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James A. Sonne  
*Ave Maria School of Law*

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## LOVE DOESN'T PAY: THE FICTION OF MARRIAGE RIGHTS IN THE WORKPLACE

James A. Sonne \*

“[E]qual rights for all, special privileges for none.”<sup>1</sup> The battle cry is well known. From founding struggles, through civil war, to a civil rights era, “equal treatment under law” has sounded a steady drumbeat in American history. It is so deeply rooted in public discourse that it is no surprise that the debate over same-sex marriage is seen by many as its latest chapter. Indeed, called by some proponents as “the civil rights struggle of our time,”<sup>2</sup> the effort to include same-sex couples in marriage has drawn a nation to questions of equality, rights, and privilege.<sup>3</sup> A big problem for such a movement, however, and for that matter, its opposition too, is that one of the major areas of focus to this point—legal rights and benefits at work<sup>4</sup>—has been vastly overstated and sorely misunderstood. The reality, for better or worse, is that

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\* Associate Professor of Law, Ave Maria School of Law, Ann Arbor, Michigan. B.A., 1994, Duke University; J.D., 1997, Harvard Law School. The author wishes to thank Jeffrey Melville, Brian Isgett, and Michael Bryan for their research, Professors Richard Myers, Stephen Safranek, and Douglas Kahn for their insights, Mary Sonne for her encouragement, and Ave Maria School of Law for its support.

1. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 256 (1997) (quoting Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 318 (1985) (discussing Jeffersonian Republicans)).

2. Rabbi Devon Lerner, *Why We Support Same-Sex Marriage: A Response From Over 450 Clergy*, 38 NEW ENG. L. REV. 527, 529 (2004) (quoting Rabbi Howard Berman).

3. See, e.g., Shailagh Murray, *Gay-Marriage Amendment Fails to Advance in the Senate*, WALL ST. J., July 15, 2004, at A4 (noting that the same-sex marriage issue “came to a boil” in early 2004).

4. See, e.g., Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 600, 606 (2004) (calling benefits at work “critical”); Stephanie Armour, *Gay Parents Cheer a Benefit Revolution*, USA TODAY, Jan. 10, 2005, at 1B (stating that “employee benefits are key”); H.J. Cummins, *Same-Sex Marriage: A Workplace Issue*, STAR TRIB. (Minneapolis), June 12, 2004, at 1D (observing that “marriage is a huge employee-benefit issue”); *Gay Marriage in Massachusetts* (NPR broadcast, May 12, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1894006> (discussing claim that “most significant” gay marriage issues arise on the job) (last visited Feb. 17, 2006).

marriage-based workplace inequalities, which exist to an extent, simply do not rise to the levels supposed by either side; nor do they provide the imprimatur for marriage many assume. As a result, not only is the workplace a virtual “red herring” in the debate, but the very idea of marriage in this context is given cursory, emotional treatment, leaving it largely unexplored in any systemic fashion. In response, this article strives to fill the void by examining in a comprehensive manner the rights and benefits that actually do exist, their origins and purposes, and the conclusions that can be drawn therefrom, for both the workplace and the contemporary marriage debate.

The benefits of marriage are myriad. From the sublime joy of unifying love to the mundane sharing of chores, marriage yields a host of gifts to its participants. To be sure, such benefits do not arise without a corresponding set of duties and responsibilities. Yet, few would dispute that, at least as understood in modern America, marriage is a desirable state that increases the health and happiness of couples, families, and society.<sup>5</sup> In light of this reality, federal, state, and local laws offer many rights and benefits that aim to support the institution. Surprisingly, though, one place where direct support is largely absent (or, at least, marginal) is at work. Although it may shock some, especially those waging the current “marriage wars,” the law offers few workplace rights and benefits to marriage in itself. To be sure, there is some legal treatment, but it is largely limited to indirect public benefits (e.g., tax, Social Security)<sup>6</sup> that are rooted more in presumptions of economic dependency, and corresponding child-rearing,<sup>7</sup> than any objective value of marriage, and, as such, are not even useful to most modern couples to the degree both partners prefer to

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5. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 225 (2000) (“The preeminent stature of marriage in public opinion is not unwarranted because it still is a public institution, building in material rewards along with obligations. History and tradition cement the hold of marriage on individual desires and social ideals.”) (emphasis added); LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 77 (2000) (“[T]he key seems to be the marriage bond itself: Having a partner who is committed for better or for worse, in sickness and in health, makes people happier and healthier.”).

6. See generally Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000) (discussing general tax consequences of marriage, including provisions on income, gifts, and estates). See also Social Security Act of 1935, 42 U.S.C. § 402(b), (c) (2000) (spousal payment options).

7. See Teresa Stanton Collett, *Benefits, Nonmarital Status, and the Homosexual Agenda*, 11 WIDENER J. PUB. L. 379, 385–86 (2002) (describing implicit preference for single wage-earners with children in both federal Social Security and the federal tax code).

work—and would also be of little use to most unmarried pairs, if so offered, for the same reason.<sup>8</sup> In general, the law demands no marital wage,<sup>9</sup> no health or pension benefits,<sup>10</sup> and no paid job leave,<sup>11</sup> and, at least in the federal system, there is not even a bar to marriage discrimination.<sup>12</sup> In fact, to the extent marriage rights or benefits are obtained at all, most are provided voluntarily by employers in response to the market, not the law.<sup>13</sup>

In addressing the foregoing, this article proceeds in six parts. Part I introduces the treatment of marriage in modern law and culture. Part II traces the origins and history of legal approaches to marriage in the workplace, from federal, state, and local perspectives. Part III, which forms the bulk of the article, canvasses the current state of marriage law at work—as far as it goes. Part IV describes voluntary efforts taken by employers regarding marriage and explores the role they may have in confusing legal rights with market benefits. Part V gives theoretical insights for marriage at work as seen from the legal, cultural, and economic lenses of the preceding parts. Part VI offers a brief conclusion.

In short, this article posits that, at least on the job, the law is not the haven for marriage that many assume it to be. Benefits and rights do exist, but more as the result of personal choice than of law. Given that modern marriage has increasingly taken the form of a pair of co-equal partners making their own private

8. See *id.* (noting little benefit to dual-income couples in Social Security and income tax systems).

9. See William Quigley, *Full-Time Workers Should Not Be Poor: The Living Wage Movement*, 70 MISS. L.J. 889, 89–99, 923–31 (2001) (noting lack of federal “living” or family wage, and indicating, by reference, that any such wages required by local ordinance are not paid based on marital status or actual family size).

10. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (observing that federal employee benefits law “does not mandate that employers provide any particular benefits”).

11. See Arline Friscia, *The Worker-Funded Leave Act: The Time is Now to Help Build Stronger Families With a More Stable Economy*, 26 SETON HALL LEGIS. J. 73, 74 (2001) (noting that the United States “is one of the only countries that does not provide paid family leave”).

12. See *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 783 (E.D. La. 1967) (“It is plain that Congress [has] not ban[ned] discrimination in employment due to one’s marital status . . .”).

13. See Lynne Marie Kohm, *Does Marriage Make Good Business?: Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 582 (2004) (“Employer encouragement of a good, stable, healthy marriage is neither legal nor illegal: it is good employment practice . . .”); see also *id.* at 567 (“Ultimately, employer endorsement of marriage yields happy and productive employees.”).

choices about the “mystery of human life”<sup>14</sup> rather than a state-regulated public affair intrinsically connected to children, it is perhaps only logical that its role at work has become more the domain of such partners than of law. Indeed, in the end, marriage is seen, at least in this arena, largely as a private choice that is assisted only to the extent it serves both the individual and the job at issue—and, in light of modern norms of marriage generally, maybe this should not be all that surprising.

## I. TAKING THE PULSE: MARRIAGE, LAW, AND CULTURE

Implicit in the modern debate on same-sex marriage is the notion that, whatever its definition or application, marriage is something that merits a fairly high degree of sanction, protection, and respect in both culture and law. On the cultural side, the signs of support are ubiquitous. From the fact that couples now spend an average of \$21,000 on a wedding,<sup>15</sup> to census data indicating that “[n]early everyone marries,”<sup>16</sup> to continued cultural contempt for adultery,<sup>17</sup> to the very high level of interest attached to the same-sex marriage issue itself<sup>18</sup> (even to the point of an impassioned constitutional debate on both the federal and numerous state levels that many analysts credit for the outcome of

14. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

15. *See Wedding Bills Are Ringing Up*, CHI. TRIB., June 10, 2004, at 15.

16. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 16 (2002) [hereinafter, U.S. CENSUS BUREAU, MARRIAGES AND DIVORCES] (“Between 80 and 90 percent of men and women age 15 in 1996 are projected to marry by the end of their lives.”), available at <http://www.census.gov/prod/2002pubs/p70-80.pdf> (last visited Feb. 17, 2006).

17. *See* Lydia Saad, *The Cultural Landscape: What's Morally Acceptable?*, GALLUP POLL NEWS SERV., June 22, 2004 (discussing polling data from May 2004 indicating that ninety-one percent of Americans consider adultery to be “morally wrong”), available at <http://poll.gallup.com/content/default.aspx?ci=12061&VERSION=p> (last visited Feb. 17, 2006).

18. *See* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 1 (2002) (“The idea of providing rights to same-sex couples in general, and the prospect of opening up the institution of marriage to gay men and lesbians in particular, have instigated an extremely heated public debate . . . .”); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1484 (1993) (“[G]aylaw has insisted that the state not only tolerate same-sex unions, but recognize them as marriages, or at least as something marriage-like . . . .”); Harbour Fraser Hodder, *The Future of Marriage*, HARV. MAG., Nov.-Dec. 2004, at 39 (citing Nancy Cott in opining that the “two ends of the spectrum” on the marriage debate agree on “how crucial it is as a social institution”).

the 2004 presidential election),<sup>19</sup> one is forced to conclude that the pursuit of, or the inclusion in, the marital state is viewed by society as something that is quite worthwhile and important. This is the case notwithstanding historic increases in rates of divorce in both the 1970s and 1980s,<sup>20</sup> seismic shifts in societal views on various matters of sexual morality,<sup>21</sup> and the growing approval of certain “marriage alternatives,” such as domestic partnerships or unmarried cohabitation.<sup>22</sup> Indeed, the image of marriage generally has seen a radical transformation in the latter part of the twentieth century, from “[f]amily solidarity and the community of life” to “primarily the concern of the individuals involved.”<sup>23</sup> Yet, the primacy of this union of two persons, and the strength of its pursuit, remains.<sup>24</sup> As one analyst noted recently, “while marriages may fail, the will to be married endures.”<sup>25</sup>

As one might expect from this continued support for marriage in culture, however bruised, battered, or differently interpreted it might be, the law has followed (or, perhaps at times, has led)<sup>26</sup> in a correspondingly supportive fashion—at least formally. After all,

19. See James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4 (describing same-sex marriage issue as “crucial” to 2004 election, particularly in Ohio); Paul Farhi & James V. Grimaldi, *GOP Won With Accent on Rural and Traditional*, WASH. POST, Nov. 4, 2004, at A01 (analyzing impact of marriage on 2004 election).

20. See U.S. CENSUS BUREAU, MARRIAGES AND DIVORCES, *supra* note 16, at 3, 4 tbl.1 (describing “marital pattern for the last half of the twentieth century” as one of more divorce and later marriage); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2075 (2003) [hereinafter *Developments in the Law*] (“[W]hile the institution of marriage has continued to dominate, divorce law has become increasingly relevant . . .”).

21. See Saad, *supra* note 17 (noting 2004 poll’s sixty percent approval of “sex between an unmarried man and woman”).

22. See WAITE & GALLAGHER, *supra* note 5, at 36 (noting that “cohabitation is now more popular than ever” in that as of 2000 “eight times as many” couples lived together outside of marriage than did in 1970).

23. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 291, 293 (1989).

24. See *id.* at 293 (observing that modern family law “remains marriage-centered in many ways”).

25. Cheryl Wetzstein, *Marriage Savers’ Counties Speed Divorce Rate Dip; Grass-Roots Guidance Program Shows “Extraordinary Results,”* WASH. TIMES, Apr. 6, 2004, at A02; see also Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 WHITTIER L. REV. 327, 378 (2000) (“Marriage as a conventional social and legal institution has undergone serious and substantial attack . . . yet it still stands strong . . .”).

26. See Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1971–72 (2000) (discussing the “tangled” relationship of law and culture in marriage, and the “perceived legitimacy of law” in that setting).

whether the positive law guides the underlying culture or it is the other way around,<sup>27</sup> one should not be surprised to find that law and culture reflect on one another in the marriage context in a manner that communicates continued respect and sanction for the institution, despite significant upheaval and change. The Supreme Court has called marriage “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>28</sup> “From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy,”<sup>29</sup> particularly as it concerns children.<sup>30</sup> In this way, laws on marriage “transform a private agreement into a source of significant public benefits and protections,”<sup>31</sup> as well as related responsibilities. Although one might infer from the current marriage debate that there is no conventionally accepted or “appropriate form,” marriage as a social, cultural, or political phenomenon is heightened only further (rightly or wrongly) by such debate.<sup>32</sup> Thus, even this fight itself bears witness to the importance of the values and prize at stake.

With the foregoing in mind, how exactly does the current law support this cultural preference for the institution of marriage, whatever its present state or definition? At present, there are “more than *one thousand* places in the corpus of federal law where legal marriage confer[s] a distinctive status, right, or benefit,”<sup>33</sup> or, at the least, where “marital status is a factor.”<sup>34</sup> These

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27. See Francis Cardinal George, O.M.I., *Law and Culture*, 1 AVE MARIA L. REV. 1, 4 (2003) (noting the “chicken and the egg” challenge in “thinking about law and culture”).

28. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

29. COTT, *supra* note 5, at 2.

30. See *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (assuming marriage to be the “foundation of the family”).

31. *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999).

32. Compare Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 197 (1998) (noting that in the 1996 Defense of Marriage Act (“DOMA”), where marriage in federal law is defined as between “one man and one woman,” Congress found that “same-sex marriage would ‘belittle,’ ‘demean,’ ‘trivialize,’ and ultimately destroy real marriage”), and Robert H. Bork, *The Necessary Amendment*, FIRST THINGS, Aug.–Sept. 2004, at 17 (predicting “nuclear” fallout from Supreme Court approval of same-sex marriage), with COTT, *supra* note 5, at 225 (noting that the same-sex marriage fight “has, ironically, clothed the formal institution with renewed honor”), and John G. Culhane, *Up-rooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1189 (1999) (“Marriage might actually receive a boost from the infusion of same-sex couples.”).

33. COTT, *supra* note 5, at 2 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-97-16 DEFENSE OF MARRIAGE ACT (1997) [hereinafter 1997 GAO REPORT]); see also U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR

thousand-plus federal laws on, or legal references to, marriage include: (1) income, estate, and gift taxation rates, deductions, exemptions, and credits;<sup>35</sup> (2) medical, housing, and other public health/welfare programs;<sup>36</sup> (3) immigration priorities;<sup>37</sup> (4) Social Security (including Medicare) rights for spouses and widow(er)s;<sup>38</sup> (5) veterans' survivor benefits;<sup>39</sup> (6) pension protections;<sup>40</sup> (7) public civil servant rights and benefits;<sup>41</sup> and (8) unpaid job leave,<sup>42</sup> among others.<sup>43</sup> Most of these laws are restricted, at least at present, to legally married male-female couples by way of the 1996 Defense of Marriage Act ("DOMA"), which defines "marriage" for federal law purposes as "a legal union between one man and one woman as husband and wife."<sup>44</sup>

The spectrum of federal provisions just listed, of course, does not even include the thousands of state and local laws, which are the primary sources of marital rights and obligations.<sup>45</sup> The most

REPORT (2004) (updating 1997 GAO REPORT).

34. Theodora Ooms, Commentary, *The Role of the Federal Government in Strengthening Marriage*, 9 VA. J. SOC. POL'Y & L. 163, 169 (2001) (describing 1997 GAO Report as covering laws "in which marital status is a factor, even though the laws may not directly create benefits, rights or privileges").

35. See, e.g., I.R.C. § 1(a)-(b) (2000) (providing relevant income tax rates for married individuals and "head of household" taxpayers, respectively); *id.* § 151(b) (providing spousal exemption).

36. See, e.g., Ooms, *supra* note 34, at 172-73 (describing efforts by the federal government in 1996 to "strengthen the institution of marriage" by reforming federal welfare and related block grants to states).

37. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (excluding spouses from being required to meet the criteria employed to determine and limit immigration status or admittance).

38. See, e.g., Social Security Act of 1935, 42 U.S.C. § 402(a)-(b) (2000) (outlining spousal Social Security).

39. See, e.g., Veterans' Administration and Department of Defense Health Resources Sharing and Emergency Operations Act, 38 U.S.C. §§ 1102, 1115, 1121, 1141 (2000) (outlining relevant disability and death benefits provided to spouses of military veterans).

40. See, e.g., Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1055(c)(2) (2000) (restricting ability of employee to change pension beneficiary or otherwise waive spousal rights).

41. See, e.g., Civil Service Act, 5 U.S.C. § 6382(a)(1) (2000) (discussing job leave); *id.* § 8109(a)(3)(D) (explaining workers' compensation survival benefits); *id.* § 8416(a)(2) (outlining spousal powers over retirement annuity).

42. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2000) (entitling employee to leave for sick spouse).

43. See generally 1997 GAO REPORT, *supra* note 33 (listing "benefits, rights, and privileges . . . contingent on marital status"); see also Lynne Marie Kohm, *The Collateral Effects of Civil Unions on Family Law*, 11 WIDENER J. PUB. L. 451, 463-67 (2002) (describing a "set of benefits conferred upon a spouse").

44. 1 U.S.C. § 7 (2000).

45. See James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 61

noteworthy of these laws concern: (1) the eligibility and validity of marriage itself;<sup>46</sup> (2) separation and divorce (including child custody issues);<sup>47</sup> (3) property (e.g., community or common law, elective shares);<sup>48</sup> (4) trusts and estates;<sup>49</sup> (5) public welfare benefits (e.g., survivor workers' compensation and unemployment compensation relocation rights);<sup>50</sup> (6) limited improvements in access to health or life insurance;<sup>51</sup> (7) tax rates, credits, exemptions, or deductions;<sup>52</sup> and (8) the marital evidence privilege,<sup>53</sup> among others. Although many states and localities also have laws concerning "marital status" discrimination,<sup>54</sup> these typically protect both the married and unmarried and, thus, although indicating a measure of recognition otherwise lacking in federal law, can largely be said to "support" marriage only by reference.<sup>55</sup>

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(2003) (noting that the "incidents of marriage are generally governed by state law"); see also *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) ("[R]egulat[ing] marriage is a sovereign function reserved exclusively to the respective states.").

46. See UNIF. MARRIAGE AND DIVORCE ACT § 201 (amended 1973), 9A U.L.A. 175-77 (1998) [hereinafter UMDA]. The UMDA has been substantially adopted in eight states and, at least for the purposes of this discussion, is a typical model of state law on marriage and divorce. See *id.* at 159; see also GLENDON, *supra* note 23, at 39 n.11 (describing the typicality and influence of the UMDA for state law purposes).

47. UMDA § 302 (amended 1973), 9A U.L.A. 200-16 (1998); see also HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 590 n.6 (2d ed. 1988) (citing property division statutes).

48. See Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 522-26 (2003) (summarizing marital property systems).

49. See UNIF. PROBATE CODE § 2-102, 8 U.L.A. 81-82 (1993) (on spousal intestate share); § 2-202, 8 U.L.A. 139-42 (1998) (on spousal elective share); § 2-402 to -404 (on homestead and other marriage-based property exemptions to estate divestiture). The Uniform Probate Code has been adopted, in whole or in part, by thirty-seven states. UNIF. PROBATE CODE, 8 U.L.A. 1-8 (describing state enactments).

50. See, e.g., CAL. LAB. CODE § 3501(b) (West 2003) (presuming spouse to be a "dependent" for workers' compensation death benefit); CAL. UNEMP. INS. CODE § 1256 (West Supp. 2005) (defining "good cause" termination for unemployment compensation to include a move with spouse of an impracticable distance).

51. See, e.g., *Baker*, 744 A.2d at 884 (listing health and life insurance as marital benefits).

52. See, e.g., *Baehr*, 852 P.2d at 59 (noting "variety of state income tax advantages [for marriage], including deductions, credits, rates, exemptions, and estimates").

53. See *id.* (including marital evidence privilege among the "most salient marital rights and benefits").

54. See, e.g., CAL. GOV'T CODE § 12940(a) (West 2005); MICH. COMP. LAWS ANN. § 37.2102 (West 2001); N.Y. EXEC. LAW § 296(1)(a) (Consol. Cum. Supp. 2005).

55. See Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 25 (2000) ("After all, marital status discrimination provisions protect all employees whether they are married, single, divorced, separated, or widowed.").

Certainly, marriage has seen fairly significant challenges in the form of increased divorce and the rise of domestic partnerships and cohabitation, and a tremendous shift has occurred away from community interests and toward the individual in modern concepts of marriage.<sup>56</sup> Further, there is little doubt that such dynamic cultural shifts, whether one approves of them or not, have been assisted, followed, and, at times, even led by various corresponding changes in the law.<sup>57</sup> Nevertheless, as just described, a wide-ranging and unmistakable system of legal and moral support for the institution of marriage, whatever its focus or understanding, remains.<sup>58</sup> The substance and emphasis may have changed, and these changes, as explored below, have certainly made their mark. And yet, marriage remains, and largely with its prominence in law and culture intact.

Notwithstanding these supports of marriage, however, the one area where direct rights and benefits are less significant is on the job. Indeed, of those noted above, the only laws that directly enhance rights and benefits at work are, on the federal side, unpaid leave<sup>59</sup> and minor benefit protections, if benefits are offered at all;<sup>60</sup> and, on the state or local side, limited increases in insurance access,<sup>61</sup> the ability in some places to quit to move with a spouse and still obtain unemployment benefits,<sup>62</sup> workers' compensation

56. See GLENDON, *supra* note 23, at 1 (noting "unparalleled upheaval in . . . family law systems"); *id.* at 291-93 (describing shift from family as community to family as a set of personal, individual relationships).

57. See *id.* at 311 (arguing that the primary effect of modern family law reform has been "to consolidate and, sometimes, increase the power of several [cultural] movements that were already going forward").

58. See Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 270 (1997) (arguing that the "movement toward increasing personal autonomy . . . is still sought within the [family] context"); see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) ("Marriage has survived all of these transformations [in the twentieth century], and we have no doubt that marriage will continue to be a vibrant and revered institution.").

59. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1) (2000) (requiring leave for sick spouse).

60. See, e.g., Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1055(c)(2) (2000); *id.* at § 1161(a) (limit on waiver of spousal pension rights and health care continuation, respectively, for existing plans).

61. See, e.g., HAW. REV. STAT. §§ 393-7, 393-11 (1993) (requiring certain health care for dependents); *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999) (citing "opportunity" for health or life insurance).

62. See, e.g., CAL. UNEMP. INS. CODE § 1256 (West Cum. Supp. 2005) (defining "good cause" termination).

for survivors,<sup>63</sup> and, at least referentially and in about half the states, laws on “marital status” discrimination.<sup>64</sup> Many workers also benefit from spouse provisions in Social Security,<sup>65</sup> but such “benefits” are neither direct, in that they “are not dependent [up]on the degree” of contributions by employer or employee, nor do they vest in any contract sense.<sup>66</sup> Instead, they are a “general welfare” expense funded by a tax based on Congressional judgment as to retirement needs,<sup>67</sup> a judgment which, incidentally, includes the distinct possibility that many two-income couples (which describes most modern married pairs)<sup>68</sup> receive no such benefits at all<sup>69</sup>—a reality that would prove all the more common for presently unmarried couples if such “rights” were so extended.<sup>70</sup>

One might argue that, at least to an extent, federal or state income taxes also offer a “worker benefit” by their treatments of marriage. Yet, as discussed below, not only are such taxes derivative (i.e., they treat income, not employment per se), they do not give as high a preference to marriage in the labor arena as is generally assumed,<sup>71</sup> particularly for dual-income couples, which, again, describes most modern married or unmarried pairs.<sup>72</sup> Fur-

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63. See, e.g., *Baker*, 744 A.2d at 884 (citing the workers’ compensation “survivor benefit”).

64. See Porter, *supra* note 55, at 15–16 (listing twenty-one states and the District of Columbia with “marital status” laws); Kohm, *supra* note 13, at 576–77 n.69 (noting same number of jurisdictions as of 2004).

65. See, e.g., Social Security Act of 1935, 42 U.S.C. § 402 (b)-(c), (e)-(f) (2000) (listing spousal options).

66. See *Flemming v. Nestor*, 363 U.S. 603, 609–10 (1960) (“[E]ach worker’s [Social Security] benefits . . . are not dependent on the degree to which he was called upon to support the system by taxation.”).

67. See *id.* at 609 (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

68. See Marion Crain, “Where Have All the Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1877–78 n.3 (1999) (citing data showing most married pairs are dual-earning).

69. See Jonathan Barry Forman, *Promoting Fairness in the Social Security Retirement Program: Partial Integration and a Credit for Dual-Earner Couples*, 45 TAX LAW. 915, 925 (1992) (“[U]nder the dual entitlement rule [of Social Security], when an individual can claim both a worker’s benefit and a benefit as an auxiliary [e.g., spouse] of another worker, only the larger of the two benefits is paid to the individual.”).

70. See WAITE & GALLAGHER, *supra* note 5, at 39 (noting economic independence of unmarried couples).

71. See Cain, *supra* note 6, at 467 (“Recent reports [in 1997] indicate that approximately half the married couples filing tax returns report bonuses and half report penalties.”). *But see* Jamie Heller, *How New Tax Law Relieves Marriage Penalty*, WALL ST. J., June 4, 2003, at D2 (noting recent, limited marriage help).

