes by the federal and state governments.68 The failure to achieve protection under the fourteenth amendment has been a major impetus in this move; as Representative Griffiths of Michigan succinctly asserted: "This fight is with the Supreme Court."69 There is widespread belief among the members of women's groups that this amendment will automatically end discrimination. Many persons with whom this writer has conversed are not even aware that it will affect only governmental and not private action. Many believe that it will automatically invalidate nearly all laws treating men and women differently;70 they cite the voting rights amendment as precedent. On the other hand, many also believe that in some respects government may still differentiate, e.g., separate restrooms for men and women in public buildings.71 A broad restriction upon sex discrimination which does allow for some degree of discrimination is in another league from the narrow voting rights amendment. This writer is in agreement with those authorities who assert that

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70. Sen. Ervin fought a last ditch effort to tack a series of qualifying amendments on the resolution because he feared that its reach is so extensive that it would bring chaos to the legal and social fabric of America. *See* 118 Cong. Rec. 4250 (daily ed. March 20, 1972) (remarks of Sen. Ervin). The lengthy debate and defeat of the several Ervin amendments will be a rich source of legislative history both during the ratification process and for interpretation if ratification is eventually achieved. For highlights of the debate, see *Equal Rights: Amendment Passed Over Ervin Opposition,* 30 Cong. Q. Weekly Rep. 692-95 (Mar. 25, 1972). The last debate and materials incorporated therein are in 118 Cong. Rec. 4247-73, 4372-480, 4588-612 (daily editions Mar. 20, 21, 22 1972).

An intriguing ambiguity is revealed by the Citizens' Advisory Council on the
the ambiguity of an equal rights amendment is such that only a series of litigation will make its meaning and applicability clear; questions of application and of justification for discrimination will have to be tested out case by case.\textsuperscript{72} For that reason, some feel the amendment is an exercise in futility; others, nevertheless, justify the attempt to pass it for its educational value, \textit{i.e.}, the process and the passage would influence cultural notions about the role of men and women.\textsuperscript{73}

There seems little doubt that the amendment would, at least, place a substantial burden on the state to justify treating men and women differently. At a minimum, it will create a presumption that discriminatory legislation or action is invalid; in other words, sex discrimination would be treated much the same as racial discrimination. Ratification of the amendment will produce this change immediately. A source of difficulty in interpretation will be the extent to which the words "equality of rights" differ from "equal protection of the laws." The words chosen apparently allow for less differential than would have been permissible with equal protection words.\textsuperscript{74} Whatever the resolution of that ambiguity, the validity of many state laws will obviously be put into question by the amendment.

Two of the specific matters debated on the floor of Congress were the military draft and protective labor legislation. Amendments to exclude

\begin{quote}
Status of Women in its report. The council said that separation of the sexes by law would be forbidden except in situations where the separation is shown to be necessary because of an overriding and compelling public interest and does not deny individual rights and liberties. For example, in our present culture the recognition of the right to privacy would justify separate restroom facilities in public buildings. \textit{Women in 1970}, at 16.

Yet, at page 19, in its rejection of limiting words upon the amendment, the Council emphatically said: "Women should not be singled out for special treatment in the law under \textit{any} constitutional test whether it be the test of 'reasonableness' or a 'compelling and overriding public interest'\textquotedblright."
\end{quote}


\textsuperscript{73} \textit{Hearings on S.J. Res. 61 and S.J. Res. 231, supra} note 69, at 164.

\textsuperscript{74} To substantiate his fear that the amendment would allow for no differential treatment, Sen. Ervin referred to Brown, Emerson, Falk & Freedman, \textit{The Equal Rights' Amendment: A Constitutional Basis for Equal Rights for Women}, \textit{80 Yale L.J.} 871 (1971). However, the analysis therein is that no differentiation on the basis of sex would be permissible except that required by a constitutional right of privacy. Somewhat farther on the spectrum is Prof. Kurland, who envisages that \textit{reasonable} differential treatment could be acceptable. Statement of Philip Kurland before the Senate Judiciary Committee, 118 \textit{Cong. Rec.} 4569, 4570 (daily ed. Mar. 22, 1972). Senator Bayh indicated in the final debate that he believed distinctions based on distinct male-female physical differences would be permissible. In this regard, he stated that "protective" labor legislation and obligations such as the duty to support children would be made applicable to both sexes, but that criminal sanctions such as
both of those from the amendment's operation were defeated;\textsuperscript{75} therefore, it is expected that a draft law and labor legislation pertaining to only men would be unconstitutional. Among the protective laws in Missouri that are likely to be invalid unless applied equally to men are those limiting the hours a day and week a woman may work,\textsuperscript{76} limiting the time before and after childbirth a woman may work,\textsuperscript{77} forbidding women to work around mines except in a clerical capacity,\textsuperscript{78} forbidding women to clean or work around moving machinery\textsuperscript{79} and even those requiring a place to sit and screened stairways only where women work.\textsuperscript{80}

In the area of family law many legal principles are likely to be affected by the amendment, mostly in the direction of ending discrimination against men. Differentials in ages in ability to marry without parental consent are likely to be invalid.\textsuperscript{81} The result would be the end of discrimination against the male, who now has to have permission until he is 21, and the end of possible discrimination against the female, because of the protection of only males from an unwise early marriage. The rule that a woman's domicile follows that of her husband,\textsuperscript{82} and an attempt to apply a requirement that a woman use her husband's surname would be presumptively invalid.\textsuperscript{83} Other legal doctrines likely to be changed would be to the benefit of men: a limitation of the right of support from a spouse, whether during or after marriage, to women only;\textsuperscript{84} the right of children to be supported by the father rather than the mother;\textsuperscript{85} the mother favored for the right to custody of very young children;\textsuperscript{86} and the right of only the mother of an illegitimate child to consent to its adoption.\textsuperscript{87}

