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NOTE: Next week's will be the last issue of R.G. for this school year.

RES GESTAE

Ann Arbor, Michigan

"Merrill Lynch is B.....t on America"

April 20, 1973

MOSCOW

SATURDAYS CAN BE HEAVY

SEP 16 1974

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Saturday morning classes attract a curious group of followers. Seekers after Professional Responsibility, denizens of a vagrant Contracts course and speculators in Investment Securities, all can be seen straggling off to class on the weekend. For the Securities students, at least, an interesting teacher has brightened the dreary Saturdays of winter term: Cyril Moscow, polished practitioner, natural teacher and hard-headed business lawyer.

Investment Securities is a two hour course which treats the intricacies of Federal regulation in the field. Moscow, who is a partner in the respected Detroit firm of Honigman, Miller, Schwartz & Cohn, was attracted to teaching the course by a coincidence of things. As consultant to the Law Revision Commission which rewrote the Michigan Corporation Code, he came to know Stanley Siegel, professor here and Reporter for the Commission. At the same time Professor Schulman of Wayne Law School, who taught the course last year, approached Moscow to teach securities law at night to interested lawyers. He accepted the offer, reflecting, "I always wanted to wear leather patches on my sleeves and see the law from the other side of the desk." Siegel got wind of Moscow's Wayne commitment and arranged for the lawyer to teach the same basic course at Michigan as well.

Moscow finds that the benefits of teaching go beyond the mere sartorial; "I welcome the discipline of going through these materials" (he uses a

conventional casebook and statutory supplement). Practitioners too often arrive at results and, yet don't know how they got there." Such "cross fertilization," as Moscow termed it, cuts both ways. While he has undertaken "scholarship as a hobby," Moscow claims to know "little about legal education" (a situation which has hardly deterred full-time teachers of law). Nevertheless, students have generally found his lectures engaging. Moscow attributes part of this success to the fact that securities is a "fascinating industry." He does not employ a Socratic approach,

"When you get there, there's no there, there."

-- Gertrude Stein

preferring instead to "get out information and structure" through extemporaneous lecture. On the one occasion he did query students concerning a set of problems, he was treated to the Michigan passing game. He took this as evidence that not much had changed since his time in law school

After undergraduate education at Wayne, Moscow attended the University of Michigan Law School between 1954 and '57 where he was an editor of the law review and on Coif (his classmates included Whitmore Gray and Robert Knauss). He picked up trial experience in the Department of Justice's Attorney General program until 1960 when he moved onto Honigman. There were no securities courses in Moscow's time, so he is largely self-educated in the area, although he might well be said, between 1960 and 70, to have grown up with the field.

LETTER

To the Editors:

I am writing this letter to explain the rationale for the Senate resolution replacing the lettuce boycott with a mild resolution permitting the dining hall to buy Teamster head lettuce when, as the resolution stated, the preferred UFW head lettuce is not available. A sign would be placed above the lettuce bin when Teamster lettuce was served so that those who wish to observe the boycott could do so, while those who require lettuce for dietary reasons or who do not wish to be involved in the boycott could still have the freedom to choose what they eat. As statistics revealed, when in September when head lettuce was available, there were 1152 servings per week while after the boycott, the lack of head lettuce dropped the number of servings to 760 serving per week. It hardly seemed fair for all freedom of choice to be abruptly removed by continuing a complete ban on all Teamster lettuce -- even to the point of having no lettuce at all. In the Senate meeting, emotional questions of suffering and shady practices of unions were discussed. But this discussion totally avoided the key point of the whole session: by imposing the boycott, were we not denying law club students the right to make their own moral judgments and decide for themselves what they would or would not eat? That was the concern of myself and several other Senate members who voted in favor of the resolution.

/s/ Jim Hill
LSSS Senator-at-large

MOSCOW from p. 1

The strongest undercurrent in Moscow's teaching is his pro-business practitioner bias, as much a product of his time as of his experience. Lectures are rippled with financier jokes and business anecdotes, told in a comradily fashion. For instance on state government securities officials, he said "they are not dunderheads on pensions put in our way to obstruct

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us but are sincere, able and sophisticated people." While his respect for securities regulators is apparent, the message of "us" and "them" adversariness is clear, and "us" is the business side. Moscow says that "businessmen are some of the brightest people in the country; they are just not trained in the law." This generality is doubtless true but does not respond to the basic question

often asked by young lawyers: are businessmen doing what's best for society and should I be assisting them?

It is this absence of qualms about the norms of business that is the striking feature of Moscow's approach and that of most lawyers from his generation. In Moscow's view, the "lawyer must view himself as a skilled craftsman and should develop the skills of his craft." Thus it follows that "the lawyer should separate purely technical skills from his social orientation." While as a theoretical matter, he thinks this means that a successful attorney still "could be a socialist," Moscow emphasizes that "the work is very hard and if you try to do it with one hand tied behind your back, it will take all your energy to be competent."

Moscow has witnessed the alternative to concentration on technical proficiency among students he's recently interviewed for the firm here and elsewhere. "Some young lawyers are ambiguous in their thinking about the profession," he said, "and it carries over into their practice. The good tactician cannot ponder whether he should take, for example, the union side or the company side; he must just say he has a client and take it from there." Law students, Moscow opined are, in some cases afflicted with "only a vague idea" of what they want to do or have aims tending along the line of "selling bandaids to Indians." Moscow believes that such law students have missed the main question, which must be answered at the outset: "are you in or out of the system."

Harsh as his criticism may seem, Moscow is fundamentally right. The

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see MORE MOSCOW p. 4

Kamisar on Privilege

ANN ARBOR (April 19) --- President Nixon's claim of "executive privilege" in shielding White House aides from testifying about the Watergate incident may seem unprecedented.

