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The Business of Intimacy

Bridging the Private–Private Distinction

Martha M. Ertman

econ·o·my: . . . 2. Household management.

The New Shorter Oxford English Dictionary vol. 1 (1993)

The law governing intimate relationships would benefit from exploring the metaphorical and doctrinal analogies between business and intimate affiliations.¹ These analogies bridge the private–private distinction by drawing connections between private business law and private family law.² They also improve on conventional family law’s understanding of family, remedying long-standing inequities within current family law 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 non-relatives, doubled from 15 percent in 1960 to 30 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, polyamorous affiliations,⁴ nonsexual unions, and new parenting relations.⁵ Because these relationships lie 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, sexual orientation, and class

hierarchies. Due to these hierarchies, those deemed naturally inferior are economically and socially marginalized within intimate relationships.⁸ 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. 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.⁹ 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, and the contemporary ban on same-sex marriage rests on the purportedly natural superiority of heterosexual couplings.¹⁰

This chapter 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.¹¹ Family law doctrine increasingly favors private ordering in matters such as entry into marriage, contractual ordering of marriage, non-marital relationships, divorce, adoption, the use of reproductive technologies, and the privatization of domestic relations dispute resolution.

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 commercial transactions,¹² 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 supplies new ways to understand those relationships.

Third, because much of the legal intervention in intimate relationships is related to financial issues, such as dividing debts, 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.¹³

In addition to remedying the naturalized model's inadequacies, business models have the potential to disrupt its inequalities. Business models are relatively free of the antiquated notions of status, morality, and biological relation that have hampered family law's ability to adapt with the times.¹⁴ A major problem with this focus is that it often is expressed in a view of marriage as the foundation of modern society,¹⁵ so that any threat to marriage seems to

threaten society as a whole. Unlike family law, business models are largely unhampered by this moral, biological baggage, allowing for consideration of important contractual elements of intimate relationships.

Because family includes both status and contractual elements, approaches that focus on contract are often criticized for ignoring status-based elements of intimate affiliation.¹⁶ Yet the business models discussed in this chapter (business partnerships, corporations, and limited liability companies) are similar to intimate relationships in that they have significant status elements that complement their contractual character. 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.¹⁷

The business model suggests that differences among relationships are 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 and ideas about naturalistic hierarchy.

Moreover, making the analogy between business models and intimate relationships would alleviate the hierarchy that is created by affording 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.¹⁸ 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 chapter explores how the partnership model, the corporate model, 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. First I critique the naturalized model of family and suggest private ordering as a remedy for its defects. Then I analogize business models to intimate relationships. Departing from the conventional approach that analogizes marriage to business partnerships, I suggest 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, I explore 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, I explore similarities between the business form and the intimate affiliation, detailing the manner in 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. Although importing business models (metaphorically and doctrinally) to the regulation of intimate relationships may not solve all problems, 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.

Comparing the Naturalized Model with a Contractual Approach

In this section I critique the naturalized model of intimate affiliations and contend that the functionalism of a contractarian approach remedies the inadequacy and inequality of the naturalized model.

The Natural Model and Its Deficiencies

Nature is a slippery term, with different meanings in different contexts.¹⁹ 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 of *nature*, the natural is also universal.²⁰ I argue here that naturalized arguments suffer from two major defects.

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, that women are morally inferior to men, and that gay people are inferior to heterosexuals by divine mandate.²¹ Thus, naturalized rhetoric both masks and underlies biases that cannot be justified rationally.²² 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 and dictates a gendered division of labor in which the woman is the primary homemaker and the man is the primary wage earner. John Finnis has opposed legal recognition of same-sex relationships on the grounds that heterosexual sexuality, particularly penile-vaginal penetration, is morally superior to same-sex sexuality because the former can result in procreation.²³

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 same-sex coupling is grounded in the moral values of consent and other-regarding behavior.²⁴ Similarly, Andrew Koppelman has revealed that the purported defense of marriage is actually a defense of race, sex, and gender subordination.²⁵ He explores the manner in which the miscegenation ban designated interracial unions as unnatural and linked race, sex, and gender hierarchy with biology, morals, and divine will.²⁶

THE NATURAL MODEL MASKS AND REINFORCES SUBORDINATION

Beyond being analytically flawed, 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.²⁷ Doctrinal silence on what precisely is a criminally unnatural act or status allowed courts to strategically ignore the fact that (purportedly natural) heterosexuals routinely engage in crimes against nature.²⁸ Similarly, southern courts in the nineteenth century referred to incest as "an outrage upon nature,"²⁹ 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.³⁰ 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.³¹

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.³²

Framing the question as whether Littleton's sex was "immutably fixed by our Creator at birth," the court concluded that Littleton "was created and born a male."³³ The final words of the decision succinctly articulate naturalized approaches to the world: "There are some things we cannot will into being. They just are."³⁴

Only an irrational resort to naturalized understandings can support this result. A New Jersey court, faced with facts similar to those in *Littleton*, recognized the marriage.³⁵ 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.³⁶ This assertion is demonstrably false.³⁷

The treatment of transsexual marriage in both 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.