In the political area the exemption from jury duty automatically

\begin{itemize}
\item those of the White Slavery Act (forbidding transportation of women for immoral purposes or prostitution) would remain because the latter are based on unique physical differences. \textit{Equal Rights: Amendment Passed Over Ervin Opposition, supra} note 70, at 695. This writer fails to see the substantive distinctions the Senator so glibly draws.
\item \textit{Equal Rights: Amendment Passed Over Ervin Opposition, supra} note 70, at 694-95.
\item \textsection 290.040, RSMo 1969 (repealed 1972).
\item \textsection 290.060.
\item \textsection 293.060.
\item \textsection 292.040.
\item \textsection 292.150, 170. Even if all of these statutes were superseded by federal legislation, without the amendment they would remain effective in aspects to which the federal law was not applicable. See text accompanying note 169 infra.
\item See, e.g., \textsection 451.090 (2), RSMo 1969.
\item Cases cited note 8 supra.
\item For a discussion of this problem, see the text accompanying notes 14-19 supra.
\item See \textsection 452.070, 559.353, RSMo 1969.
\item See id. \textsection 452.220, 559.353.
\item See Horst v. McLain, 466 S.W.2d 187 (K.C. Mo. App. 1971).
\item See \textsection 453.040, RSMo 1969. For an argument that a known father now may have rights under the due process clause of the fourteenth amendment, see Krauskopf, \textit{Missouri Adoption Law and the Proposed Uniform Adoption Act,} 26 J. Mo. B. 172, 174 (1970). This argument is significantly advanced by the decision in Stanley v. Illinois, 92 S. Ct. 1208 (1972).
\end{itemize}
given to women by the Missouri Constitution is likely to be superseded by the amendment.\(^8\) Again, it may be men who assert that a valuable right (exemption) is granted to women on terms more favorable than those accorded to men. The Missouri Public Accommodations Law does not forbid discrimination on the basis of sex,\(^9\) and the amendment may require reading that prohibition into the statute.

There are numerous practices of state agencies which may become suspect under the amendment. Public schools probably could not limit opportunities to take certain courses, such as cooking or automotive mechanics, to members of one sex, and public schools and colleges probably could not limit or forbid girls from attempting to participate in interscholastic athletics. The controversy over long hair may continue or erupt anew under this amendment. The circuits have split on the extent to which they permit public schools to regulate the length of a male's hair, and the Supreme Court continues to deny certiorari.\(^9\) Perhaps, a man will have a "right" under the amendment to wear his hair as long as women are permitted to wear theirs.

The examples could continue.\(^9\) The inescapable conclusion is that the Equal Rights Amendment, if ratified, will provide much fuel for litigation by both men and women, unless governmental agencies voluntarily cease treating men and women differently, solely on the basis of their sex.

III. Remedies: Equal Pay Legislation

Following World War II organized women's groups pushed for equal pay legislation in every session of Congress.\(^9\) In 1963, the Equal Pay Act was finally passed as an amendment to the Fair Labor Standards Act.\(^9\)

The key provision of the act states:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less

\(^8\) Mo. Const. art. I, § 22 (b).
\(^9\) Ch. 314, RSMo 1969.
than a rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.  

Although the Equal Pay Act is narrow in that it applies only to wage differentials, the enforcement provisions of the Act are strong. The employee or employees involved may sue directly for unpaid wages, an additional equal amount as liquidated damages, and reasonable attorney's fees. More importantly, the Secretary of Labor is authorized to sue for an injunction and back wages. In one such action, 230 employees recovered a quarter of a million dollars in damages. Since the Act applies to every employer having employees subject to a minimum wage under the Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor is the entity which administers it.

There has been a great deal of litigation under the Equal Pay Act, often concerning what constitutes equal work. The plaintiff must show that he or she performs work which calls for skill, responsibility, and effort equal to that required of the counterpart alleged to be receiving a higher compensation. A significant case on this issue was decided by the Eighth Circuit Court of Appeals in 1970. In Shultz v. American Can Co., "equal" was held to mean "substantially equal," rather than identical. The court refused to accept the contention that a higher rate of pay for male machine operators was justified by additional duties of paper handling and loading. The paper handling duties were regularly carried out by lower paid workers, and the court found that the loading duties which were occasionally carried out, even if regularly performed by men machine operators, were "minor and incidental" to the main performance, and, thus, were not justification for the higher wage rate. The case illustrates that the courts will treat as specious claims that slight, incidental duties, especially of a type ordinarily paid at a lower rate, do not justify paying men more than women.

In 1963, the Missouri General Assembly passed an act which is somewhat similar to the federal statute in forbidding lower wages for women.

94. Id., 29 U.S.C. § 206 (d) (1).
98. 424 F.2d 356 (8th Cir. 1970).
100. See §§ 290.400-.461, RSMo 1969.
Administration was given to the Industrial Commission, which was empowered to carry out an educational program concerning the problems of female employment and to mediate any dispute concerning pay discrimination. However, the Commission has never been appropriated sufficient funds to perform its mandate. The Missouri act also provides that a female receiving less wages than she is entitled to may maintain an action in circuit court for recovery. The limitations on these actions, however, render them worthless. Suit must be instituted within 6 months of the alleged violation, and liability cannot extend prior to 30 days before receipt of written notice of the claim filed by the employee.

IV. REMEDIES: DISCRIMINATORY PRACTICES LEGISLATION

A. Federal—Civil Rights Act and the E.E.O.C.

Title VII of the Civil Rights Act of 1964 declares it an unlawful employment practice for any employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Similar provisions pertain to labor unions and employment agencies.

