The Liberal Transformation of Spousal Law: Past, Present and Future

*Shahar Lifshitz**

Scholars and lawmakers are familiar with a meta-narrative describing the liberal revolution of spousal law that occurred in the last decades of the twentieth century, which further transformed marriage, already transformed from a Catholic religious sacrament into a public institution and legal status model in the nineteenth century, into a private contract at the end of the twentieth. This Article addresses the liberal transformation of spousal law. The goals of the discussion are threefold: First, the Article examines the liberalization as a historical narrative and the sub-narratives contained therein. Secondly, it explores the liberalization as the normative framework for the current normative debates. Finally, the Article criticizes the existing school of thought and proposes principles for a new theory that would depart from the thought patterns imposed by the liberalization narrative.

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Introduction

Well into the twentieth century, family law scholars complained about the stagnant state of research within their field. They argued that while grand and comprehensive theories were being developed in other areas of law, studies pertaining to family law were limited to discrete issues, but the theoretical foundations of the field as a whole were still lacking.[1] The void, however, seems to be being filled in recent decades, as the theoretical research of family law has advanced and developed. Simultaneously, like the meta-narratives describing the development of other branches of law — such as the narrative of the rise and fall[2] (and, according to some, the second rise[3]) of contractual freedom — family law, or, at least, the branch thereof regulating spousal relationships ("*spousal law*"), has recently been awarded its own meta-narrative.

This meta-narrative describes the liberal revolution of spousal law that occurred in the last decades of the twentieth century, which further transformed marriage, already transformed from a Catholic religious sacrament into a public institution and legal status model in the nineteenth century, into a private contract at the end of the twentieth.[4] This Article addresses the liberal transformation of spousal law. The goals of the discussion are threefold: *First*, the Article examines the liberalization as a *historical narrative* and the sub-narratives contained therein. *Secondly*, it explores the liberalization as the

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1 *See* Carl. E. Schneider, *The Next Step: Definition, Generalization and Theory in American Family Law*, 18 U. Mich. J.L. Reform 1039 (1985); Lee. E. Teitelbaum, *Placing the Family in Context*, 22 U.C. Davis L. Rev. 801, 801-09 (1989); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. Rev. 265, 269-70 (2000).

2 *See, e.g.*, Patrick S. Atiyah, The Rise and Fall of Freedom of Contract (1979); Morton J. Horwitz, The Transformation of American Law 1780-1860 (1977); Jack E. Beatson & Daniel E. Friedman, *From Classical to Modern Contract Law*, *in* Good Faith and Fault in Contract Law 3 (Jack E. Beatson & Daniel E. Friedmann eds., 1995).

3 *See, e.g.*, The Fall and Rise of Freedom of Contract (Frank H. Buckley ed., 1999).

4 *See, e.g.*, Mary A. Glendon, The Transformation of Family Law: State Law and Family in the United States and Western Europe (1989); John Witte, From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (1997); Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443. In this Article I use the term "spouses" not only for married partners, but also for couples in non-marital relationships, such as cohabitants or other unmarried couples.

normative framework for the *current* normative debates. *Finally*, it criticizes the existing school of thought and proposes principles for a new theory that would depart from the thought patterns imposed by the liberalization narrative.

In accordance with its goals, the Article is divided into three parts. Part I surveys the main changes that occurred within Western spousal law during the final decades of the twentieth century. It further shows how these legal developments, together with the general transformation of the family that took place in the twentieth century, were incorporated by both scholars and lawmakers into the *meta-narrative* that depicts the liberalization of *marital law*. It also explains how the liberalization narrative serves as a framework for the three following sub-narratives: (1) *Privatization*, which describes the transition from the perception of marriage as a public institution to its being perceived as a private relationship; (2) *Individualization*, which describes the change in the legal attitude from considering the family as a cooperative unit, or an autonomous entity (the "*family-as-unit approach*"), to considering family as a collection of separate individuals (the "*individualistic approach*"); and (3) *Equality*, which describes the movement from the non-egalitarian approach in its two versions — the hierarchical version, in which women are inferior to men, and the version supporting an allocation of roles between men and women without a hierarchy between these roles — to the egalitarian approach aspiring to design gender-blind spousal laws.

Part II demonstrates that aside from its historical role, the liberalization meta-narrative contributes to the theoretical analysis of spousal law by establishing the normative framework in which the battle over family law is being waged. It begins by describing the prevailing reality as chaos. Thereafter, using theoretical categorizations suggested by the liberalization narrative, it identifies amidst the chaos the central camps involved in the struggle over the future character of spousal law.

The first approach — the "*liberal-contractual model*" — seeks to extend the modern revolution and base spousal law on the private and individualistic approaches, as well as the "sameness" version of the egalitarian approach, which rejects any differences between men and women. An even more extreme version of these approaches reflects a surprising coalition between radical groups on the left of the political map and libertarian groups on the right, which is interested in completely abolishing marriage as a legal institution. Our analysis demonstrates how these approaches ultimately lead to a contractual regulation of spousal relationship.

The second approach — the "*counter-reform movements*" — sets forth opposite proposals that call for a counter-revolution and a return to the traditional regulation of spousal law by using the public and family-as-unit approaches and the approach emphasizing the differences between men and

women. This approach, resting on a coalition between conservatives and communitarians, aims to replace contractual regulation of spousal law with a perception of the spousal relationship as a covenant and legal model of status.

The third and final approach is committed to the central foundations of the modern reforms, such as narrowing the traditional limitations on marriage capacity, unilateral no-fault divorce and a no-fault property regime, but supports various amendments to the economic relationship between spouses (such as the reinstitution of long-term alimony or limitation of contractual freedom) in order to protect women. Thorough analysis of this approach reveals that it, like the liberal-contractual approach, accepts the private, individualistic and even egalitarian principles as the basis for spousal law. However, in contrast to the original egalitarian approach that ignores the differences between men and women, this approach acknowledges that in reality there are still differences between the members making up the family. Its primary concern is to repair distortions in justice that have resulted from the modern reforms' disregard for the gender differences in the family context. Accordingly, we are not dealing with a comprehensive alternative to the liberal pole (which is represented by the private, individualistic and egalitarian approaches). Moreover, this approach does not reject the contractual vision of marriage. On the contrary, in many cases it bases its suggestions for reforms on economic analysis and on analogies between spousal relationships and commercial partnerships. Therefore, this approach will be referred to in this Article as the "*economic approach*."

Part II concludes, therefore, that the two opposite poles described by the liberalization narrative represent two opposite normative strategies for designing spousal law: the liberal strategy, which is based on a coalition among the private, individualistic and egalitarian approaches, and the conservative strategy, which is based on a coalition among the public, family-as-unit and non-egalitarian approaches. In the modern school of thought, as in the past, it is still the liberal and conservative camps that are battling over spousal law. The liberal pole's approaches are interrelated and identified with the contractual vision of marriage, while the conservative pole's approaches are interrelated and identified with the view of marriage as a status or covenant.

Part III critically analyzes the three following dichotomies at the center of the traditionalist-liberal struggle: private/public, individualistic/family-as-unit, and egalitarian/non-egalitarian. The discussion exposes basic malfunctions inherent in both the liberal and the conservative-traditional alternatives. Additionally, it reveals internal tensions among the approaches that make up the current coalitions. It further demonstrates that none of the current schools of thought regarding spousal law (the liberal-contractual model, the radical approach, the economic approach, and the conservative-communitarian

counter-reforms) constitutes a proper basis for its general regulation. A new theory of spousal law is needed that will shatter the existing dichotomies and define new connections and contexts, and I suggest guiding principles for such a one. First, the theory proposes ways to properly balance the interests of both spouses against public interests, among which the interests of the children are of paramount importance. Second, it highlights the role of marriage as a social institution and the public expectation that is derived therefrom. Unlike the traditional stance of the public-traditional approach, however, it suggests principles for a pluralistic and dynamic design of spousal institutions. Third, in contrast to the modern trend of avoiding any moral discourse in the realm of family law, it suggests a modern moral discourse that is appropriate to the field and names values that can be fully embraced in our pluralistic society, but refrains from adopting the traditional family values touted by the conservative camp. Fourth, the theory suggests a relational discourse for spousal law as an alternative to both the individualistic rhetoric, which presently dominates the field, and the traditional family-as-unit approach. Fifth, it suggests an innovative egalitarian approach that does not blur the differences between men and women, but rather recognizes the difference between masculine and feminine lifestyles and seeks to design a legal arrangement allowing both men and women to choose the lifestyle they desire. Finally, the theory incorporates the relational egalitarian rhetoric within our proposed innovative public discourse regarding family law. While the present Article cannot lay out an entire legal system based on these principles, the discussion demonstrates the practical ramifications of the theory for topics such as same-sex marriage, covenant marriage, cohabitation law, divorce law, and marital property law.

Before concluding this Introduction, two short comments are necessary: First, there is a deep-rooted distinction in legal thought between the branches of family law concerning spousal relationships on the one hand and the branches concerning the parent-child relationship on the other hand (such as custody and child support). This Article focuses on the theory that guides the regulation of spousal relationships and the legal branches identified therewith. Despite the focus on the spousal relationship, one of the lessons of this Article is that the best interests of the children should also be a guiding principle within the branches of family law associated with spousal law, and not only merely within those governing the relationships of parents and children.

Second, although the discussion in this Article refers in many instances to broad trends characterizing the Western world, it is abundantly clear that there are significant differences in developments in different locations. In general, the narrative of liberalization, like many meta-narratives, is painted with broad brushstrokes, and it is thus only natural that it should be plagued by generalizations and oversimplifications. The limited framework allotted

here does not allow me to address distinctions and nuances, whether historical or normative, among different locations. Rather, this Article serves as a mere "appetizer" for a broader research that will address the civil regulation of spousal law, and which will include an examination of the nuances and distinctions that have had to be omitted here.

I. The Liberalization Narrative of Western Spousal Law

A. The Twentieth Century Revolution

During the second half of the twentieth century, a dramatic revolution took place within Western spousal law. Most notably, the traditional limitations on marriage capacity were narrowed,[5] and at the same time the constitutional right to marry, which was even applied in certain states to same-sex couples,[6] was developed;[7] most of the rules regulating the spousal relationship during marriage were abolished;[8] the importance of the unilateral no-fault divorce model increased,[9] and at the same time the clean-break principle became a guiding principle for regulation of the economic commitments between spouses following divorce;[10] alternative relationship patterns, such as cohabitation and civil unions, received legal recognition and support by a

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5 *See* Dagmar Coester-Waltjen & Michael Coester, *Formation of Marriage*, 4 International Encyclopedia of Comparative Law ch. 3 (Mary A. Glendon ed., 1997).

6 See the survey in Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "The Tragedy of the Commons,"* 22 BYU J. Pub. L. 441 (2008); *see also* Yuval Merin, Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States (2002).

7 *See* Ariela Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 Colum. L. Rev. 1348 (2010); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790-1990*, 41 How. L.J. 289 (1998).

8 *See* Harry Willekens, *Long Term Developments in Family Law in Western Europe*, *in* The Changing Family: Family Forms and Family Law 47, 55 (John M. Eekelaar & Thandabantu Nhlapo eds., 1998).

9 *See* Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. Cin. L. Rev. 1 (1988); *see also* Glendon, *supra* note 4, at 148-96; Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Fam. L.Q. 497 (1996).

10 *See* June Carbone, *Feminism, Gender, and the Consequences of Divorce*, *in* Divorce: Where Next? 181, 189 (Michael D.A. Freeman ed., 1996).

narrowing of the legal gaps between them and marriage;[11] and contractual freedom within the spousal relationship increased.[12]

These changes did not have the same impact in every country. Nevertheless, the basic development trajectory is common to most Western countries and is especially evident in the Scandinavian countries and in some states within the United States.[13] The legal revolution was accompanied by a general transformation of the family,[14] which underwent a drop in the marriage rate, a rise in the divorce rate, a rise in the number of alternative relationships and in public tolerance towards them, and the integration of women into the workforce accompanied by the rise of the second wave of the feminist movement. Assembling elements of both the legal and extra-legal developments, historians, sociologists and legal scholars have described a meta-narrative that might be named the liberalization of spousal law.[15]

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11 *See* Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 Victoria U. Wellington L. Rev. 793 (2008) (N.Z.); Shahar Lifshitz, *A Liberal Analysis of Western Cohabitant Law*, *in* Family Finance 305 (Bea Verschraegen ed., 2009).

12 *See* Marica Neave, *Private Ordering in Family Law: Will Women Benefit*, *in* Public and Private: Feminist Legal Debates 145, 146 (Margaret Thornton ed., 1995).

13 A comprehensive analysis of liberalization in family law, which considers the entirety of developments described in this Article and which is sensitive to the nuances and distinctions among various legal systems, was conducted in Shahar Lifshitz, Hasdara Hozit Shel Yahasim Zugyim Bamishpat Ha'ezrahi [Contractual Regulation of Spousal Relationship in Civil Law] (2002) (unpublished Ph.D. dissertation, Bar Illan University) (Isr.) (to be published as Shahar Lifshitz, Hasdara Ezrahit shel Yahasim Zugi'im [Civil Regulation of Spousal Relationship] (forthcoming 2013) (Isr.)). Because of space constraints, the present Article will make do with a concise description of the liberalization narrative, which is based on the broader description and references mentioned in the said research projects.

14 *See, e.g.*, Martine Segalen, *The Industrial Revolution: From Proletariat to Bourgeoisie*, *in* A History of the Family, Vol. 2: The Impact of Modernity 377, 402-07 (Andre Burguière et al. eds., 1996); Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 Utah L. Rev. 587.

15 For the liberalization narrative, see Glendon, *supra* note 4; Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in United States (1988); Witte, *supra* note 4; *see also* Lifshitz, *supra* note 13, ch. 2-6.

B. The Liberalization Narrative

The liberalization narrative serves as a framework for three sub-narratives: privatization, individualization, and movement towards equality.

1. Privatization

The first component of the liberalization narrative is privatization, i.e., the transition from a perception of marriage as a public institution to its being perceived as a private relationship.[16] The privatization narrative itself is composed of three elements: the deregulation of spousal law, the decline of the "moral discourse," and the preference of the individual over the public interest.

Up until the second half of the twentieth century, states controlled most aspects of spousal relations: The state set the rules of eligibility to marry, designed the marriage ceremony, and regulated the ongoing marriage. Fault divorce systems set forth public criteria for appropriate behavior and these rules regulated divorce as well as its economic consequences.[17] In parallel to the regulation of marriage, the state fought, using different methods, against the private design of spousal relationships. Thus, most legal systems opposed the contractual regulation of spousal law. In addition, the law cultivated the exclusivity of legal marriage and the traditional family structure, while continuously battling the attempts of partners to regulate their spousal relationship outside marriage.[18]

In stark contrast thereto, many changes that have occurred in spousal law over the last few decades reflect a trend of deregulation in which the state avoids regulating spousal relations while handing control of these relations over to the involved parties.[19] Thus, the freedom of the involved parties to decide to marry or to divorce is increasing. The state avoids regulating the spousal relationship during marriage, and, as a result, the laws of ongoing

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16 *See* Singer, *supra* note 4; Willekens, *supra* note 8, at 55.

