Buffalo Law Review

Volume 32 | Number 2 Article 7

4-1-1983

Sexism in the Statutes: Identifying and Solving the Problem of Ambiguous Gender Bias in Legal Writing

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SEXISM IN THE STATUTES: IDENTIFYING AND SOLVING THE PROBLEM OF AMBIGUOUS GENDER BIAS IN LEGAL WRITING

INTRODUCTION

Following the landmark United States Supreme Court case of *Reed v. Reed*,[1] courts and legislatures have devoted substantial attention to evaluating, and in many cases eradicating, sex-based distinctions in federal and state laws. The courts have generally focused on establishing and applying the appropriate standard for reviewing sex-based classifications.[2] At the same time, Congress and state legislatures have been concerned with the processes of ratifying the federal Equal Rights Amendment (ERA)[3] and its state counterparts,[4] and also with the modification of sex-based provisions in the laws under their respective jurisdictions.[5] The

1. 404 U.S. 71 (1971) (holding unconstitutional a provision of the Idaho probate code that preferred males over females as administrators).

2. In Reed v. Reed, 404 U.S. 71, 76 (1971), the Court held that the statute did not even meet the relatively minimal requirement that it bear a "fair and substantial relation" to a state objective. The Court used a higher standard of review in Frontiero v. Richardson, 411 U.S. 677 (1973), where the Court voided a statute that required female officers in the armed services to prove they had dependents while presuming that male officers had families to support. The holding that sex was a suspect classification, thereby requiring a compelling state interest to be valid, was unprecedented; however, because Justice Brennan only wrote for a plurality of the Court, it was also non-precedential. Three years later, in Craig v. Boren, 429 U.S. 190, 197 (1976), the Court adopted an intermediate standard of review for sex-based classifications: statutes must serve "important governmental objectives" if they treat members of both sexes differently.

3. Congress submitted the federal ERA to the state legislatures for ratification on March 23, 1972. H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 9809, 9907 (1972). It extended the ratification deadline in October of 1978, when the amendment still needed approval by at least three more states. H.R.J. Res. 638, 95th Cong., 2d Sess., 124 CONG. REC. 34, 314-15 (1978). The ratification process ended on July 1, 1982, when the 1979 extension expired. *See* 128 CONG. REC. S7771-74 (daily ed. July 1, 1982) (statement of Sen. Packwood).

4. Seventeen states (Alaska, Colo., Conn., Hawaii, Ill., Md., Mass., Mont., N.H., N.J., N.M., Pa., Tex., Utah, Va., Wash., & Wyo.) have passed state ERAs of differing forms. C. THOMAS, SEX DISCRIMINATION 380 (1982). Voters in New York State defeated a proposed state ERA in 1975.

5. Some legislative changes are in direct response to court actions which construed the statutes in issue. For example, after a New York court held in Cohen v. Cohen, 200 Misc. 19, 103 N.Y.S. 2d 426 (Sup. Ct. 1951), that "adultery" did not include homosexual relationships, the state legislature specifically included such conduct in the definition of adultery in its divorce statute. N.Y. DOM. REL. LAW § 170 (McKinney 1977).

On the other hand, court action is not always essential to prompt a legislature to change

legislative and judicial branches have not always coordinated their efforts in dealing with sex-based distinctions.[6] Nevertheless, their combined efforts in the decade since *Reed* have produced important progress toward the goal of sexual equality.[7]

Commentators have devoted considerable attention to these legislative and judicial actions, to the relationship between them, and to the effect that passage or failure of the federal ERA will have on that relationship.[8] For the most part, however, these commentators have only dealt with two of the three ways in which sex bias has entered the law. First, many of them have analyzed cases that involved unambiguously sex-biased classifications. A law might say, for instance, that "all men, but no women, are eligible for benefit *X*"; the bias against women in such a law is clear.[9] There has also been ample analysis of cases involving classifications that are, literally, gender-neutral. This type of law, on its face, applies the same standard to members of both sexes; an example would be "all armed service veterans are eligible for benefit *Y*." The law is literally gender-neutral, but may still be subject to

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a biased statute. A good example is New York's Equitable Distribution Law, N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1982), which the legislature passed without being challenged as to the constitutionality of the earlier property distribution law.

6. Some commentators have decried the failure of a majority of the Court to declare that sex is a suspect classification. *See, e.g.*, Dubnoff, *Sex Discrimination in the Burger Court — A Retreat in Progress?*, 50 FORDHAM L. REV. 369 (1981) (advocating application of equal protection clause to women); Loewy, *Returned to the Pedestal — The Supreme Court and Gender Classification — 1980 Term*, 60 N.C.L. REV. 87, 95 (1981) (Court "returned women to the pedestal, stripped of much of their personhood"); Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 WAYNE L. REV. 1355 (1975) (author finds "immense significance" in difference between the burden of proof required by the challenging party under the "strict scrutiny" test applied to "suspect" classfications, and the lesser burden applied to "ordinary" classifications through the "rational relationship" test).

7. Some have argued, however, that not enough progress has been made. *See, e.g.*, Ginsburg, *From No Rights, to Half Rights, to Confusing Rights*, 7 HUM. RTS. 12 (1978); Knowles, *The Legal Status of Women in Alabama: A Crazy Quilt*, 29 ALA. L. REV. 427 (1978) (some statutes already corrected, but other modifications are still necessary); Conlin, *Equal Protection versus Equal Rights Amendment — Where Are We Now?*, 24 DRAKE L. REV. 259, 329 (1975) ("any vestigal faith in the ultimate recognition by the courts of the principle of equality has vanished").

8. When this Comment was drafted, articles discussing this relationship from the post-ERA-defeat perspective had yet to appear. See *supra* notes 6-7 for a collection of some of the pre-defeat views on the subject. For treatment of some of the broader implications of passage of the federal ERA, see Strong, *Contributions of ERA to Constitutional Exegesis*, 14 GA. L. REV. 389 (1980).

9. The statutes in Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), were biased in this way.

constitutional challenge.[10] The third source of sex bias in law lies between the extremes of literally biased law and literally bias-free law; consider, for instance, the statute that says "a person is eligible for benefit *Z* if he is married and over the age of 18." Women may, or may not, be eligible for this benefit. This Comment will focus on these "ambiguously sex-biased classifications," which use gender-specific words (such as "he" and "man") that always refer to men but only sometimes refer to women.

The problem of ambiguously sex-biased classifications in legal writing is a manifestation of a more general problem in the English language, *i.e.*, that many gender-biased words have no grammatically acceptable gender-neutral alternative. Most legal writers probably believe this problem is one that linguists, not lawyers, should be solving.[11] Nevertheless, legal writers should be aware of the problem of bias in the language, as it affects their own legal writing.[12] To a limited extent, this Comment addresses this general problem.[13] The main focus, however, is on the legal problem of ambiguously sex-biased classifications, which results from the gender bias in the English language. Judges must be aware of the legal aspects of these classifications if they are to decide cases arising pursuant to them, and legislators must understand ambiguously sex-biased classifications if they are to prevent similar statutory difficulties from arising in the future.

Ambiguous sex-biased classifications have been the subject of

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10. The plaintiff in Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) argued that she was unconstitutionally denied benefit *Y* (in her case, state employment) because the literally gender-neutral classification excluded most women but only a few men. (The Court held that she would have to prove the *intentional* character of the discriminating legislation in order to prevail). *See also* Geduldig v. Aiello, 417 U.S. 484 (1974) (gender-neutral disability statute did not work invidious discrimination violative of the Constitution on ground that it excluded normal pregnancies from coverage).

11. Even some linguists approach the problem with some hesitation: one admits to "suspect[ing] that most women in the English-speaking world are not even aware of the problem." M. ADLER, SEX DIFFERENCES IN HUMAN SPEECH 22 (1978). Despite the lack of popular awareness, linguists have been able to conduct substantial research and analysis of the general problem. A general discussion of the problem is beyond the scope of this Comment, however. For other works providing linguistic background to the legal issues, see generally: J. AIKEN, ENGLISH PRESENT AND PAST (1930); Bodine, *Androcentrism in prescriptive grammar: singular 'they', sex-indefinite 'he', and 'he or she'*, 4 LANG. IN SOC'Y 129 (1975); M. KEY, MALE/FEMALE LANGUAGE (1975); R. LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975).