There are conflicting stories concerning the source of the “sex” provision in this Act. Representative Howard Smith, who eventually voted against the entire bill, introduced the amendment adding the word “sex.” Some asserted this was a joke, or a move by Representative Smith designed to help defeat the legislation. Representative Smith denied this. Members of the National Women's Party point out that they had vigorously lobbied for such an inclusion and that Representative Smith mentioned them when he first stated he would offer an amendment. The lack of debate in regard to the sex provision is explained by the fact that full hearings and debate on the issue of sex discrimination had taken place only the year before when the Equal Pay Act was before Congress. Whatever its source, the

101. Id. § 290.460.
102. Id. § 290.430.
104. § 290.440, RSMo 1969.
105. Id. § 290.450.
109. Id.
provision barring discrimination on the basis of sex in any form affecting employment is in the Act, and the courts are giving it the same potency they have given the racial provisions.

The coverage of Title VII is obviously much broader than that of the Equal Pay Act, since it forbids all types of discrimination, and applies to administrative or executive positions as well as to non-administrative employees. It originally extended to all employers who had 25 or more employees. The Equal Employment Opportunities Enforcement Act of 1972 extended this to employers of 15 or more persons. Title VII did not include within its jurisdiction educational institutions or federal and state agencies, with the exception of employment agencies. The 1972 legislation brings these entities within the discrimination ban of the Act.

The enforcement provisions of the Act have not been as strong as those for the Equal Pay Act, and have been the source of much controversy. The Equal Employment Opportunity Commission (E.E.O.C.) is charged with administration of Title VII, but in addition to educational functions, it was originally given power only to conciliate disputes. The Attorney General was empowered by the 1964 Act to bring court action to enjoin discriminatory "[p]ractices and [p]atterns"; however, by October, 1971 only two actions on sex discrimination had, in fact, been instituted. Primary enforcement was left in the hands of individuals, who can seek injunctions, damages, attorney's fees and costs.

Political controversy concerning enforcement powers of the E.E.O.C. has been heated. The E.E.O.C. desired self-enforcing cease and desist power or, at least, power to initiate court action itself to obtain injunctions and damages. Since it is charged with ending not only sex discrimination but also racial discrimination, and its power extends over most employers in the country, there are many groups who opposed this grant of power. The possibility of a further clog on the already heavily burdened federal courts also influenced some to oppose a grant of this type of power to the E.E.O.C. The latest in the rounds of legislative maneuvers to change Title VII was House Resolution 1746, which passed the House of Representatives on September 16, 1971. Entitled the Equal Employment Opportunities Enforcement Act of 1972, it was radically amended to in-
clude many of the provisions of Senate Resolution 2515. It passed the Senate on February 22, 1972, after a five week long filibuster.\textsuperscript{122} On March 8, the amended version was approved by the House of Representatives.\textsuperscript{123} The measure gives the E.E.O.C. power to initiate actions in federal court seeking injunctions and damages for discriminatory action.\textsuperscript{124} This legislation also extends the Commission's jurisdiction to state and local governments and educational institutions.\textsuperscript{125} However, in regard to state and local government agencies, the E.E.O.C. cannot bring court action; only the Attorney General is authorized to do so.\textsuperscript{126} If the case is alleged to be "in the general public interest," the Commission may ask for a special three judge panel with direct appeal to the Supreme Court.\textsuperscript{127} Significantly, the private aggrieved party is given a cause of action against educational institutions and governmental units if neither the E.E.O.C. nor the Attorney General brings suit.\textsuperscript{128} This may be the most important aspect of the inclusion of these units under Title VII, because no comparable private power had existed.

The 1972 Act has given the E.E.O.C. significant power, but, even with substantial increases in staff and operating funds, there will still be a need for private lawsuits under the Act. The number of complaints filed with the Commission is large and is increasing phenomenally.\textsuperscript{129} In the area of sex discrimination the increasingly active women's organizations probably account for a large percentage of the increase. Of the total of 75,000 charges that had been filed by the middle of 1971, 16,000 were claims of sex discrimination.\textsuperscript{130} During the entire year of 1970, 3500 sex discrimination complaints were made; in the first six months of 1971, 3800 were filed.\textsuperscript{131} Inclusion of governmental agencies and educational institutions within the jurisdiction should lead to an astronomical leap in these numbers. Therefore, the private lawsuit against private, governmental and educational employers can be a vital remedy.\textsuperscript{132}

\textsuperscript{123} CONG. REC. 118 (daily ed. Mar. 8, 1972); 3 U.S. CODE CONG. & AD. NEWS 814 (1972).
\textsuperscript{124} Enforcement Act § 4. The filibuster was broken after this form of enforcement was agreed upon rather than cease and desist power, which had previously been in the bill at the behest of labor, civil rights, and women's rights groups. N.Y. TIMES, Feb. 23, 1972, at 1, col. 1.
\textsuperscript{125} Enforcement Act §§ 2, 3. Enforcement of the discrimination ban in most federal agencies is placed in the Civil Service Commission. Id. § 11.
\textsuperscript{126} Id. § 4.
\textsuperscript{127} Id.
\textsuperscript{128} Id. Private civil action against heads of federal agencies is authorized by section 11 of the Enforcement Act.
\textsuperscript{129} Hearings on S. 2515 and H.R. 1746, supra note 117, at 53, 65-72.
\textsuperscript{130} Fuentes, Federal Remedial Sanctions: Focus on Title VII, 5 VALPA L. REV. 374, 379 (1971).
\textsuperscript{131} Id.
\textsuperscript{132} The role of the private attorney is discussed in Pressman, Sex Discrimination in Employment and What You Can Do About It, 54 WOMEN L.J. No. 4, 6 (1968). That fees can be substantial is illustrated by an award of $11,000 to one
B. The Missouri Fair Employment Practices Act and the M.H.R.C.

