

Marriage as a Trade: Bridging the Private/Private Distinction

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The love of man and woman is, no doubt, a thing of infinite importance; but also of infinite importance is the manner in which woman earns her bread and the economic conditions under which she enters the family and propagates the race. Thus an inquiry into the circumstances under which the wife and mother plies her trade seems to me quite as necessary and justifiable as an inquiry into the conditions of other and less important industries—such as mining and cotton-spinning.¹

I. INTRODUCTION

The law governing intimate relationships would benefit from exploring the metaphorical and doctrinal analogies between business and intimate affiliations. These analogies bridge the private/private distinction by drawing connections between private business law and private family law.² They also improve upon conventional family law's under-

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¹ CICELY HAMILTON, *MARRIAGE AS A TRADE*, at v (1912).

² Commentators frequently discuss the split between the market and the family in public/private terms, constructing them as separate, dichotomous realms. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS*, at xiii (1993) ("If . . . the market, the family, and the state[] are structured by norms that express fundamentally different ways of valuing people and things, then there can be some ways we ought to value people and things that can't be expressed through market norms."); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (noting that the market is private in relation to the government but public in relation to the family). This Article uses the conventional categories but reconfigures the public/private split between market and family as a private/private split. This reconfiguration reveals that both the market and the family rely upon elements of private ordering and financial arrangements.

standing of family. The exploration remedies long-standing inequities within current family law discourse that are fossilized artifacts of the naturalized construction of intimate relationships.

The naturalized model of family is a socially constructed norm that defines what families should be. This model is often inadequate because it cannot respond to changing forms of intimate relationships. The percentage of households considered "nonfamily," those in which people live alone or with nonrelatives, doubled from fifteen percent in 1960 to thirty percent in 1995.³ As a result, greater numbers of Americans are living in relationships that do not fit within the naturalized model; these include same-sex affiliations, polyamory,⁴ nonsexual unions, and new parenting relations.⁵ As these relationships are outside the bounds of conventional family law, a patchwork of legal doctrines has emerged to regulate them. In various jurisdictions, nonmarital affiliations are called reciprocal beneficiary relationships, domestic partnerships, meretricious relationships, and civil unions. Each affiliation is defined differently and accorded different rights and duties.⁶ The diversity of policies among states, municipalities, companies, and educational institutions indicates that a new model of intimacy is needed to account for the growing number of legally recognized forms of intimate relationships.

In addition to being descriptively inadequate, the naturalized model of family contributes to inequalities both within relationships and among various types of relationships.⁷ In its various forms, the naturalized model of intimate affiliations contributes to race, sex, gender,⁸ sexual

³ A STATISTICAL PORTRAIT OF THE UNITED STATES 24 (Mark S. Littman ed., 1998).

⁴ "Polyamory," as used in this Article, refers to any intimate affiliation between more than two adults regardless of whether it has a sexual component. See *infra* Part III.C.

⁵ Over the past few decades, legal parenthood has extended beyond marital contexts and, due to reproductive technology, even beyond biology. See, e.g., UNIF. PARENTAGE ACT § 5(b) (1973), 9B U.L.A. 301 (1987) (providing that alternative insemination donors have no rights or responsibilities in relation to the child as long as a licensed physician is involved and the donor is not married to the recipient).

⁶ See, e.g., HAW. REV. STAT. §§ 572C-2 to -6 (1997) (granting limited marital rights to "reciprocal beneficiaries" who are couples legally barred from marriage—e.g., blood or affiliational relatives and same-sex partners); VT. STAT. ANN. tit. 15, §§ 1201–1227, 1301–1306 (2000) (granting limited rights to relatives who are "reciprocal beneficiaries," and more extensive rights to individuals in same-sex "civil unions"); *Vasquez v. Hawthorne*, 994 P.2d 240, 243 (Wash. Ct. App.) (granting near-marital rights to individuals in "meretricious relationships" between opposite-sex cohabitants but refusing to grant such rights to same-sex cohabitants), *review granted*, 11 P.3d 825 (Wash. 2000). Additionally, contractual domestic partnership provisions vary.

⁷ This Article builds upon, but is distinct from, Martha Fineman's influential reconceptualization of family as a unit of dependency and caretaking. It seeks to fill the gaps in Fineman's analysis by suggesting default rules to govern various forms of intimate relationships. It also expands the definition of family to include affiliations of more than two adults, nonsexual dyads, and transsexual unions. See, e.g., MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) [hereinafter *FINEMAN, ILLUSION OF EQUALITY*]; MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

⁸ In this Article, sex refers to physical differences between men and women, and gen-

orientation, and class hierarchies. Due to these hierarchies, those deemed naturally inferior are economically and socially marginalized within intimate relationships.⁹ Coverture, for example, deemed women naturally inferior to men, and accordingly limited married women's right to contract, hold property, or otherwise participate in public life.¹⁰ Similarly, miscegenation laws deprived women of color who were intimately or sexually involved with white men of the benefits afforded by marriage doctrines such as intestate succession rules.¹¹ The naturalized model of family also constitutes and reinforces hierarchies of purportedly natural relationships over supposedly unnatural ones. For example, miscegenation laws marginalized interracial couples by construing these affiliations as unnatural,¹² and the contemporary ban on same-sex marriage rests on the purportedly natural superiority of heterosexual couplings.¹³

This Article explores private law's potential to provide a metaphor that accounts for the range of intimate affiliations and counteracts the inequalities of the natural model. Three justifications exist for considering the commonalities between business models and intimate affiliations. First, judges and legislators will be open to business models because family law is already progressing toward privatization.¹⁴ Family law doc-

der designates cultural expressions of those purported differences. Naturalized understandings collude with both gender and sex hierarchies. For example, they collude with gender subordination by framing homemaking as a natural expression of love, demeaned by any attempt to commodify that labor. Naturalized understandings of intimacy similarly collude with sexual subordination in the transsexual marriage cases, by making rights and responsibilities turn on whether a transsexual person is "really" male or female. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000).

⁹ See generally PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* 54-55 (1995); LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 33-36, 43-44, 53 (1998).

¹⁰ NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982).

¹¹ See BARDAGLIO, *supra* note 9, at 62 (describing an 1855 Louisiana Supreme Court case refusing to recognize an interracial marriage performed in France on the grounds that it was an "unnatural alliance" (citing *Dupre v. Ex'r of Boulard*, 10 La. Ann. 411, 412 (La. 1855))); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

¹² See BARDAGLIO, *supra* note 9, at 185 ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results." (quoting *Scott v. State*, 39 Ga. 321, 323 (Ga. 1869))).

¹³ See *Defense of Marriage Act, May 15, 1996: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 99-100 (1996) [hereinafter *Hearings*] (statement of Hadley Arkes, Professor of Jurisprudence and American Institutions, Amherst College) ("Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting.").

¹⁴ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1531-65. Singer identifies four principle advantages of privatization: (1) it provides alternatives to traditional family structures; (2) it respects diversity in family structures; (3) it increases the degree of control exercised by participants in families; and (4) it increases private choice and autonomy. She also identifies five disadvantages of privatization: (1) it exacerbates existing gender inequalities; (2) it has detrimental effects on third parties,

trine increasingly favors private ordering in matters such as entry into marriage, contractual ordering of marriage, nonmarital relationships, divorce, adoption, the use of reproductive technologies, and the privatization of domestic relations dispute resolution.¹⁵

Second, business law's flexibility is compatible both with the various ways that people order their intimate lives and the range of legal and institutional responses to those arrangements. Much as the Uniform Commercial Code ("U.C.C.") allows for changes in the ways businesspeople conduct their affairs,¹⁶ business models offer a repertoire of tools to address both extant and future problems in private relationships. Business law dynamically responds to demand; as the demand for legal rules to regulate an expanding array of intimate relationships increases, business law's range of models supplies new ways to understand those relationships.

Third, since much of the legal intervention in intimate relationships is related to financial issues, such as dividing debt, assets, and income when a relationship ends, models tailored to solve financial problems are well suited to address family law problems. Given the benefits of importing business models to remedy the inadequacies of traditional, naturalized models of domestic relations law, it is not surprising that both statutory schemes and scholarly proposals have begun to do so.¹⁷

In addition to remedying the naturalized model's inadequacies, business models have the potential to disrupt its inequalities. Business models are free of the antiquated notions of status, morality, and biological relation that have hampered family law's ability to adapt with the times.¹⁸ For example, a major problem with family law's focus on status is that it often treats marriage as the foundation of modern society,¹⁹ so that any

particularly children; (3) it interferes with family law reform efforts; (4) it perpetuates the public/private split; and (5) it inhibits public discourse to identify and develop shared values. *Id.*

¹⁵ See Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U. L. REV. 897, 897 (1999) (discussing different legal orderings in society, and observing that contract "has become the dominant doctrinal current in modern American law").

¹⁶ See, e.g., U.C.C. § 1-102(1)(b) (1990) (stating that one primary purpose of the U.C.C. is "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties").

¹⁷ See *infra* notes 125-130, 168-175 and accompanying text.

¹⁸ See generally BARDAGLIO, *supra* note 9, at 184 (suggesting that the idea of intimate affiliation as contractual rather than status-based was key to altering relations of power based on race, sex, and gender in the nineteenth-century South). Business offers an alternative ethical vision—one in which individualism, choice, and autonomy are in some sense natural and therefore protected by law. This individualist vision has the advantage of furthering equality in a way that was impossible in traditional family law, which treated family members not as autonomous individuals, but rather as masters or servants. Moreover, individualist visions of intimate affiliation allow individuals to affiliate as they choose, requiring that the law treat a range of affiliations as valid rather than posit one as superior to all others.

¹⁹ See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (declaring that marriage is "the

threat to marriage seems to threaten society as a whole. Unlike family law, business models are largely unhampered by this idealized status, allowing for consideration of important contractual elements of intimate relationships.²⁰

Because family includes both status and contractual elements, approaches that focus on contract are often criticized for ignoring status-based elements of intimate affiliation.²¹ Yet the business models discussed in this Article (business partnerships, corporations, and limited liability companies) are similar to intimate relationships in that they have significant status elements that complement their contractual character.²²

The status hierarchies in business models, however, are fundamentally different from those in the natural model. Status differences in family law reflect and perpetuate inequality, grounding that inequality in purportedly natural differences. Business analogies, in contrast, substitute functionalist reasoning for moral judgment.²³

The business model views differences among relationships as equivalent to differences among business entities, making those differences morally neutral, and thereby undermining hierarchies among them. An understanding of marriage as akin to corporations, cohabitation as akin to partnerships, and polyamory as akin to limited liability companies would enable us to avoid attaching moral judgments to the differences among those relationships. Regulation would turn on the functional needs of particular arrangements rather than moralistic reasoning that glorifies the naturalistic hierarchy.

Moreover, making the analogy between business models and intimate relationships would alleviate the hierarchy that is created by af-

foundation of the family and of society"); Defense of Marriage Act, 1 U.S.C. § 7 (Supp. IV 1998), 28 U.S.C. § 1738C (Supp. IV 1998).

²⁰ See Singer, *supra* note 14, at 1527 (concluding that contractual ordering of intimate relations facilitates a departure from moral rhetoric).

²¹ See, e.g., MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 33 (1999).

²² Business law recognizes the vulnerable status of some parties. A minority shareholder in a close corporation, for example, can sue to dissolve the corporation or to be bought out when the majority shareholder has oppressed the minority shareholder. MODEL BUS. CORP. ACT § 14.30(2)(ii) (1999).

²³ In the context of postdivorce income sharing, for example, business models offer rules based on entitlement. The naturalized model, in contrast, awards alimony based on a homemaker's need and a wage earner's ability to pay, which translates to charity rather than entitlement. See, e.g., UNIF. MARRIAGE & DIVORCE ACT §§ 307, 308 (amended 1973), 9A U.L.A. 288, 446 (1998). Business models would liken a homemaking spouse to a partner or shareholder, entitling that spouse to a share of the relationship's assets upon the relationship's termination. One concrete implication of choosing an entitlement model, rather than a charity model, is that the entitlement model requires postdivorce income sharing to continue even if the primary homemaker remarries or cohabits. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts, and Dissociation under No-Fault*, 60 U. CHI. L. REV. 67, 138 (1993). The entitlement model functions to facilitate both independence and intimacy, while the moralist goal is to recognize only one form of family to the exclusion of all others.

foring legal benefits to those who already have a private safety net, sexual and affectionate ties, and an extended family. Legally recognizing alternative affiliations intervenes in the pernicious pattern in law and life that those with more get more, thus alleviating the inequality that results from the “haves” coming out ahead.²⁴ Bridging the private/private split allows us to combine elements of status and contract to craft doctrines that counteract the systemic inequality in the current naturalized model of family.

This Article explores how the partnership model,²⁵ the corporate model,²⁶ and the limited liability company (“LLC”) model are similar in some ways to cohabitation, marriage, and polyamory, and suggests that this insight justifies importing elements of business law to improve domestic relations law. Part II first critiques the naturalized model of family and suggests private ordering as a remedy for its defects. Part II then situates this proposal within the commodification literature, concluding that the benefits of contractual models outweigh their deficiencies, as demonstrated by examples of how private law has intervened in naturalized models of the family. Part III explores new ways to think about variety among relationships that results from analogizing business models to intimate relationships. Departing from the conventional approach that analogizes marriage to business partnerships, this Article suggests that marriage might be more similar to close corporations, and that opposite-sex cohabitation and same-sex relationships may be more analogous to business partnerships. Finally, most speculatively, this Article explores whether polyamorous relationships, often overlooked or pathologized in family law literature, might be analogous to limited liability companies or other hybrid business forms that combine elements of partnerships and corporations. For each analogy, this Article explores similarities between the business form and the intimate affiliation, detailing the manner in

²⁴ See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

²⁵ Partnership models include statutory schemes such as the Uniform Marriage and Divorce Act and the Uniform Probate Code as well as scholarly proposals that divorce law be modeled on partnership law. See Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); Starnes, *supra* note 23, at 119–29, 130–37.

²⁶ While the corporate model literature is much thinner than the literature comparing intimate relationships to partnerships, Katherine Wells Meighan has proposed that contributions to one spouse’s education be accounted for at divorce under a corporate finance model. Katherine Wells Meighan, *For Better or for Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce*, 5 GEO. MASON L. REV. 193 (1997); cf. A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses be Forced to Pay Each Other’s Debts?*, 78 B.U. L. REV. 961 (1998) (applying corporate model to marital debt); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (asserting that traditional Chinese family law functioned similarly to modern American corporate law).

which the analogy could alleviate inequality not only within relationships, but also among various types of relationships.

Of course, private law is not a silver bullet that can eradicate all inequalities. Private ordering often imposes contractual norms of autonomy and consent on marginalized people for whom these ideals are illusory. Moreover, the reality is that only a few people, mostly those who have both sophistication and assets (and the bargaining power that accompanies these advantages) will enter into contractual arrangements that counteract rather than contribute to hierarchies within and among relationships. While importing business models (metaphorically and doctrinally) to the regulation of intimate relationships may not solve all problems,²⁷ this approach does hold the unique promise of providing new ways of understanding basic financial issues that family law, hampered by outdated notions of status, has failed to resolve.

II. COMPARING THE NATURALIZED MODEL WITH A CONTRACTUAL APPROACH

This Part critiques the naturalized model of intimate affiliations, and contends that the functionalism of a contractarian approach remedies the inadequacy and inequality of the naturalized model. The Part subsequently reviews the well-developed debate about applying economic analysis to intimate relationships, concluding that the benefits of contractualization outweigh its costs.²⁸

A. *The Natural Model and its Deficiencies*

Nature is a slippery term, with different meanings in different contexts.²⁹ Legal designations of some groups or intimate affiliations as natural have three distinct but overlapping meanings. First, nature usually implies biological imperatives that are dictated by forces independent of human intervention. Second, nature often includes a moral dimension, referring to divine or other sources of authority rather than human authority. Finally, something designated as natural is taken for granted, as not needing explanation, or as intuitively obvious. Under all three meanings

²⁷ See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 430 (1997) (discussing "the promises and dangers . . . of doctrinal comparisons in general").

²⁸ See Singer, *supra* note 14, at 1531 ("The privatization of family law is neither a panacea nor an unmitigated disaster.").

²⁹ One dictionary lists nineteen meanings of natural. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 947 (2d college ed. 1972). George Orwell suggests that the term "natural" is "strictly meaningless, in the sense that . . . [it does] not point to any discoverable object." GEORGE ORWELL, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 132 (Sonia Orwell & Ian Angus eds., 1968).

of nature, the natural is also universal.³⁰ Naturalized arguments, however, have two major defects.

1. *The Natural Model Rests on Irrational Biases*

Naturalized arguments support and reinforce judgments that some people or arrangements are inferior to others. These arguments contend, for example, that African Americans tend to be less intelligent than whites,³¹ that women are morally inferior to men,³² and that gay people are inferior to heterosexuals by divine mandate.³³ Thus, naturalized rhetoric both masks and underlies biases that cannot be justified rationally.³⁴ It is said that nature abhors a vacuum. Apparently nature so abhors a vacuum in legal reasoning that it fills the void with nature itself.

