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One Small Word: Sexual Equality Through The State Constitution

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NOTES

ONE SMALL WORD: SEXUAL EQUALITY THROUGH THE STATE CONSTITUTION

RUTH L. GOKEL

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ONE SMALL WORD: SEXUAL EQUALITY THROUGH THE STATE CONSTITUTION

RUTH L. GOKEL

I. INTRODUCTION

A. *In General*

In one of its boldest initiatives, the Constitution Revision Commission has proposed adding one small word to the Florida Constitution—one small word which would prohibit sexual discrimination in Florida as a matter of state constitutional law. The word “sex” would be added to the second sentence of article I, section 2. That sentence would then read: “No person shall be deprived of any right because of race, religion, sex, or physical handicap.”¹ This proposal will be Revision No. 2 on the November ballot.

This concept—equality of rights, opportunities, and treatment for both sexes—is an idea whose time has come. Enormous progress has been made at both the state and federal levels through legislation and judicial decisions. But much remains to be done. The fourteenth amendment to the United States Constitution provides that “[n]o State shall . . . deny to any person . . . the equal protection of the laws.” But the United States Supreme Court has thus far refused to rule sex a suspect classification,² which would require a showing of a compelling state interest before discriminatory classifications would be upheld. As a result, discrimination against women as a class continues.

The value of clear policy statements like the proposed federal equal rights amendment and Revision No. 2 is inestimable. Women in increasing numbers are entering the work force, marrying later, delaying or refusing to have children, and generally asserting more

1. Fla. C.R.C., Rev. Fla. Const., Ballot Packages & Ballot Language, Revision No. 2 (May 11, 1978), 33 Fla. C.R.C. Jour. app. (May 5, 1978). For the complete text of art. I, § 2, see Appendix to this issue.

This provision, like the proposed federal equal rights amendment and the prohibitions against sex discrimination already in the constitutions of sixteen states, would be applicable equally to women and men. While women historically have undoubtedly been the more discriminated against, discrimination against men on the basis of sex does exist and would of course be prohibited.

2. “Suspect class” is a term of art in constitutional law. Once a group has been designated as suspect, any legislation impacting on that group is subject to strict judicial scrutiny. The more severe the scrutiny, the less likely that legislation will be upheld. In all the cases litigated to date in which the United States Supreme Court has applied strict scrutiny, the state has met the burden of showing a compelling state interest only once, in *Korematsu v. United States*, 323 U.S. 214 (1944). There, military necessity during wartime allowed the incarceration of Japanese-Americans during World War II.

See notes 56-60 and accompanying text *infra* for a discussion of the Court's refusal to hold sex a suspect classification.

control over their lives. Women have discovered that simultaneously running a house, raising a family, holding a job, and continuing an education—all the while balancing precariously on a pedestal—is very difficult. Men who have been expected to perform successfully at their jobs, serve as model fathers and husbands, act as master builders and gardeners, and generally know best, should be particularly sensitive to this situation.

This article is intended to be suggestive, not definitive. The national effort to make a clear policy statement prohibiting discrimination on the basis of sex will be examined briefly. Florida's failure to pass the federal equal rights amendment and some of the deceptive techniques used to influence votes on this issue will be assessed. The Constitution Revision Commission's decision to allow the people of Florida to vote directly on the issue of sexual equality rather than through their representatives in the state legislature will then be discussed. Finally, the article will survey current state law and assess the impact that adoption of Revision No. 2 by the electorate would have on life in Florida.

B. *The Federal Equal Rights Amendment*

The history of the federal equal rights amendment is well known. No detailed account will be given here of the long and bitter battle over what is now everywhere known as the ERA.³ This amendment had been proposed in virtually every session of Congress since 1923⁴ and was finally passed on March 22, 1972, by a Senate vote of eighty-four to eight.⁵ The amendment was then submitted to the states for ratification. To date, thirty-five states have ratified the amendment, three short of the necessary thirty-eight. Though the ratification effort is currently stalled, the swift action by most states⁶ indicates substantial support for the concept of equality represented by the amendment.

For the most part, opposition to the equal rights amendment has been based on lies, deceptions, distortions, and half-truths spread as gospel by well-organized and well-financed groups.⁷ The pattern

3. See generally B. BROWN, A. FREEDMAN, H. KATZ, & A. PRICE, *WOMEN'S RIGHTS AND THE LAW* 1-12 (1977) [hereinafter cited as *WOMEN'S RIGHTS*]; M. DELSMAN, *EVERYTHING YOU NEED TO KNOW ABOUT ERA* 1-57 (1975); Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871, 872-88 (1971) [hereinafter cited as *Yale Article*].

4. *Yale Article*, *supra* note 3, at 981-85.

5. M. DELSMAN, *supra* note 3, at 42-43.

6. Thirty states ratified the ERA in 1972 and 1973. *Id.* at 257.

7. The STOP ERA organization, headed by Phyllis Schlafly, is prototypical. The method of distortion can be seen in similar campaigns such as the anti-gun control lobby, the anti-

for use of the big lie against the ERA was set by Senator Sam Ervin during his Herculean, though fortunately fruitless, efforts to prevent passage of the amendment in Congress. His official depiction of a thoughtful, well-documented, and well-reasoned 1971 *Yale Law Journal* article arguing in favor of the ERA⁸ was, to put it politely, "a masterpiece of distortion."⁹ Ervin may not have written the attack, but he placed it in the *Congressional Record* and was "responsible . . . for disseminating it widely."¹⁰ Two examples suffice to indicate the misrepresentation. They are typical of the misrepresentation which has characterized the vicious campaign against the ERA. In his minority report, Senator Ervin quoted the *Yale Law Journal* article as follows: "'Male officers are provided a dependents' allowance based on their grade and the number of dependents . . . [The Equal Rights Amendment will recognize] the husband of a female officer . . . as a dependent.'"¹¹ The article actually read:

On the other hand the rules on dependents' allowances, in-service housing and medical benefits discriminate against women. *Male officers are provided* quarters on base, or a basic quarters allowance for their dependents if they live off base; male officers also receive a *dependents' allowance based on their grade and the number of dependents*, regardless of any money the officer's wife may earn. *The husband of a female officer*, however, is not recognized as a dependent unless he is physically or mentally incapable of supporting himself and is dependent on his wife for more than half of his support.¹²

Besides distorting the *Yale Law Journal* article by stringing together bits of sentences and leaving out the intervening words, Senator Ervin also distorted by deleting qualifying phrases. In the area of domestic relations, his version read: "'A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home.'"¹³ After the word "home," the article con-

abortion movement, and the ubiquitous anti-communist/big military coalition. Ms. Schlafly's early authorship of a small volume, *Strike from Space* (with Chester Ward, 1965), a vehemently militaristic handbook of Goldwater conservatives, provides an interesting counterpoint to her recent anti-ERA work.

8. Cited as *Yale Article*, *supra* note 3.

9. M. DELSMAN, *supra* note 3, at 41.

10. *Id.*

11. S. REP. NO. 689, 92d Cong., 2d Sess. 39 (1972).

12. *Yale Article*, *supra* note 3, at 978 (emphasis added).

13. S. REP. NO. 689, 92d Cong., 2d Sess. 41 (1972).

tinued: "unless the state also permitted the wife to sue for divorce if her husband unjustifiably refused to accompany her in a move."¹⁴ Ervin either forgot to mention these qualifying words—or deleted them deliberately. There are at least twenty-nine other such distortions in his minority report.¹⁵ Opponents of equal rights for both sexes have persistently adopted this pattern of deception pioneered by Senator Ervin. The clear implication is that these opponents will be impeded by the truth.

In Florida, the federal ERA has been considered and defeated in every legislative session since 1973. The full house has voted three times, passing the measure twice.¹⁶ The full senate has voted it down twice.¹⁷ In the 1978 session, action by a handful of committee members prevented a vote by either house.¹⁸ Thus, less than two dozen men have seen fit to thwart the majority will of nearly nine million Floridians.¹⁹ The Constitution Revision Commission has now given the people of Florida the chance to speak for themselves.

II. THE INTENT OF THE COMMISSION

The Florida Constitution currently provides that "[a]ll natural persons are equal before the law"²⁰ To make equality explicit for certain classes of natural persons, the basic rights section further

14. *Yale Article*, *supra* note 3, at 942.

15. For a painstaking comparison, see U.S. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, DEP'T OF LABOR, THE EQUAL RIGHTS AMENDMENT—SENATOR ERVIN'S MINORITY REPORT AND THE YALE LAW JOURNAL (1972). The author is indebted to the author of this comparison, Dr. Virginia J. Cyrus, for the two preceding examples.

16. Action in the house has been as follows: in 1972, passed by a vote of 84-3, FLA. H.R. JOUR. 904-05 (Reg. Sess. 1972); in 1973, failed to pass by a vote of 64-54, FLA. H.R. JOUR. 216-17 (Reg. Sess. 1973); in 1974, died in committee, FLA. H.R. JOUR. 135 (Reg. Sess. 1974); in 1975, passed by a vote of 61-58, FLA. H.R. JOUR. 109 (Reg. Sess. 1975); in 1976, died in committee, FLA. H.R. JOUR. 115-16 (Reg. Sess. 1976); and in 1977, died on the house calendar, FLA. H.R. JOUR. 117 (Reg. Sess. 1977).

17. Action in the senate has been as follows: in 1972, died on the senate calendar, FLA. S. JOUR. 655 (Reg. Sess. 1972); in 1973, killed in committee, FLA. S. JOUR. 70, 74 (Reg. Sess. 1973); in 1974, failed by a vote of 21-19, FLA. S. JOUR. 110 (Reg. Sess. 1974); in 1975, tabled by a vote of 19-18, FLA. S. JOUR. 161 (Reg. Sess. 1975); in 1976, died on the senate calendar, FLA. S. JOUR. 402 (Reg. Sess. 1976); and in 1977, failed by a vote of 21-19, FLA. S. JOUR. 143 (Reg. Sess. 1977).

