Unbundling Marriage Law

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*This article illuminates the legal regulation of the economic rights of nonmarital partners at separation or death. Current approaches have typically fallen into two categories: one advocating for the separation of legal regimes based on formal status, treating cohabitant partners as strangers, and the other taking a functional approach, treating cohabitation and marriage as substantively identical. However, both approaches fail to offer a coherent alternative for regulating cohabitation. This article proposes a novel third option – the institutional, autonomy-based, pluralist model. The pluralist model acknowledges the legal commitment between cohabitants while carefully distinguishing the legal regulation of cohabitation from that of marriage. Unlike prevailing models that offer a “package deal,” the pluralist model selectively applies only suitable components of marriage law to non-marital relationships, considering thoughtful criteria for their applicability and ensuring a nuanced approach. The pluralist model offers a middle ground between treating cohabitants as strangers and treating them as married for purposes of regulating marital property, spousal support, and inheritance. Ultimately it provides a framework that considers the complexities of non-married relationships while maintaining a desirable level of legal clarity.*

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# Introduction

The 20th century’s liberalization of family law had a destabilizing effect on legal marriage’s traditional monopoly on spousal relationships.[[2]](#footnote-2) Consequently, law makers and legal scholars turned their focus to regulating non-marital relationships.[[3]](#footnote-3) Nevertheless, for many years, the law of non-marriage took a back seat to the fight for marriage rights by same-sex couples and marginalized groups. In the United States, the widely celebrated case *Obergefell v. Hodges*[[4]](#footnote-4) opened the door to a new and independent discussion of the law of non-marriage. Lawmakers[[5]](#footnote-5) and legal scholars[[6]](#footnote-6) have debated whether we should impose marriage-like commitments on non-married partners. One school of thought believes that we should separate the legal regimes governing marriage and non-marriage based on the formal status the couple chooses.[[7]](#footnote-7) Although adherents to this approach oppose imposing marriage-like commitments on cohabitants, they do not offer a coherent alternative for regulating cohabitation as a unique social institution. Other scholars take a more functional approach that advocates regulating relationships based on their essence, regardless of their formal status.[[8]](#footnote-8) Under this approach, despite their formal differences, cohabitation and marriage are viewed as substantively identical and thus should be treated equally by the law. What is missing from the current discourse is a third option, which would treat marriage and cohabitation as two equally respected options, with each subject to its own regulatory regime.

This article aims to fill this gap. It offers an institutional, autonomy based, pluralist theory to guide the regulation of non-marital intimate relationships.[[9]](#footnote-9) The proposed theory emphasizes the responsibility of the liberal state to create a variety of intimate relationship institutions that offer meaningful choices to individuals as well as the need to differentiate between the legal status of married couples and that of cohabitants.

Based on this theory, I suggest a novel and detailed legal model (the “pluralist model”) that recognizes the legal commitment between cohabitants yet distinguishes the legal regulation of cohabitants from that of married partners, and that also recognizes the plurality of cohabiting relationships and the need to distinguish among them.

Unlike most of the prevailing models that seek to apply marriage law as a “package deal” to cohabitants,[[10]](#footnote-10) the theory underlying the pluralist model unbundles marriage law and applies only its suitable components. It also suggests the criteria that should be used to determine which components of marriage law should govern non-marital intimate relationships.

First, based on the original rationale of marriage law, the article distinguishes contractual, ex-ante components of marriage law from its extra-contractual, ex-post elements. With this distinction in mind, I argue that objections to applying marriage law to cohabitants are more relevant in the context of contractual-ex-ante components. Another distinction the pluralist theory draws on the tension between individualistic and community-oriented regulations. Under the proposed model, while both marriage and cohabitation should reflect tension between the individualistic and communal aspects of the spousal relationship, marriage laws should strengthen the communal aspects of the relationship while cohabitation laws should place greater emphasis on the spouses’ individual autonomy. Finally, the model argues that cohabitation law should be less rigid than marriage law in terms of distinctions among different types of cohabitants and opt out options.

In addition, while most scholarship in the field concentrates on issues that arise at the end of the marital or cohabitation relationship, the model proposed in this article addresses the economic rights of non-marital partners throughout their relationship as well as at separation and upon death. Accordingly, it contributes to the literature by offering a more complete perspective than the discussions undertaken to date.

The article proceeds as follows. Parts I and II address the existing approaches to marital and cohabitation laws and offer a critical analysis, paying special attention to new legislation recently proposed by the Uniform Law Commission. Part III offers the theoretical foundation for a pluralistic institutional approach to distinguishing between the regulation of marriage and cohabitation. Part IV then lays the foundation for a coherent model that distinguishes between different components of marriage law and determines which are suitable for application to unmarried partners.

# I. Current approaches

Traditionally, American law,[[11]](#footnote-11) like the laws of other western countries,[[12]](#footnote-12) sharply distinguished between marriage and cohabitation and even invalidated contracts in which the cohabitants explicitly took on marriage-like commitments.

In the last decade of the 20th century, a liberal trend emerged across the western world that began to narrow the gap between the mutual obligations of cohabitants and those of married partners.[[13]](#footnote-13) More recently, however, liberal discourse itself has become divided between different approaches to the legal regulation of cohabitation.

On the one hand, there is a liberal-contractual argument in favor of distinguishing marriage from nonmarital relationships. The contractual argument focuses on the partners’ wishes and holds that the absence of a formal marriage reflects the couple’s rejection of marriage laws. Therefore, imposing marriage laws on cohabitants would not respect their choice not to get married.[[14]](#footnote-14) This liberal-contractual argument underlies the opt in or the explicit contract model that has been adopted in some jurisdictions, and that recognizes economic obligations between cohabitants only when the parties have entered into a formal agreement.[[15]](#footnote-15) This contractual argument is supported by empirical findings that point to systematic lifestyle differences between married and cohabitant partners, which suggest that married couples’ level of commitment is generally higher than that of cohabitants.[[16]](#footnote-16) According to the contractual argument, the law should reflect these differences.[[17]](#footnote-17)

On the other hand, some prominent scholars and lawmakers support the complete equalization of marriage and cohabitation commitments based on either a relational contract theory[[18]](#footnote-18) or the status model.[[19]](#footnote-19) In the legal literature, this approach is often supported by functional arguments that assert that the legal focus should be on the essence of the relationship and not on its formal classification.

On a sociological level, the relational contract/status model rejects the core premise of the “contractual argument,” namely that cohabitants intentionally reject marriage law.[[20]](#footnote-20) It argues that even from a contractual perspective, cohabitation often is not the outcome of an affirmative decision not to marry, but rather the natural continuation of the cohabitants’ existing lifestyle.[[21]](#footnote-21) The parties in these relationships have not rejected marriage; at most, they have not assigned it any great significance.[[22]](#footnote-22) Furthermore, even when the decision not to marry initially reflects an aversion to marriage law, one should not ignore that changing circumstances may lead the couple to update their life plans and mutual commitments, even if not in a formal way. Therefore, according to this approach, even from a contractual, autonomy-based perspective, the formalism of the contractual argument should be replaced by a relational approach that emphasizes the actual way in which the partners’ relationship developed,[[23]](#footnote-23) their mutual dependency, and their possible departure from their initial intentions, even if these were not articulated explicitly by the parties.[[24]](#footnote-24) Thus, according to this relational model, which several courts have implicitly adopted, the implied contract is not limited to an express, formalized understanding of the legal aspects of the relationship; rather it is based on a broader understanding between the partners regarding their mutual commitment.[[25]](#footnote-25) Furthermore, while most jurisdictions require concrete proof to show the existence of an implied contract,[[26]](#footnote-26) according to the broader version of the relational contract model, living together in a long-term marriage-like union is evidence of the parties’ intention to undertake a marriage-like sharing of property.[[27]](#footnote-27)

The status model also departs from the contractual model by taking into account extra-contractual considerations. These include equitable considerations aimed at preventing exploitation, as well as fairness[[28]](#footnote-28) and gender equality. [[29]](#footnote-29) Those who equate marriage and cohabitation assume that cohabitation and marriage differ in form but involve substantially the same functional characteristics.[[30]](#footnote-30) Under this functional view,[[31]](#footnote-31) invoking the formal differences between the institutions as the sole basis for depriving the weaker partner in a cohabitation relationship of remedies available under marriage law is simply unjust.[[32]](#footnote-32) Although the American Law Institute[[33]](#footnote-33) and several American jurisdictions[[34]](#footnote-34) have adopted the status model, this approach is not generally popular in the United States. The status model has been recognized in other Western jurisdictions, however, including provinces in Australia[[35]](#footnote-35) and Canada[[36]](#footnote-36) and in a few European countries.[[37]](#footnote-37)

Between these two approaches is a range of intermediate positions. Some of these argue in favor of legal, ad hoc recognition of both explicit and implicit contractual agreements between cohabitants.[[38]](#footnote-38) These intermediate positions often base claims for the economic rights of cohabitants on equitable considerations such as the doctrine of unjust enrichment.[[39]](#footnote-39) Such positions have recently gained prominence with the Uniform Law Commission’s (ULC) approval of the Uniform Cohabitants’ Economic Remedies Act (UCERA). According to the UCERA, specific rights of non-married couples are recognized in accordance with contractual doctrines (oral, express, or implied in fact), and equitable doctrines such as unjust enrichment. Furthermore, previous barriers limiting the use of such doctrines in the context of non-marital unions have been removed:[[40]](#footnote-40) First, the UCERA eliminates the non-recognition of agreements based on public policy considerations. Second, it invokes the doctrine of unjust enrichment to broaden the definition of “contribution” to include non-economic contributions.[[41]](#footnote-41)

# II. Critical Analysis of Current Approaches

As the previous part demonstrates, the existing approaches (the contractual distinctions on the one hand and the relational and status equalizations on the other hand) both reflect a partial and insufficient view of cohabitation law.

The contractual argument is correct in analyzing the typical differences between married couples and unmarried couples and in emphasizing the autonomy of the couple by ascribing meaning to the choice not to marry. The contractual model is incomplete, however, in that it fails to address countervailing arguments in favor of imposing marriage law on cohabitants: the need to avoid exploitation due to gender differences and relational commitments embedded in long-term cohabitation. At the same time, the status model does not offer a solution to unmarried couples who desire a legal package that is not marriage. As Erez Aloni has shown, the status model provides only a formal exit option to such couples—an arrangement that leaves much to be desired. Among other problems, these couples may lack awareness that they are subject to the laws of marriage or may lack the legal or economic means to enter into an opt out agreement.[[42]](#footnote-42) Furthermore, as Brown, Cahn, and Carbone have shown,[[43]](#footnote-43) in many cases, women from disadvantaged socio-economic groups generally prefer to maintain financial independence and avoid taking on their partners’ debt.[[44]](#footnote-44) As these commentators observe, the more vulnerable party, i.e., the party whose interests the status model tries to protect, is the most likely to lose from a regime that treats all cohabitation arrangements like marriages.

To conclude, analysis of the existing approaches demonstrates that regulation of the economic relationship between cohabitants is a complex matter that requires a balancing of various considerations. Yet each of the existing approaches focuses too heavily on a specific type of consideration and thus fails to offer a suitable balance.

Considering the existing approaches to cohabitation law from a sociological perspective further reveals their inadequacy. Cohabiting couples are diverse group that includes subgroups of cohabitants, each characterized by different preferences and interests.[[45]](#footnote-45) Each of the existing models focuses on one subgroup and ignores or denies the existence of other groups. What is needed is a richer model that responds to different subgroups of cohabitants.

In some ways, the UCERA represents a middle ground that addresses the criticisms directed to both approaches. Yet, the model grants the courts too much room for ad-hoc judgment, impairing the predictability of the law and undermining the effort to design cohabitation as an institution. Therefore, an additional legal model is required to account for the heterogeneity of the sociological phenomena of non-marriage and yet still treat it as a legal institution with core characteristics in a way that narrows the reliance on ad-hoc judgment by the courts.