The naturalized model takes various forms, most typically understanding the family as biologically, morally, or divinely based. The most common model constructs the family as a married man and woman living with their biological offspring,³⁵ and dictates a gendered division of labor in which the woman is the primary homemaker and the man is the primary wage earner.³⁶ John Finnis has opposed legal recognition of same-sex relationships on the grounds that heterosexual sexuality, particularly penile-vaginal penetration,³⁷ is morally superior to same-sex sexuality because the former can result in procreation.³⁸

³⁰ But cf. JOHN STUART MILL, *NATURE* (1874), reprinted in *THREE ESSAYS ON RELIGION*, 3, 64-65 (1969) (discussing the irrationality of viewing the "natural" as either inevitable or aspirational).

³¹ See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

³² See, e.g., LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981) (asserting a male-oriented perspective of moral development).

³³ See ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 286 (1996).

³⁴ See, e.g., BARDAGLIO, *supra* note 9, at 55 (quoting the 1860 outburst of Henry Hughes of Mississippi: "Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The same law which forbids consanguineous amalgamation forbids ethical amalgamation.").

³⁵ See *Hearings*, *supra* note 13.

³⁶ The frequent confluence of legal economic commentary and naturalized views of intimate affiliation demonstrates that law and economics can include aspects of moral and political philosophy. See Don Herzog, *Externalities and Other Parasites?*, 67 U. CHI. L. REV. 895 (2000).

³⁷ See Karla C. Robertson, Note, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U. L. REV. 1375 (1998) (arguing that marriage itself is constructed around the act of penile-vaginal penetration).

³⁸ John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); see also Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927 (1999) (defending moral condemnation as a justification for legal doctrine); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 302 (1995) (suggesting that any sexual acts other than penile-vaginal penetration are immoral because the participants "treat their bodies . . . as means or instruments in ways that damage their personal (and interpersonal) integrity").

Progressive scholars have revealed the vacuity of this logic. Mary Becker has demonstrated that Finnis's own arguments show that heterosexual sexuality is actually morally inferior to same-sex coupling because the latter is grounded in the moral values of consent and other-regarding behavior.³⁹ Similarly, Andrew Koppelman has revealed that the purported defense of marriage is actually a defense of race, sex, and gender subordination.⁴⁰ He explores the manner in which the miscegenation ban served as a vehicle for white men to control both African Americans and white women⁴¹ by designating interracial unions as unnatural, and affiliating race, sex, and gender hierarchy with biology, morals, and divine will.⁴² Koppelman argues that the same-sex marriage ban similarly posits penile-vaginal penetration as the only natural sexual act, thus constituting and reinforcing gender hierarchy by defining men as those who penetrate women (and are thus superior) and women as those whom men penetrate (thus making women inferior).⁴³ Under this reasoning, state recognition of same-sex marriages would sanction men penetrating other men, and women penetrating other women, undermining the rigid male-female dyad just as *Loving v. Virginia* undermined white supremacy.⁴⁴

2. *The Natural Model Masks and Reinforces Subordination*

Beyond being irrational, naturalized rhetoric masks and reinforces existing hierarchies. For instance, statutory prohibitions have denominated a wide range of nonreproductive sexuality (between opposite-sex or same-sex partners) as crimes against nature.⁴⁵ Doctrinal silence on what precisely is a criminally unnatural act or status has allowed courts to strategically ignore the fact that (purportedly natural) heterosexuals routinely engage in crimes against nature.⁴⁶ Similarly, southern courts in

³⁹ Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 185-91, 197-202 (1998).

⁴⁰ Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

⁴¹ *Id.* at 224.

⁴² *Id.* at 213 (divine justifications for miscegenation rules); *id.* at 226-27 (moral justifications for miscegenation rules); *id.* at 261 (natural justifications for miscegenation rules); *id.* at 263 (natural justifications for gender hierarchy).

⁴³ *Id.* at 235-36.

⁴⁴ Indeed, *Loving v. Virginia*, 388 U.S. 1 (1967), was the first United States Supreme Court case to hold a law unconstitutional on the grounds that it was grounded in white supremacy. See Koppelman, *supra* note 40, at 201.

⁴⁵ See, e.g., OKLA. STAT. tit. 21, § 886 (1994) (prohibiting "the detestable and abominable crime against nature, committed with mankind or with a beast"); MODEL PENAL CODE § 213.2 cmt. 1 (1999) (noting that "deviate sexual intercourse" covers numerous acts that pre-Code law treated differently, including "sodomy," which includes anal intercourse with a male or female, and copulation with an animal).

⁴⁶ JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 7-8 (1999).

the nineteenth century referred to incest as "an outrage upon nature,"⁴⁷ but imposed few penalties on men who abused their female relatives absent a showing of force. Peter Bardaglio suggests that judicial reluctance to punish defendants, despite the strong rhetoric condemning sexual abuse of women and girls, was due to the jurists' desire to uphold what they deemed to be legitimate patriarchal authority in the family while loudly condemning excessive exercises of that authority.⁴⁸ In this way, naturalized rhetoric can both mask and justify hierarchy.

A recent Texas case illustrates that naturalized models are alive and well, actively contributing to inadequacy and inequality in legal doctrine. In a remarkably candid opinion asserting that sex is biologically or divinely mandated, the Texas Court of Appeals refused to recognize a marriage between a transsexual woman and a man.⁴⁹

Christie Littleton underwent surgical and hormonal treatments associated with sex reassignment in the late 1970s. She married Jonathan Mark Littleton in 1989 and lived with him until he died in 1996. When Littleton filed a wrongful death action against her husband's doctor, the doctor moved for summary judgment on the grounds that Littleton lacked standing because she was really a man, making her marriage legally invalid.⁵⁰

The court stated that Littleton's sex was "immutably fixed by our Creator at birth,"⁵¹ disregarding her self-conception as a female, her sex reassignment surgery, her altered birth certificate, and her physician's testimony that she was a "true male to female transsexual."⁵² The *Littleton* court clung to biology-based, naturalized understandings of sex, gender, and sexual orientation:

Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts.

⁴⁷ Peter Bardaglio, "An Outrage upon Nature": Incest and the Law in the Nineteenth-Century South, in *IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900*, at 32, 33 (Carol Bleser ed., 1991).

⁴⁸ *Id.* at 34.

⁴⁹ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000). I use the term "transsexual woman" to refer to a male-to-female transsexual.

⁵⁰ Both the trial court and the court of appeals found for Dr. Prange on the ground that there was no genuine issue of material fact as to Littleton's sex. *Littleton* 9 S.W.3d at 231. This holding is remarkable given the court's conclusion that "some physicians would consider Christie a female; other physicians would consider her still a male." *Id.* The dissenting opinion suggested that there was a genuine issue of material fact, given that Littleton's birth certificate stated that she was female (making her legally female). *Id.* at 234. If sex is a question of fact, then the court ignored procedural conventions to uphold naturalized conceptions of sex, gender, and sexual orientation. If, in contrast, sex is a question of law, then the court did comply with civil procedure. A third alternative is that sex is a mixed question of law and fact, again raising the possibility that the court may have disregarded procedure in its defense of the natural model.

⁵¹ *Id.* at 224.

⁵² *Id.* at 223-25.

Transsexual medical treatment, however, does not create the internal sexual organs of a women [sic] There is no womb, cervix or ovaries in the post-operative transsexual female. . . . Biologically a post-operative female transsexual is still a male. . . . Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.⁵³

The court seemed to believe that reproductive organs determine sex and that Littleton, because she had no ovaries, was still male. This position is doctrinally unique: in sex discrimination lawsuits, for instance, a woman's standing does not depend upon her reproductive capacity.⁵⁴ If "woman" were defined as one who is capable of conceiving and bearing children, then a woman who has a hysterectomy no longer would be legally female. Indeed, reducing a woman to her reproductive capacity runs counter to the last thirty years of sex discrimination law.⁵⁵

Only an irrational resort to naturalized understandings can support this result. A New Jersey court, faced with facts similar to those in *Littleton*, recognized transsexual marriage.⁵⁶ The New Jersey court's reliance on the transsexual plaintiff's "full capacity to function sexually as . . . female," however, is equally problematic in that it implies there is only one way for males to function sexually and another, complementary, way for females to function sexually.⁵⁷ This assertion is demonstrably false.⁵⁸

The treatment of transsexual marriage in New Jersey and Texas remains firmly grounded in a naturalized understanding of sex, gender, and sexual orientation. Both cases assume that only natural men and natural women can marry each other. The inadequacy of this reasoning demonstrates the natural model's inability to recognize emerging forms of intimate affiliation, as well as its collusion with inequality both within and among various types of relationships.

⁵³ *Id.* at 230–31.

⁵⁴ *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The *Hopkins* Court held that an employer may not take gender into account in making an employment decision; notably, the Court did not require the plaintiff to prove her reproductive capacity.

⁵⁵ See generally MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY (1995).

⁵⁶ *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (N.J. 1976).

⁵⁷ *Id.* at 210; see also Robertson, *supra* note 37.

⁵⁸ ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

B. Contractualization as a Solution to the Weaknesses of the Natural Model

Business models⁵⁹ offer an attractive alternative to naturalized constructions of intimate relations for at least two reasons. First, market rhetoric is rarely naturalized. Second, contracts do not require public or majoritarian approval to be enforced, and could, therefore, disrupt the hierarchical structure that naturalized understandings impose upon marginalized groups. In short, contract provides a way around majoritarian morality.

Markets are neither biological, evolutionary, or divinely ordained. They function through arms-length transactions that theoretically benefit all participants. This conception is admittedly idealized. Market forces presume rather than create equality; commercial contracts are often relational rather than arms-length; and many contracts disadvantage the participant with the weaker bargaining position.⁶⁰ Premarital and marital contracting, for example, raises the issue of the limited bargaining power of economically vulnerable spouses.⁶¹ However, contractarian business models also have the potential to remedy existing inequality by providing innovative ways to compensate primary homemakers for their contributions to family wealth.⁶²

Moral rhetoric has certainly been central to progressive reform in some historical contexts.⁶³ In the current age, however, moral arguments are more likely to buttress than contest subordination. The antigay

⁵⁹ Business models tend to be antiessentialist. Antiessentialism, which refuses to reduce an individual to a single characteristic such as race, sex, gender, sexual orientation, or class, is a frequent subject of progressive feminist literature. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). While business models generally focus on profit, nonprofit corporations expand the model beyond an essentialist profit-maximizing entity. See *infra* notes 212–215.

⁶⁰ For example, employment agreements are relational and can perpetuate subordination by forcing employees to waive the right to litigate employment discrimination claims and instead to submit to arbitration or other private dispute resolution procedures. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); see also Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051 (1996); Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

⁶¹ See Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 131 (1993); Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996).

⁶² See *infra* notes 168–172 and accompanying text.

⁶³ The abolitionist movement and the Women's Christian Temperance Union's campaign to raise the age of consent are two examples. See HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* (1998); Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth Century America*, 9 YALE J.L. & HUMAN. 1 (1997). For a contemporary example of progressive use of moral rhetoric, see Becker, *supra* note 39.

movement charges that same-sex sexuality is morally wrong, and the gay rights movement counters with liberal arguments about entitlement to equal treatment based on principles of autonomy, individualism, and choice.⁶⁴ Much moral rhetoric used to justify the traditional conceptions of family is rooted in a religious commitment to hierarchy. The link between religious rhetoric and the rhetoric of subordination, while not universal, is apparent both on the fringe (as in many white supremacist movements),⁶⁵ and in the political center (as in antigay religious institutions).⁶⁶ While social progressives in various denominations engage in anti-poverty and anti-death penalty activism, religious organizations generally are not on the forefront of contemporary progressive social movements.⁶⁷

Seemingly moral considerations do underlie elements of contract law, such as the doctrines of unconscionability and nonenforceability for violating public policy.⁶⁸ These doctrines, however, are exceptions to the general rule of a morally neutral stance towards contracts.⁶⁹ Generally courts will enforce private agreements even when moral considerations suggest that they should not.⁷⁰ Thus, when a majority expresses hostility

⁶⁴ While liberalism relies on problematic assumptions of agency and an essentialized notion of self, it can also serve progressive ends. See Lisa Duggan, *Queering the State, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 179 (Lisa Duggan & Nan D. Hunter eds., 1995). In suggesting that queer theorists appropriate the liberal discourse of the separation of church and state to combat "the religion of heteronormativity," Duggan proposes a "less defensive, more politically self-assertive set of linguistic and conceptual tools to talk about sexual difference." *Id.* at 189, 192. This Article similarly proposes appropriating the liberal tools of business organization to view intimate affiliations in a new light.

⁶⁵ See Pam Belluck, *Hate Groups Seeking Broader Reach*, N.Y. TIMES, July 7, 1999, at A16.

⁶⁶ See, e.g., John Ellement, *Two Groups Sue Cambridge to Halt Benefits to Employees' Partners*, BOSTON GLOBE, Mar. 22, 2000, at B3 (describing the successful challenge to Boston's domestic partnership policy mounted by the Catholic Action League and the American Center for Law and Justice in 1999 and the former group's suit to invalidate a similar Cambridge, Massachusetts ordinance); *The History Behind Trent Lott*, N.Y. TIMES, July 10, 1998, at A14 (describing the religious right's activist opposition to gay rights since the 1970s).

⁶⁷ But see, e.g., Becker, *supra* note 39, at 167 ("Moral and religious arguments have supported and opposed violence, slavery, and patriarchy."); Gustav Niebur, *Religious Coalition Plans Gay Rights Strategy*, N.Y. TIMES, Aug. 24, 1999, at A10 (noting religious coalition's support of gay rights); Gayle White, *Life or Death?*, ATLANTA J. & CONST., Jan. 31, 1998, at 1D (noting that religious groups have been active in work against the death penalty). However, the money and political clout rests with the large religious organizations that routinely oppose measures that benefit women and gay people. Duggan, *supra* note 64, at 183.

⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *id.* §§ 178-79.

⁶⁹ *Id.* § 17.

⁷⁰ Richard A. Posner, *Ask, Tell*, NEW REPUBLIC, Oct. 11, 1999, at 52, 53 (reviewing WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)).

[T]he judiciary is much more willing to enforce general rights on behalf of a disfavored minority than it is to create rights specially for them, and legislatures are

toward a marginalized group, private ordering is sometimes the only solution to a bad situation. Just as the classical liberalism of contract enables parties to skirt moral rhetoric, the procedures of private ordering offer a way around majoritarian rules that harm marginalized people.

The following doctrinal examples illustrate how private law enables marginalized people to use contract law's moral neutrality to circumvent hostile public rules. Some nineteenth-century wills skirted constructions of family as naturally monoracial by including African American women as beneficiaries. Such inclusion, which gave rise to legal claims by those women, disrupted existing race, sex, gender, and class hierarchies. Similarly, a 1997 Florida case enforced a same-sex cohabitation contract, skirting constructions of marriage as naturally heterosexual, and intervening in sexual orientation hierarchies. Both instances of private ordering improved upon family law doctrine by expanding the range of recognized relationships and counteracting hierarchy among and within relationships.

1. Nineteenth-Century Trust and Estate Law

Adrienne Davis documents the way in which women of color in the nineteenth-century South obtained some benefits, through the wills of their white paramours, that miscegenation laws otherwise would have prevented.⁷¹ The Georgia Supreme Court observed in 1887 that

Every man in this State has a right to will property to whom he pleases. There is no policy of the State which would make it unlawful or contrary to such policy for a man to will his property to a colored person, to any bastard or to his own bastard, and such considerations as these alone would not authorize a will to be set aside.⁷²

Davis points out the broad significance of the morally neutral enforceability of wills. As individuals, African American women obtained some measure of economic independence.⁷³ As a group, the beneficiaries of

distinctly unwilling to legislate in favor of homosexuals. The principle that legal disputes are to be decided without regard for whether the judge finds one litigant or the other repulsive or sympathetic is fundamental to the judicial game, and it means that whatever rights of contract or due process or property or privacy the law recognizes for the community in general will be available in a practical sense, and not merely in a theoretical sense, to unpopular members of the community.

Id.

⁷¹ Davis, *supra* note 11.

⁷² *Id.* at 218 (quoting *Smith v. DuBose*, 78 Ga. 413, 430 (1887) (internal quotations omitted)).

⁷³ One of the wills that Davis discusses was executed by one of the wealthiest men in post-Civil War Georgia, David Dickson. Dickson had a relationship with one of his slaves,

these wills—African Americans, formerly enslaved, and illegitimate—were invested with economic personality and market rights. Economic personality was essential to those who had been defined as objects of commerce themselves: “[E]mancipated blacks rejected their denomination by law as solely commodities, seeking instead to establish relationships to property, and thereby to enter the market sphere.”⁷⁴ Decisions that allowed these women and their children to inherit intervened in the naturalized hierarchy by recognizing the economic personality of African American concubines, who were typically marginalized on the basis of their race, sex, and gender.⁷⁵

A recent case in Washington illuminates the continued significance of naturalized understandings of family in trust and estate law. Robert Schwerzler died intestate after living with Frank Vasquez for eighteen years.⁷⁶ Although Washington recognizes marriage-like rights of opposite-sex cohabitants, paradoxically calling this affiliation a “meretricious relationship,”⁷⁷ the court refused to apply this rule to same-sex partners.⁷⁸ Of course, Schwerzler could have skirted this hostile rule by making a will. However, because he failed to do so, his partner of nearly two decades is situated similarly to African American women not mentioned in their white lovers’ wills.