In Missouri the Fair Employment Practices Act, which was amended in 1965 to include sex discrimination, prohibits discrimination in employment in terms similar to those of the federal legislation. Administrative enforcement is placed in the Missouri Human Rights Commission (M.H.R.C.), which was originally given much more extensive powers than the federal E.E.O.C. The M.H.R.C. has the power to hold its own hearings and to issue cease and desist orders. Although court action to enforce a cease and desist order is seldom resorted to, the Commission's Director feels that the power to do so is a valuable weapon in achieving voluntary conciliation with employers who have discriminated. An additional advantage of the Missouri legislation is that it applies to employers of 6 or more persons; the only remedies available to those working for a person who employs more than 6 and less than 15 persons are under the Missouri law. Prior to the recent changes in the federal legislation, the Missouri law also provided the only remedies for discrimination by the state or its political subdivisions.

The M.H.R.C., like the E.E.O.C., is burdened by a caseload that is too extensive for its staff and funding to handle as expeditiously as would be desired. Although the number of cases received in 1971 was 40% over the previous year, the Commission closed more cases in 1971 than it received. Nevertheless, it began 1972 with a backlog of 800 cases. Much of the recent increase in cases has been due to sex discrimination complaints. They rose from 67 in 1970 to 169 in 1972, which represents 17% of the of plaintiffs' attorneys in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Missouri attorneys are likely to receive cooperation and help from the Regional Office of the E.E.O.C. Letter from Regional Attorney Sandra Neese to the author, Nov. 29, 1971.

133. See Ch. 296, RSMo 1969.

134. The Attorney General has ruled that the omission of the word "sex" from section 296.030, RSMo 1969, which delineates the powers of the Missouri Commission on Human Rights, was a legislative oversight, and that the scope and breadth of section 296.040, RSMo 1969, confers jurisdiction upon the Commission to receive, conciliate, and prosecute complaints of sex discrimination. 28 Mo. Atty Gen. Op. No. 298 (Nov. 24, 1971).

135. § 296.040, RSMo 1969.


137. § 296.010 (2), RSMo 1971 Supp.

138. However, some entities are questioning the power of M.H.R.C. over them. The City of St. Louis has moved for dismissal of a subpoena issued by the M.H.R.C. for production of copies of hiring and promotion tests used by the St. Louis Fire Department. The city claims its charter provides exclusive processes for hiring practices. Progress, Feb., 1972, at 1 (the M.H.R.C. Newsletter). The Board of Curators of the University of Missouri also challenges the jurisdiction of the M.H.R.C. Hurst, supra note 136.

139. Letters to the author from Executive Director Clyde L. Scott, March 27, 1972, and Chairman Richard J. Chamier, March 27, 1972.

140. Scott letter, supra note 139.

141. Id.; Progress, supra note 138.
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complaints filed. Of the 123 complaints filed through February, 1972, 32% were sex discrimination matters. The pattern of increasing charges of sex discrimination experienced by the E.E.O.C. has been repeated here. The M.H.R.C. treats these charges no differently than those alleging discrimination on other grounds, and investigates all charges filed directly with it. Approximately 40% of the charges filed are deferred to the M.H.R.C. by the E.E.O.C. where they were originally filed; these are screened, and jurisdiction is waived in many of those involving employers with enough employees to give the E.E.O.C. jurisdiction. When jurisdiction is so waived, the E.E.O.C. proceeds exclusively. Therefore, the person who wants to insure that the M.H.R.C. will investigate his charge should file his complaint directly with the M.H.R.C. and not with the E.E.O.C.

C. Private Action Under the Civil Rights Act

Pursuit of a private remedy (rather than relying solely on the administrative process) will apparently have to be under the federal legislation. The Missouri Act does not provide for action other than by the Human Rights Commission. Enforcement by private suit is complicated by the fact that Title VII requires that the state agency be given 60 days within which to act before jurisdiction may be asserted by the E.E.O.C. The practice that has developed is that if the aggrieved person files his claim with the E.E.O.C. first, it notifies the Human Rights Commission. At the end of 60 days, if the controversy has not been settled, the E.E.O.C. treats the claim as filed with it at that time, and proceeds with its own investigation. In January, 1972 the Supreme Court held that this procedure met the requirements of the Act. As a practical matter, the Missouri Human Rights Commission may expedite this process by waiving jurisdiction relatively quickly. The E.E.O.C. treats the claim as having been filed as of the time notice of waiver or dismissal is received. An additional complexity in the federal act is the time limitations. If no charge is filed with a state agency, it must be filed with the E.E.O.C. within 180 days after the alleged discrimination.

142. Scheer, We Comment On—Equal Rights for Women, PROGRESS, Nov. 1971, at 3 (the M.H.R.C. Newsletter).
143. Scott letter, supra note 139.
144. Chamier letter, supra note 139.
145. Letter from Sandra Neese, Regional Attorney, E.E.O.C. to the author, Nov. 29, 1971; Scott letter, supra note 139.
146. The Executive Director states:
This procedure has the effect of reducing duplication in our investigative efforts, and stabilizes or reduces our case backlog which permits us to give quicker service on complaints. (Note: If we had sufficient staff we would be investigating all of these EEOC deferred complaints as well as those filed directly to MCHR.)
Scott letter, supra note 139.
149. Neese letter, supra note 145; Scott letter, supra note 139.
150. Letter from Eugene P. Kennan, District Director E.E.O.C., St. Louis, to Clyde Scott, Executive Director M.H.R.C., March 9, 1972.
When a charge has been filed initially with a state agency the charge must be filed with the E.E.O.C. within 300 days of the discriminatory act, or within 30 days of notice of termination of the state proceedings, whichever is earlier. It is to be expected that the E.E.O.C. office which has received the original charge and has filed it for the aggrieved person with the state agency, will automatically assume jurisdiction upon the 299th day after the act if no termination of the state proceeding has been effected.

