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Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences

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BIOLOGY, EQUALITY, AND THE LAW: THE LEGAL SIGNIFICANCE OF BIOLOGICAL SEX DIFFERENCES

by
*Kingsley R. Browne**

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IN times past one who proclaimed "Vive la difference!" would have been viewed as, at worst, a bon vivant. Times have changed, and one who makes such an utterance today is likely to be viewed as, at best, a sexist pig. Even to recognize "la difference," let alone to celebrate it, may be sufficient to bring one into disrepute.

A rather strong and popular movement, whose members believe that a person's sex should be legally irrelevant because they believe it is logically irrelevant, is underway. The followers view men and women as inherently identical, except in reproductive function and surface anatomy. Any other observable differences are considered results of social conditioning. For example, most of the commentary in support of the Equal Rights Amendment proceeds from the assumption that there are no differences between the sexes that should have any recognition in the law. This assumption may be faulty, however, because many attitudes commonly ascribed to stereotypic thinking about the proper role of the sexes may actually be reflections of reality.

A large and growing body of psychological, biological, and anthropological literature suggests that differences between men and women exist in temperament and cognitive functioning. The psychological literature shows that men tend to be more aggressive and to perform better on mathematical and visual-spatial tests, and women tend to be more nurturant and to perform better on tests of verbal fluency.¹ Many of these differences appear early in childhood; others tend to appear at about puberty. The early appearance of many of these traits supports the conclusion that

1. See *infra* notes 6-33 and accompanying text.

these differences are at least in part products of biological differences. The biological literature reveals that sex differences are, to some extent, a result of exposure both of male fetuses to androgens² in utero and of adolescent and adult males to high levels of circulating androgens.³ The anthropological literature indicates that many traits perceived as artifacts of our own culture, such as male dominance and aggressiveness, appear in virtually every known society.⁴ One could argue, of course, that the reason for the overwhelming prevalence of male dominance throughout the world and throughout history is cultural. Such an explanation, however, does nothing to elucidate the reasons for the phenomenon. If human societies need to elevate one sex to a higher status relative to the other for some functional reason, and if there are no differences between men and women, an approximately equal distribution of male-dominated and female-dominated societies would be expected. The explanation that men have attained higher status by subordinating women only serves to support the position that it was male aggressiveness that allowed such a situation to develop in the first instance.

The existence of sex differences in temperament suggests that the policy of attempting to achieve an androgynous society through anti-discrimination laws, affirmative action programs, and constitutional interpretation may be misguided. Disparate effect may not be the only appropriate factor to consider in determining whether some form of improper discrimination has occurred. If men, on the average, are inherently more aggressive than women and, because of biological predisposition, tend to have different interests and abilities than women, then discriminatory motives on the part of those who run male-dominated institutions are not the only reason for disparities in status between men and women. Moreover, these differences suggest that certain forms of discrimination should be permissible because they are based on natural differences between the sexes.

A recognition of sex differences does not compel an acceptance of all forms of sex discrimination. Much discrimination has nothing to do with genuine sex differences, and this Article does not defend such discrimination. A recognition of differences does mean, however, that not all discrimination is invidious, and thus an inquiry must be made into the particulars of each case.

An understanding of human nature is crucial to our understanding of the consequences of certain policies we adopt. Social policies are most successful when they are based upon realistic assumptions and formulated with a view toward their consequences. Policies based upon a utopian egalitarian vision and developed in ignorance of reality pose significant dangers to a free society. This Article explores the question of sexual

2. Androgens are male hormones that stimulate activity of the male sex organs. STEDMAN'S MEDICAL DICTIONARY 66 (24th ed. 1982).

3. See *infra* notes 150-270 and accompanying text.

4. See *infra* notes 75-95 and accompanying text.

equality from a biological perspective and argues that attempts to impose a sex-blind legal order on a two-sexed species may not be successful without considerable coercion by the state. Although some may be willing to accept the tradeoff of a certain amount of individual liberty for greater sexual equality, it is far from clear whether there is a general understanding that such a tradeoff is necessary. A rational policy, whose goal is to treat the sexes fairly, must take into account the actual differences between the sexes. In the words of William Blake, "One Law for the Lion & Ox is Oppression."⁵

I. BIOLOGICAL SEX DIFFERENCES

A. *Temperament and Cognitive Function*

The sex differences that are most relevant to this study are differences in behavior, rather than in physiological traits such as reproductive function and body strength. The specific areas that will be dealt with are aggressiveness, nurturance, and cognitive function. Differences in these traits will be discussed only briefly because there is little controversy concerning their existence. The major controversy concerns the origin and significance of these traits.

1. *Aggressiveness*

Sex differences in aggressiveness are well documented.⁶ Boys are more aggressive both physically and verbally from the time social play begins at age two or two-and-a-half. In a trait that may be related to aggressiveness—competitiveness—many studies have found no difference between the sexes, but in studies that find a difference the boys are the more competitive sex.⁷ Maccoby and Jacklin concluded that overall boys tend to be more competitive than are girls.⁸ Eleanor Maccoby had previously concluded that aggression, defined broadly to include dominance and initiative, is a trait associated with males, and she suggested that aggressiveness may underlie the growth of analytic thinking.⁹ Aggression can be manifested in many ways. Participation in violent crime constitutes one such

5. W. BLAKE, *THE MARRIAGE OF HEAVEN AND HELL* Plate 24 (1790).

6. See, e.g., E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974); Maccoby & Jacklin, *Sex Differences in Aggression: A Rejoinder and Reprise*, 51 *CHILD DEV.* 964 (1980). But see Tieger, *On the Biological Basis of Sex Differences in Aggression*, 51 *CHILD DEV.* 943 (1980).

Aggression is not a unitary concept. E.O. Wilson has described seven different categories of what might be called aggression: (1) defense and conquest of territory; (2) the assertion of dominance within well-organized groups; (3) sexual aggression; (4) acts of hostility by which weaning is terminated; (5) aggression against prey; (6) defensive counterattacks against predators; and (7) moralistic and disciplinary aggression used to enforce the rules of society. E. WILSON, *ON HUMAN NATURE* 101 (1978). Some would not define aggression so broadly, but would limit it to interactions between conspecifics. See K. LORENZ, *ON AGGRESSION* 11 (1963).

7. E. MACCOBY & C. JACKLIN, *supra* note 6, at 249.

8. *Id.* at 254.

9. Maccoby, *Woman's Intellect*, in *THE POTENTIAL OF WOMEN* 37 (S. Farber & R. Wilson eds. 1963).

manifestation. In 1981, for example, the rate of male arrests for armed robbery was almost thirteen times as high as the female rate. The rate of arrest for murder and nonnegligent manslaughter was almost seven times as high for males as that for females.¹⁰

In anthropologist Ashley Montagu's book entitled *The Natural Superiority of Women* the author puts forth the proposition that women are superior to men.¹¹ In support of his thesis Montagu acknowledges that men are more aggressive than women, but argues that the nonaggressiveness of women is a virtue because it is a reflection of women's greater emotional control.¹² The purpose of this Article is not to argue whether differences in particular traits show the superiority or inferiority of either sex, but to note the empirical observation that differences do exist. Debate over whether the temperamental characteristics of one sex are superior to those of the other, even when differences are found to exist, is frivolous.¹³ For example, it could be said that men are superior to women in aggressiveness, and women are superior to men in nonaggressiveness. The worth of the traits depends upon the values of the observer and the context in which the traits appear. A value-neutral statement that males exhibit greater aggressiveness than females would be more accurate.

Very little controversy actually exists over whether men exhibit more aggressive behavior than do women. The major point of contention centers on the extent to which differences in aggression are a result of biological predisposition and the extent to which differences are a product of socialization.

2. Cognitive Function

The proposition that there are no significant differences between the IQ scores of the sexes is generally accepted, but the reason for this lack of difference is not commonly known. The best-known tests of intelligence, the Stanford-Binet and the Wechsler Adult Intelligence Scale (WAIS), have been standardized to eliminate sex differences by either deleting items indicating large differences or by balancing the tests to give equal weight to items favoring each sex.¹⁴ Thus it makes little sense to compare the IQs of the two sexes. Even if the tests were not standardized to eliminate sex differences, the results of the comparison would depend solely upon the value assigned to the individual items. For example, if a test is heavily weighted in favor of quantitative analysis, at which males tend to excel, males may appear to have a higher IQ than females. If the test em-

10. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 182 (103d ed. 1982-1983) [hereinafter cited as STATISTICAL ABSTRACT].

11. A. MONTAGU, *THE NATURAL SUPERIORITY OF WOMEN* 19 (1953).

12. *Id.* at 88-89.

13. In some contexts, however, it is easier to assess superiority and inferiority because of an absence of dispute about the value of the characteristics involved. For example, females have a consistently higher life expectancy and are less susceptible than males to scores of infectious, degenerative, and genetic diseases. *Id.* at 75-90.

14. L. WILLERMAN, *THE PSYCHOLOGY OF INDIVIDUAL AND GROUP DIFFERENCES* 388 (1979).

phasizes verbal ability, at which females excel, females will appear to have higher IQs than males.

Sex differences can be demonstrated in a number of cognitive abilities. Females consistently outperform males on tests of verbal fluency.¹⁵ Girls tend to say their first words earlier, speak more clearly, combine words into sentences earlier, and use longer sentences than do boys.¹⁶ This female superiority lasts throughout their school careers.¹⁷ No consistent differences have been observed, however, with respect to verbal reasoning.¹⁸

Consistent sex differences also appear in quantitative ability, but males have the edge in this area. Male superiority in quantitative skills appears at a much later age than the appearance of the verbal superiority of the female. Only slight differences are observed until around puberty, but the male advantage after puberty is quite strong.¹⁹ The difference is commonly attributed to differential reinforcement of mathematical performance in boys and girls and differential course-taking in school,²⁰ but that does not appear to be a complete answer. In the kibbutzim of Israel, which have a sexually egalitarian philosophy, these same sex differences in cognitive performance appear even when boys and girls all take the same courses and there is no social expectation that the boys will outperform the girls.²¹

Another trait in which males show consistent superiority is visual-spatial relations.²² Males outperform females on tests such as the embedded-figure test²³ and the rod-and-frame test.²⁴ Results of these tests are some-

15. Kipnis, *Intelligence, Occupational Status and Achievement Orientation*, in *EXPLORING SEX DIFFERENCES* 104 (B. Lloyd & J. Archer eds. 1976); Buffery & Gray, *Sex Differences in the Development of Spatial and Linguistic Skills*, in *GENDER DIFFERENCES: THEIR ONTOGENY AND SIGNIFICANCE* 123 (C. Ounsted & D. Taylor eds. 1972) [hereinafter cited as *GENDER DIFFERENCES*].

16. Kipnis, *supra* note 15, at 104.

17. *Id.*

18. Kellaghan & MacNamara, *Family Correlates of Verbal Reasoning Ability*, 7 *DEV. PSYCHOLOGY* 49, 51-52 (1972); Oetzel, *Annotated Bibliography*, in *THE DEVELOPMENT OF SEX DIFFERENCES* 223 (E. Maccoby ed. 1966).

19. L. WILLERMAN, *supra* note 14, at 391; E. MACCOBY & C. JACKLIN, *supra* note 6, at 85-91; Kipnis, *supra* note 15, at 106.

20. See Fennema, *Sex-related Differences in Mathematics Achievement: Where and Why*, in *WOMEN AND THE MATHEMATICAL MYSTIQUE* 76 (L. Fox, L. Brody & D. Tobin eds. 1980).

21. L. TIGER & J. SHEPHER, *WOMEN IN THE KIBBUTZ* (1975). For a discussion of the status of women in the kibbutz, see *infra* text accompanying notes 96-126.

22. E. MACCOBY & C. JACKLIN, *supra* note 6, at 91-98.

23. In the embedded-figure test, subjects are asked to find a figure hidden in a camouflaging background. People not as affected by context can separate the figure from the background and are described as "field-independent," while those who cannot distinguish the figure from the background are called "field-dependent." E. MACCOBY & C. JACKLIN, *supra* note 6, at 91-93.

24. See Witkin & Goodenough, *Field Dependence and Interpersonal Behavior*, 84 *PSYCHOLOGICAL BULL.* 661, 662 (1977). The rod-and-frame test is a test of field independence in which subjects are placed in a darkened room and can see only an illuminated frame with an illuminated rod in the center. The rod and frame are tilted off-center independently of one another and the subject is requested to indicate when the rod is perpendicular to the ground and not the frame. E. MACCOBY & C. JACKLIN, *supra* note 6, at 27.

times used to show that males are more analytical than females, but it is important to remember that the results demonstrate analytic ability only in the visual-spatial mode where males excel. Psychologist Corinne Hutt has concluded that "[t]he masculine faculty for reasoning seems to be evident at most ages . . . , and the facility for envisaging the unusual, the unorthodox relations between images or ideas—the originality inherent in creativity—seems similarly to be a function of sex rather than of social and domestic circumstance."²⁵

The sexes also differ a great deal in their favored sensory modality. In one experiment men and women were asked to perform a purely verbal task and a purely visual task.²⁶ The verbal task consisted of running through the alphabet mentally and counting the number of letters containing the sound "ee." The visual task entailed going through the alphabet mentally and counting the number of letters containing a curve in their upper-case form. Males excelled on the visual task and females excelled on the verbal task.²⁷

Some of the sex differences in cognitive function appear related to differences in the way that function is lateralized in the brain. The left hemisphere of the brain generally controls verbal abilities, in which females excel, and the right hemisphere controls spatial perception, in which males excel.²⁸ Males show a greater lateralization of function than females.²⁹ Thus when the left hemisphere of males is damaged, performance on verbal tests decreases; when the right hemisphere is damaged, nonverbal performance declines. Females tend not to show such selective deficits after comparable brain damage.³⁰ Researchers have recently suggested that structural sex differences that have been observed in the corpus callosum may be related to sex differences in hemispheric specialization for visual-spatial functions.³¹

3. *Maternal Behavior and Nurturance*

Just as there is little dispute over whether males exhibit more aggressive behavior than do women, there is little dispute over whether females exhibit more nurturant behavior toward infants and children than do males. As Maccoby and Jacklin have observed, "women throughout the world

25. Hutt, *Neuroendocrinological, Behavioural, and Intellectual Aspects of Sexual Differentiation in Human Development*, in GENDER DIFFERENCES, *supra* note 15, at 73, 113.

26. Coltheart, Hull & Slater, *Sex Differences in Imagery and Reading*, 253 NATURE 438, 438-39 (1975).

27. *Id.*

28. McGlone & Davidson, *The Relation Between Cerebral Speech Laterality and Spatial Ability with Special Reference to Sex and Hand Preference*, 11 NEUROPSYCHOLOGIA 105, 111 (1973).

29. *Id.*

30. Inglis & Lawson, *Sex Differences in the Effects of Unilateral Brain Damage on Intelligence*, 212 SCIENCE 693, 693-94 (1981). For a general treatment of the subject of functional cerebral asymmetry, see S. SPRINGER & G. DEUTSCH, LEFT BRAIN, RIGHT BRAIN (1981).

31. The corpus callosum is the structure that connects the two hemispheres of the brain. Lacoste-Utamsing & Holloway, *Sexual Dimorphism in the Human Corpus Callosum*, 216 SCIENCE 1431, 1431 (1982).

and throughout human history are perceived as the more nurturant sex, and are far more likely than men to perform the tasks that involve intimate care-taking of the young, the sick, and the infirm."³² The question of the existence of the phenomenon requires little discussion, because the controversial question is whether female nurturance is a result of inherent biological qualities of the female or a result of social conditioning.³³

B. Sex Differences in Infants and Young Children

Behavioral sex differences have been observed even in infants and young children.³⁴ Numerous studies have shown a propensity for male children to range farther in their play,³⁵ engage in more outdoor play,³⁶ and display greater aggression than do female children.³⁷ Even newborns exhibit sex differences in behavior, but because of the nature of newborn behavior any conclusions must be considered tentative.³⁸ For example, evidence indicates that females are more sensitive to tactile stimulation³⁹ and more responsive to taste.⁴⁰ Some of these differences, however, may be merely a reflection of the more advanced neurological development of females.⁴¹ Males, on the other hand, tend to lift their heads higher.⁴² In a study of two-day-old and three-day-old babies, girls were found to smile

32. E. MACCOBY & C. JACKLIN, *supra* note 6, at 215; see also D. BARASH, *THE WHISPERINGS WITHIN: EVOLUTION AND THE ORIGINS OF HUMAN NATURE* 108 (1979) (worldwide, women largely bear responsibility for child care).

33. See *infra* notes 173-92, 246-70 and accompanying text.

34. Singer, Westphal & Niswander, *Sex Differences in the Incidence of Neonatal Abnormalities and Abnormal Performance in Early Childhood*, 39 *CHILD DEV.* 103, 105-10 (1968).

35. The superior performance of males on visual-spatial tasks is thought by some to be related to the exploratory tendency of males. See Buffery & Gray, *supra* note 15, at 123, 124-25.

36. Harper & Sanders, *Preschool Children's Use of Space: Sex Differences in Outdoor Play*, 11 *DEV. PSYCHOLOGY* 119, 119 (1975).

37. Serbin, O'Leary, Kent & Tonick, *A Comparison of Teacher Response to the Preacademic and Problem Behavior of Boys and Girls*, 44 *CHILD DEV.* 796, 799 (1973) [hereinafter cited as *Teacher Response*]; see Pedersen & Bell, *Sex Differences in Preschool Children Without Histories of Complications of Pregnancy and Delivery*, 3 *DEV. PSYCHOLOGY* 10, 12-14 (1970).

Even if no sex differences were found in childhood, that would not mean that behavioral differences observed in adults were not biological, any more than it would mean that female breasts and male beards do not have a biological foundation.

38. See Korner, *Methodological Considerations in Studying Sex Differences in the Behavioral Functioning of Newborns*, in *SEX DIFFERENCES IN BEHAVIOR* 197, 200-04 (R. Friedman, R. Richart & R. Vande Wiele eds. 1974).

39. Bell & Costello, *Three Tests for Sex Differences in Tactile Sensitivity in the Newborn*, 7 *BIOLOGIA NEONATORUM* 335, 335 (1964).

40. Nisbett & Gurwitz, *Weight, Sex, and the Eating Behavior of Human Newborns*, 73 *J. COMP. & PHYSIOLOGICAL PSYCHOLOGY* 245, 248 (1970).

41. See E. MACCOBY & C. JACKLIN, *supra* note 6, at 18. Female newborns are approximately one month to six weeks more developed than males. Garai & Scheinfeld, *Sex Differences in Mental and Behavioral Traits*, 77 *GENETIC PSYCHOLOGY MONOGRAPHS* 169, 183 (1968).

42. Bell, Weller & Waldrop, *Newborn and Preschooler: Organization of Behavior and Relations Between Periods*, 36 *MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEV.*, serial no. 142 (1971).

more, whereas boys were found to startle more.⁴³ Such early differences are difficult to attribute to the influence of social learning.

A study of one-year-old infants found clear behavioral differences between the sexes.⁴⁴ When attempts were made to remove children from their mothers' laps girls were more reluctant to leave. When the mothers placed their babies on the floor, girls tended to return to their mothers immediately, while male infants spent more time away from their mothers. After fifteen minutes of free play, a wooden barrier was placed between the infants and their mothers. The females cried and motioned for help much more frequently than the boys, and the boys made much more active attempts to circumvent the barrier. In terms of overall activity, boys were much more active than girls; the girls tended to sit and play with toys and the boys banged their toys on the floor.⁴⁵ The authors concluded that girls were more dependent, showed less exploratory behavior, and exhibited a much quieter style of behavior. Boys were more independent, showed more exploratory behavior, were more vigorous, and played more actively.⁴⁶

A study involving children ages two to five also showed that males have a higher activity level than females.⁴⁷ Studies have also shown that nursery school boys engage in more gross motor activities, change focus more often, and are more aggressive.⁴⁸ A number of other writers have also reported that male children are more aggressive than females.⁴⁹ By age two or three, evidence indicates that boys are exploring the space around them and manipulating their environment more than are girls.⁵⁰

A study conducted with twenty-month-old children revealed that their toy preferences matched adult stereotypes.⁵¹ Each child was allowed to play with six toys. The three traditional male toys were a hammer, a truck, and a gun, and the three traditional female toys were a bead bracelet, a doll, and an iron. Boys played with male toys more than girls did, and girls played with female toys more than boys did.⁵²

Whether the differences seen in children are due to innate biological

43. Korner, *Neonatal Startles, Smiles, Erections, and Reflex Sucks as Related to State, Sex, and Individuality*, 40 *CHILD DEV.* 1039, 1048 (1969).

44. Goldberg & Lewis, *Play Behavior in the Year-Old Infant: Early Sex Differences*, 40 *CHILD DEV.* 21, 21 (1969). These results have been replicated in a sample of children from a lower socio-economic status background. Messer & Lewis, *Social Class and Sex Differences in the Attachment and Play Behavior of the Year-Old Infant*, 18 *MERRILL-PALMER Q.* 295, 298-302 (1972).

45. Goldberg & Lewis, *supra* note 44, at 24.

46. *Id.* at 24-26.

47. *Teacher Response*, *supra* note 37, at 799.

48. Pedersen & Bell, *supra* note 37, at 13.

49. See, e.g., Hatfield, Ferguson & Alpert, *Mother-Child Interactions and The Socialization Process*, 38 *CHILD DEV.* 365, 376-77 (1967); Hutt, *supra* note 25, at 88-92; McIntyre, *Sex Differences in Children's Aggression*, 7 *PROC. EIGHTIETH ANN. CONV. OF APA* 93, 93 (1972).

50. Birns, *The Emergence and Socialization of Sex Differences in the Earliest Years*, 22 *MERRILL-PALMER Q.* 229, 238-42 (1976).

51. Fein, Johnson, Kosson, Stork & Wasserman, *Sex Stereotypes and Preferences in the Toy Choices of 20-Month-Old Boys and Girls*, 11 *DEV. PSYCHOLOGY* 527, 528 (1975).

52. *Id.*

differences, socialization differences, or both is, of course, difficult to determine. Maccoby and Jacklin have concluded that the sex differences in child behavior are not primarily the product of differential parental treatment based upon sex. They stated that "[p]arents seem to treat a child in accordance with their knowledge of his individual temperament, interests, and abilities, rather than in terms of sex-role stereotypes."⁵³ Harper and Sanders, in a study of three- to five-year-old children, reported that boys wandered farther than girls, but found no evidence that girls were receiving more reinforcement for maintaining proximity.⁵⁴ The researchers concluded that, if anything, the independent exploratory behavior of boys received more restrictive responses than did that of girls.⁵⁵

Militating in favor of a conclusion that at least a partial biological component exists for differences in exploratory behavior and rough-and-tumble play is the observation that the same differences have been observed in nonhuman primates such as the rhesus monkey.⁵⁶ These differences appear even when the monkey infant is separated from its real mother and given a surrogate mother of wire and terry cloth.⁵⁷ In such a case no one can argue that the surrogate mother reinforces different behaviors in male and female monkey infants.

The fact that differences appear cross-culturally also supports the position that some behavioral sex differences are innate. Whiting and Edwards studied children in six cultures and found consistent sex differences.⁵⁸ In only one culture, a small New England town, were boys aged three to six not more aggressive than girls, using the measure of assaults.⁵⁹ In the other five cultures, all in developing nations, boys were more aggressive, both verbally and physically.⁶⁰ Girls, however, were as likely to exhibit counteraggression, by defending themselves, as the boys were.⁶¹ A study conducted with American, Swiss, and Ethiopian school children showed boys in all three cultures to be more aggressive.⁶²

The worldwide sex differences in aggression do not appear to be solely a result of males' experiencing greater socialization pressures for aggression.⁶³ Even in societies described as egalitarian, in which there are no observable socialization pressures for behavioral differentiation along sex lines, stereotypically masculine and feminine behavioral patterns occur.

53. E. MACCOBY & C. JACKLIN, *supra* note 6, at 362.

54. Harper & Sanders, *supra* note 36, at 119.

55. *Id.*

56. Harlow & Suomi, *Social Recovery by Isolation-Reared Monkeys*, 68 PROC. OF NAT'L ACAD. OF SCI. 1534, 1538 (1971).

57. *Id.* at 1535.

58. Whiting & Edwards, *A Cross-Cultural Analysis of Sex Differences in the Behavior of Children Aged Three Through 11*, 91 J. SOC. PSYCHOLOGY 171, 176-80 (1973).

59. *Id.* at 176-77.

60. *Id.*

61. *Id.* at 176.

62. Omark, Omark & Edelman, *Formation of Dominance Hierarchies in Young Children*, in PSYCHOLOGICAL ANTHROPOLOGY 289, 299-300 (T. Williams ed. 1975).

63. Rohner, *Sex Differences in Aggression: Phylogenetic and Enculturation Perspectives*, 4 ETHOS 57, 64 (1976).

For example, in reporting on her work among the !Kung Bushmen, Patricia Draper observed that children exhibit sex-differentiated behavior patterns despite an absence of socialization pressures in that direction.⁶⁴ She found the boys to be exploratory, mobile, peer-oriented, and rough, while the girls showed less of these behaviors and voluntarily spent more time with adults.⁶⁵

A similar example of differentiation can be found in the kibbutzim of Israel, which were built upon a foundation of extreme sexual egalitarianism. Despite conscious attempts to discourage the development of sex differences, the typical pattern emerged.⁶⁶ Boys exceeded girls in the frequency of locomotor play, and girls exceeded boys in verbal, visual, and fantasy play.⁶⁷ Girls exhibited more integrative behavior, such as sharing and cooperation, and boys exhibited more conflict and aggression.⁶⁸ Thus, even in a society where there is little, if any, socialization pressure for a divergence of male and female behaviors, the stereotypic patterns still emerge, which calls into question the belief that behavioral differentiation is purely a result of socialization pressures.

Empirical evidence does not support the notion that sex-role stereotypes are perpetuated by young boys' choosing adult male role models and young girls' choosing adult female role models. The selection of role models seems to be random in young children.⁶⁹ Moreover, children's play behavior is sex-typed long before the adoption of same-sex role models occurs.⁷⁰ Furthermore, the sex-typed behavior of a child does not closely resemble the behavior of the child's adult models.⁷¹ Although boys may tend to choose all-male play groups, the fathers of the boys tend not to choose all-male social groups.⁷² In addition, although boys may have seen their mothers driving the family car more often than they have seen their fathers driving it, boys still choose to play with cars and trucks.⁷³ In the same vein, few girls have probably observed their mothers playing hopscotch and jacks.⁷⁴

Consistent cross-cultural differences in child behavior exist. These behaviors appear early in life even in the absence of observable cultural pressures. This result supports the thesis that certain sex differences in behavior have their origins, at least in part, in biology.

64. Draper, *Cultural Pressure on Sex Differences*, 2 AM. ETHNOLOGIST 602, 602 (1975).

65. A colleague who reviewed this manuscript prior to publication suggested that this sentence could be rewritten to provide: "She found the boys to be more nosy, squirming, content with juvenile friends, and rough, while the girls showed less of this rowdy behavior and voluntarily spent more time with rational adults."

66. M. SPIRO, GENDER AND CULTURE: KIBBUTZ WOMEN REVISITED 74-92 (1979).

67. *Id.* at 75.

