Mothers as Suckers: Pity, Partnership, and Divorce Discourse

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Mothers as Suckers: Pity, Partnership, and Divorce Discourse

Cynthia Lee Starnes*

ABSTRACT: Aiming to protect divorcing mothers from the market costs of caretaking, the American Law Institute has proposed a new alimony model based on loss sharing. Good intentions notwithstanding, the Institute's rationale and vocabulary perpetuate a dispiriting view of mothers as suckers, economically incapacitated by their unpaid family labor. A far better reform discourse lies in the gender-neutral language and egalitarian principles of partnership. In this Article, Professor Starnes offers an enriched partnership model that complements the marital partnership model she earlier proposed. This new model provides a compelling rationale for income sharing during the minority of marital children, even as it casts mothers as full stakeholders in marriage, equal rather than subservient, empowered rather than incapacitated, respected rather than pitied.

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MOTHERS AS SUCKERS

Once upon a time, there was a woman who discovered she had turned into the wrong person.¹

INTRODUCTION

Many mothers have been stunned to learn that after years of viewing themselves as proud and valuable contributors to marriage, to family, to a new generation, the law of divorce views them as suckers. Surely this is a mistake, a mother might insist, a confusion of identities, a dialectical lapse that will be corrected as soon as it is discovered. Sadly, there is no mistake. The dispiriting message is that primary caretakers, the vast majority of whom are mothers,² have been duped into providing free family caretaking at great personal economic cost; a price they must pay for their imprudent ways. The American Law Institute ("ALI" or "Institute"), in its recent Principles of the Law of Family Dissolution,³ does little to alter this view of mothers. Instead, the ALI has adopted a vocabulary and concept that cast mothers as economic casualties of marriage, sometimes entitled to reparations, but never as equal stakeholders entitled to share in marital profits.

The story of a mother’s status as a marital casualty begins with the market costs of mothering.⁴ Because time and energy spent caring for

1. ANNE TYLER, BACK WHEN WE WERE GROWNUPS 3 (2001).
2. See discussion infra Part I.B. Because mothers are performing the majority of childcare within families, this Article will use the term “mother” rather than “parent” to refer to a primary caretaker, taking note of Ann Crittenden’s observation that “the politically correct term for child-rearing is ‘parenting’—neatly disguising the fact that the mothers are doing most of the work.” ANN CRITTENDEN, THE PRICE OF MOTHERHOOD 24 (2001).
4. “Mothering” is used in this Article in its broadest sense to describe both the process of protecting, nurturing and training children and the activities that sustain the home in which children are raised. Under this definition, “mothering” thus includes both caretaking and homemaking. Katharine Silbaugh uses the term “housework” to include “preparing meals, washing dishes, house cleaning, outdoor tasks, shopping, washing and ironing, paying bills, auto maintenance, driving . . . making coffee, feeding the baby, emptying garbage, answering the telephone, planning family activities, making beds, caring for pets, weeding, sweeping floors . . . putting clothes away.” Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 NW. U. L. REV. 1, 11 (1996). Joan Williams describes seven types of “care work”: growth work; household and yardwork; household management; social capital development; emotion work; care for the sick; and daycare. Joan Williams, From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition, 76 CHI.-KENT L. REV. 1441, 1462-65 (2001).

Mothering need not be performed by a birthgiver. As Sara Ruddick observes, “All human life begins in some woman’s birth giving but no woman’s birth giving is ever more than a beginning.” Sara Ruddick, Thinking Mothers/Conceiving Birth, in REPRESENTATIONS OF MOTHERHOOD 29, 44 (Donna Bassin et al. eds., 1994). A functional definition of mothering recognizes that “a child is mothered by whoever protects, nurtures, and trains her.” Id. at 35. Thus while a father could undertake mothering, this Article focuses on women who mother, since women are overwhelmingly the primary caretakers of children. See discussion infra Part I.A.
children are not invested in education, training, or labor-force participation, primary caretaking often reduces earnings and ultimately earning capacity. Recent studies confirm that motherhood is associated with a significant decline in wages, which increases with the number of children in the household.\(^5\)

Married women may be unaware of the costs of mothering as they share income with a spouse more fully invested in the labor force. Divorce, however, shatters any illusion of economic security and self-worth. Though a mother’s caretaking has benefited her spouse and family, she alone must bear its costs, often as a single parent with little property,\(^6\) no alimony,\(^7\) and insufficient child support\(^8\) after divorce. In a worst-case scenario, divorce exposes the undignified reality that a primary caretaker is “just a man away from poverty.”\(^9\)

Concerned commentators have offered an array of divorce reform proposals, emphasizing a married mother’s contribution to a couple’s joint parenting responsibility and challenging the notion that equity lies in

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5. See discussion infra Part I.A.


7. Fewer than twenty percent of divorcing women have an alimony award entitling them to continue to share income with a spouse after divorce. See ALI PRINCIPLES, supra note 3, § 5.04 cmt. a (summarizing empirical studies of the incidence of alimony). Joan Williams reports that only about eight percent of women are awarded alimony. JOAN WILLIAMS, UNBENDING GENDER 122 (2000).

8. See NANCY E. DOWD, *REDEFINING FATHERHOOD* 222 (2000) (“Strong evidence demonstrates that even if . . . all support were paid, the support would be inadequate to meet the needs of children.”); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 62 (2002) (“Increasing numbers of families are headed by women who receive inadequate or no child support from absent fathers.”); Barbara Stark, *Pomo Parenting*, 80 OR. L. REV. 1035, 1061 (2001) (book review) (“[E]ven if child support is paid, it is usually inadequate.”).

9. NAT’L DISPLACED HOMEMAKERS NETWORK, *THE MORE THINGS CHANGE . . . A STATUS REPORT ON DISPLACED HOMEMAKERS AND SINGLE PARENTS IN THE 1980s* 60 (1990). Lower-income mothers who were already in or near poverty before divorce may experience a less precipitous decline in their standard of living. Higher income mothers may have assets sufficient to bufeter them against any loss of the marital standard of living.
cutting off mothers from the family wage. These proposals have culminated in the recent ALI Principles, an amalgam of best-practice divorce laws and revolutionary reform proposals. Among these proposals is a dramatic new alimony scheme with special provisions targeting primary caretakers.

As states reexamine their no-fault divorce laws and evaluate the Institute's proposals, reform seems likely. But there is danger that even well-meaning action to protect mothers will effect change that imposes new costs even as it addresses old ones. This danger is made more real by the ALI's

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Some feminist commentators have urged public law responses to the costs of caretaking. Martha Fineman, for example, argues for public support for the work of caregivers. Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 161-64, 231-33 (1995). Because caretaking has public value, reasons Fineman, it creates a "social debt—a debt that binds each and every member of society, not only individual family members or receivers of care." Martha Albertson Fineman, Contract and Care, 76 Chi.-Kent L. Rev. 1403, 1410-11 (2001). Fineman warns that income-sharing proposals privilege only traditional, heterosexual women and do not meet women's needs at large. Martha Albertson Fineman, The Nature of Dependencies and Welfare "Reform," 36 Santa Clara L. Rev. 287, 299-304 (1996). Vicki Schultz agrees, adding that "joint property feminists tie homemakers' pay to their spouses' income—a methodology that introduces severe class bias." Vicki Schultz, Life's Work, 100 Colum. L. Rev. 1881, 1912 (2000). Of great concern to Schultz is the possibility that "the wife of a high-level executive who gets one-half his earnings for caring for the house and kids is paid much more than the wife of a janitor, for example, even though both wives may be doing essentially the same work." Id. Moreover, says Schultz, feminists should not be encouraging women to invest in patriarchal relationships. Id. at 1908.

It is not clear that public and private law solutions must be either/or propositions. Because caretaking often benefits both an individual spouse and society at large, both private and public measures should be employed to ensure equity for caretakers. If a well-positioned spouse is not required to share income with the caretaker who has conferred direct benefits on him, that spouse will receive a windfall at the cost of society at large. When private resources are unavailable, either because a spouse's income is low or because the caretaker is alone or part of a couple, perhaps a same-sex couple not subject to divorce law, public law solutions are necessary and appropriate. Moreover, a private-law income-sharing proposal need not and should not reinforce patriarchal marriage. Actually, income-sharing proposals tend to have exactly the opposite effect, casting mothers as equal participants in marriage rather than subservient participants hoping for a handout. As Martha Ertman rightly observes, "primary wage earners might be less enthusiastic about gendered specialization of labor if they had to foot the bill for it." Martha M. Ertman, Love and Work: A Response to Vicki Schultz's Life's Work, 102 Colum. L. Rev. 848, 858 (2002). Partnership, in particular, offers a vocabulary and conceptual model for income sharing that further the norms of egalitarian marriage many feminists and same-sex couples seek. For such a proposal, see discussion infra Part III.
disturbing conceptual basis for alimony. While its economic bottom line is surely an improvement over existing law, the Institute's rationale warrants careful scrutiny, for at its core is an emphasis on loss that perpetuates a view of mothers as casualties—of a market economy, of marriage, of motherhood. It would be a mistake to assume this assignment of status can do no harm, to assume that the linguistic path from identification of harm to proposed solution is unimportant. On the contrary, a conceptual rationale and its linguistic tools can have a profound normative impact, "form[ing] our minds by habituating them to certain modes of attention, certain ways of seeing and conceiving of oneself and of the world." By casting mothers as incapacitated persons entitled to protection, the Institute resurrects long-abandoned themes of coverture, affirming the second-class status of women that feminists have so long fought against. Though this result is surely inadvertent, it is not inconsequential.

Casting mothers as suckers might be less offensive if it were more necessary to achieve the Institute's goals. It is not. A far better reform option lies in an analogy to the egalitarian principles and gender-neutral vocabulary of partnership. This Article proposes a new, enriched partnership model that begins by casting married mothers and fathers as equal partners in parenting who jointly contribute to, share responsibility for, and benefit from parenting. This parenting-partnership model provides a compelling rationale for post-divorce income sharing during the unfinished parental work of raising minor children. This new model supplements the marital-partnership model I have proposed elsewhere, which will in some cases also entitle a mother to a buyout at divorce. For mothers, the language and principles of partnership bring economic equity to divorce, affirming the importance of a mother's contributions and sending a message of equality

11. See infra notes 73–87 and accompanying text.
13. Under coverture, a wife's disabilities entitled her to the protection of her husband, who, as the recipient of her services, was morally bound to shelter her in much the same way he was bound to shelter his children. See generally Reva B. Siegel, Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880, 103 YALE L.J. 1073 (1994). For an argument that coverture survives in the form of property laws that allocate family wealth to husbands, see Joan Williams, Is Coverture Dead? Beyond a New Theory of Alimony, 82 GEO. L.J. 2227, 2229 (1994). Offensive as coverture may be to contemporary ears, its result was to protect women. The price for that protection is clear. The price should be equally clear when mothers are cast as disabled persons in need of protection in this more contemporary setting.
rather than subservience, of empowerment rather than incapacity, of respect rather than pity.

