Unchaining the *Agunot*: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom

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† For all the *agunot*, victims of miscarriages of justice, who still seek a remedy. Our collective soul is marred by this injustice.

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INTRODUCTION

Throughout Israel's turbulent history, not a week has gone by without her being a focus of world attention.[1] The situation of Israeli women, however, has rarely captured the spotlight. In most fields of law, Israeli women enjoy a strong suite of rights and an egalitarian status compared to their sisters in other nations.[2] However, in the domain of divorce law, women are subject to a blatantly discriminatory regime, in which their strictly-limited right to obtain a divorce is grossly inferior to the corresponding right held by Israeli men.

Israeli law accords Orthodox rabbinical courts exclusive control over marriage and divorce, and those courts in turn grant full control over divorce to men.[3] No one—not the government, not the courts, not even a rabbi—is

1. Roger I. Zakheim, *Israel in the Human Rights Era: Finding a Moral Justification for the Jewish State*, 36 N.Y.U. J. INT'L. L. & POL. 1005, 1031 (2004).

2. *See* RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 20, 24-65 (2004); Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 AM. J. COMP. L. 293, 311-16 (2005); S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 160-62, 183 (1997).

3. The Israeli courts, unique among modern legal systems, combine both civil and religious institutions. While the civil courts have jurisdiction over most legal questions, religious courts retain exclusive jurisdiction over certain areas of family law. Israelis must thus move between two completely different judicial systems, depending on the legal issue that brings them into court. For Jews, the religious courts, known as the rabbinical courts, retain exclusive jurisdiction over matters of marriage and divorce. *See* The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, S.H. 165, arts. 1-2. The civil system of family courts has parallel jurisdiction to handle questions of custody, child support, property distribution, and all matters not related to the narrow issue of getting married or divorced. *See* The Family Court Law, 1995, S.H. 393, arts. 1, 3-4; *see also* Dan Arbel & Joshua Gaifman, *The Family Court Act 1995*, 43 HAPRAKLIT 431 (1997) (providing an instructive overview of the family court and its functions).

The concurrent jurisdiction has produced a "race to the courthouse" phenomenon, whereby men try to raise issues in the rabbinical court, which is generally more favorable to men, while women try to win jurisdiction in the family court, which is generally more women-friendly court. Menashe Shava, *The Relationship Between the Jurisdiction of the Family Court and the Jurisdiction of the Rabbinical Court*, 44 HAPRAKLIT 44 (1998).

authorized to divorce a couple except for the husband. The judicial act of divorce is not constitutive, but merely declarative—the rabbinical court can merely declare that the husband must divorce his wife, and in limited instances, can apply coercive measures in hopes of persuading the husband to grant the divorce.[4] This leaves wives estranged from their husbands yet unable to remarry due to their legal inability to terminate their present marriages. Such women are called *agunot*: "chained" wives.[5]

While divorce law has remained stagnant, the opposite is true of Israeli constitutional law. For nearly half a century, Israel had no constitution. In the last decade of the twentieth century, however, the nation experienced a constitutional revolution. The Supreme Court, by means of a decision in an ordinary case, transformed existing legislation and effectively created a formal constitution with American-style judicial review.[6] Thus, while other nations may debate the proper interpretation and scope of their constitutions—Israel also debates whether its Constitution actually *exists*.[7]

Its lack of publicity and prominence notwithstanding, the new Constitution has swept through Israel's legal landscape, leaving a substantial mark throughout Israeli law, with a notable exception: divorce law.[8] Though the field

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The rabbinical court system consists of trial courts (regional rabbinical courts) and an appellate court (the High Rabbinical Court). For a general discussion of the rabbinical court's origins, jurisdiction, administration, and procedures, see HALPERIN-KADDARI, *supra* note 2, at 233; M. Chigier, *The Rabbinical Courts in the State of Israel*, 2 ISR. L. REV. 147 (1967); and Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. REV. 239, 254-55 (2007). On the Orthodox hegemony in Israeli law, see Gidon Sapir, *Law or Politics: Israeli Constitutional Adjudication as a Case Study*, 6 UCLA J. INT'L L. & FOREIGN AFF. 169, 184-87 (2001).

4. J. David Bleich, *Modern Day* Agunot*: A Proposed Remedy*, 4 JEWISH L. ANN. 167, 171 (1981); HALPERIN-KADDARI, *supra* note 2, at 236-37; *see* Heather Lynn Capell, *After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel*, 33 TEX. INT'L L.J. 331, 337 (1998); Erica R. Clinton, *Chains of Marriage: Israeli Women's Fight for Freedom,* 3. J. GENDER RACE & JUST. 283, 289 (1999).

5. This term was originally used for galley slaves whose arms and legs were bound together (the singular of *agunot* is *aguna*). For the definition of *aguna*, see M. Chigier, *Ruminations Over the Agunah Problem*, 5 JEWISH L. ANN. 207, 210-11 (1981); and Clinton, *supra* note 4, at 295-96. *See also* Mark Washofsky, *The Recalcitrant Husband: The Problem of Definition*, 5 JEWISH L. ANN. 144 (1981) (noting that in the history of Jewish law, the problem of the *agunot* has been the greatest challenge to basic equity).

6. CA 6821/93 Unified Bank Mizrahi v. Migdal Collective Vill. [1995] IsrSC 49(4) 221, 407; *see* Gal Dor, *Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective*, 11 IND. INT'L & COMP. L. REV. 1, 32 (2000).

7. For discussion of the debate over the Israeli Constitution, see Ruth Gavison, *The Constitutional Revolution: A Reality, or a Self-Fulfilling Prophecy?*, 28 MISHPATIM 21, 31, 73 (1997). An adult Israeli may be entirely unaware that her country even has a constitution. Indeed, the people were not consulted or even aware of its preparation and some have accused the Court of acting behind the nation's back. *See, e.g.*, Klod Klein, *The Silent Constitutional Revolution*, MAARIV, Mar. 27, 1992; *see also* Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel*, 70 ALB. L. REV. 409, 411, 473 (2007). Chief Justice Barak himself conceded that "it is true that no special appeal was made to the public to approve the text of the Basic laws." CA 6821/93 *Bank Mizrahi*, at 448.

8. *See, e.g.*, Aharon Barak, *The Constitutionalization of the Israeli Legal System As a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 1 (1997); G. Barneha, *Judicial Review over Economic Legislation by Virtue of Basic Law: Human Dignity and Liberty*, 12 MISIM 80 (1998); Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The*

has garnered enormous scholarly attention from a multitude of legal, social, psychological, and economic angles,[9] the constitutional dimensions of divorce remain virtually untouched.[10]

The current study seeks to fill this academic lacuna and explore the missing constitutional component of Israeli divorce law. Analyzing the Israeli marital dissolution regime through a constitutional prism, it enlists this new framework to support women's rights, enrich scholarly and political discourse, and equip Israel's policymakers with a new tool to secure women's divorce entitlements and facilitate their fight for equal marital emancipation.

