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TENANCIES IN ANTIQUITY: A TRANSFORMATION OF CONCURRENT OWNERSHIP FOR MODERN RELATIONSHIPS

PETER M. CARROZZO*

I. INTRODUCTION

The methods of concurrent ownership of property recognized in the United States today are nearly six hundred years old.¹ They were born at a time when the Renaissance was barely gestating, when a flat earth was the center of the universe, and when kings were divine.² To fully appreciate the antiquity of these ancient tenancies, consider the state of the fifteenth century world: it was a time before the discovery and colonization of the New World, and a time before the rise of democracy and constitution-making in the very places where these tenancies are now prevalent.³ Yet the relics of real property law persist.⁴

This paralysis in the law preserves a special estate for married persons known as the tenancy by the entirety, along with its plethora of rights and benefits.⁵ Currently, the institution of marriage—remarkably older than the concept of land ownership—is at the center of a controversial struggle to expand the institution's definition. Most recently, the Vermont Supreme Court held that the exclusion of same-sex couples from the benefits of marriage violated the state constitution.⁶ Albeit a watershed moment, this is just one battle in a large war. As the war wages on, another option is available. As this Article will propose, that option is to modernize the methods of

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1. See generally CASES AND MATERIALS ON MODERN PROPERTY LAW 242–45, 277–80 (Jon W. Bruce & James W. Ely, Jr. eds., 4th ed. 1999).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 279–80.

6. *Baker v. State*, 744 A.2d 864 (1999).

concurrent ownership of real property and thereby equalize rights among the numerous concepts of "family" which currently exist.

Legal scholars have enumerated the flaws and inadequacies with the methods of concurrent ownership as they are currently composed. In a recent article, John V. Orth uncovers numerous anomalies and intricacies inherent in the tenancy by the entirety.⁷ Professor Orth maneuvers through the muddled incidents of the tenancy by the entirety, frequently commenting on its illogical evolution and "jerry-built structures."⁸ Toward the end of his article, he raises the question of extending the privileges of the estate to unmarried persons.⁹ Considering the current "attenuated" state of marriage and the many couples today "that function as couples but that are not, for one reason or another, legally united," he concludes: "Why should the law—to use fashionable jargon—'privilege' one relationship above others?"¹⁰ This Article attempts to address the call for change trumpeted by Professor Orth.

After discussing the methods of concurrent ownership, describing their ancient origins and languid evolution, and briefly describing the state of the war over equal rights for same-sex relationships (and commenting on those ignored in the controversy), this Article proposes a solution to remedy the inequality—the creation of a new and more equitable tenancy.

II. METHODS OF CONCURRENT OWNERSHIP: AN OVERVIEW

"Concurrent ownership of real property exists whenever two or more persons have a concurrent and equal right to the possession and use of the same parcel of land."¹¹ Alternatively, in the words of William Blackstone, land held in severalty exists whenever a sole tenant holds the land "in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein."¹²

7. John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35 (1997).

8. *Id.* at 43–47.

9. *Id.* at 47.

10. *Id.* at 48.

11. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.1, at 187 (2d ed. 1993).

12. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 179 (Leslie B. Adams ed., 1983) (1785). At the outset of his chapter on estates, Blackstone spends one paragraph on severalty as a method of holding estates in land. Briefly, he notes that it "is the most common . . . [method] of holding an estate," and states that: "there is little or nothing

Today in the United States, three forms of concurrent ownership exist in a majority of jurisdictions. They are joint tenancy, tenancy in common, and tenancy by the entirety.¹³

A. Joint Tenancy

A joint tenancy is an estate in real property owned by two or more individuals where each owner has an equal right to the use and enjoyment of the estate during his or her life.¹⁴ An incidence of joint tenancy is the right of survivorship whereby, upon the death of a joint tenant, the entire estate goes to the survivor.¹⁵ Where three or more persons hold as joint tenants, the remaining survivors share the interest of the deceased joint tenant.¹⁶ This process continues until the last surviving joint tenant takes the entire estate.¹⁷ An estate held in joint tenancy cannot be devised and is not subject to the laws of intestacy as long as one joint tenant survives.¹⁸ Heirs and creditors of a deceased joint tenant have no rights to the estate.¹⁹

Inevitably, the existence of a joint tenancy requires determining whether the four unities—time, title, interest and possession—are present.²⁰ For the four unities to be present, it is necessary for the joint tenants' interests to accrue at the same moment (unity of time); by the same deed or conveyance (unity of title); each joint tenant must possess an equal undivided share of the entire estate (unity of possession); and their interests must be equal in length and quality (unity of interest).²¹ At common law, if one of the four unities was not present, a joint tenancy could not exist.²² An ineffectual attempt to create a joint tenancy results in the creation of a tenancy in common.²³

Although the four unities are still important in determining the

peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise." *Id.*

13. CUNNINGHAM ET AL., *supra* note 11, § 5.1, at 187.

14. 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 3 (1995).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* § 4.

21. *Id.*

22. 7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 51.03[1], at 51-13 (Michael Allen Wolf ed., 1999).

23. 2 THOMAS E. ATKINSON ET AL., *AMERICAN LAW OF PROPERTY* § 6.2, at 9 (A. James Casper ed., 1952). For a discussion of tenancy in common, see *infra* pp. 427-29.

existence of a joint tenancy,²⁴ the trend in several jurisdictions is to replace the rigid unities analysis with an examination of the parties' intent.²⁵ In certain situations, the four unities can become quite cumbersome. For example, where an owner of real property in severalty wants to create a joint tenancy with another, the common law necessitated a transfer to a third party—called a "straw man"—as an intermediary.²⁶ This "straw man" would then transfer the property back to the original owner and the desired joint tenant or tenants.²⁷ Some states have eliminated the necessity for this rigmarole by statute²⁸ or judicial decision,²⁹ allowing a direct conveyance to effectuate the same result. The easing of these rules depicts the further willingness of courts and legislatures to look beyond the four unities since the direct conveyance illustrated above lacks the unities of time and title.

A joint tenancy can only be created by an act of the parties such as a grant or devise.³⁰ Therefore, it is never created by operation of law.³¹ To create a joint tenancy, the habendum clause of the deed or conveying instrument must exhibit the clear intent of the parties.³² So, a transfer "to A and B, and to the survivor of them" or some other similar language is required by courts in order to establish the creation of a joint tenancy.³³ If the deed or other conveying instrument names two or more individuals as grantees and contains no language specifying how the parties shall hold, a tenancy in common results.³⁴

Unilateral severance of a joint tenancy can be achieved simply by an act of one joint tenant that destroys any one of the four unities;³⁵

24. CUNNINGHAM ET AL., *supra* note 11, § 5.3, at 194 n.7.

25. 20 AM. JUR. 2D, *supra* note 14, § 4.

26. CUNNINGHAM ET AL., *supra* note 11, § 5.3, at 198.

27. *Id.*

28. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 184, § 8 (West 1991).

29. *See, e.g.*, Therrien v. Therrien, 42 A.2d 538 (N.H. 1946).

30. 20 AM. JUR. 2D, *supra* note 14, § 9.

31. *Id.*

32. *Id.* § 7.

33. CUNNINGHAM ET AL., *supra* note 11, § 5.3, at 195; *see also In re Russell*, 61 N.E. 166 (N.Y. 1901).

34. 7 POWELL, *supra* note 22, § 50.02[2], at 50-6 to 50-7. This marks a change in the common law, which preferred joint tenancies and required specific language to create a tenancy in common. *Id.* § 50.02[2], at 50-6. Gradually, legislatures and courts eased the requirements of specific language. *Id.* "In the United States, virtually every jurisdiction has a statute that creates a presumption favoring tenancies in common over joint tenancies, or abolishes joint tenancies or the right of survivorship." *Id.*

35. 20 AM. JUR. 2D, *supra* note 14, § 21.

however, intent to sever must be exhibited.³⁶ Also, the joint tenancy can be destroyed by an outright conveyance of one tenant's interest—by entering into an agreement to convey or encumber the estate.³⁷ This may be done without the consent of other joint tenants.³⁸ The ultimate grantee of a joint tenant's interest becomes a tenant in common with the former joint tenant.³⁹ In the case of three or more joint tenants, the remaining tenants continue to hold as joint tenants in relation to each other.⁴⁰

The ability to effectuate a unilateral severance places joint tenants in a precarious situation. As a result, creditors of an individual joint tenant can sever the tenancy through a sale on execution.⁴¹ Upon severance, the new owner will be a tenant in common with the other joint tenants and will inevitably bring a partition action.⁴² Thus, through severance, the entire estate will be destroyed and the original intent of the parties entering into the tenancy will be frustrated.⁴³

An additional idiosyncrasy of the joint tenancy is the loophole by which one joint tenant can make a secret conveyance of his interest, severing his share through a unilateral deed, which will then be placed in a secure place such as a safe deposit box.⁴⁴ Upon the death of the unscrupulous joint tenant, the deed will be discovered and the remaining joint tenants, as a result of the severance, will have no right of survivorship.⁴⁵ However, if an unsuspecting, innocent joint tenant dies first, the survivorship right of the crafty joint tenant will be preserved and the former secret deed will then be destroyed with no one being any wiser.⁴⁶

B. Tenancy in Common

A tenancy in common is an estate held by two or more persons whereby each tenant has several separate interests in the land but an

36. *Id.*

37. *Id.* §§ 21–22.

38. *Id.*

39. CUNNINGHAM ET AL., *supra* note 11, § 5.4, at 199–200.

40. *Id.* at 200.

41. *See id.* at 202.

42. 20 AM. JUR. 2D, *supra* note 14, § 29.

43. *See generally id.* §§ 21–22, 29.

44. *See* Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 FORDHAM L. REV. 173, 175 (1986).

45. *See id.*

46. *See id.*

undivided possession of the entire estate.⁴⁷ Simply put, as Blackstone states, "tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession."⁴⁸ As a result of these several separate interests, and unlike the joint tenancy, there is no right of survivorship between or among tenants in common.⁴⁹ When one tenant in common dies, his or her interest is administered as part of his or her estate and will either devise by will or descend by the laws of intestacy.⁵⁰ The four unities are not necessary to create a tenancy in common.⁵¹ Tenants may acquire by different conveyances at different times and be in possession of unequal shares.⁵² Also, one tenant in common could be in possession of a life estate while the another possesses a remainder interest.⁵³ The sole unity required is that of possession.⁵⁴

A tenancy in common can arise by voluntary acts of the parties, either through a deed or other form of *inter vivos* conveyance or testamentary gift.⁵⁵ Additionally, since it is the default method of ownership, a tenancy in common can arise by operation of law: either by the laws of intestacy, by a failed attempt to create a different form of cotenancy, or by the termination of a marriage of tenants by the entirety.⁵⁶

Tenancies in common are freely alienable by the parties without obtaining the consent of cotenants.⁵⁷ Thus, individual shares can be transferred by deed, lease, will, or can be encumbered by a mortgage.⁵⁸ Similar to joint tenancies, the creditors of a tenant in common can perfect a judgment against and foreclose upon individual shares.⁵⁹ Upon foreclosure, the creditor becomes a tenant in common with the remaining cotenants.⁶⁰ Once again, the original intent of the parties

47. 7 POWELL, *supra* note 22, § 50.01[1], at 50-4.

48. 2 BLACKSTONE, *supra* note 12, at 194.

49. *Id.*

50. 7 POWELL, *supra* note 22, § 50.01[2], at 50-5.

51. CUNNINGHAM ET AL., *supra* note 11, § 5.2.

52. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 224 (1962).

53. CUNNINGHAM ET AL., *supra* note 11, § 5.2, at 190.

54. 20 AM. JUR. 2D, *supra* note 14, § 32.

55. *Id.* § 36.

56. *Id.*

57. 7 POWELL, *supra* note 22, § 50.02[9], at 50-12.

58. *Id.*

59. *See id.* § 50.05[2], at 50-29.