72. See Cain, *supra* note 6, at 469 (explaining dual-earner tax effects); Crain, *supra*

ther, civil servant benefits to public workers might also be seen as relevant “rights,”<sup>73</sup> but these are more like private employer policies than ones generally applicable to the public. Similarly, there is no question that many private employers voluntarily offer marriage-based benefits, including health care, life insurance, and paid leave,<sup>74</sup> but again, these arise largely from private business policy, not legal right or obligation.<sup>75</sup>

Although at first glance the foregoing provisions might seem to offer significantly more benefits to married employees than to the unmarried, looks may be deceiving. For example, apart from unpaid family leave, none of the above laws requires anything more of employers for a married worker than for an unmarried worker. There is no national “family” or other wage subsidizing marriage;<sup>76</sup> no paid spousal leave (except in California);<sup>77</sup> no compulsory health, life, or disability insurance for spouses;<sup>78</sup> and no mandatory pension, severance, or other retirement that might yield benefits, even indirectly, to a spouse.<sup>79</sup> Indeed, it is a truism that “employers are under no obligation to provide spousal benefits at all.”<sup>80</sup> Mandatory contributions to public programs (e.g., Social Security, workers’ compensation, unemployment compensation) are typically the same for all employees.<sup>81</sup> To be sure, married employees, or retirees, can receive benefits for spouses

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note 68, at 1877–78 n.3 (noting percentage of dual-earner married couples); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1388 (2001) (noting “cohabitants are more likely than married couples to have relatively comparable earnings”).

73. See, e.g., Civil Service Act, 5 U.S.C. § 6382(a)(1)(C) (2000) (spousal leave); *id.* § 8109(a)(3)(D) (workers’ compensation survivorship); *id.* § 8416(a)(2) (federal retirement annuity rights).

74. See Suffredini & Findley, *supra* note 4, at 602 (noting “important incentives to marry” from employers).

75. See Kohm, *supra* note 13, at 582 (observing “[e]mployer encouragement” of marriage is “neither legal nor illegal”).

76. See Quigley, *supra* note 9, at 891–99, 923–24 (noting lack of federal “living” or family wage, and listing relevant state and local laws, all of which impose a set formula regardless of marriage or family size).

77. See Michael Gardner, *Family Leave Act Effective on July 1*, SAN DIEGO UNION-TRIB., June 27, 2004, at A3 (describing California’s paid leave system, the first of its kind in contrast to the unpaid federal system).

78. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (commenting that federal law “does not mandate that employers provide any particular benefits”).

79. See *id.*

80. Jonathan A. Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19, 24 (2000).

81. See, e.g., 26 U.S.C. § 3111(a) (2000) (indicating wage percentage as Social Security contribution basis).

under such programs, and in that sense they are advantaged. Yet, these benefits are based largely on expectations of dependency, with marriage serving not as their *raison d'être* but as a presumption of such dependency not readily shared, or desired, by unmarried pairs (both of whom typically work) or singles.<sup>82</sup> Further, such benefits, at least when created, were designed primarily for non-employee spouses of whom the public also expects reciprocal duties in child-rearing<sup>83</sup>—duties not yet typical of singles or unmarried couples.<sup>84</sup>

For the most part, then, marriage yields few direct benefits or rights at work. This is not to say that there are not other areas, such as family or property law, where greater support exists, but simply that the workplace is not one. Thus, to the extent such status is sought by same-sex couples or otherwise, it is perhaps more for “symbolic meaning[]”<sup>85</sup>—a not inconsequential thing—than tangible benefit. As Professor Gerard Bradley once observed, “[m]uch of what is truly good in and about marriage is beyond effective legal assistance.”<sup>86</sup> In this sense, and perhaps simply “[b]ecause marriage . . . [is] part of our affectional and private lives,” concern for marriage at work can largely be said to be more “a matter for the civil society . . . than for the government.”<sup>87</sup> Indeed, this theme of individual freedom over community duty, although perhaps derived more from a theory of rights than the subsidiarity norm<sup>88</sup> proposed by Professor Bradley and others, re-

82. See 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, 474–75 (1996) (noting that government benefits like Social Security “recognize that one spouse is often economically dependent on the other,” and that “[t]he only couples who consistently benefit from the current laws are those in which only one partner works in the labor force . . . [which] is likely to be the situation more often in opposite-sex than in same-sex couples”).

83. See *Califano v. Boles*, 443 U.S. 282, 287–88 (1979) (upholding marriage rule for “mother’s” Social Security and citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975), for notion that, at least in the widow(er) context, benefits are designed to allow spouses “not to work and to devote themselves to care of children”).

84. See, e.g., William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1013 (2003) (“[C]ohabitors desire significantly fewer children . . .”).

85. David B. Cruz, “*Just Don’t Call It Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 929–30 (2001) (noting role of symbolism in same-sex marriage debate).

86. Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 729, 731 (2000).

87. BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 192 (1996).

88. The principle of “subsidiarity” is “the notion that social problems should be addressed in the first instance by families and other nongovernmental institutions, before

flects a paradigm shift from the community to the individual in family law generally.<sup>89</sup> Yet, as explored below, whatever its merits elsewhere, because work is largely a personal task, the relative lack of family perspective in this arena may not be as consequential as one might think.

## II. WEDLOCK AT WORK: ORIGINS AND HISTORY

In the famous 1888 case of *Maynard v. Hill*,<sup>90</sup> where the Supreme Court affirmed the right of the sovereign state to define and regulate marriage (including its dissolution), the Court opined that marriage “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.”<sup>91</sup> This emphasis on the public dimension of marriage dominated the formation of American law and, in fact, still prevails in large part today.<sup>92</sup> There is certainly an impassioned debate on the primacy of this public interest in marriage, with some arguing that marriage is a creation of the state<sup>93</sup> and others positing that the state is merely recognizing a pre-existing bond.<sup>94</sup> No matter which end (or midpoint) of the spectrum is correct, however, all sides in the debate seem to have always recognized the legitimate role for government in marriage.<sup>95</sup>

In reviewing the public role in marriage, numerous interests have been articulated. Among these are ordered procreation and

resort to governmental entities.” Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1747 (2002).

89. See GLENDON, *supra* note 23, at 295 (noting recent shift from community to individual in marriage law).

90. 125 U.S. 190 (1888).

91. *Id.* at 211.

92. See DiFonzo, *supra* note 45, at 34–43 (describing the enduring importance of the state role in marriage).

93. See, e.g., *Baehr*, 852 P.2d at 58 (emphasizing “the state’s role”); *Goodridge*, 798 N.E.2d at 954 (“[T]he government creates civil marriage.”).

94. See, e.g., William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 175 (2004) (noting that “male-female couplings . . . predate[] the concept of civil marriage”); GLENDON, *supra* note 23, at 5 (asserting that historically, “[f]amilies and marriage are pre-legal institutions”).

95. See F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 591 (2001) (“[A]ll sides in the debate . . . [accept] that the state has a reasonable role to play . . .”).

child rearing,<sup>96</sup> relationship “stability” (for the couple and family),<sup>97</sup> security for children and spouses,<sup>98</sup> mental or physical health,<sup>99</sup> increased regularity in property relations,<sup>100</sup> “civic virtue and public morality,”<sup>101</sup> and, at least historically, “our very existence and survival.”<sup>102</sup> Traditionally, marriage has “been singled out . . . for preferred status because [it is] so important and valuable to society and to the stability and continuity of the state, and to achieving the purposes for which the state exists.”<sup>103</sup> As noted above, these interests are reflected in many legal provisions. For example, paternity and custody presumptions foster order in procreation and child support,<sup>104</sup> spousal rights of support and mutual representation foster partner stability,<sup>105</sup> public benefit and tax rules help ensure financial security of dependents,<sup>106</sup> and marital entry rules (e.g., age, sanguinity) naturally advance state visions of virtue and morality.<sup>107</sup> Of course, each of these specific legal provisions also combine to encourage the more generally acknowledged benefits of marriage (e.g., health, happiness, secu-

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96. See Duncan, *supra* note 94, at 154–59 (explaining that procreation and childrearing are critical areas of state interest in laws on marriage).

97. Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51, 74 (1998).

98. See Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 779–80 (2001) (emphasizing historic state interest in “protecting those who undertake the most vulnerable family roles for the benefit of society”).

99. See WAITE & GALLAGHER, *supra* note 5, at 47–77 (describing physical and mental benefits of marriage).

100. See Gary Chartier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1593, 1620 (2001) (noting the property interests reflected in marital regulation and recognition).

101. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 754 (1998).

102. *Loving*, 388 U.S. at 12.

103. Wardle, *supra* note 101, at 754 (commenting on traditional “heterosexual marriages”).

104. See Duncan, *supra* note 94, at 168 (noting paternity law’s interest in marital rearing of children).

105. See WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 142–43 (2002) (describing laws that serve the “emotional and personal interconnection” of married, and, at least arguably in Vermont, civil union couples).

106. See Chambers, *supra* note 82, at 474 (“[T]axing and benefit regulations . . . build on the expectation that married couples will share resources and recognize that one spouse is often economically dependent . . .”).

107. See, e.g., Chartier, *supra* note 100, at 1596–98 (noting “politics of virtue” in same-sex marriage debate).

urity, and, for that matter, existence), as well as to increase the symbolic strength of the institution.<sup>108</sup>

Public support for marriage, and even the debate surrounding the concept and its meaning, is not new. Indeed, throughout Western history, "societies have given unique and special preference" to marriage because of its oft-perceived benefits, both to "society in general and for individual women, men, and children in particular."<sup>109</sup> From Aristotle (384–321 B.C.), who saw it "as the foundation of the republic,"<sup>110</sup> to the declaration by Congress in 1996 that "[m]arriage is the foundation of a successful society,"<sup>111</sup> support for marriage has been constant. As far as American policy is concerned, such support has been strong from the start. As such, "colonial law, like its English parent, highlighted the civic or public nature of the marriage pact."<sup>112</sup> And, in this fashion, "public structuring of marriage during the eighteenth and nineteenth centuries served important government purposes."<sup>113</sup> A relative shift occurred in "the twentieth century [when marriage came to be] defined primarily in economic terms."<sup>114</sup> And yet, once again, despite this dynamic change in focus from the community and its public values to the rights of the individual and private economics, "[t]he position of legal marriage [whether in the law or culture] above comparable relationships resist[ed] toppling."<sup>115</sup> As one family law scholar has noted, despite changes in our culture and history, the "[c]ourts have consistently held that marriage is a fundamental constitutional right that must be afforded to all Americans, 'stemming from pre-Bill of Rights' values upon which our nation is 'based.'"<sup>116</sup>

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108. See Chambers, *supra* note 82, at 450 (noting importance of marriage "symbolism").

109. Wardle, *supra* note 98, at 777 (commenting on "heterosexual marriage").

110. John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1023 (2001).

111. COTT, *supra* note 5, at 222 (quoting Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(1), 110 Stat. 2105, 2110 (the welfare reform law signed by President Clinton in 1996)).

112. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 19 (1985).

113. Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1699 (2002).

114. *Id.* at 1705.

115. COTT, *supra* note 5, at 224–25; see also Kohm, *supra* note 25, at 328 (noting that, despite developments in the twentieth century, "lasting marriage is the goal and . . . remains the norm") (quoting HARRY D. KRAUSE FAMILY LAW 18–19 (1992)).

116. Kohm, *supra* note 43, at 453 (quoting Lynne Marie Kohm & Mary A. Yarhouse, *Fairness, Accuracy, and Honesty in Discussing Homosexuality and Marriage*, 14 REGENT U.

In light of this history of unwavering public support generally, one would expect a similar trend in the workplace. Perhaps due to a general approach of subsidiarity or, more likely, the size and diversity of a growing nation that left marital support largely to communities and families themselves,<sup>117</sup> work-related benefits did not appear on any large scale until the 1930s.<sup>118</sup> There were programs for spouses of Civil War veterans, but no programs for workers generally.<sup>119</sup> Indeed, before 1935, benefits from any source (now arguably the main form of voluntary "marriage support" at work and supplying, on average, twenty to thirty percent of compensation)<sup>120</sup> could rightly be described as "the fringe of employee compensation."<sup>121</sup> Thus, it could be argued that marriage was not necessarily excluded specifically, but as the natural result of a more general laissez-faire approach to such employee benefits, and, for that matter, most workplace rights before the New Deal.

When public support in the workplace did arrive, it did not come in the form of direct marriage rights, but largely by way of indirect public benefit and tax incentives, which, generally speaking, were "designed for families with an employed husband and a homemaker wife" with children<sup>122</sup>—the typical family form at the time.<sup>123</sup> On the federal level, the relevant marriage "aid" in the years surrounding World War II included spousal and survivor Social Security and related Medicare benefits,<sup>124</sup> favorable tax

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L. REV. 249, 254 (2002)).

117. See COTT, *supra* note 5, at 29 ("In the early United States, . . . where the population spread out thinly under little state surveillance, the state apparatus was not likely to enter the life of a couple . . .").

118. See *id.* at 174 ("New Deal policy innovations revived the fading connection between citizenship and marital role through economic avenues.").

119. See Ooms, *supra* note 34, at 169 (describing Civil War programs for disabled soldiers and widows).

120. See Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 691 n.11 (2002) (citing estimates of 18.7% to 29% of compensation in benefits form).

121. Hein, *supra* note 80, at 26 (citing, inter alia, 1940s War Labor Board data).

122. *Id.* at 22; see also COTT, *supra* note 5, at 172 (noting post-Depression emphasis on traditional family).

123. See June O'Neill, *Keynote Address: Marriage Penalties and Bonuses in the Federal Income Tax*, 16 N.Y.L. SCH. J. HUM. RTS. 119, 120 (1999) (noting that "two earner couples were rare" prior to World War II).

124. See Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 11-12 (describing benefits for spouses, divorcees, and widow(er)s in the Social Security amendments in 1939 and 1950).

treatment for employer-provided health coverage,<sup>125</sup> and, at least indirectly, special tax treatment for married couples as such.<sup>126</sup> As noted above, these public incentives and benefits, although “funded” chiefly by work-based contributions in the case of Social Security or based largely on employment income in the case of income tax, were created “for the general welfare,”<sup>127</sup> rather than as vested benefits,<sup>128</sup> whether for the married or single.

On the state and local levels, the “support” for marriage that presently exists in the workplace, albeit minor, historically arose through early twentieth-century income and benefit tax incentives similar to the federal code<sup>129</sup>—benefit measures such as survivor workers’ compensation<sup>130</sup> and unemployment compensation rights,<sup>131</sup> and, of more recent vintage, arguable protection from discrimination.<sup>132</sup> In general, the former provisions, such as tax, workers’ compensation, and unemployment, were designed in accord with various policies of mutual economic support and presumptive spousal and child dependency, with emphasis on the “male breadwinner” model,<sup>133</sup> while the latter non-discrimination provisions reflected more of a concern for individual choice, par-

125. See Jeffrey Ralph Pettit, *Help! We've Fallen and We Can't Get Up: The Problems Families Face Because of Employment-Based Health Insurance*, 46 VAND. L. REV. 779, 784 (1993) (discussing rise of tax incentives for both employers and employees and noting corresponding role of collective bargaining).

126. See Cain, *supra* note 6, at 469–74 (describing marriage-based tax treatment of income and benefits).

127. STATUTORY HISTORY OF THE UNITED STATES: INCOME SECURITY 167 (Robert B. Stevens ed., Chelsea House 1970) (quoting Social Security Act of 1935, ch. 531, 49 Stat. 620).

128. See *Flemming v. Nestor*, 363 U.S. 603, 610 (1960) (describing non-contract nature of Social Security).

129. See Chambers, *supra* note 82, at 472 (noting role of marriage under “state income tax laws”).

130. See Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1086–87 (1999) (describing origins of workers' compensation).

131. See *Richards v. Unemployment Comp. Bd. of Review*, 420 A.2d 391, 394–95 (Pa. 1980) (noting role of “economic necessity” in justifying unemployment benefits for spouses unavailable for work due to marital move).

132. See John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1417 (1991) (pointing out that state law protections from “marital status discrimination” began “in the mid to late 1970s”).

133. See, e.g., *Tomarchio v. Twp. of Greenwich*, 379 A.2d 848, 854–55 (N.J. 1977) (discussing presumptions of economic dependency in the workers' compensation system, as interpreted by the court).

ticularly for the female worker, rather than family dependency or other support of marriage as such.<sup>134</sup>

Apart from the foregoing, there is no history of other, more significant, marriage support on the job, such as increased wages, mandatory benefits, paid leave, or, at least in federal law, non-discrimination.<sup>135</sup> Indeed, the only direct federal protection—unpaid job leave—was not even passed until 1993,<sup>136</sup> and even this law, according to the Supreme Court, is based more on a public policy interest in accommodating working mothers, who are not necessarily married, rather than supporting marriage as such.<sup>137</sup> In effect, other than indirect Social Security and tax incentives if applicable, and benefits it might offer to public employees directly, no other marriage protections have been historically mandated (nor, other than unpaid leave, are they now) by federal law.<sup>138</sup> Moreover, on the state and local levels, many of the protections that actually have come to exist can properly be described as quixotic, lacking any cohesive vision.<sup>139</sup> It is certainly true that the states have done more for marriage than the federal government, at least historically, but even their efforts, at least when it comes to the workplace, have been less than consistent or comprehensive.

In considering this history of marriage at work, one might consider that “[m]any laws related to the economic sharing presumed to be inherent in marriage are premised, in part, upon the traditional division of labor between husbands and wives” for the benefit of a family.<sup>140</sup> Thus, it makes some sense that apart from indirect Social Security and tax incentives, which reflect this model, the workplace has never been a primary source of marriage rights given that most employment laws concern only the

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134. See *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 610 (7th Cir. 2001) (“[T]he primary purpose [of marital status discrimination laws] . . . is to prevent discrimination against married women . . .”).

135. See, e.g., Porter, *supra* note 55, at 24 (“It is clear that Congress, in enacting Title VII [in 1964], did not feel it was necessary to protect the classification of marital status.”).

136. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2601(b)(2) (2000).

137. See *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.”).

138. See Hein, *supra* note 80, at 24 (noting that employers have “no obligation to provide spousal benefits at all”).

139. See, e.g., Porter, *supra* note 55, at 16, 34 (describing “confusion” in state “marital status” laws).

140. Collett, *supra* note 7, at 385.

individual worker.<sup>141</sup> In any event, the reality of the limited benefits or rights that do exist is significant, both for what they include and what they do not. Indeed, as the survey of current law provided below shows, this historical trend of leaving marital protection largely to private choice and the individual continues under the modern employment law regimes of federal, state, and local authority, notwithstanding their possible regulatory expansion in other respects.

### III. CONTEMPORARY LAW: A PRIVATE AFFAIR?

Having surveyed the roots of marriage in law and culture generally, the next step in the study of marital rights on the job is to examine specifically the contemporary law on the matter. As noted above, federal law is largely limited to indirect, and often unused, public Social Security and tax incentives and private unpaid leave, and on the state or local side, fairly minor public benefits (e.g., workers' compensation and unemployment) and private rights (e.g., non-discrimination). Of course, such generalities are insufficient to understand the full landscape, and thus the modern marriage debate in context, as noted at the start of this article. Therefore, let us proceed to analyze each of these rights and benefits, in both their substance and their theoretical bases, to understand better this area of law and its implications for both marriage and employment.

#### A. *Federal Rights and Benefits*

As noted above, the federal rights and benefits that arguably support marriage in the workplace, directly or indirectly, are: (1) unpaid family leave;<sup>142</sup> (2) limited pension and health plan protections;<sup>143</sup> (3) Social Security and Medicare benefits;<sup>144</sup> (4) income

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141. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 574 (2001) (explaining individual and employment law).

142. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2000) (listing leave entitlements).

143. See, e.g., Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1055(c)(2) (2000) (explaining spousal rights under joint and survivor annuity option).

144. See, e.g., Social Security Act of 1935, 42 U.S.C. § 402(b), (c) (2000) (regarding spousal Social Security).

taxation credits, deductions, and incentives;<sup>145</sup> and (5) civil servant benefits,<sup>146</sup> at least to the extent they reflect a federal policy of support for marriage for government workers.

## 1. Family and Medical Leave

The Family and Medical Leave Act of 1993 (the "FMLA") became law after a long legislative journey that began in 1985, and in states before that.<sup>147</sup> The FMLA requires covered employers (generally, public agencies or private employers with fifty or more workers)<sup>148</sup> to give covered employees (generally, those who have worked at least 1250 hours in the past year)<sup>149</sup> up to twelve weeks unpaid leave per year for the birth or adoption of a child, a parent's, child's, or personal "serious health condition," or, most relevant for our purposes, "to care for [a] spouse" who "has a serious health condition."<sup>150</sup> Although this spousal leave provision is clearly part of the FMLA, there is little legislative history on it; instead, the primary emphasis in the FMLA's passage was on other leave provisions, such as for the birth of a child or one's own health because it is not so limited to pregnancy.<sup>151</sup> Indeed, nowhere in its "findings" and "purposes" does Congress comment on spousal leave.<sup>152</sup> Instead, the focus is squarely on "parents," "fathers," "mothers," and "employees," with no mention of spouses or couples at all.<sup>153</sup> To be sure, spousal leave is within the FMLA's concept of "family caretaking," but the Act's stated purpose and the leave provisions themselves overwhelmingly subordinate marriage to the care of sick children or the individual employee at issue.<sup>154</sup>

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145. See generally Cain, *supra* note 6, at 466 (discussing general tax consequences of marriage).

146. See, e.g., Civil Service Act, 5 U.S.C. § 8416(a)(2) (2000) (explaining spousal retirement annuity rights).

147. See Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1516–20 (2001).

148. 29 U.S.C. § 2611(4) (2000) (defining "employer").

149. *Id.* § 2611(2) (defining "eligible employee").

150. *Id.* § 2612(a)(1)(A)–(C).

151. See Hayes, *supra* note 147, at 1508 (noting that the FMLA passed primarily for "the needs of new mothers").

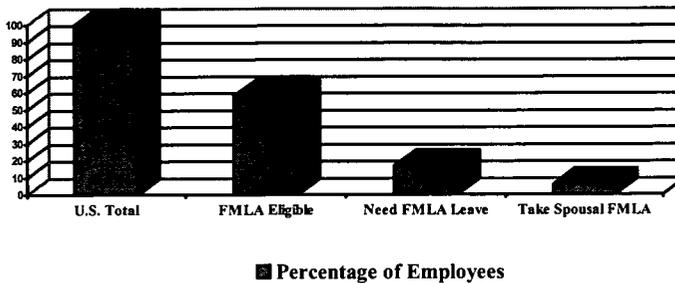
152. 29 U.S.C. § 2601 (2000) (Congressional findings and purposes of the FMLA).

153. See *id.* § 2601(a)(2)–(4).

154. See generally *id.* § 2601 (providing Congress' general family leave approach in the

When considering the importance, or lack thereof, of spouses under the FMLA, it is critical to note that, based on the fifty-employee minimum for coverage, only about fifty-eight percent of American employees are even covered and eligible under its terms.<sup>155</sup> Further, of the covered and eligible, only seventeen percent, on average, need FMLA leave in a given year.<sup>156</sup> Moreover, less than six percent of the employees who take leave take it for a spouse.<sup>157</sup> This data is illustrated in the following chart:

Figure 1: Application of Family and Medical Leave Act of 1993 (FMLA)



Thus, given these numbers, the annual rate of workers who are both covered and eligible under the FMLA and who actually need leave to care for an ill spouse is less than .7%.<sup>158</sup>

Indeed, apart from even the foregoing, married and unmarried workers are largely treated the same under the FMLA. All employees, married or not, can and do obtain FMLA leave for their

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FMLA).

155. See Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., Sept. 2001, at 17, 19 (indicating 58.3% of American workers were covered by FMLA in 2000); see also COMM'N ON FAMILY AND MEDICAL LEAVE, U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 61 (1996) (reporting similar data in 1996).

156. Waldfogel, *supra* note 155, at 21 tbl.4 (noting 16.5% of FMLA-covered took leave in 2000).

157. See *id.* at 20 (noting 5.9% of FMLA leave in 2000 was for spousal care).

158. The estimate (.0066) is from combining percentages of: (1) FMLA eligible and covered (58%), (2) eligible and covered who need FMLA leave (17%), and (3) eligible and covered who need FMLA for a spouse (6%). As an aside, it should be noted that married couples who work for the same employer are also restricted in that they are only allowed twelve weeks of annual FMLA leave between them. See 29 U.S.C. § 2612(f) (2000).

own illnesses and those of a parent (yet *not* an in-law) or a child.<sup>159</sup> One might argue that there is, at least derivatively, a difference for unmarried employees in that child-based leave does not typically extend beyond blood or other direct legal relationships.<sup>160</sup> Just as in the law of paternity generally, however, the connection raised by the FMLA for relationships to children is largely “premised upon [a] biological linkage [to the child] rather than [a parent’s] marital status.”<sup>161</sup> Thus, perhaps with the minor exception of a “stepchild,”<sup>162</sup> it is not one’s marriage to the child’s mother or father that yields this right to job leave under the FMLA, but rather one’s relation to that child.

In sum, the spousal FMLA leave that is both available and needed is limited. To be sure, it can be a valuable form of job security in some cases. Yet, even to the extent leave is helpful, there is still no requirement that it be paid,<sup>163</sup> thus further minimizing its allure in a context where it can be assumed that family budgets are already strained by virtue of the costs and lack of earnings, if any, of the spouse or partner with the “condition” at issue.<sup>164</sup> The FMLA may yield many responses, from high praise to sharp criticism, for its coverage and treatment of leave issues, but discriminatory treatment based on marital status is simply not significant fodder for such a debate.

## 2. ERISA Protections

The dominant law in all of employee benefits is the Employee Retirement Income Security Act of 1974 (“ERISA”),<sup>165</sup> which was enacted in response to a series of scandals in the pension arena that caused major damage to the retirement income of thou-

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159. See *id.* § 2612(a) (setting forth general FMLA leave entitlement provision).

160. See *id.* § 2611(12) (defining “son or daughter” under the FMLA as “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis”); see also Ryiah Lilith, *Caring for the Ten Percent’s 2.4: Lesbian and Gay Parents’ Access to Parental Benefits*, 16 WIS. WOMEN’S L.J. 125, 126–27 (2001) (describing “parental leave” challenges to same-sex couples). Interestingly, the FMLA does not include “in-laws” in its definition of “parent.” See 29 U.S.C. § 2611(7) (2000).

161. Collett, *supra* note 7, at 395.

162. 29 U.S.C. § 2611(12) (2000).

163. See *id.* § 2612(c).

164. See Erin Gielow, Note, *Equality in the Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1546–49 (2002) (describing economic pressures of unpaid leave in childbirth context).

