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## Anti-Sex Discrimination Laws: A Mandate for the Redistribution of Social Resources Based upon the Emerging Constitutional and Statutory Equality of the Sexes

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## **Abstract**

Not since the era when feminists such as Susan B. Anthony and Elizabeth Cady Stanton fought for women to attain the right to vote, receive an education, and own property has the women's movement achieved its present potentiality for revolutionizing the basic tenets of our social structure.

**KEYWORDS:** sex, discrimination, equality

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## **Anti-Sex Discrimination Laws: A Mandate for the Redistribution of Social Resources Based upon the Emerging Constitutional and Statutory Equality of the Sexes**

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Not since the era when feminists such as Susan B. Anthony and Elizabeth Cady Stanton fought for women to attain the right to vote, receive an education, and own property has the women's movement achieved its present potentiality for revolutionizing the basic tenets of our social structure. Historically, women's entrance into the hierarchial spheres of our social, economic, and political institutions has been precluded by our society's strict adherence to traditional sex roles. However, American society is presently undergoing a consequential transitional period during which both female and male sex roles are being redefined and expanded. It is axiomatic that legal change is often necessary to initiate progressive change in society's mores, as well as to implement and institutionalize such change.<sup>1</sup> The legal ramifications necessary to implement a potential sex-role equalitarianism are that women's rights and responsibilities be recognized as equal to those of men for the first time in our American constitutional history.

Accordingly, the contemporary emergence of the women's movement is asserting that dysfunctional social institutions and laws based upon outmoded sex-based stereotypes be modified to reflect the profound historical transformations that have occurred during the past two hundred years within our political, economic, and educational institutions. This article will describe the legal and political change which has occurred and is presently occurring in response to women's evolving historical role, and the movement which bears the burden of reforming the underlying legal principles which have been molded by ubiquitous traditions that have restricted women's roles in the past.

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1. CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, *Introduction, IMPACT ERA, LIMITATIONS AND POSSIBILITIES* 3 (1st ed. 1976).

## 1. THE PROBLEM

The unfortunate history of sex discrimination was acknowledged by the United States Supreme Court in 1973 in *Frontiero v. Richardson*,<sup>2</sup> in which the Court held unconstitutional medical and housing benefit statutes that allowed a serviceman to claim his wife as a dependent without showing her actual dependency, but required a servicewoman who claimed her husband as a dependent to show his actual dependency. Exemplifying the “unfortunate history”<sup>3</sup> of sex discrimination that was recognized by the Supreme Court in this opinion is a decision a century earlier in which the Supreme Court denied a woman the right to practice law solely because of her sex.<sup>4</sup> In a 1948 decision, the Supreme Court continued to accept the traditional social classification of a “woman’s place” when it upheld a state statute which barred women from becoming bartenders, on the theory that “[t]he 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.”<sup>5</sup> However, twenty-five years later, the Supreme Court dramatically reversed its former philosophical view and unequivocally took judicial notice of the issue of “shifting social standards” in relation to women’s changing role:

No longer is the female destined solely for the home and the rearing of the family and only the male for the market place and the world of ideas. . . . The presence of women in business, in the professions, in government and, indeed, in all walks of life, where education is a desirable, if not always necessary antecedent, is apparent and a proper subject of judicial notice.<sup>6</sup>

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2. 411 U.S. 677 (1973). In the plurality opinion, Justices Brennan, Douglas, White, and Marshall concluded that classifications based upon sex were inherently suspect and must be subjected to strict judicial scrutiny in order to afford women equal protection under the First and Fourteenth Amendments of the United States Constitution. In a concurring opinion, Chief Justice Powell and Justice Blackmun found pending passage of the Equal Rights Amendment a compelling reason to defer designation of sex classifications as suspect so as not to preempt current legislative action on a major political decision.

3. *Id.* at 684.

4. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

5. *Goesart v. Cleary*, 335 U.S. 464 (1948). In this case, the United States Supreme Court upheld a Michigan statute that limited the employment of women as bartenders to establishments owned by the father or husband of the female employee.

6. *Stanton v. Stanton*, 95 S. Ct. 1373 at 1378 (1975). The Utah Supreme Court decision was reversed by the U.S. Supreme Court which held that a Utah statute was

The women's movement has been a primary stimulus in effecting such change of opinion in the United States Supreme Court and in implementing recent successful enforcement activity of existing anti-discrimination legislation. Because the burden of change is upon those who want change, women's advocates have had to continually ". . . challenge their adversaries' claims with argumentation and documentation, to monitor law enforcement, to prod the bureaucracy, to pressure the legislators and, at the same time, to extend their support and enlarge their resources"<sup>7</sup> to their constituents.

## 2. THE STATISTICS

Abundant evidence of a demand for change to eliminate the sex-stereotyping replete in our social institutions is apparent from an assessment of women's actual roles during the past twenty-five years in contrast to their "mythological" roles. Such contrast is clearly evidenced by that statistical figure which gainsays the myth of "women's place in the home," by revealing that the number of women working in the labor force nearly doubled during this period, while the number of working men increased by only one-fourth.<sup>8</sup> Challenging the myth of motherhood is the statistic which shows that fertility rates for the century dropped from near record highs in the 1950's to record lows in the 1970's.<sup>9</sup> The myth of marriage as woman's primary career is belied by those statistics which indicate that college enrollments for women rose far more rapidly than those for men;<sup>10</sup> that the rocketing entrance of women into professional schools is historically unprecedented;<sup>11</sup> and

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unconstitutional as a violation of equal protection which declared that girls attained majority at age eighteen, but boys did not attain majority until they reached twenty-one years of age.

7. Cowan, *Legal Barriers to Social Change: The Case of Higher Education*, in *IMPACT ERA*, *supra* note 1, at 179-80.

8. UNITED STATES DEP'T OF COMMERCE, BUREAU OF CENSUS, *A Statistical Report of Women in the United States*, VI *Women Today* 66 (May 10, 1976).

9. *Id.* See Sicherman, *American History*, 1 No. 2 *SIGNS, JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 472 (Winter 1975).

10. *A Statistical Report*, *supra* note 8, See also DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *School Enrollment in the United States: 1972*, CURRENT POPULATION REPORTS, from I. MURPHY, *PUBLIC POLICY ON THE STATUS OF WOMEN*, 111 n. 18 (2d ed. 1973).

11. U.S. DEP'T OF LABOR, 1975 *MANPOWER REPORT OF THE PRESIDENT, THE CHANGING ECONOMIC ROLE OF WOMEN* 66 (1975).

that the rate of women remaining single has risen rapidly.<sup>12</sup> The myth that women work merely for spending money is gainsaid by the statistic that in 1975 women comprised 40% of the total labor force, although 60% of these women worked because of pressing economic need.<sup>13</sup> In 1975, the number of families headed by women rose to an historic high of 13%, but 45% of all families below the poverty level were headed by women.<sup>14</sup> Challenging the myth of equal opportunity are those statistics which reveal in 1974 that women earned only 40%-70% of what men earned with comparable education and training,<sup>15</sup> despite the passage of fair employment laws as early as 1963. The myth of egalitarian marriage is belied by the harsh reality of women's financial rights in those forty-three separate property states which makes the earnings of each spouse after marriage the property of the earning spouse alone, regardless of the other's domestic services or child care,<sup>16</sup> and by the realization that upon divorce only 10% of women in this country receive the law's guaranteed support, and that most divorced mothers do not receive court-ordered child support.<sup>17</sup> An understanding of such changes and the proposed solutions to cope with such problems are critical to an understanding of a major social and economic phenomenon of our time.

### 3. THE HISTORY

During the past two hundred years, those conditions which caused the exclusive stereotypical picture of women as wife, housewife, and mother to become obsolete were: (1) the amount of time women spent in actual mothering being reduced to an historical low;<sup>18</sup> (2) women's

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12. *A Statistical Report*, *supra* note 8. See also J. FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* 29 (1975). Since 1970, the number of households in which a person lived alone or with non-relatives had risen in 1976 by 41%. *Rise in Number of Women-Headed Households Is Reported by Census Bureau*, VI *WOMEN TODAY* 131 (Sept. 27, 1976).

13. Women's Bureau, U.S. Dep't of Labor Employment Standards Ad., *Women Workers Today* 1 (Oct. 1976), *TWENTY FACTS ON WOMEN WORKERS* ¶ 2 (June 1975).

14. *TWENTY FACTS*, *supra* note 13, at ¶ 13-14. See U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, *U.S. WORKING WOMEN, A CHARTBOOK*, chart 31 (1975).

15. *U.S. WORKING WOMEN*, *supra* note 14, at chart 34.

16. Bingaman, *The Impact of the ERA on Marital Economics*, in *IMPACT ERA*, *supra* note 1, at 116-17.

17. Weitzman, *Legal Equality in Marriage and Divorce: The ERA's Mandate*, in *IMPACT ERA*, *supra* note 1, at 201.

18. In 1800, the average white woman surviving menopause bore seven children, 50% of whom survived to adulthood. Sicherman, *American History*, *supra* note 9, at

lack of physical strength no longer being a determining factor in their ability to compete in a technological society; (3) women no longer being regarded as productive economic contributors within their own homes;<sup>19</sup> (4) women's aspirations and expectations being raised enormously when they were educated to expect the personal application of the democratic ideals of equal opportunity and equal justice under the law;<sup>20</sup> (5) women controlling their reproductive lives by determining the number of children they wished to bear and rear. Even a cursory assessment of the *de facto* opportunities available to women since the Industrial Revolution through the present reveals that while the "reasons" for class distinctions based solely on sex existed no more, those distinctions and corresponding restrictive stereotypes were as firmly entrenched as ever throughout our institutions and laws.<sup>21</sup>

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472. Komarovsky, *Women's Role in American Society: Retrospect and Prospect*, in *WOMEN'S ROLE IN CONTEMPORARY SOCIETY* 63-64 (1972). In 1975, her counterpart lived 30 years longer, bore one to two children, 95% of whom survived to adulthood. *Fertility, A STATISTICAL PORTRAIT OF WOMEN IN THE U.S.*, in 1 *J. OF REPRINTS OF DOCUMENTS AFFECTING WOMEN* 175 (July 1976).

19. The Industrial Revolution was a major cause of job segregation which has been repeatedly cited as a primary means by which men have maintained a superior position in a capitalistic society. Sociologist Jean Lipman-Blumen notes that patriarchy and capitalism allowed men to control a disproportionate amount of resources, such as power, status, money, land, political influence, legal power, education, occupational resources, aggression, strength, competitiveness, and leadership, as contrasted with women's resources of sexuality, youth, beauty, promise of paternity, and domestic and clerical services. Lipman-Blumen, *Toward a Homosocial Theory of Sex Roles: An Explanation of the Sex Segregation of Social Institutions*, in 1 No. 3 Pt. 2 *SIGNS, A JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 17 (Spring 1976).

20. Women obtained little formal education in America until after the American Revolution, when education for women was thought desirable so that they, as mothers, could intelligently educate future citizens of a new republic. However, women met considerable resistance when they began to enter the non-traditional domains of public power during their participation in the abolitionist and suffragette movements before the Civil War. See *In re Lockwood*, 154 U.S. 116 (1894) (women not entitled to vote under the Fourteenth Amendment), and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (women not entitled to practice law under the Fourteenth Amendment). See also Castle, *Susan B. Anthony, Reformer*, 59 *A.B.A. J.* 526 (1973).

