

# Comments

## Women and Credit

*"The human species, according to the best theory I can form of it, is composed of two distinct races, the men who borrow, and the men who lend."*<sup>1</sup>

Credit is a necessity of life, not only to men but to women. Regardless of credit worth, single, married, separated, divorced or widowed women either are denied credit or are subject to a higher standard of credit worth than their male counterparts in the major consumer credit transactions. This differential treatment is reflected in the procedures and attitudes used by lenders in the evaluation of the credit risk. Economic justifications for the different behavior are statistically refuted. What remains as the source of the discrimination is a centuries-old belief as to the status of women. The consequences of this unjustified denial of credit include restraints on relocation, impediments to educational and employment opportunities for oneself and children and inadequate retirement provisions.

The purpose of this comment is to demonstrate that sex and/or marital status discrimination in the credit transaction is rooted in unsound economic and social assumptions regarding women. Remedial solutions which yield economic opportunity for credit combine enforcement of federal and state legislation with a restructured administrative policy and self help procedures. Equal credit opportunities will be available once society ceases assigning economic and social roles on the arbitrary basis of sex and marital status.

### I. CREDIT RISK ANALYSIS

The fundamental element in the economic survival of both lenders and borrowers is the credit risk. An evaluation of credit risk is to be made more in terms of the realities of the market place than in terms of abstract, economic theorems. Everyday credit risk decisions reflect a business judgment of the nation's economic health and of the frequency of credit difficulties. When the economic and social costs and benefits of increasing or decreasing credit risk are balanced against each other,

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1. C. LAMB, THE TWO RACES OF MEN, AN ESSAY 1820 (1823).

a sound business judgment of credit worth can be made.<sup>2</sup> If the determination of credit risk includes non-risk factors, the business assessment becomes distorted.

Credit risk analysis has traditionally been a function of three elements: character, capacity and collateral.<sup>3</sup> The individual's desire to pay (character), his ability to pay (capacity), and his financial strength (collateral) are judged in the framework of economic and social conditions of the risk's environment.<sup>4</sup> A modern analyst measures prospective credit risk by identifying borrower characteristics related to actual credit collection difficulties in the past and by assessing the status of these characteristics in the present credit structure.<sup>5</sup> When the credit risk is measured within the framework of statistics, the traditionally subjective determinations of credit evaluators can be minimized. The factoring in of sex and marital status into the credit risk decision will be shown to be an invalid predictor of prospective credit worth.

#### A. Credit Cards and Small Loans

The point system is the most common method of analyzing credit information. Its purpose is to filter out the worst credit risks. Points are given for marital status, profession, terms of employment<sup>6</sup> and bonus

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2. E. FIELDLER, MEASURES OF CREDIT RISK AND EXPERIENCE, NATIONAL BUREAU OF ECONOMIC RESEARCH 10-11 (1971) [hereinafter cited as FIELDLER].

3. T. BECKMAN & R. BARTELS, CREDITS AND COLLECTIONS IN THEORY AND PRACTICE (6th ed. 1955).

4. Character is the combination of mental and moral qualities which prompt the debtor to want or intend to pay when a debt is due. Honesty, integrity and responsibility are among the qualities of character. Evidence of character is a long and consistent record of debt payment, length of time at residence or employment, educational development and positions of trust which an individual may hold in business or social organizations. Character is often the most significant factor particularly in consumer credit dealings because capital has little weight when consumers borrow on their signatures. *Id.* at 53-64.

Capacity relates to the ability to pay. Although the most significant factor is earning power, expenditure pattern and length of credit obligation are also important. Evidence of capacity includes income which is related to the individual's health, education, occupation and age. *Id.* at 55-56.

Collateral is financial strength of the individual in terms of what the creditor may seize as payment for the debt. Evidence of a consumer's collateral includes household goods, bank accounts or real estate. Credit will not be extended solely upon the basis of collateral for the creditor contemplates a continuous relationship with the consumer. Furthermore, several states have laws exempting certain personal property from seizure. *Id.* at 56-57.

Whereas character, capacity and collateral relate to the individual's credit worth, a creditor's sound business judgment is often made in the frame of reference of economic, political and social conditions of the risk's environment. *Id.* at 57.

5. FIELDLER, *supra* note 2.

6. A typical scoring sheet of a major finance company provided 15 points if the applicant had been employed on the same job for 8-14 years but only 3 points if employed on the same job for 1-5 years. This rule of thumb results in discrimination against those who change employment for financially beneficial reasons bearing no relation to stability

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of income. *Hearings on the Availability of Credit to Women, Before the National Commission on Consumer Finance, 92d Cong., 2d Sess. (1972)* [hereinafter cited as *Consumer Credit*]. The following form is a typical credit point form:

**DIRECTIONS:** Circle the number in each row that most closely describes you. Record the number in the Code Box column. Total the Code Box column, adding in the Bonus Points. A score of 20 points or more? Send today!

Sample Line						Code Box
	21-25 1	26-35 <u>2</u>	36-45 2	46-65 2	65 & over 1	2
Age	21-25 1	26-35 2	36-45 2	46-65 2	65 & over 1	
Marital Status	single 1	separated 1	divorced 1	widowed 1	married 2	
Dependents (including yourself)	one 2	two 2	three 2	four 1	five or more 1	
Living Facilities	with parents 1	rent: furn. 1	rent: unfurn. 2	own, mtg. 4	own, no mtg. 5	
Years at Present Address	under 1 yr. 1	1-2 yrs. 1	3-5 yrs. 1	6-10 yrs. 2	over 10 yrs. 2	
Years at Previous Address	under 1 yr. 1	1-2 yrs. 1	3-5 yrs. 1	6-10 yrs. 2	over 10 2	
Total Monthly Income	under \$400 1	\$401-600 1	\$601-800 3	\$801-1000 5	over 1000 7	
Years with Present Employer	under 1 yr. 1	1-3 yrs. 2	4-6 yrs. 3	7-10 yrs. 4	over 10 yrs. 5	
Total Monthly Obligations	under \$75 2	\$75-125 2	\$126-200 2	\$201-300 1	over \$300 1	
Occupation	part time 1	unskilled 2	skilled 3	exec. or super. 4	profess. 5	
Bonus points (Circle all that apply)	phone in your name 2	loan exp. at this bank 5	loan exp. at other bank 3	checking at this bank 2		
Total						

points for telephone in the head of the household's name, customarily the husband's name.

Discrimination on the basis of sex surfaces when the credit grantor says that he assigns fewer points to women than married men because women earn less than men. The justification is specious because points have already been assessed to her income.<sup>7</sup> This differential treatment intensifies when the single woman is told that she must meet higher standards than male applicants for bank sponsored credit cards in terms of employment, time at present residence and minimum salary.

Marital status discrimination is highlighted when a woman's changed marital status simultaneously shifts her credit status to the risk category. When a newly married woman, with a prior good credit record, notifies the credit card institution to reissue her card with her husband's surname, she generally must reapply, submitting financial information about her husband, for the wife is now considered a dependent. Her husband's present employment and prior credit references are the principal credit criteria in the analysis of her credit worth. If she does not supply the requested information, the wife is evaluated as a new applicant with no prior credit record, despite her good credit record as a single woman. If she qualifies for a credit card, it is standard practice to issue the card in the husband's name or to the wife, using the husband's first and last name. The married woman surrenders her credit identity because more than one wife could exist. However, use of her own first name and her husband's surname would preserve her individuality.

Her credit identity problems are compounded when the local credit bureau files information on the wife under the husband's name. She builds no credit standing even though her earnings constituted the family's income. That good credit record established in the husband's name remains with the husband. Even if the wife has regularly paid her debts, her husband's credit delinquency record becomes her credit record. Unfortunately, when she is most in need of a good credit identity, such as unexpected death or enormous medical expenses, she is least likely to obtain credit because she lacks a credit identity.