17 *See* Nancy F. Cott, Public Vows: A History of Marriage and the Nation (2000).

18 *See* Ariela Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 Colum. L. Rev. 1165 (2006); Ariela Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756 (2006).

19 *See* Michael D.A. Freeman, *Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?*, *in* The Resolution of Family Conflict 7 (John M. Eekelaar & Sanford N. Katz eds., 1984); Neave, *supra* note 12; Valerio Pocar & Palona Ronfani, *From Institution to Self-Regulation*, *in* The European Family: The Family Question in the European Community 195, 196 (Jacques Commaille & Francois de Singly eds., 1997).

marriage have been nullified. Beyond the deregulation of marriage and divorce, the traditional legal preference of marriage has weakened and the gap between legal marriage and other forms of spousal relationships has become narrower. In this way, the state avoids channeling partners into choosing a specific form of spousal relationship, and leaves that choice to the involved parties.[20] A clear expression of the shift of roles from the state to the involved parties is the increasing freedom of the spouses to contractually define their rules of marriage. Through contractual relations, the parties, and not the state, become the legislators of spousal law.[21]

The decline of the state's role is manifested not only by operative changes, but also within spousal law rhetoric. Carl E. Schneider contends in two influential articles that the "moral discourse" concerning modern family law has decreased significantly during the twentieth century.[22] He maintains that the secularization of marriage in most Western countries during the nineteenth century did not release spousal law from collective value systems. This collective theology, partly rooted in previous religious doctrines, did not hesitate to define the way of the "good life" with respect to family relationships and to condemn those who deviated from it. In contrast to the previous models, modern spousal law is not based on a moral collective concept. On the contrary, the law aims at avoiding moral judgments.[23]

Finally, an additional component of the privatization of spousal law is the preference of the individual over the public interest. Traditional spousal law was mainly focused on the public interest, less so on the welfare of the individuals involved in a specific spousal relationship.[24] In contrast thereto,

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20 For further discussion, see Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 Sup. Ct. Rev. 75; Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 Cardozo L. Rev. 2133 (2007).

21 *See* Lawrence Alexander & Paul Horton, *Freedom of Contract and the Family: A Skeptical Appraisal*, *in* The American Family and the State 229, 230-36 (Joseph R. Peden & Fred R. Glahe eds., 1986); Marsha Garrison, *Marriage: The Status of Contract*, 131 U. Pa. L. Rev. 1039, 1049-53 (1983).

22 *See* Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 Utah L. Rev. 503; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985).

23 *Cf.* Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 109 (1996); Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 Mich. L. Rev. 430 (1985).

24 *See, e.g.*, Evans v. Evans, (1790) 161 Eng. Rep. 466, 467 (Consistory Ct.) ("In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good").

modern law values the contribution of marriage and family to the individual and his wellbeing, while public interests are considered of secondary importance.[25]

2. Individualization

Another sub-narrative describing the changes that occurred within spousal law is the shift from the family-as-unit approach to an individualistic approach.[26] The feudal social structure was composed of a number of basic connected units. These units were perceived as groups, not individuals. The family represents a prime example of such a group.[27] With the collapse of the feudal structure, a change took place within the general social structure, and the individual was steadily substituted for the family as the unit of which civil laws take account.[28]

Despite this change, for a long period of time family law continued to perceive the family as a unit and not as a collection of individuals.[29] The family continued to receive preference over the individual, and the basic goal of spousal law was to maintain the stability of the family unit. In contrast thereto, in the last few decades of the twentieth century, a dramatic change took place in all those aspects and culminated in the current trend, which

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25 *See, e.g.*, Martha A. Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 19 (1991) ("Currently, marriage is viewed as an institution existing primarily for the benefit of the individuals involved – to promote their happiness, not to perpetuate social ends"); *see also* Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. Rev. 1, 4-23.

26 *See, e.g.*, Glendon, *supra* note 4, at 102-03 ("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") (emphasis added).

27 *See* Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 Geo. L.J. 1519, 1526 (1994).

28 *See* Henry S. Maine, Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas 163 (10th ed. 1906) (Eng.).

29 *See, e.g.*, William Blackstone, Blackstone's Commentaries on the Laws of England 189 (1892) ("By marriage the husband and wife are one person in law, that is the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband"); *see also* Hendrik Hartog, Man and Wife in America: A History 103-07, 115-17 (2000).

nullifies the family as a legal unit.[30] In addition, the law views the individual not as a family member, but rather as an autonomous entity with the power and the right to form relationships, to determine their nature, and to walk away from them.[31] For example, the entry into marriage is determined by the decisions of individuals and is not subject (as it was in the past) to the limitations and needs of the original family unit. Likewise, the "independent" status of partners is preserved after marriage. As such, in many cases the legal status of partners towards one another is like that of two unrelated independent individuals. The shift towards unilateral no-fault divorce shows that individuals have a right to terminate their relationship with the family framework.[32] In the United States, a number of Supreme Court decisions have been interpreted as granting a constitutional status to the right to divorce.[33] Furthermore, the commitment to individuals, rather than to the family unit, is reflected in the "clean break" concept, which determines the economic outcomes of divorce.[34] This concept clearly favors the freedom of individuals over the preservation of the family unit.

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30 *See, e.g.*, Elizabeth S. Scott, *Rehabilitation Liberalism in Modern Divorce Law*, 1994 Utah L. Rev. 687, 687 ("[T]he law increasingly has come to deal with the family not as an *organic unit* bound by ties of relationship, but as a loose association of separate individuals") (emphasis added). The replacement of the family unit by the individual is especially evident in the constitutional law of certain countries. Accordingly, rights that were formulated in the past for the purpose of protecting the family and the bond of marriage are now presented as individual rights, *see* Dolgin, *supra* note 27.

31 *See* Salvatore Patti, *Intra-Family Torts*, 4 International Encyclopedia of Comparative Law, *supra* note 5, ch. 9 ("The family member is first an individual and then a family member").

32 *See* Wardle, *supra* note 6, at 512 ("Clearly the contract terminated at will by either spouse model of marriage (defined by no fault divorce laws) is the dominant model of marriage in the world today").

33 *See* Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. Rev. 879 (1988).

34 *See* Pelech v. Pelech, [1987] 1 S.C.R. 801 para. 89:

> [T]o burden the respondent with her care . . . for no other reason than that they were once husband and wife seems to me to create a fiction of marital responsibility at the expense of individual responsibility. I believe that the courts must recognize the right of the individual to end a relationship as well as begin one . . . .

See also 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 ….").

3. Movement Towards Equality

The third sub-narrative is that of the movement towards equality.[35] Until the turn of the nineteenth century, religious and civil spousal law in the Western world was based on a clear hierarchical model. According to this model, the husband-father is the head of the family, while the wife and children are subject to his authority.[36] Nineteenth century spousal law rejected the extreme hierarchical approach that emphasized the superiority of the husband in all areas of life. The ideology guiding the law of this period did not speak of women's inferiority in relation to their husbands, but rather of different domains and roles: The domain of the home was perceived as being the female domain, whereas the public domain, especially workplaces, was perceived as being the male domain.[37] Firstly, women received eligibility for many legal actions, which had not been granted in the past. Violence was no longer viewed as a legitimate right of men.[38] In many aspects of domestic life, the woman received legal advantages. For example, the old approach granting the husband the total right of child custody was rejected, and a maternal preference emerged in child custody battles.[39]

Despite these changes, nineteenth century spousal laws clearly were not based on an egalitarian model. On the contrary, as part of the ideology of separate domains, a significant portion of the partner's legal rights and obligations were defined based on gender. Accordingly, men bore the onus of financially supporting their families, and also had the right to manage the family property and decide its location.[40]

Against the backdrop of the previous gendered models, we can appreciate the drama characterizing the changes that took place in the second half of the twentieth century. In this period, as a result of the collapse of the classic family structure, a new legal commitment to equality between the sexes was

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35 *See* Hartog, *supra* note 29, at 3 ("The legal history of marriage, often imagined as the evolution from 'feudal' husband-headed households to 'modern' companionate, relatively egalitarian, marriages, is a very old scholarly chestnut"); Martha Minow, *"Forming Underneath Everything That Grows": Toward History of Family Law*, 1985 Wis. L. Rev. 819, 827-34.

36 *See* Hartog, *supra* note 29.

37 *See* Cott, *supra* note 17; *see also* Reva B. Siegel, *Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127 (1994).

38 *But see* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996).

39 Hartog, *spura* note 29, at 194-95.

40 *See* Nancy F. Cott, The Bonds of Womanhood: 'Woman's Sphere' in New England, 1780-1835, at 63-101 (1977).

born by virtue of women's entry into the workforce and the influence of the second wave of feminism.[41] A new legal model arose, committed to full equality between partners within the domain of the spousal relationship. The new model rejects rules based on gender, those aimed at strengthening the preferred status of the man, as well as those aimed at protecting the woman due to her "weakness."[42]

According to the new model, almost all of the old gender-based rules dealing with ongoing marriage were nullified. The shift to a no-fault divorce system also supported the trend towards a gender-neutral system, as in many cases the definition of fault was grounded in gender-based expectations. Perceptions of equality clearly affected the outcome of divorces, as modern law usually formulates the duty to support the family in a neutral fashion. Within child custody law, the decline of the presumptions favoring mothers and the rise of the standard promoting the best interest of the child, as well as the preference given to joint custody arrangements, also reflect the rise of the guiding principle of equality.[43]

The egalitarian approach is well illustrated by the modern vision of contracts between partners, especially prenuptial agreements. Traditionally, such agreements were not enforceable, due to the perception of the woman as being weak, irrational and dependent. Such perceptions brought about the need to protect women from indecent contractual relations. In contrast thereto, in modern law, the willingness to enforce these agreements has increased as part of the trend emphasizing equality between partners and rejecting the assumption that women are the "weaker" party in marriage.[44] Hence, modern law's view of prenuptial agreements reflects not only the modern commitment to equality, but also the modern approach to equality, which, under the clear

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41 *See* Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law (1989); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tul. L. Rev. 953, 961-82 (1991).

42 *See* Fineman, *supra* note 25.

43 *See, e.g.*, State ex Rel Watts v. Watts, 350 N.Y.S.2d 285, 289 (1973) ("The simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide"); *see also* Martha A. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 Wis. L. Rev. 789, 846-48.

44 *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) ("Society has advanced, however, to the point where women are no longer regarded as the 'weaker' party in marriage, or in society generally").

influence of the meta-narrative, minimizes the differences prevailing today between men and women.[45]

II. Time to Think: Spousal Law at a Crossroads in the Beginning of the Third Millennium

A. From Historical Narrative to Normative Theories

The meta-narrative of liberalization often gives the impression of a linear and consistent process.[46] In my opinion, however, it describes a dynamic and, as such, characterizes trends alone. Clearly, then, one can find various components within traditional spousal law that reflect a modern, private, individualistic and egalitarian approach, while many other components within modern family law actually embody a traditional (public, family-as-unit and non-egalitarian) approach. In other cases, the law expresses a compromise or a balance in the power struggle between the different approaches.

The chaotic, inconsistent nature of Western family law became evident as of the last years of the previous millennium and the first decade of the current one.[47] On the one hand, in most Western countries the "liberal" trends that bridge the gap between cohabitants and married partners and recognize various spousal patterns (such as same-sex relationships) continue. On the other hand, other countries and states are adopting laws that favor legal marriage and defend the traditional definition of marriage as an opposite-sex relationship. On the one hand, in recent years many Western countries have adopted a unilateral no-fault divorce model. On the other hand, Louisiana and other U.S. states following in Louisiana's footsteps have established a new marriage track, known as a covenant marriage, which makes the option of divorce difficult. These states have also proposed new legislation geared towards stricter divorce laws. While in many U.S. states and in England,

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45 *See* Brenda Cossman, *A Matter of Difference: Domestic Contract and Gender Equality*, 28 Osgoode Hall L.J. 303 (1990); Martha Minow, *Consider the Consequences*, 84 Mich. L. Rev. 900 (1986).

46 *See, e.g.*, Minow, *supra* note 35, at 833-34 ("[F]amily Law expressed the last remnants of status hierarchies maintained in a feudal order, but its last 150 years marked *progress* toward the *liberal* commitment to individual rights") (emphasis added); *see also* Glendon, *supra* note 4, at 76 (describing the development of marriage law in France as a "continuous liberation").

47 *See* John Dewar & Stephen Parker, *English Family Law Since World War II: From Status to Chaos*, *in* Cross Currents: Family Law and Policy in the US and England 123 (Sanford N. Katz et al. eds., 2000).

one can point to the removal of fault as a consideration in determining the economic consequences of divorce as a rising trend, in other countries, such as Germany and, to a lesser degree, Australia, a counter-reform is taking shape, which allows much stronger consideration of these factors. Moreover, even in countries in which the role of fault in divorce has weakened, a practice of tort suits between partners is emerging, allowing fault considerations to return to marriage law through the backdoor. In parallel to the adoption of the "clean-break" concept in certain countries, the commitment to this concept in other countries is weakening, as many lawmakers propose new models of long-term alimony. While the willingness to apply contractual freedom concerning agreements to the economic consequences of divorce exists, it is unclear whether it is possible to regulate the ongoing spousal relationship by means of a legally binding agreement or to enter a contract making the option of divorce more difficult than is stated by law.[48]

Therefore, as long as the liberalization narrative is viewed as a merely historical linear narrative, it will rightfully be accused of inaccuracies and overgeneralizations. Nevertheless, the liberalization narrative does far more than simply provide a historical description; it scientifically contributes to the theoretical thought process regarding spousal law by metaphorically establishing the platform on which the battle over family law is being waged. According to this metaphor, the two opposite poles described by the liberalization narrative do not precisely reflect existing legal systems, but rather symbolize concepts and principles through which two opposite normative strategies for designing spousal law can be described: one based on a coalition among the private, individualistic and egalitarian approaches; and the other based on a coalition among the public, family-as-unit and non-egalitarian approaches.

The specific issues under debate among the different approaches have considerably shifted throughout history. For instance, in the past, the battle between the private and public approaches focused on the marital capacity of interracial partners and on bigamy,[49] whereas today the focus has shifted to same-sex marriage.[50] In the past, merely allowing consensual divorce

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48 For a comprehensive description of the current trends in spousal law in the Western world, see Lifshitz, *supra* note 13, at 400-11. The current Article is based on the deeper research conducted there and on the many references cited there.

49 *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America 1 (2002).

50 *See* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501 (1997). At least in the legal scholarship, however, a new interest in polygamy has recently emerged,

was considered extremely individualistic, while today those who wish to make divorce laws stricter support models that were once considered very liberal. Nevertheless, when various aspects of family law are under debate, commonly two camps will form: one that bases its views on public interests, collective values, the importance of the family unit and its stability and the differences between men and women; and a second camp that emphasizes the private aspects of the spousal relationship, the value of contractual freedom, moral neutrality, the autonomy of the partners, their right to discontinue their relationship and gender equality.

This analysis leads from the historical positive to the normative part of the Article. In the following sections, the main theoretical streams struggling over the future regulation of spousal relationship will be analyzed. By using the theoretical categorizations suggested by the liberalization narrative, I will show how these theoretical approaches can be divided into the familiar two camps, i.e., the liberal and the conservative.