Furthermore, the regulation of non-marriage is trapped in a dichotomy between treating the unmarried couple as strangers and treating them as married.[[46]](#footnote-46) This dichotomy does not take into account the special nature of the non-married couple’s relationship and thus fails to offer a fitting legal regime. So, for example, while the UCERA expands the definition of “contribution” for purposes of defining each cohabitant’s share of the couple’s property upon dissolution by recognizing non-monetary domestic contributions,[[47]](#footnote-47) its application may still yield unjust results. If the cohabitants are treated as strangers, then the domestic partner’s contribution would be measured according to its market value, which fails to account for the cohabitants’ special relationship and concerns for gender equality. Alternatively, if the cohabitants are treated as married spouses, the result would be similar to that of the status model.[[48]](#footnote-48)

A similar analysis is also relevant to contract doctrine.[[49]](#footnote-49) To the extent courts treat the relationship between cohabitants as similar to that of strangers, then it is very difficult to infer from concrete circumstances a commitment to a real economic sharing regime. On the other hand, to the extent that courts infer the existence of an agreement to apply marriage laws automatically from a couple’s relationship ,we arrive at the status model once again through the back door. In other words, the UCERA does not provide real tools to give real, independent content to the relationship between cohabitants. That is, it does not distinguishbetween cohabitants and married couples or express the typical expectations and commitments created in these relationships.

# III. Toward an Institutional Pluralist Distinction between Marriage and Cohabitation

The existing approaches, while substantively different, are trapped in the same dichotomy. Under one approach, despite formal differences, cohabitation and marriage relationships are seen as substantively identical and thus should be treated equally by the law. Under this approach, at times, the law relies on the similarities between marriage and nonmarriage to deny equal treatment to the unmarried couples. The other approach, by contrast, views cohabitation and marriage as substantively different, with marriage reflecting a greater degree of commitment between the parties. Under this approach, the law should not recognize cohabitation as a separate and unique institution. What is missing from the current discourse is a third option, which treats and designs marriage and cohabitation as two equally respected options, with each subject to its own regulatory regime. This is exactly the vision of the institutional pluralism approach expressed in this article.

According to this approach, the law should design marriage and cohabitation as separate regimes as part of society’s responsibility to recognize a diversity of intimate relationships. It argues for the importance of diversity based on a pluralist attitude that is committed to autonomy as a primary liberal value, and it emphasizes the responsibility of the liberal state not only to respect individuals’ choices but also to create a variety of social institutions that offer meaningful choices.[[50]](#footnote-50)

Therefore, unlike the contractual approaches that try to recreate or express the typical intentions of the couple inorganically, as if people’s consciousness existed separately from the law governing their lives,[[51]](#footnote-51) the pluralist theory emphasizes the need to design two separate legal frameworks from the outset. It bears emphasizing that separating legal institutions does not mean ignoring non-marital relationships and treating cohabitants as strangers, but rather designing a unique legal system that fits the needs and unique characteristics of non-married relationships.[[52]](#footnote-52)

Hence, unlike the prevailing models that address marriage law only as a package deal with respect to cohabitants, the theory underlying the new model unbundles marriage law and applies only its suitable components. It also suggests the criteria that should be used to determine which components of marriage law should apply by default, with both opt-in and opt-out options for cohabitants.[[53]](#footnote-53)

First, legal regulation in general, and the legal regulation of marital relationships in particular, offers some components aimed at directing human behavior ex ante, and other components aimed at responding to situations post factum.[[54]](#footnote-54) My model distinguishes between channeling, contractual-ex-ante components, on the one hand, and responsive, extra-contractual ex-post components on the other. Drawing on this distinction, the model rejects the imposition on cohabitants of channeling regulations, which aim to encourage couples ex-ante to behave according to society’s vision regarding marriage. Applying such regulations to unmarried couples would undermine the ideal of designing marriage and non-marriage as separate legal institutions. Additionally, applying rules based on contractual logic that focuses on fulfilling expectations and intentions does not conform to recent research revealing typical differences in the expectations of married versus unmarried couples.[[55]](#footnote-55) On the other hand, laws designed to respond ex-post to given situations and to prevent injustices and exploitation are relevant to both married and non-married relationships.[[56]](#footnote-56) Hence, non-marriage law should impose on cohabitants the responsive components of marriage law that aim ex-post to protect the more vulnerable party from such mistreatment.

Second, other criteria that the theory offers reflect the tension between individualistic and community-oriented regulation. The regulation of marriage reflects intrinsic tension between spousal autonomy and the need for an exit option on the one hand, and the mutual commitment and the communitarian aspects of marriage on the other.[[57]](#footnote-57)

According to the proposed model, while both marriage and cohabitation should reflect tension between the individualistic and communal aspects of the spousal relationship, marriage laws should strengthen the communal aspects of the relationship while cohabitation laws should place more emphasis on the personal autonomy of the spouses, and especially on their right to exit.

Third, while the legal arrangement of marriage is designed as a social institution that expresses an agreed core of mutual expectations, the legal framework governing non-married relationships should be designed in a flexible manner.[[58]](#footnote-58) Accordingly, while parties to a marriage can usually live with a “one size fits all” set of default rules, the model offers a distinction between different types of cohabitants such as those in trial marriages, those who are postponing legal marriage, and those who are in long-term relationships and desire to continue with a previously existing lifestyle. To distinguish among these types, the article suggests criteria to ascertain which cohabitants should be subject to marriage law.

Finally, another implication of the difference between the institutional nature of marriage and the flexibility that characterizes non-marital relationships is related to the ability to opt out. Marriage laws should be designed as a rigid default subject to exceptions that may be invoked by a formal and supervised agreement. On the other hand, a non-married partner’s ability to opt-out of default rules governing the relationship should be easier and less sticky.

In this spirit, in addition to proposing conventional default for regular cohabitants, the pluralist model grants courts authority to apply marriage laws to “relational long-term cohabitants” yet supports the recognition of flexible opt out arrangements.

# VI. From Theory to Practice

In the following sections, I outline a model for an institutional pluralist regulation of non-married partner relationships.

# A. Property Law Governing Non-Married Partners

# *(1) The Equal Division Rule and its Underlying Rationales*

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

In the United States, a distinction has evolved between two major approaches to marital property.[[59]](#footnote-59) Most American states follow traditional common-law principles in the allocation of property at divorce, respecting the separate ownership of each partner, yet dividing the property between the partners based on the court’s equitable judgment in view of their respective contributions and need.[[60]](#footnote-60) A minority of states follow community property principles that originated in the civil law tradition, according to which all property acquired during the marital relationship—excluding pre-marital assets, inheritance, and gifts—is considered to be the common property of both spouses.[[61]](#footnote-61) With time, however, the gap between common law and community property states has narrowed. While equitable distribution does not necessarily imply equal distribution, the clear trend in most common law states today is towards a default of equal distribution of the marital property upon divorce, regardless of the formal title of the property.[[62]](#footnote-62)

Two main rationales have been offered to explain this trend. The first is based on the couple’s joint contributions to the relationship and is supported by analogy to commercial partnerships. The second is grounded in the ideal of marriage as an egalitarian community.

The contribution rationale addresses the division of labor between partners wherein the provider (traditionally the man) contributes to the family’s welfare by working outside the home, and the other partner (traditionally the woman) is responsible for care of the home, while relinquishing, either partially or fully, a career outside the home.[[63]](#footnote-63) While the latter’s efforts enable the former to earn income and accumulate property, formal property law ignores such contributions, thus resulting in injustice.[[64]](#footnote-64) Theoretically, the contribution rationale might support an equitable regime that authorizes courts to measure the relative contribution of the spouses to the acquisition of income and property.[[65]](#footnote-65) It has been argued, however, that in the absence of a market value for the domestic role,[[66]](#footnote-66) the equal division rule is preferable to equitable division because it prevents an arbitrary result[[67]](#footnote-67) or even worse, the systematic underestimation of the domestic partner’s contribution.[[68]](#footnote-68)

The contribution theory is highly influential,[[69]](#footnote-69) but it is not always convincing, since it is probably incorrect to assume that in all cases, the domestic partner’s contribution equals the income of the “provider.”[[70]](#footnote-70) This critique of the contribution theory is especially forceful with respect to healthy, childless couples who out-source most of their domestic tasks;[[71]](#footnote-71) high-income providers whose earnings are based on unique skills or reputation or on pre-existing family wealth that was acquired prior to the marriage; or providers who also have primary responsibility for domestic tasks.

Beyond those situations, there is a deeper problem with the contribution rationale and the analogy between marriage and commercial relationships. In the commercial context, the separate individualistic identities of the partners are usually maintained. In the family context—specifically in cases of long-term relationships—spouses perceive themselves at least partially as a “we”—a plural subject that is in turn a constitutive feature of each spouse’s identity.[[72]](#footnote-72) This “we” perception led Professors Dagan and Frantz to suggest the ideal of marriage as an egalitarian community.[[73]](#footnote-73) According to Dagan and Frantz, during married life, at least in normative families, spouses usually develop an egalitarian community that enables them to share life’s advantages as well as its difficulties. Marital property law should reflect and encourage such an ethos regarding marriage by adopting the equal division rule regardless of the partners’ respective contributions.

# *(2) The Applicability of the Equal Division Rule’s Rationales to Cohabitation*

According to the pluralist model, while the egalitarian community ideal reflects the proper rationale for marital property, it is not necessarily applicable to cohabitants. First, the egalitarian community ideal is a channeling rationale that seeks to design marriage in an ideal way. Since the pluralist approach aspires to distinguish the social institution of cohabitation from that of marriage, it should abstain from automatically applying the marriage ideal to cohabitation. Furthermore, substantively, the ideal of marriage—the commitment that makes two “I”s into a “we”—does not suit the autonomy-based foundation of the cohabitation institution.

By contrast, the contribution theory—despite or perhaps because of its limited scope when applied to marriage—is the proper model for cohabitation property law:

First, the contribution rationale is a classic “responsive” rationale, rather than a rationale that intends to design marriage in specific ways. The pluralist approach is open to imposing on cohabitants rules that are built on responsive rationales.

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

Finally, the contribution rationale is a perfect example of an extra-contractual consideration. As such, the pluralist approach supports its imposition on cohabitants.

# *(3) Deviations from the Equal Division Rule in Cases of Asymmetric Contribution*

Basing non-marital property law on the contribution ideal rather than on the egalitarian-community ideal has some specific and quite dramatic implications for the flexibility and scope of the equal division rule.

The egalitarian community rationale perceives equal division as intrinsically valuable and an expression of society’s vision about the proper marital relationship. Thus, it applies the equal division rule regardless of the spouses’ actual contributions, even in cases where there the contributions of each partner to the family assets are clearly unequal. In the case of cohabitants, however, the contribution theory is the sole justification for the equal division rule. In cases of clear asymmetry in the contribution of each cohabitant, it would be artificial to adhere to the equal division rule. Consequently, according to the pluralist theory, in cases of clear asymmetry in the partners’ contributions, and especially where there is an atmosphere of autonomy and economic separation during the relationship, cohabitation law and marriage law diverge: With respect to married partners, the pluralist theory advocates the equal division rule. But with respect to cohabitants in otherwise similar circumstances, ordinary property rules that compensate domestic cohabitants for their actual contributions should be applied.

To sum up, the pluralist model differs from both the status and the contractual approaches. In contrast to the status approach, the pluralist model opens the door for an exception to the rule of equal distribution of apparently joint property, even when it comes to property accumulated during the union, and especially in cases of significant disparities in contribution backed by a general atmosphere of limited economic sharing. However, in contrast to the contractual approach and even to the approach of the UCERA, the flexible default under the pluralist model in the case of cohabitation should be equal distribution, with ad-hoc compensation arrangements based on principles of unjust enrichment and implied contract doctrines available as exceptions.

To be sure, a default rule of equal distribution of the property accumulated during the relationship may be troubling to those who wish to distinguish more sharply between married and unmarried partners. Additionally, the diversity of marital patterns among unmarried partners may support an arrangement of ad hoc compensation based on the doctrines of implied contract and unjust enrichment. Nevertheless, there is no realistic formula for evaluating, in the abstract, the contributions of the domestic partners for the purpose of applying the doctrine of unjust enrichment or for inferring the terms of an actual agreement between intimate partners. A default rule of equal distribution thus offers a starting point, and one that diminishes the opportunity to underestimate the contribution of the domestic partner. As mentioned, however, the default rule is both flexible and limited to property acquired during the relationship. Finally, as we discuss in greater detail below, the pluralist model proposes entry requirements as a precondition to triggering the equal distribution default rule.

