



PERSPECTIVES

A Magazine for and about Women Lawyers



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Advocates Reignite the Fight for an Equal Rights Amendment

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FEATURE

Advocates Reignite the Fight for an Equal Rights Amendment

By Cynthia L. Cooper

Cynthia L. Cooper, a journalist in New York, is a former practicing lawyer who writes frequently about human rights and justice.

U.S. Supreme Court Justice Ruth Bader Ginsburg sought out a pocket Constitution before a packed house at the historic headquarters of the National Women's Party in Washington, D.C., on Women's Equality Day in August 2018. Moderator Jill Morrison, executive director of the Women's Law and Public Policy Fellowship Program at Georgetown Law School, posed a question: "Could you explain why you believe that the Equal Rights Amendment (ERA) is still as needed today as it ever was?"

Justice Ginsburg scrolled through the hand-sized Constitution, explaining infirmities in the post-Civil War language of the Fourteenth Amendment, which inserted "male" in the second section. She described how every constitution around the world since 1950 has guaranteed that women and men are treated as equal citizens. Then, she made it personal.

"Just like freedom of speech [and] freedom of the press, a fundamental tenet of our society should be the equal citizenship stature of men and women, and that's what the Equal Rights Amendment would do," Justice Ginsburg said. "Now I take this pocket Constitution and show it to my granddaughters, and I can't point to a provision that says explicitly men and women have equal rights and obligations under the law. I would like to be able to (do that)."

ERA Comes Back

The text of the ERA is simple: "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." The language was developed by lawyer and suffrage fighter Alice Paul in 1943, although the equality amendment was first introduced in 1923.

When, under the amendment process, it was approved in 1972 by two-thirds of the members of the U.S. House of Representatives and Senate, a deadline for ratification by the states was inserted—at first seven years, then extended to 10 years. The ratification fell three states short of the 38 needed, and in 1982, the ERA was declared dead.

Now, new impetus is reviving it. Two key strategies have emerged to make the ERA a reality: One approach is to gain the final three ratifications and amend the original congressional time limit; the other is to "start over" with a vote in Congress and gather 38 new state ratifications.

"All along, since 1982, there was a little hum of energy," says lawyer Jessica Neuwirth, author of the 2015 book *Equal Means Equal: Why the Time for an Equal Rights Amendment Is Now*. "It went from a hum to a whisper," Neuwirth notes, "and now it's an ascendant line. It's steady and it's strengthening. Not like a roar, but a much greater awareness than there used to be." Neuwirth is cofounder of the

ERA Coalition, a D.C.-based entity that serves as a resource for more than 70 organizational members working on the issue. [<http://www.eracoalition.org>]

With new logos, T-shirts featuring Gloria Steinem and Dorothy Pittman Hughes, branding, online resources, a movie (*Equal Means Equal*, directed by Kamala Lopez), and events, renewed efforts are aiming to secure this long-term structural fix. But it's not easy. "It's surprisingly gotten little news coverage," says Katherine Franke, director of the Center for Gender & Sexuality Law at Columbia Law School in New York City. "Substantive and meaningful law reform gets lost as the most salacious or more sensational news stories swallow the news cycle."

Equal Protection and Laws Fall Short

Public opinion leans heavily toward a constitutional guarantee of equal rights for men and women—a 2016 poll by the ERA Coalition shows that 94 percent support it, and other polls also show strong support.

The problem is that 80 percent don't know it is lacking. "Many people, including lawyers, think the ERA is in the Constitution. I was stunned to hear that," says Linda T. Coberly, Chicago managing partner of Winston & Strawn LLP, which in 2017 began a pro bono effort to support ERA efforts.

Lawyers, Coberly contends, have a critical role in educating the public. Winston & Strawn created a fact sheet to translate legal concepts for laypeople, beginning with a 2011 quote from late Supreme Court Justice Antonin Scalia: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."

In the absence of the ERA, in the past decades litigators turned to the Equal Protection clause of the Fourteenth Amendment to challenge sex discrimination. More than 100 years after it was adopted, the Fourteenth Amendment was first applied to sex discrimination in *Reed v. Reed* (404 U.S. 71 (1971)), which held that a state probate law wrongly favored male administrators over female ones.

But sex-based classifications have not benefited from the same rigorous review in the courts as classifications based on race, religion, or national origin, where the government must demonstrate a compelling reason for discrimination. "The rights women have under the Fourteenth Amendment are lesser than the rights other discriminated groups have," Coberly explains. "Discrimination against women will be subjected to intermediate scrutiny, whereas a law that discriminates on the basis of race or national origin or religion will be evaluated under strict scrutiny."

