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Functions of Womanhood: The Doctrine of Necessaries in Florida

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COMMENTS

Functions of Womanhood: The Doctrine of Necessaries in Florida

| | |
|--|-----|
| I. INTRODUCTION | 397 |
| II. HISTORY OF THE DOCTRINE OF NECESSARIES | 400 |
| A. <i>Coverture and the Common Law</i> | 400 |
| B. <i>Married Women's Property Acts</i> | 401 |
| C. <i>Equal Rights Amendments</i> | 403 |
| III. FLORIDA AND THE DOCTRINE OF NECESSARIES | 404 |
| A. <i>The District Courts' Approach</i> | 405 |
| 1. <i>MANATEE AND PARKWAY</i> | 405 |
| 2. <i>THE INFLUENCE OF OTHER STATES</i> | 406 |
| B. <i>The Florida Supreme Court's Resolution</i> | 408 |
| 1. <i>SHANDS</i> | 408 |
| 2. <i>EQUAL PROTECTION STANDING</i> | 409 |
| C. <i>The District Courts Divide</i> | 409 |
| 1. <i>WEBB</i> | 409 |
| 2. <i>NORTH SHORE</i> | 411 |
| 3. <i>WAITE</i> | 411 |
| IV. EQUAL PROTECTION APPLIED | 414 |
| A. <i>Sex-Based Classifications and the Judiciary</i> | 414 |
| 1. <i>THE STANDARD OF SCRUTINY</i> | 414 |
| 2. <i>LEGISLATIVE OBJECTIONS</i> | 416 |
| B. <i>Impact of the Doctrine on Women</i> | 418 |
| 1. <i>ECONOMIC AND SOCIAL EFFECTS</i> | 418 |
| 2. <i>CREDITOR EXPECTATIONS</i> | 421 |
| C. <i>Extension Versus Abolition of the Doctrine</i> | 424 |
| 1. <i>ABOLITION</i> | 424 |
| 2. <i>EXTENSION</i> | 426 |
| 3. <i>SUMMARY</i> | 428 |
| V. MARRIAGE AS A PARTNERSHIP OF EQUALS | 429 |
| A. <i>Actual Financial Contribution</i> | 430 |
| B. <i>Application of the Principles of Partnership Law</i> | 431 |
| 1. <i>EQUALITY AND EQUITABILITY</i> | 431 |
| 2. <i>UNIFORM PARTNERSHIP ACT</i> | 433 |
| 3. <i>DUTIES OF GOOD FAITH AND LOYALTY</i> | 434 |
| VI. CONCLUSION | 435 |

I. INTRODUCTION

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicated the

domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.¹

At English common law, a woman constructively forfeited her identity because the law merged her identity with that of her husband in marriage. Once married, she was unable to own property, enter into contracts, or receive credit in her own name. She was totally dependent on her husband for supplying the necessities for daily living. Courts developed the "doctrine of necessities" to provide that a husband who is derelict in providing food, clothing, shelter, and/or medical services to his wife is liable to a third party who provides these necessities² to the wife.³ However, because the wife was thought legally incapable of incurring an obligation independent of her husband and because the husband was legally, and exclusively, responsible for providing the necessities for the entire family unit, the wife had no reciprocal liability to a third party to provide necessities to her husband.⁴ The United States adopted the English common law model of the marital relationship with its correlative duties after the Revolution.⁵

The Married Woman's Property Acts and, eventually, various state equal rights amendments and gender-neutral property and support laws fomented legal recognition in the United States of the mutual interests of husbands and wives in property. In the early 1980s, the Florida district courts began to recognize the implausibility of the antiquated role of women encoded in the doctrine of necessities.⁶ The courts analyzed the burden of financial responsibility in the marriage in light of a notion of equality of husband and wife. These district courts held that the doctrine of necessities had to be either extended to apply reciprocally or abolished altogether.⁷ The Florida Supreme Court, however, was not as willing as the district courts to bring the laws of Florida into the twentieth century. In

1. *Bradwell v. Illinois*, 16 U.S. (1 Wall.) 130, 141 (1873) (Bradley, J., concurring).

2. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 251 (1968).

3. In fact, the doctrine of necessities also extends to the needs of the children. *See, e.g.*, *North Carolina Baptist Hosp. v. Franklin*, 405 S.E.2d 814 (N.C. Ct. App. 1991); *Morris v. Commonwealth, Dep't of Social Serv.*, 408 S.E. 2d 588 (Va. Ct. App. 1991). Treatment of the doctrine of necessities as applied to children, however, is beyond the scope of this Comment.

4. *See Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 645 (Fla. 1986).

5. CLARK, *supra* note 2, at 251; *see also* 1 *WOMEN IN AMERICAN LAW* 3-19 (Marlene S. Wortman ed., 1985); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 1-14 (1985).

6. *See infra* part III.A.

7. *See, e.g.*, *Parkway Gen. Hosp. v. Stern*, 400 So. 2d 166 (Fla. 3d DCA 1985); *Manatee Convalescent Ctr., Inc. v. McDonald*, 392 So. 2d 1356 (Fla. 2d DCA 1980).

Shands Teaching Hospital and Clinics, Inc. v. Smith,⁸ the high court held that the doctrine of necessities was "a fixed rule of law" which the court was powerless to alter in the absence of legislative action.

The court noted in its opinion that there was no equal protection claim properly presented in *Shands*⁹—and through this door, the district courts once again began to usher in cases extending or abolishing the doctrine of necessities. More recently, the validity of the doctrine under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution,¹⁰ as well as under article I, section 2¹¹ and article X, section 5¹² of the Florida Constitution of 1968, was challenged in *Waite v. Leesburg Regional Medical Center, Inc.*¹³ The Florida Supreme Court, however, denied review of this case and permitted the antiquated doctrine to remain untouched. This Comment will outline the history of the doctrine of necessities leading up to the *Shands* decision and the various arguments for keeping the doctrine intact, extending it to both spouses reciprocally, and for abolishing it altogether. Application of the rational relation test used for equal protection challenges to the doctrine will reveal that the court must extend the doctrine to apply to both spouses and may do so in the absence of a clear legislative mandate.

Extension of the doctrine of necessities will reorder the protection of husbands, wives, and creditors. Husbands who are not the sole breadwinners or are dependent upon their wives will no longer be exclusively responsible for supplying necessities to the household. Wives will no longer have the defense of the doctrine of necessities as an absolute bar to creditors' claims for debts incurred for necessary expenses. Extension will provide creditors a greater degree of security in their transactions and eliminate the uncertainty that currently

8. 497 So. 2d 644 (Fla. 1986).

9. See *infra* notes 67-73 and accompanying text.

10. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

11. All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property

FLA. CONST. art. I, § 2.

12. "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal"

FLA. CONST. art. X, § 5.

13. 582 So. 2d 789 (Fla. 5th DCA 1991), *rev. denied* 592 So. 2d 683 (1991).

arises from the inconsistencies among the districts. Some fear that the class that has traditionally benefitted from the doctrine—women—will have its security blanket removed. At first glance, this may seem a bitter pill to swallow for the sake of “women’s rights.” In the long run, however, the failure to modify the doctrine will be more detrimental to women than the modification of the protection which the doctrine provides.

The protection from creditors afforded by the doctrine of necessities can be enhanced in a non-debilitating manner by holding each spouse liable for the necessities incurred by the other to the extent of the proportion of their respective financial contributions to the marriage partnership. Courts can apply the traditional principles of partnership law in accordance with the protective and support policies of the doctrine of necessities. These principles—the fiduciary duty, obligations of fairness and full disclosure, duties of loyalty and good faith, and imposition of liability upon each partner for expenses incurred by the partnership—create a financial structure for the couple which discourages lopsided spending and protects dependent spouses.

II. HISTORY OF THE DOCTRINE OF NECESSARIES

The inferior legal status of women has been thought to be “natural or necessary or divinely ordained. . . . Courts classified women with children and imbeciles, denying their capacity to think and act as responsible adults and enclosing them in the bonds of protective paternalism.”¹⁴

A. *Coverture and the Common Law*

At English common law, a marriage merged the husband and wife into one person. That is, the legal existence of the woman was suspended during marriage. As a consequence of this loss of legal identity, “[a] married woman . . . cannot be bound personally beyond her moral obligation . . . [and can] incur no personal liability, because by reason of coverture she is incapable of making any contract that will so bind her.”¹⁵ Once married, the husband assumed control of the wife’s personal property, including not only that owned before marriage, but also any property acquired by her during the marriage.¹⁶ He also acquired her personal earnings and her capacity to

14. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 872 (1971).

15. *McQuaid v. Fontane*, 5 So. 274, 276 (Fla. 1888).

16. CLARK, *supra* note 2, at 293.

contract.¹⁷ The inability to contract prevented the wife from contracting even for food, clothing, or medical needs. Under the common law, solely the husband bore the obligation to provide such "necessaries" for the wife.¹⁸ If the husband failed to provide the necessities, the doctrine of necessities allowed the wife to contract for them without the husband's consent or joinder. The husband, nevertheless, would be liable for the debt.¹⁹

B. *Married Women's Property Acts*

The Married Women's Property Acts, which state legislatures enacted as early as the mid-nineteenth century,²⁰ ostensibly promoted the emancipation of women from the constraints of coverture. These Acts provided women the right to enter into contracts and to acquire, own, and transfer separate property.²¹ Once state legislatures passed such Acts, the husband no longer had complete dominion over the wife and lost the right to the control or possession of the wife's property.²² The terms of the Acts did not subject the property to claims against the husband.

Legislatures unevenly created these state statutes and private laws involving married women's property.²³ Although the Married Women's Property Acts had the effect of giving a degree of emancipation from the constraints of coverture, the impetus for the reform came not so much from a recognition of the equality of women as from the need of the lawmakers to respond to tremendous market pressures.²⁴ The economic instability during the early nineteenth cen-

17. *Id.* at 287.

18. The wife had the obligation to provide household services to her husband and contribute to the "domestic felicity," but the economic sphere belonged to the husband. See *infra* note 138.

19. 2 WILLIAM BLACKSTONE, COMMENTARIES *430.

20. In 1839, Mississippi passed the first Married Women's Property Act. Most other states enacted such acts by 1850. CLARK, *supra* note 2, at 322; see JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN app. 1 (1991); see also NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982).

21. See LEILA J. ROBINSON, THE LAW OF HUSBAND AND WIFE (1890); RANSOM H. TYLER, COMMENTARIES ON THE LAW OF INFANCY AND THE LAW OF COVERTURE (1873).

22. In Florida, coverture was voided in *Merchant's Hostess Service of Florida v. Cain*, 9 So. 2d 373 (1942). See generally HOFF, *supra* note 20 (discussing women's legal status in the United States from pre-Revolutionary America through the demise of coverture and into the present day); see also 1 WOMEN IN AMERICAN LAW, *supra* note 5, at 117-21.

23. See *infra* notes 31-35 and accompanying text.

24. 1 WOMEN IN AMERICAN LAW, *supra* note 5, at 122; see also MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA? 8 n.18 (1987); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1400-04 (1983).

tury²⁵ compelled judges and legislators to seek ways to ease exchange restrictions. The judges sought to foster economic growth while avoiding undue hardship to families. Lawmakers helped serve this goal by both narrowing dower rights, which impeded land development, and by protecting the property of married women from creditors through narrow interpretation of the property acts when the economy worsened.²⁶

While the Married Women's Property Acts reformed the legal role of women, they did not mitigate the duty of the husband to provide support to the wife.²⁷ Even the current Florida statute pertaining to married women's rights states that it does not relieve a husband of the duty to support his wife.²⁸ The law of support between husband and wife developed from the definition of marriage at common law which constructed the role of the husband as the "head of household, decisionmaker, and economic provider"²⁹ and the role of the wife as homemaker. Because the Married Women's Property Acts eased the restraint on the wives' property, but did not alter the underlying definitions of the roles of support in the marriage, they had little affect on the doctrine of necessities.³⁰

25. *E.g.*, the Panic of 1837. See Chused, *supra* note 24, at 1359-84 (documenting the economic and legal interrelationship).

26. 1 WOMEN IN AMERICAN LAW, *supra* note 5, at 117-21.

