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Why Virginia Rejected ERA

The Legislature of the State of Virginia, prior to voting on the Equal Rights Amendment, set up a Task Force of prominent lawyers to study the effect of ERA on Virginia laws. The members of the Task Force were distinguished law professors from various law schools in Virginia, including the law schools of the University of Virginia, the University of Richmond, Washington and Lee University, and William and Mary College. At the time of their appointment, the majority of the Task Force members were in favor of ratification of the Equal Rights Amendment.

The 97-page Task Force Report was presented on January 15, 1974 to the Privileges and Elections Committee of the Virginia Legislature. This Report is the most comprehensive analysis of the effect of the Equal Rights Amendment yet made, and it constituted the evidence on which the Privileges and Elections Committee rejected the Equal Rights Amendment.

The Privileges and Elections Committee of the Virginia Legislature took its constitutional ratification obligations seriously, made a deep study of ERA, examined all the available evidence, and concluded that ERA "is not in the best interest of the United States." The majority members of this Committee are glad to share with any other State Legislator considering ERA the documentary evidence on which the decision to reject in Virginia was based.

The 97-page Virginia Task Force Report proves that there is *nothing whatever* ERA will do to benefit women in Virginia, and that there are no Virginia laws which adversely discriminate against women which ERA will remedy. The Task Force Report shows that ERA will *not* give women more employment rights, more property rights, more marital rights, or more family rights. ERA will *not* help women with respect to jobs or home. The Task Force Report proves that there are *no advantages* for women in ERA, and *many disadvantages.*

Obligations, Not Rights

In the area of domestic relations, the Task Force Report concludes that ERA would require amendments to Virginia law which "would impose further obligations on women, rather than accord them further rights."

In the area of employment, the Task Force concludes: "The passage of the ERA would apparently have little impact on Virginia law pertaining to labor and employment."

In the area of property rights, the Task Force Report concludes that Virginia statutes are already "worded so as to insure a policy of equal rights for women in the area of property law."

In the area of criminal law, the Task Force Report states that ERA will require Virginia "to integrate the sexes in its prison system."

In the military area, the Task Force Report states that ERA would require that "the draft be applied to men and women," and that duty assignments, including combat, be made "on a sex-neutral basis." Virginia Military Institute would be required to become sex-neutral.

The Task Force Report shows that ERA will cause women to suffer a significant loss of rights, or at least to be placed in jeopardy of losing rights by judicial interpretation, in the following areas:

1. Women will no longer have the right "to exempt themselves from jury service in certain circumstances."

2. The Virginia law (Section 40.1-34) which requires that employers provide suitable restrooms or seating facilities for females whose jobs require them to stand while working "would be invalid under ERA."

3. The Virginia law (Section 40.1-39) which requires an employer of four or more persons of both sexes to provide separate toilet facilities "would be suspect under the kind of strict standard of review which ERA is likely to create."

Effect on Wives' Support

4. The Task Force Report quotes *Va. Code Ann,* No. 20-61 which requires a husband to support his wife, and then explains that "the statute imposes a lesser obligation of support upon a wife than upon a husband, manifestly because one is a woman and one, a man. The Equal Rights Amendment would require that this be changed. The obligation to support could not be imposed because of sex. . . . Language would have to be revised to assure that the partner in the marriage who works outside the home will see to the financial sustenance of the partner whose duties lie within the home and in the care of the children." *It is thus clear that the present law which now makes it mandatory on the husband to support his wife would be invalidated,* and ERA would impose an equal obligation on the wife to go to work and support her husband if he chooses to remain in the home. In other words, the wife would lose her present absolute legal rights, and would retain a right of sup-

port only if she could persuade her husband to allow her to stay at home instead of him.

Effect on Support of Children

5. The Task Force Report states that the obligation to support the children has been interpreted by Virginia case law as "imposing the primary duty of support upon the father," and no case could be found imposing a joint legal duty of support of children on the mother so long as the father is living. The Task Force Report concludes that, while such an interpretation is valid under the Virginia Constitution, "it would not be under the Equal Rights Amendment."

6. The Task Force Report points out that present Virginia law subjects a man to being sent to the road force, workhouse, city farm or work squad, or prison work release program, for non-support of his wife or children, whereas a woman is not. The ERA would make a woman subject to the same punishment.

Effect on Divorce

7. The Task Force Report cites *Va. Code Ann.* No. 20-103 which imposes obligations on the husband "to pay any sums necessary" for his wife to enable her to carry on a divorce suit, with no concurrent obligation on the wife. This would be invalidated by ERA.