# *(4) Inheritance, Gifts, and Property Acquired before Cohabitation*

Based on the contribution theory, most states traditionally distinguish between assets acquired during the marriage by the couples’ labor (“lab property”), on the one hand, and inheritance, gifts, and property acquired before the marriage (“luck property”) on the other. The former reflects both spouses’ joint effort, including the domestic partner’s contribution, and is thus subject to the equal division rule, while the latter is typically not a product of a joint venture and is thus considered private property, i.e., property that is not subject to division. As explained by John T. Oldham:

In most states, if a marriage is dissolved by divorce spouses do not share all property accumulated during marriage; property acquired during marriage by one spouse by gratuitous transfer is not considered a marital asset. Because no effort is necessary to acquire a gift or an inheritance, such acquisitions are not considered true partnership acquisitions. For similar reasons, acquisitions before marriage are not shared. [[74]](#footnote-74)

However, a few scholars have challenged the Labor-Luck distinction,[[75]](#footnote-75) arguing, based on the egalitarian community ideal, that the community ideal of sharing a life together must result in converging at least part of the separate property into community property.[[76]](#footnote-76) Even beyond scholarship, many states have recently begun to recognize the transmutation of separate property into marital property in cases of mingling of sources, joint use (especially of the family home), or an implied contract.[[77]](#footnote-77) Going one step further in this direction, the American Law Institute recommends a bright line rule that would transfer an increasing percentage of separate property into marital property based on the length of the marriage.[[78]](#footnote-78)

Unlike marital property law, cohabitation property law should be based on the contribution theory as this model is more suitable to the individualistic aspects of the cohabitation institution and its focus on commercial and responsive rationales.[[79]](#footnote-79)

Accordingly, in cases of cohabitation, it makes sense to adhere to the traditional exclusion of non-labor property from the joint marital assets—an outcome that is appropriate to the institution’s emphasis on autonomy.

Interestingly, even the ALI principles—the archetype for equating marriage and cohabitation regulation under the status model—consider it inappropriate to blur the distinction between Labor-Luck properties in case of cohabitants.[[80]](#footnote-80) Yet, the ALI fails to explain this outcome.[[81]](#footnote-81) The pluralist model explains why dividing traditional “private” property is undesirable in the case of cohabitants even if it is justified in the case of marriage.

# *(5) Management of Property During an Ongoing Relationship*

As both common law states and community property states apply a de facto equal division rule upon divorce, the main difference between the two concerns the management and control of property during an intact marriage. The main question that arises is whether each spouse is allowed to use property registered in his or her name according to his or her discretion, or whether both spouses must consent to use of the family property. A similar legal question concerns the extent to which the legal actions of one of the spouses binds the other spouse. This question is of special significance in cases where one of the spouses is in debt.[[82]](#footnote-82) While a nuanced analysis of the legal arrangements under each property regime is beyond the scope of the current article, I note that the issue underscores the tension between the aspects of autonomy and community in a marriage. In principle, in common law jurisdictions where property separation formally prevails during marriage, the autonomy aspect increases, while in community property jurisdictions, the community aspect increases, and therefore the consent of both spouses is required to use the family property.[[83]](#footnote-83) Under the pluralist approach, a non-marital spousal institution should emphasize autonomy. Therefore, an arrangement that provides for property separation during the cohabitation and grants autonomy to each of the spouses with respect to his or her property is more suitable for this institution. It bears noting that, in many cases, it is the more vulnerable party, e.g. women from lower socio-economic classes, who choose not to marry due to their fear of depending on financially unstable partners[[84]](#footnote-84). Therefore, in regulating the economic aspects of an ongoing relationship, extra-contractual considerations that focus on protecting women in non-marital relationships support the distinction between married and non-married partners.

# *(6) Increased Human Capital*

Another area where the pluralist model distinguishes between marriage and cohabitation is in the treatment of human capital, e.g., academic or professional degrees, licenses, or a personal reputation that has increased during the relationship.

Even leaving aside cohabitation law, the inclusion in the marital estate of human capital that increased during marriage is a complex issue that exposes unsettled tensions within marital law.

On the one hand, most states do not include enhanced human capital within the marital estate.[[85]](#footnote-85) While formal justifications for this reluctance—“human capital is not property”[[86]](#footnote-86)—and those based on purported difficulties in calculation[[87]](#footnote-87) are unconvincing,[[88]](#footnote-88) more serious objections to the division of earning capacity are based on autonomy*.*[[89]](#footnote-89)

First, symbolically, human capital division contradicts the individualistic perception of human efforts and skills as personal.[[90]](#footnote-90) Second, unlike other marital property, human capital is divided in the post-divorce period as a function of the actual salaries of both spouses at that time.[[91]](#footnote-91) Thus, human capital division harms the right of complete exit from any spousal commitments.[[92]](#footnote-92)

On the other hand, despite the inherently individualistic character of career development, one should not ignore its community aspect when it occurs during marriage.[[93]](#footnote-93) Economic research shows that increased human capital is one of the main assets acquired during marriage.[[94]](#footnote-94) It is not surprising, then, that the reluctance of current law to include human capital within the marital property results in extremely unequal economic outcomes between men and women at divorce.[[95]](#footnote-95) Thus, the egalitarian and community aspects of marriage militate against ignoring increases in human capital.[[96]](#footnote-96)

Considering the importance of community and equality to marriage regulation, prominent scholars have supported including the increase in human capital in the marital estate, despite the autonomy objection. According to these views, the autonomy objection justifies taking a different approach to property division but not ignoring human capital altogether.[[97]](#footnote-97) Along these lines, a well-known decision under New York law,[[98]](#footnote-98) as well as courts from outside of the United States,[[99]](#footnote-99) have challenged the traditional rule and divided increases in human capital. Other jurisdictions, while not dividing increases in human capital, may consider human capital as a factor the court should weigh in exercising its discretion with respect to the division of marital property. [[100]](#footnote-100)

Under the pluralist model, marital property law and cohabitation property law should differ on this issue:

In the context of marriage, the model’s commitment to marriage as an egalitarian ideal should not result in ignoring the increase in human capital despite the autonomy objection.[[101]](#footnote-101) Cohabitation, in contrast, is an autonomy-based institution. Hence, both the symbolic concern that the division of human capital contradicts the individualistic perception of human efforts and skills as personal and the practical concern that human capital division harms the right to exit are stronger in the case of cohabitations than in the case of married partners.

Accordingly, the model opposes dividing the increase in human capital between cohabitants because the community consideration is weaker, and the autonomy-based objection is stronger—especially insofar as it harms the right of exit. Yet even the pluralist model should not ignore the injustice that may result from the dissolution of non-marital, long-term relationships in which one partner significantly contributed to the other partner’s career and sacrificed his or her own development. While cohabitation property law does not consider human capital to be family property, such injustices should be addressed through complementary remedies such as career loss compensations. In the next part, I discuss these remedies.

# B. Spousal Support and Compensation for Loss of Career

# *(1) Models of Spousal Support and Compensation for Career Loss*

*Traditional alimony*: The obligation of alimony was traditionally characterized by three elements: First, it was a gender-based model: only men were required to pay alimony. Second, it was an obligation that lasted until the woman either died or remarried. Third, it was fault-based, meaning that only men determined to have caused the dissolution of the spousal bond were obligated to pay alimony.[[102]](#footnote-102)

*Rehabilitative maintenance*: In the second half of the 20th century, in many states the traditional model of long-term alimony was almost completely abolished. In its place, a new model of rehabilitative maintenance was established. According to this model, maintenance payments are required for a short period, and their aim is to provide the spouse who was supported economically during the relationship with a short recovery period in which to adjust to independent living.[[103]](#footnote-103) The underlying ideology of the rehabilitative maintenance model is the individualistic, clean-break principle, in which the divorce completely ends any economic relationship between the divorcing couple.[[104]](#footnote-104)

*The revival of long-term alimony*: Although the traditional model of alimony has been abandoned in most western countries, not all jurisdictions have adopted the rehabilitative maintenance model in its place. Additionally, a counter-trend to the clean-break principle has emerged that extends the support duty beyond the rehabilitation period.[[105]](#footnote-105) The reason for this modern revival of long-term alimony is the recognition that in spite of the seemingly egalitarian divide of the marital property, the domestic partner—most often the woman—is severely economically disadvantaged in the event of divorce.[[106]](#footnote-106) Yet, modern spousal support law operates without any guiding ideology, which has led to confusion and a lack of uniformity, even regarding the most substantive components of support law.[[107]](#footnote-107) Thus, several jurisdictions have taken steps to remedy the gender bias of the traditional model but continue to base the modern support mechanism partly or fully on the notion of fault.[[108]](#footnote-108) A second version of modern long-term support abandons the concept of fault and focuses on the needs of the economically weaker party. This version is sometimes justified in the legal scholarship by analogy to an insurance agreement.[[109]](#footnote-109)

*Compensation for loss of career*: Ira Ellman has suggested an additional model for spousal payment following divorce. Unlike the conventional model that focuses on the future—namely the partners’ needs and incomes after divorce—this model focuses on the career loss of the domestic partner during marriage.[[110]](#footnote-110) According to this model, the domestic partner should be compensated for her loss of earning capacity during marriage.[[111]](#footnote-111) The compensation should be paid either as a lump-sum after divorce or as periodic payments, depending on the circumstances. This model gained support among some scholars[[112]](#footnote-112) and was adopted as the guiding model of the American Law Institution.[[113]](#footnote-113)

# *(2) Imposing Spousal Support and Compensation for Career Loss on Cohabitants*

Should any of these models be applied to cohabitants?

Fault-based alimony is grounded in a perception of marriage as a commitment for life. According to this perception, the partner who initiates the separation breaches the marital contract, and alimony represents compensation for the breach.[[114]](#footnote-114) The modern move from fault-based to no-fault unilateral divorce undermines this rationale, even with respect to marriage.[[115]](#footnote-115) Obviously, the pluralist model—with its emphasis on individualism and resistance to imposing societal ethos on cohabitants—opposes the imposition of fault-based alimony on cohabitants.

The no-fault versions of modern long-term spousal support recognize the right to end the marriage unilaterally. Yet these models extend the need-based support responsibility or the sharing mechanism between the couples for lengthy and sometimes even unlimited periods after the divorce. Thus, they severely limit the autonomy of the partners as individuals and especially their right of exit. This underscores the need for a pluralist distinction between marriage and cohabitation: in the case of marriage, the community aspect of marriage justifies, at least in certain circumstances, need-based alimony grounded in the insurance rationale. However, considering the substantive burden that long-term alimony imposes on individual autonomy, the pluralist theory insists that the law should design other alternatives that give priority to the partners’ absolute right of exit. Thus, according to the pluralist model, cohabitant laws should not adopt any formulation of long-term alimony as a default.[[116]](#footnote-116)

In contrast, it may be appropriate to apply rehabilitative maintenance to cohabitants. First, rehabilitative alimony is based on extra-contractual considerations that are as relevant to cohabitants as they are to married spouses. Furthermore, in the case of cohabitation, there is no need for formal divorce to untie the bond between the partners, and either party may choose to terminate the relationship unilaterally and with immediate effect. Accordingly, when one cohabitant is economically dependent on the other, a sudden interruption of the couple’s economic commitment due to the breakdown of the relationship seriously disadvantages the dependent partner. Thus, the extra-contractual considerations that justify rehabilitative alimony in the context of cohabitants are even stronger than they are in the marital context. Finally, rehabilitative alimony is, by definition, limited to a short period and thus does not threaten the pluralist model’s commitment to the right of exit.

For the reasons explained above, the pluralist model firmly opposes long-term unlimited spousal support but supports rehabilitative maintenance for cohabitants. The model is less definitive, however, with respect to compensation for loss of career opportunities during cohabitation.

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

On the other hand, the model may support such compensation, since compensation for loss of career opportunities reflects the principles of restitution and unjust enrichment, which are extra-contractual in nature. Furthermore, substantively, compensation for financial losses is essentially the payment of a debt that was created during the marriage/cohabitation period and thus is unlike classic forward-looking alimony.

