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## A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate

Shahar Lifshitz\*

### I. INTRODUCTION

In the past decade American marriage law has been the arena for a major controversy regarding same-sex marriage.<sup>1</sup> Typically, liberals tend to support same-sex marriage,<sup>2</sup> while conservatives oppose it.<sup>3</sup> The liberal-conservative dispute concerning same-sex marriage is usually related to a broader debate on the legitimacy of limiting the possibilities for marrying. Liberals present marriage as a private arrangement between the partners,<sup>4</sup> and they therefore oppose restricting the right to marry with classic liberal arguments about individual freedom, equality, and privacy.<sup>5</sup> The opponents of same-sex marriage, in contrast,<sup>6</sup> seek to

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1. For the variety of the existing approaches, see the following symposiums: Symposium, *Breaking With Tradition: New Frontiers for Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 65 (2005); Symposium, *Can Anyone Show Just Cause Why These Two Should Not Be Lawfully Joined Together?*, 38 NEW ENG. L. REV. 487 (2004); Same-Sex Marriage Symposium Issue, 18 BYU J. PUB. L. 273 (2004); Symposium, *Vermont Civil Unions*, 25 VT. L. REV. 1 (2000).

2. See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (The Free Press 1996); Mark P. Strasser, "Defending" Marriage in Light of the *Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster after Lawrence*, 38 CREIGHTON L. REV. 421 (2005); Mark Strasser, *Marital Acts, Morality, and the Right to Privacy*, 30 N.M. L. REV. 43 (2000).

3. See, e.g., David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3 (1998); Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001). For the tradition-oriented and even religious aspects of those opposing same sex-marriage, see Daniel Borrillo, *Who is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 YALE J.L. & FEMINISM 89 (2005).

4. See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (describing the decline in the role of marriage as a public institution as part of privatization process).

5. For marriage as a fundamental right, see *Meyer v. Nebraska*, 262 U.S. 390 (1923) where the Supreme Court recognized that the right of an individual to marry was encompassed in the term "liberty" found in the Due Process Clause. See also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (analyzing the right to marry as part of the right to privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (the Supreme Court included the right to marry, as well as the right to procreate, as fundamental rights under equal protection analysis). For a later application of the right to be married, see *Turner v. Salfi*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1134 (6th Cir. 1995), cert. denied, 516 U.S. 1158 (1996); see also Cathy J. Jones, *The Rights to Marry and Divorce: A New Look at some Unanswered Questions*,

justify proposed legal limits to the right to be married by presenting marriage as a public institution.<sup>7</sup>

Based on the unique experience amassed in Israel regarding marriage and cohabitation law, this Comment seeks to highlight the potential consequences of the struggle between liberals and conservatives regarding limitations on the right to marriage for an additional liberal-conservative debate concerning the unique status of legal marriages.

The conservative position limiting entry to marriage won a decisive victory in Israel. Accordingly, partners of the same-sex, like partners from different religious communities, are not allowed to formally marry. Generally speaking, the right to marry is subject to a broad range of civil and religious restrictions.<sup>8</sup> The strict limitations on the right to marry helped trigger the development of cohabitation as a substitute for formal marriage. Ironically, the array of rights and obligations of cohabitants is approaching that of married partners, and at times even exceeds the latter. This Comment will argue for the development of a similar dynamic in the United States, where the distress of same-sex partners serves as a motivator for proposals, for strengthening the institution of cohabitation, for the weakening of the institution of marriage, and at times, even for the abolishment of marriage as a legal institution.

In light of this developing dynamic and taking into account the aggregate Israeli experience, this Comment will advance three arguments. Part II will present a conservative critique of the conservative position against same-sex partners. It will argue that the conservative camp's relative success in limiting the possibility of same-sex marriages harms this camp's broader agenda for the preference of legal marriages. Part III will present a liberal critique of the liberal camp. This Comment proposes that efforts by liberals to decrease the gap between legal marriage and cohabitation, in many instances, harm the values of freedom of choice and autonomy in the name of which they act. Finally, Part IV will argue on behalf of democratic compromises such as civil

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63 WASH. U. L. Q. 577 (1985). For an application of the general right to marriage of same-sex couples, see, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); Karen M. Loewy, *The Unconstitutionality of Excluding Same-Sex Couples from Marriage*, 38 NEW ENG. L. REV. 555, 560 (2004).

6. See Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992) (supporting a narrow interpretation of the right to be married which does not include same-sex marriage); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 HOW. L.J. 289 (1998).

7. See, e.g., Don S. Browning, *Linda McClain's The Place of Family and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1383, 1395–96 (2007); Coolidge & Duncan, *supra* note 3; Wardle, *supra* note 3.

8. See *infra* Part II.A.

union in the United States and spousal registry in Israel.

## II. THE CONSERVATIVE PRICE OF THE CONSERVATIVE OPPOSITION TO SAME-SEX MARRIAGE

This part uses the Israeli experience to reveal the potential consequences of the struggle between liberals and conservatives regarding limitations of the right to marriage.

### A. *The Israeli Marriage Law Experience*

#### 1. *The religious dominance of marriage and divorce law*

Israeli marriage and divorce law is strikingly irregular in the landscape of Israeli law. Although the legal system in Israel is primarily secular and liberal,<sup>9</sup> marriage and divorce are adjudicated in religious courts and are subject to religious law.<sup>10</sup> The prime expression of the religious character of Israeli family law is the fact that civil marriage and civil divorce do not exist in Israel. Accordingly, persons who desire to marry or divorce are obliged to do so in a religious ceremony even if they hold no religious beliefs.

A particularly severe problem faces those who are not permitted to marry under religious law, such as mixed-faith couples (adherents of different religions); persons having no recognized religious affiliation; persons ineligible to marry (in the case of Jews the most common examples are a *kohen* [a member of the priestly class] and a divorcee); and same-sex couples. The legal system in Israel does not offer these couples any “official” possibility of marrying each other.<sup>11</sup> This state of affairs has given rise to sharp criticism from a civilian point of view and is certainly intolerable from a secular liberal perspective.<sup>12</sup> It is not surprising that from time to time the public discourse in Israel has generated proposals for the establishment of civil marriages.<sup>13</sup> However,

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9. See Shahar Lifshitz, *Secular Family Law in the Next Fifty Years—Classical Liberalism Versus Communitarian Liberalism*, 17 BAR-ILAN L. STUD. 159, 161 (2001).

10. For a comprehensive review of issues of jurisdiction and law in relation to personal status, see ARIEL ROSEN-ZVI, *FAMILY LAW IN ISRAEL – BETWEEN SACRED AND SECULAR* 23–97 (1990); PINHAS SHIFMAN, *FAMILY LAW IN ISRAEL* 22–135 (2nd ed., 1995).

11. See RUTH HALPERIN KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 235–36 (2004); SHAHAR LIFSHITZ, *COHABITATION LAW IN ISRAEL FROM THE PERSPECTIVE OF A CIVIL LAW THEORY OF THE FAMILY* 55–60 (2005) [hereinafter LIFSHITZ, *COHABITATION LAW*]; Shahar Lifshitz, *A Civil Turn Point of Israeli Civil Family Law*, 3 TZIVYON 37 (2002).

12. See LIFSHITZ, *COHABITATION LAW* *supra* note 11; see also Amnon Rubinshtein, *The Rights to Marriage*, 3 TEL-AVIV STUD. IN L. 433 (1973).

13. See, e.g., Draft Bill Civil Marriage and Civil Divorce, 2004 HH, 2199; Draft Bill Civil

the combination of political power of the religious parties, civil consideration about the unity of the Jewish nation,<sup>14</sup> and national-historical considerations regarding Jewish marriage as a national symbol<sup>15</sup> led to the rejection of those proposals. Thus, only religious marriages are recognized in Israel.

