NAVIGATING GENDER IN MODERN INTIMATE PARTNERSHIP LAW

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Abstract

With women edging up to become half the workforce, claims of women’s economic empowerment now abound. But the reality is that gender equality has not been mainstreamed. The truly eye-opening new data is how marginalized and partial many women’s attachment to the labor force continues to be. Simultaneously, another misleading narrative also circulates—that of separateness—of disconnected individualism. In the context of intimate partnership and feminist legal theory, this Article pushes back against these accounts and demonstrates their problematic link. Contrary to the storylines, many women’s lives in fact remain characterized by deep bonds with partners, children, and extended family, and these connections tend to make women less economically powerful. This vulnerability is recurrently developed inside couple relationships, particularly because labor division still often translates into women specializing in unpaid work.

In this Article I explore how a feminist family law should respond to the connections and risks that come with intimate partnering. I contend that existing intimate partner economics law misses opportunities for strengthening bonds and unfairly distributes the risks and rewards of partnering by turning asymmetry into gendered inequality. This stems from law’s false assumptions that partners are situated equally and are largely unconnected. In contrast, expanding the lens from my earlier work on partnership marriage, I propose that for both unmarried and married couples, law should be based on economic sharing behavior and the benefits and burdens it recurrently produces. As one example of its application, I overview how the theory translates into law when couples break up. This serves to define, modernize and advance the partnership ideal that has so far only been partially developed and implemented in law. I situate my proposal and argue for its appeal in

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what I identify as related pluralist feminist and family law agendas. This framework is important for sex equality. By recognizing and valuing care work within the family economy, it mitigates the economic risks of sharing that tend to be more acute for women. Yet it resists assignment of the care-giving role to women by recognizing sharing whatever the pattern, thus supporting a range of choices. The sharing model serves equality in another critical way as well, as its principles apply across different forms of couple relationships, whether married or cohabiting, same sex or opposite sex.

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I. INTRODUCTION

Claims that gender equality has been achieved now abound. In this “mancession” economy, with men losing more jobs than women, women recently edged up to become about 50% of the workforce.¹ The media heralded the

¹ See, e.g., Ashley English, Heidi Hartmann, & Jeff Hayes, Are Women Now Half the Labor Force? The Truth about Women and Equal Participation in the Labor Force, INST. FOR WOMEN’S POL’Y RES. (2010), http://www.iwpr.org/publications/pubs/are-women-
profound achievement announcing: “[t]he battle[ ] of the sexes is over” and “[a] woman’s nation changes everything.” Declaring victory, one news source said “We did it!” Rosie the Riveter, the mighty symbol of women in the workplace, apparently has seized the day.

But such sweeping tales of equality are misleading. Gender equality has not been mainstreamed. Although there have indeed been remarkable changes in recent decades in women’s status, including women’s attachment to the labor force, important economic and power inequalities between men and women persist in modern family and work life. No doubt, life at work has shifted to include more women. Yet life back at home has not changed nearly as much. Rather than serving as a marker of equality, the increased participation of women in the workforce highlights, and for newcomers, escalates the unresolved tensions between work and family. The solution to the conflict for many women is to constrain their employment, often by scaling back or entirely disrupting their attachment to the market. Neglected in the media accounts celebrating women’s employment status, there is eye-opening new data that demonstrates the continued marginalization of women’s labor force attachment. The result is that women still tend to have significantly less economic power than men.

The frontlines of gender inequality are shifting focus—it’s less about sexism and more about care-giving now. With this shift, inequality is increasingly at risk of becoming invisible. When layered onto continuing and powerful gender behavior norms, the equality fable circulating in American popular culture further obscures gender inequities making them seem normal, and perhaps, inevitable.

This story of women’s economic empowerment circulates alongside another misleading narrative—that of separateness, of disconnected individualism. Professor Martha Fineman identifies this as the autonomy myth. The cultural and legal emphasis on the autonomous individual that runs particularly strong in now-half-the-labor-force-the-truth-about-women-and-equal-participation-in-the-labor-force (observing that women’s share of paid employment has increased in the current recession while men have experienced heavier job losses); see also Catherine Rampell, As Layoffs Surge, Women May Pass Men in Job Force, N.Y. TIMES (Feb. 5, 2009), available at http://www.nytimes.com/2009/02/06/business/06women.html (observing that men account for 82% of job losses).


3 See generally Maria Shriver, The Shriver Report, A Women’s Nation Changes Everything, THE CENTER FOR AM. PROGRESS (2009), available at http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf. The title of the report seems to suggest great achievements in terms of women’s equality. However, the report itself addresses the work family conflict as a serious problem. Id. at iv.


5 See id.

America is an inheritance of liberal theory. As political theorist Maxine Eichner has explained, this conception is valuable as “[i]t has helped ground the . . . ideal that all citizens should be treated as free and equal . . . [h]owever . . . [i]t is not, as it is often treated, an adequate ontological understanding of the human condition.”

Attending to individual autonomy need not and should not eclipse recognition of relational autonomy and connection.

These myths of economic parity between the sexes and of separate individualism are problematic and are linked. In family life in particular, the disconnection thesis is wrong. Notwithstanding the divorce rate (which is declining) and recent decreases in marriage rates, long-term partnering is still in vogue. According to one recent study, 9 in 10 American adults will marry in their lifetime—a marriage rate higher than in most other Western countries. Meanwhile, cohabitation rates have skyrocketed, nearly doubling since 1990. Most of us spend long periods of our lives with an intimate partner, with deep connections characterizing these relationships. It also remains the case that for most couples having and raising children together is an important part of a shared life. Although single parent families have risen dramatically, the majority (70%) of families raising children still include two parents in the household, who are usually married. In addition to child care, care work for elders is also recurrently and increasingly being provided by couple’s teamwork.

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8 Id.
9 See, e.g., D’Vera Cohn, At Long Last, Divorce, PEWRESEARCH.ORG (June 4, 2010), http://pewresearch.org/pubs/1617/long-duration-marriage-end-divorce-gore (reporting declining divorce rates even when taking into account declining marriage rates).
12 Suzanne M. Bianchi, John P. Robinson & Melissa A. Milkie, Changing Rhythms of American Family Life 40 (2006). Other recent studies find similar or even higher numbers of two parent families. See, e.g., Sheela Kennedy & Larry Bumpass, Cohabitation and Children’s Living Arrangements: New Estimates from the United States, 19 DEMOGRAPHIC RES. 1663, 1676 tbl.6 (2008) (as of 2001, 66% of children were born to married mothers, 18% to cohabiting mothers, and 16% to single mothers), available at http://www.demographic-research.org/Volumes/Vol19/47/; Audrey Light & Manuelita Ureta, Living Arrangements, Employment Status, and the Economic Well-Being of Mothers: Evidence from Brazil, Chile and the United States, 25 J. FAM. & ECON. ISSUES 301, 311 (2004) (reporting a marriage rate of 71% for U.S. mothers, a cohabitation rate of only 4.4% for U.S. mothers, with 76–84% of mothers having either a partner or a husband in the U.S. as well as Brazil and Chile; “Divorce accounts for the largest portion (45%) of unmarried mothers in the U.S.”).
13 See infra note 57.
Of course, family connections can have profound benefits for all involved. But they also strongly contribute to women’s economic vulnerability and partnering plays an important role in that. When partnered, various life projects and decisions often become collaborative, and that includes economic as well as emotional activities. For example, coupling recurrently affects choices about having and raising children, about where to live, about employment, about family care work, and about investments and consumption. This sharing process influences ongoing family relationships and, at the same time, it shapes the financial power of each partner individually going forward. It produces risks and rewards, both economic and personal. But as it happens, sharing patterns in contemporary intimate partner relationships continue to be gender asymmetric. Although there have been some notable changes in recent years, men and women continue to specialize according to conventional gender scripts—with men as breadwinners, and women as caregivers. When there are two partners to share the load, and when the pressures of the labor market, of family needs, and of gender ideologies converge, women can and often do trade off some market power to allow for care work.

What’s a feminist legal theorist to do? One key strategy for increasing women’s economic power has been to focus on the public sphere, encouraging women’s market attachments. Yet thus far this project has proved herculean, with many factors obstructing it. It requires women who typically also have significant caregiving responsibilities to successfully mediate the formidable pressures of work and family. As recent studies make clear, workers who are also caregivers face a severe time crunch because the employment market places high demands on workers for time and energy at the same time care-giving needs in family life have intensified.14 Importantly, another dynamic is also in play. Notwithstanding the challenges to and greater flexibility in gender roles today, traditional gender ideologies remain powerfully influential in shaping couples’ decisions about how to allocate market and family work. For many women, caregiving is a valued component of their identity, as is providing for the family for many men. Less well known is that gender ideologies are not only part of individual identity development, but classic, or nowadays semi-classic gender differentiation is a key part of how many couples construct intimacy. In many families, women’s care work contributions and men’s economic contributions are pathways for connection and demonstrations of love. Gender distinctions then are building blocks for how many partners relate to each other. They shape family as well as market attachments.

These forces compel feminists to confront an essential question. Can we accept and value women’s association with connection and caregiving and yet resist assignment of these standards to women? My view is that it is possible to work toward both goals simultaneously by serving multiple constituencies of women and men. This should be, and I believe is, a central goal of what I identify as an emerging pluralist feminist agenda. Such an agenda can be seen as

14 See infra notes 27–29, 165 & accompanying text.
complementary with a pluralist family law agenda that is also being powerfully articulated by queer theorists, among others, who seek to recognize a range of family forms and human connections. At their core, both of these approaches are designed to recognize and nurture a diverse set of individual and relational autonomy interests. In this Article, I support and situate my theory for intimate partnership law within these two frameworks.

Because market attachment interacts with family life, I suggest that feminist employment based strategies are necessarily partial. As a complement, I argue for a renewed focus inside family life as a site for reform. Intimate partner economic relations are a key arena for law’s regulation of the family and for construction of gender relations as well. Yet given the quite recent patriarchal history of partnering, feminists understandably have not favorably viewed internal family relationships as a resource for nurturing women’s autonomy. I share this concern and investigate home life as a place where inequalities may be embedded, unseen, or accepted. But paradoxically, I see modern family life as holding much promise for supporting the values of autonomy and plurality. My optimism stems from the dynamic mix of behaviors and attitudes now present in intimate partnerships. Couples widely support an equality ideal. In addition, while partnering frequently includes conformity to traditional roles, at the same time, it has become a place for experimentation and for challenging gender scripts. For example, same-sex relationships, which often reject sharp gender distinctions, have become more visible in society and in the public debate over their legal status. In addition, many couples—both opposite and same sex—now share both caregiving and market roles (to varying extents). As a result, alternative models for structuring relationships are more prominently available for consideration and adoption.

In this Article, I advocate and overview the basic contours of a theory of intimate partnership on which to ground couples’ economic relations law. This expands on my earlier projects that develop an explicit theoretical foundation for, and map the implications of, a partnership legal regime during ongoing marriages and at divorce. Here, with an emphasis on gender asymmetry and feminism, I widen the lens and begin to explore sharing rules in cohabitant partnerships as well. I draw on existing community property principles, but advance them,

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I set aside the question of how sharing principles might apply to purely co-parenting relationships, where partners share parenting but not a wider life together. Sharing of market and care work certainly can occur among co-parents and produce connections and vulnerability. However, the scope of sharing between co-parents is different and more limited than with intimate partners. This topic is beyond the scope of this piece.
explicating a specific theoretical foundation, extending their application, and attending to gender inequality.

Intimate partnership law must simultaneously support the interests of community, individualism, and equality that are at stake in law’s regulation of couple relationships. To do so, I propose that the law for both married and unmarried couples should be based on economic sharing behavior and its predictable effects. Economic interdependence shapes ongoing relationships as well as each partner’s individual economic power. This theory enables legal rules that fairly identify and distribute what should be the communal risks and rewards of partnering.

More specifically, the law must recognize the sharing behavior that cohabiting and married couples may engage in. Next, sharing must be conceptualized broadly. It includes collaborative contributions of both market and family labor needed to sustain the family. I urge that laws must recognize labor division more broadly, conceptualizing it as one component of a larger sharing process. Intimate partners recurrently function as an interdependent economic unit, negotiating and jointly making production, investment, and consumption decisions to promote the welfare of the family as a whole. Career development choices are often a part of this merger. Last, law must account for both the positive and negative impacts that a shared life often produces. Sharing can help nurture and sustain ongoing couple relationships. It also sculpts financial resources: producing wealth and debt; driving consumption and investment; and diminishing, sustaining, or enhancing earning power. This collaboration shapes the financial status of the family unit and each partner individually.

Translated into legal rules, to the extent that economic assets and liabilities are shaped by the sharing process, I propose a co-ownership regime, applicable in part to income streams, vested during the relationship and at its end through break-up or death. Wealth that has not been shaped by economic activities during relationship remains separate. Because studies find that married couples overwhelmingly create a joint economy and this predictably shapes financial resources, for spouses I support a modified and expanded community property regime that includes an equal entitlement to wealth accumulated during marriage, including income sharing during the relationship and through alimony at divorce. I suggest this as a default rule that can be rebutted by evidence in the unusual case that the spouses do not in fact have an interdependent economy.

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16 This includes but goes beyond the typical definition of separate property as a resource that is not acquired through joint labor. It allows for the possibility that property acquired before the relationship began or by gift should nonetheless be considered joint wealth. For example, if a couple based earnings and investment decisions on the fact that there was a pool of wealth available from a gift, then the gift helped to shape the family economy and can potentially be shared. For further discussion of this topic, including commentary by other scholars, see Kelly, Rehabilitating Partnership Marriage, supra note 15, at 204–05.

17 See Kelly, Money Matters, supra note 15, at 133.

18 Id. at 134–35.
find that economic behavior among cohabiting couples substantially varies, I propose that cohabitants have the same legal entitlements as married couples but only if cohabitants have engaged in an interdependent economy. Simply by virtue of their status as intimate partners, I suggest that cohabitants should have an entitlement to make a claim to co-ownership and income sharing. However, the degree of co-ownership (if any) will depend on the degree of sharing. The focus of legal evaluation is on economic sharing behavior, including labor, finances, and career development decisions. Evidence of economic interdependence is required before sharing rules attach. However, cohabitants raising their joint child(ren) are the exception. The data supports a presumption of interdependence for this growing subgroup of unmarried partners.¹⁹

Although I suggest that the form of the relationship should trigger different default rules for establishing interdependent sharing (it is presumed for married couples but not for most cohabitants), it is the economic function of the relationship and not its form that is determinative. Marriage is not the dividing line—behavior is. In addition, beyond private property law, intimate partner rights should similarly extend to other important financial resources available through law such as health care, taxes, and social security. As I will highlight by way of example, this proposed regime stands in sharp contrast to existing legal approaches that are often still based on an opposite premise—that most of us are economically separate with minimal connections.

The intimate partnership model I offer serves an important protective function against the risks women disproportionately bear by tending to specialize in unpaid care work. At the same time, the sharing rules I offer are pluralistic and inclusive. Sharing behavior is the nexus for sharing property, and that is true regardless of the particular pattern of sharing—whether or not a couple divides market and family work evenly. Roles are not assigned in law, they are merely recognized in a structure that also supports experimentation and flexibility because both market and family work confer property rights, regardless of who does the work. Also important, although the results will vary, the regime I propose applies across couple relationships, whether partners are married or cohabiting, opposite, or same sex. I suggest that this approach is consistent with an emerging pluralism agenda in feminism and family law that emphasizes relational functions over forms. Last, I recognize that my reform proposal is not a panacea. It offers one pathway for supporting individual and relational autonomy in family life.

In summary, this Article explores how a feminist family law should respond to gendered sharing patterns and economic risks that continue to exist in many intimate partner relationships. It proceeds in four parts. In Part II, I overview the sharing processes and economic inequalities that are often produced in intimate partnerships. I first sketch the modern empirical landscape on how couples share and allocate unpaid family care work. That is followed by a summary of how couples allocate market work between them. I demonstrate the resilience of gender roles with women specializing in family care work and men in market work.

¹⁹ See sources cited infra note 122 & accompanying discussion.
However, this coexists with notable increases in the care work men do and in women’s market work. Moreover, the data shows that couples work hard together and share the load, making about equal contributions when you add up both paid and unpaid work. Next, I overview the economic vulnerability produced in important part by sharing and asymmetry. No doubt, women’s weaker labor force attachment translates into reduced economic power in the market, and for some couples, in the family economy as well. In the last section of Part II, I briefly explore the psychological literature on identity development working toward an understanding of why gender roles remain the norm. Individual and relational identity construction is a complex and dynamic process and both gender differentiation and flexibility play important parts. With this relational landscape in mind, in Part III, I first tour feminist reform strategies in the public sphere that seek to mitigate the economic risks women disproportionately face in light of their family connections and care-giving roles. I do so to situate my proposal in the private sphere as a necessary part of the equality puzzle and to argue for its appeal in a pluralistic feminist family law agenda. In Section B, I turn to my proposal to ground intimate partnership law on sharing behavior and, as one example, highlight how the theory can be implemented to reform the law governing when couple’s break up.

