MARRIED AGAINST THEIR WILL?
TOWARD A PLURALIST REGULATION OF
SPOUSAL RELATIONSHIPS

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Shahar Lifshitz∗

Abstract

This article addresses the regulation of the relationships between unmarried cohabitants. In the article I challenge the conventional divide between conservative and liberal approaches: On one hand, moral condemnation of non-marital 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. The article offers arguments based in morality and efficiency to support the proposed bipolar default systems and the role of

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marriage as screening mechanism. It further delineates the refinements and limitations that are necessary to address liberal objections to the distinction between marriage and cohabitation within the pluralist approach. Hence, the article offers a detailed and comprehensive legal model that unlike existing all-or-nothing approaches, selectively applies marriage law to cohabitation and distinguishes between different types of cohabitants.

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

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INTRODUCTION

John, an engineer, dated Lisa, an alternative healer. They decided to live together in John’s house. Lisa had no license to work as a healer in John’s state, hence she gradually assumed a significant part of the responsibility for running the household and was even involved in the education of John’s children from his previous marriage. After seven years of cohabitation, due to the tensions ensuing from John’s refusal to marry Lisa, they decided to separate. Had John and Lisa been married, the labor incomes and property accumulated by either spouse during the marriage would have been classified in most American jurisdictions as marital property and hence subject to equal division at divorce. Lisa would also be entitled to a certain portion of

1 See Shari Motro, Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property 102 NW. U. L. REV. 1623, 1623 (2008) (addressing the distinction between labor income and gifts, inheritance and property that was acquired before marriage). Motro challenges this dichotomy and points to deviations from the dichotomy even in practice (id, 1636-1645). See also infra subpart III.C.3.
2 See Carolyn J. Frantz & Hanoch Dagan, Properties of Marriage, 104 COLUM. L. REV. 75,100 (2004) (“The cornerstone of the contemporary law of marital property … is the rule of equal division upon divorce”). Even today, however, there are gaps between different states. See the survey id, notes 106-15 and J. THOMAS OLDHAM,
John’s post-divorce income that might be classified legally as alimony, compensation for loss of career opportunity, or Lisa’s share in John’s increase of earning capacity during marriage. Lisa, however, was not married to John. Should the absence of a formal marriage make a difference in her case? For decades, there has been substantial uncertainty regarding this question. This article aims to fill in this gap.

The present 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. The article thus argues that the law should offer two distinctive legal regimes for marriage and cohabitation and enable the couples’ substantive freedom to choose between them. The 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. Since the last decades of the 20th century, however, there is a trend to narrow the gap between the mutual obligations of cohabitants and those of married partners. Conventional wisdom depicts this trend as liberal, while opposition to it is viewed as conservative and moralistic. The new restatement on family
dissolution\(^9\) may reflect the next seemingly liberal step,\(^{10}\) which is to totally equalize the regulation of the economic relationships between unmarried cohabitants and that of married partners.\(^{11}\)

The 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. The distinction between marriage and cohabitation is justified because it provides a *screening mechanism* for the *spouses* to express their different preferences.

The second rationale argues that the law should *design* marriage and cohabitation as separate spousal institutions as part of society’s responsibility to provide *diversity of spousal institutions*. 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. While equating marriage and cohabitation provides a single default rule, the distinction between marriage and cohabitation provides a menu.\(^{13}\) A bipolar default system, I argue, is vital for an efficient ‘*signaling*’ process and encouraging *information delivery* between spouses.
Legal scholars have partially recognized the liberal distinction between marriage and cohabitation obligations. 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. 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.

This contractual model, however, is incomplete, as it fails to address three contrasting arguments in favor of imposing marriage law on cohabitants: The first argument focuses on gender differences, which might result in exploitation and injustice. It contests the contractual argument with extra-contractual considerations that justify applying marriage law to cohabitants. The second argument opposes the factual premise that cohabitants intentionally reject marriage law. Based on relational contract theory, this argument emphasizes the implied commitment inherent in long-term cohabitant relationships, even in the absence of a formal commitment. The last argument undermines the core assumption of the contractual argument, i.e. that cohabitants reject marriage law, specifically pointing to cases of same sex couples who are legally disqualified from marriage.

Prominent scholars and lawmakers believe that these contrasting arguments support the complete equalization of marriage and

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15 See infra subpart I.B.

16 See Grace G. Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. Rev. 1125 (1981) (suggesting to impose marriage commitments on cohabitants in order to protect weaker members of the family) and Ira M. Ellman, ‘Contract Thinking’ Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. Rev. 1365 (2001) (criticizing the contractual perspective of Marvin v. Marvin and suggests an extra-contractual perspective to cohabitants law).

17 This argument may also be based on a modern approach to contract law, which legitimately intervenes in the agreement of parties in cases of power imbalance and injustice. See infra, subpart I.D.2.

18 See Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 V. A. L. Rev.1225 (1998); applying relational contract theory to the long-term commitment embedded in marriage).

cohabitation commitments based on either a relational contract\textsuperscript{20} or the status model.\textsuperscript{21}

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, in this article I offer 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: the model is thus sensitive to cases in which life as cohabitants does not reflect the rejection of marriage law but rather unilateral decision of the more powerful spouses, natural continuation of a previous life-style or legal incapacity for marriage. (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 those cornerstones, this article offers an innovative and comprehensive legal model that integrates the arguments of the equalizing approaches into its normative framework without neglecting the basic arguments in favor of the distinction between marriage and cohabitation. The model is composed of the following elements:

First, cohabitation and marriage law should be distinguished.

Second, while the prevailing models address marriage law as a package deal with respect to cohabitants,\textsuperscript{22} the new model applies to cohabitation only selected components of marriage law.

Third, I develop criteria to determine the appropriate components of marriage law to apply to cohabitants. As I explain, cohabitation law

\textsuperscript{20} See Scott, \textit{supra} note 6, 258-61 (suggesting that the law should presume implied contract to apply marriage law in any case of cohabitation spanning over five years).

\textsuperscript{21} 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, \textit{supra} note 9, 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, \textit{The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State}, 76 NOTRE DAME L. REV. 1265 (2001) (suggesting a status model regulation of cohabitant relationships).

\textsuperscript{22} The package deal characterization of the existing models is apparent in the ALI’s (\textit{supra} note 9) structuring of chapter 6 (the chapter that address cohabitants’ obligations). 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. On the other side of the spectrum, the traditional stance (see \textit{supra} note 4) and the explicit contract model reject the imposition of all components of marriage law on cohabitants (See \textit{infra} subpart I.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.
should impose on cohabitants the responsive components of marriage law that aim to prevent exploitation and protect weaker parties from marriage ex-post according to the extra-contractual considerations. At the same time, the model rejects the imposition of channeling regulation 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.

Based on these criteria, the 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.24 This regime insists on equal division of income accumulated during marriage, regardless of the partners’ actual contribution. In some circumstance it entails also pre-marriage property, gifts and inheritance, as well as increase in human capital in the marital property. In contrast, the pluralist model provides for regular cohabitants a narrow contribution-based marital property regime. This regime entails only labor incomes that accumulate during marriage as marital property. It also deviates from the equal division rule, in cases of asymmetry between cohabitants’ contribution. Beyond marital property law, married partners are entitled in some circumstance to long-term alimony or to compensation for career loss. Cohabitants, in contrast, are entitlement according to the pluralist model’s criteria 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 sesetivity to power gap and exploitation lead it to adopt a nuanced approach that distinguishes between aspects of cohabitation law and the circumstances of the creation of contract.

Beyond cohabitation law, the pluralist theory that I developed offers a fresh look at other fields of spousal regulation. The article demonstrates the theory’s potential contribution regarding three


24 Cf. Frantz & Dagan, supra note 2 (offering a theory of marital property law based on autonomy, community and equality). While Franz & Dagan emphasize the coherence between those values, this article emphasizes the conflict between autonomy and community. It further argues that while marriage law should balance between these competing values, cohabitant law should prefer autonomy.
publicly-disputed topics: (1) same-sex marriage and civil unions; (2) covenant marriage; and (3) secular regulation of religious marriage.

First, the article distinguishes between different and same-sex couples and suggests a unique legal regime for the later that takes into account their legal restriction from getting married. Unlike rejected ‘separate but equal’ approaches, however, I argue that recognition of same-sex couples’ mutual commitments through cohabitation law is a third best solution. Hence, I support the recognition of same-sex marriage or at least of civil union regimes.

Second, the article supports legal regimes that enable spouses to choose between a regular marriage and ‘covenantal marriage’ that is subject to unique regulation. In the conventional political discourse, covenant marriage is perceived as a victory of conservative approaches, and is accordingly criticized by liberals. The article, however, sheds a pluralist light on covenant marriage as it adds new spousal institution to the existing menu.25

Finally, the article addresses contracts to apply religious law on marital relationships and proposals for turning religious marriage into an official marriage track offered by the civil legal system.26 Apparently, these contracts and proposals also add new spousal institutions. Yet I argue that the substantive contents 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 follow: Part I presents the existing theoretical approaches that support the various legal models and criticize them. Hence, it explains the need for a new theory. Part II develops the pluralist-liberal theory. Part III presents in detail the concrete legal model derived from the new theory. Part IV addresses same-sex cohabitants and goes beyond cohabitation law to suggest a pluralist regulation model for spousal relationship. A brief conclusion follows.

I. EXISTING APPROACHES AND THEIR LIMITATIONS

American law and scholarship are extremely ambiguous regarding regulation of the economic relationship between cohabitants following their separation. This part draws a roadmap of the main

25 While the articulation of the pluralist theory and its application to cohabitant law and civil unions are original and innovative product of this article, few applications of pluralist thought to covenant marriage and religious marriage already exist in legal scholarship. See Joel A. Nichols, Multi-Tired Marriage: Ideas and Influence from New-York and Louisiana to the International Community, 40 Vand. J. Transnat’L L. 135 (2007) (holding that covenant marriage and civil enforcement of Jewish divorce law in New York is a kind of pluralist regulation of marriage). As I will demonstrate later (infra subpart IV.B), this article’s rationale, scope and application of pluralist theory are significantly different from those of Nicholas, even in the context of covenant marriage and religious marriage.