In addition to the lack of a credit identity, newly separated and divorced women generally must wait six to twelve months before their credit applications will be considered. Creditors support this marital

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7. Littlefield, *Sex-based Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 578 (1973) [hereinafter cited as Littlefield].

status discrimination by arguing that a sudden change in marital status creates temporary unreliability. The automatic caveat that the newly separated or divorced man would be treated similarly breaks down for a man has no duty to notify the creditor of a changed marital status. His name remains unchanged and his prior credit record survives the dissolved marriage. Another obstacle facing the divorcee is that the divorce settlement of alimony and support payments is considered an unstable source of income and seldom counted as valid income. If the estranged husband is dependable, an otherwise creditworthy divorcee is denied the credit because this source of income is automatically invalidated.<sup>8</sup>

The widow soon learns that it is easier to continue a deceased husband's charge account for she is treated as a new applicant upon an attempt to change the account to her own name.

In transactions involving credit cards and loans, a woman must submit superior credentials to qualify for bank sponsored credit cards. Once a woman marries, she surrenders her credit reputation when she assumes her husband's name. Any subsequent dealings denominate credit worth to the family unit, identified by the husband's name. Upon a change in marital status, whether it be death, divorce or separation, the woman can not obtain credit for she has no credit record upon which a business judgment can be rendered. A modest proposal is that a woman's credit worth be assessed in terms of her individual qualifications.

### B. *Home Mortgage Financing*

The pattern of discrimination on the basis of sex and marital status in home mortgage financing is traced in the economic and social justifications submitted by the potential mortgagees or home loan insurance agents. The economic facts distinguishing women as a socioeconomic class are founded upon basic assumptions concerning income potential, pregnancy and employment continuity. The inferior legal status of women is defined as the social justification for the different credit treatment. Once the discrimination is illustrated, the question becomes

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8. See generally A. LOTMAN, CREDIT REPORT, PENNSYLVANIA COMMISSION ON THE STATUS OF WOMEN (1973); *Consumer Credit*, *supra* note 6, at 5-6. Both of these organizations have been invaluable sources of information and their reports reflect astute analyses of the credit problem.

whether there exists in the present credit structure a significant correlation between sex and marital status and credit worth.

### 1. *The Married Woman*

When a married woman applies with her husband for a home mortgage, the couple is informed that the working wife's income is to be discounted by 50 per cent or not counted at all. Lenders place great weight on the income of the loan applicant because they believe that the percentage of income devoted to housing expense is an important factor in the assessment of the credit risk. The amount of family income is seen to be in direct proportion to the amount lenders are willing to extend. When the working wife's income is not counted 100 per cent the maximum amount of loan eligibility diminishes.<sup>9</sup>

#### a. *Commercial Lenders*<sup>10</sup>

Commercial lenders refuse to count the working wife's income 100 per cent when computing the family's effective income.<sup>11</sup> A nonprofessional working wife's income is discounted even more than a professional.<sup>12</sup>

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9. See Comment, *Discrimination Against Women in Home Mortgage Financing*, 3 YALE J.L. & SOC. ACTION 186 (1973) [hereinafter cited as *Discrimination*].

10. Where public or private mortgage insurance is not available, the lender requires a down payment of at least 25 per cent of the cost of the home so that his risk is minimized. If mortgage insurance is provided, the down payment may be less than 10 per cent because the insurer assumes the risk. Because the type of mortgage has a low loan to value ratio, the loan being almost equal to the value of the home and property, default is more frequent than mortgages with a large down payment. Note, *Mortgage and Consumer Credit*, 1 WOMEN'S LAW REP. 25, 28 (1973).

11. A recent survey supporting this conclusion is the May, 1972 study of the savings and loan industry by the United States Savings and Loan League. Of the 400 savings and loan companies surveyed, 28 per cent would give full credit to a working wife's income, and 14 per cent would count the income more than 50 per cent. The no-response rate was 21 per cent which was significant because all other questions in the survey had a 1 per cent or less no-response rate. *Discrimination*, *supra* note 9.

Another survey underscoring the practice of income discounting is the Federal Home Loan Bank Board Survey of 100 savings and loan associations in 1971. Twenty-five per cent of the mortgage lenders refused to count a working wife's income *at all* if she were 25 years old, had two school age children and worked full time as a secretary. Sixty-three per cent said they would count 50 per cent or less of her income. Only 22 per cent would allow full credit. The Bank Board de-emphasized the significance of these results by noting that only 74 institutions responded and that the selection process used no method of scientific sampling. *Discrimination*, *supra* note 9, at 168 n.18. Viewed another way the survey probably understates the extent of discrimination. The 100 institutions were selected as those most likely to cooperate. Also, the 74 respondents demonstrated liberal lending policies to families in the low income or minority groups. Yet 68 per cent of the responding associations would not give full credit to the full time working wife's income despite their liberal lending practices. *Consumer Credit*, *supra* note 6, at 5-6 (testimony of S. Rohde, Center for National Policy Review, Catholic University School of Law).

12. In a survey of the mortgage lending practices in the District of Columbia area, the District of Columbia Advisory Commission on the Status of Women and the Women's Legal Defense Fund found that even though all 40 lenders surveyed viewed current sal-

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### *b. The Veteran's Administration (VA)*<sup>13</sup>

The married couple seeking to secure a VA guarantee combine their individual incomes as their effective gross income. The VA guidelines provide that a working wife's income must be discounted because she is not considered a valid, reliable source of long term income. A lender may count her "net income," gross income minus child care expenses, when the wife is beyond childbearing age, the threshold year being 38, and has established a precedent of returning to her employment after pregnancy.<sup>14</sup>

A lender's interpretation of the VA guidelines is as multifarious as the techniques used to convince the VA that a wife's income is reliable. Often lenders will not count the wife's salary except to offset short term personal obligations. Other lenders require a baby letter, a statement of the wife and her pediatrician that she is on a program of birth control with no plans of pregnancy.<sup>15</sup> One couple was required to sign affidavits agreeing to abortion if their method of birth control should fail. The VA infrequently guarantees a mortgage loan for the woman veteran unless she has a husband with earnings to cover the debt.<sup>16</sup> These credit standards reflect the vagueness of the VA's requirement that a steady pattern of past employment and the probability of future work be demonstrated.<sup>17</sup>

### *c. The Federal Housing Administration (FHA)*<sup>18</sup>

Although the FHA has never had specific procedures applicable to female applicants, it has always had criteria assessing the reliability of

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aries as a valid source of income for men and women, only 27 (66.5 per cent) would not discount the income if the working wife were a professional and only 3 (32.5 per cent) would not discount the wife's income if she were a nonprofessional. The response rate was low. *Hearings on the Economic Problems of Women Before the Joint Economic Committee*, 93d Cong., 1st Sess., pt. 3, at 531 (1973) [hereinafter cited as *Economic Problems*] (testimony of Mary Dublin Keverling, Chairman of D.C. Comm'n on the Status of Women).

13. The VA, 38 U.S.C. §§ 201-44 (1970), is an independent agency in the executive branch of government. Part of its wide program of veterans' benefits is its home insurance under *id.* § 1910.

14. *Economic Problems*, *supra* note 12, at 532-33.

15. Complaints have been made that the "baby letter" is an unconscionable invasion of privacy. *Id.* at 548.

16. *Search for a Mortgage Loan*, in *WOMEN AND CREDIT*, NATIONAL ORGANIZATION FOR WOMEN (1972).

17. On July 19, 1973, the VA approved an Information Bulletin wherein it stated that the VA will recognize fully the income and expenses of the veteran and his or her spouse in its determination of the ability to repay a loan. The VA regional officers were instructed that income was not to be discounted on the basis of sex and/or marital status. Unless a data collection system is created to determine if the criteria are followed, the loan officials may continue to say "age and sex" not "income" are the proper credit standards. *Economic Problems*, *supra* note 12, at 551 (testimony of Hon. Frankie Freeman, Member of United States Comm'n on Civil Rights).

18. The FHA, 12 U.S.C. §§ 1702-15 (1970), is now under the auspices of the Department

the working wife's income. Before 1965, the practice had been not to count her income in support of the mortgage because of the assumption that the wife would quit work permanently upon her first pregnancy. The FHA policy since 1965 is that no source of income should *arbitrarily* be excluded; however, either all of the working wife's income or none of it is counted.<sup>19</sup> Before a young working wife obtains approval to use her income as part of the "effective income" she has the burden of proof that she has established a stable source of income and definitely plans to continue employment. With regard to the pregnancy possibility, the FHA manual<sup>20</sup> states that since employers frequently provide maternity leave, a woman with "strong motives" for returning to work who fails to do so "would represent such a very small percentage of volume that it could be accepted as a calculated risk."<sup>21</sup> The "strong motive" standard is vague and the danger of various interpretations could be curbed by more specific FHA guidelines.