27. Robert Toews, *The Doctrine of Necessaries & Wisconsin's Attempt to Modify the Doctrine to Conform to the Equal Protection Clause*, 1 LAW & INEQ. L. REV. 407, 414 (1983).

28. FLA. STAT. ANN. § 708.10 Married Women's Rights; construction of law

This law shall not be construed as:

- (1) relieving a husband from any duty of supporting and maintaining his wife and children;
- (2) abolishing estates by the entirety or any of the incidents thereof;
- (3) abolishing dower or any of the incidents thereof; . . . note 1: (1) . . . is not unconstitutionally discriminatory; the statute does not create a duty on the part of the husband to support his wife and does not relieve a wife of any duty which she may have to support her children.

29. Margaret M. Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support, and the Doctrine of Necessaries*, 22 J. FAM. L. 221, 225 (1983-84).

30. 41 AM. JUR. 2D *Husband and Wife* § 348 ("The liability of a husband for necessities furnished his wife is not generally affected by the . . . Married Women's Acts . . . because the liability of the husband arises primarily from the marital relationship, and not from the fact that at common law he was entitled to all his wife's personalty and the usufruct of her realty."); see also Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and State Legislatures*, 29 AM. J. LEG. HIST. 1 (1985) (finding that the need for more certain guidelines for creditors and for minimizing incentives to hide assets were, at least, partially responsible for the creation of the married women's property laws); Chused, *supra* note 24 (tracing the property rights of women in the first half of the nineteenth century and concluding that the married women's property laws were not a response to coverture as much as to the changing role of women in relationship to raising children and the disposition of family wealth).

C. *Equal Rights Amendments*

During the 1970s, the push for a national Equal Rights Amendment and the adoption by several states of equal rights provisions and amendments in their state constitutions³¹ accompanied a reinvigoration of the criticism of the role of women in society and the law. A national Equal Rights Amendment was promoted as a constitutional basis from which changes in the American legal structure could be made.³² Members of Congress introduced an Equal Rights Amendment in every Congress from the 68th to the 92nd, but most of these died in committee. By the early 1980s, opposition to the national amendment appeared insurmountable and the movement died.³³

Although Congress never passed a national Equal Rights Amendment, some of the constitutional amendments adopted by individual states were substantially the same as the proposed federal amendment.³⁴ Other states passed provisions adding a dimension of equality of men and women to their state constitutions or altered the terms of their constitutions to a gender-neutral standard.³⁵

The Florida Constitution contains no specific equal rights amendment or provision.³⁶ It does, however, provide that all persons

31. Over a third of the states passed such provisions or amendments during the 1970s. *See generally* ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, §§ 4, 21; ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3; MD. CONST. DECLARATION OF RIGHTS, art. 46; MASS. CONST. art. I, § 4; MONT. CONST. art. II, § 4; N.H. CONST. art. 2, pt. 1; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3A; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WISC. CONST. art. XXXI, § 1; WYO. CONST. art. VI, § 1.

32. Brown et al., *supra* note 14, at 920-80 (the Equal Rights Amendment would have prompted dramatic changes in the areas of protective labor legislation, domestic relations law, criminal law, and the military).

33. In the face of opposition from the Republican Party, lack of cohesive support from the Democrats, and opposition from special corporate interests, the National Organization for Women formally announced in 1982 the end of the ERA Countdown Campaign. NAT'L NOW TIMES, Aug. 1982, at 2-3. *See generally* MARY F. BERRY, WHY ERA FAILED (1986); MARY A. DELSMAN, EVERYTHING YOU NEED TO KNOW ABOUT ERA (1975); RIGHTS OF PASSAGE: THE PAST AND THE FUTURE OF THE ERA (Joan Hoff-Wilson ed., 1986); GILBERT Y. STEINER, CONSTITUTIONAL INEQUALITY (1985).

34. State legislatures passed similar amendments in Pennsylvania (1971); Colorado, Maryland, Texas, Washington (1972); New Mexico (1973); New Hampshire (1974); Massachusetts (1976); and Hawaii (1978). *See generally* BERRY, *supra* note 33, at 86-100 (outlining the changes in the courts and states in the 1970s, in the shadow of the ERA campaign); J. RALPH LINDGREN & NADINE TAUB, THE LAW OF SEX DISCRIMINATION 89-107 (1988).

35. *See supra* note 31.

36. In 1978, Florida voters rejected the addition of the word "sex" to the second sentence of Florida Statute article 1, section 2. The sentence would have then read, "[n]o person shall be deprived of any right because of race, sex, or physical handicap." *See* Ruth L. Gokel, Note, *One Small Word: Sexual Equality Through the State Constitution*, 6 FLA. ST. U. L. REV. 948 (1978).

are equal before the law³⁷ and that married women shall have the same rights as married men in regard to holding, controlling, and disposing of property.³⁸ As further evidence of the legislature's attempts to provide for equal rights and abolish sex-stereotyping, in 1979, the Florida legislature changed the terms "husband" and "wife" to the gender-neutral terms "spouse" and "party" in the Florida Constitution.³⁹

III. FLORIDA AND THE DOCTRINE OF NECESSARIES

The Florida Supreme Court abolished the common law doctrine of coverture in *Merchant's Hostess Service of Florida v. Cain*.⁴⁰ In *Cain*, a personal advertising business sued for an accounting on a contract and for an injunction to prohibit the defendant husband and wife from further breaching their contract with the advertising business. The wife claimed that because she was a married woman, the defense of coverture prevented the contract from being enforced against her.⁴¹

The Florida Supreme Court responded that coverture, a "holdover" from the common law, no longer had a place in equity law. The court premised its consideration of the doctrine on the notion that husbands and wives are "partners and equals"⁴² in marriage. Because the factors upon which coverture was predicated had disappeared, so must coverture itself.⁴³ This way, the wife could not enter a contract and carry on business and then later employ the theory of coverture to avoid her obligation. Although the Florida Supreme Court expressly abolished coverture in Florida, the doctrine of necessities remained untouched. The Florida Supreme Court has upheld the common law doctrine of necessities as recently as 1986.⁴⁴ Although other states have departed from the common law doctrine when chal-

37. FLA. CONST. art. I, § 2.

38. FLA. CONST. art. X, § 5.

39. See *Manatee Convalescent Ctr., Inc. v. McDonald*, 392 So. 2d 1356, 1357 (Fla. 2d DCA 1980).

40. 9 So. 2d 373 (Fla. 1942).

41. *Id.* at 374.

42. *Id.* at 375. The court vividly contrasted this notion of equality with the description of the woman's role during coverture as a "chattel . . . incapable of taking an education or following a career," expected only to "thrill over . . . accouchement and the kitchen" and with the description of coverture itself as "the product of a period in which man was smeared with the externals of a potential culture." *Id.*

43. *Id.* The lone dissenter argued that the court could not legislate, but could "only interpret and apply the law as it actually exists." *Id.* at 376. This argument would reappear in the 1980s when the doctrine of necessities was challenged on equal protection grounds. See *infra* part III.

44. *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986); see *infra* part III.B.

lenged on equal protection grounds,⁴⁵ the Florida Supreme Court has yet to entertain a case challenging the doctrine on those grounds.

A. *The District Courts' Approach*

1. *MANATEE AND PARKWAY*

In *Manatee Convalescent Center, Inc. v. McDonald*,⁴⁶ a hospital sought to hold a wife liable for expenses resulting from the hospitalization of her husband. The Second District Court of Appeal of Florida agreed with the hospital that the movement of the law was, in fact, toward equality of the sexes, despite the rejection by Florida voters of a proposed Equal Rights Amendment and the absence of the word "sex" in article 1, section 2 of the state constitution.⁴⁷ Legislative intent to ban gender bias from the laws of Florida, said the court, derived from the legislature's then-recent purge from the divorce laws of references to "husband" or "wife" (in favor of the gender-neutral "spouse" or "party") and its adoption of reciprocal and complementary duties of support and maintenance.⁴⁸ Furthermore, the court recognized the flexibility of the law to change with the evolution of society. The court extended the doctrine of necessities, holding that a wife is liable for the necessities of the husband, as he is for hers.⁴⁹

The Third District Court of Appeal of Florida modified the doctrine of necessities in *Parkway General Hospital, Inc. v. Stern*.⁵⁰ The court held a wife responsible for the necessities—in this case, the cost of hospitalization—of the husband solely because of the marital relationship. Relying on the rationale already enunciated by the *Manatee* court, this district court reiterated that the modification of Florida constitutional, statutory, and decisional law compelled its decision.⁵¹

45. *E.g.*, *Medical Serv. Ass'n v. Perry*, 819 S.W.2d 82 (Mo. Ct. App. 1991); *Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003 (N.J. 1980). Other states have modified or abolished the doctrine based on state equal rights amendments. *See, e.g.*, *Schilling v. Bedford County Memorial Hosp., Inc.*, 303 S.E. 2d 905 (Va. 1983); *Condore v. Prince George's County*, 425 A.2d 1011 (Md. 1981); *United States v. O'Neill*, 478 F. Supp. 852 (E.D. Pa. 1979); *Albert Einstein Medical Ctr. v. Gold*, 66 Pa. D. & C.2d 347 (1974).

46. 392 So. 2d 1356 (Fla. 2d DCA 1980).

47. *Id.* at 1357; *see also supra* notes 36-38 and accompanying text.

48. 392 So. 2d at 1357.

49. The district court made no reference to the relative assets or earning capacity of either the husband or the wife in its opinion. The reciprocal and complementary duties of support and maintenance announced by the court seemed to apply regardless of the actual finances of each spouse. The court did, however, decline to decide whether the doctrine of necessities should be interpreted to mean that one spouse will be responsible for the necessities of the other only if the resources of the spouse who incurred the debt are insufficient to pay it. *Id.* at 1359 n.1.

50. 400 So. 2d 166 (Fla. 3d DCA 1981).

51. *Id.* at 167.

2. THE INFLUENCE OF OTHER STATES

The decisions of other states to abolish or extend the doctrine strongly influenced the movement of the Florida district courts.⁵² For example, in *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*,⁵³ the New Jersey Supreme Court extended the doctrine of necessities to hold either spouse liable for the necessities incurred by the other. The court described the common law doctrine of necessities as "an anachronism that no longer fits contemporary society. . . . The common law must adapt to the progress of women in achieving economic equality and to the mutual sharing of all obligations by husbands and wives."⁵⁴

The court did not require absolute equality of the sexes as a prerequisite to altering the doctrine of necessities. The court reasoned that the statistics indicating the financial dependence of some wives on their husbands was "insufficient reason" to leave the gender-based classification undisturbed when balanced against a doctrine which "denigrates the efforts of women who contribute to the finances of their families and denies equal protection to husbands."⁵⁵ By applying the doctrine in a gender-neutral fashion, the court recognized the modern role of women in the workforce⁵⁶ and in the marriage as an integral part of a single financial unit.⁵⁷

In *Memorial Hospital v. Hahaj*,⁵⁸ an Indiana district court altered the doctrine of necessities, making the spouse who incurs the debt for necessities primarily liable. If the property of that spouse proves insufficient, then the financial resources of the marital relationship are secondarily liable. This court noted that today's woman is "a differ-

52. The *Manatee* court considered *Kurpiewski v. Kurpiewski*, 386 A.2d 55 (Pa. Super. Ct. 1978) (finding a sex-neutral burden of support to exist in Pennsylvania after the passage of an equal rights amendment to the Pennsylvania constitution) and *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*, 417 A.2d 1003 (N.J. 1980) (doctrine of necessities modified to equalize the responsibility of each spouse for the necessities of the other). The Florida district court in *Webb v. Hillsborough County Hospital Authority*, 521 So. 2d 199 (Fla. 2d DCA 1988), also noted the decision in *Jersey Shore* as well as *Wengler v. Druggist's Mutual Insurance Co.*, 446 U.S. 142 (1980) (statute providing work-related death benefits to widow without requiring proof of her dependency on husband but requiring proof from a widower of dependency on wife violates equal protection) and *Califano v. Goldfarb*, 430 U.S. 199 (1977) (provisions granting survivor's benefits to widow regardless of dependency, but to widower only if he was receiving half of his support from his deceased wife violates Due Process Clause of Fifth Amendment).