12. *See* Wydick, *Plain English for Lawyers*, 66 CALIF. L. REV. 727, 752-54 (1978) (noting sexism in legal writing); Biskind, *Write It Right*, N.Y.L.J., May 9, 1972, at 4, col. 4.

13. *See infra* notes 131-33 and accompanying text.

at least some legal analysis. In 1977, the United States Commission on Civil Rights announced:

> Equalization of the treatment of men and women under Federal law is an overdue task which should command priority attention of the President and Congress. . . . [A] myriad of unwarranted differentials clutter the U.S. Code. While many are obsolete or of minor importance when viewed in isolation, the cumulative effect is reflective of a society that assigns to women, solely on the basis of their sex, a subordinate or dependent role.[14]

The Commission's report to the President and Congress[15] was based on the findings of a comprehensive study of the U.S. Code, which identified more than 800 Code provisions that contained various types of literally biased references.[16] The Commission did not recommend changes in provisions that were clearly unbiased or harmlessly biased,[17] and many of its recommended changes concerned Code sections that were literally biased in favor of members of one sex.[18] However, the Commission also directed many of its recommendations to the ambiguously sex-biased portions of the Code.[19] It recommended removing the sex-specific terms because such references "reflect the fact that the use of masculine pronouns and other referents in the Code reinforces the traditional view of women as members of the 'other' sex."[20] Most of those rec-

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14. U.S. COMM'N ON CIVIL RIGHTS, SEX BIAS IN THE U.S. CODE 204 (1977) [hereinafter cited as SEX BIAS IN THE CODE].

15. The Commission issued its report pursuant to the Civil Rights Act of 1957, Pub. L. No. 85-315, § 104(b), 71 Stat. 634, 635, as amended. Heading the research team was Columbia University law professor Ruth Bader Ginsburg, now a D.C. Circuit Judge.

16. SEX BIAS IN THE CODE, *supra* note 14, at 13. The study found the 800 sections by using a computer program that searched for 59 "key" biased words. *Id.* at 11-12. Therefore, the study could not identify all of the literally gender-neutral provisions in the Code to which women or men might object.

17. Two types of retrieved provisions are not relevant here. "[S]ections which specifically prohibit sex discrimination rather than differentiate between females and males" were not discussed in the study. *Id.* at 13. In addition, the Commission made only passing reference to such biased references as those in proper names; *e.g.*, it "left undisturbed" references to "Twin Sisters Mountain," 16 U.S.C. § 192 (1982), and "Minute Man National Park," *id.* § 410s. SEX BIAS IN THE CODE, *supra* note 14, at 89.

18. *E.g.*, 22 U.S.C. §§ 1064-1082 (repealed 1980), which provided annuities to widows regardless of their dependency status but only to widowers if they were dependent on their late spouses. *See* SEX BIAS IN THE CODE, *supra* note 14, at 111-13.

19. *E.g.*, 12 U.S.C. § 1715m (1982), which provides a housing certificate to a "serviceman" or his "widow." There is no counterpart for servicewomen or their widowers, so this classification must therefore be termed ambiguously biased. *See* SEX BIAS IN THE CODE, *supra* note 14, at 81-82.

20. SEX BIAS IN THE CODE, *supra* note 14, at 14.

ommendations called for the eradication of particular ambiguously sex-biased references. The Commission reasoned:

> While the United States Supreme Court, the ultimate interpreter of the Constitution, might have determined that "man" also means "woman" in terms of rights, duties, privileges, and obligations under the Constitution, the Court instead has chosen on numerous occasions to deny to women certain rights and privileges not denied to men.[21]

The Commission enunciated these views more than six years ago. Its assertions indicate that the general problem of gender bias should be given at least *some* attention by members of the legal community.

Thus far, Congress and the President have not given "priority attention"[22] to the problem of ambiguously sex-biased classifications. Recently, more than a quarter of the United States Senators in the 98th Congress co-sponsored a bill "to amend the laws of the United States to eliminate gender-based discrimination."[23] However, even if these amendments pass, it is not certain that they will change all the existing ambiguously sex-biased classifications in the U.S. Code. In any case, the amendments will not have any direct effect on gender-biased provisions in state laws.[24] Accordingly, there is still a need for evaluating whether the courts of the 1980s will continue to exclude "woman" from the meaning of "man" (or vice versa), so as to deny to members of one sex rights and privileges never denied to the other.

Part I of this Comment will first deal briefly with some of the causes of gender bias in legal writing. It will then attempt a more thorough analysis of the legal effects of that bias. Five distinct types of ambiguously sex-biased language in statutes and legal documents will be presented, and the similarities and differences among them then discussed. The remainder of Part I is devoted to

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21. *Id.* at 2.

22. *Id.* at 204.

23. S. 501, 98th Cong., 1st Sess. (1983).

24. The problem is by no means solely a federal one. In 1981, a New York State Senator remarked:

> The use of "man," "men," "mankind," etc. is prevalent in spite of the meaning of the law to refer to people, person or persons, human beings, etc. The State of New York has long been committed to equal rights for all of its citizens, men and women. . . . It is inappropriate, in today's society, for the laws of New York to contain statutory language that refers to only one gender . . . to apply to all people.

1981 LEGISLATIVE ANNUAL 395 (statement of Sen. Winikow).

a critical evaluation of existing methods to limit the extent of the biased classifications. Part II will consider alternatives to the now-prevailing uses of ambiguously sex-biased classifications in statutory and non-statutory provisions. Some of these alternatives will be tailored to eradicate bias in statutes and legal documents.[25] However, the preferred solution applies to all kinds of legal writing. It proposes to eradicate the problem of ambiguously sex-biased classifications by literally removing the words that cause the ambiguities. Indeed, it is a solution that many legal writers have already chosen.[26]

I. IDENTIFYING THE PROBLEM: THE ORIGINS AND EFFECTS OF GENDER-BIASED PROVISIONS AND THE ATTEMPTS TO LIMIT THOSE EFFECTS

A. *The Political and Seemingly Non-Political Reasons for Gender Bias in the Law*

Since many of today's laws are carryovers from previous decades or even previous centuries, it is not surprising that some statutes remain in their original gender-biased form. Prior to 1850, the main reason for writing gender-biased laws was essentially rooted in the politics of the era: legislators had no need to draft statutes in gender-neutral terms. According to one commentator:

> [I]n the first half of the nineteenth century there were no challenges to classifications based on sex. So deeply engrained were the customs and traditions of the day that no one thought to question sex discrimination. That women were denied, among other things, the right to vote, to serve on juries, and to enter into certain professions was an accepted fact of political life.[27]

It follows that it would have been equally acceptable, in the early nineteenth century, to draft statutes that only applied to those citizens (*i.e.*, men) who derived benefits or responsibilities from them.

When women's efforts towards equality intensified in the latter half of the nineteenth century, ruling-class men responded with a different argument: the supremacy of "nature and the physical order."[28] Interestingly, it appears that legislators of those years

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25. *See infra* notes 118-30 and accompanying text.

26. *See infra* notes 131-37 and accompanying text.

27. Comment, *Secularization of the Law and Sex Discrimination*, 31 MERCER L. REV. 581, 583 (1980).

28. *Id.* at 586 (when men could no longer deny women their rights on the basis of the

carried this ideology into their statute writing; the desire was for simplicity and order in their written laws. At the federal level, Congress manifested this desire by passing what became known as the "Dictionary Act,"[29] a forerunner of today's federal general-construction statute.[30] The Act literally extended masculine-gender words to apply to females,[31] but according to its Senate sponsor, "The only object is to get rid of a great deal of verbosity."[32] The purpose of the "Dictionary Act" was to put statutes in a natural and logical form; the same rules of nature and logic, at *that* time, precluded their applicability to women.

In retrospect, it is questionable whether this aesthetic motive was the *only* reason for not extending statutes directly to women. For as the nineteenth century continued, some women became, to an extent, inspired by the relatively improved status of blacks in America.[33] These women sought to be included under provisions of law which referred to "he" and "man," but which neither included nor excluded women by their terms. More than one legal writer has pointed out that courts in the late nineteenth century put an end to the expectations of these women.[34] Since these later efforts to limit women's rights were as successful as those in the early nineteenth century, it must be questioned if the motives of the later drafters were any less political than those of the earlier ones.

