RATIFICATION OF THE EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

REPORT OF THE JOINT PRIVILEGES AND ELECTIONS COMMITTEES OF THE GENERAL ASSEMBLY To THE GOVERNOR And THE GENERAL ASSEMBLY OF VIRGINIA

Senate Document No. 25

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1974

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Report of the Joint Privileges and Elections Committees of the General Assembly on Ratification of the Equal Rights Amendment to the Constitution of the United States of America

Richmond, Virginia
February 25, 1974

TO: HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*

and

THE GENERAL ASSEMBLY OF VIRGINIA

The Privileges and Elections Committees of both houses of the General Assembly were directed by Senate Joint Resolution No. 134 to investigate and report on the equal rights amendment to the United States Constitution, and related questions. The joint resolution was adopted by the General Assembly at its 1973 Session as follows:

> Whereas, the Ninety-Second Congress of the United States of America, in both houses by a constitutional majority of two-thirds thereof, has made the following proposition to amend the Constitution of the United States, as follows:
>
> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That
>
> "The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states within seven years from the date of its submission by the Congress:
>
> "Article . . . .
>
> "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."; and
>
> Whereas, such proposed amendment to the Constitution of the United States clearly and substantially conforms with the intent and purposes of the present Constitution of Virginia which was carefully drafted by the General Assembly of the Commonwealth and ratified by its people in such a manner as to insure the highest degree of equality; and
>
> Whereas, ratification of such proposed United States amendment was, within the very limited time available, considered by the Virginia General Assembly at its present session; and
>
> Whereas, during such consideration, an estimated one thousand persons, most of whom were women, appeared at a public hearing conducted by the Privileges and Elections Committees of both houses of the General Assembly on the subject and many strong opinions were expressed; and
>
> Whereas, Virginians have always, in chivalrous fashion, held

womanhood in their highest esteem and considered women worthy of special protection, dignity and honor; and

Whereas, because of concern as to the following possibilities, this proposed amendment was not ratified at this time:

1. it might deprive women of needed protection of laws that have been enacted for their health and safety,

2. it might deprive women of the protection of laws that have been enacted for their financial well-being,

3. it might deprive women of the protection of laws that recognize their special role as mothers and homemakers, and

4. it might expose women to being drafted for dangerous military service under circumstances that might be embarrassing or degrading to them; and

Whereas, the Virginia Constitution states as follows: Article I, Section 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination. . . ;

Whereas, it seems reasonable that deliberate and very careful consideration should be given to all aspects of these possibilities and all other factors to determine if they outweigh the proposed amendment for the assurance of greater equality; and to determine if any Virginia law affects discrimination and to determine which Virginia laws might be in conflict with the Constitution of the State of Virginia; now, therefore, be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the Privileges and Elections Committees of both the Senate and the House of Delegates are hereby directed to jointly conduct a study on all aspects, legal, practicable and equitable, regarding an amendment to the Constitution of the United States which has been proposed by the Congress relating to equal rights for both men and women, and to determine if any Virginia law affects discrimination and to determine which Virginia laws might be in conflict with the Constitution of the State of Virginia.

The Committees shall consider and report on all views of all such aspects in such a manner that will intelligently and thoroughly appraise all members of the General Assembly of the wisdom of ratifying such proposed amendment. The Committee shall also review the statutes of Virginia with the view of recommending any changes to the laws which they feel are appropriate to conform them to the present Constitution of Virginia regarding equality of rights of men and women.

The Committees shall complete their study and submit their final report to the Governor and General Assembly not later than December thirty-one, nineteen hundred seventy-three, and shall submit such interim reports as they may deem appropriate.

To make the investigation called for in the resolution, a subcommittee, chaired by Senator Omer L. Hirst of Annandale, was appointed. Serving with Senator Hirst were Senator George S. Aldhizer, II of Broadway, Senator Howard P. Anderson of Halifax, Honorable Walther B. Fidler of Sharps, Honorable A. R. Giesen of Verona and Honorable D. French Slaughter of Culpeper.

Members of the Subcommittee determined that the impact of the amendment was of such importance, not only to the citizens of the Commonwealth, but to the citizens of her sister states, that a study in depth by outstanding legal scholars of the State was required.

Pursuant to such determination, a task force of outstanding teachers and practitioners of law was established. Mr. Harold G. Wren, Dean of The T. C. Williams School of Law, University of Richmond, was appointed chairman of the task force and serving with him were Mr. A. E. Dick Howard, Professor of Law, University of Virginia School of Law, Mr. Robert E. R. Huntley, President of Washington and Lee University, former dean of its law school; Mrs. Carroll Kem Shackelford, Attorney at Law, Culpeper and Mr. William F. Swindler, Professor of Law, George Wythe School of Law, The College of William and Mary.

As an aid to the task force in its study, a public hearing was held in Richmond, Virginia, in September, 1973, at which numerous citizens appeared and testified before the Subcommittee and the task force. The input of citizen's testimony was accompanied by prepared material from other students of the amendment in the United States.

On receipt of the task force report, the Joint Committee held a meeting at the Capitol in January, 1974, open to the public, to afford Committee members an opportunity to question members of the task force concerning the contents of the report.

Following dissemination of the task force report to the public, another public hearing was held in Richmond, on February 12, 1974, by the Privileges and Elections Committees of both houses. Many citizens spoke both for and against ratification of the amendment representing their individual view as well as those of the varied organizations they represented.

The Joint Committee has adopted the task force report, which is attached hereto and incorporated herein by reference. In accordance with its directive the Privileges and Elections Committees of both houses make no recommendation for or against ratification of the amendment but recommend that the report be utilized in amending various State statutes to bring them into conformity with Section 11 of Article I of the Virginia Constitution and that it also be used by members of the General Assembly as a resource document in making legislative judgment on the question of ratification.

Respectfully submitted,

James M. Thomson, *Chairman*

Omer L. Hirst, *Vice Chairman*

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UNIVERSITY OF VIRGINIA
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SCHOOL OF LAW

February 1, 1974

Senator Omer L. Hirst
State Capitol
Richmond, Virginia 23219

Dear Omer:

In my statement to the joint session of the House and Senate Privileges and Elections Committees last Wednesday, I elaborated on the question of an exception for sexual privilege which the legislative history of ERA suggests would operate in prisons. As this question seems to have occasioned a fair amount of interest, both among the members of the Committees and beyond, I attach a brief written statement summing up what I said in Richmond.

I would appreciate your having this statement copied and given to the members of the Privileges and Elections Committees as an addendum to my section of the Task Force Report submitted earlier.

Sincerely,

Dick

A. E. Dick Howard
Professor of Law

February 1, 1974

TO: Senate and House Committees on Privileges and Elections General Assembly of Virginia

FROM: A. E. Dick Howard

RE: The extent to which the proposed Equal Rights Amendment to the United States Constitution, if adopted, would require sexual integration of prisons

In the report of the Task Force studying the effect on Virginia law of the ratification of the proposed Equal Rights Amendment to the Federal Constitution, there is a section discussing the impact of ERA on the administration of the prison system. One aspect of that discussion enquires into the question whether ERA would require integration of the sexes in prisons.

On January 30, 1974, the members of the Task Force created to study the effect of ERA on Virginia law testified before a joint meeting of the House and Senate Committees on Privileges and Elections. At that hearing, I elaborated on the passage in the Task Force Report which discussed sexual privacy in prisons. I submit this memorandum by way of summing up those remarks.

As I indicated in the body of the Task Force report, ERA, if adopted, would affect the prison systems of the several states at least to the extent of requiring the integration of the prison *system.* Thus ERA would call into question the existence of totally separate institutions, since the existence of distinct prisons for men and women typically results in differences in facilities, treatment, and programs. For example, I am not aware of any state in the country that has more than one prison for women, while many states have a number of prisons for men. In those states, a male inmate is more likely to spend his time in a prison closer to the place where he had resided before incarceration. He is therefore more likely than is a woman prisoner to be closer to lawyers, family, friends, and other counselors. Such a difference in treatment, springing solely from sex, is likely to be questionable under ERA.

Further throughout the states, differences in the facilities and services available within men's and women's prisons respectively are a commonplace. There are often differences in the range and character of medical and religious services. Physical environments differ, women's prisons typically emphasizing rehabilitation (sometimes by having campus-like environments), men's prisons usually emphasizing maximum security. Prison rules differ; for example, women are less likely to be required to wear prison uniforms than are men. Recreation facilities differ; men's prisons are commonly better equipped with playing fields and like facilities than are women's prisons. Vocational and industrial programs are usually more varied for men than for women. In some respects, therefore, women in prison are better treated than are men, in other respects, men have the better treatment. In either event, to the extent that differences in treatment follow solely from the fact that the prisoners are male and female respectively, ERA would appear to require the differences to be erased.

Assuming, then, that ERA would require that the prison system must be integrated, does it follow that there must be integration in cell blocks, bathrooms, showers, etc.? In addressing this question, one must look to the legislative debates during the course of Congress' action on ERA. Those debates indicate that Congress had in mind two exceptions to the requirement of ERA that classifications based on sex would be invalid. The first exception turns on unique physical differences. It is clear that Congress intended that a sexual classification springing from a characteristic unique to one sex (e.g., a

child-bearing statute) would be permissible under ERA. The other exception deals with sexual privacy and is less clear. The question is: under ERA, would the courts recognize a sphere of sexual privacy, that is, the right of men and women to enjoy separate facilities such as college dormitories, cell blocks in prisons, etc.

Those who have argued, both on the floor of Congress and elsewhere, that ERA would permit exceptions for sexual privacy have often cited as the basis for such an exception the United States Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In that case, the Court, looking to a "penumbra" of rights emanating from certain provisions of the Bill of Rights, found a right of marital privacy. In the debates on ERA, Senator Bayh and others pointed to the *Griswold* case and, in response to questions about separate restrooms and other facilities, said that the courts would certainly recognize a right of sexual privacy based on *Griswold*. See, e.g., the majority report of the Senate Judiciary Committee on the Equal Rights Amendment (printed in the Congressional Record for March 22, 1972), in which the Committee referred to "the constitutional right of privacy established by the Supreme Court" in the *Griswold* case.

In my portion of the Task Force report, I indicated that I was troubled by this reliance on *Griswold*. That opinion establishes a right to privacy in the context of the marital relation, but though often cited for much broader propositions it does not establish any generalized right to privacy. There is language in the *Griswold* opinion that courts in other cases might well use to extend the right of marital privacy to other contexts (for example, to create a right to sexual privacy in restrooms and other public facilities), but no such general extension of the right to privacy has taken place yet. Hence, if the right to sexual privacy as an exception to ERA rests on a prediction of how the courts will apply *Griswold*, that prediction might better be characterized as prophecy and might or might not come to pass.

I have concluded, however, that the question ought not be resolved simply by deciding where *Griswold* was being misread in the legislative debates. Whatever their reading of *Griswold*, the Congress, in agreeing to ERA, appears to have intended that when the courts are called upon to apply ERA they recognized a right of sexual privacy. For example, Senator Bayh pointed to the committee reports in the House and Senate as "unequivocally clear" as to the intention that a right to privacy be "fully protected" under ERA. Congressional Record, March 22, 1972, pp. S4544-45. Even if Senator Bayh and others read too much into *Griswold* (as I think they did) in stating what they thought was the ambit of the existing right to privacy (that is, in case law as it stood in 1972), Congress could, if they chose, create legislative history evidencing an intention that a right of sexual privacy be implicit in ERA when the courts came to apply that amendment to sexual classifications.

Prophesying what the courts will do necessarily entails an element of uncertainty. But if the courts, in applying ERA, look to the legislative history, I believe they would conclude that Congress intended a sphere of sexual privacy to be recognized. As regards prisons, it would follow that, although the prison system would have to be integrated and equality of treatment of men and women prisoners assured, there would not have to be integration of men and women within the prisons themselves.

COMMONWEALTH OF VIRGINIA

OMER L. HIRST
35TH SENATORIAL DISTRICT
FAIRFAX COUNTY,
SOUTH-CENTRAL PART AND A
PORTION OF THE CENTRAL PART OF
7315 LITTLE RIVER TURNPIKE
ANNANDALE, VIRGINIA 22003

SENATE

COMMITTEE ASSIGNMENTS:
PRIVILEGES AND ELECTIONS, CHAIRMAN
EDUCATION AND HEALTH
REHABILITATION AND SOCIAL SERVICES
TRANSPORTATION
RULES

January 22, 1974

I am happy to transmit herewith the copy of the report of the Task Force which was set up by the joint subcommittee of the Privileges and Elections Committees of the House of Delegates and Senate to study the possible impact of ratification of the proposed Equal Rights Amendment on the body of law in Virginia.

The Joint Privileges and Elections Committee, chaired by Delegate James M. Thomson, appointed a joint subcommittee composed of Delegates Fidler, Slaughter and Giesen and Senators Aldhizer, Anderson and Hirst, who was named Chairman. This joint subcommittee in the discharge of its responsibilities set up a Task Force of eminent scholars to assist it. This Task Force was made up of Dr. Harold G. Wren, Dean of the T. C. Williams Law School of the University of Richmond; Mrs. Carroll Kem Shackelford, a prominent woman lawyer practicing in Culpeper, Virginia; Professor A. E. Dick Howard of the University of Virginia Law School; Robert E. R. Huntley, President of Washington and Lee University; and Dr. William F. Swindler of the Marshall-Wythe School of Law of the College of William and Mary.

In the course of the Task Force study, Mrs. Shackelford applied herself to matters of family law; President Huntley to matters of health and safety; Professor Swindler to matters of property rights; Professor Howard to matters of criminal and military law; and Dean Wren coordinated the study. The Task Force was assisted by Mr. Vann Lefcoe, Assistant Attorney General, Mr. C. M. Conner, Jr. and Mrs. Cheryl Booker of the Division of Legislative Services and by various professors and outstanding students.

The Task Force report is intended not to make legislative judgment but rather to equip the legislators with a finding of fact and of reasoned opinion so that they may make wise legislative judgment.

It is anticipated that the Task Force will appear before the joint subcommittee to amplify their views and to answer questions in the near future.

Respectfully,

Omer L. Hirst, Jr.

Omer L. Hirst, Chairman
Joint Subcommittee

OLH/db

ON THE EFFECT OF RATIFICATION
OF
THE EQUAL RIGHTS AMENDMENT ON THE LAW OF VIRGINIA

TO: The Honorable Omer L. Hirst
Chairman, Subcommittee on Equal Rights Amendment
Joint Committee on Privileges and Elections
7617 Little River Turnpike
P. O. Box 118
Annandale, Virginia 22003

FROM: Task Force on the Effect of Ratification of the Equal Rights Amendment on the Law of Virginia

Sir:

I hand you herewith the subject report, which is divided into the following parts:

Part I — Effect of ratification of the Equal Rights Amendment on laws designed to provide protection for the health and safety of women.

Part II — Effect of ratification of the Equal Rights Amendment on laws designed to protect the financial well-being of women.

Part III — Effect of ratification of the Equal Rights Amendment on laws which recognize the special role of women as mothers and homemakers.

Part IV — Effect of ratification of the Equal Rights Amendment on the criminal law of Virginia and on military law affecting Virginians.

