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Foreword (Symposium: Finding a Path to Gender Equality: Legal and Policy Issues Raised by All-Female Public Education)

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Foreword

Nadine Strossen¹

Just one month after the Supreme Court's landmark decision in *United States v. Virginia*² sounded the death-knell for the nation's two all-male public military colleges -- the Virginia Military Institute ("VMI") and the Citadel³ -- thus ending a protracted and bitter controversy concerning gender equality issues, another, related controversy sprang to center stage. The City of New York acknowledged that it would be opening an all-female public middle school in East Harlem, the "Young Women's

¹ Professor of Law, New York Law School; President, American Civil Liberties Union. A.B., J.D., Harvard University. In 1991 and 1994, the *National Law Journal* named Professor Strossen one of "The 100 Most Influential Lawyers in America." She was also included in the special Twentieth Anniversary issue of *Working Woman Magazine* as one of "350 Women Who Changed the World 1976-1996." She lectures all over the U.S. and in many foreign countries, and comments frequently in the national media, on constitutional law and human rights issues. Her most recent publications include: *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* (Scribner 1995), which *The New York Times* named a "notable book" of 1995; *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (N.Y.U. Press 1995) (co-authored), which was named an outstanding book on human rights by the Gustavus Myers Center for the Study of Human Rights in North America; and, since July 1996, a monthly column for the E-Zine "Intellectual Capital" <<http://www.intellectualcapital.com>>.

For research assistance with the preparation of this Foreword, Professor Strossen thanks her Academic Assistant, Amy L. Tenney, and her Research Assistants Andrew G. Sfougatakis and Steven Cunningham. For their extraordinary work in planning and organizing the symposium, she thanks her ACLU Assistant, Lara Meinke, and Josephine Sacco, who was the Executive Topics Editor of the *New York Law School Journal of Human Rights* during the 1996-97 academic year. For their outstanding efforts in publishing this special symposium issue of the *Journal*, she thanks and congratulates Nicole J. Krug and Jill A. Lichtenbaum, who are, respectively, the *Journal's* Editor-in-Chief and Managing Editor during the 1997-98 academic year.

² 116 S. Ct. 2264 (1996).

³ See Mike Allen, *Defiant V.M.I. to Admit Women, But Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at A1 (noting that immediately after the Court's decision, the Citadel announced that it would admit women, and VMI did the same three months later).

Leadership School" ("YWLS"), in September, 1996.⁴

Upon learning of this planned school -- which had not been the subject of any public hearings⁵-- the New York Civil Liberties Union ("NYCLU"), the New York City Chapter of the National Organization for Women ("NOW"), and the New York Civil Rights Coalition wrote to City officials setting forth their view that it violated gender equality guarantees of the U.S. Constitution, as well as civil rights laws.⁶ When the City nonetheless persisted with its plans to open the school, these civil rights organizations filed an administrative complaint with the U.S. Department of Education's Office of Civil Rights.⁷ That complaint, in turn, brought down the wrath of a number of women's rights and civil rights advocates upon the complaining organizations.⁸

As the National President of the American Civil Liberties Union ("ACLU"), I was proud that our New York affiliate, the NYCLU, was consistently applying the neutral gender equality principles that the ACLU long had advocated, including through the pioneering work undertaken by our Women's Rights Project a quarter century ago under the leadership of its founding Director, Ruth Bader Ginsburg,⁹ and culminating in our brief supporting the landmark decision that she herself had authored for the

⁴ See Jacques Steinberg, *Central Board Backs All-Girls School*, N.Y. TIMES, Aug. 22, 1996, at B3.

⁵ Anne Conners, *Symposium: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 33, 38 (1998).

⁶ See Letter from Norman Siegel, Executive Director of the NYCLU, and Christopher Dunn, Acting Legal Director of the NYCLU, to Rudolph F. Crew, Chancellor, New York City Bd. of Educ. (July 15, 1996) (on file with *Journal*).

⁷ See Administrative Complaint, *National Organization for Women v. New York City Bd. of Educ.* (Dept. of Educ. Aug. 22, 1996).

⁸ See, e.g., Derrick Bell, *Et Tu, A.C.L.U.?*, N.Y. TIMES, July 18, 1996, at A23; Susan Estrich, *All Hail The Citadel for Going Coed*, USA TODAY, Aug. 29, 1996, at 15A. See also Stephen Gillers, *Girls School in Harlem Is Unlike Virginia Case*, Letter to the Editor, N.Y. TIMES, July 21, 1996, at 14.

⁹ See Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. Rev. 1940, 1950 (1991) (describing Ruth Bader Ginsburg's leadership as Director of the ACLU Women's Rights Project).