60. *Id.*

entering into the tenancy in common could easily be thwarted by an action in partition brought by the new cotenant-creditor.⁶¹

C. Tenancy by the Entirety

An estate held by a husband and wife as a single entity, by reason of the legal unity of marriage, is a tenancy by the entirety.⁶² An indestructible right of survivorship attaches to this form of tenancy whereby, upon the death of either spouse, the survivor takes the entire estate.⁶³ At common law, the four unities, discussed herein, were necessary to create a valid tenancy by the entirety.⁶⁴ Additionally, the unity of person, satisfied only by a legal marriage between the tenants by the entirety, was, and still is, an indispensable requirement.⁶⁵

This fifth unity often presents some entanglements. In jurisdictions that recognize the tenancy by the entirety, parties that take property as husband and wife must be legally married as of the date of the conveyance.⁶⁶ As a result, fiancées who purchase real property and are recited as husband and wife in the habendum clause of the deed in anticipation of the marriage will not hold the property as tenants by the entirety.⁶⁷ Either a joint tenancy or a tenancy in common will arise, depending on the jurisdiction.⁶⁸

Under the common law, a conveyance or devise to a husband and wife automatically created a tenancy by the entirety.⁶⁹ Although a number of jurisdictions that recognize the tenancy by the entirety still follow this rule, the trend in some states is to require a clear expression of intent.⁷⁰ This necessity is largely the result of statutes that create the tenancy in common as the default method of concurrent ownership.⁷¹ Under the common law, just as with joint tenancies, a direct transfer from an owner of real property in severalty (a sole owner) to himself or herself and spouse would not create a tenancy by the entirety due to the

61. *Id.* § 50.07[3][a], at 50-40 to 50-41.

62. 41 AM. JUR. 2D *Husband and Wife* § 28 (1995).

63. *Id.*

64. 7 POWELL, *supra* note 22, § 52.01[1], at 52-3.

65. *Id.*

66. 41 AM. JUR. 2D, *supra* note 62, § 35.

67. *Id.*

68. *Id.*; *see, e.g.,* *Perez v. Gilbert*, 586 N.E.2d 921 (Ind. Ct. App. 1992); *Novak v. Novak*, 516 N.Y.S.2d 878 (Sup. Ct. 1987).

69. 7 POWELL, *supra* note 22, § 52.01[2], at 52-3.

70. *Id.* § 52.02[2], at 52-16.

71. *Id.*

absent unities of time and title.⁷² Thus, it was necessary to transfer to a third party or "straw man."⁷³ Most states today have statutes allowing a direct transfer.⁷⁴

Unique to the tenancy by the entirety is its indestructibility by a unilateral act of either spouse.⁷⁵ A spouse may not unilaterally convey, encumber, or alienate his or her interest, nor bring a partition action to sever the estate, since the single marital unit—an entity unto itself—holds the entire estate.⁷⁶ The right of survivorship is freely alienable provided the spouse who alienates survives.⁷⁷

The value of the tenancy by the entirety is exhibited when judgment creditors arise. A number of jurisdictions that recognize estates by the entirety⁷⁸ treat them as impregnable fortresses against the claims of an individual spouse's creditors.⁷⁹ Jurisdictions vary in their approaches and there is conflicting case law arising even within the same jurisdiction.⁸⁰ A few states still cling to the common law and deny the imposition of a valid lien by a judgment creditor of an individual spouse.⁸¹ Some states subject the interest of the individual spouse to levy and execution.⁸² These states, however, hold that the ultimate purchaser of such an interest at an execution sale will become a tenant in common with the remaining spouse on title, but without the right to force a partition.⁸³ Two states that recognize the tenancy by the entirety allow it to be severed and the right of survivorship eradicated by creditors of individual spouses.⁸⁴ Obviously, a joint obligation entered into by both spouses—such as a mortgage entered into to purchase the marital residence—can be satisfied out of a tenancy by the entirety.⁸⁵

72. *Id.* § 52.02[5], at 52-18.

73. *Id.*

74. *Id.*

75. CUNNINGHAM ET AL., *supra* note 11, § 5.5, at 205-06.

76. 41 AM. JUR. 2D, *supra* note 62, § 41, at 43.

77. See 7 POWELL, *supra* note 22, § 52.03[5], at 52-25; 41 AM. JUR. 2D, *supra* note 62, § 41, at 42.

78. The present status of the tenancy by the entirety in the United States will be treated *infra*, Part III.C.

79. For a list of jurisdictions denying creditors access to an individual spouse's interest, see 7 POWELL, *supra* note 22, § 52.03[3], at 52-22 n.7.

80. *Id.* at 52-22 to 52-24.

81. This is the law in Hawaii and Pennsylvania. *Id.* at 52-24 n.11.

82. *Id.* at 52-22 to 52-23.

83. For a list of states taking this approach, see *id.* at 52-23 n.8.

84. *Id.* at 52-23 n.10. This is the rule in Oklahoma and Tennessee. *Id.*

85. CUNNINGHAM ET AL., *supra* note 11, § 5.5, at 206.

Similarly, "joint liabilities can still be satisfied out of [estates by] the entirety."⁸⁶

When an individual tenant by the entirety declares bankruptcy, additional issues arise. Under bankruptcy law, a debtor's estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."⁸⁷ Federal law enumerates certain property as exempt.⁸⁸ A state can choose to recognize the federal exemptions or opt out of federal law and apply state exemptions.⁸⁹ Debtors, too, have the option of utilizing the federal or state exemptions.⁹⁰ Thus, under the specific allowance in § 522(b)(2)(B) of the Bankruptcy Code, most states that opt out of the federal exemptions allow debtors to exempt property held as a tenancy by the entirety.⁹¹

A crafty couple, armed simply with a marriage certificate, can easily exploit this exemption. Since any property can be held as a tenancy by the entirety, a husband and wife can purchase numerous investment properties. One spouse could then incur significant debt, file bankruptcy and retain all of the investment property held by the marital unit.⁹² Such a scenario frustrates the spirit of this exemption. The historic and present-day purpose for allowing this protection to married couples is to prevent families from being forced from the marital home and into a state of poverty due to the financial difficulties of one spouse.⁹³

Acting in concert, a husband and wife can terminate a tenancy by the entirety by a joint conveyance to a third party; most jurisdictions also allow termination by mutual assent or a conveyance of the interest

86. 7 POWELL, *supra* note 22, § 52.03[3], at 52-24.

87. 11 U.S.C. § 541(a)(1) (1994).

88. *Id.* § 522(d).

89. *Id.* § 522(b).

90. *Id.*

91. *Id.* § 522(b)(2)(B); see Michael O. Massey, *When the Tenancy by the Entirety Doctrine Meets the Bankruptcy Code: Clash of the Titans*, 73 FLA. B.J. 49, 52 (1999) (explaining the procedure in the state of Florida).

92. Of course, the interests of a secured creditor (such as a mortgagee of the real estate) could not be denied the remedy of foreclosure. 9A AM. JUR. 2D *Bankruptcy* § 1308 (1995). Similarly, the interests of joint creditors would not be frustrated by this technique. *Id.* The status of tenancies by the entirety with regards to bankruptcy law is currently in a state of flux. Where a debtor spouse has any joint debt with the non-filing spouse, there is case law allowing the entireties estates to be liquidated and distributed to both joint and individual creditors. See *In re Planas*, 199 B.R. 211 (Bankr. S.D. Fla. 1996).

93. A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 94-95 (1998).

of one spouse to the other.⁹⁴ Normally, divorce or annulment transforms the tenancy by the entirety into a tenancy in common.⁹⁵ Merely entering into a legal separation agreement, absent a showing of intent to terminate the estate, will not sever the tenancy by the entirety.⁹⁶ A subsequent remarriage of the former tenants by the entirety (now tenants in common) will not operate to restore the estate.⁹⁷ Once the estate is converted into a tenancy in common, either spouse can force a partition, absent contrary agreement in the divorce decree.⁹⁸

III. ORIGINS AND EVOLUTION OF THE FORMS OF CONCURRENT OWNERSHIP

A. Origins

Concurrent ownership of real property was recognized as early as the time of Henry de Bracton,⁹⁹ one of the judges of the *coram regae* (King's Bench) in the 1240s and 1250s.¹⁰⁰ His treatise, *De Legibus Et Consuetudinibus Angliae* [*On The Laws and Customs of England*],¹⁰¹ is believed to have been written sometime in the 1220s or 1230s using current plea rolls of the King's Bench.¹⁰² Bracton's historic treatise¹⁰³ speaks of joint tenants who are seised "pur my et pur tout"¹⁰⁴—that venerable phrase which explains each tenants' simultaneous ownership of an equal undivided fractional share ("pur my") and the entire estate ("pur tout").¹⁰⁵ The right of survivorship ("*jus accrescendi*")¹⁰⁶ seems to

94. 41 AM. JUR. 2D, *supra* note 62, § 46, at 46-47.

95. *Id.* § 58, at 53.

96. 7 POWELL, *supra* note 22, § 52.05[4], at 52-32.

97. 41 AM. JUR. 2D, *supra* note 62, § 60, at 54.

98. CUNNINGHAM ET AL., *supra* note 11, § 5.5, at 206.

99. WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW § 115, at 211 (2d ed. 1932).

100. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 23, 201 (3d ed. 1990).

101. *Id.* at 201. See also BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (*DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE*) (Woodbine and Thorne eds., 1968).

102. BAKER, *supra* note 100, at 201.

103. BRACTON, *supra* note 101. This treatise was only the second attempt to compile "the whole of the common law," being preceded by the smaller treatise of the same name that was familiarly called Glanvill for short, believed to be authored by a royal justice in 1187-1189 (possibly Glanvill himself). BAKER, *supra* note 100, at 200-01.

104. AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 3 (A. James Casner et al. eds., 1952) (citing BRACTON, *supra* note 101).

105. 7 POWELL, *supra* note 22, § 51.01[1], at 51-3.

106. 2 BLACKSTONE, *supra* note 12, at 184. See also 2 BRACTON, *supra* note 101, at 54.

have been an incident of joint tenancy from the outset of its creation.¹⁰⁷

In the thirteenth century and under the old common law, every conveyance to two or more persons created a joint tenancy.¹⁰⁸ The advantage of creating joint tenancies in this period was their effective frustration of the incidents of feudalism.¹⁰⁹ The most burdensome incidents—wardship and marriage—attached where a tenant died with minor children.¹¹⁰ In such a case, the estate would revert back to the lord (upon whose estate the tenant lived, originally for the performance of services by the tenant such as knight service)¹¹¹ who would be entitled to all of the profits from the land during the period of infancy.¹¹² This profit would pay the expense of raising the ward.¹¹³ Additionally, the lord would be entitled to the great wealth exchanged upon arranging a suitable marriage for the young heir or heiress.¹¹⁴ Thus, the joint tenancy, with its accompanying right of survivorship, would prevent land from reverting back to the lord; thereby, a system that was lucrative to lords was thwarted.¹¹⁵

Seemingly, the joint tenancy would have been the bane of lords; however, there is some authority showing that they actually preferred this method of ownership.¹¹⁶ The law's treatment of joint tenants as one person maintained a coherent and organized feudal system; a "single feud" or estate lasted until the death of the last owner and thereby the services due the lord were not divided.¹¹⁷ Since the feudal system was necessarily a contractual relationship of mutual dependence, the existence of identifiable parties was crucial.¹¹⁸

By the time of Thomas Littleton's *Tenures*,¹¹⁹ published in 1481, the joint tenancy was described in a way most recognizable today and with

107. WALSH, *supra* note 99, § 115, at 211.

108. 2 ATKINSON ET AL., *supra* note 23, § 6.1, at 3.

109. *Id.* § 6.1, at 3–4.

110. BAKER, *supra* note 100, at 275.

111. *Id.* at 257–59.

112. *Id.* at 275.

113. *See id.*

114. *Id.*

115. *See id.* at 288–89.

116. *See generally id.* at 256–60.

117. 2 ATKINSON ET AL., *supra* note 23, § 6.1, at 3–4; *see also* MOYNIHAN, *supra* note 52, at 217.

