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College Admission Policies Based on Sex and the Equal Protection Clause

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COMMENTARY

COLLEGE ADMISSION POLICIES BASED ON SEX AND THE EQUAL PROTECTION CLAUSE

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I. INTRODUCTION

There are many institutions of higher education in the United States that exclude students from admission on the basis of sex. Some schools practice their sexual admission policies overtly while others are more secretive; it is well known, however, that there are many schools restricted to either men or women alone. In addition, some schools attempt to limit the admission of members of an "undesirable" sex either by using a quota system or by setting higher admission standards for the undesirables. As is too often the case with a suspicious situation, a lack of data conceals the extent to which sexual admission policies in higher education exist. Nevertheless, a Presidential Task Force recently reported that there is enough known information to make it apparent that sexually discriminatory admission policies in college and universities are widespread. The Task Force recommended that the United States Commissioner of Education should henceforth conduct a survey to document sexual discrimination in education, as he does for discrimination based on race, religion, and national origin.[1] Although both men and women have been excluded from schools because of sex, women have been the primary targets of sexual admissions policies. Due to such policies, many women are denied the opportunity to attend the schools of their choice, and some are denied the opportunity to attend any school whatsoever.[2] This situation raises a serious constitutional ques-

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1. THE REPORT OF THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 7-8, 22-24 (1970).

2. Admittedly, there may be various reasons why women do not attend college. However, statistics do show that although for many years the number of females that

tion: Is it a violation of the equal protection clause for colleges and universities to exclude students on the basis of sex?

Public institutions of higher education are of course engaged in state action that is subject to the fourteenth amendment. But sexual admission policies also exist at many schools that traditionally have been considered "private" and thus beyond the ambit of the fourteenth amendment. However, it is well established that activities that either serve public functions or that are financed with public funds, even when performed by private entities, may constitute state action that must be given constitutional protection.[3] According to these criteria, many schools are no longer as private as they would like to think. In fact, there has been a trend toward recognizing the many public aspects of private schools.[4] Today, at both public and private schools, higher education is an important public function; the nation depends upon it for educated manpower, and individuals depend upon it for economic and social success.[5] Additionally, in the last decade private colleges and universities have been increasingly financed with government funds.[6] Thus, as Professor O'Neil concludes, "a growing

graduate from high school has been higher than the number of males, the number of females admitted to college each year is always lower than the number of males. U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS 187. In 1968 there were 4,477,649 male students enrolled in institutions of higher education, and only 3,035,442 female students. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, 1969 DIGEST OF EDUCATIONAL STATISTICS 60. It is not known how many females attend a college not of their choice due to sexual admission policies.

3. *E.g.*, Evans v. Newton, 382 U.S. 296 (1966); Griffin v. County School Board, 377 U.S. 218 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Cooper v. Aaron, 358 U.S. 1 (1958); Terry v. Adams, 345 U.S. 461 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Hammond v. University of Tampa, 334 F.2d 951 (5th Cir. 1965); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

4. For an extensive and excellent analysis of the public aspects of private colleges and universities, *see* O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1969-70).

5. *See* text at notes 36-44 *infra*.

6. In 1966 (the last year for which complete figures are available) 26.5% of the income of private institutions of higher education came from governmental sources. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, 1969 DIGEST OF EDUCATIONAL STATISTICS 86. Between 1956 and 1966, while governmental aid to higher education has increased absolutely and proportionately, non-governmental payments have decreased. It is estimated that in this decade private colleges and universities will receive from one-third to one-half of their income from government sources. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, EDUCATION IN THE SEVENTIES 27-28 (1968), and 1969 DIGEST OF EDUCATIONAL STATISICS 97.

number of . . . private institutions are so clearly public in substance if not in form that courts should have no hesitation treating them precisely the same as state colleges and universities."[7] Therefore, the inquiry of whether sexual admission policies violate the equal protection clause applies not only to public schools, but also to many, if not all, private schools.