## 2. *The Minority Woman*

Since lenders have strict maximum limits on the ratio of mortgage payments to effective income, the inclusion of a wife's income, or other valid sources of income could be the marginal difference in purchasing power needed to qualify for a mortgage. The practice of income discounting is especially oppressive to minority families where it is more common for both partners to work.<sup>22</sup> The wife's income could make the difference between poverty and an acceptable living standard for the exclusion of her income would effectively shut the family out of the new home market.

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of Housing and Urban Development. The FHA insures mortgages with low down payments and longer periods of maturity than are available with conventional loan institutions. A FHA insured loan can not exceed \$33,000.

19. The FHA's policy change is indicative of the recognition of the stability of a working wife's employment. FHA statistics show that in 1964, 27 per cent of insured cases had working wives; in 1970, the number rose to 44 per cent. In 1964, the FHA counted the wife's income in 73 per cent of the cases; in 1970, her income was counted 89 per cent of the cases where the loan application was approved. The FHA has not analyzed reasons for loan application rejection. A greater degree of discrimination could exist for those rejected could be those instances where the FHA had failed to include the young working wife's income.

20. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MORTGAGE CREDIT ANALYSIS HANDBOOK FOR MORTGAGE INSURANCE ON ONE TO FOUR FAMILY PROPERTIES (1972).

21. *Id.* § 22b.

22. Fifty-one per cent of nonwhite wives and 40.5 per cent of white wives participate in the labor force. In the 1970 Census, those of Spanish origin comprised 26 per cent of the white race. Negroes comprised 89 per cent of the nonwhite races. UNITED STATES DEPARTMENT OF LABOR, WORKING WOMEN, WOMEN'S BUREAU OF EMPLOYMENT STANDARDS ADMIN. 4 (rev. 1973) [hereinafter cited as WORKING WOMEN].



### 3. *The Single Woman*

When a woman applies individually for a mortgage loan, she often encounters marital status discrimination whether she is single, separated, divorced or widowed.<sup>23</sup> The discrimination is reflected in the attitude that a married mortgagor is more stable than one who is single because responsibilities tie the married mortgagor to his obligations.<sup>24</sup> Since more women than men comprise these categories,<sup>25</sup> the marital status discrimination inflicts greater harm to the woman, particularly the black woman.<sup>26</sup> Even if the income of divorced and separated women is regarded as stable, lenders often refuse arbitrarily to count alimony and child support as reliable sources of income. On the other hand, current earnings, retirement and disability payments are considered valid sources of income.<sup>27</sup> Economic reliability and stability, not sex and marital status, are the keys to the credit risk decision.

#### C. *Economic and Social Justifications for the Credit Practices*

##### 1. *The Economic Negatives*

###### a. *Loss of Creditworthy Customers—the Married Woman*

Practices used in mortgage financing are founded upon certain assumptions concerning the reliability of a woman's income. When a woman marries, the possibility of uncontrolled pregnancy is presumed as well as automatic and perpetual employment termination upon having a child. Lenders argue that her income is temporary and the absence of her income would significantly impair the family's ability to continue the mortgage obligation. These business hypotheses lack economic verification for two reasons: the small likelihood of the working wife's income terminating in the early years of the mortgage, which

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23. The Federal Home Loan Bank Board survey, *supra* note 11, concluded that 64 per cent of the savings and loan associations surveyed used marital status as a factor in evaluating the loan application.

24. *See supra* note 20, § 2-7(a):

The mortgagor who is married and has a family generally evidences more stability than a mortgagor who is single because, among other things, he has responsibilities holding him to his obligations.

Noteworthy is that single men also experience the discrimination; however, analysis of that problem is beyond the scope of this comment.

25. The 1970 Census Report stated that 14½ million women are separated, divorced and widowed whereas only 5 million men fit those categories. UNITED STATES BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, GENERAL POPULATION CHARACTERISTICS, FINAL REPORT PC (1)-B1 UNITED STATES SUMMARY, TABLE 54: HOUSEHOLD AND FAMILY CHARACTERISTICS BY RACE AND SIZE OF PLACE 1-278 (1970).

26. A higher proportion of black women as compared with white women are separated, widowed and divorced and must support themselves. *Id.*

27. *Economic Problems, supra* note 12, at 539-40.

are the critical years; and the probability that delinquency or default is not a function of the amount of income devoted to housing expenses.

(i) Employment Continuity

Lenders often classify income of the woman who marries as temporary because of assumed high quit rates and uncontrolled pregnancies. Their attitudes fail to account for the variables which determine a working wife's labor status: family child care needs, if any, economic necessity and desire to remain in the work force. With regard to marital status, of the 44 per cent of the female population in the labor force in 1972,<sup>28</sup> 41 per cent of the working women were married and lived with their husbands.<sup>29</sup> Forty-one per cent of the married women between the ages of 25 and 34, the primary childbearing years, worked.<sup>30</sup> Furthermore, in 1969, 66 per cent of the childless wives between the ages of 25 and 34 participated in the labor force. At 30, a working wife with no children has a worklife expectancy of 27 years.<sup>31</sup> A change in marital status does not cause immediate employment termination.

The next assumption challenged is that pregnancy is a significant factor in job continuity. One half of all wives living with their husbands with children between the ages of 6 and 17, and two thirds of the separated, divorced or widowed women with school aged children, are employed. The worklife expectancy of a 35 year old woman who has returned to the labor force is 24 years. Twenty-nine per cent of the married women with pre-school children and one half of the separated, widowed or divorced women are in the labor force.<sup>32</sup> Married women do return as permanent members of the work force.

Even though women become pregnant and do leave the work force,

28. *Id.* at 6. Of the 43 million women not in the labor force, 36 million kept house, 4 million were students and 3 million were not members for health reasons. WORKING WOMEN, *supra* note 22, at 4.

29. Participation in the labor force according to marital status ranges from 27 per cent of widows to 41 per cent of the married women with the husband present, 55 per cent of the single women and 62 of divorced or separated women. WORKING WOMEN, *supra* note 22, at 2.

30. Labor force participation rate of women by age and marital status in 1972:

	Total	Under 20	20-24	25-34	35-44	45-64	65 and older
Single	54.9	41.9	69.9	84.7	71.5	71.0	19.0
Married women husband present	41.5	39.0	48.5	41.3	48.6	44.2	7.3
Widowed, divorced separated	40.1	44.6	57.6	62.1	71.7	61.1	9.8

*Economic Problems*, *supra* note 12, at 6.

31. *Id.*

32. WORKING WOMEN, *supra* note 22, at 2.

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the crucial question is how many wives will quit work and refuse to return to work if by quitting they will default on their mortgage payments with the consequent foreclosure? An inquiry must be made into the credit experience concerning the stability of the wife's income and the availability of maternity leave provisions. The 1964 study by the United States Savings and Loan League<sup>33</sup> reveals that loans to families where the husband's salary accounted for 100 per cent of the family income had a higher likelihood of being delinquent than loans to families where the husband's income was only a portion of the family income.<sup>34</sup> Suspicions about the woman's creditworthiness are calmed by studies which find that women are better risks than men,<sup>35</sup> the probability of bad accounts for single and married women being substantially lower than for men with the same marital status.<sup>36</sup>

Certain federal laws,<sup>37</sup> state laws<sup>38</sup> and many union plans<sup>39</sup> provide for maternity benefits with job security. A few state statutes require

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33. L. KENDALL, *ANATOMY OF THE RESIDENTIAL MORTGAGE*, UNITED STATES SAVINGS AND LOAN LEAGUE (1964). The study failed to control other factors which might relate to delinquency.