While the courts have applied "heightened scrutiny" to sex-based discrimination in some cases, the application is uneven. State ERAs give a window into the possible effect of a constitutional equality on judicial interpretation. "Most of them are using strict scrutiny. They have been very effective in cases involving reproductive rights and pregnancy discrimination," says Linda Wharton, an associate professor of political science at Stockton University in Galloway, New Jersey, and former managing attorney of the Women's Law Project in Philadelphia, who has studied the topic extensively. State ERAs or state constitutional equivalents exist in nearly half the states (Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming).

Apart from a constitutional inclusion, specific laws provide a measure of protection against sex

discrimination, such as Title VII of the 1964 Civil Rights Act on workplace discrimination, Title IX on educational equality, the Equal Pay Act, and the Pregnancy Discrimination Act. All face limitations. “They provide patchwork protection and have been subject to different levels of enforcement and judicial interpretation,” wrote Thomas Susman, director of the ABA Governmental Affairs Office, in a June 2018 letter to Congress that also described a 2016 ABA Resolution reaffirming support for the ERA. [https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_10B_authcheckdam.docx]

New Paths to the Constitutional Equality

Women’s rights advocates looked again at the ERA after claims of unequal treatment based on sex crashed into judicial brick walls—for example, in the denial of a class action to chain-store employees with sex discrimination claims (*Wal-Mart v. Dukes*, 564 U.S. 338 (2011)) or in the failure to hold a police department accountable for the systemic failure to enforce domestic violence protection orders (*Castle Rock v. Gonzales*, 545 U.S. 748 (2005).)

“We had a litigation-focused strategy. I realized that the courthouse should not be perceived as the sole path to justice,” says lawyer Carol Robles-Román, who in March 2018 became copresident and CEO of the ERA Coalition after leading the legal advocacy group Legal Momentum.

Two intersecting approaches to securing an Equal Rights Amendment are underway. Neither is simple.

A “three-state strategy” aims to gather three more ratifications to add to the 35 passed from 1972–1982 and reach the magic number of 38. The concept was developed in 1992 after the Twenty-Seventh Amendment (the “Madison” amendment) on congressional pay was added to the Constitution, 203 years after it was first passed by Congress.

In May 2017, Nevada became the 36th state to ratify the federal ERA, and the first since 1977. In May 2018, Illinois followed suit to become the 37th state. “It’s part of Illinois voicing its view that we don’t want to live in the Dark Ages. We do want the U.S. Constitution to protect gender equality. Or at least that’s what I hope,” says Lorie Chaiten, director of the Women’s and Reproductive Rights Project of the Illinois ACLU, which supported the measure.

During the latest ratification process in Illinois, Anne Schlafly Cori of the anti-ERA Eagle Forum wrote to the *Chicago Tribune* to reiterate objections from the 1970s. Cori’s late mother, Phyllis Schlafly, helmed the Stop ERA campaign at that time, arguing, among other things, that the ERA would require unisex bathrooms and an expansion of gay rights.

Cori wrote that the ERA would lead to the end of sex-segregated prisons, women’s shelters, and accommodations for pregnant women, and it would “mandate taxpayer-paid abortions” and equal representation of women in military combat. “Nothing in (the) ERA would ever give women a pay raise or stop any sexual harassers,” Cori wrote.

ERA groups countered her arguments in testimony and literature, and the vote easily passed in the Illinois Senate, but only squeaked by with one vote above the threshold in the state’s House of Representatives.

Now one more state is needed. Activists are focused on Virginia or North Carolina; the other states that await ratification are Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri,

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Oklahoma, South Carolina, and Utah. In Virginia, women wearing suffragist outfits joined a rally in Richmond in August, and the topic will be discussed at a day-long symposium at William & Mary Law School in November. And in late October, two Virginia officeholders will join a panel at CUNY Graduate Center in New York for a program called “A New Era for the ERA: Women of Color Lead the Way.”

In North Carolina, state representative Deb Butler, a Wilmington, N.C., lawyer, introduced a ratification bill, although, she says, the conservative legislative leadership is intent on pushing it aside. “I wanted to at least file and get the conversation started,” she says. “The public will drive this discourse.”

The Equal Rights Amendment North Carolina Alliance has gathered a roster of 21 organizations and is holding a fall forum on the subject.

