CHAPTER 20

Sex Discrimination

DIANE LUND *and* REGINA HEALY

§20.1. Introduction. During the 1971 SURVEY year, women throughout the country attempted to counteract the discrimination embodied in the laws of our society. In some situations, particularly in those relating to employment, women's efforts were assisted by statutory declarations of a woman's right to equality. In other areas such as education, where reliance must usually be placed on constitutional arguments, women's claims have met with varying degrees of success. With respect to the laws which limit a woman's right to exercise control of her own body, the campaign to effect a statutory change in New York's abortion laws[1] was an isolated triumph for the forces of change.[2] The advocates of women's rights cannot look back upon a year in which law reform was totally successful, but it nevertheless was a year in which some substantial gains were made.

§20.2. Discrimination in employment: Statutory remedies. The woman who encounters employment discrimination has a number of legal remedies she may choose to pursue. The most well-known of these is established by Title VII of the Civil Rights Act of 1964.[1] Title VII makes it an

> unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or . . . to limit, segregate or

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§20.1. [1] N.Y. Penal Law §125.05 (McKinney 1967), as amended by Laws of 1970, c. 127, now defines a *justifiable abortional act* to include an abortion performed within 24 weeks of the commencement of the pregnancy.

[2] In Massachusetts, bills presented to the 1971 legislature to modify the present abortion laws were given an unfavorable report by the Joint Committee on the Judiciary and died. The General Laws presently provide that anyone who acts in specified ways "with intent to procure the miscarriage of a woman" shall be guilty of a crime. G.L., c. 272, §19.

§20.2. [1] 42 U.S.C. §2000e.

> classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . .[2]

Title VII applies to employers who are engaged in industries affecting commerce and who employ 25 or more persons. The statute does not apply to the United States government as an employer, nor to any state or political subdivision thereof, nor to any bona fide private club.[3] The statute, however, does extend to employment agencies that serve the above employers[4] and to labor organizations whose members work for them.[5] Title VII is enforced by the Equal Employment Opportunity Commission, a federal commission consisting of five members appointed by the president.[6] The commission is intended to function as a conciliatory agency,[7] and the jurisdictional prerequisites for commission intervention prescribed by the statute reflect the limited and supplementary role which Congress envisioned for the commission. The commission defers to state or local antidiscrimination agencies whenever possible. With regard to any unlawful employment practice occurring in a state or political subdivision that has an agency through which redress may be had, a complaint must first be filed with that agency and a 60-day period allowed in order to give the state agency time in which to act before the commission will step in.[8] After the expiration of the 60-day period, or earlier if the state proceedings have been terminated, the aggrieved person may file a complaint with the commission.[9] In any event, the complaint must be filed within 210 days following the occurrence of the allegedly unlawful practice or within 30 days after the state proceedings have been terminated, whichever occurs first.[10] Once the complaint is properly before it, the commission must investigate the complaint; if the commission finds reasonable cause to believe that the charge is true, it endeavors to eliminate the practice "by informal methods of conference, conciliation and persuasion."[11] As a result of the role assigned to the commission by Congress, even when a woman satisfies the jurisdictional requirements of Title VII and is able to present her complaint to the commission, her likelihood of success will depend upon the commission's ability to persuade the employer to

[2] Id. §2000-2(a).
[3] Id. §2000e(b).
[4] Id. §§2000e(c), 2000e-2(b).
[5] Id. §§2000e(d), 2000e-2(c).
[6] Id. §2000e-4(a).
[7] See Id. §2000e-5(a).
[8] Id. §2000e-5(c). The statute provides for a 120-day period during the first year after the effective date of such state or local law.
[9] Id. §2000e-5(b).
[10] Id. §2000e-5(d). Different time periods apply if there is no state agency through which redress must first be sought.
[11] Id. §2000e-5(a).

change its practices. The complainant can bring a civil action against the employer, but not until 30 days after filing her complaint with the commission.[12] If her cause of action arises out of Title VII's provisions, she must first pursue the avenue of administrative conciliation.

Under certain circumstances, Title VII may even permit what might otherwise be considered employment discrimination. A statutory exception permits discrimination on the basis of sex in "those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."[13] The commission has construed this exception narrowly to date.[14] Although it has been argued that sex becomes a bona fide occupational qualification (BFOQ) whenever state law limits a woman's working activities for her own physical or mental protection, such protective labor laws[15] have often been declared invalid in light of Title VII,[16] thereby eliminating the possibility of their being interpreted so as to create a BFOQ.