34. *Id.*

35. D. DURAND, *RISK ELEMENTS IN CONSUMER INSTALLMENT FINANCING* 74 (1941) [hereinafter cited as DURAND].

36. Smith, *Measuring Risk on Installment Credit*, in *MANAGEMENT SCIENCE* 327-40 (1964).

37. Women employees in the railroad industry are given the right to use their regular sick benefits during absences for pregnancy or childbirth. Federally employed women do not receive as maternity leave as such but paid sick leave is available. 5 U.S.C. §§ 6301-11 (1970). A regulation promulgated by the Civil Service Commission permits sick leave to be used as maternity leave. The annual number of sick days can be accumulated. Job security is guaranteed to women granted maternity leave. Furthermore, government employees may participate in one of the health insurance plans which include payments toward maternity medical care for the women employees. *Id.* §§ 8901-13.

Exec. Order No. 11375, 3 C.F.R. 684 (1971), precludes discrimination on the basis of sex by federal contractors and subcontractors and by federally assisted construction contractors and subcontractors. Guidelines relating to maternity leave are being prepared.

In private industry, women employees are protected by rulings from the Equal Employment Opportunity (EEOC), which administers Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-15 (1970). Employers must grant recall rights to women after childbirth as they would grant to men after an extended illness. Also, a leave of absence should be granted for pregnancy whether or not it is granted for illness. The EEOC has ruled that the employer can decide when the pregnant woman must leave her work and paid sick leave but unpaid maternity leave does not violate the act. See Littlefield, *supra* note 7, at 586-88.

38. New Jersey, Rhode Island and Puerto Rico provide cash benefits for maternity leave. Of the six states and Puerto Rico that prohibit employment for periods before and after childbirth, only Puerto Rico gives women reemployment rights or compensation. Thirty-seven states and the District of Columbia disallow collection of unemployment benefits during the period before and after childbirth, even if the employment termination was due to a layoff. State and local governments often allow women employees to use sick leave as maternity leave; some also have insured medical leave. See Littlefield, *supra* note 7, at 588.

39. Voluntary health plans embrace union negotiated insurance plans and programs offered by commercial insurance companies, associations of hospitals or physicians, and group cooperatives. *Id.* at 587-88.

that women workers in certain industries and occupations take a maternity leave;<sup>40</sup> however, the validity of these statutes under Title VII of the Civil Rights Act of 1964,<sup>41</sup> or their constitutionality under the equal protection clause of the fourteenth amendment or the proposed equal rights amendment is questionable.<sup>42</sup> The most obvious point is that the male may also leave the labor force due to sustained illnesses or medical conditions.

Advocates of equality of consideration for credit extension can successfully rebut the argument that pregnancy interferes with a woman's ability to produce income. Women are in the labor force and return to the labor force after pregnancy. Their credit worth does not depreciate because of their marital status. Finally, if maternity benefits or job security are not available, intelligent financial planning can insure that the income void during that time will not be too great.

(ii) Housing Expense to Income Ratio

Lenders have traditionally believed that the amount of family income allocated to housing is an important factor in determining a credit risk.<sup>43</sup> The ratio of expenses to income is usually between 20-25 per cent so that an applicant with an income of \$10,000 would be eligible for a loan yielding total annual payments of \$2000-2500. Since 26.2 per cent of the average working couple's income is attributed to the working wife,<sup>44</sup> the issue becomes whether, upon the wife's leaving the work force, the absence of her income converts the mortgage loan into a credit risk.

The risk probability of a loan relying upon a wife's income for support was analyzed by John Herzog and James Earley for the National Bureau of Economic Research.<sup>45</sup> Their conclusion was that significant risk factors were the percentage of the borrower's equity in the purchase, the existence of junior financing and the purpose of the loan.<sup>46</sup> The expense to income ratio was not statistically significant in deter-

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40. These states are Connecticut, Massachusetts, Missouri, New York, Vermont, Washington and Puerto Rico. See UNITED STATES DEPARTMENT OF LABOR, HANDBOOK ON WOMEN WORKERS 276-77 (1969).

41. 42 U.S.C. §§ 2000e-e15 (1970).

42. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 929-32 (1971).

43. See textual material relating to note 9 *supra*.

44. CONSUMER CREDIT, *supra* note 6, at 9 (testimony of J. McElhorne, Economist Federal Home Loan Bank Board).

45. J. HERZOG & J. EARLEY, HOME MORTGAGE DELINQUENCY AND FORECLOSURE (1970) [hereinafter cited as HERZOG & EARLEY].

46. *Id.* at 50-52, 54, 58-60, 62-63.

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mining delinquency and foreclosure risk.<sup>47</sup> The only significant borrower characteristic was occupation with professional persons, executives and managers, being the least delinquent, and self-employed persons and salesmen as the most delinquent.<sup>48</sup> The author of studies of FHA and VA insured loans, George von Furstenberg, agrees that as the loan to value ratio rises, it becomes an increasingly more important indicator of default risk in mortgage loans.<sup>49</sup> Earlier studies also discount the expense to income ratio as a predictor of mortgage default.<sup>50</sup> Consequently, to the degree that the expense to income ratio is not predictive of risk, lenders who use it in credit risk analysis lack an adequate justification for discounting the working wife's income.

### *b. Loss of Creditworthy Customers—the Single Woman*

The poor risk status of the single woman is founded upon a belief that she is inherently unstable and incapable of handling her own affairs. The single woman has been denominated as less responsible on her obligations than a married man, and she is likely to change her marital status which triggers the uncontrolled pregnancy which results in permanent job termination. The validity of these assumptions is doubtful.

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47. Herzog and Earley point out that the lenders could have controlled this aspect of the credit risk by the use of the 20-25 per cent rule. Yet, the results of the study show that the expense to income ratio did not pass the significance test at the 1 per cent or 5 per cent levels. *Id.* at 54; *Discrimination, supra* note 9, at 171 n.45.

48. See HERZOG & EARLEY, *supra* note 45, at 54.

49. G. VON FURSTENBERG, TECHNICAL STUDIES OF MORTGAGE DEFAULT RISK: AN ANALYSIS OF THE EXPERIENCE WITH FHA AND VA HOME LOANS DURING THE DECADE 1957-66 (1971).

50. In 1964, the study by the United States Savings and Loan League, *supra* note 33, concluded that the significant risk characteristics were high loan to value ratios and a borrower with many dependents.

A 1963 FHA study concluded that the credit risk is lessened when the loan to value ratio is low. The risk predictors included the age of loans, amount of down payment and term of loans. The study did not analyze the borrower as a factor in the determination of credit risk. HOUSING AND HOME FIN. AGENCY, FHA EXPERIENCE WITH MORTGAGE FORECLOSURES AND PROPERTY ACQUISITIONS (1963).

A 1962 VA study of VA guaranteed loans in default as of December 31, 1960, and all new defaults in the first quarter of 1961, found the risk factors to be the loan to value ratio and the long term of maturity. Defaults decreased as borrower's equity increased. VETERANS ADMINISTRATION REPORT, LOAN SERVICE AND CLAIMS STUDY (1962).

Whereas the United States Savings and Loan League looked to the causes of delinquency and ignored foreclosure, the FHA and VA studies used foreclosure as the risk indicator with no analysis of the factors relevant to default.

The Herzog and Earley study of the determinants of credit difficulties in home mortgage loans is the most reliable study to analyze the validity of the economic justifications for discounting a working wife's income. The sample used included good and bad loans made by the VA, FHA and conventional mortgage lenders. Herzog and Earley applied multiple regression analyses. From the regression results, risk indexes were constructed based on the several risk-related characteristics for which time series credit risk data was available. See FIELDER, *supra* note 2, at 33.

Not only is the credit reliability of women higher than men,<sup>51</sup> marital status is not significantly relevant to delinquency and foreclosure risk.<sup>52</sup> The conclusion that single women have less responsibility with regard to their obligations can not be supported.

Single women who remain single have a 45 year worklife expectancy, which is longer than the average male.<sup>53</sup> If she remains single, the single woman's income remains as stable as the income of a married man.

