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Cover Page Footnote

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FAMILY VALUES AND THE BANKRUPTCY CODE: A PROPOSAL TO ELIMINATE BANKRUPTCY BENEFITS AWARDED ON THE BASIS OF MARITAL STATUS

*A. Mechele Dickerson**

INTRODUCTION

CONGRESS recently passed a law that states that only persons of the opposite sex who are in marriages authorized by the State are entitled to federal benefits awarded to married persons. Specifically, the "Defense of Marriage Act" provides that, for the purposes of any federal act, ruling, or regulation, marriage means a "legal union between one man and one woman as husband and wife" and spouse means "a person of the opposite sex who is a husband or a wife."[1]

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1. Defense of Marriage Act, Pub. L. No. 104-199 (1996). Congress passed this Act when it appeared that Hawaii might allow gay couples to obtain marriage licenses. The Hawaii legislature ultimately refused to allow same-sex marriages and subsequently adopted legislation similar to the Defense of Marriage Act. *See* Haw. Rev. Stat. § 572-1 (Supp. 1998) (defining marriage contract as one "between a man and a woman"). Other states followed suit and passed similar statutes. *See, e.g.*, Ark. Code Ann. § 9-11-109 (Michie Supp. 1998) (defining marriage as only between a man and a woman and declaring void all marriages between persons of the same sex); Fla. Stat. Ann. § 741.212 (3) (West 1997) (explaining that "the term 'marriage' means only a legal union between one man and one woman as husband and wife, and the term 'spouse' applies only to a member of such a union"); Ga. Code Ann. § 19-3-3.1(a) (Supp. 1998) ("It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state."); La. Civ. Code Ann. art. 89 (West 1997) ("Persons of the same sex may not contract marriage with each other."); Mich. Comp. Laws Ann. § 551.1 (West Supp. 1998) ("Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state."); 23 Pa. Cons. Stat. Ann. § 1704 (West Supp. 1998) ("It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.").

In response to the possibility that a sister state might allow same-sex couples to marry, North Dakota passed contingent legislation. *See* N.D. Cent. Code §§ 14-03-01,

While courts or agencies who interpret federal acts, including the Bankruptcy Code ("The Code"),[2] are now required to recognize only heterosexual marriages authorized by a state, it is unclear why federal bankruptcy benefits should be granted based on marital status. Encouraging, supporting, and protecting marriage is not one of the goals of federal bankruptcy laws. Instead, bankruptcy laws have two primary goals: to give honest debtors a financial "fresh start" in life, and to ensure that creditors receive maximum, equitable debt repayment.[3] These objectives are implemented through the Code's statutory framework, which is designed to govern a debtor's current and future relationship with third-party creditors. Generally speaking, the Code's framework helps individual debtors either to restructure and repay some of their debts in Chapter 13[4] or to discharge debts in Chapter 7.[5]

In its rush to vilify same sex unions,[6] Congress failed to explain why *any* federal benefits should be granted based simply on a person's decision (or ability) to marry. A married person who files a bankruptcy petition receives the following benefits simply because of marital status: the right to file a joint petition;[7] the ability (under some circumstances) to shield certain property from the reach of creditors;[8] the right to budget for expenses for a "dependent" non-debtor spouse;[9]

-08 (1997) (defining spouse as a "person of the opposite sex who is a husband or wife" only if another state recognizes marriages between people of the same sex).

2. *See* 11 U.S.C. §§ 101-1330 (1994 & Supp. II 1996).

3. *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994).

4. *See* 11 U.S.C. §§ 1301-1330.

5. *See id.* §§ 706-728. Individuals can also use Chapter 11 to restructure and repay debts if their combined debt exceeds Chapter 13's eligibility limits. *See id.* § 109(e). Business debtors may liquidate under Chapter 7 and may reorganize or liquidate under Chapter 11. *See id.* §§ 101(41), 109(b), 1123(a)(5)(D).

6. For example, during the debate on the Defense of Marriage Act, Senator Jesse Helms (R-NC) made the following statement: "[I]nch by inch, little by little, the homosexual lobby has chipped away at the moral stamina of some of America's courts and some legislators, in order to create the shaky ground that exists today that prompts this legislation being the subject of debate . . . ." 142 Cong. Rec. S10,068 (daily ed. Sept. 9, 1996) (statement of Sen. Helms).

7. *See* 11 U.S.C. § 302 (noting that debtor and spouse may file joint petition); *see also infra* notes 117-18 and accompanying text (explaining the congressional intent behind § 302).

8. *See* 11 U.S.C. § 522(b) (explaining that debtors can exempt any interest the debtor has in property owned by a tenant by the entirety); *id.* § 522(d) (noting that debtor can exempt the debtor's interest in property a dependent uses as a residence); *id.* § 524(a)(3); *In re* Homan, 112 B.R. 356, 359-60 (B.A.P. 9th Cir. 1989) (discussing 11 U.S.C. § 524(a)(3)); *In re* Strickland, 153 B.R. 909, 912-13 (Bankr. D.N.M. 1993) (same); *In re* Smith, 140 B.R. 904 (Bankr. D.N.M. 1992) (same); *see also infra* notes 135-48 and accompanying text (describing the protection from creditors afforded a debtor spouse's property that is held in tenancy by the entirety); *infra* notes 157-59, 162 and accompanying text (commenting on a debtor spouse's ability to claim a non-debtor spouse as a dependent under § 522(d)).

9. *See* 11 U.S.C. § 1325(b)(2) (noting that Chapter 13 debtors may exclude from their "disposable" income any expenses reasonably necessary to be expended for the maintenance or support of a dependent of the debtor); *see also infra* notes 161-63 and

and the ability to protect a non-debtor spouse from certain creditor collection activities.[10] Due in part to the dramatic increase in bankruptcy filings by individuals,[11] Congress is currently reevaluating the type of relief individuals should receive when they file a bankruptcy petition.[12] As part of this reform process, Congress should ask whether—notwithstanding the policy expressed in the Defense of Marriage Act—certain debtors should be entitled to extra benefits based simply on their choice or ability to marry.

This Article considers the role of marital status in federal bankruptcy laws and argues that Congress should ignore marital status when awarding benefits to debtors in bankruptcy cases. Part I of this Article discusses the historical justifications given for protecting and promoting the institution of marriage. This part traces the dramatic changes both in the nature and permanency[13] of modern intimate rela-

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accompanying text (explaining that a debtor may enjoy the protections of this section without proving the non-debtor spouse's financial dependence).

10. *See* 11 U.S.C. § 524 (stating that if the bankruptcy estate included community property and the bankruptcy case discharged community claims, discharge is effective against community creditors of the non-debtor and debtor spouse); *see also id.* §§ 1201, 1301 (noting that creditors stayed from collecting co-signed debts during pendency of Chapter 12 and Chapter 13 cases); *infra* notes 168-73 and accompanying text (noting that the benefits of sections 1201 and 1301 extend to all non-debtor cohabitants).

11. In 1997, 1.3 million individuals filed bankruptcy petitions. *See U.S. Bankruptcy Filings 1980-1997 (Business, Non-Business, Total)* (visited Aug. 11, 1998) <http://www.abiworld.org/stats/1980annual.html> (showing increase in filings since 1980). This is an increase of almost 200% since 1990. *See id.*

12. Largely in response to recommendations made in the National Bankruptcy Review Commission's October 1997 Report, National Bankruptcy Review Comm'n, Bankruptcy: The Next 20 Years (1997), a number of bills designed to reform perceived abuses in the bankruptcy system were introduced in Congress during the 1997-98 session. *See, e.g.*, Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998) (precluding individuals from filing for complete relief in bankruptcy under Chapter 7 liquidation if they are deemed to have the means to pay creditors); Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998, H.R. 3146, 105th Cong. (1998) (amending federal bankruptcy law to expand the list of creditors' claims); Religious Fairness in Bankruptcy Act of 1997, H.R. 2611, 105th Cong. (1997) (modifying federal bankruptcy law with respect to religious donations); Religious Liberty and Charitable Donation Protection Act of 1997, H.R. 2604, 105th Cong. (1997) (expanding debtors' right to make charitable contributions); Private Trustee Reform Act of 1997, H.R. 2592, 105th Cong. (1997) (amending courts' authority to determine the necessary expenses of trustees); Responsible Borrower Act of 1997, H.R. 2500, 105th Cong. (1997) (prescribing guidelines for a needs based bankruptcy system); Credit Card Consumer Protection Act of 1997, H.R. 1975, 105th Cong. (1997) (amending the Truth in Lending Act); Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. (1997) (amending the requirements for converting a Chapter 7 case to a Chapter 12 or Chapter 13 case); Religious Liberty and Charitable Donation Protection Act of 1998, S. 1244, 105th Cong. (1997) (expanding debtors' right to make charitable contributions).

13. It is reported that half of all marriages will end in divorce. *See* Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 Women's Rts. L. Rep. 147, 149 (1996) ("The current divorce rate is almost one in two, as compared to greater than one in three in 1945. In urban areas, the divorce rate

tionships between spouses and notes that the State no longer dictates the manner in which married couples govern their economic interspousal affairs. Part II examines the hostility courts and legislators have traditionally exhibited when asked to give legal recognition or benefits to unmarried couples. This part shows that, largely in response to the dramatic increase in the number of both heterosexual and homosexual couples who cohabit but are not legally married,[14] modern courts and legislators are generally willing to extend at least some limited legal protections to unmarried cohabitants.

Part III examines non-bankruptcy and bankruptcy laws' treatment of married and unmarried couples. This part argues that the current interpretation and application of these laws disparately treats married and unmarried couples. Because the historical justifications for the disparate treatment of married and unmarried couples no longer exist, part IV concludes by proposing that Congress give bankruptcy benefits to any married or unmarried "economic unit" that jointly pools resources, jointly incurs debts, and jointly agrees to have one member of the unit give economical support to the other member.[15]

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exceeds 50 percent, and in most large cities and their surrounding suburbs there are more divorces each year than marriages."); Amy L. Wax, *Against Nature—On Robert Wright's the Moral Animal*, 63 U. Chi. L. Rev. 307, 347 n.66 (1996) (citing Council on Families in America, Marriage in America: A Report to the Nation (Institute for American Values 1995)).

14. According to United States Census reports, the number of unmarried couple households numbered 439,000 in 1960, 523,000 in 1970, 1,589,000 in 1980, 2,856,000 in 1990, 3,668,000 in 1995, and 4,130,000 in 1997. *See* U.S. Bureau of the Census, Statistical Abstract of the United States 56 (116th ed. 1996) [hereinafter Statistical Abstract]; Census Bureau, *Marital Status and Living Arrangements* (last modified March, 1997) <http://www.census.dove/prod/3/98pubs/p20-5060updf>. Moreover, the percentage of adults who are married was 65.6% in 1980, but is now reported to be 60.3%. *See* Statistical Abstract, *supra*, at 54.

15. This Article does not consider whether marital status is relevant when granting federal benefits other than bankruptcy benefits, nor does it address whether states should permit same sex marriages. These issues have been exhaustively treated elsewhere. *See, e.g.*, James W. Button et al., Private Lives, Public Conflicts (1997) (analyzing the adoption and implementation of gay rights legislation); Richard D. Mohr, A More Perfect Union (1994); Same Sex Marriage (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (offering individual perspectives on legalizing same-sex marriage); Vada Berger, *Domestic Partnership Initiatives*, 40 DePaul L. Rev. 417 (1991) (analyzing the benefits and drawbacks of domestic partnership initiatives); Amy R. Brownstein, *Why Same-Sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating* Adams v. Howerton, 16 Loy. L.A. Int'l & Comp. L.J. 763 (1994) (examining current treatment by United States courts of same-sex marriage for immigration purposes); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419 (1993) (discussing the history of same-sex marriage and its implications); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 How. L.J. 173 (1992) (examining the religious foundation of legal prohibitions against same-sex marriage); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164 (1992) (analyzing and proposing improvements in domestic relations law); Robert L. Cordell II, Note, *Same-Sex Marriage: The Fundamental Right of Marriage and*

I. PROTECTION AND PROMOTION OF THE INSTITUTION OF MARRIAGE[16]

Historically, marriage was a public matter, not a private concern of two individuals. At common law, the act of marriage merged two beings into one.[17] Marriage, as a legal "status," was defined and regulated by the State.[18] As participants in this status-based relationship, spouses were defined by their roles as wives or husbands and were bound by legal restrictions that largely disregarded their personal preferences or desires.[19] For example, because the State dictated all terms of the marital relationship, neither party could terminate the relationship (i.e., divorce) unless there was proof that one of them had engaged in behavior inconsistent with the duties of marriage.[20] Thus, when marriage was a merger, spouses were required to show "fault" before the State would terminate the marriage.[21] Indeed, in almost all

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an Examination of Conflict of Laws and the Full Faith and Credit Clause, 26 Colum. Hum. Rts. L. Rev. 247 (1994) (canvassing states' traditional conflict of laws rules regarding marriage laws and marriage recognition); Steven K. Homer, Note, *Against Marriage*, 29 Harv. C.R.-C.L. L. Rev. 505 (1994) (comparing traditional marriage and same-sex relationships in the context of legal discrimination); Jeffrey J. Swart, Comment, *The Wedding Luau—Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 Emory L.J. 1577 (1994) (analyzing greater governmental tolerance of same-sex units); Lisa R. Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 Cardozo L. Rev. 681 (1990) (arguing that legalization of same-sex marriage is consistent with the American family).

16. I address the nature of past and current spousal economic relationships (and argue that Congress should adopt a marriage model that imposes financial burdens on spouses if marital status is recognized in bankruptcy cases) in a related article. *See* A. Mechele Dickerson, *To Love, Honor, and (oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts* (unpublished manuscript, on file with the author).

17. *See* 1 William Blackstone, Commentaries 430 ("By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything . . . .").

18. In *Maynard v. Hill*, 125 U.S. 190 (1888), the Supreme Court described marriage as a "contract" that cannot be changed by the contracting parties because the State holds the parties to various obligations and liabilities. *Id.* at 211. The Court then referred to marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.*

19. *See* Milton C. Regan, Jr., Family Law and the Pursuit of Intimacy 11-12 (1993) [hereinafter Regan, Family Law]; Lenore J. Weitzman, The Divorce Revolution 4 (1985) [hereinafter Weitzman, Revolution].

20. For example, neither party could be married to two people at the same time, or enter into a contract that was inconsistent with their marital vows, a requirement that continues today. *See* John De Witt Gregory et al., Understanding Family Law § 4.03, at 84-85 (1993); *see also* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127, 2182-83 (1994) [hereinafter Siegel, *Modernization*] (noting that the basic terms of a marriage were fixed by law and could not be altered by the parties).

21. 1 Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 2.1, at 75 (2d ed. 1987).

matters, the private and public interests[22] of the individual spouses were subordinated to the State's interest in preserving the marital unit.[23]

When marriage was a status, men and women had clearly defined roles as husbands and wives. Once "merged," the wife became her husband's property[24] and all her personal rights were controlled by the merged unit (i.e., her husband).[25] A husband was given the sole right to control all marital assets, including property his wife owned before marriage or property held as tenants by the entirety.[26] While entirety property could not be immediately seized by a spouse's separate creditors and sold to satisfy a separate debt, in some cases creditors were allowed to reach a spouse's survivorship interest in entirety property.[27] Thus, all marital assets potentially could be used to pay either the couple's debts *or* the husband's separate debts.

22. Many family law feminist scholars argue that it is not possible to separate public, market interests from private, family ones. *See* Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 186-88 (1995) (noting that a family's right to "privacy" was often used to cloak violence against women and children even when the wife sought protection from the State); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 Geo. L.J. 2227, 2281 (1994) (arguing that "the boundaries between the market and the family are porous"). *But cf.* Regan, Family Law, *supra* note 19, at 158-59 (advocating the consideration of a new model of "status" in family law, but conceding that women in general, and wives specifically, may be devalued if the law is designed to make changes in the "public" world of work, but not in the "private" world of the family).

23. *See Maynard*, 125 U.S. at 210-11; Siegel, *Modernization*, *supra* note 20, at 2132; *see also* Martha Albertson Fineman, The Illusion of Equality 19 (1991) (comparing historical and modern views of marriage); Regan, Family Law, *supra* note 19, at 10 (noting that nineteenth century judges and scholars explicitly recognized marriage as a status rather than merely as a contract); Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 Va. L. Rev. 663, 669-70 (1976) [hereinafter Glendon, *Marriage and the State*] (discussing laws that have restricted marriage by imposing age and consent restrictions and waiting period requirements).

24. *See* Weitzman, Revolution, *supra* note 19, at 3 ("Upon marriage the wife became a *femme covert* [sic], a legal nonperson, living under her husband's arm, protection, and cover.") (citation omitted); Blanche Crozier, *Marital Support*, 15 B.U. L. Rev. 28, 29 (1935) ("The financial plan of marriage law was founded upon the economic relationship of owner and property.").

25. For example, a wife assumed her husband's surname and could not engage in legal actions unless they were brought in her husband's name. *See* Lenore J. Weitzman, The Marriage Contract 5, 9-12 (1981) [hereinafter Weitzman, Contract] (discussing wives' loss of independent identity); Glendon, *Marriage and the State*, *supra* note 23, at 702 (observing that many "believe that a woman's name changes upon marriage as a matter of law").