## 2. *The secular response*

Notwithstanding the fact that there are no official civil marriages in Israel, Israeli secular law has developed a variety of alternatives to marriage. The most prominent alternative is cohabiting with a partner outside marriage. The legal regulation of cohabitation is an outstanding example of the type of civil family laws that have developed in Israel in the shadow of religious law. These laws comprise a combination of civil legislation and liberal judges' rulings, which reject religious principles and restrictions.<sup>16</sup> Historically, the trend toward the expansion of the institution of cohabitation began with the development of social laws governing cohabitant partners, which grant them certain rights. These social laws include legislation relating to the protection of tenants, laws conferring social insurance rights (through Israel's National Insurance Institute), regulations dealing with entitlement to benefit payments from various bodies, and laws regulating the rights to termination of employment payments.<sup>17</sup> Alongside these social laws, Succession Law 5725-1965<sup>18</sup> also extends the rights of "married persons" to cohabitants. Beyond the economic legislation, additional laws equate the status of cohabitant partners with that of married couples. These include sections of the criminal statutes that deal with domestic violence, the Names Law 5716-1956,<sup>19</sup> and the Family Courts Law 5755-1995<sup>20</sup> (which included cohabitants in its definition of family members).

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Marriage and Civil Divorce, 2000 HH, 2125; *see also* PINHAS SHIFMAN, CIVIL MARRIAGE IN ISRAEL: THE CASE FOR REFORM 1995.

14. In Israeli discourse it was argued that the establishment of civil marriage will encourage the siblings of religious Jews to get married to secular partners, and as a result, the national unity will be harmed. *See* SHAHAR LIFSHITZ, THE SPOUSAL REGISTRY 35-37 (2007).

15. *See* Pinhas Shifman, *State Recognition of Religious Marriage: Symbols and Content*, 21 ISR. L. REV. 501 (1986) (on religious marriage as a symbol).

16. For the tension between the recognition of the cohabitation relationship and the religious point of view, *see, e.g.*, the comments of Justice Silberg in CA 337/62 *Riezenfeld v. Jacobson* [1963] IsrSC 16(2) 1009, 1021; SHIFMAN, *supra* note 13.

17. For a comprehensive discussion on cohabitation law in Israel, *see* LIFSHITZ, COHABITATION LAW, *supra* note 11; Shahar Lifshitz, *The External Rights of Cohabiting Couples in Israel*, 37 ISR. L.REV. 346, 389-94 (2003).

18. Succession Law, 1965, S.H. 63.

19. Names Law, 1956, S.H. 94.

20. Family Courts Law, 1995, S.H. 393.

The rulings of the supreme court in Civil Appeal 2000/97 *Lindorn v. Karnit—Road Accident Victims' Fund*<sup>21</sup> play a significant role in the augmenting the legal status of cohabitants to that of married persons. In this case, the Israeli Supreme Court expanded the rights of cohabitants beyond those expressly provided in legislation. This development, which is a departure from earlier precedent, allows the courts, in principle, to grant all the rights currently accorded to married couples to those couples living in cohabitation relationships. A number of decisions by the Supreme Court delivered over recent years appear to confirm this trend.<sup>22</sup>

The extension of cohabitant rights was not accompanied by a more narrow definition of cohabitants. On the contrary, legal rulings have adopted more flexible criteria which makes it easier for couples to be considered cohabitants.<sup>23</sup> Firstly, most of the laws granting rights to cohabiting couples do not stipulate a minimum period of time for them to be recognized as such.<sup>24</sup> Laws that do stipulate a minimum period of time to attain cohabitation status require a relatively short time period (usually one year).<sup>25</sup> Recent rulings have continued this trend, and in many cases where the law does not stipulate a minimum period, courts have also

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21. CA 2000/97 *Lindorn v. Karnit*, [1999] IsrSC 55(1) 12. In this case the court held, contrary to earlier precedent, that the term "spouse" in Section 78 of the Civil Wrongs Ordinance includes cohabitants. Consequently, the court held that the partner of the victim could also obtain financial compensation under that section.

22. Thus, for example, recently in CA 2622/01 *Manager of Land Betterment Tax v. Aliza Lebanon*, [2003] IsrSC 37(5) 309, the court continued this policy by granting cohabitants tax benefits available to married couples, without seeking express legislative authority. For additional recent rulings in various areas where the court equalized the status of cohabitants with those of married couples, see Lifshitz, *supra* note 17, at 394–97.

23. For a definition of cohabitants' case law and legislation, see Daniel Friedman, *The Cohabitants in Israeli Law*, C2 TEL AVIV STUD. IN L. 459, 461–63 (1973); Lifshitz, *supra* note 17 Ariel Rosen-Zvi, *Israel: An Impasse*, 29 J. FAM. L. 379, 382–83 (1991).

24. See, e.g., Article 1 of the Prevention of Domestic Violence Law, 1991, S.H. 138; Article 21 of the Standing Service in the Israel Defense Forces (Retirement) Law (Combined), 1985, S.H. 141; Article 86 of the Penal Code, 1977, S.H. 25; Article 5 of the Dismissal Compensation Law, 1963, S.H. 163; Article 1 of the Disabled Persons (Payments and Rehabilitation) Law [Combined Version], 1959 S.H. 295; Article 1 of the Disabled Veterans of the War against the Nazis Law, 1954, S.H. 76; Article 1 of the Families of Soldiers Killed in Action (Payments and Rehabilitation) Law, 1950, S.H. 162. Many other laws refer to the definition of cohabitation in these laws; accordingly, the definition of cohabitation in these laws and the absence of any demand for a minimum period of cohabitation are highly important.

25. See, for example, the Real Estate Taxation (Betterment, Sale and Purchase) Law, 1963, S.H. 156, which establishes, in Article 62(B) the condition of cohabitation in a sold residential apartment for a duration of at least one year prior to the sale. In addition, several laws require a minimum period of joint cohabitation even in the case of a married couple, and this requirement naturally also applies to cohabiting couples. See, for example, Article 20A of the Tenant Protection Law [Combined Version], 1972, S.H.176, which requires a minimum period of cohabitation of at least six months. See also Article 238 of the National Insurance Law [Combined Version], 1995, S.H. 205 which establishes that the right to old age pension and survivor's pension conditioned on at least one year of marriage.

refrained from establishing a minimum period for cohabitation.<sup>26</sup> Moreover, the rulings have clarified that a couple may be recognized as cohabiting partners even if they live together for only a very brief period.<sup>27</sup>

Secondly, while Israeli law usually requires joint habitation as a condition for recognition as a cohabiting couple,<sup>28</sup> there is no formal requirement that the couple share a common registered address. Given the trend to extend the institution of cohabitation, the requirement of joint habitation, itself has often been interpreted in a restrictive manner.<sup>29</sup> Accordingly, there have been cases in which couples have been recognized as cohabiting partners and received the rights accruing from this status for periods when they did not live together in the same residential unit,<sup>30</sup> and even when their relationships were completely disconnected.<sup>31</sup>

Thirdly, there have been rulings in which the presence of additional intimate relations alongside the relations with the partner claiming the

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26. See, for example, the recent ruling of the National Labor Court in LA 183/99, *Aaron v. Supervisor of Pension Payments* [2002] 37 Labor National 396. While the cohabiting partner's claim for a pension was rejected, her claim for a grant was accepted, since the legislation relating to the right of a cohabiting partner to a grant does not include any time restriction.

27. Thus, for example, in CA 621/69 *Nissim v. Juster* [1970] IstrSC 24 (1) 617, which related to the inheritance laws, the court established that a period of close to one year could be sufficient, provided that during this entire period the joint life took place on the basis of the same profound relations that generally exist between a legally-married husband and wife. In this respect, the court determined, on pp. 623–24, that: "There can be no doubt that such a period of time (viz. one year – S.L.) and even much shorter than that is certainly sufficient." These comments were quoted in CA 4305/91 *Sadeh v. Kavors*, [1994] 32 Dinim Elyon 803, and have been quoted frequently by the labor courts in discussing the rights of cohabiting partners. See, e.g., LCC 57/14-6 *Ohana v. Makefet Pension and Payments Fund, Coop. Ass'n Ltd.*, 9 Labor Regional 985.

