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ABSTRACT

The history of the development of equity--justice and fairness--can be traced through law and court cases. Early United States Supreme Court opinions (1873) on issues of newly asserted claims by women provide evidence of preconceptions concerning women and their stereotyped positions. Occupational exclusion was reinforced by law to maintain a caste system. An even more fundamental right denied to women was the right to vote. Again, in 1948, male judges relegated women to "appropriate" and "feminine" occupations. In 1908, enacted legislation to shield women from excessively long hours of labor in stressful work situations was upheld. Appeals for equity were muted by supporters of the Equal Rights Amendment, since women voters were promoted as having more sensitivity and integrity. Protective legislation based upon traditional stereotypes about women continued to be upheld into the seventies. Progress toward equity include the passage of Title VII of the Civil Rights Act, the accomplishments made since its passage from the perspective of cases won by women, and the relationship of equity to the newer affirmative action mandates. (YLB)

Research and Development Series No 214K

EQUITY FROM A LEGAL PERSPECTIVE

by
Lisa Aversa Richette

SUMMARY Vocational educators have grappled with equity as a problem and have espoused it as a cause since 1963 when Congress issued both an equity mandate and an equity challenge with the passage of the Vocational Education Act. This paper is one of seventeen reports commissioned by the National Center for Research in Vocational Education to meet the equity challenge through a multidisciplinary approach encompassing three perspectives—academic, vocational education, and special interest group advocacy.

The following paper defines equity as justice and fairness and traces the histo. / of its development through law and court cases related to equity for women. Specific topics covered are the right to vote, the right to work, occupational segregation, and protective legislation based upon traditional stereotypes about women. The author challenges the judicial acceptance of a protective doctrine under the Equal Protection Clause of the Fourteenth Amendment. Progress toward equity includes: (1) the passage of Title VII of the Civil Rights Act; (2) the accomplishments made since its passage from the perspective of cases won by women; and (3) the relationship of equity to the newer affirmative action mandates.

INTRODUCTION

In seeking to pick out the most durable and constant theoretical thread in the only partially completed tapestry of the history of women's rights both in the United States and elsewhere[1] the diligent and painstaking investigator encounters the recurring strand of equity: that brilliant primary thread which has colored English legal development throughout the centuries with a bold representational value of justice as opposed to law, and woven into it an underlying sense of fairness and justness rather than a rigid adherence to narrow legal doctrine.[2]

That underlying notions of equity should play so important a role in the evolution of rights for a historically oppressed sex causes little intellectual marvel; historically equity constantly intervened where no other remedy existed at common law. Continental scholars whose legal systems are based on codified precepts enacted by lawgiving bodies are intrigued by the concept of equity as a contrapuntal force to law; their interest is today profoundly stirred by the infusion of equity concepts and equitable

remedies in feminist legal actions mandated by statute. Feminist lawyers on the Continent most particularly regard the Civil Rights Act of 1964 as a powerful and desirable instrument for social change for which no analogue can be found in their legal codes.[3] Thus, continental systems relying wholly on codified law have neither provided broad redress for individual grievances for women nor have they been generative forces in social change since their courts have been fettered and restricted in ability to fashion broad and all encompassing remedies for large numbers of women. Where no concept of equity exists, social change must be posited on doctrinaire political reform. Programmatic declarations of equality such as appear in Article III of the Italian Constitution have a fine operatic ring, but they are operatively hollow in terms of individual circumstancess of inequality everywhere in Italian life in the postwar decades following the establishment of the Italian Republic.[4]

EARLY DOOMED APPEALS TO EQUITY

The very first manifesto of the American Women's Movement—"The Declaration of Sentiments"—adopted by the First Women's Rights Convention at Seneca Falls, New York on July 19, 1848 with its unvarnished and stark recital of women's conditions may be viewed as a petition to a higher court of equity for the redress of enumerated wrongs. Since the framework which pressed down upon women so mercilessly was constructed by law, the appeal is to a force higher than law:

> Now, in view of this entire disenfranchisement of one-half the people of this country, their social and religious degradation -*in view of the unjust laws* above mentioned (emphasis supplied), and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.[5]

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The concept of equity, an overarching construct which encompasses law although transcending it, has been an important ideological tool in every movement in American history seeking to change the legal status quo, from the abolitionist cause, to the movement for recognition of labor unions, to the championing of juvenile rights. Since equity invokes an underlying force of justice, it provides a firm basis for changing and expanding the legal structure to encompass the newly recognized legitimacy of these groups. For women, whose lives are so intricately enmeshed in a centuries-old patriarchal structure, equity has been the Michelangeloesque finger of Jove imparting personhood to the lifeless stereotypes traditionally perceived by legal institutions.