Supreme Court in *United States v. Virginia*.¹⁰

Recognizing that opposition to the YWLS was, however, politically unpopular with many traditional ACLU allies and supporters, I called Norman Siegel, the NYCLU's Executive Director, to congratulate and thank him for having the political courage¹¹ to insist that New York City adhere to the same principles of inclusivity, equality, and integration for male and female students in the New York City public schools that the ACLU recently had demanded the States of Virginia and South Carolina¹² adhere to in their public military colleges, VMI and the Citadel. This position was also consistent, I believed, with the NYCLU's and ACLU's opposition, several years earlier, to the all-male public schools that had been proposed or launched in New York City, Detroit, and other cities.¹³

But Norman -- along with his colleagues at NOW and the New York Civil Rights Coalition -- was simultaneously receiving many communications that conveyed the opposite message from mine: namely, denunciation of their position. A number of feminists, civil rights supporters, and liberals, who had championed the gender desegregation of VMI and the Citadel, in order to promote educational and occupational

¹⁰ Brief of Amici Curiae National Women's Law Center, American Civil Liberties Union, The American Association of University Women, B'Nai B'rith Women, Center for Advancement of Public Policy, Center for Women Policy Studies, Coalition of Labor Union Women, Connecticut Women's Education and Legal Fund, Equal Rights Advocates, Federally Employed Women, Inc. in Support of the Petitioner, 116 S. Ct. 2264 (1996) (No. 94-1941).

¹¹ See Norman Siegel, *A.C.L.U. Sees Unequal Education, But . . .*, Letter to Editor, N.Y. TIMES, July 24, 1996, at A24 (responding to Op-Ed by Derrick Bell, criticizing NYCLU opposition to the YWLS: "Mr. Bell also misunderstands the A.C.L.U. Of course we promote and defend the rights of women, African-Americans, lesbians and gays and others . . . [b]ut we defend civil liberties regardless of how unpopular or 'politically incorrect' the cause, or our clients, may be. Remember Skokie?").

¹² The ACLU Women's Rights Project, along with the ACLU of South Carolina, represented Shannon Faulkner in her challenge to the Citadel's male-only admissions policy. See *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 331 (1995).

¹³ The ACLU, along with its state affiliate in Michigan and NOW, represented African-American women who successfully challenged Detroit's all-male public school. See *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991). In addition, the NYCLU opposed the proposed Ujamaa Institute in New York City, for black male students. See Pam Belluck, *Complaint Against Newcomer School*, N.Y. TIMES, Nov. 14, 1995, at B4.

opportunities for young women, were now supporting the YWLS for the same reason. They questioned me and others at the ACLU and NOW as to how we could possibly object to this school, which was designed to provide special educational opportunities for young African-American and Latina women.¹⁴

Adding fuel to the fire of this controversy was the seething national debate about affirmative action. During the summer of 1996, gender- and race-conscious affirmative action programs were facing mounting attacks across the country, including the then-pending ballot initiative in California, Proposition 209, which ultimately eliminated all such programs throughout that bellwether state.¹⁵ As prime defenders of affirmative action, the ACLU¹⁶ and NOW were pilloried by some of our usual allies and supporters for challenging a school that, in their view, exemplified affirmative action principles. Didn't we recognize, they asked, that the same kind of evenhanded neutrality that we advocated in the YWLS context was being invoked to discredit and dismantle affirmative action programs designed to remedy entrenched and ongoing gender and race discrimination?¹⁷ Conversely, though, some of the most vocal proponents of the YWLS and other all-female public educational programs generally oppose affirmative action programs that are designed

¹⁴ See Denise Morgan, *Finding A Constitutionally Permissible Path to Gender Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y. L. SCH. J. HUM. RTS. 95, 101-102 .

¹⁵ On December 23, 1996, Judge Thelton E. Henderson entered a preliminary injunction enjoining California from enforcing the Proposition. The preliminary injunction was vacated on April 8, 1997 by a three-judge panel of the Ninth Circuit Court of Appeals. The petition for rehearing and the suggestion for rehearing en banc were also denied. The Supreme Court denied the petition for a writ of certiorari on November 3, 1997. *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431, 1448 (9th Cir. 1997), *reh'g and reh'g en banc denied*, 122 F.3d 692, 711 (9th Cir. 1997), *and cert. denied*, 118 S. Ct. 397, 397 (1997). See Tim Golden, *Federal Appeals Court Upholds California's Ban on Preferences*, N.Y. TIMES, Apr. 9, 1997, at A1.

¹⁶ For example, the ACLU led the broad-based coalition that challenged Proposition 209 as violating the U.S. Constitution; Marc Rosenbaum, the Legal Director of the ACLU of Southern California, was lead counsel for the anti-209 Coalition in that lawsuit. See Golden, *supra* note 15, at A1.

