

ABROGATING THE DOCTRINE OF NECESSARIES IN
 FLORIDA: THE FUTURE OF SPOUSAL LIABILITY
 FOR NECESSARY EXPENSES AFTER CONNOR V.
 SOUTHWEST FLORIDA REGIONAL MEDICAL
 CENTER, INC.

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I.	INTRODUCTION	1031
II.	CONNOR AND THE HISTORY OF THE DOCTRINE IN FLORIDA	1033
	A. Cases Addressing the Doctrine.....	1033
	B. The Florida Supreme Court’s Decision in Connor.....	1036
	1. The Majority Opinion.....	1037
	2. Justice Overton’s Dissent.....	1038
III.	THE CONSENSUS OF THE STATES	1040
	A. Joint and Several Liability.....	1040
	1. Judicial Implementation of Joint and Several Liability.....	1040
	2. Legislative Implementation of Joint and Several Liability.....	1042
	3. Joint and Several Liability as a Creditor’s Tool.....	1043
	4. Spouses Living Apart.....	1044
	B. Primary Liability on the Spouse Who Incurred the Debt.....	1045
	C. Marriage as Partnership.....	1046
	D. Primary Liability on the Husband.....	1048
	E. The Equal Protection Problem Persists.....	1049
	F. Abrogation of the Doctrine.....	1050
	1. The Response of Other Legislatures.....	1051
	2. The Effect of Abrogation	1051
IV.	CONCLUSION.....	1052

I. INTRODUCTION

The law is not static. It must keep pace with changes in our society, for the doctrine of *stare decisis* is not an iron mold which can never be changed. . . . It may be argued that any change in this rule should come from the legislature Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.¹

The doctrine of necessities is a common-law doctrine first adopted by the Florida courts in 1895.² The doctrine, which originated in English courts more than three hundred years ago,³ held a husband liable to third parties for any necessities the third party

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1. *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971).

2. See *Phillips v. Sanchez*, 35 Fla. 187, 17 So. 363 (1895).

3. See Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1767 (1984) [hereinafter *Unnecessary Doctrine*].

provided to his wife.⁴ At common law, a woman's legal identity merged with that of her husband; she could not own property, enter into contracts, or receive credit as an individual.⁵ This condition, known as coverture, created a need for the doctrine of necessities because a married woman was dependent upon her husband for maintenance and support. By prohibiting women from obtaining necessities, the law forced women to look to the bounty of their husbands for food, shelter, clothing, and medical services.⁶

In 1943, the Florida Legislature abrogated coverture,⁷ yet the necessities doctrine remained. As late as December 1995, a husband remained liable for the necessities incurred by his wife.⁸ However, the longstanding common-law doctrine created issues of equal protection because women had no similar liability for their husbands' debts.⁹

The Florida Supreme Court recognized the need to either abolish the doctrine or extend liability to both spouses in *Shands Teaching Hospital & Clinics, Inc. v. Smith*.¹⁰ Despite this recognition, the court refused to decide the issue, imploring the Legislature to resolve the question.¹¹ In December 1995, the court faced the issue once again in *Connor v. Southwest Florida Regional Medical Center, Inc.*¹² The court, believing a lack of consensus existed among the states employing the doctrine, decided to abolish the doctrine, leaving the Legislature to codify the doctrine if it wished.¹³ In dissent, Justice Ben Overton suggested that the judiciary was too quick to pass responsibility to the Legislature.¹⁴ He believed the court's decision was actually in the minority, and that the doctrine should be modified to afford primary and secondary liability.¹⁵ As it stands, the doctrine remains uncodified by the Florida Legislature. Two bills proposing joint and several liability between spouses were introduced during the 1996 Regular Session, but died in committee.¹⁶

4. See *id.*; see also *Connor v. Southwest Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 175 (Fla. 1995).

5. See *Connor*, 668 So. 2d at 175.

6. See *id.*

7. See Act effective June 4, 1943, ch. 21932, 1943 Fla. Laws 484; see also FLA. STAT. § 708.08 (1995) (stating that a married woman has the right, without the joinder of her husband, to contract and be contracted with as though she were unmarried).

8. See *Connor*, 668 So. 2d at 179.

9. See *id.* at 176; *Webb v. Hillsborough County Hosp. Auth.*, 521 So. 2d 199, 202 (Fla. 2d DCA 1988) (holding that, without a reciprocal duty, the doctrine of necessities violates the Equal Protection Clause of the U.S. Constitution).

10. 497 So. 2d 644 (Fla. 1986).

11. See *id.* at 646.

12. 668 So. 2d 175 (Fla. 1995).

13. See *id.* at 177.

14. See *id.* at 177-79 (Overton, J., dissenting).

15. See *id.*

16. See Fla. HB 1211 (1996); Fla. SB 906 (1996); see also FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 320,

Part II of this Comment examines the history of the necessities doctrine in Florida and provides an overview of the court's Connor decision. Part III explores the decisions of other states addressing the necessities issue. In addition, Part III discusses the options that legislatures may consider and the need for any of these options in today's society. Finally, Part IV concludes that the Florida Legislature should not codify any form of the necessities doctrine.

II. CONNOR AND THE HISTORY OF THE DOCTRINE IN FLORIDA

A. Cases Addressing the Doctrine

The doctrine of necessities was originally adopted in Florida over a hundred years ago in *Phillips v. Sanchez*.¹⁷ Ironically, Mr. Phillips was the spouse in need of medical care.¹⁸ For the last two years of his life, he was an almost entirely blind invalid suffering from a skin disease.¹⁹ Mrs. Phillips kept boarders in their home and could not care for her husband by herself due to the responsibilities of managing the household.²⁰ She therefore retained the services of her sister to assist in Mr. Phillips' care.²¹ Finding that Mrs. Phillips had authority to act as the agent of her husband, the court stated:

As a general proposition, the wife has no authority to bind the husband by contract unless she is his agent in fact. This well known exception to this general rule is an incident to her right of support from her husband, and she is, for that purpose, his agent, and can bind him to pay for such things as are necessary for the proper maintenance of herself and family. Domestic service in accordance with the means of the husband and social station of the family is a necessity.²²

Thus, Mr. Phillips, through his estate, was required to pay. Significantly, the court found Mr. Phillips' medical care a necessity for his wife.²³

HB 1211; FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 94, SB 906.

At the time this Comment was being prepared for publication, a bill that would impose joint and several liability for hospital bills on husbands and wives living together was pending in the Florida House of Representatives Committee on Financial Services. See Fla. CS for HB 349, § 12 (1997) (proposed FLA. STAT. § 395.301(7)).

17. 35 Fla. 187, 17 So. 363 (1895). For a more complete discussion of the history of the doctrine of necessities in Florida, see Mary Elizabeth Borja, Functions of Womanhood: The Doctrine of Necessaries in Florida 47 U. MIAMI L. REV. 397 (1992).

18. See *Phillips*, 35 Fla. at 190, 17 So. at 364.

19. See *id.*, 17 So. at 364.

20. See *id.*, 17 So. at 364.

21. *Id.* at 191, 17 So. at 364.

22. *Id.*, 17 So. at 364.

