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Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships

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Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships

Shahar Lifshitz*

Abstract

This Article addresses the regulation of the relationships between unmarried cohabitants. It challenges the conventional divide between conservative and liberal approaches. On one hand, moral condemnation of nonmarital conjugal relationships and public policy in favor of marriage lead conservatives to reject the application of marriage law to cohabitating partners. On the other hand, based on principles such as freedom, tolerance, and equality, liberals tend to equate the mutual legal commitments of cohabitants with those of married partners. I break with conventional analysis by offering a novel liberal model that separates between the mutual obligations of cohabitants and married partners. The proposed model is based on a pluralist constitutional theory that underscores the responsibility of the liberal state to create a range of social institutions that offer meaningful choices to individuals. The Article thus argues that the law should develop two distinctive legal regimes for marriage and cohabitation and provide couples with substantive freedom to choose between them. It offers arguments based in morality and efficiency to support the proposed bipolar default systems and the role of marriage as a screening mechanism. The Article further shows that this pluralist theory goes well beyond standard cohabitation law and provides a framework for an innovative pluralist regulation of spousal relationships. It demonstrates the potential contribution of such a framework regarding three

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publicly disputed topics: same-sex marriage and civil unions; covenant marriage; and secular regulation of religious marriage.

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I. Introduction

This Article addresses the regulation of economic relationships between unmarried cohabitants, criticizing the extant approaches to cohabitation and offering a new legal model. The proposed model is based on a pluralist constitutional theory that underscores the responsibility of the liberal state to create a range of social institutions that offer meaningful choices to individuals.

This Article, thus, argues that the law should offer two distinctive legal regimes for marriage and cohabitation and that it should provide the couples with substantive freedom to choose between them. This Article further shows that this pluralist theory goes well beyond standard cohabitation law and can provide a framework for an innovative pluralist regulation of spousal relationships.

Traditionally, American law sharply distinguished between marriage and cohabitation, and even invalidated contracts in which the cohabitants explicitly took upon themselves marriage-like commitments.¹ Since the last decades of the twentieth century, however, there is a trend to narrow the gap between the mutual obligations of cohabitants and those of married partners.² Conventional wisdom depicts this trend as liberal,³ while opposition to it is viewed as conservative⁴ and moralistic.⁵ The new restatement on family dissolution⁶ may

1. See, e.g., Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165 (1985) (discussing the traditional policy that invalidates contracts between cohabitants).

2. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (validating a contract between cohabitants and also applying marriage commitment between cohabitants according to the implicit contract theory). *But cf.* *Morone v. Morone*, 413 N.E.2d 1154, 1158 (N.Y. 1980) (limiting the recognition of mutual commitments between cohabitants to explicit contracts); *Lindsey v. Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (applying marriage law to cohabitants regardless of their implicit contract).

3. See, e.g., Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 227 ("Other critics contend that, in an era in which family arrangements are understood to be a matter of *private choice*, cohabitation unions and marriage should be subject to the same legal treatment." (emphasis added)); see also Herma H. Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Option*, 65 CAL. L. REV. 937, 937 (1977) (supporting the process of granting rights to cohabitants on the basis of liberal rationales of increasing freedom). For similar approaches in the context of other Western jurisdictions, see H.A. Finlay, *Defining the Informal Marriage*, 3 U.N.S.W. L.J. 279, 279 (1980) (finding support for the application of marriage law to cohabitants under a liberal-contractual theory).

4. See, e.g., Scott, *supra* note 3, at 227 ("On the other side of the debate are highly visible defenders of marriage, many of whom are social and political conservatives with a religious or moral agenda."); Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1193-94 (arguing that imposing marriage commitments on cohabitants undermines marriage); see also *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979) ("[P]ublic policy disfavors private contractual alternatives to marriage.").

5. See, e.g., J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 106 (1984) ("Because of the perceived immorality of these relationships, even express contracts between cohabitants were not enforced.").

6. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* 907 (LexisNexis 2002) [hereinafter ALI].

reflect the next seemingly liberal step,⁷ which is to equalize completely the regulation of the economic relationships between unmarried cohabitants and between married partners.⁸

This Article breaks with conventional wisdom by presenting a liberal-pluralist case against equalizing the mutual obligations of cohabitants and married partners. It offers three rationales for distinguishing marriage and cohabitation.

It first offers a *pluralist observation*: A variety of spousal relationships characterized by different levels of commitments exist in our society.⁹ The distinction between marriage and cohabitation is justified because it provides a *screening mechanism* for the *spouses* to express their different preferences.¹⁰

The second rationale argues that the law should *design* marriage and cohabitation as separate spousal institutions as part of society's responsibility to provide a *diversity of spousal institutions*.¹¹ It demonstrates the importance of diversity on the basis of a pluralist attitude that is committed to *autonomy* as a primary liberal value and emphasizes the responsibility of the liberal state not only to respect individuals' choices, but also to create a variety of social institutions that offer meaningful choices to individuals.¹²

The third rationale is based on an *innovative efficiency analysis*, which supports the intrinsic values of autonomy and pluralism.¹³ While equating marriage and cohabitation provides a single default rule, the distinction between marriage and cohabitation provides a menu.¹⁴ A bipolar default system, I argue, is vital for an efficient "*signaling*" process and encouraging *information delivery* between spouses.

7. See Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 354 (praising ALI Principles for acknowledging diversity and legitimate unconventional family forms).

8. See ALI, *supra* note 6, at 907 (discussing domestic partners and the legal obligations domestic partners have toward one another at the dissolution of their relationship).

9. See *infra* Part III (highlighting the different approaches to cohabitation law).

10. See *infra* Part III.A.1 (arguing that couples should have the ability to choose the legal institution that best fits their relationship).

11. See *infra* Part III.A.2 (arguing that the law should design a variety of spousal options in order to support the diversity of spousal lifestyles).

12. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 179 (1994) (supporting the active role of the state that stems from his liberal account of autonomy); see also *infra* notes 132–33 and accompanying text (noting Raz's work further).

13. See *infra* Part III.A.3 (discussing how the pluralist approach provides signaling effect).

14. See Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 3 (2006) ("A menu is a contractual offer that empowers the offeree to accept more than one type of contract."). This Article, however, refers to menus that are offers from the state to both partners.

Legal scholars have partially recognized the liberal distinction between marriage and cohabitation obligations.¹⁵ Focusing solely on the presumed wishes of typical cohabitants, these scholars hold that the absence of a formal marriage reflects the rejection of marriage laws.¹⁶ This contractual argument underlies the *explicit contract model* that was adopted in few jurisdictions and recognizes economic obligations between cohabitants only when the parties have entered a formal agreement.¹⁷

This contractual model, however, is incomplete, as it fails to address three contrasting arguments in favor of imposing marriage law on cohabitants: exploitation due to gender differences,¹⁸ relational commitments embedded in long-term cohabitation,¹⁹ and the case of same sex couples that are disqualified from marriage.²⁰

Prominent scholars and lawmakers believe these contrasting arguments support the complete equalization of marriage and cohabitation commitments based on either a relational contract²¹ or the status model.²²

15. See Ruth Deech, *The Case Against Legal Recognition of Cohabitation*, 29 INT'L & COMP. L.Q. 480, 480–81 (1980) (opposing the modern trend to apply marriage law to cohabitants from the liberal-individualistic perspective); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1471 (2001) (criticizing ALI for equating marriage and cohabitation); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 815 (2005) (arguing that marriage and cohabitation are not functionally equivalent).

16. See Westfall, *supra* note 15, at 1470 ("Imposing marital obligations on parties in an informal relationship is wholly at odds with some of the potentially liberating implications of the *Marvin* court's decision.").

17. See *infra* Part II.B (discussing the contractual distinction between marriage and cohabitation).

18. See Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1127–28 (1981) (suggesting imposition of marriage commitments on cohabitants in order to protect weaker members of the family); Ira M. Ellman, "Contract Thinking" Was *Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1365–73 (2001) (criticizing the contractual perspective of *Marvin v. Marvin* and suggesting an extra-contractual perspective to cohabitants law).

19. See Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in RECONCEIVING THE FAMILY 331, 337–49 (Robin F. Wilson ed., 2006) (criticizing the status model basis of the ALI and suggesting replacing it with the relational contract model); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1229–33 (1998) (applying relational contract theory to the long-term commitment embedded in marriage).

20. See *infra* Part II.D.3 (describing the same-sex counterargument).

21. See Scott, *supra* note 3, at 258–61 (suggesting the law should presume an implied contract to apply marriage law in any case of cohabitation spanning over five years).

22. The status model applies marriage-like commitments to cohabitants that are living together as a couple, without need to argue for explicit or implied contract. See ALI, *supra* note

This Article demonstrates, however, that all the existing approaches (the traditional and contractual distinctions on the one hand and the relational and status equalizations on the other hand) share the same partial and insufficient view of cohabitation law. Hence, instead of choosing between complete equation or total separation of marriage and cohabitation, this Article offers a third option: A nuanced model that selectively applies elements of marriage law and distinguishes between different types of cohabitants. Fortunately, the philosophical foundation of the pluralist theory prescribes three major cornerstones for developing such a nuanced model: (1) substantive freedom of choice;²³ (2) tolerance for couples' life-styles, limited by state responsibility for preventing exploitation; and (3) restricted individualism, emphasizing the right of exit, yet respectful of relational commitments.

Driven by these cornerstones, this Article offers an innovative and comprehensive legal model that integrates the arguments of the equalizing approaches into a normative framework, without neglecting the basic arguments in favor of the distinction between marriage and cohabitation. Three elements comprise this model.

First, this model rests on the premise that cohabitation and marriage law should be distinguished. Second, while the prevailing models address marriage law as a package deal with respect to cohabitants,²⁴ this new model applies only selected components of marriage law to cohabitants. The third element encompasses the criteria developed in this Article to determine which components of marriage law are appropriate to apply to cohabitants.

As this Article explains, cohabitation law should impose on cohabitants the *responsive* components of marriage law that aim to prevent exploitation and

6, at 919 ("This section thus does not require . . . that the parties had an implied or express agreement It instead relies, as do the marriage laws, on a status classification."); see also Grace G. Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1265-66 (2001) (suggesting a status model regulation of cohabitant relationships).

23. This model is sensitive to cases in which life as cohabitants does not reflect the rejection of marriage law but rather a unilateral decision of the more powerful spouse, a natural continuation of a previous life-style, or a legal incapacity for marriage.

24. The package deal characterization of the existing models is apparent in ALI's structuring of the chapter addressing cohabitants' obligations. ALI, *supra* note 6, at 907. Paragraph 6.03 defines who are domestic partners (the ALI label for cohabitants) and paragraphs 6.04-6.06 apply marriage commitments almost without exception on domestic partners. *Id.* at 916-41. On the other side of the spectrum, the traditional stance and the explicit contract model reject the imposition of all components of marriage law on cohabitants. Prince, *supra* note 1, at 165; *infra* Part II.B. Unlike those all-or-nothing approaches, the pluralist model suggests in-between approaches that apply selective and suitable components of marriage law to cohabitants.

protect weaker parties from marriage ex post. At the same time, the model rejects the imposition of *channeling* regulation²⁵ on cohabitants, which aims to guide couples ex ante to behave according to society's vision regarding marriage. Cohabitation law should also adopt the *autonomy-based* components of marriage law—especially those that are compatible with the "*right of exit*"—while leaving behind the *community aspect* of marriage law.²⁶

Based on these criteria, this model distinguishes between property rules of marriage and cohabitation. In the case of marriage, the model supports a marital property regime that fulfills the ideal of marriage as community.²⁷ This regime insists on equal division of income accumulated during marriage, regardless of the partners' actual contribution.²⁸ In some circumstances it also entails pre-marriage property, gifts and inheritance,²⁹ as well as increase in human capital in the marital property.³⁰ In contrast, the pluralist model provides for regular cohabitants a narrow contribution-based marital property regime. This regime categorizes only labor income that accumulates during marriage as marital property. It also deviates from the equal division rule in cases of asymmetry between cohabitants' contributions. Beyond marital property law, married partners are entitled, in some circumstances, to long-term alimony or to compensation for career loss. In contrast, according to the

25. See P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1251–70 (1980) (distinguishing between the directive-channeling function of the law and its responsive-reflective aspects); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496–505 (1992) (describing the channeling aspects of marriage law).

26. See *infra* Part III.B (designing cohabitation as an autonomy-based social institution).

27. See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 76–81 (2004) (offering a theory of marital property law based on autonomy, community, and equality).

28. Cf. *id.* at 100 ("The cornerstone of the contemporary law of marital property . . . is the rule of equal division upon divorce."). Even today, however, there are gaps between the marital property laws of the different states. See *id.* at 106–15 (providing a survey that highlights equal division gaps between the states); J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 3.03 (2007) (discussing the different distribution systems); see also *infra* Part IV.C.1 (discussing the equal division rule and its underlying rationales).

29. See Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1624 (2008) ("Unlike spouses' marital earnings, property acquired before marriage and gifts and inheritances received during marriage are regarded as external to the marital economic partnership. Property acquired before marriage cannot be said to be a product of spouses' joint venture because the labor expended to produce it preceded their union."). Motro challenges this dichotomy and points to deviations from the dichotomy even in practice. *Id.* at 1636–45; see also *infra* Part IV.C.3 (discussing cohabitation property law).

30. See *infra* Part IV.D (discussing spousal support and compensation for loss-of-career).

pluralist model's criteria cohabitants are entitled only to short-term rehabilitative maintenance.

Fourth, contrary to the prevailing legal discourse, the model offers a distinction between different types of cohabitants. Thus, it develops criteria to distinguish between trial period, regular, relational, exploitative, and same-sex cohabitations and tailors a unique package of rights and duties to each kind of cohabitation.

Finally, beyond the menu of default rules that the pluralist model offers, it also supports cohabitants' freedom of contract. Yet the model's sensitivity to power gap and exploitation enables it to adopt a nuanced approach that distinguishes between aspects of cohabitation law and the circumstances of the creation of contracts.

Beyond cohabitation law, the pluralist theory that I developed offers a fresh look at other fields of spousal regulation. This Article demonstrates the theory's potential contribution regarding three publicly disputed topics: same-sex marriage and civil unions, covenant marriage, and secular regulation of religious marriage.

First, this Article distinguishes between different and same-sex couples and suggests a unique legal regime for the latter that takes into account their legal restriction from getting married. Unlike rejected "separate but equal" approaches, however, this Article argues that recognition of same-sex couples' mutual commitments through cohabitation law is the third-best solution. Hence, this Article supports the recognition of same-sex marriage or—at least—civil union regimes.

Second, this Article supports legal regimes that enable spouses to choose between a regular marriage and a "covenantal marriage" that is subject to unique regulation. In the conventional political discourse, covenant marriage is perceived as a victory of conservative approaches, and accordingly is criticized by liberals.³¹ This Article, however, sheds a pluralist light on covenant marriage as it adds a new spousal institution to the existing menu.³²

31. See *infra* Part V.C (describing the conventional view of covenantal marriage).

32. While the articulation of the pluralist theory and its application to cohabitant law and civil unions are an original and innovative product of this Article, a few applications of pluralist thought to covenant marriage and religious marriage already exist in legal scholarship. See Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 140–42 (2007) (arguing that covenant marriage and civil enforcement of Jewish divorce law in New York is a kind of pluralist regulation of marriage). As demonstrated later, *infra* Part V.B, this Article's rationale, scope, and application of pluralist theory are significantly different from those of Nichols, even in the context of covenant marriage and religious marriage.

Finally, this Article addresses contracts applying religious law to marital relationships and discusses the proposals for turning religious marriage into an official marriage track offered by the civil legal system.³³ Apparently, these contracts and proposals also add new spousal institutions. Yet, this Article argues that the substantive content of the religious marriage law at hand must satisfy the pluralist theory requirements for substantive freedom of choice, prevention of exploitation, and right of exit.

The Article continues as follows: Part II presents the existing theoretical approaches that support the various legal models and criticizes them. Hence, it explains the need for a new theory. Part III develops the pluralist-liberal theory. Part IV presents in detail the concrete legal model derived from the new theory. Part V addresses same-sex cohabitants and goes beyond cohabitation law to suggest a pluralist regulation model for spousal relationships. A brief conclusion follows.

II. Existing Approaches and Their Limitations

American law and scholarship are extremely ambiguous regarding regulation of the economic relationship between cohabitants following their separation.³⁴ This Part draws a roadmap of the main competing approaches responsible for the current chaos. Somewhat ironically, this review of the literature will show that the same theories—contractual on the one hand and status-based on the other—have been relied upon to justify and reject the distinction between marriage and cohabitation. I conclude this part by exploring the shortcomings of the existing theory and identifying the need for a new theory.

A. The Status Model Distinction Between Marriage and Cohabitation

Until the last decades of the twentieth century, moral condemnation of nonmarital conjugal relationships and public policy considerations in favor of marriage motivated traditional family law to fight against cohabitation in various ways.³⁵ Traditional law not only rejected the application of marriage

33. See Nichols, *supra* note 32, at 140–41 ("Rather than retaining our unitary and singular notions of marriage and divorce law, perhaps we should take seriously the possibility of multi-tiered marriage.").

34. See *infra* Part II.D.4 (providing a table summarizing the existing approaches).

35. See, e.g., Jane Lewis, *Family Policy in the Post-War Period*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE U.S. AND ENGLAND 81, 82–90 (Sanford N. Katz et al. eds.,

law to cohabitating partners, but also invalidated explicit contracts between cohabitants.³⁶ While this traditional model is not very popular among states today, there are still some modern cases that adhere to the traditional stance and invalidate even explicit contracts between cohabitants.³⁷

B. The Contractual Distinction Between Marriage and Cohabitation

Influenced by liberal-contractual principles like freedom of choice³⁸ and the state's moral neutrality,³⁹ family law during the second half of the twentieth century⁴⁰ became more respectful of spouses' private choices.⁴¹ Thus, most jurisdictions validate explicit contracts in which cohabitants take upon themselves marriage-like commitments.⁴² Interestingly, however, those liberal-

2000) (noting that the legal means for discouraging cohabitation included excluding cohabitants from marriage rights, defining children born outside of marriage as illegitimate, and, in some states, even criminalizing cohabitation).

36. See Oldham & Caudill, *supra* note 5, at 97 (explaining that contracts between cohabitants traditionally were unenforceable); Prince, *supra* note 1, at 165 (noting the traditional policy invalidating contracts between cohabitants).

37. See, e.g., Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979) ("The issue of unmarried cohabitants' mutual property rights . . . cannot appropriately be characterized solely in terms of contract law. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage."); see also Thomas v. LaRosa, 400 S.E.2d 809, 814 (W. Va. 1990) (holding that agreements for future support, express or implied, made between adult, nonmarital partners are not enforceable).

38. See, e.g., Kozlowski v. Kozlowski, 403 A.2d 902, 909 (N.J. 1979) (Pashman, J., concurring) ("The decision to cohabit without marriage represents each partner's voluntary choice as to how his or her life should be ordered a choice with which the State cannot interfere.").

39. See Kay & Amyx, *supra* note 3, at 937 (supporting the Marvin arguments from the liberal-neutral perspective).

40. See MARY A. GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 1-6* (1989) (describing the liberalization process in Western family law in the last decades of the twentieth century); JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 12-15* (1997) (arguing that contractual models of marriage emerged in the second half of the twentieth century).

41. See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446-48 (describing privatization processes that transformed marriage from a public institution into a private arrangement); see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1536-37 n.151 (1984) ("If marriage is seen as nothing more than what the parties agree to and if the parties' agreement is all that is enforceable by the courts, a couple's agreement should not be less enforceable just because it does not include formal marriage.").

