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Senate

REMARKS BY PROF. LEO KANOWITZ ON THE EQUAL RIGHTS AMENDMENT

Mr. COOK.* Mr. President, last week the full Senate Judiciary Committee held hearings on the proposed equal rights amendment. The most persuasive witness I had the privilege of hearing was Prof. Leo Kanowitz of the University of New Mexico Law School who succeeded in a quite convincing fashion in refuting most of the "red herrings" which have been raised by opponents of this amendment.

He predicted that passage of the equal rights amendment would be a good first step toward the goal of liberation of American women but warned that it would not be "a cure-all for the Myriad problems of sex discrimination in law."

I urge all Senators, especially those who remain unconvinced of the necessity for the equal rights amendment, to read the remarks of Professor Kanowitz. I ask unanimous consent that the statement be printed in the RECORD.

There being no objection, the remarks were ordered to be printed in the RECORD, as follows:

THE EQUAL RIGHTS AMENDMENT AND THE OVERTIME ILLUSION

INTRODUCTION

Mr. Chairman, I should first like to thank the Committee for inviting me to state my views on the proposed equal rights amendment to the United States Constitution. As a citizen, a lawyer, and a law professor, I have been deeply concerned for a number of years with the status of women in the United States, or more precisely, with the question of sex roles in our society—as this question has come to be more accurately designated in Sweden.

Since 1965, I have studied this question to determine the role that has and can be played with respect to it by our legal institutions. The results of those studies have recently been published in my book, *Women and the Law: The Unfinished Revolution*,[1] a copy of which I have today taken the liberty of presenting to the Chairman and Committee members.

In *Women and the Law*, I explore major aspects of the legal status of American women and analyse some of the social causes and effects of sex-based discrimination in American law. Among the subjects examined are abortion, prostitution, marriageable age, age of majority, married women's names, support obligations within the family, divorce, special criminal penalties for women, jury service rules, domiciles of married women, marital property regimes in the common law and community property states, and contracts and torts of husband and wife.

Much of the book, however, deals with the law affecting women's employment in the United States, particular attention being paid to the Equal Pay Act of 1963 and to the history and effects of the prohibition against employment sex discrimination in Title VII of the 1964 Civil Rights Act. In addition, *Women and the Law* explores in considerable detail the principles of American constitutional law affecting this area of human rights.

Rather than recapitulating the contents of *Women and the Law*, or even its exposition and analysis of persisting sex-based discriminatory legal rules and official practices, I would refer the Committee to the book itself—although I am sure that many instances of such discrimination have already been brought to your attention by other witnesses. But I would take this occasion to repeat the hopes I expressed for the book in its Preface.

"Perhaps," I wrote, "an awareness of the many areas of sex-based legal discrimination, whose continued existence this book seeks to identify, will stimulate, first, courtroom and legislative attacks upon those disparities or injustices, then, a much-needed national examination of the respective roles of the sexes in every sphere of American life, and finally, the active and continuing participation of all Americans in bringing about the needed changes."[2]

My investigation in this field has persuaded me that many irrational and harmful distinctions continue to be made in the legal, political and social treatment of the sexes in our country, that the resulting injustices have impeded our development as a nation, and that they have led to much personal unhappiness for American men as well as women.

By relegating women to special tasks, by perpetuating ancient myths about the alleged physical and psychological limitations of women, we American men have subjected ourselves to an awesome burden. For the doubtful joys of feeling superior to women, we have paid a terrible price. Not only have we suffered with respect to uneven laws in the field of support obligations within the family, child support and custody awards in divorce proceedings, and the frequent lack of protective labor legislation where such legislation exists for women, but our insistence that men and only men are entitled to be society's doers and shakers has led to our dying from eight to ten years earlier, on the average, than the women of our country. Perhaps even more important is that, because of arbitrary social and legal distinctions, both men and women are often prevented from relating to one another as people, as fellow members of the human race.

So, when I speak or write of the need to erase sex-based discrimination in American law, I am moved not only by the desire to end the injustices that American men have perpetrated upon our nation's women, but to end those we have imposed upon ourselves as well.

Footnotes at end of article.

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But recognizing that sex discrimination pervades American law and that it is pernicious does not tell us how best to bring about the needed changes. It is to this question—and specifically to whether the constitutional amendments proposed in either Senate Joint Resolution 61 or in Senate Joint Resolution 231 are appropriate steps to that goal—that I would now address myself.