Nowhere are these preconceptions concerning women more evident than in the early United States Supreme Court opinions on issues of newly asserted claims by women. Bradwell v. Illinois[6], a decision holding that women may not be admitted to the practice of law as one of the "privileges and immunities" of citizenship under the Fourteenth Amendment, is a classic illustration of the failure of law to encompass equitable concepts when an equitably mandated result disturbs the cosmogony of male judges. Under the facts of the case, Myra Bradwell should clearly have prevailed. Eminently qualified, more scholarly indeed than some of the then justices of the Supreme Court whose legal backqrounds were sketchy at best,* her sole apparent liability as a legal practitioner was her sex. Since no clear definition of privileges and immunities existed in the Constitution, the Court was compelled to carve out a special meaning for this phrase *as it applied to Bradwell and other women.* Instead of seeking out the broad and fundamental definitions of citizenship consistent with a democratic republic, the majority of the justices reiterated Victorian precepts regarding women's place. Denying Myra Bradwell the right to practice law as an American citizen, the justices consigned her to her "proper" destiny. Mr. Justice Miller, speaking for the majority, dealt crisply with the issue by referring to the hours-old precedent of the Slaughterhouse cases which concerned the right of Louisiana butchers to refuse to take their animals to slaughter at a state-controlled monopoly. Since states could regulate the slaughterhouse industry in the interests of public health, and it was not one of the privileges and immunities of citizenship to practice freely the trade of butchering when public health policies came into play, it follows, reasoned the Court, that individual states may prohibit women from practicing certain professions in

*Mr. Justice Miller was a graduate with medical training from an obscure institution known as Transylvania College.

exercise of the states' police powers. It is important to note that in *Slaughterhouse* only one aspect of butchering was delimited, not the basic right to ply the trade. This tenuous and sophistic reasoning imparts to *Bradwell* an odor no less real and pervading than that of the actual slaughterhouse in the Louisiana case. Interestingly enough, one justice was not content with the cursory dismissal of Bradwell's claim meted out by the majority; he felt compelled to deliver a sermonette which has become a classic statement of the male legalistic view:

> It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in its respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based on exceptional cases.[7]

Although the Illinois legislature, by a special resolution, admitted Bradwell to practice in 1890, the chilling effect of this decision pervaded legal circles even to the second half of this century. As late as 1949 this writer was denied the right to *apply* for admission to the Harvard Law School whose governing rules forbade the entry of women. Since Harvard enjoyed elitist prestige and provided the greatest percentage of clerks to appellate judges on both the federal and state levels, one perceives here the classic operation of a self-fulfilling prophecy. Men make the best lawyers because the only lawyers are men!

Occupational exclusion is a powerful tool for the maintenance of a caste-like system, particularly when the criteria for exclusion are immutable biological characteristics for which a manifest destiny can be assigned in the natural scheme of things. Equity here is powerless to change karma; indeed, the justices do not even regard equitable notions as applicable.

Perhaps even more fundamental than the freedom of occupational choice in the area of political rights for women, was the right to vote. Again, invoking the privileges and immunities clause, Susan B. Anthony and thirteen other women voted in the November 1872 elections in Rochester, New York. In the ensuing prosecution, Anthony eloquently and unsuccessfully appealed to the court's sense of equity:

> When I was brought before Your Honor for trial, I hoped for a broad and liberal interpretation of the Constitution and its recent amendments, that should declare equality of rights the national guarantee to all persons born or naturalized in the United States. But failing to get this justice—failing, even to get a trial by a jury not of my peers—I ask not leniency at your hands—but rather the full rigors of the law.[8]

Anthony was convicted, fined, and her appeal aborted by her lawyer's posting of bail. A similar issue concerning the right to vote emerged in the suit instituted by a husband and wife, Francis and Virginia Minor, who contended that Missouri could not deprive women of the right to vote. Their brief contained a comprehensive recital of arguments whose fountainhead was an underlying notion of justice which rendered obsolete the old view that the states had absolute power to regulate the right to vote. Buttressing their claim to equitable relief, the Minors again invoked the privileges and immunities clause of the Fourteenth Amendment, a badly bent sword by now, to assert their contention that an Amendment conferring the right to vote upon blacks who had previously been enslaved, of necessity empowered woman as well to vote:

> . . .if the Fourteenth Amendment does not secure the ballot to woman, neither does it to the negro; for it does not in terms confer the ballot upon anyone. As we have already shown, it is the altered condition of citizenship that secures to the negro this right; but the plaintiff might well reply, I was born to that condition, and yet am denied its privileges.

Not only did the plaintiff, Virginia Minor, so reply, until the passage of the Nineteenth Amendment in 1920, all disenfranchised American women could join in her lament. It is a reality of our tripartite system that when the judicial branch fails to offer equity, the legislature—either slowly or with alacrity (as the case of the

Pregnancy Discrimination Act of 1976 following on the heels of the *Gilbert* decision which excluded pregnancy benefits as part of the vested rights of American women workers)—moves to correct the distorting lens of justice. That the use of equitable doctrines constitutes an economical, efficient, and predictable technique for achieving full personhood rights is axiomatic and the desideratum of a functional legal system.