8. The Task Force Report states that the present Virginia law and Virginia case law which view alimony as granted only to the wife "is certainly discriminatory," and "would not stand under the Equal Rights Amendment." ERA would thus require alimony to be available to husbands as well as to wives.

Effect on Children

9. The Task Force Report states that the ERA likewise "would require that the obligation of support of minor children be imposed on either party."

10. The Task Force Report states that the present Virginia law which requires children 17 or over to support their aged mother regardless of her age or capabilities, but a father only when incapacitated, is unequal and therefore would be invalidated by ERA.

11. The Task Force Report cited a recent case in Pennsylvania (Wiegand v. Wiegand) which has a state ERA of the precise language of the proposed Federal ERA, which indicates that the usual statutory rights of the wife in regard to alimony pendente lite, counsel fees, and court costs in a divorce action, "would be unconstitutional if the Amendment were ratified."

Effect on Sex Crimes

12. The Task Force Report states that the following Virginia criminal laws "could well be invalidated": rape, statutory rape, seduction, and the laws prohibiting a man from defaming a virtuous woman or using "grossly insulting language" to a woman of good character.

Effect on Prisons

13. The Task Force Report states that "the major impact ERA will have on the prison system is to prohibit separate institutions and the concomitant discrepancy in treatment, facilities and programs which are attendant to such segregation." The Report explains that there is no guarantee in the U.S. Constitution to the right of privacy, and that the *Griswold v. Connecticut* case is irrelevant to the prison question because prisoners have been denied privacy by the very nature of the penal institution (including regimentation, forced exposure, and constant surveillance). The Task Force states: "The right of privacy claimed by advocates of the ERA is not a reflection of existing law and may or may not be accurate prophecy."

In an addendum, the author of the section on prison integration indicated that he could not forecast how far the courts would compel sex integration, but the basic fact that integration of the prisons would be required could not be disputed.

Effect on the Military

14. The Task Force Report states that, if the military draft is established, it "would have to apply equally." Thus, women would lose their present right to be exempt from the military draft.

15. The Task Force Report states that the military "will have to accommodate women in all duty assignments on a basis equal with men," and eliminate separate corps such as the WACs. The Task Force Report states that, in regard to privacy in the military, "the same rationale applies" as in the discussion about prisons. ERA would require the military to open all occupational classifications to women and eliminate the present exclusion of women from combat. The problem of "living conditions (sleeping and toilet facilities)" is raised by the Task Force Report. All service academies would have to accept women on an equal basis, including Virginia Military Institute. Women could not be discharged for pregnancy.

Virginia Women's Clubs

Among the many organizations which testified against ERA in Virginia was the Virginia Federation of Women's Clubs. Here was the official resolution presented to the Virginia Legislature:

Whereas, the Congress of the United States has approved a Constitutional Amendment known as the Equal Rights Amendment which states, "Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex", and

Whereas, the Constitution of Virginia adopted in 1971, Article 1, Section 11, states, "The right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination", and

Whereas, the Constitution of Virginia guarantees equality under the law regardless of sex and avoids some of the possible disadvantages of the Equal Rights Amendment, therefore

Resolved, that the Virginia Federation of Women's Clubs believes that the best interests of women will not be served by the ratification of the Equal Rights Amendment and urges the General Assembly not to ratify the Amendment.

Report Of Virginia Attorney General

The Attorney General of the State of Virginia provided the Privileges and Elections Committee with an opinion on the effect of the Equal Rights Amendment. Here are significant excerpts from that opinion:

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The Effect of the ERA

One of the basic changes which would be wrought by the passage of the ERA is in the military area. Women would have to be admitted into the military on an equal footing with men. There could only be one set of admission standards applicable to men and women alike. Likewise, if the draft is reinstituted, it must apply equally to men and women. Once in the military, women would have to be assigned to the same duties on the same basis as men. These duties would, of course, include service in the combat zones. In sum, all distinctions in the military based on sex would have to be abolished.

Other basic changes would occur in the area of public accommodations. Separate colleges, hospitals and prisons for men and women would have to be sexually integrated. For instance, Virginia Military Institute would be mandated to admit females on an equal basis with men. Also, there could no longer be separate prisons for men and women. Furthermore, if the open-ended language of the Amendment is to be accorded its reasonable meaning, not only must separate colleges and prisons be abolished, but facilities within those institutions, such as dormitories, would be required to be assigned on a sex-blind basis. Even public restrooms would be required to be sex-neutral.

These consequences, while admittedly dramatic, will be the natural outgrowth of the ERA's absolute ban on sexual classifications. There are some proponents of the ERA, however, who suggest that these consequences will be avoided because ERA will be qualified by the constitutionally protected "right to privacy."