68. *Id.*

69. E. MACCOBY & C. JACKLIN, *supra* note 6, at 363.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* at 363.

C. The Universality of Male Dominance

Even most opponents of the position that biologically influenced temperamental differences exist will acknowledge that male dominance exists in virtually all human societies, if dominance is defined as preferential access to activities and resources.⁷⁵ Men tend to occupy higher-status positions, play roles more highly valued by society, be more active in the exercise of political and decisionmaking power, and generally dominate more at the interpersonal level than females do.⁷⁶ Occupations that engage large numbers of females tend to carry a lower status than the occupations that men dominate.⁷⁷ In the United States, for example, medicine is a predominantly male, high-status position, but in the Soviet Union medicine is largely a female occupation that carries a much lower status.⁷⁸ Conversely, elementary and secondary school teaching is a low-prestige, largely female profession in the United States, but in some European countries it is a prestigious male occupation.⁷⁹

Even where women contribute the major portion of the food supply, their efforts will be assigned a lower status by the society. In many hunting and gathering groups, for example, hunting may contribute only about twenty percent of the total caloric intake, yet hunting, universally a male activity, is always regarded as a higher status endeavor than gathering is and meat is always the favored food.⁸⁰ Kathleen Gough has stated that "[e]ven in hunting societies [which she describes as having an egalitarian social life] it seems that women are always in some sense the 'second sex,' with greater or less subordination to men."⁸¹

A division of labor by sex exists in virtually every society: Men tend to perform particular kinds of activities, and women tend to perform others.⁸² A certain consistency in the way different cultures execute the division of labor exists. Male activities tend to be more strenuous and involve extensive travel and cooperation.⁸³ Female activities, however, tend to be more solitary and less mobile.⁸⁴

The majority of societies organize their social institutions around males, rather than around females. In Murdock's World Ethnographic Sample,

75. There are a few societies about which anthropologists disagree. Because the author does not here argue that male dominance is inevitable, cf. S. GOLDBERG, *THE INEVITABILITY OF PATRIARCHY* (1977), only that it is the path of least resistance, joining that battle is unnecessary.

76. I. FRIEZE, J. PARSONS, P. JOHNSON, D. RUBLE & G. ZELLMAN, *WOMEN AND SEX ROLES* 80-81 (1978).

77. *Id.*

78. Kipnis, *supra* note 15, at 95.

79. *Id.*

80. E. FRIEDL, *WOMEN AND MEN* 13 (1975).

81. Gough, *The Origin of the Family*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 51, 69 (R. Reiter ed. 1975).

82. D'Andrade, *Sex Differences and Cultural Institutions*, in *THE DEVELOPMENT OF SEX DIFFERENCES*, *supra* note 18, at 174.

83. *Id.* at 176.

84. *Id.*

376 societies were described as patrilocal,⁸⁵ while only eighty-four were labelled matrilocal.⁸⁶ Four hundred and twenty-seven of the 431 societies that permitted polygamous marriage allowed multiple wives, while only four societies permitted multiple husbands.⁸⁷ In the tracing of descent the ratio is approximately four-to-one favoring patrilineality over matrilineality.⁸⁸

Another sphere of social sex differences described by D'Andrade is authority and deference. In two-thirds of the societies surveyed by D'Andrade the husband exercises considerable authority over his wife; in one-fifth of the societies the husband is mildly dominant; and in the remainder a fairly equal sharing of authority exists.⁸⁹ D'Andrade stated that it appears that women may actually have more *de facto* authority in the family in four societies: the people of Modjokuta, Java; the Tchambuli of New Guinea; the Jivaro of South America; and the Berbers of North Africa.⁹⁰ He concluded, however, that with respect to power in groups larger than the family, "it is very likely all societies would be found to be male controlled."⁹¹ Although noting that the extent of differences varies by culture and that occasionally the trend is reversed, D'Andrade also concluded that "[t]he cross-cultural mode is that males are more sexually active, more dominant, more deferred to, more aggressive, less responsible, less nurturant, and less emotionally expressive than females."⁹²

When a conceivable cultural pattern has never arisen in any society, an appropriate consideration is the reason for its absence. A matriarchy, or female-dominated society, and societies without incest taboos or religion are examples of cultural patterns that are unknown.⁹³ The conclusion that cultural universals may have their roots in what might be called human nature is not unreasonable.

Many argue that the reason for the universality of male dominance is that the demands on the female of bearing and caring for children preclude her participation in the more "important" aspects of social life.⁹⁴ Consequently, a key to the agenda of many feminists for creating a sexually egalitarian society is freeing women from these demands by requiring

85. Webster's International Dictionary defines "patrilocal" as a marriage in which the wife resides with the husband's family. WEBSTER'S INTERNATIONAL DICTIONARY 1793 (2d ed. 1950).

86. D'Andrade, *supra* note 82, at 181. A matrilocal marriage is one in which the husband resides with the wife's family. WEBSTER'S INTERNATIONAL DICTIONARY 1515 (2d ed. 1950).

87. D'Andrade, *supra* note 82, at 181.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 189.

92. *Id.* at 201.

93. See Parker & Parker, *The Myth of Male Superiority: Rise and Demise*, 81 AM. ANTHROPOLOGIST 289, 294 (1979) (cross-cultural uniformities "indicate the likelihood of organic foundations and minimize the possibility of cultural coincidence, diffusion, or conspiracy").

94. See, e.g., Rosaldo, *Woman, Culture, and Society: A Theoretical Overview*, in WOMAN, CULTURE, AND SOCIETY 17 (M. Rosaldo & L. Lamphere eds. 1974).

universal day care and greater participation of men in the rearing of children.⁹⁵ As discussed in the next section, the consequences of such changes may not be as predicted.

D. Case Study—The Kibbutz

The idea that the result of freeing women from the yoke of domestic service would be a society in which all social distinctions between men and women would disappear is not new. Yet when the idea was tried it yielded results far different from those expected by its proponents. Melford Spiro reported that one of the principal goals of the kibbutz movement of Israel, which began in 1910, was the emancipation of women, to be achieved by a complete transformation of sex roles and the institutions of marriage and the family.⁹⁶ Kibbutz ideology attributed sexual inequality to the "biological tragedy of women," which arose from the social and cultural restraints imposed upon women by their reproductive systems.⁹⁷ These restraints shackled women to the domestic domain, while men were free to participate in high-status, extra-domestic occupations. Consequently, women were economically dependent upon men, and, because of the demands of their domestic responsibilities, they lacked the motivation to engage in political leadership. This explanation of sexual inequality led the leaders of the kibbutz movement to conclude that sexual inequality could be eliminated if women were relieved of the burden of child-rearing.⁹⁸

To implement these ideals radical restructuring of the institutions of

95. See Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 DAEDALUS 607 (1964). Alice Rossi wrote:

It will be the major thesis of this essay that we need to reassert the claim to sex equality and to search for the means by which it can be achieved. By sex equality I mean a socially androgynous conception of the roles of men and women, in which they are equal and similar in such spheres as intellectual, artistic, political and occupational interests and participation, complementary only in those spheres dictated by physiological differences between the sexes. This assumes the traditional conceptions of masculine and feminine are inappropriate to the kind of world we can live in in the second half of the twentieth century.

Id. at 608.

Fourteen years later she wrote:

[T]he particular version of egalitarianism underlying current sociological research on, and advocacy of, "variant" marriage and family forms is inadequate and misleading because it neglects some fundamental human characteristics rooted in our biological heritage. Unless these biosocial factors are confronted, allowed for, and, if desired, compensated for, the current press toward sexual equality in marriage and the workplace and shared child-rearing may show the same episodic history that so many social experiments have demonstrated in the past.

These are serious charges, and they are not lightly made. In fact, they were arrived at only after a long period of personal and intellectual concern that involved confronting my own previous analysis of sexual equality in the pages of *Daedalus* and finding it wanting.

Rossi, *A Biosocial Perspective on Parenting*, in *THE FAMILY I* (A. Rossi, J. Kagan & T. Hareven eds. 1978).

96. M. SPIRO, *supra* note 66, at 7.

97. *Id.*

98. *Id.*

marriage and the family was necessary.⁹⁹ A system of collective socialization was implemented to relieve mothers of the responsibility of caring for their children.¹⁰⁰ Children no longer lived with their parents; instead, they lived in age-graded children's houses. In addition to relieving women of child-care duties, it was also necessary to relieve them of housekeeping responsibilities, which led to the creation of communal kitchens, laundries, and dining rooms.¹⁰¹

Contrary to the expectations of the kibbutz pioneers, however, the sexual division of labor did not disappear for long. Because women lacked the physical stamina and strength for much of the farm work, the highest status occupation in the kibbutz, the service branches such as nursing and teaching evolved into female specialties by decision of both the males and females.¹⁰² By 1950 a sexual division of labor along traditional lines had reappeared in all established kibbutzim.¹⁰³ From 1950 to 1975 the division of labor became accentuated, with the percentage of women in the farming branches of the kibbutz economy declining even further.¹⁰⁴

Perhaps the most fascinating aspect of the reappearance of the sexual division of labor was the contrast between the attitudes of the pioneer women, who participated in the establishment of the kibbutzim, and the attitudes of the sabra women, the pioneers' daughters and granddaughters who were born and raised in the kibbutzim. Although the pioneer women felt the need to demonstrate their equality with men by participation in farm labor, the sabra women did not.¹⁰⁵ The sabra women were taught and believed that men and women are equal, but they rejected the proposition that equality means identity.¹⁰⁶ By 1975 most sabra men and women adopted the view that the kibbutz division of labor was based upon innate differences between the sexes.¹⁰⁷ Spiro concluded that "[h]aving rejected the assumption that equality with males means becoming like males, [sabra women] have also rejected its corollary (held by their grandmothers) that sexual dimorphism must be minimized as much as possible."¹⁰⁸ This change in attitude has resulted in a renewed interest on the part of kibbutz women in feminine fashion, jewelry, cosmetics, and hairstyle.¹⁰⁹ The attitude change also resulted in changes in the educational systems of the kibbutz. In 1950 the kibbutz movement opposed any sexual differentiation in education.¹¹⁰ Today, in addition to the coeducational academic courses, manual arts courses are offered for male students, and domestic science is

99. *Id.* at 11.

100. *Id.*

101. *Id.* at 13.

102. *Id.* at 15-16.

103. *Id.* at 16.

104. *Id.* at 15-18.

105. *Id.* at 18.

106. *Id.* at 20-21.

107. *Id.* at 18-19.

108. *Id.* at 42.

109. *Id.* at 42-43.

110. *Id.* at 19.

taught to females.¹¹¹

The expectation that emancipation from domestic work would lead to equal participation of men and women in the political realm also never came to fruition. From the very beginning most positions of authority were filled by men.¹¹² Spiro reported that one of the federations was so concerned about the low rate of participation of women in kibbutz governance that it required that women constitute at least one-third of the membership of governing bodies.¹¹³ Because so few women were willing to serve, however, the one-third quota was seldom met.¹¹⁴

Spiro also reported that a return to a more traditional configuration of the family had occurred. In the early years of kibbutz history, work superseded the family as the focus of women's lives to an extent approaching that of men.¹¹⁵ The family has by now reacquired a position of affective centrality for women.¹¹⁶ Many women now view caring for their children as an important source of fulfillment that has a biological basis. By contrast, for the majority of men work continues to be the dominant interest.¹¹⁷

A movement is underway to change sleeping arrangements so that children can sleep with their parents instead of in the children's houses.¹¹⁸ In Spiro's six-kibbutz sample the majority of sabra women favored the change, but a plurality of men continued to favor collective sleeping for the children.¹¹⁹ Spiro reported that more than three-fourths of the kibbutzim of one federation have instituted a change from collective to family

111. *Id.*

112. *Id.* at 21-25; see L. TIGER & J. SHEPHER, *supra* note 21, at 91 (finding that males constituted 84% of the participants in economic public service, 71% of the federation leadership, and 78% of the political activists in the Kibbutz Artzi, one of the most liberal kibbutzim).

113. M. SPIRO, *supra* note 66, at 23.

114. *Id.* at 24-25. Spiro summarized as follows:

It is clear, then, that neither a culture that has stressed the importance of political leadership and participation on the part of women, nor a social system that has encouraged and facilitated this end, has had its intended consequences. It should be emphasized, moreover, that the attitudes of the sabra men—those at least who comprised our six-kibbutz sample—are highly favorable to the notion of female leadership . . .

In short, if kibbutz governance has become predominantly male, it is not because of lack of opportunity for, or encouragement of women, but because most of them—there are, of course, many exceptions—are not interested in acquiring positions of authority and leadership. Their lack of interest is markedly discrepant from both the conception of female emancipation held by the feminist ideology of the kibbutz and its analysis of the means by which this goal might be achieved. This ideology, it will be recalled, viewed the political activation of women as one of the goals of female emancipation, for sexual equality required the abolition of sex-role differentiation in the polity no less than in the economy.

Id.

115. *Id.* at 30.

116. *Id.*

117. *Id.*

118. *Id.* at 34-35.

119. *Id.* at 35.

sleeping.¹²⁰ Most kibbutzim, however, including those in which a majority favor the change, have not followed this lead for at least two reasons. One reason is based upon ideology and the other upon pragmatism.¹²¹ First, the kibbutz establishment is opposed to the change because it strikes at the heart of a fundamental element of kibbutz ideology.¹²² Second, because of the large investment in children's houses and adult apartments, implementation of the sleeping changes would be tremendously expensive.¹²³

Despite these radical changes from the early kibbutz, the great majority of both male and female sabras believe that sexual equality remains a primary characteristic of the kibbutz in theory and in practice. In interviews with Spiro, only fourteen percent of each sex disagreed with this position.¹²⁴ Tiger and Shepherd have reached similar conclusions,¹²⁵ which call into serious question the feminist position that complete sexual equality could be achieved if there were more day-care centers and if husbands would be willing to accept an equal share of domestic responsibility.¹²⁶ The kibbutz study demonstrates that sex roles have an origin deeper than many feminists assume.

E. The Evolution of Sex Differences in Behavior

The mere observation of phenomena such as male dominance and female nurturance does not explain their existence. Before a determination of how society might best respond to sex differences can be made, an understanding of the origin of sex differences is necessary. We proceed from the assumption that the fundamental underlying explanation of the sexual division of labor and the concomitant "supremacy" of males lies in the differential participation of the sexes in reproduction and in nursing the young.¹²⁷ Understanding how it came to pass that a "woman's place" would be in the home is not difficult, in light of the demands of gestation and lactation. No temperamental differences are required to explain the origins of this phenomenon.

The mobility of women is obviously reduced by pregnancy. Moreover, the adaptation of the female pelvis for childbirth makes even nonpregnant women less efficient at locomotion than males.¹²⁸ As the pressures of natural selection acted to increase the size of the human brain, the size of the

120. *Id.* at 36.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. L. TIGER & J. SHEPHERD, *supra* note 21, at 272.

126. *See* Rossi, *supra* note 95, at 628-47.

127. *But see* S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 17 (1975) ("It seems eminently sensible to hypothesize that man's violent capture and rape of the female led first to the establishment of a rudimentary mate-protectorate and then sometime later to the full-blown male solidification of power, the patriarchy."); Handwerker & Crosbie, *Sex and Dominance*, 84 *AM. ANTHROPOLOGIST* 97, 98-99 (1982) (men are dominant because they are taller).

128. J. PFEIFFER, *THE EMERGENCE OF MAN* 154 (1972).

newborn skull also increased, which necessitated a broadening of the female pelvis.¹²⁹ Consequently, a far greater pelvic sexual dimorphism exists in humans than in nonhuman primates.¹³⁰ Moreover, once a child is born, the requirements of nursing dictate that it stay close to its mother, at least until weaned. The female pelvis is therefore an accommodation of the competing demands of locomotion and childbirth, while the male pelvis is specialized for locomotion. Because of the combination of the large size of the adult human brain and the limitations on newborn brain size imposed by pelvic morphology, human babies are less mature at birth than are other primates.¹³¹ Human children, therefore, have a longer period of development, which results in a period of dependency on the mother that extends well beyond weaning.¹³² With this increased dependence of infants comes an increase in female dependence on males.¹³³

Virtually all partisans in the debate concerning sex differences—marxist feminists, liberal feminists, extreme environmental determinists, extreme biological determinists, and those in between—accept the proposition that status differences between the two sexes are, at least in large part, a product of differences in reproduction and child-rearing responsibilities.¹³⁴ The views of the proponents of the various explanations of male dominance differ chiefly in whether they see it as having any roots in biological adaptation apart from the exigencies of reproduction.¹³⁵ The distinction distills down to the question of whether there are temperamental differences with at least partial origins in biological differences.

A well-accepted maxim of evolutionary biology is that behavioral changes precede genetic changes.¹³⁶ For example, the giraffe did not first evolve a long neck and then begin to eat leaves from high branches; instead, it was probably in an environment where a need existed to exploit these branches for food. Since the individual giraffes with longer necks had superior access to these branches, and thus to more food, they were probably stronger, healthier, and lived longer than the shorter-necked giraffes. These advantages allowed them to produce greater numbers of healthy offspring who would also have longer necks. Over time, therefore, the average neck length of giraffes increased. This assumes, of course, that neck length in giraffes is a genetically influenced trait.

The same kind of mechanism may have been operating among the ancestors of man. The exigencies of childbirth and nursing led child care to

129. *Id.*

130. *Id.* at 155.

131. *Id.*

132. *Id.*

133. *Id.* at 157.

134. Dunbar, *Female Liberation as the Basis for Social Revolution*, in *SISTERHOOD IS POWERFUL* 477, 488 (R. Morgan ed. 1970).

135. *Id.*; see also Rogers & Walsh, *Shortcomings of the Psychomedical Research of John Money and Co-workers into Sex Differences in Behavior: Social and Political Implications*, 8 *SEX ROLES* 269, 272 (1982) (patterns of male and female behavior are the result of social construction).

136. E. MAYR, *ANIMAL SPECIES AND EVOLUTION* 603 (1963).

become a female occupation. The males were free of these burdens and were able to wander farther in search of animals. At this stage it is unnecessary to invoke temperamental differences to explain the sexual division of labor, although such differences certainly already existed.¹³⁷ Once the division existed, however, any biological differences that enabled the sexes to perform their roles better were likely to increase. For example, men's aggressiveness, assertiveness, and willingness to explore new territory in search of prey may have been adaptive traits that increased in frequency. Women's nurturant behavior toward children would also have been advantageous. Thus a division of labor that may have begun as a cultural convenience could be transformed into a genetically influenced pattern. What probably happened was that some sexually dimorphic behavior already existed in man by virtue of his primate heritage, and others developed through the exploitation by "Man the Hunter" of a new cultural niche.¹³⁸ Because humans have a much longer period of immaturity and dependence, powerful selective pressures would have encouraged the development of maternal and child behaviors that resulted in a strong maternal-infant attachment.¹³⁹ One explanation for differences in the strength of parental attachment may be that the male's genetic best interest does not include devoting a great deal of energy caring for offspring that he can never know with certainty belong to him.¹⁴⁰

An evolutionary explanation for the sexual division of labor is buttressed by the observation of such a division among chimpanzees, who are our closest primate relatives and with whom we share ninety-nine percent of our DNA.¹⁴¹ Numerous instances of chimpanzee hunting behavior have been observed, and participation is limited almost exclusively to males.¹⁴² The male chimpanzees cooperate in the chase and share their prey, which includes bushpigs, bushbucks, and many different monkey species.¹⁴³ Females, on the other hand, specialize in gathering social in-

137. This description is somewhat metaphorical because temperamental sex differences arose much earlier in our evolutionary history. Such differences are found in virtually all mammalian species. A more precise description would reflect the interaction of these two phenomena rather than a strictly linear causal sequence.

138. Hamburg, *The Psychobiology of Sex Differences: An Evolutionary Perspective*, in *SEX DIFFERENCES IN BEHAVIOR*, *supra* note 38, at 373, 379.

139. *Id.* at 379-80.

140. *Cf.* D. BARASH, *supra* note 32, at 53 (stating that human male typically spends much time and energy preventing his female partner from bearing another man's child).

141. Jones, *Comparative Aspects of DNA in Higher Primates*, in *MOLECULAR ANTHROPOLOGY: GENES AND PROTEINS IN THE EVOLUTIONARY ASCENT OF THE PRIMATES* 357, 358 (M. Goodman & R. Tashian eds. 1976); *see also* Goodall & Hamburg, *Chimpanzee Behavior as a Model for the Behavior of Early Man: New Evidence on Possible Origins of Human Behavior*, in 6 *AM. HANDBOOK PSYCHIATRY* 14, 15 (S. Arieti 2d ed. 1975) ("in some ways chimpanzees . . . are biologically closer to man than they are to the orangutan—certainly closer than to the baboon."); King & Wilson, *Evolution at Two Levels in Humans and Chimpanzees*, 188 *SCIENCE* 107, 113 (1975) ("the genetic distance between humans and chimpanzees is well within the range found for sibling species of other organisms.").

142. Teleki, *The Omnivorous Chimpanzee*, 228 *SCI. AM.*, Jan. 1973, at 33, 35.

143. *Id.* at 34.

sects by inserting sticks into the insects' nests.¹⁴⁴ This activity can be engaged in at the same time the females are tending their young. The sex differences in chimpanzees parallel sex differences in humans in that females show less ranging behavior than do males.¹⁴⁵ The proposition that humans and apes, although closely related, exhibit similar forms of behavior for entirely different reasons is difficult to accept.

Harper and Sanders explain sex differences in play behavior using an evolutionary framework.¹⁴⁶ The play behavior of mammalian young generally involves patterns that are basic to the survival of the species. Selection would favor the forays of the young males away from the camp so they might become more familiar with the home range.¹⁴⁷ Similarly, the more centripetal and nurturant behavior of young females is in anticipation of their later social roles.¹⁴⁸

Although our cultural environment has changed a great deal since the early days of human evolution, for the most part we almost certainly retain a genetic structure similar to our culturally primitive ancestors.¹⁴⁹ Even though we have experienced a tremendous amount of cultural evolution in the past few centuries, which may render some of our behavioral traits maladaptive, biologically we remain very similar to our hunter-gatherer ancestors. An extreme environmentalist position would deny the biological stage of the above explanation and lead to the conclusion reached by the founders of the kibbutz that freeing women from domestic responsibilities will result in sexual equality. The two sexes will be identical except for surface anatomy and biological function directly related to reproduction.

To this point this Article has merely reviewed some sex differences in behavior and discussed, in general terms, their possible evolutionary history. The focus now shifts to an explanation of the biological mechanism that may underlie these behavioral differences.

II. SEXUAL DIFFERENTIATION AND THE INFLUENCE OF HORMONES

A. Morphological Differentiation

The fundamental biological difference between males and females derives from the different chromosomal complements of the sexes.¹⁵⁰ Mem-

144. McGrew, *Evolutionary Implications of Sex Differences in Chimpanzee Predation and Tool Use*, in *THE GREAT APES* 440, 446 (D. Hamburg & E. McCown eds. 1979).

145. Wrangham, *On the Evolution of Ape Social Systems*, 18 *SOC. SCI. INFO.* 335, 336-37 (1979).

146. Harper & Sanders, *Sex Differences in Preschool Children's Social Interactions and Use of Space: An Evolutionary Perspective*, in *SEX AND BEHAVIOR* 61 (T. McGill, D. Dewsbury & B. Sachs eds. 1978).

147. *Id.* at 67.

148. *Id.* at 69.

149. There is, of course, no direct evidence of the genetic composition of our hominid ancestors, but given the genetic congruity between humans and apes, the conclusion is compelled. See *supra* note 141 and accompanying text.

150. Wilson, George & Griffin, *The Hormonal Control of Sexual Development*, 211 *SCIENCE* 1278, 1278 (1981) [hereinafter cited as *Hormonal Control*].

bers of both sexes have twenty-two pairs of autosomes and one pair of sex chromosomes.¹⁵¹ The sex chromosomes of females are both "X" chromosomes, while males have one "X" and one "Y." In the normal course of events, an XX embryo will develop into a female, and an XY embryo will develop into a male.¹⁵²

For approximately the first two months after conception embryos of both sexes develop in an identical fashion. After two months, anatomical and physiological differences emerge between the two classes of embryo, and the distinctive phenotypes, or outward appearances, of the sexes begin to appear.¹⁵³ Chromosomal sex, which is fixed at conception, determines whether ovaries or testes appear in the developing embryo.¹⁵⁴ The Y chromosome plays a pivotal role in the mechanism by causing the previously undifferentiated gonad to develop into testes. The triggering mechanism for this gonadal differentiation is imperfectly understood, although it has been postulated that the Y chromosome produces a substance known as the H-Y antigen, which stimulates testicular development.¹⁵⁵

If testes develop, their hormonal secretions result in the development of the male phenotype.¹⁵⁶ If an ovary develops, or if no gonad at all develops, a female phenotype results. The fact that a female phenotype is produced even in the complete absence of gonads is the basis for the observation that the female form is the basic human form and the male form is merely a variant. Consequently, it is often stated that female hormones are unnecessary to the development of the female form.¹⁵⁷ It should be noted, however, that the fetus is in an estrogen-rich¹⁵⁸ maternal environment, so that even if the fetus itself does not produce estrogen, it is still exposed to estrogen.¹⁵⁹

The primordial genital tract of each sex has the following three components: (1) the gonads (ovaries or testes); (2) two genital duct systems (the Wolffian system and the Müllerian system); and (3) a common opening for the genital ducts and the urinary tract to the outside.¹⁶⁰ The male internal genital tract results from a persistence of the Wolffian ducts and a regression of the Müllerian ducts, while in females the situation is precisely the

151. An autosome is any chromosome other than a sex chromosome. STEDMAN'S MEDICAL DICTIONARY 145 (1982).

152. Hutt, *Biological Bases of Psychological Sex Differences*, 132 AM. J. DIS. CHILDREN 170, 170 (1978).

153. *Hormonal Control*, *supra* note 150, at 1279.

154. Gadpaille, *Research into the Physiology of Maleness and Femaleness*, 26 ARCHIVES GEN. PSYCHIATRY 193, 195 (1972).

155. Ohno, *The Role of H-Y Antigen in Primary Sex Determination*, 239 J. A.M.A. 217, 217 (1978).

156. *Hormonal Control*, *supra* note 150, at 1278.

157. See MacKinnon, *Sexual Differentiation of the Brain*, in 3 HUMAN GROWTH 183, 184 (F. Falkner & J. Tanner eds. 1979).

158. An estrogenic hormone is a hormone that "stimulates the accessory sex structures and the secondary sex characteristics in the female." GOULD MEDICAL DICTIONARY 531 (3d ed. 1972).

159. Döhler & Hancke, *Thoughts on the Mechanism of Sexual Brain Differentiation*, in HORMONES AND BRAIN DEVELOPMENT 153, 153 (G. Dörner & M. Kawakami eds. 1978).

160. *Hormonal Control*, *supra* note 150, at 1279.

opposite.¹⁶¹ Two testicular hormone secretions are essential for male development. The Müllerian-inhibiting substance, which, as its name suggests, causes regression of the Müllerian ducts, and androgens, which play a critical role in the development of the male genital tract.¹⁶²

B. *Sexual Differentiation of the Central Nervous System*

In the past few decades a considerable amount of information has accumulated to show that prenatal exposure to androgens circulating in the blood of the fetus has an irreversible effect on the fetal brain.¹⁶³ Subtle differences in brain structure are thought to result from exposure to such hormones.¹⁶⁴ Just as the basic pattern of morphological differentiation is assumed to be female, the intrinsic pattern of central nervous system development is likewise assumed to be female. Changes from the basic pattern result from gonadal androgens.¹⁶⁵

A critical period of development appears to exist during which exposure to androgens results in psychosexual differentiation.¹⁶⁶ In humans this period is somewhere between the fourth and seventh months of gestation.¹⁶⁷ Although the effect of circulating androgens on psychosexual development has been repeatedly demonstrated experimentally in nonhuman mammals, ethical considerations preclude similar experimentation with humans. Consequently, the bulk of the information on humans comes from "experiments of nature" in which fetuses have experienced aberrant hormone exposures.

1. *Animal Studies*

One major source of data that has contributed to our understanding of the influences of hormones on behavior is the study of hormonal manipulation of nonhuman mammals. Although one ought not to extrapolate uncritically from animal behavior to human behavior, indications are that the same kinds of physiological processes are at work. These studies will be highlighted to provide a basis for comparison in the later discussion of the influence of hormones on human behavior.

When androgens are administered to a pregnant female guinea pig, fe-

161. *Id.*

162. The two androgens that are most important in sexual differentiation are testosterone, which virilizes the Wolffian system, and dihydrotestosterone, which virilizes the external genitalia. *Id.* at 1282.