53. 417 A.2d 1003 (N.J. 1980).

54. *Id.* at 1008-09.

55. *Id.* at 1008.

56. *See infra* note 129.

57. 417 A.2d at 1009.

58. 430 N.E.2d 412 (Ind. Ct. App. 1982).

ent legal creature”⁵⁹ than the woman under coverture whom the doctrine of necessities was designed to protect. The court also recognized that the modern marital relationship is a partnership for which the adoption of such a form of the doctrine of necessities is sensible, if not in accord with general notions of partnership responsibility.⁶⁰

Wisconsin extended the doctrine in the form of primary/secondary liability in *Marshfield Clinic v. Discher*.⁶¹ In this case the state’s highest court imposed primary liability upon the husband in all cases, regardless of whether or not he was the spouse who incurred the necessary expense.⁶² The court imposed a legal duty on the wife for the support of the family, but the court limited this duty to amounts that a creditor had first tried to collect from the husband, but which the husband lacked resources to satisfy.⁶³ The court reasoned that its modification of the doctrine passed constitutional equal protection scrutiny because, first, the liability scheme served several important government objectives, including helping families obtain necessary and important goods and services and enabling wives to obtain credit more easily;⁶⁴ and second, the court viewed this formulation as substantially related to these goals.⁶⁵ The court did not want to impose greater than secondary liability upon women until such time that women “achieve greater equality with their husbands in terms of their relative financial strength.”⁶⁶

The evolving role of women convinced the court to modify the common law doctrine. The court quoted from the latest labor statistics, which revealed the increasing number of working wives and their overall contribution to income.⁶⁷ Although the court acknowledged that the doctrine may need further modification in the future, the court did not resolve the issue of whether such change should come from the legislature or again from the courts.

The Court of Appeals of Maryland chose to abolish the doctrine altogether in *Condore v. Prince George’s County*.⁶⁸ After detailing the spousal support obligations from coverture through the Married Women’s Property Acts to the present day, the court decided that the

59. *Id.* at 414.

60. *Id.* at 415.

61. 314 N.W.2d 326 (Wis. 1982).

62. *Id.* at 327.

63. *Id.* at 328; see also *In Re Estate of Stromsted*, 299 N.W.2d 226 (Wis. 1980).

64. *Marshfield*, 314 N.W. 2d at 328.

65. *Id.* at 331.

66. *Id.*

67. *Id.* at 329.

68. 425 A.2d 1011 (Md. 1981).

common law doctrine violated the prohibition against gender-based discrimination in the state's Equal Rights Amendment. The court left further policy decisions in the area to that state's legislature.

Around the country, courts considering the question of whether to retain the doctrine of necessities in its common law form were deciding against it. The three cases from New Jersey, Indiana, and Maryland illustrate the three options open for courts that consider the doctrine of necessities untenable in its original form. These influential cases all were decided before the Florida Supreme Court decision in *Shands*.

B. *The Florida Supreme Court's Resolution*

1. *SHANDS*

As late as 1986, in *Shands Teaching Hospital and Clinics, Inc. v. Smith*,⁶⁹ the Florida Supreme Court declined to alter or abolish the doctrine of necessities, stating that such action particularly belonged to the province of the legislature. *Shands Hospital* sued to recover the unpaid balance of a bill from a widow who had not agreed in writing to pay for the services rendered to her husband. The court recognized the possibility of "instances where it would be inequitable to hold either a wife or a husband liable for medical services rendered to a spouse . . . [or] not to hold either spouse liable."⁷⁰ Nevertheless, the court shied away from any modification of the common law rule, arguing that "the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus."⁷¹ In so ruling, the court expressly disapproved the decisions in *Parkway* and *Manatee*.⁷²

This decision, which purports to act on behalf of family interests to the detriment of the rights of the individual (woman), has been characterized as part of a regressive movement by the courts.⁷³ Often, protection of the individual is the justification for laws or doctrines that inhibit individual rights.⁷⁴ On the other hand, the Supreme Court of California, in an influential opinion striking down a state

69. 497 So. 2d 644 (Fla. 1986).

70. *Id.* at 646 (footnote omitted).

71. *Id.*

72. *Id.*

73. This regression refers to the focus after the Middle Ages on the intrafamilial obligations which have largely come to be replaced today by the concept of primacy of the individual rights holder. See LOIS G. FORER, *UNEQUAL PROTECTION: WOMEN, CHILDREN, AND THE ELDERLY IN COURT* 41-44 (1991).

74. LINDGREN & TAUB, *supra* note 34, at 21-22.

provision that prohibited the hiring of women as bartenders, has recognized that:

Laws which disable women from full participation in the political, business, and economic arenas are often characterized as "protective" or beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.⁷⁵

2. EQUAL PROTECTION STANDING

The Florida Supreme Court did not completely close the door, however, to any resolution by the courts of the viability of the doctrine. The *Shands* court was careful to note that the parties presented no valid equal protection argument (because the hospital lacked standing to sue on those grounds).⁷⁶

The *Shands* decision included reference to *Gates v. Foley*.⁷⁷ As in *Shands*, the argument was posed in *Gates* that any change in the common law should come from the legislature.⁷⁸ The Florida Supreme Court in *Gates* nevertheless extended a cause of action for loss of consortium to a wife on grounds of equal protection and certain gender-neutralizing statutes.⁷⁹ Mindful of the argument that alteration of the common law should be left to the legislature, the *Gates* court asserted that the law is not static but must evolve with changes in society.⁸⁰ "Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to reconsider an old and unsatisfactory court-made rule."⁸¹

C. The District Courts Divide

1. WEBB

Two years after the Florida Supreme Court issued the *Shands* decision, a case challenging the doctrine of necessities on equal protection grounds arose in the Second District. In *Webb v. Hillsborough*

75. *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971).

76. 497 So. 2d 644, 646 (Fla. 1986); *see also* *Medlock v. Fort Smith Serv. Fin. Corp.*, 803 S.W. 2d 930 (Ark. 1991) (holding that the assignee of a medical center lacked standing to sue on equal protection grounds because the assignee neither suffered injury under the Fourteenth Amendment nor belonged to the prejudiced class).

77. 247 So. 2d 40 (Fla. 1971).

78. *Id.* at 43.

79. *Id.* at 45.

80. *Id.* at 43.

81. *Id.*

County Hospital Authority,⁸² a husband appealed from a final judgment holding him liable, under the doctrine of necessities, for the hospital expenses incurred by his wife. The husband argued, recalling the equal protection doorway left open in *Shands* and the court's hint that courts have an obligation to reconsider outmoded court-made rules, that the common law imposes no responsibility on the wife for necessities provided to her husband; therefore, he argued, he was not liable for the necessities provided to his wife absent any agreement otherwise.⁸³

The Second District was unwilling to abolish the doctrine of necessities, but did alter the doctrine by holding that both a husband and wife are responsible for the necessities provided to each.⁸⁴ The court referred to the underlying equal protection rationale from *Manatee* and *Parkway* to support its decision.⁸⁵ The district court distinguished the Florida Supreme Court's disapproval of those cases in *Shands*, emphasizing that, in *Webb*, the husband did have standing to raise an equal protection claim (unlike the hospitals which had tried to raise it in the earlier cases).⁸⁶

The district court did place a condition precedent on the general rule of liability: "In the absence of an agreement, the income and property of one spouse should not be exposed to satisfy a debt incurred by the other spouse unless the assets of the spouse who incurred the debt are insufficient."⁸⁷ This limitation to secondary liability for the spouse who did not incur the expense protects the spouse who did not expressly consent to the debt and assigns the burden of proof to the creditor to show that the spouse who incurred the debt lacks sufficient resources to satisfy the debt.⁸⁸

The district court also addressed the argument posited in *Shands* that the courts should leave to the legislature any change in the doctrine of necessities.⁸⁹ The court agreed with this principle in the abstract, but argued that more persuasive reasons existed to make changes pending future legislative action.⁹⁰ When faced squarely

82. 521 So. 2d 199 (Fla. 2d DCA 1988).

83. *Id.* at 200-01.

84. *Id.* at 202.

85. *Id.* at 202-03.

86. *Id.* at 203.

87. *Id.* at 204 (quoting *Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1010 (N.J. 1980)). Because the record from the court below did not indicate whether the wife, in fact, had the ability to pay, the Second District remanded the case for further proceedings.

88. *Id.*

89. *Id.* at 205.

90. *Id.*

with an equal protection challenge to the doctrine, the district court stated that it had no choice but to hold that the doctrine does, in fact, violate equal protection.⁹¹ Clearly, the court had the option to abolish the doctrine. Rather than leave such a "hiatus"⁹² in the law, the court extended the doctrine to include both spouses.

2. NORTH SHORE

Only three months after the Second District Court of Appeal decided *Webb*, the Third District Court of Appeal came to the same conclusion. In *North Shore Medical Center, Inc. v. Angrand*,⁹³ the district court reversed a final judgment dismissing a suit against a husband and wife for hospital services and supplies provided to the husband. The court argued that because the husband admitted that he could not pay the bill, "a judgment against his wife for the necessities provided to him should also be entered."⁹⁴ Despite the fact that the plaintiff in this action was a hospital, which lacks standing to raise an equal protection claim, the court relied on the rationale from *Webb* to support its decision.

These two cases illustrate the tensions between the alternatives once a court abrogates or reforms the doctrine. The constitutional analysis of the underlying rationale of the doctrine of necessities and its traditional application as a support remedy solely for wives proves violative of equal protection. The competing policy interests—support for needy wives versus equitable application of the law—are not easily reconciled. Some state courts have, in fact, abolished the doctrine, thereby leaving any reformulation to the state legislature. Other state courts choose to style a new doctrine themselves, while acknowledging the province of the state legislature to make further changes in spousal support remedies.⁹⁵

3. WAITE

Three years later, the Fifth District Court of Appeal came to a different conclusion than that of the Second and Third Districts when confronted with a similar equal protection challenge to the doctrine of

91. *Id.* at 207.

92. *Id.* at 205.

93. 527 So. 2d 246 (Fla. 3d DCA 1988).

94. On rehearing, the district court withdrew its direction to the trial court to enter judgment against the husband and wife. It was brought to the court's attention that the hospital had voluntarily dismissed its action against the wife during the pendency of the appeal for rehearing. In light of this change, the district court ordered the judgment to be entered against the husband alone. *Id.* at 247.

95. See *infra* part IV.C.2.

necessaries. In *Waite v. Leesburg Regional Medical Center*,⁹⁶ a medical center sued a patient and her husband to recover a debt owed for medical services provided to the wife. The husband argued that any liability on his part for medical services, without reciprocal liability on her part, would violate equal protection. The district court held that there was no violation of equal protection and that the husband was responsible for the debt.⁹⁷

The *Waite* court noted that it had considered and rejected such an equal protection argument in *Halifax Hospital Medical Center v. Ryals*.⁹⁸ In *Halifax*, the Fifth District Court of Appeal acknowledged that logic dictated that either both spouses or neither spouse should be liable for the debts of the other. However, in the absence of legislative action, the court refused to alter the common law rule and claimed that it was bound by the Florida Supreme Court's decision in *Shands*.⁹⁹ The district court resuscitated this argument in *Waite* and expressed its reluctance to establish a fixed rule of law (by altering or abolishing the common law) "when the issue is one of equity which can only be determined based on the particular equities of a given factual situation."¹⁰⁰

The *Waite* decision was unsound for several reasons. First, the husband, unlike the hospital in the *Shands* case, had standing to make an equal protection challenge. The husband bore a burden not imposed on the wife that constituted a sufficient personal stake in the outcome.¹⁰¹ In *Shands*, the Florida Supreme Court had particularly foreseen confronting the equal protection challenge when it properly arose¹⁰² and had carefully noted the lack of standing of Shands Hospital as a reason for not permitting the equal protection rationale to hinder the traditional application of the doctrine of necessities.

The *Waite* court hesitated to decide this "broad public policy

96. 582 So. 2d 789 (Fla. 5th DCA 1991), *rev. denied*, 592 So. 2d 683 (Fla. 1991).