21. During the nineteenth century, women seeking paid employment could readily enter the fields of teaching, nursing, librarianship, and clerical positions, since these areas were seen as proper extensions of their domestic and homemaking roles. However, these roles were also characterized by lower pay, infrequent advancement, and lowering of the status of the profession in the long run. During World War I and World War II, women provided a readily manipulative source of labor and filled 80% of the war-related jobs after being given only brief training. These experiences of successfully performing "male-only" jobs that had been excluded from them during peace time, coupled with

The spark which ignited the Commission on the Status of Women to action in 1966, the forerunner of the present women's movement, was the arrogant non-enforcement posture of the Equal Employment Opportunity Commission toward women's economic equality as stipulated under Title VII of the 1964 Civil Rights Act.<sup>22</sup> After the Conference of the Commission on the Status of Women, which was headed by a male, refused to bring a resolution to the floor from the Commission on the Status of Women on June 30, 1966<sup>23</sup> that would have urged the Equal Employment Opportunity Commission to treat sex discrimination as seriously as it had treated racial discrimination, twenty-eight women who had supported the ignored resolution formed the National Organization of Women, organized "to bring women into full participation in the mainstream of American society now, assuming all of the privileges and responsibilities in truly equal partnership with men."<sup>24</sup>

#### 4. THE OBSTACLES

Anti-discrimination laws on the books have not effectively realized sexual equality because they simply have not been enforced. The cause of sex discrimination's most visible manifestation, economic discrimination in the labor force, is directly attributable to those varied attitudes which affirm the inferior position of women. One such attitude perceives sex discrimination as the last "socially acceptable" prejudice, but invari-

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their increasing educational attainment, made many women aware that they possessed capabilities far greater than they were allowed to exhibit in their traditional female roles. During the postwar periods, women suffered hostility and discrimination in entering male professional and business worlds, and in attempting to enter male labor unions, which had traditionally insisted on contracts with segregated job categories, seniority lists, and pay scales for men and women. Women hence began to appreciate the implications of the 1,000 laws, institutions, and practices that have relegated women to an inferior status. MacDougal, Lasswell, Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT. L. 497 at 502 (July 1975).

22. FREEMAN, *supra* note 12, at 53-54. An appalling lack of enforcement activity against sex discrimination was notarized by such pervasive departmental attitudes as that of the first Equal Employment Opportunity Commission director, who publicly stated that the provision of "sex" added to Title VII was a "fluke . . . conceived out of wedlock," and that "men were entitled to female secretaries." Ironically, the "sex" provision was added to Title VII by one of its strongest opponents, Rep. Smith of Virginia, as a joke in an attempt to make the employment section of the bill look silly and fail to pass. 110 CONG. REC. 2577 (1964).

23. FREEMAN, *supra* note 12, at 54 n. 27.

24. *Id.* at 55.

ably "more subtle, more sophisticated and more acceptable" than other forms of discrimination.<sup>25</sup> Abundant studies confirm that sex discrimination has become institutionalized in the labor force due to (1) uninformed and prejudicial attitudes of employers,<sup>26</sup> (2) the traditional domestic, dependent, and non-career orientation of women,<sup>27</sup> and (3) the dual role of women as both wife-housewife-mother and employee.<sup>28</sup> The

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25. Former U.S. Labor Dep't attorney Thomas Murphy noted that "the acceptance of lower wages for females doing work equal to that of their male colleagues has been widespread and tacitly accepted among those who have displayed indignation toward similar racial inequity." Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act of 1963-1970*, 39 U. CIN. L. REV. 615 (Fall 1970).

26. A recent study revealed that most administrators of job training and employment programs, as well as the employees themselves, were either misinformed or unfamiliar with job discrimination laws and practices. NEWS FROM THE U.S. LABOR DEP'T, WOMEN AND WORK 3 (Jan. 1975). In addition, employers sometimes argue that job discrimination is justified because women get pregnant, cannot do heavy work, and are absent from work more often than men. However, it is often pointed out that, in reality, pregnancy is a short-term disability, and that choices to do work requiring weightlifting abilities or hazardous conditions should depend upon individual inclinations and ability, for women as they do for men. Further, it is statistically evident that women's absentee rates do not differ from those of men. *Rights of Working Women: International Perspective*, 14 VA. J. INTERN. L. 729 at 740 (1974).

27. Researchers have found that subtle mechanisms of social control such as the marriage structure and traditional female roles have channelled women away from male occupational fields and toward roles which society finds necessary for its maintenance and continuity. *Hearings 805 of H.R. 16098 Before Special Subcommittee on Education, House Committee on Education and Labor*, 91st Congress, 2d Sess. 624 (1970) at 274. See U.S. DEP'T OF LABOR, 1975 MANPOWER REPORT OF THE PRESIDENT, THE CHANGING ECONOMIC ROLE OF WOMEN at 60. See also REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON WOMEN AND EMPLOYMENT, EXPLOITATION FROM 9 TO 5, *Employer Attitudes and Practices* (1975).

Numerous studies have concluded that a girl early in life discovers that her expectations and opportunities have been restricted, that her rights and freedoms have been limited, and that her femaleness has been defined as a caste-like attribute which sets her apart from men. Freeman, *Legal Basis of the Sexual Caste System*, 5 VALPARAISO U. L. REV. 213 (1971). See also *Dick and Jane as Victims: Sex Stereotyping in Children's Readers*, WOMEN ON WORDS AND IMAGES (1972), and *Sex Discrimination: The Textbook Case*, 62 CALIF. L. REV. 1312 (1974). Many researchers have pointed out that boys have been encouraged to develop "masculine" traits which are common attributes found in most professional and occupational roles such as ingenuity, creativity, bravery, perseverance, achievement, adventurousness, curiosity, autonomy, and self-respect, while girls have been discouraged from developing these traits as "unfeminine" and sex-inappropriate behavior for girls. See E. MACOBY, *THE DEVELOPMENT OF SEX DIFFERENCES* (1966).

28. As long as quality child day care is lacking, most commentators point out that employers will be reluctant to hire women, place them in positions of responsibility, or

simplest principles of equal opportunity are frequently resisted either consciously or subconsciously by employers who continue to assume that the higher status, responsibility, and paycheck of the working man and the correlatively lower status, responsibility, and paycheck of the working woman are somehow naturally ordained and "normal."<sup>29</sup>

Weakness in the enforcement of anti-discrimination laws has further been attributed to a lack of executive leadership,<sup>30</sup> and to a lack of proper legislative drafting, resulting in insufficient staffing, inherent bureaucratic delay and discretion, and weak management and enforcement authority written into the enabling machinery and legislation itself.<sup>31</sup> A further non-supportive posture on equal rights for women has come from the judiciary, as indicated by various law review articles.<sup>32</sup> One such analysis written by two law professors who describe themselves as "middle-aged, white males who had never been radicalized, brutalized, politicized or otherwise leaned on by the Establishment," concluded:

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provide them with extensive job training. However, despite a consensus of studies which have concluded that maternal deprivation is not a result of working mothers, widespread opposition to group child care for middle class families exists. This opposition is evidenced by the attitudes of board members in public and private child and family agencies, local businessmen, and labor leaders, as well as by President Nixon's veto of the 1970 Child Development Bill and President Ford's veto of the 1976 Day Care and Child Services Act. The United States Senate on May 6, 1976, failed to override President Ford's veto of the Day Care and Child Services Act (H.R. 9803) that would have funded federal staffing standards for day care centers. *Day Care Override in Senate Fails*, VI WOMEN TODAY 65 (May 10, 1976). However, the Senate Finance Committee approved a compromise day care bill (H.R. 12455) on May 11, 1976, that prevented many centers from being forced to shut down. *Senate Finance Committee Passes Compromise Day Care Bill*, VI WOMEN TODAY 72 (May 24, 1976). Current day care facilities provide for only 18% of the need and are inadequate for most women to utilize because they are either too expensive or subsidized only for the very poor. TWENTY FACTS, *supra* note 13, at ¶ 10. See also MURPHY, *supra* note 87, at 58-59, and TASK FORCE, *supra* note 27, at 173-85.

29. Gates, *Occupational Segregation and the Law*, in 1 No. 3 Pt. 2 SIGNS, JOURNAL OF WOMEN IN CULTURE AND SOCIETY at 68 (Spring 1976). See also Miner, *The Lesson of Affirmative Action for the Equal Rights Amendment*, in IMPACT ERA, *supra* note 1, at 90.

30. During President Nixon's first term, the Citizens Advisory Council on the Status of Women was provided with a paid staff of only two. I. MURPHY, PUBLIC POLICY ON THE STATUS OF WOMEN at 21, 42-43 (2d ed. 1973).

31. *Id.* at 39. FREEMAN, *supra* note 12, at 179-80, 182-83. Murphy, *Sex Discrimination in Employment—Can We Legislate a Solution?*, 17 N.Y.L.F. 436 at 450-51 (1971).

32. Sangerman, *A Look at the Equal Pay Act in Practice*, 22 No. 5 LAB. L.J. 259 (1971).

[t]hat by and large the performance of American judges in the areas of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection, critical analysis which have served them so well with respect to other sensitive social issues . . . [S]exism, the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences, is . . . easily discernible in contemporary judicial opinions. . . .<sup>33</sup>

## 5. THE LAWS

### A. Equal Pay Act

The Equal Pay Act was adopted in 1963 as an amendment to the Fair Labor Standards Act of 1938.<sup>34</sup> Directed only to the hourly worker, it requires the same pay for men and women doing equal work which demands equal skill, effort, responsibility, and is performed under similar working conditions in the same establishment.<sup>35</sup> The Act, which is enforced by the Labor Department's Wage and Hour Division, permits wage differentials based on a bona fide seniority or merit system, or on a system that measures earnings by quantity or quality or production or by "any other factor other than sex."

On July 1, 1972, the Act was extended to cover executive, administrative, and professional employees and outside sales personnel.<sup>36</sup> On May 1, 1974, the Act was further extended to cover seven million employees of the federal, state, and local governments.<sup>37</sup> Still unprotected are employees in small retail or service establishments.

The Equal Pay Act has been the most effectively enforced of all anti-discrimination legislation, primarily because of the power of the

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33. Johnstone and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 at 676 (1971).

34. 29 U.S.C. § 206 (d)(1) (1964). An equal rights platform had been adopted by both political parties in every national convention since 1944, and some form of equal pay legislation had been introduced yearly in Congress since 1945. *Equal Pay Act of 1963—Problems in Upholding Standard for Female Employees*, 5 ST. MARY'S L.J. 409 (1973).

35. 29 U.S.C. § 206 (d)(1) (1964). 109 CONG. REC. 8702 (daily ed. May 23, 1963).

36. Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375, 29 C.F.R. § 3541 (1973), 38 Fed. Reg. 11390 (1973).

37. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., *EQUAL PAY UNDER THE FAIR LABOR STANDARDS ACT 1* (June 1974).

Wage and Hour Division in the Labor Department, which has authority to investigate complaints, assist employers with compliance, and file lawsuits. By 1974, the Department had further increased its compliance measures to include intensified enforcement, public education, employer training programs, ongoing research and review, evaluation of progress, and cooperative sharing of data between state and local governments.