23. See *id.* at 192, 17 So. at 364. In his dissent in *Connor*, Justice Overton found irony in the fact that the dispute in *Phillips* focused on necessary medical services for the husband: "Interestingly, the case in which we established the doctrine involved circum-

Eighty-five years later, and thirty-seven years after the Florida Legislature abrogated coverture, a Florida court addressed for the first time the question of whether the doctrine resulted in a wife's liability for the necessary expenses of her husband. In *Manatee Convalescent Center v. McDonald*,²⁴ the Second District Court of Appeal extended the doctrine, holding the wife liable for medical expenses incurred by her deceased husband.²⁵ The court looked to actions of the Florida Legislature, which had adopted a reciprocal and complementary burden of support between spouses.²⁶ For example, in 1971, the Florida Legislature changed all references to "husband" and "wife" in the divorce laws, chapter 61, Florida Statutes, to "spouse" or "party."²⁷ Additionally, the Legislature amended section 61.08, Florida Statutes, to allow alimony for either spouse.²⁸ In light of these changes, the *McDonald* court found that a modification of the doctrine was appropriate.²⁹ The Third District Court of Appeal reached a similar decision soon after in *Parkway General Hospital, Inc. v. Stern*.³⁰

In 1986, the matter finally reached the Florida Supreme Court in *Shands Teaching Hospital & Clinics, Inc. v. Smith*.³¹ The court in *Shands* rejected *McDonald* and *Stern*, holding that the decision to abrogate the doctrine of necessities was best left to the Legislature.³² The court agreed that it was an anachronism to hold the husband liable for a wife's debts without holding a wife similarly responsible and found merit in the arguments of both the hospital and the wife.³³ The hospital argued that the marital partnership benefits when one spouse receives medical services.³⁴ These benefits, the hospital asserted, gave rise to an implied-in-law contract, and thus the other spouse should be liable to prevent unjust enrichment.³⁵ However, the wife denied that she had received any benefit or unjust enrichment from her husband's medical services.³⁶ She argued that the hospital should have sought her guaranty of the medical bills before

stances where the wife, acting as an agent for the husband, incurred obligations for the care of her invalid husband and the claim was against his estate." 668 So. 2d at 179 Overton, J., dissenting).

24. 392 So. 2d 1356 (Fla. 2d DCA 1980).

25. See *id.* at 1359.

26. See *id.* at 1357.

27. See *id.*; see also Act effective June 22, 1971, ch. 71-241, 1971 Fla. Laws 1319.

28. See *McDonald*, 392 So. 2d at 1357; see also ch. 71-241, § 10, 1971 Fla. Laws at 1323.

29. See 392 So. 2d at 1357.

30. 400 So. 2d 166 (Fla. 3d DCA 1981).

31. 497 So. 2d 644 (Fla. 1986).

32. See *id.* at 646.

33. See *id.* at 645.

34. See *id.*

35. See *id.*

36. See *id.*

they rendered services and sought payment from the assets of her deceased husband's estate.³⁷

The Florida Supreme Court hesitated to create a fixed rule of law because it could "easily visualize instances where it would be inequitable to hold either a wife or a husband liable for medical services rendered to a spouse, just as we can visualize instances where it would be inequitable not to hold either spouse liable for medical services received by the other spouse."³⁸ As such, the Shands decision focused on the court's desire and authority to modify a common-law rule.³⁹

Significantly, the Florida Supreme Court's decision in Shands did not address the underlying equal protection issue created by the doctrine. Instead, the court held that the hospital as petitioner did not have standing to make an equal protection argument.⁴⁰ By refusing to decide, the court essentially left the issue open for the district courts of appeal.

Two years after Shands, the equal protection issue came before the Second District Court of Appeal in *Webb v. Hillsborough County Hospital Authority*.⁴¹ A husband, who did not contract for medical services provided to his wife, argued that he should not be liable for the debt because such liability would violate his right to equal protection under the Florida and federal constitutions.⁴² The court agreed that a one-sided application of the necessities doctrine resulted in an equal protection violation and relied on *McDonald* and *Stern* to conclude that the doctrine should be extended.⁴³ The Shands decision did not deter the Second District Court from extending the doctrine. Instead, the court concluded that the Florida Supreme Court's disapproval of *McDonald* and *Stern* was based on the hospitals' lack of standing to make equal protection claims.⁴⁴ With the

37. See *id.* at 646.

38. *Id.*

39. The court called the situation a "decisional quandary," *id.*, and explained why it was hesitant to change the longstanding rule. The court stated that the issue had such broad social implications that its resolution required input from the public in general and that the judiciary was the branch of government least capable of receiving this input. See *id.* As such, the court looked to *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971), and *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985), to determine what it believed to be the controlling question: whether the court was the proper institution to resolve the issue. In *Gates*, the court expanded the common-law right of consortium to allow wives a cause of action. See 247 So. 2d at 45. In contrast, the *Zorzos* court declined to create a common-law right to sue for parental consortium when the parent does not die, leaving the Legislature to make any change in the law. See 467 So. 2d at 307. Unlike the parties in *Gates*, the parties in *Shands* did not raise a valid equal protection argument. Therefore, the court distinguished the case and followed *Zorzos*. See *Shands*, 497 So. 2d at 646.

40. See *Shands*, 497 So. 2d at 646 n.1.

41. 521 So. 2d 199 (Fla. 2d DCA 1988).

42. See *id.* at 200.

43. See *id.* at 203.

44. See *id.*

husband bringing suit in this case, no such standing issue existed.⁴⁵ Therefore, the court chose to extend the doctrine with one limitation: “For purposes of pleading and proof by a creditor, a showing that the spouse to whom necessities were provided is unable to pay . . . shall be a condition precedent to the liability of the other spouse for the necessities.”⁴⁶ Despite the supreme court’s call to the Legislature in *Shands*, the *Webb* court believed it had discretion to modify the rule:

[I]f a court failed to make such a choice, followed existing common-law by affirming a final judgment . . . which held a husband responsible for necessities provided to his wife, left law as is that a wife is not reciprocally responsible, and simply announced that the choice of law is for the legislature to make, the constitutional equal protection violation would have been ignored, which a court is not entitled to do. Thus, it appears inevitable that there be a court-made choice of law in order not to ignore the equal protection violation.⁴⁷

Webb, however, did not end the controversy surrounding the necessities doctrine. In *Heinemann v. John F. Kennedy Memorial Hospital*⁴⁸ and *Faulk v. Palm Beach Gardens Community Hospital, Inc.*,⁴⁹ the Fourth District Court of Appeal disagreed with the *Webb* court and held that a wife was not liable for the necessary expenses incurred by her husband.⁵⁰ The Fifth District Court of Appeal also rendered a decision in direct conflict with *Webb*. In *Waite v. Leesburg Regional Medical Center, Inc.*,⁵¹ the court simply disregarded *Webb* and held that an unmodified necessities doctrine violated neither the federal Equal Protection Clause nor its state counterpart.⁵²

B. The Florida Supreme Court’s Decision in *Connor*

Kenneth Connor incurred medical expenses in 1992 for services provided to him by Southwest Florida Regional Medical Center.⁵³ Connor was unable to pay an \$85,000 outstanding balance owed to Southwest.⁵⁴ In 1993, Southwest sued Connor and his wife for the debt, claiming a written agreement obligated the Connors to pay.⁵⁵ Mrs. Connor moved to dismiss Southwest’s complaint against her

45. See *id.*

46. *Id.*

47. *Id.* at 207.

