An anthology of radical feminist writings from the current women's movement. Forty-five articles ranging from the personal to the theoretical and drawn largely from the feminist annual NOTES.
Jane Crow and the Law: Sex Discrimination and Title VII
by Pauli Murray and Mary Eastwood

Mary Eastwood is a founder and one of the directors of Human Rights For Women. Pauli Murray is a Professor of American Studies at Brandeis University and teaches a course in women's studies. Both were founding members of NOW; both recently wrote articles for the Valparaiso University Law Review, Symposium on Women and the Law (Spring, 1971), and both have been active in the women's movement since it began. This article is an abridgment of a 1965 article by Pauli Murray and Mary Eastwood published in 34 Geo. Wash. L. Rev. 232, with 1971 notes by the authors.

1971 NOTE: This was the first article dealing with Title VII of the Civil Rights Act of 1964 written by feminist lawyers. In 1965, most lawyers and government officials charged with enforcing the equal employment opportunity provisions of Title VII regarded the sex discrimination prohibition as unimportant and openly asserted that this aspect of the law need not be enforced with the same seriousness as discrimination by reason of race. This attitude directly contributed to the rise of the new feminist movement. Today, much of the legal theory on Title VII, and some of the constitutional theory, presented in "Jane Crow and the Law" has become a part of the law of the land.

Copyright © 1965 The George Washington Law Review. Permission to Print this abridgment granted by The George Washington Law Review and the authors.
Antifeminism and Racism

Discriminatory attitudes toward women are strikingly parallel to those regarding Negroes. Women have experienced both subtle and explicit forms of discrimination comparable to the inequalities imposed upon minorities. Contemporary scholars have been impressed by the interrelation of these two problems in the United States, whether their point of departure has been a study of women or of racial theories. In The Second Sex, Simone de Beauvoir makes frequent reference to the position of American Negroes. In An American Dilemma, Gunnar Myrdal noted that the similarity of the two problems was not accidental, but originated in the paternalistic order of society. “From the very beginning,” Dr. Myrdal observed, “the fight in America for the liberation of the Negro slaves was closely coordinated with the fight for women’s emancipation... The women’s movement got much of its public support by reason of its affiliation with the Abolitionist movement.”

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

Equality of Rights Under the Constitution

In three nineteenth century cases, the Supreme Court held that the privileges and immunities clause of the fourteenth amendment did not confer upon women the right to vote or the right to practice law within a state. Between 1908 and 1937, the Supreme Court up-
held various state labor laws applicable to women but not men, on
the ground that sex furnishes a reasonable basis for legislative
classification. The Court upheld in 1948 a state law forbidding the
licensing of females (with certain exceptions) as bartenders and
in 1961 a state law providing that no female may be taken for jury
service unless she registers with the clerk of court her desire to
serve.

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

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

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

Although the Supreme Court has in no case found a law dis-
tinguishing on the basis of sex to be a violation of the fourteenth
amendment, the amendment may nevertheless be applicable to sex
discrimination. The genius of the American Constitution is its ca-
pacity, through judicial interpretation, for growth and adaptation
to changing conditions and human values. Recent Supreme Court
decisions in cases involving school desegregation, reapportionment,
the right to counsel, and the extension of the concept of state action
illustrate the modern trend toward insuring equality of status and
recognizing individual rights. Courts have not yet fully realized that women’s rights are part of human rights; but the climate appears favorable to renewed judicial attacks on sex discrimination.

1971 NOTE: The Supreme Court has not yet ruled that a law discriminating on the basis of sex is unconstitutional. However, a law giving preference to male relatives in the administration of decedents’ estates, held by the Idaho Supreme Court to be constitutional, will be heard by the high court next term. Lower courts have found the following violative of the fifth or fourteenth amendments’ due process or equal protection guarantees: the exclusion of women from juries; exclusion of women from a state university; heavier criminal penalties for women than for men convicted of the same crimes; and a prohibition against women working as bartenders. A U.S. Court of Appeals recently ruled that the issue of whether California’s special restrictions on working hours of women, having the effect of preserving the better jobs for men, raised a substantial constitutional question. This case, Mengelkoch v. Industrial Welfare Commission, is currently pending in the U.S. District Court in Los Angeles. But other federal courts have found that sex distinctions in computing social security benefits and the exclusion of women from the draft do not violate the Constitution. The position of women under the Constitution is still unclear.

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

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

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

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

It may not be too far-fetched to suggest that this doctrine as presently applied has implications comparable to those of the now discredited doctrine of "separate but equal." It makes the legal position of women not only ambiguous but untenable. Through unwarranted extension, it has penalized all women for the biological function of motherhood far in excess of precautions justified by the findings of advanced medical science. Through semantic manipulation, it permits a policy originally directed toward the protection of a segment of a woman's life to dominate and inhibit her development as an individual. It reinforces an inferior status by lending governmental prestige to sex distinctions that are carried over into those private discriminations currently beyond the reach of the law.