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law of God, they shifted to the law of nature).

29. Act of Feb. 25, 1871, ch. 71, 16 Stat. 431.

30. 1 U.S.C. § 1 (1982) ("words importing the masculine gender include the feminine as well").

31. Act of Feb. 25, 1871, ch. 71, 16 Stat. 431. The Act did not, however, extend masculine words to females in *all* cases; *see infra* notes 100-02 and accompanying text.

32. CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871) (statement of Sen. Trumbull). The Supreme Court recently reviewed this language in construing 42 U.S.C. § 1983 (1976), a civil rights statute passed a few months after the Dictionary Act. *See* Monnell v. Department of Social Servs., 436 U.S. 658, 689 n.53 (1978).

33. Comment, *supra* note 27, at 582.

34. *Id.*, quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (scope of thirteenth, fourteenth, and fifteenth amendments limited to cases of race discrimination). *See also* A. SACHS & J. WILSON, SEXISM AND THE LAW 69 (1979) (Supreme Court frequently "evaded" the application of race-discrimination doctrine in women's rights cases, and when it did mention that doctrine, its decisions "invariably . . . favored male supremacy").

At about the same time, efforts to solve the general problem of gender bias in English were met with similar resistance by late nineteenth-century grammarians. *See* Bodine, *supra* note 11, at 130-34 (defeat of proposal to use "they" as a singular, gender-neutral pronoun); M. KEY, *supra* note 11, at 141 (rise and fall of coined pronoun, proposed as a gender-neutral alternative).

B. *The Effects of Gender Bias in Law: Five Characters in Search of an Ambiguous Sex-Biased Classification*

Today's courts must deal with a significant number of cases involving ambiguously sex-biased classifications. They pose a problem for the judiciary because courts have had to dispose of most of them on an individual basis.[35] Moreover, a disproportionate number of the cases appear to come from criminal defendants charged with sex offenses,[36] and the public policy issues raised in their cases may blur the problem of ambiguous gender-bias when it arises in other statutory contexts.[37]

The courts have faced two fundamentally different types of arguments in cases involving ambiguously sex-biased classifications. In one type, the litigant making the argument, typically a defendant, seeks to escape a penal or pecuniary *burden*; in the other, the party, typically a plaintiff, seeks a pecuniary or property *benefit*. These cases further break down into three subtypes of "burden" cases, and two subtypes of "benefit" cases. To illustrate the issues raised in each of these situations, the cases of five hypothetical characters, *A*, *B*, *C*, *D*, and *E*, will be presented; some of the similarities in their cases will then be discussed.

1. *Burden Case No. 1: Classification Does Not Apply*

> *A*, a female, is on trial for carrying a concealed weapon. The applicable statute says that "a person commits [the offense] when he intends to conceal, and does in fact conceal, a weapon as defined [elsewhere in the Penal Code]." *A* claims that the statute does not apply to a female defendant and that she should therefore be released.

In this case the claimant argues that since burden-imposing stat-

35. Many courts have no clear alternative to the case-by-case approach. *See infra* notes 79-82 and accompanying text.

36. A plurality, if not a majority, of the cases cited in this Comment are sex-offense cases; clearly, such cases do not ordinarily crowd any court's calendar.

37. In Acosta v. Delaware, 417 A.2d 373 (Del. 1980), the court considered this aspect of the defendant's argument about the ambiguous bias in the state's sex-offense statutes:

> [W]e think common sense has to be applied. . . . We do not think evolving concepts of sexual equality should impact constitutionally in such an abrupt and callous manner that the only remedy in the legalistic mind is to deny protection from sexual abuse to small children. We do not think that justice is that blind.

Id. at 376.

utes should be strictly construed,[38] the sex-specific language should not be extended to members of the other sex. The claimant must, of course, ignore or distinguish any provisions that permit extending the sex-specific term to members of both sexes.

Prior to 1971, several claimants prevailed in cases similar to *A*'s. In 1951, a New York court decided *Cohen v. Cohen*,[39] in which plaintiff sought a divorce from her husband on the ground of adultery. The defendant responded that his wrongdoing was not adultery, since the law defining adultery was sex-specific; that is, it contemplated that adulterer and accomplice would be of opposite sexes.[40] Since Mr. Cohen's accomplice was of the same sex, he escaped the "burden" by successfully claiming its inapplicability, and Mrs. Cohen was denied her divorce.

A few years later, in *Adamson v. Hoblitzell*,[41] Kentucky's highest court considered a similar argument from a female defendant charged with vagrancy. The statute in question provided four separate grounds for conviction, one of them sex-specific. Defendant therefore argued that the statute as a whole was inapplicable to her. The court rejected her argument, but it did so on the ground that her conviction had been pursuant to one of the three gender-neutral subsections of the statute.[42] The court did not, however, address the argument any further, and therefore left open the possibility that it might have reversed the female's conviction, on account of statutory inapplicability, had it been under the sex-specific provision of the statute.

Two other relatively recent cases illustrate the possible continued viability of *A*'s literal-inapplicability argument. In the 1970 case of *Cincinnati v. Wayne*,[43] the burden imposed was the relatively conventional one of criminal conviction. The city of Cincinnati charged the defendant with violating an ordinance prohibiting indecent exposure. The court read a reference in the ordinance to the display of "his person," and since the defendant was female, it

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38. *E.g.*, FLA. STAT. ANN. § 775.021 (West 1976). Many legislatures have repudiated the common-law strict-construction principle. *See, e.g.*, CAL. PENAL CODE § 4 (West 1970); N.Y. PENAL LAW § 5.00 (McKinney 1975) (statutes construed by "fair import of their terms").

39. 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951).

40. *Id.* (citing adultery law then in effect, N.Y. PENAL LAW § 100 (McKinney 1909), *repealed by* 1965 N.Y. Laws 1037, § 3).

41. 279 S.W.2d 759 (Ky. 1955) (citing vagrancy statute).

42. *Id.*

43. 23 Ohio App. 2d 91, 261 N.E.2d 131 (1970).

refused to extend the classification beyond its literal reading.[44]

In *Atkinson v. Thomas*,[45] the state "burdened" the claimant by denying her the right to vote in a primary election. The claimant sought to retain her right to vote, but she was faced with an attempt to disenfranchise her for failing to meet the county's residency requirement. The test of residency for a "single man" was that he spend most of his nights in the county; there was no separate test for a "single woman." The court refused to extend the sex-specific test to the other sex, and it denied the petition before it to disenfranchise the woman.

Cases such as these have not arisen in recent years, primarily because many of the statutes have been amended to hold members of both sexes liable for a violation. On the other hand, many provisions still use sex-specific language to refer to the victim of the claimant's offense.[46] The litigant arguing literal inapplicability then asserts that the statute does not apply because the *victim* is not literally included under it. A good example is found in *D.G.D. v. State*,[47] where defendant claimed that his victim, a female over fourteen years of age, was not protected by the applicable statute. The statute prohibited persons from being lewd to "a female or to a male under the age of fourteen years," and the defendant argued unsuccessfully that the "under fourteen" language modified both "male" and "female." The court's conclusion was that the victim was within the prohibition of the law.[48]

2. *Burden Case No. 2: Classification Should Not Apply*

> *B*, a male, is charged (in a separate case) with the same concealed-weapon offense as was *A*, and the elements of the offense (including the sex-specific language) are the same. *B* claims that, since females do not come within the classification, his equal protection rights would be violated if it were applied to him.

This kind of argument is a by-product of women securing their

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44. *Id.* at 93-94, 261 N.E.2d at 133-34.

45. 407 S.W.2d 234 (Tex. Civ. App. 1966).

46. The most famous statute of this type is the federal White-Slave Trade (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1982)) (prohibiting interstate transportation of young girls for immoral purposes).

47. 142 Ga. App. 266, 235 S.E.2d 673 (1977).

48. *Id.* at 266, 235 S.E.2d at 674 (quoting GA. CODE § 26-2610).

rights under the equal protection clauses embodied within the fifth and fourteenth amendments. Defendants in several different types of cases have attempted to make *B*'s argument with respect to ambiguously sex-biased statutes; the most frequent user of the argument, however, is almost certainly the male sex offender. Such defendants claim that sex-specific language in rape and prostitution statutes deny them equal protection because women, arguably, can commit the same offenses without being prosecuted.