The four parts of the report are generally in accord with the four points of inquiry suggested by Senate Joint Resolution No. 134, dated February 23, 1973. However, since the Resolution directed the Privileges and Elections Committees of both the Senate and the House of Delegates to conduct a study on *all* aspects of ratification, the Task Force broadened its study to include within Part IV, the effects of ratification on the criminal law of Virginia, as well as on Federal military law as it affects Virginians. Furthermore, included in Part IV, is a discussion of the question whether the Equal Rights Amendment will subject sexual classifications in statutes to "strict scrutiny" or whether it will be read to impose a more "absolute prohibition" on sexual classifications.

The conclusions of the Task Force are as follows:

Part I — Labor and Employment

The ratification of the Equal Rights Amendment would, at the very least, result in the application of stricter standards of scrutiny to statutes which contain sex classifications. It does not appear that the Virginia Constitution, as construed, provides as strict a level of review of statutes as that which would obtain under the Equal Rights Amendment. Although the Virginia Code Article dealing with labor and employment presently contains very few statutes that involve sex qualifications, some statutes involving hours worked by women and dealing with suitable restrooms and seating facilities for women, but not men, would likely be invalid under the Equal Rights Amendment. The statute covering hours women work is already unenforceable, however, owing to federal legislation. In general, passage of the Equal Rights Amendment would have no substantial legal impact on federal legislation that displaces any state statute or regulation.

Part II — Virginia Law Regarding Property

The Virginia statutes are worded so as to [illegible] women in the area of property law. The statutes, however, have been at times narrowly construed since they are in derogation of the common law. It is recommended that the Subcommittee consider the wisdom of a declaratory or construction statute which would make it clear that Title 55 of the Code of Virginia should not be construed so as to distinguish between or discriminate against either men or women in connection with their property rights.

Part III — Family Law of Virginia

Ratification of the Equal Rights Amendment would require some changes in statutes dealing with family law. Although the changes required are minimal, rights and duties would be imposed according to role, not according to sex. Ratification of the Equal Rights Amendment would also cause the courts of Virginia to accept a pattern of family living in which husband and wife are equal partners, fulfilling varying roles according to individual choice. Most of these required changes would bring the procedural statutes in line with the substantive laws which have been amended to conform to *Article I, Section 11,* of the Virginia Constitution which prohibits discrimination based on sex.

Amendments to Virginia law which would be required by the ratification of the Equal Rights Amendment would impose further obligations on women, rather than accord them further rights. For example, a number of the present provisions of Virginia law with regard to support are discriminatory against men, not women. A recent case in Pennsylvania, which has amended its Constitution to adopt the precise language of the proposed Equal Rights Amendment, indicates that the usual statutory provisions with regard to the wife's rights to alimony pendente lite, counsel fees, and court costs in a divorce action, would be unconstitutional if the Amendment were ratified. See *Weigand v. Weigand,* 310 Atl.2d 426 (Pa. Superior Ct. 1973).

Part IV — Criminal Law of Virginia and Military Law Affecting Virginians

Since courts are reluctant to extend criminal law classifications, those criminal statutes which provide protection for one sex but do not include the other sex would be invalidated under the Equal Rights Amendment. Alternatively, the General Assembly could extend the protection of these statutes to the members of the other sex. Typical of the statutes involved are the statutory rape and seduction laws, which might change to provide for the protection of males as well as females.

Ratification of the Equal Rights Amendment would require the Commonwealth to integrate its prison system, but the precise degree of integration required within each institution would remain a matter of debate. The Commonwealth would be required to make sure that any deprivation of liberty of prisoners would be on a sex-neutral basis.

In the military area, ratification of the Equal Rights Amendment would require that the draft be applied to men and women, if it should be reestablished. Standards for enlistment would have to be sex-neutral. Duty assignments would have to be made on a sex-neutral basis, subject to the qualification that living conditions, and problems of morale and discipline, might present military necessities allowing for different treatment in particular cases.

Admission to the officer corps, whether through the service academies or otherwise, would have to be on a sex-neutral basis.

The bulk of the changes in the military area would be in Federal, rather than state, law. In two particulars, (admission to the Virginia Military

Institute, and military wills), state statutes would have to be amended to be placed on a sex-neutral basis.

These are the principal changes in the law of Virginia, or in the Federal law affecting Virginians, which would be required by the ratification of the Equal Rights Amendment. A more complete statement of these changes appear in the four parts of the report which follow.

Respectfully submitted,

A. E. Dick Howard
Robert E. R. Huntley
Carroll Kem Shackelford
William F. Swindler
Harold G. Wren, Chairman

HGW:pb

I. Comparison of ERA with the Existing Legal Framework

Laws of Virginia dealing with labor and employment which discriminate on the basis of sex would, in the absence of ERA, be subject to attack in at least three ways.

(a) Under the 14th Amendment to the United States Constitution such discriminatory laws would be subject to judicial review and would be invalid at least to the extent that they are "patently arbitrary" and bear no rational relationship to a legitimate governmental interest.[1] It may even be true that such discriminatory laws would be subjected to so-called "strict scrutiny" under the 14th Amendment, even though traditionally such "strict scrutiny" has been reserved for discrimination related to race, alienage, and national origin.

In the recent Sup. Ct. case of *Frontiero* v. *Richardson*,[2] the Court struck down a provision of federal law which discriminated on the basis of sex in connection with dependency allowances in the armed services of the United States. The discrimination resulted from a provision which required proof of support where the spouse of the military person was a male but indulged in a presumption of support where the spouse of the military person was a female. Four members of the Court felt that classification on the basis of sex should be treated as a "suspect" classification and subjected to strict scrutiny, with the burden being on the government to demonstrate a compelling need for the distinction. One member of the Court concurred in the result without an opinion, one member dissented without an opinion, and three members concurred in the result with an opinion, written by Justice Powell, that sex should not at this time be added "to the narrowly limited group of classifications which are inherently suspect." [3] These concurring justices felt that the discriminatory law involved in the case at bar could readily be invalidated under the traditional approach, i.e., that the discrimination bore no rational relationship to a legitimate government interest. These justices felt that any decision to extend the strict scrutiny test to sex discrimination should be deferred until a case arises in the Court clearly calling for its application and until the status of the ERA is resolved by the states.[4]

Thus, though there would seem to be a movement in the direction of treating sex discrimination under the existing federal constitution by the same strict standards which are applied to racial discrimination, the Supreme Court at this time has not clearly resolved the issue.

The issue of the standards of judicial review to be applied in sex discrimination cases is treated more extensively elsewhere in the Task Force's report. In short, there can be little doubt that the passage of ERA would at the very least result in the application of the "strict scrutiny" standard to laws which contain sex classifications. Indeed it is quite possible that ERA would

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1. See Reed v. Reed, 404 U. S. 71 (1971).
2. 93 S. Ct. 1764 (1973).
3. 93 S. Ct. 1764 at 1773 (1973).
4. It should be noted that the *Frontiero* case arose under the Due Process clause of the 5th Amendment because the law involved was a federal one; in the *Reed* case, the Equal Protection clause of the 14th Amendment was involved because the case concerned itself with a state statute which discriminated against women as administrators of estates. The Court in *Frontiero*, however, seemed to draw no distinction as to the treatment to be accorded sex discrimination under the 5th Amendment and the 14th Amendment.

result in an even more rigid standard than strict scrutiny, an absolute standard which would *per se* invalidate all statutory sex classification except where based on a unique physical characteristic.[5]

(b) Article I - Section 11 of the Virginia Constitution, adopted as part of the recent constitutional revision contains a provision outlawing government discrimination on the basis of sex except where mere separation of the sexes is involved. In *Archer and Johnson v. Mayes*,[6] the Virginia Supreme Court, in upholding the constitutionality of Virginia statutes which permit women to exempt themselves from jury service in certain circumstances, stated that the new Virginia constitutional provision will invalidate legislation only where such legislation is not rationally related to a legitimate governmental interest. In other words, the Virginia Supreme Court has indicated that the Virginia provision is to be construed in a way similar to the customary construction of the 14th Amendment to the United States Constitution.

Thus it does not appear that the Virginia Constitution provides the same absolute rule about sex classification that would obtain under the ERA.

(c) There are two provisions of federal statutory law which might directly impinge upon sexual discrimination in labor and employment. One of these is the so-called Equal Pay Act of 1963 which was adopted as an amendment to the Fair Labor Standards Act of 1938.[7] Essentially this Act provides that every employer who is covered by the Act must give equal pay for equal work to his employees without regard to sex. Presumably this statute would displace any state statute or regulation which established sex classifications in connection with the payment of wages. Such statutes are rare and none appears to exist in Virginia.[8]

The other basic federal statute which might impinge upon labor and employment in the Commonwealth is Title VII of the Civil Rights Act of 1964.[9] This Act places sex in the same category as race, religion, color or national origin and outlaws discrimination by an employer against an employee on any of these bases. It is not altogether clear whether this Act would be construed to displace all state legislation which is "protective" in nature, such as the Virginia statute which states that employers must provide "suitable restrooms or seating facilities" for female employees who are required to stand while working [10] or the Virginia statute which requires an employer of four or more persons of both sexes to provide separately labeled toilet facilities.[11] It does appear clear, however, that the Civil Rights Act and regulations promulgated under it by the EEOC render unenforceable state legislation which limits the employment of females at certain hours or in certain kinds of occupations because such statutes are based upon presuppositions about the characteristics of the sex which ignore individual capacities and qualifications. The only

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5. See Emerson, *In Support of the Equal Rights Amendment*, 6 Harv. Civ. Rts.—Civ. Lib. L. Rev. 225 (1971), and Freund, *The Equal Rights Amendment Is Not The Way*, 6 Harv. Civ. Rts. — Civ. Lib. L. Rev. 234 (1971). Also see Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 Harv. Civ. Rts. — Civ. Lib. L. Rev. 243 (1971) and Brown, etc., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871 (1971).
6. 213 Va. 633 (1973).
7. 29 U. S. C. 206 (d).
8. See Rivera v. Div. of Industrial Welfare, 265 C. A. 2d 576, 71 Cal. Rptr. 739 (1968).
9. 42 U. S. C. Sec. 2000e.
10. Va. Code sec. 40.1 - 34.
11. Va. Code sec. 40.1 - 39.

exceptions which are likely to be recognized are the so-called "authenticity" or "genuineness" exceptions; e.g., as in the case of an actor or actress.[12]

Passage of ERA would have no direct legal impact on either of the pieces of federal legislation referred to above. Insofar as these acts displace or invalidate state law they derive from Congress's power under the 14th Amendment; insofar as they regulate practices of private employers where no "state action" is involved they derive from Congress's power under the Commerce Clause of the United States Constitution. They could, of course, be modified by Congress to make them either more or less rigorous without regard to whether or not ERA is passed. ERA prohibits governmental action which is discriminatory at the state or federal level and would have no direct impact on private employers.

II. Effect of ERA on Virginia Legislation.

The Virginia Code article dealing with Labor and Employment contains very few statutes which involve sex qualifications. Since the time of the adoption of the new Virginia constitutional provisions outlawing such discrimination, the Virginia General Assembly has adopted amendments to a number of statutes dealing with labor and employment to make them sex neutral. For example, Section 40.1 - 80 formerly contained provisions establishing different rules as to the hours when boys and girls may work. The 1973 amendment treats both sexes alike. For further examples of this kind of amendment, see: Sections 40.1 - 99, 101, 105, 106, 109, 112. Similarly, the Virginia statute which prohibits females from working in mines or quarries was amended in 1973 to eliminate the prohibition.[13]

There do remain several statutes dealing with labor and occupations which contain sex classifications.[14]

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12. "(b) (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week. "(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. *Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.*" 29 C. F. R. sec. 1604.1 (emphasis added).

13. Va. Code sec. 45.1 - 32. Similar amendments occurred in those parts of the Code dealing with Workman's Compensation and with Health. See, for example, the amendment to Section 32 - 423 dealing with sexual sterilization, which formerly provided that no sterilization procedure could be performed within 30 days from the date of the request therefor "on any female who has not theretofore given birth to a child." As amended, the statute extends this protective provision to "any person who has not theretofore become the parent of a child."

14. See Art. 3, Ch. 3 of Title 40.1.

Section 40.1-34 requires that employers provide suitable restrooms or seating facilities for females whose jobs require them to stand while working. It seems doubtful that this statute is invalidated by any existing rule of law. As has been noted above, the 14th Amendment to the United States Constitution and Article 1, Section 11, of the Virginia Constitution are not likely to be applied with the kind of strictness which would overturn a statute arguably related to a rational objective. The Civil Rights Act of 1964 might be construed as displacing the statute on grounds that it imposes an additional cost in employing females which might result in discriminating against their employment, or on grounds that it discriminates against men by failing to require for them a similar benefit. There seems little doubt that the statute would be invalid under ERA.

Section 40.1-35 places a limitation on the number of hours per day and the number of hours per week for which a female may be employed (the statute is subject to many exceptions — Sec. 40.1-36). This statute may or may not be illegal under the 14th Amendment to the United States Constitution or Article 1, Section 11 of the Virginia Constitution but is almost certainly displaced by the Civil Rights Act since it is based on some stereotypical premise that more women than men are unsuited for long hours, and since its enforcement would result in depriving women of certain kinds of employment and of eligibility for over-time. Of course the statute would also be invalid under ERA. Sections 40.1-37 and 40.1-38 have to do with record-keeping and penalties for violation in connection with 40.1-35 and 36 and are hence invalid to the degree which those sections are invalid.

Section 40.1-39 requires an employer of four or more persons of both sexes to provide separate toilet facilities. It seems likely that this statute continues to be valid under current law. Whether or nor it would be invalidated by ERA is debatable. Some have contended that even the strictest application of ERA would not invalidate such statutes as this one because of the supervening constitutional protection of the right to privacy.[15] It is not clear, however, that the Supreme Court's recognition of the right to privacy has or will be articulated in terms which would speak to the question of the separation of the sexes. The right to privacy which begins to emerge from such cases as *Griswold* v. *Connecticut* [16] seems intended to protect certain private decisions and private sanctuaries from governmental intrusion. It might be a rather long step to move from this tentative recognition of a new constitutional right to a position in which the state's interest in segregating toilet facilities is constitutionally guaranteed. Thus it may be that Section 40.1-39 would be suspect under the kind of strict standard of review which ERA is likely to create.

Conclusion:

III.

The passage of the ERA would apparently have little impact on Virginia law pertaining to labor and employment. The provisions of federal law contained in the Equal Pay Act and the Civil Rights Act would not be directly affected by the amendment, though of course the symbolic effect of the amendment's passage might result in more vigorous enforcement.

Most Virginia statutes dealing with labor and employment which contained sex classifications have already been amended by the General

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15. "— the right of privacy would permit, perhaps require, the separation of the sexes in public rest rooms —." Emerson, *In Support of the Equal Rights Amendment*, 6 Harv. Civ. Rts. — Civ. Lib. L. Rev. 223 at 231-2 (1971).

16. 381 U. S. 479 (1965).

Assembly, presumably as a result of passage of Article 1, Section 11 of the Virginia Constitution. Of the remaining statutes which contain sex classification, at least one (that dealing with maximum working hours for women) is already unenforceable as to employers covered by the Civil Rights Act of 1964 and regulations promulgated pursuant thereto, one (that dealing with suitable restrooms and seating facilities for women) is probably now valid but would likely be invalid under ERA, and one (that dealing with separate toilet facilities for the sexes) is valid under existing law and might or might not be invalidated by ERA.