Part I of this Article surveys reports of the earnings gap between mothers and non-mothers and concludes that the cost of motherhood requires legal intervention at divorce to ensure mothers' fair treatment. Part II presents a brief summary of the ALI's loss-sharing alimony model, explores its casting of mothers as market losers, and identifies the model's significant quantification problems. Finally, Part III proposes, as a reform alternative, a parenting-partnership model for alimony, which provides a conceptual rationale and a quantification mechanism for income-sharing during the unfinished parental work of raising children.

I. MOTHERING IS NOT FREE

Evaluating the appropriateness and adequacy of legal intervention on behalf of mothers depends initially on an understanding of the work and the costs of mothering. Unfortunately, the reality is that whether she is a Betty Crocker, a Soccer Mom or a Gapper, a mother's primary caretaking responsibilities often reduce her earnings and her earning capacity.

A. THE MOTHER/NON-MOTHER EARNINGS GAP

Reports of the economic costs of mothering are not new. In his much-cited 1988 study of the male/female wage gap, Victor Fuchs concluded that the primary explanation for women's lower earnings was not employment discrimination, but rather family responsibilities that limit women's career investments. Looking at women ages 30 to 39, and controlling for education, Fuchs found that hourly wages declined proportionately with the number of children in the household. For women, observed Fuchs, "the greatest barrier to economic equality is children."
More recent studies suggest Fuchs’s observation may be as true today as it was in 1988. In 1996, Furchtgott-Roth and Stolba publicized the stunning news that, notwithstanding reports of a continuing wage gap between men and women, the 1993 earnings of childless women ages 27 to 33 were 98% of the earnings of men in the same age group. Also using men as a comparative baseline, Sigle-Rushton and Waldfogel studied the effects of motherhood on lifetime, rather than single-year, earnings. Drawing on 2000 data, they compared the cumulative earnings of men and women from ages 19 to 60. Among women with a medium education, those who were childless earned 58% of male earnings; those with one child earned 52% of male earnings; and those with two children earned 49% of male earnings.

Numerous other studies have explored the impact of motherhood on women’s earnings by using childless women rather than men as a comparative baseline. In her 1998 survey of the literature, Jane Waldfogel observed that “researchers typically find a family penalty of 10–15% for

21. See Jane Waldfogel, Understanding the “Family Gap” in Pay for Women with Children, 12 J. ECON. PERSP., 137, 158 (1998) (stating that Fuchs’s conclusion “is at least as true today as it was a decade ago”).

22. DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, WOMEN’S FIGURES: THE ECONOMIC PROGRESS OF WOMEN IN AMERICA 8 (1996). Using 1991 data, Waldfogel compared the wages of young men and women (with a mean age of 30), and found that childless women earned 90.1% of average male earnings; mothers earned 72.6% of average male earnings; and married mothers earned 76.9% of average male earnings. Waldfogel, supra note 21, at 145. Using 1994 data, Waldfogel compared the hourly wages of men and women in the wider age range of 24 to 45. Id. at 144. She found that childless women earned 81.3% of average male earnings (up from 68.4% in 1978), while mothers earned 73.4% of average male earnings (up from 62.5% in 1978). Id. The married mothers in Waldfogel’s study fared better than mothers in general, earning 76.5% of average male earnings in 1994. Id.


24. Id. at 11.

25. "Medium education includes those who completed secondary school and may also have completed some higher education, but without receiving a bachelor’s degree or equivalent, e.g. those with a high school degree or some college in the U.S." Id. at 12–13. Low-skilled mothers are those without a high school degree, and high-skilled mothers have completed at least an undergraduate degree. Id.

26. Id. at 25.
women with children as compared to women without children.” In a 2001 study using data from 1982 through 1993, Budig and England identified a wage gap between mothers and childless women of about 7% per child. Interestingly, Budig and England reported that the motherhood penalty is higher for women who work full-time than for those who work part-time; that women in “heavily male professional and managerial jobs” experience smaller penalties than those in other jobs; that Black and Latino mothers experience smaller penalties for third and subsequent births than other mothers; and that “[s]econd children reduce wages more than a first child, especially for married women.” In a 2003 study searching for educational predictors of the size of the motherhood penalty, Anderson, Binder, and Krause found that medium-skilled mothers experience more persistent and severe income losses than either low-skilled or high-skilled mothers.
In a recent study aimed at determining whether the wage gap between women with children and those without children is shrinking, Avellar and Smock examined the earnings over time of two cohorts of women. The first cohort consisted of women who were ages 21 to 33 in 1975 and ages 31 to 42 in 1985; the second cohort consisted of women who were ages 21 to 29 in 1986 and ages 33 to 41 in 1998. The researchers found an hourly wage gap between mothers and non-mothers of $3.14 in the first cohort and $2.94 in the second cohort. From this data, they concluded that the motherhood penalty has not declined. “For both cohorts of women,” said Avellar and Smock, “taking into account an array of variables, children decrease women’s wages significantly, and this penalty has been quite stable.”

Mothers who intermittently drop out of the labor force for significant periods are likely to have lower lifetime earnings than women with uninterrupted labor force attachment, simply because of foregone wages during employment gaps. A 2004 study by Sigle-Rushton and Waldfogel confirms this prediction. Comparing the lifetime earnings of mothers and childless women between age 19 and age 45, these researchers found that women with one child earned 89% of childless women’s earnings and that women with two children earned 80% of childless women’s earnings.

There is some question as to whether the hourly earnings of women with employment gaps ever rebound to the level of non-Gappers, that is, whether past employment gaps cause permanent reductions in future earnings. Jacobsen and Levin report that although there is a partial-rebound effect, Gappers never catch up to non-Gappers. “Even women whose labor-

36. Id. The cohorts included only women with at least two years of wages. Id.
37. Id. at 602. Using a “fixed-effects” model, Avellar and Smock found a motherhood penalty of 3.8% in the first cohort and 3.8% in the second cohort, a decrease they label statistically insignificant. Id. at 600, 603. Net of other variables, Avellar and Smock reported a motherhood penalty of about 1.8% per child in the early cohort and about 1% in the later cohort. Id. at 603.
38. Id. at 604.
39. Id.
40. Sigle-Rushton & Waldfogel, supra note 23.
41. Id. at 21. Sigle-Rushton and Waldfogel speculate that a comparison of the earnings of mothers and fathers would likely reveal an even larger pay gap since fathers tend to earn more than non-fathers. Id. at 17.
42. Joyce P. Jacobsen & Laurence M. Levin, Effects of Intermittent Labor Force Attachment on Women’s Earnings, MONTHLY LAB. REV., Sept. 1995, at 18. Jacobsen and Levin define a “labor force break” as unemployment for six months or longer after receipt of one’s last educational degree. Id. at 15; see also Budig & England, supra note 28, at 218 (suggesting that the similarly high child penalties of married and divorced women, as opposed to never-married women, imply that married mothers’ wage penalties are “long-lasting, enduring even if the marriage ends”). Relying on older data, Mincer and Polachek found that women who remain out of the labor market after the birth of their first child suffer a decline in earning capacity of about 1.5% per year. Jacob Mincer & Solomon Polachek, Family Investments in Human Capital: Earnings of
force gap occurred more than twenty years ago still earn between 5% and 7% less than women who never left the labor force and have comparable levels of experience.  

In their hypothetical case of a woman who left the labor force at age 25 and returned at age 32, Jacobsen and Levin calculate that the cost of a seven year gap in employment is effectively ten years of earnings.

While estimates of the size of the pay gap between women with children and those without children vary depending on methodologies, measures of motherhood, statistical models and control variables, a persistent and perhaps increasing pay gap is consistently reported across studies. The explanation for these costs lies at least partly in the curious persistence of traditional marital roles.

**B. THE MOTHER/FATHER CARETAKING GAP**

The explanation for the costs of mothering is simple enough: women who do the cooking, the laundering, the tutoring, the shopping, the chauffeuring, the bed-time story-reading, and the bathroom cleaning invest time and energy at home that limit their opportunity to invest in other things. Studies consistently show that whether or not they work outside the home, women perform the vast majority of domestic chores.

In a time-use survey based on 2003 data, the Bureau of Labor Statistics reported that adult women in households with children under age 18 spent...
about 1.7 hours per day providing primary childcare, as opposed to about 0.8 hours (50 minutes) for men in such households. When the youngest child was under age 6, women averaged 2.7 hours of primary childcare per day, while men averaged 1.2 hours.

The Bureau’s figures come as no surprise, given the multitude of studies reporting that mothers undertake a disproportionately large share of family chores. Naomi Cahn, for example, notes that “mothers of pre-school age children spend 100 hours more per month than men in childcare.” In a study cited by Hochschild, husbands performed 45 to 50% of household work in only 18% of dual-earner families; none of the husbands studied did more. Silbaugh reports that women spend more than half of their working hours on housework while men spend less than one-fourth of their working hours on such work. In a curious study reported by Rhode, only one husband in twenty made the bed in which he slept. These primary family responsibilities often take a toll, leaving women with less time and energy to devote to paid employment.

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48. “Primary childcare activities include physical care; playing with children; reading to children; assistance with homework; attending children’s events; taking care of children’s health care needs; and dropping off, picking up, and waiting for children.” BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, AMERICAN TIME-USE SURVEY, TECHNICAL NOTES (2004) [hereinafter BLS 9/04].

49. Id. at tbl. 7. For a colorful commentary on this report, see Donald G. McNeil, Jr., Real Men Don’t Clean Bathrooms, N.Y. TIMES, Sept. 19, 2004, § 4, at 3.

50. BLS 9/04, supra note 48, at tbl. 7.

51. See, e.g., David H. Demo & Alan C. Acock, Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?, 42 FAM. REL. 323, 326 (1993) (finding that women assume 70% to 80% of all housework); see also SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN xiv (1991) (concluding that the only thing that has changed in the last fifteen years is that middle-class men now think they do more housework); FRANCES K. GOLDSCHEIDER & LINDA J. WAITE, NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME 111 (1991) (observing that when both spouses work outside the home, “husbands do not step into the breach very often, if at all; employed wives seem simply to add the demands of a job to their traditional responsibilities of running a household”). In the words of the American Law Institute:

[D]espite the dramatic changes in the workforce participation of married women over the last several decades, marital roles have persisted and their impact on the work experiences of married women remains great. Whether or not women actually leave full-time employment after the birth of their children, studies consistently show that they usually perform for more than half of the married couple’s domestic chores.

ALI PRINCIPLES, supra note 3, § 5.05 reporter’s notes cmt. d (emphasis added).


56. As the American Law Institute observed, “wives . . . in the great majority of cases . . . sacrifice earnings opportunities to care for their children . . . .” ALI PRINCIPLES, supra note 3, § 5.05 reporter’s notes cmt. e.
A caretaker’s market disinvestment may take several forms. She may forego paid employment altogether, serving as a full-time homemaker (a Betty Crocker); she may combine primary caretaking responsibilities with paid employment (a Soccer Mom); or she may sequence full-time and part-time homemaking, periodically dropping out of the job market to care for young children or elderly parents (a Gapper). This is no fiction; these mothers and the market losses they experience are real.

Empirical evidence strongly suggests that although their ranks may be shrinking, a significant number of mothers continue to work as full-time Betty Crockers, especially when their children are young. In 2003, 39% of married women with children under age six were not employed in the market at all, an increase over 2002 figures. Over 47% of married mothers with children less than one year old were not in the labor force in 2003, a 1.8 percentage point increase from 2002. In fact, labor force participation of married mothers of children under age one has fallen every year since 1998.