In *Commonwealth v. Finnegan*,[49] the defendant was accused of promoting prostitution. He argued that male-specific language in the "patronizing" section of Pennsylvania's statute denied him equal protection because females could patronize prostitutes without criminal penalty. The court noted the literally gender-neutral language in the sections of the statute that penalized the prostitute and the procurer, and it concluded that females could indeed be prosecuted for patronizing. The defendant's equal protection rights were therefore not violated, since the statute as a whole focused on the roles played by prostitute and customer, not on the sexes of the participants.[50] However, the *Finnegan* court's reliance on the language of the particular statute fails to foreclose the possibility that the same argument could succeed with respect to other ambiguously sex-biased provisions of Pennsylvania law.

The improper-applicability argument has been used by a variety of claimants, not just sex offenders. In the quasi-criminal area of enforcing support obligations, defendants have also made the argument. *People v. Gilliam*[51] is typical: the defendant was convicted of felony nonsupport, and he argued that the statute applied to men only and therefore violated the equal protection clause of the Constitution. The court, however, found "a clear legislative intent that the Penal Code apply to females as well as males,"[52] and it held that this intent applied to the felony nonsupport offense. It also observed that Michigan's divorce law, which created the obligation that the Penal Code enforced, had been amended to provide

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49. 280 Pa. Super. 584, 421 A.2d 673 (1980) (quoting PA. STAT. ANN. tit. 18, § 5902 (Purdon 1973)).

50. 280 Pa. Super. at 591-92, 421 A.2d at 1089-90. *See also Ex parte* Groves, 571 S.W.2d 888 (Tex. Crim. App. 1978) (sex-specific statute didn't violate defendant's equal-protection rights).

51. 108 Mich. App. 695, 310 N.W.2d 843 (1981) (quoting non-support statute, MICH. COMP. LAWS § 750.165 (1968)).

52. 108 Mich. App. at 700, 310 N.W.2d at 845.

that either parent could be liable for child support.[53] In this way, the court resolved the ambiguity by finding the statute unambiguously unbiased.[54]

In the federal courts, several plaintiffs raised the improper-applicability argument about a support-related provision in the pre-1978 Bankruptcy Act.[55] *In re Wasserman*[56] involved a bankrupt male claimant who sought to have his support debts to his ex-wife discharged; the court held that the use of "wife" in the statute created a sex-biased classification that was invalid under the Supreme Court's "fair and substantial relation" test.[57] Two years later, however, a federal district court considered the same provision and upheld the validity of excluding support debts from discharge in bankruptcy. The court rejected the defendant's argument, declining to follow *Wasserman,* because it was "without merit . . . that a wife's support and maintenance obligations are dischargable in bankruptcy."[58]

3. *Burden Case No. 3: Prejudicial Use of Classification*

> *C* is also a criminal defendant. The statute in this case does not use ambiguously sex-biased classifications, but the judge, when instructing about the credibility of the witnesses, said, "If a witness has not proved himself credible to you, do not take his testimony into account." *C* appeals the subsequent conviction on the ground that the judge prejudiced the jury against the testimony of a male witness who testified in *C*'s behalf.

These cases involve classifications that affect the claimant indirectly but, nonetheless, prejudicially. The claimants are almost al-

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53. *Id.* (quoting divorce statute, MICH. COMP. LAWS ANN. § 552.17a (West Supp. 1982), which had been amended by 1970 Mich. Pub. Acts 182, § 1, to substitute the words "either parent" in lieu of "the husband").

54. *Accord,* Commonwealth v. Baggs, 258 Pa. Super. 133, 392 A.2d 720 (1980) ("he" in nonsupport statute did not violate state constitution equal rights amendment) (quoting 1972 Pa. Laws 334, PA. CONS. STAT. tit. 18, § 4323 (a) (repealed 1978)).

55. The Bankruptcy Act provided at that time that debts for alimony or for maintenance or support of "wife or child" were not dischargeable in bankruptcy. 11 U.S.C. § 35(a)(7) (1976). The statute, as amended in 1978, now refers to support debts to a "spouse, [or] former spouse" as non-dischargeable. 11 U.S.C. § 523 (a) (5) (1982).

56. 3 BANKR. CT. DEC. (CRR) 467 (D.R.I. July 18, 1977).

57. Craig v. Boren, 429 U.S. 190 (1976), provides the standard of "important governmental objectives," but the *Wasserman* court found that the classification did not even meet the lesser test of "fair and substantial relation" in Reed v. Reed, 404 U.S. 71 (1971).

58. Stephens v. Stephens, 465 F. Supp. 52, 53 (W.D. Va. 1979).

ways criminal defendants, and the sixth and fourteenth amendments form the foundations of their claims.

Claims of prejudicial application began arising soon after women were given the right to vote through ratification of the nineteenth amendment. Criminal defendants claimed that women thereby obtained the right to serve on juries as well, and that their cases were therefore prejudiced by statutes denying women the opportunity to hear their cases. In 1921, two state courts considered this question, and while both rejected the fair-trial claims of the criminal defendants before them, the cases presented different analyses of the rights of women jurors. In the first of these cases, *State v. James*,[59] the New Jersey Supreme Court refused to extend to women the right to sit on juries, despite their newly-franchised status. The existing state juror-qualification statute was held unchanged by the federal provision:

> While [the New Jersey juror qualification] statute does not provide in [its] terms that men shall be summoned as jurors, it contains a distinct recognition of the common-law qualification that men only shall be impaneled, by the use of the personal pronouns of the masculine gender "he" and "his."[60]

The defendant therefore received as fair a trial as the juror qualification statute allowed. The Pennsylvania Supreme Court reached the opposite result as to juror qualifications two weeks later, but in doing so it did not conclude that the defendant had been deprived of his right to a fair trial. "[W]hat was being guaranteed . . . was . . . the right to a jury trial of certain kinds of cases and the method of trial, and not a rigid fixing of the mode of selecting jurors or their qualifications. . . ."[61]

Modern-day juror qualifications do not attempt to exclude women pursuant to common-law tradition; in fact, the Supreme Court has recently ruled that a defendant's due process rights may be violated if women have greater freedom than do men to be exempted from juror service.[62] Nevertheless, prejudicial-application arguments continue to be made in cases such as the one in *C*'s hypothetical. Courts, however, have been reluctant to find that juries or jurors were prejudiced by unenforced sex-specific provisions

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59. 96 N.J.L. 132, 114 A. 553 (1921).

60. *Id.* at 137, 114 A. at 555.

61. Commonwealth v. Maxwell, 271 Pa. 378, 389, 114 A. 825, 828-29 (1921).

62. Duren v. Missouri, 439 U.S. 357 (1979) (fact that 15% of jurors were women, compared to over 50% residing in vicinity, was evidence of a due-process violation).

in grand jury qualification statutes,[63] by reference to "he" in instructing a jury about picking a foreman,[64] or by the kind of instruction on credibility that was given in *C*'s case.[65]

4. *Benefit Case No. 1: Classification Literally Applies*

> *D*, a male, seeks to collect under a state worker's compensation statute following the death of his wife. The statute contains references such as "upon his death" and "wife may apply for benefits." *D* argues that the statute should be read to include his claim.

Originally, this argument was made *by* women in response to the overt denial of rights *to* women.[66] Two later cases show that the argument still has merit, and that men and women may seek benefits by using it.

The claimant in *Petrozzino v. Monroe Calculating Machine Co.*[67] was in essentially the same situation as *D* in the above hypothetical. The court was "satisfied that . . . the Legislature took into account that . . . . [t]he same considerations apply whether the parent who died is the mother or the father," and it mandated that "his" in the worker's compensation statute be read as "his or her."[68] *Petrozzino* illustrates the relatively recent viability of the literal-applicability argument, for members of either sex, in the context of statutory interpretation.[69]

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63. *See* McMath v. State, 544 S.W.2d 902 (Tenn. Crim. App. 1976) and Honeycutt v. State, 544 S.W.2d 912 (Tenn. Crim. App. 1976) (reference in grand juror statute requiring the jury foreman to be a "good and lawful man" not violative of defendants' equal protection rights in absence of showing that statute was used to exclude women from serving as a jury forewoman).