26. *See* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. Rev. 1033, 1045 (1972). Before the nineteenth century, the doctrine of coverture deprived wives of the right to control their property and gave that right to their husbands. *See* Joan C. Williams, *Married Women and Property*, 1 Va. J. Soc. Pol'y & L. 383, 385 (1994) ("Married women 'covered' by their husbands lost control over property brought into the marriage . . . .").

27. Although some individual creditors could levy upon the entirety property to reach both the debtor spouse's present and survivorship interest in the property, the

Because husbands had the right to exercise absolute control over their wives' person and property, the common law imposed a duty on them to financially support their wives.[28] Husbands were generally given wide latitude in deciding the parameters of this duty, however, as states routinely refused to set a minimum level of required financial support.[29] If, however, a wife purchased basic goods or services from a third-party creditor, the law made the husband liable (under the doctrine of necessaries) to pay the creditor for those goods or services.[30] While creditors could generally force husbands to pay for their wives' basic living expenses, courts would not force husbands to pay for unnecessary items[31] or items within the wife's means to repay.[32]

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creditor's interest was always subject to the non-debtor spouse's right of survivorship. *See* Caryl A. Yzenbaard, *Ohio's Beleaguered Entirety Statute*, 49 U. Cin. L. Rev. 99, 102 (1980). Because the creditor would be a co-tenant with the non-debtor spouse, it could not partition the property to sell it immediately to satisfy the debt. *See id.* at 102-03. With the right only to reach the debtor spouse's survivorship interest, a creditor could satisfy the debt only if the debtor spouse survived the non-debtor spouse. *See id.* at 102.

28. *See* Crozier, *supra* note 24, at 28 ("[The duty] is so familiar that we generally overlook its peculiar nature. Upon even the briefest analysis it is clear that this is a rule quite different from any which would be applied in other departments of life . . . .").

29. *See id.* at 33. Crozier noted that:

> [The] right of support is not a right to any definite thing or any definite amount even in proportion to the husband's means. . . . [T]he chances—which have nothing to do with legal rights—may be either that she will with difficulty get an inadequate subsistence or that she will live in idleness and luxury. This is precisely the situation in which property finds itself; it may be overworked and underfed, or it may be petted and fed with cream, and that is a matter for the owner to decide.

Id.; *see also* Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe 115 (1989) [hereinafter Glendon, Transformation] (noting judicial noninterference in disputes involving spouses' financial support obligations); Weitzman, Contract, *supra* note 25, at 40-42 (citing cases dealing with the nature and sufficiency of a husband's support during marriage).

30. *See* Richland Mem'l Hosp. v. Burton, 318 S.E.2d 12 (S.C. 1984). Many state courts subsequently abolished the doctrine, finding that it constituted unconstitutional gender-based discrimination. *See, e.g.*, Emanuel v. McGriff, 596 So. 2d 578, 580 (Ala. 1992) (holding that the doctrine of necessaries is unconstitutional); Condore v. Prince George's County, 425 A.2d 1011, 1019 (Md. 1981) (holding that neither husband nor wife is liable without a contract for the necessaries supplied to the other); North Ottowa Community Hosp. v. Kieft, 578 N.W.2d 267 (Mich. 1998) (finding that the common law doctrine of necessaries is unconstitutional); Govan v. Medical Credit Servs., Inc., 621 So. 2d 928, 931 (Miss. 1993) (holding one spouse not liable for debts for another without express consent); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905, 908 (Va. 1983) (holding that the necessaries doctrine creates a gender-based classification not substantially related to serving important government interests and is therefore unconstitutional).

31. The scope of what was "necessary" was dependent on the husband's financial status. *See* Karol Williams, Comment, *The Doctrine of Necessaries: Contemporary Application As A Support Remedy*, 19 Stetson L. Rev. 661, 664 (1990).

32. Creditors had the burden of proving that the item was necessary, that the husband had not already provided the item, and that the wife lacked independent means of paying for it. *See* Webb v. Hillsborough County Hosp. Auth., 521 So. 2d 199, 204

Just as husbands had roles to play, wives historically had gender-specific roles. Throughout much of this century, with the possible exception of war periods,[33] wives were expected[34] to stay home[35] and be housewives and mothers.[36] In part because of this forced role as caregiver in the home, wives were deemed to be intellectually incapable of managing any matter outside the home.[37] A wife could not own property separately,[38] enter into contracts,[39] execute any legal document,[40] sue or be sued,[41] or have a domicile separate from her hus-

(Fla. 1988); Sharpe Furniture, Inc. v. Buckstaff, 299 N.W.2d 219, 222-23 (Wis. 1980). While creditors theoretically had an incentive to give a married woman necessary goods and services, in practice few creditors did so because of the uncertainty that courts actually would force husbands to reimburse them. *See* Note, *The Unnecessary Doctrine of Necessaries*, 82 Mich. L. Rev. 1767, 1774 (1984).

33. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1223 n.152 (1989) (citing Alice Kessler-Harris, Women Have Always Worked: A Historical Overview 141-43 (1981)); Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 Tex. J. Women & L. 37, 45 n.45 (1995) (observing that women's participation in the workforce after Pearl Harbor rose 460%); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 Mich. L. Rev. 1155, 1160-66 (1991).

34. It is doubtful that black wives were "expected" to remain home and be taken care of financially by their husbands. African-American wives and mothers have consistently worked outside the home in numbers that vastly outnumber those of white women. *See* Weitzman, Contract, *supra* note 25, at 201 (stating that "the stay-at-home housewife so taken for granted in the legal model is an ideal that poor black families cannot afford"); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 Geo. L.J. 2481, 2486-90 (1994). Recent statistical studies suggest that most black mothers are not currently married, and it is unclear whether they cohabit with the fathers of their children. *See* Jane Mauldon, *Family Change and Welfare Reform*, 36 Santa Clara L. Rev. 325, 331-33 (1996).

35. In pre-industrial agrarian marriages, wives worked on the family farm supervised by their husbands. *See generally* Glendon, Transformation, *supra* note 29, at 111 (noting that in a large group of marriages, specifically those where women had no independent means and did not work outside the home, turn-of-the-century economic reforms were irrelevant); Weitzman, Contract, *supra* note 25, at 169 (stating that "most women were engaged in domestic employment or agricultural work"); Glendon, *Marriage and the State*, *supra* note 23, at 707-08 (noting that a woman's role included care of a household and children as well as duties in the agricultural production unit).

36. *See* Regan, Family Law, *supra* note 19, at 28 (discussing the Victorian role expectations of spouses); Weitzman, Contract, *supra* note 25, at 60-64 (discussing the wife's traditional domestic responsibilities).

37. *See* Johnston, *supra* note 26, at 1084. Although wives were expected to care for the children in the home, fathers had the right to ownership and control over the children and, as a result, until the early part of the twentieth-century mothers routinely were denied custody of their children at divorce. *See* Linda D. Elrod, Child Custody Practice & Procedure § 1:05 (1996); Fineman, *supra* note 22, at 76.

38. *See* Siegel, *Modernization*, *supra* note 20, at 2127; Williams, *supra* note 26, at 385.

39. *See* Blackstone, *supra* note 17, at 145; Siegel, *Modernization*, *supra* note 20, at 2127.

40. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073, 1082 (1994) [hereinafter Siegel, *Home as Work*]; Siegel, *Modernization*, *supra* note 20, at 2127; Williams, *supra* note 26, at 386-87.

band.[42] Indeed, even if she were forced to leave the home to earn wages to help support her family, the law gave her husband the right to control (or sue to collect) those wages.[43] States ultimately passed laws designed to give married women the right to keep their pre-marital property and their individual wages.[44] At common law, however, wives were essentially prevented from participating in any financial activity in or outside the home and were deemed incompetent to participate in most activities outside the domestic sphere.[45]

Finally, because wives were viewed as little more than their husbands' chattel, they had no bodily integrity.[46] Specifically, the law as-

41. *See* Siegel, *Home as Work*, *supra* note 40, at 1082; *see also* Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 Geo. L.J. 95, 101 (1991) (stating that, even in equity, a wife could not sue under her own name).

42. *See, e.g.*, Haddock v. Haddock, 201 U.S. 562, 571-72 (1906) (discussing a wife's duty to remain at the matrimonial domicile); Mas v. Perry, 489 F.2d 1396, 1399-1400 (5th Cir. 1974) (recognizing that a wife's domicile is deemed to be that of her husband, but refusing to expand that concept when the wife is married to a citizen of a foreign country); *see also* Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. Ill. L. Rev. 813, 844 (discussing domicile in divorce litigation).

43. While many states adopted "earnings statutes" in the 1860's that were designed to give wives the right to their wages, wives in Georgia were not entitled to own their wages until 1943. *See* Johnston, *supra* note 26, at 1070; *see also* Siegel, *Home as Work*, *supra* note 40, at 1076-90, 1117 (discussing a wife's lack of property rights to her wages); Williams, *supra* note 26, at 386-87, 389 (discussing how a wife's wages and services belonged to her husband).

44. *See* 7 Richard R. Powell et al., Powell on Real Property ¶ 622[3] (1998); Johnston, *supra* note 26, at 1061-70; *see also* Del. Code Ann. tit. 13 § 311 (1989) (stating how a wife may keep her own earnings as a result of the Married Women's Act of 1869); 750 Ill. Comp. Stat. Ann. 65/7 (West 1993) (stating that a wife may own real and personal property in her own right); Ind. Code Ann. § 31-11-7-2 (Michie 1997) (stating that married women have the same property rights as unmarried women); N.H. Rev. Stat. Ann. § 460:1 (1992) (stating that property acquired at any time by a woman shall be free from interference or control by her husband); N.Y. Dom. Rel. Law § 50 (McKinney 1998) (stating that real or personal property owned by a married woman shall be sole and separate property); N.C. Gen. Stat. § 52-1 (1991) (stating that real and personal property of any married person acquired before or during marriage shall remain the sole and separate property of such married persons); S.C. Code Ann. § 20-5-20 (Law. Co-op. 1985) (stating that a married woman has the power to convey her separate property to the same extent as if she were unmarried); Tenn. Code Ann. § 36-3-504 (1996) (stating that marriage shall not impose any disability on a woman as to ownership or disposition of any property); Utah Code Ann. § 30-2-4 (1995) (stating that a wife has the same rights to property as an unmarried woman); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359, 1410 (1983). *But see* Crozier, *supra* note 24, at 35-41 (noting that early interpretations of the Married Women's Property Act still deemed a wife's wages to be owned by her husband). Allowing wives to hold separate properties primarily benefited the rich, who were able to bequeath property to their daughters without having the property automatically transferred to their sons-in-law. *See* Siegel, *Home as Work*, *supra* note 40, at 1202; Siegel, *Modernization*, *supra* note 20, at 2135.

45. *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (arguing that women are "unfit" for many occupations in the market because the "domestic sphere" was the "domain and function[ ] of womanhood").

46. At common law, husbands could moderately "chastise" their wives by using a stick no bigger than their thumbs. *See* Blackstone, *supra* note 17, at 432-33.

sumed that sex-on-demand was an irrevocable term in the marriage contract and thus, a husband could not "rape" his wife.[47] Indeed, at common law, only rarely could the State successfully convict a husband who helped another man rape his wife or who forced his wife to have sex with another man.[48] Moreover, if a wife were assaulted by her husband (or at the direction of her husband), she could not pursue a civil action against him for assault because her husband controlled her right to file all legal actions and, consequently, he would be both the plaintiff and the defendant in the assault litigation.[49] Similarly, even if she sued her husband, she would not be entitled to keep any monetary damages, because her husband owned her property.[50]

Things (happily) have changed since the common law. Modern courts and legislators have overwhelmingly rejected the view that spouses' preferences and desires about the marital relationship are irrelevant and that marriage is a status with state-imposed terms[51] designed to promote the stability and welfare of society.[52] For example, men no longer have the legal right to exercise complete and unfet-

47. *See* 1 Sir Matthew Hale, History of the Pleas of the Crown 628-29 (1847); Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 Stan. L. Rev. 677, 680 (1996); Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. Rev. 261, 265 (1993).

48. *See* Rene I. Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. Fam. L. 559, 562-63 (1990-91). For a general discussion of marital rape statutory exemptions, including attempts to extend the exemption to non-married cohabiting males, see Eskow, *supra* note 47, at 681-83.

49. *See* William E. McCurdy, *Torts Between Persons In Domestic Relation*, 43 Harv. L. Rev. 1030, 1033 (1930).

50. Jack L. Herskowitz, Comment, *Tort Liability Between Husband And Wife: The Interspousal Immunity Doctrine*, 21 U. Miami L. Rev. 423, 427 n.29 (1966) (citing Austin v. Austin, 100 So. 591, 592 (Miss. 1924)). Likewise, even when wives had the right to prosecute their husbands for assault, courts generally would not interfere in family disputes unless the wife was severely injured because each family (i.e., the husband) had the right to determine the domestic governance in its household. *See generally* Carl E. Schneider, *Moral Disclosure and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1836 (1985) (discussing nineteenth century judicial views concerning noninterference in the family). Not surprisingly, the traditional plighting of troth in marriage ceremonies required women to pledge to "love, honor and *obey*" their husbands, while men were required to "love, honor and *keep*" their wives. *See To Love, Honor—And Obey?*, Time, July 21, 1986, at 45 (emphasis added).

51. *See* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 Geo. L.J. 2303, 2313 (1994) [hereinafter Regan, *Spouses and Strangers*]; Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 Geo. L.J. 2423, 2424-25 (1994). *See generally* Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Cal. L. Rev. 207 (1982) (arguing that spouses should have access, during marriage, to legal dispute resolution of privately contracted marital obligations).

52. *See* Glendon, Transformation, *supra* note 29, at 291-93 (discussing the transformation of marital status views); Regan, Family Law, *supra* note 19, at 89-117 (describing evolution from status to contract as legal basis of family relationships); *see also* Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 Utah L. Rev. 687 (positing that "relationships are voluntary and contractual").

tered domination and control over all aspects of their wives's lives[53] and wives are no longer deemed legal non-entities. Although states currently give spouses greater leeway in deciding how to govern and terminate their marriages, states still exercise complete control over how marriages are created[54] and continue to view marriage as a matter of "public concern."[55] Likewise, although states no longer assume that wives are incapable of handling any financial aspects of their lives, and thus, need to be controlled by their husbands, states continue to believe that married couples assume at least some minimal commitment of mutual support upon marriage.[56]

While acknowledging that society continues to favor the institution of marriage, some family law scholars have observed that modern marriages should be viewed more accurately as partnerships of autonomous persons formed to promote the happiness of the two individuals and that the operation of the partnership should be largely free from external regulations.[57] The Uniform Marriage and Divorce

53. Although modern assault and battery statutes make prosecutions theoretically possible, law enforcement and social services agencies may not treat intra-family assaults as seriously as stranger assaults. *See* John Marzulli, *Home Violence Swells: Rise in Homicide, Rape & Assault—NYPD*, N.Y. Daily News, Dec. 30, 1997, at 10 (noting criticism that police did not take domestic violence seriously); *see also* Rhonda L. Kohler, Comment, *The Battered Women and Tort Law: A New Approach to Fighting Domestic Violence*, 25 Loy. L.A. L. Rev. 1025, 1029-30 (1992) (noting criticism of "traditional tort law for not taking into account the experiences of women in battering relationships").

The Southern Baptist Convention recently added an article to the Baptist Faith and Message that both defines marriage in heterosexual terms and requires a wife "to submit graciously to the servant leadership of her husband." Mary Rourke, *A Woman's Place: What the Denominations Think*, L.A. Times, June 16, 1998, at E2. Thus, at least some members of society continue to prefer the common law view of female subservience.

54. *See* Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993) (discussing the state's control over who can legally marry); *see also supra* note 1 (citing examples of statutes that define and regulate marriage).

55. Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 18 (Ct. App. 1993); *see also* Chandler v. Central Oil Corp., 853 P.2d 649, 653 (Kan. 1993) (noting that annulments are disfavored because "the marriage relationship is a matter of public concern"); Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990) (McDermott, J., dissenting) (disagreeing with the majority's characterization of marriage in contractual terms and rejecting the view that marriage is a "mere contract for hire").

56. *See Borelli*, 16 Cal. Rptr. 2d at 18 (quoting See v. See, 415 P.2d 776, 780 (Cal. Ct. App. 1966)); *see also* Cal. Fam. Code § 4300 (West 1994) (requiring spouses to support each other); *id.* § 720 (requiring that husbands and wives pledge to one another mutual respect, fidelity, and support); *id.* §§ 1620, 3580 (prohibiting husbands and wives generally from altering their legal relationship toward each other); Nev. Rev. Stat. § 123.090 (Michie 1993) (entitling creditors to separate property of nondebtor spouse to satisfy necessaries of debtor spouse); Tex. Fam. Code Ann. § 4.02 (West 1993) (obligating each spouse to support the other).

57. *See* Schultz, *supra* note 51, at 251. *See generally* Fineman, *supra* note 23, at 18-19 (noting that earlier views of marriage protected the private unity of a husband and wife from state intrusion or regulation, but suggesting that marriage currently exists as an institution primarily to promote the happiness of a couple).