B. The Contractual Model of Marriage

1. Continued Liberalization and the Rise of the Contractual Model of Marriage

One school of thought seeks to continue and radicalize the existing modern trends, such as the removal of fault from divorce proceedings; the granting of the option of immediate no-fault unilateral divorce; the clean-break concept; the establishment of the right to marry and the right to divorce as constitutional rights; neutrality towards different types of lifestyle; and the abolishment of rules meant to protect women as the weaker spouse. The aspiration of scholars of this movement is that spousal law will completely overlap with the legal theory of the modern-liberal private, individualistic and egalitarian pole.[51]

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see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 Colum. L. Rev. 1955 (2010); *see also* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277 (2004).

51 *See* William N. Eskridge, The Case for Same-Sex Marriage (1996); David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. Mich. J.L. Reform 805 (1985); Eric M. Clive, *Family Law Reform in Scotland: Past, Present and Future*, 34 Jurid. L. Rev. 133 (1989); Ruth L. Deech, *Financial Relief: The Retreat from Precedent and Principle*, 98 Law Q. Rev. 621 (1982); John Eekelaar, *The Family Law Bill: The Politics of Family Law*, 26 Fam. L. 45, 46 (1996); Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 Wm. & Mary Bill Rts. J. 497 (2000); Henry M. Holzer, *Philosophic Assumptions of Some Contemporary Judicial Doctrines*, *in* The American Family and the State 165

Supporters of the "liberal" approach value increasing the contractual freedom within spousal relationships. Their normative arguments are founded on the sociological, ideological and legal components of the liberalization narrative.[52] *First*, they claim that private ordering, as opposed to public regulation through state law, is compatible with the modern perception of marriage as a private arrangement. *Second*, they explain why contractual regulation, emphasizing the separation between the spouses and even the rivalry between them, is compatible with the individualistic aspects dominant in modern spousal law. *Finally*, another advantage noted by the supporters of contractual regulation is its "blindness" towards gender. Going one step further, a dominant approach among family law scholars argues that modern Western law should be driven by a purely contractual vision of marriage.[53]

2. The Contract as an Alternative to Legal Marriage

Despite the dramatic changes that have occurred within Western marriage law, the perception of marriage as a legal category still remains. However, one might wonder what need there is for a legal definition of marriage in a legal world in which contractual arrangements between spouses are enforced independently of their personal status, marriage itself does not add or reduce commitments (indeed, according to the individualistic approach, general law must be applied within the context of the family), exiting a marriage is very easy and merely depends on the will of one side (a model of divorce on

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(Joseph R. Peden & Fred R. Glahe eds., 1986); Rhoda E. Howard-Hassmann, *Gay Rights and the Right to a Family: Conflicts Between Liberal and Illiberal Belief Systems*, 23 Hum. Rts. Q. 73 (2001).

52 Support for the freedom of contracts with respect to the regulation of spousal relationships through liberal arguments mentioned in this Article is also common in the legal literature, *see, e.g.*, Robert H. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 950-56 (1979); Marjore M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 Calif. L. Rev. 204 (1982); Jeffrey E. Stake, *Mandatory Planning for Divorce*, 45 Vand. L. Rev. 397 (1992); Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 Harv. J.L. & Pub. Pol'y 121 (1985); Kaylah Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. Colo. L. Rev. 1223 (1993).

53 *See, e.g.*, Witte, *supra* note 4. Ironically, the process of liberalization has moved modern spousal law in the direction of the classic pure contractual model, during a period in which contract law has been abandoning that model and taking into account public and relational aspects, while also taking into consideration the power gap between the parties to the contract. On the opposite trends of spousal law and contractual law, see Lifshitz, *supra* note 13, at 281-86.

demand), and most rights allowed to married partners are granted to those who are not legally married (bridging the gap between married partners and cohabitants). Against this background, it is not surprising that prominent scholars frequently raise doubts regarding the necessity of preserving marriage as a legal institution.[54]

Nevertheless, even if we accept the extreme measure of abolishing marriage as a legal institution, this option does not mean that the law must avoid any and all involvement in the spousal relationship, even with respect to "regular" legal rules. On the contrary, in light of the abolishment of marriage as a legal status, there is no longer any legal justification for not applying the regular laws to the spousal relationship. Clearly, then, at least within the internal relationship between the spouses, explicit or implicit contractual arrangements will be of much importance. Simply participating in a marriage ceremony and/or living together as a married couple may be interpreted as a type of contractual relationship. If so, it is actually the abolishment of the legal category of marriage that may give impetus to the approach which views the marriage ceremony and spousal life as a private contractual source for defining spousal and familial commitments.

3. The Surprising Coalition of the Radical Left and the Liberal Right

Surprisingly, the call for the abolishment of marriage as a public and legal institution unites movements of the liberal right and of the radical and critical left. On the one hand, the perception of marriage as a contract reflects the liberal, even libertarian, values of individual freedom, moral neutrality,

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54 *See, e.g.*, E.M. Clive, *Marriage: An Unnecessary Legal Concept?*, *in* Marriage and Cohabitation in Contemporary Societies 71 (John M. Eekelaar & Stanford N. Katz eds., 1980); Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 Cardozo L. Rev. 1221 (2006); Elizabeth Emnes, *Regulatory Fictions: On Marriage and Countermarriage*, 99 Calif. L. Rev. 235 (2011); Brenda Hoggett, *Ends and Means: The Utility of Marriage as a Legal Institution*, *in* Marriage and Cohabitation in Contemporary Societies, *supra*, at 94; Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 Cardozo L. Rev. 1161 (2006). *But cf.* Cynthia G. Bowman, Unmarried Couples, Law, and Public Policy (2010) (calling for a narrowing of the legal gap between marriage and cohabitation); Mary A. Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758 (2005) (opposing favoring marriage in accordance with the private neutral approach, but also opposing the nullification of marriage as a legal institution and proposing a theory that perceives marriage as a public license that is necessary for procedural reasons); Elizabeth S. Scott, *World Without Marriage*, 41 Fam. L.Q. 537 (2007) (proposing domestic partnership as a substitute for marriage).

individualization of the family, equality (identical treatment of men and women), etc. On the other hand, certain movements on the left such as the Marxist and the Critical Legal Studies (CLS) movements that oppose the conservation of the social structure, and feminist movements that view marriage as an oppressive institution, have joined the call for the abolition of marriage as a legal institution.

Moreover, my analysis reveals that the alternative to legal marriage is not its replacement by a less formal institution like cohabitation, but rather the regulation of the spousal relationship on the basis of regular law, especially contract law. Similarly, Martha Fineman presents the arguments for the need to abolish marriage as a legal institution in her treatise *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*,[55] which is often considered to be a groundbreaking exposition of the radical movement within spousal law. She clarifies that her intention is not to apply marital law to cohabitants, but rather to completely nullify all special legal regulation of spousal relationships. In later writings, Fineman admits that even after the abolishment of marriage as a legal institution, the law will not be able to ignore spousal interactions. Therefore, she suggests that these interactions be regulated through regular branches of law, primarily contract law.[56]

Nevertheless, the coalition between the liberal-contractual model and the "radical" call for the abolishment of marriage seems to be merely a temporary one focused on spousal law. The dramatic differences in perspective between the two camps become evident when it comes to discussing possible alternatives to the institution of marriage and the legal regulation of spousal relations in general. According to the liberal-contractual model, the perception of marriage as a contract is not an intermediate stage towards future reforms, but rather a goal to be achieved through the process of liberalization. In "radical thought," the shattering of traditional family laws built around "standard" family structures is not a goal, but rather a means towards constructing an alternative legal system.

The alternative legal system suggested by this movement is based on moving the center of gravity of family law regulation from governing spousal relationships to governing parent-child relationships. One suggestion voiced by the radical movement is to significantly increase the economic obligations of the non-custodial parent towards his/her children, regardless of the parents'

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55 Martha A. Fineman, The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies 5-6 (1995); *see also* Nancy D. Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law (2008).

56 *See* Martha L. Fineman, *Contract Marriage and Background Rules*, *in* Analyzing Law: New Essays in Legal Theory 183 (Brian Bix ed., 1998).

spousal relationship. June Carbone describes this suggestion as a process in which the spousal relationship evolves "from partners to parents."[57] In addition, children and their caretakers should be recognized by society as its main unit deserving of public support.

To sum up, the liberal-contractual camp seeks to continue the modern reforms based on the coalition between the private, individualist and egalitarian approaches and to redesign marriage as contract. I demonstrate that, surprisingly, left radical and right libertarian approaches converge within this contractual vision of marriage.

C. The Conservative-Communitarian Camp: The Counter-Revolution and the Traditional Pole

1. Criticism of Modern Reforms

Since the 1990s, many components of spousal law reform have been attacked. The criticism of modern reforms is multifold. I will describe three major aspects thereof: (i) institutional criticism blaming the modern reforms for the ruin of the institution of marriage; (ii) criticism focused on gender; and (iii) criticism regarding the welfare of the child. At the outset, it is important to emphasize the fact that counterarguments have been raised against many of these criticisms. Elsewhere I analyze the normative arguments of both sides regarding proper divorce laws and suggest possible solutions to the relevant issues.[58] Nevertheless, this Section does not focus on concrete suggestions, but rather on the way in which the criticisms have influenced the discourse of spousal law, especially the attitude towards the liberalization narrative and the contractual model of marriage. Therefore, I will focus on the nature of the arguments, less so on evaluating their accuracy.

One type of criticism is *institutional criticism*. The sharp rise in the divorce rate that occurred during the second half of the twentieth century constitutes the backdrop to this criticism. Critics of the modern reforms tend to attribute part of the responsibility for the rise in the divorce rate to the changes in spousal law, especially to the modern option of initiating a unilateral no-fault divorce. They point out at least two reasons why these changes could seemingly have affected the divorce rate. One is to the decrease in the *financial*

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57 June Carbone, From Partners to Parents: The Second Revolution in Family Law (2000).

58 *See* Shahar Lifshitz, *I Want to Get Divorced Now! On the Civil Regulation of Divorce*, 28 Iyuney Mishpat [Tel-Aviv U. L. Rev.] 671 (2005) (Isr.).

and legal costs of divorce proceedings.[59] The other is the expressive message of no-fault divorce laws, which provides fertile ground for the rise in the divorce rate.[60] Other types of institutional criticism focus on the drop in the marriage rate and the rise in the number of children born out of wedlock. The critics blame legal reforms that recognize rights of cohabitants and weaken the traditional privileges granted to traditional spouses for the instrumental as well as the long-term social damage that marriage has suffered.[61]

A second type of criticism is gender-based and blames the modern reforms for creating financial distress for women as a result of divorce. The well-known research of Lenore Weitzman is identified with such criticism.[62] In her study, Weitzman analyzed the economic consequences of divorce on men and women. According to her, women experience a drop of seventy-three percent

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59 *See* Margaret F. Brinig & Frank H. Buckley, *No-Fault Laws and At-Fault People,* 18 Int'l Rev. L. & Econ. 325 (1998); Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. Legal Stud. 869 (1994); Eric Rasmusen & Jeffery E. Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453 (1998); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990). *But see* Ira M. Ellman & Sharon L. Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. Ill. L. Rev. 719 (denying the linkage between divorce law and the divorce rate). Regarding this debate, see also Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 Harv. J.L. & Pub. Pol'y 241 (1993).

60 *See* William A. Galston, Divorce American Style, Public Interest 124 (1996); Barbara D. Whitehead, The Divorce Culture: Rethinking Our Commitments to Marriage and Family (1997); Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992). *But cf.* John Eekelaar, *Evaluating Legal Regulation of Family Behaviour*, 1 Int'l J. Juris. Fam. 17 (2011) (suspicious toward the expressive function of the law).

61 *See, e.g.*, Maggie Gallagher, The Case for Marriage: Why Married People Are Happier, Healthier and Better off Financially (2000); Amy L. Wax, *The Two Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 Mich. J. Race & L. 491 (1996). *But cf.* Eekelaar, *supra* note 60, at 26-30. For the complex relationship between cohabitation and marriage law and marriage rate, see also Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 Fam. L.Q. 491 (2007); Kathleen Kiernan, A. Barlow & R. Merlo, *Cohabitation Law Reform and Its Impact on Marriage: Evidence from Australia and Europe*, 63 J. Int'l Fam. L. 71 (2007).

62 Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1987).

in their lifestyle, while men's lifestyle rises by forty-two percent.[63] Part of the criticism is directed towards the laws that regulate the economic outcomes of divorce. With respect to alimony, it has been argued that this policy ignores a large population of women who live according to the household model in which the husband is the primary provider and the wife stays at home or works part-time. The criticism regarding property division is related to the considerable differences between men and women in earnings, work hours, and the allocation of work-related and domestic tasks, as a result of which a large gap is created throughout the marriage between the career opportunities amassed by men and those amassed by women. Nevertheless, most modern laws ignore a variety of properties known as "career assets," among them licenses, degrees, work tenure, personal reputation and earning capacity in its abstract meaning. The fact that these properties are not divided is severely damaging to women.[64]

Additional criticism is aimed at the transition to a model of unilateral no-fault divorce. In a fault-based system, assuming the party not initializing the divorce proceeding is not "at fault," it is not possible to attain a unilateral divorce. Therefore, in this type of system, cooperation between both spouses is necessary to attain a divorce. In contrast thereto, in the modern system, characterized by no-fault divorce, one side can attain a unilateral divorce without proving fault and without the cooperation of his or her partner. An economic analysis comparing the two systems reveals that a divorce model based on fault is considerably more beneficial towards the "innocent" partner who refuses to divorce.[65] This type of model grants the refusing partner the right to "veto" the divorce, thereby forcing the partner interested in the divorce to buy his or her consent. By contrast, a no-fault divorce model is beneficial

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63 Harsh criticism has been raised in later research with respect to Weitzman's research methods, specific results of her study and some of her statistical analyses. Nevertheless, despite these reservations, the phenomenon of women's financial distress following divorce, as well as the existence of a considerable gap between men and women in this regard, are not controversial. *See, e.g.*, Allen M. Parkman, No Fault Divorce: What Went Wrong? 83-87 (1992).

64 *See* Fineman, *supra* note 25; Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, *in* Divorce Reform at the Crossroads 75 (Stephen D. Sugarman & Herma H. Kay eds., 1990); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351 (1987); Minow, *supra* note 45; Jana B. Singer, *Husbands, Wives and Human Capital: Why the Shoe Won't Fit*, 31 Fam. L.Q. 119 (1997).

