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THE LEGAL STATUS OF WOMEN IN ALABAMA, II: A CRAZY QUILT RESTITCHED

Marjorie Fine Knowles*

I. INTRODUCTION

Dramatic and substantial changes have occurred during the past decade in the traditional relationship between American women and their families, their work, their marriages, their education, and their money. These dramatic changes have been accompanied by major developments in the law, both federal and state. *


1. For a sampling of the major changes occurring in the lives of American women, see THE FIRST NATIONAL WOMEN’S CONFERENCE, NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN’S YEAR, THE SPIRIT OF HOUSTON (1978) (official report) and PRESIDENT’S ADVISORY COMMITTEE FOR WOMEN, VOICES FOR WOMEN (1980) (official report).


Concerning women and education, see PROJECT ON EQUAL EDUCATION RIGHTS, NOW LEGAL DEFENSE AND EDUCATION FUND, STALLED AT THE START 11 (1978).

2. See U.S. COMMISSION ON CIVIL RIGHTS, supra note 1. See, e.g., NATIONAL ADVISORY COUNCIL ON WOMEN’S EDUCATIONAL PROGRAMS, EQUITY FOR THE EIGHTIES (1980) (1979 annual report examining the Women’s Educational Equity Act and its implications); PROJECT ON EQUAL EDUCATION RIGHTS, supra note 1, at 21-30 (impact of Title IX); THE SOUTHEASTERN PUBLIC EDUCATION PROGRAM, AMERICAN FRIENDS SERVICE COMMITTEE, ALMOST AS FAIRLY 9-18 (1977) (report on Title IX after one year in Arkansas, South Carolina, Alabama, Mississippi, Georgia, and Louisiana); Note, Title IX Coverage of Gender Discrimination in Employment Practices of Educational Institutions, 15 SUFFOLK U.L. REV. 261 (1981).

One nonlegal focal point of change is the effort to avoid sexism in language. See NATIONAL COMMITTEE ON WOMEN IN PUBLIC ADMINISTRATION, AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION, THE RIGHT WORD: GUIDELINES FOR AVOIDING SEX-BIASED LANGUAGE (rev. ed. 1979).

3. See, e.g., Ellis, The Decline and Near Fall of Statutory Sexism in Mississippi, 51 MISS. L.J. 191 (1980); PENNSYLVANIA COMMISSION FOR WOMEN, IMPACT OF THE PENNSYLVANIA
Indeed, the pace of change has been so rapid that the legal status of women in Alabama no longer fits the pattern sketched by this author only five years ago; significant developments have taken place in nearly every area of law reviewed. The purpose of this Article is to report and analyze these legal developments—to update the author's earlier article and to show that the "crazy quilt" of women's rights in Alabama now bears a different pattern.

Although the time for ratification of the Equal Rights Amendment to the United States Constitution has passed, the legislative and judicial steps toward the establishment of gender-neutral laws reported in this Article evidence a remarkable movement in this state toward sexual equality under the law. Neither this movement toward sexual equality, nor this Article's observation of that progress, however, supports those who argue that the Equal Rights Amendment is not needed. Clearly, in the absence of a constitutional mandate, both legislative and judicial steps toward sexual equality are reversible. The wealth of new legislation that is pro-


5. Of the eight areas examined by the author in 1978, Knowles, supra note 4—viz., contracts, torts, property, family law, citizenship, criminal law, labor law, and the legal profession—only labor law showed no substantial change.

6. See id. at 432 (Alabama law concerning women described as patchwork, resembling a "crazy quilt").

7. Contra, R. Lee, A Lawyer Looks at the Equal Rights Amendment 39-53 (1980) (arguing that a constitutional amendment for changes already in progress is not needed).

8. Appeal to existing constitutional protections offers little consolation to those who fear that the legislative and judicial progress of the last decade may be reversed; in its recent reviews of gender-based statutes the Supreme Court has been uncertain in its standard of review and uneven in its conclusions. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 94 (1981) (Marshall, J., dissenting) ("although the Court purports to apply the Craig v. Boren test, the 'similarly situated' analysis the Court employs is in fact significantly different from the Craig v. Boren approach"). Compare Orr v. Orr, 440 U.S. 288, 283 (1979) (gender-based classifications must be substantially related to an important governmental objective) (holding Alabama's gender-based alimony statute unconstitutional) and Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (gender-based classification must be tailored to further an important governmental interest) (holding statute giving husband the unilateral right to dispose of community property unconstitutional) with Rostker v. Goldberg, 453 U.S. 57, 79 (1981)
ducing legal sexual equality in Alabama highlights the curious failure of the Alabama Legislature and the legislatures of fourteen other states\(^9\) to recognize the need for the Amendment by ratifying it.\(^10\)

In the past five years the legal institutions of both Alabama and the nation have reexamined those areas of the law most asymmetrical in their treatment of men and women and have corrected some inequities based on out-dated sexual stereotypes.\(^11\) During this period, issues first raised by women's groups have found their legitimate place on the public agenda. For example, at the state level Alabama is currently addressing the once taboo subject of family violence.\(^12\) At the federal level the discussion of employment opportunities has expanded to include topics such as comparable worth,\(^13\) fetal protection from workplace hazards,\(^14\) and child care.\(^15\) The changes in Alabama law since 1977 that are described

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("The Constitution requires that Congress treat similarly situated persons similarly . . . .") (upholding the constitutionality of male-only draft registration on the ground that men and women are not similarly situated with respect to the draft).

For a review of women's organizations' use of the judicial system to combat sex discrimination, see K. O'Connor, Women's Organizations' Use of the Courts (1980).


On the impact of a state equal rights amendment identical in wording to the federal amendment, see Pennsylvania Commission for Women, supra note 3.


11. Compare Knowles, supra note 4, pts. V (Property) & VI (Family Law), with pts. IV (Property) & V (Family Law) infra.

12. See notes 91-98 infra and accompanying text.


15. See, e.g., U.S. Commission on Civil Rights, supra note 1.

A bill introduced in the United States Congress entitled the Economic Equity Act of
below reflect both the extent of reexamination and correction that has occurred and this state’s attempt to grapple with “new realities”—problems long submerged and only now being addressed—in the lives of American women and men.

II. Contracts

The traditional discrimination against women in contract law was embodied in the principle denying the capacity of married women to make contracts. Progress toward investing married women with full legal capacity to contract dates back to the nineteenth century, and Alabama has generally shared in that progress. The one exception in this area was its statutory requirement that a married woman receive written consent from her husband to convey her real property. Until 1977 Alabama had the distinction of being the only state to restrict a married woman’s conveyance of property in this manner, and Alabama courts held that the restriction applied not only to conveyances but also to contracts for the sale of land.

The 1975 and 1977 decisions of Trabits v. Snow dramatize the Alabama Supreme Court’s determination to lift the statutory restriction on a married woman’s right to convey her real property and to contract for that conveyance. In the 1975 decision, the Ala-

1981 and described by one of its co-authors as “the most comprehensive economic rights package ever introduced into the U.S. Senate,” addresses “7 critical areas—tax and retirement rights, child and dependent care, military service, farm credit and agricultural taxation, accessibility of insurance, maintenance and child support, and the Federal regulatory process.” 127 Cong. Rec. 3510 (1981) (remarks of Sen. Durenberger).