Act[58] somewhat synthesizes this status-less view of marriage by defining marriage as a "personal relationship between a man and a woman [that arises from] a civil contract to which the consent of the parties is essential."[59] Certain political, economic, and legal developments created the impetus for viewing marriage less as a merger and more as a partnership. These developments include: the development of an industrial (rather than agrarian) workforce;[60] the increase in the number of women wage-earners;[61] society's increased demand to protect and promote individual liberty;[62] a reduction in gender bias in marriage laws;[63] society's changing moral beliefs;[64] and the changing economic relationships between spouses.[65]

The biggest push to view marriage as a partnership occurred after scholars and lawyers representing "homemaker" wives saw these stay-

58. The Uniform Marriage and Divorce Act is recognized in the following states: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *See* Marti E. Thurman, Note, *Maintenance: A Recognition of the Need for Guidelines*, 33 U. Louisville J. Fam. L. 971, 974 n.21 (1994-95).

59. Unif. Marriage and Divorce Act § 201 (amended 1973), 9A U.L.A. 175 (1998).

60. *See* Siegel, *Home as Work*, *supra* note 40, at 1092. As husbands increasingly left the family farm to work in an industrial workplace, wives became even more dependent on their husbands for cash. To combat the prevailing view that husbands left the home to "work" while wives stayed at home and did nothing socially productive, antebellum women's rights advocates argued that household labor should also be viewed as "work." *See id.* at 1092-94.

61. *Compare* Weitzman, Contract, *supra* note 25, at 3 (predicting that as more married women enter full-time work, for more pay and at higher occupational levels, their roles, power, and authority within family will continue to change), *with Borelli*, 16 Cal. Rptr. 2d at 22 (Poché, J., dissenting) (commenting that "[t]he assumption that only the rare wife can make a financial contribution to her family has become badly outdated in this age in which many married women have paying employment outside the home [and a] two-income family can no longer be dismissed as a statistically insignificant aberration").

62. *See generally* Moore v. City of East Cleveland, 431 U.S. 494, 500-06 (1977) (holding a zoning ordinance unconstitutional because of its arbitrary definition of "family"); Vlandis v. Kline, 412 U.S. 441, 453 (1973) (finding a due process violation when state law irrebuttably presumes that an in-state student with a non-resident spouse is a non-resident); Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (stating that dissimilar treatment of married and unmarried people in the distribution of contraceptives violates the equal protection clause of the Fourteenth Amendment); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that due process is violated when a state statute criminalizes status of narcotic addiction without proof that the accused used narcotics in the jurisdiction).

63. *See* Crozier, *supra* note 24, at 28 (comparing the economic relationship between spouses in traditional marriages to that "between master and slave . . . between a person and his domesticated animal"). Once slavery was abolished, it increasingly became difficult to treat wives as their husbands' property. *See* Siegel, *Modernization*, *supra* note 20, at 2201. *But cf.* John Stuart Mill, *The Subjection of Women*, *in* Essays on Sex Equality 123, 217 (Alice S. Rossi ed., 1970) (observing that "marriage is the only actual bondage known to our law" and "there remain no legal slaves, except the mistress of every house").

64. *See* Schneider, *supra* note 50, at 1842-45 (discussing the waning influence of Christianity in some groups).

65. *See* Glendon, *Marriage and the State*, *supra* note 23, at 698 (discussing factors that led to the diminution of the legal effects of formal marriage).

at-home spouses harmed economically by no-fault divorce laws. To counter the treatment homemaker spouses increasingly received at divorce, wives' advocates argued that spouses should be viewed as economic partners because work both in the home and in the market benefits the joint financial endeavor (i.e., the marriage).[66] These advocates argued that if the parties agreed (either implicitly or explicitly) that the wife would stay home to rear children and care for the family, then the stay-at-home spouse would be entitled to equal financial treatment at divorce because her household labor is as an asset that contributed to the financial success of the marriage.[67] By characterizing marriage as a "partnership," wives encouraged courts to analyze the marital relationship using contract terminology.

Because common law marriages were regulated by both the State and the Church, courts historically refused to view marriage as a mere contract.[68] In addition, because the wife's existence merged into her husband's at common law, spouses historically could not enter into contracts with each other: such a contract would be deemed to be between the husband (as a legally competent contracting party) and the husband (as the legal representative of his legally incompetent wife).[69] Moreover, because the state dictated all terms of the marital relationship, courts routinely found that inter-spousal contracts either were void for lack of consideration (because the wife was legally obligated to perform domestic services) or were unenforceable on public policy grounds (because the husband had a duty to support his wife).[70]

66. *See* Weitzman, Contract, *supra* note 25, at 66-67; Regan, *Spouses and Strangers*, *supra* note 51, at 2316.

67. *See* Regan, *supra* note 51, at 2316; *see also* Barry A. Schatz & Jacalyn Birnbaum, *New Statute Promotes Homemakers' Rights*, 80 Ill. B.J. 610, 616 (1992) (reporting that Illinois recognizes the value of a homemaker's contribution to marital estate and noting that the contribution may require a lengthy absence from the work force); Mark A. Sessums, *What Are Wives' Contributions Worth Upon Divorce?: Toward Fully Incorporating Partnership Into Equitable Distribution*, 41 Fla. L. Rev. 987 (1989) (arguing for a rebuttable presumption of "equal" distribution of property at divorce to avoid discounting wives' contributions outside the market, especially when the parties have agreed to such an arrangement); John R. Dowd, Note, *Defining the Doctrine of Equitable Distribution in Mississippi: A Rebuttable Presumption That Homemaking Services Are as Valuable to the Acquisition of Marital Property as Breadwinning Services*, 16 Miss. C. L. Rev. 479, 486-87 (1996) (noting state court's recognition that homemaker services significantly contribute to a marital estate and that rendering those services may have caused a homemaker to sacrifice his/her own career).

68. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts, and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67, 116 (1993).

69. See Blackstone, *supra* note 17, at 430; *see also* Hartog, *supra* note 41, at 101 (noting a spouse's inability to enter into a separation agreement).

70. *See* Matthews v. Matthews, 162 S.E.2d 697, 698 (N.C. Ct. App. 1968) ("[A] contract between husband and wife whereby one spouse agrees to perform specified obligations imposed by law as a part of the marital duties of the spouses to each other is without consideration, and is void as against public policy."); *see also* Weitzman, *supra* note 25, at 338 (noting historical restrictions on contracts between husbands and wives).

Even after wives were given the legal right to enter into contracts in their own names, judges were reluctant to enforce any market-based contract that released a husband from providing economic support to his wife or that obligated the husband to pay his wife for performing domestic services[71] because of the courts' concern that recognizing such contracts would encourage married couples to act strategically (rather than altruistically) in their marriages to protect themselves financially in the event of divorce. Similarly, courts felt that encouraging spouses to contractually define their duties to each other during the marriage would promote an alienated, cynical view of marriage that desecrates the institution and debases its intimate nature.[72] In addition to questioning the incentives created by such contracts, courts felt institutionally incompetent to handle a contract that regulated marital minutiae such as who takes out the trash, who changes the baby's diapers, and how often couples have sex.[73] Finally, judges were concerned that recognizing inter-spousal contracts would result in married couples flooding the courts with requests for judicial intervention in private marital affairs.[74]

71. While modern courts will enforce most premarital agreements, most will still not enforce inter-spousal contracts that obligate the husband to pay the wife for performing acts traditionally performed by wives, including performing domestic household labor. *See* Finch v. Finch, 592 N.E.2d 1260, 1262 (Ind. Ct. App. 1992) (ruling that a wife cannot be compensated for leaving her job to care for her sick husband upon divorce); Ritchie v. White, 35 S.E.2d 414, 416-17 (N.C. 1945) (finding a contract between husband and wife for services rendered by wife to her late husband unenforceable because it related to domestic obligations incident to marriage); Oates v. Oates, 33 S.E.2d 457, 460 (W. Va. 1945) (holding that a wife's agreement to perform domestic duties for compensation was contrary to public policy and lacked consideration); *cf.* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) (noting that "a spouse is not entitled to compensation for support apart from rights to community property and the like that arises from the marital relation itself"); *see also* Schultz, *supra* note 51 (noting cases dealing with the marital contract or relation). *See generally* Siegel, *Modernization*, *supra* note 20, at 2182, 2204 ("Without exception, courts ruled interspousal contracts regarding wives' domestic labor unenforceable.").

72. *See generally* Archer v. Archer, 493 A.2d 1074, 1080 (Md. 1985) (holding that a medical degree and license were not encompassed within the legislatively intended definition of marital property); Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982) (holding that where a spouse receives from his or her partner financial contributions used in obtaining a professional degree with expectation of deriving material benefits for both marriage partners, such spouse may have to reimburse the supporting spouse); Lesman v. Lesman, 88 A.D.2d 153, 155 (N.Y. App. Div. 1982) (noting the majority view that "a wife who contributes to her husband's professional education may not, upon divorce, receive an award for her contributions"); Starnes, *supra* note 68, at 116 n.221 (citing a Supreme Court case holding that marriage is more than a mere contract). *But see Borelli*, 16 Cal. Rptr. 2d at 21-22 (Poché, J., dissenting) (rejecting the view that enforcing an interspousal contract would degrade the spouse providing the service and reduce that spouse to no better than a hired servant).

73. *See generally* Glendon, *Marriage and the State*, *supra* note 23, at 709 ("Contracts which purport to regulate who washes the dishes and takes out the garbage are no more enforceable than the famous 'invitation to dinner.'").

74. Starnes, *supra* note 68, at 116.

Despite courts' initial unwillingness to enforce any marital contract, and their continued reluctance to recognize contracts that govern the operation of an existing marriage, couples have increasingly turned to the law to give certainty to their legal and economic obligations to each other in the event of divorce. As a result, more couples are relying on prenuptial agreements and other premarital financial planning.[75] Indeed, given the increased use of these contracts by some types of prospective spouses,[76] modern marriage in many ways looks like an arms-length contractual agreement.[77] While courts traditionally resisted attempts to enforce marital contracts, given the increased use of premarital agreements and the rise in divorces, courts now routinely recognize the validity of these agreements.[78]

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75. Drafting a prenuptial or antenuptial contract requires the assistance of an attorney. The estimated cost of a prenuptial agreement ranges from $1,500 to $3,000 in routine cases to potentially six figures in complicated cases. *See* Burton Young & Mitchell K. Karpf, *In Addition to Safeguarding Inheritances, Prenuptial Contracts Can Help Attorneys Protect Their Firm Ownership Interests*, Nat'l L.J., Dec. 15, 1997, at B7 (observing that complex agreements conceivably could cost as much as $100,000). Given this, only prospective spouses with significant assets to protect and who can afford to hire a lawyer to protect those assets will use premarital contracts. *See* Gary Belsky, *The Best Money Moves for Every Season of Your Life*, Money, Aug. 1997, at 116, 117. *See generally* Eric Schmuckler, *Breaking Up Is Complex To Do*, Forbes, Oct. 24, 1988, at 360, 360 (discussing the complexities of divorce among the wealthy without a prenuptial agreement). Currently, an estimated five percent of the 2.4 million couples who marry each year sign prenuptial agreements. *See* Belsky, *supra*, at 117.

76. Prospective spouses most likely to use (or be told to use) pre-marital agreements include those who (1) have children from previous relationships, (2) own a business, (3) earn significantly more than the other spouse, or (4) have considerable assets. *See* Belsky, *supra* note 75, at 117; *see also* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 Mich. L. Rev. 447, 479 (1996) (discussing the availability of contractual agreements among married couples that provide for a different division of assets upon divorce or death than the law would normally allow); Richard A. Epstein, *A Last Word on Eminent Domain*, 41 U. Miami L. Rev 253, 271 (1986) ("Today of course marriages are much less status and more contractual, and it is not surprising that antenuptial agreements have a far wider scope to play, especially in second marriages when either or both partners have substantial assets and children by previous marriage."); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 79 n.174 (1990) (discussing two situations in which prenuptial agreements are typically used); Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 Geo. L.J. 193, 222 (1984) ("Antenuptial agreements most commonly are associated with the very wealthy, or with older people who want to preserve their estates for children of a previous marriage.").

77. *See* Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. Mich. J.L. Reform 217, 255 (1990) (observing that marriage has become a less public, more private, institution that can better accommodate broad variations in spousal behavior and preferences).

78. *See* Scott, *supra* note 52, at 703 (noting courts' willingness to enforce marital contracts); Brigid McMenamin, *'Til Divorce Do Us Part*, Forbes, Oct. 14, 1996, at 52, 53 (commenting that if done right, prenuptial agreements are "bullet proof"). Section 306 of the Uniform Marriage and Divorce Act provides that courts should enforce written separation agreements unless the agreement is unconscionable. *See* Unif. Marriage and Divorce Act § 306, 9 U.L.A. 249 (1998). A number of states have either adopted U.M.D.A. section 306 or have concluded that written agreements should

II. LEGAL TREATMENT OF UNMARRIED COHABITING COUPLES

States promote marriage primarily to provide a stable environment for rearing children and to prevent divorced wives from becoming public wards. To encourage marriage and discourage couples from cohabiting, states historically refused to give unmarried couples any legal rights or benefits because of their view that non-marital sexual relationships were morally offensive and because of their concern that acknowledging these relationships would undermine and debase the institution of marriage.[79] To discourage these relationships, courts refused to enforce contracts between unmarried couples if the contract was designed to regulate marriage-like activities or could be construed as being based on illicit sexual activities.[80] In addition to concluding that unmarried unions were immoral and threatened the economic stability provided by marriage, some states also felt that there was no compelling justification to protect the rights of unmarried couples because unmarried cohabiting couples could protect their legal rights by marrying each other.[81] Finally, courts and states resisted granting

generally be enforceable unless the agreement is deemed to be unconscionable. *See, e.g.*, Idaho Code § 32-925(1)(b) (1997) (stating that separation agreements are not enforceable if they are unconscionable); Ky. Rev. Stat. Ann. § 403.180 (Michie 1996) ("If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, support, and maintenance."); Mont. Code Ann. § 40-2-6081(b) (1997) (stating that a premarital agreement is not enforceable if it was unconscionable when executed); N.C. Gen. Stat. § 52B-7(a)(2) (1996) (stating that a premarital agreement is not enforceable if it was unconscionable when executed); *In re* Marriage of Manzo, 659 P.2d 669, 671 (Colo. 1983) (noting that an agreement is subject to review by the district court for unconscionability); Simmons v. Simmons, 396 N.E.2d 631, 633 (Ill. 1979) (stating that an agreement may not be so unjust as to be unconscionable); Voigt v. Voigt, 670 N.E.2d 1271, 1277 (Ind. 1996) (holding that courts should exercise great restraint when determining the enforceability of a settlement agreement); Ferry v. Ferry, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979) (explaining that a court is bound to uphold an agreement unless unconscionable); Weber v. Weber, 548 N.W.2d 781, 783 (N.D. 1996) ("Property settlement agreements in divorce cases must be scrutinized for unconscionability."); Penhallow v. Penhallow, 649 A.2d 1016, 1021 (R.I. 1994) (requiring proof of involuntary execution and nondisclosure or waivers in addition to unconscionability for an agreement to be set aside by the court).

79. *See* Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 Minn. L. Rev. 163, 167 (1985) (stating that some courts have maintained that cohabitation agreements involve immoral consideration and are therefore unenforceable); Schneider, *supra* note 50, at 1815.

80. *See* Weitzman, Contract, *supra* note 25, at 386. In the highly celebrated palimony dispute involving the actor Lee Marvin, the court indicated that it would enforce an agreement between unmarried cohabitants unless it appeared that the agreement rests upon a consideration of sexual services. *See* Marvin v. Marvin, 557 P.2d 106, 112-13 (Cal. 1976); J. Thomas Oldham & David S. Caudhill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 Fam. L.Q. 93, 97 (1984).

81. *See generally* Oldham & Caudhill, *supra* note 80, at 106 ("It was traditionally assumed that if a couple wished to establish a serious commitment to one another, they would marry or at least hold themselves out as husband and wife."). Of course, this applied only to unmarried straight cohabitants. Gay cohabitants could not pro-

benefits associated with marriage (like inheritance or divorce rights) to unmarried cohabitants or those in common law marriages[82] because of the difficulty of proving whether those cohabitants had legally established their entitlement to those marital benefits.[83]

Just as courts' views of the legal relationship between married couples have changed, courts have been increasingly willing to grant legal rights to unmarried couples. Informal marriages[84] (including those that produce children)[85] and other types of non-traditional family arrangements are becoming much more common in American society.[86] Indeed, the United States Census Bureau has recognized this societal change and has created separate categories for some of these arrangements.[87] As these informal marriages become more common,

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tect themselves by marrying since gay marriages have never been, and are not now, legally valid anywhere in this country.

82. Common law marriages are recognized in the following twelve jurisdictions: Alabama, Colorado, Idaho, Iowa, Kansas, Montana, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and Washington, D.C. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709, 715 n.24 (1996). States that recognize common law marriages generally define them as any informal marriage between heterosexuals that does not meet the formal statutory requirements for marriage. *See* Gregory et. al., *supra* note 20, at 27. States generally will find that a couple is in a common law marriage if the cohabiting couple agrees and has the present intent to enter into a matrimonial relationship and holds themselves out to the community as husband and wife. *See id.* at 27-28; Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 Geo L.J. 1829, 1842, 1850 (1987).

