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Of Rights Lost and Gained

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TABLE OF CONTENTS

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I. INTRODUCTION

At the general election in November, 1978, Florida voters will have the opportunity to consider and approve or reject revisions to the state constitution proposed by the Constitution Revision Commission. The commission's proposals will appear in eight separate items on the ballot, with the bulk of the proposed changes in the first ballot item.[1] Seven so-called "controversial" proposals will be voted on separately, in order to give the electorate an effective voice in the major policy decisions encompassed by each of those proposals. Voters will be given the opportunity to determine whether responsibility for reapportionment should be removed from the legislature and vested in a nonpartisan, appointed reapportionment commission;[2] whether the elected Cabinet should be eliminated;[3] whether the elected Public Service Commission should be replaced with an appointed one;[4] whether the judicial retention system based on merit should be extended to include circuit court and county court judges;[5] whether the Governor and Cabinet should be replaced as the State Board of Education by a lay board appointed by the Governor;[6] whether sex should be included with race, religion, and physical handicap in article I, section 2;[7] and whether the recom-

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1. Fla. C.R.C., Rev. Fla. Const., Ballot Packages & Ballot Language, Revision No. 1 (May 11, 1978) [hereinafter cited as Ballot Packages]. This item contains all proposed changes to the following articles except those appearing as separate ballot items: article I (declaration of rights), article II (general provisions), article III (legislature), article IV (executive), article V (judiciary), article VI (suffrage and elections), article VIII (local government), article X (miscellaneous), article XI (amendments), and article XII (schedule).

2. *Id.* at Revision No. 3 (revision of art. III, § 16, legislative) (single-member districts and Reapportionment Commission).

3. *Id.* at Revision No. 4 (revision of art. IV, §§ 1(g), 3-6, 8(a); art. XI, § 2, executive (cabinet)); *see* Johnson, *supra* this issue; Moyle, *supra* this issue.

4. Ballot Packages, *supra* note 1, at Revision No. 5 (revision of art. IV, § 10; art. V, § 3(b)(3), executive (Public Service Commission and Public Counsel)).

5. *Id.* at Revision No. 6 (revision of art. V, §§ 10, 11(a)-(b), judiciary (selection and retention of circuit and county judges)).

6. *Id.* at Revision No. 8 (revision of art. IX, education); *see* Draper, *A New Look for Public Education: The Proposed Revision of Florida's Education Governance System*, *infra* this issue.

7. Ballot Packages, *supra* note 1, at Revision No. 2 (revision of art. I, § 2, declaration of

mended finance and taxation package should be approved.[8]

This is the first time that Florida voters will consider recommendations for constitutional revision that have not been approved first by their legislature.[9] Thus the electorate has a unique opportunity to express directly its sentiments on such important issues of government structure as the elected Cabinet, the composition of the State Board of Education, and the advisability of a reapportionment commission. Certainly the Constitution Revision Commission's proposals in the government structure area are daring. Indeed, if all of them are approved by the people, the political face of the state will be altered dramatically. For this reason, the commission's final product might well be characterized as a structural reform of state government.

But the commission's work and its work product reflect another theme equally daring and potentially more significant than the structural reform measures in its impact on the quality of life in the state over the next twenty years. The commission was intensely concerned about the protection of individual rights. Its recommendations for the revision of article I reflect the depth of its commitment to the preservation of human liberty and individual freedom. Such interests and concerns were no doubt fueled both by the times and by the personalities of many of the commissioners. The commission's deliberations began at a time when human rights were being emphasized in both domestic and foreign policy and when the pride and good feelings engendered by the bicentennial were still running high.[10] As a people, we were more knowledgeable about the uniqueness of our system of government, more intimate with the high ideals espoused by the framers of our national Constitution, more willing to believe again in the noble venture they initiated, and secure enough to participate more generously in the unparalleled

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rights (sex)); *see* Note, *One Small Word: Sexual Equality Through the State Constitution, infra* this issue.

8. Ballot Packages, *supra* note 1, at Revision No. 7 (revision of art. VII; art. X, § 12(h), finance and taxation); *see* Greenfield, *Flexibility and Fiscal Conservatism: Provisions of the 1978 Constitutional Revision Relating to Bond Financing, infra* this issue; Wall, *Homestead and the Process of History: The Proposed Changes in Article X, Section 4, infra* this issue; Note, *Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property, infra* this issue; Note, *Defining a Fair Share: The Proposed Revision to Florida's Corporate Profits Tax, infra* this issue; Note, *The False Promise of Homeowner Tax Relief, infra* this issue.

9. FLA. CONST. art. XI, § 2, providing for the creation of a Constitution Revision Commission and providing that its recommendations be submitted directly to the secretary of state, was added to the constitution in 1968. D'Alemberte, *Commentary*, in 26A FLA. STAT. ANN. 548 (West 1970); Sturm, *The Procedure of State Constitutional Change—With Special Emphasis on the South and Florida*, 5 FLA. ST. U.L. REV. 569 (1977).

10. *See* D'Alemberte, *Constitution Revision Symposium: Introduction*, 5 FLA. ST. U.L. REV. 565 (1977).

effort to free the human spirit than at any time in our recent history. It was a time, too, when there was a resurgence of interest in state constitutions as sources of rights for the individual.[11] It is not without significance that reprints of Justice William Brennan's *Harvard Law Review* article, *State Constitutions and the Protection of Individual Rights*, were distributed to the commissioners by Commission Chairman Talbot "Sandy" D'Alemberte.[12]

D'Alemberte was particularly concerned about and dedicated to the extension of individual rights beyond the minimum required by the Federal Constitution. He introduced and managed on the floor a proposal amending article I, section 1 to provide that "[r]ights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution."[13] The purpose of this beguilingly simple proposal was to breathe new life into the declaration of rights of the Florida Constitution. It was to remind the bench and the bar that federal constitutional rights are only minimum guarantees. They do not exhaust the possibilities for human freedom. It was to remind the courts and the legislature that the rights which Floridians have enshrined in their constitution are not necessarily coextensive with nor as limited as the rights they enjoy as Americans by virtue of the Federal Constitution.

D'Alemberte's appointment of Commissioners Dempsey Barron, LeRoy Collins, Dexter Douglass, and Jon Moyle—all skilled and vocal advocates of individual rights—to committees responsible for developing proposed revisions to article I was without doubt a most significant factor. Of course, it took more than the efforts of these five men to imbue the final product with the stamp of individual rights. It took a commission composed of thirty-seven women and men with open minds and sensitive consciences to hear and to respond. Still, those five men were, in most instances, the initiators,

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11. Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Falk, *Foreword: The State Constitution: A More Than 'Adequate' Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

12. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

13. Fla. C.R.C., Proposal 185, adopted by a 30-0 vote, 19 Fla. C.R.C. Jour. 288 (Jan. 12, 1978). The proposal was derived from CAL. CONST. art. I, § 24. *See* Transcript of Fla. C.R.C. proceedings 145-46 (Jan. 12, 1978) (remarks of Sandy D'Alemberte).

the floor managers, and the principal spokesmen for the proposals concerning individual rights. Their contributions to the success of the venture should not and cannot be minimized.

Nor should the appearances and testimony of concerned citizens be minimized. At public hearings around the state, citizens from all walks of life pressed individual rights issues before the commission. Perhaps the most eloquent statement was made in the keynote address delivered on the opening day of commission proceedings by Chesterfield Smith:

> First, I believe that our Constitution must contain an enhanced and enriched Bill of Rights which, in addition to guaranteeing to all of our citizens their traditional personal and property rights, must also address and embrace the quality of life to the extent that Floridians have come in recent times to understand to be their minimum entitlement. Truly, we are in the age of enhanced citizen participation in law-making — in rule making — in governmental decision making at all levels. It is the age of the unrepresented and the under-represented, the age of the women, the consumers, the environmentalists, the aliens, the physically and mentally disabled, the poor and the ethnic minorities. It is the age of ethics and openness and honesty for all public officials. Perhaps these immutable principles, often heretofore ignored in the Bill of Rights too, should now be embedded in Florida in Constitutional concrete.[14]

This article examines the commission's response to this challenge.

II. VENTURED BUT NOT GAINED

Not every request for constitutional redress from "the unrepresented and the under-represented" received commission approval. The commission heard 800 suggestions for revision from members of the public testifying at public hearings conducted around the state. The commission itself then reduced the 800 suggestions to 232 issues it was interested in pursuing. A total of 258 proposals were actually introduced. Probably less than half that number were adopted.

This section discusses five proposals which were not approved for inclusion in the final revision document. The commission or one of its committees rejected proposals guaranteeing indigent persons access to the state courts without regard to their ability to pay fees and costs, guaranteeing certain rights for the mentally handi-

14. Transcript of Fla. C.R.C. proceedings 37 (July 6, 1977). Chesterfield Smith was chairman of the 1965 Constitution Revision Commission.

capped, guaranteeing all citizens the right to a clean and healthful environment, guaranteeing juveniles the full panoply of procedural protections available to the criminally accused adult, and guaranteeing the media greater leeway to report on events of general public concern without liability for defamation. In each instance, the commission either declined to go farther than the Federal Constitution required, or it declined to establish new state constitutional rights not now recognized in the Federal Constitution.

An examination of these ill-fated proposals is useful for the insight it provides to the process of revising a state constitution. In addition, it may encourage judicial and legislative responses to problems which the commission viewed as inappropriate subjects for constitutional redress at this time. In any event, an analysis of the unsuccessful efforts is necessary if a complete picture of the commission's efforts to improve the climate for individual freedom in this state is to be presented.

A. Access to Courts and the Ability to Pay

The Federal Constitution contains no specific provision guaranteeing access to the courts. Nevertheless, the due process clause of the fourteenth amendment does impose some limitations on state power to regulate and control such access. In *Boddie v. Connecticut*, the United States Supreme Court ruled that a state's conditioning the bringing of an action for divorce on the payment of a filing fee and costs for service of process denied indigent persons due process of law.[15] The *Boddie* holding was extremely narrow, resting as it did on the fundamental nature of the marriage relationship and the state monopolization of the process by which that relationship could be altered.[16] Indeed, the Court expressly disclaimed any intention to decide that access to the courts was itself a right so fundamental that "its exercise may not be placed beyond the reach of any individual . . . ."[17]

Efforts to extend the principles of *Boddie* to challenge statutory requirements that a filing fee be paid before one's debts could be

15. 401 U.S. 371 (1971).

16. *Id.* at 374.

17. *Id.* at 382-83. Justice Douglas concurred in the result but based his conclusion on the equal protection clause: "Affluence does not pass muster under the Equal Protection Clause for determining who must remain married and who shall be allowed to separate." *Id.* at 386. Justice Brennan rejected the significance attached by the majority to the state's control over the divorce process, stating that he saw "no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law." *Id.* at 387 (Brennan, J., concurring in part).

discharged in bankruptcy[18] or before one could appeal an adverse administrative decision on eligibility for welfare benefits[19] were unavailing. In both instances, the Court distinguished *Boddie* and made clear that the due process clause would operate to guarantee access to the courts only when loss or impairment of a fundamental interest was at stake as a consequence of financial inability to participate in a process required by state law.[20] Thus, as a matter of federal constitutional law, access to the courts is not itself a protected interest. A person must be seeking the protection or vindication of an interest recognized as fundamental by the Court before the due process clause will prohibit a state from demanding payment of an admission fee.[21]

Unlike the Federal Constitution, the Florida Constitution specifically addresses access to courts: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[22]

However, in a 1974 case involving access to courts in an adoption proceeding, the Florida Supreme Court looked chiefly to federal constitutional law rather than to the state constitution for guidance.[23] When Helen Grissom, an indigent widow whose only source of income was Social Security, sought to adopt a child she had been caring for since 1959, she was faced with paying between twenty-five and thirty dollars to publish notice of the proceeding.[24] Relying on *Boddie v. Connecticut*[25] the Florida Supreme Court held that this statutory method of obtaining jurisdiction over the natural mother, whose whereabouts were unknown,[26] was unconstitutional in its application to indigents. According to the court, the right to have children either naturally or by adoption is as fundamental as the right to marry. Furthermore, the court found that by statute the state had created an exclusive judicial procedure which had to be

18. United States v. Kras, 409 U.S. 434 (1973).

19. Ortwein v. Schwab, 410 U.S. 656 (1973).

20. *Id.* at 659; 409 U.S. at 445.

21. In addition to marriage, other fundamental interests include: voting (Carrington v. Rash, 380 U.S. 89 (1965)); travel (Shapiro v. Thompson, 394 U.S. 618 (1969)); privacy (Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)); childrearing (Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)); procreation (Roe v. Wade, 410 U.S. 113 (1973); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

22. FLA. CONST. art. I, § 21. A provision guaranteeing access to courts has been included in every constitution since 1838. *See* FLA. CONST. of 1838, art. I, § 9; FLA. CONST. of 1861, art. I, § 9; FLA. CONST. of 1865, art. I, § 9; FLA. CONST. of 1885, art. I, § 4. *See also* Note, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U.L. REV 871 (1977).

23. Grissom v. Dade County, 293 So. 2d 59 (Fla. 1974).

24. *Id.* at 60.

25. *Id.* at 63.

26. FLA. STAT. §§ 49.011(10), .10 (1977).

used before the right to adoption could be realized. Since Ms. Grissom was unable to pay the publication cost, she was unable to invoke the jurisdiction of the circuit court, the forum required by state law,[27] to resolve a matter of fundamental importance—the adoption of a child. Application of the publication requirement under those circumstances denied Ms. Grissom due process and equal protection of the law.[28]

The *Grissom* opinion contained one passing reference to the state constitutional guarantee of open courts[29] and briefly noted that Ms. Grissom was "precluded from our courts because she [could not] 'purchase jurisdiction' over the wayward natural mother."[30] Although resolution of the issue under the access to courts provision would have been appropriate,[31] the court virtually ignored that section of the state constitution. Particularly troublesome is the possibility that after *Grissom*, the requirements expressed in *Boddie* are the applicable standard under the state, as well as the federal, constitution. It is unclear from the *Grissom* opinion whether the publication requirement was held invalid under the state constitution or under the Federal Constitution.[32] Given the almost complete reliance on *Boddie*, however, *Grissom* is best considered a fourteenth amendment case. Since the *Grissom* court clearly did not construe the access to courts section in the Florida Constitution, the conclusion that access to courts, as a matter of state constitutional law, is as limited as the federal requirement would appear to be erroneous.[33]

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27. FLA. STAT. § 63.102 (1977) vests exclusive jurisdiction of adoptions in the circuit courts.

28. 293 So. 2d at 61, 63.

29. The opinion set forth the following quotation from Rainey v. Rainey, 38 So. 2d 60 (Fla. 1948):

> ". . . In a democratic society like ours the administration of justice is not a chattel or commodity of the bar that it may traffic or barter with ad libitum. It is an attribute of sovereignty clothed with a vital public interest and we are commanded to administer it without 'sale, denial or delay'. Section 4, Declaration of Rights, Constitution of Florida, F.S.A."

293 So. 2d at 61. The court did not mention that a similarly worded provision is contained in art. I, § 21 of the 1968 constitution.

30. 293 So. 2d at 61.

31. *See* Brief for Appellant at 20-22, Grissom v. Dade County, 293 So. 2d 59 (Fla. 1974).

32. In phrasing the issue to be resolved, the court said that the question was whether sections 49.011(10) and 49.10, Florida Statutes, were "unconstitutional *as applied* to indigent persons, under the due process and equal protection provisions of the State and Federal Constitutions." 293 So. 2d at 61. The court's conclusion is equally ambiguous: "The publication statutes are therefore unconstitutional as applied and the State should be required to pay the costs of publication in such cases as these." *Id.* at 63.

33. Fla. C.R.C., Declaration of Rights Committee Minutes 6 (Oct. 13, 1977) (remarks of Robert F. Williams representing Florida Legal Services, Inc.).

Believing that the state of the law regarding access to the state's courts was inadequate,[34] Florida Legal Services, Inc. submitted two proposals to amend section 21 to the Constitution Revision Commission.[35] The proposals were considered by the Declaration of Rights Committee[36] on two occasions.[37] Commissioners Dempsey Barron and Dexter Douglass both considered the subject matter inappropriate for a constitutional amendment, arguing that relief should be sought from the legislature.[38] One proposal read: "No indigent person shall be denied access to any court in any proceeding because of inability to pay statutory fees and costs."[39] A motion to approve a proposal amending section 21 by inserting this language as a second sentence was defeated on a tie vote.

Commissioner Jesse McCrary filed a proposal which would have added "[n]o person shall be denied access to any court because of inability to pay statutory fees" as a second sentence to section 21.[40] McCrary's proposal was temporarily passed. Thus, the commission did not debate the issue.[41]

Although the committee's refusal to recommend the requested change to section 21 doubtless was disappointing to the sponsors, there likely will be no long-range impact from this refusal on judicial construction of that section. Since *Grissom* did not construe the state constitutional access to courts provision, that little-used section[42] remains available to support a holding that access to the

34. Memorandum from Robert F. Williams to Governor LeRoy Collins, re: Article I, Section 21, and Access to Court for Indigents (Oct. 6, 1977).

35. One proposal would have amended § 21 by inserting the following new language at the end of the provision: "The legislature shall provide by general law for the waiver of statutory fees and costs for insolvent persons in any proceedings before any court." As an alternative, a self-executing proposal was submitted which would have amended § 21 by inserting this new language at the end of the provision: "No insolvent person shall be denied access to any court in any proceeding because of inability to pay statutory fees and costs."

36. This committee was chaired by former Governor LeRoy Collins and included Commissioners Dempsey Barron, Dexter Douglass, Freddie Groomes, Richard Moore, and Jon Moyle. Charlotte Hubbard, alternate commissioner, was also a member of the committee.

37. Fla. C.R.C., Declaration of Rights Committee Minutes 6 (Oct. 13, 1977); *id.* at 4 (Nov. 14, 1977).

38. *Id.* at 6 (Oct. 13, 1977); *id.* at 4 (Nov. 14, 1977). Concern also was expressed about use of the phrase "insolvent person." At Chairman Collins' request, the author redrafted the self-executing proposal, *supra* note 35, substituting "indigent person" for "insolvent person." Memorandum from Patricia Dore to the Declaration of Rights Committee, re: Article I, Section 21 (Nov. 14, 1977).

