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SEX-BASED DISCRIMINATION IN NEW YORK STATUTORY LAW: A ROADMAP FOR LEGISLATIVE REFORM

In November 1975, New York voters failed to ratify a state equal rights amendment (ERA) that would have guaranteed men and women the equal protection of the laws by prohibiting the State's use of sex as a basis for legal classifications. Perhaps the single most important factor contributing to the ERA's defeat was the public's misunderstanding of the practical impact of such a sweeping constitutional amendment. Electoral defeat, therefore, should not be viewed as an unqualified endorsement of New York's existing statutory law. Since much of this legislation is premised on anachronistic sexual stereotypes, eradication of sex discrimination continues to be a necessary legislative objective.

1 The proposed ERA was initially approved by the legislature in 1974. N.Y.A. 9030-A, 197th Sess. (1974). The electorate, however, defeated its ratification by a vote of 1,774,885 to 1,363,831. N.Y. Times, Nov. 6, 1975, at 33, col. 5.


3 Anti-ERA forces charged that the ERA would allow homosexual marriage, force women to contribute ½ the costs of raising a family, abolish the right to seek alimony, and require coed toilet facilities. See, e.g., N.Y. Times, Nov. 6, 1975, at 1, col. 6.

4 As recently as 1961, the United States Supreme Court, in upholding a rule exempting women from jury duty, stated:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. Hoyt v. Florida, 368 U.S. 57, 61-62 (1961). This view of women was discarded by the Court, however, in 1975 when, upon reconsideration of the automatic exemption of women from jury service, it concluded that there was no rational basis for this sex-based exemption. Taylor v. Louisiana, 419 U.S. 522, 535-37 (1975). See generally L. KANOWITZ, WOMEN AND THE LAw: THE UNFINISHED REVOLUTION (1969).

Indeed, annual statistics compiled by the Department of Labor indicate that as of 1974 women constituted 45.7% of the entire labor force. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, Nov. 1975, Vol. 22, No. 5, at 18.

5 In 1972, prior to the proposal of the state ERA, the New York State Law Revision Commission began a study of discriminatory New York statutes that would require modification upon passage of the Federal ERA. The Commission has approved a legislative package, proposing numerous reforms of these laws, to be presented to the New York Legislature in 1976. Telephone interview with Ms. Joyce Pulliam, N.Y. State Law Revision Comm'n, Oct. 21, 1975.
This Note will offer a broad overview of the nature and scope of sex discrimination in New York's statutory law. It is submitted that, given the commitment of the legislature to adapt the law to modern social needs, the task of reforming these laws should be pursued, notwithstanding the defeat of the ERA. Absence of a specific constitutional command should not deter an affirmative and comprehensive program of legislative reform.

Scope of the Legislative Task

Approaches Available

The statutory provisions authorizing different treatment of persons because of their sex are many and diverse. The legislature has several options available to rectify these sexually discriminatory laws. To accord both sexes the equal protection of the laws, a statute's application can be extended to members of the previously excluded sex. Alternatively, the discriminatory provision can be repealed altogether.


A computer survey of New York statutes revealed more than 250 provisions containing sex-based references. See N.Y. State Law Revision Comm'n, Preliminary Staff Worksheet on N.Y. Statutes Found to Have Sex-Based Distinctions (1975) [hereinafter cited as Comm'n Worksheet]. These provisions appear in nearly every statutory code. See, e.g., N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1975) (alimony available only for former wife); N.Y. ENVIRONMENTAL CONSERVATION LAW § 9-1303(12) (McKinney 1973) (Department may incur expenses for training of men outside of state); N.Y. TRANSP. LAw § 103(3) (McKinney 1975) (free transportation for widows of deceased common carrier employees).

Extending application of a statute to that sex previously excluded can be simply achieved through "neuterization" of the provision in question. For example, "husband" and "wife" can be replaced by "spouse," "boy" and "girl" can be replaced by "minor," and "male" and "female" can be replaced by "person." See, e.g., ch. 351, § 3, [1972] N.Y. Laws 1590, amending ch. 575, § 2, [1953] N.Y. Laws 1357 (codified at N.Y. EDUC. LAW § 3228 (McKinney Supp. 1975)) (references to boys deleted from enumerated qualifications of newspaper carriers); ch. 377, § 10, [1973] N.Y. Laws 1331, amending ch. 783, § 2, [1963] N.Y. Laws 2603 (codified at N.Y. LABOR LAw §§ 172, 173 (McKinney Supp. 1975)) (references to minors substituted for references to boys and girls in maximum work hour provisions).


The courts have on occasion also invalidated statutory provisions found to be discriminatory. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975) (provision exempting women...
Also available to the legislature is a third avenue of reform: a statutory classification can be restructured on individualized criteria that focus not on a person’s sex but on his or her responsibilities and capabilities. Such an approach was employed by the legislature in its recent amendment to the jury exemption rule. Responding to the United States Supreme Court’s invalidation of Louisiana’s automatic exemption of all women from jury service,9 the New York Legislature amended the State’s jury selection statute10 to provide for the exemption of any person whose primary responsibility during the day is child care.11 Thus worded, the statute not only avoids creating discriminatory classifications on the basis of sex, but also more precisely reaches the class of persons intended to benefit by this exemption.

Extent of Existing Discriminatory Provisions

The task of eradicating sex discrimination from New York law is not as overwhelming as it might first appear. Initially, it should be noted that, over the years, the legislature has responded to the changing status of women by eliminating many discriminatory provisions.12 In addition, numerous affirmative legislative steps have been taken to ensure women equal treatment in school admissions,13 credit14 and insurance15 practices, employment opportunities,16 and wage policies.17

from jury service); Reed v. Reed, 404 U.S. 71 (1971) (probate code provision giving men preference over women in the administration of estates); In re Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972) (family court provision according special treatment to minor females).

In jurisdictions which have sought to eradicate sex discrimination from the law, a pattern of legislative response has emerged. Generally, once a statute accords one sex a benefit, its application is extended to the other sex. Conversely, if the statute imposes a burden on one sex, it is most often withdrawn. See generally 1 Women’s L. Rep. 1.64 (1974).


11 N.Y. Judicairy Law §§ 507(7), 599(7), 665(7) (McKinney Supp. 1975) all exempt from jury service [a] ... person who resides in the same household with a child or children under sixteen years of age, and whose principal responsibility is to actually and personally engage in the daily care and supervision of such child or children during a majority of the hours between eight a.m. and six p.m. ... .


14 Ch. 564, § 1, [1975] N.Y. Laws 823 (McKinney) (codified at N.Y. Ins. Law § 40-e
Of those statutes that still authorize sex discrimination, many require only the slightest legislative attention. One such group pertains to institutions and persons that no longer exist or procedures no longer practiced. Such obsolete legislation could easily be repealed as part of the legislature's routine housekeeping function. Another group of statutes requires the deletion of objectionable language which reflects traditional sexual stereotypes. While "male persons" fight fires and practice law, "matrons" supervise children. Simple neuterization would reflect the fact that today both sexes fill or are capable of filling these jobs. A third category of statutes requiring minor, if any, legislative attention are those related to the right of privacy. For example, even under the ERA, it is generally agreed that statutes requiring separate hygiene facilities for each sex would have remained constitutionally valid, so long as adequate accommodations are available to both sexes.

(McKinney Supp. 1975)) (sex discrimination in the issuance or renewal of insurance policies prohibited).


18 See, e.g., N.Y. CORREC. LAW §§ 910-11 (McKinney 1968) (commitment of young females found in houses of prostitution to charitable institutions); id. §§ 472(1)-(2), 473 (special benefits to widows of prison employees hired before 1925); N.Y. UNCONSOL. LAWS §§ 1771-74 (McKinney 1949) (commitment of wayward females to state institution that no longer exists). For a more extensive list of statutes dealing with institutions that no longer exist and procedures no longer practiced, see Comm'n Worksheet, supra note 6, at A-1, -2, -6.