26 See Nichols, id., at 140-41.
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 20th century, moral condemnation of non-marital conjugal relationships and public policy considerations in favor of marriage motivated traditional family law to fight against cohabitation in various ways. Traditional law not only rejected the application of marriage law to cohabitant’s partners but even invalidated explicit contracts between cohabitants. 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.

B. The contractual distinction between marriage and cohabitation

Influenced by liberal-contractual principles like freedom of choice and the state’s moral neutrality, family law during the second half of the 20th century became more respectful of spouses’
private choices. Thus, most jurisdictions validate explicit contracts in which cohabitants take upon themselves marital-like commitments. Interestingly, however, those liberal-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. 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.

This contractual argument is supported by empirical findings that point to systematic differences in life-styles between married and cohabitants partners and suggest that married couples’ level of commitment is generally higher than that of cohabitants. Under the contractual argument, the law should reflect these differences.

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33 See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (describing privatization processes that transformed marriage from a public institution to a private arrangement). See also Frances E. Olsen, *The Politics of Family Law*, 2 LAW & INEQ. 1, note 45 (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.”).

34 See, e.g., Moore, supra note 5; See also Latham v. Latham, 274 Ore. 421, 427 547 P.2d 144, 147 (1976) (agreements in consideration of cohabitation were not void) Carlson v. Olson, 256 N.W.2d 249 (Minn.1977) (adopting the Marvin case regarding the validation on cohabitation contract); In re Estate of Steffes, 290 N.W.2d 697, 708-09 (Wis. 1980) (holding that contracts between unmarried cohabitants are enforceable if independent from illicit sexual conduct);

35 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. Bring, *Domestic Partnership and Default Rules, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, 269 (Rabin F. Wilson ed., 2006) (“Parties who didn’t want to get married but wanted to cohabit would find themselves with a set of responsibilities on dissolution that they didn’t want to assume”).

36 See Garrison, supra note 14, 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”). See also Homer H. Clark, *The New Marriage*, 12 WILLAMETTE L. REV. 441, 452 (1976) (respect for freedom in the case of cohabitants means avoiding legal regulation of the status of the those who have chosen not to be subject to the norms entailed by marriage).


38 See, e.g., Garrison, supra note 14, at 839-45 (demonstrating through extensive survey of sociological research that cohabitants and married couples behave differently and stating at 841 that “these behavioral differences appear to reflect
The contractual argument against imposing marriage law on cohabitants underlies the explicit contract model that was adopted in Texas, Minnesota, New York, and other American jurisdictions. 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

This model focuses on the implicit commitment inherent in long-term cohabitation, even in the absence of explicit contract. The court in the celebrated Marvin v. Marvin case opened the gate to applying marriage-like commitment to cohabitants’ relationship if it reflects their implied contract. There is a great ambiguity, however, as to the circumstance under which the implied contract theory ultimately should be applied. 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. Typical couples, however, are rarely consciously thinking of the legal aspects of their underlying attitudinal differences.

39 See Minn. Stat. Ann. §513.075 (West 2002). (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).
40 See Tex. Fam. Code Ann. §1.108 (Vernon 1998); See also Zaremba v. Cliburn, 949 S.W.2d 822, 829 (Tex. Ct. App. 1997) (holding that property claims arising from non-marital cohabitation of two male partners are subject to statute of frauds provision requiring written contract).
41 See, e.g., Morone v. Morone, 50 N.Y.2d 481, 488, 413 N.E.2d 1154, 1157 (1980) (upon dissolution of nonmarital living arrangement, the mutual rights of the spouses “should not exceed beyond recovery on theory of express contract”).
43 See Marvin, supra note 5, at 110 (“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.”).
44 See, e.g., 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, as we do here, or implied is of no legal consequence. The only difference is in the nature of the proof of the agreement.”); 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). See generally J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY 1.02 (2007) (listing decisions following Marvin).
46 See Scott, supra note 19 at 335 (“courts often conclude that the parties’ understanding were too indefinite for contractual enforcement.”).
relationship.\footnote{47} Thus, assuming implied contract between couples is artificial.\footnote{48} Moreover, the implicit contract model fails to address the contractual argument, whereby cohabitation without marriage reflects the rejection of marriage laws.\footnote{49}

2. The Revised Relational Contract Model

Against the background of the above critiques, a revised relational version of the implicit contract model was recently developed. On a sociological level, the model rejects the core premise of the contractual argument, namely that cohabitants intentionally reject marriage law.\footnote{50} Cohabitation is often not the outcome of an active conscious decision not to marry, but rather the natural continuation of cohabitants’ existing lifestyle. The parties in these cases have not rejected marriage; at most, they have not assigned it any great significance.\footnote{51} Furthermore, even when the decision not to marry initially reflects an aversion to marriage law, one should not ignore changing circumstance that lead the spouses to update their life plans and mutual commitments – albeit not in a formal way. On a legal level, the relational contract theory\footnote{52} that suggests unique, dynamic, informal regulation for contracts characterized by ongoing personal relationship\footnote{53} has the potential to breathe new life into the implied contract model. Applying the relational theory to cohabitants’ relationships,\footnote{54} the formalism of the contractual argument should be

\footnote{47}{See, e.g., Brinig, supra note 37, 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.”).}

\footnote{48}{See, e.g., C. Bruch, Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers Services, 10 Fam. L.Q. 101, 135 (1976) (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”).}

\footnote{49}{See supra subpart I.B.}

\footnote{50}{See Blumberg, supra note 16, at 1135-6 (presentation of sociological findings which 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 B.Y.U. L. Rev. 1023, 1032-33 (2001) (explaining why a person who is willing to legalize his relations with his/her partner might nevertheless have reservations concerning the institution of marriage).}

\footnote{51}{See Blumberg, supra note 21, at 1296.}


\footnote{53}{See, e.g., Macneil, id. (distinguishing between relational contracts and discrete transactional contracts: the former address long-term personal relationships while the latter deal with an isolated transaction between two strangers).}

\footnote{54}{See Scott, supra note 19 (first trial to systematically apply the relational theory into cohabitation law). Cf. Ellman, supra note 7 at 1377-78 (stating the relational contract theory supports status based regulation of cohabitation relationship).}
replaced by a relational approach that emphasizes the actual way in which the partners’ relationship developed, their mutual dependency and their deviation from initial intentions, even if these were not articulated explicitly by the parties. Thus, according to this relational version of the contractual model, which was unofficially adopted by few courts, the implied contract is not limited to 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. Going one step forward in this direction, Professor Elizabeth Scott recently suggested that law should presume a contractual obligation to apply marriage law in any case of couples that lived together above five years.

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 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 preventing exploitation; fairness; gender equality, and concern for children. The equators of marriage and cohabitation assume that cohabitation and marriage differ in their formal form but involve substantially the same functional characterization of marriage. Under this functional view, using the formal differences


57 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 (Nev. 1984) (applying community property law on cohabitants based on the purpose, duration and stability of the relationship and on the expectations of the parties).

58 See Scott, id., at 342-48.

59 See Blumberg, supra note 16, at 1159-70.

60 See, e.g., SUSAN M. OKIN, JUSTICE, GENDER AND THE FAMILY (1989) (suggesting a fairness account of marital law).


63 See Regan, supra note 40, at 1437 (2001) (describing anti-formalist objections to the distinction between marriage and cohabitation).
between the institutions as the sole reason for denying the weaker partner in a cohabitation relationship marriage law remedies is simply unjust.  

2. The Power Gap Argument

The sensitivity of modern contract law, to unequal bargain positions of the parties further undermines the power of contractual arguments. The contractual argument implicitly premises that the choice not to get married is a joint decision of equal partners. 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, and status in the marriage market. Consequently, the choices not to get married reflect, in many cases, a unilateral decision of the powerful spouses rather than a joint decision of both parties.

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64 See Martha Minow, Redefining Families: Who’s In and Who’s Out?, 62 COLO. L. REV. 268 (1991) (arguing for legal recognition of functional families outside the traditional legal categories, including adult couples in informal unions).  
65 The main representatives of the extra-contractual consideration are Ganz Blumbers and Ira Ellman. See Blumberg supra note 22 at 1163 and Blumberg, supra note 17, at 1297 (supporting cohabitation law regulation based on fairness and protecting the weaker party); Ellman, supra note 16. (criticizing the contractual perspective for cohabitation law). See also LAW COMM’N OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), Ch. 2 ("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.").  
67 Modern contract law doctrines of economic duress (See Restatement [Second] of Contracts § 175 & 176 [1981]); and unconscionability (see § 2-302 of the Uniform Commercial Code [hereinafter U.C.C. § 2-302] and Restatement [Second] of Contracts § 208 [1981]), as well as specific legislations in area of law such as consumer, labor and banking, are sensitive to cases of disparities of power between the parties of contract. Thus, they 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 (1976).  
69 See, e.g., Wax, id., at 565-75.  
70 See, e.g., ALI, supra note 9, § 6.02 cmt. a (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).  
71 Sociological research points to gaps in power similar to marriage in cohabitants’ relationships, see Rebecca Stanford et al, The Division of Labor among Cohabiting
3. The Same-Sex Couples Argument

The last argument focuses on same-sex couples who are disqualified to marry in most of American jurisdictions.\(^{72}\) It argues that in those cases, the basic assumption of the contractual argument – namely that the life as cohabitants reflects the couples’ rejection of marriage law – is not relevant.\(^{73}\) The case of same-sex couples has been a dominant force in the movement to equate marriage and cohabitation regulation.\(^{74}\)

4. The Status Model in Existing Jurisdictions

Beside the implied and expressed contract theories, American courts apply from time to time complementary extra-contractual doctrines like restitution,\(^{76}\) unjust enrichment\(^{77}\) and constructive trust\(^{78}\) in order to compensate cohabitants for their contribution to their partners’ wealth. Yet while they lead to partial ruling in favor of

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\(^{39}\) J. OF MARRIAGE AND FAM. 43 (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. OF SOCIAL AND PERSONAL RELATIONSHIPS 473 (1986). (concerned that the combination of unequal lifestyles and the freedom to leave will lead to serious harm to women).