39. Commissioners Groomes, R. Moore, and Collins voted in favor of the motion. Commissioners Barron, Douglass, and Moyle voted against the motion. Fla. C.R.C., Declaration of Rights Committee Minutes 4 (Nov. 14, 1977).

40. Fla. C.R.C., Proposal 247.

41. *See* Fla. C.R.C., Calendar 3 (Jan. 27, 1978).

42. *See* Note, *Article I, Section 21: Access to Courts in Florida,* 5 FLA. ST. U.L. REV. 871 (1977).

courts is itself so fundamental in Florida that "its exercise may not be placed beyond the reach of any individual,"[43] no matter how poor.

B. Rights of the Mentally Handicapped

Two members of the Human Rights Advocacy Committee for Florida State Hospital at Chattahoochee[44] appeared before the Declaration of Rights Committee to urge approval of two proposals concerning rights of the mentally handicapped. The first proposal would have amended the last sentence of article I, section 2 by inserting the words "or mental" after the word "physical," so that the sentence would read: "No person shall be deprived of any right because of race, religion, or physical or mental handicap."[45]

Several commissioners raised questions about the reach of such a provision.[46] Arguably, statutory provisions providing for the appointment of a guardian to manage the affairs of a person declared mentally incompetent[47] and providing for involuntary commitment[48] would be unconstitutional under the proposal. It was contended that the only rights which the proposal would safeguard for the mentally handicapped were those which the person was in fact qualified to exercise. This argument was based on certain federal regulations designed to implement a federal rehabilitation act.[49] Although the committee seemed sympathetic to the plight of mentally handicapped persons, the proper forum for relief was seen as legislative rather than constitutional.[50]

The second proposal would have created a new section in article I providing protections for the mentally handicapped closely paralleling the rights of accused persons.[51] Consideration of this proposal

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43. Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971).

44. Phil Southerland, Associate Professor at Florida State University College of Law, and Winsor Schmidt, Assistant Professor at Florida State University Institute for Social Research, are members of the Human Rights Advocacy Committee which was established pursuant to FLA. STAT. § 20.19(7) (1977).

45. Fla. C.R.C., Declaration of Rights Committee Minutes 2 (Nov. 14, 1977).

46. *Id.* at 3.

47. FLA. STAT. § 744.331 (1977).

48. *Id.* § 394.467; *see* Note, *The Confinement of Mabel Jones: Is There a Right to Jury Trial in Civil Commitment Proceedings?*, 6 FLA. ST. U.L. REV. 103 (1978).

49. Fla. C.R.C., Declaration of Rights Committee Minutes 3 (Nov. 14, 1977). Douglass expressed his doubt that the federal regulations referred to by Mr. Schmidt would be useful precedent for limiting state constitutional language. *Id.*

50. *Id.*

51. Any person subject to involuntary civil commitment proceedings shall, upon demand be informed of the nature and cause of the allegations against him, shall be furnished a copy of the allegations, and shall have the right to have compulsory process for witnesses, to confront at hearing adverse witnesses, to be heard in

provided the occasion for a wide-ranging discussion of the care and treatment of persons committed to state psychiatric institutions. But perhaps because the problems raised were so complex or because the committee was not prepared properly,[52] this discussion ended with rejection of the proposal and a recommendation that relief be pursued in the legislature.[53]

C. *Right to a Clean and Healthful Environment*

Among the subjects members of the public asked the commission to address in the constitution was a right to a clean and healthful environment.[54] The commission agreed to consider the question[55] and the issue was referred to the Declaration of Rights Committee for study.[56]

In recent years several states have added provisions to their constitutions which address environmental interests.[57] These state constitutional provisions fall generally into two categories: (1) broad policy statements, and (2) recognition of individual rights relating to the environment.[58] Twelve state constitutions[59] have policy state-

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person, by counsel or both, and to have a speedy and public hearing by impartial jury in the county where the allegations arise.

No person shall be compelled in any involuntary civil commitment proceeding to be a witness against himself nor twice put in jeopardy of such commitment based upon the same facts or circumstances. No person shall be subject to indefinite involuntary commitment.

Any person involuntarily committed to any mental institution shall have the right to receive such individual treatment as will give that person a realistic opportunity to be cured or to improve his mental condition, by the least drastic means, and with informed consent by that person, or if incompetent, by his guardian.

Id. at 2-3.

52. Since these proposals originated from a source outside the commission, no staff work had been requested or performed. The oral presentations were not accompanied by any written materials, save the language considered for inclusion in the constitution.

53. Fla. C.R.C., Declaration of Rights Committee Minutes 4 (Nov. 14, 1977).

54. Fla. C.R.C., Summary of Proposed Revisions to the Florida Constitution 1, 7 (Sept. 27, 1977) (suggestions submitted by the public) [hereinafter cited as Suggestions].

55. Fla. C.R.C., Constitution Revision Commission Issue List (List of 232) 27 (Sept. 28, 1977) [hereinafter cited as List of 232].

56. Fla. C.R.C., Declaration of Rights Committee Minutes 1-2 (Oct. 4, 1977).

57. *See* Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENV. AFFAIRS 473 (1974); Note, *A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens*, 5 FLA. ST. U.L. REV. 809 (1977).

58. Memorandum from Patricia Dore to the Declaration of Rights Committee, re: Right to Clean and Healthful Environment (Oct. 10, 1977).

59. ALASKA CONST. art VIII; FLA. CONST. art. II, § 7; GA. CONST. art. III, § 8; HAWAII CONST. art X; IDAHO CONST. art VIII, § 3A; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX; N.M. CONST. art XX, § 21; N.Y. CONST. art. XIV, § 4; N.C. CONST. art XIV, § 5; VA. CONST. art. XI.

ments similar to the provision added to the Florida Constitution in 1968: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise."[60] However, five states have constitutional provisions which extend substantive environmental rights to their citizens.[61] Since Florida's constitution already contains a statement of policy on the environment, the question under consideration by the commission was whether that statement ought to be strengthened by creating an individually enforceable right.

The committee debated the issue at two meetings and, within the space of one week, completely changed its position. Initially, with very little discussion, the committee approved a proposal offered by Moyle[62] which was derived from the Illinois Constitution.[63] At its next meeting, the committee voted to reconsider the vote by which it approved Moyle's proposal. The committee's earlier action had caught the attention of the business community, which was well represented at the second meeting.[64] It was suggested that the Moyle proposal might be viewed as anti-business.[65] Grave concerns were voiced that a constitutional right stated in absolute terms would prohibit the legislature and the courts from taking into account the societal benefits derived from an activity which might also injure a single individual's right to a clean and healthful environment.[66] Moyle argued to no avail that his proposal did not grant an absolute right, nor did it tie the hands of the legislature and the courts. He referred specifically to the last sentence, which provided: "Each

60. FLA. CONST. art. II, § 7.

61. ILL. CONST. art XI, § 2; MASS. CONST. art. XLIX (1780, amended 1918); PA. CONST. art. I, § 27; R.I. CONST. art I, § 17 (1843, amended 1970) (amend. XXXVII); TEX. CONST. art XVI, § 59(a).

62. Fla. C.R.C., Declaration of Rights Committee Minutes 5-6 (Oct. 13, 1977). The motion approved the amendment of article II, § 7 to read:

> The public policy of the state and the duty of each person is to provide and maintain a healthful environment, to conserve and protect its natural resources and scenic beauty and to abate air and water pollution and excessive and unnecessary noise for the benefit of this and future generations. The Legislature shall provide by law for the implementation and enforcement of this public policy. Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the Legislature may provide by law.

63. *Id.* at 5.

64. Jon Shebel, representing Associated Industries of Florida, and Wade Hopping, representing CF Industries, ITT Community Development, and General Development Corporation, both addressed the committee at its Oct. 20, 1977 meeting. Fla. C.R.C., Declaration of Rights Committee Minutes 2, 6 (Oct. 20, 1977).

65. *Id.* at 3.

66. *Id.* at 2 (remarks of Wade Hopping); *Id.* at 6 (remarks of Jon Shebel).

person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the Legislature may provide by law."[67]

Having rescinded its earlier approval of the Moyle proposal, the committee then approved Douglass' motion to move the existing natural resources and scenic beauty provision from article II into article I.[68] Moyle's second and third attempts to gain committee approval of a right to a clean and healthful environment were also unsuccessful.[69] In a startling turnaround, the committee then unanimously approved Douglass' motion to insert the following new language as the opening sentence to the natural resources provision: "The people of this state have a right to a clean and healthful environment."[70]

The intense committee debate between business interests and environmentalists proved to be an accurate foreshadowing of what was to follow when the issue was debated by the full commission. After Collins presented the committee's proposal, Moyle offered as an amendment the modified Illinois provision he offered and lost before the committee.[71] Moyle explained that his amendment was designed to avoid the extensive litigation which possibly would follow if the committee's proposal were approved. Unlike the commit-

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67. *Id.* at 2-3.

68. *Id* at 3.

69. Moyle moved to strike the existing language of former art. II, § 7 and insert the following, *id.* at 6:

> The public policy of the state and the duty of each person is to provide and maintain a clean and healthful environment, to conserve and protect its natural resources, scenic beauty, to abate air and water pollution, excessive and unnecessary noise for the benefit of this and future generations. Each person shall have the right to a clean and healthful environment. The Legislature shall provide by law for the implementation and enforcement of this public policy.

The motion was defeated on a tie vote. *Id.* at 7. Moyle then tried his hand at amending another section of article I. He moved that § 2 be amended by inserting "and to a clean and healthful environment" after the word "property," so that the section would read: "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, to acquire, possess and protect property and to a clean and healthful environment . . . ." Barron offered but later withdrew an amendment adding "with economic stability" after "environment." The motion by Moyle was defeated by a 2-4 vote. *Id.*

70. *Id.* The committee's environmental recommendation became Proposal 34. The committee voted to delete the treason provision in art. I, § 20. *Id.* at 2. When it then voted to recommend the relocation of the natural resources and scenic beauty provision from art. II, § 7 to art. I, it recommended placement in the now vacant section. This put Proposal 34 in an unusual posture for floor debate, in that three quite distinct issues were encompassed in the one proposal: deletion of the treason provision, transfer of the existing natural resources and scenic beauty provision, and recognition of the right to a clean and healthful environment.

71. *See* note 62 *supra.*

tee proposal, which simply recognized a right to a clean and healthful environment, Moyle's amendment also authorized the legislature to restrict and regulate the enforcement of that right reasonably.[72]

Commissioner John Mathews offered as a substitute amendment: "Everyone has a right to all the rights of Utopia."[73] The substitute, which he ultimately withdrew, enabled Mathews to pinpoint in dramatic fashion the problem he found with the original proposal and with the Moyle amendment—"out of real good motivation and out of lofty ideals we are trying to put something that is not practical and won't work into the constitution."[74] He believed that the policy statement alone, added to the constitution in 1968, was serving well. Authorizing individuals, who might disagree with that assessment, to sue would benefit no one but lawyers, argued Mathews.[75]

Several commissioners were concerned with the extent to which Moyle's amendment might authorize not only governmental but private interference with personal liberty. They raised the specter of a person with habits that another found obnoxious (such as cigar smoking, screaming, or expectorating tobacco juice), who would be liable to suit for failing to meet the affirmative duties specified.[76] Moyle found no more support for his approach with the full commission than he had with the committee. His amendment was defeated on a voice vote.[77]

Commissioner Don Reed offered an amendment to the original proposal which qualified the newly created right by specifying that it be "consistent with economic and social considerations."[78] This

72. Transcript of Fla. C.R.C. proceedings 13-14 (Jan. 10, 1978) (remarks of Jon Moyle).

73. *Id.* at 15 (remarks of John Mathews).

74. *Id.* at 16.

75. *Id.* at 15-16. Mathews, of course, is a lawyer himself.

76. *Id.* at 20-21 (remarks of John Mathews and Don Reed). Interference with the use of property was suggested also. *Id.* at 25-26 (remarks of Elliott Messer).

77. Transcript of Fla. C.R.C. proceedings 27 (Jan. 10, 1978).

78. Don Reed's amendment struck the period after the word "environment" and inserted "consistent with economic and social considerations." It also inserted "shall" after the word "state." With the Reed amendment, the first sentence read: "The people of this state shall have a right to a clean and healthful environment consistent with economic and social considerations." A memorandum dated Nov. 7, 1977, to Jon Shebel and Ron Spencer from Robert Rhodes, recited that "[a] major concern of the business community with [the committee proposal] is that the self-executing right does not necessarily include a balancing of environmental and economic factors." Rhodes suggested that the second sentence should be amended to read: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty *consitent* [*sic*] *with reasonable economic development.*" (Emphasis in original.) It would seem that inserting the balancing language in the first sentence which creates the right, as Reed's amendment did, would be more likely to achieve the results sought by Rhodes than his own suggested amendment. Arguably, implementation of the policy by the legislature would be restricted by the reasonable economic development requirement, while the people's right to a clean and healthful environment would not.

approach was resisted strenuously by Collins on the theory that it unnecessarily cluttered and fundamentally weakened the proposal. In Collins' view the logic behind Don Reed's amendment would require extensive modification and limitation throughout the declaration of rights. For instance, the right to be rewarded for industry[79] should carry a proviso that the industry not unduly pollute the environment; the right to acquire, protect, and possess property[80] should be limited to property uses which are not in any manner deleterious to the public interest;[81] the right to pursue happiness[82] should contain an exception for those persons who are incarcerated.[83]

But, in the final analysis, it was probably the following remarks of noted environmentalist and conservationist Commissioner Nathaniel Reed that doomed both Don Reed's amendment and the original proposal:

> We have a proven record of progress. If not spectacular, it is certainly one of the outstanding records in this country. We have the ability for citizens organizations to sue. We have a legislature that has given law and money to start departments that are effectively monitoring and enforcing the rules . . . .
>
> We are second to none. . . . I believe in staying with the winning team. The present language in the constitution is enough to guide us for the next 20 years safely and well without getting into the very difficult court decisions that your amendment would raise on top of their proposal.[84]

Don Reed's amendment was defeated on a voice vote.[85] Proposal 34 then was defeated overwhelmingly by a vote of six to twenty-five.[86]

The following day, on motion of Nat Reed, the commission reconsidered the vote by which Proposal 34 failed,[87] approved by voice vote an amendment striking the first sentence of the proposal,[88] and then adopted Proposal 34 as amended by a vote of twenty-seven to four.[89]

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79. FLA. CONST. art I, § 2.
80. *Id.*
81. Transcript of Fla. C.R.C. proceedings 41 (Jan. 10, 1978) (remarks of LeRoy Collins).
82. FLA. CONST. art. I, § 2.
83. Transcript of Fla. C.R.C. proceedings 30 (Jan. 10, 1978) (remarks of LeRoy Collins).
84. *Id.* at 39.
85. *Id.* at 42.
86. 17 Fla. C.R.C. Jour. 262 (Jan. 10, 1978).
87. Transcript of Fla. C.R.C. proceedings 9 (Jan. 11, 1978).
88. 18 Fla. C.R.C. Jour. 278 (Jan. 11, 1978).
89. *Id.*

The net result of this lengthy and sometimes stormy process was that the precatory statement on natural resources and scenic beauty thought inadequate by some commentators to meet the pressures of increased growth[90] remains essentially unchanged.[91] Any substantive implications of the commission's action transferring the language from article II to article I are subtle at best.[92]

D. *Rights of Juvenile Offenders*

Since 1950, the Florida Constitution has permitted the legislature to establish separate proceedings for disciplining juvenile offenders without regard to the constitutional restrictions applicable to the prosecution of adult offenders.[93] As a result of the 1968 revision, the provision concerning juveniles was streamlined and transferred to article I, section 15(b). It now provides:

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90. *See* Tobin, *supra* note 57; Note, *A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens*, 5 FLA. ST. U.L. REV. 809 (1977); Note, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 FLA. ST. U.L. REV. 736 (1974).

91. The commission rejected Proposal 59, which would have added wildlife to the natural resources and scenic beauty provision. 17 Fla. C.R.C. Jour. 264 (Jan. 10, 1978). Proposal 100, relating to access to public beaches, was approved by the commission, 19 Fla. C.R.C. Jour. 286 (Jan. 12, 1978), and is discussed in Note, *Open Beaches in Florida: Right or Rhetoric?*, *infra* this issue.

92. Nathaniel Reed characterized the transfer as "simply a house-cleaning move." Transcript of Fla. C.R.C. proceedings 10 (Jan. 11, 1978). But the following dialogue between Mathews and Douglass at least suggests the possibility of a more substantial consequence: "[Douglass:] You have no objection to moving that? [Mathews:] Well, I think it is better to not be in the Bill of Rights. [Douglass:] Why? [Mathews:] Because the Bill of Rights is something that you've got to enforce." Transcript of Fla. C.R.C. proceedings 17 (Jan. 10, 1978).

93. The Legislature shall have power to create and establish Juvenile Courts in such County or Counties or Districts within the State as it may deem proper, and to define the jurisdiction and powers of such courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the Legislature from time to time are accused, including the right to define any or all offenses committed by any such persons as acts of delinquency instead of crimes; to provide for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the Legislature may determine, and to fix their compensation and term of office; all in such manner, for such time, and according to such methods as the Legislature may prescribe and determine, without being limited therein by the provisions in this Constitution as to trial by jury in Sections 3 and 11 of the Declaration of Rights, as to use of the terms "prosecuting attorney" and "information" in Section 10 of the Declaration of Rights, as to election or appointment of officers in Section 27 of Article 3, as to jurisdiction of criminal cases in Sections 11, 17, 22 and 25 of Article 5, as to original jurisdiction of the interests of minors in Section 11 of Article 5, and as to style of process and prosecuting in the name of the State in Section 37 of Article 5, or other existing conflicting provisions of the constitution.

FLA. CONST. of 1885, art. V, § 50 (1950), becoming art. V, § 12 in 1956, when revised art. V was approved. No substantive changes were made to the provision in the 1956 revision.

> When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

This provision, like its predecessor, merely authorizes but does not require the legislature to establish a system under which a juvenile may be "tried without a jury or other requirements applicable to criminal cases." However, since the legislature has accepted the constitutional invitation,[94] a juvenile is left without a state constitutional basis for claiming the right to jury trial, bail, confrontation, counsel, or the right to be free from double jeopardy and self-incrimination.