118. BAKER, *supra* note 100, at 257–58.

119. 3 THOMAS LITTLETON, TENURES § 277 (Eugene Wambaugh ed., John Byrne & Co. 1903) (1481).

all of its accompanying incidents.¹²⁰

In addition to the joint tenancy, the English common law of the thirteenth century recognized the tenancy in coparceny as the only other form of concurrent ownership.¹²¹ An estate in coparceny was one held by female heirs of an owner in fee where the laws of primogeniture did not apply because no male heirs of equal consanguinity (for example, sons) existed.¹²² "This estate . . . was created by the laws of inheritance, never by deed or will,"¹²³ as distinguished from joint tenancies (and tenancies in common, as discussed *infra*) "which before the Statute of Wills in 1540 could only be created by inter vivos conveyance."¹²⁴

Coparceners owned a single estate in equal shares but free of the right of survivorship; the interest of each coparcener would pass to her heirs upon death.¹²⁵ Partition was a right unique to coparceners. In fact, the origin of the name "parceny" appears to stem from this right.¹²⁶ As primogeniture was never the law in the United States, the tenancy in coparceny is a dinosaur of cotenancy; today it is a method of concurrent ownership indistinguishable from and absorbed by the tenancy in common.¹²⁷

Appearing soon after the joint tenancy, the tenancy in common arose as a separate and distinct estate at the outset of the fourteenth century, during the reign of Edward I.¹²⁸ The birth of the tenancy in

120. Littleton, a popular Common Pleas judge under Edward VI, wrote his famous treatise in the 1450s or 1460s. BAKER, *supra* note 100, at 215. It was published in 1481, one year before the author's death. *Id.* Tenures has the distinction of being the first English law book printed by the new printing press. *Id.* at 216. Its significance as a legal treatise cannot be under-emphasized. *Id.* His work is renowned for its clarity and conclusiveness. *Id.* It was written at a time when the law of real property had reached a "most settled stage of development" and carried with it a certain authority that no prior treatise enjoyed. *Id.* at 215-16.

121. 2 ATKINSON ET AL., *supra* note 23, § 6.1, at 3. Bracton discusses the tenancy in coparceny and its incidents as an alternative method of concurrent ownership. AMERICAN LAW OF PROPERTY, *supra* note 104, at 3 (citing BRACTON, *supra* note 101).

122. 3 LITTLETON, *supra* note 119, §§ 277-291. Littleton acknowledged that parceners are daughters of an owner in fee dying without sons. *Id.* § 241. Additionally, parceners could be sisters of an owner dying childless and with no brothers. *Id.* § 242. Furthermore, estates in coparceny could arise where sons took land and the custom of the manor, as a holdover of Anglo-Saxon Law, was for them to take as coparceners. 2 BLACKSTONE, *supra* note 12, at 187; 2 ATKINSON ET AL., *supra* note 23, § 6.7, at 33.

123. 2 ATKINSON ET AL., *supra* note 23, § 6.7, at 33.

124. 7 POWELL, *supra* note 22, § 51.01[4], at 51-4.

125. 2 ATKINSON ET AL., *supra* note 23, § 6.7, at 33.

126. WALSH, *supra* note 99, § 115, at 215.

127. MOYNIHAN, *supra* note 52, at 236.

128. 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127 (3d ed. 1923).

common was an inevitable occurrence; upon the first partition action where the tenants continued to reside together on the land, a tenancy in common arose necessarily.¹²⁹ Additionally, evidence shows that the tenancy in common arose at common law to describe an estate that existed whenever one of the four unities was lacking.¹³⁰

Similar to the joint tenancy, the tenancy in common was well developed by the time of Littleton's *Tenures*. Littleton discusses the numerous methods of creating the tenancy in common such as: through separate titles held by owners of the same piece of land; by the alienation of one joint tenant's interest;¹³¹ and by a transfer to two or more owners and their heirs.¹³² Since the joint tenancy was the default method of ownership at this time, an additional method of creating a tenancy in common was "by special limitation in a deed."¹³³

The origins of the tenancy by the entirety are somewhat more elusive. As early as the thirteenth century, Bracton recognized the concept of a husband and wife owning a tenement in land jointly,¹³⁴ but the incidents of that ownership are not set forth. The concept of the, as yet unnamed tenancy by the entirety, is first enunciated in the case *William Ocle and Joan his wife*,¹³⁵ decided during the reign of Edward III in 1327.¹³⁶ William Ocle and his wife purchased land together "to them two and their heirs."¹³⁷ Subsequently, William Ocle was executed for high treason for the murder of the King's father, Edward II.¹³⁸ As a result of the treason, pursuant to feudal law, the land escheats to the

129. *Id.* This was decided in a 1304 case and it was held that the right of survivorship would not attach to the estate that resulted since that would have prejudiced the lord by denying him the incidents of the feudal tenure. *Id.* at 127 n.8 (citing Y.B. 32, 33 Edw. I. (R.S.) 34).

130. 2 ATKINSON ET AL., *supra* note 23, § 6.1, at 4; WALSH, *supra* note 99, § 115, at 215.

131. 3 LITTLETON, *supra* note 119, § 292, at 137.

132. *Id.* § 296 (stating that in this scenario, the original owners will hold a joint estate and their issue will be tenants in common).

133. 2 BLACKSTONE, *supra* note 12, at 192. *See also* Part II.A (discussing joint tenancy as the default method of ownership).

134. 3 BRACTON, *supra* note 101, at 129. "Some tenements are privately owned, the property of an individual by himself, without a parcener or one joined to him, others are not held alone but with another joined to him or a parcener: with one conjoined, as where a man holds with his wife. . . ." *Id.* (citation omitted).

135. 3 HOLDSWORTH, *supra* note 128, at 128 (citing *William Ocle and Joan his wife*; Mich. 33 Ed. III. Coram Regae Salop in Thesaur.; cp. Y.B. 39 Hen. VI. Hil. Pl. 8).

136. *Id.*

137. 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND: COMMENTARY UPON LITTLETON* § 291 (Professional Books Limited 1985) (1832) (quoting *William Ocle and Joan his wife*; Mich. 33 Ed. III. Coram Regae Salop in Thesaur.; cp. Y.B. 39 Hen. VI. Hil. Pl. 8).

138. *Id.*

lord, in this case, King Edward III.¹³⁹ This parcel of land was then transferred to Stephen de Bitterly.¹⁴⁰ John Hawkins, the heir of Joan Ocle, petitioned the king as rightful heir to his parents' estate and received judgment to the land.¹⁴¹ The oneness of person between husband and wife was the determinative factor and led to the judgment in favor of the heir of Joan Ocle.¹⁴²

Although Littleton does not cite the *Ocle* case, he addresses the concept of tenancies by the entirety in a hypothetical where a husband and wife take land in a joint estate with a third person.¹⁴³ Under these circumstances, according to Littleton, the husband and wife are seised of one moiety¹⁴⁴ and the third person is seised of the other moiety.¹⁴⁵

And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath, by force of the jointure, the one moiety in law, and the other[,] the other moiety.¹⁴⁶

Unlike joint tenancies and tenancies in common, the concurrent ownership by husband and wife was necessitated by the unity of the person: "[I]n the eyes of the law husband and wife were but one person: they were two souls in one flesh."¹⁴⁷ As exhibited in the *Ocle* case, this oneness of person made true concurrent ownership by husband and wife a legal, albeit fictitious, impossibility.¹⁴⁸ Thus, it was necessary for land to be owned in its entirety "by the marital unit of husband and wife."¹⁴⁹ As a result, a fiction (the unity of husband and wife) bore a further fiction, the "concurrent" ownership of land by one entity.¹⁵⁰

139. BAKER, *supra* note 100, at 274-75.

140. 2 COKE, *supra* note 137, § 291.

141. *Id.*

142. *Id.* A husband and wife "cannot take by moieties. Albeit baron and feme . . . be one person in law, so as neither of them can give any estate or interest to the other." *Id.*

143. 3 LITTLETON, *supra* note 119, § 291, at 135-36.

144. The definition of a "moiety" is: "A half of something (such as an estate)." BLACK'S LAW DICTIONARY 1021 (7th ed. 1999).

145. 3 LITTLETON, *supra* note 119, § 291, at 135-36.

146. *Id.* § 291, at 136.

147. BAKER, *supra* note 100, at 550-51.

148. 2 COKE, *supra* note 137, § 291.

149. 7 POWELL, *supra* note 22, § 52.01[2], at 52-3.

150. King v. Greene, 153 A.2d 49, 60 (N.J. 1959) (Weintraub, C.J., dissenting). In referring to the tenancy by the entirety, a seemingly exasperated Chief Justice Weintraub noted in his dissenting opinion:

Additionally, as scholars have noted, the feudal system played a part in denying women the right to own property and in prompting the creation of what would become the tenancy by the entirety.¹⁵¹ "The exigencies of feudalism demanded that the functions of ownership be vested in males, presumably capable of bearing arms in war."¹⁵²

The first modern pronouncement of a husband and wife owning an estate by the "entirety" is in William Blackstone's *Commentaries*; however, it is still not given a status independent from its sister forms of concurrent ownership.¹⁵³ In the ninth edition of Blackstone's *Commentaries*, the tenancy by the entirety is set forth as a separate and distinct form of ownership:

And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is that neither the husband nor wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.¹⁵⁴

The estate by the entirety is a remnant of other times. It rests upon the fiction of a oneness of husband and wife. Neither owns a separate, distinct interest in the fee; rather each and both as an entity own the entire interest. Neither takes anything by survivorship; there is nothing to pass because the survivor always had the entirety. To me the conception is quite incomprehensible.

Id. Cornelius Moynihan, in his treatise on real property, characterizes the tenancy by the entirety as "an anomaly based on an anachronism." MOYNIHAN, *supra* note 52, at 234.

151. See generally Oval A. Phipps, *Tenancy by the Entireties*, 25 TEMP. L.Q. 24 (1951).

152. *Id.* at 24.

153. Blackstone describes the different forms of owning estates in land in a chapter entitled "Of Estates in Severalty, Joint-Tenancy, Coparcenary, and Common." The tenancy by the entirety is notably missing from the chapter heading. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 179 (9th ed. 1783).

154. *Id.* at 182. For a discussion of the different editions of Blackstone's *Commentaries*, see CATHERINE SPICER ELLER, THE WILLIAM BLACKSTONE COLLECTION IN THE YALE LAW LIBRARY: A BIBLIOGRAPHICAL CATALOGUE (1938). The ninth edition is the first to contain the discussion of a husband and wife owning an estate by its "entirety." That edition was published posthumously in 1783. It purports to include "the last corrections of the author and continued to the present time by Ri. Burn, LL.D." Richard Burn, the editor of this popular edition upon which most later editions rely, noted in the "[a]dvertisement concerning this ninth edition":

The editor judges it indispensable to preserve the author's text intire. The alterations which will be found therein, since the publication of the last edition, were made by the author himself, as may appear from a corrected copy in his own handwriting. What the editor hath chiefly attended to is, to note the alterations

This articulate pronouncement and definition of the tenancy by the entirety is significant in the evolution of the estate for several reasons. It marks the first time the term "entirety" is used to describe the method in which a husband and wife own an estate.¹⁵⁵ Apparently, Blackstone treats "entirety"¹⁵⁶ as an antonym for the word "moiety."¹⁵⁷ Further, his use of the phrase *pur tout et non pur my* is noteworthy.¹⁵⁸ Here, Blackstone is borrowing a page from Bracton's definition of joint tenants who are seised "*pur my et pur tout*."¹⁵⁹ This clever play on Bracton's words effectively elucidates the convoluted manner in which tenants by the entirety are said to hold; specifically, they own the entire estate ("*pur tout*") but do not hold fractional shares ("*non pur my*").¹⁶⁰

Thus, as early as the fifteenth century and the publication of Littleton's *Tenures*, two of the methods of concurrent ownership which we know today—joint tenancy and tenancy in common—had been fully developed.¹⁶¹ Since Littleton compiled his treatise from older plea roles, we can deduce that these forms of ownership are older still. From Bracton's treatise and 1300s case law, we know that concepts similar to the joint tenancy and tenancy in common were viable even a century before. A primitive ancestor of the tenancy by the entirety is first recognized in the Ocle case from the thirteenth century.¹⁶² With the publication of Blackstone's ninth edition in 1783, the tenancy by the entirety had fully come of age, rounding out the last of the three

made by subsequent acts of parliament. These, together with some few other necessary observations, in order to prevent confusion, are inserted separate and distinct at the bottom of the page.