165. 29 U.S.C. § 1001 (2000).

sands.<sup>166</sup> The main thrust of ERISA is to regulate plan administrators and fiduciaries to safeguard employees from imprudent or disloyal management of their plan funds or rights and also to enforce promises made under pension plans as well as so-called “welfare benefit plans” (e.g., health, life, disability).<sup>167</sup> Although not its primary focus, ERISA also aims to protect employees from themselves by regulating certain aspects of their participation in the relevant plans, including, albeit in a minor way, within their marriages.<sup>168</sup>

ERISA considers marriage in three direct, though fairly limited, ways: (1) annuity pension rules;<sup>169</sup> (2) as an exception to its anti-alienation rule;<sup>170</sup> and (3) continued access to otherwise provided health-care coverage.<sup>171</sup> First, unless waived by the non-employee spouse, certain pensions, particularly “defined benefit” plans (i.e., plans that typically offer fixed benefits based on years of service, not contributions) must give continued annuity rights to surviving spouses, while other pensions, such as “defined contribution” plans (i.e., plans based, at least in part, on employee contributions) must give flat rights of survivorship.<sup>172</sup> Second, although ERISA normally bars alienation of pension benefits in a participant’s lifetime, it will recognize a limited transfer under a “qualified domestic relations order” (“QDRO”) issued by a court for alimony or other support upon a divorce or similar domestic action.<sup>173</sup> Third, under an amendment to ERISA by the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”),

166. See *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 454 (3d Cir. 2003) (Becker, J., concurring) (“ERISA was enacted . . . to address the increasingly-apparent insecurity of workers’ vested pension funds . . .”).

167. See *Massachusetts v. Morash*, 490 U.S. 107, 107 (1989) (“[The] primary purpose[] [of ERISA is] preventing the mismanagement of accumulated plan funds and the failure to pay benefits from such funds . . .”).

168. See *Hagwood v. Newton*, 282 F.3d 285, 291 (4th Cir. 2002) (addressing marital interests in context of ERISA spousal survivor benefit rights); Lorraine Schmall, *Defined Contribution Plans After Enron*, 41 BRANDEIS L.J. 891, 921–22 (2003) (noting self-protective aspects of ERISA’s non-alienation provisions).

169. See JOHN F. BUCKLEY, *ERISA LAW ANSWER BOOK 14-12 to 14-14* (4th ed. 2003) (describing relevant spousal rights to annuity payments upon survivorship).

170. See *Boggs*, 520 U.S. at 848, 851 (describing non-alienation limit in domestic relations).

171. See 29 U.S.C. § 1167(3) (2000) (including “spouse” as “qualified beneficiary” for continued coverage).

172. See Leslie A. Klein & Frank P. VanderPloeg, *Retirement Equity Act (REA) Workshop: Spousal Consents and Other Issues*, SK012 ALI-ABA 97, 100-101 (2004) (describing “general requirements for spousal interests in retirement benefits” under ERISA).

173. *Boggs*, 520 U.S. at 847–48.

covered health-care plans, if offered at all, are required to offer employees, spouses, and dependent children rights to continued coverage, at employee expense, for temporary periods post-termination.<sup>174</sup>

Turning to the first area of marriage treatment (i.e., pension annuity rules), under ERISA the relevant requirement is that:

A "qualified joint and survivor annuity" ("QJSA") must be the "default" form of retirement benefit payment for a married participant under a . . . defined benefit pension plan . . . or any other plan that has a benefit option in the form of a life annuity which is elected by the Participant, unless properly waived by the participant with the spouse's consent.<sup>175</sup>

Thus, unless waived, "the interests of a married plan participant must be distributed in the form of a QJSA," which is "an annuity for the life of the participant with a survivor annuity for the life of his or her spouse" of 50% to 100% of the retiree annuity.<sup>176</sup> As a result, though, such retirees "typically receive a lower benefit during retirement to account for the likely increase in the number of years that the pension plan will have to make payments."<sup>177</sup> With this in mind, "[n]ot surprisingly, a relatively low percentage of workers choose to take their benefits in the form of joint and survivor annuities."<sup>178</sup> Spouses have protection in that their consent is required to waive survivor rights,<sup>179</sup> but given the likelihood of actuarial equivalency, there is no further benefit to the married (as opposed to unmarried) participant. Rather, it is the spouse who has the right, and it is only one of structure that typically does not yield an overall increase in pension funds.

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174. See Jarret Tomás Barrios, *Growing Pains in the Workplace: Tax Consequences of Health Plans for Domestic Partners*, 47 TAX LAW. 845, 861-62 (1994) (describing COBRA coverage as marital benefit).

175. Klein & Vanderploeg, *supra* note 172, at 100 (describing QJSA requirements in ERISA).

176. BUCKLEY, *supra* note 169, at 14-12, 14-13. If the employee dies pre-retirement, the interest must be paid in a "qualified pre-retirement survivor annuity," which differs from QJSA only in timing. *See id.* at 14-25.

177. Jonathan Barry Forman, *Whose Pension Is It Anyway?: Protecting Spousal Rights in a Privatized Social Security System*, 76 N.C. L. REV. 1653, 1667 (1998); *see also* Ellen E. Schultz, *Widows Lament*, WALL ST. J., June 29, 2005, at B1 (describing survivorship dynamics in modern pension plans).

178. Forman, *supra* note 177, at 1667.

179. *See* 29 U.S.C. § 1055(c)(2) (2000).

With regard to defined contribution plans, ERISA generally requires that, unless waived, assets remaining at death be given first to a surviving spouse.<sup>180</sup> Thus, “profit sharing, 401(k), and other plans not subject (and not wanting to be subject) to the QJSA/QPSA requirements [must] make a surviving spouse the ‘default’ beneficiary of [a] participant’s entire account balance. . . .”<sup>181</sup> This certainly provides a specific right to the spouse of a participant. And yet, again, not only is this right subject to waiver, it does not actually yield any more benefits, and to a degree, unmarried workers, if not their partners, actually retain more rights by virtue of their freedom to dispose of such benefits as they see fit, including bequeathing them by contract or plan designation.<sup>182</sup>

The second manner in which marriage is relevant under ERISA is a related, yet more indirect, protection for spouses in providing certain exceptions to its general rule of “non-alienation” of pension provisions, which include the QDRO.<sup>183</sup> In establishing “[f]orm and payment of benefits” requirements, ERISA mandates generally that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”<sup>184</sup> The law, however, does afford exceptions to this rule, chief among them being that “[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any [QDRO].”<sup>185</sup> A QDRO is an order that “creates or recognizes the existence of an alternate payee’s right” to plan benefits and concerns, among other things, “alimony payments, or marital property rights to a spouse, former spouse . . . or other dependent of a participant,” and “is made pursuant to a State domestic relations law.”<sup>186</sup> In so doing, ERISA makes exceptions to non-

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180. See Klein & VanderPloeg, *supra* note 172, at 100-01 (observing that non-annuity contribution plans are generally exempt from QJSA requirement if the “participant’s entire vested benefit is payable in full, on death, to his or her surviving spouse, unless the surviving spouse consents to the designation of another beneficiary”).

181. *Id.* at 101.

182. See Collett, *supra* note 7, at 392 (“The availability of private agreements and a careful analysis of the ‘marital benefits’ reveal that there are few advantages in furtherance of economic sharing by married couples that are not available to same-sex couples through private ordering of their relationships, and the few advantages that cannot be duplicated impact remarkably few individuals.”).

183. See 29 U.S.C. § 1056(d) (2000) (setting forth the ERISA non-alienation provision).

184. *Id.* § 1056(d)(1).

185. *Id.* § 1056(d)(3)(A).

186. *Id.* § 1056(d)(3)(B).

alienation in the domestic relations context, but in a manner largely dependent on state law. Thus, ERISA adds little to state rights that otherwise exist.<sup>187</sup> It is arguable that the federal DOMA limits extending QDROs (or mandatory QJSAs, for that matter) to the unmarried context,<sup>188</sup> but the inclusion of “other dependent” in the QDRO statutory language<sup>189</sup> would certainly seem to diminish this per se limit, at least in relation to state law, as would the existing option, if not rule, of alternative beneficiary arrangements for non-spousal partners.<sup>190</sup>

Finally, COBRA amended ERISA in 1985 to allow “a qualified beneficiary” access to “continued coverage under the plan when he might otherwise lose that benefit [following a qualifying event], such as the termination of employment.”<sup>191</sup> COBRA is “designed to create a bridge from one employer’s health plan to another.”<sup>192</sup> There is no requirement that employers pay for “this bridge,” but only that they offer access to the plan by a “qualified beneficiary” at no more than 102% its cost for up to eighteen months (or thirty-six in certain circumstances) or access to new coverage, whichever occurs first.<sup>193</sup> Under COBRA, a “qualified beneficiary,” however, includes not only the employee, but also a “spouse” and any “dependent child,” while a “qualifying event” includes not only a job loss, but also death or a “divorce or legal separation.”<sup>194</sup> Thus, if coverage is offered to spouses, they will have a continued right to it upon a spouse’s job loss or death, or the end of their marriage. To be sure, this right is extended only to the legally married,<sup>195</sup> but there is nothing to bar an employer

187. See *Boggs*, 520 U.S. at 848 (noting, under the QDRO exception, “Congress ensured that state domestic relations orders, as long as they meet certain statutory requirements, are not pre-empted”).

188. See Klein & VanderPloeg, *supra* note 172, at 105 (noting potential impact of the DOMA on ERISA).

189. 29 U.S.C. § 1056(d)(3)(B)(ii)(I) (2000).

190. See Klein & VanderPloeg, *supra* note 172, at 105 (“[W]here a plan permits joint-and-survivor annuities for the lives of a participant and a non-spouse beneficiary, nothing prevents the plan from offering, or a participant from electing, such benefit for the participant and his or her [unmarried partner] . . .”).

191. *Geissal v. Moore Med. Corp.*, 524 U.S. 74, 76 (1998).

192. RICHARD CARLSON, *EMPLOYMENT LAW* 318 (2005).

193. See *id.* at 318–19 (describing COBRA).

194. See 29 U.S.C. § 1167(3) (2000) (stating that a “qualified beneficiary” includes spouses and dependents); *id.* § 1163(1)-(3) (stating that death, job termination, and divorce/separation are “qualifying events”).

195. See Am. Bar Ass’n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 *FAM. L.Q.*

that has otherwise shown its willingness to cover unmarried partners (truly, the only situation where the issue would arise) from offering similar continuation rights. Again, ERISA is more about protecting than creating expectations. There is no guarantee, but the practical reality, including that most unmarried partners are each already covered by their own insurance,<sup>196</sup> leads one to conclude that the marriage difference is not that great.

As noted in Part I, “employers are under no obligation to provide spousal benefits at all” under ERISA.<sup>197</sup> And, apart from the rights just described, even when benefits are offered, “ERISA does not confer beneficiary status on nonparticipants by reason of their marital . . . status.”<sup>198</sup> Further, although they offer some protection, QJSA/QPSA rights typically are paid for by the couple,<sup>199</sup> the QDRO merely reflects a balance of pension protection with state domestic rights,<sup>200</sup> and COBRA simply enforces the status quo.<sup>201</sup> Individual employers may provide other beneficiary rights and benefits, but ERISA does not require them, regardless of the nature of the marriage or relationship at issue.

### 3. Social Security and Medicare Benefits

The precursors of Social Security are many, from the “Poor Laws” of seventeenth century England,<sup>202</sup> to eighteenth century writings of Thomas Paine,<sup>203</sup> to the nineteenth century ideals of

339, 367, 369 (2004) (listing COBRA among rights “automatically accorded to married spouses”).

196. See Collett, *supra* note 7, at 388–89 (positing little benefit in extending health care to same-sex couples).

197. Hein, *supra* note 80, at 24; see also CARLSON, *supra* note 192, at 319 (noting “[n]either COBRA nor ERISA requires an employer to establish or maintain a health plan for its employees”).

198. *Boggs*, 520 U.S. at 847.

199. See Forman, *supra* note 177, at 1667–68 (regarding QJSA funding).

200. See *Boggs*, 520 U.S. at 848 (observing that by its QDRO limit to non-alienation, Congress recognized that “[a]s a general matter, ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States’”) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

201. See *Lutheran Hosp. of Ind., Inc. v. Bus. Men’s Assurance Co. of Am.*, 51 F.3d 1308, 1313 (7th Cir. 1995) (asserting purpose of COBRA as “[p]reservation of the status quo”).

202. See Patricia E. Dille, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1079 (1997) (commenting on the influence of “English Poor Laws” on our modern Social Security system).

203. See Larry DeWitt, *Historical Background and Development of Social Security: Old*

the Catholic Church (particularly, Pope Leo XIII's encyclical *Rerum Novarum* of 1891)<sup>204</sup> and Germany under Bismarck,<sup>205</sup> to name a few. These roots took hold in America on a small scale with pensions for Civil War veterans<sup>206</sup> and culminated on a grand scale with the New Deal passage of the Social Security Act of 1935.<sup>207</sup> Often called the untouchable "third rail" of politics,<sup>208</sup> the system was based "on the theory that 'American Citizens had a right to protection against distress caused by economic conditions beyond their control.'"<sup>209</sup> As Supreme Court Justice Cardozo wrote shortly after its passage, "[t]he hope behind [the Social Security Act] is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."<sup>210</sup> The original system offered basic retirement levels, while hospital coverage was added in 1965 under a related program called Medicare.<sup>211</sup>

### i. Benefits and Funding

Although loosely designed as an investment and return system funded by work-based contributions, as opposed to a needs-based welfare program, the funding and payout functions operate inde-

*Age in Colonial America*, Social Security Online (noting the role of Thomas Paine's pamphlet *Agrarian Justice*, which advocated, among other things, a public old-age support system), available at <http://www.ssa.gov/history/briefhistory3.html> (last visited Feb. 20, 2006).

204. See Pope Leo XIII, *Rerum Novarum* [*On the Condition of the Working Classes*] ¶ 79 (St. Paul, ed., Pauline Books & Media 1995) (1891) (arguing, at least in labor union context, that funds should be set aside to "furnish the means of assisting individual members in need . . . whenever anyone is stricken . . . by old age, or by misfortune").

205. Mary Ann Glendon, *Discovering Our Dependence*, FIRST THINGS, Oct. 2004, at 12 (commenting on Otto von Bismarck's establishment of "the world's first social security system").

206. See Dilley, *supra* note 202, at 1086 (citing the "Civil War pension system" as a "root[]" of the current system).

207. See *id.* (tracing the historical development of the Social Security Act of 1935).

208. Michael Kranish, *Bush, Kerry Remain Vague on Social Security*, BOSTON GLOBE, Oct. 15, 2004, at A25 ("Social Security is known as the 'third rail' of politics [sic] touch it and you die.").

209. Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865, 901 (2004) (quoting J. Douglas Brown, *Philosophical Basis of the National Old Age Insurance Program*, in SOCIAL SECURITY AND PRIVATE PENSION PLANS: COMPETITIVE OR COMPLEMENTARY? 1, 3 (Dan M. McGill ed., 1977)).

210. *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

211. See 42 U.S.C. § 426 (a)-(b) (2000) (offering basic Medicare eligibility in concert with Social Security Act).

pendently. Thus, "each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he . . . support[ed] the system by taxation."<sup>212</sup> To be sure, the pension system is funded by a payroll tax on work, and benefits are paid out based on minimum years in the labor force and one's earnings. But, as the Supreme Court has made clear, the link between input and output is a systemic, rather than individual, one.<sup>213</sup> Thus, it is a "pay-as-you-go" system under which "current workers contribute FICA/payroll taxes that go directly to fund benefits to current retirees and other beneficiaries," and "[w]hen today's workers reach retirement, they in turn will expect tomorrow's workers to contribute taxes sufficient to fund their promised benefits."<sup>214</sup>

In providing this "intergenerational" benefit,<sup>215</sup> the program, although funded by workers and their employers, and based on worker eligibility, does not limit its benefits to workers.<sup>216</sup> Rather, it includes among its beneficiaries certain dependents of eligible retirees, including children and, more importantly for our present purpose, spouses—both current and surviving, and, in some cases, divorced.<sup>217</sup> Although now paid on a gender-neutral basis (i.e., to spouses of either sex), these "social insurance" benefits were based, at least at their inception, on the "presumption that a man is responsible for the support of his wife and children."<sup>218</sup> Of course, the various spousal benefits can also be justified in terms of worker-based incentives, not only for the care of children (i.e., a "non-working" spouse's presumed work), but also to support a population-based system where children cared for today are expected to fund benefits as workers of tomorrow (i.e., by future work).<sup>219</sup> In any event, whether implicitly or explicitly, there is no

212. *Flemming v. Nestor*, 363 U.S. 603, 609–10 (1960).

213. *See id.* at 610 (noting systemic nature of the Social Security system).

214. Hon. Rick Santorum, *Wealth Creation in the New Millenium: Transforming Poverty in America*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 388 (2002).

215. *Id.*

216. *See Forman, supra* note 69, at 935 (noting "redistribution" in Social Security taxes and payouts).

217. *See Forman, supra* note 177, at 1656–58 (describing family Social Security benefits).

218. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644 (1975) (citing relevant Social Security legislative history).

219. *See Glendon, supra* note 205, at 11 (noting the need for future laborers for Social Security system and what Cambridge economist Partha Dasgupta calls the "free rider problem" of "childless individuals").

doubt dependency and reward are rational qualifiers for benefits under the system—qualifiers that take on greater importance than ever when, as now, the system faces growing financial challenges that, even from the most optimistic viewpoint, seem to require contraction over expansion.<sup>220</sup>

With regard to funding, “Social Security levies a flat-rate payroll tax on all [of a worker’s] employment earnings up to a specified maximum.”<sup>221</sup> No further contribution is required based on marital status or dependents—i.e., only work is taxed, and it is taxed equally.<sup>222</sup> Thus, it is true that the benefits that spouses or dependents receive from the system as such are not necessarily funded directly by their own taxes, but rather by those of their worker spouses or, frankly, others.<sup>223</sup> Of course, the contributions that spouses make by supporting a wage-earning spouse and children are recognized, at least implicitly, when it comes to benefits,<sup>224</sup> although the benefit amounts reflecting such recognition might not be enough to outweigh one’s desire, and right, to also engage in paid work.

Spousal pension benefits derive largely from the wage-earner spouse’s insurance amount.<sup>225</sup> This amount, calculated after meeting a threshold requirement of ten years in the workforce, is “based on a worker’s past earnings” as follows:

[B]enefits are calculated by first determining average indexed monthly earnings (AIME), which represents the present value of a worker’s average monthly wage (up to a specified maximum) during the thirty-five years in which he or she earned the most. The AIME is then used to determine the primary insurance amount (PIA),

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220. See Kranish, *supra* note 208 (positing that Social Security “is on the road to bankruptcy”).

221. Liu, *supra* note 124, at 10. For 2005, the pension tax rate is 12.4% on earnings to \$90,000, see 42 U.S.C.A. § 430 (West Supp. 2005), and is split between employer and employee (6.2% each), see 26 U.S.C. §§ 3101(a), 3111(a) (2000). The Medicare tax rate is 2.9% on all earnings (with no cap), also split between employer and employee (1.45% each). See *id.* §§ 3101(b), 3111(b).

222. See Forman, *supra* note 69, at 935–36 (noting taxing of only “individual workers based on their individual earnings,” while paying out benefits both “to workers and their [spouses/dependents],” if they have them).

223. See *id.* (noting redistribution effect of Social Security taxation and benefits).

224. See Jane Maslow Cohen, *Competitive and Cooperative Dependencies: The Case for Children*, 81 VA. L. REV. 2217, 2237–38 (1995) (noting recognition of “non-cash contributions to welfare” by spouses).

225. See Forman, *supra* note 177, at 1657 (describing derivative nature of spousal Social Security benefits).

which is the basic monthly amount a person would receive if he or she retired and began to collect benefits at the normal retirement age. The PIA is calculated by applying to the AIME a formula involving three brackets with decreasing benefit rates.<sup>226</sup>

A spousal benefit is then determined for those “at normal retirement age” who have been married for at least one year (or have children with the spouse), with a “dual entitlement rule” that provides the spouse “is entitled to the greater of (1) the PIA based on his or her own AIME, or (2) fifty percent of the PIA based on the AIME of his or her spouse.”<sup>227</sup> In the event of divorce or death, a divorcee can receive “the spousal benefit, but only if the marriage lasted at least ten years and that divorced spouse was not married at the time of first eligibility for benefits,” and a widow(er) can receive up to “a monthly surviving spouse benefit equal to 100% of the [deceased] worker’s PIA,”<sup>228</sup> both with the “dual entitlement rule” (i.e., one can only receive the larger of one’s own benefit or the spousal benefit) still in effect.<sup>229</sup> In the event of disability, the 50%-spousal (or, later, 100%-survivor) benefit is also available (with the “dual entitlement rule”) for older spouses (age sixty-two) or those with minor or disabled children.<sup>230</sup>

As far as Medicare is concerned, “[a] person entitled to Social Security . . . is automatically entitled to hospital insurance” at age sixty-five (also known as “Medicare Part A”).<sup>231</sup> This eligibility applies regardless of the basis for Social Security, and, thus, it includes retirees and all spouse types (i.e., spouse, divorcee, survi-

226. Liu, *supra* note 124, at 11. In 2006, the monthly benefit at normal retirement (i.e., sixty-five to sixty-seven years old, see 42 U.S.C. § 416(l) (2000)), is “the sum of: (a) 90% of the first \$656 of [AIME], plus (b) 32% of [AIME] over \$656 and through \$3,955, plus (c) 15% of [AIME] over \$3,955,” *Primary Insurance Amount*, SOCIAL SECURITY ONLINE, <http://www.ssa.gov/OACT/COLA/piaformula.html> (last visited Feb. 20, 2006), up to \$1,939, 2005 Social Security Changes, SOCIAL SECURITY ONLINE <http://www.ssa.gov/pressoffice/factsheets/colafacts2005.htm> (last visited Feb. 20, 2006). Participants can also retire before or after normal retirement age, with their benefits generally adjusted (down or up) accordingly. See NAT’L ORG. OF SOC. SEC. CLAIMANTS’ REPRESENTATIVES, 1 SOCIAL SECURITY PRACTICE GUIDE 4-26 to 4-30 (2005) [hereinafter CLAIMANTS’ REPRESENTATIVES].

227. Liu, *supra* note 124, at 12. One-year marriage or parentage are common methods for spouse coverage, although other routes (e.g., pre-existing coverage, widowhood) do exist. See 42 U.S.C. § 416(b) (2000).

228. Forman, *supra* note 69, at 925.

229. See *id.* at 925–26 (describing “dual entitlement rule” in divorce/survivor context).

230. See CLAIMANTS’ REPRESENTATIVES, *supra* note 226, at 7–9 to 7–10.

231. HARVEY L. MCCORMICK, 1 MEDICARE AND MEDICAID CLAIMS AND PROCEDURES § 1:13 (3d ed. 2001).

vor),<sup>232</sup> and extends benefits regardless of a retiree's earnings record or that of a spouse.<sup>233</sup> The benefits generally include hospital, skilled nursing, home health, and hospice care.<sup>234</sup> Further benefits (e.g., physician care, outpatient services, prescription drugs) are obtained from the other parts of Medicare (i.e., "Medicare Part B"),<sup>235</sup> but such benefits are available (and generally at a premium) regardless of Social Security eligibility.<sup>236</sup>

## ii. Practical and Theoretical Implications

Based on the foregoing, marriage can yield a 50%-spousal or a 100%-survivor benefit, unless more is obtained by one's own work, and there is no doubt this benefit is not enjoyed by the unmarried. Further, by virtue of Social Security eligibility, spouses can also receive Medicare Part A. Yet, as noted in Part I above, there are several factors that limit this apparent preference for marriage. First, given the "dual entitlement rule," both the expectation at the benefits' creation and the nature of modern marriage point to a "relatively small"<sup>237</sup> amount due to the increase of dual-income households (a reality shared by the unmarried).<sup>238</sup> Second, the benefits at issue are rooted in a theory of "presump-

232. See 42 U.S.C. § 426 (a)(2)(A) (2000) (referencing one's eligibility for retirement under the Social Security Act, which includes spouse coverage, as criterion for Medicare Part A eligibility).

233. See Catherine V. Kilgore, *Health Care and Social Security Update—2001*, 70 MISS. L.J. 1007, 1007 (2001) (noting Medicare "is available . . . regardless of financial status"). Thus, to the extent such benefits are based on simple Social Security eligibility (i.e., ten years of work) and not earnings, the only distinction between married and unmarried would lie for those with no significant work history at all—a rather rare state for the unmarried and one which, presumably, would otherwise give rise to welfare-based coverage under Medicaid, a comparable program for the indigent. See 2 MCCORMICK, *supra* note 231, § 21:16.

234. See 1 MCCORMICK, *supra* note 231, § 1:21 (discussing Medicare Part A benefits).

235. See *id.* § 1:28 (discussing Medicare Part B benefits).

236. See *id.* §§ 1:22 to 1:27 (discussing individuals covered under Medicare Part B).

237. SOCIAL SECURITY BOARD, A REPORT OF THE SOCIAL SECURITY BOARD TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES (1938) [hereinafter, 1938 SSB REPORT] (on file with author), available at <http://www.ssa.gov/history/reports/38ssbadvise.html> (last visited Feb. 20, 2006).

238. See Liu, *supra* note 124, at 2–3 (noting limited Social Security benefits to dual-income married couples, which describes most couples); see also Collett, *supra* note 7, at 386 (noting in same-sex context, "[b]ased upon the limited research available, same-sex couples likely to marry will continue to pursue two careers") (citing M.V. Lee Badgett & Josh A. Goldfoot, *For Richer, For Poorer: The Freedom to Marry Debate*, ANGLES, May 1996, at 1, 3, available at [http://www.iglss.org/pubs/angles\\_arc.html](http://www.iglss.org/pubs/angles_arc.html) (last visited \_\_\_\_)).

tive need” or dependence on one worker,<sup>239</sup> not marriage per se (a presumption not shared by the unmarried), further limiting any notion of an unqualified endorsement of relationship form.<sup>240</sup> Third, at least in comparison to other forms, although alternative parenting is increasing, the “family” (i.e., child) aspect of the benefit<sup>241</sup> offers a cycle of incentive and reward for child-rearing<sup>242</sup> that is, at least presently, performed mainly in the traditional husband-wife setting (even if there was a divorce).<sup>243</sup>

First, to the extent benefits are offered to spouses, it should be noted that, at least practically, their number is not large, and, if anything, is decreasing—often to the distress of progressives and traditionalists alike.<sup>244</sup> Again, one premise at the benefits’ creation was in “time many women will have developed substantial benefit rights based upon their own past earnings,” and, thus, eventually would cost “a relatively small amount.”<sup>245</sup> For the most part, this has proven true as follows: (1) 5% of Social Security recipients (3% of all benefits) are paid on a spousal retirement basis only<sup>246</sup> (down from 16% and 10%, respectively, in 1960),<sup>247</sup> (2) 10% of recipients (less than 10% of benefits) are paid on a spousal sur-

239. See 1938 SSB REPORT, *supra* note 237 (predicting in 1938 that “the cost of providing the supplement for dependent wives would gradually decline” given rise of working women and the “dual entitlement rule”).