These opposing considerations underscore the importance of distinguishing between different types of cohabitants when it comes to compensation for the loss of career opportunities. Insofar as “regular cohabitants” are concerned, the ex-ante rationales for distinguishing marriage from cohabitation, i.e., enhancing the partners’ autonomy and independence and ensuring their right of exit, should overcome ex-post extra-contractual considerations. Thus, the basic package of cohabitant law should not include loss of career compensation. Yet, in cases of long-term relationships that are accompanied by economic dependency, a different balance is needed, and loss of career compensation may be appropriate. The following parts address the unique features of long-term cohabitation and its suggested regulation according to the pluralist theory.

# C. Succession Law and Marital Property upon Death

# *(1) Legal background*

Analytically, the rights of a surviving spouse after the death of his or her spouse are divided into two[[117]](#footnote-117): (1) the survivor’s part of the marital property; and (2) the survivor’s right to the private property of the deceased, which is subject to the deceased’s will or to the default laws of succession.

According to the “marriage as partnership” model,[[118]](#footnote-118) upon the death of one spouse, each spouse is regarded as the owner of half of the marital property, so half of the property becomes subject to the deceased’s will or to the laws of succession, while the remaining half becomes the survivor’s property by operation of marital property law. Indeed, this view is reflected in the laws of community property states.[[119]](#footnote-119) In equitable distribution states, by contrast, the death of a spouse triggers succession law without regard to the norms of marital property law, which apply only in the event of divorce. In these jurisdictions, the surviving spouse is protected only by her entitlement to an “elective share,” meaning that she may choose to receive a specific portion of the decedent’s total estate, thus protecting her from disinheritance. Traditionally, this provision was designed to provide surviving spouses with reasonable support, preventing them from losing everything upon the death of their partners.[[120]](#footnote-120) In recent decades, however, the idea behind the elective share has come to be perceived as related to the principles of partnership theory.[[121]](#footnote-121) In that spirit, the UPC reform of 1990 suggested enlarging the elective share to half of the estate in attempt to give the surviving spouse a fair share of the marital property at her partner’s death, explicitly relying on partnership theory as a justification.[[122]](#footnote-122) While half of the estate does not necessarily equal the surviving spouse’s right under marital property law (which usually relates only to the property accumulated during the marriage), the differences between the results of succession law and those of marital property laws are perceived as stemming from practical considerations.[[123]](#footnote-123)

At all events, only after the surviving spouse takes either the elective share or her share according to the matrimonial property laws do the deceased’s will (or, alternatively, the succession default rules) come into the picture.[[124]](#footnote-124) In many states, succession laws grant the surviving spouse broad rights to the deceased’s estate, and usually no less than half of the intestate estate. [[125]](#footnote-125)

# *(2) Cohabitation Rights upon Death*

To date, most public discussion concerning the rights of non-married partners has focused on their rights at the time of separation. Most states within the United States do not recognize successions rights for non-married partners.[[126]](#footnote-126) Similarly, under the inheritance laws of most western countries, the rights of non-married partners upon death are limited.[[127]](#footnote-127)

Under the pluralist theory, a distinction must be made between joint property rights upon death that are the results of the economic partnership between the couples and rights based on inheritance laws. When it comes to property rights at the time of death, the analysis in the previous sections explaining why the property rights of non-married partners must be recognized by default upon separation is also relevant to the exercise of these rights upon death. As explained above, the recognition of these rights represents a responsive aspect of the law and extra-contractual considerations. Those considerations are relevant in the event of death as well. Similarly, in countries that have adopted an elective share model based on social justifications, it is particularly appropriate to consider those social aspects when it comes to non-married partners.[[128]](#footnote-128)

Cohabitant rights based on inheritance laws are entirely different. Default inheritance laws are commonly understood as reflecting the way most people would like to bequeath their property.[[129]](#footnote-129) For this reason, in ​​inheritance more than in other areas, great weight should be given to the consideration that the couple did not marry because they did not want to formalize their relationship and give it legal meaning.

Moreover, it is appropriate to note systemic institutional considerations as well. When it comes to marriage, the definition of who is married is a formal definition, and clear inheritance rules help shape the expectations of married couples. In contrast, a non-married relationship includes a wide variety of life patterns.[[130]](#footnote-130) The need to determine who should inherit for purposes of inheritance laws will add uncertainty to an area that requires certainty. Therefore, in the case of cohabitants, it is preferable to have a rigid default rule based on formal status of “non-married” and to allow for an opt-in alternative that can be accomplished through a will.

Additionally, under the proposed pluralist model, inheritance laws will also deal with the division of the estate after the spouse’s rights have been settled according to marital property laws or in accordance with the elective share doctrine. For this reason, the extra-contractual considerations of justice, fairness, equality, and the protection of the weaker party—all of which inform marital property laws and, according to some, should also inform inheritance laws[[131]](#footnote-131)—should be addressed at the outset. Therefore, it makes sense that when considering how to dispose of the deceased’s individual property—i.e., the property as to which the surviving spouse has no claim based on the couple’s joint efforts or other extra-contractual considerations—his choice to marry or not to marry should be among the considerations that are relevant to the construction of his presumed will.

A similar argument is also relevant to theories of inheritance laws that focus on the way in which the testator creates intergenerational continuity through his property.[[132]](#footnote-132) According to these theories, recognition of the spouses’ joint efforts is expressed in the framework of marital property laws. On the other hand, when shaping the personal story of the testator, there is room to respect the couple’s choice not to marry and the variety of reasons that might explain this choice. Furthermore, in many cases, the inheritance claims of cohabitants emerge with successive relationships, which may provoke conflicts between the deceased’s spouse at the time of his or her death and the deceased’s children from a previous relationship. In these cases, the result of defining the surviving partner as an heir is that he will inherit half of the deceased’s property, including property accumulated during his marriage to the parent of the children competing for the inheritance, or even property the deceased inherited from his previous spouse.

Yet even according to the pluralist model, courts may be authorized to grant inheritance rights to unmarried partners” in the following circumstances:

(1) Where a marital agreement excludes the possibility of the survivor receiving his share of the marital property. In such cases, social and extra-contractual considerations are not answered in the first stage, and corrective intervention by the court may be required.

(2) When unmarried partners have children together, especially when neither has children not in common with the other.

(3) In long-term cohabitation relationships where the court concludes based on the circumstances that treating the surviving partner as the spouse of the deceased reflects the deceased’s presumed wishes.[[133]](#footnote-133)

To sum up, while the law of most states in the United States treats cohabitants as strangers at the death of one of them, and other countries such as Israel take a diametrically opposed, functional approach that treats cohabitants as married for inheritance law purposes,[[134]](#footnote-134) the pluralistic model offers a third way. In the event of death, this model distinguishes between survivor’s rights to marital property and pure inheritance rights. The former should be applied both to married and nonmarried partners, while the latter should be applied only to married spouses. Yet, the model still offers the possibility of recognizing cohabitants’ pure inheritance rights in the circumstances mentioned above.

# D. The Need for Flexibility

In the third part,[[135]](#footnote-135) I emphasized the institutional distinction between the regulation of relations between married partners and that of non-married partners. I proposed that in view of the informal nature of relationships between non-married partners, rules of entry are required for recognition in the world of binding legal commitments. Beyond designing entry requirements that are sensitive to different types of cohabitants, two legal developments are required. The first is to recognize the quasi-marital commitment that may exist between non-married partners in long-term relationships, even without formal entry. The second is to reduce the rigidness of the default rules and allow more freedom to adapt those rules to the partners’ actual lifestyle through a flexible opt-out mechanism. In this part, I elaborate on three dimensions of these developments: entry requirements, opt in, and opt out alternatives.

# *(1) Entry Requirements*

Sociologists tend to view a short period of cohabitation as a trial period, following which the parties are likely to determine whether they wish to make a more serious commitment.[[136]](#footnote-136) The pluralist theory supports this trial period function because it enhances the autonomy of the couple, improves spousal choosing mechanisms, and deepens the meaning of marriage as a signal of commitment. Moreover, in short, childless relationships, the extra-contractual justifications for imposing a marriage commitment on cohabitants are relatively weak. For these reasons, the pluralist model establishes a substantive minimum period of bona fide cohabitation to benefit from the specific marital rights to which unmarried partners would be entitled under the model this article proposes. During this trial period, the parties’ respective legal rights and obligations should be regulated according to ordinary civil law doctrines.

The model distinguishes, however, between childless cohabitation and cohabitation that is accompanied by children in common. First, from the screening and signaling perspectives, joint upbringing of children might reflect a higher commitment than regular cohabitation. Second, when children are involved, the extra-contractual rationales are more significant and justify imposing on cohabitants the components of marriage law described in the previous sections. The minimal duration time of the trial period may vary as a function of specific demographic and sociological considerations in a given environment. Yet as a rule of thumb, a three-year minimum for childless cohabitation and a one year minimum for cohabitants with children seems plausible.[[137]](#footnote-137)

Considerations of simplicity and predictability might suggest using a period of actual cohabitation as the sole entry requirement.[[138]](#footnote-138) But if simplicity, predictability, and ex-ante planning considerations totally overcome ex-post considerations that are sensitive to a diversity of actual lifestyles, then the formal explicit contract model is preferable. Thus, the pluralist model prefers a more nuanced approach in which living together establishes a presumption that can be rebutted by facts demonstrating that the presumed cohabitants did not share a life together as a couple.[[139]](#footnote-139)

The ALI, for example, has identified thirteen factors that courts should consider in deciding whether a couple shared a life together.[[140]](#footnote-140) Some factors, such as making statements acknowledging the relationship or participating in a commitment ceremony are more contractual in nature, while other factors, such as intermingling finances, becoming economically dependent, having defined tasks and a division of labor between partners, or raising children jointly, are more extra-contractual.[[141]](#footnote-141)

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

According to the ALI method, after considering the relevant presumptions and factors, the court should determine whether the partners are in fact domestic partners (the ALI label for cohabitants). If so, cohabitation law (which according to the ALI is almost identical to marriage law) should be applied.

Under the pluralist model, by contrast, entry requirements should not be applied uniformly but should be adapted to the specific rights in question, as discussed in the previous parts.

Indeed, the pluralist model matches the entry requirements with specific cohabitant rights. For example, if a partner sues for alimony, then the decision whether he or she is a cohabitant will be based on the economic dependency of the other partner. On the other hand, if a partner sues for marital property, then the partners’ mutual contribution—including contributions in the form of domestic labor—will be the important criterion.

# *(2) Opting in: Relational Commitments between Long-Term Cohabitants*

Thus far, this article has addressed the scope of rights and duties that the pluralist model offers for cohabitants. In order to balance between the ex-ante distinguishing rationales and the ex-post extra-contractual considerations, the pluralist model provides a narrow and flexible contribution-based marital property regime accompanied by an entitlement to short-term rehabilitative maintenance. During long term cohabitation, however, the usual equilibrium between ex-ante and ex-post perspectives is changed. First, in long-term relationships—especially those accompanied by economic dependency and specification of roles—extra-contractual considerations such as protecting the dependent party take on greater weight. Second, during their cohabitating years, cohabitants usually deviate from their ex-ante historical decision and develop a new, non-formalized, long-term commitment. Against this backdrop, the pluralist theory defines significant cohabitation periods,[[142]](#footnote-142) accompanied by behavior and statements that express mutual commitment, as “relational cohabitations.” In such cases, courts may infer from the relationship a broader consent to the application of additional elements of marriage law beyond those reflected in the usual default proposed in this article.

In the case of “relational cohabitants,” marital property law should be based on the “marriage as egalitarian community” rationale. As observed in previous sections, the adoption of such a model has practical consequences that: (1) allow the application of an equal distribution rule even when the contribution of the spouses is not equal;[[143]](#footnote-143) (2) deviate from the labor-luck distinction and apply sharing principles even to assets that were acquired before the marriage;[[144]](#footnote-144) and (3) take into the account future career assets and gaps in earning capacity as a reason to provide the economically weaker party with a bigger portion of the marital property.[[145]](#footnote-145) In the context of support laws, courts may include alimony based on compensation for the domestic partner’s loss of career opportunities.[[146]](#footnote-146) And under inheritance laws, courts may apply to relational cohabitants the same rules and principles they would apply to married spouses.[[147]](#footnote-147)

# *(3) Opting out of Cohabitation Commitments*

While the relational aspects of cohabitation extend cohabitants’ regular commitments, the partners may narrow their commitments through opt-out agreements.