A similar BFOQ exception to the prohibition against sex discrimination in employment exists in the Massachusetts antidiscrimination laws,[17] which in some respects offer broader protection than does the federal legislation.[18] The agency that administers the state antidiscrimination laws is the Massachusetts Commission Against Discrimination (MCAD).[19] Its jurisdiction extends to any employer with six or more employees.[20] MCAD will investigate every complaint it receives; if the allegations appear to be true, MCAD will attempt to conciliate the parties.[21] If conciliation efforts fail, MCAD may hold

[12] Id. §2000e-5(e).

[13] Id. §2000e-2(e).

[14] The commission has concluded that the job of an airline stewardess cannot be limited to persons of one sex. 33 Fed. Reg. 3361 (1968). In this decision the commission did not accept the argument that an employee's sexual appeal to customers might be "reasonably necessary to the normal operation" of an airline.

[15] E.g., G.L., c. 149, §56, which limits a woman's hours of work in manufacturing industries to nine hours a day.

[16] E.g., Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971), discussed in §20.3 *infra*.

[17] G.L., c. 151B, §4.

[18] More employers are subject to the state antidiscrimination statute, and the state agency has enforcement powers.

[19] G.L., c. 151B enumerates the powers of the MCAD in combating discrimination in employment, in the issuance of surety bonds, in housing accommodations, and in the granting of mortgage loans. G.L., c. 151C delineates the commission's authority with regard to educational practices. An unsuccessful effort was made during the 1971 legislative session to enlarge the scope of Chapter 151C to include discrimination based on sex. (House Bill 1500.)

[20] G.L., c. 151B, §1.

[21] Id. §5. Conciliation was utilized by MCAD in resolving complaints involving loss of tenure due to a maternity leave, equal pay disputes, and failure to promote women as quickly as comparably qualified men. The conciliation agreements in the above cases uniformly affirmed women's rights to equal opportunity and treatment. In cases involving failure to promote women fairly, MCAD has ordered the payment by the employer of back wages to make up the difference between the wages the complainant actually received and the wages she would have received had she received the promotion to which she was entitled.

public hearings.[22] MCAD has the power to issue cease and desist orders,[23] a power which the federal commission does not have.

Other remedies for unfair employment practices may be found in the federal equal pay act,[24] the state equal pay act,[25] and various state and federal executive orders.[26]

§20.3. Discrimination in employment: Women's protective laws; Additional subjects. In *Garneau v. Raytheon Co.*,[1] women employees of Raytheon alleged that male employees were being hired for or promoted to upper echelons of the company in preference to equally qualified females. The plaintiffs also challenged the Massachusetts statute that fixes the maximum hours for female employees,[2] on the ground that the statute was in conflict with the Civil Rights Act of 1964[3] and therefore invalid. Raytheon filed motions for summary judgment on all claims, alleging procedural defects. The plaintiffs moved for summary judgment with respect to their counts challenging the maximum hours statute. The federal district court, ruling on the motions of both parties, accepted none of Raytheon's contentions, and found an irreconciliable conflict between the Massachusetts law and the civil rights act.[4] The court held that the state law must yield and declared that Raytheon's female employees were entitled to the same opportunities for overtime pay that were available to male employees. The court also entered an order enjoining the Massachusetts commissioner of labor and industries from taking any steps to enforce the limited work hours rule with respect to females covered by the civil rights act.[5]

[22] Ibid.

[23] Ibid. MCAD has not hesitated in using its cease-and-desist powers. In the case of Ms. Mary Ann DeLio, MCAD issued a cease-and-desist order against the Everett Liquor Board after the board had refused to renew Ms. DeLio's permit to tend bar. Although Ms. DeLio had been employed as a bartender for nine years, the board contended that she was "neither physically nor emotionally capable" of handling the job. The order filed by MCAD directed the board to cease denying work permits on the basis of sex and to issue a permit to Ms. DeLio.

[24] 29 U.S.C. §206(d).

[25] G.L., c. 151B, §4(1).