PART II

THE EQUAL RIGHTS AMENDMENT AND PROPERTY RIGHTS OF WOMEN UNDER VIRGINIA LAW

Title 55 of the Virginia Code covers the general subject of property, and Chapter III (55-35 to 55-47) is the so-called Married Women's Property Act of March 1, 1900 (Va. Acts 1899-1900, ch. 1139), as amended. With reference to the proposed Equal Rights Amendment (hereinafter referred to as E. R. A.) to the Constitution of the United States, the following questions are suggested in reference to the abovementioned sections of Title 55:

(1) Would ratification of E.R.A. cast any cloud upon rights established under Chapter III of Title 55 of the Virginia Code?

(2) Does Chapter III as it now stands discriminate as between married and unmarried women, or does it in effect or by inference preserve property rights treated in the remainder of Title 55 as of full equal enjoyment by both men and women?

(3) What changes in Title 55 might be required in consequence of adoption of the pending Equal Rights Amendment?

The Virginia Code provisions on married women's property rights are modeled after the pioneer English statute on the subject adopted in 1882 (45 & 46 Vict., ch. 75), which consolidated and enlarged upon earlier statutes of 1857 and 1870 and provided that a married woman should be competent to acquire, hold and dispose of real estate and personalty by will or otherwise, where this was her separate property, as if she were a *feme sole.* The reluctance of English common law courts to treat the statute broadly led Parliament to make several early revisions in the 1882 act, which the Virginia General Assembly may have had in mind when the 1900 law was drafted. Modern British law on the subject is contained in the Law Reform (Married Women and Tortfeasors) Act of 1935 (25 & 26 Geo. V, ch. 30).

Virginia legislation on property rights of *femes coverts* date from 1674, with the first general statute on the subject enacted in 1814. The principal developments in legislation, from 1877 to 1900, were reviewed by the court in 1955, with the following summary:

> Sections 55-35 and 55-36 are parts of what was originally called the Married Woman's Act, Acts 1876-77, ch. 329, p. 333, as amended by Acts 1877, ch. 265, p. 247. These acts and similar acts passed in other states were designed to enlarge the personal rights of married women and secure to them separate legal estates over which they were granted greater dominion and control than they had formerly enjoyed.
>
> Upon codification of the general laws in 1887, the Married Woman's Act was revised and amended, and married women were further emancipated and their property rights broadened. . .

In *Norfolk & Western R. Co. v. Dougherty* (1895), 92 Va. 372, 374, 23 S.E. 777, where a married woman sought to recover for personal injuries and property damage, when discussing and determining her rights under Chapter 103, Code of 1887, and especially in construing S. 2288, Judge Harrison said:

"Under Chapter 103 of the Code, all the disabilities imposed upon a married woman by the common law, so far as the affect the separate estate created by that chapter, have been removed, and she stands before the world, as to that separate estate, absolutely free to assert all rights touching it, and to invoke all remedies relating to the same, as though she had never married. These privileges she now enjoys *like all other single individuals*, restrained alone by the same laws that determine the rights of man, and when she exercises her privilege, and invokes the law's aid in asserting her rights, she must conform to the same rules of pleading and practice by which man is governed when he sues.

"Section 2288 of the Code clearly provides that, as to matter connected with, relating to, or affecting the separate estate of a married woman, she may sue and be sued in the same manner, and there shall be the same remedies in respect thereof, for and against her and her said estates, as if she were unmarried."

Section 2290, Code of 1887, relieved the husband of all liability, contractual or tortious, incurred by his wife prior to their marriage and from all liability connected with or relating to her trade, business or separate estate that occurred during coverture. Yet he was not relieved of liability for her post-nuptial torts which were committed other than in connection with her trade, business or separate estate.

With the statutory rights and liabilities of spouses toward each other for tortious wrongs in this unsatisfactory and anomolous condition, the Legislature in 1900 materially changed and recast chapter 103, Code of 1887. Acts 1899-1900, ch. 1139, p. 1240. In this re-enactment it removed every vestige of the husband's liability as such for his wife's torts and rendered her solely liable for all of her tortious acts. . . .

This recast of chapter 103 abolished separate estates as such and further enlarged married women's rights by giving them full ownership of and absolute dominion over their property. Having given a married woman full ownership and control over her property, S. 2284 which declared what made up her separate estate, in which were included rights of action and damages for a wrong, was no longer needed, and that section was repealed.[1]

The 1900 statute — variously amended, principally in 1932 — was read narrowly by the courts in the early part of the century,[2] but by 1911 it was acknowledged that the statute gave independent rights to married women to sue without reference to a "next friend." [3] While the statute has been construed

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[1] Vigilant Ins. Co. v. Bennett, 197 Va. 216, 218 (1955), emphasis supplied; cf. also Augusta Nat. Bank v. Beard's Exec., 100 Va. 687 (1902).

[2] Cf. Dunn v. Stowers, 104 Va. 290 (1905): and. *re* narrow construction of the statute as in derogation of the common law, cf. Furey v. Furey, 193 Va. 72 (1952).

[3] Lynchburg Cotton Mills v. Rives, 112 Va. 137 (1911); cf. also Moreland v. Moreland, 108 Va. 93 (1908); Ratcliffe v. McDonald, 123 Va. 781 (1918).

to mean that neither husband nor wife may sue for loss of consortium,[4] certain domestic relations rights, e. g., husband's rights to wife's services and liability for her support, have been preserved.[5] As the court said in 1924:

> The effect of this statute is to give the wife as full control over her property during the coverture, as her husband has over his. She may sue her husband as if he were a stranger... The revisors of the Code, 1919, when they came to deal with section 5134, on order there might, thereafter, be no doubt of the total abolition of the husband's common law rights, added immediately after "but neither his right to curtesy," the following significant words, "nor his marital rights," to language which of itself seemed to have eliminated the husband's previous rights. The language "nor his marital rights" would seem but to emphasize and clarify, to make certain, the first few lines of the act: "A married woman shall have the right to acquire, hold, use, control, and dispose of property *as if she were unmarried,*" etc. It follows that a husband in Virginia may be a trespasser upon his wife's lands whenever she is not occupying them, if he goes there against her will or her commands; that she may prosecute him for criminal trespass; that she may dispossess him if he is in possession; or may hold him to account in connection with any transaction with reference to her lands, as if he were a stranger. His right to curtesy and his marital rights give him no more power or authority over his wife's property than if he were a total stranger.[6]

In 1926 it was held that the statute extinguished the common law concept of curtesy initiate, and that curtesy consummate could only arise where the wife predeceased the husband (and, presumably, died intestate).[7] In 1963 Chief Judge Hoffman for the United States District Court for the Eastern District of Virginia categorically declared that the 1900 statute was intended to place a married woman on a footing of equality with her husband in all respects of property law.[8]

A perusal of the statutes, and the foregoing summary of principal cases of construction of the statutes, suggest that the legislative purpose expressed in Title 55 generally is to establish a policy of equal rights for women in the general subject of property law. In terms of legislative language, and in certain of the cases, this policy is at least not contradicted; the only difficulty which is apparent derives from the fact that the statutes, being in derogation of the common law, are often narrowly construed by the courts and thus tend to place some qualifications on the policy.[9] It would therefore seem appropriate to recommend some type of declaratory or construction statute to the effect that "nothing in this Title shall be construed to distinguish between or discriminate against either men or women in the acquisition, holding or disposition of any rights in property either real or personal."

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[4] Carey v. Foster, 221 F. S. 185 (E. D. Va., 1953), aff'd. 345 F. 2d 772 (4th Ct., 1965).

[5] Hall v. Stewart, 135 Va. 384 (1923); cf. also First Nat. Bank v. House, 145 Va. 149 (1926); Childress v. Fid. & Cas. Co., 194 Va. 191 (1952).

[6] Edmonds v. Edmonds, 139 Va. 652 (1924); cf. also Com. v. Rutherford, 160 Va. 524 (1933).

[7] Jones v. Kirby, 146 Va. 109 (1926).

[8] Carey v. Foster, 221 F. S. 185 (E.D. Va., 1953), aff'd. 345 F. 2d 772 (4th Ct., 1965).

[9] Cf. First Nat. Bank v. House, 145 Va. 149 (1926); Furey v. Furey, 193 Va. 727 (1952).

PART III

TO: Dean Harold G. Wren, Chairman
FROM: Carroll Kem Shackelford
IN RE: Report on Impact of the Equal Rights Amendment and *Article I, Section 11* of the Virginia Constitution on Family Law in Virginia

SCOPE

Senate Joint Resolution No. 134 passed by the Virginia General Assembly in February of 1973 directed the members of this Task Force to review and study the statutes of Virginia in order to determine what changes would be required to conform the laws to *Article I, Section 11* of the Virginia Constitution and to the Equal Rights Amendment should it be ratified, thereby eliminating any discrimination based upon sex and securing equality of rights for men and women.

Four particular areas of inquiry were set forth in the resolution. By agreement at the initial meeting of the Task Force in July 1973, I was assigned the responsibility of examining Virginia law as it pertains to woman's role within the structure of the family and to various aspects of domestic relations, to-wit: marriage, annulment, divorce, support and alimony, custody, adoption and use of name. Domicile was excluded, and will be dealt with by Professor Swindler in his study of property rights.

ASSUMPTIONS AS TO CONSTITUTIONAL INTERPRETATIONS

I will attempt no precise or scholarly statement in regard to standard of judicial review. This, I am sure, will be dealt with by the scholars of the Task Force and as a preamble to the integrated study.

However, I do feel it necessary to state briefly the assumptions upon which I have relied in measuring probable acceptance or rejection of certain concepts within the realm of family law and of certain pertinent Virginia domestic relations statutes.

These assumptions are three-fold, as follows:

(1) Judicial review of women's rights under the Fourteenth Amendment has not yet irrevocably subjected classification by sex to the standards of a suspect classification though it is clearly moving in this direction. Thus, classification by sex remains a valid concept so long as treatment of all individuals within this class is equal. Even after the Supreme Court accords it suspect classification status, which will probably be before long, there will remain the right of allowable differentiation between the sexes based upon compelling state interest.

(2) Judicial interpretation of the Equal Rights Amendment would most probably apply a more nearly absolute standard, striking down any classification based upon sex whatsoever, except for (a) differentiations because of physiological differences, and (b) differences protected by the constitutional right of privacy.

(3) Prior to *Archer and Johnson v. Mayes* (213 Va. 613-1973) it would have been expected that all statutory amendments required by the Equal Rights Amendment would likewise have been required by *Article I, Section 11.* However, this case has lessened the strict standard which the framers of *Article I, Section 11* and the General Assembly itself initially expected would be applied to measure whether or not a provision was discriminatory because of sex; classifications based on sex, which would be acceptable under present

Fourteenth Amendment interpretations, will continue to be acceptable under this section. However, such classifications will probably not meet the more absolute test likely to be applied under the Equal Rights Amendment.

I wish to state that, though I believe the standard of review most likely to be adopted by the Supreme Court in interpreting the Equal Rights Amendment will be a less than totally absolute one, as set forth in (2) above, I do not think it impossible that some Court in the future might restrict this standard to permit no differentiation as to sex of any dimension. I believe that the arguments of those persons who oppose ratification of the Equal Rights Amendment for this (sometimes called the "unisex") approach should be given grave consideration.

(N.B. Since writing the above I have read with distress Prof. Howard's interpretation of the constitutional right of privacy and the Griswold case.)

MAJOR OBJECTIONS TO RATIFICATION OF THE EQUAL RIGHTS AMENDMENT IN THE AREA OF FAMILY RELATIONS.

In the realm of family relations, the objections of opponents to the Equal Rights Amendment are varied and sincere. Many, in my opinion, are not based upon sound legal premises, and are couched in generalities which do not bear close analysis. Nonetheless, it would be a mistake to dismiss them preemptorily. An amendment to the U. S. Constitution is not for legal scholars alone; it is for all American men and women. On this front, blocking ratification has become an emotional issue—the defense of the home and the family. And it is clear that concerns about the effect of passage of the Equal Rights Amendment upon laws which allegedly define and determine woman's role in the home and within the family unit, and upon privileges and protections allegedly accorded by law to women as wives and mothers override all other considerations in the minds of many women and men alike. Women see their protections and privileges eroded; men see their roles diminished.

Using as a guide the testimony and written statements presented at a public hearing before this Task Force on 18 September 1973, I will list below in four categories the primary objections to ratification in the area of family relations:

(1) Objections based upon acceptance of the traditional and common law role of husband as head of household and wife as helpmate and mother.

Many opponents to ratification base their opposition upon a belief that the amendment would change the family structure as it exists today in American society. They believe that man is, and should be, the head of the household; that there is pride and dignity for man in this role; that responsibility for the economic welfare of a family unit rightfully resides with the man. They likewise believe that the proper role for a woman within the family unit is to provide support and encouragement to the man; to establish and maintain the home environment, to bear the children and to provide their day-to-day care. They fear that the laws which allegedly define these roles would be invalidated by the Equal Rights Amendment, and that both men and women—but especially women—would be required by law to assume different roles within the pattern of family living.

There is no Virginia statute which directly sets the husband up as head of the household, nor is there any Virginia statute which defines a wife's role within the family structure as that of helpmate and mother. Nonetheless, it is clear that society at large in Virginia accepts the common law definition of role within the family unit, an attitude which is accepted in the case law.

The cases directly in point are not many, possibly because the concept of husband as head of household and wife in a subordinate role went essentially

unchallenged through the years. *Virginia Railway & Power Co. v. Gorsuch* (120 Va. 655-1917) sets forth the wife's obligation to obey her husband; *Kerr v. Kerr's Heir* (182 Va. 731-1944) defines the husband as head of the family; and the recent case of *Archer and Johnson v. Mayes* (213 Va. 634-1973) refers to women as the center of home and family life, charged with certain responsibilities in the care of the home and children. Moreover, a long line of cases dealing with the issues of alimony and child support clearly use as a basis the husband's obligation as head of household and the wife's rights to support as homemaker.

It is extremely doubtful that any Virginia General Assembly would feel required by ratification of the Equal Rights Amendment to pass laws defining the roles within the family of husband and wife. However, it is probably inevitable that developing case law will recognize eventually a redefinition of the parts played in family by husband and wife as those of essentially equal partners rather than as those of head of household and helpmate. It is probably equally inevitable that such change in judicial attitude will come with or without the Equal Rights Amendment.

This is in no way to say that Virginia (or any other state) would be required—or would in fact—pass laws to dictate certain roles. Privileges and obligations within and to the family will be joint and equal. How they are handled will be entirely a matter of personal choice between the husband and wife.

(2) Objections based upon the fact that ratification would cause women to lose rights, privileges and protection within the home:

In direct relation to the above stated objection is the claim that ratification of the Equal Rights Amendment would place in jeopardy the right of women to be provided with a home and financial support by their husbands; would deprive women of the privilege of remaining at home raising their children while their husbands provide for the financial needs of the family. The charges have been made that ratification would invalidate the laws in fifty states which impose an obligation on the husband to support his wife; that women would lose the protection of laws which "give the wife her legal right to be a full-time wife and mother in her own home, taking care of her own babies; ... that all laws which say the husband must support his wife will immediately become unconstitutional." (Quotes from Mrs. Phyllis Schlafly)

These premises are invalid.