163. See, e.g., MacKinnon, *supra* note 157; Meyer-Bahlburg & Ehrhardt, *Prenatal Sex Hormones and Human Aggression: A Review, and New Data on Progestogen Effects*, 8 AGGRESSIVE BEHAV. 39 (1982); Reinisch, *Fetal Hormones, the Brain, and Human Sex Differences: A Heuristic, Integrative Review of the Recent Literature*, 3 ARCHIVES SEXUAL BEHAV. 51 (1974); Ward, *Sexual Behavior Differentiation: Prenatal Hormonal and Environmental Control*, in SEX DIFFERENCES IN BEHAVIOR, *supra* note 38, at 3.

164. McEwen, *Gonadal Steroids and Brain Development*, 22 BIOL. REPROD. 43, 43 (1980).

165. MacLusky & Naftolin, *Sexual Differentiation of the Central Nervous System*, 211 SCIENCE 1294, 1294 (1981).

166. Reinisch & Karow, *Prenatal Exposure to Synthetic Progestins and Estrogens: Effects on Human Development*, 6 ARCHIVES SEXUAL BEHAV. 257, 258 (1977).

167. G. DÖRNER, HORMONES AND BRAIN DIFFERENTIATION 197-98 (1976).

male fetuses are masculinized and subsequently exhibit behaviors comparable to those of normal genetic males.¹⁶⁸ Conversely, the administration of antiandrogens, which inhibit the action of androgens, has a feminizing effect on the behavior of male offspring by reducing aggression and physical activity.¹⁶⁹ Antiandrogens have a feminizing effect upon morphology as well. None of the same major effects could be produced in females treated in adulthood with testosterone.¹⁷⁰ The study, therefore, concluded that the prenatal secretion of gonadal hormones affects the developing brain and causes the individual to behave predominantly as a male or a female in adulthood.¹⁷¹

Similar experiments have been performed on rats.¹⁷² Rats differ from guinea pigs in that the critical period for brain differentiation in rats is from postnatal days one to five, instead of the prenatal period.¹⁷³ Consequently, experiments may be performed on newborn rats, which obviates the need for complicated fetal surgery. Male newborn rats have been castrated to discover whether they would differentiate along female lines if they were deprived of testicular androgens during the critical period. Males castrated at days one to five develop behavioral characteristics normally present only in genotypic females, while males castrated later do not.¹⁷⁴ Similar results have been obtained when the rats are chemically castrated with antiandrogens.¹⁷⁵ From experiments of this nature scientists concluded that rats of both sexes are born with an undifferentiated central nervous system of the female pattern. In addition, they concluded that during the first few days of postnatal life the internal secretions of the immature testes of the male rat organize the neural mechanism underlying future patterns of normal male sexual behavior.¹⁷⁶ Conversely, when female rats are treated with androgens during their critical period, their be-

168. Diamond & Young, *Differential Responsiveness of Pregnant and Nonpregnant Guinea Pigs to the Masculinizing Action of Testosterone Propionate*, 72 *ENDOCRINOLOGY* 429, 429 (1963); Phoenix, Goy, Gerall & Young, *Organizing Action of Prenatally Administered Testosterone Propionate on the Tissues Mediating Mating Behavior in the Female Guinea Pig*, 65 *ENDOCRINOLOGY* 369, 369 (1959) [hereinafter cited as *Organizing Action*].

169. *Organizing Action*, *supra* note 168, at 369.

170. *Id.* at 377.

171. Goy, *Organizing Effects of Androgen on the Behaviour of Rhesus Monkeys*, in *ENDOCRINOLOGY AND HUMAN BEHAVIOUR* 12, 12 (R. Michael ed. 1968); *see also* Young, Goy & Phoenix, *Hormones and Sexual Behavior*, 143 *SCIENCE* 212, 214 (1964) (female rats exhibited male mounting behavior; male rats responded receptively to mounting by other rats).

172. *See, e.g.*, Whalen & Edwards, *Hormonal Determinants of the Development of Masculine and Feminine Behavior in Male and Female Rats*, 157 *ANATOMICAL REC.* 173 (1967).

173. Grady, Phoenix & Young, *Role of the Developing Rat Testis in Differentiation of the Neural Tissues Mediating Mating Behavior*, 59 *J. COMP. & PHYSIOLOGICAL PSYCHOLOGY* 176, 176 (1965).

174. Goy, *Early Hormonal Influences on the Development of Sexual and Sex-related Behavior*, in *THE NEUROSCIENCES: SECOND STUDY PROGRAM* 196, 198 (F. Schmitt ed. 1970); Grady, Phoenix & Young, *supra* note 173, at 176.

175. Nadler, *Differentiation of the Capacity for Male Sexual Behavior in the Rat*, 1 *HORMONES & BEHAV.* 53, 53 (1969); Ward, *Female Sexual Behavior in Male Rats Treated Prenatally with an Anti-androgen*, 8 *PHYSIOLOGY & BEHAV.* 53, 53 (1972).

176. Harris & Levine, *Sexual Differentiation of the Brain and its Experimental Control*, 181 *J. PHYSIOLOGY* 379, 379 (1965).

havior is masculinized.¹⁷⁷ The critical period in female rats, however, seems to begin in prenatal life and run into postnatal life.¹⁷⁸

Studies conducted on closer relatives of man are, of course, more relevant to the study of human behavior. A number of studies have been conducted on the rhesus monkey with results quite similar to those in the rodent experiments. Female monkeys injected with androgens during the prenatal critical period later display both sexual and nonsexual stereotypic male behavior.¹⁷⁹ They engaged in higher frequencies of threat behavior, play initiation, rough-and-tumble play, and chasing play. Genetic males castrated at birth showed normal stereotypic male behavior, which demonstrates the importance of exposure during the critical period.¹⁸⁰

2. Human Studies

a. Congenital Adrenal Hyperplasia. One of the experiments of nature that is analogous to experimental androgenization of female animal fetuses is a condition known as congenital adrenal hyperplasia (CAH), or adrenogenital syndrome. This condition results from excessive production of androgens by the fetal adrenal gland, which is a consequence of an enzymatic defect in the synthesis of the adrenal hormone cortisol.¹⁸¹ In CAH the androgen enters the circulation of the fetus too late to induce masculinization of the internal reproductive system, but early enough to masculinize the external genitalia. This means that the critical period for the differentiation of the internal reproductive system is earlier than that for the external genitalia. The result may be complete external masculinization, with the fetus having a penis and empty scrotum, or the masculinization may be less extreme, with the fetus exhibiting an enlarged clitoris with partial fusion of the labia majora. In either event the internal female reproductive tract will have developed.¹⁸²

The CAH females of particular interest to this inquiry are those whose condition is diagnosed at birth. Their genitalia are generally surgically corrected, and their cortisol deficiency is corrected through supplementation. When they are properly treated the affected girls will develop physically as normal females, although the onset of their menstruation may be late.¹⁸³

Excessive fetal androgen production also appears to cause behavioral

177. Dörner & Staudt, *Perinatal Structural Sex Differentiation of the Hypothalamus in Rats*, 5 *NEUROENDOCRINOLOGY* 103, 103 (1969-1970). Goy, *supra* note 174, at 200; Whalen & Edwards, *supra* note 172, at 175-76.

178. Dörner & Staudt, *supra* note 177, at 103-06.

179. Goy, *supra* note 171, at 24-26; *see also* Phoenix, *Prenatal Testosterone in the Nonhuman Primate and its Consequences for Behavior*, in *SEX DIFFERENCES IN BEHAVIOR*, *supra* note 38, at 23 (female monkeys injected with testosterone exhibited typically male characteristics in play).

180. Goy, *supra* note 171, at 21.

181. *See generally* J. MONEY & A. EHRHARDT, *MAN & WOMAN: BOY & GIRL* 96-105 (1972).

182. *Id.* at 96.

183. *Id.* at 97.

virilization.¹⁸⁴ Some of the leading work on these behavioral effects has been done by John Money, Anke Ehrhardt, and their colleagues. They compared the behavior of the fetally androgenized girls with that of a control group matched for age, IQ, socioeconomic status, and race.¹⁸⁵ The girls and their mothers were then interviewed on a number of subjects. The results showed that the CAH girls demonstrated far less of what might be considered stereotypic female behavior than the control group girls. For example, the CAH girls considered themselves tomboys at a significantly higher rate than did the non-CAH girls.¹⁸⁶ Eleven of the fifteen CAH girls regarded themselves as tomboys throughout their childhood, and this status was confirmed by their mothers. In contrast, none of the control girls were identified as tomboys throughout their childhood. Moreover, only four of the normal girls experienced any episodes of tomboyism and these were brief; for the CAH girls, however, tomboyism was a way of life.¹⁸⁷ Although differences in tomboyish play were observed, no difference was found in the frequency with which the children initiated fights.

The CAH girls, consistent with their energetic outdoor activities, chose utilitarian and functional clothing over feminine fashions.¹⁸⁸ The CAH girls also preferred male toys, such as cars, trucks, and guns, to female toys such as dolls. The lack of interest in dolls corresponded to a lack of interest exhibited toward infants.¹⁸⁹ All of the control girls wanted to have babies when they grew up, but one-third of the CAH girls said that they preferred not to have children.¹⁹⁰ The two groups also differed in the priority assigned to careers. The majority of the androgenized girls subordinated marriage to career, or desired a career in addition to marriage, while the control girls chose marriage as the most important goal.¹⁹¹ Money and Ehrhardt concluded:

The most likely hypothesis to explain the various features of tomboyism in fetally masculinized genetic females is that their tomboyism is a sequel to a masculinizing effect on the fetal brain. This masculinization may apply specifically to [neural] pathways, most probably in the limbic system or paleocortex, that mediate dominance assertion (possibly in association with assertion of exploratory and territorial rights) and, therefore, manifests itself in competitive energy expenditure.

184. *Id.* at 98-105.

185. Ehrhardt, Epstein & Money, *Fetal Androgens and Female Gender Identity in the Early-Treated Adrenogenital Syndrome*, 122 *JOHNS HOPKINS MED. J.* 160 (1968).

186. All of the differences reported between the groups are statistically significant at least at the $p=.05$ level, unless from the context it appears otherwise. That is, there is no more than a 5% chance that the differences observed are merely a result of chance variation. *Id.* at 164.

187. *Id.* at 164. The study defined tomboyism as activities involving rough-and-tumble play and characterized by a high level of physical energy, especially in vigorous outdoor play, games, and sports. *Id.* at 165.

188. *Id.* at 164.

189. *Id.* at 165. The difference between the diagnostic and control groups with respect to juvenile interest in infant care-taking was significant at the $p=.001$ level. *Id.*

190. *Id.*

191. *Id.*

Fighting and aggression are not primarily implicated.¹⁹²

A later study by Ehrhardt and Baker attempted to duplicate the results of the Ehrhardt and Money study.¹⁹³ This time, however, the study compared the fetally androgenized girls to their unaffected sisters and mothers instead of using matched controls from the general population. For the most part, the results of this study confirmed the earlier study.¹⁹⁴ Fifty percent of the girls with CAH clearly preferred the company of boys to that of girls when they had a choice, while the unaffected sisters showed a clear preference for members of their own sex.¹⁹⁵ The girls with CAH were also far more likely than their sisters to be tomboys, prefer functional clothing, and have no interest in jewelry, make-up, and hairstyle.¹⁹⁶ The CAH girls were significantly less likely to show interest in dolls, infants, weddings, marriage, pregnancy, and motherhood than were their sisters.¹⁹⁷ In contrast to the earlier study, however, no significant difference in the frequency of desire for a career was noted.¹⁹⁸ Although the CAH girls instigated fights twice as often as their unaffected sisters, this difference was not statistically significant because of the small sample size.¹⁹⁹ Ehrhardt and Baker concluded that since androgens modify behavior in genetic females, similar factors may contribute to the development of temperamental sex differences in general and may even influence behavioral differences between individuals of the same sex.²⁰⁰ Despite Ehrhardt and Baker's belief that clear evidence of a hormonal influence on behavior exists, they stated that they were not suggesting that toy preference, play behavior, and the other factors examined were solely determined by hormone levels. Instead, they concluded that hormones are only one of the factors contributing to the development of temperamental differences between the sexes.²⁰¹

b. Testicular Feminization. Testicular feminization (Tfm, or androgen insensitivity) is, in a sense, the converse of congenital adrenal hyperplasia. CAH girls are genetic females who are masculinized by exposure to androgens, while Tfm boys are genetic males who are feminized because their tissues are insensitive to androgens.²⁰² Although such boys do produce androgens, their bodies respond as though they did not.

As discussed previously, a genetically female or male fetus will develop

192. J. MONEY & A. EHRHARDT, *supra* note 181, at 103.

193. Ehrhardt & Baker, *Fetal Androgens, Human Central Nervous System Differentiation, and Behavior Sex Differences*, in SEX DIFFERENCES IN BEHAVIOR, *supra* note 38, at 33.

194. *Id.* at 49.

195. *Id.* at 41.

196. *Id.* at 43.

197. *Id.* at 42.

198. *Id.*

199. *Id.* at 41.

200. *Id.* at 49-50.

201. *Id.*

202. Money, Ehrhardt & Masica, *Fetal Feminization Induced by Androgen Insensitivity in the Testicular Feminizing Syndrome: Effect on Marriage and Maternalism*, 123 *JOHNS HOPKINS MED. J.* 105, 105 (1968) [hereinafter cited as *Fetal Feminization*].

as a female in the absence of androgens.²⁰³ The same is true when androgens are present but the tissues are unreceptive to, and thus unaffected by, the androgens. This syndrome is clearly genetically transmitted, but the exact mode of inheritance is unknown.²⁰⁴ The effect of androgen insensitivity is the suppression of the differentiation of the Wolffian ducts and the external genitalia.²⁰⁵ As a result, many of the affected babies appear morphologically to be normal females. At puberty enough estrogen is produced by the testes for female secondary sexual characteristics, such as breasts and pubic hair, to develop. The syndrome often is not diagnosed until adolescence, when the "girl" fails to menstruate, or adulthood, when the "woman" has fertility problems. The vagina is then typically discovered to be a blind pouch and the internal reproductive tract is usually incomplete; it is neither fully male nor fully female.²⁰⁶

Money and his colleagues studied a number of patients with this syndrome and found that the girls and women showed a high preference for being a wife with no outside job.²⁰⁷ The patients also enjoyed homecraft, had dreams and fantasies of raising a family, played primarily with dolls and other female toys, and had a positive interest in infant care.²⁰⁸ Ninety percent of the females rated themselves as completely content with the female role.²⁰⁹ The investigators concluded that the genetic sex of these people was irrelevant to their psychosexual sex and that mediation between genetics and psychological behavior is hormonal.²¹⁰ One confounding factor, of course, is that the pattern of prenatal hormonal exposure and the sex of rearing are congruent, which makes it difficult to determine why these children grow up with typical female behavior. The reason could be either a lack of effective prenatal androgen exposure, their rearing as girls, or both. Congruence is not present in the case of CAH because the prenatal hormonal exposure is of the male pattern and the sex of rearing is female.

c. Exogenous Hormones. A class of cases also exists in which fetuses are exposed to exogenous opposite-sex hormones in utero.²¹¹ This typically occurs as a result of the administration of hormones to pregnant women.²¹² The condition of progestin-induced hermaphroditism resembles the animal experiments even more closely than do the hormonal abnormalities discussed above.²¹³ This condition is not a natural one, but is iatrogenic. The condition results from the administration of synthetic

203. See *supra* notes 156-59 and accompanying text.

204. J. MONEY & A. EHRHARDT, *supra* note 181, at 109.

205. *Id.* at 110.

206. *Id.* at 109-10.

207. *Fetal Feminization*, *supra* note 202, at 109-10.

208. *Id.* at 110-11.

209. *Id.*

210. *Id.* at 113.

211. Reinisch & Karow, *supra* note 166, at 264.

212. *Id.* at 257.

213. *Id.* at 258.

progestins²¹⁴ to the mother to prevent a threatened miscarriage.²¹⁵ These progestins seem to act in the same way that testosterone does in lower mammals. The genetic female offspring of these women exhibit virilization of the external genitalia similar to, but to a lesser degree than, that of CAH girls.²¹⁶ A study of ten girls suffering from progestin-induced hermaphroditism revealed that nine labelled themselves "tomboys."²¹⁷

Another group of investigators studied six-year-old and sixteen-year-old males whose diabetic mothers had been given a variety of female sex hormones during pregnancy.²¹⁸ The sixteen-year-olds, when compared with a control group, were less aggressive, less assertive, had less athletic skill, and did not perform as well on the embedded-figure task.²¹⁹ The six-year-old subjects were rated as less assertive and poorer athletically than were the members of the control group.²²⁰

C. Circulating Hormones and Behavior

The apparent influence that androgens in fetal life have on later temperament and personality has already been discussed.²²¹ This effect has been described as the "organizing effect" because of the belief that fetal hormones exert an influence on the organization of the fetal brain.²²² Another kind of hormonal effect has been called the "activational effect," which is the result of the immediate influence of hormone levels on behavior.²²³ Three examples of the hormonal influence on behavior are discussed below.

1. Testosterone and Aggression

Circulating testosterone is thought to have an activating effect on human aggressive behavior.²²⁴ In younger men the rate of testosterone production

214. A progestin is a synthetic sex-hormonal steroid that has a physiological action similar to progesterone. J. MONEY & A. EHRHARDT, *supra* note 181, at 290.

215. Gadpaille, *supra* note 154, at 195.

216. *Id.* at 199.

217. Ehrhardt & Money, *Progestin-Induced Hermaphroditism: I.Q. and Psychosexual Identity in a Study of Ten Girls*, 3 J. SEX RESEARCH 83 (1967).

218. Yalom, Green & Fisk, *Prenatal Exposure to Female Hormones: Effect on Psychosexual Development in Boys*, 28 ARCHIVES GEN. PSYCHIATRY 554 (1973). The hormones included diethylstilbesterol (DES), estrogen, estradiol, and progesterone. *Id.* at 555.

219. *Id.* at 559.

220. *Id.*

221. *See supra* notes 181-220 and accompanying text.

222. *See* Young, Goy & Phoenix, *supra* note 171, at 214.

223. *Id.*

224. Moyer, *Sex Differences in Aggression*, in SEX DIFFERENCES IN BEHAVIOR, *supra* note 38, at 335 (historically males have greater propensity for violence); Olweus, Mattson, Schalling & Löw, *Testosterone, Aggression, Physical, and Personality Dimensions in Normal Adolescent Males*, 42 PSYCHOSOM. MED. 253 (1980) (circulation of testosterone causes aggression in adolescent males); Rubin, Reinisch & Haskett, *Postnatal Gonadal Steroid Effects on Human Behavior*, 211 SCIENCE 1318 (1981) (some evidence that plasma testosterone causes aggressive behavior in humans). *But see* Meyer-Bahlburg, Boon, Sharma & Edwards, *Aggressiveness and Testosterone Measures in Man*, 36 PSYCHOSOM. MED. 269 (1974) [hereinafter cited as *Aggressiveness and Testosterone*] (no conclusive evidence that high plasma testosterone causes aggression).

is highly correlated with aggression.²²⁵ As men get older their testosterone levels decline. At the same time, their rate of participation in violent crime decreases,²²⁶ although, of course, other factors such as increased maturity play a large part in this decrease. Castration has also been observed to result in decreased aggressive behavior, particularly in sex-related aggression.²²⁷ Administration of antiandrogenic agents also reduces aberrant sexual behavior in men.²²⁸ Such administrations, however, are not particularly effective in reducing nonsexual violence.²²⁹ Although effects of circulating androgens on aggressive behavior in men have been clearly shown, such differences appear only when androgen levels are altered greatly.²³⁰ Prenatal exposure to androgens appears, therefore, to have a more pervasive effect on behavior than do circulating hormones, and prenatal androgen exposure "primes" the individual to respond at puberty to the circulating hormones.²³¹

A great deal of study has been directed at the effect of sex hormones on the behavior of nonhuman mammals. W.D. Joslyn conducted a fairly representative study on rhesus monkeys.²³² Three male and three female monkeys were separated from their mothers when they were three to four months old. The females were given regular injections of testosterone for about eight months, and the males were untreated. Before the testosterone treatment started, the males were dominant and showed greater aggressiveness than did the females. After the testosterone treatment began, the frequency of aggression by females increased.²³³ Two of the females attacked and subdued the two most dominant males and remained dominant over them for at least a year after the end of the hormone treatment.

One must bear in mind, however, that the relationship of hormone levels and behavior involves a complex interaction. For example, one study has shown that if male monkeys low in the male dominance hierarchy are placed with females whom they can dominate and with whom they can engage in sexual intercourse, the males' testosterone levels rise dramatically.²³⁴ On the other hand, after an animal is defeated in a fight, his testosterone level goes down.²³⁵ Given the relationship between testosterone

225. Olweus, Mattson, Schalling & Löw, *supra* note 224, at 254.

226. Persky, Smith & Basu, *Relation of Psychologic Measures of Aggression and Hostility to Testosterone Production in Man*, 33 *PSYCHOSOM. MED.* 265, 275 (1971).

227. Bell, *Hormone Influences on Human Aggression*, 147 *IRISH J. MED. SCI.* (Supp. 1) 5, 6 (1978); LeMaire, *Danish Experience Regarding the Castration of Sexual Offenders*, 47 *J. CRIM. L. & CRIMINOL.* 294, 297 (1956).

228. Laschet, *Antiandrogen in the Treatment of Sex Offenders: Mode of Action and Therapeutic Outcome*, in *CONTEMPORARY SEXUAL BEHAVIOR: CRITICAL ISSUES IN THE 1970s* 311, 314 (J. Zubin & J. Money eds. 1973).

229. *Id.* at 317.

230. Rubin, Reinisch & Haskett, *supra* note 224, at 1320.

231. *Aggressiveness and Testosterone*, *supra* note 224, at 269; Hutt, *supra* note 25, at 73.

232. Joslyn, *Androgen-Induced Social Dominance in Infant Female Rhesus Monkeys*, 14 *J. CHILD PSYCHOLOGY & PSYCHIATRY* 137 (1973).

233. *Id.* at 145.

234. Rose, Holaday & Bernstein, *Plasma Testosterone, Dominance Rank and Aggressive Behaviour in Male Rhesus Monkeys*, 231 *NATURE* 366, 367 (1971).

235. Psychological stress has been shown to lower plasma testosterone levels signifi-

and aggression, it would appear that a drop in testosterone level after defeat, with a concomitant decrease in aggressiveness, would be an adaptive response to the circumstances. Consequently, it can be seen that circulating hormone levels may be an effect, as well as a cause, of aggressive behavior.²³⁶

2. *The Menstrual Cycle and Behavior*

Another area in which hormones appear to have a significant effect on human behavior is in the condition known as premenstrual tension syndrome.²³⁷ A substantial number of women exhibit irritability, depression, hopelessness, or other symptoms just prior to or during menstruation.²³⁸ Estimates of the syndrome's prevalence range from twenty-five to ninety percent of all women of reproductive age.²³⁹ The syndrome has been postulated to result from estrogen excess, progesterone deficiency, or an altered ratio of estrogen to progesterone.²⁴⁰

A number of studies have shown a significantly higher suicide rate in menstrual and premenstrual women.²⁴¹ Several studies have also shown a greater propensity toward violent crime among such women. For example, women who were menstruating committed eighty-four percent of the violent crimes committed by women in Paris in one year.²⁴² Another study revealed that in a New York prison for women, twenty-six of the forty-two women who had been convicted of violent crimes had committed them during the premenstrual week.²⁴³ Likewise, a study conducted in an English boarding school for girls showed that "naughty" girls tended to be "naughtier" during menstruation, and that older girls who were given disciplinary power meted out greater punishment during their own menstruation.²⁴⁴ Another study, conducted in a North Carolina correctional facility for women, demonstrated a higher frequency of aggression during the

cantly. Kreuz, Rose & Jennings, *Suppression of Plasma Testosterone Levels and Psychological Stress*, 26 ARCHIVES GEN. PSYCHIATRY 479, 482 (1972).

236. See also Rubin, Reinisch & Haskett, *supra* note 224, at 1319.

237. *Id.* at 1320.

238. These symptoms are also observed in the condition known as "postpartum depression," which results from drastic changes in a woman's hormone levels after she has given birth. Hamburg, Moos & Yalom, *Studies of Distress in the Menstrual Cycle and the Postpartum Period*, in ENDOCRINOLOGY AND HUMAN BEHAVIOUR, *supra* note 171, at 94. Over 80% of new mothers are believed to suffer this depression. M. KLAUS & J. KENNEL, *MATERNAL-INFANT BONDING* 93 (1976).

239. Moyer, *supra* note 224, at 335; see also J. WILLSON & E. CARRINGTON, *OBSTETRICS & GYNECOLOGY* 107 (6th ed. 1979) (symptoms sufficient to prompt women to seek relief occur in 10-20% of women).

240. Rubin, Reinisch & Haskett, *supra* note 224, at 1320.

241. See, e.g., Holding & Minkoff, *Parasuicide and the Menstrual Cycle*, 17 J. PSYCHOSOM. RESEARCH 365, 367-68 (1973) (and several other studies referred to therein).

242. Cooke, *Presidential Address: The Differential Psychology of the American Woman*, 49 AM. J. OBSTET. & GYNEC. 457, 459 (1945).

243. Morton, Addison, Addison, Hunt & Sullivan, *A Clinical Study of Premenstrual Tension*, 65 AM. J. OBSTET. & GYNEC. 1182, 1189 (1953).

244. Dalton, *Schoolgirls' Behaviour and Menstruation*, 2 BRIT. MED. J. 1647, 1648 (1960).

premenstrual and early menstrual phases of the cycle.²⁴⁵

3. *Hormones and Motherhood*

In the period immediately following birth the hormonal levels of the mother undergo dramatic changes.²⁴⁶ Evidence indicates strongly that these changes facilitate the expression of maternal behavior toward the infant.²⁴⁷ During this period complex interactions appear to take place between the mother and the infant that help cement their relationship.²⁴⁸

Some of the clearest evidence of the hormonal basis for what transpires during this period comes from studies performed on animals. Experimental studies on rats show that a four-day separation of the infants from the mother that begins immediately after birth totally disrupts the mother's maternal response to her pups.²⁴⁹ In goats the critical period of interaction has been determined to be approximately the first five minutes after birth.²⁵⁰ In one experiment two groups of kids were compared. Kids in the first group were taken away from their mothers immediately after birth for a period of one to three hours. Kids in the second group were left with their mothers for five minutes after birth and then taken away for one to three hours. When the kids were reintroduced to their mothers only two of fifteen mothers in the first group allowed their kids to nurse, but fourteen of fifteen mothers in the second group immediately reaccepted the kids. The researcher concluded that during the first few minutes after birth something happens that prepares the mother to attach herself to the kid. If attachment occurs the mother displays signs of distress on removal of the kid. If, however, the mother does not attach to the kid, the removal of the kid has no effect even though the mother may be lactating.²⁵¹

An experiment involving the transfusion of blood from newly delivered mother rats into virgin rats has demonstrated that the mother's hormonal levels are largely responsible for the critical period.²⁵² Seven of the eight virgin rats that received blood from newly delivered mothers exhibited maternal behavior, but none of the controls, which were virgin rats that had exchanged blood with other rats, did.²⁵³ Blood transfused either twenty-four hours before or after birth had far less impact on the exhibition of maternal behavior.²⁵⁴ The researchers concluded that only blood transfused during a very limited period around birth has the capacity to

245. Ellis & Austin, *Menstruation and Aggressive Behavior in a Correctional Center for Women*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 388, 394 (1971).

246. See M. KLAUS & J. KENNEL, *supra* note 238, at 51.

247. *Id.*

248. *Id.*

249. Rosenblatt & Lehrman, in *MATERNAL BEHAVIOR IN MAMMALS* 39 (H. Rheingold ed. 1963).

250. Klopfer, *Mother Love: What Turns It On?*, 59 AM. SCI. 404, 405 (1971).

251. *Id.* at 407.

252. Terkel & Rosenblatt, *Humoral Factors Underlying Maternal Behavior at Parturition: Cross Transfusion Between Freely Moving Rats*, 80 J. COMP. & PHYSIOLOGICAL PSYCHOLOGY 365, 369 (1972).