Contractualization as a Solution to the Weaknesses of the Natural Model

Business models 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 on marginalized groups. In short, contract provides a way around majoritarian morality.

Markets are not biological, evolutionary, or divinely ordained. They are social creations, functioning through arm's-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 arm's length, and many contracts disadvantage the participant with the weaker bargaining position. Premarital and marital contracting, for example, raises the issue of the limited bargaining power of economically vulnerable spouses.³⁸ 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.

Moral rhetoric has certainly been central to progressive reform in some historical contexts.³⁹ In the current political climate, however, moral arguments are more likely to buttress than contest subordination. The antigay 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.⁴⁰ Much of the moral rhetoric used to justify the traditional conceptions of family is rooted in a religious commitment to hierarchy.

Seemingly moral considerations do underlie elements of contract law, such as the doctrines of unconscionability and nonenforceability for violating public policy.⁴¹ These doctrines, however, are exceptions to the general rule of a morally neutral stance toward contracts. Generally courts will enforce private agreements even when moral considerations argue against doing so.⁴² Thus, when a majority expresses hostility toward a marginalized group, private ordering is sometimes the only remedy for a bad situation. Just as the classical liberalism of contract enables parties to skirt moral rhetoric, private ordering offers 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 of white decedents. 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 on family law doctrine by expanding the range of recognized relationships and counteracting hierarchy within and among relationships.

NINETEENTH-CENTURY TRUST AND ESTATE LAW

Adrienne Davis documents the way in which some 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.⁴³ The Georgia Supreme Court observed in 1887 that "[e]very 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."⁴⁴ Davis points out the broad significance of the morally neutral enforceability of wills. As individuals, African American beneficiaries obtained some measure of economic independence. As a group, these beneficiaries—African Americans, formerly enslaved, and illegitimate—were invested with a measure of

economic personality and market rights. Economic personality was extraordinarily valuable to those who had been defined as objects of commerce themselves: "emancipated blacks rejected their denomination by law as solely commodities, seeking instead to establish relationships to property, and thereby to enter the market sphere."⁴⁵ 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.⁴⁶

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.⁴⁷ Although Washington recognizes marriagelike rights of opposite-sex cohabitants, the court, paradoxically calling this affiliation a "meretricious relationship,"⁴⁸ refused to apply this rule to same-sex partners.⁴⁹ 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 nineteenth century African American women not mentioned in their white lovers' wills.

COHABITATION CONTRACTS

Washington's failure to recognize the long-term relationship between two men for intestacy purposes contrasts with Florida's willingness to recognize the relationship of two women formalized in a contract.⁵⁰ The presence of private ordering explains the difference. 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 \$2,500 a month for the remainder of Posik's life as liquidated damages for breach of the agreement. The agreement further provided 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.⁵¹ 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. Echoing 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."⁵²

The Georgia Supreme Court similarly enforced a cohabitation contract between two women despite the state's then-valid sodomy statute.⁵³ 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.⁵⁴ 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.”⁵⁵

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 antisubordination discourse.

Feminists have long agreed that the marriage contract as traditionally construed disfavors women.⁵⁶ Some feminists contend that contractualization offers the possibility of altering outdated status-based understandings of marriage.⁵⁷ But in this matter as in others, feminists disagree. Margaret Jane Radin compellingly challenges legal economists’ universal commodification approach.⁵⁸ However, as she acknowledges, we might contractualize aspects of intimate relationships that already have value on the market, such as home-making services.

This chapter highlights similarities between businesses and intimate affiliations, thereby suggesting a new conception of intimate relationships that could disrupt subordination.⁵⁹ 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. I seek 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.

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, we are 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. Yet perhaps treating different relationships differently is not, as a normative matter, a good thing.

The next question 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.⁶⁰ In this section I fill 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.

I focus on two important points of state intervention in the relationship—formation and dissolution—occasionally referring 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.⁶¹ 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.

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.⁶² A review of doctrines governing partnership formation 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. Model statutes such as the Uniform Marriage and Divorce Act (UMDA)⁶³ and the Uniform Probate Code⁶⁴ 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,⁶⁵ justifying the payment of spousal debts in bankruptcy,⁶⁶ holding spouses to fiduciary duties,⁶⁷ and recognizing same-sex relationships through domestic partnership legislation.⁶⁸

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,”⁶⁹ a norm that “encourages commitments between spouses, promotes gender equality, and supports caretaking of children and elderly dependents.”⁷⁰ 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.⁷¹

Certain commentators reject the partnership analogy. Some of them claim that it cannot justify spousal support or other important aspects of family law.⁷² Others contest the applicability of such an idealized model to actual marriages, in which gender hierarchy and inequality are likely to exist.

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.

