


1-1-1982

The Legal Status of Women in Alabama, II: A Crazy Quilt Restitched

Marjorie F. Knowles

Georgia State University College of Law, mknowles@gsu.edu

Follow this and additional works at: https://readingroom.law.gsu.edu/faculty_pub

 Part of the [Law and Gender Commons](#), [Law and Society Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Marjorie F. Knowles, The Legal Status of Women in Alabama, II: A Crazy Quilt Restitched, 33 Ala. L. Rev. 375 (1982).

This Article is brought to you for free and open access by the Faculty Publications at Reading Room. It has been accepted for inclusion in Faculty Publications By Year by an authorized administrator of Reading Room. For more information, please contact mbutler@gsu.edu.

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.¹ These dramatic changes have been accompanied by major developments in the law, both federal² and state.³

* Professor of Law, University of Alabama. A.B., 1960, Smith College; LL.B., 1965, Harvard Law School. The author served as Inspector General, U.S. Department of Labor, 1979-1980. The author wishes to thank the following persons for their assistance: Rebekah Adams, Ellen Brooks, Lisa R. Browning, Peggy Cain, Penny Davis, Clara L. Fryer, Libba Latham, Denise Littleton, Marian Phillips, and Barry Thompson.

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).

For an examination of the growth of the female paid labor force and its many implications, see THE URBAN INSTITUTE, THE SUBTLE REVOLUTION (R. Smith ed. 1979). A useful compilation of data detailing employment patterns of women workers appears in a report by the Commission on Civil Rights. See U.S. COMMISSION ON CIVIL RIGHTS, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN (1981).

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;⁴ significant developments have taken place in nearly every area of law reviewed.⁵ 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"⁶ 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.⁷ Clearly, in the absence of a constitutional mandate, both legislative and judicial steps toward sexual equality are reversible.⁸ The wealth of new legislation that is pro-

STATE EQUAL RIGHTS AMENDMENT (rev. ed. 1980).

4. Knowles, *The Legal Status of Women in Alabama: A Crazy Quilt*, 29 ALA. L. REV. 427 (1978).

For another review of the legal status of women in Alabama, see J. CRITTENDEN, *THE LEGAL STATUS OF HOMEMAKERS IN ALABAMA* (1977) (report prepared for the Homemaker's Committee of the National Commission on the Observation of International Women's Year). For a list of provisions of the Alabama Code and Constitution that contain distinctions based on sex, see THE ALABAMA WOMEN'S COMMISSION, *CITATIONS FROM ALABAMA LAW* (2d rev. ed. 1980).

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. 268, 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 states⁹ 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

("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).

9. The 15 nonratifying states are Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. See SPOKESWOMAN, Nov. 1, 1979, at 5-6.

10. For a thorough review of the impact of the Equal Rights Amendment, see B. BROWN, A FREEDMAN, H. KATZ & A. PRICE, *WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAW* (1977).

On the impact of a state equal rights amendment identical in wording to the federal amendment, see PENNSYLVANIA COMMISSION FOR WOMEN, *supra* note 3.

The latest report by the United States Commission on Civil Rights is U.S. COMMISSION ON CIVIL RIGHTS, *THE EQUAL RIGHTS AMENDMENT: GUARANTEEING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION* (June 1981).

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.

13. For a discussion of comparable worth, see, e.g., Note, *Sex-Based Wage Discrimination Under Title VII: Equal Pay for Equal Work or Equal Pay for Comparable Work?* 22 WM. & MARY L. REV. 421 (1981); 30 AM. U.L. REV. 547 (1981). For an argument that Title VII requires equal pay for comparable work and a description of a method to identify jobs held by women that are comparable to better paid jobs held by men, see Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657 (1981).

14. See, e.g., Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981).

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.¹⁶ Progress toward investing married women with full legal capacity to contract dates back to the nineteenth century,¹⁷ and Alabama has generally shared in that progress.¹⁸ 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.¹⁹ Until 1977²⁰ Alabama had the distinction of being the only state to restrict a married woman's conveyance of property in this manner,²¹ and Alabama courts held that the restriction applied not only to conveyances but also to contracts for the sale of land.²²

The 1975 and 1977 decisions of *Trabits v. Snow*²³ 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.

