Report of Columbia Law School Equal Rights Advocacy Project

The Legal Status of Women under Federal Law

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Introduction

I. Scope and Limitations of the Study

A computer print-out furnished to the Commission on Civil Rights by the Department of Justice provides the basis for this report on gender-based differentials in federal statutes. The print-out lists over 800 U.S. Code sections containing programmed words. Each of these sections was examined to determine whether in fact it differentiates on the basis of sex.

A few of the listed sections, identified on the print-out because they contain the programmed word "sex," do not differentiate between males and females but, on the contrary, prohibit gender-based discrimination.* E.g., 8 U.S.C. §§ 1152(a), 1422; 20 U.S.C. § 1078a; 28 U.S.C. §§ 1862, 1867(e); 48 U.S.C. §§ 1405p, 1542; 50 U.S.C. App. §460(b)(3). Some of the listed sections were repealed, terminated or incorporated in other provisions after the date of the print-out. In most instances, this report makes no reference to statutes that appear on the print-out but were no longer in force in 1974, when the study was completed. With few exceptions apart from the antidiscrimination provisions, the listed sections display substantive differentials or terminology inconsistent with a national commitment to equal rights, responsibilities and opportunities, free from gender-based discrimination.

Preparation of this report commenced in August, 1973. Research was undertaken by a team of fifteen Columbia Law School

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* Antidiscrimination statutes generally prohibit differential treatment based on race, religion or national origin. E.g., 42 U.S.C. §§ 1971, 1981 (by construction), 1982, 2000a, 2000a-1, 2000b, 2000d, 2000d-1. Inclusion of sex in the catalogue remains exceptional.

students during the 1973-74 academic year. Each student was assigned a parcel of statutes, instructed to review them in conjunction with relevant legislative history, case law and commentary, and directed to divide the statutes into three categories: sections that contained unnecessary gender-based references (e.g., "father, mother" when "parent" would suffice); sections that contain differentials neutralized by a preceding or subsequent definitional section (e.g., 5 U.S.C. § 7152; 11 U.S.C. §§ 1(23), 1(33), 402; 38 U.S.C. § 102(b); 40 U.S.C. § 270d); sections that embody substantive differentials.

It was anticipated initially that revised texts might be proposed for each section listed on the print-out and still in force. This anticipation proved naive. As the study proceeded it became apparent that overhaul was indicated going far beyond elimination of conspicuous gender-based differentials.

For example, Title 26, the Internal Revenue Code, though replete with terminological problems, does not expressly single out women for disadvantageous treatment. Yet it is among the Titles meriting prime attention if federal law is to be made consistent with the equal rights principle. For in a variety of ways, the current scheme may impact substantially and adversely upon two-earner married couples, imposing a tax penalty when a working woman marries or a non-working spouse returns to the labor force.

Several other Titles entail substantive differentials more salient from examination of the statutory texts, but posing similarly difficult policy questions with respect to the desirable repair. Titles that require comprehensive review in consultation with concerned government agencies, public interest groups and experts in the particular field include, among others, 10 (Armed Forces), 42 (Public Health and Welfare), 45 (Railroads). In some cases, encompassing reform proposals are already in the congressional hopper, e.g., Titles 11 (Bankruptcy) and 18 (Crimes and Criminal Procedure).

Taking into account the limited resources available for this study, the authors determined that the most useful product would be Title-by-Title analyses, listing sections identified by the print-out, indicating whether the programmed word or words included in the section signalled a problem of terminology only or a substantive differential, and proposing directions for necessary or desirable revision. The format for the Title analyses was selected with a view to the large effort that must be launched if gender discrimination is to be eradicated from federal law.

The Title analyses presented in this report offer no more than a starting point. They do not purport to identify all sections in need of revision, nor could they do so in light of the deficiencies in the computer word list. And they do not deal at all with the manifold regulations prescribed under the various laws. In many cases, suggestions made regarding the direction of recommended revision are highly tentative; detailed or expert studies yielding firmer proposals were not possible within our budgetary confines, and in some instances a range of solutions could be accommodated to the equality principle.

II. Congressional Responsibility for Comprehensive Revision

Since 1963, Congress has taken a lead role in altering the legal climate in this country with respect to gender discrimination. Enactment of the Equal Pay Act in that year and inclusion of a ban on sex discrimination in Title VII of the Civil Rights Act of 1964 marked the beginning of a national commitment to remove artificial barriers to women's development of their individual talents. A milestone was passed by the House in 1971 and the Senate in 1972 when the equal rights amendment was approved by overwhelming majorities. Yet in myriad ways, the U.S. Code continues to project images of distinct spheres of action for men and women. It is in the national interest for Congress to assume leadership and control in changing those projections.

Congresswoman Martha Griffiths has proposed* that each standing committee of the House of Representatives, acting as a whole or by sub-committee, conduct a study of

> the application, operation and administration of those laws . . ., including regulations prescribed thereunder, the subject matter of which is within the jurisdiction of such committee in order to--
>
> (1) . . . identify those areas covered by such laws and regulations in which differences exist in their application, operation and administration because of sex;
>
> (2) determine whether those differences in application, operation, and administration because of sex are -
>
> (A) appropriate and justifiable; or
> (B) unduly and unnecessarily discriminatory on account of sex;
>
> and

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* H. Res. 108, 93d Cong., 1st Sess. (1973).

> (3) determine whether, and the extent to which, any such differences in application, operation and administration because of sex should, in the public interest, be removed, modified, or continued without change.

The Griffiths proposal, perhaps coupled with a similar resolution applicable to the Senate and provision for cooperation among committees working in the same or related areas, seems to us the most appropriate method for accomplishing the eradication of gender-based differentials now explicit or implicit in the U.S. Code. No unit operating outside the legislature could approach the task with equivalent resources and expertise. Moreover, drafting consistency would be promoted by allocating the assignment to those with continuing responsibility for legislation in the area in question. Of paramount importance, immediate attention, participation and constant control by Congress itself would indicate to the nation that implementation of the equal rights principle is indeed the priority business it should be as we join in the celebration of International Women's Year in 1975, prepare for our bicentennial, and enter the closing quarter of the twentieth century.

III. Deficiencies in the Key Word List and Other Language Problems

The print-out we were furnished, listing over 800 provisions in the U.S. Code containing gender-based references, was the product of an incomplete and inadequate word list.* Words conspicuously

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* The list consisted of the following words: female, females, feminine, male, males, man, man's, woman, woman's, women, women's, widow, widow's, widowed, widower, widower's, widowerhood, widowers, widowhood, widows, husband, husband's, husbands, wife, wife's, mother, mother-in-law, mother's, mothers, father, father-in-law, father's, fathers, girl, boy, boys, sister, sister-in-law, sisters, brother, brother-in-law, brother-sister, brothers, serviceman, serviceman's, servicemen, servicemen's, masculine, pregnancy, maternal, maternity, sex, sexual, sexually, rape, prostitute, prostitutes, prostitution.

absent from the list include "he," "she," "her," "men". Counterparts were not uniformly included, e.g., "husbands" was included but "wives" was not.

We are unable to determine with any degree of precision the number of additional sections a comprehensive word list would reveal. Indications are, however, that augmentation would be substantial. Cross-references in a section, or comparison with preceding and following sections, or random "reading on" in the Code have turned up provisions omitted from the print-out that contain gender-based terms. Moreover, inclusion of the pronoun "he" would add entries to the print-out by the hundreds.

A. Personal Pronouns

No pronouns appear on the computer word list. "He," "him," and "his" should be added, as should "she," "her," and "hers". The feminine pronouns might turn up substantive differentials since these words are now used only when a sex-specific reference is intended.

Code use of masculine pronouns to refer to a person or individual (see 1 U.S.C. § 1) reinforces the traditional view of women as members of the second or "other" sex. Since no neutral substitute is available, we propose that both masculine and feminine forms be used ("he/she" or "he or she") unless a sex-specific reference is intended.* Alternatively, where appropriate, "person" ("person's") or "individual" ("individual's") might be used in lieu of "he" ("his"), or the provision might be rephrased to omit the pronoun. Solutions to pronoun usage should not be worked out for isolated sections; a consistent, sex-neutral pattern should be employed throughout the Code.

* Giving the male form first place is subject to objection. To avoid giving precedence to either sex, alphabetical order might be followed, i.e., he/she, her/him, her/his.

B. Masculine Nouns and Other Male-Oriented Terms

Ubiquitous references to "man" or "men," like constant use of the male pronoun, depict a society in which men are the dominant actors. The computer word list includes "man" and "serviceman," but does not include "men" or words other than "serviceman" in which "man" or "men" is used in combination with a descriptive prefix or suffix.

When terminology reinforcing sex stereotypes appeared in the sections reviewed, we proposed alteration.* For example, we suggested substituting "person" or "individual" for "man" (in singular sense) (e.g., 16 U.S.C. §§ 754, 760a; 40 U.S.C. § 210); "humans" or "human beings" for "man" (in collective sense) (e.g., 7 U.S.C. §§ 135(a), 135(z)(2)(d)); "humanity" or "human beings" for "mankind" (e.g., 7 U.S.C. § 1704(b)(3)); "service member" for "serviceman" (e.g., 12 U.S.C. §1715m; 14 U.S.C. §498); "human resources" for "manpower" (e.g., 20 U.S.C. §§ 401, 1322); "artificial" for "manmade" (20 U.S.C. §1532); "chairperson" for "chairman" (e.g., 20 U.S.C. §1532); "stevedore" or "longshore worker" for "longshoreman" (e.g., 31 U.S.C. §725s); "sailor" for "seaman" (e.g., 31 U.S.C. §725s); "line installer" for "lineman" (49 U.S.C. §1(7)); "crew member" for "crewman" (e.g., 8 U.S.C. §§ 1101(a)(10), 1221(a), 1251, 1322); "workers' compensation" for "workman's compensation".

The computer program should be revised to include "men" on the word list and to assure that scanning turns up all sections with words in which "man" or "men" is a component.

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* Our approach and recommendations are consistent with the guide issued by the United States Bureau of Census listing 59 sex-neutral occupational descriptions to replace sex-specific terminology.

C. Unnecessary Gender-Based References

When the sex of the person or persons identified in a section is (or should be) irrelevant to the legislative objective, we proposed substitution of a single, sex-neutral term. For example, we suggested substituting "spouse" for "husband" and "wife," "surviving spouse" for "widow" and "widower," "parent" for "mother" and "father," "sibling" for "brother" and "sister," and "persons" or "individuals" for "men" and "women".*

With the exception of "men," the sex-specific words just enumerated appear on the key word list. However, the list does not include "grandmother," "grandfather," "son," "daughter," "niece," "nephew," "uncle," "aunt". It may be that sections including one or more of these words would be identified by key words such as "husband," "wife," "mother," "father". Doubt would be removed by including the omitted words in a revised program.

D. Terms Relating to Unique Physical Characteristics

The word list includes "pregnancy," "maternal," and "maternity". Others might be added, e.g., "paternal," "paternity," "pregnant," "abortion," "abortifacient". Use of a comprehensive list would facilitate determination whether Code provisions draw unnecessary or inappropriate distinctions based on biological differences between the sexes.

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* A model displaying the recommended sex-neutral drafting style is the Uniform Marriage and Divorce Act.

E. Word Sets

Some word sets are complete, e.g., "woman," "woman's," "women," "women's". Others are not, e.g., "man" and "man's" appear on the list, "men" and "men's" do not. Plural and possessive forms should be included in a revised list unless it is clear that additional sections would not be identified by listing such forms.

F. Sex-Neutral Words

To assure that the context in which sex-neutral words appear does not signal gender discrimination, a revised word list might include such terms as

spouse(s)
surviving spouse(s)
parent(s)

G. Other Terms That Might Signal Sex-Based Differentials

Among words that might be added to the list to insure a comprehensive print-out are

alimony
child (children)
dependent
divorce
dower
illegitimacy
illegitimate
legitimacy
legitimate
marriage
married
sterilization
support

The preceding comments, pointing up the impressionistic quality of the key word list, indicate the need for a fresh computer run, employing a more fully developed, detailed list.

Title-by-Title Review

The Title-by-Title analyses that follow indicate unnecessary or inappropriate gender-based references in need of terminological revision, and point out substantive differentials inconsistent with the principle of equal rights, responsibilities and opportunities for men and women, free from gender-based discrimination.

In formulating recommendations we have been guided by congressional hearings and reports on the equal rights amendment, particularly S. Rep. No. 92-689, Senate Comm. on the Judiciary, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-259, House Judiciary Comm., 92d Cong., 1st Sess. (1971), and by the comprehensive discussion in Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L. J. 871 (1971).

Valuable guidance was also supplied by Eastwood, The Double Standard of Justice: Women's Rights Under the Constitution, 5 Val. L. Rev. 281 (1971), memoranda on the equal rights amendment prepared and distributed by the Citizens' Advisory Council on the Status of Women, and other commentaries cited in Davidson, Ginsburg & Kay, Sex-Based Discrimination 3-4, 99-100, 107-108 (1974), and in the Title reviews .

One concept turns up in these analyses with striking regularity. Underlying many of the Code's substantive differentials is the legislature's assumption of an adult population composed of two classes: breadwinning males and dependent females. Such gross classifications

were once thought to operate benignly in women's favor. Today, it is apparent that they shore up attitudes and further entrench practices tending to confine women to a place in a world controlled by men. See Frontiero v. Richardson, 411 U.S. 677 (1973); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971).

Use of breadwinning male/dependent female classifications must terminate if women are to have a fair chance to develop their political and economic potential. Functional descriptions must be substituted for familiar, convenient, but increasingly inaccurate sex-based categorizations. As expressed by the Federal Legislation Committee of the Bar Association of the City of New York:

> Any . . . favorable treatment required by some women because of their . . . family roles could be preserved by statutes which utilize those factors--rather than sex--as the basis for distinction.

Title-by-Title Review

Title 1 -- Definitions

Section identified by print-out: 1 U.S.C. §1

I. Discussion

1 U.S.C. §1 states that in all federal legislation, unless the context indicates otherwise, "words importing the masculine gender include the feminine as well"; both nouns and pronouns are covered by this stipulation. Although no substantive differential may be generated by 1 U.S.C. §1, the current drafting scheme suggests a society in which men are (and ought to be) the dominant participants. Revision of 1 U.S.C. §1 is recommended to reflect in form as well as substance the equal status of women and men before the law. In addition, a new subsection is proposed, numbered 1 U.S.C. §106(c), instructing drafters to use sex-neutral terminology in all federal legislative texts.

Under the recommended revision, sex-related words would be authorized in only three situations: 1) when no suitable sex-neutral substitute term exists, e.g., aunt and uncle; 2) when the reference is to a physical characteristic unique to some or all members of one sex; 3) when a sex-specific reference is consistent with the constitutional right of privacy.

Our review of all U.S. Code provisions listed on the print-out revealed very few instances of references in the three exceptional categories. It may be expected, therefore, that sex-based language

would rarely appear under the revision proposed. Although we have included a "privacy" exception, it is probable that most privacy situations can be described in sex-neutral terms, for example, providing for conduct of strip searches by an officer of the same sex as the person to be searched, in lieu of stipulating that women are to be searched by women. Use of sex-neutral terminology in such contexts has the additional advantage of indicating that, to the extent privacy requires sex separation, separate facilities and treatment must be equal.

II. Recommendations

1 U.S.C. §1 -- Replace "words importing the masculine gender include the feminine as well" with "words importing one gender include the other as well; legislation drafted after _____, 197_ will conform to 1 U.S.C. §106(c)".

1 U.S.C. §106(c) -- [A new section, to be added to Chapter 2, which is currently titled "Acts and Resolutions; Formalities of Enactment; Repeals; Sealing of Instruments". This title might be amended to include the phrase "Sex-Neutral (or Non-Discriminatory) Terminology".]

Sex-Neutral (or Non-Discriminatory) Terminology to be Used in all Legislative Texts

After _____, 197_, all federal statutes, regulations and rules shall be written in language that is neutral in relation to sex. Such neutral language shall include, but shall not be limited to

1) human(s), human being(s), humanity, individual(s), member(s), people, person(s), personnel, worker(s), or their derivatives to replace sex specific words such as man (men) or woman(women) whether appearing alone, in compound words, or in phrases; for example:

humanity for mankind
human resources for manpower
service member(s) for serviceman(men) or servicewoman(women)

individual(s) or person(s) for men and women

2) -er(s) suffix to replace man(men) or woman(women) in compound words; for example:

enterer for entry(man) or entry(woman)

3) artificial in lieu of manmade

4) spouse to replace wife or husband

5) surviving spouse to replace widow or widower

6) decedent or deceased spouse to replace deceased wife or deceased husband

7) parent(s), parental or parenthood to replace mother(s), father(s), maternal, maternity, paternal, paternity

8) sibling(s) to replace sister(s) and brother(s)

9) child(ren) to replace daughter(s), son(s), girl(s), boy(s)

10) the pronoun combination he/she, her/him, hers/his to replace third person singular pronoun(s)

11) plural constructions to avoid third person singular pronouns

Nothing in this section shall be construed to prohibit the use of sex-related words in those limited instances where no suitable sex-neutral substitute exists, or the reference is to a physical characteristic unique to some or all members of one sex, or the constitutional right to privacy requires a sex-specific reference.

Title 2--The Congress

Sections identified by print-out: 2 U.S.C. §§ 6, 36A, 38A, 124, 125

A. Discussion

2 U.S.C. §6 reduces the number of Representatives where a state denies "males" the right to vote. It dates from the post-Civil War period and, consistent with the abortive second section of the fourteenth amendment,* reflects an intent to assure the franchise to black men.

2 U.S.C. §§ 36A, 38A, 124 and 125 concern death benefits for the "widow or widower" of a member of Congress.

B. Recommendations

If 2 U.S.C. §6 is retained, it should be amended to take account of the nineteenth amendment: "males" should be deleted; the appropriate reference is to any individual eligible to vote.

2 U.S.C. §§ 36A, 38A, 124 and 125, although nondiscriminatory, should be amended to eliminate unnecessary gender-based references: "surviving spouse" should replace "widow or widower".

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* . . . . But when the right to vote . . . is denied to any of the male inhabitants of [a] State . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Title 5--Government Organization and Employees

Sections identified by print-out: 5 U.S.C. §§2108, 3110, 3364, 5561, 5582, 5583, 7152,8101, 8109, 8110, 8133, 8135, 8141, 8332, 8341, 8342, 8521, 8705*

A. Discussion

In 1972, Congress terminated the inconsistency between federal employment policy, as indicated in Title 5, and the policy Congress mandated in 1964 for private employers under Title VII of the Civil Rights Act of that year.** In lieu of amending each particular section that provided to the spouse or family of a male employee benefits not available (or accorded on a limited basis) to the spouse or family of a female employee, Congress enacted a catch-all provision. 5 U.S.C. §7152 stipulates that all regulations granting benefits to government employees

> shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children . . . .

Further, 5 U.S.C. §7152 provides that

> any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

The section applies not only to other sections of Title 5, but also to "any other provision of law granting benefits to employees."

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* Three antidiscrimination provisions were identified by the print-out because they include the word "sex": 5 U.S.C. §7151 (declares it U.S. policy to insure equal employment opportunity without discrimination because of, inter alia, sex); 5 U.S.C. §7154 (prohibits discrimination in federal employment because of, inter alia, sex); 5 U.S.C. §8902 (prohibits federal employee health benefit plans that exclude an individual because of, inter alia, sex).

** Extended to federal, state and municipal employment by the Equal Employment Opportunity Act of 1972.

The House Report on the bill that became 5 U.S.C. §7152 emphasizes that other Titles are affected by the catch-all equalization provision. H.R. Rep. No. 415, 92d Cong., 1st Sess. (1971). However, the Senate Report refers only to the impact of the provision on other sections of Title 5. S. Rep. No. 528, 92d Cong., 1st Sess. (1971).

B. Recommendations

Although 5 U.S.C. §7152 appears to require complete equality of benefits for federal employees regardless of sex, to eliminate any room for doubt, and in keeping with a consistent program to avoid unnecessary gender references in federal legislation, each section discriminatory on its face should be amended. Sections discriminatory on their face include:

5 U.S.C. §2108 — Subsections 3(F) and (G) provide benefits to a mother of a veteran who lacks a husband capable of supporting her.

[It is doubtful that 5 U.S.C. §7152 sex-neutralizes this provision. Amendment might provide benefits for a parent of a veteran not supported by a spouse and incapable of self-support.]

5 U.S.C. §3364 — Provides for promotion of substitute postal employees in the order in which they were originally appointed as long as they are "of the required sex".

[Here too it is doubtful that 5 U.S.C. §7152 effects the necessary change. The sex of the substitute employee should be irrelevant.]

5 U.S.C. §5561 — Deals with payments to missing employees and lists "wife" but not "husband" as an employee's "dependent".

["Wife" should be replaced by "spouse".]

5 U.S.C. §§ 8101, 8110, 8133, 8135, 8141	Relevant, inter alia, to compensation for work injuries. These sections, the first two definitional, qualify widows of employees for benefits without regard to dependency but qualify widowers only when, by reason of physical or mental disability, they are "wholly dependent for support" on the (female) federal employee.

[A bill introduced by Representative Martha Griffiths would provide equal treatment for the surviving spouse, whether male or female. H.R. 1502, 93d Cong., 1st Sess. (1973).]

5 U.S.C. §8332	Deals with computation of the number of years on which an employee's annuity is based. Subsection (j) refers to the individual or his widow.

[The reference should be to surviving spouse.]

Further, references not discriminatory on their face or in effect, but unnecessarily gender-based should be amended. Sex-related terms which should be replaced by sex-neutral terms appear in, inter alia, 5 U.S.C. §§ 2108, 3110, 5582, 8109, 8133, 8341, 8342, 8705 and 8521. E.g., substitute "surviving spouse" for "widow or widower"; "sibling" for "brother or sister"; "parent" for "mother or father"; "service members" for "servicemen".

Title 7--Agriculture

Sections identified by print-out: 7 U.S.C. §§ 135, 135a, 135d, 1704, 2014, 2044, 2401, 2402, 2532, 2541, 2568

The identified sections are discussed below under three headings. Several appear in the chapter regulating insecticides; in these sections, the term "man" is used to signify human beings. The second group uses the term "sexually" in relation to plant reproduction; this use is not sex discriminatory. Three miscellaneous sex references raising questions of terminology and substance are treated in the final portion of this comment.

I. Insecticides (7 U.S.C. §§ 135, 135a, 135d)

A. Discussion

These sections regulate economic poisons harmful to human beings and use the word "man" in that context. Changing the word "man" to "human beings" would have no substantive impact, but would conform terminology to the equality principle.

B. Recommendations

7 U.S.C. §§ 135(a), 135(z)(2)(d)--substitute "living humans" or "living human beings" for "living man".

7 U.S.C. § 135a(a)(3)--substitute "highly toxic to humans" or "human beings" for "highly toxic to man". (49 U.S.C. § 135a also contains masculine pronouns which should be changed throughout the Code to both masculine and feminine ones.)

7 U.S.C. §§ 135d(a)(1), (2)--substitute "humans" or "human beings" for "man".

II. Plant Variety Protection (7 U.S.C. §§ 2401, 2532, 2541, 2568)

These sections are part of a statutory scheme designed to assure developers of novel varieties of sexually reproduced plants protection similar to that afforded under the patent law with respect to plants that reproduce asexually. Use of the term "sexually" in these sections is appropriately descriptive and should not be revised.

III. Other Provisions

A. Discussion

7 U.S.C. § 1704(b)(3) includes the phrase "diseases common to all of mankind".

7 U.S.C. § 1704(h), part of the Agricultural Trade Development and Assistance Chapter of this Title, provides that the President may use foreign currencies or proceeds from sales of those currencies to finance programs in foreign countries aimed at "maternal health" and "child health and nutrition," among other goals.

The purpose of the program is to ease the world food crisis by rewarding voluntary programs dealing with population growth and family planning. The broad intent of Congress, as expressed in the statute and the House Report on it, can be read to encompass the health of both mothers and fathers. See H. Rep. No. 1558 (May 27, 1966). Aid to women but not to men would be justifiable under the equality principle only if assistance were confined to health care of pregnant women and lactating mothers. To the extent that assistance relates to birth control, family planning and the general health of parents,

aid should be supplied to men as well as women. Accordingly, consideration should be given to substituting "parental welfare" for "maternal welfare".

7 U.S.C. § 2014(c), sets eligibility standards for the food stamp program. Enacted in 1971, the section provides that a household shall not be eligible for assistance if it includes an able-bodied adult person between the ages of 18 and 65 who has not registered for work at a state or federal employment office or who has refused to accept work. Four classes of adults do not render their household ineligible though they fail to meet these requirements: (1) "mothers or other members of the household who have the responsibility of care of dependent children or of incapacitated adults," (2) students, (3) persons who work at least 30 hours a week, and (4) narcotics addicts and alcoholics.

The first category is described in the explanatory House Report (No. 91-1402) as "those persons responsible for the care of others". The Report makes no specific reference to mothers as distinct from others responsible for care of dependents. It thus appears that Congress intended to exempt only those mothers who are actually responsible for the care of another. However, the style of the drafter reflects the traditional assumption that mothers inevitably care for children while fathers occupy the role of "Other" when they do so. Cf. de Beauvoir, Second Sex (1949). In any case, even if Congress intended to single out all mothers for special treatment in a context unrelated to any unique physical characteristics of women,

such special treatment would be impermissible under the equality principle. The phrase "mothers and," while it adds nothing to the substance of the exemption, reflects one-eyed sex role thinking and should be eliminated as inappropriate, confusing and redundant.

7 U.S.C. § 2044 provides that the Secretary of Agriculture may refuse a certificate of registration to any migrant farm labor contractor (jobber) who has been convicted under state or federal law of any one of a number of crimes, including rape or prostitution.

The purpose of the statute, as expressed in Senate Report 202, 88th Cong., 1st Sess. (1973), is to prevent exploitation and abuse of farm workers by labor contractors, who generally exercise total control over the finances, work schedules, and living conditions of the workers. If the statute is retained at all (imposing a further disability on a person once convicted of a crime is questionable), it should be revised to protect men as well as women from forcible sexual intercourse. Although rape is defined sex-neutrally in recently revised criminal laws, most states have not yet revised their penal codes to accomplish this result. For proposed change in the federal law, see S.1400, 93d Cong., 1st Sess. (1973) (Justice Department drafted revision of Title 18). Pending revision of state and federal rape laws to eliminate the sex of the offender and of the victim as an element of the crime, forcible sodomy should be included as a conviction that may disqualify a jobber.

In line with the Model Penal Code, many states have made prostitution laws sex-neutral, though enforcement is still sex discriminatory. See Rosenbleet & Pariente, The Prostitution of the Criminal Law, 11 Am. Crim. L. Rev. 373 (1973). Changes in federal law

on this subject are discussed in the comments on Title 18 (Crimes). The nature of the jobber's role vis-a-vis the workers argues for inclusion of pimping and pandering, defined sex-neutrally, in the 7 U.S.C. § 2044 catalogue of offenses.

B. Recommendations

7 U.S.C. § 2014(b)--in the phrase "except mothers or members of the household . . ." delete "mothers or".

7 U.S.C. § 1704(b)(3)--replace "diseases common to all of mankind" with " . . . to all of humanity" or " . . . to all human beings".

7 U.S.C. § 1704(h)--consider replacing "maternal welfare" with "parental welfare".

7 U.S.C. § 2044(b)(7)--add "forcible sodomy" as one of the listed crimes; add "pimping" and "pandering" or, in the Model Penal Code's terms, "promoting prostitution" to the list of crimes; reference to prostitution should be reviewed for consistency with revision of sections of Title 18 dealing with this subject.

Title 8--Aliens (Immigration and Naturalization)

Sections identified by print-out: 8 U.S.C. §§ 1101, 1152, 1153, 1154, 1182, 1202, 1221, 1251, 1322, 1328, 1353, 1403, 1409, 1422, 1428, 1435, 1449, 1451, 1452, 1486, 1557

Sex-based references, most of them without discriminatory effect, abound in this Title. Principal substantive differentials appear in provisions relating to married women (but not married men) and provisions concerning prostitution.

I. Terminology

A. Discussion

Following the general pattern, the Secretary is defined throughout as "he". Other references not discriminatory in effect, but unnecessarily gender-based, include: "father or mother" (8 U.S.C. §1403); "crewman" (8 U.S.C. §§ 1221(a), 1251, 1322); "husband and wife" (8 U.S.C. §1152(b)); "husband or wife" (8 U.S.C. §1328); "daughter or son" (8 U.S.C. §1182(b)); "son or daughter" (8 U.S.C. §§ 1153(a)(1), (2), (4), 1182(g)(h)); "brother or sister" (8 U.S.C. §1153(a)(5)); "brother and sister" (8 U.S.C. §1154(c)); "widow or widower" (8 U.S.C. §1486(3)). Consistent usage is not characteristic of this Title. In several sections "spouse" appears, in others "husband" and "wife" are stated separately, although the same rule applies to both. Similarly, no reason appears for usage of "child" or "children" in some sections, "son(s)" or "daughter(s)" in others.

Sections in which gender references are made, without discriminatory effect and for an appropriate purpose, include: 8 U.S.C. §1152(a) (no preference or discrimination in issuance of visas on basis of, inter alia, sex); 8 U.S.C. §1422 (right to be

naturalized shall not be abridged because of, inter alia, sex); 8 U.S.C. §1489 (notwithstanding any treaty or convention to the contrary, women who are U.S. nationals do not lose their citizenship through marriage to an alien or residence abroad following their marriage); 8 U.S.C. §1409 (acquisition of U.S. nationality by child born out-of-wedlock where mother is U.S. national); 8 U.S.C. §1428 (relating to absence to perform religious duties, applicable to "missionary, brother, nun or sister"); 8 U.S.C. §§ 1202, 1221(c), 1449 (calling for identification of a person's sex).

B. Recommendations

8 U.S.C. §1403--replace "whose father or mother" with "if either parent".

8 U.S.C. §§ 1101(a)(10), 1221(a), 1251, 1322--substitute "crew member" for "crewman".

8 U.S.C. §1152(b)--change "husband and wife" to "spouse".

8 U.S.C. §1328--change "husband or wife" in last sentence to "spouse", and "each other" to "the other spouse".

8 U.S.C. §§ 1153(a)(1), (2), (4), 1182(b),(g)(h)--replace "son(s) or daughter(s)" with "child" or "children".

8 U.S.C. §§ 1153(a)(5), 1154(c)--replace "brother(s)" [or][and] "sister(s)" with "siblings".

8 U.S.C. §1486(3)--replace "widow or widower" with "surviving spouse".

No change is recommended for 8 U.S.C. §§ 1152(a), 1422, 1428, 1202, 1221(c), 1449 . The latter three sections, requiring identification of an individual as male or female, appear useful for census and other statistical purposes. Race was eliminated from 8 U.S.C. §1202 in 1961 because "neither race nor ethnic classification have any bearing on eligibility of aliens to enter the United States." H.R. Rep. No. 1086, 87th Cong., 1st Sess. However, as 8 U.S.C. §1152(a) confirms, sex is not and has never been a ground of exclusion. Until 1952, racial classification could operate to exclude. See 66 Stat. 193.

*It would be appropriate to eliminate throughout the Code any differential treatment of children based on birth status. Cf. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

II. Substance

A. Discussion

1. Sex-based references in 8 U.S.C. §§ 1353, 1451.

8 U.S.C. §1353 authorizes transportation for wives and dependent children of employees of the Immigration and Naturalization Service. Pursuant to 5 U.S.C. §7152, the same benefits should be available to husbands of employees.

8 U.S.C. §1451, regarding revocation of naturalization, refers to wife or minor child.

2. Prostitution and "immoral sexual acts".

Several sections in Title 8 concern "prostitution," "immoral sexual acts," "crimes of moral turpitude". In some cases, the gender reference is explicit, e.g., 8 U.S.C. §1557 relates to "alien women and girls". Cf. 8 U.S.C. §1328 (changed from "alien women or girls" to "any alien" in 1910). In other cases, it is unclear whether "prostitute" or "prostitution" include male prostitutes and prostitution. Beyond the problem of discrimination on the face or in application of these provisions, there is the larger issue of appropriate treatment of prostitution and "immoral sexual acts" by the law. See, e.g., Rosenbleet & Pariente, The Prostitution of the Criminal Law, 11 Am. Crim. L. Rev. 373 (1973). Revision of these sections of Title 8 should be harmonized with revision of sections of Title 18 (Crimes) dealing with sex offenses. Further,

relevant international agreements may bear revision. See, e.g., reference in 8 U.S.C. §1557 to international agreement on "white-slave traffic".

3. Nationality of married women (8 U.S.C. §§ 1435, 1452).

Two sections relating to married women's citizenship, 8 U.S.C. §§ 1435, 1452, are understandable only in historical context. Congress initially approached this issue with the common-law notion of incorporation of a married woman's identity into that of her husband as the backdrop. See generally Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 117-30 (1974). Congress provided in 1855 that

> any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.