\(^{72}\) Until the 2008 elections, two American states (Massachusetts and California) validated same sex marriage. See Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003) (mandating marriage-equivalent unions for same-sex couples); In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004) (civil unions with same rights and benefits but without the title “marriage” would not be equal to marriage); In re Marriage Cases, 76 Cal. Rptr.3d 683, 183 P.3d 384, 2008 WL 2051892 (May 15, 2008) (mandating same-sex marriage because domestic partnership with same rights and benefits but without the title “marriage” is not equal to marriage). But in the 2008 elections, a ban on same-sex marriage was voted in.

\(^{73}\) See, e.g., Kogan, supra note 51, at 1031 (urging that the “Equality Position” adopted by the ALI Principles is most defensible in terms of the long-term interests of gay and lesbian people.

\(^{74}\) See, e.g., Blumberg, supra note 22, at 1268-69 (same-sex couples have been the dominant force in the movement to regularize nonmarital cohabitation); Scott, supra note 6, at 238 (“Today, the most compelling arguments against privileging marriage over nonmarital unions are made on behalf of same-sex couples.”).

\(^{75}\) See Watts v. Watts, supra note 47, at 506 (“Unlike claims for breach of an express or implied in fact contract, a claim of unjust enrichment does not arise out of an agreement entered into by the parties. Rather, an action for recovery based upon 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.”).


the non-wealthy partner, these doctrines never lead to a general equation of marriage and cohabitation.\(^\text{79}\)

The American Law Institute\(^\text{80}\) (ALI) recently offered new principles that reflect a dramatic shift. Motivated by the extra-contractual consideration and supported by the same-sex argument,\(^\text{81}\) the ALI rejects both Marvin’s implied contract model and the explicit contract model.\(^\text{82}\) Instead, the ALI establishes a series of criteria relating to the sociological and psychological components of marital ties\(^\text{83}\) and determines that if these conditions are fulfilled, marriage law should be applied.\(^\text{84}\) In addition, according to the ALI, cohabitants who want to opt out of marriage commitments need a written agreement and such agreements are subject to strict judicial review.\(^\text{85}\) 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.\(^\text{86}\) Even before the ALI, the Washington Supreme Court\(^\text{87}\) as well as legislatures and courts outside the United States adopt a status approach.\(^\text{88}\)

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

\(^{79}\) For the narrow application of the unjust enrichment doctrine in the context of spousal law see, e.g., Estin, supra note 48, 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.”). See also Tarry v. Stewart, 649 N.E.2d 1 (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 (N.H. 1982) (refusing to compensate cohabitant partner for daily life service).

\(^{80}\) See ALI, supra note 6, 907-943.

\(^{81}\) See ALI, Id. at 914 (“Finally there are domestic partners who are not allowed to marry each other under state law because they are of same sex although they are otherwise eligible to marry and would marry one another if the law allowed them to do so.”).

\(^{82}\) ALI, id., at 918 – 19.

\(^{83}\) Id. § 6.03.

\(^{84}\) See Id. § 6.03-6.05.

\(^{85}\) See infra note 213.

\(^{86}\) See Garrison, supra note 14, at 837 (“[The principle] instead relies, as do the marriage laws, on a status classification”).

\(^{87}\) See Lindsey, 101 Wash.2d at 304, 678 P.2d 328; Connell v. Francisco, 898 P.2d 831 (Wash. 1995). (Washington supreme court in both cases adopted a general rule requiring a just and equitable distribution of property following a meretricious relationship.)

\(^{88}\) 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 § 2E, 2001 (NZ). See also the following argument of the Canadian law commission: “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.” LAW COMM’N OF CANADA, supra note 68 at ch.3 pts.1, 4. For the Israeli court’s trend to equate marriage and cohabitation see Shahar Lifshitz, A Potential Lessen from the Israeli Experience for the American Same-Sex Marriage Debate, BYU L. REV. notes 65-83 (forthcoming, 2009). See also Blumberg, supra note 22, at 1299-302 (comparative survey of legal regimes that adopt the status model).
Table I: Summery of the Existing Approaches

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<th>Status distinction between marriage and cohabitation</th>
<th>Contractual distinction between marriage and cohabitants</th>
<th>Contractual equation of marriage and cohabitants</th>
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<td>Traditional stance Hewitt v. Hewitt</td>
<td>Moral hostility to cohabitants, public-policy preference for marriage</td>
<td>Distinction</td>
<td>Invalidation of even explicit contract</td>
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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 that invalidates even explicit contracts in which cohabitants assume marital-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 and the status models and their underlying rationales demonstrate the extremely problematic nature of regulating cohabitation law solely on the basis of the explicit contractual model.

So ultimately, do the relational contract and status models settle the debate in favor of equating marriage and cohabitation as is often
assumed by legal scholars? 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 failed 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’s begin with the contractual models (the implied and revised-relational) for equation marriage and cohabitation. 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. Yet even those who believe that in certain instances, cohabitation relationships reflect such implied or relational contract, cannot ignore the fact that in other cases, refraining from marriage indeed reflects a conscious rejection of marriage and its legal consequences, or that yet in 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 it is problematic to adopt the opposite policy, that ignores those cohabitants who rejected, or at least have not yet taken on, legal marital commitments.

Normatively, the implicit and relational contract models are also limited to the contractual arrangements of the partners and ignore the extra-contractual considerations. Thus, these models are also exposed to the power gap and extra-contractual arguments. Friedman v. Friedman, a Californian case, might clarify this concern. Friedman addresses spouses that lived together twenty years and raised two children. When they separated, the woman sued for maintenance and division of assets. The court dismissed the claim and emphasized that in this case the parties, or at least the man, had consciously refused to marry (in fact, at one stage the parties set a date for their wedding, which was later cancelled by the man). Consequently, it was not possible to infer implicit contract to apply the marriage laws from this relationship. The contractual approaches enable powerful spouses to opt out from marriage commitments either by contractual arrangement or even by clear unilateral notification that he doesn’t agree to take upon himself marriage commitments. Thus, the Friedman case followed its contractual logic. However, is the Friedman conclusion justified? Does the contractual argument completely exhaust the discussion on this question? Might the weaker

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89 See, e.g., Friedman v. Friedman, 24 Cal. Rptr. 2d 892 (Ct. App. 1993).
90 But cf. Scott, supra note 19, at 344 (demanding formal written agreement to opt out in order to protect the vulnerable party).
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? Don’t these alternative arguments call for a deviser model that takes into account both contractual and extra-contractual considerations?

2. Limitations of the Status Approach

Interestingly, the status model is subjugated 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. This type is characterized by a power gap and even exploitation. It argues correctly that in such patterns of relationship, cohabitation doesn’t reflect mutual agreement to reject marriage law but rather unilateral decision of the powerful spouse to take advantage of marital life without marital commitments. 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 reliance was created that he/she does not want to take on him/her self marriage law commitments and the other spouse eventually accepted it.

Second, the contractual models are justifiably criticized 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 cohabitants 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.

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.

Furthermore, even the gender equality perspective that 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 explicit or implied agreement of 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 modern messages regarding women’s equality. Lawmakers is to 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.

91 For a similar criticism, see Ellman, supra note 17, at 1370.
92 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 massage of equality is very
The narrow perspective of the status model becomes even clearer when it viewed through the perspective of the same-sex couples argument. This 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.

3. Intermediate Summary

Our journey among the existing approaches demonstrates several flaws that are 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, which 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 and thus none of the existing approaches offers a suitable balance.

Taking into account 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 sections demonstrate, this theory offers an innovative and unique perspective on cohabitation law and on a broader level on the regulation of spousal relationships in general.

II TOWARDS 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 relationship are substantively identical, thus the law should

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typical to modern family law. See DEBORAH L. RHODE, JUSTICE & GENDER - SEX DISCRIMINATION & THE LAW (1989) (describing the tension between “sameness” feminism which presumes actual equality between man and women and “difference” feminism which takes difference between man and women into consideration). See also MARTHA MINOW, MAKING ALL THE DIFFERENCE - INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (suggesting a model of difference feminism). Yet while in other contexts there are some proposals to balance between the positions, in the case of cohabitants so far, each argument and model took an extreme position.

93 See supra notes 63-64 (the anti-formalism case). Both contractual and status approaches share this view. See, from the contractual perspective, Garrison, supra
equate their regulation. According to the second option, cohabitation and marriage are different. Marriage reflects more commitments between the parties and hence it should be encouraged also from the public perspective by distinguishing marriage and cohabitation regulation. 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 argues from the liberal perspective of individual rights 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.

The existing contractual approaches are reflective. Thus, they are concerned with gaps between the legal regulation of the economic relationship and the couples’ hypothetical wishes. Driven by this concern, they adopt one of two strategies. The first strategy demands the courts to inquire into the wishes of the parties in the specific case.

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94 See supra notes 37-38 (empirical support of the contractual argument).
95 See supra note 14, at 835 (“The commitment argument would, of course, 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.”); From the status perspective, see ALI, supra note 9, at § 6.02 cmt. a (“The absence of formal marriage may have little or no bearing on the character of the parties’ and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.”).
96 See supra note 37, 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”).
according to its circumstances. In many cases, this strategy leads to uncertainty, and it is also often invasive. The second strategy adopts a rule that reflects the presumed wish of the majority of the couples as its default rule. In light of this strategy, a substantive part of the debate between the competing approaches is actually factual, regarding the typical expectations of cohabitants. Each side of this debate is backed by sociological research aiming to prove that one kind of cohabitants’ legal expectation is the prototypical and to deny or at least undermine the existence of other kinds of cohabitants’ expectations.