In 1967, the United States Supreme Court observed that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[95] With that observation, the Court began the process of conforming the generally lax and sometimes arbitrary juvenile proceedings to "the basic requirements of due process and fairness"[96] mandated by the Federal Constitution. In proceedings to determine the delinquency of a juvenile, due process now requires timely notice of the charges; the right to be represented by counsel, retained or appointed; the right to confront and cross-examine witnesses; and protection from self-incrimination.[97] Proof of delinquency must be established beyond a reasonable doubt,[98] and the double jeopardy clause prevents the state from trying a juvenile as an adult after a juvenile court determination that he has violated a statute.[99]

The Court, however, has rejected the claim that due process requires the right to trial by jury in juvenile proceedings.[100] Although admitting its disillusionment with the juvenile court system, the Court was unwilling in 1971 to impose the jury trial requirement on the states. Rather, it encouraged the states to experiment and "to seek in new and different ways the elusive answers to the problems of the young . . . ."[101] Nor did the Court exclude the possibility that

94. *See* FLA. STAT. § 39.09 (1977), *as amended by* ch. 78-414, 1978 Fla. Laws ___ (CS/CS/SB 119).
95. *In re* Gault, 387 U.S. 1, 13 (1967).
96. Kent v. United States, 383 U.S. 541, 553 (1966).
97. *In re* Gault, 387 U.S. 1 (1967).
98. *In re* Winship, 397 U.S. 358 (1970).
99. Breed v. Jones, 421 U.S. 519 (1975).
100. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
101. *Id.* at 547.

jury trial might be, at least in part, an answer to the complex youthful offender problem. But the Court insisted that choice was to be made as a matter of state—not federal—policy: "If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation."[102]

Both the idea of prohibiting trial of juvenile offenders without a jury and the idea of establishing a right to trial by jury in all cases when a deprivation of personal liberty might result were suggested to the commission during the first round of public hearings.[103] Neither of these requests received the number of votes necessary under commission rules to warrant further study, and thus they were not referred to committee. However, at the first meeting of the Declaration of Rights Committee, the need for section 15(b) was questioned,[104] and a memorandum explaining the provision and identifying the consequences if it should be deleted was requested.[105] The committee subsequently voted to recommend no change in section 15(b).[106] However, D'Alemberte filed a proposal to delete section 15(b),[107] resulting in full debate of the question of extending the right to jury trial to juvenile court proceedings.

Section 15(b) provides that a juvenile may demand to be tried as an adult.[108] In that event, of course, the juvenile is entitled to trial by jury. However, in order to secure that right, the juvenile must sacrifice the beneficent aspects of the juvenile proceeding.[109]

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102. *Id.*

103. Suggestions, *supra* note 54, at 5.

104. Fla. C.R.C., Declaration of Rights Committee Minutes 5 (Oct 4, 1977) (remarks of Jon Moyle).

105. *Id.; see* Memorandum from Patricia Dore, prepared by Judith Bass, to Declaration of Rights Committee, re: Article I, Section 15(b) (Oct. 10, 1977).

106. Fla. C.R.C., Declaration of Rights Committee Minutes 5 (Oct. 13, 1977).

107. Fla. C.R.C., Proposal 178.

108. FLA. STAT. § 39.02(5)(a) (1977), *as amended by* ch. 78-414, 1978 Fla. Laws ___ (CS/CS/SB 119); FLA. R. JUV. P. 8.150(a); *see* State v. Williams, 304 So. 2d 472 (Fla. 2d Dist. Ct. App. 1974) (holding that transfer upon demand is mandatory). A juvenile 14 years of age or older may be tried as an adult involuntarily if, after a waiver hearing, the court transfers the case. FLA. STAT. § 39.02(5)(a) (1977). A juvenile of any age may be tried as an adult if "charged with a violation of Florida law punishable by death or by life imprisonment" and if an "indictment on such charge is returned by the grand jury." *Id.* § 39.02(5)(c); *see* Woodard v. Wainwright, 556 F.2d 781 (5th Cir. 1977); Johnson v. State, 314 So. 2d 573 (Fla. 1975) (both cases sustain the constitutionality of this procedure).

109. The court may place a delinquent child in a community control program, in the custody of the Department of Health and Rehabilitative Services, in a licensed childcare facility, or require the child to participate in a community work project or to render service in a public service program. FLA. STAT. § 39.11(1)(a)-(c) (1977), *as amended by* ch. 78-414, 1978 Fla. Laws ___ (CS/CS/SB 119). Juvenile proceeding records are not open to public

D'Alemberte intended to eliminate this constitutionally sanctioned Hobson's choice. In his view, the legislature's flexibility to build and maintain a separate juvenile justice system should be restricted only to the extent the state and federal constitutions limited its discretion in dealing with adults accused of crime.[110] He contended that approval of his proposal would not affect the legislature's authority to protect juveniles from publicity of their alleged criminal conduct[111] or from the ignominy of a permanent criminal record.[112] Most of the other commissioners who debated the proposal seemed unimpressed with D'Alemberte's arguments, in light of the fact that the accused juvenile did have the right to trial by jury if he exercised his right to demand trial as an adult.[113] It was, as D'Alemberte characterized it, "a fairly easy philosophical question,"[114] which the commission rejected by a substantial margin.[115]

Thus, the commission refused to take the position that juvenile offenders tried in juvenile court are entitled to the same constitutional rights as accused adults. In effect, this was a rejection of an opportunity to expand the state constitutional rights of juveniles.[116] Consequently, any experimentation in this area must await action by the legislature. When and if that time arrives, at least section 15(b) will not be an impediment.

E. The Metromedia *Standard*[117]

Article I, section 4 contains standards of proof for defamation actions in addition to free speech and press provisions. The last two

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inspection. FLA. STAT. § 39.12 (1977), *as amended by* ch. 78-414, 1978 Fla. Laws ___ (CS/CS/SB 119).

110. [I]t is my intention — and I hope it is the intention of the Commission — to vote favorably on this to allow the legislature to construct whatever system they want [but] to make sure that at the end of that system there is the right to trial by jury before anyone, including a juvenile, is retained or institutionalized or punished.

Transcript of Fla. C.R.C. proceedings 302-03 (Jan. 12, 1978) (remarks of Sandy D'Alemberte).

111. *Id.* at 304. *But see* FLA. STAT. § 39.12(7) (1977), *as amended by* ch. 78-414, 1978 Fla. Laws ___ (CS/CS/SB 119).

112. Transcript of Fla. C.R.C. proceedings 303 (Jan. 12, 1978) (remarks of Sandy D'Alemberte).

113. *Id.* at 298-99 (remarks of Ben Overton); *id.* at 301 (remarks of LeRoy Collins); *id.* at 303, 305 (remarks of James Kynes). *But see id.* at 310 (remarks of Jon Moyle).

114. *Id.* at 311.

115. Proposal 178 failed by a vote of 11-18. 19 Fla. C.R.C. Jour. 291 (Jan. 12, 1978).

116. Although debate on Proposal 178 focused almost exclusively on the right to trial by jury, the deletion of § 15(b) would have had broader implications. *See* FLA. CONST. art. I, §§ 14-15(a).

117. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Portions of this section appeared in a memorandum prepared by the author for D'Alemberte and the Ethics, Privacy and Elections Committee.

sentences of section 4 state: "In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated."

Decisions of the United States Supreme Court subjecting state libel and slander laws to the restraints of the first amendment have cast considerable doubt on the validity of the truth-and-good-motives aspect of section 4.[118] In 1964, in *New York Times Co. v. Sullivan,* the Court announced a federal constitutional rule prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'— that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[119] The *New York Times* standard was held applicable to criminal libel actions as well, prohibiting the punishment of truthful criticism and the punishment of false statements absent proof of actual malice.[120] Thus, at least with respect to those instances when the *New York Times* rule is applicable—when the defamation plaintiff is a public official or public figure[121]—the state constitutional burden of proof has been superseded by the federal constitutional standard.[122]

Several suggestions from the public dealt specifically with revision of the defamation provision of section 4. The commission was asked to establish truth alone, without proof of good motive, as a complete defense, to provide that reports relating to matters of public concern are privileged in the absence of actual malice, to remove the language concerning the standard of proof, and to establish standards of proof for cases involving public figures.[123] Although the

118. For examples of Florida cases construing this section, see Florida Publishing Co. v. Lee, 80 So. 245 (Fla. 1918); Drennen v. Westinghouse Elec. Corp., 328 So. 2d 52 (Fla. 1st Dist. Ct. App. 1976) (requiring proof of truth and good motives); Miami Herald Publishing Co. v. Brautigam, 127 So. 2d 718 (Fla. 3d Dist. Ct. App. 1961), *cert. denied,* 369 U.S. 821 (1962). *Lee* and *Brautigam* predate New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and *Drennen* involves purely private defamation. The Court has not extended federal constitutional protection to "purely private libels, totally unrelated to public affairs." Garrison v. Louisiana, 379 U.S. 64, 72 n.8 (1964). In this area the states may determine for themselves the appropriate standard for recovery. See Sindorf v. Jacron Sales Co., 341 A.2d 856 (Md. Ct. Spec. App. 1975) for a thorough discussion of this point. Also, see RESTATEMENT (SECOND) OF TORTS § 580B, at 222-31 (1977), for a discussion of the impact of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) on the common law of libel and slander.

119. 376 U.S. 254, 279-80 (1964).

120. Garrison v. Louisiana, 379 U.S. 64 (1964).

121. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Kalvan, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker,* 1967 SUP. CT. REV. 267.

122. *See* Ocala Star-Banner Co. v. Damron, 221 So. 2d 459 (Fla. 1st Dist. Ct. App. 1969), *rev'd,* 401 U.S. 295 (1971).

123. Suggestions, *supra* note 54, at 2-3.

commission apparently was not interested in pursuing the matter since none of these suggestions received the votes necessary for committee referral, the question of revising the defamation aspect of section 4 was considered by the Ethics, Privacy and Elections Committee[124] at D'Alemberte's request.[125]

D'Alemberte appeared before the committee and urged its favorable consideration of a proposal which would at once have conformed the state constitution to the federally required standard in cases involving public officials and public figures and provided greater leeway than the federally required minimum when the defamatory material concerned a matter of public interest or concern.[126] These ends would have been achieved by deleting the last two sentences of section 4 and inserting: "In all defamation actions, truth shall be a defense and, in all matters of public or general interest, the publication shall be privileged in the absence of actual malice."[127] The committee voted unanimously to accept the concept in principle, subject to refinement of the language.[128] The committee thus agreed to establish as a state constitutional standard the so-called *Metromedia* standard, a federal rule from which the United States Supreme Court has receded.

In 1971, in *Rosenbloom v. Metromedia, Inc.*,[129] a plurality of the Supreme Court changed the focus of the *New York Times* rule from the identity of the plaintiff—public official/public figure—to the nature of the material published. The actual malice rule was held to apply in a libel action brought by a private individual seeking recovery for the publication of a "defamatory falsehood in a newscast relating to his involvement in an event of public or general concern . . . ."[130] Three years later, in *Gertz v. Robert Welch, Inc.*, the Court rejected the *Metromedia* plurality's position and held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[131] The committee accepted the

124. This committee was chaired by Jon C. Moyle and included LeRoy Collins, Dexter Douglass, Lois Harrison, Jesse McCrary, Ben Overton, Kenneth Plante, and J.B. Spence. Charlotte Hubbard was included as an alternate.

125. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 1-2 (Oct. 14, 1977). D'Alemberte also filed a proposal providing that: "The right to collect, edit and publish information on government and issues of public or general concern shall not be abridged." Fla. C.R.C., Proposal 243. Proposal 243 was temporarily passed, *see* Fla. C.R.C., Calendar 4 (Jan. 27, 1978), but was never considered and died on the Calendar.

126. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 1 (Oct. 14, 1977).

127. *Id.* at 2.

128. *Id.*

129. 403 U.S. 29 (1971).

130. *Id.* at 52.

Gertz invitation and voted to recommend that as a matter of state constitutional law, proof of actual malice was necessary before recovery could be had for publication of a defamatory falsehood injuring a private individual who was involved in a matter of public concern.[132]

Proposal 4 was handled by Douglass on the floor. He explained that federally imposed standards had rendered the current defamation provision obsolete in cases involving public officials and public figures and that, therefore, the language was in need of revision. The options available to the commission, in his opinion, were either to conform the state constitution to the federal requirements in all respects or to adopt the committee proposal, which would provide greater state constitutional protection to publishers from damage awards for defamation arising out of reports on matters about which there was legitimate public concern.[133]

Commissioner Kenneth Plante offered a series of amendments to Proposal 4 which would have implemented the first option articulated by Douglass. Plante first tried to strike section 4 entirely and substitute verbatim the language of the first amendment to the United States Constitution.[134] Plante explained that, if adopted, his amendment would accomplish two goals. First, it would reduce the length of the state constitution by combining into one short provision principles now stated in three somewhat longer sections. Second, it would establish a state constitutional standard in the area of free speech and press that is precisely the same as the federal standard.[135] The amendment failed on a voice vote,[136] probably because, as Douglass suggested in questioning Plante, the amendment as drafted reached far beyond the narrow area being debated.[137]

Plante accepted Douglass' suggestion and offered a second amendment to the pending proposal which struck all of section 4

131. 418 U.S. 323, 347 (1974).

132. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 4 (Oct. 19, 1977). In light of the Florida Supreme Court's expressed preference for the phrase "matters of public or general *concern*" over the phrase "matters of public or general *interest*," Firestone v. Time, Inc., 271 So. 2d 745, 748 (Fla. 1972), *remanded*, 424 U.S. 448 (1976), the language ultimately approved by the committee was: "In all defamation actions, truth shall be a defense and, in all matters of public or general concern, the publication shall be privileged in the absence of actual malice." Fla. C.R.C., Proposal 4. For a general discussion of this issue, see Note, *Media Liability for Libel of Newsworthy Persons: Before and After* Time, Inc. v. Firestone, 5 FLA. ST. U.L. REV. 446 (1977).

133. 2 Transcript of Fla. C.R.C. proceedings 137-49 (Jan. 9, 1978).

134. 16 Fla. C.R.C. Jour. 259 (Jan. 9, 1978).

135. 2 Transcript of Fla. C.R.C. proceedings 150-54 (Jan. 9, 1978).

136. 16 Fla. C.R.C. Jour. 258 (Jan. 9, 1978).

137. 2 Transcript of Fla. C.R.C. proceedings 153 (Jan. 9, 1978).

and substituted: "The legislature shall make no law abridging the freedom of speech, or of the press."[138] Plante and Douglass again were the principal debaters. Plante told the commissioners that if they approved Proposal 4 in its original form,

> [Y]ou are granting a greater freedom to the press and speech than the United States Constitution. You are making it harder for a private citizen who has had something printed or written or said about him to get any kind of redress in the courts to try to make that individual or that association or whatever it is be answerable when they present an outright lie.[139]

Douglass countered with this comparison of the choices before the commission:

> [T]he real issue that you get to on this is whether or not in Florida we are going to stand up for freedom of speech as we perceive it and grant the right to free comment on issues of public concern . . . .
>
> If you want to abdicate to Washington, then adopt Senator Plante's amendment. If you want Florida to stand on its own two feet, then adopt one that will work for you.[140]

Adjournment time arrived before the commission had an opportunity to vote on whether it wished to abdicate to Washington.[141]

When debate resumed the following day, Plante offered a substitute amendment which struck the last sentence in Proposal 4, the new language proposed by the committee.[142] The effect of the substitute was to remove all reference to defamation from the state constitution. That drew comment from Commissioner Ben Overton. In his view, adoption of the substitute amendment would leave the proper standard of liability in those cases not controlled by the Federal Constitution completely to the discretion of the Florida Supreme Court.[143] Such a basic policy question, in Overton's opinion, was more appropriately decided in a political, rather than a judicial, forum.[144] Plante seemed to view such an eventuality as inevitable, regardless of the commission's action, and in any event more desira-

138. 16 Fla. C.R.C. Jour. 259 (Jan. 9, 1978).
139. 2 Transcript of Fla. C.R.C. proceedings 164-65 (Jan. 9, 1978).
140. *Id.* at 167-68.
141. 16 Fla. C.R.C. Jour. 259 (Jan. 9, 1978).
142. 17 Fla. C.R.C. Jour. 262 (Jan. 10, 1978).
143. Transcript of Fla. C.R.C. proceedings 69-70 (Jan. 10, 1978). At that time, Commissioner Overton was chief justice of the Florida Supreme Court.
144. *Id.* at 71.

ble than approving the standard proposed by the committee.[145] The substitute amendment was adopted by an eighteen to thirteen vote. Proposal 4 as amended then was defeated overwhelmingly by a vote of eight to twenty-five.[146]

Since the Supreme Court decisions in *New York Times Co. v. Sullivan*[147] and *Garrison v. Louisiana,*[148] the Florida Constitution has been revised twice. Both times the revisers failed to bring the language of section 4 into compliance with the federal law.[149] In the most recent revision, the commission not only left in the state constitution an inaccurate statement of law, offensive to legal purists and misleading to the people, but it also rejected an effort to establish a defamation standard more protective of publishers' rights than the federally required standard. It then rejected as well an effort to establish the federal standard as state law. The commission's inability to formulate an acceptable policy in this area means, as Overton warned, that conflicts between the rights of free speech and press and the individual's interest in good reputation will be resolved by the judiciary, unaided by political policymakers—the commission and the people.[150]

III. An Enriched Declaration of Rights

Despite these failures, the commission's overall response to individual rights issues was quite positive. No provision currently securing rights for the individual or for the people collectively was recommended for deletion from article I. Rather, the commission reaffirmed those rights and liberties which past generations had secured and used them as a foundation upon which to construct "an enhanced and enriched Bill of Rights" designed to serve the future needs of Floridians.

The revisions prohibiting the deprivation of any rights on account of gender and prohibiting binding interest arbitration in the public

145. *Id.* at 72-74 (remarks of Kenneth Plante).

146. 17 Fla. C.R.C. Jour. 262 (Jan. 10, 1978).

147. 376 U.S. 254 (1964).

148. 379 U.S. 64 (1964).