83. *See* Morone v. Morone, 413 N.E.2d 1154, 1157-58 (N.Y. 1980) (noting that while common-law marriage works "substantial justice" in some cases, the doctrine was not desirable because there was no built-in method to distinguish valid from invalid claims); *see also* Kandoian, *supra* note 82, at 1851-52 (observing that common law marriages encourage fraud because a lack of public records makes it difficult to verify that the "marriage" actually exists); Prince, *supra* note 79, at 197 (discussing cohabitation agreements). *But see* Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 Hous. L. Rev. 1131, 1137 (1991) (arguing that the dangers of fraud are no greater in a common law marriage than in any other arrangement that potentially offers a large reward).

84. By "informal" marriages, I mean any intimate relationship that is not officially recognized by the State. Included within this term would be common law marriages, gay marriages, and any other long-standing relationship between unmarried persons who are not legally married.

85. *See* Regan, Family Law, *supra* note 19, at 124; Kandoian, *supra* note 82, at 1865 (discussing an increase in children living in households of cohabiting couples); Mauldon, *supra* note 34, at 330-33 (noting uncertainty as to number of black mothers who cohabit with their children's father).

86. *See supra* note 14; *see also* Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. Fam. L. 497, 500 (1990-91) (discussing the rise in "alternative" family arrangements, including unmarried gay and straight couples and single parent households). *See generally* Oldham & Caudhill, *supra* note 80, at 112 n.89 (discussing studies that indicate that premarital cohabitation may be a "permanent social phenomenon" in the United States).

87. One such category is POSSLQ, Persons of the Opposite Sex Sharing Living Quarters. *See* Statistical Abstract, *supra* note 14, at 44. One federal court even has

they also become more accepted because, even if the arrangement is not officially condoned or encouraged, states are increasingly willing to grant legal rights to persons in informal marriages or non-traditional family arrangements.[88]

Reasons cited for the increase in non-traditional living arrangements include lower tax benefits for married, low income workers in comparison to single workers, higher taxes imposed on high income married couples, the desire to avoid having a divorced parent's new spouse's income reported on college financial aid applications, and the concerns older individuals have of losing federal retirement or health benefits upon marriage.[89] For many, unmarried cohabitation has become an important form of emotional and financial interdependence, comparable to the relationship associated primarily with "traditional" marriages.[90] Indeed, among certain groups, informal marriage is the norm.

For example, informal marriages among gay and lesbian couples is the only "norm" available to them because they are legally prohibited

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cited a humorous poem extolling the joys of "Official POSSLQuity." *See* Fischer v. Dallas Federal Savings & Loan Ass'n, 106 F.R.D. 465, 469 n.5 (N.D. Tex. 1985). Other terms used to describe unmarried cohabitants include CUPOS (Cohabiting Unmarried Persons of Opposite Sex) and PSSSLQ (Persons Of The Same Sex Sharing Living Quarters). *See In re* Relationship of Eggers, 638 P.2d 1267, 1270 n.2 (Wash. Ct. App. 1982) (rejecting POSSLQ in favor of CUPOS); Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 Women's Rts. L. Rep. 109, 131 n.214 (1996) (referring to PSSSLQs).

88. For example, courts no longer view the unmarried cohabitation of an ex-spouse as *prima facie* grounds for terminating an award of alimony. *See* Mitchell v. Mitchell, 418 A.2d 1140, 1143 (Me. 1980); Melletz v. Melletz, 638 A.2d 898, 903 (N.J. Super. Ct. App. Div. 1994). Likewise, courts no longer terminate parents' custodial rights simply because a parent cohabits with a non-spouse. *See* Nolte v. Nolte, 609 N.E.2d 381, 385-86 (Ill. App. Ct. 1993); Fort v. Fort, 425 N.E.2d 754, 759 (Mass. App. Ct. 1981); Almond v. Almond 257 S.E.2d 450, 452-53 (N.C. Ct. App. 1979). *But see* Bottoms v. Bottoms, 457 S.E.2d 102, 108-09 (Va. 1995) (awarding custody to maternal grandmother because mother lived with lesbian lover).

Some courts also have allowed gay persons to adopt children. *See In re* M.M.D., 662 A.2d 837 (D.C. 1995); *In re* K.M., 653 N.E.2d 888 (Ill. Ct. App. 1995); *In re* Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995); *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993). Others have permitted gay individuals to adopt each other. *See In re* Swanson, 623 A.2d 1095, 1097-98 (Del. 1993) (allowing the adoption of a gay lover in part to facilitate estate planning.); 333 East 53rd St. Assocs. v. Mann, 121 A.D.2d 289 (N.Y. App. Div. 1986), *aff'd*, 512 N.E.2d 541 (N.Y. 1987) (permitting adoption of one elderly woman by another for purposes of establishing succession rights to rent-controlled apartment); *In re* Adult Anonymous II, 88 A.D.2d 30 (N.Y. App. Div. 1982) (approving adoption of an adult male by his male lover).

89. *See* Martin, *supra* note 86, at 17-18. Other reasons cited for the decline in marriages include changing attitudes toward marriage caused by low employment rates for males, high labor force participation for women, and couples' fear that the marriage will end in divorce. *See* Mauldon, *supra* note 34, at 333-36.

90. *See generally* Regan, Family Law, *supra* note 19, at 129 (defining marriage as "a relationship in which one's sense of self is constituted in part through connection with another").

from marrying. In addition, among those in the lower socio-economic classes, unmarried cohabitation appears to have been common for some time.[91] Likewise, as American life expectancy increases, many widowed, older Americans increasingly are choosing to live together to reduce living expenses, but not to marry, if marriage would cause them to lose retirement or other governmental benefits.[92] Notwithstanding a change in social attitude and acceptance of these informal marriages,[93] courts still remain somewhat hesitant when asked to enforce contracts that attempt to impose marriage-like duties on unmarried parties, or to compensate cohabitants for activities traditionally associated with legal marriages.[94]

III. BENEFITS AWARDED BASED ON MARITAL STATUS

An examination of the current interpretation and application of bankruptcy laws reveals a disparity in the way in which married and unmarried couples are treated. This part scrutinizes non-bankruptcy benefits awarded on the basis of marital status, as well as bankruptcy benefits awarded to married and unmarried debtors. Despite their limited utility to creditors and debtors, status-based considerations continue to play a significant role in bankruptcy laws.

A. *Non-Bankruptcy Benefits Awarded on the Basis of Marital Status*

Notwithstanding the dramatic changes in the nature and permanency[95] of spouses' relationships to each other, state and federal laws

91. *See* Weitzman, Contract, *supra* note 25, at 193; Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 J. Fam. L. 271, 293 (1969); Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. Chi. L. Rev. 88 (1960).

92. *See* Lani Luciano, *Money Helps: Answers to Your Questions*, Money, Sept. 1997, at 181, 182 (reflecting fear that remarrying will jeopardize the receipt of a former spouse's social security benefits); Melynda Wilcox, *Love & Money, Senior Style*, Kiplinger's Pers. Fin., Oct. 1, 1996, at 83, 83 (referencing a study by the American Association of Retired Persons which notes an increase in midlife and older citizens cohabiting as unmarried couples because of a fear that they will lose survivor benefits if they marry); *see also* Weitzman, Contract, *supra* note 25, at 365 (suggesting that cohabitation is the "preferred option for some once-married middle-aged and older persons" who fear losing survivors' benefits from an earlier marriage).

93. In response to the increasing number of cohabiting, unmarried employees, a number of municipalities and companies have adopted domestic partner initiatives to extend some benefits to the partners of their employees. *See infra* notes 182, 189-96 and accompanying text. The popular media also has discussed the changing nature of, and the difficulties of addressing, non-traditional families and unmarried cohabitants. *See* Letitia Baldridge, Letitia Baldridge's Complete Guide to the New Manners for the '90s 182-85 (1990) (discussing the legalities of living together, how to address cohabiting couples, and how to structure cohabiting household); Elizabeth L. Post, Emily Post's Etiquette 165-73 (15th ed. 1992) (same).

94. *See* Regan, Family Law, *supra* note 19, at 122-23.

95. *See supra* note 13.

continue to provide benefits to protect and promote marriage. States continue to believe that the rights to property and economic support that flow from a legal marriage decrease the likelihood that wives and children will become wards of the state if the parents divorce.[96] Thus, encouraging marriage is still believed to be necessary to protect the state fiscally.[97] Because of the view that encouraging marriage ultimately yields economic (and perhaps emotional) gains that exceed the cost of awarding marriage based benefits, married couples continue to receive favorable treatment under both federal and state laws.

For example, under federal tax laws, spouses have the right to file a joint tax return[98] and the ability to reduce certain gift[99] and estate taxes.[100] They also have the right to receive certain federal entitlements that are granted based on marital status (including social security benefits),[101] and they receive favorable privileges in immigration decisions.[102] Spouses have the right under state laws to sue for loss of consortium and for wrongful death,[103] and the right not to be forced to testify against each other in criminal proceedings.[104] State laws also give spouses the right to receive property from each other when one dies intestate[105] and in many states, spouses can rely on state laws to

96. *See* Bowman & Cornish, *supra* note 15, at 1180 n.78, 1181 n.82; *see also* Mich. Comp. Laws. § 551.1 (West 1998) (defining marriage as a unique relationship between a man and a woman and expressing the state's "special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children").

97. *See generally* Prince, *supra* note 79 (discussing public policy limitations on cohabitation agreements).

98. *See* 26 U.S.C. § 6013 (1994).

99. *See id.* § 2001(d) (adjustment for gift tax paid by spouse).

100. *See id.* § 2056(a) (allowance of marital deduction).

101. *See, e.g.*, Federal Old-Age Survivors and Disability Insurance Benefits, 42 U.S.C. § 402(b)-(c) (1994) (providing benefits to homemaker spouse at retirement of long-employed spouse); *id.* § 402(e)-(f) (providing benefits to a surviving spouse upon death of an employee spouse); *id.* § 416(a) (defining spouse and surviving spouse); *id.* § 416(b) (defining "wife"); *id.* § 416(c) (defining "widow"); *id.* § 416(f) (defining "husband"); *id.* § 416(g) ("defining widower"); *see also id.* § 416(h)(1) (establishing factors to be used for determining family status).

102. *See* 8 U.S.C. § 1151(b) (1994) (exempting immigrant spouses of United States citizens from certain visa restrictions).

103. *See* Alaska Stat. § 09.55.580 (Michie 1997); Ariz. Rev. Stat. Ann. § 12-612 (West 1997); Ga. Code Ann. § 51-4-2 (Supp. 1997); Tenn. Code Ann. § 20-5-107 (1997).

104. *See, e.g.*, Ala. Code § 12-21-227 (1995) (giving a spouse the option to testify, but not compelling testimony); Kan. Stat. Ann. § 60-423 (1994) (same); Md. Code Ann., Cts. & Jud. Proc. § 9-106 (Supp. 1997) (same); Mich. Comp. Laws § 600.2162 (Supp. 1998) (same); Miss. Code Ann. § 13-1-5 (Supp. 1997) (same); Mo. Ann. Stat. § 546.260 (West 1998) (same); N.C. Gen. Stat. § 8-57 (1986) (same); 42 Pa. Cons. Stat. Ann. § 5913 (West Supp. 1998) (same); Wash. Rev. Code Ann. § 5.60.060 (West Supp. 1998) (same).

105. Each state has a statutory provision that provides, in substantial part, that a surviving spouse is entitled to receive a share of the deceased spouse's estate even if the spouse dies intestate. *See, e.g.*, Cal. Prob. Code § 13500 (West 1991) (giving a spouse the right to property when the other spouse dies intestate); N.Y. Est. Powers

shield their assets from individual creditors by owning property as tenants by the entirety.[106] In addition to receiving quantifiable state and federal benefits, married couples receive certain status-based entitlements, including the right to visit each other in hospitals and in jails.[107] Finally, although many unmarried workers have successfully convinced both public and private employers to extend employee benefit coverage to their non-spouse partners,[108] in most instances only married employees receive workplace employee benefits for their dependents.[109]

B. *Bankruptcy Benefits Awarded to Married and Unmarried Debtors*

Although bankruptcy laws are designed to regulate debtors' economic affairs with their creditors, and not their sexual affairs with their significant others, the Code grants several benefits to debtors based solely on their decision or ability to marry. That bankruptcy laws give married debtors benefits denied to unmarried debtors is not surprising, as other federal and state laws discriminate in favor of married couples.[110] Likewise, because bankruptcy laws generally reflect social norms and values,[111] it is not surprising that bankruptcy laws favorably treat people in "traditional" marriages.[112] Although it is

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& Trusts § 5-1.1-A (McKinney Supp. 1997) (same); Tex. Prob. Code Ann. § 38 (b) (West 1980 & Supp. 1998) (same); Va. Code Ann. § 64.1-1 (Michie 1995) (same).

106. *See infra* notes 135-48 and accompanying text.

107. *See* Abigail Goldman, *Gays Rally Support for Right to Marry*, L.A. Times, Feb. 13, 1998, at B5.

108. For a discussion of domestic partner ordinances and initiatives, see *infra* notes 189-94 and accompanying text.

109. *See, e.g.*, Bowman & Cornish, *supra* note 15, at 1194 n.152 (discussing proposed ruling designed to prevent discrimination on the basis of marital status in the provision of health insurance benefits); Howard Pianko & Dean L. Silverberg, *Domestic Partner Benefits On The Rise: What Are The Legal And Tax Issues?*, N.Y. L.J., Nov. 17, 1997, at 53 (recognizing that "[e]mployers are facing increasing pressure to extend benefits to their employees' domestic partners").

110. *See supra* notes 96-109 and accompanying text. *See generally* Chambers, *supra* note 76, at 472-74 (listing burdens and benefits conferred on married but not unmarried couples).

111. Many of the exceptions to discharge found in 11 U.S.C. § 523 can be justified only on the basis of public policy. *See, e.g.*, 11 U.S.C. § 523(a)(5) (1994 & Supp. II 1996) (excepting alimony and child support); *id.* § 523(a)(6) (excepting debts for willful and malicious injury); *id.* § 523(a)(8) (excepting student loans); *id.* § 523(a)(9) (excepting debts arising out of drunk driving). In addition, in response to a number of bankruptcy filings by airlines, Congress amended § 365 of the Code to make it more difficult for airlines to perform under certain airport leases. *See id.* § 365(d)(5)-(9). Finally, after one particularly infamous bankruptcy case involving a CEO who admitted he filed a bankruptcy to enhance the company's bargaining power with a union, Congress amended § 1113 of the Code to require a company to satisfy additional procedural hurdles before being allowed to reject a collective bargaining agreement. *See id.* § 1113.

112. For an early view of traditional marriages, see George F. James, *The Income of Married Couples: Is the Knutson Bill Justice?*, Taxes, Apr. 1948, at 311, 366 ("It must

quite unlikely that any given debtor could take advantage of *all* marital benefits in a single case,[113] Congress should examine whether granting status-based benefits is consistent with the goals of a federal system designed to regulate a debtor's obligations to third-party creditors.[114]

The following sections discuss several bankruptcy benefits all married debtors receive (even if they are not economically dependent on each other) but no unmarried couples receive (even if they are economically linked).[115] It seems clear that Congress does not grant marital benefits to debtors in order to promote or protect marriage. Instead, Congress grants most marital bankruptcy benefits for reasons that have nothing to do with the desire to encourage marriage. As I detail below, Congress provides some benefits as a matter of administrative convenience and provides others to ensure that debtors' and creditors' rights in state-created property interests are the same under state and federal bankruptcy laws. Indeed, Congress generally recognizes a debtor's marital status simply to avoid the expense and time of requiring married couples to prove that they are economically linked. In discussing two benefits made available to both married and unmarried economically linked couples, I conclude this part by arguing that status-based benefits are not consistent with bankruptcy policy and goals because they create an over and under-inclusive system.

1. Joint Filing

Section 302 of the Code gives married couples the right to file a joint bankruptcy petition.[116] Congress awards this right to facilitate

be recognized that the basic American social pattern is still that of married couples living together, the husband being the principal or sole wage earner, and the wife's major contribution being the management of the home and the care of children."). It is doubtful whether the husband-in-marketplace, wife-at-home paradigm actually was a "tradition" for all groups in society. *See* Williams, *supra* note 22, at 2282 n.282 (positing that the "tradition" encompassed only Protestants); *see also supra* notes 33-34 (discussing wartime and black wives' nontraditional roles).

113. For example, debtors can shield community property under 11 U.S.C § 524 only in the nine community property states. *See* Boggs v. Boggs, 117 S. Ct. 1754, 1760 (1997) (discussing community property states); *In re* Brollier, 165 B.R. 286, 289 n.4 (Bankr. W.D. Okla. 1994) (listing Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin as community property states).

114. If the debtor owes a former spouse debts incurred during a divorce, bankruptcy policy should consider the debtor's marital relationship because the ex-spouse would be a creditor. *See* 11 U.S.C. § 523(a)(5) (stating that debts in the nature of alimony and child support are non-dischargeable in all bankruptcy cases). *But see id.* § 523(a)(15) (stating that other divorce-related debts may be dischargeable in Chapter 7 liquidation cases).

115. I discuss these benefits in another article and conclude that, if Congress persists in granting benefits based on marital status it should also impose burdens on spouses (including the duty to help repay debts). *See* Dickerson, *supra* note 16.