253. *Id.*

254. *Id.* at 366.

induce maternal behavior.²⁵⁵

Similar experiments cannot be performed on humans, of course, but circumstantial evidence suggests that a similar factor is at work. Studies in humans show that the bond between the mother and the infant can be disrupted during the immediate post-partum period by separating the mother and the infant.²⁵⁶ The mother's behavior is often disturbed for a year or more by events that take place within the first twenty-four hours after the birth of the infant.²⁵⁷ Mothers can still attach to their infants after an early separation, however, but attachment at this stage is more difficult.

The strength of the maternal attachment is demonstrated by an accident that took place in an Israeli hospital. Two mothers were inadvertently given the wrong babies in the hospital and took them home and cared for them.²⁵⁸ Doctors discovered the error at the two-week check-up. The mothers had become so attached to the babies, however, that they were reluctant to give them up, while the fathers strongly supported correcting the error.²⁵⁹

Interactions between baby and mother also induce certain physiological responses in the mother. A study using thermal photography showed that fifty-four of sixty-three mothers demonstrated significant increases in blood flowing to their breasts after hearing babies' hunger cries.²⁶⁰ The cries of infants also stimulate the secretion of the hormone oxytocin in the mother, which triggers uterine contractions and nipple erection preparatory to nursing.²⁶¹ The uterine contractions aid in the reduction of post-partum bleeding. Licking of the mother's nipple also causes an increased release of oxytocin, as well as release of prolactin.²⁶² Klaus and Kennel speculate that the secretion of prolactin may act in humans, as it does in birds, to activate the close attachment between mother and young.²⁶³

The mother's physiological function also has an influence on her baby's behavior. Researchers have observed that babies respond to a female voice in preference to a male voice, apparently because of its higher pitch.²⁶⁴ Mothers, as well as fathers, often speak to infants in a much higher pitched voice than their normal speaking voice.²⁶⁵ Also, hearing

255. *Id.* at 370.

256. See, e.g., Rose, Boggs & Alderstein, *The Evidence for a Syndrome of "Mothering Disability" Consequent to Threats to the Survival of Neonates*, 100 AM. J. DIS. CHILD. 776, 776 (1960).

257. M. KLAUS & J. KENNEL, *supra* note 238, at 52-53.

258. *Id.* at 51.

259. *Id.*

260. Lind, Vuorenkoski & Wasz-Höckert, *Emotional Attitudes toward the Child and Child Rearing and the Effect of Cry Stimulus on the Temperature of the Lactating Breast*, in PSYCHOSOMATIC MEDICINE IN OBSTETRICS & GYNAECOLOGY 284, 285 (N. Morris ed. 1972).

261. Newton & Newton, *Psychologic Aspects of Lactation*, 277 NEW ENG. J. MED. 1179, 1185 (1967).

262. M. KLAUS & J. KENNEL, *supra* note 238, at 78-79.

263. *Id.* at 79.

264. *Id.* at 73.

265. *Id.*

the maternal heartbeat appears to have an effect on the newborn. Babies exposed to the heartbeat become noticeably calmer. This phenomenon is thought to be causally related to the fact that mothers characteristically hold infants on their left side near their heart.²⁶⁶ The side preference holds true irrespective of the handedness of the mother.²⁶⁷ In a study of mothers who had been separated from their babies for at least the first twenty-four hours after birth, first-time mothers showed no side preference, while mothers who had given birth previously to children from whom they had not been separated at birth, showed a left-side preference. The control group of mothers who were not separated from their infants at birth showed a marked left-side preference.²⁶⁸ Studies also reveal that when presented with their babies for the first time, mothers engage in a very characteristic sequence of behavior. When nude babies are placed next to their mothers shortly after birth, most mothers go through a pattern of behavior that begins with touching the infant with her fingertips and proceeds in a few minutes to massaging, stroking, and then encompassing palm contact of the trunk.²⁶⁹

The existence of a special physiological and psychological relationship between mother and infant does not diminish the importance of a healthy, loving relationship between father and infant. It does, however, call into question the assumptions that mothers and fathers are interchangeable and that the imposition of child-care responsibility on women is merely an arbitrary cultural artifact. In comparing the relative attachments of females and males to infants, sociologist Alice Rossi noted that attachment in human males is socially learned. She also concluded that fathering in human males is learned from females or required by the norms of kinship systems,²⁷⁰ rather than being a result of innate predisposition.

III. CONCLUSIONS ABOUT SEX DIFFERENCES

A number of criticisms have been raised concerning the studies dealing with hormones and behavior and their implications. While some of the points raised are valid, none is devastating to the conclusion that certain observable average temperamental differences between the sexes reflect basic biological differences. At one level are the critics who take the position that examination of biological foundations of human behavioral sex differences may not be ethically justifiable.²⁷¹ This is essentially an emo-

266. Salk, *The Role of the Heartbeat in the Relations Between Mother and Infant*, 228 SCI. AM., May 1973, at 24.

267. *Id.*

268. *Id.* at 27.

269. M. KLAUS & J. KENNELL, *supra* note 238, at 68-69.

270. Rossi, *A Biosocial Perspective on Parenting*, *supra* note 95, at 5.

271. See, e.g., Rosoff & Tobach, *Prologue to GENES AND GENDER II: PITFALLS IN RESEARCH ON SEX AND GENDER* (R. Hubbard & M. Lowe eds. 1979). The authors state:

The research on "sex differences" at the least wastes the time and effort of people who might be better employed in trying to understand the root causes of human problems. At worst, it is an attempt to "prove" that "nature" programs women to be inferior to men through gene action.

tional reaction that surfaces whenever a biological basis for any human behavior is suggested.²⁷² Proponents of the position that biological differences influence behavioral differences are then labelled "biological determinists."²⁷³

Of course, any kind of determinist view is usually an oversimplification. Appending that label to most researchers is an unfair criticism. Opponents of a biological explanation set up a straw man by mischaracterizing the arguments of their opponents and then attack the caricature they have created. No serious researcher in the field of sex differences makes the claim that any behavioral trait is exclusively biologically determined; they all recognize that social and biological factors interact to produce the phenotypic behavior.²⁷⁴ As fair, and more accurate, would be to call those who oppose any biological explanation "cultural determinists." This author is unaware of any researcher who considers biological contributions to behavior as critical and at the same time finds cultural contributions irrelevant or even unimportant. Feminist writers who take the position that all observed temperamental differences between the sexes are culturally determined and that biology is irrelevant are easy to find, however.²⁷⁵ Other critics take the position that any inquiry into the nature of sex differences is motivated by an insidious desire to maintain the oppressive status quo.²⁷⁶

Many feminist writers seem to view the human psyche as a virtual *tabula rasa* upon which only the environment may write. The argument here is not that behavioral sex differences are determined solely by biology; the environment obviously plays a very large part in the development of any behavioral trait. The argument is only that certain behaviors are more readily evoked in members of one sex or the other. How the extreme

Id. at 7.

272. See, e.g., M. SAHLINS, *THE USE AND ABUSE OF BIOLOGY: AN ANTHROPOLOGICAL CRITIQUE OF SOCIOBIOLOGY* (1976).

273. See J. SAYERS, *BIOLOGICAL POLITICS passim* (1982); *GENES AND GENDER I* (E. Tobach & B. Rosoff eds. 1978).

274. Some of the criticisms are merely bizarre. For example, Rogers and Walsh, in criticizing the "biological determinism" of John Money state: "[T]he writings of Money are confused. At one time he lays emphasis on biological determinants of gender identity and at another time, when his findings point more heavily towards cultural determinants, he places an equal emphasis on the latter." Rogers & Walsh, *supra* note 135, at 270.

We seldom see such a denunciation of scientific objectivity. The authors criticize Money for being a biological determinist and at the same time denounce him for not being enough of a doctrinaire biological determinist. Apparently, Money's "calling them as he sees them" is not a virtue in the eyes of Rogers and Walsh, because it makes it more difficult for them to attach a pejorative label to him.

275. See Millett, *Barnard Alumnae* (Spring 1970), *quoted in* L. HOLLIDAY, *THE VIOLENT SEX: MALE PSYCHOBIOLOGY AND THE EVOLUTION OF CONSCIOUSNESS 10* (1978).

276. P. GREEN, *THE PURSUIT OF INEQUALITY 10* (1981) (studies of biological sex differences implicitly repudiate the tenets of liberal democracy); see also Rogers & Walsh, *supra* note 135, at 270 (the work of Money and Ehrhardt is "quite obviously aimed at perpetuating [male-female] divisions" in our society). Rogers and Walsh also stated: "Those who adopt a biological determinist position in attempting to explain the behavioral differences between the sexes serve the status quo by providing explanations that maintain these differences. This is the main sociopolitical *raison d'etre* of this practice." *Id.* at 278.

behaviorists would explain personality differences in infants is hard to imagine,²⁷⁷ unless they believe that differences in personality among newborns are due entirely to differences in the uterine environment.

Those who take the cultural determinist position apparently believe that human beings have somehow escaped the influences of natural selection. They apparently assume that during the course of evolving into *Homo sapiens* we somehow cast off the shackles of biology and emerged completely liberated into a world where the entire key to our perfectability lies in our environment. If this point of view were true, it would have a dramatic effect on mankind's ability to evolve behaviorally, because if behavior is not genetically influenced it cannot be acted upon by natural selection. Perhaps we have crossed some evolutionary Rubicon and, as if by magic, our minds and our bodies diverged. Sociobiologist²⁷⁸ E.O. Wilson, in his Pulitzer Prize-winning book *On Human Nature*, observed that "if the genetic components of human nature did not originate by natural selection, fundamental evolutionary theory is in trouble."²⁷⁹ Similarly, if human nature has no genetic component, evolutionary theory is also in trouble.

Some of the criticism of the view that biological sex differences exist is merely the result of ignorance of the interaction between the environment and the genetic constitution of the organism. There is a common misconception that if a behavioral trait is genetically influenced it would emerge in all humans in all environments and would be completely insensitive to environmental changes.²⁸⁰ This view is pure nonsense. No gene or complex of genes works independently of the environment. As E.O. Wilson has stated, "innateness refers to the measurable probability that a trait will develop in a specified set of environments, not to the certainty that the trait will develop in all environments."²⁸¹

The other form of criticism of the studies discussed above is more legitimate, but also ultimately unconvincing. These critics point to the less than optimal conditions in each particular study and then conclude that the studies therefore show nothing.²⁸² This kind of criticism can be aimed at almost any study and certainly at any study of human behavior.

Three possible explanations account for the tendency of different kinds of studies to show consistent sex differences. First, independent flaws and biases in methodology that only coincidentally yield consistent results are

277. See A. THOMAS & S. CHESS, TEMPERAMENT AND DEVELOPMENT 152 (1977) ("review of the available data suggests an appreciable, but by no means exclusive, genetic role in the determination of temperamental individuality in the young infant").

278. "Sociobiology" is defined as "the systematic study of the biological basis of all social behavior." E. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS 4 (1975).

279. E. WILSON, ON HUMAN NATURE 35 (1975).

280. See Lowe, *Sociobiology and Sex Differences*, 5 SIGNS 544, 544 (1980); see also Brillmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, U. CHI. L. REV. 505, 546 (1980) ("The recency of greater female longevity is inconsistent with claims that the phenomenon is biological or genetic.").

281. E. WILSON, *supra* note 279, at 102.

282. Rogers, *Male Hormones and Behavior*, in EXPLORING SEX DIFFERENCES, *supra* note 15, *passim*.

present. Second, a conspiracy to maintain the status quo exists. Third, the described differences are real. The principle of parsimony favors the third explanation.

One point raised in criticism of the CAH studies is that the parents know that their daughters had genital surgery and need to take cortisol to avoid becoming virilized. Therefore, the argument goes, parents may treat the girls differently, which could account for the observed behavioral differences. The possibility may exist, although doubted by the investigators, that parents do treat fetally androgenized girls differently. The differential treatment, however, would seem to result in reinforcement of more, rather than less, feminine behavior,²⁸³ because parents who knew that their daughters had this problem might be less tolerant of cross-sex behavior than would the parents of normal girls.

By force of circumstance the studies have not been perfect, because controlling for all relevant factors is impossible. Ideally, one would control for all social and cultural variables and the study would be double-blind, so that neither the experimenters nor the subjects and their families would know the identity of the affected subjects. Some conclude, therefore, that as long as controlling completely for social factors is impossible, trying to explain behavioral differences in biological terms is useless.²⁸⁴

The criticisms raised by those who believe that a biological component to human behavior does not exist could be made of most other scientific disciplines, such as astronomy, as well. Although creating a galaxy or a star in a laboratory is impossible, astronomers can and do work with what nature has given them. No one seriously argues that astronomers are therefore wasting their time. The argument that the study of biological differences is fruitless without control for all social factors can be turned around on its proponents. That is, if in the absence of control for biological variables it is pointless to study the impact of social factors on behavior, then attempts to study human behavior should not be made at all. This ignores the dictum of Alexander Pope that "[t]he proper study of Mankind is Man."²⁸⁵

One must remember that the sex differences described are average differences; they are not absolute. Some men are more nurturant than are some women; some women excel in mathematics; some men exhibit extraordinary verbal fluency. To note that these differences are average differences, however, is not to deprecate their importance, although some critics do make this logical leap. One writer has commented, for example,

283. Ehrhardt & Baker, *supra* note 193, at 48-49.

284. P. GREEN, *supra* note 276, at 126; Rogers, *supra* note 282, *passim*. Consider, for example, the commentary in Griffiths & Saraga, *Sex Differences in Cognitive Abilities: A Sterile Field of Enquiry?*, in *SEX-ROLE STEREOTYPING* 17 (O. Hartnett, G. Boden & M. Fuller eds. 1979), in which the authors stated: "Questions concerning the origin and nature of sex differences cannot properly be answered by and in a society that is predicated on their existence. And in a society not premised on their existence, we feel it unlikely that these issues would be a major concern." *Id.* at 36. This statement is merely obscurantism masquerading as scientific objectivity.

285. A. POPE, *AN ESSAY ON MAN*, epistle II, at 1 (1733).

that sex differences in infant behavior are unimportant because one cannot determine the sex of an infant merely by observing its temperament.²⁸⁶ That reasoning is akin to saying that sex differences in height are unimportant because one cannot determine a person's sex by measuring his height.

Another observation that is made to minimize the significance of sex differences is to note that within-sex differences are greater than between-sex differences. Apparently, this observation is meant to sound erudite and to convey to the reader that its author has a firm grasp of the statistical technique of analysis of variance. The proper rejoinder to the observation, however, is "so what?," because the observation adds absolutely nothing to the assessment of the significance of sex differences. A return to the analogy of height is worthwhile, since height is relatively value-neutral and is unquestionably a trait in which clear sex differences have been shown. The average height difference between men and women is between five and six inches,²⁸⁷ while the commonly observed range of male heights is probably from about five feet to six feet six inches.²⁸⁸ The within-group difference in males, therefore, is about three times the between-group difference. This fact remains that average height differences between men and women are substantial and significant, and in any endeavor in which there is a premium on height, males will be disproportionately represented.

Many people think that a belief in the existence of sex differences necessarily reflects stereotypic thinking. Many sexual stereotypes derive from everyday observations of average differences, but this fact is sometimes forgotten. One psychologist has argued that reported sex differences are a part of our society's cultural stereotypes and therefore questions the reliability of observations and the soundness of conclusions.²⁸⁹ This argument is somewhat puzzling, since experimental results directly contrary to human experience should be more suspect than results that confirm it. Another critic questions the validity of sociobiological conclusions because the model of human nature constructed by sociobiologists is "not fortuitous," but instead bears a striking resemblance to the status quo.²⁹⁰ If, however, the sociobiologists are correct, one would expect social institutions, the status quo, to conform to human nature. For the theory to predict a social order entirely different from any that has ever been seen would be strange indeed. The critic is being disingenuous and is really rejecting sociobiology by definition: If social institutions that bear a striking resemblance to the status quo are predicted, then the predictions reflect the bias of the researcher; if social institutions completely different from any ever seen are predicted, then the researcher is unbiased, but wrong.

286. Adkins, *Genes, Hormones, Sex and Gender*, in *SOCIOBIOLOGY: BEYOND NATURE/NURTURE?* 385, 389 (G. Barlow & J. Silverberg eds. 1980) ("Readers who feel that sex differences in newborns are truly significant should consider whether they could accurately identify the sex of diapered infants on the basis of their behavior.")

287. STATISTICAL ABSTRACT, *supra* note 10, at 126.

288. *Id.*

289. Adkins, *supra* note 286, at 387-88.

290. Miller, *Philosophy, Dichotomies, and Sociobiology*, in *THE SOCIOBIOLOGY DEBATE* 319, 323 (A. Caplan ed. 1978).

The unfairness of sexual stereotypes lies not in their existence, but in the establishment of the stereotypes as culturally prescribed norms. For example, it would be unfair, and contrary to society's interest in utilizing all of its talent, to bar women from the field of mathematics merely because on the average women do not perform as well as men in that discipline. Also contrary to society's interests, however, would be a requirement that fifty percent of all mathematicians be women merely because women constitute fifty percent of the population. The latter system would suffer from the same infirmity as the former, in that neither would lead to maximum use of the individual talents of society.

The source of the unfairness of sexual stereotypes should not be forgotten. For example, one might assume that a secretary or a nurse is a woman. Such an assumption is commonly labelled sexist. Whether the assumption is in fact sexist depends upon its foundations. If the assumption simply flows from the empirical observation that most secretaries and nurses are women, it is not sexist. If the assumption is that secretaries and nurses ought to be women, then it may actually be sexist.²⁹¹

Suggestions of biological differences trouble many people, because they apparently believe that equality in some sense is impossible without a belief in the "sameness" of all people. For example, consider the assertion that the study of biological differences in behavior "repudiate[s] the entire ethos of liberal democracy."²⁹² It is a peculiar view of democracy that requires as its cornerstone biological and behavioral identity. Sociologist Marvin Bressler has reflected on this issue as follows:

An ideology that tacitly appeals to biological equality as a condition for human emancipation corrupts the idea of freedom. Moreover, it encourages decent men to tremble at the prospect of "inconvenient" findings that may emerge in future scientific research. This unseemly anti-intellectualism is doubly degrading because it is probably unnecessary.²⁹³

IV. BIOLOGY AND ETHICS

A recognition that certain behavioral sex differences have their origins in biology does not in any way answer the question of whether the differences are good and to be fostered by society, or bad and to be suppressed. A large gap may exist between the descriptive *is* and the prescriptive *ought*.²⁹⁴

Students of evolutionary biology have drawn differing conclusions from the scientific data. Herbert Spencer concluded from an analysis of evolu-

291. Wilson, *Human Decency is Animal*, N.Y. Times, Oct. 12, 1975, § 6 (Magazine), at 38, 48-50.

292. P. GREEN, *supra* note 276, at 10.

293. Bressler, *Sociology, Biology, and Ideology*, in GENETICS 178, 197 (D. Glass ed. 1968); see also Dobzhansky, *Is Genetic Diversity Compatible with Human Equality?*, 20 SOC. BIOL. 280 (1973) (discussing relationship of biological diversity and social equality).

294. Flew, *Evolutionary Ethics*, in NEW STUDIES IN ETHICS 31-51 (W. Hudson ed. 1967), reprinted as *From Ought to Is*, in THE SOCIOBIOLOGY DEBATE 142 (A. Caplan ed. 1978).

tionary theory that society should not interfere with the action of natural selection.²⁹⁵ He opposed, therefore, state-sponsored welfare programs and public education, because he believed that such programs interfered with the elimination of inferior stocks from society.²⁹⁶ On the other hand, W.K. Clifford believed that social harmony was a necessary condition for the evolutionary success of a society, which led him to quite different conclusions.²⁹⁷

A variety of lessons can be learned from the empirical observation of sex differences. Attempts to deduce moral and ethical principles from biology, however, are not particularly fruitful. Albert Einstein once observed that "[a]s long as we remain within the realm of science proper, we can never meet with a sentence of the type: 'Thou shalt not lie.' . . . Scientific statements of facts and relations, indeed, cannot produce ethical directives."²⁹⁸

Society should suppress some aspects of human nature. Homicide, theft, and assault are proscribed and punished in all societies. One can at least argue that every society has a need to deal with these problems because the nature of some portion of any society is to kill, assault, or steal. Societies pronounce such actions "bad" irrespective of any link they may have to human nature. An understanding of human nature is, however, quite relevant in seeking to predict the consequences of the implementation of our moral judgments. Based on the undesirable activities described above, society has developed an elaborate criminal justice system, consisting of police, courts, and prisons, to deal with those who engage in the proscribed activities. To the extent that criminal activity results from human nature, it will be relatively resistant to social change. Thus, the idea that poverty is the root of crime cannot be entirely correct, and the result of social programs to combat crime will always be less than complete.

In the same vein, to the extent that social sex differences are a product of biological differences, constant monitoring will be required to suppress

295. H. SPENCER, II *THE PRINCIPLES OF ETHICS* 392-94 (1896). Spencer stated: "The yearly accumulating appliances for keeping alive those who will not do enough work to keep themselves alive, continually increase the evil. Each new effort to mitigate the penalties on improvidence, has the inevitable effect of adding to the number of the improvident." *Id.* at 393.

Ironically, modern sociobiology, which some consider an atavistic relative of Spencer's "social Darwinism," provides a biological explanation for altruistic behavior, which is not ordinarily associated with Spencer. Such behavior directed toward relatives is explained by the concept of kin selection. See Eberhard, *The Evolution of Social Behavior by Kin Selection*, 50 Q. REV. BIOL. 1, 2 (1975). Because an animal shares a certain proportion, depending upon the degree of relation, of his genes with his kin, its genes may be perpetuated by the animal's sacrificing himself for some of his kin. Altruistic behavior is also explained by the concept of reciprocal altruism, which describes behavior that is apparently detrimental to the one performing the behavior, but is ultimately beneficial because it may be reciprocated at a later date. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOL. 35, 45-47 (1971).

296. H. SPENCER, *supra* note 295, at 394.

297. Clifford, *On the Scientific Basis of Morals*, in *LECTURES AND ESSAYS* 287 (L. Stephen & F. Pollock eds. 1886) (natural selection has favored those groups whose members favor the collective good over the individual good).

298. A. EINSTEIN, *OUT OF MY LATER YEARS* 114 (1950).

them, and governmental institutions will be required to enforce the new proscriptions. Some might argue that concern about attempts to change human nature is unnecessary because the attempts are doomed to fail anyway. The resistance of human nature to social modification does not mean, however, that attempted modification will be without effect. Human behavior is malleable even if human nature is not. Human nature merely provides a predisposition to behave in particular ways. Social institutions can be constructed to modify behavior, but before such attempts are made the nature of the tradeoffs must be assessed.

Attempts to achieve statistical parity by way of affirmative action in the sex area pose problems significantly more serious than do such attempts in the area of race. The races are theoretically assimilable, both biologically and culturally. A theoretical possibility exists that a society could be fashioned in which a person's race would matter as little as his eye color.²⁹⁹ If this occurred and mating decisions were made completely without regard to race, racial differences would disappear through interbreeding. Although biological differences between the races do exist, the social differences between the races are not based upon the particular biological differences, but are based only upon the fact that observable differences exist.³⁰⁰ Consequently, racial affirmative action is theoretically a temporary phenomenon. Once blacks and other racial minorities become assimilated into the dominant culture, affirmative action could be considered to have performed its function and might be abandoned.³⁰¹

The theoretical prospects for terminating affirmative action programs for women are bleaker. The sexes are neither biologically nor socially assimilable. After millions of years of breeding between the sexes, two sexes

299. See Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 586 (1977).

300. *Id.* at 586-87.

301. The practical likelihood of ever ending racial affirmative action programs is questionable, however, even if the programs have by objective measure accomplished their purpose. Any social entitlement program is easier to start than to stop, and the primary beneficiaries of the programs are not likely to view favorably attempts to end them, regardless of whether they are still needed.

The incentives under which such governmental institutions as the United States Commission on Civil Rights and the Equal Employment Opportunity Commission operate ensure that affirmative action programs will continue, because the very existence of these agencies is dependent upon a perception that the evil they were created to combat still exists. Thomas Sowell has pointed out that single-issue agencies tend to push their activities into the area of negative social returns because they are not structured in such a way that they may gain returns from other activities. T. SOWELL, KNOWLEDGE AND DECISIONS 141 (1980). Thus a corporation that receives a diminished marginal return from each unit of activity will tend to channel its resources into more profitable activities. Because an agency established to prevent a particular diminishing evil has no mandate to attempt to combat other evils, it must apply more activity to each residual unit of evil if it is to maintain its level of employment and appropriations. Antidiscrimination agencies must therefore expand their definitions of "discrimination" and "minority," with the result that "[u]rgent tasks such [as] securing basic civil rights for blacks ultimately give way to activities designed to get equal numbers of cheerleaders for girls' high school athletic teams." *Id.* Attempts to abolish affirmative action may also be considered unfair if the rules are changed to require minorities to compete on an equal footing after a number of generations are told that mediocrity is all they need to succeed.

still exist. The social role of women must at a minimum accommodate the biological role of women as childbearers, and should accommodate the prevailing heterosexual ethic of our society as well.³⁰² To the extent that biologically based temperamental sex differences are responsible for social sex differences, programs to eliminate the social differences must be considered permanent. Otherwise, reversion to the more "natural" state will occur as it did in the kibbutz.³⁰³

The observation that the greater aggressiveness and physical strength of males may have been adaptive at one time, but is no longer, is a true statement that misses the point.³⁰⁴ What was once adaptive may become maladaptive through environmental, including cultural, change. That does not mean, however, that the traits can be legislated away.

Consideration of behavioral sex differences is necessary for accurate prediction of the magnitude and duration of the tradeoffs that must be accepted to achieve sexual equality. Accurate estimation is critical since other important values, such as liberty, efficiency, and fairness, are involved in the tradeoff.³⁰⁵ The more decisionmakers are constrained by an inability to consider sex when relevant, the more other values must be sacrificed for equality.³⁰⁶

V. THE USE OF SEX IN DECISIONMAKING

The proposition that biologically based temperamental sex differences exist is, without question, controversial in some circles. The remainder of this Article rests upon the assumption that the proposition is true. As discussed above, however, the truth of the proposition does not in itself suggest the proper resolution of the question of how society in general, and the law in particular, should respond.³⁰⁷

A number of responses are possible. Average differences, for example, might be exaggerated and converted into rigid societal norms. This approach was prevalent to a large extent in the nineteenth century³⁰⁸ and to a

302. Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 206 (1979).

303. For a discussion of the kibbutz, see *supra* notes 96-126 and accompanying text.

304. See, e.g., Hale & Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L.J. 199, 203 (1971); Lambert, *Biology and Equality: A Perspective on Sex Differences*, 4 SIGNS 97, 98 (1978).

305. For a more detailed discussion of the tradeoffs necessary to achieve equality, see Browne, *Liberty vs. Equality: Congressional Enforcement Power Under the Fourteenth Amendment*, 59 DEN. L.J. 417, 442-57 (1982).

306. Many feminists apparently concede that liberty and efficiency must be sacrificed, a sacrifice they accept. They seem to believe, however, that their position has a monopoly on fairness and would probably not concede that fairness is involved in the tradeoff.

307. Acceptance of the position that sex differences exist as a result of our evolutionary past is not incompatible with a radical feminist perspective. See L. HOLLIDAY, *THE VIOLENT SEX: MALE PSYCHOBIOLOGY AND THE EVOLUTION OF CONSCIOUSNESS* (1978). Holliday reviewed the data concerning the existence of temperamental sex differences and concluded that the differences are real. One of the ways she suggested society might deal with male aggressiveness is to produce fewer male children. *Id.* at 12. She also gives directions for how to accomplish this. *Id.* at 215.

308. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (upholding state law

lesser extent in the twentieth.³⁰⁹ Another method would be to arrange social institutions so as to minimize the differences and to permit no recognition, at least no public recognition, of them. Those who subscribe to the philosophy that equality means identity and believe that androgyny is a socially desirable goal advocate this approach.³¹⁰ The third response, which maximizes both individual freedom and the benefit to society of utilizing its entire pool of talent, is to recognize that sex differences exist and, when practical, to allow individuals to deviate from the norm.