The 1972 Enforcement Act provides that an individual may pursue his private remedy if the E.E.O.C. has dismissed his charge or if 150 days have elapsed since filing the charge with the E.E.O.C. and no conciliation agreement has been reached and no court action has been filed by the E.E.O.C. or the Attorney General. Notification is to be sent to the aggrieved party and he has 90 days after notice to initiate court action.

In eastern Missouri, there had been a vital jurisdictional prerequisite imposed by the federal court for the eastern district. It would not entertain a private action unless there had been a finding by the E.E.O.C. of probable cause to believe discrimination had occurred. In other words, if the E.E.O.C. dismissed a matter there was no recourse in court. Other courts, including the federal court for the western district, held that a probable cause finding was not jurisdictional. The 1972 amendment clarifies that a probable cause finding is not a prerequisite to jurisdiction.

D. Substantive Interpretations Under the Civil Rights Act

Although Title VII is relatively new, enough court decisions on substantive issues have been resolved to indicate that the course of court interpretation is going to be in favor of liberal construction of the statute, in order to achieve the goal of equal treatment of men and women with regard to employment. That the law provides blanket coverage of all aspects related to employment is apparent from a recent decision which the Supreme Court refused to review. In Bartmess v. Drewrys U.S.A., Inc., retirement plan provisions negotiated through collective bargaining which required women to retire and collect pension benefits at age 62 but which allowed men to work until age 65 were held to infringe upon a woman's equal right to work.

Uncertainty as to whether the Civil Rights Act supersedes state protective legislation which limits the hours women can work, the weight


153. This is the procedure that was followed before the 1972 amendment, when the time limit was 210 days. Keenan letter, supra note 150.


155. Id.


159. 444 F.2d 1186 (7th Cir.), cert. denied, 40 U.S.L.W. 3212 (U.S. Nov. 9, 1971).

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they can be required to lift, or the time they can be employed before or after childbirth has given way to the conclusion that it does supersede such legislation. Since it is doubtful that this kind of legislation would be declared unconstitutional as a violation of equal protection, it has been extremely significant that Title VII has achieved the same result through the doctrine of supremacy of federal legislation. During the transition period in which interpretations were developing, employers were justifiably frustrated. On the one hand, they were told that if they violated the state legislation by allowing a woman to lift weights in excess of the statutory limits they would be subject to state criminal prosecution; on the other hand, if they did not permit a woman to hold a job in which she had to lift such weights they would be subject to damages under Title VII. The E.E.O.C. finally took the position that an employer could not refuse to employ a woman for a job she could perform without violating the federal legislation and, therefore, to the extent that state legislation conflicted, it was not enforceable. Either through state legislation, court action, or attorney general’s rulings, by 1972, most states had effectively eliminated protective legislation pertaining only to men or only to women. The Attorney General of Missouri has ruled that Missouri’s legislation limiting the hours women may work is superseded by the federal statute. This writer would expect the following also to be superseded: restrictions against women working around mines or near moving machinery and against cleaning mill machinery; and limits on the time before and after childbirth that women may work. Since the supremacy of the federal laws would only apply in regard to employers of 15 or more persons, state legislation or the Equal Rights Amendment will be needed to invalidate protective requirements in smaller operations.

One of the more interesting substantive issues under Title VII arises from the clause in the Act which permits hiring members of only one sex “in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation” of a par-
ticular business. Words that ambiguous are a lawyer's delight! If sex is a bona fide occupational qualification for a job, employers could close the job to all members of the other sex to the extent of not even entertaining applications. The E.E.O.C. took the position quite early that sex as a BFOQ would rarely be found. In Weeks v. Southern Bell Telephone & Telegraph Co., the Court of Appeals for the Fifth Circuit adopted essentially the Commission's position and held that the employer has the burden of establishing that he had a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the requirements of the job. Later decisions tended to follow this approach. In one case in which the employer had asserted that weight lifting requirements might be more than women could handle, the court suggested that a job study should be carried out to analyze these requirements after which individual applicants could be given an opportunity to demonstrate their capacity to perform the requirements. The capstone of the BFOQ controversy came on November 9, 1971, when the Supreme Court refused to review the decision in Diaz v. Pan American World Airways, Inc. Although the feminists may be disgruntled that such an important decision came in a case in which the plaintiff was a man, the substance is crucial for guaranteeing an opportunity to obtain employment without regard to sex. Pan American had refused to entertain applications from men for the position of flight cabin attendant (commonly known as stewardess). At the trial, Dr. Eric Berne testified for Pan Am that women were superior to men in fulfilling the psychological needs of passengers. The trial court held that sex (female) was a BFOQ for the position of flight cabin attendant. The court found: women were superior in the non-mechanical functions of the job; passengers overwhelmingly preferred women as attendants; sex qualification was the best available tool to screen out applicants likely to be unsatisfactory; and that without this selection criteria the average performance of Pan Am would be lessened. The circuit court held, on the basis of the trial court's fact finding, that female sex was not a BFOQ for the position. Three of the court's considerations are of particular interest. First, the court made the determination that the business necessity requirement for the exception should be interpreted under a necessity, rather than a convenience test. It stated that sex discrimination was valid only if the essence of the business would be undermined by the hiring of members of both sexes; since the essence of the business of Pan