48. 585 So. 2d 1162 (Fla. 4th DCA 1991).

49. 598 So. 2d 1029 (Fla. 4th DCA 1991).

50. See *Heinemann*, 585 So. 2d at 1162; *Faulk*, 589 So. 2d at 1029.

51. 582 So. 2d 789 (Fla. 5th DCA 1991).

52. See *id.* at 790.

53. See *Connor v. Southwest Fla. Reg’l Med. Ctr., Inc.*, 643 So. 2d 681, 681 (Fla. 2d DCA 1994).

54. See *id.* at 682.

55. See *id.*

because she had not executed any agreement to pay for the services provided to her husband.⁵⁶

The trial court followed an unmodified doctrine of necessities as it believed existed under Shands and disregarded the Webb court's expansion of the doctrine.⁵⁷ As a result, the court dismissed the claim.⁵⁸ Subsequently, the Second District Court of Appeal reversed and remanded the case, recognizing that the doctrine of necessities in Florida was "muddied" and certifying the case to the Florida Supreme Court as being in conflict with four cases in other districts.⁵⁹

1. The Majority Opinion

The supreme court began its opinion by discussing the history of the doctrine, highlighting McDonald, Shands, and Webb, as well as the four cases that directly disagreed with or ignored Webb.⁶⁰ Although Connor was before the court in the same posture as Shands, the conflict in the district courts over the abrogation or extension of the doctrine forced the court to address the equal protection issue it had left unresolved in Shands.⁶¹

Mrs. Connor argued that the doctrine of necessities could no longer be justified because women could contract freely for their own necessities.⁶² The hospital argued that although the original purpose behind the doctrine no longer existed, the continuance of the doctrine served an important function by promoting the partnership theory of marriage.⁶³ The hospital contended that the doctrine should therefore be extended to create liability for both men and women to the third-party creditors of their spouses.⁶⁴

In justifying its decision to abrogate the doctrine, the court looked to the lack of consensus among other states confronting the issue. First, the court cited three cases that abrogated the doctrine entirely and gave the state legislature the choice whether to enact a version of the doctrine into law.⁶⁵ It went on to cite six cases that extended the doctrine's application to both sexes.⁶⁶

56. See *id.*

57. See *id.* at 682.

58. See *id.*

59. *Id.* at 684.

60. See *Connor v. Southwest Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 175 (Fla. 1995).

61. See *id.* at 176.

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.* (citing *Emanuel v. McGriff*, 596 So. 2d 578 (Ala. 1992); *Schilling v. Bedford County Mem'l Hosp., Inc.*, 303 S.E.2d 905 (Va. 1983); *Condore v. Prince George's County*, 425 A.2d 1011 (Md. 1981)).

66. See *id.* (citing *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145 (R.I. 1994); *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1 (Ind. 1993); *St. Francis Reg'l Med. Ctr.*,

In addition, the court observed that the legislatures of four states—Oklahoma, Kentucky, Georgia, and North Dakota—had enacted laws dealing with the doctrine.⁶⁷ Both Oklahoma and Kentucky had codified the doctrine in its original common-law form.⁶⁸ Georgia had abolished the doctrine in 1979,⁶⁹ and North Dakota had imposed joint and several liability for debts incurred by either spouse for food, clothing, fuel, and shelter.⁷⁰ The North Dakota statute, however, does not require a spouse to contribute to the other spouse's medical expenses.⁷¹

Thus, the court believed its refusal to modify the common law in *Shands* was reinforced by the lack of consensus among other state courts and legislatures.⁷² Similarly, the court concluded that its refusal to hold a wife liable for her husband's necessities was correct in light of the Florida Legislature's inaction since *Shands*.⁷³ In turn, equal protection concerns demanded that the court refuse to hold a husband liable for his wife's necessities as well.⁷⁴ By abrogating the doctrine, the court claimed it was actually refraining from making a policy decision better left to the Legislature.⁷⁵

2. Justice Overton's Dissent

In dissent, Justice Overton expressed dismay with the reasoning behind the court's decision to abrogate.⁷⁶ While the majority relied on the lack of consensus among other states to justify its position on the doctrine, Justice Overton emphasized that the court's decision to abrogate was actually in the minority.⁷⁷

Justice Overton agreed that the doctrine, in its present state, violated the Equal Protection Clause.⁷⁸ Nevertheless, he felt that the doctrine "is just as important today, under the partnership theory of marriage, as it was when the doctrine was created under the unity theory of marriage."⁷⁹ According to Justice Overton, abrogation

Inc. v. Bowles, 836 P.2d 1123 (Kan. 1992); *North Carolina Baptist Hosps., Inc. v. Harris*, 354 S.E.2d 471 (N.C. 1987); *Richland Mem'l Hosp. v. Burton*, 318 S.E.2d 12 (S.C. 1984); *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003 (N.J. 1980)).

67. See *id.* at 177.

68. See *id.* (citing OKLA. STAT. tit. 43, § 209 (1994)); KY. REV. STAT. ANN. § 404.040 (*Banks-Baldwin* 1994)).

69. See *id.* (citing 1979 Ga. Laws 466, 491).

70. See *id.* (citing N.D. CENT. CODE § 14-07-08 (1993)).

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.* (Overton, J., dissenting).

77. See *id.* at 179.

78. See *id.* at 177.

79. *Id.*

“weaken[s] the obligations of marriage by eliminating the spousal duty to care for one another,” “shift[s] the policy of this state by, in effect, requiring each spouse to take care of himself or herself,” and “reduces the legal obligations of the marriage contract.”⁸⁰

Justice Overton reasoned that the Legislature’s inaction implied agreement with the judicially created policy surrounding the common-law doctrine of necessities as it existed before Connor.⁸¹ Further, he asserted that it was within the court’s discretion to decide the merits of the case because the incorporation of the doctrine into Florida’s common law was originally a matter of judicial policy.⁸² Interestingly, Justice Overton disagreed with the majority’s opinion that a lack of consensus existed among the states.⁸³ To support this assertion, Justice Overton tallied the number of cases addressing the doctrine and considered their outcomes.⁸⁴

In his survey of these cases, Justice Overton discussed the options exercised by various courts. Twelve states had extended the doctrine in one of the following three ways: (1) by imposing joint and several liability;⁸⁵ (2) by imposing primary liability on the spouse who incurred the debt and secondary liability on the other spouse;⁸⁶ or (3) by imposing primary liability on the husband and secondary liability on the wife.⁸⁷ Four states had abrogated the doctrine entirely,⁸⁸ and two had simply reaffirmed the common-law doctrine without addressing the equal protection concerns.⁸⁹

Further, Justice Overton argued that Florida had moved to a partnership theory of marriage, and that the doctrine was just as applicable today as it was in 1895: “[I]n many households, both spouses are employed but only one spouse provides the medical coverage for the entire household. Under these circumstances, the extension of the

80. *Id.*

81. *See id.*

82. *See id.* at 177-78.