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 exceptions of all kinds of cohabitants.

Instead of viewing this failure to express the wishes of the parties as a fault, the pluralist approach views it as an opportunity to influence the preferences and expectations of cohabitants’ partners. 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. According to this view, the law should actively design the social institution of cohabitation, as a distinctive institution separate from marriage, and channel couples to express their ex-ante preference regarding the institution that best fits their relationship. The formal and currently

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97 The Marvin case and its original implied contract theory are a typical example for this strategy.
98 See my previous critique of the implied contract theory, supra notes 46-48.
100 Cf. empirical research support of the explicit contractual model for distinction between marriage and cohabitation, supra notes 37-38 with the empirical support of the relational contract model for equation. See supra notes 52-51.
101 See Brinig., supra note 37, at 270 (“The problem, as noted above, is that the principle proposes a default that no one wants”); See also Garrison, supra note 14, at 847-48 (“the 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.”).
The underestimated requirement of registering marriage serves as a screening mechanism between the different types of spousal relationships. The pluralist approach’s use of the channeling aspect of cohabitation law is very unique. Most of the existing applications of the channeling function of family law belong to the perfectionist philosophical tradition, which prefers one type of family life over another and directs couples to the preferable spousal pattern. In contrast, the pluralist approach posits marriage and cohabitation as equally respectable institutions and expects the partners to choose between them according to their real preferences.

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 a variety 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 Tubule Rasa society, i.e. 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 that of cohabitants, in order to support the diversity of spousal lifestyles. Philosophically, the pluralist theory is based on modern liberal approaches that stress 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. The modern liberal approaches emphasize 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.
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 spousal relationship may choose between a high level of legal commitment (i.e., legal marriage) and a lower level (i.e., cohabitation). Such a framework would offer individuals a range of options.

On the other hand, think of a legal world that is totally in accord with the supposedly liberal position that equates the legal status of cohabitants to that of married couples. In such a world, couples who desire to maintain spousal relationships are automatically subject to the system of marriage laws. Such a framework does not offer couples social institutions with meaningful differences and the possibility of making 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 efficiency analysis. Such analysis emphasizes the function of marriage as a social institution that enables a person to pre-commit him/herself and hence to signal to his/her spouse, children and society as a whole the scope and seriousness of his/her commitment. The pluralist approach argues that legal differences between the mutual commitments of married and cohabitating partners is vital for this ‘signaling’ effect because it enables the couples to signal their readiness to take their commitment to a higher level. If, however, marriage and cohabitants’ commitments would be equalized, marriage commitments are going to be imposed on spouses automatically so marriage itself would not add new commitments. Thus, the signaling effect of marriage would be obscured.

The signaling aspect of marriage corresponds to updated efficiency analysis on another aspect. 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 state should respect the autonomy of minority communities in order to enhance the diversity of our society.

See Russell D. Murphy, A Good Man is Hard to Find: Marriage as an Institution, 47 J. OF ECON. BEHAVIOR & ORG. 27 (2002). (explaining the role of marriage as a social institution that reflects a systems of cultural understandings).

information delivery 111 between the partners, by forcing one of them to contract out from the default rule and expose his/her future expectations. 112 Apparently, conventional application of this approach results in equation of marriage and cohabitation in a way that would force the financially stronger party to opt out and expose his/her intention not to share. 113 This application, however, ignores the tendency of prospective couples in general and specifically prospective cohabitants not to contract. 114 Thus, from a contractual perspective, the couple might stick to a default rule that doesn’t reflect their intentions, without even the benefit of information delivery. It is precisely at this point that the benefit of the signaling mechanism that 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 bio-polar default system (i.e. marriage law and cohabitation law). 115 Hence it enables the spouses to signal to their partner important information regarding his/her intentions and expectations without need to contract in or out as conventional signal default rule unrealistically expects. 116

113 See Scott, supra note 19, at 342-6 (supporting equation of long term cohabitation and marriage from penalty default law perspective).
114 See Brining, supra note 37, at 271-73 (based on empirical findings regarding couples reluctant to contract, rejects the penalty default law justification for equation of marriage and cohabitation).
115 While extensive research exists regarding default rule, law and economic scholarship just recently reveal 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”) and Yair Listokin, What Do Corporate Default Rules and Menus Do? An Empirical Examination (Yale Law School Working Paper No. 335) (on file with author) (demonstrating the importance of offering a menu of default laws in corporate law).
116 Apparently, one should argue that the need to get married according to the pluralist model is parallel to the conventional need to opt out by agreement in a signal default law system. Yet, the bi-polar 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, id). 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 romanticist aspects of spousal lives.
B. Designing Cohabitation as an Autonomy-Based Social Institution

A philosophical debate exists regarding the morality of pluralism. According to one view, pluralism justifies a passive role of the state and tolerance toward non-liberal practices that harm the individual within groups. This article’s pluralist theory, however, is part of a liberal tradition that based pluralism on the liberal value of autonomy. Thus, while demanding that the liberal state support and encourage a range of social institutions, it insists that those institutions should not harm the autonomy of their members.

The autonomy foundation of the pluralist theory does not only justify 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’ life-styles, 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.

1. Substantive Freedom of Choice

The pluralist approach is based first and foremost on strengthening individual’s autonomy by giving multiple choices between different options. Yet, the existence of a variety of options is meaningless if the individual is unable to choose between them.

Thus, the pluralist approach 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 establishments of spousal institutions like civil unions.

Similarity, but in a different context, unlike the formal egalitarianism that characterizes the explicit contract model, the pluralist model’s emphasis on autonomy leads it to ensure that living as cohabitants reflects substantive free choice on the part of both

119 See supra notes 107-108 (Describing Raz, Kymlicka and Gardbaum’s approaches). See also ISAIAH BERLIN, FOUR ESSAY ON LIBERTY (1969) (early roots of the Liberal-Pluralist approach).
120 See Raz, supra note 12, 155, 161-162.
121 See infra subpart IV. A
partners and is not result of a unilateral decision of the more powerful partners. Thus, when the powerful partner takes advantage of the weaker partners’ vulnerable situation and deprives her/him 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.\textsuperscript{122}

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

The second principle addresses the tension between the couples’ 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 couples’ freedoms.\textsuperscript{123} During the second half of the 20\textsuperscript{th} century, however, a private ideology of family emerges that emphasizes the couple’s freedom over society’s moral values and general interests.\textsuperscript{124} Yet even today, marriage regulation reflects complex compromises and balancing acts between society’s interest\textsuperscript{125} and ethos regarding proper spousal relationships\textsuperscript{126} 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 variety of spousal institutions. This

\textsuperscript{122} See infra subpart III.F. (suggesting mechanisms for distinguishing between different types of decision-making).
\textsuperscript{124} See Singer, supra note 36 (describing privatization of American family law); See also V. Pocar & P. Ronfani, \textit{From Institution to Self-Regulation, THE EUROPEAN FAMILY} 195, 196 (Dordrecht, J. Commaille & F. de Singly eds., 1997) (locating the privatization process within a broader Western process).
\textsuperscript{125} See Karen Servidea, Reviewing Premarital Agreements to Protect the State’s Interest in Marriage, 91 Va. L. Rev. 535 (2005) (suggesting a public approach to pre-marital agreements).
\textsuperscript{126} See, e.g., Naomi R. Cahn, \textit{The Moral Complexities of Family Law}, 50 STAN. L. REV. 225 (1998) (identifying new moral discourse that dominates modern family law); See also Franz & Dagan, supra note 2, at 98-106 (arguing that marital property law should be perceived as an expression of a societal ideal for marriage as an egalitarian community).
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. The pluralist theory therefore challenges lawmakers not only to reflect on and support the 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, and 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 unfairness 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 over the individual members of the family. 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 20th century, in parallel to privatization, a process of individualization emerged in Western family law, which emphasized the individual identity of the families’ members. One central ingredient of individualization is the recognition in modern marriage law of the partner’s right of exit, which is expressed by the shift from fault divorce to unilateral no-fault divorce and the rise of the ‘clean-break’ as a guiding principle of modern alimony law. Still, despite the rise of the individualization principles, important aspects of marriage law still prefer the ‘We’ over the ‘I’, or at least try to balance between the individual autonomy of each spouse to the community aspect of the

128 Cf. GLENDON, supra note 32, 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 (1994) (“The 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.").
129 See Franz & Dagan, supra note 2, at 85-87.
130 See GLENDON, supra note 32, at 148-91.
131 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); Turner v. Turner, 385 A.2d 1280, 1282 (N.J. 1978) (“The law should provide both parties with the opportunity to make a new life”)

marital unit. Furthermore, in recent years, there is a trend to restore alimony and other forms of post-divorce spousal commitment in a way that undermines the clean-break principle. In some legal regimes, even the move toward unilateral no-fault divorce itself is under attack. 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, 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. Thus, while marriage law imposes in certain circumstance long-term post-divorce spousal commitment, the pluralist model insists on the right of each cohabitant to easily end the relationship 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 relationships but also his/her ability to make binding legal commitments. This aspect of autonomy challenges the pluralist theory to balance between ex-ante to ex-post perspectives.

From an ex-ante channeling perspective – focusing on distinguishing marriage and cohabitation – the pluralist theory prefers that couples take upon themselves legal commitments either by marriage or by expressed contracts. 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. 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. 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, the pluralist model

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133 See infra subpart III.C.
134 See infra subpart VLC.
distinguishes between marriages 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. 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.

III. 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 with its complete merger of marriage and cohabitation commitments. 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 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. 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. Thus, according to the pluralist model, those components of marriage law whose principal function is to encourage 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.