But, according to a University of Michigan law professor, "executive privilege" dates back to George Washington's time, and similar safeguards have been claimed by Congress and the judiciary.

Yale Kamisar points out that some 20 Presidents ---including Washington--- have invoked "executive privilege" for one reason or another, and that Congress and the courts have frequently claimed the right to withhold privileged information under the Constitutional doctrine of "separation of powers," which protects each branch of government from encroachment by another branch.

But, in noting recent Congressional criticism of President Nixon's resistance to the Watergate investigation, Kamisar observes that throughout history each branch has tended to exalt its own privilege while questioning the same immunities when applied to other governmental units.

It is a debate, says Kamisar, which "has never been clearly resolved or examined by the Supreme Court, because it involves the most difficult and sensitive of Constitutional issues."

Historically speaking, says the U-M Constitutionalist, there are numerous instances of all three governmental branches claiming immunities. For example:

---In the 1950's, during the Joseph McCarthy era, Congress repeatedly claimed its right to withhold information from the courts in order to maintain "untrammled freedom of legislative activity." In fact, even at the time Sen. McCarthy was being censured by the Senate, a Senate resolution was passed prohibiting McCarthy's staff from releasing files to a federal court investigating a conspiracy charge against the McCarthy committee.

---As a member of the U.S. Supreme Court, Justice Tom Clark invoked privilege when he refused to give Congress information about his previous activities as U.S. attorney general, in connection with a Congressional investigation of the U.S. Justice Department.

---During Grover Cleveland's first term as President, his attorney general refused to furnish a Senate judiciary committee with information relating to the suspension of a U.S. attorney. Although the Senate never forced the attorney general to produce the information, it condemned his actions in four separate resolutions.

---President Theodore Roosevelt informed the Senate of his instructions to the U.S. attorney general not to explain the government's failure to prosecute the U.S. Steel Corporation for antitrust violations.

---Throughout history, Congressional employees have been forbidden to release information from Congressional files unless they are specifically authorized to do so by resolution of Congress.

---In 1876, the U.S. House of Representatives refused to give the courts access to information relevant to a bribery charge against William W. Belknap, U.S. secretary of war.

---During the trial of Aaron Burr for treason in 1807, Chief Justice John Marshall of the Supreme Court subpoenaed the President to produce certain documents which might be helpful to Burr's defense. President Thomas Jefferson claimed the absolute power to withhold the documents except one.

---George Washington's secretary of war, on the advice of the President, refused to furnish documents to a Congressional committee investigating the alleged incompetency of a U.S. general.

Kamisar indicated to Res Gestae that he had personal experience with at least one invocation of "congressional priv-

KAMISAR from over

ilege" during the McCarthy period. In 1954 as a young attorney with Covington and Burling in Washington, D.C., Kamisar was called upon to defend the General Electric Company, a prominent defense contractor, against the claim of its employees that the company had conspired with the McCarthy Government Operations subcommittee to fire workers who had resorted to the Fifth Amendment under interrogation. Kamisar characterized this as "the most difficult case," he had ever worked on because of the side of the issue he was faced with. The discharged employees were seeking discovery of the minutes of closed executive sessions between GE management and McCarthy committeemen, where, they believed, the plan to take their jobs was hatched.

Kamisar was joined in the task of writing the brief by Burke Marshall, who would later head the first Civil Rights Division of the Kennedy Justice Department and go on to teach law at Yale and Abe Shyles, who subsequently served as Chief Counsel to the State Department before taking a post with the Harvard Law faculty. In their brief, according to Kamisar, the three men were reluctant to hinge their argument on the contention that the executive session minutes were unavailable for scrutiny because affected with the legislative privilege. Rather, they were able to get the D.C. Court of Appeals to "go off on a procedural point," as Kamisar put it, by arguing that the Court need not meet the privilege question, since the workers had not exhausted alternative means of garnering the evidence, such as subpoenaing GE executives to testify to the content of their discussions with the subcommittee. Nevertheless, the Senate protected its own by passing the unanimous resolution, which was mentioned by Kamisar above, barring McCarthy staff members from divulging subcommittee business.

Kamisar emphasized that the matter of executive privilege in the Watergate case is by no means closed by President Nixon's announcement

Tuesday that he had uncovered "major developments." The Michigan law professor pointed out that the Senate investigating committee ground rules would allow any given question or answer to be shrouded in the privilege and Nixon promised that his staff would answer only "proper" questions. At least some Congressional frustration with this state of affairs was aired by Senator Walter Mondale of Minnesota Wednesday when he demanded that, if the President does have "new information" concerning the Watergate conspirators, he should proceed to remove those implicated now and not wait for laborious committee investigations to smoke them out. Kamisar suggested that, on the basis of past events, this sort of unilateral revelation was unlikely.

-- U/M News Service &
R.G. Staff



father of three, he is not an immoral, dishonest or perverse man. He is really one of us. He just doesn't sound like us. How much of young lawyers' commitment to social progress is empty rhetoric? Securities law is a lucrative practice. You and your family can live comfortably on the income from skillful work. The tensions of conscience and materialism await us all. And, it's disquieting to confront a lawyer like Cyril Moscow, who is placid, even witty and spirited, in the face of such conflicts.

For a class, made up largely of graduating seniors, Moscow's Investment Securities course may be a look into their futures.

-- J.J.S.

MORE MOSCOW from P. 2

R.G. Special Supplement Iscariot Scores ERA

"EQUALITY OF RIGHTS UNDER THE LAW SHALL NOT BE DENIED OR ABRIDGED BY THE UNITED STATES OR BY ANY STATE ON ACCOUNT OF SEX."