28. See the definition of a cohabiting partner in the National Insurance Law, *supra* note 25, one of the components of which is that "she resided with him at the time of his death." See also LC 44/62-0 National Insurance Institute v. N. Mishali, 16 Piskei Din Avoda 3 in para. 3 of the ruling, as well as Article 4(A)(1) of the Civil Service (Retirement) Law [combined version], 1970, S.H. 65.

29. See 1826/99 *Shelly Meir v. National Insurance – Haifa Branch* [2002] (unpublished). Paragraph 14 of the ruling states:

Regarding the requirement of the law in defining "his wife" for joint habitation – this is not necessarily an additional requirement for habitation under the same roof, but rather the meaning of this requirement is that the relations between the partners in accordance with the double test is such that it may accordingly be determined that she lives with him in light of the manner in which the partners managed their joint lives on this general subject.

See MENACHEM GOLDBERG, SOCIAL INSURANCE FILE: NATIONAL INSURANCE LAWS, NATIONAL HEALTH INSURANCE LAWS, PENSION LAWS; LAWS, REGULATIONS, ORDERS, PRECEDENTS, EXPLANATIONS 43 (24 ed., 2004), and the rulings noted therein.

30. See cases discussed in Lifshitz, *supra* note 17, at 409 n.176.

31. *Id.* at 409 n.177.

rights of a cohabiting partner has not negated eligibility for these rights.<sup>32</sup> Furthermore, courts have allowed couples to obtain rights as cohabitants, even when one of the partners is married.<sup>33</sup>

Lastly, there have been cases in which even prior declarations by persons that they reside alone have not subsequently negated their claim, or the claim of their partner, to the rights of cohabiting partners.<sup>34</sup>

### B. *The Potential Lesson for the Same-Sex Marriage Debate*

Formally, the conservative position, which emphasizes entry limitations on marriage, won a decisive victory in Israel.<sup>35</sup> Ironically, the strict limitations on the right to marry were a trigger for the development of the institution of cohabitation as a substitute for formal marriage. In the Israeli legal and public discourse the need to “compensate” those unable to marry is presented, time and again, as justification for strengthening the institution of cohabitation.<sup>36</sup> Yet, marital rights were awarded to all cohabitants, and not only to those who are barred from marrying. This state of affairs has greatly weakened the traditional privileges associated with legal marriage. At a later stage, the weakening of legal marriage was not limited to a blurring of the distinction between it and cohabitation—it was also weakened by the recognition of same-sex units,<sup>37</sup> the validation of spousal relationships with non-married partners,<sup>38</sup> and the cancellation of privileges formerly granted to families

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32. See *id.* at 409 n.178.

33. This was first decided in CA 384/61 *State of Israel v. Pessler* [1962] IsrSC 16(1)102. In this connection there have been varying shifts in the trend seen in certain legislation—most prominently the Succession Law—which have negated the rights of cohabitants married to other person. At the same time, in those cases where the legislation has refrained from expressly establishing this qualification, the courts have continued to follow their earlier policy. See HCJ 6086/94 *Ella Nazri v. Officer Responsible for the Population Registry* [1996] IsrSC 49(5) 693, in which the Supreme Court allowed the cohabiting partner of a married man to change her name to his notwithstanding the objections of the legal wife. For the argument that by so doing, the Supreme Court was enabling *de facto* bigamy, see LIFSHITZ, COHABITATION LAW, *supra* note 11, at 267–74.

34. See CA 481/73 *Rosenberg v. Stessel* [1974] IsrSC 29 (1) 505.

35. See *supra* note 10.

36. For the role of cohabitation as an alternative to marriage or as a technique for circumventing religious law, see LIFSHITZ, COHABITATION LAW, *supra* note 11, at 55–67; ROSEN-ZVI, *supra* note 10, at 303; SHIFMAN, *supra* note 13, at 19–20; Daniel Friedman, *The Cohabitee in Israeli Law*, C 2 TEL-AVIV U. L. REV. 459, 483 (1973); see also HCJ 693/91 *Ophrat v. Superintendent of Population Registry* [1993] IsrSC 47(1) 749 paras. 38–47 of Justice Barak’s judgment.

37. See HCJ 721/94 *El-Al v. Danilowitz* [1994] IsrSC 48(5) 749 (holding that same-sex cohabitants entitled to cohabitants’ rights); see also HCJ 3045/05 *Ben Ari v. The Director of the Population Administration in the Ministry of the Interior* [2006] (not published) (directing to register same-sex couples who married abroad as married based on a marriage certificate issued in the foreign country, but the court does not decide on the essential validity of the marriage).

38. See *supra* note 33.

based on spousal ties.<sup>39</sup> Beyond the economic benefits, modern Israeli law also encourages unconventional family types by enhancing the possibility of adoption by same-sex couples<sup>40</sup> and by enabling single woman to receive artificial insemination with state support and financing.<sup>41</sup> Thus, in Israel, the conservative-religious camp's relative success in limiting the entry to marriage has harmed this camp's broader agenda for the preference of legal marriages.

In recent years, a similar dynamic has emerged in the United States. On one hand, the religious-conservative camp won a victory in most states in preventing same-sex marriage.<sup>42</sup> On the other hand, the unique status of marriage has been weakened by American proposals to (1) narrow the legal gap between marriage and cohabitation,<sup>43</sup> (2) recognize and support un-conventional family lifestyles,<sup>44</sup> (3) decrease marriage as a relevant factor in adoption and assisted reproduction cases,<sup>45</sup> (4) develop alternative institutions to marriage,<sup>46</sup> and (5) abolish marriage as

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39. Article 74 (B) (1) (a) of the National Insurance Law [Combined Version], 1995, S.H. 205; Single Families Law, 1992, S.H. 147; Article 2 (5) of the Income Assurance Law, 1980, S.H. 30.

40. For more on lesbian adoption see HCJ 1779/99 Berner – *Kadish v. Minister of the Interior* [2000] IsrSC 54(2) 368 and CA 10280/01 *Yarus-Haqaq v. Attorney General* [2005] IsrSC 59(5) 64.

41. HCJ 9981/95 *Yarus-Haqaq v. Health Department*, [1997] (Tak-Al 97 (1) 939) (abolition of regulations that require social worker assessment as a pre-condition for assistance in artificial insemination for a single woman); CC(JER) 5222/06 *Unidentified Person v. Minister of Health and others* [2006] Tak-Mach 2712(3) (permitting fertilization from a married person). *But cf.* HCJ 2458/01 *New Family v. Approvals Comm. for Surrogate Motherhood Agreements*, Ministry of Health [2002] IsrSC 57(1) 419 (holding that the inability of a single woman to be a surrogate is discrimination, but the law was not invoked due to constitutional restraint motives).

42. Indeed, Massachusetts is currently the only American state which recognizes same-sex marriage. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, (Mass. 2003). For a comprehensive survey of the recognition of same-sex couples in the U.S. as well as other western countries, see Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and the Tragedy of the Commons*, BYU J. PUB. L. (forthcoming 2007).

43. *See, e.g.*, AMERICAN LAW INSTITUTE, PRINCIPLE OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002); Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001).

44. *See, e.g.*, June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341 (2006) (seeking to use adoption as a substitute for marriage in creating and recognizing intimate relationship and families); Leah Ward Sears, *The "Marriage Gap": A Case for Strengthening Marriage in the 21<sup>st</sup> Century*, 82 N.Y.U. L. REV. 1243, 1251 (2007) (At the other end of the debate, some scholars argue that "the traditional marriage-and-family paradigm imposes an ethnocentric 'benchmark' or 'ideal.' This paradigm, they say, does not speak to the experience of racial minorities, women, single parents, divorced and remarried persons, gays and lesbians, and others."); *see also* the opinions discussed by Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA. L. REV. 379, 403 (2003).

45. *See* Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Martial Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006) (opposing the favoritism toward marriage in adoption and assisted reproduction).

46. The most common are the civil union and the domestic partnerships laws. *See* the survey

a legal institution.<sup>47</sup> To be sure, each of these developments is supported by arguments that are independent from the same-sex marriage debate.<sup>48</sup> Yet, implicitly or explicitly, the exclusion of gay couples from marriage motivates the trends that narrow the gap between marriage and other types of family lifestyles<sup>49</sup> and the calls to abolish marriage.<sup>50</sup>

Taking into account the Israeli experience, conservatives should be concerned that, in the end, the conservative camp's relative success in negating the possibility of same-sex marriages will be a Pyrrhic victory harming this camp's broader agenda for the preference of legal marriages.