A judicial statement of the purpose of the Equal Pay Act is found in *Schultz v. Wheaton Glass*:<sup>38</sup>

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

Paradoxically, women's wages were higher before the Act went into effect than after.<sup>39</sup> This trend had stabilized, however, between 1969 and 1973, when the average annual discrepancy between the mean incomes of women and men had remained unchanged, but the number of wage discrimination complaints had doubled.<sup>40</sup>

The most frequently litigated exception to the Equal Pay Act has been the broad exception that permits wage differentials to be based on "any other factor other than sex." Several law review articles have noted that the Labor Department lost most of its early Equal Pay cases because of a misapplication of this statute.<sup>41</sup> One such case was *Hodgson*

38. 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied* 398 U.S. 905 (1970).

39. In 1955, women's median salary income as a proportion of men's was 64%. In 1959 it fell to 61%, and in 1973 to 57%. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., THE EARNINGS GAP Table I (March 1975). The reason for the Equal Pay Act's not budging the median pay rate of women for over an eight-year period may be explained by the fact that, until the 1972 Amendment to the Equal Pay Act, more than 40% of women in the work force were not covered by the Act. In addition, economist Barbara Bergmann attributes the decline in female wages to the vast overflowing of the secretarial labor market after World War II, causing a consequent lowering of women's wages in this category. Bergmann, *The Economics of Women's Liberation*, 208 ANNALS OF THE N.Y. ACAD. SCI. 155 (March 15, 1973). In 1974, the median pay rate for female clerical workers was 67% of that for male clerical workers. *Building the Movement: The New Working Women's Organizations*, 6 THE SPOKESWOMAN 5 (Feb. 15, 1976).

40. U.S. DEP'T OF LABOR, 1975 MANPOWER REPORT OF THE PRESIDENT, THE CHANGING ECONOMIC ROLE OF WOMEN at 63.

41. 29 U.S.C. § 206 (d)(1)(iv). See *Labor Law—Equal Pay Act—Economic Benefit to Employer is Justification for Wage Differential Between Male & Female*

*v. Robert Hall Clothes*,<sup>42</sup> a highly criticized decision in which the court held that an economic benefit to an employer was “a factor other than sex,” thus finding justification for paying salesmen higher wages than saleswomen who had performed equal work. The court rationalized that the segregation of salespeople by sex in men’s and women’s clothing departments had been justified by reasons of business necessity, and that the sale of more expensive clothing in the men’s department resulting in a higher dollar volume in gross sales for the men’s department had justified the salary differential.<sup>43</sup>

Since this questionable decision, courts have attempted to look at actual performance and requirements of a job, so that traditional justifications for paying men more than women doing substantially equal work are no longer likely to be approved by the judiciary.<sup>44</sup> Congress has found the following not allowable as a basis for wage differentials on “any other factor other than sex”: that an employee is head of a household;<sup>45</sup> that a woman costs more to employ;<sup>46</sup> or that legal restrictions in the state or other laws limit the number of hours, weightlifting, and rest periods for women.<sup>47</sup> The courts, in addition, have found the following not justifiable as “any other factor other than sex” by which to justify wage differentials where male and female employees perform substantially equal work: the flexibility of male employees;<sup>48</sup> a vague and largely illusory training program for males;<sup>49</sup> an arbitrary job classification of “heavy” work for males and “light” work for females;<sup>50</sup> and an illusory compensation rate paid for night work because men refused to work during the day due to the low wages paid to women.<sup>51</sup> To offset past wage discrimination, a court has recently held that a salary equalization formula could be implemented to bring the salaries of female

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*Employees*, 44 Miss. L.J. 1028 at 1031 (Nov. 1973). See generally Sangerman, *supra* note 32.

42. 473 F.2d 589 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973). See Note *Hodgson v. Robert Hall Clothes, Inc.: Concealed Sex Discrimination & the E.P.A.*, 122 U. PA. L. REV. 1033 (1973).

43. 473 F.2d at 597.

44. *Labor Law—Equal Pay Act*, *supra* note 41, at 1031-32.

45. 29 C.F.R. § 800.149 (1972).

46. 29 C.F.R. § 800.151 (1972).

47. 29 C.F.R. § 800.163 (1972).

48. *Schultz v. Wheaton Glass*, 421 F.2d 259 (3d Cir. 1970), *cert. denied* 398 U.S. 905 (1970).

49. *Schultz v. First Victoria Bk.*, 420 F.2d 648 (5th Cir. 1969).

50. *Hodgson v. Daisy Mfg. Co.*, 445 F.2d 823 (8th Cir. 1971).

51. *Hodgson v. Corning Glass Works*, 474 F.2d 226 (2d Cir. 1973).

faculty members and administrative employees more in line with those of male employees, provided that the minimum salary required under the formula was also applied to the opposite sex.<sup>52</sup>

Since its inception, the Equal Pay Act findings involving sex discrimination as of December 10, 1975, revealed that 900 cases had been filed; 219,925 employees had been underpaid; \$122 million had been found due in back pay; \$23 million of actual income had been restored to 60,000 employees; and a complaint backlog existed numbering 1,790.<sup>53</sup> During the first quarter of 1976 more than 6,000 employees—most of them women—were found underpaid by \$4.5 million in violation of the Equal Pay Act. These figures represent a 31% increase over the same period during the previous year.<sup>54</sup>

#### **B. Title VII of the Civil Rights Act of 1964**

Title VII of the Civil Rights Act of 1964, as amended, prohibits job discrimination because of race, color, religion, sex, or national origin. The Act prohibits discrimination in hiring or firing, wages, fringe benefits, classifying, promoting employees, extending or assigning the use of facilities, training, apprenticeships, and any other terms, conditions, or privileges of employment.<sup>55</sup> Before the 1972 Amendment, the Act was severely hampered by lack of an active, powerful, well-financed agency; by complicated procedural requirements and time limitations that produced a bulk of decisional law;<sup>56</sup> by its lack of authority to issue cease and desist orders to enforce the law; and by the Justice Department's refusal to bring legal action based on sex discrimination.<sup>57</sup> Before the 1972 Amendment, the Equal Employment Opportunity

52. Board of Regents of Univ. of Neb. v. Dawes, 522 F.2d 380 (8th Cir. 1975).

53. Not included in these figures was a \$13 million back pay award which was paid to 13,000 employees by American Telephone & Telegraph Co. This amount was not included in the Wage & Hour Dept. Compliance action statistics because, although the violative practice was originally disclosed by Wage & Hour investigators, it was resolved through the Solicitor's Office, and was not based on individual complaint actions. U.S. DEP'T OF LABOR, EQUAL PAY FINDINGS (Dec. 10, 1975).

54. U.S. DEP'T OF LABOR, NEWS, WOMEN AND WORK (Nov. 1975).

55. 42 U.S.C. §§ 2000(e)(2)-(e)(3)(1970).

56. 42 U.S.C. § 2000(e)(5)(1970), discussed in Murphy, *supra* note 31, at 451 n. 106.

57. Indicative of the Justice Department's lack of political sensitivity to sex discrimination was the remark of one departmental spokesman in the fall of 1969: "The fact that women have not gone into the streets is indicative that they do not take employment discrimination seriously." FREEMAN, *supra* note 12, at 79.

Commission established by Title VII was limited to investigating charges of violations of Title VII, to bringing about compliance through “informal methods of conference, conciliation and persuasion,” and to merely recommending that the attorney general prosecute the most serious cases.<sup>58</sup>

An example of the compromising posture which the early Equal Employment Opportunity Commission exhibited was its 1965 Guidelines on Discrimination Because of Sex, which requested that the various states merely update discriminatory provisions of their protective labor laws, thereby postponing the more difficult question of whether such laws would be a basis for the application of the “bona fide occupational qualification” exception to Title VII. For nearly three years following the adoption of the 1965 Guidelines, the E.E.O.C. did not declare that any of the protective labor laws held by 46 states were pre-empted.<sup>59</sup> The 1972 E.E.O.C. Guidelines, however, stated that protective labor laws were superseded by Title VII and could not be used as a reason

58. Act of July 2, 1964, Pub. L. No. 88-352, § 706, 78 Stat. 259.

59. 30 Fed. Reg. 14, 926-27 (1965). Note, *Employment Practices & Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. at 138-39 n. 17 (1973). Female protective labor legislation, which had been sponsored by the Women’s Bureau, feminists labor unions, and social reformers, was enacted during the first half of the century by many states to shield the growing number of women entering the work force from employment hazards and potential abuse by employers. Although originally believed to be desirable social legislation that primarily limited hours worked and weights lifted by women (see *Muller v. Oregon*, 208 U.S. 412 (1908)), these laws have been increasingly challenged as “emanating from Victorian notions of woman’s role in society and as proliferating incidents of employer discrimination.” Note, *Employment Practices & Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. at 133-34. The courts have consistently found these laws to be exclusionary, since they fail to consider individually qualified women for certain jobs. *Id.* at 140.

A bulk of decisional law and law review articles have pointed out that protective labor legislation is opposed to the underlying philosophy of Title VII, and many have suggested that “most of the so-called protective legislation has really been to protect men’s rights in better paying jobs.” 110 CONG. REC. 2580 (1964) (remarks of Rep. Martha Griffiths). Note, *Employment Practices & Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. at 134 n. 3.

In 1964, forty states and the District of Columbia had laws or regulations governing in some way the hours which women were permitted to work. WOMEN’S BUREAU, U.S. DEP’T OF LABOR EMPLOYMENT STANDARDS AD., *STATE LABOR LAWS IN TRANSITION: FROM PROTECTION TO EQUAL STATUS FOR WOMEN* 12 (1976). The *Muller v. Oregon* decision of 1908 upheld protective labor legislation until 1971 when the Ninth Circuit Court, in *Mengelkock v. Industrial Welfare Com.*, 442 F.2d 1119 (9th Cir. 1971), struck down a state hours law on equal protection grounds.

for refusing to employ women.<sup>60</sup> By 1975, all states except Nevada had repealed their maximum hours laws for women.<sup>61</sup>

The 1972 Amendment to the Equal Employment Opportunity Act broadened the jurisdictional and enforcement authority of Title VII so that the E.E.O.C. could file lawsuits in federal district courts against private employers, employment agencies, and unions when conciliation failed. It expanded jurisdiction over public and private educational institutions, and state and local governments. It also extended coverage to include employers or unions with 15 or more persons, and transferred authority to file "pattern or practice" suits from the United States Department of Justice to the E.E.O.C.<sup>62</sup> The 1972 Revised Guidelines on Discrimination Because of Sex illustrated the widened policy coverage of the E.E.O.C., which barred hiring based on stereotyped characterizations of the sexes and barred classifications of "men's" and "women's" jobs by advertising under "male" and "female" help-wanted advertisements in the newspapers.<sup>63</sup> The Guidelines further stated that the bona fide occupation qualification would be construed narrowly,<sup>64</sup> so that it would be relevant only where sex was needed for authenticity, as for an actress; for privacy, as for a matron; or for a physiological function, as for a sperm-donor.<sup>65</sup> Concepts of male and female customer preferences, based on reputed psychological needs of customers, have been rejected by the courts, where the essential job functions could be performed by either a male or female, so that males may now enter non-traditional fields such as that of airline steward,<sup>66</sup> and females may now

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60. WOMEN'S BUREAU, U.S. DEP'T OF LABOR EMPLOYMENT STANDARDS AD., BRIEF HIGHLIGHTS OF MAJOR FEDERAL LAWS AND ORDER ON SEX DISCRIMINATION 2 (June 1974).

