Jane Crow and the Law: Sex Discrimination and Title VII

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During the 1960's, more concern for the legal status of women has been demonstrated than at any time since the adoption of the nineteenth amendment. The President's Commission on the Status of Women, established in December 1961,[1] submitted its report, American Women, to the President in October 1963.[2] The Interdepartmental Committee and Citizens' Advisory Council on the Status of Women were established to facilitate carrying out the recommendations of the President's Commission.[3] The Fair Labor Standards Act was amended by the Equal Pay Act of 1963[4] to provide equal pay for equal work without discrimination on the basis of sex. At the direction of the President, the Civil Service Commission has prescribed a policy of non-discrimination in federal employment.[5] President Johnson has made special efforts to seek out qualified women for responsible executive positions. Three human rights

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1. Exec. Order No. 10980, 26 Fed. Reg. 12059 (1961).

2. The reports of the Commission's seven committees and a report on four consultations were also published and are available at the Women's Bureau, U.S. Dep't of Labor, or at the United States Superintendent of Documents, Washington, D.C.

3. Exec. Order No. 11126, 28 Fed. Reg. 11717 (1963), as amended by Exec. Order No. 11221, 30 Fed. Reg. 6427 (1965).

4. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).

5. U.S. Civil Serv. Comm'n, Federal Personnel Manual ch. 713-6—713-8 (1963).

conventions,[6] two of which are of special importance to women, were submitted to the Senate for its advice and consent to ratification in 1963.

"Sex" was included along with race, color, religion, and national origin in the equal employment opportunity provisions of the Civil Rights Act of 1964.[7] As of August 1965, ten states and the District of Columbia had fair employment laws that prohibited discrimination on the basis of sex.[8] As of October 1965, forty-five state commissions on the status of women had been established;[9] some of these have already reported and made recommendations.

Despite all of this activity, there are problem areas that need to be clarified. Two basic ones form the subject of this article: the extent to which the Constitution may protect women against discrimination, and the interpretation of the sex discrimination provisions of the equal employment opportunity title of the Civil Rights Act of 1964.

Antifeminism and Racism

Negroes have successfully invoked the protection of the Constitution against race discrimination; the enactment of the Civil Rights Act of 1964 was achieved primarily because of the evils of race discrimination. We think that sex discrimination can be better understood if compared with race discrimination and that recognition of the similarities of the two problems can be helpful in improving and clarifying the legal status of women.

Discriminatory attitudes toward women are strikingly parallel to those regarding Negroes. Women have experienced both subtle and explicit forms of discrimination comparable to the inequalities imposed upon minorities.[10]

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6. The United Nations Convention on the Political Rights of Women (1953); The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1951); and the International Labor Organization Convention on the Abolition of Forced Labor (1957).

7. 78 Stat. 253 (1964), 42 U.S.C. § 2000e (1964).

8. Ariz. Rev. Stat. art. 4, §§ 41-1461—66 (1965); D.C. Commissioner's Order No. 65-768 (June 10, 1965); Rev. Laws of Hawaii ch. 90a (Supp. 1963), as amended by Sess. Laws of Hawaii Act 44 (1964); Laws of Md. ch. 717 (1965); Mass. Ann. Laws ch. 151b, §§ 1-10 (1965); Vernon's Ann. Mo. Stat. ch. 296 (1965); Neb. Law 656 (approved Aug. 3, 1965); N.Y. Discrimination Because of Sex Law, 188th Sess. ch. 516 (1965); Utah Anti-Discrimination Act of 1965, 34 Utah Code Ann. ch. 17, §§ 1-8 (1965); West's Wis. Stat. Ann. §§ 111.31 - 111.37 (Supp. 1965); Wyo. Laws ch. 170 (approved Mar. 1, 1965).

9. Alaska, Connecticut, New Mexico, Ohio, and Texas did not yet have commissions.

10. Thirty years ago, Blanche Crozier pointed out this parallel:

> Not only are race and sex entirely comparable classes, but there are no others like them. They are large, permanent, unchangeable, natural classes. No other kind of class is susceptible to implications of innate inferiority. Aliens, for instance, are essentially a temporary class, like an age class. Only permanent and natural classes are open to those deep, traditional implications which become attached to classes regardless of the actual qualities of the members of the class. This is the only kind of class prejudice which can be reached by laws aimed not toward guarding against the unjust effect of the prejudice in

Contemporary scholars have been impressed by the interrelation of these two problems in the United States, whether their point of departure has been a study of women or of racial theories. In *The Second Sex,* Simone de Beauvoir makes frequent reference to the position of American Negroes.[11] In *An American Dilemma,* Gunnar Myrdal noted that the similarity of the two problems was not accidental, but originated in the paternalistic order of society.[12] "From the very beginning," Dr. Myrdal observed, "the fight in America for the liberation of the Negro slaves was closely coordinated with the fight for women's emancipation .... The women's movement got much of its public support by reason of its affiliation with the Abolitionist movement."[13]

The myths built up to perpetuate the inferior status of women and of Negroes were almost identical, Dr. Myrdal found:

> As in the Negro problem, most men have accepted as self-evident, until recently, the doctrine that women had inferior endowments in most of those respects which carry prestige, power, and advantages in society, but that they were, at the same time, superior in some other respects. The arguments, when arguments were used, have been about the same: smaller brains, scarcity of geniuses and so on. The study of women's intelligence and personality has had broadly the same history as the one we record for Negroes. As in the case of the Negro, women themselves have often been brought to believe in their inferiority of endowment. As the Negro was awarded his "place" in society, so there was a "woman's place." In both cases the rationalization was strongly believed that men, in confining them to this place, did not act against the true interest of the subordinate groups. The myth of the "contented woman," who did not want to have suffrage or other civil rights and equal opportunities, had the same social function as the myth of the "contented Negro."[14]

Similarly, Ashley Montagu, in his study, *Man's Most Dangerous Myth: The Fallacy of Race,* documents the parallel between antifeminism and race prejudice:

> In connection with the modern form of race prejudice it is of interest to recall that almost every one of the arguments used by the racists to "prove" the inferiority of one or another so-called "race" was not so long ago used by the antifeminists to "prove" the inferiority of the female as compared with the male. In the case of these sexual prejudices one generation has been sufficient in which to discover how completely spurious and erroneous virtually every one of these arguments and assertions are.[15]

The myths essentially "deny a particular group equality of opportunity and then assert that because that group has not achieved as much as the groups

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the particular case but toward a general upholding of the dignity and equality, the legal status, of the class.

Crozier, *Constitutionality of Discrimination Based on Sex,* 15 B.U.L. Rev. 723, 727-28 (1935).

11. de Beauvoir, The Second Sex 116, 297-98, 331, 714-15 (5th ed. Parshley transl. 1964).
12. Myrdal, An American Dilemma 1075 (2d ed. 1962).
13. *Ibid.*
14. *Id.* at 1077.
15. Montagu, Man's Most Dangerous Myth: The Fallacy of Race 181 (4th ed. 1964).

enjoying complete freedom of opportunity it is obviously inferior and can never do as well."[16] Morevoer, Dr. Montagu finds the same underlying motives at work in antifeminism as in racism, "namely, fear, jealousy, feelings of insecurity, fear of economic competition, guilt feelings and the like."[17]

These findings indicate that, in matters of discrimination, the problems of women are not as unique as has been generally assumed.[18] That manifestations of racial prejudice have been more brutal than the more subtle manifestations of prejudice by reason of sex in no way diminishes the force of the equally obvious fact that the rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issue of human rights.