While married women with older children are more likely to work outside their homes, a surprisingly large number of these mothers make caretaking their full-time job. In 2003, over 23% of married women with children between ages 6 and 17 worked exclusively in their homes. Betty Crocker, it seems, is no dinosaur. Recent reports of an opt-out revolution of middle-class women who are choosing full-time caretaking suggest she may not soon disappear.

57. Two recent surveys suggest cultural ambivalence toward working mothers with young children. A 2002 survey found that 48% of Americans believe preschool-age children “suffer” if their mothers work. JACOBS & GERSON, supra note 29, at 54 (citing NAT’L OPINION RESEARCH CTR., GEN. SOC. SURVEY, 1972-2000: CUMULATIVE CODEBOOK (2002)). A 1999 survey found that 42% of employed parents are “concerned that many working mothers care more about succeeding at work than meeting their children’s needs.”


59. BLS 4/04, supra note 58, at tbl. 4.

60. Id.

61. Id.

Soccer Moms are also real. Many married women combine mothering tasks with market employment, working two shifts—the first in the public sphere and a second in the private sphere. Soccer Moms may devote fewer hours to paid employment than non-mothers, bring less energy to the job, be more willing to take time off to tend to family needs or activities, and acquire less education, experience, and job tenure than non-mothers. Soccer Moms often occupy traditionally female jobs in the secondary market where wages are low and opportunities for advancement are limited. As Congress recognized in the Family and Medical Leave Act, a caretaker’s home responsibilities often impact her market work.

63. Susan Casey coined the term “soccer mom” in her 1995 campaign for Denver City Council. See Christopher Cox, Original Soccer Mom Spurs Kick, BOSTON HERALD, Oct. 24, 1996, at 1. As Casey explained:

We arrange our lives around our kids and support them . . . . I wanted people to understand that. I’ve been a teacher, I have a Ph.D., I’ve managed national presidential campaigns, but when I wake up in the morning and when I go to bed at night, my heart and soul are in my family.

Id.

64. “In 1996, for example, married working mothers on average put 1,197 hours into their paying jobs, a mere half of the 2,192 hours averaged by married fathers.” CRITTENDEN, supra note 2, at 18. Based on 2000 data, Jacobs and Gerson reported that the mean weekly workload of employed husbands was 45 hours, as compared with 36.6 hours for employed wives. JACOBS & GERSON, supra note 29, at 44-45. While the birth of children decreases the number of hours wives work, it slightly increases the number of hours husbands work. In 2000, wives with three or more children worked 5.6 fewer hours per week than wives without children, while husbands with three or more children worked 0.7 hours per week more than husbands without children.

Id. at 49.

65. Mothers who juggle home and market labor may be less productive on the job because they spend less of their non-employment time in leisure than non-mothers. Avellar & Smock, supra note 35, at 598-99.

66. Working women are more likely than working men to stay home when a child is sick or when child-care plans break down. JACOBS & GERSON, supra note 29, at 90.


68. Susan Faludi reports that “nearly 80 percent of working women [are] still stuck in traditional ‘female’ jobs—as secretaries, administrative ‘support’ workers and salesclerks.” FALUDI, supra note 51, at xiii. Vicki Schultz has recently argued that women’s lower pay in relation to men is due to job segregation and pay discrimination rather than to family responsibilities, which may be a consequence of job segregation, rather than its cause. Schultz, supra note 10, at 1895-96. Female-dominated jobs, such as clerical, sales and health-care work, are typically less flexible than those in male-dominated occupations. JACOBS & GERSON, supra note 29, at 102. Part-time work may be a partial answer to the need for flexibility. As Jacobs and Gerson note, “[p]art-time work is, almost by definition, more flexible” than full-time work. Id.

69. See Family and Medical Leave Act, 29 U.S.C. § 2601(a) (5) (2000) (finding that “the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men”). As the Census Bureau observed in 1986, many women “choose work that will fit around . . . their family responsibilities, a complication and impediment to occupational advancement not faced by
Gappers are also real. Elaine Sorensen reported that over 84% of the female work force between ages 35 and 41 have periodically dropped out of the labor market. In their study of Gappers, Jacobsen and Levin found that the average length of the final employment gap for women in the 1980s was 7.5 years (though the median was 4.5 years), and that these women never fully rebounded to the earnings levels of non-Gappers, even 20 years after their last employment gap.

Whatever the extent and duration of a mother’s market disinvestment, employers are not likely to view her as an “ideal worker.” Whether she is a Betty Crocker, a Soccer Mom or a Gapper, a mother’s work for the family is likely to negatively impact her ability to earn market wages. How is the law to deal with the reality that mothering is not free? One possibility is to craft divorce reforms based on the notion that principles of fairness entitle mothers to reparations for their losses. Another possibility is to recognize that the costs of mothering underscore the necessity of legal intervention at divorce, and then to craft divorce reforms that recognize mothers’ status as equal stakeholders in marriage, entitled to share family gains. Unfortunately, the ALI adopts the first approach, emphasizing mothers’ losses rather than their contributions.

II. PROTECTING MARITAL CASUALTIES: THE ALI MODEL

The ALI’s response to the costs of mothering is a new alimony model that casts mothers as casualties of marriage entitled to compensation for their economic loss. Notwithstanding its concession that quantifying loss poses intractable problems, the Institute insists on a view of mothers as victims of misfortune (market disinvestment) rather than purveyors of a necessary good (family caretaking).

71. Elaine Sorensen, Exploring the Reasons Behind the Narrowing Gender Gap in Earnings 3 (1991); see also Avellar & Smock, supra note 35, at 598–99 (finding that mothers who undertake both home and market labor have more sporadic participation in the labor market than men). Gaps in employment may be long or short-term and may involve job termination or temporary separations, including maternity leave. As Jacobs and Gerson note, even women who take advantage of family-supportive policies may face career risks. Jacobs & Gerson, supra note 29, at 111.


73. Id. at 15; see discussion supra Part I.A.

74. See Williams, supra note 7, at 1 (describing a deeply entrenched, gender-based system of “domesticity,” consisting of an ideal worker, “who works full time and overtime and takes little or no time off for childbearing or child rearing,” and a marginalized caregiver who supports his ideal worker status).
A. A Conceptual Innovation: Compensating Loss

In a "principal conceptual innovation," the ALI dramatically recharacterizes alimony as "compensation for loss rather than relief of need." The Institute, actually "results from the unfair allocation of the financial losses arising from the marital failure." The Institute thus proposes that loss be recognized and allocated according to "equitable principles." In implementing its loss-allocation model, the ALI identifies two primary types of compensable loss. First, under section 5.04, a spouse

75. ALI PRINCIPLES, supra note 3, § 5.02 cmt. a (emphasis added). The ALI notes that while the Canadian Supreme Court has adopted a loss-based model, no American authority of similar stature has done so. Id. § 5.02 reporter's notes cmt. a. Accompanying the new ALI model is a new name for alimony—"compensatory payments." Id. Basing alimony on loss rather than need, reasons the Institute, "transforms" an alimony petition from a "plea for help" to a "claim of entitlement." Id. Another view of this shift from need to loss, however, is that it transforms mothers from beggars to victims. See Starnes, supra note 4, at 140-42.

Curiously, the ALI also claims that its new loss-allocation model is "less the alteration of existing practices than the explanation of them." ALI PRINCIPLES, supra note 3, § 5.02 cmt. a. Each of its "categories of compensable loss," adds the Institute, "approximate fact patterns that typically support alimony claims in existing law." Id. § 5.03 cmt. c. Actually, the Institute's claim that it is mirroring current practice is curious in view of its earlier observation that alimony decisions "vary widely, even within the same jurisdiction" depending as they do on judicial discretion. Id. at Intro. cmt. b. Judges, notes the Institute, apply "different principles as often as they face different facts." Id.

76. Id. § 5.02 cmt. a.

77. Id. § 5.02(1). A guiding principle in allocating loss, says the Institute, is "[t]he primacy of the income earner's claim to benefit from the fruits of his or her own labor, as compared to claims of a former spouse." Id. § 5.02(3)(d). This principle is an unfortunate reminder of the old common law rule that property ordinarily belongs only to the spouse who earns it and not to a dependent wife. See IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 284-86 (4th ed. 2004). While no state now expressly follows this traditional common law rule at divorce, the rule may rear its ugly head as a divorce judge, vested with broad discretion, searches for a starting point for the equitable division of marital property. See id. Joan Williams argues that divorce law still follows this common law rule by generally treating a husband's wage as his sole property. WILLIAMS, supra note 7, at 115.

78. The two awards described here are located in Topic 2. Topic 2 awards may be combined, but the combined award may not exceed a cap to be set by state rulemakers. ALI PRINCIPLES, supra note 3, § 5.10(2)(d). Topic 2 also sets out a third compensable loss in the case of a claimant who has cared for a third party in fulfillment of a moral obligation owed by both spouses. Id. § 5.11. The third person who receives care under section 5.11 will often be an elderly parent, a storyline that may occur with increasing frequency in a population with increasing longevity. See JACOBS & GERSHON, supra note 29, at 83 (reporting that 35 million Americans were aged 65 or older in 2000, a number expected to reach over 80 million by 2050). Those who care for the elderly are disproportionately female. In a 1997 study, 11% of working women reported that they provided care to an elderly or dependent adult, as compared with 7.4% of working men. Id. at 95-96. Because section 5.11 is very similar to the section 5.05 rule on caretakers of children and, even with the increasing population of elders, is sure to cover far fewer cases, this Article will focus on section 5.05.

The Principles propose two additional types of compensatory spousal payments in Topic 3. These awards are based on rescission and restitution and will be available to a much smaller group of claimants than their Topic 2 counterparts. See ALI PRINCIPLES, supra note 3, §§
may partially recover for loss of the marital living standard if her spouse's earning capacity is "significantly greater" than her own, and the marriage is of "sufficient" duration.79 The basis for the award," explains the Institute, "is disproportionate vulnerability to the financial consequences of divorce.80 As an example of such vulnerability, the Institute cites the case of the traditional wife whose "economic dependence... grows as the marriage ages."81 Compensation for this wife is appropriate, explains the Institute, since "[t]o leave the financially dependent spouse in a long marriage without a remedy would facilitate the exploitation of the trusting spouse and discourage domestic investment by the nervous one."82 Disparate financial vulnerability is thus the eligibility requirement of section 5.04,83 which intervenes to protect the economic losers in marriage. Conspicuously absent from this theme is any notion that such vulnerable persons are entitled not just to equitable relief for their afflictions, but rather to an affirmative return on their work as full stakeholders in marriage.84 The Institute's next alimony section does no better.

Under section 5.05, a primary caretaker is entitled to support if her earning capacity at divorce is "substantially less" than that of her spouse.85

5.12-5.14 (describing the two types of compensation payments "not based on the parties' disparate financial capacity" as "compensation for contributors to the other spouse's education," and "restoration of premarital living standards after a short marriage").

79. Section 5.04(1) provides:

A person married to someone with significantly greater wealth or earning capacity is entitled at dissolution to compensation for a portion of the loss in the standard of living he or she would otherwise experience, when the marriage was of sufficient duration that equity requires that some portion of the loss be treated as the spouses' joint responsibility.