To fulfill this end, the discussion is composed of three distinct Parts. The first is a brief sketch of Israeli divorce law, the harm to women that results from its inequity, and current proposals for reform. The second provides an outline of Israel's unique constitutional landscape, including the birth, scope, and core principles of the Constitution. The third examines the interplay of these two areas of law, argues that the freedom to obtain a divorce is a fundamental right deserving constitutional protection, and explores the implications of such a right for both current divorce law and future reforms.

I. JEWISH DIVORCE, ISRAELI-STYLE: A CRITICAL ANALYSIS

Divorce can be one of the most devastating experiences that an individual faces in a lifetime. For an Israeli woman, the devastation is exacerbated; in addition to emotional and financial trauma, she stands to endure legal trauma as well, due to Israel's peculiar implementation of the Jewish vision of divorce.

Judaism has always accepted the institution of divorce as essential to ending and burying moribund marriages. It is, however, viewed as an unfortunate necessity, so undesirable that the Bible describes it as the exclusive privilege of men. According to Biblical rules, men have an absolute, unilateral, no-fault right to repudiate their spouses at any time, for reasons serious or cavalier, through a *get*, a Jewish divorce decree.[11] Subsequent rabbinical developments have sought both to provide women with a limited fault-based divorce right and to equalize the divorce prerogative by abridging a husband's

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Impact on Administrative Law, 3 U. PA. J. CONST. L. 581, 643-44 (2001); Gavriella Shalev, *The Impact of Basic Law: Human Dignity and Liberty on Contract Law*, 1 KIRYAT HA'MISHPAT 41 (2001); Menashe Shava, *The Quality and Administration of Alimony—Is It Possible To Employ the Principles of Basic Law: Human Dignity and Liberty?*, 23 IYUNEI MISHPAT 775 (2000); A. Yuren, *The Constitutional Revolution in Tax in Israel*, 23 MISHPATIM 55 (1994).

9. *See, e.g.*, BOAZ KRAUS, DIVORCE: A PRACTICAL GUIDE TO DIVORCE (1998); ESTER SIVAN, DIVORCE IN ISRAEL AND THE STATUS OF THE WOMAN (2002); JACOB SLOSER, A MAN'S RIGHTS IN THE FAMILY? (1996).

10. See authorities cited *infra* Part I.

11. The rules relating to divorce are set forth in *Deuteronomy* 24:1-4. *See* MOSHE MEISELMAN, JEWISH WOMEN IN JEWISH LAW 98 (1978).

freedom to divorce his wife against her will.[12] Thus, according to current Jewish-Israeli law, either spouse may be released from the marriage upon establishing a recognized divorce ground; otherwise, mutual consent is the sole marital outlet.[13]

However, despite this seemingly sex-blind approach, divorce law remains unequal in both its theory and application. As described in the following sections, modern rabbinical divorce law merely made facial discrimination more subtle, providing an insubstantial guarantee of equality. The divorce regime continues to display a systematic and prominent predisposition in favor of men, licensing them to enchain their wives indefinitely. Men have more grounds through which they can obtain divorce, and it is easier for them to establish those grounds and to persuade the court that they are severe enough to warrant freedom. Men are also the sole beneficiaries of processes that carry benefits for new relationships: remarriage permits when their spouses oppose divorce and civil alternatives when such permits are not available. All of these inequalities embedded in the divorce regime lead in turn to the ugly and widespread phenomenon of *get* extortion.

A. Asymmetrical Divorce Grounds and Their Biased Application

The availability of divorce grounds in rabbinical court jurisprudence is asymmetrical. Men have more grounds for divorce at their disposal and more latitude in establishing those grounds. For example, because there is a religious obligation upon men, but not women, to procreate, a wife's infertility creates a solid claim for divorce, while a husband's sterility secures a right to divorce only in narrow circumstances.[14] Bias also guides treatment of adultery: even suspicion of a wife's infidelity is a husband's divorce trump card, but a man's established and repeated adultery rarely constitutes grounds for his wife's

12. The push for equality in divorce law reached its climax in 1000 C.E., when the uninhibited freedom of husbands to sever marriage ties was finally abridged. Rabbeinu Gershom recognized that a law giving husbands the unilateral right to divorce left women prey to arbitrary abandonment. He decreed, "To assimilate the right of the woman to the right of the man, it is ordained that even as the man does not put away his wife except of his own free will, so shall the woman not be put away except by her own consent." Rabbeinu Gershom's revolutionary decree in Responsa Asheri, 42, 1. For the decree, see Elimelech Vestrich, *Protection of the Status of the Jewish Woman in Israel–Intersection Between Legal Traditions of Different Communities*, 7 PLILIM 273, 284-89 (1998). This decree is still valid and is a basic tenet of Jewish divorce law. *See* Bleich, *supra* note 4, at 168; Shahar Lifshitz, *Equality in Marriage, the Right to Divorce, and Autonomy of Communities*, 27 IYUNEI MISHPAT 139, 163-65 (2003).

13. *See* ARIEL ROZEN-TZVI, FAMILY LAW IN ISRAEL: BETWEEN HOLY AND SECULAR 406-14 (1990); PINCHAS SHIFMAN, FAMILY LAW IN ISRAEL 421-24 (2d ed. 1995).

14. A woman *may* be entitled to divorce based on her husband's barrenness, but only if she can establish that having children is critical for her. *See* BEN ZHION SHARSHEVSKI, FAMILY LAW 298-300 (4th ed. 1994); Elimelech Vestraich, *Men's Suits for Infertility in the Rabbinical Courts' Decisions*, 25 MISHPATIM 241 (1995).

freedom.[15] Insanity or mental illness—classic divorce grounds in both Western and Islamic systems—are available to Jewish men as grounds for divorce, but they cannot free women.[16] Similarly, a spouse's absence or disappearance is never a divorce ground for women, while an abandoned husband can easily be released.[17]

Even when the same grounds are available to both sexes in theory,[18] in practice the rabbinical court is far more willing to grant divorces to men than to women.[19] This bias stems from a basic tenet of Jewish divorce law: a *get* must be given of a husband's free will. If forced, the *get* is invalid,[20] and grave consequences ensue for a woman and her children born after the invalid *get* was obtained.[21] However, if a woman is forced to divorce, no such risks exist for her husband.[22] Consequently, a woman must do more than a man to satisfy the court of the presence and severity of circumstances creating grounds for marital dissolution.[23] In fact, Israeli women of the twenty-first century may find it difficult to divorce consistent non-providers, adulterers, and even violent and

15. SHARSHEVSKI, *supra* note 14, at 317-20; *see* Ruth Halperin, *Adultery of the Husband as a Ground for Divorce*, 7 MECHKAREI MISHPAT 279, 322 (1989). *See also* the rabbinical court decision in Case No. 059133397-21-1, *in* 18 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 11-12 (2008).