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. In those cases in which marriage law itself is based mainly on the expressed and/or presumed intention of the parties, it might not be appropriate to impose marriage law to 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. It suggests that cohabitation law should 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 especially should reject limitations of the spouses’ right of exit.

Based on those three criteria, the next part discusses which aspects of the main components of marriage law (especially marital property law, alimony, compensation for career losses and marital contracts) should be applied to cohabitants.

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

First, the model posits an ‘entry requirement’ in order to screen couples who are trying out their relationship. Trial periods according to the model should not be regulated by cohabitation law but by regular civil doctrines like contract law and unjust enrichment.

Second, the pluralist model defines significant cohabitation periods, accompanied by relational commitments between the partners, as relational cohabitations. It offers an innovative distinction between regular to 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. Those in the later 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. In egalitarian situations, the model respects cohabitant’s formal agreement and in some circumstances and topics even informal understandings that deviate from the conventional cohabitants’ law. In situations that raise suspicion of exploitation, the model demands formal agreements in order to opt out of cohabitation obligation and even those formal agreements are subjugated to strict supervision.

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.

\[136\] For the difference between relational implied and expressed commitments see supra subpart I.C. For the classification criteria of regular and relational cohabitants see infra subpart III.E.
The following parts elaborate on the implications of the new model.

**B. Who should be defined as Cohabitants?**

Sociologists tend to view short period of cohabitation as a trial period, following which the parties are likely to determine whether or not they wish to take a more serious commitments. 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 signal for commitment. Moreover, in cases of short child-less relationships, the extra-contractual justifications for imposing marriage commitment on cohabitants are relatively week. For these reasons, the pluralist model establishes a substantive minimum period of “living together” in order to get cohabitation rights. Partners’ inter-claim within this trial-period should be regulated according to regular civil law doctrines.

The model distinguishes, however, between children–less 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. Second, when children are involved, the extra-contractual rationales are more significant and according to the model would justify imposing selective components of marriage law on cohabitants. The accurate minimal duration time of the trial period might be influenced by specific demographic and sociological variables in a specifics society. Yet as a rule of thumb, three years minimum for childless cohabitation and one year for cohabitants with children sounds plausible.

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138 In analogy to contract law, the commitments between partners in the trial period should resemble precontractual liability. See Alan Schwartz, Precontractual Liability and Preliminary Agreements, 120 HARVARD L. REV. 661 (2007); Lucian A. Bebchuk & Omri Ben-Shahar, Precontractual Reliance, 30 J. LEGAL STUD. 423 (2001).

139 The ALI offer of three years minimum for childless cohabitation and two years for cohabitants with children (ALI, supra note 9, at 921). See also the New Zealand three years minimum with court’s discretion to reduce this period when children are involved and serious injustice might happen (supra note 85, §14A). But cf. the case-by-case approach of the implied contract theory that does not state any minimum duration threshold. See also Lifshitz, supra note 85 (describing the recognition of an extremely short cohabitation period in Israel). However, pluralist theory also opposes the five years minimum cohabitation period that Scott suggests, see supra note 19, at 343, as it leaves the weaker parties without sufficient remedies for an extend period.
Apparently, simplicity and predictability considerations might support a technical test of periods of joint habitation as a sole entry requirement.\textsuperscript{140} 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. Thus, the pluralist model prefers in this context a more nuanced approach that posits living together as presumption that can be rebutted by a demonstration that the supposed cohabitants did not share a life together as a couple.\textsuperscript{141}

The ALI, for example, established 13 factors that should direct courts in deciding whether a couple shared life together.\textsuperscript{142} Some factors such as making statements regarding the relationship or participation in commitment ceremonies are more contractual, while other objective factors such as intermingling finances, becoming economically dependent, having defined tasks and role division between partners or joint child raising are more extra-contractually oriented.\textsuperscript{143}

Most of the ALI factors might serve also the pluralist model in the screening process. Yet, there is a substantive difference between the status approaches of the ALI and the pluralist model’s mechanism.

According to the ALI method, after considering its presumptions and guiding factors, the court should give a yes or no answer as to whether the partners are actually domestic partners (the ALI label for cohabitants). In case of a positive answer, cohabitation law (which according to the ALI is almost identical to marriage law) should be applied.

The pluralist model, on the other hand, argues that the entry requirements should not be applied uniformly, but rather need to be adapted to the specific types of cohabitants’ rights.

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

\textsuperscript{140} See Scott, supra note 19, at 342-3.

\textsuperscript{141} See, e.g., ALI, supra note 9, § 6.03 (7) See also Bill Atkin, The Legal World of Unmarried Couples: Reflections on ‘De Facto Relationships’ in Recent New Zealand Legislation, 39 VUW. L. REV. (forthcoming, 2009) (describing similar mechanism in New-Zealand).

\textsuperscript{142} See also § 2D(2) of the Property (Relationships) Act 1976 in New Zealand that states ten factor regarding the partners’ lifestyle that guide court in determining whether they should be consider as a couples.

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 he or 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 by domestic tasks will be the important criterion.

Given this definition of cohabitants we are moving now to their scope of mutual duties. Subparts C and D address regular cohabitants focusing on 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 law is the rule of equal division of marital property upon divorce. (Hereinafter: the equal division rule). 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

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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 W. Prager, Sharing Principles and the Future of Marital Law, 25 UCLA L. REV. 1 (1977).

See Franz & Dagan, supra note 2, 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. See the survey id., notes 107-115 and OLDHAM, supra note 2, § 3.03
home, while giving up, either partially or fully, on a career. While the latter’s efforts enable the former to gain income and accumulate property, formal property law ignores such contribution and hence results in injustice.

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. It has been argued, however, that in the absence of a market value for the domestic role, the equal division rule is preferable to equitable division because it prevents an arbitrary result or even worse, equitable division may systematically underestimate the domestic partner’s contribution. Finally, an analogy has been drawn between marriage’s economic arrangement and commercial partnerships. It has been argued that as in a commercial partnership, in marriage too, equal division should be the default rule.

146 See Motro, supra note 1, at 1632 (“non- or low-wage earning spouses often contribute substantially to their partners’ earnings—both directly ... and indirectly by managing the household and raising children”).

147 See, e.g., Martha A. Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 UTAH L. REV. 387, 397 (1993) (“It is the contribution they have made to the family that justifies their partnership share at dissolution.”). See also Katharine Silbaugh, Commodification and Women’s Household Labor, 9 YALE J. L. & FEMINISM 81, 109–10 (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 (3) HEBREW U. STUDENT L.J. 627 (2004) (analyzing the injustice in a separate property system that ignores the domestic spouse’s contribution).


149 In theory, domestic tasks like cleaning, cooking and child care are executed by outsiders and have clear market value. I believe, however, that at least in the case of child rearing, a parents’ 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’ task 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.


151 See Motro, supra note 1, at 1633-34 (ad hoc valuations of spouses’ relative contributions often mirrors 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) (“divorce doctrines that allow for substantial judicial discretion generally operate to women’s disadvantage”).

The contribution theory is highly influential, but it is not very convincing, since it is probably not true to assume that in all cases the non-market domestic partner’s contribution equals the income of the ‘provider.’ This critique of the contribution theory is specifically valid in cases of healthy childless couples that are out-sourcing most of their domestic tasks, or with high-income providers that are based on unique skills or reputation that was acquired prior to the marriage and providers who are taking also 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. This ‘we’ perception recently led Professors Dagan and Franz to suggest the ideal of marriage as an egalitarian community. According to Dagan and Franz, during marriage life, at least in normative families, spouses usually develop an egalitarian community that enables them to share life’s advantages as well as its difficulties. Marital property law should reflect and encourage such an ethos regarding marriage, by adopting the equal division rule, regardless the partners’ actual contribution.

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 applicable to cohabitants. First, the egalitarian community ideal is a channeling rationale that seeks to design marriage in an ideal way. 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 ‘I’s into a ‘we’ – does not suit the autonomy-based building of the cohabitation institution.

In contrast, the contribution theory – in spite and perhaps due to 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. The pluralist approach is open to imposing rules that are built on responsive rationales to cohabitants.

Second, the contribution rational and the analogy to commercial relationships are based on an individualistic model that suits the pluralist construction of cohabitation law.

Finally, the contribution rational 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 derives 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 the equal division as intrinsically valuable and as an expression of societal vision about proper marital relationship. Thus, it applies the equal division rule regardless of the spouses’ actual contribution, even in cases in which there are clear gaps in the 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, a regular property rule backed by compensation to the domestic cohabitant for his/her actual contribution should be applied.

158 Cf. Garrison, supra note 14, at 884-89 (suggests 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, unlike Garrison, in standard cases I support the equal division rule as the default. Second, in my approach, the regular principles of unjust enrichment should be adapted to the spousal relationship context.
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). The former reflects both spouses’ joint effort, including the domestic partner’s contribution and hence is subject to the equal division rule, while the later is typically not a product of a joint venture and thus is considered private property, i.e. property that is not subject to division.\textsuperscript{159}

Recently, however a few scholars have challenged the Lab-Luck distinction,\textsuperscript{160} arguing, based on the egalitarian community ideal, that the community ideal of sharing a life together must result in converging at least part of the separate property into community property.\textsuperscript{161} Even beyond scholarship, many states recently began to recognize the transmutation of separate property into marital property in cases of mingling of sources, joint use especially of the family home, or an implied contract.\textsuperscript{162} Going one step further in this direction, the American Law Institute recommends a bright line rule that would transfer an increasing percentage of separate property into marital property based on the length of the marriage.\textsuperscript{163}

Unlike marriage, 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, which suits also 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 case of cohabitants.\textsuperscript{164} Yet, ALI fails to explain this intuition.\textsuperscript{165} The

\textsuperscript{159} See Oldham, \textit{supra} note 152; Motro, \textit{supra} note 1. It should be noted, though, that even the contribution theory does not fully explain the Lab-Lack distinction. For example, the couple’s behavior influences the motivation of the gift giver or the inheritor. \textit{See}, e.g. Motro, \textit{id.} at 1640.