The Institute recommends that state rulemakers implement this model by creating a presumption of entitlement "in marriages of specified duration and spousal-income disparity."

Id. §5.04(2).

80. Id. §5.05 cmt. e.

81. Id. § 5.04 cmt. c. The Institute adds that "whether a financially dependent wife has unrealized earning potential or not her sense of financial loss at divorce typically increases with the marriage's duration..." Id. In an effort at gender neutrality, the Institute notes that "[a]lthough the rationale... has its most persuasive application to the case that conforms to the historical pattern in which wives were financially dependent upon their husbands, it also applies to marriages in which the husband is financially dependent upon his wife." Id.

82. Id.

83. Parenthood is thus not a prerequisite to a section 5.04 recovery.

84. For a proposal based on such stakeholder status, see discussion infra Part III.

85. Section 5.05(1) provides:

A spouse should be entitled at dissolution to compensation for the earning-capacity loss arising from his or her disproportionate share during marriage of the care of the marital children, or of the children of either spouse.

ALI PRINCIPLES, supra note 3, § 505.1(x).
Caretaking responsibilities, observes the Institute, often limit market labor and "typically result in a residual loss in earning capacity that continues after the children no longer require close parental supervision." Noting the "strong persistence in traditional marital roles," the Institute concludes that "wives continue, in the great majority of cases, to sacrifice earnings opportunities to care for their children, in reliance upon continued market labor by their husbands." Like section 5.04, the rationale of section 5.05 is based on the notion that mothers deserve protection because they are economic losers in marriage.

Curiously, the Institute signals a serious underestimation of the significance of its extensive rhetoric of economic vulnerability and loss, by rather casually suggesting that the "choice of language is of course less important than the underlying rule it describes." This is not so. Language can have a powerful effect on the way mothers view themselves and are viewed by others. Cast as casualties of marriage under the ALI approach, The Institute recommends that state rulemakers create a presumption of entitlement to a section 5.05 award when:

(a) there are or have been marital children, or children of either spouse;

(b) while under the age of majority the children have lived with the claimant . . . for a minimum period specified in the rule; and

(c) the claimant's earning capacity at dissolution is substantially less than that of the other spouse.

Id. § 505.2.

86. Id. § 5.05 cmt. a.
87. Id. § 5.05 reporter's notes cmt. c. Regarding the share of domestic chores women perform, the Institute states:

Whether or not women actually leave full-time employment after the birth of their children, studies consistently show that they usually perform far more than half of the married couple's domestic chores. For this reason, the birth of children usually affects the earning capacity of women who continue to work full time as well as those who do not.

Id. § 5.05 reporter's notes cmt. d.

88. Curiously, while both sections 5.04 and 5.05 speak of "entitlements" to compensation for loss, payments under both sections terminate automatically if a spouse remarries. Id. §§ 5.04, 5.05, 5.07. Since "[a]bout 75 percent of all divorced women eventually remarry," this automatic termination rule impacts the vast majority of divorcing women who receive alimony. Id. § 5.06 reporter's notes cmt. c. Elimination of loss clearly does not explain this rule, for the financial impact of remarriage is usually irrelevant to alimony termination. Surely the rationale is not that a woman now belongs to another man who has responsibility for her, a Cinderella-notion more consistent with coverture than with entitlement. For a discussion of the remarriage penalty, see Cynthia Lee Starnes, One More Time: Alimony, Intuition and the Remarriage-Termination Rule, IND. L.J. (forthcoming).

89. ALI PRINCIPLES, supra note 3, § 5.02 cmt. a. This comment appears in the objectives section of the Principles, as part of its comparison of a loss-based model to models based on expected benefits. Evidently, the Institute's dubious point is that if loss and benefits models achieve the same dollars and cents results, the choice of models is relatively unimportant.
mothers may deserve pity and even compensation, but they are denied the status of full stakeholders in marriage entitled to dignity and a share of marital gain. The Institute's loss-based rationale is problematic not only for the dispiriting message it sends, but also for the intractable quantification problems it faces.

B. "INTRACTABLE PRACTICAL PROBLEMS" AND QUANTIFICATION ACCOMMODATIONS

After establishing loss as an eligibility requirement for alimony, the Institute sets out to quantify alimony by measuring a claimant's loss. In a surprising move, the Institute reasons that since loss is just the flip side of gain, loss of the marital living standard under section 5.04 can be measured by calculating the disparity in the spouse's post-dissolution expected earnings. Section 5.04(3) so quantifies loss "by applying a specified percentage to the difference between the incomes the spouses are expected to have after dissolution." The Institute thus frankly co-opts the mathematics of the expectation models it shuns.

In quantifying loss under section 5.05, the Institute again resorts to expectation measures as a necessary concession to the near impossibility of measuring actual loss. The Institute concedes "two intractable practical problems in implementing the principle that both spouses should share in the earning-capacity loss" of a primary caretaker under section 5.05. The first problem lies in the difficulty of calculating the actual lost earnings caused by primary caretaking. Such a calculation would compare "an individual's actual earning capacity with the hypothetical earning capacity of the same person" who was not a primary caretaker. But how are legal actors to know what a mother's earning capacity would have been had she made

90. The Institute thus notes that "a principle that compensates a spouse for loss of the marital living standard could instead be said to protect the gain in living standard that that spouse obtained from the marriage." Id.

91. Id. § 5.04(3). The Institute thus measures a spouse's loss by measuring the disparity in expected spousal incomes. The Institute specifically rejects, however, a full expectation model based on contribution, reasoning that although as a "general proposition" homemakers contribute to their spouse's success, such contributions do not always enhance the other spouse's earnings and, even when they do, establishing the causal connection between contribution and success is difficult. Id. § 5.04 reporter's notes cmt. b. The Institute offers two explanations for rejection of the expectation-based contract models offered by numerous commentators: (1) "contract principles allow an expectation award only against a party in breach," which the Institute deems inconsistent with no-fault divorce, and which would sometimes place a homemaker in breach; and (2) "a conventional contract rationale would require describing the spousal relation in exchange terms that seem inapt." Id. § 5.04 cmt. b. For an argument that contract generally and partnership in particular offer useful models for divorce, see discussion infra Part III.

92. Id. § 5.05 cmt. d.

93. Id.
"different life choices"? Any attempted quantification of hypothetical earning capacity will almost always be exceedingly speculative.94

The second problem, says the Institute, involves preparatory behavior—"[e]arning-capacity losses [that] arise from the expectation that one will in the future have primary responsibility for marital children."95 To take a simple example, the high school student who neglects her studies because she plans to keep house rather than join the labor force, engages in preparatory behavior that diminishes her opportunity for admission to Harvard and perhaps for a successful career in business.96 The Institute seems troubled by the possibility that a future spouse might compensate this woman for her costly high school decision to forego her studies.97 Finding "no satisfactory solution" to the problems of either preparatory behavior or calculation of hypothetical earnings, the Institute concedes that "the basic principle—that the residual loss in earning capacity arising from child-care responsibilities should be shared—cannot be perfectly expressed in an administrable rule."98 Quantification of loss, said the Institute, thus requires "pragmatic accommodation."99

As an initial accommodation, the Institute determines that although "not entirely consistent with the section's basic rationale," the law should simply assume, without proof, that when a primary caretaker's earnings are "substantially less than those of her spouse," the explanation is the caretaker's home labor.100 Because "fewer errors may be made by assuming that all primary caretakers incur an earning-capacity loss than by attempting to ascertain the loss in each case,"101 the Institute creates an irrebuttable

94. "An accurate measure of the earning-capacity loss," reasons the Institute, "would require a determination of what the claimant's earning capacity would have been if he or she had not, and had never intended to, provide the major portion of parental care for the marital children. Accurate measurements based on that hypothetical possibility are not ordinarily available." ALI PRINCIPLES, supra note 3, § 5.05 cmt. e.

95. Id. § 5.05 cmt. d. "Economists clearly believe that women's incomes are affected not only by their actual responsibility for the care of children but also by their expectations that they will have this responsibility, which leads some to 'under-invest' in their own education and training." Id. § 5.05 reporter's notes cmt. d.

96. It is possible of course to trace preparatory behavior to the very early point at which women's indoctrination into the sex/gender system begins, which encourages "choices" that make a woman economically dependent on her husband and thus vulnerable to divorce. Of course, this tracing would seriously undermine the Institute's rationale for compensatory payments and thus allow a windfall for the husband who benefited from his wife's caretaking.

97. In the Institute's words, the question is whether "higher hypothetical earning capacity should be based on assumptions of more market-oriented behavior before the marriage as well as after it." Id. § 5.05 cmt. d.

98. Id.

99. ALI PRINCIPLES, supra note 3, § 5.05 cmt. d.

100. Id. § 5.05 (2) (c).

101. Id. § 5.05 cmt. d.

102. Id. (emphasis added). "This section thus allows claims for all primary caretakers whose earning capacity at dissolution is significantly less than their spouse's, but not otherwise. While
presumption that when spousal earnings are substantially disparate, a primary caretaker’s lower earnings resulted from her home labor.\textsuperscript{103}

Quantifying a caretaker’s presumptive loss then requires an additional accommodation, which the Institute terms “an approximate proxy measure of loss.”\textsuperscript{106} This proxy measure presumptively calculates loss based on “the difference in the spouses’ expected post-dissolution earnings” multiplied by a percentage based on the duration of child care.\textsuperscript{105} Like the formula for measuring lost marital standard of living in section 5.04, this formula purports to quantify loss by quantifying expected benefit, again placing the Institute in the awkward position of invoking the mathematics of the expectations models they reject.

The Institute offers three justifications for resorting to measures of expected gain in order to calculate loss under section 5.05. First, they claim that basing compensation on the disparity in spousal earnings is actually a good proxy for earning capacity loss, since statistics suggest that spouses are more “similar in socioeconomic status” than “randomly chosen pairs of people.”\textsuperscript{106} Thus, reasons the Institute, a mate’s earnings approximate what a primary caretaker’s earnings would have been but-for caretaking. Second, an expectation formula compensates a primary caretaker’s lost opportunity “to have had children with someone with whom she would enjoy an enduring relationship,”\textsuperscript{107} evidently again on the theory that a hypothetical, more-enduring mate would have earning capacity much like her husband’s, which, but-for caretaking, would have been her own earnings. Finally, and most curiously, the Institute reasons that their proxy measure compensates loss by “providing a more balanced allocation at dissolution of the benefits created by both spouses’ contributions to the marriage.”\textsuperscript{108} That is, the Institute’s proxy measure of loss is more attractive because it apportions expected marital benefits . . . like expectation models. Surprisingly, the Institute then offers a one-paragraph classic expectation rationale,

\begin{quote}
this rule is not entirely consistent with the section’s basic rationale, it is as close as is administratively practical, and consistent with prevailing law.” \textit{Id.}
\end{quote}

\textsuperscript{103.} \textit{Id.} As the Institute explains, the reasons for this rule are “partly pragmatic, and arise from the difficulty of establishing what an individual’s earning capacity would have been had the individual made different life choices years earlier.” \textit{Id.} A spouse may, however, avoid payments under section 5.05 by convincing a court that the claimant was not a primary caretaker, for example, that she “did not provide substantially more than half of the total care that both spouses together provided for the children.” \textit{Id.} § 5.05(3); see also \textit{id.} § 5.05 cmt. d.