Id. Thus, we can infer the discussion on estates in entirety is from the pen of Blackstone.

155. 2 BLACKSTONE, *supra* note 153, at 182. This is not, however, the first time we see the word "entirety" used. Blackstone also uses the word in his discussion of parceners. "Parceners, though they have a *unity*, have not an *entirety*, of interest. They are properly intitled each to the whole of a distinct moiety." 2 BLACKSTONE, *supra* note 12, at 188 (citing Co. Litt. 163, 164 (citation in original) (Although the appearance of the word "entirety" pre-dates the ninth edition, it is not used in the context of ownership by a husband and wife.)).

156. The definition of "entirety" is: "The whole, as opposed to a moiety or part." BLACK'S LAW DICTIONARY 553 (7th ed. 1999).

157. See 2 BLACKSTONE, *supra* note 12, at 188.

158. 2 BLACKSTONE, *supra* note 153, at 182.

159. AMERICAN LAW OF PROPERTY, *supra* note 104, at 3 (citing BRACTON, *supra* note 101).

160. *Id.*

161. 3 HOLDSWORTH, *supra* note 128, at 126; 3 LITTLETON, *supra* note 119, §§ 277–324.

162. See 3 HOLDSWORTH, *supra* note 128, at 128 (citing William Ocle and Joan his wife; Mich. 33 Ed. III Coram Regae Salop in Thesaur; C.P. Y.B. 39 Hen. VI. Hil. Pl. 8).

methods of concurrent ownership.¹⁶³ As will be discussed, these methods, specifically entireties, evolved to a certain extent; but it is entirely conceivable that if Thomas Littleton were alive today, he would have little difficulty recognizing the methods in which estates are held concurrently.

B. Evolution

In nearly six hundred years of human history, change is bound to occur. What is remarkable about the methods of concurrent ownership is the extent to which they have stayed the same. The most notable change in the joint tenancy and tenancy in common has been the switch in the default method of ownership from the former to the latter.¹⁶⁴ Today, every jurisdiction in the United States has switched to the tenancy in common as the default.¹⁶⁵ Besides this change, the tenancies themselves have remained, for the most part, frozen in time.

Changes in the tenancy by the entirety were inevitable. The nineteenth century saw women such as Elizabeth Cady Stanton and Susan B. Anthony, the founding mothers of the women's movement, challenging their subservience.¹⁶⁶ The result was the gradual toppling of numerous sexist laws, concepts, and institutions—a movement that continues into the present.¹⁶⁷ Clearly, the tenancy by the entirety in its original form could not coexist with the Seneca Falls Declaration of Independence of 1848.¹⁶⁸ Once women began to question their second-class citizenship, the tenancy by the entirety was a feeble foe.

Conceptually, the tenancy already sat upon an unstable foundation, cracked by the numerous legal fictions necessary for it to stand. Thus, in an 1820 treatise by Richard Preston,¹⁶⁹ we see early jabs at the oneness of husband and wife:

In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly, when lands are granted to

163. 2 BLACKSTONE, *supra* note 153, at 182.

164. 20 AM. JUR. 2D, *supra* note 14, §§ 21–22.

165. 7 POWELL, *supra* note 22, § 50.02[2], at 50-6 to 50-7. For a list of states and the respective statutes or cases, see *id.* at 50-6 n.5.

166. ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848–1869*, at 19–20 (1978).

167. *Id.*

168. *Id.* at 23.

169. 1 RICHARD PRESTON, *AN ELEMENTARY TREATISE ON ESTATES* (1820).

them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do.¹⁷⁰

Preston's treatise on estates recognizes the possibility of a husband and wife owning land as tenants in common "as other distinct and individual persons would do" appealing to nothing more than "natural reason, free from artificial deductions."¹⁷¹ Upon relaxing the old English common law mandate of the oneness between husband and wife, the essence of the tenancy by the entirety, the crack in the foundation is irreparable.¹⁷²

Both Preston, and Edward Coke, in his *Commentaries Upon Littleton*, highlight an additional incongruity, although neither comments on the illogical consequences of the rule. When an estate was transferred to a man and his intended wife, followed by a subsequent marriage, the resulting estate would be a joint tenancy as opposed to a tenancy by the entirety.¹⁷³ The significance of this rule is in its recognition of the individuality of the two spouses. The result was a legal impossibility—one body, represented in the fictitiously merged husband and wife, somehow held two moieties jointly.¹⁷⁴ Not even Dickens could create a fiction sufficient to repair this anomaly.

The enactment of married women's property reform legislation in the nineteenth century further weakened the unstable conceptual

170. *Id.* at 132. Following this sentence, Preston footnotes Coke's *Institutes* section 187b. *Id.* However, Coke does not make this distinction regarding a husband and wife, during marriage, taking land as tenants in common. 2 COKE, *supra* note 137, § 291. Further evidence of the novelty of Preston's statement is a footnote in James Kent's *Commentaries*: "Mr. Preston . . . says, that as the law is now understood, husband and wife may, by *express words*, be made tenants in common, by a gift to them during coveture." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 132 n.(c) (5th ed. 1844).

171. 1 PRESTON, *supra* note 169, at 132.

172. Preston's heretic claim, that a husband and wife could hold an estate from its inception as tenants in common, was not universally and immediately accepted. 2 KENT, *supra* note 170, at 132 n.(c). Kent cites authority questioning "the solidity of Mr. Preston's opinion." *Id.*

173. 2 COKE, *supra* note 137, § 291. "And if an use be limited to a man and his intended wife, preparatory to their marriage, and they intermarry, they would be joint-tenants, and not tenants by entireties." *Id.* Coke explains, in a somewhat more cryptic fashion: "But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities between them, which is implied in these words of our author [Littleton], *husband and wife*." *Id.* As noted earlier, this is still the rule in all jurisdictions where the tenancy by the entirety exists. See *supra* notes 62–77 and accompanying text.

174. 2 COKE, *supra* note 137, § 291.

foundation of the tenancy by the entirety.¹⁷⁵ Under the common law, and as a result of men's dominant status, husbands had complete and exclusive control over estates in the entirety.¹⁷⁶ "At common law, we have said, husband and wife were a unity—and the husband, let us hasten to add, was that unity."¹⁷⁷ Estates held by the entirety were under the "exclusive control" of the husband;¹⁷⁸ he alone possessed the right of alienability and the right to collect the rents and profits from the land.¹⁷⁹ Additionally, the husband's creditors had the ability to reach an entirety estate, subject only to the wife's right of survivorship.¹⁸⁰

The inequity inherent in subjecting a wife's property to her husband's speculative adventures and financial incompetence was the impetus for the passage of the married women's property acts.¹⁸¹ In fact, protection of married women's property prompted the first wave of such legislation and would eventually lead to sweeping reforms in a broad range of areas.¹⁸² The first of these laws, enacted in the Arkansas Territory in 1835, protected a wife's property from the pre-marital debts of her husband.¹⁸³ Following Arkansas, nearly every state and territory enacted similar legislation protecting a wife's property.¹⁸⁴ Numerous explanations have been offered for the broad emergence of this legislation in the alternative to the aforementioned desire to equalize rights between spouses.¹⁸⁵ Debtors' rights legislation was popular in this era as a result of the severe Panic of 1837.¹⁸⁶ Married women's property acts could simply be viewed as an extension of this type of legislation. However, as legal historians note, this was not the first time the country had endured economic hardship, yet married women's property acts

175. See 7 POWELL, *supra* note 22, § 52.03[2], at 52-21 to 52-22.

176. *Id.* at 52-21.

177. 2 ATKINSON ET AL., *supra* note 23, § 6.6, at 27-28.

178. 7 POWELL, *supra* note 22, § 52.03[2], at 52-21.

179. *Id.*

180. 2 ATKINSON ET AL., *supra* note 23, § 6.6, at 28.

181. DUBOIS, *supra* note 166, at 42.

182. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398 (1983).

183. *Id.* at 1398-99 (citing Act of Nov. 2, 1835, 1835 ARK. TERR. LAWS 34-35).

184. *Id.* at 1398. Chused notes that the emergence of legislation enacted in this first wave of married women's property acts occurred in a "deluge." *Id.*

185. *Id.* at 1400.

186. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1176-1970*, at 168 (1997). For a discussion of the Panic of 1837, see Chused, *supra* note 182, at 1400-01.

were wholly new.¹⁸⁷ "The acts must therefore have been part of a larger evolution in the treatment of women by the law."¹⁸⁸

An additional driving force behind reform was the broader movement to modernize and "Americanize" many of the arcane concepts of the common law.¹⁸⁹ Prompted in part by democratic principles, numerous real property concepts such as fee tails, land tenures, and future interests were questioned.¹⁹⁰ Similarly, "the common-law doctrine that husband and wife were one legal person seemed to many critics a relic of a feudal hierarchical society that was incompatible with democracy."¹⁹¹

By the end of the nineteenth century, and after two additional stages of reform, married women's property was no longer treated as a special and distinct form of ownership from all other property.¹⁹² The earlier reforms from the first wave of legislation were abandoned; notably, the law no longer immunized married women's property from the creditors of husbands.¹⁹³ Alternatively, both the husband and wife had a separate interest protected from the creditors of the other, and "husbands and wives became jointly liable for purchases made for family purposes and were separately liable for individual investments."¹⁹⁴ Entireties estates, with respect to creditors, thereby, took on the form that we recognize today.

The actual changes to tenancies by the entirety occurred at a painfully slow pace. In fact, the gradual transformation commenced by the married women's property acts had still not come to complete fruition well into the twentieth century. A comprehensive seven volume treatise written in 1952 notes: "[D]ivergent views have been taken in various jurisdictions as to the rights of each spouse to alienate or encumber his interest in property held in entirety. . . ."¹⁹⁵ By this time, as the same treatise recognizes, a majority of jurisdictions treated the

187. Chused, *supra* note 182, at 1403-04.

188. *Id.* at 1404. The author refers to numerous other 1840s reforms in the law, such as changes in divorce, child custody, and abortion, to conclude that this was an active and progressive period in the area of women's rights. *Id.* n.237.

189. ALEXANDER, *supra* note 186, at 169. For a more general analysis on the American reform of English law, see WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

190. ALEXANDER, *supra* note 186, at 169.

191. *Id.*

192. *Id.* at 170.

193. *Id.*

194. *Id.*

195. 2 ATKINSON ET AL., *supra* note 23, § 6.6, at 28.

married women's property acts as having eliminated the common law rule of the husband's unilateral control and enjoyment of the property.¹⁹⁶ As a result, in most jurisdictions, the tenancy by the entirety became an estate where "neither spouse has any specific interest to convey or encumber, or any interest which a creditor of one of the spouses could reach for the satisfaction of the debt."¹⁹⁷ Yet the ambiguity persists into recent times. A 1976 Massachusetts case held that a husband's unilateral control of property held by the entirety did not violate the Fourteenth Amendment.¹⁹⁸

Contemporaneously with the aforementioned treatise, and further indicating the state of flux in which the tenancy by the entirety is perpetually mired, a law review article written at mid-century described the state of the tenancy by the entirety in the United States.¹⁹⁹ The author of the article placed jurisdictions in three groups with regard to their treatment of the estate after the enactment of the married women's property acts:

- (1) that tenancy by entireties, incapable of existence apart from the common law property relations of spouses and the husband's dominance, was necessarily destroyed through the wife's emancipation;
- (2) that tenancy by entireties, not being specifically mentioned, was not affected in any way by the Married Women's Acts or other legislation dealing with general marital relations, and therefore it still existed as at common law;
- (3) that the destroyed incidents of the husband's dominance and the wife's disabilities were incidents of the common law marital status and not peculiarly incidents of tenancy by the entireties, and therefore the tenancy may and does still exist, although without such incidents.²⁰⁰

As the article notes, the enactment of reform legislation regarding married women's property led to the early abrogation of the tenancy by

196. *Id.*

197. *Id.* at 29.