149. Florida's action is not without parallel. When Illinois revised its constitution in 1970, the convention essentially made no change in its libel provision, which reads: "In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Ill. Const. art I, § 4; *see* Helman & Whalen, *Constitutional Commentary,* in 1 Ill. Stat. Ann. Const. 296 (Smith-Hurd 1971).

150. *See* Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo. 1975), *cert. denied,* 423 U.S. 1025 (1975); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. 3d Ct. App. 1974), *cert. denied,* 424 U.S. 913 (1976); Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569 (N.Y. 1975).

sector are examined elsewhere in this issue.[151] In addition to those two revisions and the declaration of state constitutional independence briefly discussed in the Introduction to this article, the commission adopted five other proposals revising article I. The commission recommended to the people proposals specifying that testimony cannot be compelled unless transactional immunity is granted in exchange for the testimony, reforming the money bail system, reforming Florida grand jury proceedings, recognizing a right to be let alone by government, and requiring all branches and all levels of government to be open and accessible to the people. This section recounts the drafting, debating, redrafting, and refining of these five proposed revisions—each of which offers greater protection for individual liberty under the state constitution than is guaranteed by the Federal Constitution.

Perhaps in recommending these proposals the commission was subscribing to the following sentiments expressed by Justice Brennan:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[152]

A. Transactional Immunity

The Florida Constitution now provides that "[n]o person shall . . . be compelled in any criminal matter to be a witness against himself."[153] This statement essentially tracks the language of the fifth amendment to the United States Constitution.[154] The right not to give evidence against oneself poses obvious law enforcement problems. Immunity statutes, therefore, have been enacted to enable the state to secure information about unlawful activity while at the same time protecting the person forced to speak from criminal

151. Note, *One Small Word: Sexual Equality Through the State Constitution, infra* this issue; Note, *Prohibiting Binding Arbitration: The Proposed Change in Article I, Section 6, infra* this issue.

152. Brennan, *supra* note 12, at 491.

153. FLA. CONST. art. I, § 9.

154. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. It has been suggested that since the Florida constitutional provision refers to any criminal "matter," as compared with any criminal "case" in the Federal Constitution, the state provision affords broader protection. D'Alemberte, *Commentary*, in 25A FLA. STAT. ANN. 111, 112 (West 1970).

liability for conduct about which he is forced to testify.[155]

A person who has been granted immunity must testify or suffer imprisonment for contempt. Since such a person is therefore compelled to waive his constitutional right against self-incrimination, should not the immunity be coextensive with the constitutional protection? In 1892 the United States Supreme Court said that "absolute immunity against future prosecution for the offense to which the question relates" was required by the fifth amendment.[156] In recent years, however, the Court has receded from that position and now maintains that the fifth amendment is satisfied if a person is granted use and derivative use immunity in exchange for waiving his right to be silent.[157]

Since 1905, Florida has by statute[158] granted transactional immunity to a person when his testimony is compelled. However, in recent sessions the legislature has indicated interest in changing the statutory immunity to use and derivative use.[159] Furthermore, the Florida Supreme Court in *Tsavaris v. Scruggs*, has reserved as an "open question" the issue of whether the Florida Constitution requires transactional immunity.[160] The commission received conflict-

155. See Note, *The Florida Grand Jury: Abolition or Reform?*, 5 FLA. ST. U.L. REV. 829 (1977) [hereinafter cited as *Florida Grand Jury*], for a discussion evaluating transactional and use immunity and recommending constitutional revision in this area. The commission had the benefit of the note author's analysis and suggestions on this subject, most of which first appeared in a memorandum distributed to the Declaration of Rights Committee at D'Alemberte's request. *See* Memorandum from Patricia Dore, prepared by Robert Q. Williams, to Steven J. Uhlfelder, re: Article I, Section 16: Use and Transactional Immunity (Sept. 12, 1977).

156. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

157. Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

158. Ch. 5400, § 1, 1905 Fla. Laws 78 (current version at FLA. STAT. § 914.04 (1977)).

159. Senator Ed Dunn introduced a use and derivative use immunity bill in the senate during the 1977 session. Fla. SB 19 (1977). A companion bill was introduced in the house of representatives by Rep. Ralph Haben. Fla. HB 1114 (1977). The house bill passed by a vote of 115-2. FLA. H.R. JOUR. 216 (Reg. Sess. 1977). After amending it, the senate also passed the house bill, and by a near unanimous vote: 39-1. FLA. S. JOUR. 216-18 (Reg. Sess. 1977). The house refused to concur in the senate amendments, and the bill died on the calendar upon adjournment sine die. FLA. H.R. JOUR. 373 (Reg. Sess. 1977). Senator Dunn again introduced a use and derivative use immunity bill during the 1978 session. Fla. SB 130 (1978). The bill, which had no house companion, received three references: Judiciary Criminal, Judiciary Civil, and Rules. A committee substitute was passed out by the Judiciary Criminal Committee. Fla. CS/SB 130 (1978). The bill died in the Judiciary Civil Committee.

160. 360 So. 2d 745 (Fla. 1977). The court made the following observation in footnote 6:

> Immunity statutes are designed to insulate the witness against the incriminating effect of testimony the State compels him to give. As a federal constitutional matter, it is only necessary that the witness be given use immunity. *Zicarelli v. New Jersey Com'n of Investigation*, 406 U.S. 472 (1972); *Kastigar v. United States*, 406

ing suggestions from the public—one to require use immunity and one to require transactional immunity.[161] Neither was referred to committee for study even though D'Alemberte had sent a memorandum to all commissioners calling their attention to the issue.[162]

Barron, who has been a staunch opponent of legislative attempts to replace transactional immunity with use and derivative use immunity, introduced Proposal 255 to amend section 9 by adding:

> Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation under the laws of the state shall not be excused from giving testimony or producing evidence, when legally called upon to do so, on the ground that it may tend to incriminate him under the laws of the state; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify.[163]

The commission approved Proposal 255 by a vote of twenty-three to five without debate.[164] The question was debated subsequently, however, when Commissioner William James offered an amendment to strike the language added by Proposal 255.[165] In explaining the amendment, James raised the specter of organized crime. "[M]ost of your state attorneys were opposed to this particular type of immunity in the constitution, and being used because they thought it would be a detriment against our fight against organized crime in the State of Florida."[166] Other commissioners stressed the

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U.S. 441 (1972). Under Section 914.04, Florida Statutes (1975), the prosecutor, by requiring a subpoenaed witness to testify over objection on self-incrimination grounds, confers transactional immunity as to the matter about which he inquires and use immunity as to other offenses. *State* ex rel. *Hough v. Popper*, 287 So. 2d 282, *reh. den.* 287 So. 2d 321 (Fla. 1974). Whether, in such circumstances, this broader grant of immunity is required by Art. I, § 9, Florida Constitution, is an open question.

Id. at 749.

161. Suggestions, *supra* note 54, at 5.

162. The memorandum, dated August 23, 1977, said: "There have been some suggestions that the Fifth Amendment and its Florida counterpart in Article I, Section 9 are outmoded. I hope you will have time to read the enclosed article from the New Yorker on the origins of the Fifth Amendment." (The article enclosed was Harris, *Annals of Law: Taking the Fifth* (pt. I), NEW YORKER, Apr. 5, 1976, and *id.* (pt. 2), Apr. 12, 1976.)

163. Fla. C.R.C., Proposal 255.

164. 25 Fla. C.R.C. Jour. 358 (Jan. 27, 1978); *see* Transcript of Fla. C.R.C. proceedings 180 (Jan. 27, 1978). The commission subsequently approved the following amendments to the provision, which were incorporated in Proposal 258 from the Committee on Style and Drafting: insert the word "natural" before "person" to make clear that artificial entities are not entitled to the protection and delete "or corporation" because the word "person" in that context includes both natural and artificial persons. 26 Fla. C.R.C. Jour. 364 (Mar. 6, 1978).

165. 27 Fla. C.R.C. Jour. 527 (Mar. 7, 1978) (amend. 4).

166. Transcript of Fla. C.R.C. proceedings 83 (Mar. 7, 1978).

inappropriateness of the subject for constitutional treatment.[167] The proponents countered with the argument that only by guaranteeing transactional immunity constitutionally could the right against self-incrimination be secured. In a question to Commissioner John Moore, Commissioner James Kynes asked:

> Would you believe me, sir, if you believe in the Fifth Amendment right, and you think that transactional immunity is the proper law and should be a law of Florida, and it does run to the heart of the Fifth Amendment right against self-incrimination; that we should implant this in the constitution of the State of Florida?[168]

It is fair to say that the major policy questions were addressed by the commission, although the fine points of the arguments on both sides of the issue were at times confused and even inaccurate. Throughout the debate, for example, the proponents spoke of a "fifth amendment right."[169] They were, of course, discussing the state constitutional right against self-incrimination in section 9. The phrase "fifth amendment right," though technically inaccurate, apparently was convenient shorthand, understood by lay people and lawyers alike, for expressing the right of a person not to testify about matters which might incriminate him. Opponents painted transactional immunity as a type of shield behind which the devious could hide while confessing a life of crime to prosecutors impotent to act. Plante, for example, paraded this horrible:

> Let's say that you are pulled in under grand jury investigation dealing with . . . some type of conspiracy in a fraud case. And while you are in there, you say, by the way, remember that murder that happened last spring? I was the one who did it. Is that person immune then from prosecution under transactional immunity because he has come forward in a grand jury and said that he murdered those people?[170]

It is clear that immunity attaches only to those matters about which a person is *compelled* to testify over his objection. The grand jury witness who confesses guilt in the circumstances described by Plante's hypothetical would do so at his peril. Even assuming that immunity had been granted to the witness, it would extend only to

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167. *Id.* at 83, 93, 95 (remarks of William James); *id.* at 90-91 (remarks of Kenneth Plante); *id.* at 88 (remarks of John Moore).

168. *Id.* at 89. *See also id.* at 84 (remarks of Dexter Douglass).

169. *See generally id.* at 83-98.

170. *Id.* at 90-91. *See also id.* at 94 (remarks of William James).

those transactions about which the grand jury or the state attorney inquired. In any event, since transactional immunity is currently required by statute in Florida, elevating the doctrine to constitutional status would not change the substantive contours of the immunity.

By rejecting the James amendment,[171] the commission recognized that transactional immunity is the sine qua non of the constitutional right against self-incrimination in Florida. It thus voted to close the "open question" of *Tsavaris*.

B. Pretrial Release

The need for revising the state constitutional provision concerning pretrial release and the likely consequences of the commission's proposal in this area are addressed elsewhere in this issue of the *Review*.[172] This section of this article traces the evolution of the bail reform measure with a view toward providing a comprehensive history of the commission's action and laying a predicate for the bail article mentioned above.

Amending article I, section 14 to provide for pretrial release on personal recognizance was recommended to the commission at the public hearings[173] and was an issue which the commission expressed interest in pursuing.[174] The matter was referred to the Declaration of Rights Committee for study and development.[175] The committee debated two proposals. One, offered by Collins, was rejected because it seemed to increase judicial discretion while failing to establish any presumption in favor of nonmonetary bail.[176] Recognizing that the present Florida Rules of Criminal Procedure permit release on personal recognizance but that with the constitutional language entitling a person to release "on reasonable bail, with sufficient

171. 27 Fla. C.R.C. Jour. 527 (Mar. 7, 1978). The vote on the amendment was 11-22.

172. Brummer & Rogow, *An End to Ransom: The Case for Amending the Bail Provision of the Florida Constitution* [hereinafter cited as *An End to Ransom*], *infra* this issue.

173. Suggestions, *supra* note 54, at 5.

174. List of 232, *supra* note 55, at 1.

175. Fla. C.R.C., Declaration of Rights Committee Minutes 2 (Oct. 4, 1977). Initially, the committee considered requiring the legislature to provide by law for pretrial release, conditions of such release, and pretrial release on bail or other terms. *Id.* at 5.

176. Collins proposed that § 14 be amended as follows:

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on assurances ascertained by the court or reasonable bail, ~~with sufficient surety~~ unless charged with a capital offense or an offense punishable by life imprisonment ~~and the proof of guilt is evident or the presumption is great~~ giving due weight to the evidence and to the nature and circumstances of the event.

Fla. C.R.C., Delegation of Rights Committee Minutes 5 (Oct. 13, 1977) (new language underlined; deleted language struck through).

surety" there was no guarantee under the state constitution that nonmonetary bail always would be available, Douglass moved the deletion of "with sufficient surety" and the insertion after the word "bail" of the phrase "which includes personal recognizance." This motion was approved unanimously.[177]

Before Proposal 24 was debated on the floor, D'Alemberte expressed to Douglass concern about its inadequacy and sought his support for the following language: "Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be released upon conditions guaranteed to secure his appearance at future court proceedings. Monetary bail shall be required only if no other method will secure this appearance."[178] Douglass, joined by D'Alemberte, Spence, McCrary, and Don Reed, offered this language on the floor as an amendment to Proposal 24.[179] The purpose of the amendment, as explained by Douglass, was to create a presumption in favor of release on nonmonetary bail and to impose on the state the burden of demonstrating the insufficiency of nonmonetary release.[180] The debate disclosed no significant opposition to those consequences.[181] However, several commissioners were uncomfortable because the amendment did not discriminate, as did the existing language and the committee proposal, between (1) capital offenses and offenses for which a life sentence was possible, and (2) all other crimes.[182] An amendment was offered by Commissioner Robert Shevin, joined by Douglass, and approved by the commission which restored the exception for capital offenses and

177. *Id.* As recommended by the committee, Proposal 24 provided:

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail which includes personal recognizance ~~with sufficient surety~~ unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

178. Letter to Dexter Douglass from Talbot D'Alemberte (Nov. 7, 1977) (on file with the State Archives). The language was suggested in a telephone conversation by Professor Bruce Rogow to the author, who in turn suggested it to D'Alemberte. D'Alemberte also received the following suggestion from Bennett Brummer, Public Defender, Eleventh Judicial Circuit: "Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail and to have release conditioned upon the least restrictive alternative likely to assure his presence before the court." Letter to Steven Uhlfelder, executive director of the Constitution Revision Commission, from Bennett H. Brummer (undated) (on file with the State Archives).

179. 12 Fla. C.R.C. Jour. 213 (Dec. 6, 1977).

180. Transcript of Fla. C.R.C. proceedings 217 (Dec. 6, 1977) (remarks of Dexter Douglass).

181. *But see id.* at 221-27 (remarks of John Moore); *id.* at 232-34 (remarks of Robert Shevin).

182. *Id.* at 218 (remarks of Robert Shevin); *id.* at 220-21 (remarks of LeRoy Collins).

offenses punishable by life imprisonment.[183] Commissioner William Birchfield then offered an amendment, which was adopted without debate, striking the word "guaranteed" and inserting "reasonable under the circumstances."[184] Birchfield was concerned that without his amendment it would be incumbent on the judiciary to guarantee the appearance of released persons.[185]

Only Shevin opposed the Douglass amendment. He preferred the approach of the original proposal, arguing that, as amended, Proposal 24 in effect would establish as the state constitutional standard the holding of the Fifth Circuit Court of Appeals in *Pugh v. Rainwater*[186]—a standard which the state was contesting at the time.[187] As proponents of the amendment, McCrary and Douglass both argued that monetary bail discriminated against poor people.[188] Reminding the commissioners that the historical purpose of bail was only to ensure an accused's presence in court, McCrary argued that reliance on money to secure appearance was inherently discriminatory and unfair:

> [I]t does discriminate against the poor, the depressed. And I'm not talking about races. It's discriminating against poor whites, poor Cubans, poor Puerto Ricans, poor anybody that doesn't wear a tie and drive a Thunderbird. It discriminates against the migrant and against any one of you for any particular night if you don't have your billfold saying that you're a lawyer or a banker or Indian chief.[189]

The Douglass amendment was approved on a voice vote. Proposal 24 as thus amended was adopted by a vote of thirty-three to one.[190]

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183. 12 Fla. C.R.C. Jour. 213 (Dec. 6, 1977).

184. *Id.*

185. Transcript of Fla. C.R.C. proceedings 230-31 (Dec. 6, 1977) (remarks of William Birchfield).

186. 557 F.2d 1189 (5th Cir. 1977), *modified*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

187. Transcript of Fla. C.R.C. proceedings 232-34 (Dec. 6, 1977) (remarks of Robert Shevin); *see An End to Ransom, supra* note 172.

188. Transcript of Fla. C.R.C. proceedings 235-38 (Dec. 6, 1977) (remarks of Jesse McCrary); *id.* at 239-44 (remarks of Dexter Douglass).

189. *Id.* at 236-37.

190. 12 Fla. C.R.C. Jour. 213 (Dec. 6, 1977). The lone negative vote was cast by Jan Platt. As adopted December 6, 1977, Proposal 24 read:

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be released upon conditions reasonable under the circumstances to secure his appearance at future court proceedings, unless charged with a capital crime or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great. Monetary bail shall be required only if no other method will secure this appearance.

The Style and Drafting Committee recommended several changes to the provision, based on

After the second round of public hearings and in response to the criticism of its proposed revision of section 14,[191] the commission revisited the bail issue. Plante offered the following amendment, which differed substantially from the commission's prior action:

> Every person charged with a crime or violation of municipal or county ordinances, except as otherwise provided herein, shall be released upon conditions reasonable under the circumstances to secure his appearance at future court proceedings including monetary bail when no other method is adequate. No person charged with a capital offense or an offense punishable with life imprisonment shall be released prior to trial unless it is determined that release or bail with adequate surety will adequately insure his appearance in court.[192]

Debate on the Plante amendment centered around two issues: the effect of the language in the first sentence on the presumption of nonmonetary release and the effect of the deletion in the second sentence of the "proof is evident or the presumption is great" standard.

With respect to the first sentence, Plante explained that his amendment would remove from the state the burden of proving that money bail was necessary to ensure a person's presence at future court proceedings.[193] McCrary offered an amendment striking "including monetary bail when no other method is adequate" from

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comments submitted by Professor Rogow. *See* letter to Talbot D'Alemberte from Bruce Rogow (Dec. 21, 1977) (on file with State Archives); Transcript of Fla. C.R.C. proceedings 13 (Mar. 6, 1977). The commission, however, amended the provision substantively before it approved the report of the Style and Drafting Committee.