II. The Inequality of Admission Policies Based on Sex

Since its landmark decision of *Brown v. Board of Education*,[8] the Supreme Court has made it quite clear that for a school to deny persons admission on the basis of race is inherent discrimination for which there is no justification. That decision, although not complied with by many schools, at least is settled as a "legal" matter. With the recognition that sexual segregation bears many similarities to racial segregation,[9] there have been several attempts to have the courts also outlaw the sexual admission policies of colleges and universities. In *Heaton v. Bristol*[10] and *Allred v. Heaton*,[11] two Texas cases that pre-dated the women's rights movement, the state Court of Civil Appeals twice rejected pleas for orders directing an all-male state college to sexually integrate its student body. In 1970, two cases challenging sexual segregation in colleges were decided by federal district courts. In *Kirstein v. University of Virginia*[12] the state was ordered to stop excluding female students from admission to the University of Virginia at Charlottesville, and in *Williams v. McNair*[13] South Carolina was allowed to continue to operate Winthrop College as a school for women only. In each of these cases the plaintiffs challenged the constitutionality of admission policies based on sex as violative of the equal protection clause.

As the *Williams* case indicates, considerable opposition exists to the proposition that the equal protection clause requires equal-

7. O'Neil, *supra* note 4, at 188.
8. 347 U.S. 483 (1954).
9. *See* sources and discussion in Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 233-42 (1965).
10. 317 S.W.2d 86 (Tex. Civ. App. 1958).
11. 336 S.W.2d 251 (Tex. Civ. App. 1960).
12. 309 F. Supp. 184 (E.D. Va. 1970).
13. 316 F. Supp. 134 (D.S.C. 1970).

ity of treatment for members of both sexes. The defenders of the status quo will not easily concede that sexual classifications in education are as inherently discriminatory and as unjustifiable as racial classifications. The old arguments that the courts rejected for racial integration are now being proferred in an attempt to maintain sexual segregation. The decision in *Williams* that a state school open only to members of one sex does not violate the equal protection clause was based in part on the following rationale:

> It must be remembered too, that Winthrop is merely a part of an entire system of State-supported higher education. It may not be considered in isolation. If the state operated only one college and that college was Winthrop, there can be no question that to deny males admission thereto would be impermissible under the Equal Protection Clause. But, as we have already remarked, these plaintiffs have a complete range of state institutions they may attend.[14]

This statement is nothing more than a slightly disguised version of the old "separate but equal" doctrine that was supposedly laid to rest in the *Brown* case, but has apparently been reincarnated in South Carolina as far as sexual discrimination is concerned. Those cases[15] which have relied on the separate but equal doctrine have failed to explain how the explicit statement in *Brown* that separate educational facilities are "inherently unequal" can be any less true of segregation based on sex than it is of segregation based on race. Although sex has not yet been declared a "suspect classification" like race, separate educational facilities remain unequal regardless of who uses them. As will be discussed below, sexual segregation in schools involves many of the aspects that were the foundation of the Supreme Court's ruling in *Brown*.

As indicated in *Brown*, segregation, especially when sanctioned by law, is inherently discriminatory because it has a detrimental effect upon the excluded class by signifying that its members are subordinate and unwanted.[16] Women are the primary

14. *Id.* at 137.

15. Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970); Allred v. Heaton, 336 S.W.2d at 258-61 (Tex. Civ. App. 1960); Heaton v. Bristol, 317 S.W.2d at 98-100 (Tex. Civ. App. 1958).

16. 347 U.S. at 494.

targets of sexual segregation in higher education.[17] Relegating them to separate educational facilities stamps them with a badge of inferiority—a manifestation of the male-oriented society in which women are kept in their "place."[18] In fact, sexual separatism in education originated because men were generally considered to be intellectually superior to women, whose position in life could rarely be anything better than housewife.[19] Women, of course, sense that they are considered to be intellectually inferior,[20] and this affects their ability to learn. In many cases, a sense of inferiority unfortunately becomes a "self-fulfilling prophecy"[21] that imprints society's misguided notions about women upon the minds of individual females.[22] Sexual admission policies, like racial ones, are harmful because they generate feelings of inferiority about and among the excluded group, causing frustration and degradation for its members.