¹⁷ See Bell, *supra* note 8. *But see*, Siegel, *supra* note 11.

to compensate for past discrimination against women and girls (and members of racial minorities).¹⁸

Jolted by the thorniness and intensity of the debate not only among the public and media at large, but also among civil libertarians and feminists, I did some research into the legal and policy issues presented by the YWLS and other single-gender public schools and programs. I discovered that, while public school districts around the country had been operating single-gender classes and programs -- and even, in two instances, entire schools¹⁹ -- they had not received the sustained scrutiny of educational or legal experts. Thus, there was no consensus as to either the desirability of such programs in terms of educational policy, or their legality in terms of constitutional law and civil rights statutes. Indeed, I discovered that there was surprisingly little scholarly examination of either the policy or legal issues presented by such programs, let alone any resolution of these issues.²⁰

The Supreme Court's decision in the *Virginia* case, along with the launch of the YWLS, thus functioned as catalysts for renewed analysis of the desirability and legality of single-gender public educational programs.

Accordingly, I was delighted that the *New York Law School Journal of Human Rights* accepted my proposal to sponsor a symposium on these important issues, focusing not only on the YWLS controversy itself, but

¹⁸ See Conners, *supra* note 5, at 37.

¹⁹ See Stephen Chapman, *Same Sex Schools Offer An Option That Benefits Many Children*, ST. LOUIS POST-DISPATCH, Aug. 8, 1997, at 7B (noting that Philadelphia and Baltimore had all-girls schools long before New York and that this "newest educational trend" was, in these two cities, an "old fashioned idea").

²⁰ In the wake of *U.S. v. Virginia*, a number of pieces in law journals have addressed these issues. See, e.g., Carrie Corcoran, *Single-Sex Education After VMI: Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987 (1997); William Henry Hurd, *Gone With The Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J.L. & POL'Y 27 (1997); Jolee Land, *Not Dead Yet: The Future of Single-Sex Education After United States v. Virginia*, 27 STETSON L. REV. 297 (1997); Linda L. Peter, *What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W. L. REV. 249 (1997); Christopher H. Pyle, *Women's Colleges: Is Segregation By Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209 (1997); Valerie K. Vojdik, *Girl's Schools After VMI: Do They Make The Grade?*, 4 DUKE J. L. & POL'Y 69 (1997).

also on the generic educational and legal issues it poses. Moreover, I was honored that the *Journal's* officers invited me to serve as the Faculty Advisor for the symposium.

Because the ACLU opposes the YWLS in particular,²¹ and takes -- at best -- a very skeptical view toward any single-gender public educational program in general,²² though, I

²¹ As explained in the next note, the ACLU National Board is currently debating the precise contours of its policy concerning single-gender public educational programs. Some National Board members believe the ACLU should absolutely oppose all such programs under all circumstances. Even Board members who eschew such an absolutist position, though, would oppose almost all such programs, making exceptions only for those that might pass a searching scrutiny in terms of their purpose and effect.

Since New York City officials have not submitted any evidence concerning the purpose or effect of the YWLS, they have clearly not satisfied their burden of proof under the policy proposed by some ACLU Board members who would not deem all single-gender public educational programs *per se* impermissible. See subparagraph (e) in the following note. See e.g., Conners, *supra* note 5; Sara Mandelbaum, *Symposium: Legal and Policy Issues raised by All-Female Public Education*, 14 N.Y.L.SCH. J. HUM. RTS. 81 (1998); Norman Siegel, *Symposium: Legal and Policy Issues raised by All-Female Public Education*, 14 N.Y.L.SCH. J. HUM. RTS. 49 (1998); Vojdik, *supra* note 20.

²² In my capacity as ACLU President, in 1996 I appointed a committee to report to the ACLU National Board as to whether the organization's existing policies cover the civil liberties issues presented by all-female public educational programs with sufficient clarity, and if not, to propose new policy language. By a divided vote, that committee recommended that the ACLU adopt a new policy that would oppose almost all single-gender public educational programs, subject only to a narrow exception for those programs (if any) that might satisfy a demanding standard of review. A dissenting member of the committee concluded that the ACLU's current policies mandate absolute opposition to all single-sex public educational programs, and urged that this *per se* opposition be continued.

At its meeting on January 30, 1998, the ACLU's National Board began its discussion of the committee's majority and dissenting reports, but did not complete that discussion. As the committee's chair noted, however, every committee member believed that the YWLS violated civil liberties principles, since it does not meet the demanding standard of review recommended by the committee's majority. Moreover, she stressed that the standard of review proposed by the committee's majority was so stringent that, for all practical purposes, its impact would be nearly identical to that of the dissent's absolute opposition -- i.e., requiring opposition to most, if not all, single-gender public educational programs. The draft policy proposed by the Committee's majority reads as follows:

(a) As a general principle, the ACLU supports the full gender integration (i.e., coeducation) of females and males in public schools,

colleges and universities as the primary means to the nondiscriminatory provision of equal rights, opportunities and resources to all students regardless of sex. The egalitarian coeducation of males and females is basic to fundamental civil rights and liberties, and is supported by federal and state constitutional guarantees of equality and liberty in government-sponsored education. This general principle applies to all levels of the public educational process, and to subsidiary programs, classes and activities within educational institutions as well as to the larger institutions themselves.