42. See Morone v. Morone, 413 N.E.2d 1154, 1158 (N.Y. 1980) (validating explicit contracts between cohabitants); see also *In re Estate of Steffes*, 290 N.W.2d 697, 708-09 (Wis.

contractual principles also support a contractual argument against imposing marriage law on cohabitants. Under the contractual argument, the choice not to marry reflects the partners' opposition (or at least of that partner who refuses to marry) to bear the financial burdens imposed on married persons who decide to separate from their spouses.⁴³ Therefore, precisely from the liberal approach, which stresses individuals' intentions, it is appropriate to respect their decision not to marry, and not impose upon them quasi-marital obligations.⁴⁴

This contractual argument is supported by empirical findings.⁴⁵ These findings point to systematic differences in lifestyles between married and cohabiting partners and suggest that married couples' level of commitment is generally higher than that of cohabitants.⁴⁶ Under the contractual argument, the law should reflect these differences.⁴⁷

The contractual argument against imposing marriage law on cohabitants underlies the *explicit contract model* that was adopted in Minnesota,⁴⁸

1980) (holding that contracts between unmarried cohabitants are enforceable if independent from illicit sexual conduct); *Carlson v. Olson*, 256 N.W.2d 249, 253 (Minn. 1977) (adopting the views advanced in *Marvin* regarding the validation on cohabitation contracts).

43. See, e.g., *Tapley v. Tapley*, 449 A.2d 1218, 1220 (N.H. 1982) ("We realize that couples enter into these unstructured domestic relationships in order to avoid the rights and responsibilities that the State imposes on the marital relationship."); see also Margaret F. Brinig, *Domestic Partnership and Default Rules*, in *RECONCEIVING THE FAMILY*, *supra* note 19, at 269, 269 ("[P]arties who did not want to get married but wanted to cohabit would find themselves with a set of responsibilities on dissolution that they did not want to assume.").

44. See Garrison, *supra* note 15, at 857 ("Conscriptive cohabitation laws do 'define attributes of personhood . . . under the compulsion of the State' by imposing obligations on those who have not chosen them" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))); see also Homer H. Clark, Jr., *The New Marriage*, 12 WILLAMETTE L. REV. 441, 452 (1976) (stating that respect for cohabitants' freedom means avoiding legal regulation of the status of those who have chosen not to be subject to the norms entailed by marriage).

45. See Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 66 (1995) (providing empirical data to support a contractual argument against imposing marriage law on cohabitants).

46. See *id.* (describing substantive distinctions between the elements of cohabiting relationships and those of married spouses, based on empirical studies); see also Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1439-40 (2001) (describing extensive sociological literature regarding the differences between marriage and cohabitation).

47. See, e.g., Garrison, *supra* note 15, at 839-45 (demonstrating, through extensive survey of sociological research, that cohabitants and married couples behave differently, and stating that "[t]hese behavioral differences appear to reflect underlying attitudinal differences"); Brinig, *supra* note 43, at 274-76 (drawing on sociological research to conclude that marriage and cohabitation are different).

48. See MINN. STAT. ANN. § 513.075 (West 2002) (stating that under the Minnesota Cohabitation Statutes, unless a contract such as a cohabitation agreement is in writing, a claimant cannot maintain a cause of action to enforce the contract).

Texas,⁴⁹ New York⁵⁰ and other United States jurisdictions.⁵¹ This model recognizes economic obligations between cohabitants only when the parties have entered a formal written agreement, or, at a minimum, an explicit oral agreement.

C. *The Contractual Equation Between Marriage and Cohabitation*

1. *The Implicit Contract Model*

*Marvin v. Marvin*⁵² opened the gate to applying marriage-like commitment to cohabitants' relationships if it reflects their implied contract.⁵³ Great ambiguity exists, however, as to the circumstances under which to apply the implied contract theory.⁵⁴ The common application of the implied contract theory insists on proof of a concrete understanding between the partners—albeit not necessarily articulated in a formal way—to apply marriage commitments to their relationship.⁵⁵ Typical couples, however, are rarely consciously thinking

49. See TEX. FAM. CODE ANN. § 1.108 (Vernon 1998) ("A promise or agreement made on consideration of marriage or nonmarital conjugal cohabitation is not enforceable unless the promise or agreement is in writing and signed by the person obligated by the promise or agreement."); see also *Zaremba v. Cliburn*, 949 S.W.2d 822, 829 (Tex. App. 1997) (holding that property claims arising from nonmarital cohabitation of two male partners are subject to the statute of frauds provision requiring written contract).

50. See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (asserting that, upon dissolution of nonmarital living arrangement, the mutual rights of spouses "should not exceed beyond recovery on theory of express contract").

51. See, e.g., *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) ("Because of the potential abuse in marital-type relationships, we find that such agreements must be in writing."); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992) ("If live-in companions intend to share property, they should express that intention in writing.").

52. See *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) ("In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.").

53. See, e.g., *Watts v. Watts*, 405 N.W.2d 303, 316 (Wis. 1987) (holding that unmarried cohabitants can bring claims that rest in either contract or equity such as unjust enrichment or partition); *Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979) ("Whether we designate the agreement reached by the parties in 1968 to be express . . . or implied is of no legal consequence. The only difference is in the nature of the proof of the agreement."). See generally J. THOMAS OLDHAM, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY § 1.02 (2007) (listing the decisions following *Marvin*).

54. See Ann L. Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1381 (2001) (analyzing the diversity of results under the implied contract theory).

55. See Scott, *supra* note 19, at 335 ("[C]ourts often conclude that the parties' understandings were too indefinite for contractual enforcement.").

of the legal aspects of their relationship.⁵⁶ Thus, assuming implied contracts between couples is artificial.⁵⁷ Moreover, the implied contract model fails to address the contractual argument that cohabitation without marriage reflects the rejection of marriage laws.⁵⁸

2. *The Revised Relational Contract Model*

Against the background of the above critiques, a revised relational version of the implicit contract model recently emerged. On a *sociological level*, the model rejects the core premise of the contractual argument, namely that cohabitants intentionally reject marriage law.⁵⁹ Cohabitation is often not the outcome of a *conscious decision* not to marry, but rather the *natural continuation* of cohabitants' existing lifestyle.⁶⁰ The parties in these cases have not rejected marriage; at most, they have not assigned it any great significance.⁶¹ Furthermore, even when the decision not to marry initially reflects an aversion to marriage law, one should not ignore changing circumstances that lead cohabitants to update their life plans and mutual commitments—albeit not in a formal way. On a *legal level*, the relational contract theory,⁶² which suggests a unique, dynamic, informal regulation for

56. See, e.g., Brinig, *supra* note 43, at 272 ("While couples at the time they marry arguably are not thinking in contract mode, it is even less likely that couples who move in together will be doing so . . .").

57. See, e.g., Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 135 (1976) (noting that most unwed persons who choose to cohabit likely do so "in ignorance of the . . . [financial] consequences of either marriage or nonmarriage" and "with absolutely no thought given to the legal consequences of their relationship").

58. For a discussion of the contractual distinction between marriage and cohabitation based on level of commitment and financial obligation at dissolution, see *supra* Part II.B.

59. See Blumberg, *supra* note 18, at 1135–56 (presenting sociological findings that reject the thesis that a life of cohabitation reflects a repudiation of legal obligations entailed by marriage); see also Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 BYU L. REV. 1023, 1032–33 (2001) (explaining why a person who is willing to legalize relations with a partner might nevertheless have reservations concerning the institution of marriage).

60. See Blumberg, *supra* note 22, at 1296 (arguing that a decision to cohabit, despite the absence of the legal formality of marriage, does not signify the parties' rejection of reciprocal economic obligation).

61. See *id.* (explaining that as the incidence of cohabitation increases, so too does the significance of the parties' decision to cohabit rise).

62. Relational contract theory was originally suggested by Ian Macneil. See Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 694–96 (1974) (proposing a shift from viewing contracts as discrete transactions to a more dynamic relational model). For

contracts characterized by ongoing personal relationships,⁶³ has the potential to breathe new life into the implied contract model. Applying the relational theory to cohabitants' relationships,⁶⁴ the formalism of the contractual argument should be replaced by a relational approach that emphasizes the actual way in which the partners' relationship developed,⁶⁵ their mutual dependency, and their deviation from initial intentions, even if the parties did not articulate them explicitly.⁶⁶ Thus, according to this relational version of the contractual model, which has been unofficially adopted by few courts,⁶⁷ the implied contract is not limited to a concrete and specified understanding regarding the legal aspects of the relationship; rather, it is based on a broader understanding between the partners regarding their mutual commitment.⁶⁸ Going one step further in this direction, Professor Elizabeth Scott recently suggested that the law should presume a contractual obligation to apply marriage law in the case of couples that have lived together for more than five years.⁶⁹

further development of the theory, see generally Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981), and Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987). Relational contract theory has become the subject of extensive scholarship. See, e.g., *Symposium in Honor of Ian R. MacNeil: Relational Contract Theory: Unanswered Questions*, 94 NW. U. L. REV. 737, 737–936 (2000) (collecting articles on relational contract theory from participants in a symposium held in honor of Ian Macneil).

63. See, e.g., Macneil, *supra* note 62, at 720–21 (distinguishing between *relational* contracts, which address long-term personal relationships, and discrete *transactional* contracts, which deal with an isolated transaction between two strangers).

64. See Scott, *supra* note 19, at 331–33 (providing the first trial to systematically apply the relational theory to cohabitation law); cf. Ellman, *supra* note 18, 1377–78 (stating that relational contract theory supports status-based regulation of the cohabitation relationship).

65. See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 895–98 (1978) (comparing the regulation of long-term contracts according to classical, modern, and relational contract theory). *But cf.* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 871–75 (2000) (arguing for the place of formalism even in relational contracts).

66. See Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 17 (arguing for a duty to adjust to promote contractual flexibility and cooperation among parties).

67. See Scott, *supra* note 19, at 335 ("[A] few courts have implicitly suggested that living together in a long-term marriage-like union is evidence of the parties' intentions to undertake marriage like sharing of property . . ."); see also *Hay v. Hay*, 678 P.2d 672, 673–75 (Nev. 1984) (applying community property law to cohabitants based on the purpose, duration, and stability of the relationship and on the expectations of the parties).

68. See Ellman, *supra* note 18, at 1374 ("Contractual obligations are discrete while social obligations are embedded in a larger relationship on which they depend for their existence and meaning.").

69. See Scott, *supra* note 19, at 343 ("A cohabitation period of at least five years, for

D. *The Status Model Equation Between Marriage and Cohabitation*

The status model goes one step beyond the contractual models and applies marriage-like commitments to cohabitants, without the need to argue for explicit or implied contract. It is based on three main arguments.

1. *The Extra-Contractual Argument*

The status model contests the contractual model with extra-contractual considerations. These include equitable considerations aimed at fairness,⁷⁰ gender equality,⁷¹ concern for children,⁷² and the prevention of exploitation.⁷³ Those who equate marriage and cohabitation assume that these relationships differ in their formal form but involve substantially the same functional characterization of marriage.⁷⁴ Under this functional view,⁷⁵ using the formal differences between the institutions as the sole reason for denying marriage law remedies to the weaker partner in a cohabitation relationship is simply unjust.⁷⁶

example, supports a presumption that the relationship was marriage-like and also discourages opportunistic and marginal claims.").

70. See, e.g., SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 170–86 (1989) (suggesting a fairness account of marital law).

71. See, e.g., Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1113–21 (1989) (comparing various methods of post-divorce property allocation as a return on the wife's marital investment).

72. See Shahar Lifshitz, *The Best Interests of the Child and Spousal Laws*, in *THE CASE FOR THE CHILD: TOWARD A NEW AGENDA* 45, 64–66 (Ya'ir Ronen & Charles W. Greenbaum eds., 2008) (calling for child-oriented regulation of spousal law).

73. See Blumberg, *supra* note 18, at 1159–70 (arguing that, due to female cohabitants' unequal bargaining power, a marital status model of the relationship may be more appropriate than a contractual model).

74. See Regan, *supra* note 46, at 1437 (describing anti-formalist objections to the distinction between marriage and cohabitation).

75. See Martha Minow, *Redefining Families: Who's in and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991) (arguing for legal recognition of functional families outside of traditional legal categories, including adult couples in informal unions).

76. The main proponents of extra-contractual consideration are Grace Blumberg and Ira Ellman. See Blumberg, *supra* note 18, at 1163 (supporting cohabitation law regulation based on fairness and protection of the weaker party); Blumberg, *supra* note 22, at 1297 (same); Ellman, *supra* note 18, at 1367 (criticizing the contractual perspective of cohabitation law); see also LAW COMM'N OF CAN., *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* 24 (2001) ("Parliament's goal is to achieve some other outcome—like the support of children, the recognition of economic interdependence, the prevention of exploitation—that is connected to, but not exactly congruent with, the marriage relationship.").

2. The Power Gap Argument

The sensitivity of modern contract law⁷⁷ to the unequal bargaining positions of the parties⁷⁸ further undermines the power of the contractual argument. The contractual argument rests on the implicit premise that the choice not to get married is a joint decision of equal partners.⁷⁹ While this equality premise corresponds to an idealist vision of a utopian world, it is far from reflecting the concrete gender reality. In the real world, big differences exist between men and women in their economic capacity, business experience, patterns of negotiation management,⁸⁰ and status in the marriage market.⁸¹ Consequently, the choice not to marry reflects, in many cases, a unilateral decision of the more powerful partner,⁸² rather than a joint decision of both parties.⁸³

77. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33-63 (1992) (describing the modern model of contract law).

78. Modern contract law doctrines of economic duress and unconscionability, as well as specific legislation in areas of law such as consumer, labor, and banking, are sensitive to cases of disparities of power between the parties of a contract. See U.C.C. § 2-302 (2003) (unconscionability); RESTATEMENT (SECOND) OF CONTRACTS §§ 175, 176 (1981) (economic duress); *id.* § 208 (unconscionability). Thus, these doctrines allow the courts to intervene in the content of the contract, in cases in which there is concern that inequality between the parties has been exploited by one of them in the course of establishing the contract. See, e.g., M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power*, 26 U. TORONTO L.J. 359, 359 (1976) ("[M]any of the traditional defenses to contract enforcement, for example, duress, undue influence, breach of fiduciary duty, were properly seen as merely exemplary of a general doctrine of 'unequal bargaining power.'").

79. See Blumberg, *supra* note 18, at 1161 (noting that women have obtained formal legal equality with men only recently and may never achieve complete social and financial equality).

80. See, e.g., Marcia A. Neave, *Resolving the Dilemma of Difference: A Critique of "The Role of Private Ordering in Family Law,"* 44 U. TORONTO L.J. 97, 112-13 (1994) (explaining how differences between men and women, both in financial circumstance and in negotiation patterns, make private ordering dangerous for women); see also Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 560-64 (1998) (offering a pessimistic description of the possibility of equality between men and women in the spousal context).

81. See, e.g., Wax, *supra* note 80, at 565-75 (describing factors that affect marital equality, in both traditional and dual-earner marriages).

82. See, e.g., ALL, *supra* note 6, at 916-18 (arguing that cohabitation reflects strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage).

83. Sociological research points to gaps in power similar to marriage in cohabitants' relationships. See Rebecca Stafford et al., *The Division of Labor Among Cohabiting and Married Couples*, 39 J. MARRIAGE & FAM. 43, 53-54 (1977) (describing unequal division of tasks and lifestyles within cohabitation); see also Michael D. Newcomb, *Cohabitation, Marriage, and Divorce Among Adolescents and Young Adults*, 3 J. SOC. & PERS. RELATIONSHIPS 473, 485 (1986) (finding that female cohabitants reported a lower quality of life and were far less happy than their noncohabiting counterparts).

3. *The Same-Sex Couples Argument*

The last argument focuses on same-sex couples that are unable to marry in most United States jurisdictions.⁸⁴ It argues that in those cases, the basic assumption of the contractual argument—namely that life as cohabitants reflects a couple's rejection of marriage law—is not relevant.⁸⁵ The case of same-sex couples has been a dominant force in the movement to equate marriage and cohabitation regulation.⁸⁶

4. *The Status Model in Existing Jurisdictions*

Aside from the implied and expressed contract theories, American courts, at times, apply complementary extra-contractual doctrines,⁸⁷ such as restitution,⁸⁸ unjust enrichment,⁸⁹ and constructive trust⁹⁰ to compensate cohabitants for their

84. Until the 2008 elections, two American states (Massachusetts and California) validated same sex marriage. See *In re Marriage Cases*, 183 P.3d 384, 433 (Cal. 2008) (mandating same-sex marriage because domestic partnership with the same rights and benefits but without the title "marriage" is not equal to marriage); *In re Opinion of Justices to Senate*, 802 N.E.2d 565, 569–71 (Mass. 2004) (stating that civil unions with the same rights and benefits but without the title "marriage" would not be equal to marriage); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (mandating marriage-equivalent unions for same-sex couples). But after the 2008 elections in California, a ban on same-sex marriage was voted in. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

85. See, e.g., Kogan, *supra* note 59, at 1031 (urging that the "Equality Position" adopted by ALI is most defensible in terms of the long-term interests of gay and lesbian people).

86. See, e.g., Blumberg, *supra* note 18, at 1268–69 ("[S]ame-sex couples have been the dominant force in the movement to regularize nonmarital cohabitation."); Scott, *supra* note 3, at 238 ("Today, the most compelling arguments against privileging marriage over nonmarital unions are made on behalf of same-sex couples.").

87. See *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987) ("Unlike claims for breach of an express or implied in fact contract, a claim of unjust enrichment . . . is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.").

88. For a discussion of restitution in the context of informal intimacy, see generally HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 164–209 (2004).

89. See Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 55 (1978) ("[R]etaining the benefit of services may be unjust if one cohabitant performed them for the other because of a fundamental mistake."); Jeffrey L. Oakes, Comment, *Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit as a Basis for Recovery in Louisiana*, 56 LA. L. REV. 873, 903 (1996) (stating that recovery for unjust enrichment can be determined by considering "the amount of the defendant's enrichment, the amount of the plaintiff's impoverishment, and a causal connection between the two").

90. See, e.g., *Shuraleff v. Donnelly*, 817 P.2d 764, 768 (Or. Ct. App. 1991) ("[T]he division of property here should recognize the parties' efforts over 15 years of cohabitation to build a future

contribution to their partners' wealth. Yet, while these doctrines can lead to partial rulings in favor of the non-wealthy partner, they never result in a general equation of marriage and cohabitation.⁹¹

The American Law Institute (ALI) recently offered new principles that reflect a dramatic shift.⁹² Motivated by the extra-contractual consideration and supported by the same-sex argument,⁹³ ALI rejects both *Marvin's* implied contract model and the explicit contract model.⁹⁴ Instead, ALI establishes a series of criteria relating to the sociological and psychological components of marital ties,⁹⁵ and asserts that if these conditions are fulfilled, marriage law should be applied.⁹⁶ In addition, according to ALI, cohabitants who want to opt out of marriage commitments need a written agreement, which are subject to strict judicial review.⁹⁷ The combination of these legal steps indicates that the regulation of the relations between cohabitants is shifting from a contractual model to one of status.⁹⁸ Even before ALI, the Washington Supreme Court,⁹⁹

together based on the contributions of both. That can be accomplished only by including assets held in each party's name alone.").

91. For the narrow application of the unjust enrichment doctrine in the context of spousal law, see for example, *Estin*, *supra* note 54, at 1400. "The case law of cohabitation makes it clear that courts will not order compensation for services performed by one partner that can be characterized as part of the ordinary give-and-take of a shared life." *Id.*; see also *Tarry v. Stewart*, 649 N.E.2d 1, 5 (Ohio Ct. App. 1994) (refusing cohabitant's reimbursement claim for improvements made to house due to benefit received from living in house during relationship); *Tapley v. Tapley*, 449 A.2d 1218, 1219-20 (N.H. 1982) (refusing to compensate cohabitant partner for daily life services).

92. See ALI, *supra* note 6, at 907-43 (discussing the financial claims of domestic partners against one another at the termination of their relationship).