191. The Center for Governmental Responsibility, University of Florida, Public Testimony Before the Florida Constitution Revision Commission, Summaries of Points Raised at Hearings Feb. 21, 22, and 23, 1978, at 6 (Mar. 2, 1978).

192. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978) (amend. 13).

193. Transcript of Fla. C.R.C. proceedings 46 (Mar. 7, 1978) (remarks of Kenneth Plante). The following dialogue between John Moore and Plante was especially revealing:

> [John Moore:] [I]f I interpret what we have already passed in this Proposal 258, if my interpretation is correct, it would require the state to prove that a money bail is the only method by which appearance at trial can be assured, and only in that case would they require money bail. Do you feel that this amendment that you are proposing here changes that burden on the state?
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> [Plante:] I think so. . . . [I]t is my personal feeling that I think it will give the judge that flexibility. He will not have to prove that the person could not be released on [his] own recognizance. It is just that he feels the bail ought to be posted.
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> I think what we have adopted puts the burden on the state to prove that a person should not be released on [his] own recognizance. . . .
>
> I think this would relieve it to a degree — not all the way, but to a degree.

Id. at 50-51. *See also id.* at 80-82 (remarks of Kenneth Plante); *id.* at 75-76 (remarks of James Kynes).

the first sentence of Plante's amendment.[194] McCrary sought to leave to judicial discretion the decision of whether money bail was necessary.[195] The McCrary amendment, which was adopted by unanimous voice vote, was later withdrawn by the sponsor after the commission approved a motion by Kynes to reconsider the vote by which it had passed.[196] Neither McCrary nor Kynes offered any meaningful explanation for this turnaround.[197] The commission did, however, adopt a noncontroversial amendment inserting "until adjudged guilty" at the beginning of the first sentence.[198] There were no other amendments to the first sentence and, except for comments by Plante and Kynes stressing that the language guaranteed maximum flexibility to the courts,[199] there was no further debate on that aspect of Plante's amendment.

Debate on the second sentence of the Plante amendment, which concerned release of persons charged with capital offenses or crimes punishable by a life prison term, involved two issues: whether anyone so charged should be eligible for release on personal recognizance and whether the "proof is evident or the presumption is great" language should be deleted. Under the Plante amendment, a person so charged was not entitled to release "unless it is determined that release *or* bail with adequate surety will adequately insure his appearance in court."[200] Commissioner John Ware offered an amendment striking "or" and substituting "on."[201] Explaining his amendment, Ware stated that "there ought to be a requirement that when [persons are] charged with a capital offense or an offense punishable by life imprisonment, that they not be released unless they post bail to insure that they will appear."[202] Plante accepted the Ware amendment, stating that "or" was a typographical error. The commission adopted the Ware amendment by a vote of twenty-eight to four.[203]

The potential federal constitutional problems created by the

194. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978) (amend. 13A).

195. Transcript of Fla. C.R.C. proceedings 53 (Mar. 7, 1978).

196. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978).

197. Transcript of Fla. C.R.C. proceedings 61-62 (Mar. 7, 1978). McCrary's only explanation was "that after some consultation with Commissioner Plante and Commissioner Douglass, I would like to withdraw my amendment." *Id.* at 62.

198. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978) (amend. 13B).

199. Transcript of Fla. C.R.C. proceedings 75-76 (Mar. 7, 1978) (remarks of James Kynes); *id.* at 80-82 (remarks of Kenneth Plante).

200. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978) (amend. 13) (emphasis added); *see* text accompanying note 192 *supra.*

201. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978) (amend. 13C).

202. Transcript of Fla. C.R.C. proceedings 70 (Mar. 7, 1978) (remarks of John Ware).

203. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978).

Ware amendment[204] were avoided when the commission adopted an amendment by Shevin, Douglass, and Collins striking the second sentence of the Plante amendment and substituting the following language: "No person charged with a capital offense or an offense punishable by life imprisonment shall be released prior to trial when the proof of guilt is evident or the presumption is great."[205] The proponents argued that, as a matter of policy, a person charged with committing a capital offense or an offense for which a life term was possible and against whom there was substantial evidence should not be entitled to release pending trial—regardless of the likelihood that he would appear for trial.[206] There also was an indication that some commissioners had an eye on the upcoming constitutional referendum and were willing to compromise on this aspect of the proposal so as not to endanger all reform of the bail system. For instance, Kynes urged adoption of the amendment because:

> [A]s a practical matter, the opponents of bail bond reform will use the language [of the Plante amendment] to go over the State and say this is nothing more than a vehicle to let killers out on the street. . . . I believe that as a practical matter those of you who voted for bail bond reform should accept this amendment, so as to not give the opponents, the bail bondsmen around the State, the opportunity to use that as a battle cry.[207]

Only John Moore spoke against the amendment. He argued that a person was entitled to the presumption of innocence, regardless of the crime. "If a person is presumed innocent for burglary, he is presumed innocent from murder. If you want to change that presumption of innocence, vote for this proposal. If you feel that everyone is presumed innocent until proven guilty, vote against this proposal."[208] The amendment was adopted by a vote of twenty-nine to three.[209]

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204. To the extent that pretrial release conditioned exclusively on payment of money bail invidiously discriminates against the poor, the Ware amendment raised substantial fourteenth amendment problems. *See* Pugh v. Rainwater, 557 F.2d 1189 (5th Cir. 1977), *modified*, 572 F.2d 1053 (5th Cir. 1978) (en banc); *An End to Ransom*, *supra* note 172.

205. 29 Fla. C.R.C. Jour. 544 (Mar. 9, 1978) (amend. 19). Collins had offered—but withdrawn—a similarly worded amendment earlier. *See* Transcript of Fla. C.R.C. proceedings 58, 60 (Mar. 7, 1978).

206. 1 Transcript of Fla. C.R.C. proceedings 26-27 (Mar. 9, 1978) (remarks of Robert Shevin); *id.* at 28-30 (remarks of Dexter Douglass); *id.* at 33-34 (remarks of LeRoy Collins). *See also* Transcript of Fla. C.R.C. proceedings 64-67 (Mar. 7, 1978) (remarks of Yvonne Burkholz); *id.* at 77-79 (remarks of LeRoy Collins).

207. 1 Transcript of Fla. C.R.C. proceedings 33 (Mar. 9, 1978) (remarks of James Kynes). *See also id.* at 33-34 (remarks of LeRoy Collins).

208. *Id.* at 27.

209. 29 Fla. C.R.C. Jour. 544 (Mar. 9, 1978). Negative votes were cast by Brantley,

The language finally approved by the commission[210] certainly supports the construction that monetary bail may not be required as a condition of pretrial release unless other conditions are inadequate to assure future appearances.[211] However, as the debate on the Plante amendment indicates, the commission's intent was to leave the question of appropriate conditions of release entirely to judicial discretion, with no particular presumption favoring nonmonetary criteria limiting that discretion. Whether the proposed revision is construed to mandate a presumption in favor of nonmonetary conditions or release may depend ultimately on how the provision is presented to the electorate[212] and on constitutional litigation in the federal courts. Since the commission declined to recommend any change regarding pretrial release of persons charged with a capital offense or an offense punishable by a life term, reconciliation of that provision with the presumption of innocence and the principles of due process and equal protection likely will rest with the federal courts.[213]

D'Alemberte, and John Moore.

210. The proposed revision to § 14 provides:

> Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be released upon conditions reasonable under the circumstances to secure his appearance at future court proceedings including monetary bail when no other method is adequate. . . . No person charged with a capital offense or an offense punishable by life imprisonment shall be released prior to trial when . . . the proof of guilt is evident or the presumption is great.

Fla. C.R.C., Rev. Fla. Const. art. I, § 14 (May 11, 1978) (new language underlined; deletions omitted).

211. *See An End to Ransom, supra* note 172.

212. Since it is the intent of the voters to which the court will turn in construing ambiguous language, much will depend on how the newspapers explain the effects of the bail revision. *See* Levinson, *Interpreting State Constitutions by Resort to the Record, supra* this issue. A summary prepared by the revision commission staff explains the proposed revision of § 14 in these terms:

> This provision requires that one accused of a noncapital offense or of an offense not punishable by life imprisonment be released upon such conditions as the judge determines will secure the accused's presence at trial. Currently, persons arrested for a crime may be released under conditions other than posting monetary bail; however, monetary bail is still the method most commonly used to secure a person's appearance at future court proceedings. The proposed change requires the judge, prior to imposing monetary bail, to determine that conditions such as release to another person or release on one's own recognizance are not adequate to secure the person's appearance in court.

Fla. C.R.C., Proposed Revision of the Florida Constitution 1 (1978) (staff summaries of proposed changes).

213. *See* Escandar v. Ferguson, 441 F. Supp. 53 (S.D. Fla. 1977), holding that rule 3.130(a), (h)(4), FLA. R. CRIM. P., and FLA. CONST. art. I, § 14, violate both the equal protection and due process clauses of the fourteenth amendment. The author suggested the following change in the last sentence of § 14 to meet the federal constitutional infirmities identified in *Escandar:* "No person charged with a capital offense or with an offense punishable by life imprisonment shall be released prior to trial when the proof of guilt is evident or the presump-

C. Right to Counsel in the Grand Jury Room

The commission considered two proposals relating to the operation of state grand juries. The first, Proposal 77, would have amended section 15(a) by requiring a two-thirds vote of the members of a grand jury to return an indictment charging a capital crime or other felony. A similar provision had been recommended by the 1965 Constitution Revision Commission, but it was deleted by the legislature.[214]

By statute, most state grand juries are composed of between fifteen and eighteen persons. The concurrence of twelve members is necessary to return an indictment.[215] However, by special law, some populous counties have grand juries composed of twenty-three persons. Fifteen members constitute a quorum, and the concurrence of twelve members is required to return an indictment.[216] Commissioner Thomas Barkdull, the sponsor of Proposal 77, viewed the proposal as a way of guaranteeing equal treatment: regardless of the population of the county, no person should be indicted on less than a two-thirds vote of the members of the grand jury.[217] The proposal was approved unanimously by the commission.[218]

The second proposal concerning grand juries was reported out of the Declaration of Rights Committee. That committee was asked to study several suggestions originating from the public testimony,[219] ranging from abolition of the grand jury to providing certain procedural rights for witnesses appearing before the grand jury.[220] The committee approved Proposal 32 to amend section 15(a) by adding new language dealing with the rights of witnesses called to testify before a grand jury. Under the provision initially approved by the committee, a grand jury witness would have the right to be advised of the right to counsel, the right to have counsel present at all times,

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tion is great, unless the court determines that release on bail will secure his appearance at future court proceedings." Letter from Patricia Dore to Sandy D'Alemberte (Mar. 20, 1978) (on file with State Archives).

214. *See* D'Alemberte, *Commentary*, in 25A FLA. STAT. ANN. 336 (West 1970).

215. FLA. STAT. §§ 905.01, .23 (1977).

216. Ch. 63-753, § 1, 1963 Fla. Laws (Special Acts) 299; ch. 63-824, § 1, 1963 Fla. Laws (Special Acts) 382.

217. Transcript of Fla. C.R.C. proceedings 197-98 (Dec. 8, 1977).

218. 14 Fla. C.R.C. Jour. 231 (Dec. 8, 1977). John Moore and Jan Platt later offered an amendment to delete the two-thirds vote requirement and other provisions approved by the commission relating to the grand jury. 27 Fla. C.R.C. proceedings 527 (Mar. 7, 1978) (amend. 12); Transcript of Fla. C.R.C. proceedings 120 (Mar. 7, 1978). After the question was divided, *i.e.*, separated as to the individual revisions being addressed by amendment 12, the sponsors withdrew that portion concerning the two-thirds vote. *Id.* at 125.

219. Suggestions, *supra* note 54, at 5-6.

220. *Id. See also* List of 232, *supra* note 55, at 2.

and, if the witness were a target of the investigation, the right to be advised of that fact before testifying.[221] However, at a subsequent meeting, Barron, the prime sponsor of the proposal, suggested that the second sentence of his proposal—"Such a witness shall have a right to have counsel present at all times"—was ambiguous and in need of clarification. It could be read, he said, as authorizing counsel's presence even when the client was not testifying. In any event, Barron noted, the language did not address the scope of counsel's role during the proceedings.[222] Barron requested and secured committee approval of an amendment striking the second sentence and inserting in its stead: "A witness shall have the right to be accompanied by and to receive the advice of counsel during his testimony."[223]

Proposal 32 was thoroughly considered by the commission. The floor debate centered mainly on the policy question of permitting counsel to accompany a witness into the grand jury room as opposed to the present practice of allowing the witness to leave the room to confer with counsel. Supporters of the measure argued that it would introduce a necessary and long-overdue measure of fairness into grand jury proceedings: "[W]hat this does is present fairness to some extent in the grand jury system by allowing a witness, if he chooses to take a lawyer in the room with him, to keep him from being intimidated by five prosecutors questioning, to make sure that that witness' rights are protected . . . ."[224] Opponents argued that the proposal would destroy the secrecy and the investigatory function of the grand jury:

> It's not uncommon for organized crime to provide Counsel for the witnesses who are subpoenaed to appear before a grand jury. That Counsel then becomes a conduit back to all other persons who might be called before that grand jury to testify.
>
> By doing that, you are totally destroying the investigation of the grand jury.[225]

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221. Fla. C.R.C., Declaration of Rights Committee Minutes 8 (Oct. 20, 1977). The language approved was:

> Any person called to testify before a grand jury must be advised of his right of counsel and shall not be compelled to testify against himself unless granted immunity. Such a witness shall have a right to have counsel present at all times. A person under investigation by a grand jury shall be advised, prior to giving testimony, that he is under investigation.

Id.

222. Fla. C.R.C., Declaration of Rights Committee Minutes 2 (Dec. 7, 1977).

223. *Id.* at 1-2.

224. Transcript of Fla. C.R.C. proceedings 250 (Dec. 8, 1977) (remarks of Dexter Douglass). *See also id.* at 254 (remarks of Robert Shevin); *id.* at 262-63 (remarks of Jesse McCrary); *id.* at 264 (remarks of Dempsey Barron); Transcript of Fla. C.R.C. proceedings 129 (Mar. 7, 1978) (remarks of Dexter Douglass); *id.* at 132-34 (remarks of Dempsey Barron).

225. Transcript of Fla. C.R.C. proceedings 248 (Dec. 8, 1977) (remarks of John Moore).

The current practice, which, as noted above, permits the witness to leave the grand jury room to confer with counsel after each question if he wishes, was used in debate to illustrate that the proposed change was not drastic or radical. It also was used to rebut the argument that the secrecy of the proceedings would be destroyed.[226]

That aspect of the proposal requiring that a target of an investigation be notified that he is under investigation before he testifies was not debated at all. However, the role of a witness' counsel and the right of an indigent witness to appointed counsel were addressed.

State attorneys who testified before the committee[227] and individual commissioners[228] expressed concern that introduction of a witness' counsel into the grand jury room would convert the investigatory inquiry of the grand jury into an adversary proceeding. However, commission approval of the committee amendment specifying that the witness had a "right to be accompanied by and to receive the advice of counsel during his testimony"[229] foreclosed this possibility. The amendment ensured that counsel would not be allowed to cross-examine other witnesses, directly examine the client-witness, interject objections to questions asked by the prosecutor or a grand juror, or question or address the grand jurors. Counsel's role

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226. *Id.* at 246 (remarks of Dempsey Barron); *id.* at 250 (remarks of Dexter Douglass); *id.* at 257-58 (remarks of LeRoy Collins); *id.* at 263 (remarks of Jesse McCrary).

227. The committee heard testimony from several state attorneys, including Richard Gerstein (Eleventh Judicial Circuit), Robert Egan (Ninth Judicial Circuit), and Ed Austin (Fourth Judicial Circuit). Robert Stone (Nineteenth Judicial Circuit) and Harry Morrison (Second Judicial Circuit) also were in attendance. Fla. C.R.C., Declaration of Rights Committee Minutes 2-5 (Dec. 7, 1977).

In his testimony, Richard Gerstein stressed the importance of clearly limiting the role of the witness' counsel. He urged consideration of language similar to that contained in Recommendation 1, ABA Report to the House of Delegates, Section of Criminal Justice, approved August 9, 1977:

> "Such counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors or otherwise take part in the proceedings before the grand jury. The court shall have the power to remove such counsel from the grand jury room for conduct inconsistent with this principle."

Fla. C.R.C., Declaration of Rights Committee Minutes 5 (Dec. 7, 1977). In response to Gerstein, Collins stated that the committee amendment, *see* text accompanying note 223 *supra*, was exclusive and would not authorize counsel to engage in other activity. Fla. C.R.C., Declaration of Rights Committee Minutes 5 (Dec. 7, 1977). *See also* Transcript of Fla. C.R.C. proceedings 247 (Dec. 8, 1977) (remarks of Dempsey Barron).

228. *See* Transcript of Fla. C.R.C. proceedings 254 (Dec. 8, 1977) (remarks of Robert Shevin).

229. 14 Fla. C.R.C. Jour. 232 (Dec. 8, 1977). Barron was prepared to offer an amendment to the committee amendment inserting "subject to reasonable rules governing appropriate participation by counsel" after the word "testimony." Copy on file with State Archives. The amendment was not offered because the commission accepted the view that the committee amendment adequately clarified counsel's role. *See* note 230 *infra* and accompanying text.

would be passive and limited to advising the client-witness.[230]

Commission intent on an indigent witness' right to counsel at state expense was not as clear as its intent on the role of counsel. Plante raised the issue by asking Collins, "[B]y putting this in the constitution as a right to have an attorney, what about in case[s] of [indigents] called before a grand jury? Would the public defender have to represent [them] if they asked for counsel?"[231] Collins responded: "Yes, I would think so. He would have that same right. He would have that same right to have him in there as well as any other client."[232] Collins later corrected that statement, saying, "[Y]ou can't get public defenders until you are charged with a crime. And a witness before a grand jury may not be charged with a crime; he probably wouldn't be."[233]

By statute, the public defender must represent an indigent person arrested for or charged with a felony, and he may represent a person under arrest for or charged with a misdemeanor or violation of a municipal or county ordinance.[234] Of course, if the constitutional provision confers a right to counsel for all witnesses called before a grand jury, persons who cannot afford to retain counsel and who request the assistance of counsel will be entitled to appointed counsel. Whether this appointed counsel would be the public defender, however, is open to question. The legislature could authorize the public defender to represent indigent witnesses before the grand jury. Or, the courts could appoint private counsel. However, the fact that public defenders presently are not authorized to represent indigent persons not charged with crimes should not detract from Collins' statement that an indigent witness would have the same right to have counsel in the grand jury room as would any other person.