N.Y. FAMILY CT. ACT § 719(b) (McKinney 1963), defining "Persons in Need of Supervision" (PINS) as males under 16 and females under 18 has yet to be amended despite the court of appeals' decision that the portion of the statute applicable to females between 16 and 18 is unconstitutional. See In re Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972). For an extensive list, see Comm'n Worksheet, supra note 6, at A-3, -6. None of the numerous bills proposing amendment to PINS provisions, e.g., N.Y.S. 5302, N.Y.A. 8451, 198th Sess. (1975); N.Y.S. 5547, N.Y.A. 8135, 198th Sess. (1975), have been passed.

19 Despite the normal rule of legislative draftsmanship that dictates the use of male pronouns, nurses are typically referred to by the use of female pronouns. Compare N.Y. PUB. HEALTH LAW §§ 356(2)(b), 2560(3) (McKinney Supp. 1975) with id. §§ 203, 208 (McKinney 1971).

Other sexual references appear at N.Y. ENVIRONMENTAL CONSERVATION LAW § 9-0101(3) (McKinney 1973) (fire patrolemen are "able-bodied males"), id. § 11-0515(1) ("scientific men"), and N.Y. NOT-FOR-PROFIT CORP. LAW § 1410(a)(1) (McKinney Supp. 1975) ("business men"). For a more extensive list, see Comm'n Worksheet, supra note 6, sec. D.


21 See N.Y. JUDICIARY LAW § 472 (McKinney 1968).

22 N.Y. GEN. CTY. LAW § 18-b(4) (McKinney 1968); N.Y. GEN. MUNIC. LAW § 121-b(4) (McKinney 1965).

23 See generally Brown, supra note 2, at 900-02.

24 See, e.g., N.Y. LABOR LAW §§ 293, 378, 381(1) (McKinney 1965) (women employees in certain establishments must have separate hygiene facilities).

25 E.g., Brown, supra note 2, at 900-02.
A fourth and final category of statutes not requiring undue legislative concern is that consisting of discriminatory statutes which either do not affect fundamental rights or are of limited application. Some of these impose special obligations on males only. Male employees of liquor manufacturers, for example, must be registered with and their fingerprints submitted to the State Liquor Authority. Men must aid sheriffs, attorney generals, and environmental officers in the performance of their duties. Few affirmative duties, by comparison, are imposed on women, and yet, as a class, they do enjoy numerous benefits. Women are exempt from civil arrest and are entitled to the exemption of certain real and personal property from the satisfaction of a money judgment. In actions alleging the slanderous imputation of unchastity, they need not prove special damages, and, if employed in factories, they are entitled to seats and pure drinking water. These statutes, as those that impose burdens on men, can either be extended to apply to members of both sexes or repealed altogether, depending on the continued utility of the individual provision.

Legislators face a more difficult task when reforming laws that employ sex-based classifications in the delineation of more funda-

30 See, e.g., N.Y. Pub. Health Law §§ 2308, 4136 (McKinney 1971) (women must be examined for venereal disease during pregnancy). Given the state's interest in the well-being of its citizens and the fact that pregnancy is a unique physical characteristic, this provision should not be considered objectionable.
31 For example, women, but not men, are entitled to seek alimony upon the dissolution of a marriage. N.Y. Dom. Rel. Law § 236 (McKinney Supp. 1975). See notes 57-58 and accompanying text infra. When a physical examination is required by her employer, a woman is entitled to have either a female physician perform the examination or have another female present when the examination is performed by a male. N.Y. Labor Law § 206-a (McKinney 1965).
34 Id. § 5205(a) (McKinney 1963) (exemption for woman's personal property including clothing and household effects).
37 Id. § 377. Although most protectionist statutory provisions of this type were repealed in 1973, see note 8 and accompanying text supra, a number still remain. See Comm'n Worksheet, supra note 6, at A-3, -4.
mental or socially important rights and responsibilities. In these areas, where eradication of sex discrimination cannot be effected through simple equalization of a statute’s application to include members of both sexes, it is suggested that legislators should consider adopting new classifications based on individual needs and capabilities. Statutes requiring such special legislative concern are those which involve the family, sex-plus-age discrimination, survivor’s benefits, and unique physical characteristics.

**Family Law**

Laws governing the family have traditionally been premised on sexual stereotypes of women as “homemakers” and “childrearers” and men as “breadwinners.” Accordingly, many of the statutes in this area are overly protective of women and impose substantial burdens on men. It is urged that New York seriously consider following the lead of a growing number of states that have adopted functionally based classifications to replace traditional sex-based provisions.

*Support and Alimony*

Under present law, a husband is required to support his wife, which includes the duty to furnish her with all requirements necessary for her existence and maintenance. Her financial need,
however, is not the sole criterion upon which the support obligation is measured. The necessaries to which she is entitled are determined according to her spouse's station in life, taking into consideration his potential as well as actual earnings.

A man is also charged with the primary obligation for the support of his child. Here too, the measure of support generally looks to the child's needs relative to the father's financial capabilities; the resources of the mother and the child are irrelevant. Neither divorce nor the mother's subsequent remarriage relieve a father of this responsibility which continues until the child is 21.

Under the existing statutory scheme, a man's failure to fulfill his support obligations results in the forfeiture of certain rights. Neglect of the duty to support his wife disqualifies him as a "surviving spouse" under the testacy and intestacy provisions of the Estates, Powers and Trusts Law. His failure to support his family abolishes the need for his consent if the mother decides to surrender the guardianship and custody of his child to an agency or place the child in a youth center.

A woman's support obligation, by comparison, is limited. She is

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See, e.g., Grishaver v. Grishaver, 225 N.Y.S.2d 924 (Sup. Ct. N.Y. County 1961) (hairdresser services "necessary" according to standard of living to which wife was accustomed); New York Tel. Co. v. Teichner, 69 Misc. 2d 135, 329 N.Y.S.2d 689 (Suffolk County Dist. Ct. 1972) (telephone service "necessary" if consistent with "customary mode of living").

See N.Y. DOM. REL. LAW § 32 (McKinney Supp. 1975); N.Y. FAMILY CT. ACT § 412 (McKinney 1963). In Grant v. Grant, 61 Misc. 2d 968, 307 N.Y.S.2d 153 (Family Ct. N.Y. County 1969), for example, the husband's voluntary retirement was held to have no effect on his support obligation.

N.Y. DOM. REL. LAW § 32(2) (McKinney 1964); N.Y. FAMILY CT. ACT § 413 (McKinney Supp. 1974).

In L. v. State, 70 Misc. 2d 660, 335 N.Y.S.2d 3 (Family Ct. Westchester County 1972), for example, an unemployed father with a proven earning capability of $12,000 to $18,000 per annum was directed to contribute to special education expenses required by his handicapped daughter.


N.Y. EST., POWERS & TRUSTS LAW § 5-1.2(a)(6) (McKinney 1967). This disqualification deprives the husband of those benefits conferred upon a surviving spouse under id. §§ 4-1.1 (intestate share), 5-1.1 (statutory right of election), 5-1.3 (right to intestate share upon marriage subsequent to execution of pre-1930 will), 5-3.1 (family exemption), and 5-4.4 (right to share in wrongful death damages). N.Y. EST., POWERS & TRUSTS LAW §§ 4-1.1, 5-1.1, 4-1.3, 4-1.4 (McKinney Supp. 1975), amending (McKinney 1967).