61. Only two states, Illinois and Ohio, by 1975, enforced maximum hours laws for women for employers of 14 or fewer workers who were not covered by Title VII of the Civil Rights Act of 1964. STATE LABOR LAWS IN TRANSITION, *supra* note 59, at 12.

62. 42 U.S.C. § 2000(e)(1970), as amended by EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, Pub. L. No. 92-261, §§ 701(b), 702, 718, 83 Stat. 103.

63. 29 C.F.R. § 1604.4 (Supp., 1971). Because of public pressure generated by the National Organization of Women on August 14, 1968, the Equal Employment Opportunity Commission ruled that separate want ads for "male" and "female" headings were a violation of Title VII and ordered newspapers to desegregate their want ads. FREEMAN, *supra* note 12, at 77. See *Pittsburgh Press Co. v. Pittsburgh Com. of Human Relations*, 413 U.S. 376 (1973).

64. 29 C.F.R. § 1604.1 (Supp., 1971).

65. 29 C.F.R. § 1604 (a)(2) (Supp., 1971).

66. 29 C.F.R. § 1604.1 (Supp., 1970). *Diaz v. Pan America World Airways, Inc.*, 311 F. Supp. 559 (S.D. Fla. 1970) *rev'd and remanded*, 3 BNA FEP Cas. 337 (5th Cir.

enter non-traditional fields such as that of baseball umpire<sup>67</sup> or railroad switchperson.<sup>68</sup>

The impact of the 1972 Amendment undoubtedly further extended to influence government funding of employment programs for women in non-traditional fields. Such recent training and recruitment programs funded by the Department of Labor as the Work Incentive Program, the Job Corps, and the Apprenticeship Outreach Program for Women have trained and placed women in many occupations hitherto restricted to men, such as carpentry, auto mechanics, painting, bricklaying, plastering, welding, shipfitting, railway yard clerks, operators of heavy equipment, pickup truck drivers, electrical, radio and machine workers, tool and die makers, and meatcutters.<sup>69</sup>

Certain of the 1972 Guideline provisions are currently being challenged by employers in the courts,<sup>70</sup> particularly those which provide that disabilities contributed by pregnancy, miscarriage, abortion, childbirth, and recovery are to be treated as temporary disabilities under health insurance or sick leave plans in connection with employment. The E.E.O.C. and the courts have labeled as discriminatory restrictive employment practices that are applied only to one sex, the so-called "sex-

1971). (An argument that female stewardesses were necessary to fill the psychological needs of air passengers was rejected.)

67. *New York State Div. of Human Rts. v. New York-Pennsylvania Professional Baseball League*, 36 App. Div.2d 364, 320 N.Y.S.2d 788 (Sup. Ct. 1971).

68. *Weeks v. So. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

69. In 1974, 99% of the nation's registered apprentices were men; however, during the 1964 to 1974 decade, women in apprenticeship programs grew from 400 in 1964 to 3,700 in training in 1974. *What Constitutes "Making Headway" in Apprenticeship Participation?* VI WOMEN TODAY 61 (April 26, 1976). Advocates for Women state that women will be included in affirmative action apprenticeship programs in California, the first state in the nation to recruit affirmative action goals and timetables for women in apprentice job opportunities. *Women Will Be Included in Apprenticeships in California, Women's Group Says*, VI WOMEN TODAY 69 (May 10, 1976).

Yet after undergoing training programs, many women continue to meet obstacles in getting hired, despite their equal on-the-job performance to men. Women Working in Construction and Wider Opportunities for Women filed suit against the United States Dep't of Labor on March 29, 1976, charging the Dep't of Labor with ignoring women workers under federal affirmative action hiring plans. The plaintiffs claim they have been refused jobs because of their sex, and charge the District of Columbia Apprenticeship Council with violation of federal law for the past five years because of "its failure to force apprenticeship sponsors to submit affirmative action plans." *Labor Dep't Charged with Ignoring Women in Construction Trades*, VI WOMEN TODAY 53 (April 12, 1976).

70. See note 145 *infra*.

plus" factor that includes sex plus an additional factor of status, such as motherhood or marriage.<sup>71</sup> Though almost all "sex-plus" restrictions have been declared illegal, two federal court decisions currently conflict as to whether the "sex-plus" status discrimination is justified under the bona fide occupational qualification exception to Title VII.<sup>72</sup>

The 1972 Guidelines and the court's interpretation of Title VII have emphasized that the traditional stereotypes about women as a class should not be applied to individual members of the class, but that each woman should have the right to an individualized appraisal of her abilities and capabilities, and should have the right to choose to do that which society has historically considered unsuitable for women. A judicial expression of this philosophy of Title VII is found in *Weeks v. So. Bell Telephone and Telegraph Co.*,<sup>73</sup> a suit brought by the National Organization of Women:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.<sup>74</sup>

The Equal Employment Opportunity Commission's enforcement of Title VII is still beset with inadequate funding and a shortage of staff with which to meet an ever-increasing backlog of pending cases numbering 120,000 as of 1976, with a two- to seven-year waiting period for processing.<sup>75</sup> However, over the last few years, there has been a growing feeling that the E.E.O.C. has become at least as active on sex discrimination as on racial discrimination.<sup>76</sup>

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71. 29 C.F.R. § 1604.3(a)(Supp., 1971).

72. Epstein, *Sex Discrimination in Hiring Practices of Private Employers: Recent Legal Developments*, 48 TULANE L. REV. 125, 142-43 (1973). *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), cert. den., 404 U.S. 991 (1971), *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

73. 408 F.2d 228 (5th Cir. 1969).

74. *Id.* at 236.

75. *EEOC Under Fire*, 6 THE SPOKESWOMAN 5 (June 15, 1976).

76. J. FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* 188 (1975) notes that the growing acceptance of sex discrimination as a legitimate concern was due partially to the impact of the cases themselves, to the impact of the women's liberation movement, and to the more receptive attitudes of many young attorneys hired.

Part of this change in attitude within the E.E.O.C. came from its decision in 1973 to go after the single largest private employer of women in the United States—American Telegraph and Telephone Co. The E.E.O.C. presented 30,000 pages of testimony and documents to show that the Bell system systematically discriminated against minorities and women, and to show that sex discrimination alone accounted for a difference of \$500 million per year in wages. The suit was settled when American Telegraph and Telephone Co. agreed to pay \$38 million in back wages which, although far short of the \$3.5 billion that was due, still represented a greater monetary gain for more people than the sum total of all the E.E.O.C.'s efforts since the Commission was created.<sup>77</sup> The task force director coordinating this case stated that the E.E.O.C. had espoused the feminist view of N.O.W., that is, their view of institutionalized sex discrimination in society: "We wanted to present the whole sociology and psychology of sexual stereotypes as it was inculcated into the Bell System structure."<sup>78</sup> A further successful E.E.O.C. settlement was a 1974 settlement decree involving nine of the largest steel companies in America and the United States Steel Workers of the American A.F.L.-C.I.O., that resulted in court approved decrees providing \$31 million in back pay for 40,000 minority and women employees.<sup>79</sup>

Recent statistics pointing to the rising enforcement power of the E.E.O.C. reveal that in 1974 there were almost 40,000 recommended actionable charges, although the success rate of attempted conciliation was only 50%.<sup>80</sup> However, although courts have upheld the E.E.O.C.'s broadened enforcement power, data tabulated during 1975 showed that among public employers female workers were still concentrated in low paying, low prestige jobs.<sup>81</sup> In 1975, the E.E.O.C. filed 180 direct suits as compared with 86 in 1974, and achieved 90 court settlements or consent decrees in 1975 as compared with 27 in 1974.<sup>82</sup> Most of the

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77. *Id.* at 188-90. E.E.O.C. v. Am. Tel. and Tel. Co., 365 F.Supp. 1105 (E.D.Pa. 1975).

78. Shapiro, *Women on the Line, Men at the Switchboard: Equal Employment Opportunity Comes to the Bell System*, N.Y. Times, May 20, 1973 (Magazine), at 27, in FREEMAN, *supra* note 76, at 189 n. 53.

79. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC 9TH ANNUAL REP'T 1 (1975).

80. *Id.* at 1, 39.

81. *Id.* at 13-14.

82. U.S. EQUAL EMPLOY. OPPORTUNITY COM., NEWS, FY 1975—RECORD YEAR FOR EEOC COURT ACTIONS 1 (Oct. 1975).

charges brought against companies and unions in 1975 were based on discrimination in job classifications, hiring and discharge policies, and conditions of employment such as pay, and maternity and disability benefits.<sup>83</sup> The court settlement cases in 1975 achieved a combination of injunctive relief, periodic progress reports, back pay awards, affirmative action in recruiting, hiring, advertising and promoting, the setting of goals and timetables, the elimination of job classifications, the treatment of maternity leave as other temporary disabilities, and increased vocational training for women. Many of the cases brought by women workers under E.E.O.C. regulations were directed at unions, where courts in several instances had found collusion between unions and management in efforts to keep women segregated in lower paying jobs.<sup>84</sup>

83. *Id.* at 1-33.

84. MURPHY, *supra* note 30, at 50. See Note, *Labor Law—Civil Rights—Invidious Discrimination by Employer Does not Per Se Violate N.L.R.A.*, 4 N. MEX. L. REV. 261 (May, 1974).

Sociologist Gunnar Myrdal has explained the dilemma between the clash of interest of the working man and the working woman: "All over the world men have used the trade unions to keep women out of competition. Women's competition has . . . been particularly obnoxious and dreaded by men because of the low wages women, with their few earnings outlets, are prepared to work for." Note, *Labor Law—Sex Discrimination—Employer Sex Discrimination and Labor Management Relations Act*, 5 RUTGERS-CAMDEN L.J. 585 at 596 (1974). See *Jubilee Mfg. Co. v. United Steel-Workers*, 202 NLRB No. 2, 82 LRRM 1482 (1973), for its holding that sex discrimination was not in violation of the National Labor Relations Act, and see 82 LRRM at 1487, for J. Jenkins dissent. See 5 RUTGERS-CAMDEN L.J. at 602, for the contention that the National Labor Relations Board is still the most efficient forum for a discriminated employee to process a grievance, because of the backlog of cases under the Equal Pay Act and Title VII.

Indicative of their feeling that union membership would not promote their interests, only 12% of women workers were members of a union in 1971. *Hearings on H.R. Res. 35, H.R. Res. 208, H.R. Res. 961, etc. Before the Subcomm. No. 4 of House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 2 at 256 (1971). In March 1974, however, the Coalition of Labor Union Women was formed and had grown to a membership of 5,400 in forty-five local chapters by 1976. The union has been formally endorsed by seventeen international unions and has declared support of the Equal Rights Amendment as a major goal. *Building the Movement: The Coalition of Labor Union Women*, 6 THE SPOKESWOMAN 5 (March 15, 1976).