2. Cohabitation Contracts

Washington’s failure to recognize the long-term relationship between two men for intestacy purposes stands in contrast to Florida’s willingness to recognize the relationship of two women, in a decision based on contract law.⁷⁹ The difference is explained by private ordering. Dr. Nancy Layton convinced nurse Emma Posik to move in with her, and to give up her job and home. In return for Posik’s agreement to move in and care for their home, Layton promised to support them, leave her estate to Posik in her will, and pay \$2500 a month for the remainder of Posik’s life as liquidated damages for breach of the agreement. The agreement further pro-

Julia, and had a child with her, Amanda. Dickson’s will provided that the bulk of his estate would go to Amanda and her children, also fathered by a white man. “Amanda Dickson—a former slave, black and illegitimate—stood poised to take control of one of the most valuable estates in Georgia, worth half a million dollars.” *Id.* at 279.

⁷⁴ *Id.* at 284.

⁷⁵ See *id.* at 261–63 (describing claims of gender and racial deviance leveled at African American concubines who stood to benefit from the wills).

⁷⁶ *Vasquez v. Hawthorne*, 994 P.2d 240 (Wash. Ct. App.), *review granted*, 11 P.3d 825 (Wash. 2000).

⁷⁷ *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995). Other states refuse to recognize meretricious relationships, declining to enforce contracts between the partners when sex is found to be the consideration for the agreement. See *Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976).

⁷⁸ *Vasquez*, 994 P.2d at 243.

⁷⁹ *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

vided that Posik could move out if Layton failed to provide adequate support or brought a third person into the home for more than four weeks without Posik's consent.⁸⁰ When Layton got involved with another woman and wanted her to move into the house, Posik sued to enforce the agreement. Remarkably, given Florida's explicit ban on same-sex marriage and adoption, Posik won. Like the nineteenth-century southern courts that prioritized morally neutral, liberal, freedom of contract notions over naturalized status-based understandings of intimate relationships, the court reasoned that "the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose."⁸¹

The Georgia Supreme Court similarly enforced a cohabitation contract between two women despite the state's then-valid sodomy statute.⁸² The court found that the agreement in question included a merger clause that prohibited the court from considering parol evidence relating to the "illegal and immoral" nature of the relationship.⁸³ The court also held that even if parol evidence were permissible, any "alleged illegal activity was at most incidental to the contract rather than required by it."⁸⁴

Taken together, these two cases stand for the proposition that private law offers unique opportunities for same-sex partners to contract around a majoritarian morality that ignores or vilifies their relationships. Every time a court enforces a same-sex cohabitation contract, it intervenes in the understanding that the only legally recognizable relationships are those that cohere with naturalized notions of intimacy as biologically, morally, or divinely dictated. Not surprisingly, contractual analysis has a rich history in anti-subordination discourse.

3. *Feminist Contractarian Approaches*

One strand of feminist thought has long championed contractual approaches to intimate affiliation. This analysis requires a definition of contract. While a contract conventionally is defined as a legally binding agreement,⁸⁵ the term also refers more generally to private ordering.⁸⁶ Contract law is associated closely with liberal legal theory, which celebrates agreements as the basis of civil society and the means through

⁸⁰ *Id.* at 760.

⁸¹ *Id.* at 761.

⁸² *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992).

⁸³ *Id.* at 646.

⁸⁴ *Id.*

⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

⁸⁶ Katharine Silbaugh has referred to this expansion of formal contract as "meta-contract." Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) [hereinafter Silbaugh, *Commodification*]; Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) [hereinafter Silbaugh, *Marriage Contracts*].

which free subjects order their relationships.⁸⁷ Intimate relationships, as prototypical consensual arrangements between private actors, seem ideally suited for contractual analysis.

Marriage is both a status and a contract.⁸⁸ William Blackstone made two famously contradictory statements about the contractual nature of marriage. While he posited that "our law considers marriage in no other light than as a civil contract,"⁸⁹ he also said that women could not contract with their husbands under the doctrine of coverture because a husband's contract with his wife "would only be to covenant with himself," as the wife's legal identity was merged with her husband upon marriage.⁹⁰ This logic assumes that women are both able and unable to contract.⁹¹ Given this tradition of pairing female agency with subordination in the marriage contract, it is hardly surprising that feminist approaches to marital contracting have varied widely.

Feminists have long agreed that the marriage contract disfavors women. In a 1912 monograph, Cicely Hamilton identified the terms of the contract as an exchange of sex for subsistence, sharply critiquing this deal on several grounds.⁹² First, she criticized the compulsory nature of marriage because women lacked other meaningful market options.⁹³ Second, she objected to its devaluation of women and their labor by according them only subsistence in the form of room and board.⁹⁴ According to Hamilton, allowing subsistence wages for homemaking created inefficiencies since the work "become[s] what ill-paid labour always tends to become—inefficient."⁹⁵ Hamilton also argued that compulsory marriage

⁸⁷ CAROLE PATEMAN, *THE SEXUAL CONTRACT* 5–18 (1988). In the nineteenth century, contractual understandings replaced "patriarchalism." MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 19 (1985) ("Contract ideology stemmed from a world view whose lode star was the untrammelled autonomy of the individual will. Relations of all kinds were to be governed by intentions, not the ascribed status, of their makers.").

⁸⁸ MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000) (arguing that family is best understood as a covenant, a midpoint between status and contract).

⁸⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 433 (Edward Christian ed., 15th ed. 1982) (1809).

⁹⁰ *Id.* at 442.

⁹¹ PATEMAN, *supra* note 87, at 156.

⁹² HAMILTON, *supra* note 1, at 14 (suggesting that a woman "exchanged, by the ordinary process of barter, possession of her person for the means of existence").

⁹³ *Id.* at 15, 29, 146. Hamilton explained that "[t]he housekeeping trade is the only one open to us—so we enter the housekeeping trade in order to live. This is not always quite the same as entering the housekeeping trade in order to love." *Id.* at 15. This position prefigures Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227 (Henry Abelove et al. eds., 1993).

⁹⁴ HAMILTON, *supra* note 1, at 76 ("[H]owever arduous and exacting the labour that trade entails—and the rough manual work of most households is done by women—it is not paid except by subsistence. . . . She is fed and lodged on the same principle as a horse is fed and lodged.").

⁹⁵ *Id.* at 77.

clouded women's romantic feelings with monetary interests.⁹⁶ To address these problems Hamilton embraced a contractual model in which both parties have some bargaining power. In championing a transformation of marriage from compulsory servitude to voluntary trade, Hamilton employed the rhetoric of choice that is central to contractarian approaches. Liberal theory, upon which she relied, similarly makes choice central to personhood, closely associating personhood with the freedom to contract.⁹⁷

Feminist support for contractarian analyses reemerged in the early 1980s.⁹⁸ Feminist contractarians contend that contractualization, despite its limitations, alters outdated status-based understandings of marriage, and, on balance, offers new opportunities for female agency in marriage.⁹⁹ They further argue that the state-imposed marriage contract "discriminates on the basis of gender by assigning one set of rights and obligations to husbands and another to wives," and "denies the diversity and heterogeneity in our pluralistic society by imposing a single family form on everyone."¹⁰⁰ Instead, individuals should be able to contract around this state-supplied marriage contract because contracts are both "suitable instruments for establishing egalitarian relationships," and effective mechanisms to legitimize relationships between those legally barred from marriage.¹⁰¹

In short, feminist contractarians assert that contractualizing marriage could mitigate family law's inequalities based on sex, gender, sexual orientation, and perhaps race and class.¹⁰²

4. The Shortcomings of the Contractual Approach Do Not Outweigh Its Benefits

The most serious concern with importing business models to regulate intimate relationships is that doing so will commodify intimacy, turning emotional relationships into hardhearted economic exchanges. While legal economists strongly suggest that most things can be under-

⁹⁶ *Id.* at 20.

⁹⁷ *Id.* at 211 (suggesting that voluntary marriage would facilitate "[t]he recognition of woman's complete humanity, apart from husband or lover, [and] must mean inevitably the recognition of her right to develop every side of that humanity, the mental and moral, as well as the physical and sexual"); see also Martha Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1163-64 (1996).

⁹⁸ See, e.g., LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* (1981); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 205 (1982).

⁹⁹ Shultz, *supra* note 98, at 280.

¹⁰⁰ WEITZMAN, *supra* note 98, at xx.

¹⁰¹ *Id.* at xxi.

¹⁰² See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 425-26 (1987).

stood in the language of exchange, others persuasively contest this understanding and point to the dangers of universal commodification.¹⁰³ Although anxiety about universal commodification often is well-founded, I conclude that many progressive scholars have overlooked untapped benefits of commodification. The strongest argument in favor of commodification is its potential to denaturalize constructions of family and to intervene in sex, gender, sexual orientation, race, and class hierarchies.

Legal economists such as Gary Becker and Richard Posner have made strong claims for commodification. Becker suggests that children and parents are in a debtor-creditor relationship with each other: children are indebted to their parents for childrearing expenses and should repay that debt by supporting their parents in their parents' old age.¹⁰⁴ Posner's "bioeconomic" theory argues that human sexuality can be explained by a combination of sociobiology and legal economics.¹⁰⁵ Posner claims that his theory can justify female infanticide, female sequestration, and child-selling as economically efficient in some cultural contexts.¹⁰⁶ Consistent with the premises of this Article, he also suggests that polygamy might be bioeconomically efficient (and thus presumably legally permissible),¹⁰⁷ and that the state should recognize private law arrangements between same-sex partners even if it retains the ban on same-sex marriage.¹⁰⁸

Margaret Jane Radin compellingly challenges legal economists' universal commodification theory.¹⁰⁹ Acknowledging that, for goods such as love, Chicago-style legal economics often functions as rhetoric, Radin worries that such rhetoric will proliferate and lead to literal commodification. She argues that the most dangerous aspect of market rhetoric is the possibility that it will deprive us of other ways of understanding human experience:

If market rhetoric took over the world to such an extent that there was no other way available to us in which to conceive of children, then there would be no reason left to avoid trading

¹⁰³ JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 118 (2000).

¹⁰⁴ GARY S. BECKER, A TREATISE ON THE FAMILY 5-6 (enlarged ed. 1991).

¹⁰⁵ See RICHARD A. POSNER, SEX AND REASON (1992). But see Martha M. Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485 (1993); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992); Jane E. Larson, *The New Home Economics*, 10 CONST. COMMENT. 443 (1993).

¹⁰⁶ POSNER, *supra* note 105, at 143-44, 146-69, 409-17; see also Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 347 (1978).

¹⁰⁷ POSNER, *supra* note 105, at 91, 94-95. But see *id.* at 215 (discussing a "conceivable" efficiency justification for banning polygamy based on the interests of children).

¹⁰⁸ *Id.* at 319-20, 313-14; see also Posner, *supra* note 70, at 53-54 (reaffirming the enforcement of "palimony" contracts between same-sex partners despite a lack of legal recognition of same-sex marriage).

¹⁰⁹ MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

them as commodities. In such a world the prediction that such a trade would spring up would no doubt be accurate, and in that world we might no longer have the conceptual tools to be worried about it.¹¹⁰

Such commodification dehumanizes us.¹¹¹

Yet perhaps we can conceive of intimacy that is partly commercial and partly noncommercial.¹¹² If the extraordinarily high value of intimacy-related goods and services places them above commercial valuation, those people who provide the most valuable goods and services paradoxically will be deprived of the economic self-sufficiency that is also closely associated with personhood.¹¹³ Consequently, relationships and services should be partially commodified.¹¹⁴ Thus one might commodify aspects of intimate relationships that already have value on the market, such as homemaking services like cleaning, childcare, cooking, carpooling, and maintaining kin relationships.¹¹⁵

This Article highlights similarities between businesses and intimate affiliations, thereby suggesting a new conception of intimate relationships that could disrupt subordination.¹¹⁶ This comparison is not an equation; not every intimate interaction is akin to a business transaction, nor are all business relationships solely financial in character. This Article seeks simply to open discursive space to bridge the private/private divide, making room for new ways to think about the old problems rooted in naturalized understandings of intimacy.

¹¹⁰ *Id.* at 13–14.

¹¹¹ *Id.* at 100–01; *see also* ANDERSON, *supra* note 2, at 168 (noting that surrogacy “commodifies both women’s labor and children in ways that undermine the autonomy and dignity of women and the love parents owe to children”).

¹¹² *See* MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 43–57, 177–87 (1993) (discussing various applications of market rhetoric to intimate relationships).

¹¹³ RADIN, *supra* note 109, at 20.

¹¹⁴ *Id.* at 21 (acknowledging that goods can be “incompletely commodified—neither fully commodified nor fully removed from the market”); *see also* Silbaugh, *Marriage Contracts*, *supra* note 86.

¹¹⁵ *See* VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 101–02 (1994) (observing that dating often commodifies romance (citing BETH BAILEY, *FROM FRONT PORCH TO BACK SEAT: COURTSHIP IN TWENTIETH CENTURY AMERICA* 13, 23 (1988))).

¹¹⁶ Other commentators have observed or promoted importation in the opposite direction. *See* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303 (1994) (arguing that family models should be imported to the market); Martha Minow, “*Forming Under Everything That Grows*”: *Toward a History of Family Law*, 1985 WIS. L. REV. 819 (noting that the nineteenth-century social-purity movement imported values from the private/domestic realm to the private/business realm as well as the private/government realm).

III. ANALOGIZING PARTICULAR INTIMATE RELATIONSHIPS TO PARTICULAR BUSINESS MODELS TO ALLEVIATE INEQUALITY WITHIN AND AMONG RELATIONSHIPS

Once the law departs from naturalized models of family, it is free to recognize a range of legitimate affiliations. Having explored what business models can offer the law regulating intimate relationships generally, one is left with the specific question of which business forms should regulate which relationships. One might claim that all intimate relationships between consenting adults are functionally equivalent, and as a normative matter should be governed by the same rules. Current legal regimes, however, distinguish among different kinds of intimate relationships. A wide variety of legal doctrines regulate marriages, same-sex partnerships, opposite-sex partnerships, and affiliations that include more than two adults.¹¹⁷ Yet perhaps treating different relationships differently is, as a normative matter, not a good thing.

Although it is difficult to conceptualize a legal regime that treats every consensual intimacy between adults the same,¹¹⁸ it is nonetheless theoretically possible. Current scholarship often likens marriage to partnership and one could argue that all intimate affiliations (marriage, cohabitation, polyamory, and nonsexual unions) should be treated as partnerships.¹¹⁹ Even assuming, however, that it would be possible to craft one legal regime to regulate the various kinds of intimate relationships, doing so may in fact be inadvisable.

¹¹⁷ Of course, marriage gets special, usually preferential, treatment on numerous fronts, from alimony to wrongful death. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), cert. denied, 121 S. Ct. 174 (2000); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbians and Gay Men*, 95 MICH. L. REV. 447, 453 (1996). Same-sex relationships, in contrast, are regulated by a range of civil and criminal doctrines. See Ertman, *supra* note 97. Nonmarital partnerships between people of the opposite sex similarly are subject to different civil and criminal rules in various jurisdictions. Compare *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (enforcing a cohabitation contract while not elevating cohabitation to the level of marriage), with *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1204 (Ill. 1979) (noting that "public policy disfavors private contractual alternatives to marriage"). Polyamory is governed by more uniform rules that include civil sanctions and criminal penalties. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878).

¹¹⁸ For instance, different aspects of intimate relationships trigger different rights and obligations. Sexuality might universally be required. Cohabitation also could be a proxy for seriousness and stability to ensure that casual daters would not unintentionally become bound by rules meant for much more serious relationships. Yet some couples (married and unmarried) commute or otherwise live apart for long periods. Formality, such as filing with the state, is another possibility. However, such a requirement would not improve current law, which fails to provide default rules for cohabitants.

¹¹⁹ Marriage might be analogous to a limited partnership, cohabitation to a general partnership, and polyamory to another kind of partnership, such as a registered limited liability partnership. Partnership metaphors have been used in a variety of contexts, suggesting the flexibility of the metaphor. See, e.g., Ronald Dworkin, *The Partnership Conception of Democracy*, 86 CAL. L. REV. 453 (1998) (framing democracy as a partnership of citizens).

First, the legal regulation of intimate relationships is in flux, meaning that any one regime is unlikely to serve the various existing forms of relationship well, let alone adapt to the inevitable developments that will occur over time. Second, the very diversity in the legal rules governing different types of relationships means that imposing one model for all relationships would inevitably shortchange most people in some respect, and might not benefit anyone considerably. A plethora of options for organizing business relations exists, and there is no reason to believe that intimate relationships are or should be more homogeneous than commercial endeavors. In light of the range of legal approaches to regulating intimate relationships and the variety in the relationships themselves, it may not make sense to reform every aspect of the law simultaneously. Once domestic relations law imports business models to address some family law problems, lawmakers might formulate a universal business model for all types of relationships. Until then, incremental change is more pragmatic.

The question to be answered now is which business models are most analogous to particular intimate affiliations. Generally, the literature points to partnership, focusing on the marriage analogy and only occasionally considering same-sex couples and polyamory.¹²⁰ This Part fills the void by exploring a range of doctrines governing partnerships, close corporations, and limited liability companies. Recognizing this range of business models as viable analogies for intimate relationships would alleviate the inequality that results from the naturalized model's designation of some relationships as natural and others as unnatural.

This Part focuses on two important points of state intervention in the relationship—formation and dissolution—though there is occasional reference to other state interventions such as dispute resolution and the imposition of fiduciary duties. Markedly absent from this discussion are the myriad ways in which state nonintervention in business and family life determines the course of events during the relationship.¹²¹ The law is most involved in a business or intimate affiliation at entry and exit, however, and these moments determine which law governs. Accordingly, it makes sense to focus on parallels in formation and dissolution.