83. *See id.* at 178.

84. *See id.*

85. *See id.* (citing *North Carolina Baptist Hosps. v. Harris*, 354 S.E.2d 471 (N.C. 1987)).

86. *See id.* (citing *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 8 (Ind. 1983)). Justice Overton incorrectly cited South Carolina as being under this category. *See id.*; *see also Richland Mem'l Hosp. v. Burton*, 318 S.E.2d 12, 13-14 (S.C. 1984) (stating that the necessities doctrine allows third parties providing necessities to a husband or wife to bring an action against the other spouse).

87. *See id.* (citing *Ohio State Univ. v. Kinkaid*, 549 N.E.2d 517 (Ohio 1990) (noting that the Ohio Legislature extended the doctrine to both parties)).

88. *See id.* (citing *Emanuel v. McGriff*, 596 So. 2d 578 (Ala. 1992); *Condore v. Prince George's County*, 425 A.2d 1011 (Md. 1981); *Govan v. Medical Credit Servs., Inc.*, 621 So. 2d 928 (Miss. 1993); *Schilling v. Bedford County Mem'l Hosp., Inc.*, 303 S.E.2d 905 (Va. 1983)).

89. *See id.* (citing *Hitchcock Clinic, Inc. v. Mackie*, 648 A.2d 817, 819 (Vt. 1993); *Medlock v. Fort Smith Serv. Fin. Corp.*, 803 S.W.2d 930, 931 (Ark. 1991)).

doctrine fits like a glove by requiring the more able spouse to care for the needs of the household.”⁹⁰ Justice Overton stated that each spouse is entitled to share in the fruits of the marital partnership and cited two cases, *Canakarlis v. Canakarlis*⁹¹ and *Thompson v. Thompson*,⁹² as involving the equitable distribution principles recognized by Florida.⁹³ *Canakarlis* held that spouses are considered partners for purposes of equitable distribution of marital assets upon divorce,⁹⁴ while *Thompson* held that professional goodwill obtained after the formation of the marriage partnership was a partnership asset.⁹⁵

Finally, Justice Overton cited *Via v. Putnam*⁹⁶ as an illustration of the court’s commitment to spousal support. Putnam was a probate case and did not address the doctrine of necessities.⁹⁷ However, Justice Overton quoted the Putnam court for the proposition, “The institution of marriage has been a cornerstone of western civilization for thousands of years and is the most important type of contract ever formed.”⁹⁸

III. THE CONSENSUS OF THE STATES

A. Joint and Several Liability

1. Judicial Implementation of Joint and Several Liability

The North Carolina Supreme Court recognized joint and several liability as a viable solution to an outdated necessities doctrine in *North Carolina Baptist Hospitals, Inc. v. Harris*.⁹⁹ In *Harris*, the hospital filed suit against both Mr. and Mrs. Harris to collect approximately \$3000 for medical expenses incurred by Mr. Harris.¹⁰⁰ Mrs. Harris specifically refused to sign as guarantor at the time of her husband’s admission to the hospital.¹⁰¹ When the hospital business office gave her the form authorizing treatment for Mr. Harris, she signed it in her husband’s name and noted that the signature was signed by her hand.¹⁰² While the lower court granted summary

90. *Id.* at 179.

91. 382 So. 2d 1197 (Fla. 1980).

92. 576 So. 2d 267 (Fla. 1991).

93. See Connor, 688 So. 2d at 179.

94. See 382 So. 2d at 1203-04.

95. See 576 So. 2d at 268.

96. 656 So. 2d 460 (Fla. 1995).

97. See Connor, 688 So. 2d at 179.

98. *Id.* (quoting Putnam, 656 So. 2d at 465 (quoting in turn *In re Estate of Yohn*, 238 So. 2d 290, 296 (Fla. 1970))).

99. 354 S.E.2d 471 (N.C. 1987).

100. See *id.* at 471.

101. See *id.*

102. See *id.* at 472.

judgment against Mr. Harris, it refused to hold Mrs. Harris liable, dismissing the complaint.¹⁰³ The North Carolina Supreme Court, however, found Mrs. Harris liable for the debt in its entirety, holding that a wife may be held responsible for the necessary medical expenses of her husband, even in the absence of an express undertaking on her part.¹⁰⁴

The Harris court's analysis focused primarily on the state's trend toward gender neutrality and the need for neutrality in the application of the doctrine.¹⁰⁵ Although Mrs. Harris argued that abrogation of the doctrine would achieve this objective, the court reasoned that a reciprocal duty for both spouses would serve several beneficial ends.¹⁰⁶ The court observed that the doctrine had historically encouraged health care providers and facilities to provide needed medical services to married persons.¹⁰⁷ According to the court, the doctrine also recognized that marriage involved shared wealth, expenses, duties, and rights.¹⁰⁸ To allow for spousal liability, the court opined, would be to recognize "a personal duty of each spouse to support the other, a duty arising from the marital relationship itself and carrying with it the corollary right to support from the other spouse."¹⁰⁹ The court thus adopted joint and several liability, but did not elaborate on its decision to invoke that method as opposed to primary and secondary liability.

In *Kilbourne v. Hanzelik*,¹¹⁰ the Tennessee Supreme Court also found that the necessities doctrine applied to both sexes. However, the facts of *Kilbourne* differ from those of *Harris* or any of the Florida cases discussed above. The *Kilbourne* court based its decision to extend the doctrine on the since-overruled *Manatee Convalescent Center, Inc. v. McDonald*.¹¹¹ In *Kilbourne*, the group medical insurance of the appellant, Linda Kilbourne, paid \$50,000 in medical expenses incurred by her husband after a car accident in which the other driver was killed.¹¹² She subsequently filed suit against the administrator of the deceased driver's estate to recover those expenses.¹¹³ The trial court granted summary judgment against Mrs. Kilbourne based on common-law rules that did not obligate a wife to

103. See *id.* at 471-72.

104. See *id.* at 475.

105. See *id.* at 473.

106. See *id.*

107. See *id.*

108. See *id.*

109. *Id.* at 474.