16. Once insane, a man is not legally competent to give his wife a *get*, but if a man is well enough to divorce his wife, his condition is not sufficient grounds for divorce. Talmud Yebamot 14, 1.

17. ROZEN-TZVI, *supra* note 13, at 143-73; Marc S. Cwik, *The Agunah Divorce Problem in Jewish Society: Exploring the Possibility of an International Law Solution*, 17 WIS. INT'L L.J. 109, 114, 116-17 (1999). Currently, eight hundred Israeli women whose husbands have disappeared or become mentally incompetent are in legal limbo. Capell, *supra* note 4, at 337.

18. Divorce grounds that are identical for both sexes include defects and chronic disease, failure or refusal to have sexual relations, refusal to live in the location agreed upon at the time of marriage, violation of Mosaic law (a woman who makes her husband violate the commandments of the Torah), and violation of Jewish religion (a woman who violates modesty rules that are not written in the Torah but that are customary among Jewish women). *See* DAVID WERNER AMRAM, THE JEWISH LAW OF DIVORCE ACCORDING TO BIBLE AND TALMUD 63-77 (2d ed. 1968); SHARSHEVSKI, *supra* note 14, at 308-25.

19. Bleich, *supra* note 4, at 172 (noting the rabbinical courts' hesitancy to compel a husband to give a *get*); Irwin H. Haut, *"The Altar Weeps": Divorce in Jewish Law*, *in* WOMEN IN CHAINS 45, 53 (Jack Nusan Porter ed., 1995) (attributing the courts' reluctance to order divorce to their endorsement of the minority Halachic opinion of Rabenu Tam that disapproved of divorce under most circumstances); s*ee also* HALPERIN-KADDARI, *supra* note 2, at 236-37 (observing that divorce grounds against women are easily accepted while the same claims against men rarely end in divorce); Pinchas Shifman, *Jewish Halacha in a Changing Reality: What Delays the* Get*-Delayed Women?*, 6 ALEI MISHPAT 27, 43-44 (2007).

20. ERWIN E. SCHEFTELOWITZ, THE JEWISH LAW OF FAMILY AND INHERITANCE AND ITS APPLICATION IN PALESTINE 111 (1947).

21. See discussion *infra* Part I.C.

22. According to biblical law, a man may marry an additional wife, and thus even if the *get* is invalid, both the subsequent marriage and children of that marriage are legitimate according to the Torah. SHARSHEVSKI, *supra* note 14, at 332.

23. HALPERIN-KADDARI, *supra* note 2, at 237; Zerach Verhaphtig, *Compulsion of a* Get *in Theory and Practice*, 3 SHNATON HAMISPHAT HAIVRI 153, 157-159, 209-215 (1976). For the problems divorcing women face in the rabbinical courts, see Rivka Lovitch, Women Plaintiffs in Rabbinical Courts: The Struggle to Solve the Problems of *Mesoravot Get*—Two Steps Forward, One Step Back, http://www.idi.org.il/sites/english/BreakingTheNews/Pages/WomenPlaintiffsinRabbinicalCourts.aspx (last visited Nov. 25, 2008).

abusive partners.[24] In one extreme case, a woman spent seventeen years convincing the rabbinical court that she was entitled to divorce, even though her husband habitually beat both her and her children and repeatedly broke his promises, made in court, to end the abuse. Only after the husband was convicted of murder and six counts of rape was the rabbinical court willing to issue a compulsory divorce order.[25]

B. Unequal Religious Alternatives Faced by a Chained Spouse

When a woman refuses to obey a divorce order issued by the rabbinical court, under certain conditions, it may issue her husband a "permit" to remarry in the face of his wife's opposition.[26] This remedy is not available to women in the same position. If a man withholds his consent to a divorce, his wife has no remedy against his recalcitrance; she is not divorced and cannot remarry or have legitimate children until he agrees to grant her the *get*.[27] This unfair treatment of women is affirmed by the civil-secular court system. When given the opportunity to narrow the conditions for granting a permit, the Supreme Court has instead supported an expansive exercise of this discriminatory measure.[28]

This unequal gender-based consideration of spousal consent has given rise to the pernicious practice of "*get* extortion."[29] Men can leverage their veto power over the *get* as a bargaining chip to demand property concessions, evade financial obligations, and gain child custody rights.[30] In one case, a husband who left his Holocaust-survivor wife for another woman refused to give her a *get* unless she turned over money she received as war reparations.[31] Husbands can also validly condition their consent upon non-monetary criteria, even restraining their wives' most basic and private affairs by controlling, for

24. *See, e.g.*, HCJ 1371/96 Rephaeli v. Rephaeli [1997] IsrSC 51(1) 198; Mordechai Frishtic, *Physical Violence of Husbands as a Ground for Divorce in Jewish Law and Rabbinical Adjudication*, 17 DINEI ISR. 83 (1994).

25. Glen Frankel, *The Rabbinical Ties that Bind*, *in* WOMEN IN CHAINS, *supra* note 19, at 27.

26. Penal Code, 1977, S.H. 226 arts. 176, 179; *see also* Bleich, *supra* note 4, at 168-69; Clinton, *supra* note 4, at 297-98. The grant of a permit is an unusual remedy requiring the approval of 100 rabbis. Once a permit is granted, the husband is still *formally* married to his wife, but substantively has no financial or other obligations toward her and may marry another wife. *See* Marc Cwik, *The Problem of Recalcitrance in Jewish Divorce* (on file with author).

27. *See* SHIFMAN, *supra* note 13, at 420-21.

28. *See, e.g.*, DN 10/69 Boronovsky v. Chief Rabbi [1970] IsrSC 28(1) 7 (holding, in a case where the rabbinical court granted a remarriage permit to a husband over his wife's objection, that the rabbinical court enjoys a broad discretion to grant permits and that it may do so in order to compel a wife to accept the *get*).

29. Pinchas Shifman, *Forty Years to Family Law—A Struggle Between Religious Law and Secular Law*, 19 MISHPATIM 842, 853 (1990).

30. *See, e.g.*, Honey Rackman, *Getting a* Get, *in* WOMEN IN CHAINS, *supra* note 19, at 219.