This, together with a provision that it shall not take effect until two years after the date of ratification, is the sum and substance of the Equal Rights Amendment to the Constitution. The ERA has been passed by the Congress, where one of its strongest supporters was Michigan law grad Martha Griffiths, and has been sent to the states for ratification. To date thirty states have ratified the proposed amendment of the thirty-eight required. One has voted to withdraw its ratification.

see ERA p. 8

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be made to admit on an unsexed basis or be prohibited from setting up sexual quotas. It might be a good idea to prohibit such sexual discrimination, but it seems to me that if that is so, the Senate and House ought to have the guts to stand up and say Harvard, you can't discriminate on the basis of sex any more, rather than pushing this question under the rug.

Most of the Ivy League schools and I think, Stanford, Duke, Tulane, and certainly many other prominent private universities engage in some form of sexual discrimination. Some exclude women altogether. Others--and I think Yale College, for example, falls in this category--apparently have stated quotas--that is, irrespective of how good the women candidates are, how good their grades are, only a certain number get in. Still others, Middlebury has been cited as an example of this, apply more stringent standards to women than to men, and a certain grade point will get a male in but it takes a higher grade point to get a woman in. Now, as I say, I don't wish to argue the educational soundness of such distinctions but only to point out there are those, declining in number, I guess, who believe that it is educationally desirable to separate the sexes or to have fixed quotas.

Let me examine a couple of the cases from which one might argue that, say, Yale College was engaged in State action and was therefore subject to the amendment, and obliged to admit on an unsexed basis--that is, without regard to sex. Certainly the private schools are performing a function which the State often performs. I work for a State university, a university clearly engaged in State action. Moreover, they are doing so with dollars supplied to a very large extent by the Congress and to a lesser extent by the States. I think if you uncovered the budget of any medical school today and figured out where their dollars come from, you would find that a very large share of the dollars of all the medical schools come from the Federal Government in one form or another. And this is also true with regard to the undergraded schools such as MIT, Harvard College and Yale College.

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the reach of the amendment into private or quasi-private activity, of the law which passes under the rubric of State action in the constitutional area. What kind of private affairs will this amendment reach? I think that is an important question for the Senate to be concerned with.

Second, I would like to discuss the question which you were touching on at the end with Professor Kanowitz, whether the amendment and the interpretation which the courts may put upon it will leave any room at all for functional discrimination against women.

And finally I would like to talk about a kind of bizarre area--that is, the question of homosexual relations and homosexual marriages.

First I turn to the State action question. In the course of the discussion of the amendment on the House floor, Mrs. Griffiths spoke to those who were concerned about it and said in effect: Don't worry about this; this only reaches actions by the Government. I think her words were, "applies only against the Government." I am sure that you are aware that under the current status of constitutional law that's a fairly facile answer for what is really a very complex and difficult problem. In the Supreme Court's efforts to root out racial discrimination in the time since World War II, it has defined many acts as state action and therefore subject to the governance of the 14th amendment, which prior to World War II would have been regarded as purely private acts. I would submit that this extension of the State action doctrine hasn't ended.

Let me give you two examples that some might regard as private activity but which might, under the Supreme Court decisions be state action and under the proposed amendment arguably would be outlawed.

First are the activities of the great private universities. Mind you, I am not saying whether it is my personal opinion that private universities

STATEMENT OF JAMES J. WHITE, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN, BEFORE THE SENATE JUDICIARY COMMITTEE, SEPT., 1970.

Mr. White. I thank you for inviting me and to ask me to express my views.

I want to emphasize at the outset I speak only for myself, certainly not for the law school, not for my colleagues and, I suppose, least of all, for the women law students at the law school; I am sure as a result of my comments here they will regard me as the crassest kind of Judas.

I oppose both the House version of the amendment [the 27th or "equal rights" amendment] and I must say that I find yours [Senator Ervin's] almost equally objectionable. However, my opposition is not characterized by the kind of passion and certainty which others have expressed here. I, for one, do see benefits, substantial benefits perhaps, coming from such an amendment's passage and its ratification by the States. I think these benefits are highly problematical, but I think it is likely that there are such benefits. However, on balance my conclusion would be to vote against both of them.

A couple of caveats first of all. Unlike those who have spoken before me, I am not a constitutional scholar. If my opinion has any weight, it is only because I have done some legal research in the question of the status of women lawyers and written an article on that in which I have found their status to be dismal and that the discrimination against them was pervasive and deep seated.

I limit my remarks to three or four areas which may not have been discussed at great length in the past. I will pass the questions which have already been talked about, divorce, custody, support, the draft. It seems those have been discussed here by Professors Freund and Kanowitz, and they were also discussed on the floor of the House. I will talk about three areas that I think have interest. First is the question of

Now compare that activity to the cases, and I am sure they are cases with which you are familiar, Senator, particularly Burton v. The Wilmington Parking Authority and Simpkins v. Moses H. Cone Memorial Hospital. The Cone case can be read for the proposition that the infusion of a lot of money into an activity which would otherwise be a private activity is a factor making it into a State function. Despite the fact that only approximately 17 percent of the money that was put into a new addition was Federal money, the Court held the hospital subject to the 14th amendment. That too is the position that commentators have taken about that case. I am going to read from "Political and Civil Rights of the United States" by Emerson, Haber & Dorsen. They have a comment on this case and a comment on another decision that was vacated on appeal. Let me read what Judge Wright said and then read what they say about Simpkins v. Moses H. Cone Memorial Hospital.