Before I explain my reasons, however, let me state my position on these two proposed amendments. First, I support the Equal Rights Amendment as worded in Senate Joint Resolution 61. Secondly, I oppose the amendments to that Amendment that are set forth in Senate Joint Resolution 231.

Thirdly, I should also like to discuss with this Committee what I believe is the core question in the controversy over the Amendment's desirability namely the issue of state protective labor legislation. As I shall explain, I believe that much of the discussion of this question is at cross-purposes, that it proceeds from a basic fallacy in the thinking of proponents as well as opponents, and that if it can be cleared up, the spectacle of otherwise natural allies opposing one another may disappear. Finally, I would be glad to try to respond to any questions the Committee might care to ask about other aspects of this subject.

SENATE JOINT RESOLUTION 61

Senate Joint Resolution 61, if adopted and ratified by the requisite number of state legislatures, would add a new article to the United States Constitution, to take effect one year after the date of ratification. The crucial language of that proposed new article reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."

I have had occasion to consider the present desirability of such a constitutional amendment in my book, *Women and the Law*. Writing in 1969, I suggested that many proponents of the Equal Rights Amendment were mistaken in their belief that the United States Supreme Court and lower state and federal courts had in the past held existing provisions of the United States Constitution, in particular the Fifth and Fourteenth Amendments, inapplicable to women.

"The fact is," I wrote, "that the courts have not done this at all. Instead, they have generally held that existing constitutional provisions do apply to women, but that within the limits of those provisions, women in many situations constitute a class that can reasonably be subjected to separate treatment."[3]

I also suggested that the adoption of the Equal Rights Amendment would not fundamentally change the picture. "While the proposed amendment states that equality of rights shall not be abridged on account of sex," I wrote "sex classifications could continue if it can be demonstrated that though they are expressed in terms of sex, they are in reality based upon function. On the other hand, under existing constitutional provisions, particular classifications of men and women that cannot be shown to be based upon function, are vulnerable to attack—as has already been demonstrated in some lower state and federal courts with respect to discriminatory laws in the realm of jury service, differences in punishment for identical crimes, right to sue for loss of consortium and the like."[4]

This latter reference was to a series of recent cases in which sex-based discriminatory legal rules had already been struck down by various courts as violating the equal protection clause of the United States Constitution's Fourteenth Amendment. (*E.g., White* v. *Crook,* 251 F. Supp. 401 (1966); *Robinson* v. *York,* 281 F. Supp. 8 (1968); *Owen* v. *Illinois Baking Corporation,* 260 F. Supp. 820 (D.C. Mich 1966); *Clem* v. *Brown,* 3 Ohio Misc. 167, 207 N.E. 2d 398 (1965) etc.)

I also suggested that "as some of these cases make their way to the Supreme Court, the Court, influenced by the reasoning of the opinions below and perhaps more responsive to the present sociological climate surrounding the question of women's legal status than it has been in the past, may drastically revise its prior approach to determining the kind and extent of official sex discrimination that is allowable."

I continue to hold these views. I believe that there is a very high degree of probability that the United States Supreme Court, when it next confronts an equal protection or due process challenge to a sex discriminatory law, will drastically modify the undifferentiated principle originally enunciated in the 1908 case of *Muller* v. *Oregon,* 208 U.S. 412 (1908) that "Sex is a valid basis for classification,"—a principle I described in *Women and the Law* as being "often repeated mechanically by the courts without regard to the purposes of the statute in question or the reasonableness of the relationship between that purpose and the sex-based classification,"[5] Indeed, I suggested, "the subsequent reliance in judicial decisions upon the *Muller* language is a classic example of the misuse of precedent, of later courts being mesmerized by what an earlier court had *said* rather than what it had *done*."[6]

But if I believe that the Equal Rights Amendment would not achieve anything that could not be achieved by the courts in interpreting existing constitutional provisions, the question arises as to why I am supporting the Equal Rights Amendment at this time, especially since my position on the Amendment has heretofore wavered between mild opposition and lukewarm support. The answer is simple. Although I still believe that there is a very high degree of probability that the Supreme Court will perform as I hope and expect in this area, there is no guarantee that it will do so. Moreover, I now believe that it is necessary for all branches of government to demonstrate an unshakeable intention to eliminate every last vestige of sex-based discrimination in American law. The adoption of the Equal Rights Amendment at this time would give encouragement to the many American women and men who now see the need for substantial reform in this area. Finally, should the next few years bear out my prediction that the Court will soon begin to interpret existing constitutional provisions so as to eliminate irrational sex discrimination in the law, no harm will have been achieved by the presence of the Equal Rights Amendment. Indeed, many examples can be cited in which laws and official practices may violate more than one constitutional provision at one time.

