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## To Love, Honor, and (Oh) Pay: Should Spouses Be Forced to Pay Each Other's Debts?

A. Mechele Dickerson

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## ARTICLES

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A. MECHELE DICKERSON\*

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### INTRODUCTION

As a society, we remain conflicted by the benefits, burdens, and economic obligations that should accompany the venerable institution of marriage. Few modern marriages are "traditional" ones<sup>1</sup> where the husband works in the market to provide for the family's financial needs, the wife remains in the home to provide for the family's emotional needs, and the blissfully happy couple stays together till death do them part.<sup>2</sup> Perhaps as a reflection of the times, at least one state now offers two marriage options to potential mates: a risk-free, no-fault version and a burdensome "covenant" version.<sup>3</sup>

<sup>1</sup> For a typical view of traditional marriages, see George F. James, *The Income of Married Couples: Is the Knutson Bill Justice?* 26 TAXES 311, 366 (Apr. 1948) ("It must be recognized that the basic American social pattern is still that of married couples living together, the husband being the principal or sole wage earner, and the wife's major contribution being the management of the home and the care of children.").

<sup>2</sup> It is doubtful whether the husband-in-marketplace, wife-at-home paradigm actually was a "tradition" for all groups of society. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2282 n.282 (1994) (positing that this notion of "tradition" refers to Protestant views of marriage). Because African-American wives and mothers consistently have worked outside the home in numbers that vastly outnumber those of white women, the "traditional" marriage paradigm most likely was never part of *their* tradition. See LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 201 (1981) ("[T]he stay-at-home housewife so taken for granted in the legal model is an ideal that poor black families cannot afford."); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2486-90 (1994) (noting that neither the past nor the present structure of most black marriages fits with the paradigm assumed in discussions of marriage). Indeed, recent statistical studies suggest that most black mothers are not currently married and many do not cohabitate with the fathers of their children. See Jane Mauldon, *Family Change and Welfare Reform*, 36 SANTA CLARA L. REV. 325, 330-33 (1996).

<sup>3</sup> See *Covenant Marriage Law*, LA. REV. STAT. ANN. § 9:272 (West 1991 & Supp. 1998); see also Terry Carter, *A Stealth Anti-Divorce Weapon*, A.B.A. J., Sept. 1, 1997, at

Louisiana passed its covenant marriage law after some legislators expressed concerns that prospective spouses do not fully understand the emotional and economic demands that marriage entails and that some people trade in spouses like people trade in cars.<sup>4</sup> Although Louisiana and other states<sup>5</sup> are in the process of reassessing the duties that prospective spouses must assume before they marry and before they divorce, no federal or state legislative body has developed a normative standard for assessing spouses' financial obligations to each other while they remain married.

Over 1.3 million individuals filed for bankruptcy relief in 1997, an increase of almost 200% since 1990.<sup>6</sup> Statistically, a significant proportion of those individual filers are likely to be married.<sup>7</sup> A married person who files for bankruptcy receives certain benefits under the Bankruptcy Code simply because of his<sup>8</sup> marital status.<sup>9</sup> These benefits, which collectively I shall re-

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28 (discussing the premarital counseling requirements and additional burdens imposed by covenant marriage).

<sup>4</sup> See Ellen Goodman, *Louisiana's New Marriage Options*, NEW ORLEANS TIMES-PICAYUNE, Aug. 10, 1997, at 87 (discussing bill author's analogy between marriage and buying a new car, where making "payments" for the first twelve months "[is]n't a problem" but becomes less exciting for payors as they "get into the third, fourth and fifth year of making those payments").

<sup>5</sup> A bill to amend the Code of Virginia to provide for covenant marriage was recently entered in the Virginia General Assembly. See H.B. No. 1056 (Va. 1998).

<sup>6</sup> See Admin. Office of the U.S. Courts, *U.S. Bankruptcy Filings (1980-1997): Non-business Total* (visited July 16, 1998) <<http://www.abiworld.org/stats/statsfront.html>>; see also *Bankruptcy Code: Witnesses at Senate Hearing Disagree on Need for Congress to Review Code*, BNA BANKR. L. DAILY, May 20, 1991 (reporting 725,000 bankruptcy filings in 1990, a 300% increase over the 227,000 filings in 1979); *Reform: Review Panel's Consumer Proposals "Miss Mark," Credit Union Group Asserts*, BNA BANKR. L. DAILY, Jan. 7, 1998 (reporting on 1997 bankruptcy filings).

<sup>7</sup> Sixty percent of all adults in the United States are married. See 1997 U.S. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, at 55 (117th ed.).

<sup>8</sup> Both husbands and wives are entitled to bankruptcy benefits based on marital status. I will refer to debtors as "he" or "him" because a survey of the reported decisions indicates that husbands, not wives, are most likely to use bankruptcy laws to protect their non-debtor spouses. See sources cited *infra* note 11 (discussing cases in which a debtor has protected property used by a non-debtor spouse); see also Otilie Bello, Comment, *Bankruptcy and Divorce: The Courts Send a Message to Congress*, 13 PACE L. REV. 643, 643 n.4 (1993).

<sup>9</sup> See, e.g., Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended in scattered sections of 11 and 29 U.S.C.) (allowing, *inter alia*, stays of action for co-debtors); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 and 28 U.S.C.) (allowing, *inter alia*, married couples to file joint bankruptcy petitions and to claim certain exemptions).

fer to as "marital benefits," include: (1) the right to file a joint petition;<sup>10</sup> (2) the ability to shield specific types of property from creditors;<sup>11</sup> (3) the right to include expenses for a non-debtor spouse in a bankruptcy budget;<sup>12</sup> and (4) the ability to protect a non-debtor spouse from certain debt collection activities.<sup>13</sup> The biggest benefit, however, is indirect. That is, a married couple could agree that the husband will be solely responsible for purchasing household goods, items for the family, or items used solely by his wife. The husband could then file for relief in bankruptcy to discharge any debts incurred in making such purchases. Because the debts would be in the husband's name, his wife would have no obligation under bankruptcy laws to help him pay those bills, even if she possessed assets or disposable income that she could use to service the debt.

Although Congress recently enacted sweeping legislation to deny unmarried mothers the right to receive welfare benefits unless they work to *earn* those benefits,<sup>14</sup> Congress has not required non-debtor spouses to *earn* the bankruptcy benefits that they indirectly receive when their spouses' debts are discharged. Under the current system, the subset of married individuals among the 1.3 million bankruptcy filers receives governmental benefits without a corresponding burden being imposed on solvent non-filing spouses.

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<sup>10</sup> See 11 U.S.C. § 302 (1994).

<sup>11</sup> See 11 U.S.C. § 522(b)(1)(B) (allowing debtors to exempt from the estate any interest in property held as tenants by the entirety or joint tenants); 11 U.S.C. § 522(d)(1) (allowing debtor to exempt up to \$15,000 of the debtor's interest in property that a dependent uses as a residence); 11 U.S.C. § 524(a)(3) (acting as an injunction against community property claims after discharge). A number of cases have arisen under this last provision. See, e.g., *In re Homan*, 112 B.R. 356, 360 (B.A.P. 9th Cir. 1989); *In re Strickland*, 153 B.R. 909, 912 (Bankr. D.N.M. 1993) ("The discharge of debts . . . prohibits creditors from proceeding against community property acquired after the petition was filed, even as against the non-debtor spouse."); *In re Smith*, 140 B.R. 904, 906-07 (Bankr. D. N.M. 1992) (noting that, following a discharge of debts, creditors are prohibited from proceeding against community property); see also *Norwest Fin. v. Lawver*, 849 P.2d 324, 325-26 (Nev. 1993) (noting that, in community property states, only a non-debtor spouse with substantial separate debt would have an incentive to file jointly with a debtor spouse).

<sup>12</sup> See 11 U.S.C. § 1325(b)(2) (defining the debtor's disposable income as income received by the debtor that is not reasonably necessary to provide for the maintenance or support of a dependent of the debtor).

<sup>13</sup> See 11 U.S.C. § 524(a)(3) (providing that, if the bankruptcy estate includes community property and the bankruptcy discharged any community claims, the discharge is effective against community creditors of both the non-debtor and the debtor spouse); 11 U.S.C. §§ 1201, 1301 (prohibiting creditors from collecting co-signed debts during pendency of Chapter 12 and Chapter 13 cases).

<sup>14</sup> See Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).

Instead, current laws place the burden of subsidizing the debtor onto both creditors and society at large rather than on the debtor's solvent spouse.

Bankruptcy laws have two primary goals—to give debtors a “fresh start” and to ensure that all similarly situated creditors receive maximum debt repayment.<sup>15</sup> If bankruptcy laws continue to treat married couples more favorably than others,<sup>16</sup> it is imperative that Congress explain why marriage should be encouraged via the mechanism of bankruptcy laws. Moreover, given the two stated goals of bankruptcy, Congress must determine if encouraging marriage is consistent with those goals. Marriage has always been viewed as a relationship involving at least some level of mutual emotional and economic support, and it would therefore seem that Congress would require financially able non-filing spouses<sup>17</sup> to help their filing spouses to repay some of their debts. Because many federal laws, most notably tax laws, intentionally give married individuals favorable treatment, this aspect of the bankruptcy laws is not surprising.<sup>18</sup> Likewise, because bankruptcy laws generally reflect social norms and values,<sup>19</sup> those laws are naturally consis-

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<sup>15</sup> See generally WARREN & WESTBROOK, *infra* note 17, at 219.

<sup>16</sup> I argue, in another context, that Congress should not award other benefits based on marital status because doing so unfairly discriminates against unmarried couples. See A. Mechele Dickerson, “Family Values” and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, -- *FORDHAM L. REV.*-- (1998). However, since Congress has, in fact, elected to provide status based bankruptcy benefits, it fails in its obligations to the public unless it clearly defines the benefits and burdens associated with the “status” of being married. Only by providing such definition will Congress be able to ensure that debtors are forced to assume certain burdens in return for receiving certain benefits.

<sup>17</sup> Many non-filing spouses may lack the ability to provide financial support to their spouses because they are unemployed, own no separate assets, or own assets that would be exempt from seizure under applicable state or bankruptcy law. See generally ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS* 219 (3d ed. 1996) (indicating that most consumer bankruptcy proceedings are “no-asset” Chapter 7 liquidations in which debtors have no non-exempt assets that can be sold to pay debts); Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 *AM. BANKR. INST. L. REV.* 165, 183 n.112 (1997) (citing studies which found 95-97% of Chapter 7 filings to be no-asset proceedings).

<sup>18</sup> See generally David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *MICH. L. REV.* 447, 472-73 (1996) (describing the unintended behavioral effects of laws that treat a married couple as a single joint entity).

<sup>19</sup> Debtors are required to repay some claims, as a matter of public policy, even if they receive a bankruptcy discharge. For example, debts for alimony, child support, student loans, and certain drunk driving claims are not dischargeable in either Chapter 7 or Chapter 13 cases. See 11 U.S.C. § 523(a)(5), (8), (9); 11 U.S.C. § 1328(a)(2). In addition, Congress responded to the rash of bankruptcy filings by airlines in the 1980s by amending section 365 of the Code to restrict airlines' ability to perform under certain airport leases.

tent with a pervasive societal desire to foster marriage. Although supporting or promoting marriage may be a justifiable public policy in theory, the practice of using the bankruptcy marital benefits to promote marriage, given the monumental number of individuals filing for bankruptcy relief, is questionable.

This Article considers the role of marital status in bankruptcy and argues that the law should generally deny federal bankruptcy benefits to any married debtor whose spouse refuses to accept a burden typically associated with marriage—the duty to support one's spouse both emotionally and financially. Part I discusses three models of marriage that family law scholars have developed to define the rights and duties associated with marriage, as well as the burdens that Congress logically should impose on married debtors under each model. This Part also traces the historical evolution of ideas about the economic relationship between spouses and discusses how courts and legislators have responded to this evolution. This part concludes by noting that modern attempts to redefine the rights and duties of spouses generally arose from states' attempts to protect the property of wives both in the context of marriage and upon divorce.<sup>20</sup>

Part II discusses the public policy ramifications of adopting each of these models and argues that Congress should adopt the partnership model. This model presumes that spouses would help to pay each other's debts. Spouses could rebut the presumption by showing either that the debts sought to be discharged in bankruptcy did not benefit the marital partnership or that all partnership assets have already been made available to creditors in the filing spouse's bankruptcy case. I conclude by arguing that Congress should deny marital benefits to any married debtor whose spouse indirectly or directly benefits from the bankruptcy discharge unless the non-filing spouse agrees to support the debtor economically during the bankruptcy proceedings.

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See 11 U.S.C. §§ 365(d)(5)-(9), 1328(a)(2). Finally, after one CEO admitted that he filed a petition in bankruptcy on behalf of an airline in order to avoid the obligations imposed by a collective bargaining agreement, Congress amended section 1113 of the Code to make it more difficult for debtors to breach union agreements. See 11 U.S.C. § 1113. See generally *Oversight Hearing on Effect of Bankruptcy Actions on the Stability of Labor-Management Relations and the Preservation of Labor Standards: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 98th Cong. 1-3 (1984).

<sup>20</sup> It is not surprising that modern marriage theories developed alongside divorce reform because divorce laws were the only ones "that spoke directly or systematically to an ideal of marital relations." Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809 (1985).

## I. CHARACTERIZING AND DEFINING MARRIAGE

A. *Marriage as a Merger*1. Non-Bankruptcy Law<sup>21</sup>

The earliest marriage model in the Anglo-American legal tradition was that of a merger. At common law, the act of marriage was deemed to merge two beings into one.<sup>22</sup> Once the merger was complete, the law conferred a legally recognized status on the merged unit (the marriage entity), the terms of which were dictated by the state.<sup>23</sup> This legal status curtailed the individual wishes and interests of legally recognized<sup>24</sup> spouses and forced them to

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<sup>21</sup> See generally Dickerson, *supra* note 16 (tracing the law's treatment of marriage in contexts other than that of bankruptcy, as well as arguing that Congress should disregard marital status in awarding bankruptcy benefits).

<sup>22</sup> The "one" being, of course, the husband. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*442 ("By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything . . .").

<sup>23</sup> In *Maynard v. Hill*, 125 U.S. 190, 205 (1888), the Supreme Court referred to marriage as a "contract" but cautioned that, although the parties' consent is required to form the contract, once they marry,

a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

*Id.* at 211.

<sup>24</sup> States used marriage laws to prevent certain groups of people from entering into a legal marriage and thus from obtaining the benefits accorded to married couples. The most obvious and notable example of such laws pertained to slaves. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 189-90 (1982) (discussing the relationship between the supply of slaves and the stability of slave union households). See also *Stewart v. Munchandler*, 65 Ky. 278, 281 (1867) (finding that slave marriages were illegal because slaves were legally incapable of contracting for any purpose); *Lemons v. Harris*, 80 S.E. 740, 741 (Va. 1914) (same); cf. *Ray v. Ray*, 134 So. 744, 744 (La. 1931) (determining that slaves' marriages were valid only if their masters gave consent); *Erwin v. Nolan*, 217 S.W. 837, 842 (Mo. 1920) (same). Because ante-bellum state laws did not recognize marriage between slaves, slave owners could destroy these marriages with impunity by keeping one slave spouse and selling the other. Indeed, many slave owners used the threat of sale to control the behavior of their slaves. See Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, in *FAMILY MATTERS* 142, 146 (Martha Minow ed., 1993); Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 348 (1996). Even after slavery was abolished, states continued to



assume certain fixed roles as wives or husbands.<sup>25</sup>

At least until the middle of the twentieth century, marriage was viewed as a life-long legal, moral, and financial commitment that could not be terminated simply because of the spouses' wishes.<sup>26</sup> Because the state dictated all terms of the marriage, parties could terminate the relationship through divorce only if one party was legally at "fault," thus requiring the "innocent" party to prove that the "guilty" party engaged in behavior inconsistent with the duties of marriage.<sup>27</sup> By providing only narrow grounds for the termination of a marriage, a state ensured that its interest in preserving the marital unit<sup>28</sup> triumphed over any private<sup>29</sup> interests of individual spouses.

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denigrate and interfere with the right of blacks to marry. See *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding that statutes prohibiting interracial marriages are unconstitutional).

States still refuse to grant legal recognition to marriages involving people deemed by society to be either unworthy or incapable of fulfilling the duties associated with marriage. See, e.g., N.Y. CIVIL RIGHTS LAW § 79-a (McKinney 1992) (deeming anyone sentenced to imprisonment for life "civilly dead," thereby rendering such a person incapable of entering into any contract, including one of marriage); R.I. GEN. LAWS § 15-1-5 (1996) (deeming marriages of the mentally ill and mentally challenged, to whom the state refers as "lunatics" and "idiots," absolutely void).

<sup>25</sup> See *infra* notes 30-31 and accompanying text.

<sup>26</sup> See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* 19 (1991) (discussing early marriage laws, which tightly regulated marriages and their dissolution); MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 10-12 (1993) (noting that any agreement by the spouses to alter the state imposed rights and duties of marital partners was unenforceable); LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 4 (1985) ("The Church enforced its view of marriage as a sacrament that could not be dissolved by mere mortals."); Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 703-04 (1976) (discussing the evolution of marriage from "a relationship that was legally terminable only for serious cause to a relationship dissoluble at will").

<sup>27</sup> See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 7.1, at 429-431 (2nd ed. 1987); JOHN DE WITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* § 7.01 (1993); see also Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Right to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2182-83 (1994).

<sup>28</sup> See Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 959 (1998).

<sup>29</sup> Many feminist family law scholars reject the notion that it is possible to create a wall that separates public and market interests from those that operate in the private and familial sphere. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 186-88 (1995) (observing that the notion of a family's right to "privacy" was often used as an excuse for the states' failure to address the public health problems of violence against women and children, even when those who were assaulted sought state intervention); Williams, *supra* note 2, at 2280-82

When marriage was a legally defined and sanctioned status, husbands and wives had fixed, clearly defined roles. The common law placed a unilateral obligation on husbands to support their wives financially<sup>30</sup> and likewise required wives to provide domestic services for their families and consortium for their husbands.<sup>31</sup> These obligations notwithstanding, states refused to set a minimum level of financial support that husbands were required to provide to their wives. Instead, courts routinely held that the appropriate level of support was a matter within the husband's sole discretion.<sup>32</sup> If, however, a wife purchased necessities such as food, clothing, shelter, or medical services, then the husband was obliged under the doctrine of necessities to pay the creditor who provided those basic goods and services for his family.<sup>33</sup>

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(arguing that "the boundaries between the market and the family are porous"); cf. REGAN, *supra* note 26, at 158-59 (arguing that the dichotomy between the public and private worlds is socially constructed). Regan asserts that "[l]aw and social practice thus operate to preserve a rigid dichotomy between the 'public' world of work, organized around an implicitly male worker, and the 'private' world of the family, tended by an implicitly female caregiver." *Id.*

<sup>30</sup> See Blanche Crozier, *Marital Support*, 15 B.U. L. REV. 28, 28 (1935). As early as 1935, Crozier observed that the husband's legal duty to support his wife "is so familiar that we generally overlook its peculiar nature. Upon even the briefest analysis it is clear that this is a rule quite different from any which would be applied in other departments of life . . . ." *Id.*

<sup>31</sup> See generally REGAN, *supra* note 26, at 9-11 (discussing the respective marital duties and remedies that were available for breach of those duties).

<sup>32</sup> See Crozier, *supra* note 30, at 33. Crozier highlights the way in which these legal duties reinforced the wife's status as property. Under these conceptions of familial roles, a wife who lives with her husband has a "right" to receive support from him, but the

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

*Id.* See also MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 115 (1989) (noting the trend of judicial noninterference in disputes involving the financial support relationships of spouses when they are still living together); WEITZMAN, *supra* note 2, at 40-42 (citing cases discussing the nature and sufficiency of the support husbands were required to provide during marriage).

<sup>33</sup> See, e.g., *Schrader v. Schrader*, 400 P.2d 675, 678-79 (Colo. 1965) (ordering husband to reimburse wife for \$1,500 loan taken from her mother to care for herself and her child while the parties were still married); *Ing v. Chung*, 34 Haw. 709, 709-710 (1938) (discussing statute which mandated that a husband be liable for debts incurred by his wife for necessities); *Fortson v. Iden*, 214 N.E.2d 399, 400 (Ind. App. 1966) (holding husband liable to his wife's father for the expense of her burial); *Gossett v. Patten*, 23 Kan. 240, 241 (1880) (holding husband liable for debts incurred by his wife in defending against divorce action because the expense fell within the doctrine of necessities); *Credit Serv.*

Although a creditor generally could force a husband to pay for his wife's or family's basic living expenses, the creditor bore the burden of proving (1) that the item was necessary;<sup>34</sup> (2) that the husband had not already provided the item; and (3) that the wife lacked independent means of paying for it.<sup>35</sup>

The "benefit" that husbands in traditional marriages received in return for the "burden" of financially supporting their wives was the sole right to control them<sup>36</sup> and all of the marital assets.<sup>37</sup> Once the parties "merged," the

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Corp. v. Dickerson, 243 So.2d 827, 830 (La. Ct. App. 1971) (holding that wife's hospital treatment was necessary and husband was therefore liable); Thibeault v. Poole, 283 Mass. 480, 483 (1933) (permitting husband to sue in his own name for expenses of caring for his wife following an accident); Tabor v. Tabor, 53 A.2d 525, 526 (R.I. 1947) (ordering father to reimburse son for payments son made to cover his mother's hospital bills); *see also* Sellman v. Sellman, 185 P.2d 846, 847 (Cal. Dist. Ct. App. 1947); Annis v. Manthey, 208 N.W. 453, 454 (Mich. 1926); Bergh v. Warner, 50 N.W. 77, 78 (Minn. 1891); Gabel v. Blackburn Operating Corp., 442 S.W.2d 818, 820 (Tex. 1969); Hinton Dep't Co. v. Lilly, 141 S.E. 629, 630 (W. Va. 1928).

<sup>34</sup> Because the scope of what was "necessary" was dependent on the husband's financial status, creditors could seek reimbursement for a greater number of items from wealthier husbands, including legal expenses, furniture, funeral expenses, or expensive items of clothing. *See, e.g.,* Anderson v. W.T. Grant Co., 226 So.2d 166, 167-168 (Ala. Ct. App. 1969) (discussing the general rule that husbands must provide necessities and affirming judgment for plaintiff company to recover debt for clothes from the husband of a credit holder); Dean v. Belk-Gallant Co., 145 S.E.2d 118, 119 (Ga. Ct. App. 1965) (affirming judgment that husband was liable for wife's purchases of clothing and bed linen made on husband's credit card absent an express agreement that the wife was to be liable); *see also* cases cited *supra* note 33; Karol Williams, Comment, *The Doctrine of Necessaries: Contemporary Application as a Support Remedy*, 19 STETSON L. REV. 661, 664 (1990) (reviewing the relativist view of necessities).