The issue was raised again, and blurred to some extent, by Douglass' responses to a series of questions from Commissioners Mark

230. Statements by several commissioners made these points quite unequivocally: "[T]he attorney could only counsel and advise with the person in the grand jury room." Transcript of Fla. C.R.C. proceedings 247 (Dec. 8, 1977) (remarks of Dempsey Barron). "[T]he committee wound up by taking the position that we would make it very clear that the only thing he could do in that room or that he was authorized to do in the room would be to sit by his client and advise his client when he was called upon for advice." *Id.* at 257 (remarks of LeRoy Collins). "He's not an adversary there. He's not going to be questioning the members of the grand jury." *Id.* at 263 (remarks of Jesse McCrary). "[T]his amendment . . . says the witness shall have the right to be accompanied and to receive the advice of Counsel in his testimony . . . . I think that precludes . . . any great abuse occurring because it places in it the proceeding is limited to being with a witness and advising the witness." *Id.* at 255 (remarks of Dexter Douglass).

231. *Id.* at 261.

232. *Id.*

233. *Id.* at 262.

234. FLA. STAT. § 27.51 (1977).

Hollis[235] and John Moore.[236] The language of the proposal does not support Douglass' construction limiting the right to counsel to persons under investigation. The first sentence provides that "[a]ny person called to testify before a grand jury shall be advised of his right to counsel . . . ." The second sentence provides "[a] witness shall have the right to be accompanied by and to receive the advice of counsel . . . ." From the context, it seems apparent that both sentences address the same category of persons. A "person called to testify before a grand jury" is "a witness." In contrast, the third sentence concerns a different category of persons—those under investigation by the grand jury. Thus, a witness before a grand jury would be entitled to be advised of his right to counsel, to be free from compelled testimony unless granted immunity, and to be accompanied and advised by counsel during his testimony. A person under investigation by the grand jury who is called as a witness would be entitled to all those rights *plus* the right to be notified, before he testifies, that he is a target of the investigation.[237]

Nor do Barron's remarks support the Douglass construction. Barron spoke of "a man named Gideon," jailed in Panama City, who convinced the United States Supreme Court that his sixth amendment right to counsel had been violated because the state had not provided counsel for his defense.[238] Stating that *Gideon v.*

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235. [Hollis:] Commissioner, does this mean that every witness before the grand jury has the right to an attorney?

[Douglass:] If he is under investigation, he does. Or he would have.

[Hollis:] What about indigents, will they be provided with attorneys?

[Douglass:] If they are under investigation and they cannot afford to hire an attorney, they will be given the same thing they are given now in every other proceeding, which is a public defender.

Transcript of Fla. C.R.C. proceedings 130 (Mar. 7, 1978).

236. [J. Moore:] The proposal . . . says: "The witness shall have the right to be accompanied by and receive the advice of counsel during his testimony."

Now, how do you interpret that to restrict it only to those persons under investigation?

[Douglass:] I think that is what was proposed intentionally in the committee. I think Senator Barron, who introduced this, felt that way. That is the way I think it would be interpreted by reading this.

[J. Moore:] . . . I don't agree with you.

Id. at 131-32. The committee minutes do not indicate that the committee intended to limit the right to persons under investigation. *See generally* Fla. C.R.C., Declaration of Rights Committee Minutes 7-8 (Oct. 20, 1977); *id.* at 1-5 (Dec. 7, 1977).

237. The language originally proposed by Barron followed the same structure. The first two sentences spoke respectively of "[a]ny person" and "[s]uch a witness" while the third sentence spoke of "a person under investigation." *See* note 221 *supra*. Although the committee amendment changed the second sentence substantively, it did not change the class of persons entitled to the right.

238. Transcript of Fla. C.R.C. proceedings 132-33 (Mar. 7, 1978).

Wainwright[239] "is a basis for which now people are entitled to counsel,"[240] Barron continued:

> It is fundamental that [the grand jury room] is where you need a lawyer the most. And I think that if we do nothing else, we should write this provision in the constitution *to guarantee to every person* that he not only is entitled to a lawyer, but he is entitled to have the lawyer with him when he needs him the most.[241]

The commission approved Proposal 32 by a vote of twenty-five to five,[242] thereby recommending state constitutional rights for grand jury witnesses which exceed the federal constitutional requirements in all respects.[243] The sixth amendment right to counsel accrues only "at or after the time that adversary judicial proceedings have been initiated."[244] Speaking directly to the question of counsel's presence in the grand jury room, the United States Supreme Court has observed that "[u]nder settled principles the witness may not insist upon the presence of his attorney in the grand jury room."[245] But even though the right to have counsel present with a witness during grand jury testimony is not required by the sixth amendment, the American Bar Association, through its Criminal Justice Section, recently recommended that counsel be permitted in federal grand jury rooms.[246]

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239. 372 U.S. 335 (1963).

240. Transcript of Fla. C.R.C. proceedings 133 (Mar. 7, 1978).

241. *Id.* (emphasis added).

242. 14 Fla. C.R.C. Jour. 232 (Dec. 8, 1977). Subsequently the commission defeated by a vote of 5-28 amendment 12 to Proposal 258, which would have deleted the language inserted by Proposal 32. 27 Fla. C.R.C. Jour. 527 (Mar. 7, 1978). The Style and Drafting Committee recommended: that the substance of Proposal 32 be placed in subsection (b) of § 15; that the current subsection (b) be relettered subsection (c); that "shall" be substituted for "must" before "be advised"; that "to" be substituted for "of" before "counsel" in the first sentence; and that the last sentence be reworded to read "Prior to giving testimony, a person under investigation by a grand jury shall be advised that he is under investigation." Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 6 (Mar. 6, 1978). The commission adopted these recommendations. 30 Fla. C.R.C. Jour. 570 (Apr. 14,1978).

243. *See Florida Grand Jury, supra* note 155. The committee had the benefit of the note author's analysis and recommendations, most of which first appeared in a series of memoranda prepared at D'Alemberte's request. *See* Memorandum from Patricia Dore, prepared by Robert Q. Williams, to Declaration of Rights Committee, re: Article I, Section 15 (Oct. 10, 1977); Memorandum from Patricia Dore, prepared by Robert Q. Williams, to Steven J. Uhlfelder, re: Article I, Section 15(a) - Abolition of Grand Jury (Sept. 26, 1977). The note author also testified before the committee concerning grand jury reform. Fla. C.R.C., Declaration of Rights Committee Minutes 7 (Oct. 20, 1977).

244. Kirby v. Illinois, 406 U.S. 682, 688 (1972).

245. United States v. Mandujano, 425 U.S. 564, 581 (1976).

246. *See ABA Annual Meeting*, 46 U.S.L.W. 2089 (Aug. 23, 1977).

D. The Right to Be Let Alone

The need for a state constitutional provision protecting privacy has been treated comprehensively elsewhere.[247] This article will examine the commission's privacy proposal[248] with the objective of exploring intent on three of its aspects: the limitation to intrusion by government; the stating of the right in absolute terms; and the interaction with and relationship to other constitutional provisions with which it may conflict.

The appropriateness and the necessity of recognizing a state constitutional right of privacy were raised before the commission during its opening proceedings.[249] The issue also arose at the public hearings.[250] The matter was referred to the Ethics, Privacy and Elections Committee for study and development.[251] At its second meeting, that committee unanimously approved in principle the inclusion in the state constitution of a provision protecting privacy.[252]

Agreement on the appropriate language, however, was not as easily achieved. The committee was divided over two major policy questions: (1) whether the right ought to protect individuals against governmental and private intrusion, and (2) whether the right ought to be stated in absolute or qualified terms. On the other hand, there was agreement that it would be appropriate and necessary, if a privacy proposal were adopted, to consider elevating to constitutional status the public records and open meetings laws as well as to address the obvious conflict with the financial disclosure requirements of the Sunshine Amendment.

Douglass and Overton were the strongest supporters of a provision reaching private as well as governmental intrusion. The committee initially assented to approving in principle the establishment of a right of privacy against both private and governmental intrusion.[253]

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247. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy, infra* this issue [hereinafter cited as *To Be Let Alone*]; Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 630 (1977) [hereinafter cited as *Toward a Right of Privacy*].

248. As finally approved by the commission, the language reads: "*Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.*" Fla. C.R.C., Rev. Fla. Const. art. I, § 23 (May 11, 1978).

249. Transcript of Fla. C.R.C. proceedings 20-21 (July 6, 1977) (remarks of Ben Overton).

250. Suggestions, *supra* note 54, at 7. Gerald B. Cope, Jr., the author of *Toward a Right of Privacy, supra* note 247, and *To Be Let Alone, supra* note 247, made a presentation to the commission at the public hearing held in Gainesville, Fla. *See* The Center for Governmental Responsibility, Public Testimony Before the Florida Constitution Revision Commission, Summaries of Hearings August 18, 1977 - September 26, 1977, at 76-79 (Oct. 6, 1977).

251. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 2 (Oct. 5, 1977).

252. *Id.* at 4-5 (Oct. 14, 1977).

253. *Id.* at 5.

At the next committee meeting, however, there was a lengthy discussion concerning the potential impact of a private intrusion provision on the newsgathering activities of the print and electronic media.[254] Nevertheless, a motion was made to adopt the following language: "The right of the individual to be left alone and to be free from governmental or private intrusion is essential to the well-being of a free society and shall not be infringed."[255] The motion was withdrawn at Moyle's request in order to permit further reflection on the impact of the proposed ban on private intrusion.[256] No vote was taken on the language until the last meeting of the committee. At that time, the committee approved language which created a self-executing right against governmental intrusion and established a policy against private intrusion to be implemented by the legislature.[257]

Had the committee's position prevailed with the full commission, protection of privacy in Florida would have encompassed private activity, an area completely untouched by the federal constitutional protection.[258] While genuine concern was expressed about invasions of personal privacy by private individuals and organizations, the commission seemed to feel that the legislature would address those problems without a constitutional directive.[259] The vagueness of the language,[260] the worry about increasing governmental regulation of private enterprise,[261] and the possibility of judicial constructions resulting in unforeseen consequences[262] resulted in the commission's refusal to go along with the committee proposal as it related to the private sector.[263]

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254. The committee heard testimony from James Spaniolo, representing *The Miami Herald*, and Sharyn Smith, assistant attorney general, both of whom expressed concern that newsgathering activities would be adversely affected if the provision guaranteed a right against private intrusion. *Id.* at 6-8 (Oct. 19, 1977).

255. *Id.* at 8.

256. *Id.* at 8-9.

257. Fla. C.R.C., Proposal 132. The proposal created a new § 23 in article I with two subsections: (a) Every individual has the right to be let alone and free from governmental intrusion into his private life. (b) The legislature shall protect by law the private lives of the people from intrusion by other persons. *See* Fla. C.R.C., Ethics, Privacy and Election Committee Minutes 4-5 (Nov. 21, 1977).

258. Since the federal constitutional right of privacy is an aspect of the liberty protected by the due process clause of the fourteenth amendment, only state interference with the right is restricted. Roe v. Wade, 410 U.S. 113, 153 (1973).

259. Transcript of Fla. C.R.C. proceedings 31-32 (Mar. 7, 1978) (remarks of Don Reed).

260. *Id.* at 21-23 (remarks of William Birchfield and Don Reed); *id.* at 27-28 (remarks of William James); *id.* at 189 (remarks of Don Reed).

261. *Id.* at 190-91 (remarks of Jan Platt and Don Reed).

262. *Id.* at 21-23 (remarks of William Birchfield and Don Reed).

263. Initially, Proposal 132 was approved by a vote of 30-5. 16 Fla. C.R.C. Jour. 257 (Jan. 9, 1978). Subsequently, the commission defeated a substitute amendment offered by James

The other major dispute involved the value and importance to be afforded the right to be let alone. By what standard are Florida courts to resolve conflicts between governmental action and the right to be let alone? Is the newly recognized right a fundamental one, of the same stature as the rights of speech, press, assembly, and religion, thus requiring a substantial justification for government action infringing upon it? Or, is the right less important in the hierarchy of our values and thus subject to infringement by government on a less demanding demonstration of need?

The first formulation of the right considered by the committee addressed the judicial standard question directly. It stated: "The right of the people to privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[264] Although the drafter intended the "compelling state interest" language to signal to the courts the great importance of the right,[265] Douglass maintained that the language would be viewed by the courts as an invitation to diminish the value of the right.[266] While not sharing Douglass' view, D'Alemberte worried that its use in connection with the right of privacy and not other rights could lead to a diminution of those other rights.[267] Faced with Douglass' vehement opposition to the language and D'Alemberte's concern about its possible effect on other rights, the compelling state interest language was abandoned and did not appear in any of the succeeding drafts of the proposal.[268]

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to delete the substance of Proposal 132 from Proposal 258. 27 Fla. C.R.C. Jour. 525 (Mar. 7, 1978). Don Reed then offered substitute amend. 2 for amend. 5, which deleted subsection (b), the private intrusion provision. Substitute amend. 2 for amend. 5 was adopted by a vote of 23-8. *Id.* at 526. A motion to reconsider the vote by which this substitute amendment was adopted was approved by a vote of 19-15 later that day, *id.* at 532, and on reconsideration the substitute amendment failed by a vote of 17-16. *Id.* Since 19 votes were necessary to amend Proposal 258, subsection (b) was reinstated. *Id.* Still later that same day, the commission voted 20-15 to reconsider the vote by which substitute amend. 2 for amend. 5 failed. *Id.* at 534. The substitute amendment was taken up by the commission again and finally approved by a vote of 20-14. 28 Fla. C.R.C. Jour. 536-37 (Mar. 8, 1978). Thus, the private intrusion provision does not appear in Proposal 258.

264. This was the formulation recommended by Gerald Cope. *See* Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 4 (Oct. 5, 1977); *Toward a Right of Privacy, supra* note 247, at 739.

265. *See* Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 4 (Oct. 5, 1977); *Toward A Right of Privacy, supra* note 247, at 739-40.

266. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 3 (Oct. 14, 1977).

267. *Id.* at 2-3.

268. The author prepared eight different formulations of the right for the committee's consideration at its Oct. 19, 1977 meeting. The language approved by the committee at its Nov. 21, 1977 meeting was suggested by a memorandum submitted by the author to the committee at that meeting. Memorandum from Patricia Dore to Ethics, Privacy and Elections Committee, re: Privacy, Open Meetings and Public Records (Nov. 21, 1977).

Also bearing on the question of the value and importance of the newly recognized right was an effort to restrict the right by protecting against only "unwarranted" intrusion by the government. Collins and Overton were the main proponents of this position, which was rejected three times by the committee.[269] They renewed the effort and were joined by Shevin when Proposal 132 went to the floor. In presenting the proposal, Moyle explained that the right to be let alone was entitled to the "same dignity and same importance as the rights of free press, free speech, religious belief, and association."[270] But it was in the context of debating and voting on whether "unwarranted" should be inserted to modify "intrusion" that the commission itself spoke to the fundamental nature of the right.[271]

Those in favor of qualifying the right argued that approving the proposal as recommended by the committee would result in the

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The written record does not account for the dramatic change in emphasis between the proposal left pending at the Oct. 19, 1977 meeting and the proposal approved at the Nov. 21, 1977 meeting. Between those two meetings, countless hours were spent in an effort to resolve a dispute and to avert a floor fight that potentially would have endangered passage of any proposal relating to privacy. The principal actors in the development of the right to be let alone were D'Alemberte and Douglass. If the language expressing the right were acceptable to both of them, a formidable alliance would be forged, thus easing the proposal's passage.

The two were in agreement on three points: (1) that the compelling state interest language was not appropriate; (2) that the likelihood of an independent construction by the state courts would be increased if the language used did not mimic the federal right (hence the phrase "right to be let alone" rather than "right of privacy" was preferred); and (3) that the right was fundamental and therefore ought to be stated in absolute terms and ought not be qualified by "unwarranted." They adamantly disagreed on extending the right to include intrusion by private persons, with Douglass favoring the extension and D'Alemberte opposing it.

The suggestion that a self-executing right to be free from governmental intrusion be located in article I and a policy statement against private intrusion to be implemented by the legislature be placed in article II was offered as a compromise. D'Alemberte was agreeable. Douglass was willing to accept the policy statement but insisted that it be in article I. The committee backed Douglass and sent Proposal 132 to the floor, recommending the creation of a new section in article I containing two subsections: (a) governmental intrusion and (b) private intrusion.

The D'Alemberte-Douglass alliance remained firm on the absolute statement of the right against governmental intrusion and that aspect of Proposal 132 emerged intact as a result. They fought each other long and hard on the private intrusion section, as the saga of substitute amendment 2 for amendment 5 to Proposal 258 (recounted in note 263 *supra*) illustrates. In the end, D'Alemberte prevailed.

269. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 8 (Oct. 19, 1977); *id.* at 4-5 (Nov. 21, 1977).

270. 2 Transcript of Fla. C.R.C. proceedings 7 (Jan. 9, 1978).