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 more persons operate a business for profit.⁷³ The partners need take no formal action, and the agreement can be oral or written.⁷⁴ 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.⁷⁵ 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.⁷⁶ 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. Similarly a general partnership is formed when two or more people operate a business for profit; 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.⁷⁷

Similarly, the division of power in the business partnership is closer to the division in an opposite-sex cohabiting relationship than that in a marriage.⁷⁸ Spouses tend to engage in gendered division of labor, whereas opposite-sex cohabitants are less likely to do so.⁷⁹ 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 more than 70 percent of homemaking and caretaking, whereas cohabiting women do considerably less.⁸⁰ Further, cohabiting women are more likely to engage in the same amount of wage labor as their male partners.⁸¹ 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,⁸² and hence potentially have more power. Moreover, opposite-sex cohabitation generally does not create joint rights to property acquired during the relationship.⁸³ 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.⁸⁴ 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.

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 moving in together. However, same-sex cohabiting relationships may be less prone to the gendered specialization of labor that both reflects and perpetuates inequality in opposite-sex relationships.⁸⁵ Although studies on organization of household and wage labor in same-sex relationships are rare because of 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.⁸⁶ This pattern makes sense, given that gendered specialization may be less likely in a relationship where the partners are both women or men.⁸⁷ Moreover, some same-sex partners structure some elements of their romantic partnerships to look like business partnerships in order to avoid judicial hostility to cohabitation agreements deemed to be based on meretricious consideration.⁸⁸

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 leaves, and no judicial action

is required to formalize the dissolution.⁸⁹ 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.⁹⁰ Partnership dissolution at will is akin to contemporary no-fault divorce, whereas other bases such as insolvency, insanity, or exit echo fault-based divorce (which is enjoying a renaissance as covenant marriage).⁹¹ Similarly, marriage ends with the death of a spouse. However, unlike a marriage, a partnership need not be terminated by court decree,⁹² 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. In short, despite the similarities between divorce and partnership dissolution, business partnerships and cohabitation share a higher level of private ordering.

A fourth reason that the analogy of partnership to cohabitation makes sense turns on 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.⁹³ California offers benefits to the same-sex domestic partners of state employees.⁹⁴ Hawaii provides inheritance and other benefits to pairs of people statutorily defined as reciprocal beneficiaries.⁹⁵ Similarly, the Oregon Court of Appeals has held that the state constitution requires a state university to provide benefits to the domestic partners of its employees.⁹⁶ The wide range of sources of domestic partnership law provides numerous definitions of a domestic partner. In California, for example, domestic partners must be of the same sex (unless they are over sixty-two) and cannot be closely related.⁹⁷ Vermont combines these models by recognizing civil unions between same-sex romantic partners and reciprocal beneficiary relationships between unmarried people who are closely related.⁹⁸

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, whereas corporations, like marriages, are generally taxed as separate entities.⁹⁹

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

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.¹⁰⁰ 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, whereas 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 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.¹⁰¹ Prominent among this literature is Cynthia Starnes's proposal to give primary homemakers a buyout of their interest in the marital partnership. Starnes analogizes 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.¹⁰² 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.¹⁰³

Third and finally, partnership law would impose a fiduciary duty on partners to treat one another fairly.¹⁰⁴ Partners are not acting at arms 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."¹⁰⁵ 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).¹⁰⁶ 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.

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.¹⁰⁷ 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.

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 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 decision makers 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.

Finally, if government more regularly recognized cohabiting relationships, cohabitants 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.

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.

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.”¹⁰⁸ Like marriages, corporations are formed and dissolved through state action.¹⁰⁹ 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.¹¹⁰ However, close corporations are quite different from publicly held corporations. Close corporations are typically family businesses or small businesses run by close associates. They are smaller; they rarely separate ownership from control, because the majority shareholders often serve as officers and directors; and there is no market for their shares.¹¹¹ 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.

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, the differences between spousal and corporate roles, and the status of corporations as fictitious persons with perpetual life and limited liability. On 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.¹¹² 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, incorporators, directors, or officers.¹¹³ Similarly, it is difficult to find an analogy between shareholder rights and spousal rights. For example, shares in publicly traded corporations are freely transferable,¹¹⁴ 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 directors would be,¹¹⁵ 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.¹¹⁶ The special circumstances of management and control of family businesses require doctrinal recognition of shareholders' particular interests and vulnerabilities in such businesses.¹¹⁷ Like a minority shareholder, a disadvantaged spouse (often a woman) takes a serious financial risk when exiting marriage. Applying the selected doctrines of close corporation law to marriage may reduce some of this risk.

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,¹¹⁸ whereas a marriage is legally nothing more than the two individuals who create it.¹¹⁹ However, neither one of these characterizations is entirely accurate. Both corporations and marriages involve individuals forming a new fictional legal entity and operating it for their mutual (and, presumably, society's) gain. Although individual spouses often act independently of one another, the marriage is, for some purposes, a separate entity. For example, 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."¹²⁰ Under this definition, a husband and a wife qualify as an organization, as do corporations and partnerships.¹²¹ 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.¹²²

Moreover, critics have challenged the assertion that a corporation can be conceived of as a person.¹²³ 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.¹²⁴ Similarly, some commentators have suggested that marriage be understood as a set of contracts.¹²⁵ Clearly, both marriages and corporations contain elements of status and contract.