<sup>35</sup> *See* Webb v. Hillsborough County Hosp. Auth., 521 So.2d 199, 204 (Fla. 1988) (making a spouse's inability to pay a condition precedent to the application of the doctrine of necessities); Sharpe Furniture, Inc. v. Buckstaff, 299 N.W.2d 219, 223 (Wisc. 1980) (discussing the elements of the doctrine of necessities and its evolution in Wisconsin law). Thus, although creditors theoretically had an incentive to give a married woman necessary goods and services, in practice few creditors offered credit on this basis because of their uncertainty about what items courts would find to be necessities. *See* Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1767 (1984).

<sup>36</sup> At common law, a husband could give his wife "moderate correction" for her "misbehaviour." *See* 1 BLACKSTONE, *supra* note 22, at \*444. Any harm caused by such "corrections" could not be legally compensated because common law considered the wife and the husband to be a single legal entity, and an entity cannot sue itself. *See* William E. McCurdy, Note, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1041-43 (1930). Moreover, even if a wife successfully recovered anything of value from her husband, she was not entitled to keep any of it because her husband owned her property. *See* Jack L. Herskowitz, Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423, 427 n.29 (1966). Likewise, even when wives were given the right to prosecute their husbands for assault, the right often was an empty one with no remedy. Because family disputes were "private" and

woman's separate existence as a legal entity was annihilated in the eyes of the law<sup>38</sup> and her personal<sup>39</sup> and economic<sup>40</sup> rights were controlled and represented by her husband, the legal representative of the merged unit. For example, a husband was given ownership of all his wife's assets in fee simple by operation of law.<sup>41</sup> Thus, the wife's assets could be seized by the couple's creditors to pay either the couple's debts or the husband's separate debts. The property subject to seizure originally included the wife's separate "pre-merger" property as well as property theoretically exempt from the debts of separate creditors such as property owned by the spouses as tenants by the entirety.<sup>42</sup>

Although "[t]he precise genesis of tenancy by the entirety is unknown," it depends on the legal fiction that a man and a woman merge at marriage.<sup>43</sup>

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courts felt that each family (i.e., the husband) had the right to determine the domestic governance in their household, courts generally would not interfere in these "private" matters unless the wife was severely injured. See generally FINEMAN, *supra* note 29, at 186-88 (observing that the right to "privacy" in family governance effectively gave men the freedom to assault their wives and children physically); Schneider, *supra* note 20, at 1835-38 (discussing nineteenth century judicial views concerning noninterference in family affairs).

<sup>37</sup> See 2 BLACKSTONE, *supra* note 22, at \*433 (explaining that marriage is the "sixth method of acquiring property in goods and chattels").

<sup>38</sup> See WEITZMAN, *supra* note 26, at 3 ("Upon marriage the wife became a *femme covert* [sic], a legal nonperson, living under her husband's arm, protection, and cover.") (citation omitted).

<sup>39</sup> At common law, wives could not participate in any legal actions, such as executing a contract, suing, or being sued, in their own names. See *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (recognizing that the domicile of the wife is ordinarily deemed to be that of her husband); Glendon, *supra* note 26, at 702 (explaining that the custom of women changing their names upon marriage had been so strong that most people believed it changed as a matter of law); see also WEITZMAN, *supra* note 2, at 9-12 (discussing a wife's loss of independent identity through the compelled loss of her name).

<sup>40</sup> See Crozier, *supra* note 30, at 29 ("The financial plan of marriage law was founded upon the economic relationship of owner and property.").

<sup>41</sup> See John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045 (1972) (discussing the instantaneous loss of title in her assets that a woman experienced upon marriage). Before the nineteenth century, the doctrine of coverture deprived wives of the right to control their property and gave that right to their husbands. See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385 (1994) ("Married women 'covered' by their husbands lost control over property brought into the marriage . . .").

<sup>42</sup> See generally Caryl A. Yzenbaard, *Ohio's Beleaguered Entirety Statute*, 49 U. CIN. L. REV. 99, 102-03 (1980) (describing the four approaches used to determine to what degree tenancy property was subject to levy and execution by creditors of one spouse at that time).

<sup>43</sup> See 7 RICHARD R. POWELL ET AL., *POWELL ON REAL PROPERTY* ¶ 620[3] (Patrick J. Rohan ed., 1998). Historically, entirety laws required that (1) each spouse have a right of

Entirety laws were designed to prevent creditors of one spouse from seizing and selling family assets to satisfy that spouse's separate debts.<sup>44</sup> Despite the harm to individual creditors, states enacted entirety laws to shield basic family assets, particularly family homes, from creditors and thereby decrease the likelihood that a financially irresponsible husband would squander away the family's assets, thus forcing the family into poverty.<sup>45</sup>

Just as a man's sex defined his gendered role within the merger of marriage, a woman's sex also determined her gendered role as a wife. Throughout much of this century, with the exception of wartime,<sup>46</sup> wives were expected to remain in the home<sup>47</sup> and serve as companions, housewives and mothers.<sup>48</sup> As a result of their forced roles as domestic caregivers,

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survivorship in entirety property; (2) the spouses acquire the same interest in property by the same instrument at the same time; and (3) the spouses have an undivided interest in the entire property. Modern entirety laws maintain the right of survivorship, prevent entirety property from being partitioned, and prevent spouses from disposing of entirety property or using it to pay individual debts without the consent of the other spouse. See Benjamin C. Ackerly, *Tenants by the Entirety, Property and the Bankruptcy Reform Act*, WM. & MARY L. REV. 701, 702-03 (1980).

<sup>44</sup> See Yzenbaard, *supra* note 42, at 103 (noting that the court in *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977), "chose the view [of entirety laws] that best protects the family").

<sup>45</sup> This policy consideration makes entirety laws analogous to homestead laws. See, e.g., *In re Johnson*, 207 B.R. 878, 881 n.6 (Bankr. D. Minn. 1997) (noting that Minnesota homestead exemption laws were designed to prevent the "destitution and dependency of families, and of promoting their stability, self-sustenance, and independence over the generations"); George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950) (describing homestead legislation as uniquely American and tracing its origin to an 1839 statute enacted in the Republic of Texas).

<sup>46</sup> Women worked in the market in greater numbers during war periods. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1248 (1989) (describing the accommodations that employers made during wartime to encourage women to stay in the workforce, including the provision of child care, shopping facilities, meals, and convenient banking); Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 TEX. J. WOMEN & L. 37, 45 n.45 (1995) (observing that, after Pearl Harbor, women's participation in the workforce rose 460%); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1166-69 (1991) (describing the need for female workers during World War II as effecting a temporary change in the position of women in the labor market).

<sup>47</sup> In pre-industrial agrarian marriages, wives worked both in the home and on the family farm under the supervision of their husbands. See generally GLENDON, *supra* note 32, at 111 (describing the evolution of the role of wives from "important collaborators in interdependent family enterprises" to dependents); WEITZMAN, *supra* note 2, at 169 (explaining that "[w]omen have always worked," but that the work women did in the past was typically agricultural and supervised by male family members); Glendon, *supra* note 26, at 707-08 (noting that a woman's role included caring for the household and children, as well as participation in the agricultural production unit).

<sup>48</sup> See WEITZMAN, *supra* note 2, at 60-64; cf. REGAN, *supra* note 26, at 27-32

wives were perceived to be intellectually inferior and essentially incompetent in all financial matters outside the home.<sup>49</sup> For example, a wife could not own separate property, enter into contracts, execute legal documents, or maintain a domicile separate from her husband.<sup>50</sup> Indeed, even if a wife was forced to work in order to help support her family, her husband was legally entitled to her wages.<sup>51</sup>

The Married Women's Property Acts, adopted in various states throughout the middle and late nineteenth century, ultimately<sup>52</sup> gave adult<sup>53</sup> married women the right to retain ownership of pre-marital property as well as personal wage earnings.<sup>54</sup> Because these acts shielded property that parents had

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(discussing the Victorian role expectations of spouses). Again, this most likely was not expected of black wives, who historically have held wage earning jobs. See discussion *supra* note 2.

<sup>49</sup> See Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 225, 234 (1996) (discussing the role that the myth of women's inferiority has played in the subordination of women); Lucille M. Ponte, *United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity*, 7 HASTINGS WOMEN'S L.J. 1, 32-33 (1996). Although wives were expected to stay home to care for their children, states gave fathers the sole right to control their children. See FINEMAN, *supra* note 29, at 76. As a result, until the early part of the twentieth century, mothers routinely were denied custody of their children when they divorced their husbands. See LINDA D. ELROD, *CHILD CUSTODY PRAC. & PROC.* § 1:05 (1993).

<sup>50</sup> See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082 (1994) (describing the status and rights of married women in the ante-bellum period); Williams, *supra* note 41, at 386-87 (same); see also *supra* notes 34-41 and accompanying text.

<sup>51</sup> Although many states adopted "earnings statutes" in the 1860s that were designed to give wives the right to their wages, wives in Georgia were not entitled to own their wages until 1943. See *City of Commerce v. Bradford*, 94 S.E.2d 160, 169 (Ga. Ct. App. 1956); see also Siegel, *supra* note 50, at 1080-92 (providing a brief overview of married women's rights before and after the Civil War); Siegel, *supra* note 27, at 2145 (discussing the movement towards earnings statutes).

<sup>52</sup> See Williams, *supra* note 41, at 387-89 (noting that the earlier Married Women's Property Acts did not grant wives title to their earnings and explaining that, prior to the earnings statutes, a husband was entitled to both his wife's services and her wages); see also Crozier, *supra* note 30, at 35-41 (noting that early judicial interpretations of these acts deemed a wife's wages to be owned by her husband).

<sup>53</sup> See, e.g., VA. CODE ANN. § 55-44 (Michie 1995 & 1997 Supp.) (mandating that a receiver be placed in control of a wife's estate during her coverture and while she was a minor).

<sup>54</sup> See POWELL, *supra* note 43, at ¶ 622[2] (discussing the effect of women's property laws on entirety laws); Johnston, *supra* note 41, at 1061 (discussing the "flurry of legislation" to implement Married Women's Property Acts between 1839 and 1895). See, e.g., DEL. CODE ANN. tit. 13, § 311 (1993 & 1996 Supp.); 750 ILL. COMP. STAT. ANN. 65/9 (West 1993 & 1998 Supp.); IND. CODE ANN. § 31-1-9-2 (West 1979 & 1998 Supp.);

bequeathed to their daughters from the separate creditors of their daughters' husbands, these laws provided wives with some degree of protection from their husbands' improvident behavior.<sup>55</sup> Overall, however, wives in traditional merger marriages were viewed both legally and socially as helpless and intellectually inferior to men in all matters outside the home<sup>56</sup> and were kept both economically and physically<sup>57</sup> subordinate and subservient to their husbands.<sup>58</sup>

## 2. Marriage as a Merger in Bankruptcy

As a matter of bankruptcy policy, Congress could view marriage as a traditional merger and grant benefits accordingly. If Congress chooses to adopt this model, it should impose financial obligations on both the debtor and non-debtor spouse in a manner consistent with the view that the spouses are truly "one." Thus, if the law were to treat spouses as merged upon marriage, then one spouse would not be allowed to file a bankruptcy petition unless the

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MICH. COMP. LAWS ANN. § 557.21 (West 1988 & 1998 Supp.); N.H. REV. STAT. ANN. § 460:1, :2 (1992 & 1997 Supp.); N.Y. DOM. REL. LAW § 50 (McKinney 1988 & 1998 Supp.); N.C. GEN. STAT. § 52-1, -2 (1991); OHIO REV. CODE ANN. § 3103.07 (Anderson 1996 & 1997 Supp.); S.C. CODE ANN. § 20-5-10, -20, -30, -40 (Law Co-op, 1985 & Supp. 1997); TENN. CODE ANN. § 36-3-504 (1996 & 1997 Supp.); UTAH CODE ANN. § 30-2-1, -2, -3, -4 (1995 & 1997 Supp.). See generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1359-61 (1983).

<sup>55</sup> The original impetus behind allowing women to own property distinct from that of their husbands was to protect wealth transfers by the rich. Giving wives the right to own property in their own names ensured that wealthy parents could bequeath property to their daughters without having the property automatically transferred to their sons-in-law. See Siegel, *supra* note 27, at 2135-36.

<sup>56</sup> See e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (arguing that women are "unfit" for many occupations in the market, including law, because the "domestic sphere" is the "domain and function[ ] of womanhood").

<sup>57</sup> Wives, viewed as little more than their husbands' chattels, had no legal rights to bodily integrity. Because the law assumed that sex-on-demand was an irrevocable term of the marriage contract, a husband could not commit acts that would fall within the legal definition of the "rape" of his wife. See 1 SIR MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* \*629; Lisa R. Eskow, Note, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 680 (1996) (quoting HALE, *supra*, and discussing the historical rationale for the marital rape exemption); Jaye Sitton, Comment, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 264-68 (1993) (discussing the legal history of the marital rape exemption). For a general discussion of marital rape statutory exemptions, including attempts to extend the exemption to non-married cohabiting males, see Eskow, *supra*, at 681-83.

<sup>58</sup> Not surprisingly, the traditional plighting of troth in marriage ceremonies required women to pledge to "love, honor and obey" their husbands, while men were required to "love, honor and keep" their wives. See, e.g., *To Love, Honor—and Obey?* TIME, July 21, 1986, at 45 (comparing the marriage vows of Princess Diana to the more traditional vows of the Duchess of York).

other spouse also files a petition. Moreover, because separate assets would be treated as joint assets in such a merger marriage, creditors of the debtor spouse would have the right to use the property of both spouses to satisfy the debts sought to be discharged, including property held separately or as tenants by the entirety. In cases where the non-filing spouse can prove that she has no income and no separate assets, the debtor spouse would be allowed to shield from creditors property that is used by the "dependent" spouse.

a. *Joint Filing*

The predecessor to the current Bankruptcy Code, the Bankruptcy Act, contained no provisions for joint filings because married women historically could not incur debt or own property separate from their husbands.<sup>59</sup> Without personal debt or property, there was no need for married women ever to file for bankruptcy protection in order to discharge debts or protect property. In contrast, section 302 of the Code gives married couples the right to file a joint bankruptcy petition.<sup>60</sup> The scant legislative history behind section 302 suggests that Congress believed that most married couples hold most of their property jointly and should therefore be jointly liable on their debts.<sup>61</sup> Based on its assumption that most married couples have merged their finances and property, Congress allowed bankruptcy proceedings for married debtors to be administered jointly, primarily in order to save the debtors the expense of having to hire more than one attorney and pay two sets of filing fees,<sup>62</sup> as

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<sup>59</sup> See generally *In re Knobel*, 167 B.R. 436, 439 (Bankr. W.D. Tex. 1994) (describing how section 302 of the Code changed previous bankruptcy law).

<sup>60</sup> See 11 U.S.C. § 302(a) (1994).

<sup>61</sup> See S. REP. NO. 95-989, at 32 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5818. In the course of testimony about the proposed code, one prominent bankruptcy judge testified that:

A significant reality about contemporary consumer credit and therefore of consumer insolvency is that these debtors are usually married persons, often jointly obligated, but frequently entirely dependent upon the husband's earnings alone. Just as frequently, however, these families have little discretionary income to commit to non-essentials and the wife actually disposes of most of the family income for basic family necessities.

*Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 1317 (1976) (statement of Hon. Conrad K. Cyr, U.S. Bankruptcy Judge, District of Maine).

<sup>62</sup> Legal fees and costs can be daunting, especially given that clients in bankruptcy are unlikely to have any significant liquid resources. Debtors currently must pay \$130 to file a case and \$45 in administrative fees. See 28 U.S.C. § 1930(a)(1) (1994). One study has shown that the average attorney's fee for a Chapter 13 case is \$535 and for a Chapter 7 case is \$459. See Braucher, *supra* note 17, at 175 n.55. Another study found the average Chapter 13 fee to be \$820 and the average Chapter 7 fee to be \$637. See *id.*; cf. *In re Roffle*, 216 B.R. 290, 296 (Bankr. D. Colo. 1998) (fees in "vanilla" Chapter 13 cases should generally not exceed \$1,200.); *In re Crivilare*, 213 B.R. 721, 723 (Bankr. S.D. Ill. 1997) (average fee in Southern District of Illinois is \$500); *In re Lee*, 209 B.R. 708, 712



well as to reduce the administrative costs involved in having two separate bankruptcy cases.<sup>63</sup>

If Congress were to treat marriage as a merger, a joint filing should be mandatory rather than optional. If two spouses are legally deemed to be one entity, they could possess only joint assets and incur only joint debts. As a merged unit, both parties would be responsible for paying those debts<sup>64</sup> and, consequently, both would have to receive a discharge in order to eliminate their personal liability for those debts. Thus, the only circumstance in which only one spouse would be allowed to file but the other would be granted relief in bankruptcy would be when the spouses could prove that the wife has no separate property or income *and* that the husband's case involves the administration of both joint assets and his separate assets.

b. *Substantive Consolidation of Spousal Assets*

Filing jointly permits spouses' cases to move through bankruptcy with the same attorney and trustee. Joint administration does not, however, permit the creditors of one spouse to seek recovery of their claims from the other

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(Bankr. N.D. Ill. 1997) (recovery of attorney fees over \$800 because of special circumstances); *In re Taylor*, 100 B.R. 42, 46 (Bankr. D. Colo. 1989) (award of \$970 in fees for routine Chapter 13 case).

In addition to reducing out-of-pocket expenses, filing jointly probably reduces the amount of time each debtor must devote to attending bankruptcy hearings. By local rule, courts can excuse one spouse from having to participate fully in a bankruptcy case if the attending spouse can provide all relevant financial information for the absentee spouse. See *In re Keiser*, 204 B.R. 697, 699 (Bankr. W.D. Tex. 1996) ("It is the well established practice in this District in cases involving joint debtors to excuse one co-debtor from attending the section 341 meeting upon good cause shown so long as the other co-debtor attends and answers all questions to all parties' satisfaction."). The court in *Keiser* ultimately dismissed the bankruptcy case of the non-attending spouse. See *id.* at 699. The court noted, however, that the spouse's presence was not vital but that it viewed both the dismissal and the entire controversy as primarily a "struggle of wills" between the United States trustee and the couple's attorney. See *id.*

<sup>63</sup> See *In re Allen*, 186 B.R. 769, 771 (Bankr. N.D. Ga. 1995) ("Joint administration is thus a procedural tool permitting use of a single docket for administrative matters . . .") (citation omitted); *D'Avignon v. Palmisano*, 34 B.R. 796, 799 (D. Vt. 1982); *In re Coles*, 14 B.R. 5, 6 (Bankr. E.D. Pa. 1981).

<sup>64</sup> This approach is consistent with the obligation a merged corporation owes to the companies that participated in the merger. That is, under general corporate law, a new corporation formed as a result of the merger of two or more entities is responsible for all the debts and liabilities of the previously independent entities unless the merger agreement or applicable law provides otherwise. See, e.g., CAL. CORP. CODE § 1107 (West 1990 & 1998 Supp.); DEL. CODE ANN. tit. 8, § 259(a) (1991 & 1998 Supp.); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) (holding a successor corporation bound to the terms of a collective bargaining agreement executed by its predecessor); *Krull v. Celotex Corp.*, 611 F. Supp. 146, 148 (N.D. Ill. 1985); *In re Iota Industries, Inc.*, 33 B.R. 49, 50 (Bankr. S.D.N.Y. 1983).

spouse's property.<sup>65</sup> Creditors would have access to the other spouse's assets only if the court substantively consolidated the debtors' cases and treated the two cases as if they were one.<sup>66</sup> Although Congress acted on the assumption that most married couples have joint debts and assets, it recognized that some do not. Accordingly, it gave courts the discretion to decide whether the spouses' assets and liabilities should be combined into a single pool.<sup>67</sup> Courts typically consolidate spouses' cases only if the spouses' assets and debts are substantially intertwined<sup>68</sup> and if the benefits of consolidation outweigh any harm it might create.<sup>69</sup>

If one spouse is allowed to file a separate bankruptcy petition, but the bankruptcy court is prevented from ordering that the non-filing spouse's assets be used (or sold) to pay debts that may have benefited the marital unit, married debtors will have a strategic incentive to shift debts to one spouse and title assets in the name of the other spouse before filing a petition. In this way, spouses could shield assets from creditors in the debtor-spouse's bankruptcy case. Because bankruptcy laws are intended to give a fresh start only to debtors, and not to any entity associated with debtors,<sup>70</sup> providing a

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<sup>65</sup> See FED. R. BANKR. P. 1015(b).

<sup>66</sup> See *In re Reider*, 31 F.3d 1102, 1109 (11th Cir. 1994) (discussing differences between joint administration and substantive consolidation).

<sup>67</sup> See *id.* Section eleven of the Code provides that courts have the discretion to "determine the extent, if any, to which the debtors' estates shall be consolidated." 11 U.S.C. § 302(b); see also J. Stephen Gilbert, Note, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207, 231 (1990) (discussing two-step approach used by courts to decide whether cases will be consolidated).

<sup>68</sup> See *In re Knobel*, 167 B.R. 436, 441 (Bankr. W.D. Tex. 1994) (discussing whether the spouses' residency in a community property state constitutes sufficient intermingling to qualify for consolidation); *In the Matter of Chan*, 113 B.R. 427, 428 (N.D. Ill. 1990) ("Cases should be consolidated where the affairs of the husband and wife are so intermingled that their respective assets and liabilities cannot be separated."); *In the Matter of Steury*, 94 B.R. 553, 555 (Bankr. N.D. Ind. 1988) (involving consolidation with respect to property held by the entirety); *In re Birch*, 72 B.R. 103, 106 (Bankr. D. N.H. 1987) ("It has been held that husband and wife consolidations are justified only when the interrelationship of the debtors' debts and assets are so 'hopelessly obscured' that they cannot be unscrambled.") (citation omitted); *In re Scholz*, 57 B.R. 259, 262 (Bankr. N.D. Ohio 1986) (denying a motion to consolidate because the debtors shared neither assets nor obligations); *In the Matter of Winston*, 24 B.R. 474, 476 (Bankr. S.D. Ohio 1982); *In re Barnes*, 14 B.R. 788, 790 (Bankr. N.D. Tex. 1981) ("[T]he peculiarities of the Texas community property system will often justify the substantial consolidation of joint cases.").

<sup>69</sup> See *In re Reider*, 31 F.3d at 1106 (noting that injustice and harm to creditors is an important factor in deciding whether or not to consolidate); *Steury*, 94 B.R. at 554.

<sup>70</sup> See 11 U.S.C. § 524(e) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). A non-debtor spouse would, however, be relieved of paying claims against community property for which he or she would otherwise be liable if those claims were discharged in the debtor's bankruptcy case. See 11 U.S.C. § 524(a)(3).

financial incentive to engage in this strategic pre-filing behavior not only goes far beyond the fresh start policy, but also thwarts bankruptcy's goal of maximizing repayment of creditors.