\textsuperscript{104.} \textit{All Principles, supra} note 3, § 5.05 cmt. e.

\textsuperscript{105.} \textit{Id.}

\textsuperscript{106.} \textit{Id.}

\textsuperscript{107.} \textit{Id.} “The most direct measure of her financial loss would compare her situation at divorce to the hypothetical situation had she married a different man. For this claimant, the measure employed by this section is a reasonably equitable substitute, and far more practical.” \textit{Id.}

\textsuperscript{108.} \textit{Id.} This rationale, says the Institute, “does not assume the claimant suffered an earning-capacity loss, and . . . therefore does not suggest a remedy measured by it.” \textit{Id.}
emphasizing parents' joint responsibility for children and the contributions of primary caretakers, and suggesting that the primary caretaker has a claim to a wage earner's post-divorce earnings.\textsuperscript{109} Of course, this rationale has nothing to do with loss. The Institute recognizes as much, noting that benefits-based proposals reach "very similar conclusions," at least in cases of long-term marriages.\textsuperscript{110}

Something is amiss. After insisting that a loss-based rationale is superior to an expectation rationale, the Institute concedes the impossibility of quantifying loss, resorts to an expectation formula, and then touts its loss-based model for achieving an expectation remedy. The circularity is unmistakable. One wonders why the Institute insisted on a loss rationale in the first place, if an expected-benefits rationale would avoid the intractable problems of quantification of loss and support the same mathematical model, without assigning mothers the pitiable status of losers. Fortunately, there is an escape from the negative normative message of the Institute's rationale and the pragmatic problems of loss quantification.

III. DEPATHOLOGIZING MOTHERHOOD: THE PARTNERSHIP METAPHOR

Even as language can convey a dispiriting message of incapacity and pity about mothers, it can also convey an affirmative message of empowerment and dignity. A partnership model of marriage conveys the latter message, offering a vocabulary and concept that cast mothers as full stakeholders in marriage, equal in status to fathers, regardless of who brings home the bigger paycheck. Partnership provides an alternative reform discourse, free from the stubborn remnants of old ideologies that sabotage reform efforts long after they are spoken in polite society. Under partnership, the equality of husbands and wives—in contribution, in responsibility, in right—thus

\textsuperscript{109} As the Institute explains this rationale:

By fulfilling their joint responsibility for their children's care, the claimant under this section has allowed the other parent to have a family while also developing his or her earning capacity. At dissolution, the primary wage earner retains both that earning capacity and the parental status, while in the absence of any remedy the primary caretaker loses any claim upon the other spouse's earnings. The result is that, while the primary caretaker's contribution to the marital endeavor—children—remains shared after the dissolution, the primary wage earner's contribution—financial support—reverts entirely to him or her in the absence of any remedy.

\textsuperscript{110} ALI PRINCIPLES, supra note 3, § 5.05 cmt. e. Although it adheres to its loss-based rationale, language that could be used to support an expected-benefits rationale appears sporadically in the Institute's commentary. See, e.g., id. § 5.05 cmt. a ("[C]ost is ordinarily incurred in the expectation that... the primary caretaker will continue to share in the income of the other parent."); see also discussion infra Part III.

\textsuperscript{109} Id. § 5.04 reporter's notes cmt. c.
becomes an analytical starting point for reform¹¹¹ and a default position when reform fails, but never a combat goal. But all this supposes partnership is a good fit for marriage. Is it?

A. PARTNERSHIP PRINCIPLE AND PRACTICE

Partnership offers an intuitive metaphor for marriage. In both principle and practice, partnership and marriage have much in common. Both are consensual relationships¹¹² that typically begin with the exchange of commitments, often without written agreement or legal advice.¹¹³ Both often involve specialization, with one party primarily contributing money, and the other primarily services,¹¹⁴ a practice that describes both the traditional marriage and many contemporary ones between primary breadwinners and primary caregivers.

Expectations of gain, broadly understood, generally motivate both partners and spouses to enter the relationship.¹¹⁵ In marriage, anticipated gain may be emotional, spiritual and sexual as well as economic, but in some way, couples ordinarily expect that marriage will make life better, a hope evident in the celebration that commonly accompanies marriage. As Elizabeth Scott observes, marrying couples are often motivated by self-interest, each believing that “individual self-fulfillment will be promoted by a substantial investment in a stable, interdependent, long-term relationship...

¹¹¹. As some marital property litigants have learned, the analytical starting point can be determinative. See, e.g., Luedke v. Luedke, 476 N.E.2d 853, 865 (Ind. App. 1985) (finding that the trial court abused its discretion in dividing property and that equitable distribution requires a 50/50 starting point), rev’d, 487 N.E.2d 138, 134 (Ind. 1985) (holding that no statutory language requires a 50/50 starting point).

¹¹². See DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS AND LLCs 194 (2d ed. 2002) (noting that “the law has always considered a partnership to be a consensual relationship”).

¹¹³. See ALFRED F. CONARD ET AL., ENTERPRISE ORGANIZATION: CASES, STATUTES, AND ANALYSIS 18 (4th ed. 1987) (“The great mass of ordinary partnerships are probably in that form because the parties never gave their organizational structure much attention. Their agreements are informal, and often unwritten.”); KLEINBERGER, supra note 112, § 7.2.1 (stating that some partnerships “arise from a handshake”).

¹¹⁴. See KLEINBERGER, supra note 112, § 8.1 (“A partnership obtains both labor and capital from its partners, although not every partner necessarily provides both.”). See generally ROBERT W. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS 13.3.4 (1989).

¹¹⁵. Anticipated gain is a key characteristic of a partnership, which the UPA defines as “an association of two or more persons to carry on as co-owners a business for profit.” UNIF. P’SHP ACT § 6.1, 6 U.L.A. 275 (2001) [hereinafter UPA] (emphasis added). The UPA has undergone several revisions since its promulgation by the National Conference of Commissioners on Uniform State Laws in 1914. KLEINBERGER, supra note 112, at 190. The most recent revision, published in 1997, is often referred to as the Revised Uniform Partnership Act. REVISED UNIF. P’SHP ACT, 6 U.L.A. 1 (2001) [hereinafter RUPA]. At least thirty states have adopted the RUPA, repealing the UPA. Id. See generally ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT (2001); WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 174 (3d ed. 2001).
with a marital partner.” Similarly, couples may believe that “having and raising children together in a loving home is important to self-realization.” While the nature of expected gain in marriage is surely more personal, more intimate, and more complex than in a commercial partnership, an expectation of some type of gain describes both relationships.

Most compelling, however, is the normative appeal of partnership. The “ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities, and risks.” Much of the attraction of partnership thus lies in its egalitarian principles of mutual contribution, reciprocal responsibility, and shared fate—principles that infuse family norms if not family realities. Absent agreement otherwise, “[e]ach partner has equal rights in the management and conduct of the partnership business”; a rule consistent with modern equality rhetoric and with community property law. Not unlike spouses, partners have “the right to know what is going on in the partnership, the right to be involved in conducting the business, the right to commit the partnership to third parties, the right to participate in decision making, and the right to veto certain decisions.” Partners also undertake a duty of loyalty and of good


117. *Id.* at 12.

118. For a suggestion that business partners may also seek a form of psychic benefit, see CONARD ET AL., supra note 113, at 17:

One of the outstanding features of the organizational revolution is the impulse of people to join in common endeavors. This impulse is commonly attributed to the desire to pool money, resources, skills, and intelligence for greater achievements; it may also respond to some less rational need for affiliation or psychic reinforcement. Modern laws generously provide convenient receptacles for these efforts, by way of corporations for business, religious, eleemosynary, educational or social purposes. However, millions of people continue to pool their resources through less formal, or substantially unstructured groups. Of these, the best known to the law is the ordinary partnership.


120. RUPA, supra note 115, § 401(f).

121. KLEINBERGER, supra note 112, § 9.1.

122. RUPA, supra note 115, § 404(a), (b). In a passage often quoted in partnership law, Justice Cardozo describes the fiduciary duty of loyalty in a joint venture:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market
faith and fair dealing toward each other, obligations consistent with social norms of mutual trust and responsibility between spouses. Partners also share equally all profits and losses, a principle that tends to encourage partners "to view their economic fate as linked with the fate of the enterprise as a whole." A similar sense of shared fate is inherent in normative concepts of egalitarian marriage. The distinction between status as a partner and status as a mere participant such as a wage earner is significant: a partner participates in important decisions, while a wage earner obeys instructions; a partner contributes property while a wage earner merely works in the business; a partner may agree to share losses while a wage earner is not affected by loss.

It would be foolish, of course, to insist that partnership perfectly describes marriage. The question, however, is not whether anyone would mistake a business partnership for a marriage, but rather whether any gain can flow from an analogy to partnership. Such an analogy need not be an all-or-nothing proposition, for partnership can inform discourse without

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123. RUPA, supra note 115, § 404 (d). This section provides: "A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." Id. See generally KLEINBERGER, supra note 112, § 9.8.4. The good faith obligation is "a contract concept, imposed on the partners because of the consensual nature of the partnership." RUPA, supra note 115, § 404 cmt. 4. Partner selfishness is not allowed unless the other partners consent. See KLEINBERGER, supra note 112, § 9.8.3.

124. See RUPA supra note 115, § 401(b) ("Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.").

125. KLEINBERGER, supra note 112, § 7.2.3. Sharing profits (gross income less expenses) tends to produce a different attitude than having a share of revenues (gross income). Id. "Someone with a share merely of revenues tends to focus on making sales, worrying little about the rest of the enterprise. For someone who shares profits, in contrast, sales (and revenues) are only part of the equation; a profit will exist only if the whole business is functioning well." Id. Like business partners, spouses may view themselves as sharing not just paychecks, but ultimate gains and losses.

126. As one court observed:

When couples enter marriage, they ordinarily commit themselves to an indefinite shared future of which shared finances are a part. Acquisitions are made, foregone or replaced for the good of the family unit rather than for the financial interests of either spouse. Property is bought, sold, enhanced, diminished, intermixed and used without regard to ease of division upon termination of the marriage. All this may be modified by agreement, of course, but, by the nature of the marital relationship, couples ordinarily pledge their troth for better or worse until death parts them and their financial affairs are conducted accordingly.

In Marriage of Stice, 779 P.2d 1020, 1026-27 (Or. 1989) (quoting In re Marriage of Jenks, 656 P.2d 286, 290 (Or. 1982)).

127. KLEINBERGER, supra note 112, § 7.4.4.
dominating it. Much can indeed be gained from an analogy to partnership, as the drafters of no-fault divorce laws understood.

B. NO-FAULT DIVORCE: THE CLEAN-BREAK PARTNERSHIP MODEL

Especially attractive to the drafters of the harbinger of no-fault divorce, the Uniform Marriage and Divorce Act ("UMDA"), was the historical partnership principle of at-will dissolution, the unalterable power of a partner to dissolve the partnership at any time. This dissolution right is the linchpin of no-fault divorce, which authorizes divorce at the will of either party upon a finding that the marriage is "irretrievably broken." Indeed, the UMDA drafters went so far as to substitute the partnership term "dissolution" for the more traditional term "divorce." UMDA drafters also expressly adopted a partnership model for the division of marital property, recognizing that the power to dissolve the marriage does not entitle a spouse to walk away from marriage without financial consequence, an incident of cohabitation rather than marriage.