93. See *id.* at 914 ("[T]here are domestic partners who are not allowed to marry each other under state law because they are of the same sex, although they are otherwise eligible to marry and would marry one another if the law allowed them to do so.").

94. See *id.* at 918-19 (describing the increase in the number of unmarried cohabiting heterosexual couples and explaining that U.S. courts generally use contract law to resolve disputes).

95. See *id.* at 916-37 (explaining how to determine whether cohabitants are "domestic partners").

96. See *id.* at 916-41 (providing guidelines on defining domestic partnership property and allocating this property after dissolution).

97. For a discussion of the fairness of judicial review of cohabitants' agreements to opt out of equal division at dissolution, see *infra* note 287.

98. See *Garrison*, *supra* note 15, at 837 (noting that the ALI Principles, like marriage laws, rely on a status classification).

99. See *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (applying a rebuttable presumption in favor of a just and equitable distribution of property following a meretricious relationship); *Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (adopting a general rule requiring a just and equitable distribution of property following a meretricious relationship).

as well as legislatures and courts outside the United States, had adopted a status approach.¹⁰⁰

My analysis of the existing approaches is summarized in the following table:

Table I: Summary of the Existing Approaches

	Representative	Ideology	Distinction /Equation	Validity of Contract
Status Distinction Between Marriage and Cohabitation	Traditional Stance <i>Hewitt v. Hewitt</i>	Moral Hostility to Cohabitants, Public-Policy Preference for Marriage	Distinction	Invalidation of Even Explicit Contract
Contractual Distinction Between Marriage and Cohabitation	Texas Minnesota The NY Cases (The Explicit Contract Model)	Contractual Argument	Distinction	Validate Only Explicit Oral/Written Agreements to Apply Marriage Law

100. In New Zealand, for example, financial support and property division claims are recognized when unions of three years' duration dissolve. See Property (Relationships) Amendment Act, 2001, § 2E (N.Z.) (defining relations of short duration as those that last less than three years); see also LAW COMM'N OF CAN., *supra* note 76, at 33 ("Individuals in close personal relationships who are not married . . . may have many of the characteristics of economic and emotional interdependency that ought to give rise to rights and responsibilities."). For the Israeli court's trend toward equating marriage and cohabitation, see Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. PUB. L. 359, 372–75 nn.65–83 (2008). See also Blumberg, *supra* note 22, at 1299–302 for a comparative survey of legal regimes that adopt the status model.

	Representative	Ideology	Distinction /Equation	Validity of Contract
Contractual Equation of Marriage and Cohabitation	Original <i>Marvin</i> and Most of Its Followers	Implied Contract Theory	Depends on the Existence of Implied Contract	Validation Agreements Between Cohabitants Either to Apply or to Reject Marriage Law
	A Few <i>Marvin</i> Followers Scott	Relational Contract Theory	Equation	
Status Equation of Marriage and Cohabitation	Washington New-Zealand ALI	Extra-Contractual, Power Gap & Same-Sex Arguments	Equation	Validation of Explicit Agreement to Opt Out of Marriage Law but Subjects Them to Strict Supervision

E. The Need for a New Theory

Our discussion thus far has demonstrated three central points. First, liberal-contractual considerations—such as state neutrality, freedom of choice, and freedom of contract—oppose the traditional status approach, which invalidates even explicit contracts under which cohabitants assume marriage-like commitments. Second, the explicit contract model and its underlying contractual argument expose the non-liberal aspects of imposing marriage commitments on cohabitants. Third, the relational contract, the status models, and the underlying rationales of each, demonstrate the extremely problematic nature of regulating cohabitation law solely on the basis of the explicit contractual model.

So, as is often assumed by legal scholars, do the relational contract and status models settle the debate in favor of equating marriage and cohabitation? My analysis suggests that they do not. I evaluate the equating models (the relational contract and the status) and argue that even if persuasive to some degree, they fail to defy the essence of the contractual argument against equating marriage and cohabitation. I further demonstrate that, ironically, the

relational contract and the status model that developed as alternatives to the explicit contract model fall into the same traps as the explicit contract model. Thus, none of the existing theories provides an adequate solution to the problems of cohabitants.

1. *Limitations of the Contractual Approaches*

Let us begin with the contractual models (the implied and revised-relational) for equation marriage and cohabitation.¹⁰¹ These models criticize the explicit contractual model for its factual premise that cohabitation always reflects conscious rejection of marriage law. Against this premise, they present alternative scenarios in which cohabitation does not reflect rejection of marriage law but rather relational agreement to apply marriage commitments.¹⁰² Yet, even those who believe that, in certain instances, cohabitation relationships reflect such implied or relational contracts cannot ignore the fact that, in other cases, refraining from marriage indeed reflects a conscious rejection of marriage and its legal consequences or that, in yet other cases, cohabitation serves as a kind of trial period prior to marriage. Therefore, just as it would be problematic to apply the explicit contract model to all cohabitants, so too is it problematic to adopt the opposite policy, which ignores those cohabitants who rejected—or at least have not yet taken on—legal marital commitments.

Normatively, the implied and relational contract models are limited also to the contractual arrangements of the partners and ignore extra-contractual considerations.¹⁰³ Thus, these models are also exposed to the power gap and extra-contractual arguments. *Friedman v. Friedman*,¹⁰⁴ a California case, might clarify this concern. *Friedman* involved cohabitants who had lived together for twenty years and raised two children.¹⁰⁵ When they separated, the woman sued for maintenance and division of assets.¹⁰⁶ The appeals court found

101. See *supra* Part II.B–C (discussing the different reasons motivating couples to choose cohabitation instead of marriage).

102. See *supra* notes 59–62 and accompanying text (discussing the relational contract model's criticisms of the explicit contractual model).

103. See Ellman, *supra* note 18, at 1375 ("The point here is that the successful marriage, and by extension the successful domestic partnership, is not based upon the parties' compliance with any agreement explicit enough in its terms for the law sensibly to treat it as a contract. The successful intimate relationship is reciprocal, but not contractual.").

104. See *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 900–01 (Ct. App. 1993) (finding that the trial court's order granting temporary relief to the nonmarital partner of the appellant constituted an abuse of discretion).

105. *Id.* at 894–95.

106. *Id.* at 893.

insufficient evidence to support the claim that an implied contract existed between the man and the woman, instead finding that "the record discloses that the parties specifically chose to live together 'without any sanction by the State.'"¹⁰⁷ Consequently, it was not possible to infer an implied contract and apply marriage laws to this relationship.¹⁰⁸

The contractual approaches enable a powerful spouse to opt out from marriage commitments either by contractual arrangement or even by clear unilateral notification that she does not agree to take upon herself marriage commitments.¹⁰⁹ *Friedman*, thus, followed contractual logic. However, is the *Friedman* conclusion justified? Does the contractual argument completely exhaust the discussion on this question? Might the weaker party's claim be supported by extra-contractual considerations, such as her contribution (by caring for the home and the children) to the production of income and the enrichment of the family unit, considerations of gender equality, concern for the children, and other considerations?¹¹⁰ Do not these alternative arguments call for a revised model that takes into account both contractual and extra-contractual considerations?

2. *Limitations of the Status Approach*

Interestingly, the status model is subject to similar critiques regarding the narrow perspectives of its factual and legal premises.

First, the status model also focuses on a specific type of cohabitants.¹¹¹ This type is characterized by a power gap and even exploitation. It argues correctly that in such patterns of relationship, cohabitation does not reflect mutual agreement to reject marriage law, but rather unilateral decision of the powerful spouse to take advantage of marital life without marital

107. *Id.* at 899.

108. *See id.* ("The record before us discloses no conduct on the part of the parties from which it can be implied that the parties (particularly appellant) intended to promise that respondent would be supported as if she and appellant had actually been married if the relationship ended.").

109. *But cf.* Scott, *supra* note 19, at 344 (demanding formal written agreement to opt out in order to protect the vulnerable party).

110. For a similar criticism, see Ellman, *supra* note 18, at 1370.

111. *See e.g.*, Scott, *supra* note 3, at 250 ("[T]he A.L.I. domestic partnership status promises to provide greater financial protection to dependent parties in informal unions than is currently available. It will mitigate real hardship and unfairness by enforcing expectations in long-term marriage-like unions and by discouraging exploitation by parties with greater financial sophistication and resources.").

commitments.¹¹² Yet, this model overlooks cases in which cohabitation situations are not the result of a power gap but rather a joint decision of egalitarian couples. It also ignores cases in which one partner honestly clarified to the other at the beginning of the relationship—before inducing reliance—that she does not want to take on marriage law commitments, which the other partner eventually accepted.¹¹³

Second, the contractual models are criticized justifiably for their exclusive focus on the partners' implied or explicit agreement. Yet, even if the parties' wishes should not serve as the decisive consideration of cohabitant law, neither should they be ignored without justification. In those cases in which justification is missing, the contractual argument against imposition of marital obligations on partners that rejected marriage is still valid.

Furthermore, even the gender equality perspective, which was a core element of the power gap arguments for equating marriage and cohabitation, does not justify the status model. Apparently, the need to protect women might justify the deviation from the express or implied agreement between the partners in the appropriate cases. Yet, the paternalistic assumption that women in spousal relationships are always the weaker partners—and are therefore in need of legal protection—clashes with the modern view that women and men are equals. Lawmakers, thus, must develop a model that protects women without the implicit harm to their agency. So far, neither the contractual models nor the status model meet this challenge.¹¹⁴

The narrow perspective of the status model becomes even clearer when viewed through the perspective of the same-sex couple's argument.¹¹⁵ This

112. *See id.* at 263 ("The A.L.I. approach assumes that financially vulnerable partners would always choose no relationship over a relationship without financial security; in fact, some may prefer a shared life without financial sharing.").

113. *See id.* at 250 ("Thus, at least implicitly, the Principles take the normative position that cohabiting couples should not be free to choose lasting unions of limited interdependency and commitment.").

114. The description of the tension between the need to protect women as the weaker economic side of a couple and the need to reflect a message of equality is very typical in modern family law. *See* DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 305–15 (1989) (describing the tension between "sameness" feminism which presumes actual equality between men and women and "difference" feminism which takes difference between men and women into consideration); *see also* MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 373–90 (1990) (suggesting a model of difference feminism). While in other contexts there are some proposals to balance between the positions, in the case of cohabitants so far, each argument and model takes an extreme position.

115. *See* Scott, *supra* note 3, at 228 ("This group [of same-sex couples] does not challenge the privileged status of marriage, but rather argues that, as long as the special status continues, same-sex couples should have the right to enjoy the tangible benefits that marriage confers, as well as its symbolic social importance.").

argument refutes the premise that cohabitation always reflects no commitments. This claim, however, is relevant only to those couples, like same-sex couples, who are not qualified to get married. Yet, the case of same-sex couples has been a dominant force in the movement to equate marriage and cohabitation regulation in general.

Thus, notwithstanding the significant problems underlying the contractual model of cohabitation, it is not clear that the appropriate solution is to replace that model with a status model that imposes marriage law on all cohabitants.

3. *Intermediate Summary*

Our journey through the existing approaches demonstrates several flaws common to all approaches. First, each model focuses on one subgroup of cohabitants but ignores or denies the existence of other groups. What is needed is a richer model that responds to different subgroups of cohabitants. Second, the various strata of discussion between the existing approaches demonstrate that the regulation of the economic relationship between cohabitants is a complex matter that requires balancing among a variety of considerations and arguments. At least at the present stage, each approach is too focused on a specific type of consideration; thus, none of the existing approaches offers a suitable balance.

Given the disadvantages of the existing approaches, the original motivation for offering a new theory was to suggest a number of principles that could serve as a framework for integrating the partial viewpoints that were raised. The pluralist theory that is the product of my efforts, however, goes far beyond integrating and balancing the existing approaches and arguments. As the following text demonstrates, this theory offers an innovative and unique perspective on cohabitation law, and, on a broader level, on the regulation of spousal relationships in general.

III. Toward a Pluralist Approach to Cohabitation Law

Despite the substantive differences between them, the existing approaches are trapped in the following dichotomy. According to one option, despite the formal differences between them, cohabitation and marriage relationships are substantively *identical*,¹¹⁶ thus, the law should equate their regulation.

116. See *supra* notes 74–75 and accompanying text (discussing the anti-formalism case). Both contractual and status approaches share this view. For an explanation of the contractual perspective, see Garrison, *supra* note 15, at 835. "The commitment argument would, of course,

According to a second option, cohabitation and marriage are *different*. Marriage reflects a greater commitment between the parties,¹¹⁷ and, hence, should be encouraged from the public perspective by *distinguishing* marriage and cohabitation regulation.¹¹⁸ What is missing in the current discourse is a third option, which treats and designs marriage and cohabitation as two equally respected options and yet distinguishes their regulation. This is exactly the vision of the pluralist approach that is expressed in this Part. In what follows, I describe the rationales supporting the pluralist distinction between marriage and cohabitation. From these rationales, I draw the principles of the cohabitation institution, and, finally, I outline a model for a pluralist regulation of cohabitation.

A. *The Pluralist Case for Distinguishing Marriage and Cohabitation*

This Part offers three related, and yet separate, arguments in support of a distinction between marriage and cohabitation.

1. *The Channeling Perspective: Marriage as an Ex Ante Screening Mechanism*

Similar to the contractual argument, the first argument for pluralist distinction comes from the liberal perspective of individual rights and argues for the right of spouses to choose their preferred type of spousal relationship. Yet, instead of the contractual *ex post* reflective approach, the pluralist view offers a forward-looking approach, allowing couples to choose, *ex ante*, their preferred model among a variety of legal institutions.

depend on a showing that most cohabitants view their relationships as marital and intend to assume marital obligations; without such a showing, marriage and cohabitation could not fairly be treated as equivalent." *Id.* For an articulation from the status perspective, see ALI, *supra* note 6, at 914–15. "[T]he absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage." *Id.*

117. See *supra* notes 46–47 and accompanying text (providing empirical support of the contractual argument).

118. See Garrison, *supra* note 15, at 861 ("Given the substantial benefits associated with marriage, family law should clearly signal that marital commitment matters and promote reliance on such commitment."); see also Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 214 (2003) ("While marriage and family relations are far from perfect, they are incomparably superior to any other model of a companionate or nurturing relationship.").

The existing contractual approaches are *reflective*. They are concerned with gaps between the legal regulation of the economic relationship and the couple's hypothetical wishes.¹¹⁹ Driven by this concern, the contractual approaches adopt one of two strategies. The first strategy demands that the courts inquire into the wishes of the parties in accord with the specific circumstances of the case.¹²⁰ In many cases, this strategy leads to uncertainty and is also invasive.¹²¹ The second strategy adopts, as a default, a rule that reflects the presumed wishes of the majority of couples.¹²² In light of this strategy, a substantive part of the debate between the competing approaches is actually factual, revolving around what are deemed typical expectations of cohabitants. Each side of this debate is backed by sociological research¹²³ aiming to prove that one kind of cohabitant's legal expectations are prototypical, and to deny—or at least undermine—the existence of other kinds of cohabitants' expectations.¹²⁴

By contrast, impressed with the data presented by both sides of this heated debate, the pluralist approach begins with a pluralist observation that in our society, a variety of spousal relationships exist, characterized by different levels and stages of commitments. Thus, any default rule almost inevitably would fail to fulfill the expectations of all kinds of cohabitants. Instead of viewing this failure to express the wishes of the parties as a fault, the pluralist approach

119. See, e.g., Brinig, *supra* note 43, at 277 ("In sum, by using a default rule that is not what people would most likely agree to in advance, as the ALI proposes to do, we force those who do not want this type of relationship into contract-mode."). For a broader context, see Robert E. Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. CHI. L. REV. 1155, 1173 (1990). "The state has no desire to impose its default rules on unwilling parties." *Id.*

120. *Marvin* and its original implied contract theory are a typical example for this strategy. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) ("We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations.").

121. For my previous critique of the implied contract theory, see *supra* notes 55–57 and accompanying text.

122. See Garrison, *supra* note 15, at 848 ("Black-letter rules and presumptions should fit the typical case, not the atypical."); see also Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 606–13 (1990) (arguing for the majoritarian default rule).

123. Compare *supra* notes 46–47 (providing empirical research supporting the explicit contract model for distinction between marriage and cohabitation), with *supra* notes 52–60 (detailing the empirical support of the relational contract model for equation).

124. See Brinig, *supra* note 43, at 270 ("The problem, as noted above, is that the Principles propose a default that no one wants."); see also Garrison, *supra* note 15, at 847–48 ("[T]he existence of some, relatively rare cases of marriage-like cohabitation does not justify the imposition of conscriptive rules on the vast majority of cohabitants whose relationships are not marriage-like.").

views it as an opportunity to influence the preferences and expectations of cohabitants' partners.¹²⁵

Taking into account the potential influence of cohabitation law on cohabitants' preferences, the pluralist approach deviates from the pure reflective *ex post* position of the contractual approaches and focuses on the *ex ante channeling* function of cohabitation law.¹²⁶ According to this view, the law should actively design the social institution of cohabitation¹²⁷ as a distinct institution separate from marriage, and it should channel couples to express their *ex ante* preference regarding the institution that best fits their relationship. The formal—and currently underestimated—requirement of registering marriage serves as a *screening mechanism* between the different types of spousal relationships.¹²⁸

The pluralist approach's use of the channeling aspect of cohabitation law is quite unique. Most of the existing applications of the family law's channeling function belong to the perfectionist philosophical tradition,¹²⁹ which prefers one type of family life to another, and directs couples to the preferable spousal pattern.¹³⁰ In contrast, the pluralist approach posits marriage and

125. See Stevan J. Burton, *Default Principles, Legitimacy and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 139–40 (1993) (analyzing the influence of default rules on social legitimacy); cf. Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 415–19 (1994) (arguing that the contractual remedy will ultimately define the parties' expectations). See generally Russell B. Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) (explaining the sociological and psychological mechanisms by which default rules influence the parties' preferences and expectations).

126. See Schneider, *supra* note 25, at 529 ("[T]he channelling function serves the valuable, the necessary, goal of shaping and promoting the social institutions of family life."); see also Trebilcock, *supra* note 78, at 252 ("I am attracted by the idea of the legal system making available to prospective partners a quite limited set of *ex ante* options, in order to maximize the signaling value of these options . . .").

127. See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 947–52 (1996) (analyzing the role of the law in building social institutions).

128. Cf. Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801–03 (1941) (arguing that one of the functions of formalism in contract law is to provide a simple external test of an intention by the parties to undertake a particular set of legally enforceable obligations).

129. See Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 391–404 (1996) (comparing the neutral account of freedom with the perfectionist one).

130. See Schneider, *supra* note 25, at 505–12 (discussing the channeling function of family law); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2134–37 (2007) (same); see also Scott, *supra* note 3, at 229 ("In my framework, the government is justified in *channeling* intimate relationships into marriage because formal unions function as a useful means of providing care in a family setting." (emphasis added)). In this light, the traditional status model and its contemporary progeny distinguish marriage and cohabitation in order to express marriage's

cohabitation as equally respectable institutions and expects the partners to choose between them according to their real preferences.¹³¹

2. *The Autonomy-Based Rationale for Pluralism*

The channeling perspective justifies the distinction between marriage and cohabitation as a screening mechanism that enables couples to express *ex ante* their choice between varieties of *existing* social institutions. But the pluralist approach goes one step further. It demands that the law help in the *design and creation* of a variety of spousal options. Thus, according to the pluralist approach, even in a hypothetical *Tabula Rasa* society—that is, a society without a legal concept of marriage—the law should develop a concept of marriage, and differentiate between the legal status of married couples and cohabitants in order to support the diversity of spousal lifestyles.

Philosophically, the pluralist theory is based on modern liberal approaches that stress the idea that individual autonomy means not only the absence of formal limitations on the individual's choices (as negative-passive liberals suggest), but also the existence of a range of options from which to choose.¹³² This approach emphasizes the duty of the liberal state to create a diversity of social institutions that enable the individual to make genuine and meaningful choices between various alternatives.¹³³

The application of these modern liberal approaches to cohabitation law leads to surprising conclusions. Think of a world in which the law distinguishes between marriage and cohabitation. In such a world, a couple in a relationship may choose between a high level of legal commitment (legal

advantage.