97. *Id.* at 790.

98. 526 So. 2d 1022 (Fla. 5th DCA 1988). *Halifax* also involved a hospital suing a husband and wife for medical expenses incurred by the wife. The district court rejected the trial court's equal protection analysis and held that the husband is financially responsible for necessary expenses incurred by his wife. *Id.*

99. *Id.*

100. 582 So. 2d 789, 790 (Fla. 5th DCA 1991) (quoting *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 646 (Fla. 1986)).

101. See *Orr v. Orr*, 440 U.S. 268, 273 (1979). In *Orr*, the Supreme Court considered state alimony statutes under which husbands but not wives could be required to pay alimony on divorce. The Court struck down the statutes on equal protection grounds and held that although the goal of helping the needy spouse was a legitimate state objective, it was inadequate to justify the sex-based classifications in the statutes when individual hearings were already a part of the procedure for awarding alimony. *Id.* at 280-81.

102. See *supra* notes 76-81 and accompanying text.

question”¹⁰³ of whether to alter or abolish the common law doctrine of necessities in deference to the state legislature.¹⁰⁴ However, it can also be argued that the court has a particular responsibility to decide these issues because the doctrine is court-made¹⁰⁵ and because equal protection is “one of the exceptions to the separation-of-powers doctrine [as an] area of constitutionally guaranteed or protected rights.”¹⁰⁶ The jurisdictional brief submitted to the Florida Supreme Court by the appellants in *Waite* argued that altering the doctrine of necessities does not violate any principles of separation of power.

When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.¹⁰⁷

Ultimately, the district court decision in *Waite* fails equal protection scrutiny.¹⁰⁸

The clear difference in treatment of the doctrine of necessities among the district courts of appeal calls for a review of the doctrine of necessities under an equal protection analysis. The Florida Supreme Court cannot simply ignore the constitutional ramifications of the doctrine as the different Florida district courts of appeal currently apply it.

103. *Waite v. Leesburg Regional Medical Ctr.*, 582 So. 2d 789, 790 (Fla. 3d DCA 1991).

104. To illustrate, the Second District Court of Appeal defended its opinion in *Webb* at length against any possible charges of reckless judicial activism. That court, which did alter the doctrine of necessities, approached the issues of the case with “legal realism” which dictates that a court must make a “choice of law in this kind of case despite the sometimes controversial nature of the general subject.” *Webb v. Hillsborough County Hosp.*, 521 So. 2d 199, 206 n.5 (Fla. 2d DCA 1988). The *Webb* decision emphasized the careful thought and “reflection” which had gone into its decision. The court simply changed court-made rules for reasons compelled by the United States Supreme Court and “Florida constitutional, statutory, and decisional law.” *Id.* (quoting *Parkway Gen. Hosp., Inc. v. Stern*, 400 So. 2d 166, 167 (Fla. 3d DCA 1981)).

105. *See infra* part IV.C.

106. Petitioners’ Amended Brief on Jurisdiction at 9, *Waite v. Leesburg Regional Medical Ctr., Inc.*, 582 So. 2d 789 (Fla. 3d DCA 1991) (No. 90-02163) (quoting *Dade County Classroom Teachers Ass’n v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972)).

107. *Id.*

108. *See, e.g., Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142 (1980) (statute providing worker’s compensation benefits to widow without requiring proof of her dependency on husband, but requiring widower to prove dependency on wife, violates equal protection); *Orr v. Orr*, 440 U.S. 268 (1979) (statute authorizing alimony payments by husbands but not wives violates equal protection); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (provisions of Social Security Act granting survivor benefits to widow and child based on earnings of deceased husband and father, but granting survivor benefits to children but not widower based on earnings of deceased mother, violates equal protection); *Reed v. Reed*, 404 U.S. 71 (1971) (a mandatory preference for men over women as administrators of estates violates equal protection).

IV. EQUAL PROTECTION APPLIED

The Florida Supreme Court¹⁰⁹ and the United States Supreme Court¹¹⁰ have upheld sex-based classifications where the bias was substantially related to important state objectives. Absent such state objectives, however, the classification must fail.¹¹¹ Moreover, often sexual classifications are not the product of rational legislative thought, but only "the perpetuation of a stereotyped attitude."¹¹² Courts that have altered or abolished the doctrine of necessities have all referred to the policy of protecting needy women as an important and necessary consideration, but have, nonetheless, refused to leave the outmoded doctrine untouched. Courts can no longer justify absolute deference to a notion of all women as a uniform class of financial dependents today.

A. Sex-Based Classifications and the Judiciary

1. THE STANDARD OF SCRUTINY

*Reed v. Reed*¹¹³ was the first case in which the United States Supreme Court invalidated a legislative classification based on sex. *Reed* presented the question whether a state statute giving men a preference over women as administrators of a decedent's estate was rationally related to the state's objective of reducing the workload of probate courts.¹¹⁴ Under the guise of application of rational-basis scrutiny¹¹⁵ the Court held that the statute did not operate as a reasonable means of reducing the workload of probate courts. In striking

109. In re Estate of Rincon, 327 So. 2d 224, 226 (Fla. 1976) (upholding dower and curtesy statute's differing treatment of widows and widowers on the grounds of men's and women's "disparat[e] . . . economic capabilities").

110. In *Kahn v. Shevin*, 416 U.S. 351 (1974), the Supreme Court upheld a property tax exemption for widows but not widowers on the basis that the alleged governmental objective was one of compensating for past discrimination against women. For criticism that *Kahn* does not withstand the constitutional test formulated in *Craig v. Boren*, 429 U.S. 190 (1976) (*Craig* requires a court to evaluate the actual reasons prompting enactment of the challenged law and not any reason that may be proffered as justification for the rule or statute at the time of the challenge), see Leo Kanowitz, "Benign" Sex Discrimination: Its Troubles and Their Cure, 31 HASTINGS L.J. 1379, 1388-91 (1980) [hereinafter "Benign" Sex Discrimination]; Nancy S. Erickson, *Equality Between the Sexes in the 1980's*, 28 CLEV. ST. L. REV. 591, 599-600 (1979).

111. See *infra* notes 113-123 and accompanying text.

112. *Craig v. Boren*, 429 U.S. 190, at 213 n.5 (1976) (Stevens, J., concurring). See generally FORER, *supra* note 73.

113. 404 U.S. 71 (1971).

114. *Id.* at 76.

115. To meet a rational basis scrutiny test, the classification scheme need only be shown to have a rational relationship to the legislative objective. The Supreme Court has shown extreme deference to legislative choices under this test. Although the court purported to use a rational basis test, the test used was actually more strict. Kanowitz, *supra* note 110, at 1381-82 (1980).

down the statute, the Court argued that the mandatory preference for males as administrators violated the Equal Protection Clause of the Fourteenth Amendment.

In *Frontiero v. Richardson*,¹¹⁶ a plurality of the Court agreed that gender-based classifications were inherently suspect. In *Frontiero*, a married woman sought the same employment benefits as a married man in the uniformed services. The government had been denying the benefits to female employees on the basis of administrative convenience. The Court based its approach on the "long and unfortunate history of sex discrimination" in this country, the high visibility of sexual distinctions, and the fact that sex frequently bears no relation to job performance.¹¹⁷ Justice Brennan argued in *Frontiero* that sex has suspect status because

the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.¹¹⁸

A majority of the Court finally settled on a test of intermediate scrutiny in *Craig v. Boren*¹¹⁹ in which the Court invalidated an Oklahoma statute which permitted women to purchase 3.2% beer at age eighteen while requiring men to wait until age 21. The Court defined the new test as requiring gender classifications to "serve important governmental objectives and . . . be substantially related to achievement of those objectives."¹²⁰ Where the state can achieve its purpose by a gender-neutral statute, the sex-linked classification has been abolished¹²¹ or modified to apply equally to both sexes.¹²²

The rule pronounced in *Craig* places the *original* purpose of the law in the balance to be weighed against the state objective. The original purpose of the doctrine of necessities was to permit the wife who lacked any contractual capacity of her own because of coverture to

116. 411 U.S. 677 (1973).

117. *Id.* at 684-87.

118. *Id.* at 686-87.

119. 429 U.S. 190 (1976).

120. *Id.* at 197.

121. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

122. See, e.g., *Richland Memorial Hosp. v. Burton*, 318 S.E. 2d 12 (S.C. 1984); *Marshfield Clinic v. Discher*, 314 N.W. 2d 326, 328 (Wis. 1982); *Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1010 (N.J. 1980).

The Court has, however, upheld a gender-based classification on the grounds that it was rationally related to the end of compensating for past gender discrimination. *Kahn v. Shevin*, 416 U.S. 351 (1974) (Florida statute granting widows, but not widowers, a \$500 property tax exemption because of the disproportionate financial difficulties of widows).

procure necessities in absence of their supply by the husband.¹²³ The intermediate scrutiny equal protection test illuminates the problem of the relation of the gender-biased means to the achievement of those ends. Although a rule does not necessarily violate equal protection simply because it discriminates against a class of persons, the doctrine of necessities fails intermediate scrutiny because its original purpose is not well-tailored to the government's ends.

2. LEGISLATIVE OBJECTIONS

In cases involving the doctrine of necessities, an analysis of the legislative objective is initially problematic because this is a common law doctrine, not a legislative enactment. The courts have altered or abolished other gender-based laws, many of which, like the doctrine of necessities, stemmed from the theory of coverture, in the absence of legislative action in the area. For example, courts have abolished or extended actions for loss of consortium, sex-based differences in sentencing for the same crime, and minimum wages for women only, to apply to both sexes equally based solely on constitutional principles of equality, without regard for the policy views (favoring retention of the bias) of state and federal lawmakers.¹²⁴ The courts created the common law doctrine and courts can abolish or alter the same.

Not all courts willingly take such an affirmative role in molding the law.¹²⁵ In decisions retaining the common law doctrine of necessities, some courts say that such policy choices are properly the province of the representative branch.¹²⁶ Other courts have emphasized the goals of promoting "domestic harmony" and public welfare.¹²⁷ Authors have argued that the rule should be retained for the protection of the "needy" wife.¹²⁸ Where the rule affects all women, regardless of actual financial status, modern economic and social realities reveal this rationale as impacting too broadly.

Statistically, it is true that despite the increase in number of

123. See *supra* notes 15-19 and accompanying text.

124. See LEO KANOWITZ, *WOMEN AND THE LAW* 149-96 (1969).

125. *E.g.* *Schilling v. Bedford Hosp.* 303 S.E.2d 905 (Va. 1983) (abolishing the doctrine of necessities on equal protection grounds under intermediate scrutiny but refusing to extend the doctrine, as in *Condore*, on the grounds that the legislature was the proper body to do so); *Condore v. Prince George's County*, 425 A.2d 1011 (Md. 1981) (abolishing the doctrine of necessities in light of the state's equal rights amendment, but refusing to extend the doctrine on the grounds that the legislature was more fit to address the matter).

126. See *Medlock v. Fort Smith Serv. Fin.*, 803 S.W.2d 930 (Ark. 1991); *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986).

127. *E.g.*, *Bencomo v. Bencomo*, 200 So. 2d 171 (Fla. 1967).