The United Nations Charter and the Universal Declaration of Human Rights both stress respect for human rights and fundamental freedoms for all persons without distinction as to race, sex, language, or religion.[19] Until the enactment of the Civil Rights Act of 1964, "sex" generally had not been included with "race, color, religion and national origin" in federal laws and regulations designed to eliminate discrimination. As a practical matter, "civil rights" had become equated with Negro rights, which created bitter opposition and divisions. The most serious discrimination against both women and Negroes today is in the field of employment. The addition of "sex" to Title VII of the Civil Rights Act, making it possible for a second large group of the population to invoke its protection against discrimination in employment, represents an important step toward implementation of our commitment to human rights.

Equality of Rights Under the Constitution

The President's Commission on the Status of Women called for judicial clarification of the legal status of women under the Constitution:

> Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land. . . .
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> Early and definitive court pronouncement, particularly by the U.S. Supreme Court, is urgently needed with regard to the validity under the 5th and 14th amendments of laws and official practices discriminating against women, to

16. *Id.* at 182.
17. *Id.* at 184.
18. Hacker, *Women As A Minority Group*, 30 Social Forces 60, 65 (1951). The author lists a number of similarities in the status of Negroes and the status of women.
19. See U.N. Charter preamble; art. 1, para. 3; art. 8; art. 13, para. 1; art. 55; and art. 76; and the Universal Declaration of Human Rights preamble; art. 2; and art. 16, para. 1.

the end that the principle of equality become firmly established in constitutional doctrine.[20]

Underlying this statement is the more than forty years of controversy over the proposed equal rights amendment to the Constitution. An equal rights amendment has been introduced in every Congress since 1923.[21] In its present form, the proposed amendment provides that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[22] It has twice passed the Senate, but with the "Hayden rider" providing that the amendment "shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon persons of the female sex."[23] The President's Commission on the Status of Women concluded that equal rights for women is already guaranteed under the Constitution; it therefore believed that "a constitutional amendment need not now be sought. . . ."[24]

Both proponents and opponents of the equal rights amendment, unlike the Commission, generally have assumed there is a constitutional gap with respect to women,[25] a view also expressed by the Senate Judiciary Committee in reporting favorably on the proposed amendment.[26] This view, on the surface, seems to be supported by judicial decisions narrowly interpreting the fourteenth amendment in sex discrimination cases.[27]

In three nineteenth century cases, the Supreme Court held that the privileges and immunities clause of the fourteenth amendment did not confer upon women the right to vote[28] or the right to practice law within a state.[29] Between 1908 and 1937, the Supreme Court upheld various state labor laws applicable to women but not men, on the ground that sex furnishes a reasonable basis for legislative classification.[30] The Court upheld in 1948 a state law forbidding

20. President's Comm'n on the Status of Women, American Women 44-45 (1963) [hereinafter cited as American Women]. The Commission Report and summaries of the committee reports also appear in Mead & Kaplan, American Women (1965).

21. President's Comm'n on the Status of Women, Report of the Committee on Civil and Political Rights 32 (1963) [hereinafter cited as Report on Civil and Political Rights].

22. See, *e.g.*, H.R.J. Res. 11 and S.J. Res. 85, 89th Cong., 1st Sess. § 1 (1965).

23. 96 Cong. Rec. 872-73 (1950); 99 Cong. Rec. 8954-55 (1953).

24. American Women at 45.

25. See generally *Hearings Before Subcommittee No. 1 on Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women of the House Committee on the Judiciary*, 80th Cong., 2d Sess., ser. 16 (1948); *Hearings on S.J. Res. 39 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. (1956).

26. "[W]e withhold from our women a constitutional guarantee of equal treatment under the law and thus lag behind such countries as Burma, Egypt, Japan, Greece, Pakistan, and West Germany." S. Rep. No. 1558, 88th Cong., 2d Sess. 3 (1964). See also S. Rep. No. 2192, 87th Cong., 2d Sess. (1962); S. Rep. No. 303, 86th Cong., 1st Sess. (1959); S. Rep. No. 1150, 85th Cong., 1st Sess. (1957).

27. For a summary of the leading cases concerning the constitutionality of laws distinguishing on the basis of sex, see Report on Civil and Political Rights, app. B.

28. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

29. *In re* Lockwood, 154 U.S. 116 (1894); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

30. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Radice v. New York, 264 U.S. 292 (1924); Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915); Riley v. Massachusetts, 232 U.S. 671 (1914); Muller v. Oregon, 208 U.S. 412 (1908).

the licensing of females (with certain exceptions) as bartenders[31] and in 1961 a state law providing that no female may be taken for jury service unless she registers with the clerk of court her desire to serve.[32]

The courts generally have over-simplified the question of reasonableness of classification by sex by applying the principle that "sex is a valid basis for classification."[33] The blanket application of such a doctrine totally defeats the meaning of equal protection of the law for women.

Ironically, the 1908 case, *Muller v. Oregon*, cited as leading precedent for this doctrine, upheld an Oregon maximum hour law for women in certain industries, partly "to secure a real equality of right" for women in the unequal struggle for subsistence. The thrust of the decision was to equalize the bargaining position of women in industry. The other ground for sustaining the legislation was the relation of woman's health needs to her maternal functions and the public interest in preserving "the well-being of the race."[34] The decision was rendered against a background of the common law position of women before they had gained political equality and on the basis of medical knowledge available more than fifty years ago.

Later decisions, disregarding the rationale of *Muller*, seized upon the Court's language and extended the doctrine of sex as a basis for legislative classification to remote or unrelated subjects. *Muller* has been cited in support of jury exclusion,[35] differential treatment in licensing occupations,[36] and the exclusion of women from a state supported college.[37]

Although the Supreme Court has in no case found a law distinguishing on the basis of sex to be a violation of the fourteenth amendment, the amendment may nevertheless be applicable to sex discrimination. The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values. Recent Supreme Court decisions in cases involving school desegregation,[38] reapportionment,[39] the right to counsel,[40] and the extension of the concept of state action[41] illus-

31. Goesaert v. Cleary, 335 U.S. 464 (1948).
32. Hoyt v. Florida, 368 U.S. 57 (1961).
33. Muller v. Oregon, 208 U.S. 412, 422 (1908).
34. *Ibid.*
35. Commonwealth v. Welosky, 276 Mass. 398, 414, 177 N.E. 656, 664 (1931), *cert. denied*, 284 U.S. 684 (1932).
36. Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912); People v. Case, 153 Mich. 98, 101, 116 N.W. 558, 560 (1908); State v. Hunter, 208 Ore. 282, 288, 300 P.2d 455, 458 (1956).
37. Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App.), *cert. denied*, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App.), *cert. denied*, 359 U.S. 230 (1958).
38. Brown v. Board of Educ., 347 U.S. 483 (1954), *reargued on the question of relief*, 349 U.S. 294 (1955).
39. Baker v. Carr, 369 U.S. 186 (1962).
40. Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).
41. Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

trate the modern trend towards insuring equality of status and recognizing individual rights. Courts have not yet fully realized that women's rights are a part of human rights; but the climate appears favorable to renewed judicial attacks on sex discrimination as suggested by the President's Commission on the Status of Women.