19. Ala. Code § 30-4-12 (1975) (declared unconstitutional, *Peddy v. Montgomery*, 345 So. 2d 631 (Ala. 1977)).

20. *Peddy v. Montgomery*, 345 So. 2d 631 (Ala. 1977) (§ 30-4-12 of the Alabama Code declared unconstitutional).

21. Johnson, *Sex and Property*, 47 N.Y.U. L. Rev. 1033, 1079 (1972).

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.²⁴ 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*,²⁵ 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]."²⁶ By the time the court's second opinion in *Trabits v. Snow*²⁷ 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.²⁸

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.²⁹

24. 294 Ala. 313, 317, 316 So. 2d 336, 339 (1975).

25. 345 So. 2d 631 (Ala. 1977).

26. *Id.* at 637.

27. *Snow v. Trabits*, 347 So. 2d 395 (Ala. 1977).

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.

III. TORTS

Great strides toward the equality of men and women in their capacity to sue and be sued in tort actions occurred prior to 1978.³⁰ Common-law precedents that both protected³¹ and restricted³² married women's actions in tort were abolished. Another important tort law restriction in Alabama disappeared in 1979 when the state legislature amended section 6-5-390³³ 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.³⁴ 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:³⁵ "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."³⁶ The Code section governing actions for the wrongful death of a minor³⁷ 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."³⁸

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)).

33. ALA. CODE § 6-5-390 (Supp. 1981).

34. ALA. CODE § 6-5-390 (1975) (amended, 1979).

35. *Jones v. Jones*, 355 So. 2d 354, 355 (Ala. 1978).

36. *Id.* See Knowles, *supra* note 4, at 444-46.

37. ALA. CODE § 6-5-391 (1975).

38. *Id.*

minor child.³⁹ 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.⁴⁰

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."⁴¹ 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.⁴²

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 -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.⁴³

39. ALA. CODE § 6-5-390 (Supp. 1981).

40. *Id.*

41. ALA. CODE § 6-5-391 (1975).

42. See note 43 *infra* and accompanying text.

43. *Mattingly v. Cummings*, 392 So. 2d 531 (Ala. 1980) (constitutionality of § 6-5-391 upheld despite its conditional priority to fathers where the cause of action arose before the statute was amended).

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,⁴⁴ but married women were singularly disabled in those areas; over the last century, the old restrictions were gradually removed, mainly by legislative action.⁴⁵ 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.⁴⁶ 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,⁴⁷ the extension of the right of election to a surviving widower,⁴⁸ 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.⁴⁹ There are also changes in the rules governing the intestate share of the surviving spouse⁵⁰ that generally give a surviving spouse a larger share than under previous laws.⁵¹ Throughout the new Code, benefits and detriments appear to be allocated on a sex-neutral basis. While this is a very

44. See L. KANOWITZ, *WOMEN AND THE LAW* 35 (1969).

45. See Knowles, *supra* note 4, at 432-33, 448.

46. Alabama Probate Code, Pub. Act No. 399, 1982 Ala. Acts _____. This act will be effective January 1, 1983. *Id.* § 8-101.

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 market place 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.*

54. ALA. CODE § 43-3-1 (Supp. 1981).

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.⁵⁸ 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.⁵⁹

In the First Special Session of 1981, the Alabama Legislature amended both the real property⁶⁰ and personal property⁶¹ intestate succession statutes to make their wording completely sex-neutral.⁶² "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 curtesy⁶³ 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.*⁶⁴

Once this change was in place, a conflict became apparent. As previously noted⁶⁵ 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

58. *Lake v. Russell*, 180 Ala. 199, 60 So. 850 (1913). *Accord*, *Holt, Intestate Succession in Alabama*, 23 ALA. L. REV. 319, 339 (1971).

59. ALA. CODE § 43-3-10 (1975).

60. *Id.* § 43-3-1.

61. *Id.* § 43-3-10.