If one more state passes the ERA, the attention will shift to Congress. Proponents argue that Congress has the authority to repeal or waive the original ratification deadline. Currently, resolutions H.J. Res. 53 in the House and S.J. Res. 4 in the Senate sponsored by Rep. Jackie Speier (D–CA) and Sen. Ben Cardin (D–MD), respectively, seek to remove the deadline.

Whether this novel approach will withstand a constitutional challenge is a matter of debate among scholars. ERA proponents argue that waiving the deadline is within congressional power. Skeptics say that ratification today fails a test of being “sufficiently contemporaneous” and differs from the Madison amendment, which had no time limitations. Other questions arise over the validity of rescissions—five states passed rescission resolutions after their initial pro-ERA vote, but rescissions have been considered null in other amendment fights.

Starting Over

An alternative strategy is to begin again by getting two-thirds of both chambers of Congress to propose a new constitutional amendment on equal rights and gathering the requisite 38 state ratifications. Since 1992, when she was first elected, Rep. Carolyn Maloney (D–NY) has introduced legislation in every congressional session to do just that. The current H.R. Res. 33 keeps the ERA intact with one additional sentence that references women—“so women would be in the Constitution,” Maloney says.

When new versions are discussed, additional concepts come into play, too. Should the overarching concept relate to “gender” equality instead of “sex” equality? Or, as suggested by the African American Policy Forum, a group co-founded by UCLA and Columbia law professor Kimberlé Crenshaw, should it refer to “women in all their diversity” and define “sex” as “including pregnancy, gender, sexual orientation, or general identity,” and add classifications related to race or other categories?

In June 2018, in order to gain traction on a new ERA—now sometimes called the Women’s Equality Amendment—representatives Maloney and Speier announced an informal “shadow” hearing. “We’ve waited too long,” Maloney notes. “We’ve been totally stalled since the ’80s.”

Among those testifying was actress Alyssa Milano, known for her #MeToo movement activism. “Lack of recognition of women’s equality in our Constitution perpetuates this idea that women are less than men, which then leads to unequal treatment, abuses of power, sexual harassment, and assault,” she said.

Maloney is passionate in her ERA advocacy. “It’s the most important thing we could do to help women. It would be bedrock firm in our Constitution; it could not be taken away from us,” she says. “I’d like it to be the legacy of every woman in America.”

VOICES

A Story of Recovery

By Laurie J. Besden

Laurie J. Besden, Esq., a licensed attorney in Pennsylvania and New Jersey, serves as the executive director of Lawyers Concerned for Lawyers—Pennsylvania (LCL-PA, Inc.). LCL-PA, Inc., is the confidential lawyer, judge, and law student assistance program for the state of Pennsylvania assisting individuals struggling with substance use and/or mental health disorders.

“Hi, Laurie, it’s Bill. Just sending you my blessings and good wishes. I hope to hear from you sometime. I am doing well, very well. Thank you. Bye.”

Although to many people the above transcription of a voice mail message I received on May 24, 2018, at 5:36 PM would seem ordinary, this message is anything but ordinary to me. And it’s a message I will cherish for the rest of my life.

To understand why the voice mail is so meaningful to me, you need the backstory.

“Bill” is the Honorable William R. Carpenter, Court of Common Pleas of Montgomery County, Pennsylvania. I am “Laurie,” a licensed attorney in Pennsylvania and New Jersey. I was born and raised in Montgomery County, Pennsylvania. Bill’s comment that he is “doing well, very well” refers to a stroke he suffered in the spring of 2018. Bill called me after my mom, Roberta Besden, and my rescue Staffordshire Terrier, Amazing (half of the Amazing and Grace dog duo), visited him during his stay at a rehabilitation facility.

What isn’t clear from anything above is that Bill sentenced me to incarceration in the Montgomery County Correctional Facility for 11 and a half months commencing on January 29, 2004, as a result of my fifth arrest, four of which were felony prescription fraud cases. While imposing a sentence according to the criminal sentencing guidelines, Bill sentenced me to the option of a new life. His sentence unequivocally saved my life.

I grew up in the suburbs of Philadelphia in a home of privilege (beach home in Margate, New Jersey; overnight camps; convertibles), where education was the primary focus—so much so that my family paid for all of my (and my physician sister’s) educations. After graduating from the University of Maryland, College Park, in three and a half years with a 3.97 GPA, I was off to law school despite always wanting to be a cosmetologist.

I attended Penn State Dickinson Law in Carlisle, Pennsylvania. In my third year of law school, I was in a car accident that introduced Vicodin into my life. That initial prescription set off the fire of active addiction that I couldn’t put out until my freedom was taken from me on January 29, 2004. On that same day, J. David Farrell, a Montgomery County lawyer in long-term recovery and a volunteer with Lawyers Concerned for Lawyers of Pennsylvania, presented himself in person at the prison and brought me the message of recovery sharing his experience, strength, and hope.