Act of Feb. 10, 1855, Ch. 71, §2, 10 Stat. 604. As explained in F. G. Franklin, The Legislative History of Naturalization in the United States 275 (1906):

> The woman section was taken, nearly in exact words, from the English act of 1844. There could be no objection to it, because women possessed no political rights. There was no good reason for putting women to the probationary term, and the trouble and expense of naturalization. Being a citizen, she could train her children properly.

In 1907, Congress dealt with the reverse situation, a female citizen of the United States married to an alien, by providing that

> any American woman who marries a foreigner shall take the nationality of her husband.

Act of March 2, 1907, Ch. 2534, §3, 34 Stat. 1228. The effect upon citizenship of a marriage before 1907 between an American woman and an alien was not clear. Some courts said that the 1907 act was "merely declaratory of the common law previously prevailing." In re Krausman, 28 F.2d 1004 (E.D.Mich. 1928) (1903 marriage led to loss of citizenship); In re Drysdale, 20 F.2d 957, 958 (E.D. Mich. 1927); Watkins v. Morgenthau, 56 F. Supp. 529 (E.D.Pa. 1944). Others said that an American woman did not necessarily lose her citizenship by a pre-1907 marriage to an alien. In re Wright, 19 F. Supp. 224 (E.D.Pa. 1937) (married women could elect her husband's citizenship); In re Zogbaum, 32 F.2d 911 (D.S.D. 1929). In any event, after 1907 a marriage would result in loss of citizenship.

In 1922, Congress moved toward recognition of the married woman as an independent person for citizenship purposes. In the Cable Act, it provided that

> any woman who marries a citizen of the United States. . . shall not become a citizen of the United States by reason of such marriage.

Further, Congress stipulated that a woman would no longer lose her United States citizenship by marriage to an alien, unless she married an alien ineligible for citizenship. However, the new provisions were to operate prospectively only. Citizenship previously lost or gained through marriage remained unaffected. See Cable Act of Sept. 22, 1922, Ch. 411, §§ 2, 3, 7, 42 Stat. 1021. Ultimately, in 1931, Congress provided that henceforth a United States citizen would not suffer loss of citizenship upon her marriage to an alien

ineligible for citizenship. Act of March 3, 1931, Ch. 442, §4, 46 Stat. 1511. See 8 U.S.C. §1489.

Current provisions deal with the status of women who lost or gained United States citizenship through marriage before 1922. 8 U.S.C. §1435 provides that women who lost their United States citizenship because they married aliens before 1922, or ineligible aliens before 1931, may regain citizenship by petitioning for a certificate of citizenship. 8 U.S.C. §1452 provides that women who gained United States citizenship through marriage to citizens before 1922 remain citizens.

B. Recommendations

1. 8 U.S.C. §1353--replace "wives" with "spouses".

8 U.S.C. §1451--clarify that a spouse is not adversely affected by revocation of naturalization.

2. All sections involving "prostitution" and "immoral sexual acts," e.g., 8 U.S.C. §§ 1182(a)(12), 1251(a)(12), 1328, 1557, require careful review. Where sex differentials appear on the face of the provisions, e.g., 8 U.S.C. §1557, inconsistency with the equality principle is evident. In other cases, it is likely that provisions have been interpreted or applied in a sex discriminatory manner.

Recommendations concerning the appropriate treatment in this Title of prostitution and "immoral sexual acts" should be made on the basis of a comprehensive study involving expert reports and consideration of approaches and solutions adopted by other nations.

3. No change is recommended in 8 U.S.C. §1452, providing that women who acquired citizenship through marriage prior to 1922 remain citizens. It would be unfair to terminate a status relied upon for over half a century, even though citizenship was acquired under a rule that submerged the married woman's separate identity and, at the same time, denied equal rights to alien men who married United States citizens.

8 U.S.C. §1435 might be amended to provide that women who lost their citizenship prior to 1922 or 1931 through marriage to aliens will now, just as automatically, be deemed United States citizens unless they affirmatively elect against citizenship. Immigration and Naturalization Service reports indicate the following figures for women in this category who regained citizenship by petition pursuant to 8 U.S.C. §1435: in 1973, 14 women; in 1972, 19; in 1971, 35; in 1970, 35; and in 1969, 28. The burden of petitioning may not be substantial, but even a minimal burden appears inappropriate for persons cut off from citizenship by a rule that denied them status as independent individuals. An election not to reclaim citizenship may be adequate for situations in which the woman does not wish to obtain the benefits and assume the obligations of United States citizenship.

Title 10 -- Armed Forces

Sections identified by print-out: 10 U.S.C. §§ 101, 311, 505, 510, 591, 651, 772, 918, 920, 925, 1038, 1072, 1077, 1126, 1332, 1431, 1477, 2031, 2771, 3071, 3209, 3215, 3220, 3283, 3296, 3297, 3311, 3363, 3364, 3383, 3504, 3580, 3683, 3818, 3848, 3888, 3916, 3927, 3963, 4309, 4313, 4651, 4682, 4712,4713, 5001, 5143, 5206, 5446, 5447, 5448, 5449, 5452, 5504, 5575, 5576, 5577, 5581, 5582, 5583, 5584, 5586, 5587, 5589, 5590, 5596, 5663, 5664, 5665, 5701, 5702, 5703, 5704, 5707, 5708, 5710, 5711, 5751, 5752, 5756, 5757, 5758, 5760, 5762, 5763, 5764, 5765, 5766, 5767, 5768, 5769, 5770, 5771, 5776, 5778, 5782, 5783, 5784, 5785, 5787b, 5891, 5896, 5897, 5898, 5899, 6015, 6018, 6160, 6294, 6376, 6379, 6380, 6382, 6384, 6386, 6387, 6388, 6389, 6393, 6395, 6398, 6400, 6401, 6402, 6403, 6909, 6911, 7541, 7601, 8208, 8215, 8257, 8297, 8549, 8683, 8818, 8848, 8888, 8927, 9651, 9682, 9712, 9713

Once off-limits to women, the armed forces now provide separate and unequal opportunities for them. Current inequities are surveyed, and recommendations for change are outlined in Note, The Equal Rights Amendment and the Military, 82 Yale L.J. 1533 (1973).

Although the Coast Guard (see Title 14 Review) has moved toward full implementation of the equal rights principle, other services have not. Barriers to equal opportunity for women in the Army, Air Force, Marines and Navy have been rationalized by reference to congressional exclusion of women from combat duty and from the draft. Proscription of assignment of women to combat duty, traditionally considered a benign

and expedient classification, has been invoked to justify restrictive quotas and higher enlistment standards for women, career specialties, educational and training programs closed to women, and exclusion of women from admission to the Military, Naval and Air Force Academies. Indicative of the extent to which sex-based differentials in the military have been taken for granted, in Kahn v. Shevin, 42 L.W. 4591, 4593 n. 10 (U.S.S.C. April 24, 1974), Mr. Justice Douglas, writing for himself and five of his brethren, noted:

> Gender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the Armed Services. 50 App. U.S.C. §454.

The Supreme Court itself has never ruled upon the constitutionality of limiting the draft to one sex. In other contexts, it is unlikely that the Court would cite a congressional determination, rather than its own adjudication, to signify the permissibility of a legislative classification.

Debate on the equal rights amendment makes it clear that proponents envisioned no exemption for the armed services from the principle of equal rights, responsibilities and opportunity. See, e.g., 118 Cong. Rec. S4389-S4409 (daily ed. March 21, 1972); 118 Cong. Rec. S4138, S4142 (daily ed. March 17, 1972); S. Rep. No. 92-689, Senate Committee on the Judiciary, 92d Cong., 2d Sess. 13-14, 24-26, 36-39 (1972); Hale & Kanowitz, Women and the Draft, 23 Hastings L.J. 199 (1971); Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 967-79 (1971).

Comprehensive revision of Title 10 to eradicate gender-based differentials is a challenging task, requiring participation of experts knowledgeable in military affairs and sensitive to the requirements of the

equality principle. The combination may be rare, for stereotypical assumptions about the (limited) capabilities of women and unwillingness to assess their potential on an individual basis remain characteristic of military and defense officials at the highest levels. See, e.g., Affidavit of William P. Clement, Jr., Deputy Secretary of Defense, April 23, 1974; Affidavit of Vice Admiral William P. Mack, Superintendent of the United States Naval Academy, April 22, 1974; Affidavit of Lt. General A.P. Clark, Superintendent of the United States Air Force Academy, April 19, 1974; Affidavit of Lt. General William A. Knowlton, Superintendent of the United States Military Academy, April 24, 1974, submitted as Defendants' Exhibits 1-4 in support of Motion to Dismiss or for Summary Judgment, Edwards v. Schlesinger, Civil Action No. 1825-73, D.D.C., 43 U.S.L.W. 2009 (1974), plaintiffs' appeal pending.

During the past few years, spurred by plans for all-volunteer armed forces, several pronouncements have been made, and some action has been taken by Congress and the Department of Defense to expand service opportunities for women and to integrate male and female personnel. 1967 amendments to Titles 10, 32, and 37 (P.L. 90-130) removed a few of the career impediments encountered by women officers. However, these amendments hardly accomplished the large task indicated in the Senate Report (No. 676, 1966): to provide female officers "the same promotion and career tenure opportunities as male officers". More recently, in May 1974 (P.L. 93-290), enlistment age requirements for men and women were equalized. A proposed Defense Officer Personnel Management Act, presently before the House Armed Services Committee, encompasses sex integration as part of a broad program to reform the officer structure for all services. The purpose of the proposed comprehensive reform is

to foster more efficient use of personnel. The Central All Volunteer Task Force has prepared a report for the Department of Defense on increasing utilization of women in anticipation of low volunteer levels for men. The armed forces have been directed to plan for substantially increased utilization of women in all service occupations. Office of the Assistant Secretary of Defense, Manpower and Reserve Affairs, Utilization of Military Women, FY 1973-1977 (December 1972). To date, however, there has been more talk than action regarding changes directed toward significantly broader opportunities for women. Moreover, even the plans not yet off the drawing board fall short of promoting equal rights, responsibilities and opportunity, free from gender-based discrimination.

Because women currently in service have not been permitted to demonstrate and develop their full potential, special attention must be paid to their situation in effecting the changes necessary to comport with the equal rights principle. Appropriate transition regulations will be required to avoid adverse impact upon female members whose opportunities for training and promotion have been separate and unequal.

Sex-based differentials identified by the print-out are classified and summarized below.

I. Terminology: Discussion and Recommendations

Under this heading, only provisions that do not require substantive revision will be noted. All amendments to eliminate substantive differentials should include corresponding changes in terminology.

10 U.S.C. §101(32), which defines "spouse," requires no alteration. 10 U.S.C. §1077(a)(8), authorizing "maternity" care for dependents, to the extent that it refers to health care immediately related to childbirth,

appropriately identifies a physical characteristic unique to women. Accordingly, no change is recommended.

10 U.S.C. §925, concerning sodomy, does not differentiate on the basis of gender. However, the text appears infirm for vagueness (unnatural carnal copulation is not defined) and disregard of personal privacy interests. Cf. Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1974).

10 U.S.C. §1126, concerning distribution of gold star lapel buttons to survivors of persons who died in service, defines "widow" as including "widower". "Surviving spouse," a sex-neutral term, should be substituted for the awkward definition currently used.

10 U.S.C. §2771(a)(4) refers to "father or mother". "Parent" should suffice. 10 U.S.C. §4313 concerns expenses "per man" at national rifle matches sponsored by the Army. The expression should be "per person". 10 U.S.C. §5001 defines a "member" of the Navy as a "member, male or female". The gender references are unnecessary and should be deleted. 10 U.S.C. §6160 refers to the pension of an "enlisted man"; 10 U.S.C. §1431(a)(3) refers to "midshipmen". The references should be to "enlisted member" or "enlisted person", and to "midshippersons".

II. Substance: Discussion and Recommendations

A. Credit for service in women's corps no longer in existence.

10 U.S.C. §1038 applies to women who served in the now defunct Women's Auxiliary Army Corps during World War II; it provides that such service be credited to them for purposes of determining their total length of service. 10 U.S.C. §1332 provides credit to women for service in the Women's Medical Specialist Corps prior to January 1, 1949. Service credit for former service by civilians in the Women's Medical Specialist

Corps, now the Army Medical Specialist Corps, is granted in 10 U.S.C. §3683. 10 U.S.C. §3963 concerns the retirement grade of women officers, dieticians, nurses, and physical therapists who served between 1940 and 1946.

Credit for past service in these situations is clearly appropriate. No change is recommended. Under the equal rights principle, segregated corps and separate authorizations for women's ranks will be impermissible. For discussion of appointment and promotion of women, see subsection F., infra.

B. Qualifications for enlistment.

10 U.S.C. §505 formerly specified higher enlistment age requirements for women than for men. Enlistment age differentials were eliminated in May 1974 by P.L. 93-290, which renders applicable to all persons the age requirements previously stipulated for men.

10 U.S.C. §§ 510(c) and 591(c) set out special provisions for women reservists. These sections should be eliminated as part of a comprehensive revision to replace current sex-based differentials with specifications equally applicable to men and women.

C. Membership in service-related organizations.

10 U.S.C. §311 provides that only males, and females who are National Guard officers, are members of the militia authorized by Art. I §8 cl. 16 of the Constitution. The equal rights (and responsibilities) principle precludes special "favors" for women. For this reason, the Senate rejected Senator Ervin's attempts to amend the equal rights amendment to exempt women from compulsory military service. See 118 Cong. Rec. S4395, S4408 (daily ed. March 21, 1972). Moreover, in practice,

the National Guard, which under the equal rights principle may not exclude women, has been the resource utilized under statutes specifying when the militia may be called. See Executive Orders 10730 (Sept. 24, 1969), 11053 (Sept. 30, 1962), 11111 (June 11, 1963), 11118 (Sept. 10, 1963). The section should be amended to substitute "persons" for the sex-specific references.

10 U.S.C. §2031 appears on the print-out because subsection (b)(1) included only male students in determining whether the number required to establish a junior ROTC program existed. See Note, 82 Yale L.J. 1533, 1543 (1973). This differential is no longer operative.

D. Service-related benefits.

10 U.S.C. §§ 101(36) and 1072, as identified in the print-out, define "dependent" for female members to include only persons actually dependent on the member. Differential dependency definitions for male and female members were held unconstitutional in Frontiero v. Richardson, 411 U.S. 677 (1973), and are no longer applied in the services. See P.L. 93-64, 87 Stat. 1074 (July 1973), amending 37 U.S.C. §401, and 53 Comp. Gen. (B 178979, August 31, 1973).

10 U.S.C. §772(c) assumes that all Navy Nurses are female and prohibits them from wearing uniforms without special authorization when not in active duty. The assumption that all nurses in service are female is no longer accurate and there is no apparent reason for the special restriction on uniform wearing. The provision should be deleted if no adequate justification exists for the restriction. If it is retained, it should be sex neutralized by using alternative pronouns.

10 U.S.C. §1431 concerns election of annuities. Subsection (b)(3)

states that members whose "widows" are entitled to indemnity compensation under Title 38 may not make the election. The wording suggests either that widowers are not entitled to indemnity compensation or that women members would not elect reduced retirement pay to provide for a survivor's annuity. Both interpretations are inconsistent with the equal rights principle. The same election should be available to all service members, without regard to their sex. Surviving spouse, not widow, should be the reference in subsection (b)(3).

10 U.S.C. §1477, defining persons eligible for death gratuity benefits, contains two provisions in need of revision. Subsection (a)(3) permits the inference that brothers are to be preferred to sisters. Revision is appropriate to clarify that siblings stand on an equal footing, regardless of their sex. Subsection (b) provides different definitions with respect to out-of-wedlock children of male and female members. A single, sex-neutral definition should be substituted. The following revision would provide a consolidated definition, while still taking account of the normally greater proof problem entailed where the service member is the alleged father: eliminate subsection (b)(4); number subsection (5) as subsection (4); reletter (A)-(D) as (B)-(E); insert a new subsection (4)(A) reading

> "(A) Whose official birth certificate names the decedent as parent;"

E. Assignment and career specialty restrictions.

By statute in the Air Force, Navy and Marines, and by military policy in the Army, women are excluded from combat duty positions. 10 U.S.C. §6015 prohibits assignment of women in the Navy and Marines

to duty in aircraft engaged in combat missions or on vessels other than hospital ships and transports; 10 U.S.C. §8549 prohibits female members of the Air Force from duty in aircraft engaged in combat missions, with exceptions for women designated under 10 U.S.C. §8067, principally nurses, physicians, chaplains; 10 U.S.C. §§ 6911 and 8257 stipulate that aviation cadets in the Navy and Air Force shall be male.

Consistent with reservation of combat assignments to men, numerous military occupational specialites are closed to all women or include only a token few. Further indicative of the special place carved out for women in service, 10 U.S.C. §6018 provides that no naval officer, except Nurse Corps officers and officers appointed under 10 U.S.C. §5590, i.e., all women officers other than health care personnel, shall be assigned to shore duty absent special reason.

As indicated in the legislative history of the equal rights amendment, the principle of equal rights, responsibilities and opportunity, as applied to the armed forces, calls for assignment of men and women on the basis of individual capacity in light of the needs of the services. The principle does not permit formulation of personnel utilization policy on the basis of sex. Reference to average capabilities of all women, or of all men, could not rationalize duty assignments. Rather, strictly job-related standards, including tests of strength and skill when relevant, would determine placement of personnel. See Note, 82 Yale Law Journal 1533, at 1547-52

Use of neutral, strictly job-related criteria for military assignment determinations should assure that no women (and no men) will be forced into positions for which they are unqualified. On the other hand,

eliminating sex per se as an assignment determinant will make it possible for women to advance in the military as far as their talents and aspirations permit.

F. Military academies.

10 U.S.C. §4342, authorizing appointments to cadet corps at the military academies, does not confine appointments to males. Nonetheless, the academies refuse to accept women. Their refusal has been upheld against constitutional challenge on the ground that exclusion of women from combat establishes the rationality of reserving all academy places to men. Edwards v. Schlesinger, 43 U.S.L.W. 2009 (D.D.C. 1974), appeal pending.

The military academies are prestigious educational institutions, providing unique training for career specialties and military leadership. These institutions might serve as a model for the services in affording equal opportunity. However, their present policy, barring all women without regard to individual capacity, is indicative of the attitude that has inhibited significant progress toward eradication of sex discrimination in the armed forces.

The equal rights principle mandates equal access to the academies for men and women. While the present text of 10 U.S.C. §4342 would permit admission of women, two provisions of the section require change. Subsection (a)(1) guarantees 65 cadet positions to sons of service members who die in action; subsection (b)(1) provides 100 cadet positions for sons of certain retired career officers. In both subsections, "children" should replace "sons".

G. Appointments and promotions.

Sections identified by the print-out indicate significantly different appointment, assignment and promotion systems for male and female members of the Army, Navy and Marine Corps. Similarly marked statutory differentials do not appear in sections governing the Air Force. Statutes concerning the Army, Navy and Marines, but not the Air Force, call for designation of a woman as senior officer over all women officers: 10 U.S.C. §3071 (Woman Director of WAC); 10 U.S.C. §5143 (Assistant Chief for Women, Navy); 10 U.S.C. §5206 (Director of Women Marines).

1. Army

Of all the uniformed services, only the Army has a distinct women's corps, the Women's Army Corps, established by 10 U.S.C. §3071. Women may receive temporary assignments outside the WAC. However, their permanent assignment in the WAC controls promotion opportunities and retirement status. Sections relating to the WAC include: 10 U.S.C. §3220 (number of reserve officers per unit); 10 U.S.C. §3283 (commissioned officers); 10 U.S.C. §3296 (WAC promotion list); 10 U.S.C. §3297 (selection board for WAC); 10 U.S.C. §3311 (women may be appointed only to WAC or medical corps); 10 U.S.C. §3363 (promotion of reservists); 10 U.S.C. §3364 (WAC promotion order and zone of consideration list); 10 U.S.C. §3383 (member may hold high ranking reserve appointment on authorization of Secretary Army); 10 U.S.C. §3504 (grade for retired Director or Deputy Director of WAC if called to active duty); 10 U.S.C. §3580 (separate command authority for WAC).

2. Navy and Marine Corps

Women holding commissions (other than health care personnel) are

appointed under 10 U.S.C. §5590, a section applicable exclusively to females. 10 U.S.C. §5590 appointments are confined to the two lowest ranks. Several sections relevant to officer assignments, transfers and promotions are applicable only to men: 10 U.S.C. §5575 (Navy supply corps); 10 U.S.C. §5576 (chaplain corps); 10 U.S.C. §5577 (civil engineer corps); 10 U.S.C. §5582 (transfers from staff to line); 10 U.S.C. §5583 (appointment of Marine officers from among Marine noncommissioned officers); 10 U.S.C. §5584 (appointment of Marine officers from among former officers); 10 U.S.C. §5586 (appointment of Naval and Marine officers from warrant officers and enlisted members); 10 U.S.C. §5587 (other officers designated as engineering, aeronautical engineering, and special officers); 10 U.S.C. §5596 (temporary appointment of line officers). 10 U.S.C. §5572 provides for the promotion of women officers in the Navy and Marine Corps. 10 U.S.C. §5581 authorizes appointment of women to the medical, dental, and medical services of the Naval reserve.

Numerous other sections reflect the separate and often unequal situation of female Navy and Marine officers, e.g., 10 U.S.C. §5663 (section on appointment of officers to specific duties does not apply to women, reservists, or retired officers); 10 U.S.C. §5664 (women staff corps officers shall have women running mates in the line); 10 U.S.C. §5752 (governing eligibility of female officers for submission to selection board for promotion); 10 U.S.C. §5751 (governing promotion eligibility of male officers); 10 U.S.C. §5589 (male appointees as ensigns designated for limited duty). Also governing officer promotion and further describing a sex segregated system are 10 U.S.C. §§ 5753, 5756, 5757, 5758, 5760, 5762, 5763, 5764, 5765, 5766, 5782, 5768,

5769, 5771, 5778, 5784, 5787b, 5896, 5899, 5897, 5783, 5446, 5447, 5448, 5449, 5504, 5767, 5785.

The appointment preference for academy graduates, characteristic of all of the services, is specified by statute for the marines. 10 U.S.C. §5585.

3. Air Force

Statutes currently in force do not establish separate appointment and promotion lines for men and women in the Air Force. Existing differentials include 10 U.S.C. §§ 8208 and 8215. Prior to 1967, the former set a 2% restrictive quota for female commissioned officers, the latter, a 2% quota for female warrant officers. At present, both sections authorize the Secretary of the Air Force to prescribe limitations on the number of female officers. A sex-based reference unnecessary in a fully integrated service appears in 10 U.S.C. §8297 (selection board for female officer).

4. Required revision

The equal rights principle requires a unitary system of appointment, assignment, promotion, discharge and retirement for men and women. An important step in that direction is reflected in the proposed Defense Officer Personnel Management Act. However, the proposed Act stops short of lifting the combat exclusion for women. Until that is done, women who aspire to unlimited opportunity in the military will continue to be held back by restrictions unrelated to their individual merit.

Transition to a system guided by the equal rights principle will require numerous adjustments. Women appointed to the WAC (a corps

which must be dissolved), or pursuant to 10 U.S.C. §5590, for example, must be appointed or reappointed under a sex-neutral authorization without loss of time credit or accrued benefits. Compare P.L. 85-155, §203 (1957) on transfer of members of the Women's Medical Specialist Corps to the integrated Army Medical Specialists Corps. Women qualified for higher ranks, but held back because they had to await a vacancy in a "women's line," should be afforded immediate opportunity for promotion. To make up for discrimination that confined women's service opportunities, e.g., ineligibility for admission to the academies, ineligibility for the sea duty essential to promotion to lieutenant commander rank, special skills training and educational programs should be offered. Further, current prerequisites and preferences for assignments and promotion should be scrutinized for strict job-relatedness.

For many women currently in service, affirmative action programs to remedy or reduce the impact of past discrimination may come too late. Interim measures will be required so that these women are treated fairly. They should not be penalized for having served under separate and unequal conditions over which they had no control.

Conversion to an integrated appointment and promotion system is a large and challenging task. However, it is not unprecedented. Compare experience under Title VII of the Civil Rights Act of 1964: effective plans have been developed and put into operation to integrate complex industrial seniority lines once segregated by race and/or sex. It may be that when the process is completed the greatest gain will be to the services, in terms of more effective personnel utilization.

H. Separation from service.

1. Discharge for pregnancy or motherhood

Statutes governing each of the armed forces provide that the enlistment or appointment of a woman may be terminated under regulations prescribed by the Secretary and approved by the President: 10 U.S.C. §3818 (Army officers and enlisted women); 10 U.S.C. §6294 (Navy and Marine enlisted women); 10 U.S.C. §6393 (Navy and Marine officers); 10 U.S.C. §6403 (Navy and Marine reserve officers); 10 U.S.C. §8818 (Air Force officers and enlisted women). Executive Order 10240 (1951), 16 Fed. Reg. 3689, text set out in note to 10 U.S.C. §3818 in U.S.C.A., provides that a female officer or enlisted woman who

(a) is determined to be the parent of a child,

(b) has personal custody of a child,

(c) is the stepparent of a child,

(d) is pregnant, or

(e) has given birth to a child

may be totally separated from service, by revocation of appointment, discharge or otherwise.

No regulation requires or permits separation of a male member who becomes a parent, gains custody of a child, or causes a pregnancy. The first three specifications, (a), (b) and (c), treat women differently on the basis of cultural expectations, not biologically unique functions. To the extent that the regulation is applied to force women out of service against their will, it discriminates against females. To the extent that it permits voluntary separation of females before expiration of their agreed term, it discriminates against males who wish to leave service in

order to attend personally to child care.

The fourth and fifth specifications, (d) and (e), describe a physical characteristic unique to women, but one that bears no necessary relationship to ability to perform in the military. In several lawsuits, women resisting involuntary discharge for pregnancy have challenged the regulation as arbitrary, therefore impermissible under due process and equal protection strictures. Most of these challenges have terminated in a waiver of discharge by the service in question. Evidence submitted and arguments made in some of the cases indicate that a double standard of sexual conduct figured in the involuntary discharge order more than any concern about the woman's capacity to do her job. See, e.g., Brief for Petitioner, Struck v. Secretary of Defense, U.S.S.C., October Term 1972, No. 72-178 (pointing out, i.a., that armed forces regulations exhibited greater tolerance for self-confessed drug addicts and alcoholics than for pregnant women).

10 U.S.C. §§ 3818, 6294, 6393, 6403 and 8818 should be repealed and Executive Order 10240 should be rescinded. These provisions are totally inconsistent with the neutrality required by the equal rights principle. If a provision relating to child custody is deemed necessary, the provision should be drafted in sex-neutral terms, and it should be based on actual responsibility for child care, without regard to the sex of the custodian, responsibility that in the particular case in fact impedes effective performance in service. Further, for service separation purposes, disability due to pregnancy should be subject to the same treatment as any other physically disabling condition.

2. Retirement and discharge in general

Sex-based differentials pervade provisions relating to separation from service, i.e., voluntary and mandatory retirement, honorable discharge following specified period in grade without promotion, discharge for unsatisfactory performance. Some of the differentials favor men. Others appear to favor women, but may merely take account of women's reduced opportunities for promotion and perhaps also the higher eligibility requirements applied to women. Relevant sections include 10 U.S.C. §651 (longer period of required service for men); 10 U.S.C. §3848 (30 years may be authorized as pre-retirement period of service for WAC reserve officers, period otherwise applicable to male and female reserve officers is 28 years); 10 U.S.C. §3916 (applicable to regular promotion list lieutenant-colonels); 10 U.S.C. §6382 (male naval lieutenants passed over for promotion to lieutenant commander for the second time); 10 U.S.C. §§ 6384, 6395 (regarding officers discharged for unsatisfactory performance -- in computing years of service, count total commissioned years for men, active service years for women); 10 U.S.C. §§ 6398, 6400 (mandatory retirement for high ranking women officers); 10 U.S.C. §§ 6401, 6402 (discharge of lower ranking women officers not on promotion list at completion of thirteen years or seven years service;

Differentials in length of service computations appear in 10 U.S.C. §8888 (retirement pay for Air Force officers); 10 U.S.C. §8927 (mandatory retirement); 10 U.S.C. §6388 (staff officers); 10 U.S.C. §6387 (line officers); 10 U.S.C. §3888 (regular commissioned officers); 10 U.S.C. §3927 (mandatory retirement for commissioned officers). 10 U.S.C. §6386 provides that the President may suspend operation of discharge and retirement sections as to male, but not female naval lieutenants. 10 U.S.C. §§ 5479, 6376,

and 6380 concern discharge and retirement rules for officers other than those with §5590 appointments, i.e., women.

Discharge regulations, and the opportunity, or obligation, to retire should not be based on sex, but on performance and legitimate needs of the service for each grade. In developing uniform, sex-neutral provisions, care should be taken to assure that during the transition period women currently in the armed forces are accorded full credit for their service, and are not further disadvantaged because they served under a system that denied them equal opportunity for advancement.

I. Nurses and medical specialists.

Sections listed on the print-out include a number of provisions concerning nurses: 10 U.S.C. §8296 (promotion lists in the Air Force); 10 U.S.C. §8683 (computation of active service years for retirement pay and grade purposes); 10 U.S.C. §§ 8888, 8927 (computation of service years upon mandatory retirement); 10 U.S.C. §6403 (nurses excepted from special regulations concerning removal of women officers); 10 U.S.C. §6382 (nurses and other women not discharged for failure of selection to certain ranks); 10 U.S.C. §6389 (removal of officers appointed under 10 U.S.C. §5581 (health care personnel) for failure of selection); 10 U.S.C. §6018 (exemption of nurses and all women officers from requirement of special reason for assignment to shore duty); 10 U.S.C. §6379 (concerning retirement of certain high ranking officers).

Both male and female nurses serve in the armed forces, although the large majority (77%) are female. Sections that refer to nurses and "other women" inappropriately sex-type a profession in which the rate of male participation is no longer minimal. Beyond eliminating the suggestion that nurses are necessarily women, the sections require revision consistent with eradication throughout Title 10 of separate treatment and references to "women" officers or members.* In determining any special provisions for nurses, care must be taken to assure that the service rendered by persons in this profession is properly valued. The marked tendency thoughout society has been to assign lesser status and pay to jobs performed predominantly by women. To the extent that provisions governing nurses in the armed forces are similar to those designed for

* 10 U.S.C. §§ 8888 and 8927 have already been so revised.

women officers under 10 U.S.C. §5990, and different from provisions applicable to other specialty corps, they are suspect for lack of neutrality and for perpetuating traditional, but unjust assumptions about the quality and value of "women's work".

J. Other substantive differentials.

10 U.S.C. §772(j)(1) allows Boy Scouts to wear uniforms; no reference is made to Girl Scouts. Several sections authorize sale or donation of used or obsolete military materials to youth scouting or defense groups. See 10 U.S.C. §§ 4651, 4682, 7541, 9651, 9682 (designating, e.g., Boy Scouts, but not Girl Scouts, as recipients). These provisions require revision to assure equal benefits for scouts and defense trainees, without regard to sex. See the Title 36 Review, infra, on sex discrimination in youth scouting groups and other congressionally authorized "patriotic societies".

10 U.S.C. §§ 918 and 920 concern rape and carnal knowledge. These provisions should be amended, consistent with the sex neutralization recommended in S.1400 (Criminal Code Reform Act of 1973) and the Title 18 Review, infra.

10 U.S.C. §§ 4712, 4713, 9712, 9713 concern the disposition of estates of persons who die while under military law, or while a resident of the Soldier's Home; each of these sections has a distribution plan inconsistent with the Supreme Court's decision in Reed v. Reed, 404 U.S. 71 (1971). The sections establish the following priority order for distribution of the net estate: "(1) surviving spouse (2) son, (3) daughter, (4) father, if he has not abandoned the support of his family, (5) mother, (6) brother, (7) sister, (8) next of

kin, and (9) beneficiary named in will of the deceased." In addition to mandating a sex-based preference between relatives of equal degree, in violation of Reed, the distribution scheme discriminates between parents by specifying for fathers a condition not applicable to mothers. The sex-based preferences should be removed from these sections: "son" and "daughter" should be replaced by "child(ren)"; "father" and "mother" should be replaced by "parent(s)"; "brother" and "sister" should be replaced by "sibling(s)". Further, if any qualification is retained regarding a parent's support obligation, the qualification should be sex neutralized. Increasingly, courts are recognizing that support of children is the responsibility of both parents. Each should be called upon to discharge the obligation in accordance with her or his means and capacities. See, e.g., Conway v. Dana, 318 A.2d 324 (Pennsylvania Supreme Court 1974).

10 U.S.C. §4309 authorizes the Army to help set up rifle ranges to assist public training in riflery; the section requires that ranges be open to all "able-bodied males". The reference should be to "persons," not "males".