The protective cover of the fourteenth amendment is broad enough to reach all arbitrary class discrimination. As Chief Justice Warren pointed out in *Hernandez v. Texas*:[42]

> When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

The difficulty in asserting women's rights lies not in the limited reach of the fourteenth amendment, but in the failure of the courts to isolate and analyze the discriminatory aspect of differential treatment based on sex.

In a recent New York case, *Shpritzer v. Lang*,[43] the state courts upheld the right of a policewoman to take an examination for the rank of sergeant. Although the decision was based on interpretation of a provision of the New York City Administrative Code, the Supreme Court, Appellate Division, indicated that a contrary interpretation might deprive the petitioner of her constitutional rights:

> Such a construction obviates the necessity of passing upon the constitutionality of the section. For a construction that it authorized discrimination solely because of sex might render it suspect. . . .
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> We find no prohibition in statute or rule against the eligibility of policewomen to take the promotional examination for Sergeant. To place such a construction upon the language of Administrative Code § 434a-2.0(d) is unwarranted, unreasonable, and demonstrates an archaic approach in light of modern day conditions. Moreover, such a construction amounts to a denial of petitioner's constitutional rights solely because of her sex unless it is demonstrated that some rational basis exists for the distinction.[44]

In affirming the lower court decision, the New York Court of Appeals stated that it did not reach the constitutional question of equal protection of the laws.[45]

Obviously, society has a legitimate interest in the protection of women's maternal and familial functions. But in discussing the legal status of women, courts generally have been content to parrot the doctrine that sex forms the basis of a reasonable classification and to ignore the fact that women vary

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42. 347 U.S. 475, 478 (1954).

43. 32 Misc.2d 693, 224 N.Y.S.2d 105 (Sup. Ct. 1961), *modified*, 17 App. Div.2d 285, 234 N.Y.S.2d 285 (1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869, 191 N.E.2d 919 (Ct. App. 1963).

44. 17 App. Div. at 289-90, 234 N.Y.S.2d at 289-90.

45. 13 N.Y.2d 744, 241 N.Y.S.2d 869, 191 N.E.2d 919 (Ct. App. 1963).

widely in their activities and as individuals. What is needed to remove the present ambiguity of women's legal status is a shift of emphasis from women's class attributes (sex per se) to their *functional* attributes. The boundaries between social policies that are genuinely protective of the familial and maternal functions and those that unjustly discriminate against women as individuals must be delineated.

Before attempting to formulate any principle of equal protection of the laws, certain assumptions that have confused the issue must be reexamined. The first is the assumption that equal rights for women is tantamount to seeking identical treatment with men. This is an oversimplification. As individuals, women seek equality of opportunity for education, employment, cultural enrichment, and civic participation without barriers built upon the myth of the stereotyped "woman." As women, they seek freedom of choice: to develop their maternal and familial functions primarily, or to develop different capacities at different stages of life, or to pursue some combination of these choices.

The second assumption confusing the "woman problem" is that, because of inherent differences between the sexes, differential treatment does not imply inequality or inferiority. The inherent differences between the sexes, according to this view, make necessary the application of different principles to women than to minority groups.

To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation; its benefits are geared to the performance of a special service much like veterans' legislation. When the law distinguishes between the "two great classes of men and women," gives men a preferred position by accepted social standards, and regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status.

The doctrine of "classification by sex" extracted from *Muller*[46] is too sweeping. Courts have sanctioned inequalities as "protection" and "privilege"; suggestions of "chivalry" and concern for the "ladies" conceal continued paternalism. Deriving their respectability from a principle of equality, these applications remain anachronisms in the law.

It may not be too far-fetched to suggest that this doctrine as presently applied has implications comparable to those of the now discredited doctrine of "separate but equal."[47] It makes the legal position of women not only ambiguous but untenable. Through unwarranted extension, it has penalized all women for the biological function of motherhood far in excess of precautions justified

46. Muller v. Oregon, 208 U.S. 412 (1908).
47. Plessy v. Ferguson, 163 U.S. 537 (1896).

by the findings of advanced medical science. Through semantic manipulation, it permits a policy originally directed toward the protection of a segment of a woman's life to dominate and inhibit her development as an individual. It reinforces an inferior status by lending governmental prestige to sex distinctions that are carried over into those private discriminations currently beyond the reach of the law.

Although the "classification by sex" doctrine was useful in sustaining the validity of progressive labor legislation in the past, perhaps it should now be shelved alongside the "separate but equal" doctrine. It could be argued that, just as separate schools for Negro and white children by their very nature cannot be "equal,"[48] classification on the basis of sex is today inherently unreasonable and discriminatory.

There are a few laws that refer to women or men or males or females, but that in reality do not classify by sex and accordingly would not be constitutionally objectionable if classification by sex were prohibited. For example, a law that prohibits rape can apply only to men; a law that provides for maternity benefits can apply only to women. If these laws were phrased in terms of "persons" rather than "men" or "women," the meaning or effect could be no different. Thus, the legislature by its choice of terminology has not made any sex classification.[49]

A second category of law or official practice that would not become invalid if the "classification by sex" doctrine were discarded are those that do not treat men and women differently, but only separately: for example, separate dormitory facilities for men and women in a state university or separate toilet facilities in public buildings. Unlike separation of the races, in our culture separation of the sexes in these situations carries no implication of inferiority for either sex.

If this reappraisal of sex discrimination under the fifth and fourteenth amendments were accepted by the courts, one might speculate as to the effect on various other laws. Alimony based on sex would not be permitted, but alimony not based on sex but provided for the non-paid homemaker could be proper, as would be alimony that takes into account the relative income of the two parties. Any equitable division of property between spouses not based on sex would be permitted. Also permissible, because not based on classification by sex, would be equitable arrangements upon dissolution of a marriage that require one parent to furnish all or a major portion of the financial support and the other parent to bear all or a major portion of responsibility for the care, custody, and education of the children. Laws that provide benefits for wives or widows where the same benefits were not provided for husbands

48. Brown v. Board of Educ., 347 U.S. 483 (1954).

49. The two examples of laws which probably would not be considered unconstitutional under the proposed equal rights amendment given in the Senate Judiciary Committee report on the amendment, S. Rep. No. 1558, 88th Cong., 2d Sess. (1964), would fall in this category. The report states, "a law granting maternity benefits to women would not be an unlawful discrimination against men. . . . Nor would the amendment mean that criminal laws governing sexual offenses would become unconstitutional." *Id.* at 2.

or widowers would be inconsistent, unless based on the non-sex factor of dependency.

To be consistent with the principle of equality of rights, different minimum ages for marriage for boys and girls (if different, lower for girls than for boys) and different ages in state child labor laws (if different, higher for girls than for boys) should be equalized. State labor standards legislation would have to apply equally to men and women. Both sexes would be subject to compulsory military service[50] and jury service, but exemptions could be made for activities, such as care of dependent children or other family members, if based on performance of the function rather than sex.