16. Under the common-law doctrine of coverture, a married woman was denied the right to enter a contract alone. McAnally v. Alabama Insane Hosp., 109 Ala. 109, 113, 19 So. 492, 493 (1895). See Knowles, supra note 4, at 432-33.
17. See Knowles, supra note 4, at 432-33.
18. Following adoption of the Married Women’s Property Acts in Alabama beginning in 1846, see Knowles, supra note 4, at 434-36 & nn.37-62, the State's married women were given the capacity to contract as if sole. Ala. Code § 2346 (1886) (now codified at ALA. CODE § 30-4-8 (1975)). Additional contractual rights were bestowed in the nineteenth and twentieth centuries. See Knowles, supra note 4, at 438 & nn.66-73.
22. See, e.g., Thompson v. Odom, 279 Ala. 211, 184 So. 2d 120 (1975).
23. 294 Ala. 313, 316 So. 2d 336 (1975); Snow v. Trabits, 347 So. 2d 395 (Ala. 1977).
bama Supreme Court held that a contract to sell land was not subject to enforcement by a decree of specific performance because the husband of the wife-vendor had signed the contract only as a witness and had not specifically indicated his agreement to the transaction as then required by statute. The court noted, however, that complainants had failed to challenge the constitutionality of the statute. It allowed the parties to amend their pleadings, and they did raise the issue of the constitutionality of the statute. In the meantime, the court rendered its decision in Peddy v. Montgomery, holding that the Alabama Code provision “limiting the freedom of a married woman to alienate or mortgage her lands, or any interest therein, without the assent and concurrence of her husband, violates the [equal protection clause].” By the time the court’s second opinion in Trabits v. Snow appeared, the question whether Mr. Trabits’ signature represented his assent to the conveyance had been mooted by the pronouncement in Peddy v. Montgomery that his signature was no longer required.

Now that a married woman’s right to convey freely or contract to convey her real property is established, no significant legal discrepancies remain in the treatment of men and women in Alabama contract law; however, several statutes still contain anachronistic wording which implies that only men enter into the contractual arrangements at issue.

25. 345 So. 2d 631 (Ala. 1977).
26. Id. at 637.
28. “The husband’s signature is no longer necessary to validate a wife’s contract to convey land owned by her, as a witness or otherwise.” Id. at 397.
29. E.g., ALA. CODE § 8-1-131 (1975) (“Any money or thing paid or delivered to any person whether as principal, agent or broker in furtherance or settlement of any contract made in violation of this article may be recovered in any action brought by the person paying the same, his wife or child.”); ALA. CODE § 8-1-150 (1975):

(a) All contracts founded in whole or in part on a gambling consideration are void. Any person who has paid any money or delivered any thing of value lost upon any game or wager may recover such money, thing or its value by an action commenced within six months from the time of such payment or delivery.

(b) Any other person may also recover the amount of such money, thing or its value by an action commenced within 12 months after the payment or delivery thereof for the use of the wife or, if no wife, the children or, if no children, the next of kin of the loser.
Great strides toward the equality of men and women in their capacity to sue and be sued in tort actions occurred prior to 1978. Common-law precedents that both protected and restricted married women’s actions in tort were abolished. Another important tort law restriction in Alabama disappeared in 1979 when the state legislature amended section 6-5-390 to make the cause of action for the injury of a minor child available on a sex-neutral basis.

Until the 1979 amendment, the father had the primary right to sue for an injury to his minor child and the mother could bring suit for injury to her minor child only if the father was dead, had deserted the family, was in prison under a sentence of two years or more, was confined in a hospital for the insane, or had been declared mentally incompetent. The justification for the disparity between the mother’s and the father’s right to sue under the statute lay in the father’s legal duty to support his minor children. "the father has the primary duty to support and maintain the minor children . . . [T]herefore . . . the parent with this primary obligation is entitled to any damages recovered as a result of injury to . . . a minor child." The Code section governing actions for the wrongful death of a minor also gave the father primary right to sue and granted the mother a cause of action only “in cases mentioned in section 6-5-390.”

In 1979 the Alabama Legislature amended the portion of section 6-5-390 that specifies who may bring an action for injury to a

30. See generally Knowles, supra note 4, at 442-47.
31. At common law a husband was held liable for his wife’s torts whether committed before or after marriage. 3 C. VERNIER, AMERICAN FAMILY LAWS 72, 74 (1935). In Alabama, this common-law liability was abolished by statute. See ALA. CODE §§ 30-4-6 to -7 (1975).
32. At common law a husband could maintain an action for loss of consortium, but a wife could not maintain a similar action. Alabama adhered to the common-law view, see Smith v. United Constr. Workers, Dist. 50, 271 Ala. 42, 122 So. 2d 153 (1960), until 1974. The right to sue for loss of consortium was extended to the wife in Swartz v. United States Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974) (overruling Smith v. United Constr. Workers, Dist. 50, 271 Ala. 42, 122 So. 2d 153 (1960)).
36. Id. See Knowles, supra note 4, at 444-46.
37. ALA. CODE § 6-5-391 (1975).
38. Id.
minor child. The Code now provides that if a father and mother are living together as husband and wife, each has an equal right to bring a suit for damages. If the father and mother are not living together as husband and wife or if legal custody has been vested in either party or some third party, the party having legal custody has the exclusive right to bring the action.

The legislature did not similarly amend the Wrongful Death of a Minor statute; accordingly, that section still provides that the mother has a cause of action only "in cases mentioned in section 6-5-390." In light of the amendment of section 6-5-390, however, the Wrongful Death of a Minor statute's reference to the "cases mentioned in section 6-5-390" is at best confusing and at worst meaningless.

The Alabama courts have neither ruled on the amended version of section 6-5-390 nor interpreted section 6-5-391 in light of that amendment. To be consistent with the obvious legislative intent in amending section 6-5-390, however, the cause of action in section 6-5-391 for the wrongful death of a minor should be available to either a mother or father on the same terms as the cause of action for injury to a minor child. Dictum in a 1980 case for wrongful death of a minor in which the cause of action arose before the 1979 amendment suggests that the Alabama Supreme Court will read sections 6-5-390 and 6-5-391 together to permit the mother's enlarged right of action in the amended injury statute to apply to the mother's right of action under the wrongful death statute as well.

When read together, these two sections provide that the father shall have the primary right to commence an action for the wrongful death of his minor child, and the mother has a secondary right to do so. Her right to initiate the action is contingent upon the father's inability to do so on account of his death, desertion, imprisonment, or insanity. Although that priority has been recently amended, effective July 19, 1979, nevertheless the original section was in effect when this cause of action arose.

Id. at 532.
IV. PROPERTY

The law of property in Alabama has become increasingly sex-neutral. At common law, no special disabilities were imposed on single women in the ownership, management, and disposition of property, but married women were singularly disabled in those areas; over the last century, the old restrictions were gradually removed, mainly by legislative action. While both the Alabama Legislature and the Supreme Court of Alabama have taken significant steps in the last five years to change the remaining marital-status and gender-based property laws, the most dramatic recent step was the adoption in 1982 of a comprehensive sex-neutral Probate Code. To understand the significance of this legislation, it is helpful to review the preceding steps taken by the legislative and judicial branches; statutes enacted by the legislature will be detailed first, starting with the new Code, followed by an examination of judicial decisions in this field.

While a thorough examination of the new Probate Code is beyond the scope of this Article, certain salient points should be noted. First, the language used in the statute, while retaining the so-called generic “he,” is otherwise completely sex-neutral. Spouse, married person, and parent, for example, are used throughout.