A. *What Is Wrong with Sex Discrimination?*

Two interrelated ideas—the source of unfairness of sex discrimination and the definition of equality—produce most of the difference of opinion concerning sex discrimination. The traditional view of sex discrimination is that it suffers from the same flaws as any other class-based discrimination because it imputes group characteristics, whether real or imagined, to each individual member of the group, regardless of whether the individual actually possesses those characteristics.³¹¹ This is a common justification for prohibiting an employer's refusal to hire a woman of childbearing age because of the employer's fear that the woman may soon become pregnant and leave either temporarily or permanently.³¹² As in so many areas of policy dealing with equality, this rule is then carried a step beyond its initial justification. Now an employer is not only forbidden from making group-based choices, but he is also forbidden from making choices based upon individual characteristics.³¹³ Thus an employer may not refuse to hire a woman based upon her current or planned pregnancy, despite his obvious interest in knowing whether the person he hires has current plans to leave his employ within a few months.³¹⁴

Why, then, is it considered improper for an employment decision to be based upon pregnancy? Typical arguments against stereotyping and group discrimination simply will not support a ban on such action by the employer; only a peculiar view of equality can justify it. Apparently the rea-

allowing only men to vote); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding state prohibition of women practicing law).

309. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding state law preventing women, unless wives or daughters of male tavern owners, from holding the job of bartender).

310. See, e.g., Ferguson, *Androgyny As an Ideal for Human Development*, in *FEMINISM AND PHILOSOPHY* 45, 45 (M. Vetterling-Braggin, F. Elliston & J. English eds. 1977) (the most rational way to increase satisfying social relationships between the sexes is to eliminate sex roles and develop androgynous beings).

311. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *WOMEN'S RIGHTS AND THE LAW* 2 (1977) [hereinafter cited as *WOMEN'S RIGHTS*]; Brown & Freedman, *Sex Averaging and the Equal Rights Amendment*, 2 *WOMEN'S RIGHTS L. REP.*, June 1975, at 35.

312. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871 (1971) [hereinafter cited as *Constitutional Basis*]; Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 *AM. B. FOUND. RESEARCH J.* 583, 634.

313. 42 U.S.C. §§ 2000e to 2000e-16 (1976 & Supp. V 1981).

314. 42 U.S.C. § 2000e(k) (Supp. V 1981).

soning is that women are saddled with a biological impediment that does not burden men. Consequently, to ensure that women are not ultimately represented in smaller numbers than men, consideration of factors that will yield a statistically unequal result must be forbidden. This might be called the "New Affirmative Action": Not only must various groups, such as employers and men, pay for past wrongful social conduct of others, but they must also compensate for "biological discrimination," the natural biological differences between males and females. The New Affirmative Action derives from a pernicious view of equality and probably cannot be successful without considerable coercion by the state.

Ann Scales is a proponent of this New Affirmative Action.³¹⁵ She criticized the decision of the United States Supreme Court in *Gilbert v. General Electric Co.*,³¹⁶ which held that omission of pregnancy benefits from private benefit plans did not violate title VII of the Civil Rights Act of 1964.³¹⁷ Scales characterized the decision as a "fundamental failure to recognize the inequities generated by biological differences."³¹⁸ She compared unfavorably statements in the Supreme Court opinion with statements made by the district court.³¹⁹ The district court, finding a violation of title VII, stated that even if inclusion of pregnancy in the benefit plan would tend to discriminate against men economically, it was still justifiable.³²⁰ In response, the Supreme Court stated that the district court had wrongly assumed that title VII required an employer to pay greater economic benefits to one sex based on their role in "the scheme of human existence."³²¹

Scales then referred to the differing views of the two courts as a conflict of values about a woman's place and substantive equality.³²² Although this conclusion is undoubtedly correct, the issue is whether in pursuit of substantive equality the government has, or should have, an obligation to require compensation for biological differences. Many supporters of women's rights take a somewhat paradoxical view of this question. On the one hand, they argue that the ERA will forbid governmental distinctions on the basis of sex.³²³ On the other hand, they expect compensation for the "inequities" created by biological differences.³²⁴ Ruth Bader Gins-

315. See Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1980-1981).

316. 429 U.S. 125 (1976).

317. 42 U.S.C. § 2000e (1976 & Supp. V 1981).

318. Scales, *supra* note 315, at 398.

319. *Id.* at 399-400.

320. *Gilbert v. General Elec. Co.*, 375 F. Supp. 367, 380-86 (E.D. Va. 1974).

321. 429 U.S. at 139 n.17.

322. Scales, *supra* note 315, at 400.

323. See *Constitutional Basis*, *supra* note 312; Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975). Some commentators apparently believe that the permissibility of sex discrimination depends on whether males or females are disadvantaged. Consider the statement: "As a general proposition, I do not quarrel with the [Michael M. v. Superior Court, 450 U.S. 464 (1981)] plurality's willingness to uphold noninvidious classifications, particularly against males." Loewy, *Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C.L. REV. 87, 98 (1981).

324. See Scales, *supra* note 315, at 398.

burg, for example, has called for extensive benefits for pregnancy and childbirth, to be financed through taxation of employers and employees based on the number of women and men employed by the company.³²⁵ At the same time, she says that under the ERA the use of gender as a factor would be prohibited.³²⁶

If the New Affirmative Action were merely based upon the principle that likes should be treated similarly and unlikes should be treated differently, there would be little cause for concern. That, however, is not the rule being applied. Instead, the rule used is that men and women must be treated alike regardless of their differences, unless a need arises, because of inherent biological differences, to grant special benefits to women to give them parity in some sense with men. This equality principle goes far beyond the antidiscrimination principle that originally motivated the cause of women's rights and is probably the primary reason for popular support for the ERA.

In *Equality and the Rights of Women* Elizabeth Wolgast observed that concentration on the concept of equality of rights has actually impaired the cause of women because of its logical inappropriateness to many of women's concerns.³²⁷ She noted that the concept of equality has meaning only where some standard is available by which a comparison might be made.³²⁸ Thus, one might say that a five-foot plank is not equal to a six-foot plank, if length is the measure of comparison. Not all that is not equal, however, is unequal. Many comparisons will yield the conclusion that the items compared are neither equal nor unequal. Consider, for example, a cat and a dog. Descriptions in terms of general equality or inequality have no meaning. The dog and the cat are neither equal nor unequal; they are simply different.

In order for two things to be unequal, there must be some way they could be equal. Wolgast argued, therefore, that women have improperly framed many of the issues. Instead of arguing for equal rights, women should be arguing for special rights when they seek such things as pregnancy benefits.³²⁹ Women deserve benefits not under any principle of sexual equality, but because men and women are different and have different needs. She recognizes, however, that there may be no single principle by which to determine whether sex should be a consideration.³³⁰

At least two strategic reasons exist for couching demands for special rights in terms of equal rights. The first reason is to obtain the support of mindless egalitarians. Once an issue is phrased in terms of equality it will

325. Ginsburg, *supra* note 323, at 38.

326. Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 175.

327. E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980).

328. *Id.* at 38.

329. *Id.* at 87-88.

330. *Id.* at 88. This Article does not attempt to explore the various philosophical conceptions of equality, such as equality of opportunity versus equality of result. For the author's further comments on equality, see Browne, *supra* note 305. See generally M. ADLER, *SIX GREAT IDEAS* (1981) (discussing several dimensions of equality).

attract supporters who will look no further to determine whether other considerations, such as personal liberty, efficiency, or fairness, might outweigh considerations of equality.³³¹ These supporters find no need to balance other considerations since, in their view, the scales are automatically tipped in favor of equality because equality is the only categorical imperative.³³²

The second reason for presenting issues in terms of equal rights is to enlist the aid of the judiciary, which is the branch of government that has shown a consistent history of exalting equality over common sense. The courts have found no mandate in the Constitution for legislating special rights. Once the word equality is invoked, however, sympathetic courts may rely on the equal protection clause and cloak their decisions in high-sounding refrains of "equal protection of the laws."

Many sound reasons for proscribing certain forms of sex discrimination exist. Much discrimination is unfair and ultimately harmful to society in general. This general proposition, however, does not lead to the conclusion that all distinctions based upon sex are morally wrong, nor does it mean that all actions considered by some to be sex discrimination are invidious.

B. Permissible Versus Impermissible Discrimination

Assuming that average sex differences exist, under what circumstances should they be considered in making decisions? If no overlap existed between the two groups in the traits under consideration, this question would be much easier, although still difficult, to answer. Aside from the physiology of reproductive function, however, there are no absolute differences between males and females. A significant overlap exists between the sexes in all behavioral traits.³³³ Consequently, sex is an imprecise predictor of behavior even in those areas where the largest sex differences exist. While men as a group are more aggressive and better at mathematical and visual-spatial tasks than are women, and women as a group are more nurturant and better in verbal skills than are men, the skills of an individual cannot be predicted accurately from his or her sex.³³⁴ Contrary to the conclusion of some, however, that does not mean that sex is irrelevant information, only that it is incomplete.

If knowledge of a person's sex reveals only limited information about that person, the question arises as to whether and in what circumstances decisions concerning an individual should be made on the basis of sex. Instances arise in which such decisionmaking should be considered proper. Anything other than an absolute rule will undoubtedly present some difficulties in application. This is one justification given by those supporters of the ERA who argue that the amendment should be interpreted as an abso-

331. See E. WOLGAST, *supra* note 327, at 52.

332. *But see infra* notes 495-500 and accompanying text.

333. See *supra* note 286 and accompanying text.

334. See *supra* note 6-33 and accompanying text.

lute ban on governmental distinctions based on sex.³³⁵ Absolutist positions are always easier to apply because their application requires no exercise of discretion or judgment. Ease of application is definitely a factor to be considered in determining what a rule should be, but it is not in itself a justification for any rule.

In the absence of an absolute ban some basis for distinguishing between proper and improper discrimination must be formulated. As abhorrent as the idea is to some of the more rabid enthusiasts for governmentally mandated wholesale equality, concerns of economic efficiency should be permitted to enter into the calculus of the decisionmaking process.³³⁶ Practical considerations of efficiency might seem to have no place in dealing with a moral question such as equality. A justification for killing based on efficiency, for example, is certainly difficult to imagine. One need only consider the course of the death penalty in modern America as proof.³³⁷ The propriety of an efficiency argument in the area of equality is on an entirely different footing, however. A major underlying premise of egalitarian ideas, which we all share in greater or lesser degree, is the notion that at least some discrimination between groups, whether they are groups based upon sex, race, or social class, is irrational. Distinctions between groups are relevant, the argument goes, only because we choose to attach significance to them. Efficiency is a valid consideration, although not the only consideration, because discrimination is rational to the extent that it is efficient.

Efficiency in this context means a reduction in risk costs associated with a decision.³³⁸ Risk costs consist of the following two elements: information costs, or the cost to the decisionmaker of acquiring information to reduce the risk of an incorrect decision;³³⁹ and the expected value of the residual risk, or the risk of an incorrect decision that remains because of incomplete information.³⁴⁰ As an example of the efficiency analysis, consider the options open to an employer who desires employees able to lift 200 pounds. A far greater number of men than women will be able to lift that amount of weight. For the sake of the example assume that one out of ten men can lift it, but only one out of 100 women can. How efficient would it then be to use sex as a proxy for the desired trait? The information costs are quite low, because they consist of merely the negligible cost of determining one's sex. The value of the residual risk is relatively high, however, because the use of sex as a decision criterion will yield an incorrect result in nine out of ten cases. The employer can more efficiently reach his decision by giving individual applicants tests to determine the

335. *Constitutional Basis*, *supra* note 312, at 873-74.

336. Not all would agree. Consider the statement that the use of sex as a decision criterion should be barred "whatever the price in efficiency." *Id.* at 891.

337. *See generally* W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979) (tracing the subject of capital punishment).

338. *See* Freed & Polsby, *supra* note 312, at 603.

339. *Id.*

340. *Id.*

amount of weight each can lift. The information costs are slightly higher, because it costs more to administer a weight-lifting test than to determine sex. On the other hand, the expected value of the residual risk is essentially zero, because the decision criterion perfectly discloses the information sought. Obviously, the second method of decisionmaking is far more efficient.

The greater efficiency of the second method of decisionmaking does not mean, however, that a profit-maximizing employer will not consider the sex of applicants.³⁴¹ The employer can still increase the efficiency of the decisionmaking process by screening applicants on the basis of sex and testing only members of the group having a ten percent chance of passing the test (males) and not testing those having only a one percent chance of passing (females). Consequently, if any increase in efficiency, no matter how small, justified decisions based upon sex, such a course would be entirely proper.

What, if anything, leads to the conclusion that the employer should not be permitted to make his employment decisions in such a manner?³⁴² To answer this question an inquiry must be made into the balance between the incremental increase in efficiency from using sex as a preliminary decision criterion and the hardship to the woman occasioned by having her sex considered. In the example given, the increase in efficiency of the decisionmaking process is quite small, but the hardship to the woman is fairly substantial because she is completely barred from a job for which she may be as well qualified as are the men who were hired.

One might observe that the list of factors to be considered is incomplete. Suppose the hypothetical employer is a law firm seeking to hire new associates. Given the balancing test set out above, the firm could maintain a ratio of ten males to one female by giving the strength test even if the applicants are not prescreened by sex. Consequently, a third factor needs to be considered—the legitimacy of the employer's desire for the trait in question. Unless the law firm is a highly unusual one, the ability to lift 200 pounds is irrelevant to the employer's business.

Good reasons exist, however, for granting a large amount of deference to an employer's desire for a particular trait. A major factor in the success of many business enterprises is the ability of an entrepreneur to provide something different from what his competitors are providing. Judges reviewing these decisions, therefore, should not conclude that an employer's desire for a trait is not legitimate merely because others in the business do not desire it or because the trait is not central, in the eyes of the judge, to the employer's business.³⁴³

341. Not all employer behavior is profit-maximizing. Some employers may be willing to forego some profits in order to indulge a "taste for discrimination." R. POSNER, *THE ECONOMICS OF JUSTICE* 360 (1981).

342. This discussion assumes the propriety in the first instance of antidiscrimination laws, which allow the state to limit the liberty of the employer to hire whom he pleases.

343. See *infra* notes 467-69 and accompanying text.

C. *Decisionmaking and Groups: A Digression on Manhart*

In *City of Los Angeles Department of Water & Power v. Manhart*³⁴⁴ a number of topics considered in this Article, namely decisionmaking, groups, and the meaning of equality, were discussed. Although *Manhart* did not involve sex differences in temperament, which are of primary interest here, it did concern the biological sex difference of longevity. In *Manhart* the Supreme Court held that an employer's pension plan under which both sexes were to receive equal periodic benefits upon retirement, but females made higher contributions during employment because of their longer life expectancy, violated title VII.³⁴⁵ Based upon a study of mortality tables and its own experience, the Department of Water and Power determined that its 2,000 female employees would, on the average, live a few years longer than its 10,000 male employees. Consequently, the Department required females to make payments to the fund that were 14.84% higher than the contributions of otherwise comparable males.

Justice Stevens, writing for the Court, concluded that although women, as a class, generally live longer than men, not all individuals in the respective classes share the characteristics of the average class representatives.³⁴⁶ The Court stated that the purpose of title VII was to preclude "treatment of individuals as simply components of a racial, religious, sexual, or national class."³⁴⁷ The Court, as well as some commentators, erroneously viewed the issue as a contest over individual rights versus group rights.³⁴⁸ Some commentators have noted that the Burger dissent³⁴⁹ in *Manhart* insisted on group equality in the actuarial context, which conflicted with his insistence on individual equality in the affirmative action cases.³⁵⁰ Chief Justice Burger insisted that his view treated women as individually as circumstances permitted and stated that statistics should be used when determinations on an individual basis are impossible or infeasible.³⁵¹ The Chief Justice's view that individual treatment is impossible is not precisely correct; however, individual treatment is highly impractical.

The *Manhart* Court based its decision upon the common misconception that treating someone as a member of a group is necessarily not treating him as an individual. The majority considered it morally superior to ignore membership in a sex class and consider only membership in the human species.³⁵² Yet, the more groups to which a person can be assigned, the more he is being treated as an individual. To know that a person is a forty-year-old, American, female lawyer who smokes cigarettes

344. 435 U.S. 702 (1978).

345. *Id.* at 713.

346. *Id.* at 704, 708.

347. *Id.* at 708.

348. *Id.* at 708-09; see Brillmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 508 (1980) [hereinafter cited as *Demographic Analysis*].

349. Chief Justice Burger was joined by Justice Rehnquist. 435 U.S. at 725.

350. *Demographic Analysis*, *supra* note 348, at 509 n.19, 559.

351. 435 U.S. at 708.

352. *Id.*

is to know more about that individual than to know only that a person is a member of the human race. Still, all we know about her is based upon her membership in age, nationality, sex, occupation, and smoking classifications. A notion of individuality and equality requiring that this person be lumped with every other member of her species and that the rest of the data be ignored in order to treat her as an individual is palpably absurd. Until we become intimate with someone, in which case the person is then a member of a class of one, most of what we know about a person is based upon his membership in groups.

In the context of insurance ratemaking, which is performed based upon statistical predictions, the ability to use an individual's membership in groups is essential. Leaving aside for the moment the specific interpretation of title VII at issue in *Manhart* and addressing the question purely as a moral one, the justification for allowing insurance rates based on age rather than sex is not readily apparent. In both cases the same principle is involved. In *Manhart* Justice Stevens observed: "Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics."³⁵³ The principle involved in sex-segregated tables is as relevant to tables based upon age. Many forty-five-year olds do not have as many years left to live as the average sixty-year-old and many sixty-year-olds will outlive the average forty-five-year-old. Must we conclude that age-based mortality tables are discriminating against individuals in favor of group parity? Certainly, this view of age discrimination makes as much sense as the conclusion in *Manhart*. The critical point is that predictions of the death of individuals will be correct more often if sex is considered than if sex is ignored.

As Spencer Kimball observed in a thorough analysis of *Manhart*, the Supreme Court and many commentators have made the same fundamental error in their analysis of the discrimination question by using the payments after retirement as the measure of the benefits.³⁵⁴ The compensation to the employee is not the periodic pension check the employee receives after retirement, but rather the contractual right against the insurance company that he gets every pay period. Looking solely at retrospective results leads to some absurd conclusions. If a person purchases a twenty-year term life insurance policy and lives beyond its expiration, a conclusion that what he received for his premiums was of no economic value is erroneous, despite the fact that his beneficiary ultimately received no payment from the insurance company. The purchaser received a promise from the insurance company that if he died within the term of the policy

353. *Id.*

354. Kimball, *Reverse Sex Discrimination: Manhart*, 1979 AM. B. FOUND. RESEARCH J. 83, 97; see also Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 532-41 (1982) (implications of *Manhart* considered).

his beneficiary would receive the face value of the policy.³⁵⁵ He also received the noneconomic, but nonetheless valuable, benefit of the peace of mind of knowing that if he died his beneficiary would be taken care of. In fact, he received the same thing that a friend who had the same policy received, even though his friend died and the friend's widow received the insurance proceeds. To say that only people who die get their money's worth from their insurance policies is unrealistic.

One of the justifications proposed by Brilmayer and her colleagues for barring the use of sex in ratemaking is that sex is an immutable characteristic.³⁵⁶ Immutability is, of course, precisely what makes sex an ideal trait for an insurance company to use.³⁵⁷ A company need not worry that a woman will take out a life insurance policy today and become a man tomorrow, but it must consider that a nonsmoker who takes out a policy today will become a smoker tomorrow. Sex and birth date are ideal traits upon which to classify risks because they are both immutable. An insurance company, particularly one providing group insurance, must use only a few traits that are easy to measure and do not require constant monitoring. This consideration shows the impracticality of using specific traits sometimes used in individual policies and cited with approval by the Brilmayer article.³⁵⁸ Although the use of many traits may increase the accuracy of mortality predictions, the cost of obtaining, verifying, and monitoring is likely to outweigh the value of the increase in predictive accuracy. This is particularly true in the group insurance context, where individuals are continually joining and leaving the group.³⁵⁹

In buttressing its conclusion that sex-segregated mortality tables are improper, the *Manhart* Court analogized sex to race and stated that "a statute that was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification."³⁶⁰ The Brilmayer article similarly argues that in the insurance context sex is more like race than it is like age.³⁶¹ The accuracy of this conclusion is far from clear. Sex is a dichotomous variable; each person belongs to one of the two sexes, and ordinarily little difficulty arises in determining which one. Age, though a continuous variable, is similarly easy to determine. Race on the other hand, is quite different. Although culturally race is often perceived as a discrete variable, biologically it is a continuous variable, or, to be precise, a series of variables, most of which are continuous.³⁶² A person's racial identity is largely

355. Benston, *supra* note 354, at 497.

356. *Demographic Analysis*, *supra* note 348, at 527.

357. Benston, *supra* note 354, at 510.

358. For examples of other traits used, see *Demographic Analysis*, *supra* note 348, at 533 n.130.

359. Benston, *supra* note 354, at 500.

360. 435 U.S. at 709.

361. *Demographic Analysis*, *supra* note 348, at 536-39.

362. A. BRUES, *PEOPLE AND RACES* 1 (1977) (A race is "a division of a species which differs from other divisions by the frequency with which certain hereditary traits appear among its members.").

a social phenomenon, rather than a biological one.³⁶³ By any rational measure a person who is seven-eighths white and one-eighth black would be considered white. That has not been the case in the United States, however. The actual practice in the United States, and almost everywhere, is to ascribe a person of "mixed blood" to the socially inferior race.³⁶⁴ Furthermore, most, if not all, of the morbidity and mortality differential between the races appears to be due to environmental factors such as diet and medical care.³⁶⁵ These environmental differences are lessening with a decrease in discrimination against racial minorities and an increase in the availability of social welfare benefits.³⁶⁶

The Brilmayer group, in arguing that associations between sex and life expectancy are spurious, made another mistake that commonly recurs in the discussion of biological differences. They stated: "The recency of greater female longevity is inconsistent with claims that the phenomenon is biological or genetic. In evolutionary terms, a few centuries is an extremely short time."³⁶⁷ This is an incorrect view that completely ignores the interaction of biology and environment. In the context of sex differences in mortality the argument ignores the important environmental variable of health care. For example, assume a society in which the life expectancy at birth is fifty years for men and women and a high frequency of deaths results from childbirth. Introduction of modern medical care will greatly reduce the frequency of deaths from childbirth, and, all else being equal, the life expectancy at birth for women will increase. This means that the life expectancy is different in different environments, not that a genetic component to sex differences in longevity does not exist. The real question is whether existing knowledge of the environmental and genetic causes of sex differences in mortality justifies predictions based upon mortality tables. Insurance companies, which have the greatest interest in the accuracy of their predictions, believe that the predictions are justified, or they would not use them. The evidence is strong that the insurance companies are correct.³⁶⁸

Efficiency considerations weigh heavily on the side of using sex-segregated mortality tables. The reduction in risk costs is fairly substantial. Using decision criteria other than sex and age in the group insurance context would substantially increase information costs. The use of sex-segregated tables reduces the residual risk, and the burden imposed on people because sex is considered is only an incremental increase or decrease in premiums. Finally, the trait about which knowledge is desired—longevity—is obvi-

363. Kimball, *supra* note 354, at 112.

364. See A. MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 122-23 (5th ed. 1974).

365. See Pettigrew & Pettigrew, *Race, Disease and Desegregation: A New Look*, in II *ETHNIC GROUPS OF AMERICA: THEIR MORBIDITY, MORTALITY AND BEHAVIOR DISORDERS* 36 (A. Shiloh & I. Selavan eds. 1974).

366. *Id.*

367. *Demographic Analysis*, *supra* note 348, at 546.

368. See Benston, *supra* note 354, at 514; Kimball, *supra* note 354, at 108.

ously critical in the business of insurance.³⁶⁹

VI. DISPARATE TREATMENT

Probably no one would dispute that sex has been used more than necessary as a decision criterion in the past and, to a more limited extent, today. A flat ban on considering sex, however, is an overreaction to the errors of the past. Some areas in which consideration of sex might be proper are discussed in this section. The list is intended to be illustrative, rather than exhaustive, and the arguments for the use of sex are more compelling for some illustrations than for others.

A. *Women and Combat: "Ancient Canard" or Wisdom of the Ages?*

One of the most emotion-laden areas in the debate concerning equal rights for women involves women's service in combat. Anthropological, biological, and psychological information can be used to aid in resolving the combat issue. Arguments against the use of women in combat revolve around the less aggressive nature of women, their lesser physical strength, problems of discipline resulting from interactions between male and female soldiers, and the inability to provide privacy to soldiers in mixed-sex units.³⁷⁰ Arguments in favor of the use of women in combat include the right and responsibility of women to share in the benefits and burdens of military service and the decreased importance of strength and aggressiveness resulting from the technological revolution in modern warfare.³⁷¹

No society has ever relied on female warriors. Those who favor the use of women in combat are thus forced to use such arguments as, "Herodotus mentions women soldiers who were as bloodthirsty as men,"³⁷² and examples such as Joan of Arc,³⁷³ pioneer women,³⁷⁴ unnamed warrior queens throughout history,³⁷⁵ and female members of terrorist organizations.³⁷⁶ The Israeli military is commonly cited as an exception to the universal lack of a substantial combat role for women.³⁷⁷ Although Israel at one time used female combat soldiers, women were never fully assimilated into the

369. The Supreme Court has recently extended the holding of *Manhart* by deciding that title VII also "prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman a lower monthly benefit than a man who has made the same contributions." Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3493, 77 L. Ed. 2d 1236, 1242 (1983).

370. See, e.g., Gilder, *The Case Against Women in Combat*, N.Y. Times, Jan. 28, 1979, § 6 (Magazine), at 29.

371. *Constitutional Basis*, supra note 312, at 967-78; Hale & Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 HASTINGS L.J. 199, 207-12 (1971).

372. Hale & Kanowitz, supra note 371, at 206.

373. *Id.*

374. Dobrofsky, *Women's Power and Authority in the Context of War*, 3 SEX ROLES 141, 154-55 (1977).

375. Tieger, supra note 6, at 959.

376. Hale & Kanowitz, supra note 371, at 206.

377. *Constitutional Basis*, supra note 312, at 977; Dobrofsky, supra note 374, at 155.

army and never given primary combat responsibility. A Brookings Institute study concluded that the conception of the Israeli woman warrior is more myth than reality and that Israel has been overrated as a model of equality for women in the military.³⁷⁸

Although cross-cultural universality is not conclusive proof of the wisdom of a given practice, it might appropriately be given presumptive weight, and deviations from a universal pattern should not be lightly undertaken.³⁷⁹ The universality of the male as warrior may well be a product of adaptive forces that have been reflected in biology. It would be a cruel twist of fate indeed if the sex that is larger, stronger, and more aggressive were not the sex from which warriors were drawn. The reasons for the use of men in combat are varied. Males are much more expendable than are females in terms of propagation of the species because the number of females limits the size of a population.³⁸⁰ A single female can give birth to only one child (excluding multiple births) every nine months during her reproductive years; a man can sire vastly more. The greatest number of children ever born to one woman is sixty-nine,³⁸¹ while the greatest number ever sired by a man is 1056, a record reportedly set by a seventeenth-century Moroccan king.³⁸² Requiring the more expendable male to defend the less expendable female is clearly a sensible arrangement.

Some believe that disputing the evolutionary history of sex differences is unnecessary because cultural conditions have changed to such an extent that sex differences are no longer important. Hale and Kanowitz, in referring to arguments that men are more aggressive than women, have questioned the need for using military personnel who are more aggressive, in light of the technical nature of warfare and its destructive potential.³⁸³ This reliance on the technological nature of modern warfare is not convincing. Although some potential conflicts are of such a nature, and human participation may be limited to pushing buttons, the nation's substantial commitment to conventional military forces demonstrates the desire that not every conflict accelerate into a nuclear conflagration. Heavy reliance on the highly technical nature of warfare is likely to be a self-fulfilling prophecy: If we are prepared to fight only nuclear wars, we will fight only nuclear wars.