62. Act of August 20, 1981, Pub. Act No. 967, § 1, Spec. Sess., 1981 Ala. Acts 148, 148-49 (amending §§ 43-3-1 and 43-3-10 of the Alabama Code).

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.

64. Act of August 20, 1981, Pub. Act No. 967, § 1, Spec. Sess., 1981 Ala. Acts 148, 148-49 (amending § 43-3-1 and 43-3-10; repealing § 43-3-12 and incorporating it into § 43-3-10) (emphasis added to indicate incorporation of § 43-3-12).

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 43-3-10.⁶⁶ 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.⁶⁷

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 marriage⁶⁸ was held unconstitutional by the court as a denial of equal protection of the law.⁶⁹ 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.⁷⁰ 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.⁷¹ In the 1979 case of *Dorough v. Johnson*,⁷² 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."⁷³ When faced squarely with the issue, the court held this statute violates the equal protection clause

66. Act of December 1, 1981, Pub. Act No. 1170, § 1, Third Spec. Sess., 1981 Ala. Acts 454, 454-55 (amending § 43-3-10).

67. *Id.* (emphasis added to indicate additions).

68. ALA. CODE § 43-1-8 (1975) (declared unconstitutional, 1978).

69. *Parker v. Hill*, 362 So. 2d 875, 877 (Ala. 1978).

70. ALA. CODE § 43-1-15 (1975). The Arkansas Supreme Court has recently held that an Arkansas statute providing dower rights for the surviving wife but not the surviving husband violates the equal protection clause of the United States Constitution. See *Stokes v. Stokes*, 613 S.W.2d 372 (Ark. 1981).

71. See *Mindler v. Crocker*, 245 Ala. 578, 582, 18 So. 2d 278, 281 (1944); *Knowles*, *supra* note 4, at 452.

72. 373 So. 2d 1082 (Ala. 1979).

73. *Id.* at 1087 n.3.

of the fourteenth amendment of the United States Constitution and left to the legislature the question whether to extend it to widowers.⁷⁴ The new Probate Code provides for a right of election available to the surviving spouse, whether widow or widower.⁷⁵

The new statute also makes the homestead allowance available on a sex-neutral basis to the surviving spouse.⁷⁶ In 1981 the Alabama Supreme Court had held that Alabama's former Homestead Act,⁷⁷ which was gender-based, violated the fourteenth amendment to the United States Constitution.⁷⁸ 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.⁷⁹ However, by the time of this decision, the legislature had amended the statute to make it sex-neutral,⁸⁰ the same result achieved in the new Probate Code.⁸¹

Prior to the adoption of the new Probate Code, the greatest area of gender-based law in Alabama was that governing decedent's estates.⁸² Provisions for statutory dower,⁸³ the widow's right to dissent from her husband's will,⁸⁴ and the widow's right to quarantine⁸⁵ all favored the widow to the detriment and often in defiance of the deceased spouse.⁸⁶ 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,⁸⁷ they illustrate the sex bias that existed prior to the adoption of the new Probate Code. The legislature has taken

74. Hall v. McBride, 416 So. 2d 986 (Ala. 1982).

75. Alabama Probate Code, Pub. Act No. 399, §§ 2-201, 2-203, 1982 Ala. Acts ___, ___.

76. *Id.* § 2-206, 2-401, 1982 Ala. Acts ___, ___.

77. Ala. Code tit. 7, § 663 (1940) (applied only to "widows").

78. Ransom v. Ransom, 401 So. 2d 746 (Ala. 1981).

79. *See id.* at 748.

80. ALA. CODE § 6-10-61 (1975).

81. Alabama Probate Code, Pub. Act No. 399, § 2-401, 1982 Ala. Acts ___, ___.

82. *See generally* Comment, *Reverse Sex Discrimination Under Alabama's Law of Decedents' Estates*, 32 ALA. L. REV. 135 (1980); Comment, *Gender-Based Discrimination in the Alabama Probate Laws*, 11 CUM. L. REV. 671 (1980).

83. ALA. CODE §§ 43-5-1 to -53 (1975).

84. *Id.* § 43-1-15.

85. *Id.* § 43-5-40.