128. Silbaugh, supra note 12, at 84.
130. UPA, supra note 115, §§ 29, 31; see KLEINBERGER, supra note 112, § 11.2.1 ("For centuries the law has characterized partnership as a voluntary arrangement, and a partner's power to dissolve reflects and preserves that character.") RUPA carefully distinguishes a partner's power to "dissociate" from a partnership from the dissolution of a partnership. Compare RUPA, supra note 115, § 601, with RUPA, supra note 115, § 801. "An entirely new concept, 'dissociation' is used in lieu of the UPA term 'dissolution' to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business." Id. § 601 cmt. 1. For a discussion of dissociation and dissolution, see supra Part III.B.
131. The UMDA requires a court to enter a decree of dissolution of marriage if:

   the court finds that the marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage . . . .

UMDA, supra note 129, § 302(a).
132. See id. §§ 302, 305.
133. In a prefatory note, the drafters state: "The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." Id. at Prefatory Note. Consistent with partnership principles, most divorce statutes return a spouse's separate property. See ELLMAN ET AL., supra note 77, at 293-94. This divorce practice is analogous to the return of capital furnished (but not contributed) to a business partnership. See KLEINBERGER, supra note 112, § 8.6.
Unfortunately, while the UMDA's simple partnership model laudably casts mothers as equal partners in marriage, it also promotes a clean-break vision of divorce that imposes the costs of divorce disproportionately on mothers. How did this come to be, in spite of the UMDA's noble effort to frame laws on egalitarian partnership principles? The answer begins with two borrowed partnership concepts: the right to dissolve a partnership at will and the subsequent liquidation of partnership assets. The divorce model based on these concepts empowers a spouse to dissolve a marriage at any time without a showing of fault, and authorizes a court to divide marital property in a one-time order that finally settles the parties' rights and responsibilities. Central to this divorce scheme is the principle that spouses deserve a clean break and a fresh start, an opportunity to begin life anew without the lingering financial entanglement of a dead marriage. In practice, this principle supports a final resolution of economic rights at divorce through a one-time division of marital property and limited opportunities for alimony. While this model initially held great appeal for a variety of divorce reformers, it is becoming evident that in the many marriages in which property is insignificant, the practical effect of the clean-break principle is to devastate long-term caretakers who are set free to begin new lives with few resources, dated employment histories and limited market skills. Younger caretakers of minor children are also hard-hit by

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134. See discussion supra notes 127–29 and accompanying text.

135. As the UMDA prefatory note explains, "the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses." UMDA, supra note 129, at Prefatory Note. This comment is curious in view of the small number of women who have ever received alimony. See supra note 7 and accompanying text. The Official Comment to UMDA § 308 provides:

The dual intention of this section and Section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

UMDA, supra note 129, § 308.

136. The notion that a caretaker can be quickly rehabilitated appeals to caretaking women wishing for financial independence, to feminists insisting women do not need male support, to husbands hoping to avoid supporting their ex-wives, and to clean-break advocates seeking a clear conscience. See Starnes, supra note 10, at 97–98.

137. See supra note 6.

138. For an early and caustic indictment of the impact of no-fault divorce on long-term caretakers, see In re Marriage of Branter, 136 Cal. Rptr. 635, 637 (1977) (stating that no-fault divorce laws are not meant to serve as a "handy vehicle for the summary disposal of old and used wives").
the clean-break principle, as they are set free to begin new lives, not as ideal workers, but as marginalized caregivers.\textsuperscript{139}

The problem with current law lies not in partnership, however, but in the simplistic use of partnership principles. No-fault divorce laws fail to recognize both the case in which partnership business continues after the dissociation of a partner\textsuperscript{140} and the critical distinction between dissolution, windup and termination.\textsuperscript{141} The reform remedy that I propose in the next section is not to scrap partnership, but to expand it; not to abandon the powerful, egalitarian, gender-neutral principles that drew no-fault reformers in the first place, but to enrich our understanding of those principles.

IV. PARTNERSHIP TOOLS FOR INCOME SHARING

They had trusted each other to the point that no one had ever raised the prospect of a written partnership agreement let alone dissolution. But sitting at the end of the conference table was one of the partners having just announced that he wanted to dissolve the partnership and take his considerable collection of contingency fee cases with him. The other partners were stunned. Could he really expect to keep these cases and not share the income realized from them?\textsuperscript{142}

Like spouses, business partners may begin their relationship as starry-eyed optimists, full of hope and trust, eschewing the need for a written prenuptial or partnership agreement.\textsuperscript{143} Not until their relationship is in jeopardy do partners begin to understand the mutual vulnerability inherent in shared adventure. Strangely, the law of no-fault divorce seems to miss the mutuality of marital partners’ fate, instead implementing a partnership model that places the costs of divorce primarily on one spouse—the female caretaker. A more fully developed concept of partnership can do better, providing a compelling rationale for buyout of a lower-income spouse and income-sharing for a caretaker of minor children.

A. A MARITAL PARTNERSHIP MODEL: DISSOCIATION AND BUYOUT

Marriage is a lifetime commitment—from both a traditional and a normative perspective, marriage is for life.\textsuperscript{144} However, it is also a

\textsuperscript{139} The terms “ideal worker” and “marginalized caregiver” are borrowed from Joan Williams. See WILLIAMS, supra note 7, at 1.

\textsuperscript{140} See infra notes 150-54; see also Starnes, supra note 10, at 119-27.

\textsuperscript{141} See supra note 124 and accompanying text; see also infra notes 157-65 and accompanying text.


\textsuperscript{143} See supra note 113 and accompanying text.

\textsuperscript{144} As Elizabeth Scott notes, marrying couples want marriage to be binding:
commitment that spouses may break. Marriage serves an important social function by enabling parties to tie themselves together in a significant and formal, if intensely personal, relationship that family, friends and the public at-large recognize as legally binding. Why would anyone do this? As Elizabeth Scott observes, couples may believe their best hope for long-term personal happiness lies in a lasting commitment to another person. So, too, may they believe that their children will benefit from a stable parental relationship. Couples may thus not want to be free to succumb to temptations that, while gratifying in the short-term, interfere with their ultimate goal. And so, much like Ulysses asked his crew, couples ask the law to bind them to the matrimonial mast.

No-fault divorce does not change this view of marriage. While marriage licenses still do not designate a term other than life, everyone understands that spouses are free to change their minds, to break their promises of lifetime commitment at any time and for virtually any reason. High divorce rates make it clear that many do indeed change their minds. Marriage, however, need not be an inescapable commitment in order to be a lifetime one. Even though divorce laws recognize spouses' freedom to end their relationship, these laws do not change the terms of the initial marital commitment any more than the ability to terminate a business contract alters its initial terms. In neither case are parties compelled to specifically perform their promises, nor are their broken promises penalized through punitive damage awards. The point is that breaking a promise is not the

Two people enter marriage committed to its success and endurance, though not, as in the past, because of religious obligation or moral duty to the spouse. Rather, each person determines that individual self-fulfillment will be promoted by a substantial investment in a stable, interdependent, long-term relationship with a marital partner. The couple also view having and raising children together in a loving home as important to self-realization.

Scott, supra note 116, at 12.

145. Id. at 22 ("For many, the goal of self-fulfillment in marriage means substantial investment in a long-term relationship, rather than short-term gratification and 'nonbinding commitment'.").

146. See id. at 40 ("At least since Ulysses told his crew to tie him to the mast so that he would not yield to the entreaties of the sirens... people have used precommitment strategies as a means of self-management.").

147. As Allan Farnsworth explains:

Somewhat surprisingly, our system of contract remedies rejects, for the most part, compulsion of the promisor as a goal. It does not impose criminal penalties on one who refuses to perform one's promise, nor does it generally require one to pay punitive damages. Our system of contract remedies is not directed at compulsion of promisors to prevent breach; it is aimed, instead at relief to promisees to redress breach.

same as never having made one. No-fault divorce law allows parties to break promises; it does not pretend promises were never made.\textsuperscript{148}

But if promises can be broken, what is the point of insisting they were initially made? The answer is that freedom to terminate a relationship does not necessarily mean freedom to terminate it without cost. To say marriage may be dissolved upon request and without penalty is not to say it may be dissolved without a price, by walking away with all the assets or income accumulated during the marriage. Unlike cohabitation, which parties traditionally may end without legal involvement or economic consequence,\textsuperscript{149} marriage is a legal status,\textsuperscript{150} which ends only with state involvement and, absent agreement otherwise, with state determination of the economic price of exit.\textsuperscript{151}

So what is the exit price? Drawing on the imagery of Joan Williams,\textsuperscript{152} the answer might begin with a view of marriage as a commitment to share, among other things, the effort necessary to sustain and nurture the family. In practice, this commitment often produces a family wage through the combined efforts of one spouse who works in the market as an ideal worker, and the other who works primarily in the home as a supporting caregiver.\textsuperscript{153} At divorce, the spouses’ sharing abruptly ends as the ideal worker’s paycheck

\begin{itemize}
\item Denial of the existence of marital promises is more consistent with an action for annulment than for divorce.\textsuperscript{148}
\item Cohabiting parties may, of course, enter contracts creating enforceable rights, though such “contracts may be subject to scrutiny to which business contracts are not ordinarily subject. See, e.g., Marvin v. Marvin, 557 P.2d 106, 110 (1976).\textsuperscript{149}
\item marriage is a legal status,\textsuperscript{150} which ends only with state involvement and, absent agreement otherwise, with state determination of the economic price of exit.\textsuperscript{151}
\item Parties can generally avoid this default rule by entering into a prenuptial agreement, though few choose to do so.\textsuperscript{151}
\item See WILLIAMS, supra note 7, at 1–9. Although Williams’s imagery provides compelling support for a partnership model of marriage, she rejects such a model as a “highly commercialized” analogy that is “unconvincing” and “threatens intimate relations with undesirable commodification.” Id. at 135. To the contrary, the concepts and vocabulary of partnership can help free reform discourse from habituated assumptions about family entitlements that sabotage efforts to make family law truly equitable. Escape from the discourse of domesticity is a powerful step toward gender equity. For an argument that it is actually the refusal to commodify women’s labor that harms women, see infra notes 175–82 and accompanying text.\textsuperscript{152}
\item WILLIAMS, supra note 7, at 1. Williams reasons that “the ideal worker’s wage is the product of two adults: the ideal worker’s market work and the marginalized caregiver’s family work.” Id. at 5. Susan Okin has suggested that a couple’s “equal legal entitlement to all earnings coming into the household” could be made clear by requiring employers to “make out wage checks equally divided between the earner and the partner who provides all or most of his or her unpaid domestic services.” OKIN, supra note 10, at 180–81.\textsuperscript{153}
\end{itemize}
is taken from the family and assigned to one spouse as his alone. Conceptually, this is not a wholly inappropriate result, since to require continued income sharing would be to require specific performance of the promise of lifetime sharing, a result as inconsistent with understandings of marriage and divorce as it is with understandings of contract. The question, however, is not whether the law should require continued performance of marital commitments, but rather whether it should impose a price for broken commitments.