110. See *Kilbourne v. Hanzelik*, 648 S.W.2d 932, 934 (Tenn. 1983).

111. See *id.* at 932; *Manatee Convalescent Ctr., Inc. v. McDonald*, 392 So. 2d 1356 (Fla. 2d DCA 1980).

112. See *Kilbourne*, 648 S.W.2d at 932.

113. See *id.*

pay for her husband's necessities and that denied her a right to recover for necessities that were in fact paid by her.¹¹⁴ The court of appeals affirmed the decision, but the Tennessee Supreme Court ultimately reversed and remanded, noting the existence of amended alimony statutes that established a gender-neutral burden of support in both Florida and Tennessee.¹¹⁵ The supreme court adopted the reasoning in *McDonald*, thereby allowing Mrs. Kilbourne a cause of action to recover the money she, or in actuality, her insurance company, paid.¹¹⁶

In his concurring opinion, Justice Harbison stated that several issues raised by the estate administrator were still open.¹¹⁷ A factual dispute existed as to whether Mrs. Kilbourne and her husband were separated at the time of the accident.¹¹⁸ Justice Harbison noted that a duty to furnish necessities to a spouse living apart is different from that of spouses living together.¹¹⁹

2. Legislative Implementation of Joint and Several Liability

A number of states currently have family expense statutes and statutes that expressly codified an expanded doctrine implementing joint and several liability.¹²⁰ Florida legislators introduced bills in the 1996 Regular Session aimed at doing the same.¹²¹ Both bills failed, dying in committee before reaching the floor.¹²² Their introduction, however, illustrates the future of the doctrine in Florida and the direction the Legislature may take in codifying an expanded doctrine. Florida House Bill 1211 and Florida Senate Bill 906 both stated: "The husband and wife are liable jointly and severally for any debts contracted by either, while living together, for necessary household supplies of food, clothing, and fuel, for medical care, and for shelter for themselves and family, and for the education of their minor children."¹²³ Unlike the Virginia, Montana, and Hawaii stat-

114. See *id.*

115. See *id.* at 932.

116. See *id.* at 933.

117. See *id.* at 934 (Harbison, J., concurring).

118. See *id.*

119. See *id.*

120. See COLO. REV. STAT. § 14-6-110 (1995); D.C. CODE ANN. § 30-201 (1996); HAW. REV. STAT. ANN. § 572-24 (Michie 1995); 750 ILL. COMP. STAT. ANN. 65/15 (West 1996); MINN. STAT. § 519.05 (1995); MONT. CODE ANN. § 40-2-106 (1995); S.D. CODIFIED LAWS §25-2-11 (Michie 1996); VA. CODE ANN. § 55-37 (Michie 1995); WASH. REV. CODE § 26.16.205 (1995).

121. See Fla. HB 1211 (1996); Fla. SB 906 (1996).

122. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 320, HB 1211; FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF SENATE BILLS at 94, SB 906.

123. Fla. HB 1211 § 1 (1996); Fla. SB 906 § 1 (1996). Interestingly, the bill pending before the Florida House of Representatives Committee on Financial Services as this Com-

utes, which simply create spousal liability for "necessaries,"¹²⁴ the Florida bills specifically listed the covered expenses. North Dakota, on the other hand, imposes joint and several liability for food, clothing, fuel, and shelter, but does not include medical expenses.¹²⁵ This exclusion is a significant difference because most of the modern cases dealing with the doctrine of necessities focus on medical costs.¹²⁶

3. Joint and Several Liability as a Creditor's Tool

Recognizing that most doctrine-of-necessaries cases today do not involve a neglectful spouse who refuses to provide food, shelter, and clothing to the other spouse, it becomes apparent that the doctrine owes its continued existence to its use as a collection device for creditors. In the last fifty years, all of the Florida cases in which a party invoked the doctrine involved unpaid medical expenses.¹²⁷ In case after case, hospitals sought to trap an unwilling spouse into making payment on a debt for which he or she did not contract.¹²⁸

ment was being prepared for publication would impose joint and several liability only for hospital bills. See Fla. CS for HB 349, § 12 (1997) (proposed FLA. STAT. § 395.301(7)) ("Hospital bills are considered family expenses in which the husband and wife, while living together, are jointly and severally liable for each other and their minor children.").

124. See HAW. REV. STAT. ANN. § 572-24 (Michie 1995):

Both spouses of a marriage, whether married in this State or in some other jurisdiction, and residing in this, shall be bound to maintain, provide for, and support one another during marriage, and shall be liable for all debts contracted by one another for necessities for themselves, one another, or their family during marriage

See also MONT. CODE ANN. § 40-2-106 (1995):

Neither husband nor wife, as such, is answerable for the acts of the other or liable for the debts contracted by the other; provided, however, that the expenses for necessities of the family and of the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

See also VA. CODE ANN. § 55-37 (Michie 1995):

Except as otherwise provided in this section, a spouse shall not be responsible for the other spouse's contract or tort liability to a third party, whether such liability arose before or after the marriage. The doctrine of necessities as it existed at common-law shall apply equally to both spouses, except where they are permanently living separate and apart, but shall in no event create any liability between such spouses as to each other

125. See N.D. CENT. CODE § 14-07-08 (1995).

126. See Borja, *supra* note 17, at 423 n.162; Unnecessary Doctrine, *supra* note 3, at 1784; see also generally Alan P. Woodruff & Arthur H. Lester, Claims for Medical Expenses Under the Doctrine of Necessaries, FLA. B.J., Dec. 1993, at 30.

127. See Borja, *supra* note 17, at 423 n.162.

128. See, e.g., Connor v. Southwest Fla. Reg'l Med. Ctr., Inc., 668 So. 2d 175 (Fla. 1995); Schilling v. Bedford County Mem'l Hosp., 303 S.E.2d 905 (Va. 1983); Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003 (N.J. 1980); Webb v. Hillsborough County Hosp. Auth., 521 So. 2d 199 (Fla. 2d DCA 1988). The spouses in these cases were unwilling to pay for the debts of their living spouses. A spouse who refuses to pay when the estate of the deceased spouse is either insufficient to cover the debt or not subject to probate is another factual scenario prevalent in doctrine-of-necessaries cases. See,

A doctrine providing for joint and several liability allows a hospital or other creditor unfettered discretion in the collection of a debt because those creditors may seek payment from either spouse, regardless of which spouse actually incurred the debt.¹²⁹ The New Jersey Supreme Court noted that such an extension of the doctrine treats spouses equally, but characterized the rule as “equality with a vengeance.”¹³⁰ The court stated:

The rule would result in the immediate exposure of the property of one spouse for a debt incurred by the other spouse. A creditor would receive the same benefits as if both spouses had agreed to joint liability. Neither equity nor reality justifies imposing unqualified liability on one spouse for the debts of the other or exempting one spouse from liability for the necessary expenses of the other.¹³¹

The entire purpose of the original necessities doctrine—to provide for a spouse who cannot provide for her or himself—is further undermined because joint and several liability allows a creditor to proceed against a nondebtor spouse regardless of whether the financial resources of the debtor spouse are sufficient to cover the debt.¹³² In other words, the doctrine, touted as a device that encourages marital care and support, is reduced to a creditor’s remedy.¹³³

4. Spouses Living Apart

Some state laws recognize that a support duty may not exist if spouses are not living together.¹³⁴ The recent Florida bills and the Virginia statute state this exception,¹³⁵ other states’ statutes do not expressly make a distinction, but rather clarify it through case law.¹³⁶ Without this distinction, a spouse who is not living with the debtor at the time the debt is incurred and who awaits final dissolution of the marriage could be liable for the debt.

e.g., *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145 (R.I. 1994); *Marshfield Clinic v. Discher*, 314 N.W.2d 326 (Wis. 1982); *Condore v. Prince George’s County*, 425 A.2d 1011 (Md. 1981); *Heinemann v. John F. Kennedy Mem’l Hosp.*, 585 So. 2d 1162 (Fla. 4th DCA 1991).

