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IMPLEMENTING WASHINGTON'S ERA:
PROBLEMS WITH WHOLESALE
LEGISLATIVE REVISION

Linda H. Dybwad*

In November 1972, the people of the State of Washington approved an equal rights amendment to the Constitution of the State of Washington¹ which provides:

§ 1. Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.
§ 2. The Legislature shall have the power to enforce, by appropriate legislation, the provisions of this article.

Chapter 154 of the Washington Session Laws of the 1973 First Extraordinary Session² implements that constitutional amendment and represents an attempt by the Legislature to conform many of the state's statutes to the principles of equal rights between the sexes.

Chapter 154 amends 120 separate sections of the Revised Code of Washington and repeals four sections. Consequently, it spans a wide variety of topics that must be grouped at least roughly by subject matter in order to examine the potential effect of the equalization process. By far the greatest number of the revised statutes touch upon the marital or family relationship in some manner. These changes seek to equalize treatment of spouses by extending to the wife many rights formerly available only to the husband, as well as extending to husbands some benefits previously reserved only to wives. The wife is also now subject to several duties formerly imposed only on the husband. Some amendments remove restrictions on the employment of women;³

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3. Ch. 154, § 20, amending WASH. REV. CODE § 15.24.086 (1963); § 21, amending WASH. REV. CODE § 18.18.010 (Supp. 1972); § 60, amending WASH. REV. CODE § 41.08.040 (1963); § 80, amending WASH. REV. CODE § 43.22.160 (1963); § 81, amending WASH. REV. CODE § 43.22.170 (1963); § 82, amending WASH. REV. CODE § 43.22.260 (1963); § 83, amending WASH. REV. CODE § 43.22.270 (Supp. 1972); § 84, amending WASH. REV. CODE § 43.22.280 (1963); § 85, amending WASH. REV. CODE § 43.51.570 (1963); § 86, amending WASH. REV. CODE § 43.78.150 (1963); § 89, amending WASH. REV. CODE § 49.24.080 (1963); § 90, amending WASH. REV. CODE § 49.24.110 (1963);
others amend criminal laws concerning sex related crimes to include protection for men. All women are now members of the Washington State Militia and may receive military training at the University of Washington. The various amendments are susceptible of several general criticisms.

Some of the changes made by Chapter 154 are simply unnecessary. R.C.W. § 1.12.050 provides that "words importing the masculine gender may be extended to females also." In light of this general principle of statutory construction, it is difficult to believe that either the courts or the agencies responsible for the administration of the pre-revision statutes would have had difficulty reading the male pronouns to include females. Consequently, except for the psychological value of statutes drafted to be sex neutral, these amendments will have little impact.

Also, the drafters have failed to be consistent in the selection of words in the amending process. For instance, the word "widow" was often amended to "widow or widower," but in other revisions was changed to "surviving spouse." Such technical inconsistencies will make no practical difference in the interpretation of the law. However, to the reader of the entire bill, they convey an impression that the revisions were made mindlessly and mechanically—certainly a dangerous and unwise approach.

Most importantly, the revisions contained in Chapter 154 reflect a failure to recognize potential alternatives for legislative revision in the context of the equal rights amendment. There is no single way to effect equalization; benefits may be extended to the sex not previously

6. Thus, a change such as ch. 154. § 15. amending WASH. REV. CODE § 6.16.090 (1963) which states: "as used in this section the masculine shall apply also to the feminine," is completely unnecessary. Both the courts and the agencies responsible for administration of these laws would have no difficulty reading the masculine to include the feminine with or without the amendment.
8. See, e.g., ch. 154. § 78. amending WASH. REV. CODE § 41.44.170 (1963). Since the surviving spouse, in the absence of state authorized homosexual marriage, will be a widow or widower, there is probably no difference in result.

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covered or withdrawn entirely. A third possibility lies in examining the entire conceptual framework of a statute and reworking it to achieve equality by eliminating underlying sex role stereotypes.

This article will attempt to illustrate the legislative choices available in implementing the equal rights amendment by evaluating the many revisions contained in Chapter 154 in terms of equal rights principles and the policies underlying the criminal, family and employment provisions it amends.

I. THE EQUAL RIGHTS AMENDMENT

The equal rights amendment clearly establishes, as a principle of constitutional law, the inherent equality of males and females. It requires, therefore, that men and women be treated identically in terms of their legal rights and responsibilities. In the past men and women have often been treated differently by statute because large numbers of either sex share a certain characteristic. For instance, women generally are of smaller physical stature than men and in some historic contexts were unable to protect themselves from exploitation by employers. Hence, legislators protected women, as a group, by passing limitations on the weights they could be required to lift while employed. It is apparent that such statutes work a real hardship on individual members of the group who do not share the characteristic, for example the 200-pound woman, or the union of women that now has sufficient bargaining power to gain favorable treatment. In addition, as the overall characteristics of the sex group change, the original statute will discriminate against the entire group by retaining in the law a sex role, or sex stereotype, that is merely reflective of the behavior or circumstances of large numbers of the sex group at some time in the past.

The equal rights mandate requires that legislators avoid the easy classification on the basis of sex. Lawmakers may not determine that large numbers of either sex generally share a characteristic and then legislate on that basis. Instead, they must focus precisely on the problem to be corrected, for example, that workers of small stature are being compelled to lift weights in excess of healthful limits, and draft the statute in those terms, not in terms of sex.

If this test is applied, it is readily apparent that sex cannot be a proper basis for classification except where a statute concerns a characteristic shared by all females and no males, or all males and no females. This is a narrow test. A perfect protototype of such legislation would concern actual anatomical differences between men and women; a law regulating sperm donors or wet nurses. However, laws that on their face address only general physical differences between the sexes fail to meet the requirements of the equal rights amendment. For example, a statute forbidding women to lift in excess of twenty-five pounds on the job could not meet the test. While it is generally true that men are able to lift heavier weights than women, many women can and do lift such weights with no ill effects. The ability to lift specific weights comfortably depends on individual stature and strength, not sex.

10. Following passage of the equal rights amendment, classification on the basis of sex will almost always be an over inclusive classification. Historically, sex has been a permissible basis for classification. See Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). Although the Supreme Court recently invalidated a sex classification on the ground that it was arbitrary (see Reed v. Reed, 404 U.S. 71 (1971)), a majority of the court has to date failed to declare sex a “suspect” classification which would result in placing the burden of justifying the classification on the state. Cf. Sailer Inn. Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529 (1971). But see Frontiero v. Richardson, 411 U.S. 667 (1973) (Brennan, J.J., concurring).

11. But, believe it or not, even anatomical differences between men and women may be so minimized in the future that they will not furnish a basis for different legislative treatment. See generally, Gorney, The New Biology and the Future of Man, 15 U.C.L.A. L. Rev. 273 (1968). There are, for instance, “reports of Chinese men functioning in past centuries as wet nurses.” and “[t]heoretically, there seems to be no reason why with proper preparation a pregnancy could not be gestated in a man’s abdomen and thrive to term, in a transplanted uterus or other suitable spot, thereupon being delivered by Caesarian section into the affectionate arms of a nursing father.” Id. at 284.

12. In Bowe v. Colgate-Palmolive Company, 416 F.2d 711, 717-18 (7th Cir. 1969), the court stated:

If anything is certain in this controversial area, it is that there is no general agreement as to what is a maximum permissible weight which can be safely lifted by women in the course of their employment. The states which have limits vary considerably. Most of the state limits were enacted many years ago and most.
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It is apparent, then, that few of the existing laws differentiating between males and females can withstand application of the amendment. Yet, the very importance of certain male-female relationships, such as marriage, as well as the influence of traditional sex roles, have combined to fill the statute books with laws benefiting or penalizing either men or women.

Revisors of these statutes must recognize, however, that the principles of the equal rights amendment do not operate in a vacuum. The underlying policies of each statute should be considered carefully in deciding how, in terms of its probable effect, the equal rights amendment should be applied. Once the underlying policy of a statute is understood, the appropriate method of revision—extending the statute to both sexes, repealing the statute, or completely overhauling the statute—should be selected; the choice should be based on both equal rights principles and the policies and assumptions underlying the particular law involved.