65 *See* Elizabeth H. Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 Am. Econ. Rev. 437 (1986).

towards the partner who wishes to divorce, who does not have to buy the other side's cooperation. Critics of divorce law contend that women who invest their energy in household work and, consequently, do not develop financial earning capacity represent a prototype of the "innocent" partner opposing divorce. The right of opposition, granted to them by earlier divorce laws, acted as a mechanism for financial compensation in the case of divorce. This compensation has been abolished in existing divorce law. Therefore, the counter-reformers seek to make it more difficult to initiate a unilateral no-fault divorce.[66]

Another damaging aspect of the modern reforms is the expansion of the contractual regulation of spousal relationships. Despite ostensible legal equality, there are still gaps between men and women with regard to wages, professional experience and negotiation patterns. These differences are exacerbated with the expansion of contractual freedom between men and women, ultimately increasing men's power and enabling them to attain better prenuptial and divorce agreements than is allowed by law.[67] In a slightly different context, it has been argued that the trend towards equality within custody law (the weakening of the maternal preference) and the rise of joint custody have also hurt women, who have actually continued to play the role of the custodial parent, but whose power of negotiation has weakened, as they have been exposed to the threat of their husbands suing for custody unless they agree to reduced child support.[68]

A third criticism of the modern reforms relates to claims regarding long-term damage caused to children of divorced parents and to children growing up in single-parent homes.[69] It has been found that children who grow up in families that have gone through a divorce are more prone to experiencing emotional distress, learning difficulties, and early pregnancy, and at a later stage are more likely to be unemployed, drop out of school, commit juvenile crimes and suffer from relationship issues. Moreover, some critics of modern divorce law have challenged the hypothesis that the cause of the children's

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66 *See* Parkman, *supra* note 63.

67 *See* Martha J. Bailley, *Pelech, Canon and Richardson*, 3 Can. J. Women & L. 615 (1989-1990); Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229, 248 (1994); Neave, *supra* note 12.

68 On the dynamic of custody negotiations, see Carbone, *supra* note 10, at 191; Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 Calif. L. Rev. 615, 643-56 (1992).

69 *See* Sara McLanahan & Gary Sandefur, Growing Up with a Single Parent: What Hurts, What Helps 142 (1994); Judith S. Wallerstein & Joan B. Kelly, Surviving The Breakup: How Children and Parents Cope with Divorce 10 (1980).

distress in the case of divorce is not the divorce itself, but rather relates to the conflicts that preceded the divorce. In order to do so, they present recent psychological studies that have used sophisticated statistical tools to isolate the effects of the various components of divorce. According to these studies, at least some of the problems experienced by children of divorced parents are attributed to the divorce itself and not to the related processes.[70] The counter-reformers use these findings as a basis for demanding stricter divorce laws in order to protect the welfare of children.[71] In a different context, based on updated studies revealing the difficult reality encountered by children and mothers living in unconventional family patterns (mainly single-parent homes),[72] legal changes that weaken the status of the legal institution of marriage and increase the legitimacy of alternative family patterns, such as cohabitation without marriage, same-sex partnerships and single-parent families, have been challenged.[73]

2. The Call for a Counter-Reform

Based on the above criticisms, towards the end of the twentieth century a new school of thought developed, which is calling for a counter-reform.[74] On a *doctrinarian* level, adherents of this school usually support the traditional definition of marriage, while avidly opposing any attempt to recognize same-

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70 *See* Paul R. Amato & Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval (1997); Robert E. Emery, Marriage Divorce and Children's Adjustment (1988); Paul R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses and Empirical Support*, 55 J. Marriage & Fam. 23 (1993).

71 *See* Katherine S. Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 Notre Dame L. Rev. 1547 (1998). *But Cf.* Scott, *supra* note 59 (suggesting a milder version of the argument).

72 *See* McLanahan & Sandefur, *supra* note 69.

73 *See, e.g.*, William A. Galston, *A Liberal Democratic Case for the Two-Parent Family*, 1 Responsive Community 14 (1990-1991).

74 For research projects that analyze various countries in the Western world (such as France, Canada and the United States), describe anti-modern reactions to the changes occurring within the family, and call for the return of values that are associated with traditional family patterns, see David Cheal, Family and the State of Theory 41 (1991); *see also* Wilfried Dumon, *The Uncertainties of Policy with Regard to the Family*, *in* The European Family: The Family Question in the European Community, *supra* note 19, at 61, 66; Jane Lewis, *Family Policy in the Post-War Period*, *in* Cross Currents: Family Law and Policy in the US and England, *supra* note 47, at 81, 91-96.

sex marriage.[75] According to the counter-reformers, a family that has a stable heterosexual marriage at its core represents the most appropriate framework for raising children. Therefore, they recommend extensive reforms within spousal law aimed at strengthening the institution of marriage[76] and drawing a distinction between legal marriage and other lifestyles such as single-parent families and cohabiting partners.[77] The counter-reformers also argue for stricter divorce laws.[78]

In contrast to the modern ideology of neutrality, counter-reformers speak of the need to base spousal laws on principles of "collective moral" values. Hence they also seek to strengthen the role of fault in determining the economic consequences of divorce.[79] This school of thought contends that new life has to be instilled into the traditional pole so it can be used as an infrastructure for designing an alternative to the existing system. Accordingly, in contrast to the modern approach towards marriage, which perceives it as a private arrangement between separate individuals, a theoretical approach has emerged that seeks to design spousal law according to public interests and values. Attempts are being made to replace the individualistic ethos that has characterized the modern approach towards spousal law with a "familial" or a "unit" ethos.[80]

In society at large, the inclination to return to the traditional family is often linked with criticism of the modern commitment to equality and a desire to

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75 *See* George W. Dent, *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999). For the influence of these arguments on the decisions rendered by courts in England and the European Union, which confirmed the statute that does not recognize same-sex marriages, see John Eekelaar, *Why People Marry: The Many Faces of an Institution*, 41 Fam. L.Q. 413, 424-26 (2007-2008).

76 *See* Bruce C. Hafen, *The Constitutional Status of Marriage Kinship and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983); *see also* William Galston, Liberal Purpose: Goods, Virtues, and Diversity in the Liberal State 285 (1991).

77 *See* Stephen L. Carter, *"Defending" Marriage: A Modest Proposal*, 41 How. L.J. 215 (1998); Wardle, *supra* note 6.

78 *See* Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 Stan. L. Rev. 607 (1997).

79 *See* Scott T. FitzGibbon, *A City Without Duty, Fault or Shame*, *in* Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution 28 (Robin Fretwell Wilson ed., 2006); Peter N. Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 Fam. L.Q. 269 (1997).

80 *See, e.g.*, Milton C. Regan, Family Law and the Pursuit of Intimacy (1993); Hafen, *supra* note 25; Bruce C. Hafen, *The Family as an Entity*, 22 U.C. Davis L. Rev. 865 (1989).

return to models based on strict gender roles.[81] In academic research, however, supporters of the counter-revolution usually do not support replacing the equality approach with the classic inequality approach. Finally, the counter-reformists reject the *contractual* model of marriage and support a return to an "improved" *status* model. In other instances, such as with the new rules in Louisiana and other states within the United States, there has been an attempt to restore the Calvinist approach, which views marriage as a holy covenant between the partners and society.[82]

To sum up, while the supporters of modern reforms are inspired by the liberal (private, individualist and egalitarian) approaches, the counter-reformers seek to revive the conservative approaches (public, family-as-unit at times, at least in non-academic literature, even the non-egalitarian). Yet, despite the dramatic differences between them, both sides are well integrated within the intellectual framework that the liberalization meta-narrative has established.

D. The Economic Approach: Liberal-Egalitarian Amendments Concerning the Economic Results of the Modern Reforms

In-between the opposite extremes of modern reformers and counter-reformers, a new conception of family law has developed in recent years. In many contexts, this movement adopts the guiding principles of the *liberal-contractual model*, such as the perception of marriage as a private arrangement of a quasi-commercial nature between two separate individuals; the legitimacy of the individual's choice of lifestyle that best serves him or her, and as a result a refusal to condemn alternative family patterns to marriage; avoidance of imposing collective moral values on couples; a refusal to acknowledge the collective importance of the institution of marriage; a refusal to view divorce as a social evil; and objection to rules that reflect "sexist" assumptions. Accordingly, this movement supports a variety of doctrines at the heart of the modern reforms: the movement towards a unilateral no-fault divorce, avoidance of fault considerations when determining the financial relationship

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81 *See* Allan D. Bloom, The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students (1987).

82 *See* Regan, *supra* note 80; Margaret Brinig & Steven Hock, *Covenant and Contract*, 12 Regent U. L. Rev. 9 (1999-2000); Michele B. Brooks, *The Biblical View of Marriage: Covenant Relationship*, 12 Regent U. L. Rev. 125 (1999-2000); Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. Mem. L. Rev. 397 (1999).

between the divorcing partners, a commitment to contractual freedom, and bridging the legal gap between married partners and cohabitants.

This movement has been devoting most of its effort to the advancement of amendments concerning the economic outcomes of divorce, although some specific changes have been suggested within the realm of custody law as well. The underlying notion is that the combination of a "rigid" obligation to an "equal" division of property (a division in which each side receives half of the property) and a financial disconnection between the partners following divorce is problematic for the "domestic" partners, mostly women.[83]

Therefore, specific formulas have been suggested with the goal of designing a new "package deal" regarding the economic outcome of divorce. Some of the suggestions are focused on property laws and expand upon the court's ability to deviate from an equal division of property and to consider the different needs of each partner and the gaps in their earning capacity. Another type of suggestion aims at expanding the definition of "marital property," so as to include earning capacity and human capital.[84] Suggestions regarding maintenance laws wish to pull back from the individualistic clean-break concept and renew, in some form, the obligation (or even the economic partnership) between partners following a divorce.[85] These proposals are typically based on analogies between marriage and commercial institutions

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83 *See* Herma H. Kay, *Beyond No Fault: New Directions in Divorce Reform*, *in* Divorce Reform at the Crossroads, *supra* note 64, at 6, 11; Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* Divorce Reform at the Crossroads, *supra* note 64, at 191; Singer, *supra* note 64.

84 *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75, 101, 107-20 (2004); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. Kan. L. Rev. 379 (1980); Erik V. Wicks, *Professional Degree Divorces: Of Equity Positions, Equitable Distributions, and Clean Breaks*, 45 Wayne L. Rev. 1975 (2000).

85 *See* June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 Hous. L. Rev. 359 (1994); Ira M. Ellman, *The Theory of Alimony*, 77 Calif. L. Rev. 1 (1989); Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. Toronto L.J. 533 (1991).

like partnership[86] or insurance.[87] Along a somewhat different line, based on economic analysis of the relationship between the spouses, Ira Ellman proposes replacing the concept of alimony with a new mechanism of compensation for loss of career.[88] In addition thereto, those supporting these approaches have suggested a mechanism aimed at protecting the weaker parties of the family unit from unsupervised contractual freedom.[89]

Nevertheless, even as this movement has been putting forward suggestions for new legal reforms that deviate in practice from the liberal-contractual model, its scholars have remained committed to the modern theoretical approaches (private, individualist and egalitarian). Thus most of these theories assume that the classic justifications for alimony, such as the "needs of the weak partner" and the breach of marital contract by the partner at-fault, are no longer relevant in a world committed to divorce on demand. Similarly, they do not accept the approach that dismantling marriage, even in the case of a unilateral initiative, is a breach granting a right of compensation,[90] and avoid any moral judgment of the partners' behavior, deeming the passing of such judgment a doubtful exercise.[91] Like the classical liberal theory of contract, the economic approach focuses on the interests of the involved parties, not those of the general public, and views both partners as individuals whose main goal in marriage is to increase their personal benefit.

Like the liberal-contractual approach, the economic approach is committed to equality as the leading principle of spousal law, and it usually formulates gender-neutral rules. Nevertheless, in the spirit of what is known as the "feminism of differences," a school of thought is emerging according to which, based on the existing differences between men and women, there is

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86 *See* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67 (1993) (claiming that just as a partnership's royalties are divided among the partners following the dismantling of the partnership, so, too, the earnings produced in the years following divorce should be divided between the partners).

87 *See* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998) (proposing an insurance model of alimony law that justifies the responsibility of a provider to ensure at least a minimum standard of life to the ex-domestic partner).

88 Ellman, *supra* note 85.

89 *See, e.g.*, Trebilcock & Keshvani, *supra* note 85; *see also* Brian Bix, *Private Ordering and Family Law*, 23 J. Am. Acad. Matrim. Law. 249 (2010).

90 *See* Ellman & Lohr, *supra* note 59.

91 *See* Ira M. Ellman, *The Place of Fault in a Modern Divorce Law*, 28 Ariz. St. L.J. 773 (1996).

room for considering a withdrawal from equality construed as strict sameness as a guiding principle within spousal law.[92]

Finally, the economic approach makes use of commercial and, to a certain degree, contractual metaphors. In doing so, it joins a very common genre of writing that measures marital laws through economic, commercial and contractual criteria in the spirit of the private and individualistic approaches.[93]

I mentioned earlier that some countries have accepted sporadic reforms in the spirit of the economic movement, such as the renewal of alimony and the view of earning capacity as a divisible asset. However, the most coherent attempt yet to formulate reforms regarding the financial outcomes of divorce seems to have been made by the American Law Institution (ALI) under the guidance of the Reporters Ira Ellman and Katharine Bartlett.[94] The ALI's suggestions do not specifically relate to marriage and divorce laws. However, the explanatory section of the ALI's report and the academic writing of its reporters clearly show that they support the movement towards the no-fault divorce model and the expansion of the right to marry.

Regarding the economic outcomes of divorce, the ALI wishes to expand the trend of weakening the effect of fault considerations. In the context of property rules of marriage, the ALI's suggestions demonstrate a deep commitment to a complete partnership between spouses. In addition, in the spirit of Ellman's suggestions, the ALI proposes a detailed model of alimony following divorce based on the need to compensate the domestic partner for career losses sustained throughout marriage. Within the contractual domain,

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92 *See* Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (1990); Mary Becker, *Marital Feelings: Myth, Taboo, and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 133 (1992); Robin L. West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988).

93 For the use of the partnership metaphor for marriage within the economic approach, see Case, *supra* note 54; Sanford N. Katz, *Marriage as Partnership*, 73 Notre Dame L. Rev. 1251 (1998); *see also* Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 Ga. L. Rev. 349 (2007) (exploring "a domestic partnership model based on business partnership law as a vehicle to better serve modern couples and their families in private relationship ordering"). For other models that commercialize the marital relationship, see Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 Tex. L. Rev. 17, 21 (1998). *But cf.* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65 (1998) (objecting to the commercialization of marriage).

94 *See* American Law Institute (ALI), Principle of the Law of Family Dissolution, Analysis and Recommendations (2002).

the ALI accepts the principle motive of the modern reforms, i.e., the expansion of contractual freedom within the spousal domain. In contrast, however, to the original modern-liberal reformers, the ALI proposals are accompanied by procedural and substantive legal rules intended to ensure that this contractual freedom will not harm women. A dramatic innovation of the ALI is the almost absolute comparison drawn between the economic obligation between spouses and between cohabitants.

Within the realm of child custody, the ALI adopts the egalitarian "gender-blind" model. However, in order to prevent blackmail harmful to women, they propose replacing both the traditional maternal preference and the modern abstract "best interest of the child" criterion with a list of criteria and presumptions regarding the best interests of children, granting an advantage in custody battles to the parent who was primarily responsible for the child prior to divorce and, consequently, reducing the potential for manipulative threats in demand of custody.[95]

To summarize, like the original reformers and the supporters of the contractual model, the economic approach accepts the private, individualistic and even egalitarian approaches as the basis for spousal law. Its primary concern is with repairing distortions in fairness that have resulted from the modern reforms, rather than providing an alternative to the liberal contractual theory of spousal law. Our analysis reveals, therefore, that in modern thought, as in the past, the battle over spousal laws is being fought between the liberal and the conservative camps. The approaches near the liberal pole are interrelated and identified with the contractual vision of marriage, while the conservative approaches are interrelated and identified with the view of marriage as a status or covenant. Taking into account the adherence of the existing approaches to the theoretical framework of the liberalization narrative, in the next Part I will show that it is necessary to break out of this framework and develop a new mode of thought.