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in Wardle, *supra* note 42.

47. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (Routledge 1995); Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 *CARDOZO L. REV.* 1221 (2006); Elizabeth Scott, *World Without Marriage*, *FLQ* (forthcoming 2009); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 *CARDOZO L. REV.* 1161 (2006).

48. Fineman's proposal to abolish marriage, for example, is based on the need to support the mother-child relationship regardless of spousal pattern. The proposals to apply marriage law to cohabitants are motivated in many cases by the need to protect the economically weak side. See, e.g., Blumberg, *supra* note 43.

49. The American Law Institution project, for example, was interpreted by several scholars as part of this trend. See, e.g., Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partnership Principles Are One Step in the Right Direction*, U. CHI. LEGAL F. 353, 354 (2004) (praising principles for taking "an important step in the right direction of making marriage matter less"); Sears, *supra* note 44 (According to the ALI, a central purpose of family law should be to protect and support family diversity. The report views "traditional marriage" as merely one of many possible and equally valid family forms.); Katherine Shaw Spaht, *How Law Can Reinvigorate a Robust Vision of Marriage and Rival Its Post-Modern Competitor*, 2 *GEO. J. L. & PUB. POL'Y* 449, 454-55 (2004) ("[T]he three reporters for the project describe in notes and commentary their vision of marriage as . . . simply one of a variety of intimate and close relationships."); see also Blumberg, *supra* note 43, at 1268-69 (asserting that, "in the United States, same-sex couples have been the dominant force in the movement to regularize nonmarital cohabitation"). See generally Marsha Garrison, *Is Consent Necessary?: An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 *UCLA L. REV.* 815, 869 (2005) ("The evidence suggests that the perceived interests of same-sex couples have nonetheless been important in building academic and legislative support for the conscriptive [i.e. imposing marriage law on cohabitants] alternative"). For the opposite influence, i.e., the influence of cohabitation law on the recognition of same sex marriage, see Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 *UCLA L. REV.* 1555 (2004). For the connection between the same sex marriage struggle and additional struggles for different lifestyle, see Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J.L. & FEMINISM* 139 (2005). For the influence of the same-sex marriage debate on a general argument against privileging marriage in the context of state assistance to reproduction, see Storrow, *supra* note 45.

50. See, e.g., Scott, *supra* note 47 (holding that the opposition to same-sex couple is stronger in the case of marriage than in the case of civil union and therefore civil union should replace marriage); see also Zelinsky, *supra* note 47 (abolishing marriage diminishes the struggle between supporters and opponents of same-sex marriage).

### III. A CRITIQUE OF THE LIBERAL RESPONSE TO THE CONSERVATIVE CAMPAIGN

#### A. *The Liberal Case Against Equating Marriage and Cohabitation*

The modern trend narrowing the legal gap between marriage and cohabitation was originally identified in legal and public discourse in Israel<sup>51</sup> as well as in the United States<sup>52</sup> and other western countries<sup>53</sup> as based on liberal values of autonomy, freedom, and contractual models of regulation.

Contrary to this conventional wisdom, in many cases equating cohabitation to marriage harms the liberal values of freedom of choice and autonomy. In order to clarify this point, this Comment will focus on the regulation of the economic relationship between the cohabitant partners (as opposed to their rights against the state and other external bodies).

This Part will present two liberal arguments against imposing marriage law on cohabitants: contractual and pluralist. The contractual argument focuses on the partners' wishes. As long as one speaks of couples that have the legal capacity to be married, cohabitation may reflect their rejection of marriage laws. One should keep in mind that in the context of the economic relationship between the spouses, the legal rights of one spouse are the legal obligations of the other. So one may assume that the reason the cohabitants are not married is that at least one of them did not want to assume these obligations. In this case, imposing marriage laws on people who reject marriage does not respect their

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51. For the identical character of "progressive" liberal views aimed at strengthening the institution of cohabitation, see ROSEN-ZVI, *supra* note 10, at 306, and Rosen-Zvi, *supra* note 23, at 385 (using the institution of cohabitation to illustrate the liberal voice of the family law system in Israel). See also Shifman, *supra* note 15, at 33–35 (regarding the recognition of cohabitation as a social development, which at least part of the public regards as progressive, and part of the public as immoral).

52. See H. A. Finlay, *Defining the Informal Marriage*, 3 U.N.S.W L. J. 279 (1980) (supporting applying marriage law to cohabitants using liberal-contractual arguments); Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937 (1977) (supporting the process of granting rights to cohabitants on the basis of liberal rationales of increasing freedom, particularly freedom of choice); Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, (1986) (supporting more freedom of contract in cohabitant relationship).

53. See, e.g., A. M. van de Wiel, *Cohabitation Outside Marriage in Dutch Law*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 212, 215 (John. M. Eekelaar & Sanford N. Katz eds., 1980) (presenting the process of applying marriage law to cohabitants as an element of a general policy emphasizing the neutrality of the state towards various lifestyles in relation to Holland); see also Svend Danielsen, *Unmarried Partners: Scandinavian Law in the Making*, 3 OXFORD J. LEGAL STUD. 59, 65 (1983) (The principle of neutrality is at the center of Sweden's approach to cohabitation.).

choice.<sup>54</sup>

The contractual nature of quasi-marital obligations is particularly relevant to those cases in which the relationship between the parties lasts only a relatively short time. In many cases, living together is a preliminary stage before marriage. Sociologists who have investigated this phenomenon tend to view this period of cohabitation as a trial period in which the parties are likely to determine whether or not they wish to marry.<sup>55</sup> Thus, a substantive legal system that imposes quasi-marital obligations on cohabitants who have lived together for only a short period of time in fact negates the significance of this trial period.

From a contractual perspective, ignoring that there is a trial period blurs the boundaries between pre-contractual stages and contractual obligations. This blurring only exacerbates the contractual problems raised by the institution of cohabitation. The contractual argument focuses on the wishes of partners and the law's need to reflect the different levels of commitment between cohabitants and married people.

Unlike the contractual argument, the pluralist argument focuses on the need of the law to create different types of institutions that support the diversity of spousal lifestyles.<sup>56</sup> This argument is based on modern liberal approaches that emphasize individual autonomy. It stresses that individual autonomy means not only the absence of formal limitations on the individual's choices but also the existence of a range of options. 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 choices between various alternatives.<sup>57</sup> The application of these approaches to cohabitant law may lead 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 that

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54. For the contractual argument against imposing marriage law on cohabitants, see Garrison, *supra* note 49; David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1471 (2001).

55. There is extensive sociological literature concerning cohabitation as a test period prior to marriage. See, e.g., Thomas J. Abernathy, *Adolescent Cohabitation: A Form of Courtship or Marriage?*, 16 ADOLESCENCE 791 (1981); Alfred DeMaris & William MacDonald, *Premarital Cohabitation and Marital Instability: A Test of the Unconventionality Hypothesis*, 55 J. OF MARRIAGE AND FAM. 399 (1993); Alfred DeMaris & K. Vaninadha Rao, *Premarital Cohabitation and Subsequent Marital Instability in the United States: A Reassessment*, 54 J. OF MARRIAGE AND FAM. 178 (1992).

56. While the contractual argument was already claimed in the legal literature, the pluralist argument is a renovation of this article. The argument however is submitted very briefly in this article and it will be extended in another project, which is still a work in progress. See SHAHAR LIFSHITZ, *MARRIAGE AGAINST THEIR WILL? A LIBERAL THEORY OF COHABITATION LAW* (Forthcoming).

57. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 179 (Clarendon Press 1994).

might be characterized as a sociological marriage may choose between a high level of legal commitment (i.e., legal marriage) and a lower level of commitment (i.e., cohabitation). Such a framework would offer individuals a range of options.