The Equal Rights Amendment will in no way dictate repeal of laws requiring the support of a wife by her husband. It would merely require that, given the same situation in reverse, a wife would have a similar obligation to support her husband. That is to say, within a family unit where the husband is the major wage earner and the wife elects to stay at home and contribute to the family welfare in non-monetary ways, the legal obligation for financial support would be upon the husband; in family units where the wife has separate estate or is the major wage earner and the husband cares for home and children, such obligation would be upon the wife, and in family units where both partners either have independent means or choose to work, the obligation would be in relation to the estate and/or wage earning power of each. Rights and duties would be imposed according to role, not according to sex. These principles would apply during a marriage and after a divorce.

In Virginia the present law (*Va. Code Ann.* §§ 20-61) imposes during marriage an obligation upon the husband to support his wife, and upon the wife to support an incapacitated husband. However, it should be noted that such obligation arises only when there is desertion or willful neglect or refusal or failure to provide support, and only when the situation is one of "necessitous

circumstances." The obligation to support the children under this Code section is joint. Furthermore, it is a well-established legal principle that the courts will not interfere in an on-going marriage to dictate a level of support.

Thus it will be seen that in Virginia a woman's present legal right to be supported and "protected" within the home is of limited dimensions. Any financial support which she receives beyond the level of necessaries is over and above the obligation imposed by law.

Case law expands the obligation of support only after divorce.

(3) Objections based upon the premise that the Equal Rights Amendment will force women out of the home and into the labor force.

The statement has been frequently made that ratification of the Equal Rights Amendment would immediately force a wife and mother to contribute fifty percent of the financial support of the family.

This is a misconception of the meaning of the Equal Rights Amendment, and yet it has been repeated so often that a great many women now sincerely believe that after ratification they would be required by law to enter the labor force and begin to provide a direct and regular financial contribution to the family budget. And, perhaps more disturbing, they sincerely believe that they would no longer have the choice of staying at home and caring for their children, but would be required under any circumstances either to find baby sitters or mother's helpers to look after their children when they are working or to place them in day-care centers.

There is no statute in Virginia which seeks to determine the amount, the nature of the form of the contribution that either a husband or a wife shall make to the family welfare, nor would the Equal Rights Amendment require any such law. These matters are now considered, and will continue to be considered matters for personal and private decision. The law looks only to the protection of spouse and children from dire need; it does not attempt to legislate a person either into the market place or into the home.

(N.B. The matter of support after a divorce, which surprisingly was not often brought up at the public hearing, will be discussed later in this report.)

(4) Objections based upon religious beliefs:

It is the sincere contention of some persons that ratification of the Equal Rights Amendment would impose a social structure contrary to Christian beliefs, and that the amendment itself is in opposition to the teachings of the Bible. This position is predicated upon the belief that God created men and women to fulfill unequal roles in life; that the family structure is defined in the Bible with the father as the head of the household and the mother as helpmate and caretaker of the children. That to mandate equality of rights between men and women would be in direct violation of these religious precepts.

It is manifest that present laws defining family obligations are not based upon religious beliefs, and that any such basis would be unconstitutional.

MAJOR CHANGES NEEDED TO CONFORM VIRGINIA DOMESTIC RELATIONS STATUTORY AND CASE LAW TO *ARTICLE I, SECTION 11* AND TO THE EQUAL RIGHTS AMENDMENT.

I. IN RE MARRIAGE LAWS.

(1) Permitted Age.

Va. Code Ann. § 20-48 sets eighteen as the minimum age of marriage for males and sixteen for females, with the added requirement of consent of parent

or guardian for girls. At common law the permitted ages were fourteen and twelve, based upon a presumption of respectively average age of puberty. The Virginia law, while rejecting such early minima, probably reflects both the notion of "emotional maturity" and the concept that a man should not marry until he is capable of providing for a family. The Equal Rights Amendment would clearly require the same minimum age for men and women, and parental consent for both or neither, while *Article I, Section 11* might well accept the age variation as fulfilling a compelling state interest in the establishment of families.

(2) Marriage of Insane Persons.

Va. Code Ann. § 20-46 forbids the marriage of an insane woman under the age of forty-five and of an insane man to any woman under such age. Drawn with the obvious intent of preventing procreation by insane persons, this statute would meet the test of compelling state interest presently applicable to *Article I, Section 11* under *Archer and Johnson v. Mayes.*

By like token, it might well meet the test of strict scrutiny required under the Equal Rights Amendment because of the inferred basis of physiological differences between the sexes in so far as having children is concerned.

Nonetheless, an easy solution would seem to be to permit neither to marry, or to establish the same minimum age for all partners in such marriages.

(3) Unlawful Marriages.

The following marriages are forbidden under the Virginia Code:

(a) Marriage between persons of specified degrees of consanguinity and affinity (*Va. Code Ann.* §§ 20-30 to 20-40).

(b) Bigamous marriages (*Va. Code Ann.* §§ 20-41 to 20-44).

(c) Marriage to an insane or feeble-minded person who has been admitted to a State institution (*Va. Code Ann.* § 20-47).

All of these laws apply equally to men and women, and violate in no way *Article I, Section 11* or the Equal Rights Amendment.

(4) Miscellaneous.

Va. Code Ann. § 20-14 establishing the situs for issuance of a marriage license should be extended to apply to the residence of either the man or the woman.

Va. Code Ann. § 20-27 should likewise be extended to permit the marriage ceremony fee to be paid by either the man or the woman. No other licensing provision in *Va. Code Ann.* § 20-13 through § 20-37.1 contains any discriminatory language.

Va. Code Ann. § 20-1 through § 20-10 require premarital syphilis tests. These provisions refer consistently to "persons" and contain no discriminatory language.

II. IN RE ANNULMENT LAWS AND AFFIRMATION OF MARRIAGE.

The Virginia Code sections authorizing suits to annul (*Va. Code Ann.* § 20-89) and to affirm (*Va. Code Ann.* § 20-90) marriages apply to either party. However, the former refers back to *Va. Code Ann.* § 20-48 which establishes permitted ages for marriage. This provision has been discussed above. Otherwise no change would be required by *Article I, Section 11* or the Equal Rights Amendment.

III. IN RE DIVORCE LAWS.

The law of divorce in Virginia is already in the process of evolution toward acceptance of the philosophy that a marriage based on irreconcilable differences cannot last and cannot be made to endure.

In 1960 the Legislature added a three-year separation without fault on either party as grounds for divorce; this provision was amended to two years in 1964. The Virginia Advisory Legislative Council is presently, as per direction of House Joint Resolution No. 225, studying the laws on separation and divorce; a committee of the Virginia State Bar is likewise studying no-fault divorce. While it may well be that the impetus for change comes from recognition of new sociological and economic patterns in family living, it is likewise certain that these developments reflect a new concept of woman's role in marriage. Changes required in both statutory and case law under *Article I, Section 11* and under the Equal Rights Amendment would essentially merely express, but perhaps speed up, changes which are coming anyway.

(1) Divorce a vinculo matrimonii.

Va. Code Ann. § 20-91 prescribes eight grounds for absolute divorce (Subsection 5 has been repealed), which will be dealt with here seriatim.

(a) Adultery, or sodomy or buggery.

So far as statutory law (Va. Code Ann. § 18.1-167) and judicial interpretation are concerned, Virginia recognizes adultery as the sexual act of a partner in marriage outside the marriage, and establishes no distinction between men and women. No change would be required by *Article I, Section 11* or the Equal Rights Amendment.

Virginia case law does not seem to delineate sodomy or buggery beyond the dictionary definition. If either legislative or judicial clarification establishes such grounds as applying only to men, they may well be validated under the exception based on physiological traits. If, however, they were defined as applicable to women as well, there would be no doubt that they did not violate the Equal Rights Amendment. *Article I, Section 11* would accept the provision without further definition.

(b) Natural or incurable impotency of body existing at the time of the marriage.

A similar problem arises here, with the above comments equally applicable.

(c) Confinement in a penitentiary subsequent to the marriage if cohabitation is not resumed upon release.

No discrimination based upon sex; no change required.

(d) Conviction of an infamous crime before marriage without knowledge of spouse.

No discrimination; no change.

(e) Repealed

(f) Willful desertion or abandonment for one year.

The statute is not discriminatory on its face. Either husband or wife may be charged with desertion. However, Virginia case law has expanded this ground for divorce to include constructive desertion. Here again, either husband or wife may be charged with constructive desertion, except for one form—a wife's refusal to follow her husband to a new abode reasonably selected

by him. This concept is enunciated in *Graves v. Graves* (193 Va. 659—1952) and reaffirmed in the more recent *Martin v. Martin* (202 Va. 769—1961). It would seem that both *Article I, Section 11* and the Equal Rights Amendment would require either that this extension of the statute be overruled, or that, if one spouse is to have the right to choose the place of abode, it should be not necessarily either the husband or the wife, but the spouse contributing the most to the family's welfare. Manifestly the first alternative is the simpler solution.

(g) Wife's pregnancy by another man at time of marriage without husband's knowledge.

This ground is most likely derived from the presumption that any child born during marriage is the husband's child, he thereupon becoming jointly responsible for its support. In 1967 the Virginia Supreme Court undercut this rationale somewhat indirectly by holding this presumption of legitimacy during marriage to be rebuttable *(Gibson v. Gibson* 207 Va. 821—1967). A husband who rebutted the presumption successfully would not be liable to share in the child's support even during the marriage. However, beyond this consideration, the statute on its face is discriminatory.

Both *Article I, Section 11* and the Equal Rights Amendment would require change. The statute could be extended to give the wife a ground for divorce if she did not know at the time of her marriage that another woman was carrying her husband's child. The complex problems of proof which such a provision would bring about dictate against this remedy. A far simpler solution would be repeal of the section.

(h) Wife's prostitution before marriage without husband's knowledge.

The statute is discriminatory on its face. A change is required.

Since Virginia law does not define prostitution as a crime chargeable only to females (*Va. Code Ann.* § 18.1-194), the provision could be amended to extend this ground for divorce to women as well as men. However, repeal would be more in line with realities. It is interesting to note that Virginia is the only state which allows divorce on this ground.

(i) Living separate and apart without cohabitation for two consecutive years.

This ground includes the provision "A decree of divorce granted pursuant to this subsection (9) shall in no way lessen any obligation a husband may otherwise have to support his wife unless he shall prove that there exists in his favor some other ground of divorce under this section," an amendment which was added in 1970.

Reciprocal obligations for support after divorce of both husband and wife based upon role and ability rather than upon sex will be dealt with more fully below in the discussion of alimony. Suffice it here to say that both *Article I, Section 11* and the Equal Rights Amendment would require either extension of this provision to cover any obligation a wife may have to support her husband, or repeal.

(2) Divorce a mensa et thoro.

Va. Code Ann. § 20-95 establishes the grounds for a divorce from bed and board as "cruelty, reasonable apprehension of bodily hurt, abandonment or desertion."

As far as desertion is concerned, this Code section places no durational requirement as does the a vinculo statute. In all other respects the comments above in re desertion apply.

As far as cruelty and apprehension of bodily hurt are concerned, these grounds may, and, indeed, have been used by husbands as well as wives in obtaining a divorce. (*Hudgins v. Hudgins* 181 Va. 81-1943) Because the statute is phrased in "neutral" terms and has not been interpreted as being available to only one sex, the fact that women seem more often than men to bring divorce actions on these grounds is inconsequential. No statutory change would be required by *Article I, Section 11* or the Equal Rights Amendment.

IV. IN RE SUPPORT AND ALIMONY LAWS.

Before discussing in any detail the Virginia statutory provisions and case law in regard to support and alimony, it would be well to consider the customary use of these terms, for it is within this framework that discussion and opposition to the Equal Rights Amendment are most often phrased.

Support in both lay and legal language would seem to be limited to financial contributions. When referring to support, the layman universally means money payments to cover expenses of daily living, including housing, clothing, food, transportation, medical costs, recreation, and, in the case of children, costs of education. Support under the law likewise means financial contribution, and it becomes the obligation of the courts in interpreting and applying such laws to determine the amount of payment. No legal recognition is given to obligations to provide non-monetary support to either spouse or children nor is any legal recognition given to the value of such non-monetary contribution to the family welfare.

While maintenance is sometimes used to refer to financial care of spouse and children during marriage and support to such care after a divorce or separation, it is more customary for the terms to be used interchangeably, and Virginia legislators have chosen to do so. I will therefore use only the term support in this report.

Alimony to the layman inevitably means money payments by a husband to his wife after divorce. Furthermore, to most laymen, there is the clear implication of punishment—payments required of a guilty husband to compensate a guiltless wife both for past years of devotion to the family and for future protection. Many consider it an obligation which arises in addition to the obligation of a husband to support his divorced wife and his children in her custody.

This is not the law in Virginia. However, as will be seen from the more detailed discussion below, confusion is apparent. The statute, except by inference, does not award alimony only to a wife; and yet the case law treats it as a degree of support above the legal level of necessaries, which is owed after divorce by husband to wife, according to his means and the family's social and financial position. Furthermore, the term is used interchangeably with support when referring to financial payments to a wife after divorce.

To bring some semblance of order to the discussion below, I will use support in referring (1) to the obligation owed by one spouse to another during an on-going marriage, (2) to the obligation owed by parents to their children both during marriage and after divorce, and (3) to the obligation owed by children to parents. I will use alimony in referring to the obligation of one spouse to another after divorce, in addition to or regardless of any obligation toward the children.

(1) Support During Marriage.

(a) Support of Spouses.

In this regard, *Va. Code Ann.* § 20-61 provides as follows:

"Desertion or non-support of wife, husband or children in necessitous circumstances.—Any husband who without cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his wife, or any wife who without cause deserts or willfully neglects or refuses or fails to provide for the support and maintenance of her husband who is incapacitated due to age or other infirmities... the wife, husband ... being then and there in necessitous circumstances, shall be guilty of a misdemeanor..."

Prior to 1972 this Code section required support of a wife by her husband if she were in necessitous circumstances but no obligation was imposed upon a wife toward a husband. Subsequent to adoption of the Revised Virginia Constitution with its *Article I, Section 11* prohibition of discrimination based on sex, which became effective 1 July 1971, the General Assembly amended this Code section—twice in 1972 and twice in 1973. Accordingly, it may be presumed that the legislators feel that the imposition of an obligation upon a wife of support of her husband only if he is incapacitated and in necessitous circumstances meets the requirements of *Article I, Section 11.* Constitutionality has not yet been tested before the Courts. However, the rationale of *Archer and Johnson v. Mayes* might well accept the differentiation between obligations as being an expression of the traditional role of husband and wife within the family, it being a compelling state interest to protect the same.

It is otherwise with the Equal Rights Amendment. On its face the statute imposes a lesser obligation of support upon a wife than upon a husband, manifestly because one is a woman and one, a man. The Equal Rights Amendment would require that this be changed. The obligation to support could not be imposed because of sex; instead it would have to be imposed because of the role assumed within the family unit coupled with ability to earn. Language would have to be revised to assure that the partner in the marriage who works outside the home will see to the financial sustenance of the partner whose duties lie within the home and in the care of the children. The courts will have to recognize concomitant obligations. If providing financial support is imposed upon one party to the marriage, regardless of sex, the care and supervision of the home and children will have to be imposed upon the other. By like token, failure to provide proper care must be subject to punishment as would be failure to provide proper financial contributions.

(b) Support of Children.

Va. Code Ann. § 20-61 further provides:

"... any parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of eighteen years, or child of whatever age who is crippled, or otherwise incapacitated for earning a living... [the] child or children being then and there in necessitous circumstances, shall be guilty of a misdemeanor..."