III. Towards a New Theory

This Part critiques the existing thought patterns and suggests foundations for a new alternative. Towards that end, it analyzes the three dichotomies that stand at the center of the traditionalist-liberal struggle: private/public, individualist/family-as-unit, and egalitarian/non-egalitarian. The discussion will expose basic malfunctions inherent in both the liberal and traditional

95 The ALI custody standard is based on the approximation standard proposed by Scott, *supra* note 68.

alternatives. Along with the abstract analysis of the liberal and the traditional poles, I will criticize the current concrete approaches regarding spousal law — the liberal-contractual, the radical, the economic, and the conservative-communitarian counter-reforms — and conclude that none of the existing approaches constitutes a proper basis for the general regulation of spousal law. My discussion, therefore, will clarify the need for an additional theory that shatters the existing dichotomies while exploring new connections.

A. The Private-Public Axis: Towards a Public, Dynamic and Pluralistic Regulation

1. The Role of Children Within Spousal Law

At the heart of the private approach lies the perception of the spousal relationship as a private matter between the couple. However, it ignores the fact that the private arrangement between the partners affects the lives of the couple's children. This raises the issue of externalism, as legal arrangements take into account the interests of the couple while ignoring those of the children. The attempt to sharply distinguish between spousal law — to be regulated through a private-contractual prism — and parent-child law focused on the public responsibility for the "best interest of the child" is problematic, as certain domains, such as divorce law and marriage law, as well as the economic relationship between spouses, have dramatic consequences for the children's lives.

Consider, for example, *divorce* law, which is currently classified within the core of spousal law. In the psychological research there is an ongoing debate regarding the extent to which preventing or delaying a divorce in the case of extreme conflict between spouses positively affects the children.[96] Nevertheless, although the debate remains unresolved, research clarifies that a divorce is a complex psychological process with considerable consequences for children.[97] Therefore, even those who do not think that a policy making it more difficult to attain a divorce will improve the welfare of children, might still agree that the process of divorce should be designed to take into account the effects of divorce on children. Such a design may include the requirement that a family court receive a review from a professional (psychologist or

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96 *See supra* notes 69-71 and accompanying text.

97 *See* McLanahan & Sandefur, *supra* note 69; A.J. Cherlin, F.F. Furstenberg, D.R. Morrison & P.K. Robins, *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United states*, 252 Sci. 1386 (1991) (both attempting to develop a model that examines and maps the complex effects of divorce on children).

social worker) regarding the expected effects of divorce on the children. It may be necessary to set different default rules for divorce proceedings involving children and those that do not. Certainly, a perspective focused on children may allow the family court to delay or accelerate the divorce proceedings, as appropriate, in consideration of the children's wellbeing. The liberal-contractual model, which views divorce as a completely private arrangement between partners, constitutes shaky ground for these types of considerations.[98]

The economic relations within the family also exemplify the difficulty in separating the spousal relationship from the parent-child relationship. Under the influence of the liberal approaches, Western legal systems distinguish between the economic relationship of the partners (subject to marital property law and featuring such mechanisms as alimony), on the one hand, and the economic responsibility towards the children on the other hand. In accordance with this distinction, there has been an attempt to found the economic relationship between partners on the individualist ethos of the "clean break" concept, while simultaneously maintaining the economic commitment of the non-custodial parent towards his or her children.

Similarly, liberal Western legal systems distinguish between contracts regulating the spousal relationship (indicating an expansion of contractual freedom) and contracts regulating alimony and child custody (where contractual freedom is reduced and court supervision is increased). However this distinction is merely artificial, as the economic situation of the children is clearly affected by the general economic situation of the custodial parent, and not only by the amount of child support received.[99] For example, a divorce agreement that dispossesses the custodial parent of the family property and leaves him or her without anything will damage the welfare of the children in the custody of that parent. Similarly, a decision to sell the couple's apartment has a dramatic effect on a child who, besides the divorce proceedings, must undergo the additional trauma of moving to a new home, which may involve having to transfer schools as well.[100] Disconnecting spousal law from parent-child law is, therefore, theoretically problematic and practically nearly impossible. A proper theory of spousal law has to deviate from the private

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98 *See* Scott, *supra* note 59; *see also* Shahar Lifshitz, *The Best Interest of the Child and Spousal Laws*, *in* The Case for the Child: Towards a New Agenda 45 (Ya'ir Ronen & Charles W. Greenbaum eds., 2008).

99 *See* Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 Theoretical Inquiries L. 179 (2012).

100 *See* McLanahan & Sandefur, *supra* note 69.

approach and subordinate spousal law to considerations of the children's "best interests."[101]

The desire of counter-reformers to make divorce laws stricter, fight alternative family patterns and return to the traditional regulation of the family is often supported by considerations of the children's welfare.[102] Yet, I disagree with the traditional camp's use of the "children" argument. First, according to my analysis, child considerations do not require a drastic constriction of divorce law, as do the counter-reform and the traditional models. On the contrary, research on the consequences of divorce for children reveals a complex picture, confirming that in certain cases divorce does damage children, but also demonstrating that in other cases a swift divorce may ease the children's distress. Certainly, a return to a fault-based system, focused on the spousal behavior of the parties, cannot be expected to contribute to focusing the divorce proceedings on the wellbeing of the children. Second, in light of studies establishing marriage as a positive framework for raising children, the counter-reform seeks to strengthen traditional marriage, but refuses to acknowledge the rights of cohabitants and the benefits of single-parent families. In contrast thereto, there is still tension between the desire to channel, *ex ante*, children into participating in a relationship that is beneficial to them, and the need to support, *ex post*, children "as they are." Therefore, considerations of the "best interests of the children" require support of alternative families as well.[103]

The role of children within spousal law demonstrates a typical pattern among the existing philosophies in this field. The liberal approaches view the spousal relationship as a private matter and therefore ignore the consequences of this relationship, as such, on other factors in society (the children in this case). The traditional approaches view the children as an issue rendering spousal law a public matter. However, their use of considerations of the

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101 In contrast to the legal systems that separate spousal property law from parent-child law, English law allows considerations for the best interest of the children to be taken into account within spousal property law, *see* Matrimonial Causes Act, 1973, c. 18, § 25 (Eng.) (amended by Matrimonial and Family Proceeding Act, 1984, c. 42 (Eng.)); *see also* Lenore J. Weitzman, *Marital Property: Its Transformation and Division in the United States*, *in* The Economic Consequences of Divorce: The International Perspective 85, 101-05 (Lenore J. Weitzman & Mavis Maclean eds., 1992). For a more moderate approach in California that gives the right to reside in the family's residence to the custodial parent, see Kay, *supra* note 83, at 21-22.

102 *See supra* notes 69-73 and accompanying text.

103 *See* Eekelaar, *supra* note 60; Ira Ellman, *Marital Roles and Declining Marriage Rates*, 41 Fam. L.Q. 455 (2007).

children's welfare is too narrow and wrongly identifies the public good with traditional regulation, whereas "considerations of the children's welfare" may lead to other conclusions. These matters demonstrate the need for a new theory that will view the wellbeing of the child, in its broad meaning, as a guiding principle of spousal law.

2. The Public Results of Private Life

The children-based analysis represents a central part of a broader criticism of the private approach, which underscores the fact that the family performs important social functions even in the modern world and spousal relationships may have broad social implications beyond the consequences for those directly involved. Yet the private approaches focus strictly on the involved parties and do not take broader consequences into account. For instance, legal arrangements diminishing the economic responsibility between family members may expand public support of weak family members. This, of course, has economic consequences for society at large, which the private approach fails to consider. In another context, the private approach's demand that all legal distinctions between marriage and alternative family patterns be abolished does not coincide with the economic and behavioral analyses that show that, from a utilitarian perspective, society at large gains from spousal relationships being regulated within the formal framework of marriage.[104]

Even leaving aside the concrete public effects of any given legal arrangement, the mere presentation of marriage as a private matter between the involved parties is insensitive to the meaning of marriage as a *social institution* and to the important role of law and society in the design of such an institution. Social institutions are essential in any society, for they grant human beings a tool for managing their identity, status and relationships with other human beings.[105] In the spousal context, the existence of the social institution of marriage grants tangible meaning to the decision to marry, to the marriage

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104 For psychological, economic and social analyses that demonstrate the advantages of the institution of marriage over other family patterns, see, for example, William Bishop, *'Is He Married?': Marriage as Information*, 34 U. Toronto L.J. 245 (1984); David D. Haddock & David D. Polsby, *Family as a Rational Classification*, 74 Wash. U. L.Q. 15 (1996); Russel. D. Murphy, Jr., *A Good Man Is Hard to Find; Marriage as an Institution*, 47 J. Econ. Behav. Org. 27 (2002); Wax, *supra* note 61.

105 *See* Peter L. Berger & Thomas Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (1966); Clifford Geertz, The Interpretation of Cultures (1973). In the legal context, see Eric A. Posner, Law and Social Norms (2000).

ceremony, to being married, to one's expectations from one's partner, and to one's role as husband or wife.[106] In many ways, the desire to enjoy these social norms, legal and non-legal, is what induces couples to marry.[107]

The role of marriage as a social institution requires us to consider the social impact of the legal regulation of marriage, in addition to private considerations. This may clash with the desire of couples to receive public recognition of their spousal relationship, while seeking to make unique arrangements through the institution of marriage.[108] Consider a couple interested in marriage, but seeking to stipulate in an agreement that the relationship will automatically expire in a number of years; or consider a couple seeking to marry, but not yet ready for a mutual economic commitment. A "private" mode of thought would accept this type of contractual arrangement (on the premise that it reflects the desires of both parties). According to the private approach, such arrangements concern only the parties to the relationship and there is no justification for public criticism. Yet this approach fails to internalize that public acknowledgment of such use of the marriage institution will affect not only the concerned couple, but also the way in which the institution of marriage is perceived by the public thereafter. This issue requires those who shape the law to examine not only the interests and desires of the concerned couple, but also the social meaning that society wishes to attribute to marriage. Similarly, recognition of same-sex marriages may affect not only the concerned couple, but also the collective social understanding of the meaning of marriage.[109] Therefore, public responsibility towards the social institution of marriage makes it necessary to examine whether same-sex marriages have a positive or a damaging influence on the public at large. This type of examination involves public considerations that are not taken into account by the private-neutral approaches.

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106 *See* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901 (2000).

107 *But cf.* Eekelaar, *supra* note 75 (demonstrating a complex picture regarding the decision to get married).

108 *Cf.* 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, 158-59 (1998).

109 *See* Mary Anne Case, *Why Evangelical Protestants Are Right When They Claim That State Recognition of Same-Sex Marriage Threatens Their Marriages and What the Law Should Do About It*, *in* Sacred/Secular Divide: The Legal Story (Winnifred Fallers Sullivan ed., forthcoming 2011).

3. The Rigidity of the Traditional Approaches and the Need for a Dynamic Public Approach

In the current legal discourse, the use of public rhetoric serves the traditional camp's argument against the recognition of same-sex marriage. In my view, however, it is a mistake to assume that the public nature of marriage necessitates non-recognition of same-sex marriages. On the contrary, one can think of a number of public considerations in favor of officially recognizing same-sex relationships, such as a desire to provide an appropriate framework for raising children within this type of family unit, a desire to allow same-sex couples an economically stable framework for managing an intimate relationship, and a desire to moderate the gender-related implications and patriarchic practices still identified with marriage and, in doing so, to redesign marriage as an egalitarian institution.[110] I merely wish to emphasize that the discussion regarding the recognition of same-sex couples must reference not only individual rights, but also the social meaning of so-called private arrangements and the manner in which recognition of same-sex relationships could affect the public institution of marriage.

The discussion of same-sex relationships is connected to a broader issue: the dynamic state of social norms, social institutions and culture. This dynamism is a welcome phenomenon, as it allows existing social institutions to constantly evolve and improve. In my view, therefore, a conservative approach cannot serve as a replacement for a private one, as it views deviation from the historical and social definition of marriage as problematic. On the contrary, specifically because marriage serves as a social "brand," so to speak, there is a clear public interest in preserving its relevance by updating it. Neither the private approaches, focused solely on arguments of individual rights, nor the public approaches, sanctifying the existing social institutions, rise to the challenge.

4. Social Institutions, Pluralism and Spousal Law as a Menu

The existing versions of the public approach are associated with a monolithic paradigm, which seeks to channel the spousal relationship into the institution of marriage, to attribute to it a uniform meaning, and to enter into confrontation with alternative lifestyles.[111] In contrast thereto, the private approach is usually guided by the neutral liberal ethos. It opposes any guidance by the state regarding any particular perception of the "good life."

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110 *See* Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. Rev. 1199 (2010).

111 *See* McClain, *supra* note 20.

Not persuaded by either approach, in a recent article I proposed a new pluralistic approach,[112] based on perfectionist liberal values 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 plausible options. Hence, modern liberal approaches emphasize the duty of the liberal state to create a diversity of social institutions, enabling the individual to make genuine and meaningful choices among various alternatives.

In the spousal realm, the pluralistic approach posits an alternative to both the private *and* the public approach. On the one hand, like the public approach, the pluralistic approach rejects the purely private vision of marriage and insists on the active role of the state in designing marriage as well as alternative spousal institutions. On the other hand, in contrast to the collective social and often traditionalist moral values that guide the public approach, the pluralistic approach seeks to design spousal institutions in light of the liberal value of autonomy. Furthermore, while the public approach seeks to channel people into one social institution (i.e., traditional marriage), the pluralistic approach requires the state to contribute to the creation of a diversity of valuable spousal patterns that offer spouses a significant choice. The potential of the suggested pluralistic approach can be demonstrated via two issues currently preoccupying spousal law: the legal approach towards cohabitation and covenant marriages.

Civil law systems have traditionally exhibited a hostile attitude towards spouses living as cohabitants. This hostility was part of the public approach that viewed this lifestyle as immoral and wished to defend marriage as the social institution through which spousal relationships must be conducted. In modern thought, and in the spirit of the private liberal approaches, several jurisdictions have expanded the rights of cohabitants. One example is the proposals set forth by the ALI, which represents the "economic" approach and almost completely equalizes the regulation of the economic relationship between unmarried cohabitants and married partners.

While conventional wisdom depicts the ALI trend as liberal,[113] the application of the pluralistic approach may lead to surprising conclusions. In a legal world in which the legal distinction between marriage and cohabitation

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112 *See* Shahar Lifshitz, *The Pluralistic Vision of Marriage*, *in* MARRIAGE AT CROSSROADS (Elizabeth Scott & Marsha Garrison eds., forthcoming 2012) (expanding the description of the pluralistic model, its philosophical foundations and its applications).