86. *See* Comment, *Reverse Sex Discrimination Under Alabama's Law of Decedents' Estates*, 32 ALA. L. REV. 135, 149 (1980).

87. ALA. CODE § 43-5-3 (1975).

a giant step along the road suggested by the author⁸⁸ 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."⁸⁹ Family law continues to change in recognition of women's changing role in the workplace and in the family.⁹⁰ 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.⁹¹ The Protection from Abuse Act⁹² 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.⁹³ 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).

90. See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

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).

92. Protection from Abuse Act, ALA. CODE §§ 30-5-1 to -11 (Supp. 1982).

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).

99. Literature on this aspect of the tax structure is extensive. See, e.g., Wenig, *Marital Status and Taxes*, in UNMARRIED COUPLES AND THE LAW 189 (I. Douthwaite 1979); Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1416-43 (1975). See generally I. Sloan, *LIVING TOGETHER* 43-47 (1980); Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49 (1971); Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27 (1978).

100. See Gerzog, *supra* note 99, at 29.

would be incurred by the filing of a joint return usually results.¹⁰¹ Differing tax rates in conjunction with other provisions of the Internal Revenue Code produce a "marriage penalty" when two income-producing individuals marry.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.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.¹⁰⁴

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

101. See Bittker, *supra* note 99, at 1429-31.

102. See Gerzog, *supra* note 99, at 27.

103. See *id.*

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.*

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) ¶ 80,563 (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.* ¶ 80,564.

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.

106. For a list of specific proposals, see Moerschbaecher, *The Marriage Penalty and the Divorce Bonus: A Comparative Examination of the Current Legislative Tax Proposals*, 5 REV. TAX. INDIVIDUALS 133, 138-45 (1981).

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 \$30,000.¹⁰⁷

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

The Supreme Court of Alabama has recently held¹¹³ that married women "are not legally required"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."¹¹⁵ In reaching this conclusion, the court found that *Forbush v. Wallace*¹¹⁶ "does not accurately state

107. Economic Recovery Tax Act of 1981, 26 U.S.C.A. § 221 (Supp. 1982). The amount deductible for 1982 is limited to 5% up to a maximum amount of \$1500, but thereafter to 10% up to a maximum of \$3000. *Id.* For a discussion of the reasons for these changes, see H.R. REP. No. 201, 97th Cong., 1st Sess. 52-53 (1981).

108. See F. HARPER & J. SKOLNICK, PROBLEMS OF THE FAMILY 143-46 (rev. ed. 1962).

109. Until recently Alabama law allowed women to marry at a younger age than men. Ala. Code tit. 34, §§ 4, 10 (1958). Under the 1975 Code, however, both females and males can marry at 18 without parental consent. ALA. CODE § 30-1-5 (1975). The minimum age requirement for marriage with parental consent in Alabama is 14. ALA. CODE § 30-1-4 (1975).

110. ALA. CODE § 30-1-9 (1975).

111. ALA. CODE § 22-16-5 (1975).

112. ALA. CODE § 13A-3-3 (Supp. 1981). For a more complete survey of marriage laws in Alabama, see Knowles, *supra* note 4, at 462-72.

113. Alabama v. Taylor, 415 So. 2d 1043 (Ala. 1982), summarized in 50 U.S.L.W. 2620 (1982).

114. *Id.* at 1048.

115. *Id.* at 1047.

116. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972). In *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,"¹¹⁷ 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.¹¹⁸

B. Mothers and Children

Although change is occurring, some aspects of family law still reflect the traditional sex roles of mothers and fathers.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²² In 1976, in *Roe v. Conn*,¹²³ a three-judge federal court held unconstitutional portions of two Alabama statutes that set forth procedures for legitimation.¹²⁴ The objectionable provisions permitted a father to legitimate a child merely by declaring himself the father¹²⁵ and to change the child's name in the same proceeding.¹²⁶ Neither statute provided for notice to the mother or ensured protection of the child's interests.¹²⁷ The Alabama Legislature recently responded to this holding by substantially amending the legitimation statutes.¹²⁸ The Code now provides that upon the father's proper filing of a declaration seeking to legiti-

117. *Alabama v. Taylor*, 415 So. 2d 1043, 1047 (Ala. 1982), summarized in 50 U.S.L.W. 2620 (1982).