[26] E.g., Exec. Order No. 11,246, 3 C.F.R. 424 (Comp. 1968-1970), which provides in part that contractors working with the federal government must agree not to discriminate against any employee or applicant for employment because of race, color, or sex. A discussion of a recent private action to enforce the substance of Exec. Order No. 11,246 may be found in §9.3 *supra*.

§20.3. [1] 323 F. Supp. 391 (D. Mass. 1971).

[2] G.L., c. 149, §56, which provides that "no woman shall be employed or permitted to work in any . . . factory . . . or any manufacturing, mercantile or mechanical establishment . . . more than nine hours in any one day. . . ."

[3] 42 U.S.C. §2000e.

[4] Id. §2000e-2(a) provides in part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or . . . to limit . . . or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex. . . ."

[5] The court further ruled, with respect to the first count of the complaint, that the

The question of the impact of Title VII upon the protective labor laws of the various states has been raised in a number of other federal court proceedings.[6] Protective laws were initially enacted, together with the child labor laws, in order to safeguard working women and children from exploitation. Their constitutionality was upheld in *Muller v. Oregon*[7] as a justifiable means of protecting persons of lesser capabilities.[8] Some protective labor laws sought to provide protection for women by requiring special working conditions, such as seats on which to rest,[9] but most such statutes sought to provide protection by prohibiting certain kinds of work for women,[10] imposing limits on the weight of objects to be lifted by women,[11] prohibiting night work by women,[12] and by limiting the number of weekly working hours for women.[13]

Whatever may have been the original merits of the protective labor laws, at the present time their operation often denies employment opportunities to women.[14] The protection that the laws purport to provide becomes less necessary as women become more independent and self-sufficient. In many instances, union contracts and other forms of government regulation[15] are adequate to meet whatever need remains. The practical reasons that can be advanced in support of retaining the protective labor laws are not compelling ones, and considerable merit attaches to the arguments that these statutes tend to keep women out of higher-paying jobs in industry because these jobs often involve night work, overtime, or the handling of heavy objects.

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action could be maintained as a class action. The court stated that the class was not limited to women who had actually applied for a promotion or transfer at Raytheon, since the apparent futility of the application undoubtedly had discouraged women from taking either of these steps. Furthermore, because the Equal Employment Opportunity Commission had then just recently ruled that Title VII was in conflict with and did supersede state protective labor laws, the court refused to define the class as all women employed by Raytheon after the enactment of the Civil Rights Act of 1964. The court concluded that the proper class was composed of those women who had been working for Raytheon during the 90-day period immediately preceding the filing of the complaint. Civil No. 70-353C (D. Mass., Sept. 30, 1971).

[6] E.g., Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971); Local 246, Util. Workers v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968).

[7] 208 U.S. 412 (1908).

[8] "The two sexes differ in . . . the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence." Id. at 422.

[9] Colo. Rev. Stat. Ann. §80-2-13 (1963).

[10] Utah Code Ann. §34-4-1 (1953) (mining), repealed by Laws of 1969, c. 85, §173. The present provision is contained in §34-22-2.

[11] G.L., c. 149, §53A (40 pounds).

[12] G.L., c. 149, §59 (prohibiting female employment in a manufacturing establishment before 6 A.M. or after midnight, with certain exceptions).

[13] G.L., c. 149, §56 (nine hours per day).

[14] The situation disclosed in Garneau is a case in point. The women employees of Raytheon were legally prohibited from putting in overtime due to G.L., c. 149, §56.

[15] Fair Labor Standards Act of 1938, 29 U.S.C. §§201-217.

To the practical considerations must be added the question of the constitutional validity of laws that interfere with an adult woman's right to compete for and to hold jobs on an equal footing with men. Equal protection standards[16] that must be met when a state seeks to interfere with fundamental rights are stringent; there must be a compelling state interest to justify such an interference.[17] The right to work is basic.[18] If state protective labor laws were challenged, it is unlikely that sufficient justification for the laws could be offered. The judiciary has been understandably reluctant to deal with protective laws in constitutional terms, in view of the degree of administrative supervision needed to implement such a decision effectively.[19]