II. ECONOMIC INEQUALITY IN MODERN INTIMATE PARTNER RELATIONSHIPS

A. Asymmetric Sharing: A Gender Laboratory with Reduced but Resilient Role Specialization

“The cultural image of the American mother has changed from the cheery, doting homemaker to the frenzied, sleepless working mom.” 20

This quote is the opening line of fascinating new research in Changing Rhythms of American Family Life written by sociologists Bianchi, Robinson and Milkie. But perhaps in describing today’s norms of motherhood and gender relations, change is too strong a word. Instead, intimate partner relations might be thought of as a kind of gender laboratory, where multiple ideals percolate and often compete in the decisions about how to allocate market and family work as well as in the construction of identity. Yet gender role experimentation is seriously constrained by continuing systemic disadvantages borne by women and strong ties to the past. It is clear that many women have a “schema of devotion to the family” that continues to powerfully influence the way women and men work and care for their families—and how they understand themselves. 21

20 BIANCHI ET AL., supra note 12, at 1.
New research on American couples’ allocation of market and family work demonstrates striking continuity with past gender patterns, as well as notable change. Economic behavior in families, especially among women, has changed significantly over the preceding decades. For the majority of families, separate spheres are a thing of the past. Women, especially mothers, have increased their paid market work and men do more family work than in the past. Despite these shifts, substantial gender role specialization remains. Women still do more unpaid care work than men, and men still provide more market work and income than women. Women still do twice the housework and childcare as their partners—even when both parents work. As I will highlight below, this resource allocation pattern translates into reduced economic power in the market and, in important respects, at home as well.

This pattern also holds in other developed countries across the world, including in Europe where workers put in fewer market hours than in the U.S. and where there is often more governmental support for child care along with paid family leave. Summarizing the research, author Branka Rešetar reports:

Sociologists who have comparatively examined the effect of wives’ employment on the division of housework in 10 countries, including some European ones, have demonstrated the wife’s dominant share of housework in every developed country. This thesis is supported by research conducted in all EU countries as well as by other research showing the same result, regardless of women’s employment status.

. . . . One of the key findings based on work undertaken in fourteen European countries referring to the period from 1994 to 2001 is that

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22 See BIANCHI ET AL., supra note 12, at 9, 13.


24 For income contributions, see infra notes 160–63 & accompanying discussion.

mothers across Europe still spend much more time caring for their offspring than fathers do.\textsuperscript{26}

More specifically, what are the modern contours of care work? For many families today, navigating the demands of work and home life is an escalating pressure cooker. New data in \textit{Changing Rhythms} evaluating family time use diaries between 1965 to 2000 finds that American parents today are in fact busier than parents in the past.\textsuperscript{27} Adding paid employment to unpaid family work, total workloads for parents have risen.\textsuperscript{28} Parents average a 9 to 9.5 hour work day, 7 days a week; employed mothers average 10 hours a day, every day (with workloads far greater than homemaker mothers).\textsuperscript{29} What is causing the increase?

Very likely, an important part of the explanation is that parenting has intensified over the last several decades. Even as women have increased their education and employment—resulting in more time away from home—parent and child interactions appear to be higher than ever before. Strong evidence suggests that parents are managing to spend as much time with their children (or possibly more) than in the days when a majority of children had at-home mothers.\textsuperscript{30} Single parents and two parent families alike have increased the number of hours spent on childcare.\textsuperscript{31} Not surprisingly, employed mothers average fewer childcare hours than at-home mothers.\textsuperscript{32} Yet the data shows “that an employed mother in 2000 spent as much time in direct child care as her unemployed counterpart in the 1970s.”\textsuperscript{33} Fathers too spend more time with and caring for children than their fathers did.\textsuperscript{34}

\begin{thebibliography}{99}
\bibitem{27} BIANCHI ET AL., \textit{supra} note 12, at 56 (surveying and compiling data from multiple studies including Current Population Surveys from the Census and Labor Statistics Bureaus).
\bibitem{28} \textit{Id.} at 56–57.
\bibitem{29} \textit{Id.} at 57.
\bibitem{30} \textit{Id.} at 1, 63, 76, 85. Bianchi and her colleagues found that, in 1965, 57% of families with children had a mother full-time at home, with 60% of children living in such families. \textit{Id.} at 40, 59.
\bibitem{31} \textit{See id.} at 64, tbl.4.1 (showing increases in hours of “primary” child care per week from 1965 to 2000 for married fathers from 2.6 to 6.5; for married mothers from 10.6 to 12.9 and for single mothers 7.5 to 11.8). Bianchi reports that their data is consistent with other data, including cross-national data, over the last several decades. \textit{Id.} at 65. It is possible the data underestimates child care time as parents are multitaskers and supervising children is a background activity that might go unnoticed in parents’ reports of their time. Nancy Folbre, \textit{Measuring Care: Gender, Empowerment and the Care Economy} 7 J. HUM. DEV. 183, 192 (2006).
\bibitem{32} BIANCHI ET AL., \textit{supra} note 12, at 76–77.
\bibitem{33} \textit{Id.} at 77.
\bibitem{34} \textit{Id.}
\end{thebibliography}
A number of strategies make this heroic feat possible. One is that mothers often maximize their availability for family time by reducing market work when children are young and by tracking their work hours to when children are in school or other activities. Another is that parents spend a lot of time with their children outside of work and they privilege that time. They give up or scale back on some activities—particularly housework and time outside the family—and weave time with their children into the time they have. Many contemporary parents are master multi-taskers who spend their “leisure time” with their children, participating in their activities.

These patterns of parent-child interaction suggest that expectations for parenting have been changing over time. A norm of intensive parenting is emerging. It, too, is gendered—it is described by sociologists as an ideal of “intensive mothering” with an “involved father.” We live in a time of “helicopter moms”—as the popular media calls them—who painstakingly schedule, monitor and participate in nearly all their children do. Middle class children today are heavily scheduled, engaging in multiple extracurricular activities at the same time. This is labor intensive for parents, and disproportionately so for mothers, who schedule, transport, and monitor their children’s participation. To be clear, not all adopt nor endorse this style of parenting—in particular, it varies by socioeconomic class. It is more likely to be found among college-educated mothers than those with less education. Yet few parents are immune to today’s pressures...
for very involved parenting. The modern vision of parenting urges provision of every opportunity for a child’s future, and parents heed the call.  

As parent’s time with children has amplified, gender distribution of family care work remains unequal. Women still provide at least twice as much child care as men. The Changing Rhythms data finds that married mothers spend 19 hours per week in primary and secondary child care activities whereas married fathers spend fewer than 9. Yet, there is also noteworthy change. As married mothers increased their hours of paid work, married and single mothers’ time caring for children are more closely matched. Additionally, as noted, paternal time with children has increased. In terms of who does what aspects of child care, the data show that mothers still do most of the routine child care, twice as much as fathers, whereas fathers devote most of their child care time to educational or recreational activities.

Additionally, women still do almost twice as much housework as men. This is true even when women are employed, and even when they earn more than their male partners. However, considerable change is also evident. Married women have significantly reduced their hours doing housework, so that now married and single mothers average about the same amount of time—by one estimate, 17 hours per week, along with another roughly 2 hours on shopping and obtaining services. And, as with child care, men have notably increased their hours of housework, from 4.5 hours in 1965 to about 10 hours per week in 2000. In terms of who does what kind of work, women still tend to do much more of the daily core tasks like cooking and cleaning, but men’s biggest increases in housework have been with these tasks. Still, the majority of men’s housework time is spent on other things such as work outdoors and on financial management. Overall, women are doing less housework across the board, men have picked up more of it, but they still do half what women do in terms of both child care and housework.

Yet another pressure on modern families is that unpaid family care work has expanded and once again, women tend to do much more of it. As already highlighted, parenting norms have increased the demands of caring for children. In addition, in many families the period of time parents provide care for children has

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42 See, e.g., BIANCHI ET AL., supra note 12, at 9. See generally SHARON HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD (1996) (arguing that work family tensions are exacerbated by contemporary intensive mothering models).
44 Id. at 69, tbl.4.2.
45 Id.
46 Id. at 66.
47 Id. at 91–94, 113.
49 BIANCHI ET AL., supra note 12, at 92–94.
50 Id. at 94.
51 Id. at 93–94.
52 Id. at 120.
lengthened, as young people are now increasingly viewed and behave as “emerging adults” who are quasi-dependent.\(^{53}\) At least among the parents who are financially able to do so, the trend is for parents to continue to nurture and support their children to later ages, through college age and beyond.\(^{54}\) Further along on the age spectrum, more and more, families are stepping up to provide short and long-term care for the elderly and disabled. Most older persons rely exclusively on family and friends to provide assistance, while others supplement family care with assistance from paid providers.\(^{55}\) And the need for elder care is expected to rise even higher in the coming years as the population ages, people live longer, and later life is frequently accompanied by declining mental and physical health.\(^{56}\)

Tracking the pattern for childcare, although men share the load as well, the data show that there is a gender gap in elder care. Women do far more of the unpaid caregiving for older people than men do, including wives caring for their husband’s parents.\(^{57}\) Indeed, a great number of women take care of elderly loved ones as long as or longer than they care for children.\(^{58}\)

2. Market Work

This load of family care work is now combined with paid market work for a majority of women as well as men, a remarkable change from earlier decades. As a result, women have become more powerful economic actors. Recall the declarations of victory noted earlier, marking when women recently became half of the work force. Yet, the sheer number of women who are employed is not the full story—it masks significant economic disparities between men and women. In

\(^{53}\) See generally Jeffrey Jensen Arnett, Emerging Adulthood: The Winding Road from the Late Teens through the Twenties (2004).


In 2009 there were 39.6 million persons 65 years or older. They represent 12.9% of the U.S. population (about one in every eight Americans). By 2030, there will be about 72.1 million older persons (more than twice their number in 2000), who will constitute 19% of the population. Aging Statistics, ADMINISTRATION ON AGING, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (SEPT. 1, 2011, 1:17 PM), http://www.aoa.gov/AoARoot/Aging_Statistics/index.aspx.


\(^{58}\) See Smith, supra note 57, at 353 (citing data finding that women can expect to spend 17 years caring for children and 18 years caring for elders) (citations omitted).
assessing economic equality between the sexes, the really eye-opening data is how many fewer hours of market work women do comparatively. As I will describe, although women’s participation in the market has increased, women work far fewer market hours than their male counterparts. Women who work full-time work fewer hours than men who work full-time. Moreover, many women work only part-time or withdraw from the market altogether for extended periods of time. Women’s tendency to scale back market work is strongly linked to partnering and the care work that is woven into family life. It is much more likely to occur and to occur more dramatically as a part of an intimate partner relationship, especially one with children. One recent longitudinal study found “the more likely a woman is to have dependent children and be married, the more likely she is to be a low earner and have fewer hours in the labor market. The opposite holds for men: marriage and dependent children make it much more likely that a man has higher earnings and works longer hours.” Not surprisingly, partnering often creates an environment that makes it economically possible to spend more time doing unpaid care work, and less time in the labor force. This can be a real benefit to families who chose that path. However, as the next section develops, reducing your attachment to the wage market dramatically decreases individual earning power and lifetime wages.

In the modern family economy, it is typical for women to scale back their market work to make time and space for care work. The Bureau of Labor Statistics reports that among women who worked at some point during calendar year 2007, 62% worked full-time and year round, compared to 75% for men. In 2008, 25% of employed women usually worked fewer than 35 hours per week compared to 11% of employed men. Another study found that even “persistent or strongly attached women workers work about 22 percent fewer hours than persistent male workers.” Additionally, 3 in 10 women report 4 years or more without earnings, compared to only 1 in 20 men.

In particular, sizable subgroups of women eliminate or cut back hours at work when children are young, yet men do not do the same when they become fathers. Narrowing the lens to women with children under age 18, it is clear that mothers still do significantly less market work than fathers. This group has shown dramatic increases in labor force participation over recent decades and yet, at the same time


61 Id. at 70, 72.

62 Rose & Hartmann, supra note 59, at 9.

63 Id.

64 BIANCHI ET AL., supra note 12, at 43.
experience high demands for family care-giving. Scaling back paid work is the trade-off. As of 2010, the labor force participation rate for mothers with children under 18 receded to 71%, down from an all-time high of 73% in 2000. That compares to 94% of fathers.

Further highlighting the link between women’s caregiving and paid work, employment of mothers tends to decrease when children are young and it rises when children grow older. In 2010, 64% of mothers with children under 6 were in the labor force, compared with 70.5% of mothers with older children. When children are very young, even more moms stay home. For example, in 2008, 40.4% of women with children under 3 years old were outside the labor force. The employment rate of mothers with infants under a year old was even lower at 56.5%. In contrast, fathers’ employment remains very high and stable as children age, increasing marginally (to approximately 95%) when children are under 6, and decreasing marginally when children are ages 6 to 18. Looking at 2000 data of two parent families with children under 6, Bianchi and her colleagues found that only 31% had both parents employed full time and in 37% only the father was employed. That means more than a third of partnered mothers with young children stay at home, a third work part-time, and another third work full-time. Notably, unmarried mothers have higher overall employment rates than married mothers. “In 2008, 76% of unmarried mothers were in the labor force, compared with 69% of married mothers.”

Another revealing point of comparison is to look at annual market hours for mothers and fathers. Bianchi and her colleagues found that the average hours of market work across all mothers with children under 18 is 1172 hours per year. If you exclude at-home mothers from the calculation, employed mothers average 1711 market hours per year. That falls far short of the 2080 hours typically expected for a year round fulltime employee. Among employed parents, compare married fathers’ 44.6 average market hours per week to married mothers’ 33.5

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66 Women in the Labor Force, supra note 60, at 1.
67 Employment Characteristics of Families, supra note 65, tbl.5.
68 Id.
69 Women in the Labor Force, supra note 60, at 13–14 tbl.5.
71 See Employment Characteristics of Families, supra note 65, tbl.5; Women in the Labor Force, supra note 60, at 13.
72 Bianchi et al., supra note 12, at 41–42.
73 Women in the Labor Force, supra note 60, at 1.
74 Bianchi et al., supra note 12, at 45.
75 Id. Similarly, another study found that across a 15 year span, employed women work about 500 hours less than employed men. Rose & Hartmann, supra note 59, at 9.
hours and unmarried mothers’ 36.9 hours. The full picture of average hours of market work across all mothers (calculated by adding back in at-home mothers) is that only 57% of all mothers are employed across the entire year; with mothers averaging 36 weeks per year and 25 hours per week.

3. Sharing the Load by Specializing

No doubt, as the preceding sections demonstrate, families today manage to meet the demands of both family and work life by sharing the load and working hard. The time use and other data in Changing Rhythms show that if you add both paid work and unpaid family work in a two-parent household with children under 18, women and men average approximately the same number of hours of work—about 65 hours per week. That is an increase in total hours worked compared to a generation ago. In terms of who does what kind of work and how much, the traditional pattern of men as breadwinners and women as caregivers has shifted form and decreased but it does still persist. “[I]t remains most common for couples to follow what is termed a neo-traditional model—with a wife’s career and labor force participation taking a backseat to a husband’s career advancement, especially when children are young.” Sociologist Steven Nock has suggested that families are moving toward an era of mutually economically dependent couples where couples depend on the income from each partner. This includes families with neo-traditional income production patterns, as well as statistically atypical families where the wife earns as much or more than her husband. For some, this trend may result in departure from the female dependence model prevalent now. Still, even as women do more market work, “mutual dependence” typically includes strong gender specialization.