This is on page 1660. Reading from 203 F. Supp. 855-858-859:

"At the outset one may question whether any school or college can ever be 'private' as to escape the reach of the Fourteenth Amendment. Institutions of learning are not things of purely private concern. No one any longer doubts that education is a matter affected by the greatest public interest. And it is true, whether it is offered by a public or private institution, clearly the administrators of a private college are performing a public function. They do the work of the State often in the place of the State. Does it not follow they stand in the State's shoes? And if so, are they not agents of the State subject to the constraints on governmental action to the same extent as private persons who govern a company town--or control a political party, recognizing authorities strongly suggest the Constitution never sanctions racial discrimination in our schools and colleges no matter how private they claim to be."

Well, it seems to me if you insert that with the amendment you arrive at the conclusion that private schools

can no longer discriminate on the basis of sex.

Now, the authors of the book--

Senator Ervin. I might explain that I think that those who are the chief advocates of this amendment entertain that opinion because one of their chief complaints they voice is about a case from Texas where the legislature for Texas had established, I think it was, 18 State-supported colleges and they provided that 16 of them should be open to all regardless of sex but that one of them should restrict its admission to women and the other should restrict its admission to men. And the one that restricted its admission to men was a State college which had a compulsory ROTC, or required it as a mandatory part of their studies. And this Texas girl sought to compel the State College that was restricted to men and which had a mandatory ROTC requirement to admit her.

And the Texas court refused to do so. That case is cited by the chief advocate of this amendment to be one of the obstacles they want to remove.

Mr. White. Certainly. But clearly the amendment would reach that case because that is clearly State action. That is Texas A.&M., I guess.

Senator Ervin. But you are certainly correct, the Federal courts have undoubtedly extended the theory of State action to any institution of learning, however private it might be in its origin or in its management, which receives funds from the State. And I would say that today most every educational institution in this country either receives some aid from the State, directly or indirectly.

Mr. White. Let me read what Emerson and Dorsen have to say about Simpkins v. Moses H. Cone in this context. They say, "Even more significant is Simpkins v. Moses H. Cone Memorial Hospital... private schools like private hospitals are the beneficiaries of numerous Federal aid and subsidies, tuition grants for Korean War veterans,"--and they cite the statute, the National Defense Education Act, and

the Higher Education Facilities Act of 1963--to the extent that Simpkins represents the law, it is difficult to see how private schools participating in the foregoing programs can avoid being drawn into the areas of State action.

So it seems to me if we were to argue the case and if the Court at least were willing to apply the same standards that it has applied to the racial discrimination cases (it is conceivable that it wouldn't) many of our private schools and certainly the most prominent ones would wind up being State agencies. Under the amendment they would have to admit on a nonsexed basis.

Now, as one who, from his undergraduate days, harbors a thorough distaste for Yale College students, it wouldn't bother me to see Yale become 90 percent female. However, I suppose there are Yale graduates, including many outspoken liberal graduates, who would believe that at least there ought to be some kind of quota and some kind of balance. If we find that there is State action, I see no basis upon which a court could say a quota is permissible under these circumstances. And if the women applying to Yale College turn out to have better credentials than 90 percent of the men, well, then presumably the school would have to be made up of 90 percent women and 10 percent men who happened to slip through.

I want to turn now to a second area where we might measure the State action question, the enforcement of wills and other private agreements. Assume, for example, that a father bequeathes his business to his sons or to his male heirs. Presumably writing the will is a private act which would not be reached by the amendment. However, assume that things happen this way: At the time of his death, the stock, let's say, that he has left to his daughter is worth less than the ratable share in the business. The probate court hears the case and decides it and issues an order transferring the business to the male heirs and the stock to the daughter. The daughter says that is State action, that transfer by the court under Shelley v. Kraemer... and the Girard Trust case is State action and as such it is in violation of the amendment and impermissible. It seems

to me that the daughter has a perfectly rational argument. Of course there are ways in which a court might try to avoid that outcome, the court might construe the amendment in a way to not reach that result. Certainly the daughter has a colorable argument, and perhaps a good one. Indeed, an argument just like that one was made in the 1970 Supreme Court case, Evans v. Abney, which is the last time this case involving the park in Macon, Ga., has come to the Supreme Court. And as I recall, it came up once, it went back, and the Georgia court then appointed private trustees. The Supreme Court said you can't do that, so the Georgia court said, well, the trust fails and that park goes back to the heirs. The case came up again and it was argued that when the court gave the park over to the heirs, that was State action under Shelley v. Kraemer and racially discriminatory State action.

Judge Black's response to that argument is interesting. He does not say Shelley v. Kraemer does not apply. He does so much as admits that, but he says it does not matter because the distribution back to the heirs was not racial discrimination. He argues that it benefited each race equally, or deprived each race equally because nobody got to use the park. But it is interesting to note that he didn't say that Shelley v. Kraemer did not apply. Presumably in the hypothetical case I have put, the analogy would be to say: Well, probate court, you can't order distribution according to the will; what you will have to do is allow things to go by intestacy which, of course, would frustrate the intention of the grantor. I do not want to argue whether or not we ought to permit people to make such wills; some people would argue we should not, but it seems to me that this is a poor way of reaching that result, and at least we ought to argue openly about whether we are going to interfere with private lives in that way.

Senator Ervin. Of course, you come down to the proposition in that connection if you are going to give freedom to people, you have to give freedom to act foolishly as well as wisely. And I think all Americans crave that freedom to act according to their own judgment, whether it is wise or whether it is foolish in

eyes of other people. And it certainly could impair the freedom to do in this case.

White. Well, I think that is true. These are just two hypotheticals I have thought up, and I don't think they can be dismissed as silly teachers' rumination, because I think every one of these is we are talking about now is going to be presented to the courts if this amendment passes, within a few years afterwards. There are plenty of people around who want to raise these issues.

And when I talk to the women they do not say, no, that's an improper interpretation of the amendment. They say, yes, that is right, and that is the way it ought to be. And they are going to potential plaintiffs. So I don't think these are far-out kinds of things, things that will not happen. I think they are things that may well happen.