198. *D'Ercole v. D'Ercole*, 407 F. Supp. 1377, 1382 (D. Mass. 1976). Judge Tauro noted, in his description of the tenancy by the entirety: "The husband during his lifetime has paramount rights in the property." *Id.* at 1380. The court conceded that the tenancy by the entirety was "balanced in favor of males" but held Mrs. D'Ercole's constitutional challenge insufficient because married persons could alternatively create a joint tenancy or a tenancy in common. *Id.* at 1382 (quoting *Klein v. Mayo*, 367 F. Supp. 583, 585 (1973)).

199. Phipps, *supra* note 151, at 24.

200. *Id.* at 28 (footnotes omitted).

the entirety in several jurisdictions who took the approach represented by group one.²⁰¹ An 1860 Alabama case noted that since a husband and wife are "capable of taking separately, it is impossible that they should take by entireties, as if they constituted a single person."²⁰² In fact, this movement for equality led to the abolition of tenancies by the entirety in 1925 in England—the birthplace of the estate.²⁰³

A few jurisdictions took the approach represented by group two and maintained the arcane and sexist incidents of a husband-dominated tenancy by the entirety.²⁰⁴ The Massachusetts case of *Pray v. Stebbins*,²⁰⁵ representing this approach, held that the married woman's property acts only dealt with a woman's separate property.²⁰⁶ Therefore, tenancies by the entirety, which concerned inseparable interests of a husband and wife, were not altered, and consequently, not equalized, by the reform legislation.²⁰⁷

The third and final approach taken by jurisdictions, that of maintaining the estate but equalizing spousal rights in tenancies by the entirety is depicted in the 1883 New York case, *Bertles v. Nunan*.²⁰⁸ At issue was the continuing viability of the unity of husband and wife in the aftermath of New York's legislation regarding married women's property.²⁰⁹ Four years earlier, a decision by the New York Court of Appeals held that the tenancy by the entirety had been abrogated by the reform legislation.²¹⁰ However, that portion of the decision was not joined by a majority of the judges.²¹¹ The *Bertles* court sought to resolve the confusion and establish the New York rule on tenancies by the

201. *Id.* at 29.

202. *Id.* at 28 (quoting *Walthall v. Goree*, 36 Ala. 728, 735 (1860)).

203. 7 POWELL, *supra* note 22, § 52.01[3], at 52-4 n.7. "A Husband and Wife Shall, for All Purposes of Acquisition of Any Interest in Property, Under a Disposition Made or Coming into Operation After Commencement of This Act, Be Treated as Two Persons." *Id.* (quoting 15 & 16 Geo. V, c 2, § 37).

204. Phipps, *supra* note 151, at 29-31.

205. 4 N.E. 824 (Mass. 1886).

206. *Id.* at 827.

207. *See id.* at 826. North Carolina and Michigan were the other states following this approach. Phipps, *supra* note 151, at 29-30. In recent times, the three states enacted statutes equalizing the rights to control of and profits from entireties estates: Michigan in 1975 (MICH. COMP. LAWS ANN. § 557.71(1) (West 1988)); Massachusetts in 1980 (MASS. GEN. LAWS ANN. ch. 209, § 1 (West 1998)); and North Carolina in 1982 (N.C. GEN. STAT. § 39-13.6 (1999)).

208. 92 N.Y. 152 (1883).

209. *Id.*

210. *Meeker v. Wright*, 76 N.Y. 262 (1879).

211. *Id.*

entirety.²¹²

The *Bertles* court recognized that the tenancy by the entirety was one of many real property rules from feudal times whose reason or purpose had long since disappeared.²¹³ As practitioners of judicial restraint, the court would not overturn the concept simply as a result of its antiquity without some indication from the legislature.²¹⁴ The apparent intention of the legislature in enacting the married women's reform acts "was not to destroy the oneness of husband and wife, but to protect the wife's property, by removing it from under the dominion of the husband."²¹⁵ The tenancy by the entirety, although a product of the sexist past, actually "enlarged" rather than "abridged" the rights of married women.²¹⁶ Thus, it was a concept that furthered the spirit of the statute to protect married women's rights and therefore was not eradicated.²¹⁷

The reasoning of the court in *Bertles* seems emblematic of those states where the tenancy by the entirety survived. An additional feature of the case depicting the plodding nature of the change brought about by the reform is the date of the decision. The first New York reform legislation was enacted in 1848,²¹⁸ yet the status of the tenancy by the entirety was in flux until the *Bertles* decision in 1883.

The great confusion among jurisdictions, coupled with the glacial transformation, led to a multiplicity of approaches and numerous inconsistent rules that continue to the present day.

C. Present Status of the Tenancy by the Entirety

Today, in a majority of jurisdictions, the tenancy by the entirety is still an accepted form of concurrent ownership by a husband and wife.²¹⁹ Nineteen jurisdictions have enacted statutes explicitly recognizing the tenancy by the entirety.²²⁰ Six states have statutes that incidentally

212. *Bertles*, 92 N.Y. at 165.

213. *Id.*

214. *Id.*

215. *Id.* at 164.

216. *Id.* at 165.

217. *Id.*

218. Act of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307.

219. 7 POWELL, *supra* note 22, § 52.01[3], at 52-11.

220. *Id.* at 52-4 to 52-12. Those nineteen jurisdictions are as follows: Alaska, Delaware, the District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, and Wyoming. *Id.*

mention the tenancy by the entirety and, therefore, seem to implicitly recognize the estate.²²¹ Six additional states recognize entireties estates in case law.²²² Thus, in a total of thirty states, the tenancy by the entirety is an effective form of concurrent ownership for spouses.²²³ Rounding out the balance of jurisdictions, thirteen states have abolished the tenancy by the entirety, either by statute or case law.²²⁴ In the remaining seven states, the status of the tenancy by the entirety is unknown, either due to mixed decisions or silence by the courts and legislatures.²²⁵

IV. THE DIVERSITY AND CHANGING CONCEPTION OF MODERN RELATIONSHIPS AND THE FAMILY

In the last fifty years, radical changes have taken place in the concept of relationships and the definition of family. With the emergence of same-sex relationships and cohabiting heterosexual couples, the idea of a family as a husband, wife, and child as depicted in numerous television shows and appliance advertisements from the 1950s, although not quite anachronistic, certainly is becoming just one type of family among numerous options.²²⁶

A. *Waging War: Equal Rights for Same-Sex Relationships*

On June 28, 1969, New York City police officers, armed with a warrant, raided the Stonewall Bar in Greenwich Village—a "gay bar" in violation of the State Liquor Authority's ban on serving alcohol to

221. *Id.* Those six states are: Arizona, Arkansas, Kansas, Kentucky, Nebraska, and Utah. *Id.* These six states have simultaneous death, partnership, or intestacy statutes that mention the tenancy. *Id.*

222. *Id.* Those six states are as follows: Georgia, Mississippi, Montana, Rhode Island, Vermont, and Virginia. *Id.*

223. *Id.* It seems nothing is ever simple with the tenancy by the entirety. The number of jurisdictions that recognize the tenancy by the entirety fluctuates depending on the source consulted. A property treatise from 1993 lists the number of jurisdictions recognizing the tenancy at twenty. CUNNINGHAM ET AL., *supra* note 11, § 5.5, at 203 n.3.

224. 7 POWELL, *supra* note 22, § 52.01[3], at 52-4 to 52-12. The tenancy by the entirety has been abolished in California, Connecticut, Iowa, Maine, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Washington, West Virginia, and Wisconsin. *Id.*

225. *Id.* The states where the status of the tenancy is unknown are Alabama, Colorado, Idaho, Illinois, Louisiana, South Carolina, and Texas. *Id.* Since Louisiana did not receive the common law, their silence is understandable. *Id.* § 52.01[3], at 52-7.

226. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). Describing same-sex relationships as modern may be a dubious distinction. Eskridge provides exhaustive accounts of same-sex unions recognized throughout recorded human history and on most continents. *Id.* at 1435.

homosexuals.²²⁷ These shakedowns were common events to the police and bar patrons alike.²²⁸ A handful of officers would arrest bar-goers who clung to their anonymity. However, in an unprecedented turn of events, the patrons of this establishment fought back.²²⁹ A full-fledged riot erupted and the two hundred patrons spilled onto Christopher Street and Sheridan Square.²³⁰ Before the evening was over, close to one thousand bystanders eagerly lent a hand on behalf of the patrons—fueled by years of frustrating oppression and hidden humiliation.²³¹ The helmeted Tactical Patrol Force finally quieted the uprising.²³² The Gay Rights movement had its Lexington and Concord.²³³

In June, 1967, the United State Supreme Court held Virginia's anti-miscegenation statute unconstitutional in *Loving v. Virginia*.²³⁴ In declaring bans on interracial marriage a denial of equal protection and due process, Chief Justice Warren declared: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."²³⁵ That being the case, marriage was defined by the Chief Justice as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."²³⁶

The issue of same-sex marriage is a lightning rod of controversy in the gay rights movement. The pronouncement by Chief Justice Warren in *Loving*, along with other Supreme Court decisions pronouncing marriage as a fundamental right,²³⁷ are appealed to as precedents.²³⁸

227. Jerry Lisker, *Homo Nest Raided, Queen Bees Are Stinging Mad*, N.Y. DAILY NEWS, July 6, 1969, reprinted at http://www.cs.cmu.edu/afs/cs/user/scotts/ftp/bulgarians/NY-DN_Stonewall.txt. The headline and article possess numerous sarcastic references to the transvestites involved in the uprising. It is difficult to imagine a similar article being written with such condescension today—a notable statement of how far the gay rights movement has come.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. 388 U.S. 1 (1967).

235. *Id.* at 12.

236. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

237. See, e.g., *Skinner*, 316 U.S. at 535 (invalidating Oklahoma's law requiring sterilization of certain criminals); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating Wisconsin's bar on remarriage of a former spouse who had unpaid support obligations); *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating Missouri's ban on marriage by prison inmates).

238. The scholarship analyzing the arguments for expanding to same-sex unions the fundamental right to marry is voluminous. See, e.g., SAME-SEX MARRIAGE: PRO AND CON

There have been numerous attempts to create this right through litigation in true Charles Hamilton Houston style. In 1971, the Minnesota Supreme Court, in *Baker v. Nelson*,²³⁹ handed down the first appellate decision in the United States on the issue of same-sex marriage. The petitioners, Jack Baker and Mike McConnell, argued the right to same-sex marriage was included within the right to privacy pronounced in *Griswold v. Connecticut*.²⁴⁰ The Minnesota Supreme Court disagreed.²⁴¹ Similar attempts in state courts to expand the rights and benefits of marriage were rebuked for years.²⁴²

An occasional victory for same-sex partners has been interspersed among the many failures, thereby invigorating the combatants. One such victory occurred in *Braschi v. Stahl Associates Co.*, a 1989 decision by the New York Court of Appeals.²⁴³ A gay couple lived together in a rent-controlled apartment for ten years.²⁴⁴ When the tenant on the lease died, the landlord attempted to evict his partner (and thereby terminate the rent-controlled lease in order to obtain a more lucrative tenancy), arguing that only a resident surviving spouse or other family member of the tenant of record was entitled to retain possession.²⁴⁵ The court of appeals held the surviving tenant could retain possession of the rent-controlled premises.²⁴⁶ The decision was based on an historic extension of the definition of a family: "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."²⁴⁷ This definition has since

(Andrew Sullivan ed., 1997) [hereinafter SAME-SEX MARRIAGE]; WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME SEX MARRIAGE* (1996). Numerous law reviews have further addressed the issue. See, e.g., John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999). For a comprehensive list of law review articles on the subject prior to 1995, see Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, app. A, at 96 (1996).