Moreover, should the Supreme Court *not* respond as I have suggested it ought to in this area, then the need for the Equal Rights Amendment will have become manifest. The time that will have been gained by sending it on its ratification road immediately would be precious.

There is one word of caution I would add at this point, however. And that is that this Committee and Congress, if it adopts the proposed Equal Rights Amendment as I hope it will do, will make sure that the record discloses that it does not thereby intend to discourage the United States Supreme Court from interpreting existing constitutional provisions—and especially the equal protection clause of the Fourteenth Amendment—so as to eliminate every sex-based discrimination in American law that cannot be sustained by overwhelming proof of functional differences between men and women.

I say this because there is a very real danger that if this is not done, the adoption of the Amendment at this time will ultimately represent a defeat rather than a victory for those of us who seek the eradication of irrational sex-based distinctions in American law and society. In the absence of such a clarifying declaration in the legislative history the Court, when faced with an equal protection or due process challenge to a sex-discriminatory legal rule or official practice

Footnotes at end of article.

within the next few years, may be prompted to reason as follows: Since a coordinate branch of the federal government, the Congress, has deemed it necessary to adopt the Equal Rights Amendment, then it must have believed that existing constitutional provisions were inadequate to provide the needed relief in this area. Though such a view is not determinative, it is at least persuasive. As a result, deferring to Congress' apparent wishes in this respect, the Court could withhold any modification of the *Muller* principle and simply await the ratification of the Equal Rights Amendment before providing the needed relief in this area.

The problem of course is that one cannot be sure that the Equal Rights Amendment will be ratified by the requisite number of State legislatures. Even if it is eventually ratified, this may occur many years from now. In the meantime, many litigants, both men and women, seeking to prevent unreasonable discrimination based upon sex, may find that no redress is available from the courts.

I am aware of course of the decision in *Gray v. Sanders*, 372 U.S. 368, wherein the Supreme Court at page 379, invoked the Fifteenth Amendment's prohibition against voting denials based on race and the Nineteenth Amendment's similar prohibition of denials based on sex to sustain a challenge to a county-unit voting system that was based on the Fourteenth Amendment's equal protection clause. *Gray v. Sanders* is no guarantee however that the Court would act the same way under the circumstances we are presently concerned with. For one thing, *Gray* was decided *after* the ratification of the Fifteenth and Nineteenth Amendments, while the fear that I have expressed concerns the Supreme Court's response while the ratification of the proposed Equal Rights Amendment would still be pending. For another thing, the *Gray* decision did not require the Court to overrule or substantially modify any of its recent decisions. But if the Court were to do as I hope and expect it will with respect to equal protection and due process challenges to sex-based legal discrimination, it would have to drastically modify several decisions that were rendered as recently as 1961 (*Hoyt v. Florida*, 368 U.S. 57) and 1954 (Goesart v. Cleary, 335 U.S. 464).

For these reasons, I believe it is of crucial importance that this Committee and Congress, in adopting the proposed Equal Rights Amendment, make clear their hope and expectation that forthcoming decisions of the United States Supreme Court will soon transform that Amendment into a constitutional redundancy.

Finally, before moving on to the proposed amendments to the Amendment that are contained in S.J. Res. 231, let me make one more observation.

Some proponents of the Equal Rights Amendment are undoubtedly convinced that its adoption will inevitably revolutionize judicial attitudes about sex roles in our society. Some opponents of the Amendment are equally convinced that its adoption will introduce chaos, uncertainty and confusion in our law and judicial processes.

My most recent studies in this area have persuaded me that neither view is correct. I have just returned from a seven-month sabbatical leave in Europe. While there, I began an examination of law-based sex discrimination problems in France, West Germany, Switzerland, England, Denmark, and Sweden.