64. *See* State v. Berch, 222 N.W.2d 741 (Iowa 1974). The court found that a reference to "he" in foreman-election instructions did not cause jury to infer that it had to elect a male for that position. The court said, "The fact that the words 'he' and 'his' refer to either gender is a matter of common knowledge." *Id.* at 747.

65. *See* State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975) (judge's use of "his" in credibility-of-witness remark not prejudicial, since it had not been shown to refer to any particular male witness).

66. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (upholding state's common-law rule forbidding women to practice law).

67. 47 N.J. 577, 222 A.2d 73 (1966).

68. *Id.* at 582-83, 222 A.2d at 76-77.

69. A number of statutes conferring *benefits* on members of a single sex have passed constitutional muster. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974) (upholding statute that provided property tax exemption for widows but not widowers).

The argument may also be raised in the non-statutory context. *Ebitz v. Pioneer National Bank*[70] involved a will calling for the establishment of a public trust to "aid and assist worthy young men to acquire a legal education." A potential female legatee argued that the provision should be read to include her, and the lower court agreed.[71] The state's highest court affirmed, on the ground that the testator had intended the provision to apply to members of both sexes. However, it refused to decide what would have resulted had the provision been intended to favor males.[72]

5. *Benefit Case No. 2: Classification Should Apply*

> *E* has also recently suffered the loss of his wife, a covered employee under her state's worker's compensation scheme. However, the applicable statute is more obviously sex-specific in *E*'s case than it was in *D*'s. *E* tries to make *D*'s argument, *i.e.*, that the language should be read to include *E*'s claim. In all likelihood, *E* will either lose when he makes *D*'s argument, or will feel it futile to make that argument. Therefore, *E* instead argues that the statute denies him equal protection, because it treats widows of covered male employees better than it treats widowers of covered female employees.

If the *Ebitz* court had been unable to decide on the basis of the testator's intent, it would have been faced with the issue that *E* raises here. Courts have considered the equal protection issue in a number of cases, but they have not produced a clear answer.

A recent state court case roughly follows the facts of *E*'s case. In *Hewitt v. State Accident Insurance Fund Corp.*,[73] a mother, who was covered under Oregon worker's compensation, died, and the father (not the woman's husband) filed for benefits. The statute contained a special provision under which an unmarried woman who cohabited with an unmarried man for more than one year could collect on the death of the covered male cohabitor. Hewitt

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70. 372 Mass. 207, 361 N.E.2d 225 (1977).

71. Plaintiffs, female law students, sought aid from the trust, but the administering bank rejected their applications. Probate court held that testator did not intend to exclude young women from the provisions of the trust. *Id.* at 211, 361 N.E.2d at 226.

72. The Supreme Judicial Court did not elect to dispose of this case on constitutional grounds, holding instead that testator's intent to include plaintiffs as potential beneficiaries could be found from the will as a whole. *Id.* at 210, 361 N.E.2d at 226.

73. 54 Or. App. 398, 635 P.2d 384 (1981), *aff'd*, 294 Or. 33, 653 P.2d 970 (1982).

argued that the provision should apply as well to unmarried men under similar circumstances; the court was unwilling to construe "woman" to include "man," but it agreed with the claimant that the scheme violated his equal protection rights.[74]

On the other hand, at least one federal court has expressed an unwillingness to find an equal protection violation in a benefit case. In *Stearns v. Veterans of Foreign Wars*,[75] the female plaintiff charged that the VFW had violated her constitutional rights by denying her membership. Initially, the alleged state action was that Congress had granted the organization a charter that contained male-biased language; the court held that Congress had intended the charter to apply to females as well as males, and that the use of "he" therein did not violate the fifth amendment.[76] The court of appeals remanded for a consideration of whether any other state action was involved,[77] and the district court on remand found none.[78]

C. *The Courts' Approaches in the Burden and Benefit Cases*

The issues in the five cases discussed above are varied, but the opinions of the various courts share a common technique and a common omission. The common technique that all employ is an individualized approach to the arguments made to them. Generally, the later cases involving ambiguously sex-biased classifications do not cite the earlier ones; when an earlier case *is* cited, it is most likely to be (1) only from the United States Supreme Court or from the same jurisdiction and (2) very similar in its facts to the case before the court.[79] For the most part, the principle of *stare decisis* does not seem to apply to cases of ambiguously sex-biased classifications; the interpretations and policy decisions of one judge do not cross jurisdictional boundaries and influence another

74. 54 Or. App. at 401, 635 P.2d at 388.

75. 353 F. Supp. 473 (D.D.C. 1972), *aff'd*, 500 F.2d 788 (D.C. Cir. 1974).

76. 353 F. Supp. at 475.

77. 500 F.2d at 788.

78. 394 F. Supp. 138 (D.D.C. 1975), *aff'd*, 527 F.2d 1387 (D.C. Cir.), *cert. denied*, 429 U.S. 822 (1976).

79. *E.g.*, in one of the cases denying a woman the right to practice law, *In re* Maddox, 93 Md. 727, 50 A. 487 (1901), the court made reference to the United States Supreme Court's decision in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). The Iowa court deciding State v. Berch, 222 N.W.2d 741 (1974) similarly relied on an earlier case from the jurisdiction, State v. Clark, 180 Iowa 477, 163 N.W. 250 (1917).

judge's decisions in this area as such factors so often do. It may go without saying that the principle of *stare decisis* is difficult to apply where, as here, the problem at hand is ill-defined in general and thus often poorly or inconsistently treated in legal research sources.[80]

The common omission in these cases is related to the courts' individualistic approaches to each case. Many of the cases mention the intent of the legislature, but few of them cite to the actual legislative history. It must be conceded that state legislative histories are hard or impossible to locate and often insufficient when located,[81] but the state courts that construe these provisions generally do not concede this, and seem to instead intuitively find the intent of the legislatures with limited substantiation. Moreover, the classifications in federal statutes should not reflect this problem, since federal legislative history is relatively comprehensive and well indexed; nevertheless, some federal cases construing these provisions have failed to refer to legislative history in their individualistic determinations of the cases before them.[82]

Consequently, the use by the legislatures of ambiguously-biased provisions has caused problems, for both litigants who must attempt these arguments and the courts who must hear them. If the statutes in the first two cases had been literally gender-neutral or unambiguously biased, *A* and *B* would have been more clearly right or more clearly wrong, respectively. Similarly, if the legislatures in the last two hypotheticals had clearly said what they had meant, *D* and *E* would have known all along what their rights were under the statute.

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80. It should be recognized that legal research sources have not made the ambiguously-biased classification a household word; it is difficult to find more than one case construing such a classification in the same research location. This difficulty may explain why the later cases do not cite the earlier ones to the extent that one might expect.

81. *See, e.g.*, Knowles, *supra* note 7, at 432 (historical analysis of state's laws difficult because of "the complete absence of official legislative history").

82. The case above involving the VFW charter, Stearns v. Veterans of Foreign Wars, 353 F. Supp. 473 (D.D.C. 1972), mentions the congressional report issued at the time, but the opinion does not quote it beyond the bare citation; it cannot be ascertained from the text of *Stearns* what the legislative history told the court. The bankruptcy case, Stephens v. Stephens, 465 F. Supp. 52 (Bankr. W.D. Va. 1979), mentions no legislative history source at all.

D. *The Existing Method of Limiting the Bias — Statutory Rules of General Construction*

Legislatures have given courts some guidance for resolving ambiguously sex-biased classifications. Congress and most state legislatures have included rules of statutory construction in their codified laws.[83] These statutory provisions instruct courts in such matters as how to construe plural terms when the singular is specified,[84] and how the word "person" is to be applied to corporations.[85] For the purposes of this analysis, however, only one such construction provision is relevant: the type that extends "words importing the masculine gender"[86] to females.