113 *See* Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353.

is preserved, one may choose between a spousal relationship accompanied by a high level of legal commitment (legal marriage) and one accompanied by a low level of (or no) legal commitment (cohabitation). This legal world fulfills the pluralistic demand, since it offers various options which individuals may pick and choose from. On the other hand, in a legal world that equates cohabitation with marriage, partners interested in an intimate relationship are automatically subordinated to the marriage law system, whether or not they have undergone a marriage ceremony. In such a legal world, with no real difference between social institutions, the law does not offer them a real menu of options to choose from.[114]

The regulation of covenant marriage demonstrates another application of the pluralist approach. One of the significant achievements of the counter-reform movement is the establishment of a unique covenant marriage track in a number of U.S. states with stringent divorce laws.[115] In light of the conflict between the private liberal approaches that support an easing of divorce proceedings and the traditional public approaches that support constricting them, this unique track is perceived as a victory for the traditional-public approaches.[116]

However, viewing this issue from a pluralistic perspective may lead to a different conclusion. Covenant marriages have not been accepted in any state as an exclusive marriage track, but rather as an alternative to the standard marriage track. The establishment of a covenant marriage track may therefore be seen to concur with the pluralistic method, which aims at enriching the variety of available social institutions, and not as a conservative effort to make divorce laws stricter. From a pluralistic perspective, it is laudable to strive towards a legal system that recognizes the social institutions of cohabitation, conventional marriage and covenant marriage all as legitimate and different ways to conduct a spousal relationship.

5. The Need for a New Moral Discourse

One of the characteristics of the traditional-public regulation of spousal law is the application of collective moral codes. These codes serve as an ideological basis for the condemnation of extramarital spousal relationships and the

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114 *See* Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 Wash. & Lee L. Rev. 1565 (2009). *Cf.* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815, 815 (2005) (criticizing the comparison between marriage and cohabitation from a contractual perspective).

115 *See* Lifshitz, *supra* note 114, at 1632-34.

116 *See supra* note 82 and accompanying text.

prohibitions on bigamy and homosexual relations. A prime example of this moral discourse is the fault-based divorce system, requiring the law to judge the morality of the partner's behavior in every divorce proceeding. In stark contrast to the public approaches, the private approach supports the transition to a no-fault divorce regime and more generally seeks to design the spousal relationship through contractual-commercial metaphors that do not involve a moral message regarding the proper way to behave in spousal contexts.[117]

In keeping with the pluralistic approach, this Article rejects the traditional moral discourse, as it is neither possible nor desirable to expect uniform spousal norms in a given society. However, it also distances itself from the private neutral rhetoric rejecting all moral discourse in family law. First, the neutral state principle, providing that the law should refuse to impose any controversial moral claim regarding "the good life," is rejected by almost all modern philosophers, including liberal scholars.[118] Second, even in the commercial-contractual domain, modern Western law does not hesitate to morally evaluate human behavior. Hence, the application of doctrines such as faulted breach, unconscionability, exploitation, unfairness and good faith involves a moral evaluation of the parties' behavior and a condemnation of behavior deemed immoral by the court.[119] In these areas, the law does not appear reluctant to locate a collective moral code and enforce it.[120] Finally, in the area of spousal relationships, despite the justified objection to the traditional moral discourse, there are certain spousal and familial behaviors — such as violence, psychological abuse, physical risk, sudden abandonment, estrangement from the commitment to one's children, economic exploitation and, in some circumstance, even fraud and breach of trust — whose problematic moral nature is difficult to deny even today.[121] Hence, future family lawmakers should be challenged to consider modern moral discourse based on modern

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117 *See supra* Section I.B.

118 Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 Harv. L. Rev. 1350 (1991).

119 *See, e.g.*, Good Faith and Fault in Contract Law (Jack E. Beatson & Daniel E. Friedmann eds., 1995); Fault in American Contract Law (Omri Ben-Shahar & Ariel Porat eds., 2010).

120 *See* Hanoch Dagan, *Pluralism and Perfectionism in Private Law* (Tel Aviv University Legal Working Paper Series, Working Paper No. 128, 2011), *available at* http://law.bepress.com/taulwps/fp/art128/.

121 *See* Barbara B. Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 Geo. L.J. 2525 (1994).

family values, such as those mentioned above, and not to hesitate to condemn improper familial behavior in appropriate cases.[122]

Moreover, one may observe, interpret and sometimes breathe new life into existing law through modern moral rhetoric. For example, there is room for considering marital property law not only through economic discourse using implicit contracts, but also through moral rhetoric emphasizing the values of sharing commitments as well as justice and fairness.[123] Similarly, modern alimony law should reflect a moral approach by addressing post-divorce responsibility stemming from the lifestyle of the spouses, rather than a hypothetical economic bargain. In a different context, there is room for considering the liberal perfectionist values of autonomy and equality through a public prism, centered on an attempt by the state to design the spousal relationship in light of these values. Therefore, spousal law must continue to limit private spousal arrangements that create relationships such as bigamy or those that considerably limit the ability of spouses to attain a divorce.

Should the proposed modern public-moral discourse ultimately support a return to a fault-based system, at least in the context of the economic consequences of divorce? I am inclined to respond in the negative. First, the value of personal autonomy, an important part of the new moral discourse, respects the individual's right to disconnect from relationships and commitments. Therefore, as opposed to under public-traditional approaches, the initiator of a divorce should not be viewed as being in breach or tortuous merely for doing so. Second, classic fault considerations focused on the sexual behavior of the partners are not sensitive enough to appreciate the complexity of the spousal relationship and to evaluate the difficulty in isolating the discrete infidelity or even the breach of trust within the complexity of the relationship. Finally, when the complexity of this situation is taken into account, the attempt to identify the partner at fault causes negative side effects of intrusion into and damage to the spousal intimacy that outweigh the advantages of any such attempt. In light of the various considerations, I support a policy of no-fault divorce. However, as opposed to the view of private approaches based on moral neutrality, in extreme cases of ongoing breach of trust, or abuse of the other party, certain considerations of fault (in its non-traditional meaning) should be taken into account in determining divorce outcomes. In addition,

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122 Certain aspects of this thought process that are presented in this Article correspond with the one presented at the time by Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 Stan. L. Rev. 225 (1998).

123 *Cf.* Frantz & Dagan, *supra* note 84 (suggesting a spousal property theory that is based on the perception of marriage as a community that emphasizes equality and autonomy of the individual, including the right to exit the spousal relationship).

in contrast to the neutral private approaches, a modern moral approach would be receptive to damage claims for abuse, fraud, etc.

In sum, I join in the demand for the design of a moral discourse within spousal law. However, I am strongly opposed to the attempt to base this moral discourse on "traditional family values." Hence, some of these values must be replaced by modern family values identified in the previous paragraphs, such as trust, cooperation, caring for the children, preventing economic exploitation, and an aversion to violence. I believe that this moral discourse should replace the existing economic bargain metaphor. While this approach adheres in most cases to the no-fault system rule, in extreme cases it would, nevertheless, be more accommodating towards modern fault considerations.

B. From the Individual-Unit Dichotomy Towards a Relational Approach

1. The Difficulty of the Individualist Approach

The individualist approach rejects the traditional view of the family as a unit or a meaningful entity and emphasizes the separate personal autonomy of each of the family members. Accordingly, it does not recognize the unique commitments embedded in the spousal relationship and is therefore content to apply to it standard legal rules and principles, such as the rules regarding explicit and implicit contracts. In addition, it emphasizes the right of individuals to disconnect from the spousal framework at any given time. The application of this approach to family life raises a number of essential difficulties, as follows.

i. The Incompatibility of General Legal Rules with the Familial Context

We have seen that both the *liberal-contractual* and the *radical* theories that have adopted the individualist approach seek to abolish what is known today as spousal law and to regulate the spousal relationship through standard general legal principles. However, applying standard general law to the spousal relationship just as if spouses were strangers, as suggested by the individualist approach, is an inappropriate policy, since the relationship between spouses is a complex and long-term affair that combines interdependence, economic reliance, a shared psychological consciousness of being part of the same little community (i.e., the family), trust, explicit and hidden expectations and, in some contexts, power differentials creating fear of exploitation. This type of relationship is different in essence than most social relationships regulated by the law, certainly different from the average commercial relationship. On this premise, standard legal rules designed for regulating relationships among strangers are inapplicable "as is" to the spousal relationship.

A prime example of the difficulty in designing the spousal relationship through standard legal rules is the property relations between partners. Standard property laws are generally based on formal arrangements such as formal registration in cases of real estate and the assumption that one's earnings and the products of one's labor belong to him or her. In contrast thereto, spousal relations are characterized by informal arrangements and situations in which earnings seemingly produced by one partner are in fact based on massive, but hidden, assistance of the other partner. Therefore, the application of standard property law in the case of spouses may lead to severe and unjust results. While in the past, legal systems and scholars supported property separation in the liberal and individualist spirit,[124] nowadays even individualist legal systems draw an analogy between spousal relations and commercial partnerships and, as a result, recognize community property regimes between parties.[125]

In my opinion, the commercial-contractual analogy, derived from the individualist approach, is too narrow a prism for designing spousal law. It reflects a view of spousal law as a product of a conscious conventional system, explicit or implicit, created through negotiations between two separate (and sometimes opposing) parties for economic purposes. Such an interpretation of spousal law ignores the nature of spousal relations.

First, the commercial analogy primarily deals with a situation between two equal parties. In contrast thereto, the spousal situation is characterized in many cases by power differences and, sometimes, even power struggles, which shape even the most basic expectations of the partners forming the relationship. Therefore, the application of the theory of implied contracts to the spousal relationship must be balanced with moral considerations aimed at achieving justice and equality in the spousal relationship. *Second*, whereas the economic component is most often the main incentive of the parties to a commercial relationship, spousal relations involve a profound personal commitment, such that in many cases the economic aspect of the spousal relationship is merely secondary. *Third*, viewing spousal law as a product of conscious transactions ignores the fact that in the family context, many decisions are made implicitly, without discussion, negotiation or any apparent

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124 *See* Mary A. Glendon, *Is There a Future for Separate Property?*, 8 Fam. L.Q. 28 (1974) (seeing individualist and egalitarian perceptions as ultimately seeking to establish the order of the property division); *see also* Kevin J. Gray, Reallocation of Property on Divorce 30 (1977). For an individualist and egalitarian reasoning that supports the division of property, see Patrick N. Parkinson, *Who Needs the Uniform Marital Property Act*, 55 U. Cin. L. Rev. 675, 698-704 (1987).

125 *See, e.g.*, Katz, *supra* note 93.

awareness of the content of the decision. *Fourth*, the contractual analogy and the economic analyses suggested by the liberal approaches are appropriate to a business world in which, even in cases of long-term relations, the parties to the relationship typically maintain an individual consciousness. In contrast thereto, in the spousal-family context, a quasi-collective consciousness often develops, in which one perceives oneself as part of a broader community, in a way that renders him or her incapable of drawing a sharp distinction between his or her personal interests and those of other individuals within the family or the family in its entirety.[126] Therefore, a theory of spousal law must properly capture the unique relationship among family members. The individualist approach, which sees the couple as separate individuals connected by contractual-commercial transactions and attempts to regulate the spousal relationship through various applications of standard general law, is not up to the task.

ii. The Difficulty with Quick and Absolute Severance

In many cases the unique relationship between spouses shapes one's financial and social situation, and one's personal identity may even be irreversibly affected by it and the decisions made within the family framework. This makes it necessary to reconsider the goal of a quick, complete and smooth severance, which is the goal of the individualist approach. Consequently, we must reevaluate the logic behind the individualist concept of a clean break

Consider, once again, the economic aspect of the spousal relationship and its dissolution. Spousal life encompasses a wide variety of economic interactions between spouses, such as one partner supporting the other partner during his or her studies, allowing him or her to pursue an education; someone who takes most of the domestic tasks upon him- or herself, enabling his or her partner to develop a profession at the expense of his or her own professional development; or a partner who uproots him- or herself from his or her residence following his or her partner's career change and consequently loses his or her job. In at least some of these cases, the consequences of these spousal decisions are irreversible and will affect the spouses even after separation or divorce. Disregard for these irreversible consequences is responsible for the difficulties encountered by the modern legal design of the economic relations between spouses (primarily, the economic distress of women following divorce). The individualist ethos emphasizing the separate identities of the partners does not acknowledge the nature of the spousal relationship or the

126 *See* Milton C. Regan, *Spousal Privilege and the Meaning of Marriage*, 81 Va. L. Rev. 2045 (1995); Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 Utah L. Rev. 537.

fact that the relationship pattern between the spouses throughout the marriage may have considerable and irreversible consequences even after a divorce.

Moreover, when the real nature of the spousal relationship is acknowledged, it seems clear that beyond its economic consequences, divorce is a dramatic step with a profound impact on one's identity. Therefore, there is room for refining the individualist liberal model of divorce through a variety of legal techniques, such as extending the cooling period before divorce and giving the court discretion to suspend the granting of a divorce decree until the parties participate in a process of counseling and mediation. These steps may serve as a barrier to a hasty divorce that does not reflect the parties' good judgment. In addition, this type of action may balance the desire of the party seeking to end the spousal relationship upon demand with the need to allow the other party a period of adjustment and recovery to allow him or her to acclimatize him- or herself to his or her new personal situation.

2. The Partial Solution of the Economic Approach and the ALI

At least with respect to the economic relationship between spouses, the reforms suggested by the ALI and scholars of the economic approach, such as the reinvention of the alimony duty, are moving spousal law in the right direction. Still, the private and individualist discourse used by the economic approach, which is completely based on commercial analogies, does not grasp the complexity and uniqueness of the spousal relationship.

There are two aspects to my criticism of the economic approach and the ALI. In certain instances, I agree with their practical proposals. However, I believe that the language and conceptualizations of these approaches do not provide a satisfactory theoretical rationale for these proposals. In other instances, the language and conceptualizations of the economic approach ultimately limit the practical proposals. Therefore, the criticism considers not only the theoretical language, but also practical proposals set forth by the economic approach. I will illustrate these issues.

First, because of the commercial analogy the reforms proposed by the model focus solely on economic matters. In contrast thereto, actual internalization of the uniqueness of the spousal relationship and its non-economic components should lead to reforms in other areas as well, such as family violence, law of evidence, tax law and divorce law.[127] *Second*, sometimes commercial analogies do not achieve satisfying results even in economic contexts. For example, in most Western legal systems, only the property accumulated throughout the

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127 On the subject of divorce, see Lifshitz, *supra* note 58. Space constraints prevent me from elaborating on the subjects of violence, evidence and tax, but I hope to dedicate an independent article to these subjects in the near future.

marriage by virtue of joint effort of the spouses, unlike property acquired before the marriage or property received as a gift or inheritance, constitutes divisible property. This is in line with the analogy of commercial partnership: In the commercial context, an individualist identity is maintained even in cases of partnership and there is therefore a clear distinction between the property of the partnership and the personal property of the partners. In the family context, however, and especially in long-term relationships, the spouses do not perceive themselves merely as autonomous individuals, but also as part of a family unit and community. The distinction between the family context and the commercial context carries implications for property division. In the commercial context, in which an individualist identity is maintained, we would not attribute to either party any intent to contribute a personal asset to the joint venture. In contrast thereto, in the family context, the sense of cooperation gives rise to a property approach that is best captured by the saying "what's mine is yours and what's yours is mine."[128] At some point, this spirit of cooperation blurs the distinction between private and shared property. Accordingly, in the spousal context, there are many cases in which it would be justified to include gifts, inheritances and pre-marriage property in the marital property. The rhetoric of commercial partnership that has been adopted by the economic approach does not allow recognition of shared private property even in such cases. This demonstrates the need for an alternative approach that emphasizes the unique aspects of the spousal relationship.[129]

Moreover, the suggestion by the economic approach that the concept of a clean break be neglected in deviation from the contractual-liberal model creates a dissonance between its practical suggestions and its adherence to individualist rhetoric. Think of the spouses' *earning capacity* that accumulates throughout marriage. Essentially, the analogy between marriage and commercial partnership leads to the conclusion that earning capacity

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128 *See* Frantz & Dagan, *supra* note 84 (recently suggesting a theory according to which the economic cooperation between spouses reflects the perception of marriage as an egalitarian community); *see also* Carbone, *supra* note 85; Shahar Lifshitz, *On Past Assets and Future Assets and the Philosophy of Marital Property Law*, 34 Misphatim [Hebrew U. L.J.] 627 (2004) (Isr.).