If the single woman does marry, the change in marital status is not the sine qua non of income depletion and consequent loan risk categorization. If the couple chooses to move, the property can be sold or rented. If the home is used as the family residence, it will often be converted into a joint tenancy with the husband and wife assuming joint liability on the promissory note. The wife's choice to remain in the labor force results in a combined income from which the payments will be made. Even if the wife were to quit her employment, the husband's income, often higher and regularly incremented, should be adequate to continue regular payments.

The justifications for the differential treatment of single women are economically unsound and are reminiscent of the myth that a woman needs the protection of a man.

*c. Loss of Purchasers in the Secondary Mortgage Market*

The aforementioned business practices may result in an economic negative in the secondary mortgage market. In order to facilitate the flow of funds for additional residential financing, government sponsored corporations, the Federal National Mortgage Association<sup>54</sup> (FNMA) and the Federal Home Loan Mortgage Corporation<sup>55</sup> (FHLMC) have been created to purchase mortgages from mortgagees.<sup>56</sup>

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51. DURAND, *supra* note 35, at 74-5.

52. HERZOG & EARLEY, *supra* note 45, at 58, 59-60, 62.

53. UNITED STATES DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, WORK LIFE EXPECTANCY AND TRAINING NEEDS OF WOMEN, MANPOWER REPORT NO. 12 (May 1967).

54. 12 U.S.C. §§ 1716-23 (1970). The FNMA, "Fannie Mae," is a government-sponsored "private" corporation regulated by the Secretary of the Department of Housing and Urban Development. FNMA provides a secondary mortgage market for FHA and VA insured mortgages, *id.* § 1717(b)(1), and since 1972, for conventional (non-FHA and VA) mortgages. *Id.* § 1717(b)(2). See Note, *Mortgage and Consumer Credit*, 1 WOMEN'S LAW REP. 25, 28 (1973).

55. 12 U.S.C. §§ 1451-59 (1970). Its Board of Directors is composed of the members of the Federal Home Loan Bank Board. *Id.* § 1452. FHLMC, "Freddie Mac," buys mortgages originated by federal savings and loan associations, federal home loan banks, and state chartered banks that are members of the Federal Home Loan Bank System. *Id.*

56. Life insurance companies are often the only private industry which buys and sells mortgages. *Id.*

## Comments

Whereas the credit practices by the VA and FHA insured mortgagees are limited by guidelines issued by the insuring agencies, the credit practices of conventional mortgagees are controlled by the mortgage seller's warranties in the conventional selling contract with the FNMA. The FNMA contract carries a warranty of nondiscrimination by sex although it fails to mention marital status discrimination.<sup>57</sup> The contract requires the potential seller to make a "reasonable" credit determination of the probability that a two income family will have sufficient income in the future to liquidate the debt.<sup>58</sup> In contrast with the FNMA, the FHLMC has more positive credit guidelines in that they specify that a lender's reasonable determination should include both incomes in at least 20 per cent of the cases.<sup>59</sup> If part time work can be expected to remain stable for three years, the income is to be counted.<sup>60</sup> The guidelines emphasize that the possibility of temporary leave, such as maternity leave, is no reason to discount any part of the applicant's income.<sup>61</sup>

Changes in mortgage financing practices are economically mandated if potential sellers are to participate in the secondary mortgage market. Provided these guidelines are enforced, the potential mortgage seller whose underwriting policy is the inclusion of the working wife's income has a reliable purchaser of the mortgage. The economic soundness of existing credit practices has been further undermined by the foreclosure of purchasers in the secondary mortgage market.

Economically, sex and marital discrimination in the grant or denial of credit is an unsound business practice. Not only may potential customers be foreclosed, but significant purchasers of conventional

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57. The warranty is:

Seller had not discriminated against the mortgagor in the fixing of the amount, interest rate, duration, or the terms or conditions of the loan, because of the race, color . . . sex, age . . . of the mortgagor and will not discriminate against the mortgagor in the servicing of the mortgage, because of the race, color . . . sex, age . . . of the mortgagor.

Conventional Selling Contract, FNMA Form 1002, § 701(s), CCH FED. BANKING L. REP. ¶ 25,764 (1972).

58. Section 311. Credit and Property Underwriting.

(c) Income in the Case of More than One Mortgagor. In the case of joint title to the property, the effective income of each mortgagor is computed separately then added together to provide a sum for total effective income. The key determination to be made is whether the circumstances reasonably indicate that the income, jointly or severally, will continue in a manner sufficient to liquidate the debt under the terms of the note and mortgage.

*Id.* ¶ 25,733.

59. *Economic Problems*, *supra* note 12, at 199 (testimony of W. Taylor, Director of the Center for National Policy Review, Catholic University School of Law).

60. *Discrimination*, *supra* note 9, at 170.

61. *Id.*

mortgages may refuse to deal with potential mortgage sellers. Since "sound business practice" does not compel these business practices, the reason may lie in the opinion that a woman can not be held legally liable for her debts. Is sex and marital status discrimination "as much a traditional vein of American society as racial bigotry, and its roots probably run insidiously deeper?"<sup>62</sup>

## 2. *The Social Justification for Credit Practices*

The social justification for credit practices is that a woman's legal status is inferior to a man's. Misunderstood concepts of property and domestic relations laws yield this belief.

The common law doctrine of "necessaries" permits a creditor to hold the husband liable for the debts incurred by the wife for her support. If the wife's obligation is construed as support, the creditor demands information concerning the financial stability of the husband who will be ultimately liable if the wife is irresponsible. When the wife's debt is not support, the husband's cosignature is nevertheless required as a form of insurance. Unless both owners have cosigned, the creditor can not levy upon the property acquired during marriage and held in tenancy by the entireties. Creditors understandably hesitate to relinquish the opportunity to seek the husband's assets for payment of the wife's debts.<sup>63</sup>

Creditors have voiced the fear that the husband's common law duty of support will provide the vehicle by which the wife can avoid her contractual obligations. The legal duty of support for the wife's "necessaries" can not be waived by either partner. When these rules of domestic relations law are qualified by family expense statutes and judicial construction of "necessaries," the creditor's dilemma is substantially eliminated.

Family expense statutes provide that both the husband and wife's property are liable for the expenses of the family. The apparent conflict arises as to the wife's responsibility for those obligations with the scope of the husband's duty of support and the family expense statutes. Creditors believe that, despite the wife's credit worth, the husband is ultimately liable for debts construed to be part of her support. In some states, the husband remains liable for the support of the wife and

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62. Murphy, *A Study of the Equal Pay Act, 1963-1970*, 39 U. CIN. L. REV. 615 (1970).

63. Hoffmann, *Sex in the Money Market*, 2 MARYLAND L.F. 135 (1972) [hereinafter cited as Hoffmann].



## Comments

children, but the wife is not relieved of her obligations. If the obligation is within the husband's duty of support, the wife is guaranteed a right of indemnification by the husband for payment of those expenses incurred on behalf of the family. Furthermore, since "necessaries" are only a part of the expenses within the purview of the family expense statutes, the wife remains solely liable for obligations which are not "necessaries." Consequently, creditors need only be concerned with the wife's financial stability and information pertinent to her husband's financial status is irrelevant in assessing her credit worth.

In the 27 states without family expense statutes, the creditor's justification that the husband's duty to support encourages the wife's irresponsibility is weakened in light of the sparse case law reflecting a strict construction of the term "necessaries." If the creditor anticipates the wife's avoidance of contractual duties, the creditor can require that the wife contract to remain solely liable for her obligations. The public policy against the husband-wife waiver of the duty of support can be distinguished from the wife-creditor contract. Not only is the fear of unequal bargaining power between spouses dissipated when the parties are the woman and creditor, but her right to her husband's support survives her contractual obligation to remain solely liable for her debts. Also, states with equal rights amendments may have to substitute these support laws with laws having equal applicability to both the male and female.<sup>64</sup>

In many states, if the pledging of the husband's credit is being abused, he has the right to seek a court order prohibiting his wife from obtaining credit on his account. The injunction may be rescinded if he fails to provide her with "reasonable necessities;" however, he can close his credit accounts, and, although she has a criminal action for nonsupport, she has no action in tort or contract for nonsupport. The married woman's dilemma intensifies when she encounters the institutional practice of filing the credit account in the husband's name regardless of who pays the bills.<sup>65</sup>

Eleven states statutorily limit the liability of a married woman.<sup>66</sup> If the credit extended is greater than the statutory amount the creditor fears subsequent debt disclaimer and demands an alternative source of

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64. *Hearings before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Banking and Currency*] (testimony of M. Gates and N. Polikoff, Center for Women Policy Studies).