18. In the 1978 session, Representative Elaine Gordon introduced three house bills and Senator Lori Wilson introduced four senate bills. Fla. SCR 3, SJR 4, SR 5, and SB 6 (1978) all died in the Rules Committee on June 2, 1978. Legislative Information Division, Joint Legislative Management Committee, Bill Action Report 1 (July 27, 1978). Fla. HR 1 (1978) died on the house calendar the same day. *Id.* at 2. Fla. HCR 2 and HJR 3 (1978) both died in the Committee on Health and Rehabilitative Services. *Id.*

19. A poll taken by Cambridge Survey Research for The Democratic National Committee just last year indicated that 62% of Floridians favored passage of the federal ERA. Survey released by Florida Senator Lori Wilson, Apr. 4, 1977, on file at *FSU Law Review*.

20. FLA. CONST. art. I, § 2.

provides that "[n]o person shall be deprived of any right because of race, religion or physical handicap." The issue of sex discrimination is not specifically addressed.²¹

The Constitution Revision Commission had several options. It could do nothing. It could add a "little ERA" as a new section. It could delete the second sentence naming particular classes. Or it could add sex to the existing list of specific categories.²² Recognizing that sexual discrimination exists in Florida, the commission chose to do something.

The debates clearly indicate the commission's intent to add a prohibition against sex discrimination and to let the people of Florida vote it up or down. On December 8, 1977, the commission considered Proposal No. 28, which would have added a third sentence to article I, section 2: "Equality of rights under the law shall not be denied or abridged by the state, counties, municipalities or other governmental units on account of sex."²³ Commissioner and Attorney General Robert Shevin, a longtime supporter of the ERA, then offered an amendment to strike this sentence and insert "sex" after "religion" in the second sentence of section 2.²⁴ He explained that his purpose was to change Proposal No. 28 to "make it identical to Proposal 27."²⁵

Commissioner William Birchfield then offered a substitute to Commissioner Shevin's amendment. He proposed to delete both the existing second sentence and the proposed third sentence.²⁶ He stated that the "intent of this change . . . is structural only. And it's not intended to deprive any natural person of equality before the law"²⁷ Birchfield said that the committee's intent would be to continue the protections based on race, religion, and physical handicap, and to add sex. "These rights," he insisted, "would still

21. *Id.* Arguably, the Florida Supreme Court has, however, adopted the "middle tier" standard of review for sex. See discussion of *In re Estate of Reed*, *infra* at notes 64-65 and accompanying text.

22. Proposal No. 186, introduced by Commissioners Dexter Douglass and Talbot "Sandy" D'Alemberte, would have added a new § 23 to art. I: "Equality of rights under the law shall not be denied or abridged on account of sex." Though temporarily passed on January 13, 1978, this proposal failed in favor of Proposal No. 28. The same was true of Commissioner Barkdull's Proposal No. 225, which would have deleted the second sentence in art. I, § 2—the sentence naming race, religion, and physical handicap.

Note that the commission "temporarily passed" those proposals which it did not want to deal with right away but also did not want to kill. It was essentially a way of deferring consideration of a political hot potato.

23. See Transcript of Fla. C.R.C. proceedings 134 (Dec. 8, 1977) (remarks of Don Reed).

24. *Id.* at 134-35. This eventually became the final version.

25. *Id.* at 135.

26. *Id.*

27. *Id.* at 136.

be constitutionally protected under this section."²⁸

The subsequent debate centered on the validity and usefulness of the commission's adoption of this declaration of intent. Commissioner Jan Platt asked Commissioner Ben Overton,²⁹ "[W]hat would be the legal implication of this declaration of intent?"³⁰ Commissioner Overton, then Chief Justice of the Florida Supreme Court, responded that "the courts do look at the legislative history to try to determine legislative intent where it's necessary to get a proper construction."³¹ Commissioner Dexter Douglass then wanted to know whether or not a statement of intent is binding on the court. Commissioner Overton responded that it was not.³²

Commissioner Freddie Groomes, one of five women on the commission, voiced the crucial concern, whether "some people . . . are going to believe that instead of bettering our status, that we may be moving back if, indeed, the last sentence in that article is removed?"³³ Commissioner Shevin noted that race and religion are federally protected and "probably if we didn't have them in the [Florida] constitution, they would still be amply protected. But I sure would hate to have to explain to eight and a half million Floridians why you took out the protection against discrimination on the basis of race or religion."³⁴

The other concern was honesty with the people. As Commissioner Don Reed put it, "[I]f you want to be fair with the people . . . , you will vote head-on on the question. Do you want to insert [sex] into this document or do you want to leave it out?"³⁵ Commissioner James Apthorp objected that "by . . . expanding this list . . . we invite a continuous process of revision"³⁶ Commissioner Nat Reed gave the obvious response: "[D]o you not think that this Commission would raise . . . the flag of fear, on the striking of the language 'race, religion'? We have come a long way in the past but the shadow of the memory is still present in many of our people's lives and minds."³⁷ Commissioner Yvonne Burkholz added, "It is very, very difficult to take away rights, ladies and gentlemen, and I

28. *Id.* at 137.

29. One of three judges on the commission.

30. Transcript of Fla. C.R.C. proceedings 144 (Dec. 8, 1977).

31. *Id.*

32. *Id.* at 147.

33. *Id.* at 150. Dr. Groomes has served as chairperson of the Governor's Commission on the Status of Women.

34. *Id.* at 160.

35. *Id.* at 152.

36. *Id.* at 163.

37. *Id.* at 166.

suggest that we think twice or three times or four times before we do that."³⁸

Commissioner Birchfield's proposal to delete the second sentence in article I, section 2, was defeated by a vote of twenty-four to ten.³⁹ The commission then adopted Proposal No. 28, to add "sex" to the second sentence, by a vote of twenty-four to nine.⁴⁰

On January 9, 1978, the commission reconsidered Proposal No. 28. Commissioner Jack Mathews was concerned with the possible consequences in the courts if the proposal were defeated at the polls.⁴¹ Commissioner Burkholz responded that she, too, had thought seriously about this possibility. But, she said,

[t]he issue of whether or not the people vote for it or against it should not be a consideration because if it is a consideration on this issue, it might very well be a proper consideration of every other issue that we determine to vote yes or no on. I think we need to deal with this issue on the merits.⁴²

On the merits, the commission decided that the statement that "all natural persons are equal before the law" was inadequate to prevent discrimination on the basis of sex. Noting that explicit prohibitions against discrimination on the basis of race, religion, or physical handicap have been found necessary, the commissioners reasoned that discrimination on the basis of sex should be prohibited as well as a matter of state constitutional law. The motion to reconsider Proposal No. 28 failed.⁴³

Between March 9 and May 5, some testing of the prevailing political climate appears to have taken place. At the commission's final debate on May 5, Commissioner Don Reed moved to delete the reference to sex in article I, section 2.⁴⁴ The debate began again. Commissioner Shevin once again strongly supported placing the issue before the people, saying, "I think it would be a terrible mistake and a terrible slap in the face of the women of Florida to now, at the last moment, be fearful of putting this issue on the ballot."⁴⁵

A supporter of equal rights for women, Commissioner Lois Harri-

38. *Id.* at 169.

39. *Id.* at 188.

40. *Id.* at 195.

41. 1 Transcript of Fla. C.R.C. proceedings 5 (Jan. 9, 1978).

42. *Id.* at 8.

43. *Id.* at 31. The vote was 25-11. And it failed again on March 9, 1978, by a vote of 22-11. 1 Transcript of Fla. C.R.C. proceedings 24 (Mar. 9, 1978).

44. Transcript of Fla. C.R.C. proceedings 32 (May 5, 1978).

45. *Id.* at 34.

son, opposed Shevin's motion to retain the sex discrimination proposal.⁴⁶ Her concern was emotionalism:

I have come to the reluctant conclusion . . . that Article I, Section 2, does not meet [the test of presenting issues clearly and without confusion to the voters]. The best evidence of this confusion has been in the last days since our last meeting.

The State UP and AP wire services and most of the State's press have reported headlines that we are proposing a state ERA or a straw ballot or a referendum for the national ERA. And this is not what we have done.⁴⁷

She pointed out that Revision No. 2 does not track the language of the federal ERA.⁴⁸ Whether adopted or rejected, a vote on this proposed revision to the Florida Constitution, she concluded, could not properly be considered a vote on the federal ERA.⁴⁹ For these reasons, she urged deletion, saying, "Heated emotions can overrule clear thinking and cloud decisions."⁵⁰

Commissioner Burkholz had also reassessed the political situation and changed her position. She agreed with Commissioner Harrison that the proposal should be deleted:⁵¹

This issue is incapable of being treated not emotionally. It is incapable of being treated logically, even by logical women and men. I fear . . . that despite our protestations that this is not an equal rights amendment, that as Commissioner Harrison has pointed out, the press and the people will deal with it this way.⁵²

But Commissioner Groomes disagreed. She addressed the issue of fear: "I am not willing to sacrifice what we perhaps can do in Florida for fear. I am not afraid, and I hope that the other Commissioners here will not back off on sheer fear."⁵³

Commissioner Shevin concluded the debate:

46. Lois Harrison is president of the League of Women Voters of Florida.

47. Transcript of Fla. C.R.C. proceedings 35 (May 5, 1978).

48. *Id.*

49. *Id.* at 36.

50. *Id.*

51. Contrary to her statement on Jan. 9, 1978. Note, however, that both Commissioners Burkholz and Harrison are strong supporters of equal rights for women and men and that both will be working hard to secure the adoption of Revision No. 2. Their overriding concern in May was that opponents of equal rights would succeed in confusing adoption of an amendment to the Florida Constitution with the adoption of an amendment to the United States Constitution. Conversation with Yvonne Burkholz (July 13, 1978).

52. Transcript of Fla. C.R.C. proceedings 44 (May 5, 1978) (remarks of Yvonne Burkholz).

53. *Id.* at 38-39 (remarks of Freddie Groomes).