Now, a second general area to which would like to speak is whether the amendment leaves any room for functional discrimination between the sexes. I suppose it is indisputable if I am the member of the Los Angeles Rams that I don't have to interview women for members of my front four. And I suppose it is also indisputable that if I am looking for a brassiere model I don't have to interview males, and if I want to reproduce, it is rational discrimination to find a member of the opposite sex. So that at least in those areas we would say a functional discrimination on the basis of sex is a rational way of going about your business. The question is, to what extent the amendment will interfere through the Civil Rights Act with that might be regarded as functional discriminations, and let me give you an example. My hypothesis is that the amendment would cut out, or at least severely restrict the provisions in Title 7 which authorize "bona fide occupational qualifications reasonably necessary to the normal operation of a particular business." It is not clear but the amendment might well cut that provision out of the Civil Rights Act of 1964. If it did, then the question becomes, is there any functional discrimination that is illegal under the Civil Rights Act, because then we have just the Civil Rights

Act which says you can't discriminate on the basis of sex, and we have no bona fide exception in it. The question is whether I could establish any job classification which a woman could not perform.

Let me give you a hypothetical case. In arguing by analogy now from the racial area, suppose that I run a men's store in Montgomery, Ala., and I also have a men's store in New York City, and a black applies for a job as a salesman. I say to him, I will not hire you for my Montgomery store because my clientele will not deal with a black man and I will lose business. However, I don't discriminate on the basis of race except when it is a functional discrimination and I will hire you, and I will give you a job at the same wage in my New York store. If the applicant says no, I want to be employed in Montgomery, I take it the courts are going to say, you must employ him in Montgomery. You don't have the choice to employ him somewhere else. And you must employ him even if your discrimination against him would be functional--that is, even if your discrimination is going to cost you 10 percent of your business this year, you still must employ this man. The fact that your profits are less this year is a social cost that you bear for getting integration. We want it bad enough that we are going to make you bear that cost even though your discrimination is functional.

Transfer that analysis to the context of a woman and take this hypothetical case. Let's say we have a case in which the job is carrying hundred-pound grain sacks in a grain elevator and a woman comes in and says, I want to apply for the job. We don't say you can't have the job because you are a woman; we start out by saying we will test you. We test the woman and it turns out that she can carry hundred-pound sacks but she carries only 70 percent of the sacks the male carrier is carrying. Can we say to her you can't have the job because you only carry 70 percent of the sacks that a male carries? Why can't she respond like the black responds in the Montgomery case, saying that's a social cost you must bear either you have to hire me and accept the fact I carry only 70 percent or you must

change the job. You must make the load into two bags or you must give me a fork-lift or something so I can do the job. But if there is only a reasonable cost involved, you have got to change the job so that I can have it.

One could pass this argument off as a remote. When I made this point with the women law students at the law school they said, yes, we would make that argument, and it is reasonable to make him change his activity. Of course, Mrs. Griffiths on the House floor said no, that's not the intent we have behind it. But it seems to me that is an argument you could make, and there would be strong precedent for such an argument in the racial cases.

The question that the Congress should ask itself is do we wish to allow these kinds of discriminations, or do we not wish to allow these kinds of discriminations. Do we wish to allow these kinds of functional discriminations or is it so important to us to get women into all of these jobs that we should make the employer bear this cost, and make him change his jobs? Perhaps this case is out on the fringes, but it certainly is a case that can be brought if this amendment goes through. It is one that will be argued persuasively. And it is one that I can see someone winning on somewhere. Indeed some of the EEOC regulations come fairly close to that.

As a final point, and I think an appropriately bizarre one, let me talk about homosexual behavior and how the behavior might affect homosexual behavior.

With the exception of Illinois and perhaps a few other States, there are laws on the books which make it a crime to engage in certain kinds of homosexual activity. First of all, I suppose the amendment would bring into question all that law. Personally, I guess I would favor doing away with that law, at least as it involves consenting adults. But again, I think the question is, is this the way we should do away with it, or should we allow the States to control this themselves?

But the more interesting problem is

raised by what is going on now in California where, as you may know, there is a Protestant minister who purports to marry members of the same sex. They go through a marriage ceremony. Assume our minister performs a marriage ceremony between two men, one of whom, let's say, is a movie star and makes a lot of money. They live together as man and wife for 4 years, during which the movie star makes several million dollars. Then they break up and the one who was performing the wifely function comes to court and he says we were married. This is a community property State and I want my half of the income which you earned in the 4 years of our marriage. A woman could claim that half and I have a right to claim that half.

Well, I think this is a pretty bizarre kind of thing, probably not a very, not of crucial importance in connection with the amendment, but it is an example of the kinds of areas to which the amendment might reach and where there will certainly be litigation. They are looking for every way to test the marriage laws of California. And, surely those laws will be tested on this basis and conceivably a court would find that the State had to authorize marriage and recognize marital legal rights between members of the same sex. [In 1970 Senator Ervin proposed an alternative equal rights amendment.]

Finally, and at the risk of discourtesy to my sponsor here, let me suggest some criticisms which I have of your proposed amendment. I agree with your hypothesis which is that it would be desirable to accomplish our goals by strengthening the EEOC and by vigorous legislation, not by any amendment at all. However, I see several distasteful consequences potentially in your amendment.

First it seems to me that the language in your second sentence, "or which is reasonably designed to promote the health, safety, privacy, education, or economic welfare of women," might be interpreted to be a backtracking on the progress made in the courts under the Civil Rights Act of 1964. As you know, there have been a number of lawsuits under Title 7, and I think with the exception of one Federal district court case in Minnesota

the women, assaulting the State laws, have been victorious, and they have got new jobs. I think that is the way the statute should have worked, and I think it is working pretty well in that area. One could argue that your language cuts back upon those cases. And I think if the language is left in, if it is your intention not to cut back on those cases, somewhere it should be made plain that that is not your intention, because I think there is some danger that those cases would be cut back on.