A threshold question is whether the revisions required by equal rights should be used as an opportunity for reform in the law not directly related to equal rights. Since we have to get the materials out and think about them anyway, it is only logical to do the entire job of reform. However, equalization without reform is preferable to no equalization, and where the reform itself entails controversial, nonrelated issues, equalization is likely to be defeated by objections that are not relevant to sex related reform.¹³

if not all, would be considered clearly unreasonable in light of the average physical development, strength and stamina of most modern American women who participate in the industrial work force. Almost all state limits are below the 33 to 44.1 pounds recommended by an investigatory committee of the International Labor Organization (I.L.O.) in March, 1964. Even those limits were rejected by the I.L.O. and the provision finally adopted in I.L.O. Convention No. 127 (June 28, 1967) simply states that no worker should transport loads "which, by reason of its weight is likely to jeopardize his health or safety" and that the maximum weight of loads for women "shall be substantially less than that permitted for adult male workers." At the same time, Recommendation 127 was adopted stating that the maximum load for an adult male should be 55 kg. or 121 pounds. While there was no agreement as to a maximum load for women, the I.L.O. experts individually suggested limits ranging from 60.5 to 76.9 pounds, virtually twice the limit agreed to by the court below.

In addition, one important aim of the equal rights amendment should be to aid in breaking down stylized sex roles that handicap both men and women in their relationships with each other and with society. To further this aim, and with it true equality for women, revisors of legislation should make every effort to discern the underlying sex roles that may have influenced the enactment and development of existing laws and take care to avoid their reappearance in the revision.

II. THE PRIVACY QUALIFICATION

One of the revisions contained in Chapter 154 is a good illustration of the operation of equal rights principles in the context of other individual constitutionally protected rights. Section 53 provides that "no member of one sex under arrest shall be confined in the same cell or apartment of the city jail or prison, with any member of the other sex whatever." This amendment represents a change in wording only, since the statute formerly prohibited confining male and female prisoners together. However, both versions recognize and respect the constitutional right to privacy.

The Supreme Court has recognized an individual right to privacy inherent in several provisions of the United States Constitution. That right already has been interpreted as broad enough to preclude state interference with the individual decision to use contraceptives, to possess pornographic literature in the home, and to have an abortion.


16. The Court in Griswold v. Connecticut, 381 U.S. 479 (1965), would not permit the state to forbid the use of contraceptives by married persons because of the incursion it represented into the privacy of the marital relationship. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court extended its decision to unmarried persons, stating that laws could not properly distinguish between these classifications in the case of contraceptives.


Although the exact parameters of the constitutional right to privacy have not been completely delineated, it, of course, will operate in conjunction with equal rights amendment concepts, and "[i]n general it can be said . . . that the privacy concept is applicable primarily in situations which involve disrobing, sleeping, or performing personal bodily functions in the presence of the other sex." Since the landmark privacy decisions have emphasized the right of personal choice in intimate matters of human sexuality, it is probable that the equal rights amendment will not make undesirable incursions into personal privacy.

III. FAMILY LAW

More than sixty sections of Chapter 154 amend various laws that in some way concern the rights and responsibilities of family members. These amendments have equalized this plethora of laws by systematically extending the statutory right or benefit to the sex not previously covered, although in a few instances the right in question has been withdrawn rather than extended.

It is not surprising that much amending of laws dealing with the family was required. The importance of the family relationship to society has resulted in a multitude of legislative actions over the years that generally reflect the historic position of the woman in the family


20. E.g., mothers as well as fathers, may now maintain an action for the personal injury, wrongful death or seduction of a child. Ch. 154, § 4, amending WASH. REV. CODE § 4.24.010 (Supp. 1972); § 5, amending WASH. REV. CODE § 46.20.100 A mother may sign a driver's license application for a minor child and appear with the child at a revocation hearing. Ch. 154, § 87, amending WASH. REV. CODE § 46.20.100 (Supp. 1972); § 88, amending WASH. REV. CODE § 46.20.322 (1963). The statutory pension funds have been extended to cover surviving spouses rather than just widows. See, e.g., ch. 154, § 61, amending WASH. REV. CODE § 41.16.010 (1963); § 62, amending WASH. REV. CODE § 41.16.100 (1963); § 63, amending WASH. REV. CODE § 41.16.120 (1963); § 64, amending WASH. REV. CODE § 41.16.140 (1963); § 65, amending WASH. REV. CODE § 41.16.150 (1963); § 66, amending WASH. REV. CODE § 41.16.160 (1963); § 67, amending WASH. REV. CODE § 41.16.170 (1963); § 68, amending WASH. REV. CODE § 41.16.230 (1963); § 69, amending WASH. REV. CODE § 41.18.010 (1963); § 70, amending WASH. REV. CODE § 41.18.040 (1963); § 71, amending WASH. REV. CODE § 41.18.010 (1963); § 70, amending WASH. REV. CODE § 41.18.100 (1963); § 74, amending WASH. REV. CODE § 41.24.160 (1963); § 75, amending WASH. REV. CODE § 41.24.180 (1963).

21. The sections permitting a woman to bring an action for her own seduction or for false accusation of sex crimes were repealed. Ch. 154, § 121(1), repealing WASH. REV. CODE § 4.24.030 (Supp. 1972); § 121(2), repealing WASH. REV. CODE § 4.24.120 (1963).
relationship as deferential to male management and protection. Such legally imposed deference is inconsistent with the equal rights amendment.

At common law a married woman was a legal nonentity. As a result of the doctrine of coverture, or unity of husband and wife, a married woman incurred both substantive and procedural disabilities. She could not contract, sue or be sued, or manage her lands or chattels. This legal disability produced, in time, at least three major groups of laws that must be squared with the equal rights amendment. First, there are a series of laws permitting the father, but not the mother, to manage the rights and accept the responsibilities of the minor children of the family. Second, some laws extend benefits to women or female children, but not to their male counterparts, on the theory that women were the only sex in need of support or protection. Finally, there is a group of laws which may generally be referred to as married women's laws. These laws essentially fall into two categories: those laws that represent piecemeal removal over the years of the disabilities of married women; and those that still reflect coverture and prevent the wife from acting independently.

The manner in which Chapter 154 equalized these laws is subject to two major criticisms. There are several substantive inconsistencies in the manner chosen for equalization. In addition, the extension of

22. L. Kanowitz, supra note 13, at 35-40. The unmarried woman, however, was in a better legal, if not social, position.
23. E.g., Wash. Rev. Code § 4.24.010 (Supp. 1972), giving the father the right to bring an action for the death or injury of a minor child.
24. These are primarily survivor's benefits from pension funds. See note 62 infra.
26. E.g., Wash. Rev. Code § 23A.08.310 (1963), permitting a married woman to transfer and receive the profits of stock in her own name without her husband's consent.
27. E.g., Wash. Rev. Code § 79.48.130 (Supp. 1972), which allowed a married woman to apply for state lands under the Carey Act only if she was the head of a family. This disability has been removed by ch. 154, § 115.
See also Wash. Rev. Code § 6.12.040 (1963) (allowing the husband to select real property for purposes of homestead). The wife could select only if she was the head of a family or if the husband was absent.
28. The general principle for revision in the bill, as noted above, was to extend rights and benefits to the sex not previously covered. However, in some instances, the right was extended in one section, and withdrawn in another section dealing with a similar topic. For instance, the law permitting a personal injury cause of action to survive death was amended to allow dependent brothers to share in the proceeds of the cause of action regardless of age. Ch. 154 § 3, amending Wash. Rev. Code § 4.20.060 (1963). Previously, proceeds could be shared by all dependent sis-
statutory rights to the sex not previously covered represents in several instances a failure to consider adequately the policy underlying the law being equalized, as well as the policy of a companion statute that previously had been revised to conform to equal rights principles.

A. Criminal Nonsupport

The husband and wife have always been jointly and severally responsible for the expenses of the family and the education of children. Similarly, either parent has always been criminally liable for failure to support or for abandonment of a minor child. However, in the past only the husband was criminally liable for desertion or nonsupport of his wife.

The Section penalizing nonsupport of a wife has now been amended to provide:

(1) Every person who: . . . (c) Has sufficient ability to provide for support of such person's spouse or is able to earn the means for such person's spouse [sic] support and wilfully abandons and leaves such person's spouse in a destitute condition; or who refuses or neglects to provide such person's spouse with necessary food, clothing, shelter, or medical attendance, unless the abandonment is justified by misconduct.