131. See Shahar Lifshitz, *A Liberal Analysis of Western Cohabitation Law* 13 (Bar-Ilan Univ. Pub. Law and Legal Theory Working Paper No. 07-09, 2009), available at <http://ssrn.com/abstract=1352045> ("What is missing in the current discourse is a third option which refers to and designs marriage and cohabitation as two equally respected options while still distinguishing their regulation.").

132. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369–429 (1986) (designing a modern liberal theory based on the principles of freedom and individual autonomy).

133. See RAZ, *supra* note 12, at 179–93 (supporting the idea of the state playing an active role, which stems from his liberal account of autonomy); see also Gardbaum, *supra* note 129, at 392 ("Political liberalism views the conflict between individual choice and various alternative bases as a central fact in the fact of reasonable pluralism and accordingly requires state neutrality on the issue."); cf. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 207–19 (1989) (asserting that the state should respect the autonomy of minority communities so as to enhance the diversity of society).

marriage) and a lower level (cohabitation). Such a framework offers individuals a range of options.

On the other hand, think of a legal world totally in accord with the (supposedly) liberal position equating the legal status of cohabitants with that of married couples. In such a world, couples who desire to maintain spousal relationships are subject automatically to the system of marriage laws. Such a framework does not offer couples social institutions with meaningful differences and the possibility to make genuine choices.

3. *The Efficiency Perspective: Pluralism and the Signaling Function of Marriage*

Beyond its intrinsic value, the diversity of the spousal institution that the pluralist approach suggests is supported also by an efficiency analysis. Efficiency analysis emphasizes the function of marriage as a social institution¹³⁴ that enables a person to pre-commit herself and hence to *signal* to her spouse, children, and society as a whole the scope and seriousness of her commitment.¹³⁵ The pluralist approach argues that legal differences between the mutual commitments of married and cohabitating partners are vital for this "signaling" effect because it enables the couples to signal their readiness to take their commitment to a higher level.¹³⁶ Even if, however, the commitments of married couples and cohabitants were equalized, the marriage commitments still are going to be imposed on spouses automatically. The marriage itself, thus, would not add new commitments, obscuring the signaling effect of marriage.

134. See, e.g., Russell D. Murphy, Jr., *A Good Man Is Hard to Find: Marriage as an Institution*, 47 J. ECON. BEHAVIOR & ORG. 27 (2002) (explaining the role of marriage as a social institution that reflects a system of cultural understandings).

135. See, e.g., William Bishop, *"Is He Married?": Marriage as Information*, 34 U. TORONTO L.J. 245, 245 (1984) ("These two encounters suggested to me that many of the important functions of marriage in modern society can be explained by an economic model—in particular by the model of market signaling."); see also Michael J. Trebilcock, *Marriage as Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 245, 248–55 (F.H. Buckley ed., 1999) (explaining through various disciplines how marriage reflects a message or in economic terminology signals a high level of commitment by the couple); David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 15, 32–46 (1996) (supporting the signaling role of marriage from an efficiency perspective).

136. See Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT*, *supra* note 135, at 201, 216 ("The signaling function of marriage (as distinct from a cohabitation agreement) serves to reveal a person's preferences toward sexual and social relationships in which he or she may wish to become involved." (citations omitted)).

The signaling aspect of marriage corresponds to updated efficiency analysis in another respect. An emerging branch in law and economic scholarship regarding the efficient default rules rejects the majority rule and prefers default rules that create incentives for information delivery between the partners¹³⁷ by forcing one of them to contract out from the default rule and reveal her future expectations.¹³⁸ Apparently, conventional application of this approach results in the equation of marriage and cohabitation in a way that would force the financially stronger party to opt out and expose her intention not to share.¹³⁹ This application, however, ignores the tendency of prospective couples in general and prospective cohabitants in particular, not to contract.¹⁴⁰ Thus, from a contractual perspective, the couple might stick to a default rule that does not reflect the couple's intentions, while still not receiving the benefit of information delivery. It is precisely at this point that the benefit of the signaling mechanism, which the pluralist distinction between marriage and cohabitation offers, becomes clear. Instead of offering one default rule and unrealistically expecting one of the partners to contract out, the pluralist approach offers a unique bipolar default system (that is, marriage law and cohabitation law).¹⁴¹ Hence, it allows one partner to signal to the other important information regarding her intentions and expectations without the need to contract in or out, as conventional signal default rule models unrealistically expect.¹⁴²

137. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 97–100 (1989) (suggesting a "penalty default rule" that focuses on information delivery between the couples).

138. See, e.g., Lucian Ayre Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 *J.L. ECON. & ORG.* 284, 289–90 (1991) (asserting that the limited liability rule of *Hadley* encourages high valuation buyers to communicate). *But cf.* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *YALE L.J.* 729, 738–41 (1992) (exposing situations in which the penalty default rule fails to incentivize information delivery).

139. See Scott, *supra* note 19, at 342–45 (supporting equation of long-term cohabitation and marriage from penalty default law perspective).

140. See Brinig, *supra* note 43, at 271–73 (rejecting the penalty default law justification for the equation of marriage and cohabitation based on empirical findings regarding couples' reluctance to contract).

141. While extensive research exists regarding the default rule, law and economic scholarship recently revealed the importance of a menu. See Ian Ayres, *Menus Matter*, 73 *U. CHI. L. REV.* 3, 3 (2006) ("A menu is a contractual offer that empowers the offeree to accept more than one type of contract."); Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination* (Yale Law School Research Paper No. 335), available at <http://ssrn.com/abstract=924578> (demonstrating the importance of offering a menu of default laws in corporate law).

142. Apparently, one should argue that the need to get married according to the pluralist

B. *Designing Cohabitation as an Autonomy-Based Social Institution*

A philosophical debate exists regarding the morality of pluralism.¹⁴³ According to one view, pluralism justifies a passive role of the state and tolerance toward non-liberal practices that harm the individual within groups.¹⁴⁴ This Article's pluralist theory, however, is part of a liberal tradition that bases pluralism on the liberal value of autonomy.¹⁴⁵ While demanding that the liberal state support and encourage a range of social institutions, it also insists that those institutions should not harm the autonomy of their members.¹⁴⁶ The concept of autonomy providing the foundation for the pluralist theory not only justifies the state's involvement in designing cohabitation as a separate social institution, but also lays down the cornerstone for such an institution. Designing cohabitation as an autonomy-based social institution prescribes three major principles: (1) substantive freedom of choice; (2) tolerance for couples' lifestyles, limited by state responsibility for preventing exploitation; and (3) restricted individualism, emphasizing the right of exit, yet respectful of relational commitments. A careful application of these principles enables the pluralist approach to integrate the arguments of the equating models into its normative framework without neglecting the basic arguments in favor of the distinction between marriage and cohabitation.

model is parallel to the conventional need to opt out by agreement in a signal default law system. Yet, the bipolar system has two main advantages over signal default law. First, by designing the social content of both institutions (marriage and cohabitation), the transaction cost of private contracting is saved. See Listokin, *supra* note 141, at 41 ("Transaction costs are reduced even when the corporate enabling laws are offered as menus rather than instituted as default laws."). Second, while private contracting is often perceived by parties as contradictory of the romantic vision and intimacy of a spousal relationship, the historical and cultural background of marriage have the opposite influence, namely that the request for marriage usually enhances intimacy and the romantic aspects of spousal lives.

143. See JOHN KEKES, *THE MORALITY OF PLURALISM* 15–37 (1993) (comparing six theses of pluralism).

144. See, e.g., Chandran Kukathas, *Liberalism and Multiculturalism: The Politics of Indifference*, 26 *POL. THEORY* 686, 687 (1998) (suggesting a pluralist justification for multiculturalism).

145. See *supra* notes 132–33 (describing the approaches of Raz, Kymlicka, and Gardbaum); see also ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118–72 (1969) (discussing the early roots of the liberal-pluralist approach).

146. See RAZ, *supra* note 12, at 155, 160–63 (discussing the way multiculturalism gives shape to individual freedom).

1. *Substantive Freedom of Choice*

The pluralist approach is based first and foremost on strengthening individual autonomy by offering a multitude of different options.¹⁴⁷ Yet, the existence of a variety of options is meaningless if the individual is unable to choose between them. The pluralist approach, thus, accepts the same-sex argument that the liberal case for distinguishing marriage and cohabitation is not valid for those who are disqualified to get married. Consequently, it suggests a unique legal regime for same-sex cohabitants. More importantly, it demonstrates that from a pluralist perspective, cohabitation is an insufficient substitute for same-sex couples. Hence, it argues for the necessity of same-sex marriage or as a second best, the establishment of spousal institutions like civil unions.¹⁴⁸

Similarly, but in a different context, unlike the formal egalitarianism that characterizes the explicit contract model, the pluralist model's emphasis on autonomy ensures that living as cohabitants reflects substantive free choice on the part of both partners, and not the result of a unilateral decision of the more powerful partner. Thus, when the powerful partner takes advantage of the weaker partner's vulnerable situation and deprives her of the ability to make a meaningful choice, the pluralist theory supports the imposition of marriage commitments on cohabitants even against their formal or informal agreements.¹⁴⁹

2. *Tolerance, State Responsibility, and the Extra-Contractual Considerations*

The second principle addresses the tension between a couple's autonomy to manage their own lives and the state's responsibility to prevent unfairness and exploitation. Traditionally, legal regulation of marriage expressed and supported shared moral principles and interests of society as a whole, sometimes even at the cost of limiting the couple's freedoms.¹⁵⁰ During the

147. *See id.* at 373 ("For a person to enjoy an autonomous life he must actually use these faculties to choose what life to have. There must in other words be adequate options available for him to choose from.").

148. *See infra* Part V.A (discussing same-sex marriage and civil unions from a pluralist perspective).

149. *See infra* Part IV.F (suggesting mechanisms for distinguishing between different types of decision-making).

150. *See, e.g.,* Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 711–20 (1976) (describing the public nature of traditional

second half of the twentieth century, however, a private ideology of family emerged that emphasized the couple's freedom over society's moral values and general interests.¹⁵¹ Yet even today, marriage regulation reflects complex compromises and balancing acts between society's interest,¹⁵² ethos regarding proper spousal relationships,¹⁵³ and couples' autonomy to choose their own lifestyle. According to the pluralist approach, at this point, marriage and divorce should diverge, and cohabitation law should give more respect than marriage law to the partners' lifestyle and abstain from supporting any specific public agenda.

Apparently, the emphasis of the pluralist approach on the couples' autonomy moves it closer to the contractual approach and exposes it to the extra-contractual argument. Closer inspection, however, reveals that unlike the passive-negative liberal approach that characterizes the contractual models, the pluralist approach has the potential to take the extra-contractual argument into consideration. The pluralist theory emphasizes the active role of the state in encouraging diversity by creating a variety of spousal institutions.¹⁵⁴ This active role puts on the state the responsibility for those institutions (marriage and cohabitation). It is sensitive to situations in which cohabitation without legal rights is a source or a by-product of exploitation and subordination and thus undermines the autonomy basis of the pluralist theory.¹⁵⁵ The pluralist theory, therefore, challenges lawmakers not only to reflect on and support the

regulation of marriage and divorce); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1805–13 (1985) (describing the traditional moral discourse of American family law).

151. See Singer, *supra* note 41, at 1446–69 (describing privatization of American family law); see also Valerio Pocar & Paola Ronfani, *From Institution to Self-Regulation*, in THE EUROPEAN FAMILY: THE FAMILY QUESTION IN THE EUROPEAN COMMUNITY 195, 196 (Jacques Commaile & Francois de Singly eds., 1997) (locating the privation movement within a broader Western process).

152. See Karen Servidea, Note, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535, 554–65 (2005) (suggesting a public approach to premarital agreements).

153. See, e.g., Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 245–48 (1998) (review essay) (identifying new moral discourse that dominates modern family law); see also Frantz & Dagan, *supra* note 27, at 98–106 (arguing that marital property law should be perceived as an expression of a societal ideal for marriage as an egalitarian community).

154. See e.g., KEKES, *supra* note 143, at 215 ("If a state were indeed committed to pluralism, it would have to support all these institutions, and others too of course, and by supporting them, it would have to take an active role in advocating very many substantive values.").

155. See RAZ, *supra* note 132, at 390–99 (discussing the value of autonomy under a theory of pluralism).

diversity of spousal institutions but also to supervise the content of each of those institutions.

Consequently, the pluralist approach opposes the full equation of marriage and cohabitation. Specifically, it opposes the imposition of legal rules that aim to direct couples to behave in accordance with society's vision regarding marriage. At the same time, the sensitivity of the pluralist approach to extra-contractual considerations guides the pluralist model to apply those elements of marriage law that aim to prevent weaker cohabitating partners from exploitation and unfair treatment.

3. Individualism, Right of Exit, and Relational Commitments

The third component of the design of cohabitation as an autonomy-based institution is individualism and the right of exit. Historically, marriage law focused on the family as community and usually preferred the community to the individual members of the family.¹⁵⁶ The thorough restrictions of divorce law on the ability to end the relationship—as well as alimony, which continues the relationship of divorced couples—demonstrate that perception of unity. During the second half of the twentieth century, in parallel to privatization, a process of individualization emerged in Western family law, which emphasized the individual identity of family members.¹⁵⁷ One central ingredient of individualization is the recognition in modern marriage law of the partner's right of exit,¹⁵⁸ which is expressed by the shift from fault divorce to unilateral no-fault divorce¹⁵⁹ and the rise of the "clean break" as a guiding principle of modern alimony law.¹⁶⁰ Still, despite the rise of the individualization

156. See Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 874 (1989) ("[N]ineteenth century jurisprudence developed a rationale for society's interest . . . in stable marriage and the nurturing of children. The family was seen as a crucial social institution, which gave society an interest in the rearing and education of 'sound and well-bred citizens for the future.'").

157. Cf. GLENDON, *supra* note 40, at 102 ("In summary, then, we have noted the emergence of new legal images of the family which, in varying degrees, stress the separate personalities of the family members rather than the unitary aspect of the family."); see also Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 687 ("[T]he law increasingly has come to deal with the family not as an organic unit bound by ties of relationship, but as a loose association of separate individuals.").

158. See Frantz & Dagan, *supra* note 27, at 85–87 (describing the need for a partner's right of free exit under a liberal value system).

159. See GLENDON, *supra* note 40, at 148–90 (discussing the historical development of divorce reform laws in Europe and the United States).

160. See, e.g., *Koelsch v. Koelsch*, 713 P.2d 1234, 1241–43 (Ariz. 1986) (emphasizing the importance of a clean break in determining the method of property distribution).

principles, important aspects of marriage law still prefer the "We" over the "I," or at least try to balance the individual autonomy of each spouse with the community aspect of the marital unit.¹⁶¹ Furthermore, in recent years, there has been a trend to restore alimony and other forms of post-divorce spousal commitment in a way that undermines the clean-break principle.¹⁶² In some legal regimes, even the move toward unilateral no-fault divorce itself is under attack.¹⁶³ All these indications reinforce the prevalence of unity and community over individualization in marriage law.

In contrast to the complex relationship between community and individualization in the case of marriage,¹⁶⁴ cohabitation as an autonomy-based institution should adhere to the individualistic approach that emphasizes the separateness of the cohabitants. The individualistic aspects of cohabitation law become extremely important regarding the ending of the relationship.¹⁶⁵ Thus, while marriage law imposes, in certain circumstances, long-term post-divorce spousal commitment,¹⁶⁶ the pluralist model insists on the right of each cohabitant to end the relationship easily and to untie the economic connections between the spouses a short time after their separation.

The value of autonomy supports not only the right of each partner to end the relationship, but also her ability to make binding legal commitments.¹⁶⁷ This aspect of autonomy challenges the pluralist theory's attempt to balance the *ex ante* and *ex post* perspectives.

From an *ex ante* channeling perspective—focusing on distinguishing marriage and cohabitation—the pluralist theory prefers that couples take upon

161. See June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 413–14 (1994) (offering a community theory of marital property law); cf. Frantz & Dagan, *supra* note 27, at 133 (offering a theory of marital property law based on autonomy, community, and equality).

162. For a discussion of the trends in property relationships between cohabitants, see *infra* Part IV.C.

163. For a discussion on the criticisms of no-fault divorce, see *infra* Part V.C.

164. Compare Frantz & Dagan, *supra* note 27, at 76–81 (offering a theory of marital property law based on autonomy, community, and equality), with RAZ, *supra* note 132, at 369–429 (designing a modern liberal theory based on the principles of freedom and individual autonomy).

165. See, for example, *infra* Part IV.C.3 for a discussion of how the pluralist model accounts for the individualist aspects of cohabitation law in the distribution of property.

166. See, e.g., Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 4–10 (1989) (discussing the purpose for and historical trends of alimony as a post-divorce spousal commitment).

167. See Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionality*, 117 PHIL. REV. 481, 519–20 (2008) (suggesting an autonomy-based account of contractual commitments).

themselves legal commitments either by marriage or by expressed contracts.¹⁶⁸

From an ex post perspective, the autonomy rationale entails a dynamic aspect that enables the spouses to update their life plan and take upon themselves relational commitments.¹⁶⁹ Rigid adherence to the historical decision of cohabitants not to get married—even if their behavior and lifestyle (albeit not their contract) reflect deviation from their original choices—does not correspond to the dynamic aspect of autonomy.

As the next part shows, the pluralist model balances between the ex ante and the ex post perspective in the following way. On the one hand, like the relational contract model, the pluralist model recognizes the relational commitments between couples, even if those commitments were not expressed in legal terms.¹⁷⁰ On the other hand, there are two important differences between the pluralist and existing relational theory. First, while the existing version of the relational theory implicitly identifies the relational commitment between cohabitants with marriage commitments,¹⁷¹ the pluralist model distinguishes between marriage commitments and the relational spousal commitments embedded in cohabitation. Second, the existing relational theory establishes simple criteria involving a period of joint dwelling that define cohabitants, and then presumes that all cohabitants share the same relational commitments.¹⁷² In contrast, the pluralist approach maintains that substantive fulfillment of the relational contract ideology should result in a fine-tuning mechanism that adjusts the content of the relational contract to different types of cohabitant lifestyles.

IV. From Theory to Practice: The Pluralist Model of Cohabitant Law

A. Outline of a Model

According to the pluralist approach, marriage and cohabitation should be separate legal institutions. Thus, the pluralist approach rejects the status model

168. See *supra* Part III.A.1 for an account of the ex ante channeling perspective and its influences on the pluralist model.

169. See *supra* Part III.A.2 for an account of the autonomy-based rationale for pluralism.

170. See Macneil, *supra* note 62, at 773 ("When such tacit assumptions concern an exchange, and when they are mutual assumptions, they serve the same planning functions as specifically expressed mutual consent.").

171. See *supra* notes 64–66 and accompanying text (discussing the identifiers of relational commitment under the relational theory).

172. See Scott, *supra* note 3, at 258–61 (suggesting the law should presume an implied contract to apply marriage law in any case of cohabitation spanning over five years).

with its complete merger of marriage and cohabitation commitments.¹⁷³ At the same time, the pluralist theory also rejects the opposite policy that denies any commitments between cohabitants. Instead of these all-or-nothing approaches, the pluralist approach suggests a careful design of cohabitation as a separate social and legal institution with rights and duties that draw on the philosophical foundations that justify its separate existence. Hence, the pluralist model offers a selective application of elements of marriage law to cohabitants. The model further suggests three criteria to determine the appropriate components of marriage law to apply to cohabitation.