\textsuperscript{160} See especially Motro, \textit{supra} note 1, at 1649 (marriage is not only partnership of contributions but also shared risk, a merging a fates, and a commitment to be “in the same boat” and to contribute unequally at times “to keep the union afloat”).

\textsuperscript{161} See Motro, \textit{supra} note 1, at 1641-44 (suggesting formulation for transmutation of separate property into marital property); Franz & Dagan, \textit{supra} note 2, at 117-19 (classifying inheritance gifts and the fruits and increasing value of separate property during marriage as marital property); Lifshitz, \textit{supra} note 147, at 702-19 (supporting the conversion of separate property in marital property in cases of long-term relationship that were characterized by a shared life).

\textsuperscript{162} See Motro, \textit{supra} note 1, at 1641; J. Thomas Oldham, \textit{Tracing, Commingling, and Transmutation}, 23 FAM. L.Q. 219, 221-33, 247-48 (1989) (surveying techniques of \textit{commingling} separate property into marital property); \textit{See also} Lifshitz, \textit{supra} note 147 at 677-81 (describing similar development in Israeli law).

\textsuperscript{163} See ALI \textit{supra} note 9, § 4.12; \textit{See also} Lifshitz, \textit{id.}, 706-07.

\textsuperscript{164} See ALI, \textit{supra} note 9, § 6.04 (3) (the converging of private to marital property is not applied in case of long-term cohabitation).
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 (e.g., 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 an enhanced human capital within the marital estate. While formal justifications for this reluctance, such as “human capital is not property” and difficulties in calculation are far from convincing, the more serious objections to division of earning capacity are based on autonomy. First, symbolically, human capital division contradicts individualistic perception of efforts’ and skills as personal. Second, unlike other marital property, human capital is divided in the post divorce period and as a function of the actual

165 See ALI, id. at cmt. b (stating that no state converts separate property into marital property in case of cohabitants but failing to explain why).
166 See Franz & Dagan, supra note 2, at 163.
167 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 (Super. 1986) (same); See also Ira M. Ellman, The Theory of Alimony, 77 CAL. L. REV.1,69 (1989) (arguing that degrees and licenses are not property).
169 Regarding the formalist objection see ALI Principles, supra note 9, § 4.03 cmt. b, 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 e.g. Franz & Dagan, supra note 2, 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”). See also Joyce Davis, Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property, 17 WOMEN’S RTS. L. REP. 109, 118 (1995-96) (“On a daily basis, in courts all over the country, judges and juries calculate the value of various losses and interests”).
170 Franz & Dagan supra note 2, at 109-10; See also Lifshitz, supra note 147 at 733-40.
salary of both spouses at those times.\textsuperscript{172} Thus, human capital division harms the right of complete exit from any spousal commitments.\textsuperscript{173}

\textit{On the other hand} – beyond its individualistic character – one should not ignore the \textit{community aspect} of career development during marriage.\textsuperscript{174} Furthermore, economic research shows that increased human capital is one of the main assets acquired during marriage.\textsuperscript{175} 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.\textsuperscript{176} Thus, the \textit{egalitarian} and \textit{community} aspects of marriage oppose the ignoring of the increase in human capital.\textsuperscript{177}

Taking into account the importance of community and equality to marriage regulation, prominent scholars support the inclusion of the increase in human capital in the marital estate, despite the autonomy objection. According to these views, the autonomy objection justifies a different technique of division but not ignoring human capital altogether.\textsuperscript{178} In this light, new cases in New-York\textsuperscript{179} as well as legal systems outside the United States\textsuperscript{180} challenged the traditional rule and divide increase in human capital. Other Jurisdictions do not divide increase in human capital but are ready to consider human

\textsuperscript{172} Theoretically, the domestic partner part in the human capital should be perceived as constant amount debt that is paid during the post-divorce years regardless of the actual income of the ‘provider.’ This method, however, will result in 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.


\textsuperscript{174} See Franz & Dagan \textit{supra} note 2, at 110 (“Careers involve collective decision making and collective action”).


\textsuperscript{177} See Franz & Dagan \textit{supra} note 2, at 113-14 (arguing for dividing increase to human capital in light of the egalitarian community ideal); See also Lifshitz, \textit{supra} note 147, at 728-33 (arguing that ignoring the increase of human capital harms the main rationales of marital property law).

\textsuperscript{178} See Franz & Dagan \textit{supra} note 2, at 107 (“A commitment to the ideal of marriage as an egalitarian liberal community requires treating spouses’ increased earning capacity as marital property, while tailoring property division rules to address the unique features of this asset.”). For earlier support in dividing human capital, see, e.g., Krauskopf, supra note 177; Weitzman \textit{supra} note 178, at 387-88.


\textsuperscript{180} See, e.g., in Israel: C.A 4623/04 unidentified person (male) v. unidentified person (female) (Pub. August 26 2007)
capital as a factor in court discretion regarding marital property division.\textsuperscript{181}

Going back to the pluralist model, I believe that here again marriage property law and cohabitation property law should differ:

In the context of marriage, the commitment of the model to marriage as an egalitarian ideal should not result in ignoring the increase in human capital despite the autonomy objection.\textsuperscript{182} Cohabitation, in contrast, is an autonomy-based institution. Thus, the community consideration in favor of human capital division is weak and the autonomy-based objection strengthens – especially the harm to the right of exit principle. Thus, 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. While cohabitation property law refuses to include human capital in marital property, those cases should be handled by complimentary remedies like career losses compensations. In the next part, I discuss these remedies.

\textit{D) Spousal Support and Compensation for Loss of Career}

1. Models of Spousal Support and Compensation for Career Loss

\textit{Traditional alimony}: The obligation of alimony has traditionally been characterized by 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, namely men that found guilty of having caused the dissolution of the spousal bond were obligated to pay alimony.\textsuperscript{183}

\textit{Rehabilitative maintenance}: In the second half of the 20\textsuperscript{th} century, in many states the traditional model of long-term alimony was almost completely abolished. 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


\textsuperscript{182} While Franz and Dagan’s (\textit{supra} note 2) support of dividing human capital reflect a priority assigned to the community ideal over autonomy, I believe that even in the case of married couples, a better balance is needed. Thus, I believe that when possible, alterative tools like disproportional dividing of the regular property at divorce are preferable to dividing human capital by splitting the couples’ post-divorce incomes. Yet this issue demands extended discussion which is beyond the scope of the current article.

economically during the relationship, with a short recovery period which will allow her to adjust to independent living. The underlying ideology of the new model was the individualistic clean-break principle, which aspires that a divorce would end completely any economic relationship between the divorcing couple. 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 place. Additionally, a counter-trend to the clean-break principle emerges that continues the support duty beyond the rehabilitation period. The reason for this modern revival of long-term alimony law is the recognition that in spite of the seemingly egalitarian divide of the marital property, the domestic partners – most of the time women – are severely economically disadvantaged in the case of divorce. 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. Thus, several jurisdictions abandon the gender bias of the traditional model but continue to base the modern support mechanism partly or fully on fault notion (hereinafter: modern fault base alimony). A second version of modern long-term support law abandons the concept of fault and focuses on the needs of the economically weaker party. This version is sometimes justified in the legal scholarship by analogy to an insurance agreement (hereinafter: the Need Base support). A third and most radical version suggests sharing the income of both

184 See, e.g., Ellman, id.; See also supra note 131.
185 See, e.g., O'Brien v. Obrien, 66 N.Y.2d 576 (N.Y, 1985) (the concept of the traditional alimony is no longer valid); See also Herma H. Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CAL. L. REV. 291, 313 (1987) (positioning the clean-break principle as a superior principle to which a system of no-fault divorce must aspire).
189 See, e.g., ALL, supra note 9, at 42-49 (surveying jurisprudence that continue to include fault partly or fully as parameter in their alimony law).
members of the couple following divorce (the income sharing model).\textsuperscript{191} This model is similar in its approach to those who ask to include human capital in the marital property. Yet, it prefers the support law umbrella and techniques over those of property law.\textsuperscript{192}

\textit{Compensation for loss of career}: Twenty years ago, Ira Ellman suggested an innovative model for spousal payment following divorce. Unlike the conventional model that focuses on the future – namely the partners’ needs and incomes after divorce – this model focused on the career loss of the domestic partner during marriage.\textsuperscript{193} According to this model, the domestic partner should be compensated for her loss of earning capacity during marriage.\textsuperscript{194} The compensation should be paid after divorce as a lump-sum or as periodical payments according to the circumstances. This model gained support among other scholars\textsuperscript{195} and was adopted as the guiding model of the American Law Institution.\textsuperscript{196}

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

Should any of these models be applied to cohabitants?

\textit{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.\textsuperscript{197} The modern move of divorce law from fault divorce to no-fault unilateral divorce made this


\textsuperscript{192} Cf. Franz & Dagan, supra note 2, at 99-101 (preferring marital property regime over maintenance as it better expresses that this property is the right of the domestic partner and not charity for his/her misery); But cf. Joan M. Krauskopf, \textit{Theories of Property Division / Spousal Support: Searching for Solutions to the Mystery}, 23 Fam. L. Q. 253 (1989) (describing the complex relationship between alimony and Property settlements).

\textsuperscript{193} See Ellman, supra note 171, at 42-49.

\textsuperscript{194} According to Ellman, however, the domestic partner is entitled to compensation only in cases that her losses stem from the contribution to her partner’s career or from taking primary care of the spouse’s children.


\textsuperscript{196} See ALI supra note 9, ch. 5 and specifically § 5.02 cmt. a (“The principle conceptual innovation of this chapter is therefore to recharacterizes the remedy it provides as compensation for loss rather than relief of need”).