(b) The ACLU also supports the equal application of the above general principle to private educational institutions that receive public funds or any governmental assistance, financial or otherwise.

(c) The ACLU recognizes, however, that gender equity -- specifically, equal rights for females -- has remained an unfulfilled ideal at all levels of the American educational process. Historical and contemporary sex discrimination has disadvantaged and continues to disadvantage females; therefore, it cannot always be erased solely through the adoption of neutral, "sex-blind" or "gender-blind" standards as an unyielding rule. Equal treatment in unequal circumstances may sometimes perpetuate inequality. Compensatory actions may sometimes be essential to achieving equality for women and girls. The ACLU vigorously supports affirmative action measures sufficiently narrowly tailored to further the goal of eliminating invidious sex discrimination in education.

(d) As a general rule, compensatory and remedial efforts to address the ongoing effects of sex discrimination should be undertaken in coeducational institutions, programs, classes and activities. However, in narrow circumstances, single-sex educational alternatives may be permissible if they meet all of the following requirements:

- 1) have the purpose and effect of compensating for and remedying sex-discriminatory educational prejudice and/or disadvantage;
- 2) are narrowly tailored to effectuate the above goals;
- 3) are otherwise consistent with the principles and policies of the Union -- for example, the support of equal opportunity for all students regardless of race, national origin, religion, sexual orientation, disability, or other protected status;
- 4) cannot achieve their compensatory and remedial

thought it would undermine at least the perceived fairness and evenhandedness of the symposium for me to serve as its sole Faculty Advisor. Therefore, I invited my New York Law School colleague, Professor Denise Morgan,²³ who teaches and writes about educational law, and who had been working with proponents of the YWLS, to join me as co-Faculty Advisor.

With one caveat, I am proud of the wide-ranging group of experts Professor Morgan and I were able to enlist as participants in this symposium -- wide-ranging in terms of both the nature of their expertise and their perspectives on the issues. The caveat is that, despite repeated and persistent attempts by Professor Morgan and myself, we were unable to secure the participation of any representative of the New York City Board of Education, or any other proponent of the YWLS itself. We were told that, since the school was facing legal challenges, attorneys for the Board of Education had instructed everyone associated with it to decline our invitations to speak at the symposium, or to submit written contributions to this special symposium issue of the *Journal of Human*

goals equally well through gender-neutral means;
and
5) are offered to students on a voluntary basis.

(e) If a single-sex educational institution, program, class or activity is proposed (or is challenged as a denial of equal protection because of such single-sex status), its proponent bears the burden of proving by specific evidence all of the following requirements:

- 1) genuinely compensatory or remedial in purpose and effect as noted above;
- 2) substantially related to an important governmental interest (i.e., sex-based compensatory and remedial objectives);
- 3) does not rely upon, promote, or perpetuate sex role stereotypes.

(f) The ultimate goal of any permissible single-sex educational alternative must be to fulfill the larger societal objective of equal educational opportunity for all students.

²³ See Morgan, *supra* note 14, at 95.

Rights.²⁴ In light of this general stance, we were particularly happy that William Thompson, the President of the Board of Education, initially accepted our invitation to speak at the symposium. However, he subsequently sent us a fax retracting that acceptance.

Just a few days before the symposium took place, I received a telephone call from Ann Rubenstein Tisch, the philanthropist who is a chief sponsor of the YWLS.²⁵ Having learned about the then-impending symposium, she called to complain that no one who was directly involved with or actively supporting the YWLS was participating in our program. I explained to her that Professor Morgan and I shared her disappointment on that score, and entreated her both to speak at the symposium herself and to use her influence to encourage any other advocate or spokesperson

²⁴ See Statement of Professor Denise Morgan, at 4 (unpublished transcript, on file with *Journal*):

[T]he lawyers who I spoke to from the Board of Education and corporation counsel representing the City and the [District], as well, advised their client that in light of the complaint that's been filed against the school, this would be an inappropriate forum for them to discuss the legal and policy issues raised by the school. Sort of deposition by symposium.

But see Conners, *supra* note 5, at 37:

[T]he sudden prohibition on speaking publicly on this issue is new Prior to this recent prohibition, I had been speaking and debating publicly with them for several months. With all due respect to the people on the other side of this panel, you should be hearing from the proponents of this particular school, the very people who are backing this school. I think their silence is very telling. Why are they not here to explain and defend their views to you? This question goes to the whole process under which the Board of Education opened this school . . . [It] did not hold public hearings on this school. Plans to open the school were kept secret for two years until an enterprising newspaper journalist broke the story two months before the school opened.