The obligation to support the children being imposed jointly upon the parents, this portion of the statute would be valid under *Article I, Section 11* and the Equal Rights Amendment alike. However, I would comment that, as presently worded, the statute cannot be effectively enforced. And I would guess that there are few, if any, fines or jail sentences being imposed by Virginia courts upon a mother for failure to support her children.

Moreover, Virginia case law has clearly interpreted this statute as imposing the primary duty of support upon the father. Early cases give no consideration to a concurrent obligation upon the mother. *Owens v. Owens* 96 Va. 191—1898, ***Bruce v. Dean*** 149 Va. 39-19 , ***Boaze v. Commonwealth*** 165 Va. 786-19 . In fact, I could find no case imposing a joint legal duty of

support of children upon the mother. Even the recent 1972 case, *Commonwealth v. Shepherd* 212 Va. 843-1972 holds that, while the Code section indicates a legislative intent that a mother is liable as well as a father for support of a child, the obligation is here imposed only after the death of the husband.

This judicial interpretation might be upheld under *Article I, Section 11;* it would not be under the Equal Rights Amendment.

(c) Enforcement Provisions.

Conviction of nonsupport is punishable under the aforesaid *Va. Code Ann.* § 20-61 as follows:

(1) By fine not exceeding $500 (applicable to both men and women)
or

(2) by confinement in jail not exceeding twelve months—or both (applicable to both)
or

(3) by confinement on the State convict road force at hard labor or on work release employment as provided in 53-166.1 for not less than 90 days nor more than twelve months (applicable to men alone)
or

(4) forfeiture of a sum not exceeding $1,000 (applicable to both)

In addition there are the following enforcement provisions in Title 20, Chapter 5:

Va. Code Ann. § 20-62. Commitment to workhouse, city farm or work squad. Though this section refers to "persons convicted of nonsupport under the provisions of this chapter," it is apparent that it refers to the penalty outlined in (3) above and is meant to apply to men only.

Va. Code Ann. § 20-63. Support payments by county, city or state. This section applies to "the prisoner [sentenced] for the support of his wife or child or children."

Va. Code Ann. § 20-64. Proceeding instituted by petitioner. This section provides for petitions by wife or child or certain public officers, but not by husband.

Va. Code Ann. §§ 20-65, 20-66, 20-67, 20-68, 20-69 and 20-70. These sections set forth procedures for investigation and reports, trial, appeal, contempt, arrest. Each applies only to husband or father, or refers to orders to support wife and children.

Va. Code Ann. § 20-71. Temporary orders for support. This section provides for temporary orders for "support of the neglected wife or children", and none other.

Va. Code Ann. § 20-71.1. Attorney's fees in proceedings under § 20-71. This section provides that the Courts may order a husband to pay the fees of wife's attorney in such proceedings, but not vice versa.

Va. Code Ann. § 20-72. Probation on order directing defendant to pay and enter recognizance, and

Va. Code Ann. § 20-73. Condition of the recognizance. These two sections refer to "the defendant" in terms of "his or her entering into a recognizance" and "his or her personal appearance in Court" yet, at the same time, state that the Court shall have "the power to make an order, directing the defendant to

pay a certain sum or a certain percentage of his earnings periodically either directly or through the Court to the wife or to the guardian, curator or custodian of such minor child or children, or to an organization or individual designated by the Court as trustee." Obviously, there is a need for clarification over and above any consideration of discrimination.

Va. Code Ann. §§ 20-74, 20-75, 20-76, and 20-77 contain language which is "sex-neutral."

Va. Code Ann. § 20-78. Continuance of failure to support after completion of sentence refers only to "any person sentenced under § 20-72 to § 20-79 who, after the completion of such sentence, shall continue in his failure, without just cause, adequately to support his wife or children. . ."

Va. Code Ann. § 20-79. Effect of divorce proceedings. Subsection (a) refers to orders and decrees providing for alimony and support of wife, and custody and support of children. There is no reference to support of husband. Subsection (b) refers to "either party" and contains no other language directly pertaining to husband or wife. Subsection (c). The language is "sex-neutral."

Va. Code Ann. § 20-80. Violation of orders, trial, forfeiture of recognizance. Here again we have confused language. There is reference to the "defendant" as "him or her," and yet provision is made that the Court may order the recognizance forfeited "the sum or sums thereon to be paid, in the discretion of the Court, in whole or in part to the defendant's wife, or to the guardian, curator, custodian, or trustee of the minor child or children."

Va. Code Ann. § 20-81. Presumption as to desertion and abandonment. This section deals with proof of "neglect of wife, child or children by any person. . . " and "proof that a person has left his wife, or his or her child or children in destitute or necessitous circumstances. . ."

Va. Code Ann. § 20-82. Husband and wife competent as witnesses. No problem.

Va. Code Ann. § 20-83. Venue of offense. Again reference only to deserted wife, child and children.

Va. Code Ann. § 20-84. Extradition. This section refers to "the person charged with having left the State with the intention of evading the terms of his or her probation or of abandoning or deserting his wife, or his or her child, or children. . ." Again no reference to desertion of husband.

Va. Code Ann. §§ 20-85, 20-86, 20-87, 20-87.1. These sections refer to "persons" and "parents" making no distinction between male and female.

It will be seen that while the fountainhead statute (*Va. Code Ann.* § 20-61) has been amended to impose upon a wife the obligation to support her incapacitated husband, the enforcement section of this statute and the succeeding statutes which further delineate penalties and procedures for enforcement have not been similarly amended. They still relate only to the duty imposed upon a husband to support his wife and upon parents to support their children.

Accordingly, it is apparent that Title 20—Chapter 5 needs an almost complete revision to conform the statutes one to another. This, without consideration of the additional problems presented by *Article I, Section 11* and potentially by the Equal Rights Amendment.

I have discussed above the possible varying effects of *Article I, Section 11* and the Equal Rights Amendment upon Section 20-61 in so far as this statute imposes different obligations of support upon a husband and a wife. Separate problems arise vis á vis this and the succeeding statutes in so far as they also

impose different penalties upon a husband and a wife—whether as spouse or as parent. The man is subject to being sent to the road force, workhouse, city farm or work squad, or prison work release program whereas a woman is not.

It is not my task to discuss the effectiveness of these provisions, their function in relation to relief programs, nor alternative proposals. I merely point out that while *Article I, Section 11* might well be held to permit such variation in penalties imposed, the Equal Rights Amendment would not.

The Virginia Code contains three miscellaneous statutes which relate to enforcement of support obligations, to-wit: *Va. Code Ann.* § 63.1-127 which empowers a local welfare board to proceed against any person legally liable for support of an applicant; *Va. Code Ann.* § 16.1-190 which authorizes the court to order a parent to provide medical care for a child, and *Va. Code Ann.* § 8-388 which provides that a Court order for alimony or support becomes a lien on real estate upon docketing. Each of these statutes is phrased in "neutral" language, and hence presents no *Article I, Section 11* nor Equal Rights Amendment problem.

In addition, there are the provisions of *Va. Code Ann.* §§ 20-113, 20-114, and 20-115. These statutes, in effect, apply the provisions for enforcement of non-support orders under *Va. Code Ann.* § 20-61 to court orders for alimony and/or support under *Va. Code Ann.* § 20-103 and § 20-107. However, they are of a more restricted nature and contain no language which has a sex-basis application. Therefore, again, no *Article I, Section 11* nor Equal Rights Amendment problem.

(d) The Uniform Reciprocal Enforcement of Support Act:

This Chapter 5.2 of Title 20, added to the Code of Virginia in 1952, refers throughout to "obligor" and "obligee."

Such language successfully covers all fronts and meets the test of both Article I, Section 11 and the Equal Rights Amendment.

(2) Support Pending Divorce.

Va. Code Ann. § 20-103 provides that, at any time while a suit for divorce is pending, the Court may order "the man to pay any sums necessary for the woman and to enable her to carry on the suit, or to prevent him from imposing any restraint on her liberty. . . or to preserve the estate of the man, so that it be forthcoming to meet any decree which may be made in the suit. . ."

Since this section imposes obligations upon a man alone with no concurrent reference to relative roles, abilities, or means of the husband and wife, it would not meet the requirements of either *Article I, Section 11* or the Equal Rights Amendment. The elements which should be considered in determining an obligation of temporary support are the same as those to be considered in awarding alimony, and are discussed in some detail immediately below.

(3) Support After Divorce:

(a) Support of Former Spouses—Alimony

Va. Code Ann. § 20-107 provides:

> "Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce the court may make such further decree as it shall deem expedient concerning the estate and the maintenance of the parties, or either of them. . . provided, that the court shall have no authority to decree support of children or alimony after the death of the father or husband."

Because it views alimony as an extension of a husband's legal duty to support his wife, the Virginia Supreme Court has interpreted the above statute, in spite of its "neutral" phrasing, as making alimony available only to women. In 1878 in *Harris v. Harris*, 31 Gratt. (72 Va.) 13, the court said, "Alimony had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position. . ." The court has continued to operate on this presumption that alimony is to be granted only to the wife. *Turner v. Turner*, 213 Va. 42-1972; *Bray v. Londergren*, 161 Va. 699-1934.

The concept that a wife is entitled to support during and after marriage unless her misconduct causes the dissolution of the marriage is so firmly entrenched that by amendment in 1970 it was specifically incorporated into the two-year separation, "no-fault" grounds for divorce provision, *Va. Code Ann.* § 20-91 (9), which is the statutory expression of the case law found in *Mason v. Mason* 209 Va. 528 (1969), *Grey v. Grey* 210 Va. 536 (1970), *Lancaster v. Lancaster* 212 Va. 127 (1971), *Young v. Young*, 212 Va. 761 (1972).

And yet, although it has not wavered from its view that alimony is the exclusive right of the wife, the Virginia Supreme Court has upon occasion declined to grant it. In *Babcock v. Babcock*, 172 Va. 219 (1939) the Court found that the wife, though innocent, was more capable of earning a livelihood than her husband and should therefore be self-supporting. *Baytop v. Baytop*, 199 Va. 388 (1957) denied alimony to an innocent, working, childless wife. *Hawkins v. Hawkins*, 187 Va. 595 (1948) and *Barnard v. Barnard*, 132 Va. 155 (1922) considered the wife's earning ability in determining the amount of alimony due her.

Making alimony thus available to the members of only one sex is certainly discriminatory. It would seem impossible to justify this situation under *Article I, Section 11* as validated by a compelling state interest. Certainly it would not stand under the Equal Rights Amendment.

The case law which limits alimony to the wife is supported by inference in the statute. The clause ". . .provided, that the court shall have no authority to decree support of children or alimony after the death of the father or husband." clearly implies its availability to wife alone. Thus, though the main provision of the statute refers to "the parties, or either of them. . ." and apparently intends no distinction based on sex, both *Article I, Section 11* and the Equal Rights Amendment would require a change in wording and in intent.

Rather than retain § 20-107 in its present form and give the courts the responsibility of formulating other guidelines to establish the circumstances in which a husband as well as a wife would be entitled to alimony, the General Assembly could draft a new statute which would specifically state the criteria to be considered in awarding alimony. One such alimony statute which would unquestionably be consistent with the philosophy of the Equal Rights Amendment and with *Article I, Section 11* is § 308 of the Uniform Marriage and Divorce Act. This provision states:

(a) . . .the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

  (1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and
  (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct,

and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
(3) the standard of living established during the marriage;
(4) the duration of the marriage;
(5) the age, and the physical and emotional condition of the spouse seeking maintenance; and
(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

This or any similar alimony statute would be valid under the Equal Rights Amendment, and under *Article I, Section 11*, so long as it were framed in terms of parental function, marital contribution, and ability to pay, rather than sex of the spouse.

The very elements listed are now considered by the Virginia courts in setting the level of alimony but, to date, they have been universally applied in determining the amount of a husband's obligation toward a wife—never vice versa. cf *Klotz v. Klotz*, 203 Va. 677 (1962).

(b) Support of Children.

Va. Code Ann. § 20-107, which provides for alimony is likewise the Code section which empowers the court to provide for support of the children after a divorce: ". . .the court may make such further decree as it shall deem expedient concerning the estate and the maintenance of the parties or either of them, and the case custody and maintenance of their minor children. . . provided to decree support of children or alimony to continue after the death of her father or husband."

Here again, as in regard to alimony, the statute does not directly impose the obligation of support of the minor children upon either of the parties, but the clear inference of intent that it reside with the father is contained within the proviso clause. And here too the Virginia case law universally has accepted the precept that it is the father's duty to continue to provide support after the break-up of the family unit. The cases, in fact, deal not with whether or not the husband shall support the children but upon what level. Guidelines are set down taking into consideration the father's financial ability, the family's station in life, the age and physical condition of the children, new educational requirements. *Mihalcoe v. Holub* 130 Va. 425 (1921), *Bundy v. Bundy* 197 Va. 795 (1956), *Oliver v. Oliver* 202 Va. 268 (1961), *Taylor v. Taylor* 203 Va. (1961), *Gramelspacher v. Gramelspacher* 204 Va. 839 (1964) etc.

The duty is imposed on the father independently of the mother's separate estate, *Heflin v. Heflin* 177 Va. 385 (1941), and is not abrogated by guilt upon the part of the wife. *Stolfi v. Stolfi* 203 Va. 696 (1962)

In the discussion above of this statute as it pertains to alimony, I took the position that both *Article I, Section 11* and the Equal Rights Amendment would require the availability of alimony to a husband as well as to a wife. By like token, the Equal Rights Amendment would require that the obligation of support of minor children be imposed on either party; for reasons of role, ability to earn, separate estate, and not for reason of sex. However, I feel it is less certain that the same requirement would exist under *Article I, Section 11*,

in so far as support of children is concerned. The doctrine of *Archer and Johnson v. Mayes* might well assert a compelling state interest in placing a divorced mother in the position of being able to stay home and care for her infant children, and thus uphold the present case law.

(4) Support of Parents

The statute which requires children seventeen or over to support their parents (*Va. Code Ann.* § 20-88) imposes the obligation to support without reference to sex ("persons" and "parties liable") but accords the right of support in a discriminatory manner. The right to be supported arises only where necessitous circumstances exist and it is a right applicable to a mother, presumably no matter what her age or capabilities; to a father only when inferior or incapacitated.

The present language of the statute accords unequal rights for ostensibly no reason other than sex. Hence it would not meet the requirements of either *Article I, Section 11* or the Equal Rights Amendment. However, an amendment specifying that a mother with the present care of other infant children was entitled to support from her adult children might make the provision acceptable under *Article I, Section 11.*

V. IN RE CUSTODY LAWS:

(1) Natural Guardians

There is no *Article I, Section 11* or Equal Rights Amendment problem here. *Va. Code Ann.* § 31-1 makes father and mother (or the survivor) joint natural guardians of their children with equal legal powers and equal legal rights.

(2) Custody where Parents are Separated

Va. Code Ann. § 31-15 clearly states that custody shall be awarded "as will best promote the welfare of the child" to either parent and further provides that ". . .as between the parents there shall be no presumption of law in favor of either."

The wording of this statute would defeat effectively any presumption in favor of one parent or the other which may have existed at common law or in certain Virginia cases, as discussed more fully below.