128. See Karol Williams, *The Doctrine of Necessaries: Contemporary Application as a Support Remedy*, 19 STETSON L. REV. 661 (1990).

women in the workforce, women still contribute less to the average family income than their male counterparts.¹²⁹ The statistical likelihood that a wife will be financially dependent on the husband does not justify a presumption by courts in all necessities cases that the wife is, in fact, financially dependent.¹³⁰ This reasoning discriminates against those men who provide an equal financial contribution to the marriage and those who are financially dependent upon their wives.¹³¹ In *Wengler v. Druggists Mutual Insurance Co.*,¹³² the Supreme Court held that such gender-based discrimination, which is traditionally justified by the "assertion that most women are dependent on male wage earners and that it is more efficient to presume dependence in the case of women than to engage in case-to-case determination [,] . . . fails . . . scrutiny under the Equal Protection Clause."¹³³

Furthermore, if the extension of liability to encompass the dependent spouse's resources did create undue hardship for families, the

129. The rate of participation by women in the American labor force has risen steadily since 1870. By 1890, women comprised about 17% of the labor force and 14% of those women were married. Chused, *supra* note 30, at 34 n.118 (citing U.S. BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 129-34 (1976)). By 1970, 40% of women worked outside the home. 151 DAILY LABOR REPORT, ECONOMIC SECTION, *Employment: One in Ten Families Faced Unemployment During Second-Quarter 1992*, BLS Report, Aug. 5, 1992 at B-1. That percentage rose to 55% in 1985 and 60% in 1990. *Id.* By the second quarter of 1992, 10.6 million married-couple families relied on the husband as the sole wage-earner, while 25.9 million married-couple families have both the husband and wife working. 208 DAILY LABOR REPORT, CURRENT DEVELOPMENTS SECTION, *Speakers Issue "Wake-Up Call" to Employers, Workers, on Workforce Quality*, Oct. 26, 1990 at A-13. The income from these women contribute to the basic support of the family. These numbers will continue to grow as women who were never expected, much less encouraged, to develop labor market skills and never entered the marketplace are replaced by women with higher levels of education and training and expectations of jobs and careers.

Along with the increase in the employment rate, there has been a decrease in the birth rate. Bureau of the Census, U.S. Dep't of Commerce, Statistics at a Glance, § 3 (Nov. 10, 1992). Martin O'Connell, *Maternity Leave Arrangements: 1961-85 in WORK AND FAMILY PATTERNS OF AMERICAN WOMEN*, Series P-23, No. 165 (1990). For those women who are having children, the likelihood of leaving the job force permanently has dropped and less time is being taken from work by those who return. *Id.* Employers are becoming more generous in parental leave. Other women are not dropping out of the work force at all. *Id.* These statistics indicate that the traditional roles of husband and wife and the economic patterns they produced no longer hold true.

130. The realizations that both spouses contribute to the marriage and that women are not or need not be financially dependent upon their husbands are consistent with developments such as rehabilitative alimony, equitable distribution of property, and enforcement of antenuptial agreements. See Nora J. Lauerman, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. CIN. L. REV. 493, 498-501, 511-19 (1987).

131. See *Marshfield Clinic v. Discher* 314 N.W.2d 326, 337-338 (Wis. 1982) (Abrahamson, J. dissenting).

132. 446 U.S. 142 (1980).

133. *Id.* at 151-52.

legislature could enact rules (prompted by economic reality) to limit the extent of creditor access to the family's resources.¹³⁴ This approach reserves to the legislature its authority to create laws for the protection of needy persons while allowing courts to carry out their role as enforcers of constitutional principles.

B. *Impact of the Doctrine on Women*

The doctrine of necessities does not exist in a vacuum. It responds to the problems of some women while simultaneously creating problems for others. By retaining the doctrine of necessities, the Florida Supreme Court has frozen in time the role of women. This, perhaps, is a longing for a return to a mythical past that will not suffice for the needs of the modern family or the capabilities of the modern woman.

1. ECONOMIC AND SOCIAL EFFECTS

One reason for the hesitation of the courts to reform the doctrine of necessities stems from the doctrine's seeming current viability. The original purpose of aiding dependent wives whose husbands fail to supply them with the most basic means of living is no less salutary or necessary today. In fact, a broader utilization of the doctrine has been proposed as a supplement to current statutory support provisions.¹³⁵

A closer analysis of the rationale for the doctrine reveals that although the doctrine of necessities may appear necessary, the doctrine actually no longer remains a well-defined remedy. Not all women fall in the category of those who require this financially protective doctrine,¹³⁶ nor do all men serve the function of sole provider.¹³⁷ By protecting women unilaterally, the courts send the message that all women are intrinsically incapable of functioning or attaining the capacity to function adequately in the economic

134. Brown et al., *supra* note 14, at 946.

135. Williams, *supra* note 128 (arguing that needy wives should actively procure necessary expenses other than hospital costs, including food, clothing, and needs for children, and then have the creditor collect payment from the husband). *But see* Mahoney, *supra* note 29, at 238 (explaining that "[t]he traditional scholarly wisdom had been that courts have so limited the scope of the doctrine that few merchants would wish to rely on it" (citation omitted)).

136. This idea that compensatory protection serves as a "smokescreen" for an economic inequality was seen earlier in the context of the struggle for various equal rights amendments. *See supra* notes 31-35 and accompanying text.

137. In post-industrial society, married couples increasingly need the second income of the wife in order to sustain their standard of living.

For a thought-provoking "sociological scrutiny" of the rise and fall of the "modern family," see JUDITH STACEY, *BRAVE NEW FAMILIES* (1990).

realm.¹³⁸ The rule as it stands is overbroad. Surely, men and women are not yet socially or economically equal.¹³⁹ However, the same doctrine which shields disadvantaged women pins them in a traditional submissive role. The doctrine of necessities remains part of the very baggage that women must cast off in order to claim their right as equals in marriage and before the eyes of society. The protective benefits of the doctrine of necessities could still be retained while modifying the rule to comply with the demands of equal protection.¹⁴⁰

Regardless of the ideality of the proposed reforms, "[t]here are many who consider this to be impossible, given the status of men and women in society; each comes to the marriage with certain political,

138. While no one would claim that the law was responsible for the traditional division of labor in the family, it did serve to sanction and reinforce traditional family roles. . . . For example, by promising housewives lifelong support, the law created disincentives for women to develop their economic capacity and to work in the paid labor force. In addition, by making them responsible for domestic services and child care, it reinforced the primacy of these activities in their lives, leaving them with neither the time nor the motivation to develop careers outside the home.

WEITZMAN, *supra* note 5, at 2; *see also* Lauerman, *supra* note 130, at 507.

Studies of the socialization of women indicate that females are faced throughout their lives with the choice of being either "female" or "competent." For example, the same work product, when attributed to a man, is rated higher by both men and women than when it is attributed to a woman; both men and women consider "masculine" traits, such as being aggressive and achievement oriented, desirable when exhibited by a man but "undesirable" when exhibited by women. Meredith M. Kimball, *Socialization of Women: A Study in Conflict*, in MARRIAGE, FAMILY, AND SOCIETY 189 (S. Parvez. Wakil ed., 1975).

139. In the fourth quarter of 1991, women who worked full time had median earnings of \$373/week compared to \$503/week for men who worked full time. 24 DAILY LABOR REPORT, *Weekly Earnings Increased 3.3 Percent for Wage, Salary Workers in 1991*, Feb. 5, 1992 at B-4.

The gender-gap in wages appears to be closing. During the 1980s, the gender-gap in wages decreased by 10.5%. *Id.* However, commentators have argued that such change is attributable to falling wages for men rather than rising wages for women, 174 DAILY LABOR REPORT, CURRENT DEVELOPMENTS SECTION, *Erosion of Real Wages Spreads to White-Collar Job Categories*, Sept. 8, 1992 at A-1, and that, world-wide, gains in women's pay have been slim, 174 DAILY LABOR REPORT, CURRENT DEVELOPMENTS SECTION, *ILO Study Finds Few Gains for Women in Global Workforce; Decline Projected*, Sept. 8, 1992 at A-5.

Although 76% of those questioned in a national survey of registered voters favored an equal employment policy, 70 DAILY LABOR REPORT, CURRENT DEVELOPMENTS SECTION, *Most Support Pay Equity, Survey Says*, Apr. 10, 1992 at A-17, and such a policy should be most advantageous to "younger, better educated, more highly qualified women," Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986). In fact, "[y]ounger women are nearly as segregated into traditional female jobs as middle-aged and older women, and the gap between the wages paid to young women and young men is likely to grow as they age." 90 DAILY LABOR REPORT, CURRENT DEVELOPMENTS SECTION, *Job Segregation Between Sexes Does Not Decrease for Younger Women, Study Says*, May 9, 1991 at A-2.

140. Lauerman, *supra* note 130, at 507 (arguing that the concept of equality of husbands and wives demands that equals be treated equally and those who are not equal should be treated differently to a degree consistent with their dissimilar positions).

social, and economic baggage, and combining unequals will rarely produce an equal partnership."¹⁴¹ Others are willing to go half-way, that is, to alter the doctrine to impose secondary liability upon the wife, but retaining the primary liability of the husband.¹⁴² This approach recognizes that at least some women contribute to the household income, but denies recognition of the discriminatory affect of the doctrine of necessities upon at least some men. This Comment does not ignore economic realities.¹⁴³ Indeed, the most responsive formulation to economic reality is not to have a doctrine which responds to any statistical formulation of economic dependency at all, but rather one which applies according to the facts of a particular case.

The underlying rationale of the doctrine of necessities, which purports to "protect" women, actually *increases* their vulnerability. "[S]ocial and legal stereotypes are complexly interrelated and mutually reinforcing."¹⁴⁴ The model of the "needy wife" becomes a self-fulfilling prophecy.¹⁴⁵ The stereotype of the husband as the sole breadwinner and the wife as the homemaker leaves the wife at the financial mercy of her husband. Because society assumes that wives will be able to turn to their husbands for financial aid, women's individual financial autonomy is restricted and they often fail to develop critical financial skills.¹⁴⁶

Lenore Weitzman analyzed the extensive impact on women of the social and economic consequences of the common law assumptions. Weitzman describes the economic effects as hindering women's opportunity to develop personal, educational, and practical skills necessary for financial independence and competence; devaluing the actual contribution of the wife to the community support; and ignor-

141. KAREN DECROW, *SEXIST JUSTICE* 179 (1974); *see also* Lauerma *supra* note 130, at 507.

142. *See, e.g.,* Marshfield Clinic v. Discher, 314 N.W.2d 326 (Wis. 1982).

143. *See supra* note 129.

144. LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 54 (1981).

145. *Id.* The New York Supreme court addressed the "threatening effect to female equality of 'benevolent legislation' " when interpreting a statute that permitted payment of alimony to women but not to men. *Thaler v. Thaler*, 391 N.Y.S.2d 331, 339 (1977). In *Thaler*, the court argued that the discriminatory statute, while purporting to relieve economic discrimination against women, may actually have fostered it.

Society created its classical concept of woman, and cast it in law. Women were helpless and delicate, incapable of conducting worldly commerce, and too dainty to be soiled by it. Directives which . . . shelter women from the responsibilities men are obliged to assume . . . are offensive. *One woman's shelter is another's trap, and perhaps her own later on.*

Id. (citation omitted) (emphasis added).

146. WEITZMAN, *supra* note 144, at 54-55.

ing the real value of the wife's unpaid services.¹⁴⁷ Furthermore, the social impact fosters women's self-identity as dependents, incapable of effectively and productively functioning outside of the home.¹⁴⁸ Artificial social role constructs for men and women, premised on the notion that women are passive homemakers and caregivers and men are the breadwinners and protectors,¹⁴⁹ leave those whose individual capacities and goals do not comport with these constructs "burdened . . . with feelings of guilt, despair, and inadequacy."¹⁵⁰

Therefore, the disadvantages that the assumptions underlying the doctrine of necessities impute to women as a class—and that perpetuate the characteristics that prevent courts from abolishing the doctrine—outweigh the advantages of the "band-aid" type effects of a rule which may aid women in need.

2. CREDITOR EXPECTATIONS

Creditors currently face uncertainty when extending credit to

147. *Id.* at 53-59. Both in the United States and abroad, the value of women's housework is gaining recognition. Some want to add "housework" to the gross national product—the standard measure of the goods and services produced in a country. This would emphasize and heighten the status of the work and the women who perform it. In October 1991, Rep. Barbara-Rose Collins, D-Detroit, introduced a bill to an Education and Labor subcommittee that would require the Bureau of Labor Statistics to value unpaid services which would then be included in the GNP. Unpaid services include "housework, caring for children or the elderly, agricultural work, volunteer work and work in a family business." H.R. 3625, 102d Cong., 1st Sess. (1991); Maria Odum, *Legislator Wants to Put a Price on Housework*, DET. FREE PRESS, Apr. 8, 1992, at 4E.

Housework contributes an estimated \$4 trillion to the world economy each year. Stu Silverstein & Julie Rose, *Valuing Housework as a Way to Help Women*, L.A. TIMES, Aug. 24, 1992, at D2. The value placed on the work done by women in this country is \$16,000 per woman, per year. Odum, *supra*.