Hale and Kanowitz have also stated that "[w]e must also consider whether natural and instinctive behavior is controlling when military personnel undergo extensive physical and psychological conditioning."³⁸⁴

378. For conclusions by the Brookings Institution, a policy study institution sympathetic to many women's causes, on the Israeli military experience for women, see M. BINKIN & S. BACH, *WOMEN AND THE MILITARY* 131-32 (1977).

379. For a view contrary to this position, see Wasserstrom, *supra* note 299, at 613.

380. See G. HARRISON, J. WEINER, J. TANNER & N. BARNICOT, *HUMAN BIOLOGY* 474 (2d ed. 1977).

381. *GUINNESS BOOK OF WORLD RECORDS* 30 (1978). Twelve children appears to be a more realistic maximum. D. BARASH, *supra* note 32, at 47.

382. D. BARASH, *supra* note 32, at 47.

383. Hale & Kanowitz, *supra* note 371, at 203.

384. *Id.*

They conceded that physical standards may need modification, but stated that modification should be encouraged.³⁸⁵ Some alterations in training requirements have already been made to accommodate women. For example, at the United States Naval Academy women are permitted to carry lighter rifles in combat exercises and are given additional time to run obstacle courses.³⁸⁶ A study conducted at West Point showed that, given the same regimen of physical training, women increase their strength less than half as much as do men.³⁸⁷ This effect is undoubtedly due in large part to the anabolic effect of testosterone.³⁸⁸ Hale and Kanowitz also claimed that physical standards are unrealistic because so few military personnel are assigned to combat units.³⁸⁹ This statement is itself an unrealistic position, which would lead to the conclusion that it is wasteful to teach a soldier to use a rifle unless he is assigned to a combat unit. It is in the nation's interest to have soldiers who can fight and depth in the armed forces sufficient to allow personnel to be rotated in and out of combat duty. Moreover, a mechanism must exist by which the number of combat troops can be easily increased in the event they are needed.³⁹⁰

As to the suggestion that extensive psychological training³⁹¹ would overcome any sex differences in aggressiveness, it is worth noting that sex differences in basic personality are not thought to be due to differences in the neocortex, the portion of the brain governing higher intellectual functions and involved in learning. Instead, these differences are thought to be due to differences in the limbic system and paleocortex, the more primitive portions of the brain that are not as subject to conscious control as is the neocortex.³⁹² The importance of the limbic system can be demonstrated by the surgical removal of the neocortex of the cat. If the limbic system is left intact, the basic personality of the cat does not change. If the cat is then stimulated in a way that would ordinarily elicit only mild anger, however, the animal will react ferociously.³⁹³ The experiment shows the importance of the neocortex in mediating aggressive behavior, but is not encouraging for the proposition that basic temperament, especially aggres-

385. *Id.* at 204; see *Constitutional Basis*, *supra* note 312, at 971-72.

386. N.Y. Times, May 25, 1980, at 42, col. 1.

387. See Gilder, *supra* note 370, at 44.

388. See A. GUYTON, TEXTBOOK OF MEDICAL PHYSIOLOGY 935, 971 (1976) ("Testosterone, the male sex hormone, causes increased deposition of protein in the tissues throughout the body, including especially an increase in the contractile proteins of the muscles.").

389. Hale & Kanowitz, *supra* note 371, at 204.

390. George Gilder pointed out the risk of the obsession with sexual equality in the armed forces: "While the Soviet Union's nearly all-male armies grow to a size three times ours and Cuba pursues its prey around the world, it would be unfortunate for American leaders to give the impression that they regard combat chiefly as an obstacle to women's rights." Gilder, *supra* note 370, at 46.

391. Hale & Kanowitz, *supra* note 371, at 203.

392. See *supra* note 192 and accompanying text. See also R. STAGNER, THE PSYCHOLOGY OF PERSONALITY 443 (4th ed. 1974) (The term "limbic system" describes "various cerebral centers just below the cortex, and including pleasure and pain, excitement and depression, arousal of action and inhibition of action—the kinds of processes we have treated . . . as basic to personality.").

393. J. PINCUS & G. TUCKER, BEHAVIORAL NEUROLOGY 66 (2d ed. 1978).

siveness, is easily modified through learning. Consequently, the extent to which twelve to sixteen weeks of basic training can be expected to alter such deeply rooted traits is questionable.

If body strength at the time of induction were the only characteristic desired in prospective combat soldiers, an efficiency analysis would provide little support for a policy limiting enlistment of women and barring them from combat. Everyone could be given a test of strength, and those who passed would be eligible for combat duty.³⁹⁴ Realistically, however, probably few oppose the use of women in combat primarily on the ground of their lesser physical strength; instead, the objection of most is probably based upon a general intuitive notion that combat and womanhood are incompatible. This intuitive notion probably derives from observations of the sex differences in basic personality that have been dealt with previously—the greater aggressiveness of men and the greater nurturance of women.³⁹⁵ Because these personality traits are difficult to measure on an individual basis, and virtually impossible to measure in a mass setting, an efficiency analysis should permit the use of sex as a proxy for aggressiveness.³⁹⁶ The use of sex as a proxy would greatly decrease information costs because of the ease of ascertaining sex and the difficulty of measuring aggressiveness. Although the residual risk is substantially reduced by the elimination of females, a risk is still present because not all males are temperamentally suited to combat.

The risk of error should be balanced against the harm to individuals occasioned by having their sex considered. One could argue about whether military service is a benefit or a burden, but that is not a particularly productive line of inquiry. Military service probably seems like a burden to those who are participating, but may appear to be a benefit to those who cannot.³⁹⁷ Much can be said for the idea that males and females should have equal citizenship obligations and should both be subject to a military draft, whether or not women are permitted to serve in combat. This compromise is not entirely satisfactory for women who desire to make a career of military service, because their inability to serve in combat inhibits their advancement.³⁹⁸ Moreover, as long as they are not eligible for combat, women can fill only a minority of service positions.³⁹⁹

Even taking into account the foregoing arguments, a strong case could

394. One factor that confounds the discussion, however, is the fact that men gain more strength through training than do women. See *supra* notes 387-88 and accompanying text. Therefore, if predictions of post-training strength are needed, the training effect would have to be taken into account.

395. See *supra* notes 6-33 and accompanying text.

396. For remarks on the trend toward using standardized tests to measure the intangibles that make someone a good soldier, see Gilder, *supra* note 370, at 44.

397. For a discussion of some of the benefits of military service, see Goodman, *Women, War, and Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN'S RIGHTS L. REP. 243, 244-49 (1979).

398. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

399. M. BINKIN & S. BACH, *supra* note 378, at 109 (women cannot exceed 22% of nation's military force as long as combat restriction is in place).

still be made that sexually integrated combat units would invite disaster. Quite apart from the differences between the sexes is the phenomenon that persons respond to members of the opposite sex differently from the way they respond to members of their own sex. A man and a woman may form attachments different in degree and kind from attachments formed by members of the same sex.⁴⁰⁰ A man may take risks that are foolish from a military standpoint to protect a female comrade, when he would not do so were his comrade a male.

The Brookings study discussed two competing schools of thought regarding the integration of women into combat units.⁴⁰¹ The first is that men tend to draw together in social groups that exclude women in a phenomenon known as "male bonding."⁴⁰² As a corollary, in matters of organized aggression, males and females tend to reject other females as potential leaders and defenders, and males reject females as colleagues.⁴⁰³ The authors of the Brookings study found this hypothesis difficult to accept in light of the prominent role of women in some terrorist organizations.⁴⁰⁴ That the psychological factors at work in the hiding of bombs in car trunks are the same as those operating on soldiers manning the trenches is, however, doubtful. The other school cited in the study holds that the primary ethos of the combat soldier has changed from the social cohesiveness observed during World War II to one of "every man for himself."⁴⁰⁵ Consequently, the argument goes, group behavior has lost its significance. Whether that ethos has changed is questionable, but even more questionable is whether such a change is something to be cultivated.

Whether women should serve in combat may be one of the questions most amenable to resolution using the biological and anthropological evidence, as well as an efficiency analysis. The reasons why women are universally excluded from combat should be considered. The suggestion that the demands of motherhood have greatly handicapped women as fighters⁴⁰⁶ may explain why mothers have not been sent into combat, but it does not explain the exclusion of nonpregnant women without children. We should not, of course, assume that merely because something has always been done in a particular way, that way is necessarily the right way for all time. On the other hand, we ought not to conclude that conformity

400. R. LEE, *A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT* 59 (1980).

401. M. BINKIN & S. BACH, *supra* note 378, at 89-92.

402. *Id.* at 90. The study quoted the following passage from Lionel Tiger's book *Men in Groups*:

(1) that defence and maintaining the social order are clearly crucial to the persistence of human social systems; (2) that these behaviors are typically undertaken by males, usually without female full colleagues . . . (3) that on all occasions defined by a community as vitally important and during which strong emotion is expressed by community members aware of the overall situation a male or males will assume the most significant roles.

Id. (quoting L. TIGER, *MEN IN GROUPS* 84-85 (1969)).

403. L. TIGER, *MEN IN GROUPS* 85 (1969).

404. M. BINKIN & S. BACH, *supra* note 378, at 91.

405. *Id.* at 91-92.

406. Hale & Kanowitz, *supra* note 371, at 203.

with tradition necessarily reflects the acceptance of an "ancient canard" about women or that conformity is the result of stereotypic thinking. Even a practice resulting from stereotypic thinking, of course, is not necessarily incorrect. The facile assumption that all other societies have been wrong on this issue and that ours is the first society just enough to divine the moral answer displays a certain arrogance.

1. *A Digression on Rostker v. Goldberg*

The decision in *Rostker v. Goldberg*⁴⁰⁷ is more significant for what it assumed than for what it expressed. In holding the Military Selective Service Act constitutional despite its exclusion of females from its draft-registration requirements, the Supreme Court assumed, without discussion, that the exclusion of women from combat was constitutional.⁴⁰⁸ Once the Court cleared—or evaded—the hurdle of the combat exclusion, the question became fairly simple. Testimony was presented before Congress that in the event of a mobilization the military would need 650,000 draftees in the first six months and that up to 80,000 of these could be women.⁴⁰⁹ The majority concluded that because of the different need for men and for women the sexes were not similarly situated. The Court stated that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."⁴¹⁰

Justice White dissented because he believed that "the number of women who could be used in the military without sacrificing combat readiness is not at all small or insubstantial, and administrative convenience has not been sufficient justification for the kind of outright gender-based discrimination involved in registering and conscripting men but no women at all."⁴¹¹ Justice White correctly viewed the decision as one of administrative convenience, but there must be some point at which administrative convenience is sufficient justification to distinguish between men and women who are not similarly situated. At least seven times as many men as women would have to be drafted in a mobilization.⁴¹² If all women of draft age were registered, the cost to register a woman who is ultimately drafted would be seven times the cost to register a man ultimately drafted. The question then becomes whether Congress should be constitutionally precluded from choosing between spending the additional money on training soldiers or on registering women. One suspects that the national security would be better served by the former course.

Justice Marshall declared in dissent that "[t]he Court today places its imprimatur on one of the most potent remaining public expressions of 'an-

407. 453 U.S. 57 (1981).

408. *Id.* at 76-77.

409. *Id.* at 81.

410. *Id.* at 79.

411. *Id.* at 85 (White, J., dissenting).

412. *Id.* at 81.

cient canards about the proper role of women.'"⁴¹³ Justice Marshall failed to define clearly what he believed that ancient canard to be. Since Justice Marshall noted that the combat exclusion was not challenged, the canard presumably is not that women should not serve in combat.⁴¹⁴ The remainder of the dissent analyzed the evidence showing that the military could use up to 80,000 women in the event of a major European war and concluded that the exclusion of women was not necessary to meet military needs or to achieve military flexibility.⁴¹⁵ Because efficiency concerns are hardly canards about women, one is left with the conclusion that either Justice Marshall was engaging in mere sloganeering or that he believes the underlying assumption that the combat exclusion is constitutional to be incorrect.

B. *The Maternal Preference*

An area where the greater nurturance of females deserves some recognition is in the "maternal preference" or "tender years" presumption. The presumption supports granting custody to fit mothers because the mother is the "natural custodian of her child of tender years."⁴¹⁶ The presumption is based solely upon the child's rights and not the rights of the parents.⁴¹⁷ One commentator has observed that "[t]he maternal presumption in divorce proceedings is anathema to most feminists,"⁴¹⁸ because feminists view the presumption as a reinforcement of the enduring stereotype of women as instinctive childraisers.⁴¹⁹ One court responded to that argument by concluding that even though the presumption was based on past practice, the preference given the mother actually comported with fact and was not unsound or unconstitutional.⁴²⁰ Another court concluded quite the opposite and stated that the presumption should be rejected because it is based on "outdated social stereotypes," not on consideration of the child's welfare.⁴²¹

Leo Kanowitz has denied the logic of the position that the maternal preference is just.⁴²² He stated that fathers are capable of, and should be encouraged to develop and maintain, meaningful relationships with their

413. *Id.* at 86 (Marshall, J., dissenting) (quoting *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring)).

414. 453 U.S. at 87 (Marshall, J., dissenting).

415. *Id.* at 111.

416. *Mullen v. Mullen*, 188 Va. 259, 270-71, 49 S.E.2d 349, 354 (1948).

417. *McCreery v. McCreery*, 218 Va. 352, 237 S.E.2d 167, 168 (1977).

418. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 108 (1978).

419. *Id.* Richard Wasserstrom declared, without finding it necessary to cite any authority: "[I]t is sex-role acculturation, not biology, that mistakenly leads many persons to the view that women are both naturally and necessarily better suited than men to be assigned the primary responsibilities of child rearing." Wasserstrom, *supra* note 299, at 611.

420. *Gordon v. Gordon*, 577 P.2d 1271, 1277 (Okla. 1978) (citing *Craig v. Boren*, 429 U.S. 190, 199 (1976)).

421. *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 288 (Fam. Ct. 1973).

422. Kanowitz, *The ERA: The Task Ahead*, 6 HASTINGS CONST. L.Q. 637, 649 (1979).

children.⁴²³ The question is not, however, whether a father is, or should be, capable of taking care of his children, but what is in the best interests of the child. The presumption merely provides that when all tangible factors are roughly equal, the intangible of maternal nurturance is to be given some weight.⁴²⁴

One feminist writer has argued that the maternal preference should be retained, but her conclusions seem to be based upon a misunderstanding of the underlying philosophy of child-custody decisions.⁴²⁵ She stated that the maternal preference should be relied on unless the father has assumed the childcare role during marriage.⁴²⁶ Two substantial flaws are implicit in this short statement. The first is the assumption that the granting or withholding of custody is intended to reward or punish parents for past conduct, when in fact the decision is based upon the perceived best interests of the child.⁴²⁷ The second flaw is measuring each parent's commitment to the home and children by the amount of time spent at home taking care of the children. Such an analysis does not take into account the commitment that may be reflected in the economic support resulting from the father's employment. It is also directly contrary to the principle that a wife who does not work outside the home is entitled to some fraction of the property accumulated during the marriage because of her provision of various kinds of support for the husband in the home. If the wife benefits the husband by staying home and taking care of the children while he works, the husband also benefits the wife by going out and earning a living while she stays home with the children. If the wife is to get credit for the husband's work, the husband should get credit for the wife's childcare.

The maternal preference is an efficient way of deciding custody matters. Efficient does not necessarily mean cheap in an economic sense. Cheaper ways of deciding child-custody questions certainly exist, such as a conclusive presumption that mothers get custody without inquiry into other factors. When all other things are equal, or in close cases, the use of the maternal presumption will give a correct answer in more cases than not. Once all the tangible factors have been considered and they roughly balance, the decision can be made in only one of two ways. Either some arbitrary rule can be imposed, such as that custody goes to the mother, or a nonarbitrary rule can be imposed, such as a coin toss. Since the overriding concern is the welfare of the child, the rule that yields the correct result would seem preferable, unless equality is such a transcendent goal that the child's welfare should not be balanced against it.

The presumption should possibly be given more weight than being merely a tie-breaker. The maternal-infant bond is a strong one. Perhaps even where tangible measures weigh somewhat in favor of the father, the

423. *Id.*

424. *See supra* note 416 and accompanying text.

425. Uviller, *supra* note 418, *passim*.

426. *Id.* at 129.

427. *See* UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. (1971).

presumptive strength of that bond should add some weight to the other side to tip the balance in her favor. As discussed previously, childrearing, virtually everywhere and in all times known, has been a female occupation. Females are more nurturant than males from childhood.⁴²⁸ There seems little reason in logic for the law to ignore reality.

C. *Drinking Laws: Craig v. Boren*

In *Craig v. Boren*⁴²⁹ the Supreme Court struck down an Oklahoma law that prohibited the sale of 3.2% beer to males under twenty-one and to females under eighteen.⁴³⁰ In reaching its conclusion, the Court for the first time articulated the current standard of review for sex classifications under the equal protection clause. Such classifications, the Court concluded, "must serve important governmental objectives and must be substantially related to achievement of those objectives."⁴³¹

The State of Oklahoma argued that the objective underlying the statute was the enhancement of traffic safety, and the Court accepted, at least for purposes of the opinion, that the objective was an important one.⁴³² The Court concluded, however, that the sex-based distinction was not substantially related to the achievement of that objective.⁴³³ In support of the distinction, Oklahoma introduced a variety of statistical surveys to show that drinking among eighteen- to twenty-year-old males was a greater problem than drinking among females of the same age. The state demonstrated that the arrest rate of males for drunkenness was over nine times the female arrest rate, that youths aged seventeen to twenty-one were over-represented among casualties of traffic accidents (with males in the preponderance), and that young males were more inclined to drink and drive. The most relevant statistic was a survey of arrests of eighteen- to twenty-year-olds for alcohol-related driving offenses, which demonstrated that 0.18% of females and 2% of males had been arrested for drinking and driving.

The disparity in arrest rates was not considered persuasive by the Court.⁴³⁴ The Court noted that it had struck down "far more predictive empirical relationships than this."⁴³⁵ For example, in *Reed v. Reed* the Court struck down an Idaho statute that provided that males must be preferred over females in determining who should be appointed to administer the estate of an intestate decedent when several persons were equally entitled to serve.⁴³⁶ The Court in *Craig* noted that Idaho's presumption that women lacked experience in formal business matters would have held true

428. See *supra* text accompanying note 32.

429. 429 U.S. 190 (1976).

430. *Id.* at 190.

431. *Id.* at 197.

432. *Id.* at 199-200.

433. *Id.* at 200.

434. *Id.* at 202.

435. *Id.*

436. 404 U.S. 71 (1971).

in substantially more than two percent of the cases.⁴³⁷ The Court also noted that it had refused to accept statistical defenses in *Frontiero v. Richardson*⁴³⁸ and *Weinberger v. Wiesenfeld*,⁴³⁹ two cases involving state statutes that required dependency tests for men, but not for women. Both statutes were struck down, even though the Court realized that men are not likely to be dependent upon their wives.⁴⁴⁰

A substantial difference exists between the facts in *Craig*, on the one hand, and *Reed*, *Frontiero*, and *Wiesenfeld*, on the other hand. In the latter group of cases sex was used as a proxy for relatively easily measured traits—either ability to administer an estate or dependency on a spouse. In *Reed* the court system was already set up to make such determinations when two potential administrators were of the same sex. Similarly, under the facts of *Frontiero* and *Wiesenfeld* the government could have required wives as well as husbands to show dependency. The government's decision not to do so was made purely in the interest of administrative expediency.

Justice Stevens, concurring in *Craig*, found that the statutory scheme insulted all young men of the state because it imposed a restraint on 100% of the males for the sins of the 2%.⁴⁴¹ The overinclusiveness of the statute really cannot be the basis of his objection, however, unless he would also be willing to strike down a twenty-one-year-old limit applied uniformly. Under a uniform rule the analysis would be under the due process clause, instead of the equal protection clause. Such a statute not only would impose the sins of 2% of the males upon the other 98%, but would inflict the sins of 0.18% of the females upon the other 99.82%. Understanding how this would be a more fair result is difficult.

Justice Rehnquist correctly pointed out in dissent that the majority's reliance on the 2% "fit" between maleness and drunk-driving arrests misconceived the nature of the equal protection inquiry.⁴⁴² The statistical fit between the class and the trait is not the dispositive factor in the inquiry; instead, the critical question is "whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment."⁴⁴³ The question should have been whether an arrest rate for males that was eleven times as high as the arrest rate for females justified different treatment of the two groups.

The higher incidence of drunk-driving arrests is almost certainly a re-

437. 429 U.S. at 202 n.13.

438. 411 U.S. 677 (1973) (holding unconstitutional a federal law allowing a serviceman to claim his wife as a dependent for purposes of obtaining increased benefits, while allowing a servicewoman to claim her husband as a dependent only if he actually depended upon her for over one-half his support).

439. 420 U.S. 636 (1975) (holding unconstitutional system under which surviving widows with children were entitled to death benefits, while surviving widowers with children were not).

440. 429 U.S. at 202 n.13.

441. *Id.* at 214 (Stevens, J., concurring).

442. *Id.* at 225 (Rehnquist, J., dissenting).

443. *Id.* at 225-26.

sult, at least in part, of the generally wilder nature of young males as compared to young females.⁴⁴⁴ Although seemingly maladaptive, the recklessness and general lack of good sense of young males in matters of personal safety has probably been adaptive in that it accounts for the willingness of young males to take risks in defense of the group. These males are the most expendable segment of society, both because they are male and because they are young and have not acquired the wisdom that makes older members of the group valuable beyond their genetic contributions.⁴⁴⁵

The propensity of males toward recklessness has its costs. For example, in 1981 males accounted for 87.3% of all arrests for murder and nonnegligent manslaughter.⁴⁴⁶ Of the total number of all such homicide arrests, 34.1% were of males eighteen to twenty-four years old.⁴⁴⁷ Similarly, 92.8% of all armed robbery arrests were of males, and 42.5% of those total arrests were of males aged eighteen to twenty-four.⁴⁴⁸ Of all arrests for drunkenness, 92.1% were of males, and 28.9% of the total were males of the eighteen to twenty-four age group.⁴⁴⁹

The principle involved in *Craig* is similar to that involved in *Manhart*.⁴⁵⁰ Both cases required the prediction of future events that were not presently measurable. A showing that substantial differences exist between the groups in the trait under consideration should at least create a presumption that the classification is legitimate.

The opinion in *Craig* shows the failure of the members of the majority to appreciate the tradeoffs involved in striking down "discriminatory" legislation. The majority perceived as somehow unfair the fact that all eighteen- to twenty-year-old males were prevented from buying alcohol merely because two percent of the group had been arrested for driving under the influence.⁴⁵¹ A state is perfectly free, however, to apply a twenty-one-year age limit to both sexes and thereby treat females worse than they were treated before, despite the fact that their arrest rate is less than ten percent that of males. Who ever said equality was fair?

D. Female Flight Attendants: The Diaz Case

One of the early cases dealing with the bona fide occupational qualification (BFOQ) exception to title VII of the Civil Rights Act of 1964⁴⁵² was *Diaz v. Pan American World Airways, Inc.*⁴⁵³ In *Diaz* the Fifth Circuit Court of Appeals held impermissible an airline's practice of hiring only

444. See *id.* at 199-201.

445. D. BARASH, *supra* note 32, at 73.

446. STATISTICAL ABSTRACT, *supra* note 10, at 182.

447. *Id.*

448. *Id.*

449. *Id.*

450. 435 U.S. 702 (1978); see *supra* notes 344-69 and accompanying text.

451. 429 U.S. at 199-204.

452. 42 U.S.C. § 2000e-2(e)(1) (1976 & Supp. V 1981).

453. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

women as flight attendants, despite the existence of rational reasons for the practice.⁴⁵⁴

Pan American World Airways, Inc. (Pan Am), had hired males as cabin attendants from the late 1920s until 1965. Early in the airline's history cabin attendants also acted as baggage handlers and were responsible for mooring the company's seaplanes at docks in Latin America. At that time all of the attendants were male. Following World War II, with improvements in Latin American airfields that permitted landings on land instead of sea, as well as a decline in the use of cabin attendants as baggage handlers, Pan Am began hiring women as well as men for the positions. By 1959 Pan Am had determined that the overall level of service provided by the women flight attendants was superior to that provided by men. Although the men were as competent as the women in the mechanical functions, such as storing coats and serving food, they were not as good as the women at the nonmechanical duties, which consisted of providing reassurance to anxious passengers and making the flight as pleasurable as possible. These nonmechanical duties had by then assumed a position of high importance to the airline. Pan Am managers had also concluded on the basis of experience that passengers of both sexes preferred female attendants.

Following passage of title VII,⁴⁵⁵ Pan Am conducted a study in order to ensure that it was not in violation of the statute. The study found that the overwhelming majority of passengers of both sexes preferred female flight attendants. In 1965 Pan Am limited the position of flight attendant to women.

In 1967 Celio Diaz applied to Pan Am for a position as flight attendant, but was rejected because of the women-only hiring policy. He then filed a class action suit charging that the airline's policy violated title VII. The parties stipulated that Pan Am's practice was illegal unless sex constituted a BFOQ. On that point Pan Am presented expert testimony to justify its practice. Psychiatrist Eric Berne testified for Pan Am that an airline cabin is a unique environment that creates three typical emotional states: apprehension, boredom, and excitement. Of the three, apprehension is the most important factor with which the airline must deal. Berne also testified that passengers of both sexes would respond better to the presence of females than to males.⁴⁵⁶ The trial court found the testimony to be persuasive and stated that it found "not only that under the conditions of modern air travel most Pan Am passengers do in fact prefer female stewardesses to male stewards, but also that there are basic psychological reasons which explain that preference."⁴⁵⁷

Pan Am presented testimony concerning the difficulties of determining in advance whether individual applicants had the personal qualifications

454. *Id.* at 389.

455. 42 U.S.C. § 2000e-2(e)(1) (1976 & Supp. V 1981).

456. 311 F. Supp. at 565.

457. *Id.* at 566.

conducive to the optimal performance of the flight attendant's function. An industrial psychologist testified that a high level of job performance required "sincere interest and motivation in providing for the comfort and ease of others in the working environment of that position."⁴⁵⁸ He also testified that the aggregate of separate personality traits that produces this interest and motivation constitutes what is commonly described as femininity. Although some men possess more of these qualities, such as benevolence, interest in the comfort of others, and lack of perceived aggressiveness, than do some women, the psychologist stated that "it would be quite infrequent to find a man possessing each of these traits to at least as high a degree as the average woman."⁴⁵⁹ The psychologist also testified that making reliable determinations prior to employment is not possible using personality tests and that the best available method for determining whether a prospective employee is likely to have the desired traits is to use the person's sex as a decision criterion. He concluded that the elimination of sex as a qualification would eliminate the best available tool for screening out unsatisfactory applicants and would thus reduce the average performance level.⁴⁶⁰

The trial court concluded that sex constituted a BFOQ because identification during the hiring process of those few men who possessed the desired aggregate of personal characteristics was not "practically possible."⁴⁶¹ The court of appeals reversed, but accepted the factual findings of the trial court. The court held, however, that as a matter of law Pan Am's showing could not justify its discriminatory practices.⁴⁶² The court stated that the essence of Pan Am's business was the safe transportation of passengers from one place to another and that sex discrimination is valid only when the hiring of both sexes would undermine the essence of the business operation.⁴⁶³ The court further held that the impracticability of finding the few males who would perform well could not justify the discrimination unless the abilities that most women possess are necessary to the business and not merely tangential.⁴⁶⁴ The court of appeals was also unimpressed by Pan Am's showing of passenger preference. The court stated that allowing the validity of sex discrimination to be controlled by the preferences and prejudices of passengers would be anomalous,⁴⁶⁵ since the purpose of enacting title VII was largely to overcome these very prejudices.⁴⁶⁶

Assuming the correctness of the district court's findings, which the court of appeals did not declare clearly erroneous, application of an efficiency analysis would result in a contrary conclusion. The information costs are

458. *Id.* at 567.

459. *Id.*

460. *Id.*

461. *Id.* at 568.

462. 442 F.2d at 388.

463. *Id.*

464. *Id.* at 388-89.

465. *Id.* at 389.