172. 408 F.2d 228 (5th Cir. 1969).
175. 442 F.2d 385 (5th Cir. 1971), cert. denied, 40 U.S.L.W. 3212 (U.S. Nov. 9, 1971).
176. Dr. Berne is a psychiatrist and an author. See E. Berne, GAMES PEOPLE PLAY (1967).
Am was safe transportation, it would not be undermined by hiring male flight cabin attendants. Second, the court referred to the *Weeks* rule that all or substantially all of one sex must be shown to be unable to perform a job necessary to the normal operation of the business and stated cryptically that here not "all men" were so shown. Third, the court approved the Commission's guidelines which discount entirely, as an irrelevant factor, the preference of customers for members of one sex. The court said: "[I]t was, to a large extent, these very prejudices the Act was meant to overcome." The court indicated that customer preference was to be taken into account only when it was based on the inability of members of the non-preferred sex to perform the primary function of the business. Although more litigation may be expected on the meaning and application of BFOQ, it is evident that the Commission's guidelines are going to be accepted by the courts and they will rarely accept sex as a BFOQ.

The guidelines now indicate that the Commission will consider sex as a BFOQ only for reasons of genuineness or authenticity (e.g., an actor). The argument that women are more expensive to hire due to maternity leaves, absenteeism or high job turnover will not be accepted by the E.E.O.C. as a reason for making male sex a BFOQ for any job. The Commission's guidelines state that the following situations do not warrant application of the BFOQ exception:

(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. . . . The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

The decision in *Phillips v. Martin-Marietta Corp.*, which is the first Supreme Court opinion on the BFOQ issue, augurs well for the E.E.O.C. position. The case involved a rule against hiring women with pre-school children. The Court stated that the Civil Rights Act required that persons of like qualifications be given equal employment opportunities regardless of sex and vacated a summary judgment which had approved the rule.

How to treat pregnancy and childbirth is a problem area in itself.

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178. 442 F.2d at 389.
180. *Id.* See generally Comment, *supra* note 161, at 1181-86.
182. It should be noted, however, that the Court did use language which Justice Marshall found dangerous in that it indicated a belief that such a hiring policy could be justified by showing that, in general, a woman's responsibility for small children interfered with job performance. *Id.* at 544 (concurring opinion).
Both the Office of Federal Contract Compliance and the E.E.O.C. have ruled that pregnancy and childbirth must be treated akin to other temporary physical disabilities: employment of a pregnant woman may not be terminated at the behest of the employer; maternity leave for a reasonable time with reinstatement to a job with equal status, pay and seniority must be granted, if otherwise, a disparate effect on employees of one sex results; and medical or disability insurance must be available on equal terms with other disabilities. In short, the possibility of childbirth cannot justify male sex as a BFOQ for a job. Little court litigation has occurred but one would expect the usual deference to administrative formulation of policy.

In summary, Title VII theoretically ends sex discrimination in employment. Its prohibitions are all-inclusive; the Commission and the courts are interpreting them liberally to end discriminatory practices, and attorneys who are successful may collect fees from the hapless defendant. The real challenge lies where it usually is in legal conflicts—in the facts. Those expecting an early end to what they visualize as discrimination must be reminded that these rights can be protected only when suspicions or beliefs of discrimination can be translated into proof of discrimination.

V. Remedies: Executive Orders

As part of the compromise necessary to obtain passage of the 1964 Civil Rights Act, Title VII exempted governmental agencies. However, the Act itself suggested that the President, by executive order, deal with discrimination in federal employment. Title VI of the Civil Rights Act

183. 41 C.F.R. § 60-20.3 (g) (1971). For a discussion of the general functions of the O.F.C.C., see the text accompanying notes 190-98 infra.


188. In Schattman v. Texas Empl. Comm'n, 459 F.2d 32 (5th Cir. 1972), the circuit court reversed a finding that a policy of terminating employment two months prior to expected delivery time violated the Civil Rights Act of 1964 on the ground that the employer was excluded from jurisdiction as a state agency. The court went on to hold no violation of equal protection under the fourteenth amendment because evidence established the reasonable basis required by Reed v. Reed, 92 S. Ct. 251 (1972). Physicians had testified that women were less efficient and subject to physical limitations during the last two months of pregnancy. If jurisdiction of the Civil Rights Act had existed, this generalized evidence probably would not have been sufficient. The interpretations of the Act discussed in the text are that only evidence of a particular person's inefficiency and limitations due to pregnancy would justify terminating her employment. See Koontz, supra note 184.

of 1964 forbade discrimination on the basis of race, color or national origin in any activity receiving federal funds, and authorized the federal departments (with the President's permission) to secure compliance. President Johnson responded with Executive Order No. 11,246 forbidding discrimination on account of race, color, religion, or national origin in any aspect of federal employment and in employment by contractors with the federal government. In 1967 this order was amended to forbid discrimination on account of sex. This amended order not only encompasses local and state governmental units and educational institutions, but also includes many private employers who were already subject to the jurisdiction of E.E.O.C. under Title VII. It is estimated that the Order covers one-third of all jobs in the United States even though it has been limited by rule to employers of 25 or more receiving over $10,000 in federal funds annually.

Administration of the portion of the Order covering federal employees is vested in the Civil Service Commission, and of that covering employees of contractors in the Department of Labor. The latter duties are entrusted to the Office of Federal Contract Compliance (O.F.C.C.). However, each federal department actually dispensing money to contractors is given primary responsibility for obtaining adherence to the Order and the rules and regulations promulgated by the Department of Labor to effectuate it.