²⁵ See Steinberg, *supra* note 4 (reporting that Ms. Tisch and her husband have pledged to recruit businesses, universities, and hospitals to create internships for the YWLS's students).

for the YWLS to do so. However, that effort also failed.

Despite the non-participation of the individuals who were the most directly engaged in operating and defending the YWLS, the symposium did include forceful advocates for the desirability and legality both of all-female public schools and programs in general, and of the YWLS in particular. For example, my co-Faculty Advisor for this symposium, Professor Morgan, made such a presentation. The symposium also included the three major critics of the YWLS, the leaders of the three civil rights and feminist organizations that have challenged its legality.²⁶ And it included an array of experts -- lawyers, social scientists, and educators -- who contributed an impressive range of knowledge, experience, and views concerning single-gender public educational initiatives in general.²⁷

In this issue of the *Journal of Human Rights*, we are publishing a variety of materials related to the topic of the symposium: edited transcripts of the oral presentations that were made at the symposium; written pieces submitted by individuals who spoke at the symposium; and some additional pieces written by other individuals.

Taken as a whole, the contributions address, and shed light on, the following principal questions:

- ▶ What are the statutory standards for evaluating any single-gender public educational program, under federal, state, and local civil rights laws? Do they absolutely preclude any such program? Would they permit it so long as there were an equal counterpart for members of the other gender? In other words, are “separate-

²⁶ See e.g., Siegel, *supra* note 21; Conners, *supra* note 5; Michael Meyers, *Symposium: Legal and Policy Issues Raised By All-Female Public Education* 14 N.Y.L.SCH. J. HUM. RTS. 47 (1998).

²⁷ See Morgan, *supra* note 24, at 4:

But we were not deterred by this [the non-participation of individuals directly involved with, or representing, the YWLS], and we have put together an excellent panel of people to speak to us: on one side we have leading opponents of the school, people who have done substantial research and investigation into the school in order to file a complaint against it, and on the other side . . . a group of people who have expertise in a number of different legal and policy areas that are raised by the school.

but-equal” public educational programs, in terms of gender, consistent with civil rights laws? If so, how could the equality of those programs be assessed and assured?

- ▶ What are the constitutional standards for evaluating any single-gender public educational program, in light of *United States v. Virginia*?²⁸ What evidence would satisfy the “skeptical” form of intermediate scrutiny that the Court applied to VMI in that case?²⁹ To what extent would the degree of scrutiny be different in the context of a program that was intended to benefit females, and to compensate for inadequate or unequal educational opportunities in coeducational settings?³⁰ What evidence would establish such a benign intent?
- ▶ Is the legal analysis of single-gender public educational programs, under the Constitution and civil rights statutes, the same as the legal analysis of single-race public educational programs? Or can the two types of programs be distinguished under either the Constitution or civil rights statutes -- either as a matter of law, or as a factual matter?
- ▶ How do the legal and factual analyses of special public schools for gay and lesbian students, such as the Harvey Milk School in New York City, compare to the legal and factual analyses of special

²⁸ 116 S. Ct. 2264 (1996).

²⁹ *See id.* at 2274 (describing the applicable standard of review as “skeptical scrutiny,” and stating that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action”).

³⁰ *See id.* at 2276 (internal citations omitted):

Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promote equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

- public schools for female students, such as the YWLS?³¹
- ▶ What evidence is there that girls are deprived of adequate or equal educational opportunities either in coed public educational settings in general, or in New York City public schools in particular? And does that evidence establish that any educational short-changing of girls is specifically attributable to the presence of boys in the classroom, rather than to other factors?
 - ▶ Correspondingly, what evidence is there that girls receive better educational opportunities in all-female settings than in coed settings? And does that evidence establish that any such educational advantage is specifically attributable to the absence of boys from the classroom, rather than to other factors?
 - ▶ Can single-sex public educational programs be justified on the basis of any alleged inherent biological or genetic differences between the sexes in terms of personality characteristics, psychological development, intellectual capacity, or behavioral or

³¹ See Kim Kirkley, *Symposium: Constitutional, Statutory, and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L.SCH. J. HUM. RTS. 127, 127-128 (1998):

Schools for gay youth, such as the Harvey Milk School in New York City, are an extraordinary, temporary measure to serve these teenagers who have literally been driven out of public schools. This is a last-ditch effort to make sure that they get the public education that is their right. Such schools have been set up to provide an education for this special group of youth, just as special schools have been set up to provide a single-sex education for a special group of students. I am asking that we think about the parallel issues as well as the differences . . . and consider how the resolution of the single-sex schools issue may also affect schools for gay youth. Ultimately, of course, the goal is to eradicate homophobia and to provide gay young people an education alongside others. In the meantime, however, there are students for whom the public school environments are so extremely hostile that sometimes their only chance is outside of the mainstream public school environment.