On the other hand, think of a legal world which is totally in accord with the supposedly liberal position that equates the status of cohabitants to that of married couples. In such a world, couples who desire to maintain an intimate relationship that can be characterized as a sociological marriage are automatically subject to the system of spousal laws. Such a framework does not offer couples social institutions with meaningful differences nor the possibility of making genuine choices.

Alongside the liberal arguments against equalizing cohabitation and marriage, there are also contrasting arguments which support imposing marriage law on cohabitants. The first counter-argument rejects the premise that cohabitants intentionally reject the commitment that marriage law reflects. According to this argument, one should not deny the implied commitment inherent in long-term cohabitant relationships, even in the absence of a formal commitment.<sup>58</sup> The second counter-argument focuses on gender differences, including power imbalance and economic disparity. Failing to impose marriage law on cohabitants may result in injustice and exploitation.<sup>59</sup>

Even if the counter arguments demonstrate that in some cases applying marriage law to cohabitants is justified, those arguments do not justify total equation of cohabitation and marriage.

Firstly, even if, in certain instances, cohabitation relationships reflect a natural continuation of a previous lifestyle in other cases, refraining from marriage reflects a conscious rejection of marriage and the associated legal consequences, or trial period prior to marriage.<sup>60</sup> Therefore, just as it would be problematic to adopt a policy that relates to all cohabitants as not being interested in the “legalization” of their spousal relationships, so too it is problematic to adopt the opposite policy, which equate marriage and cohabitation laws and ignores those

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58. For the long-term commitment embedded in marriage, see Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998). For the long-term commitment embedded in cohabitation, see Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts and Law Reform*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331 (Robin Fretwell Wilson ed., 2006) [hereinafter Scott, *Domestic Partnerships*]; Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, U. CHI. LEGAL F. 225 (2004).

59. For the extra-contractual perspective, see Blumberg, *supra* note 43 and Ira M. Ellman, “Contract Thinking” Was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001).

60. For the sociological studies that supported these possibilities, see *supra* note 55. In practice, even the studies which raise additional reasons why couples might choose not to marry do not deny the possibility that a life of cohabitation may reflect a trial marriage period.

cohabitants who rejected, or at least haven't taken yet, marriage commitments. Furthermore, it is hard to ignore the basic intuition,<sup>61</sup> backed up by economic, social, and psychological studies, that the stability<sup>62</sup> and level of commitment in the relationship between married couples is higher than that in the relationship between cohabitants.<sup>63</sup> The law must reflect these differences in the level of commitment between the two institutions by distinguish marriage and cohabitation law.

Secondly, from a liberal perspective one should justify any deviation from express or implied arrangements. In those cases in which such justification is missing, the imposition of a coerced obligation is certainly problematic.

Finally, the counter arguments do not handle with the pluralist-liberal argument that supports the existence of multiple social institutions and, as a result, seeks to preserve the distinction between legal marriage and sociological marriage.

Taking into account all the layers of the previous discussion, one should conclude that while the counter arguments justify selective application of elements of marriage law to cohabitants in certain circumstances, they fail to support the total legal equation of marriage to cohabitation. Additionally, the proper balance between the liberal arguments and the counter arguments should result in distinctions between different kinds and or stages of cohabitants such as trial marriages, rejection of legal marriage, and the desire to continue with a previously existing lifestyle. In order to distinguish between those types, strict "gatekeeper rules" should define circumstances which call for the application of marriage commitments to certain kinds of cohabitants.

Suggesting a comprehensive model for cohabitant law is beyond the scope of this Comment.<sup>64</sup> Yet, even the existing discussion demonstrates

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61. At the same time, this intuition is limited to circumstances in which there is no legal or ideological obstacle to marriage.

62. For a substantive distinction between the elements of cohabiting relationships and those of spousal relationships, see Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53 (1995). See also Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1439-40 (presenting empirical studies which show that on average the relationship between married couples is more stable than the relationships between cohabitants).

63. See William Bishop, *'Is He Married?': Marriage as Information*, 34 U. TORONTO L. J. 245 (1984); David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L. Q. 15, (1996); Michael J. Trebilock, *Marriage as a Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 245 (F. H. Buckley ed., 1999) (suggesting theoretical analyses which explain by means of various disciplines how marriage reflects a message or in economic terminology signals a high level of commitment by the couple); For the role of marriage as a social institution which has the task of reflecting a system of cultural understandings, at the core of which is the notion of mutual obligation, see Russell D. Murphy, *A Good Man is Hard to Find: Marriage as an Institution*, 47 J. OF ECON. BEHAV. & ORG. 27 (2002).

64. I suggest such a comprehensive model in my book for the Israeli context. See LIFSHITZ,

the severe consequences which may flow from the application of marriage law to all types of cohabitants. Unfortunately, as the next two Parts demonstrate, unselective application of marriage law as a whole to all kinds of cohabitants is exactly the situation in Israel and some aspects of law in the United States are going in that direction as well.

*B. Marriage Against Their Will: The Case of Cohabitation Law in Israel*

Generally speaking, Israeli Law tends to ignore the liberal arguments against imposing marital commitments on cohabitants. Thus, Israeli Law applies marriage law to cohabitants' relationships not only in the context of the external right, i.e., the rights of cohabitants against third parties, but also regarding the mutual commitments. Consequently, in contrast to the recommendation in the previous part to selectively apply marriage commitments on cohabitants, the Israeli law equates cohabitants' inheritance,<sup>65</sup> property,<sup>66</sup> and alimony<sup>67</sup> rights to those of married persons and sometimes grants cohabitants even greater rights than married couples.<sup>68</sup> Furthermore, in many legal systems, multiple legal contexts

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COHABITATION LAW, *supra* note 11. I am also currently working on a corresponding model for American law. See LIFSHITZ, *supra* note 56.

65. The Succession Law, 1965, S.H. 63, Section 55, in the absence of a will, vests cohabitants with a right of succession equivalent to that of married spouses. Section 57(c) of the Law vests cohabitants with the right to claim maintenance from the estate.

66. *See, e.g.*, CA 749/82 Moston v. Viderman [1989] IsrSC 43(1) 278; CA 52/80 Shachar v. Friedman [1984] IsrSC 38(1) 443. At the same time, in a few cases, the Supreme Court made it clear that the presumption of community of assets in the case of cohabitants is relatively "weaker" than that applying to married couples, and thus the two cannot be completely equated. *See Shachar*, IsrSC 38(1) at 458; CA 4385/91 Salem v. Carmi [1997] IsrSC 51(1) 337, 348.

67. *See* CA 805/82 Versano v. Cohen [1983] IsrSC 37(1) 529. In this judgment the court raised the possibility that in the future the courts would infer an implied agreement from the relationship between cohabitants, according to which a maintenance obligation would apply between the couple even following separation. Additionally, the court held that conceivably, even a unilateral decision to conclude a relationship, entailing eviction of one of the partners from the residence, might provide a cause of action for a claim for compensation in respect of the damage caused as a result of the breach of an implied contractual condition, to the effect that a reasonable amount of time had to be allowed to pursue separation proceedings between the parties. This possibility arose again in CA 2000/97 Lindorn v. Carnit – Road Accident Victims Fund [1999] IsrSC 55(1) 12, para. 18 of the judgment and is currently applied by lower courts.