(3) Custody after Divorce

Va. Code Ann. § 20-107, which likewise decrees child support and alimony, is the statute which deals with custody upon divorce. It says merely that the court ". . .may make such further decree as it shall deem expedient concerning the estate and the maintenance of the parties, or either of them, and the care, custody, and maintenance of their minor children. . ." Though it gives the court the right to award custody to either parent, it lacks the strong direction of § 31-15, which establishes the welfare of the children as the test, and it does not contain the specific bar against a presumption in favor of one or the other parent.

The succeeding statute (§ 20-108) provides that all decrees of custody and support are subject to review or revision, granting continuing jurisdiction to the courts in matters pertaining to the welfare of minor children after a divorce.

Virginia case law has consistently held that the controlling consideration in custody decisions must be the child's welfare, even while at times asserting the father's primary right to custody (*Meyer v. Meyer* 100 Va. 228 1902) and, at

others, the presumption that the mother is the natural custodian of infant children *(Rowlee v. Rowlee* 211 Va. 689 1971, etc.).

Hence it would seem that, though the language of § 20-107 might be strengthened to more nearly approximate that used in § 31-15, neither the statutory law nor the case law in re custody presents any *Article I, Section 11* or Equal Rights Amendment problem.

VI. IN RE ADOPTION LAWS

Virginia statutory law makes no distinctions on the basis of sex as to persons who may adopt a child. The pertinent statutes of Title 63.1—Chapter 11 of the Virginia Code speak of the "petitioner" without any reference to sex. These provisions would, therefore, be acceptable under *Article I, Section 11* and the Equal Rights Amendment.

However, a problem is presented by the consent provision. *Va. Code Ann.* § 63.1-225. This section provides that in the case of a legitimate child, the consent of both parents is required, whereas in the instance of an illegitimate child, the consent of the mother alone is sufficient. The latter part of this statute would clearly be in conflict with the Equal Rights Amendment since the sex distinction is without valid basis. The legislature might amend the provision to require the consent of both of the unwed parents. A more practical alternative, however, would be to give the right of consent to the parent who has custody of the illegitimate child. Because this provision would be based upon function rather than sex, it would conform to the requirements of *Article I, Section 11* and the Equal Rights Amendment.

An additional problem is presented by *Va. Code Ann.* § 63.1-232 which refers in part to the marriage of the mother of an illegitimate infant to a man who desires to adopt her child. No concurrent provision is made for the father of an illegitimate infant in a similar situation. The standards of both *Article I, Section 11* and the Equal Rights Amendment would dictate an extension of this statute.

VII. IN RE USE OF NAME

While it is the well-nigh universal custom in Virginia for a woman to adopt her husband's surname upon marriage, there is no constitutional nor statutory requirement to this effect. At common law she was entitled but not compelled to do so. Nonetheless, there are several provisions which reflect an assumption that she will.

Article II, Section 2 of the Constitution of Virginia states:

> "Applications to register shall require the applicant to provide under oath the following information on a standard form: full name, including the maiden name of a woman, if married;. . . "

In an opinion letter to Joan S. Mahan, Secretary of the State Board of Elections, dated 6 June 1973, the Attorney General of Virginia affirmed that there was no requirement in this state that a married woman use her husband's surname. However, he went on to say that *any* (emphasis his) public use of the husband's surname would, as a matter of law, effect a change of name; any return to use of a maiden name as the legal name would require proceedings under *Va. Code Ann.* § 8-577.1. He further said that Article II, Section 2 merely reflects a presumption that a woman will assume her husband's name, a presumption which he regards as rebuttable.

However, the presumption is further underscored by *Va. Code Ann.* § 24.1-51 which states, in part, "Whenever the name of any registered voter shall have been changed, either by marriage or order of court, or otherwise. . ."

Va. Code Ann. § 55-106.1 provides that upon marriage a woman shall be entitled to have "a change of name" admitted to record in the clerk's office of any jurisdiction where she owns land.

Article I, Section 11 would not dictate necessarily any change in the present law. Indeed, it would probably sustain, under the compelling state interest doctrine, a law requiring all family units to use the husband's surname.

The Equal Rights Amendment would most likely require legislation specifically permitting a woman to retain her maiden name and specifically denying the presumption that she take her husband's name.

SUMMARY

IN RE THE EQUAL RIGHTS AMENDMENT:

Changes which would be required in Virginia statutory law in the realm of family relations by ratification of the Equal Rights Amendment as the 27th Amendment to the United States Constitution are minimal. In fact, major amendments have recently brought the law substantially in line with the doctrine of equality of rights for each sex. Further changes needed are essentially those to conform procedural statutes to the substantive ones.

However, Virginia case law has not kept up with Virginia statutory law in this section of domestic relations. Changes which would be required in judicial interpretation are more compelling. The common law concept, accepted by the Virginia courts, of the family unit based upon man as head of household and woman as helpmate and mother would have to be replaced by acceptance of a pattern of family living in which husband and wife are equal partners, fulfilling varying roles according to individual choice. Such change would express itself primarily in case law in re alimony, and support of husband, wife, and children.

It is clear, however, that the Virginia courts are already moving in this direction, and new attitudes are creating new law.

IN RE *ARTICLE I, SECTION 11*:

As far as the prohibition against discrimination based upon sex contained in *Article I, Section 11* of the Virginia Constitution is concerned, here likewise the problem in the realm of family law is basically one of conforming procedural statutes to more properly reflect the already enacted provisions of the substantive statutes. There is little sex discrimination left in Virginia statutory family law.

As far as the case law is concerned, unless the holding of *Archer and Johnson v. Mayes* is overturned, the evolution toward acceptance of new attitudes and concepts of family responsibility will be inevitable but slow. It will certainly come, but the demand for dramatic or immediate change will not arise under *Article I, Section 11* as it would under the Equal Rights Amendment.

ADDENDUM TO SUMMARY

It is to be noted that those amendments to Virginia law in the realm of domestic relations, which would be required under *Article I, Section 11* and under the Equal Rights Amendment, would be in the nature of provisions imposing further obligations upon women rather than according women further rights. Several present provisions in regard to support and enforcement are discriminatory against men, not against women.

PART IV

The Equal Rights Amendment: Its Effect on the Virginia Criminal Law and on Military Law Affecting Virginians

As part of the Task Force Report commissioned by the General Assembly to determine the effect on Virginia Law of ratification of the Equal Rights Amendment to the United States Constitution (hereinafter E.R.A.), the following discussion will focus on the effect of E.R.A. on the criminal laws of Virginia and on military laws of Virginia and federal military laws affecting Virginians.

Scope

The criminal law section of this discussion will deal only with those criminal statutes which might require modification in the event of ratification of the E.R.A., or laws which are suspicious in light of the philosophy of the E.R.A. All the criminal statutes of the Virginia Code were reviewed, except criminal provisions in other areas of the law, such as domestic relations, which are being discussed in other reports. Laws dealing with juveniles are not considered, as they are being dealt with in the domestic relations report. However, provisions of the Code dealing with prisons are included as a subsection in the criminal law discussion.

As most of the Virginia law regulating the state militia or involving military personnel has been revised by the General Assembly to be sex-neutral, the discussion in that section will be primarily a review of the legislative history and pertinent literature regarding the predicted effect of the E.R.A. on the military establishment. However, some statutory revisions appear to be necessary.

Introduction

Prefatory to reviewing specific statutes, it will add perspective to discuss (1) the goal sought to be achieved by the E.R.A. (2) the standard of review courts are likely to apply in cases involving the E.R.A., and (3) the exceptions to the prohibitions mandated by the E.R.A.

Purpose. What the E.R.A. seeks to do is to prohibit classifications by law or other governmental action which are based solely on a person's gender. This would be achieved by "an immediate mandate, a nationally uniform theory of sex quality." [1] The allowed purpose is to legislate, not sameness,[2] but equality, not to eliminate sexual distinctions from society, but to recognize that the law should not be based on irrational and unjust prejudices which deny full and equal opportunity for personal development for every citizen.

The assumption underlying the E.R.A. is that justification for a law, discriminatory in effect, will not be accepted if based upon antiquated notions of a "woman's role" in society; that role is for each woman to decide. Succinctly stated, characteristics which are valid for some but not all members of a particular gender, would, under the E.R.A., not form a valid basis for differing legal treatment of the sexes.[3] Physical characteristics which are unique to a particular sex, however, might be a permissible basis for classification.[4]

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1. Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L. J. 871 (1971).

2. *See* SEN. RPT. NO. 92-689, p. 12.

3. *Supra* note 1 at 889.

4. See discussion of exceptions to the E.R.A., *infra;* and *supra,* note 1 at 893.

Most laws which would be invalidated if the E.R.A. is passed would fall because of being either over- or underinclusive. Examples of overinclusive laws are those which sweep into their coverage persons who do not possess the relevant characteristic which is the touchstone of the statute. This happens when all of one sex are included in a classification and the other is excluded.[5] Laws which may be considered underinclusive are laws which extend, for example, protection to one sex when the other sex needs similar protection. The most obvious example here is that of statutory rape or seduction laws. Young or naive males need protection just as do young women.

When a benefit is given or withheld or a penalty assessed to persons of one gender and not another merely on the difference of sex, such a law would be invalidated, subject only to the possible exceptions discussed below. If there is a recognizable interest which the state wishes to protect, it must act fairly and treat the sexes as legal equals, as persons and not as men and women. "Equality of rights means that sex is not a factor." [6]

Standard of review. The central question is whether the ERA would be interpreted by the courts as subjecting sexual classifications to "strict scrutiny" (and therefore sustainable only upon a finding of a "compelling" governmental interest (a standard rather like that applied in Fourteenth Amendment cases involving racial classifications) or whether it would be read as laying down a more absolute prohibition on sexual classifications.

The legislative history is not clear. The Senate Report [7] states that were the Supreme Court to hold that sex discrimination "is inherently suspect and cannot be justified in the absence of a 'compelling and overriding state interest,' then part of the reason for the Amendment would disappear." [8] Such language indicates a less than absolute ban on sex-based classification. Note that the quoted language says only that "part" of the reason for the E.R.A. would disappear. It is passages like that which help create the opacity of the Amendment's legislative history. However, the minority views of Senator Ervin predict an interpretation which establishes an absolute prohibition of sex-based classification, rather than a compelling state interest test for purposes of judicial review.[9] Senator Ervin clearly states his opinion that the E.R.A. would establish a prohibition of categorization by sex. He quotes testimony of Professors Freund and Kurland in support of his interpretation.[10] The President's Task Force on Women's Rights and Responsibilities also concluded, favorably, that the E.R.A., would "make unconstitutional legislation with disparate treatment based wholly or arbitrarily on sex." [11]

The interpretative article most cited by both proponents and opponents of E.R.A. is the *Yale Law Journal* article supporting the E.R.A.[12] Many think it the best guide to an interpretation of the Amendment.[13] On the question of

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5. *Supra* note 1 at 890.
6. *Supra* note 1 at 892.
7. *Supra* note 2 at 10.
8. *Ibid.*
9. *Id.* at 33-36.
10. *Ibid.*
11. *A Matter of Simple Justice,* THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, April 1970, p. 5.
12. *Supra* note 1.
13. *Supra* note 2 at 35-36; see also Note, *The Civil Rights Amendment and the Military,* 82 YALE L. J. 1533, 1536 (1973).

judicial review, the authors are unequivocal: the E.R.A. would impose an absolute ban on sex-based classification.[14] Professor Freund, an opponent of the E.R.A., also believes the Amendment would prohibit any classification based on sex.[15] He bases his views on the writings of the Amendment's sponsors and advocates and the failure of the Congress to accept any amendment of the E.R.A. which would have rephrased it along the lines of the Fourteenth Amendment.[16] Adding the open-ended language of the Amendment itself to this history and literature suggests the conclusion that an absolute prohibition on sex-based classification would be the standard for judicial review.[17]

In reviewing statutes, courts can apply alternative remedies. If the law is underinclusive, it can be expanded to include all affected; if overinclusive, it can be narrowed. Finally, the statute can be stricken in its entirety. The latter action is that which most likely will be applied in criminal law cases. Because of the strict construction given criminal statutes and their penal nature, criminal statutes are not extended. Since most laws violative of the E.R.A. are underinclusive, the usual result will be "judicial repeal." In a few cases of overinclusiveness, the law can be narrowed. But where this would obviously negate the will of the Legislature, the court may strike down the entire law.

Exceptions. The E.R.A. would apparently not disturb a law directed at only one sex when the classification is based on an unique physical characteristic of the sex included in the legislation.[18] This may be viewed as an exception to the E.R.A. or, better, as a situation which is not within the ambit of the Amendment. By the latter view, a legislature that bases legislation on unique physical characteristics is not using sex as a measure for classification; thus the E.R.A. is inapplicable. An example of such legislation is found in Va. Code Ann. §§ 18.1-213-215 (1973). These sections prohibit, *inter alia*, persons over eighteen from fondling the breast of a female child. The sections generally deal with sexual offenses against children, and protection is given both males and females. However, since only females have breast development of such a nature to require protection from sexual offenses, there would appear to be no discrimination.

A second area in which proponents of the E.R.A. believe an exception to the absolute prohibition exists is in the segregation of personal facilities, such as toilet facilities and sleeping quarters. This exception is claimed to exist because of the constitutionally protected right of privacy decreed by the United States Supreme Court in *Griswold v. Connecticut.*[19] This belief may well be misplaced, however; if so, a right of privacy such as decreed in *Griswold* would not apply to segregation of facilities as proponents of the E.R.A. adduce. Moreover, it is possible that as Senator Ervin has asserted,[20] constitutional

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14. *Supra* note 1 at 873, 890, 892; *see also* Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RTS. — CIV. LIB. L. REV. 225, 229 (1971), where Professor Emerson states: "(C)lassification by sex . . . ought *always* to be regarded as unreasonable." (Emphasis in original). He excepts the "unique physical characteristic" case. *See also* Note, *The Sexual Segregation of American Prisoners*, 82 YALE L. J. 1229, 1255 (1973), where the conclusion is made that an absolute interpretation of the E.R.A. was intended by the Congress.

15. Freund, *The Equal Rights Amendment Is Not the Way*, 6 HARV. CIV. RTS.—CIV. LIB. L. REV. 234, 237 (1971).

16. *Ibid.*

17. *Id.* at 238; *see also* Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 HARV. CIV. RTS. — CIV. LIB. L. REV. 244 (1971).

18. *Supra* note 1; *see also supra* note 2 at 12.

19. 381 U.S. 479 (1968); *see also supra* note 1 at 900.

20. *Supra* note 2 at 46.

construction would require the absolute nature of the E.R.A. to override the doctrine of privacy. The primary reason for questioning the privacy argument, however, is a possible confusion by its proponents of the constitutional right of privacy and the tort concept of privacy; and a concomitant misreading of *Griswold*. As this argument must be met first in regard to prisons, and as it has no particular impact on the criminal law as such, its discussion will be deferred to the subsection on prisons.

Criminal Law

Introduction. The effect of the E.R.A. on the criminal laws of Virginia would be most noticeable in the area of sexual offenses. In other areas, the law generally makes men and women equally liable for criminal activity; there are exceptions, however, which will be noted later. Although Virginia does not have the number of sexually discriminatory criminal laws that certain other states have,[21] it does have discriminatory laws as will be specifically discussed in the following section on "statutes."

The thrust of the E.R.A. in the criminal law field would be to equalize both the protections given and the activity punished by the law. It would invalidate laws which are based upon unreasonable and unfounded stereotypes, for instance, the laws of seduction. Furthermore, and most importantly, it would extend to men the same protection from certain acts as now given women, for example, equal protection from sexual assaults such as rape.