A 1975 United States Commission of Civil Rights report concluded, however, that despite the adoption of anti-discrimination laws "there is no generally available, effective means of correcting discriminatory practices in referral unions." *U.S. Com. on Civil Rights Issues Report on Bias in Referral Unions*, VI WOMEN TODAY 72 (May 24, 1976). Such unions predominate in the building trades and refer workers directly to employers through hiring halls, select members, and screen apprentices. Among the factors cited by the Commission as limiting apprenticeship entry into building trades

The trend of cases and consent decrees during 1976 indicates a "ripple" effect calling for broadened enforcement power across the country of Title VII and related equal employment acts. For example, settlements won under Title VII in 1976 included: a \$1 million back pay consent decree settlement from United Airlines Corp.;<sup>85</sup> a decision declaring sexual harassment a form of sex discrimination;<sup>86</sup> the establishment of quotas for job offers made by a New York law firm to women lawyers;<sup>87</sup> a \$1.9 million back pay consent decree and a \$1.3 million future recruitment program for women and minorities from Merrill Lynch, Pierce, Fenner and Smith, Inc.;<sup>88</sup> a \$935,000 back pay settlement agreement awarded to women and minorities from a Gulf Oil Company refinery in Texas;<sup>89</sup> and a \$1 million settlement order awarded to Seattle women from Safeco Insurance Company.<sup>90</sup> A recent Supreme Court decision<sup>91</sup> is likely to be favorable to minorities and women on the "last hired, first fired" issue because of its holding that seniority and entitlement to benefits must be granted from the date workers applied for work, but were refused employment because of sex or racial discrimination, rather than from the date of actual employment. Failure to comply with equal opportunity employment requirements for policewomen had caused federal funds to be withheld from Chicago police departments,<sup>92</sup>

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for women are maximum age limits, experience requirements, and oral interviews, which are described as being frequently non-job related and often insulting. *Id.*

85. *EEOC and United Airlines Sign Consent Decree*, VI WOMEN TODAY 67 (May 10, 1976).

86. *Williams v. Saxbe*, 413 F. Supp. 654 (D.C. 1976) held that retaliatory actions taken by a male Justice Dep't supervisor against a female employee who had rejected his sexual advances were illegal and constituted sex discrimination under Title VII.

87. A New York law firm agreed to use only job-related criteria in hiring and not to use sex as a basis for determining conditions of employment, assignment, salary, or promotion. The firm also agreed to pay \$40,000 in legal fees claimed in the suit to Columbia University. *Law Firm Agrees to Hiring Quota*, 6 THE SPOKESWOMAN 4 (March 15, 1976).

88. *O'Bannon and EEOC v. Merrill Lynch*, Civil Action No. 73-905 (D. Pa. July 9, 1976).

89. *Women and Minorities Get \$935,000 in Back Pay from Gulf Oil Co.*, VI WOMEN TODAY 123 (Sept. 13, 1976).

90. Equal Employment Opportunity Commission, *Bronkhorst v. Safeco Corp.*, No. 554-72C2 (D.Wash. Sept., 1976).

91. *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976):

92. Payments to the Chicago Police Dep't of funds administered under the Crime Control Act of 1973 were deferred in the fall of 1974. A further \$38 million due to be paid Chicago under the General Revenue Sharing Act was also withheld under court order. *Gates*, *supra* note 29, at 72.

and had threatened nonrenewal of licenses to Massachusetts television stations.<sup>93</sup> A new federal statute, signed into law on October 2, 1976, further imposed criminal penalties for sex discrimination in federally-funded public works and relief projects employment and will subject violators to one year's imprisonment or a \$10,000 fine.<sup>94</sup>

Women's advocates groups have begun to educate women about the existence of fair employment laws and to provide psychological and, at times, financial support so that working women are now more willing to challenge discriminatory practices by pursuing legal action. A current target of increasing litigation is the insurance industry which, according to thorough documentation of government reports, has ". . . practiced pervasive discrimination against women in coverage, availability, underwriting practices, and rating,"<sup>95</sup> thereby intensifying the discrimination women face in other areas such as employment, credit, domestic relations, and marital property. Recent settlement successes for working women's organizations include a \$500,000 back pay award won for employees at CHA, a major insurance firm by Women Employed (W.E.) in Chicago.<sup>96</sup> In addition, W.E. has placed pressure on the Department of Labor which has brought substantial back pay awards in the banking industry, and has persuaded the State Insurance Department of Illinois to take steps to outlaw the sale of discriminatory insurance policies. Boston's working women's organization, 9 to 5, recently won a significant "first" in state regulation of company employment practices, including affirmative action, benefit policies, arbitrary work

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93. Springfield Tel. Broadcasting Corp., licensee of WWLP-TV in Springfield and WRLP-TV in Greenfield, Mass. *Two Massachusetts TV Stations Ordered to "Show Cause" by FCC*, VI WOMEN TODAY 69 (May 10, 1976).

94. Act of Oct. 2, 1976, Pub. L. No. 94-453, § 246, 90 Stat. 1517.

95. Brown & Freedman, *The Impact of the ERA on Financial Individual Rights: Sex Averaging in Insurance*, in IMPACT ERA, *supra* note 1, at 127. The authors point out that basic assumptions about women in the work force underlie current insurance practices: (1) that women are only marginally connected to the labor force, will retire earlier, and therefore will utilize more insurance than men; (2) that childbirth and pregnancy are not temporary disabilities but are voluntary; (3) that pregnancy is acceptable only for married women; hence, coverage for pregnancy, childbirth, sterilization, and abortion are available only at a prohibitive family rate based on two adults and two children; (4) that only work outside the home in career-type jobs is valuable enough to insure, not domestic work; (5) that unmarried, separated, and divorced women are considered unstable. *Id.* at 128. See also Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-Aiello Analysis*, 44 U. CIN. L. REV. 57 (1975).

96. *Building the Movement: The New Working Women's Organizations*, 6 THE SPOKESWOMAN 5 (Feb. 15, 1976).

rules, and employee qualifications. The group successfully confronted political and corporate utilities lobbyists in an effort to establish greater maternity benefits for working women. In addition, 9 to 5 filed suit against four Boston-based publishing companies alleging sex discrimination in hiring, pay, and promotion policies.<sup>97</sup> San Francisco's Women's Organization for Employment compelled one of the city's employers, Fireman's Fund Insurance, to produce its first affirmative action plans for women and has "joined in a suit to insure court-monitored compliance with the plan." The group has also put pressure on state agencies to enforce regulations banning discriminatory practices such as sex-segregated job order files.<sup>98</sup>

### **C. Title IX of the Educational Amendments of 1972**

Title IX of the Educational Amendments of 1972 will open for judicial review numerous aspects of sex discrimination existing throughout our educational institutions. Congress noted the correlation between equal education and equal opportunity in its drafting of Title IX when it stated that one of the avowed purposes of Title IX was to improve the quality of the American workforce.<sup>99</sup>

With certain exceptions, Title IX prohibits sex discrimination in any academic, extracurricular, research, occupational training, or other educational program from the pre-school to postgraduate level that is operated by an organization or agency which receives or benefits from federal aid.<sup>100</sup> However, the notorious lack of compliance with the Act's requirements by 1976 demonstrated that most schools reacted as if Title IX had never been enacted. The Project on Equal Education Rights (P.E.E.R.) sponsored by N.O.W.'s Legal Defense and Education Fund had filed charges in ten regional offices of the United States Department of Health, Education, and Welfare's Office for Civil Rights in 1976 against 40 states and the District of Columbia, alleging violation of Title IX of the Education Amendment of 1972. Failure to obey the law by those 41 agencies could lead to a \$3.4 billion loss of federal education aid. P.E.E.R.'s charges are based on a recent survey of progress under Title IX that found 41 state departments of education in violation of at least one of the Act's five requirements, and 33 states in multiple viola-

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97. *Id.*

98. *Id.*

99. 117 CONG. REC. 39,248-49, 39,260 (1971).

100. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-86.

tions.<sup>101</sup> Women's advocate groups, however, continue to provide substantial leadership in attempting to remove sex-stereotyping conditions from the classroom.<sup>102</sup>

The lack of H.E.W.'s enforcement of Title IX had caused five groups, including the National Education Association, the National Organization of Women, and Women's Equity Action League, to file suit against H.E.W. in 1974 charging the governmental agency with non-enforcement of Title IX.<sup>103</sup> Early in 1976, a coalition of 57 civil rights and women's groups urged H.E.W. to end its toleration of discrimination in federally funded programs which violate Constitutional and Federal law<sup>104</sup> and its "hands-off" policy of high prestige colleges and universities.<sup>105</sup> Two months after this censure, H.E.W. publicly reversed its previous stance of discretionary enforcement, and instead

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101. *Peer Files Charges After Survey Shows Violations Under Title IX*, VI WOMEN TODAY 75-76 (May 24, 1976). See generally *Sex Discrimination in Vocational Education: Title IX & Other Remedies*, 62 CAL. L. REV. 1121 (1974). Women students who now comprise over half the enrollees in vocational educational programs are still confined to women's fields which often lead to low-paying, dead-end jobs. In 1973, girls formed the vast majority of those taking business and commercial courses (79% female) and health courses (95% female), while boys were still highly concentrated in technical, industrial, and trade subjects (98% male). *Supra* note 11, at 66. A House bill (H.R. 12835) passed on May 11, 1976, included two provisions that are aimed at reducing sex discrimination and sex stereotyping in vocational educational programs. *Vocational Education Bill Includes Anti-Discriminatory and Stereotyping Clauses*, VI Women Today 71 (May 24, 1976).

102. The Project on Equal Education Rights (PEER) has been established to monitor and publicize federal legislation banning sex discrimination in education, primarily through enforcement of Title IX at the elementary and secondary school level. PROJECT ON THE STATUS AND EDUCATION OF WOMEN, 11 ON CAMPUS WITH WOMEN, PEER TO WATCH SCHOOLS 6 (May 1975). The Council on Interracial Books, Inc., has sponsored workshops for parents, teachers, textbook publishers, and librarians to eliminate sexist and racist stereotyping in textbooks and curricular materials used in schools. PROJECT ON THE STATUS AND EDUCATION OF WOMEN, 11 ON CAMPUS WITH WOMEN, ELIMINATING STEREOTYPING IN CURRICULAR MATERIALS at 6. The subject of the National Educational Association conference held in Washington, D.C. in February 1976 was "Women's Rights: A Force for Educational Equity," which considered how schools sort students by developing different expectations and offering different options for males and females. *NEA Conference on Women's Rights Set for Feb. 19-22 in DC*, VI WOMEN TODAY 28 (Feb. 16, 1976).

103. PROJECT ON EQUAL EDUCATION RIGHTS, 1 PEER PERSPECTIVE, HEW UNIT STALLS ON SEX BIAS CASES 1-2 (Dec. 1975).

104. *Fifty-Seven Groups Cite Deficiencies in HEW Compliance Program*, VI WOMEN TODAY 16 (Feb. 2, 1976).

105. Cowan, *Legal Barriers to Social Change: The Case of Higher Education*, in IMPACT ERA, *supra* note 1, at 173.

resolved to seek a timely resolution of every complaint it received and to urge staff and budget increases.<sup>106</sup>

Since a school is, in some degree, a microcosm reflecting social stratification, prestige, and occupational choices, it is likely that many of the obstacles resisting equality in the outside society will also be encountered in our educational institutions. For example, one study of Title IX's enforcement progress noted that the recent furor over Title IX's demand that equal amounts of money be expended on female and male athletic activities in educational institutions was indicative of the guarding of athletics throughout our society as a predominantly male domain.<sup>107</sup> Exemplifying such resistance met in the struggle to obtain equal athletic opportunity for women was the National Organization of Women's court battle against Little League Baseball in 1974 which ultimately won for girls the opportunity and right to play Little League baseball.<sup>108</sup> Adequate enforcement of Title IX should preclude a repetition of those court decisions which, in the very recent past, have denied girls the opportunity to compete in state school athletic events. In one such decision which prohibited a girl from competing in a state cross-country track event, the court cited chivalrous and protective reasons to justify a denial of equal athletic opportunity and concluded: "athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow."<sup>109</sup> The recent defeat of the Casey Amendment in the United States Congress<sup>110</sup> that would have limited the power of Title IX in prohibiting honorary societies and single-sex physical education classes exemplifies the ongoing monitoring activity that women's action groups must pursue in order to avoid a watering-down of existing laws.