The opinion of Mr. Chief Justice Waite in *Minor* effectively crushed future optimism that the privileges and immunities clause of the Fourteenth Amendment would be judicially enlarged to give women full personhood and citizenship status with men. Said the Court:

> The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. (The exclusive use of the masculine pronoun is interesting. Editor's note.) No new voters were necessarily made by it. Indirectly it may have had that effect because it increased the numbers of citizens entitled to suffrage under the Constitution and the laws of the States, but it operates for this purpose, if at all, through the States and the State laws and not directly upon the citizen.[10]

Waite's restrictive view of the Amendment forecloses the possibility of a direct equitable appeal by aggrieved women. Insulated by the sound chamber of state laws and state rights tc enact such laws, the Court was to remain impassive for decades to the cries, placards, marches, and chants of the women's suffrage movement. Not only had equity failed to animate the privileges and immunities clause of the Fourteenth Amendment, but the post-Civil War legislative gains for which so many women had fought actually became further barriers on the road to personhood. It is interesting to note that at no point did the Court consider, nor was it specifically asked to do so by the courageous litigants Bradwell and Minor, the effect of the post-Civil Rights Acts which had been passed to give meaning to the Fourteenth Amendment under the aegis of Article 5 of the Amendment which provides that "the Congress shall have power to enforce by appropriate legislation the provisions of this Article." Not until 1948, in the disappointing and trivializing decision of *Goesart et al. v. Cleary* (335 U.S. 464), would the Court consider an appeal to equity in the context of occupational and vocational freedom of choice for women. And in 1948, as in 1872, the social and world view of an eminent group

of male judges would continue to impose a form of psychological *chador* upon women, enshrouding them in the "appropriate" and "feminine" occupations deemed seemly for the sex.

When the legislative process, under intense proselytizing by groups dedicated to women's advancement, enacted legislation to shield women from excessively long hours of labor in stressful work situations, the very same police power of the states invoked to legitimate the restrictions on women's occupational choice, was now challenged as representing an undue interference with the employer's own constitutionally protected due process rights. In *Muller v. Oregon*, 208 U.S. 416 (1908) the Court compellingly distinguished its earlier holding in a New York case where a regulation of working hours for male bakers had been stricken down as violative of the due process right of freedom of contract[1] by again reinvoking its hallowed view of the inferiority and dependency of women, thereby justifying Oregon's intervention in the free marketplace exchange of employers and employees. Ironically enough, the supporting brief upon which Justice Brewer relied was submitted by the great liberal, Louis D. Brandeis. Written in large part by Josephine Goldmark, a researcher for the National Consumer's League, an organization founded in 1890 and dedicated to the advancement of working women, the brief was a compendium of economic, sociological, and physiological statistics proving women's special vulnerability to industrial hazards. Brandeis and Goldmark cited protective laws from other states and European nations together with over ninety reports "of committees, bureaus of statistics, comissioners of hygiene, inspectors of factories both in this country and in Europe."* The stigmatizing impact of the brief's imprint upon the constitutional rights of women was profound: in exchange for shorter working hours women traded off freedom of movement in scores of occupations cordoned off by male monopolies as too dangerous, too demeaning, or too disciplined. In the following language of the Court one hears the echoing resonance of the present day opponents of ERA:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. . . . Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various

*This original sociological brief remains a classic model for equity argument.

forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved . though limitations upon personal and contractual rights may be removed by legislation, *there is that in her disposition and habits of life which will operate against a full assertion of those rights.* (emphasis supplied). . . even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him (her brother), it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of men. (p. 422)

FROM EXPEDIENCY TO EQUALITY

That the price exacted for protecting women at the workplace was a judicial recognition of their dissimilarity to men caused little concern to the National Consumers' League and its supporters who viewed the Muller decision as a paramount triumph, and fought to protect this precedent against any possible encroachment by the later-day supporters of Alice Paul and her proposal for the Equal Rights Amendment in the second decade of the twentieth century. Appeals to equity were muted before the kind of special pleading on behalf of women which now prevailed. In a sense, the movement for women's suffrage was part of this philosophical perception of women as "special" or "different" since suffragist rhetoric stressed to society as a whole the importance of women's vote. The assumption was that given political power, women would exercise it to enact different priorities from men, and, if elected, would bring deeper sensitivity and integrity to their political roles.[12] Women's issues were constricted into the single thrust of suffrage; once the vote was gained, the loss of the radical nineteenth century appeal to equity imparted voicelessness to women leaders who now faced a formidable legal bulwark of precedent and statute enclosing the majority of their sex in formal role definitions from which only the most rebellious or exceptional could break loose. Having traded what one author has termed "justice" for "expediency"[13] they now found their legal arsenal depleted for the next several decades.