Changes of direct relevance include the abolition of both dower and curtesy, the extension of the right of election to a surviving widower, and entitlement of a surviving spouse to a homestead allowance, exempt property, and family allowance, whether or not he or she takes an elective share. There are also changes in the rules governing the intestate share of the surviving spouse that generally give a surviving spouse a larger share than under previous laws. Throughout the new Code, benefits and detriments appear to be allocated on a sex-neutral basis. While this is a very

45. See Knowles, supra note 4, at 432-33, 448.
47. Id. § 2-113, 1982 Ala. Acts ___, ___.
48. Id. § 2-203, 1982 Ala. Acts ___, ___.
49. Id. § 2-206, 1982 Ala. Acts ___, ___. These are defined and explained in §§ 2-401, 2-402, 2-403, 2-404.
50. Id. § 2-102, 1982 Ala. Acts ___, ___.
51. Id. § 2-102, Commentary, 1982 Ala. Acts ___, ___.
desirable step, efforts should be made to assure that women, who are still economically disadvantaged in the marketplace and who may have been laboring under the illusion that the law afforded them a protected place in dealing with property, are not unfairly disadvantaged.

To appreciate fully the impact of the new Probate Code, it is illuminating to trace the smaller changes made over the last five years, bearing in mind that all the statutes discussed below are now within the new comprehensive enactment.

Intestate succession to a decedent’s real property was controlled by section 43-3-1 of the Alabama Code.52 Under prior law the “husband or wife of the intestate” received the real estate of the deceased, “subject to the payment of debts, charges against the estate, and the widow's dower” only “[i]f there are no children or their descendants, no father or mother, and no brothers or sisters or their descendants . . . .”53 The husband or wife was, therefore, sixth in line of descent. In 1980 the legislature amended this statute to advance the husband or wife of the intestate from sixth to second place in the order of succession to the deceased’s real property.54 The intestate’s children or their descendants remained first in line to inherit the real property of the deceased, subject to payment of debts, charges against the estate, and the widow’s dower rights.55 Although this particular change did not eliminate a provision that discriminated against women on its face, the revision did affect women disproportionately because statistically women outlive their husbands.56

Under prior law husband and wife were treated unequally in intestate succession to both real and personal property. According to section 43-3-12, when a married woman died intestate, her husband was entitled to one-half of her personal property and the use of her real property during his life.57 This provision of the Alabama Code was clearly designed to be a statutory substitute for the com-

52. ALA. CODE § 43-3-1 (1975) (amended 1980).
53. Id.
55. Id.
56. See, e.g., Reed v. Reed, 404 U.S. 71, 75 (1971) (“we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows”).
57. ALA. CODE § 43-3-12 (1975).
mon-law "curtesy" of the husband. When a married man died intestate, however, section 43-3-10 provided that his wife was entitled to all the personal property only if the intestate had no children, to one-half if he had one child, to a child's share if he had more than one and not more than four children, and to one-fifth if the intestate had more than four children.

In the First Special Session of 1981, the Alabama Legislature amended both the real property and personal property intestate succession statutes to make their wording completely sex-neutral. "Surviving spouse" was substituted for "husband or wife" in section 43-3-1 and "spouse" was substituted for "widow" in section 43-3-10. As a result of this redrafting, additional changes were required. The same act, therefore, abolished curtesy for the husband by repealing section 43-3-12 of the Alabama Code; the sex-biased wording of the statute was made more sex-neutral, and the substance of the section was incorporated into section 43-3-10. The amended statute provided:

The personal estate of persons dying intestate as to such estate, after the payment of debts and charges against the estate, is to be distributed in the same manner as real estate, and according to the same rules; if a spouse having a separate estate dies intestate, leaving a spouse living, the surviving spouse is entitled to one half of the personalty of such separate estate absolutely and to the use of the realty during his or her lifetime.

Once this change was in place, a conflict became apparent. As previously noted, section 43-3-1 determines intestate succession of real property, and section 43-3-10 does the same for personal property. Since the legislature incorporated the provisions of the old

59. ALA. CODE § 43-3-10 (1975).
60. Id. § 43-3-1.
61. Id. § 43-3-10.
63. Id. § 2, 1981 Ala. Acts 148, 149 (repealing § 43-3-12). Section 1 of this Act evidences the incorporation of repealed § 43-3-12 into § 43-3-10. See notes 59 & 62 supra and accompanying text.
65. See text accompanying notes 60 and 61 supra.
curtesy statute, section 43-3-12, into section 43-3-10, some provisions for distribution of real property were codified in the personal property distribution statute. To remedy this problem, the Alabama Legislature in its Third Special Session of 1981 again amended section 43-3-10. The statute then read:

The personal estate of persons dying intestate as to such estate, after the payment of debts and charges against the estate, is to be distributed in the same manner as real estate, and according to the same rules; except that in any event the surviving spouse is entitled to no less than one half of the personalty of such separate estate absolutely.

During the period under review, the Alabama Supreme Court has also initiated changes in the area of property law. The Alabama statute providing for the automatic revocation of a woman’s will in the event of her marriage was held unconstitutional by the court as a denial of equal protection of the law. Nevertheless, a wife retained the right to dissent from her husband’s will and take her dower interest in lieu of her portion under the will. A similar election was not available to a surviving husband; therefore, a married woman could prevent her husband from receiving any interest in her separate estate by leaving a valid will giving her property to others. In the 1979 case of Dorough v. Johnson, however, a woman dissented from her husband’s will, and the Alabama Supreme Court remarked that “[a]ppellants failed to raise any issue as to the constitutionality of the statutory procedure for dissent which allows the widow the right to claim against the will with no corresponding right to a widower.” When faced squarely with the issue, the court held this statute violates the equal protection clause.
of the fourteenth amendment of the United States Constitution and left to the legislature the question whether to extend it to widowers.\(^7\) The new Probate Code provides for a right of election available to the surviving spouse, whether widow or widower.\(^7\)

The new statute also makes the homestead allowance available on a sex-neutral basis to the surviving spouse.\(^7\) In 1981 the Alabama Supreme Court had held that Alabama’s former Homestead Act,\(^7\) which was gender-based, violated the fourteenth amendment to the United States Constitution.\(^7\) Although the statute was underinclusive—benefiting only the widow and not the widower—and thus unconstitutional, the court declined to declare the statute invalid. Instead, the court elected to expand the benefits available under the statute to surviving husbands to better effectuate the intent of the legislature.\(^7\) However, by the time of this decision, the legislature had amended the statute to make it sex-neutral,\(^8\) the same result achieved in the new Probate Code.\(^8\)

Prior to the adoption of the new Probate Code, the greatest area of gender-based law in Alabama was that governing decedent’s estates.\(^8\) Provisions for statutory dower,\(^8\) the widow’s right to dissent from her husband’s will,\(^8\) and the widow’s right to quarantine\(^8\) all favored the widow to the detriment and often in defiance of the deceased spouse.\(^8\) Although the impact of these provisions was tempered somewhat by provisions like the one denying dower to a surviving wife who had a separate estate greater than her dower interest,\(^8\) they illustrate the sex bias that existed prior to the adoption of the new Probate Code. The legislature has taken

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76. Id. § 2-206, 2-401, 1982 Ala. Acts ___, ____.
77. Ala. Code tit. 7, § 663 (1940) (applied only to “widows”).
79. See id at 748.
80. ALA. CODE § 6-10-61 (1975).
84. Id. § 43-1-15.
85. Id. § 43-5-40.
87. ALA. CODE § 43-5-3 (1975).
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a giant step along the road suggested by the author by adopting the new comprehensive Probate Code with its gender-neutral provisions.

V. FAMILY LAW

The legal rights and duties that traditionally have been based on the assumption that man is the sole provider and woman is the sole homemaker are no longer legitimate because the assumption is faulty: "Today, fifty percent of all women are in the labor force and ninety-one percent have been or will be in the labor force during their lives." Family law continues to change in recognition of women's changing role in the workplace and in the family. In the interval between the author's prior article and the present reexamination, at least two issues of special importance to women and their role in the family have emerged: domestic violence and the marriage tax. Both have become issues of national concern, receiving attention from federal and state governments.