116. 11 U.S.C. § 302(a). The Bankruptcy Act of 1898 did not provide for joint filings because married women historically could not incur debt separately or own separate property and, thus, there was no need for them to file for bankruptcy protection

case administration, not to promote marriage or to encourage spouses to support each other. The scant legislative history of § 302 suggests that Congress believed that most married couples are jointly liable on their debts and jointly hold most of their property.[117] Although Congress assumed that most married couples are jointly obligated and jointly own property, even married couples who have no joint debts or assets or who live apart are allowed to file a joint petition.[118] Having assumed that married couples are economically linked, Congress allowed cases to be jointly administered to obviate the need for married debtors to hire two attorneys and pay two filing fees.

Legal fees and costs involved with bankruptcy filings can be daunting—especially when one remembers that debtors (by definition) generally have limited funds. Thus, allowing economically linked married debtors to save expenses is reasonable.[119] In addition to reducing out-of-pocket expenses, allowing a married couple to file a joint case reduces the administrative costs of having two related cases proceed through the same court at the same time with two separate trustees potentially evaluating the same debts and assets. Finally, allowing economically linked married debtors to file a joint petition potentially reduces the amount of time each must spend in court (and thus, must miss from work) since courts can excuse one spouse from fully participating in the bankruptcy case if the attending spouse can provide all relevant financial information for the absentee spouse.[120]

But while allowing economically linked married debtors to file a joint petition makes sense and is administratively efficient, there is no reason why this benefit should be extended to all married debtors, yet

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to discharge their debts or protect their property. *See In re* Knobel, 167 B.R. 436, 439 (Bankr. W.D. Tex. 1994).

117. *See* S. Rep. No. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818.

118. *See In re* Colwell, 208 B.R. 85, 85 (Bankr. S.D. Fla. 1997) (allowing a legally separated married couple who had lived apart for over three years and who had no joint debts or assets to file a joint petition).

119. Debtors currently must pay $130 just to commence a case and $45 in administrative fees. *See* 28 U.S.C. § 1930(a)(1) (1994). Legal fees in Chapter 7 cases range from $200 to $500. Telephone Interview with Debera Conlon, Assistant U.S. Trustee, Eastern District of Virginia (Jan. 13, 1997) [hereinafter Conlon Interview]; *see also In re* Crivilare, 213 B.R. 721, 723 (Bankr. S.D. Ill. 1997) (observing that the average fee in Southern District of Illinois is $500). Attorneys' fees in a basic Chapter 13 case range from $800 to $1,500. Conlon Interview, *supra*; *see also In re* Roffle, 216 B.R. 290, 296 (Bankr. D. Colo. 1998) (capping fees in "vanilla" Chapter 13 case at $1,200); *In re* Lee, 209 B.R. 708, 709 (Bankr. N.D. Ill. 1997) (noting that the maximum fee for Chapter 13 case was $800); *In re* Taylor, 100 B.R. 42, 46 (Bankr. D. Colo. 1989) (reducing an award to $970 in a Chapter 13 case).

120. *See In re* Keiser, 204 B.R. 697, 699 (Bankr. W.D. Tex. 1996). Although the court in Kaiser acknowledged the local practice of excusing one spouse from attending the meeting of creditors required by § 341 of the Code, the court dismissed the bankruptcy case of the non-attending spouse. *Id.* As the court noted, however, the dismissal (indeed the entire controversy) primarily was a "struggle of wills" between the United States Trustee's Office and the couple's attorney. *Id.*

denied to all economically linked unmarried ones. Indeed, the cases involving economically linked unmarried debtors who have attempted to file a joint petition illustrate the inconsistency of limiting the right to file a joint petition to married couples. For example, the debtors in *In re Allen*[121] were a gay couple who sought to file a joint Chapter 13 petition.[122] Without considering whether the debtors were linked economically, or whether state marriage requirements violated the Due Process or Equal Protection clauses of the United States Constitution,[123] the court refused to allow the joint petition because the debtors were not "spouses" as defined by the Code.[124] The court stressed that since its holding applied to all unmarried couples, whether heterosexual or homosexual, it was not unfairly discriminating against same-sex couples.[125] While implicitly recognizing that refusing to grant a gay couple a marriage license might be a violation of equal protection, the court refused to decide that issue. Instead the court opined that if the debtors were "truly interested in pursuing their right to enter into a legally recognized marriage," they should pursue their legal remedies in state court.[126]

A mother and daughter with joint medical debts relating to injuries the daughter received in a car accident attempted to file a joint petition in *In re Lam*.[127] The debtors argued that "judicial (and debtor) economy would be served by allowing the joint or co-filing."[128] The court concluded that joint filings are appropriate only where there is an "identity" of assets and debts that warrants allowing two separate entities to participate in one case.[129] The court refused to allow the mother and daughter to file jointly because they only shared *some* joint debt, did not live together, and did not own joint assets.[130] The court reached this conclusion even though spouses can file a joint petition even if they shared *no* joint debts, lived apart, and owned no joint assets.

In two cases where unmarried couples lived together, shared living expenses, owned property together, and, in one case, raised children together, courts still refused to permit a joint filing because the debt-

121. 186 B.R. 769 (Bankr. N.D. Ga. 1995).

122. *See id.* at 771.

123. *See id.* at 774

124. *See id.* at 773. With the recently enacted Defense of Marriage Act, bankruptcy courts currently cannot allow a gay couple to file jointly unless they find the Act to be unconstitutional.

125. *Id.* at 774.

126. *Id.*

127. 98 B.R. 965, 966 (Bankr. W.D. Mo. 1988).

128. *Id.*

129. *See id.*

130. *See id.*; *see also In re* Jackson, 28 B.R. 559, 564 (Bankr. E.D. Pa. 1983) (denying joint filing for parents and child).

ors were not spouses within the meaning of the Code.[131] While the courts indicated their willingness to jointly administer the cases after they were filed, this would not obviate the initial requirement that both debtors hire an attorney and both pay a filing fee. Indeed, the one court that has permitted an unmarried couple to file jointly allowed the filing only because the debtors were ex-spouses.[132] Acknowledging that the divorced debtors technically were not spouses, the court relied on the legislative history of § 302 to conclude that allowing these ex-spouses to file a joint Chapter 13 petition was consistent with bankruptcy policy.[133]

Since Congress allows joint filings to facilitate the administration of what it assumes are economically linked debtors (i.e., a husband and wife), it is unclear why this benefit should not be extended to any economically linked debtors, whether married or not. Allowing *all* married couples (even those who do not share debts and assets) to file a joint petition but denying that right to *all* unmarried couples (even if they can show they actually *have* merged their financial lives) makes no sense if Congress views joint filings as vehicles to simplify the process of administering the estates of economically linked debtors. Allowing all economically linked couples to file jointly would be consistent with bankruptcy policy because the savings in legal and filing fees could be given either to the debtors (to protect their fresh start) or to creditors (to repay debts). Moreover, because the determination to allow a joint petition would examine the debtors' economic (not personal) relationship, courts could allow joint filings without becoming embroiled in a constitutional determination of whether states may deny certain legal rights to people simply because of the their marital status.[134]

2. Property Held as Tenants by the Entirety

The Code also gives married debtors the right to shield property held as tenants by the entirety from their creditors because it incorporates the favorable status states accord entirety property.[135] Relying

131. *See In re* Malone, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985); *In re* Coles, 14 B.R. 5, 6 (Bankr. E.D. Pa. 1981).

132. *See In re* Pipes 78 B.R. 981, 983 (Bankr. W.D. Mo. 1987).

133. *See id.* at 983 (citing H.R. Rep. No. 95-595, at 321 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6277).

134. The Defense of Marriage Act suggests that Congress now believes it necessary to protect the institution of formal heterosexual marriages. *See supra* notes 1, 6; *infra* note 201. Because I suggest later that any unmarried couple—whether same sex lovers, unmarried male and female lovers, a parent and child, or siblings—be allowed to file jointly if they can establish that they are an "economic unit," permitting unmarried couples to file jointly would not threaten the institution of marriage or require federal bankruptcy or district courts to recognize any type of informal marriage. *See infra* Part IV.

135. Congress allows states to determine whether debtors may rely on state or federal exemptions to keep property from creditors. *See* 11 U.S.C. § 522(b)(1) (1994).

on state entirety laws is consistent with the bankruptcy laws' "fresh start" policy because those laws were designed to prevent one spouse's separate creditors from seizing all marital assets and using those assets to pay that spouse's debts.[136] Because the tenancy depended on the legal fiction that man and woman merged at marriage,[137] historically the tenancy required that: (1) each spouse have a right of survivorship in entirety property; (2) the spouses acquire the same interest in the property by the same instrument at the same time; and (3) the spouses have an undivided interest in the entire property.[138]

More than half of the states prevent debtors from using the federal exemptions and, instead, require debtors to exempt property pursuant to applicable state laws. *See* 4 Collier on Bankruptcy ¶ 522.02[1], at 522-13 (Lawrence P. King et al. eds., 15th ed. 1996). Debtors who either live in states that have opted out of the federal bankruptcy exemptions or choose to rely on state law to exempt property may exclude tenant by the entireties property from their bankruptcy estates and thus prevent the trustee from using that property to satisfy creditor claims. *See* 11 U.S.C. § 522(b).

136. Yzenbaard, *supra* note 27, at 102-04.

137. *See* Powell, *supra* note 44, ¶ 620[3].

138. *See* Janet D. Ritsko, Comment, *Lien Times in Massachusetts: Tenancy by the Entirety After* Coraccio v. Lowell Five Cents Savings Bank, 30 New Eng. L. Rev. 85, 92-95 (1995). Though modern entirety laws have changed somewhat since the common law, modern laws (1) maintain the right of survivorship; (2) prevent entirety property from being subject to partition; and (3) prevent spouses from disposing of any part of entirety property or using the property to pay individual debts without the consent of the other spouse. *See* Benjamin C. Ackerly, *Tenants by the Entirety Property and the Bankruptcy Reform Act*, 43 Wm. & Mary L. Rev. 701, 703 (1980). Tenancy by the entirety laws have existed in forty states. Several states abolished the tenancy because it conflicted with community property laws or perpetuated the now outdated view of marriage as merger. *See* Section on Real Property, Probate, and Trust Law, American Bar Ass'n, Report of the Committee on Changes in Substantive Real Property Principles 82 (1944). Estimates of the number of jurisdictions in which the tenancy is still recognized range from as few as seventeen to as many as thirty-seven. *See* Powell, *supra* note 44, ¶ 620[4]; Ritsko, *supra*, at 87 n.16; *see, e.g.*, Alaska Stat. §§ 34.15.140(c), 34.15.110(b) (Michie 1996) (confirming the right of tenancy by the entirety); Ark. Code Ann. § 9-12-317 B (Michie 1998) (discussing dissolution of tenancy by the entirety); Del. Code Ann. tit. 25, 309 (1989) (recognizing tenancy by the entirety); D.C. Code Ann. § 45-216 (1996) (creating the presumption of tenancy in common unless expressly stated otherwise); Fla. Stat. §§ 689.11, 689.15 (West 1994) (recognizing tenancy by the entirety); Haw. Rev. Stat. §§ 509-1, 509-2 (1993) (construing tenancy in common as the default formation, but recognizing tenancy by the entirety); 765 Ill. Comp. Stat. Ann. 1005/1c (West 1993) (unpholding tenancy by the entirety); Ind. Code Ann. § 32-4-2-1 (Michie 1995) (recognizing tenancy by the entirety); Ky. Rev. Stat. Ann. § 381.050 (Michie Supp. 1996) (creating a tenancy in common unless the right of survivorship is expressly mentioned); Md. Code Ann. Real Prop. § 4-108 (1996) (recognizing tenancy by the entirety); Mass. Ann. Laws ch. 184, § 8 (Law Co-op. 1996) (same); Mich. Comp. Laws Ann. §§ 552-102, 557-71, 557-81, 557-101 (West 1998) (detailing procedures and particulars for tenancy by the entirety); N.Y. Est. Powers & Trusts Law § 6-2.2(b) (McKinney 1992) (creating a presumption of tenancy by the entirety between husband and wife); N.C. Gen. Stat. §§ 39-13.3(b), 39-13.6(b) (1984) (same); Okla. Stat. Ann. tit. 60, § 74 (West 1994) (recognizing tenancy by the entirety or joint tenancy as the grantor may elect); Or. Rev. Stat. § 108.090 (1990) (discussing creation and dissolution of estates by entireties); 23 Pa. Cons. Stat. Ann. § 3507 (West 1991) (dictating that in cases of divorce, tenancy by the entirety becomes tenancy in common); R.I. Gen. Laws § 34-11-3 (1995) (recogniz-

Despite the potential harm to individual creditors, states enacted entirety laws to ensure that, notwithstanding one spouse's financial difficulties, a married couple could keep their basic family assets (particularly the family home) and avoid being forced into poverty.[139] Under most state laws, only creditors with a claim against both spouses may reach entirety property.[140] Thus, unless state law allows individual creditors to reach entireties property,[141] if only one spouse files for bankruptcy, the debtor can keep or "exempt" entirety property and prevent separate creditors from satisfying their debts with the entirety property.[142]

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ing tenancy by the entirety); Tenn. Code Ann. § 66-1-109 to -110 (1993) (permitting tenancy by the entirety); Vt. Stat. Ann. tit. 15, § 67 (1989) (upholding tenancy by the entirety); Va. Code Ann. § 55-21 (Michie 1995) (maintaining the right of survivorship when it "manifestly appears from the tenor of the instrument" that survivorship was intended); Wyo. Stat. Ann. § 34-1-140 (Michie 1997) (permitting the creation of a tenancy by the entirety or a joint tenancy without a straw person).

139. The policy justification for state homestead laws is also to shield basic family assets from the reach of creditors. Homestead acts allow a householder to designate a house and land as his homestead and then exempt the homestead from execution by the owner's creditors. *See, e.g.*, *In re* Johnson, 207 B.R. 878, 881 n.6 (Bankr. D. Minn. 1997) (noting that Minnesota homestead exemption laws are designed to prevent the "destitution and dependency of families, and of promoting their stability, self-sustenance, and independence over the generations"); Kingman v. O'Callaghan, 57 N.W. 912, 915 (S.D. 1894) ("The object of all homestead legislation is to protect the home, to furnish shelter for the family, and to promote the interest and welfare of society and the state by restricting . . . alienation or encumbrance by the owner's sole act and deed."); George L. Haskins, *Homestead Exemptions*, 63 Harv. L. Rev. 1289, 1289 n.4 (1950) (citing Act of Jan. 26, 1839, [1838-40] Laws of the Republic of Tex., 3d Cong., 1st Sess. 113). Homestead property is exempt (up to varying dollar amounts) from execution for certain kinds of debts. These dollar amounts vary greatly, ranging from an unlimited amount in some states to a much more modest amount in others. *Compare* Fla. Stat. Ann. § 222.01 (West 1998) (discussing the homestead exemption), *and* Tex. Prop. Code Ann. § 41.001 (West 1984) (unlimited homestead exemption), *with* Ga. Code Ann. § 44-13-1 (Supp. 1998) (limiting homestead exemption to $5,000), *and* Va. Code Ann. § 34-4 (Michie 1996) (same).

140. *See In re* Oberlies, 94 B.R. 916, 923 (Bankr. E.D. Mich. 1988) (noting that under Michigan law, a trustee could administer entirety assets for the benefit of joint creditors); *In re* Townsend, 72 B.R. 960 (Bankr. W.D. Mo. 1987); Ackerly, *supra* note 138, at 702-03. In addition to preventing commercial creditors from collecting debts, it is estimated that in 1995 over 250,000 parents who were obliged to pay child support effectively shielded assets from child support recipients by creating entireties estates. *See* Robert D. Null, Note, *Tenancy By The Entirety as an Asset Shield: An Unjustified Safe Haven For Delinquent Child Support Obligors*, 29 Val. U. L. Rev. 1057, 1092 (1995).

141. Several jurisdictions continue to permit only joint creditors to reach entirety property. *See* John V. Orth, *Tenancies by the Entirety*, *in* 4 Thompson on Real Property § 33.07(e) n.111 (David A. Thomas ed., 1994 & Supp. 1997).

142. Entirety property is deemed "destroyed" only when both the husband and wife acting jointly file a joint petition and effectively "convey" the property to the trustee. Only if destroyed would the property be available to all creditors (joint and separate) on an equal basis under 11 U.S.C. § 522(b)(2)(B). *See* Grant v. Himmelstein, 203 B.R. 1009, 1013 (Bankr. M.D. Fla. 1996); *see also* Community Nat'l Bank & Trust Co. v. Persky, 893 F.2d 15, 17 (2d Cir. 1989); Kirschenbaum v. Feola, 22 B.R. 81, 85 (Bankr. E.D.N.Y. 1982) (declaring § 522(b)(2)(B) a "nullity" in New York).

Even if the debtors could not exempt entirety property, the Code currently curtails a trustee's ability to sell non-exempt entirety property.[143] A trustee ordinarily has the power to sell a debtor's property free and clear of any other interest as long as the co-owner consents.[144] The trustee can only sell entirety property, however, if it can be shown that: (1) the property cannot easily be partitioned; (2) selling only the estate's interest would yield significantly less than selling the property free of the non-debtor spouse's interest; and (3) the benefit (to the debtor's bankruptcy estate) of selling the home outweighs the harm to the non-debtor spouse.[145] Because selling a family home often causes extreme harm to a non-debtor spouse (especially a homemaker spouse), trustees often fail to satisfy the third requirement and, thus, cannot sell the entirety property.[146] Finally, while courts have not fully resolved when entirety property can be sold or how to generally treat entirety property when a non-filing spouse is present,[147] most courts conclude that a trustee cannot sell either the debtor's or

143. *See In re* Siegel, 204 B.R. 6, 9 (Bankr. W.D.N.Y. 1996) (noting that a trustee's ability to sell entireties property raises a "myriad of difficult issues" and that this ability may be "subject to both statutory and constitutional limitations").