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

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

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

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

To be consistent with the principle of equality of rights, different
minimum ages for marriage for boys and girls (if different, lower
for girls than for boys) and different ages in state child labor laws
(if different, higher for girls than for boys) should be equalized.
State labor standards legislation would have to apply equally to
men and women. Both sexes would be subject to compulsory mili-
tary service and jury service, but exemptions could be made for
activities, such as care of dependent children or other family mem-
bers, if based on performance of the function rather than sex.
If laws classifying persons by sex were prohibited by the Constitution, and if it were made clear that laws recognizing functions, if performed, are not based on sex per se, much of the confusion as to the legal status of women would be eliminated. Moreover, this may be the only way to give adequate recognition to women who are mothers and homemakers and who do not work outside the home—it recognizes the intrinsic value of child care and homemaking. The assumption that financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world is all too common. Underlying this assumption is the unwillingness to acknowledge any value for child care and homemaking because they have not been ascribed a dollar value.

The Bona Fide Occupational Qualification Exception

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

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

Sections 703(b) and (c) contain comparable provisions defining unlawful employment practices of employment agencies and labor organizations. Section 703(e) provides that it is not an unlawful employment practice for an employer to hire an individual "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. ..." Section 704(b) provides that it is an unlawful employment practice for an employer,
labor organization, or employment agency to print or publish a notice or advertisement relating to employment, specifying sex, except when sex is a bona fide occupational qualification for employment.

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

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

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

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


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

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

A second excuse an employer might use for refusing to hire a woman is sex prejudice on the part of the public, customers, other employees or some other group. Similarly, this assumption may be false; even if the assumption could be proved true, the prejudice may not affect the particular woman’s performance of the job; she may even be able to overcome the prejudice and perhaps change the discriminatory attitudes. Sex prejudice is one of the negative factors listed in the Federal Personnel Manual that fails to justify discrimination in hiring.

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

1971 NOTE: The Equal Employment Opportunity Commission guidelines on discrimination because of sex include the above three types of discrimination as not justifying exclusion of persons of one sex under the bona fide occupational qualification provision. The EEOC added a fourth situation—that of providing "separate facilities" for the opposite sex, as not a "b.f.o.q." "unless the expense would be clearly unreasonable." The EEOC guidelines further would permit sex discrimination for jobs such as actor or actress.

Employment Advertisements

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

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

1971 NOTE: Although the EEOC initially announced that job advertisements under sex-segregated want ad headings would not be considered violative of Title VII, it subsequently reversed its position, and the present guidelines state that such sex labeled job advertisements are violative of Title VII. However, the job ad provision of Title VII remains largely unenforced. In a suit to try to directly subject newspapers themselves to the prohibition against identifying job ads by the desired sex of applicant, a Federal court in California ruled that newspapers are not "employment agencies" within the meaning of Title VII. The case has been appealed to the U.S. Court of Appeals in San Francisco.

Some newspapers have discontinued separate male and female
columns because they were required to by state or local fair employment laws (e.g. New York, Washington, D.C., Pittsburgh).

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

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

The debate in the House of Representatives when “sex” was added to Title VII of the civil rights bill indicates that both proponents and opponents of the amendment thought it might remove the “restriction” or “protection,” depending on the point of view, of these state labor laws. Speaking in favor of the sex amendment, Representative Griffiths stated, “[I]f labor is seeking to maintain the old distinction, they will do far better to support this amendment and ask for a savings clause in this law. . . .” A “savings clause” for state protective laws for women was not added to Title VII. Section 708 of the act provides:

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

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

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

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

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

It could be argued that, since compliance with these state laws would impose unreasonable requirements on employers, compliance may be tantamount to requiring employers to refuse to hire women at all for certain jobs; such a requirement would be unlawful under Title VII except in cases where being a male is a bona fide occupational qualification.
1971 NOTE: Federal courts in several Title VII cases have held that special weight lifting and hours restrictions on women employees deny women equal employment opportunities in violation of the federal statute. Some of these cases are still pending. A number of states have repealed their hours restrictions on women only. And in some, the restrictive laws are not enforceable because of Attorney Generals' opinions ruling them inconsistent with the non-discrimination requirements of the federal law, which, of course, supersedes conflicting state law under Article VI of the Constitution.

The First Title VII case to be heard by the Supreme Court involved the question of whether an employer could refuse to hire women with pre-school age children while hiring men with such children (Phillips v. Martin-Marietta). The Court held that employers subject to Title VII could not have one hiring policy for women and another for men.

Conclusion

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

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