My study is still incomplete and it shall be some time before I shall be able to publish my conclusions. For the moment, however, I think I can say with some assurance that the experience of the West German courts in interpreting a similar constitutional provision (*"Männer und Fraunen sind gleichberechtigt,"*—translated as "Men and women are equal before the law." Art. 3, sec. 2 Constitution of the German Federal Republic) demonstrates two important points. One is that our Courts will face no extraordinary difficulties in dealing with the Amendment. The other is that the Amendment will not of itself represent a cure-all for the myriad problems of sex discrimination in law and society—although it will be a step in the right direction. For as I suggested in *Women and the Law*, even after the adoption of the Equal Rights Amendment, "the crucial factor will continue to be the responsiveness of the judiciary to the social impulse toward equality of treatment without regard to sex."[7]

But in contrast to my former position, when I believed that, for *tactical* reasons, efforts to secure passage of the Amendment ought to be abated in favor of vigorous challenges under existing constitutional provisions, I now believe, for the reasons advanced earlier in these remarks, that, provided the adequate legislative history is made, passage of the Amendment at this time could do no harm and possibly could do much good.

SENATE JOINT RESOLUTION 231

Let me now turn my attention to Senate Joint Resolution 231. That Joint Resolution, introduced as a substitute to Senate Joint Resolution 61, would change the proposed Equal Rights Amendment in several respects. First, it would place a seven-year limitation on the ratification process. Secondly, it would become effective two years after ratification rather than one year after ratification as proposed in S.J. Res. 61. But most importantly, it would qualify the basic declaration of equality contained in S.J. Res. 61 by adding this second sentence:

> This article shall not impair, however, the validity of any law of the United States or any state which exempts women from compulsory military service or which is reasonably designed to promote the health, safety, privacy, education, or economic welfare of women, or to enable them to perform their duties as homemakers or mothers.

As indicated earlier, I recommend the rejection of S.J. Res. 231.

First of all, I oppose the seven year limitation on the ratification process. Hopefully, the basic Equal Rights Amendment, as worded in S.J. Res. 61, will be ratified long before seven years have passed. But should that not be the case, I can see nothing that will be gained by imposing such a time limit—especially if, as I have suggested, the legislative history will clearly show Congress' hope and expectation that the Supreme Court will in the meantime render the Amendment unnecessary.

Second, while there is some merit to the idea that the State legislatures and Congress should be given more than one year to enact appropriate implementing legislation, a one year period would be adequate since both state and federal legislatures would have had time to prepare for their work while the ratification process was still pending.

My most severe reservations about S.J. Res. 231, however, go to the language in the second sentence of the first section that would qualify the basic declaration in favor of equal treatment in the law without regard to sex that is contained in the first sentence of that section.

I suggest that there are serious questions about the *meaning* of the second sentence. And even if the meaning of it can be ascertained, I fear that the interpretation probably intended by its sponsor would render that language objectionable to me as being incompatible with the needs of our society and the basic goal of equal treatment under law without regard to sex.

In ascertaining the meaning of the second sentence, I think it is important to note first the provision that it qualifies. That provision states, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Then comes the sentence in question which states that the Article shall not impair the validity of certain knds of laws which presently are assumed to benefit women in a variety of ways.

Footnotes at end of article.

One possible interpretation, resulting from this juxtaposition of the two sentences, would be as follows: Since the first sentence guarantees equality of treatment without regard to sex, and since the benefits presumably flowing to women from certain laws are held inviolate in the second sentence, then the only way to achieve the equality of treatment guaranteed in the first sentence is to extend those benefits to men. Under this construction, since women's present exemption from compulsory military service is to be preserved, the constitutional command of equal treatment can be obeyed only by extending the exemption to men. This would render unconstitutional our present Selective Service law which presently applies to men only.

While, personally, I would have no objection to such a construction of this language, I wonder if this would be acceptable to the Resolution's sponsor.

A similar analysis can be offered of the remaining language of the second sentence, i.e., up to the beginning of the last clause. For, it is not only women who have an interest in laws designed to promote their health, safety, privacy, education or economic welfare. Men are equally interested in being protected by government in these areas. A reasonable reconciliation of this language with the command of the first sentence would be to read it as requiring the extension of the benefits of such laws to men. Indeed, if this is intended by this language, I could support it—although, as I will explain, the Equal Rights Amendment, as worded in S.J. Res. 61, achieves this same goal and is preferable.

The last clause of the second sentence raises some difficulties, however. It states, "or to enable them to perform their duties as homemakers or mothers." Here the extension approach is clearly not intended. Though it is possible to think of men performing the function of homemakers, it is a little difficult to conceive of them as mothers in a biological sense. Moreover, this last clause would appear to lend constitutional dignity to the social presumption that the highest, if not the sole, life's work for women is that of wife and mother.