271. Several amendments were introduced to insert "unwarranted" into the proposal. Collins and Overton offered amendment 1 to Proposal 132. The amendment failed by a vote of 11-24. 16 Fla. C.R.C. Jour. 256 (Jan. 9, 1978). Collins, Overton, and Shevin offered amendment 14 to Proposal 258. The amendment was adopted by a vote of 19-14. 27 Fla. C.R.C. Jour. 526 (Mar. 7, 1978). Barkdull moved to reconsider the vote by which amendment 14 was adopted. By a vote of 23-12, the commission agreed to reconsider and then defeated amendment 14 by a vote of 11-24. 27 Fla. C.R.C. Jour. 531 (Mar. 7, 1978).

invalidation of statutes and court rules which now authorize intrusion by government into people's private lives and might result in judicial interpretations not considered by the commission. Shevin suggested that statutes authorizing electronic surveillance of organized crime activities would be void,[272] while Collins worried about the proposal's impact on statutes requiring agricultural and other inspections[273] and on court rules concerning discovery.[274] Overton argued that, unless qualified, the right might lead to a ruling that smoking marijuana in one's home could not be punished.[275] Overton also feared that the proposal might displace a decision of the Florida Supreme Court that there was no cause of action for an invasion of privacy tort when a newspaper published a picture, taken by a news photographer invited onto the premises by the fire marshal, which showed the outline of a body.[276] Collins' and Shevin's basic concern seemed to be the extent to which the police power would be restricted if the right to be let alone were not qualified.[277] The appropriate parallel, according to Collins, was the freedom from unreasonable search and seizure. The people, he argued, are not protected from all searches and seizures but only from unreasonable ones. Similarly, the people should not be protected from all governmental intrusions, only unwarranted ones.[278]

The major opponents, in the committee and on the floor, of qualifying the right were Douglass and Moyle. According to Douglass, the word "unwarranted" was "a weasel word to afford to the courts the opportunity to dilute an important right that everybody thinks they have . . . anyway."[279] Both Moyle and Douglass argued that, although stated in unqualified terms, the right to be let alone was not

272. 2 Transcript of Fla. C.R.C. proceedings 42 (Jan. 9, 1978).

273. Transcript of Fla. C.R.C. proceedings 10-13 (Mar. 7, 1978).

274. 2 Transcript of Fla. C.R.C. proceedings 40 (Jan. 9, 1978). *See also* dialogue between Shevin and Douglass regarding the potential impact on discovery, *id.* at 68-69, and dialogue between Collins and Moyle, *id.* at 73-74.

275. *Id.* at 35. Overton was referring to an Alaska decision holding that prosecution for smoking marijuana in the privacy of one's own home was barred by that state's constitutional right of privacy provision. Ravin v. State, 537 P.2d 494 (Alaska 1975); *see* Transcript of Fla. C.R.C. proceedings 25-26 (Mar. 7, 1978) (remarks of Ben Overton). *See also Toward a Right of Privacy, supra* note 247 at 694-96.

276. 2 Transcript of Fla. C.R.C. proceedings 35-36 (Jan. 9, 1978). The decision referred to is Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976). *See also* Transcript of Fla. C.R.C. proceedings 26 (Mar. 7, 1978).

277. *See generally* 2 Transcript of Fla. C.R.C. proceedings 39-42 (Jan. 9, 1978) (remarks of LeRoy Collins); *id.* at 42-45 (remarks of Robert Shevin); Transcript of Fla. C.R.C. proceedings 10-16 (Mar. 7, 1978) (remarks by LeRoy Collins); *id.* at 37 (remarks of Robert Shevin).

278. Transcript of Fla. C.R.C. proceedings 40-41 (Mar. 7, 1978) (remarks of LeRoy Collins).

279. 2 Transcript of Fla. C.R.C. proceedings 37 (Jan. 9, 1978).

an absolute. If government action were challenged as violative of the right, it would be for the courts, by balancing the interests asserted by the government against the right of the individual, to determine whether the right had in fact been infringed.[280] The important point, they argued, was the weight to be accorded the right. They rejected the search and seizure parallel postulated by Collins, preferring instead to place the right on the same plane with free speech, press, association, and religion. Moyle argued, for example, that inclusion of "unwarranted" would dilute the importance of the right. In his view, it was as unacceptable to protect only against unwarranted intrusion as it would be to guarantee a right to speak reasonably or to enjoy reasonable religious freedom.[281]

Throughout the debate on the privacy proposal in the committee and on the floor, the commissioners were concerned about preserving the so-called Sunshine Amendment in article II, section 8.[282] Mathews offered an amendment to Proposal 132 which addressed the problem directly.[283] His purpose, he explained, was "to call attention to an inconsistency that . . . is built in unless you somehow or another resolve it . . . ."[284] Commissioner Lew Brantley objected to the Mathews amendment, saying that it would prevent the legislature from extending the financial disclosure requirements of article II, section 8 to cover other categories of persons.[285] Plante and Moyle then offered a substitute amendment, which Mathews agreed did "the same thing, perhaps in a better way, than my amendment

280. *Id.* at 23-25, 37-39, 66-67, 69-70 (remarks of Dexter Douglass); *id.* at 31-33, 48-49, and Transcript of Fla. C.R.C. proceedings 25, 38-40 (Mar. 7, 1978) (remarks of Jon Moyle). *See also* 2 Transcript of Fla. C.R.C. proceedings 45-47 (Jan. 9, 1978) (remarks of J.B. Spence).

281. 2 Transcript of Fla. C.R.C. proceedings 49 (Jan. 9, 1978); Transcript of Fla. C.R.C. proceedings 19, 23-25 (Mar. 7, 1978) (remarks of Jon Moyle).

282. At one point the committee unanimously approved an amendment to a formulation of the privacy proposal then before it, *see* text accompanying note 255 *supra*, to insert "unless otherwise provided herein." Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 8 (Oct. 19, 1977). There was no vote by the committee on that particular formulation. *See* text accompanying note 256 *supra*. There was also some discussion about whether the Sunshine Amendment could be saved from an argument that it had been repealed by the later adopted privacy proposal by adding a rule of construction to that effect in article X. The matter was not resolved by the committee, and Proposal 132 was reported to the floor without explicit language designed to preserve the Sunshine Amendment.

283. With the Mathews amendment, subsection (a) of Proposal 132 read: "Every individual except office holders and candidates as defined in Section 8 of Article II has the right to be let alone and free from governmental intrusion into his private life." 16 Fla. C.R.C. Jour. 257 (Jan. 9, 1978).

284. 2 Transcript of Fla. C.R.C. proceedings 51-52 (Jan. 9, 1978). Ware offered an amendment to the Mathews amendment to make it totally consistent with art. II, § 8. Ware's amendment, approved on a voice vote, added "officers and employees" to the list which already included officeholders and candidates. *Id.* at 53.

285. *Id.* at 54-55.

[did]."[286] Without further debate, the substitute amendment was adopted on a voice vote.[287]

As this debate demonstrated, the commission faced the obvious conflict between the right to be let alone and the financial disclosure requirements of the Sunshine Amendment. It resolved that conflict in favor of the Sunshine Amendment. The language "except as provided herein" was designed *solely* to preserve the Sunshine Amendment.

Other potential conflicts were recognized and raised during debate on Proposal 132. For example, some commissioners wondered whether approval of the proposal would impliedly repeal section 12 so that the people would now have a right to be secure against *all* searches and seizures and not only unreasonable ones. The debate indicates that the commission believed that questions involving the validity of searches and seizures would continue to be controlled largely by section 12.[288]

One could argue, however, that in particularly close cases concerning the reasonableness of a search, the right to be let alone might tip the balance and cause a court to hold a search invalid. Significantly, the commission did not treat article I, section 12 in the same way it treated article II, section 8. That is, while it generally was understood that search and seizure questions would not be affected by Proposal 132, the record reflects no intention to foreclose the possibility that they might be affected. Rather, it left the issue for judicial resolution, understanding that the competing interests would have to be balanced.[289] And in that process, as discussed above, the right to be let alone would carry substantial weight.

With approval of Proposals 137 and 138 relating to public records and open meetings,[290] the commission solved one problem but perhaps created others. By elevating the public records and open meeting laws to constitutional status, the commission averted the sacrifice of Florida's much touted "government in the sunshine" to the

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286. *Id.* at 60. The substitute amendment inserted "except as otherwise provided in this constitution" before the period in subsection (a). 16 Fla. C.R.C. Jour. 257 (Jan. 9, 1978).

287. 2 Transcript of Fla. C.R.C. proceedings 60-61 (Jan. 9, 1978). The commission subsequently approved the recommendation of the Style and Drafting Committee to delete "in this constitution" and to substitute "herein." 30 Fla. C.R.C. Jour. 570 (Apr. 14, 1978).

288. 2 Transcript of Fla. C.R.C. proceedings 15-16 (Jan. 9, 1978) (remarks of Dexter Douglass); *id.* at 43-44 (remarks of Dexter Douglass and Robert Shevin).

289. In response to a question from Douglass regarding the relationship between the proposal and § 12, Shevin stated: "I recognize we will be giving the court a choice between the interpreting of [Section 12] and this amendment provision and trying to decide which one prevails." *Id.* at 44.

290. *See* text accompanying notes 291-323 *infra*.

newly recognized right to be let alone.[291] However, the inherent conflict between public records and the right to be let alone was not resolved. Rather, it was moved to a new battleground where both rights presumably would have equal legal stature. Unlike its treatment of the interrelation between the right and financial disclosure, the commission did not declare which right was to prevail when the public's right to know conflicted with the individual's right to be let alone. Resolution of that conflict was left to the judiciary, as was the conflict between the government's need to collect information and the individual's right to keep information private.

E. Open Government

Among the suggestions received by the commission from the public for revising article I were two to provide a right for citizen access to government and governmental decisionmaking.[292] The matter was referred to the Ethics, Privacy and Elections Committee.[293] The committee's recommendations in the open government area were developed in the context of its recommendation to recognize a right to be let alone. The privacy issue and the open government issue were always discussed together, and the two rights—the public's right to know and the individual's right to be let alone—were considered inextricably interwoven. Approval of the right to be let alone meant that open government proposals also had to be approved in order to maintain a constitutional balance between the two.[294] The committee reported out to the full commission three proposals relating to open government. Each is discussed separately below.

1. *The Open Meetings Proposal*

At its October 19, 1977 meeting, the committee considered four formulations representing three different approaches to the question of open meetings.[295] One approach required all meetings conducted

291. *See generally* Transcript of Fla. C.R.C. proceedings 240-42, 244-245 (Dec. 8, 1977) (remarks of Jon Moyle); 2 Transcript of Fla. C.R.C. proceedings 93, 103-04 (Jan. 9, 1978) (remarks of Jon Moyle).

292. Suggestions, *supra* note 54, at 7.

293. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 2 (Oct. 5, 1977).

294. *Id.* at 3-5 (Oct. 14, 1977); *id.* at 6-12 (Oct. 19, 1977); *id.* at 4-6 (Nov. 21, 1977).

295. The open meetings proposals drafted by the author for committee discussion were:

> 1. The executive and legislative branches of government shall be open and accessible to the people unless otherwise provided herein.
>
> 2. It shall be the policy of the state that the executive and legislative branches of government shall be open and accessible to the people. Unless otherwise provided by law, all meetings of any governmental entity in the state shall be open to the public at all times.

by the legislative and executive branches to be open unless the constitution provided otherwise. Under the present constitution the only exception to open legislative meetings is for executive sessions of the senate "when considering appointment to or removal from public office."[296] A second approach was to state a policy that all meetings conducted by the executive and legislative branches should be open but to allow the legislature discretion to close meetings. A third approach also stated a policy of openness and permitted the legislature to make exceptions but established standards to limit the exercise of legislative discretion. The committee took no action on these proposals. However, the discussion disclosed a consensus on the following points: (1) that the proposal ought to extend to all branches of state government and to all levels of government in the state; (2) that the proposal ought to include only meetings of two or more persons; and (3) that the proposal ought to permit the legislature to make exceptions but only in accordance with stated standards.

At a subsequent meeting, the committee considered two new proposals drafted to implement the consensus achieved earlier.[297] The focus of these proposals differed from the earlier suggestions in that both recognized a right of access to meetings. The language included only meetings of collegial public bodies or of persons acting on their behalf, and it included meetings of all nonjudicial public bodies in the state.[298] Without discussion, the committee approved Proposal

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3. It shall be the policy of the state that the executive and legislative branches of government shall be open and accessible to the people. The Legislature may provide by law for exemptions to this section where individual privacy or an overriding governmental purpose exceed the merits of open meetings.

4. It shall be the policy of the state that the executive and legislative branches of government shall be open and accessible to the people. The legislature may provide by law for exemptions to this section where such action is essential to protect important privacy interests or overriding governmental purposes.

Memorandum from Patricia Dore to Ethics, Privacy and Elections Committee, re: Privacy, Open Meetings and Open Records (Oct. 19, 1977).

296. FLA. CONST. art. III, § 4(b).

297. The author drafted the following proposals which the committee considered at its Nov. 21, 1977 meeting:

(1) No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state or by persons acting on behalf of such a public body.

(2) No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state or by persons acting on behalf of such a public body. The Legislature may exempt meetings by general law where it is essential to protect privacy interests or overriding governmental purposes.

Memorandum from Patricia Dore to Ethics, Privacy and Elections Committee, re: Privacy, Open Meetings and Public Records (Nov. 21, 1977).

298. The question of openness in judicial proceedings was addressed in a separate recom-

137, which guaranteed access to all meetings of nonjudicial public bodies in the state unless by general law the legislature exempted a meeting from the openness requirement because closure was essential to protect privacy interests or overriding governmental interests.[299]

Several amendments were offered during the floor debate on Proposal 137. Mathews moved an amendment to limit access to public meetings to persons "during good behavior." This amendment failed.[300] Birchfield offered an amendment striking "nonjudicial" from the proposal. The sponsors of Proposal 137 resisted Birchfield's amendment because the committee had approved a separate proposal concerning the judiciary. The Birchfield amendment failed on a voice vote.[301] Shevin then offered an amendment striking "[meetings] at which official acts are to be taken" and inserting "[meetings] at which foreseeable action may be taken."[302] Shevin's concern was that, as proposed by the committee, Proposal 137 was "weaker than the existing Sunshine Law as interpreted by the Florida Supreme Court."[303] Both Moyle and Douglass assured Shevin and the other commissioners that the committee did not intend to weaken the open meetings law. In fact, they stated, the language of that statute had been used in the proposal so that its judicial interpretations would be incorporated and serve as precedent for interpretation of the constitutional provision.[304] With the uncontradicted statement of the sponsors on the record to the effect that it was their intent that the judicial interpretations of the open meetings law be incorporated and made part of the proposal, Shevin withdrew the amendment.[305]

Finally, Shevin offered an amendment to strike "to protect privacy interests or overriding governmental purposes" and to insert "to promote compelling governmental interests."[306] Shevin ex-

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mendation. *See* notes 324-34 *infra* and accompanying text.

299. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 5 (Nov. 21, 1977).

300. 14 Fla. C.R.C. Jour. 231 (Dec. 8, 1977).

301. *Id.* at 232.

302. Transcript of Fla. C.R.C. proceedings 218 (Dec. 8, 1977).

303. *Id.* at 219.

304. *Id.* at 219-23 (remarks of Jon Moyle and Dexter Douglass). FLA. STAT. § 286.011(1) (1977) provides:

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation, or formal action shall be considered binding except as taken or made at such meeting.

305. Transcript of Fla. C.R.C. proceedings 223 (Dec. 8, 1977).

306. 14 Fla. C.R.C. Jour. 231 (Dec. 8, 1977).

plained that the amendment was offered because he worried about the breadth of the "privacy interest" standard.[307] Overton pointed out the problem of applying the Shevin amendment to a meeting at which information exempted from the public records law might be discussed. That meeting might be closed to protect the privacy of the person being discussed but could not be closed to protect a compelling governmental interest because there would not be a governmental interest involved.[308] The amendment was defeated on a voice vote.[309]

On the first vote, Proposal 137 failed to receive the necessary votes.[310] It was reconsidered, however, and approved without further debate by a vote of twenty-seven to three.[311]

2. *The Open Records Proposal*

At its October 19, 1977 meeting the committee discussed but took no action on two proposals concerning public records.[312] Overton raised questions about the impact of the proposals on the courts'

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307. Transcript of Fla. C.R.C. proceedings 227-28 (Dec. 8, 1977).

308. *Id.* at 227-28 (remarks of Ben Overton).

309. *See* 14 Fla. C.R.C. Jour. 231 (Dec. 8, 1977).

310. *Id.* at 232. The vote was 16-15.

311. 16 Fla. C.R.C. Jour. 257 (Jan. 9, 1978). The Style and Drafting Committee recommended the following changes: strike "or overriding governmental purposes" and insert after "essential," "for overriding governmental purposes." Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 9 (Mar. 6, 1978). This recommendation was adopted by the commission. 30 Fla. C.R.C. Jour. 570 (Apr. 14, 1978). The Style and Drafting Committee subsequently recommended striking "for" and inserting "to accomplish." 30 Fla. C.R.C. Jour. 555 (Apr. 14, 1978). The commission adopted this recommendation also. *Id.* at 559. As finally adopted, the proposal reads:

> *No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state or by persons acting together on behalf of such a public body. The legislature may exempt meetings by general law when it is essential to accomplish overriding governmental purposes or to protect privacy interests.*

Fla. C.R.C., Rev. Fla. Const. art. I, § 25 (May 11, 1978).

312. The public records proposals drafted for committee discussion were:

> 1. No person shall be deprived of the right to examine any document made or received in connection with the public business by any governmental entity in the state or persons acting on its behalf. The Legislature may exempt documents by law where it is essential to protect privacy interests or overriding governmental purposes.
>
> 2. No person shall be deprived of the right to examine any document made or received in connection with the public business by any governmental entity in the state or persons acting on its behalf. The Legislature may exempt documents from this section where individual privacy or an overriding governmental purpose exceed the merits of public disclosure.

Memorandum from Patricia Dore to Ethics, Privacy and Elections Committee, re: Privacy, Open Meetings and Open Records (Oct. 19, 1977).

needs to seal records and also whether opinions circulating among appellate court judges would be subject to the openness requirements.[313] Proposal 138, tracking the language of the public records statute[314] and excluding the judiciary, was considered and approved by the committee at its November 21, 1977 meeting.[315] Proposal 138 generated little debate on the floor[316]—and also little enthusiasm. It failed by a fifteen to fourteen vote.[317]

The proposal was reconsidered in January after the commission approved Proposal 132—the right to be let alone. At that time two amendments were offered to Proposal 138. Don Reed moved to strike "nonjudicial" so that the proposal would ensure public access to all public records. The amendment was resisted by Moyle because access to judicial records was addressed by the committee in a separate proposal. Reed's amendment failed on a voice vote.[318] Commissioner Nathaniel Polak offered an amendment providing that the effective date of Proposal 138 would be June 1, 1979.[319] The Polak amendment resulted from debate about the impact of the proposal on the legislatively created exceptions to the current public records statute. Overton's statement that those exceptions would be grandfathered in[320] was contradicted by Moyle and Douglass.[321] The commission agreed to the delayed effective date so as to give the legislature an opportunity to review the exceptions it had created and to determine whether those exceptions were warranted in light

313. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 9-10 (Oct. 19, 1977).