The Right to Privacy

The right to privacy argument proffered by some as an exception to the ERA had its genesis in the Supreme Court's decision in *Griswold* v. *Connecticut*. In that case, the Court declared unconstitutional a state statute prohibiting the use of any device to prevent conception. The defendants in that case were convicted under a general aiding and abetting statute for giving advice to a married couple concerning contraceptive methods. The Court held that the anti-contraception statute violated the right to privacy guaranteed by portions of the Bill of Rights.

The right to privacy found to exist in *Griswold*, however, was limited to the martial relation and the marital home. In order for the right of privacy articulated in *Griswold* to be a qualification on or an exception to the ERA, it is obvious that it will have to be greatly expanded beyond its present boundaries. As yet, however, the Supreme Court has not extended the right of privacy concept to provide for a general right of sexual privacy. At present, therefore, any right of privacy exception to the ERA is, at best, a "legal hypothesis."

Regardless of the lack of precedent for a general right of sexual privacy, if it is bottomed on the freedom of association guaranteed by the First Amendment, serious doubts must be raised about its impact on the ERA. If such a right to privacy is to be a qualification on the ERA, would it not also be a qualification on the less stringent Equal Protection Clause of the Fourteenth Amendment? Surely no one would seriously suggest that a federal court would hold that the right to privacy would limit, to any degree, the mandates of the Fourteenth Amendment, as interpreted by the Supreme Court, that dual racial systems be abolished and that unitary systems be created. As stated by Professor Freund, "Freedom of association is a constitutional right enjoying recognition even longer and firmer than privacy. It has been invoked without avail, as has the interest in privacy, to blunt the force of equal protection in the field of racial separation. Is it to have greater recognition . . . where relations between the sexes are concerned?" The answer is clearly no.

A right to privacy exception raises many questions, the most important of which is to what extent will individuals be allowed to waive their right to privacy. If an effective waiver can be made, will the State be required to furnish three identical sets of facilities, one for men, one for women and one for both? A firm answer to this question is lacking.

There have been some suggestions that we may look to the legislative history of the ERA to find support for the proposition that the right to privacy is an exception to the ERA. This approach has its shortcomings, however, First, the Amendment has already been submitted to the states for ratification. The opportunity for Congress to create unambiguous legislative history, therefore, is lost. Second, as pointed out by Mr. Howard and indicated above, the members of Congress supporting this exception may have read too much into the Supreme Court's opinion in *Griswold*. To characterize the right to privacy as "young, but fully recognized" is grossly misleading. As noted above, the *Griswold* decision was limited to state intrusion into the sanctity of the marital relationship and nothing more. Third, and most importantly, the states are not ratifying Congressional debates, "they are ratifying the language submitted to them in the text of the amendment." To restate the testimony of Professor Freund, the language of the ERA admits of no exception.

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Axing Alimony

Some Courts, Citing Women's Liberation, Go Easy on Husbands

No-Fault Divorce Weakens Wives' Bargaining Power; Judges Say Go to Work

Feminists Say It's Unfair

By William Wong
Staff Reporter of The Wall Street Journal

SAN FRANCISCO — For the past 11 years, Alice Boortz had been getting $350 a month in alimony from her ex-husband, a college administrator. Then he petitioned the superior court in Santa Clara County, south of here, to reduce and eventually end his alimony payments. Alice objected. Her lawyer argued that Alice, now 67 years old, is unemployable, has no retirement benefits and gets no income but alimony.

Judge O. Vincent Bruno nonetheless sided with her ex-husband. Noting that he and Alice long since had gone their separate ways—he had even remarried—Judge Bruno told them both to "start making a provision for themselves." That's fine with Mr. Boortz; when he retires in five years or so, he'll get a pension of about $900 a month. But Alice, unless she wins her case on appeal, will have to shift for herself. She will join a growing number of women whom changing legal currents, at least temporarily, have stranded on financial shoals.

Influenced by their interpretation of women's liberation and by the enactment of no-fault divorce laws in many states, courts are getting stingier with alimony awards. More judges are willing to reduce or end them at a former husband's request. Even child-support payments are no longer automatically considered the father's responsibility alone; courts "are examining the mother's situation with more care," says Doris Walker, an Oakland, Calif., attorney.

Equal Opportunity?

Though divorce in the past often has caused financial hardship, the burden usually fell more heavily on ex-husbands because of the legal presumption that they are required to support their wives and families. In some states, as in New York, a husband still can be compelled to support a wife who deserted him to, say, run off with another man, if without his support she would become a public charge. Even a wife's legal fees in divorce, regardless of fault, traditionally have been the husband's responsibility.