240. Cf. Knauer, *supra* note 32, at 155–56 (noting that presumptions of “economic[] interdependen[ce]” are not common in private domestic partnership policies or local ordinances, most of which require “proof”).

241. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (noting that the provision of spousal benefits in the 1939 Social Security amendments was “one of a large number of amendments designed to ‘afford more adequate protection to the family as a unit’”) (citing H.R. REP. NO. 76–728, at 7 (1939)).

242. See COTT, *supra* note 5, at 177 (arguing Social Security encourages “stay-at-home wives and mothers”).

243. See *Unmarried Childbearing*, NATIONAL CENTER FOR HEALTH STATISTICS (estimating the percentage of unmarried births in 2003 at 34.6%), <http://www.cdc.gov/nchs/fastats/unmarry.htm> (last visited Feb. 20, 2006).

244. See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2059–64 (1996) (summarizing range of critiques of Social Security).

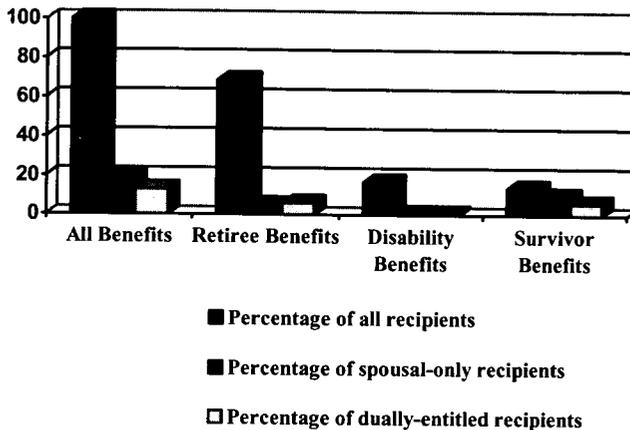
245. 1938 SSB REPORT, *supra* note 237.

246. See *OASDI Monthly Statistics*, June 2005, SOC. SEC. ONLINE, tbl.1 (listing OASDI benefits by program and type of benefit, June 2004–June 2005), [http://www.ssa.gov/policy/docs/statcomps/oasdi\\_monthly/2006-01/table01.html](http://www.ssa.gov/policy/docs/statcomps/oasdi_monthly/2006-01/table01.html) (last visited Feb. 22, 2006); *id.* tbl.2 (listing all OASDI benefits by type of beneficiary, June 2004–June 2005), [http://www.ssa.gov/policy/docs/statcomps/oasdi\\_monthly/2006-01/table02.html](http://www.ssa.gov/policy/docs/statcomps/oasdi_monthly/2006-01/table02.html) (last visited Feb. 22, 2006).

247. See SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, tbl.5.A4 (2003) (on file with author) (listing retirement benefits by year and type from 1940–2002).

vivor basis,<sup>248</sup> and (3) less than 1% of recipients or benefits are paid on a disabled spouse basis.<sup>249</sup> Of those receiving benefits both by their own work and by marriage (42% of women; 1% of men):<sup>250</sup> (1) 6% of are paid on a retirement basis, (2) 6% are paid on a survivor basis, and (3) less than 1% are paid on a disabled basis.<sup>251</sup> The relevant data is illustrated as follows:

Figure 2: Breakdown of Social Security Recipients (June 2005)



With regard to individual benefits, “spousal only” recipients, as noted above, receive one-half of their spouses’ amount (plus Medicare), while, on average, the “dually entitled” yield a marriage-based benefit that is only about one-third of their given retiree benefit<sup>252</sup> or one-half of their given survivor benefit<sup>253</sup> (and, by its

248. See SOC. SEC. ONLINE, *supra* note 246, at tbl.1; *id.* at tbl. 4 (listing all OASI survivors benefits, by type of beneficiary, June 2004–June 2005), [http://www.ssa.gov/policy/docs/statcomps/oasdi\\_monthly/2006-01/table04.html](http://www.ssa.gov/policy/docs/statcomps/oasdi_monthly/2006-01/table04.html) (last visited Feb. 22, 2006). Interestingly, with respect to same-sex pairs, it is doubtful there would be much survivor benefit since they “are usually about the same age and have a similar life expectancy.” Frank S. Berall, *Tax Consequences of Unmarried Cohabitation*, 23 QUINNIPIAC L. REV. 395, 398 (2004).

249. See SOC. SEC. ONLINE, *supra* note 246, at tbl.1; *id.* at tbl.5 (listing all DI benefits, by type of beneficiary, June 2004–June 2005), [http://www.ssa.gov/policy/docs/statcomps/oasdi\\_monthly/2006-01/table05.html](http://www.ssa.gov/policy/docs/statcomps/oasdi_monthly/2006-01/table05.html) (last visited Feb. 22, 2006).

250. See SOC. SEC. ADMIN., *supra* note 247, at tbl.5.G3 (providing data on dually entitled, December 2002).

251. Compare *id.* at tbl.5.A1 (all recipients, December 2005), with *id.* at tbl.5.G3 (dually entitled, December 2002). There is no data on disabled spouses, yet they are likely minimal given figures for such benefits generally.

252. See *id.* at tbl.5.G3 (listing average combined and reduced secondary spouse bene-

nature, no further Medicare).<sup>254</sup> In fact, in light of recent proposals to convert part of Social Security to a private account system, it is likely that such benefits may see even further reductions in the future.<sup>255</sup>

The foregoing data suggests that spousal benefits are increasingly unused; this is, of course, due primarily to the role of the “dual entitlement rule” in modern couples, which, shown by this data alone, are increasingly dual-income. Moreover, there is no question that most unmarried pairs, given their independent nature, would face a similar fate.<sup>256</sup> Thus, at least practically, it is economic choice, not marriage, that plays the greater role. In fact, rather than a benefit, some have argued quite persuasively that the system actually undermines marriage, at least in its modern form. This argument asserts that the “dual entitlement rule” harms low-income spouses, largely women, whose contributions are left unrecognized if they yield a benefit less than half their partner's.<sup>257</sup> It also posits that the system undervalues domestic work, particularly for spouses who rely on lower-income workers, are divorced before the required ten years of marriage, or survive their worker spouse and are far from the age required for accessing benefits.<sup>258</sup> Of course, challenges on these grounds typically give rise to calls for more marital (or child) rights, not less.<sup>259</sup>

fits, December 2002).

253. See *id.* (listing average combined benefits and reduced secondary widow(er) benefits, December 2002).

254. See 42 U.S.C. § 426(a)(2)(A) (2000) (stating that eligibility for retirement, regardless of PIA, yields Medicare).

255. See Karen Damato, *Spouses May Lose with Social Security Overhaul*, WALL ST. J., Mar. 3, 2005, at D2 (summarizing the uncertain impact of President Bush's proposed Social Security reforms on spouses).

256. See WAITE & GALLAGHER, *supra* note 5, at 39 (noting economic independence of unmarried couples).

257. See Alstott, *supra* note 244, at 2062 (“For secondary workers who . . . receive the spousal benefit . . . the payroll tax [to fund the program] is a true tax, because it confers no incremental future benefits.”).

258. See Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 243–44 (1980) (arguing that Social Security “fails to take into account the effect of women's dual roles on their participation in the labor force”); Liu, *supra* note 124, at 17–23 (positing certain shortcomings of Social Security, including that the income-based spousal benefit favors spouses of the well-paid, the impact of the ten-year divorce threshold, and a “widow's gap” that arises between a worker's death and spousal retirement).

259. See Alstott, *supra* note 244, at 2059–66 (describing various “[f]eminist proposals for Social Security reform,” most of which contemplate reforms that would increase, rather than reduce, the relevant benefits).

Second, Congress created spouse benefits in 1939.<sup>260</sup> At first, they were only for wives, although, after several amendments and challenges, they are now for both sexes.<sup>261</sup> In general, such benefits were meant to shift Social Security from a “retirement plan for individual workers, to a family benefit plan,”<sup>262</sup> based on “generally valid presumptions” of dependency on “the wage earner.”<sup>263</sup> As the Supreme Court has noted, “Congress has used marital status as a general guide to dependency.”<sup>264</sup> It has, however, limited this “guide” by the “dual entitlement rule,” which not only prevents a “double dip,”<sup>265</sup> but also indicates that, in the end, dependency, not marriage, is the key factor.

As posited above, the system’s dependency presumption does not easily translate to the unmarried. By choice or circumstance, the overwhelming majority of unmarried couples (and singles as such) are not financially interdependent.<sup>266</sup> “In fact, many people enter into nonmarital cohabitation to avoid . . . the economic responsibilities and obligations of marriage.”<sup>267</sup> One could say that the choice to cohabit does not negate dependency, particularly where the right to marry is limited (e.g., same-sex marriage).<sup>268</sup> In

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260. See *Califano v. Goldfarb*, 430 U.S. 199, 214–15 (1977) (summarizing 1939 Social Security amendments).

261. See *id.* at 215–17 (tracing and expanding the provision of Social Security benefits for male spouses).

262. 1938 ADVISORY COUNCIL, THE SOCIAL SECURITY BOARD’S COMMENTS AND RECOMMENDATIONS, <http://www.ssa.gov/history/reports/38ssbadvise.html> (last visited Feb. 20, 2006); see also *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 (1975) (Powell, J., concurring) (noting Social Security’s emphasis on “protection of the family”).

263. *Weinberger*, 420 U.S. at 644 n.13 (citing REPORT OF THE COMMITTEE ON SOCIAL INSURANCE AND TAXES TO THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN 29 (1963)). Although the legislative history refers to female-male dependency, it is dependency on “wage earner” that is key, regardless of gender.

264. *Bowen v. Owens*, 476 U.S. 340, 346 (1986). Indeed, “that marriage changes dependency is expressed throughout the Social Security Act.” *Id.* (quoting *Califano v. Jobst*, 434 U.S. 47, 52 n.8 (1977)).

265. See Jonathan B. Forman, *Making Social Security Work*, 65 OHIO ST. L.J. 145, 153 (2004) (describing “dual entitlement rule”).

266. See WAITE & GALLAGHER, *supra* note 5, at 39 (noting economic independence of unmarried couples).

267. Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute’s “Domestic Partners” Proposal*, 2001 BYU L. REV. 1189, 1209–10.

268. See Dee Ann Habegger, Note, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IND. L. REV. 991, 1000 (2000) (noting that “heterosexuals always have the option of getting married”). Yet, even for same-sex pairs, the common wisdom suggests most are not financially interdependent. See Chambers, *supra* note 82, at 475 (“[T]he employment of only one partner is likely to be the situation more often in opposite-sex than in same-sex couples.”). And, according to some studies, this would not change even if they married. See Collett, *supra* note 7, at 386 (regarding same).

most contexts, though, the option does exist, and given that Social Security operates on a national scale based on legislative expectations of resources and need, presumptions of dependence are legitimate, particularly in light of the independent reality of singles or the typical unmarried couple, same-sex or otherwise.<sup>269</sup> Social Security “was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation’s resources.”<sup>270</sup>

Third, there is no doubt that, for whatever its flaws, the spousal benefit in Social Security also has a fairly strong, albeit imperfect, relationship to expectations and rewards for child-rearing, or other domestic work, or both.<sup>271</sup> In this respect, whatever one thinks of the assumptions that give rise to the system, the expectation that spousal benefits would, at least in part, compensate women for unpaid work, either to care for children or in the home generally, is present.<sup>272</sup> It is true that such rewards, as they are paid, are intimately tied to dependency in marriage,<sup>273</sup> and do not necessarily require children or even actual domestic work—and, thus, are perhaps over-inclusive.<sup>274</sup> Further, to the extent they are based in a spouse’s work and not the value of homemaking, they can be quite insufficient—and, thus, are perhaps under-inclusive.<sup>275</sup> Yet, even with these shortcomings, the

269. See Collett, *supra* note 7, at 386 (predicting “few, if any” spousal benefits to same-sex couples if offered).

270. *Flemming v. Nestor*, 363 U.S. 603, 610 (1960).

271. See COTT, *supra* note 5, at 178 (noting view of Social Security as “[f]or the benefit of child nurture,” and supporting a “pattern in which husbands remained principal earners and wives were homemakers and childrearers”); Cohen, *supra* note 224, at 2238 (noting recognition of “non-cash contributions” of spouses).

272. See Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet’s CONSTITUTIONAL LAW*, 89 COLUM. L. REV. 264, 280 (1989) (positing that “Social Security recognizes the value of women’s domestic contributions to the household economy only indirectly”); Blumberg, *supra* note 258, at 290–91 (noting that Social Security “was originally predicated upon the assumption of a worker-homemaker marriage that endured until the death of one of the spouses”).

273. See Becker, *supra* note 272, at 280.

274. See Alstott, *supra* note 244, at 2064 (“[T]he current spousal benefit . . . provides ‘unearned’ benefits to wives [in that it] is available both to (low-earning) working wives and to homemakers.”).

275. See Liu, *supra* note 124, at 23 (citing ten-year marriage rule for divorcees and the difference in spousal benefits based on the other’s PIA in positing that Social Security fails to “satisfy the principle of social contribution,” or otherwise provide “benefits based on the value of unpaid housework done by women”).

system is more than rational, particularly in comparison to the treatment of the unmarried.

As noted above, Social Security is predicated on the expected contributions and needs of its participants.<sup>276</sup> As the Supreme Court posited in *Califano v. Jobst* in 1977, “[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.”<sup>277</sup> With this goal in mind, the typical unmarried couple is, unlike the married, a pair of dual-income, independent partners that, although it certainly would involve domestic work (as it would for even a single person), is unlikely to include a “stay-at-home” member, much less one that would not want to participate in the paid work force.<sup>278</sup> To the extent such couples bear or raise children, not only do more unmarried couples prefer not to have children (approximately fifty percent of cohabiting couples are childless, as opposed to nineteen percent of married couples),<sup>279</sup> but studies also “indicate that cohabitators desire significantly fewer children than married couples.”<sup>280</sup> Further, based on related research, the nature of unmarried pairs, even with children, is such that “[a]bout half” ultimately marry (thus, leading to treatment as such under Social Security), and of those who choose not to, only “about 10% last five years” or more.<sup>281</sup> Such data, whatever its underlying merits, would not exactly reflect a “modicum of efficiency.”

Assuming one accepts child-rearing as a basis for spousal benefits, there are two other types of parents that need be considered—singles and same-sex pairs. For singles, there is no doubt that their care and sacrifice for their children often border on the heroic, and yet the reality—for better or worse—is that unless they receive other aid, such parents must engage in paid em-

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276. See *Flemming*, 363 U.S. at 610 (describing Social Security’s “predications”).

277. 434 U.S. 47, 53 (1977).

278. See Wardle, *supra* note 267, at 1209 (“[T]he financial expectations of parties who cohabit differ markedly from persons who marry.”).

279. JANE LAWLER DYE, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: FERTILITY OF AMERICAN WOMEN: JUNE 2004, at 6 tbl.3 (2005) (estimating that 18.7% of married and approximately 50.3% of cohabiting couples are childless), available at <http://www.census.gov/prod/2005pubs/p20-555.pdf> (last visited Feb. 20, 2006).

280. Duncan, *supra* note 84, at 1013.

281. J. Thomas Oldham, *Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants or, Can’t Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1422 (2001).

ployment regardless.<sup>282</sup> To be sure, they do not receive further benefits at retirement other than by their own work (unless they have dependents), they do not receive survivor or divorce benefits unless married,<sup>283</sup> nor are their children helped pre-retirement.<sup>284</sup> And yet, assuming their child's other parent has worked, that other parent will likely also get benefits from that work (and, with no "dual entitlement" dilution).<sup>285</sup> Further, to the extent child or other support is available from that parent (or by public means), the situation, though unfortunate, is not made worse by Social Security.<sup>286</sup> With regard to same-sex couples, the typical relation (at least at present) is, again, marked by independence.<sup>287</sup> In addition, although methods for adding children to their relationships have increased, these still face uncertainty<sup>288</sup> and do not necessarily entail a breadwinner-stay-at-home pair, with its presumptive dependency dimension.<sup>289</sup> Perhaps this will be reassessed if such parenting gains in acceptance and a wider push is made for a marriage-like model.<sup>290</sup> Yet, no such child-based needs

282. Cf. Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where is the C in TANF?*, 61 MD. L. REV. 308, 310 (2002) (positing that, often to the detriment of single mothers (at least in childrens' formative years), "[w]elfare reform is viewed as the story of getting single women to become self-sufficient, whether by work, marriage, or child support, or through some combination of the three").

283. See Forman, *supra* note 265, at 159 (noting unmarried workers do not receive any benefits beyond their own earnings-based amount, unless they were once married or have dependents at retirement).

284. See Stephen D. Sugarman, *Financial Support of Children and the End of Welfare As We Know It*, 81 VA. L. REV. 2523, 2573 (1995) (proposing pre-retirement Social Security dependent benefits, presently unavailable before a parent's retirement, as a solution to pre-retirement financial woes of single parents).

285. See Liu, *supra* note 124, at 10–11 (summarizing benefits derived from one's own earnings).

286. See generally Sugarman, *supra* note 284, at 2523–37, 2561–64 (summarizing the various sources and politics of support for children of single parents, including child support, work, and public assistance).

287. See WAITE & GALLAGHER, *supra* note 5, at 39 (noting economic independence of non-married); Collett, *supra* note 7, at 386 (noting, on available data, the predictive "two career" nature of same-sex marriage).

288. See *Developments in the Law*, *supra* note 20, at 2020–24 (noting "sporadic and uncertain" approach to same-sex couples by the courts, including on parenting and adoption issues); see also Pamela Gatos, Note, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 204–17 (2001) (summarizing various legal and social challenges facing same-sex parenting efforts).

289. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 9 (1996) (acknowledging that "same-sex couples do not simply ape the mores of traditional marriage").

290. See Goodridge, 798 N.E.2d at 964 (rejecting alleged economic independence of same-sex couples as a rationale for denying them state law benefits related to children).

are being pressed in any systematic fashion at the present time (at least via Social Security).<sup>291</sup>

#### 4. Federal Income Taxes

In many ways, the foregoing Social Security analysis applies similarly to federal income tax treatment of marriage in employment. Like Social Security, such treatment is not directly related to a particular job, yet it requires considerations of income, expense, and dependency, all of which usually involve work.<sup>292</sup> And, in the end, the government's treatment of marriage via tax rates, deductions, and incentives in employment ends up looking very similar to Social Security. In fact, to the extent it is dissimilar, such tax policy even furthers the argument that marriage is not the source of employment rights that many claim. Whether it is the effect and status of the "marriage bonus" (or penalty),<sup>293</sup> the impact of fringe benefit treatment,<sup>294</sup> or the range of choice in the system,<sup>295</sup> federal taxation of work income<sup>296</sup> does not prefer marriage over any other status to a degree warranting inferences of rampant and baseless discrimination. In most cases, the actual distinction between married and unmarried is minimal, and in

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291. To be sure, Social Security is often raised by those alleging discrimination against unmarried same-sex couples, but typically the challenges are from an equal treatment, not a child-rearing, perspective. *See, e.g.,* ESKRIDGE, *supra* note 289, at 66–70 (listing Social Security with potentially discriminatory benefits, but from a financial or social insurance, not a parenting, perspective); Chambers, *supra* note 82, at 474–76. *But see* Eleanor Michael, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve The "Best Interests of the Same-Sex Family,"* 36 CONN. L. REV. 1439, 1465 (2004) (casting denial of spousal Social Security to same-sex parents in terms of family financial health).

292. According to the Internal Revenue Service, salaries and wages accounted for approximately seventy-six percent of individual income amounts in 2003. *See* INTERNAL REVENUE SERVICE, INDIVIDUAL INCOME TAX RETURNS, PRELIMINARY DATA: SELECTED INCOME AND TAX ITEMS, TAX YEARS 2002 AND 2003, <http://www.irs.gov/pub/irs-soi/03in01fg.xls> (last visited Feb. 20, 2006). Pensions or other retirement accounts (which account for 7.5% of 2003 income) should also be included, at least derivatively, in employment-based income for tax purposes. *See id.* (listing income bases).

293. *See, e.g.,* Mary Ann Milbourn, *Setting the Stage: If 2004's Tax Breaks Look Familiar, They Should*, ORANGE COUNTY REG., Feb. 27, 2005 (describing status of "marriage penalty" for 2004).

294. *See, e.g.,* Cain, *supra* note 6, at 471–74 (describing taxation of fringe benefits and marital status).

295. *See, e.g.,* Berall, *supra* note 248, at 395–401 (summarizing alternatives for unmarried couples for federal taxation of employment purposes).

296. Note that this discussion on employment taxation does not address the other non-employment provisions of the tax code that address marriage, such as gift and estate taxes. *See* John A. Hartog, *Federal Estate and Gift Taxation*, SK070 ALI-ABA 81, 86 (2004) (summarizing gift and estate tax rules for married couples).

some cases, the married can even be said to be discriminated *against*. Once again, just as in Social Security, there is little question that “traditional” couples can reap more benefits than others, but, as discussed below, such benefits have more to do with expectations and need than any categorical endorsement of respective relationship forms.

The tax system “treats a married couple as a single economic unit [wherein] [s]pouses report their combined income on a joint return, and calculate their tax liability based on that combined income.”<sup>297</sup> This “income” is then subject to a tax structure that, at least as it has developed under the current progressive rate approach (i.e., where higher income is taxed at higher rates),<sup>298</sup> can be supported by a theory that “a [married] couple acts as an economic unit by pooling its resources, and should be taxed accordingly.”<sup>299</sup> By taking a resource-based approach, the system, intentionally or not,<sup>300</sup> does not reflect all marriages, but only those fitting the “economic unit” mold. Thus, there are “marriage bonuses in some situations and marriage penalties in others,”<sup>301</sup> with the difference based primarily not on marriage itself, but on the choices of individuals and couples. In the end, it is more these choices than marital status as such that create a difference, if any, between married and unmarried (like Social Security). To be sure, such choices can be influenced by the tax system, but this influence should not be overemphasized.

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297. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 339 (1994). Couples can file as “[m]arried individuals filing separate returns.” 26 U.S.C. § 1(d) (2000). Yet, the advantages concern relative liability (i.e., individual, not joint) for owed amounts and the limited ability to take advantage of otherwise unavailable deductions (e.g., the 7.5% cap on deductible medical expenses), not a return to “unmarried” filing status. See *id.* § 1(c) (showing unmarried filing status provisions); see also Ann F. Thomas, *Marriage and the Income Tax Yesterday, Today, and Tomorrow: A Primer and Legislative Scorecard*, 16 N.Y.L. SCH. J. HUM. RTS. 1, 12–13 (1999) (discussing the same filing issues). Thus, only about two percent file as such. See INTERNAL REVENUE SERVICE, IRS PUBLICATION 1304, at tbl.3.4 (2004) (indicating that for 2001, about forty-five million returns were filed on joint filing status and two million were filed on married filing separately), available at <http://www.irs.gov/pub/irs-soi/01in34mt.xls> (last visited Feb. 20, 2006).

298. See Zelenak, *supra* note 297, at 339 (noting that income tax “[p]rogressivity means that, as more income is added to a taxable unit, increasingly higher tax rates apply to the added amounts of income”).

299. *Id.* at 343.

300. See *id.* at 344–48 (positing that the “joint return” was not designed to support marriage per se, but simply to allow “income splitting” in all states, not just in community property ones, as was held in *Lucas v. Earl*, 281 U.S. 111 (1930) (discussing separate property) and *Poe v. Seaborn*, 282 U.S. 101 (1930) (discussing community property)).

301. *Id.* at 340.

## i. Tax Rates

With regard to rates, in treating a married couple as a single “economic unit,” as opposed to a pair of singles, the system does not simply double rate ranges.<sup>302</sup> Rather, it largely falls short of such doubling in implicit or explicit recognition of income/expense sharing.<sup>303</sup> Although this can yield a “bonus” for some couples, particularly those with a single wage earner (for which any expansion helps) or a pair with rather disparate wages, most modern dual-income couples actually face a “penalty” due to the failure to expand rates enough. Granted, some doubling has been temporarily adopted for low incomes,<sup>304</sup> yet for middle to higher ones, the brackets still reflect a “unit” model by not doubling.<sup>305</sup> For example, in 2005 the twenty-five percent bracket for singles is \$29,700–\$71,950, but for joint filers it only goes to \$119,950 (not \$143,900), with higher rates thereafter with similarly uneven ranges.<sup>306</sup> Again, any expansion, even if not doubled, does help single-earner (or disparate earner) couples in that the income is split to some degree. For example, in 2005 a single-earner with \$80,000 would pay a higher rate (twenty-eight percent) on amounts over \$71,950, whereas if the person married, that income would be taxed at a lower rate (twenty-five percent).<sup>307</sup> Yet, such a “bonus” has become rarer for married couples, most of

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302. *See id.* at 340 (noting that the current individual income tax structure imposes “brackets [that] are wider than the brackets for single taxpayers, but less than twice as wide”).

303. *See id.* at 344 (acknowledging that the “standard justification for joint returns is that the typical married couple pools its income,” while disputing the historical basis and present reality as explicit support).

304. The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”), Pub. L. No. 107-16, 115 Stat. 38 (2001) and Working Families Tax Relief Act of 2004 (“WFTRA”), Pub. L. No. 108-311, 118 Stat. 1166 (2004) relieved some of the “marriage penalty” by doubling lower brackets (ten percent and fifteen percent) and standard deductions. *See id.* Ellen D. Cook & Nathan Oestreich, *WFTRA’s Individual Income Tax Provisions*, 36 TAX ADVISER 98, 102–03 (2005) (describing relief). Yet, such relief expires in 2011. *See id.* at 98 (discussing expiration).

305. Cook & Oestreich, *supra* note 304 at 102–03 (showing relevant relief limited to fifteen percent bracket (and below) and the standard deduction).