The sharing behavior and gender asymmetry described so far includes data on married as well as unmarried couples. I next highlight the research to compare sharing patterns of married and unmarried couples (opposite and same-sex). Of course, economic collaboration occurs in both types of relationships. However, there are significant differences between the groups in terms of couples’ financial connections. Married couples overwhelmingly develop a joint economy, whereas

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76 Id. at 45–48. The term unmarried mother includes cohabiting mothers as well as mothers who do not live with a partner. Cohabitant versus married couple’s work patterns are discussed infra in notes 139–43 & accompanying text.
77 Id. at 45.
78 Id. at 115.
79 Id. at 1.
80 Id. at 13 (citing PHYLLIS MOEN, IT’S ABOUT TIME: COUPLES AND CAREERS 13 (2003)).
82 See sources cited and accompanying discussion, infra Part II.A, 4–5. For comprehensive summaries of studies on cohabitants, see CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW AND PUBLIC POLICY 138–46 (2010) (concluding that
cohabitant sharing behaviors vary greatly. Although the data shows there is a significant subset of unmarried couples who merge their economic resources, overall cohabitants are far more likely to maintain separate finances. In addition, although gendered labor specialization occurs across the groups, it is more likely to occur and to occur more dramatically in marriage than in cohabitation. Notably, married and unmarried couples’ behavior is most similar when a couple jointly raise biological children.

4. Economic Sharing in Marriage

Sharing is a cultural and behavioral norm in marriage. Spouses value and regularly engage in interdependent sharing that includes economic as well as emotional connections. Sharing money is so strongly associated with marriage


84 See Renata Forste, *Prelude to Marriage or Alternative to Marriage? A Social and Demographic Look at Cohabitation in the U.S.*, 4 J.L. & Fam. Stud. 91, 93 (2002) (finding that cohabiting couples are less likely to make joint investments than their married counterparts); Carolyn Vogler, *Cohabiting Couples: Rethinking Money in the Household at the Beginning of the Twenty First Century*, 53 Soc. Rev. 1, 12–13 (2005) (cohabiting couples are less likely to pool their income than married couples). For an in-depth and comprehensive discussion of cohabitant behavior and law and policy, see generally Bowman, supra note 82.


86 See Vogler, supra note 84, at 13.

that non-conformity is thought to signal a lack of commitment and trust thought essential in marriage. Recent research finds that couples “consider pooling of income and sharing in general to be . . . self evident . . . and the very foundation upon which the relationship rests.” Although spouses don’t always completely share all financial assets, that is common. Moreover, spouses generally see themselves as a collaborative economic unit with income being a family asset.

In addition to sharing money, spouses typically engage in an interdependent web of decision-making about resources. Researchers find that “[a] myriad of small and large decisions over time and daily practice come together to create a shared life.” As is evident from the discussion earlier, labor is a key joint economic resource in families and spouses decide together how to allocate the paid market work and unpaid family work that is needed to sustain the family. And, as already described, in significant ways the organization of market and family work still follows traditional gender norms.

The data on same-sex couples who are married or in a civil union is still developing. The available research finds that in general there appear to be few differences between formally committed same-sex and opposite sex couples. Evidence suggests that most same-sex couples in committed relationships believe in and engage in pooling resources. Pooling of resources is especially common among those same-sex couples who engage in ceremonies of commitment. The evidence also suggests however, that formally committed same-sex couples tend to keep more of their finances separate than married heterosexual couples do.

unequally share power over money). For a fuller discussion of spouses sharing processes, see Kelly, Money Matters, supra note 15, at 121–35.

88 See Blumstein & Schwartz, supra note 87, at 96, 109–11. As one commentator recently noted, the failure to share money is seen as evidence that a couple is not “really” married. See Lisa R. Mahle, A Purse of Her Own: The Case Against Joint Bank Accounts, 16 Tex. J. Women & L. 45, 46–47 (2006).

89 Modern Couples, supra note 87, at 49.

90 See id. at 11, 14–17, 49 (describing pooling patterns).

91 See id. at 154–55 (“The perception of the family as an economic unit remains strong.”); Forste, supra note 84, at 98–99 (observing that collective orientation of married couples manifests itself in the merging of financial resources); Pahl, supra note 87, at 126–27 (finding spouses to have a collective rather than individualistic model of the family).

92 Modern Couples, supra note 87, at 3.


96 Id.

97 Id.
Further, studies report that same-sex couples more often have dual earners.\textsuperscript{98} Interestingly however, straight and gay couples with children have about the same percentages of stay-at-home parents: 26\% for gay couples; 25\% for heterosexual couples; 24\% for lesbian couples.\textsuperscript{99}

In terms of domestic labor, studies often report a more egalitarian division among same-sex couples.\textsuperscript{100} Yet other studies contest this, finding that the majority of same-sex couples engage in asymmetric sharing like the heterosexual pattern, with only 25\% of couples sharing tasks equally.\textsuperscript{101}

5. Economic Sharing in Cohabitant Relationships

Research on economic behavior in unmarried couple relationships has also developed relatively recently and is ongoing. However, there is a substantial and growing body of evidence that finds significant differences in financial relationships for married versus unmarried couples.\textsuperscript{102} Crucially, unlike married couples, the economic links between cohabitants vary greatly. There is no typical pattern. Instead, cohabitants engage in a range of disparate behaviors, from economic merger, to purposeful and clear financial separation, to somewhere in


\textsuperscript{102} For other discussion of studies on the economics of cohabitant relationships reaching opposite conclusions, see BOWMAN, supra note 82, at 139–43 (concluding that many cohabitants are “substantially economically interdependent”); Marsha Garrison, Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation, 52 UCLA L. REV. 815, 839–46 (2005) (concluding that most cohabitants are financially separate). As I explain in this section, variation is a defining feature of cohabitation and there are subgroups who are interdependent and others who are not.
between. For example, approximately half of cohabitants join their incomes, and half do not.

Another aspect of this heterogeneity is that there are some sub-group differences associated with socio-economic class, race, and ethnicity. In particular, “[c]ohabitation remains more common among those with less education and for whom economic resources are more constrained.” Cohabitation is significantly more common among African Americans and Hispanics than non-Hispanic Whites. Research suggests that cohabitation patterns linked to race and ethnicity “draw on both economic and cultural differences.”

Keeping this diversity in mind, however, there are some research themes that have emerged. In terms of economic sharing, data suggests that cohabitants as a group are more likely to view each other as individual economic entities and are significantly less likely to merge their money than married couples. It appears

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103 See, e.g., Kristen R. Heimdal & Sharon K. Houseknecht, Cohabiting and Married Couples’ Income Organization: Approaches in Sweden and the United States, 65 J. MARRIAGE & FAM. 525, 532 tbl.2 (2003) (46% of U.S. cohabitants in the survey keep money separate and 54% pool their incomes); Vogler, supra note 84, at 17–23 (summarizing studies on money management and observing sub-group variations) (citations omitted); Forste, supra note 84, at 92–93 (same); see also infra note 104.


106 Seltzer, supra note 105, at 1250 (citation omitted).

107 See, e.g., Bowman, supra note 82, at 111–17 (describing studies).

108 Id. This means that cohabitation law disproportionately impacts low income persons and minorities, as it does same-sex couples who do not have access to marriage.

109 See, e.g., Heimdal & Houseknecht, supra note 103, at 527; Forste, supra note 84, at 93 (“cohabiting couples are less likely to invest in joint activities such as combining bank accounts, buying a home together, or assuming financial responsibility for their partner” (citation omitted)); Vogler, supra note 84, at 12–13, 24 (finding cohabitants far more likely to organize money as separate economic entities, consistent with other studies); Brines & Joiner, supra note 85, at 333, 350 (same); Winkler, supra note 104, at 1079 (stating that most cohabitants do not pool their incomes). BLUMSTEIN & SCHWARTZ, supra note 87, at 94–101 (finding 37% of male and 44% of female cohabitants opposed income pooling, versus 8% of husbands and 12% of wives).
that “money in marriage is ‘joint, cooperative, and nebulous,’ whereas for cohabiting couples, money tends to be ‘separate, individual, and calculable.’”

For example, one recent study found that 46% of unmarried couples keep either some or all of their money separate, compared to only 17.4% of married couples. Additionally, unmarried couples often arrange their finances so that they split expenses and do so fifty-fifty, even when partners’ respective earnings are unequal.

Still, different subcategories of cohabitants have varying tendencies for economic sharing. Several cohorts have been emphasized in the literature. First are “nubile” couples, defined as young, never married couples without children. This group makes up a large share of cohabitants. There are also post-marital cohabitants—couples where at least one partner was previously divorced. Both nubile and post-marital couples are far more likely than married couples to have separate finances and to insist on and measure equal contributions to expenses.

Cohabitants with children are another important sub-group that researchers have begun to study. Birthrates among cohabitants have risen sharply, accounting for almost all of the recent increases in so called “single mother births.” This trend is particularly strong among non-Hispanic Blacks and Hispanics. Additionally, as many as 2 in 5 children now spend some time as a cohabiting family living either with both biological parents or with their mother and her boyfriend. Nonetheless, unmarried couples remain far less likely to have children than married couples.

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110 Heimdal & Houseknecht, supra note 103, at 527 (citing to Singh, & Lindsay, Money in Heterosexual Relationships, The Australian & New Zealand J. of Sociology, 32, 57–69 (1996)). See also Blumstein & Schwartz, supra note 87, at 98.

111 These percentages include survey respondents who said either 1) “We pool some of the money and keep the rest separate” or 2) “We each keep our own money separate[.]” Heimdal & Houseknecht, supra note 103, at 532–33. Research has also found differences in patterns associated with race, see Catherine Kenney, Cohabiting Couples, Filing Jointly? Resource Pooling and U.S. Poverty Policies, 53 Fam. Relations 237, 243 (2004) (“African American couples, even those who are married, are far less likely to say that they put all of their money together than are Hispanic or non-Hispanic Whites.”).

112 See Vogler, supra note 84, at 18–19.

113 See id. at 9–10.

114 See id. at 10.

115 See id. at 9.

116 See id. at 17–18, 23.

117 See, e.g., Kennedy & Bumpass, supra note 12, at 1663, 1665, 1676–80, tbl.6, tbl.7 (finding, consistent with other studies, that as of 2001, 18% of children are born to cohabiting parents, up from 11% in 1990–94, while single mother births remained at 16%).

118 Id. at 1677 (“[C]ohabiting births increased from 17 to 27 percent of all births to non-Hispanic blacks. Consequently, a majority of African-American children born in the late 1990s were born into a two-parent family.”).

119 See id. at 1664–65, 1676–77 & tbl.6 (finding that as of 2001, 66% of children were born to married mothers, 18% to cohabiting mothers and 16% to single mothers).

120 See id.
When there are children in the household, there appear to be differences in economic behavior depending on whether unmarried partners share a biological child together or if one partner, usually the male, is a step-parent. A number of studies find that the relatively small but growing cohort of cohabitants who share a biological child\textsuperscript{121} tend to combine their financial resources similar to married couples.\textsuperscript{122} Conversely, relationships “in which the cohabiting male is a stepparent to the child(ren) are less likely to pool income and may show evidence of lower contributions from the male partner.”\textsuperscript{123} That said, research also finds that cohabiting step-fathers and those in blended families do often make money available to the entire household either by sharing incomes in a common pot or by splitting expenses and sometimes, by paying more than half.\textsuperscript{124} In summary, the presence of children in unmarried couple households often means that partners significantly share income and expenses. Specifically, cohabitants with joint biological children evidence marriage-like pooling.

In addition to having children in the household, research suggests that the expected stability of the relationship is the other main factor that may influence the decision about whether and to what extent partners will share income.\textsuperscript{125} That helps explain why spouses generally do develop a shared economy. Even with high divorce rates, marriage is assumed to reflect a high level of commitment, and, in fact marriages last far longer on average than cohabiting unions.\textsuperscript{126} The same norms do not accompany unmarried unions.\textsuperscript{127} As I have described, cohabitation is marked by contextual variation.\textsuperscript{128} The relationship is typically short-term, and less stable than marriage.

The average duration of cohabitation in the U.S. is two years.\textsuperscript{129} Within one year of cohabiting, half of couples either break up, or marry and about 29% of

\begin{footnotes}
\footnotetext{121}{See Vogler, supra note 84, at 10 (stating the subgroup makes up 17% of cohabitants in Britain); Seltzer, supra note 104, at 1251 (reporting 15% in the U.S.).}
\footnotetext{122}{See Vogler, supra note 84, at 13 (summarizing studies); Kenney, supra note 111, at 244 (researching low income families and finding 61% of cohabitants who have only joint child combine all their money in a common pot, compared to 47% of blended and step parents families). For analysis of the “lock in” effect of having biological children together versus step-parent relationships for married couples, see Treas, supra note 87, at 725 (1993).}
\footnotetext{123}{Kenney, supra note 111, at 239.}
\footnotetext{124}{Id. at 244–45 (finding a majority of low income cohabitant fathers, including a majority of step-fathers share resources with the household).}
\footnotetext{125}{See id. at 238 (synthesizing studies).}
\footnotetext{126}{See id.}
\footnotetext{127}{For rich discussion of the absence of norms in cohabitation especially compared to marriage, in the broader context of norms, families and communities, see MARGARET F. BRINIG, FAMILY, LAW, COMMUNITY: SUPPORTING THE COVENANT 16–17 (2010).}
\footnotetext{128}{See, e.g., Seltzer, supra note 104, at 1248 (“It is a sociological truism that the meaning of cohabitation outside of marriage and other family relationships depends on the social context in which they occur.”).}
\footnotetext{129}{See Kennedy & Bumpass, supra note 12, at 1686; Vogler, supra note 84, at 10.}
\end{footnotes}
cohabiters break up within the first two years. More than half of cohabiting unions dissolve within 5 years, even those where the couple has married. Only one-third of cohabitants remain unmarried and together for 3 years, and this number declines to one-fifth at 4 years, and only 15% or less remaining beyond 5 years. Unmarried unions that produce children tend to last longer than average, but ultimately are even more likely to dissolve than those without children, and much more likely to dissolve than marriages with children. This tendency for instability may well be an impediment to sharing. In addition, even if there is significant economic sharing in the relationship, the sharing period is usually short. However, for a small cohort, cohabitation is longer-term and appears to replace marriage.

In terms of gender and economic resources, there are significant inequalities between male and female cohabitants, although notably less so than for spouses. The data shows remarkably less disparity in unmarried partner incomes than for married partners. For example, one study found that while female cohabitants earn 90% of their partner’s incomes, wives earn only 60% of their husbands’ incomes. This suggests greater independence for unmarried women. However, the separate money management system that is popular among cohabitants can translate into male dominance. Since men tend to have larger incomes, they then have greater control over and access to wealth. If the usually male higher earner “helps out” the usually female lower earner, that can then be seen as a generous subsidy responsive to dependency rather than a shared pot of money available to equal partners.

Available studies also find that women’s labor force participation, especially for mothers, differs in cohabiting versus married partnerships. Women cohabitants are more likely to be employed and to work more hours than married

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130 See Kennedy & Bumpass, supra note 12, at 1673–74; Seltzer, supra note 104, at 1252 (summarizing studies).
131 See, e.g., Seltzer, supra note 105, at 1252.
132 Kennedy & Bumpass, supra note 12, at 1673–74.
133 See, e.g., Vogler, supra note 84, at 10; Kennedy & Bumpass, supra note 12, at 1685–86 (as of 2002 “over 20% of marital births and over 50% of cohabiting births had experienced their parents’ separation by age 9”; and for the period 1990–94, “32% of children—71% of children born to cohabiting parents and 26% of children born to married parents—could expect to experience parental separation by age 12.”).
134 See, e.g., Kennedy & Bumpass, supra note 12, at 1673–74; BOWMAN, supra note 82, at 116, 132 (summarizing studies).
135 See, e.g., Brines & Joiner, supra note 85, at 341; Kenney, supra note 110, at 243.
136 Brines & Joiner, supra note 85, at 341.
137 See Vogler, supra note 84, at 18–19 (summarizing studies).
138 See id.
women.

Further, unlike married couples, there is some evidence that cohabiting partners make decisions about market attachment independently. For married mothers, market hours decrease as their husbands’ incomes rise. In contrast, an unmarried partner’s rising income has either no effect, or even increases unmarried mothers’ work hours. Similarly, additional children in the household reduce wives’ work hours the most, with the weakest effect on cohabiting mothers.

In terms of housework, women still do more than men in both cohabiting relationships and marriage. However, studies also show that cohabitants are less likely to divide household labor along gender lines than married couples. “Compared with wives, women in cohabiting couples do fewer hours of housework but more hours of paid work.” The studies conflict on whether cohabiting men do more housework than married men. Cumulatively, these differences suggest that cohabitants share incomes, as well as work and family responsibilities to a much lesser extent than spouses.