The *Garneau* court answered only the question of whether an employer subject to Title VII can, under appropriate circumstances, use the Massachusetts protective labor laws to justify the denial of employment opportunities to women. The court, by answering in the negative, concurred with two opinions rendered by Attorney General Quinn at the request of MCAD.[20] The court's holding is also consistent with the current position of the Equal Employment Opportunity Commission.[21] In spite of the *Garneau* decision, however, the protective labor laws of the Commonwealth are in force for some employers[22] and not for others, a situation sufficiently confused to open the way to selective compliance with the laws. The confusion is liable to be compounded because the statute defining the scope of MCAD's jurisdiction specifically excepts the protective labor laws.[23] The exception was inserted in the law at a time when it was assumed that the protective labor laws were valid, and it is therefore possible that the exception is subject to reinterpretation in light of the recent developments in the area of employment discrimination. While the exception to MCAD's jurisdiction still exists, however, MCAD may be reluctant to attack an employer's now invalid adherence to the protective labor laws.

Attempts to obtain repeal of the women's protection laws met with little success during the 1971 SURVEY year. All bills concerning the

[16] U.S. Const. amend. XIV.

[17] Griswold v. Connecticut, 381 U.S. 479 (1965).

[18] "The instant case compels the application of the strict scrutiny standard of review . . . because the statute limits the fundamental right of one class of persons to pursue a lawful profession. . . ." Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971).

[19] See Mengelkoch v. Industrial Welfare Commn., 284 F. Supp. 956, 960 (C.D. Cal. 1968), in which the court noted that a challenge to the state's protective laws involved important questions "from the standpoint of the orderly administration of the law of the state. . . ."

[20] Mass. Op. Atty. Gen. (Mar. 5, 1971); Mass. Op. Atty. Gen. (Sept. 30, 1970).

[21] The commission, after some vacillation, now takes the position that all state protective laws that are prohibitory conflict with Title VII. 29 C.F.R. §1604.1(b) (1971).

[22] The two major categories of Massachusetts employers not subject to Title VII are governmental bodies (the state and all political subdivisions) and employers having fewer than 25 employees. 42 U.S.C. §2000e(b).

[23] G.L., c. 151B, §9.

operation and effect of the protective laws were referred to a special study commission, the purpose of which was

> to study laws limiting and regulating the employment of females in the commonwealth, determine the effect of such laws on the health, safety and welfare of the commonwealth and evaluate the implications of Title VII of the U.S. Civil Rights Act of 1964 as well as other federal laws and the Constitution of the United States on such laws.[24]

The study commission is made up of legislators and representatives from labor, industry, women's rights groups, and the general public. Within the next year, the commission is expected to introduce new legislation designed to update the existing protective labor laws.

There are a number of avenues open to the legislative study commission; the commission could recommend: (1) maintenance of the status quo; (2) extension of the protective labor laws to both men and women; (3) repeal or modification of those protective laws that are without valid basis and retention of those that are justifiable; or (4) repeal of all protective labor laws without distinction. The first alternative, maintenance of the status quo, is unacceptable because it would be unfair. The constitutionality of many of the laws is suspect, and many others seem clearly invalid. As long as the legislature refrains from clarifying the state laws, there will be room for unscrupulous or uninformed employers to take advantage of women employees without running the risk of prosecution, because of the uncertainty of the situation. The legislature has a duty to refashion the laws to remove confusion and facilitate enforcement. The second alternative, extension of the protective laws to men, is clearly unrealistic. The third, selective retention of the protective laws, is perhaps the most defensible on a rational basis; if the protective labor laws are based on any valid distinctions that ought to be enshrined in law, then the laws embodying such distinctions perhaps ought to be retained. Although selective retention would perhaps be the most rational choice, it would arguably make the protective laws much more complex and perhaps more difficult to enforce. It will also take a great deal of time to survey the Commonwealth's economy, job by job, to determine those jobs that women ought not to be permitted to hold and the conditions under which other jobs must be held. Until such time as a job-by-job analysis is conducted, it is submitted that the wholesale repeal of the protective labor laws is called for. Most of such laws have become suspect under the language of the civil rights act and presently perform no function other than unjustifiably keeping women from competing equally with men.

Additional subjects. Preliminary steps have been taken to remedy discriminatory employment practices in state government. On July 20, 1970, Governor Sargent issued a Code of Fair Practices,[25] which

[24] Resolves of 1971, c. 23.