Moreover, as was held in the *Brown* case, it is impossible for separate educational institutions to be equal in nature.[23] Schools possess "'qualities which are incapable of measurement but which make for greatness.'"[24] Even if schools are seemingly equal in aspects such as physical facilities and the scope of their curricula (which is doubtful), there are intangible factors such as the quality

17. While it is true that in *Williams* the complainants were males, they suffer the harm, discussed below, of being denied equal educational opportunity. Furthermore, as a matter of policy, the separate but equal doctrine is not a valid basis for allowing unequal treatment regardless of whom the complainants are.

18. *See* C. BIRD, BORN FEMALE Ch. 6 (1968); C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION 292-98 (1968); A. MONTAGUE, THE NATURAL SUPERIORITY OF WOMEN 128-29 (1967); G. MYRDAL, AN AMERICAN DILEMMA 1075-77 (1962); Hacker, *Women As a Minority Group*, 30 SOCIAL FORCES 60 (Sept. 1951); Harris, *The Second Sex in Academe*, 56 AAUP BULL. 283 (Sept. 1970); *cf.* K. CLARK, PREJUDICE AND YOUR CHILD 39 (2d. ed. 1963); Note, *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 433 (1953).

19. S. BRUBACHER & W. RUDY, HIGHER EDUCATION IN TRANSITION 66-71 (1968); C. JENKS & D. RIESMAN, *supra* note 18, at 292-98; M. NEWCOMER, A CENTURY OF HIGHER EDUCATION FOR AMERICAN WOMEN ch. 2 (1959).

20. "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image." REPORT OF THE PRESIDENT'S TASK FORCE, *supra* note 1, at 7. *See also* Harris, *supra* note 18, at 283.

21. *See* Hobson v. Hansen, 269 F. Supp. 401, 491-92 (D.D.C. 1967).

22. 347 U.S. at 494. "Like those minority groups whose self castigation outdoes dominant group derision of them, women frequently exceed men in the violence of their vituperations of their sex." Hacker, *supra* note 18, at 61.

23. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

24. 347 U.S. at 493, *quoting from* Sweatt v. Painter, 339 U.S. 629, 634 (1949).

of teaching, campus atmosphere, and academic reputation that can never be equalized. While there are a few good women's colleges, a look at any standard college guide shows that, as far as facilities, staff, and courses are concerned, the better women's schools are not nearly equal in quality to the better men's or coeducational schools.[25]

> The Gourman Institute ratings for all women's schools are at least two hundred points (on an 800 scale, 400 being accreditation level) below those of their supposedly equivalent men's schools. . . . Even at the best-known women's schools, the smaller endowment, more limited facilities, and smaller range of courses, especially in male-dominated fields, affect all women students. Our society does not yet value the education of women as highly as it values that of men, and consequently we do not invest as much in female as we do in male education. As with racially segregated education, sex-segregated education works to the disadvantage of the group which is discriminated against.[26]

As a result, females are not only deprived of the personal advantages of being well-educated, but also they are handicapped in securing employment dependent upon educational background. The separate but equal doctrine has superficial appeal, but, because it seriously misconstrues the realities of education, it cannot withstand even slight scrutiny.

Even if separate educational facilities were not inherently unequal, they would still be unconstitutional unless they were equal in fact. This was the approach taken in the *Kirstein* case, wherein the court found that the prestige of the main campus of the University and some of the courses of instruction offered there were not available at other state schools.[27] Even *Williams* rests on the proposition that state institutions limited to one sex are permissible only if the state educational system *taken as a whole* does in fact provide equal educational opportunity for both sexes.[28] The

25. *See, e.g.*, AMERICAN COUNCIL ON EDUCATION, AMERICAN UNIVERSITIES AND COLLEGES (9th ed., A. Cartter ed. 1964); J. CASS & M. BIRNBAUM, COMPARATIVE GUIDE TO AMERICAN COLLEGES (1965); LOVEJOY'S COLLEGE GUIDE (11th ed. 1970).

26. Harris, *supra* note 18, at 293.

27. 309 F. Supp. at 187.