239. 191 N.W.2d 185 (Minn. 1971).

240. *Id.* at 186-87 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

241. *Baker*, 191 N.W.2d at 186-87.

242. See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Gajovski v. Gajovski*, 610 N.E.2d 431 (Ohio Ct. App. 1991); *Slayton v. State*, 633 S.W.2d 934 (Tex. App. 1982); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

243. 543 N.E.2d 49 (N.Y. 1989).

244. *Id.* at 50.

245. *Id.* at 50-51.

246. *Id.* at 55.

247. *Id.* at 53-54. To establish the couple's relationship and "financial commitment and interdependence," the court accepted evidence that the couple was regarded by their

been confined only to the context of rent control.²⁴⁸

A few years before the historic *Braschi* decision, Berkeley, California passed the first domestic partnership ordinance extending marital-type rights to cohabiting couples.²⁴⁹ Other municipalities have followed Berkeley's lead, among them West Hollywood,²⁵⁰ Takoma Park,²⁵¹ Madison,²⁵² San Francisco,²⁵³ and New York.²⁵⁴ Most of these ordinances allow same-sex and opposite-sex couples with capacity to enter contracts to file as domestic partners. Such filing, for example, extends certain health benefits, allows bereavement leave for partners of municipal employees, and grants visitation to partners of prisoners.²⁵⁵

At the Hawaii Department of Health on December 17, 1990, three couples filed marriage license applications.²⁵⁶ Each of their applications met all of the state's marriage license requirements except that they were for same-sex couples.²⁵⁷ Pursuant to an opinion of the State Attorney General, in April of the following year, the Hawaii Department of Health denied these applications.²⁵⁸ The case was doggedly pursued in the courts, and on May 5, 1993, the Hawaii Supreme Court found that the state's denial of the rights and incidents of marriage to same-sex couples represented a denial of equal

respective families and friends (and by the building's superintendent and doorman) as a couple. *Id.* at 55. Additionally, the two maintained joint savings, checking accounts, and credit cards. *Id.*

248. See *In re Estate of Lasek*, 545 N.Y.S.2d 668 (Sup. Ct. 1989) (refusing to extend the definition of a family in a case by a life partner against an estate for the expenses of nursing and household services); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (refusing to extend *Braschi* to allow visitation rights for a same-sex partner of a child's biological mother).

249. 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) (citing City of Berkeley, Cal., Policy Establishing Domestic Partnership Registration (1984)). For a history and analysis of these ordinances, see *Id.* and Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 J. FAM. L. 497 (1991).

250. Bowman & Cornish, *supra* note 249, at 189 & n.120 (citing WEST HOLLYWOOD CAL., W.H.M.C. § 4220-28 (1985)).

251. *Id.* at 189 & n.124 (citing TAKOMA PARK, MD. CODE §§ 6-81(a), 8b-108(b) (1986)).

252. *Id.* at 190 & n.129 (citing MADISON, WIS. GENERAL ORDINANCES § 3.36(15) (1988)).

253. *Id.* at 189 & n.122 (citing SAN FRANCISCO, CAL. ORDINANCE 176-89 (1989)).

254. *Id.* at 190 & n.130 (citing New York, N.Y. Exec. Order No. 123 (Koch 1989)).

255. See generally *id.*

256. ESKRIDGE, *supra* note 238, at 4.

257. *Id.*

258. *Id.*

protection.²⁵⁹

Although the petitioners' right to privacy argument failed,²⁶⁰ the court found sex was a "suspect" classification under the equal protection clause of the Hawaii Constitution.²⁶¹ In applying a strict scrutiny test to the state's marriage laws, the court held that the state failed to display a compelling interest for the state's sex-based classification.²⁶² The court listed "a multiplicity of rights and benefits" that accompany a marriage license, including "the benefit of the exemption of real property from attachment or execution. . . ."²⁶³ The case was remanded to a trial court, affording the state an opportunity to justify the denial by a compelling state interest.²⁶⁴

The fear across America was of same-sex couples flocking to Hawaii, obtaining marriage licenses, and populating the country. States would be forced to recognize these unions under the Full Faith and Credit Clause of the U.S. Constitution,²⁶⁵ so the argument went.²⁶⁶ Resistance came from several fronts. On May 7, 1996, House Bill 3396 was introduced in Congress, reading in part: "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage"²⁶⁷ Virulent debate followed on what familiarly became known as the Defense of Marriage Act.²⁶⁸

259. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

260. *Id.* at 55–57. The court refused to proclaim a fundamental right to same sex marriage: "[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." *Id.* at 57.

261. *Id.* at 64.

262. *Id.* at 57–67.

263. *Id.* at 59.

264. *Id.* at 68.

265. U.S. CONST. art. IV, § 1, cl. 1.

266. *But see* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965 (1997) (refuting this argument).

267. Defense of Marriage Act, H.R. 3396, 104th Congress (1996).

268. SAME-SEX MARRIAGE, *supra* note 238, at 205–38. Alternatively, Congressman John Lewis of Georgia christened it "the defense of mean-spirited bigots act." *Id.* Lewis noted, in a passionate attack on the act: "I have fought too hard and too long against discrimination based on race and color not to stand up against discrimination based on sexual orientation." *Id.* Congressman Lewis, a hero of the civil rights movement, fought discrimination as a college student in Nashville, Tennessee, as a freedom rider in milieu at bus depots across the south, and led the march across the Pettus Bridge in Selma, Alabama. *See* DAVID HALBERSTAM, *THE CHILDREN* (1998).

Ultimately, the law was passed by an overwhelming majority and signed into law by President Clinton in the middle of the night on Saturday, September 21, 1996.²⁶⁹ The reaction in Hawaii was no different.²⁷⁰ In the November 1998 election, an overwhelming majority of voters, in a referendum previously passed by the state legislature, accepted the following amendment to the Hawaii Constitution: "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."²⁷¹

Notwithstanding this determined resistance, on December 20, 1999, the Vermont Supreme Court in *Baker v. State* held that the state's exclusion of same-sex couples from the benefits and incidents of marriage violated the common benefits clause of the Vermont Constitution.²⁷² In similar fashion to the approach taken by the Hawaii Supreme Court, Chief Justice Amestoy cited the throng of benefits attached to a marriage license.²⁷³ Such benefits establish the test to be applied in the court's analysis: "The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."²⁷⁴

The main concern the state put forth was the link between marriage and procreation.²⁷⁵ The decision easily dismissed this argument, noting "that many *opposite-sex* couples marry for reasons [wholly] unrelated to procreation" and that numerous same-sex couples today are raising children.²⁷⁶ So, limiting the right to marry to the former bore no relation to the state's objective.²⁷⁷ The court concluded that without a justifiable

269. Culhane, *supra* note 238, at 1122.

270. See *supra* notes 256–69 and accompanying text.

271. HAW. CONST. art. 1, § 23.

272. 744 A.2d 864, 886 (Vt. 1999). The common benefits clause of the Vermont Constitution reads, in part: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . ." VT. CONST. art. VII, ch. I.

273. *Baker*, 744 A.2d at 883. Incidentally, among those rights listed were "homestead rights and protections," and "the presumption of joint ownership of property and the concomitant right of survivorship." *Id.* at 884.

274. *Id.*

275. *Id.* at 881.

276. *Id.*

277. *Id.* at 880–81. To prove this point, the decision lists a number of reports on lesbian and homosexual couples raising children and progressively notes that "increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children." *Id.* at 882.

purpose behind the state's exclusion, there is "a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples."²⁷⁸

Admitting that "courts may not have the best or the final answers,"²⁷⁹ the majority left it to "the Legislature to craft an appropriate means of addressing the constitutional mandate."²⁸⁰ On March 16, 2000, the Vermont House of Representatives voted seventy-six to sixty-nine in favor of a bill that would create for same-sex couples the option of entering into a "civil union" recognized by the state.²⁸¹ By applying for a license from a town clerk, the couple would receive a certificate of civil union carrying with it all of the rights and benefits attached to a marriage certificate, including the obligation of bringing an action for dissolution in family court upon separating.²⁸² On April 26, 2000, Governor Howard Dean signed Vermont's historic civil union bill into law, allowing same-sex couples to form civil unions as of July 1, 2000.²⁸³ This remarkably progressive proposal does, however, still fall short of allowing the union to be called a marriage.²⁸⁴

B. Forgotten Casualties: Cohabiting Couples

In light of the pending confrontation between the immovable object, in the form of the Defense of Marriage Act, and the irresistible force, in the form of Vermont's civil unions, the war over same-sex marriage likely will continue to be a hard-fought struggle. Certain corporations and businesses have also extended domestic partnership-type rights similar to those provided by municipalities discussed herein.²⁸⁵ However, these inroads made by same-sex couples have created new claims of discrimination, specifically by heterosexual cohabiting couples.²⁸⁶

In 1970, there were 523,000 unmarried couples—defined as "two

278. *Id.* at 886.

279. *Id.* at 888 (quoting Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996)).

280. *Id.* at 886.

281. Carey Goldberg, *Vermont's House Backs Wide Rights for Gay Couples*, N.Y. TIMES, Mar. 17, 2000, at A1.

282. *Id.*

283. *Vermont Civil Union Bill Becomes Law*, N.Y. TIMES, Apr. 27, 2000.

284. *Id.*

285. *Id.*

286. *Foray v. Bell Atlantic*, 56 F. Supp. 2d 379, 329 (S.D.N.Y. 1999).

unrelated adults of the opposite sex—sharing the same household.²⁸⁷ By 1980, that number had increased three-fold to 1,589,000.²⁸⁸ Additionally, 431,000 of those unmarried cohabiting couples had at least one child under fifteen years of age.²⁸⁹ In 1998, 4,236,000 unmarried cohabiting couples resided in the United States—an increase of 800 percent in a mere twenty-eight years.²⁹⁰ Significantly, 1,520,000 of these couples had children under the age of fifteen.²⁹¹ The tremendous increase in the numbers of couples cohabiting without the formalities of a marriage license shows that they are a sizable percentage of the population whose numbers likely will increase.

One such cohabiting couple is Paul Foray and Jeanine Muntzer.²⁹² Mr. Foray is a long-time employee of Bell Atlantic, formerly Nynex.²⁹³ In January 1996, Bell Atlantic enacted a policy extending health benefits to same-sex couples.²⁹⁴ After Mr. Foray learned of this policy, he applied for health benefits for his partner (who had recently quit her full-time job to study to become a nurse, thereby losing her health benefits) and was denied.²⁹⁵ He was told by Bell Atlantic that he had the option of getting married.²⁹⁶ Having three divorces between them, the marriage option was simply one that the couple did not want to pursue.²⁹⁷ Notwithstanding the absence of a marriage certificate, Ms. Muntzer stated their relationship was no different from that of a married couple: "[w]e have a home and a dog, and we have a committed relationship."²⁹⁸

On May 18, 1998, Paul Foray filed suit in federal court alleging that the company's policy violates Title VII of the Civil Rights Act of 1964.²⁹⁹ Mr. Foray claimed that if his gender were female, his domestic partner

287. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988, tbl. 54 (108th ed. 1988).

288. *Id.*

289. *Id.*

290. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1999, tbl. 68 (119th ed. 1999) [hereinafter STATISTICAL ABSTRACT 1999].

291. *Id.*

292. The following account is from Dennis Duggan, *Waging New Battle in Sex Revolution*, N.Y. NEWSDAY, May 19, 1998, available at 1998 WL 2670603.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999).

would be considered an eligible dependent and would be entitled to receive health benefits.³⁰⁰ On a motion to dismiss for failure to state a cause of action, the court rejected the plaintiff's argument.³⁰¹ As the court noted, in order to establish sex discrimination, the plaintiff had to "show that he was treated differently from 'similarly situated' persons of the opposite sex."³⁰² The court held that the plaintiff did not meet this burden, stating: "[A] woman with a female domestic partner is differently situated from plaintiff in material respects because under current law, she, unlike plaintiff, is unable to marry her partner."³⁰³

Whether this argument necessarily defeats all claims to extend benefits to unmarried, cohabiting, heterosexual couples remains to be seen.³⁰⁴ Taken to its logical conclusion, the option-to-marry argument could be used to reject any gender-based discrimination claim, as a woman through modern surgical procedures has the option of changing genders. Recognition of the well-deserved rights for same-sex couples will likely increase the claims of cohabiting heterosexual couples. Thus, some sort of alternative that equalizes rights for all denied groups would be a preferable option.