N.Y. SOC. SERV. LAW § 384(1)(c) (McKinney 1966).

only liable for her husband's support if he is unable to support himself and is therefore certain to become a public charge.\textsuperscript{53} Even then, she need only furnish an amount sufficient to prevent him from becoming a public charge.\textsuperscript{54} Furthermore, a mother's duty to support her children is secondary to that of the father, arising only in the event of the father's death, abandonment, or inability to support.\textsuperscript{55}

The obligations of spousal support exist solely within the context of the matrimonial relationship and cease upon dissolution of the marriage.\textsuperscript{56} Thereafter, alimony, a wholly statutory creation, becomes the measure of the man's continuing economic responsibility to the woman.\textsuperscript{57} Under no circumstance can this obligation be charged to the former wife.\textsuperscript{58} The measure of the alimony award is similar to that used in the determination of the amount of support owed by a husband to a wife.\textsuperscript{59} As set forth by statute, the court possesses discretion to make the award as "justice requires, having regard to the length of time of the marriage, the ability of the wife to be self supporting, the circumstances of the case and of the respective parties."\textsuperscript{60}

\textsuperscript{53}N.Y. DOM. REL. LAW § 32(4) (McKinney Supp. 1975); N.Y. FAMILY CT. ACT § 415 (McKinney Supp. 1974); N.Y. SOC. SERV. LAW § 101(1) (McKinney Supp. 1975). See also Comm'n Worksheet, \textit{supra} note 6, sec. B.

\textsuperscript{54}N.Y. SOC. SERV. LAW § 101(2) (McKinney Supp. 1975).


\textsuperscript{58}See, e.g., Steinberg v. Steinberg, 46 App. Div. 2d 684, 360 N.Y.S.2d 75 (2d Dep't 1974) (mem.), wherein the court denied the husband's petition for alimony, noting that it lacked the power to fashion a remedy not provided for by statute.


\textsuperscript{60}N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1975). In Kay v. Kay, 175 N.Y.L.J. 91, Nov. 10, 1975, at 1, col. 6 (Oct. 30, 1975), the court of appeals, acknowledging the relevance of a wife's ability to support herself, nevertheless concluded that the wife could not be expected to seek employment in view of her 23-year absence from the labor market. In Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (Sup. Ct. N.Y. County 1975), the
Relying as they do on sex as the primary basis for classification, the aforementioned statutes make an unfair and often invalid presumption concerning the respective roles and capabilities of the parties to a marriage. Instead, laws governing the family should emphasize the mutuality of spousal responsibility. With respect to support during the marriage and maintenance upon dissolution, the “homemaker” and “childrearer,” be it husband or wife, could continue to look to the “breadwinner” to whatever extent necessary. Legislative reform should be guided accordingly.

Divorce

Of all the grounds for separation and divorce, only one is blatantly sex based. Wives, but not husbands, may be granted a decree of separation in the event of their spouses’ nonsupport. New York’s adoption of a functional approach to support would necessitate the revision of this ground for separation, making it available to a husband whose financially able wife fails to support him.

It is also suggested that the legislature consider substantive reform of the State’s divorce laws. With one notable exception, a finding of fault is necessary for the dissolution of a marriage. Although the grounds for a finding of fault are, in theory, sex neutral, the fault requirement itself has, in practice, a discriminatory effect. The granting of a divorce to a husband on fault grounds precludes an award of alimony to a wife. In an attempt to avoid

court directed the husband to pay his ex-wife, an experienced executive secretary who was clearly able to be self-supporting, enough alimony to enable her to pursue medical studies. Having supported her now successful Wall Street attorney husband through his studies, she was entitled, according to the court, to seek “the same opportunity which she helped give the defendant.” Id. at 621, 366 N.Y.S.2d at 982. Accord, Kover v. Kover, 29 N.Y.2d 408, 278 N.E.2d 886, 328 N.Y.S.2d 641 (1972).

Many other statutes found in the Domestic Relations Law and the Family Court Act are drafted in sexually discriminatory terms. They outline procedures for the institution of proceedings for support and alimony and for the enforcement of support and alimony awards. See Comm’n Worksheet, supra note 6, sec. B.

62 Id. § 170.
63 Id. § 200(3).
64 Fault grounds upon which the court will award a separation decree or divorce include adultery, abandonment, imprisonment, and cruel and inhuman treatment. Id. §§ 170, 200. Absent any fault on the part of either spouse, the parties to a marriage may secure a divorce if they live separate and apart for a period of one year pursuant to a written separation agreement which has been filed with the courts. See id. § 170(6).
the harsh result of this forfeiture, the courts, at least in divorce proceedings grounded upon cruel and inhuman treatment, generally apply the indicia of fault in a discriminatory fashion depending on which party is bringing the action. It is not unusual, therefore, for a plaintiff husband to be required to present a far greater quantum of proof as to the conduct alleged as the predicate for his action for divorce than a plaintiff wife would be required to present. Even permitting a man to seek alimony would not alter this sexually discriminatory policy since it can be expected that the courts will continue to favor the wife who is more likely to be the party without adequate means of support.

While this discriminatory practice can perhaps be most easily eliminated through abolition of the forfeiture rule, it may be argued that continued reliance on the concept of fault as the basis for marital dissolution is itself of questionable value. The legislature should consider the adoption of additional nonfault grounds such as "irretrievable breakdown," a ground for divorce now adopted by at least half of American jurisdictions. It appears more rational to

67 This forfeiture appears particularly harsh in light of the present law governing marital property distribution which law is discussed in text accompanying notes 78-84 infra.

68 See Foster & Freed, supra note 38, at 184; note 69 infra.

Indeed, the court of appeals, in Hessen v. Hessen, 33 N.Y.2d 406, 308 N.E.2d 891, 353 N.Y.S.2d 421 (1974), sanctioned the practice of weighing the evidence supporting a charge of fault with an eye to the consequences of a finding of fault. In recommending that the courts use their discretion in considering the circumstances of each case, the court noted:

Moreover, and perhaps most important, the Legislature could not have intended so broad an application of the cruel and inhuman treatment ground where its effect would be to deprive a defendant wife of support. Id. at 410, 308 N.E.2d at 894, 353 N.Y.S.2d at 426.


This partiality in favor of the woman is less frequent when the ground sued upon entails a more objective and definite incident of fault such as adultery or abandonment. See, e.g., Schine v. Schine, 31 N.Y.2d 113, 286 N.E.2d 449, 335 N.Y.S.2d 58 (1972) (divorce granted husband and alimony denied wife who locked husband out of domicile); Recht v. Recht, 36 App. Div. 2d 999, 391 N.Y.S.2d 395 (1st Dep't 1971) (divorce granted husband and alimony denied wife found guilty of adultery).

70 The inequities of the present divorce law and the need for a reform which would emphasize the needs and capabilities of the parties rather than the circumstances of marital misconduct has been discussed by judges and commentators alike. See, e.g., Popper v. Popper, 173 N.Y.L.J. 28, Apr. 29, 1975, at 17, col. 7 (Sup. Ct. N.Y. County); Levy, supra note 38, at 41-118; Foster & Freed, supra note 38, at 184-86; Teitelbaum, Cruelty Divorce Under New York's Reform Act: On Repeating Ancient Error, 23 BUFFALO L. REV. 1 (1973).

permit two parties who have freely entered into a relationship to dissolve that union by mutual consent when there is "no reasonable prospect of reconciliation."\textsuperscript{72}

\textit{Distribution of Marital Property}

New York's marital property law is based on the common law system.\textsuperscript{73} At common law, a woman lost all legal identity upon marriage; her husband assumed all rights to control, manage, and convey her property.\textsuperscript{74} By virtue of the Married Women's Property Acts\textsuperscript{75} and later corollary statutes,\textsuperscript{76} a wife was given the right to retain title to property she brought to the marriage or separately acquired during marriage. Moreover, she was given the right to contract, manage, control, and devise her property.

These statutory abrogations of the common law rules, however, gave a wife no interest in her husband's property. Just as she retained control over her separately acquired property, he retained control over his.\textsuperscript{77} Thus, under present law, a wife has no interest in either the husband's compensation or in the property he acquires therewith, whether real or personal.\textsuperscript{78} She acquires an interest in

\textsuperscript{72} Uniform Marriage and Divorce Act § 305(c).

Senator Goodman recently sponsored a bill that would add an irretrievable breakdown concept to New York divorce law. His bill provides that a divorce should be granted upon proof that

(1) The marriage is irretrievably broken and that further attempts at reconciliation would be futile or impracticable and not in the best interests of the parties or the family. The fact that the husband and wife have lived separate and apart for a period of one or more years shall be presumptive evidence that the marriage is irretrievably broken.