10 U.S.C. §7601 authorizes sale of commissary stores to certain members of the service and widows of such members. The reference should be to "surviving spouse," not "widow".

Title 11--Bankruptcy

Sections identified by print-out: 11 U.S.C.§§1, 35, 402

[Note: Comprehensive revision of Title 11 is now pending in Congress. See H.R. 10792, 93d Cong., 1st Sess. (1973).]

I. Terminology (11 U.S.C.§§1(23), (33), 402)

A. Discussion

Inclusion of women in this title is established by typical definition sections:

> 11 U.S.C. §1(33)-- Words importing the masculine gender may be applied to and include all persons.
>
> 11 U.S.C. §402-- The singular number includes the plural and the masculine gender the feminine.

One of the three definition provisions identified in this Title is not the standard variety:

> 11 U.S.C. §1(23)--"Persons" shall include corporations . . ., partnerships, and women . . . .

A conceivable interpretation is that absent the stipulation, only men, not corporations, partnerships or women, rank as "persons".

B. Recommendation

If references to both sexes are supplied uniformly throughout the Code, gender conversion provisions such as those incorporated in 11 U.S.C. §1(33) and 11 U.S.C. §402 would serve no purpose and should be eliminated.

Explicit definition of "persons" to include "women" as in 11 U.S.C. §1(23) is as unnecessary and undesirable as explicit definition of that term to include men. The reference to "women" should be eliminated.

II. Substance (11 U.S.C. §35(a)(7))

A. Discussion

11 U.S.C. §35(a)(7), the sole substantive provision identified by the print-out, contains the words "wife" and "female". The section enumerates debts that are not affected by a discharge in bankruptcy. The subsection with sex-based differentials stipulates:

> [debts] for alimony . . ., or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation.

Literally interpreted, unaffected debts include alimony owed to either spouse, but "maintenance or support" for wives only. Since no definition provision in this Title states "the feminine gender includes the masculine," a female obligated to support a husband would be released from that debt by a discharge in bankruptcy. It seems unlikely that this effect was intended.

Whether "seduction," "breach of promise," and "criminal conversation" belong in the catalogue of unreleased debts is questionable. All have roots in an era when the natural delicacy, timidity and chastity of good women ranked as fundamental interests of fathers, husbands and prospective husbands. Thus criminal conversation at

common law meant seduction of another man's wife. The actionable injury was to the husband. E.g., Prettyman v. Williams, 1 Penniwell (Del.) 224, 39 A. 731 (1891); Crocker v. Crocker, 98 F. 202 (C.C. Mass. 1918).

B. Recommendations

"Wife"should be replaced by "spouse" in 11 U.S.C. §35(a)(7). This is required by the equal rights principle and keeps pace with the developing trend in the states toward sex-neutral financial provisions in marriage and divorce laws. See Uniform Marriage and Divorce Act §§ 307, 308.

It may be that "seduction" et al. as civil wrongs under state law are earmarked for repose. To the extent that these claims are preserved, sex neutralization would be required by the equal rights principle. However, it seems anomalous, long past the Victorian age, to retain this catalogue among debts unaffected by bankruptcy. 11 U.S.C. §35(a)(7) might therefore be revised to read:

> (7) [debts] for alimony, maintenance or child support, due or to become due; or (8) . . .

[H.R. 10792 replaces 11 U.S.C. §35(a)(7) with a sex-neutral provision that also eliminates "seduction" torts. The provision, 4-506(6), reads:

> any liability to a spouse or child for maintenance or support, or for alimony due or to become due, or under a property settlement in connection with a separation agreement or divorce decree;"]

Title 12--Banks and Banking

Sections identified by print-out: 12 U.S.C. §§ 1430(b), 1464(c), 1709a, 1715m, 1717, 1721, 1724, 1731a, 1735g

With two exceptions, sections on the print-out for Title 12 are listed solely because they contain references to the "Servicemen's Readjustment Act of 1944". This Act was repealed in 1958 (P.L. 85-857), and replaced by 38 U.S.C. § 1801.

A. Discussion

12 U.S.C. §§ 1430b, 1464c, 1709a, 1717, 1721, 1731a, 1735g, dealing with home financing, refer to the Servicemen's Readjustment Act of 1944. The Act has been replaced by 38 U.S.C. § 1801. 1972 amendments to Title 38 eliminate substantive differentials from 38 U.S.C. § 1801.*

12 U.S.C. § 1715m provides for the issuance of housing certificates to a "serviceman" or his "widow".

12 U.S.C. § 1724 deals with community property of "husband and wife".

B. Recommendations

No change is recommended in 12 U.S.C. §§ 1430b, 1464c, 1709a, 1717, 1721, 1731a, 1735g. It would be inappropriate to alter the title of an Act passed decades ago and no longer in force.

Replace "servicemen," "serviceman," and "widow" in 12 U.S.C. § 1715m with sex-neutral terms, such as "service member(s)" and "surviving spouse".

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* Terminological change is recommended in the report on Title 38.

Eliminate unnecessary gender references in 12 U.S.C. § 1724 by replacing "husband and wife" with "spouses" or "married couple".

Title 13--Census

Section identified by print-out: 13 U.S.C. § 101

A. Discussion

The print-out identified only one section in this Title with a sex-based word. 13 U.S.C. § 101 authorizes annual and decennnial collection and publication of statistics relating to crime and to "defective, dependent, and delinquent classes". The statistics are to include information on a number of factors, including sex.

This provision does not discriminate between men and women in its terms nor does it state the uses to which the statistics are to be put. Investigation beyond the scope of this review should be undertaken to assure that the information is not being used by the Census Bureau or law enforcement agencies to design sex-discriminatory rehabilitative programs, prisons, or welfare programs.

Title 14--Coast Guard

Sections identified by print-out: 14 U.S.C. §§ 41A, 42, 192, 353, 354, 355, 357, 359, 360, 361, 362, 365, 366, 367, 368, 370, 371, 421, 423, 424, 483, 487, 498, 641, 760, 762, 771, 775, 780, 787, 796

Recent amendment eliminating the Women's Reserve, P.L. 93-174, 87 Stat. 692 (1973), designed to terminate gender-based discrimination in the Coast Guard Reserve, looks toward elimination of principal differentials revealed by the print-out. Under the amendment

> all members of the women's branch of the Coast Guard Reserve who were serving on active or inactive duty before enactment [of P.L. 93-174] shall become members of the Coast Guard Reserve without loss of grade, rate, date of rank, or other benefits earned by prior service.

P.L. 93-174 deletes all references to the Women's Reserve in the following sections: 14 U.S.C. §§ 41A, 42, 762, 771, 775, 780, 787, 796. However, the amendment appears to have left untouched 14 U.S.C. §315, a section not identified by the print-out because the word "men" was not programmed. 14 U.S.C. §351 deals with enlistments and provides: "[T]he Commandant may enlist mer . . ."

Although the apparent intent of P.L. 93-174 is to provide

equal opportunity in the Coast Guard, free from gender-based discrimination, see H.Rep. 93-499; S. Rep. 93-550, terminology was not overhauled and substantive problems remain, most conspicuously, reference to "men" in 14 U.S.C. §351.

I. Terminology

A. Discussion

1. The term "enlisted man" or "enlisted men" appears in several sections listed in the print-out as well as in some sections not identified by the computer run. E.g., 14 U.S.C. §§ 41, 192, 350, 351, 353, 354, 355, 357, 359, 360, 361, 362, 365, 366, 367, 368, 370, 421, 423, 424, 483, 487. Cf. use of the words "his or her" in 14 U.S.C. §483.

2. 14 U.S.C. §498 (posthumous awards) uses the term "serviceman".

3. 14 U.S.C. §641 provides for disposal of certain material to the sea scout service of the Boy Scouts "and to any public body or private organization not organized for profit having an interest therein for historical or other special reasons".

4. 14 U.S.C. §760 provides death benefits for "widow or widower".

B. Recommendations

1. Change "enlisted man" to "enlisted member".

2. Change "serviceman" to "service member".

3. No change appears necessary in 14 U.S.C. §641 if the sea scout service of the Boy Scouts remains open to females on the same terms as males. Regulations might stipulate that disposal shall not be made to organizations that exclude persons from membership on the bases of race, religion, national origin or sex.

4. Change "widow or widower" to "surviving spouse".

II. Substance

A. Discussion

1. 14 U.S.C. §351 provides for enlistment by "men" but not by women.

2. 14 U.S.C. §371 (aviation cadets) employs the word "male". The effect is to reserve the grade aviation cadet to men.

3. 14 U.S.C. §487 (procurement and sale of stores) authorizes sales to officers, enlisted men, and widows of such officers and enlisted men.

B. Recommendations

The sex neutrality required by the equal rights principle calls for:

1. elimination of the word "men" and substitution of the word "persons" or "individuals" in 14 U.S.C. §351;

2. deletion of the word "male" each time it appears in 14 U.S.C. §371;

3. substitution of "surviving spouse" for widow in 14 U.S.C. §487.

Title 15--Commerce and Trade

Sections identified by print-out: 15 U.S.C. §§ 55, 77k, 77ooo, 80A-2, 1052, 1261

I. Terminology

A. Discussion

15 U.S.C. §§ 55, 77k, 77ooo and 1261 all use sex-based terms where sex-neutral terms would have the same substantive effect. 15 U.S.C. § 55 defines the terms "food," "drug" and "device" using "man" to connote "human beings". 15 U.S.C. §§ 77k and 77ooo set forth standards for measuring the behavior in specified circumstances of an indenture trustee and of certain individuals associated with issuers of securities, respectively. Each defines the standard by reference to a hypothetical "prudent man". 15 U.S.C. § 80a-2 defines "member of the immediate family" using the terms "brother or sister," rather than the sex-neutral term "sibling". 15 U.S.C. § 1261, concerning labelling hazardous substances, uses the term "man" to connote human beings in subsection (g).

B. Recommendations

15 U.S.C. §§ 55(b), (c), (d)--replace "man or other animals" with "human beings or other animals" (3 times); replace "the body of man or other animals" with "the bodies of humans or other animals" (twice).

15 U.S.C. §§ 77k(c), 77ooo(c)--replace "prudent man" with "prudent individual".

15 U.S.C. § 80a-2(a)(19)--replace "brother or sister" with "sibling".

15 U.S.C. § 1261(g)--replace "man" with "human beings".

II. Substance

A. Discussion

15 U.S.C. § 1052 sets forth types of trade-marks which may be refused registration on the principal register on account of their nature. It includes the name, signature or portrait of a deceased President during the life of his widow, except by written consent of the widow. The assumption that deceased Presidents are male is correct at this point in history, but may not continue to be true in the future. Certainly the surviving spouse of a deceased female President should be granted the same control over use of his deceased spouse's name, portrait or signature as is now given to the surviving spouse of deceased male Presidents.

B. Recommendations

15 U.S.C. § 1052--replace "widow" with "surviving spouse" (twice).

Title 16--Conservation

Sections identified by print-out: 16 U.S.C. §§ 112, 117c, 192, 218, 410r-3, 433k, 410s, 410t, 410v, 410x, 754, 760a, 1131

With the possible exception of 16 U.S.C. §754, sex-based references in this Title do not appear to be discriminatory in effect. Changes recommended are primarily terminological.

A. Discussion

16 U.S.C. §§ 112, 117c and 1131 appear on the print-out because they include the word "man" as a generic term indicating all members of the human race.

16 U.S.C. §§ 192, 410s, 410t, 410v and 410x contain proper names that include a programmed word: §192 mentions "Twin Sisters," a mountain in the Rocky Mountain National Park; §§ 410(s), (t), (v), and (x) establish "Minute Man" National Historical Park.

Two provisions concerning conveyances of park land, 16 U.S.C. §§ 218 and 410r-3, appear on the print-out because they include the term "his wife". 16 U.S.C. §218 probably quotes the language of the Kentucky deed and quitclaim to which the provision refers. 16 U.S.C. §410r-3 refers to a tract of land described in a masters deed "in the proceeding entitled 'The Connecticut Mutual Life Insurance Company against Toni Iori, a single man; Peter Iori and Helen Iori, his wife, d/b/a Iori Bros., et al., ...'"

16 U.S.C. §433k establishes Whitman Mission National Historic Site as a "public national memorial to Marcus Whitman and his wife, Narcissa Prentiss Whitman . . . ."

An arguably substantive sex differential appears in 16 U.S.C. §754, authorizing the commutation of rations "not to exceed $1 per man per day" for officers and crews of vessels of the Fish and Wildlife Service. While the phrase is not necessarily discriminatory in effect, it reflects the fact that currently, no women are employed in the Fish and Wildlife Service. 16 U.S.C. §743 provides that "officers and men" of the Coast Guard be detailed for such service. Heretofore, non-Reserve status in the Coast Guard has been limited to men. Hence, women could not qualify for the Fish and Wildlife Service. Thus, the reference in 16 U.S.C. §754 to "man" accurately describes what has been an occupational exclusion. (N.B. 16 U.S.C. §743 does not appear on the print-out because "men" was not included as a programmed word.)

16 U.S.C. §760a provides for a limitation on fishing take "per unit of time, per man, or per gear". Read literally the section indicates either that all takers of fish are male or that women who fish should not be limited in their catch.

B. Recommendations

16 U.S.C. §§ 112, 117c, 1131--change "man" to "human beings" or "humans".

16 U.S.C. §§ 192, 410(s), (t), (v), (x)--the proper names to which reference is made in these sections should be left undisturbed.

16 U.S.C. §§ 218, 410r-3--no change is recommended if these sections simply repeat deed or court record descriptions.

16 U.S.C. §433k--delete "his wife" or replace with "a married couple": ". . .to Marcus Whitman and Narcissa Prentice Whitman, a married couple . . . ."

16 U.S.C. §743--replace "officers and men" of the Coast Guard with "officers and enlisted members" or "personnel".

16 U.S.C. §§ 754, 760--replace "man" with "person" or "individual".

Title 17--Copyrights

Section identified by print-out: 17 U.S.C. § 24

Title 17, providing for copyright protection of the creative work product of individuals, discriminates only in terminology in the identified section. No substantive differential was disclosed by the print-out.

A. Discussion

17 U.S.C. § 24 concerns duration, renewal and extension of copyrights by the author or others if the author is dead. In identifying those entitled to renew or extend the copyright, the section uses the sex specific terms "widow" and "widower".

B. Recommendation

To eliminate the unnecessary gender-based references in 17 U.S.C. § 24, substitute "surviving spouse" for "widow," "widower" the first time mentioned; "spouse" the second time mentioned, since the second reference applies to situations in which both the author and spouse are deceased.

Title 18 -- Crimes

Sections identified by print-out: 18 U.S.C. §§ 113, 714, 1111, 1114, 1153, 1384, 1735, 1737, 1952, 2031, 2032, 2198, 2421, 2422, 2423, 2424, 3056, 3185, 3242, 3567, 3614, 4082, 4251, 4321

Some of the sections listed on the print-out are not sex discriminatory in substance and raise only terminological questions. Principal substantive differentials inconsistent with the equal rights principle appear in sections penalizing prostitution and related offenses, seduction, statutory rape and rape. To eradicate sex-based discrimination in the catalogue of crimes, prostitution should be decriminalized, i.e., laws classifying or referring to prostitution or solicitation by or on behalf of a prostitute should be repealed, and all retained sections with gender distinctions should be recast in sex-neutral form. Sections referring to the Federal Reformatory for Women and the National Training School for Boys require modification as part of an encompassing program to eliminate unwarranted sex segregation in correctional institutions.

S. 1400 (Criminal Code Reform Act of 1973), an important source for recommendations made here, would sex-neutralize the substance of several Title 18 provisions. Other principal sources considered in proposing needed change include Sex Discrimination in the Criminal Law: The Effect of the Equal Rights Amendment, 11 Am. Crim. L. Rev. 469 (1973); The Sexual Segregation of American Prisons, 82 Yale L.J. 1229 (1973).

I. Terminology: Discussion and Recommendations

18 U.S.C. §§ 1735 and 1737, in conjunction with certain Title 39 provisions, regulate the mailing of sexually-oriented advertisements. The "sex" involved in these sections is unrelated to gender-based

discrimination.

In 18 U.S.C. §1114, the term "enlisted man" should be replaced by "enlisted member" or "enlisted person". In 18 U.S.C. §4082, "sibling" should replace "brother or sister".*

II. Substance

A. Discussion

18 U.S.C. §3056, providing Secret Service protection for the wife of a former President during his life and for the widow until her death or remarriage, should be extended to cover the spouse or surviving spouse of a woman President. See S.1400 (Criminal Code Reform Act of 1973) §3056, p. 221, which eliminates the substantive discrimination but unnecessarily refers to the surviving spouse as the "widow or widower".

A further unwarranted male reference appears in 18 U.S.C. §714, which regulates use of the "Johnny Horizon" anti-litter symbol. According to the congressional reports, this tall, lean figure with sportsclothes, hiking boots, and a field jacket is "a representative of a rugged outdoorsman who loves our forests, deserts, mountains, lakes, streams and terrain". H.R.Rep. 1356, 91st Cong., 2d Sess. 2(1970); S.Rep. No. 999, 91st Cong., 2d Sess. 2(1970). This sex stereotype of the outdoorsperson and protector of the environment should be supplemented with a female figure promoting the same values. The two figures should be depicted as persons of equal strength of character, displaying equal familiarity and concern with the terrain of our country.

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* 18 U.S.C. §2198, penalizing seduction, also contains sex-based terminology. In the discussion below repeal of 18 U.S.C. §2198 is recommended because the section exhibits a view of women wholly at odds with the equal rights principle.

18 U.S.C. §2198 penalizes seduction of a woman passenger on an American ship by any employee on board; 18 U.S.C. §3614 provides that the fine imposed for a violation of 18 U.S.C. §2198 may be awarded to the woman seduced or her child if any. The behavior penalized by 18 U.S.C. §2198 is seduction and illicit connection "under promise of marriage, or by threats, or the exercise of authority, or solicitation, or the making of gifts or presents". Subsequent marriage to the seducer is a defense and no conviction may be had on the uncorroborated testimony of the woman.

The notion of the weak-willed woman, exploited victim unless he marries her, but too untrustworthy to be believed without corroboration, implies a view of womanhood intolerable in contemporary society. Only one aspect of the crime defined in 18 U.S.C. §2198 might merit retention: the prohibition against inducing intercourse by exercise of authority. See S. 1400 (omitting the crime defined in 18 U.S.C. §2198 but retaining as an offense abuse of authority over persons in detention). In general, apart from custodial situations, the problem is likely to arise only when the importuned person is young. Statutes prohibiting corruption of a minor should suffice to deal with that evil. Finally, the purpose presumably served by the penalty section (18 U.S.C. §3614) is better accomplished through sex-neutral child support laws.

18 U.S.C. §§ 1153 and 2032 make it a crime for a person to have carnal knowledge of a female, not his wife, who has not attained the age of sixteen years. The latter section outlaws this behavior in the special maritime and territorial jurisdiction of the United States and punishes it with a sentence of fifteen years; the former subjects any Indian who commits this or certain other enumerated offenses to the laws and penalties

applicable to those committing the offenses within the exclusive jurisdiction of the United States.

The "statutory rape" offense defined in these sections follows the traditional pattern: the victim must be a female and the offender, a male. Protection of a girl's virtue as an asset to be traded by her family at marriage time can no longer survive as a justification for such provisions. The immaturity and vulnerability of young people of both sexes can be protected through appropriately drawn, sex-neutral proscriptions. The Model Penal Code and S. 1400, §1633, taking into account present realities, require a substantial age differential between the offender and the young person, thus declaring criminal only those situations in which overbearing or coercion may well play a part. Moreover, penalties are scaled in the Model Penal Code and S. 1400. The current penalty of fifteen years for a first offense is excessive.

Title 18 sections containing the word "rape" do not define the term. 10 U.S.C. §920 does provide a definition, again in traditional sex discriminatory fashion. That section should be marked for change. 18 U.S.C. §§ 113, 1111, 2031, 3185, 3242, 3567, and 4521, all containing references to rape, would be compatible with the equal rights principle if "rape" is elsewhere sex-neutrally defined. But note the constitutional problem and highly questionable policy reflected in 18 U.S.C. §§ 3567, 1111, and 2031, which authorize the death penalty for rape among other crimes.

The 1973 Senate bill, S. 1400, in §1631, provides a definition of rape that, in substance,* conforms to the equality principle. It

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* This report recommends alteration of pronoun usage throughout the Code. S. 1400 retains use of the masculine pronoun to cover individuals of both sexes.

states:

> "A person is guilty of an offense if he engages in a sexual act with another person, not his spouse, and: (1) compels the other person to participate: (A) by force; or (B) by threatening or placing the other person in fear that any person will imminently be subjected to death, serious bodily injury, or kidnapping; (2) has substantially impaired the other person's power to appraise or control the conduct by administering or employing a drug or intoxicant without the knowledge or against the will of such other person, or by other means; or (3) the other person is, in fact, less than twelve years old."

The term "sexual act" is defined sex-neutrally in 1636(a) of S. 1400.

"Although in most cases the woman will be the victim in this type of crime, as long as there is any possibility, regardless how remote, that a man could be forced to have sexual intercourse with a woman, he too must be protected from such an attack. And of course, a woman who attacks a man should be punished as severely as a man who attacks a woman". Sex Discrimination in the Criminal Law, supra, at 479-480. S. 1400, §1631 encompasses as well forcible homosexual attacks, thus protecting all persons from forcible penetration by members of their own or the opposite sex.

18 U.S.C. §1153 states that an Indian charged with rape or assault with intent to rape shall be tried for the offense as defined by state law; the section specifically mentions a female as the victim of the rape or assault. 18 U.S.C. §3242, which parallels the first part of 18 U.S.C. §1153, subjects any Indian committing one of a number of crimes, including rape and assault with intent to commit rape, to the procedures and courts that govern the commission of the offense within the exclusive jurisdiction of the United States. Sex-neutralization of the latter part

of 18 U.S.C. §1153 could be effected through three changes: provision of a federal definition of rape, as proposed in S. 1400, §1631; reference to that definition in 18 U.S.C. §1153, thus avoiding reference to a state definition that may remain sex discriminatory; substitution of the word "person" for the current reference to "female".

Title 18 sections concerning prostitution include: 18 U.S.C. §1952(b) (forbidding the use of interstate commerce with intent to distribute the proceeds of any unlawful activity, includes prostitution as defined under state law or the law of the United States); 18 U.S.C. §1384 (prohibiting prostitution and the related activities of solicitation, procuring, setting up a house of ill fame, or using vehicles or buildings for prostitution near a military base); and 18 U.S.C. §§ 2421-24 (the Mann Act, prohibiting travel and transportation of women in interstate or foreign commerce for prostitution, debauchery, or other immoral purposes).*

These prostitution proscriptions are subject to several constitutional and policy objections. Prostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions. See Griswold v. Connecticut, 381 U.S. 479(1965); Eisenstadt v. Baird, 405 U.S. 438(1972); Roe v. Wade, 410 U.S. 113(1973). Not arguable is the sex discrimination evident on the face and in application of current anti-prostitution provisions. Sex-neutralizing the statutory language is unlikely to effect significant substantive change,

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* The Mann Act also calls for registration of information about a recently entered alien woman or girl engaged in the business of prostitution; the registrant is then shielded from use of the information in a criminal prosecution.

for enforcement concentrates on the female even when male prostitution is encompassed in the same category. Nor is it realistic to expect that vigorous enforcement will be directed against the person who patronizes a prostitute. See Rosenbleet & Pariente, The Prostitution of the Criminal Law, 11 Am. Crim. L. Rev. 373 (1973).

The Mann Act suffers from added problems. It proscribes the transportation of women and girls for prostitution, debauchery or any other immoral purpose. This language, which is not confined to illegal acts, but encompasses "immoral" conduct as well, appears overbroad and vague to the point where fair notice of the activity proscribed is hardly supplied. Moreover, the proscription is not limited to situations in which there is a financial factor. Thus, the Act poses the invasion of privacy issue in an acute form.

The Mann Act is also offensive because of the image of women it perpetuates. In the year it was passed, the alien prostitution importation act (penalizing the entry of any alien for the purpose of prostitution) was amended to include boys as well as girls. The Mann Act was directed to a different group; it was meant to protect from "the villainous interstate and international traffic in women and girls," "those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens". H.R.Rep. No. 47, 61st Cong., 2d Sess. 9-11(1909). As the courts consistently proclaimed, the Act was meant to protect weak women from bad men. See, e.g., Caminetti v. United States, 242 U.S. 470(1917); Gebardi v. United States, 287 U.S. 112(1932).

S. 1400, §1841, defines and limits prostitution-related

conduct subject to criminal penalty. It reflects recognition that, to the extent the interest at stake is protection against kidnapping, robbery, assault or other injury, statutes directed to those evils are the appropriate safeguards. The proposed Criminal Code revision concentrates on financially motivated prostitution businesses:

> A person is guilty of an offense if he owns, controls, manages, supervises, directs, finances, procures patrons for, or recruits participants in, a prostitution business. S. 1400, §1841.

Prostitution is defined as engaging in a sexual act (as defined in S. 1400, §1636(a)) as consideration for anything of pecuniary value; prostitution business, as the derivation of profits from prostitution by a person who acts under the control or supervision of another person.

Although S. 1400, §1841, in contrast to the Mann Act which it would displace, is cast in sex-neutral form, retaining prostitution business as a crime and defining prostitution in a criminal code are questionable. If prostitution is not a crime, then prostitution solicitation or business, unaccompanied by coercion, should be decriminalized as well. Reliable studies indicate that prostitution is not a major factor in the spread of venereal disease, e.g., 13 Int'l Rev. of Crim. Policy 67, 69 (1958), and that prostitution plays a small and declining role in organized crime's operations, President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society 189 (1967). For a concise resume of the current state of the law and the reasons for repeal of all laws proscribing prostitution or prostitution solicitation, see Report to the House of Delegates, American Bar Association Section of Individual Rights and Responsibilities, June 1974. Consistent with the Recommendation accompanying that Report, references to prostitution in a criminal context should be deleted from Title 18 and all other Titles of the U.S. Code.

Two sections of Title 18 refer to sex-segregated institutions: 18 U.S.C. §4082 (the National Training School for Boys); 18 U.S.C. §4321 (Board of Advisers of the Federal Reformatory for Women). Sex-segregated adult or juvenile institutions are obviously separate and in a variety of ways, unequal. Differences in training programs, distance from cities and relatives, work-release programs, educational opportunities, security, and other conditions redound to the benefit of men in some instances and women in others. See The Sexual Segregation of American Prisons, 82 Yale L.J. 1229 (1973). If the grand design of such institutions is to prepare inmates for return to the community as persons equipped to benefit from and contribute to civil society, then perpetuation of single-sex institutions should be rejected.

The equal rights principle looks toward a world in which men and women function as full and equal partners, with artificial barriers removed and opportunity unaffected by a person's gender. Preparation for such a world requires elimination of sex separation in all public institutions where education and training occur. While the personal privacy principle permits maintenance of separate sleeping and bathing facilities, no other facilities, e.g., work, school, cafeteria, should be maintained for one sex only.* Cf. New York Times, June 20, 1974, p. 44 (reporting on successful experience at state (Massachusetts) and federal (Texas) sex integrated correctional institutions).

18 U.S.C. §4082, ordering the Attorney General to commit convicted offenders to "available, suitable, and appropriate" institutions, is not sex discriminatory on its face. It should not be applied, as it now is, to permit consideration of a person's gender as a factor making

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* Prisoners could be assigned to institutions based on individual characteristics, e.g., the nature of the offense committed, disciplinary record, danger of escape and other security considerations. But gender should not be a relevant factor in determining institutional assignments.

a particular institution appropriate or suitable for that person.

The Senate bill, S. 1400, contains several sections on the Board of Correction and the Parole Commission created by that Act. The provisions do not appear sex discriminatory on their face; implementing regulations should not deviate from this neutrality.

B. Recommendations

18 U.S.C. §3056: Change "wife" and "widow" to "spouse" and "surviving spouse".

18 U.S.C. §714: Amend the statute to provide for a female counterpart to Johnny Horizon; she should promote the same values as he does on an equal basis.

18 U.S.C. §§ 2198 and 3614: Eliminate these sections.

18 U.S.C. §2032: Eliminate the phrase "carnal knowledge of any female, not his wife who has not attained the age of sixteen years" and substitute the offense as set forth in S. 1400, §1633.

18 U.S.C. §1153: Eliminate the phrase "carnal knowledge of any female, not his wife" and substitute the offense as set forth in S. 1400, §1633.

A sex neutral definition of rape, such as the one set forth in S. 1400, §1631, should be added to Title 18 or Title 10 and referred to throughout for the definition of the offense.

18 U.S.C. §§ 113,1111,2031,3185,3242,4521: These need no change if a sex-neutral definition of rape is adopted.

18 U.S.C. §1153: Change "female" to "person" and refer any Indian to United States penalties, laws, and courts, as in 18 U.S.C. §3242.

18 U.S.C. §4082: Change the name and eliminate the single sex character of the National Training School for Boys.

18 U.S.C. §4321: Change the name and eliminate the single sex character of the Federal Reformatory for Women, as part of the larger reorganization of the federal correctional system necessitated by the equal rights principle.

18 U.S.C. §§ 1384, 1952(b), 2421-2424: Repeal these sections.

Sections identified by print-out: 19 U.S.C. §§ 165, 1401a, 1582

Programmed words appear in three provisions of this Title. In two of the identified sections, 19 U.S.C. §§ 165 and 1401a, unnecessary gender-based references are used to describe family members. The third, 19 U.S.C. § 1582, entails a substantive differential: it authorizes the Secretary to employ female inspectors to search the persons of women entering the United States.

I. Terminology

A. Discussion

19 U.S.C. §§ 165 and 1401a refer to "brothers and sisters". A single, sex-neutral term would suffice.

B. Recommendations

19 U.S.C. § 165(c)(1)--substitute "siblings" for "brothers and sisters".

19 U.S.C. § 1401a(g)(2)(A)--substitute "siblings" for "brothers and sisters".

II. Substance

A. Discussion

19 U.S.C. § 1582 authorizes employment of female inspectors to search the person of women who go through customs. Insofar as the section refers to body searches the constitutional right of privacy is relevant. See Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973). This right can be safeguarded, consistent with the equality

principle: sex separation is not a violation of that principle where it relates to disrobing and intimate bodily functions and implies no stigma of inferiority or special treatment accorded one sex only. See S. Rep. No. 92-689, 92d Cong., 2d Sess. 12 (1972). However, the statute as currently phrased suggests that only women's rights to privacy need be protected, or alternatively, that female inspectors will be employed solely for the purpose of conducting searches of the persons of females, and not for other inspection jobs. These implications do not reflect current personnel policy, are inconsistent with the equality principle, and should not be reflected in the statutory text.

B. Recommendation

19 U.S.C. § 1582 should read: "The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and is authorized to require body searches to be carried out by inspectors of the same sex as the individual being searched; . . . . "

Title 20--Education

Sections identified by print-out: 20 U.S.C. §§ 75b, 76, 80a, 401, 904, 951, 1078a, 1322, 1532

The print-out for this Title identifies several provisions that use sex-based terms unnecessarily. Only one of the identified provisions, 20 U.S.C. § 904, involves a substantive differential.

I. Terminology

A. Discussion

Terms with masculine connotations include "manpower" (20 U.S.C. §§ 401, 1322); "masters" (20 U.S.C. § 951); "men" or "man's" (20 U.S.C. §§ 951, 1532); "chairman" (20 U.S.C. § 1532) and "manmade" (20 U.S.C. § 1532). The term "men and women" is used in 20 U.S.C. §§ 75b, 76, 80a, 401; a sex-neutral term would suffice. The term "fellowship" appears in 20 U.S.C. § 1532. Although this word is masculine in origin, it need not be replaced since fellowships have not been awarded solely to men in recent years, and the term now has a sex-neutral connotation. 20 U.S.C. § 1078a was identified by the computer because it contains the programmed word "sex"; the section prohibits sex discrimination in insured student loans.

B. Recommendations

20 U.S.C. § 75b--replace "men and women" with "persons".

20 U.S.C. § 76--replace "American men and women" with "Americans".

20 U.S.C. § 80a--replace "men and women" with "members".

20 U.S.C. § 401--replace "men and women" with "people".

replace "manpower" with "human resources".

20 U.S.C. § 951--replace "man's" with "humanity's".

replace "make men masters of their technology; and not its unthinking servant" with "enable humanity to control its technology; and not be its unthinking servant".

20 U.S.C. § 1078a--no change should be made.

20 U.S.C. § 1322--replace "trained manpower" with "a trained work force".

20 U.S.C. § 1532--replace "man's" with "humanity's".

replace "his" with "its".

replace "manmade" with "artificial".

replace "Chairman" with "Chairperson" (twice).