The first criterion distinguishes between the *channeling* and *responsive* components of marriage law.¹⁷⁴ This distinction balances the *ex ante* aspiration to design marriage and cohabitation as separate social institutions and the *ex post* response for situations in which, during a cohabitation period, cohabitants' lifestyle and needs resemble those of married partners. According to the pluralist model, thus, those components of marriage law with the principal function of encouraging specific kinds of behaviors or to express society's ethos regarding marriage properties should not apply to cohabitation. In contrast, "responsive" provisions of marriage law, such as provisions focusing on the protection of weaker and dependant family members, should be applied to cohabitants.¹⁷⁵

Second, based on the original rationale of marriage law, the pluralist model distinguishes between those components of a *contractual nature* and those that are *extra-contractual*.¹⁷⁶ In those cases in which marriage law itself is based mainly on the expressed—or presumed—intentions of the parties, it might not be appropriate to impose marriage law on those who have chosen not to get married. In contrast, in those cases in which marriage law is based on extra-contractual considerations, such as justice, prevention of exploitation, or protection of children, it would be appropriate to impose it on cohabitants.

The third criterion distinguishes between *community*- and *autonomy*-based components of marriage law.¹⁷⁷ It suggests that cohabitation law should

173. Cf. Lewis, *supra* note 35, at 82–90 (noting that the legal means for discouraging cohabitation included excluding cohabitants from marriage rights, defining children born outside of marriage as illegitimate, and, in some states, even criminalizing cohabitation).

174. See Atiyah, *supra* note 25, at 1251–70 (distinguishing between the directive-channeling function of the law and its responsive-reflective aspects).

175. For a discussion of responsive provisions of marriage law, see *supra* Part I.

176. For a discussion of the contractual approach to marriage law, see *supra* Part II.B. For a discussion of the extra-contractual approach, see *supra* Part II.D.1.

177. See Frantz & Dagan, *supra* note 27, at 76–81 (offering a theory of marital property law based on autonomy, community, and equality).

recognize the commitments between the partners as individuals. In contrast, cohabitation law should reject regulation that prefers the "We" aspects of spousal relationships over the "I," and should reject limitations on the spouses' right of exit.

An additional unique feature of the pluralist theory is its sensitivity to the variety of cohabitant relationships. Contrary to the current legal approaches, the pluralist model distinguishes between trial marriage, regular cohabitants, relational cohabitants, same-sex cohabitants, and exploitation cohabitation. It tailors a unique package of rights and duties to each kind of cohabitation.

First, the model posits an "entry requirement." This requirement is designed to screen couples that are trying out their relationship. According to the model, trial periods should not be regulated by cohabitation law, but rather by regular civil doctrines such as theories of contract law and unjust enrichment.¹⁷⁸

Second, the pluralist model defines significant cohabitation periods, accompanied by relational commitments¹⁷⁹ between the partners, as relational cohabitations. It offers an innovative distinction between regular and relational cohabitants. Couples in the former category are entitled to the basic package of cohabitation law that includes mainly the responsive, extra-contractual, and autonomy-based components of marriage law.¹⁸⁰ Those in the latter category are entitled to an extended package that reflects their relational commitments, closer, albeit not identical, to marriage law.

Third, the model discusses the validity of different kinds of agreements between cohabitants. It distinguishes between exploitive situations and egalitarian decision-making between cohabitants.¹⁸¹ In egalitarian situations, the model respects the cohabitants' formal agreement, and, in some circumstances, even acknowledges informal understandings that deviate from the conventional cohabitant law.¹⁸² In situations that raise suspicion of exploitation, the model demands formal agreements in order to opt out of

178. See *supra* notes 86–89 and accompanying text (discussing the application of regular civil doctrines to cohabitation).

179. For the difference between implied and expressed relational commitments, see *supra* Part II.C. For the classification criteria of regular and relational cohabitants, see *infra* Part IV.E.

180. For a discussion of responsive provisions of marriage law, see *supra* Part I. See *supra* Part II.D.1 for a discussion of the extra-contractual components of marriage law. See *supra* Part III.A.2 for an account of the autonomy-based components of marriage law.

181. See *infra* Part IV.F for a discussion of how the pluralist model distinguishes between exploitive and egalitarian decision-making.

182. See *infra* Part IV.F for examples of egalitarian-neutral situations.

cohabitant obligations, and even those formal agreements are subject to strict supervision.¹⁸³

Finally, the model distinguishes between same-sex and different-sex couples and argues that in certain circumstances, same-sex cohabitants' commitments should be parallel to marriage law. The following Parts elaborate on the implications of the new model.

B. Who Should Be Defined as Cohabitants?

Sociologists tend to view a short period of cohabitation as a trial period, following which the parties are likely to determine whether or not they wish to make a more serious commitment.¹⁸⁴ The pluralist theory supports this trial period function because it empowers the autonomy of the couple, improves spousal choosing mechanisms, and deepens the meaning of marriage as a signal for commitment. Moreover, in cases of short, childless relationships, the extra-contractual justifications for imposing a marriage commitment on cohabitants are relatively weak. For these reasons, the pluralist model requires that a couple live together for a substantive minimum period of time before they may acquire cohabitation rights. Partners' inter-claims within this trial period should be regulated according to regular civil law doctrines.¹⁸⁵

The model distinguishes, however, between childless cohabitation and cohabitation that is accompanied by common children. First, from the screening and signaling perspectives, joint upbringing of children might reflect higher commitment than regular cohabitation.¹⁸⁶ Second, when children are

183. See *infra* Part IV.F for examples of situations that raise suspicions of exploitation.

184. See, e.g., Thomas J. Abernathy, *Adolescent Cohabitation: A Form of Courtship or Marriage?*, 16 *ADOLESCENCE* 791, 791 (1981) ("[C]ohabitation has been described variously as another aspect of courtship; and extension of the engagement period; and a trial, or two-stage marriage." (citations omitted)); Alfred DeMaris & William MacDonald, *Premarital Cohabitation and Marital Instability: A Test of the Unconventionality Hypothesis*, 55 *J. MARRIAGE & FAM.* 399, 399 (1993) (discussing cohabitation as a testing ground for marital incompatibility); Alfred DeMaris & K. Vaninadha Rao, *Premarital Cohabitation and Subsequent Marital Instability in the United States: A Reassessment*, 54 *J. MARRIAGE & FAM.* 178, 178 (1992) (assessing the validity of the claim that premarital cohabitation serves to filter incompatible partners).

185. Treatment of commitments between parties during the trial period should resemble treatment of precontractual liability commitment. For a discussion of the implications of precontractual liability in contract law, see generally Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 *HARV. L. REV.* 661 (2007); Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 *J. LEGAL STUD.* 423 (2001).

186. For a discussion of the channeling perspective as an *ex ante* screening mechanism, see *supra* Part III.A.1. For a discussion of the signaling function of marriage, see *supra* Part

involved, the extra-contractual rationales are more compelling, and, according to the model, would justify imposing selective components of marriage law on cohabitants.¹⁸⁷ The accurate minimal duration of the trial period might be influenced by specific demographic and sociological variables in a specific society. Yet as a rule of thumb, a three-year minimum for childless cohabitation and a one-year minimum for cohabitants with children sound plausible.¹⁸⁸

Apparently, simplicity and predictability considerations might support a mechanical test period of joint habitation as a sole entry requirement.¹⁸⁹ But if simplicity, predictability, and ex ante planning considerations totally overcome ex post sensitivity to diversity in actual lifestyle, then the formal explicit contract model is the preferable model. The pluralist model, thus, prefers in this context a more nuanced approach that posits living together as a rebuttable presumption that can be refuted by a demonstration that the supposed cohabitants did not share a life together as a couple.¹⁹⁰

ALI, for example, established thirteen factors to assist courts in deciding whether a couple shared a life together.¹⁹¹ Some factors, such as making statements regarding the relationship or participation in commitment

III.A.3.

187. For a discussion of extra-contractual rationales, see *supra* Part III.B.2.

188. The ALI suggests a three-year minimum for childless cohabitation and a two-year minimum for cohabitants with children. See ALI, *supra* note 6, at 921 ("If a jurisdiction sets the Paragraph (3) *cohabitation period* at three years, a reasonable choice, a Paragraph (2) *cohabitation parenting period* of two years would be appropriate."). New Zealand provides for a three-year minimum cohabitation period, but it grants the court discretion to reduce this period when children are involved and serious injustice may occur. See Property (Relationships) Act 1976, 2001 S.N.Z. No. 166, § 14A (permitting the New Zealand courts to reduce the minimum cohabitation period under certain circumstances). Compare, though, the case-by-case approach of the implied contract theory that does not state any minimum durational threshold. *Supra* Part II.C.1; see also Lifshitz, *supra* note 72, at 374 (describing the recognition of an extremely short cohabitation period in Israel). However, the pluralist theory also opposes the five-year minimum cohabitation period that Scott suggests because it leaves the weaker party without sufficient remedies for an extended period. See Scott, *supra* note 19, at 343 ("A cohabitational period of at least five years, for example, supports a presumption that the relationship was marriage-like and also discourages opportunistic and marginal claims.").

189. See Scott, *supra* note 19, at 342–43 (suggesting a five-year minimum cohabitation as a simple framework that promotes certainty for both the courts and the parties).

190. See also Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 VUW L. REV. 793, 796–810 (2008) (describing a similar mechanism in New Zealand).

191. See, e.g., ALI, *supra* note 6, § 6.03 (establishing thirteen factors to determine whether a two persons share a life together as a couple); see also Property (Relationships) Act 1976, 2001 S.N.Z. No. 166, § 2D(2) (stating ten factors regarding the partners' lifestyle to guide the court in determining whether they should be considered as a couple).

ceremonies, are more contractual. Other objective factors, such as intermingling finances, becoming economically dependent, having defined tasks, dividing roles between partners, and raising children jointly, are more extra-contractually oriented.¹⁹²

Most of the ALI factors might also serve the pluralist model in the screening process. Yet, there is a substantive difference between the status approaches of ALI and the pluralist model's mechanism. According to the ALI method, after considering its presumptions and guiding factors, the court should give a definite answer as to whether the partners are actually domestic partners (the ALI label for cohabitants).¹⁹³ In the case of an affirmative answer, cohabitation law (which, according to ALI, is almost identical to marriage law) should be applied.¹⁹⁴ The pluralist model, on the other hand, argues that the entry requirements should not be applied uniformly, but rather should be adapted to the specific types of cohabitants' rights.

Thus, for regular cohabitants, legal rights are based mainly on extra-contractual considerations; the entry requirements to getting those rights should be based mainly on objective factors, such as economic dependency, mutual contribution, and specification of roles. In contrast, the "relational package" is based on a relational contract theory that is sensitive to the parties' consent commitments.¹⁹⁵ Thus, the requirements for getting these rights should give substantial room to consensual factors like mutual statements, ceremonies, and the like.

Even beyond the general classification as regular or relational cohabitants, the pluralist model matches the entry requirements criteria to the specific cohabitant rights. For example, if a partner sues for alimony, then the decision whether she is a cohabitant will be based on the economic dependency of the other partner. On the other hand, if a partner sues for marital property, then the mutual contribution, including contribution from domestic tasks, will be the important criterion.

Given this definition of cohabitants, we move now to the scope of their mutual duties. Subparts C and D address regular cohabitants, focusing on

192. Cf. Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural Status*, in RECONCEIVING THE FAMILY, *supra* note 19, at 284, 284 (suggesting a classification similar to the ALI factors).

193. See ALI, *supra* note 6, at 916–18 (outlining the factors a court must consider when making the determination that two persons are domestic partners).

194. See *id.* at 938 ("This section incorporates by reference . . . the classification rules for property owned by married persons at dissolution.").

195. For a detailed discussion of the "relational package" under the pluralist model, see *infra* Part IV.E.

marital property, alimony, and compensation for career loss, which are the main components of the economic relationship between spouses. Subpart E defines relational cohabitants and discusses their extended duties.

C. Property Relationship Between Cohabitants

1. The Equal Division Rule and Its Underlying Rationales

In order to examine which part of the current marital property regime should be applied to regular cohabitants, let us start with a brief introduction to marital property law and its underlying rationales.

The cornerstone of the contemporary marital property law¹⁹⁶ is the rule of equal division of marital property upon divorce (the equal division rule).¹⁹⁷ Two main rationales were given for this rule. The first rationale is based on the joint contribution of the couple backed by analogy to commercial partnership. The second rationale addresses the ideal of marriage as an egalitarian community.

The *contribution rationale* addresses the contemporary task division among couples wherein the provider—generally the man—contributes to the family's welfare by working outside the home and the other partner (generally the woman) is responsible for care of the home, while giving up, either partially or fully, on a career.¹⁹⁸ While the latter's efforts allow the former to earn income and accumulate property, formal property law ignores such contribution, and, hence, results in injustice.¹⁹⁹

196. Historically, the regulation of the property relation between couples was divided between community property states (in which property acquired from labor during marriage was considered to be community property) and common law states (in which the property of each member of a couple was considered to be separate or private). In the recent decades, however, the gap between the states narrowed as even common law states began to divide property acquired during the marriage upon the marriage's dissolution. For early descriptions of those movements, see Susan Westerberg Prager, *Sharing Principles and the Future of Marital Law*, 25 UCLA L. REV. 1, 14–23 (1977).

197. See Frantz & Dagan, *supra* note 27, at 100 ("The cornerstone of the contemporary law of marital property—the one rule that seems least disputed (at least as a theoretical matter) by courts, commentators, and lay people alike—is the rule of equal division upon divorce."). It might be admitted, though, that even today there are gaps between different states. For a survey of state laws regarding the division of property upon divorce, see *id.* at 100–02 nn.107–15; OLDHAM, *supra* note 28, § 3.03.

198. See Motro, *supra* note 29, at 1633 ("Non- or low-wage-earning spouses often contribute substantially to their partners' earnings—both directly... and indirectly, by managing the household and raising children.").

199. See, e.g., Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family*

Theoretically, the contribution rationale might support an equitable regime that authorizes courts to measure the relative contribution of the spouses to the acquisition of income and property.²⁰⁰ It has been argued, however, that in the absence of a market value for the domestic role,²⁰¹ the equal division rule is preferable to equitable division because it prevents an arbitrary result²⁰²—or even worse, equitable division may systematically underestimate the domestic partner's contribution.²⁰³ Finally, an analogy has been drawn between marriage's economic arrangement and commercial partnerships. Some have argued that, as in a commercial partnership, equal division should be the default rule in marriage as well.²⁰⁴

The contribution theory is highly influential,²⁰⁵ but it is not very convincing, since it is unlikely true that in all cases the non-market domestic

in American Law and Society, 1993 UTAH L. REV. 387, 397 ("[I]t is the contribution they have made to the family that justifies their partnership share at dissolution."); *see also* Katherine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 109–10 (1997) (noting that the idea of equal exchange requires that we focus on the non-monetary contributions of women to compensate for their market disadvantage); Shahar Lifshitz, *On Past Property and Future Property, and on the Philosophy of Marital Property Law in Israeli Law*, 34 HEBREW U. STUDENT L.J. 627 (2004) (analyzing the injustice in a separate property system that ignores the domestic spouse's contribution).

200. Lifshitz, *supra* note 199, at 630–31; *see also* Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1272 (1998) (suggesting arguments in favor of including relative contribution as a factor in equitable distribution decisions).

201. In theory, domestic tasks like cleaning, cooking, and childcare are executed by outsiders and have clear market value. I believe, however, that at least in the case of child rearing, a parent's care cannot be equated with paid labor. Additionally, even today, only some parenting tasks, such as actual care of the children during working hours, have been commoditized, but other parenting tasks like parental responsibility, management of child and house issues, and supervision of outside workers within the home, are not commercial and lack a clear market value.

202. *See, e.g.*, J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 249–50 (1989) (describing drawbacks of broad judicial discretion over divorce); David Westfall, *Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property*, 27 HARV. J.L. & PUB. POL'Y 917, 920–21 (2004) (criticizing the unpredictability of a case-by-case equitability system).

203. *See* Motro, *supra* note 29, at 1633–34 ("[A]d hoc valuations of spouses' relative contributions . . . often mirror society's tendency to undervalue nonmarket labor."); *see also* Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1119 (1989) ("[D]ivorce doctrines that allow for substantial judicial discretion generally operate to women's disadvantage.").

204. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 43–44 (1994) (describing the partnership theory of marriage by analogizing to commercial partnerships).

205. *See* Motro, *supra* note 29, at 1631 ("The most prevalent justification for the rule classifying spouses' earnings as marital is known variously as the partnership theory of marriage, the contribution theory, the joint property theory, or the marital-sharing theory."

partner's contribution equals the income of the "provider."²⁰⁶ This critique of the contribution theory is especially valid in cases of healthy, childless couples that out-source most of their domestic tasks.²⁰⁷ It is also useful in situations of high-income providers, whose earning power is based on a unique skill or reputation acquired prior to the marriage, or where there are providers taking the primary responsibility for the domestic tasks. Beyond those situations, there is a deeper problem with the contribution rationale and the analogy between marriage and commercial relationships. In the commercial context, the separate individualistic identities of the partners are usually maintained. In the family context—specifically in cases of long-term relationships—"spouses perceive themselves at least partially as a 'we'—a plural subject that is in turn a constitutive feature of each spouse's identity."²⁰⁸ This "we" perception recently led Professors Dagan and Frantz to suggest the ideal of marriage as an egalitarian community.²⁰⁹ According to Dagan and Frantz, at least in normative families, spouses usually develop an egalitarian community during marriage that enables them to share life's advantages as well as its difficulties.²¹⁰ Marital property law should reflect and encourage such an ethos regarding marriage by adopting the equal division rule, regardless of the partners' actual contributions.

2. *The Applicability of the Equal Division Rule's Rationales to Cohabitation*

According to the pluralist model, while the egalitarian community ideal is the proper rationale for marital property in the case of married spouses, it is not

(citations omitted)).

206. Cf. Frantz & Dagan, *supra* note 27, at 102 ("[T]here is little reason to believe that the non-market contributions of the spouse with less market power are sufficient to balance the other spouse's significant market power advantage."); see also ALI, *supra* note 6, at 735 ("[I]t is precisely because spouses are not usually financial equals that the rules governing the financial consequences of divorce have such importance.").

207. See, e.g., Motro, *supra* note 29, at 1640 ("The equal division rule is especially unfair from a labor-centered perspective where both spouses earn significantly different amounts and there are no children.").

208. Frantz & Dagan, *supra* note 27, at 81–82; see also Milton C. Regan, *Spousal Privilege and the Meaning of Marriage*, 81 VA. L. REV. 2045, 2079–89 (1995) (describing the family as a larger relational unit).

209. See Frantz & Dagan, *supra* note 27, at 100–02 (justifying the equal division law as an endorsement of egalitarian liberal community); see also Lifshitz, *supra* note 199, at 676–77 (describing the family as a unit as the rationale of recent developments in Israeli marital property law).

210. See Frantz & Dagan, *supra* note 27, at 104 ("Spreading the benefits and risks of this kind of behavior equally between the parties transforms personal sacrifice into joint endeavor.").

applicable to cohabitants. First, the egalitarian community ideal is a channeling rationale that seeks to design marriage in an ideal way.²¹¹ Since the pluralist approach aspires to distinguish the social institution of cohabitation from that of marriage, it should abstain from automatically applying the marriage ideal to cohabitation. Furthermore, substantively, the ideal of marriage—the commitment that makes two "Is" into a "We"—does not suit the autonomy-based building of the cohabitation institution.

In contrast, the contribution theory—in spite of, and, perhaps because of, its limited scope regarding marriage—is, I believe, the proper model for cohabitation property law. First, the contribution rationale is a classical "responsive" rationale, rather than a rationale that intends to design marriage in specific ways.²¹² The pluralist approach is open to imposing rules built on responsive rationales to cohabitants. Second, the contribution rationale and the analogy to commercial relationships are based on an individualistic model that suits the pluralist construction of cohabitation law.²¹³ Finally, the contribution rationale is a perfect example of the extra-contractual consideration. As such, the pluralist approach supports its imposition on cohabitants.