\textsuperscript{73} For a careful analysis of the roots of the New York form of marital property ownership and a discussion of necessary reforms, see Johnston, Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality, 47 N.Y.U.L. Rev. 1033 (1972).

\textsuperscript{74} The common law system of marital property law is to be distinguished from the community property system followed in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Under this system, each spouse is deemed to own half of all property and income acquired during marriage. In some of these states, however, the husband retains a right to manage and control the community property. See, e.g., La. Civ. Code Ann. art. 2404 (West 1971); Nev. Rev. Stat. § 123.230 (1973). See generally Younger, Community Property, Women and the Law School Curriculum, 48 N.Y.U.L. Rev. 211 (1973).

\textsuperscript{75} E.g., Clark, supra note 38, ch. 7; L. Kanowitz, Women and the Law — The Unfinished Revolution 35-41 (1969).

\textsuperscript{76} See Comm'n Worksheet, supra note 6, sec. G.

\textsuperscript{77} See Foster & Freed, supra note 38, at 172-75; Gabler, The Impact of the ERA on Domestic Relations Law: Specific Focus on California, 8 FAMILY L.Q. 51, 79 (1974).

his property only if title is conveyed to them jointly\textsuperscript{79} or if it is determined that the husband intended a gift to the wife\textsuperscript{80} or held the property for her in constructive trust.\textsuperscript{81}

Upon divorce, these principles work against the wife\textsuperscript{82} who, not being a principal wage earner, has had little opportunity to independently acquire title to property.\textsuperscript{83} As a consequence, she finds herself wholly dependent upon the alimony award.\textsuperscript{84} Because this is a result of her disadvantaged position rather than of her sex, per se, even an ERA would not have required a change of these rules.

Nevertheless, it is submitted that the present laws governing the economics of marital property dissolution be restructured.\textsuperscript{85} As suggested by many commentators, the homemaking task, as assumed by either party or as shared by the parties, should be recognized as a valid and valuable contribution to the marriage.\textsuperscript{86} Each party should be accorded an interest in the other's income and, regardless of the form in which title is taken, in the property

\textsuperscript{79} See N.Y. Est., Powers & Trust Law § 6-2.2(b) (McKinney Supp. 1975).
\textsuperscript{80} See Lindt v. Henshel, 25 N.Y.2d 357, 254 N.E.2d 746, 306 N.Y.S.2d 436 (1969), wherein the court found that the husband's payment for a statue that his wife had selected and contracted to purchase could be considered a gift to his wife. Conversely, in Manheim v. Manheim, 60 Misc. 2d 88, 302 N.Y.S.2d 473 (Sup. Ct. Nassau County 1969), aff'd mem., 34 App. Div. 2d 755, 310 N.Y.S.2d 1017 (2d Dep't 1970), the court, finding insufficient evidence of a gift on the part of the husband, ordered the wife to return certain household goods.

\textsuperscript{81} In Janke v. Janke, 47 App. Div. 2d 445, 366 N.Y.S.2d 910 (4th Dep't 1975), the wife successfully sued for a 1/2 interest in a tavern business owned by the husband. The court found that a constructive trust existed where the wife had contributed to the business operation full-time services for a 12-year period as well as a cash inheritance. In Wirth v. Wirth, 38 App. Div. 2d 611, 326 N.Y.S.2d 308 (3d Dep't 1971), however, no constructive trust was found. There, the former wife sought a declaratory judgment that she was half owner of her former husband's home, insurance policies, investments, and savings even though he had taken title to them in his own name and had paid for them with his own income. The wife claimed that a constructive trust had arisen by virtue of the fact that the parties' agreement to use her income for the family's living expenses discharged the husband from his support obligation, thus enabling him to acquire the substantial assets in question. The court found that in the absence of concealment or misrepresentation, no constructive trust had arisen.

\textsuperscript{82} See authorities cited note 38 supra.

\textsuperscript{83} N.Y. Dom. Rel. Law § 234 (McKinney 1964) gives the court presiding over a divorce proceeding authority to determine questions of title upon the dissolution of a marriage. While possession to property may be awarded as justice requires, ownership must be awarded to the party holding title. See, e.g., McGuigan v. McGuigan, 46 App. Div. 2d 665, 359 N.Y.S.2d 842 (2d Dep't 1974) (mem.).

\textsuperscript{84} See, e.g., Kay v. Kay, 175 N.Y.L.J. 91, Nov. 10, 1975, at 1, col. 6 (Oct. 30, 1975).

\textsuperscript{85} For specific suggestions as to the reform of the New York laws on marital property, see Foster & Freed, supra note 38; Comment, Marital Property: A New Look at Old Inequities, 39 ALBANY L. REV. 52 (1974) [hereinafter cited as Marital Inequities]; Note, Marriage Contracts for Support and Services: Constitutionality Begins at Home, 49 N.Y.U.L. REV. 1161 (1974).

\textsuperscript{86} See, e.g., DAVISON, supra note 2, at 186-96; Brown, supra note 2, at 946; Foster & Freed, supra note 38, at 175.
acquired therewith during the marriage. Upon termination of the marriage, rights to property should be determined according to equitable principles, taking into account the relative contributions of each party.87 Furthermore, the non-wage-earning spouse should be awarded maintenance to allow for eventual self-sufficiency.88 In determining these rights, the court should consider, "as justice requires," the circumstances of the case, the needs and means of the parties, and their respective prospects of future financial security.89

SEX-PLUS-AGE DISCRIMINATION

In several areas of New York law, sex-plus-age discrimination determines the allocation of certain legal rights. In effect, persons of the same age are denied equal rights because of their sex.90 Inasmuch as this type of discrimination largely reflects outmoded notions of the roles and capabilities of both men and women, it is submitted that such statutes be revised so as to apply equally to members of both sexes.

Marital Age

While both men and women may marry at the age of 18 without parental consent,91 the age at which minors may marry

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87 Several theories of marital property ownership exist. The "partnership" notion presumes that all property acquired during marriage, regardless of the form in which title is taken, is held by the spouses as tenants by the entirety and upon dissolution should be distributed on a 50-50 basis. This closely resembles the community form of marital property ownership. Proponents of this theory generally advise that, if warranted by special circumstances, the court should be afforded discretion in making the distribution. Thus, if one party has made only a negligible contribution to the familial relationship or to the family assets, the court could award that party less than a half interest. See Foster & Freed, supra note 38, at 176-77; Marital Inequities, supra note 85, at 76-79.

88 "Equitable" distribution of property, another theory, does not rest solely on a presumption of joint ownership. It requires the exercise of judicial discretion so that apportionment might be effected on the basis of subjective criteria including the parties' respective education, talents, estates, ages, and liabilities. See id. at 79. This approach is incorporated in the Uniform Marriage and Divorce Act § 307 and is embodied in a bill proposing the amendment of N.Y. Dom. Rel. Law § 236 (McKinney Supp. 1975). N.Y.A. 7840, 198th Sess. (1975). The bill was passed by the State Assembly in 1975 and will be considered by the State Senate in 1976. Foster & Freed, Recent Developments in Family Law—1, 175 N.Y.L.J. 86, Oct. 31, 1975, at 1, col. 1, at 2, col. 2.

89 See, e.g., Foster & Freed, supra note 38, at 191; Marital Inequities, supra note 85, at 79.

90 Certain statutes incorporating sex-plus-age discrimination have been found unconstitutional on equal protection grounds. See, e.g., Stanton v. Stanton, 421 U.S. 7 (1975) (father required to support male children until they reached the age of 21 but female children only until the age of 18); In re Patricia A., 31 N.Y.2d 85, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972), discussed in note 18 supra.

with parental consent is 14 for women and 16 for men. This distinction is premised on the traditional view that females mature earlier than males, both physically and psychologically. It is also reflective of the popular belief that men should postpone marriage until they are prepared for a career and the burdens of family support.