129 *See* Frantz & Dagan, *supra* note 84; Lifshitz, *supra* note 128; Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 Nw. U. L. Rev. 1623 (2008) (all arguing in favor of including pre-marriage property, gifts and inheritances in the marital property in certain circumstances). Actually, even the existing law sometimes blurs the distinction between the individual's and the marital property. However, the partnership analogy theory fails to explain this unclearness. In contrast thereto, the community and the prevailing relational theories explain it more successfully.

accumulated throughout marriage should be perceived as a divisible asset in divorce proceedings, as it is the product of a joint venture between the spouses.[130] Hence, the demand that one's earning capacity be considered is supposed to coincide with the individualist approach.

However, a more thorough examination reveals that the recognition of one's earning capacity as a divisible asset is covertly (and profoundly) contrary to the basic principles of the individualist approach and liberal approaches generally. *First*, the sharing of earning capacity runs counter to the individualist approach, which views one's achievements as the product of his or her personal efforts and talents. It also runs counter to the liberal approach, which implicitly opposes commodification by implicitly stating that one has ownership over his or her spouse, or that personal attributes are negotiable.[131] *Second*, adopting the idea of earning capacity as an asset may encourage spouses to adopt a lifestyle in which they are dependent on their partner. This is in and of itself contrary to the individualist worldview, which sees personal autonomy and independence as fundamental values. *Finally*, earning capacity is not a tradable property. It is therefore impossible to actualize the earning capacity of the spouse immediately following the divorce. Hence, one's earning capacity is actually calculated by dividing the wages of the spouse that is the provider as paid.

The practical implication of one's earning capacity being perceived as an asset is the renewal of the economic dependency between the spouses following the divorce.[132] Indeed, there are situations in the economic-commercial context as well in which economic obligations between organizations or human beings persist following their separation. However, in the case of a prolonged marriage during which most of the spouse's earning capacity is accumulated, paying off such a large sum may necessitate the continuation of an economic partnership for an unlimited period of time, despite the divorce. It is hard to find a commercial parallel to this situation, which runs counter to the desire of the individualist approach to allow freedom to exit marriage in a meaningful sense. Thus, the issue of earning capacity exposes an internal conflict within the individualist approach between the principle of promoting

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130 *See* Frantz & Dagan, *supra* note 84; Krauskopf, *supra* note 84; Wicks, *supra* note 84 (all discussing the justifications for the allocation of human capital).

131 *See* Lifshitz, *supra* note 128, at 728-30; Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 Ark. L. Rev. 439 (1987); Singer, *supra* note 64.

132 *See* Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act — And Some Reflections About Its Critics and Its Policies*, 1991 BYU L. Rev. 43, 60-61; Parkman, *supra* note 131.

the freedom to bind oneself in a contract *ex ante*, and the need to protect the individual's autonomy and his or her ability to disconnect from the spousal relationship *ex post*.[133]

The conflicts between the different implications of the individualist approach explain why most scholars identified with the economic approach avoid fully considering one's earning capacity as a divisible asset through a division of profits following divorce and prefer the more limited model, which compensates the domestic partner for his or her career losses.[134] Moreover, I believe that the conflicting implications of the individualist approach are responsible for the stubborn refusal of Western legal systems to recognize earning capacity as a divisible asset. As long as a different school of thought that breaks away from the strict individualist approach is not adopted, it will be difficult, so it seems, to overcome these problems.

3. Towards a Relational Approach

An important component of the counter-reform is the call for the reestablishment of the perception of family as an entity with rights and as a unit of moral significance. This alternative is somewhat daunting due to its historical connotations and its implications. Historically, the unitary approach has been identified with doctrines such as the subordination of the decision to marry to the approval of the extended family; the legal merger between husbands and wives following marriage, denying women the ability to perform basic legal functions; a rigid definition of family roles with no option of contractual relations; overwhelming constriction of divorce law; and a refusal to protect family members from physical harm or property damage caused by another family member. It is hard to deny the problems inherent in these doctrines. However, in light of the dynamism of spousal law, adoption of the unitary approach does not necessarily entail accepting all of these doctrines, as they

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133 On this tension, see also Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, *in* The Fall and Rise of Freedom of Contract, *supra* note 3, at 201, 240-41.

134 *See* American Law Institute (ALI), *supra* note 94; Ellman, *supra* note 85. *But see* June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 Vand. L. Rev. 1463 (1990) (criticizing Ellman for reducing alimony laws to compensation for losses); Antony W. Dnes, *Application of Economic Analysis to Marital Law: Concerning a Proposal to Reform the Discretionary Approach to the Division of Marital Assets in England and Wales*, 19 Int'l Rev. L. & Econ. 533 (1999). The present Article adds depth to this critique, since it reveals that the individualist foundations of the approach have prevented it from granting the contractual remedies that flow from the commercial metaphor.

carry with them unacceptable traditional baggage. Moreover, the unitary approach poses a more essential difficulty: When the family is viewed as a moral entity with rights that are separate and that compete with the rights of the individuals who make up that entity, it hints at an ontology in which such a group is accorded a separate moral status and made subject to a collectivist ethics in which individuals' rights are sometimes rejected in favor of the collective's rights. If so, basing a theory of family law on these foundations requires sharp deviation from the liberal-individualist approach and from the ethics accepted in Western law and culture.[135]

So far, we seem to be left with a tragic choice between unsuccessful alternatives. On the one hand, the individualist approach is compatible with our liberal principles, but its application to the family context is highly problematic, especially in its original version, but also in its more modern and subdued versions. On the other hand, the traditional baggage associated with the unitary approach is unacceptable and, in any event, requires sharp deviation from accepted Western liberal-individualist principles and ontology. Fortunately, although this dichotomy does mirror the major approaches within current spousal law, it is not necessary to choose between these approaches. The essential problem with the individualist approach is that it does not cope with the profound, unique and sometimes irreversible impact of the spousal relationship and familial affiliation on the economic, social and psychological world of the spouses. Therefore, the solution is not to recognize the ontological and moral significance of the family or the spousal unit, but rather to design a relational theory of the spousal relationship.[136]

Like the individualist approach and contrary to the unitary approach, the relational approach accepts the individualist ontology and ethos, according to which only individuals, not groups, have moral status. However, the relational approach is different from the individualistic approach in a number of significant respects.

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135 Indeed, in contrast to the original liberal-individualistic ethics, a new liberal school of thought that recognizes the importance and the status of communities has developed in recent decades. Nevertheless, the liberal discourse justifies the support of communities in light of their roles and their importance to individuals and their culture. See especially the founding writings of Will Kymlicka, Liberalism, Community and Culture (1989); *see also* Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 Soc. Res. 491 (1994). *But see* Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. Cal. L. Rev. 1001 (1983) (developing an ontology of groups).

136 *See* Martha Minow & Mary L. Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and the Law*, 11 Hypatia 4 (1996); *see also* Scott & Scott, *supra* note 87.

First, in the relational framework, obligations between spouses do not stem from conscious contractual commitments, but rather from a social context saturated with interpersonal relationships.[137] This may narrow contractual freedom in the spousal context as well as the possibility of founding spousal law on contractual rationales as they are commonly understood. *Second*, under this approach, the distinction within the spousal relationship between one's personal interest and the interest of one's partner is blurred. Therefore, contractual principles, even when applied, must be adjusted to the unique spousal context. Within the realm of the economic relationship, this may lead to a broadening of community property regimes, for instance, in certain cases to include pre-marriage assets, inheritance and gifts in the marital divisible property. *Third*, applying the standard general law to spousal relationships in the spirit of the individualist approach is not possible. Therefore, unique spousal laws will be designed not only with regard to the economic relations between parties, but also with respect to other areas of law, such as criminal law, tax law, evidentiary law, etc. *Fourth*, a spousal relationship has such a profound impact on the involved partners that it does not always allow for an immediate and easy separation. In light of the irreversible implications of a spousal relationship, in some cases the legal bond between partners may never be entirely severed. This will provide an anchor for the continuation of an economic obligation between spouses following a divorce, without the qualms that characterize the individualist approach. In some cases, it may serve as a basis for the constriction of existing divorce laws.

C. The Need for a New Perception of Equality

1. The Failure Within the Liberal-Contractual Perception of Equality

The egalitarian approach in its original version, i.e., the manner in which it was implemented through the reforms of the second half of the twentieth century, raises difficulties on a factual as well as legal level. In the spirit of the "feminism of sameness,"[138] the egalitarian approach strives to design a legal system that is gender-blind.[139] Accordingly, it tends to stress the significance of the social changes that began to take place during the second half of the twentieth century with regard to women's status. In light of the

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137 *Cf.* Scott T. FitzGibbon, *Marriage and the Good of Obligation*, 47 Am. J. Juris. 41 (2002).

138 For a discussion of the distinction between "feminism of sameness" and "feminism of difference," see Minow, *supra* note 92; Theoretical Perspective on Sexual Difference (Deborah L. Rhode ed., 1990).

139 *See supra* Section I.D.

modern changes that abolished the rules discriminating against women and obstructing the penetration of women into the workplace, its expectation is that the remaining differences between men and women will be repealed soon. Therefore, it contends that there is no point in treating women as a unique group and providing them with special protection. This is the backdrop to the contemptuous statements of modern judges with respect to legal rules meant to protect women.

However, the egalitarian approach blurs the boundary between hope and reality, by applying rules appropriate for an ideal egalitarian world to a reality in which equality has yet be achieved. The modern commitment to equality, as we have learned, has yet to lead to actual equality between men and women, and even in the modern world there are still considerable gaps between them in the domestic sphere as well as in the workplace. The combination of factual repression of the reality that treats men and women differently in the modern era and satisfaction with formal equality that does not achieve the desired results for various populations has served as a basis for the modern reforms. The modern reforms advocate reducing post-divorce alimony, expanding contractual freedom in the spousal context by abolishing rules meant to protect women, and repealing maternal preference in custody law. The harsh reality faced by divorced women as a result of these reforms shows that this is indeed a lethal combination.[140]

2. The Problem with Returning to a Traditional Non-Egalitarian School of Thought

The liberal-contractual approach's failure to achieve equality has led to a counter-movement, which seeks to renounce equality as a guiding principle in spousal law. This is a problematic and dangerous conclusion. Indeed, in certain cases a willingness to renounce the demand for equality in the spousal context may lead to the adoption of rules intended to protect women, and, in other cases, to the adoption of rules intended to favor women over men. However, the history of spousal law has taught us that a legal world in which equality between men and women is not considered a fundamental value, even when the unequal treatment is presented as stemming from a difference in roles and not from the family hierarchy, does not lead to women's protection, but rather to their oppression. Similarly, in the modern era there have been cases in which feminist claims regarding behavioral and cultural differences between men and women have granted legitimacy to discrimination against

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140 *See supra* Section II.C.

women in the workplace.[141] Furthermore, an approach emphasizing essential differences between men and women dangerously limits the freedom of both men and women to choose roles suited to their specific personalities. Hence, the failure of the liberal-contractual version of the egalitarian approach does not entail rejecting the principle of equality altogether, but rather requires designing an alternative perception of equality. Such an attempt has been made by the innovative liberal approaches, which I will now review.

3. The Coalition Between Modern Feminism and the Economic Approach and the Tension Between a Strategy of Sameness and a Tactic of Recognizing Differences

In recent decades both liberals and feminists have realized that in modern reality men and women are treated differently. This is the backdrop to the proposals by both the modern feminist and the economic approach for new reforms, which are aimed at repairing distortions in the original egalitarian approach. These proposals would allow deviation from the equal division of the spousal property in favor of the domestic partner, attempt to reestablish the obligation of alimony, prefer the "primary child-caretaker" parent in custody battles, and create mechanisms intended to prevent entering into discriminatory contractual relations. Clearly these suggestions deal with disillusionments inherent in the original egalitarian approach by replacing formal equality with substantive equality and by moving from the "feminism of sameness" to a "feminism of difference."

In my opinion, however, much of the criticism aimed in recent years at the liberal-contractual model is merely temporary, as it relates to the difficulty in applying egalitarian legal rules in family law while the "gender equality movement" has yet to complete its work. However, beyond this criticism, the critics do not dispute the essential goal of the egalitarian approach, which is to establish a gender-blind legal system in which men and women are self-sufficient and need not depend on each other. In such an "ideal" world, women as a group will not be discriminated against, but will not require special protection either.[142] In this spirit, the willingness of both modern feminism

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141 *See, e.g.*, EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir., 1988); *see also* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990). *See generally* Joan Williams, *Domesticity as Dangerous Supplement of Liberalism*, 2 J. Women's Hist. 69 (1991).

142 *See, e.g.*, Kay, *supra* note 9, at 77-79; *see also* Susan M. Okin, Justice, Gender and the Family (1989) (perceiving the ideal world as being gender neutral);

and the economic approach to suggest legal rules similar to those suggested by the ALI, with the goal of protecting women, is perceived as only a temporary requirement.[143] In a world that reflects the ideal of these approaches, spousal law will be based on the principles of the liberal-contractual model, including contractual freedom, divorce upon demand and the clean break concept.

Modern thought regarding equality is caught, therefore, in the tension between long-term strategic considerations focused on the desire to build an ideal egalitarian world and specific tactical considerations focused on the protection of women in the existing social reality. This tension can be demonstrated in a number of contexts discussed at-length in the previous sections. For instance, in regard to alimony, we have seen on one hand that the modern policy seeking to abolish post-divorce alimony has deeply wounded many groups of women (primarily women who did not work or who worked, but sacrificed their own careers for those of their partners). On the other hand, alimony has a strategic price. First of all, it may strengthen the public image of women as being dependent. Second, alimony may encourage women to adhere to their traditional roles, which would thwart the attempt to complete the egalitarian revolution.[144]

Another example is the maternal preference in custody. On the one hand, the modern gender-blind policy exposes women to blackmail and has weakened their status in custody negotiations. On the other hand, the maternal presumption reinforces the social image of women as the appropriate caretakers of children. In addition, it creates psychological pressure on women to adhere to their traditional role and demand child custody, even in cases in which they are not really interested in custody. In the long term, the maternal presumption sabotages the attempt to create a world in which the onus of childrearing is not immediately interpreted as being borne by women.