cognitive ability traits?³²

- ▶ Could single-sex public educational institutions be justified on the basis of any social science evidence that might be adduced, or should they be deemed inherently inconsistent with certain constitutional or societal norms?³³
- ▶ Aside from single-gender institutions or programs, are there other educational reforms that would improve educational opportunities for girls -- including in math, science, and leadership skills -- within the coed setting? How effective are the following

³² See Joan Bertin, *Symposium: Educational and Social Scientific Perspectives on All-Female Education*, 14 N.Y.L.SCH. J. HUM. RTS. 175, 178-179 (1998) (noting that Carol Gilligan's research is cited for this proposition, but that Gilligan herself repudiates this (mis)interpretation of her research). See also Carol Gilligan & The Program on Gender, Science and Law, *Opposing All-Male Admission Policy at Virginia Military Institute: Amicus Curiae Brief of Professor Carol Gilligan and the Program on Gender, Science and Law*, 16 WOMEN'S RTS. L. REP. 1, 14 (1994):

The observations about psychological development patterns that are generally associated with gender in *In a Different Voice* are not based on any premise of inherent differences between the sexes, but on the basis of their different opportunities and experiences There is too much variation within each sex to argue that psychological differences result from "real" differences between the sexes. It is incontrovertible, for example, that qualities such as aggression and empathy are not sex-based -- women can be aggressive and men can be empathetic.

(citing Carol Gilligan, *IN A DIFFERENT VOICE* (1982)).

³³ See, e.g., Bertin, *supra* note 32, at 176-177 ("[C]onstitutional rights simply cannot vary depending upon what the latest group of studies may show. Rather, there are some normative values expressed in our laws and in our legal system that supersede scientific information."). See also Cynthia Fuchs Epstein, *Symposium: Educational and Social Scientific Perspectives on All-Female Education*, 14 N.Y.L.SCH. J. HUM. RTS. 185, 207 (1998):

[R]ebutting this or that datum circumvents the most important issue. Globally, universally, or even within communities, what is the social meaning created by segregation? . . . There are overwhelming destructive consequences to women of maintaining segregation in any social institution.

alternative strategies: teacher training, mentoring programs, after-school programs, and smaller classes? To what extent have such strategies been implemented, either in New York City or in other public educational systems?

- ▶ Looking beyond the girls or boys who are directly involved in single-gender public schools or programs, what impacts do such schools or programs have on other individuals? What are their impacts, for example, on students and teachers in the same public school system who remain in coed settings?³⁴

³⁴ See, e.g., Bernice Sandler, *Symposium: Constitutional, Statutory, and Policy Issues Raised By All-Female Public Education*, 14 N.Y.L.SCH. J. HUM. RTS. 61, 66-67 (1998):

Although research strongly suggests that all-female environments can be positive and productive for females, there is a smaller body of research, as well as a very long history, which suggests that single-sex environments for males are either neutral or negative in their impact, especially in the development of anti-female attitudes and behaviors. For example, looking at the military, fraternities, and male athletic teams such as football, one is not surprised to find a higher level of anti-female attitudes and behavior. This leaves us in the paradoxical position of favoring single-sex schools for girls and coeducational schools for boys, something not possible to achieve.

But see Morgan, *supra* note 14, at 115:

Opponents of The[Young Women's]Leadership School argue that single-sex schools will drain female students away from coeducational schools and tip the gender balance in those schools towards the boys. However, there are more female students in the public school system than there are male students, and too few female students desire single-sex education to have a significant effect on the gender composition of coeducational schools.

See also Sandra Del Valle, *Symposium: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 17, 27 (1998):

The YWLS offers poor Latinas a choice within the public school context – that is, the possibility of a high quality education in the

- ▶ Assuming that some single-gender public educational institutions or programs are legally permissible and educationally desirable, what role should they play within the public education system? Should they be -- at one end of the spectrum -- limited to temporary, short-range, voluntary options for a small number of students? Or -- at the other end of the spectrum -- should they be mandated as the long-range, permanent approach for most or all students? Or something in between?
- ▶ Focusing specifically on the substantive policy judgments reflected in New York City's establishment of the YWLS, what was the actual intent giving rise to it?³⁵ Was it to provide compensatory educational opportunities for certain female students, as City officials now maintain, or was that asserted purpose actually a *post hoc* rationalization, as critics contend?³⁶

city for a population that desperately needs that choice One of the most obvious questions that I have to answer for myself about this school, however, is whether . . . endorsing the creation of new, small, separate schools lessens some of the pressure we must necessarily continue to place on the school system as a whole. Does having a YWLS mean we don't press for sexual harassment to be taken seriously in the rest of our schools? . . . Of course not.