466. *Id.*

considerably lower if sex, rather than any kind of individual personality test, is used. Moreover, the personality tests available to allow individual determinations were found to be unreliable. Even with a substantial increase in information costs, therefore, the value of the residual risk is not decreased; in fact, the value is increased since sex is a more reliable predictor of the existence of the desired traits than is a personality test. The use of sex as a decision criterion is highly efficient, because it results in not only lower information costs, but in a lower residual risk as well.

The incremental increase in efficiency of using sex as a decision criterion must be weighed against the hardship to the man in being barred completely from the position for which he may be qualified. Under the facts as given, the probability that he is in fact qualified is fairly low, which means that the value of moral risk that a qualified person will be rejected is also low. To the qualified applicant barred from employment, however, it matters little what the abstract probability is of his being qualified. Still, in such a case, the substantial gain in efficiency may well be sufficient justification for consideration of sex.

The final factor to be considered, which should perhaps logically be a threshold consideration, is the legitimacy of the desire for the trait sought. The court of appeals took a very narrow view of Pan Am's business: the provision of safe transportation.⁴⁶⁷ At a time when fares were regulated by the government, the only way for airlines to compete was in providing frills. One could argue that almost no qualification of flight attendants is necessary to the airline's primary function. The fact that the flight attendants ruined the food or had an unpleasant odor would not interfere with the ability of the airline to provide safe transportation from place to place. In reality, however, the goal of any business is to make a profit; the goods or services provided are merely means to that end. The question should be whether the employer's practice furthers its ability to make a profit, not whether it advances the employer's primary function as perceived by a judge.

Whether the court of appeals' decision was actually mandated by the language of title VII is highly questionable. Under title VII a person's sex must be reasonably necessary to the business's normal operation to constitute a BFOQ.⁴⁶⁸ The court apparently read the term "normal operation" to mean "primary function" and the phrase "reasonably necessary" to mean "absolutely necessary." Apparently, the court reasoned that if the primary function of the business could continue without the sex classification, then the classification was not acceptable.⁴⁶⁹

The court of appeals' view of the BFOQ in *Diaz* allows insufficient scope for entrepreneurial creativity. Competition within a particular in-

467. *Id.* at 388.

468. 42 U.S.C. § 2000e-2(e)(1) (1976 & Supp. V 1981).

469. 442 F.2d at 388 ("No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.").

dustry is often in terms of some service associated with, but not essential to, the primary function of the business, especially in heavily regulated industries where price competition is not permitted. Pan Am's decision was not the result of stereotypical thinking about the proper role of the sexes in our society; Pan Am had used men and found as an empirical fact that their job performance was inferior to that of women. Given the impracticability of individualized determinations and the employer's legitimate interest in maintaining a high level of job performance in its employees, Pan Am's rational business judgment should have been allowed to stand.

E. *Single-Sex Schools*

Perhaps one final example of disparate treatment deserves mention—single-sex schools. The United States has a long tradition of maintaining single-sex schools. That practice, however, has come under increasing attack.

The purpose here is not to argue that single-sex schools are desirable from an educational standpoint; it is sufficient to note that a respectable body of authority suggests that such schools are advantageous for some students. For example, a study by the Carnegie Commission on Higher Education reported that women who attend women's colleges have academic records superior to those of women who attend coeducational schools.⁴⁷⁰ Moreover, both men and women are more likely to drop out of college if they attend a coeducational institution.⁴⁷¹ Achievement after graduation also seems to be higher for women who attend women's colleges, since graduates of women's colleges constitute a disproportionately large number of entries in *Who's Who of American Women*.⁴⁷²

One educator provided two arguments for the maintenance of single-sex schools.⁴⁷³ The first argument is that pedagogical diversity better serves the variety of student needs.⁴⁷⁴ The second argument is that because socialization is different for males and females, full educational development of women may be fostered by single-sex schools.⁴⁷⁵ In a coeducational setting a young woman must moderate her academic achievements if she is to be successful in the competition with other young women for the attention of males. The latter argument may not provide support for the maintenance of all-male schools, in addition to all-female schools, but the former does. The position in favor of single-sex schools is less that males and females are different from one another than it is that they interact with

470. CARNEGIE COMMISSION ON HIGHER EDUCATION, OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION 72 (1973).

471. *Id.*

472. *Id.* at 73.

473. Letter from David B. Truman to Herma Hill Kay (Dec. 12, 1980) *quoted in* H. KAY, SEX-BASED DISCRIMINATION 803-04 (2d ed. 1981) (Dr. Truman was President of Mount Holyoke College from 1969 to 1978).

474. *Id.* at 805.

475. *Id.* at 804.

one another differently from the way they interact among themselves.⁴⁷⁶

The constitutional status of state-run single-sex schools is unsettled. The Supreme Court has never decided whether the constitutional ban on separate-but-equal schools applies to sex as it does to race. In *Vorchheimer v. School District*⁴⁷⁷ the Court was faced with this question, but could not agree on an answer. The lower court's decision was affirmed by an equally divided Court without opinion.⁴⁷⁸ The Court of Appeals for the Third Circuit had framed the question as follows: "Do the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"⁴⁷⁹ The court answered in the negative.⁴⁸⁰

The female plaintiff in *Vorchheimer* challenged the system of public schools provided by the Philadelphia School District. The school district provided four kinds of high schools: academic, comprehensive, technical, and magnet. The academic high schools had high admissions standards and offered only college preparatory courses. Only two such schools existed in the city—Central High School for boys and Girls High School for girls. Central High School refused to admit the plaintiff solely because of her sex. The schools for boys and girls were comparable in quality, academic standing, and prestige, and the plaintiff submitted no factual evidence to show that attendance at Girls High would constitute psychological or other injury. Instead, she merely did not like the impression the school gave her. The court of appeals characterized the injury as a deprivation "of the opportunity to attend a specific school, not that of an opportunity to obtain an education at a school with comparable academic facilities, faculty and prestige."⁴⁸¹

The court rejected the applicability of the holding of *Brown v. Board of Education*⁴⁸² that "separate but equal" is "inherently unequal" and stated that "[w]e are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law."⁴⁸³ The court noted that the special emotional problems of adolescents have prompted some educational experts to prefer single-sex high schools.⁴⁸⁴ The court, quoting from *Williams v. McNair*,⁴⁸⁵ concluded that the Constitution does not require that sexual distinctions conform to educational opinion, but only that "the discrimination not be wholly wanting in reason."⁴⁸⁶

476. A. ASTIN, *FOUR CRITICAL YEARS* 232 (1977).

477. 430 U.S. 703 (1977).

478. *Id.* at 703.

479. 532 F.2d 880, 881 (3d Cir. 1975).

480. *Id.*

481. *Id.* at 882-83.

482. 347 U.S. 483 (1954).

483. 532 F.2d at 886.

484. *Id.* at 887.

485. 316 F. Supp. 134, 137 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971).

486. 532 F.2d at 887.

The most recent Supreme Court pronouncement concerning single-sex schools occurred in *Mississippi University for Women v. Hogan*,⁴⁸⁷ in which the Court considered the question of whether a statute excluding males from a state-supported professional nursing school violates the equal protection clause of the fourteenth amendment.⁴⁸⁸ Although the plaintiff could have attended two other state-supported schools, the Court held that the allotment of more openings in state-supported nursing schools to women violated the fourteenth amendment.⁴⁸⁹ The Court somewhat curiously viewed the practice as discriminating against women rather than men because it reinforced the view that women should be nurses.⁴⁹⁰ The majority noted that in 1980 women received more than ninety-four percent of the baccalaureate degrees conferred in nursing nationwide.⁴⁹¹ The suggestion that perhaps it would have been permissible for the state to provide an all-female nursing school if it also provided an all-male nursing school is absurd. Clearly, to provide the same option to men would not have been practical, considering the low demand among males for positions in nursing schools. The majority also rejected the dissent's suggestion that the system was justified because it served the objective of providing women a choice of educational environments.⁴⁹²

The impact of the case is not clear. The majority stated that because Mississippi maintained no other single-sex public university or college, the Court was not faced with the question of whether states can provide separate but equal undergraduate institutions for males and females.⁴⁹³ Justice Powell, on the other hand, found broader implications in the decision and stated in dissent that the majority had held, in essence, that no state may provide any institution of higher education that is open only to women students.⁴⁹⁴

I. A Digression on Race and Sex

Much of the debate over separate but equal schooling relies on principles established in the area of racial discrimination.⁴⁹⁵ Attempts to analo-

487. 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).

488. *Id.* at 3334, 73 L. Ed. 2d at 1095.

489. *Id.* at 3339, 73 L. Ed. 2d at 1101-02. To some the question of the propriety of single-sex education appears to be merely a question of whose ox is gored. For example, one commentator argued: "The Court is to be commended for giving MUW's program a hard look, but a more deferential posture might be appropriate when considering women's schools which more effectively advance the best interests of women." Comment, *Challenge to Single-Sex Schools Under Equal Protection: Mississippi University for Women v. Hogan*, 6 HARV. WOMEN'S L.J. 163, 174 (1983). She also wrote that "there may be an important role to play for feminist education which empowers women students by challenging patriarchal values." *Id.*

490. 102 S. Ct. at 3339, 73 L. Ed. 2d at 1101-02.

491. *Id.* at 3339 n.14, 73 L. Ed. 2d at 1101 n.14.

492. *Id.* at 3340 n.17, 73 L. Ed. 2d at 1103 n.17.

493. *Id.* at 3334 n.1, 73 L. Ed. 2d at 1095 n.1.

494. *Id.* at 3342, 73 L. Ed. 2d at 1105 (Powell, J., dissenting).

495. See, e.g., *Vorchheimer v. School Dist.*, 532 F.2d 880, 888 (3d Cir. 1975) (Gibbons, J., dissenting). For a more extended discussion of the differences between race and sex in the constitutional context, see Rutherglen, *supra* note 302, at 205-12.

gize from race to sex, however, are generally unpersuasive. Those who make such attempts risk contradiction on the separate-but-equal principle. In the educational arena, they oppose separate but equal treatment and argue that such treatment is as invidious with respect to sex as it is with respect to race.⁴⁹⁶ Yet, when opponents of the ERA raise the specter of the necessity for "unisex" bathrooms to avoid establishing a twentieth-century counterpart to *Plessy v. Ferguson*,⁴⁹⁷ their concern is treated as trivial, and they are told that the ERA could coexist with separate public restrooms.⁴⁹⁸ Ruth Bader Ginsburg has stated that "[p]erhaps Congress found it hard to conceive of a plaintiff litigating the issue, or of a judge who would find man or woman harmed by that limited separation."⁴⁹⁹ Two comments are in order concerning Ginsburg's statement. First, in this litigious age the unavailability of a plaintiff to litigate the issue is difficult to conceive. Second, if the harm is viewed as a stigma and a reinforcement of traditional views that the sexes are different in important ways, the practice may well be enjoined.⁵⁰⁰

A proponent of the ERA has argued that the amendment would have to be balanced against the constitutional right to privacy, which would act as a limit on the sexual integration of restrooms.⁵⁰¹ As Paul Freund has pointed out, however, why the constitutional right to privacy would serve as a limit is not clear, when presumably the constitutional right to freedom of association, which has a longer history of recognition, would not do so.⁵⁰² If the constitutional right to privacy is the right not to be viewed in a

496. See Rutherglen, *supra* note 302, at 205-08.

497. 163 U.S. 537 (1896).

498. Ginsburg, *supra* note 326, at 175.

499. *Id.*

500. See Wasserstrom, *supra* note 299, at 594. Some relatively innocuous practices have been criticized on this basis. For example, one book on the subject of sex discrimination states, with respect to allowing a BFOQ defense for actors and actresses: "Insisting on same-sex portrayal merely perpetuates narrow sex role stereotypes and exaggerates [recognizes?] the differences between the sexes." B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 242 (1974).

Another argument used by some ERA opponents is that the amendment would mandate recognition of homosexual marriage. This argument is usually somewhat similarly dismissed. See Ramey, *Book Review*, 9 HASTINGS CONST. L.Q. 1011 (1982) (reviewing R. LEE, *A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT* (1980)). Only if the differences between sex and race are recognized, however, is this a weak argument. Although it might appear that the amendment deals only with sex and not with sexual preference, analogies to racial discrimination cases suggest that this interpretation is not correct. In *Loving v. Virginia*, 388 U.S. 1 (1966), the Supreme Court struck down a law that forbade whites from marrying nonwhites. The statute was nondiscriminatory in the sense that it applied alike to whites and nonwhites, but it was struck down on equal protection grounds. *Id.* at 11-12. If the analogy of race and sex is accepted, the same reasoning would apply to homosexual marriage. As Richard Wasserstrom has observed: "If a nonsexist society is a society in which one's sex is no more significant than eye color in our society today, then laws which require the persons who are being married to be of different sexes would clearly be sexist laws." Wasserstrom, *supra* note 299, at 606.

501. See Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 225, 229 (1971).

502. Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234, 240 (1971). Freund also questions whether prisoners could be segregated by sex. If sexual segregation is to protect privacy, he asks, why can't it be waived? *Id.* at 241.

state of undress by members of the opposite sex, why would opaque doors on bathroom stalls not suffice? Moreover, if the right to privacy argument is accepted, it follows that a state cannot constitutionally provide sexually integrated restrooms, regardless of whether there is an ERA. The state has absolutely no flexibility, for it must go to the brink of violating privacy rights in order to satisfy the strictures of the ERA; the state must go to the brink of violating rights under the ERA in order to satisfy the strictures of the constitutional right to privacy. Furthermore, why does one's right to privacy extend only to protection from being viewed by members of the opposite sex? Some people may object to sharing bathrooms even with members of the same sex, just as some object to sharing bathrooms with those of other races.

The answer is, of course, that race and sex are different.⁵⁰³ The analogy from race to sex is imperfect at best. A prevailing "heterosexual ethic"⁵⁰⁴ exists in our society for which there is no equivalent racial purity ethic. Even where the prevailing sentiment is racist, maintaining the separation of the races serves a function different from maintaining the separation of the sexes.

The primary reason that we view racially segregated restrooms as inherently immoral, while most of us have no such sentiment about sexually segregated restrooms, is that the ideological wellspring of the two practices is quite different. Richard Wasserstrom has observed that the underlying reason for racially segregated restrooms was that blacks were "dirty and impure," and, as a result, whites sought to ensure that blacks did not contaminate the bathrooms used by whites.⁵⁰⁵ He concluded, however, that the premise for sexually segregated bathrooms arose from the importance of preserving the mystery or forbiddenness relating to the genitalia of the opposite sex and the other sex's sexuality.⁵⁰⁶

This digression on restrooms has not been to predict how the "potty problem" would be resolved under the ERA. Instead, this discussion is to show the inappropriateness of an uncritical extension of principles developed in the field of racial discrimination to the field of sexual discrimination. Prior to any such extension, the reason that a particular practice is wrong in the racial area should be determined, and then the applicability of that rationale in the sexual area should be assessed. Under such an analysis, a different rule could be applied to racially segregated restrooms than is applied to sexually segregated restrooms.

How should a rule of sexually separate, but equal, schools fare? First, one must determine whether sexual segregation is practiced for the same reasons that racial segregation is. Racially segregated schools were maintained because of a belief that blacks were inferior to whites both intellec-

503. Rutherglen, *supra* note 302, at 211.

504. *See id.* at 206-07.

505. Wasserstrom, *supra* note 299, at 592.

506. *Id.* at 593-94.

tually and otherwise.⁵⁰⁷ Although arguably the same kind of belief may have played some role in the establishment of separate schools for the two sexes, apparently that is not the case today. Instead, it appears to be a sincere belief, probably correct, that at least some students will receive more from their educational experience if they attend single-sex schools—a reason that seems morally superior to the reason for racially segregated schools.⁵⁰⁸

One must remember, of course, that separate but equal has two components: separate and equal. A system that is separate and substantially unequal cannot be justified. Substantial equality should be required, but practical considerations require that identity not be required. Thus, the court in *Kirstein v. Rector & Visitors of the University of Virginia*⁵⁰⁹ correctly held that Virginia improperly limited the premier state university to males and provided no comparable alternative for females.⁵¹⁰

Imposition of a rule that the state is not permitted to maintain single-sex schools costs much in liberty and returns little in equality. This is particularly true when a state provides coeducational as well as single-sex schools, and each person has a choice of the kind of institution to attend. Those who desire single-sex schools are deprived of that option. Those who do not desire them would have been allowed to attend coeducational institutions anyway. Those who oppose single-sex schools under such circumstances are not challenging the way the state is making them live their own lives; they are challenging the way the state is permitting others to live theirs. A constitutional requirement of such conformity is an embarrassment to those who view the Constitution as a protector of liberty.⁵¹¹

VII. STATISTICAL PARITY AND PROPORTIONAL REPRESENTATION

A recognition of inherent differences between the sexes is critical in assessing attempts to achieve proportional representation, either by disparate impact analysis under title VII⁵¹² or by affirmative action programs.⁵¹³ In both cases the goal is statistical parity, and in both cases the desire for such parity is the result of the assumption that the sexes are not different in any significant respect. Many believe that deviations from proportional representation are necessarily the result of sex discrimination.⁵¹⁴ If 250 chief

507. See *Brown v. Board of Educ.*, 347 U.S. 483, 489-91 (1954).

508. See *supra* note 470 and accompanying text.

509. 309 F. Supp. 184 (E.D. Va. 1970).

510. *Id.* at 187.

511. Another threat to single-sex schools is presented by the case of *Bob Jones University v. United States*, 103 S. Ct. 2017, 74 L. Ed. 2d 157 (1983), in which the Supreme Court held that a school was not entitled to tax-exempt status unless it advanced the public policy of the United States. Consequently, the Court upheld an IRS decision stripping the school of its tax-exempt status because of its policy forbidding interracial dating and marriage. *Id.* at 2036, 74 L. Ed. 2d at 182. Presumably, the IRS is free to define single-sex schools as violative of public policy and deny them tax exemptions also.

512. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976 & Supp. V 1981).

513. See Exec. Order No. 11,246, 3 C.F.R. 492 (1981).

514. See F. MORRIS, *CURRENT TRENDS IN THE USE (AND MISUSE) OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION* 21-28 (2d ed. 1978).

executive officers of the Fortune 500 companies are not female, that is considered a reflection of sex discrimination. Such reasoning is erroneous, however. Disproportionate representation only indicates that selection has not been random with respect to sex, but it demonstrates nothing else.⁵¹⁵

Many courts have been somewhat reluctant, and rightly so, to conclude that mere deviations from proportional representation reflect discriminatory practices, because they recognize that other variables must be considered.⁵¹⁶ In this respect, much of the political discussion, including that surrounding the ERA debate, has been far less rigorous. If the sex differences described previously do exist, then even in the absence of any selection based upon sex an equilibrium sex ratio that may not be one-to-one would be expected in many occupations. For example, given male superiority in mathematics, the likelihood that fifty percent of mathematicians will be females is small. Also, attempts to reach a one-to-one proportion are as immoral as attempts to make mathematics a completely male profession.

Even though we recognize sex differences, we must retain tolerance for "cross-sex" achievement. Sex differences in achievement can be self-perpetuating in a rather insidious manner. Assume, for example, that the equilibrium ratio of male-to-female mathematicians is 80:20. That means that four male mathematicians will exist for every female mathematician. One could easily predict that mathematics would be perceived as a male profession and girls would tend to gravitate away from the occupation, even in the absence of steering by guidance counselors or pressure from friends and family. This result would be unfortunate both for girls whose major talent lies in that area and for society in general, which would fail to benefit from the girls' talent. Equally unfortunate, however, would be viewing a deviation from a 50:50 ratio as an affront to one of the sexes and imposing pressures on university mathematics departments to achieve such proportions. Mandating a 50:50 ratio based upon one misconceived view of reality is as wrong as mandating a 100:0 ratio based upon another such view.

In addition to differences in innate ability, differences in temperament will likewise have an impact on the distribution of the sexes in various occupations. The greater drive and aggressiveness, as well as differences in interest, of males will continue to result in a greater proportion of men in positions of political and economic power. The lesson of the kibbutz suggests that this will be so regardless of any sexually egalitarian philosophy we might adopt.⁵¹⁷ Even in the absence of discrimination, and independent of any notions about the proper role of the sexes, this disproportional-

515. See generally Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33 (discussing statistical methods of proof of employment discrimination).

516. *Id.* at 47-72.

517. See *supra* text accompanying notes 96-126.

ity will occur as it has in every known society, unless we are willing to allow the state to stifle these differences in the name of equality.

Conversely, because of the greater nurturance of women, women will probably continue to be the primary childrearers. We need not require this to be the case, but we need not require that it not be the case either. More women than men are willing to be full-time homemakers; more women than men are willing to work only part time. Women should be allowed to do so without any social opprobrium being attached to their being "just a housewife and mother." On the other hand, if the husband and wife choose to reverse the traditional roles and have the husband stay home with the children while the wife works, no reason exists not to tolerate that. That such a situation will be common, however, is unlikely because the pressure for the man to be the breadwinner is deep-rooted. A woman who goes out and earns a living is not considered "less of a woman," but a man who voluntarily stays home with the children throughout their school years might be considered "less of a man."

We should be no less tolerant of same-sex behavior than we are of cross-sex behavior, however. Society seems to have reached the point when a woman mathematician need not apologize for her station in life, but a housewife must. The freedom we accord members of society must extend as well to their choice of sex roles. In our zeal to become tolerant of what might at one time have been considered aberrant behavior, we must not look with scorn on more "normal" behavior. Freedom of choice entails the freedom to choose not to be "modern."

VIII. THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment is of central concern to the theme of this Article because it would constitute a constitutional proscription of the recognition of actual biologically based differences between men and women.⁵¹⁸ The amendment reflects an elevation of a particular conception of equality to a position where that conception is *the* fundamental goal. Whenever any value becomes so idolized that other values need not be considered in the making of policy, we should consider whether we are proceeding along the proper course.⁵¹⁹

518. Section 1 of the ERA provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." S.J. Res. 8, 92d Cong., 1st Sess. (1971); H.R.J. Res. 208, 92d Cong., 1st Sess. (1971).

519. As will become apparent, this author does not share Professor Leo Kanowitz's view that opponents of the ERA are either closed-minded or stupid. Kanowitz has written:

These, then, are the bases for some of the principal substantive objections to the Amendment. Whether the objections are based on major or minor considerations, there are, as I have tried to demonstrate, principled, logical, and dispositive answers that can be and often have been brought to bear by the Amendment's supporters. Those answers, unfortunately, have not always been communicated, partly because many ERA opponents have refused "to be confused by the facts." Others, though willing to listen, have often found it hard to understand because of the complexities and legal technicalities that are unavoidably involved in those answers.

Kanowitz, *The ERA: The Task Ahead*, 6 HASTINGS CONST. L.Q. 637, 651 (1979).

A. Of What Use Is the ERA?

Proponents of the ERA tend to be vague on the question of what the amendment will achieve that cannot be, or has not already been, achieved under existing interpretations of the fourteenth amendment.⁵²⁰ Published works on the subject seem to devote as much ink to ridiculing nineteenth century cases that have long since been overruled, or to taking Blackstone to task for his description of the unity of the husband and wife, as they do to discussing issues of current concern.⁵²¹ Many writers support passage of the ERA as a necessary symbol of sexual equality.⁵²² One might question, however, whether the fundamental charter of our nation should be altered to provide a pat on the back to any segment of society, however large.⁵²³ One book has described the amendment as "an invitation for new values to enter the social arena."⁵²⁴ The Constitution should not be amended, however, to invite new values; rather, it should be amended only to reflect new values. The authors who wish to invite these new values also appear to view the ERA as a tool of consciousness raising.⁵²⁵ They have stated that "[t]here is a multitude [of women] only vaguely aware of discrimination who would, if queried, question the legitimacy of the demand for equality. A constitutional amendment based on the fact of discrimination gives credibility to the need for equality and legitimacy to the demand."⁵²⁶ Yet, a constitutional amendment cannot be justified as a pedagogical tool to convince the masses that they are oppressed. If women are oppressed to such an extent that they need constitutional protection, one would think that they would already know of the oppression even in the absence of a constitutional amendment to prove it to them.

A report of the United States Commission on Civil Rights is illustrative of the claims of the proponents of the ERA.⁵²⁷ The Commission has claimed that women continue to be discriminated against in the labor force and that the ERA will "close loopholes in antidiscrimination laws."⁵²⁸ In support of this proposition, the report runs through the obligatory litany of

520. U.S. CONST. amend. XIV.

521. See, e.g., Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19, 21 (1978).

522. See, e.g., Ramey, *supra* note 500, at 1024 ("never was a symbol of the nation's commitment to women's equality more sorely needed than it is now").

523. Thomas Sowell has observed:

One of the real problems in talking about the Equal Rights Amendment in any rational way is that to many it appears as a sort of referendum on the ultimate worth of women. I think that is unfortunate because it is hard enough to formulate social decisions with which society can live without also treating this decision as some sort of measure of the ultimate worth of one-half of the human race.

Sowell, *Status Versus Behavior*, 1979 WASH. U.L.Q. 179, 188.

524. WOMEN'S RIGHTS, *supra* note 311, at 10.

525. *Id.* at 11.

526. *Id.*

527. U.S. COMM'N ON CIVIL RIGHTS, THE EQUAL RIGHTS AMENDMENT: GUARANTEEING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION (1981) [hereinafter cited as GUARANTEEING EQUAL RIGHTS].

528. *Id.* at 6.

oppressive laws of the nineteenth and early twentieth centuries.⁵²⁹ Thereafter, it proceeds to report on presently existing discriminatory state statutes, such as an Ohio statute that prohibits women from being, inter alia, gas or electric meter readers, bellhops, and bowling alley pinsetters.⁵³⁰ Such examples of antiquated, and no doubt unenforced, statutes are in no sense persuasive on, or even relevant to, the question of the need for the ERA. The above-described Ohio statute is undoubtedly unconstitutional under present interpretation of the fourteenth amendment. Moreover, the same Ohio legislature that ratified the ERA⁵³¹ could repeal the statute; the need for a constitutional amendment is unclear.

The central question in determining the need for the ERA is: What laws, constitutional under present standards, would be unconstitutional under the ERA? Proponents of the ERA can point to few. A subsidiary question is: Which laws identified under the first question are not amenable to legislative change? The Civil Rights Commission report identified what its authors perceived to be flaws in the social security system and the Employee Retirement Income Security Act (ERISA).⁵³² The Commission did not explain why Congress, which approved the ERA by the constitutionally necessary two-thirds majority and extended the ratification deadline, could not simply amend the legislation that supposedly violates the amendment that it favors. How the failure of the state legislatures to ratify the ERA in any way restricts Congress's ability to get its own house in order is difficult to understand.

The report also pointed to the fact, which has become a mindless slogan, that employed women receive, on the average, only fifty-nine cents for every dollar earned by a man.⁵³³ The report fails to reveal, however, how the ERA will do more than title VII⁵³⁴ or the Equal Pay Act⁵³⁵ to remedy this situation. Moreover, the ERA would affect only government employees since, it restricts only governmental action. The only real, substantive change predicted in this area is the unavailability to a governmental employer of the BFOQ defense under title VII.⁵³⁶ The desirability of this goal is highly questionable, but, in any event, given the narrow interpretation of the defense by the courts, the elimination of the defense would have

529. *Id.* at 6-7.

530. *Id.* at 7 n.41.

531. Ohio ratified the Equal Rights Amendment on Feb. 7, 1974. Const. amends. 14 to end U.S.C.A. note at 520 (West Supp. 1983).

532. GUARANTEEING EQUAL RIGHTS, *supra* note 527, at 14-17.

533. *Id.* at 7. The disparity between the wages of men and women is not solely, or probably even primarily, a result of sex discrimination. Women between the ages of twenty-five and fifty-nine are eleven times more likely than men to leave the job market. G. GILDER, WEALTH AND POVERTY 130 (1981). Moreover, the average woman spends only eight months at a particular job, while the average man spends three years. *Id.* In an age when an increasing number of housewives are entering the job market for the first time, one would expect a decrease in the ratio of female wages to male wages, which is precisely what is observed.

534. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976 & Supp. V 1981).

535. 29 U.S.C. § 206(d) (1982).