If laws classifying persons by sex were prohibited by the Constitution, and if it were made clear that laws recognizing functions, *if performed*, are not based on sex per se, much of the confusion as to the legal status of women would be eliminated. Moreover, this may be the only way to give adequate recognition to women who are mothers and homemakers and who do not work outside the home—it recognizes the intrinsic value of child care and homemaking. The assumption that financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world is all too common. Underlying this assumption is the unwillingness to acknowledge any value for child care and homemaking because they have not been ascribed a dollar value.

The Committee on Civil and Political Rights suggested several possible subjects for constitutional attack: for example, state laws excluding women from jury service, domiciliary rules that restrict a married woman's right to vote, and discrimination in public employment.[51]

The administration of the sex discrimination provisions of Title VII of the Civil Rights Act of 1964[52] should create new interest in constitutional equality of rights. Insofar as certain types of sex discrimination in private employment might be officially sanctioned through interpretations by the Equal Employment Opportunity Commission under Title VII, this most important area of discrimination against women may be brought within the reach of the fifth

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50. In reporting favorably on the proposed equal rights amendment the Senate Judiciary Committee pointed out that under the equality of rights standard of the proposed amendment:

> It could be expected that women will be equally subject to military conscription and they have demonstrated that they can perform admirably in many capacities in the Armed Forces. But the Government could not require that women serve where they are not fitted just as men with physical defects are utilized in special capacities, if at all.

S. Rep. No. 1558, 88th Cong., 2d Sess. 3 (1964).

51. Report on Civil and Political Rights 36. In a suit filed in Federal District Court in Montgomery, Alabama, nine Lowndes County residents, with the aid of the American Civil Liberties Union have attacked the exclusion of women, as well as Negroes, from the county jury list. Washington Post, Oct. 26, 1965, § A, p. 8, col. 2. Women are excluded from jury service by Alabama law. Code of Alabama, tit. 30, §§ 18, 20, 21 (1958).

52. 78 Stat. 253 (1964), 42 U.S.C. § 2000e (1964).

amendment. The issue of constitutionality under the fourteenth amendment of a state labor standards law that applies only to women might be relitigated in state efforts to enforce a law that an employer believes would require him to violate Title VII.

The Civil Rights Act of 1964, Title VII

The Committee on Private Employment of the President's Commission on the Status of Women noted in its report that "increased employment of women and the need for their services has brought forcefully to public attention the necessity for equal employment opportunities for that one-third of the Nation's work force composed of women."[53] The report continued:

> Although women in the work force have a somewhat higher-than-average schooling than men, they, more generally than men, work in jobs far below their native abilities or trained capabilities. Barriers to women's employment and to their occupational progress generate feelings of injustice and frustration. Moreover, failure to develop and use the talents of women is a waste the Nation cannot afford. The public interest requires elimination of restrictions on employment of women and assurance of fair compensation and equal job treatment on a merit basis.[54]

The United States Department of Labor reports that twenty-four million women were in the work force as of April 1962.[55] The forecast is for thirty million by 1970.[56] One-eighth, or approximately three million, of these women are non-white, of which 2,455,000 are Negro.[57] It is estimated that eight or nine of every ten women will be gainfully employed during some portion of their lives.[58] Since women have a longer life span than men, many older women will be returning to the job market for longer periods of time than formerly. About three out of five women workers are married; among married women, one in three is working; among non-white married women, almost one in two.[59] These figures show that women constitute a permanent sector of the labor force that will increase, not diminish.

Women are the responsible heads of 4,643,000, or one-tenth of all families in the United States, which constitutes a minority comparable in size to the Negro minority. Among non-white families, more than twenty-three per cent are headed by women. Nearly half the families headed by women have incomes of less than $3,000. Nearly three-fourths of non-white families headed by women live in poverty.[60]

Since a substantial number of women are the responsible heads of families, the nature of their employment opportunities is crucial to the welfare of one-

53. President's Comm'n on the Status of Women, Report of the Committee on Private Employment 1 (1963) [hereinafter cited as Report on Private Employment].
54. *Ibid.*
55. *Id.* at 30.
56. *Ibid.*
57. Peterson, *Working Women*, 93 Daedalus 671, 683-84 (1964).
58. American Women at 6.
59. *Id.* at 27; Report on Private Employment 47; Peterson, *supra* note 57, at 674.
60. Women's Bureau, U.S. Dep't of Labor, Women in Poverty 2-3, July 1964.

tenth of the families in the United States; it is, of course, also important to many other families not headed by women, but in which women contribute to family support.

If "sex" had not been added to the equal employment opportunity provisions of the Civil Rights Act of 1964, Negro women would have shared with white women the common fate of discrimination since it is exceedingly difficult to determine whether a Negro woman is being discriminated against because of race or sex. Without the addition of "sex," Title VII would have protected only half the potential Negro work force.[61]

The Bona Fide Occupational Qualification Exception

The most important issue in administering the sex discrimination provisions of Title VII is the interpretation of the bona fide occupational qualification exception. Section 703(a) of the Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[62]

Section 703(b) and (c) contain comparable provisions defining unlawful employment practices of employment agencies and labor organizations.[63] Section 703(e) provides that it is not an unlawful employment practice for an employer to hire an individual "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."[64] Section 704(b) provides that it is an unlawful employment practice for an employer, labor organiza-

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61. Arguing in favor of adding "sex" to Title VII in the House of Representatives, Rep. Martha Griffiths stated,

> Supposing a little 100-pound colored woman arrives at the management's door and asks for the job of driving a haulaway truck and he says, "Well, you are not qualified," and she says, "Oh, yes, I am. During the war I was the motorman on a streetcar in Detroit. For the past 15 years I have driven the schoolbus."
>
> Surely, Mr. Chairman, we are hiring the best drivers to drive the most precious cargo. Of course, that woman is qualified. But he has only white men drivers. Do you know that that woman is not going to have a right under this law? Merely to ask the question is to answer it.

110 Cong. Rec. 2579 (1964).

62. 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(a) (1964).

63. 78 Stat. 255 (1964), 42 U.S.C. §§ 2000e-2(b)-(c) (1964).

64. 78 Stat. 256 (1964), 42 U.S.C. § 2000e-2(e) (1964).

tion, or employment agency to print or publish a notice or advertisement relating to employment, specifying sex, except when sex is a bona fide occupational qualification for employment.[65]

A loose definition of bona fide occupational qualification as to sex could subvert the purpose of Title VII, which is to provide equal employment opportunity. The language of this exception in section 703(e), providing that it shall apply "in those certain instances" where it is reasonably necessary "to the normal operation of that particular business or enterprise," does not permit exclusion of women (or men) in any broad or general category of jobs.

The House Judiciary Committee report which preceded the addition of sex to the civil rights bill states that the section[66]

> provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification.[67]

The application of this exception to sex discrimination should also be extremely limited.