Further, although civil law provides that a marriage is not perpetual, this view is not universal. Some religious doctrines assert that marriages are perpetual and that spouses are reunited in heaven.¹²⁶ Thus, although 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,¹²⁷ 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.¹²⁸

In sum, many of the seemingly stark differences between marriages and corporations become less marked on closer examination. The similarities are sufficiently numerous to merit exploring how corporation law might parallel marriage law. Although 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.¹²⁹ Legal economists view marriage, like other enterprises, as existing for profit maximization,¹³⁰ 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.¹³¹ In reality, marriage is both economic and social, both for profit and for nonpecuniary purposes.

The formation of both types of relationships requires application to and certification from the state.¹³² Incorporation occurs when the articles of incorporation are filed with the secretary of state.¹³³ Similarly, marriage is formed when the spouses file a marriage license with the state. Marriage generally requires a ceremony in addition to this filing. The ceremony itself, however, may be a perfunctory civil hearing as minimalist as the most skeletal articles of incorporation.¹³⁴

Corporate dissolution, particularly for close corporations, parallels divorce.¹³⁵ Voluntary corporate dissolution, for example, is akin to no-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.¹³⁶ 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. 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.¹³⁷ 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,¹³⁸ some business organizations require a supermajority of the shareholders and the board to dissolve a corporation by vote.¹³⁹ Moreover, corporate dissolution requires the formality of filing articles of dissolution, just as divorce requires formal state action.¹⁴⁰ Finally, shareholders divide assets upon dissolution based on their percentage of ownership, just as spouses divide assets based on their ownership interest.¹⁴¹

The dissolutions of both close corporations and marriages can be judicial, as in the case of dissolution due to shareholder or spousal deadlock.¹⁴² Courts also dissolve close corporations when minority shareholders are victims of oppression, or when minority shareholders' reasonable expectations of the enterprise are frustrated.¹⁴³ The marital version of dissolution due to the frustration of reasonable expectations is divorce either in a fault-based regime or in a regime entitling an economically vulnerable spouse to a share of family wealth.¹⁴⁴

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 breaches 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 as a result of either oppression or deadlock. Oppression occurs when majority shareholders breach their fiduciary duty to minority shareholders by acting illegally, oppressively, or fraudulently.¹⁴⁵ 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.¹⁴⁶ Fiduciary duties and the duty of good faith differ for close and publicly traded corporations.¹⁴⁷ Majority shareholders of close corporations often are held to fiduciary duties similar to those that business partners

owe each other.¹⁴⁸ This heightened duty parallels the fiduciary duty that some jurisdictions have imposed on spouses.¹⁴⁹

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.¹⁵⁰ Particularly relevant is the implication that the fiduciary duty remains intact despite strained relations between the partners.¹⁵¹

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.¹⁵² 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.¹⁵³

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 one spouse commits adultery.¹⁵⁴ The action for damages as a result of 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.¹⁵⁵ 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. She conceives of this investment as a hybrid of debt and equity. Under Meighan's model, the nonstudent spouse therefore is entitled to a return on her investment.¹⁵⁶

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 tailored to the needs and expectations of the parties rather than a moral judgment that one form of intimate affiliation is natural whereas 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.

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.

DEFINING POLYAMORY AND EXPLORING ITS LEGITIMACY

Although the polyamory/LLC analogy may be the most counterintuitive comparison, the surprise may be due partly to the relative infancy of the LLC and the rarity with which we discuss polyamory. Once we accept the feasibility of business analogies and recognize the existence of polyamory, however, it becomes clear that the LLC's legal structure might be particularly appropriate in providing a way to understand polyamorous relationships. Given the considerable flexibility 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.¹⁵⁷

As used in this chapter, 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 him but not with one another. Such an arrangement, polygamy, has been associated with Mormons and is still common in many nonindustrialized societies.¹⁵⁸ Polyamory also includes arrangements whereby one woman is involved with more than one man,¹⁵⁹ 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, I see the arrangement as 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.¹⁶⁰

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.¹⁶¹ Although *polyamory* literally means "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. 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.¹⁶²

One could argue that intimate arrangements involving more than two people differ from pairings and are therefore normatively inferior.¹⁶³ In fact, some forms of polyamory (such as polygamy) have been criminalized.¹⁶⁴ Despite polygamy's historical connection with the Church of Latter Day Saints, the practice is not protected under the Free Exercise Clause of the First Amendment.¹⁶⁵ However, legal hostility to polygamy is decreasing; antipolygamy statutes are rarely enforced.¹⁶⁶ Moreover, courts have held that participation in polygamous arrangements does not bar adoption or child custody.¹⁶⁷

It is not surprising that opponents of gay rights often cite legal prohibitions on polygamy to justify legal prohibitions on same-sex relationships.¹⁶⁸ Despite ideological divides between gay people and polygamists, both groups are participants in tolerated, exoticized arrangements. 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.¹⁶⁹ 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 exists in current law. Most states require some ceremony and state filing for a relationship to qualify as a marriage,¹⁷⁰ 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.¹⁷¹ 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.¹⁷² In addition, as discussed earlier, many jurisdictions recognize cohabitants' contractual and equity claims when the relationship ends. 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 breakups and will also serve expressive functions.