\textsuperscript{197} See Brinig & Carbone, supra note 183(describing the contractual logic of the traditional model).
rationale inconceivable even in the case of marriage. Needless to say that 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 unilaterally end the marriage. Yet these models continue the need-based responsibility or the sharing between the couples for substantially long and sometimes even unlimited periods after the official divorce. Thus, they severely limit the autonomy of the partners as individuals and especially their right of exit. This is exactly the case for a pluralist distinction between marriage and cohabitation: in the case of marriage, the community aspect of marriage justifies at least in certain circumstance need-based alimony grounded in the insurance rationale. 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. Thus, according to the pluralist model, cohabitants’ law should not adopt any formulation of unlimited long-term alimony.

In contrast, it may be appropriate to apply *rehabilitative maintenance* to cohabitants. First, rehabilitative alimony is based on extra-contractual considerations that are certainly relevant to cohabitants. Furthermore, in the case of cohabitation, there is no need for formal divorce to 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 cohabitants between whom there is a pattern of economic dependency, a sudden interruption of the economic commitment, upon the breakdown of the relationship, implies that the economically dependent partner will be seriously disadvantaged. Thus, the extra-contractual considerations that justify rehabilitative alimony in case of cohabitants are even stronger than the parallel considerations in case of married spouses. Finally, rehabilitative alimony by definition is limited to a short period and thus it does not threaten the pluralist model’s commitment to the right of exit.

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

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198 See ALI *supra* note 9, at 807 (“But the Law does not requires alimony claimant to show that the other spouse breaches, nor would such requirement be consistent with modern no fault principles”).

199 As autonomy plays a substantive role even in case of marriage, I prefer the insurance rationale over income-sharing and I also would recommend limiting it to long-term relationships accompanied by economical reliance.

200 *But cf. Scott* *supra* note 19, at 303 (arguing for insurance based alimony in cases of above five years of cohabitation).
On the 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. 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. Furthermore, substantively, a compensation for financial losses is essentially payment of debt that was created during the marriage/cohabitation period and 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 distinction between different types of cohabitants. As long as we discuss ‘regular cohabitants’, the ex-ante rationales for distinguishing marriage and cohabitation, the autonomy value that encourages the partners towards independence and the commitment to the right of exit should overcome the ex-post extra-contractual consideration. Thus, the basic package of cohabitant law shouldn’t 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 sub-part 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, I discussed the scope of rights and duties that the pluralist model offers for regular cohabitants. In order to balance between the ex-ante distinguishing rationales and the ex-post extra-contractual considerations, the pluralist model provides narrow-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 depended parties take on a greater weight. Second, during their cohabitating years, cohabitants usually deviate from their ex-ante historical decision and develop a relational commitment. Against this background, the pluralist theory

See, e.g., ALI, supra note 9 at § 5.02 cmt. f (compensation for spousal payment is based less on explicit agreement and promise and more on the relationship itself). See also Herma H. Kay, Beyond No Fault: New Directions in Divorce Reform, DIVORCE REFORM AT THE CROSSROADS 6, 32-33 (Stephen D. Sugarman & Herma H. Kay eds., 1990) (exposing the similarities between loss of compensation to restitution/unjust enrichment remedies).
defines significant cohabitation periods, accompanied by behavior and decelerations that express mutual commitments, as relational cohabitations. It posits relational cohabitations in the midway between marriage and cohabitation. In the context of post-separation spousal support, it goes beyond regular cohabitants’ law and provides the domestic partner compensation for his/her career 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. In the context of marital property law, as an expression of the relational commitments between cohabitants, the pluralist model goes beyond the contribution rationale. 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. 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.

Table II: The pluralist model applications

<table>
<thead>
<tr>
<th>Property Law</th>
<th>Marriage</th>
<th>Relational cohabitations</th>
<th>Regular cohabitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Model</td>
<td>Income sharing</td>
<td>Mix Model</td>
<td>Contribution</td>
</tr>
<tr>
<td>Lab Assets</td>
<td>Inflexible equal division</td>
<td>Inflexible equal division</td>
<td>Flexible equal dividing</td>
</tr>
<tr>
<td>Luck Assets</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Human capital</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

F. Opting out of Cohabitation Commitments

While the relational aspects of cohabitation extend cohabitants’ regular commitments, in opting-out agreements, the partners seek to narrow their commitments.

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202 The accurate period is not rigid and it might be changed in accordance with specific sociological variables. As a rough estimation, ten years of cohabitation is plausible.

203 For the difference between the objective extra-contractual entry criteria for regular cohabitation status and the more consensual nature of entry requirement for the relational cohabitation, see supra subpart III.A.
The existing approaches towards cohabitants’ opting-out agreements are divided between the status and the contractual approaches.\(^{204}\) Status-based approaches that equalize marriage to cohabitation subject cohabitants’ agreements to unique procedural requirements and substantive judicial review that exceed regular contract standards.\(^{205}\) Those requirements and standards make opting out from cohabitation law commitments extremely difficult.\(^{206}\) At times, certain cohabitation commitments and even the definition of the couples as cohabitants become mandatory.\(^{207}\) In contrast, the contractual approaches validate cohabitants’ opting-out agreements according to regular contractual standards.\(^{208}\)

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.

First, 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,\(^{209}\) the pluralist model opposes such classification of cohabitation law components. The pluralist model points to an important difference between marriage and cohabitation in this

\(^{204}\) The need of cohabitants to opt out of their commitments by agreements is relevant, of course, only according to approaches whose default rules impose marriage commitments on cohabitants. Consequently, I refer in this part to the contractual and status model for equating marriage and cohabitation.

\(^{205}\) See, e.g., ALI, supra note 9, at § 6.01 (2) (applying the unique marital contract regime for agreements between cohabitants).

\(^{206}\) See Westfall, supra note 14, at 1479-80 (criticizing the ALI for the application of marital contract rules to agreements between cohabitants and references to cases in which the strict nature of those rules will severely hamper cohabitants’ ability to contract out of marriage law commitments.) See also Atkin, supra note 143 at 48 (in New Zealand, the Property [Relationships] Act of 1976 subjugates cohabitants’ contracts to a unique fairness review).

\(^{207}\) See, e.g., Lifshitz, supra note 85, at 81-83 (addressing the limitation of cohabitants’ freedom of contract in Israel).

\(^{208}\) See supra subpart I.E.1. While regular contractual approaches might enable partners to opt out of their commitments even by clear ex-ante unilateral clarification, Scott, supra note 19, at 342-45 demands a formal written contract for opting out in order to protect the weaker parties.

\(^{209}\) See, e.g., Maynard v. Hill 125 U.S. 190, 210–211 (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 (1998). Yet there is still a lot of ambiguity regarding the validation of certain marital agreement. 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 (1993) (addressing the validation of agreements that regulate ongoing marriage). See also Restatement (Second) of Contracts 190 (1981) (limitations on the freedom of contract of married partners according to public vision of marriage). See also Karen, supra note 125 (suggesting a public approach to the pre-marital agreement).
context. In 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 legal voluntary act but rather a factual situation. Thus, legal treatment of certain obligations between cohabitants as mandatory means that no spouse in any circumstance could refrain from such mutual commitments. In practice, it totally negates the option of living as a spouse 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. 210

On the other hand, the pluralist model’s sensitivity to power gaps between cohabitants, responsibility to the 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 supports in this instance also 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 offers distinction between neutral-egalitarian circumstances and situations that raise suspicion of exploitation.

Neutral-egalitarian situations include child-less cohabitants who formed an agreement before they decided to live together or during their three years’ 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 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 contracts formation in neutral-egalitarian situations. 211

210 See ALI, supra note 9, at § 7.05. See also Scott, supra note 19, at 341 (under the ALI regime, parties who want limited commitments have no assurance that their understanding will be enforced). See also Atkin, supra note 143, at 48 (describes new legislation in New Zealand that aim to limit the previous overly-broad discretion of court to review cohabitants’ agreements).

211 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 he/she does not want to take on
The situations that raise suspicions of exploitation include pregnant mothers, joint parent cohabitants and child-less 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. 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 at those circumstances, it subjects them to unique procedural requirements and substantive fairness review.\textsuperscript{212}

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 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 following formations, children were born to previously child-less cohabitant, unexpected circumstance occurred or significant cohabitation periods pass.\textsuperscript{213}

IV. TOWARDS 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 regulations 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

\textsuperscript{212} In these aspects, the models converge with the ALI, which developed doctrines such as extended disclosure, independents counseling requirements and fairness review in the context of marital contracts and than applied them to cohabitants’ agreements. \textit{See} ALI, \textit{supra} note 9, at §6.01 (2) and § 7.03-7.05. While the ALI applies those doctrines to all cohabitants, the pluralist model applies them selectively.

\textsuperscript{213} \textit{Cf.} ALI, \textit{supra} note 9, at §7.05 (2) (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 invalidation of opting out contracts. \textit{For example,} let’s assume that two childless financially independent cohabitants, one of whom is wealthier, initially opt out of the equitable division rule. Ten years later, their financial situations have not changed, and neither has their lifestyle. I do not see any 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 not to enforce the original agreement, the result should not be automatic application of regular cohabitants’ commitments. \textit{For example,} even if the court invalidates partner’s agreements that deny any partnership between them, the result should not be automatic imposition of standard cohabitations’ commitments (i.e. equal division of property), but rather another method for compensation of the domestic partner for his/her contributions.
right of exit. In this part I 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. In a similar vain, 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. But, just like opposite-sex couples, there are some same-sex couples that would prefer not to get married even if they were allowed to. 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 from marriage, while it would severely harm the existing social diversity for all partners.

Unlike cohabitation, civil union is a formal institution that enables cohabitants to signal ex-ante their mutual commitments. Thus, imposing marriage commitments on civil union partners enables the law to screen between those who haven’t gotten married because the law forbids it, and those who wouldn’t marry even if they were allowed to. Yet as long as same-sex partners are excluded from marriage, the pluralist’s requirement for substantive freedom of choice between the variety of spousal institutions is not fulfilled, hence even civil union is not sufficient solution for same sex couples. Consequently, from a pluralist perspective, liberals should continue the struggle for same-sex marriage, consider political compromises that equate the legal regulation (albeit not the title of civil unions) to that of marriage, while at the same time completely opposing the establishment of cohabitation as a sole alternative to marriage.

