Women Under the Law

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DURING A RECENT TAXI RIDE, MY DRIVER turned up his radio to hear the report that the Virginia State Legislature had just defeated the Equal Rights Amendment. Shaking his head he remarked, "Something's wrong when we need an amendment like that—no human should have to *ask* for equal rights in this country. We shoulda learned that for good in the Civil War."

The Civil War did indeed spawn considerable legislative, judicial and popular rethinking on the American notion of "equality." The Fourteenth Amendment, ratified in 1868, provides for "due process of law" and "equal protection of the laws." It has since become the major constitutional vehicle for changing perceptions of what equality should encompass. In the previous language of the second section of the Amendment, which first guaranteed the right to vote, the word "male" was placed in the Constitution for the first time. The use of the word "male" three times, and always in conjunction with the term "citizens" must have caused some to fear that the protections of the 14th Amendment might not apply fully to women. As everyone knows, a new amendment has been proposed which many feel to be a necessary adjunct to the protections long since afforded by the 14th Amendment. First introduced in Congress in 1923, the Equal Rights Amendment (ERA), stated that "Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Heated discussions on the necessity, intent and implications of the ERA are now commonplace within the LDS community. One of the most surprising developments was the emergence of an almost unprecedented, highly visible Mormon lobby, credited by the national press as a key factor in blocking ERA passage in Nevada, Washington, Idaho and Utah. If the credit is deserved, this has been no mean feat—only three state votes were needed before March 22, 1979, and the deadline for ratification has been extended until June 30, 1982. Less conspicuous but possibly as important, has been the closely related mobilization of well-organized groups of LDS women (and some men) to counteract the

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perceived intent of the leaders of a number of IWY (International Women's year) conventions.

Such demonstrations of political power understandably have not been enthusiastically received by proponents of the ERA. Yet political opposition by religious organizations to legislation perceived as a moral issue has ample precedent and is surely legitimate. On the other hand, "Mormon" opposition to ERA to date, as commonly articulated on the local level of the Church—be it in Florida, Maryland, California or elsewhere—too often reflects astonishing ignorance of the basic legal questions involved. Too often one hears objections voiced by church members that are manifestly silly, obviously uninformed or even calculatedly misdirected. The uniformity and fervor with which this ignorance is displayed can, in the long run, only hurt the image of the Church.

Certainly there are many worthy arguments against the ERA. But only after addressing the facts, can we move on to a meaningful discussion of any underlying moral issues. To date the few articles or guidelines appearing in official church publications have been conclusory and much too brief to allow a reasonable "free agent" to come to an informed personal decision. With this goal in mind, the following comments are offered as a belated, but still very limited first step toward fuller understanding of this complex subject.

The arguments most often advanced in Mormon circles against the ERA are that it is 1) unnecessary, and 2) potentially dangerous to many revered, traditional values.

To consider first the question of the necessity of the amendment— It is generally admitted in discussion among church members that many inequalities faced by women are deplorable but that the solution lies in a case-by-case judicial or legislative remedy, not in a constitutional amendment. Such an assertion (really involving the proper role of government in social change) usually derives from the speaker's general political philosophy rather than from the specifics of the women's rights debate, perhaps explaining why supporting evidence is rarely offered or felt necessary. There are nevertheless a number of important practical considerations in assessing the appropriate avenue of redress.

The federal government has responded directly to acknowledged sexual discrimination in employment, principally through the passage of Title VII of the Civil Rights Act of 1964. Title VII, interpreted and enforced by the Equal Employment Opportunity Commission (EEOC), gives those employees recourse against discrimination "because of such individual's race, color, religion, sex, or national origin."[1] This act and related federal laws and executive orders have had a profound effect on existing state and federal labor laws, many of which were passed decades ago to correct the shocking abuses of the late 19th and early 20th centuries. Such "protective" laws were generally aimed at women and/or children, and designed 1) to confer benefits, such as a minimum wage or a mandatory rest period or lounging facilities, or 2) to exclude women from certain jobs for which they were felt to be unsuited, or 3) to impose other protective restrictions on women's employment, e.g., limiting the number of hours women can work, restricting women's work to certain hours of the day, or prohibiting employment of women in jobs requiring lifting above a set weight limit.