Equalization of the minimal marital age is not a simple task. Among the factors to be considered in determining a proper age are the frequent instability of youthful marriages, on the one hand, and the increase in adolescent promiscuity, on the other. Society’s interest in marital stability must be balanced against the merits of increased accessibility to marriage. If it is determined that a younger marital age would encourage more youthful marriages and promote marital instability, the legislature might conclude that an older marital age for both sexes would best serve the public interest.

Penal and Corrections Law

Sex-plus-age discrimination also appears in the Penal Law provision proscribing the endangerment of the welfare of a child. Potential victims of this crime are defined as males under the age of 16 and females under the age of 17. There appears to be no reason to deny 16-year-old males the same protection against “scheming and cunning adults” afforded 16-year-old females.

The Corrections Law specifies that incarcerated males between the ages of 16 and 21 may not be placed in the same correctional facilities.

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92 Id. See generally Levy, supra note 38, at 23-26; Brown, supra note 2, at 938-39; Note, The Uniform Marriage and Divorce Act—Marital Age Provisions, 57 Minn. L. Rev. 179 (1972).
95 See, e.g., Clark, supra note 38, § 2.9, at 78; Note, The Uniform Marriage and Divorce Act—Marital Age Provisions, 57 Minn. L. Rev. 179, 181-89 (1972).
96 Other American jurisdictions which have considered equalization of the minimal marital age have reached varying conclusions. Compare N.D. Cent. Code § 14-03-02 (Supp. 1975) (marital age for females raised to 18, the prescribed age for males) with Va. Code Ann. § 20-48 (Supp. 1975) (marital age for males lowered to 16, the prescribed age for females). The Uniform Marriage and Divorce Act § 203 provides that both males and females may marry at the age of 18 without consent and at the age of 16 with consent.
98 Id.
facility as older males.100 Young females, however, are not accorded similar protection from the corruptive influences of older female inmates,101 there being only one state facility for female prisoners.102 The State's unequal protection of women in this regard is inexcusable when a like benefit could easily be conferred through other means short of the use of a separate facility, such as the designation of separate corridors within the existing facility for young female inmates.103

Senior Citizens' Benefits

At the other end of the age spectrum, sex-plus-age discrimination appears in several statutes concerning the distribution of state pension funds. Presently, under the Supplemental Pension Act,104 the maximum retirement allowance or pension is available to women at age 62. A man does not qualify for the maximum amount until he is 65.105 This differential is repeated in other provisions pertaining to state-subsidized low-income housing.106 Thus, females who are recipients of social security payments and private pension funds at age 62 may exclude $75.00 a month of such payments from the computation of their income in order to qualify as a low-income tenant. Male recipients of these funds may only claim the $75.00 exclusion at age 65.107

These provisions were originally designed to conform state law to the federal social security benefit structure which also gave women a three-year preferential over men.108 Recently, however,

100 N.Y. CORREC. LAW § 71(1)(b) (McKinney Supp. 1975).
102 See Comm'n Worksheet, supra note 6, at H-1.
103 The suggestion of having separate corridors within a prison has been incorporated into bills proposing coed facilities. See, e.g., N.Y.S. 5523, N.Y.A. 8066, 198th Sess. (1975).
105 Id. §§ 161(1)-(2), 163(2)(b)-(3), (5)(a)-(b).
108 Act of June 30, 1961, Pub. L. No. 87-64, § 103(a), 75 Stat. 137, as amended, 42 U.S.C. § 414(a)(1) (Supp. III, 1973). The constitutionality of this 3-year preference given women in the social security benefit structure was upheld in Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968). There, the court reasoned that the distinction was compensatory in nature and reasonably designed to offset the economic discrimination suffered by women throughout their working careers. Similar logic was applied in Kahn v. Shevin, 416 U.S. 351 (1974), wherein the Court upheld the validity of a limited tax exemption for widows.
SEX-BASED DISCRIMINATION

the federal-computation schedule was equalized so that all persons 62 and over are treated alike.\(^{109}\) The legislature should consider amending New York's statutes to maintain consistency between federal and state benefit programs.

Survivors' Benefits

Throughout several areas of New York statutory law, numerous provisions specify widows, mothers, and dependent children, but not widowers, as the recipients of survivors' benefits.\(^{110}\) For example, widows, but not widowers, of veterans,\(^{111}\) city officers,\(^{112}\) state employees,\(^{113}\) teachers,\(^{114}\) policemen, and firemen\(^{115}\) are entitled to receive annuities and pension and death benefits. Widows of veterans may be cared for in veterans' hospitals,\(^{116}\) may be buried at the expense of the State,\(^{117}\) and are entitled to a refund of the veterans' tax payment for the year in which he died.\(^{118}\) Widows of veterans also enjoy a preference in public housing eligibility,\(^{119}\) and widows of veterans and clergymen may claim a limited exemption from real property taxes.\(^{120}\) Under the Workmen's Compensation Law, widows, but not widowers, of a deceased employee are entitled to a minimum death benefit.\(^{121}\) And compensation due a deceased claimant is awarded a "surviving widow," but only a "dependent widower."\(^{122}\)

It is doubtful that such provisions could withstand constitu-


\(^{110}\) For an extensive list of New York's discriminatory survivors' benefits statutes, see Comm'n Worksheet, supra note 6, sec. C.

\(^{111}\) E.g., N.Y. Exec. Law §§ 362(2)(a)-(b) (McKinney 1972); N.Y. Mil. Law § 217(2) (McKinney Supp. 1975).


\(^{113}\) N.Y. Retirement & Soc. Sec. Law § 61(d)(1) (McKinney 1971).

\(^{114}\) N.Y. Educ. Law § 532(d) (McKinney Supp. 1975); N.Y. Retirement & Soc. Sec. Law §§ 162(2)-3 (McKinney 1971).


\(^{117}\) N.Y. Gen. Munic. Law § 148(1)(a) (McKinney 1965). This free burial accorded widows of veterans, however, is limited to those who have not left sufficient funds to defray such expenses.

\(^{118}\) N.Y. Gen. City Law § 25-a-76(c) (McKinney 1968); N.Y. Tax Law § 696(c) (McKinney 1975).


\(^{120}\) N.Y. Real Prop. Tax Law § 458 (McKinney Supp. 1975); id. § 460 (McKinney 1972). Both of these statutes specify that the widow of the veteran or clergyman does not qualify for the real property tax exemption if she has remarried.

\(^{121}\) See N.Y. WORKMEN'S COMP. LAW § 16(5) (McKinney Supp. 1975).

\(^{122}\) Id. §§ 15(4), 16(1-b), (2)-(4) (McKinney 1965).
tional attack. In *Weinberger v. Wiesenfeld*, the United States Supreme Court held that provisions of the Social Security Act granting benefits only to widows unconstitutionally discriminated against female wage earners inasmuch as they acquired less protection for their families than did men similarly situated. In *Frontiero v. Richardson*, the Court invalidated an armed forces' policy requiring servicewomen to prove their husbands' dependency in order to qualify for increased benefits, such benefits having been available to married servicemen without proof of their wives' dependency.

The New York statutes noted above extend to widows of certain men benefits not available to widowers of women identically situated. To remove this inequity, the benefits conferred in each statute may either be extended to widowers or withdrawn altogether. Alternatively, the entire survivors' benefits scheme could be restructured on the sex-neutral criterion of dependency.

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124 *Id.* at 645. The provision of the Social Security Act challenged in *Wiesenfeld* awarded insurance benefits to widows who had not remarried and had the responsibility for caring for a child. Despite the fact that female wage earners were required to pay social security taxes, no equivalent provision existed for the payment of benefits to their widowers. *Id.* at 637 n.1, 645, 653. The Court noted that the challenged provision rested on an "archaic and overbroad" generalization... that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support. *Id.* at 643 (citation omitted) (footnote omitted).

In rendering its decision, the Court in *Wiesenfeld* distinguished its earlier opinion in *Kahn v. Shevin*, 416 U.S. 351 (1974), wherein a Florida statute granting a special tax exemption to widows withstood constitutional attack. The statutory classification in *Kahn* was considered benign and compensatory in that it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Id.* at 355. In contrast, the *Wiesenfeld* provision penalized female wage earners by limiting the benefits they could acquire through the social security program.