In summary, variation is the defining characteristic of cohabitation today. There is a small subset of cohabitants who have a joint economy just as married couples overwhelmingly do, but there is also a large cohort who do not. As a group, unmarried partners are far more likely to keep their finances separate, to make economic decisions individually, and to calculate and account for expenses based on a fifty-fifty split. The exception is when unmarried couples live together raising their biological child(ren). In such relationships, a financial merger is evident just as it is with married couples. In terms of gendered labor specialization, it surely exists among cohabitants, but is less pronounced than among spouses. As

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140 See, e.g., id. at 160 (finding that cohabiting mothers work 10 hours more per week than married mothers). The Changing Rhythms data evidences significant differences between married and unmarried mothers work hours, but does not separate out cohabiting mothers from truly single mothers. See BIANCHI ET AL., supra note 12, at 55 tbl.3.4 (finding married mothers average weekly hours of market work was 23.8 compared to 28.9 for unmarried mothers, compared to 42.5 for married fathers).

141 See Abrons, supra note 139, at 160.

142 See id. at 160–61.

143 See id.

144 See, e.g., Seltzer, supra note 105, at 1254; BOWMAN, supra note 82, at 144 (summarizing studies) (citations omitted).

145 See, e.g., Vogler, supra note 84, at 9.

146 Seltzer, supra note 105, at 1254.

147 Id. (reporting only small or no differences in the housework done by men in formal and informal unions); Pamela J. Smock & Sanjiv Gupta, Cohabitation in Contemporary North America, in JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN AND SOCIAL POLICY 53, 68–69 (Alan Booth & Ann C. Crouter eds., 2002) (finding that cohabiting and married men do the same amount of housework); contra Jeanne A. Batalova & Philip N. Cohen, Premarital Cohabitation and Housework, 64 J. MARRIAGE & FAM. 743, 746 (finding that cohabiting men reported doing more housework than married men); Shannon N. Davis, Theodore N. Greenstein & Jennifer P. Gerteisen Marks, Effects of Union Type on Division of Household Labor: Do Cohabiting Men Really Perform More Housework?, 28 J. FAM. ISSUES 1243, 1263 (2007).
a group, unmarried partners have less disparity in earnings, in women’s and men’s market attachments, and in performing housework than married partners. Overall then, economic inequality is less often produced or produced to a lesser extent in a significant set of cohabitant relationships. However, some cohabitant unions do raise concerns for gender inequality. There are indeed unmarried couples who develop an interdependent economy, and who specialize according to traditional gender roles. In addition, there are women cohabitants who may be matching or nearly matching the market hours of their partners, but who earn less, are also doing more unpaid care work, and still are expected to pay at least a half share for expenses. These patterns are especially likely when there are children, and may well produce economic vulnerability inside the household as well as in the market. As one cohabitant in a study commented: “it’s not fair to go half and half with someone who isn’t earning as much.”

That is even more true if the disparity in earnings flows in significant part from partnership behavior.

B. Asymmetric Vulnerability

For most married and some unmarried couples, it is clear that, faced with the conflicting demands of work and family, with two players on the team to share the work, couples frequently decide that it makes sense for the female partner to scale back or even fully disrupt her attachment to the market. This stems from a sharing process that shapes the lives of each individual partner as well as the relationship itself. Interdependence brings both significant risks and potential benefits. My focus in this section is on risk. In particular, this recurring and gendered sharing pattern produces serious risks for women in terms of access to financial resources and power. For many women, that risk translates into significant disadvantages in the market, and at home.

It is well established that women have less power in the labor market. Even when women work full-time, they still earn significantly less than men. The numbers show that the gender wage gap has slowly grown smaller, but persists. Looking at full-time, year-round workers, since 2004 through 2010, women earned 80 to 81% of what men earned. Adding race to the picture, the wage gap is worse. In 2008, an African American woman earned just 61 cents for every dollar earned by a white, non-Hispanic man, while a Hispanic woman earned only 52 cents on the dollar compared to white, non-Hispanic males.

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148 Vogler, supra note 84, at 19 (quoting S. Singh & J. Lindsay, Money in Heterosexual Relationships, 32 Australian & New Zealand J. Sociology, 57, 67 (1996)).


But that is just one part of the story. The wage gap data significantly understates women’s economic disadvantages. It leaves out large numbers of unpaid caregivers. It is well documented that employed mothers earn significantly less than non-mothers. The literature has identified this effect as a “motherhood penalty,” or a “family gap.” In addition, the wage gap data is based on full-time year round workers—and so excludes almost half of all women. Recall that the Changing Rhythms data found that 43% of mothers do not work year round, and mothers average about 1200 hours in paid work annually. Women scale back their paid market work in significant part to allow time for care work. “Many mothers engage in various forms of underemployment, opting for jobs that demand less of them than their skills would otherwise warrant or working part-time or intermittently (or both).” Of course, working fewer market hours decreases women’s earnings and earning power. One set of researchers calculated that women take home 41% of all labor market earnings, whereas mothers command only 28%. That means that among families with children, fathers earn almost $3 for every $1 earned by mothers. Calling this a “mommy tax,” other researchers have looked at lifetime earnings reductions, and the estimates range from $1,000,000 for higher earning mothers to $600,000 (for a family earning of $45,000 a year, with the mother’s earnings being $15,000). One recent study estimates that women who leave the workforce for only 2 to 3 years, experience a 30% drop in lifetime earnings.

These gender differences in the market are paralleled in the family economy. Corresponding to the increase in labor market participation, women’s contributions of earnings to the family have been shifting upward. Yet because women work and earn less overall in the market than men, a significant disparity continues. For example, you see both an increase and the continued disparity in recent comparative data on married couples. In 58% of married-couple families in 2007, both the wife and husband had earnings from work, up from 44% in 1967. Couples in which only the husband worked represented 18% of married couple

153 BIANCHI ET AL., supra note 12; Labor Force Participation Rates, supra note 70; Employment Characteristics of Families, supra note 65.
154 GORNICK & MEYERS, supra note 23, at 8.
155 For a convincing development of these points, see WILLIAMS, UNBENDING GENDER, supra note 21, at 1–3; GORNICK & MEYERS, supra note 23, at 147.
156 GORNICK & MEYERS, supra note 23, at 48.
157 Id.
158 Id. at 47 (citing ANN CRITTENDON, THE PRICE OF MOTHERHOOD 88 (2001)).
159 Rose & Hartmann, supra note 59, at iii–iv.
160 WOMEN IN THE LABOR FORCE, supra note 60, at 75–76 (collecting and comparing data from 1967 and 2007).
families in 2007, compared to 1967.\textsuperscript{161} In 2007, working wives contributed 36\% of their families’ incomes, up by 9\% from 1970.\textsuperscript{162} The proportion of wives earning more than their husbands has also grown. In 1987, 18\% of working wives whose husbands also worked earned more than their spouses; in 2007, the proportion was 26\%.\textsuperscript{163}

C. Understanding Asymmetric Sharing

As is evident from the empirical landscape just described, many forces remain in place that channel men more into more market work and women more into unpaid family work. Rather than serving as a marker of equality, the increased participation of women in the workforce highlights—and for newcomers escalates—the tensions between work and family. Family life requires intense care work for children, for the disabled, for elders, for each family member, and for the household. For many families today, these demands have amplified as elder care needs are rising, cultural expectations and practices for parent’s time with children have risen, and “emerging” adult children now remain in the care of their families much longer than in the past. At the same time, the employment market continues to require time commitments from workers that often cannot be satisfied for workers with significant caregiving responsibilities. These unresolved conflicts create hefty and increasing pressures for families today, as the majority of American workers are also caregivers,\textsuperscript{164} a phenomenon that is on the rise as more women join the paid work force—and the elderly population swells.

Unquestionably then, couples’ economic behavior responds to the time crunch that characterizes modern family life.\textsuperscript{165} There are structural tensions embedded in work and family obligations. It is a formidable challenge for both partners to work full-time year-round, over many decades of employment. Partnering and sharing workloads can be an effective mitigation strategy.

Yet, another force remains strongly influential in couple’s sharing patterns. The power of gender norms must be taken into account in understanding and developing a legal response to sharing and vulnerability in couple relationships. Intimate partner relationships are an important arena for experiencing and constructing gender identities and that very often includes marking differences—viewing men as masculine and women as feminine.\textsuperscript{166} This can profoundly impact behavior as well as perceptions. One consequence of the existing gender

\textsuperscript{161} Id.
\textsuperscript{162} Id. at 77.
\textsuperscript{163} Id. at 78.
\textsuperscript{164} HEYMANN, supra note 55, at app. F.
\textsuperscript{166} See MODERN COUPLES, supra note 87; Steven L. Nock, Time and Gender in Marriage, 86 Va. L. Rev. 1971, 1977 (2000) (“Recent research has shown that husbands and wives consistently behave in ways designed to maintain their senses of masculine and feminine identities.”).
framework is that it makes it easy to view women’s market attachment as tentative and flexible—and this sharply increases the odds of that attachment being lessened or severed. No less important are the internal effects: the shaping of an individual’s sense and depiction of self, as well as connections with others.\textsuperscript{167}

Even today, with many recent and ongoing changes percolating in family life, gender norms and the identities of individuals and couples drawing on those norms drives the choices many couples make.\textsuperscript{168} As a group, women, but not men, tend to scale back their market hours, and continue to do the bulk of the care work at home. As is perhaps best evidenced by the empirical data just presented on how couples actually behave, the traditional models of men as breadwinners and women as caregivers remain prominent.\textsuperscript{169} The same conclusion is supported in the psychological and social science research on identity construction that I will briefly highlight here. Gender differentiation remains a key feature of identity for many individuals and for intimate partner relationships. However, as in the behavioral data, the research demonstrates change along with conformity to tradition, with complex and sometimes contradictory findings.

In recent decades, there have been remarkable ideological changes inside many intimate partner relationships. Rejecting rigidly separated roles, a majority of couples commit to sharing market work and family work—and egalitarian sharing is the explicit goal.\textsuperscript{170} So many intimate partners today—men and women alike—value equality within a sharing framework. This transition in values is an important shift away from patriarchal views of intimacy that dominated in the recent past.\textsuperscript{171} Also important, it marks a convergence in goals for many intimate partners, where both partners now commonly want time for family and a satisfying work life. This mutuality helps reinforce couples’ relational bonds and at the same time, can be a force for equality.

Yet actual sharing practices are not symmetrical. What explains the apparent difference between ideals and practice?\textsuperscript{172} Could couples’ claims to equality be just

\textsuperscript{167} See, e.g., Modern Couples, supra note 87, at 44.
\textsuperscript{168} See Williams, Unbending Gender, supra note 21, at 37–38 (persuasively describing a system of domesticity that acts like a force field pulling women toward traditional roles—the research detailed throughout this article indicates that this is still true).
\textsuperscript{169} See infra, Part II.
\textsuperscript{171} For an insightful discussion on shifting moral values in family law, see Naomi Cahn, The Moral Complexities of Family Law, 50 Stan. L. Rev. 225–71 (1997).
\textsuperscript{172} I have previously explored this question in the context of ongoing marriage. See Kelly, Money Matters in Marriage, supra note 15, at 128–29.
wishful thinking? It is possible that gender power differentials are embedded in accepted gender norms and often unseen even when present. Surely if equality means sameness of family and market work allocation, then the behavioral data shows that it is an yet unrealized goal for most couples. Unmistakably, part of the explanation is that there are structures in care work and market work that make it very difficult to equalize the kinds of work partners engage in.

But another explanation is also possible. For many couples it seems that equality does not mean sameness of the kind, or even quantity, of work. To the contrary, differentiation is an important part of how couples understand themselves and operate. Although the landscape is shifting and increasingly flexible, many men and women continue to construct their individual identities, as well as their partner relationships, by aligning with traditional gender models—and equality is a value understood within that framework. That equality is contextual is supported by the research of Steven Nock, a prominent sociologist, who finds that the practice of gender role division is widely regarded by spouses as fair, even if workloads at times are uneven.

173 For instance, that is the assumption that one set of psychologists takes to couples therapy. See Carmen Knudson-Martin & Anne Rankin Mahoney, Couples Gender & Power: Creating Change in Intimate Relationships xvii (2009) (“[C]ouples today frequently use a language of equality to frame their relationships. They speak as if they are fully equal, unaware of the insidious ways that gendered power affects them.”).

174 As a vivid example of the challenges, consider some couples who have publicly committed to equal sharing, defined as equal division, through a process called “equally shared parenting.” The descriptions by couples who attempt to achieve this goal document how difficult it is to defy gender norms at home and also to navigate work demands to allow for care-giving. Some couples report that the experiment is a success, while others report that they have given up and returned to the neo-traditional patterns. For a detailed description of this movement, see Lisa Belkin, Equally Shared Parenting, N.Y. Times, (June 15, 2008), available at http://www.nytimes.com/2008/06/15/magazine/15parenting-t.html?_r=3&oref=slogin&ref=magazine&pagewanted=all&oref=slogin; see also Mark Vachon & Amy Vachon, Equally Shared Parenting: Rewriting the Rules for a New Generation of Parents (2010) (describing the goal and strategies for achieving it).

175 See, e.g., Shari Kendall, Father as Breadwinner, Mother as Worker: Gendered Positions in Feminist and Traditional Discourses of Work and Family, in Family Talk Discourse and Identity in Four American Families 123, 124–25 (Deborah Tannen et al. eds., 2007) (finding that asymmetry is a defining feature in identity discourses where women who work see themselves as the primary caregivers with their partners secondary).

176 See, e.g., Modern Couples, supra note 87, at 76, 148 (observing the continued influence of male breadwinner and female caregiver models along with commitments to equality).

177 Nock, supra note 1666, at 1977. Similarly, another set of researchers found that men in the study who endorsed sharing housework nonetheless reported that their unequal contribution was fair. Instead of comparing themselves to their wives, they compared themselves to men in earlier generations who did little or no housework. See Amy J. Himsel & Wendy A. Goldberg, Social Comparisons and Satisfaction with the Division of
partner relationships “involves complex assumptions about give and take, benefits, and costs, over an entire shared past and an imagined shared future.” 178 Accordingly, couples have “a unique and idiosyncratic economy of exchange” that relies on “intimate, subjective, and private constructions of meaning.” 179 Role differentiation then may well be understood as equality. As I have advocated in earlier work, this perspective supports a definition of equality that “centers on equality of status—recognition and respect for each partner and the contributions that partner makes, whatever they may be.” 180 For many modern couples, that still means different contributions.

In addition to navigating equality and difference, intimate partners today must resolve competing claims for identity formation within existing sociocultural and economic constraints. Recurrently, the particular arrangements couples make draw on both new and older cultural norms. In her research on gender identity discourse, Shari Kendall explains that “[i]nteractions involving work and family do not concern merely who does what but entail a personal struggle in the individual’s identities as they attempt to reconcile competing discourses of gender relations.” 181 In this process, gender difference has diminished, but remains a defining feature in the relational landscape. As Kendall notes, a hybrid identity often emerges for women, so that a traditional caregiver role exists, but it is shared with a partner, and combined with market work. 182 This allows women to “simultaneously maintain their work identities within a feminist discourse and to sustain their identities as ‘good mothers’.” 183 A ranking among roles can be an important part of identity dynamics. Women may well see themselves as primary caregivers, with their partner secondary. 184 In parallel, women’s constructions of work-related

178 Nock, supra note 166, at 1981.
179 Id. at 1982; see also MARGARET F. BRINIG, FROM CONTRACTS TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 84 (2000) (observing that spouses do not keep track of contributions in successful marriages).
180 Kelly, Money Matters, supra note 15, at 129.
181 Kendall, supra note 175, at 124.
182 Id.
183 Id. at 125. Naomi Cahn has also suggested that wives perform in accordance with gender expectations and that this can produce social approval and interpersonal power. See Naomi Cahn, GENDERED IDENTITIES: WOMEN AND HOUSEHOLD WORK, 44 VILL. L. REV. 525, 532 (1999); Naomi Cahn, The Power of Caretaking, 12 YALE J. L. & FEMINISM 177, 200 (2000).
184 See Kendall, supra note 175, at 124–25, 154.
identities position them as merely workers and their male partners as breadwinners.\textsuperscript{185}

Men must also mediate competing claims for identity, but the prevailing norms continue to be quite different. Even with women’s increased market work, studies find that continuing strong pressure for men to be good providers.\textsuperscript{186} More recently, there is also an emphasis on fathers being more involved in care work at home.\textsuperscript{187} Interestingly, men’s breadwinner role and caretaking role are sometimes conceptually converged, because earnings are one way of caring for the family. Contributing income from market work is associated with being a good partner and a good father—and “[p]aid work hours ‘count’ as” family time.\textsuperscript{188} Indeed for some men, one important way to provide care for children is to finance the reduced employment of the mother.\textsuperscript{189} Indirectly then, some fathers see themselves as caring for dependents by subsidizing mother’s availability. Further, fathers may feel emotional closeness to children from providing a home and economically supporting the caregiver mom.\textsuperscript{190} Income can help build intimacy, as for example, it can be deployed to protect and nurture children in a safe neighborhood with good schools.\textsuperscript{191} As Bianchi and her colleagues suggest, given the prevailing norms, “it is very difficult to cut back on one’s role as a provider and still be a ‘good father.’”\textsuperscript{192} This might explain why when children arrive, men tend to work more, not fewer hours, and why many couples don’t even consider the possibility of the father decreasing his work hours even when the mother’s earnings are higher.\textsuperscript{193}

Men’s and women’s contrasting responses to job losses incurred in the recent economic recession provide a good contemporary example of how these ideologies can interact with behavior. Research shows that when faced with a job loss, mothers double their hours of child care, whereas fathers’ child care hours remain unchanged and were virtually identical to their employed counterparts.\textsuperscript{194} For many men, seeking employment is seen as the priority, with job hunting as the new,

\textsuperscript{185} See id. at 124–25 (citing support for her own findings to JEAN POTUCHEK, WHO SUPPORTS THE FAMILY?: GENDER AND BREADWINNING IN DUAL EARNER MARRIAGES (1997)).