306. *See Rev. Proc.* 2004-71, 2004-50 I.R.B. 970, 971–72 (listing 2005 tax brackets).

307. *See id.* Rate expansion also helps those who file as “qualifying widow(er) with dependent child” (i.e., “surviving spouse”) for they have the same rates as joint filers. *See id.* at 971. Yet, such filers are very rare (.06%) and are less likely to have much wage-based income. *See* INTERNAL REVENUE SERVICE, IRS PUBLICATION 1304, at tbl.1.3 (2004) (listing the number of 2001 tax returns by filing status), available at <http://www.irs.gov/pub/irs-soi/01in13ms.xls> (last visited Feb. 20, 2006).

whom, like their unmarried counterparts, are dual-income and increasingly have fairly similar earnings.<sup>308</sup>

There is no doubt that to the extent temporary “marriage penalty” relief has been adopted at lower rates (fifteen percent and below),<sup>309</sup> similarly situated dual-income pairs, especially lower income pairs, are treated the same regardless of marriage.<sup>310</sup> Of course, such relief still retains, and perhaps enlarges, a “bonus” in that, as noted above, expanded rates always help single-earner couples,<sup>311</sup> as well as ones with disparate wages.<sup>312</sup> Yet, just as in Social Security, this would generally only apply to those who fit a more traditional model by way of economic choice, not marital status. Indeed, based on available data, it appears that, just as in Social Security, such “bonuses” would elude most couples that are not, or cannot be, married based on their largely dual-income or otherwise independent nature,<sup>313</sup> just like they would for most similarly situated married couples.<sup>314</sup>

Joint filing can yield differences for marriage, but not always in the same way. Thus, there are “bonuses” for sole-earner pairs, while other couples, especially those who deem it best for each partner to work, often see penalties, despite recent tax changes.<sup>315</sup> To be sure, “it is impossible for a progressive-rate income tax to neither encourage nor discourage marriage, meaning that people

308. See Collett, *supra* note 7, at 386 (describing same-sex pairs as “two career[]”); Crain, *supra* note 68, at 1877 n.3 (citing statistics showing most married couples are dual-earning); Estin, *supra* note 72, at 1388 (noting “cohabitants are more likely than married couples to have relatively comparable earnings”).

309. See Jan M. Rosen, *Your Taxes; That “Marriage Penalty” Defies an Easy Solution*, N.Y. TIMES, Feb. 16, 2003, Sec. 3 (summarizing impact of the “marriage penalty” and its partial relief in 2001).

310. See STAFF OF JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 25–28 (Comm. Print 2003) (positing equitable effect of marriage penalty relief in EGTRRA). Indeed, couples, married or not, who pay little or no tax would naturally already be unaffected by joint filing.

311. See Cain, *supra* note 6, at 470 (noting that a “bonus” occurs whenever any degree of splitting exists).

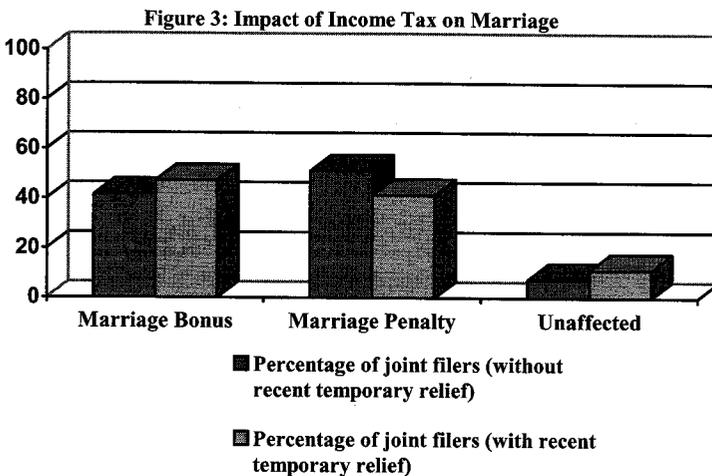
312. The Senate Finance Committee estimated in 2000 that couples with income disparities of 70/30 or more receive a “marriage bonus.” See S. Rep. No. 106-329, at 2 (2000).

313. See WAITE & GALLAGHER, *supra* note 5, at 39 (noting that “[c]ohabitators, far more than spouses, are committed to economic independence” such that “income inequalities [often] destabilize the relationship”).

314. See Leslie A. Whittington & James Alm, *Tax Reductions, Tax Changes, and the Marriage Penalty*, 54 NAT’L TAX J. 455, 457 (2001) (estimating only one-third to one-half of married couples see a “bonus”).

315. DOUGLAS A. KAHN & JEFFREY H. KAHN, *FEDERAL INCOME TAX 574–75, 578* (5th ed. 2005) (noting the circumstantial nature of the “marriage penalty,” and not just in the wage arena (e.g., capital loss limits)).

who marry should pay neither more nor less than they paid on the same income before they married, and also to tax all married couples who have the same total income equally.<sup>316</sup> And, of course, in the end, most of this is caused by a free choice (despite the taxes) in favor of “coequal breadwinn[ing]” and away from a traditional model.<sup>317</sup> Yet, the fact remains that about half of all married couples pay more (or at least the same) tax filing jointly than if they filed singly,<sup>318</sup> and one would expect a similar, if not higher, disparate impact on same-sex (or unmarried) pairs if such filing was required.<sup>319</sup> Relevant estimates<sup>320</sup> are illustrated as follows:



316. See MICHAEL J. GRAETZ, *THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE* 33 (1999).

317. Crain, *supra* note 68, at 1877; see also Zelenak, *supra* note 297, at 365 (arguing that “widespread effects of the tax laws on decisions to marry are unproven”).

318. See GRAETZ, *supra* note 316, at 29 (estimating “about two-thirds”); Whittington & Alm, *supra* note 314, at 457 (estimating “penalty” affects forty-two percent to sixty percent of married couples). It should be noted that recent “penalty” relief, see *supra* note 304, is helpful, but it only eliminates the penalty for about nineteen percent of affected couples and, regardless, expires in 2011. See Donald Kiefer et al., *The Economic Growth and Tax Relief Act of 2001: Overview and Assessment of Effects on Taxpayers*, 55 NAT’L TAX J. 89, 95–96 (2002).

319. See, e.g., James Alm et al., *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage*, 53 NAT’L TAX J. 201, 212 (2000) (positing tax penalty as “most likely” on same-sex couples).

320. This rough chart balances Whittington & Alm’s bonus figure of one-third to one-half and penalty figure of “42 to 60 percent,” see *supra* notes 314, 318, with Kiefer’s relief adjustments, see *supra* note 318.

Indeed, rather than marriage bias, it is often the reverse. And regardless, the larger factor is economic, not marital. One might argue that, despite this reality, at least those eligible to marry have a choice. Yet, again, the realities that typically mark the unmarried point to the fact that such a choice would not mean much beyond its symbolism.<sup>321</sup>

As an aside, one should consider that, to the extent there are any differences between married and unmarried, there is a chance the latter could bridge the gap by filing as "head of household," which essentially "splits the difference" between single and joint rates.<sup>322</sup> The problem, however, is that such status is usually limited to unmarried singles and relatives (e.g., children, parents), not unrelated partners, or to a taxpayer living with a "dependent" (i.e., one who receives "over half of [his] support . . . from the taxpayer").<sup>323</sup> It is conceivable that an unrelated partner could qualify as a "dependent" (and, possibly, still retain the benefit of single rates for his own wages).<sup>324</sup> However, not only does the "dependent" definition state further that the relationship must not violate local law, which might doom such filing in those states where certain marriage alternatives are not allowed<sup>325</sup> (of course, the U.S. Supreme Court's non-discrimination logic in *Lawrence v. Texas*<sup>326</sup> might pose a challenge), but more immediately, the studies of such couples suggest that the number of those who would both fit the support threshold *and* refuse to take

321. See Jeannette Anderson Winn & Marshall Winn, *Till Death Do We Split: Married Couples and Single Persons Under the Individual Income Tax*, 34 S.C. L. REV. 829, 846 n.71 (1983) ("Indeed, if most unmarried couples have dual incomes, joint treatment [i.e., as a married couple] would not often be preferred.").

322. See KAHN & KAHN, *supra* note 315, at 579–80 (describing generally "head of household" status as one where taxpayer "pays taxes at rates that are lower than those imposed on single taxpayers but higher than those imposed on married taxpayers filing a joint return"). For example, in 2005, the twenty-five percent bracket for "head of household" filers is from \$39,800 to \$102,800 (rather than \$29,700–\$71,950 for singles; \$59,400–\$119,950 for married). See Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 971-72 (listing rates).

323. 26 U.S.C. § 152(a) (2000). As an aside, and at a minimum, children can qualify as dependents. See *id.*

324. See Berall, *supra* note 248, at 408 (on the possibility of "domestic partner . . . [being] a dependent").

325. See *id.* at 400 (noting that "both unmarried cohabitants and same sex married couples appear ineligible for [dependency] status" in at least the thirty-nine states that "have enacted Defense of Marriage Acts").

326. 539 U.S. 558 (2003). For discussion of the issue pre-*Lawrence*, see Cain, *supra* note 6, at 472 n.30.

advantage of the income split of single filing would be very small.<sup>327</sup>

## ii. Deductions, Exemptions, Exclusions, and Credits

Turning to other parts of the system relating to marriage in employment—personal deductions/exemptions, benefit exclusions, and income credits—we see, again, a focus on dependence, not marriage. The personal deduction/exemption concerns an ability to both take a higher standard deduction (if one does not itemize) and exempt a certain amount of income due to joint filing status and dependents.<sup>328</sup> Benefit exclusions exclude payments by employers for health care and other benefits for the taxpayer, spouse, or dependents,<sup>329</sup> while earned income credits offer poverty protection.<sup>330</sup> In general, “no dependency exemption deduction is allowed a taxpayer for his cohabitant, nor will there be any exclusion from income if the cohabitant’s employer pays for health insurance [or other relevant benefits].”<sup>331</sup> Yet, even more than in rates, the personal deduction/exemption really only inures to the benefit of those who fit the single breadwinner model<sup>332</sup>—a rarity for most such couples.<sup>333</sup> Similarly, couples that

327. Indeed, cohabitor “head of household” would not only defy data suggesting they are “3.6 times more likely [than the married] to keep money separate,” Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples’ Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 534 (2003), but the rate expansion, which is about fifty percent, typically only helps those who fit a single-earner model, see Knauer, *supra* note 32, at 134 (noting high income dual-earners benefit little), something which is rare for such couples, see Estin, *supra* note 72, at 1388 (on dual-income cohabitators).

328. See KAHN & KAHN, *supra* note 315, at 233–41 (describing standard, dependent exemption deductions).

329. See *id.* at 154 (describing non-taxable medical insurance payments).

330. See *id.* at 556 (describing generally the earned income tax credit).

331. Berall, *supra* note 248, at 399. Again, at a minimum, children are dependents. See *supra* note 323.

332. In general, there is no difference with regard to the personal exemption in that it is available on an equal basis to all taxpayers/dependents (\$3200 each in 2005, see Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 974). There is also an exemption “phaseout” on thresholds less than double for the married than the unmarried (starting at \$218,950 for married in 2005; \$145,950 for unmarried, see *id.*), which would typically only benefit one-earner couples (the threshold only extends thirty-three percent at marriage). See Angela V. Langlotz, *Tying the Knot: The Tax Consequences of Marriage*, 54 TAX LAW. 329, 337 (2001) (describing the phaseout). Further, given that the standard deduction for filing jointly is now double the singles’, see CCH TAX BRIEFING: WORKING FAMILIES TAX RELIEF ACT OF 2004 ¶ 110 (2004), any two-person filing is the same.

333. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law*

benefit most from benefit exclusions are those with a non-working partner<sup>334</sup>—also a rarity.<sup>335</sup> Finally, although the income credit can be higher for those filing jointly than as singles, it is much less than double<sup>336</sup> and, therefore, as long as each partner has any income at all, the unmarried are actually better off.<sup>337</sup>

The first aspect of the personal deduction/exemption is the standard deduction. This deduction, offered to those who do not itemize tax-deductible expenses,<sup>338</sup> allows a taxpayer a set amount (in 2005, \$10,000 for joint filers and surviving spouses; \$5000 for non-head of household unmarried filers)<sup>339</sup> to be deducted from gross income based on simplified expectations of necessary expenses.<sup>340</sup> As just indicated, though, the doubling of this deduction yields no difference between the married and unmarried.<sup>341</sup> The second aspect—the personal exemption—allows

*of Cohabitant Obligation*, 52 UCLA L. REV. 815, 839–43 (2005) (summarizing economic independence of cohabitators).

334. See, e.g., Collett, *supra* note 7, at 388–89 (noting “de minimis” benefit to insure same-sex couples).

335. See LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY 57 (2002) (indicating non-working rates of 8.4% for never-married cohabitators; 11.1% of once-married).

336. See Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 973 (describing “phaseout” ranges of the earned income credit with no children as \$6530 to \$11,750 for singles and \$8530 to \$13,750 for married couples).

337. See Langlotz, *supra* note 332, at 341 (noting disparate impact of income credit “phaseout” on married).

338. Although the decision to itemize is connected with amounts otherwise available via standard deduction, itemized deductions are beyond the scope of this article given their greater link to post-income expenditures than standard limitations on income. To the extent marriage is a factor once a decision to itemize has been made, it really only arises when deductions are so great that the “alternative minimum tax” becomes reality—a reality which does, incidentally, disproportionately harm married couples in comparison to unmarried. See *id.* at 348–49 (noting disproportionate exemption and “phase-out” amounts).

339. See Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 973 (listing standard deductions).

340. See Robert S. McIntyre & Michael J. McIntyre, *Fixing the “Marriage Penalty” Problem*, 33 VAL. U. L. REV. 907, 916–17 (1999) (describing simplification and poverty avoidance purposes of standard deduction).

341. It should be noted that the deduction for “head of household” is \$7300 in 2005, see Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 973, but, as posited above, it is unlikely that unmarried pairs could so file (even if allowed) given that they typically would not meet the support threshold or would want to be given the benefit of single filing. See *supra* note 327 and accompanying text. Yet, even if they were allowed and inclined, the likely result would not be equality with the married, but, in fact, they would be better off since the married can only take a \$10,000 deduction, see Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 973, whereas “heads of household” have that deduction (\$7300) and, possibly, a dependent’s as well (up to \$5000). See INTERNAL REVENUE SERVICE, IRS PUBLICATION 501 (2004).

amounts (in 2005, \$3200 per person)<sup>342</sup> without regard to marriage in further recognition of expectant need.<sup>343</sup> This applies to single, married, or “head of household” filers.<sup>344</sup> Thus, again, no inequality exists.<sup>345</sup> As an aside, it should be noted that there is a “phaseout” of personal exemptions based on overall income, but the level for the married is less than twice that for the unmarried (thirty-three percent).<sup>346</sup> Therefore, if anything, married couples (as compared to unmarried ones) are more likely harmed, not helped, by this disparity.<sup>347</sup> Further, in comparison to unmarried singles, only the traditional single-earner (or disparately earning) married couple is really helped (if at all), since the “phaseout” difference is lifted by such a small amount.

A common claim of disparate treatment between married and unmarried couples in the income tax realm arises in the area of tax-exempt benefits, primarily health care. As noted above, unlike for the married, there is “generally” no “exclusion from income if the cohabitant’s employer pays for health insurance.”<sup>348</sup> The same charge can be leveled at tax treatment of other benefits, including health savings accounts,<sup>349</sup> dependent care,<sup>350</sup> “de minimis” fringes,<sup>351</sup> and discounts, mandatory lodging, meals, or “no-additional cost service[s],”<sup>352</sup> although health care is the big

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342. See Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 974 (providing personal exemptions for 2005).

343. See McIntyre & McIntyre, *supra* note 340, at 917 (discussing the personal exemption).

344. See INTERNAL REVENUE SERVICE, *supra* note 341, at 9 (describing one personal exemption per individual).

345. See Langlotz, *supra* note 332, at 337 (noting similar treatment of married and unmarried for exemption).

346. See Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 974 (noting 2005 phaseout at \$218,950 married, \$145,950 single).

347. See Langlotz, *supra* note 332, at 337 (noting “marriage penalty” in non-doubled exemption phase-out).

348. Berall, *supra* note 248, at 399; see also INTERNAL REVENUE SERVICE, IRS PUBLICATION 15-B, at 5 (2005) (excluding certain COBRA premiums); Alden J. Bianchi, *HIPAA, COBRA, and Other Welfare Benefit Developments: Valuing and Taxing Employment-Based Medical Benefits Provided to Domestic Partners and Same-Sex Spouses*, SK064 ALI-ABA 817, 823–24 (2005) (describing income exclusion treatment).

349. See Bianchi, *supra* note 348, at 833 (noting “disparate tax treatment” of health flexible savings account).

350. See Langlotz, *supra* note 332, at 342–43 (describing excluded “dependent care assistance” provided by employers and credits for “out-of-pocket” “dependent care services necessary for gainful employment”).

351. See INTERNAL REVENUE SERVICE, *supra* note 348, at 6 (on de minimis “fringe” benefits).

352. See Cain, *supra* note 6, at 471–72 (discussing “no additional-cost service[s]” and

target.<sup>353</sup> Generally, “[e]xcept for the rare case in which the . . . life partner of the employee qualifies as a dependent”<sup>354</sup> (defined above in the “head of household” discussion), the tax-free treatment of such benefits for married pairs, but not unmarried ones, is a disparate benefit. And yet, on closer examination, the actual benefit may not be quite as valuable to the respective couples as one might think.

Taking the smaller items first, the results are mixed. De minimis benefits include things like picnics, low-value gifts, occasional entertainment, and minor personal use of copiers, and are of “so little value [and regularity] . . . that accounting for [them] would be unreasonable or administratively impracticable.”<sup>355</sup> Yet, such items are excluded not only for spouses, but for “any recipient,”<sup>356</sup> and thus there is no disparate treatment. Discounts, waivers, working condition fringes, or no-additional cost services, if given at all, for spouses generally extend only to minor employee discounts (usually about twenty percent or less),<sup>357</sup> minimal use (at least by spouses) of college tuition reductions for employees of colleges or universities,<sup>358</sup> rather rare (or at least non-duplicative) meals or lodging,<sup>359</sup> or very specific items like travel for airline workers<sup>360</sup> or other “excess capacity services.”<sup>361</sup> With the argu-

“qualified employee discount[s]”).

353. See *id.* at 472 (noting importance of health insurance to “most working Americans”).

354. *Id.*

355. INTERNAL REVENUE SERVICE, *supra* note 348, at 6.

356. *Id.*; see also *id.* at 11–12 (describing similar tax exclusion of “de minimis meals”).

357. See *id.* at 8 (describing “employee discounts”).

358. See INTERNAL REVENUE SERVICE, IRS PUBLICATION 970, at 8 (2004) (discussing “qualified tuition reduction”), available at <http://www.irs.gov/pub/irs-pdf/p970.pdf> (last visited Feb. 22, 2006). A “qualified tuition reduction” is excluded from income, see 26 U.S.C. § 117 (d)(1)–(2) (2000), for employees, spouses, and dependents, “is available only to a limited group of taxpayers,” see Robert J. Rosepink, *No Taxpayer Left Behind: Taxwise Techniques for Funding Education*, SK069 ALI-ABA 1295, 1383 (2005), and is typically designed for children, and not spouses, see generally John Nevin Kennedy, *The Income Tax Status of University Employees’ Tuition Assistance Programs*, 96 DICK. L. REV. 281 (1992).

359. See 26 U.S.C. § 119 (2000) (excluding on-premises lodging and meals for employees and spouses). This author could find no reported cases on the taxation of lodging or meals for unmarried partners, apart from the general assumption that they would be taxed. See Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1599–1602 (1996) (discussing “meals and lodging”). Therefore, it would appear that such benefits are either not largely provided to this population or any such offering of facilities or meals would be inconsequential.

360. See Cain, *supra* note 6, at 471–72 (describing “tax-free airline travel” for spouses).

361. INTERNAL REVENUE SERVICE, *supra* note 348, at 13–14 (describing travel, hotel,

able exception of meals or lodging,<sup>362</sup> the married (as well as widow(er)s) are treated differently for these benefits, some of which can be quite helpful in individual cases, particularly for widow(er)s. And yet, they are hardly the stuff of which civil rights battles are made. Finally, dependent care, usually child-care, is also excluded up to a certain cap (\$5000 in 2005).<sup>363</sup> Far from being a benefit, however, this cap is imposed regardless of marriage, resulting in a potential penalty to joint filers.<sup>364</sup>

Turning to the “big ticket item” of health care and related benefits, it would first seem that tax-free coverage if offered for a spouse, but not unmarried partner, is of great benefit, particularly by comparison.<sup>365</sup> Indeed, for modern workers, such coverage constitutes about seven percent of compensation,<sup>366</sup> and there is no doubt it is encouraged by its tax status, in that the employer can grant and, presumably receives in return, the full dollar value, rather than having it, like wages, taxed on receipt,<sup>367</sup> and that otherwise uninsured or minimally insured couples can be helped greatly.<sup>368</sup> Once again, though, the practical reality, particularly in comparison to the unmarried, is that although it can be a great benefit, tax-exempt health care is not as significant as some might assume.

First, only sixty-three percent of employers offer coverage (individual or family) at all.<sup>369</sup> Moreover, for married couples, “[i]f

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and phone discounts).

362. Despite the possibility that cohabitators may not benefit from the spousal provisions for meals or lodging, *see supra* note 359, it is unclear that Congress's 1978 amendment of 26 U.S.C. § 119(a) to include spouses was designed to be an exclusionary, rather than a clarifying, measure. *See generally* H.R. REP. NO. 95-1232 (1978).

363. *See* INTERNAL REVENUE SERVICE, *supra* note 348, at 7 (discussing “dependent care assistance”).

364. *See* Langlotz, *supra* note 332, at 342 (describing marriage penalty via dependent care exclusion).

365. *See* Knauer, *supra* note 32, at 169–70 (describing health care as the “largest single item” for the married). This discussion includes payments for COBRA, *see* INTERNAL REVENUE SERVICE, *supra* note 348, at 5 (describing exclusion for COBRA premiums), and health savings accounts, *see* Bianchi, *supra* note 348, at 833 (discussing health accounts).

366. *See* BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., NATIONAL COMPENSATION SURVEY: EMPLOYER COSTS FOR EMPLOYEE COMPENSATION—DECEMBER 2004, tbls.2, 5 (2005) (showing average cost for public employers of 7.3% of compensation for health care; 6.6% for private firms), available at <http://www.bls.gov/ncs/ect/home.htm> (last visited Feb. 20, 2006).

367. *See* Pettit, *supra* note 125, at 784–85 (discussing financial incentives to employers to provide health care coverage in lieu of wage compensation).

368. *See* Collett, *supra* note 7, at 389 (noting coverage of “previously uninsured partner” is a great benefit).

369. *See* KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS: 2004 ANNUAL SURVEY

both partners are employed by employers providing insurance benefits, it is rarely advantageous for one to enroll as a beneficiary under the plan sponsored by the [other's] employer," especially since this usually requires a fee.<sup>370</sup> Given these realities, and that most married couples are dual-income,<sup>371</sup> their use of these plans, at least as a couple, is far from universal.<sup>372</sup> In fact, for the unmarried, "[e]vidence from existing plans shows that enrollment rises very little, usually 1% or less and almost always less than 2% when . . . offered to same-sex and opposite-sex partners."<sup>373</sup> One reason is that, again, they—even more than the married—tend to be dual-earning, and thus each is likely already covered<sup>374</sup>—and would likely prefer it that way.<sup>375</sup> Although taxes may play a role,<sup>376</sup> it would seem to be economically irrational for an uncovered person to prefer to buy insurance at full price on the open market rather than bear the (admittedly disparate) tax on another's plan.<sup>377</sup> Further, even if partner coverage were avail-

5-6 (2004) (summarizing survey data indicating sixty-three percent of employers offer health coverage), available at <http://www.kff.org/insurance/7148/upload/2004-Employer-Health-Benefits-Survey-Full-Report.pdf> (last visited Feb. 20, 2006).

370. Collett, *supra* note 7, at 388-89. As an aside, the rate for covered employees who decline coverage is eighteen percent. See KAISER FAMILY FOUND., *supra* note 369, at 6 (noting eighty-two percent enrollment).

371. See BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., CURRENT POPULATION SURVEY: EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2004 (2005) (estimating fifty-one percent of married as dual-income), available at <http://www.bls.gov/lnewsrelease/pdf/famee.pdf> (last visited Feb. 22, 2006); see also Crain, *supra* note 68, at 1877 n.3 (citing other estimates as high as sixty-one percent).

372. Although an exact figure is difficult, the data that exists suggests seventy-two percent of all married couples have employer health care, see KAISER COMM'N ON MEDICAID AND THE UNINSURED, HEALTH INSURANCE COVERAGE IN AMERICA tbl.1 (2004) (listing coverage), available at <http://www.kff.org/uninsured/upload/Health-Insurance-Coverage-in-America-2003-Data-Update-Report.pdf> (last visited Feb. 22, 2006), and, thus, at a minimum, those relying solely on coverage through one spouse would be less than seventy-two percent given that this figure necessarily includes dual-income marriages, see Crain, *supra* note 68, at 1877 n.3 (discussing dual incomes), many of whom would have access to two plans and, thus, would not necessarily access benefits by marriage.

373. M.V. Lee Badgett, *Calculating Costs with Credibility: Health Care Benefits for Domestic Partners*, 5 ANGLES 1 (2000); see also Collett, *supra* note 7, at 388-89.

374. See *id.* at 2 (citing dual coverage, stigma, and taxes as possible reasons for low numbers electing partner coverage); Grant Arthur Gochin & Brian H. Kleiner, *Expanding the Family Definition: Health Care for Domestic Partners*, 18 EQUAL OPPORTUNITIES INT'L 111, 112 (1999) ("Most homosexual relationships are a two adult working family . . . most homosexuals have health insurance through their own employer.").

375. See Garrison, *supra* note 333, at 843 (observing that "cohabitators, striving to be independent . . . avoid the interdependence that pooling [finances] brings" (footnote omitted)).