126 The armed forces rule in *Frontiero*, like the social security provision challenged in *Wiesenfeld*, presumed a wife's dependence on her spouse's income. *Id.* at 688-89.

127 In some instances, it can be argued that the benefits afforded survivors in New York's statutory scheme have the same benign purpose as the statute upheld in *Kahn*, discussed in note 124 supra. See, e.g., *N.Y. REAL PROP. TAX LAW §§ 458(1), (3) (McKinney Supp. 1975).* For the most part, however, the New York statutes, like the provision invalidated in *Wiesenfeld*, unilaterally limit the accrual of benefits in the case of the family of a female wage earner. See, e.g., *N.Y. RETIREMENT & SOC. SEC. LAW §§ 61(d), (1), 162(2) (McKinney 1971).*

128 Across-the-board extension of survivors' benefits to widowers would entail a considerable commitment of funds. The State Office of the Comptroller is presently studying ways in which the sexually discriminatory distinctions of these provisions might be removed with the least adverse economic ramifications. Telephone interview with Ms. Joyce Pulliam, N.Y. State Law Revision Comm'n, Oct. 21, 1975.

In Washington, the widows' benefits provisions were extended to widowers in response to the enactment of a state ERA. Dybwad, supra note 5, at 587-89.
Unique Physical Characteristics

Statutes that deal with physical characteristics unique to one sex raise special questions to the reformer committed to the eradication of sex discrimination from the law. These statutes employ classifications relying upon sex because they are directed towards circumstances encountered only by one sex by reason of inherent and unique biological traits. Nonetheless, they must be carefully scrutinized since reliance on a physical characteristic may be no more than a guise for sex discrimination. Statutes requiring special analysis in this regard include those dealing with pregnancy, rape, and illegitimacy.

Pregnancy

New York employers are required by law to provide disability coverage for their employees. In lieu of wages, disability payments are made to employees who are unable to work due to a nonoccupational injury or sickness. Under the present law, pregnancy-related disabilities are the only physical condition specifically excluded from coverage.

New York's insurance program is similar to the California system which was attacked for its exclusion of pregnancy-related disabilities in Geduldig v. Aiello. In Aiello, the Supreme Court held that this exclusion from coverage did not constitute invidious dis-

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129 Because inherent and unique physical characteristics are involved, in many cases classifications relying upon sex must be retained. For example, if the father of a child is unknown, the birth certificate must be in the mother's name. See N.Y. PUB. HEALTH LAW § 4135 (McKinney Supp. 1975). Unlawful nudity can include exposure of the female breast but not of the male breast because the female breast is considered a sexual organ while the male breast is not so recognized. N.Y. PENAL LAW §§ 245.00-.02 (McKinney Supp. 1975).
131 See supra note 2, at 894.
132 See N.Y. WORKMEN'S COMP. LAW § 202 (McKinney 1965).
133 Id. § 204 (McKinney Supp. 1975), amending (McKinney 1965); id. § 201(9) (McKinney 1965).
134 Id. § 205(3) (McKinney 1965) states that benefits cannot be claimed for any period of disability caused by or arising in connection with a pregnancy, except any such period occurring after return to employment with a covered employer for a period of two consecutive weeks following termination of such pregnancy . . . .

Unlike the pregnancy exclusion, other exclusions relate not to the nature of the illness, but to the circumstances of its contraction or treatment. Excluded from coverage are illnesses extending over a specified length of time, illnesses treated by unauthorized physicians, injuries due to an employee's willful or illegal act, injuries due to an act of war, and injuries due to motor vehicle accidents. Id. § 205 (McKinney Supp. 1975), amending (McKinney 1965).
crimination under the equal protection clause. In a footnote, the Court observed that pregnancy is not a sex-based classification. Consequently, given California's interest in preserving the financial integrity of its self-insurance plan, the pregnancy exclusion was upheld as being rationally related to a legitimate state purpose.

Application of the Aiello rationale to New York's insurance program would most likely result in an identical holding. It has been suggested, however, that Aiello is not necessarily controlling in New York. New York's Human Rights Law provides that freedom from sex discrimination in employment is a civil right. In Union Free School District No. 6 (Town of Islip) v. New York State Human Rights Appeal Board, the New York Court of Appeals explicitly rejected the Aiello analysis as controlling and construed the Human Rights Law as prohibiting public employers from treating pregnancy and maternity differently from other temporary disabilities with respect to the payment of sick leave benefits. In reaching this conclusion, the court did not address the question of whether the Human Rights Law would have a similar effect when applied to private employers. It would appear from Town of Islip and earlier cases relating to mandatory maternity leave policies, three decisions of the appellate division invalidating mandatory maternity leave policies of local boards of education as violative of the Human Rights Law were affirmed by the court of appeals. The appellate division found that the Human Rights Law required a

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135 417 U.S. at 494. Whereas the New York statute excludes all pregnancy-related disabilities, the California exclusionary provision was limited to normal pregnancies.

136 In what has come to be known as Aiello's "Footnote 20," the Court noted: While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

137 Id. at 496-97 n.20.

138 Id. at 496.


140 Id. § 291(1) (McKinney Supp. 1975).


142 The court of appeals noted that it was not "unmindful of" the Aiello decision finding California's pregnancy-related disability exclusion not violative of the equal protection clause. The court further observed, however, that the fact that the policies challenged in Town of Islip might not be constitutionally forbidden was irrelevant to its determination of whether the New York provision violated the more strict statutory proscription of the Human Rights Law. Id. at 376, 320 N.E.2d at 860, 362 N.Y.S.2d at 141, 142.

143 Id.

144 Three decisions of the appellate division invalidating mandatory maternity leave policies of local boards of education as violative of the Human Rights Law were affirmed by the court of appeals. The appellate division found that the Human Rights Law required a
however, that the New York Court of Appeals will ultimately conclude, on the basis of a broad reading of the Human Rights Law, that pregnancy cannot be treated any differently from other temporary disabilities.145

The greatest impediment to extending temporary disability benefits to pregnant women has been the fear of its prohibitive cost.146 Estimates of the consequential financial burden on employers vary with the degree of coverage contemplated, the number of women employees likely to become pregnant, and the length of time for which payments would be made.147 This excuse for legislative inertia, however, overlooks the fact that if the legislature is to give the Human Rights Law full effect, pregnancy should be treated like any other temporary disability.148 Moreover, the financial objections to inclusion of pregnancy could be mitigated by a scaling down of the maximum benefits allowed for all temporary disabilities.

cost was a considerable factor in the Aiello Court's decision. 417 U.S. at 493-96.


146 A study of the cost of extending coverage to include pregnancy-related disabilities approximated increases ranging from $12 million annually, based on a 7-week benefit period and a $54.00 per week payment to 28,000 claimants; to $100 million annually, based on a 26-week benefit period with payments of $95.00 per week to 54,000 claimants. TASK FORCE ON CRITICAL PROBLEMS, NEW YORK STATE SENATE, INSURANCE AND WOMEN 25 (1974).
Commitment to the view that pregnancy should be treated like any other disability also necessitates reevaluation of the present Labor Law provision prohibiting the employment of a woman within four weeks after childbirth unless she presents a physician's written statement of her fitness to return to the job. No similar restriction is imposed on males who take disability leaves. It is suggested that this statute either be repealed or revised to require that all employees forced to take temporary leaves obtain a physician's statement of fitness.

Rape

The crime of rape can only be committed against a woman. Despite the sexual bias in the crime's definition, the State's rape laws, when viewed as a part of the entire statutory scheme of sex offenses, may be sustained, since they rest on physical characteristics unique to each sex.