The Federal Employment Experience. Section 701(b) of the act defines the term "employer" to exclude the United States, but provides "that it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin and the President shall utilize his existing authority to effectuate this policy."[68] The federal policy of non-discrimination as to sex has been defined by the Civil Service Commission at the direction of the President. Two categories of positions are excepted: (1) law enforcement positions requiring the bearing of firearms, and (2) institutional or custodial positions where the duties may be properly performed only by a person of the same sex as the individuals under care or for whom services are rendered. Other exceptions are permissible "in certain unusual circumstances when it can be clearly and logically concluded from the facts at hand that a *particular individual* under consideration cannot reasonably be expected to perform effectively the duties of the position."[69]

Under the federal policy, employment conditions generally are not con-

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65. 78 Stat. 257 (1964), 42 U.S.C. § 2000e-3(b) (1964).
66. Then numbered § 704(e).
67. H.R. Rep. No. 914, 88th Cong., 1st Sess. 27 (1963).
68. 78 Stat. 253 (1964), 42 U.S.C. § 2000e (1964).
69. U.S. Civil Serv. Comm'n, Federal Personnel Manual ch. 713-7 (1963). As to objections to an eligible based on sex, the Manual states,

> Objections of this kind, if based on the physical requirements of a particular job, will not be sustained unless it can be shown that the person is not physically able to perform the duties of that particular job. For example, work of an arduous nature will have to be evaluated in the light of the actual physical demands of the job and the physical capacities of the eligible.

Ibid.

sidered a proper basis for limiting hiring opportunities to males or to females as the case may be. Examples of conditions that may not be used as bases for sex discrimination are listed in the Federal Personnel Manual:

> —Travel, including extensive travel, travel in remote areas, or travel with a person or persons of the opposite sex.
> —Rotating assignments or other shift work.
> —Geographical location, neighborhood environment, or outdoor work.
> —Contact with public or a particular group or groups.
> —Exposure to weather.
> —Living or working facilities, except where the sharing of common living quarters with members of the opposite sex would be required.
> —Working with teams or units of opposite sex.
> —Monotonous, detailed, or repetitious duties.
> —Limited advancement opportunities.[70]

A sample made in 1963 disclosed that, of 34,000 requests for candidates for new appointments from the Civil Service examination lists, only forty specified sex, *i.e.*, sex was considered relevant in approximately one-tenth of one per cent of the requests. This number has since been reduced to such an extent that the Civil Service Commission no longer keeps count.

Excuses For Sex Discrimination. The federal guidelines might be viewed as negatively defining "bona fide occupational qualification," by setting forth factors that may *not* be used to justify exclusion of one sex or the other. There would seem to be little reason for a federal policy under Title VII that differs greatly from that demonstrated to be workable by the federal government.

Several types of excuses are likely to be claimed as bona fide occupational qualifications that have no relationship to ability to perform a job. One might be based on assumptions of the life patterns of women in general: for example, the assumption that women are only temporary workers because they leave to marry and raise children, or the assumption that turnover among women is high because they must leave the job if the family moves. Such assumptions are often mythical. However, even if it could be proved that women are likely to leave the job earlier, this should not justify pre-judging a particular individual.

A second excuse an employer might use for refusing to hire a woman is sex prejudice on the part of the public, customers, other employees, or some other group. Similarly, this assumption may be false; even if the assumption could be proved true, the prejudice may not affect the particular woman's performance of the job; she may even be able to overcome the prejudice and perhaps change the discriminatory attitudes. Sex prejudice is one of the nega-

70. *Id.* at ch. 713-7 — 713-8.

tive factors listed in the Federal Personnel Manual that fails to justify discrimination in hiring.

A third excuse employers might offer as a bona fide occupational qualification is based on the assumption that certain attributes are peculiar to one sex. For example, women express emotions differently than men; men may be considered less capable of operating intricate equipment; men are stronger than women; women have more endurance than men, and so forth. Individual variations are, of course, more significant than any generality as to characteristics, even if the generality can be shown to be valid and the characteristic be relevant to performance of the job.

Administration of State Fair Employment Laws. Two of the eleven jurisdictions[71] that prohibit discrimination in employment on the basis of sex have had some experience under state law. Wisconsin enacted its provision in 1961; the Hawaii law became effective January 1, 1964. The other jurisdictions adopted their laws in 1965.

The Wisconsin fair employment law permits "the exclusive employment of one sex in positions where the nature of the working conditions provide valid reasons for hiring only men or women. . . ."[72] The Fair Employment Practices Division of the Wisconsin Industrial Commission has made no official interpretation under the provision; rather, each case is determined individually. During a two year period, 141 instances of alleged discrimination were formally reported, seven of which were based on sex.[73]

In administering the Hawaii fair employment law,[74] the state's Department of Labor and Industrial Relations considers a bona fide occupational qualification in relation to sex to mean an occupation that members of one sex will be unable to perform. In considering the grant of an exception, each request is handled individually since no specific rules have been adopted. In making a determination, consideration is given to facilities and type of work: for example, the employment of women only in the fitting room of a ladies' clothing section of a department store has been allowed.

Employment Advertisements

Under section 704(b) of the Civil Rights Act, employment advertisements may not indicate a preference, limitation, specification, or discrimination based on sex except where sex is a bona fide occupational qualification for employ-

71. See note 8 *supra.*

72. West's Wis. Stat. Ann. § 111.32(5)(d) (Supp. 1965). Section 11.32(5)(e) excepts from the prohibition against *age* discrimination "hazardous occupations, including without limitation because of enumeration, law enforcement or fire fighting."

73. Wisconsin Indust. Comm'n, Biennial Report 34 (1964). Some of the complaints based on race and age were, of course, brought by women. See selected case histories in *id.* at 19. The Wall Street Journal, July 29, 1965, p. 1, col. 4, reports that a total of sixteen discrimination complaints had been brought as of that time. The article also states that most employers in the state voluntarily comply with the sex discrimination ban and that there has been little difficulty in administering the law.

74. Rev. Laws of Hawaii ch. 90a (Supp. 1963), as amended by Sess. Laws of Hawaii, Act 44 (1964).

ment.[75] The Wisconsin fair employment law does not include a comparable provision.[76] The Hawaii law permits "advertisements which solicit employees on the basis of race, sex, age, religion, color or ancestry where such criteria form all or part of a bona fide occupational qualification . . . ."[77] In making these determinations under the act, employers are encouraged to request an advisory determination from the state government.[78]

The continued use of sex-segregated newspaper advertisements indicates that compliance with section 704(b) of the Civil Rights Act is very slow.[79] Newspapers could assist employers and employment agencies in complying with this provision and comparable state provisions by discontinuing separate help-wanted columns for men and women. A few newspapers—for example *The Blade* (Toledo, Ohio), *Toledo Times, The Phoenix Gazette,* the *Honolulu Star Bulletin*—have done this. *The Blade* and *Toledo Times* also print the following notice:

> Attention: Help Wanted Advertisers. Effective July 2, 1965, it will be unlawful to discriminate among employment applicants because of sex unless this is a bona fide occupation requirement. This is one of the provisions of the new Civil Rights Act and is covered in Title VII, section 704(b) of the Act. No reference to sex should be made in your ad unless necessary for the performance of the job. The Blade and Toledo Times suggest you consult your legal counsel if you have questions regarding the new Act.

Where sex is a bona fide occupational qualification, it could be specified in the individual advertisements. Sex-segregated columns encourage employers to

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75. 78 Stat. 257 (1964), 42 U.S.C. § 2000e-3(b) (1964).