Unlike the technical inconsistencies in the amendments contained in chapter 154, these substantive inconsistencies may prove troublesome. Especially where the inconsistencies are extant in the same piece of legislation, a court or agency may have difficulty discerning the policy considerations of the legislature, normally an important interpretative aid. The failure of the amendments to be consistent also makes it difficult to predict a probable legislative response to an equal rights problem.

30. WASH. REV. CODE § 26.20.030 (Supp. 1972). The crime is a felony if children under the age of 16 are involved and a gross misdemeanor if they are over 16.
31. Id.
of the abandoned spouse, shall be guilty of the crime of family desertion or nonsupport.

Ostensibly, this section now meets the requirements of the equal rights amendment, since it has extended liability for desertion or nonsupport to women. There is, however, an indication that the revised statute has retained underlying sex role assumptions and is inconsistent with the reasons for proscribing desertion or nonsupport.

In the child support context, the legislature has assumed that minor children generally are unable to adequately care for themselves, and therefore both parents have been given the obligation not to desert dependents and to provide them with "necessary" food, clothing, shelter or medical attendance. The word "necessary" is used in the same context in the child support statute as in the spousal support statute, and interpretations of "necessary" in the former could be held to be authoritative in the latter.

In interpreting "necessary," the Washington court has held that parents have a duty to support minor children regardless of the child's actual need. For example, in a situation where a stepfather was providing for the needs of the child, the natural father argued that the child was not "in need" and therefore, he could not be found guilty of failure to furnish "necessary" food, clothing, shelter and medical attendance. The word "necessary" is used in the same context in the child support statute as in the spousal support statute, and interpretations of "necessary" in the former could be held to be authoritative in the latter.

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The language in the spousal support statute did not make it clear whether the duty owed to the wife was the same as that owed to children. The statute first proscribed abandoning a wife and leaving her "in destitute condition." This seemed to imply that if the wife was

33. Ch. 154, § 3(d)(a)-(b), amending WASH. REV. CODE § 26.20.030(1)(a)-(b). The obligation extends independently to both parents and stepparents with the proviso that the stepparent's obligation ceases at termination of the marriage.
35. Id. at 94, 323 P.2d at 241. The stepfather did not relieve the father of the duty merely by furnishing support. Accord, State v. Ozanne, 75 Wn. 2d 546, 452 P.2d 745 (1969), where the mother was furnishing minimal support for the children. However, an affirmative undertaking by the wife to release the husband from the duty is a defense. State v. Tucker, 151 Wash. 218, 275 P. 558 (1929).
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not actually in need, this crime could not have been committed. However, the statute also uses the same language as that found in the section concerning child support—it is a crime to refuse or neglect to provide “necessary” food, clothing, shelter or medical attendance for a wife. If “necessary” in the spousal support statute is read in the same manner as “necessary” in the child support statute, the result would have been to require support of a wife who was fully able to care for herself, or who was cared for by some third party.\textsuperscript{36}

The spousal support section, as originally drafted, merely expressed the sex role realities of the time.\textsuperscript{37} Wives and children were supported by husbands. Where the husband was unable to support his children, the wife had an obligation to do the best she could. Fundamental attitudes toward children have not changed,\textsuperscript{38} nor have the

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\textsuperscript{36} Two cases among the few reported involving a prosecution for failure to support a wife where children were not also involved illustrate attitudes of another era and probably are not indicative of the approach which could be expected from a contemporary court. For example, in State v. McPherson, 72 Wash. 371, 130 P. 481 (1913), a 16-year-old husband was convicted for failure to support his 17-year-old pregnant wife. The defendant had sent his wife home to her mother and thereafter failed to contribute to her support. Defendant testified that his nine dollar weekly salary as a clerk was insufficient to support his wife. The court stated:

His confession of his inability to support his wife is not to his credit. It shows a moral cowardice few young men would confess. The prosecuting attorney very pertinently asked him if he was the only married clerk in the city. \textit{Id.} at 374, 130 P. at 482-83. The court determined that the wife was “in need” even though she was living with her parents. \textit{See also} State v. Bracking, 82 Wash. 385, 144 P. 530 (1914), sustaining a conviction on the basis of evidence that the wife was “without funds” and the defendant husband was “able-bodied, healthy, and strong, and had an office in the Globe Building in Seattle.”

\textsuperscript{37} The assumption that women are unable to support themselves is an offshoot of the more general sex role concept that men are the breadwinners and women take care of the home and are supported. For the influence this sex role notion has in the drafting and administration of welfare statutes, see Goldberg \& Hale, \textit{The Equal Rights Amendment and the Administration of Income Assistance Programs in New Mexico}, 3 N. Mex. L. Rev. 84 (1973). \textit{See also} Johnston, \textit{Sex and Property, The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality}, 47 N.Y.U.L. Rev. 1033 (1972).

\textsuperscript{38} However, ch. 154, § 44, may represent a change in traditional attitudes towards children. Prior to amendment, \textit{Wash. Rev. Code} § 26.37.020 (1963) provided that when a mother was an “inmate of a house of ill fame” and the father was unfit, a child could be removed from her custody. The revision, instead of establishing a like ground for fathers, struck this ground altogether. Thus, although prostitution is a crime, \textit{see Wash. Rev. Code} § 9.87.010 (Supp. 1972), and conviction of a crime is another ground of parental unfitness, the legislature appears to have eliminated, without debate, open parental sexual misconduct as a consideration in the determination of fitness. If the legislature regards prostitution sufficiently troublesome and unwholesome to provide penal sanctions, it would appear inconsistent to ignore its impact on the growth and development of children. Conversely, and in line with the sanction

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needs of children changed. They need care, and each parent is expected to shoulder a portion of the burden to the extent of ability. However, fundamental attitudes concerning interspousal rights and responsibilities have changed and are changing. The assumption that a wife is economically helpless is not warranted and should not be the basis for statutory revision. The revision of the spousal support section appears to follow this principle and extends the responsibility for support to both spouses. However, the extension ignores the fact that the underlying assumption justifying the duty to support the wife has disappeared in many cases and rarely has existed in the case of husbands.

At the very least, a court interpreting the revised spousal support section should read into “necessary” some criteria of actual need with respect to the interspousal support duty. To do otherwise will undermine a fundamental principle of the equal rights amendment—that the husband and wife are equal, capable adults in a special relationship. That special relationship, of course, properly can be the basis for legislative imposition of special duties. But the legislature should first recognize that unlike the situation involving children, in a coequal partnership there is no general need to impose support duties at all. Instead, the statute should be structured to reach only those situations where there are reasons to impose such a duty. Factors such as age, education, job skills, child care responsibilities and physical and emotional condition should be considered, and criminal sanctions should

against prostitution, ch. 154, § 18, amending WASH. REV. CODE § 7.48.240 (1963) redefined “houses of ill fame” to eliminate references solely to women. Also, institutions for “reformation of fallen women” were removed from tax-exempt status. Ch. 154, § 119, amending WASH. REV. CODE § 84.36.040. (Supp. 1972).

39. There are no reported prosecutions of women for nonsupport. This interestingly enough, may represent an underlying recognition that the woman (mother) is making an economic contribution to the family by providing home and child care services. Generally she is not expected to provide these services and have gainful out-of-home employment. See Goldberg & Hale, The Equal Rights Amendment and the Administration of Income Assistance Programs in New Mexico, 3 N. MEX. L. REV. 84 (1973).

40. 63.1% of all women workers in 1972 were married (58.5% married, husband present; 4.6% married, husband absent). U.S. DEPT. OF LABOR. WOMEN’S BUREAU. WHY WOMEN WORK. BULLETIN (June 1973).