Forcible rape is defined as the unconsented to act of sexual intercourse, sexual intercourse occurring upon any penetration of the vagina by the penis. In distinguishing rape as a crime that can be committed only against a female, the legislature has expressed a special interest in the protection of a woman's vagina, likely because the penetration of this orifice by the male sex organ may result in pregnancy. In addition, it is commonly recognized that sexual attacks upon women often result in severe physical and emotional injury. In denying males similar protection against sexual intercourse forcibly induced by females, the legislature has

149 N.Y. LABOR LAW § 206-b (McKinney Supp. 1975). In addition to the physician's statement, a woman seeking to return to work within four weeks of childbirth must present her own written statement expressing her desire to return to the job. Id.
150 N.Y. PENAL LAW §§ 130.25-.35 (McKinney 1975).
151 Id. §§ 130.00-.65. These statutes delineate the crimes of sexual misconduct, rape, sodomy, and sexual abuse.
154 Id. § 130.00(1).
apparently concluded that such a circumstance is unlikely to occur and, if it did, the male would suffer little emotional or physical injury.\textsuperscript{157} In any event, other penal statutes adequately protect males from sexual assaults. Forcible sodomy,\textsuperscript{158} a crime as serious as rape,\textsuperscript{159} proscribes homosexual and heterosexual deviate sex acts.\textsuperscript{160} This is conduct, other than intercourse, that requires contact between a bodily orifice and the physical organ of another.\textsuperscript{161} By virtue of these parallel sodomy and rape provisions,\textsuperscript{162} both sexes are accorded similar protection against similar acts of unconsented sexual contact.

One additional aspect of New York’s rape laws deserving of attention concerns those statutes outlining the crime of statutory rape.\textsuperscript{163} This crime occurs when a male has intercourse with a female under the age of 17, who, because of her youth, is deemed incapable of giving consent.\textsuperscript{164} This statutory presumption may be justified by the State’s special interest in protecting young women from pregnancy.\textsuperscript{165} Since this condition is unique to women, it is not as essential to protect young males from seduction by older females.\textsuperscript{166} Nevertheless, a similar presumption of inability to consent due to nonage is incorporated in the sodomy statutes.\textsuperscript{167} Taken as a whole, therefore, New York’s statutory scheme of sex

\textsuperscript{157} In Brooks v. State, 24 Md. App. 334, 330 A.2d 670 (1975), the court, in dismissing the defendant’s contention that the rape laws unconstitutionally discriminated on the basis of sex, noted: The equality of the sexes expresses a societal goal, not a physical metamorphosis. It would be anomalous indeed if our aspirations toward the ideal of equality under the law caused us to overlook our disparate human vulnerabilities. Id. at 339, 330 A.2d at 673. In State v. Kelly, 111 Ariz. 181, 526 P.2d 720 (1974), cert. denied, 420 U.S. 955 (1975), the court perceived “no need by males for protection against females from rape which would be sufficient to demand legislative attention.” Id. at —, 526 P.2d at 723.

\textsuperscript{158} N.Y. Penal Law §§ 130.40-.50 (McKinney 1975).

\textsuperscript{159} Sodomy and rape in the third degree are class E felonies punishable by one to four years imprisonment. Id. §§ 10.00(5), 70.00(2)(e), 130.25, .40. In the first degree, these crimes are both class B felonies punishable by up to 25 years imprisonment. Id. §§ 10.00(5), 70.00(2)(b), 130.35-.50. This parallel structure was intentional. Temporary State Comm’N on Revision of the Penal Law and Criminal Code, Proposed New York Penal Law 343 (1964).

\textsuperscript{160} N.Y. Penal Law §§ 130.40-.50 (McKinney 1975).

\textsuperscript{161} Deviate sex acts entail contact “between the penis and the anus, the mouth and the penis, or the mouth and the vulva.” Id. § 130.00(2).

\textsuperscript{162} See note 159 supra.

\textsuperscript{163} Statutory rape, if the female is under 17 and the male is over 21, is charged in the third degree. If the victim is less than 14, the charge is second degree rape if the male is over 18. First degree rape occurs if she is less than 11. N.Y. Penal Law §§ 130.25-.35 (McKinney 1975).

\textsuperscript{164} Id. § 130.05(3)(a).

\textsuperscript{165} See Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975).

\textsuperscript{166} See People v. Green, 183 Colo. 25, 514 P.2d 769 (1973).

\textsuperscript{167} N.Y. Penal Law §§ 130.40-.50 (McKinney 1975).
offenses does not appear to invidiously discriminate against either sex. Both males and females are protected against forced sexual attack and young members of both sexes are presumed incapable of consenting to the proscribed acts.

It can be argued, however, that by separately defining the two types of unlawful sexual activity—rape and sodomy—these laws do not clearly reflect as the paramount concern the State's interest in protecting all persons from bodily intrusion. Other states, in reforming their rape laws, have generally proscribed "sexual penetration," that is, all unlawful intrusions of bodily orifices by any object. By focusing on the act itself, these statutory schemes punish and protect members of both sexes equally, measuring such punishment and protection according to the degree of force exercised, the victim's vulnerability, and, in the case of minors, the relative ages of the actor and victim. Though New York's sexual assault laws are not discriminatory in effect, adoption of this type of sex-neutral statutory scheme would appear to merit legislative consideration.

Illegitimacy

Currently, the rights and responsibilities of a father vis-à-vis his illegitimate child are substantially less than those of the mother. Arguably, this unequal treatment is a product of the "unique physical characteristics" inherent in parenthood. Maternity is an easily identifiable condition, whereas paternity is often impossible to establish. Given this fact, some sex-based classifications in this area of the law may be justified. It seems reasonable that if

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169 "Sexual penetration," as defined in Michigan's revised sex offense statute, includes sexual intercourse, cunnilingus, fellatio, anal intercourse, and all other intrusions of any object into the physical openings of another. MICH. COMP. LAWS ANN. § 750.520a (Supp. 1975); accord, FLA. STAT. ANN. § 794.011 (Supp. 1975).
170 See note 169 supra.
171 For a valuable study, focusing on New York law, of the inequitable treatment accorded the illegitimate child and his father, see, Note, Illegitimacy and Equal Protection, 49 N.Y.U.L. REV. 479 (1974).
172 The evidence supporting a charge of paternity must be so clear and convincing as to completely satisfy the trier of fact that the respondent is the father of the child. See, e.g., Edick v. Martin, 34 App. Div. 2d 1096, 312 N.Y.S.2d 427 (4th Dep't 1970) (mem); Gray v. Rose, 32 App. Div. 2d 994, 302 N.Y.S.2d 185 (3d Dep't 1969) (per curiam). It should be noted that while the mother's testimony need not be corroborated, Comm'r of Soc. Serv. v. S., 75 Misc. 2d 971, 348 N.Y.S.2d 831 (Family Ct. Bronx County 1973), the alleged father's testimony concerning the access of others must be. N.Y. FAMILY CT. ACT § 531 (McKinney 1963).
the father of a child is unknown, the obligation to support the child must be imposed upon the mother. She also should be entitled to surrender the child for adoption and enjoy fully all other parental rights.

It is in the case of the father who is known or who can be identified that the present laws work the greatest injustice. Without adjudication or acknowledgment of paternity, his rights and responsibilities vis-à-vis his child are most limited. This policy would appear just, except for the fact that under the Family Court Act he has no standing to initiate a proceeding to gain legal recognition of his paternity.

Adjudication or acknowledgment results in the imposition of a

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175 See id. § 111(3) (McKinney Supp. 1975).
177 "Acknowledgment" of paternity removes the bar of ...e 2-year statute of limitations on the institution of a filiation proceeding. N.Y. Family Ct. Act § 517(a) (McKinney 1963). Acknowledgment must be in writing or declared in court and must indicate a willingness to accept paternal responsibility for the child. Id. See, e.g., Wong v. Beckford, 28 App. Div. 2d 137, 283 N.Y.S.2d 491 (1st Dep't 1967). Additionally, by acknowledging his paternity, the male becomes severally liable for the support of the out-of-wedlock child. N.Y. Dom. Rel. Law § 33(5) (McKinney 1964).