Recognizing the strong metaphorical connections between intimate relationships and business could both remedy the inadequacy of family law and intervene in inequalities among and within relationships. Departing from conventional wisdom, this Article concludes that marriage is not most analogous to partnership, but rather more like a close corporation. Partnership, in contrast, is more analogous to cohabiting relation-

¹²⁰ See, e.g., Shultz, *supra* note 98, at 239–40; WEITZMAN, *supra* note 98, at xxi; Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. REV. 21, 43 (1994).

¹²¹ See Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

ships, perhaps most like same-sex cohabitation. The wide range of polyamorous arrangements (including, for example, both polygamy and lesbian couples with known sperm donors) makes it difficult to analogize them to any particular business form. However, these arrangements could still be categorized as a type of legally recognized intimate affiliation. This Part suggests that they are more like limited liability companies than they are like either corporations or partnerships, in part because the highly contractual nature of an LLC could address the wide variety of conditions present in polyamorous arrangements.

While this Article does not attempt to propose an ideal domestic relations law based on business law, neither does it foreclose the possibility of such a project.¹²² This Article does suggest underlying justifications for undertaking such an endeavor or for altering domestic relations law in ways that remedy the inadequacies and inequalities inherent in naturalized models of family. If domestic relations law were to recognize a range of intimate affiliations, this change alone would provide the coherence and consistency currently lacking in family law doctrines that recognize marriage as the only fully legitimate affiliation and simply cobble together regulations for the vast array of other intimate affiliations.

Importing business models to family law would counteract inequality in two ways. First, business models would make differences among relationships morally neutral, (the equivalent of the differences among partnerships, corporations, and LLCs). Second, they would alleviate the inequity of the "haves" coming out ahead of the "have-nots"¹²³ by expanding the definition of family to include, for instance, same-sex cohabitation and polyamory. By analogizing cohabitation to partnerships, marriage to close corporations, and polyamory to LLCs, this Part identifies commonalities between the forms and explores whether differences hamper the specific analogies.

A. Partnership and Cohabitation

The literature that describes importing business models to domestic relations law implicitly assumes that the model being imported is a general partnership.¹²⁴ A review of doctrines governing partnership formation

¹²² For a discussion of importing business law to better understand domestic relations law, see Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Family Arrangements*, 1994 UTAH L. REV. 777 (importing U.C.C. Article 2 methodology and insights to domestic relations cases).

¹²³ For instance, couples in legally recognized relationships generally earn higher incomes than those in legally marginalized relationships. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 60, at 479 (1999) [hereinafter STATISTICAL ABSTRACT] (documenting median income for married couple families in 1997 of \$51,591, compared to \$13,692 for "unrelated subfamilies"). This income disparity suggests that nonmarital affiliations need more, rather than less, legal protection.

¹²⁴ Limited partnerships are less analogous to marriage in that limited partnerships in-

and dissolution reveals that partnership may, however, be more analogous to cohabiting relationships than to marriages. Critiques of the partnership model of marriage—contending that it erroneously assumes equality between spouses and lacks doctrinal bite—further support this conclusion. This very equality, paired with the informality of the general partnership, make it analogous to cohabitation.

A well-developed literature explores analogies between partnership and intimate relationships, suggesting that partnership doctrine offers a way to remedy inequalities within marriage. Partnership has thus provided a new metaphor, replacing ideas such as coverture, to understand marriage. Model statutes such as the Uniform Marriage and Divorce Act ("UMDA")¹²⁵ and the Uniform Probate Code¹²⁶ apply partnership models to domestic relations law. Scholarly proposals use partnership models to alleviate homemaker indigency upon divorce by applying partnership buyout rules at dissolution,¹²⁷ justifying the payment of spousal debts in bankruptcy,¹²⁸ holding spouses to fiduciary duties,¹²⁹ and recognizing same-sex relationships through domestic partnership legislation.¹³⁰

volve limited liability of the limited partner, as well as passivity in corporate affairs.

¹²⁵ The UMDA adopted the partnership theory of marriage to justify its alteration of the rules governing asset distribution upon divorce. UNIF. MARRIAGE & DIVORCE ACT, prefatory note, 9A U.L.A. 161 (1998) ("The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."). The UMDA has been adopted in eight states. Starnes, *supra* note 23, at 122. Moreover, the Act refers to termination of a marriage as dissolution, a term borrowed from partnership law.

¹²⁶ UNIF. PROBATE CODE, 8 U.L.A. 1 (Supp. 1997). Eight states have adopted the 1990 revisions of the Uniform Probate Code. *Id.* Based on the contemporary view of marriage as a partnership, "the economic rights of each spouse are seen as deriving from an unspoken or imputed marital bargain under which the partners agree that each is to enjoy a half interest in the economic production of the marriage . . ." Waggoner, *supra* note 120, at 57. The 1990 revisions to the Uniform Probate Code attempt to remedy inequality in inheritance doctrine, which currently entitles surviving spouses only to one-third of the decedent's estate, rather than the one-half share dictated by partnership theory. The revised code approximates the partnership theory of marriage by giving a surviving spouse a percentage of the decedent's estate that depends on the length of the marriage. The revised code assumes that a longer marriage creates the full partnership interest in half of a decedent's estate, while a shorter marriage may not justify such a large share. UNIF. PROBATE CODE § 2-202 cmt. (amended 1993), 8 U.L.A. 103 (1998). The revised code provides that if the decedent and spouse were married for five years, the surviving spouse is entitled to 15% of the augmented estate, 30% if they were married for ten years, and 50% if they were married for fifteen or more years. *Id.*

¹²⁷ Singer, *supra* note 25; Starnes, *supra* note 23.

¹²⁸ Dickerson, *supra* note 26, at 964.

¹²⁹ Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business but the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367 (1997).

¹³⁰ See, e.g., Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363 (1998); Craig A. Sloane, *A Rose By Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L. & COMP. L. 189 (1997); see also Edmund V. Ludwig, *Friendage*, 17 PA. LAWYER 28 (May/June 1995).

At the heart of the partnership analogy of marriage is an idealized image of marriage as "equal partnerships between spouses who share resources, responsibilities, and risks,"¹³¹ a norm that "encourages commitments between spouses, promotes gender equality, and supports caretaking of children and elderly dependents."¹³² The appeal of these norms is reinforced by factual similarities between intimate relationships and partnerships:

[B]oth relationships typically commence with the exchange of commitments and without express agreement or advice of counsel . . . seek profits though profit in the case of marriage may be emotional, sexual, and perhaps spiritual as well as financial . . . [and] often involve a specialization of labor. Commonly, one partner contributes capital primarily or exclusively, while another contributes services primarily or exclusively—a specialization that resembles a traditional marriage, as well as many contemporary ones, in which the husband contributes income through outside employment and the wife contributes caretaking services.¹³³

Certain commentators reject the partnership analogy. Some of them claim that it cannot justify spousal support or other important aspects of family law.¹³⁴ Others contest the applicability of such an idealized model to actual marriages, in which gender hierarchy and inequality are more likely to exist.¹³⁵

The suggestion that marriages are more like close corporations than partnerships seems to fly in the face of doctrines that already apply partnership models to marriage. However, thinking about marriage as akin to a close corporation and cohabitation as akin to general partnership makes sense for a number of reasons.

1. *The Similarity of Business and Cohabiting Partnerships*

Cohabitation is remarkably analogous to a business partnership, particularly with regard to formation, dissolution, and the presumption that the parties are equal. A business partnership is formed whenever two or

¹³¹ Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 198 (Steven D. Sugarman & Herma Hill Kay eds., 1990).

¹³² Starnes, *supra* note 23, at 119.

¹³³ *Id.* at 119–20.

¹³⁴ See, e.g., FINEMAN, *ILLUSION OF EQUALITY*, *supra* note 7, at 4–5; Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 *TEMP. L. REV.* 1413 (1996); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 *TEX. L. REV.* 689, 706–07 (1990).

¹³⁵ See *infra* notes 148–156 and accompanying text.

more persons operate a business for profit.¹³⁶ The partners need take no formal action, and the agreement can be oral or written.¹³⁷ In business law, an equal partnership is the default entity. Partnership doctrine incorporates the ideal that partners are equal, enjoying equal rights to share in the profits and to control and manage partnership property.¹³⁸ One of the reasons that business relationships and intimate relationships are described as private is the purported lack of state intervention in those relationships. The end of a partnership (romantic or business) is one of the few instances in which the state can play an active role. During the course of the relationship, the state generally allows the parties to regulate their own affairs.¹³⁹ By contrast, the state is involved in both the formation and dissolution of corporations, just as it is involved in both the formation and dissolution of marriages. Thus partnership, like cohabitation, is characterized by more private ordering than corporations or marriage.

In cohabitation, the formal relationship begins when the parties move in together. This is similar to a business relationship in that a partnership is formed when two or more people operate a business for profit, and presumably couples move in together expecting to benefit from the arrangement personally and economically. Neither arrangement requires state action. In fact, unless the partners live in a jurisdiction that permits domestic partners to register, no involvement of the state at this stage is even possible.¹⁴⁰

Similarly, the division of power in the business partnership is closer to the division in an opposite-sex cohabiting relationship than that in a

¹³⁶ UNIF. P'SHIP ACT § 6(1) (1914), 6 U.L.A. 256 (1995); REVISED UNIF. P'SHIP ACT § 202(a) (1997), 6 U.L.A. 53 (Supp. 2000); *see also* UNIF. P'SHIP ACT § 7(4) (1914), 6 U.L.A. 280 (1995); REVISED UNIF. P'SHIP ACT § 202(c)(3) (1997), 6 U.L.A. 54 (Supp. 2000) (explaining that profit sharing is evidence of partnership). This Article refers both to the Uniform Partnership Act and the Revised Uniform Partnership Act, the latter of which has been adopted by twenty-eight states. 6 U.L.A. 1 (Supp. 2000).

¹³⁷ LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES 50-51 (1996).

¹³⁸ UNIF. P'SHIP ACT § 18 (1914), 6 U.L.A. 526 (1995); REVISED UNIF. P'SHIP ACT § 401 (1997), 6 U.L.A. 74 (Supp. 2000). Partners can, of course, contract around this default rule in their partnership agreement. *See* REVISED UNIF. P'SHIP ACT § 103 (1997), 6 U.L.A. 42 (Supp. 2000).

¹³⁹ Shultz, *supra* note 98, at 205. While courts historically have not intervened in existing marriages or business partnerships, the trend in business partnership law is to allow judicial intervention in ongoing relationships, rather than to require partners to dissolve a relationship when serious disputes arise. REVISED UNIF. P'SHIP ACT § 405 (1997), 6 U.L.A. 83 (Supp. 2000). Courts similarly are increasingly willing to enforce contracts between cohabitants. *See* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App.), *review denied*, 699 So. 2d 1374 (Fla. 1997); Crooke v. Gilden, 414 S.E.2d 645, 646 (Ga. 1992). For a discussion of courts' willingness to enforce agreements between partners but not spouses, *see* Sanford N. Katz, *Propter Honoris Respectum: Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1261 (1998).

¹⁴⁰ An exception is criminal prosecution for violating fornication laws. RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 98-99 (1996).

marriage.¹⁴¹ Spouses tend to engage in gendered division of labor, while opposite-sex cohabitants are less likely to do so.¹⁴² This gendered division of labor translates into power differences because the primary homemaking spouse has less time for wage labor, and wages are a significant source of power in the relationship. Wives tend to do over seventy percent of homemaking and caretaking, while cohabiting women do considerably less.¹⁴³ Further, cohabiting women are more likely to engage in the same amount of wage labor as their male partners.¹⁴⁴ Of course, power in any relationship, including cohabitation, is heavily influenced by the funds that each person brings into the relationship. Men generally have more money than women,¹⁴⁵ and hence, potentially have more power. Moreover, opposite-sex cohabitation generally does not create joint rights to property acquired during the relationship.¹⁴⁶ Women are much more likely than men to seek legal relief to obtain a return on their nonmonetary investments in a romantic partnership, suggesting that the title for property acquired during the partnership is more likely to rest with the male.¹⁴⁷ Thus, the general partnership rule of equal access to partnership property may not apply consistently to opposite-sex cohabitants. Overall, however, the comparisons outpace the contrasts.

¹⁴¹ See Julie Brines & Karla Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 348–49 (1999) (describing the “equality principle” that creates stability in cohabiting relationships, compared to the specialized division of labor that creates stability in marriage).

¹⁴² *Id.* at 334–36.

¹⁴³ Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 AM. SOC. REV. 327, 332 (1994) (noting that “cohabiting women do less housework than do married women,” and that married women generally report “performing over 70 percent of total housework, even if they are employed”). Analyzing data on married and cohabiting couples, people who live alone or with their parents, and divorced and widowed individuals, South and Spitze found that the pattern of time spent doing housework across marital statuses differs substantially between men and women: it is greatest for men during widowhood and greatest for women during marriage. *Id.* at 337. They conclude that this gender gap, at its greatest in married households, is not due to the presence of children. *Id.* at 344.

¹⁴⁴ Brines & Joyner, *supra* note 141, at 341 (“Among couples with an employed male, female cohabitators on average earn nearly 90 percent of the partner’s salary, whereas a wife’s earnings amount to just over 60 percent of the husband’s income.”); see also STATISTICAL ABSTRACT, *supra* note 123, at 416 (documenting 4,326,000 opposite-sex cohabitants in 1998 and reporting that in 1998, 83% of single women aged 25–34 engaged in wage labor, compared to 89.1% of single men in the same age group; in contrast, 71.6% of married women in that age group engaged in wage labor, compared to 96.4% of married men in that age group).

¹⁴⁵ STATISTICAL ABSTRACT, *supra* note 123, at 481 (documenting that the 1997 median income for men was \$25,212, compared to \$13,703 for women). This general trend does not apply to the same degree in communities of color. White men earned \$12,323 more, on average, than white women in 1997; Hispanic men earned only \$5,856 more, on average, than Hispanic women; and African American men earned only \$5,048 more than African American women. *Id.*

¹⁴⁶ A notable exception to this general rule is Washington’s recognition of nonmarital “meretricious relationships” between men and women. See *supra* note 77 and accompanying text.

¹⁴⁷ Atwood, *supra* note 61.

A second reason that business partnerships are more like cohabitation than like marriage turns on a well-developed critique of the partnership theory of marriage. This criticism contends that the business partnership model of marriage does not, or cannot, remedy the gender inequity in marriage. The formal equality assumptions underlying the partnership model are inconsistent with the fact that spouses "stand in culturally constructed and socially maintained positions of inequality," making the model harmful to women and children because it "actually reinforce[s] men's control within the family before and after divorce."¹⁴⁸

The inequities of the contemporary partnership model of marriage date from the model's inception. Historically, partnership models in community-property states were intended to remove the impediments of coverture on married women, not to make women equal to their husbands.¹⁴⁹ Courts narrowly construed the definition of marital property to allow wives to maintain an interest in their separate property.¹⁵⁰ This practice, however, did not protect the many women who did not own significant separate property and who deserved to share in the marriage's increased value due to their husbands' education, training, or business that occurred during the marriage.¹⁵¹ In the end, the partnership model of marriage lacks the doctrinal integrity to overcome a competing claim based on a more generally accepted legal model, such as the corporation.¹⁵²

Business partnerships are analogous to same-sex cohabiting relationships in many of the same ways they are analogous to opposite-sex cohabiting relationships. As with partnership and opposite-sex cohabiting relationships, same-sex cohabiting relationships have high levels of informality. Individuals create them not through state action, but rather by choosing to live together. Unlike opposite-sex cohabiting relationships, however, same-sex cohabiting relationships are less prone to the gendered specialization of labor that both reflects and perpetuates inequality

¹⁴⁸ FINEMAN, ILLUSION OF EQUALITY, *supra* note 7, at 3, 29. Moreover, the partnership model of marriage limits a homemaking spouse to half of the family assets on divorce, even though her postdivorce obligations to care for children and other dependents might justify giving her more than half of the family assets. *Id.* at 4-5.

¹⁴⁹ Smith, *supra* note 134, at 692 (documenting ways in which the partnership model is historically, doctrinally, and procedurally flawed); see also Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940's*, 6 L. & HIST. REV. 259 (1985) (contending that Congress implemented joint tax returns in 1948 to counteract the equal distribution of property to wives in community property states).

¹⁵⁰ Smith, *supra* note 134, at 701.

¹⁵¹ *Id.* at 707-16.