129. See Marcus L. Moxley, *North Carolina Baptist Hosps., Inc. v. Harris: North Carolina Adopts a Gender-Neutral Approach to the Doctrine of Necessaries* 66 N.C. L. REV. 1241, 1246-47 (1987).

130. *Baum*, 417 A.2d at 1009.

131. *Id.*

132. See Moxley, *supra* note 129, at 1250-51.

133. See *id.*

134. See, e.g., MINN. STAT. § 19.05 (1995); S.D. CODIFIED LAWS § 25-2-11 (Michie 1996); VA. CODE ANN. § 55-37 (Michie 1995).

135. Fla. HB 1211 (1996); Fla. SB 906 (1996).

136. See COLO. REV. STAT. § 14-6-110 (1995); *O’Brien v. Galley-Stockton Shoe Co.*, 173 P. 544, 544 (Colo. 1918) (holding that the statute making a husband and wife jointly liable for family expenses does not apply where the husband and wife have separated and are living apart).

In *Bartrom v. Adjustment Bureau, Inc.*,¹³⁷ the Supreme Court of Indiana held that the duty of spousal support continues until the marital relationship is dissolved.¹³⁸ Finding irrelevant an Indiana statute allowing equitable distribution to take place at the date of final separation, the court cited a case that held that an estranged spouse may look to the other spouse for support pending the date of final dissolution.¹³⁹ Due to a lack of precedent that might suggest spousal support could be terminated prior to divorce, the court held that Mrs. Bartrom was liable for expenses incurred by her husband after the couple filed for divorce, but before the final dissolution.¹⁴⁰ The inequity of such a situation was recognized by the sponsors of the Florida bills.¹⁴¹

B. Primary Liability on the Spouse Who Incurred the Debt

Other courts have elected to extend the necessities doctrine to both spouses by imposing primary liability on the spouse who incurred the debt and secondary liability on the other.¹⁴² As discussed above, the New Jersey Supreme Court found joint and several liability an inequitable solution because it gave the same rights to a creditor who contracted with one spouse as it gave to a creditor who held an agreement with both.¹⁴³ Nevertheless, the court recognized marriage as a “shared enterprise [and] a joint undertaking” that is “akin to a partnership.”¹⁴⁴ As a result, the court held that a creditor who provides necessities to one spouse can assume that the financial resources of both spouses may be used for payment; however, one spouse may only become liable for the debt when the resources of the other spouse who incurred the debt are insufficient.¹⁴⁵ The court justified its position by stating, “Marshaling the marital resources in that manner grants some protection to a spouse who has not expressly consented to that debt.”¹⁴⁶ Relying on the partnership theory of marriage, the court chose an alternative somewhat less extreme than either joint and several liability or abrogation.¹⁴⁷

137. 618 N.E.2d 1 (Ind. 1993).

138. See *id.* at 9.

139. See *id.* at 8 (citing *Welling v. Welling*, 272 N.E.2d 598 (Ind. 1971)).

140. See *id.*

141. Fla. HB 1211 § 1 (1996); Fla. SB 906 § 1 (1996).

142. See *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1148 (R.I. 1994); *Bartrom*, 618 N.E.2d at 8; *St. Francis Reg'l Med. Ctr., Inc. v. Bowles*, 836 P.2d 1123, 1128 (Kan. 1992); *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1010 (N.J. 1980).

143. See *Baum*, 417 A.2d at 1009.

144. *Id.* at 1010.

145. See *id.*

146. *Id.*

147. See *id.*

C. Marriage as Partnership

In *Connor*, Justice Overton stressed the importance of the partnership theory of marriage.¹⁴⁸ He stated that under the partnership theory, each spouse is entitled to share in the financial fruits of the marriage, a concept he believed Florida recognized in its equitable principles of distribution.¹⁴⁹ As Justice Overton suggested, the shared financial success or failure of a couple is an important aspect of marriage.¹⁵⁰ Nevertheless, marriages and business partnerships are not sufficiently analogous; the ultimate goal of marriage is not financial enterprise and profit.¹⁵¹ Significantly, the cases mentioned in Justice Overton's dissent involved dissolution of marriage and allowed for a case-by-case determination of how much each spouse contributed to the marriage and how much each might take away.¹⁵² These cases suggest that the law must step into the boundaries of the marriage institution to make sense of the chaos that a separation of such a partnership creates.¹⁵³ While applying the principles of partnership and equitable distribution are necessary when a marriage ends,¹⁵⁴ the application of these principles to the marriage itself is less appropriate.

The partnership theory of marriage casts onto all married couples one belief: two individuals are united as one financial entity.¹⁵⁵ However, some couples choose to join their lives without joining their re-

148. See 668 So. 2d at 179 (Overton, J., dissenting).

149. See *id.*

150. See *id.* at 178; see also *Thompson v. Thompson*, 576 So. 2d 267, 270 (Fla. 1991) (holding that the court should consider goodwill accumulated during a marriage as a marital asset); *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203-04 (Fla. 1980).

151. See *Unnecessary Doctrine*, *supra* note 3, at 1791-94. But see *Borja*, *supra* note 17, at 429-35.

152. See *Connor*, 668 So. 2d at 178-79, (citing *Canakaris*, 382 So. 2d at 1203-04; *Thompson*, 576 So. 2d at 268).

153. See *Canakaris*, 382 So. 2d at 1204 (stating that a trial court must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be "shortchanged.").

154. See *Thompson*, 576 So. 2d at 270; *Canakaris*, 382 So. 2d at 1204. The *Thompson* court quoted *Prahinski v. Prahinski*, 540 A.2d 833 (Md. Ct. Spec. App. 1988), for the proposition that it would be inequitable to ignore goodwill attributable to a spouse if in fact it exists. See 576 So. 2d at 270 (quoting *Prahinski*, 540 A.2d at 841).

155. See *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 417 A.2d 1003, 1105 (N.J. 1980) (stating that marriage is a partnership and that in most marriages, a husband and wife consider themselves a financial unit); *Unnecessary Doctrine*, *supra* note 3, at 1793 (stating that the partnership theory of marriage is superficially tempting because most spouses, like business partners, pool their assets); see also Judith Treas, *Money in the Bank: Transaction Costs and the Economic Organization of Marriage* 58 AM. SOC. REV. 723, 723 (1993) (stating that Americans expect married couples to pool their income and assets and discussing a study in which 69% of wives and 75% of husbands favored pooling when asked whether spouses should combine all their income and assets).

sources.¹⁵⁶ Some spouses enter into premarital agreements to protect assets each brings into the marriage and maintain separate bank accounts and credit cards.¹⁵⁷ This arrangement is not yet the norm, but the trend illustrates a changing society upon which neither the legislature nor the judiciary should cast antiquated beliefs. The unity theory of marriage that prevailed a century ago and a doctrine of necessities that required no reciprocal duty for a woman to support a man seem absurd and outdated now.¹⁵⁸ How long is it before a partnership theory of marriage no longer fits the needs of modern society?