C. Rights Denied, Realities Ignored: Single Parents and Subsequent Marriages

Today, in addition to the numerous same-sex couples and unmarried cohabiting heterosexual couples constituting families, less than sixty percent of the United States population is married and ten percent is divorced.³⁰⁵ Comparatively, in 1950, the married population numbered sixty-seven percent and the divorced population two percent.³⁰⁶ Further, single parents comprise a sizable percentage of the families in the nation.³⁰⁷ Today, over twenty-three percent of the families in the United States are single parent households.³⁰⁸ That number was a mere twelve

300. *Id.*

301. *Id.* at 330.

302. *Id.* at 329.

303. *Id.* at 330.

304. This is the second ruling of its kind at the district court level. *See also* *Cleaves v. City of Chicago*, 21 F. Supp. 2d 858, 861 (N.D. Ill. 1998) (rejecting a claim that an employee benefits plan covering spouses and homosexual couples only, to the exclusion of unmarried heterosexual partners, was a Title VII sex discrimination violation).

305. STATISTICAL ABSTRACT 1999, *supra* note 290, tbl. 70.

306. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-1983, tbl. 60 (103d ed. 1983) [hereinafter STATISTICAL ABSTRACT 1982-1983].

307. STATISTICAL ABSTRACT 1999, *supra* note 290, tbl. 70.

308. *Id.*

percent in 1950.³⁰⁹ Divorced persons and single parents, similar to cohabiting homosexual and heterosexual couples, are denied the benefits of the tenancy by the entirety.³¹⁰

A necessary corollary of the increasing divorce rate is the increase in subsequent marriages and the existence of children from prior marriages. Ironically, the very existence of the tenancy by the entirety creates additional problems in the situation of subsequent marriages. When a divorced person with children remarries and buys a home with his or her new spouse, the new husband and wife would own as tenants by the entirety in those states where it exists.³¹¹ Upon the death of the remarried spouse, any property owned as a tenancy by the entirety would be excluded from the decedent's estate.³¹² Thus, children from the prior marriage would be excluded from inheriting any property held in that manner.³¹³

V. A TRANSFORMATION IN CONCURRENT OWNERSHIP FOR MODERN RELATIONSHIPS

Although Littleton and his contemporaries would be very familiar with the methods of concurrent ownership which are recognized today, the modern day conception of relationships and the family likely would be unrecognizable. Currently, couples and families who are comparable in most important respects are treated unequally. A crusade is being fought; one side fights to preserve the concept of marriage and family, the other side fights to expand it. Still others are ignored as their rights lay as casualties on the battlefield. While the war wages on, updating the antiquated methods of concurrent ownership is a solution that would rectify some of the disparities that currently exist. In this cause there are several options.

A. Abolishing the Tenancy by the Entirety

This popular solution is the simplest method for creating a level playing field among the numerous interests that exist. As discussed herein, the tenancy by the entirety has been abrogated in thirteen states

309. STATISTICAL ABSTRACT 1982-1983, *supra* note 306, tbl. 60.

310. *See supra* notes 62-77 and accompanying text.

311. *See supra* notes 62-77 and accompanying text.

312. PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 130 (2d ed. 1994).

313. *Id.*

and in England.³¹⁴ Advocates for abolition are numerous. An American Bar Association report from 1944 called for complete abolition of the ancient tenancy wherever it still existed.³¹⁵ Treatises and law review articles echo this demand³¹⁶ or expose some of the estate's idiosyncratic anomalies.³¹⁷ Several law reviews have criticized the ways in which the tenancy by the entirety can be used to avoid child support payments,³¹⁸ bar federal tax liens,³¹⁹ and circumvent criminal and civil forfeiture laws.³²⁰ Also, the treatment of entireties estates by the bankruptcy code is in a state of confusion.³²¹

Outright abolition will forever remove the reminders of the sexism inherent in the ancient concept. The tenancy by the entirety was necessitated by women's status as legally indistinct from their husbands.³²² Additionally, women, being property themselves, did not have the capacity to own property—obviously a chair cannot own a table. In practice, the entireties estates protected women as they afforded them the ability to have an ownership interest in land—specifically the right of survivorship.³²³ However, until the nineteenth century and the passage of married women's property legislation, the one-half interest which women held in the estate was a dubious right

314. See *supra* note 224 and accompanying text.

315. 2 ATKINSON ET AL., *supra* note 23, § 6.6, at 32.

316. See, e.g., *id.*; Jane Harper Porter, Comment, *Real-Property Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?*, 58 N.C. L. REV. 997 (1980).

317. MOYNIHAN, *supra* note 52, at 234–35.

In situations where the marriage relationship is unstable, the tenancy can operate to the disadvantage of one or both of the spouses. The inability of either spouse to compel partition or to effectuate a severance, or in some states to convey a separate interest to a third person, can create a deadlock with respect to the property.

Id. at 234.

318. Robert D. Null, Note, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligor*, 29 VAL. U. L. REV. 1057 (1995).

319. Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839 (1995).

320. Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553 (1993); Barbara W. Sharp, Note, *Losing Sticks from the Bundle: Incompatibility of Tenancy by the Entireties and Drug Forfeiture Laws*, 8 BYU J. PUB. L. 197 (1993).

321. Massey, *supra* note 91, at 49. "The tenancy by the entirety doctrine is one of the most disputed and confusing issues facing bankruptcy courts." *Id.* See also Steven B. Chaneles, *Tenancy by the Entireties: Has the Bankruptcy Court Found a Chink in the Armor?*, 71 FLA. B.J. 22 (1997); Paul C. Wilson, Note, "Fresh Start" or "Head Start": *Missouri Courts Rethink the Role of Tenancies by the Entirety in Bankruptcy*, 56 MO. L. REV. 817 (1991).

322. See *supra* notes 134–52 and accompanying text.

323. See *supra* note 77 and accompanying text.

since their husbands had the exclusive rights of control and of collecting the rents and profits from the land.³²⁴ Also, the creditors of the husband could attach the land.³²⁵ Arguably, since the gender equalization that resulted from the reform legislation, the sexism inherent in the ancient tenancy of medieval times is as much a relic as the estate's origins.³²⁶ However, even in the present day, the language used in the habendum clause of a deed to create a tenancy by the entirety maintains the stigma of a husband's possession of his wife: "to John Jones and Jane Jones, his wife."³²⁷

Although the spirit of this proposal to abolish the tenancy by the entirety is equality across the board, the benefits of the estate should not be brushed aside. Intuitively, preservation of the family home is at the core of the modern concept of tenancy. A change in the law that results in disadvantaging everyone and which leads in practice to displacing children from their homes is difficult to justify at any level. Admittedly, children of single parents, same-sex couples, and unmarried cohabiting couples are denied this protection.³²⁸ A better solution would be one that expands the benefits to formerly denied groups rather than denies the benefits to everyone. Abolishing the tenancy by the entirety would eradicate any philanthropic hopes of creating a unique estate whose core purpose is to encompass a broader view of the family.

B. Altering the Tenancy by the Entirety

The fifth unity whose existence is necessary to create a tenancy by the entirety, the "unity of person,"³²⁹ is the root cause of the inequity in the methods of concurrent ownership. Logically, if the cause of the problem is removed, the problem itself will be eradicated. However, that conclusion proves to be fallacious. Expanding the tenancy by the

324. See *supra* notes 175–88 and accompanying text.

325. See *supra* notes 78–86 and accompanying text.

326. The accuracy of this assertion is doubtful considering the slow and gradual equalization of the rights between spouses well into the twentieth century. See *supra* Part III.B.

327. See CASES AND MATERIALS ON MODERN PROPERTY LAW, *supra* note 1, at 280. There are numerous other ways to create a tenancy by the entirety, including "to John Jones and Jane Jones, as husband and wife." *Id.* However, real estate practitioners are familiar with this old sexist clause that appears on deeds with great frequency. Although one could argue this language is simply a benign term of art, it is still a reminder of a thankfully bygone era of gender inequality.

328. See *supra* notes 62–77 and accompanying text.

329. See *supra* notes 65–68 and accompanying text.

entirety to include non-married persons is not a unique proposition.³³⁰ Clearly, under current law, there is no way to create a similarly beneficial tenancy.³³¹ However, the obvious ramifications of this solution make it less acceptable than the present state of affairs.

Removal of the marriage requirement opens the door for the tenancy by the entirety to be used as an effective weapon for a multitude of persons to defraud creditors. It is not difficult to imagine numerous persons holding property as tenants by the entirety with no relationship and nothing in common besides an unscrupulous and avaricious desire to create effective creditor-proof estates. Thus, although this alteration to the tenancy by the entirety would thoroughly equalize the rights of all persons, the concomitant and comprehensive denial of creditor's rights simply makes it an unacceptable solution. Additionally, the spirit behind the protections afforded the tenancy by the entirety—the mantra of preserving the family home—is lost in this proposal. In order to stay faithful to this cause, the owners of tenancies by the entirety must bear some resemblance to a family unit.

C. *The "Familial" Residence Exemption*

Alternative legislation could be enacted to rectify the inequity created by the tenancy by the entirety without becoming entangled in the complexities of the tenancy. The core concern of protecting the family unit is not entirely served through protecting marital property. A married couple is often an incidence of a family, but certainly not a necessity. Thus, protecting "familial" property would be the broadest way to satisfy the core concerns at stake. Toward that goal, a statute could be enacted which allows a "familial residence" exemption. Such a statute would require language in the habendum clause of a deed such as the following: "to John Jones and John Smith, to own as their familial residence." Certain additional safeguards are necessary before such a right could be created. This special method of owning property should only be available for a primary residence and would not be a shield against the underlying financing on the premises. In order to prevent persons from claiming that their primary residence is a one hundred unit building with lucrative commercial and residential rents (where the

330. See, e.g., Orth, *supra* note 7, at 47. "Today, no discussion of the tenancy by the entirety would be complete without addressing one final question: Why is the tenancy by the entirety still limited to married persons?" *Id.*

331. *Id.* at 48. "No combination of joint tenancy or tenancy in common plus contracts not to partition and to make a will can give the unmarried couple all the benefits automatically conferred on spouses holding property as tenants by the entirety." *Id.*

cotenants just happen to reside in the penthouse), it would be necessary to limit the protections of the familial residence to non-multiple dwellings (for example, three families or less).

This concept of creating a safe-haven for a family residence has its roots in the nineteenth century homestead exemptions.³³² These acts allowed a homeowner to designate real property as a homestead and thereby exempt the land from execution by creditors.³³³ In fact, proposals to eliminate the tenancy by the entirety have recommended replacing these estates with improved homestead laws.³³⁴ Many states have enacted homestead laws;³³⁵ however, to provide protections equally, the laws must be expanded to include non-marital couples, be they same-sex or cohabiting opposite-sex couples, and single parents.

Although such legislation would increase the number and size of family homes afforded protection from attachment by creditors, problems of succession, specifically in the context of subsequent marriages where children from prior marriages exist, would not be remedied by this proposal. Also, the familial residence exemption still denies unmarried persons the full package of rights that accompany the tenancy by the entirety.

D. The Creation of a More Equitable Tenancy

We have identified several so-called new types of couples whose numbers are rapidly increasing—specifically cohabiting homosexuals and heterosexuals. Additionally, we have acknowledged the existence of single parents and subsequent marriages with children of prior marriages as being prevalent throughout history. We have identified various flaws with the methods of concurrent ownership as they currently exist in addressing the unique interests of the above groups. Specifically, the unavailability of the tenancy by the entirety to cohabiting homosexuals and heterosexuals and single parents denies these groups the creditor protection afforded to married couples and denies a simple technique for devising land at death to a partner. Further, the existence of the tenancy by the entirety could work to deny children of a prior marriage from inheriting property from their remarried parent.