Praiseworthy as were the original intents of such laws, changing social attitudes and marked improvement of working conditions in general have made most of them irrelevant. Now such laws often operate solely to prevent women from getting higher paying jobs which might, for example, involve some manual labor. In short, many would say that these laws are now more repressive than protective.

Title VII has done much, on a case-by-case basis, to "neuterize" or eliminate these dated laws, forcing a reconsideration of the legitimacy of their current purpose. It has also led to an extension of their benefits and "protection" to men as well. For example, a "weight-lifting restriction" law in Oregon, applicable only to women has now been replaced by a new Consolidated Work Order which prohibits requiring *any* employee to lift "excessive weights."[2] A similar Washington statute, has been changed to state that "lifting requirements must be made known to prospective employees and proper instructions on lifting techniques must be provided."[3] Seating, rest and mealtime requirements have been extended to workers of both sexes in eleven states.

Despite the influence of Title VII and pressure from other sources, many "straggler," sex-based state labor laws and industrial practices remain. Of recent note has been the practice of many companies to exclude pregnancy from disability insurance coverage, while including elective surgery. There is no assurance that state legislatures will address these remaining discriminatory laws and practices. Even though heightened awareness generated by the ERA debate greatly increases the chances that more state action will be taken, many laws and practices, theoretically illegal or invalid under Title VII will remain in force as long as they are not challenged or systematically examined.

Unfortunately, there are few mandates in federal law as clear as Title VII is in the area of employment discrimination. To some extent, Social Security laws are still based on dated stereotypes which offer inadequate protection to a person who spends substantial time as a homemaker supported by a spouse. Our legal structure regards the homemaker as a dependant rather than as a mature adult who also provides for the family. Social Security laws can tragically victimize divorced persons, often disfavoring men as well. They discourage remarriage by older divorced or widowed persons who may stand to lose or to reduce their benefits. Military recruitment and career opportunities are still handled in ways which unnecessarily—and some would say unfairly—restrict women. While a 1974 Supreme Court decision requires that military benefits be distributed regardless of sex,[4] a quota system restricts the number of women accepted into the military and a 1948 law prohibiting women from involvement in combat[5] is still used to bar women from service in the thousands of assignments in "combat-type" positions during peacetime. The result is that women cannot serve on virtually any seagoing vessel, any aircraft or in a large number of other responsible and rewarding positions. True, combat positions constitute only a small portion of the armed forces, but job opportunities in combat zones or units constitute a large number of the most appealing and important assignments.

Lacking a mandate of the kind expressed in Title VII, states have made spotty progress in reforming their analogous nonlabor laws. A few states have added equal rights amendments to their own constitutions. A half-dozen states have

undertaken, through special public or state commissions, a comprehensive review of state law, with the goal of bringing laws into conformance with the ERA. Ten or so other states have conducted similar reviews, using legislative bodies for preliminary review of sex-based laws. Usually though, the task of gearing up such a review is so political that it is assigned a low priority.