For example, the district court in Oregon in *Richards v. Griffiths Rubber Co.* found that the administrative rules which said women couldn't lift more than a certain number of pounds were permissible and "reasonable under the equal protection clause" but held that they were impermissible under Title 7 of the Civil Rights Act. That would seem to me to be the result a court would reach when comparing the 14th amendment and the amendment as passed by the House--that is, that the equal rights amendment more narrowly restricts the area of reasonable discrimination between men and women. Personally, I would not like to see those cases cut back on. I think there is some danger in your language.

A second concern about your language --and I don't know quite how to balance this--is its explicit reference to the draft. Now, another issue that is going to arise, of course, is admission to the service academies. Is there a right and, if so, on what basis, for the admission of women to Annapolis and to West Point and to the Air Force Academy. There is some small danger, it seems to me, that by including explicit reference to the draft you lend the negative inference that things like the academies are not covered by your exclusion and are governed by the amendment. That will make it harder for a court to say that Congress and the States didn't have the draft and the service academies in mind.

The final language that I have objection to in your amendment, and really this is one that the women law students at the law school brought forward to me--they found the language at the end, "performs their duties as homemakers or

mothers" to be really offensive language to them. I don't think you have in mind that it is the duty of every woman to be a homemaker and a mother and that if a woman chooses to practice law, that is her right.

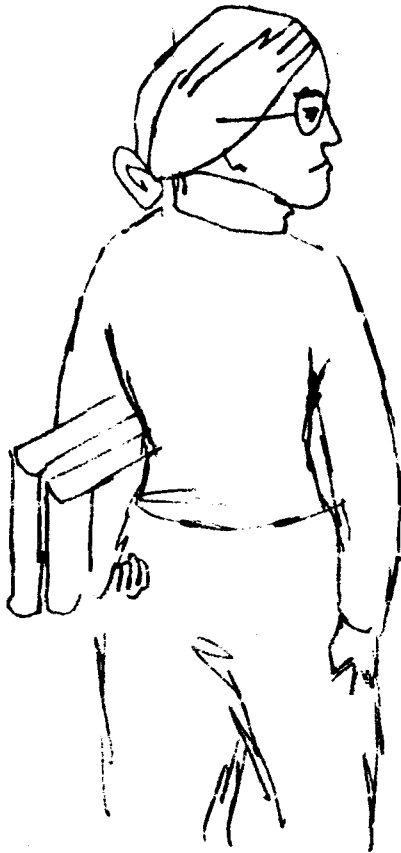
Senator Ervin. I certainly do not, because I think that women voluntarily assume that or they voluntarily refrain from assuming that.

Mr. White. Well, certainly, I am sure that is your intention. However, it is conceivable that other language could be found. I think this language is needlessly offensive. Now, I don't think that is the only reading you can put on it, but I do think if other language should be found; that language is offensive to women who choose not to be homemakers and mothers.

Those are the only comments I have about the draft of your amendment.

In conclusion if I were given a completely unfettered hand and I were a Senator, I would vote against all of the amendments and I would seek to accomplish the goals which I seek--and I think these are very important needs--by strengthening the EEOC, perhaps by additional legislation. Mrs. Green has held hearings, I believe, on the bona fide occupational exemption and how that ought to be cut down perhaps by legislation.

At the same time, I don't dismiss the amendment out of hand. I see the potential for some good from it. The women law students, who by and large are not radical people at all--they are a very moderate sort of people, were uniformly in favor of the amendment and their position was this, and I think it is rational: "I don't care if it causes lots of chaos a lot of places. Anything that rocks the boat and stirs up opinion and makes people question their judgments about the relationship between the sexes and what is appropriate is a desirable thing in overcoming what we all know is discrimination in employment on the basis of sex."



In 1965 Prof. James J. White wrote a law review article on the status of women lawyers in the legal profession. As a result he has been viewed nationally as something of an authority on the subject. This notoriety caused him to be asked to testify before the Senate Judiciary Committee when they considered the Equal Rights Amendment in the fall of 1970. Prof. White testified against the passage of the amendment.

In order to promote discussion in the law school on the potential impact of the ERA on the law (and at the request of several readers) we have reproduced that testimony for the Res Gestae readership. We welcome your comments.

--HF

Credit: not a full right yet

from House Beautiful,
April 1973

Because of protest, picketing and refusal by women to accept harsher standards for themselves than for men in obtaining credit, some progress (though not enough) has been made toward granting equal credit rights. Pressure has forced some department stores, loan associations, banks and brokerage houses to amend discriminatory policies. Aware of the seriousness of the problem, many states have established agencies to investigate credit problems based upon sex or marital status. Legislation to rectify the condition was drafted by Congresswoman Bella Abzug (D.-N.Y.) with her "Equal Credit Opportunity Act." Her proposal, should it become law, would prohibit discrimination by credit unions, savings and loan associations and federally insured banks on the basis of sex or marital status.

Positive steps have been taken by a few department store chains to suspend credit form requirements that a working woman's husband must be a co-signer. Franklin Simon in New York has been especially progressive and lists "Ms." on its applications. The major credit card companies—Diner's Club, American Express, Master Charge, BankAmericard and Carte Blanche—claim they do not discriminate and require only "verifiable income" and a good credit rating.