314. FLA. STAT. § 119.011(1) (1977) defines public records as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." FLA. STAT. § 119.011(2) (1977) defines agency as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

315. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 5 (Nov. 21, 1977). As approved by the committee, Proposal 138 provided:

> No person shall be denied the right to examine any public record made or received in connection with the public business by any nonjudicial public officer or employee in the state or by persons acting on their behalf. The Legislature may exempt records by general law where it is essential to protect privacy interests or overriding governmental purposes.

Id.

316. *See* Transcript of Fla. C.R.C. proceedings 239-46 (Dec. 8, 1977).

317. 14 Fla. C.R.C. Jour. 232 (Dec. 8, 1977).

318. 16 Fla. C.R.C. Jour. 257 (Jan. 9, 1978).

319. *Id.*

320. 2 Transcript of Fla. C.R.C. proceedings 96 (Jan. 9, 1978).

321. *Id.* at 96-97 (remarks of Jon Moyle); *id.* at 99 (remarks of Dexter Douglass).

of the standards established by Proposal 138.[322] Without further debate or amendment, Proposal 138 was approved twenty-one to eleven.[323]

3. *The Open Judiciary Proposal*

As the discussion concerning the public records and open meetings proposals indicated, the committee determined that the special needs of the judiciary warranted a separate proposal relating to the openness of judicial proceedings and records. The committee considered two proposals at its November 21, 1977 meeting.[324] One addressed openness of judicial proceedings and records;[325] the other addressed openness of judicial proceedings and records and also the proceedings and records of so-called "judicial agencies" such as The Florida Bar.[326] The committee discussion of the proposals indicated the members' understanding that the word "proceedings" did not include the conferences of appellate judges or the deliberations of petit juries. The committee also was aware that neither proposal addressed the secrecy of proceedings of the Judicial Qualifications

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322. *Id.* at 99-100 (remarks of Robert Shevin and Dexter Douglass); *see* 16 Fla. C.R.C. Jour. 257 (Jan. 9, 1978).

323. 16 Fla. C.R.C. Jour. 257-58 (Jan. 9, 1978). The Style and Drafting Committee recommended the following changes: strike "or overriding governmental purposes"; strike, "where" and insert "when" and after "essential," insert "for overriding governmental purposes." Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 9 (Mar. 6, 1978). The recommendations were approved by the commission. 30 Fla. C.R.C. Jour. 570 (Apr. 14, 1978).

The Style and Drafting Committee subsequently recommended striking "for" and inserting "to accomplish," and striking "their" and inserting "the officer's or employee's." *Id.* at 555. The commission approved these recommendations. *Id.* at 559. As finally adopted, the proposal reads:

> *No person shall be denied the right to examine any public record made or received in connection with the public business by any nonjudicial public officer or employee in the state or by persons acting on the officer's or employee's behalf. The legislature may exempt records by general law when it is essential to accomplish overriding governmental purposes or to protect privacy interests.*

Fla. C.R.C., Rev. Fla. Const. art. I, § 24 (May 11, 1978).

324. *See* Memorandum from Patricia Dore to Ethics, Privacy and Elections Committee, re: Privacy, Open Meetings and Public Records (Nov. 21, 1977).

325. "All judicial proceedings and records shall be open and accessible to the people. Where it is essential to protect privacy interests or overriding governmental purposes, the supreme court by rule or the legislature by general law may exempt proceedings and records from this section." *Id.* at 3.

326. All judicial proceedings and records and all proceedings and records of judicial agencies shall be open and accessible to the people. Where it is essential to protect privacy interests or overriding governmental purposes, the supreme court by rule or the legislature by general law may exempt proceedings and records from this section.

Id.

Commission.[327] The committee voted to recommend adoption of the second proposal, which required openness for judicial proceedings and records and also for the proceedings and records of "judicial agencies."[328]

This proposal, number 133, was presented to the commission with the explanation that it would not affect appellate court conferences or petit jury deliberations but that it would require that grand jury proceedings be open unless closed by rule or by statute.[329] On motion by Barkdull, Proposal 133 was referred back to committee for clarification.[330] A subcommitted comprised of Overton and Douglass recommended, and the commission adopted, an amendment which expressly excluded grand and petit juries from the proposal and restricted the openness requirement to judicial "hearings" as opposed to "proceedings."[331] Douglass, Spence, and Birchfield sponsored an amendment deleting the language in article V, section 12(d) which required confidentiality of Judicial Qualifications Commission proceedings until formal charges are filed.[332] Their amendment passed.[333] Without further amendment or debate, Proposal 133 was adopted by a vote of twenty-five to zero.[334]

Commission debate on two other proposals also related to open proceedings and records. Proposal 67 by the Committee on the Judiciary, relating to the judicial nominating commissions, was

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327. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 6 (Nov. 21, 1977). FLA. CONST. art. V, § 12(d) expressly provides that J.Q.C. proceedings are confidential until formal charges are filed with the clerk of the supreme court.

328. Fla. C.R.C., Ethics, Privacy and Elections Committee Minutes 6 (Nov. 21, 1977).

329. Transcript of Fla. C.R.C. proceedings 120-24 (Dec. 8, 1977).

330. *Id.* at 125.

331. 20 Fla. C.R.C. Jour. 310 (Jan. 13, 1978).

332. *Id.* at 311.

333. *Id.*

334. The proposal was reconsidered and further amended by inserting the word "hearings" to make clear that hearings, proceedings, and records could be exempted by rule or general law. 22 Fla. C.R.C. Jour. 331 (Jan. 24, 1978). The Style and Drafting Committee recommended, and the commission approved, the same changes in the last sentence as had been recommended and approved for Proposals 137 and 138. Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 9 (Mar. 6, 1978); 30 Fla. C.R.C. Jour. 555, 559, 570 (Apr. 14, 1978); *see* notes 311, 323 *supra.* Barkdull offered amend. 5 to Proposal 258, which reinserted the language in art. V, § 12(d) stricken by commission approval of the amendment offered by Douglass, Spence, and Birchfield. Amendment 5 was adopted. 27 Fla. C.R.C. Jour. 533 (Mar. 7, 1978). As finally approved by the commission, Proposal 133, amending art. V, § 1, reads:

> *All judicial hearings and records and all proceedings and records of judicial agencies except grand and petit juries shall be open and accessible to the people. When it is essential to accomplish overriding governmental purposes or to protect privacy interests, the supreme court by rule or the legislature by general law may exempt hearings, proceedings and records from this section.*

Fla. C.R.C., Rev. Fla. Const. art. V, § 1 (May 11, 1978).

amended on the floor to require all proceedings and records of the commissions to be open and accessible to the public.[335] Subsequently, Overton and others introduced Proposal 215, which also concerned the judicial nominating commissions. The purpose of the proposal was to replace the previously adopted Proposal 67 and to conform the language as it related to openness and accessibility with that in Proposals 137 and 138.[336] Some objection was raised about the need to deal with the openness of the nominating commissions in a separate proposal. Moyle argued that these commissions were already covered by Proposals 137 and 138, if the commissions were nonjudicial, and would be covered by Proposal 133 if they were judicial agencies.[337] Since the judicial nominating commissions appeared to be neither fish nor fowl,[338] the commission approved Proposal 215, specifically subjecting the nominating commissions to the constitutional requirement of openness.[339]

The four proposals relating to public accessibility to government processes and records all share two important characteristics. First is the premise that the public's business ought to be conducted in the sunshine. The commission recommended elevation of the open meetings and public records statutes to constitutional status in part because of its decision to recommend recognition of a right to be let alone by government. But the commission also was responding to the concerns of those who worried that Florida's nationally recog-

335. 10 Fla. C.R.C. Jour. 185 (Nov. 21, 1977). Approval of this amendment by D'Alemberte and John Moore was the commission's first expression regarding openness and accessibility of records and proceedings. Proposals 133, 137, and 138 did not come to the floor until December. *See* notes 300, 316, 329 *supra.*

336. Transcript of C.R.C. proceedings 140-42 (Jan. 13, 1978) (remarks of Ben Overton). Actually, the language in Proposal 215 did not parallel that in Proposals 137 and 138. Proposal 215 provided in part: "The supreme court may by rule exempt portions of the proceedings and records from this provision where it is essential to obtain information pertaining to applicants or to protect privacy interests or overriding governmental purposes." The Style and Drafting Committee recommended, and the commission approved, deletion of the language "to obtain information pertaining to applicants or," Fla. C.R.C., Style and Drafting Committee Minutes 18 (Feb. 14, 15, 16, 1978); 30 Fla. C.R.C. Jour. 570 (Apr. 14, 1978). The Style and Drafting Committee recommended, and the commission approved, the same changes in the last sentence as had been recommended and approved for Proposals 133, 137, and 138. Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 54 (Mar. 6, 1978); 30 Fla. C.R.C. Jour. 555, 559, 570, (Apr. 14, 1978); *see* notes 311, 323, 334 *supra.*

337. Transcript of Fla. C.R.C. proceedings 160-63 (Jan. 13, 1978).

338. The uncertain status of the judicial nominating commissions results from an advisory opinion to the Governor in which the court said: "While the function of the commissions is inherently executive in nature, the mandate for the commissions comes from the people and the Constitution, not from the Legislature, the Governor, or the Courts." *In re* Advisory Opinion to the Governor, 276 So. 2d 25, 30 (Fla. 1973).

339. 20 Fla. C.R.C. Jour. 310 (Jan. 13, 1978).

nized devotion to "government in the sunshine" was slowly eroding, as well as to those who maintained that the public's right to know was a principle of such fundamental importance in a democracy that it ought to be included in the declaration of rights.

The second characteristic common to the four proposals is a statement of standards against which exceptions to the principle of openness is to be tested. A constitutional requirement that all meetings, hearings, proceedings, and records be open and accessible to the public was viewed as unworkable and potentially harmful to both private citizens and the government. Neither the open meetings nor the public records statutes provide for public accessibility at all times and under all circumstances. In fact, the commission was told that presently there are more than 150 exceptions to the public records law. While it was agreed that most of the legislatively created exceptions probably were appropriate, that circumstance was viewed as a happy coincidence owing to the legislature's historical acceptance of the sunshine concept. Rather than trust to accident and unbridled legislative discretion the principle of public access to public business, the commission elected to recommend the establishment of criteria by which the legislature and ultimately the courts could judge exceptions to open government.

Exceptions to the principle of openness may be provided only when the exception is "essential to accomplish overriding governmental purposes or to protect privacy interests."[340] These criteria—overriding governmental purposes and privacy interests—are broad statements of principle befitting constitutional provisions. No attempt was made by the commission to define or delimit them. However, that is not to suggest that they are without meaning or that they have no content. On the contrary, the phrase "essential to accomplish overriding governmental purposes" was derived from a series of United States Supreme Court decisions.[341] The phrase is an integral part of the so-called "compelling state interest" standard of judicial review. In order for legislation to pass constitutional muster under this standard of review, the government has the burden of demonstrating that the challenged legislation serves an overriding or compelling purpose and that the means selected are essen-

340. *See* Fla. C.R.C., Proposals 133, 137, 138, 215.

341. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Court has used "overriding," "compelling," "important," and "substantial" to characterize the state interest. However, it attaches "no particular significance to these variations in diction." *In re* Griffiths, 413 U.S. 717, 722 n.9 (1973).

tial or necessary to achieve that overriding or compelling purpose. Put another way, if less drastic means are available to the government through which it can achieve that interest of overriding importance, the means selected are not essential and the legislation fails to satisfy the standard.

The phrase "to protect privacy interests" has no similar derivative or federal constitutional history. However, when it is read in its context, "*essential* to protect privacy interests," the same analysis suggested above applies. The legislature may provide an exception to the public records provision regarding, for example, personal medical records. In order to sustain the legitimacy of that exception, the state would have the burden of proving that the exception granted by the legislature was essential to protect privacy interests and that no less drastic alternative was available to protect those interests.

While the decisions give some indication as to the meaning of "overriding governmental interests,"[342] the phrase "privacy interests" is potentially very broad indeed. It is certainly not coextensive with nor as limited as the newly recognized right to be let alone. Although the "right of privacy" language is in the title to the section and is used as a kind of shorthand for the right to be let alone, the word "privacy" nowhere appears in the language expressing the right. Certainly, the phrase "privacy interests" picks up whatever is protected by the right to be let alone. However, the phrase is broader in scope than is the right and is more comprehensive in its application since the right to be let alone pertains only to natural persons.[343] Beyond that, it will be for the courts to determine whether an asserted governmental interest is overriding, what privacy interests are, and whether, in either event, those interests could have been protected or accomplished by a means less drastic than closure to the public.

IV. CONCLUSION

At the organizational sessions in July, 1977, the members of the Constitution Revision Commission listened as high-ranking public figures—some of them members of the 1965 Commission—proffered advice on the proper approach to constitution-making.[344] The advice

342. *See, e.g.*, cases cited in note 341 *supra*.

343. The summary prepared by the revision commission staff notes that exemptions may be made when it "is essential to protect privacy interests of a *person or business* . . . ." Fla. C.R.C., Proposed Revision of the Florida Constitution 2 (1978) (emphasis added) (staff summaries of proposed changes).

344. The following persons addressed the commission: Governor Reubin Askew, Tran-

offered was not always consistent. Former Governor Millard Caldwell, for example, believing that the time was not right for writing a constitution, told the commission to "meet, organize, adjourn sine die and go home."[345] In contrast, the chairman of the previous commission, Chesterfield Smith, urged the commission to be expansive in its view of the task ahead and to consider revising the declaration of rights to "address and embrace the quality of life to the extent that Floridians have come . . . to understand to be their minimum entitlement."[346]

The commission's response in the following months, at least insofar as the declaration of rights was concerned, fell somewhere between Caldwell's entreaty to do nothing and Smith's call to do a great deal. Indeed, the proposed revision of article I could be viewed as embodying the spirit of Governor Reubin Askew's initial message to the commission:

> Do not hesitate to be bold. But also do not hesitate to be cautious. "Your greatest challenge will be to discern the difference between needed reform and necessary restraint—to preserve the strengths of the past even as you seek to perceive the spirit of the future."
>
> . . . Constitutional change is a continuing process, a continuing challenge—much like life itself.
>
> . . . [C]hange comes hard, . . . reform comes slowly, often much too slowly. But we . . . know that reforms which are really needed can be achieved in time—with the help of the people.[347]

Quite significantly, the commission did "preserve the strengths of the past" by reaffirming the freedoms already secured by the state constitution. As Askew also reminded the commissioners, however, "constitutional change is a continuing process." And recognition of new freedoms is an evolving process. The commission's rejection of proposals relating to the rights of the mentally handicapped, the

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script of Fla. C.R.C. proceedings 15 (July 6, 1977); Chief Justice Ben Overton, *id.* at 19; Senate President Lew Brantley, *id.* at 25; House Speaker Donald Tucker, *id.* at 26; 1965 Revision Commission Chairman Chesterfield Smith, *id.* at 31; Commissioner of Education Ralph Turlington, Transcript of Fla. C.R.C. proceedings 6 (July 7, 1977); former Governor Millard Caldwell, *id.* at 28; former commissioner and President of Florida AFL-CIO Charlie Harris, *id.* at 33; former Commissioner Warren Goodrich, *id.* at 41; former Commissioner Joe Jacobs, *id.* at 46.

345. Transcript of Fla. C.R.C. proceedings 28 (July 7, 1977) (remarks of Millard Caldwell).

346. *See* note 14 *supra* and accompanying text.

347. Transcript of Fla. C.R.C. proceedings 18 (July 6, 1977) (remarks of Governor Reubin Askew).

right to a clean and healthful environment, the right to jury trial in juvenile proceedings, and a standard of liability in defamation cases more favorable to the publisher could be viewed as a rejection of the principles encompassed by those proposals. With the possible exception of the right to a clean environment, however, these rejected proposals represented comparatively recent ideas making their initial bid for constitutional recognition.[348] If basic human rights are viewed as evolving over time, the commission's inaction in these areas could reflect a belief that the time simply has not yet arrived to incorporate these concepts into the state's basic charter.

In its assessment of the needs of the future, the commission was at once bold and cautious. It recommended that Florida become the fourth state to recognize, as a freestanding right, the right to be let alone[349] and only the second state to guarantee constitutionally public access to public records and public meetings.[350] However, neither notion is new for Floridians. The constitution was amended in 1968 to prohibit the "unreasonable interception of private communications";[351] access to public records was established as state policy in 1909;[352] and the open meetings statute was first enacted in 1967.[353]

Similarly, transactional immunity, while a new state constitutional right, has been required by statute in this state for the past seventy-three years.[354] In addition, the right to counsel in grand jury proceedings is recognized by ten states and has been endorsed by the House of Delegates of the American Bar Association.[355] Likewise, Florida's current constitutional provision on bail and the implementing court rules have been the subject of litigation in the federal courts for the past decade. The commission's recommendation on bail marks another step in the gradual expansion of the right to be at liberty pending adjudication of guilt.

It remains to be seen whether the people of Florida are willing to support the commission's boldly cautious perception of the future.

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348. The first major United States Supreme Court decision concerning the rights of persons involuntarily confined in mental institutions was in 1975. O'Conner v. Donaldson, 422 U.S. 563 (1975). Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) was only recently overruled by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Jury trial in juvenile proceedings was not rejected by the Supreme Court until 1971. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

349. *See Toward a Right of Privacy, supra* note 247, at 692.

350. *See* MONT. CONST. art. II, § 9.

351. FLA. CONST. art. I, § 12; *see Toward a Right of Privacy, supra* note 247, at 721-24.

352. Ch. 5942, 1909 Fla. Laws 132.

353. Ch. 67-356, 1967 Fla. Laws 1147 (current version at FLA. STAT. § 286.011 (1977)).

354. *See* text accompanying note 158 *supra; Florida Grand Jury: Abolition or Reform?, supra* note 155, at 859.

355. *See Florida Grand Jury, supra* note 155, at 850-51.

But if Governor Askew is correct, we can say with some assurance that the reforms which are really needed will be achieved in time—with the help of the people.