41. A helpful comparison and guideline may be found in the recently passed divorce law with respect to standards for awarding maintenance to parties to a divorce. See ch. 157, § 9. [1973] Wash. LAWS. WASH. REV. CODE § 26.09.090 (Supp. 1973). Governor Evans vetoed §§ 30-33 of ch. 154 because they conflicted with the new divorce laws by duplicating, with sex neutral changes, the old divorce provisions. Spousal misconduct has not been treated in the same manner from revision to re-
be imposed only where those factors leave one of the spouses incapable of his or her own support. Consideration of such factors can also minimize the "transition problems" faced by society while many women are still economically dependent as well as accommodate the personal preference of either spouse to remain in an economically dependent role.\textsuperscript{42} If the policy and assumptions underlying the spousal support statute had been more carefully considered in light of equal rights principles, the statute would have been completely rewritten rather than merely extended to cover both sexes.

**B. Third Party Transactions**

As a result of a legislative attempt to implement equal rights between the sexes,\textsuperscript{43} the laws governing the rights and responsibilities of spouses with respect to marital property\textsuperscript{14} underwent significant changes prior to the passage of Chapter 154. Thus, Chapter 154 did not amend any statutes dealing directly with marital property. It did, however, amend certain miscellaneous statutes concerning the relationship of third parties to property belonging to the marital community or one of its members. Unfortunately, the amendments contained in Chapter 154 do not adequately reflect the policies demonstrated by the 1972 community property amendments, and when considered with them, fail to provide a coherent guide for third parties attempting to deal with marital property.

Marital property laws characterize and vest management rights in...
that property for several purposes. The purpose of primary importance to an ongoing marital relationship is to define the rights of third parties, particularly creditors, in marital property. There are basically three types of marital property to be considered by creditors of a husband and wife: the community property, the husband's separate property and the wife's separate property. Actions of each spouse involving his or her separate property are sufficient to bind that property. Prior to the 1972 amendments, the husband's actions presumptively bound the community, but the wife's did not since she lacked power of management and control. In certain instances, however, the wife could obligate the community property, as well as her husband's separate property, by her actions.\textsuperscript{45} The husband, on the contrary, was not able to bind the wife's separate property by his actions.\textsuperscript{46}

The 1972 amendments, by conferring coequal management power in community property on both spouses, made an important change in this situation.\textsuperscript{47} As Professor Cross analyzes the impact of this statutory change, either spouse may obligate all of the community, but neither can bind the separate property of the other, since the basis for the wife's authority to bind her husband's separate property has disappeared.\textsuperscript{48}

At first glance the changes made in Chapter 154 merely implement the equalization concepts contained in the community property amendments. For instance, R.C.W. § 6.16.070 has been changed to provide that the real and personal estate of any married person, as well as his or her personal earnings, are exempt from execution or attachment upon any liability or judgment against the other spouse.\textsuperscript{49} However, this section does more than exempt the separate property of

\textsuperscript{45} Cross, Equality for Spouses in Washington Community Property Law—1972 Statutory Changes, 48 WASH. L. REV. 527 (1973) [hereinafter cited as Cross]. The wife could bind the community, as well as the husband's separate property, under two theories: (1) That she acted as agent for the husband; or (2) that the husband had an affirmative duty to control her actions. Id. at 549.

\textsuperscript{46} Id. See also WASH. REV. CODE § 6.16.070 (1963).


\textsuperscript{48} Cross, supra note 45, at 549.

\textsuperscript{49} Ch. 154, § 14, amending Wash. Rev. Code § 6.16.070 (1963). The section provides:

All real and personal estate belonging to any married person at the time of his or her marriage, and all which he or she may have acquired subsequently to such marriage, or to which he or she shall hereafter become entitled in his or her own right, and all his or her personal earnings, and all the issues, rents and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the other spouse, so long as he or she or any minor heir of

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a spouse from enforcement of a judgment against the other spouse; it exempts community property in the form of earnings as well.

The inconsistency is traceable. R.C.W. § 26.16.130, one of the community property sections repealed in 1971, provided: "A wife may receive the wages of her personal labor, and maintain an action therefor in her own name and hold the same in her own right . . . ." The exemption of a wife’s personal earnings from execution formerly found in R.C.W. § 6.16.070 was tied to this general statement of a woman’s right to control her own earnings, something she could not do when she had no management rights in the community since her earnings were community property. Additionally, the exemption coincided with the general theory of limited liability—where there is limited control there is a justifiable reason for limited liability. 50 Surely, with the advent of equal management powers in community property earnings, the reason for this earnings exemption has disappeared and it should not have been perpetuated and extended in the amendment to R.C.W. § 6.16.070. 51 Again, merely extending the statute without considering its underlying policy assumptions has resulted in an inadequate revision.

Another variance from what appears to be the policy underlying the marital property statutes appears in the revision of the code sections dealing with the right to isolate and manner of isolating homestead property from creditors. 52 A recognized danger in conferring equal...
management power on both spouses is the possibility that they will take inconsistent actions, either deliberately or inadvertently. The revision of the general community property statutes took this possibility into account and provided that participation of both spouses was required for certain transactions. In another area of possible conflict, the acting spouse was restricted to disposition of no more than one half of the total community property by his or her actions. However, Chapter 154, in revising R.C.W. § 6.12.020 et seq., failed to foreclose the possibility of inconsistent actions by the respective spouses.

A related but more general aspect of the legislature's failure to develop a consistent theory of third party relations with marital property is demonstrated by the various revisions of married women's property statutes. These, like many other sections, were merely extended to include males. For example, a section that formerly permitted a married woman to transfer stock standing in her own name without the consent of her husband was amended to permit any person to transfer stock without the consent of his or her spouse. It is extremely difficult to justify extension, rather than repeal, of statutes whose primary purpose was to remove the coverture disabilities of a married woman. First, there is no longer a need for statutes to remove disabilities from married women; both the equal rights amendment and the management power over community property have removed any doubt concerning the current existence of such disabilities. Additionally, by extending such statutes to both spouses the legislature runs

54. Wash. Rev. Code § 26.16.030(1) (Supp. 1972). Prior to the 1972 amendments, participation was required for some transactions and restrictions were placed on donative transactions. However, the primary purpose of those requirements prior to the extension of coequal management powers was to protect the wife, rather than to prevent inconsistent actions.
55. The statute describing the effect of declarations of homestead was unclear before ch. 154, § 6, amending Wash. Rev. Code § 6.12.020 (1963) was enacted. See Treadwell & Shulkin, Joint Tenancy—Creditor-Debtor Relations, 37 Wash. L. Rev. 58, 68 (1962). The revision, by inserting language to make the sections sex neutral, has compounded this confusion.
59. The legislature appears to have recognized this in at least one instance by repealing rather than extending the code section permitting a married woman to enter into contracts. Ch. 154, § 121(3), repealing Wash. Rev. Code § 26.16.170 (1963).
the risk of conflicts, such as those previously noted, with the general marital property statutes.

The 1972 revision of the community property statutes represents a legislative decision that community property laws will no longer be based on the single view that the husband is the breadwinner and manager, and the wife is the housekeeper and child raiser. Where husband and wife both desire to exercise management of marital property, they may do so. However, it is important that third parties confronted with coequal management powers have clearly defined expectations with respect to marital property. Such individuals and institutions cannot be expected to deal fairly and nondiscriminatorily with married persons in the absence of careful legislative formulation of the parties’ rights and responsibilities.

C. Survivor’s Benefits

Numerous sections of Chapter 154 amend statutes that provide survivor’s benefits to widows and children. The amendments reach survivor’s benefits in several different contexts. Pension funds, industrial insurance and employee benefits of common carriers and public utilities have been changed to provide that the surviving


62. See amendments to statutory pension funds cited in note 20 supra (firemen’s retirement). See also, ch. 154, § 76, amending WASH. REV. CODE § 41.32.520 (1963); § 77, amending WASH. REV. CODE § 41.33.020 (1963) (teachers’ retirement); § 78, amending WASH. REV. CODE § 41.44.170 (1963); § 79, amending WASH. REV. CODE § 41.44.210 (1963) (city employees’ retirement); § 1, amending WASH. REV. CODE § 2.12.030 (Supp. 1972) (judges’ retirement).


64. Ch. 154, § 117, amending WASH. REV. CODE § 81.28.080 (1963); § 118, amending WASH. REV. CODE § 81.94.060 (1963).

65. Ch. 154, § 116, amending WASH. REV. CODE § 80.28.080 (1963). The old soldier’s home is now open to spouses of all service personnel (ch. 154, § 102,
spouse, rather than just the widow, may receive the respective benefits after the death of the employee.