The Alabama Legislature passed two statutes in 1981 in response to growing evidence of family violence. The Protection from Abuse Act established procedures for obtaining judicial relief from violent disturbances within a family. Under the Act a court may enter any temporary order it deems necessary to protect the plaintiff or a minor child from abuse or from the danger of abuse. This order may direct defendant to refrain from abusing plaintiff, restore possession of the household to plaintiff to the exclusion of defendant, award plaintiff temporary custody of minor children or reasonable visitation rights with minor children, or require defendant to pay temporary reasonable support when defen-

88. Knowles, supra note 4, at 459-60.
89. Ellis, supra note 3, at 195 (citing Department of Labor Employment and Training Report of the President).
91. There is a rapidly developing body of literature on domestic violence. Two publications by the Alabama Law Institute examine the problem of family violence and child abuse, ALABAMA LAW INSTITUTE, FAMILY VIOLENCE (1980); ALABAMA LAW INSTITUTE, CHILD ABUSE AND NEGLECT (1978). Various approaches to the problem are explored in Note, Domestic Violence: Legislative and Judicial Remedies, 2 Harv. Women's L.J. 167 (1979).
93. See id. § 30-5-6(b).
dant has a legal obligation to provide support.94

The Domestic Violence Shelters Act95 provides for the establishment of facilities to offer aid and shelter for victims of domestic violence. Ironically, funding for these facilities comes from the imposition of an additional five dollar tax on marriage licenses.96 The Act directs the Office for Prosecution Services to establish minimum requirements for these shelters and to develop standards for certifying which shelters will receive state funds.97 That office is also responsible for approving or rejecting applications for funding and for evaluating a facility to ensure its compliance with the minimum standards.98

The marriage tax is a second problem area that has gained increased attention during the last five years. The so-called marriage tax is a creation of the federal income tax scheme; the remedy, therefore, lies with the federal government.99 The present federal tax law treats a married couple as a single taxable unit100 and levies federal income taxes on the couple's total income. Married individuals may elect to file separate returns, but the rate schedule for single persons is not applicable and a higher tax liability than

94. See id. § 30-5-7.
95. Domestic Violence Shelters Act, id. § 30-6-1 to -13. Results of federal government attention to this problem include the creation of the Office on Domestic Violence, see 44 Fed. Reg. 25, 699 (1979), and funding for project support and staff. See Joseph A. Califano, Jr., Memorandum to Arabella Martinez (May 22, 1979); Joseph A. Califano, Jr., Memorandum to Julius Richmond (May 22, 1979). However, a bill to provide support for state and local projects failed to pass the Senate in 1980.
96. See ALA. CODE § 30-6-11 (Supp. 1982).
97. See id. § 30-6-3.
98. Implementation of this statute has been delayed by a suit brought in Tuskegee seeking an injunction against its operation and a declaration that the Act imposes an unconstitutional tax. See Roberts v. Young, CV-81-110 (Macon County, Ala.). The plaintiffs, an individual who had to pay the fee, on behalf of herself and other fee-payers, and the Probate Judge of Russell County, in his official capacity and as President of the Alabama Probate Judges Association, have moved for summary judgment. No date for trial of this case has been set pending decision on that motion. Letter from Ellen I. Brooks, Deputy District Attorney of Montgomery County (May 6, 1982).
100. See Gerzog, supra note 99, at 29.
would be incurred by the filing of a joint return usually results.\textsuperscript{101} Differing tax rates in conjunction with other provisions of the Internal Revenue Code produce a "marriage penalty" when two income-producing individuals marry.\textsuperscript{102} Marriage does not always produce a tax penalty, however; in some cases a tax savings, or marriage bonus, will result when an income earner marries someone with no taxable income and the couple files a joint return.\textsuperscript{103} Generally, if a couple’s total income is allocated between them more evenly than 80\%-20\%, their total tax liability will increase upon marriage.\textsuperscript{104}

Judicial challenges to the constitutionality and legality of this scheme have all failed,\textsuperscript{105} and until 1981, none of the proposed solutions to this problem received legislative approval.\textsuperscript{106} The Economic Recovery Act of 1981, however, contains a "Deduction for

\textsuperscript{101} See Bittker, supra note 99, at 1429-31.
\textsuperscript{102} See Gerzog, supra note 99, at 27.
\textsuperscript{103} See id.
\textsuperscript{104} See id. at 28; Wenig, supra note 99, at 206. The Internal Revenue Code contains at least 40 sections that treat married and single individuals differently for tax purposes. Id.
\textsuperscript{105} See Gerzog, supra note 99, at 37-40. The marriage penalty, questioned because two single individuals would have a lower tax burden than a similarly situated married couple, has been upheld as constitutional based on the principle of horizontal equity. This principle requires only that all married couples be treated alike regardless of differences in their income pattern, not that married couples be treated like two similarly situated individuals. In Johnson v. United States, 422 F. Supp. 958 (N.D. Ind.), cert. denied, 434 U.S. 1012 (1976), the court held that the tax law did not discriminate against women by imposing a higher marginal tax rate on their income when combined with that of their husbands. Id. at 968-69. Additionally, the court said the tax law did not impermissibly infringe upon the couple's constitutional right to marry. Id. at 973-74. The Court of Claims in Mapes v. United States, 576 F.2d 896 (Ct. Cl.), cert. denied, 439 U.S. 1046 (1978), reiterated the findings in Johnson, see id. at 900, and, in addition, concluded that the legislative attempts at horizontal equity were not unreasonable. See id. at 902-04. The "marriage penalty" was challenged on constitutional grounds again in Pierce v. Commissioner, 40 T.C.M. (P-H) 1 \textsuperscript{1980}, in which plaintiffs contended that the "'marriage ceremony tax' is unconstitutional, encourages immoral behavior, and interferes with the right to marry." Id. The court simply deferred to precedent: "The marriage penalty, inequitable as it is, has been upheld as constitutional." Id. \textsuperscript{1981}.

The Internal Revenue Service recently challenged the practice of couples who divorce at the end of the year for tax reduction purposes and then remarry at the beginning of the subsequent year, see Boyter v. Commissioner, 74 T.C. 989 (1980). In this case the divorce-remarriage scheme was held invalid for lack of jurisdiction by the foreign court granting the divorce. See id. at 995-97. Mr. and Mrs. Boyter were not allowed to file as single individuals for the tax year in question. See id. at 1001. Couples seem to have only two choices under the federal tax laws: (1) legally divorce but live together and file as single individuals, or (2) marry and pay higher taxes.

Two-Earner Married Couples.” The new law provides that married couples filing a joint return may deduct an amount equal to ten percent of the earned income of the spouse with the lower earned income for the taxable year but not in excess of $30,000.\textsuperscript{107}

It is noteworthy that the issues of domestic violence and the marriage tax are finally on the state and national agendas and are receiving the attention they deserve. At the same time that these two issues began receiving attention, significant developments began to occur in other areas of family law, especially in the laws on alimony, child custody, and child support.

A. Marriage

Alabama, like all states,\textsuperscript{108} has statutory requirements for marriage. These statutory provisions include requirements of age,\textsuperscript{109} licensing,\textsuperscript{110} and health examination.\textsuperscript{111} In addition, the parties to an incestuous union are subject to criminal penalty.\textsuperscript{112}

The Supreme Court of Alabama has recently held\textsuperscript{113} that married women “are not legally required”\textsuperscript{114} to register to vote in their husband’s name, but may use “the names by which they have chosen to be known and have used.”\textsuperscript{115} In reaching this conclusion, the court found that \textit{Forbush v. Wallace}\textsuperscript{116} “does not accurately state


114. \textit{Id.} at 1048.