118. *Id.* at 1048.

119. See Knowles, *supra* note 4, at 472; text accompanying notes 88 & 89 *supra*.

120. *Godfrey v. Hays*, 6 Ala. 501, 503 (1844). The mother as well as the father may be convicted of criminal nonsupport, however. ALA. CODE § 13A-13-4 (Supp. 1980).

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).

122. ALA. CODE §§ 26-12-1 to -9 (1975).

123. 417 F. Supp. 769 (M.D. Ala. 1976).

124. *Id.* at 781-83; Knowles, *supra* note 4, at 473-74.

125. Ala. Code tit. 27, § 11 (Supp. 1973) (current version at ALA. CODE § 26-11-2 (Supp. 1981)).

126. *Id.* tit. 27, § 12 (current version at ALA. CODE § 26-11-3 (Supp. 1981)).

127. *Roe v. Conn*, 417 F. Supp. 769, 781-82 (M.D. Ala. 1976).

128. ALA. CODE §§ 26-11-2 to -3 (Supp. 1981).

mate his child, the probate court must notify the mother and allow thirty days for her to respond.¹²⁹ The probate court must appoint a guardian *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.¹³⁰ The statute prescribes similar procedures when the father requests that the child's name be changed.¹³¹

During the past five years the Alabama Supreme Court has addressed another legal concern of illegitimate children. In *Everage v. Gibson*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.¹³³ In an attempt to comply with United States Supreme Court standards, particularly those set out in *Trimble v. Gordon*,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.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.¹³⁶ In *Everage* the court concluded that an adjudication of paternity under Alabama's paternity statute¹³⁷ also protected the child's right to assert inheritance rights.¹³⁸ The new Probate Code is consistent with the result in *Everage*, and, to the extent that it effects

129. *Id.* § 26-11-2(b).

130. *Id.*

131. *Id.* § 26-11-3.

132. 372 So. 2d 829 (Ala. 1979).

133. ALA. CODE §§ 26-11-1 to -2, 26-12-1 to -9, 43-3-1, 43-3-7 (1975). See Holt, *A Plea for Moderation of Alabama's Harsh Treatment of Succession to Parental Property by Illegitimates*, 12 CUM. L. REV. 27, 35 n.37 (1981).

134. 430 U.S. 762 (1977). See *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).

135. *Everage v. Gibson*, 372 So. 2d 829, 833 (Ala. 1979).

136. *Id.*

137. ALA. CODE § 26-12-1 to -9 (1975).

138. *Everage v. Gibson*, 372 So. 2d 829, 833 (Ala. 1979). The court's decision in *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. *Id.* at 838 (Jones, J., dissenting); Note, *An Equal Protection Challenge to Alabama's Intestacy Scheme As It Affects Illegitimate Children: Everage v. Gibson*, 31 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. ALA. CODE § 26-12-7 (Supp. 1981).

changes in the law governing the inheritance rights of an illegitimate, it improves them.¹³⁹

C. Divorce and Alimony

The statutes governing the grounds for divorce have not been changed during the last five years.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.¹⁴¹ On the other hand, nonsupport is a ground available only to the wife.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.¹⁴³ Under the former law only the husband could be ordered to pay alimony upon dissolution of the marriage.¹⁴⁴ In the 1979 decision of *Orr v. Orr*,¹⁴⁵ the United States Supreme Court found these Alabama alimony statutes underinclusive and, therefore, violative of the equal protection clause of the fourteenth amendment.¹⁴⁶ In response, the Alabama Legislature repealed one statute¹⁴⁷ and passed several amendments making the alimony statutes gender-neutral.¹⁴⁸ A judge now has the power to order either a husband or wife to provide support for the spouse.¹⁴⁹ These amendments dramatically alter the statutory scheme for alimony, but the courts will probably continue to consider the same

139. Alabama Probate Code, Pub. Act No. 399, §§ 2-109, 2-611, 1982 Ala. Acts ___, ___.

140. For a discussion of divorce in Alabama, see Knowles, *supra* note 4, at 474-77.

141. ALA. CODE § 30-2-1(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).

143. ALA. CODE §§ 30-2-31, -50, -51, -52, -54 (Supp. 1981).

144. ALA. CODE §§ 30-2-51 (allowance for wife upon grant of divorce), -52 (amended 1979) (allowance for wife upon grant of divorce for misconduct of husband), -53 (repealed 1979) (allowance for wife upon grant of divorce for misconduct of wife) (1975).