\textsuperscript{186} See BIANCHI ET AL., supra note 12, at 11–13 (summarizing studies).

\textsuperscript{187} See id. at 11.

\textsuperscript{188} See id. (citations omitted).

\textsuperscript{189} See id.

\textsuperscript{190} See id.

\textsuperscript{191} See id.

\textsuperscript{192} See id. at 13 (citations omitted).

\textsuperscript{193} See id. at 12–13 (citations omitted).

Conversely, unemployed women find themselves with more time for the job they never left—their care work responsibilities. Aside from their potential impact on care and market work identities and behaviors, gender norms can also strongly impact how family members relate to one another. For many family members, love and connection is demonstrated, understood and nurtured through gender roles. Intimate partners may see sex role distinctions as a pathway to being male and female and, at the same time, as an important method for nurturing a loving relationship. As one set of sociologists recently observed, “[w]omen’s contributions of care and domestic work and men’s economic contributions and emotional support are still to a large extent used to express and are understood as love, intimacy, and caring.”

As the foregoing exploration reveals, sharing, identity formation and couple relations are complex processes. This helps us understand embedded role specialization, but also to see beyond it. Importantly, not every intimate partner relationship includes sharp gender differentiation. Additionally, where the asymmetrical pattern is present, it is often accompanied by role sharing, experimentation and gender role challenges or deviance. As couples have tended to move toward sharing market and family work, it becomes easier to view role differentiation as optional and departures from it as more acceptable. It is easier to call gender role assignments into question when they are not being strictly followed. Alternative models have emerged and are available to couples for consideration and possibly, adoption. For example, there are some couples who explicitly endorse and pursue a goal of “equally shared parenting,” a model where family and market work are equally shared and where neither partner is ranked as first expert in parenting or first priority in career development. Sharing behavior in same sex couples might also provide an alternative model. While some same sex couples follow a caregiver/breadwinner model, those roles are less obviously predetermined based on gender difference. Moreover, same sex couples as a group tend to have more symmetrical sharing of market and family work. So for all couples, there is now a range of models circulating—from the explicit distinction between caregivers and breadwinners, to the now typical family/market work hybrid with specialists in each area, and finally to equally dividing care work and market work.

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195 Id.
196 Id.
197 See, e.g., MODERN COUPLES supra note 87, at 44; Nock, supra note 166, at 1975–76.
198 MODERN COUPLES, supra note 87, at 44.
199 See id. at 13–14.
200 See supra note 174 (describing the approach and its challenges).
201 See supra notes 98, 100.
202 See, e.g., Solomon et al., supra note 94, at 561–71.
203 See SCHWARTZ, supra note 170, at 2–3 (separating married couples into three categories: (1) traditional, where there is a sharp differentiation between women’s sphere at home and men’s sphere in the market; (2) the typical arrangement today, identified as “near
It is possible that consideration of alternative models interacting with the multiple, and sometimes conflicting identities individuals have with regard to work and family will change and could even transform conventional gender norms. The idea that experimentation can shape gender identity over time is consistent with Judith Butler’s performative theory of gender, stemming from Foucault’s description of “practices that systematically form the objects of which they speak.”

Expanding on this concept, Butler argues that actual practices bring gender into being, by indexing and repeating normative patterns. Similarly, sociologists use the terms “doing gender” to describe the dynamic of developing and reflecting gender identity through conduct. The converse then might also occur, if couples see traditional patterns as flexible and deviate from them, over time sex role assignments might be diminished or deconstructed.

In summary, the allocation of market and family work in couple relationships stems from a complex, multifaceted and dynamic set of interactions. Research on behavior and gender identity demonstrates that traditional norms of gender remain strongly influential in how couples choose who will do what kind of work and how much. In the typical pattern today, labor division is differentiated by gender in an important part because its organization is grounded in conventional roles. In addition to weakening many women’s attachment to the market, this inheritance has become a significant part of individual and relational identity construction. Performing unpaid family work is a part of how many women constitute themselves as female, as mothers, as wives and girlfriends, and as contributors of love and care to their families. With different background principles in place, many men constitute themselves distinctly as breadwinners, taking pride in providing the primary economic support to the family as a way of caring for and connecting with their partner and their children, perhaps by subsidizing a mother’s diminished market attachment.

However, these models do not stand alone in influencing identity development. It has become more common and more culturally acceptable for women to be employed. In parallel, an ideal of gender equality is now commonly endorsed by couples. Interestingly, inside many contemporary intimate partner relationships, sex roles are simultaneously accepted, reproduced, and also at times resisted and rejected. Alternative ideals and arrangements have more prominently emerged as opposite sex couples, and especially same sex couples, challenge the gender link to care work and market work. Exploration of diverse models has the potential to challenge and even deconstruct gender roles. Still, a modified version

\[\text{footnote}{204}\text{Michael Foucault, The Archaeology of Knowledge 49 (1972).}\]

\[\text{footnote}{205}\text{See generally Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (1999).}\]

of conventional roles dominates today. Intimate partners must navigate these diverse views and complex processes within the socio-cultural context in which they are situated, as they determine their choices and identities.

III. NAVIGATING GENDER IN INTIMATE PARTNERSHIP LAW AND FEMINISM

What stance should intimate partnership law take with regard to the gendered sharing patterns and economic risks that continue to exist in many intimate partner relationships? In this section, I evaluate that question using a feminist legal theory lens. I advocate that intimate partnership law must simultaneously support the interests of community, individualism and equality that are at stake in law’s regulation of couple relationships. To do so, I expand on my earlier work regarding marriage law and propose that the law governing intimate partners should be based on economic sharing behavior and its effects. This offers a unified approach to laws governing married and unmarried couples and to property and support laws as well. This section overviews the theory, its application in the context of when couples break up, and its reformation of existing law. I suggest that this approach is consistent with an emerging pluralism agenda in both feminist legal theory and family law, and assert that it should be included as one part of a multi-faceted agenda for law reform.

I first briefly tour various strands of feminist responses to the risks of women’s specialization in caregiving. Mitigating harm from care work has been an important focus for feminist efforts to increase women’s economic power. I start by highlighting reform efforts in the public sphere. I do so to situate my proposal in context, and to emphasize its importance as a necessary part of the equality puzzle. Next, I turn to my reform proposal, its potential appeal in a pluralistic feminist and family law agenda, and its limitations.

A. The Public Sphere as Empowerment: A Tour of Feminist Responses to the Risks of Care-giving

The meanings of feminism have in recent decades become increasingly diverse, variable, and sometimes conflicting. Critical race theorists and queer theorists in particular have raised important questions about whose viewpoint is given voice in feminism and who might be left out. Single notions of truth have been strongly critiqued, urging instead the view that “truths are multiple, provisional, and thus linked to individuals’ lived experiences, perspectives, and positions in the world.” That said, across the different strands of theory, a widely


\[208\] Levit & Verchick, supra note 207, at 26–31 (providing a cogent description of these questions as raised by critical race feminists and lesbian feminists).

\[209\] Id. at 10.
recognized goal in feminist legal theory is to achieve equality among women and men. But what is the meaning of equality? How can it be achieved? These core questions remain contested and continue to generate diverse responses. Drilling down to the issue of intra-family allocation of market and family work as I do in this Article, feminists confront a central question: can we accept and value women’s association with care-giving and at the same time resist its assignment to women?

Both life at work and life at home have been the subject of feminist efforts to reduce gender inequality. In recent decades, however, the central focus has been on women’s access to and fair treatment in the employment market, with intra-family concerns garnering much less attention. Second wave feminists set the course still followed for much of the feminist reform agenda today—economic independence is targeted as a key goal, with the market viewed as the pathway to achieving it. These efforts are valuable as they have the potential to open up more options for both women and men—to allow for flexibility in who does market and care work. But the barriers are daunting. In particular, for a host of reasons, many women do not construct their lives or identities with economic independence as the goal. Instead, as I have described, sharing and interdependence characterize many intimate partnerships, and conventional gender models often steer the organization of family and work life.

Enabling women’s market work is an important empowerment strategy advocated by feminists. Vicki Schultz, for example, urges feminists to prioritize full engagement in paid work as an important source of satisfaction and independence for women. As some scholars have emphasized, wages are a particularly important resource for lower income women who are often not in a position to sacrifice income for more family care time. Linda Hirschman also advises women to “get to work” (and stay there). As I have said, strategizing full-time work is undoubtedly beneficial to women as it increases their economic power. But it also comes with some theoretical and practical problems. For example, being single and without dependents could certainly facilitate women’s market attachments. But of course, most women don’t follow that course, and nor should they be required to do so. Short of that, the model requires women to prioritize their jobs and figure out how to shift off the care work. Finding and financing quality dependent care on a large scale, outside the family, is extremely difficult. It is not a viable strategy for all women.

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210 Id. at 1.
212 See Vicki Schultz, Life’s Work, 100 Colum. L. Rev. 1881, 1883, 1939–40 (2000). Joan Williams refers to this as an assimilationist model, because it requires women to conform to male market norms. Williams, Reshaping the Work Family Debate, supra note 99, at 115–26. However, Schultz does argue for reducing the work week to 35 hours to facilitate work life balance for everyone. Shultz, supra at 1957.
difficult. At a minimum, it would require structural changes in the public sphere, and subsidies to those who cannot afford to pay privately.\textsuperscript{215} Moreover, it would require that family members diminish the care work they themselves provide—shifting not only work, but changing values that many may hold dear. As Joan Williams rightly points out, this strategy leaves out the large number of women who don’t share these goals.\textsuperscript{216} The get to work approach doesn’t appeal to those who Williams calls “femmes”—women or men who align themselves with and celebrate traditionally feminine standards.\textsuperscript{217} It has limited appeal to the many women today who want substantial time for both market and family work, and are struggling for balance.\textsuperscript{218}

A more middle ground approach has emerged among some feminist legal theorists, who work to restructure the public sphere to support the efforts of the majority of today’s families who engage in both market and family work.\textsuperscript{219} A key goal is to facilitate and expand women’s \textit{options} for women’s attachments to the labor market by explicitly accommodating for care work responsibilities. From this, a set of prescriptions has emerged as contenders for reform. In terms of supporting employees with care responsibilities, models include providing workers with more flexible schedules, reduced hours, proportional pay and benefits for part-time workers,\textsuperscript{220} and better family and medical leave—preferably paid, and with job protection.\textsuperscript{221} Government incentives to businesses and individuals could also play an important role.\textsuperscript{222} In terms of enabling “outsourcing” of some care work from the family, proposals include changing children’s school days to more

\textsuperscript{215} Schultz, \textit{ supra} note 212, at 1902 (advocating full employment for women).

\textsuperscript{216} See Joan Williams, \textit{“It’s Snowing Down South”: How to Help Mothers and Avoid Recycling the Sameness/Difference Debate}, 102 COLUM. L. REV. 812, 814 (2002).

\textsuperscript{217} \textit{Id.} at 815.

\textsuperscript{218} See discussion \textit{ supra} Part II.


\textsuperscript{220} See, e.g., WILLIAMS, \textit{Unbending Gender, supra} note 21, at 99–100.

\textsuperscript{221} See, e.g., Lester, \textit{ supra} note 219, at 2–3, 80–81 (listing various paid leave proposals for both men and women); Kessler, \textit{ supra} note 219, at 460–67 (arguing that the importance of family caregiving work calls for employer accommodation).

\textsuperscript{222} For a list of such proposals, see Joan C. Williams & Holly Cohen Cooper, \textit{The Public Policy of Motherhood}, 60 J. SOC. ISSUES 849, 857 (2004).
closely track the business hours many parents typically work, and making quality child care more widely available and affordable.\textsuperscript{223} Although it has been emphasized much less, making time and money available for elder care must also be part of a care work reform agenda.\textsuperscript{224}

The strategy of supporting care work and market work simultaneously has great potential to increase women’s market power by mitigating care work penalties. At the same time, by working to dial back the time crunch families now experience, it expands opportunities for men and women to share family work more evenly. But again, successful implementation of proposals like these requires changing infrastructures. That is difficult. The powers that be will likely need to be convinced there is a serious problem with the way things are now and that change will clearly result in advantages that outweigh its costs.

Gender norms are another strong force of resistance against strengthening women’s attachment to the labor force.\textsuperscript{225} A large cohort of women will likely be reticent to further “depersonalize” care work and purchase the “services” elsewhere. For men, diminishing market work and earnings in exchange for unwaged care work would defy the still influential breadwinner norm. Such resistance will make it harder to gain adoption and implementation of the changes. If adopted now, the feminist public sphere reform agenda would provide opportunities for role flexibility that differs from the conventional gender behavior patterns and identities present in many families. This could certainly be viewed by feminists as productive. A structure that allows for casting off gender roles could help deconstruct the system. Role sharing with less specialization may unsettle the power of gender norms in some families. But the effects will predictably be partial, as a significant cohort of people won’t see the opportunity as desirable and won’t take it. So for some, gender scripts will be maintained or even strengthened. A more family friendly employment market could facilitate women’s ability, and perhaps desire, to scale back paid work in exchange for more time at home.

The family leave policies now in place in Sweden offer helpful lessons for both the potential and the limitations for strengthening women’s labor force attachment through a workplace regime that allows for care work. In Sweden, employees are entitled to take up to 38 weeks of paid parental leave, and that can be taken over time, allowing a parent to reduce their work hours by 25% until a child is 8 years old.\textsuperscript{226} The leave policies pressure men to take some of the leave through a public education campaign celebrating “Daddy Days” combined with a

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\textsuperscript{224} See generally Smith, \textit{supra} note 57.

\textsuperscript{225} See discussion \textit{supra} Part III.

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requirement that 30 days of leave is for fathers only, that must be taken or be lost. 227 This has resulted in 70% of fathers taking parental leave. 228 Further, studies suggest mothers’ earning potential losses are reduced if fathers take more leave. 229 To an extent then, Sweden’s approach is a success story for shifting stereotypical gender patterns, and for somewhat improving women’s earning power.

However, Sweden’s example is only a quite limited success. The female caregiver, male breadwinner model still holds overall. Women in Sweden take most of the available leave, with fathers accounting for only 12% of the total leave taken. 230 Moreover, 60% of Swedish mothers work part-time, compared to only 5% of fathers. 231 One key reason for this pattern is mothers’ preferences. In one survey half the mothers explained that they wanted all the days of leave to themselves. 232 Some employers also resist paternal leave. 233 Additionally, Swedish women still perform a disproportionate amount of family care work. 234

What’s a feminist to do? One important reaction is to notice that complex dynamics interact with decisions about how to allocate wage work and family work. Another is that the extent of women’s attachment to the work force is going to vary, even if changes supporting caregivers’ market attachment are made in the public sphere. While some women will develop and maintain a strong connection to the market, others will scale back or disrupt their attachment to dedicate significant time to care work.

In my view, this supports the call for a pluralism agenda, one that strategizes women’s attachment to the market as well as the unpaid care work women so often perform. This places me in the company of scholars who have argued that a feminist agenda must be inclusive and serve multiple and diverse constituencies of women and of men. Notably, Joan Williams persuasively argues for reconstructing feminism with this multiplicity in mind. 235 She argues that “feminists seeking to

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228 Conversely, according to Halverton, in the United States, slightly more than 3% of all male employees take paternity leave under the Family and Medical Leave Act. Halverson, supra note 227, at 260.