Perhaps the most serious remaining legalized sex discrimination is in the broad area of state domestic relations law, encompassing the management and ownership of real and personal property; the determination of domicile; divorce, including grounds for divorce, custody of children, alimony and support; inheritance laws and many other critical aspects of family life. Michigan, Massachusetts and North Carolina, for example, have retained an old rule of law which gives the husband the exclusive right to manage and control the marital property—thus giving him, as well, the right to squander and dissipate it. In Louisiana, a "community property state", the husband still has the right (as he once had in eight states) to the sole management of the marital property, resulting, in one recent case, in the award of an injured wife's lost wages to her husband, as "head and master of the community," over her protest.[6] Forty-two states have a common law property system, which means that the nonbreadwinner has no right to own or manage any of the property of the other spouse, other than the right to support (usually unenforceable as long as the spouses are living together). The person who has title to the property has all rights to it and can sell or give it away at any time. In ten states, courts do not have the power to transmit property (such as the family home) from one spouse to another upon divorce. While laws of this type are not explicitly sex-based, a strong argument can be made that they violate the equal rights principal because of their disparate impact on married women, who predominate among the nonwage-earning spouses or who earn, on the average, far less than their husbands. (A number of states still retain a double standard in other aspects of divorce law. Most child custody suits are won by mothers even in cases where fathers are manifestly better qualified to rear the children).

Inheritance tax laws in many states require a surviving wife who has spent all or most of her working life in the home or family business to prove direct financial contribution to the estate—often a difficult or impossible task—in order to reduce taxation. State inheritance tax laws which benefit widows but not widowers discourage property ownership by married women. Some state laws give a man a life interest in all his wife's lands but give the wife a life interest in only one third (or other fraction) of the lands of her husband. In Illinois, which has passed a state ERA, a statutory scheme has been upheld by the State Supreme Court allowing illegitimate children to inherit from their mother's but not their father's intestate (without a will) estate.[7]

The criminal justice system of many states is, in both the letter and application of the law, sexually discriminatory. Many state laws against rape and similar offenses still stress the sexual, rather than the violent nature of the crime, and women are sometimes required to reveal details of past sexual activity in legal proceedings.

A number of jurisdictions require judges to impose minimum and maximum sentences for men, but allow indeterminate sentences for women, even for the same offense. The result is that women may be incarcerated for a longer period

of time than a man convicted of the same offense, while the man may have a longer wait for parole consideration. Because comparatively few women go to jail, facilities are often inadequate and female inmates generally have fewer opportunities to learn marketable job skills. One recent study showed that 30 percent of eligible men received work releases but only 9 percent of eligible women did.[8]

Many state laws dealing with unemployment compensation deny benefits to women forced to leave their jobs because their husband's employment required a move. A number of states terminate unemployment benefits to women in certain stages of pregnancy and for specified periods following delivery, regardless of their ability or willingness to work. Few states treat pregnancy as they would other similarly limiting medical conditions, with the result that those pregnant women or new mothers who need to work are penalized thereby discouraging childbearing.

While one may not agree that every one of these areas of discrimination is or even should be major causes for concern, viewed collectively they go a long way toward explaining the concern of many people that something more is needed to secure for American women the same legal rights enjoyed by American men.

What, then, is the appropriate avenue? Several are available. An appeal to state and federal courts has produced varied results. In general, the courts respond to existing law, upholding discriminatory statutes if a clear "legislative purpose" can be found. Notably, the United States Supreme Court, in the century following the passage of the 14th Amendment, demonstrated almost complete deference to sex-lines drawn by the legislature. Until 1971, not one sex-based distinction had been overturned by the Supreme Court.

In the past few years, however, the highest court has been moving to deny enforcement of or otherwise limit sexually discriminatory laws. One of two major approaches used in Supreme Court sex-discrimination cases is an appeal to the Court to declare that differential classification on the basis of sex is impermissible because some other "fundamental right" is involved (i.e., one of a well-defined, narrow category of legal rights which includes, among others, the right to work and the right to travel). Because very few rights are viewed, in the constitutional sense, as fundamental, this argument is successful in very few cases.