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."¹⁷³

LLCs are a hybrid of corporations and partnerships that allow their members to tailor the organization contractually to be more like a partnership or a corporation.¹⁷⁴ Because a primary characteristic of LLCs is their flexibility, they may take many different forms. The following comparison of LLCs is based on default rules in most LLC statutes. However, because members can vary the terms by agreement, these default examples do not hold true for every LLC. Such an alteration of the agreement would be equivalent to a prenuptial or cohabitation contract, both of which are generally enforceable.¹⁷⁵

The characteristics that LLCs share with corporations include relative formality, limited liability, perpetual life, and free transferability of ownership interests.¹⁷⁶ Unlike general partnerships, LLCs are formed by filing Articles of Organization with the secretary of state or equivalent agency.¹⁷⁷ Members also enjoy limited liability unless a court pierces the corporate veil.¹⁷⁸ LLCs, like corporations, often enjoy perpetual life.¹⁷⁹ Finally, most LLC statutes provide that ownership interests are freely transferable.¹⁸⁰

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 in that one person can form a corporation.¹⁸¹ Absent contrary agreement, LLCs are managed by their owners, unlike corporations, in which ownership and control are often separated.¹⁸² Moreover, like partnerships, LLCs are relatively free of mandatory statutory provisions, leaving members to order their affairs by contract.¹⁸³ Many states allow oral LLC operating agreements, and members may require unanimous agreement to allow

a member to transfer her interest.¹⁸⁴ 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.

LLCs are analogous to polyamorous arrangements in that they take many different forms. The LLC model is particularly appropriate for closely held businesses,¹⁸⁵ 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. 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.

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, whereas dissolution marks the end of the entity.¹⁸⁶ A member dissociates from the LLC upon voluntary withdrawal, death, bankruptcy, or the figurative death of member business associations.¹⁸⁷ Members, like partners, have a default right to payment for their interests in the LLC. 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. As with partnerships, dissociation triggers dissolution unless the members elect to continue operating the firm. Dissolution of an LLC also can result when the firm's agreed-on duration expires, when a particular event occurs, when all members consent, or when a judge decrees. As with marriage, LLC statutes generally require state filings when the entity dissolves.¹⁸⁸

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. 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 in that 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,¹⁸⁹ 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.¹⁹⁰

People leave polyamorous arrangements just as they leave marriage or cohabiting relationships. Although 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.¹⁹¹ Just as criminalizing prostitution facilitates 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.

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 virtue of being one affiliation in 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 whereas 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 nonmarital affiliations.

Conclusion

I contend 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, this chapter seeks to 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 by-products of reliance on the naturalized model of family. Business models 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 moral obligation, biological destiny, or divine mandate, none 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 recognize a range of equally valid 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 be neither sexual nor romantic.

Although I do not attempt to propose an ideal domestic relations law based on business law, neither do I foreclose the possibility of such a project.¹⁹² This chapter does suggest underlying justifications for undertaking such an endeavor or for altering domestic relations law to 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 at least two ways. First, business analogies 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-nots¹⁹³ by expanding the definition of family to include, for instance, same-sex cohabitation and polyamory.

In this chapter I have 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.

Notes

1. This chapter is adapted from my article *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 Harv. Civ. R. & Civ. Lib. L. Rev. 79 (2001) (© 2001 by the Presidents and Fellows of Harvard College and the Harvard Civil Rights-Civil Liberties Law Review) (reprinted with permission).

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* xiii (1993); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983). This chapter 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 on elements of private ordering and concern financial arrangements.

3. *A Statistical Portrait of the United States* 24 (Mark S. Littman ed., 1998).

4. Polyamory, as used in this chapter, refers to any intimate affiliation between more than two adults, regardless of whether it has a sexual component. See *infra*, the section titled “Limited Liability Companies and Polyamory.”

5. See, e.g., Unif. Parentage Act § 5(b) (1973), 9B U.L.A. 301 (1987).

6. See, e.g., Haw. Rev. Stat. §§ 572C-1 to 572C-7 (1997); Vt. Stat. Ann. tit. 15, §§ 1201-1207, 1301-1306 (2000); *Vasquez v. Hawthorne*, 994 P.2d 240, 243 (Wash. Ct. App.), review granted, 11 P.3d 825 (Wash. 2000).

7. This chapter builds on, 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 and nonsexual dyads. 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. 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); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982).

9. See Bardaglio, *supra* note 8, at 62; Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *Stan. L. Rev.* 221 (1999).

10. See Bardaglio, *supra* note 8, at 185; *Defense of Marriage Act, May 15, 1996: Hearings on H.R. 3396 before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong. 99-100 (1996). One state has lifted the ban. *Goodridge v. Dep't Pub. Health*, 798 N.E. 2d 941 (Mass. 2003).