Academic discrimination based on sex permeates all levels of education. In February 1976, the United States Office of Education re-

106. *H.E.W. Reverses Position on Enforcement of Discrimination Complaints*, VI WOMEN TODAY 52-53 (April 12, 1976).

107. Lipman-Blumen, *supra* note 19, at 23-24.

108. *N.O.W. v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. Ct. 1974). The court, after hearing expert testimony on anatomy, physiology, reaction time, and maturation rate, made a finding of fact that girls between eight and twelve were not, as a class, subject to materially greater hazards of injury while playing baseball than boys of the same age group. On Dec. 26, 1974, Congress amended the national Little League federal charter to open the League to girls. Act of Dec. 26, 1974, Pub. L. No. 93-551.

109. *Hollander v. the Connecticut Interscholastic Athletic Conf.*, 164 Ct. 654 (1971), *appeal dismissed* 295 A.2d 671 (1972).

110. Lipman-Blumen, *supra* note 19, at 21 n. 16.

leased a report showing that women academics had actually lost ground in salary level and number of positions during 1975, despite the passage of Title IX.<sup>111</sup> Dr. Bernice Sandler, an officer of Women's Equity Action League, confirmed that the position of women in higher education had worsened over the past 100 years, and that the so-called shortage of qualified women on campus is an academic myth.<sup>112</sup> A strategy of inaction rather than one of voluntary compliance critical to effective law enforcement has been forthcoming from the halls of higher education.<sup>113</sup> A course of opposition to enforcement of anti-discrimination laws at the university level has appeared through petitions circulated, articles and letters written, and committees formed by university professors, by the use of substantial resources at their disposal, and sometimes by the favors of political patronage. Delay inherent in the bureaucratic process itself; the sheer number and complexity of the institutions covered; and inherent discretion and decentralized power, making accountability difficult in institutionalized bureaucracies, add to the problematic enforcement of Title IX.<sup>114</sup>

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111. The report stated that "the average salaries of men continue to exceed the average salaries of women at every academic rank and at every institutional level, in both publicly and privately controlled institutions." *Feds Release New EEO Plan for Higher Education*, 6 THE SPOKESWOMAN 2 (March 15, 1976). Overall, women's salaries increased 5.8%, while men's salaries increased 6.3%, from 1974 to 1975. The percentage of women declined at the ranks of professor, associate professor, and instructor, while it increased at the ranks of assistant professor, lecturer, and undesignated rank. *National Center for Education Statistics Releases Preliminary Data on Instructional Faculty in Colleges*, VI WOMEN TODAY 57 (April 12, 1976).

In 1975, while women made up 24% of all full-time faculty in this country, they comprised only 10% of full professors, 17% of associate professors, and 40% of lower echelon instructors and lecturers. Patterson, *Another School with Scandal*, Miami Herald, June 5, 1976, § D, at 1, col. 2.

112. In 1870, women comprised one-third of faculty positions, but in 1975 they held less than one-fourth of faculty positions at the college and university level. *National Center for Education Statistics Releases Preliminary Data on Instructional Faculty in Colleges*, *supra* note 111, V WOMEN TODAY at 57. Sandler, *Patterns of Discrimination and Discouragement in Higher Education*, in WOMEN'S ROLE IN CONTEMPORARY SOCIETY, *supra* note 18, at 568, 570. Dr. Sandler contends that a higher percentage of women with doctorates are available for college teaching than are men with doctorates. She notes that exemplars of the widespread attitude on college campuses toward women being qualified to earn doctoral degrees but not qualified to teach on those campuses was the situation at Columbia University in 1970, at which time the University had granted 36% of its doctorates to women in psychology, but could find no women qualified to teach in psychology. *Id.* at 570.

113. *Cowan*, *supra* note 105, at 174.

114. *Id.* at 170, 173.

A 1975 lawsuit<sup>115</sup> in which a New York college was found guilty of sex discrimination against a woman faculty member has been cited by the New York City Commission on Human Rights as having important implications for women seeking to prove sex discrimination in employment. The court stated in this case:

[W]hat Dr. Winsey did to cause her termination would have not been considered "troublesome" if she had not been a woman. It often happens that those who are not not supine and fight for their rights will be regarded as troublesome and those disturbed by the struggle would wish that the troublesome one "would just go away." To terminate Dr. Winsey's employment for this reason . . . is to have unlawfully discriminated against her.<sup>116</sup>

A pending 1976 University of Pittsburgh Medical School sex discrimination suit, brought by the National Organization of Women, could have important implications for a drastic tenure procedure revision at almost every college and university in the nation. A successful decision could significantly ease the entry of women into higher academic ranks by forcing predominantly male deans and faculties, who now may judge tenure candidates on abstract standards, to judge such candidates on objective criteria instead, such as merit, scholarly achievements, and ability to teach.<sup>117</sup>

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115. *Pace College v. Comm'n on Human Rights*, 38 N.Y.2d 28, 339 N.E. 880, 377 N.Y.S.2d 471 (1975). *Pace College* in New York was ordered to reinstate Dr. Winsey as Assistant Professor, and to pay her \$22,650 in back pay plus retroactive increments and \$15,000 damages for mental pain and humiliation.

116. *Id.* at 34, 38 N.Y.S.2d at 480, 339 N.E. at 886.

117. Dr. Sharon Johnson, Assistant Professor of biochemistry at the Univ. of Pittsburgh Medical School, contended that her denial of tenure in 1973 was a result of sex discrimination. Between 1967 and 1972, Dr. Johnson was awarded four grants from the National Institute for Health and the National Science Foundation, totaling \$256,000, had published seven articles and one review, and was elected to the Society. The department chairman told her these qualifications would satisfy her tenure requirements. However, when that chairman left in 1971, the new chairman denied her tenure, stated that the faculty deemed her research "irrelevant to the goals of the department," and that she was "too chemical." A member of the President's Advisory Council for Equity in the Education of Women stated that women such as Dr. Johnson often fall victims of tenure criteria because the existing system works to perpetuate an "old boy" club in which tenure criteria change to accommodate somebody's protege, a role women seldom are in. Since the suit was filed, Dr. Johnson's costs have exceeded \$50,000, much of which has been raised through the N.O.W. Legal Defense and Education Fund. *Another School with Scandal*, *supra* note 111, at 2, col. 1-2.

#### D. Executive Order 11246

Executive Order 11246, issued in 1965 and amended in 1967, prohibits employment discrimination based upon sex, race, color, religion, or national origin by federal contractors employed in \$50,000 contracts, and contractors who perform under federally assisted construction contracts exceeding \$10,000.<sup>118</sup> One of N.O.W.'s first actions after its formation was to induce President Johnson to amend Executive Order 11246 in 1967 to add the provision of "sex" to its protected minority groups.<sup>119</sup> Under the Order, contractors are required to take affirmative action in recruitment, advertising, hiring, transfer, layoff, rates of pay, and selection for training and apprenticeship, and may face termination or suspension of government contracts if sex discrimination is found. The potential this Executive Order has for achieving equal employment opportunity in the United States is apparent when one realizes that about one-third of the nation's total civilian workforce are employed by federal contractors. The Executive Order is enforced by the Department of Labor's Office of Federal Contract Compliance Programs through administrative regulations known as Revised Order 4, issued in May 1968. This Order requires the government to take the initiative to determine whether contractors are in compliance and to otherwise invoke economic sanctions, rather than to depend upon the filing of complaints, as is required for enforcement of Title VII by the E.E.O.C.<sup>120</sup> The Sex Discrimination Guidelines issued by the Department of Labor in 1970 require that contractors not advertise under male or female classifications, base seniority on sex, deny jobs because of state protective labor laws, distinguish between married and unmarried persons of one sex only, or penalize women because they require leave for childbearing.<sup>121</sup>

However, the predictable lack of enforcement of this executive order arises from the same subtle and obvious sources of sex discrimination that resisted enforcement of the aforementioned laws. A recent report released by the General Accounting Office indicated that a major obstacle to compliance is the government's refusal to use the sanctions it has available:

118. 41 C.F.R. §§ 60-1.1 et seq. (1974).

119. FREEMAN, *supra* note 12, at 75. Exec. Order No. 11375, amending Exec. Order No. 11246, took effect on Oct. 13, 1968. 32 Fed. Reg. 14,303 (Oct. 17, 1967). See generally TASK FORCE, *supra* note 27, at 103-8.

120. *Labor Moves to Gut Enforcement Rules*, 7 THE SPOKESWOMAN 1 (Oct. 15, 1976).

121. TASK FORCE, *supra* note 27, at 105.

Some contractors are not even being asked to run affirmative-action programs, many are not being asked for a copy of affirmative-action plans, and some are not giving women equal employment opportunities. Less than half of the back pay that the Labor Department has found to be owed to women because of violation of the Equal Pay Act has actually been paid. The Office of Federal Contract Compliance, the agency responsible for implementing Executive Order 11246, has never terminated a federal contract because of sex discrimination.<sup>122</sup>

In addition, the United States Department of Labor had proposed new enforcement regulations, published in the Federal Register on September 17, 1976, that would seriously weaken existing enforcement mechanisms.<sup>123</sup>

The supervision of Executive Order 11246 relating to educational institutions was delegated to the United States Department of Health, Education, and Welfare. Although the Order has been in effect since 1968, H.E.W. had not officially issued guidelines to the academic community until October 4, 1972.<sup>124</sup> Dr. Sandler, who implemented the first use of the Executive Order by women at universities, pointed out that it was not enforced with regard to sex by federal agencies until the Women's Equity Action League had filed 250 charges in 1970 with H.E.W. on behalf of women employed at professional and staff levels in educational institutions.<sup>125</sup> Although the pressure of the Women's Equity Action League and the National Organization of Women to enforce Executive Order 11246 at colleges and universities has not yet resulted in increased numbers of jobs or promotions for women, its increased public support<sup>126</sup> may strengthen the power of this law as well as its enforcement effect.

## 6. THE PROGRESS

By 1972, three-fourths of the 1966 demands of the National Organization of Women had been achieved, including Congressional passage

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122. Griffiths, *Can We Still Afford Occupational Segregation? Some Remarks*, in SIGNS, JOURNAL OF WOMEN IN CULTURE AND SOCIETY, *supra* note 19, at 111.

123. 17 Fed. Reg. 40,339 (1976). *See supra* note 120.