A second, and more common approach has been to ask the Court to declare sex, like race or religion, to be a "suspect classification" and thus subject to the court's "strict scrutiny" in assuring equal protection of the law. This standard of review based on the 14th Amendment, has been available to disadvantaged minorities for many years. The argument advanced here is that sex *per se* is an undependable indicator of a person's attributes for the purpose of determining legal rights. The fact that a person is female is not an accurate indicator of her ability to perform certain kinds of work; similarly, the fact that a person is a male might not necessarily mean that he is the less-qualified parent for purposes of determining child custody. The Supreme Court, however, has thus far failed to rule that sex is a "suspect classification." To do so would be tantamount to declaring that the denial of legal rights on the basis of sex was unconstitutional under the equal protection clause of the Fourteenth Amendment. It would be the judicial equivalent to ratifying the ERA, providing unmistakable anti-discriminatory precedent for lower courts and legislative bodies in determining the consti-

tutionality of existing and future law. The fact that the Court has had ample opportunity to make such a ruling without doing so suggests that it is unlikely to do so in the forseeable future. (On the other hand, the same could have been said of discrimination based on race not many years ago.) As Representative Martha Griffiths noted, when the Equal Rights Amendment first passed the House of Representatives in 1970 (after a 47-year effort)[9]

> There never was a time when decisions of the Supreme Court could not have done everything we ask today . . . The Court has held for 98 years that women, as a class, are not entitled to equal protection of the laws. They are not "persons" within the meaning of the constitution.

There are other limitations on the effectiveness of the judiciary as an avenue of redress in cases of apparent sexual discrimination. The Court has the right to sanction discrimination, even under a "strict scrutiny" review, if the government can show "compelling reason" to maintain the discriminatory law or practice. For example, the government has argued that sexual stereotypes should be retained in the social security system because of the "convenience" to the government in using actuarial or other standards and because of the "economic necessity" of using such distinctions.

In addition to recognizing both the Court's propensity to take an inconclusive, piecemeal approach to sex-discrimination cases, as well as the inherent limitations of existing legislation and the judicial system, it is important also to note that redress in court is often a very expensive and time-consuming undertaking—a luxury rarely available to those already deprived. Should a petitioner, through heroic individual effort, finally succeed in getting a case before the Supreme Court, there is still no guarantee that the case will be heard. In sum, many would argue that a judicial solution to the problem of sex discrimination has not proven effective, and offers no immediate hope of providing an adequate tool for fashioning genuinely equal rights for men and women.

What about a legislative solution? Legislatures could, by analysis and revision, eliminate discrimination in existing state and federal laws—and indeed they will be required to do so if ERA is passed. But will they all do so without this "coercion"? While a number of states have, as noted, begun to systematically review state laws, the majority are far from a serious full scale reevaluation. Both state and federal legislative bodies continue to operate piecemeal, responding to political and economic pressures and the press of time. The publicity surrounding ERA has unquestionably moved equal rights for women up the agenda for many legislatures, but without a broad national mandate on sex discrimination, they have approached discriminatory laws on a hit-and-miss basis. In other states, the issue of equal rights still receives a very low priority (because—some would argue—legislative bodies are largely male!). States without an ERA must debate the need for equality when considering each new piece of legislation on the subject. Many sex discrimination measures have passed in legislatures by very narrow margins—if three senators had changed their votes, women would not have recourse to employment discrimination. In light of the lethargy and unpredictability of legislatures, few legal scholars seriously believe there is any hope that a comprehensive legislative remedy will be accomplished, as one author put

it, "in the lifetime of any woman now alive."[10] Thus, the argument that solutions should be sought through a legislative approach, really reflects the belief that there is no pressing need for change.

Given the judicial and legislative record to date, one can more readily understand why those opposed to the perceived injustices see the ERA as a necessary step in the right direction. Even after its ratification, many judicial and legislative hurdles would remain. But there would also be an expression of national policy to cut through the often unenthusiastic treatment rendered by the courts and legislatures. It would, in their minds, "hasten the day," giving our lawmakers the "bigger picture" and bringing some economy to both courts and legislatures in their treatment of sex discrimination.

The argument for an Equal Rights Amendment does not therefore stem from any inherent lack of power in the existing judicial and legislative systems to accomplish these objectives; it is rather, from the slow and spotty record of these branches of government in correcting existing abuses.