If marriage is viewed as a merger, creditors of both spouses should have access to all marital assets, regardless of whether the assets are nominally titled in the name of one spouse or whether only one spouse files a bankruptcy petition. Although using a non-filing spouse's assets to pay the filing spouse's debts may be controversial,<sup>71</sup> a *per se* rule of asset consolidation for married couples would be consistent with the approach to consolidation taken by courts in cases involving estates of closely related debtor and non-debtor businesses and debtors and related non-debtor individuals.

In cases involving business entities, courts have been reluctant to consolidate the assets of debtors and non-debtors.<sup>72</sup> Courts have indicated that consolidation should be ordered only on rare occasions, in part because substantive consolidation is not explicitly authorized by the Code.<sup>73</sup> Other courts have concluded that bankruptcy courts cannot consolidate a non-debtor's assets because they lack jurisdiction over the non-debtor.<sup>74</sup> Still others have suggested that granting such a consolidation request would amount to an involuntary bankruptcy filing against the non-debtor without allowing that party any of the protections that debtors receive under the Code.<sup>75</sup>

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<sup>71</sup> See Christopher J. Predko, Note, *Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy*, 41 WAYNE L. REV. 1741, 1764-66 (1995) (arguing that bankruptcy courts do not have jurisdiction over the administration of solvent non-debtors).

<sup>72</sup> See *Federal Deposit Ins. Corp. v. Colonial Realty Co.*, 966 F.2d 57, 61 (2d Cir. 1992) (discussing consolidation cases and indicating that consolidation is an extreme remedy which must be used sparingly); *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 518 (2d Cir. 1988) (cautioning that the power to consolidate should be used sparingly because of the potential for injustice).

<sup>73</sup> See *Eastgroup Properties v. Southern Motel Assoc., Ltd.*, 935 F.2d 245, 248 (11th Cir. 1991); *In re Auto-train Corp.*, 810 F.2d 270, 276 (D.C. Cir. 1987). Courts generally rely on section 105 of the Code to justify bringing a non-debtor's assets within a debtor's bankruptcy estate. See e.g., *In re Munford, Inc.*, 115 B.R. 390, 397 (Bankr. N.D. Ga. 1990). Section 105(a) of the Code gives courts the authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Code. 11 U.S.C. § 105(a).

<sup>74</sup> See *In re DRW Property Co.*, 54 B.R. 489, 497 (Bankr. N.D. Tex. 1985) ("The court is also unaware of any statutory or common law authority to consolidate substantively debtor and non-debtor partnership. The non-debtor partnerships are certainly well-outside of the scope of this Court's jurisdiction."); *In re Alpha & Omega Realty, Inc.*, 36 B.R. 416, 417 (Bankr. D. Idaho 1984).

<sup>75</sup> See *In re Lease-A-Fleet*, 141 B.R. 869, 874 (Bankr. E.D. Pa. 1992) ("It seems to this court that it is cruel and unusual, among other things, for an entity to be in some way appended as a party to a debtor's case, but to not have the benefit of the automatic stay, avoidance powers, or the right to formulate a plan of reorganization, as does any

Notwithstanding these reservations, most courts conclude that consolidation is proper when the debtor and non-debtor are alter-egos or have engaged in acts that would warrant piercing the corporate veil.<sup>76</sup> Thus, where the debtor and non-debtor have disregarded corporate formalities, have commingled assets, or where there is "substantial identity" between the parties such that one entity exercises "ultimate control over the assets" and the other entity operates as a mere instrumentality, courts are likely to consolidate the assets of the debtor and non-debtor.<sup>77</sup> Even where these factors are present, however, courts may deny a request to consolidate if creditors show that unscrambling the debtor's and non-debtor's assets would cause the creditors harm or be unjust.<sup>78</sup>

If marriage is viewed as a merger, spouses' bankruptcy cases should be consolidated by operation of law. If marriage truly merges two lives, all of the debt would be joint; all property would be jointly owned; and neither spouse would have separate creditors. If all assets and debts are joint, which must necessarily be the case for a merged unit, there would be substantial identity between the debtor and non-debtor. Likewise, in marriages that are viewed as analogous to the merger of two corporations, one of which is the alter ego of the other, only one spouse would control the assets and the non-debtor spouse would be a mere instrumentality of the other.

Although courts have allowed creditors to prevent consolidation if the creditors can demonstrate that they relied on the separate credit and assets of one of the spouses and would thus be harmed by a consolidation,<sup>79</sup> if mar-

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debtor."); see also Predko, *supra* note 71, at 1766 (comparing substantive consolidation to an involuntary bankruptcy without the requisite safeguards).

<sup>76</sup> See *Sampsel v. Imperial Paper & Color Corp.*, 313 U.S. 215, 218 (1941) (indicating that when a family corporation is "so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket," a bankrupt's creditors can reach the corporate assets); *Soviero v. Franklin Nat'l Bank*, 328 F.2d 446, 448 (2d Cir. 1964) (holding that there was "a unity of interest and ownership" between a series of corporations such that an injustice would be done to the bankrupt owner's creditors not to include the corporations in the estate); *In re United Stairs Corp.*, 176 B.R. 359, 364 (Bankr. D.N.J. 1995); *In re Jeter*, 171 B.R. 1015, 1020 (Bankr. W.D. Mo. 1994); *In re New Center Hosp.*, 179 B.R. 848, 853 (Bankr. E.D. Mich. 1994), *rev'd in part*, 187 B.R. 560 (E.D. Mich. 1995); *In re Munford, Inc.*, 115 B.R. 390, 397 (Bankr. N.D. Ga. 1990); *In re Tureaud*, 59 B.R. 973, 976-77 (N.D. Okla. 1986) (applying a ten-factor piercing test to a consolidation case); *In re Crabtree*, 39 B.R. 718, 720 (Bankr. E.D. Tenn. 1984); *In re 1438 Meridian Place*, 15 B.R. 89, 95 (Bankr. D.D.C. 1981). If a court has the jurisdiction to enjoin creditors from suing related non-debtors under section 105, see *infra* notes 255-260, it is unclear why it would not also have the jurisdiction to consolidate some of the non-debtor's assets with the debtor's estate in cases where the court determines that the debtor and non-debtor are alter egos.

<sup>77</sup> See e.g., *In re Reider*, 31 F.3d 1102, 1106 (11th Cir. 1994).

<sup>78</sup> See *id.* (discussing the harm or injustice factor in substantive consolidation).

<sup>79</sup> See *id.* at 1109 (indicating that a creditor may avoid consolidation through a showing

riages were viewed as mergers, such a showing would not be allowed under the merger marriage regime because, by definition, all debts and assets are either joint or are held in the husband's name. Likewise, even if separate, pre-merger creditors exist, those creditors should be allowed to satisfy their claims out of the joint assets because individual members of a merged unit cannot, by definition, own separate property and because the post-merger unit is liable for all of the pre-merger debts of the two previously separate units.<sup>80</sup>

c. *Exemption of Entirety Property*

If Congress adopts the model of marriage as a merger, requiring both spouses to file bankruptcy petitions and directing courts to consolidate the assets of married couples in bankruptcy, then federal law may conflict with state laws that protect entirety property.<sup>81</sup> This conflict would arise if bank-

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of reliance).

<sup>80</sup> This would be consistent with the obligations imposed on merged corporations because, once a merger is complete, assets of the new corporation are available to creditors who have done business with any "division" of the new corporation. *See* *Hoche Prods., S.A. v. Jayark Films Corp.*, 256 F. Supp. 291, 295-96 (S.D.N.Y. 1966) (holding a film distribution company liable for debts of company it acquired, including liability for fraudulent activities); *Johnson v. Marshall & Huschart Mach. Co.*, 384 N.E.2d 141, 143 (Ill. App. Ct. 1978) (indicating that consolidation or merger is one of the situations in which a company is liable for its predecessor's debts); *see also* *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U.S. 587, 595 (1885) (holding a railroad company bound to honor the contracts entered by its predecessor); *Altman v. Central of Georgia Ry. Co.*, 580 F.2d 659, 662 (D.C. Cir. 1978) ("Upon a merger or consolidation the general rule of law is that the successor corporation becomes obligated to pay the debts and liabilities of the constituent companies."); *Forest Labs., Inc. v. Pillsbury Co.*, 452 F.2d 621, 625 (7th Cir. 1971) (holding a purchasing company bound by the trade secret agreements of the purchased company).

<sup>81</sup> Forty states have had entirety laws at one time or another, and estimates of the number of jurisdictions in which the tenancy is still recognized range from as few as seventeen to as many as thirty-seven. *See* 7 POWELL, *supra* note 43, at ¶ 620[4]; *see, e.g.*, ALASKA STAT. § 34.15.110(b) (Michie 1996); ARK. CODE ANN. § 9-12-317 (Michie 1998) (providing for the division of entirety property at divorce); DEL. CODE ANN. tit. 25, § 309 (1989 & 1996 Supp.); D.C. CODE ANN. § 45-216 (1996 & 1998 Supp.); FLA. STAT. ANN. § 689.11, § 689.15 (West 1994 & 1998 Supp.); HAW. REV. STAT. ANN. § 509-2 (Michie 1993 & 1997 Supp.); 765 ILL. COMP. STAT. ANN. 1005/1c (West 1998); IND. CODE ANN. § 32-4-2-1 (West 1979 & 1997 Supp.); KY. REV. STAT. ANN. § 381.050 (Michie 1972 & 1996 Supp.); MD. CODE ANN., REAL PROP. § 4-108 (1996 & 1997 Supp.); MASS. GEN. LAWS ANN. ch. 184, § 8 (West 1997); MICH. COMP. LAWS ANN. §§ 557-71, -81, -101 (West 1988 & 1998 Supp.); N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(b) (McKinney 1992 & 1998 Supp.); N.C. GEN. STAT. § 39-13.3(b), -13.6 (1997); OKLA. STAT. ANN. tit. 60, § 74 (West 1997); OR. REV. STAT. § 108.090 (1997); 23 PA. CONS. STATS. ANN. § 3507 (West 1998); R.I. GEN. LAWS § 34-11-3 (1997); TENN. CODE ANN. § 66-1-109 (1997); VT. STAT. ANN. tit. 15, § 67 (1997); VA. CODE ANN. § 55-37 (Michie 1997);

ruptcy laws treated all property—whether held jointly, separately or by the entirety—as joint property reachable by creditors.<sup>82</sup> Under most state entirety laws, only a creditor with a claim against both spouses can reach entirety property to satisfy the claim.<sup>83</sup> Because the Code incorporates by reference the favored treatment state laws accord entirety property,<sup>84</sup> most married debtors in bankruptcy currently are able to shield entirety property from creditors.

Laws permitting property owners to exempt certain property, such as entirety property, were initially enacted for some of the same reasons as bankruptcy laws—to preserve small properties with sentimental value and to prevent families from sinking into poverty.<sup>85</sup> Yet the fact that spouses may be able to use a state's entirety laws to shift debts and assets, putting them beyond the reach of creditors, implies that the tenancy is not always consistent

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WYO. STAT. ANN. § 34-1-140 (Michie 1997).

<sup>82</sup> 11 U.S.C. § 302(b) provides that, “[a]fter commencement of a joint case, the court shall determine the extent, if any, to which the debtors’ estates shall be consolidated,” and section 522(b)(2)(B) provides that joint debtors must agree whether to rely on state or federal exemption laws. If the spouses file a joint petition for relief under Chapter 7, the trustee could liquidate the entirety property and use the equity derived from that liquidation to pay the claims of joint creditors. See *In re Sung*, 777 F.2d 921, 932 (4th Cir. 1985) (disallowing an exemption under section 522(b)(2)(B) of property owned by the entirety and allowing the property to be administered “for the benefit of joint creditors under § 363(h)”).

<sup>83</sup> See, e.g., *In re Oberlies*, 94 B.R. 916, 917 (Bankr. E.D. Mich. 1988) (noting that, under Michigan law, a trustee can administer assets held by debtor and non-debtor spouse as tenants by the entirety for the benefit of joint creditors). See generally, Ackerly, *supra* note 43, at 702-03. The entirety tenancy has other deleterious effects: In addition to preventing commercial creditors from collecting debts, it is estimated that in 1995 over 250,000 parents who were obliged to pay child support effectively shielded assets from child support recipients by creating entirety estates. See Robert D. Null, Note, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors*, 29 VAL. U. L. REV. 1057, 1092 (1995).

<sup>84</sup> Congress allows debtors to choose between federal bankruptcy or state exemption laws, see 11 U.S.C. § 522(b), and, in turn, Congress gives states the right to decide whether to grant their citizens the right to choose between state and federal exemptions. See 11 U.S.C. § 522(b)(1). Thus, debtors who choose to rely on state law exemptions or who live in states that have “opted out” of the federal bankruptcy exemptions may use state laws to exempt entirety property from their bankruptcy estates, thus preventing the trustee from using that property to satisfy creditor claims.

<sup>85</sup> See *In re Ellingson*, 63 B.R. 271, 272 (Bankr. N.D. Iowa 1986) (noting that exemptions further the social policies of (a) assuring that the debtor retains enough property to survive; (b) protecting the debtor’s dignity and cultural and religious identity; (c) giving the debtor a chance to rehabilitate and earn future income; (d) protecting the debtor’s family from impoverishment; and (e) shifting the burden of supporting financially needy debtors from society to creditors).

with the policy objectives that underpin the bankruptcy laws.<sup>86</sup> Moreover, because entirety laws are premised on the legal fiction that spouses merge at marriage, the Code, to be internally consistent, should not treat entirety property as owned by the merged unit unless it treats spousal assets as merged with respect to other types of property.

Unless state law allows individual creditors to reach entireties property,<sup>87</sup> a spouse who has incurred debts that benefit either the marital unit or the non-filing spouse can file for bankruptcy and exempt entirety property.<sup>88</sup> Moreover, even if a debtor spouse cannot exempt entirety property, the Code severely curtails a trustee's ability to sell non-exempt entirety property.<sup>89</sup> Although a trustee ordinarily has the power to sell property of the debtor's

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<sup>86</sup> Neither state nor federal bankruptcy laws prevent debtors from using the tenancy to shield extravagant real or personal property from creditors. See, e.g., *In re Garner*, 952 F.2d 232 (8th Cir. 1991) (involving 6700 shares of stock held by the entirety); *Ramsey v. Ramsey*, 531 S.W.2d 28, 30 (Ark. 1975) (promissory notes); *Weathersbee v. Wallace*, 686 S.W.2d 447, 450 (Ark. Ct. App. 1985) (certificates of deposit); *Colclazier v. Colclazier*, 89 So.2d 261, 264 (Fla. 1956) (corporate stock); *Haid v. Haid*, 175 A. 338, 340 (Md. 1934) (motor boat); *Cohen v. Goldberg*, 244 A.2d 763, 765 (Pa. 1968) (bank account); *In re Holmes' Estate*, 200 A.2d 745, 747 (Pa. 1964) (stocks); *In re McEwen's Estate*, 33 A.2d 14, 15 (Pa. 1943) (beneficial interest in a trust).

<sup>87</sup> Seventeen jurisdictions permit only joint creditors to reach entirety property. See John V. Orth, *Tenancies by the Entirety*, in 4 THOMPSON ON REAL PROPERTY § 33.06(e) n.81 (David A. Thomas ed., 1994 & Supp. 1997).

<sup>88</sup> Although section 363(h) nominally permits separate creditors to reach entirety property, section 522(b)(2)(B) permits state law to protect some of the debtor's property by exempting it from process. See *In re Persky*, 893 F.2d 15, 18 (2nd Cir. 1989); *Matter of Feola*, 22 B.R. 81, 85 (Bankr. E.D.N.Y. 1982). States are not yet uniform in their treatment of entirety property when a non-filing spouse is present. See, e.g., *In re Dawson*, 10 B.R. 680, 684 (Bankr. E.D. Tenn. 1981) (holding that, under Tennessee law, a court can sell a debtor's right of survivorship, but because the right typically is worth little, sale would not be allowed because of the harm to non-debtor spouse); *In re Shaw*, 5 B.R. 107, 110 (Bankr. M.D. Tenn. 1980) ("Although staggered filings of bankruptcy that are calculated to frustrate the interests of creditors of both spouses is troublesome, it is merely one aspect of the larger problem presented by the continued recognition by Tennessee and other states of an estate in property which has long been criticized as an unjustifiable legal anachronism."). In most states, a trustee cannot sell either the debtor's or non-debtor spouse's interest in entirety property unless a creditor exists who has a joint claim against both spouses. See, e.g., *In re Monzon*, 214 B.R. 38, 41 (Bankr. S.D. Fla. 1997). But see *In re Lashley*, 206 B.R. 950, 953 (Bankr. E.D. Mo. 1997) (holding that debtor has right to avoid creditor's lien on entirety property even though creditor has a joint judgment against both debtor and non-debtor spouse); *In re Himmelstein*, 203 B.R. 1009, 1014 (Bankr. M.D. Fla. 1996) (holding that even joint creditor cannot force sale of entirety property unless claim is reduced to judgment).

<sup>89</sup> See, e.g., *In re Siegel*, 204 B.R. 6, 9 (Bankr. W.D.N.Y. 1996) (noting that a trustee's ability to sell entireties property raises a "myriad of [sic] difficult issues" and that this ability may be "subject to both statutory and constitutional limitations").

bankruptcy estate free and clear of any entity's interest as long as that entity consents,<sup>90</sup> the trustee's power to sell either the estate's interest or the non-debtor spouse's interest in entirety property is limited.<sup>91</sup> That is, the trustee cannot sell entirety property unless the trustee establishes that (1) the property cannot easily be partitioned; (2) the sale of the estate's interest would yield significantly less for the debtor's estate than selling the property free of the non-debtor spouse's interest; and (3) the benefit of selling the property outweighs the harm to the non-debtor spouse.<sup>92</sup> Although trustees can satisfy the first two requirements with relative ease,<sup>93</sup> they generally cannot prove that selling the entirety property, which is typically the family home, will not unduly burden the non-debtor spouse.<sup>94</sup> Thus, they generally are prevented from selling the property.<sup>95</sup>

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<sup>90</sup> See 11 U.S.C. § 363(f)(2).

<sup>91</sup> This is consistent with the rights that separate creditors traditionally have had under state laws. That is, the ability of creditors to satisfy their debts from the property was severely curtailed even in jurisdictions that allowed separate creditors to reach entirety property. Although some individual creditors could levy upon entirety property to reach both the debtor spouse's present and survivorship interest in the property, the creditor's interest would be subject to the non-debtor spouse's right of survivorship. See Yzenbaard, *supra* note 42, at 102 & n.22. In such a case, the creditor is considered to be a co-tenant with the non-debtor spouse but cannot immediately partition the property to satisfy the debt. See *id.* The right to reach the debtor spouse's survivorship interest allows a creditor to satisfy the debt only if the debtor spouse survives the non-debtor spouse. See *id.* Thus, a wife's absolute right of survivorship in entirety property gave her limited protection from her husband's improvident actions. See C.J. Messerschmidt, Case Comment, Beall v. Beall—The Effect of One Spouse's Death on an Offer to Sell Property Held as Tenants by the Entireties, 42 MD. L. REV. 508, 515-16 (1983).

<sup>92</sup> See 11 U.S.C. § 363(h)(1)-(3).

<sup>93</sup> Because most property held by the entirety consists of family homes, it is often difficult to partition such property. See *In re Gauthreaux*, 206 B.R. 502, 505 (Bankr. N.D. Ill. 1997); *In re Addario*, 53 B.R. 335, 338 (Bankr. D. Mass. 1985); see also *In re Griffin*, 123 B.R. 933, 935 (Bankr. S.D. Fla. 1991). Likewise, because many state laws limit the creditor's (or, in bankruptcy, the estate's) interest in the entirety property to the right of survivorship, trustees can easily show that selling the undivided interest in the entirety property would realize significantly less for the estate than selling the property free of the non-debtor's interest. See *Gauthreaux*, 206 B.R. at 506; *In re Trout*, 146 B.R. 823, 829 (Bankr. D. N.D. 1992).

<sup>94</sup> Courts frequently consider non-economic factors when valuing the "detriment" to the non-debtor spouse, making it extremely difficult for trustees to establish the third requirement. See generally *In re Harris*, 155 B.R. 948, 950 (Bankr. E.D. Pa. 1993) (collecting cases); cf. *In re Persky*, 893 F.2d 15, 21 (2d Cir. 1989); *Gauthreaux*, 206 B.R. at 506 (involving tax consequences if property was sold); *In re Waxman*, 128 B.R. 49, 53 (Bankr. E.D.N.Y. 1991); *In re Coombs*, 86 B.R. 314, 318 (D. Mass. 1988) (citing non-debtor spouse's disability in holding that the benefit to the estate did not outweigh the detriment to the non-debtor spouse).

<sup>95</sup> The trustee must also give the non-filing spouse the right of first refusal. See 11



If marriage is treated as a merger and all debts of either spouse are deemed to be incurred jointly, then creditors should also be able to treat the spouses' assets as joint and to satisfy debts from entirety property. Such a rule would require only a moderate alteration of the Code, which currently incorporates state entirety laws. Congress is not required to recognize the tenancy in the bankruptcy context merely because state law recognizes it.<sup>96</sup> And, although not immediately obvious, this approach satisfies the Supreme Court mandate instructing bankruptcy courts to interpret state laws in a way that prevents a party from receiving a windfall simply because the dispute is resolved in a federal bankruptcy court rather than a state court.<sup>97</sup> The impetus behind the Court's rule was to decrease forum-shopping,<sup>98</sup> an objective that could be realized more uniformly by treating all property held by the entirety similarly, regardless of state property law.

In addition, Congress has elected either to modify or to ignore debtors' and creditors' state-created interests in debtors' assets in other contexts if doing so would further bankruptcy policy.<sup>99</sup> This approach furthers the con-

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U.S.C. § 363(i).

<sup>96</sup> See *Butner v. United States*, 440 U.S. 48, 54 (1979) ("The constitutional authority of Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States' would clearly encompass a federal statute" that redefined a creditor's interest in property of the estate.); see also *In re Jeffers*, 3 B.R. 49, 56 (Bankr. N.D. Ind. 1980) ("There is no doubt that Congress can, through its constitutional authority to establish 'uniform Laws on the subject of Bankruptcies throughout the United States,' change state-created property rights.") (citation omitted).

<sup>97</sup> See *Butner*, 440 U.S. at 55 (indicating that state law should govern in federal bankruptcy cases to prevent forum shopping and windfalls).

<sup>98</sup> For a general discussion of the need to prevent forum shopping in bankruptcy disputes, see Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 103 (1984) (arguing that bankruptcy law should not provide debtors with a means of avoiding substantive law); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 824-28 (1987) (discussing some of the problems associated with forum shopping in the bankruptcy context); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain*, 91 YALE L.J. 857, 899-906 (1982) (providing reasons for retaining substantive property laws in bankruptcy); cf. Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1945-46 (1994) (responding to Baird and Jackson).