115. \textit{Id.} at 1047.

116. 341 F. Supp. 217 (M.D. Ala. 1971), \textit{aff’d mem.}, 405 U.S. 970 (1972). In \textit{Forbush} a three-judge federal court found that under Alabama common law a married woman who does not change her name by court proceeding must use her husband’s surname after their marriage as her legal name.
the common law on names, and that a married woman may use any name by which she chooses to be known, provided, of course, that the choice is not made for a fraudulent purpose.

B. Mothers and Children

Although change is occurring, some aspects of family law still reflect the traditional sex roles of mothers and fathers. An example of this statutory tradition is the father's duty to support his children during their minority as long as the children remain members of his family. The desertion and nonsupport statutes define "parent" as the natural legal parent, the legal guardian of a child, or the father of an illegitimate child. The mother of an illegitimate child may initiate proceedings upon her pregnancy and no later than five years after the birth of her child to establish its paternity. In 1976, in Roe v. Conn, a three-judge federal court held unconstitutional portions of two Alabama statutes that set forth procedures for legitimation. The objectionable provisions permitted a father to legitimate a child merely by declaring himself the father and to change the child's name in the same proceeding. Neither statute provided for notice to the mother or ensured protection of the child's interests. The Alabama Legislature recently responded to this holding by substantially amending the legitimation statutes. The Code now provides that upon the father's proper filing of a declaration seeking to legiti-

118. Id. at 1048.
119. See Knowles, supra note 4, at 472; text accompanying notes 88 & 89 supra.
121. Ala. Code § 30-4-50 (1975). This section imposes a legal duty of support upon one who has "publicly acknowledged or treated the child as his own, in a manner to indicate his voluntary assumption of parenthood," whether the alleged parent is in fact the child's father. Law v. State, 238 Ala. 428, 430, 191 So. 803, 805 (1939).
124. Id. at 781-83; Knowles, supra note 4, at 473-74.
126. Id. tit. 27, § 12 (current version at Ala. Code § 26-11-3 (Supp. 1981)).
mate his child, the probate court must notify the mother and allow thirty days for her to respond.\textsuperscript{129} The probate court must appoint a guardian \textit{ad litem} to represent the child if the mother objects to the declaration or if the appointment would be in the best interest of the child.\textsuperscript{130} The statute prescribes similar procedures when the father requests that the child’s name be changed.\textsuperscript{131}

During the past five years the Alabama Supreme Court has addressed another legal concern of illegitimate children. In \textit{Everage v. Gibson}\textsuperscript{132} the court sought to avoid a potential constitutional challenge to Alabama’s intestacy scheme, which makes illegitimate children the heirs of their mother but not of their father.\textsuperscript{133} In an attempt to comply with United States Supreme Court standards, particularly those set out in \textit{Trimble v. Gordon},\textsuperscript{134} the court added a third possible method of legitimation to the procedures already recognized as appropriate methods for obtaining inheritance under the intestacy scheme.\textsuperscript{135} The court had previously recognized the father’s marriage to the child’s mother and subsequent recognition of the child as his own or the father’s voluntary filing of a written declaration of recognition as a proper procedure for legitimation.\textsuperscript{136} In \textit{Everage} the court concluded that an adjudication of paternity under Alabama’s paternity statute\textsuperscript{137} also protected the child’s right to assert inheritance rights.\textsuperscript{138} The new Probate Code is consistent with the result in \textit{Everage}, and, to the extent that it effects

\textsuperscript{129} \textit{Id.} § 26-11-2(b).
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} § 26-11-3.
\textsuperscript{132} 372 So. 2d 829 (Ala. 1979).
\textsuperscript{133} \textit{Id.} at 829 (Jones, J., dissenting); \textit{Note, An Equal Protection Challenge to Alabama’s Intestate Intestacy Scheme As It Affects Illegitimate Children: Everage v. Gibson}, 31 \textit{ALA. L. REV.} 493, 507 (1980). A recently-enacted statute extends the period of time during which a paternity suit may be filed from two years to five years. \textit{ALA. CODE} § 26-12-7 (Supp. 1981).
\textsuperscript{134} 430 U.S. 762 (1977). See \textit{Lalli v. Lalli}, 439 U.S. 259 (1978) (upholding a statute allowing an illegitimate child to inherit from intestate father only if there has been a declaration of paternity and an order declaring paternity within father’s lifetime).
\textsuperscript{135} \textit{Everage v. Gibson}, 372 So. 2d 829, 833 (Ala. 1979).
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} § 26-12-1 to -9 (1975).
\textsuperscript{138} \textit{Everage v. Gibson}, 372 So. 2d 829, 833 (Ala. 1979). The court’s decision in \textit{Everage} has been criticized on the ground that it provides only ephemeral protection to an innocent party—the child—in the barren interest of preserving the constitutionality of the statute. \textit{Id.} at 838 (Jones, J., dissenting); \textit{Note, An Equal Protection Challenge to Alabama’s Intestacy Scheme As It Affects Illegitimate Children: Everage v. Gibson}, 31 \textit{ALA. L. REV.} 493, 507 (1980). A recently-enacted statute extends the period of time during which a paternity suit may be filed from two years to five years. \textit{ALA. CODE} § 26-12-7 (Supp. 1981).
changes in the law governing the inheritance rights of an illegitimate, it improves them.\textsuperscript{139}

\section*{C. Divorce and Alimony}

The statutes governing the grounds for divorce have not been changed during the last five years.\textsuperscript{140} Two grounds for divorce continue to be available to only one spouse. The husband may ground his petition on the wife's being pregnant without his knowledge or agency at the time of their marriage.\textsuperscript{141} On the other hand, nonsupport is a ground available only to the wife.\textsuperscript{142}

Although legislative action to correct these sex-biased divorce statutes has not been tendered, the state legislature has corrected the sex bias in Alabama's alimony statute by extending alimony to husbands as well as wives.\textsuperscript{143} Under the former law only the husband could be ordered to pay alimony upon dissolution of the marriage.\textsuperscript{144} In the 1979 decision of Orr \textit{v. Orr},\textsuperscript{145} the United States Supreme Court found these Alabama alimony statutes underinclusive and, therefore, violative of the equal protection clause of the fourteenth amendment.\textsuperscript{146} In response, the Alabama Legislature repealed one statute\textsuperscript{147} and passed several amendments making the alimony statutes gender-neutral.\textsuperscript{148} A judge now has the power to order either a husband or wife to provide support for the spouse.\textsuperscript{149} These amendments dramatically alter the statutory scheme for alimony, but the courts will probably continue to consider the same

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140. For a discussion of divorce in Alabama, see Knowles, \textit{supra} note 4, at 474-77.
141. Ala. Code § 30-2-11(10) (1975). Although this ground appears to be a permissible classification on the basis of sex since it involves a unique physical characteristic, the statute should allow the wife to seek a divorce if another woman was carrying the husband's child at the time of his marriage.
142. Id. § 30-2-1(12).
146. Id. at 278-83.
148. Id. §§ 30-2-31, -50, -51, -52, -54.
149. Id. A provision for the termination of periodic alimony when the receiving spouse remarries or cohabits was added in 1978 and reenacted in 1981. See id. § 30-2-55; Comment, \textit{Alimony, Cohabitation, and the Wages of Sin}, 33 ALA. L. REV. 139 (1982).
\end{flushright}
factors that they considered before Orr in arriving at a decision on a request for support.\textsuperscript{150}