¹⁵² A dependent spouse, basing her claim at dissolution on a vague theory such as marital partnership often loses to other claimants for marital property. If one spouse acquires property with community assets, that property is marital property subject to distribution at divorce. If, however, the spouse incorporates a business and that corporation acquires property, that property then belongs to the corporation rather than the community. Thus, the marital partnership fiction loses in a contest with the corporate fiction. *Id.* at 706-07.

in opposite-sex relationships.¹⁵³ While studies on organization of household and wage labor in same-sex relationships are rare, due to the difficulties in identifying a random sample of a stigmatized minority, the results of these studies suggest that same-sex couples are more likely to participate equally in wage labor, and less likely to divide household labor along gendered lines.¹⁵⁴ This pattern makes sense, given that gendered specialization may be less likely in a relationship where the partners are both women or men.¹⁵⁵ Moreover, many same-sex partners seem to structure their romantic partnerships to look like business partnerships, in order to avoid judicial hostility to cohabitation agreements deemed to be based on meretricious consideration.¹⁵⁶

A third similarity between business partnerships and cohabitation lies in the rules governing dissolution. The dissolution of a business partnership is more like the dissolution of a cohabiting relationship than the end of a marriage. A business partnership dissolves when one partner

¹⁵³ Michelle Huston & Pepper Schwartz, *The Relationships of Lesbians and of Gay Men*, in UNDER-STUDIED RELATIONSHIPS: OFF THE BEATEN TRACK 89, 108–11 (Julie T. Wood & Steve Duck eds., 1995). But see CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN (1999). While Carrington's study of fifty-two gay families concludes that most gay couples divide home-making duties unequally, he concedes that these findings run contrary to research done in the 1970s and 1980s. Carrington suggests that this new data may be due to cultural changes encouraging gay families to organize in traditional ways, as well as his methodology of observing families and interviewing family members separately. *Id.* at 12–14, 17.

¹⁵⁴ Virginia Rutter & Pepper Schwartz, *Same-Sex Couples: Courtship, Commitment, Context*, in THE DIVERSITY IN HUMAN RELATIONSHIPS 197, 209 (Ann Elizabeth Auhagen & Maria von Salisch eds., 1996).

Both gay and lesbian partners will engage in the provider role, but they each prefer a coprovider situation. Gay men, like other men, do not expect that a provider will take care of them. When one gay partner is the provider, the partner who is being provided for tends to be more dissatisfied with the situation. In contrast, lesbians do not expect to support another person financially, except temporarily. Lesbians are not socialized, as many men are, to take pleasure in a paternalistic provider role. A lesbian who finds herself in the role of provider is likely to be the more dissatisfied partner.

Id.

¹⁵⁵ PHILIP BLUMSTEN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 148 (1983) (suggesting that "same-sex couples cannot assign housework on the basis of who is male and who is female").

¹⁵⁶ See, e.g., *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992); see also *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (finding that the mere fact of a sexual relationship between the cohabitants did not mean that an agreement between them was based on meretricious consideration). But see *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Cal. Ct. App. 1981) (declining to enforce an agreement between two men on the grounds that the complaint's reference to "lover" as one of many services provided between the cohabitants made the agreement one based on meretricious consideration). Given the social tendency to view relationships between same-sex couples as based only on sex, the *Jones* court's interpretation is not surprising. However, as illustrated by doctrines such as loss of consortium, annulment, and the ban on marriage in some jurisdictions where one person is a transsexual, legal doctrine also defines a legitimate heterosexual relationship as one that includes particular sexual practices. Robertson, *supra* note 37.

leaves, and no judicial action is required to formalize the dissolution.¹⁵⁷ This end is more like cohabitants breaking up than spouses divorcing.

In some ways, however, partnership dissolution is akin to divorce. Partnership dissolution is available at the will of the parties, at the end of a given term, or for the insolvency, insanity, exit, or death of a partner.¹⁵⁸ Partnership dissolution at will is akin to contemporary no-fault divorce, while other bases such as insolvency, insanity, or exit echo fault-based divorce (which is enjoying a renaissance as covenant marriage).¹⁵⁹ Similarly, marriage ends with the death of a spouse. However, unlike a marriage, a partnership need not be terminated by court decree,¹⁶⁰ and death or exit of one of the partners also ends a cohabiting partnership. Finally, one could argue that cohabitation, more than marriage, exists at the will of the parties because cohabitation ends when one party seeks to dissolve the affiliation, whereas divorce requires state action. Despite the similarities between divorce and partnership dissolution, business partnerships and cohabitation share a higher level of private ordering.

The fourth reason that the analogy of partnership to cohabitation makes sense is the proliferation of domestic partnership legislation and contractual arrangements. Domestic partnership law is based both in private contract and public regulation. Numerous private employers and universities make contractual promises to provide benefits to the same-sex partners of their employees or students. In addition, many municipalities and a few states offer benefits to the domestic partners of public employees.¹⁶¹ California offers health care benefits to the same-sex domestic partners of state employees.¹⁶² Hawaii provides inheritance and other benefits to pairs of people statutorily defined as reciprocal beneficiaries.¹⁶³ Similarly, the Oregon Court of Appeals has held that the state constitution requires a state university to provide benefits to the domestic

¹⁵⁷ UNIF. P'SHIP ACT §§ 29, 31 (1914), 6 U.L.A. 752, 771 (1995); REVISED UNIF. P'SHIP ACT § 801 (1997), 6 U.L.A. 103 (Supp. 2000).

¹⁵⁸ UNIF. P'SHIP ACT § 31 (1914), 6 U.L.A. 771 (1995); REVISED UNIF. P'SHIP ACT § 801 (1997), 6 U.L.A. 103 (Supp. 2000).

¹⁵⁹ LA. CIV. CODE ANN. art. 102 (West Supp. 1998); ARIZ. REV. STAT. § 25-901 (1999). For extended discussion of covenant marriage, see Katherine Shaw Spaht, *Marriage: Why A Second Tier Called Covenant Marriage?*, 12 REGENT U. L. REV. 1 (1999). The progressive potential of covenant marriage depends on whether it maintains its contractual nature. Only if couples freely choose to restrict their exit options from marriage will covenant marriage strengthen the marriages of the most committed spouses rather than trap the most naïve spouses.

¹⁶⁰ UNIF. P'SHIP ACT §§ 29, 31 (1914), 6 U.L.A. 752, 771 (1995); REVISED UNIF. P'SHIP ACT § 801 (1997), 6 U.L.A. 103 (Supp. 2000).

¹⁶¹ For example, Massachusetts and New York allow state employees to register their domestic partnerships in order to enjoy limited rights such as bereavement leave and hospital visitation. Lambda Legal Defense and Education Fund, *State-by-State*, available at <http://www.lambdalegal.org/cgi-bin/pages/states> (last visited Dec. 3, 2000).

¹⁶² CAL. GOV'T CODE § 22867 (West Supp. 2000).

¹⁶³ HAW. REV. STAT. § 572C-4 (1998) (requiring that reciprocal beneficiaries be legally prohibited from marrying one another). The Hawaii definition is broad enough to include, for example, a widowed mother and her son.

partners of its employees.¹⁶⁴ The wide range of sources of domestic partnership law provides numerous definitions of a domestic partner. In California, domestic partners must be of the same sex (unless they are over 62) and cannot be closely related.¹⁶⁵ Vermont combines these models by recognizing civil unions between same-sex romantic partners and reciprocal beneficiary relationships between unmarried people who are closely related.¹⁶⁶

Finally, the tax treatment of partnerships is similar to the tax treatment of cohabitants, and dissimilar to the tax treatment of corporations and marriages. Partnerships, like cohabitants, are taxed as disaggregated groups, while corporations, like marriages, are generally taxed as separate entities.¹⁶⁷

In sum, partnership is more analogous to cohabitation than to marriage because of the informality in formation and dissolution and the likelihood of equality among the partners. The following section operationalizes this insight, suggesting ways that partnership doctrine, in the cohabitation context, could alleviate inequality within and among relationships.

2. The Partnership Model Could Remedy Inequality Within Cohabiting Relationships

The partnership analogy could alleviate inequality within cohabiting relationships in several ways. First, it would relieve cohabitants of the burden of proving a contract (express or implied), constructive trust, or other legally cognizable claim to justify dividing assets when the relationship ends. Current law, which requires an express or implied contract or equitable claim such as restitution or constructive trust, burdens economically vulnerable parties. The partner with the cash is most likely to have title to property such as a home or car, while the other partner may contribute sweat equity, such as maintaining the car or fixing up the house. Partnership law offers a way to recognize the sweat equity of the partner who contributes more labor than cash to the relationship. Upon dissolution cohabitants would be required to show the domestic equivalent of operating a business for profit, which might be articulated as operating a household for mutual benefit. Once this burden is met, business partnership law could provide a model for distributing cohabiting partnership property. Under such a model, a rule that assets purchased or improved with partnership property are partnership property could remedy

¹⁶⁴ *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435 (Or. App. 1998).

¹⁶⁵ CAL. FAM. CODE § 297 (West Supp. 2000).

¹⁶⁶ VT. STAT. ANN. tit. 15, §§ 1201–1207, 5160–5169 (2000).

¹⁶⁷ BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 2.01[2] (6th ed. 1994).

the difficulty of distinguishing individual property from partnership property.

Another way that partnership law might alleviate inequality within a cohabiting relationship is by providing a buyout remedy, which recognizes the contributions a cohabitant might make to her partner's increased earnings during the partnership. One of the major issues in family law scholarship of the last decade is how legal doctrine contributes to the indigency or near-indigency of many primary homemakers upon divorce, due to the law's traditional refusal to recognize homemakers' contributions to family wealth.¹⁶⁸ Prominent among this literature is Cynthia Starnes' proposal to give primary homemakers a buyout of their interest in the marital partnership. Starnes analogizes modern marriage to business partnership and contends that divorce should be structured to mirror partnership dissolution, so that a homemaker's contributions to the enterprise could be remunerated through a buyout.¹⁶⁹ She suggests that the homemaker be reimbursed at divorce for her contributions to the value of the marital enterprise, including investments in the household and the wage earner's career and the homemaker's own lost opportunity costs.¹⁷⁰ Specifically, the homemaker would receive half of the marital partnership property, and the primary wage earner would buy out her share of his post-dissolution income.¹⁷¹ The simplicity of Starnes' model holds practical appeal. Calculations would be easy and parties would avoid spending an inordinate amount of time and money on experts who evaluate the homemaker's contribution to the wage earner's increased earnings.¹⁷² Starnes' buyout model could alleviate power disparities within a cohabiting relationship by providing a mechanism for reimbursing primary homemakers for their contributions to family wealth.

Third and finally, partnership law would impose a fiduciary duty on partners to treat one another fairly.¹⁷³ Partners are not acting at arms

¹⁶⁸ See Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1998); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

¹⁶⁹ Starnes, *supra* note 23, at 71-72.

¹⁷⁰ *Id.* at 130-37.

¹⁷¹ After making a compelling case that contemporary marriage dissolution resembles partnership dissolution, Starnes proposes a simple arithmetic model for calculating the disparity between spouses' enhanced earnings, and a sliding scale determination of buyout price based on the duration of the marriage. *Id.* at 119-24, 131-37. For example, if the marriage lasted one year, then the primary homemaker is entitled only to 3% of the disparity in the spouses' enhanced earnings; but if the marriage lasted fifteen years or more, she is entitled to 50% of these enhanced earnings.

¹⁷² An even more equitable measure would compensate the homemaker for postdivorce services and sacrifices related to child care, as well as services rendered and opportunities foregone during the course of the marriage. I argue elsewhere that Premarital Security Agreements based on U.C.C. Article 9 security agreements would address these shortcomings in a pure partnership buyout model. Ertman, *supra* note 168, at 85-87.

¹⁷³ RIBSTEIN, *supra* note 137, at 143.

length, and are held to "something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."¹⁷⁴ Specifically, a partner is held to a duty of loyalty (accounting to the partnership for benefits derived from partnership property, refraining from adversarial dealings with the partnership, or competing with the partnership), as well as a duty of care (refraining from grossly negligent or reckless conduct, intentional misconduct, or a knowing legal violation).¹⁷⁵ Without these duties, cohabiting partners could misrepresent facts or appropriate partnership property. With the duties in place, a socially or economically weak cohabitant could protect her interests.

3. The Partnership Model Could Remedy Inequality Among Various Types of Relationships

Applying the partnership model to cohabitation also addresses inequality among various types of relationships by providing a morally neutral range of options, thus justifying state recognition of the relationship in a fashion that reflects the parties' needs and expectations rather than making a moral judgment that one form of intimate affiliation is natural while others are unnatural and immoral.

Many people see domestic partnership as an alternative to same-sex marriage. Paula Ettlebrick, for example, argues that achieving legal marriage for same-sex couples may reinforce, rather than undermine, subordination if marriage retains its normatively superior status.¹⁷⁶ Moreover, domestic partnership policies that include opposite-sex couples prevent the dual-status regime from being a separate-but-equal one in which same-sex partners are governed by different, less comprehensive rules than opposite-sex partners.¹⁷⁷

The ability of domestic partnership models to fill the vacuum created by the ban on same-sex marriage illustrates the strengths of the partnership model. The primary impediment to state recognition of same-sex relationships is majoritarian morality. Partnership and other contractarian models have the potential to get around this obstacle in three ways. First, private law is generally based on functionalist concerns about regulating

¹⁷⁴ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

¹⁷⁵ REVISED UNIF. P'SHIP ACT § 404 (1997); 6 U.L.A. 79 (Supp. 2000); *see also* UNIF. P'SHIP ACT § 21 (1914), 6 U.L.A. 608 (1995).

¹⁷⁶ Paula L. Ettlebrick, *Legal Marriage Is Not the Answer*, HARV. GAY & LESBIAN REV., Fall 1997, at 34 (arguing that battling for legal same-sex marriage may rob the lesbian and gay community "of an important opportunity to challenge heterocentric sexual and family hierarchies").

¹⁷⁷ Those who support rights for same-sex relationships but oppose same-sex marriage view domestic partnership as a way to satisfy both of these goals. Linda S. Echols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 406-08 (1999).

existing relationships rather than a desire to express moral truths about the best or most superior relationships. Second, private law reasoning, focusing as it does on the intent of the parties rather than the public's view of what the terms of the arrangement should be, is independent of both moral and majoritarian concerns. Finally, because domestic partnerships are recognized at the local level (businesses, universities, municipalities, and some states), their proponents can convince smaller, more accessible groups of decisionmakers to implement the policies. In short, domestic partnerships illustrate one way that business models may avoid many of the problems posed by the naturalized model of intimate affiliation.¹⁷⁸

Finally, if government more regularly recognized cohabiting relationships, cohabitators might have some public safety net in the form of social security, wrongful death, intestacy, or other claims. Without these support systems, married people, who already have the most social and economic security, also have the strongest legal safety net. Recognizing the similarities between business partnerships and cohabitation thus counteracts the invidious pattern of the "haves" coming out ahead of the "have-nots."

B. Close Corporations and Marriage

If cohabitation co-opts the partnership model, and if marriage is considered to be distinct from cohabitation, then marriage requires a distinct business model. Marriage has unexpected commonalities with the close corporation, especially regarding formation and dissolution. Moreover, analogizing marriage to a close corporation could alleviate inequality within marriage by providing weak economic partners the opportunity to bring claims such as oppression and breach of fiduciary duty. The corporate analogy also could alleviate inequality between marriage and other intimate affiliations by making it only one in a whole range of legally recognized relationships, with functionalist—rather than morally charged—distinctions between those various forms.

1. The Similarity of Close Corporations and Marriages

Both close corporations and marriages are intended to be "long-term, ongoing entities" that require "stability and predictability to function properly."¹⁷⁹ Like marriages, corporations are formed and dissolved

¹⁷⁸ See Ertman, *supra* note 97.

¹⁷⁹ Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2053 (1996) (arguing that choice of law rules governing the validity of same-sex marriage should defer to the state of celebration, just as choice of law rules governing the validity of incorporation look to the law of the state of incorporation). Of course, cohabitation can also be a stable, long-term

through state action.¹⁸⁰ Publicly traded corporations are markedly different from marriages, of course, by virtue of their size, their separation of ownership from control, and the free transferability of their shares.¹⁸¹ However, close corporations are quite different from publicly held corporations.¹⁸² Close corporations are typically family businesses or small businesses run by close associates.¹⁸³ They are smaller; they rarely separate ownership from control, since the majority shareholders often serve as officers and directors; and there is no market for their shares.¹⁸⁴ Moreover, close corporations enjoy the special rights of limited liability and perpetual life, much as spouses enjoy special rights such as inheritance and joint parenting. These parallels between close corporations and marriages accompany significant differences between the two forms. This section traces historical links between the laws regulating marriage and those regulating corporations, identifying contemporary similarities and differences between the two forms. Ultimately, I conclude that the similarities, at least regarding formation and dissolution, are sufficient to merit further exploration of the analogy.

Historically, both marriages and corporations have gone from being unregulated by the state to being highly regulated, and both are now returning to a state of relative deregulation.¹⁸⁵ Early English law viewed marriage as a "contract for the purchase of a wife, a purely private transaction, regulated, as were other contracts, for such matters as fraud, tortious interference, and breach."¹⁸⁶ Until the early nineteenth century, poor people who could not afford to pay for a formal divorce severed their financial ties through a "wife sale," which "consisted of the husband bringing his wife to the cattle market on market day, a halter around her neck, and offering her to the highest bidder, who by pre-arrangement was

project.

¹⁸⁰ See ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS § 8.13, at 207 (1996); F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 9.27 (3d ed. 1998).

¹⁸¹ O'NEAL & THOMPSON, *supra* note 180, § 1.4.

¹⁸² For example, the Model Business Corporation Act does not require a board of directors if the corporation has fewer than 50 shareholders. MODEL BUS. CORP. ACT § 8.01(c) (1999).

¹⁸³ For a discussion of the way business and family law overlap in legal issues associated with family businesses, see Terry A. O'Neill, *Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock*, 73 IND. L.J. 589, 590 (1998).

¹⁸⁴ O'NEAL & THOMPSON, *supra* note 180, §§ 1.02, 1.14.