124. MURPHY, *supra* note 30, at 37.

125. *Id.*

126. 1500 citizens signed a full-page petition addressed to President Ford in the New York Times on April 6, 1975, urging the President to enforce Executive Order 11246 with regard to sex discrimination on academic campuses. *Ford Urged to Enforce E.O. 11246*, 12 ON CAMPUS WITH WOMEN 1 (Nov. 1975).

of the still-pending Equal Rights Amendment.<sup>127</sup> and the 1973 landmark decision of the United States Supreme Court, *Roe v. Wade*, which supported a woman's right to have a legal abortion.<sup>128</sup> In the Ninety-second Congress, more legislation had been passed to further the cause of equal rights for women than in all previous Congresses combined, largely attributable to women's rights advocates' active lobbying in Washington. One recent legislative success was the passage of the Equal Credit Opportunity Act,<sup>129</sup> effective on October 28, 1975, which pro-

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127. The proposed Equal Rights Amendment passed by Congress on March 22, 1972 (H.R.J. Res. 208, 92d Cong., 2d Sess.) in January 1977 required the ratification of three more state legislatures before it could become our Twenty-Seventh Constitutional Amendment. The Equal Rights Amendment is based on the principle that sex should not be a determining factor by which government affects the legal rights of its citizens. The text of the proposed amendment reads: Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article. Section 3. This amendment shall take effect two years after the date of ratification.

128. 410 U.S. 113 (1973). The effect of this decision was prevented from being overturned in May 1976 by a final Senate defeat (vote 47 to 40) of the proposed Helm's Amendment to the U.S. Constitution, which would have barred the right to obtain an abortion. *Senate Votes Against Anti-Abortion Amendment, Thwarting "Right to Lifers."* VI WOMEN TODAY 65 (May 10, 1976). A class action suit was filed on Oct. 1, 1976, by the National Abortion Rights Action League (N.A.R.A.L.) and four leading gynecologists alleging that the anti-abortion amendment to the Labor-H.E.W. appropriations bill which prohibits payment of Medicaid money for abortion, and which became law Oct. 1, 1976, is unconstitutional and blatantly discriminatory against poor women. *N.A.R.A.L. Files Suit Against Anti-Abortion Amendment*, VI WOMEN TODAY 139 (Oct. 11, 1976). See also *Planned Parenthood of Cent. Missouri v. Danforth*, 96 S. Ct. 2831 (1976), that held, inter alia, that a spousal consent provision and a blanket parental consent requirement for minors were unconstitutional in a Missouri abortion statute, and that the provision requiring a physician to exercise professional care to preserve a fetus' life and health on pain of criminal and civil liability was also unconstitutional.

In the fall of 1976, the U.S. Supreme Court agreed to rule on various abortion issues, such as whether indigent women can obtain a nontherapeutic abortion at state expense, in *Mahon v. Roe*, U.S. 75-1440. In this case, a Conn. attorney general is appealing a New Haven, Conn. Dist. Ct. ruling that required the state to pay for abortions requested by women on welfare. The Court will also review a Missouri case, *Poelker v. Doe*, U.S. 75-442, after the Eighth U.S. Cir. Ct. of Appeals ruled that the city of St. Louis, Mo., must provide physicians at city hospitals who are able to ethically perform abortions. In *Beal v. Doe*, U.S. 75-554, the Court will review the Third U.S. Cir. Ct. of Appeal's decision which held that the Federal Social Security Act compels states participating in Medicaid to provide abortion funds.

129. 12 C.F.R. § 202, Reg. B (1976). This Act prohibits a creditor from discriminating against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction. It is one of three bills introduced by Congresswoman Bella

vided the legal mechanisms by which to correct numerous existing discriminatory lending practices throughout banking and credit institutions, such as ignoring a wife's earned income regardless of its actual monetary value. By March 1976, 32 bills aimed at women's rights had been introduced into the Ninety-fourth Congress on such diversified issues as child care, civil rights, education, employment, health, the media, social security, and income tax revision.<sup>130</sup>

A pending innovative bill, exemplary of the legislature's recognition of the sociological changes in women's role, is aimed at providing an opportunity for expanded retirement security for housewives which would extend the 1974 Individual Retirement Account law to permit a spouse to contribute the same amount for the other spouse. This bill,<sup>131</sup> directed primarily at the housewife, recognizes that although the housewife "does work valued at between \$5,000 and \$15,000 per year" she has "little or no retirement protection and security." A further innovative bill entitled "Equity in Social Security for Individuals and Families" would eliminate the concept of dependency for the non-salaried spouse and would base social security coverage for married persons on the

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Abzug in the Ninety-third Congress aimed at corrective legislation against the existence of separate credit standards for men and women.

On April 20, 1976, the Justice Dep't filed its first suits to enforce prohibitions against sex discrimination in lending as provided for in the 1974 Amendments to the Fair Housing Act of 1968 against a New Jersey mortgage corporation and a Utah loan association. Various loan associations were charged with discriminatory practices against women and their families such as using sex as the criteria to determine the conditions of loans, requiring women loan applicants, but not men, to submit written assurances of their intention to continue working during the entire term of the loan, and discounting all or part of a wife's income in determining qualifications for loans. *United States v. Prudential Savings & Loan Ass'n, et al.*, Civil Action No. C-76124 (DCA Utah Apr. 20, 1976); *United States v. Jefferson Mtfg. Corp.*, Civil Action No. 76-0694 (DCA N.J. Apr. 20, 1976).

A coalition of ten civil rights groups and housing and civic organizations filed suit in May 1976 in a Washington U.S. District Court against four federal agencies which regulate the nation's home mortgage lending institutions: the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Depository Insurance Corp., and the Federal Home Loan Bank Board. Among the more than thirty types of discriminatory conduct cited in the complaint were loan criteria that had a discriminatory impact on women and minorities such as disregarding a wife's income. *10-Group Coalition Files Suit Against Four Federal Agencies Charging Bias*, VI WOMEN TODAY 67 (May 10, 1976).

130. *Status of Legislation Affecting Women*, 5 WOMEN'S EQUITY ACTION LEAGUE WASHINGTON REPORT 2-3 (May 1976).

131. S. 2732, 94th Cong., 2d Sess. (1976). *Retirement Accounts for Housewives Proposed*, 6 THE SPOKESWOMAN 2 (June 15, 1976).

assumption that they are equal entities in an economic partnership.<sup>132</sup> Social Security benefits and coverage, whether based on one salary or two, would annually be divided equally between married partners and credited to their separate accounts.

Two bills introduced into the Ninety-fourth Congress aimed at ameliorating the transitional ills that would accompany a redistribution of women's economic opportunity in our society are the Equal Opportunity and Full Employment Act and the Displaced Homemakers Act. The Equal Opportunity and Full Employment Act<sup>133</sup> would attempt to provide jobs for all people seeking both full and part-time employment, and would provide such services as adequate day-care facilities, thus recognizing the need for special remedies for those suffering the effects of past and present discrimination. The Displaced Homemaker Act<sup>134</sup> is directed at providing multi-service programs, job training and counseling, health and educational services, and financial management assistance for those three to six million "displaced homemakers" who are unable to function independently in today's society because of widowhood or divorce.

The National Women's Political Caucus and similar politically oriented women's advocates groups have urged women to realize that if they want political, economic, and social change they must assume responsibility for effecting the mandatory preliminary legal changes themselves. The National Women's Political Caucus and the Women's Campaign Fund have encouraged women to enter political careers<sup>135</sup>

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132. *Equity for Wives Under Social Security*, 5 WOMEN'S EQUITY ACTION LEAGUE WASHINGTON REPORT 1 (July 1976).

133. H.R. 50,1609, 1610, 2209, Equal Opportunity and Full Employment Act, *as amended* by Subcomm. Print, March 20, 1975.

134. H.R. 7003, S. 2541, 94th Cong., 2d Sess. (1976). A "displaced homemaker" is defined as one who has provided unpaid household services for other family members for most of her adult life, whose dependent source of income has been terminated through divorce or widowhood, and who lacks marketable skills to thereafter enable her to support herself. Under present laws, these homemakers are ineligible for unemployment benefits because their labor in the home has been unpaid and they often do not qualify for old age benefits under existing social security laws. U.S. DEP'T OF LABOR, WOMEN AND WORK, LEGISLATION TO AID DISPLACED HOMEMAKERS INTRODUCED IN BOTH HOUSES OF CONGRESS (Nov. 1975).

135. In 1976, women held less than 5% of all elected offices in the United States, according to a study conducted by the Center for American Women and Politics at Rutgers University. In 1974, 1,800 women ran for national and statewide offices, and 765 of them were elected. In 1976, the National Women's Political Caucus estimated that 2,300 women would run for such offices. *Currents*, 6 THE SPOKESWOMAN 7 (March

through such campaigns as that to “re-integrate the United States Senate” in 1976. More women legislators are likely to lead to more elected and appointed women administrators, which is likely to lead male political leaders to compete for women’s increasingly powerful vote and thereby to recruit more women to hold office.<sup>136</sup> Indicative of the Executive Department’s increasing responsiveness to women’s efforts to determine their political future was President Ford’s acceptance in July 1976 of a 115-point report of the National Commission on the Observance of International Women’s Year, aimed at ending much of the “sexism still so rampant throughout our country.”<sup>137</sup> The President’s acceptance was implemented by his issuance of Executive Order 11832, the purpose of which is to fulfill the points raised by the National Commission. As part of his commitment to the 115-point program, President Ford had directed a review of the United States Code by the Attorney General and all affected federal agencies to determine the need for revision of unjustified sex-based provisions. Such review was to be conducted in coordination with a similar review proposed by the President to be initiated by the Governors of all the states.

Further evidence of the responsive posture of the executive and federal judicial branches toward women’s rights is their endorsement of the entrance of women into traditionally male-dominated governmental sectors. For example, in 1972 women were appointed for the first time in history as F.B.I. agents, postal inspectors, sky marshalls, secret service agents, and narcotics agents. Not only have the Army, Navy, and Air Force resolved to double and triple their ranks of women and give women jobs previously reserved for men, such as pilot training, but a 1975 law<sup>138</sup> passed and given overwhelming support by the House and Senate directed that women be admitted to armed service academies beginning in the fall of 1976. More than 800 women had received Congressional nominations to the Naval, Army, and Air Force Academies to compete for 300 first-year places allotted to females.<sup>139</sup> The advent

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15, 1976). No women have ever been appointed to the United States Supreme Court. In 1975, there were no women senators, and women held only 19 of the 435 seats in the United States House of Representatives. NAT. COM’M ON THE OBSERVANCE OF INTERNATIONAL WOMEN’S YEAR, TO FORM A MORE PERFECT UNION 341 (1976).

136. Freeman, *The Political Impact of the ERA*, in *IMPACT ERA*, *supra* note 1, at 67.

137. *Nat. IWY Com’m Submits Report; President Ford Accepts It*, VI WOMEN TODAY 100-1 (July 19, 1976).

138. Pub. L. No. 94-106, § 8 (Oct. 7, 1975).

139. *More than 800 Women Get Congressional Nominations to Military*

of women into the military service is likely ultimately to present for judicial review the issue of the laws and traditions behind male-only combat.<sup>140</sup> As one legal analysis concluded, “[l]ike other laws apparently written to protect women as a class, these statutes have had a profound adverse impact on opportunities for women in the military services.”<sup>141</sup> For example, in 1975, *Schlesinger v. Ballard*<sup>142</sup> upheld a military statute in favor of allowing women more time than men in which to achieve advancement before discharge. However, Justice Brennan pointed out that the majority chose to pass over the issue of whether the discriminatory pattern chosen by Congress that was beneficial to women was itself constitutional. Indicative of an increasing approval of women’s equality in the armed forces was the overwhelming House passage of a bill<sup>143</sup> on September 13, 1976, which would abolish the offices of Director of Lady Marines and Director of the Waves, and disband the Women’s Army Corps. A House committee report stated that having a separate corps was a “. . . vestige of the time when women were not treated equally,” and that “[e]ach female officer in the future, like each male officer, will be a member of some functional corps of the service.”<sup>144</sup>

Recent judicial decisions indicate a growing commitment by the courts to apply greater objectivity to their rulings on women’s rights issues. For example, such decisions have demonstrated that sex discrim-

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*Academies*, VI WOMEN TODAY 53 (April 12, 1976).