144. *See* 11 U.S.C. § 363(f)(2) (1994).

145. *See id.* § 363(h)(1)-(3). The trustee also must give the non-filing spouse the right of first refusal. *See id.* § 363(i).

146. Trustees fairly easily satisfy the first two requirements. Because most entirety property is the family home, it is often difficult to partition the home effectively. *See* Berland v. Gauthreaux, 206 B.R. 502, 505 (Bankr. N.D. Ill. 1997); Bakst v. Griffin, 123 B.R. 933, 935 (Bankr. S.D. Fla. 1991); Neylon v. Addario, 53 B.R. 335, 338 (D. Mass. 1985). Likewise, because many state laws limit the estate's interest in the entirety property to the right of survivorship, trustees easily show that selling the undivided interest in the entireties property would realize significantly less for the estate than selling the property free and clear of the non-debtor's interest. *See Gauthreaux*, 206 B.R. at 505; Armstrong v. Trout, 146 B.R. 823, 829 (Bankr. D.N.D. 1992). Because courts frequently consider non-economic factors when valuing the "detriment" to the non-debtor spouse if the trustee is allowed to sell the family home, trustees frequently fail to satisfy the third requirement. *See Persky*, 893 F.2d at 20-21 (noting that a non-debtor spouse is unlikely to find new home for minor children); *Gauthreaux*, 206 B.R. at 505-06 (non-debtor spouse contributed all money to purchase property and would incur substantial tax consequences if property was sold); *Siegel*, 204 B.R. at 7 (holding that a sale would deprive a wife of her home of 22 years and would not produce proceeds adequate to acquire comparable residence); *In re* Waxman, 128 B.R. 49, 53 (Bankr. E.D.N.Y. 1991) (observing that a wife had strong family and religious ties to the community); Salem v. Coombs, 86 B.R. 314, 316 (D. Mass. 1988) (noting a co-owner's physical disabilities). *See generally* Price v. Harris, 155 B.R. 948, 950 (Bankr. E.D. Va. 1993) (citing supporting cases).

147. *Compare In re* Shaw, 5 B.R. 107, 111 (Bankr. M.D. Tenn. 1980) (holding that courts cannot sell a non-debtor's interest unless the debtor's *entire* interest in the property was part of the estate), *with In re* Dawson, 10 B.R. 680, 687 (Bankr. E.D. Tenn. 1981) (explaining that while a court can sell a debtor's right of survivorship, the right is typically worth little and sale would not be allowed because of harm to non-debtor spouse resulting from sale).

non-debtor spouse's interest in entirety property unless a creditor exists who has a joint claim against both spouses.[148]

Laws permitting property owners to exempt property (including entirety property) initially had the same policy consideration as bankruptcy laws, i.e., to preserve small, sentimental items of property and to prevent families from sinking into poverty.[149] State laws that allow debtors to hold potentially extravagant real or personal property as tenants by the entirety,[150] however, no longer appear consistent with the policy objectives of bankruptcy laws. Moreover, allowing married couples to rely on state entirety laws unavailable to unmarried couples creates both an over- and under-inclusive system. It is over-inclusive because it allows all married debtors to exempt entirety property even if they live apart, do not have joint debts, or (other than owning entirety property) appear to have separate economic lives. It is under-inclusive because no unmarried debtor can shield entirety property from creditors even if the debtor and another person own property jointly, have joint debts, and have merged their lives economically.

For example, a debtor who is a widower with three minor children, or a debtor who cohabits with his lover and their children, cannot hold property as tenants by the entirety under state law and, thus, cannot shield it from creditors in bankruptcy. Unless he can rely on a state homestead law to exempt the property, the debtor cannot shield his property from creditors even if he desires to protect his family's home or if losing that home forces him and his children into poverty. Similarly, an elderly couple may own a home together but choose not to marry for fear of losing social security or other retirement benefits. Though resembling a married couple in all aspects other than holding

148. *See In re* Monzon, 214 B.R. 38, 40-41 (Bankr. S.D. Fla. 1997); *cf. In re* Lashley, 206 B.R. 950, 952 (Bankr. E.D. Mo. 1997) (stating that a debtor has the right to avoid a creditor's lien on entireties property even though the creditor has a joint judgment against both debtor and non-debtor spouse); *In re* Himmelstein, 203 B.R. 1009, 1014 (Bankr. M.D. Fla. 1996) (ruling that a claim must be reduced to judgment).

149. *See In re* Ellingson, 63 B.R. 271, 277-78 (Bankr. N.D. Iowa 1986) (noting that exemptions further social policies of giving debtors property necessary to survive, protecting debtors' dignity and cultural and religious identity, giving debtors a chance to rehabilitate and earn future income, protecting debtors' families from impoverishment, and shifting the burden of supporting debtors from society to creditors). *See generally* Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 Rutgers L. Rev. 615, 620-27 (1978) (discussing the origin and development of exemption laws and the policies exemption laws should further).

150. *See, e.g., In re* Garner, 952 F.2d 232, 233 (8th Cir. 1991) (noting that a couple owned over 6000 shares of stock held as tenants by the entirety); Ramsey v. Ramsey, 531 S.W.2d 28, 30 (Ark. 1975) (promissory notes); Weathersbee v. Wallace, 686 S.W.2d 447, 450 (Ark. Ct. App. 1985) (certificates of deposits); Colclazier v. Colclazier, 89 So. 2d 261, 264 (Fla. 1956) (corporate stock); Jones v. Jones, 270 A.2d 126, 128 (Md. 1970) (citing a case in which a motor boat was held by a couple as tenants by the entirety); Cohen v. Goldberg, 244 A.2d 763, 764 (Pa. 1968) (savings accounts); *In re* Estate of Holmes, 200 A.2d 745, 746-47 (Pa. 1964) (stocks); *In re* McEwen's Estate, 33 A.2d 14, 15 (Pa. 1943) (beneficial interest in a trust).

a state-issued marriage license, this couple could not own their home as tenants by the entirety even though losing their home could send them into poverty. Finally, elderly siblings or an elderly parent and child may choose to pool their assets, live together, and save expenses but could not shield their property from creditors even though their economic lives may be merged.

Because the Code relies on state laws, Congress understandably allows only legally married couples to claim entirety property as exempt. Congress is not required, however, to recognize this tenancy in bankruptcy merely because state law recognizes the tenancy.[151] Throughout the Code, Congress has elected to either modify or ignore debtors' and creditors' state-created property interests if doing so furthers the substantive goals of federal bankruptcy laws.[152] While bankruptcy courts generally should adopt state law definitions of property interests to avoid forum shopping,[153] bankruptcy laws exist to create a unified federal collection system that operates independent of the vagaries and inconsistencies of various state laws.[154] Thus, while Con-

151. *See In re* Jeffers, 3 B.R. 49, 56 (Bankr. N.D. Ind. 1980) ("There is no doubt that Congress can, through its constitutional authority to establish 'uniform laws on the subject of Bankruptcies throughout the United States,' change state-created property rights."); *see also* Moore v. Bay, 284 U.S. 4, 10 (1931) (concluding that "the Bankruptcy Act . . . is superior to all state laws upon the subject"). *But see* Butner v. United States, 440 U.S. 48, 55 (1979) (requiring bankruptcy courts to interpret laws in a way that prevents a party from receiving a windfall simply because the dispute is resolved in a federal bankruptcy court, rather than a state court (quoting Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961)).

152. For example, the trustee has the right under 11 U.S.C. § 544 to avoid liens as a "hypothetical creditor" even though none of the debtor's creditors actually could avoid the lien under state law. In addition, the Code gives trustees the right to avoid certain pre-petition transfers as preferences under 11 U.S.C. § 547 even though there is no state law analogue to § 547. Finally, the Supreme Court, in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209-12 (1983), concluded that the IRS was required to return property of the debtor that it seized pre-petition even though the debtor would have no right to force the IRS to return the property under applicable state law.

153. *See Butner*, 440 U.S. at 55 (emphasizing that, absent countervailing federal interests, courts should adopt a state's definition of property interests). For a general discussion of the need to prevent forum shopping in bankruptcy disputes, see generally Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. Chi. L. Rev. 815, 825-28 (1987), and Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97, 100-01 (1984).

154. *See* U.S. Const., art. I, § 8, cl. 4; *see also* Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) ("Even where Congress has not completely displaced State regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."); *In re* Baker, 35 F.3d 1353, 1355 (9th Cir. 1994) (stating that federal bankruptcy preemption is more likely to occur where a state statute makes an exception out of the Bankruptcy Code or where the statute is concerned with economic regulation rather than the protection of the public health and safety); *In re* Di Giorgio, 200 B.R. 664, 669 (D. Cal. 1996) ("The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law . . . ." (quoting *Baker*, 35 F.3d at 1353)).

gress may *choose* to recognize state-defined property rights, there is no constitutional or statutory requirement that federal bankruptcy laws adopt state law characterizations of property. Conversely, Congress is not constitutionally or statutorily prohibited from giving unmarried debtors additional protections in property even if state law does not favorably treat such property.[155]

The fact that Congress allows married debtors to rely on state laws to shield entirety property from creditors is not unreasonable. Because doing so unfairly discriminates against unmarried debtors without clearly promoting marriage, however, there is no theoretical justification for continuing to grant this status-based benefit. Indeed, it is unclear why Congress continues to look to state laws in shaping the Code, given the difficulties lower courts have faced when forced to interpret and apply those laws.[156] Congress may recognize entirety laws because it does not want to give creditors protections in bankruptcy that are not available under state laws and to prevent forum shopping. It cannot be said, however, that this promotes marriage. If Congress recognizes entirety laws because it concludes that having a place to live is consistent with bankruptcy's "fresh start" policy, this fresh start should protect the homes of *all* debtors, whether they are married, single, economically linked or not. In short, whether bankruptcy laws recognize entirety laws either to discourage forum shopping or to protect the fresh start, it cannot reasonably be argued that recognizing these laws promotes marriage or that bankruptcy laws *should* promote marriage.

3. Expenses for Non-Debtor Spouse

In states that permit debtors to use federal bankruptcy exemptions to keep property,[157] a debtor can treat the non-debtor spouse as a "dependent" and exempt both property that his "dependent" spouse uses as a residence[158] and, in addition, a limited amount of jewelry and professional supplies the "dependent" spouse uses.[159] Because the term "dependent" is defined to include a spouse "whether or not actu-

155. For example, federal bankruptcy exemptions allow debtors to exempt up to $15,000 in value in real property the debtor or the debtor's dependent uses as a residence. *See* 11 U.S.C § 522(d)(1) (1994). To provide at least some benefits to non-homeowners, the Code allows debtors who did not use the full $15,000 exemption to use up to $7,500 to exempt *any* property. *See id.* § 522(d)(5). More than half of the states prevent debtors from electing to use these exemptions. *See* Collier on Bankruptcy, *supra* note 135, at 522-23 n.4a. This exemption, however, is available when applicable for non-homeowners even if they would not be entitled to exempt property under applicable state law.

156. *See supra* notes 147-48 and accompanying text.

157. The report prepared by the National Bankruptcy Review Commission proposes that Congress enact uniform federal exemptions. *See* National Bankruptcy Review Commission, *supra* note 12, at 121-24.

158. *See* 11 U.S.C. § 522(a)(1), (d)(1).

159. *See id.* § 522(d)(4), (6).

ally dependent,"[160] debtors can exempt this property without proving either that the non-filing spouse cannot afford to purchase those items with the non-filer's own income or that the non-filer is in any way economically dependent on the debtor. Similarly, debtors may treat their non-debtor spouses as dependents and include the spouses' expenses in the budget they prepare in their Chapter 13 cases.[161] While many courts consider a non-filing spouse's income as well as expenses when considering the amount of "reasonably necessary" expenses a Chapter 13 debtor can include in a proposed budget,[162] the Code does not require that non-debtor spouses prove that they are incapable of paying their own expenses (by, for example, earning wages outside the home or finding a higher-paying job) or that they are economically dependent on the debtor. Finally, debtors may treat their non-debtor spouses as dependents when claiming a right to exempt certain retirement income that is "reasonably necessary" for the debtor's or spouse's support.[163]

If a debtor provides all (or nearly all) the financial support for a non-debtor, the non-debtor's expenses *should* be considered during the debtor's bankruptcy case even if the parties are not married. Because there is no general definition for "dependent,"[164] and the one definition the Code provides is not exclusive, it is at least conceivable that a cohabitant could be construed as a "dependent" if her cohabiting partner filed a bankruptcy petition. For a number of reasons, however, cohabiting partners probably would not be treated as each other's dependents. First, courts historically have been reluctant to grant benefits to unmarried couples if those benefits are ones that are

160. *Id.* § 522(a)(1).

161. *See id.* § 1325(b)(2)(A).

162. Chapter 13 debtors must disclose their spouses' income on their bankruptcy schedules. *See* Schedule I, Form Six, Current Income of Individual Debtor(s). Although no statutory authority requires this, courts routinely consider the non-debtor spouse's income when deciding whether a debtor has committed all disposable income to funding a Chapter 13 plan. *See In re* Mathenia, 220 B.R. 427 (Bankr. W.D. Okla. 1998); *In re* Velis, 123 B.R. 497, 511-12 (Bankr. D.N.J. 1991); *In re* Harmon, 118 B.R. 68, 69 (Bankr. E.D. Mich. 1990); *In re* Belt, 106 B.R. 553, 561-62 (Bankr. N.D. Ind. 1989); *In re* Smith, 98 B.R. 44, 46 (Bankr. N.D. Fla. 1989) (citing *In re* Kern, 40 B.R. 26, 28-29 (Bankr. S.D.N.Y. 1984)); *In re* Strong, 84 B.R. 541, 543 (Bankr. N.D. Ind. 1988); *In re* Saunders, 60 B.R. 187, 188 (Bankr. N.D. Ohio 1986); *In re* Sellers, 33 B.R. 854, 857 (Bankr. D. Colo. 1983). Creditors often argue that it is unfair to allow debtors to use separate income for family necessities unless the court considers the extent to which the non-filing spouse's income would remain "disposable" to the debtor, but uncommitted to the plan. *See In re* Soper, 152 B.R. 985, 988 (Bankr. D. Kan. 1993). Courts also consider the non-debtor spouse's income when deciding whether a debtor's student loan should be discharged because it would be an "undue hardship" to force repayment. *See In re* Lezer, 21 B.R. 783, 789 (Bankr. N.D.N.Y. 1982); *In re* Bagley, 4 B.R. 248, 249 (Bankr. D. Ariz. 1980).

163. 11 U.S.C. § 522(d)(10)(E). *See Velis*, 123 B.R. at 512 (discussing § 522(d)(10) and referring to the "Bankruptcy Code fiction that a non-debtor spouse is a dependent of the debtor spouse regardless of actual dependency").

164. *See* 11 U.S.C. § 101.

typically associated with marriage.[165] Second, just as people in common law marriages find it difficult to prove the existence of their marriage,[166] cohabiting partners would have a difficult time convincing a bankruptcy court that they should be treated as dependents since they probably have no legal duty to support each other. Third, bankruptcy courts may be reluctant to extend bankruptcy protections to non-legal dependents, given their general unwillingness to allow debtors to avoid paying debts simply because the debtor wants to support a non-legal dependent.[167] Finally, since the Defense of Marriage Act makes it abundantly clear that Congress wants to restrict marriage benefits only to those who have a state-issued license, it is quite possible that bankruptcy courts would be hesitant to interpret "dependent" to include a cohabiting partner.

If a debtor has agreed to support her non-filing cohabitant and the non-filer is actually dependent on the debtor, courts should not ignore the cohabitant's expenses in the debtor's bankruptcy case. Nevertheless, bankruptcy courts conceivably could adopt a narrow interpretation of the term "dependent" and find that it includes only a spouse, child, or other person who has a legal relationship with the debtor. If courts adopt such a definition, the Code would again be both over and under-inclusive because an unmarried debtor could not exempt property used by her actually dependent cohabitant or include her cohabitant's expenses in her budget even though a married debtor could exempt property used by her financially independent husband and could include his expenses in her Chapter 13 budget.

4. Benefits Available to Cohabitants

At least two benefits that most likely were designed to protect non-debtor spouses currently *are* available to non-debtor cohabitants. Creditors of a Chapter 12 or 13 debtor generally cannot attempt to

165. *See supra* note 94 and accompanying text.

166. *See supra* note 83 and accompanying text.