The apparent intention of this last clause provides a key, I believe, to the probable meaning and intention of the rest of the language in the second sentence. That is, rather than intending these benefits and protections to be extended to men, the Amendment's sponsor apparently intends, by the language of the second sentence, to preserve these for women alone. Not only would this represent a nullification of the spirit and intent of the proposed Equal Rights Amendment as worded in S.J. Res. 61, but it would be a substantial step backward from the encouraging recent trend of decisions in the state courts and lower federal courts.

Even if S.J. Res. 231 is intended to embrace the possibility of extending to men certain rights, privileges and benefits of law presently enjoyed by women only, the basic fallacy in its reasoning is its apparent assumption that the unadorned Equal Rights Amendment, as worded in S.J. Res. 61, would, if adopted and ratified, deprive women of many of these rights, privileges, and benefits.

But I suggest that this need not happen at all. In *Women and the Law*, I pointed out how it would be consistent with judicial precedent for the courts, in interpreting the Fourteenth Amendment's equal protection clause in sex discrimination cases, to cure the invalid inequality by extending the benefits of particular laws to the sex (male or female) that had not previously enjoyed those benefits rather than by removing them from the one that had. That analysis, I suggested, was equally applicable with respect to the Equal Rights Amendment.

Footnotes at end of article.

The Supreme Court's recent decision in *Levy* v. *Louisiana*, 391 U.S. 68 (1968), I wrote had "held that a denial to illegitimate children of a right to recover for wrongful death of their mother, where her legitimate children could recover the same wrong, violated the equal protection guarantee. But the Court's remedy for such a violation was not to remove from the legitimate children the right to recover for their mother's wrongful death, but rather to extend this right to her illegitimate children." [8]

"Even some state courts," I observed, "exercising their power to entertain federal constitutional challenges to state laws, have achieved similar results. Thus in *Clem* v. *Brown*, an Ohio Court of Common Pleas, holding that the state's rule permitting husbands but not wives to recover for loss of consortium deprives a wife of 'equal protection of the law' remedied this inequality by extending the right to wives rather than by removing it from husbands. Similarly, the decision of a federal district court in Michigan in *Owen* v. *Illinois Baking Corporation* was one more example of a . . . court curing what it regarded as a constitutionally infirm one-way consortium rule by extending the right to sue to married women.

"As long ago as 1871, the United States Supreme Court held that a state could not limit the right to sue on a cause of action created under state law so as to deprive the federal courts of the power to entertain such suits if jurisdiction was otherwise present . . . Though [this] result . . . was dictated by the requirements of Article III of the U.S. Constitution, conferring the Judicial Power upon the United States, rather than by the equal protection clause of the 14th Amendment, it is another illustration of the Court's past practice of implementing constitutional provisions by extending a state-created benefit beyond the limits intended by the state, while recognizing that the state could, if it wanted, remove the benefit from all." [9]

This, I believe, is the spirit in which the Supreme Court, aided by the legislative history, will interpret the Equal Rights Amendment as worded in S.J. Res. 61. This, I believe, is the spirit in which the Court can and should interpret the Fourteenth Amendment's equal protection clause in forthcoming sex discrimination cases.

I would also stress that the Amendment as worded in S.J. Res. 61 empowers Congress and the States, within their respective jurisdictions, to enforce the new article by appropriate legislation. This, I suggest, is the ultimate corrective, the ultimate guarantee of social consensus with regard to decisions to extend one-way rules or abrogate them.

In sum, I believe that S.J. Res. 231 is based on an invalid assumption as to the probable effects of the Equal Rights Amendment as worded in S.J. Res. 61, and therefore recommend its rejection. Though I am absolutely certain that the sponsor of S.J. Res. 231 is as interested as I am in advancing the status of American women in law and society, he has proposed a way that I simply cannot support. The fact of the matter is that this is an extraordinarily difficult question about which reasonable men and women do differ. My hope is that, in the course of these hearings, understanding of all of us will be advanced, and that the ultimate decision is the right one.

EQUAL RIGHTS AMENDMENT, PROTECTIVE LABOR LAWS, AND THE OVERTIME ILLUSION

Finally, I should like to turn my attention to how the Equal Rights Amendment, if adopted, could work in the area that has been the subject of greatest controversy. I am referring specifically to the Amendment's effect upon the State's protective labor laws that presently apply to women only. Parenthetically, I would point out that my analysis here also applies to the effects of the equal protection clause, if and when the

Supreme Court begins to interpret that clause vigorously in the sex discrimination area.