Allowing the law to interfere with the marriage itself—to dictate that an individual can no longer contract as an individual but rather only as an entity—goes far beyond the state's interest in promoting marital support.¹⁵⁹ The doctrine of necessities undermines the rights of the individual because it attaches liability to one individual for the debts of another. Mrs. Harris had a reason for refusing to guarantee her husband's medical expenses, although we can only speculate as to what that reason was.¹⁶⁰ When courts or lawmakers interfere with

156. See Unnecessary Doctrine *supra* note 3, at 1795-97:

Superficially, the interest that married people have in apportioning support obligations for themselves may seem to be simply an economic one. The implications of this decision, however, transcend family economics. The choice of support obligations affects the emotional character of the marital relationship and the internal power structure of the family.

157. See Treas, *supra* note 155, at 723. Treas states:

Despite general support for common ownership, some married individuals hold money back from the common pot as demonstrated by studies of British working class couples, of readers of an American women's magazine, and of dual career couples in Chicago. In extreme cases, all money is segregated and common expenditures are met according to an agreed upon formula or end-of-the-month bargaining. Separate accounting systems are apparently on the rise—the proportion of married women with checking or savings accounts in their own names nearly doubled between 1972 and 1980.

Id. (emphasis added).

158. Very few courts deny that the original common-law doctrine of necessities has no place in modern society. As the court in *Manatee Convalescent Ctr., Inc. v. McDonald* stated, "Changing times demand reexamination of seemingly unchangeable legal dogma. Equality under law and even handed treatment of the sexes in the modern market place must also carry the burden of responsibility which goes with the benefits." 392 So. 2d 1356, 1358 (Fla. 2d DCA 1980).

159. With respect to the state's interest in promoting stable marriages, one commentator writes:

Spousal support obligations, it is argued, benefit spouses and society by encouraging sharing and mutual support in marriage. This behavior is thought to foster individual contentment which in turn promotes social harmony. The problem with applying this reasoning to the necessities doctrine is that law cannot coerce these benefits; sharing produces cooperation and happiness only when it is voluntary. The necessities doctrine forces sharing on reluctant partners and thus seems unlikely to promote the State's goal of marital happiness.

Unnecessary Doctrine *supra* note 3, at 1795 (footnotes omitted).

160. See *North Carolina Baptist Hosps., Inc. v. Harris*, 354 S.E.2d 471, 472 (N.C. 1987); see also *supra* text accompanying notes 101-02.

a spouse's decision by allowing the doctrine of necessities to stand, they succumb to a paternalistic attitude that ignores a basic principle: One can decide when and how one will contract for liability and whose debts one will guarantee.¹⁶¹

Furthermore, Florida is not a community property state. Therefore, marital property is owned separately, and neither spouse has a legal interest in the assets or income of the other. This fact further undermines the analogy between marriage and business partnerships. The doctrine of necessities in effect leads to a system of community property by imposing liability for each spouse's debts on the other.¹⁶² As such, neither form of the doctrine of necessities—joint and several liability or primary and secondary liability—is an adequate alternative.

Finally, Justice Overton argued that "in many households, both spouses are employed but only one spouse provides the medical coverage for the entire household. Under these circumstances, the extension of the doctrine fits like a glove by requiring the more able spouse to care for the needs of the household."¹⁶³ If both spouses are earning wages that could be contributed to potential medical expenses, one can only assume Justice Overton is referring to health care insurance that may be a benefit of one spouse's job and not the other. However, doctrine-of-necessaries cases that involve any mention of insurance disputes are practically nonexistent.¹⁶⁴ Therefore, Justice Overton's example is inapt because the necessities doctrine is generally utilized only in cases in which an individual is indebted to a health care provider outright.¹⁶⁵

D. Primary Liability on the Husband

The Wisconsin Supreme Court extended the doctrine to place primary liability on the husband and secondary liability on the wife, regardless of who incurred the debt.¹⁶⁶ The court found that joint and several liability was not an appropriate alternative because, statisti-

161. The controversy surrounding the doctrine of necessities is evidence of the courts' reluctance to create an exception to this principle.

162. See *Unnecessary Doctrine* *supra* note 3, at 1792. To ensure that a spouse's separate property may be applied to debts for necessities incurred by the other spouse, some community property states have statutes expressly codifying the doctrine to impose joint and several liability. See CAL. FAM. CODE § 94 (West 1996); NEV. REV. STAT. § 123.090 (1995).

163. Connor, 668 So. 2d at 179.

164. One of the few doctrine-of-necessaries cases that involves an insurance dispute, *Kilbourne v. Hanzelik*, 648 S.W.2d 932 (Tenn. 1983), is discussed above. See *supra* text accompanying notes 110-19.

165. See, e.g., Connor, 668 So. 2d at 175; *St. Francis Reg'l Med. Ctr., Inc. v. Bowles*, 836 P.2d 1123, 1124 (Kan. 1992); Harris, 354 S.E.2d at 471.

166. See *Estate of Stromsted v. St. Michael Hosp. of Franciscan Sisters*, 299 N.W.2d 226, 230 (Wis. 1980).

cally, the majority of married women were not the primary wage earners in their respective families and were partially dependent on their husbands.¹⁶⁷

This modification did not present a gender-neutral solution, however, and the equal protection issue came before the Wisconsin Supreme Court two years later in *Marshfield Clinic v. Discher*.¹⁶⁸ In that case, the court cited several United States Supreme Court cases that held that a gender-based rule does not violate the Equal Protection Clause if it serves important governmental objectives and the means employed are substantially related to the achievement of those objectives.¹⁶⁹ In light of these cases, the court upheld the doctrine it had modified earlier, stating that imposing primary liability on the husband serves several important goals:

The rule benefits families by making it more likely that they will obtain necessary and appropriate goods and services. It enables wives to obtain credit more easily, rather than having to depend on their husbands to make necessary purchases. It also protects wives from economic hardship by placing primary liability on husbands. This is significant because . . . wives have made substantial economic gains in the past decade, but substantial economic disparities still persist between husbands and wives.¹⁷⁰

At the same time, the court recognized the rule would become outmoded in a society in which women are equal with men on an income-producing level. The court stated:

In the future it may be that wives will achieve greater equality with their husbands in terms of their relative financial strength. If that occurs then this rule may need to be modified, but for the present it is well suited to the relative economic status of the typical husband and wife.¹⁷¹

Marshfield was decided in 1982, and the necessities doctrine has not been modified further by the Wisconsin Legislature.

E. The Equal Protection Problem Persists

It is generally agreed that placing primary liability on the husband is a poor solution because it does little to correct any disparities between the sexes.¹⁷² It is not a gender-neutral alternative and is

167. See *id.* at 230-31.

168. 314 N.W.2d 326 (Wis. 1982).

169. See *id.* at 328 (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Califano v. Westcott*, 443 U.S. 76, 85 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979)).

170. *Id.*

171. *Id.* at 331.

172. See Mark S. Brennan, Comment, *The New Doctrine of Necessaries in Virginia*, 19 U. RICH. L. REV. 317, 328-29 (1985); *Unnecessary Doctrine* *supra* note 3, at 1777-78.

still subject to constitutional attack.¹⁷³ At least one commentator argues that the decision of the Wisconsin Supreme Court was simply wrong.¹⁷⁴ Furthermore, although extending the doctrine in this way may take statistics into account, it panders to a view of wives as dependent and inferior and thus perpetuates a stereotype that a forward-looking judiciary or legislature should seek to avoid.¹⁷⁵ The minimal protection such a rule affords women does not outweigh the societal harm it may cause to the gender.