Criminal laws which are premised upon sex-discriminatory foundations would not be permitted to stand. As courts generally do not extend criminal law classifications, these laws would be invalidated.[22] Such construction is applied so as to avoid the judicial creation of new crimes.[23] Applying this rule of statutory construction and the principles of the E.R.A., one can conclude that the following statutes could well be invalidated.

Statutes

Va. Code Ann. § 18.1-44 (1973 Supp.). Rape; carnal knowledge of a child under sixteen years of age, or mentally ill, etc.

Rape. The rape laws are obvious problem areas insofar as the effect of the E.R.A. is concerned. Under Virginia law, rape can only be committed by a man on a woman. Assuming the absolute test of review, this would likely be an impermissible classification. The central question concerns the precise act which is forbidden. Although the statute does not require penetration, case law does. *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968). In *McCall v. Commonwealth*, 192 Va. 422, 65 S.E.2d 540 (1951), the court held that in a prosecution for rape, the State must prove "an actual penetration to some extent of the male sexual organ into the female sexual organ." 65 S.E.2d at 542. Thus, Virginia law is clear that rape requires penetration of the female organ by the male sexual organ and that any other kind of penetration, *e.g.*, instrument, appendage, is not rape. It appears, then, that protection of the female genital organ is not the purpose of the statute. Such rationale has been suggested as a possible means of upholding current rape laws.[24] However, that argument is contrary to the philosophy of the E.R.A. as giving special preference to women. Even though the sexual apparatus of men and women is different, in principle protection should be guaranteed to both or neither.

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21. *See, e.g., supra* note 1 at 959, where the Michigan law, exacting different penalties for men and women for the same crime, is discussed.

22. *Id.* at 915 and 954.

23. *Id.* at 915.

24. *Supra* note 1 at 956.

Virginia's rape law is designed to prohibit unwanted and forceable sexual intercourse. However, by granting such protection only to women, the statute is underinclusive. Men can also be the victims of such a sexual assault and under E.R.A. should be granted equal protection. The current rape law is not designed to prevent unwanted pregnancy, as the fact of no pregnancy, or no emission or sterility is no defense.[25] Therefore, no argument along such lines is possible. This is not to say that such acts cannot be punished under the E.R.A. It is only to point out that the rape statute should be revised to prohibit sexual assaults on any person, such as has been proposed in Wisconsin.[26]

Statutory rape I. A further problem with the Virginia rape statute is that it protects females under disabilities (*e.g.*, inmates of institutions, mentally-ill, etc.) but not males even though it is obvious that males in similar situations also need protection. This is commonly known as statutory rape, such persons being legally deemed incapable of giving, understandably and freely, their consent to the act. A revision of the statute could prohibit any sexual activity between a person in such circumstances and any other person, pursuant to the state's general police power and power to protect the health and welfare of such persons. Such a revision would include all such persons, male and female.

In any such revision, the punishment prescribed must be the same for male and female. At present, if a female commits a sexual assault on a male, with forced sexual intercourse, the punishment would be for an assault and battery. In reverse circumstances, the man would be punished for rape and given life imprisonment. As it is the unwanted sexual intercourse which is prohibited, an equalization in punishment should be made.

Statutory rape II. In addition to the above discussion, this section also forbids sexual intercourse between a male and a female who is under sixteen years of age, regardless of her consent. A female of such age is legally deemed incapable of consenting. In these cases it is not only the unwanted sexual acts which are prohibited but all sexual acts. Thus, the purpose of the law is different from that in other rape cases. In statutory rape cases, the state has made a paternalistic judgment that a female under sixteen should be protected from sexual intercourse until she is old enough to exercise some wisdom in her judgments. Regardless of the merits of such a law, the fact is that any such law would likely not pass muster under the E.R.A. unless it is extended to cover males.

This action may be accomplished through a provision added to sections 18.1-213 and -215 making it a crime for any person to have sexual intercourse with any child under fourteen years of age. It should be noted that those sections forbid certain sexual acts (other than sexual intercourse) with children under the age of fourteen. It now appears inconsistent that one may commit all of the sexual acts prohibited by these sections on a child between fourteen and sixteen without criminal responsibility, but sexual intercourse with one in that same age group is punishable by life imprisonment pursuant to § 18.1-44. The "eighteen years of age or over" requirement for one liable for acts prohibited in these sections. (§§ 18.1-213, -15) can be waived for acts of sexual intercourse or retained for them, depending on the legislative will; however, the age standard should be the same for all the proscribed acts. The further advantage of adding such a provision to these sections is that they apply indiscriminately to males and females, forbidding as they do, any *person* from committing the acts proscribed.

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25. Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968); *supra* note 1 at 955, note 205.

26. Wisconsin Legislative Council, REPORT TO THE 1973 LEGISLATURE, p. 15; *see also*, Note, *Sex Discrimination In the Criminal Law: The Effort of the Equal Rights Amendment*, 11 AM. CR. L. REV. 469, 480 (1973).

Va. Code Ann. § 18.1-14 (1960 Repl. Vol.) Causing or encouraging children under eighteen years of age to commit misdemeanor, etc.

In conjunction with the purport of the second title, the statute provides a limitation to its thrust. When the offense charged pursuant to this Section consists of having or attempting to have sexual intercourse with a female under the age of eighteen, her previous unchaste character, if any, or the fact of a prior marriage are permitted to be shown for purpose of mitigation. There is no apparent reason for limiting such evidence of mitigation to cases involving sexual intercourse with a female under eighteen years of age. Such evidence is just as applicable to males. It appears this provision is a statutory recognition and perpetuation of the double standard of morality for men and women. The E.R.A. would require "elimination of such discrimination." Either the provisions would have to be made applicable both to males and females or be repealed.

Va. Code Ann. § 18.1-45 (1960 Replac. Vol.). Effect of subsequent marriage to female between fourteen and sixteen.

This statute would require revision consistent with the revision suggested for § 18.1-44. It applies only to females, and though meritorious in intent, it deprives women of the equality envisioned in the E.R.A. An example of this is the requirement that the male support and maintain his wife until she reaches sixteen. This deprives the female of the choice to work and to support her husband (while he is in school, for instance). The statutory perpetuation of this antiquated "role of women" departs from the principle of E.R.A. The state may not have a strong interest in promoting marriage of persons of such young ages, given the divorce rate in such age categories and the attendant difficulties of marriage for persons so young. However, under an absolute standard of review, such balancing considerations would not be allowed. If the intent of the statute is to legitimize sexual activity between consenting young people, it should be broad enough to include both males and females.

Va. Code Ann. § 18.1-46 (1960 Replac. Vol.). Effect of female being of bad moral repute or lewd.

This section would need revision in light of that suggested for § 18.1-44. Its scope would have to be expanded to include male and female.

Va. Code Ann. § 18.1-47 (1960 Replac. Vol.). Depositions of female witnesses in cases of rape and attempted rape.

In line with the revision of § 18.1-44 to cover any person who is the victim of a sexual assault, this section should provide that its deposition procedure should likewise apply to any person who has been assaulted and is a witness. As it stands, the statute reflects the concept of women as being less emotionally stable and generally psychologically weaker than men. The E.R.A. would stand in the way of basing a statute on such a concept.

Va. Code Ann. § 18.1-194, 204-211 (1960 Replac. Vol.). Prostitution and related statutes.

Although the statute defining prostitution (§ 18.1-194) is, on its face, sex-neutral, and no significant judicial gloss has arisen which would impair such neutrality. See *Tent v. Commonwealth*, 181 Va. 338, 25 S.E.2d 350 (1943), its enforcement has been primarily directed against women. The elimination of such discriminatory enforcement can be secured through directives within the executive branch of government and no statutory revision would be needed. However, since the reality of the historical situation clearly manifests the fact that women comprise the vast proportion of prostitutes who have been subjected to sanctions under the law, and men comprise the vast proportion of

customers not subject to legal sanction, there is a substantial argument made that in seeking to eliminate or to control prostitution, the law should include both the prostitute and the customer. A statute directed only at the prostitute, in light of the realities, may be seen as being invidiously discriminatory against women in a situation where both parties willfully join in the illegal act. Only § 18.1-195 could affect men who frequent prostitutes, but then only if they do so in a "bawdy place". Other acts of prostitution result only in the punishment of the prostitute. Thus broadening of the statute would include both the prostitute and the customer within its purview.

Va. Code Ann. §§ 18.1-204 through 18.1-211 (1960 Replac. Vol.).

These sections [27] may be discussed as a group, as all are similar in import and defect. They are all suspect classifications insofar as they designate women for special concern in circumstances where males may need the same protection. Each of these sections seem to assume that only females need the protection of the law and that only males will commit certain of the prohibited acts, *e.g.*, § 18.1-207 (placing or leaving wife for prostitution). These sections suffer from underinclusiveness and may be brought into compliance with the E.R.A. by a revision broadening in each case the classification so as to include males or to make the sections sex-neutral.[28] The psychological and sociological considerations which form the basis of such classification is founded upon the questionable grounds of the inherent weakness and vulnerability of all women to coercion, suggestion, and the will of all men. The writing into law of such a stereotype would violate the primary thrust of E.R.A.

Va. Code Ann. § 19.1-256 (1973 Supp.). Slander and libel.

The first sentence of this section makes it a crime for a man to defame a chaste woman in terms imputing to her acts not "virtuous and chaste". There is no similar protection for the reputation of men. This statute is underinclusive and fails to recognize the fact that women or men may defame other women. If the character of the woman is the thing to be protected, why not punish women for defaming other women? Obviously, the statute harkens between back to notions of chivalry. However, it fails to give men the same protection as women from defamatory comments, and it does not punish women who defame other women by comments decreed defamatory if pronounced by a man and directed to a woman.

The last sentence of the statute prohibits the use of "grossly insulting language to any female of good character or reputation." This prohibition is not restricted to males, but assumedly females could also be convicted. Again, however, women are singled out for special treatment for reasons not founded on a rationale compatible with E.R.A. Men of similarly good character and reputation receive no such protection.

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27. 18.1-204 taking, detaining, etc. female for prostitution or consenting to it.
18.1-205 placing female for immoral purposes.
18.1-206 receiving money for procuring female.
18.1-207 placing or leaving wife for prostitution.
18.1-208 receiving money from earnings of female prostitute.
18.1-209 retaining female in house of prostitution for debts.
18.1-210 venue where female transported for purposes of 18.1-204-212.
18.1-211 competency of female to testify regarding 18.1-204-212.

28. *Supra* note 1 at 964-65; *see also* C. Rosenbeet and B. Pariente, *The Prostitution of the Criminal Law*, 11 AM. CR. L. REV. 373 (1973). The authors suggest a constitutional attack on all prostitution laws on grounds of equal protection and violation of the right to privacy.

Va. Code Ann. §§ 18.1-38 and 39 (1973 Supp.). Abduction with intent to extort money or of a female for immoral purpose; threatening, attempting, or assistance in such abduction.

Section 18.1-38 deals with, *inter alia*, "abduction against her will of any female with intent to defile her, and abduction of any female under sixteen years of age for the purpose of concubinage or prostitution. . ." Section 18.1-39 deals with the threatening, attempting, or assisting in such acts. The statutes are underinclusive by failing to extend to males and to male children such protection. E.R.A. would require revising the statute to be sex neutral so as to extend protection to all persons vulnerable to such prohibited acts. The statutes also discriminate in the punishment ascribed for abduction pursuant to the above statute and abduction generally. For instance, the abduction of a male child for the purpose of sexual abuse is punishable under § 18.1-37 by imprisonment for one to twenty years. Comparatively, abduction of a female child for similar immoral purposes is punishable by death pursuant to § 18.1-38. The harm to the male child may be just as or more severe, but punishment is less merely because of the victim's sex. Such discrepancy in protection and punishment would be prohibited by E.R.A.

Va. Code Ann. §§ 18.1-41, 42 (1960 Repl. Vol.). Seduction of female, etc.

This statute makes it a crime for a man to seduce a previously chaste woman under promise of marriage, or for a married man to seduce any unmarried female of previously chaste character. Such a statute would fall before the E.R.A. because of the underlying social and psychological stereotypes at play. The statute is antiquated and potently discriminatory in its underinclusiveness and irrational classifications. No protection is offered for previously chaste men from women, whether single or married. The presupposition that only men will seduce women is not based in fact, and punishing only men for seduction is discriminatory.

Section 18.1-42 may create a discriminatory legal preference by denying a conviction for seduction when the only evidence is the testimony of the woman. Such a preference may be seen as denigrating the credibility of women by requiring corroborative evidence of the woman's charge. By statutorily giving greater weight to the man's denial to the woman's charges, the statute arguably may effect a discriminatory standard.

Prisons

The major impact E.R.A. will have on the prison system is to prohibit separate institutions and the concomitant discrepancy in treatment, facilities, and programs which are attendant to such segregation.

Virginia still maintains separate penal institutions for men and women. Va. Code Ann. § 53-76 (1972 Replac. Vol.). Such segregated institutions would violate the E.R.A. Segregation of institutions on the basis of sex harkens back to segregation based on race. As with race, separate-but equal sexually segregated institutions would not be allowed.[29] With a dual system of institutions comes a dual system of values and treatment. In such a situation, "History and experience have taught us that . . . one group is always dominant and the other subordinate." [30] Although the necessary elimination of separate institutions is conceded by both proponents and opponents, the effect of the E.R.A. within the resultant integrated facility is very much in controversy. It is here that the privacy argument becomes crucial.

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29. Note, *The Sexual Segregation of American Prisons*, 82 YALE L. J. 1229, 1261, 1264 (1973).

30. *Supra* note 1 at 874.

Griswold v. *Connecticut*,[31] is the touchstone for all constitutional privacy cases. In that case the defendants, two doctors, were convicted of violating the Connecticut birth control law by giving medical advice regarding contraceptive methods to married couples. The Court held the statute unconstitutional as being a violation of the privacy guaranteed by certain of the Bill of Rights and the penumbra surrounding them. However, the privacy so protected may not be as broad a concept as the proponents of the E.R.A. conceive.

The decision was founded on the First, Fourth, Ninth and Fourteenth Amendments. The Fourteenth, of course, merely was used to apply the other Amendments to the State. The Ninth Amendment, the Court stated, stressed that there are other fundamental rights held by the people which are not specifically enumerated in the Bill of Rights. These rights are to be determined by reference to the "traditions and collective conscience of our people" [32] and with our "experience with the requirements of a free society." [33] A right of marital privacy was asserted to be such a right.[34] A broader right was not asserted. However, at the heart of the opinion were the rights emanating from the First and Fourth Amendments.

One prong of the decision was the right of association which had been established by earlier opinions as inhering in the First Amendment's freedom of speech. Emanating from this right is a zone of privacy not to be violated by the government. Marriage was held to be an association, the privacy of which is protected by the First Amendment. Marriage, said the court, "is an association for as noble a purpose as any involved in our prior decisions." [35] As such, the marriage relationship is protected from invasion by the government.

Another prong of the decision is the Fourth Amendment's prohibition of unreasonable searches and seizures. Because the Connecticut statute banned the use of contraceptives, the police may well be required to invade the marital bedroom to secure evidence of the crime.[36] Such action is reprehensible and "repulsive to the notions of privacy surrounding the marriage relationship." [37] It is into this zone of privacy, created by the Fourth Amendment, that the government is constitutionally forbidden to go. Thus a penumbra of rights of privacy created by specific constitutional guarantees compelled invalidation of the statute.