³⁵ See *United States v. Virginia*, *supra* note 2, at 2276 (stating that "'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded").

³⁶ See *Vojdik*, *supra* note 20, at 97-99:

While school officials now claim that [the YWLS] seeks to improve girls' performance in math and science, there is no evidence that this was the actual purpose of the school rather than a *post hoc* rationalization in the face of threatened litigation by the NYCLU and NOW Before filing the complaint with the Department of Education, the NYCLU and NOW wrote to the Board of Education In response . . . , counsel for the Board of Education . . . [did] not assert that the school is intended to serve a remedial or compensatory objective.

After the NYCLU and NOW filed their administrative

- ▶ What evidence did the New York City officials who decided to set up the YWLS have about the comparable educational opportunities and problems faced by girls and boys in the city as a whole, and in that school district in particular? For example, are girls performing disproportionately worse than boys in math? Are they dropping out at higher rates? What evidence did they have about the extent to which coed settings were responsible for any educational shortcomings faced by girls? What alternative approaches did they consider? What alternative approaches did they actually try? What evaluation was undertaken of the (in)effectiveness of any such alternative approaches? Did they consider or implement the recommendations in the January, 1994

complaint, the Board of Education for the first time advised the press that the girls' school was intended to benefit girls

The Board of Education never sought the advice . . . of the Chancellor of Education's Task Force on Sex Equity in New York Schools, which has been monitoring gender equity in the public schools since 1983. The Task Force issued a report on the status of girls' achievement in 1994 which included a number of recommendations to the Board of Education for improving gender equity. None of the recommendations included offering girls single-sex education Moreover, in 1995, the Board refused to approve \$500,000 to fund junior varsity athletics for girls in New York City schools, despite the consensus among experts that participation in athletics has a positive effect on girls' self-esteem and confidence. The Board also refused to require its teachers and administrators to receive training in nondiscrimination and equal opportunity regulations, training which federal regulations specify as mandatory. The Board's previous lack of commitment to issues of gender equity and improving the quality of girls' education undercuts its recent attempt to justify the girls-only school as compensatory.

The mission and curriculum of the school is also not consistent with an attempt to provide disadvantaged girls remedial education in math or science Instead, the curriculum appears oriented to the liberal arts and fine arts.

report of the Chancellor's Task Force on Sex Equity,³⁷ and if not, why not? For example, have teachers been trained to identify and combat overt and subtle sexism in the classroom? With what results?

- ▶ What strategies are City and school officials considering and implementing to provide equal educational opportunities for the boys in that school district? What strategies are they considering and implementing to provide equal educational opportunities for girls and boys in the rest of the City?
- ▶ Can the City show that the YWLS will encourage and empower young women rather than perpetuate the stereotype that girls need special protection?
- ▶ Focusing on the processes underlying New York City's establishment and defense of the YWLS, why did the City bypass the public hearing process? Why did it not disclose information about the school, either during the planning process or after the administrative complaint had been filed?³⁸ Why did it not provide the information and documentation sought by the U.S. Department of Education's Office of Civil Rights, in a timely fashion? In this respect, did the City violate federal civil rights laws and procedures, as contended by its critics?³⁹

³⁷ Report From The Chancellor's Task Force On Sex Equity, *The Gender Gap In New York City Public High Schools: Significant Differences On The Basis of Sex in Enrollments, Math and Science Achievement, and Staffing* (1994).

³⁸ See, e.g., Vojdik, *supra* note 20, at 97 ("From the beginning, the proposal and plans for [the YWLS] were withheld from the public, making it difficult to determine the actual purpose of the school.").

³⁹ See Siegel, *supra* note 26, at 56-57:

It is now more than five months since we filed our complaint, and it appears that the investigation is stalled, if it ever began. Most of the documents requested by the Office of Civil Rights of the New York City Board of Education have not been submitted . . . [T]his makes a mockery of Title IX enforcement. This lack of compliance is simply an outrage, regardless of where you stand on the merits The New York City Board of Education refuses to comply with the demands of the federal

Multifarious as are the questions addressed by contributors to this symposium issue of the *Journal of Human Rights*, their answers are equally multifarious in every respect, including in their assessments of precisely what educational problems face female (and male) public school students, and what solutions are educationally effective and legally permissible. While there appeared to be a consensus that many girls are ill-served in the typical coed public school setting, there was no consensus either that girls are more ill-served than boys, or that the presence of boys in the classroom is the primary cause of whatever problems the girls faced.⁴⁰

Likewise, in terms of improving educational opportunities for girls, a consensus emerged only in rejecting either of two possible extreme positions: one that would deem all single-sex public educational programs to be always undesirable and illegal;⁴¹ and one that would embrace all such programs as the preferred long-range solution to problems of gender inequity in our nation's public schools.⁴² However, there was no

government, and at least process-wise it is very similar to when I was a young lawyer starting out with the ACLU in the south, when states like Mississippi and Alabama refused to cooperate with the federal government regarding civil rights enforcement.