**D. Child Custody and Support**

In the last five years the courts and legislature have also initiated substantial changes in the law affecting child custody and support. The recent Alabama Supreme Court decision in *Devine v. Devine*,\textsuperscript{151} for example, illustrates the full circle traveled by courts in treatment of the difficult questions surrounding child custody.\textsuperscript{152} Originally, the father benefited from a judicial presumption that he was the parent to have custody.\textsuperscript{153} The courts had reasoned that since the husband was the head and master of his family and responsible for the care and maintenance of his children, he was the parent most responsible for the children.\textsuperscript{154} The Alabama courts steadily modified this position, however, developing instead a "tender years presumption." This presumption was "based upon the inherent suitability of the mother to care for and nurture young children. All things being equal, the mother [was] presumed to be best fitted to guide and care for children of tender years."\textsuperscript{155} Gradually, the tender years presumption displaced the influence of the paternal preference rule and became recognized as a rebuttable factual presumption.\textsuperscript{156}

In reliance on a number of United States Supreme Court decisions,\textsuperscript{157} the Alabama Supreme Court announced in *Devine* that "the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in custody proceedings solely on the basis of sex."\textsuperscript{158} In the *Devine* case the court concluded that either the father or the


\textsuperscript{151} 398 So. 2d 686 (Ala. 1981).

\textsuperscript{152} Id. at 691.

\textsuperscript{153} Id. at 688.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 691. The tender years presumption in favor of the mother was partially codified, see Pub. Act No. 79, § 3808, 1872-73 Ala. Acts 125. The Act grants custody of the child or children to the father when his wife voluntarily abandons him only if the child or children have reached the age of seven. Id.


\textsuperscript{158} 398 So. 2d 686, 695 (Ala. 1981).
mother would be a capable and appropriate person to have custody of minor children. Invocation of the tender years presumption in favor of the mother, therefore, deprived the father of equal protection of the law. Writing for the majority in Devine, Justice Maddox demonstrated, using historical evidence, how a presumption can reflect the sex-stereotyping of a particular time in history and asserted that courts had come to rely on the presumption as a substitute for careful factual analysis. Justice Maddox instructed trial courts to weigh carefully the facts of each case before granting custody and not to invoke mechanically an outdated presumption.

159. Id. at 696.
160. Id. at 696.
161. Id. The court suggested consideration of a number of factors:
The sex and age of children are indeed very important considerations; however, the court must go beyond these to consider the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose.

Id. at 696-97. For a defense of the maternal presumption, see Uviller, Fathers' Rights and Feminism: The Maternal Presumption Revisited, 1 HARV. WOMEN'S L.J. 107 (1978).

In considering gender-based presumption in custody suits, the Supreme Court of Appeals of West Virginia chose an interesting approach in Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). The court changed the presumption in favor of the mother to one in favor of the “primary caretaker parent.” Id. at 362. In defending the existence of a presumption, the court said it was necessary to have an established rule because full blown “hearings...do not enhance justice, particularly since custody fights are highly destructive to the mental health of the children.” Id. at 361. The court provided a partial list of the criteria used to determine the identity of the primary caretaker:

In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for . . . (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in morning; (8) discipline, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id. at 363.
The Alabama Legislature has also been active in the area of child custody and support, taking two steps within the last five years to deal with problems in the enforcement of custody and support decrees. First, in 1980 the legislature joined forty-four other states by adopting the Uniform Child Custody Jurisdiction Act. This Act was developed as a response to concern for children who are the subject of custody fights, and sometimes kidnappings, that cross state lines. Second, in 1981 the legislature enacted a statute providing for the garnishment of up to forty percent of the responsible parent's weekly disposable earnings for the support of his or her minor child. This measure ensures access to the earnings of parents who do not voluntarily comply with the support decree.

Welcome changes have been made by both the judicial and legislative branches of government in Alabama in the area of child custody and support during the last five years. The reforms resemble those that would have been required if the Equal Rights Amendment had been ratified. The equitable and inherently just nature of these changes highlights the desirability of passage of an equal rights amendment.

VI. CITIZENSHIP

Certain basic rights that seem inherent to American citizen-
ship have only recently been granted to women. The right to vote was not extended to Alabama women until ratification of the nineteenth amendment by three-fourths of the states in 1920. A possible obstacle to equal voting rights in Alabama may remain, however, to the extent that a married woman is legally incapable of establishing a domicile separate from that of her husband. Because single women and all men are free to establish or change domicile, the denial of this right to married women is a denial of equal protection of the laws. Although the Alabama Supreme Court reaffirmed this common-law rule after the nineteenth amendment was ratified, the question has not yet been considered under the heightened standard of review currently applied to sex-based classifications.

Among other recent sex-based abridgments of citizenship was the ban on women jurors in Alabama until 1966. In White v. Crook a three-judge federal district court held Alabama's statute restricting jury service to males violative of the equal protection clause of the United States Constitution. Although the Code was amended to reflect this holding, the legislature adopted, in addition, a provision allowing the trial judge to excuse a woman from jury service at her request "for good cause shown." The exemption was a denial to female litigants of the opportunity to have a jury of their peers, and a denial of full citizenship. Without com-

165. "The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.
166. In Alabama, as in most states, the franchise was limited to male citizens. See Ala. Const. art. 8, § 177. Although the Alabama legislature rejected the nineteenth amendment by a vote of 59 to 31, see Lumpkin, The Equal Suffrage Movement in Alabama, 1912-1919 at 146-47 (1949) (unpublished thesis in University of Alabama Library), the term "male" was effectively stricken from the state constitution upon its ratification. See Graves v. Eubank, 205 Ala. 174, 87 So. 587 (1921).
167. See Knowles, supra note 4, at 483.
168. The traditional common-law rule was that upon marriage the domicile of the wife becomes that of her husband. Alabama follows that rule, see Stafford v. State, 33 Ala. App. 163, 31 So. 2d 146 (1947). The wife was deemed incapable of legally establishing domicile because it is assigned to her.
171. See generally Knowles, supra note 4, at 484-85.
ment or fanfare the special provision for female jurors was deleted in the 1975 Code. In 1978 the following statute was adopted by the Alabama Legislature: "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status." Albeit tardy, legislative recognition that special treatment undercuts the claim of full citizenship, which includes both rights and responsibilities, is commendable.

VII. CRIMINAL LAW

Alabama's new Criminal Code became effective on January 1, 1980. The relevant portions of the Code were analyzed in the previous article. Topics that were affected by the new code include prostitution, sexual assaults, abortion, presumed coercion.

175. According to the Table of Comparative Sections of the 1975 Alabama Code, tit. 30, § 21 was replaced by § 12-16-43, Alabama Code, from which the sentence excusing women was omitted. Section 12-16-43 has now been repealed. Ala. Code § 12-6-43 (Supp. 1981).


178. See Knowles, supra note 4, at 487-505.

179. The new Criminal Code contains no provision making prostitution or patronization of a prostitute a criminal offense. Local governments are given authority to prohibit houses of prostitution and punish the inmates of such houses, see Ala. Code § 11-47-113 (1975), but the patrons go unpunished. Criminalization of only one of the participants rests on tenuous ground as evidenced by scholarly writings, see, e.g., Haft, Hustling for Rights, 1 Civ. Lib. Rev. 8 (1974), and decisions from other states, see Note, Criminal Law—The Principle of Harm and Its Application to Laws Criminalizing Prostitution, 51 Den. L.J. 235, 238 n.12 (1974). For a discussion of Alabama's new prostitution statutes, see Knowles, supra note 4, at 488-93. For two more recent discussions of prostitution, see Milman, New Rules for the Oldest Profession: Should We Change Our Prostitution Laws? 3 Harv. Women's L.J. 1 (1980) and Walkowitz, The Politics of Prostitution, 6 Signs 123 (1980).