76. West's Wis. Stat. Ann. § 111.32(5)(b) (Supp. 1965) defines discrimination because of age as including advertising which limits, specifies or discriminates respecting individuals between the ages of forty and sixty-five.

77. Hawaii Dep't of Labor & Indust. Relations, Questioning Applicants for Employment 2, Dec. 1964.

78. *Ibid.*

79. See Citizen's Advisory Council on the Status of Women, Equal Employment Opportunities for Women, A Memorandum on Policy 8 (1965). *But see* the guidelines established by the Equal Employment Opportunity Commission on help wanted advertising, permitting placement of advertisements in columns classified "Jobs of Interest—Male" or "Jobs of Interest—Female" provided the advertisement specifically states the job is open to both sexes and a notice appears in a prominent place on each page of advertisements pointing out that the sex classification is not intended to discourage applications from persons of the opposite sex and the listings are for the convenience of readers. Equal Employment Opportunity Comm'n, Press Release, Sept. 22, 1965.

In July 1965 the District of Columbia Human Relations Council advised that to be in compliance with D.C. Commissioners' Order No. 65-768 (June 10, 1965) advertisements should be published under the "Help Wanted—Men and Women" or under both the "Men" and "Women" headings, except where sex is a bona fide occupational qualification. In October, however, it was reported that the Human Relations Council decided to permit advertisements in sex labeled columns, provided the newspaper printed a notice stating the separate categories are not meant to exclude applicants of either sex. Washington Post, Oct. 28, 1965, § A, p. 9, col. 1. The ruling of the New York State Commission for Human Rights was similar. State Commission for Human Rights, Press Release, Sept. 17, 1965.

place sex labels on jobs, thereby unnecessarily restricting employment opportunities of both men and women.

Women are likely to be discouraged from applying for a job listed under a newspaper column heading that specifies men, even if the advertisement is accompanied by some form of disclaimer and disavowal of intent to violate federal or state law. The better paying jobs are more often listed in the male column. Even for those women who would have the courage to apply for positions listed under the male column, the necessity of reading both male and female columns instead of one column would be, at best, an inconvenience. Moreover, it could be argued that to consider sex specification with a disclaimer acceptable under section 704(b) assumes that the provision is not violated unless intent to evade the law is shown. The language of section 704(b) flatly prohibits indicating any preference or specification based on sex (except where sex is a bona fide occupational qualification), without regard to any element of intent.[80]

Effect of Title VII on State Laws Regulating the Employment of Women

The major types of state laws regulating the employment of women are: laws prohibiting the employment of women in certain occupations, such as employment in bars and mines;[81] maximum hour laws for women;[82] minimum wage laws for women;[83] laws prohibiting the employment of women during certain hours of the night in certain industries;[84] weight lifting limitations for women;[85] and laws requiring special facilities for women employees, such as seats and restrooms.[86]

The debate in the House of Representatives when "sex" was added to Title VII of the civil rights bill indicates that both proponents[87] and oppo-

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80. 78 Stat. 257 (1964), 42 U.S.C. § 2000e-3(b) (1964).

81. Women's Bureau, U.S. Dep't of Labor, Summary of State Labor Laws for Women 13-14 (1965) [hereinafter cited as State Laws for Women].

82. *Id.* at 7-11.

83. *Id.* at 1-5.

84. *Id.* at 11-12.

85. *Id.* at 15.

86. *Ibid.* State laws providing maternity benefits present no possible conflict with Title VII. They do not apply to all women as a class but only to women having babies, and they would apply no differently if they were phrased in terms of both sexes.

87. Speaking in favor of the amendment, Rep. Griffiths stated,

> Some people have suggested to me that labor opposes "no discrimination on account of sex" because they feel that through the years protective legislation has been built up to safeguard the health of women. Some protective legislation was to safeguard the health of women, but it should have safeguarded the health of men, also. Most of the so-called protective legislation has really been to protect men's rights in better paying jobs. . . .
>
> In my opinion, when this bill is passed, some of these arbitrary classifications passed in State statutes will be tested again by colored women, and I have yet to find a lawyer on this floor who cares to state unequivocally that the State law will continue to prevail.

110 Cong. Rec. 2580 (1964). Rep. St. George, speaking specifically against laws prohibiting women from working at night, pointed out that protective legislation "prevents women from going into the higher salary brackets." *Ibid.* Only Rep. Kelly, who supported the sex amendment, stated that she believed the amendment "will not repeal the protective laws of the several States." *Id.* at 2583.

nents[88] of the amendment thought it might remove the "restriction" or "protection," depending on the point of view, of these state labor laws. Speaking in favor of the sex amendment, Representative Griffiths stated, "[I]f labor is seeking to maintain the old distinction, they will do far better to support this amendment and ask for a savings clause in this law . . . ."[89] A "savings clause" for state protective laws for women was not added to Title VII. Section 708 of the act provides:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.[90]

There was no discussion of the effect of this provision on state laws regulating the employment of women. It seems clear, however, that an employer would have to continue to comply with a state labor law regulating the employment of women unless the law "purports to require or permit" him to refuse to hire an individual because of sex or to discriminate with respect to compensation, terms, conditions, or privileges of employment or to do any other act unlawful under section 703.[91] A law prohibiting the employment of women in certain occupations might require an employer to do an act that would be an unlawful employment practice under the Civil Rights Act; such a state law would require an employer to refuse to hire a woman because of her sex even though she were otherwise qualified.

On the other hand, a minimum wage law for women does not require an employer to discriminate in payment of compensation. Such a law merely prescribes a standard for women; the lack of a legal standard for men does not affirmatively permit discrimination against men. Under this reasoning, the employer would not be relieved from complying with state minimum wage laws for women. To comply with Title VII, however, he would have to pay male employees the same wage he pays female employees doing the same

88. Speaking in opposition to adding "sex" to Title VII, Rep. Celler stated, "In many States we have laws favorable to women. Are you going to strike these laws down? This is the entering wedge, an amendment of this sort. The list of forseeable consequences, I will say to the committee, is unlimited." *Id.* at 2577-78. Speaking against the amendment generally, Rep. Multer stated that he believed state protective laws "may be repealed by implication, by the amendment . . . ." *Id.* at 2732.

89. *Id.* at 2580.

90. 78 Stat. 262 (1964), 42 U.S.C. § 2000e-7 (1964).

91. 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2 (1964).

work. As a practical matter, there are relatively few cases where men are paid less than women at the minimum wage level.[92]

Similarly, state laws requiring rest periods and special facilities, such as seats, dressing rooms, or restrooms,[93] for women would not necessarily permit discrimination in the conditions of employment merely because the requirements are imposed only for women employees. Nor do they affirmatively permit an employer to refuse to hire a woman. To comply with Title VII, the employer could provide for male employees what the state law requires him to provide for female employees.

More difficult problems are presented by state laws prohibiting the employment of women in excess of a specified maximum hours per day or week, laws prohibiting the employment of women between certain hours at night, and laws imposing weight lifting limitations. These laws would be consistent with Title VII only if the employer could readjust the manner of operating his business so that the treatment of all his employees, male or female, met the standards prescribed for females under state law. This would mean, however, that an employer might have to discontinue overtime employment entirely, close his business during certain hours of the night, or reduce the weight of his equipment or product. This result, of course, would be unrealistic and far removed from the purpose of the Civil Rights Act to prohibit class discrimination.