11. See Jana B. Singer, *The Privatization of Family Law*, 1992 *Wis. L. Rev.* 1443, 1531-65.

12. See, e.g., U.C.C. § 1-102(1)(b) (1990).

13. Partnership models include Uniform Marriage and Divorce Act, 9A U.L.A. 161 (1998); and the Uniform Probate Code, 8 U.L.A. 1 (Supp. 1997). See Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 *Geo. L.J.* 2423 (1994) [hereinafter Singer, *Alimony and Efficiency*]; 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 (1993). Corporate finance models include 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); and 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).

14. See generally Bardaglio, *supra* note 8, at 184.

15. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Defense of Marriage Act*, 1 U.S.C. § 7 (Supp. IV 1998), 28 U.S.C. § 1738C (Supp. IV 1998).

16. See, e.g., Milton C. Regan Jr., *Alone Together: Law and the Meanings of Marriage* 33 (1999) [hereinafter Regan, *Alone Together*].

17. 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).

18. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974).

19. One dictionary lists twenty-eight meanings of *natural*. *The New Shorter Oxford English Dictionary* Vol. II, 1888-1889 (1993).

20. These understandings can clash with each other. John Stuart Mill, *Nature* (1874), reprinted in *Three Essays on Religion* 3, 64-65 (1969).

21. See, e.g., Richard J. Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994); Lawrence Kohlberg, *The Philosophy of Moral Development* (1981); and Robert H. Bork, *Slouching toward Gomorrah: Modern Liberalism and American Decline* 286 (1996).

22. See, e.g., Bardaglio, *supra* note 8, at 55.

23. 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); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *Geo. L.J.* 301, 302 (1995).

24. Mary Becker, *Women, Morality, and Sexual Orientation*, 8 *UCLA Women's L.J.* 165, 185-91, 197-202 (1998) [hereinafter Becker, *Women, Morality, and Sexual Orientation*].

25. Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994).
26. *Id.* at 224, 213, 226-27, 261, and 263.
27. *See, e.g.*, Okla. Stat. tit. 21, § 886 (1994); Model Penal Code § 213.2 cmt. 1 (1999). Such bans have recently been struck down as unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003).
28. Janet E. Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* 7-8 (1999).
29. 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* 32, 33 (Carol Bleser ed., 1991).
30. *Id.* at 34.
31. *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.
32. 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.
33. *Id.* at 224, 231.
34. *Id.* at 231.
35. *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).
36. *Id.* at 210.
37. Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* (1953); Alfred C. Kinsey, et al., *Sexual Behavior in the Human Male* (1948).
38. *See* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Pre-marital Agreement Act*, 19 J. Legis. 127, 131 (1993); Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 Denv. U. L. Rev. 1169 (1996).
39. 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, *Women, Morality, and Sexual Orientation*, *supra* note 24.
40. Although 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).
41. Restatement (Second) of Contracts § 208 (1981); *id.* at §§ 178-79.
42. Richard A. Posner, *Ask, Tell*, *New Republic* 52, 53 (Oct. 11, 1999) (reviewing William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999)).
43. Davis, *supra* note 9.
44. *Id.* at 285 (quoting *Smith v. DuBose*, 78 Ga. 413, 430 (1887) (internal quotations omitted)).
45. *Id.* at 284.
46. *See id.* at 261-63.
47. *Vasquez v. Hawthorne*, 994 P.2d 240 (Wash. Ct. App.), *review granted*, 11 P.3d 825 (Wash. 2000).
48. *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995).
49. *Vasquez*, 994 P.2d at 243.
50. *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).
51. *Id.* at 760.
52. *Id.* at 761.
53. *Crooke v. Gilden*, 414 S.E. 2d 645 (Ga. 1992).
54. *Id.* at 646.
55. *Id.*
56. Cicely Hamilton, *Marriage as a Trade* (1912).

57. 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, 280 (1982).
58. Margaret Jane Radin, *Contested Commodities* (1996).
59. 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); Martha Minow, "Forming under Everything That Grows": *Toward a History of Family Law*, Wis. L. Rev. 819 (1985).
60. See, e.g., Shultz, *supra* note 57, at 239-40; Weitzman, *supra* note 57, at xxxi; Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21, 43 (1994).
61. See Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J.L. Reform 835 (1985).
62. Limited partnerships are less analogous to contemporary marriage in that limited partnerships involve limited liability of the limited partner as well as passivity in corporate affairs.
63. 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 act refers to termination of a marriage as dissolution, a term borrowed from partnership law.
64. Unif. Probate Code, 8 U.L.A. 1 (Supp. 1997). Eight states have adopted the 1990 revisions of the Uniform Probate Code. *Id.*
65. Singer, *Alimony and Efficiency*, *supra* note 13; Starnes, *supra* note 13.
66. Dickerson, *supra* note 13, at 964.
67. 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).
68. 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).
69. 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).
70. Starnes, *supra* note 13, at 119.
71. *Id.* at 119-20.
72. 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, 706-7 (1990).
73. 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). This chapter 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).
74. Larry E. Ribstein, *Unincorporated Business Entities* 50-51 (1996).
75. 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).
76. Shultz, *supra* note 57, at 205. 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).
77. 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).
78. See Julie Brines & Karla Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 Am. Soc. Rev. 333, 348-49 (1999).
79. *Id.* at 334-36.

80. Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 *Am. Soc. Rev.* 327, 332 (1994).
81. Brines & Joyner, *supra* note 78, at 341; see also U.S. Census Bureau, *Statistical Abstract of the United States* 60, at 416 (1999) [hereinafter *Statistical Abstract*].
82. *Statistical Abstract*, *supra* note 81, at 481. This general trend does not apply to the same degree in communities of color. *Id.*
83. A notable exception to this general rule is Washington's recognition of nonmarital "mercenary relationships" between men and women.
84. Atwood, *supra* note 38.
85. 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* 12-14, 17 (1999).
86. 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).
87. Philip Blumsten & Pepper Schwartz, *American Couples: Money, Work, Sex* 148 (1983).
88. See, e.g., *Crooke v. Gilden*, 414 S.E. 2d 645 (Ga. 1992). But see *Jones v. Daly*, 176 Cal. Rptr. 130, 134 (Cal. Ct. App. 1981).
89. 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).
90. 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).
91. 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).
92. 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).
93. Lambda Legal Defense and Education Fund, *State-by-State*, <http://www.lambdalegal.org/cgi-bin/pages/states> (last visited Dec. 3, 2000).
94. Cal. Gov't Code § 22867 (West Supp. 2000).
95. Haw. Rev. Stat. § 572C-4 (1998). The Hawaii definition is broad enough to include, for example, a widowed mother and her son.
96. *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435 (Or. App. 1998).
97. Cal. Fam. Code § 297 (West Supp. 2000).
98. Vt. Stat. Ann. tit. 15, §§ 1201-1207, 1301-1306 (2000).
99. Boris I. Bitker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* para. 2.01[2] (6th ed. 1994).
100. For an example of a statutory scheme that would switch the current burden of proof in establishing a contract regarding property sharing in a nonmarital relationship, see American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2000).
101. See, e.g., 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).
102. Starnes, *supra* note 13, at 71-72.
103. *Id.* at 130-37.
104. Ribstein, *supra* note 74, at 143.
105. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).
106. 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).
107. Paula L. Ettlebrick, *Legal Marriage Is Not the Answer*, *Harv. Gay & Lesbian Rev.* 34 (Fall 1997).

108. 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). Of course, cohabitation also can be a stable, long-term project.
109. 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).
110. Hamilton, *supra* note 109, at § 1.4.
111. *Id.* at §§ 1.02, 1.14; Terry A. O'Neill, *Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock*, 73 Ind. L.J. 589, 590 (1998).
112. O'Neal & Thompson, *supra* note 109, at § 1.03.
113. 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).
114. O'Neal & Thompson, *supra* note 109, at § 1.4.
115. See Model Bus. Corp. Act § 8.03 (1999).
116. See *id.* at § 14.30 cmt. 2.
117. See *id.* at § 8.01 cmt.; see also *Donahue v. Rodd Electrotype 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).
118. O'Neal & Thompson, *supra* note 109, at § 8.4.
119. See Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 Utah L. Rev. 537, 542-43.
120. U.C.C. § 1-201(28) (1990) (emphasis added).
121. U.C.C. § 3-403 cmt. 4 (1990).
122. See, e.g., Colo. Rev. Stat. § 4-9-203(2) (2000).
123. Daniel J. H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021 (1996).
124. Hamilton, *supra* note 109, at § 8.6, 193.
125. Brinig & Carbone, *supra* note 101, at 877-82.
126. Mark Oppenheimer, *Mormon's New England Temple a Symbol of Arrival*, Hartford Courant A5 (Sept. 20, 2000).
127. Homer Clark, *Domestic Relations* at § 15.4 (2d ed. 1988).
128. Dickerson, *supra* note 13, at 964.
129. Model Bus. Corp. Act § 3.01 (1999).
130. See, e.g., Richard A. Posner, *Economic Analysis of Law* 155-56 (5th ed. 1998).
131. See Regan, *Alone Together*, *supra* note 16; Jack Hitt, *Marriage à la Market*, N.Y. Times Magazine 17 (Mar. 19, 2000).
132. See Model Bus. Corp. Act §§ 2.02, 2.10 (1999).
133. *Id.* at § 2.03.
134. See, e.g., Unif. Marriage & Divorce Act §§ 203, 206, 9A U.L.A. 179 (1998).
135. See Model Bus. Corp. Act § 14.05 (1999). As with partnership law, corporate dissolution precedes winding up. *Id.* at § 14.03.
136. *Id.* at § 14.20.
137. *Id.* at § 14.01.
138. Louisiana, for example, allows spouses to agree at the formation of their marriage that they will be governed by a fault-based regime. La. Civ. Code Ann. art. 102 (West Supp. 1998).
139. Model Bus. Corp. Act § 14.02 (1999).
140. Cf. Model Bus. Corp. Act § 14.03 (1999), with Unif. Marriage & Divorce Act § 303, 9A U.L.A. 216 (1998).
141. Cf. Model Bus. Corp. Act § 14.05 (1999), with Unif. Marriage & Divorce Act § 307, 9A U.L.A. 288 (1998).
142. See O'Neal & Thompson, *supra* note 109, at § 9.26.
143. *Donahue v. Rodd Electrotype Co.*, 328 N.E. 2d 505 (Mass. 1975). 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).