<sup>99</sup> For example, a trustee has the right, under 11 U.S.C. § 544, to avoid liens as a hypothetical creditor even though creditors cannot avoid liens under state law. In addition, the Code gives trustees the right to avoid certain pre-petition transfers under 11 U.S.C. § 547(b) even though no state law analogue to section 547 exists. Finally, the United States Supreme Court, in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), concluded that the IRS was required to return property seized from the debtor before the debtor filed for bankruptcy even though the debtor had no right to force the IRS to return the property under applicable state law. See *id.* at 208-12.

stitutional mandate to create a unified federal collection system that operates independent of the vagaries and inconsistencies of various state laws.<sup>100</sup> Therefore, although Congress has chosen to recognize state-defined property rights, the Constitution does not require federal recognition of state property laws' in the context of bankruptcy.<sup>101</sup> Furthermore, giving creditors access to entirety property is consistent with the view that spouses merge at marriage and do not have separate property or debts and most likely will also be more effective than current law in meeting the constitutional requirement to institute a uniform national collection system.

d. *Exempting Property or Claiming Expenses for Non-Debtor Spouse*

The impact of the fact that Congress has given debtors the right to choose either state or federal law as governing bankruptcy exemptions,<sup>102</sup> as well as giving states the right to determine whether their residents have this choice,<sup>103</sup> can be seen by examining some of the property that debtors can exempt. In states that permit debtors to choose federal exemptions,<sup>104</sup> a debtor may exempt certain property used by a "dependent."<sup>105</sup> The Code includes spouses in the definition of "dependent," therefore implicitly allowing the non-filing spouse to receive this benefit "whether or not actually dependent."<sup>106</sup> Thus, regardless of the non-filing spouse's actual economic dependence on the filing spouse, a debtor can exempt property that his

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<sup>100</sup> See U.S. CONST. art. I, § 8, cl. 4. See also *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (discussing preemption under the Supremacy Clause); *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353 (9th Cir. 1994); *In re DiGiorgio*, 200 B.R. 664, 669 (C.D. Ca. 1996) ("The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law . . . . Preemption of state law by federal bankruptcy law is more likely where 'a state statute facially or purposefully carves an exception out of the Bankruptcy Code . . . .'").

<sup>101</sup> The exemptions allowed under 11 U.S.C. § 522(d) operate independently of any exemptions provided for by the states. See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992). Although more than half of the states have opted out of the bankruptcy exemption scheme, Congress was not required to give states the choice to opt-out. See 4 COLLIER ON BANKRUPTCY ¶ 522.02[1], at 522-12, 522-13 (Lawrence P. King ed., 15th ed. 1998) (noting that, despite the appearance that the opt-out system violates the constitutional requirement that bankruptcy law be uniform, it has so far withstood constitutional scrutiny). Indeed, a report prepared by the National Bankruptcy Review Commission proposes that Congress enact uniform federal exemptions. See 1 NATIONAL BANKR. REVIEW COMM., BANKRUPTCY: THE NEXT 20 YEARS § 1.2.1, at 121-124 (1997) (recommending the elimination of section 522's opt-out provision).

<sup>102</sup> See 11 U.S.C. § 522(b)(1).

<sup>103</sup> See *id.*

<sup>104</sup> See 4 COLLIER ON BANKRUPTCY, *supra* note 101, at ¶ 522.02(1) n.3 (listing states that prohibit the election of federal exemptions).

<sup>105</sup> See 11 U.S.C. § 522(d).

<sup>106</sup> 11 U.S.C. § 522(a)(1).

spouse uses as a residence.<sup>107</sup> The debtor may also exempt a limited amount of jewelry and professional supplies used by the non-debtor spouse.<sup>108</sup>

In addition, a debtor may exempt certain retirement benefits if he can show that this income is "reasonably necessary for the support of the debtor and any dependent of the debtor."<sup>109</sup> Debtors may also treat non-debtor spouses as financial dependents when preparing their budgets in Chapter 13 cases, regardless of the non-debtor spouse's income.<sup>110</sup> For a Chapter 13 plan to be confirmed, a debtor must show that all "disposable income" will go to making plan payments.<sup>111</sup> The Code defines disposable income as income received by the debtor that is not "reasonably necessary to be expended" for the maintenance or support of the debtor or his dependents.<sup>112</sup> Although many courts include a non-filing spouse's income among the factors that determine the amount of "reasonably necessary" expenses a Chapter 13 debtor can include in a proposed budget,<sup>113</sup> the Code does not require that non-debtor spouses prove that they are incapable of paying their own expenses. Likewise, the Code does not give bankruptcy courts the authority to instruct "dependent" homemaker spouses to help alleviate the family's financial distress by earning wages outside the home or to tell a dependent wage earning spouse to find a higher-paying job. In short, despite the increased bankruptcy exemption afforded by claiming that a non-debtor spouse is a dependent, the Code does not require debtors to prove that their spouses are, in fact, economically dependent; nor does the Code enable bankruptcy courts to order a non-debtor dependent spouse to break that dependency.

The problem with the Code as currently written is that it does not adopt a consistent treatment of the property of married couples. If marriage is viewed as a merger and the spouses have a "traditional" marriage where one spouse earns all wages, owns all assets, and incurs all debts, the wage earner spouse *should* be allowed to protect items used by the dependent non-filing spouse in bankruptcy because, by definition, the non-debtor spouse will be a dependent. If the Code forces spouses to file joint petitions or substantively

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<sup>107</sup> See 11 U.S.C. § 522(a)(1), (d)(1).

<sup>108</sup> See 11 U.S.C. § 522(d)(4), (6) (permitting an exemption for \$1,000 in jewelry and \$1,500 in professional supplies).

<sup>109</sup> 11 U.S.C. § 522(d)(10)(E); see also *In re Velis*, 123 B.R. 497, 511-12 (Bankr. D.N.J. 1991), *rev'd in part, aff'd in relevant part*, 949 F.2d 78 (3d Cir. 1991) (discussing § 522(d)(10) and referring to the "Bankruptcy Code fiction that a non-debtor spouse is a dependent of the debtor spouse regardless of actual dependency").

<sup>110</sup> See 11 U.S.C. § 1325(b)(2)(A) (excluding resources used for the maintenance or support of a dependent of the debtor from the definition of disposable income).

<sup>111</sup> See 11 U.S.C. § 1325(b)(1)(B).

<sup>112</sup> See 11 U.S.C. § 1325(b)(2)(A).

<sup>113</sup> Chapter 13 debtors must disclose their spouses' incomes on their bankruptcy schedules. See Schedule I, Current Income of Individual Debtor(s). See *infra* note 200 (discussing cases).

consolidate their assets, it should also give the breadwinner debtor spouse the benefit of exempting property because of the presumed dependency of the non-debtor spouse. Conversely, if Congress does not impose such burdens on non-filing spouses, the non-filer should not receive the benefit of presumed dependency and should be required to prove that she is economically dependent on the filing spouse, owns no separate property, and earns no wages.

B. *Marriage as an Arm's Length Contractual Arrangement*

1. Non-Bankruptcy Law

One approach that Congress could take toward developing a consistent view of marriage in the Code would be to view marriages as arm's length contracts and to conclude presumptively that spouses owe each other nothing absent a written contract stating otherwise. This approach has not yet been fully explored because traditionally, at common law, marriage was defined by both the State and the Church, and courts were loath to view a relationship as venerable as marriage as a "mere" contract.<sup>114</sup> Further, because the separate "existence of the woman" was legally erased during marriages at common law, husbands could not enter into legally enforceable contracts with their wives, even if they chose to do so.<sup>115</sup> Modern judges feared that recognizing market-like contracts, such as those releasing a husband from obligation to provide economic support to his wife or enforcing an obligation on the husband's part to pay his wife for domestic services, would cause married couples to approach marriage strategically rather than as a venerable institution.<sup>116</sup>

As a result, many courts routinely held that wives had a legal obligation to perform domestic services and thus that interspousal contracts were void for lack of consideration.<sup>117</sup> Other courts held that husbands had a duty to support their wives and that contracts negating this duty were unenforceable on

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<sup>114</sup> See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No Fault*, 60 U. CHI. L. REV. 67, 116 (1993) ("Contract is sometimes thought to be too crass or too masculine a model for a relationship as venerable as marriage.").

<sup>115</sup> See 1 BLACKSTONE, *supra* note 22, at \*430. Such a contract would be nothing more than a legal fiction, as well as unenforceable, because the contracting parties would be the husband (as a legally competent contracting party) and the husband (as the representative of his legally incompetent wife).

<sup>116</sup> See sources cited *infra* note 249.

<sup>117</sup> See *id.*; see also WEITZMAN, *supra* note 2, at 338. Because a dependent wife could have no assets of her own, the only thing she could offer as consideration would be the domestic services she performed. However, because the law deemed such work to be a pre-existing duty of marriage, it could not supply consideration.

public policy grounds.<sup>118</sup> In addition to questioning the incentives created by such contracts, judges deemed themselves incompetent to interpret contracts that governed intimate interspousal affairs, such as who would do the laundry, how many children, if any, a couple planned to have, or where a couple would spend holidays.<sup>119</sup> Finally, judges were concerned that, if they agreed to interpret and enforce interspousal contracts, an avalanche of such contract disputes would overwhelm the courts.<sup>120</sup>

Despite the weight of tradition, some family law scholars argue that marriage is best viewed as a contract.<sup>121</sup> They suggest that, because modern couples seek an emotionally fulfilling relationship governed by their own private preferences and choices, they should be allowed to order all aspects of their personal relationship, including selecting the grounds and process for terminating the relationship.<sup>122</sup> Another basis for the argument that marriage is more accurately characterized as a contractual relationship involves the obligations that spouses undertake voluntarily, thus restricting their freedom in the future. Such obligations include foregoing career opportunities to stay at home to rear children or foregoing time spent with small children in order to earn money outside the home. Under such a characterization, the spouses invest jointly in "specific assets" available only within the context of a long-term marriage.<sup>123</sup> Spouses willingly make such sacrifices because they be-

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<sup>118</sup> See sources cited *infra* note 249.

<sup>119</sup> See generally Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Right to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2209 (1994) (noting that few spouses seek to enforce such contracts and that few courts would be likely to enforce them if they did).

<sup>120</sup> See Starnes, *supra* note 114, at 116.

<sup>121</sup> See Schneider, *supra* note 20, at 1858 (arguing that family law's movement toward contract comports with spouses' tendency to view the family as a "collection of individuals united temporarily for their mutual convenience and armed with rights against each other"); see also REGAN, *supra* note 26, at 35 ("Modern family law has steadily moved toward contract as its governing principle.").

<sup>122</sup> See *id.*; cf. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 21 (1990) (discussing how options should be kept open in terms of entering, remaining in, and exiting a relationship); Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, UTAH L. REV. 687, 706 (1994) (describing family law as "matters of family life" in which the state "should not interfere"). Professor Scott argues that, by removing fault from all aspects of divorce proceedings, the law obscures the character of the marriage relationship as one of moral obligation and commitment in which spouses have expectations about fidelity and devotion. See *id.* at 709.

<sup>123</sup> See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 269 (1987); see also Katherine K. Baker, *Contracting for Security: Paying Married Women what They've Earned*, 55 U. CHI. L. REV. 1193, 1226 (1988) (arguing that a woman's contribution as a homemaker should be viewed as having economic value and proposing a contract model to compensate homemakers, not only for the contributions made to the marriage, but also for opportunities

lieve that the aggregate benefit produced by the marital arrangement will exceed the "combined benefit each [spouse] could attain on his or her own."<sup>124</sup> As a result, the marital relationship contributes to each spouse's personal fulfillment and the spouses' mutual sacrifices create a high level of trust between the spouses, reinforcing the belief that they have made a binding commitment to one another concerning their rights both during and after the marriage.<sup>125</sup>

For several reasons, many feminist scholars reject the idea that marriage should be viewed simply as a contract. First, it is far from clear that people marry simply to maximize their financial wealth rather than for the benefits of being in a shared and committed emotional relationship.<sup>126</sup> Second, couples do not typically engage in the self-interested adversarial bargaining that typifies arm's length transactions, and critics therefore argue that such a characterization of an intimate relationship like marriage is unrealistic.<sup>127</sup> Third, critics note the likelihood that wives will be more harmed than they will be helped if marriage is viewed as a contract because of the greater economic leverage that husbands typically have in marriage.<sup>128</sup> Fourth, because husbands tend to have greater bargaining power, critics argue that divorcing mothers may be forced to sacrifice their economic interests in exchange for custody of their children.<sup>129</sup> Such a sacrifice, critics argue, could be devastating to some women, as women tend to be less well compensated in the market than men, and this fact has led some economists and many couples to conclude that it only makes economic sense for wives to remain home to rear

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foregone and disappointed reliance on the expected security of the marriage).

<sup>124</sup> Scott, *Rehabilitating Liberalism in Modern Divorce Law*, *supra* note 122, at 720.

<sup>125</sup> See *id.* (discussing the relationship between freedom and trust in a marriage). Because of the ease of no-fault divorce, some scholars contend that spouses may choose not to invest heavily in a marital partnership due to a belief that they will receive the same award at divorce whether they were the "good" or "bad" spouse. See WEITZMAN, *supra* note 26, at 30 ("The economic messages of the new law are clear: it no longer 'pays' to invest in the marital partnership . . .").

<sup>126</sup> See, e.g., Margaret F. Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461, 2464-65 (1994).

<sup>127</sup> See REGAN, *supra* note 26, at 149.

<sup>128</sup> See *id.* at 150; WEITZMAN, *supra* note 2, at 242, 246-48 (discussing the "double-edged sword" of a contract model).

<sup>129</sup> See Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 515-16 (1988) (noting that some parents, in the heat of divorce, may "barter the child's welfare for their own financial advantage"); Cheri L. Wood, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 404-06 (1995) (discussing the periodic use of custody as a "bargaining chip"). For an expansive discussion of how alimony questions are related to this problem, see Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 3 (1992), and Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L. J. 2423, 2428-37 (1994).

children.<sup>130</sup> Finally, viewing marriage as a matter of private contractual agreements ignores both the non-economic components of marriage and the effects a marriage contract may have on non-contracting third parties, such as children and other family members.<sup>131</sup>

Courts traditionally refused to enforce pre- or post-marital contracts. Given the increased use of prenuptial agreements and the rising divorce rate, courts now routinely recognize the validity of these agreements.<sup>132</sup> Many courts and commentators remain concerned, however, that encouraging spouses to define their duties to each other via contract "promote[s] an alienated, cynical view of marriage that debases its intimate nature."<sup>133</sup>

## 2. Marriage as a Contract in Bankruptcy

The Code does not adopt an internally consistent approach toward charac-

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<sup>130</sup> See REGAN, *supra* note 26, at 159-60. This view troubles some feminist scholars because it legitimizes the continuing gendered roles in marriage.

<sup>131</sup> See *id.* at 151 (discussing the inadequacy of contract law when confronted with the emotional issues implicit in divorce).

<sup>132</sup> See *id.* at 37 (noting courts' willingness to enforce marital contracts); see also Brigid McMenamin, *'Til Divorce Do Us Part: A Good Prenuptial Agreement May Not Be Very Romantic, But It Can Save a Lot of Grief*, FORBES, Oct. 14, 1996, at 52. Section 306 of the Uniform Marriage and Divorce Act advises courts to enforce a written separation agreement unless that agreement is unconscionable. See UNIFORM MARRIAGE AND DIVORCE ACT, § 306, 9A U.L.A. 216. A number of states have either adopted UMDA § 306 or a substantially similar provision. See, e.g., IDAHO CODE § 32-925 (1997); KY. REV. STAT. ANN. § 403.190 (Michie 1996); MONT. CODE ANN. § 40-2-608 (1995); N.C. GEN. STAT. § 52B-7 (1996); *In re Marriage of Manzo*, 659 P.2d 669, 671 (Colo. 1983) (upholding a separation agreement that was "fair, just and reasonable"); *Simmons v. Simmons*, 396 N.E.2d 631, 633-34 (Ill. App. Ct. 1979); *Voigt v. Voigt*, 670 N.E.2d 1271, 1277 (Ind. 1996); *Ferry v. Ferry*, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979); *Weber v. Weber*, 548 N.W.2d 781, 783 (N.D. 1996); *Penhallow v. Penhallow*, 649 A.2d 1016, 1021-22 (R.I. 1994).

Although certain elements of marriage can now be governed by private contractual agreements, judicial intervention still plays an unavoidable role. For example, although parties may divorce at will, only the court system can officially terminate a marriage. Likewise, parties cannot delegate or assign the personal rights or obligations of marriage. See Cohen, *supra* note 123, at 271-72.

<sup>133</sup> Starnes, *supra* note 114, at 116; see also *Archer v. Archer*, 493 A.2d 1074, 1077 (Md. 1985) (noting that "[o]ther courts have said that efforts to characterize spousal contributions as an investment or commercial enterprise deserving of recompense demean the concept of marriage"); *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982) (refusing to "support reimbursement between former spouses in alimony proceedings as a general principle"); *Lesman v. Lesman*, 452 N.Y.S.2d 935, 939 (App. Div. 1982) (characterizing marriage as "more than an economic undertaking"). But see *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 658 (Cal. Ct. App. 1993) (Poche, J., dissenting) (rejecting the majority's view that enforcement of an interspousal contract degrades the spouse providing the service and reduces that spouse to little more than a hired servant).

terizing the economic relationship between non-debtor and filing spouses, instead treating the relationship for some purposes as one between independent contracting parties and for other purposes as one deserving of special status-based legal treatment. Married couples benefit from being treated differently from other economically connected entities in several contexts of a bankruptcy case. For example, because the Code does not require couples to file a joint bankruptcy petition,<sup>134</sup> the filing spouse is allowed to discharge debts for goods and services that benefited the non-filing spouse, and the creditors are prevented from reaching the assets held by the non-filing spouse.<sup>135</sup> Likewise, even if both spouses file separate bankruptcy petitions, many courts interpret the Code to allow each of the spouses to claim separate property as exempt, thus doubling the total amount of property excluded from the reach of creditors.<sup>136</sup> Finally, creditors of a Chapter 12 or 13 debtor generally cannot attempt to collect consumer debts<sup>137</sup> from anyone jointly liable with the debtor until the Chapter 12 or 13 case is closed, dismissed, or converted to a Chapter 7 or 11 case.<sup>138</sup> As long as the co-signer acted as a guarantor and received no direct benefit from the debt, Congress temporarily<sup>139</sup> prevents creditors from collecting the debt. Although the purpose of this policy is to insulate debtors from any indirect pressure exerted by creditors who would otherwise pursue innocent friends or relatives who co-signed

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<sup>134</sup> See *supra* notes 59-64 and accompanying text (discussing joint filing).

<sup>135</sup> See *id.*

<sup>136</sup> See 11 U.S.C. § 522(m). At least one court refused to allow married couples to "stack" exemptions provided under state law. See *First Nat'l Bank v. Norris*, 701 F.2d 902, 905 (11th Cir. 1983) (finding section 522(m) inapplicable to debtors in a state that opted out of the federal exemptions of 522(d)). Other courts conclude that each spouse is entitled to separate exemptions. See *In re Miller*, 167 B.R. 782, 783 (Bankr. S.D.N.Y. 1994) (allowing a husband and wife to take duplicate exemptions for the same car even though the wife held sole title). The court in *In re Cheeseman*, 656 F.2d 60 (4th Cir. 1981), held that a husband and wife who filed a joint petition and lived together should receive a householder exemption under state law because to do otherwise would likely discourage "couples in financial trouble from weathering the storm together." *Id.* at 63. In such cases, both spouses are required to exempt property under the same law (either federal or state). See 11 U.S.C. § 522(b).

<sup>137</sup> A consumer debt is defined as a debt incurred primarily for personal, family, or household purposes. See 11 U.S.C. § 101(7).

<sup>138</sup> Creditors are allowed to collect the debt if (1) the co-debtor became liable on the debt in the ordinary course of her business; (2) the debt was actually designed to benefit the co-debtor; (3) the debtor's Chapter 13 plan does not propose to pay the creditor in full; or (4) the creditor would be irreparably harmed if it is not allowed to collect the debt. See 11 U.S.C. § 1301(a)(1), (c)(1)-(3); see also 11 U.S.C. § 1201(a) (providing protection for co-debtors in Chapter 12 family farmer cases).

<sup>139</sup> Creditors may petition the court for relief from a stay in order to collect the debt from the co-obligor and can pursue the co-obligor for any deficiency amount if the debtor fails to repay the creditor in full. See 11 U.S.C. § 1301(c).



the debt as a favor,<sup>140</sup> it benefits both filing and non-filing spouses by protecting the non-filing, co-signer spouse from creditors.

In other circumstances, however, the Code views married couples as contracting parties that bargained for a binding allocation of risk and debt that was advantageous to both and that granted priority to specific creditors. The Code adopts this view without regard to what the actual economic relationship between the spouses entailed. For example, Chapter 13 debtors can propose a debt repayment plan that gives favorable treatment to creditors who hold unsecured claims for co-signed consumer debts without regard to the co-obligor's ability to help the debtor repay that debt.<sup>141</sup> This treatment theoretically increases the debtor's incentives to devote all future income to making plan payments by alleviating the need to pay the co-signed debt in full in order to protect a friend or loved one.<sup>142</sup> Although debtors can thus "favorably" treat co-signed claims, courts generally disallow this treatment where it appears that the debtor has filed for bankruptcy *solely* to repay co-

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<sup>140</sup> See H.R. REP. NO. 95-595, at 426 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6381.

<sup>141</sup> See 11 U.S.C. § 1322(b)(1). Giving payment priority to certain unsecured creditors generally violates the section 1322(b)(1) prohibition against unfair "discrimination." Courts generally apply a four factor test to determine if discrimination would be appropriate in a given case: (1) Does the discrimination have a reasonable basis? (2) Can the debtor carry out a plan without such discrimination? (3) Is the discrimination proposed in good faith? and (4) How does the plan treat other creditors? See, e.g., *In re Martin*, 189 B.R. 619, 627 (Bankr. E.D. Va. 1995); *In re Bradley*, 109 B.R. 182, 183 (Bankr. E.D. Va. 1990).

Courts have accepted plans that propose repaying joint unsecured debts in full and repaying less than ten percent of the value of other unsecured debts. See, e.g., *In re Gonzales*, 172 B.R. 320, 328 (Bankr. E.D. Wash. 1994); *In re Dornon*, 103 B.R. 61, 65 (Bankr. N.D.N.Y. 1986); *In re Todd*, 65 B.R. 249, 253 (Bankr. N.D. Ill. 1986); see also *In re Perkins*, 55 B.R. 422, 425-26 (Bankr. N.D. Okla. 1985) (weighing the standard four factors and holding that a plan which paid one creditor one hundred percent and the others approximately twenty-two percent did not unfairly discriminate). But see *In re Battista*, 180 B.R. 355, 357 (Bankr. D.N.H. 1995) (rejecting a plan that paid co-debtor claims in full but paid other unsecured claims only six percent); *In re Chapman*, 146 B.R. 411, 418 (Bankr. N.D. Ill. 1992).