28. That is quite clear from the court's statement that if the state operated only one college, "there can be no question that to deny males admission thereto would be impermissible," and that the plaintiffs were not denied equality of opportunity because there was "a complete range of state institutions they [could] attend." 316 F. Supp. at 137.

separate but equal rationale could not save sexual admission policies in state educational systems that do not possess at least some semblance of sexual equality. For example, the state system as a whole must be able to accommodate as many female as male applicants and must make its course selections equally available for all. As far as private institutions are concerned, it is at least arguable that since they are not part of a system like state schools, they have no counterparts with which to be equal[29] and therefore they cannot be protected by the separate but equal doctrine. At any rate, sexual separatism at private or public schools, if not inherently discriminatory, still violates the fourteenth amendment if it does not provide equality in fact for men and women.

The assertion in *Williams* that the state system of higher education in South Carolina, or for that matter any other state, does in fact provide equal, though separate, educational opportunity for both sexes at best is valid only in the abstract. Even though there might be a theoretical place for a student somewhere in a state school system, sexual admission policies operate in conjunction with other factors to make it impossible or extremely difficult for many students to secure the theoretical place to which they should be entitled. In the first place, many students, even if they wanted to, cannot afford the expenses of leaving their home town and traveling across the state to attend college.[30] Married students, particularly, are not in the position to disrupt their family lives by leaving home to obtain an education.[31] In *Williams,* the

29. For those men's colleges that have coordinate or "sister" schools for women, it could be argued that they should be treated as a system of schools like the state colleges.

30. "There appear to be two basic reasons for the shift to coeducational institutions. The first is the increasing insistence of students on attending the institution within reach of home. This is primarily a financial matter, and its growing importance seems to result from the fact that with the increasing numbers of young people who go to college, a larger proportion is coming from the lower income groups." M. NEWCOMER, *supra* note 19, at 39.

31. "Another factor limiting students to institutions in a particular area is the growing tendency to marry before graduation from college. This, particularly for women, but also to some extent for men, limits the range of choice. The woman can complete her education only if she can attend her husband's college, or the only institution within reach of his job. And sometimes the husband is similarly restricted to the place where his wife can find employment." *Id.* at 39-40.

"[E]ducation must be geographically available where the woman is. If she breaks away from school or college to marry, she is less likely to return after a gap than if practicable means of continued study are immediately at hand. Many current rigidities in regard to admission ... will have to yield to greater flexibility." REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 13 (1962).

plaintiffs pointed out that they were being deprived of equal opportunity to obtain an education because the school that denied them admission due to their sex was "more convenient geographically for them than the other State institutions."[32] The court, quoting *Heaton v. Bristol,* answered that the plaintiffs, in " 'being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university.' "[33] That answer entirely misses the point—sexual admission policies do make access to schools less available for some persons than for others. The point is not that individuals have the right to a geographically convenient education (although that isn't a bad idea), but rather that they should not be deprived of the opportunity to attend a conveniently located school *because of their sex.* There is no doubt that sexual admission policies do deprive persons of access to geographically convenient schools that would otherwise be available, and in some situations, such as occurred in the *Kirstein* case, those policies make it impossible for persons to go to any school whatsoever.[34]

When the choice is to be made as to which college or university a student will attend, many factors in addition to each schools location enter into consideration. Not only will the prospective undergraduate look to the course offerings and facilities of any particular institution, but will also consider other tangible and intangible qualities of each university, such as its academic reputation and the nature of its campus life.[35] Ideally, the student will be presented with a wide range of alternatives, each with positive and negative factors. The more specialized the area in which the student wishes to concentrate, the narrower his choice between alternatives. However, to further limit the choice by a factor totally divorced from abilities or goals, namely sex, is unconscionable.

32. 316 F. Supp. at 138.

33. *Id.*

34. "[Some individuals] are not in a position . . . to go elsewhere without harm to themselves and disruption of their lives. A pattern of continued sex restriction would present these plaintiffs with the dilemma of choosing between the marriage relationship and further education. We think the state may not constitutionally impose upon a qualified young woman applicant the necessity of making such a choice." 309 F. Supp. at 187.

35. Many students, both male and female, also strongly prefer to attend schools that have coeducational student bodies. M. Newcomer, *supra* note 19, at 40.