Status-based approaches that equate marriage to cohabitation subject cohabitants’ agreements to unique procedural requirements and substantive judicial review that exceed regular contract standards.[[148]](#footnote-148) Those requirements and standards make opting out of commitments under cohabitation law extremely difficult both substantively and procedurally.[[149]](#footnote-149) In contrast, the pluralist approach offers the possibility of inferring the existence of an implied opt-out agreement from the behavior of the parties, even when there is no formal, supervised agreement. However, this possibility is not unlimited.

For example, in the typical cases described in section VI.A.2 above, in which the court infers from the behavior of the cohabitants their intention to keep property separate, such inferences may apply to business assets but not to the family home. Additionally, it is possible that even in such cases, as a substitute for recognition of full economic participation, the court will decide that the domestic partner will be entitled to financial compensation.

Finally, regarding explicit opt-out agreements in cases of significant power differences between the partners or changing circumstances, opt-out agreements may be subject to closer judicial review than normal agreements between strangers.

**Conclusion**

In conclusion, this article illuminates the legal regulation of non-marital relationships. Current approaches have typically fallen into two categories: one advocating for the separation of legal regimes based on formal status, treating cohabitant partners as strangers, and the other taking a functional approach, which tends to treat cohabitation and marriage as substantively identical. However, both approaches fail to offer a coherent alternative for regulating cohabitation.

This article proposes a novel third option – the institutional, autonomy-based, pluralist model. The pluralist model acknowledges the legal commitment between cohabitants while carefully distinguishing the legal regulation of cohabitation from that of marriage. Unlike prevailing models that offer a “package deal,” the pluralist model selectively applies only suitable components of marriage law to non-marital relationships, considering thoughtful criteria for their applicability and ensuring a nuanced approach.

With respect to the application of marital property law to non-married partners, the pluralist model argues against the automatic application of the marriage-as-an-egalitarian-community ideal, suggesting instead that the contribution theory is the appropriate model for cohabitation property law. The pluralist model thus presents a middle-ground approach, applying the equal division rule solely to property acquired during marriage, and even with respect to this type of property, it allows exceptions in cases of clear asymmetry in the partners’ contributions. Regarding spousal support and compensation for the loss of a career, the model asserts that in general, short-term spousal support is sufficient, although ad-hoc compensation arrangements are available as exceptions.

In a similar vein, in cases of non-married couples, property rights that result from the couple’s economic partnership should be respected upon death. Yet because the pluralist model emphasizes the need to consider the deceased’s choice not to marry, it rejects a default rule granting inheritance rights for non-married couples.

Although the pluralist model proposes these general recommendations as default rules, it allows couples to opt out of them by explicit (even if informal) agreement. In addition, when unmarried partners have children together or have been in a long-term cohabitation relationship, courts may infer from the relationship a broader consent to the application of additional elements of marriage law beyond those reflected in the usual default proposed in this article.

In summary, the pluralist model offers a middle ground between treating cohabitants as strangers and treating them as married for purposes of regulating marital property, spousal support, and inheritance. It provides a framework that considers the complexities of non-married relationships while maintaining a desirable level of legal clarity.