Implicit in the notion of equity is a doctrine of equality—that citizens are possessed of equal rights which equity will vindicate. An old maxim of equity which brings joy to the hearts of acolyte lawyers is, "Equity delights in doing justice, and not by halves." Although this holistic notion of justice remains largely an ideal, equity nevertheless pursues it. Women seeking to break down the sexist barriers erected by the legal system were ultimately to focus on the clause of the Fourteenth Amendment which most embodies equitable notions: the Equal Protection Clause. A term unknown to both English and American Common Law, the clause *it* graced was the veritable ugly duckling of American jurisprudence. Oliver Wendell Holmes once termed *it* "the last resort of constitutional lawyers." In 1948, a woman for the first time challenged an exclusionary occupational law on the grounds that its prohibition of women's employment as bartenders (even in bars which they owned) unless they were the wives or daughters of barowners violated women's right to equal protection under the Fourteenth Amendment.[14] In response to the question posed, Mr. Justice Frankfurter issued the amazing reply that since the state legislature could have conceivably believed that the relationship of spouse or daughter to a barowner would insulate a woman from "the moral and social problems" calling for prohibition of women from this trade, the court would not evaluate the quality of the legislature's judgment. Even the dissenters did not disagree with the fundamental premise that employment in a bar was an unseemly occupation for a woman; their concern was that the classification exempting the female kin was not rationally founded but motivated rather by the economic advantage of having one's womenfolk lend a helping hand.

To emphasize his point of view, Frankfurter begins by a reference to "the alewife, sprightly and ribald" (p. 464), then cites an obscure volume on English Wayfaring Life to sketch in a background of medieval moral chiaroscuro. The relevance of these allusions to a serious constitutional challenge by a woman seeking a livelihood in postwar America is difficult to fathom. The opinion is undoubtedly Frankfurter's worst judicial product, yet it remained as precedent for the next twenty years and was cited by one of Frankfurter's former law clerks as an insurmountable obstacle to women lawyers seeking to overturn manifestly unjust differential sentencing laws which compelled judges to sentence women to indeterminate terms of one day to the statutory maximum, thereby depriving women of the opportunity for prerelease. parole, and the other privileges available to sentenced male prisoners. To the credit of the attorney involved, and to the benefit of her clients, she proceeded with the litigation successfully, asserting an equal protection claim and thereby ending the system of separate sentencing

codes, and striking a blow against the concept that bad women are by definition, more depraved and fiendish than bad men, since men are by nature, bad, whereas women are driven-snow pure.[15]

Although sentenced women criminals were the first beneficiaries of the equitable notion inherent in the equal protection clause of the Fourteenth Amendment, another convicted woman, a Florida husband-slayer, failed in 1961 to convince the United States Supreme Court that she was denied equal protection because the convicting jury included no women under a Florida law which made jury duty for women voluntary rather than mandatory.[16] The court rejected flatly her contention that a female jury would have been more receptive to her defense of temporary insanity resulting from the pressure of her husband's infidelities, declaring that one does not have a constitutional right to a custom-designed jury peculiarly appropriate to evaluate the circumstances of a given case. Moreover, the previously established mandate that a jury contain a fair cross section of the community was not violated by a state law which recognized that most women would find jury duty onerous and burdensome in view of their domestic responsibilities. Not until 1975 when a Louisiana man, convicted of aggravated kidnapping, again protested the exclusion of women from his panel of potential jurors, did the Supreme Court reconsider its position on the inappropriateness of jury service for women.[17] Recognizing that the earlier decision had found no problem either in terms of due process or equal protection claims, the Court clumsily reversed itself by emphasizing that it was ruling on a Sixth rather than a Fourteenth Amendment claim. But the giveaway sentence stands out boldly against the legal legerdemain: "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties" (p. 535). Had the justices' wives, daughters, or female law clerks been slipping copies of *Ms. Magazine* under their erudite noses?

If equity may in fact change cosmogony, then clearly a reverse process similarly holds true. A decade of social change, of assertive feminism may indeed bring a new perspectve to the meaning of due process or justice. Three factors seem vital to the process: continued access to tribunals by litigants of every stripe, continued ventilation and discussion of women's inequities in the spirit of Seneca Falls, and an unending quest for constitutional relief in the form of an amendment granting equal rights to women. This last thrust may turn out, however, to be double-edged in nature since the Supreme Court has repeatedly hesitated to

declare that sex, like race, is a suspect classification because of the impending passage of ERA which will accomplish precisely that result and none other. Nevertheless, growing dissatisfaction on the part of large numbers of American women with the legal status quo compels the Court to rely more on its sense of equity than on the law in deciding cases determining the personhood rights of women.