Now that's all changing, and it disturbs some feminists. "If job opportunities and pay and control of marital property were equal, then it would be right that women have equal responsibility in divorce settlements," says Elizabeth Spalding, head of the Task Force on Marriage and Divorce for the National Organization for Women. "But women still aren't equal."

Courts, some feminists argue, should compensate housewives for their otherwise-unrewarded contributions to the household when a marriage breaks up. Says Nancy Erickson, a New York attorney: "Feminism doesn't say that women who have been married for 20 years, who have raised children, who have given up their careers to help their husbands' careers shouldn't be entitled to get something."

Alimony No "Life Annuity"

"Judges like to use the women's liberation movement as a whipping boy," says Amy White Fixler, a lawyer in Encino, Calif. Other lawyers observe that most judges are men and that some have had to pay alimony themselves.

Judges say that they decide each case individually and that they try to be fair. In most states, the law has given and still does give the courts wide discretion in deciding family-support questions. But the idea that women should support themselves has been nourished by the women's liberation movement, Judge William Hogoboom of Los Angeles County says, and "the courts are beginning to buy this concept." When a woman can work, he says, "the tendency of courts now is to give her a period to retool her skills."

That means, when alimony is awarded, more "rehabilitative" awards of a fixed, short term—three years is typical—instead of the indefinite-term awards of the past, which usually lasted until a woman remarried. "A woman shouldn't think that, once married, she has an annuity for life," Judge Hogoboom says.

Judge Ralph Podell of the family-court division of Milwaukee County, Wis., agrees. "The concept that a man should be saddled for life is out the window now," he says. "If a woman has good health and can work, a job would be the best therapy for her. It would get her out of the house. It would be better than having her sit home and brood."

Weakened Bargaining Position

Legal experts say the abolishing of fault divorces in some states generally (though not always) works to the wife's financial disadvantage. In exclusively no-fault states, the laws eliminate traditional divorce grounds, such as adultery, mental cruelty or abandonment, in favor of a ground called "irreconcilable differences" or "irretrievable breakdown." The effect is to enable either spouse to obtain a divorce without alleging wrongdoing on the other's part. In most fault proceedings, women have appeared the more-or-less innocent parties, and courts have tended to "punish" guilty husbands by awarding wives generous property settlements or alimony. With neither party legally at fault, however, some (though not all) courts are more inclined to leave financial arrangements alone.

California pioneered divorce reform with its no-fault act of 1970. About the same time, the National Conference of Commissioners on Uniform State Laws drafted a model Uniform Marriage and Divorce Act. At least five states—Arizona, Colorado, Kentucky, Nebraska and Washington—have adopted parts of the model act. Another dozen states or so have followed New York's lead in adding a no-fault ground to existing fault grounds for divorce.

Previously existing California law, as

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well as the model act, calls for economic equality of spouses. California law, for example, directs judges to split community property—property acquired by a couple since their wedding—equally. But of the other no-fault states, only Colorado has adopted the model act's economic-equality provisions, such as for equal property division and for alimony payable by either spouse. The remaining states have left intact their old marital-property laws.

With no-fault divorce reducing the woman's bargaining leverage, separate-property laws in some states also work to her disadvantage. In such states husbands legally own or control the larger share of family property and income in most households, and continue to do so after divorce.

Two legal writers—Prof. Henry H. Foster of New York University and attorney Doris Jonas Freed of New York—cite the plight of a New York woman who divorced after 40 years of marriage. In the last 18 years of the marriage, she and her husband decided that all the wife's income should go to ordinary family support, the husband's to investments. In the divorce, the court denied the wife any share in the investments because New York doesn't recognize community property.

New York's separate-property law, rather than its no-fault divorce procedure, governed this case. But Prof. Foster says that almost "automatic" no-fault divorce could create even more "outrageous and inequitable" cases in separate-property states.

Even equal property splits in community-property states, some critics say, usually work to the woman's disadvantage. Women attorneys charge that California's split often is inadequate because there usually isn't much to split beyond a house and a car and if alimony is minimal or short-term, as is the norm these days, a woman who hasn't worked outside her home for 20 to 30 years is hard-pressed to keep off the welfare rolls.

In Texas, a community-property state with no-fault divorce, Dallas attorney Louise Raggio says the law is "creating a new poverty class" of divorced women. And Ellen Sim Dewey, a college professor, complains that Nebraska's no-fault divorce has enticed many husbands to end their marriage because they know they won't take a financial bath. "Marriages used to be more difficult to break than a business contract," she says. "Now you can break a marriage up without any kind of penalty."

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