Although I passed the Pennsylvania and New Jersey bar exams in 1999, I was taking three 10 mg

tablets of Vicodin an hour to get through the exams. My addiction followed me to the Pennsylvania Superior Court, where I served as a law clerk for Justice Frank J. Montemuro, a former justice on the Pennsylvania Supreme Court.

When my “doctor” in Texas who was conducting phone consultations with me under my nine identities was suspended, I had a 40-pill-a-day habit just to function. Then I became the doctor calling in my own prescriptions and fueled my addiction through 2004. Add cocaine. After 5 arrests, 29 car accidents, 3 rehabilitation facilities, and 3 incarcerations, I was finally sentenced to the “option of a new life” by Bill.

After I served a year in prison, David Farrell helped me find a job as a paralegal. He also connected me with other lawyers in recovery in Montgomery County and community support groups for drugs and alcohol. And I became a volunteer for Lawyers Concerned for Lawyers.

In 2005, I reported my convictions (four years late) to the Pennsylvania Disciplinary Board and New Jersey Office of Ethics and entered a three-year suspension on both of my law licenses. After continuous sobriety and filing for reinstatement, I was reinstated to the practice of law in Pennsylvania (2009) and New Jersey (2010) by a power much greater than me.

I am now the executive director of Lawyers Concerned for Lawyers of Pennsylvania (LCL) because, quite frankly, I am the product we sell. There is hope. There is help. Launched in 1988, LCL is a lawyer, judge, and law student assistance program in Pennsylvania. Most states have a similar program. Simply put, these programs are the confidential, safe, and supportive resource to combat the astoundingly high prevalence rates of substance use and mental health disorders in the legal profession.

The greatest barrier to people reaching out for support is the stigma associated with substance use and mental health disorders, which truly is just an illusion. LCL spends a great deal of time and resources on education to help break down the barrier of stigma. I don't look like an addict, but, then again, what does an addict look like? I share my story of addiction and recovery, both in and out of the legal profession, to let people know that substance use and mental health disorders do not discriminate, but neither does recovery.

Recovery has given me the opportunity to pay it forward personally—whether it is taking a recovery meeting to the local prison, sharing my story with high school students and drug court graduations, taking my rescue dog (Amazing) to volunteer with dementia residents, or volunteering as a dog walker at the Humane Society of Harrisburg (Pennsylvania).

If the cards were fair, I wouldn't be alive. The greatest gift of recovery is simply waking up each day with a blank canvas and painting it with vibrant opportunities by paying forward the gift of life that was so freely given and shared with me.

And now, through my recovery, I can be Bill's friend, in both respects.

CHAIR'S COLUMN

Stressed? You're Not Alone

By Stephanie A. Scharf

Stephanie A. Scharf is a founding partner of Scharf Banks Marmor LLC in Chicago. She is chair of the ABA Commission on Women in the Profession and co-chairs the ABA Presidential Initiative on Achieving Long-Term Careers for Women in Law.

As I travel across the country speaking with lawyers in many different settings and a broad range of practices, I've noticed heightened concern about a problem that is more pressing than ever before: the stress of working in the legal profession. Research by the American Bar Association shows that lawyers experience significant levels of alcohol abuse, drug abuse, depression, anxiety, and stress. Based on data from the World Health Organization, women are more likely than men to experience extreme stress, depression, anxiety, and related disorders. Some of the contributing factors are lower earnings, extra caregiving responsibilities, as well as the impact of bias, gender-based harassment, or even violence.

All too frequently, women lawyers face the burden of bias. Some have described a phenomenon they call "death by a thousand cuts," the everyday micro-aggressions rooted in gender bias that inexorably wear down women and contribute to increased stress and its consequences.

Gender bias has many forms. Some bias is explicit, such as the expectation that women are the caretakers in their household and employers deciding work assignments based on that assumption. How often have you witnessed employers not offering high-profile work involving travel to women because they assume that women have to be home each night? Even today, there are expectations that women lawyers must wear skirts, not slacks; that women lawyers must not be too assertive; and that women lawyers are not assertive enough. (I know that sounds like a contradiction, but both biases not only exist, they also can focus on the same person!)

The ABA Commission on Women in the Profession has recently focused on the broad role played by implicit bias and the extent to which implicit bias affects how women lawyers are evaluated and promoted—or not. Our latest publication, in partnership with the Minority Corporate Counsel Association (MCCA), is the innovative report *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*.