229 BARTLETT & RHODE, supra note 226, at 182.

230 Id.

231 Id. at 182 (citing to surveys discussed in Ira Mark Ellman, Marital Roles and Declining Marriage Rates, 41 FAM. L.Q. 455, 482 (2007).

232 Id.

233 Id.

234 Id. at 183.

235 See generally WILLIAMS, UNBENDING GENDER, supra note 21, at 231, 271–73 (arguing that a balance needs to exist between the family caregiving role of women and an economic provider role of women).
Empower women within domesticity and those who seek gender flux.\textsuperscript{236} Espousing a similar vision, Linda McClain has argued that liberal feminism must include room for debate about values, and that we need not force a “stark pick between mothering and contract, or care and justice, or connection and separation.”\textsuperscript{237} The chorus of “middle ground” feminists who seek to expand women’s choices in the market while also valuing care work are constructing a pluralist market and family system. That structure might result in what some feminists hope for: it can facilitate dual roles for women and for men, and result in more gender flexibility. However, it may also have results that some feminists would denounce. By enabling and normalizing reduced work attachments to make space for care work, it becomes easier for women to take that path and to heed the call of gender scripts. I support this dual approach as it affords women and men a range of choices about how to organize work and family life. That opens the door for resisting traditional roles but also supports families who do not. Although in a different context, my proposal discussed next serves plurality in a similar way.

\textbf{B. Work at Home as Empowering: Economic Sharing as the Basis for Intimate Partner Economic Relations Law}

\textit{1. Life at Home as a Piece of the Equality Puzzle}

As the experiences in Sweden make clear, reducing constraints for women to engage in market work is only a part of the equality puzzle. Feminists must attend to the “private” sphere of family life as well. As this Article reflects, one of my projects is to investigate equality concerns inside couple relationships. At the same time, I see modern family life as holding much promise for supporting the values of autonomy and plurality. This circles back to a goal held by early feminists who saw the prospect of internal reformation of marriage as a priority, but then later shifted gears to suffrage.\textsuperscript{238} However, with notable exceptions, internal family relationships have not been favorably viewed by feminists as a resource for nurturing women’s autonomy. There are good reasons to be wary, as the history and effects of patriarchy still loom large. Also, there are legitimate concerns about state intervention in family life. Perhaps in part for these reasons, working to change the market has enjoyed wider appeal.

With these cautions in mind, internal family life must be included to meaningfully explore and support autonomy. I next pose some possibilities for common ground among feminists. The ideology and the practice of women taking on the bulk of unpaid family care work coupled with women’s tendency for lesser attachment to the market is an important source of economic inequality. In significant part, this inequality is often developed inside couple relationships.

\textsuperscript{236} Id. at 231.
\textsuperscript{237} McClain, supra note 219, at 1263.
\textsuperscript{238} NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 64 (2000).
through collaborative decisions to allocate family resources and often results in role specialization. However, as highlighted earlier, just as care-giving brings risks, it also brings rewards to the many women who value and identify with that work. As I see it, a core goal for equality between the sexes is to support autonomous choice—to build an environment where women and men have more freedom to develop and implement unproscribed choices for how to live their lives. A commitment to autonomy so defined must necessarily be accompanied by respect for different choices—by a commitment to plurality. In addition, a healthy dose of pragmatism is useful in working to actualize equality’s component parts of autonomy and plurality. The reality is that decisions about how to allocate market work and care work are shaped by many forces, and these must be taken into account in understanding how to make choices freer. In particular, the power of gender norms in shaping behavior must play a central role is understanding and supporting autonomy.

2. Sharing and Its Effects as the Foundation for Intimate Partnership Law

With the issues of autonomy, plurality, and the resilience of gender norms in the foreground, I now turn to my proposal. In previous work, I have critiqued the overly individualistic and market-focused approach in existing marital economics law. In contrast, I have developed a theory of interdependent sharing behavior as the basis for property and support law applicable at divorce, and also in the context ongoing marriage. Drawing on the partnership ideal that is, to an extent, already part of existing law, I have articulated and advocated an explicit theoretical framework for spousal economic relations law, and outlined its law reform implications in several contexts. Here I begin to expand the reach of the theory to cohabitant relationships as well, arguing its appeal for a pluralist feminist family law. What follows is an overview of the intimate partnership model I advocate, a sketch of core legal principles that implement it when couples break up, and highlights of its departures from existing law. Although the theory is applicable across a number of contexts, I set aside discussion beyond dissolution for another time.


240 See generally Kelly, Rehabilitating Partnership Marriage, supra note 15; Kelly, Money Matters, supra note 15.

241 Here I map core principles, but set aside an in depth exploration of the theory across intimate partnerships. In other projects, I am developing the theory across formal and informal couple relationships and its cumulative implications at break up, at death and in ongoing relationships. I also have an article forthcoming that considers how to use partnership as an advocacy tool in the existing legal landscape. See Alicia Brokars Kelly, Actualizing Intimate Partnership, 50 FAM. CT. REV. (forthcoming 2012).
Intimate partnership law must simultaneously support the interests of community, individualism, and equality that are at stake in the law’s regulation of couple relationships. In particular, given the significant cohort of women who become financially vulnerable when partnered, law must be committed to gender equality. To support these interests, I propose that economic sharing behavior and its effects should be the core foundation for couple’s economic relations law. This offers a unified approach to law for married and unmarried couples.

More specifically, sharing must be defined broadly. As I have highlighted above, partner’s mutual contributions of paid market work and unpaid family work is a core part of the sharing process. However, economic sharing extends beyond labor contributions. As a part of a shared life, many couples understand economic power as a family resource to be developed and allocated collectively. Accordingly, partners often function as an interdependent economic unit, negotiating and jointly making a web of decisions about wealth production, investment and consumption. Choices about labor division and career development or diminishment are a part of this merger.

Next, law must account for the positive and negative impacts that a shared life can produce. When intimate partners engage in interdependent sharing, that process strongly shapes couples’ lives together and each partner individually—financially and personally. In terms of financial impacts, collaborative economic behavior can raise the standard of living of the family, contribute to property acquisitions and sustain or increase earning power. At the same time, sharing can result in economic losses, contributing to debt accumulation, consumption, and especially for caregivers—decreased earning power. As developed above, with regard to earning power, women more often bear the disadvantages and men the advantages of joint choices about market and care work. Economic behavior frequently follows gender norms, with men contributing more market earnings, and women contributing more of the unpaid family care work. That tends to diminish women’s economic power in the market, and sometimes inside the family as well.

So I advocate that law must recognize the sharing process and its effects, and be designed to nurture its potential and mitigate its risks. However, there are limits to the sharing process that also must be recognized. Not all couples develop a joint economy. Some purposely keep their finances separate and other couples share some resources but not others. Even when there is a financial merger, that alone often does not account for all the wealth, debt, and earning power that partners have. Law must recognize that sharing significantly contributes to, but typically does not completely shape, each partner’s economic resources.

3. Applications of Intimate Partnership Theory

Next, I outline how this theory applies and departs from existing law by highlighting core rules for when couples break up. I recommend that the legal standard for married and unmarried couple’s economic relations law should be an assessment of the degree of economic sharing and interdependence in the relationship, with sharing rules that correspond and may vary. Law’s treatment
must include earning power, as it is a crucial resource for families. In addition, to protect the autonomy of both partners and to promote gender equality, market and care work must be equally valued.

As I will more fully describe next, across couples, this inquiry will reveal a range of financial behavior patterns from interdependent, to moderately connected, to largely separate.242 If a couple engages in an interdependent economic partnership by interweaving finances and resource allocation decisions, I advocate a modified and expanded community property regime that includes an equal entitlement to wealth accumulations during the relationship and includes a limited entitlement to share earning power through income sharing obligations.243 If instead a couple’s behavior evidences an individualistic approach or a much lesser degree of sharing, then no sharing rule or only a partial sharing rule should apply.

More specifically, at one end of the sharing spectrum, there is a large subset of couples who are financially interdependent. As a rebuttable presumption, married couples and those in a civil union or other formally established relationship that provides for marriage-like legal treatment belong in this category. As I have described, research demonstrates that overwhelmingly, marital partnerships are governed by an ideology and a practice of interdependent sharing, including a joint economy.244 Similarly, the available data finds that same sex couples who are married or in a formal marriage like union follow this pattern.245 The rules I suggest are a default approach that can be rebutted by evidence in the statistically unusual case that the partners do not in fact have an interdependent economy.246

A sizable subgroup of cohabitants will also fit into the “financially interdependent” category. For these partnerships, I recommend that the same sharing rules as for married couples. However, sharing patterns are widely variable in informal unions. As described earlier, one recent summary of the data finds that only one in two unmarried couples combine their incomes.247 Further, unmarried partners tend more often to operate as separate financial entities and to make economic decisions independently.248 Accordingly, sharing rules must be flexible and variable in response to couples’ differing economic activities.

In general, I am a strong supporter of default rules in family law because they are more predictable, can more reliably protect vulnerable persons, and are more easily applied by families without legal assistance. I am open to and indeed eager

242 See supra note 103–04 & accompanying text.
243 More broadly, the theory justifies vested co-ownership during ongoing relationships, at break up and at death. In addition, beyond private property law, couple’s rights should logically extend to other important financial resources available such as health care, taxes, and social security. I have limited my focus here to cohabitation rules at break up and its connection to divorce rules.
244 See supra notes 87–92 & accompanying text.
245 See supra notes 93–96 & accompanying text.
246 See Kelly, Money Matters, supra note 15, at 157.
247 See Heimdal & Houseknecht, supra note 103, at 532.
248 See supra notes 109–112 & accompanying text.
to develop off the rack rules for unmarried couples. However, a widely applicable default rule for cohabitants is just not warranted by the existing data. The exception is unmarried couples who live together with their joint (biological) child, who research finds develop a shared economy similar to married couples. Accordingly, cohabitants who co-parent joint children should automatically fall into the interdependent category. For all other cohabitants, I propose that simply by virtue of their status as intimate partners, with no other proof required, cohabitants should have a legal entitlement to make a claim to property co-ownership and income sharing. The extent to which those claims will be successful will depend on the degree of economic sharing in the relationship.

To determine this, I recommend that the key assessment is how much the couple has merged their financial resources. To be classified as interdependent there must be a demonstration that the couple has widely shared their money and/or jointly made decisions about labor allocation, investments and consumption. The evaluation then must consider pooling of finances and decision making, as well as labor contributions. A willingness to fluidly share money is a good marker for interdependence that shapes each partner’s financial power. This approach is supported by social science research, as merging financial resources strongly signals a collective orientation. So, for example, if a couple shares a bank account and fluidly uses it to funnel income and expenses for the family as a unit, there is very likely a joint economy. Another marker is if a couple collaborates regarding employment planning. For example, interdependence might be evidenced by a partner scaling back or withdrawing from market work, or if a partner sacrifices employment options by relocating for the other’s job. A finding of interdependence is also supported if a significant amount of time is spent by one or both partners on care for children, elderly loved ones or other dependents.

Other good evidence is if a couple registers as domestic partners under a system of rules that recognizes marriage-like legal obligations between partners. This can serve as an acknowledgement by the parties themselves that they function as a financial unit. A small number of existing domestic partnership registration systems provide equivalent rights to married couples according to state law. Couples who opt into such a regime must be included in the same category as married or unionized couples, with a presumption of interdependence. However, most domestic partnership rules today recognize only a limited set of benefits compared to marriage law, with no obligations. A typical set of rules requires that, through registration, partners designate each other as default beneficiaries for inheritance and for health care decision making. This is essentially an estate and health care planning device. It shows a desire to give a gift to a partner and to have their assistance if needed for medical treatment. Although it is evidence of a

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249 See supra note 122.
250 See Forste, supra note 84, at 98.
tentative and prospective economic connection at death, that does not necessarily mean a couple is acknowledging they currently have strongly intertwined finances. Notably, such regimes provide only default rules that can be unilaterally revoked by contrary documents such as a will and do not govern at all if a couple breaks up. So for partners who register under a system that is not a state law marriage equivalent, the extent to which a joint economy is demonstrated by domestic partnership registration will depend on the content of the rules subscribed to. The more extensive the partners’ rights and obligations, the more it functions as evidence of a joint economy. To summarize, although domestic partnership registration can be important proof of interdependence, unless it includes the same set of legal rights as marriage, it should not be determinative.

The legal standard I have been describing is based on economic sharing behavior. An interdependent economy and its financial effects on wealth, debts, and earning power is presumed for partners who are married or are in a legally equivalent formal union, and can be established by cohabitants who are not. The standard does not require evidence of intent or commitment. It is true that commitment often does shape economic behavior: as I have said, more committed partners are more likely to share economic resources. However, levels of commitment are difficult to ascertain, vary across couples and in any event can change and even be abandoned. Moreover, it is behavior that directly shapes the financial situation of the family and of each partner. The standard I propose is based on behavior and not intent.253

Grounding law explicitly on economic behavior makes it clear that marriage should not be the dividing line for economic rights and obligations for intimate partners. When couples function as a financial unit, legal regulation is needed to fairly distribute benefits and burdens collectively produced whether the relationship is established formally or informally. Accordingly, for unmarried couples who develop a joint economy, I propose the same set of rules for dissolution as I advocate for married couples.

I highlight some of the core rules for interdependent couples next. Because the sharing process predictably sculpts economic assets and liabilities, including earning power, I propose a co-ownership regime for wealth and debt that is applicable in part to income streams. More specifically, property and debts shaped by the sharing process should be co-owned in presumptively equal shares. Because the effects on earning power continue significantly beyond the time a couple separates, incomes should be shared so as to equalize the partner’s standard of living for a period of time post-dissolution. This can best be accomplished by adding up each partner’s income and then dividing that into shares. In terms of the duration of income sharing, I support an entitlement based on a formula, for a typically limited period of time that corresponds to the length of the relationship. A formula model is warranted based on the partnership framework I have developed.

253 For arguments that cohabitation law should be based on an intent standard, see generally Garrison, supra note 102.
Specifically, a formula is a good compromise solution to the difficulties in precisely identifying the impact of interdependent sharing on earning power. It is difficult to disaggregate the many variables that contribute to earning power. Still, as I have described, research demonstrates that partnering importantly effects career planning choices and market attachments. A formula can provide a rough approximation of those effects, yet at the same time it acknowledges that the impacts are partial. I have endorsed a model suggested by other scholars such as one year of alimony for every two years of marriage because that methodology serves to recognize that a collaborative economy produces short- and long-term effects on each person as they emerge from the relationship. Also crucial, however, there should be built-in limits on how long income will be shared, because the effects of financial sharing do not typically go on indefinitely, and were not completely produced by partnering. However, for very long-term relationships, the sharing process may have permanent effects on each partner’s financial power. In such a situation, a permanent award is appropriate.

I do not recommend that all couples should be governed by this regime. At the other end of the sharing spectrum from interdependent couples, there are some cohabitants and some statistically exceptional married couples who do not pool their economic resources and make communal financial decisions. In addition, there are some couples who share finances only to a limited extent. For couples like these who fall outside the interdependent category, sharing rules must be tailored to the specific economic behavior evidenced. If a couple forgoes sharing, then property and earnings streams should not be shared. If a couple is partially economically connected, then sharing rules should target only the assets and possibly the earnings streams that were combined and affected. As in the marital context, guidelines or formulas can be developed to provide a range of results that track differing levels of economic sharing.

4. Partnership as a Tool for Reforming Existing Law

This proposed regime departs from the perverse assumption and rules in much of couple’s law today that partners live largely separate and economically unconnected lives. Its serves to define, modernize and advance the contrasting model of intimate partnership that family law has begun to recognize. So far, however, partnership’s reach in law is much too limited and is in need of theoretical and practical development. As I emphasize below, in significant ways, the forty-one appropriately called “separate property states,” as well as the nine community property states, still maintain a set of default rules for couples that treat wealth and income acquisition as a solo activity. In particular, except for one state,

254 I have previously endorsed this type of formula that has been suggested by other scholars. See Kelly, Rehabilitating Partnership Marriage, supra note 15, at 206 (citing Jana Singer, Divorce Reform & Gender Justice, 67 N.C. L. REV. 1103, 1117–18). See also AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.06 (2002) [hereinafter ALI PRINCIPLES].
formal title governs property ownership for cohabitants. In addition, for married and unmarried couples alike, earning power is not generally treated as a joint resource.