At the beginning of the decade of the seventies equal protection doctrine as applied to women had the same ring of trivialization as Frankfurter's lighthearted dismissal of Mildred Goesart's wish to bartend in 1948. But beginning with *Reed v. Reed*, a 1971 landmark decision which struck down an Idaho statute giving men preference over women in the administration of estates,[18] the Court began to view the claims of women to equitable treatment under the Constitution with more thoughtfulness and care. Gone was the idea that any belief that was entertainable would suffice to support legislative discrimination against women. The Idaho statute, for example, reflected the concept that women, as sheltered, inferior creatures would not be able to cope with the complexities of an estate, despite the truth that millions of widows have had to face precisely this prospect. This latter fact was noted by the Court; its principal holding was that the state's rationale for preferring men, administrative convenience, could not justify unequal treatment on the basis of sex.

Since most categories based on sex rest on stereotypes, (i.e., most women are dependent on men for support, most children are raised by women, few if any men depend upon their wives for support) the Court, in the wake of *Reed*, found itself in the midst of a flotilla of cases challenging precisely those archetypical views of sex roles.[19] In all but two cases the Court rejected the classification scheme based on sex-role stereotyping as unconstitutional.

Fascinatingly enough, the two exceptions involve cases where women *benefit* from a statutory scheme set up to provide them extra assistance; both schemes represent a type of affirmative action without being so labelled. As noted below in the section dealing with Title VII employment issues, the very notion of affirmative action is rooted in a doctrine of equitable relief. The old law school maxim comes to mind again: "equity delights to do justice, and not by halves," and yet another, "Equity regards as done that which ought to be done."

The first case, *Kahn v. Shevin*, 416 U.S. 351 (1974) called into question a Florida law granting widows a five hundred dollar property exemption each year. Using the same analytical tools that Brandeis deployed so skillfully in his *Muller* brief, Justice Douglas cited data from the Women's Bureau to illustrate the relative poverty of women and the rational basis upon which this exemption rested. The historic dependency of women and their inability to support themselves in later years gave the Florida scheme coherence and legitimacy. The unequal treatment of Florida widowers and widows was not impermissible under the Constitution since it was a way of bolstering women's economic status. Critics of the decision argue that under the plan Palm Beach millionairess widows receive the exemption, whereas marginal windowers in the back districts of St. Petersburg do not. If the real goal of the statute is to aid the impoverished, sex should not be the criterion—economic level should. Furthermore, is not the scheme ultimately based on administrative convenience since arguably, if there are more poor widows than widowers it is easier for the state to issue the blanket exemption to the entire class of widows?

The military has been a notoriously difficult area for career-building by women. Females on the officer level are restricted numerically and need rigorous qualifications. A Navy law required that male officers retire after nine years if they had been passed over for promotion twice, but allowed female officers to try for promotion four years longer, compelling them to retire after thirteen years of service if they had been rejected twice for advancement.[20] As in *Kahn*, the challenger was a male deprived of the statutory benefits. Once again the Court searched out the Congressional purposes. With considerable astuteness the Court noted that Congress had placed many restrictions on women officers with respect to combat and sea duties. As a result women had fewer opportunities for promotion than men and hence needed more time in order to have the opportunity for what the Court characterized as "fair and equitable career advancement programs." It is precisely this notion of the opportunity to catch up, not to be caught in a Catch 22 situation, that is at the heart of an equitable approach. If women are by regulation, law, tradition, custom, or even their own misguided choice, prevented from competing on the same level as men, should they then be compelled to run the race in the last lap on the same basis as men? The failure to perceive this double-bind contradiction results in wrongheaded cries of reverse discrimination. A fair and fair-minded equitable approach yields the appropriate solution, as in *Ballard.* The failure to apply equitable notions, but to cling instead to rigid legalisms leads also to the misperceptions of *minimum* percentages of admissions to a given

institution as representing quotas which are, rather, *maximum* quantities for a given minority group. One may be properly suspicious of this type of punctilious adherence to rigid definitions on the part of a class of individuals who have failed to give even the loosest definition to the concept of equality as set down in the Constitution and the Bill of Rights. Although equity, too, needs boundaries and cannot be given the full play of judges' discretion, applied within the framework of law, it has nevertheless been the most powerful catalyst for change in the area of women's employment.

TITLE VII—THE ULTIMATE ALLIANCE OF SEX EQUITY AND LAW

When, at the height of the 1964 national groundswell for Congressional legislation to end racial discrimination in employment practices, a cynical legislator introduced an amendment declaring sex discrimination also within the ambit of prohibited conduct, his avowed purpose of defeating the entire measure unexpectedly backfired, and for the first time in our history, women's equity issues became the focus of systematic governmental concern. The Civil Rights Act went beyond pious declarations of high-flown purposes; it provided mechanisms for litigation and more importantly, gave federal courts extremely broad equitable powers of relief. Subsequent amendments in 1972 widened the scope of coverage to include state and municipal employees, gave the Equal Employment Opportunities Commission more coherent jurisdictional powers and provided aggrieved employees with the right to attorneys' fees in successful litigation.