536. GUARANTEEING EQUAL RIGHTS, *supra* note 527, at 9.

only a very limited effect.⁵³⁷

The Commission's report also described antiquated laws reflecting discriminatory common law concepts about ownership, possession, and control of marital property.⁵³⁸ Again, virtually all the laws described have either been struck down already or clearly would be invalidated under existing precedents. The report also discussed the economic plight of displaced homemakers, including the failure of the social security system to recognize the value of work in the home.⁵³⁹ No explanation of how the ERA would change this state of affairs is given, other than to suggest that it would "provide a constitutional basis for urging recognition of the value of the homemaker's contribution to a marriage."⁵⁴⁰ The report failed to explain why a constitutional basis is required to enable Congress to act in an area in which it is already constitutionally empowered to act.

That the ERA would result in few changes that would legitimately advance the position of women is sufficient reason to oppose it. A more compelling reason is that the amendment would probably lead to results that are affirmatively harmful. Three areas where the ERA is likely to produce unfortunate consequences have been discussed earlier in this Article: women in combat,⁵⁴¹ sex-segregated schools,⁵⁴² and the maternal preference.⁵⁴³

A tendency for advocates of the ERA to "waffle" on the question of its applicability to the military has been noted.⁵⁴⁴ A more appropriate word would be "obfuscate." For example, both Martha Griffiths⁵⁴⁵ and Birch Bayh⁵⁴⁶ have stated that once in the military women, as well as men, would go where they were ordered. Such statements are disingenuous, to say the least, and do not address the real question: Would a policy prohibiting the assignment of women to combat positions pass constitutional muster? The bulk of the commentary, including that of both opponents and proponents of the ERA, suggests that such a policy would be invalid.⁵⁴⁷ To many the answer to this one question is sufficient reason to oppose the amendment.

Sex-segregated public schools would almost certainly not survive the ERA, if indeed they can survive under current constitutional interpreta-

537. *See* *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) ("the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex").

538. GUARANTEEING EQUAL RIGHTS, *supra* note 527, at 9.

539. *Id.* at 12-14.

540. *Id.* at 16.

541. *See supra* notes 370-415 and accompanying text.

542. *See supra* notes 470-511 and accompanying text.

543. *See supra* notes 416-28 and accompanying text.

544. SEX DISCRIMINATION AND THE LAW, *supra* note 500, at 166.

545. S. REP. NO. 689, 92d Cong., 2d Sess. 13 (1972) (statement of Sen. Griffiths).

546. 118 CONG. REC. S4390 (daily ed. Mar. 21, 1972) (statement of Sen. Bayh).

547. *See* R. LEE, *supra* note 400, at 55; SEX DISCRIMINATION AND THE LAW, *supra* note 500, at 163; WOMEN'S RIGHTS, *supra* note 311, at 2; Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1537 (1973).

tion.⁵⁴⁸ It is unfortunate that this aspect of educational diversity must be crushed beneath the jackboots of a blind conformity.

The maternal preference may survive, although it may be driven underground. In most jurisdictions the preference is not statutory, but is applied by courts to serve the best interests of the child.⁵⁴⁹ Because of the number of intangible factors involved in awarding custody, judges could, and probably would, continue to apply the preference, even if only subconsciously. Even under the ERA common-sense intuition may die hard.

A recurrent theme of ERA proponents is that the uncertainty occasioned by its passage is not a cause for concern, because courts are responsible enough to interpret it flexibly.⁵⁵⁰ William Van Alstyne has argued that state legislators who are reasonably familiar with the Supreme Court's flexible interpretations of other constitutional amendments should not be concerned that the ERA would be interpreted more rigidly and without common sense.⁵⁵¹ At the time of that writing, Professor Van Alstyne did not have the benefit of the Court's opinion in *Plyler v. Doe*,⁵⁵² which held that the equal protection clause prevented a state from withholding a free public education from illegal aliens.⁵⁵³

The ERA is not the panacea for all of society's ills that some believe it to be. The ERA will redress few instances of genuine sex discrimination. Life without the ERA may not be perfect, but life with the ERA will be more imperfect. Many of the benefits claimed for the amendment will not occur; many of the changes will be affirmatively harmful. Perhaps there is no more fitting way to end this section than with a fairy tale by Professor Leo Kanowitz about what the world will look like after the ratification of the ERA:

[W]e can look forward with some confidence to the creation of a truly sex-neutral society in our country that will inspire the rest of the world; a society in which the original promise of America's greatness will have come much closer to fulfillment; a society in which, because of the demonstrated relationship between rigid sex role stratification and the tendency toward human aggression, family relations will be improved, crime and delinquency diminished, and violent solutions to disputes between nations less likely to be sought.⁵⁵⁴

And we will live happily ever after.

548. See *supra* notes 470-511 and accompanying text.

549. See *supra* notes 416-28 and accompanying text.

550. Ginsburg, *supra* note 521, at 22.

551. Van Alstyne, *The Proposed Twenty-Seventh Amendment: A Brief, Supportive Comment*, 1979 WASH. U.L.Q. 189, 203.

552. 457 U.S. 202 (1982).

553. *Id.* at 230.

554. Kanowitz, *supra* note 519, at 662 (footnote omitted); see also W. SHAKESPEARE, *THE TEMPEST* (Act V, scene i, lines 181-84):

O wonder!

How many goodly creatures are there here!

How beauteous mankind is!

O brave new world,

That has such people in't.

B. The Standard of Review Under the ERA

Four standards of judicial review of sex classifications are potentially applicable under the ERA.⁵⁵⁵ The first, and least likely, is that the standard of review will remain the same as it is today. Under the current standard a sex classification is permissible if the state meets its burden of showing that the classification is substantially related to an important governmental interest.⁵⁵⁶ The next possible level of scrutiny is "strict scrutiny"—the same standard that is now applied to racial classifications.⁵⁵⁷ The effect of this standard would be to declare sex a "suspect class," so that for a sex classification to survive the state would have to show that it furthers a compelling state interest. The third possible standard is the oxymoronic "qualified absolute," under which only two kinds of classifications may survive: classifications necessary to safeguard other constitutional rights, such as the right to privacy; and classifications relating to physical characteristics unique to one sex, such as laws regulating wet nurses and sperm donors.⁵⁵⁸ The final possible standard of review might be called the "absolute absolute"—that is, no classification based upon sex may ever survive. The difference between the third and fourth standards is insignificant, because every constitutional guarantee must be viewed in the context of the rest of the Constitution, and whether laws regulating wet nurses and sperm donors are really sex classifications is questionable.⁵⁵⁹

Almost all the commentary on the ERA predicts the adoption of the qualified absolute standard.⁵⁶⁰ This prognosis may, however, be viewed as an attempt to create a self-fulfilling prophecy. If enough commentators predict the qualified-absolute standard, that cannot help but have an impact on later interpretation. The qualified absolute standard is Draconian. Under that standard, "[t]he issue . . . cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor."⁵⁶¹ In other words, sex classifications should always be regarded as unreasonable, "except where the law pertains to a unique physical characteristic of one sex."⁵⁶²

The single-mindedness of the most vocal proponents of the ERA is illus-

555. See R. LEE, *supra* note 400, at 40.

556. Craig v. Boren, 429 U.S. 190, 197 (1976).

557. See Regents of the Univ. of California v. Bakke, 438 U.S. 265, 279 (1978).

558. See WOMEN'S RIGHTS, *supra* note 311, at 15-16.

559. Cf. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (exclusion of pregnancy benefits from state disability insurance system was not "based upon gender as such").

560. See generally CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, A COMMENTARY ON THE EFFECT OF THE EQUAL RIGHTS AMENDMENT ON STATE LAWS AND INSTITUTIONS 4-21 (1975) (discussing standards of review).

561. *Constitutional Basis*, *supra* note 312, at 892. Not surprisingly, however, affirmative action will survive: "As in racial desegregation cases, such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against." *Id.* at 904.

562. Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 225, 229 (1971).

trated by what has been called "the leading commentary"⁵⁶³ on the amendment. The authors argued that the strict scrutiny test is inadequate because it permits some sex-based classifications to survive, since the government may justify even a suspect classification by showing a compelling state interest.⁵⁶⁴ To allow countervailing interests to limit the amendment's reach would, they asserted, "contradict its basic premises."⁵⁶⁵

The elevation of sexual equality to a position where no other values are to be balanced against it bodes ill for our society. When equality becomes a categorical imperative, thus presenting an action "as of itself objectively necessary, without regard to any other end,"⁵⁶⁶ then it must be pursued no matter what the price in liberty, justice, or efficiency. Are we, as a society, really willing to declare that we value nothing so highly that it may not be sacrificed at the altar of sexual equality?

Michael Novak has observed that the spiritual core of a genuinely pluralistic society is left empty by design.⁵⁶⁷ Individual members are therefore free to seek what they wish, and the diversity of desires ensures that no single central value is socially imposed. If we desire a society in which different ideals and values may coexist, we must not declare any one idea primary. Unrestrained egalitarianism can lead only to totalitarianism, just as unrestrained libertarianism can lead only to anarchy.

Isaiah Berlin has pointed out that only in a world where ends collide and there is no total acceptance of any one end is political philosophy even possible.⁵⁶⁸ Where one goal is supreme, debate is possible only over means and not ends. Berlin warns eloquently that the apotheosis of any single value presents significant dangers because it leads to the conclusion that all positive values must be compatible, or even entail one another.⁵⁶⁹ The world in which we live, however, presents us with choices between equally ultimate, but conflicting, ends, and precisely for that reason we accord such importance to freedom of choice. We must not be swept away by the appealing notion that because some amount of equality is good, a greater amount is necessarily better. We must not be captured by the belief that we should purchase equality at any price. We must, however, hold fast to the idea that equality is a value to be pursued, while at the same time recognizing that it is but one of many positive ideals whose realization we seek.

The tradeoffs presented by the ERA are seldom mentioned and perhaps seldom recognized. One can easily fall into the trap of viewing any impediment to the exercise of governmental power as inherently good and, there-

563. Ginsburg, *supra* note 326, at 173.

564. *Constitutional Basis*, *supra* note 312, at 880.

565. *Id.* at 890-91.

566. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 36 (1969).

567. M. NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM 53 (1982).

568. Berlin, *Does Political Theory Still Exist?*, in CONCEPTS AND CATEGORIES 143, 143-72 (H. Hardy ed. 1979).

569. See Berlin, *Two Concepts of Liberty*, in I. BERLIN, FOUR ESSAYS ON LIBERTY 118, 167-68 (1969).

fore, as something to be sought. The ERA is thus often viewed as a boon to personal liberty.⁵⁷⁰ The amendment is not the benefit that some imagine, however. It would severely restrict the power of government to classify on the basis of sex, but it would not inevitably enhance personal liberty. The amendment would prevent a majority of the population from seeking the realization of its views as to what constitutes wise policy in favor of the views of a minority. This result is not necessarily bad, but it is not necessarily good, either. "Discrete and insular minorities" often need just such protection from the oppression of the majority, but a group that constitutes fifty-one percent of the population is hardly such a minority.⁵⁷¹

The ERA would prevent a majority of the population, acting through its elected representatives, from deciding to provide the option of single-sex public schools, so that students would be permitted to choose whether to attend a coeducational or a single-sex school. Prohibition of such a system serves no easily identifiable liberty interest. A majority, which may desire such a system, is frustrated; students who desire single-sex schools are denied that option; those who did not want to attend single-sex schools would have had the option of attending coeducational institutions in any event. Benefits accrue only to the intolerant—those who believe that their views should be the standard by which others live their lives. The tradeoff is, therefore, one of liberty for a particular conception of equality. In a given instance the tradeoff may be deemed acceptable, but under a constitutional amendment the tradeoff is not one that may be accepted or rejected on a case-by-case basis. Instead, the tradeoff is established in advance, before the individual question is even raised. As Rex Lee has observed, "[a] constitutional amendment, very simply, is not a fine-tuning instrument. It has more the qualities of a sledge hammer."⁵⁷²

The notion that scrutiny of sex classifications should be more intense than, or even as intense as, racial classifications is counter to intuition and to reason. Racial classifications should be presumptively more, rather than less, suspect, as there are few, if any, racial traits upon which governmental decisions might legitimately be based. Moreover, such classifications often should not stand even if justified by an efficiency analysis, because of the significant likelihood of perpetuating the effects of past racial discrimination. An adequate answer has yet to be provided to the question of why sex classifications are more immoral than race classifications; why sexually

570. See, e.g., WOMEN'S RIGHTS, *supra* note 311, at 10 ("The matter of simple justice, the matter of equal rights, the matter of individual freedom take precedence over all other social values because they are so basic.") That statement illustrates Berlin's description of the belief that all positive values are compatible or even entail one another. See Berlin, *supra* note 569, at 168.

571. As of 1980 females constituted 51.4% of the population of the United States. STATISTICAL ABSTRACT, *supra* note 10, at 26.

572. R. LEE, *supra* note 400, at 85. Thomas Sowell makes the same point as follows: "Another of the consequences of this system is that social issues are dealt with not in terms of policies that are adjustable incrementally according to situations, but according to rights; that is, rigidities that apply categorically over very broad areas, regardless of the individual circumstances." Sowell, *supra* note 523, at 182.

segregated public schools are less moral than racially segregated public schools; why it is more moral to have a racially segregated military than a sexually segregated military. Even if the reader is not convinced that innate differences between the sexes exist, he must conclude that the jury is still out, because a very large and respectable body of evidence suggests that those differences do exist. One might then question whether an appropriate solution is to foreclose by a constitutional amendment the ultimate resolution of that question in favor of the answer that such differences do exist and the government may recognize them.

C. *The Appropriate Standard for Sex Classifications*

As unexciting as the position may seem, the standard used by the courts to decide questions of sex classifications is probably correct, even if the results they reach in particular cases are not. A rational basis standard, under which a classification will survive scrutiny if it is rationally related to a legitimate governmental interest, is too permissive. Few statutes, even those struck down under a rational basis standard, actually have no rational basis. For example, the statute invalidated in *Reed v. Reed*,⁵⁷³ under which a husband had an absolute preference over the wife to be administrator of a deceased child's estate, was not irrational. More men than women have experience in business matters. Even if that were not so, a rule that men have an absolute preference, or that women have an absolute preference, or even that persons with the most letters in their middle names have an absolute preference, is not irrational, though it may be arbitrary. Such a statute is rational because it obviates the necessity of holding a hearing on the issue of who becomes administrator. The Supreme Court was correct in striking down the law, but not because the law was irrational; the statute deserved to be struck down because the incremental saving to the government was not sufficient to justify denying women as a class the opportunity to be administrators.⁵⁷⁴

The current test properly imposes the burden on the state to justify a challenged classification.⁵⁷⁵ Such a burden is necessary to ensure that sex classifications are the product of thought and not merely habit. A presumption against sex classifications is needed to avoid an easy reliance on sex as a proxy for other traits. The states must be prepared to show that sex classifications are in fact better than other classifications that could be made. The author parts company with others on this issue and would allow considerations of efficiency and administrative convenience to be included in the decisionmaking calculus. Where strong enough, these considerations should be determinative.

Justice Rehnquist correctly noted in his dissent in *Craig v. Boren* that the standard's "substantial relationship" and "important state interest" terminology leaves much room for a judge's personal preferences to determine

573. 404 U.S. 71 (1971).

574. *Id.* at 77.

575. See *Craig v. Boren*, 429 U.S. 190, 199-200 (1976).

the outcome of a particular challenge.⁵⁷⁶ That insoluble problem can be avoided only by an absolute rule that sex classifications are either per se reasonable or per se unreasonable. What is lost in certainty and objectivity is gained in flexibility.

IX. ANDROGYNY, EQUALITY, AND LIBERTY

The extent to which some modern liberals are willing to sacrifice liberal values for the cause of equality is often surprising. A completely equal society can be achieved, if at all, only at tremendous social cost, and an unchecked egalitarianism can lead only to a common misery. Some may be willing to pay that price, but many do not realize that the price will be exacted.

Americans are proud of their liberal tradition of protecting freedom of expression, yet many appear willing to sacrifice even this value to achieve equality. For example, one commentator suggests that the Federal Communications Commission should include an evaluation of a television station's treatment of women in product advertising in its decision to renew a broadcast license.⁵⁷⁷ He argues that the solution to the problem of sex-role stereotyping can be supplied only by regulations that will "change the image of women in television commercials rather than air a controversy over what that image should be."⁵⁷⁸ Consequently, he concludes that the application of the fairness doctrine is not enough because that results in mere debate, rather than the government's imposition of the author's values.⁵⁷⁹

In a similar censorial vein, the United States Commission on Civil Rights has published a pamphlet that questions the ideological purity of some school textbooks.⁵⁸⁰ Among other things, the publication describes a history textbook that states that Asians "helped build the transcontinental railroads. They also worked as household servants or as waiters and laundrers."⁵⁸¹ Of course, the report did not, and could not dispute the truth of the statement. The point intended could only be that history should somehow be revised to reflect more modern values and ignore unpleasant or unfashionable realities. The report also described a pattern called "bootstrap," in which the impression is given that blacks can always succeed if

576. *Id.* at 221 (J. Rehnquist, dissenting).

577. Note, *Ring Around the Collar—Chain Around the Neck: A Proposal to Monitor Sex Role Stereotyping in Television Advertising*, 28 HASTINGS L.J. 149, 177 (1976).

578. *Id.* at 177; see also Ladimeji, *Flew and the Revival of Social Darwinism*, 49 PHILOSOPHY 97, 97 (1974) (freedom of speech "does not entail the freedom to proclaim on insufficient evidence the discovery of traits of racial inferiority in a social context of rising racial tension").

579. Freedom of association seems likewise in danger. See Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 324 (1983); Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 SW. U.L. REV. 237 (1982).

580. U.S. COMM'N ON CIVIL RIGHTS, CHARACTERS IN TEXTBOOKS: A REVIEW OF THE LITERATURE (1980) (hereinafter cited as CHARACTERS IN TEXTBOOKS).

581. *Id.* at 9 (quoting COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN, *How Books Distort the Asian American Image*, 7 CIBC BULL. 1, 3 (1976)).

only they are properly motivated and help themselves to get ahead.⁵⁸² The black characters were "told to work hard and maintain their ambitions in spite of prejudice."⁵⁸³ Major characters were shown to have overcome their problems through sheer perseverance. The message of the report appears to be that it would be preferable to impress upon minorities the pervasiveness of prejudice and the impossibility of their ever succeeding in this imperfect world. Surely, a more effective method of keeping minorities in a socially inferior position is difficult to imagine.⁵⁸⁴

The Civil Rights Commission pamphlet also reported that girls were usually shown as more passive and boys as more active.⁵⁸⁵ Furthermore, most scientists in the books were men.⁵⁸⁶ These observations highlight the difficulty of attempting to purify textbooks, because the question immediately arises of what the proper portrayal should be. Should it be an accurate portrayal of the current status of the depicted group, or should the book show what their status would be if they were proportionately represented in all aspects of life? The criticism of the former alternative is that it reinforces the results of past discrimination. The latter alternative is subject to the criticism that it inaccurately portrays reality and thus must reflect someone's subjective value judgment concerning the ideal situation. For example, what percentage of physicists should be portrayed as women? In 1980, 756 of 818 (92.4%) doctoral degrees in physics went to men.⁵⁸⁷ In textbooks should that percentage of physicists be men, or should only half of them be men? Or, should it be somewhere in between? Given sex differences in spatial and mathematical ability,⁵⁸⁸ half of all physicists will probably never be female, yet an underlying assumption of insisting on a 50:50 sex ratio in physicists depicted in textbooks is that in the absence of discrimination that ratio would obtain.

The call for reallocation of responsibility for childraising also inevitably presents tradeoffs that are not generally acknowledged. This call has two aspects: requiring greater participation by men and requiring greater participation by society—that is, government. Ruth Bader Ginsburg has written that "man must join woman at the center of family life, and government must step in to assist both of them during the years when they have small children."⁵⁸⁹ She complains that the burden of caring for the very young is imposed only upon parents, who are a relatively small part

582. CHARACTERS IN TEXTBOOKS, *supra* note 580, at 7.

583. *Id.*

584. Thomas Sowell has pointed out that the path to success of various ethnic groups has been through hard work. T. SOWELL, *ETHNIC AMERICA* 282-87 (1981). Similarly, George Gilder states: "The first principle is that in order to move up, the poor must not only work, they must work harder than the classes above them." G. GILDER, *supra* note 533, at 68. One would think that a person who desired an elevation of the social status of blacks would encourage industry instead of despair.

585. CHARACTERS IN TEXTBOOKS, *supra* note 580, at 10.

586. *Id.* at 11.

587. STATISTICAL ABSTRACT, *supra* note 10, at 167.

588. *See supra* notes 14-27 and accompanying text.

589. Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 34 (1975).

of society.⁵⁹⁰ Consequently, Ginsburg desires a more even distribution of childrearing burdens among parents, their employers, and taxpayers.⁵⁹¹ She does not acknowledge, however, that increased governmental participation will undoubtedly be accompanied by increased governmental regulation, nor does she reveal how men are to be compelled to do the "right thing."

Another writer has stated that "[t]he abdication of fatherly responsibility on any level can no longer be tolerated" and cited with approval the Cuban Family Code.⁵⁹² That code requires a father's participation in all aspects of family life, including childcare and housework.⁵⁹³ The father's duties are not abrogated by the fact that he may be the family's sole financial support. The writer did not analyze the status of civil liberties in Cuba.

Those who call for a reallocation of childrearing responsibilities are correct about one thing: freeing women from childrearing is a necessary condition for the kind of equality they seek. Where they err, however, is in assuming that such relief is a sufficient condition for emancipation. That position does not take into account the real differences between men and women and does not consider that the current allocation of childcare "burdens" may not be arbitrary.⁵⁹⁴

Alice Rossi has observed that attempts to reallocate childrearing responsibilities are inadequate because they neglect human characteristics that stem from our biological heritage.⁵⁹⁵ A program of sexual equality in marriage and the workplace cannot succeed unless these biosocial factors are acknowledged, and, if desired, compensated for. Unless these factors are confronted, the press for sexual equality will go the way of so many other failed social experiments. In a similar vein, Elizabeth Wolgast has argued that the ideal of equality can be achieved only through massive efforts at social conditioning aimed at producing androgynous creatures with similar roles and personalities.⁵⁹⁶ The assimilationist society that results will necessarily value uniformity over freedom and autonomy.

An egalitarian androgynous society is hardly in the interests of women, particularly if it retains a competitive capitalistic economy. Philosopher J.R. Lucas has insightfully observed that if we accept the proposition that men and women are biologically identical, then in most cases women, judged by male standards, will not be considered as good as their male rivals, and the results will be the depersonalization of both sexes.⁵⁹⁷ The obvious rejoinder is that the standards by which people are judged, if they

590. *Id.* at 40.

591. *Id.*

592. Scales, *supra* note 315, at 441 & n.341 (citing CUBAN LAW NO. 1289, arts. 26-27, 83, 85 (1975)).

593. *Id.*

594. *See supra* notes 96-126 and accompanying text.

595. Rossi, *A Biological Perspective on Parenting*, *supra* note 95, at 2.

596. E. WOLGAST, *supra* note 327, at 32.

597. Lucas, *Because You are a Woman*, 48 PHILOSOPHY 161, 171 (1973).

are to be judged at all, ought not to be male standards. Yet a complex capitalistic society in which drive and aggressiveness would not be rewarded is difficult to imagine. That does not mean that feminine traits are less important. No reason exists to believe that the aggressiveness of males has been any more important to mankind than the nurturance of females. Both became established in the species because they were adaptive. Moreover, no absolute standard is available to determine the value to be placed upon the two traits: Aggressiveness is superior in some contexts, and nurturance is in others. Female traits have been useful in the domestic sphere, and male traits have been useful in the extradomestic sphere. As a result, to the extent that male traits are still advantageous in the extradomestic sphere and that one's merit is assessed on the basis of achievement in that sphere, men will tend to continue to occupy positions of higher status.

An androgynous society is almost by definition not a free society. Some method by which to enforce the androgynous lifestyle must emerge.⁵⁹⁸ Unless ruthlessly suppressed, sex differences will continue to rear their (ugly?) heads. Many social institutions would be forced to change. For example, one author has advocated a radical change in athletics to elevate the status of female athletes.⁵⁹⁹ She recommends a change from a traditional model of sports that focuses on competition to one that emphasizes the joy of participation. The author therefore suggests a shift to such sports as "inner tube water polo," where the novelty of the inner tube creates a handicap to equalize the players' abilities.⁶⁰⁰

What should be done about sports whose results are influenced by traits in which the sexes differ? We are told "[w]e must shift our attention from what is different between men and women to what is similar. Where general differences between the sexes are still perceived, the valuing of these differences must be changed."⁶⁰¹ In other words, the importance of any trait in which the sexes differ must be diminished, not because of any inherent lack of value of the trait, but because attaching any significance to the trait will lead to inequality. For those who enjoy gymnastics, this must be seen as unfortunate. Men's gymnastics, emphasizing strength, and women's gymnastics, emphasizing grace, are two very different sports. One

598. E. WOLGAST, *supra* note 327, at 95. The author stated:

Speaking of him or her as if the sexes are the same will not convince us that they are. And if institutions and laws are made for a sexless species, they will obviously not fit the two-sexed one we belong to. Can we then insist that people accommodate their lives so that the difference of sex *will become* negligible? But that certainly is a Procrustean bed. To some the price of this "equality" will seem absurdly high.

Id. (emphasis in original).

599. Comment, *Women and Athletics: Toward a Physicality Perspective*, 5 HARV. WOMEN'S L.J. 121, 121 (1982).

600. This proposal is reminiscent of Kurt Vonnegut's story, *Harrison Bergeron*, in which strong people were forced to carry weights to make them equal to weaker people, and "mental handicap radios," which gave off periodic bursts of sound, were worn in the ears of the intelligent to prevent them from taking "unfair advantage of their brains." This equality was enforced by agents of the United States Handicapper General. Vonnegut, *Harrison Bergeron*, in K. VONNEGUT, *WELCOME TO THE MONKEY HOUSE* 7 (1968).

601. Comment, *supra* note 599, at 133.

cannot be terribly optimistic about what "androgynous gymnastics" will look like.

Not surprisingly, the fate of football is in serious question. The author advocating coed athletics acknowledged that there are biological obstacles to female achievement in sports such as football, which place a premium on physical strength.⁶⁰² She argues that these obstacles cast doubts on the merits of the game of football rather than on the athletic potential of women.⁶⁰³ This argument implies discriminatory impact analysis with a vengeance—a sport in which free competition between the sexes would lead to one sex's continually winning is foolish and should be abolished.

This rather ridiculous example is not uncharacteristic and is only one of many changes in the social fabric that would be required to achieve an assimilationist androgynous society. As long as equality is defined as "identity," stifling all real differences between the sexes will be necessary. As long as equality is viewed as the fundamental categorical imperative, no countervailing considerations will be permitted to counterbalance the egalitarian drive. We must recognize that equality has a certain value, but we must not forget that there are other values, equally fundamental, that should be considered. A society in which people are permitted to be different seems far superior to one in which they are compelled to be the same. An androgynous society may be achievable, but it will cost us tremendously in values we hold dear.

X. CONCLUSION

The purpose of this Article has not been to answer definitively the questions raised. Tens of thousands of pages have been devoted to the question of sex differences, and the precise contours of these differences are not yet known. Moreover, an acceptance of these differences leaves difficult legal and policy questions. The debate should continue over precisely what kinds of distinctions between the sexes are to be accepted and what kinds are not, but it should be an informed debate, rather than one that starts from the mistaken assumption that men and women are alike in all significant respects.

Those who favor the most expansive view of sexual equality have attempted to co-opt the fairness issue, and for the most part they have been successful. The moral high ground should not be ceded so readily. In many instances moral arguments can be made to counter those of the most ardent egalitarians. In policy questions involving equality, morality is seldom found exclusively on one side. An intelligent policy of sexual equality must take into account the natural differences between the sexes. The law, to be both fair and effective, cannot be based upon an erroneous view of human nature.

602. *Id.* at 133 n.47.

603. *Id.*