65. Hoffmann, *supra* note 63, at 138.

66. *N.Y. Times*, March 25, 1973, at 35, col. 4.

repayment. Additionally, state law often stipulates the maximum amount of money a licensee can loan to a consumer, with the husband and wife regarded as one consumer.

Legal distinctions existing with respect to property ownership and control are magnified in community property states. A precept of community property state laws is that the husband has the powers of administration and control of the community assets. In all community property states except Louisiana, the wife has sole management and control of the community property representing her income until it is commingled with other community property under the husband's management and control.<sup>67</sup> Subject to certain procedural rules, the husband's power to dispose of the community property is coterminous with those powers exercisable over his own separate property. Also, the community property can be exhausted to satisfy his debts and obligations before his separate property for no priority of liabilities is legislatively assessed against the separate assets. Unless the wife's debts are "necessaries" or are secured by a pledge or mortgage of the husband, they can rarely be enforced against the community property, even if incurred for the benefit of the community.<sup>68</sup>

Legal justification for creditor's practices are found in agency law and judicial construction of community property statutes. The most prevalent procedure requires that a married woman apply for credit in her husband's name. It is supported by a rationale that if the husband entrusts money or credit cards to his wife, he has empowered her to act as his agent. When the wife has the apparent authority to act for her husband, her contracts are binding on him as to third parties. The creditors can reach the community property to satisfy her debts based upon the theory of implied consent by the husband.

Judicial construction of community property statutes has denied the wife access to her portion of the community property.<sup>69</sup> Even though the wife has a present interest in the community property, her portion has not vested to such degree as to permit it to be subject to her debts.

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67. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington are community property states. California, Louisiana, New Mexico and Nevada have not provided for joint management of the community property and sole control over each spouse's separate property as the remaining four states have. See Brown, *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U. CALIF.-DAVIS L. REV. 61, 70-74 (1973); Carruth, *Management and Control of Community Property: Sex Discrimination in California Law*, 6 U. CALIF.-DAVIS L. REV. 383, 386-88 (1973).

68. *Id.*

69. *Grolemund v. Cafferata*, 17 Cal. 2d 679, 111 P.2d 641 (1948).

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The creditor would have no recourse if payments should cease from a wife without separate non-commingled property.

The credit problem can be viewed as the product of outdated presumptions of pregnancy and job continuity and antiquated and misunderstood laws pointing to the inferior legal status of women.<sup>70</sup> Creativity and perseverance are the basic ingredients of a solution that eliminates the discrimination practiced by private, state and federal lenders and insurers.

## II. THE REMEDY

Sex or marital status discrimination in credit transactions can be remedied through administrative controls, judicial mandate, enforceable legislation and self help approaches.

### A. *Administrative Controls*

Administrative agencies can regulate sex and marital status discrimination as to transactions involving institutions under their jurisdiction. The absence of rule making authority and effective enforcement machinery handicaps the remedial quality of administrative action.

In December, 1973, guidelines requiring that every applicant be given an equal opportunity to obtain a loan were promulgated<sup>71</sup> by the Federal Home Loan Bank Board<sup>72</sup> (FHLBB) which supervises the commercial thrift<sup>73</sup> and savings<sup>74</sup> associations. The types of proscribed practices include underwriting decisions that do not consider credit history and reasonably foreseeable economic prospects, but arbitrarily differentiate loan applicants on the basis of assumptions as to the credit

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70. A tradition infused into the property laws is the assumption of the husband's surname upon marriage. A married woman who submits her maiden name on her credit application may obtain credit based upon her own credit worth, but may also be in violation of a state law requiring her to use the married name. *See Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972), where a state law requiring a married woman to use her husband's surname on the driver's license application was upheld.

71. 38 Fed. Reg. 34653 (1973).

72. 12 U.S.C. §§ 1437-40 (1970). The members of the FHLBB comprise the Board of trustees of the Federal Savings and Loan Insurance Corporation, *id.* §§ 1724-30, which insures up to \$20,000 individual accounts in federal savings and loan associations and eligible state-chartered thrift institutions.

73. Any building and loan association, insurance company or saving bank complying with the Board's financial requirements qualifies as a member or nonmember borrower of the Federal Home Loan Bank System.

74. 12 U.S.C. §§ 1461-68 (1970). Federal savings and loan associations in the Federal Savings and Loan System are automatically members of the Federal Home Loan Bank System.

worth of each sex; the old and the young; or married, single, widowed, separated or divorced individuals.<sup>75</sup> Supplementary income of the working wife is to be considered if such income can reasonably be expected to continue through the early period of the mortgage risk.<sup>76</sup> The use of lending standards having no economic basis and causing discriminatory effects violates the law even in the absence of intent to discriminate.<sup>77</sup>

These guidelines are the most definitive administrative outline of proscribed discriminatory practices. Their specificity fills the interpretive gap left by the vague administrative promulgations of other agencies. Enforcement of these regulations will yield equal credit opportunities that the regulations were designed to provide.

Other federal regulatory bodies include the Federal Reserve Board<sup>78</sup> (FRB), the Comptroller of the Currency,<sup>79</sup> the Federal Deposit Insurance Corporation<sup>80</sup> (FDIC) the FHA and VA, and the Federal Trade Commission<sup>81</sup> (FTC). The FRB regulates all national banks and qualified state chartered banks whereas the Comptroller of the Currency regulates commercial banks chartered under the National Banking Act of 1863.<sup>82</sup> A congressional proposal is to vest the FRB with rule making powers to promulgate regulations the discriminatory practices of the mortgage financiers.<sup>83</sup> Neither agency has exercised its regulatory powers with respect to this problem.

Proposed FDIC regulations<sup>84</sup> encompass residential lending and banking practices used by FDIC insured banks and are designed to implement the provisions of the federal fair housing law.<sup>85</sup> Proponents of the proposed regulations reason that nondiscrimination is the under-

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75. Reg. § 531.8(c)(1), 38 Fed. Reg. 34653 (1973).

76. *Id.* § 531.8(c)(3).

77. *Id.* § 531.8(b).

78. 12 U.S.C. §§ 221-522 (1970). Through its Board of Governors, a seven-member board appointed by the president, the supply of money and credit in the United States is controlled.

79. *Id.* §§ 1-14.

80. *Id.* §§ 1811-31. The FDIC insures the savings of depositors of member banks up to a maximum of \$20,000. All members of the Federal Reserve System are required to be FDIC insured. The FDIC regulates state chartered commercial banks and mutual savings banks which are not members of the Federal Reserve System.

81. 15 U.S.C. §§ 41-77 (1970).

82. 12 U.S.C. §§ 21-215 (1970).

83. *Banking & Currency, supra* note 64 (testimony of P. Massey, Women's Equity Action League).

84. Proposed Regs. §§ 338.1 to .8, 37 Fed. Reg. 19385 (1972). Section 338 would prohibit 8,000 of the 14,000 state chartered commercial banks and 326 of the 490 mutual savings banks from discriminating in residential lending transactions. Savings and loan associations are not included.

85. Civil Rights Act of 1968, 42 U.S.C. § 3601 (1970).

lying principle of this fair housing law and the FDIC proposed regulations and the fair housing goal is unachievable without a similar proscription of sex discrimination.<sup>86</sup> Rule making authority is found in the FDIC's specific and incidental powers to insure sound banking practices.<sup>87</sup> Advocates of the regulations argue that not only is sex and marital status discrimination an unsound banking practice but a management unresponsive to the changing role of a woman in her labor, financial and social community, would be less likely to exercise sound business judgment in anticipating economic changes. The FDIC has not acted on these proposed rules, which, if passed, would have a significant impact on current banking practices.

Since the FHA and VA play an important role in mortgage financing, enforcement of these agencies' changed policies and additional, more specific guidelines could effectively control the current mortgage lending practices.