Finally, in regard to contractual freedom, we have seen on the one hand that in the current social reality a policy expanding contractual freedom in the spousal context harms women. On the other hand, a return to the traditional doctrines with their inherent protection of women may send a disrespectful message to women regarding their ability to take care of their interests in contractual relations. This message may also leak into contexts outside of the family, such as labor relations, and thereby harm women.[145]

Minow, *supra* note 45 (criticizing contemporary feminist writings that are reluctant to recognize the long term differences between men and women).

143 *See* Will Kymlicka, *Rethinking the Family*, 20 Phil. & Pub. Affairs 77 (1991).

144 *Cf.* Singer, *supra* note 64; Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, *in* Divorce Reform at the Crossroads, *supra* note 64, at 130, 144-45.

145 For a clear presentation of this dilemma, see Cossman, *supra* note 45.

The tension between the long-term and short-term strategies regarding equality, combined with the internal conflict between the practical suggestions of the economic approach and the individualist rhetoric to which it adheres, explains why Western legal systems are hesitant and, in some contexts, have outright avoided adopting comprehensive reforms within spousal law

4. The Need for a New Egalitarian Strategy

As mentioned above, the progressive liberal approaches also envision a world in which women can independently support themselves and, as a result thereof, the familial relationship will be designed through liberal-contractual rules. Given this strategy, the ambivalence presented above between long-term and short-term needs seems inevitable. However, it is a strategy vulnerable to criticism. Under these approaches, the ideal world is that of the modern egalitarian approach, which is compatible with the male psychological makeup, behavioral patterns and ethical codes, at the center of which lie professional development, passing up any significant devotion of time to childrearing, individual autonomy and contractual relations, and so on. Therefore, the equality promised to women in such a world requires them to abandon personal structures, behavioral patterns and typical female choices, such as devotion to childrearing, ethics of care as an alternative to a rhetoric of rights, and trust as an alternative to formal contractual relations.[146]

Even in the ideal world of the economic approach, women seem to face the same tragic dilemma: attainment of equality at the price of adopting male codes, or preserving female codes at the price of passing up equality.[147] To overcome the tragedy inherent in this choice an additional egalitarian strategy is required. One type of strategy, overly optimistic in my view, is the educational, social and legal struggle to change the status of gender and design a gender-neutral world in which men and women would bear the family burden equally. One element of it would be a workplace adjusted to parents who are committed to equal childrearing. Another type of strategy focuses on spousal law and seeks to base it on a new perception of equality. Essentially it would allow males and females to choose from a variety of female and male lifestyles, without the choice of any particular lifestyle being economically, socially or legally sanctioned.[148]

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146 For a distinction between masculine and feminine ethics, see Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373 (1986); West, *supra* note 92.

147 *See* Minow, *supra* note 45.

148 For early signs of this philosophy, see Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Calif. L. Rev. 1279 (1987).

Under the approach presented here, choosing a lifestyle centered on sacrificing one's professional career for the best interests of the children is not of less value than choosing to develop one's career. Hence, strong disapproval would be registered of a situation in which the adoption of a domestic lifestyle exposes women to inferiority throughout marriage and to distress and poverty in cases of divorce. The solution will not be achieved by limiting divorce law, but rather by granting both partners an economic option to divorce. In light of this, legal reforms should be pursued at economically protecting the partner who assumes the domestic role in the spousal relationship, without the qualms that characterize the modern liberal approach, under which choosing such a lifestyle may prevent achievement of the strategic goal of making the domestic partner self-supporting.

IV. Conclusion: The Challenges Facing Future Spousal Lawmakers

This Article has addressed three dichotomies (private/public, individualist/family-as-unit, and egalitarian/non-egalitarian) as well as the main approaches to the regulation of spousal law suggested by these dichotomies. The above analysis adduces harsh criticism of the liberal-contractual model, which seeks to further the modern reforms and base spousal law on the private-individual and egalitarian-gender-blind approaches, and of the counter-reformers, who seek a return to traditional public-unitary and sometimes non-egalitarian regulation.

I have also criticized the radical approaches that aspire to abolish marriage as a legal institution. According to the above analysis, these approaches adopt the foundations of the liberal-contractual theory in the spousal context, exposing them to the same criticism as that theory. I have argued that the reforms suggested by the radical approaches with respect to parent-child law and public responsibility for children cannot repair the damage caused to children, women and society at large by the adoption of the liberal-contractual theory.

In contrast to the sharp criticism aimed at the other approaches, I have contended that in many cases the suggestions of the economic approach for correcting the economic consequences of divorce — as framed by prominent scholars and adopted by a number of states, as well as by the ALI — represent a step in the right direction. Nonetheless, this approach cannot serve as the exclusive basis for the proper regulation of spousal law for a number of reasons. *First*, the suggestions are often limited to *economic* matters, while the economic approach adopts the foundations of the liberal-contractual

theory with respect to other issues, exposing it to the same criticism as the liberal-contractual theory regarding non-economic issues. *Second*, even in regard to economic matters, where the economic approach does abandon the practical implications of the liberal-contractual theory, it still adheres to the liberal *discourse* (primarily its private, individualist foundations) while using analogies to commercial transactions. This rhetoric does not properly reflect the complexity of the spousal relationship. Therefore, I have argued that in many cases a more complex rhetoric combining relational and public aspects may be more appropriate for the design of spousal law and for explaining the practical suggestions supported by the approach. *Third*, I have demonstrated how suggestions that deviate from the liberal-contractual theory while adopting its rhetoric and mode of thought create a dissonance within the economic approach. This dissonance is responsible for various conflicts within the approach, for instance between long-term strategies that seek to construct a gender-blind world built upon individualist foundations and short-term tactics recognizing the existing differences between men and women. It has limited the ability of the approach to suggest more general reforms, even within economic domains. These internal conflicts within the economic approach, I have asserted, prevent it from exerting a broader influence on the design of Western spousal law.

I have concluded, therefore, that what's needed is a new theory and regulation of spousal law to break out of the existing patterns and dichotomies. And while this Article is inappropriate for the development of such a comprehensive and detailed theory, the discussion herein has included not only criticism of the current approaches, but also the foundations for a different mode of thought regarding spousal law. The following paragraphs integrate the various foundations and principles raised in the discussion.

1. Balancing individual needs with public interests: The liberal approaches that adopt the private-contractual rhetoric fail to secure the interests of children as well as additional public interests inherent in marriage and in the way spousal relationships are conducted in general. The public-traditional approaches fail to address the right of the individual to choose the lifestyle he or she desires, as well as pluralism as a social reality and normative value. New regulation is therefore required that aspires to balance the needs and rights of the spouses as individuals, on the one hand, with public interests, on the other.[149]

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149 *Cf.* John Eekelaar, *Social Norms, Individualism and the Family*, 13 Theoretical Inquiries L. 75 (2012) (proposing the "purposive abstention" model, which, in principle, favors an individualist approach that allows individuals to decide family matters, unless an obvious harm will be caused to another individual or to the public at large).

2. The best interest of the child as a guiding principle of spousal law: The liberal approaches fail to integrate child considerations within the framework of spousal law. In contrast thereto, the traditional approaches have developed a narrow public discourse, in which such considerations are strictly imposed in order to return to traditional patterns of regulation, primarily through non-recognition of alternatives to traditional marriage as well as a withdrawal from the no-fault divorce model. Moreover, this has been done without evaluating whether these steps are in the best interest of certain children born outside of marriage. Against this backdrop, regulation is required that views the best interests of the child as one of the guiding principles of spousal law, while applying it in a manner compatible with modern thought regarding spousal relationships and children.[150]

Throughout the above discussion, I have begun to demonstrate how this mode of thought might impact divorce law, especially with regard to the distinction between divorce with and without children as well as the demand for a welfare report examining the effects of divorce in concrete cases. I have discussed the potential implications of the "best interest of the child" concept on spousal property, such as granting the right of residence in the spouses' residence to the custodial parent, considering the best interest of the child within the discussion of spousal property relations, and subordinating contractual arrangements between parents to considerations of the children's best interest. In addition, lawmakers must be challenged to create arrangements that encourage, *ex ante*, spousal institutions representing a positive framework for childrearing and at the same time care, *ex post*, for children without regard for the family pattern into which they were born.

3. Dynamic design of social institutions: While the liberal approaches emphasize the private nature of marriage and discount its role as a social institution, traditional approaches acknowledge this social role of marriage but seek to perpetuate the traditional character of this institution. A new approach is needed that internalizes the role of marriage as a social institution and is prepared to design that institution dynamically. For example, with regard to marital capacity, it will not accept marriage as an undisputed personal right. On the other hand, it will agree to recognize unconventional forms of marriage as long as they serve modern social and communal interests.

4. Public pluralistic regulation: In contrast to both the neutral private approach, which is content with broad contractual freedom within a spousal context, and the public-traditional approach, which channels spouses into a

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150 *See* Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. Pitt. L. Rev. 1111 (1999). In the context of divorce law, see Scott, *supra* note 59.

monolithic and monopolistic institution, future lawmakers must rise to the challenge of designing a variety of beneficial social institutions from which spouses can choose. I have demonstrated how such an approach may lead to an unconventional outlook regarding covenant marriage as well as the distinction between marriage and cohabitation.[151]

5. The need for a modern moral discourse: The public approaches base their moral discourse on "traditional family values" that do not accord with the liberal values of equality and individual autonomy. In addition, the traditional design of fault rules does not take into account the complexity of the spousal relationship and the damage inflicted to a family's intimacy when the party at fault has to be identified. However, the attempt of the liberal approaches to avoid any moral judgment is incongruous with broader trends within the liberal discourse, as it shies away from the concept of the neutral state and from developing a liberal perfectionist discourse.

Specifically regarding family law, I have argued that there is still an array of family values such as sharing and trust that should guide our family regulation. On the other hand, there is a variety of negative behaviors such as breach of trust and abuse that the law should morally condemn.[152] Therefore, my recommendation is that future family law should develop a modern liberal moral discourse comprised of general liberal values, such as autonomy and equality, along with updated family values of protecting the children's interest, spousal trust, and economic justice within the family.[153] I argue that one can interpret many components of existing spousal law in the spirit of these values, since the design of these laws based on analogies to contractual economic transactions is insufficient. In addition, despite my support for a no-fault divorce policy, I argue that in extreme cases, modern considerations of fault may be relevant to the divorce proceedings or parallel civil proceedings such as tort lawsuits.

6. Developing a relational theory of the spousal relationship: In my view spousal law should be based on an individualist ontology; I therefore reject the view of the family as an entity of independent moral significance. However,

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151 For an impressive attempt to integrate the strengthening and encouragement of marriage with respect and support for alternative institutions, see Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, 30 Harv. J.L. & Gender 25 (2007); *see also* Maxine Eichner, The Supportive State: Families, Government, and America's Political Ideals (2010). As previously mentioned, I elaborate on this subject in Lifshitz, *supra* note 114.

152 *See* FitzGibbon, *supra* note 79. *But cf.* Eekelaar, *supra* note 149.

153 *See* Cahn, *supra* note 122 (exploring the need for a new morality within family law).

the individualist approach is not an appropriate substitute for the unitary approach, as it emphasizes the separation between the parties to the spousal relationship as well as their ability to disconnect from familial contexts. In contrast thereto, my analysis emphasizes the communitarian aspect of the family as well as the complex ties between family members and their effect on their personal identities. These ties require a legal model to be sensitive to, among other things, the impact of one family member's behavior on the rest of the family, the economic and emotional dependency arising between family members, the shared aspects of family life, the unique expectations within the familial context, etc.[154] In the concrete field of property relations, I have clarified that analogizing family relations to commercial relations misses the mark, and that there is room for a property arrangement focused on the relational aspects of the family relationship. I have explained how such an arrangement would go beyond existing laws regarding property accumulated before marriage as well as the severance of the spouses following divorce. Beyond marital property law, I believe that in many legal domains — such as criminal law, tort law, contract law, evidentiary law and tax law — there is no place for imposing standard general law, but rather specific rules that take into account the unique aspects of family life should be adopted.

7. The right of exit and its limitations: The relational approach takes a complex view of the right of exit from the spousal relationship. On the one hand, it generally encourages a unilateral no-fault divorce model, as it supports the right of exit from relationships and commitments, which is derived from the value of autonomy. It also seeks, and in economic contexts as well, when possible, an arrangement that disconnects the economic ties between the parties following divorce.[155] On the other hand, it recognizes that there are certain situations in which it is appropriate to call for a long-term commitment between the spouses following divorce, considering the relational aspect of the spousal relationship as well as its irreversible consequences for the spouses. In addition, in contrast to the individualist divorce-on-demand model, the relational approach supports a certain delay of the divorce proceedings in order to ensure that decisions are made in a composed and logical manner, marriage being perceived as a relationship expressing a significant commitment.

8. Developing an egalitarian approach respecting various lifestyles and integrating it with relational thought: Modern regulation of spousal law should be committed to equality. However, mine is not an "egalitarian

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154 *Cf.* Scott & Scott, *supra* note 133 (proposing a relational contract model of marriage).

155 *Cf.* Frantz & Dagan, *supra* note 84 (emphasizing the right to exit the spousal relationship as part of the value of autonomy).

approach" ignoring gender differences. The model for equality should be an essential one, examining not only the legal rules, but also their expected results in light of the differences in family roles between men and women. Moreover, while examining equality, it should take into account differences between thought patterns, ethics, family and interpersonal behavior currently labeled as masculine and parallel patterns labeled as feminine. The basic requirement set forth by the theory is that the legal model should essentially respect various choices and lifestyles, without demanding that one group adopt the values and behavioral patterns of another. In addition, mine is not an individualist egalitarian approach that views spouses as autonomous and independent parties, but rather a relational egalitarian approach that aspires to an equality that recognizes the dependence between spouses as well as their familial roles.[156] This aspiration is a break from the tendency to combine the egalitarian and individualist approaches on the one hand, and the unitary and non-egalitarian approaches on the other.

9. Liberal values as part of the public approach: In the current discourse, liberal values of autonomy and equality are associated with private rhetoric, while the public approach emphasizes the communitarian aspects of the family. In contrast thereto, a modern public rhetoric should address both the communitarian and liberal aspects of the family.[157]

In my view the greatest challenge facing future lawmakers and scholars in the field of spousal law is to design a general theory in the spirit of these principles. Fortunately, in recent years a few researchers in specific fields have broken out of the framework established by the liberalization narrative. In some cases their conclusions and recommendations converge with the principles that this Article proposes as the future foundation for spousal law.[158] On a personal note, I hope to complement this Article with a more comprehensive study suggesting a new model of spousal law based on the foundations set forth herein.

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156 For an interesting attempt to integrate the value of equality with the value of responsibility, see Linda C. McClain, The Place of Families: Fostering Capacity, Equality, and Responsibility (2006).

157 *See* Frantz & Dagan, *supra* note 84 (presenting a theory of marital property law that is not based on an analogy to commercial partnerships or on one to an implied contract between parties, but rather on the public desire to design spousal law as an institution combining autonomy, equality and community).

158 *See, e.g.*, Eichner, *supra* note 151; McClain, *supra* note 156; Cahn, *supra* note 122; Carbone, *supra* note 85; Frantz & Dagan, *supra* note 84; Scott & Scott, *supra* note 87.