[I]t's really inconceivable to me that the people of Florida, the same people that have already prohibited discrimination on the basis of race, on the basis of religion, and very recently on the basis of physically handicapped [*sic*], aren't going to be able to grasp this issue.

They'll be able to grasp this issue . . . I believe very firmly that they will also prohibit discrimination on the basis of sex. We are not talking about sexual preference. We're talking about discrimination on the basis of whether somebody is a male or a female, a man or a woman, in job opportunities, in all opportunities that exist.⁵⁴

A roll call vote was taken, and Commissioner Shevin's proposal to retain the prohibition against sex discrimination passed by a vote of 21 to 15.⁵⁵ Proposal No. 28 will appear as Revision No. 2 on the November ballot, to be voted up or down separately from the many other proposed changes. The debates clearly indicate that a majority of the commissioners want an end to discrimination on the basis of sex. These commissioners also favor passage of the federal ERA. Though both address sex discrimination, the federal amendment and the state amendment are not identical proposals and should not be considered as such.

Adoption of Revision No. 2 would change the Florida Constitution, not the Federal Constitution. It would affect state action in Florida, not federal action in Washington. Those who oppose adoption of the federal ERA for fear of further federal intrusion into state affairs cannot oppose Revision No. 2 on that basis. Those who oppose the federal ERA and, by extension, oppose Revision No. 2 out of fear that disastrous social consequences would swiftly and inevitably follow are urged to consider carefully the following survey of the revision's potential impact on Florida law. Those who oppose any public policy statement of equality between the sexes for fear of a psychological loss of status are urged to seek professional counseling.

III. THE EFFECT ON FLORIDA LAW

This section of the note is, like Gaul, divided into three parts. The first addresses the question of the level of judicial scrutiny which would be afforded Revision No. 2 if adopted. The second addresses the tiresome, scare-tactic arguments against the commission proposal which will inevitably be raised by the ignorant and by those

54. *Id.* at 50.

55. 33 Fla. C.R.C. Jour. 584 (May 5, 1978).

who know better but choose to deceive. This part is called *The False Issues*. The third part concerns *The Real Issues*, and focuses on the pertinent laws and the changes which may be required if Revision No. 2 is adopted.

A. Judicial Scrutiny

Commissioners Harrison, Groomes, and Burkholz are probably correct in their feeling that Revision No. 2 will be perceived by the voters as "an equal rights amendment." They may also be correct in their assertion that Revision No. 2 is not such an amendment. None of the commissioners followed this statement during debate with an explanation, but some possible explanations may be suggested.

First, this assertion was not contradicted during debate by those commissioners opposed to this revision. Second, Proposal No. 186, essentially tracking the language of the federal amendment, was not adopted. Third, the "strict scrutiny/compelling state interest" level of judicial review has not been applied consistently in those states which have provisions similar to the federal ERA or provisions similar to Revision No. 2. All this supports the conclusion that the commission proposal is indeed something which is somehow different from the ERA.

But whether it is different, and how it might lead to different results, is altogether unclear. In the face of a barren record, further speculation would be fruitless. For the balance of this article, Revision No. 2 will be treated as essentially similar to an equal rights amendment. A vote in favor of Revision No. 2 will be a vote against discrimination on the basis of sex. One may justifiably expect that a person casting a positive vote would assume that the same sort of results would flow from adoption of Revision No. 2 as would flow from adoption of the federal ERA.

The United States Supreme Court is of the opinion that upon adoption of the federal ERA, sex would join race, alienage, and religion as a "suspect" classification requiring strict judicial scrutiny and a showing of a compelling state interest before a sex-based classification would be upheld. In 1973, in *Frontiero v. Richardson*, four justices agreed that sex is a suspect classification.⁵⁶ Though

56. 411 U.S. 677, 682 (1973) (Brennan, Douglas, White, and Marshall).

In this case, a married woman Air Force officer challenged the Air Force's dependency regulations which, solely for administrative convenience, provided that spouses of male service members were automatically dependent but that spouses of female service members had to prove they were dependent for over one-half of their support. The Court found "an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 679.

concurring in the judgment, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, did not agree that sex was suspect—yet. Instead, they preferred to await adoption of the federal ERA.⁵⁷ They are still waiting. Thus, though Justice Douglas is no longer on the Court, five remaining justices are in agreement on what would happen in the courts after adoption of the federal ERA.

In the meantime, principles of constitutional law mandate that Florida must meet the current United States Supreme Court standard regarding sex-based classifications, a standard established in 1976 in *Craig v. Boren*.⁵⁸ While not adopting strict scrutiny, the level of review employed by the Court in *Craig* is higher than the minimal scrutiny/rational basis test. The Court held that “classifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives.”⁵⁹ This “middle-tier” scrutiny is the minimum required of Florida courts.⁶⁰

Guidance may also be found in the experiences of those states which already prohibit sex discrimination as a matter of state constitutional law. If the voters accept the commission’s recommendation, Florida will join sixteen other states which have prohibitions against sex discrimination in their constitutions.⁶¹ With the exceptions of Utah and Wyoming, all these provisions were adopted in the 1970’s.⁶² A survey of the cases indicates that courts see these provisions as requiring sexual equality. Almost always, the appropriate

57. *Id.* at 692.

58. 429 U.S. 190 (1976).

In this case, a male between 18 and 21 challenged the constitutionality of an Oklahoma statute allowing females to purchase 3.2% beer at age 18, but allowing males to purchase such beer only after reaching 21. The Court found that the state’s statistical evidence of drunken driving on the part of young males was not sufficient to justify this gender-based classification.

59. *Id.* at 197 (emphasis added).

60. For a thoughtful discussion of suspect classifications, see Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462 (1977).

61. Of these, half specifically prohibit discrimination on the basis of sex. COLO. CONST. art. II, § 29 (adopted 1972); HAWAII CONST. art. I, § 21 (adopted 1972); ILL. CONST. art. I, § 18 (adopted 1971); MD. CONST. Declaration of Rights, art. 46 (adopted 1972); N.M. CONST. art. II, § 18 (adopted 1973); PA. CONST. art. I, § 28 (adopted 1971); UTAH CONST. art. IV, § 1 (adopted 1896); WASH. CONST. art. XXXI, § 1 (adopted 1972).

In the other eight, the wording is more like that of the equal protection clause of the fourteenth amendment to the Federal Constitution. ALASKA CONST. art. I, § 3 (adopted 1972); CONN. CONST. art. I, § 20 (adopted 1974); MASS. CONST. art. I, pt. 1st (adopted 1976); MONT. CONST. art. II, § 4 (adopted 1973); N.H. CONST. pt. 1st, art. II (adopted 1974); TEX. CONST. art. I, § 3a (adopted 1972); VA. CONST. art. I, § 11 (adopted 1971); WYO. CONST. art. I, §§ 2-3, art. 6, § 1 (adopted 1890). For a convenient compilation of these provisions, see U.S. EMPLOYMENT STANDARDS ADMINISTRATION, DEP’T OF LABOR, STATE EQUAL RIGHTS AMENDMENTS (1976).

62. This summary of the experience so far under state prohibitions against sex discrimination is drawn generally from WOMEN’S RIGHTS, *supra* note 3, at 19-36.

standard of review is said to be that of strict scrutiny/compelling state interest. This has been so regardless of the way in which the particular state provision is worded.

During the 1970's the Florida Supreme Court has several times addressed the issue of sex-based classifications.⁶³ On the whole, such classifications have been struck. In a recent case, *In re Estate of Reed*,⁶⁴ the Florida Supreme Court, in a 6 to 1 decision, arguably adopted the *Craig v. Boren* standard. The court stated:

Under the United States Constitution a sexually discriminatory law denies equal protection unless a fair and substantial relationship to a legitimate governmental objective is demonstrated. See *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). . . . For the same reasons the family allowance statute violates the Florida Constitution's equal protection clause, it violates the Fourteenth Amendment to the United States Constitution.⁶⁵

Thus, even without the stimulus of Revision No. 2, the Florida Supreme Court seems to be moving in the appropriate direction.

In anticipation of the next section, it must be noted that there are two recognized exceptions to the generally absolute prohibition against classification on the basis of sex.⁶⁶ These are the exceptions based on the constitutional right of privacy and on unique physical characteristics.⁶⁷ These were enumerated in the 1971 *Yale Law Journal* article and were incorporated as part of the legislative his-

63. The cases will be addressed individually in the appropriate following sections.

64. 354 So. 2d 864 (Fla. 1978). Justice England dissented. *Reed* involved an equal protection challenge to Florida's prior family allowance statute which provided a family allowance during probate proceedings to a needy widow of a decedent but not to a needy widower. The court found that the sex-based classification was "irrational" since there was "no reasonable relation between the classification by sex and the statute's purpose." *Id.* at 865. The statute has since been made sex-neutral. Act of May 31, 1974, ch. 74-106, § 1, 1974 Fla. Laws 212 (codified as FLA. STAT. § 732.403 (1977)).

65. 354 So. 2d at 865-66 (citations omitted) (emphasis added).

66. There are three, if one agrees that a showing of a compelling state interest is possible.

67. *Griswold v. Connecticut*, 381 U.S. 479 (1965) is the leading case on privacy. Note that the Constitution Revision Commission has proposed the addition of an explicit right to privacy to the Florida Constitution. Proposed art. I, § 23 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); see Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, *supra* this issue; Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631 (1977).

A "unique physical characteristic" means "unique" to the gender. Thus, a law may make a sex-based classification if the other sex cannot be affected by it. The usual examples are laws relating to wet nurses and sperm donors. *Yale Article*, *supra* note 3, at 893. There are not very many possibilities. Laws based on "average" differences—that women on the average are weaker than men—do not come within this exception. *Id.*

tory of the federal ERA.⁶⁸ As such, they may be used as persuasive authority for Florida courts interpreting a similar provision.