It would be improper to paint the history and current operation of Title VII unabashedly roseate. For the first few years following the passage of the Act, confusion and understaffing produced a chaotic situtation. Complaints have constantly backed up in the regional offices throughout the country. The Appointment of Eleanor Holmes Norton as Chair for the Commission in 1976 ushered in a new era during which many of the plaguing problems have been resolved, but given the economic realities of a deepening recession, the continuing nationwide discrimination against working women, and the ancient, deep-rooted subjugation of women, the Commission finds itself a beleaguered operation.[21]

Given this difficult background and viewed against the drab backdrop of women's rights litigation in the preceding century of 1872-1972, the

accomplishments of employment discrimination litigation in terms of the remedies which courts have fashioned are breathtaking. One becomes convinced that the accomplishments were made possible because of the spirit of equity which infused the entire legislation—from passage to enforcement—and the express mandate delivered by Congress to the courts to apply equitable principles both in interpretation of the Act and in its enforcement.

Several examples of judicial refusal to apply narrow, legalistic principles to the interpretation of the Act illustrate the use of sex equity concepts in sustaining the underlying purpose of the legislation.

The language of the core antidiscrimination provisions (42 USC s2000e-2 (l973)) states that employers may not:

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

Congress provided an exception applicable only to situations dealing with sex, religion, and national origin matters, and not to race or color: the *bona fide* occupational *qualification* "reasonably necessary to the normal operation of that particular business or enterprise" (Sec. 703e). Seizing upon this exception many employers continued to refuse to hire members of the opposite sex for occupations traditionally limited to one sex. Confronted by challenges to these practices, federal courts formulated a test to be met by the employer in establishing the bona fide occupational qualification-or b.f.o.q.-defense. In *Weeks v. Southern Bell Telephone and Telegraph Company*, 408 F. 2nd 228 (5th Cir. l969) the Court stated that to prevail, an employer "has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." And against contentions by attorneys for the telephone company that the positions

sought by women were unromantic (despite the fact that they paid far more handsomely than the "glamorous" bottom rung telephone operator and secretarial positions the utility had pressed women into), the court replied with all the clear-eyed pragmatism of a wily Chancellor in Equity, that Title VII "vests individual women with the power to decide whether or not to take on unromantic tasks."

The telephone utilities have felt the firm hand of sex equity in the last decade. In a consent decree entered shortly before the enactment of the 1972 Amendments to Title VII, AT&T agreed to a back-pay settlement figure of fifteen million dollars.[22]

The airlines, too, sought to cling to sex-segregated occupations under the b.f.o.q. theory; they were particularly dedicated to the view of flight cabin attendants as lissome ladies devoted to male comfort. A male, rejected for the position, unsuccessfully sued Pan American World Airways (*Diaz v. Pan American World Airways, Inc.* 442 F. 2nd 5th Cir. 1971). In considering his cause the Court of Appeals noted that "it would be totally anomalous (to construe the b.f.o.q. provision) in a manner that would, in effect, permit the exception to swallow the rule." Another effort to consign women to job ghettos involved discriminating against women with preschool children for specified jobs (*Phillips v. Martin Marietta Corporation*, 400 U.S. 542, 1971). Here again the trial and appellate courts refused to permit the ingestion of the law by a narrow exception. So consistently have courts adhered to this unwavering eye on the underlying legislative purpose that today the b.f.o.q. may well be said to include only sperm donors and wet nurses as occupations restrictable to one sex.

Definitions and judicial interpretations bring scholarly encouragement but little assistance to litigants out of work or denied advancement or equal pay. The heart of equity is action—individually ordered and fashioned to end the injustice inherent in the plaintiff's situation. Equity implies meaningful intervention, not rhetoric. Because of the broad and flexible terms of Title VII, federal courts possess the requisite powers to offer equitable relief. They permit courts "such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay" (Sec. 706 (g) 42 USCA 2000 (e) - 5g).

Less frequently voiced today but nevertheless a persistent argument of opponents of antidiscrimination legislation is the view that courts are incapable of changing subjective bias on the part of employers, universities, and the public at large. Without considering the broader implications of a position holding that legal

institutions are impotent to combat lawlessness, it is clear that the proposition is true only *insofar as courts are powerless to set into motion a new dynamic that will change the cosmogony of the biased so that their perceptions of reality do not become self-fulfilling prophecies.* Individuals clinging to the belief that women have limited capabilities and cannot complete a course of study at the Harvard Law School are forced to reconsider when the editorial staff of the *Harvard Law Review* includes women. Seeing women on a daily basis driving cabs, checking out groceries at supermarket counters, running bank departments, working as locksmiths, plumbers, electricians, and so forth renders it more difficult to get away with overbroad and archaic sexist generalizations. The equitable relief powers accorded to courts also make possible the imposition of monetary awards which make it costly and burdensome for employers to continue their tacit, if not explicit, policies of sex discrimination. Pecuniary loss is a powerful instrument of sensitization; the award acts as a future deterrent not only for the employer involved, but for all others in that position.