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214 See supra notes 73-74
215 See Lifshitz, supra note 85, at notes 76-78 (describing the function of cohabitation in Israel as substitute to marriage).
216 Cf. Garrison, supra note 14, 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 provide a third-rate solution for the few same-sex cohabitants who do”).
217 See Lifshitz , supra note 85, at notes 98-103 (discussing the concept of liberal compromise.)
218 According to the pluralist approach, in a perfect liberal world in which same-sex marriages are permitted, the institution of civil union could serve as a middle
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 couple. Unlike the standard cohabitation law regime that selectively applies components of marriage law, the default rule of this regime should 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 that, 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. In several countries, the religious legal regulation of marriage and divorce law continues to the present, alongside or instead of civil law. Although U.S. marriage and divorce laws are secular-civil, many citizens in 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. Consequently, courts often address the validity of private arrangements in which the spouses have applied religious law or jurisdiction to their relationships. Furthermore, in the spirit of multicultural theories, proposals have been initiated for turning religious marriage into an official marriage track offered by the civil legal system.
53

The civil regulation of religious marriage is often analyzed from perspectives of banning religious establishments and the rights of minority communities to legal autonomy. These important questions are beyond the scope of this article. In the following, I offer several insights from a pluralistic approach that may enrich the debate on these topics.

Legal recognition of religious marriage tracks alongside the civil track is seemingly consistent with the pluralistic approach that seeks to enrich the existing menu with new spousal institutions. Yet the substantive contents of significant parts of religious marriage law should satisfy the pluralist theory requirements for 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 thus requires that the religious marriage track is not selected as the result of social and family pressures that could potentially eliminate an individual’s essential ability to choose between the secular and the religious tracks. 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, and even polygamy. These characteristics do not conform to the pluralistic approach of personal law for British Muslims, in ISLAMIC FAM. L. 147 (Chibli Mallat & Jane Connors eds., 1990) (criticizing the attempts of the Union of Muslim Organizations of UK and Eire to secure a separate Islamic system of personal law for British Muslims).


Cf. Shachar, supra note 224, at 68-73 (criticizing Kukathas’s multiculturalism approach for its failing to address the lack of substantive choice in the apparently consensual decision-making of minority groups members.)


See Reynolds v. United States, 98 U.S. 145 (1878) (validating the constitutional ban on polygamy). See also Estin, Supra note 221, at 565-69 (describing the tension between American family law values and the practice of polygamy in Islamic marriage). See also Martha C. Nussbaum, International Human Rights Law in
approach’s commitment to prevent exploitation and inferiority within the spousal institutions that it recognizes.\textsuperscript{231} Finally, the severe limitations on the dissolution of the marital relationship characteristic of certain religions\textsuperscript{232} 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 relationship is contingent with the existing cultural background and the specific content of the religious laws. Should a religious community and law satisfy the demands of free entry, equality within relationship and reasonable exit option, then the law should validate private agreements to apply marriage law and the pluralist theory might even support the state’s offering these religious tracks as options.

Moreover, at times, disregard for the religious aspect of marriage and religious arrangement between the parties, and the exclusive focus on the secular civil aspects, might harm the values of individual autonomy and equality that the pluralistic approach seeks to defend. 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. The religious wedding ceremony requires an act of the voluntary granting of a divorce bill (\textit{Get}) by the husband to the wife. In the instance of civil divorce, the spouses are considered, by religious law, to be married as long as a \textit{Get} has not been given. This leads to an unacceptable situation, in which Jewish men\textsuperscript{233} who were married in a religious ceremony and obtain a divorce in the civil courts exploit their wives’ need for a religious \textit{get}. The husbands make their cooperation in granting the \textit{Get} conditional upon a payment (hereinafter, purchasing a \textit{Get} settlement).

Secular civil disregard of the religious dimension of marriages that enables this coercion is opposed to the values of autonomy and equality. In contrast, civil recognition of the validity of religious

\textsuperscript{231} See \textit{supra} subpart II.B.2.
\textsuperscript{233} According to Jewish religious law, the status of a Jewish woman whose husband refuses to give her a \textit{Get} is much worse than the parallel situation of a man whose wife refuses to be divorced. A woman in this condition (in halakhic [Jewish law] terminology, an agunah) cannot remarry, and if she has children from someone other than her husband, the offspring are \textit{mamzerim} (individuals seriously restricted in their own ability to marry). A man refused divorce, in contrast, can, in certain instances, receive rabbinical permission to take an additional wife; moreover, the children born out of wedlock to a married man are not \textit{mamzerim}. Thus, husbands are in better position no to cooperate in a religious divorce.
arrangements that obligate the husband to cooperate in the religious procedure will likely reduce this coercion.\textsuperscript{234} Hence, the pluralistic approach supports the imposition of the religious arrangements to cooperate with the religious divorce ceremony in these cases. Finally, the pluralistic approach’s commitment to the value of autonomy and the prevention of exploitation\textsuperscript{235} led it to support legislation in New York known as the Get Law\textsuperscript{236} that imposes civil sanctions on Jewish spouses that were wed in a Jewish ceremony but refuse to cooperate with the religious dissolution of their marriage.

In summation, the pluralistic approach would be suspicious toward 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.

C. Covenant Marriage

The liberal transformation that divorce law underwent in the last decades of the twentieth century from fault divorce to no-fault unilateral divorce\textsuperscript{237} 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.\textsuperscript{238} Against this background, they called for a counter-revolution.\textsuperscript{239} Although the demand for limiting grounds for

\textsuperscript{234} See, e.g., \textit{In re} Marriage of Goldman, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (court validates Jewish pre-marital contract and allows couple to be governed by Jewish law, which meant civil court compelled husband to issue \textit{Get}, as required by Beth Din [Jewish religious court]) But \textit{cf.} Victor v. Victor, 866 P.2d 899 (Ariz. Ct. App. 1993) (refusing to give civil validity to a similar clause the court considered to be a religious document).

\textsuperscript{235} \textit{Cf.} Nichols, supra note 25, at 163-64 (describing \textit{Get} law as an expression of legal pluralism within marriage law). Unlike Nichols, who supports both \textit{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 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 \textit{Get} law as a means to save exploited women.

\textsuperscript{236} There actually two \textit{Get} laws. For the 1983 \textit{Get} Law (as amended substantially in 1984), see N.Y. DOM. REL. LAW 253 (McKinney 1999). For the 1992 \textit{Get} Act, see 1992 Amendments (Sec. 236B(5)(h) and 236B(6)(d)) amended N.Y. DOM. REL. LAW 236B. For analysis, see Marvin E. Jacob, \textit{The Agunah Problem and the So-Called New York State Get Law: A Legal and Halachic Analysis}, in \textit{WOMEN IN CHAINS: A SOURCEBOOK ON THE AGUNAH} 159 (Jack Nusan Porter ed., 1995).

\textsuperscript{237} See supra note 32.

\textsuperscript{238} See Nichols, supra note 27, 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).

divorce was not completely victorious in any American state, the critics of the modern model of divorce law nevertheless won a certain victory when the state of Louisiana, along with other states, added a new marriage track called ‘covenant marriage.’ In these states, spouses may choose either a regular marriage that is subject to regular marriage law or a ‘covenantal marriage.’ 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. In the conventional political discourse, the special track is perceived as a victory of the conservative approaches, and is accordingly criticized by liberals. 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. 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.


\[242\] See Nichols, supra note 25, at 148-53 (describing the principles of the covenant marriage).

\[243\] See Katherine S. Spaht, Louisiana’s Covenant Marriage: Social Analysis and Legal Implications, 59 LA. L. REV. 63 (1998) (discussing and defending the origins and provisions of Louisiana’s covenant marriage law). 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). See also Nichols, id., at 154 (in Louisiana, the law makers introduce a covenant marriage law to “strengthen the family” by turning a “culture of divorce” into a “culture of marriage”).

\[244\] See Robert M. Gordon, The Limits of Limits on Divorce, 107 YALE L.J. 1435 (1998) (criticizing the counter-revolution from realistic and liberal perspectives); LaBauve, id., at 438-9 (Liberal criticism on the efforts to make divorce harder). Jeanne Louise Carriere, It’s Deja Vu All Over Again: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality, 72 TUL. L. REV. 1701 (1998) (contending that Louisiana’s covenant marriage law will likely increase litigation and increase the likelihood of spousal abuse); Daniel W. Olivas, Comment-, Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to be Ignored, 71 TENN. L. REV. 769 (2004) (contending that covenant marriage law is both ineffective and inefficient).

\[245\] 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 (1998) (justifying Louisiana’s covenant marriage laws on the basis of pluralism). 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) (“By sanctioning covenant marriage, the may lead to the false impression that couples who enter one form 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.
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Second, unlike traditional family law and most religious law, covenantal marriage does not adopt double standards for men and women, and does not include exploitative components.

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. The conventional legal approaches maintain that the state must clearly decide in favor of one of these positions. 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 therefore offers both possibilities to the spouses, this approach offers them two marriage tracks.

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, i.e. 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, the article developed 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’ 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 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 kind of cohabitants. The article further elaborates its pluralist approach to the broader issue of spousal regulation including same-sex marriage and

246 See supra notes 238-244.
247 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 for substantive free entry, prevention of exploitation and right of exit.
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.\textsuperscript{248}

\textsuperscript{248} See Shahar Lifshitz, \textit{The External Rights of Cohabiting Couples in Israel}, 37 ISRL. L. REV. 346 (2003-04) (initially offering such a theory in the context of Israeli law); \textit{See also} Shahar Lifshitz, \textit{The Freedom not to be Married} (work in progress).