B. *The False Issues*

The false issues addressed here are those most often raised by opponents of equal treatment for both sexes. Categorical statements often are made about the effect of an equal rights amendment or a similar measure in an effort to induce an emotional response from the listener and to hide the real issues by preventing informed discussion. This tactic, though quite common, is nevertheless reprehensible because it corrupts the democratic process. An uninformed citizenry cannot make rational decisions and choices. A citizenry deliberately kept in ignorance and inflamed by lies shames the manipulators and is a detriment to us all.

The false issues most often encountered are, in alphabetical order, bathrooms, combat, and homosexual marriages.

1. *Bathrooms*

The purpose of a prohibition against sex discrimination is to prohibit discrimination on the basis of sex. Historically, women—because of their sex—have been discriminated against in a number of areas and a number of ways. Wages and salaries? Yes. Hiring practices? Yes. Admission into professional schools? Yes. Extension of credit? Yes. Bathrooms? No.

No one with an intelligence brighter than that of a night light can possibly believe that adoption of Revision No. 2 will *require* women and men to share the same toilet facilities, locker rooms, or sleeping quarters. Undoubtedly, if the voters approve Revision No. 2, some litigious crackpot with more money than brains will bring a suit alleging a constitutional right to use the ladies' lounge. His suit will provide employment for attorneys and amusement for the press. He will lose, however, and the basis for the decision will be as follows.

In 1965, the United States Supreme Court, in an historic decision, *Griswold v. Connecticut*, explicitly recognized a constitutional right to privacy.⁶⁹ This decision involved the use of contraceptives by married couples in the privacy of their own homes. In 1972, in *Eisenstadt v. Baird*, the Court extended the right to receive contraceptive information to unmarried persons.⁷⁰ And then, in 1973, in

68. See S. REP. NO. 689, 92d Cong., 2d Sess. 12 (1972); *Yale Article*, *supra* note 3, at 900-02 (for privacy), and 893-96 (for unique characteristics).

69. 381 U.S. 479 (1965).

70. 405 U.S. 438 (1972).

*Roe v. Wade*⁷¹ and *Doe v. Bolton*,⁷² the Supreme Court held that the right to privacy protected a woman in the making of an abortion decision. The Court has thus explicitly—and repeatedly—recognized a right of privacy in regard to personal bodily functions.

The authors of the carefully reasoned 1971 *Yale Law Journal* article expressly recognized this right to privacy as a major qualification to the mandates of the equal rights amendment.⁷³ This recognition was adopted in the majority report on the proposed federal amendment. “[The right to privacy] would likewise permit a separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions.”⁷⁴ This federal constitutional right is applicable to all citizens.

Even if the right to privacy were not recognized as an exception to or qualification of prohibitions against sex discrimination, the outcome would be the same. Absent an exception, a bathroom challenge would present a conflict between two constitutional rights: the right to privacy and the right to be free from discrimination on the basis of sex. In such a situation, the Court would apply the time-honored judicial maneuver known as “balancing the interests involved.”⁷⁵ Given that those concerned with prohibiting sex discrimination have historically been unconcerned with bathrooms, and that the social mores in America today strongly favor privacy in the performance of personal bodily functions, the Court would undoubtedly decide that privacy prevails.

So much for bathrooms.

2. *Combat*

The issue of women in combat presents somewhat different considerations. The most important point to note at the outset, however, is that adoption of Revision No. 2 would have *absolutely no effect whatsoever* on whether, if, or when women become part of a combat unit. The reason for this is simple. The State of Florida has no army.

The United States Congress decides whether to allow American women to fight. Congress makes the rules for the national armed forces, and Congress decided in 1948 to allow the Secretary of the

71. 410 U.S. 113 (1973).

72. 410 U.S. 179 (1973).

73. *Yale Article*, *supra* note 3, at 900-02. The other qualification was on the basis of unique physical characteristics.

74. S. REP. No. 689, 92d Cong., 2d Sess. 12 (1972).

75. This is known in non-legal circles as the use of common sense.

Army to assign women certain kinds of military duty and he has prohibited women from joining combat units.⁷⁶ In all other respects, women and men are to be treated the same. The rules for the Army, Navy, Air Force, and Marines are equally applicable to the Florida National Guard, which is, for combat purposes, a *national* and not a *Florida* military force.

Ratification of the federal equal rights amendment would probably eventually require Congress to allow women to join combat units if they desire *and* if they met the requisite physical qualifications. The federal ERA would not *require* women to fight. Aptitude for combat involves particular physical and psychological qualities. Some women are suited, some are not. Some men are suited, some are not. Wounds are just as painful for men as they are for women, and death is just as final. Prohibiting a woman from making this choice solely on the basis of sex would be impermissible under the federal equal rights amendment.⁷⁷ But sex would not be the only consideration in making the choice.

However, political realities would dictate when Congress would get around to lifting the prohibition against women in combat. Certainly no congressman hoping for another term would vote for such a measure in the face of massive public sentiment to the contrary, regardless of a constitutional amendment. Moreover, once the prohibition was lifted, no woman would be *forced* to join a combat unit.⁷⁸ And that is the whole point of prohibitions against discrimination on the basis of sex: to remove artificial, irrational, and unfounded barriers to the exercise of free choice to run one's own life.

The only purely Florida force to which this provision might be applicable is the "militia" referred to in article X, section 2 of the Florida Constitution. This section, however, is already sex-neutral. It reads: "The militia shall be composed of all ablebodied *inhabitants* of the state who are or have declared their intention to

76. Women's Armed Services Integration Act of 1948, ch. 449, § 104(g), 62 Stat. 359 (1948) (current version at 10 U.S.C. § 3580 (1970)). Army regulations today still proscribe women from filling those Military Occupational Specialties "associated with combat, close combat support, unusual hazards or strenuous physical demands." Blumenson, *The Army's Women Move Out: A Status Report*, ARMY, Feb. 1978, at 18. Of the over 300 different duty assignments in the Army, only 16 are currently closed to women. *Id.* See generally U.S. GOV'T PRINTING OFFICE, ARMY OCCUPATIONAL HANDBOOK (1976).

The Navy and Marines are governed by 10 U.S.C. § 6015 (1970) ("women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports"). The Air Force prohibition is found at *id.* § 8549 ("Female members of the Air Force . . . may not be assigned to duty in aircraft engaged in combat missions.").

77. *Yale Article*, *supra* note 3, at 976-77.

78. Note that the draft has been abolished, replaced by all-volunteer forces.

become citizens of the United States"⁷⁹ The word "inhabitants" does not distinguish between males and females. This should cause no alarm among the stay-at homes, however. The possibility that the people of Florida will be called on to defend the state in the absence of any national forces is very remote.

3. *Homosexual Marriages*

The assertion that passage of a prohibition against sex discrimination would lead to homosexual marriages is equally false. An equal rights provision requires that both sexes be treated equally. There would be a violation if, for example, males were allowed to marry each other but females were not. There is no violation, however, if members of *both* sexes are prohibited from marrying members of their own sex. This is equal treatment.

There are no reported decisions in Florida to which a Florida court might turn for guidance. There are, however, three major reported decisions from other states addressing this issue.⁸⁰ In the earliest, *Baker v. Nelson* in 1971, the Minnesota Supreme Court found that a prohibition against marriages between persons of the same sex does not offend the equal protection clause of the fourteenth amendment.⁸¹ The court had to resort to *Webster's Dictionary*, the book of *Genesis*, and some statutory construction to define marriage "as a union of man and woman,"⁸² because the Minnesota statute at issue did not specify male and female.

This case was followed in 1973 by *Jones v. Hallahan*.⁸³ There again, the Kentucky statute did not specifically prohibit same-sex marriages. Again using *Webster's*, as well as other dictionaries, the court defined marriage "according to common usage"⁸⁴ and decided that while the statutes did not prevent appellants from marrying, the appellants were "incapab[le] of entering into a marriage as that term is defined. A license to enter into a status or a relationship which the parties are incapable of achieving is a nullity."⁸⁵

79. FLA. CONST. art. X, § 2(a) (emphasis added). Note that other than renumbering this section because of the proposed deletion of the current § 1, the Constitution Revision Commission has made no changes in this section.

80. A fourth case often mentioned is *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971). The court reached the same conclusion as in the three cases discussed in the text below, but this case also involved the somewhat more complicated issue of the appropriate sex to assign to a person who has undergone a sex-change operation. See generally Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1968).

81. 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

82. *Id.* at 186.

83. 501 S.W.2d 588 (Ky. 1973).

84. *Id.* at 589.

85. *Id.*

The most significant case for our purposes is *Singer v. Hara*⁸⁶ from the State of Washington, in which the court addressed the issue of same-sex marriages by applying that state's equal rights amendment.⁸⁷ In Washington, as in Minnesota and Kentucky, the particular statute mentioned "persons" and not males and females.⁸⁸ Even so, the court construed the statute to apply only to males and females.⁸⁹ The court then found that the King County Auditor had properly refused to issue a marriage license to the two male appellants. The marriage license was not refused because of an impermissible sexual classification but rather because marriage is a relationship "which may be entered into only by two persons who are members of the opposite sex."⁹⁰ The court then inquired into the intent of the citizens who ratified the state's ERA:

The primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women "on account of sex."

. . . .
 . . . The ERA does not create any new rights or responsibilities . . . ; rather, it merely insures that existing rights and responsibilities . . . which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex.⁹¹

And finally, and most importantly, "we hold the ERA does not require the state to authorize same-sex marriage."⁹²

Decisions from other states are not, of course, binding on Florida courts. But the consistency of these opinions and the fact that one decision was based squarely on a state equal rights amendment make these cases persuasive authority. In addition, there is authority from within Florida which leads to the same conclusion.

Any decision on this subject will be easier in Florida than in the other three states because section 741.04(1), Florida Statutes, specifically requires that in a marriage, "one party is a male and the other party is a female."⁹³ Attorney General Shevin addressed this question in a 1976 opinion.⁹⁴ He reviewed the cases already men-

86. 522 P.2d 1187 (Wash. Ct. App. 1974).

87. WASH. CONST. art. XXXI, § 1: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Note that neither Minnesota nor Kentucky has an equal rights amendment or a prohibition of sex discrimination.