<sup>142</sup> See *In re Cheak*, 171 B.R. 55, 57-58 (Bankr. S.D. Ill. 1994) (discussing Congress' "practical" concerns regarding cosigned debts); *Gonzales*, 172 B.R. at 327 (indicating that allowing discrimination between claims supports the public policy of encouraging the payment of child support); *In re Easley*, 72 B.R. 948, 956 (Bankr. M.D. Tenn. 1987) (refusing to confirm a plan that discriminated in favor of a cosigned debt because the debtor failed to justify the discrimination); *Todd*, 65 B.R. at 253 (noting that disallowing discrimination would chill debtors from seeking the relief bankruptcy provides); see also *Perkins*, 55 B.R. at 425-26 (expressing concern over the success of a plan if discrimination was not permitted). But see *In re Martin*, 189 B.R. 619, 628 (Bankr. E.D. Va. 1995) (noting the potential for abuse inherent in the "carve-out" provision).

signed debts.<sup>143</sup>

The advantage of this arrangement can be seen from the following example: A husband and wife co-sign a \$10,000 consumer loan from a bank. The husband subsequently files a Chapter 13 bankruptcy case and proposes a plan that will make plan payments of \$30,000 over a three year period. The husband's debts include \$10,000 in secured debt, the \$10,000 loan, and an additional \$90,000 in unsecured debt. Based solely on these facts, the plan should distribute \$10,000 in total payment for the secured claim,<sup>144</sup> and then make a pro rata monthly distribution to each unsecured creditor. Thus, the bank should receive ten percent of the monthly plan payments. Because the bank would receive only ten percent of the \$20,000, or \$2,000, it would need to go after the wife for the remaining \$8,000.

If, however, the husband chooses to treat the co-signed debt favorably by proposing that the bank receive a total of \$10,000 over the three year plan payment period, the bank would be paid in full, leaving the wife, as co-signer, free of any further obligations. Essentially, allowing the husband to treat the bank's loan favorably forces the husband's other creditors to sacrifice \$8,000 of the moneys due them simply because the husband wants to protect the wife from the bank. Moreover, in this example, the bank receives the same treatment as the secured creditor, even though the Code anticipates that only creditors holding secured claims have the right to demand that they essentially be paid in full.<sup>145</sup>

Congress has failed to create a consistent policy with respect to marriage by treating married couples both as independent contracting parties and as a single entity that enjoys status based privileges that arm's length parties do not. If Congress chooses to view marriage as an arm's length contract, then the Code should uniformly treat couples as business parties, and in the absence of explicit contractual agreements to the contrary, a filer's non-debtor spouse should receive benefits no greater than those given to creditors and other unrelated parties in interest.<sup>146</sup> Concomitantly, a non-debtor spouse should not have to assume any greater burdens than those imposed on a business party and, absent an enforceable duty imposed by a written agreement, courts would not be allowed to presume that she would support her spouse or

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<sup>143</sup> See, e.g., *In re Thompson*, 191 B.R. 967, 970 (Bankr. S.D. Ga. 1996); *Cheak*, 171 B.R. at 56. Courts typically will not allow discrimination for a debt co-signed by a non-debtor spouse with significant income. See *Martin*, 189 B.R. at 628.

<sup>144</sup> See 11 U.S.C. § 1325(a)(5)(B)(ii) (A plan must distribute property to a holder of a secured claim in an amount equal to the allowed amount of the claim.).

<sup>145</sup> See *id.*

<sup>146</sup> Where spouses have a pre-marital agreement, the non-filing spouse should still be treated as an insider in the filing spouse's bankruptcy case. See 11 U.S.C. § 101(31) (defining "insider" to include a relative of the debtor). Even if the non-filer owes no liability on her spouse's debts, she undoubtedly has access to more information about the filing spouse's day-to-day affairs than unrelated third parties.

contribute to debt repayment.

### C. *Marriage as a Partnership*

#### 1. Non-Bankruptcy Law

Another characterization of marriage that some family law scholars have explored involves seeing modern marriage as an equal partnership of autonomous individuals, formed for the purpose of promoting the happiness of the two individuals largely free from external regulation.<sup>147</sup> If both partners contributed equally to the marriage, the partnership model would promote marital sharing and altruistic behavior, both of which are considered essential not only for preserving marriages, but also for treating spouses equitably at divorce. The Uniform Marriage and Divorce Act<sup>148</sup> adopts a view that essentially synthesizes the merger and partnership models of marriage. The Act defines marriage as a "personal relationship" between a man and a woman that arises from a civil contract "to which the consent of the parties is essential."<sup>149</sup>

In the business context, a partnership is generally defined as the association of two or more persons who carry on a business for profit as co-owners.<sup>150</sup> Though marriage is not usually viewed solely as a profit-making venture,<sup>151</sup> several similarities between marital relationships and business partnerships have lead some scholars<sup>152</sup> and courts<sup>153</sup> to posit that marriage

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<sup>147</sup> See Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 250-53 (1982) (discussing the shift in societal views towards the role of marriage). See generally FINEMAN, *supra* note 26, at 18-19 (noting that earlier views of marriage protected the private unity of a husband and wife from state intrusion or regulation but suggesting that marriage currently exists as an institution primarily to promote the happiness of a couple).

<sup>148</sup> The Uniform Marriage and Divorce Act is recognized in the following states: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana and Washington. See Marti E. Thurman, Note, *Maintenance: A Recognition of the Need for Guidelines*, 33 U. LOUISVILLE J. FAM. L. 971, 974 n.21 (1995).

<sup>149</sup> UNIF. MARRIAGE AND DIVORCE ACT § 201, 9A U.L.A. 160 (1995).

<sup>150</sup> See UNIF. PARTNERSHIP ACT § 6(1) (1914), 6 U.L.A. 256.

<sup>151</sup> See, e.g., *Dewitt v. Dewitt*, 296 N.W.2d 761, 767 (Wisc. 1980) (refusing to treat divorcing "parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar for dollar return").

<sup>152</sup> See *infra* notes 173-174 and accompanying text.

<sup>153</sup> In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii characterized marriage as "a partnership created with the partners' financial resources and individual energies and efforts." *Id.* at 58; see also *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982) ("Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, 'marriage is a shared enterprise, a joint undertaking . . . [i]n many ways it is akin to a

should be treated as a partnership. Marriages, like business partnerships, are based on mutual trust and confidence between partners.<sup>154</sup> Spouses, like business partners, cannot be forced to continue the relationship against their wills.<sup>155</sup> Absent an agreement to the contrary, spouses and business partners have equal rights to share in the management and control of their respective partnerships.<sup>156</sup> Finally, like general partners who are jointly and personally liable for all partnership debts and obligations,<sup>157</sup> many spouses financially support each other<sup>158</sup>—either by choice or because such support is required by the doctrine of necessities.<sup>159</sup>

Though states retain a “monopoly on the business of marriage creation,”<sup>160</sup> they no longer treat marriage as a state-defined status existing solely to promote the societal good.<sup>161</sup> Most states, however, continue to characterize marriage as a matter of “public concern”<sup>162</sup> based on the presumption

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partnership.”) (citations omitted).

<sup>154</sup> But cf. Sally S. Neely, *Partnerships and Partners and Limited Liability Companies and Members in Bankruptcy: Proposals for Reform*, 71 AM. BANKR. L.J. 271, 319 (1997) (discussing similarities between partnerships and marriages but noting that “[n]ot all partnerships are like marriages; many are just business deals among entities with differing skills, assets or attributes which they contribute to an enterprise”).

<sup>155</sup> See J. WILLIAM CALLISON, *PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS* § 15.04, at 15-10, 15-11 (1992 & Supp. 1995); see also *Bohatch v. Butler and Binion*, No. 95-0934, 1998 WL 19482 (Tex. Jan. 22, 1998).

<sup>156</sup> See REVISED UNIF. PARTNERSHIP ACT § 401(f), 6 U.L.A. 52 (1994); UNIF. PARTNERSHIP ACT § 18(e) (1914), 6 U.L.A. 526.

<sup>157</sup> See CALLISON, *supra* note 155, §14.02, at 14-4, 14-5.

<sup>158</sup> See *In re Antoine*, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1997) (accepting unemployed debtor’s Chapter 13 plan that would be funded completely by the earnings of the non-debtor wife); *In re Sigfrid*, 161 B.R. 220, 222 (Bankr. D. Minn. 1993) (stating that an unemployed spouse may rely on non-debtor spouse’s income to fund Chapter 13 plan so long as that income is regular and stable); see also CALLISON, *supra* note 155, § 2.03, at 2-5, 2-6 (discussing the importance of trust between partners given the potential personal liability, shared profits and losses, and joint control of partnerships).

<sup>159</sup> It should be noted, however, that many states have abolished the doctrine, determining that it constitutes unconstitutional gender-based discrimination. See, e.g., *Emanuel v. McGriff*, 596 So.2d 578, 580 (Ala. 1992); *Condore v. Prince George’s County*, 425 A.2d 1011, 1019 (Md. 1981); *North Ottawa Community Hosp. v. Kieft*, 578 N.W.2d 267, 273 (Mich. 1998); *Govan v. Medical Credit Servs., Inc.*, 621 So.2d 928, 931 (Miss. 1993); *Schilling v. Bedford County Mem’l Hosp., Inc.*, 303 S.E.2d 905, 908 (Va. 1983).

<sup>160</sup> *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993).

<sup>161</sup> See GLENDON, *supra* note 32, at 291-93; REGAN, *supra* note 26, at 89-97; see also Scott, *Rehabilitating Liberalism in Modern Divorce Law*, *supra* note 122, at 687 (“In the liberal state, individuals have freedom to pursue their own self-defined ends, and relationships are voluntary and contractual. Much of the recent reform in family law . . . reflects this vision.”).

<sup>162</sup> See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1993) (indicating that marriage is distinguishable from business contracts because of public pol-

that couples take on at least some amount of obligation to provide mutual support when they marry.<sup>163</sup> The view of marriage as a partnership developed after modern courts and legislators ceased giving husbands the absolute right to control all aspects of their wives' lives.<sup>164</sup> Courts, legislators, and scholars increasingly have adopted the view that marriage is more like a partnership than a merger. The reasons for this shift include: (1) the evolution of the economy from primarily agrarian to primarily industrial;<sup>165</sup> (2) the increased number of women earning wages outside the home;<sup>166</sup> (3) the shift away from viewing any person, including a wife, as nothing more than property;<sup>167</sup> (4) the idea that each spouse has separate rights;<sup>168</sup> (5) the

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icy concerns unique to marriage); *Chandler v. Central Oil Corp.*, 853 P.2d 649, 653 (Kan. 1993) (noting that the granting of annulments has fallen out of favor because the marriage relationship is a matter of public concern); *see also Simeone v. Simeone*, 581 A.2d 162, 163 (Pa. 1990) (McDermott, J., dissenting) (disagreeing with the majority's characterization of marriage as a business contract and rejecting the view that marriage is a "mere contract for hire").

<sup>163</sup> *See, e.g., Borelli*, 16 Cal. Rptr. 2d at 18.

<sup>164</sup> This evolution of legal doctrine respecting the status of wives is dramatically illustrated in the area of domestic assaults. However, practice may need to evolve significantly to catch up with this new legal standard. *See Rhonda L. Kohler, The Battered Women and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1029-30 (1992) (arguing that husbands are not held to the same standard of care toward spouses as they are to strangers and that states often bar tort actions on the basis of *res judicata* if an ex-wife fails to raise assault allegations during divorce proceedings).

<sup>165</sup> *See Siegel, supra* note 50, at 1092 (discussing the implications of the shift from an agrarian economy for marriages). As husbands increasingly left the family farm to earn wages in an industrial workplace, wives' work became less visible to them. Thus, the need for laws recognizing wives' worth became more pronounced. In fact, ante-bellum women's rights advocates argued that household labor should be viewed as valuable "work" to combat the view that husbands left the home to "work" while wives stayed at home and did nothing socially productive. *See id.* at 1093-94.

<sup>166</sup> A number of scholars and courts have noted the dramatic shift in the marriage relationship because of the increasing trend toward wage-earning wives. *See e.g., WEITZMAN, supra* note 2, at 177 ("[I]t is likely that as more married women enter full-time work, for more pay and at higher occupational levels, their roles, power, and authority within [the] family will continue to change."). *See generally, Borelli*, 16 Cal. Rptr. 2d, at 22 (Poche, J., dissenting) (The "assumption that only the rare wife can make a financial contribution to her family has become badly outdated in this age in which many married women have paying employment outside the home. A two-income family can no longer be dismissed as a statistically insignificant aberration.").

<sup>167</sup> *See Crozier, supra* note 30, at 28 (comparing the economic relationship between spouses in traditional marriages to that "between master and slave . . . between a person and his domestic animal"). Once slavery was abolished, it became increasingly difficult to treat wives as property of their husbands. *See Siegel, supra* note 27, at 2201. This analogy is by no means a distinctly modern characterization of the status of wives. *See John Stuart Mill, The Subjection of Women, in ESSAYS ON SEX EQUALITY* 123, 217 (Alice S.

changing economic relationship between spouses;<sup>169</sup> and (6) a relaxation of society's adherence to morality shaped exclusively by traditional western religious beliefs.<sup>170</sup> Perhaps the biggest push to view marriage as a partnership came in the 1970s when scholars and lawyers began to recognize that stay-at-home spouses were often harmed economically by no-fault divorce.

Courts have increasingly accepted the argument that marriage should be treated as a partnership rather than as merger.<sup>171</sup> Specifically, as a step toward attaining more equitable treatment of women at divorce, wives have argued that property acquired or earned by the marital partnership should be deemed jointly owned.<sup>172</sup> Under this approach, courts are asked to treat both

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Rossi ed., 1970) ("Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.").

<sup>168</sup> See *Vlandis v. Kline*, 412 U.S. 441, 454 (1973) (holding that due process is violated when state law irrebuttably presumes that in-state student with a non-resident spouse is a non-resident); *Newborn v. Morrison*, 440 F. Supp. 623, 626-27 (S.D. Ill. 1977) (holding that a school violated a teacher's constitutional rights when it refused to renew her contract because of her husband's actions).

<sup>169</sup> See Glendon, *supra* note 26, at 698.

<sup>170</sup> See Schneider, *supra* note 20, at 1842-45 (discussing the waning influence of Christianity among some groups in society).

<sup>171</sup> The high-profile divorce of General Electric executive Gary C. Wendt and his wife Lorna J. Wendt is a recent example of courts attempting to place a value on the marital contributions of a stay-at-home wife. Mrs. Wendt demanded half of her now ex-husband's assets, arguing that her non-monetary contributions to the marriage made her an equal partner and that she was entitled to 50% of the marital assets at divorce. The trial judge gave her half of the couple's tangible assets and a portion of Mr. Wendt's pension and future stock benefits. Both sides have appealed. See Diane E. Lewis, *Value of Home Work: Lawyer Cites Economic Theory in Assessing a Spouse's Contribution Behind the Scenes*, BOSTON GLOBE, Dec. 9, 1997, at C1; see also William C. Symonds et al., *Divorce Executive Style: Companies Are Getting Dragged into an Area of Fierce Combat*, BUS. WK., Aug. 3, 1998, at 56, 57-59 (discussing the Wendt case and other divorces involving highly paid corporate executives and noting that companies are now structuring compensation arrangements to prevent ex-spouses from acquiring company stock).

<sup>172</sup> Courts have not yet, however, gone so far as to deem the value of professional degrees and licenses a jointly held marital asset amenable to equitable division upon divorce. See *Jones v. Jones*, 454 So.2d 1006, 1009 (Ala. Civ. App. 1984) (professional degree not divisible); *Pyeatte v. Pyeatte*, 661 P.2d 196, 201-02 (Ariz. Ct. App. 1982) (degrees or licenses not divisible community property); *In re Marriage of Graham*, 574 P.2d 75, 76-77 (Colo. 1978) (MBA not "property"); *Hughes v. Hughes*, 438 So.2d 146, 150 (Fla. Dist. Ct. App. 1983) (value of a degree too speculative to be divisible); *In re Marriage of Weinstein*, 470 N.E.2d 551, 555-56 (Ill. App. Ct. 1984) (collecting cases); *In re Marriage of McManama*, 386 N.E.2d 953, 955 (Ind. Ct. App. 1979), *vacated on other grounds*, 399 N.E.2d 371 (Ind. 1980) (legal education not property); *Ruben v. Ruben*, 461 A.2d 733, 735 (N.H. 1983) (holding "that the better rule is that a graduate degree acquired by one spouse during the course of a marriage is not considered an asset subject to division upon dissolution of the marriage"); *Muckleroy v. Muckleroy*, 498 P.2d 1357, 1358 (N.M.

work in the home and in the market as contributions that benefit the joint financial endeavor of marriage.<sup>173</sup> Accordingly, wives who remained home to rear children and care for their families would be considered to have accrued equal financial equity in the partnership, equity that courts would recognize when distributing assets in the context of divorce.<sup>174</sup>

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1972) (holding that a medical license is not community property); *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979) ("Clearly a professional degree or license is the intangible and indivisible 'property' of its holder and no other person has a vested interest therein."); *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980) (holding that a professional degree "is not a property right and is not divisible upon divorce"); cf. *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978) (holding that, although a law degree itself is not property for the purposes of divorce, its "potential for increase in future earning capacity" is a distributable asset); *Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1982) (refusing to hold that a degree is marital property but setting forth a formula to compensate the contributing spouse); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (refusing to hold a medical degree to be marital property but awarding wife compensation for support during marriage); *Lynn v. Lynn*, 453 A.2d 539, 542 (N.J. 1982) (holding that degrees and licenses earned during marriages may be factors in determining alimony, but that degrees and licenses are not themselves subject to distribution); *Pacht v. Jadd*, 469 N.E.2d 918, 922 (Ohio Ct. App. 1983) (holding that a trial court may divide a degree as a marital asset but that the failure to do so is not an abuse of discretion); *Lehmicke v. Lehmicke*, 489 A.2d 782, 784-87 (Pa. Super. Ct. 1985) (agreeing that a professional degree is not distributable property but awarding wife alimony which reflected her past support); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984) (holding that the trial court did not abuse its discretion by refusing to treat a degree as marital property because its value was speculative); *Hoak v. Hoak*, 370 S.E.2d 473, 477 (W. Va. 1988) (agreeing that professional degrees and licenses are not marital property); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984) (agreeing that a degree is not property).

<sup>173</sup> See Mary Downey, Note, *The Need to Value Homemaker Services upon Divorce*, 87 W. VA. L. REV. 115, 121 (1984) ("Marriage is recognized as an economic partnership with each spouse making his or her valuable monetary contributions."); see also WEITZMAN, *supra* note 2, at 66-67 (noting that, although most married couples aspire to a relationship grounded upon sharing, forty two states largely negate the wife's contributions); Regan, *supra* note 26, at 2316 ("[A] theory of equitable distribution characterized wives, as well as husbands, as partners whose work during marriage contributed to household welfare.").

<sup>174</sup> See Regan, *supra* note 26, at 2314 ("The theory is that each spouse contributes a set of different but equally valuable resources toward the acquisition of assets, and therefore is entitled to a portion of the fruits of their labors."); see also Barry A. Schatz & Jacalyn Birnbaum, *New State Promotes Homemakers' Rights*, 80 ILL. B.J. 610, 610 (1992) ("The full contribution of a homemaker includes her 'enabling' function—the opportunities for the family that her efforts make possible."); Mark A. Sessums, *What Are Wives' Contributions Worth upon Divorce?: Toward Fully Incorporating Partnership into Equitable Distribution*, 41 FLA. L. REV. 987, 991 (1989) ("Equitable distribution requires the court to distribute marital property upon divorce based upon a presumption that marriage is a partnership."); John R. Dowd, Comment, *Defining the Doctrine of Equitable Distribution in Mississippi: A Rebuttable Presumption that Homemaking Services Are as Valuable to*

Although treating marriage as a partnership theoretically benefits homemaker wives, some women's advocates argue that the substantial structural differences between business and marital partnerships make this approach unrealistic. These critics challenge the partnership model because it (1) fails to provide a conceptual basis for alimony or future maintenance; (2) inadequately compensates "displaced" homemakers; (3) mischaracterizes marriage solely as a profit-seeking venture; and (4) does not acknowledge that businesses and marriages commence in different ways.<sup>175</sup>

Perhaps the primary criticism is that the partnership model fails to provide ongoing support for divorcing homemakers who sacrificed their careers to benefit their marriages.<sup>176</sup> Historically, courts have refused to specify the minimum level of support husbands owed to their wives while married.<sup>177</sup> Naturally, the biggest battles in divorce litigation have been over whether wives are entitled to ongoing spousal support or maintenance and over how much support they should receive.<sup>178</sup> Because no-fault divorce laws aim to give each spouse a clean break, both emotionally and financially, courts question why one spouse (usually the husband) should have a continuing obligation to support the other spouse. In the partnership model, a husband would not be required to provide future financial support to his ex-wife even if she had remained out of the workforce for the benefit of her husband and children in reliance on her expectation of the long term stability of the partnership.<sup>179</sup>

A related criticism of the partnership model is that it rests on the erroneous assumption that a spouse who has sacrificed her career to remain home and care for her husband or family will be made whole by receiving fifty

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*the Acquisition of Marital Property as Breadwinning Services*, 16 MISS. C. L. REV. 479, 502 (1996) (arguing that recent Mississippi Supreme Court decisions compensating homemakers for their labor "signaled the Court's realization that homemaker services have legitimate, compensable economic value, which should be accounted for upon divorce") (footnote omitted).

<sup>175</sup> See Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 199 (1987) (discussing and analyzing North Carolina's statutory implementation of equitable distribution of property upon divorce); Starnes, *supra* note 114, at 108 (claiming that the partnership model rests on two basic principles—that divorce should be available at will and that it should completely sever emotional and financial ties between couples).

<sup>176</sup> See Regan, *supra* note 26, at 2315 (explaining that wives should demand that their marital contribution be treated as an earned property right rather than as a request to alleviate post-divorce hardship).

<sup>177</sup> See *supra* note 32 and accompanying text.

<sup>178</sup> See generally WEITZMAN, *supra* note 2, at 45 (providing an overview of factors involved in setting alimony).