31. *See* Lucette Lagnado, *Of Human Bondage*, *in* WOMEN IN CHAINS, *supra* note 19, at 3, 6.

example, what they can eat or wear.[32] A recent survey revealed that close to 100,000 divorced women in Israel were at some point victims of *get* extortion.[33] In the most egregious cases, no extorted concession can possibly satisfy husbands withholding a *get*; one obstinate husband was willing to remain in jail for over thirty years, ultimately dying there, rather than divorce his chained wife.[34] As the twentieth century drew to a close, there were sixteen thousand *agunot* in Israel waiting in limbo with no way to escape.[35]

Disturbingly, the rabbinical court rarely compels men to divorce, thus empowering, if not encouraging, husbands to withhold the *get* to extort concessions from their wives or simply to harass them. Even when men are commanded to divorce, the court seldom applies the coercive measures that it was legislatively authorized to use in 1995.[36] This is the case even when it is religiously encouraged or obliged to do so.[37] For example, research in 1995 found that while the rabbinical court granted remarriage permits to more than ninety men in the preceding five years, it had compelled a husband to give his wife a *get* through threats of imprisonment only thirty times in forty years.[38] Ironically, a rare instance in which the rabbinical court did induce a husband to divorce with massive pre-divorce spousal support was invalidated as ultra vires by the Supreme Court.[39] The Court is often considered extra-vigilant in the defense of human rights in other contexts,[40] but here precluded the use of this valuable tool to overcome the vengeance of recalcitrant husbands.

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32. Case No. 1-21-022290027, *in* 7 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 6 (2004).

33. Shira Zick, *Women Captured By Their Husbands—Israel 2005!*, 7 MA'AGALEI TSEDDEK 9, 12 (2006).

34. CA 220/67 Attorney General v. Ichye Avraham [1967] IsrSC 22(1) 29; s*ee also* Capell, *supra* note 4, at 342.

35. Francine Klagsbrun, *The Struggle of the Agunot*, *in* WOMEN IN CHAINS, *supra* note 19, at 231. See also the egregious case described in Netty C. Gross, *A Horror Story–Ours*, *in* WOMEN IN CHAINS, *supra* note 19, at 39.

36. *See* Rabbinical Courts (Enforcement of Divorce Decrees) Law, 1995, S.H. 139, arts. 1-3. This progressive piece of legislation is discussed *infra* Part III.B.2. For arguments that the implementation of the law has been deficient, see Moshe Drori, Enforcement of Divorce in Israel at the End of the Twentieth Century, http://www.sanhedrin.co.il/documents/drori1.pdf (last visited Dec. 7, 2008). The rabbinical court also disregards historically-used tools available under Jewish law to alleviate the plight of *agunot*. *See, e.g.*, Haut, *supra* note 19, at 50-53; Shlomo Riskin, *A Modern Orthodox Perspective*, *in* WOMEN IN CHAINS, *supra* note 19, at 187, 191. *See generally* Moshe Meiselman, *Jewish Woman in Jewish Law: Solutions to Problems of* Agunah, *in* WOMEN IN CHAINS, *supra* note 19, at 61. Instead, Orthodox rabbis have questioned the seriousness of the *agunot*'s situation; some have even held that it is "the will of the creator" that a woman remain married. Clinton, *supra* note 4, at 301-02.

37. For instance, when the wife has committed adultery, it is a commandment and a *mitzvah* to sever the marriage. *See* SHIFMAN, *supra* note 13, at 418; Verhaphtig, *supra* note 23, at 205-10.

38. Frankel, *supra* note 25, at 28.

39. HCJ 54/55 Rozentzweig v. Head of the Execution Dep't, [1955] IsrSC 9 1541, 1543-50. This ruling was reaffirmed by subsequent decisions. *See, e.g.*, HCJ 664/82 Salomon v. Salomon [1983] IsrSC 38(4) 365.

40. *See, e.g.*, HCJ 5100/94 Pub. Comm. Against Torture v. Israel [1998] IsrSC 54(4) 817 (outlawing the use of physical measures against terrorists in General Security Service interrogations). See also the cases described in Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 593-94 (1996).

Conversely, when the civil family court ordered a husband to pay his wife monetary compensation for withholding the *get* for over twelve years, the rabbinical court frustrated the effort to achieve justice.[41] The court simply refuses to process a divorce application unless the civil court keeps its hands off the divorce proceedings and until any civil order is revoked.[42] Even when a husband *voluntarily* agrees to both a *get* and compensation for his wife, the rabbinical court may refuse to process the divorce, forcing the wife to choose either a monetary civil order or a religious divorce order.[43] The counter-actions of the rival court systems can thus sadly cancel out each other's effectiveness to the detriment of women. It is no wonder, then, that Israeli family law is referred to as "war law," and women are cast in the role of captive victims.[44]

Women face a further double standard from the rabbinical court with regard to *get* extortion. When husbands withhold the *get*, the court actively encourages wives to submit to their demands, regardless of how excessive they may be, even if the interests of both women and children are clearly jeopardized.[45] If wives refuse to do so, the court has been known to chastise them or even rescind the divorce order until they agree to succumb to their husbands' whims.[46] The Supreme Court in turn has remained indifferent to the plight of women coerced into making excessive concessions for freedom. Its opinions have viewed the distress of the *agunot* as irrelevant and even as a legitimate exchange for marital liberty[47]—in effect finding the *get* to be equivalent to legal tender and commodifying the divorce decree.[48] On the other hand, in an instance when the rabbinical court suspected that a woman was attempting to use *get* extortion for economic reasons, it did not encourage her

41. *See* Case No. 19270/03 C.S. v. C.P. [2004] (not yet reported), *available at* http://www.nevo.co.il/Psika_word/mishpaha/sm03019270.doc. For an overview of the use thus far of tort law by *agunot*, and the various implications this usage has for the structure of family law, see Yifat Bitton, *Public Hierarchy—Private Harm: Negotiating Divorce within Judaism*, *in* (RE)INTERPRETATIONS: THE SHAPES OF JUSTICE IN WOMEN'S EXPERIENCE (Laurel S. Peterson & Lisa Dresdner eds., 2008).

42. Auriel Lavie, *Ordering Divorce After Ordering a Husband to Compensate His Wife*, 26 TCHUMIN 160 (2006) (exploring the positions of the rabbis toward intervention by civil courts into the divorce arena); Lovitch, *supra* note 23 (same).

43. Lavie, *supra* note 42, at 170-71.

44. Ruth Halperin-Kaddari, *Towards Concluding Civil Family Law—Israel Style*, 17 MEHKAREI MISHPAT 105, 108 (2001).

45. This is the case when husbands make financial demands that may lead women to destitution, or when such demands include low child support or forgoing custody. Zick, *supra* note 33, at 10. *See, e.g.*, Case of the Rabbinical Court (TA), *in* 82 DIVREI MISHPAT 153; and Case No. 11664295-21-2 [2005], *in* 12 HADIN VE'HADAYAN 5 (2006).