88. 522 P.2d at 1189.

89. *Id.*

90. *Id.* at 1192.

91. *Id.* at 1194.

92. *Id.* at 1195.

93. (1977).

94. [1976] FLA. ATT'Y GEN. ANN. REP. 53.

tioned and held that marriage licenses are not required to be issued to persons of the same sex.⁹⁵ It should not be forgotten either that a Florida court will look at the intent of the Constitution Revision Commission in proposing a prohibition against sex discrimination. Shevin, in his capacity as a member of the commission, proposed changing the word "sex" to "gender" to "eliminate any question on sexual preference."⁹⁶ Though his amendment failed, the commissioners were in agreement with the motive behind it.⁹⁷

Passage of Revision No. 2 would not lead to homosexual marriages in Florida. Those who raise this false issue either do not know the law or have deliberately chosen to ignore it. "Intellectually dishonest" is the kindest adjective to apply to such people.

C. *The Real Issues*

Having dealt with the scare tactics, it is time to consider the serious question of what effects the adoption of Revision No. 2 would have on Florida law.⁹⁸ The following survey addresses sex-sensitive areas of substantive law: domestic relations, labor laws, criminal laws, exemptions, specific statutory references to women, civil rights, and disparate impact. Space and time constraints do not permit an exhaustive study of these areas or consideration of other areas not mentioned at all. However, the discussion which follows will give a fairly accurate picture of the existing state of the law, potential problems already met, and the areas where changes will be required.

1. *Domestic Relations*

Within the broad area of domestic relations, five specific topics must be discussed: age, names, consortium, spousal support on divorce, and child custody and support on divorce.

Age. Laws governing the ages at which men and women are considered adults and at which men and women may marry have traditionally been sex-based. They were based on outdated premises:

95. *Id.*

96. Transcript of Fla. C.R.C. proceedings 190 (Dec. 8, 1977) (remarks of Robert Shevin).

97. *Id.* at 189-93 (especially remarks of Lois Harrison and Edward Annis).

98. For the following analysis, the author is indebted to FLORIDA SENATE JUDICIARY COMMITTEE, FLORIDA STATUTES POTENTIALLY AFFECTED BY THE EQUAL RIGHTS AMENDMENT (1973) (on file at Florida Legislative Library, The Capitol, Tallahassee, Florida); to an update prepared in 1975 by the Organization of Women Law Students at the Florida State University College of Law, in cooperation with the Big Bend Coalition to Support the Equal Rights Amendment, Florida Statutes Potentially Affected by the Equal Rights Amendment (1975) (on file with the *FSU Law Review*); and to WOMEN'S RIGHTS, *supra* note 3.

that women will marry earlier than men and not work outside the home and that men especially need education beyond high school to carry the primary responsibility for support of a family.

Section 743.07 of the Florida Statutes sets the age of majority for "all persons" at "18 years of age or older."⁹⁹ Florida law is thus in conformity with the proposed revision.¹⁰⁰

Florida law is also in conformity with Revision No. 2 on the ages at which men and women may marry. Until recently section 741.06 of the Florida Statutes provided for discretionary issuance of a license "to any male or female under the age of 18 years" on sworn application that they are parents or expectant parents.¹⁰¹ The statute further prohibited the issuance of a license to marry "to any male under the age of 18 years, [or] to any female under the age of 16 years, with or without the consent of their parents except as hereinabove provided."¹⁰² By implication, a woman, but not a man, between the ages of sixteen and eighteen could marry with parental consent. This section was repealed effective October 1, 1977.¹⁰³ The applicable provisions are now set in section 741.04(1), which eliminates the age differential between men and women and also eliminates the judge's (or clerk's) discretion. Now a license "shall issue" upon proof that the parties are over eighteen. If either of the parties is under eighteen, the license "shall not issue" without the parents' written consent.¹⁰⁴ Passage of Revision No. 2 would therefore not require any implementing legislation in this respect.

Names. Though women almost always adopt their husbands' surnames in marriage, this practice is a matter of custom, not law. At common law, a person may adopt any name by consistent usage if adopted in good faith and without intent to deceive or defraud.¹⁰⁵ Court proceedings are not required. In 1976, in *Davis v. Roos*, the First District Court of Appeal affirmed this interpretation of the common law, contrary to some misinterpretations in other jurisdic-

99. (1977).

100. And in fact all states have set the age of majority uniformly at 18, following the United States Supreme Court's decision in *Stanton v. Stanton*, 421 U.S. 7 (1975) (finding that Utah's statutory establishment of different ages of majority for males and females violated equal protection).

101. (1977).

102. *Id.*

103. Act of May 10, 1977, ch. 77-19, § 2, 1977 Fla. Laws 28.

104. FLA. STAT. (1977).

105. MacDougall, *Married Women's Common Law Right to Their Own Surnames*, WOMEN'S RIGHTS L. REP., Fall/Winter 1973, at 4; see *Stuart v. Board of Supervisors of Elections*, 295 A.2d 223, 227 (Md. 1972) (extensive discussion of the common law of names); *State ex rel. Krupa v. Green*, 177 N.E.2d 616 (Ohio Ct. App. 1961) (a leading early decision); THE CENTER FOR A WOMAN'S OWN NAME, BOOKLET FOR WOMEN WHO WISH TO DETERMINE THEIR OWN NAMES AFTER MARRIAGE (1974).

tions.¹⁰⁶ The court held that the plaintiff in *Davis* was therefore entitled to have a driver's license issued in her maiden name.

Two years earlier, in *Marshall v. State*, the same court had upheld a married woman's right to establish her birth name through legal process "even though she continued her marriage with her husband."¹⁰⁷ The circuit judge in Leon County had denied her petition as "'misleading and . . . contrary to public policy.'"¹⁰⁸ In reversing, the court of appeal noted that the Florida Statutes did not contain any prohibition against a married woman changing her name.¹⁰⁹

Section 68.07 of the Florida Statutes provides for a change of name in a court proceeding.¹¹⁰ This provision is sex-neutral and does not require spousal consent. Further, the statute does not require a spouse's name to change automatically if the other spouse changes his or her name. Rather, the spouse and any minor children "may" join in the other spouse's petition.¹¹¹ Where one parent petitions for a name change for a minor child, the other parent must be notified. But consent is not required.¹¹²

Section 68.07(7) provides, however, that these name change procedures do not apply to dissolution of marriage or to adoption. On divorce, the wife may have a change of name entered as part of the final judgment. The procedure appears to be automatic.¹¹³ By judicial rule, a child's name will be changed to his or her mother's birth name during a dissolution of marriage proceeding only if the court finds it to be in the child's best interest.¹¹⁴

Consortium. At common law, the husband could sue for loss of his wife's companionship, affection, and sexual services. The wife had no such corresponding right for loss of her husband's services. This resulted from the legal fiction that upon marriage the two became one—and that one was the husband.¹¹⁵

106. 326 So. 2d 226, 228 (Fla. 1st Dist. Ct. App. 1976).

107. 301 So. 2d 477, 477 (Fla. 1st Dist. Ct. App. 1974).

108. *Id.*

109. *Id.* at 478, referring to FLA. STAT. § 62.031, which has been transferred to § 68.07 (1977).

110. (1977).

111. *Id.* § 68.07(5).

112. *Id.* § 68.07(6).

113. See THE FLORIDA BAR, CONTINUING LEGAL EDUCATION, FLORIDA DISSOLUTION OF MARRIAGE § 4.105, at 119 (1976).

114. *Lazow v. Lazow*, 147 So. 2d 12, 14 (Fla. 3d Dist. Ct. App. 1962) ("To change the name of a minor son so that he no longer bears his father's name is a serious matter, and such action may be taken only where the record affirmatively shows that such change is required for the welfare of the minor.")

115. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 124-125, at 873-74, 889-94 (4th ed. 1971).

Since the decision in 1950 in *Hitaffer v. Argonne Co.*,¹¹⁶ however, most states have recognized a cause of action for married women on loss of consortium. Florida has been among this majority since the Florida Supreme Court's 1971 decision in *Gates v. Foley*.¹¹⁷ The court noted in that case that the "unity concept of marriage has in a large part given way to the partner concept whereby a married woman stands as an equal to her husband in the eyes of the law."¹¹⁸ In receding from the earlier leading case of *Ripley v. Ewell*,¹¹⁹ the court found that this sex-based classification "discriminates unreasonably and arbitrarily against women and must be abolished."¹²⁰

Spousal Support on Divorce. In 1971, Florida adopted what is generally referred to as "no-fault" divorce.¹²¹ The traditional grounds for divorce were abolished and replaced by the requirement that (1) the marriage be irretrievably broken or (2) one of the parties be mentally incompetent.¹²²

At the same time, all references in the statutes to "husband" and "wife" were replaced with "spouse" or "party." Section 61.08 of the Florida Statutes now provides that "the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature."¹²³ The legislature thus recognized that there are times when neither spouse will need alimony and that occasionally the husband might be in more need than the wife.

Section 61.08 further provides that "the court may consider *any factor necessary* to do equity and justice between the parties."¹²⁴ This discretion is overbroad because it permits a judge to act on the stereotypes of the past.

The 1978 legislature adopted guidelines to preserve the sex-neutral intent of chapter 61, amending section 61.08 to provide fac-

116. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

117. 247 So. 2d 40 (Fla. 1971).

118. *Id.* at 44.

119. 61 So. 2d 420 (Fla. 1952).

120. 247 So. 2d at 45.