In most instances, these changes merely clarify that widowers, as well as widows, are entitled to survivor's benefits. However, in several instances the changes make a substantive difference. For example, the teacher's retirement fund previously permitted payment to a surviving widow, but not to a surviving widower unless he was dependent.\textsuperscript{66} Chapter 154 has amended this section to permit payment of benefits to a widower regardless of dependency.\textsuperscript{67}

Disparity in treatment of widows and widowers under prior statutes was common.\textsuperscript{68} This disparity reflected two underlying assumptions: (1) That a widow is usually dependent on the deceased for support; and (2) that survivor's benefits should be available only where dependency exists.\textsuperscript{69} The first assumption, although still valid as a general proposition, is not always the case, and in the years to come, as increasing numbers of women enter and remain in various occupations, will become less valid. The second assumption, interestingly enough, appears to have been discarded by the drafters of Chapter 154 who

\begin{footnotesize}
\begin{itemize}
\item[66.] \textit{Wash. Rev. Code} \textsection{} 72.36.040 (1963); \textsection{} 103, amending \textit{Wash. Rev. Code} \textsection{} 72.36.050 (1963); \textsection{} 104, amending \textit{Wash. Rev. Code} \textsection{} 72.36.080 (1963), and veteran's compensation for service in World War II and the Korean Conflict is available to surviving spouses (ch. 154, \textsection{} 108, amending \textit{Wash. Rev. Code} \textsection{} 73.32.020 (1963); \textsection{} 109–10, amending \textit{Wash. Rev. Code} \textsection{} 73.33.010–.020 (1963)).
\item[67.] This particular change may have produced an interesting conflict. The teacher's retirement system is tied to the federal old age and survivor's insurance program administered by the Department of Health, Education, and Welfare, and the joint participation agreement provides that the terms and conditions of the teacher's retirement plan are to be construed in conformity with the federal Social Security Act 42 U.S.C. \textsection{} 301 et seq. (1970). The Social Security Act contains a requirement that a widower, to receive survivor's benefits, must be dependent on the insured wife for at least one-half of his support. \textit{Id.} \textsection{} 402(c) (1970). Consequently, there is potential conflict between the Social Security Act and the amended survivor's benefit sections of the teacher's retirement system that could nullify this amendment. Dependency requirements for widowers (the widower had to be an "invalid") were also removed from several sections providing workmen's compensation benefits. Ch. 154, \textsection{} 96, amending \textit{Wash. Rev. Code} \textsection{} 51.32.050 (Supp. 1972); \textsection{} 97, amending \textit{Wash. Rev. Code} \textsection{} 51.32.070 (Supp. 1972).
\item[68.] Under many statutes, the husband must be dependent in order to qualify for benefits earned through the wife's occupation, although the same benefits are extended to the wife of a male employee without regard to the actual dependency of the woman. The dependency test for husbands, but not wives, has been disapproved as a criterion for receiving military benefits. \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973).
\item[69.] This latter assumption is characteristic of many statutes that provide survivor's benefits, particularly in the case of children, parents, brothers and sisters. See, e.g., \textit{Wash. Rev. Code} \textsection{} 4.20.060 (1963).
\end{itemize}
\end{footnotesize}
have uniformly extended survivor's benefits to spouses regardless of dependency. This extension, of course, is not the only way to conform survivor's benefits to the equal rights amendment. The available alternative is restriction of benefits to surviving spouses, regardless of sex, who were dependent on the deceased for support. The legislative decision should be made after consideration of several factors, including the cost to employers to provide benefits to nondependent survivors and the economic impact on married persons. Generally speaking, pensions do not provide living income to retired individuals. The sudden loss of one pension, even if his or her own pension remains, could be a severe economic blow to the surviving spouse. On the other hand, removal of a dependency test converts the pension into a form of property similar to other property that may be inherited as a matter of right, regardless of need.  

IV. EMPLOYMENT

Chapter 154 ostensibly opened several occupations to women that previously were closed. Women may now be the chief or deputy mine inspector of the State, work in mines, cut men's hair as cosmeticians, hold liquor licenses and be members of the corps for conservation. However, these occupations were probably already available

70. The subject of pensions and survivor's benefits is a complex one, in need of careful legislative consideration in this time of rapidly changing economic and social conditions. Varying theories and ideas on the topic are represented in the several bills for comprehensive pension legislation now pending in Congress. Although the passage of the equal rights amendment can serve as an effective goad to consider needed changes, a broader view than mere equalization should be taken by the legislature in its decision making process. The most important of the approximately 70 bills introduced in 1973 concerning pension plan reform are H.R. 2, H.R. 462, H.R. 7157, S. 4 and S. 1631, 93d Cong. 1st Sess. (1973).

to women following the passage in 1963 of general legislation which provided:76

[H]ereafter in this state every avenue of employment shall be open to women; and any business, vocation, profession and calling followed and pursued by men may be followed and pursued by women... 

This statute was passed subsequent to the occupational statutes amended by Chapter 154 and would no doubt have been held to supersede these occupational statutes had they been challenged.

Chapter 154 also made two changes in the employment context that could be harmful to women as well as men. Rather than extending maximum hours legislation to men,77 the provision protecting women was repealed.78 Additionally, the position of "supervisor of women in industry" in the Department of Labor and Industries, previously reserved for a female, was eliminated.79

Opinion is divided as to whether state protective labor legislation applicable only to women, such as wages and hours laws, may be extended by courts to men or whether such legislation must be invalidated because it conflicts with the anti-sex discrimination provisions of Title VII of the Civil Rights Act of 1964.80 An identical issue is presented by protective labor legislation considered in conjunction with the equal rights amendment. Unlike the courts, the Legislature

77. Certain minimum wage legislation currently applies to all working persons regardless of sex. WASH. REV. CODE ch. 49.46 (1963). Notice, however, that many of the administrative orders on minimum wages apply only to women and minors. 10 WASH. AD. CODE ch. 296-128 (Supp. 9, 1971), and that there are special statutory wage provisions applicable only to women and minors that were not repealed. WASH. REV. CODE § 49.12.020 (1963).
79. Ch. 154, §§ 82-84, amending WASH. REV. CODE §§ 43.22.260-.280 (1963). It is not entirely clear that the position was eliminated. It is possible to interpret the change as merely eliminating the requirement that the supervisor of women in industry be a woman, since one reference to the position is retained in § 84 though all other references have been struck.
80. Compare Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972), with Kober v. Westinghouse Electric Corp., 325 F. Supp. 467 (W.D. Pa. 1971). Professor Kanowitz argues that where the regulatory statute is beneficial, it should be extended to cover men. L. KANOWITZ, supra note 13, at 120-24. The fact that coerced overtime is a significant worry of employees is indicated by the fact that voluntary overtime was a major bargaining issue in the recently negotiated contract between Chrysler Corp. and the U.A.W. N.Y. Times, Sept. 19, 1973, at 77. col. 2 (city ed.).
clearly can make the choice to protect all employees, not just women, from coerced overtime work. Amending maximum hours legislation by extending coverage to men appears to be preferable to repealing the legislation, since it permits the individual to decide whether or not to work overtime and distributes available work among more persons in the labor market.\textsuperscript{81}

The elimination of the position of “supervisor of women in industry” in the Department of Labor and Industries is unfortunate. One real handicap in the drive for equal rights for women in employment has been the lack of a systematic data gathering agency focusing on the whole range of women’s problems.\textsuperscript{82} The position eliminated could have accomplished this function, at least in the employment context. The statutory language consigning the position to a woman need not have been a stumbling block; the position could have been retained without the proviso that it be filled by a woman. The better alternative, however, would have been to retain the position as stated since there is ample support in affirmative action concepts for the requirement.\textsuperscript{83} Certainly, until the problems of women in industry coincide more closely with those of men, there is need for a voice on their behalf in the Department of Labor and Industries.

Chapter 154 has made an unusual change in the veteran’s employ-

\textsuperscript{81} A revision of the entire chapter. WASH. REV. CODE ch. 49.12 (1963), now covering “Female and Child Labor” and not affected by chapter 154, was introduced as S.S.B. 2463, 43rd Leg. 2d Ex. Sess. The Bill, which has not passed, would extend protective legislation to nearly all workers. (Subsequent to the placing of this article into the production process, the Bill was passed. ch. 16. [1973] Wash. Laws 2d Ex. Sess.)