The second argument of the case against the ERA is a belief that it carries a grave risk to traditional Mormon values and a disagreement on the nature and extent of the physiological and psychological differences between the sexes. At the base of this is a fear that the ERA will threaten the traditional family, focusing perhaps on the gradual shift away from traditional male/female roles over the last several decades. Many Mormons regard the traditional marital roles (husband as breadwinner and wife as homemaker) as innate, believing that God-given characteristics unique to each sex equip a person for his or her traditional role. Others feel that the roles are more flexible, that some of the traditional differences between men and women actually grow from the predominance of these roles in society.

Any constitutional amendment unavoidably casts a shadow of uncertainty over its future interpretation and implementation. The Fourteenth Amendment, for example, has far exceeded the originally perceived purpose—elevating the status of blacks—and has come to serve as a tool of justice for many oppressed persons and groups. Few amendments, however, have had the same wealth of pre-passage legislative discussion of intent as has the ERA in the House of Representatives and the Senate. And, contrary to opinion popular in some circles, the numerical majority of legal scholars are comfortable in believing that the potential changes under the ERA are largely predictable.

What then could be expected from ERA? How substantive or potentially dangerous are the "unknown" elements of this or any constitutional amendment when measured against the desired benefit? Will it threaten the traditional values of home, faith, family and femininity?

Addressing these questions, Paul Freund, a leading constitutional scholar, has made an important point: "unless equality is denied by a public agency or because of a law, the Equal Rights Amendment, by its terms, *has no application.*"[11] [emphasis added] Thus, while significant social trends may spring indirectly from this amendment, its direct implications are very narrowly delineated. Further, laws which do discriminate between the sexes would not necessarily be eliminated, but rather, the *benefits* of the law would be extended to both sexes.

Thus, the maintenance of the traditional family structure,—a matter of choice,

not law—would still remain the option of each family. Married couples could still continue to distribute responsibilities in the home as they wished, and the level of support obligation within marriage would still depend on love, not law. On the other hand, if a family had broken up, the issue of custody of children would have to be given greater consideration by the courts. Simple, sex-based presumptions would be eliminated. Child support and/or alimony would be decided more equitably, if with greater difficulty, and they would reflect the responsibilities of the parties in marriage, the earning ability of the parties, the projected child care arrangements and other factors relevant to the child's welfare.

The Equal Rights Amendment would *not* require women to take a job outside the home. This would, as now, be an individual decision. For those women who do work (recalling that millions of women support their families and that over 70% of the women who work do so out of economic necessity), the ERA would reinforce existing laws which require equal pay for equal work. As previously noted, the repeal or revision of a number of "protective" labor laws, technically invalid under Title VII and similar laws, would be hastened after ERA passage. These illusory protections were addressed in the Senate Majority report on the Amendment which stated, in part,[12]

> restrictive discriminatory labor laws such as those which bar women entirely from certain occupations will be invalid. *But those laws which confer a real benefit, which offer real protection will, it is expected, be extended to protect both men and women.* [emphasis added]

Many are fearful that women will become subject to the draft, and the ERA *is* likely to affect the military. At present there is no military draft; but the Pentagon has recently requested Congress to make women subject to a draft, if reinstituted (as was previously done before the end of World War II), and to be trained for combat purposes. ERA would require that the draft system deferments and exemptions now available be adapted to a sex-neutral system. For example, women ministers, conscientious objectors, doctors, dentists and state legislators would be treated as are men in these categories. Dependency deferments in past wars provided that "persons in a status with respect to persons (other than wives alone, except in rare hardship) dependent upon them for support which renders their deferment advisable"[13] may be deferred. Such a deferment could be applied by the President to persons with dependent children or wives and children, with whom they maintained a family relationship in their homes. Under the ERA this could be expanded to exempt both parents in a family with children, or could exempt only one (i.e., either the parent who was called or the parent most responsible for child care in the home). It is also possible to structure laws to allow a couple, in case of a draft, to decide which member would serve. Congress can opt for any alternative. Exemptions similar to the one which shields a "sole surviving son" of a family that has lost a member of the family in the service of country, must, of course, be available to both sexes equally under ERA.