¹⁸⁵ Mary Anne Case & Paul G. Mahoney, *The Role of the State in Corporations and Marriage*, 2-3, 22 (Oct. 2, 1996) (unpublished manuscript, on file with the author) ("[T]he history of marriage in Anglo-American law seems thus far to have been one of movement from contract to status and only part way back again.").

¹⁸⁶ *Id.* at 22-23. Given the history of marriage as a contract for the purchase of a wife, it is not surprising that commentators have suggested importing elements of U.C.C. Article 2, which governs the sale of goods, to domestic relations law. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 175 (1998); Weisbrod, *supra* note 122.

a man whom she would have married had the law allowed.”¹⁸⁷ The marriage contract’s term was sometimes open to bargaining, as in Irish year-and-a-day marriages, which were renewable with the parties’ consent.¹⁸⁸ English law generally did not regulate marriage formation until 1753, with the passage of Lord Hardwicke’s Act, which required licensing, witnesses, and registration of marriage.¹⁸⁹ The state made its “most aggressive attempt to assert monopoly control over both” marriage and corporations in the eighteenth century.¹⁹⁰ Having failed to control either institution, the state settled for a hybrid set of regulations that provided both more state control than purely private ordering would have, but also more flexibility than would have been available in an entirely “state-sponsored institution.”¹⁹¹

Corporations are significantly different from marriages in a number of ways, complicating the analogy between the two institutions. Seeming impediments to comparing corporations and marriage include the size of corporations, their status as fictitious persons with perpetual life and limited liability, and the differences between spousal and corporate roles. Upon closer examination, however, many of these differences are less extreme.

The first complication in the analogy results from the potential difference in size between a corporation and a marriage. A corporation can be formed by one person or it can comprise thousands of shareholders and employees.¹⁹² In contrast, marriage requires two (and only two) people. Of course, partnerships can include hundreds of partners; yet that fact has not prevented widespread acceptance of the partnership theory of marriage.

A second complication in analogizing marriages to corporations is the difficulty in identifying the rights and roles of spouses. In the partnership analogy, romantic partners correspond to business partners; in the corporate analogy, spouses may correspond to shareholders, incorpora-

¹⁸⁷ Case & Mahoney, *supra* note 185, at 23 n.30.

¹⁸⁸ *Id.* at 23 n.35. Case and Mahoney point out that this contractual approach to determining the term of the marriage emerged again in legislation proposed in Maryland in 1971 providing that “a marriage be considered a contract for three years with an option to renew for three years, renewable forever, upon mutual consent thereto.” *Id.* at 23–24, (quoting H.D. 623, 1971 Leg., 373d Sess. (Md. 1971)). Islam recognizes temporary marriages called *sigheh*. Elaine Sciolino, *Love Finds a Way in Iran: “Temporary Marriage,”* N.Y. TIMES, Oct. 4, 2000, at A3.

¹⁸⁹ Case & Mahoney, *supra* note 185, at 27. The legislation was officially titled the Act for the Better Prevention of Clandestine Marriages. Clandestine marriages were “ceremonies performed by someone who at least purported to be a clergyman, following some of the prescribed formalities, but in the wrong place, the wrong time, without the prescribed publicity or payment of licensing fees, and with fairly haphazard registration.” *Id.* at 28 (citations omitted).

¹⁹⁰ *Id.* at 19.

¹⁹¹ *Id.*

¹⁹² O’NEAL & THOMPSON, *supra* note 180, § 1.03.

tors, directors, or officers.¹⁹³ Similarly, it is difficult to find an analogy between shareholder rights and spousal rights. For example, shares in publicly traded corporations are freely transferable,¹⁹⁴ and a shareholder can exit the corporation by selling her shares without affecting the life of the corporation. These options are unavailable to spouses. Moreover, it is unclear what the marital equivalent to the shareholder right to elect new directors¹⁹⁵ would be, other than freely available divorce and remarriage.

The rights of spouses may be more similar to the rights of shareholders in close corporations than those in public corporations. Because close corporations are held by a few people who are shareholders and managers, minority shareholders often are unable to elect new managers, cannot freely transfer their shares, and generally cannot leave the corporation without affecting its life. Most significantly, a close corporation often is a hybrid of family and business that bridges the private/private divide by its very existence.¹⁹⁶ The special circumstances of management and control of family businesses require doctrinal recognition of shareholders' particular interests and vulnerabilities in such businesses.¹⁹⁷ Like a minority shareholder, a disadvantaged spouse (often a woman) takes a serious financial risk when exiting marriage. Applying the doctrine of close corporations to marriage may reduce the harmful effects of separation.

A third complication in analogizing corporations to marriages is the fact that corporations are free-standing entities with perpetual life. Marriages, in contrast, end with the death of one spouse. According to conventional wisdom, a corporation is a legal fiction, sometimes even a person in the eyes of the law,¹⁹⁸ while a marriage is legally nothing more than the two individuals who create it.¹⁹⁹ However, neither one of these characterizations is entirely accurate.²⁰⁰ Both corporations and marriages involve individuals forming a new fictional legal entity and operating it for their mutual (and, presumably, society's) gain. While individual

¹⁹³ Children could be analogized to nonvoting shareholders or beneficiaries of a fiduciary relationship. Elizabeth Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

¹⁹⁴ O'NEAL & THOMPSON, *supra* note 180, § 1.4.

¹⁹⁵ See MODEL BUS. CORP. ACT § 8.03 (1999).

¹⁹⁶ See *id.* § 14.30 cmt. 2.

¹⁹⁷ See *id.* § 8.01 cmt. (recognizing different rules for family businesses); see also *Donahue v. Rodd Electrotypes Co.*, 328 N.E.2d 505, 517 (Mass. 1975) (noting the "particularly scrupulous fidelity" owed by majority shareholders to minority shareholders in a family-owned close corporation).

¹⁹⁸ O'NEAL & THOMPSON, *supra* note 180, § 8.4.

¹⁹⁹ See Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 542-43 ("Unlike either individuals or corporations, families do not have ownership claims that are recognized apart from the interests of individual family members.").

²⁰⁰ One way that the law recognizes marriage as an entity is by requiring private parties to pay for damage to the marriage, as in wrongful death actions or loss of consortium claims.

spouses often act independently of one another, the marriage is, for some purposes, a separate entity. The U.C.C. definition of "organization" includes "a corporation, government . . . partnership or association, *two or more persons having a joint or common interest*, or any other legal or commercial entity."²⁰¹ Under this definition, a husband and a wife would qualify as an organization, as do corporations and partnerships.²⁰² Given this understanding of marriages as similar to business organizations, it is not surprising that legal doctrines prevent a spouse from disposing of or encumbering marital property without the other spouse's consent.²⁰³

Furthermore, critics have challenged the assertion that a corporation can be conceived of as a person. Daniel Greenwood, for example, argues that corporations should not be treated as persons with First Amendment rights to free speech because there is no person who speaks.²⁰⁴ The shareholders who speak, Greenwood contends, are instead essentialized profit-seekers.²⁰⁵ Many commentators have developed this insight more fully, suggesting that the corporation should be viewed as a nexus of contracts rather than as an entity itself.²⁰⁶ Similarly, some commentators have suggested that marriage be understood as a set of contracts.²⁰⁷ Clearly, both marriages and corporations contain elements of status and contract.

Further, while civil law provides that a marriage is not perpetual, this view is not universal.²⁰⁸ Some religious doctrines assert that marriages are perpetual, and that spouses are reunited in heaven.²⁰⁹ Thus,

²⁰¹ U.C.C. § 1-201(28) (1990) (emphasis added).

²⁰² U.C.C. § 3-403 cmt. 4 (1990). Discussing unauthorized signatures on negotiable instruments, this comment explains that "[t]he definition of 'organization' in Section 1-201(28) is very broad. It covers not only commercial entities, but also 'two or more persons having a joint or common interest.' Hence subsection (b) would apply when a husband and wife are both required to sign an instrument." *Id.*

²⁰³ See, e.g., COLO. REV. STAT. § 4-9-203(2) (2000) (prohibiting a married person from conveying a security interest in marital property, other than a purchase money security interest, unless his or her spouse also signs the security agreement).

²⁰⁴ Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996).

²⁰⁵ *Id.* at 1096-98. Greenwood argues that real persons—who can be neighbors, spouses, co-workers, parents, or members of religious congregations—have multiple motivations, while the law treats shareholders as expressing only one legitimate interest: profit.

²⁰⁶ HAMILTON, *supra* note 180, § 8.6, at 193. But see J. Robert Brown, Jr., *Discrimination, Managerial Discretion and the Corporate Contract*, 26 WAKE FOREST L. REV. 541 (1991) (critiquing the contractarian view of corporations and highlighting the contributions of such an approach to inequality among shareholders).

²⁰⁷ Brinig & Carbone, *supra* note 168, at 877-82. Margaret Brinig's more recent work proposes viewing courtship in contractual terms, with existing marriages viewed as covenants (a form that is a mix of status and contract), and postdivorce arrangements as franchises. MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF FAMILY* 13 (2000).

²⁰⁸ While civil marriage should be separated from religious marriage, religious forces are relevant because they are at the heart of the resistance to marriage law reforms such as state recognition of same-sex relationships. See Finnis, *supra* note 38, at 1071, 1074.

²⁰⁹ Mark Oppenheimer, *Mormon's New England Temple a Symbol of Arrival*, HARTFORD COURANT, Sept. 20, 2000, at A5.

while civil marriage is often conceived of as temporary, ending when either spouse dies, other cultural understandings of marriage may perceive it as an institution with perpetual life, similar in that way to a corporation.

A final complication is that corporations have limited liability. Spouses generally are liable for debts incurred on behalf of the marriage,²¹⁰ although they enjoy some limited liability. Bankruptcy law, for example, does not require nonfiling spouses to help pay debts incurred by the filing spouse, in effect granting nondebtor spouses limited liability.²¹¹

In sum, many of the seemingly stark differences between marriages and corporations become less marked upon closer examination. The similarities are sufficiently numerous to merit exploring how corporation law might parallel marriage law. While corporations and marriages are not identical, marriages are more analogous to close corporations than to business partnerships.

Corporations are similar to marriages with regard to formation and dissolution. The purposes for which a corporation may be formed parallel the two major purposes of marriage cited in the legal literature. A corporation may be formed for any lawful purpose, usually either for profit maximization or for a charitable or educational purpose.²¹² Legal economists view marriage, like other enterprises, as existing for profit maximization,²¹³ while romantics, moralists, and others see marriage as existing for social purposes that are often unprofitable, such as pursuing intimacy, caring for dependents, or controlling sexual conduct.²¹⁴ In reality, marriage is both economic and social, both for profit and for nonpecuniary purposes.²¹⁵

The formation of both types of relationships requires application to and certification from the state.²¹⁶ Incorporation occurs when the articles of incorporation are filed with the secretary of state.²¹⁷ Similarly, marriage is formed when the spouses file a marriage license with the state.²¹⁸ Marriage generally requires a ceremony in addition to this filing.²¹⁹ The

²¹⁰ HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.4 (2d ed. 1988).

²¹¹ Dickerson, *supra* note 26, at 964.

²¹² MODEL BUS. CORP. ACT § 3.01 (1999).

²¹³ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 155–56 (5th ed. 1998).

²¹⁴ See Regan, *supra* note 116; Jack Hitt, *Marriage a la Market*, N.Y. TIMES, Mar. 19, 2000 (Magazine), at 17.

²¹⁵ Silbaugh, *Commodification*, *supra* note 86, at 83–84. One aspect of corporations that makes them better analogies for marriages than partnerships is that the nonprofit option is not available for partnerships. Thus commentators who value noneconomic aspects of intimate relations and resist the partnership model of marriage might find that close corporations provide a more altruistic analogy for intimate relationships. See Regan, *supra* note 116; FINEMAN, *ILLUSION OF EQUALITY*, *supra* note 7, at 4–5.

²¹⁶ See MODEL BUS. CORP. ACT §§ 2.02, 2.10 (1999).

²¹⁷ *Id.* § 2.03.

²¹⁸ UNIF. MARRIAGE & DIVORCE ACT § 203, 9A U.L.A. 179 (1998).

²¹⁹ *Id.* § 206. States that recognize common law marriage do not require a ceremony or

ceremony itself, however, may be a perfunctory civil hearing²²⁰ or as minimalist as the most skeletal articles of incorporation.²²¹

Articles of incorporation need only include the corporation name, the number of shares the corporation is authorized to issue, and the name and address of each incorporator and registered agent.²²² The usual requirements for a marriage license are similarly sparse, generally requiring only the names, addresses, and ages of the parties, their parents' names, and the number of previous marriages. In addition, parties to a marriage must be of the opposite sex,²²³ not closely related, and not already married. Of course, given the contractual nature of both institutions, both incorporators and spouses are free to agree to terms beyond these minimal requirements.

Articles of incorporation as well as marriage ceremonies often embody more than the minimum requirements. Articles of incorporation may include information such as the directors' names and addresses, the corporation's purpose, and guidelines for management of corporate business; they may impose shareholder liability for corporate debts, and mandate director indemnification for certain actions.²²⁴ Similarly, fiancées can enter into prenuptial contracts determining some of the rights and obligations within the marriage.²²⁵ While some of these provisions are enforceable, such as terms providing for particular property division or waiving rights to maintenance upon dissolution, others are not, including provisions regarding child custody or child support.²²⁶ As a practical matter, many domestic disputes are resolved by private agreement regardless of whether the provisions are legally enforceable.²²⁷

Corporate dissolution, particularly for close corporations, parallels divorce.²²⁸ Voluntary corporate dissolution, for example, is akin to no-

filing with the state for a marriage to be legally valid. Cynthia Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

²²⁰ UNIF. MARRIAGE & DIVORCE ACT § 206, 9A U.L.A. 182 (1998).

²²¹ *Id.* In reform Judaism, for example, the rabbi asks: "Do you, __, of your own free will and consent, take __ to be your wife/husband and do you promise to love, honor, and cherish, her/him throughout life?" The groom/bride simply answers "I do." DIANE WARNER, COMPLETE BOOK OF WEDDING VOWS 17-18 (1996). A typical Lutheran wedding vow provides similarly: "I will take you, __, to be my husband/wife from this day forward, to join with you and share all that is to come, and I promise to be faithful to you until death parts us." *Id.* at 25.

²²² MODEL BUS. CORP. ACT § 2.02(a) (1999).

²²³ No state recognizes marriage between same-sex partners, and the federal government and over thirty states have enacted proactive legislation banning same-sex marriage should any jurisdiction recognize it. *See, e.g.*, 1 U.S.C. § 7 (Supp. IV 1998); WASH. REV. CODE § 26.04.010 (1998).

²²⁴ MODEL BUS. CORP. ACT § 2.02(b) (1999).

²²⁵ CLARK, *supra* note 210, § 1.9.

²²⁶ Silbaugh, *Marriage Contracts*, *supra* note 86.

²²⁷ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

²²⁸ *See* MODEL BUS. CORP. ACT § 14.05 (1999) ("A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up

fault divorce. Likewise, administrative corporate dissolution is analogous to annulment: it results from the corporation's failure to fulfill statutory requirements, such as filing an annual report.²²⁹ Similarly, judicial corporate dissolution, pursuant to a motion by the attorney general, could also be analogous to annulment because it occurs when the corporation received its articles of incorporation by means of fraud.²³⁰ Another, perhaps better, corporate analogy to annulment is the ability of the incorporators or initial directors to file articles of dissolution when the corporation has neither conducted any business nor issued any shares.²³¹ This circumstance is akin to lack of consummation in marriage. Just as some states require a waiting period prior to divorce or impose additional requirements beyond the standard of irreconcilable differences,²³² some business organizations require a supermajority of the shareholders and the board to dissolve a corporation by vote.²³³ Moreover, corporate dissolution requires the formality of filing articles of dissolution, just as divorce requires formal state action.²³⁴ Finally, shareholders divide assets upon dissolution based on their percentage ownership, just as spouses divide assets based on their ownership interest.²³⁵

The dissolutions of both close corporations and marriages can be judicial, as in the case of dissolution due to shareholder or spousal deadlock.²³⁶ Courts also dissolve close corporations when minority shareholders are victims of oppression, or when minority shareholders' reasonable expectations of the enterprise are frustrated.²³⁷ The marital version of dis-

and liquidate its business and affairs."'). As with partnership law, corporate dissolution precedes winding up. *Id.* § 14.03. While no-fault divorce seems to assume a clean break, the trend towards justifying postdivorce income sharing suggests a model of divorce where the "business and affairs" of the marriage are wound up over a period of years to ensure that the primary homemaking spouse is not deprived of the returns on her investment in the marriage. See Ertman, *supra* note 168.

²²⁹ MODEL BUS. CORP. ACT § 14.20 (1999).

²³⁰ Judicial dissolution is also available when the corporation continually violates state law, a situation possibly analogous to divorce for domestic violence. Such a divorce is more consistent with the old fault base of cruelty, although recurring abuse indicates the kind of irreconcilable differences that justify divorce in no-fault regimes.

²³¹ MODEL BUS. CORP. ACT § 14.01 (1999).

²³² Louisiana, for example, allows spouses to agree at the formation of their marriage that they will be governed by a fault-based regime. Under this system, divorce is available only for fault or after a two-year separation, instead of the six months otherwise required. LA. CIV. CODE ANN. art. 102 (West Supp. 1998).