Elsewhere I have proposed a simple model that provides conceptual support and numeric calculation of a marital exit price. Employing the principles and language of partnership to escape lingering gender-biased assumptions about family equity, I have suggested that a spouse whose earnings disproportionately increase during marriage in relation to those of his partner should be required to buy out her interest at divorce. This marital exit price resembles the buyout required of a fixed-term partnership that continues to operate after dissociation of a partner. The principle underlying buyout is simple: when partnership contributions generate value, i.e., enhance the ability of the partnership to generate future income, a departing partner is entitled to a share of that value. Partners who elect to continue what was once a shared effort are thus required to compensate a departing partner.

Like commercial partners, spouses commonly pool their labor, time, and talent to meet responsibilities and to generate income that they expect to share. Consider, for example, the marriage of an ideal worker and a Soccer Mom. Together, these spouses contribute capital and labor to the marital partnership in the expectation that their mutual contributions will generate shared value in the form of income and a home with children. Often, the spouses' combined efforts generate enhanced human capital primarily for the husband who has invested more extensively in paid employment than his primary caretaker spouse. In such a case, it is the marital partnership, rather than the husband alone, that has produced the husband's enhanced human capital. Although divorce terminates the parties' relationship, it usually does not terminate the husband's income stream, which continues to reflect the enhanced value produced through

154. WILLIAMS, supra note 7, at 3. "When two family members work together to produce an asset," reasons Williams, "it makes no sense to award it unilaterally to one of them." Id. at 5.
156. When a partner dissociates before the end of a fixed term, remaining partners may elect to continue rather than wind up the partnership business. See RUPA, supra note 115, § 801(2)(i). In such cases, the partners who continue the business must buy out the interest of the dissociated partner. Id. § 701(a).
157. See WILLIAMS, supra note 7, at 1–6.
158. For a discussion of the market costs of primary caretaking, see discussion supra Part I.
joint marital effort. Such a husband should therefore buy out the interest of his wife at divorce.

To implement this model and to guard against its gender-biased application, I have proposed bright-line legislation that presumptively establishes: (1) a simple mathematical model for calculating enhanced earnings, and (2) a sliding scale that bases the buyout price on the length of the marriage. While this buyout model addresses cases in which shared efforts end with divorce, it does not address cases where the presence of minor children requires the continuing, combined efforts of former spouses. For these latter cases, I propose an additional, complementary partnership model that should replace the ALI's model.

B. A Parenting Partnership Model: Children as Unfinished Partnership Business

When marital partners are also parents, they implicitly undertake an additional mutual commitment to support and nurture their children. This parenting partnership complements but does not supplant the marital partnership, which continues to define the couple's spousal relationship. While no-fault divorce laws empower a spouse to divorce a co-parent during their children's minority, they do not empower a parent to divorce her child. Parental responsibility to children continues after divorce, normatively and pragmatically linking divorced parents to each other as they continue to support and nurture their children. Family law, however, generally ignores the economic equities between divorced parents during their children's minority, leaving the primary caretaker parent largely alone to bear the post-divorce career costs of child rearing. Partnership remedies this inadequacy in current law, providing a compelling model for economic equity between divorced parents during their children's minority.

159. Starnes, supra note 10, at 130-38. This buyout share, which increases with the length of the marriage, might be patterned after the Uniform Probate Code provision for a gradually-increasing forced share based on the length of the marriage. Id. at 136 n.309. Curiously, the ALI, while rejecting a partnership model, notes that its "emphasis on duration of marriage . . . is consistent with the approach of the new [UPC], which gradually enlarges the forced share in proportion to the duration of the marriage." ALI PRINCIPLES, supra note 3, § 5.04 reporter's notes cmt. c.

160. See generally Estin, supra note 10. The ALI's alimony proposal does not compensate primary caretakers for lost earnings incurred because of post-divorce child care. See ALI PRINCIPLES, supra note 3, § 5.05 cmt. f. While the Institute recognizes the reality of a caretaker's continuing lost opportunities after divorce, they suggest that these losses are more appropriately considered as part of a child support award. Id. The Institute's deference to child support sends a disturbing message: A divorced caretaker's claim against her ex-husband depends not on her status as an equal stakeholder in parenting, but rather on her status as an appendage of a dependent child, from whom she may siphon support.

161. Other commentators have offered proposals for continued income sharing during the minority of marital children. June Carbone, for example, suggests that divorce should be irrelevant to the "economic community initiated by marriage [that] endures through the
Partnership law recognizes that the departure of a partner does not always trigger an immediate termination of the partnership. Even after a partnership dissolves, it may continue to operate until its affairs are wound up. During windup, partners “complete the business of the partnership, liquidate assets, settle liabilities, and distribute profits, if any, among the partners.” Only after this process is complete does the partnership terminate. The UPA thus recognizes a three-step process for ending a partnership: dissolution, windup and termination.

As partners wind up their affairs, they continue to be linked by mutual obligations and continue to share a fiduciary relationship. However “strained” the relations between the partners may actually be, the UPA views the process of winding up as a “cooperative venture.” During this period, profits and losses are allocated to the former partners according to their respective interests in the partnership; in the absence of an agreement otherwise, they continue to share as equal partners. Additionally, in a change from prior law, the RUPA generally authorizes

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children’s minority, whatever happens to the parents’ relationship.” Carbone, supra note 10, at 887. Emphasizing parents’ obligations to their children rather than to each other, Carbone would equalize parents’ standards of living during their children’s minority. Id. Similarly, Judith Younger has proposed a special status—“marriage for the benefit of minor children”—that would presumptively preclude divorce and thus continue income sharing during children’s minority. Judith Younger, Light Thoughts and Night Thoughts on the American Family, 76 MINN. L. REV. 891, 900–14 (1992). While neither Carbone nor Younger endorse a partnership model, the dollars and cents of their proposals are virtually identical to a proposal based on partnership. Partnership offers the additional benefit of conceptual and linguistic escape from habituated assumptions about gender roles and rights that impede efforts to achieve equity for mothers.

162. See RUPA, supra note 115, § 802(a). See generally HILLMAN ET AL., supra note 115, at 703–05.

163. Weinstein, supra note 142, at 861.

164. As Professor Gregory explains:

Under the UPA, dissolution designates the point in time when the partners cease to carry on the business together; in contrast, termination is the point in time when all the partnership affairs have been wound up. Winding up is the period of time subsequent to dissolution and prior to termination during which the process of settling partnership affairs takes place.

GREGORY, supra note 115, § 227.

165. Weinstein, supra note 142, at 861–62.

166. Id. at 872.

167. Id.

168. Id. at 861 n.23 (“Profits or benefits derived from the unfinished business of a partnership during the winding up period must be held in trust for the partnership.”).

169. See supra notes 122–23 and accompanying text (describing how partners share equally in profits and losses).
extra compensation for a partner who bears a disproportionate burden during windup.\textsuperscript{170}

As an easy example of the UPA's three-step process, consider the case of the law firm partnership. When a partner leaves the firm, the partnership may dissolve, but the dissolution does not itself complete partnership work on ongoing client cases, some of which may present valuable contingent fee opportunities. These active cases constitute unfinished partnership business, to be completed during the process of winding up the partnership. Only upon completion of this unfinished business does the dissolved partnership finally terminate.

Family law can gain much from a loose analogy to the partnership rules on windup. When parents divorce during their children's minority, the children represent unfinished work of the parenting partnership, to be completed before that partnership terminates.\textsuperscript{171} Though a divorcing spouse may ardently wish to jettison the other parent from her life, this desire is often inconsistent with normative views of children's best interests,\textsuperscript{172} with the pragmatics of child rearing and with the mathematics of child support.

But is parenting really a shared responsibility that survives divorce, rather than the individual responsibilities of two independent persons? Clearly, some divorced parents are more willing to coordinate their caretaking and financial responsibilities than others. In the best-case scenario, parents communicate amicably and work together to ensure that their children receive appropriate physical, emotional and financial support. But even between parents less inclined toward amicability, parents' obligations are in many ways interdependent.

Child support offers a prime example of this interdependency. Under the popular income-shares formula underlying many child support guidelines, the amount of financial support a noncustodial parent must contribute to a child's care generally depends not only on his income, but also on the income that the custodial parent can contribute to the child's

\textsuperscript{170} This provision represents a change from the "no compensation rule" of prior law, which denies a partner compensation for services performed for the partnership other than reasonable compensation to a surviving partner. Weinstein, \textit{supra} note 142, at 858 n.2.

\textsuperscript{171} Partners for a particular undertaking have the power to dissolve the partnership before completion of the undertaking. \textit{Kleinberger, supra} note 112, \S 11.2.1. While the parenting partnership can be viewed as a partnership for a particular undertaking (the rearing of children to majority), an analogy to partnership rules permitting premature termination does not fit well with parenting, since terminating parents' responsibilities prior to children's majority is inconsistent with normative concepts of parenting.

\textsuperscript{172} For an argument that "a coherent parental partnership ideal is the missing piece of custodial jurisprudence," see June Carbone, \textit{The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership}, 39 \textit{Santa Clara L. Rev.} 1091, 1095 (1999).
care. The mutuality of the parents' financial obligations is evident in such a computation.

Parental duties to provide physical care for a child are even more obviously interdependent. To the extent one parent satisfies legal thresholds for a child's physical care, the other need not. A parent may, of course, choose to provide additional care of some type and degree, but she is not compelled to provide basic care, having been freed from legal compulsion by the other parent's action. Similarly, when Parent A provides care that is not legally required but that Parent B perceives as necessary from a social, moral or religious perspective, Parent B is freed from the self-imposed responsibility to provide that care. Examples of such parental interdependency abound: to the extent one parent prepares a child's dinner; wraps her in a winter coat; transports her to school or to piano lessons or to the zoo; washes her underwear; or reads her a bedtime story, the other parent need not do these things. While it may seem strange from a normative perspective to think of parents as being "freed" from the need to perform such acts, some of which may generate significant psychic benefit for the parent who performs them, most parents also understand from a practical perspective the value of occasional freedom from these responsibilities. Weekend babysitters for pay understand this reality well enough.

Even in a conventional, binary custodian/noncustodian divorce decree, both parents thus typically continue to provide physical, emotional, financial and perhaps spiritual care for their children in a way that is interdependent. When divorce dissolves the parents' marriage, it does not ordinarily terminate obligations of the parenting partnership, which continue during the unfinished business of raising children.

What does this unfinished-parenting model offer divorce reformers? In addition to injecting realism into the clean-break philosophy of no-fault divorce, it provides a compelling basis for income-sharing during the children's minority. Partnership rules on the economics of unfinished business suggest two possible bases for such income-sharing: (1)
compensation for a disparately-burdened parent and (2) profit-sharing between parents.

1. A Compensation Model

As the unfinished work of parenting continues after divorce, each parent ordinarily contributes financially to the children's upbringing, in a ratio and amount determined by child support guidelines. Yet dollars alone do not satisfy parental responsibilities to children, who require physical care as well as financial support. After divorce, one parent usually undertakes primary responsibility for the children's daily physical care, often limiting paid employment in order to meet this responsibility. Were this custodial parent a business partner undertaking the lion's share of unfinished partnership work, she might receive compensation. Because she is a parent, however, her disproportionate burden is ignored, a result that is as inequitable for a parenting partner as it is for a business partner.