II. Substance

A. Discussion

20 U.S.C. § 904 establishes and regulates leave for teachers in government schools overseas. Leave may be taken by a teacher for, inter alia, "maternity" purposes. No leave is provided for fathers to care for children unless the children are ill or occasion a personal emergency for the teacher. It is appropriate that female teachers be permitted to use leave for periods during which they are physically disabled due to pregnancy or childbirth. Since male teachers are not subject to these physical consequences of parenthood, such leave need not be granted to them.* However, both male and female teachers may wish to take leaves to care for their infant children, and there is no justification for limiting such leave to female teachers

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Note, however, that it is appropriate to extend to men leave that permits them to attend the birth and assist the mother during and immediately after childbirth.

unless the leave is limited to lactating mothers. Here the leave is not so limited. The leave in question accumulates at the rate of one day for each whole or partial calendar month of the school year or 10 days per year if the school year includes more than 8 months; no more than 75 days of leave may accumulate to the credit of a teacher at any one time. Since the amount of leave either male or female teachers could take for parental purposes would be quite limited, extension to both parents is recommended.

B. Recommendation

Replace "for maternity purposes" in 20 U.S.C. § 904 with "in the event of disabilities caused by pregnancy or childbirth or for purposes of caring for the teacher's infant child or children".

Title 21--Food and Drugs

Sections identified by print-out: 21 U.S.C. §§ 134, 321, 348, 352, 353, 357, 360b, 376, 392

A. Discussion

Throughout this Title, the term "man" is used to differentiate human beings from animals, and not to distinguish between human males and females. The drafting pattern is not uniform, for the sex-neutral terms "person," "human being" and "human body" are also used throughout Title 21. In conformance with that usage, "human being(s)" or "human" should replace "man" in all identified sections.

B. Recommendations

21 U.S.C. §§ 134, 321(f), (u), (w), (x), 352, 353, 375, 392--replace "man" with "human beings".

21 U.S.C. §§ 321(g), (h)--replace "man" with "human beings" and "the body of man or other animals" with "the bodies of humans or other animals".

21 U.S.C. § 348(c)(3)--replace "man" with "human" (twice).

21 U.S.C. § 348(c)(5)(B)--replace "man" with "human beings".

21 U.S.C. §§ 360b(d), (e)--replace "man or animal" with "human or animal" (four times) and "man or animals" with "human beings or animals" (twice).

21 U.S.C. § 360b(m)(4)(A)--replace "of man or of the animals" with "of human beings or of the animals".

21 U.S.C. § 376--replace "man" with "human" (four times).

Title 22--Foreign Service

Sections identified by print-out: 22 U.S.C. §§ 214, 290, 1064-82, 1086, 1121 1281, 1321, 2167

Three unrelated areas are indicated by the print-out: employment related benefits; maternal care and family planning in certain assistance programs; Phillipine immigration.

I. Employment-related benefits (22 U.S.C. §§ 214, 1064-82, 1086, 1121)

A. Discussion

22 U.S.C. §214 authorizes passport fee exemption for a widow (but not a widower) of a deceased member of the armed forces who is traveling to the gravesite of the deceased member. 22 U.S.C. §§ 1064-82 provide annuities for members of the foreign service and their surviving spouses. 22 U.S.C. §1064 lists as annuitants "widows," without regard to dependency; "widowers" must be "dependent" to qualify. 22 U.S.C. §1076 requires automatic reduction of a married male participant's annuity to provide for his surviving spouse; such reduction is a matter of election for a married female participant. It is not clear from the legislative history whether this differential is based on life expectancy tables or expectation of need. Pursuant to 5 U.S.C. §7152, widowers should now qualify for annuities on the same basis as widows. 22 U.S.C. §§ 1086 and 1121, on return of excess annuity contributions and cost of living adjustments, are sex-neutral in effect, but use the unnecessary reference "surviving wife or husband".

B. Recommendations

Although it appears that sex-based differentials in determining

annuity eligibility of surviving spouses under 22 U.S.C. §§ 1064-82 are no longer operative, in keeping with a consistent program to avoid unnecessary gender references in federal legislation, these sections as well as 22 U.S.C. §214 should be amended to refer to "surviving spouse" in lieu of "widow". 22 U.S.C. §1076 should be revised to provide the same options (or the same automatic deduction) for married participants, without regard to sex. In 22 U.S.C. §§ 1086 and 1121, the phrase "surviving wife or husband" should be replaced by "surviving spouse".

II. Maternal care and family planning (22 U.S.C. §§ 290(f), 2167)

A. Discussion

22 U.S.C. §§ 290(f) (Inter-American Foundation) and 2167 (Development assistance to foreign countries) include among aims of the programs "maternal and child care" and "family planning". The word "maternal," if used to relate solely to a biological function unique to women, would present no equal rights problem. However, a caveat should be noted with regard to "family planning" and health care unrelated to the unique physical characteristic of giving birth. Supplying family planning services or general health care solely to women would not comport with the equality principle.

B. Recommendation

All family planning and general health assistance should be reviewed to assure that services are made available to members of both sexes. Consideration should be given to substituting "parental . . . care" for "maternal . . . care" in the statutory texts.

III. Phillipine immigration (22 U.S.C. §§ 1281, 1321)

A. Discussion

22 U.S.C. §1281 provides for immigration without quota restriction

for any Phillipine citizen (sex not specified) who lived in the United States for three continuous years prior to 1941 and who resumed residence here during the period 1946-51. The same benefit is extended to the wife and unmarried children of the qualifying Phillipine citizen. Although qualifying female Phillipine citizens may have been denied the right to have their families enter during the period 1946-51 without quota restrictions, amendment to substitute spouse for wife would serve no purpose since the relevant time period has ended. 7 U.S.C. §1321 is a reciprocal section, dealing with immigration of United States citizens to the Phillipines. Both sections are derived from a treaty with the Phillipines.

B. Recommendation

The time period might be waived for any person adversely affected by the sex-based differential in 7 U.S.C. §1281. Apart from the likelihood that these provisions have no continuing vitality, their treaty basis indicates against further amendment.

Title 24--Hospitals, Asylums and Cemeteries

Sections identified by print-out: 24 U.S.C. §§ 44a, 52, 165

A. Discussion

24 U.S.C. §§ 44a and 52 are among the provisions dealing with the United States Soldiers Home, an institution for Army veterans established and regulated by federal statute since 1883. Drafters of provisions governing the Home assumed an all-male inmate population. 24 U.S.C. §44a provides for a deduction from the pay of each "enlisted man and warrant officer of the Regular Army" to support the Home. 24 U.S.C. §52 provides for allotment of an inmate's pension to his "child, wife or parent".

24 U.S.C. §165 concerns the Superintendent of St. Elizabeth's Hospital, an officer assumed to be male, and inmate pension disbursements. The pension of a male inmate may be disbursed for the benefit of "his wife, minor children and dependent parents"; the pension of a female inmate, for the benefit of "her minor children". Upon a male inmate's death, the unexpended balance of his pension goes to "his wife, if living," if no wife survives him, to his minor children, if he is not survived by wife or minor children, to the hospital. Upon a female inmate's death, the unexpended balance goes to her minor children; if there are none, to the hospital.

B. Recommendations

No gender qualifications should be placed on admission to any facility for veterans. 24 U.S.C. §44a, if it is still operative, should apply to "enlisted members," 24 U.S.C. §52, to an inmate's spouse (not wife).

The Superintendent of St. Elizabeth's Hospital, as all government officers, should be identified as an individual who may be female. I.e., female as well as male pronouns should be used. Pension disbursements should be regulated in the same way for male and female inmates of St. Elizabeth's. As currently drafted, 24 U.S.C. §165 reflects the pattern pervasive in the Code: an adult male is assumed responsible for family (including spouse and parents) support; an adult female, at most, for child support.

Sections identified by print-out: 25 U.S.C. §§ 137, 181, 182, 183, 184, 274, 286, 342, 371, 379, 657, 933, 973

I. Terminology: Discussion and Recommendations

Several sections use references that, although not discriminatory in effect, are unnecessarily gender-based. These should be changed as follows:

25 U.S.C. § 286--replace "father or mother" with "either parent".

25 U.S.C. § 379--replace "father" (or) "mother" with "either parent".

25 U.S.C. § 657--replace "fathers, mothers" with "parents," and "brothers, sisters" with "siblings".

leave "aunts, uncles" unchanged as no appropriate sex-neutral term is available.

II. Substance

A. Archaic Laws: Discussion and Recommendations

25 U.S.C. §§ 933 and 973 concern the distribution of assets to individual members of two tribes, the legal existence of which was terminated during the 1960s. Both sections implicitly assume that tribal members are male by referring to members' spouses as wives, although the former section also refers to the "wife (or) husband" of an adult member. Though it is not clear whether these sections have any continuing application or whether the property distribution following termination has been completed, replacement of the

sex-based terms with "spouse" is recommended in keeping with a consistent program to conform terminology to the equality principle.

25 U.S.C. § 182 makes every Indian woman who marries a citizen of the United States herself a citizen; because of the Indian Citizenship Act of 1924, this provision is obsolete and should be repealed.

B. Other Substantive Differentials: Discussion

25 U.S.C. §§ 137, 181, 183, 184, 274, 342, and 371 contain discriminatory sex-based references; these references should be revised or eliminated.

25 U.S.C. § 184, concerning the rights of children born of marriages between white men and Indian women, affects only children born of marriages solemnized prior to June 7, 1897. The recommended extension to children born of all marriages of Indians to non-Indians solemnized in the same time period will thus affect a very small group of people. 25 U.S.C. § 183 sets forth evidentiary standards for proving the existence of a marriage between a white man and an Indian woman; this statute should be extended to cover all marriages between Indian and non-Indian persons.

25 U.S.C. §§ 137 and 181 pose more difficult policy questions. The former provision sets forth a work requirement for Indian males, but not females, who receive supplies and annuities from the government. This provision is no longer followed by the Bureau of Indian Affairs.[1] Accordingly, repeal would eliminate an unwarranted

[1] Telephone conversations with Mr. Bruce, Bureau of Indian Affairs, Washington, D. C. and Ms. Barbara Fix, California Indian Legal Services, Escondido, California.

sex-based differential, and conform the law to current reality. 25 U.S.C. § 181 provides that white men who marry Indian women shall not thereby acquire any rights to tribal property, privileges or interests. According different treatment to male as distinguished from female non-Indians who marry Indians is sex discriminatory. No recommendation is made as between extension and repeal of this statute as the policy question of how marriages between Indians and non-Indians are to be treated is beyond the scope of this report. However, if the statute is revised and retained, it is recommended that the term "non-Indian" be substituted for "white".

25 U.S.C. § 274 encourages the employment of Indian children as assistants in Indian schools. It specifies that girls be employed as assistant matrons, and boys as farmers and industrial teachers. Such sex-stereotyping is discriminatory, and violates federal policy as embodied in Title IX of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964.

25 U.S.C. § 342 permits the removal of the Southern Ute Indians from their present reservation to a new reservation with the consent of the adult male members of the tribe. It was passed in 1887, prior to the adoption of the nineteenth amendment prohibiting denial of the vote on the basis of sex. Individual tribes' constitutions now also grant women the vote. Although it is not likely that the government will ask the Southern Utes to move, the statute might be retained with the consent requirement amended to apply to all adult members of the tribe, without regard to sex.

25 U.S.C. § 371 recognizes the validity for inheritance purposes of marriages between Indians contracted according to Indian customs and legitimizes the children of such unions. From a terminological viewpoint, the section contains unnecessary references to the sexes of the parties to the marriage. More substantively, it specifies that children of such unions shall be deemed to be the legitimate issue of the father, but makes no such specification as to the mother. Apparently, it was regarded as beyond question that such children are the legitimate issue of the mother. The unique physical characteristic that the natural mother of a child is invariably present at the child's birth does not justify this distinction in all cases, as the children may be adopted or the identity of the father may be easy to ascertain. Elimination of this sex-based reference will have no impact on the operation of this section.

C. Other Substantive Differentials: Recommendations

25 U.S.C. § 137--this inoperative provision should be repealed.

25 U.S.C. § 181--substitute "non-Indian person" for "white man" and delete "woman" or repeal statute.

25 U.S.C. § 183--substitute "non-Indian" for "white man" and delete "woman".

25 U.S.C. § 184--substitute "non-Indians" for "white men".

substitute "non-Indian" for "white man".

delete "woman" (twice).

substitute "Indian parent" for "mother".

change "her" to "her or his" (twice).

25 U.S.C. § 274--replace "girls" with "children".

replace "assistant" with "assistants".

delete the words "matrons and Indian boys as".

25 U.S.C. § 342--delete "male".

25 U.S.C. § 371--replace "male and female Indian" with "two Indians".

replace "husband and wife" with "spouses".

replace "father" with "parents".

Title 26 -- Internal Revenue Code

Sections identified by print-out: 26 U.S.C. §§ 2, 4, 37, 46, 48, 50A, 51, 58, 71, 72, 101, 121, 142, 152, 154, 165, 179, 213, 214, 215, 217, 267, 274, 341, 425, 544, 554, 672, 682, 911, 981, 1034, 1211, 1239, 1244, 1251, 1302, 1313, 1371, 1372, 1402, 1563, 2515, 2516, 3121, 3306, 3402, 4253, 4905, 5143, 6013, 6014, 6015, 6017, 6046, 6096, 6212, 7448

I. Terminology: Discussion and Recommendations

Although the Internal Revenue Code has been drafted to avoid the inference that taxpayers are male, unnecessary gender references abound in Title 26. For example, "husband or wife" appears in 26 U.S.C. §§ 4, 46(a)(4), 48(c)(2)(B), 50A(a)(4), 58(a), 911, 981(e)(4), 1211(b)(2) 1251(b)(2)(c), 5143(d)(2). "Husband and wife" appears in 26 U.S.C. §§ 2(a), 37(i), 51(a)(2)(B)(i), 58(a), 121(d)(1), 142, 179(b), 274(b)(2), 911, 981(b),(c)(2), 1034(g), 1239(a)(1), 1244(b)(2), 1302(c)(4), 1313(c)(1), 1371(c), 1372(g), 2515(d), 2516, 3402(m)(3), 6013(a) (3 times), (b) (twice), (c),(d), §6014(b), 6015(b) (twice), 6017, 6096(a), 6212(b), 7701(a)(17) (title). 26 U.S.C. §§ 6013(a)(1) and 6015(b) refer to "either the husband or [the] wife". "Widow or widower" appears in 26 U.S.C. §37(b). 26 U.S.C. §152 refers to "son or daughter" ((a)(1)), "stepson or stepdaughter" ((a)(2)), "brother, sister, stepbrother, or stepsister" ((a)(3)), "father or mother" ((a)(4)), "stepfather or stepmother" ((a)(5)), "a son or daughter of a brother or sister of the taxpayer" ((a)(7)), "a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer" ((a)(8)), and "a descendant of a

brother or sister of the father or mother of the taxpayer" ((a)(10)(A)). Other sex-based references include "brothers and sisters" (26 U.S.C. §§ 267(c)(4), 341(d), 425(d), 544(a)(2), 554(a)(2), 672), "mother or father (26 U.S.C. §§ 213(a)(1)(A)(i), 672, 3306(c)(5)), "son or daughter" (26 U.S.C. §§ 3121(b)(3)(B), 3121(b)(3)(B)(i), 3306(c)(5)), and "stepson or stepdaughter" (26 U.S.C. §3121(b)(3)(B)(i)). Sex neutral terms such as "a married couple," "married individuals," "sibling(s)," "child(ren)," "parent(s)," "step-sibling(s)," "stepchild(ren)," "stepparent(s)," and "surviving spouse" should be substituted wherever appropriate.

Provisions of the Internal Revenue Code dealing with alimony and support are written in terms of husband as payor, wife as payee. For example, 26 U.S.C. §71 stipulates that in the case of a divorced or separated couple, periodic payments made by a husband in discharge of a marital obligation are included in the wife's gross income. 26 U.S.C. §101(e) exempts from gross income payments received by reason of the death of an insured individual, except those includible in a wife's gross income pursuant to 26 U.S.C. §71 and 682. 26 U.S.C. §152(b)(4) excludes treatment of an alimony payment as a husband's payment for dependent support. 26 U.S.C. §72(k) excludes from the general rule governing annuities, annuities paid as alimony includible in a wife's gross income. 26 U.S.C. §215 provides that husband's payments to a separated or divorced wife that are includible in the wife's gross income are deductible by the husband. 26 U.S.C. §682 concerns estate or trust income paid to a divorced or separated wife. Sex-neutralizing these provisions in substance, 26 U.S.C. §7701(a)(17), a definitional section, states that "husband" means "wife" and "wife" means "husband" where payments described in 26 U.S.C. §§ 71, 152(b)(4), 215 and 682 are made by a wife to a former

husband. In lieu of relying on a definition section to explain that "husband" may mean "wife" and "wife," "husband," all alimony and support provisions should be recast in sex-neutral language. A model that might be utilized for appropriate terminology is the Uniform Marriage and Divorce Act, a legislative text approved by the American Bar Association at its 1974 mid-winter meeting.

26 U.S.C. §1402(a)(5)(A) provides that for couples in community property jurisdictions, all gross income and deductions attributable to a trade or business shall be treated as gross income and deductions of the husband, unless the wife exercises substantially all the management and control, in which case the attribution will be to her. This provision apparently has a benign purpose; the intent seems to be avoidance of the imposition of a double self-employment tax on married couples in community property states. This intent can be effected without incorporating a presumption inconsistent with the equal rights principle. For example, the provision might be recast to state that the gross income and deductions shall be attributed to the spouse who in fact exercises dominant control of the business.

26 U.S.C. §1563 refers to a "brother-sister controlled [corporate] group". No change is needed in this descriptive term.

The reference in the title of 26 U.S.C. §4253(a) to "servicemen" should be changed to "service member" or "service personnel".

Under 26 U.S.C. §4905 a deceased taxpayer's "wife or child" may carry on his business without paying an additional tax on the business or trade. A like provision, 26 U.S.C. §5143(d)(2), exempts "a husband or wife succeeding to the business of his or her living spouse". 26 U.S.C. §4905 should be similarly neutralized. (We have recommended alphabetical order for pronouns, i.e., her/his.)

26 U.S.C. §7448 refers to annuities to "widows and dependent children of judges" with no corresponding reference to widowers. The reference should be to "surviving spouse". Further, 26 U.S.C. §7448(a)(6) defines widow to mean an un-remarried "surviving wife" married to the individual for at least two years prior to his death and who is the mother of issue by that marriage. The durational requirement is of questionable constitutionality. See Salfi v. Weinberger, C-73 1863 ACW, N.D. Calif. March 22, 1974 (three-judge court), U.S.S.C. appeal pending (declaring in violation of due process certain provisions of the Social Security Act, 42 U.S.C. §416(c)(5) and (e)(2), establishing duration-of-relationship requirements for wife and stepchild of insured).

II. Substance

A. Income Tax: Discussion and Recommendations

The Internal Revenue Code does not in terms single out women, whether in or out of the paid labor force, for disadvantageous treatment. But in a variety of ways, the tax law may impact substantially and adversely upon the two-earner family, imposing a fiscal burden when a working woman marries or a stay-at-home spouse returns to the paid labor force.

The peculiar discrimination now embodied in the income tax statutes has evolved largely as a product of history. Prior to 1948, individuals, whether married or single, residing in common law states were separate taxpayers while married persons residing in community property jurisdictions were permitted to split their aggregate income, one-half to each. Because the income tax rates were and are graduated upwards, when the income actually received by one spouse substantially exceeded that of the other, income splitting produced a significant aggregate tax saving. In 1948, noting that a number of common law states already had shifted to the community property system in order to afford the income splitting benefit to their residents and concerned that many other states would follow suit, H.R. Rep. No. 1274, 80th Cong., 2d Sess. 241, 258-59 (1948), Congress enacted a joint return provision for married couples. Revenue Act of 1948, §§ 301-305, 62 Stat. 114-16 (1948), now Int. Rev. Code of 1954, §6013.

In the twenty years that followed it was generally and correctly understood that in the vast majority of cases the tax law blessed the marital union with a saving in federal income tax. The source of benefit resided in a combination of the income splitting permission

(earlier embodied in §2 and currently in the rate table of §1(a) of the Code), the notion that housekeeping, child care and similar services furnished by the stay-at-home spouse did not give rise to income taxable to the family, and the then rule that payments made to a third party for household services were personal and therefore not deductible. Taken together, these conceptions served to place a heavy comparative tax penalty upon the unmarried wage earner and to afford a substantial tax advantage to the one-earner family. See S.Rep. No. 91-552, 91st Cong., 1st Sess. 260-64 (1969). At the same level of taxable income the single person paid as much as 41% more tax than the married couple, and a head of household taxpayer (certain unmarried individuals with dependents) occupied a tax rate position about half way between.

In 1969, responding to unmarried taxpayer dissatisfaction, Congress again revamped the system by lowering the single taxpayer and head of household rates while preserving the married taxpayers' joint return rate.

The Tax Reform Act of 1969, although it properly recognized the unfairly heavy burden theretofore placed on single individuals as compared with many married taxpayers, failed to recognize a potential adverse impact upon the two-earner family. The problem, a reverse discrimination against a sizable class of married taxpayers, focuses not alone upon the rate structure, but rather upon that structure in combination with other provisions of the Internal Revenue Code that are pertinent to the determination of taxable income. One of these, the standard deduction (26 U.S.C. §§ 141-144), also was amended and

liberalized in the 1969 Act and, again, in the Revenue Act of 1971. Another, 26 U.S.C. §214, which in specified circumstances now affords a deduction for household and dependent care services expenses of up to $400 per month, was greatly expanded in the 1971 Act.

The standard deduction may be viewed as a variable deduction (15% of adjusted gross income) subject to a ceiling limitation, and never less than a specific dollar minimum (the low income allowance). However, both the deduction ceiling and the low income allowance floor also are subject to variation, not on the basis of the taxpayer's income but rather and solely in response to the taxpayer's marital status. For an unmarried individual the deduction ceiling is $2,000. In the case of a married couple it is $2,000 for the marital unit if a joint income tax return is filed, and $1,000 for each spouse if separate returns are filed. The low income allowance is $1,300 for an unmarried individual, $1,300 for both spouses together if a joint return is filed, and $650 per spouse if it is not. The married couple is further disadvantaged by the requirements that both spouses must elect the standard deduction or neither may, and both spouses must claim the low income allowance or neither may.

26 U.S.C. §214 allows a deduction, subject to various limitations, of up to $4,800 per year ($400 per month) to a gainfully employed head of household or to a both gainfully employed married couple if there is an incapacitated or underage "qualifying individual" (e.g., a dependent child under the age of 15, an incapacitated older dependent) and the expenses are for household services, care of the qualifying individual or both. The section 214 expense is an itemized deduction and not a

"business expense"; the eligible taxpayer thus must choose either the standard deduction (including low income allowance) or the section 214 dependent care and household services deduction, but not both. The adverse impact of this forced choice falls primarily upon low income earning individuals and families.

26 U.S.C. §214 discriminates against the married state in various respects. Unless one spouse is incapacitated, under the statute both must be gainfully employed on substantially a full-time basis. A married couple is ineligible for the deduction if one spouse works only two days each week; an unmarried head of household who works only two days each week can qualify for the deduction. The statute requires that a married couple file a joint return. Because of this requirement, the income limitation of section 214(d), keyed to adjusted gross income of $18,000 with a 50% phase-out above that figure and a resultant elimination of any deduction at $27,600, pointedly discriminates against the two-earner marital unit.

The following example, in which the three principal discriminatory elements of present income tax law -- rate structure, standard deduction and section 214 -- all play a part, illustrates the marriage penalty that may be imposed on the two earner family by the Internal Revenue Code. *

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* This catalog of discriminatory Code provisions is not exclusive. 26 U.S.C. §46(a)(4), limiting the investment credit available to a married couple to that available to an unmarried individual, in effect assumes that a husband and wife cannot function as valid business partners. 26 U.S.C. §217, which specially limits the available moving expense deduction if both husband and wife commence work at a new principal place of work within the same general geographic area, designedly disadvantages the two earner family. 26 U.S.C. §1348, establishing a 50% maximum rate limitation on earned income, in the case of a married couple conditions availability of this benefit upon the filing of a joint return. Although section 1348 affects only high income families and its restriction may in part be justified on the ground that, in enacting the provision, Congress intended to reduce the pressure for the use of tax loopholes rather than to afford tax relief, H.R.Rep. No. 91-413 (Part I), 91st Cong., 1st Sess. 208 (1969), the discriminatory impact remains.

Assume that Mr. A, an unmarried individual, has adjusted gross income (gross income less business expenses and certain specified other deductions) of $18,000. He also has an incapacitated dependent mother who lives with him. His expenses for household and dependent care are $400 per month or $4,800 for the year. His other expenses for the year, deductible from adjusted gross income total $3,200. Ms. B, like Mr. A, is gainfully employed. She has no dependents. Her adjusted gross income is $12,000. Ms. B's expenses deductible from adjusted gross income are $1,000. She enjoys both a $1,800 standard deduction (in lieu of the $1,000 itemized expenses) and a $750 personal exemption, producing for her a net taxable income of $9,450. Mr. A itemizes deductions, takes two personal exemptions and reports taxable income of $8,500. His tax, computed under the head of household table, is $1,595. Ms. B's tax computed under the unmarried individual rate table is $1,925.50. Ms. B separately incurs non-deductible expenses as a person living apart and maintaining her own home. Mr. A and Ms. B wish to marry and live together in Mr. A's home with his incapacitated dependent mother. By living together they will save the cost of maintaining Ms. B's separate home. By marrying, they will incur a quite possibly greater cost. Filing a joint return, the aggregate adjusted gross income of the marital unit will be $30,000. Expenses deductible from adjusted gross income will comprise her $1,000 and his $3,200, but under the income limitation of present section 214 they will not include any part of the $4,800 expended by Mr. A for household and dependent care. Taking into account three personal exemptions, joint return taxable income will be $23,550 and tax liability will total $5,516.

By marrying, Mr. A and Ms. B increase their aggregate federal income tax liability by approximately $1,968.50, an increase of more than 55% above the tax that would have been payable had they not married.* Current tax law does not discourage Mr. A and Ms. B from living together, but current tax law forcefully discourages a formalizing of that relationship through marriage.

One other example, keyed to the rate table and standard deduction (including the low income allowance) but not to section 214, provides a very simple but perhaps even more compelling illustration of the tax law's marriage penalty. An unmarried man and woman, whether living separately or together, each of whom annually earns $2050, do not have taxable income: The $750 personal exemption plus the $1,300 low income allowance fully offset $2050 of adjusted gross income. Marriage, however, will halve their low income allowance, from $1,300 each to $1,300 for both. $4,100 of aggregate income will be offset by only $2,800 of deductions (two $750 personal exemptions plus one $1,300 low income allowance), resulting in taxable income of $1,300 and annual federal income tax liability of $185.

Equivalent differential treatment of married and unmarried couples may, of course, exist under present tax law if the income of one (or both) taxpayers is dividend, interest or other passive income rather than earned income. The tax impact of marriage upon the owner of substantial income producing property would not seem to provide a focus of equivalent concern, not only because the number of such persons is relatively

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* Mr. A and Ms. B will fare even less well were they to file separate tax returns while married.

limited but, more significantly, because the ability to deflect passive income through trust devices and the transfer tax advantages inherent in the gift and estate tax marital deductions are likely to outweigh the joint return disadvantage.

At least three different legislative solutions might be adopted to eradicate or ameliorate the "marriage penalty" currently exacted from the two-income family.

1. Elimination of the joint return ("Individual Taxation")

26 U.S.C. §6013 of the Code permits a husband and wife to make a single return jointly of income taxes, 26 U.S.C. §1(a) establishes the joint return rate table, and 26 U.S.C. §1(d) establishes the far less advantageous rate table applicable to married individuals who file separate returns. As currently structured the law grants a substantial tax benefit to an individual with income who marries a spouse without income, but penalizes two individuals who have relatively equal incomes if they choose to marry. To illustrate, an unmarried individual with $20,000 of taxable income pays tax of $5,230. If he or she marries a spouse whose income equals only the $750 personal exemption, the filing of a joint return reduces tax liability to $4,380, a saving of $850. If, instead, he or she marries an individual whose taxable income also is $20,000, their joint tax liability will be $12,140, an increase of $1,680 above the aggregate tax that would have been payable had they not married.

Elimination of the joint return provision and rate table, coupled with elimination of all other income tax provisions of the Code which treat differently married and single taxpayers, would eliminate the described

differential tax treatment for taxpayers in common law jurisdictions. To avoid a recreation of the pre-1948 problem, earlier described, it would be necessary to displace for federal income tax purposes the directives of state community property law. I.e., the Code would provide that in all cases income will be taxable to the individual who earns it. With respect to passive income, either a likely complex tracing mechanism applicable to community property state taxpayers would be employed or, alternatively, an appropriate change would be made in the gift tax statutes so that residents of common law states may obtain the advantage of passive income splitting without attracting transfer tax liability.

For several reasons, elimination of the joint income tax return (and all other income tax provisions of the Code which treat married and single taxpayers differently) is not likely to attract significant support at this point in time. Complete elimination of the joint return runs counter to the direction taken by the tax law during the past quarter century. The required responses to community property and common law state differentials are complex. One-earner families, benefitted by present law and disadvantaged by the joint return elimination, will object to the change on the ground that the present tax advantage merely offsets in part the economic burden of support placed on the single earner who is married to a non-earner.

2. Tax option out of marriage

A second approach would allow married taxpayers to elect for all federal income tax purposes to be treated as single persons. A special rule for dependency and head of household status would be required.

A child or other individual who might qualify as the dependent of either spouse would qualify as the dependent of only one, presumably the one furnishing the majority of support, and if the spouses live together only one could qualify for head of household treatment. Presumably, the section 214 household and dependent care services deduction would be available to the head of household spouse with the income limitation of that provision keyed to the adjusted gross income of this spouse. However, this approach could well result in a questionable expansion of the scope of section 214 if the option out of marriage is elected and the second spouse is primarily at home; an appropriate legislative solution will be required.

The route of a tax option out of marriage, because it affects unearned as well as earned income, again will require special treatment of the community property and common law jurisdiction dichotomy. Taxing earned income to the individual who earns it should not present major problems,* but the tax treatment of dividends, interest and other passive or unearned income will present, albeit for a smaller group, the difficulties referred to in the preceding discussion of a complete elimination of the joint return.

The tax option out of marriage will not attract the automatic antagonism of one earner family taxpayers. In all other respects, however, it will require legislative resolution of the problems noted above with respect to elimination of the joint return, and because in the option case all taxpayers will not be similarly situated, fair resolution of the passive income problem will be far more difficult.

3. Second earner deduction or credit

The concept of a second earner deduction or credit was

* See the discussion of taxpayer manipulation in II.A.3., below.

summarized by Joseph A. Pechman, director of economic studies at the Brookings Institution, in a paper entitled "Income Tax Treatment of Two-Earner Married Couples" delivered July 24, 1973 to the Joint Economic Committee of the Congress, during its hearings on the economic problems of women:

> I do not believe that it will ever be possible to arrive at a satisfactory balance in the tax liabilities of single people and families merely by juggling the tax rates. The proper solution is to keep the device of income splitting for married couples (so that geographic equality is maintained), but to eliminate the rate advantage of income splitting by halving tax brackets used by married couples in figuring their tax liabilities. . . .
>
> Another reason why income splitting does not satisfy the requirements of tax equity is that it fails to distinguish between married couples with one and with two spouses working. The tax laws were given their present form at a time when it was considered normal for the husband to work and the wife to remain at home. Today, the situation is exactly the opposite; the majority of married couples have two earners, and it is no longer appropriate to treat the one-earner couples as the norm.
>
> The exemptions, deductions and the tax rates for one- and two-earner couples are identical; hence, if they have the same money income, the same number of exemptions, and the same deductions, they pay the same tax. But this gives the wrong results, because the married couple with one spouse working has more tax paying ability than the married couple with two spouses working. The spouse who does not work produces "income" while he or she is at home, but the income so produced is in the form of services to the family which cannot be evaluated in money terms and therefore cannot be taxed.
>
> If both spouses work, the type of service performed by the nonworking spouse may be performed by a paid domestic servant; and, even if

> they get along without a domestic servant, their clothing, laundry, and food expenditures are generally higher. It is obviously not fair to tax the combined earnings of the two spouses in full because some part of the earnings is absorbed in meeting these extra expenses.
>
> . . .
>
> It is obviously impossible to calculate the exact amount by which the earned income of the two-earner couple is overstated as compared with that of the one-earner couple. As a substitute, two devices have been proposed from time to time to adjust the taxable income of the two-earner couple: the first is a deduction and the second is a tax credit, both based on the earned income of the spouse with the lower earnings. Since the purpose of the adjustment is to correct relative tax burdens of married couples with the same income, the deduction is the better device for making this particular refinement in gross income to arrive at taxable income. However, I would have no great objections to the use of the tax credit in this case.
>
> Since the difference in taxpaying ability of one-earner and two-earner couples is not inconsequential, the special deduction or credit should be more than a pittance. It should also taper off for a taxpayer with high incomes, because the discrimination against the two-earner couple does not continue to rise with income indefinitely. [Pechman suggested for consideration a deduction of 25% of the earnings of the lower earning spouse up to a maximum deduction of $2,500, or a tax credit of 10% of such earnings up to a maximum credit of $1,000.]*

The second earner deduction (or credit) is designed as a conservative approach to the present differential tax treatment of single taxpayers,

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* For an earlier and more detailed presentation of the author's views on this subject, see Pechman, Income Splitting, in 1 Tax Revision Compendium, House Ways and Means Committee, 86th Cong., 1st Sess. 473, 479-81 (1959).

one-income couples and two-income couples in a number of respects. First, it focuses upon the principal problem, earned income, and does not attempt to deal with the community property complex problem of passive income and income producing property. Second, while it would produce a shift in relative tax burdens (the second earner deduction would decrease the tax on two earner families while bracket splitting would produce additional tax in certain circumstances), unlike the elimination of the joint return the second earner deduction (or credit) would not materially increase the absolute tax burden on one-earner families. Third, the second earner deduction (or credit) approach avoids much of the potential for taxpayer confusion and error that resides in the proposal for a tax option out of marriage.