167. For example, the debtors in *In re Richmond*, 144 B.R. 539 (Bankr. W.D. Okla. 1992), sought relief in Chapter 7 because they could not afford both to repay their debts in a Chapter 13 plan and to provide support to members of their extended family. *See id.* at 540-41. The court dismissed the Chapter 7 case, finding that the debtors had no duty to support family members who are not their legal dependents. *See id.* at 542; *see also In re* Davidoff, 185 B.R. 631, 635-36 (Bankr. S.D. Fla. 1995) (dismissing a Chapter 7 petition in part because the debtor intended to support his adult children and his second wife's child even though his wife received substantial child support payments from the child's biological father); *In re* Bacco, 160 B.R. 283, 289 (Bankr. W.D. Pa. 1993) (dismissing a Chapter 7 petition in part because the debtor proposed to pay a debt for which his father also was liable); *In re* Peluso, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987) (dismissing a Chapter 7 petition because the debtor willingly incurred additional monetary obligations including his proposal to subsidize the automobile insurance and the monthly telephone charges of his emancipated, employed son).

collect consumer debts[168] from anyone who is jointly liable with the debtor until the Chapter 12 or 13 case is closed, dismissed, or converted to a Chapter 7 or 11 case.[169] Thus, if the co-signor acted as a guarantor and received no direct benefit as a result of the debt, Congress temporarily[170] insulates debtors from the indirect pressure they might feel if creditors pursued innocent friends or relatives who co-signed the debt as a favor to the debtor.[171] Because this benefit is not limited to spouses or dependents, creditors would also be prevented from collecting a debt co-signed by a debtor's non-marital partner (unless the partner was the actual beneficiary of the debt). Similarly, the Code allows debtors to repay co-signed consumer debts at a higher rate than other debts.[172] Courts allow this because they believe that this treatment increases the likelihood that the debtor will devote all future income to making plan payments, rather than attempting to protect a friend or loved one by trying to find a way to both make plan payments and to repay the co-signed debt in full.[173]

Since Congress did not restrict co-signor protections to spouses, the bankruptcy system at least implicitly concedes that a debtor *may* have an economic relationship with a person who is not a spouse or dependent and that creditors and debtors *may* benefit if the debtor is allowed to protect a non-spouse co-signor. Given this, the fact that most benefits currently available to a debtor's spouse do not appear designed to protect or promote marriage, and the fact that awarding

168. A consumer debt is defined as a debt incurred primarily for personal, family, or household purposes. *See* 11 U.S.C. § 101(8).

169. *See id.* § 1301(a)(2). Creditors are allowed to collect the debt if (1) the co-debtor became liable on the debt in the ordinary course of her business, (2) the debt was actually designed to benefit the co-debtor, (3) the debtor's Chapter 13 plan does not propose to pay the creditor in full, or (4) the creditor would be irreparably harmed if it is not allowed to collect the debt. *See id.* § 1301(a)(1), (c)(1)-(3); *see also id.* § 1201(a) (co-debtor protection in Chapter 12 family farmer cases).

170. Creditors can petition the court to have the automatic stay lifted to enable them to collect the debt from the co-obligor and, in any event, can pursue the co-obligor for any deficiency amount if the debtor does not fully repay the creditor. *See id.* § 1301(c).

171. *See In re* Case, 148 B.R. 901, 902 (Bankr. W.D. Mo. 1992); H.R. Rep. No. 95-595, at 426 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5811.

172. *See* 11 U.S.C. § 1322(b)(1); *In re* Chapman, 146 B.R. 411, 416 (Bankr. N.D. Ill. 1992); *In re* Dornon, 103 B.R. 61, 65 (Bankr. N.D.N.Y. 1989); *In re* Todd, 65 B.R. 249, 253 (Bankr. N.D. Ill. 1986); *In re* Perkins, 55 B.R. 422, 425-26 (Bankr. N.D. Okla. 1985). Indeed, courts have confirmed plans that repaid joint unsecured debts in full while giving other unsecured debts less than 10%. *See, e.g.*, Spokane Ry. Credit Union v. Gonzales, 172 B.R. 320, 328 (Bankr. E.D. Wash. 1994) (finding that co-signed debts may be classified separately from other unsecured debts); *Dornon*, 103 B.R. at 62 (same). *But see In re* Battista, 180 B.R. 355, 357 (Bankr. D.N.H. 1995) (refusing to confirm plan that paid co-debtor claims in full but paid other unsecured claims only six percent).

173. *See Battista*, 180 B.R. at 357; *In re* Martin, 189 B.R. 619, 627-28 (Bankr. E.D. Va. 1995); *Gonzales*, 172 B.R. at 328-30; *In re* Cheak, 171 B.R. 55, 57-58 (Bankr. S.D. Ill. 1994); *In re* Easley, 72 B.R. 948, 956 (Bankr. M.D. Tenn. 1987); *Todd*, 65 B.R. at 252-53; *Perkins*, 55 B.R. at 425-26.

most marital benefits creates a flawed over and under-inclusive system, bankruptcy laws should be revised to award benefits without regard to marital status.

IV. AWARDING BANKRUPTCY BENEFITS BASED ON ECONOMIC, NOT MARITAL, RELATIONSHIPS

Because many of the legal distinctions between married and unmarried couples have largely disappeared,[174] Congress should revise the current bankruptcy system to ensure that it awards benefits based on the economic, rather than the marital, relationship between two individuals. Just as tax scholars have noted when discussing whether married couples should be granted favorable tax benefits,[175] little

174. For example, wives can now sue their husbands for assault and battery and spouses can be prosecuted for rape. *See* State v. Rider, 449 So. 2d 903 (Fla. Dist. Ct. App. 1984) (holding that a spouse could be prosecuted for sexual battery upon the other spouse); Warren v. State, 336 S.E.2d 221 (Ga. 1985) (holding that there is no implicit marital exemption for rape and aggravated sodomy); People v. De Stefano, 467 N.Y.S.2d 506 (Suffolk County Ct. 1983) (declaring that a rape statute that grants husband immunity from prosecution would violate the equal protection clause of state and federal constitutions); Weishaupt v. Commonwealth, 315 S.E.2d 847 (Va. 1984) (affirming a spousal rape conviction because a wife revoked her implied consent to marital sex). In addition, unmarried couples can now legally have sex in all but thirteen states and the District of Columbia, which still maintain their fornication statutes. *See, e.g.*, D.C. Code Ann. § 22-1002 (1996) (making fornication punishable by $300 fine or six months imprisonment or both); Ga. Code Ann. § 16-6-18 (1996) (defining fornication as a misdemeanor); Idaho Code § 18-6603 (1997) (prohibiting unmarried people of the opposite sex from having sexual intercourse); 720 Ill. Comp. Stat. 5/11-8 (West 1993) (making fornication punishable as a Class "B" misdemeanor); Mass. Ann. Laws ch. 272, § 18 (Law. Co-op. 1992) (making fornication punishable by imprisonment of not more than three months or fine not more than $30); Minn. Stat. Ann. § 609.34 (West 1987) (defining fornication as a misdemeanor); Miss. Code Ann. § 97-29-1 (1994) (making fornication punishable by not more than $500 fine and imprisonment for not more than six months); N.M. Stat. Ann. § 30-10-2 (Michie 1994) (warning fornicators to cease and desist); N.C. Gen. Stat. § 14-184 (1993) (defining fornication as a Class "2" misdemeanor); N.D. Cent. Code § 12.1-20-10 (1997) (defining fornication as a Class "B" misdemeanor); S.C. Code Ann. § 16-15-60 (Law. Co-op. 1985) (making fornication punishable by fine of $100-$500 or imprisonment for six to twelve months or both); Utah Code Ann. § 76-7-104 (1995) (defining fornication as a Class "B" misdemeanor); Va. Code Ann. § 18.2-344 (Michie 1996) (defining fornication as a Class "4" misdemeanor); W. Va. Code § 61-8-3 (1997) (making fornication punishable by fine of not less than $20).

175. Several authors have advanced arguments concerning the significance of marital status in income taxation. *See* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 Stan. L. Rev. 1389 (1975); Pamela B. Gann, *Abandoning Marital Status as a Factor In Allocating Income Tax Burdens*, 59 Tex. L. Rev. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 Hastings L.J. 63 (1993); Daniel J. Lathrope, *State-Defined Marital Status: Its Future as an Operative Tax Factor*, 17 U.C. Davis L. Rev. 257 (1983); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 Yale L.J. 595, 617-19 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. Rev. 983 (1993); Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 Va. Tax Rev. 773 (1989); Jeanette Anderson Winn & Marshall Winn, *Till Death Do We Split: Married Couples and Single*

empirical evidence exists to determine the extent to which married couples are justifiably entitled to bankruptcy benefits because they share income or debts.[176] Without citing any empirical evidence, many bankruptcy courts, like Congress, make decisions based on their assumption that married couples maintain a joint household.[177] Given the temporal nature of many marriages,[178] and the statistical probability that fifty percent of all marriages will end in divorce,[179] it is increasingly unlikely that modern marriages will be "traditional" ones where the spouses pool and share all income, own all assets jointly, and are jointly liable for all debts. Indeed, since most marital unions consist of two market wage-earners,[180] spouses (especially higher income ones) in some marriages may choose to have completely separate financial lives.[181] Conversely, the drastic increase in the number of unmarried, cohabiting couples, some of whom may choose to have interlocking economic lives, further suggests that

Persons Under the Individual Income Tax, 34 S.C. L. Rev. 829 (1983); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. Cal. L. Rev. 339 (1994).

176. Kornhauser, *supra* note 175, at 80. Many family law scholars assume that spouses share at least some financial resources and that spouses presume that they will pool their funds. *See* Regan, *Spouses and Strangers*, *supra* note 51, at 2385-86 nn.390-94.

177. *See, e.g.*, *In re* Carter, 205 B.R. 733, 736 (Bankr. E.D. Pa. 1996) (discussing the "reality that married couples live as a unit, pooling their income and expenses"); *In re* Berndt, 127 B.R. 222, 225 (Bankr. D.N.D. 1991) ("As husband and wife . . . the Debtor and his non-joining spouse maintain a joint household and most of their living expenses are, as is typical, incurred in that fashion without segregation or regard as to which spouse consumed the benefit."); *see also* Chambers, *supra* note 76, at 470-71 (observing that laws providing favorable treatment to married couples "build on beliefs or guesses about the economic relationships that married persons actually have and on prescriptive views about what those relationships ought to be").

178. *See* Fineman, *supra* note 22, at 4 (describing marriage as the "most tenuous, least permanent, of our intimate relationships that is afforded the most significant and privileged position in both public and private institutions—subsidized on both ideological and economic levels"); *see also* Bowman & Cornish, *supra* note 15, at 1179-80 (1992) (describing marriage as having an "indeterminate duration" (quoting Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 2.1, at 30 (2d ed. 1987))).

179. *See supra* note 13.

180. *See* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 22 (Ct. App. 1993) (Poché, J., dissenting) ("For better or worse, we have to a great extent left behind the comfortable and familiar gender-based roles evoked by Norman Rockwell paintings."). *See generally* Steven Mintz, *New Rules: Postwar Families*, *in* American Families: A Research Guide and Historical Handbook 184 (Joseph M. Hawes & Elizabeth I. Nybakken eds., 1991).

181. *See* Schmuckler, *supra* note 75, at 364. One comprehensive study of gay and straight married and unmarried couples concluded that only those couples who believed their marriages would last forever completely merged their lives financially. *See* Philip Blumstein & Pepper Schwartz, American Couples 103-05 (1983).

awarding public—or private[182]—benefits based on marital status[183] is no longer justified.[184]

While one bankruptcy court was willing to assume, for limited purposes, that (1) a debtor, his cohabitant, and their children were a family unit, (2) he could claim expenses for her, and (3) her income should be considered when calculating his income,[185] it is unclear whether unmarried couples actually share living expenses and jointly own assets at a rate equal to or greater than married couples.[186] Indeed, the limited available empirical evidence suggests that most unmarried couples do *not* pool their assets because they realize that they generally cannot rely on state laws to protect them if they need to disentangle their lives.[187] According to the most comprehensive survey of the economic relationships of married and unmarried couples,

182. Bank of America, one of the nation's largest financial institutions, recently extended health benefits to its employees' extended families. By allowing employees to designate a spouse, unmarried partner, sibling, or parent (up to age 65) as a benefit recipient, the company acknowledged that many employees support families that include more than just their spouses and their children. *See* Edmund Sanders, *B of A Offers Partners and Extended Families Benefits*, Orange County Reg., Mar. 12, 1997, at C4; *see also* Hinman v. Dep't of Personnel Admin., 213 Cal. Rptr. 410 (Ct. App. 1985) (detailing insurance dispute involving same-sex couple who lived together for over 12 years, had joint bank accounts, were named as the primary beneficiary in each other's wills and insurance policies and otherwise "shared the common necessities of life"); Brinikin v. Southern Pacific Transp. Co., No. 796 271, slip op. at 2 (Cal. Ct. App. Aug. 27, 1987) (detailing bereavement leave dispute involving same sex couple who lived together and shared expenses). *See generally* Robert L. Eblin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 Ohio. St. L.J. 1067, 1078-79 (1990) (discussing steps taken by an employee to secure benefits for his domestic partner).

183. *See generally* Regan, Family Law, *supra* note 19, at 39-41 (discussing the declining importance of status); Glendon, *Marriage and the State*, *supra* note 23, at 688-93 (discussing increasingly tolerant judicial attitudes toward informal relationships); Schneider, *supra* note 50, at 1820 (discussing the change in the nature of the moral discourse in family law).

184. Denying benefits to unmarried debtors may especially burden women, many of whom have a shared financial relationship with people other than spouses. *See* Weitzman, Contract, *supra* note 25, at 198-99 (observing that the lower-class black family has frequently been characterized as an extended matriarchal family which emphasizes blood, not conjugal, relationships); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Va. L. Rev. 2181, 2190 (1995) (discussing the role of the extended family in the African-American community); Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 Mich. L. Rev. 1506, 1552 (1990) (noting that bankruptcy law fails to recognize the changing nature of the American family structure); *see also* Special Comm. on Gender, D.C. Cir. Task Force on Gender, Race, and Ethnic Bias, Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias (1996) (noting that access to bankruptcy protections may be denied to some individuals because of the Code's restrictions on the types of couples who are allowed to file a joint bankruptcy petition), *reprinted in* 84 Geo. L.J. 1657, 1758 n.145.

185. *In re* Bicsak, 207 B.R. 657, 658 (Bankr. W.D. Mo. 1997).

186. *See generally* Glendon, *Marriage and the State*, *supra* note 23, at 684-97 (discussing the emerging trend of cohabiting couples).

187. *See* Blumstein & Schwartz, *supra* note 181, at 97.

gay couples pool their money only when their relationship is a long-term one—such as marriage—which they believe will last forever.[188]

As a matter of bankruptcy policy, however, it is irrelevant whether it is statistically likely that married *or* unmarried couples in fact share income or debts. "Marital" benefits should be awarded to an unmarried couple only if the couple has established by objective evidence that they are an "economic unit." Once they prove they are a unit, they should be entitled to all benefits currently awarded only to married couples. To accomplish this, I propose that Congress amend the Code as follows: First, § 101, the Code's definitional section, should be amended to include the term "economic unit," defined as a public or private arrangement between members who have a committed relationship involving shared financial responsibilities. The term "dependent" should also be added to § 101 and should include within its definition a member of an economic unit. Section 302 should be amended to permit a joint case to be commenced by the filing of a petition by both members of an economic unit. Finally, solely for the purposes of exempting property or preventing a trustee from selling property, a home owned by an economic unit should be treated as entirety property—even though the unit could not characterize the property as entirety property under applicable state law.

To determine what type of proof is sufficient to establish the existence of an economic unit, bankruptcy courts could rely on the standards and tests state courts, municipalities, and private employers have used when deciding whether an unmarried person is entitled to receive benefits as the "domestic partner" of a person who is entitled to certain public or private benefits.[189] For example, when deciding whether a non-spouse was entitled to certain benefits under a rent control law, the New York Court of Appeals examined the following factors: the exclusivity and duration of the partners' relationship; their families' knowledge of the relationship; the existence of joint assets such as bank accounts, safe deposit boxes and credit cards; and

188. See *id.* at 105-06.

189. The following municipalities have adopted such laws: Berkeley, San Francisco, Santa Cruz, and West Hollywood, California; Denver, Colorado; Chicago, Illinois; Baltimore and Takoma Park, Maryland; New York, New York; Arlington, Virginia; Seattle, Washington; and Madison, Wisconsin. Massachusetts, New York and Vermont also provide limited domestic partner benefits for state workers. In addition, the following companies and organizations also have extended employee benefits to unmarried cohabitants: Advanced Micro Devices, American Express, Apple Computer, Inc., Bank of America, Boston Globe, Coors Brewing Co., Democratic National Committee, Dow Chemical Co., Eastman Kodak, Holland & Knight, IBM Corporation, Levi Strauss, Microsoft, New York Times, Northern Telecom, Perot Systems, St. Petersburg Times, Seattle Times, Time-Warner, Vinson & Elkins, and Walt Disney Co. *See Democrats Give Health Benefits to Gay Couples*, N.Y. Times, May 17, 1997, at A11; *Good News for Partners of Unmarried Employees*, Wash. Post, Apr. 19, 1997, at B1; Mark Hansen, *Bolstering Benefits*, A.B.A. J., Jan. 1988, at 32; Diana Kunde, *Perot Systems Offers Health Benefits to Employees' Partners*, Dallas Morning News, Dec. 14, 1996, at 1F; Sanders, *supra* note 182.

whether the partners named each other as beneficiaries in life insurance policies.[190] Municipalities have adopted a number of definitions and qualifications to determine whether a "domestic partner" is entitled to health coverage. For example, one jurisdiction requires the partners to show that they are unmarried adults who have lived together continuously for at least one year and "who have a close and committed personal relationship involving shared responsibilities."[191] Several ordinances require partners to assert that they share the common necessities of life, that they are jointly responsible for their basic living expenses, and that they are generally responsible for each other's welfare.[192] At least one municipality also requires partners to swear that they intend to remain together indefinitely.[193] Many municipalities require partners to register as domestic partners.[194]

If a couple satisfies such a test, they should enjoy marital benefits irrespective of whether they are in a publicly or privately arranged relationship.[195] While adopting some of these tests may in fact prevent some married couples from being treated as economic units, adopting a test that more accurately reflects a couple's economic realities would help to eliminate the uncertainty concerning who is eligible to receive benefits based on their involvement in an economic unit.[196]

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190. *See* Braschi v. Stahl Assocs., 543 N.E.2d 49, 55 (N.Y. 1989).