While partnership's "no-compensation rule" generally disallows wages for the individual partner who performs partnership work, the RUPA recognizes that this rule can impose an unconscionable hardship on a partner who undertakes a disproportionate share of unfinished partnership business during windup. The RUPA thus authorizes reasonable compensation in such cases. This framework provides a model for payments to a custodial parent who undertakes a disproportionate share of the parenting partnership's unfinished daily work.

Such a compensation model, however, would require quantification of the reasonable value of caretaking. Commodification critics argue that this is crass, that monetizing home labor degrades and exploits women, implying

176. In about ninety percent of divorce cases, mothers receive primary physical custody of children. ELLMAN ET AL., supra note 77, at 571-72. For a review of primary caretaking responsibilities, see discussion supra Part I.B.

177. UPA, supra note 115, § 18(0); RUPA, supra note 115, § 401(h). These default rules may be changed by agreement. See generally KLEINBERGER, supra note 112, § 8.5.

178. RUPA, supra note 115, § 401(h).

179. Id. § 401(h) (stating that each partner is entitled to "reasonable compensation for services rendered in winding up the business of the partnership"). Under the UPA, however, reasonable compensation is available only to a sole surviving partner. UPA, supra note 115, § 18(f); see also KLEINBERGER, supra note 112, § 8.5 n.20.

180. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 75-81 (1993). As Vicki Schultz notes, while "[n]o self-respecting feminist could be against 'valuing housework' . . . that slogan obscures a host of troubling institutional questions . . . ." Schultz, supra note 10, at 1900. "[F]eminists," warns Schultz, "should be wary of paths to 'valuing housework' that encourage women to concentrate on housework and childcare at the expense of a deep commitment to paid work." Id. at 1911. Even apart from questions of the appropriateness of Schultz's very negative view of caretaking as compared with paid labor, it is not clear that post-divorce income-sharing would actually encourage increased caretaking labor, especially in view of feminists' arguments that caretaking is less a choice than a practical necessity. See, e.g., Cahn, supra note 52, at 180 (noting "[t]he constraints on women's lives such
their fungibility and erroneously supposing that there is a market price for family-specific caretaking, an alternative provider of the loving nurture a mother supplies. Moreover, say commodification critics, such market talk raises the terrible specter of affect lost through habituated economic discourse.

As Katharine Silbaugh poignantly observes, however, home labor is not an either/or proposition, but rather a multifaceted activity capable of "plural meanings." Homemaking has both an affective and an economic component and is thus simultaneously priceless and capable of pricing.

Neither does the absence of a real market for family-specific caretaking preclude its valuation. There is no market for human arms or legs, yet a fact finder may quantify a tort plaintiff's loss of a limb. In such cases, the law creates a rhetoric market as a necessary means of ensuring fair treatment for identified parties. There are good reasons to create such a rhetoric market for caretaking, for the law's refusal to value home labor serves largely "to leave women without cash in the name of non-commodification."

Assuming homemaking does indeed have plural meanings and that such labor may be monetized without destroying its nonmonetized value, how is the law to value it? Is it really possible to place a price tag on the vast

that they appear to choose a life of household duties and to conserve power within that sphere, when, in fact, the choice is rigged.

181. This point is made by James Boyd White:

The segmentation of the exchange model tends to misvalue the work we do for ourselves, which is most of the traditional work of women . . . . This is especially true of people who raise their own children. Such work cannot be segmented into functions and then made the material of the market process, actual or hypothetical, for what the child requires is the sustained presence of, and interaction with, a loving and respectful person, something no alternative can supply. Similarly, housework has a different meaning when one is maintaining one's own home rather than acting as a servant for others.

White, supra note 12, at 190.


183. Silbaugh, supra note 12, at 96-100. As Silbaugh observes: "The commodification critique is often a conversation stopper. Because markets do not capture the entire experience in question, they are thought to threaten the existence of what they cannot describe." Id. at 120.

184. Id. at 96. Placing a price tag on one aspect of home labor, insists Silbaugh, does not destroy our understanding of its pricelessness anymore than calculating an appropriate amount of life insurance destroys our understanding of the value of life. Id. at 96-97.

185. Id. at 99. There is no market for buying and selling people, yet life insurance policies place a dollar value on a lost life. Id. at 96-97. And while there is no market for pain and suffering, juries often afford them a monetized value.

186. Id. at 98-99.

187. Id. at 95. Concerns of sentimentality, which tend to be raised when women's financial interests are at stake, engage the dubious proposition that "[w]hen love motivates work at home, nothing but love should be its reward." Silbaugh, supra note 4, at 81. Given the serious costs this proposition can inflict, "[c]oncern over women's lives becoming entirely commodified seems by comparison an abstract worry." Silbaugh, supra note 12, at 84.
array of tasks caretaking entails, from morning feedings to mid-day car pooling to midnight nursing? While it may be clear that caretaking contributes significant value to the economy as a whole, it is less clear how this value can be quantified in an individual case. Silbaugh lists several valuation methodologies: (1) ascertaining the market value of similar services, (2) measuring the opportunity costs of the homemaker, and (3) assigning an hourly wage based on the number of children and the size of the home, with offsets for services purchased on the market. While Silbaugh acknowledges the quantification challenges of each of these methodologies, she suggests that practice would make legal actors better valuators and urges them to begin this process.

There may be an easier way. While a parental compensation model contributes importantly to reform discourse by forcing recognition of the principle that caretaking is labor, and valuable labor at that, there may be a more pragmatic way to ensure equity for primary caretakers. Partnership offers a second model for income sharing during the unfinished business of raising children that avoids the quantification difficulties of a compensation model.

2. A Profit-Sharing Model

During windup, no partner ordinarily expects to receive compensation for individual effort. Rather, partners simply continue to share profits and losses as they did prior to dissolution. Absent an agreement otherwise, partners share equally. No partner expects to retain all the profit or bear all the loss generated during completion of partnership work because profit and loss belong to the partnership at large, rather than to the individual partners. An equal share of partnership profit is therefore ordinarily an appropriate and sufficient consequence of a partner’s individual labor during the completion of unfinished partnership work.

This partnership framework provides a compelling model for divorces involving minor children. Even after spouses end their marital partnership, their work as parenting partners continues to support a complex infrastructure of time, money and effort; of market labor and home labor; of paychecks and child care; of enhanced human capital associated with primary breadwinning; and lost market opportunities associated with

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188. Silbaugh estimates the economic value of unpaid domestic labor at between twenty-four percent to sixty percent of the U.S. Gross Domestic Product. Silbaugh, supra note 4, at §.
189. See Silbaugh, supra note 12, at 80–81.
190. Id.
191. Silbaugh reasons that placing a monetary value on housework "would force an increased appreciation of its value." Id. at 79.
192. See KLEINBERGER, supra note 112, § 8.5.
193. Id. § 8.3.1.
primary caregiving. Because parenting and the infrastructure necessary to support it do not end when parents divorce, neither should their sharing of these profits and losses.

Even after divorce, the individual labor of a parent in the nurture and support of minor children should be viewed as labor expended on behalf of the parenting partnership. During the period in which children require continuing financial and physical support, no individual parent should bear all the losses associated with caretaking and no individual parent should enjoy all the gain associated with ideal worker status. As equal partners in the work of parenting minor children, this model supports equal income sharing, i.e., equalization of household standards of living until the youngest child reaches majority.

This parenting-partnership model may provoke the criticism that it overcompensates a mother who benefits both from income sharing and from a disproportionate share of the benefits of child rearing. The answer to this concern is that, much as the law might like to do so, it is not possible to value psychic gain and then to offset it against financial gain. Psychic benefits simply cannot be quantified. Even an assumption that a primary caretaker of children enjoys more psychic benefits than the other parent may be erroneous, since psychic benefit is not necessarily time dependent. A primary caretaker may devote long hours to the daily drudgeries necessary to maintain a home for the child—shopping, cooking and cleaning—yet reap little psychic benefit in the process. On the other hand, a non-primary caretaker who devotes little time and energy to caretaking may reap huge psychic benefits, as when he and his child enjoy a heart-to-heart talk about the child’s perceptions, troubles and hopes. The quantity of time spent on children will not always reflect the quality of that time and is thus a poor proxy for psychic gain. Moreover, opening the door to a balancing of parental joys would raise a host of questions about the children themselves and their propensity to inspire more joy than worry or sorrow or any of the other psychic costs of parenting, which may fall disproportionately on the children’s primary caretaker.

Even when the presence of minor children supports income sharing, a buyout price should be calculated at the time of dissolution. This buyout price may be relatively small when minor children are present, since its size is a function of the length of the marriage and the increase in earnings during marriage. While payment of the buyout price may be deferred until the youngest child reaches majority and income-sharing ends, it is important

194. See discussion supra Part I.B.
195. See WILLIAMS, supra note 7, at 1–9.
196. Several commentators have proposed income-sharing at divorce. See, e.g., OKIN, supra note 10; Rutherford, supra note 10; Singer, supra note 10; Starnes, supra note 10.
to impose a buyout requirement even in cases of disparately enhanced spousal earnings.

Fundamentally, spouses are partners in an adult relationship that begins with an exchange of adult commitments, an expectation of adult joy, and a risk of adult sorrow. When children are present, they may have a profound effect on the adult relationship, but at least as a normative matter, spouses do not abandon their commitments to each other when they become parents. Instead, parents take on an additional mutual commitment toward their children. As a practical matter, no-fault divorce laws do not mistake parental commitments for spousal commitments, recognizing that termination of the latter does not terminate the former. As childless couples understand, and as empty-nesters discover, marriage is not exclusively about children.197 It would be a mistake to allow a legitimate interest in children to obscure what should also be a legitimate interest in the adults who bear them. When the marital partnership ends, a buyout should be required in order to ensure fair play for adults, whether or not they are also parents.

CONCLUSION

The ALI's response to the costs of mothering is a reform proposal that seeks to protect mothers by casting them as economic casualties of marriage entitled to reparations for their loss. When intractable quantification problems impede the effort to quantify loss, the ALI resorts to the mathematics of the expected-gain models they shun. Casting mothers as losers might be less disturbing if it were more necessary to achieve the Institute's goals. It is not. Equally available is a reform model based not on relief for suckers, but on rights for partners. Partnership casts mothers as full stakeholders in a joint venture, infusing reform discourse with an egalitarian vocabulary free of stigmatizing conceptions of husbands and wives. Moreover, partnership establishes a baseline of spousal equality—in contribution, in responsibility, in right—against which all inequalities must be justified, all old law tested for its ability to fit within a gender-neutral paradigm. This Article offers an enriched partnership model for post-divorce income sharing. Under this model, a divorcing mother may qualify for a buyout of her interest in the marital partnership and, in cases involving minor children, for income sharing during the unfinished work of the parenting partnership. These proposals provide a conceptual rationale and a quantification model for alimony while sending a message that mothers are worthy of respect rather than pity.

197. A fertility test is not a precondition to a marriage license; marriage does not end automatically when children reach age 18.