180. The law of sexual assault, including rape, has been substantially reorganized under the new Criminal Code. Alabama now has a statutory definition and provision for punishment of both rape and sodomy. Ala. Code § 13A-60-64 (Supp. 1981). For a further discussion of the sexual assault provisions in the new criminal code, see Knowles, supra note 4, at 493-98. For a more recent discussion of rape, see Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Col. L. Rev. 1 (1977); Johnson, On the Prevalence of Rape in the United States, 6 Signs 136 (1980); Gollin, Comment on Johnson's "On the Prevalence of Rape in the United States," 6 Signs 349 (1980); Johnson, Reply to Gollin, 6 Signs 349 (1980).

181. The criminal abortion statute has been on the books in its present form in Alabama since 1951 and permits abortion only to save the life or preserve the health of the mother. Ala. Code § 13-8-4 (1975) (transferred to § 13A-13-7 (Supp. 1981)). The Alabama
family offenses, the "unwritten law" defense, the Peeping Tom statute, verbal assaults, juveniles, sentencing statute is clearly unconstitutional when applied during the first or second trimesters of pregnancy. See Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). A number of bills to regulate abortion even further have been introduced into the legislature each year, but none has passed.

The United States Supreme Court's latest statement on abortion was in H.L. v. Matheson, 450 U.S. 398 (1981). The Court held that a state may require a physician to notify the parents of a minor woman or the husband of a married woman who is to have an abortion. Id.

For two recent discussions on abortion, see Hayler, Abortion, 5 SIGS 307 (1979); Note, Restriction on Women's Right to Abortion: Informed Consent, Spousal Consent and Recordkeeping Provisions, 5 WOMEN'S RIGHTS L. REP. 35 (1978).

182. "Under Alabama common law a married woman was excused from many of her crimes if committed in the presence of her husband . . . . While in his presence, she was presumed to have acted in obedience to his will and under his coercion." Knowles, supra note 4, at 499 (footnote omitted). The presumption was rebuttable, however, and did not apply in prosecutions for every crime. Id. at 500. The doctrine has only recently been abolished by the new Criminal Code. See Ala. Code § 13A-3-30(c) (Supp. 1981). For a discussion of this doctrine before its abolition, see Knowles, supra note 4, at 499-500.

183. Sections of the new Criminal Code concerning crimes against a child or the family are of special interest for purposes of this Article. Although the generic "he" is used throughout the new Code (with the exception of the statute defining rape, Ala. Code § 13A-60-62 (Supp. 1981)), the sections dealing with nonsupport, id. § 13A-13-4, abandonment of a child, id. § 13A-13-5, and endangering the welfare of a child, id. § 13A-13-6, describe the actor as "a man or woman." This use of language emphasizes that either sex could be guilty of criminal nonsupport, abandonment of a child, and endangering the welfare of a child. See Knowles, supra note 4, at 500-01.

184. The "unwritten law" defense is a defense to a charge of homicide of the defendant's wife or her paramour if the wife and paramour are discovered in the act of sexual intercourse. Although the complete defense is not recognized in Alabama, under the circumstances contemplated by the defense the defendant will probably be charged with manslaughter rather than murder. For a further discussion of the requirements for reduction of the charge, see Knowles, supra note 4, at 501. Note, however, that the cases speak only of situations in which the husband kills his wife; no Alabama case has dealt with the corresponding situation in which the wife kills her husband upon discovering him engaged in sexual intercourse with a paramour.

185. The Alabama Peeping Tom statute, which made criminal the conduct of any male who without legal cause looked into any apartment, house, or room at night that was occupied by a female, was repealed by the new Criminal Code. Pub. Act No. 607 § 9901, 1977 Ala. Acts at 911. The proscribed activity is now covered under the new crime of criminal surveillance, Ala. Code § 13A-11-32 (Supp. 1981), which is sex-neutral.

186. The new Criminal Code repealed by omission the old and infrequently used statutes that made it a crime to use "abusive, insulting, or obscene language" in the presence or hearing of any girl or woman, see Ala. Code § 13-6-18 (1975), or to disturb a woman in a public place using such language, see id. § 13-6-101. The Supreme Court of Alabama recently declared unconstitutional § 13-6-18 as violative of the fourteenth amendment to the United States Constitution because it makes an "unwarranted gender based distinction." Frolik v. State, 392 So. 2d 846, 847 (Ala. 1981). These statutes have been replaced by the sex-neutral crime of disorderly conduct, which is defined to include the use of "abusive or
Because of the growing evidence and awareness of marital rape, and the possibility of problems with Alabama's gender-based rape statute, a reexamination of the topic of the law of sexual assault is important.

Alabama's statutory provision governing sex offenses defines "female" as "[a]ny female person who is not married to the actor." Thus, it is not a criminal offense for a man to engage in forcible or unwanted sexual contact with his wife. In addition, "sexual contact" is defined as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party." A growing body of evidence indicates that marital rape is a significant social problem, a problem that is often related to the battering of wives. At this time, when Alabama is moving to supply assistance programs for victims of family battering and legal remedies to prevent family violence, the exclusion of marital


188. Unequal treatment of the sexes occurs throughout the American criminal justice system. See Knowles, supra note 4, at 504; Clements, Sex and Sentencing, 26 Sw. L.J. 890 (1972). While females had been given special treatment under Alabama law in sentencing and imprisonment, the disparity in treatment that still exists reflects the persistence of stereotypical thinking rather than gender-based legal requirements. See Knowles, supra note 4, at 504-05.

189. See Barden, Confronting the Moral and Legal Issue of Marital Rape, N.Y. Times, June 1, 1981, at 85.

190. Ala. Code § 13A-6-60(4) (Supp. 1981). The definition continues: "Persons living together in cohabitation are married for purposes of this article, regardless of the legal status of their relationship otherwise." Id.

191. Id. 13A-6-60(3) (emphasis added).

192. See Barden, supra note 189. For a review of the issues in defending women, see E. Bochnak, Women's Self-Defense Cases (1981).

193. See Domestic Shelters Act, Ala. Code §§ 30-6-1 to -13 (Supp. 1982); text accompanying notes 95-98 supra.

194. See Protection from Abuse Act, Ala. Code §§ 30-5-1 to -11 (Supp. 1982); text
rape from our criminal laws should end.

The Alabama Supreme Court has not ruled on the constitutionality of Alabama's "rape shield" law. This statute provides that evidence of the complainant's past sexual behavior is admissible, either on direct or cross-examination, in a prosecution for rape only if the court determines after an in camera hearing that the victim’s "past sexual behavior directly involved the participation of the accused." Challenges to the constitutionality of the provision have been made, but the Alabama Court of Criminal Appeals has found it unnecessary to reach the issue in any case. Other jurisdictions possessing similar rape shield statutes have scrutinized them and have accepted them as constitutionally permissible.

In 1981 the United States Supreme Court upheld the constitutionality of California's gender-based statutory rape law, which punishes an "act of sexual intercourse accomplished with a female not the wife of the perpetrator, when the female is under the age of 18 years." This decision led to reexamination of the relevant Alabama statutes for potential constitutional problems.