145. 440 U.S. 268 (1979).

146. *Id.* at 278-83.

147. ALA. CODE § 30-2-53 (Supp. 1981).

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, *Alimony, Cohabitation, and the Wages of Sin*, 33 ALA. L. REV. __ (1982).

factors that they considered before *Orr* in arriving at a decision on a request for support.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*,¹⁵¹ for example, illustrates the full circle traveled by courts in treatment of the difficult questions surrounding child custody.¹⁵² Originally, the father benefited from a judicial presumption that he was the parent to have custody.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.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."¹⁵⁵ Gradually, the tender years presumption displaced the influence of the paternal preference rule and became recognized as a rebuttable factual presumption.¹⁵⁶

In reliance on a number of United States Supreme Court decisions,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."¹⁵⁸ In the *Devine* case the court concluded that either the father or the

150. See *Thompson v. Thompson*, 377 So. 2d 141 (Ala. Civ. App. 1979).

151. 398 So. 2d 686 (Ala. 1981).

152. *Id.* at 691.

153. *Id.* at 688.

154. *Id.*

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.*

156. See *Devine v. Devine*, 398 So. 2d 686, 691 (Ala. 1981).

157. See *Orr v. Orr*, 440 U.S. 268 (1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

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.¹⁵⁹ 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.¹⁶⁰ Justice Maddox instructed trial courts to weigh carefully the facts of each case before granting custody and not to invoke mechanically an outdated presumption.¹⁶¹

159. *Id.*

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.¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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-

162. ALA. CODE §§ 30-3-21 to -44 (Supp. 1981).

163. See Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981). "In the first place, [the Act] eliminates jurisdiction based on the physical presence of the child; second, it prohibits modifications of custody decrees of other states, with very limited exceptions; and then, it requires summary enforcement of out-of-state custody decrees." *Id.* at 204.

The Paternal Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566 (1980), represents the Congressional response to this problem. This act provides that the states must give full faith and credit to all child custody decrees and establishes the Federal Parent Locator Service. *Id.* at 3569.

164. ALA. CODE § 6-6-490 (Supp. 1981). When this legislation was first enacted, there was confusion about the maximum percentage that could be garnished because of a federal statute allowing garnishment of from 50 to 65 percent of a parent's earnings in child support cases. Compare *id.* with 15 U.S.C.A. § 1673(b). A recent opinion of the Alabama Attorney General makes clear, however, that the state statute governs since it is more restrictive than the federal statute. See Letter from Eugenia D.B. Hofomann to Barbara A. Pippin (Nov. 25, 1981) (copy of letter on file, *Alabama Law Review* office).

ship have only recently been granted to women. The right to vote was not extended to Alabama women until ratification of the nineteenth amendment¹⁶⁵ by three-fourths of the states in 1920.¹⁶⁶ A possible obstacle to equal voting rights in Alabama may remain,¹⁶⁷ however, to the extent that a married woman is legally incapable of establishing a domicile separate from that of her husband.¹⁶⁸ 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,¹⁶⁹ the question has not yet been considered under the heightened standard of review currently applied to sex-based classifications.¹⁷⁰

Among other recent sex-based abridgments of citizenship¹⁷¹ was the ban on women jurors in Alabama until 1966.¹⁷² In *White v. Crook*¹⁷³ 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."¹⁷⁴ 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.

169. *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296 (1938).

170. See generally *Craig v. Boren*, 429 U.S. 190 (1976).

171. See generally Knowles, *supra* note 4, at 484-85.

172. Compare Ala. Code tit. 30, § 21 (1958) (current version at ALA. CODE § 12-16-43 (1975)) with 28 U.S.C. § 1861 (Supp. 1979).