376. See Badgett, *supra* note 373, at 2 (citing tax differential in health care coverage for unmarried pairs).

377. See Hayes, *supra* note 359, at 1600 n.21 ("[T]he tax costs [of unmarried coverage]

able and it cost less than coverage on the open market or one's own plan (which is doubtful)<sup>378</sup> it would still be understandable that, given their typically independent, dual-earning, often shorter-termed, and even uncertain nature,<sup>379</sup> most such couples would be unlikely to elect joint coverage.

As noted above, the last federal tax treatment of employment is the earned income tax credit.<sup>380</sup> This credit, which is offered to those with incomes below certain amounts, is meant "to provide relief to low income families who pay little or no income tax, and . . . to provide an incentive for low income people to work rather than to receive federal assistance."<sup>381</sup> The "designated amount" ranges are increased for joint filers, but less than twice those for singles,<sup>382</sup> and thus as long as each partner is eligible for the

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may be significantly cheaper than purchasing the same service on the open market . . ."). Further, this tax, which is on the "fair market value," would likely be on the COBRA rate (i.e., 102% of the "applicable premium" on existing coverage), see 29 U.S.C. § 1164 (2000), not the open market. See 26 U.S.C. § 4980B(f)(4)(A) (2000) (COBRA rate is "cost"); Bianchi, *supra* note 348, at 832 (noting "consensus" on COBRA). And, "[e]mployer-sponsored coverage is generally less costly than similar coverage purchased in the individual market," in that "for large firms [it] is about 40 percent lower than that for individuals." Sherry A. Glied & Phyllis C. Borzi, *The Current State of Employment-Based Health Coverage*, 32 J.L. MED. & ETHICS 404, 407 (2004).

378. See BUREAU OF LAB. STAT., U.S. DEPT OF LAB., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2002-2003, at 30-31 tbls.22-23 (2005) (showing average single premium of \$201.89, with employee contribution of \$60.24, while for families the numbers were \$482.15 and \$228.98, respectively, and, thus, unmarried pairs, at least without children, are likely better off with dual single, than family coverage), available at <http://www.bls.gov/ncs/ebs/sp/ebbl0020.pdf> (last visited Feb. 22, 2006). As an aside, such benefits are, in fact, tax-deductible to the employer. See Hayes, *supra* note 359, at 1600 n.21 (noting deductibility of domestic partner benefits).

379. See M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 83-84 (2001) (citing "studies of gay couples show[ing] high rates of labor force participation for both partners in a couple as well as a strong norm of equal participation in the paid labor force," federal tax treatment, and "the closet" as factors leading to few domestic partner enrollees in partner health care, even when offered); Julie Brines & Kara Joyner, *The Ties that Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 350 (1999) (asserting that "survival of [cohabitor] arrangements appears to depend not on principles of specialization but on equal power-sharing"); Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 33 (2000) (noting short-term nature of cohabiting couples, "with about half lasting a year or less, only one-sixth lasting three years, and about a tenth lasting five years or longer").

380. See 26 U.S.C. § 32 (2000) (codifying the earned income tax credit).

381. *Rucker v. Sec'y of Treas. of United States*, 751 F.2d 351, 356 (10th Cir. 1984).

382. See Rev. Proc. 2004-71, 2004-50 I.R.B. 970, 973 (describing "phaseout" ranges of the earned income credit with no children as \$6,530 to \$11,750 for singles and \$8,530 to \$13,750 for married couples filing jointly), available at <http://www.irs.gov/pub/irs-irbs/irb04-50.pdf> (last visited Feb. 22, 2006).

credit, unmarried couples can actually receive more than married ones under this provision.<sup>383</sup>

## 5. Civil Servant Benefits

The final federal treatment of marriage at work concerns those who work for the government itself. Perhaps this fits better in Part IV, which discusses voluntary rights and benefits offered by private employers, in that, for the most part, the government acts like any other employer. And yet, when noting its responsibilities and supposed interest in marriage as a “basic civil right[] of man,”<sup>384</sup> as well as the sheer size of its payroll, the government’s treatment of workers offers insight into what it might otherwise expect from employers voluntarily, if not by law. Civil servant benefits are “provided by the United States to those in federal service and their families,” including “current and retired federal officers and employees, members of the Armed Forces, elected officials, and judges.”<sup>385</sup> At present, the numbers of such workers are: 1.9 million general service,<sup>386</sup>—845,000 postal service,<sup>387</sup> and 2.5 million armed service,<sup>388</sup> or 3.5% of the total labor force.<sup>389</sup>

Although rights and benefits depend on one’s position in the federal government, those afforded to married workers that draw the most attention are health care, life insurance, retirement benefit rights, treatment of on-the-job injuries, FMLA-type leave, and certain moving costs.<sup>390</sup> For those in military service, other benefits like commissary privileges and assistance at separation

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383. See Langlotz, *supra* note 332, at 341 (noting the disparate impact of the earned income credit “phaseout”).

384. *Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

385. 1997 GAO REPORT, *supra* note 33, at 4.

386. See BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., CAREER GUIDE TO INDUSTRIES, 2004–05 EDITION 249 tbl.1 (2004) (estimating non-postal service government payroll of 1.871 million workers).

387. See BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., OCCUPATIONAL OUTLOOK HANDBOOK, 2004–05 EDITION 467 (2004) (estimating 845,000 postal service employees), available at <http://www.bls.gov/oco/ocos141.htm> (last visited Feb. 20, 2006).

388. See *id.* at 640 (estimating that at least 1.4 million active duty and 1.1 million reserve serve in the armed forces).

389. See Press Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., The Employment Situation: June 2005, 2 tbl.A (July 8, 2005) (on file with author) (indicating a total civilian workforce of 149.1 million, and, thus, with 2.5 million military (or 151.6 million total), 5.245 million workers would be about 3.5%), available at [http://bls.gov/news.release/archives/empisit\\_07082005.pdf](http://bls.gov/news.release/archives/empisit_07082005.pdf) (last visited Feb. 22, 2006)..

390. See 1997 GAO REPORT, *supra* note 33, at 5 (listing civil servant benefits).

from service also inure uniquely to the married.<sup>391</sup> Given the definition of "marriage" by the DOMA,<sup>392</sup> there is little doubt that benefits afforded to the married (as such) do not otherwise extend to unmarried or same-sex couples.<sup>393</sup> Yet, again, in reality, the rights and benefits may not be as great as one might assume.

As with most employers, the health benefits offered by the federal government are certainly a distinct help to single wage-earner or underinsured couples. At present, the government offers participation to singles or families of employees or retirees in plans from approved providers in their state,<sup>394</sup> and contributes up to "72% of the weighted average" cost for such coverage nationally.<sup>395</sup> "Family" includes a "spouse" (who also can continue coverage after an employee's death or divorce) and dependents.<sup>396</sup> Thus, if a spouse is either not covered or is otherwise unsatisfied with coverage by his or her own employer, marriage affords an alternative. Of course, the "if" in this proposition is rather important, especially when comparing married and unmarried pairs. Indeed, based on the choices and preferences of unmarried couples,<sup>397</sup> there is little reason to think that the small enrollment increase by such couples in private plans, if offered,<sup>398</sup> would be any different in public ones, thus in reality making any disparate effects similarly small.

With regard to pension, federal workers generally participate in the Civil Service Retirement System (the "CSRS") for those hired pre-1984 or the Federal Employees Retirement System (the "FERS") for those hired since 1984.<sup>399</sup> Although there is no mar-

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391. See *id.* (listing military benefits).

392. See 1 U.S.C. § 7 (2000) (defining marriage).

393. See MERIN, *supra* note 18, at 228–29 (describing effect of DOMA on civil service "benefit entitlements").

394. See 5 U.S.C. § 8905 (2000) (concerning election of civil servant health coverage).

395. 5 U.S.C.A. § 8906(b)(1) (West Supp. 2005) (setting the government's contribution percentage).

396. See 5 U.S.C. at 8901(5) (2000) (defining "member of family" for civil servant purposes).

397. See Garrison, *supra* note 333, at 843 (noting that cohabitators "striv[e] to be independent") (quoting PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 110 (1983)); Gochin & Kleiner, *supra* note 374, at 112 ("[M]ost homosexuals have health insurance through their own employer.").

398. See Badgett, *supra* note 373, at 1 (describing limited enrollment of same-sex couples, when offered).

399. See U.S. OFFICE OF PERSONNEL MGMT., *STATISTICAL ABSTRACTS FISCAL YEAR 2003: FEDERAL EMPLOYEE BENEFITS PROGRAM 2–3* (2004) (on retirement programs, includ-

riage-based benefit increase during a retiree's life, a widow or widower, but not an unmarried partner, can continue benefits after a retiree's death.<sup>400</sup> Like most private systems, however, such benefits come at a price. In this case, a survivor benefit is one-half the retiree's pension, but it costs a ten percent reduction of that pension while the retiree is alive.<sup>401</sup> Although the impact of this tradeoff depends on the couple, the benefit is designed to be paid by the reduction,<sup>402</sup> and thus the unmarried, on balance, suffer little harm overall (and have the ten percent to invest for one another's protection if they want). In addition to retiree benefits, both the CSRS and FERS provide a lump-sum (and annuity if ten years of service) to a widow(er) with no offset if a spouse dies when employed.<sup>403</sup> Undoubtedly, this is a benefit unique to married couples. Yet, it should be noted further that only about sixteen percent of all survivor annuitants presently receive benefits in this fashion.<sup>404</sup>

With regard to the rarer, more minor or ambiguous benefits that implicate marriage in federal work, the government also offers on-the-job injury (disability) coverage,<sup>405</sup> life insurance (employee or spouse), spousal sick leave, moving costs, and, most recently, long-term care insurance. On-the-job injury benefits contemplate spouses to an extent. If the employee sustains an injury at work and lives, he or she receives a monthly benefit according to a schedule based on injury severity and type<sup>406</sup> that is

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ing early, normal, and disability options).

400. See *id.* at 2, 4 (describing death benefits under CSRS and FERS, respectively).

401. See U.S. OFFICE OF PERSONNEL MGMT., Federal Employees Retirement System (An Overview of Your Benefits) (on "survivor benefits"), [http://www.opm.gov/fers\\_election/ri\\_90/f\\_bbp.htm#sb](http://www.opm.gov/fers_election/ri_90/f_bbp.htm#sb) (last visited Feb. 20, 2006); see also 5 U.S.C. § 8339(j) (2000).

402. See U.S. OFFICE OF PERSONNEL MGMT., *supra* note 401 (stating the reason for the reduction for "spouse survivor benefits"); see also *Lomman v. Office of Personnel Mgmt.*, No. 02-3356, 2003 WL 23415937, at \*3 (Fed. Cir. Jan. 10, 2003) (describing same reduction in retiree benefits to pay for spousal benefits).

403. See 5 U.S.C. § 8442(b)(1) (2000) (discussing the widower benefit). FERS also pays survivors of those who die pre-retirement amounts related to pre-death contributions, but anyone (not just spouses) can be designated, see *id.* § 8424(d), just like all other amounts owed at death. See, e.g., *id.* § 5582(a) (explaining the procedure for final payments).

404. See U.S. OFFICE OF PERSONNEL MGMT., *supra* note 399, at 14 (indicating, in 2003, only 99,642 out of all 632,004 annuitants obtained benefit status due to the death of a working, not retired, spouse).

405. Note that non-job injuries may otherwise be covered by the disability retirement program, which follows the FERS retirement discussion in the previous paragraph. See 5 U.S.C. § 8451(a)(1)(B) (2000).

406. See *id.* §§ 8102, 8105-8107 (providing benefits under the Federal Employees' Compensation Act).

increased by 8.33% for a spouse, child, or dependent parent.<sup>407</sup> If the employee dies, a benefit is paid in order of precedence that runs generally from spouse to minor child to dependent parent.<sup>408</sup> This dependent increase and death benefit offer a distinct advantage to eligible spouses, although the increase at issue is given, and only once, if there is any dependent (not just a spouse),<sup>409</sup> and the average total number of federal workers who die in the line of duty per year is about 192,<sup>410</sup> or .007% of the non-military federal workforce.<sup>411</sup>

The rest of the federal benefits are a mixed (bordering on empty) bag in terms of marriage. For example, employee life insurance is offered to spouses, but only if another beneficiary is

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407. See *id.* § 8110(b) (explaining disability benefit augmentation based on dependents).

408. See *id.* § 8133 (death benefit). Also, if the employee is injured yet dies from other causes, any unpaid injury benefits are also afforded survivors in a spouse-child-parent order. See *id.* § 8109(a).

409. See *id.* § 8110(b) (describing benefit augmentation).

410. See Stephen M. Pegula, BUREAU OF LAB. STATS., U.S. DEP'T OF LABOR, *Fatal Occupational Injuries to Government Workers, 1992 to 2001* (noting 1923 federal worker deaths from 1992 to 2001 (including over 200 lost at Oklahoma City in 1995 and in New York and Washington, D.C. on September 11, 2001), available at <http://www.bls.gov/pub/cwc/sh20040223ar01p1.htm> (last visited Feb. 20, 2006)).

411. See *id.* (noting 1923 worker deaths); see also BUREAU OF LAB. STATS., *supra* notes 386 and 387 (indicating 2.745 million non-military workers). It should also be noted that in addition to its workers, the government also maintains a death benefit for all public safety officers. See 42 U.S.C. § 3796 (2000). Yet, it is available to a spouse or designated beneficiary. See 42 U.S.C. § 3796 (Supp. II 2002). There is also a spousal education benefit for those harmed on duty, although the numbers are small. See *id.*; Pegula, *supra* note 410, at tbl.2 (indicating 339 state and 1495 local "public order and safety" deaths in 1992–2001, including those killed on September 11, 2001).

The government also mandates "family" benefits to very small populations. For example, death or disability benefits are provided for miners under the Black Lung Benefits Act. 30 U.S.C. § 901 (2000). Unfortunately, very few qualify. See Gardiner Harris, *Dust, Deception & Death: Few Miners Pass Tough Test for Federal Benefits*, COURIER-J. (Louisville, Ky.), Apr. 25, 1998, available at [http://courier-journal.com/dust/frame\\_compensation.html](http://courier-journal.com/dust/frame_compensation.html) (last visited Feb. 20, 2006). Damages are available to railway employees under the Federal Employers Liability Act, 45 U.S.C. § 51 (2000), and to seamen under the Jones Act, 46 U.S.C. app. § 688(a) (2000), and Death on the High Seas Act, *id.* § 761(a). However, these statutes require negligence and the number of deaths, even if all were married, is small. See JACK B. HOOD ET AL., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 16–18 (3d ed. 1999); see also BUREAU OF LAB. STATS., U.S. DEP'T OF LABOR, 2003 CENSUS OF FATAL OCCUPATIONAL INJURIES, tbl.A-1 at 11 (2004) [hereinafter BLS CENSUS] (for example, only eighteen rail and twenty-four water deaths in 2003). Benefits are available for harbor workers, overseas contractors, and natural resource workers through the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 901 (2000). See also HOOD ET AL., *supra*, at 17–20 (describing industries affected by this Act). Again, the numbers are small. See, e.g., BLS CENSUS, *supra*, at 12 (citing seven "marine cargo handling" deaths in 2003).

not designated.<sup>412</sup> Optional spousal life insurance is offered, but only up to \$5000 and with the premiums paid by the employee.<sup>413</sup> Long-term care insurance is available to employees and spouses,<sup>414</sup> yet, even though they may benefit from the risk pool, employees are “responsible for 100 percent of the premiums.”<sup>415</sup> Family leave to care for a sick spouse is available as well, but just like the FMLA, it is unpaid, and thus unlikely to be taken very often for this purpose.<sup>416</sup> Finally, limited moving and relocation expenses are paid for employees and “immediate family,”<sup>417</sup> yet the statute offering this benefit offers no definition of “family,”<sup>418</sup> and thus, it would be just as logical to infer flexibility as it would discrimination.

With regard to the military, soldier spouses receive many benefits similar to those just listed for civil servants generally,<sup>419</sup> in addition to other, perhaps more significant benefits such as increased housing allowances, supplemental aid to low-income members, and separation support,<sup>420</sup> as well as rather minor benefits such as commissary privileges, transition assistance upon separation from service, and education assistance.<sup>421</sup> There is no question that many military benefits, such as disability coverage, death benefits, or, for that matter, housing aid, are more common and significant in this context than for civil servants

412. See 5 U.S.C. § 8705(a) (2000) (providing order of precedence for life insurance claims).

413. See *id.* § 8714(c) (providing for optional life insurance on family members).

414. See 5 U.S.C.A. § 9001 (West Supp. 2005) (defining eligibility for long-term care coverage).

415. 5 U.S.C. § 9004(a) (2000).

416. See Waldfoegel, *supra* note 155, at 20–21 (5.9% of FMLA leave is spousal care).

417. See, e.g., 5 U.S.C. § 5724(a) (2000) (providing for relocation expenses for transferred employees).

418. See generally *id.* § 5701 (offering no definition of “immediate family” for civil servant benefit).

419. See, e.g., 10 U.S.C. § 1076 (2000) (providing for dependent health care coverage); 38 U.S.C. §§ 1115, 1135 (2000) (providing for compensation for dependents of veterans disabled in service); *id.* § 1310 (providing for a death benefit to spouse, children, or parent for service-related death); *id.* § 3500 (noting congressional intent on providing an education benefit on death).

420. See 37 U.S.C. § 403 (2000) (providing for housing allowances including dependents); *id.* § 402a (providing for aid to low-income soldiers with dependents); *id.* § 427 (providing for family separation allowance).

421. See, e.g., 10 U.S.C. § 1061 (2000) (providing for commissary privileges); *id.* § 1142(b)(5) (providing for job counseling); *id.* § 2147 (providing for an ability to transfer education benefits to spouse on reenlistment); 37 U.S.C. § 411f (2000) (providing for payment of expenses for family to attend burial of soldier who dies on duty).

generally.<sup>422</sup> Yet, unlike on the civilian side, where unmarried couples are only unrecognized, such relationships are, for better or worse, largely barred in the military.<sup>423</sup> Thus, even if married soldiers have and use such benefits disproportionately to unmarried ones, the latter would not be otherwise similarly situated for their receipt.

Before leaving civil servants and federal law altogether, it should be noted that the Supreme Court has also recognized a constitutional “freedom to marry” that conceivably applies to such workers (and state civil servants as well).<sup>424</sup> As applied, this “freedom” requires any public act that “significantly interferes” with marriage to receive a “critical examination” of the relevant state interest.<sup>425</sup> The challenges that have been made in the civil servant context, however, have been largely rejected on the ground that any relevant job rules or policies (e.g., anti-nepotism, financial disclosure rules) cannot really be said to “significantly interfere[]” with a “decision[] to enter into [marriage].”<sup>426</sup> In fact, in the very case that gave voice to the marriage right, the Court distinguished marriage rules in another indirectly work-related area—Social Security.<sup>427</sup> Thus, any constitutional source of rights in this context, at least as conceived to this point, is dubious at best.

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422. See, e.g., U.S. DEP’T OF VETERANS AFFAIRS, VETERAN DATA & INFORMATION, tbl.12, (indicating 810,417 disabled veterans with dependents receiving disability benefits as of September 30, 2002), available at [http://www.va.gov/vetdata/ProgramStatics/stat\\_app02/Table%2012%20\(02\).xls](http://www.va.gov/vetdata/ProgramStatics/stat_app02/Table%2012%20(02).xls) (last visited Feb. 20, 2006); U.S. DEP’T OF DEFENSE, MILITARY CASUALTY INFORMATION, U.S. ACTIVE DUTY MILITARY DEATHS, 1980 THROUGH 2004 (showing average annual active duty death toll of approximately 1500), available at <http://www.dior.whs.mil/mmid/casualty/castop.htm> (last visited Feb. 22, 2006).

423. See Am. Bar Ass’n Section of Family Law, *supra* note 195, at 363–64 (describing military limits on same-sex relationships); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES at IV-101, IV-79 (2000) (discussing prohibitions on “wrongful cohabitation” and certain sexual behavior, respectively), available at <http://www/jag.navy.mil/documents/mcm2000.pdf> (last visited Feb. 20, 2006).

424. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (discussing constitutional dimension of marriage).

425. *Id.* (internal citations omitted).

426. *Id.* at 386; see also *Cutts v. Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982) (stating that an anti-nepotism policy did not cause a burden on marriage); *Duplantier v. U.S.*, 606 F.2d 654, 671–72 (5th Cir. 1979) (stating that financial disclosures by federal judges containing information about their spouses and children do not violate notions of due process or equal protection).

427. *Zablocki*, 434 U.S. at 386–87 (citing *Califano v. Jobst*, 434 U.S. 47, 55 & n.12 (1977), which approved the denial of child’s Social Security at marriage as a “reasonable” result that does not unduly hinder marriage).

## B. *State Rights and Benefits*

As noted in Part I above, state and local laws also give insight into marriage at work. In general, though, they continue the trend found in federal law—minimal support, with exceptions based on presumptions of need or dependence, not relationship form. The most relevant such laws concern: (1) workers' compensation;<sup>428</sup> (2) unemployment compensation;<sup>429</sup> (3) insurance access;<sup>430</sup> (4) "marital status" discrimination;<sup>431</sup> (5) family leave;<sup>432</sup> (6) wage payments;<sup>433</sup> and (7) income tax.<sup>434</sup> Like the federal system, such laws also contemplate marriage for civil servants.<sup>435</sup> On the whole, though, other than a few tax provisions and civil servant benefits, marriage support at the state or local level is even more limited than in federal law. This is due partly to the fact that ERISA preempts many non-federal laws that "relate to" employee benefits;<sup>436</sup> yet it is also, and perhaps more significantly, a continuation of the philosophy that considers workers more as individuals than providers for a family—at least in law.

### 1. Workers' Compensation

Workers' compensation, which exists in all states, is a state-based system of fixed compensation for injuries on the job.<sup>437</sup> De-

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428. See, e.g., FLA. STAT. ANN. § 440.16 (West 2002 & Supp. 2005) (describing fifty percent weekly wage benefit to a spouse in the event of covered employee's death from an on-the-job accident).

429. See, e.g., CAL. UNEMP. INS. CODE § 1256 (West Supp. 2005) ("good cause" leave for unemployment compensation includes a move with a "spouse or domestic partner" to an impracticable distance).

430. See, e.g., *Baker v. State*, 744 A.2d 864, 884 (Vt. 1999) (describing enhanced insurance as benefit).

431. See, e.g., N.Y. EXEC. LAW § 296(1)(a) (Consol. 1995) (setting forth state "marital status" discrimination law).

432. See, e.g., OR. REV. STAT. § 659A.150–59 (2003) (granting state medical leave to care for sick spouse).

433. See, e.g., COLO. REV. STAT. § 8-9-104 (2004) (requiring spousal consent for wage assignments).

434. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (describing "state income tax advantages").

435. See, e.g., 40 ILL. COMP. STAT. ANN. 5/14-118 (West 2002) (granting survivor annuities to spouses of state workers).

436. See Jeffrey A. Brauch, *Municipal Activism v. Federal Law: Why ERISA Preempts San Francisco-Style Domestic Partner Ordinances*, 28 SETON HALL L. REV. 925, 961–62 (1998) (describing preemption).

437. See Gabel, *supra* note 130, at 1084–90 (describing origins and form of workers'

veloped from European models in the early to mid-twentieth century<sup>438</sup> and encouraged by federal safety laws and some of the federal civil servant benefits noted above,<sup>439</sup> the typical system consists of guaranteed (i.e., no-fault), limited compensation in the event of a job-related injury in exchange for a waiver of otherwise available (i.e., tort) remedies.<sup>440</sup> Compensation normally includes medical costs and a set percentage of the employee's wages, typically two-thirds up to a set maximum in the event of total disability,<sup>441</sup> and is meant "to resolve on-the-job injuries uniformly, efficiently, predictably, and fairly."<sup>442</sup> In most states, "employers must carry insurance" to pay for the program, with each of their premiums "reflect[ing] generally the level of risks faced by [their own] workers."<sup>443</sup> Although there is typically no increase in benefits due to marital status in an employee's life,<sup>444</sup> most states offer survivor benefits to spouses and dependents, primarily children, "to answer subsistence level needs"<sup>445</sup> and to "protect workers and their families from the catastrophic economic consequences of workplace injuries and fatalities."<sup>446</sup>

Professor Arthur Larson's treatise summarizes death benefits as follows: "All [state] statutes provide death benefits for the de-

compensation systems).

438. See HOOD ET AL., *supra* note 411, at 6–12 (describing European influence on workers' compensation).

439. See Gabel, *supra* note 130, at 1087 (noting role of federal safety laws and laws on federal civil servants, miners, and longshoremen as workers' compensation guideposts for states).

440. See Thomas A. Eaton & David B. Mustard, *Report of the Governor's Workers' Compensation Review Commission*, 38 GA. L. REV. 1241, 1256 (2004) (noting workers' compensation "fundamental features").

441. See Jeffrey O'Connell & Jay Barker, *Compensation for Injury & Illness: An Update of the Conrad-Morgan Tabulations*, 47 OHIO ST. L.J. 913, 932 (1986) (noting that "[s]tates typically require the employer to pay two-thirds of the totally disabled worker's lost weekly wages," up to applicable statutory maximums). For "permanent partial disabilities" (i.e., where an injured worker can still work), lower wage percentages are the typical method of wage loss (if any) compensation. See *id.* at 933 (describing "permanent partial"). In addition, most states also offer set amounts for "specified injuries that cause permanent partial disabilities, such as . . . damage to limbs, eyes, hearing or other functions." *Id.*

442. Gabel, *supra* note 130, at 1084.

443. O'Connell & Barker, *supra* note 441, at 931.

444. See ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* app. B tbl.6 (2004) (listing each of the states' benefit formulas, which indicate that, with limited exceptions in Arizona, Massachusetts, Rhode Island, and Utah (which range from about \$5 to \$15 per week) there is no increase in disability benefits based on marital status).