The FTC could provide administrative relief for the individual against private lenders and credit card companies.<sup>88</sup> The cease and desist order is the FTC's weapon to prohibit unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.<sup>89</sup> Sex and marital status discrimination can be categorized as unfair methods of competition in the market place of credit. Credit point scoring systems which are weighted in the male applicant's behalf can be classified as deceptive trade practices. The woman is deceived into the belief that she receives equal credit appraisal; however, her male counterpart's score is weighted by irrelevant credit factors, such as a telephone listing, customarily in the husband's name. The FTC is a viable source of relief for the consumer it is authorized to protect.

Agencies such as the FHLBB, the FRB, the Comptroller of Currency, the FDIC, the FHA and VA, and the FTC can provide admini-

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86. *Hearings on Fair Housing Lending Practices Before the FDIC*, 92d Cong., 2d Sess. (1972).

87. 12 U.S.C. § 1811 (1970). The power to determine whether a nonmember bank is insurable is in *id.* § 1816. *Id.* § 1828 outlines the power to grant requests to establish branch offices or retire capital stock. *Id.* § 1818 vests discretion to terminate an insured's status. Two factors to be weighed in each of the categories are: (a) the general character and management of the bank; and (b) the convenience and needs of the community to be served by the banks. Coupled with this claimed authority is the general federal policy to eliminate sex discrimination. Noteworthy is the FCC's use of its licensing powers in the Washington, D.C. area to prohibit discrimination against women in employment by radio and television stations.

88. Banks are exempted from the jurisdiction of the FTC. *Id.* § 45(a)(6).

89. *Id.* § 45(b).

strative remedies; however, until the regulations are earnestly enforced, the individual must seek relief in other arenas.

### B. *Judicial Mandates*

The judiciary is a remedial forum for private and class action litigants who allege that the discriminatory credit practices violate existing statutory or constitutional rights.

#### 1. *Statutory Remedies*

A federal civil remedy against private acts of discrimination may be provided by the Public Accommodations Act.<sup>90</sup> The Act provides the individual with a cause of action for injunctive relief against the denial or coercive interference with his or her rights to "... goods, services . . . privileges, advantages . . . of any place of public accommodation . . . ."<sup>91</sup>

A private establishment whose facilities are available to the public is within the scope of the Act.<sup>92</sup> Provided its operations affect interstate commerce, a private bank open to the public is arguably a public accommodation within the meaning of the Act.

Although the Act proscribes racial discrimination, it does not speak of sex or marital status classifications. A woman would be without the protected class unless it can be persuasively maintained that the minority woman sustains the greatest injury, for she is often the sole support of the family, yet denied head of household status in financial transactions.<sup>93</sup> Even though the link to race may be established, relief may be limited to the minority woman.

Unless the bank is defined as a public accommodation and sex is denominated as part of the protected class, private acts of credit discrimination may be without the purview of the Public Accommodations Act.

#### 2. *Constitutional Remedies*

A constitutional remedy based upon a construction of the fourteenth amendment's equal protection clause, and fifth amendment's due pro-

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90. Civil Rights Act of 1964, 42 U.S.C. § 2000a to a(6) (1970).

91. *Id.* § 2000a(a).

92. *Id.*

93. Even if sex classifications are made a part of the protected class, the section could be interpreted to require discriminatory intent on the part of the violator rather than a discriminatory effect. Since race is a suspect classification, a compelling state interest is required before the discriminatory effect would be upheld. See *Loving v. Virginia*, 388 U.S. 1 (1967). Distinctions based upon sex have been struck down for lack of a rational basis for them. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). Query whether the discriminatory effect of the existing credit practices is sufficient to bring women within the protected class of the Public Accommodation Act.

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cess clause and the equal rights amendment is dependent upon which standard of review is used and whether the concept of state action embraces banking practices.

Although the Supreme Court has held that the equal protection clause is applicable to discrimination on the basis of sex<sup>94</sup> it declined to employ a strict standard of review in a sex discrimination case.<sup>95</sup> Mandatory licensure of the lending institution by a state or federal agency may involve the government so that the institution's discriminatory practices constitute state action. When banks are policed by state and federal regulatory bodies for compliance with their charters, yet permitted to continue their discriminatory policies, the governmental inaction may be a denial of equal rights under the law particularly because the public domain is concerned.<sup>96</sup>

The existing discriminatory credit practices would probably be unconstitutional under the equal rights amendment,<sup>97</sup> provided state action is shown. It fails as a present solution for not all of the 38 states required for ratification have endorsed it and a two year period must lapse before its effective date.

Enforcement of statutory<sup>98</sup> and constitutional prohibitions is a costly, complex and piecemeal solution. Enforcement of well drafted legislation would deal one swift blow to the arbitrary credit practices.

### C. *Enforceable Legislation*

The most effective remedy is enforcement of corrective legislation. Discrimination on the basis of sex or marital status is not statutorily prohibited by the civil rights laws protecting beneficiaries of federally assisted programs,<sup>99</sup> or borrowers of housing financiers.<sup>100</sup> Proposed legislation is awaiting final congressional affirmation; however, federal credit legislation prompts unresolved issues.

Several major bills<sup>101</sup> introduced in the 93rd Congress would amend

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94. *Reed v. Reed*, 404 U.S. 71 (1971).

95. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

96. *See generally* *Moose Lodge v. Irvis*, 407 U.S. 163, 180 (1972) (Douglas, J., dissenting).

97. HJR, 92d Cong., 2d Sess. § 835 (1972).

98. An antitrust action alleging a group boycott by the banks against women due to their practices of discrimination on the basis of sex or marital status is an alternative private remedy. An in-depth analysis of the action is beyond the scope of this comment.

99. 42 U.S.C. §§ 2000d-d4 (1970).

100. Civil Rights Act of 1968, 42 U.S.C. § 3604 (1970).

101. S. 2101, 93d Cong., 1st Sess. (1973); H.R. 9538, 93d Cong., 1st Sess. (1973). Creditors or card issuers are prohibited from discriminating on account of sex or marital status. The prohibition applies to all credit transactions including credit approval, continuation

the Truth in Lending Act<sup>102</sup> by prohibiting sex or marital status discrimination in the consumer credit transaction. Institutions within the jurisdiction of the FRB, FDIC, FHLBB and federally chartered credit unions will be regulated by their respective licensing agencies whereas all creditors not otherwise covered are regulated by the FTC. The amendments also provide for private enforcement, the civil liability provisions including penalties from \$100-10,000 for individual actions and the lesser of \$100,000 or 1 per cent of the net worth of the company for corporate discriminatory action.<sup>103</sup>

Other bills propose amendments to the National Housing Act<sup>104</sup> and a credit act prohibiting discrimination on account of sex or marital status by any creditor or credit card issuer against any individual.<sup>105</sup> A credit legislation moratorium has been called until a bill encompassing all phases of the credit transaction and addressing significant problems with federal legislation is drafted.<sup>106</sup>

A recurrent issue is whether a federal credit act will preempt existing property and domestic relations laws. The doctrine of preemption requires that the federal law controls when the federal and state laws are in conflict. To the extent that the state property and domestic relations laws mandate sex and marital status discrimination a conflict would exist. These conflicts are substantially resolved by the equal protection clause of the fourteenth amendment and, perhaps, the equal rights amendment so that the apparent conflict is *de minimis*.<sup>107</sup> The creditor can obey both the commands of federal and state statutes.

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or denial or establishment of the credit terms. The provisions also apply to certain transactions exempt under section 1603 of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-81 (1970), such as transactions in securities or commodities by a broker-dealer registered under the Securities and Exchange Commission, credit transactions involving business purposes, transactions other than real property which require financing in excess of \$25,000, and transactions under public utility tariffs, S. Rep. No. 262, 93d Cong., 1st Sess. 27 (1973).

102. 15 U.S.C. §§ 1601-81 (1970).