3. *Cohabitation Property Law*

Basing cohabitation property law on the contribution ideal rather than on the egalitarian-community ideal creates some specific and quite dramatic implications for the flexibility and scope of the equal division rule between marriage and cohabitation.

a. *Deviations from the Equal Division Rule in Case of Asymmetric Contribution*

The egalitarian community rationale perceives equal division as intrinsically valuable and as an expression of societal vision about proper marital relationship.²¹⁴ Thus, it applies the equal division rule regardless of the spouses' actual contribution, even in cases in which there are clear gaps in the

211. See *id.* at 98–106 (arguing that marital property law should be perceived as an expression of a societal ideal for marriage as an egalitarian community).

212. For a further discussion of the contribution rationale, see *supra* Part IV.C.1.

213. See *supra* note 204 and accompanying text (drawing an analogy between marriage's economic arrangements and commercial partnerships).

214. See Frantz & Dagan, *supra* note 27, at 103–06 (arguing that the equal division rule encourages partners to view their marriage communally and promotes a sense of equality).

contributions of each partner to the acquisitions of the family assets. In the case of cohabitants, however, the contribution theory is the sole justification for the equal division rule. Thus, in clear cases of asymmetry in the contribution of each cohabitant, it would be artificial to adhere to the equal division rule. Consequently, according to the pluralist theory, in cases of clear asymmetry between partners' contributions, cohabitation law and marriage law diverge. In cases of marriage, pluralist theory advocates the equal division rule. In contrast, in cases of cohabitants under the same circumstances, the pluralist theory advocates a regular property rule, augmented by compensation to the domestic cohabitant for her actual contribution.²¹⁵

b. Inheritance, Gifts, and Property Acquired Before Cohabitation

Based on contribution theory, most states traditionally distinguish between assets that were acquired during the marriage by the couples' labor (hereinafter Lab property) and inheritance, gifts, and property that had been acquired before marriage (hereinafter Luck property).²¹⁶ The former reflects both spouses' joint effort, including the domestic partner's contribution and hence is subject to the equal division rule, while the latter is typically not a product of a joint venture and thus is considered private property, that is, property that is not subject to division.²¹⁷

Recently, however a few scholars have challenged the Lab-Luck distinction,²¹⁸ arguing, based on the egalitarian community ideal, that the community ideal of sharing a life together must result in converging at least

215. Cf. Garrison, *supra* note 15, at 884–89 (suggesting that complementary doctrines like unjust enrichment should replace marital property law in the case of cohabitants). My approach differs from that of Garrison in two aspects. First, in standard cases I support the equal division rule as the default. Second, the regular principles of unjust enrichment should be adapted to the spousal relationship context.

216. See, e.g., Frantz & Dagan, *supra* note 27, at 89–90 (identifying the different treatment given to property acquired by the couple's labor and property acquired by good fortune).

217. See Motro, *supra* note 29, at 1631–37 (describing, at length, the marital property rule and the separate property rule); Oldham, *supra* note 202, at 220–21 (discussing the distinction between "marital" property and "separate" or "nonmarital" property). It should be noted, however, that even the contribution theory does not fully explain the Lab-Luck distinction. For example, the couple's behavior influences the motivation of the gift giver or the inheritor. See, e.g., Motro, *supra* note 29, at 1640 (discussing the difficulty in categorizing certain types of property achieved during marriage).

218. See Motro, *supra* note 29, at 1649 ("[Marriage] is about two people joining the risks and rewards of their lives: merging their fates, committing to be 'in the same boat,' to sink or swim together, to contribute *unequally* at times if that's what it takes to keep the union afloat.").

part of the separate property into community property.²¹⁹ Even beyond scholarship, many states recently began to recognize the transmutation of separate property into marital property in cases involving mingling of sources, an implied contract, or joint use—especially of the family home.²²⁰ Going one step further in this direction, ALI recommends a bright line rule that would transfer an increasing percentage of separate property into marital property based on the length of the marriage.²²¹

Unlike marital law, cohabitation property law should be based on the contribution theory. Thus in cases of cohabitation, it makes sense to adhere to the traditional exclusion of non-lab property from the joint marital assets. This system suits the autonomy grounding of this institution.

Interestingly, even the ALI principles, the archetype of the status model to equate marriage and cohabitation regulation, consider it inappropriate to blur the distinction between Lab-Luck properties in the case of cohabitants.²²² Yet, ALI fails to explain this intuition.²²³ The pluralist model explains why dividing traditional "private" property is undesirable in the case of cohabitants even if it is justified in the case of marriage.

c. Increased Human Capital

Another area where the pluralist model distinguishes between marriage and cohabitation is the case of human capital that has increased during marriage

219. See *id.* at 1641–44 (suggesting a formulation for transmutation of separate property into marital property); Frantz & Dagan, *supra* note 27, at 117–19 (arguing that gifts and inheritance, even though acquired during the marriage as separate property, should be classified as marital property); Lifshitz, *supra* note 199, at 702–19 (supporting the conversion of separate property into marital property in cases of long-term relationships that were characterized by a shared life).

220. See Motro, *supra* note 29, at 1641 ("Many states recognize the transmutation of separate property into marital property where separate and marital funds have been commingled, and a few states allow for transmutation where separate property was used by both parties" (citation omitted)); Oldham, *supra* note 202, at 221–33 (surveying techniques of commingling separate property into marital property); see also Lifshitz, *supra* note 199, at 677–81 (describing similar developments in Israeli law).

221. See ALI, *supra* note 6, at 769–70 ("The percentage of separate property that is re-characterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application."); see also Lifshitz, *supra* note 199, at 706–07.

222. See ALI, *supra* note 6, at 938 (stating that private property is not converted to marital property in the case of long-term cohabitation).

223. See *id.* at 940 (stating that no state converts separate property into marital property in case of cohabitants but failing to explain why).

(for example, academic or professional degrees, personal reputation, and a license). Even leaving aside cohabitation law, the inclusion of human capital that increased during marriage in the marital property estate is a complex issue that exposes unsettled tensions within marriage law.

On one hand, until recently, most states refused to include enhanced human capital within the marital estate.²²⁴ While formal justifications for this reluctance, such as "human capital is not property"²²⁵ and difficulties in calculation,²²⁶ are far from convincing,²²⁷ the more serious objections to division of earning capacity are based on *autonomy*.²²⁸ First, symbolically, human capital division contradicts individualistic perception of efforts and skills as personal.²²⁹ Second, unlike other marital property, human capital is divided in the post-divorce period and as a function of the actual salary of both

224. See Frantz & Dagan, *supra* note 27, at 107 ("Currently, most jurisdictions refuse to include increased earning capacity within the marital estate.").

225. See, e.g., *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978) (stating that educational degrees are not property, and thus should not be included in the marital estate); *Stevens v. Stevens*, 492 N.E.2d 131, 133 (Ohio 1986) (same); see also Ellman, *supra* note 166, at 69 (arguing that degrees and licenses are not property).

226. See, e.g., *Drapek v. Drapek*, 503 N.E.2d 946, 949 (Mass. 1987) ("Since assigning a present value to a professional degree would involve evaluating the earning potential created by that degree, we also decline to include the professional degree or license as a marital asset . . ."); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 267 (S.D. 1984) ("[T]he equities to be adjusted between the parties vary with the facts and circumstances of each particular case.").

227. Regarding the formalist objection, see ALI, *supra* note 6, at 652 ("The definition of marital property must follow from the policy choice; the policy choice is not determined by the definition."). Regarding the calculation objection, see, for example, Frantz & Dagan, *supra* note 27, at 112 ("We do not deny that such valuations will be difficult. But it will likely be no more burdensome (and the calculations will be no more uncertain) than similar valuations that are currently done, particularly in tort actions."), and Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 WOMEN'S RTS. L. REP. 109, 118 (1996) ("On a daily basis, in courts all over the country, judges and juries calculate the value of various losses and interests . . .").

228. See Frantz & Dagan, *supra* note 27, at 109–10 ("Future earning capacity is seen as an individual accomplishment, indeed a constitutive component of the individual self."); see also Lifshitz, *supra* note 199, at 733–40.

229. See Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119, 125–26 (1997) (analyzing the confrontation between human capital division and the values of autonomy and self-ownership).

spouses at those times.²³⁰ Thus, human capital division harms the right of complete exit from any spousal commitments.²³¹

On the other hand—beyond its individualistic character—one should not ignore the *community aspect* of career development during marriage.²³² Economic research shows that increased human capital is one of the main assets acquired during marriage.²³³ It is not surprising, then, that the reluctance of current law to include it within the marital property results in extremely unequal economic outcomes between men and women at divorce.²³⁴ Thus, the *egalitarian* and *community* aspects of marriage oppose ignoring an increase in human capital.²³⁵

Taking into account the importance of community and equality in marriage regulation, prominent scholars support the inclusion of the increase in human capital in the marital estate, despite the autonomy objection.²³⁶ According to these views, the autonomy objection justifies a different technique of division but not ignoring human capital altogether.²³⁷ In this light, new cases

230. Theoretically, the domestic partner's contribution to the marital capital should be perceived as a constant amount debt that is paid during the post-divorce years, regardless of the actual income of the "provider." This method, however, will lead to severe injustice if the provider does not intend to continue with his previous career or in cases that his actual income is less than the estimated one.

231. Cf. Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—And Some Reflections About Its Critics and Its Policies*, 1991 BYU L. REV. 43, 60 (pointing to the clash between the clean-break and human capital division).

232. See Frantz & Dagan, *supra* note 27, at 110 ("Careers involve collective decision making and collective action . . .").

233. See Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 386–88 (1980) (explaining the importance of human capital for marital property law). See generally GARY S. BECKER, *HUMAN CAPITAL* (1964) (providing an economic analysis of the human capital concept).

234. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 110–42 (1985) (asserting that human capital explains severe gaps between the financial consequences of men and women upon divorce).

235. See Frantz & Dagan, *supra* note 27, at 113–14 (arguing for dividing increase to human capital in light of the egalitarian community ideal); see also Lifshitz, *supra* note 199, at 728–33 (arguing that ignoring the increase of human capital harms the main rationales of marital property law).

236. See Krauskopf, *supra* note 233, at 386–88, 417 (providing early support for the division of human capital); WEITZMAN, *supra* note 234, at 387–88 (stating that the states should include human capital in the definition of marital assets and divide it among the parties upon divorce); see also Frantz & Dagan, *supra* note 27, at 107–08 (showing more recent support for the division of human capital as marital property).

237. See Frantz & Dagan, *supra* note 27, at 107–08 ("A commitment to the ideal of marriage as an egalitarian liberal community requires treating spouses' increased earning

in New York²³⁸ and in legal systems outside of the United States²³⁹ challenge the traditional rule, instead dividing increases in human capital. Other jurisdictions do not divide increases in human capital, but are open to including human capital as a factor in the court's discretionary considerations regarding marital property division.²⁴⁰

Going back to the pluralist model, I believe that here again marital property law and cohabitation property law should differ. In the context of marriage, the model's commitment to marriage as an egalitarian ideal should not result in the model's exclusion of consideration of increases in human capital.²⁴¹ Cohabitation, in contrast, is an autonomy-based institution.²⁴² The community consideration in favor of human capital division, thus, is weakened, while the autonomy-based objection grows stronger—especially the harm to the right of exit principle. As such, the model opposes dividing the increase in human capital between cohabitants. Yet, even the pluralist model should not ignore cases of long-term relationships in which one partner significantly contributed to the other partner's career and sacrificed his or her own development. Complimentary remedies, such as career losses compensation, should handle those cases. The next Part discusses these remedies.

capacity as marital property, while tailoring property division rules to address the unique features of this asset.").

238. See *O'Brien v. O'Brien*, 489 N.E.2d 712, 713–14, 716 (N.Y. 1985) (holding that a medical license earned during marriage is marital property).

239. For an example from Israeli law, see CA 4623/04 Unidentified Person (male) v. Unidentified Person (female) (Aug. 26, 2007).

240. See Erik V. Wicks, *Professional Degree Divorces: Of Equity Positions, Equitable Distributions, and Clean Breaks*, 45 WAYNE L. REV. 1975, 2000–01 (2000) (discussing a Michigan decision that recognized an ex-wife's claim to opportunity costs incurred during the ex-husband's pursuit of a law degree); Susan E. Keller, *The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees as Marital Property*, 21 VT. L. REV. 409, 432–35 (1996) (identifying a judicial approach that rejects the notion of a professional degree as marital property while granting more generous awards in light of contributions made during marriage to the ex-spouse's pursuit of such a degree).

241. Frantz and Dagan's support for dividing human capital prioritizes the community ideal over autonomy. See Frantz & Dagan, *supra* note 27, at 113–14 ("[S]pouses should be expected to share the benefits and burdens of their life together, not those of their lives before (or after) the existence of the marital community."). However, a more balanced approach than this is needed, even in the case of married couples. Thus, alternative remedies, like the disproportional division of regular property at divorce, are preferable to the division of human capital by splitting the couples' post-divorce incomes. This issue deserves a more extended discussion, yet such discussion is beyond the scope of this article.

242. See, e.g., Garrison, *supra* note 15, at 839–41 (showing that cohabitants generally retain significant independence during cohabitation).

D. Spousal Support and Compensation for Loss-of-Career

1. Models of Spousal Support and Compensation for Career Loss

Traditional alimony. The obligation to pay alimony traditionally has embodied three elements. First, it was a gender-based model; only men were required to pay alimony. Second, the obligation lasted for an indefinite period—either until the woman died or until she remarried. Third, only fault men, men found guilty of having caused the dissolution of the spousal bond, were obligated to pay alimony.²⁴³

Rehabilitative maintenance. During the second half of the twentieth century, many states almost abolished the traditional model of long-term alimony. In its place, a new model of rehabilitative maintenance payments was framed. According to the new model, maintenance payments are to be given for a short period and their aim is to provide the spouse, who was supported economically during the relationship, with a short recovery period which will allow her to adjust to independent living.²⁴⁴ The underlying ideology of the new model was the individualistic clean break principle, which envisions that a divorce terminates any economic relationship between the divorcing couple.²⁴⁵

The revival of long-term alimony. Although the traditional model of alimony was abandoned in most western countries, not all countries adopted the rehabilitative maintenance model in its stead.²⁴⁶ Additionally, a counter-trend to the clean break principle emerged, which advocates extending the support duty beyond the rehabilitation period.²⁴⁷ The reason for this modern revival of

243. See Ellman, *supra* note 166, at 5–6 (describing traditional alimony law); see also June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 46–47 (2002) (highlighting the historic roots of alimony law in the United States).

244. See, e.g., Ellman, *supra* note 166, at 22 (describing the rehabilitative maintenance model adopted by some modern courts); see also *Turner v. Turner*, 385 A.2d 1280, 1282–83 (N.J. 1978) (outlining the purposes of the rehabilitative model and its benefit of facilitating a clean break between the parties).

245. See, e.g., *O'Brien v. O'Brien*, 489 N.E.2d 712, 716 (N.Y. 1985) (stating that the rehabilitative model replaced the concept of traditional alimony so as to facilitate the severance of the parties "economic ties"); see also Herma H. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 313 (1987) (discussing the clean-break principle as a central tenet of the no-fault divorce philosophy).

246. See Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 264 (1989) (stating that even prior to the passage of divorce reform statutes in America, some countries had replaced the traditional model of alimony with a compensatory model based on lost earning capacity).

247. See Mary K. Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL L. 61,

long-term alimony law is the recognition that, in spite of the seemingly egalitarian divide of marital property, the domestic partners—most of the time women—are severely economically disadvantaged by divorce.²⁴⁸ Yet, modern spousal support law operates without any guiding ideology, which led to confusion and a lack of uniformity, even regarding the most substantive component of support law.²⁴⁹ Thus, several jurisdictions abandoned the gender bias of the traditional model but continue to base the modern support mechanism partly or fully on fault notions (modern fault based alimony).²⁵⁰ A second version of modern long-term support law abandons the concept of fault and focuses on the needs of the economically weaker party.²⁵¹ This version is sometimes justified in the legal scholarship by analogy to an insurance agreement (need based support).²⁵² The third—and most radical version—suggests sharing the income of both members of the couple following divorce (the income sharing model).²⁵³ This model is similar in its approach to those

68–69 (describing a wave of reform in the 1990s that justified alimony awards exceeding mere rehabilitative need).

248. See WEITZMAN, *supra* note 234, at 323–56 (comparing the economic benefits of divorce for men with the economic costs of divorce for women); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1104 (1989) ("Although women's standard of living drops dramatically as a result of divorce, men's standard of living typically improves."); James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 353 (1987) (noting the disparate economic impact of divorce on men and women and calling for reform in the name of gender justice).

249. See Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 741 (1993) ("One recurring difficulty in contemporary divorce law has been the problem of grounding alimony and maintenance awards in a coherent theory."); Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 882–94 (1988) (illustrating the inconsistency, confusion, and absence of a clear theory in spousal support case law); see also Ellman, *supra* note 166, at 4 ("[A]limony awards as well as their rationales vary from jurisdiction to jurisdiction and from case to case.").

250. See, e.g., ALI, *supra* note 6, at 42–49 (surveying jurisdictions that continue to include fault as a factor in their alimony law).

251. See, e.g., WEITZMAN, *supra* note 234, at 149 ("While traditional alimony sought to deliver moral justice based on past behavior of the parties, the new alimony was to deliver economic justice based on the financial needs of the parties.").

252. See Scott & Scott, *supra* note 19, at 1272–73, 1312–13 (drawing the analogy between modern need-based alimony and insurance contract); see also Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533, 539 (1991) (demonstrating the development of the insurance model analogy to the alimony concept).

253. See June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 362–63 (1994) (describing the variety of income sharing approaches); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 129–37 (1993) (offering the income sharing model from a partnership perspective); Jane Rutherford, *Duty in*

that include human capital in the marital property. Yet, it prefers the support law umbrella and techniques to those of property law.²⁵⁴

Compensation for loss-of-career. Twenty years ago, Ira Ellman suggested an innovative model for spousal payment following divorce.²⁵⁵ Unlike the conventional model that focused on the future—namely the partners' needs and incomes after divorce—this model focused on the career losses of the domestic partner during marriage.²⁵⁶ According to this model, the domestic partner should be compensated for her loss of earning capacity during marriage.²⁵⁷ The compensation should be paid after divorce as a lump-sum, or as periodic payments, depending on the circumstances. This model gained support among other scholars²⁵⁸ and was adopted as the guiding model of ALI.²⁵⁹

2. *Imposing Spousal Support and Compensation for Career Loss on Cohabitants*

Should any of these models be applied to cohabitants? Fault based alimony is grounded in a perception of marriage as a commitment for life. According to this perception, the one who initiates the separation breaches the marital contract, and alimony serves as compensation for such breach.²⁶⁰ This

Divorce: Shared Income as a Path to Equality, 58 FORDHAM L. REV. 539, 584 (1990) (perceiving income sharing as a path to equalizing standards of living after divorce).

254. See Frantz & Dagan, *supra* note 27, at 105–06 (expressing preference for the marital property division approach because of its emphasis on ownership instead of charity and pity, while also acknowledging the need to supplement property division with maintenance payments in order to achieve gender equality); see also Krauskopf, *supra* note 246, at 255–56 (highlighting the common legislative and judicial practice of meddling the support payment framework with the property division framework in an attempt to achieve equitable results).

255. See Ellman, *supra* note 166, at 12 (“[T]his Article outlines an alternative theory of alimony designed to encourage socially beneficial sharing behavior in marriage by requiring compensation for lost earning capacity arising from that behavior.”).

256. See *id.* at 49 (advancing a theory of alimony as compensation for losses in earning capacity suffered during marriage because of the adoption of traditional marriage roles).

257. According to Ellman, however, the domestic partner is entitled to compensation only in cases where her losses stem from the contribution to her partner’s career, or from taking primary care of the spouse’s children. *Id.* at 73.