It could be argued that, since compliance with these state laws would impose unreasonable requirements on employers, compliance may be tantamount to requiring employers to refuse to hire women at all for certain jobs; such a requirement would be unlawful under Title VII except in cases where being a male is a bona fide occupational qualification.

State maximum hour laws for women are the most controversial of the state protective laws as well as the most common. Forty-three states and the District of Columbia have laws that regulate the number of hours, daily or weekly or both, of work for women in one or more industries.[94] The President's Commission on the Status of Women stated that "the best way to discourage excessive hours for all workers is by broad and effective minimum wage coverage, both federal and state, providing overtime of at least time and a half the regular rate for all hours in excess of 8 a day or 40 a week."[95] The Commission also recommended that, until this goal is attained, state maximum

92. Many of the employers covered by Title VII are also covered by the Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 201 (1964), which requires a higher minimum wage for both men and women than most of the state minimum wage laws.

93. State Laws for Women 15.

94. President's Comm'n on the Status of Women, Report of the Committee on Protective Labor Legislation 10 (1963) states,

> Twenty-five States and the District of Columbia have laws establishing a maximum 8-hour day or 48-hour week, or both, for one or more industries. Sixteen of these 25 States and the District of Columbia have both an 8-hour day and a 48-hour week. In the other 18 States having hour laws, the standard is 9 or 10 hours a day with the total workweek ranging from 50 to 60 hours.

For a breakdown by state, see State Laws for Women at 7-9.

95. American Women at 37.

hour laws for women should be maintained, strengthened, and expanded, that provisions for flexibility should be made, and that during this interim period continuous efforts should be made to require premium pay for overtime. The Commission further recommended that executive, administrative, and professional women be exempt from existing maximum hour laws and noted that such women "frequently find that limitations on hours adversely affect their opportunities for employment and advancement."[96]

The Fair Labor Standards Act provides for premium pay for overtime[97] as a deterrent to excessive hours of work. Employers under the act must also comply with state maximum hour laws.[98] As a result, women often are not permitted to work at the premium pay rates provided for male employees. Although the purpose of premium pay is not to reward employees, but to discourage employers from requiring excessive hours of work and to distribute employment, women employees are likely to object to this restriction as a discrimination under Title VII; if the premium pay rate is increased from time and one-half to double time as proposed by President Johnson,[99] the state restrictions may be even more objectionable to such women.

The vast majority of employees covered by Title VII are also covered by the premium pay provisions of the Fair Labor Standards Act and thus do not need the protection of state maximum hour laws. In addition, some employees not protected by the Fair Labor Standards Act are excepted from the state maximum hour laws;[100] if the coverage of the Fair Labor Standards Act is extended as proposed,[101] the number of women who might benefit by state maximum hour laws would be reduced even further.

It has been suggested that Title VII and state protective laws for women might be "harmonized" by construing the bona fide occupational qualification exception to permit employers to refuse to hire women for jobs that may occasionally require longer hours of work than the state maximum.[102] Under such an interpretation, however, the application of the state laws would be preserved for the purpose of protecting only a very few women. In addition, this solution to the conflict between federal and state law could not be used where either a male or female employee complained, under section 703(a) of

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96. *Ibid.*
97. Section 7, as amended by 75 Stat. 69 (1961), 29 U.S.C. § 207 (1964).
98. Section 18, 52 Stat. 1069 (1938), 29 U.S.C. § 218 (1964).
99. 111 Cong. Rec. 10399 (daily ed. May 18, 1965).
100. Statistics on the number of employees under Title VII and the Fair Labor Standards Act in relation to coverage of state maximum hours laws are not available.
101. See 111 Cong. Rec. 10399 (daily ed. May 18, 1965).
102. See Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 79-80 (1964); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 Iowa L. Rev. 778 (1965).

the Civil Rights Act,[103] of discrimination in the terms and conditions of employment since the bona fide occupational qualification exception of section 703(e) by its terms applies to hiring and employing, and classifying and referring for employment.[104]

Moreover, the recommendations of the state commissions on the status of women[105] show that the states will be moving toward elimination of sex distinctions in labor legislation if the recommendations of the commissions are implemented. For example, the Washington Governor's Commission recommended repeal of the state law regulating hours of work for women only.[106] The New York Governor's Committee recommended re-examination of the state's laws regulating hours of work and conditions of labor for women.[107] The Tennessee Governor's Commission also recommended study of the question of maximum hour laws "to enhance further employment opportunities for women."[108] The North Carolina Governor's Commission recommended legislation to prohibit wage, salary, or hours discrimination on the basis of sex and to provide uniformity for men and women in hours legislation.[109]

Twenty-one states and Puerto Rico prohibit or regulate night work by women in certain occupations or industries.[110] The Report of the President's Commission on the Status of Women states:

> Night work, especially on the graveyard shift, is undesirable for most people, and should be discouraged for both men and women. Overly rigid prohibitions, however, may work to the disadvantage of women in some circumstances. Strict regulations to prevent abuse are therefore normally preferable to prohibitions.[111]

Twelve states restrict the amount of weight women employees may lift, carry, or lift and carry. In those states where the restriction may be applicable to any occupation the highest maximums established are as follows: Utah—

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103. 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(a) (1964).

104. 78 Stat. 256 (1964), 42 U.S.C. § 2000e-2(e) (1964).

105. Some of the reports are preliminary or tentative, and other states have not yet reported.

106. Governor's Comm'n on the Status of Women [Washington], Status of Women 34 (1964).

107. Governor's Comm. on the Education and Employment of Women, New York Women 48 (1964).

108. Governor's Comm'n on the Status of Women in Tennessee, Women in Tennessee 4 (1964). The report states,

> There was striking consensus among the Commission members against any semblance of protectionism for women on the basis of sex. At no time did the Commission assume a protective stance or posture. Indeed, in all matters the concern was the removal of indefensible inequities in and the improvement of standards affecting women. Moreover, there was equal concern that employed women recognize and pay the price that must be paid for equal recognition in the world of work.

Id. at 1.

109. Governor's Comm'n on the Status of Women, The Many Lives of North Carolina Women 15, 86 (1964). *But see* Governor's Comm'n on the Status of Women [West Virginia], Report of the West Virginia Commission on the Status of Women, "Labor Laws" 1 (1965), in which a 48-hour workweek and an 8-hour day maximum for women were recommended.

110. State Laws for Women at 11-12.

111. American Women at 37-38.

15 pounds; Alaska and Ohio—25 pounds; Georgia—30 pounds; Michigan—35 pounds.[112] The President's Commission pointed out:

> Restrictions that set fixed maximum limits upon weights women are allowed to lift do not take account of individual differences, are sometimes unrealistic and always rigid. They should be replaced by flexible regulations, applicable to both men and women and set by appropriate regulatory bodies.[113]

In view of the waning utility of these state protective laws that make compliance with Title VII difficult, relatively little harm would result if employers were relieved of complying with the state laws under section 708 of the Civil Rights Act.[114] Furthermore, attempts to preserve all state protective laws under bona fide occupational qualification exception could virtually read "sex" out of the Civil Rights Act.