68. Thus, for example the property relations of married persons are currently addressed by The Spouses (Property Relations) Law, 5733-1973, 27 LSI 313 (1972-73) (Isr.), while the property relationship between cohabitants are established by case law development titled the community property presumption. The extent of community of assets under the Property Relations Law is less than that applied under the presumption of community of assets, both in terms of scope (the Property Relations Law defines various classes of assets which the courts include within the presumption of community of assets, but which are not subject to the resource balancing arrangement) and in terms of power (the Property Relations Law establishes a deferred community of assets, that is, an arrangement by which the couple's assets remain separate during the course of the marriage, but which grants each spouse a contractual right to claim his share of the assets, under an arrangement

require a balance between conditions for entry into a particular status and the consequences thereof. (The more that is entailed by inclusion in a particular legal status, the stricter the entry conditions need to be, and *vice versa*.)<sup>69</sup> Consequently, one might have expected that expansion of the scope of mutual economic rights between cohabitants in Israel would be accompanied by the imposition of stricter entry conditions to this class. However, Israeli cohabitation law has not respected the necessity of this balance, and the expanded economic obligations arising from this status have not led to additional strictness in the entry conditions for that status. On the contrary, legal decisions relating to the definition of cohabitation, in the context of economic relations between cohabiting partners, have maintained and even expanded the criteria for entry into the status of cohabitants. Thus, the absence of a permanent place of residence shared by both partners,<sup>70</sup> evidence of maintaining separate assets,<sup>71</sup> disloyalty toward the cohabitants partner, namely the conduct of intimate relations in parallel to those conducted with the cohabitating partner,<sup>72</sup> frequent and violent quarrels between the partners,<sup>73</sup> the lack of

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called “resource balancing”, only upon dissolution of the marriage. The presumption of community of assets, on the other hand, defines an immediate community of assets, and permits each spouse to apply to the courts during the lifetime of the marriage and request the right to realize his property rights.). Ironically, therefore, the extent of community of assets existing today between cohabitants is *higher* than that applicable to married couples. In the context of alimony, unlike cohabitants that are entitled to alimony after their separation with regard to married couples, the obligation of maintenance is determined by the personal status laws, and, in line with those laws as they apply to the majority of couples in Israel, the obligation to provide maintenance ceases absolutely upon divorce. For the irony in those situations see LIFSHITZ, COHABITATION LAW, *supra* note 11, at ch 7.

69. Thus, for example, Gilmore explains in his famous work, GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K. L. Collins ed., Ohio State University Press 1974), that the contractual commitment in classic contract laws was very strict. This strictness was balanced by hard entry conditions (in particular the demand for consideration). In contrast, modern contract laws provide for a softer contractual commitment, and accordingly the severity of the entry conditions has also been lessened. A relationship of a similar nature exists between the divorce laws and marriage dissolution laws. Thus, canonical law, where divorce was particularly strictly regimented, was characterized by entry conditions which were fairly harsh and therefore this law saw the development of a great body of rulings dealing with the possibility of declaring the dissolution of marriages. See R. H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 74–100 (D. E. C. Yale ed., Cambridge University Press 1974); RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 9–13 (Cambridge University Press 1988).

70. See, e.g., CA 79/83 A-G v. Shukrun [1985] IsrSC 39(2) 690 (The couple lived occasionally in the flat of the man and occasionally in the flat of the woman, nonetheless this fact did not negate their status as cohabitants.); see also Estate File (EF) (Haifa) 833/81 Avraham Meir v. A-G [1982] IsrDC 1982(2) 428.

71. See CA 107/87 Alon v. Mendelson [1989] IsrSC 43(1) 431, 438 (where it was held that separation of assets does not negate the status of cohabitants).

72. See, e.g., CA 79/83 A-G v. Shukrun [1985] IsrSC 39(2) 690 (where notwithstanding that the deceased maintained a number of intimate relationships concurrently, his permanent partner was granted the status of cohabitant for the purpose of the Succession Law); see also CA 4385/91 Salem v. Carmi [1997] IsrSC 51(1) 337 (where even though the partner (Salem) on certain occasions also maintained intimate relations with other men, and even though she maintained a fairly strong relationship with her ex-husband, Salem and Carmi were declared to be cohabitants).

intimate relations, and even evidence of cohabitants living in separate rooms<sup>74</sup> have not prevented couples from being considered as cohabitants. The courts also have refused to define a minimum period of shared residence necessary for cohabitation. In one case, the fact that the couple had lived together for only a few months was considered sufficient for them to be deemed cohabitants for the purposes of the Succession Law.<sup>75</sup>

The unique position of Israeli cohabitant law is connected to Israeli family law and to the view of the institution of cohabitation as a *secular alternative to religious marriage*.<sup>76</sup> That being the case, cohabitation is not viewed as a general rejection of the institution of marriage, but rather as a kind of secular marriage for those who are unable or unwilling to marry within a religious ceremony. The secular lawmakers feel an obligation to provide a remedy for those who chose or were forced to choose this form of spousal relationship.<sup>77</sup>

Viewing cohabitation as a secular alternative to religious marriage undermines the liberal contractual view which purports that cohabitation reflects a conscious decision by the parties involved to reject the legal consequences of marriage. That being the case, these liberal contractual arguments become irrelevant in the Israeli law context. Moreover, in contrast to the liberal-pluralist concern, the institution of cohabitation, which in fact plays the role of secular marriage, actually contributes to an increase in the number of social institutions.<sup>78</sup> Therefore, the liberal arguments are almost meaningless in Israel. It is not surprising that these considerations do not carry significant weight in Israeli law, which is generally faithful to the idea of an almost blanket equation of the status of cohabitants and that of married couples.

The uniqueness of Israeli family law justifies a certain variation in the types of legal arrangements relating to cohabitants. However, it would be correct to assume that in Israel, *at least some* of those in cohabitation relationships choose to do so for *universal* reasons, like being in experimental period (trial marriage) or rejection of the institution of marriage and not for reasons that stem from the specific

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73. See, e.g., EF (Haifa) 2365/85, *Motion 1387/85 Abu v. Abu* [1986] IsrDC 1987(2) 31.

74. See CA 4385/91 *Salem v. Carmi* [1997] IsrSC 51(1) 337.

75. See EF (Tel-Aviv) 3693/90 *Amir v. Zeger* (unpublished) (residence together over a number of months, cut short because of the death of one of the couple, was sufficient in order to define the woman as the heir for the purposes of the Succession Law).

76. See *supra* Part II. A.2.

77. See *supra* note 36.

78. See SHIFMAN, *supra* note 13, at 57–61; see, e.g., HCJ 73/66 *Zmulon v. Minister of the Interior* [1966] IsrSC 20(4) 645, 660 (Justice Vitkon clarified that the rationale of cohabitant law in Israel is closely connected to the religious character of marriage laws in Israel).

Israeli context (the inability or unwillingness to take part in a religious marriage ceremony).<sup>79</sup> That being the case, it would have been appropriate to expect the Israeli courts dealing with questions of cohabitation to attempt to distinguish between unique *Israeli* cohabitants and *universal* cohabitants.

In regard to *Israeli* cohabitants, one should not necessarily view the couple as having rejected the institution of legal marriage. On the contrary, in many of these cases the couples would be interested in a legal marital bond, but they are either not interested or not willing to have a religious marriage. In these cases, expansion of the legal obligations between those involved in such a relationship actually realizes their intention. On the other hand, in regard to *universal* cohabitants, their choice of lifestyle reflects, in general, a decision not to marry, rather than just a rejection of religious marriage. Therefore, in such cases, those liberal considerations against imposing marriage law on cohabitants ought to have an influence on Israeli law.

While the liberal analysis calls on Israeli law to distinguish between those unable to wed and regular cohabitants and between *universal* and *Israeli* cohabitants, Israeli courts do not draw a distinction. Consequently, they apply marital obligations to all cohabitants and not only those unable to wed.<sup>80</sup> It seems that at a certain juncture, Israeli law ignores instances in which a person could marry, but chooses not to do so, despite the fact that this choice could reflect the essential difference of that person's spousal relations from those of a married couple. Moreover, a number of recent decisions have made it clear that a significant portion of the law applying to cohabitants have become a cognitive issue that is not subject to the parties' stipulation.<sup>81</sup> For example, in *Bar-Nahor v. Estate of Osterlitz*,<sup>82</sup> which presents one of the most troubling cases from a liberal perspective, the court imposed marital obligations on cohabitants despite an explicit agreement between the parties in which they declared that they were not interested in being deemed cohabitants.<sup>83</sup> In this case Mr. Bar-Nahor and Ms. Osterlitz agreed before they began to live together regarding their financial

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79. See, e.g., Vered Baloush-Kleinman & Shlomo Sharlin, *Social, Economic, and Attitudinal Characteristics of Cohabitation in Israel*, 25 J. OF FAM. & ECON. ISSUES 255 (2004) (sociological study that demonstrates that in most cases the choice was not in favor of an alternative to marriage, but to a connection preceding marriage).