Contrary to popular belief, all legislative debate on the ERA so far indicates that the ERA would *not* bar all distinctions between the sexes. Physical characteristics which are found in all or some women but *no* men, or in all or some men, but *no* women would still be a permissible basis for certain laws, or the basis of allowable exemptions from the application of the ERA.

This principle, for example, doesn't admit the use of such things as life expectancy tables because death is not a physical characteristic unique to either sex. The idea is that tables and many other presumptions are based on averages and majorities, and judgment of individuals by averages or majorities would be prohibited by the ERA. Therefore, laws relating to female wet nurses, maternity leave or male sperm donors (all frequently misunderstood examples) will be permissible. However, only distinctions based on clear physical characteristics will be allowed, and not psychological, social or other characteristics predominantly identified with one sex or the other.

A persistent ERA "bugaboo" is what Senator Cook termed the "potty excuse," the fear that no distinctions will be permissible between men and women with respect to restrooms, disrobing and sleeping facilities, or similar areas in which privacy is desired. It is clear from the legislative debate on ERA that existing precedents on the privacy concept will remain applicable in such situations. The passage of the ERA will not dismantle existing constitutional rights, including the imprecisely defined right of privacy. Despite the fact that some homosexuals are also active in the cause of equal rights of women, the legality and acceptability of homosexuality will not be affected by the ERA. (It will only mean that if men can't marry other men, women can't marry other women.)

Any person's choice to support or not to support the ERA should develop not from a fear of the unknown, but from a rational study of the need for change and the available avenues for change. Realizing that we Mormons often take a view somewhat divergent from American society at large, we must be sure that our understanding of basic issues is as complete as possible.

FOOTNOTES

[1] § 703(a)(1), 42 USC § 2000e-2(a)(1) 1964

[2] United States Department of Labor, Employment Standards Administration, Women's Bureau, *State Labor Laws in Transition: From Protection to Equal Status for Women* p. 12 (Pamphlet No. 15, 1976)

[3] Washington Rev. Code Ann. §§ 49.12.005, 49.12.016, 49.12.035, 49.12.041, 49.12170, As enacted by L. 1973 (wd Ex. Sess.), Ch. 16.

[4] *Frontiero vs. Richardson,* U.S. Supreme Court, 1973, 411 U.S. 677, 93 S.Ct. 1794, 36. L.Ed 2d. 583.

[5] 10 USC § 6015

[6] *Sevin vs. Diamond M. Drilling Co.*, 261 S. 2d 375, 379 (La. App. 1972). See also L. Civil Code, Arts, 2402, 2404.

[7] In re Estate of Karas, 61 Ill. 2d 40, 329 N.E. 2d 234 (Ill Sup. Ct. 1975)

[8] Crisman, "Position Paper on Women in Prisons," June 10, 1976, at p. 1 (unpublished paper of ACLU National Prison Project, 1345 Connecticut Avenue, N.W., Suite 1031, Washington, D.C.)

[9] J.J. Res. 264, 91st Cong. 2d Sess. (1970), reported at 116 Cong. Rec. H7953 (daily ed. Aug. 10, 1970)

[10] Brown, Falk and Freedman, "Equal Rights for Women," 80 *Yale Law Journal* 883 (1971)

[11] Freund, "The Equal Rights Amendment is Not the Way," 6 *Harvard Civil Rights-Civil Liberties Law Review* 234 (1971)

[12] Senate Committee on the Judiciary, *Equal Rights for Men and Women,* S. Rep. No. 92-689, 92d Cong. 2d Sess. 15 (1972)

[13] 50 USC App § 456 (h)(2) (Supp. V, 1969)