121. Act of June 22, 1971, ch. 71-241, 1971 Fla. Laws 1319 (current version at FLA. STAT. § 61.001-.20 (1977)).

122. FLA. STAT. § 61.052 (1977). Compare ch. 67-254, § 16, 1967 Fla. Laws 560, 607, setting out the traditional grounds.

123. (1977). The distinctions between and reasons for rehabilitative and permanent alimony may be explored in the following cases: *rehabilitative alimony*—*Sisson v. Sisson*, 311 So. 2d 799 (Fla. 1st Dist. Ct. App. 1975), *quashed*, 336 So. 2d 1129 (Fla. 1976); *Reback v. Reback*, 296 So. 2d 541 (Fla. 3d Dist. Ct. App. 1974), *cert. denied*, 312 So. 2d 737 (Fla. 1975); *Mertz v. Mertz*, 287 So. 2d 691 (Fla. 2d Dist. Ct. App. 1973); *permanent alimony*—*Caracristi v. Caracristi*, 324 So. 2d 634 (Fla. 2d Dist. Ct. App. 1976); *Brown v. Brown*, 300 So. 2d 719 (Fla. 1st Dist. Ct. App. 1974), *cert. dismissed*, 307 So. 2d 186 (Fla. 1975); *Schultz v. Schultz*, 290 So. 2d 146 (Fla. 2d Dist. Ct. App. 1974).

124. FLA. STAT. § 61.08(2) (1977) (*emphasis added*).

tors which the court should consider in determining a proper award of alimony.¹²⁵ These factors include (but are not limited to):

- (a) The standard of living established during the marriage.
- (b) The duration of the marriage.
- (c) The age and the physical and emotional condition of both parties.
- (d) The financial resources of each party.
- (e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.
- (f) The contribution of each party to the marriage, including but not limited to services rendered in homemaking, child care, education and career building of the other party.¹²⁶

Though other factors might have been included, the legislature has taken a major step toward furthering the goal of a divorce procedure equitable to both parties. This clear statement of public policy is most welcome. It would not be endangered in any way by approval of Revision No. 2 at the polls. In fact, such approval might well be viewed as an endorsement of the legislative desire to treat the sexes equally in matters of spousal support following divorce.

Child Custody and Support on Divorce. By statute, Florida has adopted the "best interests of the child" criterion for determining custody.¹²⁷ By judicial gloss, however, Florida has preserved the "tender years doctrine" favoring awarding young children to the mother.¹²⁸ Adoption of Revision No. 2 would not permit such a presumption. The factors listed in section 61.13(3)¹²⁹ are useful guidelines for determining custody and should be retained. These factors include:

- (a) The love, affection, and other emotional ties existing between the parents and the child.
- (b) The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the educating of the child.

125. Act of June 19, 1978, ch. 78-339, 1978 Fla. Laws ____.

126. *Id.* § 1.

127. FLA. STAT. § 61.13(2)(b) (1977).

128. *Silvestri v. Silvestri*, 309 So. 2d 29 (Fla. 3d Dist. Ct. App. 1975) (citing *Anderson v. Anderson*, 309 So. 2d 1, 3 (Fla. 1975) ("other essential factors being equal, the mother of infants of tender years should receive prime consideration for custody") (dictum)). This dictum was stated despite the requirement in FLA. STAT. § 61.13(2) (1977), that "equal consideration" be given the father. Note, however, that this dictum has not been adopted by the other district courts of appeal—or by the Florida Supreme Court.

129. FLA. STAT. (1977).

- (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home.
- (f) The moral fitness of the parents.
- (g) The mental and physical health of the parents.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (j) Any other factor considered by the court to be relevant to a particular child custody dispute.¹³⁰

Summary. In the area of domestic relations, then, some changes must be made. The absolute right of a woman to change her name in conjunction with a dissolution of marriage proceeding or to retain her birth name at marriage should be made explicit. Further, the legislature should continue to consider the factors to be used in determining alimony, child custody, and child support on divorce. Explicit guidelines are necessary to protect both men and women from the perpetuation of sex-based stereotypes through judicial prejudices. Adoption of Revision No. 2 would provide needed impetus for such legislative reform.

2. Labor

Discrimination in this area has most often been found in unemployment compensation, workmen's compensation, and "protective" labor laws.

Unemployment Compensation. Discrimination in unemployment compensation generally finds expression in special rules about coverage for pregnancy and maternity leave, in the definitions of "voluntary leaving," and in coverage for domestic workers.¹³¹

Many states have special rules automatically disqualifying women from employment for certain periods before and after childbirth and requiring proof of ability to return to work not required of other employees who are temporarily disabled. In 1975, such an

130. *Id.*

131. In other states, discrimination exists in the rules regarding coverage for dependents. Florida, however, has no such coverage.

automatic denial of benefits was held an unconstitutional denial of due process by the United States Supreme Court in *Turner v. Department of Employment Security*.¹³²

Florida has no such special rules. Further, Florida's provision that pregnancy was not "good cause" for leaving employment so that unemployment compensation might be denied was repealed in 1977.¹³³ Since many women with children now work outside the home, regulations based on outdated stereotypes should not act to penalize such employment. Clearly, some women may be physically unable to work after childbirth and so would be unavailable for work. Unemployment compensation benefits would not be available for these women.

Florida is one of many states in which unemployment benefits are not available in the absence of "good cause" for unemployment. Except in cases of illness or disability, "good cause" must be "attributable to the employer."¹³⁴ Generally, good causes attributable to the employer have to do with economic lay-offs and the like. "Voluntary leaving" is not considered "good cause." Leaves necessitated by changes in family circumstances, such as marriage, moving to a new home, or caring for a sick relative are more likely to be taken by women than men. As a consequence, the "attributable to the employer" definition has a disparate impact on women. Since many more women are entering the labor market with the expectation and intention of remaining, Florida should reconsider those policies which make it difficult for women to establish a clear attachment to the labor force.

Nationally, about ninety-eight percent of those employed as domestic workers in private households are women.¹³⁵ Continued exclusion of this group from unemployment coverage has clearly had a severe impact on the ability of women to care for their families when laid off through no fault of their own. Florida now provides unemployment compensation for some domestic workers. Section 443.03(5) of the Florida Statutes was amended in 1977 to provide

132. 423 U.S. 44 (1975).

133. Act of June 16, 1977, ch. 77-262, § 4, 1977 Fla. Laws 1220 (current version at FLA. STAT. § 443.06(1) (1977)). The statute previously provided "that good cause . . . shall include only such cause as is attributable to the employer or consists of illness or disability of the individual, *other than pregnancy*, requiring separation from his employment." The italicized phrase was deleted.

For a discussion of the new provisions in Florida's unemployment law, see Note, *Reluctant Reform: Recent Changes in Unemployment Compensation in Florida*, 6 FLA. ST. U.L. REV. 507 (1978).

134. FLA. STAT. § 443.06(1) (1977).

135. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 177 (1974-75).

coverage for "domestic service after December 31, 1977, in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of \$1,000 or more after December 31, 1977, in any calendar quarter . . . to individuals employed in such domestic service."¹³⁶ This coverage is commendable, but the \$1,000 per quarter requirement still leaves most domestic workers without protection.

Workmen's Compensation. The primary concerns in this area relate to dependency benefits and coverage for domestic workers.

Florida also has an enlightened policy on dependency benefits under the Workmen's Compensation Law. The discriminatory assumption in provisions regarding dependents, of course, is that the employee is male and the dependents are the female spouse and children. In 1974, section 440.16 was amended to provide benefits to the surviving "spouse" rather than to the "widow."¹³⁷ Clearly any provision awarding benefits to one sex and not the other would be discriminatory.

Florida has also sex-neutralized the burden of proof regarding dependency. Before 1974, a widower had to show he had been living with his wife at the time of her death, had been dependent on her for support, and had not been able to support himself in order to qualify for workmen's compensation benefits.¹³⁸ In contrast, a widow merely had to be living with her husband at the time of his death.¹³⁹ In 1974, these provisions were amended.¹⁴⁰ Now a "spouse" must show substantial dependence on the decedent in order to be eligible. "Substantial dependence" is not defined in the statute.¹⁴¹ Revision No. 2 would mandate the same standards for both women and men.

Unlike the unemployment compensation provisions, however, domestic workers are not covered by workmen's compensation.¹⁴² A domestic worker injured while working in Florida has no statutory protection at all in the form of compensation for the injury. This section should be amended to make it comparable to the unemployment compensation rules.

136. Act of June 16, 1977, ch. 77-262, § 1, 1977 Fla. Laws 1220 (codified at FLA. STAT. § 443.03(5)(o) (1977)).

137. Act of June 17, 1974, ch. 74-197, § 11, 1974 Fla. Laws 542 (current version at FLA. STAT. § 440.16 (1977)).

138. Act of May 25, 1935, ch. 17481, § 2(15) 1935 Fla. Laws 1456 (current version at FLA. STAT. § 440.02(15) (1977)).

139. *Id.* § 2(14) (current version at FLA. STAT. § 440.02(15) (1977)).

140. Act of June 17, 1974, ch. 74-197, § 1, 1974 Fla. Laws 542 (current version at FLA. STAT. § 440.02(15) (1977)).

141. Determinations are made on a case-by-case basis by the judges of industrial claims and on review at the Industrial Relations Commission.

142. FLA. STAT. § 440.02(1)(c)1 (1977).

"Protective" Labor Laws. In a 1973 survey of the Florida Statutes, the Senate Judiciary Committee found four protective labor laws. Three of these have been repealed.¹⁴³ The fourth, section 449.10(1), prohibits private employment agencies from sending "any female help" to "any questionable place, or place of bad repute, house of ill-fame or assignation house"¹⁴⁴ This chapter was repealed effective July 1, 1980, by sunset law. The alternative, of course, would have been to make the section sex-neutral.

Summary. Florida should reconsider state policy about "good cause" for leaving employment and should amend chapter 440 to provide workmen's compensation coverage for domestic workers. Otherwise, Florida's labor laws are in substantial conformity with the requirements of Revision No. 2.