[25] Exec. Order No. 74 (July 20, 1970).

calls for affirmative action on the part of state agencies to ensure nondiscrimination and equal employment opportunities for women within state government. Most parts of the code include sex as a discriminatory classification. The code requires each appointing authority within the executive branch to appoint an equal employment opportunity officer and requires each authority to file an annual report with MCAD describing the programs initiated during the year in implementation of the code. It also requires that every state contract contain a nondiscrimination clause and that contracts for more than $100,000 contain an affirmative action provision. State employment services, educational counseling and training programs, and private health and educational facilities that are licensed or chartered by the state are required to function on a nondiscriminatory basis as a condition of continued participation in any state program and of eligibility for state assistance. The provisions of the code dealing with state licensing agencies, the duties of their licensees, and housing accommodations do not include sex as a discriminatory classification. Broad enforcement and implementation powers are given by the code to MCAD.

Chapter 221 of the Acts of 1971 amended the civil service law[26] to provide that examinations to establish eligibility lists for civil service appointments or promotions must be open to persons without respect to sex unless a restriction on the basis of sex has the prior approval of MCAD. Prior to the enactment of Chapter 221, civil service examinations and appointments could be restricted to persons of one sex without the approval of MCAD.[27] Chapter 221 will open previously single-sex civil service appointments to both men and women where the single-sex requirement had no rational basis.

§20.4. Discrimination in public accommodations. Chapter 418 of the Acts of 1971 enlarged the scope of the statutory prohibition against discrimination by places of public accommodation, resort, or amusement by forbidding discrimination on the basis of sex.[1] The effect of Chapter 418 has been outlined in part by the attorney general: "[Chapter 418] impliedly repealed those provisions in ch. 112, §§87F and 87T which limit a barber from offering the same services to females which he performs for males and which limit a hairdresser

[26] G.L., c. 31, §2A.

[27] G.L., c. 31, §2A, prior to being amended by Chapter 221, provided that examinations to establish a list from which civil service appointments could be made could be restricted to either male or female applicants at the discretion of the director of civil service and with the approval of state or local officials. Examinations to establish a list of persons eligible for promotion were not to be restricted to members of one sex unless "the duties and responsibilities of a position require special physical or medical standards or require custody or care of a person of a particular sex. . . ." Id. §2A(e). Chapter 221 subjects the director's discretion to the approval of MCAD.

§20.4. [1] Acts of 1971, c. 418, §§1, 2, amending G.L., c. 272, §§92A, 98, respectively, to add sex to the list of prohibited discriminatory categories. The legislation may reflect constitutional requirements. See Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969).

from offering to make the same services which are afforded females [available for males]"[2] No public objections to Chapter 418 appear to have been advanced by hairdressers, barbers, or their patrons. Chapter 418 also immediately affected men-only taverns, the owners of which sought exemption from the statute. In response to the saloon owners' supplication, the legislature enacted Chapter 910 of the Acts of 1971, which exempted taverns from the application of Chapter 418 until January 1, 1973.[3]

The highly visible effects of Chapter 418 notwithstanding, it may be that the long-term value of the new statute lies in its impact on banking and credit institutions. It is now settled that such institutions are places of public accommodation within the meaning of the General Laws.[4] If these financial institutions discriminate against women in extending credit (a charge often made by women's groups), a remedy is now available. It is supplemented by the change made in the Massachusetts antidiscrimination laws by Chapter 874 of the Acts of 1971, adding sex as a protected category to the sections prohibiting discrimination in the granting of mortgage loans.[5] These two laws should enable women to obtain financial services on an equal basis with men.

§20.5. Individual rights: Retention of maiden name. Increasing numbers of unmarried women are seeking legal assurance of their right to retain their maiden names should they become married, and many married women are petitioning to resume their maiden names. Under the common law, persons were permitted to assume any name they chose as long as the adoption of that name was for an honest purpose; contracts entered into and transactions conducted under the adopted name were valid and binding, and common law did not require that one's surname be transferred from generation to generation.[1] A statutory freedom of choice with respect to one's name exists in Massachusetts. By G.L., c. 210, §12, the Commonwealth authorizes the submission of a change-of-name petition so that an official record may be created to definitely and specifically establish a change of name.[2] In the case of *In re Regina A. H. Sloane*,[3] the petitioner, a married mother of three children, sought to have her maiden name, Regina A. Healy, established on an official record as the name by which she would be known. Her reason for seeking the change in name was to acquire an outward sign of her individual identity, a

[2] Mass. Op. Atty. Gen. (Sept. 23, 1971).