46. Zick, *supra* note 33, at 9-10, 12. For examples, see cases cited *supra* note 45.

47. *See, e.g.*, CA 5490/92 Fagas v. Fagas [1994] Tak-El 94(4) 516; CA 162/72 Amzaleg v. Amzaleg [1973] IsrSC 27(1) 582, 587-88.

48. 2 DANIEL FRIEDMAN & NILI COHEN, CONTRACTS 990 (1993) (describing the status of the *get* as a commodity); Shifman, *supra* note 29, at 853-54 (noting that civil courts have approved of unfair child support agreements that wives entered into in exchange for divorce).

husband to submit to her demands. Rather, it condemned the wife, finding it "inconceivable" to "chain" a husband for financial gain.[49]

Worse still, the rabbinical court has recently resurrected an obscure minority doctrine, allowing for the retroactive invalidation of a *get* if an ex-wife fails to fulfill the conditions upon which she was divorced.[50] The consequences of this doctrine are far-reaching and may even subject women to a perpetual bar from remarriage. If such women remarried based on the *get,* their subsequent marriages could be declared invalid and the children of the second marriage illegitimate.[51] Indeed, in several cases the rabbinical court, sometimes on its own initiative, has doubted the validity of the *get* of a divorced woman who has had children with another man.[52] The Supreme Court, in turn, has not stopped this abuse, giving an implicit stamp of approval to a gross violation of women's rights.[53] Thus, an Israeli Jewish woman today can never be sure that her divorce is final and that she is free of her ex-husband's control.

C. Unequal Secular Alternatives When Religious Divorce is Unavailable

Absent a religious divorce, a woman must remain in her moribund marriage. Were she to date others, her relationships would be deemed adulterous, causing serious consequences for her financial rights and barring her from ever marrying her lover.[54] The rabbinical court could deprive her of child custody, diminish her prospective alimony and property rights, or even issue restraining orders preventing her from allowing other men into her home.[55] Were she to have children with another man, they and their descendants would be deemed bastards, excluded from the Jewish community

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49. Case No. 8885, *in* 13 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 5-6 (2006) (suggesting that the wife's request for reconciliation stemmed from her desire to keep living in the marital home and ordering her to accept the divorce).

50. *See, e.g.*, Case No. 1-23-9997 (TA), *in* 14 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 8 (2007) . For the origins and status of the doctrine, see Shifman, *supra* note 19, at 40-41.

51. For the disastrous consequences that flow from an invalid *get*, see discussion *infra* Part I.C.

52. For a discussion of such cases, see Amihai Radzyner, *From Lviv to Tel-Aviv: "Wrongful Divorce" Judgments in the Israeli Rabbinical Courts* (forthcoming) (on file with author) (providing a comprehensive account of the retroactive invalidation doctrine and its application in the rabbinical courts). For a compilation of rabbinical court decisions discussing and applying the retroactive invalidation doctrine, see 13 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS (2006).

53. HCJ 5548/00 Cohen v. Grand Rabbinical Court [2001] (not yet reported) (approving the invalidation of the divorce when the ex-wife refused to forgo all the financial rights the civil family court granted her).

54. Case No. 1-22-051778991 [2005] (not yet reported); *see also* HALPERIN-KADDARI, *supra* note 2, at 236; Halperin, *supra* note 15, at 297.

55. Frankel, *supra* note 25, at 28.

and denied certain rights and privileges.[56] None of these consequences apply to a man. He may cohabitate with another unmarried woman while retaining his economic rights, and children born of such a relationship would not be considered social and legal outcasts.[57]

Despite the already advantageous position of men, civil and rabbinical court doctrines further aid the position of husbands at the expense of their wives. For example, the civil courts often condition property distribution on divorce, thus depriving wives who are unable to get the *get* of their share of joint property.[58] Further, civil courts have treated the girlfriends of formally-married men as new wives, according them the rights and privileges that belong to the *aguna*.[59] Thus, even a man who wants a *get* can play hard to get, since he is legally able, if not encouraged, to live with other women without a divorce, while his wife is chained to a marriage which exists only in name. The wife in turn may have no choice but to pay for the divorce that her husband desires. Unsurprisingly, as a result, Israel presents an extreme example of the feminization of divorce—over ninety percent of all divorce petitions are initiated by women.[60]

In sum, the Israeli dissolution regime is rife with prejudice and abuse and creates substantial incentives for men to oppose divorce. Both the religious and secular Israeli courts have unaccountably allowed, aided, and even incited husbands to prevent their wives from obtaining divorces—leaving women indefinitely enchained in their marriages as *agunot*. Trapped between a rock and a hard place, these women are thus torn between commitment to the principles of their faith and the desire to rehabilitate their lives and form a new family. Paradoxically, the more a woman values the religious system, the higher the price she pays for its divorce rules. It is little wonder that inequality

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56. It must be stressed that such consequences are legal, not just religious. Adultery is not only a grave sin from a religious perspective, but also carries practical civil results that impact non-religious women, including those discussed *supra*. Thus, even non-religious women would be reluctant to conceive a child with another partner while legally married, since that child would be highly stigmatized and by law unable to marry another Jew. *See* HALPERIN-KADDARI, *supra* note 2, at 236; Capell, *supra* note 4, at 337; Chigier, *supra* note 5, at 207-08; Clinton, *supra* note 4, at 296.

57. HALPERIN-KADDARI, *supra* note 2, at 236; Capell, *supra* note 4, at 337; Chigier, *supra* note 5, at 207-08; Clinton, *supra* note 4, at 296.

58. HALPERIN-KADDARI, *supra* note 2, at 238; Shifman, *supra* note 29, at 853.

59. *See, e.g.*, CA 384/61 Israel v. Pasler [1962] IsrSC 16(1) 102 (developing this policy). The "new wives" have even been entitled to change their last names to those of their "husbands" in the face of the legal wives' opposition. CA 6086/94 Ela Nizri v. Office of the Population Registration [1996] IsrSC 49(5) 693; *see also* Shahar Lifshitz, *Married Against Their Will: On the Non-Liberal Facet of Cohabitation Law*, 25 IYUNEI MISHPAT (2001) (noting the radical nature of Israeli cohabitation law in treating cohabiting couples for almost all intents and purposes as if they were married).