3. Criminal Laws

Rape. While the traditional legal definition of rape was female-sex-based,¹⁴⁵ many states now protect male victims of sexual aggression in their forcible rape statutes.¹⁴⁷ Florida is one of these states. Chapter 794 of the Florida Statutes was amended in 1972 to protect men as well as women.¹⁴⁸ In 1974, chapter 794 was renamed "Sexual Battery," and the determination evidenced two years earlier to protect both men and women from sexual aggression was carried forward.¹⁴⁹ In addition to providing explicit definitions of the acts, the actors, and the victims, the act repealed section 794.06, which had made carnal intercourse by a male with an unmarried female idiot punishable as a second-degree felony.¹⁵⁰ While the provision could have been made sex-neutral, the intent was transferred to the definitions section in the definition of "mentally defective."¹⁵¹

Section 794.05 provides particularly for the punishment of anyone having "unlawful carnal intercourse with any unmarried person, of previous chaste character, . . . under the age of 18 years."¹⁵² This

143. Act of June 25, 1975, ch. 75-195, § 4, 1975 Fla. Laws 385 (repealing FLA. STAT. §§ 450.031, .041, .091).

144. FLA. STAT. (1977).

145. Act of June 17, 1976, ch. 76-168, § 3, 1976 Fla. Laws 295, 297.

146. S. BROWNMILLER, *AGAINST OUR WILL* 16-30 (1975); Note, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

147. *WOMEN'S RIGHTS*, *supra* note 3, at 46.

148. Act of Dec. 8, 1972, ch. 72-724, § 7, 1973 Fla. Laws 15 (current version at FLA. STAT. § 794.011 (1977)).

149. Act of May 31, 1974, ch. 74-121, § 2, 1974 Fla. Laws 371 (current version at FLA. STAT. § 794.011 (1977)).

150. Act of June 7, 1909, ch. 5909, 1909 Fla. Laws 54.

151. FLA. STAT. § 794.011(1)(b) (1977).

152. FLA. STAT. (1977).

section has been sex-neutral since 1921.¹⁵³

In its statutory requirements, therefore, Florida meets the expectations of Revision No. 2. Enforcement in many states has been discriminatory, however. Police officers often focus their interrogations on the victim rather than the assailant. This skeptical and, in fact, sexist attitude on the part of enforcement personnel has often been carried over into the evidentiary standards used at trial. This has led to the humiliation of rape victims, and it has done little to inspire the conviction of rapists.

Fortunately, Florida is one of many states which have limited the use at trial of evidence concerning the victim's prior sexual conduct or reputation for chastity.¹⁵⁴ Section 794.022(1) provides that the "testimony of the victim need not be corroborated" in sexual battery cases.¹⁵⁵ Furthermore, evidence of the victim's prior sexual activity may not be admitted unless consent is at issue. Even then, the judge must find a "pattern of conduct . . . relevant to the issue of consent" out of the jury's presence before the evidence will be submitted to the jury.¹⁵⁶

Prostitution. Florida amended the statutory definitions of prostitution in 1943 so that both male and female prostitutes are covered.¹⁵⁷ In addition, both prostitutes and patrons now are subject to the same penalties.¹⁵⁸ The 1978 legislature amended the remaining section of the Florida Statutes which should be sex-neutral. Section 796.03 currently provides for punishment of anyone procuring a female under the age of sixteen for prostitution.¹⁵⁹ Chapter 78-45 of the Laws of Florida correctly extends this protection to males under the age of sixteen, effective October 1, 1978.¹⁶⁰ References to "female" have been replaced by "person."¹⁶¹

153. Act of June 14, 1921, ch. 8596, § 1, 1921 Fla. Laws 421 (current version at FLA. STAT. § 794.05 (1977)).

154. See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972), arguing as the title suggests.

155. FLA. STAT. (1977). The new Florida Evidence Code does not change this section. See *id.* § 90.404(2).

156. *Id.* § 794.022(2). This change in the rules relating to evidence in rape cases was added by Act of May 31, 1974, ch. 74-121, § 2, 1974 Fla. Laws 371.

157. Act of May 1, 1943, ch. 21664, § 3, 1943 Fla. Laws 47 (current version at FLA. STAT. § 796.07 (1977)).

Arguably, however, only females were included if § 796.07 were read with ch. 795, *Enticing Away Unmarried Women*, and § 796.03, *Procuring female under age of 16 for prostitution*. Chapter 795 was repealed in 1972. Act of Apr. 18, 1972, ch. 72-254, § 4, 1972 Fla. Laws 888.

158. FLA. STAT. § 796.07(5) (1977).

159. FLA. STAT. (1977).

160. Act of May 17, 1978, §§ 1-2, 1978 Fla. Laws 48. By this amendment Florida has unequivocally made the statutory definitions of prostitution sex-neutral.

161. *Id.* § 1.

Here again, Florida already meets the requirements of Revision No. 2. The adoption of this proposal would, however, serve a useful and necessary purpose. Adoption would provide an explicit statement that enforcement of the prostitution laws is not to be done selectively. Patrons as well as prostitutes should be prosecuted. Equal enforcement might well result in a movement to decriminalize prostitution.

Defamation. One criminal statute should be changed. Section 836.04 provides a first-degree misdemeanor punishment for anyone defaming a married or unmarried woman by "falsely and maliciously imputing to her a want of chastity . . ." ¹⁶² This section has been in the statutes since 1883. ¹⁶³ The provision either should be made sex-neutral or should be repealed. As it is, it amounts to little more than a curious anachronism.

Summary. While Florida's statutory provisions for both rape and prostitution are now sex-neutral, problems of enforcement remain. The legislature should address this situation forthrightly—perhaps in the form of public hearings, or by the establishment of a prestigious commission. An unequivocal policy statement should then be adopted reflecting the legislature's findings and the requirements of Revision No. 2.

4. Exemptions

Several Florida laws grant exemptions based on sex. These should, at the least, be made sex-neutral. The legislature should also consider whether certain economic guidelines might be appropriate.

Article VII, § 3(b). Article VII, § 3(b) of the Florida Constitution allows a \$500 property tax exemption to widows. In 1974, this provision was the subject of an equal protection challenge by a widower in *Kahn v. Shevin*. ¹⁶⁴ Using the rational basis test, the United States Supreme Court upheld the constitutionality of the provision because of the traditional disparity in earnings between men and women. The Court found that the provision properly cushions "the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." ¹⁶⁵

In dissent, Justice Brennan called for the use of "close judicial scrutiny, because [the classification] focuses upon generally im-

162. FLA. STAT. (1977).

163. Act of Jan. 30, 1883, ch. 3460, 1883 Fla. Laws 73.

164. 416 U.S. 351 (1974).

165. *Id.* at 355.

mutable characteristics over which individuals have little or no control, and also because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society."¹⁶⁶ Justice Brennan would narrow the exemption to *needy widows*.¹⁶⁷ Justice White, however, suggested changing the category to include both *needy widows and widowers*.¹⁶⁸

The better choice is that of Justice White. Ameliorating the effects of past discrimination is a worthy and appealing goal but not consonant with equal protection. The Constitution Revision Commission has chosen to follow Justice White. The revised constitution as proposed by the commission on May 11, 1978, would amend article VII, § 3(b) to include widowers.¹⁶⁹

Others. Similarly, three sections in the Florida Statutes should be made sex-neutral. They are: section 196.081, providing a homestead exemption for the widow of a permanently disabled veteran; section 205.162, exempting widows with minor dependents from payment of local occupational license taxes; and section 352.22(1)(c), allowing free or reduced transportation on common carriers to widows of deceased employees and their dependents.¹⁷⁰ Again, the purposes behind these sections are laudatory but impermissibly discriminatory.

5. *Statutes in Which Women Are Specifically Treated*

Several statutes were enacted specifically to grant women the right to do or to be particular things. These sections have served a useful purpose over the years. Some have already been repealed. Some probably should be repealed. Others probably should be retained for a while to discourage attempted reinstatements of the discriminatory laws these sections replaced.

Repealed. Section 29.09, providing that women were eligible to be court reporters, was repealed in 1977 as obsolete.¹⁷¹ Section 608.56, providing that women are competent to be incorporators, subscribers, members, stockholders, directors, or officers of corporations, was repealed with the entire chapter in 1975.¹⁷² Chapter 607, replacing chapter 608, does not reinstate this provision.

166. *Id.* at 357.

167. *Id.* at 360.

168. *Id.* at 361-62 (White, J., dissenting).

169. See Fla. C.R.C., Rev. Fla. Const. art. VII, § 3(b) (May 11, 1978).

170. FLA. STAT. (1977).

171. Act of June 6, 1977, ch. 77-104, § 15, 1977 Fla. Laws 245.

172. Act of June 29, 1975, ch. 75-250, § 139, 1975 Fla. Laws 711.

Chapter 654, Savings Banks, has been repealed effective July 1, 1980.¹⁷³ With it went section 654.03, allowing "[e]very person . . . notwithstanding [that] such person [is] a married woman" to make withdrawals from savings banks, a provision enacted in 1889.¹⁷⁴ At the same time, as part of a general repeal of chapter 660, Banking Code, Third Part, section 660.01(5), allowing trust companies or banks to accept trusts from married women, was eliminated.¹⁷⁵ The preceding two sections need not be reinstated.

Ought To Be Repealed. Section 117.02, making women eligible to become notaries public, was enacted in 1899.¹⁷⁶ By now, such eligibility should be clear. The statute should be repealed.

Probably Should Be Retained Temporarily. Certain other sections should probably be retained for the time being. Section 694.04 was enacted in 1905 to cure defects in certain conveyances by married women.¹⁷⁷ Similarly, section 689.03 was enacted in 1891 to prescribe the form for warranty deeds and to provide specifically that married women may convey whatever interest they possess.¹⁷⁸ In a state acknowledging tenancy by the entirety, such a provision probably is still sound. Finally, chapter 708, Married Women's Property, was enacted in 1943 and has remained substantially unchanged.¹⁷⁹ All these provisions should be retained.