[3] Chapter 910 provides that until January 1, 1973, a tavern (as defined in G.L., c. 138, §1) "shall not be deemed a place of public accommodation, resort or amusement within the meaning of [G. L., c. 272, §92A, as amended by Acts of 1971, c. 418, §1]."

[4] Local Fin. Co. v. MCAD, 355 Mass. 10, 256 N.E.2d 566 (1968).

[5] Amending G.L., c. 151B, §4.

§20.5. [1] See Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956), and cases cited therein.

[2] See Petition of Buyarsky, 322 Mass. 335, 77 N.E.2d 216 (1948).

[3] No. 445705 (Middlesex P. Ct., Feb. 8, 1971).

sign that would be unique to her. The court inquired as to whether Ms. Sloane's husband objected to her request. He did not, and her petition was granted.

Ms. Sloane's request was unusual. The name-change procedure is normally utilized by a woman to reacquire her maiden name following a divorce; Ms. Sloane, however, had not been divorced nor was she contemplating divorce. Although a member of an ongoing family group, she wanted a last name different from that of the other members of the group. As illustrated by *Sloane*, the court's request for the husband's assent to the wife's name change has become a standard feature of such proceedings. It is submitted that no interest of the state can be identified in the procedural requirement that a husband assent to the wife's change of name. It is not a valid exercise of judicial discretion to require a woman to bear a name that she does not want, unless there is a demonstrable administrative reason therefor. At present, a woman's child may bear a surname different from his mother's after the mother has undergone a divorce and remarriage; and no detrimental administrative consequences appear to result if the parties to a marriage choose to have different surnames. On the other hand, a growing number of women now believe it to be in their personal interest to express their individuality by the resumption or retention of their maiden names. A woman ought to be free to use her maiden name as a matter of right, subject only to her satisfying whatever procedural requirements are deemed necessary for administrative reasons. Enabling legislation is needed and should be enacted to this end.

§20.6. Discrimination in public education. The right of an unmarried pregnant student to continue to attend high school classes was recognized in Massachusetts during the 1971 SURVEY year in *Ordway v. Hargraves*.[1] Ms. Ordway had been excluded from attending classes by a school rule providing that as soon as an unmarried student was known to be pregnant, her "membership" at the school was to be terminated. Although the plaintiff had been denied entrance to school, the school officials had made special provisions to give her home tutoring and had offered to allow her to attend school functions, to participate in senior class activities, and to graduate with her class. In her action under the federal civil rights act[2] against the high school principal, the members of the regional high school committee, and the members of the school committees of the participating towns, Ms. Ordway alleged that her exclusion from school had deprived her of a constitutionally protected right. She sought an order readmitting her to classes and a preliminary injunction against the enforcement of the school rule.

At the federal district court hearing on the plaintiff's application, there was testimony that regular attendance at school would not be physically detrimental to the plaintiff, that the enforced absence of

§20.6. [1] 323 F. Supp. 1155 (D. Mass. 1971). Ordway is further discussed in §16.9 *supra*.

[2] 42 U.S.C. §1983.

the plaintiff from school could in fact be psychologically harmful to both the plaintiff and her unborn child, and that the plaintiff was not having any difficulty in her social relationships with other students. There was also testimony that the substitute instruction offered by the school in lieu of class attendance was inferior to the regular program. The defendants were unable to identify an educational purpose that would be served by the plaintiff's exclusion from classes, and conceded that the plaintiff's pregnant condition had not occasioned any disruptive incidents or otherwise interfered with school activities. In his testimony, the principal implied that the school rule reflected a desire on the part of the school committee to refrain from appearing to condone premarital sexual relations.

The court acknowledged that the right to receive a public school education was "a basic personal right of liberty," and stated that the burden of justifying a school regulation that limited such a right was on the school authorities. Absent a showing of danger to the health of the plaintiff, disruption of school activities or threat of harm to others, or any other valid reason for excluding the plaintiff, the federal District Court for Massachusetts held that the school authorities had failed to carry their burden of proof.