173. 251 F. Supp. 401 (M.D. Ala. 1966).

174. Ala. Code tit. 30, § 21 (Supp. 1973).

ment or fanfare the special provision for female jurors was deleted in the 1975 Code.¹⁷⁵ 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."¹⁷⁶ 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, 1980.¹⁷⁷ The relevant portions of the Code were analyzed in the previous article.¹⁷⁸ Topics that were affected by the new code include prostitution,¹⁷⁹ sexual assaults,¹⁸⁰ abortion,¹⁸¹ presumed coer-

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).

176. ALA. CODE § 12-16-56 (Supp. 1981). The present code provisions concerning selection and qualification of jurors are contained in §§ 12-16-55 to -64 of the Alabama Code.

177. ALA. CODE § 13A-1-11 (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

cion,¹⁸² family offenses,¹⁸³ the "unwritten law" defense,¹⁸⁴ the Peeping Tom statute,¹⁸⁵ verbal assaults,¹⁸⁶ juveniles,¹⁸⁷ 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 SIGNS 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

and incarceration.¹⁸⁸ Because of the growing evidence and awareness of marital rape,¹⁸⁹ 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."¹⁹⁰ 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."¹⁹¹ 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.¹⁹² At this time, when Alabama is moving to supply assistance programs for victims of family battering¹⁹³ and legal remedies to prevent family violence,¹⁹⁴ the exclusion of marital

obscene language" or an obscene gesture in a public place. *See* ALA. CODE § 13A-11-7 (Supp. 1981).

187. Until establishment of the Judicial Article Implementation Act, Pub. Act No. 1205, 1975 Ala. Acts 2384 (codified in scattered sections of titles 12 & 15 of ALA. CODE (1975)), jurisdiction over juveniles was exercised by a multitude of lower courts. The maximum age of persons subject to juvenile jurisdiction varied from county to county. *Compare* Ala. Code tit. 62, § 311 (1958) with Ala. Code tit. 13, § 350 (1958) (repealed 1975). It was a common practice to extend jurisdiction over females for a number of extra years apparently based on the theory that females needed supervision for a longer period of time than did males. *See* Davis & Chaires, *Equal Protection for Juveniles: The Present Status of Sex-Based Discrimination in Juvenile Court Laws*, 7 GA. L. REV. 494, 499 (1973). Juvenile jurisdiction is now vested in the district and circuit courts, ALA. CODE § 12-12-34 (1975), and the maximum age is 19 years for all persons. *Id.* § 12-15-1.

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.¹⁹⁵ 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."¹⁹⁶ 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.¹⁹⁷ Other jurisdictions possessing similar rape shield statutes have scrutinized them and have accepted them as constitutionally permissible.¹⁹⁸

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."¹⁹⁹ This decision²⁰⁰ 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."²⁰¹ The Court accepted California's stated purpose—the prevention of illegitimate teenage pregnancies—as sufficient justifi-

accompanying notes 91-94 *supra*.

195. "Rape shield" statutes restrict the admission of evidence of prior sexual conduct of the victim in a sex offense case. *See* *Lawson v. State*, 377 So. 2d 1115, 1116-17 (Ala. Crim. App.), *cert. denied*, 377 So. 2d 1121 (Ala. 1979); ALA. CODE § 12-21-203 (1975); FED. R. EVID. 412. A recent article on rape shield laws suggests that some of these statutes present sixth amendment problems. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

196. ALA. CODE § 12-21-203 (1975). For a discussion of this section, see Knowles *supra* note 4, at 497.

197. *See* *Lawson v. State*, 377 So. 2d 1115, 1117 (Ala. Crim. App.), *cert. denied*, 377 So. 2d 1121 (Ala. 1979); *Stuggs v. State*, 372 So. 2d 49, 53 (Ala. Crim. App.), *cert. denied*, 372 So. 2d 55 (Ala.), *cert. denied*, 444 U.S. 936 (1979); *Knox v. State*, 365 So. 2d 349, 349 (Ala. Crim. App. 1978); *Turley v. State*, 356 So. 2d 1238, 1244 (Ala. Crim. App. 1978).