332. See George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950).

333. *Id.*

334. 2 ATKINSON ET AL., *supra* note 23, § 6.6, at 32.

335. See, e.g., FLA. STAT. ANN. § 222.01 (West 1998); TEX. PROP. CODE ANN. § 41.001 (Vernon 1996).

Ultimately, a new form of concurrent ownership might be the only alternative to achieve equality among the various interests in light of the deficiencies in the above suggestions. Concurrent owners of real property have been restricted for six hundred years to a choice among the joint tenancy, the tenancy in common, and (for married couples) the tenancy by the entirety. The existing tenancies from the age of antiquity seem insufficient to handle the complexities of modern society. Legislation to create a fourth tenancy may be the best solution to the problems raised thus far and could comprehensively include all of those persons whose rights have formerly been denied.

This new tenancy would resemble a modified tenancy in common, with dual life estates, an optional right of survivorship, and the incidents of the aforementioned familial residence exemption. Tenants would own divisible, one-half interests in an estate, similar to tenants in common. These tenants would also possess a life estate as to the cotenant's one-half interest. Such a life estate would not attach to the survivor's interest since that would create an interest in the heirs of the survivor. This would have the effect of creating rights where no rights existed before; the surviving tenant would need to obtain the permission of his or her own heirs in order to alienate or encumber his or her own interest.

The purpose of this life estate as against the heirs of the deceased cotenant is two-fold. First, the intent of the original parties to the new tenancy would be preserved, since the heirs of the first cotenant to die would be unable to bring a partition action. They would possess an interest that would not be activated until the survivor dies. Thus, if the tenants intended to preserve a family residence for their lives together that continues after the death of one, this intent would be protected. Additionally, the dual life estates protect the interests of the heirs of each cotenant. Upon the survivor's death, the heirs of each cotenant would inherit their ancestor's fifty percent interest, and the formerly dormant interests of the heirs of the first deceased cotenant would be awoken. Thus, the interests of the tenants and their heirs are preserved simultaneously. An option of creating a right of survivorship, in the alternative to the dual life estates, would allow the new tenancy to be the virtual equivalent of the tenancy by the entirety.³³⁶

The protection from creditor's claims afforded by the previously discussed "familial residence" exemption could also be available to the

336. This right of survivorship would be created in the new tenancy just as it is created today, by adding "with a right of survivorship" in the habendum clause of the deed.

new tenancy. By labeling the estate the "familial residence," creditors would be unable to attach the estate unless they possessed a mortgage secured by the premises. This would be a change from the protection afforded a tenancy by the entirety since, in most jurisdictions recognizing the tenancy, creditors of both spouses can attach the premises. Therefore, the familial residence exemption would provide greater rights than the entirety estate. To avoid defrauding creditors, the familial residence should only be available for a primary residence that is a non-multiple dwelling, as discussed herein. And, as not to unduly burden creditors, a provision in a statute might allow only one property at a time to be held by the new tenancy. Under this reform, the familial residence option would not be confined to the narrow concept of a family as a husband and wife.

Partition would be a right shared equally by tenants utilizing this new form of concurrent ownership. They commenced the tenancy on their own accord and should be able to terminate it freely and unilaterally. Of course, to do so, both sides must be aware of the partition; a unilateral severance would be ineffectual.³³⁷ The familial residence exemption would prevent creditors (besides those holding a mortgage on the premises) from forcing a partition against the non-debtor tenant. Allowing partition is necessary for an additional reason. Since the new tenancy is an alternative method of creating a family residence, there must be some way for this family relationship to be terminated absent the divorce option.

Applying the new tenancy to a few hypothetical relationships will help to fully understand the way it would work in practice. A comparison of the current options of concurrent ownership available to these relationships displays the full benefits of, and necessity for, a new tenancy. For purposes of this analysis, New York law will be applied since it recognizes the joint tenancy, tenancy in common, and tenancy by the entirety.³³⁸ Additionally, tenants by the entirety in New York are afforded only partial protection from creditors.³³⁹ Thus, the familial residence exemption would be an expansion of these protections.³⁴⁰

337. This would avoid the possibility of severing the tenancy through the secret severance deed as discussed in Fetters, *supra* note 44, at 175.

338. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney 2000).

339. 13 WARREN WEED'S NEW YORK REAL PROPERTY § 4.03[1], at 37 (1999).

340. In New York the interest of a debtor-tenant by the entirety is subject to a judgment lien and may be sold upon the levy of execution. *Id.* Upon sale, the purchaser holds the debtor-tenant's one-half interest as a tenant in common with the non-debtor tenant by the entirety. *Id.* However, the purchaser cannot bring a partition sale as he is subject to the

Today, if a cohabiting couple (either a same-sex couple or unmarried opposite-sex couple) buys a family home, they have the option of holding the premises as tenants in common or joint tenants.³⁴¹ If the couple holds as tenants in common, each would possess a separate one-half interest in the estate.³⁴² If one cotenant were to die without a will, the survivor and the heirs of the deceased cotenant each would own a one-half interest.³⁴³ This forces the surviving cotenant to attempt to buy out the heirs' interest or to be forcibly removed by a partition action.³⁴⁴ Likewise, creditors could perfect a judgment against each cotenant's individual share and bring a partition action.³⁴⁵ The execution of a will would afford the cotenants some protection.³⁴⁶ However, intestate heirs could contest a will.³⁴⁷ Even if the will contest fails, substantial legal fees could be incurred. Ultimately, the creation of a tenancy in common is an unsatisfactory option for a cohabiting couple.

Alternatively, the cohabiting partners could hold title to the estate as joint tenants with a right of survivorship.³⁴⁸ Here, the partners' interests are better protected. Upon the death of either joint tenant, his interest goes to the survivor.³⁴⁹ Thus, the heirs of the prior deceased joint tenant would gain no interest and would be unable to contest a will, since the transfer operates under the deed and outside of the laws of intestacy.³⁵⁰ These heirs of the first joint tenant to die are placed in an unfair position since the surviving joint tenant's heirs would stand to receive the entire estate.³⁵¹ If the joint tenants have the same heirs, either natural children of a cohabiting opposite-sex couple or adoptive children of a same-sex couple, then this does not present a problem. When the joint tenants have no children, the inequity results to the heirs of the first to die. An additional problem with holding as joint tenants is that the creditors of

tenant's right of survivorship. *Id.* If the debtor-tenant (whose interest was obtained by the purchaser at the judicial sale) dies first, the purchaser loses his entire interest. *Id.* If, however, the non-debtor tenant dies first, pursuant to the right of survivorship, the purchaser at the judicial sale succeeds to the entire estate. *Id.*

341. CASES AND MATERIALS ON MODERN PROPERTY LAW, *supra* note 1, at 278–79.

342. *Id.* at 278.

343. *Id.*

344. *Id.*

345. *See supra* notes 59–61 and accompanying text.

346. HASKELL, *supra* note 312, at 9.

347. *Id.* at 223–24.

348. CASES AND MATERIALS ON MODERN PROPERTY LAW, *supra* note 1, at 278–79.

349. *Id.*

350. HASKELL, *supra* note 312, at 148–49.

351. *Id.* at 128–29.

each individual tenant could perfect a judgment against and foreclose upon a joint tenants' interest; the result is a partition action and ouster from the family home. Thus, the joint tenancy with a right of survivorship gives the parties greater protection, but the heirs of the first to die suffer. Also, the joint tenants do not enjoy the same protections as tenants by the entirety.

If a same-sex couple with no children purchases a non-multiple dwelling, the new tenancy would more closely meet their wishes and afford them greater protection than the options which currently exist. Upon the death of the first cotenant, the survivor would possess a life estate as against the heirs of the deceased cotenant. After the death of the survivor, the heirs of both cotenants would acquire their ancestor's interest.³⁵² During their lives, based on the familial residence exemption, individual creditors of each cotenant would be unable to perfect a judgment against the premises.³⁵³ The original intent of the partners is preserved, and their separate heirs will still be entitled to an inheritance.

If an unmarried opposite-sex couple with mutual children owned a non-multiple dwelling under the new tenancy (with a right of survivorship), they would also benefit from the familial residence exemption. One might conclude that a joint tenancy with the familial residence exemption would have the same effect. However, the right to partition, which would be denied to creditors of tenants holding under the new form of concurrent ownership, provides an additional protection that joint tenants do not enjoy. By holding the property under the new tenancy, but with a right of survivorship, the survivor takes the entire estate, and the mutual offspring of the couple would have his or her inheritance preserved in whole.

Altering the hypotheticals, an unmarried opposite-sex couple with no children, or with children from prior relationships, should form the new tenancy without the right of survivorship. This would allow them to preserve their familial residence and prevent their partner's children from forcing a partition. Concomitantly, each partner's children from his or her former relationships would have their inheritance preserved and actualized upon the death of the survivor. Logically, a same-sex couple with mutual offspring (possibly through adoption or a combination of adoption and in-vitro fertilization) should form the new tenancy with a right of survivorship.

352. Since the cotenants hold separate interests, they could allow their intestate heirs to inherit or choose to devise the estate pursuant to a will.

353. See *supra* Part V.D.

In the situation of a subsequent marriage with children from a prior relationship, the new tenancy is particularly effective.³⁵⁴ The surviving spouse of the second marriage could not be forced out through a partition, and the familial residence protection would be afforded the tenants. Additionally, the children from the former marriage would have their inheritance preserved.

Paradoxically, with subsequent marriages in times past, society did not want to postpone the enjoyment of the estate to posterity since the heirs would take over the land and maintain its productivity.³⁵⁵ The adult children would take over the family farm and provide an income while allowing their widowed mother to continue in her enjoyment of the land.³⁵⁶ Even if the heirs were less benevolent, a widow's right of dower (to a life estate on her husband's land) and the corresponding widower's right of courtesy would prevent the heirs from removing the surviving spouse.³⁵⁷ Today, with the termination of these rights and the increasing obsolescence of the family farm, the necessity of immediate inheritance has waned. Additionally, modern retirement benefits, unknown before the twentieth century, usually allow a surviving spouse to finance the estate without the help of the family.³⁵⁸

The addition of the familial residence exemption in the new tenancy is vital for the protection of single parents.³⁵⁹ It is an unfathomable set of circumstances whereby, under the current law, a married couple without children is afforded protection from creditors, yet a single person with children does not have that same protection. Besides a single parent having the added cost of raising a family, he or she must do so on one salary. So, by allowing a single parent owner of land to hold it as his or her familial residence, a glaring inequity is resolved.

An additional result of creating a new and more equitable method of concurrent ownership is the probable extinction of the tenancy by the entirety. Those entirety estates currently in existence will not be affected. However, the desirability of the new tenancy will discourage the creation of new tenancies by the entirety; in sixty or seventy years

354. This tenancy will be effective, provided of course, that the new tenancy would be available to married persons. To deny them this right would be illogical and unjust, since the familial residence exemption creates greater rights than currently available under some states' tenancies by the entirety.

355. HASKELL, *supra* note 312, at 148-49.

356. *Id.*

357. *Id.*

358. *Id.*

359. The statute must entitle tenancies in severalty in the familial residence exemption.

the last such tenancy will quietly disappear, and along with it, any surviving sexist stigma.

VI. CONCLUSION

Creating a new and more equitable tenancy will not remedy the injustices prevalent in a system that affords numerous marital benefits to those few that fall under the traditional definition of a married couple. Nor will it counteract any intolerance for these individuals who feel that they are as much a family as any husband and wife. Other aspects of the law will continue to deny rights to all of the groups discussed throughout the course of this Article. However, when laws from antiquity operate unjustly, centuries after their original purposes have long since disappeared, an illogical injustice demands a cure. Simply, the law of concurrent ownership, still mired in medieval times, deserves a renaissance.

* * *