258. See JOHN EEKELAAR, FAMILY LAW AND PERSONAL LIFE 51–52 (2006) (preferring compensation for loss over future need-based alimony).

259. See ALI, *supra* note 6, at 789 (“The principle conceptual innovation of this Chapter is therefore to recharacterize the remedy it provides as *compensation for loss* rather than *relief of need*.”)

260. See Brinig & Carbone, *supra* note 249, at 875–76 (describing the contractual logic of the traditional model with reference to fault’s role in protecting reliance and expectation interests).

rationale was eviscerated by the modern move of divorce law from fault to no-fault unilateral divorce.²⁶¹ Needless to say, the pluralist model, with its individualistic emphasis and its resistance to imposing societal ethos on cohabitants, opposes the imposition of fault-based alimony on cohabitants.

The no-fault versions of modern long-term spousal support recognize the right to end the marriage unilaterally.²⁶² Yet these models continue the need-based responsibility, or sharing between couples, for substantially long—sometimes unlimited—periods of time after the official divorce.²⁶³ They severely limit the autonomy of the partners as individuals, and especially hinder their right of exit. This is exactly the reason for a pluralist distinction between marriage and cohabitation: In the case of marriage, the community aspect of marriage justifies, at least in certain circumstances, need-based alimony grounded in the insurance rationale.²⁶⁴ However, taking into account the substantive burden that long-term alimony imposes on couples' autonomy, the pluralist theory insists that the law should design other spousal alternatives that give priority to the partners' absolute right of exit.²⁶⁵ Thus, according to the pluralist model, cohabitation law should not adopt any formulation of unlimited long-term alimony.²⁶⁶

It may be appropriate, though, to apply *rehabilitative maintenance* principles to cohabitants. First, rehabilitative alimony is based on extra-contractual considerations that are certainly relevant to cohabitants.²⁶⁷ Furthermore, in the case of cohabitation, there is no need for formal divorce to

261. See ALI, *supra* note 6, at 807 ("But the law does not require an alimony claimant to show that the other spouse breached, nor would such a requirement be consistent with modern no-fault principles.").

262. See Scott & Scott, *supra* note 19, at 1309 ("Under a no-fault regime, each spouse has a unilateral right to terminate marriage and the norm of lifelong obligation has been replaced by a principle of individual freedom to renege.").

263. *Id.* at 1311 ("The relational model visualizes permanent alimony as a claim by an insured party who is permanently foreclosed from the labor market. . . . At some point, she will be unlikely to recoup her lost opportunity cost without a permanent subsidy from her former spouse.").

264. In light of the fact that autonomy plays a substantive role even in the case of marriage, the insurance rationale for support payments is preferable to the income sharing rationale. Furthermore, the availability of such support should be limited to those long-term relationships where there is economic reliance.

265. See Frantz & Dagan, *supra* note 27, at 119–20 (stating that long-term alimony is disfavored because it interferes with the freedom to exit the relationship).

266. *But see* Scott, *supra* note 19, at 342–45 (arguing for insurance-based alimony in cases involving five or more years of cohabitation).

267. See Ellman, *supra* note 166, at 22–23 (demonstrating that the concept of rehabilitative alimony stems from the judiciary's exercise of "equitable discretion" rather than from contract theory).

untie the bond between the two partners, and either party may choose to terminate the relationship unilaterally and with immediate effect. Accordingly, when we consider the case of an economically dependent cohabitant, the implication is that a sudden interruption of the economic commitment upon the breakdown of the relationship will seriously disadvantage the economically dependent partner. Thus, the extra-contractual considerations that justify rehabilitative alimony in the case of cohabitants are even stronger than the parallel considerations in the case of married spouses. Finally, rehabilitative alimony by definition is limited to a short period, and thus does not threaten the pluralist model's commitment to the right of exit.²⁶⁸

So far, this Article explains why the pluralist model firmly opposes long-term unlimited spousal support but supports rehabilitative maintenance for cohabitants. The model is, however, more ambivalent regarding compensation for loss-of-career opportunity during cohabitation.

On one hand, the model objects to such compensation since it is being paid after separation and might lead to long-term (albeit not unlimited) commitment.²⁶⁹ Thus, imposition of such compensation payments on cohabitants might clash with the design of cohabitation as an autonomy-based institution and harm the partners' right of exit.

On the other hand, the model may support such compensation, since compensation for loss-of-career reflects restitution/unjust enrichment logic, which is extra-contractual in its nature.²⁷⁰ Furthermore, a compensation for financial losses is essentially payment of debt that was created during the marriage/cohabitation period. Hence, unlike classic alimony, it is past-oriented payment.

Given the nature of the contradictory considerations, it seems that the compensation for loss-of-career demonstrates the importance of distinguishing between different types of cohabitants. As long as we discuss "regular cohabitants," the *ex ante* rationales for distinguishing marriage and

268. See, e.g., *Turner v. Turner*, 385 A.2d 1280, 1282–83 (N.J. 1978) (stating that rehabilitative alimony necessarily implies a time limitation because its purpose is to facilitate each party's pursuit of a new life).

269. Cf. Ellman, *supra* note 166, at 49–53 (explaining a model for alimony awards based on restoring losses in earning capacity that seems likely to generate substantial continuing commitments between former spouses).

270. See, e.g., ALI, *supra* note 6, at 792–93 ("[C]ontinuing obligations between former spouses depend less on explicit agreement and promise than on their relationship itself . . ."); see also Herma H. Kay, *Beyond No Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 32–33 (Stephen D. Sugarman & Herma H. Kay eds., 1990) (exposing the connection between loss of earning capacity and restitution or unjust enrichment remedies).

cohabitation, the autonomy value that encourages the partners towards independence, and the commitment to a right of exit should overcome the ex post extra-contractual consideration. The basic package of cohabitant law, thus, should not include loss-of-career compensation. Yet, in cases of long-term relationships that are accompanied by economic dependency, a different balance is needed, and loss-of-career compensation should be imposed on cohabitants. The next subpart addresses the unique features of long-term cohabitation and its suggested regulation according to the pluralist theory.

E. Relational Commitments Between Long-Term Cohabitants

So far, this Article has discussed the scope of rights and duties that the pluralist model offers for regular cohabitants. To balance between the ex ante distinguishing rationales and the ex post extra-contractual considerations, the pluralist model provides a narrow and flexible contribution-based marital property regime accompanied by entitlement to short-term rehabilitative maintenance. During long-term cohabitation, however, the previous equilibrium between ex ante and ex post perspectives is changed. First, in the case of long-term relationships—especially those accompanied by economic dependency and specification of roles—extra-contractual considerations like protecting weaker, dependent parties, take on a greater weight.²⁷¹ Second, during their cohabitating years, cohabitants usually deviate from their ex ante historical decision and develop a relational commitment.²⁷²

Against this background, the pluralist theory defines significant cohabitation periods²⁷³ accompanied by behavior and declarations that express mutual commitments as relational cohabitations.²⁷⁴ It posits relational cohabitations in the midway between marriage and cohabitation. In the context of post-separation spousal support, the pluralist model goes beyond regular cohabitation law and provides the domestic partner compensation for her career

271. See Ellman, *supra* note 18, at 1370–73 (appealing to examples from case law to demonstrate the inability of the contractual model to adequately account for and remedy the losses suffered by weaker parties upon the dissolution of a long-term cohabitation relationship).

272. See Blumberg, *supra* note 18, at 1296 (“[D]omestic partners may fail to marry for many reasons [S]ome may have been unhappy in prior marriages and therefore wish to avoid the form of marriage, even as they enjoy its substance with a domestic partner. Some begin a casual relationship that develops into a durable union”).

273. The exact period of time is not rigidly set, and it might change according to different sociological variables. Ten years of cohabitation is a plausible, rough estimation.

274. For an explanation of the difference between the objective, extra-contractual entry criteria for regular cohabitation status and the more consensual nature of entry requirements for relational cohabitation, see *supra* Part IV.A.

loss. Yet, in order to distinguish between marriage and long-term cohabitation, it still denies the right to unlimited need-based alimony, as this kind of alimony undermines the autonomy basis of cohabitation. As an expression of the relational commitments between cohabitants, the pluralist model goes beyond the contribution rationale in the context of marital property law. Thus, as in the case of married partners, it inflexibly applies the equal division rule, even in cases of clear gaps between the partners' contributions.²⁷⁵ Yet, under the influence of the autonomy rationale, those extensions are applied only to assets that were acquired during marriage from labor but not to "luck assets" and human capital.²⁷⁶

Table II: The Pluralist Model Applications

		Marriage	Relational Cohabitants	Regular Cohabitants
Property Law	Model	Income Sharing Ideal	Mixed Model	Contribution
	Lab Assets	Inflexible Equal Division	Inflexible Equal Division	Flexible Equal Division
	Luck Assets	Yes	No	No
	Human Capital	Yes	No	No
Spousal Support Law	Rehabilitative	Yes	Yes	Yes
	Compensation for Loss-of-Career	Yes	Yes	No
	Need-Based	Yes	No	No

F. Opting Out of Cohabitation Commitments

While the relational aspects of cohabitation extend cohabitants' regular commitments, in making opting-out agreements, the partners seek to narrow their commitments. The existing approaches towards cohabitants' opting-out

275. Cf. Frantz & Dagan, *supra* note 27, at 104–05 (rejecting investment or contribution based division rules for former spouses because they are antithetical to communitarian ideas and threaten to "reinforce problematic gender roles").

276. See Motro, *supra* note 29, at 1624–25 (defining "luck assets" as property generated by gift or inheritance).

agreements are divided between the status and the contractual approaches.²⁷⁷ Status-based approaches that equate marriage with cohabitation subject cohabitants' agreements to unique procedural requirements and substantive judicial review that exceed regular contract standards.²⁷⁸ Those requirements and standards make opting out from cohabitation law commitments extremely difficult.²⁷⁹ At times, certain cohabitation commitments and even the definition of the couples as cohabitants become mandatory.²⁸⁰ In contrast, the contractual approaches validate cohabitants' opting-out agreements according to regular contractual standards.²⁸¹

The pluralist model balances between the competing approaches. On one hand, the pluralist model rejects the status model's equation of cohabitant and married partners' agreements. Couples' autonomy to choose their own lifestyle is a cornerstone of the pluralist design of cohabitation as an institution. Thus, while in certain legal systems certain components of marriage are mandatory,²⁸²

277. Allowing cohabitants to opt out of their commitments by agreement is only necessary, of course, under approaches whose default rules impose marriage commitments on cohabitants. Consequently, this Article refers in this Part to the contractual and status models for equating marriage and cohabitation.

278. See, e.g., ALI, *supra* note 6, at 907–08 (applying the unique marital contract regime to agreements between cohabitants).

279. See Westfall, *supra* note 15, at 1480–84 (criticizing ALI for applying marital contract rules to agreements between cohabitants and referencing cases in which the strict nature of those rules would severely hamper cohabitants' abilities to contract out of marriage law commitments); see also Atkin, *supra* note 190, at 810 (explaining that the unique fairness review applied to cohabitants' opt-out contracts in New Zealand has historically made it difficult for partners to opt out of cohabitant law commitments).

280. See, e.g., Lifshitz, *supra* note 100, at 375 (addressing the limitations on cohabitants' freedom of contract in Israel).

281. See *supra* Part II.E.1 (detailing the contractual approach to dealing with opt-out agreements). Although regular contractual approaches might enable partners to opt out of their commitments even by clear *ex ante* unilateral clarification, Elizabeth Scott suggests a more stringent requirement of a formal written opt-out contract to protect the weaker parties. See Scott, *supra* note 19, at 343–44 ("To enhance this protection [for vulnerable partners], courts can require a written agreement as clear evidence of the parties' intentions to opt out of their financial obligations to one another.").

282. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities."). In modern legal systems there is greater willingness to recognize contractual arrangements. See, e.g., Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 151 (1998) ("The vast majority of courts, however, now treat[] premarital agreements as enforceable, at least in some circumstances."). Yet, there is still a lot of ambiguity regarding the validation of certain marital agreements. See, e.g., Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037,

the pluralist model opposes such classifications of cohabitation law components. The pluralist model points to an important difference between marriage and cohabitation in this context. In the case of marriage, the decision whether or not to get married and to thereby take on those mandatory obligations is a voluntary decision of the parties involved. Living as cohabitants, on the other hand, is not a voluntary act intending legal significance, but rather a factual situation. Legal treatment of certain obligations between cohabitants as mandatory, therefore, means that no cohabitant—in any circumstance—could avoid such mutual commitments. In practice, it totally negates the option of living as a cohabitant without mutual legal binding commitments. While such a paternalistic, protective attitude might be justified under certain circumstances, its application to all cohabitants is not justified in terms of autonomy and equality. For similar reasons, the pluralist model is also suspicious of regulation that rigidly presumes that contractual deviation from cohabitation default law is unfair and thus invalid.²⁸³

On the other hand, the pluralist model's sensitivity to power gaps between cohabitants, appreciation of extra-contractual considerations, and awareness of the dynamic aspects of spousal relationships lead it to reject the regular contractual standards as adequate for cohabitants. Taking into account this variety of considerations, the pluralist model also supports a nuanced approach that distinguishes between cohabitant types, aspects of cohabitation law, and the circumstances of the creation of contract. The model distinguishes between arguments regarding the formation of the agreement and arguments regarding its execution. Regarding the former, the pluralist model distinguishes between neutral-egalitarian circumstances and situations that raise suspicion of exploitation.

Neutral-egalitarian situations include childless cohabitants who formed an agreement before they decided to live together or during their three-year trial-period. In this initial stage of their relationships, the parties are still independent and thus the claim that they did not have substantial freedom of

1038 (1993) ("[T]here has been a significant lack of uniformity among the various states as to the treatment of premarital agreements."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981) (limiting the enforceability of marital agreements that are contrary to the public interest in marriage relationships); Servidea, *supra* note 152, at 535 (suggesting a public interest approach to the pre-marital agreement).

283. *See* ALI, *supra* note 6, at 982–84 (providing a regulatory model that subjects premarital agreements to a fairness test); *see also* Scott, *supra* note 19, at 341 (stating that the ALI regime provides parties with no assurance that their agreements to limited commitments will be enforced); Atkin, *supra* note 190, at 810 (describing new legislation in New Zealand designed to limit the courts in their ability to invalidate cohabitants' opt-out agreements on the basis of unfairness).

choice is relatively weak. Also under these circumstances, the waiving of cohabitants' rights is prospective, so the parties have the opportunity to plan their behavior in advance. Thus, ordinary contract law rules are sufficient for reviewing arguments regarding contract formation in neutral-egalitarian situations.²⁸⁴

The situations that raise suspicions of exploitation include pregnant mothers, joint-parent cohabitants, and childless cohabitants that are entering the agreement after the trial period. In those contexts, the dependency between the partners usually increases and with it the potential for exploitation.²⁸⁵ Furthermore, in those agreements, the parties are waiving not only on prospective but also on existing rights. Accordingly, while the pluralist model might validate opting-out agreements even in those circumstances, it subjects them to unique procedural requirements and substantive fairness review.²⁸⁶

Finally, even if a contract was fair at the time of its formation, it does not necessarily remain fair at the time of its execution. Thus, according to the pluralist model, regardless of the circumstances at the time of the contract's formation, the courts should review the fairness of opting-out agreements at the time of their execution if, post-formation, children were born to previously childless cohabitants, unexpected circumstances occurred, or significant cohabitation periods had passed.²⁸⁷

284. To be sure, financial gaps between men and women in our society, as well as differences in their alternatives in the marriage market, improve men's position in certain bargains, even in the so-called egalitarian situation. Yet, it still seems fair that if one of the partners honestly clarified to the other at the beginning of the relationship, before reliance was created, that she does not want to take on the legal commitment of marriage, and though the other partner may have not liked it, he eventually accepted it, the law should validate this agreement.

285. See Ellman, *supra* note 18, at 1371 ("Young persons in their twenties, with no children, few responsibilities, and many prospects in front of them, may see little reason to bind themselves to lifetime obligations that could outlast their mutual affection."); see also ALI, *supra* note 6, at 987 ("Once they are parents, the effect of the terms they earlier agreed upon are therefore likely to seem quite different than they expected when childless.").

286. In these aspects, this model converges with ALI's approach, which developed doctrines in the context of marital contracts such as extended disclosure, independent counseling requirements, and fairness review and then applied them to cohabitants' agreements. See ALI, *supra* note 6, at 907-08, 959-1003 (demonstrating the application of such doctrines to both marital contracts and cohabitants' agreements). While ALI applies those doctrines to all cohabitants, the pluralist model differs by applying them only selectively.

287. *Cf. id.* at 982-83 (enabling courts to set aside an agreement if its enforcement leads to substantial injustice). Thus, in those circumstances, the pluralist model rejects the standard contractual approach and moves closer to the status approach. Yet, according to the pluralist model, the ex post fairness review of the agreement should not necessarily result in the invalidation of opt-out contracts. For example, assume that two childless, financially independent cohabitants, one of whom is wealthier, initially opt out of the equitable division

V. *Toward Pluralist Theory of Spousal Regulation*

Beyond cohabitation law, the pluralist theory offers a fresh look at other fields of spousal regulation. Under the pluralist approach, the liberal state should positively encourage diversity and strengthen autonomy by recognizing and designing new spousal institutions beyond the existing menus. The regulation of such institutions should follow the three cornerstones of the pluralist approach: substantive freedom of choice, tolerance of different lifestyles limited by state responsibility to prevent exploitation and subordinations, and right of exit. The next Part will use the pluralist approach to shed new light on three controversial topics: same-sex marriage and civil unions, covenant marriage, and secular regulation of religious marriage.

A. *Same-Sex Marriage and Civil Unions*

The pluralist rationales for not imposing marriage commitments on cohabitation are definitely inapplicable for partners that are restricted from marriage—such as same-sex partners. The case of same-sex couples has therefore been a dominant force in the movement to impose marriage law on cohabitants.²⁸⁸ In a similar vein, the situation of couples that are restricted from marriage in other jurisdictions was a dominant force in the emerging trends within those jurisdictions to blur any distinction between marriage and cohabitation.²⁸⁹ But, just like opposite-sex couples, there are some same-sex couples that would prefer not to get married even if they could. As this Article has demonstrated, blurring the distinction between marriage and cohabitation undermines the meaning of both social institutions and hence negates the *ex ante* screening of different kinds of couples. Thus, from a pluralist perspective, such a policy would hardly improve the spousal diversity available for those who are restricted

rule. Ten years later, neither their financial situations nor their lifestyles have changed. There is no reason to impose the equal-division rule against their original agreement in such a case. Furthermore, even in cases in which the *ex post* review leads the court to invalidate the original agreement, the result should not be the automatic application of regular cohabitants' commitments. For example, even if the court invalidates partners' agreements that deny any partnership between them, the result should not be the automatic imposition of standard cohabitation commitments (that is, equal division of property). Rather, another method for compensating the domestic partner for her contributions should be applied.

288. See *supra* notes 85–86 and accompanying text (citing articles describing the applicability of contract theory to same-sex partners and the prominent role of same-sex couples in the movement to regularize nonmarital cohabitation).

289. See Lifshitz, *supra* note 100, at 376–78 (describing the function of cohabitation in Israel as substitute to marriage).

from marriage, while it would severely harm the existing social diversity for all partners.²⁹⁰

Unlike cohabitation, civil union is a formal institution that enables cohabitants to signal their mutual commitments *ex ante*. Thus, imposing marriage commitments on civil union partners enables the law to separate between those who have not married because the law forbids it, and those who would not marry even if they could. Yet as long as same-sex partners are excluded from marriage, the pluralist's requirement for substantive freedom of choice between the various spousal institutions is not fulfilled, and even a civil union is not a sufficient solution for same-sex couples. Consequently, from a pluralist perspective, liberals should continue the struggle for same-sex marriage and consider political compromises²⁹¹ that equate its legal regulation (albeit not the title of civil unions) to that of marriage,²⁹² while at the same time continuing to oppose the establishment of cohabitation as a sole alternative to marriage.