The privacy concepts recognized by the Court in *Griswold* were linked to specific guarantees of the Bill of Rights.[38] Without a specific guarantee in the Constitution, the Court has not recognized a general right of privacy. Whether, therefore, a privacy exception may be read into E.R.A. must be only a legal hypothesis.

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31. 381 U.S. 479 (1965).

32. Griswold v. Connecticut, *supra*, at 499 (Goldberg, J., concurring).

33. *Ibid.; see also* Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

34. Griswold v. Connecticut, *supra*, at 499 (Goldberg, J., concurring). *See*, Eisenstadt v. Baird, 405 U.S. 438 (1972), where in *dicta*, the Court extended the privacy concept of *Griswold* to unmarried persons insofar as intimate decisions, such as whether or not to bear children, are involved. It was intimate relationships such as these that *Griswold* protected and not a general privacy concept.

35. 381 U. S. at 486.

36. 381 U.S. at 485-86.

37. *Ibid.*

38. J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 928 (1973).

In *Griswold*, the Court, in support of a right of privacy emanating from the Fourth Amendment, cited the following quote from *Boyd* v. *United States*,[39] holding that the essence of the offense of violating one's Fourth Amendment rights is

> the invasion of his indefeasible right of personal security, personal liability and private property, *when that right has never been forfeited by his conviction of some public offense.*" [40]

In regard to prisoners, to what degree have they forfeited the rights of privacy otherwise attaching to private citizens? There has been a flurry of litigation regarding prisoners' rights, but no definitive statement has been made. However, it is not radical to presume that prisoners maintain a minimal level of human dignity which is constitutionally protected and which will support a right of privacy.

The concept of privacy proposed by advocates of the E.R.A. is closer to the tort concept of privacy which has developed in the United States.[41] This concept of privacy is based upon dignity; in fact, privacy may be seen as a shield of human dignity opposing the notion of human fungibility which lies below the surface of authoritarianism. This notion of privacy may well reside in the Ninth Amendment and in the concepts of liberty enshrined in the Fifth and Fourteenth Amendments; however, the Supreme Court has not specifically so held.[42]

If the privacy asserted by the proponents of the E.R.A. is of the kind described above, then its operation is broader than assumed and can not be limited to prohibition of sexual integration. A constitutional right of privacy founded on human dignity is an individual right and operates vis-a-vis other individuals and the government not just vis-a-vis individuals of the opposite sex. However, it is just this kind of privacy which is denied prisoners by the nature of the penal institution.[43] Two aspects of present penal life display this deprivation: regimentation and forced exposure.[44] Regimentation manifests the idea of human fungibility, so that "men can be moved according to an umambiguous time schedule through the sequence of points in a daily activity cycle." [45] Prisoners are always in the presence of other prisoners or in the sight of authorities; there is no cloak of privacy which he can pull around himself.

Forced exposure is evident in mass denudation rituals, exposure before spectators (prisoners and guards), exposure during performance of bodily functions (open shower and toilet facilities), and constant surveillance.[46] The prison eliminates our need of "social distance",[47] and forecloses the idea of individuality and individual rights. "Rights can not be imposed upon a system built around the presumption of their absence." [48] Such is the existence of privacy, in the general sense, in today's prisons.

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39. 116 U.S. 616 (1866).

40. 381 U.S. at 484, n. (emphasis supplied).

41. *See, e.g.*, E. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

42. York v. Story, 324 F.2d 450 (9th Cir. 1963), where the Court of Appeals found a general right of privacy residing in those Amendments.

43. B. Schwartz, *Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison*, 63 J.C.L. AND P.S. 229 (1972).

44. *Ibid.*

45. *Ibid.*

46. *Id.* at 231-232.

47. *Id.* at 231.

48. *Id.* at 258.

Compare those conditions with this statement:

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity." [49]

Also, the Ninth Circuit Court of Appeals, in *York v. Story*,[50] stated: "We can not conceive of a more basic subject of privacy than the naked body." This was a case involving a complainant of a crime, not a prisoner. Were these concepts to be applied to the circumstances described above, the prison procedure would be drastically revised. This may well be a desired change, but the point is that short of giving such a right of privacy to every prisoner, giving it to sexually classified groups might run afoul of the E.R.A. since the right to be protected, privacy, applies to all individuals vis-a-vis all other individuals and not on a female-male classification. The right is an individual right and can not be violated merely because those who view the violation are members of the same sex.

Thus, there has to be a dramatic development in constitutional law before a general right of privacy can be established as being a constitutional right. Then, such a right will require the sanctification of the privacy of all persons vis-a-vis all others and not just in terms of the opposite sex. Finally, such a right will have to be extended to prisoners and a decision made as to the degree of liberty lost by imprisonment. If all liberty is lost, then even existing opinions [51] which might have found a basis for the required extension will not be helpful. In short, the right of privacy claimed by advocates of the E.R.A. is not a reflection of existing law and may or may not be accurate prophecy.

It is clear, then, that the E.R.A. would require sexually integrated prisons but not so clear as to the degree of integration required within each institution. However, it seems that a prison could invoke regulatory schemes which keep inmates separate for certain purposes. As the prison is required to protect the health and welfare of prisoners,[52] steps could be taken so as to minimize the probability of injury. Such regulation would have to be grounded on probable facts and be limited in operation to circumstances where injury is quite probable. Again, such regulations must be designed to protect both sexes, for instances, protection from heterosexual or homosexual assaults. Therefore, the simple segregating of the sexes for sleeping or bathing purposes would be insufficient and would be discrimination in the guise of protection. All prisoners are entitled to protection, not just one sex from another.

The equalization of facilities, treatment, and programs for all prisoners, regardless of sex, raises the question of whether to upgrade all institutions to meet the highest level now in operation or to decrease the highest level to a medium level. The state can do either, though the E.R.A. is intended to increase benefits given one group to all groups.[53] The economic burden involved

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49. *Supra* note 41 at 1003.

50. 324 F.2d 450, 455 (9th Cir. 1963). In this case the Court allowed a claim for relief for violation of civil rights of a woman whose nude body was photographed by police when she reported an assault. The officers circulated the pictures among the personnel. The Court felt this to be a deprivation of liberty as protected by the Fourteenth Amendment.

51. *E.g.*, York v. Story, *supra* note 50.

52. *See* Note, *The Sexual Segregation of American Prisons*, *supra* note 29 at 1261 and cases cited therein.

53. *Id.* at 1263.

in increasing benefits given women may be too great to justify such increase, therefore, a decrease in benefits may result in the smaller group. If men, being the larger group, have benefits not enjoyed by women, it would be little problem to extend such benefits.

Prisons would still be able to offer certain programs and use certain treatments which are not available to all prisoners. However, the method of classifying prisoners for purposes of such programs must be sex-neutral and based on otherwise reasonable principle of classification.[54] These classification standards would have to be applied on an individual basis to avoid the group classification syndrome which would automatically classify all women the same, e.g., as minimal security risks.[55] Psychological tests and other classification tests must be reviewed so as to eliminate any sex-bias which may be inherent in them.

A final classification problem is the question of placing one woman in an otherwise male institution, should that situation arise.[56] In such a case, the Eighth Amendment might have application.[57] The problem here would be the deprivation of the womens right to have relationships with other women and a possible exclusion of the woman from programs of activities which appeal to or are designed for men. It seems that in such a situation, the woman could be placed in the institution next-best suited as per her classification status. Such action could be justified on the Eighth Amendment and also as being applied to both men and women in similar circumstances and thus not an illegally discriminatory act.

The major focus of post-E.R.A. concern in prison administration in Virginia is in the enforcement of nondiscriminatory laws and regulations. Changing laws is easier than changing attitudes and long standing practices of sexual discrimination. This is especially true in the work release program.

Statutes. As was noted earlier, Va. Code Ann. § 53-76 (1972 Repl. Vol.) creates separate penal institutions for men and women. Such statutory discrimination must be eliminated by consolidation of the institution. Va. Code Ann. § 53-100 (1972 Repl. Vol.), states that all male prisoners will constitute the Bureau of Correctional Field Units. This seems to have been an oversight in the 1973 attempt to neutralize these Code sections. However, all such units will have to be sex-neutral in their constituency. Sex-neutrality has actually been accomplished in the above unit by Va. Code Ann. § 53-103 ( ), which eliminates the word "male" and retains "persons". Section 53-100 must be revised in such manner.[58]

Military

Military law affecting Virginians is of two kinds: federal and state. The state statutes regarding the State Militia have been revised to eliminate sex-biased laws; however, there are exceptions to this, as will be noted. The effect of the E.R.A. will be on the enforcement of these sex-neutral laws and the attitudes within the various branches of the militia. Thus, the effect of the Amendment on Virginia statutory law will be slight. The effect on regulations and the structure of military units could be far-reaching.

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54. *Id.* at 1964.
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*
58. Section 53.79 requires the keeping of one male and two female bloodhounds by prisons. Such blatant discrimination must end, and with it the presumption that females are nosier than males.

A discussion of the effect the E.R.A. will have on the national military establishment will include the effect on state militia, especially because the present posture of Virginia law eliminates any need of a particularized treatment. The following discussion will, then, summarize what the legislative history and available literature indicate that effect to be.

Enlistment. Since the draft has been eliminated, no discussion is required except to note that in the event of its being reestablished, the draft would have to apply equally.[59] The major problem now is in enlistment and the varying, discriminatory standards applied.

The first bar to equality in the military is the limitation placed on the number of women in the military.[60] A limitation on the general military population is advisable, but an arbitrary limitation on women violates the intent of the E.R.A. Although there are a variety of reasons for this discrimination, the most prevalent one is that women are inferior to men for military purposes.[61]

Secondly, enlistment standards such as physical, psychological, intellectual, and educational requirements, are more restrictive for women than men.[62] These standards will have to be revised so as to be sex-neutral. The restrictions on married women, with dependents, will have to be eliminated.[63]

Duty assignments. The organizational structure of the military will have to accommodate women in all duty assignments on a basis equal with men. Separate crops, such as the WAC's will have to be eliminated,[64] as well as separate companies.[65] Such sexual integration raises the question of integrated quarters and other facilities. Here, as in the case of prisons, the privacy argument is advanced by proponents of the Amendment. The discussion of privacy in the section on prisons should be consulted, here, as the same rationale applies. However, the doctrine of military necessity, drawn from the power raised and to maintain armed forces, may require a balancing of the rights guaranteed by the E.R.A. and the need of the military to maintain discipline.[66] It has been suggested, and properly so, that only in those cases where the requirements of the E.R.A. would "substantially impair discipline or morale" would there be any need to accommodate the two principles.[67] Such circumstances would necessarily be limited and would not allow general sex-based classification.

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59. *Supra* note 1 at 969; *supra* note 2 at 13. *See also,* Statement of Ms. Phyllis Schlafly to Va. Gen. Assembly, 9/18/73, p. 5; statement of LCDR Elizabeth S. Denry, USNR (Ret.) to Va. Gen. Assembly 9/18/73.

60. Note, *The Equal Rights Amendment and the Military*, 82 YALE L. J. 1533, 1539 (1973). Although the statutory ban has been lifted, women are still limited by regulation.

61. *Id.* at 1533.

62. *Id.* at 1540-42; *supra* note 1 at 972.

63. *Supra* note 60 at 1540.

64. *Id.* at 1543.

65. *Id.* at 1544.

66. *Id.* at 1538.

67. *Id. See also* note 43.

All training and occupational classifications must be non-discriminatory. This would require an opening to women of previously closed occupational classifications, such as pilots and navigators.[68] Certain occupational specialities are by statute closed to women; [69] others are matters of policy.[70] Both must be revised to comply with the E.R.A. Retirement and other employment benefits, such as medical services and dependent allowances, must be equalized. Presently women are the victims of evident discrimination in these areas.[71]

The area of greatest controversy is combat assignment. The E.R.A. would likely prohibit a general exclusion of women from combat units,[72] and would require such classification to be individualized.[73] The military would retain the right to fix individual qualifications, but they must be geared to necessity and be non-discriminatory. Again, the problem of living conditions (sleeping and toilet facilities) is raised. Moreover, there are problems of morale and discipline, especially in front-line situations. The experience of other countries, *e.g.*, Israel and North Vietnam, indicates that problems of discipline and morale are not without solution. Where military necessity is concerned, however, it is reasonable to suppose that the courts would be reluctant to second-guess military judgment.

Rank and promotion. Officer training is a prime area of sex-discrimination which would be affected by the E.R.A. All service academies, which regularly deny admission to women, would have to accept women on an equal basis.[74] In this regard, the Virginia Military Institute would also have to apply its admissions policies on a non-discriminatory basis. Va. Code Ann. § 23-105 limits the nomination of "State Cadets" to young men. The E.R.A. would require such nominations to be on a non-discriminatory basis. The military's Officer Candidate Schools would also be required to admit women on the same basis as men.[75] In short, women would have the same right and opportunity to be officers. All statutory bars to such equality would have to be eliminated.[76]

All promotional discrimination would, of course, be prohibited by the E.R.A. This would mean the elimination of separate promotion eligibility lists,[77] and closed ranks,[78] and the use of the same methods of review and appointment.[79] With the opening of career areas to women, much of the problem would be eliminated. A comparison can be drawn between the E.R.A.'s affect on the military's occupational organization and that of the Civil Rights Act of 1963.[80] However, the E.R.A. is an absolute prohibition, countered only by military necessity.

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68. *Supra* note 60 at 1547-49.
69. *Id.* at 1548.
70. *Id.* at 1549.
71. *Id.* at 1554-56; *see also supra* note 1 at 978.
72. *Supra* note 60 at 1551; *see also supra* note 1 at 976-77.
73. *Supra* note 1 at 971.
74. *Supra* note 60 at 1542.
75. *Ibid.*
76. There are various career areas and posts which women are statutorily barred from entering or holding. See *e.g.*, 10 U.S.C. §§ 5575, 5576, 5587, 5589 (1970).
77. *Supra* note 60 at 1553.
78. *Ibid.*
79. *Ibid.*
80. 42 U.S.C. § 2000e (1970).

General. In sum, the military establishment would have to eliminate sexual discrimination. Such discriminatory policies as now exist in housing, medical benefits, and dependents allowances,[81] are probably illegal under the Fourteenth Amendment and most assuredly would be illegal under the E.R.A. Also, requiring discharge cause of pregnancy would not be permitted as a general rule.[82] All regulations, benefits, exceptions, and disciplinary rules would have to be equally applied, requiring a good deal of administrative work and organizational modification.

Statutes. The impact of the E.R.A. on the military establishment would be felt by the federal establishment and would require changes in federal law. Insofar as the Virginia law is concerned, only two Code sections still need review. One has been noted, Va. Code Ann. § 23-105 (1973 Replac. Vol.) which restricts "State Cadet" nominations to the Virginia Military Institute to men. The other Code section is Va. Code Ann. §§ 64.1-53 (1973 Replac. Vol.) which excludes soldiers, mariners, and seamen from certain provisions of the Virginia law of wills (holographic wills and appointments). The operative terms are male-oriented and the section should be revised to be sex neutral, *e.g.*, military personnel.

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81. *Supra* note 1 at 978.

82. *Supra* note 60 at 1555.