\textsuperscript{82} Mink, Federal Legislation to End Discrimination Against Women, 5 VAL. L. REV. 397, 407 (1971).

ment preference statute. The prerevision statute gave honorably discharged soldiers, sailors and marines and their widows preference for appointment and employment "[i]n every public department, and upon all public works of the state . . ."\(^8\) The revised version of the statute gives the same preference not just to veterans and their surviving spouses, but to the "spouses" of veterans.\(^8\) Obviously, the extension of preference to spouses, regardless of whether the veteran is living or dead, greatly increases the number of persons entitled to civil service favoritism and could mean that a veteran and his or her spouse who were both working would gain a double economic advantage for the actual military service of only one of them. It is difficult to believe that the legislature intended such a result.

V. SEX RELATED CRIMES

Current sex roles in our society have heavily influenced the traditional legal response to sex crimes. Most frequently this has resulted in protecting only women in rape, statutory rape and seduction situations.\(^8\) Conversely, typically only women are penalized for prostitution,\(^8\) while the crime of patronizing a prostitute frequently goes unsanctioned or unprosecuted. The double standard and the historic male duty to protect women were partially responsible for this disparity; the possibility of pregnancy was also a factor. On the other hand, even young men, the law assumed, were able to make intelligent choices concerning sexual relations, and of course, could not become pregnant as a result of sexual activity.

The double standard and laws protecting helpless women are still very much with us, and render any revision of criminal laws respecting sex an explosive and controversial subject. In order to avoid controversy, revisors often choose perfunctorily to equalize sex crime statutes by the adoption of sex neutral language, although extensive reform was and is necessary.\(^8\)

84. WASH. REV. CODE § 73.16.010 (1963).
86. L. KANOWITZ, supra note 13, at 18-25. See also K. MILLETT, supra note 14, at 44.

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A. Rape

The law historically has treated violent sexual assault against a woman as a serious crime, although such treatment probably reflects the historical position of women in society more than a general concern over the serious nature of sexual assault itself. Because of the doctrine of coverture at common law, a married woman was virtually the property of her husband. Therefore, rape of a married woman was not only a personal violation of the woman, but a violation of her husband's marital and property rights as well. For an unmarried woman, loss of virginity was a serious impediment to marriage, which until recently was the only feasible future for most women. Rape was also an affront to the fathers, brothers and other male kinfolk charged with the protection of unmarried females. The preoccupation of rape laws with the chastity of the female victim furnishes additional evidence that factors other than the seriousness of sexual assault itself were at work.

Rape was formerly defined by R.C.W. § 9.79.010 as "an act of sexual intercourse with a female not the wife of the perpetrator against her will and without her consent." This statute established the three elements of rape: sexual intercourse, force, and lack of consent.

89. L. Kanowitz, supra note 13, at 35-40.
90. L. Kanowitz, supra note 13, at 18-25. See also K. Millet, supra note 14, at 44.
91. Chastity of the victim is an element of the offense in several sex crimes. See Wash. Rev. Code § 9.79.070 (1963) (seduction); Wash. Rev. Code § 9.79.080 (1963) (indecent liberties, exposure). Prior acts of sexual misconduct are generally admissible on the issue of consent. Cf. State v. Severns, 13 Wn. 2d 542, 125 P.2d 659 (1942). While arguably relevant, such testimony is highly prejudicial and is especially unnecessary where the assault is corroborated by other physical evidence of attack. Even so, such an eminent authority as Dean Wigmore suggested that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3 J. Wigmore, Evidence § 924a (3d ed. 1940) (original in italics), as quoted in Weihofen, Victims in Criminal Violence, 8 J. Pub. L. 209, 211 (1959). Weihofen himself advocates stricter standards for admission of the testimony of female victims of crime than for other crime victims, Cf. Comment, The Victim in a Forcible Rape Case: A Feminist View, 11 Am. J. Crim. L. 335 (1973).

Current information on the reporting and prosecution of rape also reveals the extent to which sex roles operate in police and judicial handling of this crime. The F.B.I. reports that "this offense is probably one of the most under-reported crimes due primarily to fear and/or embarrassment on the part of victims . . ." and that prosecutions are "frequently complicated by a prior relationship between victim and offender." F.B.I. Uniform Crime Reports 13-14 (1972). See also Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif. L. Rev. 919 (1973).

Rape could also be committed when the victim’s informed consent was impossible because of insanity, narcotic or alcoholic influences, or ignorance of the nature of the act. The act of intercourse is considered “against the will” when resistance is forcibly overcome or when resistance is “prevented by fear of immediate and great bodily harm” reasonably believed by the victim to follow in the event of resistance.3

It is helpful to note first that, consistent with the equal rights amendment, rape could be retained as a crime against women only. Essentially, this would represent a determination on the part of the legislature that a unique physical part of the female anatomy, the vagina, 4 deserves special legal protection against assault. Such a determination would also be consistent with the crime as understood in the context of current male-female sex roles.5

However, our legislature has not made such a determination. Chapter 154 revises R.C.W. § 9.79.010 to broaden the crime of rape by substituting the word “person” for female and making other appropriate changes to extend protection to both sexes.6 The statute now recognizes as a crime the rape of a male by a female. While such a crime may be difficult to imagine because of male physical characteristics, a female forcibly overcoming an objecting, nonconsenting male is probably not beyond the realm of possibility. More important, however, the elements of rape include sexual intercourse where informed consent is not possible because of insanity, narcotic or alcoholic influences or ignorance of the nature of the act. It is not at all difficult to posit a situation where a female accomplishes sexual intercourse with a male incapable of informed consent for one of these reasons. The

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5 The male is typically the aggressor, the female the passive partner. K. MILLETT, supra note 14, at 44; Comment, Forcible Rape and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 YALE L.J. 55 (1952). Frequently repeated male justifications for actual forcible rape also shed some light on the nature and operation of aggressive-passive sex roles in the context of this crime. One common myth is that all women secretly want to be raped. Griffin, Rape: the All-American Crime, RAMPARTS, Sept., 1971, at 26. Yet another contends that women “ask for it” or “deserve it” because of the places they go or the kind of clothes they wear. Amir, Victim Precipitated Forcible Rape, 58 J. CRIM. L.C. & P.S. 493 (1967); Hibey, The Trial of a Rape Case: An Advocate’s Analysis of Corroboration, Consent and Character, 11 AM. CRIM. L. REV. 309 (1973).
Washington's ERA legislature has recognized this possibility and extended the protection of rape laws to men.

It is arguable that homosexual rape is not included in the section as revised. If so, rape is still being treated as a serious crime for historical reasons and not because of a concern with the seriousness of sexual assault itself. Therefore, underlying sex role assumptions have been partially preserved in the revision even though a perfunctory equalization has been accomplished by protecting males from rape by females.

Despite the use of the sexually neutral word "person" in the revision, a reading of the statutory definitions applicable to rape and the companion statutory sections involving sex crimes indicates that homosexual rape is not proscribed by the rape statute. Initially, it is important to note that the statutes penalizing various sex crimes distinguish between "sexual intercourse" and "carnal knowledge." The rape statute prohibits only sexual intercourse. The statutes do not define either sexual intercourse or carnal knowledge in anatomical terms, but rather in terms of the nature of the act: "[a]ny sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge." 97

The cases discussing this definition do, however, make helpful anatomical distinctions. In the context of sexual intercourse, penetration is defined to mean that the sexual organ of the male entered and penetrated the sexual organ of the female. 98 Penetration is defined differently in the context of sodomy 99 which prohibits "carnal knowledge" of any male or female person by the anus or with the mouth or tongue. In a sodomy prosecution involving a male and a female child, penetration was held to mean that the mouth or tongue penetrated the female genitals. 100 Further, in a sodomy prosecution against two males, the crime was deemed to have been committed "whether the

98. It can be assumed that the court was referring to the penis when it used the term "sexual organ of the male." Entering the labia and vulva of the female was sufficient. State v. Snyder, 199 Wash. 298, 91 P.2d 570 (1939).
99. "Every person . . . who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge . . . shall be guilty of sodomy . . . ." Wash. Rev. Code § 9.79.100 (1963). Thus, the perpetrator of homosexual rape is guilty of sodomy.
100. Penetration is also relevant for distinguishing between indecent liberties and sodomy. Penetration of the female sexual organs by the tongue is required for sodomy but not for indecent liberties. State v. Olsen, 42 Wn. 2d 733, 258 P.2d 810 (1953).
genital organ of the one or the other be advanced or received, or whether the anus or the mouth of the one or the other be used.”