Another potent tool for relief used by the courts in antidiscrimination cases is the adjustment in seniority, an important item in the worker's total benefit package. Courts have made sweeping reassignments to ensure that workers do not continue to be locked into inferior bargaining positions as the result of past illegal discrimination. Appellate courts, again viewing the lower court's grant of power as grounded in equity, have not interfered with these orders except where gross abuse of discretion occurred. In an early leading case, *Bowe v. Palmolive Company*, (6 FEP Cases 1132, 1133-1136, 7th Cir. 1973) the Court upheld the careful balancing engaged in by the trial court in ordering a seniority readjustment, noting that "given the alternatives available to the district court, the impossibility of a perfect solution, and the propriety of attempting to minimize damage of interests not in themselves built upon discrimination, we find no abuse of discretion in selection of remedies."

Because discrimination is so pervasive it has become imperative in these Title VII actions for lawyers to try to quantify what is basically unquantifiable and to come forward with specific proposals for relief in the form of affirmative action training programs, goals for filling nontraditional occupational slots, and in the form of any other proposal appropriate to the given situation. The old maxim that "Equity will not stoop to pick up pins" does not apply if the pins are on the floor for a discriminatory reason. In one lengthy litigation again involving an airline company, Northwest Airlines, the Court not only ordered the company to discontinue its height and weight regulations for women, but also found illegal its

policies of prohibiting women from wearing eyeglasses, its requirement that women carry matched luggage (purchased at their own expense), and even its rules concerning the diameter of earring and the shade of lipstick worn (*Laffey v. Northwest Airlines*, 13 Fair Empl. Prac. Cases BNA 1068, 1976). Meticulous pleading by lawyers and careful but imaginative proposed relief are essential in cases under Title VII; in this respect little has changed from the early days of equity when the skills of lawyers were called into play to persuade the chancellor—or judge—to intervene.

An area where equitable relief has seemed remote is that of academe with its committees, its hallowed rules of tenure, and its arcane longueurs about research, publication, and "scholarship." Gifted and qualified women have been either excluded or discouraged for decades from seeking academic posts. Recent litigation has received less than hearty approval even from well-meaning male colleagues who believe that these issues are inappropriate to a courtroom, and that judges should have no jurisdiction in the academic world. It was therefore most heartening in the spring of 1980 when a Court of Appeals in the federal system upheld an award of relief to a female academic litigant in a Title VII case which included an order to the university to grant her tenure wrongfully withheld on discriminatory grounds (*Kunda v. Muhlenberg College*, 463 F. Supp. 294, decided by the U.S. Court of Appeals for the Third Circuit on February 19, 1980). *Kunda* is a pathmarking decision that carries out the mandates of equity to their logical and just conclusions.

It may be an ultimate historic irony that the very system of law which once "protected" women as the legal infants that they were viewed as under common law, serves today as the instrumentality for their achievement of full maturity and personhood rights as equal citizens under the law. Given equity's resilience throughout the centuries and given the need it satisfies in a society suffering from unjust laws as a forum where rights may be vindicated *despite the letter of the law*, the situation is not altogether remarkable. As a contemporary writer, Charles Rembar, observes in a lively discussion of equity in his recent *The Law of the Land*,

> So equity, a body of remedies and rights, arose from an autocratic attempt to deal with the deficiencies of the existing system of private law. It is now an integral part of private law, and also a part of public law. In the latter role, it works both on behalf of government against

the unlawful citizen and on behalf of the citizen against unlawful government.

For women, denied access to the corridors of power in government, industry, and academe, equity works on their behalf against these lawless male preserves, as well as against the broader society reluctant to perceive that the ultimate meaning of equity must be—equality.

IMPLICATIONS FOR VOCATIONAL EDUCATORS

It is imperative, if the principles of sex equity are to be kept vibrant and strong, that vocational educators themselves expound the concept of equal opportunity at every level not only in the classroom, but beyond. Educators imparting vocational skills must exemplify in their words and actions the spirit of Title VII; there cannot be even a subtle suggestion that *any* occupation is one for which either men or women are better suited or innately qualified. Vocational teachers must strive to understand how deep and pervasive cultural conditioning works in the area of employment, and they must themselves become change-agents by encouraging both men and women to seek and master skills in nontraditional fields. Finally they should include, as part of their lesson planning, a discussion of the underlying principles of Titie VII and the remedies available for any person aggrieved by a discriminatory policy or practice. In this way, students will begin to perceive that the American workplace is more than an economic unit; it is also a mechanism for social change.