Almost all of the cases cited in this Comment include at least some reference to the gender-construction laws of their respective jurisdictions. In many of the cases, these provisions are dispositive; that is, the courts rely principally on them to resolve the ambiguities posed by the gender-biased classifications in issue. In many other cases, however, courts either have refused to be bound by gender-construction laws or have used them only as supplementary support in making their decisions. The inconsistencies in the case law pose problems for litigants such as those in the five earlier hypotheticals. Even if a gender-construction law *could* have applied to one's case, one could not know beforehand whether the court *would* apply it. Moreover, in many jurisdictions, the gender-construction law itself contains the same gender bias as the laws to which it applies.

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83. 1 U.S.C. § 1 (1982). Similar provisions appear in codified laws of 45 states. *See* Official Comment to UNIF. STAT. CONSTR. ACT § 4, 14 U.L.A. 519 (1980).

84. *E.g.*, 1 U.S.C. § 1 (1982) ("words importing the singular include and apply to several persons, parties, or things; words importing the plurals include the singular . . . ."); N.Y. GEN. CONSTR. LAW § 35 (McKinney 1951) ("words in the singular number include the plural, and in the plural number include the singular").

85. *E.g.*, 1 U.S.C. § 1 (1982) ("the words 'person' and 'whoever' include corporations . . . ."); N.Y. GEN. CONSTR. LAW § 22 (McKinney Supp. 1982) ("[w]henever the reference is to a corporation, board, body, group, organization or other entity comprising more than one person or to an assemblage of persons or to an inanimate object the reference shall be construed to be neuter in gender.").

86. This exact language appears in the federal gender-construction law (1 U.S.C. § 1 (1982)) and in those of many states. New York's General Construction Law read this way until 1981; *see infra* note 127 and accompanying text.

The term "gender-construction law" and abbreviation "GCL" will hereinafter be used to refer generically to statutory provisions defining the general relationship between grammatical gender and sex classification.

1. *Inconsistent Application.* Many of today's gender-construction laws date from late in the nineteenth century,[87] or from early in this century.[88] Prior to the enactment of these statutes, the courts recognized, as a rule of statutory construction, that masculine words could extend to females; however, they also recognized exceptions to that rule. When the Kentucky Court of Appeals decided *Atchison v. Lucas*,[89] it recognized that masculine terminology "often is extended to females as well as males. . . ."[90] Nevertheless, it concluded that the woman before it, who sought the office of jailer, was ineligible for that position by virtue of the sex-specificity of its qualifications. The court refused to extend the masculine language to her, because she had not shown that the legislature had intended the statute to apply to members of both sexes.[91]

In many other cases, decided after their states' legislatures had formally enacted gender-construction laws, courts again distinguished those provisions in upholding ambiguously sex-biased classifications. They did so in early "benefit" cases such as *In re Maddox*.[92] The female applicant in *Maddox* sought to be admitted to Maryland's bar, and she argued that the state's classification of lawyers did not exclude women. Maryland's highest court denied her application; although a gender-construction law extended masculine words to females, the court held that "the rule whilst general is, by its own terms, not without exceptions."[93] Denying a female the right to enter the legal profession was, in the court's view, an exception to the provision intended by the legislature.[94]

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87. *E.g.*, the federal GCL dates from 1871. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

88. *E.g.*, New York's original GCL was passed in 1909. N.Y. GEN. CONSTR. LAW § 22 (Consol. 1909).

89. 83 Ky. 451 (1885).

90. *Id.* at 464.

91. *Id.*

92. 93 Md. 727, 50 A. 487 (1901).

93. *Id.* at 730, 50 A. at 488.

94. *Id.* at 732, 50 A. at 489. The Maryland Court of Appeals again considered the question of ambiguously-biased classification 49 years later in *In re* Estate of Snyder, 195 Md. 81, 72 A.2d 757 (1950). The case involved a will that referred only to female descendants of the testator, and one of the litigants argued that the references to females could be construed to apply to males as well. The court said:

> It is perhaps an anachronism in this age to hold that the masculine includes all genders, (Code Article 1, Section 7) but that the feminine does not. That, however, is clearly true in the construction of statutes. . . . There is great difficulty, therefore, in finding . . . that by "she" the testator meant "he or she."

Some of the early "burden" cases also show courts distinguishing gender-construction laws to reach their results. The defendant in *McDaniels v. State*[95] argued that his criminal trial had been unfairly prejudiced by the absence of female jurors; he cited an Arizona gender-construction law that extended masculine-gender terms to females as well as males. The Arizona Supreme Court heard his case in 1945, and it held that the construction provision was not enough to extend to women the right to serve on juries:

> When the [state] Constitution refers to a jury it refers to a jury as it was under the common law, and under that law a jury was no jury unless it was composed of men. . . . The fact that [Arizona's gender-construction law] provides "words used in the masculine gender include the feminine and neuter" is not sufficient to include women as jurors.[96]

The *McDaniels* case is one of the last to reject the application of a gender-construction law without a substantial explanation. The case is especially interesting because seven years earlier the same Arizona Supreme Court had decided one of the first cases in which a gender-construction law was dispositive of the issue. The case, *In re Estate of Stark*,[97] involved a dispute between a widower and a legatee under the decedent's will. The legatee sought probate of the will; the husband argued that the will should not be recognized, since it predated his marriage to the testator. The widower relied on an Arizona law which modified the common-law rule that marriage automatically revoked a will; the statute said that a husband's pre-marriage will was revoked only in the absence of intent to continue it in effect. The legatee argued that this statute did not apply to a wife's pre-marriage will, but the court, having found no evidence of intent to continue the will, applied the gender-construction law and held that testator's will had been revoked.[98] It may be merely coincidental that the Arizona court resolved both cases against the interests of the women involved; in any case, it should be questioned why the court did not distinguish the holding of the earlier case when it decided the later one.

In several later cases, courts have continued to rely on gender-

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Id. at 91-92, 72 A.2d at 761.

95. 62 Ariz. 339, 158 P.2d 151 (1945).

96. *Id.* at 343, 158 P.2d at 153.

97. 52 Ariz. 416, 82 P.2d 894 (1938).

98. *Id.* at 421-25, 82 P.2d at 896-97 (quoting ARIZ. REV. CODE § 3040(3) (1928) (current version at ARIZ. REV. STAT. ANN. § 1-214(c) (1973)).

construction laws as a device for resolving the ambiguities in sex-biased classifications. The Kentucky Court of Appeals upheld the applicability of a vagrancy statute to a female defendant in *Adamson v. Hoblitzell.*[99] The statute there defined four different types of vagrants; three of the definitions used the term "able-bodied male" and the fourth used the term "able-bodied person." The defendant argued that the statute did not apply to females. The court disagreed, reasoning that the state legislature's not having used male-specific language in the fourth definition revealed its intention not to limit the definition to males. The court also reasoned that the fact that the subsection preceding the one containing the definitions used the pronoun "he" was inconsequential, since under the applicable gender-construction law the masculine gender may be extended to include females.[100] A New York court similarly invoked a gender-construction law to reject a male defendant's equal protection argument. The defendant, charged with sodomy, had argued that the sodomy statute could only be applied to men (and was therefore unconstitutional), but the court found that females came within its provisions as well.[101]

The absence of an applicable gender-construction law has also proven dispositive. The appellate court in *Cincinnati v. Wayne*[102] refused to apply a male-specific lewdness ordinance to a female defendant, because the city had no gender-construction law with which to apply the ordinance to her case.[103]

If gender-construction provisions like these were always dispositive, as they were in these cases, there would be few ambiguities in sex-biased classifications for courts or litigants to resolve on a case-by-case basis. Other cases make clear, however, that gender-construction laws are *not* always dispositive. Most of the statutes do not purport to apply in all cases, but to apply "unless the sense of the sentence indicates otherwise."[104] When a qualification of this

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99. 279 S.W.2d 759 (Ky. 1955).

100. *Id.* at 760 (quoting KY. REV. STAT. § 446.020 (1942)).

101. People v. Reilly, 85 Misc. 2d 702, 710-12, 381 N.Y.S.2d 732, 740-41 (Sup. Ct. 1976) (quoting N.Y. GEN. CONSTR. LAW § 22 (McKinney 1951) (amended 1981)). *Accord,* Commonwealth v. Baggs, 248 Pa. Super. 133, 392 A.2d 720 (1978) (male defendant, convicted of failure to support child, unable to make equal protection argument because GCL extended "he" in statute to mothers as well as fathers).

102. 23 Ohio App. 2d 91, 261 N.E.2d 131 (1970).