Consequently, it appears that the term “carnal knowledge” encompasses unnatural sex acts, while the term “sexual intercourse” is restricted to male-female sex acts of the traditional variety.

The amended definition of sexual intercourse found in Chapter 154 does not help resolve this problem. The revision retains the previously mentioned definition of sexual intercourse and adds the following definition of “sexual conduct”:

Sexual conduct means either or both sexual intercourse or any conduct involving the sex organs of one person and the mouth or anus of another.

Initially, this definition appears in a section defining the word “prostitution” which refers to the word “sexual conduct”. Therefore, it is arguable that the definition of sexual conduct is relevant only in the context of prostitution. Whether or not the definition is relevant for purposes of all sex crimes, it is significant that the definition of sexual conduct itself distinguishes between sexual intercourse (presumably defined in the terms just discussed) and other sex acts including homosexual acts. Considering also that the word “sexual intercourse” is the only sexual conduct sanctioned by the rape statute, this analysis concludes that violent, coercive homosexual acts are penalized only by the sodomy or indecent liberties statutes.

The decision to extend rape to cover the female rape of a male, admittedly a minor social problem, but not to include homosexual rape is a curious one. Forcible sexual attack ought to be singled out for special treatment in the eyes of the law because it is a particularly grievous kind of personal assault, a violation of one of the most intimate portions of the human anatomy. If that consideration is, as it should be, the reason for creating the separate, and more serious

102. “Unnatural sex acts” is used herein to refer to oral and anal sex acts.
104. WASH. REV. CODE § 9.79.080 (1963). Note, however, that the commission of an indecent liberty requires that the victim be of previously chaste character. See note 113 infra for a definition of indecent liberties.
106. Rape is penalized by imprisonment in the state penitentiary for not less than
crime\textsuperscript{106} of rape rather than proscribing such conduct under the general category of assault,\textsuperscript{107} then all persons should receive that protection regardless of the sex of the perpetrator of the sexual assault. If failure to proscribe homosexual rape represents the influence of historical sex roles, true equality has not been achieved by this revision.

B. Statutory Rape

Statutory rape\textsuperscript{108} is qualitatively different from forcible rape. Although it includes forcible rape, statutory rape also includes sex acts that between adults would be thought of as consensual and is premised on the legal presumption that persons under certain ages are incapable of consenting to sexual acts.

Unlike many states,\textsuperscript{109} Washington has, since 1919, penalized a female person for having "sexual intercourse" with a male child under the age of eighteen years.\textsuperscript{110} There was, however, an apparent difference in the treatment of men and women since the same statute penalized a male person who had "carnal knowledge" of any female child under the age of eighteen years.\textsuperscript{111} The different statutory language indicated that men and women were to be penalized for different kinds of sexual acts with minors. It appears likely that the distinction

\textsuperscript{107}Assault is a lesser included offense and frequently is charged when the prosecutor believes that a rape conviction could not be secured. See, e.g., People v. Radunovic, 21 N.Y. 2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967).
\textsuperscript{108}Statutory rape is sometimes called, as it is in Washington, carnal knowledge. The code section penalizing "carnal knowledge" read, prior to the revisions contained in chapter 154, as follows:

Every male person who shall carnally know and abuse any female child under the age of eighteen years, not his wife, and every female person who shall have sexual intercourse with any male child under the age of eighteen years, not her husband, shall be punished as follows:

(1) When such act is committed upon a child under the age of ten years, by imprisonment in the state penitentiary for life;
(2) When such act is committed upon a child of ten years of age and under fifteen years of age, by imprisonment in the state penitentiary for not more than twenty years;
(3) When such act is committed upon a child of fifteen years of age and under eighteen years of age, by imprisonment in the state penitentiary for not more than fifteen years.

\textsuperscript{109}L. Kanowitz, supra note 13, at 19.
\textsuperscript{111}Id.
would be drawn along the lines previously suggested for distinguishing between sexual intercourse and carnal knowledge.

If the prior analysis is correct, in the statutory rape context, sexual intercourse is penetration involving the male sexual organ with the female sexual organ; carnal knowledge, on the other hand, includes sexual penetration of the mouth or anus.\[^1\] Thus, although the Washington courts have never been called upon to decide the difference, if any, between sexual intercourse and carnal knowledge in a statutory rape situation (for want of a reported prosecution of a female for statutory rape), it is probable that a female could not have been convicted for unnatural sex acts with a male under eighteen years old pursuant to the prerevision statutory rape provisions of R.C.W. $ 9.79.020.\[^{113}\]

Chapter 154 equalizes treatment of males and females by providing that it is a crime for a male to "carnally know and abuse" a female under the age of eighteen and a crime for a female to "carnally know and abuse" a male under the age of eighteen.\[^{114}\] Thus, all types of sex acts with minor males and females are now included within the statutory rape provisions. Since statutory rape represents a legislative decision that sexual activity is harmful for minors under certain ages,

\[^{112}\] See text accompanying notes 98-102 supra.

\[^{113}\] However, this is not to say a female would entirely escape prosecution for unnatural sex acts with minor males. Taking "indecent liberties" with "any child" under the age of 15 years by "any person" is proscribed by WASH. REV. CODE § 9.79.080 (1963). The courts have declared that the term "indecent liberties" is "self-defining." State v. Moss, 6 Wn. 2d 629, 108 P.2d 633 (1940); State v. Stuhr, 1 Wn. 2d 521, 96 P.2d 479 (1939). It includes exposure and touching of sexual organs and probably is distinguished from sodomy and statutory rape by the lack of penetration. State v. Olsen, 42 Wn. 2d 733, 258 P.2d 810 (1953). Oral and anal sex acts would also fall within the definition of sodomy, WASH. REV. CODE § 9.79.100 (1963) and could be prosecuted under that statute. Presumably, these unnatural forms of sexual activity by females with underage males could be penalized via these sections. However, there is a three year period, between ages 16 and 18, where it would be impossible to invoke the stricter penalties the law regards as appropriate in the event of sexual activity with minors. Statutory rape carries a penalty of life imprisonment if the child is under 10 years, not more than 20 years if the child is between the ages of 10-15 and not more than 15 years if the child is between the ages of 15-18. WASH. REV. CODE § 9.79.020 (1963). Indecent liberties with a child under 15 years old carries a penalty of not more than 20 years in the state penitentiary or not more than one year in the county jail. WASH. REV. CODE § 9.79.080 (1963). With a person over 15, however, indecent liberties is merely a gross misdemeanor. Sodomy carries a penalty of not more than 20 years if committed with a child under 15, and not more than 10 years if committed with a person over the age of 15. WASH. REV. CODE § 9.79.100 (1963). Thus, oral and anal sexual activity is clearly not proscribed by the statutory rape provisions, although it is penalized, without regard to consent, by the sodomy law.

it is sensible to include both males and females within the protection of the law.\footnote{115}{L. Kanowitz, supra note 13, at 23. But see Brown, Emerson, Falk & Freedman, \textit{The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women}, 80 \textit{Yale L.J.} 871 (1971). If it were factually determined that sexual intercourse was physically harmful to girls under a certain age, but not to boys under the same age, there would be justification for a distinction based on a differing physical characteristic.} This basic decision was made in 1919 by the Washington Legislature. The current revision merely solves a definitional problem that might have resulted in failure to include oral and anal sex acts between a female and an underage male.

Again, however, the legislature has not included within its definitions of statutory rape language that would include homosexual acts. The revised section is clearly worded in terms of acts between a male and a female.\textquoteleft\textquoteleft This could represent a decision that the sodomy statutes are sufficient to cover homosexual acts, although this activity, if thought to be equally harmful for minors, would logically call for the more severe sanctions allowable under a statutory rape prosecution.