60. Gill Ronen, *The New Agunot*, YEDIOT ACHRONOT, OCT. 4, 2006, *available at* http://www.ynet.co.il/articles/0,7340,L-3310736,00.html. In the western world, women also initiate divorce more than men, but at a lower proportion. In the United States, for example, "two-thirds of all divorces are initiated by women." Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 619 (2006).

in the divorce domain is considered the most severe discrimination faced by Israeli women today.[61]

D. Progress in the New Millennium? Proposals Calling for Divorce Reform

Male use of *get* extortion has made the *get* process one of the most disgraceful and painful aspects of Israeli law and contemporary Jewish life. The manifest harms caused by the inequality of the current divorce system have finally led policymakers to consider reform of existing law, including the potential adoption of an alternative civil divorce system. Since religious law has always governed divorce in Israel, the question of an appropriate *civil* policy of divorce law is in its infancy, and only preliminary progress has been made in exploring the substance of desirable secular divorce rules.[62] Nonetheless, three major proposals have been made, which alter the existing scheme to varying degrees: the Gavison-Medan Covenant, the Israel Democracy Institute (IDI) model, and the Ministry of Justice model.[63]

The Gavison-Medan Covenant, the proposal that is most restrictive of the divorce right, envisions a civil marriage structure but continues to commit divorce to a religious, fault-based regime.[64] The Covenant does allow for unrestricted and unconditional civil dissolution of marriage, but that dissolution alone is insufficient to permit remarriage.[65]

In the middle of the pack, the Israel Democracy Institute (IDI) model creates an alternative to the existing civil marriage structure, known as a "spousal covenant." In this model, couples seeking to create a binding and

61. Jack Nusan Porter, *Introduction: The Agunah—A Personal Perspective*, *in* WOMEN IN CHAINS, *supra* note 19, at xi, xiv (citing a letter from the Israel Women's Network).

62. SHAHAR LIFSHITZ, THE SPOUSAL REGISTRY: ISRAEL INSTITUTE OF DEMOCRACY 31-33 (2007).

63. For a survey of recent proposals to transform Israeli divorce law, see Shahar Lifshitz, *Spousal Registry*, *in* SEFER SHAVA 361 (Aharon Barak & Daniel Friedman eds., 2006). Additionally, in July 2008, thirty-four Knesset members introduced a private bill that would establish an additional civil track for marriage and divorce. *See* Bill for the Establishment of the Status of Couples to a Spousal Agreement, 2008, *available at* http://www.nevo.co.il/Law_word/law04/2008-3847.doc. Though the bill pledges allegiance to a no-fault version of divorce, it is significantly stricter than the other two no-fault models (discussed *infra* Parts III.C.2 and III.C.3), requiring mediation, one-year delays, and significant court involvement in assessing the status of dissolving marriages. Since even the more lenient and liberal no-fault models are not free from constitutional doubts (*see infra* Parts III.C.2 and III.C.3), this new bill is *a fortiori* constitutionally problematic.

64. RUTH GAVISON & YAACOV MEDAN, FOUNDATION FOR A NEW SOCIAL TREATY BETWEEN RELIGIOUS AND SECULAR PEOPLE IN ISRAEL 31-39 (2003). For a shorter English version of the main points and principles of the Covenant, see YOAV ARTSIELI, THE GAVISION-MEDAN COVENANT: MAIN POINTS AND PRINCIPLES (2004), *available at* http://www.gavison-medan.org.il/FileServer/792c573c471c12fd8eac98ae9e21cc89.pdf. The Covenant allows marriage and dissolution proceedings in both civil and rabbinical courts but only considers people single if they would have that status under religious law. GAVISON & MEDAN, *supra*, at 42, 48-49. It is perhaps telling that the authors of the Covenant clearly state in the preface of their proposal that the court "will not be granted the authority to invalidate laws concerning the covenant." *Id.* at 14.

65. While the Covenant does not include prerequisites for civil dissolution, it does permit the civil court to condition its grant upon the prior conclusion of the marriage according to religious law. GAVISON & MEDAN, *supra* note 64, at 42.

recognized spousal relationship outside the framework of religious marriage will be registered with the state as having established a spousal covenant. Such registration vests the couple with all the civil rights enjoyed by couples in the civil marriage system. Couples are able to dissolve a covenant without establishing fault, but only under certain procedural restrictions.[66] The model distinguishes between consensual divorce, which requires a six-month waiting period, and disputed divorce, which requires at least a one-year waiting period. After one year, impossibility of reconciliation must be established; if it is not, the divorce-seeker must wait an additional year, although the court may shorten or prolong the divorce proceedings as it sees fit.[67]

At the other extreme, the Ministry of Justice model also creates a spousal covenant, from which a less restrictive, no-fault version of dissolution is available, provided that a couple was not married pursuant to religious law.[68] This model champions a hands-off approach to uncontested divorce[69] and imposes a waiting period of six months for unilateral divorce, during which the couple must undergo mediation in an attempt to resolve their disputes.[70] The court is further authorized to withhold dissolution orders until procedures relating to property distribution and child custody are concluded.[71]

These new models for divorce all provide increased protection for women whose rights have been ignored under current law. However, to be adopted, proposals must do more than improve existing law; they must be consistent with the rights and duties existing under the new Israeli Constitution. The next two Parts will explore the content and scope of the unique Israeli Constitution, and its implications for both current divorce law and divorce reform proposals.

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66. *See* Draft Bill of the Spousal Covenant of the Israel Democracy Institute, *in* LIFSHITZ, *supra* note 62, at 87-94. The proposal does not alter the existing civil marriage structure, which only recognizes as "marriage" those unions created and dissolved according to Orthodox religious law, but creates the spousal covenant as an alternative to civil marriage. *Id.* at iv.

67. *Id*. at 91-92 (art. 9).

68. Bill Determining the Status of Couples Entering into a Spousal Covenant 2004, *in* LIFSHITZ, *supra* note 62, at 97-105. As in the previous proposal, spousal covenants accord couples the same rights and duties to which married couples are subject, except for rights or duties originating in religious law. *Id.* at 100-01 (art. 7).

69. *Id.* at 101 (art. 8(a)(2)). The bill does not use the term "divorce," but rather "dissolution." Alongside dissolution, which is executed by courts, the bill establishes a procedure called "deletion from the registry," executed by the registrar, for couples who mutually seek divorce or for widows and widowers. *Id.* at 101 (art. 8(a)). The bill apparently gives unbridled discretion to the registrar to refuse the application, although couples can appeal the registrar's decisions. The bill does not specify the grounds or parameters upon which the registrar may decline an application for deletion. *Id.* at 102 (art. 8(e)).

70. *Id.* at 103 (art. 9(b)). The court can also dissolve spousal covenants under various circumstances: (1) if registration was fraudulent; (2) if, one year after a party applies for dispute resolution, his partner's whereabouts are unknown; (3) if one party has a mental or emotional defect; or (4) if one party marries another person in Israel or abroad. *Id.* at 102 (art. 9(a)).

71. *Id.* at 103 (art. 9(b)).