Thus, a woman who wishes to be an engineer but is denied admission to any university that would satisfy her goal will find little consolation in the fact that she can receive an education elsewhere, if she will but choose another profession.[36] Furthermore, her choice as to the highest quality school in any given field is unjustifiably limited if she must pursue an inferior education because she is barred from the better schools because of sex. To allow her to become an engineer, but one with inferior training, will be a frustrating experience. By further decreasing educational opportunity, sexual admission policies merely compound the many real limitations upon the choices that students have in selecting a college or university that can meet their needs.

Admission policies based on sex cause harmful discrimination by implying that women are inferior and by denying students equality of educational opportunity. For all oppressed groups education has become the first and perhaps the most important step in breaking the barriers of second-class status. A baccalaureate has replaced the high school diploma as the sine qua non for employment; and entrance into the professions is even more hopeless without a graduate degree.[37] Statistics amply demonstrate that the life-long earnings of individuals bear a direct relationship to the amount of schooling they have had,[38] and studies indicate that higher earnings depend more upon a college education than upon ability and background.[39] Jacques Barzun has succinctly described the importance a college education has for subjugated persons:

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36. In *Williams,* while the plaintiffs did point to the discrimination of being denied admission to a conveniently located school, they "point[ed] to no courses peculiar to Winthrop in which they wish[ed] to enroll." 316 F. Supp. at 138. Whether or not such courses existed cannot be ascertained from the opinion; however, the curricula offered by men's women's and coeducational schools usually do differ.

37. "College attendance and a college degree are as necessary today as high school attendance and a high school diploma were in the past. The economic, social, and cultural forces in our society are all pushing in that direction." REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, THE REGENTS STATEWIDE PLAN FOR THE EXPANSION AND DEVELOPMENT OF HIGHER EDUCATION 9 (1964). *See also* Jencks & Riesman, *Where Graduate Schools Fail,* THE ATLANTIC, Feb. 1968, at 49.

38. THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN & OTHER PUBLICATIONS OF THE COMMISSION, AMERICAN WOMEN 92-94 (M. Mead & F. Kaplan ed. 1965); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1970 at 111, 325; U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, 1969 DIGEST OF EDUCATIONAL STATISTICS 14.

39. G. BECKER, HUMAN CAPITAL Ch. 4 (1964); B. WEISBROD & P. KARPOFF, MONETARY RETURNS TO COLLEGE EDUCATION, STUDENT ABILITY, AND COLLEGE QUALITY, REVIEW OF ECONOMICS AND STATISTICS 491-97 (1968).

> In American society the college is the gateway to good employment. Every year the figure goes up that expresses the value of a college education in future earnings. Banks publish it, parents daydream about it. Depressed minorities view the college as the tunnel out of prison into economic freedom—it is the great equalizer, as Horace Mann once said of all education. But now nothing short of college is education.[40]

Furthermore, sexual admission policies harm the nation as a whole by depriving it of a source of educated workers who are needed to meet the country's economic, technological, and social demands.[41] From the nation's standpoint, "the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities."[42] Thus, there can be little doubt that the discrimination caused by sexual admission policies is of serious consequence to the nation itself and to the individuals who comprise it, both of which depend greatly upon higher education.

Equality of educational opportunity is also important because it is closely related to freedom of speech and association. What could be more meaningful than the opportunity to learn and to exchange ideas with individuals of all kinds? "The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted."[43] American higher education is supposedly dedicated to freedom of expression; yet, we live in a land where a qualified student may be turned away from a school for no other reason than her sex. The possibility of an infringement of first amendment rights further aggravates the serious harm caused by sexual admissions policies.

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40. J. BARZUN, THE AMERICAN UNIVERSITY 212 (1968).

41. "Institutions of higher education play a vital role in the United States economy. As firms in an industry, these institutions absorb inputs and produce an output, both of which are of value to the society. . . . The outputs of these institutions consist of a more highly educated and productive citizenry, the results of research and the discovery of new knowledge, and, indirectly, a more rapid rate of economic growth. A strong system of higher education is essential in furthering individual aspirations, in developing a progressive economy, and in insuring a humane and sensitive society." JOINT ECONOMIC COMMITTEE, THE ECONOMICS AND FINANCING OF HIGHER EDUCATION IN THE UNITED STATES, 91st Cong., 1st Sess. 1 (Comm. Print 1969).