144. 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); Unif. Marriage & Divorce Act § 307, 9A U.L.A. 288 (1998).

145. Model Bus. Corp. Act § 14.30(2)(ii) (1999).

146. *Id.* at § 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.* at § 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).

147. 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.

148. *Donahue v. Rodd Electrotype Co.*, 328 N.E. 2d 505, 515 (Mass. 1975).

149. Streich, *supra* note 67, at 367-68.

150. *Id.* at 373 (quoting *Bakalis v. Bressler*, 115 N.E. 2d 323, 327 (Ill. 1953)).

151. *Id.* at 379.

152. *Id.* at 376.

153. *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(e), 1101 (West 1994).

154. Hirshman & Larson, *supra* note 8, at 285.

155. Starnes, *supra* note 13, at 130-31; Meighan, *supra* note 13. 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.* at § 14.34(a). If the parties cannot agree on a fair price, the court will determine the fair value of the shares. *Id.* at § 14.34(d).

156. Debt is fixed and is repaid in set installments (principal with interest), whereas equity varies and depends on the return on the investment. Meighan, *supra* note 13, at 214.

157. Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 Vand. L. Rev. 397 (1992).

158. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 Hofstra L. Rev. 53, 61 (1997) [hereinafter Chambers, *Polygamy*].

159. John Cloud, *Henry & Mary & Janet & . . .*, Time 90 (Nov. 15, 1999) (describing an arrangement among a woman, her husband, and another man).

160. Although 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).

161. Such a change in the law is not inconceivable. *See, e.g.*, Jan Battles, *Cork Opens Door to Gay Couples*, Sun. Times (London), Home News Section (Feb. 6, 2000).

162. *See* Shultz, *supra* note 57, at 298. *See also* David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. Mich. J.L. Reform 805, 813-27 (1985) [hereinafter Chambers, *Legalization of the Family*].

163. *See* William N. Eskridge, *The Case for Same-Sex Marriage* (1996), 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).

164. Posner & Silbaugh, *supra* note 77, at 143-54.

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

166. *See* Chambers, *Polygamy*, *supra* note 158, at 71-72. *But see* Michael Janofsky, *Trial Opens in Rare Case of a Utah Man Charged with Polygamy*, N.Y. Times A12 (May 15, 2001); *A Utah Man with 5 Wives Is Convicted of Bigamy*, N.Y. Times A19 (May 20, 2001).

167. *See, e.g.*, *Johanson v. Fischer (In re W.A.T.)*, 808 P.2d 1083 (Utah 1991); *Sanders v. Tryon*, 739 P.2d 623 (Utah 1987).

168. *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). See Chambers, *Polygamy*, *supra* note 158, at 53-60, 77-81.

169. Chambers, *Legalization of the Family*, *supra* note 162.

170. Clark, *supra* note 127, at § 2.4.

171. See, e.g., *Reep v. Comm'r of Dep't of Employment & Training*, 593 N.E. 2d 1297 (Mass. 1992).

172. *E.N.O. v. L.M.M.*, 711 N.E. 2d 886 (Mass. 1999).

173. *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.").

174. Hamilton, *supra* note 109, at § 6.1, p. 123.

175. Unif. Premarital Agreement Act, 9B U.L.A. 369 (1987).

176. Ribstein, *supra* note 74, at 286-309.

177. *Id.* at 288; Hamilton, *supra* note 109, at § 6.6, p. 126.

178. Ribstein, *supra* note 74, at 289.

179. Hamilton, *supra* note 109, 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.").

180. Ribstein, *supra* note 74, at 308-9.

181. See *id.* at 289.

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

183. Hamilton, *supra* note 109, at § 6.3, p. 128.

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

185. *Id.* at § 6.10, p. 137.

186. Ribstein, *supra* note 74, at 313, 316.

187. *Id.* at 313.

188. *Id.* at 316-17.

189. 607 N.W. 2d 151 (Minn. Ct. App. 2000).

190. *Id.* at 157.

191. Chambers, *Polygamy*, *supra* note 158, at 74; Cloud, *supra* note 159, at 90.

192. 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*, Utah L. Rev. 777 (1994).

193. For instance, couples in legally recognized relationships generally earn higher incomes than those in legally marginalized relationships. See *Statistical Abstract*, *supra* note 81, at 479.