²³³ MODEL BUS. CORP. ACT § 14.02 (1999).

²³⁴ Compare MODEL BUS. CORP. ACT § 14.03 (1999), with UNIF. MARRIAGE & DIVORCE ACT § 303, 9A U.L.A. 216 (1998).

²³⁵ Compare MODEL BUS. CORP. ACT § 14.05 (1999), with UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 288 (1998).

²³⁶ See O'NEAL & THOMPSON, *supra* note 180, § 9.26.

²³⁷ Donahue v. Rodd Electrotypes Co., 328 N.E.2d 505 (Mass. 1975) (holding that a majority shareholder oppressed the minority shareholder by directing the corporation to buy his shares at a favorable price and refusing the minority shareholder the same option). Legal protections for minority shareholders are particularly important because the minority shareholder "[t]ypically . . . has a substantial percentage of his personal assets invested in

solution due to the frustration of reasonable expectations is divorce either in a fault-based regime²³⁸ or in a regime entitling an economically vulnerable spouse to a share of family wealth.²³⁹

2. *The Corporate Model Remedies Inequality Within Marital Relationships*

On a concrete level, three doctrinal elements of close corporation law demonstrate how the corporate metaphor might alleviate inequality within marriage: the minority shareholder cause of action for oppression and other breach of fiduciary duty; annual shareholder meetings; and claims related to *ultra vires* action. Moreover, a corporate finance model can be used to craft an entitlement-based justification for postdivorce income sharing.

Shareholders can petition the court to dissolve a close corporation due either to oppression or deadlock. Oppression occurs when majority shareholders breach their fiduciary duty to minority shareholders.²⁴⁰ Shareholder deadlock is also grounds for dissolution either if the directors are deadlocked and there is irreparable damage to the corporation, or if the corporation cannot be employed to the shareholders' advantage.²⁴¹ Fiduciary duties and the duty of good faith²⁴² differ for close and publicly traded corporations. Majority shareholders of close corporations often are held to fiduciary duties similar to those that business partners owe

the corporation. The stockholder may have anticipated that his salary from his position with the corporation would be his livelihood." *Id.* at 514 (citation omitted). Because of the weakness of the minority position, however, no market exists for his shares. To counterbalance majority shareholder opportunism, the law recognizes a cause of action for oppression. *Id.* As an alternative to dissolution, the majority shareholder can, and often does, buy out the minority shareholder. MODEL BUS. CORP. ACT § 14.34 official cmt. (1999). The rule regarding buyouts and corporate dissolution when one shareholder (or the majority) oppresses the minority is particularly appropriate in family corporations with a fifty-fifty split of stock. *Id.* § 14.30 cmt. 2.

²³⁸ Fault can be grounds for divorce and can also be relevant to the distribution of assets upon divorce. Barbara Bennett Woodhouse, *Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2528–29 (1994).

²³⁹ UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 288 (1998).

²⁴⁰ MODEL BUS. CORP. ACT § 14.30(2)(ii) (1999) (providing grounds for dissolution where "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent").

²⁴¹ *Id.* § 14.30(2)(i). A third ground for dissolution exists when shareholders are deadlocked in voting power and have failed, for a period that includes two annual meeting dates, to elect successors to directors whose terms have expired. *Id.* § 14.30(2)(iii). This action is similar to covenant marriage in Louisiana, which imposes a two-year waiting period for divorce. LA. CIV. CODE ANN. art. 102 (West Supp. 1998). A fourth ground for dissolution is waste or misallocation of corporate assets. MODEL BUS. CORP. ACT § 14.30(2)(iv) (1999).

²⁴² MODEL BUS. CORP. ACT §§ 8.30, 8.42 (1999). Fiduciary duties and the duty of good faith are separate but related obligations that close corporation shareholders owe each other. Directors are bound to act "(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation." *Id.* § 8.30(a).

each other.²⁴³ This heightened duty parallels the fiduciary duty that some jurisdictions have imposed on spouses.²⁴⁴

Applying the partnership fiduciary duty to spouses could benefit spouses who do not control assets during the marriage. Fiduciary duties include the duty to act for the beneficiary's benefit, the duty to forego profit accrued at the beneficiary's expense, and the duty to avoid self-dealing and self-preference.²⁴⁵ Particularly relevant is the implication that the fiduciary duty remains intact despite strained relations between the partners.²⁴⁶

Historically, courts held that husbands owe their wives fiduciary duties stemming from the husbands' exclusive right to control and manage community property. Contemporary husbands and wives both have the right to manage community property, and each spouse is a fiduciary in relation to the other regarding property management.²⁴⁷ This duty has been interpreted to require divorcing spouses to fully disclose information about the existence and value of property when they determine how to divide their assets.²⁴⁸

Corporate doctrine might also alleviate inequality within marriage by importing the idea of the annual shareholder meeting. These meetings would enable spouses to address distribution of assets and labor in their marriage, particularly when conditions change. For example, although spouses often marry thinking that each will participate fully in the wage labor force, this plan may falter once the couple has children.

Additionally, corporation law could help balance power in marriage by importing the shareholder's right to sue the corporation for acting *ultra vires*. This cause of action for exceeding one's authority could stem from misappropriation of marital assets. In a different context, Linda Hirshman and Jane Larson propose a cause of action for damages when

²⁴³ *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 515 (Mass. 1975) (applying partnership fiduciary duties to close corporations because of "the fundamental resemblance" of the two models, including the "trust and confidence" essential to the partnership and "the inherent danger to minority interest in the close corporation").

²⁴⁴ Streich, *supra* note 129, at 367-68. Partners owe one another a fiduciary duty "consistent with the social norm of reciprocal trust and love between spouses." Starnes, *supra* note 23, at 120.

²⁴⁵ RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (Tentative Draft No. 1, 1996); Streich, *supra* note 129, at 373 (quoting *Bakalis v. Bressler*, 115 N.E.2d 323, 327 (Ill. 1953)).

²⁴⁶ Streich, *supra* note 129, at 379.

²⁴⁷ *Id.* at 376.

²⁴⁸ See *Compton v. Compton*, 612 P.2d 1175, 1183 (Idaho 1980); see also California's Family Code provision imposing "the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." CAL. FAM. CODE §§ 1100(c), 1101 (West 1994). In particular, these provisions require spouses to (1) provide one another access to books and records; (2) give accurate information about transactions affecting the community; and (3) account for and share any profits or benefits derived from community transactions undertaken without the other spouse's consent. Such duties parallel those imposed on business partners, making California's importation of partnership law into family law among the most explicit.

one spouse commits adultery.²⁴⁹ The action for damages due to one spouse's *ultra vires* actions provides a possible doctrinal framework to compensate both economic and nonpecuniary losses.

Models proposing buyout of one spouse's investment in the other spouse's career during the marriage, typically based on partnership law or corporate finance, are similar to the buyout remedy courts apply during the dissolution of close corporations.²⁵⁰ Katherine Meighan proposes a corporate finance solution to the problem of reimbursing a nonstudent spouse for his or her investment in the other spouse's education or training.²⁵¹ She conceives of this investment as a hybrid of debt and equity.²⁵² Under Meighan's model, the nonstudent spouse therefore is entitled to a return on her investment.²⁵³

This hybrid approach, Meighan contends, creates incentives for desirable behavior. Prior to divorce, the legally enforceable return on the investment provides an incentive for one spouse to invest in the other's education. After divorce, the equity and debt portions of the investment create different incentives. The equity portion of the investment reduces the costs associated with debt overhang and financial distress by providing financial slack for the student spouse,²⁵⁴ and allowing him or her greater flexibility in career choice.²⁵⁵ The debt portion encourages the student spouse to work to fulfill the obligation.²⁵⁶ This corporate model

²⁴⁹ HIRSHMAN & LARSON, *supra* note 9, at 285 (noting that damages could be awarded at the property distribution phase of divorce or through a tort claim for money damages during an ongoing marriage or after divorce).

²⁵⁰ Starnes, *supra* note 23, at 130–31; Meighan, *supra* note 26; *see infra* notes 300–306 and accompanying text. When a shareholder seeks dissolution of a close corporation under MODEL BUS. CORP. ACT § 14.30(2) (1999), the corporation or another shareholder may elect to purchase the minority shareholder's share for fair market value. *Id.* § 14.34(a). If the parties cannot agree on a fair price, the court will determine the fair value of the shares. *Id.* § 14.34(d).

²⁵¹ Meighan, *supra* note 26.

²⁵² Debt is fixed and is repaid in set installments (principal with interest) while equity varies and depends on the return on the investment. *Id.* at 214.

²⁵³ *Id.* Meighan calculates this return as the amount of contribution (debt) plus ten percent of the student spouse's income for ten years (equity).

²⁵⁴ *Id.* Debt overhang occurs when a debtor fails to invest in a lucrative project because the bulk of the profits would go towards satisfying the firm's obligations. *Id.* at 215. Because a relatively small portion of Meighan's proposed obligation is debt-based (costs of financing the education), interest payments are low. Education financing costs include direct school expenses, living expenses, and "any other efforts by the working spouse, whether or not possessing an explicit financial valuation, toward improving the student spouse's quality of life." *Id.* at 194. The larger equity investment encourages the student spouse to work diligently as he may retain a greater percentage of his earnings than with comparable debt investments. *Id.* at 215. Low monthly debt payments also minimize the risk of financial distress for a student spouse, and extra cash allows for potentially lucrative private investment. *Id.* at 216.

²⁵⁵ *Id.* at 217–18.

²⁵⁶ *Id.*

fruitfully imports one aspect of corporate law (corporate finance) to one aspect of marriage (the degree dilemma).²⁵⁷

3. The Corporate Model Could Remedy Inequality Among Various Kinds of Relationships

Accepting the corporation analogy to marriage addresses the inequality among various types of relationships by providing a morally neutral range of options. This analogy justifies state recognition of relationships to the extent that state recognition reflects the needs and expectations of the parties rather than a moral judgment that one form of intimate affiliation is natural while others are unnatural and immoral. One could argue that marriage (and married people) would suffer if marriage lost its preeminent status as the one natural affiliation. To the extent that this status is based on the demonization of competing affiliations, it is unjustifiable. Perhaps further discussion will at some point provide a better justification for marriage's preeminent status than the naturalized (and hierarchical) model of family. Until then, the law should recognize a range of intimate affiliations, one of which could be the close corporation/marriage.

In short, while corporations differ in some ways from marriages, there is enough similarity in current doctrine governing the two entities to justify the analogy. Development of this analogy might remedy inequities both within marriage and among various forms of relationships.

C. Limited Liability Companies and Polyamory

A third business entity that shares commonalities with intimate relationships is the limited liability company. Like the partnership and corporation analogies, the LLC analogy is based on doctrinal similarities and has the potential to remedy inequality within relationships and among various types of relationships.

1. Defining Polyamory and Exploring Its Legitimacy

While the polyamory/LLC analogy may be the most counterintuitive comparison, the surprise is due partly to the relative infancy of the LLC. However, the LLC's legal structure might be particularly appropriate in providing a way to understand polyamorous relationships in which at least two of the participants are married. Given the considerable flexi-

²⁵⁷ See also Ertman, *supra* note 168 (proposing use of Premarital Security Agreements to commodify homemakers' labor and sacrifices as a debt); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 Ky. L.J. 51 (1999) (noting the debtor-creditor elements of the relationship between primary wage-earning and primary homemaking spouses).

bility in tailoring LLCs, the LLC model might fit best with Jeffrey Stake's proposal that intimate partners select from various options to determine the rules regarding dissolution and asset distribution.²⁵⁸

As used in this Article, the term "polyamory" describes a wide variety of relationships that include more than one participant. For example, one man may affiliate with a number of women who are sexually involved with the man but not with one another. Such an arrangement, polygamy, has been associated with Mormons and is still common in many nonindustrialized societies.²⁵⁹ Polyamory also includes arrangements where one woman is involved with more than one man,²⁶⁰ regardless of whether the men are sexually involved with one another. The term also includes arrangements with combinations of people who organize their intimate lives together, regardless of the extent of the arrangement's sexual elements. Thus, if a lesbian couple has a child by alternative insemination, using a gay man as a known donor to father the child, and the donor remains involved in the child's life, the arrangement is polyamorous. These three individuals love one another, or are bonded by the love for the child. The lesbian couple's relationship is romantic and sexual, and similar to marriage in that the couple lives together and jointly parents the child. The two biological parents, in contrast, are neither romantic partners nor even involved in the way that cohabitants and co-parents are.²⁶¹

Polyamory could also include a group arrangement in which none of the participants is sexually involved with one another, but where there is some requisite level of intimacy associated with organizing lives together. For example, if Hawaii's reciprocal beneficiaries legislation (which covers any two single people barred from marrying) were expanded to cover relationships with more than two people, such arrangements could be seen as polyamorous.²⁶² While polyamory literally means

²⁵⁸ Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992).

²⁵⁹ David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997).

²⁶⁰ John Cloud, *Henry & Mary & Janet & . . .*, TIME, Nov. 15, 1999, at 90 (describing an arrangement among a woman, her husband, and another man). Commonly called polyandry, this type of polyamorous relationship could include a spectrum of arrangements, such as those in which the participants see the men involved as husbands of the woman, or those in which the men have various levels of responsibility and intimacy (some falling short of spousal status). *Id.* However, one would expect a certain level of stability or permanence to trigger legal regulation. This would allow the participants to remain free of rights and responsibilities if they choose, avoiding messy disentanglements of arrangements never intended to be permanent.

²⁶¹ While not using the term polyamory, the Minnesota Court of Appeals recognized the parental rights of a biological mother, her lesbian partner, and the sperm donor of their child. *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000).

²⁶² Such a change in the law is not inconceivable. *See, e.g.*, Jan Battles, *Cork Opens Door to Gay Couples*, SUN. TIMES (London), Feb. 6, 2000, at Home News Section (reporting that the county of Cork, Ireland, has considered recognizing domestic partnerships

"many" and "love," the term does not impose additional conditions such as sexual relations.

The policy rationale behind family law justifies the recognition of polyamorous relationships. Family law recognizes that society and individuals benefit when individuals need not stand alone against emotional, physical, and financial challenges.²⁶³ I suggest that the law should encourage and reward intimate groupings, regardless of their form, penalizing such arrangements only when they are nonconsensual or subordinate their participants.²⁶⁴

One could argue that intimate arrangements involving more than two people differ from pairings, and are therefore normatively inferior.²⁶⁵ In fact, some forms of polyamory (such as polygamy) have been criminalized.²⁶⁶ Despite polygamy's historical connection with the Church of Latter Day Saints, it is not protected under the Free Exercise Clause of the First Amendment.²⁶⁷ However, legal hostility to polygamy is decreasing; antipolygamy statutes are rarely enforced.²⁶⁸ Moreover, courts have held that participation in polygamous arrangements does not bar adoption or child custody.²⁶⁹ These developments suggest that while polygamy is still socially and legally marginalized,²⁷⁰ it does not bear its former stigma. Indeed, given the increasing openness of those in polyamorous relationships (which parallels the increased openness of those in

that include more than two people).

²⁶³ See Finnis, *supra* note 38. This perspective differs, of course, from moralistic understandings of family law that suggest that family law exists to channel all intimate arrangements into monogamous sexual couplings between men and women and to punish all other sexual or intimate arrangements.

²⁶⁴ See Shultz, *supra* note 98, at 298. Thus, contractual ordering of intimate relationships need not validate an arrangement where one person agrees to sex at the other's demand. Chambers, *supra* note 259, at 81. David Chambers argues that the state should take a stance of "supportive tolerance," which involves the state "identify[ing] the families that actually exist and endure throughout time . . . then perform[ing] a facilitative role to help those families prosper, unless strong reasons exist for believing that the arrangements cause significant harms." *Id.*

²⁶⁵ See ESKRIDGE, *supra* note 117, at 148–49; Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1531–37 (1997).

²⁶⁶ POSNER & SILBAUGH, *supra* note 140, at 143–54.

²⁶⁷ *Reynolds v. United States*, 98 U.S. 145 (1878).

²⁶⁸ See Chambers, *supra* note 259, at 71–72. However, the Utah legislature recently approved a bill to appropriate \$500,000 "for prosecution of abuse and fraud in polygamous societies and [to] pay for a hot line and emergency shelter for women and children who leave polygamous enclaves." *Utah Senate Approves Bill to Fight Polygamist Crimes*, N.Y. TIMES, Feb. 24, 2000, at A12. Yet even this regulation is aimed at abuses associated with polygamy, rather than plural marriage itself.

²⁶⁹ See, e.g., Johanson v. Fischer (*In re W.A.T.*), 808 P.2d 1083 (Utah 1991) (holding that participation in polygamous arrangement is not grounds for denying adoption); *Sanders v. Tryon*, 739 P.2d 623 (Utah 1987) (holding that living in polygamous arrangement does not by itself justify altering child custody).

²⁷⁰ *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (using criminalization of polygamy to justify Colorado's Amendment 2, which deprived gay people in Colorado of the right to seek legal protection from discrimination).

other nonmarital intimate relationships), the legal and social trend is toward greater recognition of polyamorous relationships.²⁷¹

It is not surprising that opponents of gay rights often cite legal prohibitions on polygamy to justify legal prohibitions on same-sex relationships.²⁷² Despite ideological divides between gay people and polygamists, both groups are participants in tolerated, exoticized arrangements.²⁷³ Analogizing same-sex cohabitation and polyamorous arrangements to business models both accommodates common elements in these arrangements and morally neutralizes the differences between these affiliations and marriage. Doing so coheres with supportive toleration.²⁷⁴ If particular arrangements cause harm, then criminal or tort law can intervene.