What are the still existing conditions that have brought about these few gains? Consider the facts: 38 million American women are in the labor force; of these, six million are the head of a household. But, ironically, sharing in or maintaining financial responsibility for a family does not automatically bring about "economic freedom" for a woman. With increasing frequency, cases have been reported of divorced, widowed, married and single women who've been unable to secure bank loans or credit cards in their own names without an

"authorizing" male signature. Discriminatory practices that deny women credit often have no basis other than marital status:

- Although her income exceeds \$18,000, a woman with two children was denied a charge account at a major department store because she was divorced. Bank references, a personal stock portfolio and her position as the owner of a New York City art gallery were all discounted.

- A woman with an income of over \$20,000 applied for a credit card in her name with an airline. The company responded by requesting her husband's signature before the issuance of the card. She refused the request and her card was never sent.

- And a grim report: A California widow, unable to obtain credit of her own after her husband's death, solved the problem by continuing to use her dead husband's credit cards.

Credit grantors explain that applicants are evaluated upon their ability to pay, yet the married, divorced, separated woman or widow has discovered, in fact, that companies overlook their economic potential and see them as poor credit risks. The reason: If credit has been issued in her husband's name, a woman has no chance to establish a credit rating of her own. A financial Catch 22 exists. In order to get credit, a woman must show proof that she is credit-worthy, yet she is powerless to establish a credit rating since lenders recognize her as a *dependent* of her husband, not as an autonomous individual with earning power or financial responsibility. Discrimination escalates particularly if a woman is in the child-bearing age bracket. Credit institutions have rationalized that because a woman could become pregnant and quit work, her salary could not be counted on to pay debts. Testifying at the hearings of the National Commission on Consumer Finance, Congresswoman Martha Griffiths (D.-Mich.) said that creditors who believe that women of child-bearing age are unreliable perpetuate a myth. "Most women," she stated, "have control over whether they'll become pregnant and all women have control over whether they'll quit their jobs. I know of no evidence showing that married couples tend to default on loans when the wife bears children." Congresswoman Griffiths' statement is further affirmed by the Pennsylvania Commission on the Status of Women, now investigating discriminatory policies in credit: "There is no statistical evidence to indicate that [pregnancy] causes women to be a greater credit risk than that which is

possible through accident or illness which can interrupt credit payments regardless of sex."

The single woman, too, is offended by credit practices when she marries. A Miss Barbara Jones who marries and becomes Mrs. Barbara Smith would most likely receive a new credit card in her husband's name—Mrs. Robert Smith. Bills in her husband's name would follow along with the dissolution of her individual credit rating. That a young wife earns a higher salary than her husband or is perhaps supporting a student husband is irrelevant data to banks, loan companies or retail creditors. As far as they are concerned, the man's signature—alone—validates a request for credit.

The double standard is still an invidious obstacle in the battle for economic equality for women. Carol de Saram, vice-president of the National Organization for Women (NOW), a Wall Street computer systems analyst, states that women have accepted not receiving credit as easily as they've accepted job discrimination. "But," she says, "since women have been made aware that they are a contributing part of the system and find that they don't share in the profits of that system, they've rightfully protested. Discrimination omits them from a society that makes them 'people of no property' and prevents them from earning a decent income and even being *eligible* for credit."

Ann Gropp, information officer for the Pennsylvania Commission on the Status of Women, states that this group now has identified the areas into which most credit abuses fall. They are (1) the extinction of a woman's individual credit upon marriage, (2) requiring a married woman, who is a better credit risk than her husband, to list financial information about her husband and have him join in a credit card application without asking the same requirement of him, (3) extinction of a woman's credit after divorce because all credit had been in her husband's name, (4) refusal of mortgage institutions to grant an unmarried woman a mortgage or to consider a wife's income in obtaining a mortgage, (5) discrimination of credit institutions toward widows who seek credit and (6) the application of different and stricter standards for women than for men who wish to obtain credit.

Any woman denied credit at a department store should file a complaint with her city human rights commission; if denied credit from a credit institution, with the state human rights commission. Or write to the D.C. Commission, Helen Lewis, Executive Director, Room 201, District Building, 14th Street and Pennsylvania Avenue N.W., Washington, D.C. 20004, or Carol de Saram, c/o NOW, 28 E. 56th St., N.Y.C. 10022. The issue of equal credit availability is an important one. No woman should be denied equal credit—and spending—rights.

MICHIGAN LAW REVIEW

— NOTES —

(1.) The Michigan Law Review has instituted a new policy for admitting students after their second year. All those who have completed a full second year at Michigan are eligible. For details see the Law Review bulletin board on the second floor of Hutchins Hall.

(2.) Students who submit work that is eventually published in the Michigan Law Review are made members of the Law Review staff as of the time of publication. Editorial assistance is available for any piece that appears to have a substantial possibility of publication. Questions should be addressed to Brian O'Neill, Room 410 HH.

LA RAZA LAW STUDENTS announces its Officers for 1973-74 are:

President	Felipe Ponce '74
Vice-President	Luis Guzman '75
Secretary	Jose Berlanga '75
Treasurer	Chuck Jimenez '75

LAW SCHOOL COURSE MART

OFFERINGS: FALL 1973

NOTE: ANY STUDENT ENROLLED AT THE U.M. LAW SCHOOL WHO HAS COMPLETED OVER 18 CREDIT HOURS WITH A GRADE POINT OF 0.66 OR ABOVE MAY ELECT TO TAKE UP TO 6 COURSES FROM THE COURSE MART. EACH COURSE WILL GIVE THE STUDENT 1 CREDIT UNLESS THE PROFESSOR CAN BE CONVINCED OTHERWISE. COURSES WILL BE GRADED AS FOLLOWS: "PASS" "HIGH PASS", "HIGH HIGH PASS", "REALLY HIGH" AND "ALSO RAN".