It is believed that, on balance, the second earner deduction (or credit), in dealing with the main problem of earned income and avoiding the less significant but more complex problem of passive income, currently offers the most viable solution to the problem of the two-earner family. Within the context of the second earner deduction (or credit) a number of issues require consideration and resolution.

First, if the second earner allowance is a deduction rather than a credit, is it to be treated as a "business expense" deductible from gross income in reaching adjusted gross income, or as an itemized deduction to be taken from adjusted gross income in reaching taxable income? The difference is major in that election of the standard deduction (including low income allowance) eliminates any allowance for itemized deductions.

Second, since a uniform rate second earner deduction (such as 25% of second earner income whether or not subject to a ceiling limitation),

even if treated as a "business expense," inadequately responds to the problem of the poor -- a married couple each with earnings of approximately $2,000 -- what corrective adjustment should be made?

Third, if a two-earner family qualifies for both the second earner deduction (or credit) and the section 214 deduction, are both benefits to be cumulatively available?

The first two of these three issues can be resolved, through an integrated and not complicated approach, by treating the second earner deduction as an itemized deduction but permitting the taxpayer to elect the alternative of a second earner credit available whether or not the standard deduction (or low income allowance) has been claimed. Alternative election to deduct or credit a percentage is not unusual in the Internal Revenue Code. In the case of the two earner poor family earlier described, each spouse earning gross income of $2,050, a 10% second earner credit would eliminate tax liability and thus expunge the current marriage penalty exacted upon the poor. If revenue impact studies should suggest that the Pechman view of a 10% credit subject to a $1,000 ceiling limitation may excessively burden the fisc, the credit (as an elective alternate to deduction) might be revised to a 9% credit-$500 limitation without thereby significantly adversely affecting the poor.

With respect to the issue of integration with section 214, consideration might be given to a solution outside the tax law. 26 U.S.C. §214 might be eliminated from the Internal Revenue Code and the resultant revenue increase, substantially augmented, expended by the federal government in comprehensive child care, nursery and similar facilities.

If this approach is not considered viable and section 214 is to remain in the Code, various approaches to the integration problem are possible. The marital unit could be required to elect between the section 214 deduction and the second earner deduction (or credit). A polar approach would permit the marital unit to claim both the section 214 deduction and the second earner deduction (or credit) and would, in addition, test the section 214 income limitation (the deduction begins to phase out when adjusted gross income reaches $18,000) against the adjusted gross income of the higher income spouse rather than, as under current law, against the combined adjusted gross income of both spouses. An intermediate approach would permit the marital unit to claim both a section 214 deduction and the second earner deduction (or credit) but, consistent with current law, would test the section 214 income limitation against the combined adjusted gross income of the spouses. A fourth possibility, superficially similar to the first but very different in its impact, would require the marital unit to elect between the section 214 deduction and the second earner deduction (or credit) but would treat the section 214 deduction as a "business expense" deductible from gross income in reaching adjusted gross income, thus permitting the marital unit to claim both this deduction and the standard deduction (or low income allowance).

Of the four solutions suggested, the first appears undesirable in that, in many cases, it will significantly disadvantage the married couple in comparison with a similarly situated couple living together unmarried. Of the other three solutions suggested, it is believed that the last -- requiring an election between the section 214 deduction and the second

earner deduction (or credit) but treating the section 214 deduction as a "business expense" -- is best calculated to ameliorate the current tax law disincentive to the continuation or reentry of married women in the paid labor force.*

Finally, the disadvantageous treatment currently accorded two earner couples under 26 U.S.C. §217, the moving expense provision, should be eliminated. The requirement of 26 U.S.C. §1348, the earned income rate limitation provision, that a married couple must file a joint return in order to claim benefits under the provision, merits further consideration. Although some justifications for the stricture may be grounded upon the narrow congressional intent that led to the enactment of section 1348 and although the section is applicable only to a circumscribed class of high income taxpayers, the joint return requirement does exact a marriage penalty that a second earner deduction (or credit) will ameliorate but, in many cases, will not expunge.

A concluding caveat is in order. Inherent in the second earner deduction (or credit) concept, as in elimination of the joint return and in the tax option out of marriage, is an incentive to taxpayer manipulation. As confirmed by the pre-1948 tax law experience, an undeterminable number of taxpayers will attempt to take unwarranted advantage of any change in the law. For example, in order to claim a second earner deduction (or to obtain a lower tax rate advantage if the joint return is eliminated or a tax option out of marriage granted) a husband may employ and pay

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* Under any of the suggested solutions, the requirement of present section 214, that both spouses must work substantially full time (a requirement not imposed upon unmarried taxpayers), should be eliminated.

compensation to his stay-at-home wife (or vice versa). Or a corporation which is owned by and employs one spouse may reduce her or his compensation and nominally place the other spouse on the payroll at a salary equal to the differential. The tax law is geared to deal with transparent devices and without undue difficulty should deal successfully with fraudulent arrangements. It is nonetheless important that the impetus to such arrangements be recognized at the threshold, and that the tax legislation embodying recommended changes also equip the Commissioner of Internal Revenue, should he or she consider further equipment necessary, to deal with such tax avoidance schemes.

B. Transfer Taxes: Discussion and Recommendation

The marital deduction is a central concept in both the gift tax and the estate tax. At present the deduction is available for 50% of a gift to the donor's spouse and covers up to 50% of the adjusted gross estate when the decedent's spouse is a beneficiary.* In addition, the gift tax statutes incorporate a gift splitting concept which serves to reduce gift tax liability when the donor is married and her or his spouse consents to the transfer in a gift tax return. In recent times, legislative amendments have been suggested which, in the estate tax area, would increase above 50%, and possibly to 100% of the adjusted gross estate, the maximum estate tax marital deduction.

Neither present transfer tax law nor the noted proposal for amendment of the estate tax marital deduction provision appears to impact adversely upon the status of women. No substantive change seems necessary to implement the equal rights principle in this area.

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* The deduction qualification rules, particularly in the estate tax area, are complex.

Title 28--Judiciary and Judicial Process

Sections identified by print-out: 28 U.S.C. §§ 375, 376, 604*

A. Discussion

These sections provide annuities for widows of federal judges. Pursuant to 5 U.S.C. §7152, widowers now qualify for annuities on the same basis as widows.

B. Recommendations

Although the sex-based differential is no longer operative, in keeping with a consistent program to avoid unnecessary gender references, 28 U.S.C.§§376 and 604 should be amended to refer to surviving spouse. 28 U.S.C. §375 refers only to justices of the Supreme Court who were either retired or in active service in August 1972. All members of this limited class are male. Amendment would achieve semantic consistency but the section might be left undisturbed since it accurately reflects historical fact.

* 28 U.S.C. §§ 1862 and 1867(e) were identified by the print-out because they contain the word "sex". Both relate to federal jury selection, and prohibit discrimination on the basis of, inter alia, sex.

Title 29--Labor

Sections identified by print-out: 29 U.S.C. §§ 1, 7, 11, 12, 13, 14, 49b, 49j, 206, 208, 504, 524, 557, 651

Substantive differentials in Title 29 include statutory provisions for a "Women's Bureau" in the Department of Labor (29 U.S.C. §§ 11-14, 557) and references to the crime of rape (29 U.S.C. §§ 504, 524). Other sections identified by the print-out are non-discriminatory, but contain unnecessary gender references.

I. Terminology

A. Discussion

29 U.S.C. §1 describes the functions of the Bureau of Labor Statistics as including the dissemination of information on "the earnings of laboring men and women". Under 29 U.S.C. §7 data gathered by the Bureau includes the sex of employees in "the Territory of Hawaii". 29 U.S.C. §49b establishes a national system of employment offices for "men, women, and juniors"; 29 U.S.C. §49j provides for the formation of a Federal Advisory Council and similar State councils, composed of "men and women" representing employers, employees, and the public, for the purpose of formulating policies and discussing problems relating to employment. 29 U.S.C. §651 declares it national policy to assure "every working man and woman in the nation safe and healthful working conditions . . . ."

29 U.S.C. §206, the minimum wage provision of the Fair Labor Standards Act, contains the Equal Pay Act of 1963. This provision,

29 U.S.C. §206(d), prohibits wage discrimination on the basis of sex. 29 U.S.C. §206(a)(4) establishes a minimum wage for a "seaman" on an American vessel. 29 U.S.C. §208 concerns classifications for the purpose of fixing minimum wages in Puerto Rico and the Virgin Islands; classifications on the basis of sex are prohibited by 29 U.S.C. §208(c).

B. Recommendations

29 U.S.C. §1--replace "laboring men and women" with "laboring persons" or "workers".

29 U.S.C. §7--although gathering information on the sex of employees in Hawaii is not discriminatory and may serve a useful sociological purpose, the provision appears to be obsolete since Hawaii is no longer a "territory".

29 U.S.C. §49b--replace "men, women, and juniors" with "all persons".

29 U.S.C. §49j--replace "men and women" with "persons" or "individuals".

29 U.S.C. §651--replace "working man and woman" with "working person" or "worker".

29 U.S.C. §206(a)(4)--replace "seaman" with "crew member".

29 U.S.C. §208--no change is required.

II. Substance

A. Discussion

29 U.S.C. §504 excludes persons who have been convicted of specified crimes, including rape, from holding office in labor organizations.* 29 U.S.C. §524 declares that antecedent provisions shall not be construed to impair State authority to enact and enforce general criminal laws with respect to, inter alia, rape. Although rape is defined in sex-neutral terms in recently overhauled criminal laws,

* Imposing a further disability on a person once convicted of a crime, particularly when no account is taken of individual circumstances, is highly questionable.

most states have not yet revised their penal codes in line with the equality principle. Historically, rape has been defined as a crime in which the perpetrator is male and the victim, female. See Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 955-61 (1971); Eastwood, The Double Standard of Justice: Women's Rights Under the Constitution, 5 Val. L. Rev. 281, 313-15 (1971).

29 U.S.C. §§ 11-14, 557 establish a Women's Bureau in the Department of Labor, "to formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment." Under 29 U.S.C. §12 the director of the Bureau must be a woman. 29 U.S.C. §13 invests the Bureau with investigative and reportorial functions. Current literature describing the Bureau's work indicates that its principal task is the acquisition and dissemination of information about women's employment opportunities.

B. Recommendations

Redefinition of rape in state and federal penal laws to eliminate the offender's and victim's sex as an element of the crime will bring the references in 29 U.S.C. §§ 504 and 524 in line with the equality principle.

Existence of a "Women's Bureau" in the Department of Labor would be unnecessary and inappropriate were equal employment opportunity, free from gender-based discrimination a practical reality. However, the legacy of disadvantageous treatment of women in the economic sphere

is likely to have a continuing adverse impact on women in the labor market long after the equal rights amendment becomes part of the Constitution. The Women's Bureau is therefore a necessary and proper office to serve during a transition period until the principle of equality is realized in practice. Cf. Brown, Emerson, Falk & Freedman, supra, 80 Yale L.J. at 904-905.

Title 30--Mineral Lands and Mining

Sections identified by print-out: 30 U.S.C. §§ 187, 843, 902, 922, 924, 931, 934

The print-out indicates two chapters in Title 30 with sections containing key words: 3A (Leasing and Prospecting Permits), 22 (Coal Mine Health and Safety). Chapter 3A includes a flat hiring prohibition: coal mining leases for federally-owned lands must prohibit the employment of females in any mine below the surface (30 U.S.C. § 187). This restriction, enacted in 1920 as part of the Mineral Leasing Act, collides head-on with the equality principle and current national equal employment opportunity policy, reflected in Title VII of the Civil Rights Act of 1964. Benefit provisions in Title 30 require attention as well, for they reflect the assumption of the drafters that all miners are male.

I. Terminology

A. Discussion

Provisions containing sex-based references in need of terminological revision appear in sections dealing with benefits for miners suffering from pneumoconiosis (Black Lung disease).

30 U.S.C. § 843(d) authorizes performance of an autopsy after the death of a miner, subject to "consent of his surviving widow".

30 U.S.C. § 902 defines "miner" as "any individual who is or was employed in a coal mine". However, the same section defines a miner's "dependent" to include his "wife" or "widow"; no reference is made in the enumeration to a husband or widower. 30 U.S.C. § 922 concerns survivor benefits for a miner's "widow," child, parent(s), sister and, under certain conditions,

brother. Time limits for benefit claims by the above-enumerated persons are specified in 30 U.S.C. § 924. The beneficiaries listed in 30 U.S.C. § 931 are "surviving widows, children, parents, brothers, or sisters"; 30 U.S.C. § 934 lists as persons who may qualify for the specified benefits "widow, child, parent, brother, or sister".

The legislative history of these provisions indicates Congress intended the same benefits for spouses and relatives of female miners as those expressly provided for families of male miners. S. Rep. No. 92-743, accompanying the Black Lung Benefits Act of 1972, states:

> It is possible that a miner now or in the future may be a female. It is intended that in such cases such a female miner's benefits would devolve to her spouse, and that the terms "wife" and "widow" shall be construed to include "husband" and "widower". 1972 U.S. Cong. and Adm. News at 2321.

B. Recommendations

Congressional intent should be presented clearly in the legislative texts; it should be unnecessary to resort to a report explaining that "wife" also means "husband". The sex-specific terms in 30 U.S.C. §§ 843, 902, 922, 924, 931 and 934 should be replaced by sex-neutral references, e.g., replace "widow" with "surviving spouse" in 30 U.S.C. §§ 843(d), 902, 922, 924, 931, and 934; replace "wife" with "spouse" in 30 U.S.C. § 902; replace "brother or sister" with "sibling(s)" in 30 U.S.C. §§ 922, 924, 931, and 934.

II. Substance

A. Discussion

30 U.S.C. § 187 mandates sex discrimination by persons leasing federally-owned coal mines. Perhaps reflecting the superstition that women underground bring bad luck, the section provides:

> Each lease [issued under the authority of this chapter] shall contain . . . provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface . . . .

This prohibition dates from an era when protective legislation for women was regarded by many as a progressive development, leading toward more general regulation of economic and social life in the public interest. See generally E. Baker, Protective Labor Legislation (1925); Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 15-17, 642-53 (1974). By the 1970s, it had become apparent that many laws purporting to "protect" women in fact served to safeguard men's jobs from women's competition. See, e.g., Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971). Restrictions of the kind mandated by 30 U.S.C. § 187 have been declared unlawful in the public and private sector by Title VII of the Civil Rights Act of 1964.

30 U.S.C. § 902(a)(2) and (e) render a "divorced wife" or a "surviving divorced wife" eligible for benefits if she received at least one-half her support from the miner, or substantial contributions from him pursuant to a written agreement, or if the miner was required by court order to make substantial contributions to her support. In keeping with the trend toward sex-neutral financial provisions in marriage and divorce laws,* and as required by the equal rights principle, any provision covering a divorced wife must apply as well to a divorced husband. Further, the 30 U.S.C. § 902 dependency test for a divorced spouse is inconsistent

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* See, e.g., the ABA-approved Uniform Marriage and Divorce Act.

with the position taken by Congress when it eliminated such a test for social security benefit purposes. See 42 U.S.C. § 402(b)(1)(D), as amended in 1972 by P.L. 92-603.

30 U.S.C. § 902(e) includes within the term "widow" a miner's wife who was living with him at the time of his death or was living apart for "reasonable cause or because of his desertion". The trend away from fault-based determinations in marital breakdown situations suggests the need for revision of this definition.

30 U.S.C. § 922 provides for survivor benefits to a sister, but to a brother only if he is under eighteen, disabled, or a student.

B. Recommendations

30 U.S.C. § 187 is glaringly inconsistent with federal equal employment opportunity law. The ban on female miners must be removed. Protection can be provided for young people by retaining a prohibition on employment of any person under the age of sixteen in underground mines.

30 U.S.C. § 902(a)(1) and (e) should be written in sex-neutral language, i.e., miner and spouse, not miner and wife, and the fault concept it reflects should be reconsidered.

Differentials in eligibility requirements for brothers and sisters should be eliminated in 30 U.S.C. § 922.

Title 31—Money and Finance

Sections identified by print-out: 31 U.S.C. §§ 43(b), 94, 97, 101, 125, 241, 552, 725s

Substantive differentials in Title 31 have been cured by amendments to other Titles equalizing benefit payments to members of the armed forces and federal employees of both sexes. Provisions appearing on the print-out should be revised to eliminate unnecessary gender references and terminology with masculine connotations.

A. Discussion

31 U.S.C. § 43(b) provides for survivorship benefits to "widows" and dependent children of Comptrollers General. As currently worded the section implies that all Comptrollers General will be male.

31 U.S.C. § 97 provides for payments to a soldier or to his "widow" or legal heirs for pay arrears.

31 U.S.C. §§ 94 and 101 refer to "enlisted man".

31 U.S.C. § 125 provides for payment for withheld foreign checks to "widows" of deceased veterans.

31 U.S.C. § 241 provides for settlement of damage claims made by, inter alia, a decedent soldier's "(3) father or mother, or both, or (4) brother or sister, or both . . . ."

31 U.S.C. § 552 concerns payment of public moneys for assemblages of 4-H Boys and Girls Clubs.

31 U.S.C. § 725s establishes trust funds to accommodate, inter alia, "(12) Relief and rehabilitation, Longshoremen's and Harbor Workers' Compensation Act" and (14), (43), and (46), wages due and repatriation of "American seamen".

B. Recommendations

31 U.S.C. § 43(b)--replace "widow" with "surviving spouse".

31 U.S.C. §§ 94, 101--replace "enlisted man" with "enlisted personnel".

31 U.S.C. §§ 97, 125--replace "widow" with "surviving spouse".

31 U.S.C. § 241--replace "father or mother, or both" with "either parent, or both," and "brother or sister, or both" with "either sibling, or both".

31 U.S.C. § 552--change in the proper name "4-H Boys and Girls Clubs" should reflect consolidation of the clubs to eliminate sex segregation, e.g., "4-H Youth Clubs" might be used to describe a consolidated organization.

31 U.S.C. § 725s--replace "Longshoremen" with "Longshore Workers" or "Stevedores" and "seamen" with "sailors".

Title 32--National Guard

Sections identified by print-out: 32 U.S.C. §§101, 714

A. Discussion

These sections were identified in the print-out because they contain programmed words. However, neither involves gender-based discrimination. 32 U.S.C. §101(18), part of a definition section, defines "spouse". 32 U.S.C. §714, relating to final settlement of accounts of deceased members, lists "father and mother" among survivors qualifying for payment in the absence of other designated individuals.

B. Recommendation

No substantive change is required in these sections. This Title, as all others, should be reviewed to eliminate unnecessary gender-based references. As part of the stylistic review, "father and mother" should be replaced by "parent".

Title 33--Navigation and Navigable Waters

Sections identified by print-out: 33 U.S.C. §§ 771, 772, 857, 857-4, 902, 905, 908, 909, 914

The print-out for this Title indicates sex-based differentials in employment-related benefits in three fields: the Bureau of Lighthouses and Lighthouse Service; the Coast and Geodetic Survey; and the Longshoremen's and Harbor Workers' Compensation Act. In light of 5 U.S.C. §7152, which mandates equal benefits for male and female government employees, and P.L. 92-576, which cures substantive differentials in benefits due to a surviving spouse under the Longshoremen's and Harbor Workers' Compensation Act, it appears that the substantive differentials in Title 33 are no longer operative. In keeping with a consistent program to conform terminology to the equality principle, however, each section discriminatory on its face should be amended, and unnecessary gender references should be eliminated.

I. Bureau of Lighthouses and Lighthouse Service

A. Discussion

33 U.S.C. §§ 771 and 772 extend benefits to "widows" of Lighthouse Service Personnel. Since the Lighthouse Service merged with the Coast Guard in 1939, these provisions apply only to civilian employees of the pre-1939 Lighthouse Service. (Coast Guard personnel should be covered by Title 14 benefit provisions.)

B. Recommendation

Although it has not been determined whether the pre-1939 Lighthouse Service included among its employees any female whose spouse might qualify under a nondiscriminatory scheme, consistent usage of sex-neutral terminology in the Code counsels changing references from "widow" to "surviving spouse".

II. Coast and Geodetic Survey

A. Discussion

33 U.S.C. §857 appears on the print-out merely because it refers to the "Servicemen's Indemnity Act of 1951," an Act repealed on August 1, 1956. 33 U.S.C. §857-4(a) mentions "officers and enlisted men" of the armed forces; 33 U.S.C. §857-4(c) extends rights to "widows" of members of the uniformed services.

B. Recommendations

No change is required in 33 U.S.C. §857. "Enlisted members" should replace "enlisted men" in 33 U.S.C. §857-4(a); "surviving spouse" should be substituted for "widow" in 33 U.S.C. §857-4(c).

III. Longshoremen's and Harbor Workers' Compensation Act (Chapter 18 of Title 33)

A. Discussion

P.L. 92-576, passed in 1972, amended the Longshoremen's and Harbor Workers' Compensation Act to eliminate substantive sex-based differentials. However, unnecessary gender references remain. For example, 33 U.S.C. §§ 902, 905, and 908 contain the sex-specific terms "longshoreman," "repairman," "husband or wife," "brother or sister," and "widow or widower". Probably due to congressional oversight, 33 U.S.C. §§ 909 and 914 still refer to "widow or dependent husband" and "remarriage of the surviving wife". These references are inconsistent with the 1972 amendment, "making surviving husbands and wives equally eligible for survivor benefits". (H. Rep. No. 92-1441.)

B. Recommendations

Sex-neutral references should be substituted for sex-specific terms wherever possible. The title of Chapter 18 might be changed to

"Stevedores' and Harbor Workers' Compensation Act" or "Longshore and Harbor Workers' Compensation Act". In 33 U.S.C. §902, "longshoreman" should be replaced by "longshore worker" or "stevedore"; "repairman" by "repairworker"; "brothers or sisters" by "siblings"; and "wife or husband" by "spouse". Similar changes should be made in 33 U.S.C. §§ 905 and 908.

33 U.S.C. §§ 909 and 914 should be revised to comport with the 1972 amendment extending equal benefits to surviving spouses of male and female employees. References to "widow or dependent husband" should be replaced by "surviving spouse". In 33 U.S.C. §909(b), the phrase "during widowhood or dependent widowerhood" should be changed to "while the surviving spouse remains unmarried".

Title 36 -- Patriotic Societies and Observances

Sections identified by print-out: 36 U.S.C. §§ 15, 18, 22, 23, 24, 25, 27, 28, 31, 32, 33, 34, 36, 39, 56, 57a, 67, 67b, 67d, 671, 78d, 85, 90e, 91, 92, 93, 97, 99, 100, 102, 113, 115, 141, 142, 147, 148, 155, 166, 167, 169, 174, 177, 273, 503, 535, 633, 691, 693, 697, 706, 763, 793, 799, 859, 881, 883, 887, 895, 896, 913, 941, 943, 945, 956, 973, 1001, 1003, 1005, 1007, 1017, 1018, 1042, 1101

Sections listed on the print-out for Title 36 fall into four categories: provisions concerning organizations which bestow material or educational benefits on their members; provisions dealing with patriotic or historical organizations whose membership requirements center around specified familial relationships; provisions containing unnecessary gender references; and other provisions that differentiate on the basis of sex.

I. Terminology

A. Discussion

Sections requiring only terminological revision contain unnecessary gender references and sex-specific words. 36 U.S.C. §15 names the "chairman" of the Senate and House Committees on the Library as heads of a commission to direct expenditures occasioned by the American Red Cross' use of a "Memorial Building to Women of World War I".

36 U.S.C. §§ 57a, 113, 633, 763, 793, 799, 859 describe organizations whose purpose is to assist, inter alia, widows; no corresponding reference to widowers appears in these sections. Membership in the

named organizations, however, is not specifically confined to men.*

36 U.S.C. §§ 67b, 166, 167, 177, 503, 913 refer to "men and women". 36 U.S.C. §90e extends membership in the Disabled American Veterans to "any man or woman" eligible. 36 U.S.C. §§ 67 and 67d appear on the print-out because they contain the proper name "Thad Males". Under 36 U.S.C. §85 the U.S. Blind Veterans of the World War may include "any ex-serviceman" eligible. 36 U.S.C. §155 includes "women" as group participants in "National Employ the Physically Handicapped Week". 36 U.S.C. §973 establishes the Agricultural Hall of Fame to honor "farmers and farm women". Sex-based terms appear in 36 U.S.C. §1101, which lists names of private corporations established under federal law.

B. Recommendations

Eliminate unnecessary gender references and replace sex-based terms with sex-neutral words, e.g., substitute "chairperson" for "chairman" in 36 U.S.C. §15, "surviving spouses" for "widows" in 36 U.S.C. §§ 57a, 113, 633, 763, 793, 799, 859, "persons" or "individuals" for "men and women" in 36 U.S.C. §§ 67b, 166, 167, 177, 503, 913.

No change is needed in 36 U.S.C. §§ 67, 67d, and 169. Revision

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* 36 U.S.C. §111 incorporates the Veterans of Foreign Wars as a "national association of men". However, in Stearns v. V.F.W., 353 F. Supp. 473 (D.D.C. 1973), the court concluded that analysis of the charter language revealed no congressional intent to restrict membership to males. "The use of the pronoun 'he' and the words 'enlisted man' cannot reasonably be construed to be anything more than grammatical imprecision in drafting the clause." The V.F.W.'s Constitution did limit membership to males, but the court held that, absent any discriminatory language in the charter itself, congressional chartering alone does not constitute "state action" violative of equal protection guarantees.

of 36 U.S.C. §155, in which "women" is used to mean women's groups, seems unnecessary. "Farm women" should be deleted from 36 U.S.C. §973 to eliminate the inference that all farmers are male.

Organizations that bestow material benefits on their members should consider a name change to reflect extension of membership to both sexes. 36 U.S.C. §1101 should be revised to conform to these changes.

II. Substantive

A. Discussion

1. Patriotic, historical organizations

Sections selected by the print-out incorporate nine patriotic organizations with single-sex membership. Seeking to promote patriotism and historical appreciation and scholarship, these social groups commemorate particular wars in which U.S. armed forces participated. 36 U.S.C. §18 refers to the Daughters of the American Revolution, and 36 U.S.C. §20a (not on print-out) establishes the D.A.R.'s male counterpart, the Sons of the American Revolution. The Ladies of the Grand Army of the Republic, (36 U.S.C. §78d), Sons of Union Veterans (36 U.S.C. §535), and the National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic (36 U.S.C. §§ 1001, 1003, 1005) are sex-segregated organizations which draw their membership from spouses and descendants of Civil War veterans. The Gold Star Mothers (36 U.S.C. §§ 147, 148), Blue Star Mothers (36 U.S.C. §§ 941, 943, 945, 956), and American War Mothers (36 U.S.C. §§ 91, 92, 93, 97, 99, 100, 102) are comprised of women whose sons or daughters served in the armed forces during World War I, World War II, the Korean War, or the Vietnam War.

The United Spanish War Veterans (36 U.S.C. §56) include "officers

and enlisted men" and "women who served honorably under contract or by appointment as Army nurses, chief nurses, or superintendents of the Army Nurse Corps . . . between April 21, 1898 and July 4, 1902."

2. Organizations which confer material benefits

Six organizations restricting membership to one sex furnish educational, financial, social and other assistance to their young members. These include the Boy Scouts (36 U.S.C. §§ 22-29), the Girl Scouts (36 U.S.C. §§ 31-34, 36, 39), Future Farmers of America (36 U.S.C. §273), Boys' Clubs of America (36 U.S.C. §§ 691, 693, 697, 706), Big Brothers of America (36 U.S.C. §§ 881, 883, 887, 895, 896), and the Naval Sea Cadet Corps (36 U.S.C. §1042). The Boy Scouts and Girl Scouts, while ostensibly providing "separate but equal" benefits to both sexes, perpetuate stereotyped sex roles to the extent that they carry out congressionally-mandated purposes. 36 U.S.C. §23 defines the purpose of the Boy Scouts as the promotion of ". . .the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." The purpose of the Girl Scouts, on the other hand, is ". . .to promote the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, cheerfulness, thriftiness, and kindred virtues among girls, as a preparation for their responsibilities in the home and for service to the community . . . ." (36 U.S.C. §33).

The Future Farmers of America, the Boys' Clubs of America, Big Brothers of America and the Naval Sea Cadet Corps currently have no counterpart organizations open to girls. These clubs provide valuable training and social activity not readily obtainable elsewhere to children and

adolescents.

3. Other substantive differentials

36 U.S.C. §671 provides that one out of eight elected officials of the Amvets be a woman.

36 U.S.C. §§ 141, 142, and 142d (not on print-out) establish Mother's Day and Father's Day as separate holidays. 36 U.S.C. §174 authorizes display of the flag on, inter alia, Mother's Day.

36 U.S.C. §177 prescribes different behavior in saluting the flag for men and women.

B. Recommendations

Historical tradition and the absence of any substantial distribution of benefits indicate that existing single sex patriotic organizations should be tolerated. However, the members may themselves wish to alter the organizations' composition so that they will not appear incongrous with conditions of life as we enter the century's final quarter. It is strongly recommended that Congress refuse to create such sex-segregated organizations in the future.

Social clubs designed to aid and educate young people, on the other hand, provide significant training, assistance, or access to personnel and facilities that may not be available elsewhere. These services should be provided to girls as well as boys. In some cases it may be more appropriate to establish separate clubs under one umbrella organization. For example, this solution appears suitable with respect to the Big Brothers of America. In other cases, the educational purposes of the clubs might best be served by extending membership to both sexes in a single organization. The Boys' Clubs of America has already taken a

step in this direction.* Where feasible, present club members might be consulted on their preferences. Review of the purposes and activities of all these clubs should be undertaken to determine whether they perpetuate sex-role stereotypes.

36 U.S.C. §671 is inconsistent with a fundamental corollary of the equality principle: officials should be elected on their merit, not on the basis of sex.

Differences in the authorized method of saluting the flag should be eliminated in 36 U.S.C. §177.

Replacing "Mother's Day" and "Father's Day" with a "Parents' Day" should be considered, as an observance more consistent with a policy of minimizing traditional sex-based differences in parental roles.

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* See N.Y. Times, June 23, 1974, p. 40, col. 7 (reporting that the Northwest Washington D.C. branch of the Boys' Clubs of America has opened membership to girls in the belief that "coed" programs help alleviate awkwardness among adolescents).

Title 37--Pay and Allowances of the Uniformed Services

Sections identified by print-out: 37 U.S.C. §§202, 401, 501, 551, 904, 905

I. Terminology (37 U.S.C. §§501(a)(3), (4), 551(1)(C))

A. Discussion

Provisions in this Title containing gender-based references that do not involve substantive differentials include: 37 U.S.C. §501(a)(3) (defining "parent"); 37 U.S.C. §501(a)(4) (defining "brother or sister"); 37 U.S.C. §551(1)(C) (referring to "mother or father").

B. Recommendation

Stylistic review should encompass deletion of gender-based words and substitution of neutral terms whenever feasible, for example, "sibling" should replace "brother or sister," "grandparents" "grandfather or grandmother".

II. Substance (37 U.S.C. §§202(k), 401, 501(a)(2)(D), (E), 551(1)(A), 904, 905)

A. Discussion

37 U.S.C. §202(k) relates to the pay grade of a woman officer promoted pursuant to 10 U.S.C. §5767(c), a section applicable to women only. In a sex integrated service, women would have the same opportunities as men; differentials relating to occupational specialities, promotion and pay would be eliminated.

37 U.S.C. §401 was identified by the print-out prior to its amendment by P.L. 93-64, 87 Stat. 147. Before amendment, this section provided that a person is not dependent on a female member unless the female member provides over one-half his support. The differential treatment of spouses of male and female members for pay and allowance purposes was declared unconstitutional in Frontiero v. Richardson, 411 U.S. 677 (1973), and the provision has been amended to eliminate the support test for the spouse and children of female members.