191. Berger, *supra* note 15, at 424 (citing New York, N.Y., Executive Order 123 (Aug. 7, 1989)). Several domestic partner ordinances have similar requirements. *See id.* at 423-26.

192. *See* Berger, *supra* note 15, at 425 (discussing the Santa Cruz, California domestic partnership ordinance); Bowman & Cornish, *supra* note 15, at 1193 (quoting Los Angeles, California and Seattle, Washington ordinances).

193. *See* Berger, *supra* note 15, at 432 (discussing Santa Cruz domestic partnership ordinance). In discussing these ordinances, Bowman & Cornish suggest that employers grant benefits to any person in a domestic partnership as long as both partners are "responsible for the support of the other" and would limit the definition of support to the types of items that historically would have been covered by the Doctrine of Necessaries, i.e., food, clothing, a suitable residence, and medical attention. *See* Bowman & Cornish, *supra* note 15, at 1206. These authors would also make a party who fraudulently applied for domestic partnership benefits liable for the value of the benefits received as well as reasonable attorney's fees. *See id.* at 1211.

194. *See* Berger, *supra* note 15, at 424-25 (discussing filing requirements of Santa Cruz and New York).

195. The court in *In re Fischel*, 103 B.R. 44 (Bankr. N.D.N.Y. 1989), refused to confirm a Chapter 13 plan that would be funded by the debtor's significant other even though the debtor and significant other lived together, pooled income, and had some joint debts. *Id.* at 49. Under my proposal, the plan should be confirmed just as courts routinely confirm Chapter 13 plans funded by non-debtor spouses. *See In re* Antoine, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1997) (holding that a non-debtor wife is permitted to fully fund plan of her unemployed husband). For a discussion regarding how family law destroys the marital model and collapses all sexual relationships into a private category that should not be sanctioned, privileged, or preferred by law, see Fineman, *supra* note 22, at 5.

196. Rather than imposing a numerical requirement, Congress could give courts the discretion to determine the boundaries of "substantial" just as courts currently have the discretion to decide if a married couple's assets are so intertwined that their cases should be substantively consolidated. For example, the district court in *Austin Bank*

Moreover, because debtors would rely on public, objective evidence in proving they are an economic unit, this test would reduce transaction costs for both debtors (who must prove they are an economic unit) and creditors (who can quickly determine whether a potential borrower is part of an economic unit). While it may be easier to determine dependency under current law since unmarried couples are never treated as dependants, such a rule would facilitate dependency determinations among married debtors. That is, if a creditor objects to a debtor's attempt to characterize a spouse as a "dependant" despite their status as married, the couple is still required by the Code to prove their dependency in court.

Some might argue that giving an economic unit the right to claim benefits currently available only to married debtors potentially expands the rights unmarried debtors would have under state law. Notwithstanding this risk, there are a number of reasons why awarding benefits based on a couple's economic relationship is preferable to the current treatment of unmarried couples.

First, awarding bankruptcy benefits to all economic units is consistent with the assumption that some marital benefits (most notably the right to file a joint petition) should be awarded to spouses because they are jointly liable on their debts and jointly hold most of their property.[197] Extending the right to file jointly to unmarried economic units would further bankruptcy policy by eliminating duplicate filing and attorney's fees, thereby reducing administrative expenses and allowing those funds to be used for either the debtor's fresh start or debt repayment. Unlike the subsidies associated with most benefits awarded based on marital status, awarding bankruptcy benefits to unmarried couples would have little, if any, adverse economic impact on the government coffers[198] yet would protect both the debtor's fresh

v. Chan, 113 B.R. 427 (N.D. Ill. 1990), affirmed the bankruptcy court's decision granting the debtors' motion to consolidate their estates. *See id.* at 429. The bankruptcy court found that 85% of the couple's assets were jointly held and that the debtors' affairs were too intermingled to be separated. *See id.* While affirming the decision to allow the couples assets to be substantively consolidated, the district court noted that the "degree of intermingling and obscurity [also] might have supported an order denying consolidation." *Id.*

197. *See* S. Rep. No. 95-989, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5818.

198. Extending the benefits married people receive from the government (including tax benefits and certain retirement entitlements) would, in most cases, entail additional costs if those benefits are extended to their unmarried partners. Likewise, private benefits typically available only to married employees include employee health benefits, the right to take unpaid leave to care for a spouse, and reduced family memberships at health clubs or recreational facilities. *See, e.g.* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 5 U.S.C. §§ 6381-6387 (1994)) (outlining criteria for family and medical leave). Extending those benefits to members of an economic unit also would entail additional costs. In contrast, awarding benefits to all economic units most likely poses no additional costs to creditors or

start and the creditor's desire to be repaid as much of the debt as possible.

Second, allowing debtors to provide for expenses of their economic partner is consistent with the policy supporting the Code's treatment of dependents. Congress most likely allowed debtors to take into account the economic needs of their dependents (even if not actually dependent) because it assumed that married couples are economically linked, or that the person in the family who incurred the debts is also the one who earns the income. Permitting a debtor either to exempt property used by, or to budget for the expenses of, the economically dependent member of the unit is consistent with the paradigm of the economic provider being allowed to budget for a non-debtor dependent. Moreover, treating a member of an economic unit as a dependent is consistent with the Code's literal definition of dependent, which includes, but is not limited to, a spouse.[199]

Finally, because my proposal disregards marital status,[200] Congress could award benefits to a debtor's lover, cohabitant, or common law spouse yet not be required to recognize same sex or common law marriages.[201]

Granting marital benefits to economic units would further bankruptcy policy without expanding a debtor's property rights under state law. For example, if a mother/daughter economic unit were sued in a state court, they would be precluded from arguing that their home was entirety property exempt from seizure, because they are not married to each other. Under my proposal, they could treat the home as entirety property in a bankruptcy proceeding even though they could not shield the property from creditors in a state court collection action. Because the proposal might expand the debtor's right to exercise certain state property interests in bankruptcy, it may cause some economic units to choose a bankruptcy forum to resolve their disputes

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the government and has the additional benefit of facilitating the administration of the two related bankruptcy estates.

199. *See* 11 U.S.C. § 522(a)(1) (1994) ("'[D]ependent' includes spouse, whether or not actually dependent.").

200. *Cf.* William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 La. L. Rev. 1677, 1716 (1984) (arguing that legislation creating a status of "lawful cohabitation" would avoid litigation over whether cohabiting couples should be viewed as married when awarding federal benefits). *See generally* Fineman, *supra* note 22, at 228-30 (arguing for abolition of marriage as a legal category and with it any privilege based on sexual affiliation in family law and replacing the status relationship with contract, property, tort, and criminal law doctrines).

201. By ignoring marital status altogether, bankruptcy courts can avoid the horror, so feared by the supporters of the Defense of Marriage Act, of fanning "[t]he flames of hedonism, the flames of narcissism, [and] the flames of self-centered morality . . . licking at the very foundation of our society: the family unit." 142 Cong. Rec. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr); *see also* Berger, *supra* note 15, at 451 (arguing that domestic partnership laws "should strive to protect alternative family arrangements" as opposed to marriage, which is "a distinct and separate goal").

with creditors.[202] Despite the potential for forum shopping, Congress should allow economic units (whether married or unmarried) to treat their home as entirety property in a bankruptcy proceeding because preventing creditors from foreclosing on a debtor's home is consistent with bankruptcy policy. Moreover, as discussed in part III.B.3, if Congress has determined that having a place to live is consistent with the fresh start married debtors need, there is no theoretical justification for limiting the scope of the fresh start simply because the people who inhabit the home are not married.

Adopting a functional, economic approach to awarding bankruptcy benefits is not devoid of risks. First, it requires courts to exercise discretion when deciding whether a couple has sufficiently demonstrated that it is an economic unit.[203] Allowing courts to exercise such discretion may cause some uncertainty and potentially increase administrative costs by requiring an economic unit determination in virtually all cases involving couples in formal or informal marriages. Evaluating whether a couple is an economic unit, however, should be a relatively simple task for bankruptcy courts. First, debtors would be required to submit objective evidence (i.e., deeds, bank statements, loan documents, wills, insurance policies, etc.) to prove that they are members of an economic unit. Moreover, courts are already authorized to perform a similar analysis when deciding whether to combine the assets of married couples who file jointly.

That is, while filing a joint petition causes the couple's separate estates to be jointly administered, it does not require courts to combine their assets.[204] Combining, or "substantively consolidating," estates is the procedure bankruptcy courts use to place the assets of more than one debtor (or a debtor and a non-debtor) in one joint pool, thereby giving the creditors of one debtor the right to satisfy their claims from the assets of another.[205] While Congress assumed that most married couples have joint debts and assets, it recognized that some do not and, accordingly, gave courts the discretion to decide whether the spouses' assets and liabilities should be combined into a single pool.[206]

202. Just as the Code currently attempts to give at least some benefits to homeowners and non-homeowners by allowing the latter group to exempt an additional amount of personal property because they have no homestead to exempt, *see* 11 U.S.C. § 522(d)(1), (d)(5), the Code could allow both married and unmarried debtors to exempt a homestead in bankruptcy even if they could not do so under applicable state law.

203. *See* Kornhauser, *supra* note 175, at 71 (raising same concerns when deciding whether a non-marital economic unit nevertheless should be treated as a taxable unit).

204. *See* Fed. R. Bankr. P. 1015(b).

205. Federal Deposit Ins. Corp. v. Reider (*In re* Reider), 31 F.3d 1102, 1109 (11th Cir. 1994) (discussing differences between joint administration and substantive consolidation).

206. *See* 11 U.S.C. § 302(b) (giving courts the discretion to "determine the extent, if any, to which the debtors' estates shall be consolidated"); *see also* J. Stephen Gilbert,

Because courts consider whether the spouses' assets and debts are substantially intertwined before consolidating the cases, bankruptcy courts already perform the type of test I propose, albeit in another context.[207] If courts are competent to determine whether spouses' assets and debts are intertwined, they can also determine whether cohabitants' assets and debts are intertwined.

Finally, to alleviate any concern that giving unmarried couples marital benefits will dramatically increase the number of people seeking those benefits, Congress can always erect a high threshold that requires, for example, a showing that more than 75 percent of their assets or debts are joint.[208] Having a high joint debt/asset threshold would have the secondary benefit of alleviating creditor concern that giving benefits to unmarried couples unfairly alters their rights *ex ante*. That is, creditors might argue that it is unfair to force them to subsidize the debtor's choice to become economically entangled with someone other than a legal spouse because the creditor insured against subsidizing only spouses recognized under applicable state law.[209] Modern credit practices substantially undermine this argument. Any prudent creditor would know that a debtor is a member of an economic unit because an economic unit, by definition, would own a substantial number of joint assets and have substantial joint debts. A simple credit check, which any reasonable creditor would perform, would disclose that the potential borrower is financially linked to someone else.[210] Moreover, once bankruptcy laws are changed to

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Substantive Consolidation in Bankruptcy: A Primer, 43 Vand. L. Rev. 207, 231 (1990) (discussing a two-step approach used to decide whether cases will be consolidated).

207. *See In re* Knobel, 167 B.R. 436, 441 n.10 (Bankr. W.D. Tex. 1994); *In re* Chan, 113 B.R. 427 (N.D. Ill. 1990); *In re* Steury, 94 B.R. 553, 554 (Bankr. N.D. Ind. 1988); *In re* Birch, 72 B.R. 103, 106 (Bankr. D.N.H. 1987); *In re* Scholz, 57 B.R. 259, 262 (Bankr. N.D. Ohio 1986); Ohio v. Wilkinson (*In re* Winston), 24 B.R. 474 (Bankr. S.D. Ohio 1982); *In re* Barnes, 14 B.R. 788, 790 (Bankr. N.D. Tex. 1981).

208. While adopting a very high threshold or adopting the test used by the court in *Braschi v. Stahl Associates*, 543 N.E.2d 49, 54-55 (N.Y. 1989), would reduce the number of unmarried couples who would qualify as an economic unit, it also may prevent some married couples from receiving the benefits.

209. *See* Jordan H. Leibman & Anne S. Kelly, *Accountants' Liability to Third Parties for Negligent Misrepresentation: The Search for a New Limiting Principle*, 30 Am. Bus. L.J. 345, 423 (1992) ("If a third party creditor . . . knows *ex ante* that there is a risk that the business to which it trusts its funds . . . may become judgment-proof; the third party can assess that risk and adjust the terms of its loan . . . accordingly."); *see also* Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989) (urging courts to distinguish uses of bankruptcy that further the *ex ante* bargain and those that further the interests of only one group).

210. Most loan and credit card applications ask the potential borrower to disclose joint debts. For larger loans, lenders require debtors to complete a full financial statement that lists all assets and debts. *See* Letter from F. John Dwyer, Jr., Senior Vice President, The Old Point National Bank to A. Mechele Dickerson, Assistant Professor of Law, the College of William and Mary (May 15, 1996) (on file with author). Even if a debtor does not disclose this information, lenders who enter into a secured transaction involving real estate routinely check land records to confirm property

award benefits to all economic units, creditors will adjust their practices and will protect themselves from adverse bankruptcy treatment when they determine that a potential borrower is in an economic relationship with someone else.

CONCLUSION

Many Americans may continue to believe that the only legitimate relationship between unrelated adults is one that is sanctioned by a marital tie.[211] As the choice to marry is a non-economic right,[212] however, and bankruptcy laws are designed to regulate a debtor's economic rights, bankruptcy laws should not be used to either promote or reject this private, non-economic choice.[213] While bankruptcy laws are often used to respond to public policy issues,[214] to facilitate debt repayment, and to protect debtors rights to a fresh start, Congress should grant marital benefits to any type of unit that functions economically like a married couple.[215]

Notwithstanding the rhetoric used during the debate over the Defense of Marriage Act,[216] awarding bankruptcy benefits based on an economic rather than a marital association is consistent with the Code's goals and policies. Adopting this proposal would not, however, force courts to recognize informal marriages or otherwise become entangled in state family law. Indeed, by ignoring marital status altogether and instead examining economic involvement, Congress can avoid deciding whether recognizing informal marriages demeans or otherwise denigrates the institution of heterosexual marriage[217] and

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ownership. Moreover, creditors often confirm information obtained from a credit applicant by contacting the applicant's references and employers and by requesting a report from a consumer reporting agency. Where a joint applicant is involved, a creditor usually obtains a report on the joint applicant as well. *See* Federal Regulation of Consumer Credit ¶ 2.04[2], at 2-32 to 2-33 (American Bar Association Young Lawyers Division ed., 1981).

211. Professor Martha Fineman has argued that even those who believe that divorced mothers and their children or long-term unmarried cohabitants can constitute a "family" may still consider single motherhood to be "deviant." Fineman, *supra* note 22, at 147.

212. This "right" is, of course, made available only to people who choose to marry someone of the opposite sex.

213. *See generally* Kandoian, *supra* note 82 (arguing that the social approval of marriage and marriage-like relationships affects the legal regulation of marriage).

214. *See supra* note 111.

215. For a persuasive argument that a sexual relationship between individuals should not be used to determine whether the individuals constitute a "family" or are entitled to benefits awarded only to families, see Fineman, *supra* note 22, at 143-66. *See also In re* Allison, 209 B.R. 494 (Bankr. D. Neb. 1997) (concluding that a disabled, alcoholic debtor, his unemployed adult welfare recipient daughter, and his grandson—who had severe allergies—should be treated as a household because they pool their family resources to survive).

216. *See supra* note 6.

217. *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979) (expressing concern that allowing a cohabitant to recover contract damages after the cohabiting relation-

can move bankruptcy laws closer to the reality of how modern couples govern their lives both inside and outside of marriage.[218]

ship terminated would make cohabitation an attractive alternative to marriage and contravene the State's desire to preserve the integrity of marriage); *see also* Reppy, *supra* note 200, at 1683-85 (arguing that allowing cohabitants to obtain legal marriage benefits will demean marriage); *cf.* Glendon, *Marriage and the State*, *supra* note 23, at 692 (observing that historical response to cohabitation was to pretend it was marriage and then attempt to attribute to it the legal incidents of marriage).

218. *Cf.* Weitzman, Contract, *supra* note 25, at 227 (arguing for treating marriage as a contract because it "allows couples to formulate an agreement that conforms to contemporary social reality" not the "outdated framework of traditional legal marriage"); Shultz, *supra* note 51, at 333 (arguing that contractual ordering in modern marriages is necessary because marriage as "a social institution . . . has outgrown the legal structure that used to govern it").