The implication can be drawn from the court's decision in *Ordway* that the exclusion of a pregnant unmarried student from public school in order to discourage premarital sexual activity is unconstitutional. Although admittedly the court was not presented with a direct challenge to the constitutionality of such an exclusion, it is submitted that the denial of a normal high school education to an unmarried pregnant student, solely on moral grounds, is constitutionally suspect. Had the school committee relied solely on its power to control the moral behavior of high school students, the question as to the authority of the committee to do so would have been squarely presented. The much broader question, however, involves the constitutionality of the practice of imposing penalties only on women as a means of deterring a course of action or behavior that necessarily involves both men and women.[3] The latter question, although perhaps the more important one, would have been difficult to reach on the facts of the instant case.

In *Bray v. Lee*,[4] the plaintiffs were female students who had been denied admission to Girls Latin High School in Boston. Girls Latin and Boston High School are perhaps the two most academically advanced of Boston's high schools, the former being open only to girls, the latter only to boys. The plaintiffs filed a class action challenging the admission practices of both high schools, specifically the fact that boys were accepted to Boston Latin on the basis of entrance examination scores lower than those achieved on the same examination by girls who were denied admission to Girls Latin. One cause of the discrepancy in admission standards was the difference in

[3] See, e.g., G.L., c. 276, §10 (common nightwalkers).

[4] Civil No. 70-2002-C (D. Mass. June 23, 1971).

capacity between the two schools: Boston Latin could accommodate 3000 students, but Girls Latin could accommodate only 1500. The initial decision in the case, rendered by a federal magistrate, denied the defendants' motions to dismiss and for summary judgment; the magistrate found that the plaintiffs had been discriminated against by reason of the unequal physical facilities available to them. The magistrate's opinion strongly suggests that an equal educational opportunity for both sexes would exist if they were provided with separate but equal schools.[5]

The single-sex school, public or private, is a common institution in New England and is accepted by parents and students of both sexes. There have been several propositions put forward through the years in support of continuing single-sex educational institutions, i.e., that education is more easily imparted in single-sex schools because of the lack of distracting influences present when adolescents and pre-adolescents of different sexes are present in the same school; that girls receive the opportunity in a single-sex school to learn leadership, an opportunity that would be denied to them if boys were present; that single-sex schools are necessary to prevent the discouragement of boys who, in coeducational classes, would not be able to perform as well as girls; and, finally, that the academic successes of girls in coeducational classes would cause teachers to divert the majority of their efforts and time to girls, to the detriment of the education of boys. One would be hard-pressed today, however, to defend such propositions on accepted sociological or educational grounds. Nonetheless, it is a large step from saying "the reasons advanced for single-sex public schools are not educationally or sociologically valid" to saying "single-sex public schools are per se constitutionally invalid."[6] A constitutional attack on single-sex public schools will require proof that the education received from such institutions differs from that received in an integrated environ-

[5] The decisions cited by the magistrate were all handed down prior to Brown v. Board of Education, 347 U.S. 483 (1954). One may well question whether the separate but equal concept is invalid when applied to blacks seeking integrated schools, but valid when applied to women seeking integrated schools.

[6] The constitutionality of public, single-sex educational facilities has been considered by two lower federal courts in the cases of Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), and Kirstein v. Rector and Visitors of Univ. of Virginia, 309 F. Supp. 184 (E.D. Va. 1970). In Williams, the male plaintiffs sought to enjoin the operation of certain South Carolina statutes that limited admission at Winthrop College to females. The plaintiffs did not allege any special feature of Winthrop which would have made it more educationally advantageous for them, nor did they point to any courses in which they wished to enroll that were offered only at Winthrop. They thus failed to establish that they were injured by being denied admission to Winthrop. The court stated that under the circumstances it could not find "as a matter of law that a legislative classification, premised as it is on respectable pedagogical opinion, is without any rational justification and violative of the Equal Protection Clause." 316 F. Supp. 134, 138. The existence of the "respectable pedagogical opinion" was stipulated by plaintiffs, who conceded that "a respectable body of educators . . . believe that 'a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex.' " Id. at 137. The apparent lack of effort

ment and that the difference is disadvantageous to the sex-segragated pupils. Absent a scholarly consensus as to the sociological or educational validity of such a conclusion,[7] a decision declaring the per se unconstitutionality of single-sex public schools is not likely to be forthcoming.