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2. *See* Shahar Lifshitz, *The Liberal Transformation of Spousal Law: Past, Present and Future* 13 Theoretical Inquiries in Law, 20-22 (2012) (hereinafter: Lifshitz, The Liberal Transformation). [↑](#footnote-ref-2)
3. *See* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815 (2005) (hereinafter: Garrison, Is Consent Necessary); Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev.1125 (1981); Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency,* U. Chi. Legal F. 225 (2004) (hereinafter: Scott, Marriage, Cohabitation and Collective Responsibility); Shahar Lifshitz, *Married against Their Will - Toward a Pluralist Regulation of Spousal Relationships*, 66 Wash. & Lee L. Rev. 1565 (2009); American Law Institution *Principle of The Law of Family Dissolution: Analysis and Recommendations* (2002) Ch 6, (hereinafter: ALI), [↑](#footnote-ref-3)
4. 135 S. Ct. 2584 (2015), ALI 2012. [↑](#footnote-ref-4)
5. Unif. Cohabitants’ Econ. Remedies Act (Unif. L. Comm’n 2021). [↑](#footnote-ref-5)
6. *See* e.g., Courtney G. Joslin, *Autonomy in the Family* 66 UCLA L. Rev. 912 (2019) (hereinafter: Joslin, *Autonomy in the Family*). See also Erez Aloni, *Compulsory Conjugality*, 53 Conn. L. Rev. 55 (2021) (hereinafter: Erez Aloni, Compulsory Conjugality). June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. Rev. 55, 60-61 (2016) (hereinafter: Carbone & Cahn, *Nonmarriage*); Barbara Atwood & Naomi R. Cahn, *Nonmarital Cohabitants: The US Approach,* 44 Houston J. of Int'l L. 191, 206-207 (2022) (hereinafter: Atwood & Cahn, Nonmarital Cohabitants). [↑](#footnote-ref-6)
7. Carbone & Cahn, *Nonmarriage*, *supra* note 5 at 60-61. See also Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C.D. L. Rev. 1999 (2017). [↑](#footnote-ref-7)
8. *See* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. Rev. 1 (2017) (characterizing and critiquing this approach) (hereinafter: Antognini, The Law of Nonmarriage). See also Ayelet Blecher-Prigat, *Echoes of Nonmarriage*, 51 Ariz. St. L.J. 1213 (2020) (hereinafter: Blecher-Prigat, Echoes of Nonmarriage). [↑](#footnote-ref-8)
9. For an initial development of the pluralist model and its theoretical principles, see Shahar Lifshitz, *The Pluralistic Vision of Marriage*, *in* Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 260 (Marsha Garrison & Elizabeth S. Scott eds., 2012). On the importance of pluralism and the diversity of options in marital relationships, see William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012). For further development of the autonomy-based approach, see Joslin, *Autonomy in the Family*, *supra* note 5. Those articles, however, do not provide the concrete set of standards that is needed to establish a coherent and full regulation of cohabitants’ economic life. [↑](#footnote-ref-9)
10. The “package deal” characterization of the existing models is apparent in the ALI’s (*supra* note 3) structuring of chapter 6 (the chapter that address cohabitants’ obligations). Paragraph 6.03 defines who are domestic partners (the ALI label for cohabitants), and Paragraphs 6.04-6.06 apply marriage commitments almost without exception to domestic partners. On the other side of the spectrum, the traditional stance (see *infra*  note 10) and the explicit contract model reject the imposition of all components of marriage law on cohabitants (See *infra* notes 12-16). Unlike those all-or-nothing approaches, the pluralist model suggests in-between approaches that apply selective and suitable components of marriage law to cohabitants. [↑](#footnote-ref-10)
11. *See, e.g.,* Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony*, 70 Minn. L. Rev*.* 163(1985) (discussing the traditional policy that invalidates contracts between cohabitants). [↑](#footnote-ref-11)
12. *See, e.g*., Jane Lewis, *Family Policy in the Post-War Period*, Cross Currents – Fam. L. and Pol’y in the US and England81, 82-90 (Sanford N. Katz et al. eds., 2000) (the legal means for discouraging cohabitation included excluding cohabitants from marriage rights, defining children born outside marriage as illegitimate, and in some states even criminalizing cohabitation). [↑](#footnote-ref-12)
13. *See* Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (1989); 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.) (hereinafter: Atkin, The Legal World of Unmarried Couples); Shahar Lifshitz, A Liberal Analysis of Western Cohabitant Law, in Family Finance 305 (Bea Verschraegen ed., 252-291 (2009). [↑](#footnote-ref-13)
14. *See* Ruth Deech, *The Case Against Legal Recognition of Cohabitation*, 29 INT’L & COMP. L.Q. 480 (1980) (opposing the modern trend to apply marriage law to cohabitants from the liberal-individualistic perspective); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution*, 76 Notre Dame L. Rev. 1467, 1471 (2001) (criticizing the ALI Principles for equating marriage and cohabitation); Marsha Garrison, *Is Consent Necessary?, supra note* 2 (criticizing the emerging trend of equating marriage and cohabitation from the contractual perspective). Carbone & Cahn, *Nonmarriage*, *supra* note 5. [↑](#footnote-ref-14)
15. *See, e.g.,* Tapley v. Tapley, 449 A.2d 1218, 1220 (N.H. 1982) **(“**We realize that couples enter into these unstructured domestic relationships in order to avoid the rights and responsibilities that the State imposes on the marital relationship.”). *See also* Margaret F. Brinig, *Domestic Partnership and Default Rules*, *in* Reconceiving the Family: Critical Reflections on the American Law Institute’s Principles of the Law of Family Dissolution, 269 **(**Robin F. Wilson ed., 2006) (“Parties who didn’t want to get married but wanted to cohabit would find themselves with a set of responsibilities on dissolution that they didn’t want to assume”). [↑](#footnote-ref-15)
16. S*ee, e.g.*, S. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53(1995) (describing substantive distinctions between the elements of cohabiting relationships and those of married spouses, based on empirical studies.) *See also* Milton C. Regan, *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 Notre Dame L. Rev. 1435, 1439-40 (2001) (describing extensive sociological literature regarding the differences between marriage and cohabitation) (hereinafter: Regan, Calibrated Commitment). See also Carbone & Chan, Nonmarriage, *supra* note 5, 68-69 (“unmarried couples are less likely than married couples to embrace financial interdependence”). See Erez Aloni, *Compulsory Conjugality,* *supra* note 5, 63-67 (2021). (based on empirical studies describing major differences between the expectations and intent of cohabiting relationships and those of married spouses). [↑](#footnote-ref-16)
17. *See, e.g.,* Garrison, *supra* note 2, at 839-45 (demonstrating through extensive survey of sociological research that cohabitants and married couples behave differently and stating at 841 that “these behavioral differences appear to reflect underlying attitudinal differences”); Margaret F. Brinig, *Domestic Partnership and Default Rules*, *in* Reconceiving the Family: Critical Reflections on the American Law Institute’s Principles of the Law of Family Dissolution, 269, 274-276 **(**Robin F. Wilson ed., 2006) (draws on sociological research to conclude that marriage and cohabitation are different). See also Carbone & Chan, Nonmarriage, *supra* note 5, 68. [↑](#footnote-ref-17)
18. *See* Scott, *Marriage, Cohabitation and Collective Responsibility,* *supra* note 2 at 258-61 (suggesting that the law should presume implied contract to apply marriage law in any case of cohabitation spanning over five years) (hereinafter: Scott, *Marriage, Cohabitation and Collective Responsibility)*. [↑](#footnote-ref-18)
19. The status model applies marriage-like commitments to cohabitants that are living together as a couple, without need to argue for explicit or implied contract. *See* ALI, *supra* note 3 at 919 (“This section thus does not require … that the parties had an implied or express agreement … . It instead relies, as do the marriage laws, on a status classification”). *See also* Grace G. Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 Notre Dame L. Rev. 1265 (2001) (suggesting a status model regulation of cohabitant relationships) (hereinafter: Blumberg, The Regularization of Nonmarital Cohabitation). [↑](#footnote-ref-19)
20. *See* Blumberg, *The Regularization of Nonmarital Cohabitation*, *supra* note 18, at 1135-6 (presentation of sociological findings which reject the thesis that a life of cohabitation reflects a repudiation of legal obligations entailed by marriage). *See* *also* Terry S. Kogan, *Competing Approaches to Same Sex versus Opposite Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 B.Y.U. L. Rev*.* 1023, 1032-33 (2001) (explaining why a person who is willing to legalize his relations with his/her partner might nevertheless have reservations concerning the institution of marriage). [↑](#footnote-ref-20)
21. Joslin, *Autonomy in the Family*, *supra* note 5 at 966 (“Moreover, the current doctrine presumes that the limited set of recognized decision points—transition to marriage (or the failure to do so) and entrance into an agreement (or the failure to do so)—are deliberately made, mutual decisions. {…} the existing empirical data undermine or at least call into question the accuracy of these presumptions. Sometimes the choice of marriage is something that is expressly contemplated and rejected. But the empirical data suggest that the failure to transition to marriage often is not the result of an express, deliberate decision making process”). [↑](#footnote-ref-21)
22. *See* Blumberg, *The Regularization of Nonmarital Cohabitation,* *supra* note 18, at 1296. [↑](#footnote-ref-22)
23. *See* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 Nw. U. L. Rev.854 (1978) (comparing the regulation of long-term contracts according to classical, modern and relational contract theory); but *cf.* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94Nw. U. L. Rev.847 (2000) (arguing for the place of formalism even in relational contracts). [↑](#footnote-ref-23)
24. *See* R. Hillman, *Court Adjustment of Long Term Contracts: An Analysis Under Modern Contract Law*, Duke L. J. 1 (1987). [↑](#footnote-ref-24)
25. See Joslin, Autonomy in the Family, *supra* note 5 at 915 (“The law then attributes drastic meaning to the lack of these formalities: by failing to marry, the parties have ‘chosen’ to be treated as a nonfamily. Excluded from consideration are an enormous range of quotidian decisions and behaviors which are often more insightful with respect to whether they intended to and did indeed function as a family. In this way, the law often fails to recognize and respect the actual family formation choices people have made”). [↑](#footnote-ref-25)
26. *See* Barbara Atwood & Naomi Cahn, *The Uniform Cohabitants’ Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*,57 Family Law Quarterly 1, 6-7 (2023) (*“*Most states recognize contracts between cohabitants that are implied in fact from the parties conduct.”). [↑](#footnote-ref-26)
27. See Elizabeth Scott, *Domestic Partnerships, Implied Contracts and Law Reform***,** *in*Reconceiving the Family: Critique on the American Law Institute’s Principles of the Law of Family Dissolution**,** 331 **(**Robin F. Wilson ed., 2006), at 335 (“a few courts have implicitly suggested that living together in a long-term marriage-like union is evidence of the parties’ intensions to undertake marriage like sharing of property.”). *See also* Hay v. Hay, 678 P. 2d 672 (Nev. 1984) (applying community property law to cohabitants based on the purpose, duration, and stability of the relationship and on the expectations of the parties). [↑](#footnote-ref-27)
28. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. Rev. 1103, 1113-21 (1988-89) (hereinafter: Singer, Divorce Reform and Gender Justice). [↑](#footnote-ref-28)
29. *See, e.g.,* Susan M. Okin, Justice, Gender and the Family (1989) (suggesting a fairness account of marital law). [↑](#footnote-ref-29)
30. *See* Regan, Calibrated Commitment, *supra* note 15, at 1437 (2001) (describing anti-formalist objections to the distinction between marriage and cohabitation). [↑](#footnote-ref-30)
31. *See* Blecher-Prigat, Echoes of Nonmarriage, *supra note* 7, at 1231-1237 (arguing for legal recognition of functional families outside the traditional legal categories, including adult couples in informal unions). See alsoALI, *supra* note 3, at § 6.02 cmt. a (“The absence of formal marriage may have little or no bearing on the character of the parties’ and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.”). [↑](#footnote-ref-31)
32. *See* Blumberg, The Regularization of Nonmarital Cohabitation, *supra* note 18 at 1163 (supporting cohabitation law regulation based on fairness and protecting the weaker party);Ira M. Ellman, *‘Contract Thinking’ Was Marvin’s Fatal Flaw*, 76 Notre Dame L. Rev. 1365(2001) (criticizing the contractual perspective of *Marvin v. Marvin* and suggests an extra-contractual perspective to cohabitants law). *See* *also* Law Comm’n of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships (2001), Ch. 2 (“Parliament’s goal is to achieve some other outcome - like the support of children, the recognition of economic interdependence, the prevention of exploitation - that is connected to, but not exactly congruent with, the marriage relationship.”). [↑](#footnote-ref-32)
33. *See* ALI *supra* note 3, Ch. 6. [↑](#footnote-ref-33)
34. *See* Antognini, *The Law of Nonmarriage supra* note 7 at 16 (“A limited number of states—two—apply the rules regulating property distribution at divorce to the end of a nonmarital relationship. They are Nevada and Washington”). [↑](#footnote-ref-34)
35. See e.g., Tasmanian Relationships Act, 2003, § 40 (1) (Austl.). see also 29. Cynthia Grant Bowman, unmarried couples, law, and public policy 3 194-201 (2010). See also Katharine K. Baker, *What is Nonmarriage*?, 73 SMU L. Rev. 201, 220 (2020) 61 (hereinafter Baker, what is *Nonmarriage*?). [↑](#footnote-ref-35)
36. *See* Ont. law reform comm’n, report on the rights and responsibilities of cohabitants under the family law act 3 (1993). See also Joslin, *Autonomy in the Family, supra note 5, at 938*. See also Bowman id, at 186-194. [↑](#footnote-ref-36)
37. *See* Joslin, *Autonomy in the Family, supra note 5, at 938*.. See also Bowman id, at 175–220 (analyzing regulatory models in England, Netherlands, France, and Sweden), but *cf.* Simone Wong, *Cohabitation Reform in England and Wales: Equality or Equity, Canadian journal of women and the law.,* 27(1),112, (2015) (hereinafter: Wong, Cohabitation Reform). [↑](#footnote-ref-37)
38. Atwood & Cahn, *Nonmarital Cohabitants*, *supra* note 5 at 206-207. For other countries’ experiences, see Wong, Cohabitation Reform, *supra* note 36. [↑](#footnote-ref-38)
39. For a critical survey, see Antognini, *The Law of Nonmarriage supra* note 7 at 43-48. [↑](#footnote-ref-39)
40. *See* Unif. Cohabitants’ Econ. Remedies Act *supra* note 4, see also Barbara Atwood & Naomi Cahn, *The Uniform Cohabitants’ Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*,Family Law Quarterly (2023) (hereinafter: Atwood & Cahn, The Uniform Cohabitants’ Economic Remedies Act). [↑](#footnote-ref-40)
41. *Id*. [↑](#footnote-ref-41)
42. Erez Aloni, *Compulsory Conjugality*, *supra* note 5, at 60. [↑](#footnote-ref-42)
43. Eleanor Brown, Naomi Cahn & June Carbone, *The Price of Exit*, 99 WASH. U. L. Rev. 1897, (2022) 1914–1912. [↑](#footnote-ref-43)
44. *See* Baker, what is *Nonmarriage*? supra note35 , at 217. [↑](#footnote-ref-44)
45. See Kaiponanea T. Matsumura, Consent to Intimate Regulation, 96 N.C. L. Rev. 1013 (2018). [↑](#footnote-ref-45)
46. See Antognini*, The Law of Nonmarriage, supra* note 7, at 8 *(*“courts approach nonmarital relationships in one of two ways: either by looking to marriage as a requirement for what a nonmarital relationship should be, or by distinguishing the nonmarital relationship from anything approaching marriage”). [↑](#footnote-ref-46)
47. See supra note 39 [↑](#footnote-ref-47)
48. For analysis of the limited remedies applied by the courts today on the basis of unjust enrichment, see Joslin, Autonomy in the Family, supra note 5, at 930. See also Antognini, The Law of Nonmarriage, supra note 7, at 43-46; Atwood & Cahn, The Uniform Cohabitants’ Economic Remedies Act, supra note 40, at 8-9. [↑](#footnote-ref-48)
49. On the limitations of contract law’s ability to regulate spousal relationships in general and non-marital spousal relationship specifically, see Albertina Antognini, *Nonmarital Contracts*, 73, 107 Stan. L. Rev. 67 (2021). For analysis of the courts’ scarce use of the implied contract doctrine, see Antognini*, The Law of Nonmarriage, supra* note 7, at 34. *See also* Joslin, *Autonomy in the Family, supra* note 5, at *932.* [↑](#footnote-ref-49)
50. *See* Joseph Raz, Ethics in the Public Domain: Essays, in The Morality of Law and Politics ch. 8 (Oxford, 1994) (supporting the active role of the state that stems from his liberal account of autonomy) [↑](#footnote-ref-50)
51. *See* Antognini, *The Law of Nonmarriage,* *supra* note 7 at 11 (“Courts’ reliance on marriage as the yardstick to distribute property, however, quickly becomes tautological: courts decline to distribute property in a nonmarital relationship, reasoning that the absence of an actual marriage makes it insufficiently marriage-like”). [↑](#footnote-ref-51)
52. *See* Joslin, *Autonomy in the Family*, *supra* note 5. [↑](#footnote-ref-52)
53. This idea is an innovation because in previous publications, there was no systematic attempt to establish a coherent set of standards suitable for regulating cohabitants. [↑](#footnote-ref-53)
54. *See* Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992) (describing the channeling aspects of marriage law). [↑](#footnote-ref-54)
55. Especially as expectations are affected by the existing legal order. *See* Antognini, *The Law of Nonmarriage,* *supra* note 7 at 11. [↑](#footnote-ref-55)
56. *See* Antognini, *The Law of Nonmarriage*, *supra* note 7 at 43. *See also* Joslin, *Autonomy in the Family*, *supra* note 5 at 915. See also Blumberg, The Regularization of Nonmarital Cohabitation, *supra* note 18 at 1136-1137. [↑](#footnote-ref-56)
57. *See* Lifshitz, *The Liberal Transformation*, *supra* note 1 at 52–55. See also Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. Rev. 75 (2004) (hereinafter: Frantz & Dagan, Properties of Marriage). *See also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. Rev. 1225 (1998) (hereinafter: Scott & Scott, Marriage as Relational Contract). [↑](#footnote-ref-57)