6. Civil Rights

Jury Service. Absolute exclusion of women from jury service was finally eliminated in the last three states in the 1960's.¹⁸⁰ Florida's law excluding women from jury service unless they affirmatively registered was one of the last two to be eliminated.¹⁸¹ Increasingly, these obviously discriminatory measures have been replaced by exemptions for child care.¹⁸²

173. Act of June 17, 1976, ch. 76-168, § 3, 1976 Fla. Laws 295.

174. Act of June 7, 1889, ch. 3864, § 47, 1889 Fla. Laws 48, 61.

175. Act of June 17, 1976, ch. 76-168, § 3, 1976 Fla. Laws 295.

176. Act of June 2, 1899, ch. 4742, § 1, 1899 Fla. Laws 129.

177. Ch. 5412, § 1, 1905 Fla. Laws 89.

178. Act of June 4, 1891, ch. 4038, § 2, 1891 Fla. Laws 64.

179. Act of June 4, 1943, ch. 21932, §§ 1-4, 1943 Fla. Laws 484.

180. Alabama's exclusion was held unconstitutional in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). Mississippi amended its code in 1968. MISS. CODE ANN. § 1762 (1943), as amended by ch. 335, § 1, 1968 Miss. Laws. South Carolina amended its code in 1967. S.C. CODE ANN. § 38-108 (1962), as amended by 1967 S.C. Acts 895.

181. Act of June 7, 1967, ch. 67-154, § 1, 1967 Fla. Laws 313, amending FLA. STAT. § 40.01(1) (1965).

The other state was Louisiana, whose law was held unconstitutional in *Taylor v. Louisiana*, 419 U.S. 522 (1975).

182. Thirteen states with such measures are: Connecticut, Florida, Georgia, Massachu-

Section 40.01(1) of the Florida Statutes provides that "expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty."¹⁸³ This provision is obviously sex-based since men having children under fifteen in this case are prevented from taking advantage of this exemption. Clearly, adoption of Revision No. 2 would require a change in this section. This exemption should be made sex-neutral as part of a general hardship exemption. The legislature should consider various reasons for exemptions and the best method for strict enforcement. The object must be to provide equal access to jury service for both men and women. This alone will assure that verdicts are rendered by a fair cross section of the community.¹⁸⁴

Access to the Courts. In 1926, the Florida Supreme Court identified a cause of action for the father of a minor child for loss of the child's "custody, companionship, services, and earnings."¹⁸⁵ Nearly half a century later, the right to sue on behalf of a minor child was held to apply to "either the father or the mother, or to the two parents together," necessitating a reversal of the Palm Beach County Circuit Court.¹⁸⁶

The circuit court had dismissed the mother as an improper party. The Florida Supreme Court found that two sections of the Florida Constitution—article I, section 2, providing that "[a]ll natural persons are equal before the law," and article I, section 21, providing that "[t]he courts shall be open to every person for redress of any injury"—when read with the fourteenth amendment to the United States Constitution clearly indicate that "there can be no discrimination between the parents, based upon sex, since both are equal in the eyes of the law."¹⁸⁷ Justice Boyd noted that "[i]n 1973, the theoretical proposition that women should enjoy equal opportunities, rights, and responsibilities has been accepted."¹⁸⁸

Access to the courts was extended further in 1976 in *Gammon v. Cobb*.¹⁸⁹ There the Florida Supreme Court found unconstitutional under article I, section 2 of the Florida Constitution that portion of

setts, Montana, New Jersey, New York, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming. *WOMEN'S RIGHTS*, *supra* note 3, at 263.

183. (1977).

184. See Nagel & Weitzman, *Women as Litigants*, 23 *HASTINGS L.J.* 171, 192-98 (1971) (indicating that women litigants do not receive the same treatment as men litigants).

185. *Wilkie v. Roberts*, 109 So. 225, 227 (Fla. 1926).

186. *Yordon v. Savage*, 279 So. 2d 844, 846 (Fla. 1973) (emphasis in original). See generally Note, *Article I, Section 21: Access to Courts in Florida*, 5 *FLA. ST. U.L. REV.* 871 (1977).

187. *Yordon v. Savage*, 279 So. 2d 844, 846 (Fla. 1973).

188. *Id.* at 847.

189. 335 So. 2d 261 (Fla. 1976).

section 742.011 of the Florida Statutes limiting actions to unmarried women.¹⁹⁰ Gammon had long been separated (twenty years), but never divorced, from her legal husband. In the interim she and Cobb had had seven children. Gammon and Cobb were now separated, and she wanted to bring an action for determination of paternity under chapter 742 in order to require him to support his children. The circuit court in Pinellas County dismissed the action because section 742.011 specified that "unmarried" women could bring such an action and Gammon was still legally married.¹⁹¹ The court found that the purposes of the statute were to protect the child and to impose a support obligation on the father. Therefore, the "relationship between the natural father and the child . . . should be controlling rather than the marital status of the mother."¹⁹²

Summary. In regard to jury service, the legislature must consider establishing a general hardship exemption from service and must provide appropriate guidelines. Men and women must be equally represented in jury deliberations for juries to be the representative bodies they are supposed to be.

A reconsideration of access to courts is also in order. Article I, section 21 of the Florida Constitution now requires the courts to be "open to every person for redress of any injury . . ." When read in conjunction with Revision No. 2, more causes of action may well be found than exist currently. Ready access to the courts by all Florida's citizens—whether male or female—should be welcomed by everyone.

7. *Disparate Impact*

Discriminatory intent in statutes and in judicial decisions is usually rather easy to see. Discriminatory impact because of administrative practices is often more difficult to discern. One area of possible disparate impact is sentencing and incarceration.

Disparate impact in sentencing practices usually comes in one or both of two ways: by imposition of indeterminate sentences and by imposition of different sentence lengths for women and men convicted of the same crime. Florida allows the imposition of indeterminate sentences.¹⁹³ The annual reports of the Florida Department of Offender Rehabilitation¹⁹⁴ for about five years have not included indeterminate sentences in the table for "Sentence Length." The

190. *Id.* at 268.

191. *Id.* at 262.

192. *Id.* at 268.

193. FLA. STAT. § 921.18 (1977).

194. Recently changed to the Department of Corrections.

information is available from the department's computer, however, and a recently prepared survey clearly indicates that on the average, from 1959 through 1977, women received indeterminate sentences more often than men in Florida.¹⁹⁵ This practice would not be acceptable following adoption of Revision No. 2. A solution, however, would require more than just repealing or amending a statute.

Information regarding sentence length as a function of crime committed and sex is also not available in the department's annual reports. A computer search is necessary.¹⁹⁶ If Revision No. 2 is adopted, study in this area will have to be undertaken.

Disparate impact also occurs because of the structure of the prison system. In Florida, the major women's prison is at Lowell, near Ocala. There are thirteen major institutions for men.¹⁹⁷ This means that women convicts are much more likely to be imprisoned at considerable distances from their families. Two possible solutions are to build more women's prisons or to integrate the male prisons.

Any solution must take into account the very great difference in the numbers of men and women currently imprisoned. There are more than 18,000 men and slightly more than 800 women.¹⁹⁸ It may well not be economically feasible to adopt either of those two solutions. But serious study must be given to this problem.

The Department of Corrections currently operates a program using community correctional centers (for men) and women's adjustment centers (for women) to ease the transition back into society for those in the last eighteen months of their sentences.¹⁹⁹ There are currently eight centers for women, from Tallahassee to Miami.²⁰⁰ This is the kind of program which is necessary to help ease the disparate impact on women caused by incarceration far from home and family.

This brief discussion of sentencing and incarceration suggests the kinds of rethinking which would have to be done by state policy makers upon adoption of Revision No. 2. Discriminatory administrative practices are not confined to the state prisons. It can safely be said that such policies permeate the entire process of state gov-

195. Bureau of Planning, Research & Statistics, Florida Dep't of Corrections, Percentage Distribution: Inmates Admitted with Indeterminate Sentences Since Fiscal Year 1959-60 (July 20, 1978).

196. Conversation with Gerald Smith, Bureau of Planning, Research & Statistics, Florida Dep't of Corrections (July 21, 1978).

197. FLORIDA DEP'T OF OFFENDER REHABILITATION, ANNUAL REPORT 1976-77, at 21 (1977).

198. *Id.* at 61.

199. *Id.* at 22.

200. Florida Dep't of Corrections, Community Correctional Centers, Philosophy & Programs 2 (draft Jan. 1978).

ernment in all its varied manifestations.

In some instances, this can be attributed to the powerful influences of sexist traditions. In others, it may only be a result of the inertia that so commonly afflicts a bureaucracy. To be fair, it must be acknowledged that some sexual discrimination is committed unconsciously and without nefarious intent.

Approval of Revision no. 2 would make administrative discrimination, whether conscious or unconscious, far more difficult. The changes which would result from popular endorsement of Revision No. 2 might not be as apparent in our laws as in the ways our laws are enforced.

IV. CONCLUSION

Sex discrimination is a fact of life. While great strides have been made, both legislatively and judicially, toward reducing the severity of this particular kind of discrimination, a great deal remains to be done. Adoption of Revision No. 2 is necessary because legislatures change and judges change. The fact of progress today does not ensure the continuation of progress tomorrow. An assurance of continued progress is needed in the state constitution.

In this article, several broad areas of substantive law have been investigated. Florida's legislature and judiciary are to be commended for the many changes made during this decade. Now is not the time to rest, however. In 1970, nearly forty percent of the women in Florida were part of the labor force.²⁰¹ The median income for those who worked fifty to fifty-two weeks during 1969, however, was \$4,270, compared with \$7,461 for men.²⁰² In a period when Florida's population is expanding rapidly, its citizens cannot afford to let the advancement toward sexual equality be slowed.

If for no other reason, Revision No. 2 should be adopted simply as a statement of policy that half of Florida's citizens no longer can be considered and treated as dependent and inferior beings. The time when women were totally dependent on men has long since passed. The notion that women are inferior does not deserve comment.

Changes, but not massive ones, will be required. Many proposals have been indicated in this note. Some others not addressed for lack of space might also have to be made. Florida has a good beginning.

201. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: DETAILED CHARACTERISTICS: FLORIDA 11-738 (1970).

202. *Id.* at 11-1210.

Adoption of Revision No. 2 would provide the clear policy statement needed to help women in Florida achieve the equality that is their birthright.