• APPLIED CRIMINAL LAW 101

"From the Criminal's point of view"

MEMBERS OF THE CLASS WILL BE SENT ON NIGHTLY SCAVENGER HUNTS FOR HI-FI, TV's, JEWELRY AND CARS. A WEEKLY SEMINAR WILL DISCUSS THE MOST SUCCESSFUL METHODS THAT WERE EMPLOYED BY THE CLASS. AT THE SEMINAR A COLLECTION WILL BE TAKEN UP TO POST BAIL BONDS AND JAIL VISITS WILL BE ARRANGED. THE LAST STUDENT IN THE SEMINAR WHO IS NOT CAUGHT WILL BE AWARDED ALL OF THE ITEMS WHICH WERE COLLECTED.

- A STUDENT IS ALLOWED UP TO 1 YEAR WITHDRAWAL AFTER TAKING THE COURSE.

- THE COURSE MAY BE TAKEN CONCURRENTLY WITH JAIL BREAK 720.

• APPLIED CRIMINAL LAW 102

"From the Police's point of view"

MEMBERS OF THE CLASS WILL PATROL THE HIGH CRIME AREAS OF ANN ARBOR SUCH AS THE MASSAGE PARLORS AND CORRIDORS OF HUTCHINS HALL UNDER THE DIRECTION OF AN EXPERIENCED POLICE OFFICER. THEIR GRADES WILL BE DETERMINED BY HOW MANY MEMBERS OF THE CRIMINAL LAW 101 CLASS THEY CATCH.

• CREATIVE PROCEDURE 141

"Deposition Taking"

THE CLASS WILL LEARN THE ART OF DEPOSITION TAKING. EACH MEMBER OF THE CLASS WILL TRY TO BREAK THE WORLD RECORD FOR THE LONGEST CONTINUOUS DEPOSITION EVER TAKEN (28 HOURS, 11 MINUTES, 6 SECONDS) HELD BY PROFESSOR ARTHUR MILLER. A NUMBER OF UNWILLING PETTY LARCENY SUSPECTS WILL BE SUPPLIED BY THE ANN ARBOR POLICE FOR THE USE OF THE CLASS.

• BUSINESS PLANNING 237

THIS YEAR'S SPECIAL TOPIC WILL BE "CORPORATE MANAGEMENT--HOW TO KEEP YOUR HOTELS RUNNING SMOOTHLY". THERE WILL BE A CASE STUDY OF THE HOWARD JOHNSON CORPORATION. A NUMBER OF ISSUES WILL BE EXAMINED, SUCH AS: "HOW TO NOTICE ELECTRONIC SURVEILLANCE EQUIPMENT AS IT IS BEING MOVED INTO THE ROOMS" (WASHINGTON) "HOW TO RUN ROOFTOP SUNDECKS" (NEW ORLEANS) AND "HOW TO KEEP FREAKY GRADUATE STUDENTS OUT OF THE ROOMS (ANN ARBOR).

• ANIMALS AND THEIR SYMBOLIC MEANING TO THE LAW 411

THIS YEAR'S ANIMAL FOR DISCUSSION WILL BE THE BULL.

• LAW AND COMPUTERS: THE FUTURE

THE COMPUTER HAS GIVEN US THE FOLLOWING DESCRIPTION OF THE COURSE: "BZOT HOY LBSUF CZORSO AMROT AZ RUS30 CZUOPNSRA MIZAGROUT CLEPUR MIROYVESTA"

• LEGAL ETHICS 520

THE STUDENTS WILL BE GIVEN PRACTICAL EXPERIENCE IN THE FIELD AS THEY DRAFT MEMOS FOR JOHN MITCHEL AND G. GORDON LIDDY. THE COURSE WILL BE TAUGHT BY A (RECENTLY) RETIRED F. B. I. AGENT.

• APPLIED LABOR RELATIONS 577

"The Teamsters View"

A NECESSARY COURSE FOR THOSE WHO EXPECT TO PRACTICE LABOR LAW! THE CLASS WILL SPEND 2 WEEKS IN GRUNGY DINERS, TRUCK STOPS, AND UNION HALLS WITH TEAMSTER BUSINESS AGENTS, LEARNING HOW LABOR RELATIONS REALLY WORKS. THE STUDENTS WILL BE GRADED ON THEIR CREATIVITY IN INVENTING A NEW STRONG ARM TACTIC.

• ENVIRONMENTAL LAW SEMINARS 596

THE FOLLOWING SEMINARS IN KEY ENVIRONMENTAL PROBLEMS WILL BE OFFERED THIS YEAR:

- THE VANISHING HONEYBEE
- THE USES AND ABUSES OF GARBAGE (CASE STUDY AT THE UNIV. OF MICHIGAN).
- THE NON-RETURNABLE BOTTLE DEBATE (AN EMPIRICAL STUDY IN ANN ARBOR PUBS).

• QUEER LAWS 699

WE DON'T WANT ANYONE TO GET THE WRONG IMPRESSION ABOUT THIS COURSE LIKE LAST YEAR WHEN 123 STUDENTS SIGNED UP FOR IT! THE COURSE DEALS WITH UNUSUAL LAWS THAT HAVE BEEN PASSED BY CERTAIN JURISDICTIONS.

• TORT COMMISSION 859

EACH MEMBER OF THE CLASS WILL COMMIT A TORT OF HIS OR HER CHOICE ON AN "INNOCENT" PERSON WALKING THROUGH THE QUAD. THE COURSE WILL THEN EXPOSE THE STUDENT TO THE PSYCHOLOGICAL TRAUMA OF BEING A DEFENDANT IN A TORT CASE. THE EXCITEMENT OF ARREST, "JOKING, ARRESTMENT, TRIAL AND INCARCERATION WILL BE STRESSED.