<sup>179</sup> See Schatz & Birnbaum, *supra* note 174, at 610 (discussing Illinois's old "no fault" divorce statute, patterned after the partnership model, which left many former wives and their children impoverished).



percent of the partnership assets at divorce. Critics argue that a wife who has sacrificed her career either to the marriage or to the role of primary caretaker of the couple's children has been "damaged" economically by the partnership.<sup>180</sup> This damage is caused by the fact that, if a displaced homemaker leaves the labor force for "any period," she "will probably never reach the income level she would have enjoyed through uninterrupted wage earning."<sup>181</sup>

Critics of the partnership model also argue that it is unrealistic to treat marital partnerships like business partnerships in which the members deal with each other at arm's length and which are formed out of different motives. Business partners generally initiate their relationship by negotiation and commit to a comprehensive written partnership agreement that explains the purpose of the partnership, the manner in which gains and losses are to be allocated, and the terms governing dissolution of the partnership.<sup>182</sup> Although some prospective spouses are routinely advised to execute prenuptial agreements,<sup>183</sup> most couples do not consult lawyers for premarital financial planning.<sup>184</sup> Moreover, even if couples use prenuptial agreements to distrib-

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<sup>180</sup> See Starnes, *supra* note 114, at 81.

<sup>181</sup> *Id.*

<sup>182</sup> See, e.g., BURTON J. DEFREN, PARTNERSHIP DESK BOOK § 110.1 (1978) ("Wise people set forth the nature of their business relationship, along with each individual's rights and obligations, before operations are commenced."); Herbert Kraus, *General Partnership Agreements*, in PARTNERSHIP AND JOINT VENTURE §5.02.

<sup>183</sup> These include a spouse who (1) has children from previous relationships, (2) owns a business, (3) earns significantly more than the other spouse, or (4) has considerable assets. See Eric Schmuckler, *Breaking up is Complex to Do (Financial Implications of Divorce Law)*, FORBES, Oct. 1988 at 360 (reporting that Raoul Felder, the "dean of big-money divorces," calls pre-nuptial agreements "the name of the game"); see also Chambers, *supra* note 18, at 479 ("Most states now permit couples, at the point of marriage or during the marriage, to contract for a different arrangement on death or divorce than the law would otherwise impose."); Richard A. Epstein, *A Last Word on Eminent Domain*, 41 U. MIAMI L. REV 253, 271 (1986) ("Today of course marriages are much less status and more contractual, and it is not surprising that antenuptial agreements have a far wider scope to play, especially in second marriages when either or both partners have substantial assets and children by previous marriage."); Herndon Inge, Jr., *Antenuptial Agreements*, 48 ALA. LAW. 140, 140 (1987) (suggesting that antenuptial agreements may be beneficial for wealthy prospective spouses and those with children from previous marriages); Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193, 222 (1984) ("Antenuptial agreements most commonly are associated with the very wealthy, or with older people who want to preserve their estates for children of a previous marriage.").

<sup>184</sup> Because drafting a prenuptial or antenuptial contract requires the assistance of an attorney, and the estimated cost of a prenuptial agreement ranges from \$1,500 to \$3,000, only prospective spouses who have significant assets to protect and who can afford to have a lawyer to protect those assets will use premarital contracts. See Gary Belsky, *The Best Money Moves for Every Season of Your Life*, MONEY MAG., Aug. 1, 1997, at 116. In-

ute their assets at divorce,<sup>185</sup> marriages typically begin as an exchange of emotional, rather than financial, commitments. Finally, because marriage involves more than profit maximization,<sup>186</sup> it would be virtually impossible to draft a workable written agreement that could adequately plan for the future "success" of a marriage.<sup>187</sup>

## 2. Marriage as a Partnership in Bankruptcy

Congress could treat marriage as a partnership when deciding whether a non-debtor spouse must help repay a filing spouse's debts. Just as a general partner is not required to file a bankruptcy petition when the partnership files,<sup>188</sup> a non-filing spouse would not be required to file for bankruptcy simply because the debtor spouse does. However, as in business partnerships, there would be a presumption that both partners are personally liable for the

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deed, depending on the complexity of the couple's assets and interests, preparing the agreement conceivably could cost as much as \$100,000. See Burton Young & Mitchell K. Karpf, *In Addition to Safeguarding Inheritances, Pre-Nuptial Contracts Can Help Attorneys Protect Their Firm Ownership Interests*, NATL. L. J., DEC. 15, 1997, at B7.

<sup>185</sup> Currently, an estimated five percent of the 2.4 million couples who marry each year sign prenuptial agreements. See Belsky, *supra* note 184, at 116; cf. Symonds et al., *supra* note 171, at 60 (discussing poll results that indicate only 30% of high-ranking business people have signed a prenuptial agreement).

<sup>186</sup> See, e.g., *Lesman v. Lesman*, 452 N.Y.S.2d 935, 939 (N.Y. App. Div. 1982) (Marriage "is more than an economic undertaking. The parties agree upon the manner in which they will provide financial support and nonfinancial services to each other, and they do not place values on their respective contributions, nor do they expect to pay each other for those contributions.").

<sup>187</sup> It is hard to imagine that a premarital agreement will ever be able to articulate the purpose of a particular marriage or how marriage "profits" are to be shared.

<sup>188</sup> Unfortunately, the Code does not adequately address the rights of debtor and non-debtor partners when either a partnership or a general partner files a petition for relief in bankruptcy. See Neely, *supra* note 154, at 286 ("[G]iven the current state of federal bankruptcy law . . . inquiries regarding the effect of bankruptcy on partnerships or partners has been left to judicial development . . ."). In general, the Code follows state partnership laws when determining the liabilities of partnerships and their general partners in bankruptcy. Under most state partnership laws, each partner may be held personally liable for the full amount of partnership debts. See REVISED UNIF. PARTNERSHIP ACT § 306(a) (1994), 6 U.L.A. 45; UNIF. PARTNERSHIP ACT § 15 (1914), 6 U.L.A. 456; see also Larry E. Ribstein, *The Illogic and Limits of Partner's Liability in Bankruptcy*, WAKE FOREST L. REV. 31, 31 (1997) (noting that personal liability is an important feature of partnerships and is imposed by state law). Thus, each partnership creditor has a claim against the partnership and against the general partners of that partnership. Because partnership creditors have priority over partners' individual creditors when distributing the partnership assets, creditors holding joint liability claims can sue both the partnership and the partners but may reach individual partner assets only after exhausting partnership assets. Once the partnership dissolves, partners must contribute toward the payment of partnership debts in proportion to their agreed loss shares. See *id.* at 34-36.

debts of the partnership. Under a partnership model, Congress should therefore revise the Code to create a presumption that requires non-filing spouses to help filing spouses pay partnership debts. The filing spouse would be able to rebut this presumption with conclusive proof that the debts involved did not in any way benefit either the non-filer *or* the partnership. Absent such proof, both spouses would be responsible for the debts sought to be discharged. The non-filing spouse could meet the obligation for those debts either by relinquishing non-exempt assets in a Chapter 7 liquidation or earning market wages to help repay debts under a Chapter 13 plan.

a. *Financial Support by Non-Filing Partner*

Congress should require a non-debtor who receives either a direct or indirect benefit from a debtor spouse's bankruptcy case to provide financial support to the debtor to avoid perverse incentives. Without this requirement, spouses will be able to title marital assets solely in one spouse's name or, if their state recognizes the entirety estate, hold their property as tenants by the entirety in order to separate their assets and place them beyond the reach of creditors. This strategy would provide an unearned benefit to the marital partnership in the following way: The primary wage earner would incur all debt in his name, file for bankruptcy, and then discharge debts (including those incurred for the dependent spouse). Creditors would not be able to reach entirety property and property the "dependent" non-filing spouse uses. This would allow spouses to walk away from most marital debts, yet keep potentially substantial assets.

The problem with this scenario is that it is inconsistent with one of the primary goals of bankruptcy law, which seeks equitable, maximum debt repayment even if the debts can be only partially repaid over a period of time.<sup>189</sup> To avoid this result, Congress should force non-filing spouses to surrender non-exempt assets in Chapter 7 liquidations and to work in the market to help repay debts in Chapter 13 cases.<sup>190</sup> Although states have al-

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<sup>189</sup> Society has an interest in ensuring that non-debtor spouses who have the ability to help pay debtors be required to repay these debts because the costs of bankruptcy are not borne solely by creditors. Many, if not all, creditors pass the cost of discharged debts on to other customers through higher fees and interest rates. See Robert A. Hillman, *Contract Excuse and Bankruptcy*, 43 STAN. L. REV. 99, 123 (1990) (arguing that customers bear the pain of discharge and excuse); cf. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 50-51 (1997) ("Ex ante, creditors can protect themselves with security interests, debt covenants, and other contractual provisions; in the absence of the Bankruptcy Code's restrictions on waivers they could contractually provide for a post-insolvency division of assets.").

<sup>190</sup> Cf. *In re Moix-McNutt*, 215 B.R. 405, 407 (8th Cir. B.A.P. 1997) (reviewing the case's procedural history and noting that a bankruptcy judge directed the homemaker debtor to convert her case into a Chapter 11 petition with her husband's participation or face a Chapter 7 conversion). For a treatment of the analogous business situation, arguing that the general partners of a debtor partnership should be denied bankruptcy protections

ways been reluctant to regulate, supervise, or control a married couple's "private" affairs,<sup>191</sup> Congress should regulate those affairs when a couple seeks public bankruptcy benefits.<sup>192</sup> Requiring a non-debtor spouse to surrender some assets or contribute income to a debtor spouse who has filed for bankruptcy to discharge marital debts is consistent with the partnership view of marriage. Moreover, this approach furthers public policy considerations both in and of bankruptcy and has been recognized in a number of court decisions that are discussed in the following sections.

i. Chapter 7 Dismissals Due to Non-Debtor Income

Many courts will consider the income of a debtor's non-filing spouse when determining whether a debtor seeking a Chapter 7 discharge has the "ability to repay"<sup>193</sup> some of those debts through a Chapter 13 plan.<sup>194</sup> For example,

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unless they file for bankruptcy, see Ribstein, *supra* note 188, at 64-65.

<sup>191</sup> See Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, or False Start?*, 69 N.C. L. REV. 577, 582 (1991) ("While a marriage is intact, the courts rarely dictate the extent of the duty" to support a spouse.).

<sup>192</sup> Professor Martha Fineman discusses the disingenuousness of regulating the affairs of single mothers who receive public assistance but not the affairs of married couples with children. See FINEMAN, *supra* note 26, at 190-91. She argues that the latter receive public subsidies through government programs including federal loans, subsidized insurance benefits, and the ability to file joint income tax returns. See *id.* She posits that this regulation disparity is due to the fact that the family form of two married parents with children conforms with socially accepted and expected norms. See *id.*

<sup>193</sup> Although I do not necessarily advocate this view, many argue that the ability to pay should be considered when courts rule on motions to dismiss a Chapter 7 petition for "substantial abuse" pursuant to 11 U.S.C. § 707(b). See Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in 1 NATIONAL BANKRUPTCY REVIEW COMMISSION, *supra* note 101, at 1123, 1132-49 (noting that some members of the Review Commission believed that relief under Chapter 7 should be unavailable to those with the ability to repay debts); see also *United States Trustee v. Harris*, 960 F.2d 74, 77 (8th Cir. 1992) (dismissing a Chapter 7 petition in a case where the petitioners could pay 156% of their unsecured debt within three years); *In re Green*, 934 F.2d 568, 572 (4th Cir. 1991) (adopting a "totality of the circumstances" test to determine whether a debtor can take advantage of Chapter 7's protections, rather than solely focusing on the debtor's solvency); *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989) (noting that, although a debtor's ability to repay his debts might, by itself, warrant a Chapter 7 petition, other factors are also relevant under a "totality of the circumstances" approach); *In re Piontek*, 113 B.R. 17, 22 (Bankr. D. Or. 1990) (suggesting that courts dismiss Chapter 7 cases whenever a debtor can pay "all unsecured debts without undue hardship"); *In re Edwards*, 50 B.R. 933, 938 (Bankr. S.D.N.Y. 1985) (discussing the court's reasons for setting a "rather high screening standard for a debtor's entitlement to Chapter 7 relief").

Despite such rulings, most academics reject this approach. See Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 100 (1986) (advocating a narrow

the court in *In re Wilkinson*<sup>195</sup> implicitly ruled that a debtor cannot receive Chapter 7 benefits if the debtor's spouse has income that could help repay debts. In *Wilkinson*, a debtor filed a petition for relief under Chapter 7, but her husband did not.<sup>196</sup> The debtor admitted that she intended to reaffirm (i.e., repay) all of her debts except one, which she had co-signed with her ex-husband.<sup>197</sup> Because the debtor's current husband had income sufficient to help the debtor pay her debts, the court refused to allow her to proceed in Chapter 7<sup>198</sup> and concluded that a discharge under these circumstances would constitute an abuse of the bankruptcy system because it appeared that she filed solely to discharge the debt she co-signed with ex-husband.<sup>199</sup>

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reading of the "substantial abuse" provision allowing courts to dismiss a Chapter 7 petition because "no provision within Chapter 7 prohibits an individual from seeking relief when she could be a debtor under Chapter 13"); Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1115-18; Teresa A. Sullivan et al., *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087, 1087-88 (challenging the conclusions of the Purdue Study, which asserted that most Chapter 7 debtors could repay some of their debts and, thus, should be forced into Chapter 13); Honorable Roger M. Whelan et al., *Consumer Bankruptcy Reform: Balancing the Equities in Chapter 13*, 2 AM. BANKR. INST. L. REV. 165, 190 (1994) (noting that the dismissal of a Chapter 7 case for abuse may constitute an involuntary Chapter 13 mechanism). *But see* A. Charlene Sullivan, *Reply: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1069, 1085 ("The bottom line is that a significant portion of consumers filing under Chapter 7 could have repaid their debts over payment periods ranging from three to five years, even allowing for cushions over basic living expenses.").

<sup>194</sup> See, e.g., *In re Smith*, 157 B.R. 348, 350 (Bankr. N.D. Ohio 1993) (observing that a court must consider the non-debtor spouse's income when it reviews the debtor's Chapter 7 petition); *In re Strong*, 84 B.R. 541, 543 (Bankr. N.D. Ind. 1988) (drawing parallels between the consideration of a non-debtor spouse's income in a Chapter 7 context and a Chapter 13 setting where "an accurate analysis of Chapter 13's disposable income test is impossible unless the income of a non-debtor spouse is included in the budget"); *In re Kern*, 40 B.R. 26, 28 (Bankr. S.D.N.Y. 1984) (rejecting a debtor's proposed Chapter 13 plan because his wife could "afford to bear her share," despite her "old-fashioned" belief that a husband should be the family's sole provider). *But cf. In re Berndt*, 127 B.R. 222, 225 (Bankr. D.N.D. 1991) (holding that, where a debtor and a non-debtor spouse share a joint household, the non-debtor spouse's income should not be "rendered liable" for the filer's debts but should be considered in determining whether the debtor has available discretionary income to repay debts under a Chapter 13 plan).

<sup>195</sup> 168 B.R. 626 (Bankr. N.D. Ohio 1994).

<sup>196</sup> See *id.* at 627.

<sup>197</sup> See *id.* at 628.

<sup>198</sup> See *id.* at 629 (observing that, although "it is arguably no more fair for the Debtor to be stuck with the debt incurred by her deadbeat ex-husband, than it is for the creditor not to be paid," the debtor had the ability to pay without much hardship).

<sup>199</sup> See *id.* at 629.

ii. Chapter 13 Dismissals Due to Non-Debtor Income

Because Chapter 13 debtors must use all of their "disposable income" to fund their plans, many courts also consider the non-debtor spouse's income when a married person submits his or her proposed Chapter 13 budget.<sup>200</sup> Courts also reason that it is unfair to allow debtors to allocate separate income to family necessities if the non-filing spouse's income would remain "disposable" to the debtor yet uncommitted to the plan.<sup>201</sup> For example, the debtor in *In re Carter*<sup>202</sup> failed to include her husband's income and expenses in her plan as required by federal bankruptcy law.<sup>203</sup> Without any statistical or factual basis, the court asserted "that married couples live as a unit, pooling their income and expenses."<sup>204</sup> Because the court concluded that the debtor would have access to her husband's income and that his income might be sufficient to pay her living expenses, the court refused to confirm the debtor's plan.<sup>205</sup>

iii. Confirmation of Chapter 13 Plan Funded by Non-Debtor's Income

In other cases, bankruptcy courts have carefully considered non-debtor spousal income when a non-debtor spouse agrees to fund a filing spouse's Chapter 13 plan with her income.<sup>206</sup> The debtor in *In re Antoine*, for in-

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<sup>200</sup> See, e.g., *In re Mathenia*, 220 B.R. 427, 432 (Bankr. W.D. Okla. 1998) (stating that the debtor's Chapter 13 plan could not be confirmed unless the debtor "employs a portion of his spouse's proportionate share of the family's disposable income"); *In re Halper*, 213 B.R. 279, 283 (Bankr. D.N.J. 1997) (observing that, when most courts consider a Chapter 13 plan, they consider the income and expenses of the debtor and non-debtor spouse together); *In re Cardillo*, 170 B.R. 490, 491 (Bankr. D.N.H. 1994); *In re Velis*, 123 B.R. 497, 511-12 (Bankr. D.N.J. 1991), *rev'd in part, aff'd in relevant part*, 949 F.2d 78 (3d Cir. 1991) (tracing a history of considering a non-debtor spouse's income in Chapters 7 and 13 and in student loan settings); *In re Belt*, 106 B.R. 553, 563 (Bankr. N.D. Ind. 1989) (noting that, although a debtor's Chapter 13 plan must include the non-debtor spouse's income and expenses, not all excess income must go towards funding the Chapter 13 plan); *Strong*, 84 B.R. at 543; *In re Saunders*, 60 B.R. 187, 188 (Bankr. N.D. Ohio 1986); *Kern*, 40 B.R. at 29; *In re Sellers*, 33 B.R. 854, 857 (Bankr. D. Col. 1983). But see *In re Harmon*, 118 B.R. 68, 69 (Bankr. E.D. Mich. 1990) (rejecting the trustee's argument that the non-debtor spouse's income should be included and holding that the court did not have jurisdiction over the wife's assets or income).

<sup>201</sup> See *In re Soper*, 152 B.R. 985, 988 (Bankr. D. Kan. 1993).

<sup>202</sup> 205 B.R. 733 (Bankr. E.D. Pa. 1996).

<sup>203</sup> See *id.* at 735 (citing Bankruptcy Form Schedules I and J).

<sup>204</sup> *Id.* at 736.

<sup>205</sup> See *id.* ("Without income and expense information from the debtor's husband we are unable to make a determination of the debtor's disposable income.").

<sup>206</sup> See, e.g., *In re Antoine*, 208 B.R. 17 (Bankr. E.D.N.Y. 1992); *In re Cohen*, 13 B.R. 350, 351 & n.3 (Bankr. E.D. 1981) (including the income of the debtor's non-filing husband in the debtor's Chapter 13 plan); see also *In re Sigfrid*, 161 B.R. 220, 223

stance, was an unemployed carpenter who was completely dependent on his wife for financial support.<sup>207</sup> Although the debtor's wife did not file a bankruptcy petition, the couple's joint mortgage obligation was the apparent catalyst for the husband's petition.<sup>208</sup> The wife testified that their household was maintained "as one" and that she was willing to help her spouse repay his debts.<sup>209</sup> Indeed, it appeared that the proposed plan would be funded *solely* by contributions from the debtor's wife.<sup>210</sup> The Chapter 13 trustee argued that the court could not confirm such a plan because the Code requires Chapter 13 debtors establish "regular income," and a filer without income would therefore be ineligible to file under Chapter 13.<sup>211</sup> The court determined that the unemployed debtor had "regular income" based on his wife's "significant earnings," basing this on the fact that the couple's twenty-eight year marriage indicated the couple had a "long history of mutual support and a stable marital relationship."<sup>212</sup>

The surprising nature of these decisions can be seen by comparing them to distribution decisions in the context of divorce. In distributing marital assets, courts have traditionally been reluctant to value the services of full-time homemakers.<sup>213</sup> In *Antoine*, on the other hand, the court went to great

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(Bankr. Minn. 1993) (rejecting the debtor's Chapter 13 plan because there was insufficient evidence that the non-debtor spouse's income was stable or regular); *In re Soper*, 152 B.R. 985, 988 (Bankr. D. Kan. 1993) ("If . . . the debtor were married, then his spouse's income would be properly considered in determining his net available income for payment under the [Chapter 13] plan.") (citation omitted); *In re Ellenberg*, 89 B.R. 258, 263 (Bankr. N.D. Ga. 1988) (noting that a non-debtor spouse's income and expenses are "relevant in cases where the debtor spouse is shouldering most of the expenses"). *But cf.* *In re Hanlin*, 211 B.R. 147, 148 (Bankr. W.D.N.Y. 1997) (rejecting an unemployed student's Chapter 13 plan premised on parental contribution and stating that upholding his plan would "fly in the face of any sensible reading" of Chapter 13); *In re Fischel*, 103 B.R. 44, 46 (Bankr. N.D.N.Y. 1989) (rejecting the debtor's Chapter 13 plan, despite the fact that the debtor and her non-debtor co-habitant lived together, shared their resources, and that the non-debtor gave the debtor money to pay her debts).

<sup>207</sup> See 208 B.R. at 18.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.* at 19.

<sup>210</sup> See *id.* at 18 (noting the undisputed fact that the debtor had no current source of income).

<sup>211</sup> See *id.* (reporting that the trustee stated that the debtor had no standing under Chapter 13 because he had no regular income).

<sup>212</sup> *In re Antoine*, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1992).

<sup>213</sup> See Downey, *supra* note 173; at 124 ("The efforts of the homemaker were ignored by common law and often regarded as expected duties of the wife."); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U.L. REV. 1, 61 (1996) (stating that, in a divorce context, "[h]ousework is again not simply *undervalued*, but is quite literally *not valued*"); see also Regan, *supra* note 26, at 2314 (1994) (discussing the changing views of homemaking contributions to a marriage); Suzanne Reynolds, *Increases*

lengths to expand the definition of income so that it would encompass voluntary payments made by one spouse to another.<sup>214</sup> However, the court in *Antoine* did not go so far as to hold that the non-debtor spouse's separate income was marital income or that the non-debtor had a *legal* duty to help repay her husband's debts. Nevertheless, the court's implicit assumption that the wife's income was available to her husband is consistent with imposing a duty on non-filing spouses to provide financial assistance when the non-debtor benefits from the debtor spouse's bankruptcy filing.

iv. Nondischargeability of Divorce Obligations Due to Current Spouse's Income

Courts tend to consider the income of a debtor's *current* spouse when deciding whether the debtor can use bankruptcy laws to discharge equitable distribution obligations or other non-support divorce obligations owed to a former spouse. Alimony, maintenance, and child support obligations are non-dischargeable in all bankruptcy cases.<sup>215</sup> However, a Chapter 7 debtor may discharge non-support divorce debts by showing either that he cannot repay the debts or that paying the debts will harm him more than non-payment will harm his ex-spouse.<sup>216</sup>

Some courts have refused to consider the assets of a debtor's new spouse or cohabitant even if the new spouse or cohabitant owns property or has income that could help the debtor satisfy non-support divorce obligations.<sup>217</sup> However, most courts examine the debtor's entire current financial situation, including the assets of a co-habitant or new spouse.<sup>218</sup> For example, the

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in *Separate Property and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 270 (1989) (discussing the treatment courts give "indirect" contributions to the marital partnership and the often-required "close 'causal' relationship between the efforts of the spouse and the increase in value"); Dowd, *supra* note 174, at 500 (reporting that, until 1993, Mississippi courts failed to recognize "homemaker contributions" as valid contributions to a family's assets).