80. For a comprehensive analysis of Israeli verdicts that demonstrate the disregard of the courts from the easy option to screen between universal cohabitant and Israeli-made cohabitant, see LIFSHITZ, COHABITATION LAW, *supra* note 11, at 101–20.

81. See, e.g., CA 1717/98 Blau v. Pozesh [2000] IsrSC 54(4) 376 (rulings).

82. CA 7021/93 Bar-Nahor v. Estate of Osterlitz [1994] Tak-EI 94(3) 1512.

83. See my critique at LIFSHITZ, COHABITATION LAW, *supra* note 11, at 112–20.

arrangements. Their agreement explicitly stated that, beyond their arrangement, they do not want to be considered cohabitants under the law. After almost 3 years of living together, Bar-Nahor passed away, and Osterlitz sued the estate for alimony, to which she was entitled as a cohabitant, according to Israeli law. The heirs claimed, however, that the couple explicitly claimed that they did not want to be considered cohabitants. The Israeli Supreme Court held that, despite their explicit agreement, the partners lived as cohabitants and thus should legally be considered as such. The court further argued that, as cohabitants, the partners were not allowed to waive legal rights, such as alimony from the estate, that a married person is not entitled to forgo. Thus, the court held that Osterlitz is entitled to alimony from the estate.

There are rare instances in which it would be appropriate for courts to treat a couple as cohabitants, notwithstanding any agreement to the contrary. First, sensitivity to power imbalances of certain cohabitants should lead to greater use of those tools available in contract law that protect disadvantaged parties (such as laws relating to mistake, good faith, duress, unconscionability, and the like).<sup>84</sup> A second instance where intervention is appropriate relates to the issue of children. (Furthermore, even agreements which ostensibly focus on spousal relations still need to be examined from a perspective that takes into account the welfare of the children.) Finally, given the *dynamic nature* of spousal relations, there may be situations in which the original agreement between the parties no longer reflects their actual lifestyle. In such instances it would sometimes be appropriate to deviate from the original, formal arrangement.

A careful examination of the ruling shows that in *Bar-Nahor* none of these justifications existed.

First, the *Bar-Nahor case* is not a typical instance in which the characteristic discrepancies of power between men and women arise. Both parties were adults, both had experience in spousal relations, and both had independent sources of income. The agreement between them

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84. Indeed, the Family Court in Ramat Gan Family Case (J-m) 10681/98 *Anon v. Anon*, Tak-Mish 3 (2002) 13 dealt with such a case. The case dealt with a couple who lived together for almost 20 years, and who even had children together. During the course of the relationship, the woman developed a clear economic dependence on her partner. Contrary to the case of *Bar-Nahor v. Estate of Osterlitz*, where the agreement between the parties was entered into at the beginning of the relationship, the man demanded that the woman sign a draconian agreement negating her rights after 12 years of living together and after a clear dependence had already been created. CA 7021/93 *Bar-Nahor v. Estate of Osterlitz* [1994] Tak-El 94(3) 1512. American readers might remember the famous ruling in *Wilcox v. Trautz* where following the contractual model it was held that the agreement was valid. 963 N.E. 2d 141 (Mass. 1998). Contrary to this, in *Anon. v. Anon.*, the court negated the agreement and this was confirmed by the District Court. (J-m) 10681/98 *Anon v. Anon*, Tak-Mish 3 (2002) 13. It seems to me that in the circumstances of both judgments, the ruling in *Anon. v. Anon.* has greater justification and it illustrates the difficulty of complete reliance on the contractual model.

was made at an early stage in their relationship; thus, one cannot speak of any dependence that was exploited by any of the parties. In general, the ruling does not suggest that one of the parties initiated the agreement while the other objected to it or was coerced into signing it. Second, it does not appear that the agreement made between the two partners was inequitable or unbalanced. Within the framework of the agreement, the couple purchased an apartment that was registered in both their names. As noted above, both were mature adults with independent economic resources and incomes, and they sought to maintain both personal independence and independence of assets. In this framework, they kept their respective assets separate (except for the apartment), and established an agreed-upon mechanism for quickly breaking off the relationship at the request of either party. They also sought to avoid creating economic obligations between their heirs and any surviving partner. Can one view this as a one-sided, exploitative arrangement? Third, they had no children in common during the course of the relationship. Accordingly, one cannot justify intervention in the contract in the interests of the children.

On a superficial level, one might attempt to justify the *Bar-Nahor* decision based on the dynamic relationship rationale. According to this rationale, even if the express agreement described a relationship that did not take the form of cohabitation, the later lifestyle of the parties indicated that they had abandoned their original written agreement, and lived as cohabitants. Therefore, if one believes that in the case of long term relationships, the original framework is no longer paramount, one may feel that the ruling in this case is justified. However, if one looks more closely at the case, one will see that the dynamic relationship rationale cannot justify the court's ruling.

The dynamic relationship rationale is based on the understanding that in long-term relationships, particularly in relationships of an intimate nature, the parties involved often deviate from their original plans, and these deviations may not necessarily be formalized in a new agreement. On the other hand, in the *Bar-Nahor case*, the two parties kept entirely to their original plan. They knew that the lifestyle they had chosen might be considered cohabitation from a legal point of view, and therefore indicated from the outset that they were not interested in that status. Accordingly, the decision of the court in *Bar-Nahor* should not be seen as a modification of the agreement between the parties based on changing circumstances, but rather as a blatant intervention in their original and ongoing understanding.

In summary, then, the *Bar-Nahor case* does not reflect a sophisticated protection against flaws in intent, an intervention in an

inequitable arrangement, a consideration of the interests of children, or a modification of a long-term agreement to conform to changing circumstances. There is no escaping the conclusion that at the heart of the decision is the perception that, as with legal marriage, so too sociological marriage involves certain kinds of commitments that are not subject to stipulation by the parties. As explained earlier, this kind of comparison is very problematic from a liberal perspective.

*C. The Non-Liberal Trend of Cohabitation Law in the United States*

Non-liberal trends similar to those existing in Israel have begun to take hold in the United States as well. Since the 1980s, American courts have imposed marital obligations on cohabitants.<sup>85</sup> Influenced by the famous ruling in *Marvin v. Marvin*,<sup>86</sup> courts applied marital law to cohabitants based on an implicit contract theory that focuses on the intent of the parties.<sup>87</sup> Recently, however, the American Law Institute (ALI) completed an ambitious project, designed to formulate new principles for regulating the economic outcomes of family separations.<sup>88</sup> One of the chapters in the project dealt with the regulation of economic outcomes of cohabitant separation.<sup>89</sup>

The ALI absolutely abandons the *Marvin rule*, and the contractual test established therein.<sup>90</sup> Instead, the ALI establishes a series of criteria relating to the sociological and psychological components of marital ties. If these conditions are fulfilled, then the couple may be treated as members of a domestic partnership.<sup>91</sup> From this starting point, the ALI

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85. It is difficult to place all the American case law dealing with cohabitants in one class. Indeed, alongside cases willing to accord relatively broad recognition to the rights of cohabitants, there are also judgments which require an express agreement as a precondition for such recognition. In addition, in the United States there is still a view which negates agreements between cohabitants for reasons of public policy. At the same time, at least until recently, the dominant approach in the United States was the contractual one, which recognized cohabitants' rights only when these were based on express or implied agreements. For the classification of the various judicial rulings in the United States in relation to this issue, see Frances Olsen, *Asset Distribution After Unmarried Cohabitation: A United States Perspective*, in *DIVIDING THE ASSETS ON FAMILY BREAKDOWN* 89 (Rebecca B. Harris ed., 1998), see also Sanford N. Katz, *Marriage as Partnership*, 73 *NOTRE DAME L. Rev.* 1251, 1263–68 (1998).

86. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1996).

87. See *supra* note 85. There were however some cases previous to the ALI which acted according to the status model, see, e.g., the ruling of the Washington court in *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984). Notwithstanding that this ruling is not representative, it is possible to point to a number of additional judgments. See, e.g., Blumberg, *supra* note 43, at 1293–95.