In the interim, while legislators prevent both same-sex marriage and civil unions, a liberal court should develop a unique cohabitants' regime for same-sex couples. Unlike the standard cohabitation law regime that selectively applies components of marriage law,²⁹³ the default rule of this regime should uniformly impose all marriage law commitments on same-sex cohabitants. Yet, this unique regime should include entry requirements to screen trial period cohabitants as well as flexible contract-out options for those same-sex cohabitants who, like different-sex couples, reject marriage commitments.

B. Religious Marriage

Historically, marriage and divorce law in the Western world have been adjudicated in religious courts, in accordance with religious law.²⁹⁴ In several

290. Cf. Garrison, *supra* note 15, at 872 ("Much as one may sympathize with same-sex couples who want to make marital commitments, it makes no sense to sweep the overwhelming majority of cohabitants who do not want to make such commitments into a conscriptive regime in order to provide a third-rate solution for the few same-sex cohabitants who do.").

291. See Lifshitz, *supra* note 100, at 380–81 (discussing the concept of liberal compromise).

292. According to the pluralist approach, in a perfect liberal world that permitted same-sex marriages, the institution of civil union could serve as a middle ground between marriage and cohabitation. However, in the present situation in which same-sex marriages are prohibited, same-sex couples joined in a civil union should be granted the full rights and responsibilities of married couples, according to the pluralist perspective.

293. See *supra* note 24 (explaining the "in-between approaches" of the pluralist model, which selectively choose the proper components of marital law to apply to cohabitants).

294. See generally WITTE, *supra* note 40 (describing the theological background of

countries, the religious legal regulation of marriage and divorce law continues to the present, alongside or instead of civil law.²⁹⁵ Although U.S. marriage and divorce laws are secular-civil,²⁹⁶ many citizens of the United States still marry and divorce in religious ceremonies, and, in a deeper sense, perceive themselves as subject to communal and religious legal systems.²⁹⁷ Consequently, courts often address the validity of private arrangements in which the spouses have applied religious law or jurisdiction to their relationships.²⁹⁸ Furthermore, in the spirit of multicultural theories,²⁹⁹ some propose turning religious marriage into an official marriage track offered by the civil legal system.³⁰⁰

The civil regulation of religious marriage is often analyzed from the perspective of banning religious establishments³⁰¹ and in light of the rights of

Western marriage law).

295. See, e.g., Nichols, *supra* note 32, at 164–95 (describing legal systems that recognize religious marriage partly or fully).

296. See Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 540 (2004) (“[W]e are used to understanding contemporary family law as secular and universal.”). But see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 9–13 (2000) (describing the close identification between the civil concept of marriage and the Christian religious tradition during the time the U.S. was founded).

297. See Estin, *supra* note 296, at 540 (“[M]illions of Americans identify themselves as members of minority cultural and religious traditions, including Judaism, Islam, Buddhism, Hinduism, and hundreds of others.”).

298. See *id.* (“Courts deciding family law disputes regularly encounter unfamiliar ethnic, religious, and legal traditions, including Islamic and Hindu wedding celebrations, Muslim and Jewish premarital agreements, divorce arbitration in rabbinic tribunals, and foreign custody orders entered by religious courts.”).

299. See generally AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS* 92–145 (2001) (describing four models of multicultural joint governance and suggesting a new model); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 193–95 (1995) (suggesting a liberal theory of minority rights).

300. See Nichols, *supra* note 32, at 135–36 (suggesting that “the civil government should consider ceding some of its jurisdictional authority over marriage and divorce law to religious communities”). But cf. Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, in *ISLAMIC FAMILY LAW* 147–66 (Chibli Mallat & Jane Connors eds., 1990) (discussing the attempts of the Union of Muslim Organisations of UK and Eire to secure a separate Islamic system of personal law for British Muslims).

301. See, e.g., Estin, *supra* note 296, at 542 (acknowledging that enforcement of a marital agreement in a religious context “verges dangerously on a religious establishment”); see also Edward S. Nadel, *New York’s Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 78–99 (1993) (addressing constitutional problems regarding regulation of Jewish divorce settlements); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 810–39 (1998) (same).

minority communities to legal autonomy.³⁰² Although these important questions are beyond the scope of this article, in the following paragraphs, I offer several insights from a pluralistic approach that may enrich the debate on these topics.

Legal recognition of the religious marriage track as alongside the civil marriage track is seemingly consistent with the pluralistic approach, which seeks to enrich the existing menu with new spousal institutions. Yet, it is unclear whether the substantive contents of significant parts of religious marriage law could satisfy the pluralist theory's requirement of substantive freedom of choice, prevention of exploitation, and right of exit. First, the pluralistic approach demands substantive freedom of choice between the various institutions. It requires that the religious marriage track be not selected as the result of social and family pressures, which could potentially eliminate an individual's ability to choose between the secular and religious tracks.³⁰³ Second, religious family law systems are, in some cases, characterized by unequal gender practices, such as the denial of women's rights to family property, a double standard in sexual morality,³⁰⁴ and even polygamy.³⁰⁵ These characteristics do not conform to the pluralistic approach's commitment to preventing exploitation and inferiority within the spousal institutions.³⁰⁶ Finally, the severe limitations on the dissolution of the marital relationship

302. Compare Kukathas, *supra* note 144, at 686, 687 (supporting communities' legal autonomy limited by formal right of exit), with Susan Muller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661, 664 (1998) ("[T]here is considerable likelihood of conflict between feminism and group rights for minority cultures.").

303. Cf. SHACHAR, *supra* note 299, at 68–70 (criticizing Kukathas's multiculturalist approach for failing to address the lack of substantive choice in the ostensibly consensual decisionmaking of minority group members).

304. See, e.g., JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION (1990) (describing female inferiority in Muslim marriage and divorce law); Michael S. Berger & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, in HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES 77, 89–111 (Michael J. Broyde & John Witte, Jr. eds., 1998) (describing women's inferiority in various fields of Jewish marriage and divorce law); RACHEL BIALE, WOMEN AND JEWISH LAW: THE ESSENTIAL TEXTS, THEIR HISTORY, AND THEIR RELEVANCE FOR TODAY 70–101 (1984) (same). But see Martha C. Nussbaum, *International Human Rights Law in Practice: India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 43–47 (2001) (discussing the position of women in India under Islamic law).

305. See *Reynolds v. United States*, 98 U.S. 145, 145 (1878) (validating the constitutional ban on polygamy); see also Estin, *supra* note 296, at 566 (describing the tension between American family law values and the practice of polygamy in Islamic marriage); Nussbaum, *supra* note 304, at 44 (stating that, in India, polygamy is a legal option for Muslim men, but is exercised in only about 5% of marriages).

306. See *supra* Part III.B.2 (discussing the pluralist theory's emphasis on legal institutions which prevent exploitation and subordination among married or cohabiting partners).

characteristic of certain religions³⁰⁷ are inconsistent with the pluralistic approach's commitment to the right of exit.

It should be clarified, though, that the theory's stance toward religious regulation of spousal relationships is contingent upon the existing cultural background and the specific content of the religious laws. Should a religious community and law satisfy the demands of free entry, establish equality within the relationship, and have reasonable exit options, then the law should validate private agreements to apply religious marriage law, and the pluralist theory might even support the state's offering these religious tracks as options.

Moreover, an exclusive focus on the secular-civil aspects, which disregards the religious aspect of marriage and the religious arrangement between the parties, might harm the values of individual autonomy and equality that the pluralistic approach seeks to preserve. Take, for example, the case of an Orthodox Jewish divorce. According to Jewish law, spouses who were married in a religious ceremony are deemed married as long as they do not religiously divorce.³⁰⁸ The religious divorce ceremony requires the voluntary granting of a divorce bill (*get*) by the husband to the wife.³⁰⁹ In the event of a civil divorce, religious law considers the spouses to be married as long as a *get* has not been given.³¹⁰ This leads to an unacceptable situation, in which some Jewish men who were married in a religious ceremony and obtain a divorce in the civil courts exploit their wives' need for a religious *get*.³¹¹ The husbands

307. See WITTE, *supra* note 40, at 36, 38, 40 (discussing the absence of an absolute divorce option under Catholic law); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 319–21 (1992) (describing barriers to divorce within Jewish law); JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 112–45 (1990) (describing the differences between Muslim males' right to divorce and the limitation on Muslim women who want to get unilateral divorce).

308. See Breitowitz, *supra* note 307, at 319 ("A civil divorce has no effect . . . and any subsequent cohabitation or remarriage in the absence of a *get* is regarded as adulterous.").

309. See *id.* at 319–21 (describing the procedure by which a husband grants a *get*).

310. See *id.* at 321 ("[T]he *get* is totally unrelated to either the granting or withholding of civil dissolution [of the marriage].").

311. According to Jewish religious law, the status of a Jewish woman whose husband refuses to give her a *get* is much worse than the parallel situation of a man whose wife refuses to be divorced. *Id.* at 313. A woman in this condition (in *halakhic* (Jewish law) terminology, an *agunah*) cannot remarry. *Id.* If she has children from someone other than her husband, the offspring are *mamzerim* (individuals seriously restricted in their own ability to marry). *Id.* at 324 n.48. A man refused divorce, in contrast, can, in certain instances, receive rabbinical permission to take an additional wife. *Id.* at 325. Moreover, the children born out of wedlock to a married man are not *mamzerim*. *Id.* at 324 n.48. Husbands, thus, are in better positions to not cooperate in a religious divorce.

make their cooperation in granting the *get* conditional upon a payment (purchasing a *get* settlement).³¹²

Secular civil disregard for the religious dimension of marriage that enables this coercion is opposed to the values of autonomy and equality. In contrast, civil recognition of the validity of religious arrangements that obligate the husband to cooperate in the religious procedure will likely reduce this coercion.³¹³ Hence, the pluralistic approach supports the imposition of a religious obligation to cooperate with the religious divorce ceremony in these cases. For example, the pluralistic approach's commitment to the value of autonomy and the prevention of exploitation led it to support the Get Law,³¹⁴ New York legislation that imposes civil sanctions on spouses wed in a Jewish ceremony who refuse to cooperate with the religious dissolution of their marriage.³¹⁵

In summation, the pluralistic approach would be suspicious of turning religious marriage into an official marriage track recognized by the state; in certain instances, it would recognize private arrangements that contain religious elements, but would make them subject to judicial review, and it would support civil actions meant to prevent exploitation and harm to autonomy, even when these actions cooperate with religious arrangements and practice.

312. See *id.* at 318 ("[I]n recent years we have seen the emergence of a different sort of *agunah* case: one in which the husband is very much alive and present but uses his power to grant or withhold a *get* as a stranglehold to wring out favorable concessions from his spouse.").

313. See, e.g., *In re Marriage of Goldman*, 554 N.E.2d 1016, 1022 (Ill. App. Ct. 1990) (validating a Jewish pre-marital contract and allowing couples to be governed by Jewish law, resulting in a civil court compelling the husband to issue *get*, as required by Beth Din (Jewish religious court)). But see *Victor v. Victor*, 866 P.2d 899, 902 (Ariz. Ct. App. 1993) (refusing to give civil validity to a similar clause).

314. There are actually two *get* laws. For the 1983 Get Law (as amended substantially in 1984), see N.Y. DOM. REL. LAW § 253 (McKinney 1999 & Supp. 2009). For the 1992 Get Act, see N.Y. DOM. REL. LAW § 236B(5)(h), (6)(d) (McKinney 1999 & Supp. 2009). For analysis of these laws, see Marvin E. Jacob, *The Agunah Problem and the So-Called New York State Get Law: A Legal and Halachic Analysis*, in *WOMEN IN CHAINS: A SOURCEBOOK ON THE AGUNAH* 159, 161–64 (Jack Nusan Porter ed., 1995).

315. Cf. Nichols, *supra* note 32, at 163–64 (describing *get* law as an expression of legal pluralism within marriage law). Unlike Nichols, who supports both *get* law and the recognition of religious marriage as a semi-autonomous marriage track, this Article's commitment to the liberal values of individual autonomy and equality leads it to distinguish between the two. It opposes the recognition of a religious marriage track on the grounds that this might harm individual autonomy and gender equality. At the same time, and in the name of those two values, it supports the *get* law as a means of saving exploited women.

C. Covenant Marriage

The liberal transformation³¹⁶ that divorce law underwent in the last decades of the twentieth century from fault divorce to no-fault unilateral divorce has drawn harsh criticism. Critics of the liberal transformation blamed modern divorce law for the rise in the divorce rate, harm to women and children, and the general harm to the institution of marriage.³¹⁷ Against this background, they called for a counter-revolution.³¹⁸ Although the demand to limit grounds for divorce was not completely victorious in any American state, the critics of the modern divorce law model nevertheless won a certain victory when the state of Louisiana,³¹⁹ along with other states,³²⁰ added a new marriage track called "covenant marriage." In covenant marriage states, spouses may choose either a regular marriage that is subject to regular marriage law or a covenantal marriage.³²¹ "Covenant marriage laws have three key features: (1) mandatory premarital counseling that stresses the seriousness of marriage . . . ; (2) the premarital signing of a . . . Declaration of Intent . . . requiring couples to make 'all reasonable efforts to preserve the marriage, including marriage counseling' in the event of difficulties; and (3) the provision of limited grounds for divorce."³²² In the conventional political discourse, the special track is perceived as a victory of the conservative approaches,³²³ and is accordingly criticized by liberals.³²⁴

316. See *supra* note 40 and accompanying text (discussing the liberalization of divorce law).

317. See Nichols, *supra* note 32, at 139 (describing the counter-revolution including covenant-marriage proposals that resulted from the serious crisis of marriage in civil society, with effects on children and adults).

318. See Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 622–26 (1997) (describing and critiquing proposals to reform no-fault divorce).

319. See generally LA. REV. STAT. ANN. § 9:272 (2008).

320. See generally ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2007); ARK. CODE ANN. §§ 9-11-801 to -811 (2008).

321. See generally LA. REV. STAT. ANN. § 9:272 (2006); ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2006); ARK. CODE ANN. §§ 9-11-801 to -811 (2006).

322. See Nichols, *supra* note 32, at 148–53 (describing the principles of the covenant marriage).

323. See Melissa S. LaBauve, Comment, *Covenant Marriages: A Guise for Lasting Commitment?*, 43 LOY. L. REV. 421 (1997) (describing covenant marriage as a conservative effort to make divorce harder); Katherine S. Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 72–74 (1998) (discussing and defending the origins and provisions of Louisiana's covenant marriage law); see also Nichols, *supra* note 32, at 154 ("[I]n Louisiana, [the lawmakers] introduce[d] a covenant marriage law to 'strengthen the family' by turning a 'culture of divorce' into a 'culture of marriage.'").

324. See Jeanne Louise Carriere, *"It's Déjà Vu All Over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1714–18, 1741–42 (1998) (contending that Louisiana's covenant marriage law will likely increase litigation and

The pluralist approach, however, sheds a completely different light on covenant marriage.

First, covenantal marriage was not accepted in any state as the sole marriage track, but rather as an additional option alongside the regular marriage track.³²⁵ Consequently, such marriages can be viewed as a pluralistic method of enriching the range of social institutions in society, and not as a conservative effort.³²⁶

Second, unlike traditional family law and certain religious law, covenantal marriage does not adopt double standards for men and women, and does not include exploitative components.³²⁷

Third, even though covenant marriage extends the waiting period before divorce beyond what is common in the conventional tracks, it enables a determined party to demand and obtain a divorce in a period of not more than two years. The legal literature contains trenchant debates as to whether extending the waiting period from the request for divorce to its attainment is worthwhile.³²⁸ The conventional legal approaches maintain that the state must clearly decide in favor of one of these positions.³²⁹ The pluralistic approach, in contrast, enables the spouses to decide between the available options. Just as the pluralistic approach refuses to choose for the parties between the package deal of marriage and the package deal of cohabitation, and

increase the likelihood of spousal abuse); Robert M. Gordon, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1446–61 (1998) (criticizing the counter-revolution from realistic and liberal perspectives); LaBauve, *supra* note 323, at 438–39 (criticizing efforts to make divorce harder); Daniel W. Olivas, Comment, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to Be Ignored*, 71 TENN. L. REV. 769, 795 (2004) (contending that covenant marriage law is both ineffective and inefficient).

325. See Nichols, *supra* note 32, at 148 (stating that Arizona, Arkansas, and Louisiana covenant marriage laws "provide state-sanctioned, alternate, voluntary forms of marriage" alongside traditional marriage options).

326. For a unique view in this light, see Joel A. Nichols, *Louisiana's Covenant Marriage Statute: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 932 (1998). Nichols justifies Louisiana's covenant marriage laws on the basis of pluralism. *Id.* But cf. Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261, 293 (2003) ("[S]anctioning covenant marriage . . . may lead to the false impression that couples who enter one . . . are somehow 'more married' and thus entitled to greater protection than those who enter into traditional marriage."). This view, however, overlooks the equal respect principle of the pluralist approach.

327. See, e.g., Nichols, *supra* note 32, at 151 (listing grounds for divorce under Louisiana covenant marriage law, which apply equally for husband or wife).

328. See *supra* notes 317–24 (presenting arguments for and against covenant marriage laws).

329. See, e.g., LaBauve, *supra* note 323, at 441 ("[C]ouples who wish to marry in Louisiana would probably be better served with just one set of laws to regulate their marriage.").

therefore offers both possibilities to the spouses, this approach offers them two marriage tracks.³³⁰

VI. Conclusion and Further Challenges

There exists a dichotomy within the philosophical scholarship between *liberal-neutral* approaches that equate the regulation of different spousal institutions and *perfectionist* approaches like the traditional status model that prefer one institution—marriage—over others. This Article breaks this dichotomy by designing marriage and cohabitation as two equally respectable options and yet distinguishing their regulation.

En route to this conclusion, this Article develops a pluralist theory that emphasizes the responsibility of the liberal state to create a range of spousal institutions, thereby providing meaningful choices to individuals. The theory offers three rationales for distinguishing marriage and cohabitation: screening mechanisms, autonomy, and efficiency analysis that focus on the signaling effect of marriage. Those rationales prescribe three cornerstones for the design of cohabitation as social institution: (1) substantive freedom of choice at entry; (2) tolerance for couples' lifestyles, limited by state responsibility for preventing exploitation; and (3) restricted individualism, emphasizing the right of exit, yet respectful of relational commitments. Driven by those cornerstones, this Article offers an innovative and comprehensive legal model that, unlike existing all-or-nothing approaches, applies marriage law to cohabitation selectively and distinguishes between different kinds of cohabitants. The Article further elaborates its pluralist approach to the broader issue of spousal regulation including same-sex marriage and civil union, covenant marriage and secular regulation of religious marriage.

Yet, this Article is limited to the internal relationship between couples and does not address the external dimension—namely the relationship between the spouses and external parties, and especially benefits that are given by the state on the basis of marriage. It will be a stimulating challenge to suggest a pluralist regulation of the external dimension and to differentiate it from both the neutral and the perfectionist approaches. This challenge, however, is beyond the scope of the present article.³³¹

330. Additionally, the pluralist approach allows freedom of contract that enables spouses to adapt the general spousal institutions to their own needs. Yet, this freedom of contract is limited by the theory's requirements of substantive free entry, prevention of exploitation, and right of exit.

331. See generally Shahar Lifshitz, *The External Rights of Cohabiting Couples in Israel*, 37 ISR. L. REV. 346 (2003–2004) (offering such a theory in the context of Israeli law); Shahar Lifshitz, *Spousal Rights and Spousal Duties*, in *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* (Scott Fitzgibbon ed., forthcoming 2010) ("[I]t is appropriate to promote legal marriage, and thus a distinction ought to be made between the scope of rights granted to cohabitants and those granted to married couples.").