445. O'Connell & Barker, *supra* note 441, at 931.

446. Eaton & Mustard, *supra* note 440, at 1290.

pendents of deceased workers. Thirty-nine jurisdictions pay benefits to a widow for life or until remarriage, and to children until they reach age eighteen. The rest place limitations on the benefits in terms of either amount or duration."<sup>447</sup> Further, "[u]nder most statutes, a widow and young children living with the deceased need prove only this relationship . . . [whereas] [o]ther eligible claimants must usually prove actual dependency."<sup>448</sup> Such a showing "does not require proof that, without decedent's contributions, [the] claimant would have lacked the necessities of life, but only that [the] decedent's contributions were relied on by [the] claimant to maintain [his] accustomed mode of living."<sup>449</sup> Although forty states now have "mini-DOMA" laws excluding same-sex couples from marriage (and, thus, benefits on that basis),<sup>450</sup> and a few states still hold the view that unmarried partners (same or mixed-sex) cannot be "dependents" as a moral matter,<sup>451</sup> many states are now quite flexible on who qualifies as a "dependent" for compensation purposes, and this "view . . . seems to be gaining strength."<sup>452</sup>

In light of the foregoing, there is no question that the legal widow or widower, via their general presumptive right, obtains a procedural advantage in acquiring death benefits under the systems just described. This right, however, is becoming increasingly open, at least on a factual showing, by expanding "dependency" alternatives to include unmarried couples.<sup>453</sup> As one commentator has concluded in this context, a "growing acceptance, particularly of the spousal equivalent relationship of unmarried heterosexual partners, demonstrates that state courts are modifying family law concepts and other areas of law to mesh with the current so-

447. LARSON & LARSON, *supra* note 444, § 96.01 (footnotes omitted).

448. *Id.* at 96-1.

449. *Id.* § 97.01[3].

450. See Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 370 (2005) (describing "DOMAs" in forty states).

451. See, e.g., *Williams v. Corbett*, 398 S.E.2d 1 (Ga. 1990) (unmarried cohabitation does not yield worker compensation dependency benefits); *Fields v. Hollowell & Hollowell*, 78 S.E.2d 740 (N.C. 1953) (both cited in LARSON & LARSON, *supra* note 444, §§ 97.06[1] n.2, 97.06[3] n.19, respectively).

452. LARSON & LARSON, *supra* note 444, § 97.06[3]; see also, e.g., *Dept. of Indus. Rels. v. Workers' Comp. Appeals Bd.*, 156 Cal. Rptr. 183 (Ct. App. 1979); *Kendall v. Hous. Auth. of Baltimore*, 76 A.2d 767 (Md. 1950); *West v. Barton-Malow Co.*, 230 N.W.2d 545 (Mich. 1975); *Parkinson v. J. & S. Tool Co.*, 313 A.2d 609 (N.J. 1974). These cases approve unmarried partner "dependency" for workers' compensation purposes.

453. See LARSON & LARSON, *supra* note 444, § 97.06[3].

cial reality of families.”<sup>454</sup> Same-sex couples may have a little farther to go in this context,<sup>455</sup> but any consensus on marriage as a per se requirement, if it ever existed, is eroding. Furthermore, to the extent that unmarried couples are still not recognized as “dependents,” the incidents of on-the-job deaths (as opposed to disabilities, for which, as described above, there is typically no marriage advantage) are becoming increasingly rare.<sup>456</sup> As a result, the actual benefits at issue seem less valuable, or at least less common,<sup>457</sup> than at the time when they were created.<sup>458</sup>

## 2. Unemployment Compensation

Unemployment compensation is a federally mandated and state-run program of guaranteed, yet limited, financial assistance in the event of a temporary job loss that is designed “to insure diligent workers against the ‘vicissitudes of enforced unemployment not voluntarily created without good cause.’”<sup>459</sup> Its administration is as follows:

Federal laws provide general guidelines, standards, and requirements, with administration left to the states under their particular unemployment legislation. The unemployment compensation system is generally funded by unemployment insurance taxes or “contributions” imposed upon employers. The federal taxes are generally applied to the costs of administration, while the state taxes provide trust funds for the payment of benefits.<sup>460</sup>

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454. Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 20 (1998).

455. See *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1618–19 (and accompanying notes) (1989) (observing trend of cohabitation recognition, but only one case (then) in same-sex context—*Donovan v. Workers’ Comp. Appeals Bd.*, 187 Cal. Rptr. 869 (Ct. App. 1982)).

456. See Eaton & Mustard, *supra* note 440, at 1261 & tbl.2 (noting that “[s]ince 1994, the number of fatal occupational injuries has decreased by 10.8%”). In 2000, out of a total of 126 million covered workers, there were 5,915 fatal injuries. *Id.* at 1254, 1261 & 1612.

457. Cf. M.V. Lee Badgett & R. Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California’s Budget*, 16 STAN. L. & POL’Y REV. 197, 223 (2005) (estimating death benefits to same-sex couples in California civil servant context would only result in one additional employee per year).

458. See Eaton & Mustard, *supra* note 440, at 1255 (noting that, at the time workers’ compensation arose in the United States, “[t]he metaphor of war was often used to convey the magnitude of industrial carnage”).

459. Timothy J. Moroney & Tyson Shower, *Insurance; Voluntary Unemployment—Charges to Employers*, 27 PAC. L.J. 893, 893 n.4 (1996) (citation omitted).

460. HOOD ET AL., *supra* note 411, at 141.

In general, benefits are given to those recently employed (i.e., “generally one must have been employed [by a covered employer]” and earned a minimum amount) when they are separated from employment without misconduct either involuntarily or voluntarily but with “good cause.”<sup>461</sup> Typically, benefits are based on a percentage of “an employee’s average weekly wage” up to durational and monetary maximums.<sup>462</sup> At present, although the states vary in calculating an “average weekly wage” and what percentage thereof is the relevant compensation, most averaged about one-half of the highest weekly rate in the past year.<sup>463</sup> Although some states offer minor increases for dependents, only eight include spouses, and even then, either essentially require a spouse to be non-working (e.g., in Iowa, a spouse earning more than \$120 per week is ineligible) or provide so little benefit (e.g., \$5 per week in Pennsylvania; \$6 in Michigan) as to be virtually negligible.<sup>464</sup>

The arena in which marital rights have drawn the most fire, though, is not benefit amounts, but interpretations of “good cause” termination. More specifically, many states allow an employee compensation for what would otherwise be an ineligible departure when leaving the job to marry, tend to a sick spouse, or move with a spouse beyond reasonable commuting distance.<sup>465</sup> For example, in New York, “a married claimant who quits his or her job in order to join a spouse whose employment has required relocation has not left his or her employment under disqualifying circumstances.”<sup>466</sup> Yet, not only do most states refuse to recognize such exceptions,<sup>467</sup> but a growing number of the ones that do in-

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461. *Id.* at 142–43.

462. *Id.*

463. See EMP. & TRAINING ADMIN., U.S. DEP’T OF LAB., COMPARISON OF STATE UNEMPLOYMENT LAWS 3-9 tbl.3-5 (2005) (providing “weekly benefit amounts” in each state, which typically are 1/26 the highest amount earned in a quarter, or on average, a fifty percent discount), available at <http://workforcesecurity.doleta.gov/unemploy/uiawcompar/2005/comparison2005.asp> (last visited Feb. 20, 2006).

464. See *id.* at 3–19 tbl.3-10, 3-20 tbl.3-11 (describing spousal unemployment benefits).

465. See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1280–81 & n.68 (2001) (describing unemployment insurance in the event of a spousal move as a benefit “historically reserved for spouses”).

466. *In re Di Napoli*, 249 A.D.2d 665, 666–67 (N.Y. App. Div. 1998).

467. See EMP. & TRAINING ADMIN., *supra* note 463, at 5-2 tbl.5-2 (noting that only six states include marriage as “good cause;” twenty-one include “move with spouse” (yet, six are “military spouses” only)).

clude the unmarried in their coverage.<sup>468</sup> Thus, once again, the relative benefits afforded to marriage in this context, at least nationally, are not that great.

### 3. Insurance Access

In *Baker v. State*,<sup>469</sup> where the Vermont Supreme Court struck down that state's refusal to extend certain benefits of marriage to same-sex couples, the court listed among such benefits "the opportunity to be covered" under life or health insurance policies of a spouse.<sup>470</sup> The Supreme Judicial Court of Massachusetts noted similar "medical policy" rights in *Goodridge v. Department of Public Health*.<sup>471</sup> Although there is no doubt that most employers who offer employee benefits include spouses,<sup>472</sup> and that this is assisted by its tax-free status,<sup>473</sup> such coverage, whether for singles or families, is not required by law,<sup>474</sup> except in Hawaii.<sup>475</sup> In

468. See, e.g., CAL. UNEMP. INS. CODE § 1256 (West Supp. 2005) (including move with "domestic partner" in "good cause" termination in California); *Reep v. Comm'r of the Dep't of Emp. & Training*, 593 N.E.2d 1297 (Mass. 1992) (extending Massachusetts unemployment to cohabitor move); see also Sharon P. Stiller, *Disqualifications Based on Conduct—Voluntarily Leaving Employment—Marriage and Pregnancy*, 1 N.Y. PRAC., EMP. L. N.Y. § 7:318 (2005) (noting as a New York "practice tip" the possible need to cover unmarried partners on "marital status" discrimination grounds); EMP. & TRAINING ADMIN., *supra* note 463, at 5-2 tbl.5-2 (seventeen states include "[t]o [p]erform [m]arital, [d]omestic, or [f]ilial [o]bligations").

469. 744 A.2d 864 (Vt. 1999).

470. *Id.* at 884.

471. 798 N.E.2d 941, 955–56 (Mass. 2003).

472. Of the sixty-three percent of employers that offer health care coverage to employees, see KAISER FAMILY FOUND., *supra* note 369, at 5, an overwhelming majority include family coverage, see U.S. GEN. ACCT. OFFICE, EMPLOYMENT-BASED HEALTH INSURANCE: COST INCREASES AND FAMILY COVERAGE DECREASES 9 (1997) (stating that about five percent of employers have employee-only care), available at <http://www.gao.gov/archive/1977/he97035.pdf> (last visited Feb. 22, 2006), even though the cost of such coverage is increasingly borne by employees, see Milt Freudenheim, *Fewer Employers Totally Cover Health Premiums*, N.Y. TIMES, Mar. 23, 2005, at C1 (noting twenty-seven percent rise in family premiums).

473. See Knauer, *supra* note 32, at 169–70 (describing tax status of employee insurance as marital benefit).

474. See Glied & Borzi, *supra* note 377, at 406 (noting "employer [health] coverage is voluntary"). Many states or localities mandate coverage items, like alcoholism or mental health, see RSM MCGLADREY, INC., MANDATED BENEFITS: 2005 COMPLIANCE GUIDE § 5.13 (2005), supplement COBRA continuation, see *id.* § 7.13, and even, perhaps more pertinently, require unmarried partners to be treated the same as spouses, see Renee M. Scire & Christopher A. Raimondi, Note, *Employment Benefits: Will Your Significant Other Be Covered?*, 17 HOFSTRA LAB. & EMP. L.J. 357, 364 (2000) (describing San Francisco rule for public contracts). Yet, all of these are dependent on the choice of employers to offer insurance in the first place (e.g., the San Francisco law, S.F. ADMIN. CODE, CH. 12B.1 (2004),

fact, even if coverage were so mandated by state law, either for singles or couples (mixed or same-sex), it would likely be preempted by ERISA for most workers. As noted above, ERISA preempts state regulation that “relate[s] to any employee benefit plan.”<sup>476</sup> There is an exception for “insurance” rules, but not self-insured plans,<sup>477</sup> and thus, at least for about fifty-four percent of insured workers covered by such plans,<sup>478</sup> there could be no mandate for marriage regardless.<sup>479</sup> And again, even if it were required, it is doubtful that many unmarried couples would be envious.<sup>480</sup>

#### 4. “Marital Status” Discrimination

Although there is no ban on “marital status” discrimination in federal law,<sup>481</sup> currently twenty-one states and the District of Columbia have such laws.<sup>482</sup> These provisions typically mirror the

available at <http://www.amlegal.com/library/ca/sanfrancisco.shtml> (last visited Feb. 22, 2006), only addresses “discrimination”). Moreover, to the extent such requirements affect self-insured plans, they would most likely be preempted by ERISA. See RSM MCGGLADREY, INC., *supra*, § 5.13 (discussing ERISA preemption).

475. See HAW. REV. STAT. §§ 393-7, 393-11 (1993 & Cum. Supp. 2004) (mandating employer-provided health care); see also Sharon Rabin-Margalioth, *Cross-Employee Distribution Effects of Mandated Employee Benefits*, 20 HOFSTRA LAB. & EMP. L.J. 311, 314 n.12 (2003) (noting “Hawaii is the only state” to mandate health care).

476. 29 U.S.C. § 1144(a) (2000).

477. *Id.* § 1144(b)(2). As an aside, neither tax laws, see *id.* § 1144(b)(5)(B)(i), nor domestic relations orders, see *id.* § 1144(b)(7), are preempted, and there is also a unique, limited exception for the above-referenced regulation in Hawaii, see *id.* § 1144(b)(5)(A).

478. See KAISER FAMILY FOUND., *supra* note 369, at 122.

479. See Brauch, *supra* note 436, at 961–62 (arguing ERISA preempts state/local domestic partnership laws in welfare benefit plan context). But see Jennifer Bender, Note, *The Impact of ERISA on California Health Care Law Following the United States Supreme Court’s Pro-Preemption Interpretation*, 26 WHITTIER L. REV. 1169, 1185–88 (2005) (arguing that paying for public coverage might “circumvent” preemption).

480. See Badgett, *supra* note 373, at 1 (noting minimal enrollment of unmarried partners in benefit plans).

481. See Porter, *supra* note 55, at 3 (noting that “marital status is not one of the protected categories of Title VII of the Civil Rights Act of 1964”). Although it is possible to litigate marriage-related employment rules on other Title VII bases, such as a related disparate treatment (e.g., only men can be married) or a disparate impact (e.g., a rule barring employment of both spouses causes significantly more women than men to lose employment), it is not “marital status” that gives rise to such claims, but the category (e.g., gender) actually protected by Title VII. See Joyce D. Edelman, Note, *Marital Status Discrimination: A Survey of Federal Caselaw*, 85 W. VA. L. REV. 347, 352–60 (1983) (describing marriage-related “gender” claims in Title VII).

482. See Kohm, *supra* note 13, at 576 & n.69 (listing the twenty-one states that have “marital status” laws); Porter, *supra* note 55, at 15–16 (noting same number of jurisdictions in 2004).

proscriptive language of Title VII (federal law) in it being illegal "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,"<sup>483</sup> but add "marital status" to its list of protected categories (i.e., race, color, sex, religion, national origin).<sup>484</sup> As many scholars note, however, most of these laws apply equally, at least on their face, to "all employees whether they are married, single, divorced, separated, or widowed."<sup>485</sup> Moreover, in application, such provisions have not only protected married workers, but "have played a major role in protecting the rights of unmarried couples"<sup>486</sup> and singles as well.<sup>487</sup>

"Marital status" discrimination laws, most of which were passed in the 1970s,<sup>488</sup> are widely noted for their lack of legislative history.<sup>489</sup> For the most part, however, the focus of such legislation can be said to be on extending to "marital status" the theory of Title VII, namely protection from employment decisions made for reasons unrelated to job performance or business necessity.<sup>490</sup> There is debate as to whether such laws are limited to one's status as married or single, or whether they also extend to the identity of one's mate (e.g., do they reach policies barring employment of a spouse?).<sup>491</sup> Similarly, though some states might protect unmarried pairs as such (i.e., extend protection to relationship choice or type), others only protect one's "single" status, which is less likely to trigger a discrimination claim.<sup>492</sup> Indeed,

483. 42 U.S.C. § 2000e-2(a) (2000).

484. See Porter, *supra* note 55, at 15 (noting state "marital status" laws "var[y] only slightly" from Title VII).

485. *Id.* at 25.

486. Kohm, *supra* note 13, at 577. In addition to the unmarried couple as such, "marital status" laws can also prove particularly beneficial to unmarried women, especially unwed mothers.

487. See *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 610 (7th Cir. 2001) ("[T]he primary purpose [of marital status discrimination laws] . . . is to prevent discrimination against married women . . .").

488. See Beattie, *supra* note 132, at 1418 (describing origin of state "marital status" discrimination laws).

489. See Porter, *supra* note 55, at 16 (noting lack of legislative history on state "marital status" laws).

490. See Edelman, *supra* note 481, at 360–61 (describing general approach of state "marital status" laws).

491. See Beattie, *supra* note 132, at 1419–28 (comparing "narrow view" of status, not partner identity, in upholding anti-nepotism, see *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd.*, 415 N.E.2d 950 (N.Y. 1980), with "broad view" including identity, see *Thompson v. Bd. of Trustees*, 627 P.2d 1229 (Mont. 1981)).

492. See *id.* at 1430–31 (describing implications of anti-nepotism rulings in unmarried

the very same “individual versus couple” debate is seen in places with “sexual orientation” laws as well (i.e., is it only sexual preference or does the law extend to protect the identity, or gender, of a partner or other relationship facts?).<sup>493</sup>

Regardless of the resolution of the debate over their scope, however, it is clear that the state and local laws concerning discrimination on “marital status” do not do much to support marriage. Indeed, to the extent that they exist at all (i.e., only a minority of states have them), they do not offer broad support for marriage in themselves, but rather a “hodge-podge” of provisions that, at most, protect all employees, married or not,<sup>494</sup> yet for most, provide little protection at all.<sup>495</sup> Some have argued that by offering a weak “marital status” law or even by failing to provide one in the first place, many jurisdictions implicitly endorse employer preferences for marriage.<sup>496</sup> Perhaps one can so infer, but in places where such passivity is the rule, it is ultimately the market and the decisions of employers, and not the law, that would deserve the blame (or credit).

## 5. Family Leave

As described above, the FMLA requires larger employers (i.e., those with fifty or more employees)<sup>497</sup> to offer up to twelve weeks unpaid leave per year for a birth or adoption, the employee’s own illness, or to care for a sick spouse, child, or parent.<sup>498</sup> Although this federal law dominates the relevant landscape, almost all states (forty-two) have their own law for public workers and al-

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partner setting).

493. See *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1633–38 (1996) (describing limits of “sexual orientation” law). At least fifteen states and the District of Columbia have such laws. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 205 (2d ed., 2004).

494. See Porter, *supra* note 55, at 25 (describing neutrality of “marital status” laws).

495. See *id.* at 33–34 (noting shortcomings of twenty-one states, and the District of Columbia, with “marital status” laws due to “different interpretations,” and that the other twenty-nine states have no such law at all).

496. See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 790–92 (2002) (arguing that limited or absent “marital status” laws implicitly endorse marriage preferences).

497. See 29 U.S.C. § 2611(2), (4)(A) (2000) (defining “eligible employee” and “employer”).

498. See *id.* § 2612(a)(1) (setting forth general FMLA leave provisions).

most half (twenty-three and the District of Columbia) have laws in varying degrees for private workers.<sup>499</sup> For the most part, these laws supplement the FMLA, either in scope or in substance.<sup>500</sup> Thus, while “the FMLA represents the minimum or basic package of rights and obligations[,] . . . [s]tates are free to exceed any specific provision of the federal law.”<sup>501</sup> For example, as noted, the FMLA’s employee threshold is fifty, whereas Oregon requires twenty-five,<sup>502</sup> Iowa four,<sup>503</sup> and Kansas has no minimum at all.<sup>504</sup> As further example, the FMLA requires up to twelve weeks unpaid family leave per year; and while some states offer more (e.g., California’s is twelve weeks, but pays (via public funds) about half an employee’s wages for up to six weeks),<sup>505</sup> most offer less, albeit largely for employers with fewer workers<sup>506</sup> (e.g., the District of Columbia offers sixteen weeks in a two-year period,<sup>507</sup> Maine offers ten weeks in a two-year period,<sup>508</sup> and Wisconsin offers two to eight weeks a year depending on the reason).<sup>509</sup>

Notwithstanding the existence of these leave provisions, there is reason to doubt the extent to which they provide particularly fruitful benefits by virtue of marital status. First, as described in the FMLA discussion, the taking of leave to care for a spouse, as opposed to a child or one’s self, is a very rare event.<sup>510</sup> Second, al-

499. See RSM MCGLADREY, INC., *supra* note 474, at Ex.14.2 (providing state leave requirements, of which eighteen offer leave for public employees only, twenty-three and the District of Columbia offer it to both public and private workers in varying degrees, and nine have no such leave at all). For general guidance to statutes in this “family leave” section, see *id.* and the material it cites to in JOHN F. BUCKLEY & RONALD M. GREEN, 2004 STATE BY STATE GUIDE TO HUMAN RESOURCES LAW (2004).

500. See RSM MCGLADREY, INC., *supra* note 474, § 14.17 (describing supplemental role of state leave law).

501. *Id.*

502. See OR. REV. STAT. § 659A.153 (2003) (defining “covered employer” for leave law).

503. See IOWA CODE ANN. § 216.6 (West 2000) (describing available leave).

504. See KAN. ADMIN. REGS. § 1-9-5 (2005) (providing schedule of “sick” leave).

505. See CAL. UNEMP. INS. CODE § 3301 (West Supp. 2005) (providing “[f]amily temporary disability insurance”).

506. See RSM MCGLADREY, INC., *supra* note 474, at Ex.14.2 (summarizing state leave provisions).

507. See D.C. CODE § 32-502 (2001) (creating leave obligation of sixteen weeks in two years for all employers).

508. See ME. REV. STAT. ANN. tit. 26, § 844 (West Supp. 2004) (establishing “family medical leave” of ten weeks in two years for those with “fewer than 15 employees”).

509. See WIS. STAT. ANN. § 103.10(3) (West 2002 & Supp. 2004) (establishing ranges of family medical leave for various reasons for fifty-employee public or private employers).

510. See Waldfoegel, *supra* note 155, at 20 (noting that 5.9% of FMLA leave is for spousal care).

though most states offer leave for public (i.e., their own) workers, only about half require it for private workers.<sup>511</sup> Finally, of those that actually extend leave benefits to private employees, most are largely limited to childbirth, adoption, or one's own condition.<sup>512</sup> Indeed, of the twenty-four states that have "mini-FMLAs," only eleven extend benefits based on spousal condition alone,<sup>513</sup> and, of these, at least two (the District of Columbia and West Virginia) include persons other than spouses who live with the employee.<sup>514</sup> Thus, one must conclude that, as in the FMLA, marriage is not as useful (or used) a source of rights as one might assume.

## 6. Wage Payment Laws

Apart from the minimum wage and overtime premium requirements of the federal Fair Labor Standards Act of 1938 (the "FLSA"),<sup>515</sup> regulation of wages and their payment to workers is largely a matter of state regulation.<sup>516</sup> Although such regulation typically only affects the workers themselves, there are two small areas in which marriage is implicated—the assignment of wages and wage payments on separation or death. In general, the wage assignment rules either require spousal consent before future wages can be assigned to a third party for voluntary payment of a debt<sup>517</sup> or limit the amount of involuntary garnishment (if allowed at all) by a third party if there is a dependent (e.g., a spouse).<sup>518</sup>

511. See RSM MCGLADREY, INC., *supra* note 474, at Ex.14.2 (describing leave provisions, with forty-two states and the District of Columbia for public workers and twenty-three (and the District of Columbia) for private workers also).

512. See generally DAVID G. EVANS, 1 FEDERAL AND STATE GUIDE TO EMPLOYEE MEDICAL LEAVE BENEFITS AND DISABILITIES LAWS §§ 4:3-4:54 (2005) (describing all state leave provisions).

513. See *id.* §§ 4:16 (Illinois), 4:18 (Iowa), 4:19 (Kansas), 4:20 (Kentucky), 4:21 (Louisiana), 4:24 (Massachusetts), 4:26 (Minnesota), 4:29 (Montana), 4:31 (Nevada), 4:35 (New York), 4:36 (North Carolina), 4:46 (Tennessee), and 4:51 (Washington), which are largely limited to maternity and child care.

514. See RSM MCGLADREY, INC., *supra* note 474, § 14.17[b][4] (noting "immediate family member" in the District of Columbia and West Virginia includes those "living with" the employee, but not legally related).

515. 29 U.S.C. § 201 (2000).

516. See generally STATE COMPENSATION LAWS (CCH) Vols. I & II (2004).

517. See, e.g., MD. CODE ANN., COM. LAW § 15-302 SUPP. (2005); MICH. COMP. LAWS ANN. § 493.17 (West Supp. 2005); WIS. STAT. ANN. § 241.09 (West 2001) (requiring spousal consent to assign wages).

518. Federal law provides for a maximum garnishment exemption of fifty percent for singles and sixty percent with a spouse or dependent. See 15 U.S.C. § 1673(b)(2) (2000). Many states offer statutes with similar provisions. See, e.g., CAL. CIV. PROC. CODE §

The wage payment rules, on the other hand, provide that, in the event of incapacity or death, any earned, yet unpaid, wages shall be paid first to a spouse.<sup>519</sup>

Although the foregoing wage protections and payment rules are no doubt helpful to some married couples, or at least the non-employee spouse at issue, what they offer is not very significant. First, although spousal consent is required for voluntary assignment of wages (at least in some states),<sup>520</sup> this is a protection offered to the “innocent” spouse, not the employee, and thus could easily be contracted for by the unmarried.<sup>521</sup> Second, while greater wage amounts are protected from involuntary garnishment in the case of married couples, such protection typically extends a mere additional ten percent of wages and is available for a child as well,<sup>522</sup> thus making it a helpful, yet not very profound, temporary protection from debts.<sup>523</sup> Finally, although many states provide for payment of unpaid wages to a spouse, these are typically in the form of default rules that do not provide anything other than that to which the deceased worker (and, thereafter, his or her estate) was otherwise entitled and the employer must pay anyway.<sup>524</sup>

Once again, in the wage context, it is particularly important to note that neither federal nor state law requires any wage enhancements based on familial or marital status. Although the FLSA mandates a minimum level of pay as well as enhanced compensation for overtime, neither of these provisions includes considerations of spouses or families.<sup>525</sup> Further, although many

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706.052(C) (West 1987 & Supp. 2005); COLO. REV. STAT. ANN. § 13-54-104(3)(b)(I)(A) (West 2005); VA. CODE ANN. § 34-29 (b1)(2) (2005).

519. See, e.g., FLA. STAT. ANN. § 222.15(1) (West 1998 & Supp. 2005); GA. CODE ANN. § 29-5-12 (2003); OR. REV. STAT. § 652.190 (2003) (granting final wages to spouses).

520. See *supra* note 518.

521. See Buckley & Ribstein, *supra* note 95, at 597–600 (describing ability to contract marriage “incidents”).

522. See *supra* note 518 (listing state garnishment limits, all of which provide ten percent more protection for those with a spouse or child (i.e., sixty percent of wages, rather than fifty percent, shielded from garnishment)).