The problem of possible conflict between Title VII and a state law regulating the employment of women is likely to be short lived. Although the effect of state protective laws for women in elevating labor standards for all workers should not be underrated, the trend is away from sex distinctions in labor standards legislation and towards recognition of governmental responsibility in providing equality of opportunity.

Relationship of Title VII to State Fair Employment Laws

Section 706(b) of Title VII provides that, in the case of an alleged unlawful employment practice, a charge may not be filed with the Equal Employment Opportunity Commission (EEOC) until sixty days after proceedings have been brought under the state or local law, unless the proceedings were earlier terminated.[115] Section 709(b) authorizes the EEOC to enter into agreements with state and local agencies charged with administration of state fair employment laws.[116] Under these agreements, the Commission would refrain from processing cases or classes of cases, and grievants are prevented from bringing a civil action under the federal law.

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112. State Laws for Women at 15.

113. American Women at 37.

114. 78 Stat. 262 (1964), 42 U.S.C. § 2000e-7 (1964).

115. 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(b) (1964). Under this section the period is 120 days during the first year after the effective date of the state or local law.

116. 78 Stat. 262 (1964), 42 U.S.C. § 2000e-8(b) (1964). Twenty-four states have equal pay laws: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming. The requirement of prior recourse to state law under § 706(b) might apply to discrimination in compensation cases in states where there are state equal pay laws. As to possible agreements under § 709(b) covering only discrimination in pay cases, it should be noted that the equal pay laws are generally not administered by the same state agencies that administer the fair employment laws.

Section 708 preserves rights accorded by state fair employment laws by providing that Title VII does not relieve persons from the obligation to comply with state or local laws, except those laws that require or permit unlawful employment practices.[117] This is important where the state law provides greater protection to the same employment than the federal law. Should the situation prove the reverse, and an agreement has been entered into with a state or local agency, section 709(b) provides that the EEOC shall rescind the agreement "whenever it determines that the agreement no longer serves the interest of effective enforcement"[118] of Title VII.

The eleven jurisdictions that include "sex" in their fair employment laws are the ones in which sections 706(b) and 709(b) might be applicable as to sex discrimination cases generally.[119]

Discrimination in Pay

Section 6(d) of the Fair Labor Standards Act, as amended by the Equal Pay Act of 1963, prohibits paying women less than the rate paid to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions . . . ."[120] Section 703(a)(1) of the Civil Rights Act provides it shall be an unlawful employment practice "to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin . . . ."[121]

No standard is specified in the Civil Rights Act as to what constitutes discrimination in compensation. In a memorandum filed in the Senate, however, Senator Clark, floor manager of Title VII, answered an objection related to possible conflict between the Equal Pay Act and the civil rights bill:

> Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer. The Equal Pay Act is part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.[122]

Subsequently, section 703 (h) of the civil rights bill was amended to include the following provision:

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117. 78 Stat. 262 (1964), 42 U.S.C. § 2000e-7 (1964).
118. 78 Stat. 263 (1964), 42 U.S.C. § 2000e-8(b) (1964).
119. See note 8 *supra*.
120. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).
121. 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(a)(1) (1964).
122. 110 Cong. Rec. 7217 (1964).

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).[123]

Since the amendment to the bill was a technical correction,[124] it could logically be assumed that it was designed to make more clear and certain the result indicated by Senator Clark's memorandum, quoted above. Under this view, the standards and limitations regarding equal pay cases provided under the equal pay provisions of the Fair Labor Standards Act[125] would apply in discrimination in compensation cases under the Civil Rights Act.[126] Thus, for example, paying women less than men where their work does not require equal skill, effort and responsibility would not constitute discrimination in compensation under the Civil Rights Act; such differentiation is permitted or "authorized" by

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123. 78 Stat. 257 (1964), 42 U.S.C. § 2000e-2(h) (1964).

124. Senator Bennett, who proposed the amendment to the bill, stated, "the purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified. . . . I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill." 110 Cong. Rec. 13647 (1964). Senator Dirksen said the amendment recognized the exceptions in the Equal Pay Act and that is was "necessary, in the interest of clarification." *Ibid.*

Nearly a year after the enactment of the Civil Rights Act, Senator Bennett offered an explanation of his amendment as follows: "Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 12884 (daily ed. June 11, 1965). On July 26, 1965, Senator Clark submitted for printing in the Congressional Record a letter from Anne Draper, Chairman, National Committee for Equal Pay, to the Chairman of the Equal Employment Opportunity Commission. Miss Draper pointed out:

> If Senator Bennett's post enactment legislative history is followed, it means that equal pay protection under the Civil Rights Act applies only for persons subject to the Equal Pay Act and does not extend to employees whose only coverage is under the Civil Rights Act (such as professional, administrative, and executive workers). In fact, the effect is to nullify the Civil Rights Act completely as far as equal pay protection for women is concerned, and to leave the Equal Pay Act as the only applicable Federal statute in the field.
>
> This is a drastic reinterpretation of an amendment offered as a technical correction for the purposes of avoiding conflicts. It is hard to believe that Congress actually intended to nullify the Civil Rights Act in a substantive matter of employment coverage as a means of bringing about harmony with the Equal Pay Act. Such an interpretation has the further effect of creating an anomalous differential coverage for women as to the various anti-discrimination provisions applicable to them under the Civil Rights Act itself. That is, many individuals who will be protected under the Civil Rights Act against discrimination on the basis of sex in hiring, firing, promotion, and other terms of employment will *not* be covered for "equal pay": "equal pay" protection under the Civil Rights Act would obtain only for those who happen also to be subject to the Fair Labor Standards Act.

111 Cong. Rec. 17646 (daily ed. July 16, 1965).

125. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).

126. 78 Stat. 257 (1964), 42 U.S.C. § 2000e-2(h) (1964).

section 6(d) of the Fair Labor Standards Act.[127] In the absence of duplicate coverage and possible conflict, that is, when the employment is covered only by the Civil Rights Act, the Fair Labor Standards Act limitations would not be required.

Conclusion

According women equality of rights under the Constitution and equal employment opportunity, through positive implementation of Title VII of the Civil Rights Act of 1964, would not likely result in any immediate, drastic change in the pattern of women's employment. But great scientific and social changes have already taken place,[128] such as longer life span, smaller families, and lower infant death rate, with the result that motherhood consumes smaller proportions of women's lives. Thus, the effects of sex discrimination are felt by more women today.

The recent increase in activity concerning the status of women indicates that we are gradually coming to recognize that the proper role of the law is not to protect women by restrictions and confinement, but to protect both sexes from discrimination.

We are entering the age of human rights. In the United States, perhaps our most important concerns are with the rights to vote and to representative government and with equal rights to education and employment. Hopefully, our economy will outgrow concepts of class competition, such as Negro v. white, youth v. age, or male v. female, and, at least in matters of employment, standards of merit and individual quality will control rather than prejudice.

127. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964). After this article was completed, the Equal Employment Opportunity Commission announced its guidelines on Nov. 22, 1965, to prevent sex discrimination under Title VII. 30 Fed. Reg. 14926 (1965)

128. See Ware, Women Today: Trends and Issues in the United States (1963).