II. THE RISE OF THE ISRAELI CONSTITUTIONAL ENTERPRISE

In contrast to the stagnant divorce regime, Israeli constitutional law has come through a period of enormous transition. This section will investigate the unique Israeli constitutional regime of Basic Laws and its mandates in search of a key to unlock Israeli women's marital chains. It discusses the Constitution's birth, content, scope, and principal postulates, as well as the degree of judicial scrutiny of legislation required by these principles.

A. The Birth of the Constitution: A Judge-Created Constitutional Revolution

In 1992, two laws relating to human rights were passed: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.[72] Their enactment marked a watershed in the Israeli legal world, sparking a "constitutional revolution."[73] These laws were ostensibly just ordinary legislation to which the label "Basic Law" was appended. They were adopted through regular legislative processes, with low attendance and a slim majority, in what some have called a "guerilla" fashion.[74] Since they include neither entrenchment nor supremacy clauses, they may be amended or repealed in any quorum by a regular majority and have no supra-legislative status.[75] Furthermore, by 1992 the Knesset had already enacted eight Basic Laws without the Supreme Court finding that a constitution was in the making.[76]

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72. Basic Law: Human Dignity and Liberty, 1992, S.H. 150; Basic Law: Freedom of Occupation, 1992, S.H. 114 (amended 1994, S.H. 90).

73. Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1903 (2000) (quoting Israeli Supreme Court President Aharon Barak). For a discussion of Israeli legal history prior to 1992, see Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312-22 (1995).

74. Thirty-two Knesset members were in favor, twenty-one were against, and one member abstained in voting on Basic Law: Human Dignity and Liberty. The other sixty-six members of the Knesset did not attend what was later held to be a vote adopting a constitution. Only twenty-three Members of the Knesset (MKs) participated in the vote for Basic Law: Freedom of Occupation, though they unanimously supported the bill. *See* Yoav Dotan, *Constitution for Israel?—The Constitutional Dialogue After the "Constitutional Revolution,"* 28 MISHPATIM 149, 181-82 (1997); Dotan, *supra* note 2, at 303 n.37.

75. Pre-1995 Israeli case law actually took the absence of a supremacy clause as indicating the regular status of some Basic Laws. *See* Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 644 (1999). The importance of such provisions can be seen, for example, in the U.S. and Canadian cases. *See* U.S. CONST. art. VI, § 2; Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) art. 52, § 1.

76. These eight statutes were enacted as Basic Law: The Parliament; Basic Law: Israel Lands; Basic Law: The President of the State; Basic Law: The Government; Basic Law: The State Economy; Basic Law: The Army; Basic Law: Jerusalem Capital of Israel; and Basic Law: The Judiciary. None of these Basic Laws were held to have constitutional or supreme status. *See, e.g.*, HCJ 60/77 Ressler v. Chairman of the Knesset Central Election Comm. [1977] IsrSC 31(2) 556; HCJ 119/80 HaCohen v. Government of Israel [1980] IsrSC 34(4) 281.

However, in 1995, the Supreme Court took the entire legal community—and the Knesset itself—by surprise with its revolutionary decision holding the Basic Laws to be a Constitution.[77] The Court, while sitting as a Court of Civil Appeals in an ordinary case, endowed the Israeli people with a formal constitution by means of case law. As Chief Justice Barak held:

> We have now joined the community of democratic countries (among them the United States, Canada, Germany, Italy and South Africa) with constitutional bills of rights. . . . [T]he constitutional revolution is seen in the changed constitutional status of human rights. They have become constitutional rights, engraved upon the pages of the constitution and enjoying normative supremacy. . . . Each of the Basic Laws constitutes a chapter in the constitution of the State of Israel. Each chapter stands at the head of the normative pyramid.[78]

The Supreme Court further found for itself the power of judicial review,[79] despite the Basic Laws' silence on the issue and the legislature's explicit statements that the Basic Laws were not intended to grant courts this power.[80]

Today, it is an established fact that the enactment of the Basic Laws brought about a constitutional revolution in Israel and that the legislature must now answer to the Court.[81] However, the scope and boundaries of the new constitutional regime are still far from clear—and they are continuing to expand.

B. The Content and Application of the Constitution: Scope and Boundaries

The rights explicitly enumerated in the Basic Laws include the rights to life, body, and dignity, the right to property, liberty of the individual, the right to exit and enter the country, the right to privacy and personal confidentiality, and freedom of occupation.[82] This limited bill of rights, however, does *not* encompass basic constitutional guarantees such as equal treatment and freedom of religion. While it is customary to state that equal protection of the law is a foundation for any democratic state and that it is "so simple, self-evident, and

77. A. Benjamin Archibald, *We Live To Survive Our Paradoxes: In Defense of Israel as a Jewish and Democratic State*, 10 NEW ENG. J. INT'L & COMP. L. 31, 32, 35 (2004).

78. CA 6821/ 93 Unified Bank Mizrahi v. Migdal Collective Vill. [1995] IsrSC 49(4) 221, 341.

79. *Id.* at 314-16.

80. *See* DK (1992) 3783; *see also* Sapir, *supra* note 75, at 656.

81. Segev, *supra* note 7, at 463-64. Note that even before the Basic Laws created a formal Bill of Rights, civil rights were protected by the Court, starting with Justice Agranat's landmark decision on freedom of expression in HCJ 87/53 Kol Ha'am Co. v. Minister of the Interior [1953] IsrSC 7 871. *See also* David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238, 239 (1992); Zaharah R. Markoe, *Expressing Oneself Without a Constitution: The Israeli Story*, 8 CARDOZO J. INT'L & COMP. L. 319 (2000).

82. *See* Basic Law: Human Dignity and Liberty, 1992, S.H. 150, arts. 2-7; Basic Law: Freedom of Occupation, 1992, S.H. 114 (amended 1994, S.H. 90), art. 3.

rational that it has been recognized without exception in *all* constitutions,"[83] the Israeli case confounds this conventional wisdom.

The omission was no legislative accident. For the fiercely contested 1992 Basic Laws to pass, it was necessary to bargain for the consent of unsupportive religious parties.[84] Fearful that the Supreme Court would use Basic Law: Human Dignity and Liberty to invalidate discriminatory religious law, particularly divorce law, the religious parties were only willing to give their consent in exchange for the exclusion of equality and freedom of religion from the Basic Law.[85] Thus, Israeli divorce law was responsible for key features of constitutional law; those constitutional features have in turn fed back into divorce law, and caused concomitant harm to Israeli women.