Reading the testimony presented to this Committee's Subcommittee on Constitutional Amendments during its earlier hearings this year, and the testimony presented at prior Senate committee hearings on the proposed Amendment, I am struck by what I regard as a peculiar fact. That fact is that certain groups or organizations that, according to all reasonable expectations, should be allied on the issue of equality without regard to sex are in fact divided over the desirability of the Amendment as a way of achieving that goal. I am of course speaking of the basic division between the women's organizations, who have for the most part supported the Amendment and organized labor which has, for the most part, opposed it.

By and large, representatives of organized labor have expressed a fear that, should the Amendment become part of our fundamental law, many of the protections that have been won for women workers over years of difficult struggle would be nullified. On the other hand, some supporters of the Amendment have expressed a suspicion that labor's principal motive in opposing it is to monopolize for men both jobs and other supposed benefits, which I shall soon discuss. Though this suspicion is understandable if we recall long-standing collective bargaining agreements providing substantial sex-based wage differentials for the same or similar jobs, it is not, in my opinion, an accurate reading of the motives of the Amendment's trade union opponents.

In *Women and the Law*, I quoted a 1964 statement by Congresswoman Martha Griffiths of Michigan which not only characterized organized labor's basic attitude in this area, but also pointed the way to what I believe is the ultimate solution to its knotty problems. "Some people," said Congresswoman Griffiths, "have suggested to me that labor opposes 'no discrimination on account of sex' because they feel that through the years protective legislation has been built up to safeguard the health of women. Some legislation was to safeguard the health of women, but it should have safeguarded the health of men, also." [10]

Basing my analysis upon the same principle, I suggested in *Women and the Law* how this could be done. Specifically, I demonstrated how, consistently with what had already been done in administrative and constitutional law decision, the equality of treatment required in this area could be achieved by *extending* protective laws to men rather than by removing them from women. The Equal Employment Opportunity Commission, I suggested, should pursue this approach in administering the anti-sex-discrimination provisions of Title VII of the 1964 Civil Rights Act. In areas that were beyond the jurisdictional reach of the EEOC, I urged reliance upon past judicial precedents such as those I have just referred to in my discussion of S.J. Res. 231, to achieve the same extension of those laws rather than their abrogation.

This analysis, I still believe, is a sound one. Not only has the Labor Department, in administering the Equal Pay Act of 1963, determined that where state law provides a minimum wage for women only, the Equal Pay Act entitles men in that state to the same minimum wage if they are covered by the federal law, but the EEOC also has taken the position that the benefits of state laws, presently applicable to women only—such as those requiring minimum wages, rest periods, seats at work—are required by Title VII to be extended to men. Even in those situations that are beyond the jurisdictional reach of Title VII and the Equal Pay Act, I suggested, the judicial extension technique employed in equal protection and other constitutional cases, could lead to the same results.

Moreover, these results can also be achieved under the proposed Equal Rights Amendment—especially if the legislative history disclosed that Congress intends this. The fears of some opponents of the Amendment that its adoption would nullify laws that presently protect women only is thus unfounded—since the equality of treatment required by the Amendment can be achieved by extending the benefits of those laws to men rather than removing them from women. Moreover, the failure of any court to do this can be corrected through the legislative process.

Thus, as I stated in a recent article in the *Family Law Quarterly*, "the current new concern with the legal status of women will in many respects result in improving the situation of men as well as women. Just as breakthroughs in the legal status of American blacks has benefitted other racial and ethnic 'minorities,' so the effort to provide women with equal employment opportunity can substantially improve the situation of male employees in industry and commerce."

But the problem does not stop there. Essentially, I have been discussing the fate of certain protective labor laws—minimum wages, rest periods, seats at work—about which there can be little doubt that they provide valuable protections and benefits not only worth preserving for women but also worth extending to men.

But the major source of controversy concerns two types of state protective labor laws, presently applicable to women only, about which there is much confusion as to whether they in fact represent a burden or benefit. I am referring now to those state laws limiting the weights that women are permitted to lift or carry in industry, or restricting the number of hours that women may work in a day or a week.