To a limited extent, the idea of an intimate partnership has developed in law as an important exception to the individualistic norm that otherwise dominates. The law of property division at divorce is the best example. States have abandoned the former title-based system. Instead, regardless of title, most states have adopted community property rules in divorce law, and now categorize the couple’s wealth and debts as either separate or joint.\textsuperscript{255} Crucially, this approach assumes that the couple has engaged in an economic partnership with reciprocal contributions of labor.\textsuperscript{256} As I have described, that is indeed what most married couples actually do. So the rule logically provides that spouses are presumptively entitled to claim ownership of property acquired during marriage. There are exceptions—some marital acquisitions might yet be separate. The key assessment is whether an asset is produced by the labor or “contributions” of either spouse during marriage.\textsuperscript{257} If not, it is generally deemed separate property.

I endorse this system for its recognition that collaborative economic conduct should generate co-ownership claims, and also because it does allow for a spouse as an individual actor. However, the idea of partnership in law is quite vague. In addition, the existing narrow stronghold for partnership law does not go far enough. Couple’s sharing behavior has been neglected in significant aspects of divorce law, and much more so in cohabitant’s law.\textsuperscript{258} The consequence of this is that the risks and rewards of coupling are not borne evenly between the partners. This contributes to inequality. Current law imposes more economic disadvantages on caregiver specialists, who are overwhelmingly women, and provides greater rewards for market work, performed more by men. This supports not only gender inequality, but unfairly disadvantages cohabitants a group disproportionately populated by minorities, lower income, and LGBT persons.

The intimate partnership model I offer works to mitigate these deficits. First, I offer a broader and clarified definition for partnership. In existing law, partnership refers to joint labor and contribution. That is a helpful, but only partial

\textsuperscript{255}DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 470–72 (2d ed. 2009). A minority of states, often called kitchen sink or hotchpot states, do not have this dual classification system, and assume instead that all property should be subject to joint claims. \textit{Id.} at 474. My own view is that only property affected by the sharing process should be joint. The kitchen sink states cast too wide a net for some couples.

\textsuperscript{256}\textit{Id.} at 470–72.

\textsuperscript{257}\textit{Id.}

\textsuperscript{258}I have limited the discussion of partnership’s application here to the break up context, but it logically applies across the life various stages of couple relationships. Although property claims at divorce are now grounded on economic sharing, separate property states have not taken the next obvious logical step of adopting the same approach for all marital property laws. Only community property states appropriately recognize that partnership and co-ownership of property should extend to an ongoing marriage and at death, as well as at divorce.
understanding. Labor is too narrow a focus, and contribution is much too vague. Joint labor and contribution must be understood as components within a larger interdependent sharing framework. Many couples share not only labor, but merge their financial lives, collectively pooling, developing and allocating economic resources, including market attachments. Labor and contribution then are concepts that should be understood to reference this overarching sharing process. Beyond this, contribution can be reconstructed so that it serves to recognize the effects of sharing. Collaborative economic activities significantly contribute to and shape the financial status of each partner individually, including to an extent, their earning power. As I have described, these effects of sharing are often asymmetric, with women more often disadvantaged.

This fuller construction of partnership necessitates moderate change in property division at divorce. As I have said, there ought to be a rule or at least a presumption of equal division of property. That would recognize the reciprocal and typically unaccounted for contributions of both partners, and further would assign equal value to care work and market work. Instead, in most states today distribution is discretionary based on equity. It entangles judges in a practically impossible retrospective accounting of who gave what over the entire relationship and with what value added. That environment has allowed care work, still disproportionately women’s work, to be devalued. As I have developed elsewhere, care-work has been recurrently assigned no or much lesser value in property awards especially with larger estates.

More dramatic and urgent change is called for in alimony law. In both community and separate property states, alimony rules today are not generally based on a partnership of equals model. Instead, the legal standard is a discretionary assessment of the claimant’s needs. Earning power is viewed as individually earned and owned, with a possible obligation for “support” if the (usually female) partner is deemed dependent. The result is that alimony is awarded in only about 15% of cases, and when awarded, typically the amount is low and the duration short. Decision makers very often don’t see a woman’s lesser earning power as a need developed in the partnership, nor deserving of a shared response. To remedy this gendered injustice, law must recognize that the vast majority of spouses and many cohabitants engage in a broad web of economic sharing, and that this process predictably and significantly shapes the earning power of both partners going forward. Using a formula method that I described

259 ABRAMS ET AL., supra note 255, at 515–16.
261 ABRAMS ET AL., supra note 255, at 539–86.
262 AMERICAN BAR ASSOCIATION, http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/family/chapter_10.authcheckdam.pdf (last visited Nov. 25, 2011). This is consistent with the U.S. Census Bureau which has the nationwide figure of divorces that result in alimony awards at 14.6%. See U.S. CENSUS BUREAU, CHILD SUPPORT AND ALIMONY: 1985 14 (1987). For sources and discussion of the limited duration and amount of alimony awards, see J. Frantz & Hanoch Dagan, Properties of Marriage, 104 COLUM. L. REV. 75, 119 (2004).
earlier, alimony rules should be used as a tool for fairly distributing those effects. The partnership model I advocate supports a rebuttable presumption to alimony that equalizes the standard of living of the spouses and is related to the length of the relationship. That would result in more frequent and higher awards, and shift alimony’s foundation from dependency toward equal partnership.

Another essential reform is to extend the model to law governing unmarried couples. A partnership model has wrongly been confined to marriage law and has not generally been extended into cohabitant’s law. Yet many cohabitants engage in a partnership economy just as married couples do, and these couples should be governed by the same sharing rules. In addition, some unmarried and some married couples share finances only partially. Although to a lesser degree, that process can also shape financial resources, and warrants legal regulation. Ignoring these behaviors, existing cohabitation law assumes partners are independent economic actors. The default legal rules are that title controls and that earnings, wealth and debt are acquired and owned individually.263

By adopting exceptions on an ad hoc basis, nearly all states have at least implicitly recognized that the solo acquisition rules can be unjust. These exceptions are a positive step toward reform and do sometimes, to a limited extent, recognize partners’ economic connections. However, as I describe next, the rules that have developed are often inadequate in recognizing, differentiating, and responding to couples sharing behaviors. They tend not to be a good fit for intimate relationships. Overall, as is true with significant aspects of modern marriage law, cohabitation law often unfairly leaves partners with individual ownership of financial benefits and or burdens that were developed collectively. Again, this is especially harmful to caregiver specialists, who are overwhelmingly women. The expanded partnership regime I have recommended is urgently needed.

Three states steadfastly disregard informal sharing patterns, affirm the title system and grant no other possible legal claim to cohabitants.264 A modest improvement on this, a small number of states will allow a departure from the default rules only if cohabitants have a formal written contract that allocates rights and responsibilities.265 Not surprisingly, however, the standard form contract for cohabitants is designed to protect the more economically powerful partner and confirms the existing individualistic default rules.266 Because of this, allowing an exception for a written contract is unlikely to help a partner made vulnerable through sharing, especially unpaid caregivers. It certainly might be helpful to a

264 These states are Illinois, Georgia and Louisiana. ABRAMS ET AL., supra note 255, at 539.
265 For sources and discussion, see BOWMAN, supra note 82, at 50–51. See also 25 N.J. STAT. ANN. § 25:1-5(h) (2010) (requiring cohabitant support agreements to be in writing to be enforceable).
266 See, e.g., 7 WEST-LF § 9:15 (cohabitation agreement form for couples with children).
partner who wishes to maintain separate finances, but current default rules make that less necessary. In any event, requiring a written contract is not a practical approach for fairly regulating cohabitant’s economic connections, because only a small percentage of cohabitants have them. Intimate partners tend to interact informally. In addition to a written contract, most states will also allow a property claim based on an express oral contract. As is true with the other possible exceptions to separate ownership, the burden of proof is on the claimant. The untitled partner must prove that the couple has explicitly and mutually agreed to specific terms regarding ownership of property in the future regardless of title. It is unusual to have these facts, and difficult to succeed with this theory.

Most states also allow a partner to attempt to prove an implied in fact contract. The standard evaluates whether the couple’s behavior implies an understanding between them. This rightly considers economic behavior, but the doctrine is not based on the impacts of sharing as I suggest. Instead, it is based on consent. Because of that, even in the frequent situation where partners share finances, decision makers are asked to speculate about what legal result the parties intended. I suspect that some couples have not actually developed mutual intentions as to their economic rights and responsibilities, and instead operate upon the assumption that they will remain together indefinitely. In addition, in intimate relationships sometimes people make gifts or make economic sacrifices in order to care for a loved one. Altruism is surely one way of understanding sharing behavior. That makes it harder to support an inference that sharing or sacrifice is consideration for a contract. Even assuming a court is inclined to read sharing behavior as intent, lack of specificity as to the content of the agreement is a real problem. Did the couple intend to simply share expenses for joint day to day consumption? Did they intend to share only while together? Or instead to grant one another long term co-ownership of wealth? If so, what wealth is included in their agreement? Should equal shares be implied?

Another serious barrier is that the doctrine traditionally has been asset specific and reliant on direct economic contributions. Consider, for example, if one partner contributes to the down payment of a house that is in the other partner’s name. If the untitled partner can refute that the money was a gift, he or she can argue that the contribution was made based on an unstated agreement that, at least to the extent of the money given, the untitled partner is an owner of the house. Now consider if the untitled partner did not directly contribute to the house and instead provided most of the unpaid care work and diminished her attachment to the

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267 See, e.g. BOWMAN, supra note 82, at 52 (describing Minnesota study finding 21% of cohabitants have written agreements).


269 Of course it is not the only way. Altruism can also be present alongside other explanations, like an intended partnership.
market to allow for that. It is much harder to persuade a judge to imply that her behavior must have been in exchange for an ownership interest in the house.

An untitled partner’s best argument for an implied contract is actually my definition of economic partnership with imputed consent to co-ownership as an added layer. The argument is that the partners engaged in a broad interdependent web of economic and non-economic sharing, and so must have intended that the two of them would collectively own any benefits produced from that process. A line of reasoning similar to this is sometimes accepted.\(^{270}\) I suspect that courts finding implied contracts are taking advantage of the ambiguity in the doctrine to mitigate inequities that would otherwise result. For courts willing to ignore or fill in the gaps in intent, consent is replaced with equity. Other courts are not so inclined. This is unpredictable and unjust. It misses partners who deserve a remedy. Even for those couples it assists, the scope of the implied agreement is usually too limited. The claim generally relates to economic gains, and ignores losses. Further, as is true with cohabitant’s law more generally, it does not include sharing earning power.

Another possible claim for an untitled partner is to argue that, regardless of consent, it would be “unjust enrichment” if title controls. This doctrine is also narrow, vague and unpredictable. Like implied contracts, the claim is usually deemed applicable to a specific asset, such as the couple’s residence, and not across the web of economic resources the couple has. It too investigates the possible enrichment of one person and ignores financial losses. It then begs the question of what makes any enrichment unfair. The only answer given in law is that it is in the court’s discretion, with the burden of proof on the untitled partner. Not surprisingly, the results very often do not adequately account for the risks and rewards of partnering.

However, unjust enrichment can sometimes be a helpful resource for an untitled partner in obtaining at least some remedy. Because it is a flexible, equitable doctrine, partnership economic activity can be drawn on as the basis for a claim. The argument to be made is that engaging in a collaborative economy makes it unfair that the titled party retain the benefits of the merger. Especially when there is some direct financial contribution made to a particular asset in dispute, courts sometimes agree.\(^{271}\) My own reform agenda suggests more broadly that across couple relationships, an interdependent economy and its impacts should be law’s foundation, and law must fairly distribute both benefits and burdens.

These exceptions to the title-based system for cohabitants allow for the possibility of a property claim. However, because of the difficulties in proving

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\(^{270}\) See, e.g., *In re Estate of Roccamonte*, 808 A.2d 838, 844–45 (N.J. 2002) (finding partnership behavior to be evidence of an implied contract). However, palimony claims based on implied contract have since been rejected in New Jersey and a writing is required to enforce a cohabitants support claim. See 25 N.J. STAT. ANN. § 25:1-5(h).

\(^{271}\) See, e.g., *Salzman v. Bachrach*, 996 P.2d 1263, 1266 (Colo. 2000) (requiring compensation for one partner’s direct financial contribution in a home titled in the other partner’s name).
these doctrines, and because they are inherently limited, existing cohabitants’ property law is unpredictable and unjust.

Yet another serious deficit is that unmarried couples do not have a legal entitlement to claim support. The only exception is the rare case where there is a contract. Most states will potentially recognize a contract for support, but claims based on an oral agreement or especially an implied one are exceedingly difficult to win.272 There have been some occasions where a “marital-type” relationship has been found to support a finding of an implied contract for support.273 But the trend is for the opposite—written contracts are increasingly required as the only possibility.274 In addition, a few states simply won’t recognize a support claim even if consented to in writing.275

Common law marriage is potentially another option for cohabitants. If a couple meets the standard, they qualify as spouses with the full marital legal regime applicable. However, only 12 jurisdictions still retain the doctrine, with most states having abolished it.276 In the states that do allow it, proving a common law marriage can be difficult. It requires proof of living together; a mutual intention to be married; and holding out to the public as a married couple.277 The intent element can be implied based on behavior. Economic collaboration is helpful evidence. To an extent then, economic behavior is recognized as part of the body of proof that demonstrates intent to marry. However, the standard is not based on economic activity, as my proposal is. It is based on intent, and holding out is required as a way of proving it. The doctrine then is similar to an implied-in-fact contract, but additionally requires intent to be married (not just to be partners) and requires a public reputation confirming this. Although it may be helpful to the small number of couples who qualify for recognition of their self-acknowledged informal marriage, it leaves out most cohabiting couples today who will not be able to claim or to meet this standard.278

There is one state that departs from the cohabitation law’s dominating norm of individual acquisition with narrow exceptions. Washington State explicitly departs from the title system for unmarried couples. Instead, the legal regime is

272 For a thorough evaluation of cohabitant contract claims, see BOWMAN, supra note 82, at 47–53.
273 See In re Roccamante, 808 A.2d at 844–45.
275 Again, the three states that reject any form of cohabitant claim are Illinois, Georgia and Louisiana. ABRAMS ET AL., supra note 255, at 539.
276 Id. at 162.
277 Id.
278 For advocacy of common law marriage as a useful and tool for addressing cohabitation, see generally Cynthia Grant Bowman, A Feminist Proposal to Bring Back Common Law Marriage, 75 OR. L. REV. 709 (1996); Garrison, supra note 102. Professor Bowman has shifted her reform agenda for cohabitation law away from common law marriage, concluding that it is too limited in its existing form. See BOWMAN, supra note 82, at 226 n.12.
based on the nature of the relationship itself. Evaluating five factors, legal decision-makers must determine if cohabitants engaged in a “marital-like” relationship. One of the factors is the “pooling of resources and services for joint projects.” The other factors examine the intent of the parties and the duration of the relationship. For couples who fit the standard, the same property rights attach as for married couples at break up and at death. Importantly however, there is no support claim available.

Although applicable only when cohabitants break up, the American Law Institute has proposed a similar approach, but goes a crucial step further and authorizes support as well as property rights. Like in Washington, a couple must qualify as “domestic partners,” but that status is presumed if the cohabitants live together for a certain period of time. The ALI defers to states to define the timeframe, and implies that there should be a different, presumably shorter period for qualification if the couple lives together with their common child. If the couple doesn’t qualify based on the duration of the relationship, the claimant must prove that for a significant period of time, the couple shared a residence and “a life together as a couple.” “A life together” is evaluated based on “all the circumstances” including a list of eleven factors. Collaborative economic behavior is identified as relevant evidence along with cohabiting, having children, commitment, promises, reliance, intimacy and public reputation as a couple. If a couple qualifies as domestic partners through any of these alternatives, the ALI treats them as if they were married.

In her new comprehensive book on the law of unmarried couples, Professor Cynthia Bowman endorses a modified version of the ALI approach. She proposes elimination of the multi-factor test, and supports a simplified default rule that treats an unmarried couple the same as a married couple if they have lived together for more than 2 years or have a child. Bowman also argues for extension of this treatment to other bodies of law that impact cohabitants, such as inheritance and health care law.

In significant respects, relationship-based models such as the ALI, Bowman’s proposal and Washington State are consistent with the partnership model I propose.

\[280\] Id.
\[281\] Id.; Oliver v. Fowler, 168 P.3d 348 (Wash. 2007).
\[282\] ALI PRINCIPLES, supra note 254, § 6.03.
\[283\] Id.
\[284\] Id.
\[285\] Id.
\[286\] Id.
\[287\] BOWMAN, supra note 82, at 224. As Bowman acknowledges, Professor Grace Ganz Blumberg recommended a similar regime many years before the ALI Principles were developed. Id. at 225 n.5 (citing Grace Ganz Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. REV. 1125, 1166 (1981)).
\[288\] Id.
\[289\] Id. at 224–25.
because they are grounded to an extent on economic sharing behavior, and extend beyond traditional marriage. As I have described in an earlier article, although the ALI explicitly rejects partnership as its basis and does depart meaningfully from some of the principles I advocate, in significant respects it is compatible with the intimate partnership theory I advance.