148. WEITZMAN, *supra* note 144, at 56-59. Weitzman argues that women become enormously disillusioned and resentful if or when they reevaluate their roles in the marriage and in society. When a woman redefines herself as an individual, rather than as her husband's wife, she may feel void of personal identity. "As one woman explained: 'He was achieving, developing, thriving. . . . I was losing my identity. . . . My life was defined by him, by his job, his salary, his everything.'" *Id.* at 58 (footnote omitted).

Weitzman also points out that it is not women alone who suffer from the constraints of traditional roles. Husbands also have excessive pressure to be the sole income-producer. Furthermore, husbands are discouraged from assuming greater responsibilities in the home because employers "are more likely to expect them to be totally available for work." *Id.* at 80; see also DECROW, *supra* note 141, at 156-84; KANOWITZ, *supra* note 124, at 198-99.

149. [T]here are biological differences between men and women in relation to reproduction. [But] these differences have been used to justify sex-based legal and cultural limitations on human potential that do not reflect any real difference between men and women and that enforce the inferiority of women and the dominance of men.

HOFF, *supra* note 20, at 363 (quoting attorneys Sylvia Law and Stephanie Wildman).

150. LEO KANOWITZ, *EQUAL RIGHTS: THE MALE STAKE* 15 (1981); see also LINDGREN & TAUB, *supra* note 34, at 1-38.

married women for several reasons. First, no hard and fast rule exists for determining what qualifies as a "necessary."¹⁵¹ Second, though a wife may have substantial personal financial means, if she lives in a jurisdiction that abides by the old common law rule, the creditor may be unpleasantly surprised that it can seek payment only from the husband.¹⁵² Third, the different approaches among the district courts of appeal in Florida are confusing and may make creditors hesitate to extend any credit at all. The rule as it stands does not constitute a well-defined remedy.¹⁵³

The *Webb* court considered the creditor's burden when modifying the doctrine of necessities. The court placed the burden of pleading and proof on the creditor to show that the spouse to whom it provided the necessities cannot pay as a condition precedent to imposing liability on the other spouse.¹⁵⁴ The court considered the argument that the spouse seeking to avoid liability should bear the burden of proving that the other spouse who received the necessities has the ability to pay. This formulation is advantageous because the spouse knows the financial capacity of the other spouse better than the creditor.

The *Webb* court rejected this argument, though, because shifting the burden of proof to the creditor provides "some protection to the spouse who has not expressly consented to the debt"¹⁵⁵ and because

151. The general rule has been described as "such things as are necessary . . . in accordance with the means of the husband and social station of the family." *Phillips v. Sanchez* 17 So. 363, 364 (Fla. 1895) (holding that domestic servants were a necessary). Courts have held a myriad of other items to be necessities: *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986) (medical care); *Jordan Marsh v. Cohen*, 136 N.E. 2d 350 (Mass. 1922) (furniture and household goods); *Feiner v. Boynton*, 62 A. 420 (N.J. 1905) (clothing); *Gimble Bros. v. Pinto*, 125 A.2d 865 (Pa. 1958) (mink coat); *Mihalcoe v. Holub*, 107 S.E. 704 (Va. 1921) (food). While parties in Florida have used the doctrine exclusively for medical costs, no limitations on the use of the doctrine exist. Indeed, some advocate wider use of the doctrine to encompass a wider array of necessary expenses.

152. The *Jersey Shore* court addressed this issue, which arose while the doctrine of necessities remained unmodified from the traditional common law rule, saying that under the common law rule, "even a husband who is economically dependent on his wife would be liable for the necessary expenses of both spouses, while the wife would not be liable for either." *Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1008 (N.J. 1980). The *Jersey Shore* court eventually decided that the doctrine can hold either spouse liable for the necessities of the other. *See supra* notes 53-57 and accompanying text.

153. Examples of paralyzing confusion for creditors are easily imagined. A state-wide health-care organization would have administrative obstacles from operation to operation across district lines. A patient admitted to one hospital may need to be rushed to another hospital in a different district for emergency specialized care. These problems would be obviated by a uniform policy that would facilitate creditor satisfaction.

154. *Webb v. Hillsborough County Hosp. Auth.*, 521 So. 2d 199, 204 (Fla. 2d DCA 1988) (following *Jersey Shore*).

155. *Id.* (quoting from *Jersey Shore*, 417 A.2d at 1010).

"it would be unfair to accord the same rights to a creditor who provides necessities on the basis of an agreement with one spouse as to a creditor who has an agreement with both spouses."¹⁵⁶ The creditor also has the opportunity to investigate the financial status of the spouse at the time it provides the necessities. Moreover, the court believed that placing the burden of proof on the spouse who did not incur the debt would "promote marital disharmony."¹⁵⁷

One Kansas court recently provided relief for a creditor by extending the doctrine of necessities to apply to both husbands and wives.¹⁵⁸ The appellate court rejected the wife's contention that the doctrine should not apply because her theory stemmed from the outdated notion of "unity of marriage."¹⁵⁹ Rather, the court found that the doctrine arose from agency theory, according to which either spouse has a legal obligation to provide the other with "everything necessary for their mutual comfort and enjoyment."¹⁶⁰ The creditor could look to either spouse for payment of a debt incurred by one.¹⁶¹

Parties have invoked the doctrine of necessities in Florida exclusively in cases regarding the payment of hospital expenses.¹⁶² Unlike more frivolous cases such as that in which a mink coat was found by a

156. *Id.*

157. *Id.*

158. *St. Francis Regional Medical Ctr. v. Bowles*, 823 P.2d 226, 228 (Kan. Ct. App. 1992).

159. In fact, the concept of unity of marriage was expressly abolished in Kansas in 1927. *Id.*

160. *Id.* (citing *Hartmann v. Tegart*, 12 Kan. 177 (1873)).

161. The opinion expressly eschewed any policy motivations for the equal application of the doctrine. *Id.* at 228. The appellate court left the task of establishing a stated policy of gender-neutralization to the state's highest court or to the legislature. It is interesting that this court stated that a gender-neutral policy was particularly within the province of the judicial branch and, only secondarily, within the province of the legislature. *Cf. Medlock v. Fort Smith Serv. Fin. Corp.*, 803 S.W.2d 930, 931 (Ark. 1991) (holding that the legislature, not the judiciary should decide whether duties under the doctrine of necessities should be extended to the wife).

However, in *Shands*, the Florida Supreme Court held that because the legislature was in a better position to study the issue, the legislature should resolve the issue. *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 646 (Fla. 1986). Obviously, this allocation of policy formulation solely to the province of the legislature is not completely unfounded—especially where the legislature is slow to act with what might be considered an impolitic decision. *See supra* notes 105-107 and accompanying text.

162. There have been no cases reported in Florida in the past 50 years in which the doctrine of necessities was invoked for liabilities other than hospital expenses. During this time, the doctrine has been invoked by parties in other states: *Boulder County Dep't of Social Serv. v. Harkreader*, 791 P.2d 649 (Ariz. Ct. App. 1990) (child care costs); *Hudson v. Butane Gas Corp.*, No. 83-249 1984 WL 1733 (Ark. Ct. App. 1984) (for contracts for the purchase of furniture); *Johnson v. Johnson*, 811 S.W.2d 822 (Mo. Ct. App. 1991) (nursing home costs); *Darmanin v. Darmanin*, 540 A.2d 913 (N.J. Super. Ct. App. Div. 1988) (attorneys fees); *Lichtman v. Grossbard*, 537 N.Y.S.2d 19 (N.Y. 1988) (nursing home costs). *See also supra* note 151.

court to be a "necessary"¹⁶³ or where the parties invoke judicial resources to settle a "family squabble,"¹⁶⁴ the doctrine of necessities can be an effective and expedient means of allowing persons to receive medical care without the potentially fatal delay of paperwork which the creditor might require in the absence of the doctrine. The doctrine of necessities has the further potential for lending the couple or family in Florida a degree of assistance in obtaining other necessities. But the doctrine as currently enforced in Florida ill—fits the needs of those it protects—both women and creditors.

C. *Extension Versus Abolition of the Doctrine*

If a court finds the doctrine of necessities no longer retains viability, it has two options. It can extend the protection of the rule to both spouses—by making them either jointly¹⁶⁵ or primarily/secondarily liable¹⁶⁶—or it can abolish the doctrine altogether.

1. ABOLITION

Abolition of the doctrine allows women freedom to contract for or out of liability.¹⁶⁷ In the absence of such an agreement or the common law doctrine of necessities, each spouse has personal liability for his or her own expenses and debts. States such as Maryland, Virginia, and Alabama have reevaluated the role of the doctrine of necessities and decided, rather than extending the doctrine, to abolish it altogether. The Court of Appeals of Maryland chose to satisfy the mandates of that state's Equal Rights Amendment by abolishing the doctrine of necessities in *Condore v. Prince George's County*.¹⁶⁸ The court recognized the legislature's prerogative in the field but noted

163. *Gimble Bros. v. Pinto*, 125 A.2d 865, 867 (Pa. Super. Ct. 1958).

164. See Note: *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1784 (1984).

165. *Cooke v. Adams* 183 So. 2d 925 (Miss. 1966) (holding both spouses jointly liable); accord *Jermunson v. Jermunson* 592 P.2d 491 (Mont. 1979); *Daggett v. Neiman-Marcus Co.* 348 S.W.2d 796 (Tex. Ct. App. 1961).

166. See, e.g., *Memorial Hosp. v. Hahaj* 430 N.E.2d 412, 416 (Ind. Ct. App. 1982) (holding that the spouse incurring the medical expenses, whether husband or wife, is primarily liable and the other is secondarily liable); *Busch v. Busch Constr. Co.*, 262 N.W.2d 377, 401-02 (Minn. 1977) (expressing the view that the wife is primarily liable for her necessities and the husband only secondarily liable by virtue of state statute); accord *Marshfield Clinic v. Discher*, 314 N.W.2d 326 (Wis. 1982).

167. Traditionally, couples were not permitted during the marriage to alter the terms of support contractually because of the "interests of society and the public welfare in maintaining unimpaired the integrity of the marriage and its essential obligations." *French v. McAnarney*, 195 N.E. 714, 716 (Mass. 1935); see also 1 WOMEN IN AMERICAN LAW, *supra* note 5, at 32-33. Courts have also generally abandoned this rule and will now enforce such agreements. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970).

168. 425 A.2d 1011 (Md. 1981).

that the common law "is also subject to change by judicial decision where the Court finds . . . that the common law rule is a vestige of the past, no longer suitable to the circumstances of our people."¹⁶⁹ Either abrogation or extension of the doctrine by the court could have satisfied the terms of the state's Equal Rights Amendment.¹⁷⁰ However, this court denied any role as policymaker. Pending consideration by the legislature, the court abolished the doctrine.

Virginia abolished the doctrine in *Schilling v. Bedford County Memorial Hospital*.¹⁷¹ In *Schilling*, a hospital sued a husband for medical services rendered to his wife. The wife had signed promissory notes each of the four times that she had checked into the hospital.¹⁷² Despite the husband's refusal to obligate himself for the wife's hospital expenses, the hospital recorded his name on their paperwork as "guarantor."¹⁷³ The Supreme Court of Virginia held that the doctrine of necessities, with its gender-based classification, does not substantially relate to the state's interest in promoting prompt and efficient medical care and, therefore, fails equal protection analysis.¹⁷⁴ The court did not, however, modify the doctrine because it concluded that such a task was better left to the legislature.¹⁷⁵

Recently, in *Emanuel v. McGriff*,¹⁷⁶ the Alabama Supreme Court considered the doctrine of necessities and found that the state legislature had already "solve[d] the constitutional problem."¹⁷⁷ The dissimilar treatment for men and women, the court noted, clearly violates the Equal Protection Clause.¹⁷⁸ The court then summarily stated that the purpose of the doctrine did not substantially relate to important government interests.¹⁷⁹ The state statute provided that each spouse was solely liable for their own debts and contracts.¹⁸⁰

169. *Id.* at 1018.

170. *Id.*

171. 303 S.E.2d 905 (Va. 1983).