It is with respect to these two types of laws that the extension approach begins to run into trouble. For if a state's weight-lifting limitations, presently applicable to women only, were extended to men, then, as I suggested in *Women and the Law*, "it would simply mean that certain objects would not get lifted in the course of that state's industrial life" [12] hardly a tolerable result. As for the extension of hours limitations laws, this would raise problems of another order—which I shall discuss in a moment.

Recognizing that the extension approach was not feasible in the weight-lifting area, I suggested an alternative solution. That solution was to reconcile such laws with either Title VII of the 1964 Civil Rights Act or with a constitutional requirement of equal legal treatment without regard to sex by holding that a state's weight-lifting limit for women workers "merely creates a burden of proof and of persuasion in individual women applicants to show that they can perform the work in question without harmful effects, though such work requires occasional lifting of weights in excess of those permitted by the rule. That burden could be satisfied by a certificate from a family physician or some other testing procedures." [13]

I now believe that this alternative solution was faulty in that it did not in fact conform to the equality principle, since the burden of proof and persuasion that I had proposed was applicable only to women and not to men.

A more acceptable solution, which cannot be achieved judicially but requires legislative action, is the replacement of such state statutes by others, such as the one now in force in Georgia that protects both men and women workers from being required to lift weights that could cause "strains or undue fatigue." Such a law implicitly recognizes that many individual women can, without harm, lift weights in excess of the limits previously imposed by state law, and that many individual men cannot. Thus, under the new law, people—both men and women—are protected against being required to lift weights that are excessive for them. At the same time, no artificial sex-based distinction, having the effect of depriving one sex of equal employment opportunities, is maintained.

I repeat, therefore, that with regard to state weight-lifting statutes presently applicable to women workers only, equality of treatment without regard to sex can be achieved by adopting the type of statute I have just cited.

Footnotes at end of article.

But now let us consider what I think is the nub of the ideological controversy over the desirability of the Equal Rights Amendment. And that is the question of how the Amendment would affect those state laws which presently provide penalities for employers who permit or require their women employees to work in excess of a given number of hours in a day or in a week. Were such laws extended to cover male employees it would not, as in the case of extending weight-lifting restrictions, bring industry to a grinding halt, although it would create some dislocation and expense for management. But the fundamental difficulty in extending such laws to cover male employees is that, because of what I consider organized labor's failure to educate its membership about the problems of overtime work, it would be regarded by many male workers as the imposition of a burden and not a boon. Stated differently, were employers penalized for permitting or requiring their *male* workers to work overtime hours, many of those male workers would, in the present economic situation, regard this as a deprivation of their right to earn what they consider premium wages and not as the extension to them of a protection presently applicable to women.

Indeed, many women workers undoubtedly look upon the opportunity to work overtime from the same perspective. This, I suggest, explains much that has happened in the last few years in this area. It explains for example why all Title VII suits in the hours area have been brought by women workers seeking to invalidate state hours-limitation laws presently applying for women only. By doing so, they argue, they would, like men, be able to earn attractive overtime pay. Moreover, the elimination of the sex-based distinction in this area would also eliminate the inequality of job opportunity it creates. For many an employer has refused to hire or promote a woman employee for a job in states limiting women's working hours, claiming that the job in question ofter requires overtime work. This also explains, I suggest, the position taken by the EEOC in this area in seeking to invalidate such women-only hours-limitation laws in the states where they exist. And it explains why some states have been persuaded to repeal such laws in the past few years.

This entire trend, I submit, is deplorable and mistaken. It is simply the wrong way to achieve the desired equality of legal treatment and equality of job opportunity. It is a step backward from sensible policies toward overtime work.

"[W]ith victories like these," I wrote in a recent article, "women don't need many defeats. For success in these efforts not only removes limitations upon women's right to work extra hours . . . but also means that those women who do not wish to . . . work excessive hours—and I would suggest that they are many if not in the majority—can henceforth be *forced* to do so." [14]

The consternation these developments provoke in the breasts of trade union opponents of the Amendment is indeed understandable. But I submit that labor's own record with respect to overtime policy accounts for much of this trend. For the labor movement has permitted American workers to be lulled into a false sense of economic security by the overtime illusion—the feeling that they can attain their desired standard of living by working extra hours.