523. See 38 C.J.S. *Garnishment* § 2 (2005) (describing the “garnishment” process).

524. See, e.g., TENN. CODE ANN. § 30-2-103(a)(1) (2001) (stating that “[a]n employee may designate a beneficiary” for unpaid wages at death); see also N.M. STAT. ANN. § 45-3-1301 (LexisNexis 1995) (indicating that payment to spouse is designed to avoid probate over unpaid wages that would otherwise be part of decedent’s estate).

525. See 29 U.S.C. §§ 206, 207 (2000) (establishing federal “minimum wage” and “maximum hours” rules).

states and localities require higher minimum wages and overtime premiums than the FLSA,<sup>526</sup> none offer enhancements on either a marital or a family basis.<sup>527</sup> Indeed, although some states and localities even directly profess to require a “living” or “family” wage,<sup>528</sup> presumably based on expectations of economic dependency or need,<sup>529</sup> or even on moral grounds,<sup>530</sup> none treat married workers differently, but rather all extend the benefits of higher wages to single and married persons alike.<sup>531</sup>

## 7. State and Local Income Tax

As described in the federal section above, income tax is, albeit indirectly, a source of regulation of marriage in employment. As such, the tax structure has the potential to encourage or subvert marriage to the extent it is both taken into account and, in reality, plays a role in economic and personal decision-making.<sup>532</sup> As detailed above, however, it seems that although federal law does take marriage into account, its impact on workers, particularly when considering the economic realities of most couples, is not that great.<sup>533</sup> For the most part, the same can be said for similar taxation on state and local levels.

Both the “[f]ederal and state income tax laws create a system of joint returns for married couples that treats the couples as a sin-

526. See, e.g., Minor Myers III, *A Redistributive Role for Local Government*, 36 URB. LAW. 753, 787 (2004) (indicating that “over 120 local jurisdictions” and twelve states exceed the minimum wages of federal law).

527. See Quigley, *supra* note 9, at 923–33 (cataloging existing “living wage” rates for states and localities, all of which establish a base wage rate without regard to marriage or familial status of particular individuals).

528. See Myers, *supra* note 526, at 786–87 (describing many local and state “living wage” laws).

529. See *id.* at 787 (stating that “living wage” laws were designed for “full-time wage-earners to support a family residing in the locality at a subsistence level”) (quoting *Rui One Corp. v. City of Berkeley*, 371 F.3d 1137, 1143 (9th Cir. 2004)).

530. See Pope John Paul II, *Laborem Exercens* [On Human Work] ¶ 19 (St. Paul, ed. 1981) (describing the “family wage” as one of several options in achieving “just remuneration” for the family); see also Quigley, *supra* note 9, at 894–95 (describing religious dimension of “living wage” movement).

531. See Quigley, *supra* note 9, at 923–33 (listing applicable “living” and “minimum” wage laws).

532. See GRAETZ, *supra* note 316, at 29–40 (describing potential impact on marriage of federal taxation).

533. See Zelenak, *supra* note 297, at 365 (noting that the impact of “tax laws on decisions to marry [is] unproven”).

gle economic entity.<sup>534</sup> Although nine states do not tax work compensation at all,<sup>535</sup> those that do use federal filing (e.g., single, joint) status.<sup>536</sup> In nineteen states and the District of Columbia, such status is largely irrelevant in that rates apply to all equally.<sup>537</sup> Of the remaining states, fourteen double rates between single and joint filers (i.e., marriage neutrality or “bonus”), while eight expand ranges by less than that (i.e., a “marriage penalty” more likely).<sup>538</sup> As a result, in those twenty-eight states that do not tax income or do not consider filing status in doing so, the married and single are treated identically. In the remaining twenty-two states that expand rates, the federal analysis offered above applies equally in showing that most couples, especially the unmarried, are dual-income and have increasingly similar earnings; and, thus, would not benefit much from such rate expansion, whether it is available or not.<sup>539</sup>

As far as deductions and exemptions are concerned, the states typically follow the federal rules,<sup>540</sup> resulting in little advantage to most couples. For example, personal deductions or exemptions are generally available from states on a per capita basis, and thus, as long as each individual member of a couple (or single) earns income above the relevant personal deduction/exemption amount, there is no discrimination on a marriage basis.<sup>541</sup> Further, although, as in the federal system, many employee benefits

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534. Chambers, *supra* note 82, at 472.

535. See 3 STATE TAX GUIDE (CCH) ¶700-075 (2005) (providing table of states with income taxes).

536. See *id.* (federal filing options for each state with an applicable income tax).

537. See *id.* (listing state income tax rates).

538. See *id.* (listing state income tax rates).

539. See Buckley & Ribstein, *supra* note 95, at 599 (“[T]ax benefits of marriage matter most to one-earner households . . . most homosexual couples form two-earner households.”); Estin, *supra* note 72, at 1388 (noting that unmarried pairs are more likely than married couples to be dual-earning with similar incomes); Whittington & Alm, *supra* note 314, at 457 (stating that similar earnings are reflected in a marriage penalty for forty-two to sixty percent of couples).

540. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2557 (2005) (observing that “[m]ost states rely upon federal definitions of adjusted gross income or taxable income”); Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419, 452 (1999) (“The 40 states with personal income taxes use the taxpayer’s federal adjusted gross income as the ‘computational starting point’ for determining state taxable income.”).

541. See 71 AM. JUR. 2D *State and Local Taxation* § 480 (2001) (noting state and local “[i]ncome tax laws usually allow a specified deduction, often termed a personal exemption, or considered a credit against net income, on account of each person dependent on an individual taxpayer for support”) (citations omitted).

offered to employees and their spouses are exempted from state income tax,<sup>542</sup> the ability, and, in fact, the apparent preference, of unmarried partners to obtain their own benefits similarly discounts claims of widespread discriminatory effect.<sup>543</sup> Finally, to the extent states or localities, if not the federal government, may tend toward greater recognition of unmarried couples,<sup>544</sup> any remaining power of such claims of discrimination would be diminished even further.

## 8. Civil Servants

The marriage-based rights and benefits afforded to state and local workers largely mirror those noted for federal workers above. Like their federal counterparts, these rights and benefits typically include health coverage, survivor pension, disability or death benefits, and family leave.<sup>545</sup> And, according to current Bureau of Labor Statistics data, the approximate numbers of these workers are: 7.9 million in general service;<sup>546</sup> one million in health care,<sup>547</sup> and eight million in education,<sup>548</sup> or about eleven percent of the workforce.<sup>549</sup> These numbers are, indeed, larger than those working for the federal government, and, certainly the benefits just listed are not insignificant. And yet, not only are such benefits more in the nature of voluntary employer policy,

542. Most employee benefits are exempted from "adjusted gross income" by 26 U.S.C. §§ 101-139 (2000), and, thus, are excluded in most states too. *See Super, supra* note 540, at 2557 (stating that many states have adopted federal rules).

543. *See* BADGETT, *supra* note 379, at 83-84 (2001) (noting minimal enrollment of same-sex pairs in partner benefit plans); Brines & Joyner, *supra* note 379, at 350 (observing independent nature of cohabitators).

544. *See, e.g.*, CAL. REV. & TAX. CODE § 17021.7 (West 2003) (including "domestic partner" as "spouse" for tax exclusions for certain benefits); VT. STAT. ANN. tit. 15, § 1204(b) (2001) (extending the "spouse" definition to civil union members for state income tax purposes); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (discussing state marriage and treatment of same-sex couples).

545. *See, e.g.*, Badgett & Sears, *supra* note 457, at 220 (listing benefits for married California employees).

546. *See* BUREAU OF LAB. STATS., *supra* note 386, at 254 (listing the number of state and local government workers, excluding education and hospitals).

547. *See id.* at 218 (estimating that eight percent of the 12.9 million worker health care industry consist of state and local government workers).

548. *See id.* at 211 (estimating a total of 12.5 million educational workers, with about seventy-five percent comprised of public primary and secondary education workers).

549. *See* Press Release, *supra* note 389, at 2 tbl.A (indicating a total civilian workforce of 149.1 million; thus, 16.9 million public workers would be about eleven percent of the total).

they, like their federal counterparts, are not as uniquely valuable to married couples as one might think, not only due to the increasing rarity of their need or use among modern couples,<sup>550</sup> but also to their extension in many states and localities to unmarried couples as well.<sup>551</sup>

Once again, there is no doubt that single-worker (or underinsured) couples would take advantage of spousal health care if they could, although the increasing lack of such couples, especially among the unmarried, certainly dilutes the real, or at least disparate, value of the benefit.<sup>552</sup> With regard to pension, most state plans mirror the federal system of a defined benefit plan<sup>553</sup> with no increase in benefits based on marital status during a retiree's life, but a widow(er) can receive survivor benefits at a retiree's death.<sup>554</sup> Yet, like the federal system and most other systems, such benefits are paid for by a lower benefit in the retiree's life.<sup>555</sup> States and localities also offer life or disability benefits to spouses of most workers; yet, like federal workers, the amount and incidence of actual benefits is low.<sup>556</sup> Finally, most state and

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550. See Collett, *supra* note 7, at 388–89 (noting the limited benefit of employer insurance for dual-earner couples).

551. See, e.g., Am. Bar Ass'n Section of Family Law, *supra* note 195, at 406–07 (noting that as of April 2004, ten states and 130 city and county governments “provide[d] domestic partner health benefits”).

552. See Badgett & Sears, *supra* note 457, at 221 (noting that “one-half of one percent of [California] state employees” have enrolled in civil servant benefits when opened to unmarried couples); Collett, *supra* note 7, at 388–89 (asserting “it is rarely advantageous” for dual-income couples to enroll in a single health plan).

553. See Jonathan Barry Forman, *Public Pensions: Choosing Between Defined Benefit and Defined Contribution Plans*, 1999 L. REV. MICH. ST. U. DET. C.L. 187, 188 (noting that the “overwhelming majority of [state and local government] workers are covered by defined benefit plans”).

554. M.V. Lee Badgett, *Equality Is Not Expensive*, CONN. L. TRIB., Apr. 19, 2004, at 23 (describing the survivor option for “state pension employee systems”).

555. See *id.* (observing “state pension employee systems” are largely “defined benefit” plans where “retirees themselves are paying for [any] survivor benefit” by virtue of lower payments during a retiree's lifetime); see also AM. ASSOC. OF RETIRED PERSONS (AARP), *FALLING SHORT: A 50-STATE SURVEY OF SPOUSAL RIGHTS UNDER STATE PENSION PLANS 2* (2004) (noting survivor options of state plans results in “lower payments while the participant is alive”). Interestingly, such plans also lack one of the few spousal benefits that private pensions give by way of their exemption from ERISA and its requirement of spousal consent for waiver of the survivor benefit, with only eleven states having a similar rule. See *id.* at 7.

556. See Pegula, *supra* note 410 (indicating 3227 local and 1224 state workers died on the job between 1992 and 2001, including more than 300 on September 11, 2001). One study in California on same-sex couples points out, “[e]ven high estimates of the impact of this [public survivor] benefit [for such couples] suggest[s] that the budgetary impact will be minimal.” Badgett & Sears, *supra* note 457, at 230. With regard to disability, most

local workers have family or bereavement leave,<sup>557</sup> and yet, again, like the other leave regimes described above, it is very unlikely that such leave is used that much for a spouse (as opposed to other family members or, in the case of medical leave, one's own health condition),<sup>558</sup> or comparatively speaking, would otherwise be so used by an unmarried couple (if so extended).<sup>559</sup>

In addition to the foregoing, it should be noted that at least fourteen states and 185 localities have extended many of these rights and benefits, however small, to unmarried domestic partners.<sup>560</sup> Although there is some "ambiguity over who should or will be covered when [such] benefits are extended,"<sup>561</sup> there is no doubt this expansion for civil servants limits the impact of any marriage-based discrimination, whether real or perceived. And again, as predicted, "[e]mployers that provide domestic partner benefits have found that only 1% to 2% of eligible employees actually apply for coverage."<sup>562</sup>

#### IV. PRIVATE RIGHTS AND BENEFITS

As the foregoing discussion demonstrates, although the landscape is vast and, at times, confusing, there are very few direct legal rights and benefits at work that attach to marriage. Indeed, other than family leave, "employers are under no obligation to provide spousal benefits at all."<sup>563</sup> To be sure, the benefits that employers voluntarily offer may be regulated, as in the case of

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states extend workers' compensation to their workers, see LARSON & LARSON, *supra* note 444, § 78.01, yet, as in such compensation generally, there is only an increase in benefits for dependents in a very few states (and a minor one at that), see *id.* at app. B tbl.6.

557. See RSM MCGLADREY, INC., *supra* note 474, at Ex.14.2 (listing leave in forty-two states and the District of Columbia that have it, and noting almost all (about thirty-seven) do not require paid leave for spouse care).

558. Cf. Waldfogel, *supra* note 155, at 20 (noting that in 2000, 5.9% of FMLA leave was for spousal care).

559. See Hein, *supra* note 80, at 31 (describing as "largely symbolic" municipal leave for domestic partners).

560. See HUMAN RIGHTS CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 20 (2005) (noting 185 localities as extending domestic partner health benefits as of 2004); Am. Bar Ass'n Section of Family Law, *supra* note 195, at 380-96 (listing unmarried partner benefits in fourteen states, while noting that three of these states only extend job leave).

561. Scire & Raimondi, *supra* note 474, at 369.

562. Am. Bar Ass'n Section of Family Law, *supra* note 195, at 406.

563. Hein, *supra* note 80, at 24.

ERISA, or otherwise encouraged by government policy, as in the case of income taxes, and traditional couples obtain some public benefits by virtue of taxation either on their employers, as in the case of workers' compensation, or their work generally, as in the case of Social Security. Yet, the decision to offer benefits or rights to employees directly, and in the first instance, is solely up to the employer, and as such, the benefits provided are more a product of negotiation and economics, and perhaps culture as well, than positive law. Thus, "encouragement of a good, stable, healthy marriage is neither legal nor illegal: It is good employment practice."<sup>564</sup> These benefits typically include health care, dental and vision, life insurance, paid family/bereavement leave, flexible scheduling, pension coverage, relocation benefits, and spousal perks,<sup>565</sup> and their prominence and importance to many of today's workers is high.<sup>566</sup> Yet, again, these are provided voluntarily—perhaps encouraged by law,<sup>567</sup> or in "answer to employee pressure"<sup>568</sup> or the dictates of the market<sup>569</sup>—but voluntarily nonetheless.<sup>570</sup>

Generally speaking, "[d]espite the lack of legally required benefits packages, most employers provide paid vacation days, sick leave, pension plans, and employer-sponsored health insurance to their full-time, permanent employees."<sup>571</sup> For spouses who elect to participate, such benefits typically extend to provide health care, benefits in the event of their spouse employee's death (e.g., beneficiary status for life insurance or pension), and access to their spouse in times of need (e.g., paid leave, flexible scheduling). For the most part, the benefits that are more personal to the spouse,

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564. Kohm, *supra* note 13, at 582.

565. See Am. Bar Ass'n Section of Family Law, *supra* note 195, at 405 (listing private benefits).

566. See, e.g., Press Release, Bureau of Lab. Stats., U.S. Dep't of Labor, Employer Costs for Employee Compensation—March 2005, 1 (June 16, 2005) (on file with author) (indicating that benefits average 29.6% of total compensation).

567. See Pettit, *supra* note 125, at 784 (noting influence of tax-exempt treatment in health care arena).

568. See Scire & Raimondi, *supra* note 474, at 372 (noting role of employee pressure for benefits).

569. See Crain, *supra* note 68, at 1953 (asserting that work/family benefits are only adopted to the extent they "are seen as 'strategic tools for competitive advantage'" (footnote omitted)).

570. See Glied & Borzi, *supra* note 377, at 406 ("Coverage depends on the willingness of one's employer.").

571. Andrea H. Brustein, Comment, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 U. PA. J. LAB. & EMP. L. 695, 696 (2005).

such as health, dental, or vision care, or even insurance on one's own life will generally require contributions by the spouse, the employee, or both.<sup>572</sup> Moreover, there have been trends to cut back on benefits, spousal or otherwise, or at least to increase the contributing cost to employees.<sup>573</sup> Nevertheless, such benefits can still be important, particularly to more traditional one-income couples.<sup>574</sup> This is all the more true as such couples face retirement.<sup>575</sup>

To the extent unmarried couples are not otherwise voluntarily afforded these same benefits, there is, no doubt, some disparate treatment (albeit perfectly legal in almost every jurisdiction).<sup>576</sup> And yet, not only are many such benefits not viewed as that valuable by these populations (as in the civil servant arena above),<sup>577</sup> but more employers than ever (if offering benefits at all) are voluntarily extending benefits to unmarried pairs, same-sex or otherwise, anyway, thus further limiting discrimination claims in this context.<sup>578</sup> For example, in 2004, the Human Rights Campaign Foundation found that 8,250 employers, including 216 of the Fortune 500, offered health benefits to unmarried pairs, up "13 percent" from a year before.<sup>579</sup> To be sure, such extensions have been largely market-driven, but has it not always been the case that "employers must offer competitive benefit packages to

572. See, e.g., BUREAU OF LAB. STATS., *supra* note 378 at 30 tbl.22, 31 tbl.23 (stating that the average employee health care contribution for singles is \$60.24, while for families (including spouses) it is \$228.98).

573. See Elizabeth A. Pendo, *Images of Health Insurance in Popular Film: The Dissolving Critique*, 37 J. HEALTH L. 267, 285 (2004) (citing data that "employers are cutting health insurance benefits for employee spouses and children, or offering incentives to get families out of their health plans"); see also KAISER FAMILY FOUND., *supra* note 369, at 5 (summarizing data indicating declines in health coverage).

574. Cf. Hein, *supra* note 80, at 21–22 (noting importance of benefit packages to modern couples); Collett, *supra* note 7, at 388–89 (noting by inference that spousal health coverage is more important for traditional couples).

575. See Schultz, *supra* note 177, at B1 (describing importance of retiree benefits to one-income couples).

576. See Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 574–75, 579–81 (2000) (citing general legality of affording benefits to spouses only, even under otherwise applicable "marital status" or "sexual orientation" statutes).

577. See Badgett, *supra* note 373, at 1 (noting minimal enrollment of unmarried partners in benefit plans).

578. See HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 560, at 15 (describing current trends in domestic partner health care coverage).

579. *Id.*

attract and retain top employees”?<sup>580</sup> Indeed, in the modern world, “employers face heightened competition in attracting the best employees” and “must respond to the specific needs of an increasingly diverse work force.”<sup>581</sup>

It is perhaps the foregoing broad extension of rights and benefits by employers on a voluntary basis that leads many to the impression that such treatment is mandated by law. As the above federal, state, and local law discussion demonstrates, however, this is simply not the case, either in form or in function. Indeed, those who claim that marriage is afforded an unfairly “privileged” status in many employment settings may have some basis to their critique as a philosophical matter, but their primary targets, if any, should be employers, the private marketplace, and, perhaps, even the culture,<sup>582</sup> but not the law.

## V. THEORETICAL IMPLICATIONS

In light of the foregoing exploration of marriage rights and benefits, at least to the extent they exist, we are given a fairly clear picture of the present state of both our family and legal cultures. As Professor Mary Ann Glendon has noted, the traditional model of marriage, wherein “[f]amily solidarity and the community of life between spouses were emphasized over the individual personalities and interests of family members,”<sup>583</sup> has evolved over the past century to a model that “now treats marriage as primarily the concern of the individuals involved.”<sup>584</sup> Indeed, the past thirty years “have witnessed the movement from undercurrent to mainstream in family law of individualistic, egalitarian, and secularizing trends.”<sup>585</sup> And, marriage in the workplace, ei-

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580. J. Robert Cowan, Note, *The New Family Plan: Employee Benefits and the Non-Traditional Spouse*, 32 U. LOUISVILLE J. FAM. L. 617, 632 (1994); see also PATRICIA H. WERHANE ET AL., EMPLOYMENT AND EMPLOYEE RIGHTS 187 (2004) (“Gay [and] lesbian . . . employees are a rich source for talent.”).

581. Hein, *supra* note 80, at 27.

582. See George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 592–93 (1999) (emphasizing the symbolic, rather than practical, importance of the right to marry).

583. GLENDON, *supra* note 23, at 291.

584. *Id.* at 293.

585. *Id.* at 292.

ther by legal design or as a result of cultural changes in marriage generally,<sup>586</sup> has followed suit.

As demonstrated above, the only legally mandated benefits of any real substance that are available to married couples, at least indirectly, in the workplace arise from the federal Social Security and income tax systems. Yet, both of these systems presume a form of economic interdependency that has become increasingly rare.<sup>587</sup> Thus, it is not that surprising to find that neither of these benefits are as valuable to modern married couples as they once were, nor would they be to unmarried ones even if they were to be extended as such.<sup>588</sup> The more limited, or rarer, benefits, such as spousal leave, benefit and wage protections, and workers' compensation and unemployment rights are similarly based on a traditional dependency model, and, thus, are (or would be) also of little use to modern couples.<sup>589</sup> Some may argue for extension of such benefits to meet the different needs of such couples,<sup>590</sup> but few can dispute their growing limits as now constituted.

Interestingly, it is more likely that, at least in employment, most of the reduced impact of the rights and benefits that actually do exist comes from changes in the culture of marriage generally (or at least in other areas of law—e.g., no-fault divorce, privacy)<sup>591</sup> than the other way around. Apart from family leave, most of the laws described above were adopted decades ago (when the sole breadwinner model was the norm) and have not changed much since.<sup>592</sup> Thus, their utility, at least as conceived, has neces-

586. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 56 (1995) (noting "under ten percent of families with children under age eighteen conform to the pattern of a single male breadwinner"); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 92 (1991) ("Social institutions and the law have not kept up with the changes in family life.").

587. See Chambers, *supra* note 82, at 474–75 (noting Social Security presumption of economic dependency).

588. See Dent, *supra* note 582, at 592 (describing tax and Social Security as "minor" things that "most couples hardly consider . . . in deciding whether to marry").

589. See Crain, *supra* note 68, at 1918 (citing presumption of traditional male breadwinner model behind the public benefits for marriage); see also *id.* at 1877 n.3 (noting that most married couples are dual-earning).

590. See generally Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 326–27 (2002) (summarizing the arguments for extending marriage-based benefits beyond the traditional model).

591. See generally Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1 (describing shift in law and culture from the community to the individual).

592. See *Califano v. Goldfarb*, 430 U.S. 199, 214–15 (1977) (summarizing 1939 amend-

sarily waned as mutual independence, contract, and privacy have advanced.<sup>593</sup> Whether purposeful or not, the limited impact for most couples of the foregoing laws that actually do exist (e.g., joint tax status, spousal Social Security, unpaid leave) coupled with other potentially more significant provisions that do not (e.g., marital wage, mandatory benefits, paid leave) represents an approach to marriage that leaves things largely in the hands of employers and employees in this context. This is not to say that the state has not grown in influence and regulation of marriage in other areas,<sup>594</sup> but only that the workplace is not one.

As described in Part II above, marriage is still very much impacted by many areas of law, whether it be in property, torts, family law, estate law, or tax provisions affecting family wealth generally, if not compensation in particular.<sup>595</sup> Yet, to the extent marriage has become more like a partnership of persons than a community affair necessarily linked with child-rearing,<sup>596</sup> it is understandable that the workplace, with its attendant rights and benefits, would become more the domain of the working partner than the pair or, for that matter, the state. Indeed, unlike property, torts, family law, estate law, and tax, which generally concern either the relationship among spouses (and children) or between them and the state,<sup>597</sup> employment law, at least as understood in modern-day America, is focused almost entirely on rights of the individual employee vis-à-vis an employer.<sup>598</sup> Thus, in the end, it is not surprising that, although many areas of law continue to affect the marital form (albeit in different ways than

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ments to provide spouse Social Security benefit); Zelenak, *supra* note 297, at 346 (describing adoption of joint tax filing in 1948).

593. See LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 146 (2004) (noting the rise of "individualism," "privacy," and the "ideology of choice" in modern culture).

594. See GLENDON, *supra* note 23, at 295 ("In the process of withdrawing regulation from some areas of family life while subjecting others to new forms of official intervention, the law has tended to focus primarily on individuals.")

595. Cf. ESKRIDGE, *supra* note 105, at 142-43 (describing marriage rights under various areas of law).

596. See Hafen, *supra* note 591, at 4-5 (describing cultural and legal shift of marriage to individual interests).

597. See generally Chambers, *supra* note 82, at 474 (describing most marriage-based laws as focusing on the emotional attachment of spouses, parenting, or the economic relations of the couple itself or with the state).

598. See, e.g., Rachel Geman, *Safeguarding Employee Rights in a Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 385 (1997) (noting that "current employment law focuses on individual employees").

the past), the influence of employment law, as described above, is far more limited. And, unless we either turn back the clock to the marriage paradigm of “breadwinner with dependent spouse” (which could be anathema to progressives) or expand family wages, mandatory benefits, and paid leave to all, including same-sex couples (which could be anathema to traditionalists), the situation should remain stable for some time. And, perhaps in light of the great volatility of many of the underlying issues at stake, the present balance makes a certain kind of sense.

## VI. CONCLUSION

The law offers few workplace rights and benefits to marriage as such. There is no marriage-based increase in wages or benefits, and the potential assistance that is available is largely limited to indirect public benefits and incentives that are becoming increasingly irrelevant to most modern couples. To be sure, marriage is an institution that has always been pursued and cherished by our nation, and this will likely continue to be the case for the rest of its history. In the workplace, however, the shift to individual from community in both legal and cultural conceptions of marriage has made its mark, and the result, at least in this arena, is one that favors private choice over public subsidy.

Much of the existing scholarship that touches on marriage at work tends to focus on the question of whether there should be benefits for marriage in this arena, with some scholars in support and others opposed. To be sure, these discussions are worthwhile and often go to the heart of the matter in the present battle over the future of marriage, a fight whose resolution will likely have a lasting impact not only on our nation, but on the world as a whole. Yet, as proposed herein, rather than immediately arming for such a battle (at least on this front), perhaps the first question that should be asked is whether there are benefits for marriage in the work context, and the answer, as indicated above, is “very few”—and, perhaps more importantly for the marriage debate at large, far fewer than many, on all sides, have often assumed. Marriage and “equal treatment under law” are banners under which an important public debate is underway, and both are critical to our nation and its way of life. In light of the realities explored above, however, it is hoped that a little more calm will be brought to bear in the struggle—at least in the workplace.

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