178 The rights of a father who can be identified are limited to notice of the proposed adoption of his illegitimate child, In re Adoption of Anonymous, 78 Misc. 2d 1037, 359 N.Y.S.2d 220 (Sur. Ct. Erie County 1974), and recovery for the wrongful death of the child. N.Y. Est., Powers & Trusts Law §§ 5-4.4, -4.5 (McKinney Supp. 1975). He does not qualify as a statutory distributee for intestacy purposes. Id. § 4-1.2(b) (McKinney 1967). The rights of an adjudicated father in regard to intestacy distribution are described in text accompanying note 187 infra.

It may be inferred from the different treatment accorded the adjudicated father and natural mother under id. § 4-1.2(b) that different treatment will also be accorded their spouses in determining their statutory right of election share under id. § 5-1.1 (McKinney Supp. 1975). This section provides that a spouse's statutory share is ½ the net estate if the deceased spouse is survived by no issue, but is reduced to ½ if the deceased is survived by one or more issue. Thus, if the deceased spouse is a woman who has had only an illegitimate child, her husband's statutory share may be reduced accordingly. In contrast, if a man dies leaving only an illegitimate child not formally adjudicated as his, his wife's statutory share would not be affected.

179 Proceedings to establish paternity may be instituted by the mother, a person who stands in a custodial relationship to the child, a representative of a charitable organization, or, if either the mother or child is in danger of becoming a public charge, by a public welfare official. N.Y. Family Ct. Act § 522 (McKinney 1963). This denial of standing to the father has been questioned. Crane v. Battle, 62 Misc. 2d 137, 307 N.Y.S.2d 355 (Family Ct. N.Y. County 1970) (father allowed to petition for declaration of paternity). But see Roe v. Roe, 65 Misc. 2d 395, 316 N.Y.S.2d 94 (Family Ct. Kings County 1970) (court refused to follow Crane). Recently, the Family Court, Kings County, while not ruling on the constitutionality of denying a father standing, indicated the statute would probably have to be extended to fathers in order to be held constitutional. In re Juan R., 174 N.Y.L.J. 83, Oct. 28, 1975, at 9, col. 4 (Family Ct. Kings County).
paternal obligation of support.\textsuperscript{180} Disparities between the relative rights of the mother and father, however, remain.\textsuperscript{181} While both acknowledged and adjudicated fathers, like known but unadjudicated fathers,\textsuperscript{182} are entitled to notice of a mother's proposed placement of the child for adoption,\textsuperscript{183} only her consent is required for the child's surrender,\textsuperscript{184} and she alone has the right to specify the religious orientation of the adoptive parents.\textsuperscript{185} Inequality also exists between the rights of the mother and the adjudicated father with respect to the laws of intestate distribution. Although an illegitimate child may inherit \textit{from and through} his mother, and she from and through him,\textsuperscript{186} the illegitimate child may only inherit \textit{from} his adjudicated father, and he from his child.\textsuperscript{187}

Admittedly, many adjudicated fathers fail to assume their pa-

\textsuperscript{180} At common law, the unacknowledged and unadjudicated father of an illegitimate child had no obligation to support that child. \textit{Clark}, \textit{supra} note 38, § 5.1, at 155. This common law rule is now codified at N.Y. DOM. REL. LAW § 33(5) (McKinney 1964).

Unlike the case where a child is born in wedlock and the father has the primary obligation of support, see note 45 and accompanying text \textit{supra}, if a child is born out of wedlock, the obligation to support may be apportioned between the mother and the father. \textit{See, e.g.}, id. § 33(5); N.Y. FAMILY CT. ACT §§ 513, 562, 563 (McKinney 1963).


Once paternity is adjudicated, the father becomes liable for obligations additional to that of child support if the mother herself is without adequate resources. \textit{See, e.g.}, N.Y. FAMILY CT. ACT §§ 514 (expenses of mother's confinement), 536 (mother's counsel fees) (McKinney 1963). For a more extensive list, see Comm'n Worksheet, \textit{supra} note 6, Sec. B.

\textsuperscript{182} \textit{See} note 178 \textit{supra}.

\textsuperscript{183} As observed by the court in \textit{In re Adoption of Anonymous}, 78 Misc. 2d 1037, 359 N.Y.S.2d 220 (Sur. Ct. Erie County 1974), it is not that the father's "consent" is now necessary as a condition precedent to adoption, but, rather that he be served with "notice" and given an opportunity to present facts for the Court's consideration to determine what is "in the best interest of the child."


\textsuperscript{184} N.Y. DOM. REL. LAW § 111(3) (McKinney Supp. 1975). The court of appeals recently upheld the constitutionality of this provision permitting adoption of the child by another without the natural father's consent. \textit{In re Adoption of Malpica-Orsini}, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975). In \textit{Malpica-Orsini} the mother and father had lived together for two years after the birth of the child and an order of filiation establishing the father's paternity had been entered. The mother thereafter married another man who filed a petition for adoption of the child. Following a hearing in which the natural father appeared and objected to the proposed adoption, the order was entered.

\textsuperscript{185} N.Y. FAMILY CT. ACT § 116(g) (McKinney Supp. 1974); N.Y. SOC. SERV. LAW § 373(7) (McKinney Supp. 1975).

\textsuperscript{186} N.Y. Est., Powers & Trusts LAW § 4-1.2(a)(1), (b) (McKinney 1967).

\textsuperscript{187} \textit{Id.} § 4-1.2(a)(2), (b).
ternal responsibilities. In these cases, the legislature is perhaps justified in affording the adjudicated father fewer rights than the natural mother. It should also be recognized that many fathers assume parental obligations towards an illegitimate child absent an order of filiation. For these reasons it would seem more rational for the legislature to focus on the concern exhibited by the father, be he adjudicated or unadjudicated, when determining what rights he should be granted.

At the outset, a father should be given the right to institute filiation proceedings. As currently provided, an adjudication of paternity should carry with it an obligation to support. If in fact this obligation is fulfilled, the father’s rights vis-à-vis his child should be the same as the mother’s. His consent to adoption should be required, his preference as to the religious orientation of the adoptive parents should be balanced against the mother’s desire, and his kindred should be able to inherit from the child.

By predicking the rights of the father on his satisfaction of the parental obligations imposed upon him, the interests of those fathers who voluntarily assume their parental role or who satisfy the obligation to support the child would be protected. Their failure to be adjudicated should not foreclose them from all parental rights. If they have assumed a parental role, in fact, they should be accorded rights on a parity with those of the mother. Accordingly, the legislature should consider authorizing the family courts to exercise judicial discretion on a case by case basis in determining the rights of fathers of illegitimates. Recent case law suggests that a weighing of facts and a balancing of equities is not only feasible but also desirable in those cases where the illegitimate’s father seeks to assert his rights.

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188 As the court of appeals observed in In re Adoption of Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), “[t]he vast majority of instances where paternity has been established arise out of filiation proceedings, compulsory in nature...” Id. at 573, 331 N.E.2d at 490, 370 N.Y.S.2d at 517. Consequently, many adjudicated fathers, resentful of their forced attachment to the child, may be unwilling to assume even the most limited parental role.


190 See Foster & Freed, Recent Developments in Family Law — II, 174 N.Y.L.J. 103, Nov. 28, 1975, at 1, col. 1.

191 The obligation to support should be apportioned between the mother and the father in order to reflect their relative means and capabilities. See text accompanying note 61 supra.

192 See, e.g., Va. Code Ann. § 63.1-225 (Supp. 1975), requiring the consent of the identifiable father of the illegitimate child in order to surrender the child for adoption. The court is empowered to do away with this requirement, however, if after a hearing it determines that the consent of the father would not be in the best interests of the child.

193 This willingness to look at the individual facts of each case has been exhibited in
CONCLUSION

Notwithstanding the defeat of the ERA, it is submitted that eradication of sex discrimination from New York's statutory law continues to be a necessary legislative objective. All New Yorkers stand to benefit from a comprehensive program of reform. As outlined above, satisfaction of this objective will result in rational and equitable laws consistent with modern reality.

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