103. *Id.* at 94, 261 N.E.2d at 134.

104. This language is from New York's recently revised gender-construction law. N.Y.

type is in a jurisdiction's gender-construction law, its courts must make the determination of when the sense indicates otherwise.

The author of a 1975 Comment[105] has criticized the extent to which Canadian courts have relied on this type of qualification in their federal Interpretation Act.[106] After tracing the history of her nation's gender-construction law, she concluded, "Wherever any statute or regulation is drafted in terms of the male, a woman has no guarantee that it confers any rights on her at all."[107]

Gender-construction laws are not always a major aid or a major hindrance in solving the problem of ambiguously sex-biased classifications. In many cases, courts use them only as supplementary tools to justify their resolutions of the ambiguities on other grounds.[108] Their limited helpfulness, and the extent (however limited) to which they hinder the eradication of ambiguities, suggest that they are, at best, only a partial solution to the classification problem.

2. *Reverse Application.* When the Commission on Civil Rights reviewed the U.S. Code, the first recommendation it made concerned the federal gender-construction law.[109] This statute, like many of its state counterparts,[110] is itself ambiguously biased; it clearly states that "words importing the masculine gender include the feminine,"[111] but it does not make clear what can be included in words importing the feminine gender.

The ambiguous sex bias present in the gender-construction laws themselves raises two issues: one of judicial practice, and one of legislative motive. As to practice, it may be observed that while courts have readily used gender-construction laws to extend masculine terms to women, they have been less willing to sanction the

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GEN. CONSTR. LAW § 22 (McKinney Supp. 1982).

105. Comment, *Alice through the Statutes*, 21 McGILL L.J. 685, 702 (1975).

106. Can. Stat. 1970, c. I-23, s. 3(1).

107. *See* Comment, *supra* note 105, at 702.

108. *See, e.g.*, Stephens v. Stephens, 465 F. Supp. 52 (W.D. Va. 1979) (GCL in old Bankruptcy Act aided court in finding that wife's debts were no more dischargeable in bankruptcy than were husband's); People v. Gilliam, 108 Mich. App. 695, 310 N.W.2d 843 (1981) (Penal Code's GCL helped convict defendant of felony non-support, defeating his argument that the statute had been improperly applied to men only).

109. SEX BIAS IN THE CODE, *supra* note 14, at 51-53.

110. 1 U.S.C. § 1 (1982) ("words importing the masculine gender include the feminine as well"); similar state provisions abound.

111. *Id.*

opposite extension of feminine terms to men. *Hewitt v. State Accident Insurance Fund Corp.*,[112] a recent Oregon case, illustrates this judicial reluctance. The substantive statute provided worker's compensation benefits to an unmarried woman who cohabited with a covered male for a specified period. Hewitt, an unmarried man, sought benefits under the statute after cohabiting for the specified time with a covered female. The state's gender-construction law was held not to extend to female-specific terms, and the court therefore rejected the plaintiff's claim that the statute literally applied to him.[113]

One may also raise a question of legislative motive in connection with the male-specific language in gender-construction provisions. It might be argued that legislatures drafted these statutes in sex-specific terms because they were faced only with a need to include women under male-specific legislation, there being no corresponding need to include men under female-specific laws. While this explanation no doubt covers many instances of general-construction enactment, there have been other situations in which legislatures have used gender-construction laws to create new ambiguities. At the federal level, for instance, Congress has amended the U.S. Code in several places to replace unbiased references (such as "he or she") with biased ones, on the ground that the deleted nouns and pronouns are made unnecessary by gender-construction laws.[114] Similarly, for many years, New York legislators have been formally advised to write their bills in ambiguously sex-biased form.[115]

The federal and state drafters in these relatively recent instances have justified their changes on aesthetic grounds; the official reason in New York has been that the gender-construction law "generally makes unnecessary the use of 'he or she', 'his or her', etc."[116] It has been argued in this Comment, however, that legisla-

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112. 54 Or. App. 398, 635 P.2d 384 (1981), *aff'd*, 294 Or. 33, 653 P.2d 790.

113. *Id.* at 401, 635 P.2d at 386.

114. *See, e.g.*, 10 U.S.C. § 3742 (1982). The section authorizes the award of a distinguished-service cross to any person who "distinguishes himself" in some noble way. The enacting Congress expressly omitted reference to one's distinguishing "herself," on the ground that the GCL, 1 U.S.C. § 1 (1982) made reference to females unnecessary.

115. LEGISLATIVE BILL DRAFTING COMM'N, STATE OF NEW YORK, BILL DRAFTING MANUAL 23 (undated, circa. 1982).

116. *Id.* The Drafting Commission will be revising its manual because the 1981 amendment to New York's GCL makes the "he or she" illustration "no longer a good example" of

tors of earlier years used similar-sounding justifications to conceal more politically-motivated actions.[117] Therefore, toda y's courts should carefully determine the true intent of their jurisdictions' legislature when construing ambiguously-biased provisions. When a facially ambiguous passage turns out to be an intentionally biased one, a court should apply to it the same level of scrutiny as the court would to a literally biased law. Courts should be particularly careful in interpreting formerly gender-neutral statutes that have been amended, ostensibly on aesthetic grounds, to conform them to the gender-construction principle.

Legislators, for their part, should be wary of giving rules of construction priority over substantive provisions of law. Gender-constructions should guide the courts in their interpretation of ambiguities, and should not encourage legislators to create additional ambiguities.

II. Solving the Problem: Removing Ambiguously Sex-Biased Provisions From Statutes and Other Legal Writing

A. *Reforming the Statutes — Generalized and Particularized Approaches to Removing Ambiguously-Biased Classifications*

The Commission on Civil Rights approached the problem of sex-biased classifications in the U.S. Code in two steps. First, it identified the potentially problematical sections of the Code through its large-scale computer study; then, it became more selective in its scope when it evaluated and made its recommendations as to specific provisions that the computer retrieved.[118] If a legislature is to attempt to eradicate the unnecessarily ambiguous classifications in its codified laws, it should consider both large-scale and selective approaches, as did the Commission. Neither approach is without problems; a coordinated application of both approaches, therefore, could produce the most significant improvement.

The most selective approach available to a legislature would be to reform specific ambiguously sex-biased provisions as specific complaints of improper bias come from constituents or courts. Many specific provisions have already been modified or repealed

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conciseness in drafting. Telephone interview with George Schindler, bill drafter for the Drafting Comm'n (Nov. 1, 1982).

117. *See supra* notes 27-34 and accompanying text.

118. Sex Bias in the Code, *supra* note 14, at 9-13.

by legislatures using this approach. For example, Massachusetts has eliminated a particular, objectionable classification of victims from its sex offense statutes.[119] As a result, the commonwealth's courts can now extend the protection of its penal law to both male and female victims of sex crimes.[120] The main advantage of this approach is that the resulting classifications become acceptably unambiguous. The courts, which otherwise might have no way to ascertain the intent of the legislature, obtain a clear indication of what the statute writers intended. On the other hand, the limitation on this approach is a potentially serious one: persons affected by the classification *prior* to the legislative change may have a limited remedy, if any remedy at all. Since legislators may have to wait for harm to result before taking this type of action, the effectiveness of so selective an approach must be questioned.

At the other extreme, a legislature could eradicate all ambiguously sex-biased classifications by employing a substantially modified version of today's gender-construction laws. If a state wished to go this far, it would amend its gender-construction law to provide (1) that *all* words importing one gender apply to members of both sexes, and (2) that this rule not be limited by the context of any particular substantive statute. The reform would eliminate all ambiguity from written law, but it could also produce unwanted, or even impossible, results.[121]

A more sensible approach to the problem of ambiguous bias in statutory law would combine the better aspects of selective and large-scale solutions. A large-scale *study* of ambiguously sex-biased classifications in a jurisdiction's codified laws would be appropriate, because it would bring most of them to the attention of the legislature for evaluation and *possible* change.[122] Courts would

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119. MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1970) (amended 1974).