Enforcement of the Order is cumbersome: withholding funds under current contracts or declarations that a contractor is ineligible for future funds. There is apparently no method whereby an individual may pursue a cause of action for damage to himself for violation of executive order by a private contractor. In theory, withholding of funds could be

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194. 41 C.F.R. § 60-1.5 (a) (1971).
196. The Order, part II A, § 201.
198. The Order, part II C, § 205.
199. *Id.* part II D, § 209 (a).

A private remedy may exist under the Civil Rights Act of 1964. See text accompanying notes 147-88 *supra*. Such a remedy has existed against federal agencies since March, 1972. Enforcement Act § 11. Further, a cause of action has been recognized under the Tucker Act, 28 U.S.C. § 1346 (a) (2) (1970), for back pay against a federal agency which violated the Order by refusing to employ a black woman.
done because of individual instances of discrimination within the contractor's entity. One would hardly expect cancellation of a contract or disbarment for eligibility for future contracts on the basis of isolated instances of discrimination. The impracticability of enforcement on the basis of individual instances is such that emphasis has been placed instead on "affirmative action," which the Executive Order specifically requires of contractors to insure that applicants are employed without regard to discrimination.201 Speaking in opposition to a proposal to transfer the functions of the O.F.C.C. to the E.E.O.C., Undersecretary of Labor Silberman said:

The two programs of EEOC and OFCC are substantially different. . . . The Commission undertakes to investigate complaints alleging job-related discrimination, and where the complaint appears meritorious, seeks to obtain a voluntary resolution.

The contract compliance program[s] . . . focus is not on individual instances of discrimination, as is the function of EEOC, but on broader employment patterns and systems. Its purpose is to assure that contractors take affirmative action to provide equal employment opportunity.202

The final version of the Equal Employment Opportunities Enforcement Act of 1972 did not transfer these functions but established mechanisms for cooperation among E.E.O.C., O.F.C.C. and other federal entities.203 The intent to foster the pattern described by Silberman is clear.

All federal contractors are forbidden to discriminate and all are subjected to the requirement of affirmative action.204 In January, 1970, Order No. 4 of the Secretary of Labor set out guidelines for developing affirmative action programs for all non-construction contractors obtaining $50,000 or more annually in federal funds and employing 50 or more persons.205 The order was significant, as the first which detailed required contents and methods for implementing them. The order did not include specifications for programs designed to halt sex discrimination. In June, 1970, guidelines pertaining to specific instances of sex discrimination (but not to affirmative action programs) were first published.206 It was not until because of her race. Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971). Cf. Harris v. Nixon, 325 F. Supp. 28 (D. Colo. 1971) (reviewing administrative action).

201. The Order, pt. II, § 202(1) states: "The contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex or national origin."


203. Section 10 of the Enforcement Act establishes an Equal Employment Opportunity Coordinating Council composed of the Secretary of Labor, the Chairman of the E.E.O.C., the Attorney General and the Chairman of the United States Civil Rights Commission. The Council is charged with responsibility for coordinating all of the equal employment opportunity efforts of the federal government.

204. See generally 41 C.F.R. ch. 60 (1971).

205. Id. §§ 60-2.1 to .32 (1971); CCH Empl. Prac. ¶ 1624, at 1468 (1972).

December 4, 1971, that Order No. 4 was revised to require detailed affirmative action programs for the elimination of discrimination against women.\textsuperscript{207} Labor Secretary J. D. Hodgson stated that experience under Order No. 4 made the Department increasingly aware of problems of equal employment opportunities for women, and that this led to the formulation of the revised order.\textsuperscript{208} Organized women’s groups had inundated HEW’s Office of Civil Rights during 1970-71 with complaints of discrimination in higher education. The Women’s Equity Action League, alone, filed charges at about 260 campuses between January, 1970 and October, 1971.\textsuperscript{209} Attorneys for WEAL have been dissatisfied with the response of HEW in investigating and obtaining compliance.\textsuperscript{210} It is true that HEW negotiated for a long time with various universities such as Columbia University and the University of Michigan in regard to affirmative action programs prior to the requirement that sex be included in such plans.\textsuperscript{211} However, the inclusion of sex discrimination in affirmative action may well provide the means for achieving the goal of the Executive Order to end sex discrimination.

There is good reason to believe that the years of experience of the O.F.C.C. is just now beginning to bear fruit in terms of success in contract compliance. For a long while employers did not know what was expected of them in developing affirmative action programs. Consequently, ignorance itself played a hand in slowing compliance efforts. Speaking in the fall of 1971, Secretary Silberman emphatically stated:

> Even the most vigorous policy, however, cannot be successful unless those who are subject to it have a clear idea of what is specifically required. It has only been within the last 2 years that these standards have been adequately spelled out, and it is this new element which has revolutionized the contract compliance program.\textsuperscript{212}

Affirmative action in regard to discrimination against women under Revised Order No. 4 requires employers to analyze their work force to determine whether women are being underutilized and, if so, to develop goals and timetables for remedying the deficiency.\textsuperscript{213} Underutilization is

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require no differentiation on the basis of sex in employment. See 42 U.S.C. § 2000e-2 (1970). In addition, a female must be granted a leave of absence for childbearing and, upon return in a reasonable time, must be reinstated to her original job or one of equal status without loss of service credits. 41 C.F.R. § 60-20.2 (g).
\end{quote}