37 U.S.C. §§501(a)(2)(D), (E) supply distinct definitions for children born out-of-wedlock to male and female members.

37 U.S.C. §551(1)(A), relating to payments to missing members, lists "wife," but not "husband" among the missing member's dependents. Apparently, Congress did not advert to the possibility that a female member might become a missing person.

37 U.S.C. §§904, 905 relate to effective date of pay and allowances for officers of the Navy and Marine Corps. Both sections distinguish between "male officers" and "female officers". The distinctions are based on the differential promotion provisions for male and female officers. See 10 U.S.C. §§5751-5773. Changes in Title 10 to eliminate gender-based restrictions with respect to career opportunities in the military will require corresponding changes in 37 U.S.C.

B. Recommendations

Differentials in pay and allowance provisions, now tied to differentials in career and promotion opportunities (e.g., 37 U.S.C. §§202(k), 904, 905), would not survive a comprehensive revision designed to assure equal opportunity in the military, free from gender-based discrimination. See The Equal Rights Amendment and the Military, 82 Yale L.J. 1533, 1544 (1973). As part of the revision , care must be taken to assure that appropriate transition provisions are made for present female members who have not had equal opportunity for certain duty assignments, training, and promotion. The continuing effects of past discrimination render it unfair and inappropriate to compare these female members with their male counterparts under a single set of promotion standards. Affirmative action is necessary to provide female members with opportunities for training up to now denied to them. When such action is not feasible, for example, when the female member's length of service makes it impossible to turn back the clock, provision should be made to assure that past discrimination does not operate to the disadvantage of the female member.

Provisions relating to benefits for children born out of wedlock, e.g., 37 U.S.C. §§501(a)(2)(D), (E), should be reviewed to assure that no substantive differential is retained based on the birth status of the child.* Current sex specific definitions reflect the greater proof problem involved in establishing male parental status. However, consolidated definition is feasible and, in line with a consistent pattern of sex-neutral references, preferable to the gender-based definitions now supplied. For example, 37 U.S.C. §501(a)(2) might read:

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* See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972).

(D) a child whose official birth certificate names the decedent as a parent; and

(E) a child to whose support the decedent has been judicially ordered to contribute, or of whom the decedent has been judicially decreed to be the parent, or of whom the decedent has acknowledged parentage in writing under oath.

37 U.S.C. §551(1)(A) should be amended to reflect the reality that a female as well as a male member may become a missing person. Substitution of "spouse" for "wife" in this subsection is required to render the provision consistent with the Supreme Court's ruling in Frontiero v. Richardson, 411 U.S. 677 (1973), and, a fortiori, with the equal rights principle.

Title 38--Veterans' Benefits

Sections identified by print-out: 38 U.S.C. §§ 101, 102, 103, 106, 302, 315, 321, 322, 341, 358, 402, 410, 411, 412, 413, 414, 415, 416, 417, 503, 505, 507, 531, 532, 533, 534, 535, 536, 537, 541, 542, 543, 544, 601, 701, 712, 716, 718, 722, 753, 765, 767, 768, 770, 773, 774, 1651, 1652, 1700, 1701, 1801, 1802, 1803, 1823, 1826, 3001, 3010, 3020, 3021, 3101, 3102, 3104, 3107, 3110, 3111, 3202, 3203, 3402, 3503, 5202

Prior to 1972, veterans benefits followed the familiar pattern: benefits accorded wives and widows were denied husbands and widowers of veterans. P.L. 92-540 provided the substantive cure required by the equality principle. However, retroactive extension of benefits for spouses of female veterans was not specified by Congress. Under the equal protection principle, the equalization should be retroactive. See Frontiero v. Richardson, 411 U.S. 677 (1973) (differentials in benefit provisions for male and female service members and their families violate equal protection principle implicit in fifth amendment).

I. Terminology

A. Discussion

38 U.S.C. § 102(b), as amended in 1972 by P.L. 92-540, eliminated principal substantive differentials in Title 38 by supplying an atypical definition provision: the section stipulates that "wife" includes the husband of a female veteran, "widow," the widower of a female veteran. Although this alteration accomplished the change necessary to eliminate discrimination in benefit allocations, a consistent

program to conform terminology to the equality principle requires replacement of unnecessary gender references throughout the Title.

Sections in which sex-based words appear include 38 U.S.C. §§ 102(a), 315(1), 322(a), 718(a), (b), and 5202(b) ("father, mother"); 38 U.S.C. §§ 718(a), (b), 5202(b) ("grandfather, grandmother"); 38 U.S.C. §§ 716(b), 718(a), (b), 753, 5202(b) ("brother, sister"); 38 U.S.C. §§ 701(2), 716(b), 718(a), (b), 722(b)(2), 765(7), 770(a), (f) ("widow, widower"); 38 U.S.C. § 1002 ("wife, husband"); 38 U.S.C. § 1651 ("service men and women").

"Widow," since the 1972 revision a term that means widowed person, appears unjoined by "widower" in 38 U.S.C. §§ 101(13), (14), (15), 103(a), (d), 302, 321, 322(a), (b), 341, 402(d), 410, 411, 412(b), 413, 414(b), (c), 416(a), (b), 503(a), (c), 541, 542, 543, 544, 1700, 1701(a), 1801(a), 1826(b), 3001(b), 3010(k), (l), (m), 3021(a), 3104(b), 3107(b), 3110, 3202(g). Similar terminology in 38 U.S.C. § 417 was cured by amendment in 1971. 38 U.S.C. §§ 531-537 refer to "widows" of veterans of the Mexican, Civil, Indian, and Spanish-American Wars. "Wife" not coupled with "husband" appears in 38 U.S.C. §§ 103(c), 315(1), 358, 503(a), 505(b), 507, 1652(d), 1700, 1701(a), 1801(a), 1802(g), 3107(a), (c), 3202(f), 3203(a), (b), and (c), 3503(b). In 38 U.S.C. §§ 103(a), (c), 414(b), (c), the word "woman" is used to refer to the veteran's spouse. In other sections, "husband" refers to the veteran, "wife" or "widow" to the non-veteran spouse. E.g., 38 U.S.C. §§ 411(a), 414(b), (c), 1801(a).

Sex-specific terms appear in definitional provisions 38 U.S.C. §§ 101(5) and 701(4) ("widow, "widower," "father," "mother").

38 U.S.C. §§ 765 and 1652 refer to a "midshipman" attending a service academy or serving in the Reserve Officers' Training Corps.

38 U.S.C. § 3020 furnishes instructions to "postmasters" respecting delivery of benefit checks.

Throughout Title 38 "serviceman" is the appellation given to a member of the armed forces. 38 U.S.C. §§ 415(g), 503(a), 767(a), 768(b), (c), 770(f), (g), 773, and 774 deal with "servicemen's group life insurance". 38 U.S.C. §§ 415(g), 416(e), 503(a), and 3021(a) refer to "servicemen's indemnity," a term deleted from 38 U.S.C. § 3101 in a 1972 amendment (P.L. 92-328). References to the Servicemen's Indemnity Act of 1951 or the Servicemen's Readjustment Act of 1944, both repealed in the 1950s, appear in 38 U.S.C. §§ 416(e), 712(d), 1801(b), 1803(c), 1823(a).

38 U.S.C. § 3402(c) provides for recognition of an "enlisted man" as a claims agent.

B. Recommendations

Unnecessary gender references, wherever they appear, should be replaced by sex-neutral terms: "spouse" for "wife or husband," "sibling" for "brother or sister," "parent" for "mother or father," "surviving spouse" for "widow or widower," etc.

Words with masculine connotation, e.g., "midshipman" (38 U.S.C. §§ 765, 1652) and "postmaster" (38 U.S.C. § 1020) should

be replaced by suitable neutral terms, perhaps "cadet" and "post office director".

"Service member(s)" should be used to refer to members of the armed forces, replacing "service men and women" (38 U.S.C. § 1651), "serviceman" and "servicemen" (38 U.S.C. §§ 415(g), 416(e), 503(a), 767(a), 768(b), (c), 770(f), (g), 773, 774, 3101, 3021(a)), and "enlisted man" (38 U.S.C. § 3402).

Changing the proper names of the Servicemen's Indemnity Act of 1951 and the Servicemen's Readjustment Act of 1944, both of which have been repealed and replaced by other provisions of Title 38, would be inappropriate. Historical revision should not be part of a program to amend laws currently in force.

Sex-specific terminology in Title 38 should be revised to conform to the substance of the 1972 amendment. "Widow" appearing alone should be replaced by "surviving spouse". Where "man" or "husband" refers to the veteran and "woman" or "wife" to the spouse, terms such as "member" and "spouse" should be substituted.

II. Substance

A. Discussion

38 U.S.C. § 101(3) defines "widow"* as the wife of a veteran at the time of his death "who lived with him continuously from the date of the marriage to the date of his death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse) . . . ." The parenthetical

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* Pursuant to 38 U.S.C. § 102(b), "widow" means widowed person of either sex.

qualification bears reconsideration in light of the growing trend in the states to adopt no-fault divorce laws. See, e.g., the ABA-approved Uniform Marriage and Divorce Act, which establishes "irretrievable breakdown" of a marriage as the sole basis for divorce.

38 U.S.C. § 3020 prohibits delivery of benefit checks to "widows" whom the postal employee believes to have remarried, "unless the mail is addressed to such widow in the name she has acquired by her remarriage." As written the provision implies that women automatically acquire a new name upon remarriage, an implication inconsistent with current law and the equality principle. (A spouse's surname, whether wife's or husband's, would be acquired only by choice as demonstrated by constant usage following the marriage.)

38 U.S.C. §§ 101(4), 765(8), (9), and 701(3) define "child" to include an illegitimate child under specified conditions. Current sex specific provisions reflect the greater proof problem involved in establishing male parental status. Pursuant to 38 U.S.C. §§ 101 and 765 an illegitimate child qualifies for servicemen's group life insurance benefits under his father's policy if the veteran acknowledged the child in a signed writing, was judicially ordered to contribute to the child's support, or, before his death, was judicially decreed to be the child's father. 38 U.S.C. § 765 provides additionally for proof of paternity by certified copy of the child's birth record or baptismal certificate, showing that the insured was the informant and named as father, or by service department or other public records showing that, with his knowledge, the insured was named as father.

38 U.S.C. § 101 includes a catch-all: "[the veteran] is otherwise shown by evidence satisfactory to the Administrator to be the father of such child." 38 U.S.C. § 701(3), which defines "child" for National Service Life Insurance purposes, includes an illegitimate child only if the child has been designated a beneficiary by the insured.

38 U.S.C. § 106(a)(1) deems service by "any woman" in the Women's Army Auxiliary Corps before Oct. 1, 1943 to be active service for the purpose of Title 38.

38 U.S.C. § 601(4)(c) defines "Veterans' Administration facility" to include private facilities with which the Administrator contracts to provide hospital care for women veterans. Legislative history of this provision indicates a congressional purpose to save money and promote administrative convenience by utilizing existing facilities rather than building new ones to accommodate women veterans.

B. Recommendations

Consideration should be given to revision of 38 U.S.C. § 101(3) to reflect the trend toward no-fault divorce, perhaps by substituting "except where there was a separation followed by reconciliation" for the current parenthetical qualification. To avoid the suggestion that willy nilly a woman acquires her new husband's name upon remarriage, 38 U.S.C. § 3020(b) might be amended to read: " . . . if the postal employee believes that he/she has remarried (unless the employee has reason to believe that the sender knows of the remarriage)."

Proof of parentage provisions, e.g., 38 U.S.C. § 101(4), 765(8), (9), should be examined and, to the extent feasible, made uniform and sex-neutral throughout the Code. Cf. revisions suggested for 37 U.S.C. § 501(a)(2) and 10 U.S.C. § 1477(b). Moreover, distinctions between benefit entitlement of children born in and out of wedlock, e.g., 38 U.S.C. § 701, unfairly penalize children for parental conduct over which they have no control. Cf. Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972). Birth status should not be retained as a basis for substantive differentials.

No change is recommended in 38 U.S.C. § 106(a)(1), the provision rendering women who served in the Women's Army Auxiliary Corps, disbanded in 1943, eligible for veterans' benefits. Without this provision these women would not be accorded benefits since the Corps was not considered part of the regular Army.

38 U.S.C. § 601(4)(c), providing for contract private hospital care for women veterans, is not necessarily discriminatory, given the constitutionally protected privacy interest involved and biologically-mandated services and equipment. However, investigation is appropriate to determine whether hospital facilities available to female veterans are in fact equal (in terms of accessibility and quality) to facilities administered by the VA for male veteran care.

Title 39--Postal Service

Sections identified by print-out: 39 U.S.C. §§ 3008, 3010, 3011

The sections identified regulate distribution of unsolicited sexually oriented advertisements through the mails. These sections implement congressional intent to permit individuals to protect themselves and their children from unwarranted intrusion into their homes of material they find offensive. See Section 14 of P.L. 91-375, reproduced in the comment to 39 U.S.C.A. § 3010. Such individuals may notify the Postal Service which shall thereupon issue a judicially enforceable order to the mailer to cease mailing the material to the complainant.

These provisions do not create or refer to discrimination between the sexes. Accordingly, no change is recommended.

Title 40--Public Buildings, Property and Works

Sections identified by print-out: 40 U.S.C. §§ 166b-4, 210, 270d

All sections listed on the print-out raise terminological problems; none involves substantive differentials.

A. Discussion

40 U.S.C. § 166b-4, on gratuities for survivors of deceased employees under the jurisdiction of the Architect of the Capitol, refers to the "chairman" of the Committee on House Administration and to the "widow or widower" of the employee. Other unnecessary gender-based words in this Title include "watchman" (40 U.S.C. § 210) and "plainclothesman" (40 U.S.C. § 206a, not listed on print-out). 40 U.S.C. § 210, on equipment for Capitol police, limits the cost to a stipulated amount "per man".

40 U.S.C. § 270d, a definitional section, states that the masculine pronoun as used in 40 U.S.C. §§ 270a-270c shall include all persons whether individuals, associations, copartnerships, or corporations.

B. Recommendations

40 U.S.C. § 166b-4--substitute "chairperson" for "chairman"; "surviving spouse" for "widow, widower" (twice).

40 U.S.C. § 206a(4)--substitute "plainclothesperson" for "plainclothesman".

40 U.S.C. § 210--substitute "watchperson" for "watchman"; change "per man" to "per person".

40 U.S.C. § 270d--amend to conform to solution adopted throughout the Code for pronoun usage.

Title 41--Public Contracts

Sections identified by print-out: 41 U.S.C. §§ 35, 36

A. Discussion

41 U.S.C. §§ 35, 36 incorporate sex/age differentials with respect to child labor. The distinctions are substantive and inconsistent with the equality principle. Cf. Lamb v. Brown, 458 F.2d 18 (10th Cir. 1972); In Matter of Patricia A., 31 N.Y. 2d 83, 335 N.Y.S.2d 33 (1972).

41 U.S.C. § 35 calls for stipulations by those with public contracts exceeding $10,000 to the effect that no male under sixteen years of age and no female under eighteen will be employed by the contractor. (41 U.S.C. § 36 concerns the penalty for violation of 41 U.S.C. § 35.) The differential is probably similar in origin to state "protective" laws setting limitations on age, working hours, weight-lifting and other conditions of employment for women workers but not for men. Limitations of this kind operate to restrict employment opportunities for women and to protect males from female competition for jobs. They are impermissible under Title VII of the Civil Rights Act of 1964. See, e.g., Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (weight-lifting); Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973) (age).

B. Recommendations

41 U.S.C. § 35(d) should read as follows: "That no person under sixteen years of age . . . will be employed by the contractor . . . ."

Correspondingly, 41 U.S.C. § 36 should read: "Any breach or violation of . . . section 35 . . . shall render the party responsible therefor liable . . . for liquidated damages, . . . the sum of $10 per day for each person under sixteen years of age . . . ."

Title 42 -- The Public Health and Welfare

Sections identified by print-out: 42 U.S.C. §§ 213, 241, 242c, 262, 263a, 289d, 289g, 289h, 295h-9, 298b-2, 402, 403, 405, 409, 410, 411, 413, 414, 415, 416, 417, 422, 423, 425, 427, 428, 602, 606, 607, 622, 625, 633, 701, 703, 705, 706, 708, 711, 712, 1108, 1307, 1410, 1477, 1571, 1572, 1573, 1575, 1581, 1587, 1590, 1652, 1701, 1761, 1773, 1922, 1986, 2000e-2, 2000e-3, 2000e-5, 2304, 2333, 2571, 2674, 2711, 2713, 2716, 2717, 2728, 3123, 3374, 3411, 3781, 4321, 4331, 4332, 4371, 4372, 4419, 4701, 4722, 4728, 4881

Sex-based references pervade this Title. Although many of the identified provisions require only terminological revision, invidious substantive differentials abound in Title 42, most conspicuously in Social Security, Welfare and related social legislation.*

I. Terminology

A. Discussion

Following the general pattern, high federal officials, for example, the Secretary of Health, Education and Welfare, the Surgeon-General, and the Secretary of Defense, are designated throughout as "he". See 42 U.S.C. §§ 241, 242c, 417(e)(3), 703, 1108, and 3374. Other references not discriminatory in effect, but unnecessarily gender-based, include: "man" used to mean humanity or human (42 U.S.C. §§ 241, 262, 263(a), 4321, 4331, 4332, 4371, 4372); "manpower" (42 U.S.C. §§ 602(a)(19)(A), 2571 [repealed],

* For description of shortcomings in federal social legislation that contribute to the high incidence of economic insecurity among women, see Women and Poverty, Staff Report, U.S. Commission on Civil Rights, June, 1974.

4722, 4881 [omitted, and now covered by 29 U.S.C. §848]); "salesman" (42 U.S.C. §§ 410(j)(3)(B), (D)); "midshipman" (42 U.S.C. §410(m)(3)); "chairman" (42 U.S.C. §§ 1108, 4372); college "fraternity and sorority chapters" (42 U.S.C. §410(a)(2)); "serviceman" or "servicemen" (42 U.S.C. §§ 213(d), 416(k) (title), 1410(g)(2), 1477, 1571, 1572, 1573, 1575, 1581(d)(1), 1587, 1590, 3374(a)(1)); "workmen's compensation" (42 U.S.C. §§ 633(f)(4), 4881); "enlisted men's clubs" (42 U.S.C. §1701(a)(3)); "American boy or girl citizens" (42 U.S.C. §1922); "son or daughter" (42 U.S.C. §§ 402, 403, 409, 410, 411, 416, 423, 2304); "mother or father" (42 U.S.C. §§ 402, 403, 409, 410, 411, 416, 423, 606, 1652(b), 1701(c), 2304, 3411); "grandfather or grandmother" (42 U.S.C. §§ 606, 2304); "brother or sister" (42 U.S.C. §§ 606, 2304, 3411); "stepfather or stepmother" (42 U.S.C. §§ 402(d)(4), 606); "stepbrother or stepsister" (42 U.S.C. §606); "stepson or stepdaughter" (42 U.S.C. §410); "wife or husband" (42 U.S.C. §§ 402, 403, 405, 409, 410, 411, 416, 422, 1307, 1701(c), 3411); "husband and wife" (42 U.S.C. §2333); "widow or widower" (42 U.S.C. §§ 402, 403, 405, 409, 410, 411, 416, 422, 1307); "men and women" (42 U.S.C. §1108).

Throughout the Social Security provisions of Title 42, "woman, wife former wife divorced, or widow" are used alone without male counterparts because of the pervasive sex discrimination now embodied in the Social Security system. Language changes sex-neutralizing these provisions are recommended. These changes entail eradication of substantive differentials. For discussion and recommendations, see II. B. infra.

Sections in which gender references are made, without discriminatory effect and for an appropriate purpose, include: 42 U.S.C. §§ 295h-9, 298b-2, 2000e-2, 2000e-3, 2000e-5, 3123, 4419, 4701, 4881(g) (sections prohibiting sex discrimination); 42 U.S.C. §242c (identifies sex as a factor, among others, to be included in health surveys); 42 U.S.C. §4722 (explicit

provision for recruitment of females as well as other groups historically disadvantaged in the labor market for administrative posts in state and local governments); 42 U.S.C. §4881 (sex of participants in specified public service employment programs must be identified -- section designed to assure equal employment opportunity); 42 U.S.C. §4728 (state and local government employees and persons applying for such employment shall not be required to divulge information concerning their sexual attitudes or conduct. Three such provisions -- 42 U.S.C. §2571 (federal job training shall be provided to men and women) and 42 U.S.C. §§ 2711 and 2713 (men or women as Job Corps enrollees) -- were repealed in 1973 by P.L. 93-203.

B. Recommendations

42 U.S.C. §§ 241, 242c, 417(e)(3), 703, 1108, 3374 -- use "the Secretary," "the Surgeon General" in place of "he" [alternatively, use "he/she"].

42 U.S.C. §§ 241, 262, 263(a), 4321, 4331, 4371, 4372 -- replace "man" with "humanity".

42 U.S.C.§§ 4331, 4332 -- where appropriate, replace "man" with "human".

42 U.S.C. §§ 602(a)(19)(A), 4722, 4881 -- replace "manpower" with "human resources".

42 U.S.C. §410(j)(3)(B), (D) -- replace "salesman" with "sales personnel" or "salesperson".

42 U.S.C. §410(m)(3) -- replace "midshipman" with "midshipperson".

42 U.S.C. §§ 1108, 4372 -- replace "chairman" with "chairperson".

42 U.S.C. §410(a)(2) -- replace college "fraternity and sorority chapters" with college "social societies".

42 U.S.C. §§ 213(d), 416(k), 1410, 1477, 1571, 1572, 1573, 1575, 1581, 1587, 1590, 3374 -- where appropriate, replace "serviceman" with "service member," or "service personnel"; change is inappropriate in,

e.g., 42 U.S.C. §213(d), where "servicemen's" appears as part of the title of a repealed act.

42 U.S.C. §§ 633(f)(4), 4881 -- replace "workmen's compensation" with "workers' compensation".

42 U.S.C. §1701(a)(3) -- replace "enlisted men's clubs" with "enlisted members' [or persons'] clubs".

42 U.S.C. §1922 -- replace "American boy or girl citizens" with "young American citizens".

42 U.S.C. §§ 402, 403, 409, 410, 411, 416, 423, 2304 -- replace "son or daughter" with "child(ren)".

42 U.S.C. §§ 402, 403, 409, 410, 411, 416, 423, 606, 1652(b), 1701(c), 2304, 3411 -- replace "mother or father" with "parent(s)".

42 U.S.C. §§ 606, 2304 -- replace "grandfather or grandmother" with "grandparents".

42 U.S.C. §§ 606, 2304, 3411 -- replace "brother or sister" with "sibling(s)".

42 U.S.C. §§ 402(d)(4), 606 -- replace "stepfather or stepmother" with "stepparent(s)" and "stepbrother" or "stepsister" with "stepsibling(s)".

42 U.S.C. §410 -- replace "stepson or stepdaughter" with "stepchildren".

42 U.S.C. §§ 606, 2304 -- retain "uncle or aunt" and "nephew or niece" since sex-neutral substitutes are not currently available.

42 U.S.C. §§ 402, 403, 405, 409, 410, 411, 416, 422, 1307, 1701(c), 3411 -- replace "wife or husband" with "spouse".

42 U.S.C. §2333 -- replace "a husband and wife" with "spouses" or "a married couple".

42 U.S.C. §§ 402, 403, 405, 409, 410, 411, 416, 422, 1307 -- replace "widow or widower" with "surviving spouse".

42 U.S.C. §1108 -- replace "men and women" with "persons" or "individuals".

II. Substance

A. Provisions relating to the Health and Welfare of Mothers and Children: Discussion and Recommendations

Variously worded references to maternity appear in Title 42. 42 U.S.C.

§§ 289d, 289g, and 289h concern establishment of the National Institute of Child Health and Human Development to study, inter alia, maternal health and the special health problems and requirements of mothers. These statutes, although they indicate the orientation of the Institute towards mother, child and human development, do not foreclose investigation relating to men. In fact, as part of a study of population growth and control, the Institute is currently investigating the male physical reproductive process, male behavioral responses to family planning, and male contraceptive techniques.* Consistent with the equal rights principle, the statutory references should be to parental (maternal and paternal) roles in child health and human development.

42 U.S.C. §§ 701, 703, 705, 706, 708, 711, and 712 contain numerous references to maternal health.** These provisions appear in Subchapter V of the Social Security Act, which concerns federal aid to the states for maternal and child health and crippled children's services. The statutory scheme provides federal aid to state programs for the improvement of medical care given expectant mothers, post-partum mothers, and infants. Aid is provided principally for maternal and infant care in low income and isolated areas,*** and for research projects.

Men cannot bear children, therefore these provisions, on the whole, are unobjectionable. Although the legislative history*** suggests a congressional assumption that only mothers would bring children to clinics supported by the legislation, nothing in the statutory text precludes

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* Telephone interviews with Merrill S. Read, Acting Associate Director of Extramural Programs, National Institute of Child and Human Development, Feb. 22, 1974, and Arthur Campbell, Deputy Director of Center for Population Research and Control, National Institute for Child and Human Development, Feb. 21, 1974.

** No grant is to be given under this provision after June 30, 1974.

*** S. Rep. No. 744, 90th Cong. 1st Sess. (as reported in 1967 U.S. Code Cong. & Admin. News, 3031, 3033).

fathers from utilizing the child health services. Two of these provisions, 42 U.S.C. §§ 705(a)(12) and 706(e), refer to "family planning services for mothers". The legislative history indicates that provision of birth control to families was the objective Congress had in view.* Consistent with this objective and with the equal rights principle, family planning services authorized by these statutes should be available to men as well as women.

42 U.S.C. §2674 regulates state receipt of federal funding for health programs, including maternal and child health services. The considerations noted in the preceding paragraph regarding 42 U.S.C. §701 et al. apply as well to §2674.

42 U.S.C. §602(a)(17)(A)(i), part of the statutory scheme for Aid to Families with Dependent Children, relates to situations in which a child's paternity is not known to the state. The possibility that a child's maternity may be unknown to the state is not contemplated. Presence of the mother at the time of birth may render highly exceptional cases in which a child's maternity will be undisclosed. Nonetheless, sex-neutralization of the provision is appropriate and consistent with revisions proposed in II.C. infra to eradicate the sex differentials now characteristic of federal welfare legislation.

42 U.S.C. §§ 625, 1761, and 1773 contain the phrase "children of working mothers" and "areas in which there are high concentrations of working mothers". Intended beneficiaries of these sections are children who receive inadequate care because their parents' employment requires them

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* S. Rep. No. 744, 90th Cong. 1st Sess. (as reported in 1967 U.S. Code Cong. & Admin. News, 3031, 3033).

to be absent from the home. Both single parent and two-parent families were contemplated by Congress. See H. Rep. No. 1114, 90th Cong. 2d Sess. 2 (1968). Traditional habits of thought, not purposeful discrimination between similarly situated children, led Congress to use "working mothers" as a surrogate for functional description. What Congress meant was children with no parent in the home during working hours.

The term "working mothers" should be replaced by functional description that does not rest on preconceived sex-role assignments. Reference to "working mothers" reflects the familiar stereotype of woman as the natural guardian of children, a person who works only because the father has deserted the family, or because the meager salary provided by the male breadwinner must be supplemented. The legislative texts thus reinforce outmoded assumptions that women work only out of necessity, that day care and other children's services benefit only the female parent, and that in a single parent family, the parent will be female.

Since "working mothers" is neither an appropriate nor an accurate description, it should be replaced by a sex-neutral phrase that will better convey the intent of Congress to provide for children in need of care due to the work obligations of their parents.

Statutes concerning "mothers and children" should be recast to deal with "parents and children".* Specific recommendations include:

42 U.S.C. §§ 289d, 289g, 289h -- replace "mothers" with "parents" and "maternal" with "parental".

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* The sole exceptions are provisions relating narrowly and specifically to childbearing, a function unique to women (42 U.S.C. §§ 701-712, 2674).

42 U.S.C. §§ 705(a)(12), 706(e) -- replace "family planning for mothers" with "family planning".

42 U.S.C. 602(a)(17)(A)(i) -- replace "paternity" with "parentage".

42 U.S.C. §§ 625, 1761, 1773 -- replace "working mothers" with "children in families where both parents are gainfully employed, or where one parent is deceased, absent from the home, or physically or mentally incapacitated and the other parent is gainfully employed".

42 U.S.C. §1761(a) -- replace "areas where there are high concentrations of working mothers" with "areas where there are high concentrations of families in which both parents are gainfully employed or in which one parent is deceased, absent from the home, or physically or mentally incapacitated and the other parent is gainfully employed".

B. Social Security (Old Age, Survivors and Disability Insurance Benefits): Discussion and Recommendations

> The concept that a man is responsible for the support of his wife and children led to the creation of a broad structure of social security family protection. At the same time, the steady growth of labor-force participation by women, particularly married women, has been reflected in a phenomenal growth in the number of women entitled to benefits on the basis of their own earnings records. Complaints that the . . . system discriminates against women have proliferated as a result of this growth.

Bixby, Women and Social Security in the United States, 35 Social Security Bulletin 3, 11 (1972).

A product of "the sociological conditions and climate of the 1930's,"* and amended piecemeal on several occasions thereafter, the Social Security Act retains glaring sex differentials in the qualification of

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* A Matter of Simple Justice, Report of the President's Task Force on Women's Rights and Responsibilities 11 (1970).

spouses for benefits and imposes an unfair burden on families with two earners. Further, the legislation has been criticized for shortcomings from the viewpoint of the homemaker and for inadequately responding to the work patterns of women. For recent commentary, see Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534 (1974); Note, Sex Classifications in the Social Security Benefit Structure, 49 Indiana L.J. 181 (1973); Women and Poverty, Staff Report, U.S. Commission on Civil Rights 109-117 (June, 1974). In some instances, for example, eradication of differential treatment for male and female spouses of insured individuals, solutions are apparent and should not unduly burden the fisc. In other cases, remedies are less readily devised. However, it is abundantly clear that the system requires thoroughgoing overhaul.* See Alberts, Catch 65, The New York Times Magazine, August 4, 1974, p. 11.

The principal focus of this commentary is on sex-neutralizing the current statutory framework.

Benefits that accrue to the spouse (or former spouse) of a male insured individual but not to the spouse (or former spouse) of a female insured individual: (1) 42 U.S.C. §402(g) provides a benefit for a mother, but not for a father, responsible for care of a child of the deceased wage earner**; (2) 42 U.S.C. §§ 402(b)(1) and (e)(1) provide benefits

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* A differential in benefit computation for workers retiring at age 62 was incorporated in 42 U.S.C. §415 until 1972. Despite a decision upholding the differential, Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968), Congress phased it out over a three-year period. P.L. 92-603, §104 (prospectively extending to men the more favorable computation formula previously reserved for women).

** 42 U.S.C. §402(g) has been declared unconstitutional to the extent that it excludes fathers from benefits. Wiesenfeld v. Secretary of Health, Education and Welfare, 367 F.Supp. 981 (D. N.J. 1973), U.S.S.C. appeal pending.

for a divorced wife and surviving divorced wife, but not for a divorced husband* or surviving divorced husband, of an insured individual.

Benefits that accrue to a female spouse without regard to dependency but to a male spouse only if he received at least one-half his support from his wife: (1) under 42 U.S.C. §§ 402(b) and (e), when a husband retires, dies or becomes disabled, his wife may receive benefits whether or not she is dependent upon him; (2) under 42 U.S.C. §402(c) and (f), when a wife retires, dies or becomes disabled, her husband may qualify for benefits only if he was dependent upon her for at least half his support.** (The same differentials apply to payments to disabled widows and widowers.)

Underlying these differentials is the notion that the woman's efforts in the economic sector are less important than the man's. His work should yield protection for the family; hers need not. This facet of the "male breadwinner" concept has long operated to deny women equal employment opportunity and fair remuneration for their labor. Differentials of the kind embodied in 42 U.S.C. §§ 402(b), (c), (e) and (f) have been declared unlawful under Title VII of the Civil Rights Act of 1964, as amended. See 29 C.F.R. §1604.9(d). They appear inconsistent with the equal protection principle.*** See Frontiero v. Richardson, 411 U.S. 677 (1973).**** They are

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* Divorced wives qualify only if the marriage endured for twenty years, a period difficult to view as "reasonable" in light of the current rate of marital breakdown.

** Further, a widow may draw on a deceased husband's account so long as she is not currently married; a widower must not have ever remarried.

*** Several cases now pending in various federal courts challenge gender-based differentials in 42 U.S.C. §402 noted above. A current list of such cases may be obtained from the Women's Rights Project, American Civil Liberties Union, 22 East 40 Street, New York, New York 10016.