42. Higher Education Facilities Act of 1963, 20 U.S.C. § 701 (1964).

43. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

III. The Lack of Justification for Sexual Discrimination in College Admission Policies

The defenders of sexual segregation in higher education offer questionable explanations to justify the discriminatory harm which it causes. For example, in *Williams* the court stated that

> it is conceded that recognized pedagogical opinion is divided on the wisdom of maintaining 'single-sex' institutions of higher education but it is stipulated that there is a respectable body of educators who believe that 'a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex.'[44]

It is not clear from this statement whether the court means that there is some expert opinion that the quality of education may be better when men and women are separated, or that the quality of education may be better when schools, instead of spreading themselves thin over a complete range of studies, can select certain fields, which happen to be of primary interest to one sex, to concentrate their efforts upon. If the court means the latter there is no need or justification for a school to have sexual admission policies. Expert authority may support the theory that a liberal arts education, for instance, is better when a school can devote all of its resources to liberal arts courses, but that hardly means that only men or women can or should be in the liberal arts. It is one thing for a school to offer only certain fields of study that may happen to be of primary interest to members of one sex, and quite another thing for a school to automatically exclude members of the other sex who are also interested in that field of study. While educators and the state governments may decide that home economics students should be separated from engineering students so that they may better pursue their studies,[45] it is not for them to decide that all the "fine young women" should be home economists and all the "fine young men" should be engineers.[46] Even if

44. 316 F. Supp. at 137.

45. This might raise the problem of de facto segregation, but that is a problem for the future.

46. "What is needed to remove the present ambiguity of women's legal status is a shift of emphasis from women's class attributes (sex per se) to their *functional* attributes. . . . If laws classifying persons by sex were prohibited by the Constitution, and if it were made clear that laws recognizing functions, *if performed,* are not based on sex per se, much of the confusion as to the legal status of women would be eliminated."

educational policy could justify the separation of fields of study, it would not justify restricting any of those fields to members of one sex only.

If, however, the above mentioned statement in *Williams* was meant to assert that there is some expert opinion to the effect that separation of the sexes in itself improves the quality of education, the court's position is even more suspect. In what way does sexual segregation per se improve the quality of education? Certainly sexual discrimination in higher education, with all its harsh effects, cannot be deemed justified by an unsupported and vague generality that some authorities think that a segregated education is somehow "better" than an integrated one. Depending on the kind of rights involved, inequality of treatment may be justified in some cases by a reasonable state interest, while in other cases it can only be justified by a compelling state interest. Although the courts have not yet considered the issue, it is probable that, because education is so important and intertwined with freedom of expression, it "is a right which states may restrict only for 'compelling' reasons, if at all."[47] The bald assertion that a segregated education is preferable can hardly be said to constitute such a "compelling state interest" or even a reasonable one as to justify the discrimination.

At a time when the knowledge and accepted beliefs about men and women were quite different than they are today, sexual discrimination was justified on the theory that women were innately incapable of performing the same functions as men. This theory spawned sexual separatism in higher education,[48] as well as the legal doctrine, most often associated with the 1908 case of *Muller v. Oregon*,[49] that "sex is a valid basis of classification." Increasingly rejected by lower courts,[50] the *Muller* doctrine is of dubious validity today, especially since it is founded upon a theory

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Murray & Eastwood, *supra* note 9, at 238-41. *See also*, Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 137-40 (1968).

47. Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7, 18.

48. *See* sources cited at *supra* note 19.

49. 208 U.S. 412 (1908).

50. *See, e.g.*, Kirstein v. University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966).

that has lost most of its credence. The passage of federal and state laws prohibiting unequal treatment of the sexes in employment[51] clearly indicates that even the country's legislatures, which are hardly purveyors of radical social ideas, have recognized that women can perform almost all tasks equally as well as men. Even if it is believed that men and women are different in some respects, few people, if any, currently would suggest that men are inherently better college students than women. Indeed, today it would be an absurdity to say that innate differences between men and women justify sexual classifications in higher education admission policies.