F. Abrogation of the Doctrine

Four states abolished the doctrine of necessities before Florida.¹⁷⁶ The high courts in three of these states concluded that extending the necessities doctrine represented a fundamental change in policy with broad social implications, and was therefore a decision better left to the legislature.¹⁷⁷ The Florida Supreme Court reached the same conclusion in *Connor* and explicitly stated, "We do not make a judgment as to which is the better policy for the state to adopt."¹⁷⁸ The Mississippi Supreme Court is the only court to make a definite comment on the wisdom of its decision and not implore legislators to rectify the problem.¹⁷⁹ However, the court's explanation was brief, stating:

Nothing in our jurisprudence obligates one spouse to be liable to a third party for the debts of the other without express consent. To hold otherwise would violate art. 4, § 94 of the Mississippi Constitution and open the door for either spouse to control or deplete the other's separate estate.¹⁸⁰

173. See Brennan, *supra* note 172, at 329.

174. Arguing that Wisconsin's necessities rule remains unconstitutional under *Orr v. Orr*, 440 U.S. 268 (1979), the commentator observes:

Using an intermediate level of scrutiny, the Court held that although the legislative purpose—help for "needy spouses"—was an important governmental objective, there was no justification for using sex as a proxy for need when individualized hearings to ascertain need were already part of the procedure for awarding alimony. Similarly, the Wisconsin and traditional necessities rules have aid for needy spouses as their primary purpose and require individual hearings to determine liability. By analogy to *Orr*, this use of sex as a proxy for need appears to be unconstitutional.

Unnecessary Doctrine, *supra* note 3, at 1777 (footnotes omitted).

175. See Brennan, *supra* note 172, at 329.

176. See *Govan v. Medical Credit Servs., Inc.*, 621 So. 2d 928, 931 (Miss. 1993); *Emanuel v. McGriff*, 596 So. 2d 578, 580 (Ala. 1992); *Condore v. Prince George's County*, 425 A.2d 1011, 1019 (Md. 1981); *Schilling v. Bedford County Mem'l Hosp., Inc.*, 303 S.E.2d 905, 908 (Va. 1983).

177. See *Emanuel*, 596 So. 2d at 580; *Condore*, 425 A.2d at 1019; *Schilling*, 303 S.E.2d at 908.

178. 668 So. 2d at 177.

179. *Govan*, 621 So. 2d at 931.

180. *Id.* at 931.

The Mississippi Legislature has allowed the supreme court's decision to stand.

1. The Response of Other Legislatures

Presently, only one legislature has accepted a court's challenge to codify some form of the doctrine of necessities.¹⁸¹ One year after the Virginia Supreme Court abrogated the doctrine,¹⁸² the Virginia Legislature responded by amending the chapter entitled "Property Rights of Married Women."¹⁸³ The statute provides: "The doctrine of necessities as it existed at common-law shall apply equally to both spouses, except where they are permanently living separate and apart"¹⁸⁴ However, the statute does not specify whether the courts should apply joint and several liability or primary and secondary liability.

2. The Effect of Abrogation

Creditors unable to collect from wealthy spouses may find abrogation a harsh policy.¹⁸⁵ Creditors that provide goods or services to a financially dependent spouse cannot collect the debt from the financially independent spouse and may remain unpaid. However, most creditors ask for a guarantor before services are provided as a means to protect themselves from this outcome.¹⁸⁶ Judging from the small number of doctrine-of-necessaries cases in Florida, most creditors have little difficulty obtaining the guarantee of the other spouse. Most spouses would seem to have little problem signing an express contract for necessary medical services provided to their husbands or wives. Even if a spouse were aware that his or her refusal to guarantee would free that spouse from individual financial responsibility, most would not choose this tactic for fear that their failure to sign might jeopardize the other spouse's chances of obtaining treatment. By allowing spouses to cover their individual debts, abrogation of the doctrine permits those spouses who have a reason to refuse or who maintain separate finances to structure their marriage and finances as they choose, rather than structure them upon the philosophy of the legislature or the judiciary.¹⁸⁷

181. Other states have codified some form of the doctrine or created family expense statutes without prompting by a court. See *supra* notes 68, 74, 124 and accompanying text.

182. See Schilling, 303 S.E.2d at 908.

183. VA. CODE ANN. §§ 55-37 to -47 (Michie 1996).

184. *Id.* § 55-37.

185. See Brennan, *supra* note 172, at 329-30 (arguing that such a modification of the doctrine would leave creditors no recourse to collect debts).

186. See Unnecessary Doctrine, *supra* note 3, at 1791 (arguing that creditors do not need the protection the necessities doctrine affords them because creditors can protect themselves through their own actions).

187. See *id.* at 1795-97.

Because the state cannot know what financial structure is best for an individual family, it has been suggested that an unenforceable support duty should be enacted to promote the stability of families.¹⁸⁸ A symbolic law would allow the state to encourage marital support without legally interfering in a couple's financial decisions.¹⁸⁹ Even this, however, seems unnecessary because married couples will continue to share expenses and support one another out of love and tradition, regardless of any input from the state. "No one contends that the threat of liability under the doctrine of necessities motivates spouses to provide for one another. Surely only a very few spouses know that it exists."¹⁹⁰

IV. CONCLUSION

While abrogation of the necessities doctrine may seem a harsh result to creditors and an unromantic view of spousal support, it affords more respect to the rights of married individuals than the alternatives. First, imposing joint and several liability provides far more protection to creditors than to families. It allows creditors complete discretion when collecting a debt because liability attaches to either spouse, no matter which spouse incurred the expenses. Likewise, imposing primary liability on the spouse who incurred the debt is an inadequate alternative because it relies too heavily on the partnership theory of marriage, a theory that ignores the autonomy of the individual and family in allocating financial resources. Lastly, imposing primary liability on the husband is also inappropriate because it ignores the equal protection issue created by a gender-based rule.

The Florida Supreme Court was correct in its assertion that a lack of consensus existed regarding the doctrine of necessities. Although the court stated that its decision was not a comment on which policy the state should adopt, the Florida Legislature should consider abrogation to be the best alternative and refuse to codify any form of the doctrine. While Florida's decision to abrogate may place it in the minority, the Florida Legislature would not be alone in refusing to codify the doctrine. Furthermore, those states that have reaffirmed or codified the doctrine in its original form should

188. See *id.* at 1798.

189. See *id.*:

People obey symbolic laws not for fear of legal sanction, but because they are backed by the consensus of society and the force of major social institutions. This symbolic or instructional effect of law is probably strongest in areas of traditional morality According to this system of analysis, legal endorsement of spousal support has a real, if unmeasurable, impact on spousal behavior.

190. *Id.*

follow Florida's lead by abolishing this outdated and unnecessary law. No form of the doctrine, whether it imposes joint and several liability, primary liability on the spouse who incurred the debt, or primary liability on the husband, is an acceptable alternative in a rapidly changing society in which families should be free to merge or separate their financial resources as they deem fit.