**** Frontiero declared unconstitutional a dependency test for housing and medical and dental benefits imposed on male, but not female, spouses of armed service members. But cf. Kahn v. Shevin, 94 S.Ct. 1734 (1974) (gender line regarded by Supreme Court as operating solely to alleviate economic hardship encountered by women upheld).

difficult to reconcile with the sex neutrality mandated by 5 U.S.C. §7152, and their square conflict with the equal rights principle is beyond debate.*

The "dual eligibility" problem. A woman qualifying as both a wife (or widow) and an insured individual in her own right is entitled to the larger of the two benefits, but nothing more. The result, a married woman who pays social security taxes all her working life may receive retirement benefits no larger than if she had never made contributions to the social security fund. And if she does receive an extra amount reflecting her own wage earner status, for that amount, she will have contributed disproportionately to the fund. Moreover, a retired two-earner couple may receive less in benefits than a single-earner family that had the same total earnings and paid less in social security taxes. See Griffiths, supra, at 536-37; Women and Poverty, supra, at 113-14.

Other discriminatory aspects and reform proposals. 42 U.S.C. §411(a)(5)(A) follows the language of 26 U.S.C.§1402(a)(5)(A) of the Internal Revenue Code, providing that, for couples in community property jurisdictions, all gross income and deductions attributable to a trade or business shall be treated as gross income and deductions of the husband, unless the wife exercises substantially all management and control, in which case the attribution will be to her. This provision has a nondiscriminatory purpose, but the language should be revised as suggested in the Title 26 analysis.

Coverage for a homemaker in her or his own right has been proposed, see Griffiths, supra, at 535-36. Other countries have accorded some recognition to work in the home as an independent basis for social insurance. See Hoskins & Bixby, Women and Social Security: Law and Policy in Five Countries, U.S. Dept. of HEW, Office of Research and Statistics, Research Report No. 42, DHEW Pub. No.

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* Elimination of the dependency test for men will affect a relatively small class. Only in the case where the wife is an insured individual and the husband is not, or when a husband's primary insurance amount is less than his wife's will coverage be extended.

(SSA) 73-11800. The interruption or curtailment of labor market participation occurring when a person (today, almost invariably a woman), by choice or necessity, devotes a substantial portion of her time to child rearing, occasions two problems: (1) she may lack required quarters of coverage for disability benefits*; (2) "low earning" years may reduce her level of retirement benefits**. Proposed responses include dropping the currently insured requirement for disability benefits and increasing the number of years that can be ignored in computing average earnings. See Women and Poverty, supra, at 116.

To eliminate differentials in benefits provided for families of men and women workers, the following changes are appropriate:

42 U.S.C. §§ 402-428, 1307 -- substitute "spouse" for "wife" and "husband"; substitute "surviving spouse" for "widow" and "widower"; substitute "individual" for "woman" and "she".

42 U.S.C. §§ 402(c), (f), 416(f), (g) -- delete these subsections and all references to them.

42 U.S.C. §402(g) -- strike the title "mother's insurance benefits"; an appropriate substitute is "child-in-care benefits".

42 U.S.C. §§ 402(b)(4)(B), (d)(5) -- revise language following "except that" to the extent necessary to eliminate gender-based differentials.

42 U.S.C. §413(a) -- delete differential age requirements for men and women.

42 U.S.C. §411(a)(5)(A) -- delete the presumption that husband controls, perhaps by amending the provision to attribute gross income and deductions to the spouse who in fact exercises control of the business.

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* Currently, 90% of working men, but only 40% of working women are insured for disability benefits. Testimony of Robert M. Ball (The Treatment of Women Under Social Security) before the Joint Economic Committee, 93d Cong. 1st Sess., July 25, 1973.

** In June 1973, retired women workers were paid an average monthly benefit of $144; the average for men was $181. Mallon, Women Born in the Early 1900's: Employment, Earnings and Benefit Levels, Social Security Bulletin (March, 1974).

42 U.S.C. §§ 427, 428 -- add "divorced spouse" and "surviving divorced spouse" to the beneficiary catalogue.

Several proposals have been made to deal with the "dual eligibility" problem. See, e.g., H.R. 1507 (93d Cong.), Griffiths, The Law Must Reflect the New Image of Women, 23 Hastings L.J. 1, 8-10 (1971). Bills to qualify householders for independent social security coverage have been introduced. E.g., H.R. 252 (93d Cong.). Most recently (May 2, 1974), as part of a legislative program to promote income security for the elderly, Senator Percy introduced a series of Social Security Act amendments which include: (1) eventual elimination of the retirement earnings limitation (S.3427, 93d Cong., 2d Sess.); (2) computation of benefits based on combined earnings of a married couple (S.3428); (3) elimination of the dependency requirement for entitlement to husband's or widower's benefits, provision of benefits for divorced husbands and widowed fathers with minor children, and further equalization of benefit computations for men and women (S.3429). Senator Percy noted that, unfortunately, equalization amendments cannot cure "the greatest discriminating feature": "Women receive almost uniformly lower benefits because they hold almost uniformly low paying jobs."

C. Aid to Families with Dependent Children (AFDC): Discussion and Recommendations

The statutory framework for AFDC, the nation's largest "welfare" program*, is set forth in 42 U.S.C. §§ 602-633. Based on the assumption that father is (and ought to be) the breadwinner, the legislation, though purporting "to help maintain and strengthen family life" (42 U.S.C. §601), provides a financial incentive for impoverished families to split up, for father to leave the home and for mother to bear the responsibilities

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* In terms of revenue lost, a far more substantial toll is exacted by tax relief accorded economically fortunate persons. See Dodyk, The Tax Reform Act of 1969 and the Poor, 71 Colum. L. Rev. 758 (1971).

of parenthood alone. See Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534, 540-43 (1974).

Enacted in rudimentary form in 1935, the program was designed to aid children "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of the parent". H. Rep. No. 615, 74th Cong. 1st Sess. 9 (1935). In 1961 Congress added coverage for intact families with a temporarily unemployed parent. P.L. 87-31, 75 Stat. 75. Although all states participate in the federally supported program for one-parent families, less than half have so far elected to provide AFDC to families with two able-bodied parents.

Some of the states electing to include intact families interpreted the phrase "unemployed parent" literally. They provided assistance to needy families with two able-bodied parents regardless of the sex of the parent meeting the state's definition of unemployed. In 1967, Congress clarified its meaning; it amended the statute to preclude qualification of a mother as the unemployed parent. The assistance plan for the intact family now authorized by 42 U.S.C. §607 is restricted to units with an unemployed father (AFDC-UF).*

Thus the AFDC program conclusively presumes that responsibility for support of an intact family rests on male shoulders. Should the two-parent family order its life differently, with father assuming the homemaking role,

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* S. Rep. No. 744, 90th Cong., 1st Sess. 2996 (1967) notes that this limitation was intended by Congress from the start.

AFDC will not be available. To obtain the needed assistance in states with AFDC-UF, father and mother must conform to the roles envisioned for them by Congress. Even then, limitations applicable to two-parent families may impel one of the parents to leave the home.* In states that do not provide AFDC-UF, no alternative exists; the impoverished family will not receive AFDC until it is dismantled.

The current scheme, rooted in a rigid, stereotyped view of the roles men and women should play in the family, is plainly inconsistent with the equal rights principle. Moreover, it entails an intolerable invasion of family privacy, depriving parents of a choice that should be left to the individuals involved.

Another declared purpose of AFDC is to assist the parent to attain capability for "self-support and personal independence". 42 U.S.C. §601. This purpose, like the purpose to "maintain and strengthen family life," has not been realized by the program. Federally funded job training, in organization and operation, reflects scant effort to assist impoverished women toward economic independence. See Women and Poverty, Staff Report, U.S. Commission on Civil Rights 54-57, 78-84 (June, 1974).

Designed to provide job training and employment services for AFDC recipients, the Work Incentive Program (WIN) (42 U.S.C. §630 et seq.)

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* If father is receiving unemployment insurance payments, AFDC-UF will not be furnished. Such payments count in determining family need, but do not disqualify one-parent families for AFDC. Similarly, AFDC-UF is not available if father works 100 or more hours per month, regardless of the amount he earns. In one-parent families, only the amount earned, not the number of hours worked, is relevant in determining eligibility.

has failed to achieve its goals and, in a number of respects, exposes women to disadvantageous treatment. Adult male AFDC recipients must register under WIN. Mothers need not if they have a child under six. Nor need they register if there is an adult male relative in the home who is a registrant. The option not to register accorded mothers comes at a price. Unemployed fathers must register, but they have first priority for placement; mothers who volunteer are assigned a lower priority. 42 U.S.C. §633. The result, women are less likely to receive training and placement. And if they are placed, they end up with the lowest paid, least desirable jobs. See Women and Poverty, supra, at 57; The Failure of the Work Incentive (WIN) Program, 119 U. Pa. L. Rev. 485 (1971); Griffiths, supra, at 542.

The gender-based priority system was incorporated in 42 U.S.C. §633 in 1971, effective July 1, 1972. Initially, the statute set no priorities, but the Department of Health, Education and Welfare did. HEW regulations, 45 C.F.R. 220.35(a)(3), established a rank order similar to the one now found in 42 U.S.C. §633. These priorities were revoked by HEW pursuant to a stipulation dismissing a lawsuit that challenged the ranking as sex discriminatory. CWRO v. Hodgson, No. 72-C132 (N.D. Ill., May 17, 1972). The HEW priorities had earlier been held unconstitutional in Thorn v. Richardson, No. 9577/(W.D. Wash., December 10, 1971). (4 EPD ¶ 7630) In 1972, implementing amended 42 U.S.C. §633, HEW again promulgated a priority regulation. 37 Fed. Reg. 119.

Revisions to eliminate gender discrimination in AFDC are suggested below, with the caveat that they represent only part of the large reform

needed. See Women and Poverty, supra, for more encompassing analysis.

42 U.S.C. §607 -- substitute "parents" for "fathers".

42 U.S.C. §§ 602, 633 -- eliminate the gender differentials in 602(a)(19)(A) (exclusions from mandatory WIN referrals) and 633(a) (placement priorities). [If mandatory referrals and exclusions therefrom are no longer sex based, any statutory logic for sex-based priorities will be removed.]

42 U.S.C. §602(a)(19)(A)(v) -- substitute "parent" for "mother".

42 U.S.C. §602(a)(19)(A)(vi) -- substitute "parent" and "adult" for "mother" and "female".

42 U.S.C. §§ 602(a)(19)(G), 622(a)(1)(C)(iii) -- substitute "parent" for "mother" and "the individual" for "she".

[Note that in recommending amendment to cover situations in which child care is performed by a male parent, we do not intend approval of the current scheme which forces acceptance of child care services if available. No parent should be forced to accept low quality child care or care unresponsive to the special needs of her or his child.]

D. Other Substantive Differentials: Discussion and Recommendations

42 U.S.C. §1652, passed in 1941 as part of the Defense Bases Act (55 Stat. 622-23), was intended to render applicable to extraterritorial bases death and disability compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act. See H. Rep. No. 1070, 77th Cong., 1st Sess. 7 (1941). At the time 42 U.S.C. §1652 was enacted, the Longshoremen's Act authorized compensation to "a surviving wife or dependent husband". On October 27, 1972, that Act was amended, consistent with the equal rights principle, to eliminate the dependency requirement for husbands. P.L. 92-576, §§ 5(c), 20(c)(2), 86 Stat. 1253, 1265. The Act now authorizes the same benefit to "a widow or widower". By contrast, 42 U.S.C. §1652(b), at the outset and up to the present time, limits the spouse beneficiary class to the "surviving wife". No reason for the limitation appears in the legislative history. It may be that Congress never contemplated the possibility of a married woman engaging in work covered by the provision.

The word "wife" in 42 U.S.C. §1652(b) should be replaced by the word "spouse".

42 U.S.C. §1986, providing a remedy for, inter alia, wrongful death occasioned by conspiracies to deprive persons of civil rights, states that damages may be recovered for "the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin . . . ." The section should be amended to replace "widow" with "surviving spouse".

42 U.S.C. §§ 2716, 2717 and 2728 contain sex specific instructions concerning the Job Corps, a program focusing on educational and vocational training for young persons in the 14-21 age range from sorely deprived

home backgrounds. These provisions were repealed by P.L. 93-203(1973), which reestablished the Job Corps under the authority of the Department of Labor.

42 U.S.C. §3781(b) refers to "prostitution" in a provision defining organized crime. For purposes of this section, "prostitution" should be defined in the manner proposed in S. 1400 (Criminal Code Reform Act of 1973). See analysis of Title 18, supra.

Title 43 -- Public Lands

Sections identified by print-out: 43 U.S.C. §§ 164, 166, 167, 168, 170, 171, 190, 243a, 255, 272, 278, 279, 423c, 423h, 451a, 451c, 1131, 1602

Additional sections considered: 43 U.S.C. §§ 161, 162

The system of granting tracts of public land to homesteaders for development is regulated in extensive detail in this Title. Some sections raise only terminological problems; others are fraught with sex discrimination deriving from two assumptions: that enterers are generally male, and that special rules are necessary for female enterers because of the legal disabilities accompanying marriage.

I. Terminology

A. Discussion

Throughout this Title, the words "entryman" and "entrywoman" as well as the sex-neutral "enterer" are used to describe homesteaders. In some provisions sex specific terminology is tied to a substantive differential between the rights of male and female enterers; in others, the gender-based references do not signal substantive differentials. Sex-based words should be eliminated throughout the Title, whether or not the words are linked to a substantive differential. Since the terms "entryman" and "entrywoman" were not included in the key word list, the entire Title should be reviewed to identify all provisions with gender-based references.

Other sex-specific terms used unnecessarily in Title 43 include "father and mother" (43 U.S.C. §171); "husband or wife" (43 U.S.C. §§ 279,

423h, 1131); "widow [or] widower" (43 U.S.C. §§ 451a, 451c); "father or mother" (43 U.S.C. §§ 171, 1602(b)). 43 U.S.C. §423c, which allows enterers to claim exchange lands when their original claims prove unviable, gives preference to "ex-servicemen".

B. Recommendations

Appropriate amendments include:

43 U.S.C. §171--replace "father and mother" with "parents".

43 U.S.C. §279--change "husband or wife" to "person" or "individual".

43 U.S.C. §423c--change "ex-serviceman" to "ex-service member".

43 U.S.C. §§ 423h, 1131--change "husband or wife" to "spouse".

43 U.S.C. §§ 451a, 451c--replace "or in the case of a widow, widower, heir, or devisee, from a spouse or ancestor" with "or in the case of a surviving spouse, heir, or devisee, from a spouse or ancestor".

43 U.S.C. §1602(b)--change "father or mother" to "parent".

II. Substance

A. Discussion

43 U.S.C. §§ 161, 162, 166, 167, and 168 set forth some of the basic homesteading rules. 43 U.S.C. §§ 161 and 162 allow citizens or persons intending to become citizens who have reached the age of 21 or who are heads of families to enter upon public land. Under state statute, federal regulation and common law, "head of a family" customarily referred to the male partner in a marital unit or the father in a two-parent family. 43 U.S.C. §§ 166, 167 and 168 govern the disposition of a claim when the settler or enterer marries. 43 U.S.C. §166 applies to a woman who, while unmarried, has settled on public land with the intention of entering upon it but who, at the time of her marriage, has not yet made entry or applied to do so; the section permits her to obtain a patent provided that she

meets the residence requirements and that the person she marries is not claiming a separate tract under the homestead law. 43 U.S.C. §167 deals with the marriage of two enterers "after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage". This section provides that the marriage shall not impair the right of either spouse to a patent, and that the husband shall elect on which of the two entries the home shall thereafter be made. Residence by the couple on that tract constitutes compliance with the residence requirements on each entry. 43 U.S.C. §168 allows a female citizen who has initiated a claim to a tract and has complied with the conditions as to acquisition of title to receive a certificate of patent despite her marriage to an alien entitled to become a citizen.

Various sex-neutral alternatives are available to eliminate the sex discrimination in these sections. The alternative selected depends upon more precise definition of congressional intent. Congress may have intended to limit married couples to one entry per couple, unless the individuals involved had met the requirements of 43 U.S.C. §167 by each entering separately and complying with the provisions of the homestead law for at least one year prior to the marriage. This reading of congressional intent draws some, albeit weak, support from 43 U.S.C. §§ 161 and 162, sections limiting the entry right of persons under twenty-one years of age to heads of families, i.e., only one enterer for each family in which no member is over 21. Stronger support may be gleaned from the fact that residence upon the land for specified periods of time is a condition of obtaining a patent. When these statutes were passed, state law gave the husband sole authority to determine the family's residence; failure of a wife to accompany and remain with her husband constituted desertion. Therefore, if a woman who had not previously

entered or settled upon land married a man who had previously entered or subsequently did so, the woman would not have been free to establish a separate claim on public land. For in satisfying the residence requirements, she would have given her husband grounds for divorce. 43 U.S.C. §166 provides further support for the one entry per couple interpretation; it terminates a female settler's rights to enter, even if she maintains residence on her land, if the man she marries claims a separate tract under the homestead law.

On the other hand, these provisions may merely reflect a congressional belief that married couples were required by state law to live together, and not an independent determination that married couples should be limited to one entry between them. The recommendations here proposed (see II.B. below) do not limit married couples to a single entry. Except for the special exception contained in 43 U.S.C. §167, however, they require residence on each tract on which entry is sought to be made. Thus, married couples who choose to live together would be able to enter upon only one tract at a time. Alternate recommendations limiting each married couple to a single entry,* even if the spouses were prepared to reside separately, are also noted (see II.C. below). A third sex-neutral possibility would be to extend the provisions of 43 U.S.C. §167 to couples who have not yet settled or entered for one year.

43 U.S.C. §§ 161 and 162 can be rendered sex-neutral by extending the right to enter on public lands to all otherwise eligible persons under the age of twenty-one who have one or more dependents or who are married.

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* With the exception of persons satisfying the requirements of 43 U.S.C. §167.

43 U.S.C. §166 can be rendered sex-neutral by eliminating the provision requiring the woman to forfeit her right to enter on the tract on which she has settled if the man she marries is claiming a separate tract of land, while extending to both sexes the provision requiring that a female settler who marries must continue to reside on any tract on which she wishes to make entry. Couples who wished to live together and who had both settled or entered upon public land for less than one year prior to their marriage would thus have to choose one tract on which to fulfill the residence requirements. Couples willing to live apart could make entry on two tracts.

43 U.S.C. §164, setting forth rules for the issuance of certificates or patents, contains gender-based references in provisions applicable when the enterer is absent or dies during the claim period. The surviving spouse is always a "widow," the enterer always an "entryman". Sex-neutral terms should be substituted. In some phrases in this section, both male and female pronouns are used; this usage should be extended throughout.

43 U.S.C. §167 reflects the right of the husband under state law to choose the family's domicile. This "husband's prerogative" is clearly sex discriminatory. The couple should be able to live separately, one on each tract, or together on the tract of their choosing. The proposed change retains the benefit Congress gave such couples, of satisfying the residence requirements on both tracts though residing on only one, but removes the discriminatory method of choice.

43 U.S.C. §168 is based on the once prevailing legal doctrine that a woman's identity merges with that of her husband upon marriage. This "merger" meant that when a female citizen married an alien, she forfeited her citizenship. At least in this instance, Mr. Bumble's message has taken

hold. A woman no longer loses her United States citizenship upon marriage to an alien. (See comment on Title 8.) Since nothing else in the statute suggests that marriage of an enterer to a citizen or alien non-enterer interferes with the issuance of a patent, 43 U.S.C. §168 has no current utility.

43 U.S.C. §170 concerns the rights of an enterer's wife in case of desertion by the enterer. It should be extended to apply in the same way where an enterer abandons her husband.

In 43 U.S.C. §§ 243a, 255, 272, 278 and 279, permitting service personnel and their families to count service time toward homestead entry requirements, the assumption is that service personnel are all male, and the only spouse mentioned is the "widow". The same usage of "widow" appears in 43 U.S.C. §190, giving Indians the right to enter public lands and avail themselves of the provisions of the homestead laws. The term "surviving spouse" should be substituted so that benefits now granted to widows will be granted to widowers as well.

B. Recommendations

The following recommendations do not limit married couples to a single entry:

43 U.S.C. §161--replace "Every person who is the head of a family or who has arrived at the age of twenty-one years . . ." with "Every person who is married or who has one or more dependents or who has arrived at the age of twenty-one years".

43 U.S.C. §162--replace "and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age" with "and file in the proper land office an affidavit that he or she is married, or has one or more dependents, or is over twenty-one years of age".

43 U.S.C. §164--replace "widow" with "surviving spouse" and "entryman" with "enterer" throughout.

43 U.S.C. §166--replace "entrywoman" (in title) with "settler upon public lands"; replace "woman" with "person"; correct pronouns; delete "Provided further, that the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law".

43 U.S.C. §167--replace "Marriage of entryman to entrywoman" with "Marriage of two enterers" (in title); replace "The marriage of a homestead entryman to a homestead entrywoman" with "The marriage of one homestead enterer to another homestead enterer"; replace "the husband shall elect on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry" with "but if they choose to live together, they shall together elect on which of the two entries the home shall thereafter be made and residence thereon by both spouses shall constitute a compliance with the residence requirements upon each entry"; replace "the terms 'entryman' and 'entrywoman'" with "the term 'enterer'".

43 U.S.C. §168--repeal entire section.

43 U.S.C. §170--change title to "Rights of Abandoned Spouse"; change "wife" to "spouse" where "wife" now appears with the adjective "deserted" before it; change "wife" to "deserted spouse" where "wife" now appears alone; change "husband" to "enterer spouse" the first time it appears and to "deserting enterer spouse" the second time; conform pronouns.

43 U.S.C. §243a--change "widow" to "surviving spouse" and "mother" (in title) to "parents".

43 U.S.C. §255--change "wife" to "spouse".

43 U.S.C. §272--change "widows" to "surviving spouses"; conform pronouns; change "seaman" to "sailor" or "crew member".

43 U.S.C. §278--change "widow" to "surviving spouse" in title and text of the section; change "entrywoman" to "enterer".

C. Alternate Recommendations

If one entry per couple is the congressional approach, the following additional provisions could be inserted:

43 U.S.C. §161--add "except that a married person with or without dependents who has not entered or settled with the intention of entering prior to marriage may not enter upon public lands if her or his spouse is already an enterer".

43 U.S.C. §162--add to the required affidavit "and that if married, her or his spouse is not already an enterer".

43 U.S.C. §166--In lieu of the suggested deletion (see 43 U.S.C. §166 recommendation under II.B. above), add either "That the person he or she marries has not, at the time of their marriage, already entered upon or made application to enter upon a separate tract of land under the homestead law: Provided further, that if the person he or she marries has also settled upon a tract of public land, improved, established, and maintained a bona fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, but at the time of marriage has not made entry of said land or made application to enter said land, the spouses may select either tract of land to enter in both of their names or in one of their names separately" or "That if the person he or she marries has already entered upon or made application to enter upon a separate tract under the homestead law, or has also settled upon a tract of public land, improved, established, and maintained a bona fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, but at the time of marriage has not made entry of said land or made application to enter said land, the spouses may select either tract of public land to enter in both their names jointly or in one of their names separately".

The latter provision raises the question whether the spouses may apply time put in on one tract of land to the other, if they choose to live together on the tract on which one had previously resided for a shorter time. It is not the intention of this draft to enable them to do so. Note also the problem of the present gap in coverage between 43 U.S.C. §166, which covers couples in which one spouse has settled and the other spouse has entered or is not claiming a separate tract of land, and 43 U.S.C. §167, which covers couples in which both spouses have settled or entered for one year prior to marriage. While the changes recommended above under II.B.

would eliminate this gap, the alternative recommendation would recreate the problem. If this portion of Title 43 in fact has any present effect, and if the single entry per couple view is adopted, a section should be drafted covering all situations not specifically encompassed within 43 U.S.C. §§ 166 and 167.

Title 45--Railroads

Sections identified by print-out: 45 U.S.C. §§ 51, 52, 59 228b, 228c, 228c-1, 228e, 228s-2, 228u, 228x, 228z-1, 351, 354, 362

Three chapters of Title 45 contain sections listed on the print-out: Liability for Injuries to Employees (ch. 2); Retirement of Railroad Employees (ch. 9); Railroad Unemployment Insurance (ch. 11).

Basic substantive changes are required to conform ch. 9 to the equal rights principle; alterations recommended parallel those suggested for related Title 42 social security provisions. No substantive change is required in chs. 2 and 11; terminology in ch. 2 bears correction.*

I. Liability for Injuries to Employees (45 U.S.C. §§ 51, 52, 59): Discussion and Recommendations

45 U.S.C. §§ 51 and 52 contain identical texts, the first applicable to carriers in interstate and foreign commerce, the second, to carriers in Territories or other possessions of the United States. The sections provide for employer's liability for an employee's injury or death sustained "while he is employed".** In case of an employee's death, liability runs to "his or her personal representative for the benefit of the surviving widow or husband". "He" means "he or she" here, as it generally does throughout the Code. See 1 U.S.C. § 1.

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* "Chairman," a term not on the key word list, appears in 45 U.S.C. § 351e, a ch. 11 provision. "Chairperson" has been recommended in this report as an appropriate substitute.

** The current legislative scheme, providing negligence-based liability for railroad workers and sailors, but a workers' compensation arrangement for longshore workers, is anomalous.

A raised consciousness may be responsible for the appearance of "his or her" in the text, but "surviving widow or husband" is a curiosity.

45 U.S.C. § 59, providing for survival of an injury claim, repeats the same formulas: "his or her personal representative"; "surviving widow or husband".

In 45 U.S.C. §§ 51 and 52 "he or she" should replace "he"; in 45 U.S.C. §§ 51, 52 and 59, "surviving spouse" should replace "surviving widow or husband".

II. Retirement of Railroad Employees (45 U.S.C. §§ 228b, 228c, 228c-1, 228e, 228s-2, 228u, 228x, 228z-1): Discussion and Recommendations

Sex-based differentials in Railroad Retirement are closely related to distinctions established in Social Security (Title 42) legislation. Revision of the Railroad Retirement Chapter of Title 45 should be effected in conjunction with revision of Title 42 Social Security provisions.* With respect to benefits for spouses of wage earners, Social Security and Railroad Retirement draw similar lines. The basis for these lines is the traditional view of an adult world composed of breadwinning men coupled with dependent wives. To those who do not look beneath the surface, the differentials appear to favor women: wives receive benefits denied to husbands. For the female employee, however, an insidious discrimination is operative: her labor does not secure for her family the protection afforded the family of a similarly situated male employee.

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* Consolidation of the two systems has been recommended as an urgent matter. See Railroad Retirement Commission Report, The Railroad Retirement System: Its Coming Crisis, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. (1972).

45 U.S.C. §228b(e) refers to benefits for a "wife" (but not a husband) who has in her care (individually or jointly with her husband) a child of the employee; 45 U.S.C. §228b(f) specifies a dependency test for a husband's benefit (a wife qualifies without regard to dependency); 45 U.S.C. §228b(g) refers back to the "child in care" provision of 45 U.S.C. §228b(e).

45 U.S.C. §228c(e) refers to a Social Security provision, 42 U.S.C. §402(q), which in turn relates to a sex-based distinction in 42 U.S.C. §402(b), (c): husbands must meet a dependency test to be eligible for benefits, wives need not.

45 U.S.C. §228e(b) provides an annuity to a widow, but not to a widower, of an insured employee, where the widow has in her care a child of the employee. 45 U.S.C. §228e(1) stipulates a dependency test for widowers, but not for widows. Another provision of the same section permits a widow, but not a widower, to qualify for benefits if she marries another railroad employee who dies within one year of the marriage.*

A dependency test for husbands, but not wives was declared unconstitutional in Frontiero v. Richardson, 411 U.S. 677 (1973) (dependency test

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* Restricting benefits to persons married to the employee for at least a year prior to widowhood is of questionable constitutionality. See Salfi v. Weinberger, No. C-73 1863 ACW (N.D. Calif. March 22, 1974) (42 U.S.C. §416 provision denying benefits to widows married to the wage earner less than nine months declared unconstitutional), U.S.S.C. appeal pending.

for housing allowance and medical and dental benefits for male but not female spouse of armed service member violates equal protection principle).* Excluding men from the "child in care" Social Security provision (42 U.S.C. §402(g)) was declared unconstitutional in Wiesenfeld v. Secretary of Health, Education and Welfare, 367 F. Supp. 981 (D.N.J. 1973), U.S.S.C. appeal pending. The incompatibility of the present sex-based benefit structure with Title VII is obvious. As the Railroad Retirement Board observed:

> In view of the philosophy inherent in the Equal Employment Opportunity Commission's [Sex Discrimination Guidelines], dealing with sex discrimination in private pension plans, critical analyses and a thorough review of differences in treatment of the sexes [under Railroad Retirement] are appropriate.
>
> . . .
>
> In practice, some women are breadwinners, some men dependent, and either the same dependency test should apply to both sexes or there should be none. (It should be noted that many women would fail the dependency test were it applied to them.)
>
> . . .
>
> When the present provisions of the Railroad Retirement Act were adopted [differentials based on sex] were common in other pension plans but EEOC Regulation . . . now forbids discrimination by sex in private pension plans.

Railroad Retirement Commission Report, supra, at 377, 378.

Consistent with federal decisions, the policy underlying Title VII and other federal antidiscrimination measures, and as mandated by the equal rights principle, basic change is required in 45 U.S.C. §§ 228b, c and e: the dependency test for husbands and widowers benefit qualification

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* But cf. Kahn v. Shevin, 94 S. Ct. 1734 (1974) (gender line regarded by Supreme Court as operating solely to alleviate economic hardship encountered by women upheld).

should be dropped, and "child in care" benefits should be granted to the custodial parent without regard to sex.

Appropriate amendments include:

45 U.S.C. §228b(e) -- replace "in case of a wife, has in her care (individually or jointly with her husband)", with "has in her or his care (individually or jointly with her or his spouse)".

45 U.S.C. §228b(f) -- strike the limitation that husband must have received at least one-half his support from his wife.

45 U.S.C. §228b(g) -- substitute "spouse" for "wife" each time it appears; replace "she no longer has in her care," with "such spouse no longer has in her or his care".

45 U.S.C. §228c(e) -- revise, together with 42 U.S.C. §§ 402(b), (c) and (q), to eliminate dependency test for husband's benefits.

45 U.S.C. §228e(b) -- replace "widow" with "surviving spouse," "her" with "her or his," "she" with "he or she".

45 U.S.C. §228e(1) -- eliminate dependency test for widower; provide the same treatment to widowed persons, regardless of sex, upon marriage to another railroad employee who dies within a year of the marriage.

Comprehensive revision of Chapter 9 of Title 45 should also encompass terminological change throughout the chapter, e.g., "spouse" in lieu of

"husband" or "wife," "surviving spouse" in lieu of "widow" or "widower," "sibling" in lieu of "brother" or "sister".

45 U.S.C. §228c-1 was identified in the print-out because the key word "servicemen" appears in a reference to the Servicemen's and Veterans' Survivor Benefit Act. Absent change in the title of that Act, no change should be made here.

45 U.S.C. §228s-2 contains the proviso "had such spouse's husband or wife ceased compensated service". No substantive distinction is indicated by this definitional language. "Marital partner" might be substituted for "husband or wife," or the current language might be left unaltered.

45 U.S.C. §228x defines "spouse" to include "wife or husband" of an employee who has been awarded an annuity under the Railroad Retirement Act of 1935. For definition purposes, use of "wife or husband" here appears appropriate. However, to the extent that the 1935 legislation does not award annuities to "wife" and "husband" under the same terms and conditions, a substantive differential is indicated.

45 U.S.C. §228z-1 refers to "widows' and widowers' insurance annuities". When substantive differentials in Railroad Retirement are eliminated, terminology should be changed to "surviving spouse insurance annuities".

III. Railroad Unemployment Insurance (45 U.S.C. §§ 351, 354, 362): Discussion and Recommendations

45 U.S.C. § 351(k)(2) defines a "day of sickness" for disability compensation purposes to include "with respect to a female employee," "a calendar day on which, because of pregnancy, miscarriage or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health".

45 U.S.C. § 354, designed to preclude duplicative payments for the same condition, refers to "unemployment, maternity, or sickness payments".

45 U.S.C. § 362(f) is headed "Cooperation with other agencies administering unemployment, sickness, or maternity compensation laws". References to "maternity" benefits as distinct from "sickness" benefits were deleted from the text of 45 U.S.C. § 362(f) in 1968. P.L. 90-257, §§ 206(a), (b), (c) and (d).

In effect, these sections define inability to work due to sickness to include inability to work due to disability occasioned by pregnancy. The Supreme Court currently regards inclusion of disability due to pregnancy in a state social insurance program as permissible, although not mandated under the equal protection principle. Geduldig v. Aiello, 42 U.S. Law Week 4905 (June 17, 1974).