Although most, if not all, authorities no longer argue that women are innately incapable of keeping up with men in the classroom, certain prejudices still exist, even among some of the more "enlightened" experts about the role that women should play in society. The contemporary argument made in favor of sexual segregation in higher education is that some females do not perform well in the presence of male classmates because, as Jencks and Riesman put it, "women worried about their femininity are understandably fearful of seeming too bright or too competent in direct competition with male classmates."[52] That argument, while it may accurately describe some females under current conditions, places women in a vicious circle, because "femininity" is a culturally acquired form of behavior that has developed from a male-oriented society of which sexual separatism is a manifestation.[53] Separation of the sexes fosters the concept of "femininity" which in turn hampers women from being capable of breaking the barrier of separation of the sexes. To accept "femininity" as a reason for maintaining sexual segregation ignores that "femininity" is a cultural phenomenon that has been imposed upon women, and that may cause more harm than good for both men

51. The federal legislation is Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. As of 1969, 31 states had equal pay acts, and 21 states plus the District of Columbia had acts prohibiting sexual discrimination. U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS 267, 269-70.

52. C. JENCKS & D. RIESMAN, *supra* note 18, at 306. It should be noted that this argument only goes to justifying the maintenance of women's schools, and not men's schools.

53. *See* S. DE BEAUVOIR, THE SECOND SEX (1953); B. FRIEDAN, THE FEMININE MYSTIQUE (1963); K. MILLETT, SEXUAL POLITICS (1970).

and women.[54] Like other rationalizations to support subordination of groups, the "femininity" argument pretends to be in the best interest of the subordinate group, when actually it operates to further suppress the group. As Jencks and Riesman admit, even on a more superficial level, the "femininity" argument is an uncertain one.

> [T]he advantages of segregation for women are equivocal. Men are almost always vicariously present for girls, just as whites are for American Negroes, even if they are physically missing. Girls in women's colleges seem to worry as much about being really feminine as girls in coeducational colleges, and perhaps more.[55]

On the other hand, in a coeducational environment, women may be liberated by the discovery that they do not always have to relate to their male classmates on a sexual basis.[56] Most important, a sexually segregated education does not remedy the problems that women face concerning their "femininity"; at best, it merely postpones resolution of the problems.

Sexual discrimination in higher education is justified at times by the argument that some colleges and universities are not equipped with dormitory or other facilities to accommodate women. The validity of this argument is doubtful, since many schools have easily and inexpensively converted dormitories and other facilities from use by members of one sex to use by members of the other, and back again. More importantly, this argument is not a justification for sexual discrimination; it is merely an excuse. In several cases, the Supreme Court has held that frugality is no justification for discrimination,[57] and there certainly is no merit to the assertion that a school may exclude women merely because all the available facilities are being used by men.

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54. In an essay for Time Magazine, Gloria Steinem has perceptively pointed out many of the benefits that men would receive as a result of sexual egalitarianism. Among those related to education equality are that men "will no longer be the only ones to support the family [and] . . . bear the strain of power and responsibility," nor will men be "encouraged to spend a lifetime living with inferiors; with housekeepers, or dependent creatures who are still children." There will be "no more unequal partnerships that eventually doom love and sex." TIME, Aug. 31, 1970, at 22-25.

55. C. JENCKS & D. RIESMAN, *supra* note 18, at 307.

56. *Id.*

57. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

IV. CONCLUSION

The implication of *Brown* and its progeny that education is a fundamental right warrants the test of a compelling state interest to justify any infringement of that right. There is a growing awareness that no such compelling state interest or even a reasonable one can be found to justify discriminatory admission policies based on sex. An admissions policy which uses sex as a criterion for exclusion therefore violates the equal protection clause of the fourteenth amendment. The value of sexual separatism in higher education, if any, is so minimal that the resultant disadvantages of inferior education and second-class status are so disproportionate as to be totally unjustifiable.