140. Specific laws have survived in the military services, not covered by any of the laws prohibiting sex discrimination in employment, which forbid service of women on combat ships whether or not in combat (10 U.S.C. § 6015 (1970)) and on planes in combat (10 U.S.C. § 8549 (1970)). Gates, *supra* note 29, at 64. Four women in the U.S. Navy are challenging, as unconstitutional, the law prohibiting women from serving aboard U.S. Navy vessels in a class action suit filed in the U.S. Dist. Ct. in Washington in December 1976. *Four Navy Women File Class Action Suit to be Assigned Sea Duty*, VI WOMEN TODAY 163 (Dec. 27, 1976).

141. Gates, *supra* note 29, at 64. See also *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.D.C. 1974). The court granted summary judgment to the Air Force Academy and Naval Academy when the exclusion of women therein was challenged on equal protection grounds. The court upheld the reasoning that the exclusion of women from the Academies is rationally related to a legitimate government interest because the purpose of the Academies is to train officers for combat, and women are barred from combat.

142. 419 U.S. 498, 511-12 n. 1 (1975) (Brennan, J., dissenting). Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U. CAL. L.A. L. REV. 235 at 244 n.50 (1975).

143. H.R. 13958, 94th Cong., 2d Sess. (1976).

144. *House Passes Measure Abandoning Wacs, Waves and Lady Marines*, VI WOMEN TODAY 129 (Sept. 27, 1976).

ination based on maternity conditions and such requirements as mandatory maternity leaves or blanket denials of unemployment benefits for periods preceding and following child-birth will be found to be an unconstitutional denial of due process and equal protection.<sup>145</sup> A recent New York District Court of Appeals decision found that pregnant Marines were not permanently unfit for duty and therein declared a 1970 Marine Corps regulation which so stipulated<sup>146</sup> to be a violation of due process and equal protection. In the fall of 1976, the Supreme Court is to decide the issue of whether or not a divorced woman under age sixty-two will have the same right to receive social security benefits for her dependent children as does a married woman with dependent children.<sup>147</sup>

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145. *Turner v. Dep't of Employment Sec. etc.*, 0423 U.S. 44 (1975). The Court's decision on Utah law is expected to have great impact on twenty other state unemployment insurance laws with special provisions relating to pregnancy which existed as of July 1975. Most of these laws deny pregnant women benefits regardless of their individual ability to work, availability for work, or efforts to find a job. The International Women's Year supplement report to the Unemployment Insurance Service Benefit Series indicates that, despite guidelines issued under Title VII, employers are still unwilling to hire pregnant women and often classify them as unfit for employment. *Blanket Denial of Jobless Pay During Pregnancy is Unlawful*, VI WOMEN TODAY 24 (Feb. 16, 1976).

In *Gilbert v. General Elec.*, 375 F. Supp. 367 (1975) *cert. granted*, Oct. 6, 1975, *reargued* Oct. 13, 1976, exclusion of pregnancy disability from sickness and accident benefits was found to violate equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964. The International Union of Electrical, Radio, and Machine Workers had shown how General Electric pays benefits for various other kinds of disabilities, including football knees and hair transplants, while denying payments only in pregnancy-related areas. On Dec. 7, 1976, however, the Supreme Court, in a 6-3 decision, ruled such exclusion of maternity benefits from private employer sickness and accident disability insurance plans was not in violation of Title VII. *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976). Women's rights advocates have since indicated they will seek legislative remedies to preclude the effect of the Supreme Court decision, such as supporting a Congressional amendment to Title VII or a separate bill which would make exclusion of such coverage illegal under Title VII. *Women's Rights Activists to Fight Maternity Ruling*, Miami Herald, Dec. 9, 1976, § C, at 1, col. 1-2.

*Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974) *aff'd* 511 F. 2d 199 (3d Cir. 1975). A woman employee successfully challenged under Title VII the company exclusion of pregnancy benefits from its employee income protection plan and the requirement that female employees return to work within three months of childbirth or face termination.

146. *Crawford v. Cushman, Jr.*, 531 F.2d 114 (1976). Marine Corps Reg. MCO P1900.16, MCO 500.12 (7-16-75), etc.

147. *Mathews, Sec. of H.E.W. v. Helen de Castro* (No. 75-1197), cited in *Mother's Rights Cases Come Before Supreme Court*, VI WOMEN TODAY 65 (May 19, 1976).

Further issues before the 1976-1977 Supreme Court term include the role of the state in providing abortions, the question of whether pregnancy may be excluded from the list of disabilities covered by a disability benefits plan for employees, the constitutionality of the "male only" membership policy of the Veterans of Foreign Wars, and the question of whether widowers, but not widows, must prove they received one half of their support from their spouse at the time of the spouse's death.<sup>148</sup> The Supreme Court recently bypassed making a decision upon the issue of whether female school teachers and staff members may be discharged for bearing illegitimate children, awaiting the outcome of a pending H.E.W. regulation on this issue.<sup>149</sup>

## 7. THE FUTURE

Repeated studies and polls indicate that the American public is becoming increasingly receptive to the idea that women and men should share equally the privileges and responsibilities of our society.<sup>150</sup> It is likely that widening employment opportunities, lawsuits to raise wages and collect damages for past discrimination, affirmative action programs, and new training programs in untraditional fields will create higher income for female workers ultimately,<sup>151</sup> as well as create more subtle changes in such economic structures as the present 36-hour work week. For example, economist Barbara Bergmann predicts that an influx of women into the labor force equal to that of men could be absorbed by having a 31-hour work week for both women and men.<sup>152</sup> In addition, such influx could be absorbed by utilizing innovative concepts such as flexible work-hours or job-sharing programs.<sup>153</sup>

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148. *Supreme Court Cases Include Several that Are of Interest to Women*, VI WOMEN TODAY 136-37 (Oct. 11, 1976).

149. *Drew Municipal Separate School District v. Andrews* (No. 74-1318), cited in *Mother's Rights Cases Come Before Supreme Court*, VI WOMEN TODAY 65 (May 19, 1976).

150. MURPHY, *supra* note 30, at 73-79.

151. Bell, *Economic Realities Anticipated*, in *IMPACT ERA*, *supra* note 1, at 82.

152. Bergmann, *supra* note 39, at 158-59.

153. The United States Labor Dep't stated that flexible work hour schedules and removal of barriers for part-time employment are currently subjects of collective bargaining and proposed legislation. In 1976, thirty organizations in the federal government representing more than 28,000 employees were engaged in flexible hours programs. *Senate Hearings Held on Alternative Work Patterns*, VI WOMEN TODAY 59 (April 26, 1976). On May 6, 1976, the House passed H.R. 9043, which created a three-year experimental program of four-day work weeks and flexible working hours for federal

Further subtle changes likely to occur within related institutions are modifications of the existing legal marriage contract. Required under each of its present unwritten but rigid provisions rooted in the common law are inflexible and outmoded roles for husbands and wives which continue to be legally enforced,<sup>154</sup> despite the advent of more egalitarian family patterns. New laws emerging in surrounding areas point to a need for a flexible legal marriage model more suited to the diverse roles husbands and wives assume in a modern nuclear family unit. A flexible legal model would ultimately reflect the growing acceptance of women in the labor force along with their greater financial and social independence, an extended range of domestic responsibilities shared between husbands and wives, and a modification of parenthood as a joint enterprise to be enjoyed and shared by both husband and wife.<sup>155</sup>

Whether equality under the laws will approach reality is, in the opinion of many legal analysts, dependent upon the existence of a firm Constitutional foundation for equal treatment. In the judgment of Constitutional commentators, the government now in fact possesses the "unquestioned authority" to assure such equality.<sup>156</sup> However, as stated in the words of Chief Justice Burger, "[i]n the absence of a firm Constitutional foundation for equal treatment for men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles."<sup>157</sup> Passage of the Equal Rights Amendment, as reputed by its advocates, would provide such a Constitutional foundation.<sup>158</sup> Its proponents urge that its passage would create awareness of sex discrimination, make legal recourse a realistic solu-

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employees in order to ascertain more fully the advantages and disadvantages of flexible working hours for future use. *House Passes Legislation Setting Up an Experimental Flex-Work Program*, VI WOMEN TODAY 74 (May 24, 1976). Currently some cities and industries across the nation are experimenting with the concept of job sharing, by which two people share one fulltime job and divide it between them according to time worked or tasks performed. One Mass. study found that two part-time workers were more efficient than one worker doing the same job. Curtis, *Can Two Work as Cheaply As One?*, Miami Herald, March 21, 1976, § F, at 1, col. 1-2, 4-5.

154. Weitzman, *supra* note 17, at 185. See also *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 116 (1974), and Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U. CAL. L.A. L. REV. at 264 n. 134.

155. Weitzman, *supra* note 17, at 196-97.

156. Cowan, *supra* note 105, at 176.

157. K. DAVIDSON, R. GINSBURG, H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* 63 (1st ed. 1974), Introduction to Appellant's Brief in U.S. Sup. Ct. in *Reed v. Reed*, 404 U.S. 71 (1971).

158. Cowan, *supra* note 105, at 176-77.

tion, and justify self-respect.<sup>159</sup> Its predicted impact would be to provide a Constitutional safeguard against rescission of existing nondiscrimination laws and executive orders, particularly during periods of economic recession; to abolish restraints on women by enabling them to earn a better living; and to abolish restraints on men by freeing them from bearing the sole financial responsibility for the lifetime support of others.<sup>160</sup> Clearly such a profound impact would enhance enormously the career choices, lifestyles, and work patterns for both men and women.

Institutional, political, and ethical shifts are presently occurring which will affect the very framework of social behavior. Customs, such as our ways of living and bringing up children and the consideration of what is appropriate to and conventional in today's society, are likely to be redefined during our generation and over future generations.<sup>161</sup> Regardless of its final manifestation, a strong plurality of indicators suggests the question remaining is not whether sexual equality under the law will be realized, but in what passage of time that realization will take place.

## 8. CONCLUSION

The myths of woman's place, motherhood, equal opportunity, woman's power, and egalitarian marriages are anachronisms amid contemporary social realities. In point of fact, women are participating in the labor force and in myriad untraditional roles in historically unprecedented numbers. There is much to indicate that if women continue their pressing commitment for change, they will be increasingly successful in their efforts to end legislative and judicial discrimination. As they become more politically sophisticated, skillful, and resourceful, their demands for equality will intensify, their dissatisfactions will increase, and their aspirations will rise. Constitutional and statutory equality would then provide the necessary framework by which women could achieve social, political, and economic equality for the ultimate benefit of both sexes.

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159. *IMPACT ERA*, *supra* note 1, at 4.

160. Chafetz, *The ERA and Redefinitions of Work: Toward Utopia*, in *IMPACT ERA*, *supra* note 1, at 111-12.

161. Bell, *supra* note 151, at 76.