172. *Id.* at 906.

173. *Id.*

174. *Id.* at 907-08.

175. *Id.* at 908.

176. 596 So. 2d 578 (Ala. 1992).

177. *Id.* at 579.

178. *Id.* at 579-80 (quoting *Reed v. Reed*, 404 U.S. 71, 77 (1971)).

179. *Id.* at 580.

180. The statute provides:

The husband is not liable for the debts or engagements of the wife, contracted or entered into after marriage, or for her torts in the commission of which he does not participate, but the wife is liable for such debts or engagements, or for her torts, and is suable therefor as if she were sole.

ALA. CODE § 30-4-7 (1975).

In this case, the husband had actually signed a promissory note for the debt owed to the hospital for the care of his deceased wife. The husband had been paying the hospital in \$20

The court rejected the plaintiffs request to resolve the constitutional rub by applying the support doctrine equally to both spouses.¹⁸¹ Such action was thought to be within the particular province of the legislature.¹⁸²

2. EXTENSION

Extension of the doctrine, some argue, may achieve equality with a vengeance by creating liability in each spouse for debts of the other.¹⁸³ Such equality of rights should not be viewed as a brutal form of equality which leaves women unprotected.¹⁸⁴ First, extension would obviate the equal protection problem with the doctrine as it currently stands in Florida. Second, extension does not necessarily mean joint and several liability. Extension can be tailored according to the relative financial contributions of the spouses, with each spouse paying a proportionate share. Finally, creditors could have a greater degree of security if allowed to reach the assets of either or both spouses. Extending the doctrine to include both spouses would also satisfy the equal protection requirement of a rational relationship between the sex-based classification and the state objective.¹⁸⁵

Joint and several liability would, in many cases, prove to be equality with a vengeance. However, the vengeance is ameliorated if the doctrine extends to both spouses in the form of liability on the part of both spouses for the necessary expense of either spouse, in the proportion to which each financially contributes to the marriage. Because the modified doctrine would not impose financial liability to a greater extent than the financial proportion each spouse contributes, the doctrine would not unfairly strain the resources of a spouse who contributes more household services and less monetary income. This allows courts to take a case-by-case look at the actual income contri-

and \$25 increments for seven months after his wife died. He then ceased payments and died less than a year later. The hospital filed a claim against the estate. Although the majority opinion makes little of this promissory note, a special concurrence might have found this a dispositive factor. Nevertheless, because the hospital chose to sue on the theory of the doctrine of necessities, rather than upon the promissory note, the cause of action failed. *Emanuel*, 596 So. 2d at 580 (Houston, J., concurring specially).

181. The dissent would have chosen such a remedy. *Emanuel*, 596 So. 2d at 580 (Maddox, J., dissenting).

182. *Id.*

183. LeAnn P. Wheeler, Note, *Judicial Dilemma: Extension or Invalidation of Sexually Discriminatory Classifications*, 34 RUTGERS L. REV. 128, 142 (1981); see also Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 498-505 (1987).

184. See HOFF, *supra* note 20, at 31-36 (discussing whether there can be equality among unequals).

185. See *supra* notes 113-23 and accompanying text.

butions of either spouse.¹⁸⁶ This approach recognizes the freedom of the husband and wife to structure their own financial arrangements¹⁸⁷ and allocations of household and income-generating work. A gender-neutral application would placate fears of disturbing marital felicity because neither spouse would bear the brunt of sole support. This approach would validate the economic reality of a given situation rather than apply a rigid test which may be ill-suited to the couple's support arrangements.

Furthermore, creditors would more likely extend credit when they are assured recourse from resources of either husband or wife and do not need to worry about which spouse, in fact, has the obligation to pay.¹⁸⁸ This alternative would also ensure that a spouse who has the financial means to pay but refuses to do so would not be able to unjustly avoid liability to creditors.¹⁸⁹

Some states have modified the doctrine of necessities to make the husband primarily liable and the wife secondarily liable.¹⁹⁰ The proponents of this approach say that it comports with the economic reality that women typically do not contribute an equal amount of income to the household. Women are not represented in the workforce to the same degree as men and those women who are in the work force do not earn as much as men.¹⁹¹ Courts that fashion the doctrine of necessities along primary/secondary liability lines hesitate to extend liability to apply to both spouses equally until both spouses contribute to household income equally. Other courts have imposed primary liability on the spouse who incurred the necessary expense and second-

186. If the judicial proceeding to determine the relative contributions of either spouse to the family income revealed that neither spouse had the ability to pay a judgment, the liability could be discharged in the same proceeding. See Toews, *supra* note 27, at 426.

187. See, e.g., William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 58-80 (1990) (arguing that developments in the concept of the marriage as contract and abolition of gender-linked content in the roles that the law proscribes for women pressures courts to recognize agreements between spouses as enforceable contracts).

188. *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 328 (Wis. 1982); see also Toews, *supra* note 27.

189. Women who contribute to the household income should have a proportionate financial responsibility for expenses. Denial of equal responsibility actually infringes upon women's rights. For example, laws excusing women from jury duty on grounds not available to men and denying women the right to sit on parole boards have been devised by states to "protect" women. These "protections" for women reinforce the stereotype of women as fragile and more properly belonging to the domestic sphere. See DECROW, *supra* note 141, at 36-37.

190. See, e.g., *Medical Serv. Ass'n v. Perry*, 819 S.W.2d 82 (Mo. Ct. App. 1991); *Marshfield*, 314 N.W.2d 326. But see Mahoney, *supra* note 29 (arguing that this application of the doctrine of necessities is unconstitutional).

191. *Marshfield*, 314 N.W.2d at 329-31; see also Toews, *supra* note 27, at 425.

dary liability on the spouse who did not.¹⁹² This approach has a less gender-discriminatory effect than that which always allocates liability along gender-role lines, but is problematic because it may discourage a spouse from incurring "necessary" debts, especially those items from which he or she would not personally benefit, such as child care costs. This increased incentive to neglect basic responsibilities in the household flies in the face of the policy rationale behind the doctrine of necessities.

Extending the doctrine, some argue, creates a problem of overbreadth. In actuality, the doctrine as it exists today is overbroad. As the doctrine currently applies in Florida, all men, whether financially secure or not, are liable for the debts of their wives. By extending the liability to women as equal partners with their husbands in the marriage, the doctrine would lose its overbroad aspect, would be tailored to the varying individual needs of couples and serve to protect the financially insecure spouse without reference to that person's gender. By pinning the role of the woman under the law to a functional evaluation¹⁹³ rather than societal expectations encoded in long-standing traditions based on birthright, the protective rationale of the doctrine of necessities is maintained, while the irrationality of protecting only women is removed.

3. SUMMARY

State legislatures have largely ignored the courts' calls to consider the current viability of the doctrine of necessities in light of societal needs and the doctrine's utility as a support mechanism. The Florida legislature was not prompted to act by either the affirmative modifications of the doctrine by the *Parkway* and *Manatee* courts nor by the *Shands* court's reminder to the legislature of its potential role in modifying the doctrine.¹⁹⁴

192. See, e.g., *Webb v. Hillsborough County Hosp. Auth.*, 521 So. 2d 199 (Fla. 2d DCA 1988); *North Shore Medical Ctr., Inc. v. Angrand*, 527 So. 2d 246 (Fla. 3d DCA 1988).

193. The Supreme Court adopted such a functional evaluation in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1974). The *Weinberger* court examined a provision of the Social Security Act that awarded benefits to widows and surviving minor children in cases when the husband had died, but granted benefits to only the minor children, excluding the widower, in cases where the wife had died. The Court, in finding this difference unconstitutional, buttressed its argument with a report which, while recognizing the statistical difference between the roles played by the sexes in society, proposed that the optimal means of achieving a socially desirable ends is to "tailor any subsidy directly to the end desired, not indirectly and unequally [for example,] by helping widows with dependent children and ignoring widowers in the same plight. In this example, it is the economic and *functional* capability . . . [that] counts." *Id.* at 652 n.19 (quoting from the Report of the Comm'n on Railroad Retirement System-Its Coming Crisis, H.R. Doc. No. 92-350, p. 378 (1972)).

194. See *infra* part III.B.

Abolition does not follow from existing legislation which places equal duties of maintenance and support upon both husbands and wives.¹⁹⁵ Opponents of abolition of the doctrine argue that holding each spouse financially independent of the other ignores the concept of the married couple as a financial unit and leaves creditors of a financially dependent spouse without recourse.¹⁹⁶ Supporters respond that abolishing, rather than extending the doctrine, avoids creating a new liability for the wife. It also relieves the husband of the burden of the exclusive obligation of support. However, these goals can be served through a gender-neutral extension of the doctrine.

V. MARRIAGE AS A PARTNERSHIP OF EQUALS

Today, there is a trend throughout the United States towards viewing marriage as a partnership of equals.¹⁹⁷ Florida already accepts this view.¹⁹⁸

The fact that in one marital venture a spouse is gainfully employed in the marketplace and pays a housekeeper to rear the children and keep house is not distinguishable from the spouse who devoted his or her full time to the profession of homemaker. The primary factual circumstance is each spouse's contribution to the marital partnership.¹⁹⁹

This notion of equality informs Florida courts when considering the relative contributions of both spouses to the marital partnership upon dissolution of marriage.²⁰⁰ The factual circumstances of the partners'

195. See *supra* note 28.

196. *Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1009 (N.J. 1980). The *Jersey Shore* court further argued that "[i]n a viable marriage, husbands and wives ordinarily do not distinguish their financial obligations on the basis of which one incurred the debt. Consequently, literal application of the Married Woman's Act would not comport with the expectations of husbands, wives, or their creditors." *Id.*

197. See MAX RHEINSTEIN & MARY A. GLENDON, *Interspousal Relations*, in *PERSONS AND FAMILY* 1-51 (Aleck Chloros ed., 1980) (this survey of the state of interspousal relations noted that in the United States, "basically, equality of husband and wife and the transformation of marriage into a partnership of two individuals of equal rank and dignity has already been well advanced in practically all states.") *Id.* at 13; see also *Jersey Shore*, 417 A.2d at 1008 ("a modern marriage is a partnership, with neither spouse necessarily dependent financially on the other.").

A gender-neutral partnership theory of marriage is also reflected in modern divorce law. Although gender-based expectations informed earlier divorce laws, reformers began in the 1960s to reassess the goals of divorce laws and the adequacy of the then-present laws to meet those goals. Subsequent statutory changes indicated that bread-winners and home-makers no longer existed as gender-specific, mutually exclusive groups. See WEITZMAN, *supra* note 5.

198. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203-04 (Fla. 1980).

199. *Brown v. Brown*, 300 So. 2d 719, 726 (Fla. 1st DCA 1974). The Florida Supreme Court adopted this view in *Canakaris*, 382 So. 2d 1197.

200. See *infra* notes 213-16.

contributions to the household should also be applied in doctrine of necessities cases. Courts should recognize the marriage as a partnership with contributions from both parties during the marriage, as courts do when the marriage is being dissolved.

Moreover, courts should use principles traditionally applied in partnership law when considering the mutual support obligations in the ongoing marriage. The role of either spouse in the marriage need not be gender-linked. The focus of a reformulation of the doctrine of necessities should be to protect a dependent spouse, whether husband or wife.²⁰¹ Partnership principles further this goal via gender-neutral provisions which allow couples to create their own support arrangements without penalization by gender-biased support laws and concerns of creditor expectations.

A. *Actual Financial Contribution*

This Comment has already suggested that the Florida Supreme Court should extend the doctrine of necessities to apply to both spouses in a gender-neutral manner and consider the factual circumstances of each spouse's contribution to the marital partnership.²⁰² Such inquiries need not be as complex as is often the case in the law of alimony.²⁰³ The relative financial contributions of each spouse to the partnership should give the court a workable percentage basis upon which to allocate liability for the cost of the necessary.