NOTES

1. Sachs and Wilson. *Sexism and the Law.* Free Press (1979).

   This is an excellent juxtaposition of legal developments in England and the U.S.

2. Rembar. *The Law of the Land.* New York, New York: 1980.

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3. Remiddi. *I Nostri Diritti.* Feltrinelli, 1976.

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5. Stanton, Anthony, and Gage. *History of Women's Suffrage.* 1881, pp. 70-71. Reprinted in *Up From the Pedestal.* pp. 184-186 (Quadrangle Books 1970).

6. 83 U.S. (16 Wall) 130, 21 L. Ed. 442 (1873).

7. 83 U.S. 141-2.

8. *U.S. v Anthony* 24F Cas. 829 (no. 14459) (N.D.N.Y. 1873).

9. *Minor v. Hapersett,* 88 U.S. (21 Wall) 162.

10. Idem., at p. 165

11. *Lochner v. N.Y.* 198 U.S. 45 (1905).

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13. Babcock, Freedman, Norton, and Ross. *Sex Discrimination and the Law, Causes and Remedies.* Boston: Little Brown and Company, 1975.

    Showalter. "Feminism's Awkward Age," *Ms. Magazine* 7: No. 7, p. 64.

14. Goesart v. Cleary 335 U.S. 464 (1948).

    Contains two comprehensive and brilliant discussions of the theory of equal protection. Tussman and Tenbroek. "The Equal Protection of the Laws" 37 *California Law Review* 341 (1949). "Developments in the Law—Equal Protection" 82 *Harvard Law Review,* 065 (1969).

    Brown v. Board of Education -- 347 U.S. 483, (1954).
    Racially segregated schools.

    Harper v. Virginia Board of Elections -- 383 U.S. 663 (1966).
    Right to vote.

Skinner v. Oklahoma ex. rel Williamson – 316 U.S. 535 (1942).
Sterilization of defective criminals.

Shapiro v. Thompson – 394 U.S. 618 (1969).
Residence requirements for public welfare recipients.

Boddie v. Connecticut – 401 U.S. 715 (1971).
Filing fees for indigent plaintiffs seeking divorce.

Burton v. Wilmington Parking Authority – 365 U.S. 715 (1961).
Race discrimination by private restaurant in state-owned building.

Contain significant cases where the equal protection clause has been invoked to end other forms of discrimination.

15. *Commonwealth v. Daniels*, 430 Pa. 642 (1968).

    The attorney representing the women appellants, Carolyn E. Temin, was then the only female public defender in Philadelphia.

16. *Hoyt v. Florida* 368 U.S. 57 (1961).

17. *Taylor v. Louisiana* 419 U.S. 522 (1975).

18. *Reed v. Reed* 404 U.S. 71 (1971).

19. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

    This challenges the requirement that male dependents of army personnel prove such status.

    Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

    Denial of social security survivor's benefits to male survivor caretaker of child.

    Stanton v. Stanton, 421 U.S. 7 (1975).

    Mandatory sort for females eighteen years, but twenty-one years for males.

    Craig v. Boren, 429 U.S. 190 (1976).

    Minimum drinking age for males at twenty-one, but eighteen for females.

    Califano v. Goldfarb, 97 S. Ct. 1021 (1977).

    Surviving widower required to prove dependence upon wife for more than half of his support, whereas female automatically receives benefits.

    This line of precedents is now firmly established and will not be disturbed except where stronger equitable notions of redressing historical or situational inequities intrude.

20. *Schlesinger v. Ballard* 419 U.S. 498 (1975).

21. Simmons, Freedman, Dunkle, and Blau. *Exploitation from 9 to 5.* Twentieth Century Fund Task Force on Women and Employment (1974).

This is a comprehensive analysis of women's difficulties in employment discrimination.

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ACKNOWLEDGMENTS

Before vocational educators can adequately meet the special needs of special groups, they must be committed to a philosophy of equitable education. The issue of equity in education has received a great deal of attention over the last ten years from the legislative, judicial, and academic sectors. As a result of this attention, research and analysis have shown that the term "equity" has a different connotation for nearly everyone who has attempted to define and apply it to educational programs. In addition, a host of related terms such as equality, disparity, and discrimination are a part of the vocational educator's daily vocabulary.

In an attempt to help vocational educators to articulate a definition of equity, the National Center for Research in Vocational Education has commissioned seventeen papers on equity from three broad perspectives—academic, vocational, and special needs. The authors in each of the three groups provide their own perceptions of and experiences with equity in education to bring vocational educators to a better understanding of this complex but timely issue.

The National Center is indebted to these seventeen authors for their contribution to furthering research on equity in vocational education.

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