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207. 36 Fed. Reg. 21,152 (1971); see CCH EMPL. PRAC. ¶ 4320, at 2159-68 (1972).
209. Shapley, University Women’s Right: Whose Feet Are Dragging? 175 SCIENCE 151 (1972). Apparently, W.E.A.L. has chosen academia as the place in which to first attack sex discrimination on a large scale. What happens there may set the pattern for all employment areas.
210. Id. at 153.
211. Id. at 152-53.
212. Hearings on S. 2515 and H.R. 1746, supra note 193, at 77.
\end{flushright}
defined as having fewer women in a particular job classification than would reasonably be expected by their availability. The factors to be considered by contractors and subcontractors in analyzing their work forces include: number of unemployed women, percentage of women in the work force, availability of women having requisite skills and availability of women seeking employment in the labor area surrounding the facility; availability of women having requisite skills which the contractor could reasonably recruit; availability of promotable and transferable women in the contractor's organization; anticipated changes in the contractor's work force; availability of institutions capable of training persons in the requisite skills; and training that the contractor could reasonably undertake to make all job classes available to women. Once underutilization is determined, the contractor must develop reasonably attainable goals for correcting his deficiencies within a reasonable time, assuming that he puts forth every good faith effort to make his affirmative action program work.

A second fact which had slowed progress in implementing the Executive Order was that employers did not know what information needed to be collected and delivered to the government. The long time that negotiations with Columbia University have taken is charged to the difficulty of collecting data from the University needed to determine whether or not a pattern of discrimination exists. President McGill of Columbia is reported to have stated to the Columbia University Senate that Columbia did not discriminate but that, "It is exceedingly difficult to prove what we do because it is exceedingly difficult to develop the data base to show, in the depth and detail demanded, what the university's personnel practices in fact are." Revised Order No. 4 specifically requires that support data for the analysis and program shall be compiled and maintained, and that the data shall include progression line charts, seniority rosters, applicant flow data and applicant rejection ratios indicating minority and sex status. According to Secretary Silberman,

Great progress is being made in increasing the availability of data concerning the impact of the program . . . . A contractor self-analysis and evaluation form is being developed and is undergoing review. This form will standardize the information coming in from contractors concerning their utilization of minority employees and women. It will facilitate the use of automatic data processing systems in aid of the program.

An example of the type of thing that the O.F.C.C. may require is the demand for additional information which HEW made on the University of Michigan in January, 1972. The letter requested:

214. CCH EMPL. PRAC. ¶ 4320.11, at 2161 (1972).
215. Id.
216. Id. ¶ 4320.12.
SEX DISCRIMINATION

--Computer print-outs of current University of Michigan employees listed by job classification and by departmental unit, including name, race, sex, highest degree earned or level of education, past job history, current job information, and data and method of entry into current job classification;
--A computer print-out for each employee who has participated in a U-M sponsored training program in the past two years;
--A print-out with detailed information on all employees who left U-M in the past two years;
--A print-out for each employee who has a spouse employed in any capacity at the University;
--A detailed list of women who have been upgraded since the U-M affirmative action program went into effect;
--A list of all academic and administrative persons hired since Oct. 6, 1970;
--A detailed list of all applicants considered for those positions;
--A list of job categories investigated by U-M in its review of files to achieve salary equity between males and females having equivalent qualifications, responsibilities and performance in the same job classification. Also, a list of those women whose files were selected for analysis and a list by department and job classification of those women who were granted salary increases as a result of the analysis.220

Reports are that the University expects to comply with the request. Fedele F. Fauri, Vice-President for State Relations and Planning, has stated: "[T]he information required is extensive, and it is true that much of it is next to impossible to collect, but we are going ahead with gathering of the information using all resources available." Much of the information, University officials have pointed out, will have to be gathered manually, as some information has not been placed into computer storage.221

Collection of data of this type from federal contractors will almost surely speed the affirmative action efforts. Additionally, a recent willingness to exercise sanctions is likely to impel action. After difficulty with a number of universities HEW issued its first holds on future federal funds in the fall of 1971.222 It is reported that this action has spurred other college administrators to action.223 The University of Missouri's Board of Curators, in January, 1972, adopted a statement of affirmative action which includes sex discrimination and which authorizes the president to establish affirmative procedures.224 In February, the University of Kansas announced

221. Id.
initiation of a comprehensive program.\textsuperscript{225} The American Council on Education has established a committee, headed by Derek C. Bok, President of Harvard University, to work with federal officials in setting up guidelines for HEW offices to follow in negotiating affirmative action programs with universities.\textsuperscript{226}

Secretary Silberman testified that in his opinion "the contract compliance program is, at long last, well on the road."\textsuperscript{227} If this is true, the addition of sex discrimination to the affirmative action requirements in the fall of 1972 was a most propitious development for women.

CONCLUSION

In 1963 the first President's Commission on the Status of Women called for "action within the judicial, executive, and legislative branches of government to the end that full equality of rights may become a reality."\textsuperscript{228} The decade following is without question the decade of legally shattered shibboleths of sexism. No longer do stereotyped concepts or generalized notions of the abilities or interests of a person based solely on his or her sex have legal relevance. Even in the constitutional context of state action, evidential support for such generalizations seems imperative. In the context of employment, the law now demands that an individual be judged as an individual. A revolution of culture and law is occurring that holds the promise of achieving the Commission's call for equality of rights.

\begin{itemize}
\item \textsuperscript{225} Circular Letter, \textit{supra} note 220, at 9.
\item \textsuperscript{226} \textit{Chronicle of Higher Education}, Dec. 6, 1971, at 2.
\item \textsuperscript{227} \textit{Hearings on S. 2515 and H.R. 1746, supra} note 193, at 78.
\item \textsuperscript{228} \textit{President's Comm'n on the Status of Women, Report, American Women 45} (1963).
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