In upholding the California statute, which punishes only males, the Supreme Court applied a test requiring the classification to bear a "substantial relationship to important governmental objectives." The Court accepted California's stated purpose—the prevention of illegitimate teenage pregnancies—as sufficient justifi-
cation for the sex-based classification in this statute. Justice Brennan, with whom Justices White and Marshall joined, argued that the law should be held unconstitutional because the State could not show a substantial relationship between the claimed governmental purpose and the operation of the sexually discriminatory statute. He noted that "at least 37 states... have enacted gender-neutral statutory rape laws," and no evidence supports the claim that these states have been handicapped in enforcing their statutes or protecting their social values. In another dissent, Justice Stevens questioned whether it is permissible for a state to hold responsible only one of two equally guilty wrong-doers: "Would a rational parent making rules for the conduct of twin children of opposite sex simultaneously forbid the son and authorize the daughter to engage in conduct that is especially harmful to the daughter?"

In Alabama, statutory rape is treated in sections 13A-6-61(a)(3) and 13A-6-62(a)(1) of the Alabama Code. Both the offenses of rape in the first degree and rape in the second degree are felonies and are crimes that by definition only a male can commit. Arguably the offense of sexual abuse is broad enough to cover some of the same acts prohibited by the statutory rape sections, thereby proscribing females from committing the acts. Application of the sexual abuse sections to these acts would require a

202. Id. at 470.
203. Id. at 492 (Brennan, J., dissenting).
204. See id. at 492-93.
205. Id. at 499 (Stevens, J., dissenting).
206. ALA. CODE § 13A-6-61(a) (Supp. 1981) ("A male commits the crime of rape in the first degree if: . . . (3) He, being 16 years or older, engages in sexual intercourse with a female who is less than 12 years old."). Id. § 13A-6-62(a) ("A male commits the crime of rape in the second degree if: (1) Being 16 years old or older, he engages in sexual intercourse with a female less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the female.").
207. Id. §§ 13A-6-61 to -62.
208. Id. §§ 13A-6-66 to -67. Section 13A-6-66 provides in pertinent part: "(a) A person commits the crime of sexual abuse in the first degree if: . . . (3) He, being 16 years old or older, subjects another person to sexual contact who is less than 12 years old." Section 13A-6-67 provides, in pertinent part: "(a) A person commits the crime of sexual abuse in the second degree if: . . . (2) He, being 19 years or older, subjects another person to sexual contact who is less than 16 years old, but more than 12 years old."
holding that the "sexual contact" which is the actus reus of that offense includes sexual intercourse. The definition of "sexual contact" does not appear to preclude such a holding, but the Code's separate definitions of sexual contact and sexual intercourse suggest that the drafters did not intend one definition to include the other. Additional support for this conclusion is the statement in the Commentary to section 13A-6-65 that sexual misconduct, a class A misdemeanor, "provides the outside limit of criminality for a woman who has intercourse with an unconsenting male; rape is limited to acts initiated by a male, and sodomy does not include heterosexual vaginal intercourse." Other problems plague this analysis. Even if sexual abuse can be interpreted to proscribe statutory rape by a female, the penalty for sexual abuse is much less severe than the penalty for statutory rape. Additionally, this statutory analysis fails to address the legal consequences to a female between the ages of sixteen and nineteen who has sexual intercourse with a male between the ages of twelve and sixteen. Thus, even if the sexual abuse sections are applicable, they are not sex-neutral, and a gap exists along the continuum of offenses for which a female can be convicted under the sexual abuse statute, a gap that does not exist under the gender-based rape statute.

If the sexual abuse provisions are not applicable, a sixteen-year-old female who has intercourse with a male less than sixteen years of age would be guilty of sexual misconduct. The Alabama Code provides that a female commits sexual misconduct if she "engage[s] in sexual intercourse with a male without his consent ...," and a person less than sixteen years of age is deemed incapable of consent. Sexual misconduct is a Class A

210. Ala. Code § 13A-6-60(3) (Supp. 1981) defines sexual contact as "(a) Any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."
211. Id. § 13A-6-60(1) and (3).
212. Id. § 13A-6-65, Commentary. The commentary is, of course, unofficial.
213. Sexual abuse in the first degree is a Class C felony, id. § 13A-6-66(b), and sexual abuse in the second degree is a class A misdemeanor, id. § 13A-6-67(b). Rape, however, in the first degree and in the second degree are Class A and Class C felonies respectively. Id. §§ 13A-6-61(b) and -62(b).
214. See id. § 13A-6-66 to -67.
215. Id. § 13A-6-65(a)(2).
216. See id. § 13A-6-70(c)(1).
misdemeanor.  

If immature sexual experience is one of the evils against which the statutory rape laws are directed, it seems unwise to exclude young men and boys from their protection. The Alabama statute should be amended to make intercourse between an adult woman and an underaged male the same category of offense as intercourse between an adult male and an underaged female.

VIII. THE LEGAL PROFESSION

In the past five years, the number of women entering the legal profession has continued to increase. In 1979 approximately nine and one-half percent of all American lawyers and judges were women compared to three and one-half percent in 1973. In 1980 twenty-seven percent of all law students were women, and in some law schools, nearly one-half of the students are women.

As more women have been admitted to law schools, more have been appointed to law school faculties. In 1950 approximately two percent of law professors who had tenure track positions and who were not librarians were women. In 1979 ten and one-half percent of all law school teachers were women. Demands that more

217. Id. § 13A-6-65(b).
222. Shapiro & Johnson, supra note 221, at 20. In 1981 at the University of Alabama School of Law, 155 of the 523 students were women. Interview with Anna S. Fitts, University of Alabama School of Law Registrar, in Tuscaloosa, Alabama (Oct. 13, 1981). This statistic indicates an increase of 9.1% since 1977 when 101 of 491 students were women. See Knowles, supra note 4, at 512.
224. Id. at 906.
women be appointed to law school faculties are increasing.225 In April of 1979, for example, the Coalition for a Diversified Faculty filed a complaint with the Department of Health, Education, and Welfare and the Labor Department against Berkeley's Boalt Hall School of Law charging that "the lack of women on the faculty impaired the school's service to female students, who lack proper role models."226

In 1980 six and six-tenths percent of all federal judges were women (44 out of 667), the majority of whom were appointed after 1978.227 In 1981 President Reagan appointed Sandra Day O'Connor to the Supreme Court. In Alabama, one woman, Justice Janie L. Shores, sits on the supreme court. Seven of the 221 judges sitting on other Alabama courts are women.228

The number of women participating in national and state bar associations continues to increase as more women graduate from law schools, but few women are in leadership positions. Approximately ten percent of the members of the American Bar Association are women.229 In the past, only four women have chaired ABA sections and only twelve of the 380 members of the House of Delegates are women.230 In 1981, 117 women were admitted to the Alabama bar,231 but no women held leadership positions.232

Women are also entering the political arena. At present, the United States Senate has two women members and the House of Representatives has seventeen women members.233 Although no woman has ever been elected to the Alabama Senate, there are six women in the House of Representatives.234

225. See Shapiro & Johnson, supra note 222, at 21. At the University of Alabama School of Law four of the thirty-four members of the faculty are women. Two of these were appointed after 1978.
226. Id.
227. Rossman, supra note 218, at 1240.
230. Id. at 27, 29.
IX. Conclusion

The developments described in this Article reflect the movement toward sex equity in our law and in our society. The passage of the new Probate Code in Alabama has provided the comprehensive revision needed to reform that area of the law which was most gender-biased. The laws of Alabama are now almost entirely gender-free. This quiet revolution has come about within the last decade, mirroring the important changes in the role of women in American society and our increased understanding of, and sensitivity to, that role. Given what we know about the uneven course of the quest for human liberty, it is worth remembering that without an equal rights amendment, even these giant steps are all reversible.