The coverage afforded under 45 U.S.C. § 351(k)(2)* is appropriate and desirable as a matter of social policy; such coverage should be

* Prior to 1968 amendment, the statute referred to a "maternity period". Under that formula, compensation was provided for 57 days prior to birth and fifteen days after birth regardless of the claimant's ability to work. As amended, the section applies to the actual, not presumed, period of physical disability.

mandated by the constitutional standard required under the equal rights amendment. Women temporarily unable to work due to childbirth or other pregnancy-related physical disability should not be treated as work force outcasts. Job security, income protection and health insurance coverage during such disability is essential if equal opportunity in the labor market is to become a reality for women. See generally Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 495-510 (1974).

Title 46--Shipping

Sections identified by print-out: 46 U.S.C. §§ 17, 152, 153, 154, 155, 158, 160, 186, 191, 201, 239, 262, 263, 331, 561, 599, 601, 627, 656, 672, 679, 761, 864, 924, 953, 972, 1121, 1303, 1357, 1465

The assumption that only men serve in the merchant marine pervades this Title.* Employment policies on the high seas are subject to the equality principle and the equal opportunity mandate of Title VII. Revision of individual sections is largely a matter of sex-neutralizing terminology and eliminating unnecessary gender references.

I. Terminology

A. Discussion

Terms with masculine connotations abound in Title 46. E.g., "seaman" (46 U.S.C. §§ 201, 239, 331, 599, 601, 627, 672, 679), "master" (46 U.S.C. §§ 154, 158, 160, 191, 201, 262, 263, 331, 561, 599, 601, 672(d), 679, 924, 953, 972, 1303), "husband" of the vessel (46 U.S.C. §§ 17, 262, 263, 924, 953, 972), "men" (46 U.S.C. §672(e)), "businessman" (46 U.S.C. §§ 864, 1121), and "lifeboat man" (46 U.S.C. §§ 201, 239). Unnecessary gender references include "wife, husband" (46 U.S.C. §761), "seamanship" (46 U.S.C. §672), "prudent man" (46 U.S.C. §1465), "to man" the vessel (46 U.S.C. §§ 186, 191, 656, 1303, 1357), and the pronouns "she" and "her" to refer back to the antecedent "ship" (46 U.S.C. §§ 17, 191, 262, 263, 656, 672).

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* In 1974, entrance to the merchant marine academy was opened to women.

B. Recommendations

46 U.S.C. §§ 201, 239, 331, 599, 601, 627, 672, 679 --substitute "sailor" for "seaman".

46 U.S.C. §§ 154, 158, 160, 191, 201, 262, 263, 331, 561, 599, 601, 672(d), 679, 924, 953, 972, 1303 --replace "master" with a sex-neutral term, perhaps "commanding officer" or "captain".

46 U.S.C. §§ 17, 262, 263, 924, 953, 972 --replace "husband" with a sex-neutral term, perhaps "manager".

46 U.S.C. §§ 201, 239, 672(e), 864, 1121, 1465 --substitute "person" or "individual" for "man," and "workers" or another suitable sex-neutral term for "men".

46 U.S.C. §761--substitute "spouse" for "wife, husband".

46 U.S.C. §672--replace "duties of seamanship" with a sex-neutral reference, perhaps "nautical duties" or "seafaring duties".

46 U.S.C. §§ 186, 191, 656, 1303, 1357--use "to staff" or another suitable, sex-neutral term in lieu of "to man".

46 U.S.C. §§ 17, 191, 262, 263, 656, 672--change "she" and "her" to "it" and "its".

II. Substance

A. Discussion

Substantive differentials based on sex appear in provisions dealing with passenger accommodations, survivor benefits, and apprenticeship requirements. 46 U.S.C. §152 establishes different regulations for male and female occupancy of double berths, confines male passengers without wives to the "forepart" of the vessel, and segregates unmarried females in a separate and closed compartment. 46 U.S.C. §153 requires provision of a bathroom for every 100 male passengers for their exclusive use and one for every 50 female passengers for the exclusive use of females and young children.

Under 46 U.S.C. §154 only mothers with infants and young children are to receive milk for their children's sustenance.

46 U.S.C. §155 provides for two separate compartments to be used as hospitals for men and women.

46 U.S.C. §§ 158 and 160 require submission to a customs officer of a passenger list specifying, inter alia, name, sex, and marital status of each passenger, and preparation of an inspector's report stating number of deaths on board ship and age and sex of those who died during the voyage.

46 U.S.C. §599 provides for the payment of allotted wages to grandparents, parents, wife (but not husband), sister (but not brother), or children; 46 U.S.C. §601 provides for priority to payments for support of "wife" and minor children. 46 U.S.C. §627 authorizes the distribution of a sailor's effects to "his widow" or children.

46 U.S.C. §§ 561 and 672 deal with apprenticeship of "boys" to the sea service.

B. Recommendations

46 U.S.C. §§ 152 and 153 should be amended to eliminate distinctions based on sex while preserving the individual's right to privacy. 46 U.S.C. §152 might be changed to allow double occupancy by two "consenting adults" or one consenting adult and two children with parental permission. Separate, preferably identical compartments for each sex could be provided for those who desire the privacy of sex-segregated accommodations.

Requirements for separate bathroom facilities stipulated in 46 U.S.C. §153 should be retained but equalized, so that the ratio of persons to facility is not sex-determined; the presumption that young children will be exclusively in the care of women should be eliminated.

"Parents" should replace the term "mothers" in 46 U.S.C. §154.

No change is needed in 46 U.S.C. §155, since equal, sex-segregated hospital compartments fall within the purview of the individual's right to privacy.

If specification of sex in the lists and reports authorized by 46 U.S.C. §§ 158 and 160 serves useful statistical purposes and does not foster discrimination, no change is required.

In 46 U.S.C. §§ 599, 601, and 627, change "wife" to "spouse," "sister" to "sibling," and "widow" to "surviving spouse" wherever these terms appear.

Discrimination on the basis of sex in access to apprenticeship programs is impermissible under equal opportunity requirements. Accordingly, in 46 U.S.C. §§ 561 and 672 "boy" should be changed to "young person".

Title 47--Telegraphs, Telephones, and Radiotelegraphs

Section identified by print-out: 47 U.S.C. § 153

The sole provision identified, a definitional section, presents a question of terminology only; no substantive differential was disclosed by the print-out.

A. Discussion

47 U.S.C. § 153(w)(4), defining a passenger on a ship, refers to those who "man and operate the ship," and to the "master" of the ship.

B. Recommendations

In 47 U.S.C. § 153(w)(4), substitute "to staff and operate" for "to man and operate" or eliminate "man and" as redundant so that the phrase reads, "to operate the ship"; replace "master" with a term independent of sex connotation, perhaps "captain" or "commanding officer".

Sections identified by print-out: 48 U.S.C. §§ 1413, 1415, 1418, 1461*

Two unrelated areas are identified by the print-out: rights accruing to widows of discoverers; restrictions on political rights of persons engaging in specified sexual relationships.

I. Survivors of discoverers (48 U.S.C. §§ 1413, 1415, 1418)

A. Discussion

A discoverer is defined in 48 U.S.C. §1411 as "any citizen of the United States." Though the discoverer may be male or female, 48 U.S.C. §§ 1413, 1415, and 1418 stipulate rights for the discoverer's widow, not widower. The omission probably lacks substantive significance. Widowers are likely to be covered by one of the other enumerated relationships: heir, executor, or administrator of the discoverer.

B. Recommendation

Substitute "surviving spouse" for "widow".

II. Restrictions on political rights of persons engaging in specified sexual relationships (48 U.S.C. §1461)

A. Discussion

This section restricts certain rights, including the right to vote or hold office, of bigamists, persons "cohabiting with more than one woman," and women cohabiting with a bigamist. Apart from the male/female differentials, the provision is of questionable

* Three additional sections were identified by the print-out because they contain the word "sex": 48 U.S.C. §§ 736, 1405p, 1542. Each of these sections involves a prohibition against discrimination with regard to voting based on, inter alia, sex.

constitutionality since it appears to encroach impermissibly upon private relationships. Cf. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 439 (1972).

B. Recommendations

If the section is retained, it should be revised to eliminate sex-based differentials and narrowed to avoid conflict with constitutionally protected privacy interests.

Title 49--Transportation

Sections identified by print-out: 49 U.S.C. §§ 1, 1373

I. Terminology

A. Discussion

49 U.S.C. § 1(7) prohibits free interstate transportation of passengers by a common carrier, but sets forth numerous exceptions. Among those mentioned in the provision are "general chairmen of employees' organizations when such organizations are authorized and designated to represent employees in accord with the provisions of the Railway Labor Act," "linemen of telegraph and telephone companies," and "newsboys".

49 U.S.C. § 1373(b), on observance of tariffs and granting of rebates, states that nothing in the chapter shall prohibit air carriers from issuing tickets or passes for free or reduced fare transportation to "widows, widowers, and minor children" of employees who died as a result of injuries sustained while in the performance of duty in the service of the carrier.

B. Recommendations

49 U.S.C. § 1(7)--substitute "chairpersons" for "chairmen," "line installers" for "linemen," and "news carriers" or another sex-neutral description for "newsboys".

49 U.S.C. § 1373(b)--substitute "surviving spouses" for "widows, widowers".

II. Substance

A. Discussion

Certain exceptions to the 49 U.S.C. § 1 free transportation prohibition discriminate on the basis of gender. Provision is made for "traveling secretaries of railroad Young Men's Christian Associations". In the context of race discrimination, "state action" was found where a "Y" received 20% of its income from the local United Fund and operated extensive programs for the general public. Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972). Whether or not the "Y" itself is deemed implicated in "state (governmental) action," constitutional strictures should apply to benefits furnished the organization by Congress. At the least, the equal protection principle should preclude benefits to a YMCA if equivalent benefits are not granted the counterpart YWCA.*

Reference is also made in 49 U.S.C. § 1(7) to inmates of National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes. A U.S.C.A. note to section 1 of this Title explains that the National Home for Disabled Volunteer Soldiers was consolidated in the Veterans' Administration in 1930. No sex-linked words are used in 49 U.S.C. § 1(7) in reference to these homes, but the equality principle would be compromised if the homes themselves

* It may be that "railroad" Young Women's Christian Associations have not been organized. Equal employment opportunity in the transportation industry should open jobs for women in sufficient numbers to warrant counterpart organizations.

discriminate against female service members. See comments on Title 24.

Families of employees, agents, and officers of certain organizations related to the common carrier are entitled to free transportation. 49 U.S.C. § 1(7) defines "families" to include "widows during widowhood . . . of persons who died while in the service of any such common carrier." The definition and the benefit to which it relates should be extended to spouses who survive female employees, agents or officers.

B. Recommendations

Amend 49 U.S.C. § 1(7) to refer to traveling secretaries of railroad Young Men's or Women's Christian Associations, and substitute "surviving spouses until remarriage" for "widows during widowhood".

Title 50--War and National Defense

Sections identified by print-out: 50 U.S.C. §1518
50 U.S.C. App. §§9, 31, 453, 454, 456, 460, 530, 563, 1591, 1593, 1595, 1596, 1597, 1598, 2004, 2005, 2017

I. Terminology (50 U.S.C. §1518; 50 U.S.C. App. §§460(c))

A. Discussion

50 U.S.C. §1518 contains the phrase "man and his environment".

50 U.S.C. App. §460(c) relates to delegation of the President's authority; as currently phrased, the provision indicates that the President is and always will be male.

B. Recommendation

Substitute sex-neutral terms for sex-specific words, e.g., "humans and their environment," might replace "man and his environment".

II. Substance

The compilation in 50 U.S.C. App. includes a number of Acts regulating diverse areas. These Acts will be discussed separately below. Some of the provisions appear to be obsolete. Investigation

of the extent to which the sections identified in the print-out remain operative is beyond the scope of this report.

A. Trading with the Enemy Act--provisions involved, 50 U.S.C. App. §§9(b)(2), (3), (4), 31; Discussion and Recommendations

50 U.S.C. App.§§9(b)(2), (3) relate to categories of persons entitled to return of property held by the Alien Property Custodian. Both subsections concern women married to citizens of Germany or Austria-Hungary; (b)(2) applies to a woman who at the time of her marriage was a citizen of a neutral nation, (b)(3), to a woman who was a United States citizen. For purposes of determining the status of property not acquired from her spouse, the woman is treated as though her marriage occasioned no loss of citizenship. The apparent intent was to ameliorate the adverse impact on the woman of change of citizenship effected by marriage. No change appears necessary since no discriminatory effect is discernible. Moreover, it is unlikely that any current case would turn on application of these provisions.

50 U.S.C. App. §9(b)(4) concerns property of diplomats and their families stationed in this country. The subsection uses the word "wife". The assumption reflected, that all diplomats are men, may have conformed to reality for the time period in question. As in the case of 50 U.S.C. App. §9(b)(2), (3), it is doubtful that this provision has any continuing application. Absent actual cases involving the provision, change appears unnecessary.

50 U.S.C. App. §31 concerns members of a former ruling family. Reference is made to the ruler of any constituent kingdom of the German Empire during the period April 16, 1917 to July 2, 1921 and the wife or child of such person. The gender specific term in this provision is consistent with historic fact. No change is recommended.

B. Selective Service Act of 1967--provisions involved, 50 U.S.C. App. §§453 (registration), 454 (persons liable for training and service), 456 (deferments and exemptions), 460(b)(3) (local draft boards); Discussion and Recommendations

50 U.S.C. App. §453 renders it the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who is between the ages of 18 and 26 to present himself for registration. 50 U.S.C. App. §§454, 456 refer back to the 50 U.S.C. App. §453 specification, male persons. Equal rights and responsibilities for men and women implies that women must be subject to draft registration if men are. Debate on the equal rights amendment points clearly to congressional understanding of this effect of the amendment. See, e.g., 118 Cong. Rec. S4389, S4409 (daily ed. March 21, 1972); S. Rep. No. 92-689, Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 13-14, 24-26, 36-39 (1972). Accordingly, 50 U.S.C. App. §§453, 454, 456 should refer to every "citizen" and "person"; the qualification "male" should be deleted.

50 U.S.C. App. §460(b)(3) provides "No citizen shall be denied membership on any local [draft] board or appeal board on account of sex." This guarantee of nondiscrimination is consistent with an equal rights requirement. No change is necessary.

C. Army Nurses Corps (50 U.S.C. §§1591, 1593, 1596-98): Discussion and Recommendation

These sections refer to females. The gender-based references should be eliminated. As in other cases where sex segregation has existed in military service, care should be taken in revising legislation to avoid adverse impact on persons whose opportunities in the military have been retarded or limited because of their sex.

D. War Claims (50 U.S.C. App. §§2004, 2005, 2017): Discussion and Recommendation

These sections refer to "widow or husband". "Surviving spouse" should suffice.

E. Miscellaneous Provisions (50 U.S.C. App. §§530, 563): Discussion and Recommendations

50 U.S.C. App. §530, relating to eviction or distress during military service, is designed to protect the wife and other dependents of military personnel. It appears that the section may have been intended to protect only persons actually dependent on the service member. However, the language covers all wives. This World War II statute may no longer have practical effect. If it is obsolete, it should be eliminated. If it is retained, "spouse" should replace "wife" to conform to the Supreme Court's ruling in Frontiero v. Richardson, 411 U.S. 677 (1973), and to the equal rights principle.

50 U.S.C. App. §563 provides for perfection of homestead rights when the homesteader is killed or incapacitated in military service. The sex-based reference to "widow" in this section should be replaced by "surviving spouse".

Summary of Findings and Recommendations

Concluding Comment

I. Congressional Responsibilities for Comprehensive Revision: Principal Direction of Needed Reform

Equalization of the treatment of women and men under federal law is an overdue task which should command priority attention in Congress. As demonstrated by the foregoing Title-by-Title Review, myriad unwarranted differentials clutter the U.S. Code. Many are obsolete or of minor importance when viewed in isolation. But the cumulative effect is reflective of a society that assigns to women, solely on the basis of their sex, a subordinate or dependent role.

Several of the differentials noted in the preceding pages could not survive judicial scrutiny even without an equal rights amendment to the Constitution. All of them are vulnerable under the national commitment to eradicate gender-based discrimination, evidenced most dramatically by the overwhelming approval Congress gave to the equal rights amendment. The statutory revision sketched in the Title-by-Title Review should be commenced with diligence and dispatch. As we enter the closing quarter of the twentieth century, join in the celebration of International Women's Year in 1975, and prepare for our bicentennial, federal law should not portray women as "the second sex," but as persons with rights, responsibilities and opportunities fully equal to those of men.

We have recommended that the laboring oar in the revision process be wielded by Congress itself, along the lines proposed by Representative Martha Griffiths (H. Res. 108, 93d Cong., 1st Sess. 1973). Each standing

committee should deal with the laws falling within its subject matter domain. The eventual product might be an omnibus bill aimed at eradicating all discriminatory or unnecessary gender-based provisions or references. Alternately, amendments might be introduced Title-by-Title. A congressional effort of this dimension could serve as a model for similar efforts in the states, and in other nations.

Three aspects of comprehensive revision warrant special emphasis. First, as Representative Griffiths indicated in H. Res. 108, review should encompass the manifold regulations prescribed under the various laws. (The very preliminary analyses offered in this report do not encompass consideration of regulations requiring overhaul.) Second, all antidiscrimination statutes should be canvassed so that sex may be added to the catalogue in instances where, currently, it is not included. Third, Congress should advert to the concept that pervades the Code and that must be rooted out if the principle of equal rights, responsibilities and opportunities, free from gender-based discrimination is to achieve realization -- the notion that the adult world is (and should be) divided into two classes: independent men, whose primary responsibility is to win bread for a family; dependent women, whose primary responsibility is to care for children and household. Underlying recommendations made in this report is the fundamental point that allocation of responsibilities within the family is a matter properly determined solely by the individuals involved. Government should not steer individual decisions concerning household or breadwinning roles by casting the law's weight on the side of (or against) a particular method of ordering private relationships. Rather, a policy of strict neutrality should be pursued. That policy should accommodate traditional patterns. At the same time, it should assure removal of artificial constraints so that women and

men willing to explore their full potential as human beings may create new traditions by their actions.

II. Sex-Based Terminology

The drafting scheme now reflected in the U.S. Code is appropriate to a society that accepts as inevitable the dominant position of men in political and economic spheres of life. We have proposed revision to reflect in form as well as in substance the equal status of women and men before the law.

Drafting consistency is not a hallmark of the current body of federal law. For example, in some sections, when spouse is the intended meaning, the reference is to "husband or [and] wife"; in other sections, the economy-minded drafter simply used "spouse". Similarly, where the reference is to a person's child[ren], the statutory expression is sometimes "son(s) or [and] daughter(s)," and sometimes "child(ren)". "Man," "person" and "human being" are used interchangeably; "he" is generally used alone, but an occasional "he or she" appears. Although the main rule, as expressed in 1 U.S.C. §1, is "words importing the mansculine gender include the feminine as well," certain anomalies appear. These generally reflect a congressional design to equalize treatment of women and men. For example, 26 U.S.C. §7701(a)(17), relevant to tax treatment of alimony and support payments, explains that "husband" sometimes means "wife," and "wife" sometimes means "husband"; 38 U.S.C. §102(b) informs that "wife" includes the husband of a female veteran, "widow," the widower of a female veteran. A less eclectic drafting style should be one of the improvements accomplished by thoroughgoing sex-neutralizatior of the language of federal law.

While we recommend that symbolic figures, such as "Johnny Horizon," should include women as well as men, and that the "prudent man" become the "prudent person," we do not suggest historical revision (references to the titles of legislation no longer in force should remain undisturbed), change in place or proper names (e.g., Twin Sisters Mountain, Minute Man National Park), or amendment of familiar, innocuous terms such as "brother-sister control group". The main rule we propose (see Title 1 analysis) calls for sex-neutral terminology except in the rare instance where no suitable sex-neutral substitute term exists, or the reference is to a physical characteristic unique to some or all members of one sex, or the constitutional right to privacy necessitates a sex-specific reference.

III. Substantive Differentials

A. Precise functional description should replace gross gender classification in federal social and employment benefit legislation.

Provision of payments for wives and widows, but not for similarly situated husbands and widowers, has been characteristic of federal social and employment benefit legislation. Increasing female participation in the paid labor force has impelled reassessment of the quality of this differential. Once thought to operate benignly in women's favor, the differential in fact perpetuates insidious discrimination against women who are gainfully employed, whether by choice or, as is more often the case, necessity. Withholding from a woman's spouse benefits paid to a man's spouse in effect denies the woman equal compensation. A scheme built upon the breadwinning husband/dependent homemaking wife concept inevitably treats the woman's efforts or aspirations in the economic sector as less important than the man's.

Consistent with prohibitions against gender-based differentials announced in the Equal Pay Act (1963) and Title VII of the Civil Rights Act of 1964, Congress stipulated in December, 1971 that all regulations granting benefits to government employees

> shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children . . . .

The remedy for existing inequities was to be benefit extension:

> [A]ny provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

This stipulation appears in 5 U.S.C. §7152. Amendments of the same tenor during the period 1971-73 were made in, inter alia, 5 U.S.C. §§ 8341 (annuity for surviving spouse of federal civil service employee), 2108 (veteran's preference for spouse), 5924 (allowance for spouse of federal employee living in foreign area), 37 U.S.C. §401 (allowances for spouse of member of uniformed service), 38 U.S.C. §102(b) (benefits for veteran's spouse). Change of this kind reflects congressional awareness that the prior arrangement

> [ran] counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living.

H.R. Rep. No. 94-1469, 91st Cong., 2d Sess. (1971).

Much of the needed revision still awaits congressional attention. Examples of provisions that similarly "run counter to the facts of current-day living" appear in the analyses of Titles 24, 30, 33, 42, 43, 45, 48 and 49. Among these, the Title 42 Social Security and Aid to Families with Dependent

Children provisions are particularly significant. (Title 45 Railroad Retirement provisions track differentials in Social Security.)

Lagging far behind federal antidiscrimination mandates, glaring sex differentials reflective of "the sociological conditions and climate of the 1930's "* survive in the Social Security Act: certain benefits that accrue to the spouse (or former spouse) of a male insured individual do not accrue to the spouse (or former spouse) of a female insured individual; generally, benefits accrue to a female spouse without regard to dependency, but to a male spouse only if he received at least one-half his support from his wife; a married woman who pays social security taxes all her working life may receive benefits no larger than if she never contributed to the fund. Under the Aid to Families with Dependent Children Program, only father may be considered the breadwinning parent in an intact family. In operation if not in design, the program provides a financial incentive for impoverished families to split up, for father to leave home, and for mother to bear responsibility for parenthood alone.

The sex stereotyping reflected in legislation patterned on the male breadwinner concept has long operated to deny women equal employment opportunity and fair remuneration for their labor. See Frontiero v. Richardson, 411 U.S. 677 (1973); Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination (1974). It is a prime recommendation of this report that all legislation based on the breadwinning husband/dependent homemaking wife pattern be recast using precise functional description in

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* A Matter of Simple Justice, Report of the President's Task Force on Women's Rights and Responsibilities 11 (1970).

lieu of gross gender classification. Functional description will preserve all currently existing protection for women who work full-time within and for the family unit but, unlike gender classification, it will not penalize women who engage in or aspire to paid positions in the labor force.

B. Legislation should reflect the distinction between childbearing, a function unique to women, and child rearing, a function that men as well as women may be qualified to perform.

Just as current legislation focuses on the male as breadwinner, it isolates the female as child tenderer. In diverse contexts, the label "maternal" or "mother" is used when "parental" or "parent" should be the legislature's meaning. For example, Titles 7, 22 and 42 contain provisions aimed at promoting and assisting family planning, health and welfare. However, the references are to "maternal" health or welfare and "mothers". Those terms would be appropriately descriptive only if the programs involved were confined to care for pregnant women and lactating mothers. To the extent that programs relate to birth control, family planning or the general health or welfare of a person responsible for child care, the references should be to "parental" health or welfare and "parents".

Similarly, a provision of Title 20 (§904) authorizes "maternity" leave. To the extent that leave is authorized for child rearing as distinguished from childbearing, fathers as well as mothers should be eligible.

Congress has established "Mother's Day" and "Father's Day" as separate "patriotic observances" (36 U.S.C. §§ 141, 142, 142a). A single

"Parents Day" would be consistent with national recognition that either parent, or both parents may perform the nurturing function.

Typical of the constant association of mothers and children, three provisions in Title 42 contain the phrase "children of working mothers" when the intended reference is to children with no parent in the home during working hours. Title 46 regulations concerning shipboard accommodations reflect a presumption that young children will be exclusively in the care of women.

In contrast to provisions that confuse childbearing and child rearing, the Railroad Retirement Act, 45 U.S.C. §351(k)(2), offers a model for appropriate treatment of "maternity". It defines a "day of sickness" for disability compensation purposes to include "with respect to a female employee," "a calendar day on which, because of pregnancy, miscarriage or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health". The Supreme Court currently regards inclusion of disability due to pregnancy in a state social insurance program as permissible, but not required by the equal protection principle. Geduldig v. Aiello, 42 U.S. Law Week 4905 (June 17, 1974).

The coverage afforded under 45 U.S.C. §351(k)(2) is desirable as a matter of social policy and should be mandated by the constitutional standard applicable under the equal rights amendment. Women temporarily unable to work due to childbirth or pregnancy-related physical disability should not be treated as labor force outcasts. Job security, income protection and health insurance coverage during such disability is essential if equal opportunity in the job market is to become a reality for women. Legislation building upon the 45 U.S.C. §351(k)(2) formulation should be

developed for application in all employment sectors. See generally Davidson, Ginsburg & Kay, Text, Cases and Materials on Sex-Based Discrimination 495-510 (1974). Further, the increasingly common two-earner family pattern should impel development of a comprehensive program of government-supported child care. See id. at 461-84.

C. Legislation concerning family relationships should be revised to eliminate obsolete provisions and to reflect current trends.

Title 43 provisions on homestead rights of married couples are premised on the assumption that husband is authorized to determine the family's residence. This "husband's prerogative" is destined for the scrap heap. See, e.g., Weintraub v. Weintraub, 356 N.Y.S. 2d 450 (Family Ct. 1974). Sisters and brothers should rank in the same entitlement class for survivor benefit purposes. No reason appears for the "sister preference" reflected in 30 U.S.C. §922 and 46 U.S.C. §599. Retention of a fault concept in provisions referring to separation (30 U.S.C. §902(e), 38 U.S.C. §101(3)) is questionable in light of the trend away from fault determinations in marital breakdown situations. Provisions relating to benefits for children born out of wedlock (e.g., Titles 37, 38) should be reviewed to eliminate substantive differentials based on birth status.

D. Legislation relating to criminal sexual activity requires critical review to assure sex-neutrality in the law as written and as enforced; sex segregation in sleeping and bathroom facilities may be continued but in other respects sex separation in penal institutions should be terminated.

Current provisions dealing with statutory rape, rape and prostitution are discriminatory on their face. With respect to prostitution, enforcement

practices compound the discrimination. S.1400 (Criminal Code Reform Act of 1973) would sex-neutralize the substance of sex crime provisions. The proposed Act decriminalizes prostitution, but not prostitution business. This report recommends unqualified decriminalization as sound policy, implementing equal rights and individual privacy principles, and indicated by empirical investigation and experience in other nations.

Sex-segregated penal institutions are obviously separate and, in a variety of ways, unequal. Preparation for return to a community in which men and women have equal rights, responsibilities and opportunities is not fostered by the present arrangement. While the personal privacy principle permits maintenance of separate sleeping and bathroom facilities, no other facilities, e.g., work, school, cafeteria, should be maintained for one sex only.

D. Statutory barriers to equal opportunity for education, training and employment should be removed.

In certain areas federal law retains outright sex-based exclusions from occupational training and employment opportunities; in others it exposes women to separate and unequal treatment. These restrictions should be an embarrassment to Congress. They stand in stark contrast to the employment discrimination prohibitions of Title VII of the Civil Rights Act of 1964, as amended, and the directions in Title IX of the Education Amendments of 1972 designed to promote equal educational opportunity for women and men.

Squarely conflicting with Title VII, 30 U.S.C. §187 includes a flat hiring prohibition: coal mining leases for federally-owned lands must prohibit the employment of females in any mine below the surface. This ban is impossible to justify under conditions prevailing in this latter part of the twentieth century. Similarly without justification is the sex/age differential in 41 U.S.C. §35 setting a minimum age of sixteen for boys and eighteen for girls employed by public contractors. Also intolerable

in an age when government proclaims that "equal opportunity is the law" are the Title 42 gender-based registration and priority rules set for the WIN program. Of the same genre, 25 U.S.C. §274 calls for training Indian boys as farmers and industrial workers, Indian girls as assistant matrons.

Military service may qualify as the issue that has generated more emotion-charged debate than any other regarding equal rights, responsibilities and opportunities for men and women. Women are currently exempt from draft registration. 50 U.S.C. App. §453. And they are barred from combat duty by Title 10 proscriptions governing the Air Force, Marines and Navy (10 U.S.C. §§ 6015, 8549) and by Army regulations. For these favors a toll is exacted. Women who wish to serve in the armed forces, whether for the training and educational opportunities offered, or because they aspire to permanent careers in the military, encounter a series of sex barriers. One of them, differential enlistment age requirements, was removed on May 24, 1974 by P.L. 93-290, 93d Cong., 2d Sess., amending 10 U.S.C. §505. Many remain. The combat duty exclusion has been invoked to justify restrictive enlistment quotas for women, and closing occupational specialties, training programs and the doors of the service academies to them. The separate and unequal sphere carved out for women in the armed forces supplies the rationale for differential promotion provisions (Title 10) and corresponding differentials in pay and allowances (Title 37).

Supporters of the equal rights principle firmly reject draft or combat exemption for women, as Congress did when it refused to qualify the equal rights amendment by incorporating any military service exemption. The equal rights principle implies that women must be subject to the draft if men are, that military assignments must be made on the basis of individual

capacity rather than sex, and that a woman must have the same opportunity as a man to qualify for any position to which she aspires in the uniformed services.* As Admiral Elmo Zumwalt has stated:

> [Women] are able to do their work in any rating, and there is no question but what women will be able to serve on all ships effectively when the law in contravention thereof is struck down. . . .
>
> . . . . I see no limitations on the managerial or leadership capabilities of women and I see no reason, in principle, why some day a Chief of Naval Operations should not be a woman who has had the opportunity to serve and command at sea and work up through the necessary experiences.

Up to now, women have been denied the opportunity to "work up through the necessary experiences". Thus the need for affirmative action and for transition measures is particularly strong in the uniformed services. In the transition to equal opportunity, care must be taken to avoid adverse impact on women now in service whose opportunities for training and chances for promotion have been curtailed under the current separate and unequal system.

Six federally incorporated organizations furnishing educational and recreational programs for young people are described in Title 36. Only one of them, the Girl Scouts, was organized for females. The remaining five, Boy Scouts, Future Farmers of America, Boys' Clubs of America, Big Brothers of America and Naval Sea Cadet Corps, were designed for all-male membership. Prototypically, the purpose of the Boy Scouts is to promote "the ability of boys to do things for themselves and others . . . , to teach them patriotism, courage, self-reliance, and kindred virtues"

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* Conversation with Senator Charles H. Percy, recorded June 28, 1974.

(36 U.S.C. §23), while the purpose of the Girl Scouts is to promote "the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, cheerfulness, thriftiness, and kindred virtues among girls, as a preparation for their responsibilities in the home and for service to the community" (36 U.S.C. §33).

Societies established by Congress to aid and educate young people on their way to adulthood should be geared toward a world in which equal opportunity for men and women is a fundamental principle. In some cases, separate clubs under one umbrella unit might be a suitable solution, at least for a transition period. In other cases, the educational purpose would be served best by immediately extending membership to both sexes in a single organization.

A number of single sex historical societies, for example, the Daughters of the American Revolution and the Sons of the American Revolution, have been federally incorporated. The character of these organizations, including the absence of any significant government assistance to or involvement with them, suggests that their present membership restrictions should be tolerated. However, the equal rights principle should preclude Congress from creating such sex-segregated organizations in the future.

In a variety of ways detailed above in the Title 26 analysis, provisions of the Internal Revenue Code may impact substantially and adversely upon the two-earner couple, imposing a fiscal burden when the working woman marries or the stay-at-home spouse returns to the paid labor force. To eliminate or reduce the disincentive current tax law provides for two-earner family patterns, at least three legislative measures might be considered: 1) elimination of the joint return provision and rate table ("individual taxation"); 2) allowing a married couple to elect, for federal income

tax purposes, to be treated as single persons; 3) a second earner deduction or credit. For reasons outlined in the Title 26 analysis, this report recommends the third approach.

A "Woman's Bureau" operating within the Department of Labor is established by 29 U.S.C. §§ 11-14, 557. A unit charged with formulating policies to advance the welfare and opportunities of wage-earning women would be unnecessary and inappropriate were equal opportunity free from gender-based discrimination a practical reality. However, the legacy of disadvantageous treatment of women in the economic sphere is likely to have a continuing adverse impact on women in or seeking to enter the labor force long after the equal rights amendment becomes part of the Constitution. The Women's Bureau is therefore a necessary and proper office to serve during a transition period until the equal rights principle is realized in practice.