198. *See, e.g.*, *Dorn v. State*, 267 Ark. 365, —, 590 S.W.2d 297, 299 (1979); *State v. Williams*, 224 Kan. 468, —, 580 P.2d 1341, 1343 (1978); Annot., 94 A.L.R.4th 283 (1980).

199. CAL. PENAL CODE § 261-5 (West Supp. 1980).

200. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

201. *Id.* at 469 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

cation for the sex-based classification in this statute.²⁰² Several justices rendered strong dissenting opinions, however. 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.²⁰³ 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.²⁰⁴ 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?"²⁰⁵

In Alabama, statutory rape is treated in sections 13A-6-61(a)(3) and 13A-6-62(a)(1) of the Alabama Code.²⁰⁶ 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.²⁰⁷ Arguably the offense of sexual abuse²⁰⁸ is broad enough to cover some of the same acts prohibited by the statutory rape sections, thereby proscribing females from committing the acts.²⁰⁹ 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."

209. Interview with Ellen Brooks, Deputy District Attorney of Montgomery County (Oct. 15, 1981).

holding that the "sexual contact" which is the *actus reus* of that offense includes sexual intercourse. The definition of "sexual contact"²¹⁰ does not appear to preclude such a holding, but the Code's separate definitions of sexual contact and sexual intercourse²¹¹ 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."²¹²

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.²¹³ 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.²¹⁴ 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 . . .,"²¹⁵ and a person less than sixteen years of age is deemed incapable of consent.²¹⁶ 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.²¹⁷

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.²¹⁸ In 1979 approximately nine and one-half percent of all American lawyers and judges were women,²¹⁹ compared to three and one-half percent in 1973.²²⁰ In 1980 twenty-seven percent of all law students were women,²²¹ and in some law schools, nearly one-half of the students are women.²²²

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.²²³ In 1979 ten and one-half percent of all law school teachers were women.²²⁴ Demands that more

217. *Id.* § 13A-6-65(b).

218. See NATIONAL CENTER FOR STATE COURTS, *WOMEN IN THE COURTS* 18 (1978). See generally A. SACHS & J. WILSON, *SEXISM AND THE LAW* (1978); Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 HARV. WOMEN'S L.J. 1 (1978); Rossman, *Women Judges Unite: A Report from the Founding Convention of the National Association of Women Judges*, 10 GOLDEN GATE U.L. REV. 1237 (1980).

219. Note, *The Role and Status of Women Jurists: Country-by-Country Summary*, 10 GOLDEN GATE U.L. REV. 1267, 1270 (1980).

220. Compare Soule & Standley, *Perceptions of Sex Discrimination in Law*, 59 A.B.A. J. 1144 (1973) with Note, *supra* note 219, at 1270.

221. Shapiro & Johnson, *What's a Nice Girl Like You Doing in a Profession Like This?* 8 STUDENT LAW. 18, 20 (May 1980). For a discussion of the Law School Admissions Test as an obstacle to the admission of women to law school, see White & Roth, *The Law School Admissions Test and the Continuing Minority Status of Women in Law School*, 2 HARV. WOMEN'S L.J. 103 (1979).

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.

223. Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RESEARCH J. 903, 905 (1980).

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.

228. Letter from Ellen Brooks to Marjorie Fine Knowles (June 1, 1981) (letter on file in *Alabama Law Review* office).

229. Griffin, *With More Women Becoming Lawyers*, 8 *STUDENT LAW.* 26, 27 (May 1980).

230. *Id.* at 27, 29.

231. Interview with Anna S. Fitts, University of Alabama School of Law Registrar, in Tuscaloosa, Alabama (Oct. 14, 1981).

232. 1980-81 ALABAMA LEGAL DIRECTORY 69-70.

233. See 1981 CONGRESSIONAL STAFF DIRECTORY 261-474.

234. 1980-81 ALABAMA LEGAL DIRECTORY 29-30.

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.