58. For a different aspect of the need to design cohabitation as the more flexible institution, focusing on the special nature of old-age couple hood see Naomi Cahn et al., Family Law for the One-Hundred-Year Life, 132 Yale L. J. (forthcoming 2023) (hereinafter: Cahn, Family Law for the One-Hundred-Year Life). [↑](#footnote-ref-58)
59. *See* ALI *supra* note 3 (“At one time there was a sharp division between most American states, which followed traditional common-law principles in the allocation of property at divorce, and the eight states that followed community property principles.”). *See also* Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. Rev. 1623, 1633 (2008) (“two approaches generally govern the eventual distribution of this marital property. One divides the property based on a case-by-case calculus of the parties’ relative contributions and needs; the other requires an equal division of all marital property without further inquiry.”) (hereinafter: Motro, Labor, Luck, and Love). [↑](#footnote-ref-59)
60. *See* ALI, *supra* note 3, at 19 (“The common law treated property owned by the spouses during their marriage as the individual property of one of them unless, as to a particular piece of property, they had acted to create joint ownership.”). *See also* Frantz & Dagan, *Properties of Marriage, supra* note 56, at 124. [↑](#footnote-ref-60)
61. *See* ALI, *supra* note 3, at 20 (stating that in community-property states, “property acquired with spousal earnings is therefore also owned equally by the spouses, regardless of whether purchased with funds earned by the husband, the wife, or both, unless the parties change the character of the property by agreement or gift.”). [↑](#footnote-ref-61)
62. For an extensive review of the law in force in various states in the United States, *see* J. Thomas Oldham, Divorce, Separation and the Distribution of PropertyCh. 3 (2011). [↑](#footnote-ref-62)
63. *See* Motro, Labor, Luck, and Love, *supra* note 58, at 1632 ("non- or low-wage earning spouses often contribute substantially to their partners’ earnings- both directly … and indirectly by managing the household and raising children"). [↑](#footnote-ref-63)
64. *See,* Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 Yale J.L. & Feminism 81, 109–10 (noting that the idea of equal exchange requires that we focus on the non-monetary contributions of women to compensate for their market disadvantage); Shahar Lifshitz, *On Past Property and Future Property, and on the Philosophy of Marital Property Law in Israeli Law*, 34 (3) Hebrew U. Student L.J. 627 (2004) (analyzing the injustice in a separate property system that ignores the domestic spouse’s contribution) (hereinafter: Lifshitz, On Past Property and Future Property). [↑](#footnote-ref-64)
65. *See Lifshitz*, *id.*, at 630-31; Sanford N. Katz, *Marriage as Partnership*, 73 Notre Dame L. Rev. 1251, 1272 (1998) (suggesting arguments in favor of including relative contribution as a factor in equitable distribution decisions). [↑](#footnote-ref-65)
66. In theory, domestic tasks like cleaning, cooking, and childcare are executed by outsiders and have clear market value. I believe, however, that at least in the case of child rearing, a parent’s care cannot be equated with paid labor. Additionally, even today, only some parenting tasks such as actual care of the children during working hours have been commoditized, but other “parenting” obligations such as undertaking parental responsibility, management of child and household issues, and supervision of outside workers within the home are not commercial and lack a clear market value. [↑](#footnote-ref-66)
67. *See, e.g*., J. Thomas Oldham, *Tracing,* *Commingling, and Transmutation*, 23 Fam. L.Q. 219, 249-50 (1989) (describing drawbacks of broad judicial discretion over divorce) (hereinafter: Oldham, Tracing, Commingling, and Transmutation); David Westfall, *Unprincipled Family Dissolution: The American Law Institute’s* *and* *Recommendations for Spousal Support and Division of Property*, 27 Harv. J.L. & Pub. Pol’y 917, 920-21 (2004) (criticizing the unpredictability of a case-by-case equitability system) (hereinafter: Westfall, Unprincipled Family Dissolution). [↑](#footnote-ref-67)
68. *See* Motro, Labor, Luck, and Love, *supra* note 58, at 1633-34 (*ad hoc* valuations of spouses’ relative contributions often mirrors society’s tendency to undervalue nonmarket labor). *See* also Singer, *Divorce Reform and Gender Justice*, *supra* note 27 at 1119 (“divorce doctrines that allow for substantial judicial discretion generally operate to women’s disadvantage”(. [↑](#footnote-ref-68)
69. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21, 44 (1994) (describing the partnership theory of marriage). *See* Motro, *Labor, Luck, and Love, supra* note 58, at 1631 (the contribution theory dominances current scholarship). [↑](#footnote-ref-69)
70. *Cf.* Frantz & Dagan, Properties of Marriage, *supra* note 56, at 108 (“There is little reason to believe that the non-market contributions of the spouse with less market power are sufficient to balance the other spouse’s significant market power advantage”). *See also* ALI Principles, *supra* note 3, § 4.09 cmt. c, at 735 (noting the same). [↑](#footnote-ref-70)
71. *See, e.g*., Motro, Labor, Luck, and Love, *supra* note 58, at 1640 (“The equal division rule is especially unfair from a labor-centered perspective where both spouses earn significantly different amounts and there are no children”). [↑](#footnote-ref-71)
72. *See* Frantz & Dagan, Properties of Marriage, *supra* note 56, at 81-82; *See* *also* Milton C. Regan, *Spousal Privilege and the Meaning of Marriage*, 81 Va. L. Rev. 2045, 2079-90 (1995) (describes the family as larger relational unit). [↑](#footnote-ref-72)
73. *See* Frantz & Dagan, Properties of Marriage, *supra* note 56, at 100-102 (justifies the equal division law as an endorsement of egalitarian liberal community). *See also* Lifshitz, On Past Property and Future Property*, supra* note 63, at 676-77 (describing the family as a unit as the rationale for recent developments in Israeli marital property law). See also Lifshitz, *The Liberal Transformation*, *supra* note 1, 55-60 (explaining the family-as-a-unit approach and its origins). [↑](#footnote-ref-73)
74. Thomas Oldham, *Should the Surviving Spouses’ Forced Share be Retained*, 38 Case W. Res. L. Rev. 223, 233 (1987) (hereinafter: Oldham, Should the Surviving Spouses’ Forced Share be Retained). [↑](#footnote-ref-74)
75. *See* especially Motro, Labor, Luck, and Love, *supra* note 58, at 1649 (marriage is not only partnership of contributions, but also shared risk, a merging a fates, and a commitment to be “in the same boat” and to contribute unequally at times “to keep the union afloat”). [↑](#footnote-ref-75)
76. *See* Motro, *id*, at 1641-44 (suggesting a formulation for the transmutation of separate property into marital property); Franz & Dagan, Properties of Marriage, *supra* note 56, at 117-19 (classifying inheritance gifts and the fruits and increasing value of separate property during marriage as marital property); Lifshitz, On Past Property and Future Property*, supra* note 63, at 702-19 (supporting the conversion of separate property in marital property in cases of long-term relationships that were characterized by a shared life). [↑](#footnote-ref-76)
77. *See* Motro, *id*, at 1641; Oldham, *Tracing, Commingling, and Transmutation*, *supra* note 66 (surveying techniques of *commingling* separate property into marital property); *See also* Lifshitz, On Past Property and Future Property*, supra* note 63, at 677-81 (describing similar development in Israeli law). [↑](#footnote-ref-77)
78. *See* ALI *supra* note 3, § 4.12; *See also* Lifshitz, *id*., 706-07. [↑](#footnote-ref-78)
79. *See supra* Part III.A (2) [↑](#footnote-ref-79)
80. *See* ALI, *supra* note 3, § 6.04 (3) (the converging of private to marital property is not applied in case of long-term cohabitation). [↑](#footnote-ref-80)
81. *See* ALI, *id.* at cmt. b (stating that no state converts separate property into marital property in case of cohabitants but failing to explain why). [↑](#footnote-ref-81)
82. Frantz & Dagan, Properties of Marriage *supra* note 56, at 124. In equitable division states, title theory still governs property questions during an intact marriage, while the community property regime provides for joint ownership during marriage. For more details, *see* *id.* at 124-131. [↑](#footnote-ref-82)
83. Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. Rev. 1517, 1539–1543 (2003). J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage,* 56 L & Contemp. Probs. 99 (1993). [↑](#footnote-ref-83)
84. See Sarah Avellar & Pamela J. Smock, The Economic Consequences of the Dissolution of Cohabiting Unions, 67 J. MARRIAGE & FAM. 315 (2005). (claiming that low-income women of color being worse off at the end of a cohabiting relationship) [↑](#footnote-ref-84)
85. *See* Franz & Dagan, *Properties of Marriage, supra* note 56, at 163. See also AlI. *Supra* note 3 § 4.03. [↑](#footnote-ref-85)
86. .*see, e.g.*, *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978) (stating that educational degrees are not property and thus should not be included in the marital estate); Stevens v. Stevens, 492 N.E.2d 131, 133 (Super. 1986) (same); *See also* Ira M. Ellman, *The Theory of Alimony*,77 Cal. L. Rev.1,69(1989) (arguing that degrees and licenses are not property) (hereinafter: Ellman, The Theory of Alimony). [↑](#footnote-ref-86)
87. *See, e.g*., Wehrkamp v. Wehrkamp, 357 N.W.2d 264 (S.D. Super. 1984); Drapek v. Drapek, 503 N.E.2d 946(Super. 1987). [↑](#footnote-ref-87)
88. Regarding the formalist objection, *see* ALI Principles, *supra* note 3, § 4.03 cmt. b, at 652 (“The definition of marital property must follow from the policy choice; the policy choice is not determined by the definition”); Regarding the calculation objection *see e.g.* Franz & Dagan, *Properties of Marriage, supra* note 56, at 112 (“We do not deny that such valuations will be difficult. But it will likely be no more burdensome (and the calculations will be no more uncertain) than similar valuations that are currently done, particularly in tort actions”). *See also* Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 Women’s Rts. L. Rep. 109, 118 (1995-96) (“On a daily basis, in courts all over the country, judges and juries calculate the value of various losses and interests”). [↑](#footnote-ref-88)
89. Franz & Dagan Properties of Marriage, *supra* note 52, at 109-10; *See also* Lifshitz, On Past Property and Future Property*, supra* note 63 at 733-40. [↑](#footnote-ref-89)
90. *See* Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won’t Fit*, 31 Fam. L.Q. 119, 125-26 (1997) (analyzing the confrontation between human capital division and the values of autonomy and self-ownership). [↑](#footnote-ref-90)
91. Theoretically, the domestic partner’s part in the human capital should be perceived as a constant amount debt that is paid during the post-divorce years regardless of the actual income of the “provider.” This method, however, will result in severe injustice if the provider does not intend to continue with his previous career or in cases where his actual income is less than the estimated one. [↑](#footnote-ref-91)
92. *Cf.* Robert J.Levy, *A Reminiscence about the Uniform Marriage and Divorce Act - and Some Reflections about its Critics and its Polices*, 1991 B.Y.U. L. Rev.43, 60 (1991) (pointing to the clash between the clean-break and human capital division). [↑](#footnote-ref-92)
93. *See* Franz & Dagan Properties of Marriage, *supra* note 56, at 110 (“Careers involve collective decision making and collective action”). [↑](#footnote-ref-93)
94. *See* Joan M. Krauskopf, *Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. Kan. L. Rev. 379 (1980) (analyzes the importance of human capital for marital property law) (hereinafter: Krauskopf, Recompense for Financing Spouse’s Education); *See* more generally Gary S. Becker, Human Capital(1964) (economic analysis of the Human Capital concept). [↑](#footnote-ref-94)
95. *See* Lenore j. Weitzman, the divorce revolution: the unexpected social and economic consequences for women and children in America 110-45 (1985) (human capital explains severe gaps in men and women’s financial consequences of divorce) (hereinafter: Weitzman, The Divorce Revolution). [↑](#footnote-ref-95)
96. *See* Franz & Dagan *Properties of Marriage, supra* note 56, at 113-14 (arguing for dividing increase to human capital in light of the egalitarian community ideal); *See also* Lifshitz, On Past Property and Future Property*, supra* note 63, at 728-33 (arguing that ignoring the increase of human capital harms the main rationales of marital property law). [↑](#footnote-ref-96)
97. See Franz & Dagan, Properties of Marriage, *supra* note 56, at 107 (“A commitment to the ideal of marriage as an egalitarian liberal community requires treating spouses’ increased earning capacity as marital property, while tailoring property division rules to address the unique features of this asset.”). For earlier support in dividing human capital, see, e.g., Krauskopf, Recompense for Financing Spouse’s Education, *supra* note 93; Weitzman, The Divorce Revolution *supra* note 94, at 387-88. [↑](#footnote-ref-97)
98. *See* *O’Brien v. O’Brien*, 489 N.E.2d 712, 713–14, 716 (N.Y. 1985) (holding that a medical license earned during marriage is marital property). The New York legislature later changed its policy. *See* N.Y. Dom. Rel. Law § 236(B)(5)(d)(7). [↑](#footnote-ref-98)
99. *See, e.g.,* in Israel: C.A 4623/04 unidentified person (male) v. unidentified person (female) (Pub. August 26, 2007). See also The Israeli Property Relations law, 1973, section 8 (the court can divert from the 50-50 rule if justice demands it). [↑](#footnote-ref-99)
100. See survey and discussion of Erik V. Wicks, *Professional Degree Divorces: of Equity Positions, Equitable Distributions, and Clean Breaks*, 45 Wayne L. Rev. 1975 (2000). [↑](#footnote-ref-100)
101. While Franz and Dagan’s, *supra* note 56, support for dividing human capital reflects a priority assigned to the community ideal over autonomy, I believe that even in the case of married couples, a better balance is needed. Thus, I believe that when possible, alternative tools such as the disproportionate division of material property at divorce are preferable to dividing human capital by splitting the couples’ post-divorce incomes. Yet this issue demands extended discussion that is beyond the scope of the current article. [↑](#footnote-ref-101)
102. *See* Ellman, Theory of alimony *supra* note 85, at 5-6 (describes traditional alimony law). *See also* June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payment*, 4 J. L. & Fam. Stud. 43, 46-7 (2002). [↑](#footnote-ref-102)
103. *See, e.g*., Ellman, *id.* [↑](#footnote-ref-103)
104. *See, e.g*., O’Brien v. O’Brien, 66 N.Y.2d 576 (N.Y. 1985) (the concept of the traditional alimony is no longer valid); *See also* Herma H. Kay, *An Appraisal of California’s No-Fault Divorce Law,* 75 Cal. L. Rev. 291, 313 (1987) (positioning of the clean-break principle as a superior principle to which a system of no-fault divorce must aspire). [↑](#footnote-ref-104)
105. *See* Mary K. Kisthardt, *Rethinking Alimony: The AAML’s considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, 68 (2008) (describing the second wave of awarding alimony). [↑](#footnote-ref-105)
106. See Weitzman, The Divorce Revolution *supra* note 94, at 323–56 (1985) (describing the economic benefits to men and costs to women of divorce); Singer, divorce, reform and gender justice, *supra note 27;* James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L. Q. 351 (1987) (both calling to further reform in the name of gender justice). [↑](#footnote-ref-106)
107. *See* Ann L. Estin, *Maintenance, Alimony and the Rehabilitation of Family Care* 71 N.C. L. Rev. 721, 741 (1992-93) (describing the problem of grounding alimony and maintenance awards in a coherent theory); Margaret F. Brinig & June R. Carbone, *The Reliance Interest in Marriage and Divorce*, 62 Tul. L. Rev. 855, 882–94 (1988) (illustrating the non-uniformity, confusion, and absence of a clear theory in the case law) (hereinafter: Brinig & Carbone, The Reliance Interest in Marriage and Divorce); *see also* Ellman, Theory of alimony *supra* note 85, at 4 (same). [↑](#footnote-ref-107)
108. *See, e.g.,* ALI, *supra* note 3, at 42-49 (surveying jurisprudence that continues to include fault partly or fully as a parameter in its alimony law). [↑](#footnote-ref-108)
109. *See* Scott and Scott*, Marriage as Relational Contract, supra* note 56, at 1247 (drawing analogy between modern need-based alimony and insurance contract); *See also* Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41U. Toronto L. J. 533 (1991) (initial version of the insurance model). [↑](#footnote-ref-109)
110. *See* Ellman, Theory of alimony *supra* note 85, at 42-49. [↑](#footnote-ref-110)
111. According to Ellman, however, the domestic partner is entitled to compensation only in cases that her losses stem from the contribution to her partner’s career or from taking primary care of the spouse’s children. [↑](#footnote-ref-111)
112. *See* John Eekelaar, Family Law and Personal Life, 51-52, 108-111 (2006) (preferring compensation for loss over future need-based alimony). [↑](#footnote-ref-112)
113. *See* ALI *supra* note 3, ch. 5 and specifically § 5.02 cmt. A (“The principal conceptual innovation of this chapter is therefore to recharacterize the remedy it provides as compensation for loss rather than relief of need”). [↑](#footnote-ref-113)
114. *See* Brinig & Carbone, *The Reliance Interest in Marriage and Divorce*, *supra* note 106 at 882–894 (describing the contractual logic of the traditional model). [↑](#footnote-ref-114)
115. *See* ALI *supra* note 3, at 807 (“But the Law does not require alimony claimant to show that the other spouse breaches, nor would such requirement be consistent with modern no fault principles”). [↑](#footnote-ref-115)
116. *But cf.* Scott, Marriage, Cohabitation and Collective Responsibility, *supra* note 2, at 303 (arguing for insurance-based alimony in cases of above five years of cohabitation). [↑](#footnote-ref-116)
117. *See* Shahar Lifshitz and Ram Rivlin, Till Death Do Us Part? Marital Property Claims Upon Death (un-published manuscript 2023) (hereinafter: Lifshitz & Rivlin, Till Death Do Us Part). [↑](#footnote-ref-117)
118. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 Utah L. Rev. 1227, 1244 (2005) (“The death of a spouse dissolves the community just like a divorce would dissolve the community.”). [↑](#footnote-ref-118)
119. For example, section 100 of the California Family Code, states that:

     **§ 100. Community property**

     (a) Upon the death of a person who is married or in a registered domestic partnership, one-half of the community property belongs to the surviving spouse and the other one-half belongs to the decedent. [↑](#footnote-ref-119)
120. *See* Oldham, *Should the Surviving Spouse’s Forced Share be Retained*, *supra* note 73 at 234. [↑](#footnote-ref-120)
121. Naomi Cahn, *What’s Wrong about the Elective Share “Right”?*, 53 UC Davis L. Rev. 2087, 2114 (2020) (“the goal is to provide to surviving spouses with an elective share comparable to the amount to which they would be entitled at divorce under either a community property or marital property system”). [↑](#footnote-ref-121)
122. *See* Unif. Prob. Code § 2-202 cmt. (Unif. Law Comm’n 2019); Angela Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 Cath. U. L. Rev. 519, 546 (2003) (“the primary purpose for the 1990 UPC revision (UPC revision) was “to implement the concept of marriage as a partnership.”). [↑](#footnote-ref-122)
123. *See* Lawrence W Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 725-734 (1992) (“Given the inescapable problems associated with classification, the UPC drafters decided to implement the marital-partnership theory by means of a mechanically determined approximation system, which the drafters call an accrual-type elective share.”). See also: Lifshitz & Rivlin, Till Death Do Us Part, *supra* note 116. [↑](#footnote-ref-123)
124. Nonetheless, in many countries the right to elective share and the right to inheritance according to the deceased’s will are alternatives in the sense that if one chooses to inherent according to the will, he effectively yields his elective share rights and vice versa. [↑](#footnote-ref-124)
125. For example, according to the Uniform Probate Code (UPC),

     (c) As to separate property, the intestate share of the surviving spouse is as follows:

     (1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister.

     (2) One-half of the intestate estate in the following cases:

     (A) Where the decedent leaves only one child or the issue of one deceased child.

     (B) Where the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them.

     (3) One-third of the intestate estate in the following cases:

     (A) Where the decedent leaves more than one child.

     (B) Where the decedent leaves one child and the issue of one or more deceased children. [↑](#footnote-ref-125)
126. E. Gary Spitko, *Interstate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience*, 103 Iowa L. Rev. 2175 (2018) [↑](#footnote-ref-126)
127. *See* Frank Rainer*, The Status of Cohabitation in the Legal Systems of West Germany and Other West European Countries*, 33(2) AM. J. COMP. L. 185 (1985)) describes inheritence law’s approach to cohabitants in Western Europe). See also Elena A. Kirillova, Varvara V. Bogdan, Elena V. Kaymakova, Igor N. Ozerov & Sergey S. Zenin, *Inheritance Rights of Spouses in the Actual Marriage: A Comparative-Legal Aspect*, 7(16) J. ADVANCED Res. L. & ECON. 270 (2016). Gregor Christandl, *Succession Rights for Cohabitants,* Edinburgh L. Rev. 24(1), 138 (2020( (hereinafter: Christandl, Succession Rights for Cohabitants). See also Catherine Brown, Kyle T. Gardiner, *The rights of unmarried cohabitants in Canada, Trusts & Trustees*, 24(1), 86 (2018) (describes inheritence law’s approach to cohabitants in Canada). However, see Wolfram Muller-Freienfels, *Cohabitation And Marriage Law – A Comparative Study*, International Journal of Law, Policy and the Family, 1(2) ,259, 273–274 (1987) for a survey of districts in Canada and Australia where cohabitants enjoy limited recognition of inheritance rights. For a recommendation in the direction of partial recognition, see: Law Commission, Intestacy and Family Provision Claims on Death, (Law Com no 331, 2011) para 8.1. [↑](#footnote-ref-127)
128. It is interesting to mention in this context that the Ontario law does not allow cohabitants to inherit, but that even in Ontario cohabitants can apply for financial support. *See* Stajduhar v. Kerzner Estate, No. 4511 O.J. [2017] ): hereinafter: Stajduhar v. Kerzner Estate). [↑](#footnote-ref-128)
129. *See e.g.,* restatement (Third) of Property: Wills and other Donative Transfers § 8.1 cmt. b. (St. Paul, MN: Am. Law Inst, 2003). *See also* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. Rev. 1031 (2004) [↑](#footnote-ref-129)
130. *See* Cahn, Family Law for the One-Hundred-Year Life, *supra* note 57. [↑](#footnote-ref-130)
131. *See* Mary Louise Fellows et al., *Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. Res. J. 319 (1978) (analyzing the interactions between social norms and presumed intention). [↑](#footnote-ref-131)
132. Kreiczer-Levy, *The Mandatory Nature of Inheritance*, 53 AM. J. Juris. 105 (2008) (claiming that the underlying rationale is to create intergenerational continuity through property). [↑](#footnote-ref-132)
133. See in this context The Family Law (Scotland) Act 2006. Section 25(2) holds that the court will examine the relationship according to a fixed set of parameters including length and nature of the relationship, as well as all financial arrangements between the partners. Section 29 limits the application of inheritance only to cases where partners were living together at the time of the inheritor’s death. That being said, the Scottish legislature did leave the share of the inheritance that the partner should receive for the court to determine, and the latter is allowed to take into consideration everything it sees fit (up to the maximum amount the spouse would inherit if the couple were to marry). See more on this subject: Christandl, Succession Rights for Cohabitants, *supra* note 126, at 138. I believe that American jurisprudence would also benefit from legislative action that would give courts discretion to grant unmarried partners inheritance rights in appropriate cases. [↑](#footnote-ref-133)
134. See in Hebrew Shahar Lifshitz, who is a spouse? Notes on the new definition of “spouse” in inheritance law, 46 TAU law review forum, 3–4 (2022). [↑](#footnote-ref-134)
135. *See* *supra* part III. [↑](#footnote-ref-135)
136. *See, e.g.,* Thomas J. Abernathy, *Adolescent Cohabitation: A Form of Courtship or Marriage?*, 16 Adolescence791(1981); Alferd Demaris & William Macdonald, *Premarital Cohabitation and Marital Instability: A Test of the Unconventionality Hypothesis*, 55 J. of Marriage and Family 399(1993); Alfred Demaris & Rao K. Vaninadha, *Premarital Cohabitation and Subsequent Marital Instability in the United States: A Reassessment*, 54 J. of Marriage and Fam. 178 (1992) (all discussing various aspects of cohabitation as a test period prior to marriage). [↑](#footnote-ref-136)
137. TheALI offers a three-year minimum for childless cohabitation and two years for cohabitants with children (ALI, *supra* note 3, at 921). *See also* the New Zealand three year minimum with court’s discretion to reduce this period when children are involved and serious injustice might occur. *See* Property (Relationships) Amendment Act § 2E, 2001 (NZ)., See also id §14A). However, I also oppose the five years minimum cohabitation period that Scott suggests, *see supra* note 22, at 343, as it leaves the weaker party without a sufficient remedy for an extended period. [↑](#footnote-ref-137)
138. *See* Scott, Marriage, Cohabitation and Collective Responsibility, *supra* note 17, at 342-3. [↑](#footnote-ref-138)
139. *See, e.g.,*. ALI, *supra* note 3, § 6.03 (7) *See also* Bill Atkin, *The Legal World of Unmarried Couples, supra note* 12 (describing similar mechanism in New Zealand). [↑](#footnote-ref-139)
140. *See* ALI, *id*.; *See also* § 2D (2) of the Property (Relationships) Act 1976 in New Zeeland that identifies ten factors regarding the partners’ lifestyle to guide courts in determining whether they should be considered couples. [↑](#footnote-ref-140)
141. *Cf.* Martha M. Ertman, *Private Ordering under the ALI Principles: As Natural Status, in* Reconceiving the Family: Critical Reflections on the American Law Institute’s Principles of the Law of Family Dissolution284, 289 **(**Robin F. Wilson ed., 2006) (suggesting similar classification of the ALI factors). [↑](#footnote-ref-141)
142. The accurate period is not rigid and might be changed in accordance with specific sociological variables. As a rough estimation, ten years of cohabitation is plausible. [↑](#footnote-ref-142)
143. *See* *supra* part IV.A.2 [↑](#footnote-ref-143)
144. *See* *supra* part IV.A.4 [↑](#footnote-ref-144)
145. *See* *supra* part IV.A.6 [↑](#footnote-ref-145)
146. *See* *supra* part IV. B [↑](#footnote-ref-146)
147. *See* *supra* part IV.C [↑](#footnote-ref-147)
148. *See, e.g.,* ALI, *supra* note 3, at § 6.01 (2) (applying the unique marital contract regime for agreements between cohabitants). [↑](#footnote-ref-148)
149. *See* Westfall, Unprincipled Family Dissolution *supra* note 66, at 1479-80 (criticizing the ALI for the application of marital contract rules to agreements between cohabitants and referencing cases in which the strict nature of those rules severely hampered cohabitants’ ability to contract out of marriage law commitments.) *See also* Atkin, The Legal World of Unmarried Couples, *supra* note 12 at 48 (in New Zealand, the Property [Relationships] Act of 1976 subjugates cohabitants’ contracts to a unique fairness review). [↑](#footnote-ref-149)