88. See AMERICAN LAW INSTITUTE, *supra* note 43.

89. *Id.* at ch. 6.

90. *Id.* at 918–19.

91. *Id.* at para. 6.03. According to this provision, domestic partners are two people who are

applies marriage law to domestic partners,<sup>92</sup> while at the same time making it easier for a person living with a partner to prove that their relationship falls into the category of domestic partnership.<sup>93</sup> In addition, the ALI makes it clear that domestic partners who are not interested in the application of spousal law to their relationship will be required to agree to this explicitly and that such agreement may be subject to strict judicial review.<sup>94</sup> The combination of these legal doctrines may indicate that the regulation of the relations between cohabitants is shifting from a contractual model to one of status.<sup>95</sup>

The acceptance of these principles is likely to result in rulings like the *Bar-Nahor case* in Israel,<sup>96</sup> in which the obligations of marriage will be imposed on the couple, in opposition to their explicit wishes. For the couple, the outcome is an effective “marriage against their will.”<sup>97</sup> One can hardly ignore the irony of the situation: liberal motivation leads, in the end, to a paternalistic result.

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not married to each other, who have shared a joint residential home and have lived as a couple for a significant period of time. The provision proceeds by establishing a long line of criteria which clarify what is regarded as life as a couple. These criteria include, *inter alia*, life together for a period to be determined, a lifestyle which recalls a lifestyle characteristic of married couples, the existence of economic dependence between the couple, the existence of joint children, declarations by the parties concerning the nature of their relationship *inter se* and between themselves and others and additional criteria relating to the substance of the connection between the parties.

92. See *id.* at para. 6.02.

93. See *id.* at para. 6.03, sub-para. 3, which provides that living together under one roof for a period to be determined by state law creates a rebuttable presumption that the parties lived as a couple.

94. See *id.* at para. 6.03, sub-para. 2, which refers to such an agreement and applies the provisions of Chapter 7 of the ALI which deals with conditions for enforcing agreements between married couples. The criteria established in Chapter 7 for the recognition of agreements are relatively strict compared to customary conditions in ordinary contract law. See AMERICAN LAW INSTITUTE, *supra* note 43, at 908–09, 915. For criticism of the application of these rules to agreements between cohabitants and reference to cases in which the strict nature of Chapter 7 will severely hamper cohabitants wishing to enter into a valid contract that negates the application of spousal laws to their relationship, see also Westfall, *supra* note 54, at 1479.

95. For a similar characterization of the new trends, see Blumberg, *supra* note 43, at 1294–95; Ellman, *supra* note 59. See also Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J. L. FAM. STUD. 105 (2002) (criticizing this process); Regan, *supra* note 62, at 1451; Scott, *Domestic Partnerships*, *supra* note 58 (on one hand supporting equating marriage and cohabitation, but on the other hand rejecting the status model and preferring the basis of relational contract model. Scott therefore is more open to explicit private ordering which opposes marriage law.); Westfall, *supra* note 54, at 1476.

96. See *supra* note 81.

97. See Shahar Lifshitz, *Married Against Their Will? A Liberal Analysis of Cohabitation Law*, 25 TEL AVIV U. L. REV. 741 (2002) (Isr.).

## IV. ON BEHALF OF DEMOCRATIC COMPROMISE

This Part demonstrates the outcome of the two previous critiques, both of the conservatives and of the liberals. This Part will argue on behalf of democratic compromises such as civil unions which already exist in several states in the United States<sup>98</sup> as well as other countries,<sup>99</sup> and the spousal registry which is currently discussed in Israel.<sup>100</sup> Such arrangements are based on the distinction between the symbolic dimension of the label “marriage” and the civil rights that it imparts.

According to these arrangements, the symbolic title of “marriage” will be reserved for traditional marriage (religious marriages in Israel, and opposite-sex marriages in the United States). Along with this, an alternative civil institution for marriage is being established,<sup>101</sup> in which same-sex couples as well as other couples will be able to register as spouses and receive all the civil rights enjoyed by married spouses, in all aspects but name.<sup>102</sup>

Such arrangements have advantages, from both liberal and conservative perspectives. From the liberal perspective, these proposals will, for the first time, give the rights of married individuals to those who, until now, were barred from marrying. Furthermore, even on the symbolic level, these arrangements grant spousal recognition, albeit not as a married couple, to couples prevented from marrying by the current law. Another advantage of the proposal is that it is intended for the entire population, and therefore is not a track for the “rejected.” It could be argued that a large portion of the proposal’s civil advantages are already attained at present, by means of the cohabitation laws. However, the spousal registry and civil unions have considerable advantages over the recognition of cohabitants’ rights. First, the prior registration of the parties spares the couple from the need to prove their cohabitation status. These couples will not need to engage in litigation with third parties, such as government authorities, in order to realize their rights. Additionally, due to its institutionalized nature and its ex-ante characteristic, prior registration provides higher public recognition than

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98. In the U.S. so far (until Nov. 1, 2007), California, Connecticut, New Jersey, and Vermont have valid civil union acts or quasi regime. See CAL. FAM. CODE § 297 (2005); 2005 CONN. LEGIS. SERV. No. 05-10 (West); N.J. STAT. ANN. § 26:8A-1 (West 2004); VT. STAT. ANN. tit. 15, §§ 1201–07 (2000); see also Wardle, *supra* note 42, at Appendix II (detailed survey).

99. See Wardle, *supra* note 42.

100. See LIFSHITZ, *supra* note 14.

101. While in the U.S., these alternatives already exist, in Israel, they have not been established yet.

102. There are, however, some states in the U.S., as well as in other countries, that have extended limited economic rights to domestic partners. See Wardle, *supra* note 42, at Appendix III (survey).

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that afforded to cohabitants ex-post. Furthermore, the establishment of a spousal registry/civil union will enable a filtering mechanism among those prevented from marrying. It will enable differentiation between those who want to assume marriage law (including its inherent obligations) and those who, even if permitted to marry, would prefer to live in a non-institutionalized relationship. Consequently, applying marriage law only to those registered as spouses will prevent the imposition of marriage obligations on unwilling partners.

The advantages of such an arrangement from a conservative viewpoint are equally obvious. First, this preserves the monopoly of the label “marriage” for traditional religious marriages (in Israel) and opposite-sex marriages (in the United States). Second, these arrangements distinguish between non-institutionalized and nonbinding ties, such as cohabitation, and institutionalized relationships that express commitment, such as civil union. Finally, these arrangements remove a good deal of the justifications for blurring the distinction between marriage and cohabitation and for the general weakening of marriage.

It must be admitted, however, that such a compromise arrangement has its price and shortcomings. From a conservative perspective, the waiving of the status quo in itself always raises the fear of a slippery slope in which civil union will slide into civil marriage in every aspect. A liberal point of view calls for the establishment of civil marriage in its full sense. Consequently, the forgoing of such possibility is problematic.<sup>103</sup> Notwithstanding, when one considers the advantages of the spousal registry and civil unions, on the one hand, and the disadvantages of the status quo, on the other, the spousal registry in Israel and the civil union in the United States reflect a fitting democratic compromise.

## V. CONCLUSION

Marriage is one of the basic institutions of society, tradition, and personal life. The importance of marriage to tradition and society leads conservatives, religious as well as secular, to oppose any significant changes in the features of marriage. At the same time, the importance of marriage leads liberals to oppose the exclusion from marriage of same-sex couples as well as other groups, and to reject civil union as a substitute to marriage.

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103. For the liberal case against civil union as substitute to marriage, see RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 86–89 (2006) and YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIP IN EUROPE AND THE UNITED STATES* (Princeton University Press 2002).

This Comment offers three insights regarding this dispute: First, it uses the Israeli experience to demonstrate the severe result, for conservatives, of the conservative opposition to same-sex marriage. It shows that the price of excluding from marriage same-sex couples and other groups might diminish the importance of marriage and its traditional privileges, which would, in turn, result in the equating of marriage and cohabitation. Second, it indicates the liberal danger of the so-called liberal equation of marriage and cohabitation. Finally, this Comment supports civil unions and spousal registry as tolerable democratic compromises between the conservative and liberal positions.