Extending liability to both spouses in the proportion to which they financially contribute to the marriage furthers the goals of the doctrine of necessities without unfairly penalizing spouses because of their gender or because of the way a couple allocates responsibility for financial support and household services. Both spouses can enter the marriage as equals without the constraints of the common law's gender-based approach to liability. Proportional allocation nullifies disincentives for responsibility as well. Neither spouse is unfairly penalized for spending time on non-income producing work (as the husband is under the current doctrine of necessities). This helps ensure that a couple will get the necessary goods and services they need, while creditors are reassured by the closing of the common law loophole in those cases where the wife has a financial support role in the marriage.

201. See Mahoney, *supra* note 29.

202. See *supra* part IV.

203. See FLA. STAT. ANN. § 61.08 (1991).

B. *Application of the Principles of Partnership Law*

"Spouses may contract to be business partners. But in the absence of such a contract, spouses are, in a sense, 'partners' in life."²⁰⁴ No formal arrangement is required to form a partnership. Courts look at such factors as sharing in profits and losses, the intent of the parties, the conduct of the parties toward third parties, and the rights of the parties on dissolution.²⁰⁵ Some argue against application of partnership principles because marriage is not profit-oriented in the same way as a business.²⁰⁶ But a strong economic motive often may exist in a marriage.²⁰⁷ "[T]hose entering into a marriage partnership must share not only the benefits and successes of the relationship, but also the risk of failure and the economic consequences to the parties of such failure."²⁰⁸ Indeed, when one rejects the idea that the husband can solely dictate the standard of living in the home, it appears that both spouses have a vested interest in the economic condition and improvement of the marriage partnership.

1. EQUALITY AND EQUITABILITY

The concepts and language of partnership law already in use by courts and lawyers ease the transition of the theory into the marital realm.²⁰⁹ The partnership analogy, in the context of marriage, presupposes that both husband and wife contribute equally to the marriage.²¹⁰ Both husband and wife should have a duty to support the

204. JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 45 (1989). *But see* Note, *supra* note 162, at 1792-94 (arguing that the primacy of the individual should preclude any application of partnership principles to marriage).

205. *Fenwick v. Unemployment Compensation Comm'n of New Jersey*, 44 A.2d 172, 174-75 (N.J. 1945).

206. Note, *supra* note 164, at 1793; *see also* Ira M. Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 3, 33-35 (1989).

207. Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 544 (1990).

208. *Geddes v. Geddes*, 530 So. 2d 1011, 1018 (Fla. 4th DCA 1988).

209. *See* Sally B. Sharp, *The Partnership Ideal: the Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195 (1987); *see also* *Jersey Shore Medical Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1010 (N.J. 1980) ("The reasonable expectation of marital partners are that their income and assets are held for the benefit of the marital partnership and, incidentally, for creditors who provide necessities for either spouse.").

210. Although contributions may be different in kind, the argument that they are still equal contributions supports enforcement of premarital and antenuptial agreements regarding support rights and property division. Lauerman, *supra* note 128. The Committee on Civil and Political Rights of the President's Commission on the Status of Women has refused to support equal sharing of responsibility between the husband and the wife. The Committee recommends only that:

[t]he husband should continue to have the primary responsibility of the support of his wife and minor children, but in line with the partnership view of marriage,

other. The success of the partnership requires sharing and altruism by both spouses. A mutual duty of support should not be classified as an additional burden to be imposed on women (which, according to defenders of the protective rationale, women are incapable of assuming). Rather, this duty of support merely recognizes the ability of both spouses to contribute as equals, regardless of their form of contribution.

The application of partnership principles does not require both husband and wife to contribute equally to the family income or share equally in responsibility for child care and domestic tasks, etc.²¹¹ Each spouse's contribution is presumptively of equal value under the theory of marriage as an egalitarian partnership.²¹²

Upon dissolution of marriage in Florida, the property of the husband and wife is divided equitably.²¹³ Florida courts evaluate the contributions of each spouse, including time contributed to the marital household as well as any accumulation of material goods.²¹⁴ In determining the proper award, courts consider all relevant circumstances to ensure equity and justice between the parties. Florida courts emphasize that notions of basic fairness rather than the law of

the wife should be given some legal responsibility for sharing in the support of herself and the children to the extent she has sufficient means to do so.

CCPR 23, *quoted in* KANOWITZ, *supra* note 124, at 73.

211. "[I]n the case once described as the typical American marriage . . . the parties started out with little or nothing and approached the marriage as a partnership or joint venture. . . . [I]mplicit in most such marriages was an understanding that such assets would be shared in some equitable fashion." *Tronconi v. Tronconi*, 425 So. 2d 547, 553 (Fla. 4th DCA 1982).

212. *Lauerman*, *supra* note 130, at 508 n.59.

213. Thus, under Florida Statutes § 61.075 (1991), the court "shall distribute between the parties the marital assets and liabilities in such proportions as are equitable, after considering all relative factors."

214. The United States Supreme Court acknowledged in 1975 that the earnings of both spouses were vital to the family's support, holding that an "archaic and overbroad" gender-based distinction in Social Security survivor benefits was unconstitutional. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

Florida Statutes § 61.075 (1991) provides in pertinent part:

(1) [T]he court shall set apart to each spouse that spouse's nonmarital assets and liabilities and shall distribute between the parties the marital assets and liabilities in such proportions as are equitable, after considering all relevant factors, including:

(a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as a homemaker.

(b) The economic circumstances of the parties.

...

(e) The contribution of one spouse to the personal career or educational opportunity of the other spouse.

...

(g) The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties.

community property govern determinations of how to allocate marital assets.²¹⁵

On the basis of education, training, and personality, the parties are not "equals" in the marriage.²¹⁶ The goal, however, is equity, not equality. The wife's role in the marriage entails duties as a partner in an ongoing entity, yet she also strives for greater personal freedom and self-determination.

2. UNIFORM PARTNERSHIP ACT

The policies underlying the Uniform Partnership Act carry over into the framework of marital law. U.P.A. section 9(1) provides:

Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Application of such principles to the doctrine of necessities cases binds the couple for necessary expenses incurred by either. A wife with assets could not evade liability. Unlike the primary/secondary liability theory which imposes liability according to which spouse incurs the expense, this gender-neutral approach does not discourage either spouse from procuring the "necessary."

If creditors use the gender-neutral principles in section 9(1), wives would not experience the same problems they historically have had in obtaining credit without their husbands' assistance. The section allows each partner to obtain goods and services in order to carry

215. See *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *accord Dewberry v. Dewberry*, 455 So. 2d 420 (Fla. 2d DCA 1984); *McSwigan v. McSwigan* 450 So. 2d 284 (Fla. 4th DCA 1984).

216. *Dewberry*, 455 So. 2d at 422.

The relative "inequality" of each spouse in the marriage are recognized in the alimony provisions of Florida Statutes § 61.08 (1991):

(2) . . . [T]he court shall consider . . . :

. . . .

- (c) The age and the physical and emotional condition of each party.
- (d) The financial resources of each party. . . .
- (e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
- (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- (g) All sources of income available to either party.

on the usual business of the partnership. In the marital domain, this translates into the equal ability of either husband or wife to obtain goods or services, especially those necessary for the basic support and maintenance of the family.

Additionally, the Uniform Partnership Act provides that every partner is accountable as a fiduciary who "must account to the partnership for any benefit, and hold as trustee for it any profits derived . . . without the consent of the other partner[. . .]"²¹⁷ The partners' rights and duties include receiving agreed shares of the profits of the partnership and sharing the losses of the partnership.²¹⁸ Courts should apply these principles while the marriage remains an active entity, as opposed to their application to the marriage only upon dissolution.²¹⁹ The Florida courts need to apply these principles while the marriage continues in order to give the fullest credence to the notion of husbands and wives as equals in the marriage with mutual duties and rights of support.

3. DUTIES OF GOOD FAITH AND LOYALTY

It is not enough that courts utilize the rhetoric of partnership in considering the rights and obligations of husbands and wives. Fiduciary principles, as well as obligations of loyalty and good faith, should apply to the relationship. "While a marital relationship remains in a non-adversarial stance, each party has fiduciary-like responsibility to the other."²²⁰ The classic definition of the fiduciary responsibility, that of "honesty . . . [and] the punctilio of an honor the most sensitive"²²¹ informs the moral obligation that courts should apply to the marriage partnership when considering the mutual provisions of support. Partners should be free to develop their own support arrangements, but in the absence of such contracts, both should support each other to the extent of their share of financial contribution to the marriage. Wives should not be able to use the doctrine of necessities to

217. Uniform Partnership Act § 21; *see also* Draft Revised Uniform Partnership Act § 404 (c)(1) (Draft March, 1992).

218. Uniform Partnership Act § 18 (a).

219. *See supra* notes 213-215 and accompanying text.

220. *Baker v. Baker*, 394 So. 2d 465, 468 (Fla. 4th DCA 1981). In *Baker*, the court held that the property settlement agreement was fraudulent and deceptive. The husband's personal financial statement breached the "fiduciary responsibilities inherent in the marital relationship." *Id.*; *see also* *Fleming v. Fleming*, 474 So. 2d 1247 (Fla. 4th DCA 1985); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927) ("[A] fiduciary relation . . . need not be legal; [it] may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient." *Id.* at 421 (quoting *Beach v. Wilton*, 91 N.E. 492 (Ill. 1910))).

221. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

avoid expenses that they are able to pay. Husbands should not dictate the standard of living and thus unilaterally define necessary expenses.²²²

Courts also should impose duties of loyalty and good faith to both spouses and replace the paternalistic language of husband as head of household and sole provider for his weak and servile wife.²²³ The traditional doctrine of necessities allowed spouses to make choices that worked plainly to the benefit of one spouse and to the detriment of the other. Good faith and fair dealing avoid these choices. Under a revised doctrine of necessities, both spouses should share in both the benefits and the burdens of the marriage. Equalizing responsibility reinforces recognition of the ability of both husband and wife to contribute, recognizes the worth of the traditionally under-valued "non-economic" work of the homemaker,²²⁴ and discourages acts by the spouses which would needlessly tax the resources of the partnership.²²⁵

VI. CONCLUSION

The district courts of appeal in Florida could not agree upon an application of the doctrine of necessities before the *Shands* decision and have re-divided over interpretation of the doctrine since then. The crux of the problem is that the current role of women in society conflicts with the principles which informed the doctrine of necessities at common law. Equal protection of the law demands that one spouse should not be liable for necessary debts where the other spouse is not. The broad application of the doctrine of necessities may have

222. See *supra* note 129.

223. In 1948, the Florida Supreme Court observed:

[T]he wife who is tactless enough to prefer the company of others to that of her husband, and gets more joy from her job than she does from the whoop of children, the romance of sewing on buttons and darning socks, is minus what it takes to make the home aglow with domestic felicity.

Chestnut v. Chestnut, 33 So. 2d 730, 731 (Fla. 1948). Forty years later, a Florida court commented:

We have come a long way since a wife was considered little more than the husband's property and completely dependent upon him for support. We have even come a long way from the time a woman, while not considered property, was treated as a second rate citizen in terms of full participatory rights in our society.

Geddes v. Geddes, 530 So. 2d 1011, 1017 (Fla. 4th DCA 1988).

224. See *Sharp*, *supra* note 209, at 199.

225. Some argue that it is unfair to make both spouses liable for debts without giving equal right to share in family income or assets. *Marshfield Clinic v. Discher*, 314 N.W. 2d 326, 338 (Wis. 1982); see also Note, *supra* note 164. But extending each spouse's liability only to the proportion of financial contribution each makes to the marriage partnership does not unfairly burden the assets of either spouse, even where there is no recognized right to share income or assets.

seemed appropriate when men had exclusive domain of the economic realm, but no more. Marriage is a partnership of equals who make equal contributions, though different in kind, to the marriage. The doctrine of necessities still has a place in the law as a support remedy, but should be extended to both spouses, in accordance with their proportion of financial contribution to the marriage partnership. This application would promote the original goals of the doctrine of necessities, recognize the modern role of women in society, and provide a measure of certainty in application for all concerned. The Florida Supreme Court cannot ignore its legitimate role in constitutional consideration and should address this "important and recurring question."²²⁶

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226. Petitioners' Amended Brief on Jurisdiction at 9, *Waite v. Leesburg Regional Medical Ctr., Inc.*, 582 So. 2d 789 (Fla. 3d DCA 1991) (No. 90-02163).