120. Commonwealth v. Gallant, 373 Mass. 577, 369 N.E.2d 707 (1977).

121. Such a law could eliminate valid sex-based classifications (*i.e.*, those that serve important or compelling governmental objectives) and extend pregnancy-hospitalization benefits to men. On the other hand, the Supreme Court has hinted that there is precedent for a powerful GCL. In Monnell v. Department of Social Servs., 436 U.S. 658 (1978), the Court quoted the sponsor of the "Dictionary Act," 16 Stat. 431 (1871), as saying, "when the word 'he' is used it *shall* include females as well as males." 436 U.S. at 689 n.53 (quoting CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871)). The Court itself underscored the word "shall," and acceded to this directive throughout its opinion; it is possible, then, that a large-scale solution using a powerful GCL could be accepted by the Supreme Court.

122. Biased provisions can be found by other means than computer printouts. The congressional committee system provides a means by which statutes under the purview of each

have records of these large-scale studies; they could rely on them for guidance where the legislature made no clear choice, and they would know of the legislature's selective decisions to change or retain other provisions. Ambiguity would be removed; the remaining biased classifications would be unambiguous; and, if they met the applicable constitutional standard,[123] they would be valid.

Legislatures could also formulate comprehensive, but selective, solutions to the ambiguous bias existing in many of their gender-construction laws. They could choose to end litigants' problems of inconsistency in application,[124] by deleting the provisions that prevent extension of sex-specific terms where "the sense of the sentence indicates otherwise."[125] Each could also make a separate decision to end judges' problems with reverse application,[126] by removing the sex-specific terms from the gender-construction laws themselves. New York chose the latter option in 1981, and today, "words of the masculine or feminine gender . . . shall be deemed to refer to both male or female persons."[127]

Since gender-construction laws can apply generally to all statutes or only to certain ones, a legislature could limit the extent of its reform as it wished. It could accomplish large-scale reform by applying its amended gender-construction law to all laws;[128] it could exempt certain substantive laws by attaching separate gen-

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committee could be evaluated for unacceptable bias. A 1973 House resolution suggested that its committees use their expertise to study biases in their respective areas of legislation. H.R. Res. 108, 93d Cong., 1st Sess. (1973).

123. *I.e*, that the classification served "important governmental objectives," as articulated in Craig v. Boren, 429 U.S. 190, 197 (1976).

124. *See supra* notes 87-108 and accompanying text.

125. N.Y. GEN. CONSTR. LAW § 22 (McKinney Supp. 1982).

126. *See supra* notes 109-17 and accompanying text.

127. N.Y. GEN. CONSTR. LAW § 22 (McKinney Supp. 1982).

128. *E.g.*, the modified GCL could replace not only the state's most general rule of construction, but also those attached to particular sections of law. In New York, for instance, in addition to the N.Y. GEN. CONSTR. LAW § 22 (McKinney Supp. 1982), "mini-GCL" provisions may be found at:

N.Y. ELEC. LAW § 1-104(14) (McKinney 1978);

N.Y. EST. POWERS & TRUSTS LAW § 1-1.3(b) (McKinney 1981);

N.Y. U.C.C. § 1-102(5)(b) (McKinney 1964); and

N.Y. VEH. & TRAF. LAW § 359(a) (McKinney 1970).

These gender-construction laws differ in content from the general one in N.Y. GEN. CONSTR. LAW § 22 (McKinney Supp. 1982), and each only applies to the chapter of the consolidated laws in which it appears. The largest-scale use of the modified GCL, then, would have to replace all of these limited provisions.

der-construction provisions to them;[129] or, most selectively, it could apply the revised gender-construction principles only to those laws from which the legislature wanted ambiguity removed.[130] The principle of gender construction can also extend to legal documents such as wills and contracts, to resolve in advance the problems that courts have had to resolve under existing law.

B. *Reforming All Legal Writing — A General Solution to a General Problem*

Some legislators believe that they may not solve the problems of ambiguously sex-biased classifications by any other means than the ones suggested in the previous section. According to one recent Comment, "The only other solution is to invent a new series of pronouns, but that is not something that draftsmen may do; they must take our languages as they are."[131] A later Comment severely criticized this view,[132] but despite the criticism, it should be recognized that even linguists have found the general problem of gender bias in English a difficult one to solve.[133]

It does not follow from this recognition, however, that legal writers should resign themselves both to using male-specific words and pronouns, and to relying on gender-construction principles to convey their meaning.[134] Lawyers and judges can eradicate ambigu-

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129. A somewhat more selective approach would be to retain or amend separately all of the mini-GCL provisions in state laws. This would eradicate bias in all areas except those in which the special gender-construction laws already applied.

130. If the state were to alter only one or more of its limited GCL provisions (*i.e.*, those affecting only certain sections of the state's laws), the approach would be the most selective, because its general-purpose GCL would not change.

131. Comment, *Are Statutes Written For Men Only?*, 22 McGILL L.J. 666, 672 (1976).

132. Comment, *The Language of Oppression — Alice Talks Back*, 23 McGILL L.J. 535 (1977).

133. See *supra* note 11 and works collected there for insight into linguistic approaches to removing gender bias from English.

134. The *McGill Law Journal* published a Comment, a reply Comment, and a counter-reply Comment on this legal writing problem. The opening Comment criticized the Canadian government's reliance on gender-construction laws and called for improved use of other solutions to the problem of ambiguous classifications. *See Comment*, *supra* note 105. The reply Comment argued that legislatures had to take languages "as is," and asserted that GCL's made male-biased pronouns legally acceptable. *See Comment*, *supra* note 131. The original commentator pointed out the ease with which government officials can coin technical words, thus opening the possibility that legal writers could effect a fundamental change in the language. Until this change comes about, the commentator advocated the use of existing gender-neutral words with greater flexibility. *See Comment*, *supra* note 132, at 542-

ous bias from their legal writing without waiting for gender-neutral terms to evolve. Such writers should expect that their efforts to write gender-free English may be resisted, but they should also expect similar resistance to alternatives. Professor Wydick has described the dilemma as follows:

> [W]riting genderless English is not easy. If you write "each judge has his own ideals," you will be faulted for ignoring the women on the bench. If you write "each judge has his or her own ideals," you will be faulted for clumsy construction. If you write "all judges have their own ideals," you will be faulted for not stating clearly what you mean.[135]

Wydick makes several suggestions about how to escape this dilemma. "Phrases like *he or she*," he writes, "can be used in moderation, but it is usually less clumsy to recast the sentence. . . ."[136] To recast sentences, he advises (1) omitting sex-specific pronouns when no pronoun is required, (2) using second-person pronouns ("you," "your") when one is required, and (3) changing singular nouns and pronouns to the plural when possible.[137] The gist of Wydick's advice is to deal with each ambiguous classification on a case-by-case basis; for him, however, a "case" is a substantial unit of legal writing such as a sentence or paragraph. Legislators essentially are following this advice when they evaluate ambiguous classifications in their statutory contexts. It is just as important, however, that all legal writers can conduct the same type of evaluation in their own legal writing. By using what English already provides for avoiding bias, and by using redundant terms like "he or she" only sparingly, "he" and "man" could become terms of dead-letter law, just like "thee" and "thou." They would still exist as words, but they would not cause any further problems for lawyers or courts.

CONCLUSION

Ambiguously-biased classifications based on sex form a significant part of existing law, as the cases collected here illustrate. These cases also illustrate the ineffectiveness of the built-in "solution" of gender-construction laws. While a few of the cases in this

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135. Wydick, *supra* note 12, at 752.

136. *Id.* at 753.

137. *Id.* at 753-54. Wydick also sanctions use of the passive voice "if you are desperate." *Id.* at 754.

analysis are from the nineteenth century, many more have been resolved in the past five years. Their recent appearance suggests that lawyers and litigants will not ignore these classifications until legislatures clarify them or remove them from the law.

Readers of this Comment may observe that Part I was relatively lengthy in discussing the problem's severity, Part II relatively brief in discussing its solution. In a sense, however, as extended a discussion of the solution is not necessary. One might observe that the text and notes of this Comment contain no gender-biased language, other than that used in the cases and statutes under analysis. The work is offered as an illustration that gender-neutrality is possible in even complex forms of legal writing.[138] It can be done; what remains is for all legal writers to attempt to do it.

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138. Drafters have begun writing even complex legal provisions in completely gender-neutral terms. For two good examples, see the text of New York's Equitable Distribution Law, N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1982), and the MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1982).