⁴⁰ See, e.g., Sandler, *supra* note 34, at 79:

The issue is not whether single-sex schools are good for girls. We know that they can be. We also know that what can happen in girls' schools such as more attention, nurturing, smaller classes and the like can also benefit boys. The issue is whether this is the best way to educate all of our children.

⁴¹ One symposium speaker who clearly has expressed an absolute opposition to all single-gender public educational programs is Michael Meyers. See MEMORANDUM FROM MICHAEL MEYERS TO ACLU BOARD OF DIRECTORS, January 14, 1998 (dissenting from a draft proposal by the majority of the ACLU Board's Special Committee on Single-Sex Schools because: (1) the ACLU has historically and consistently rejected a "favored sex" approach to segregation and (2) sexual equality should be comparable to racial equality when combatting segregation) (on file with *Journal*).

⁴² See, e.g., Morgan, *supra* note 14, at 115 ("[T]he fact that all-girls schools are legally permissible does not mean that every single one will survive constitutional and statutory scrutiny, nor does it mean that they are our path to salvation.") See also Sara Mandelbaum, *Symposium: Constitutional, Statutory, and Policy Issues Raised by All-Female Public*

agreement as to which single-sex options should be pursued, under what conditions and circumstances. Nor was there any agreement as to whether the YWLS in particular is either permissible as a matter of law or wise as a matter of policy.

An excellent summary of the general points of agreement and disagreement among symposium participants was presented by women's rights attorney and scholar Joan Bertin, who offered the following comments toward the end of the symposium:

I want to start with . . . some reflections on what I have heard

Education, 14 N.Y.L. SCH. J. HUM. RTS. 81, 91-92 (1998):

When analyzing whether the single sex program is valid, I think it is helpful to view these cases on a continuum The contrast between the long-established VMI . . . and the blatantly inferior VWIL (Virginia Women's Institute for Leadership) presented a relatively straightforward case. The very purpose of VWIL's existence was exclusionary, to maintain VMI as an all-male institution. On the other end of the continuum I can imagine, for instance, a vocational education class in auto mechanics, where it might be shown that women had been barred from pursuing that vocation, and that having a class consisting predominantly of men could discourage women from taking the class or result in women dropping out due to harassment or other forms of sex discrimination. This example seems like an affirmative action program that would be justified on this continuum.

It is unclear precisely where YWLS falls on this continuum because I do not think we have gotten the information that we need in order to make that determination. For example, we need to examine the goals of the program, the content of the program, the procedures for determining access to the program and why the program needs to be limited to all-girls in order to achieve its objectives. If, for example, the admissions process is not tailored to identifying those who have suffered that discrimination, one cannot simply state that the goal is to remedy discrimination . . . We must also ask: Are there less restrictive alternatives? Are there sex-neutral means for achieving the same objectives, such as teacher training, mentoring programs, after-school programs, and the like?

around the room today. There are two points in particular . . . [as to which] I think that there is widespread agreement The first is that coed schools often fail to deal with entrenched and pervasive patterns of sexism and the effects of those patterns principally on female students. The second is that single-sex schools do not really solve the bigger problem that is faced by most students in most schools and never will [I]n addition . . . they invite gender-essentialist thinking, and they risk reinforcing the destructive patterns and stereotypes that are part of the gender-related problems confronting many women and men. So, what I conclude as to why this is such a hard problem and why so many of us feel so ambivalent is that we are faced with an options choice. So, . . . we have some degree of conflict, although I think it may be much smaller than we may have originally thought, over the fact that we are trying to decide which of two suboptimal choices to select.⁴³

By highlighting the matters of agreement and disagreement, and thereby pointing the way toward further investigation and analysis, on the many important issues presented, this symposium issue of the *New York Law School Journal of Human Rights* makes a significant contribution to the burgeoning political and legal debate about single-gender public educational initiatives. Since it took place,⁴⁴ more public school districts have launched or explored single-gender programs or schools,⁴⁵ thus making the questions and perspectives raised in this issue more timely and pertinent than ever.

⁴³ See Bertin, *supra* note 32, at 175-176.

⁴⁴ On January 30, 1997.

⁴⁵ See e.g., Chapman, *supra* note 19, at 7B; Tamar Lewin, *In California, Wider Test of Same-Sex Schools*, N.Y. TIMES, Oct. 9, 1997, at A1 (discussing California governor Pete Wilson's offer of \$500,000 to each district that creates all-male and all-female academies with equal facilities); Peter J. Sampson, *School Tries Teaching Boys, Girls Apart*, BERGEN COUNTY REC., Sept. 8, 1997, at A01 (noting that administrators are experimenting in a New Jersey public school for the first time).