\section*{C. Other Sex Crimes}

Several other sex crimes in the State of Washington protected only the female. These included compelling a woman to marry,\footnote{116}{\textit{Wash. Rev. Code} § 9.79.040 (1963).} abduction,\footnote{117}{\textit{Wash. Rev. Code} § 9.79.050 (1963).} placing a female in a house of prostitution,\footnote{118}{\textit{Wash. Rev. Code} § 9.79.060 (1963).} seduction\footnote{119}{\textit{Wash. Rev. Code} § 9.79.070 (1963).} and indecent liberties with a person over the age of 15.\footnote{120}{\textit{Wash. Rev. Code} § 9.79.080(1) (1963).} These crimes have been extended to offer protection to males.\footnote{121}{Ch. 154, §§ 125-29, amending \textit{Wash. Rev. Code} §§ 9.79.040-080 (1963).} Additionally, prostitution has been redefined to include homosexual acts for purposes of the sections penalizing abduction and pimping.\footnote{122}{Ch. 154, § 124, amending \textit{Wash. Rev. Code} § 9.79.030 (1963). See text accompanying note 104 supra.} This extension is logical as well as necessary if the legislature wishes to retain criminal sanctions for these activities. All of the above laws violated the equal rights amendment by penalizing conduct by males, but not females, which does not rest on inherent physical differences between the sexes.\footnote{123}{A court that determines that the statutes violate the amendment would be faced with the choice of striking down the law altogether or extending it to include 599}
It is difficult to discern the operative data used by the legislature in extending these five crimes to protect males. Certainly, recent news events would suggest that forced prostitution and exploitation of males is a current phenomenon in need of attention.\textsuperscript{124} And, if nothing else, the lore of shotgun weddings would justify protecting males from compelled marriage. Whether the extant social problem of seduction and taking indecent liberties warrant extension of these statutes, rather than repeal, is debatable.\textsuperscript{125} To the extent there is a social problem to be deterred by proscribing the above conduct, it seems clear that males and females alike should be subject to the law’s strictures.\textsuperscript{126}

An anomaly is present in one of these five revisions. Although R.C.W. § 9.79.070 as revised provides that either males or females may now be guilty of the crime of seduction, Chapter 154 repealed R.C.W. § 4.24.030 which permitted a woman to bring a civil action for her own seduction.\textsuperscript{127} It seems unusual to extend the criminal sanction for seduction but repeal the civil action rather than extend it men, and at this juncture, would be influenced by the general principle of strict construction of criminal laws. See, e.g., Seattle v. Green, 51 Wn. 2d 871, 322 P.2d 842 (1958); State v. Lewis, 46 Wn. 2d 438, 282 P.2d 297 (1955). Since criminal laws are rarely, if ever, judicially extended to include conduct not specifically mentioned in the statute, a court would be compelled to invalidate the statute.

The obvious question in extension of criminal laws is necessity—does the magnitude of the social problem warrant invocation of penal sanctions? The reason courts refuse to engage in such extension, calling it a legislative decision, is that they lack, in the context of a single case, the ability to gather enough data to make a judgment on the wisdom of extension. In addition, the due process rights of individuals would be violated by failure to provide notice that a particular activity is criminal.

\textsuperscript{124} Full facts have not yet been announced, but it appears that the recent Texas mass murders are connected to organized homosexual prostitution. N.Y. Times, August 12, 1973, at 37, cols. 3–8.

\textsuperscript{125} The reported cases under the crimes of seduction and taking indecent liberties almost all involve children. Perhaps these statutes should be rewritten to encompass only behavior with minors. For adults, it has been suggested that seduction has outlived its usefulness as a crime. See Daniels, \textit{The Impact of the Equal Rights Amendment on the New Mexico Criminal Code}, 3 N. Mex. L. Rev. 106, 116 (1973).

\textsuperscript{126} If instances of overcriminalization are present, they should not be allowed to halt equal treatment. Indeed, extensions such as those described, particularly in the area of prostitution, may focus attention on overcriminalization issues and spur other needed reform, as well as permit reform to take place in light of the true issues rather than be obscured by questions of equal rights and sex roles. See generally Morris, \textit{Overcriminalization and Washington’s Revised Criminal Code}, 48 Wash. L. Rev. 5 (1972).

\textsuperscript{127} It is conceivable that the legislature was mindful of the difficult problem of assessing civil damages for seduction, as well as the fact that seduction is not a modern social problem, in its decision to eliminate the civil cause of action. However, it is difficult to ascertain why the same considerations did not motivate the legislature to repeal the crime of seduction, rather than extend its protection to males.
to men, especially in light of the provision in the criminal statute that "if at any time before judgment upon an information or indictment, a defendant shall marry [the seduced person] . . . the court shall order all further proceedings stayed." Prior to revision, the statute further provided that if within three years of marriage after seduction a defendant wrongfully abandoned his wife, the seduction prosecution could be re instituted.

This portion of the seduction statute, both before and after revision, suggests that certain stereotyped assumptions regarding sex roles underlie criminalization of seduction. Loss of virginity was a serious impediment to marriage; a woman who was not married also could not be expected to support herself. If the seducer assumed the obligations of marriage and support, the criminal law, having provided the necessary inducement, ceased to operate. The attempt seems not to deter conduct so much as to encourage proper conduct after the violation has occurred.

If these considerations are eliminated, the only remaining policy justification for criminalizing seduction seems to be the desire to encourage chastity. Protection of chastity apparently is not worthy of retention as a basis for a civil action, but appears to be a basis for criminal penalties—a strange legislative judgment at best.

VI. CONCLUSION

In the absence of the kind of legislative revision represented by Chapter 154, early implementation of the equal rights amendment would have taken place in the courts as individuals affected by statutes challenged their application on the basis of the newly passed amendment. The courts, lacking direct legislative expression of the impact of the amendment, would have measured the challenged statute in light of policy considerations applicable to the particular law, using principles of equal rights and statutory construction as a referent. The legislature, in making direct revision of these laws, should do no less.

The starting place for revision should be an understanding of equal rights principles. Once their basic operation and requirements are understood, it is possible to recognize the legislative alternatives and intelligently choose between them. The only consistently used equal rights formula in Chapter 154 is a principle of sex neutrality. Sex neutrality alone is simply not a sufficient guideline for wholesale legislative revision. It reflects a callousness to the other policies underlying the laws being amended and invites critics of the equal rights amendment to claim that their fears have been realized.  

Equal rights for the sexes, like other basic freedoms guaranteed by the Constitutions of the United States and Washington, functions in society, not apart from it. It is clear that sex role stereotypes, as well as other policies related to the functioning of men and women in an equal relationship in society, merit careful study before legislative action is taken. The courts are fully equipped, as is the executive, to make the interim adjustments necessary while the legislature thoughtfully revises statutes to conform to the new equal rights amendment.  

131. Opposition to the federal equal rights amendment has often been based on claims that massive overhaul of statutes would be needed, and would have to be accomplished so quickly it would invite errors such as have been discussed in this article. Additionally, critics have claimed that implementation of sex neutrality would result in absurdities that no one desires. See, e.g., Freund, *The Equal Rights Amendment is not the Way*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 234 (1971); Kurland, *The Equal Rights Amendment: Some Problems of Construction*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 243 (1971). Both Mr. Kurland and Mr. Freund testified before the Committee on the Judiciary of the United States Senate on adoption of the equal rights amendment.  

132. There are several inexplicable changes in ch. 154 which can only be errors. In § 66, amending Wash. Rev. Code § 41.16.160 (1963), there is an apparent failure to amend one use of the word “widow” to include “widower.” In § 84, amending Wash. Rev. Code § 43.22.280 (1963), “the supervisor of women in industry” was not stricken from the text, as it should have been. In § 95, amending Wash. Rev. Code § 51.32.040 (Supp. 1972). some words are apparently missing after a change made. In § 106, amending Wash. Rev. Code § 73.04.010 (1963), in changing the word “widow” in the provision that no fee be charged a veteran for administering an oath, the word “surviving” was not inserted before “spouse.” It is not clear that this last change is an error since the legislature may have intended to extend this benefit to spouses of veterans regardless of whether the veteran was deceased.