<sup>214</sup> *But cf. In re McMullan*, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996) (dismissing the Chapter 13 plan of a woman that the court characterized as "essentially a housewife" even though she received wages from the part time bookkeeping work she performed for her husband).

<sup>215</sup> See 11 U.S.C. § 523(a)(5).

<sup>216</sup> See 11 U.S.C. § 523(a)(15).

<sup>217</sup> See *In re Willey*, 198 B.R. 1007, 1015 (Bankr. S.D. Fla. 1996) (expressing concern over the "chilling" effect on courtship and remarriage if a new girlfriend's assets were to be included in disposable income); *In re Carter*, 189 B.R. 521, 522 (Bankr. M.D. Fla. 1995) (refusing to inquire into the finances of the debtor's new spouse because the inquiry would not alter the court's determination regarding the debtor's ability to pay his debts).

<sup>218</sup> See, e.g., *In re Gamble*, 143 F.3d 223, 226 (5th Cir. 1998); *In re Halper*, 213 B.R. 279, 284 (Bankr. D.N.J. 1997) (stating that the court's determination of a debtor's situation "mandates consideration of the income of a live-in companion"); *In re Koons*, 206 B.R. 768, 773 (Bankr. E.D. Pa. 1997); *In re Celani*, 194 B.R. 719, 721 (Bankr. D. Conn.



debtor in *In re Windom*<sup>219</sup> sought to discharge non-support obligations owed to his ex-wife. Because he could discharge the debts only by proving that he was unable to pay, the court assessed the husband's ability to pay based on the household's total income.<sup>220</sup> Although the debtor's current wife did not work outside of the home, the court noted that she had "the ability to work and can begin working at any time."<sup>221</sup> Because such earnings would add to the debtor's disposable income, the court refused to find that the debtor was unable to pay his divorce obligations.<sup>222</sup>

In *In re Stewart*,<sup>223</sup> a debtor likewise sought to discharge non-support divorce obligations. The debtor argued that, because his first wife had remarried and was now financially well-off, he should no longer have to pay the debt.<sup>224</sup> Although the debtor had incurred significant additional debts, the court concluded that because he and his new wife were both doctors, their combined earning potential should be "ten times to twenty times what the average American makes in a year, perhaps even more."<sup>225</sup> The court determined that the debtor could afford to pay his divorce obligation, stressing that even if the debtor could not pay the debt entirely from his own earnings, he could repay the debts with the help of his current wife "whose own considerable earnings can support them while [the debtor] pays his just debts."<sup>226</sup>

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1996); *In re Cleveland*, 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996); cf. *In re Adams*, 200 B.R. 630, 634 (Bankr. N.D. Ill. 1996) ("[C]ourts cannot possibly determine exactly how much of a debtor's own income is truly 'necessary' for his and his dependents' support without inquiring into . . . how much his new spouse is contributing to the family's maintenance."); *In re Smither*, 194 B.R. 102, 106 (Bankr. W.D. Ky. 1996) (observing that, when a debtor remarries before a court issues a determination in his section 523(a)(15) case, the court should include the new spouse's income in its calculation of disposable income); *In re Hill*, 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995) (noting that the plaintiff's assertion that the debtor's wife should take a part-time job is "not totally without merit" and noting the wife's contribution in the form of received child support).

<sup>219</sup> 207 B.R. 1017 (Bankr. W.D. Tenn. 1997).

<sup>220</sup> See *id.* at 1021 (adopting a "totality of the circumstances" approach and rejecting a "snapshot" view of the debtor's financial situation).

<sup>221</sup> *Id.* at 1022.

<sup>222</sup> See *id.*

<sup>223</sup> 201 B.R. 996 (Bankr. N.D. Okla. 1996).

<sup>224</sup> See *id.* at 1007 ("The point is not whether they (the debtor's ex-wife and children) need it, but whether he owes it to them.").

<sup>225</sup> *Id.* at 1006.

<sup>226</sup> *Id.* at 1007. Similarly, the court in *In re Duncan*, 201 B.R. 889 (Bankr. W.D. Pa. 1996), dismissed a Chapter 7 case because the debtor, who earned approximately \$60,000 annually, sought a Chapter 7 discharge rather than attempting to repay his debts through a Chapter 13 plan. See *id.* at 892-93. The court held that allowing the case to proceed would constitute a substantial abuse of the Chapter 7 process and noted that most of the debtor's monthly expenditures were household expenses rather than personal expenses.

Courts that take into account the income of a new spouse or co-habitant conclude that it is impossible to reach an adequate evaluation of a debtor's ability to repay without considering all income sources actually or potentially available to the debtor. Indeed, one recent opinion essentially imputed income to the debtor's non-filing new wife, observing that "the fact that [the debtor's new wife] chooses not to work cannot, by itself, defeat the [ex-wife's] right to recover based solely on the debtor's inability to pay."<sup>227</sup> However, courts that do consider a new spouse's income have not yet gone so far as to order a new spouse to pay directly on an obligation owed by a debtor to an ex-spouse. Nevertheless, a court that considers a current spouse's income implicitly assumes that the total household income of a married debtor is relevant to whether that married person should be permitted to discharge a non-support divorce debt.

v. Nondischargeability of Student Loans Due to Non-Debtor Income

Finally, courts routinely consider a non-filing spouse's actual *and* potential income when deciding whether a debtor should be allowed to discharge a student loan. Although student loans generally are not dischargeable,<sup>228</sup> courts will discharge an otherwise nondischargeable student loan if the debtor shows that repaying the loan will impose an undue hardship on the debtor or the debtor's dependents.<sup>229</sup> The court in *In re Albert*,<sup>230</sup> for exam-

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*See id.* at 899. For this reason, the court concluded that it should consider both spouses' incomes in determining whether the debtor could repay at least some of his debts in a Chapter 13 plan. *See id.* at 900.

<sup>227</sup> *In re Windom*, 207 B.R. 1017, 1022 (Bankr. W.D. Tenn. 1997).

<sup>228</sup> *See* 11 U.S.C. § 523(a)(8) (including student loans in exceptions to discharge).

<sup>229</sup> *See* 11 U.S.C. § 523(a)(8)(B) (describing the "undue hardship" exception). *See generally In re Fox*, 189 B.R. 115, 118 (Bankr. N.D. Ohio 1995) (noting that the Code does not define "undue hardship"); *In re Garrett*, 180 B.R. 358, 363 (Bankr. D.N.H. 1995) (indicating that the dischargeability of student loans is a case-by-case inquiry); *Virginia State Educ. Assistance Auth. v. Dillon*, 189 B.R. 382, 385 (W.D. Va. 1995) (applying a threshold undue hardship inquiry which determines "if payment of the loans would cause [the debtor's] standard of living to fall below that minimally necessary") (citation omitted); *In re Ipsen*, 149 B.R. 583, 585 (Bankr. W.D. Mo. 1992) (same); *In re Velis*, 123 B.R. 497, 512 (D.N.J. 1991), *rev'd in part, aff'd in relevant part*, 949 F.2d 78 (3d Cir. 1991) (indicating that an undue hardship inquiry should take a non-debtor spouse's income into account); *In re Belt*, 106 B.R. 553, 562 (Bankr. N.D. Ind. 1989); *In re Coleman*, 98 B.R. 443, 452 (Bankr. S.D. Ind. 1989) (indicating that a court must take all factors into account when determining undue hardship and can not rely on a "snapshot" of the debtor's situation); *In re Albert*, 25 B.R. 98, 101 (Bankr. N.D. Ohio 1982) (same); *In re Hartung*, 24 B.R. 850, 852 (Bankr. N.D. Ohio 1982) (discussing the circumstances in which a court might find undue hardship); *In re Lezer*, 21 B.R. 783, 789 (Bankr. N.D.N.Y. 1982) (applying both the "mechanical" and the "policy" tests for undue hardship).

ple, concluded that, because the debtor and non-filing spouse probably commingled funds and expenses, the court could consider the non-filing spouse's income when deciding whether repaying a student loan would cause the debtor undue hardship.<sup>231</sup> Similarly, the court in *In re Koch*<sup>232</sup> required a debtor to repay four student loans, basing its conclusion in part on the fact that the non-filing spouse failed to seek either full-time or additional part-time employment to contribute to the household's income.<sup>233</sup> In another case,<sup>234</sup> the court maintained that it did not wish to "denigrate the importance of [a non-filing spouse's] position as a homemaker" but nevertheless concluded that, because the wife was "young, healthy, and apparently capable of generating at least some income in order to relieve the family's current plight,"<sup>235</sup> repaying the student loans would not impose an undue hardship on the couple. Likewise, the court in *In re Wilson*<sup>236</sup> based its refusal to discharge a loan in part on the debtor-wife's "deliberate decision to not return to work in order to care for her newborn at home."<sup>237</sup> The court recognized the "debtor's desire to play an active role in the development and rearing of her child,"<sup>238</sup> but stressed that the debtor's decision to limit family income was voluntarily and that the wife's "employment status is subject to change at any time when she so chooses to alter her status."<sup>239</sup> Finally, the court in *In re Zibura*<sup>240</sup> acknowledged that debtors may decide to have one spouse remain in the home full-time, but concluded that it would be "inappropriate for them to make that decision at the expense of" creditors.<sup>241</sup> The court ultimately based its refusal to discharge the loan on the fact that the homemaker spouse was young and in good health.<sup>242</sup>

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<sup>230</sup> 25 B.R. 98 (Bankr. N.D. Ohio 1982).

<sup>231</sup> See *id.* at 101 (rejecting debtor's undue hardship claim).

<sup>232</sup> 144 B.R. 959 (Bankr. W.D. Pa. 1992).

<sup>233</sup> See *id.* at 962.

<sup>234</sup> *In re Franklin*, Ch. 7 Case No. 3-93-6489, Adv. No. 4-95-032, 1995 Bankr. Lexis 1297 (Bankr. D. Minn. Sep. 8, 1995).

<sup>235</sup> *Id.* at \*17.

<sup>236</sup> 177 B.R. 246 (Bankr. E.D. Va. 1994).

<sup>237</sup> *Id.* at 248.

<sup>238</sup> *Id.* at 249.

<sup>239</sup> *Id.* at 250. But see *In re Ford*, 22 B.R. 442, 442-43 (Bankr. W.D.N.Y. 1982) (granting a loan hardship discharge for a debtor with four small children based on the court's conclusion that the debtor's wife would be unable to seek employment so long as she had children under the age of 2).

<sup>240</sup> 128 B.R. 129 (Bankr. W.D. Pa. 1991).

<sup>241</sup> *Id.* at 130.

<sup>242</sup> See *id.* at 134; cf. *In re Springer*, 54 B.R. 910, 914-15 (Bankr. D. Neb. 1985) (denying hardship discharge but declining to mandate that stay-at-home mother/debtor get a job). But see *Ford*, 22 B.R. at 446 (discharging loan because of court's view that wife/debtor "will not be able to seek employment until her 2 year old infant reaches school

## vi. Public Policy Justification

As a matter of public policy, a non-debtor spouse who has benefited from the debtor's discharge and has either non-exempt assets or disposable income should not be allowed to shift the burden of repaying marital debts away from herself and onto creditors or society. If there are legitimate public policy reasons to provide government subsidized incentives to married couples to which single individuals do not have access, then other federal laws should also support the view that marriage is a unique type of relationship. Requiring non-debtor spouses to provide financial support to their debtor spouses is consistent with the view of marriage as a "covenant" and with the belief that married couples have a moral obligation to support each other both emotionally and economically. Such a policy in the context of bankruptcy would reinforce the societal goal of encouraging spouses, rather than creditors, to bear the primary responsibility of helping a partner in bankruptcy.<sup>243</sup> The failure to adopt such a policy amounts, in effect, to a subsidy for the non-filing spouse, paid for by society and by creditors, and from which neither creditors nor society receives any tangible, objective benefit.<sup>244</sup>

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age").

<sup>243</sup> The trend toward making the doctrine of necessities apply equally to husbands and wives is one example of how the law, in other contexts, treats marriage as a partnership premised on mutual economic support. *See, e.g.*, VA. CODE ANN. § 55-37 (Michie 1998); *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 1 (Ind. 1993); *St. Francis Reg'l Med. Ctr. v. Bowlas*, 836 P.2d 1123, 1125 (Kan. 1992); *Hulse v. Warren*, 777 S.W.2d 319, 322 (Mo. Ct. App. 1989); *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1003 (N.J. 1980); *Medical Bus. Assoc., Inc. v. Steiner*, 183 A.D.2d 86, 86 (N.Y. App. Div. 1992); *North Carolina Baptist Hosp., Inc. v. Harris*, 354 S.E.2d 471, 474 (N.C. 1987); *Richland Mem'l Hosp. v. Burton*, 318 S.E.2d 12, 12 (S.C. 1984); *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 326 (Wis. 1982). Other states statutorily impose mutual obligations of support on both spouses. *See, e.g.*, CAL. FAM. CODE § 4300 (West 1998); DEL. CODE ANN., tit. 13, § 502 (1993); HAW. REV. STAT. ANN. § 510-8(h) (Michie 1997); ME. REV. STAT. ANN. tit. 19-A, § 1652 (West 1998); N.Y. JUD. LAW § 412 (McKinney 1983 & Supp. 1998); OHIO REV. CODE ANN. § 3103.01 (Anderson 1998). A number of states have determined that the doctrine violates the Equal Protection clause and have therefore denied the doctrine's effect. *See, e.g.*, *North Ottawa Community Hosp. v. Kieft*, 578 N.W.2d 267, 273 (Mich. 1998); *Webb v. Hillsborough Hosp. Auth.*, 521 So.2d 199, 201 (Fla. Dist. Ct. App. 1988). *See generally* Daniel D. McClain, *Developments in State Constitutional Law: 1994: VI Equal Protection*, 26 RUTGERS L.J. 1110, 1111 & n.11 (1995).

<sup>244</sup> Although our society pays lip service to the idea that society benefits when a child is raised by a stay-at-home parent, there appears to be a collective judgment in practice that this is not true in cases where the public is forced to subsidize stay-at-home mothers. Thus, our laws reflect the belief that society benefits more when a single mother on welfare works outside the home than when she devotes her energies to full time mothering. *See infra* notes 248, 252-254 and accompanying text. Allowing married mothers to stay home and rear children rather than work outside the home to pay off debt would be inconsistent with this policy.

Requiring a stay-at-home spouse, usually the wife, to provide financial support to the wage earner spouse would also help to equalize the economic treatment of all women in bankruptcy. Only upper or middle class wives are likely to have the luxury of choosing to remain at home. In addition to making a class distinction, current doctrine also discriminates on the basis of race: Historically, black women have either never had or never exercised the option of staying home to be full-time homemakers.<sup>245</sup> Instead, they consistently earned wages in the market along with their husbands.<sup>246</sup> Requiring all wives whose husbands file for relief in bankruptcy to work in the market would result in the equal treatment of all non-filing spouses in bankruptcy, regardless of economic class, race, or current wage-earner status.<sup>247</sup>

The final, and perhaps most important, public policy justification for requiring stay-at-home spouses to relinquish non-exempt property or earn wages in return for bankruptcy benefits is that bankruptcy benefits should be treated like all other federal entitlements. Admittedly, a drastic reorientation of the government's view of what *type* of woman should be obliged to work outside the home must take place<sup>248</sup> before Congress will be willing to refuse

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<sup>245</sup> See Siegel, *supra* note 50, at 1086-87; see also Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 795 (1996).

<sup>246</sup> See Perry, *supra* note 2, at 2489-90 ("Because Black men typically earn less than white men, for most Black families, having the mother in the workforce has always been a necessity."). See generally JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* 6-8 (1985).

<sup>247</sup> Professor Twila Perry notes that one unintended "benefit" of no-fault divorce is the equalization of the economic status of women. See Perry, *supra* note 2, at 2513. She observes that since the advent of no-fault divorce, courts increasingly have refused to award alimony. See *id.* Upper and middle class women may have been harmed by no-fault laws because they did not anticipate either that the lifetime support they expected to receive from their husbands would end at divorce or that new laws would prevent them from being awarded long-term alimony. See *id.* (arguing that wealthy women could learn a lot about independence from poor women).

<sup>248</sup> See FINEMAN, *supra* note 26, at 115:

Women who have become single mothers due to the death of their spouses are generally excused from the condemnation so frequently cast at their never-married sisters. These mothers are sympathetically considered worthy as widows even if they have not worked or do not work. Widows are typically entitled to generous Social Security benefits, whereas, in contrast, mothers who are divorced or who never marry are left to the variability of the child support system or AFDC.

*Id.*; see also WEITZMAN, *supra* note 2, at 141-142 (observing that, despite increasing divorce rates, the law provides federal benefits to divorced and widowed persons on an unequal basis); Perry, *supra* note 2, at 2500-01 (asserting that society sympathizes with college-educated married women who forego careers to rear children but holds women who have children and receive public assistance in contempt); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2543 (1995) (criticizing the current welfare system for allowing welfare mothers who are "physically capable of working to get something for nothing").

federal bankruptcy benefits to husbands whose wives do not work outside the home. Historically, states have refused to order married women to work outside the home, to regulate intimate family affairs, or to enforce interspousal support obligations in intact marriages.<sup>249</sup> In contrast, the federal government has been willing to interfere with the economic relationships between spouses. For example, a spouse applying for a federally guaranteed student loan is deemed to have access to the non-applicant spouse's income.<sup>250</sup> Similarly, if only one spouse applies for federal welfare benefits, the non-filing spouse's income is deemed available to the applicant and is taken into account when determining the applicant's eligibility and the amount of benefits granted.<sup>251</sup>

Congress recently enacted federal laws that require female welfare recipients to work outside the home in return for receiving government assistance.<sup>252</sup> Just as Congress requires women to earn federal welfare benefits, it should require women who are beneficiaries of the federal bankruptcy

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<sup>249</sup> See Shultz, *supra* note 147, at 234 (positing that the "unenforceability of support obligations" during a marriage is understood as a given in domestic relations law). Although modern courts will enforce most premarital agreements, most still will not enforce interspousal contracts that obligate the husband to pay for acts traditionally performed by wives, including the provision of domestic household labor. See *Borelli v. Brusseau*, 16 Cal. Rptr.2d 16, 20 (Cal. Ct. App. 1993) (suggesting that a spouse is not entitled to compensation for support that arises from marital relations); *Finch v. Finch*, 592 N.E.2d 1260, 1262 (Ind. Ct. App. 1992) (holding that a wife cannot be compensated upon divorce for leaving her job to care for sick husband); *Ritchie v. White*, 35 S.E.2d 414, 416 (N.C. 1945) (holding that a contract between husband and wife for services rendered by wife to her late husband was unenforceable because it related to domestic obligations incident to marriage); *Oates v. Oates*, 33 S.E.2d 457, 460 (W. Va. 1945). See generally Siegel, *supra* note 27, at 2182.

<sup>250</sup> See 20 U.S.C. § 1087nn(b)(1)(A).

<sup>251</sup> See 42 U.S.C. § 1382c(d)(2) (deeming an informal marriage to be a formal one for the purposes of imputing income). One scholar observed that "[f]ederal laws recognize the unmarried couple only when those laws work to the couple's financial disadvantage." Chambers, *supra* note 18, at 473 n.101.

<sup>252</sup> Recent welfare reform legislation and welfare reform laws passed in the 1980s reflect the belief that welfare dependency is a societal problem that requires a dramatic reorientation of welfare policy. See e.g., MARY J. BANE & DAVID T. ELLWOOD, *WELFARE REALITIES: FROM RHETORIC TO REFORM* 19-27 (1994) (discussing the efforts of different states to change their welfare systems). The core objectives of welfare reform were to require welfare recipients to work as a condition of receiving federal benefits, to stress to welfare recipients that benefits are not lifelong, and to instill the work ethic in both mothers and their children. See H.R. REP. NO. 104-651, at 5-6 (1996), reprinted in 1996 U.S.C.C.A.N. 2183, 2186-87. Indeed, even welfare recipients with small children are expected either to leave the home and earn wages or to risk losing federal benefits. See, e.g., Perry, *supra* note 24, at 359 ("It would appear, at least from the recent obsession with forcing welfare mothers to work, that one value assumed to be passed on to children in the traditional family but not in a single mother family is the work ethic.").

system to earn the benefits that the bankruptcy system provides.<sup>253</sup> If an unmarried mother must work in return for public assistance benefits, a stay-at-home spouse who benefits from her spouse's discharge of marital debts should likewise be required to work in return for those benefits.<sup>254</sup> In short, given the federal government's apparent conclusion that federal benefits must be earned, there is no rational justification for not requiring that a wife either relinquish non-exempt assets or work for wages if she benefits from her husband's bankruptcy discharge.

b. *Enjoining Suits Against Non-filer*

Courts should enjoin all creditor suits against an economically independent non-filing spouse<sup>255</sup> in return for the financial assistance the spouse would be required to provide to the debtor. This would encourage the spouse to help the debtor repay debts voluntarily and discourage the debtor from filing a bankruptcy petition. The court in *In re Archambault*<sup>256</sup> issued such an injunction. After the debtor and his business filed petitions for relief under Chapter 7, a creditor sought to collect a business debt from the non-debtor spouse. The debtor and his wife sought injunctive relief and argued that although the wife had a general knowledge of the husband's business, she had virtually no legal association with it.<sup>257</sup> While acknowledging this to be an exceptional case, the court held that an injunction was appropriate because allowing the creditor to sue the wife would exert pressure on the debtor and constitute "an end-run around the automatic stay."<sup>258</sup>

Unless the non-filing spouse has a financial relationship with the debtor, allowing a separate creditor to sue the non-filer would only exert pressure on the debtor spouse and would serve no valid purpose.<sup>259</sup> Just as courts have

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<sup>253</sup> See generally, FINEMAN, *supra* note 26, at 75-76 (observing that governmental response to, and treatment of, mothers varies depending on whether the mother is married, divorced, or never married).

<sup>254</sup> See Martha L.A. Fineman, *Masking Dependency*, 81 VA. L. REV. 2181, 2197 (1995) (arguing that the punitive nature of welfare reform is used to punish women who give birth outside of a heterosexual marriage).