One difficulty in extending legal regulation to new affiliations lies in distinguishing legally recognized relationships from intimate relationships that do not lead to rights and obligations under civil law such as the right to share in wealth accumulated during the course of the relationship. Yet this difficulty is not insurmountable, as it also exists in current law. Most states require some ceremony and state filing for a relationship to qualify as a marriage,²⁷⁵ but there are exceptions to this seemingly bright line between spouses and nonspouses. For example, a de facto spouse can claim unemployment and wrongful death benefits.²⁷⁶ Moreover, some jurisdictions recognize the rights of a same-sex partner with regard to children born during the relationship when the biological or legal parent refuses to allow the nonbiological parent to have contact with the child.²⁷⁷ In addition, many jurisdictions recognize cohabitants' contractual and equity claims when the relationship ends.²⁷⁸ Thus, legal regulation already extends to intimate relationships other than marriage. Making this regulation more comprehensive will respond to the need for background rules to govern break-ups and will also serve expressive functions.

²⁷¹ See Cloud, *supra* note 260.

²⁷² See Chambers, *supra* note 259, at 53–60, 77–81. Chambers powerfully argues that proponents of gay rights are in no position to claim superiority to polygamists, and should instead carefully examine their opposition to polygamy to see if it is grounded in a justifiable fear that polygamy harms people or if it is merely participation in the same kind of bias against minority affiliations that informs much antigay legislation and social sentiment.

²⁷³ *Id.* at 81.

²⁷⁴ David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805 (1985).

²⁷⁵ CLARK, *supra* note 210, § 2.4. Most states require licensing and solemnization; but thirteen states and the District of Columbia recognize common law marriage, which requires only that the parties intend to be married and hold themselves out as married. *Id.*

²⁷⁶ See, e.g., *Reep v. Comm'r of Dep't of Employment & Training*, 593 N.E.2d 1297 (Mass. 1992) (recognizing de facto spouses for unemployment compensation purposes).

²⁷⁷ *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (recognizing rights of female partner of biological mother).

²⁷⁸ See Silbaugh, *Marriage Contracts*, *supra* note 86.

The law expresses society's conception of what is worthwhile.²⁷⁹ Thus, even though rampant employment discrimination persists, the expressive function of Title VII of the Civil Rights Act of 1964 serves the salutary purpose of condemning employment discrimination on the basis of sex, race, and religion.²⁸⁰ The law could express the belief that intimate relations benefit society and the individuals involved and that a variety of valuable relationships exist. To that end, it could provide a set of rules to govern each of those relationships, loosely modeled on various business doctrines. Explicitly providing for a range of intimate relationships would also express the normative desirability of the range itself, which is consistent with norms of pluralism, individual choice, and larger jurisprudential principles.²⁸¹ Finally, explicitly providing for a range of intimate relationships in law would challenge the naturalized construction of family centered around a heterosexual marriage. Doing so may remedy the harms caused both by the naturalized model's inability to regulate adequately new or existing forms of intimacy as well as this model's contribution to the formation of hierarchies within and among relationships.

2. *The Similarity of LLCs and Polyamorous Arrangements*

The flexibility of the LLC model makes it particularly well-suited for regulating polyamorous relationships. The wide variety of polyamorous relationships lends itself to the tremendous contractual tailoring available with LLCs. Moreover, the hybrid nature of LLCs (part corporation, part partnership) mirrors the hybrid nature of many polyamorous affiliations (which may include a marriage or other primary relationship alongside relationships with more peripheral individuals). Some people have already formed what they call "relationship LLCs."²⁸²

LLCs are a hybrid of corporations and partnerships that allow their members to tailor the organization contractually to include partnership or

²⁷⁹ See Cass R. Sunstein, *On the Expressive Functions of Law*, 144 U. PA. L. REV. 2021 (1996); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 993 (1989).

²⁸⁰ 42 U.S.C. § 2000e-2 (1994). However, the current version of Title VII also sanctions employment discrimination on the basis of sexual orientation. Congress declined to enact the Employment Non-Discrimination Act at the same time it passed the Defense of Marriage Act, 1 U.S.C. § 7 (Supp. IV 1998), 28 U.S.C. § 1738C (Supp. IV 1998). The Defense of Marriage Act federalized the ban on same-sex marriage and authorized states to ignore full faith and credit obligations regarding same-sex marriages (if any state should choose to recognize them). See also Elaine S. Povich, *Gays Lose on Two Fronts / Senate Bans Same-Sex Marriage, Defeats Anti-Bias Bill*, NEWSDAY, Sept. 11, 1996, at A4.

²⁸¹ See John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 235 (1989) ("The fact about free institutions is the fact of pluralism.").

²⁸² *What is a Relationship LLC?*, at <http://www.relationshipllc.com/main.htm> (1999) ("Now there is a new way to tie the knot. . . 'LLCs[]' may prove to be the new marriage model. . . LLCs are available to everyone, couples . . . a single parent family and groups of friends.").

corporate elements.²⁸³ Because a primary characteristic of LLCs is their flexibility,²⁸⁴ they may take many different forms. The following comparison of LLCs both to corporations and partnerships is based on default rules in most LLC statutes. However, since members can vary the terms by agreement, these default examples do not hold true for every LLC.²⁸⁵ Such an alteration of the agreement would be equivalent to a prenuptial or cohabitation contract, both of which are generally enforceable.²⁸⁶

The characteristics that LLCs share with corporations include relative formality, limited liability, perpetual life, and free transferability of ownership interests.²⁸⁷ Unlike general partnerships, LLCs are formed by filing "Articles of Organization" with the secretary of state or equivalent agency.²⁸⁸ Members also enjoy limited liability, unless a court pierces the corporate veil.²⁸⁹ LLCs, like corporations, often enjoy perpetual life.²⁹⁰ Finally, most LLC statutes provide that ownership interests are freely transferable.²⁹¹

LLCs resemble partnerships more than corporations with regard to the number of members and management. Most LLC statutes require at least two members. In this way, the LLC more closely resembles an intimate relationship than a corporation, as one person can form a corporation.²⁹² Absent contrary agreement, LLCs are managed by their owners, unlike corporations, in which ownership and control are often separated.²⁹³ Moreover, like partnerships, LLCs are relatively free of mandatory statutory provisions, leaving members to order their affairs by con-

²⁸³ HAMILTON, *supra* note 180, § 6.1, at 123 ("An LLC is free to develop its own organizational and management structure, and, at least to some extent, its own governing rules and principles.").

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987); CLARK, *supra* note 210, § 1.2.

²⁸⁷ RIBSTEIN, *supra* note 137, at 286–309.

²⁸⁸ *Id.* at 288; HAMILTON, *supra* note 180, § 6.3, at 126. This terminology differs for corporate actors: a corporation is formed by filing articles of incorporation; it is governed by bylaws and its owners are called shareholders. In contrast, an LLC is formed by filing articles of organization; it is regulated by regulations or an operating agreement and its owners are called members. *Id.* This different terminology could be imported to domestic relations law to distinguish marriage from polyamorous affiliations.

²⁸⁹ RIBSTEIN, *supra* note 137, at 289. A court might pierce the corporate veil of an LLC "based on equitable and common-sense grounds . . . including misrepresentation of capitalization or of owners' responsibility for debts, deliberate undercapitalization in the form of excessive dividends, or commingling of the firm's and the owners' assets." *Id.*

²⁹⁰ HAMILTON, *supra* note 180, § 6.6, at 133 ("[LLC] statutes make the period of existence of LLCs a matter for determination by the individual LLC. Many of the earlier statutes, however, provided an outside term of 30 years. Some statutes provide for 'perpetual' existence, as in modern corporation statutes.").

²⁹¹ RIBSTEIN, *supra* note 137, at 308–09.

²⁹² *See id.* at 289.

²⁹³ *Id.* at 304. Close corporations, however, do not separate ownership and control. In this sense, LLCs are similar to close corporations.

tract.²⁹⁴ Many states allow oral LLC operating agreements, and members may require unanimous agreement to a member's transferring her interest.²⁹⁵ As such, LLCs cohere more with contemporary contractual understandings of intimate relationships than with outdated status-based models. In short, LLCs can be almost as informal as general partnerships.²⁹⁶

LLCs are analogous to polyamorous arrangements in that they take many different forms. The LLC model is most appropriate for closely held businesses,²⁹⁷ and therefore could be analogous to the other types of intimate relationships. Furthermore, LLCs combine corporate and partnership elements in a way that mirrors the combination of marriage and cohabitation in many polyamorous arrangements.²⁹⁸ Where a woman is married to one man and a second man joins their relationship, it might make sense to have this new entity include elements of both corporate (marriage) doctrine and partnership (cohabitation) doctrine.²⁹⁹

The LLC dissolution rules provide further support for a comparison to polyamory. As with partnerships, dissociation differs from dissolution. Dissociation marks the exit of a member, while dissolution marks the end of the entity.³⁰⁰ A member dissociates from the LLC upon voluntary withdrawal, death, bankruptcy, or the figurative death of member business associations.³⁰¹ Members, like partners, have a default right to payment for their interests in the LLC.³⁰² This buyout right empowers minority members against more powerful majority members because liquidation may ensue if the entity lacks the capital to buy out the dissociating member.³⁰³ As with partnerships, dissociation triggers dissolution unless the members elect to continue operating the firm.³⁰⁴ Dissolution of an LLC also can result when the firm's agreed-upon duration expires, when a particular event occurs, when all members consent, or when a judge decrees.³⁰⁵ As with marriage, LLC statutes generally require state filings when the entity dissolves.³⁰⁶

²⁹⁴ HAMILTON, *supra* note 180, § 6.3, at 128.

²⁹⁵ *Id.* § 6.3, at 129 ("An LLC, in short, is, or may elect to become, quite 'partnership-like' without sacrificing the benefits of limited liability.").

²⁹⁶ *Id.*

²⁹⁷ *Id.* § 6.10, at 137.

²⁹⁸ See Cloud, *supra* note 260.

²⁹⁹ See *id.* (describing various polyamorous relationships in which two members are married and cohabit with others).

³⁰⁰ RIBSTEIN, *supra* note 137, at 313, 316.

³⁰¹ *Id.* at 313.

³⁰² *Id.* These rights, however, may be contingent on notice or time provisions.

³⁰³ *Id.*

³⁰⁴ *Id.* at 316.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 317.

3. *The LLC Model Could Remedy Inequality Within Polyamorous Relationships*

Current doctrine tends to recognize only two people in an intimate affiliation. In a custody fight among a lesbian couple (one of whom is the biological mother) and the sperm donor of their child, the law generally recognizes only one of two relationships: the romantic/sexual partnership of the lesbians, or the biological/parent partnership of the donor and the biological mother.³⁰⁷ Either determination excludes an important part of the family, and permits abuses of power (either heterosexual privilege by the donor against the nonbiological mother, or couple privilege by the nonbiological mother against a single donor). Contract helps to balance the power in these difficult situations, as the parties may allocate rights more fairly when drafting the agreement. As a practical matter these *ex ante* intentions should be relevant to an *ex post* judicial determination once the parties' relationship breaks down. In *LaChapelle v. Mitten*,³⁰⁸ the Minnesota Court of Appeals adopted this approach, recognizing the parental rights of the biological mother, her former partner, and the sperm donor of their child. The three had contractually agreed that the donor would be entitled to share legal custody of the child. The court reasoned that it was in the child's best interests to allow all parties to maintain a "significant relationship" with the child.³⁰⁹

People leave polyamorous arrangements just as they leave marriage or cohabiting relationships.³¹⁰ While many polyamorous relationships end, it is hard to determine whether these relationships are less stable than monogamous arrangements because the relationships are socially and legally stigmatized.³¹¹ Just as criminalizing prostitution facilitates

³⁰⁷ This Article assumes that the sperm donor is single. If he is partnered either with a man or a woman, then there is another couple who could be chosen as the relevant family. Such disputes could assume ridiculous proportions, as in *Buzzanca v. Buzzanca* (*In re Buzzanca*), 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998), where there were potentially eight parents: the sperm and egg donors and their spouses; the gestational mother and her spouse; and the intended parents under the surrogacy contract. The lower court concluded that the child had no parents, but the court of appeals upheld the contract and ruled that the intended parents were the legal parents. Contractual ordering is one way to avoid absurd results in these unprecedented situations, subject to the contract doctrines of unenforceability due to unconscionability or violation of public policy, as well as the family law principle that the best interests of the child trump any contractual agreements.

³⁰⁸ 607 N.W.2d 151 (Minn. Ct. App. 2000).

³⁰⁹ *Id.* at 157. This agreement apparently superceded an earlier agreement between the parties that the donor would have no rights or obligations in relation to the child. The biological mother's former partner had parental rights pursuant to adoption.

³¹⁰ Utah State Senator Ron Allen recently proposed increased funding to protect women and children who leave polygamous arrangements, claiming that "there were about 50,000 polygamists in Utah and that about 300 women and children left polygamous families in the last year." *Utah Senate Approves Bill to Fight Polygamist Crimes*, *supra* note 268.

³¹¹ Chambers, *supra* note 259, at 74; Cloud, *supra* note 260, at 90. Cloud recounts the story of April Divilbiss, who lost custody of her toddler when the child's paternal grand-

abuse of prostitutes by keeping their working conditions out of the public eye (and depriving them of other social benefits such as social security or unemployment insurance), social and legal marginalization of polyamorous affiliations may exacerbate inequality within these relationships. If people oppose polyamory because they fear abuse within the relationships, the LLC model and the accompanying legitimacy of polyamory could expose any power abuses, improve the minority members' bargaining power, and further provide exit strategies for weak participants through the forced buyout.

4. The LLC Model Could Remedy Inequality Among Various Types of Relationships

The LLC analogy to polyamory also could address the inequality among various types of relationships by providing a morally neutral range of options. This reasoning justifies state recognition of the relationship to the extent that recognition reflects the needs and expectations of the parties rather than a moral judgment that one form of intimate affiliation is natural while others are unnatural and immoral. Current law ignores, criminalizes, or tolerates polyamorous arrangements to various degrees. The LLC model would elevate polyamorous relationships to the level of legally recognized intimate affiliations, thereby justifying claims for division of assets, intestacy, or wrongful death that currently are recognized for marriage. If the law retains its general refusal to recognize these affiliations, it should do so for functional reasons (such as the difficulty of determining membership, or determining the extent of intended rights and liabilities) rather than moralistic objections to non-marital affiliations.

IV. CONCLUSION

This Article contends that business models are analogous to various intimate affiliations. In particular, partnership is akin to cohabitation (especially same-sex arrangements), and close corporations are akin to marriages. Perhaps most speculatively, I expand conventional analysis to include polyamorous affiliations, suggesting that such affiliations are most analogous to limited liability companies.

Recognizing the analogies between business models and intimate affiliations has the potential to improve family law by remedying the inadequacy and inequality of current doctrine, both of which are byproducts of reliance on the naturalized model of family. Business models

mother petitioned the court for custody on the grounds that April's polyamorous relationship with her husband and another man "revealed such 'depravity' that it could 'endanger the morals or health' of the little girl." *Id.* The court returned the child to her mother on the recommendation of four sets of court-appointed experts. *Id.*

could remedy the naturalized model's failure to account for nonmarital alliances, and could alleviate inequality within relationships and among various kinds of intimate affiliation. For instance, business models can counter inequality within relationships by providing an appropriate set of default rules to govern affiliations, such as the fifty-fifty distribution of assets upon dissolution. In marriage, business models offer an entitlement-based theory of postdivorce income sharing. Entitlement, based on homemaker contributions to family wealth, alleviates the economic subordination of primary homemakers. The naturalized model of family, in contrast, suggests that homemakers contribute to their family because of biological destiny or divine mandate, neither of which presupposes the agency to leave the affiliation or addresses the inequality within the relationship.

Recognizing the metaphorical connections between business forms and intimate affiliations also remedies inequality among types of relationships by intervening in naturalized understandings of family that view some affiliations (such as marriage and heterosexuality) as natural and others as unnatural. In contrast to the naturalized model, business law recognizes a range of equally valid arrangements, such as corporations, general partnerships, and limited liability companies. Just as these various business forms respond to the needs of particular arrangements, domestic relations law could account for the needs of particular intimate affiliations without designating one as superior to others. Thus, differences among intimate affiliations would be morally neutral. Choosing marriage over cohabitation would have the same social meaning as choosing to incorporate rather than form a general partnership.

Business models also could remedy inequalities among relationships that result from current law's provision of a public safety net to those who need it least. People in legally recognized families often enjoy a public safety net in addition to the emotional, physical, financial, and social benefits of a relationship. In contrast, those in legally marginalized relationships stand largely alone in the world; if a financial, health-related, or other type of disaster strikes, there may be neither a public nor a private safety net to catch them. Legal recognition should extend beyond those who are in marriage or marriage-like relationships to include those in a range of affiliations that may not be either sexual or romantic.

This Article has attempted to bridge the traditional gap between the private/domestic world and the private/business world. The purpose of this exercise is not to collapse the distinctions between these two realms, but rather to consider new approaches to old problems and reconsider the nature and purposes of legal regulation of intimate affiliation generally.