In terms of methodology, the factors-based approach in place in Washington, and for a small subset of couples under the ALI, is beneficial because it allows for an assessment of how a couple actually behaved and can account for variations from couple to couple. However, a multi-factor standard makes the inquiry diffuse and potentially confusing by including, but not prioritizing or relating, a list of other factors to consider. For example, intent is a factor in the ALI and in Washington, but its importance is not explained and neither is its connection to the other factors such as duration. In contrast, my proposal that cohabitant’s law should be based only on an assessment of economic sharing behavior is more focused and explicit, which should make it easier to understand and apply.

More importantly, the status approaches I have described seem to be in search of cohabitants who act like married couples typically do. If a couple “acts married” they will be treated as such. This can be viewed then as a modified version of common law marriage. In a different way, the regime I have mapped out is also designed in part to capture the group of cohabitants who “act married.” However, I set aside intent and commitment and focus on affording the same treatment to cohabitants who engage in the same economic conduct that married couples typically do. So I have a different definition of what part of “acting married” should be the basis for law. In addition, my proposal goes further. The partnership framework I offer includes, but goes beyond “married-like” couples, and tailors a response to couples who don’t “act married” and who have differing levels of economic connections. In contrast, the Washington and ALI type models take an all or nothing approach, treating cohabitants as either married or single.

Another point of departure is that both the ALI and Bowman’s modified version of it rely on time rather than behavior as a key dividing line for who falls into which category. The ALI recommends that the period of time a couple has lived together should give rise to the same legal treatment as a married couple, but does not specify how long that period is to be. Bowman fills in that gap and proposes two years of cohabitation as the standard. The passage of time is apparently used in both proposals as a proxy for acting like a married couple. I share the same strong impulse to create default rules. As I have said, I agree with the ALI and Bowman’s suggestion that cohabitants who also are raising a joint child together should trigger the same rules as for married couples. The data supports that cohabitants raising joint children develop a merged economy. In contrast, it is not clear to me that time is an accurate measure of “acting married.”


See supra note 122 & accompanying text.
That may be why the ALI punted. Bowman has offered a thoughtful explanation for her two year rule. This rule has been adopted in a number of other countries, and it does eliminate a significant number of short-term relationships.292 Moreover, more so than the ALI, Bowman’s theoretical approach for cohabitation law complements in significant ways the theory I have been developing, as she grounds her proposed rules on an assumption of economic interdependence, and a goal of protecting vulnerable partners, and children.293

However, I am concerned that using two years of cohabitation as the trigger for marriage rules is both over and under inclusive. The data does not find that a certain amount of time equates to interdependence. Instead, as Bowman acknowledges, the research demonstrates that unmarried couples are significantly less likely to be financially interdependent than married couples, and that there is great variation in whether and to what degree cohabiting couples share money.294 Consider, for example, that about half of cohabitants keep their money separate, compared to no more than 15–20% of married couples.295 Because of this, aside from cohabitants with joint biological children, I have proposed a rule that directly evaluates and responds to the degree of a couple’s financial merger. However, I can see the strengths of a time-based default rule and would support one if there was a clear link between time and economic behavior. If a durational time frame is adopted as a trigger for sharing rules, I strongly prefer a rebuttable default rule such as the one I propose for married couples, one that can be deviated from if the facts are not consistent with the assumption underlying the rule.296

In summary, I suggest that in significant respects, contemporary marriage law and cohabitation law recurrently fails to recognize the scope and impacts of couple’s sharing behavior. As a result, it unfairly distributes economic burdens and benefits that sharing produces. The harms are disproportionately borne by women, by cohabitants, and by same sex couples. In contrast, I propose that economic interdependence should be the key inquiry for intimate partnership law for married and for all unmarried couples. I do so because it is the level of sharing in the relationship, and the length of time that an economic community continues that shapes the financial power of each partner. But not every couple deeply intertwines their financial resources, and longer relationships don’t necessarily mean there is a financial merger. To the contrary, there is significant variation in cohabitant sharing patterns, and in a small number of marriages as well. Accordingly, I have proposed rules based on and responsive to the sharing practices couples engage in.

292 See BOWMAN, supra note 82, at 225 n.5 (citing to Great Britain, parts of Canada, such as British Columbia, and parts of Australia).
293 Id. at 225.
294 Id. at 139–40 (citations omitted). For an argument that the data shows that most cohabitants are independent and married couples are interdependent, see Garrison, supra note 102, at 845–46.
295 See BOWMAN, supra note 82, at 139–40 (citations omitted).
296 The ALI uses a rebuttable default model. In contrast, Bowman allows only a written contract to overcome her default rules. See id. at 228–29.
5. The Virtues of Sharing Rules

The sharing theory and rules I propose have important distributive effects. Particularly important for women’s autonomy interests, a co-ownership regime provides a safety net against one-sided losses that would otherwise result from asymmetric sharing in intimate partnerships. Further, an equal ownership principle accords equal value to family care work and market work. Caregivers rightly then have earned a share of the wealth, including earning power, from their contributions. This helps level the playing field as couples negotiate family resource allocation. Last, the regime is applicable not only to married couples but to unmarried partners as well. That means same sex as well as opposite sex couples are included, as are minorities and those in lower socio-economic brackets who tend more often to engage in informal partnerships. This egalitarian approach protects all couples who engage in interdependent sharing.

In addition, the sharing rules I advocate have important normative effects—the potential to support or shape perceptions and behaviors in couple relationships. The model recognizes couples’ autonomous choices to define themselves as part of a collective. Because the risks and rewards of sharing are distributed equally, collaboration is nurtured in a way that facilitates the intimate connections couples so often pursue. At the same time, equality is served in a number of ways. Care work is given the same status as market work, recognizing the dignity and value of both kinds of labor, and of the persons who provide the work. This is a step toward gender equality. However, recognizing the value of care work does not mean it has to be assigned to women. A sharing framework values the contributions of the partners whatever they may be and allows for a range of sharing patterns including traditional sharply differentiated gender roles, partial specialization as well as equal sharing.

Another important benefit of my approach is that it is tailored and responsive to couple’s actual behavior patterns. It includes those who develop a joint economy that rightly should produce shared benefits and burdens. Also crucial however, is that it leaves out those couples who do not. This is especially advantageous to cohabitants, whose economic connections vary greatly.

6. The Possible Limitations of Sharing Rules

A group of legal feminists, including myself, have sought to diminish inequalities associated with caregiving by according it more value within the family, particularly in family property law. This approach has been critiqued not

297 In similar fashion, in ongoing marriages, I have advocated a co-management principle that requires mutual consent to major transactions. This provides another layer of protection to each partner who has the legal power to object. See Kelly, Money Matters, supra note 15, at 116.

298 There are many examples, so a small subset will have to suffice. See generally Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women’s Work through Premarital Security Agreements, 77 TEX. L. REV. 17, (1998) (proposing premarital
generally because of disagreement about the value of care work, but because of the potential adverse effects of “privatizing” its value. Martha Fineman, for example, advocates a public law response to the costs of caregiving, and indeed, urges the abolition of civil marriage based on her view that it impedes development of alternative structures for caring and connection.\textsuperscript{299} Some scholars, again including Fineman, are also concerned that valuing care work within the family is too partial—"to the extent it is linked to marriage, it doesn’t fully support care work that occurs in other contexts."\textsuperscript{300} Another problem identified is that the value of the care work will depend on “the man’s income” and that means women partnered with higher earning men will share more wealth in connection with caregiving than their lower income counterparts.\textsuperscript{301} Related is the concern that intra-family awards


\textsuperscript{299} \textit{See} Martha Albertson Fineman, \textit{Why Marriage?} 9 VA. J. SOC. POL’Y & L. 239, 244 (2001).


\textsuperscript{301} \textit{See}, e.g., Schultz, \textit{supra} note 212, at 1912 ("[J]oint property feminists tie homemakers’ pay to their spouse’s income—a methodology that introduces severe class bias."); Rosenbury, \textit{supra} note 301, at 249 (arguing that the state’s focus on caregiving in the home, perpetuates gender inequality by reinforcing that a woman’s worth is tied to her care of a man or a household). Professor Herma Hill Kay at one point suggested that removing alimony claims could be useful to incentivize women’s paid work. However, she
tied to marriage also tend to privilege middle class white women. These overlapping concerns arise from the fact that women with less income and wealth, and minority women (groups that intersect) are less likely to be married, and less likely to be married to wealthy men. Last, feminist scholars are concerned that valuing care work in private property law will perpetuate gendered patterns of care and gender hierarchy. For example, Vicki Shultz suggests joint property proposals based (in part) on care work make “traditional gender-based arrangements for household labor appear inevitable, [making] . . . it seem impossible to reshape social life to structure family life in more egalitarian ways.” Additionally, because it “rewards” care work, women have an economic incentive to do it.

Notice that in significant respects, criticisms of valuing care work inside the family have been linked to critiques of marriage more generally. To the extent that recognition of care work’s value hinges on marriage, then Martha Fineman is right, it is too narrow, in at least two respects. Private law approaches to valuing care work should not stand alone, but instead should proceed in tandem with public law approaches. Next, family property law claims can and should extend beyond marriage, and my proposal extends claims to intimate partnerships more generally. Extension of the lens across varying forms of relationship affords value to care work in marital and non-marital relationships and also reduces reliance on marriage as the hub of family law. This corresponds with a pluralistic approach now voiced among feminist and LGBT scholars that seeks protection of a greater range of human connections, beyond the marital relationship. Over-emphasis on the importance of marriage can marginalize, devalue and exclude non-marital relationships. As Nancy Polikoff advocates, the state should value all families.

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302 See generally Harris, supra note 207 (arguing for anti-essentialism in feminism).
303 See supra notes 105–08 & accompanying text (highlighting some research on cohabitation patterns, race, and economics).
305 See Schultz, supra note 212, at 1905.
306 See id. at 1908.
307 Joan Williams has proposed a persuasive and multi-faceted private and public law approach that supports and values care work and works to expand options for men and women’s lives. See generally Williams, Unbending Gender, supra note 21.
308 In a persuasive recent article, Professor Suzanne Kim has helpfully catalogued a set of potent arguments for what she calls “marriage skepticism” stemming from feminists and LGBT rights scholars. See Kim, Toward Skeptical Marriage Equality, supra note 304, at 45–47.
309 See id.
What of the critique that conferring joint ownership based on care work and market work reinscribes traditional gender patterns? This argument tends to be associated with viewing marriage as a problem for women, because it tempts them into gender conformity. Feminists have long been apprehensive of marriage as a vehicle for subordination of women and gender hierarchy. So, for example, Paula Ettelbrick provocatively asks: since when is marriage a path to liberation? This critique reveals a tension I have already highlighted that feminists continue to grapple with. How can law allow for deconstruction of gender scripts at the same time it values caregiver roles? The problem identified is that if you recognize the value of care work, you reward it, and that could give women more of an incentive for doing it, drawing more women in or more deeply into the gender pattern.

Notice that this view resists women’s traditional role as caregivers, and assumes that will reduce women’s vulnerability. This parallels the strategy of some feminists discussed earlier who see full engagement in the market as the way to achieve equality. However, refusing to “reward” care work unfairly leaves the caregiver saddled with economic disadvantages from the role she played to sustain the family. If disregarding care work is meant to be a penalty that works as a disincentive for doing it, many women are not heeding the warning, and do it anyway. It is pragmatic to recognize that many factors contribute to women’s greater share of care work, and that is likely to continue at least in the foreseeable future. Moreover, such an approach implicitly rejects a pluralistic feminism, one that respects and supports a range of choices for women and for men, who may choose care work, market work or some combination of the two.

Of course, I don’t agree with the approach that law should refuse to accord value to care work to discourage women from doing it. I argue that the penalty in law for care work should be removed. However, I understand the underlying concern about women being forever channeled into gender scripts, and association of this worry to marriage. And, it is true that gender role differentiation exists in many intimate partner relationships, especially in marriage. It is also true that marriage has roots in patriarchy. But there is no requirement for gender specialization in intimate partnerships, including marriage. We are not bound to our patriarchal past. We can constitute intimate relationships, including marriage, for ourselves. Couples can share how they like, and sharing patterns do vary. As I described earlier, on one end of the spectrum there are couples who follow very traditional gender norms. At the other end are couples who divide family and market work evenly between them, and there are many couples in between. We

311 See Kim, supra note 305, at 42–45.
313 See, e.g., Schultz, supra note 212, at 1905–06.
314 See supra note 212 & accompanying discussion.
315 See WILLIAMS, UNBENDING GENDER, supra note 21, at 97.
should recognize and support sharing in its many iterations in couple relationships. At the same time, a property sharing regime does important work in recognizing that caregiving asymmetry in the context of interdependent sharing relationships makes women vulnerable to economic harm and mitigates the risk. This approach protects and supports a range of choices for how to organize market and family life, and does so across marital and non-marital partnerships. In my view, such a pluralistic approach is called for: one that respects varied exercises of autonomy. Yet, we need to keep a wary eye on inequality. The legal environment should allow for flexible roles and create an environment where shifting power is possible.

I am hopeful the theory I offer is appealing as part of a pluralistic feminist and family law reform agenda. However, I do recognize that it has limitations. One criticism of partnership based co-ownership rules is that it is class-based. Specifically, the value to women’s care work is based on their husband’s wealth. It is true that the property (including income) that couples will share under my proposal will be greater or lesser depending on the overall financial status of the family. The redistribution or better yet the reconceptualization of wealth ownership I offer is intra-family, and relates only to intimate partner relationships. That comes along with a private property system: a sharing regime will depend on where the family starts out on the socioeconomic ladder. Because intimate partnership law is part of a private property system, it does not redress wealth inequalities across couples or individuals. That is a much larger societal issue that cannot be solved here.

However, the regime I propose does in significant ways respond to feminist calls for awareness and inclusiveness of the heterogeneity among women in terms of class, race and sexual orientation (among other intersectionalities). As I have said, extending partnership sharing rules to unmarried couples targeted only to those who develop a joint economy is an approach that is inclusive of lower income persons, as well as minorities and LGBT persons, who tend more often to be cohabitants. Further, the approach I offer is by design sensitive and responsive to variable sharing patterns, and does not sweep in those partners who operate as separate financial entities. It allows for difference in sharing and economic behavior.

One final limitation of note is that I do not include here consideration of the economic connections and risks that co-parents who are not partners have, or, of the vulnerabilities from care work that surround “single” parents. As I have said, I see intimate partnership law as only one part of the equality puzzle.

IV. CONCLUSION

The two circulating myths of economic parity between the sexes, and of separate individualism, flow over into intimate partnership and feminist legal theory. I have deconstructed these accounts to demonstrate how they are problematic and are linked. Many people do not live a life of independence and separation. Instead, most of us spend long periods of our lives with an intimate
partner, often with children, forging deep connections. Many of these relationships are governed by an ideology and a practice of sharing within a collective orientation that shapes the couple, and each partner individually. Along with potential benefits, the sharing process shapes behaviors and decisions and can produce vulnerabilities within and at the end of the relationship. In particular, sharing patterns in couples recurrently produce more risks for women than for men. With a shared economy in operation, against a backdrop of intense demands for market and care work, many couples continue to adopt gendered roles, with women disproportionately contributing care work to the family and men providing more in earnings from the market. This tendency for asymmetric sharing reduces women’s economic power in the market, and sometimes at home.

I have argued that interdependent sharing, bounded by a commitment to equality should be the theoretical foundation for intimate partner economic relations law. This model recognizes that interdependence can foster both connection and vulnerability. For a large cohort of couples (but not all), I advocate that law must account for these values through a joint property regime that includes collaborative economic decision making. For cohabitants that do not merge their finances, I have proposed a legal standard that assesses the degree of sharing present, with corresponding and variable sharing rules. I have situated my proposal and argued for its appeal in what I identify as related pluralist feminist and family law agendas. This framework is important for sex equality. It works to mitigate the economic risks of sharing that tend to be more acute for women stemming from gender asymmetric caregiving patterns, yet resists assignment of that role to women. The sharing model serves pluralism in another sense as well, as its principles apply across different forms of couple relationships, whether married or cohabiting, same sex or opposite sex.