As I pointed out in *Women and the Law*, it is not uncommon for many workers to "work 48, 58, and perhaps 68 hours in a given week—a situation not unlike that prevailing at the turn of the century when organized labor was struggling to reduce the 12-hour, 6-day week to a 10-hour, 6-day week." [15] I also suggested that the requirements of time and one-half pay for overtime work under state and federal laws "were not enacted to reward workers for their willingness to work excess hours. Rather, they were designed to deter employers from requiring their employees to work such hours. The overtime rates provided for by such laws, rather than being denominated as premium rates, are therefore probably more accurately described as penalty rates, when they are viewed from the perspective of their intended objects—employers as a class. For the idea behind such provisions was that employers, faced with the prospect of having to pay one and a half times as much for each excess hour of work as they would pay for each hour of nonovertime work, would pause before requiring their employees to work such hours." [16]

But this legislative policy aimed at deterring overtime work has been distorted by certain economic facts. For one thing, as I noted in the book, "Many employers have found that it is often more economical to pay experienced workers a premium (penalty?) rate than to engage the services of inexperienced workers at straight-time rates (and to whom new fringe benefits would have to be paid) to complete a job at hand." [17] For another, I would now add that many American workers have grown to depend upon overtime work as a means of making ends meet or to improve their basic standard of living—an attitude that may make it easier to lead a trade union than if it didn't exist, but which makes little social sense.

That excess working hours *for both sexes* has for a long time been regarded as a social evil to be cured by legislation can be seen in the experience of New York at the turn of the century. But New York's efforts to place a ten-hour limit on the working hours of bakery employees of both sexes was rebuffed in 1905 by the Supreme Court in *Lochner v. New York*, 198 U.S. 45 (1905), because of its then existing notions of due process and liberty of contract. Three years later, however, the Court in *Muller v. Oregon*, 208 U.S. 412 (1908), upheld Oregon's maximum hours law for women only. As I suggested in *Women and the Law*, this sequence of judicial decisions led many states to enact hours limitations laws for women only on the theory that half a loaf was better than none—even though the Court's later decisions made it abundantly clear that the *Lochner* case would be decided differently today.

The combination of these factors suggests that it would be consistent with our nation's traditional policy toward overtime work to achieve equality of legal treatment for both sexes in the hours area by extending hours-limitations laws to men rather than by removing them from women. Among other things, such a step would provide protection for many male workers who, for a variety of reasons, prefer not to work overtime but whose refusal to do so today constitutes, even under many collective bargaining agreements, a cause for discharge.

For these reasons, I suggested in *Women and the Law* that the extension approach could be utilized in the hours-limitations field. Were this to be done, the fears of some labor opponents of the Equal Rights Amendment that these protections for women would be nullified would be without foundation. For not only would women retain this protection, but it would be extended to men as well.

But economic realities and the overtime illusion have not left us with an entirely free hand in this area. As a compromise, therefore, one designed to implement the principle of equal treatment and equality of job opportunity, I suggested the possibility of enacting on a wide scale state statutes that would embody the principle of *voluntary* overtime. "Such legislation," I wrote, "would permit both men and women to work a designated number of hours in excess of an established norm, but would provide that no employer subject to the coverage of the law would be allowed to discharge any employee for his or her refusal to work overtime." [18]

Footnotes at end of article.

The path that is ultimately taken depends on many factors. But the point that I would stress is that the claim that the Equal Rights Amendment would nullify state protective laws in the hours-limitations area is unfounded. As I have explained, there are several ways in which the right not to work overtime—which, after all, is at the heart of the hours-limitation laws for women only—can not only be preserved for women, but can be made equally available to men. Above all, it is important for organized labor to begin to re-assess its overtime work policies. When that is done, the claim of many of us that the liberation of American women will lead to the liberation of American men as well will be understood for the truth that it is.

FOOTNOTES

[1] LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION, University of New Mexico Press, Albuquerque, 1969.
[2] *Id.* at vii.
[3] *Id.* at 195.
[4] *Id.*
[5] *Id.* at 154.
[6] *Id.*
[7] *Id.* at 195.
[8] *Id.* at 186.
[9] *Id.* at 186–187.
[10] *Id.* at 100.
[11] KANOWITZ, *Women and the law: A Reply to Some of the Commentators,* 4 FAM. L.Q. 19, 29 (1970).
[12] KANOWITZ, WOMEN AND THE LAW at 183.
[13] *Id.* at 116–117.
[14] Kanowitz, *supra* note 11 at 28.
[15] Kanowitz, WOMEN AND THE LAW at 125.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 126.