103. The proposed act would incorporate the civil liability provisions of section 1640 of the Consumer Credit Protection Act. Actual damages, court costs and reasonable attorney fees are recoverable. Additional damages for the individual plaintiff include damages that are twice the amount of the illegal charge and not less than \$100 nor more than \$1000. The aggregate limitation on a creditor's class action liability can not exceed \$100,000 or 1 per cent of the creditor's net worth. This limitation was deemed sufficient to deter potential violations, achieve widespread compliance and protect legitimate businesses from unwarranted claims in frivolous lawsuits. S. 2101, 93d Cong., 1st Sess. 15-37 (1973). To minimize the possibility of frivolous lawsuits, a requirement of posting bond is a more flexible approach than a maximum damage limit.

104. H.R. 8393, 93d Cong., 1st Sess. 525 (1973); H.R. 8879, 93d Cong., 1st Sess. (1973).

105. H.R. 8246, 93d Cong., 1st Sess. (1973).

106. 120 CONG. REC. E. 209-11 (daily ed. Jan. 28, 1974) (remarks of Congresswoman Lenore Sullivan).

107. *Economic Problems*, *supra* note 12, at 456.



## Comments

A more serious question arises as to compliance with state property rights vesting in the individual as a result of inchoate rights, inheritance and community property laws. Since state law often requires the spouse's signature, the creditor must know the individual's marital status. If the creditor is unaware of the prospective mortgagee's marital status he may be precluded from levying upon an interest mortgaged without the legal formality of a spouse's signature.<sup>108</sup> In other states, the spouse's inchoate dower rights are superior to the rights of the mortgagee.<sup>109</sup> The apparent conflict between state law and the proposed federal law is reconciled when the fact of marital status is limited to the obtaining of joint signatures, a procedural protection for the spouses, and does not implicate the credit worth of the married woman.<sup>110</sup>

In those circumstances where substantial federal state issues are presented, the FRB can be authorized to promulgate regulations harmonizing congressional intent with those property laws within the proper jurisdiction of the states.<sup>111</sup> In community property states where the assets of the community are in the control of the husband, the creditor would not be in violation of the federal law if the married woman is denied credit in her own name. The married woman is not credit worthy for she lacks legal capacity to repay her debts.<sup>112</sup>

Ideally, legislation could expand the consumer protection act into a federal code of good credit practice in all areas of credit.<sup>113</sup> Efficient and regular enforcement will substantially eliminate discrimination on the basis of sex and marital status.

### D. *Self Help Remedies*

Self help remedies are available to curb the discrimination in connection with credit applications and credit records. To establish a good

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108. A creditor of either spouse can not levy on that spouse's interest in property held in tenancy by the entireties because neither spouse can voluntarily dispose of his or her interest without the consent of the other. Consequently, the creditor requires both signatures before accepting the property as security. This form of ownership is still used in Alaska, Arkansas, Delaware, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin and Wyoming. *See Banking and Currency, supra* note 64.

109. When a husband alone executes a mortgage inchoate dower is superior to the rights of the mortgagee, whether he is a conveyer or a creditor of the husband. Dower rights to estates for life exist in Alabama, Arkansas, Alaska, Delaware, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, New Jersey, Ohio, Oregon, Rhode Island, Tennessee, Virginia, West Virginia and Wisconsin. *Id.*

110. *Id.*

111. *Id.*

112. *See* S. Rep. No. 262, 93d Cong., 1st Sess. 20 (1973).

113. *See* 120 CONG. REC. E. 211 (daily ed. Jan. 28, 1974).

credit record, the single woman may need a parent or guardian guarantor for the first credit transaction. A record of employment stability, dealings with reputable firms and checking and savings accounts is an indication that the applicant is a good money manager.

If a credit identity has been established while single, then upon marriage she need not notify her creditors of a change in marital status if she retains her maiden name. If she assumes her husband's surname, the married woman should insist upon retaining her first name so that a credit identity may be preserved. The local credit bureau should be notified that the woman desires a file under her own name, independent of her husband's file, so as to preserve her individual credit status. If the bureau refuses, she can inform it that under the Consumer Credit Protection Act<sup>114</sup> the bureau is required to maintain a consumer credit report on each individual consumer. Because she is considered an individual, credit is extended to her on the basis of her income,<sup>115</sup> and she can insist on a separate file in her own name.

The couple can police retail stores or banks which sponsor credit cards. If both the husband and wife are credit worthy individuals but two credit cards are issued in the husband's name, either the institution has not passed on the wife's application or has refused to grant the card in the woman's name on account of her marital status. If the institution has denied passing on the wife's application the issuance of two cards to one person constitutes a violation of the Consumer Credit Protection Act.<sup>116</sup> When the institution admits passing on the wife's application, yet denies her a credit card in her name, the inference is discrimination because of the fact of marital status.

The Consumer Credit Protection Act also provides that when credit has been denied, the consumer has the right to know the reason for the denial or which credit bureau's report was the basis of the denial. The consumer has the right to see the file, delete erroneous information and to complete an incomplete file.<sup>117</sup>

The separated but not divorced woman should pay her bills during this separation period even though additional credit has been suspended. Delay in payment will impair future credit granting.<sup>118</sup>

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114. 15 U.S.C. §§ 1601-81 (1970).

115. *Id.* § 1681.

116. *Id.*

117. *Id.* §§ 1681g-j.

118. *See* note 16 *supra*.

Self help remedies include deliberate planning and preparation of the women's individual credit record, and persistent insistence upon her federal credit disclosure rights.

### III. CONCLUSION

The process of insuring equal credit opportunities for all individuals commences with an examination of economic justifications of each credit risk factor. The traditional credit risk factors have been an individual's character, capacity and collateral measured within the frame of reference of the particular creditor's credit risk experiences. More contemporary evaluators, though, identify the borrower characteristics in relation to past credit collection difficulties and assess the status of these characteristics in the present credit structure. In the past, sex and/or marital status have been assumed to be important factors in the credit risk decision. Yet, when these factors are analyzed in the present credit structure, their value as a predictor of prospective credit risk is statistically insignificant.

The credit discrimination is apparent in the credit card and mortgage financing transactions. When a woman applies for a credit card, she often must supply higher credentials than her male counterpart. Upon a change of marital status, she loses her prior credit worth status and is foreclosed from creating a good record because her credit data merges with her husband's when the credit bureau files it under the family unit's, the husband's name. These credit practices are not warranted because economic assumptions concerning credit worth of women are faulty. Furthermore, the justification of administrative efficiency breaks down in light of the Consumer Credit Protection Act. The Act poses a serious question as to the legality of the credit bureau's practice of filing the credit information of the husband and wife, who are two individual consumers, under one consumer's name.

In the mortgage financing transaction, a working wife's income is arbitrarily discounted. Creditors place great importance on the expense to income ratio; consequently, when and if her income terminates, the probability of default is directly proportional to the increased expense to income ratio. Creditors assume that a woman *will* marry she *will* have uncontrolled pregnancy, and she *will* permanently retire from the work force. Not only have these assumptions been statistically crumbled, but the value of the expense to income ratio as a credit risk pre-

dictor is de minimus. When the loss of potential customers is added to the loss of significant purchasers of mortgages in the secondary mortgage market, the result is that the prevalent credit practices are economic negatives.

The process of insuring equal credit opportunities for all continues with a precise analysis of the legal status of women in property law. When the common law doctrine of "necessaries" is viewed within the scope of family expense statutes, when the community property concepts of ownership and control are seen within the frame of changing social policy, and when legal technicalities are construed in light of the purpose behind the formalities, the social justifications for discrimination because of the fact of sex and/or marital status evaporate.

Once the problem is defined, the process of insuring equal credit opportunity for all focuses upon appropriate remedies. Administrative relief is a realistic alternative, provided there is continuous and effective enforcement of guidelines or contract warranties by the appropriate regulatory agency. Both statutory and constitutional remedies are proposed; however, the handicap of seeking relief in the judicial forum is that it is both costly and piecemeal. Enforcement of well drafted legislation evolves as the most practical and effective insurance of equal credit opportunity for all. In the interim, self help remedies are available not only to educate the creditor but to insist upon the creditor's compliance with the law.

The problem has been defined, remedies have been proposed and desirable results are forecasted. To a certain degree, all discrimination can be erased in the eyes of the law by any of the suggested remedial approaches. The real challenge to society is the conviction that one's physical characteristics is of no consequence in assessing credit worth.

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