The Commission and MCCA present an approach that melds new research on the scope of implicit bias in law firms and corporate law departments with the need for metrics to assess when and whether implicit bias exists in a given workplace and strategies for implementing changes through the use of "bias interrupters." We have identified four common types of implicit bias imposed on women and lawyers of color: the "Prove-It-Again," "Tightrope," "Maternal Wall," and "Tug of War" biases.

As the report suggests, "We all have biases. Now it's time to interrupt them." Included are Bias Interrupters Toolkits that lay out a metrics-driven plan for legal employers to remove bias and its effects from their business systems. From recruitment to assignments to compensation, employers now have concrete actions for leveling the playing field for women and minority lawyers. To review the report, visit www.ambar.org/biasinterrupters.

Of course, many employers understand the value of retaining a diverse range of talent in law firms and legal departments. Diversity and inclusion are not only the right thing to do, but they allow a business to thrive with a wide array of talented professionals.

I am optimistic that with the new research and tools offered by the Commission—such as our publications about interrupting bias, eliminating sexual harassment in the workplace, and best practices for retaining and advancing women lawyers—we are on the cusp of changes in the legal profession that will greatly minimize the impact of bias and open up avenues for women to thrive in the legal profession in much greater numbers than has been true in the past.

If you would like more information about eliminating the role of implicit bias in your workplace, please do not hesitate to contact me.

As we approach the end of 2018, let me offer my very best wishes for a happy and healthy holiday season.

CWP NEWS

NEW! *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*

On September 4, the ABA Commission on Women in the Profession (CWP), in conjunction with the Minority Corporate Counsel Association (MCCA), released the research report *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*. Conducted by the Center for WorkLife Law at the University of California, Hastings College of Law on behalf of CWP and MCCA, the report examines implicit gender and racial bias in legal workplaces and offers new solutions and tools focused on metrics for interrupting bias across the legal profession.

The research findings can be found at www.ambar.org/biasinterrupters. The full research report is available to ABA members free of charge; the executive summary is available to the public. The groundbreaking research report received extensive press coverage, including articles in the *New York Times*, *Bloomberg Law*, *Law 360*, *American Lawyer*, *Above the Law*, and *Corporate Counsel*.

Call for Nominations: Margaret Brent Women Lawyers of Achievement Awards

Nominations are now open for the 29th Annual Margaret Brent Women Lawyers of Achievement Award. The ABA Commission on Women in the Profession established the award in 1991 to recognize and celebrate the accomplishments of women lawyers. The annual award honors up to five outstanding women lawyers who have achieved professional excellence within their area of specialty and have actively paved the way to success for other women lawyers. These women demonstrate excellence in a variety of professional settings and personify excellence on either the national, regional, or local level.

The 2019 awards will be presented at the ABA Annual Meeting in San Francisco on Sunday, August 11, 2019. Nominations will close on January 4, 2019, at 5:00 PM CST. More information can be found at www.ambar.org/brentawards. If you have questions about the nomination process, please contact CWP Program Specialist Cecilia Boyd at cecilia.boyd@americanbar.org or 312-988-5679.

In Memoriam

Sheila Y. Thomas, former CWP commissioner, died on August 9 after a battle with cancer. Sheila was an extraordinary lawyer and spent her legal career advocating for the rights of workers, particularly women. She was also an amazing, caring person who always supported and inspired her friends. In recent years, Sheila earned a Master of Divinity and dedicated herself to helping others find their inner voice and realize their strengths and possibilities.

CWP NEWS

CWP Champions Resolutions to Redress Sexual Harassment

At the 2018 ABA Annual Meeting in Chicago, Illinois, the ABA House of Delegates passed Resolution 300, https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2018_am_300.pdf, introduced by the ABA Commission on Women in the Profession.

The Resolution “urges legal employers not to require mandatory arbitration of claims of sexual harassment.” It contends that while arbitration may be a method of obtaining relief for many, victims who wish to use other means shouldn’t be constrained from doing so as a condition of employment.

At the 2018 ABA Midyear Meeting in Vancouver, British Columbia, the ABA House of Delegates passed Resolution 302, https://www.americanbar.org/content/dam/aba/events/women/2018_mm_302.pdf. This critical step forward, introduced by ABA Commission on Women Chair Stephanie Scharf, urges all employers to adopt and enforce policies to “prohibit, prevent, and promptly redress” harassment and retaliation and does so with intersectionality in mind.

Watch here!