In the Commonwealth, fortunately, the single-sex public school may become an institution of the past. By Chapter 622 of the Acts of 1971, the legislature amended the General Laws to provide that a public school may not discriminate on the basis of sex in its admissions policies, and that students may not be discriminated against on the basis of sex with respect to privileges, advantages, and courses of study.[8] Chapter 622 also amended the General Laws in such a way as to provide that the parent or guardian of a child who is unlawfully excluded from a public school, or from an educational program of a public school because of the child's sex, may bring an action in tort for the child against the city, town, or school district whose officials are responsible for the exclusion.[9]

Part of the support for Chapter 622 was based on the expectation that the amendment would change those policies of the Boston schools that were challenged in *Bray*. Such a change would significantly enlarge the academic opportunities available for female students attending Boston's schools. Prior to the passage of Chapter 622, of the four Boston high schools graduating the highest percentages of college-bound students, only Girls Latin admitted girls.[10] The number of places available only to boys gave males a much greater chance of obtaining a high school education that would prepare them for continuing their schooling at the college level. Chapter 622 affords girls an equal opportunity to receive high-quality preparatory education and should produce a long-overdue reordering in the field of occupational education. In many Massachusetts public schools,

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on the part of the plaintiffs to develop any factual justification for their lawsuit, coupled with their seeming eagerness to stipulate arguable points, severely weakens the precedential value of the case.

In Kirstein, four female plaintiffs sued to be admitted to the University of Virginia at Charlottesville. The federal court concluded that the Charlottesville campus offered educational opportunities "not afforded in other institutions operated by the state" and that the defendants could not deny those opportunities to women on the basis of sex. It explicitly declined to rule on whether "separate but equal" facilities would be permissible. Cf. Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App. 1960), *cert. denied*, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958), *cert. denied*, 359 U.S. 230 (1959) (women refused admission to a Texas all-male college.)

The issue of single-sex public schools is also presented in an emerging line of cases involving plans for the racial desegregation of public school systems, which plans include segregation of the students on the basis of sex. Such plans have been approved by federal courts in Smith v. St. Tammany Parish School Bd., 302 F. Supp. 106 (D. La. 1969), and in Moore v. Tangipahoa Parish School Bd., 304 F. Supp. 244 (E.D. La. 1969).

[7] But see Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), discussed in n.6 *supra*.

[8] Acts of 1971, c. 622, amending G.L., c. 76, §5.

[9] Acts of 1971, c. 622, amending G.L., c. 76, §§5, 16.

[10] Boston Public Schools, Statistics of the 1968 Graduating Class (available in the vocational guidance offices of the various Boston public schools).

some or all of the vocational and trade courses are limited, either by rule or practice, to students of one sex; and in some communities, single-sex vocational or trade high schools exist.[11] In addition, the counseling provided to students concerning careers and job opportunities often is based upon sexual stereotypes, effectively restricting the choices which both male and female students might consider. Chapter 622, if effectively utilized by students and their parents, should change many of these aspects of occupational education in the Commonwealth.

§20.7. Conclusion. The status of women cannot be improved without changing those laws which require, sanction, or encourage discrimination on the basis of sex. It is a truism that attitudes cannot be legislated, but it is equally true that changes in the law are often a first step in rearranging the social order and indeed may be a prerequisite to an orderly and reasoned evolution of social attitudes. The passage and ratification of an equal rights amendment to the United States Constitution, the expansion (through litigation) of the scope of the guarantees extended to women by the Fourteenth Amendment, and the revision or repeal of discriminatory and reactionary state legislation are all potential means for achieving orderly change. Laws that confer a different status upon women or that embody concepts about the proper role of women and that fail to reflect today's realities and serve to perpetuate stereotypes must be eliminated if women are to achieve genuine equality.

[11] An excellent comparative study of occupational educational opportunities for boys and girls attending the Boston public schools is Bryan, Discrimination on the Basis of Sex in Occupational Education in the Boston Public Schools (unpublished report of the Boston Commission to Improve the Status of Women, 1972). Ms. Bryan reports that in 1970, Boston's Trade High School, to which only boys were admitted, provided training in 12 skills at an average per-pupil expenditure of $1305. Boston Trade High School for Girls provided training in 4 skills (clothing trades, food trades, cosmetology, and commercial art) at an average per-pupil expenditure of $924.