<sup>255</sup> When a partnership files for bankruptcy protection, but some of the partners do not, individual partners often will claim that creditors' actions against them personally should be enjoined by the automatic stay. See 11 U.S.C. § 362. Most courts have concluded that general partners are not protected by the automatic stay and will allow creditors to pursue the general partners' assets without regard to the automatic stay. See, e.g., *Austin v. UNARCO Indus., Inc.*, 705 F.2d 1, 4 (1st Cir. 1983) (stating that an automatic stay normally does not foreclose suits against general partners of bankrupt partnership).

<sup>256</sup> 174 B.R. 923 (Bankr. W.D. Mich. 1994).

<sup>257</sup> See *id.* at 931.

<sup>258</sup> *Id.* at 935.

<sup>259</sup> The Code generally prevents creditors from engaging in acts designed to force a debtor to repay debts either that the debtor is repaying through a Chapter 13 plan or that are discharged or dischargeable in the Chapter 7 or 13 case. See 11 U.S.C. §§ 524(a)-(b),

been willing to enjoin suits against non-debtor general partners of debtor partnerships,<sup>260</sup> Congress should instruct courts to enjoin suits against non-filing spouses even if the non-filer has income that could be used to pay the filer's debts. Such an injunction should issue whenever the non-debtor spouse receives no direct or indirect bankruptcy benefits through the marital partnership.

## II. ADOPTING A MARITAL FRAMEWORK FOR BANKRUPTCY

Although all of the marriage models pose difficulties in application and potentially create conflicts with certain public policies, Congress continues to grant benefits based on marital status<sup>261</sup> and must therefore impose burdens to prevent married debtors from engaging in strategic pre-filing behavior. I propose that Congress treat marriage as a partnership and revise the Code to provide that a married debtor's case be presumptively dismissed<sup>262</sup> unless either the debtor proves that the debts to be discharged are not marital debts<sup>263</sup> or the non-filing spouse agrees to help the filing spouse repay debts

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1201(a), 1301(a) (outlining requirements for enforceability of reaffirmation agreements obligating debtors to repay otherwise dischargeable debts; preventing creditors from collecting from debtors; and enjoining post-petition attempts to collect discharged debts).

<sup>260</sup> See, e.g., *In re Myerson & Kuhn*, 121 B.R. 145, 149 (Bankr. S.D.N.Y. 1990) (describing how the non-debtor partners of the debtor law firm partnership sought a temporary restraining order to enjoin creditors from maintaining litigation against them). The court granted the injunction, concluding that staying collection attempts against the partners was necessary to (1) ensure an orderly process of equitable distribution to all creditors; (2) encourage the non-debtor partners to assist in the law firm's reorganization efforts; (3) discourage the individual partners from filing for personal bankruptcies; and (4) prevent inter-partner disputes and partnership claims for contributions that would further complicate the partnership's reorganization process. See *id.* at 155; see also *In re Litchfield Co. of S.C. Ltd. Partnership*, 135 B.R. 797, 804-05 (Bankr. W.D.N.C. 1992) (staying an action filed by a creditor of a partnership against a non-debtor partner because (1) a partnership's power to compel individual partners to contribute to the partnership is property of the bankruptcy estate; (2) allowing the suit to continue would not have been consistent with the policy of equitable distribution to similarly situated creditors; and (3) allowing the suit to continue would have led to wasteful competition among the individual creditors attempting to collect independently).

<sup>261</sup> Whether, in fact, Congress *should* grant status-based benefits is a separate issue. In another article, I address this question and conclude that Congress should not, at least in the bankruptcy context. See Dickerson, *supra* note 16.

<sup>262</sup> Although some courts have concluded that they have jurisdiction to order the substantive consolidation of the debtor and non-debtor's assets, see *supra* notes 72-73, 76-78 and accompanying text, bankruptcy courts probably lack jurisdiction to compel a non-debtor to commit income to a debtor. See *In re Fischel*, 103 B.R. 44, 49 (Bankr. N.D.N.Y. 1989).

<sup>263</sup> Allowing spouses to prove they have a "his, hers, and ours" financial arrangement in their marriage would be consistent with the shift in philosophy in partnership law. Although the old UPA is based on the "aggregate" theory that the partnership is simply an



by relinquishing non-exempt assets or applying future income toward the debts. Before explaining why I propose that Congress treat marriages as partnerships, I will first explain why I reject the models of marriage as a merger and as an arm's length contract.

A. *Limitations of Viewing Marriage as a Merger*

Congress should not treat marriages as mergers because the merger model is based on the outdated view that wives are emotional providers and husbands are economic providers who have the right to exercise sole control over all marital assets. The marriage as a merger model sharply conflicts with modern social policies and commercial practices and promotes an anachronistic view of marriage because it (1) forces an economically independent spouse to file a bankruptcy petition and (2) automatically seizes the non-filing spouse's assets to pay the filer's debts.

1. *Mandatory Joint Filings*

Mandatory joint filing is consistent with the merger model paradigm of husbands earning all income and wives being supported by that income. However, for a number of reasons, Congress should not condition one spouse's right to bankruptcy relief on the other spouse's willingness to file a bankruptcy petition. First, although creditors can file involuntary Chapter 7 petitions and attempt to seize a debtor's existing assets,<sup>264</sup> the Code does not permit creditors to file involuntary Chapter 13 petitions because that would effectively force a debtor to work for others to repay debts.<sup>265</sup> Second, a wife in a "traditional" merger marriage would, by definition, not earn income outside the home, a generalization that is unrealistic given the number of modern wives who work outside the home for wages,<sup>266</sup> have separate

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aggregate of the partners, the new UPA adopts an "entity" theory that assumes that the partnership enterprise exists independent of the partners. Compare UNIF. PARTNERSHIP ACT § 6 (1914), 6 U.L.A. at 256 with REVISED UNIF. PARTNERSHIP ACT §§ 601(1), 602 (1994), 6 U.L.A. at 72-74, 77-78. Allowing non-debtor spouses to avoid the burden of the filing spouse's debts when the spouses can prove that the money from those debts benefited only the filing spouse seems consistent with modern partnership law.

<sup>264</sup> See 11 U.S.C. § 303(a).

<sup>265</sup> See *Toibb v. Radloff*, 501 U.S. 157, 165 (1991).

<sup>266</sup> See Janelle T. Calhoun, Comment, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921, 950 (1995) ("Historically, the father was the breadwinner and the mother stayed home with the children. In today's economy, however, both parents frequently work to support the family."); Elizabeth A. Heaney, Comment, *Pennsylvania's Doctrine of Necessities: An Anachronism Demanding Abolishment*, 101 DICK. L. REV. 233, 234 n.7 (1996) ("[M]arried women with preschool children represent the fastest growing category of workers in the U.S. economy. In 1989 only 22% of U.S. husband-wife families had the husband/father as the sole breadwinner in keeping with the traditional image of the nuclear family, while 49 percent had both partners working."); Joan O'Brien, *Straw Strength; Planned Community Builds The Old Way Naturally*;

credit cards<sup>267</sup> and checking accounts,<sup>268</sup> and own real property in their own names.<sup>269</sup> Finally, the Married Women's Property Acts gave wives the right to retain ownership of their pre-marital property and Congress should not revert<sup>270</sup> to the view that wives are dependent economic non-entities whose assets can be seized because of their spouses' improvident financial behavior.

## 2. Substantive Consolidation of Spouses' Assets

Viewing marriage as a merger allows courts to consolidate spouses' assets, potentially disrupting routine commercial transactions and unfairly harming some creditors. For example, if creditors extended credit to non-debtor Spouse *W* in reliance on that spouse's reported debts and assets, consolidating Spouse *W*'s assets with Spouse *H*'s assets could be unfair to creditors of Spouse *W*. Allowing creditors of debtor Spouse *H* to seek payment from Spouse *W*'s assets effectively destroys the expectations of Spouse *W*'s creditors, who extended credit believing that they would have sole access to Spouse *W*'s assets.

Forcing one spouse to use assets to support a filing spouse is also problematic on social policy grounds. If workers who are employed outside of the home know that they may have to repay separate debts incurred by their spouses or future spouses, some may either (1) choose not to marry; (2) marry, but refuse to work outside the home for wages; or (3) marry, but file for divorce as soon as their spouses encounter financial difficulties. Since the policy of both state and federal government is to encourage people to work,<sup>271</sup> marry, and support each other while married, Congress should not pass legislation that encourages idleness or divorce and discourages marriage.<sup>272</sup>

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*Planned Community Draws Straws*, SALT LAKE TRIB., May 2, 1997, at E1 ("[L]ess than a fourth of Americans fit the profile of bread-winning father, homemaking mother and children.").

<sup>267</sup> See Llyce R. Glink, *These Days, Single Home Buyers Are Hardly Alone*, CHIC. SUN-TIMES, Mar. 17, 1996, at 13 ("Women today commonly establish their own credit by having telephone numbers or credit cards in their own name, even when married.").

<sup>268</sup> See WEITZMAN, *supra* note 2, at 178 (discussing a 1980 Poll indicating an increase in the number of married women with separate bank accounts); Michele Morris, *Yours, Mine and Ours: (Money in Marriage)*, LADIES HOME J., Oct. 1, 1996, at 52 (discussing the financial arrangements available to married couples).

<sup>269</sup> See generally Vivian Marino, *Popping the Question to Newlyweds: When are You Going to Separate Your Finances?*, SAN DIEGO UNION-TRIBUNE, July 13, 1997.

<sup>270</sup> For a discussion of the public's rejection of the traditional concept of breadwinner-husband and homemaker-spouse, see WEITZMAN, *supra* note 2, at 174.

<sup>271</sup> See BANE & ELLWOOD, *supra* note 252, at 19-27 (describing the reorientation of welfare policy during the 1980s).

<sup>272</sup> See *In re Cheeseman*, 656 F.2d 60, 63 (4th Cir. 1981) (construing the definition of "householder" broadly to induce couple to remain married during financial crises). Critics of earlier welfare legislation argued that such laws encouraged men to abandon their wives

### 3. Allowing Separate Creditors Access to Entirety Property

Finally, because modern spouses often are equal financial partners, Congress should not give separate creditors of a fiscally irresponsible spouse the automatic right to satisfy their debts from jointly owned entirety property. Because some state laws continue to view entirety property as being owned wholly by both spouses,<sup>273</sup> a separate creditor that can satisfy its debt from entirety property in a bankruptcy proceeding arguably has significantly greater rights in bankruptcy than it would have under state law, thus encouraging forum shopping by creditors.<sup>274</sup> Because creditors can protect themselves under state law and in bankruptcy by requiring both spouses to co-sign a debt, it is against both bankruptcy policy and public policy to protect creditors from a result they could have prevented themselves.<sup>275</sup>

#### B. *Limitations of Viewing Marriage as a Contract*

If Congress chooses to recognize marital status in bankruptcy, it should not allow married couples to decide whether to support each other economically or emotionally as though they were arm's length contracting parties. Allowing couples to treat marriage as an arm's length contract harms creditors by encouraging married debtors to engage in strategic pre-filing behavior. Although a basic tenet of marriage is that spouses have an obligation to support each other to some degree,<sup>276</sup> a wife in a contract marriage would have no more duty to support her husband than would any other creditor or unrelated party in interest. This would be true even if her husband shifted all

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and children because the laws denied welfare benefits to mothers if a male wage earner lived in the home. See Perry, *supra* note 24, at 349. Modern welfare laws purportedly eliminate the incentive for men to leave their families. See Paul Offner, *Welfare Dads*, NEW REPUBLIC, Feb. 13, 1995.

<sup>273</sup> See *supra* notes 87-89 and accompanying text (discussing the treatment of entirety property by different states).

<sup>274</sup> See *supra* note 98 and accompanying text (discussing the Supreme Court's mandate to develop procedures in bankruptcy designed to deter forum shopping).

<sup>275</sup> For example, see *In re Birch*, 72 B.R. 103, 107 (Bankr. D.N.H. 1987), where the court refused to consolidate assets because the creditor had "an easily available remedy and protection, i.e., asking the wife to co-sign or guarantee the debt." *Id.* For a general discussion of efficiently allocating the risk of loss, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10 (2d ed. 1977); Steven L. Harris, *The Interaction of Articles 7 and 9 of the Uniform Commercial Code: A Study in Conveyancing, Priorities, and Code Interpretation*, 39 VAND. L. REV. 179, 211 (1986) ("One common approach to problems of risk allocation is to impose the risk of loss on the party who can prevent or insure against the loss at less cost.").

<sup>276</sup> See *supra* note 163 and accompanying text (discussing the common view of marriage taken by most states). See generally Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J. L. REF. 217, 225 n.31 (1990) ("By 1975, a fundamental consequence of marriage was that each spouse acquired a duty to support each other . . . financially during marriage in proportion to their individual abilities.").

assets to her or the couple titled assets as entirety property while leaving debts in the husband's name.<sup>277</sup> In addition to being abusive and possibly a fraudulent transfer,<sup>278</sup> such strategic pre-filing behavior is also elitist. The only debtors likely to have either the financial sophistication to arrange such a deal or the funds required to hire a lawyer are well-educated middle to upper class filers.<sup>279</sup> Even a poor debtor who understands how to manipulate the system probably could not benefit from such behavior because he is unlikely to have enough assets to make it worthwhile to shift them to his wife.<sup>280</sup>

### C. *Limitations of Viewing Marriage as a Partnership*

Although I propose that Congress treat marriage as a partnership, I recog-

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<sup>277</sup> See *In re Velis*, 123 B.R. 497, 512 (Bankr. D.N.J. 1991), *rev'd in part, aff'd in relevant part*, 949 F.2d 78 (3d Cir. 1991) (noting that failing to consider the non-debtor spouse's income and assets "creates an opportunity for abuse by an astute potential debtor in the form of a transfer of assets and streams of income into the name of the non-debtor spouse prior to and in contemplation of filing the petition").

<sup>278</sup> See Margaret Dee McGarity, *Avoidable Transfers Between Spouses and Former Spouses*, 31 FAM. L.Q. 393, 402-06 (1997) (discussing property transfers between spouses and former spouses and common reasons for them).

<sup>279</sup> Many scholars argue that the cost of legal advice has effectively removed the judicial system from the reach of the poor. See WEITZMAN, *supra* note 2, at 194-95 (arguing that the poor use the "common law divorce" of physical separation because they cannot afford to pay for legal advice); Hedieh Nasheri & David L. Rudolph, *Equal Protection Under the Law: Improving Access to Civil Justice*, 20 AM. J. TRIAL ADVOC. 305, 332 n.1 (1996-97) ("[T]he United States civil justice system has become increasingly inefficient, overburdened, and costly. As a result, the system has been unable to process cases efficiently and render justice. This crisis in the civil justice system takes its biggest toll on the nation's poor."); Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 875 (1992) (noting that people "with so little wealth might use the money to buy food, clothing, or shelter instead of legal aid"). See generally John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 589 (1984) (discussing the inherent class-based inequality of the United States legal system); Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1116-17 (1992) (noting that legal fees are not an important priority to the poor who spend their limited resources on material necessities).

<sup>280</sup> See, e.g., U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 481 (1997) (indicating a wide disparity in nonfinancial assets held by families with incomes of less than \$10,000 versus those with incomes exceeding \$50,000). Given the average household incomes of Asians, Whites, Blacks and Hispanics, permitting these pre-filing asset shifts may disproportionately benefit White and Asian debtors. See *id.* at 465. The 1995 median income for Asian households was \$40,614 and \$35,766 for White households, but only \$33,393 for Black households and \$22,860 for Hispanic households. See *id.* Similarly, while 24% of Black households in 1995 had less than \$10,000 in household income, only 10.6% of White households had less than \$10,000 in household income. See *id.*

nize that this model is also flawed. First, unlike standard partnerships, most married couples do not have a written partnership agreement that describes how marital profits and losses are to be allocated. Similarly, without a partnership agreement, courts would be forced to rely on the debtor's *ex post* characterization of the debts sought to be discharged and of the parties' intent regarding the filing partner's obligations. Without a written agreement, it would be difficult for a court to determine whether the partners agreed at the inception of the partnership that the debts the filing partner claims are "individual" were in fact supposed to be partnership debts. For example, if the debtor pays for items for the household, such as food and household goods, it would be virtually impossible to determine whether those debts should be characterized as separate or joint without an itemized account of the charges and a written partnership agreement that provides for the payment of separately incurred debts that benefit the partnership.

One way to eliminate this uncertainty is to amend the Code to presume that all debts are marital. Such a presumption is consistent with the assumption made both by Congress<sup>281</sup> and many courts<sup>282</sup> that spouses who live together pool income and have joint debts. A married debtor could rebut this presumption with a premarital agreement that explains the spouses' economic obligations to each other and documentary evidence such as receipts, canceled checks, or credit card statements that prove that the spouses incurred and paid debts consistent with the terms of the agreement. Absent such written proof, debts would be presumed to be marital debts that benefited the non-filing spouse.

Second, requiring a non-debtor spouse to use income to help a filing spouse repay debts is inconsistent with the Code's prohibition of involuntary Chapter 13 filings. Some might also suggest that conditioning federal bankruptcy benefits on the recipient's willingness to work violates the Thirteenth Amendment's prohibition against involuntary servitude. This argument, though somewhat compelling, should be rejected. The non-debtor spouse is not being forced to work to repay debts.<sup>283</sup> Rather, the non-debtor spouse is

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<sup>281</sup> See *supra* notes 60-63 and accompanying text (discussing section 302 of the Bankruptcy Code).

<sup>282</sup> See, e.g., *In re Carter*, 205 B.R. 733, 736 (Bankr. E.D. Pa. 1996) ("Consideration of the nondebtor spouse's income is seen as necessary because a portion of that spouse's income is likely to be applied to the basic needs of the debtor, potentially increasing the share of the debtor's own income that is not reasonably necessary for support."); *In re Albert*, 25 B.R. 98, 101 (Bankr. N.D. Ohio 1982) ("Although the debtor testified to the maintenance of separate expenses, it is not unreasonable to believe that the Debtor's present spouse would attempt to assist in any expenses of the Debtor.").

<sup>283</sup> See Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 447-48 n.28 (1997) (rejecting the argument that a bankruptcy system requiring debtors to work to repay creditors would be unconstitutional and would constitute peonage). But see Karen Gross, *The Debtor as a Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 169 (1990) (introducing the author's argument that a

being forced to work as a condition of receiving federal benefits, just as welfare mothers are required to work as a condition of receiving federal benefits. A non-debtor spouse who chooses not to work can do so as long as she is willing to forego those benefits. Moreover, "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy."<sup>284</sup> Congress can always condition the benefits it provides on the recipient's willingness to accept the burdens associated with those benefits.

Third, requiring a spouse in an intact marriage to leave the home to earn wages potentially serves to discourage marriage, a result which is arguably inconsistent with social policy. Legislatures consistently decline to condition a currently or previously married mother's government benefits on her agreement to work outside the home in return.<sup>285</sup> Thus, at least on some level, politicians seem to have concluded that married women provide greater value to society when they stay at home than unmarried women, especially unmarried single welfare mothers. Similarly, some might argue that forcing homemakers to get jobs devalues the contributions mothers make to society when they care for children<sup>286</sup> and that this perpetuates the myth that housework is not valuable and does not contribute to the marital estate.<sup>287</sup>

Although these arguments are appealing on their face, they also should be rejected. Bankruptcy laws are not supposed to encourage behavior that causes a debtor to be unable to repay bills unless it protects the debtor's fresh start. Likewise, bankruptcy laws are not meant to place greater value on the non-economic contributions made by one type of woman than they place on

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debtor forced to work for bankruptcy benefits is sufficiently similar to a peon to indicate that the bankruptcy laws violate the 13th Amendment).

<sup>284</sup> United States v. Kras, 409 U.S. 434, 446 (1973).

<sup>285</sup> See *supra* note 192 (discussing myriad government benefits and the way in which mothers are treated within the frameworks of those benefits).

<sup>286</sup> For example, Professor Martha Fineman challenges another author's analysis of how poor children develop negative attitudes towards work because the other author's argument ignores the possibility that mothering is "work." See FINEMAN, *supra* note 26, at 108. If mothering is considered "work," then the child of a single mother who pursues that type of work does not necessarily have a negative attitude toward work in the market. Rather, she argues that it could mean that the child prefers the work of mothering. See generally PERRY, *supra* note 24, at 360 (observing that domestic work in the home is valued less than market work because, in a patriarchal system, work is valued in "accordance with what is valued under patriarchy").

<sup>287</sup> See *supra* notes 173-174, 213 and accompanying text. See generally Martha Chammallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 730 (discussing the low value society places on housework and child care); Nancy R. Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L.Q. 41, 43-44 (1983) (asserting that homemaker work is undervalued because of the difficulty in determining its economic value); Helen Y. Nelson, *The Unpriced Services of the Unpaid Homemaker*, 52 AM. VOCATIONAL J. 36, 36-38 (Oct. 1977) (noting that the dollar value of household work is ignored in calculating the GNP).

those of another. Because a primary goal of bankruptcy laws is to treat creditors equitably, there is no theoretical justification for a system that requires an unmarried debtor to relinquish non-exempt assets in Chapter 7 or to maintain a wage-paying job in Chapter 13 but does not force a wife who benefits from her husband's bankruptcy case to relinquish similar assets or get a job. Moreover, notwithstanding any societal view as to the benefits of marriage and homemaking, bankruptcy courts fairly consistently conclude that homemaking and child-rearing, though subjectively valuable, simply do not generate "income" as that term is currently defined by our society.<sup>288</sup> Finally, the recent debate over welfare reform suggests that both Congress and the states have determined that staying at home to rear children should be a luxury available only to those mothers who do not need government benefits.

#### CONCLUSION

Given the competing and differing visions of marital roles and gender status,<sup>289</sup> it is not surprising that bankruptcy laws fail to advance a coherent or consistent standard that governs a non-debtor spouse's economic obligations to a debtor. The choice to marry is a personal right,<sup>290</sup> and bankruptcy laws are designed to regulate only a debtor's financial choices. Bankruptcy laws, therefore, should not be used to promote or reject non-economic personal choices.<sup>291</sup> However, because Congress currently gives debtors certain benefits based simply on marital status, it must decide what marriage means and to what extent married couples must love, honor, and pay each other's debts.

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<sup>288</sup> See *In re Moix-McNutt*, 215 B.R. 405, 409 (B.A.P. 8th Cir. 1997) (cautioning that "while the position of housewife has great value, it rarely generates income").

<sup>289</sup> See Marsha Garrison, *How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 422 (1996) (noting that controversy over divorce law obligations and entitlements is part of larger national debate on the issues of family, gender, and individual responsibility).

<sup>290</sup> This "right" is, of course, made available only to people who choose to marry someone of the opposite sex. See, e.g., statutes cited *supra* note 3.

<sup>291</sup> See generally Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1842, 1850 (1987) (arguing that the social approval of marriage and marriage-like relationships affects the legal regulation of marriage).