Divorce considerations are also responsible for the limited application of Basic Law: Human Dignity and Liberty. Motivated again by fear that the Supreme Court "would construe the freedoms that are specified in the bill so broadly in a way we can not even dream of,"[86] the religious parties insisted on a savings clause that immunized legislation already in force against application of the Basic Law, thereby protecting family law from judicial review.[87]

Thus, women's marital emancipation was sacrificed on the altar of political compromise. Israel's wives were chained not only by their husbands, but further by the legislature's complicity in throwing away the constitutional key to their liberty. Worse, while it was included mainly for the sake of divorce, the precedent-setting Savings Clause has far broader consequences, providing a constitutional umbrella for *all* prior legislation which violates the Basic Law's constitutional mandates.[88] So not only did politicians throw away a potential tool for emancipating women from the antiquated divorce regime, they also undermined the decisive role the Basic Law: Human Dignity and Liberty could have played in the entire legal system.

The Constitution's limited application and content notwithstanding, Israeli jurisprudence has long acknowledged that fundamental rights may exist outside of the constitutional text and that these unenumerated rights are entitled to the

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83. Awad Mohammed El Morr, *Human Rights in the Constitutional Systems of Egypt and Other Islamic Countries: International and Comparative Standard*s, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 162, 185-86 (Kevin Boyle & Adel Omar Sheriff eds., 1996) (emphasis added).

84. *See* DK (1992) 3782-3783.

85. *See* AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 920-921 (2005); Barak-Erez, *supra* note 73, at 325; Strong, *supra* note 2, at 150; Sapir, *supra* note 75, at 638.

86. DK (1992) 3786.

87. *See* Basic Law: Human Dignity and Liberty, 1992, S.H. 150, art. 10 (amended 1994, S.H. 90); s*ee also* Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1328 (1999).

88. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391 (amended 1994, S.H. 1454). For example, Israel's voluminous security legislation, primarily the Defense [Emergency] Regulations of 1945, which gives military commanders immense power over individuals, is protected from review. *See* Shimon Shetreet, *Emergency Legislation in Israel in Light of the Basic Law: Legislation Proposal*, 1 MISHPAT UMIMSHAL 433 (1993).

same supra-legislative normative status as explicit constitutional guarantees.[89] In deriving such rights, the Israeli Supreme Court draws its inspiration from a broad and generous reading of the terms "human dignity" and "liberty" that occur throughout the Basic Law.[90] However, the theoretical backing for this reading is currently obscure and under-developed and fails to provide even the most minimal guidelines for its application.[91] In fact, the Court explicitly rejects such guidelines or any other constraints on its constitutional analysis and decisions.[92] Because the Court, rather than relying on text, history, structure, or other such criteria, simply draws on the vague and potentially all-inclusive concepts of "human dignity" and the "liberty and freedom of the individual" as vehicles for the discovery and incorporation of new fundamental rights,[93] almost any right may be accorded constitutional status. [94]

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89. *See* Aharon Barak, *The Constitutional Revolution—Protected Fundamental Rights*, 1 MISHPAT UMIMSHAL 9 (1992); Aharon Barak, *Human Dignity as a Constitutional Right*, 41 HAPRAKLIT 271 (1994).

90. *See, e.g.*, HCJ 2481/93 Dayan v. Commander of Jerusalem Dist. [1993] IsrSC 48 (2) 456, 470; 3 AHARON BARAK, INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATION 423-26 (1994); HALPERIN-KADDARI, *supra* note 2, at 25. For the origin and legal and historical meanings of the term "human dignity," see Englard, *supra* note 73.

91. For a critical analysis of the liberal judicial construction of the term "dignity," see David Feldman, *Human Dignity as a Legal Value—Part 1*, 1999 PUB. L. 682, 697-98.

92. Sapir, *supra* note 75, at 658-59. This attitude is in marked contrast to U.S. constitutional jurisprudence, which makes at least a rhetorical effort to acknowledge constraints on the derivation of unenumerated substantive rights and to exercise restraint in reaching constitutional questions. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937) (finding substantive due process rights to exist only where such rights are "of the very essence of a scheme of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"); Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) (Brandeis, J., concurring) (arguing that the Court should not reach constitutional questions if the case can be decided on a non-constitutional ground); *see also* Marcia Gelpe, *Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space*, 13 EMORY INT'L L. REV. 493, 530-59 (1999) (concluding that the Israeli Supreme Court has far more latitude in its constitutional decisionmaking than its American counterpart).

93. *See* Basic Law: Human Dignity and Liberty, 1992, S.H. 150, arts. 1, 2, 4, 5. Chief Justice Barak elaborated,

> [T]he right to human dignity is, by nature, a "framework" or "general" right. The nature of such a right is that, according to its wording, it does not give explicit details of the particular types of activity to which it applies. It is open-ended. The situations to which it applies are derived from the interpretation of the open language of the Basic Law against the background of its purpose.

HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Barak, C.J., at ¶ 31) (citations omitted). For a review of the implementation of this technique in the case law, see Hillel Somer, *The Unenumerated Rights—On the Scope of the Constitutional Revolution*, 28 MISHPATIM 257 (1997). S*ee also* Aharon Barak, *Protected Human Rights: Scope and Limitations*, 1 MISHPAT UMIMSHAL 253 (1993); Barak, *Human Dignity as a Constitutional Right*, *supra* note 89; Sapir, *supra* note 75, at 645-46.

94. Indeed, as Justice Zamir commented,

> In case-law since the enactment of the Basic Law: Human Dignity and Liberty, various *obiter dicta* can be found that see many aspects in the Basic Law. This is particularly so with regard to the right to dignity. The same is true of legal literature. Some see in human dignity the principle of equality, some see in it the freedom of speech, and some see in it other basic rights that are not mentioned in the Basic Law. Someone compiling these statements could receive the impression that human dignity is, seemingly, the whole law in a nutshell, and that it is possible to apply to it the saying of the rabbis: "Study it from every aspect, for everything is in it."

Indeed, after the Constitution was established, the Court enthusiastically embarked on an open-ended, unconstrained quest to discover new rights and complete the fledgling constitutional enterprise.[95] Faithful to its standing as perhaps the most activist court in the world,[96] the Israeli Supreme Court recognized a veritable catalog of fundamental guarantees, including freedoms of speech, association, movement, and science,[97] the right to be heard,[98] marital and parental rights,[99] the right to due process of law,[100] the right to wear a beard regardless of religious belief,[101] and even the right to obtain basic social services essential to a respectable human existence.[102]

Moreover, even though the legislature firmly intended to exclude them both, the Court has interpreted Basic Law: Human Dignity and Liberty to encompass the right to equality as well as freedom of religion, rendering them constitutionally guaranteed fundamental rights.[103] Thus, the Court's creatively-

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HCJ 453/94 Israel Women's Network v. Israel [1994] IsrSC 48(5) 501, 536; *see also* Dorner, *supra* note 87, at 1330 (questioning this prevalent approach); Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 TUL. L. REV. 659, 733-34 (2003).

95. *See* Gelpe, *supra* note 92, at 551-56; Yehudit Karp, *Basic Law: Human Dignity and Liberty—A Biography of Power Struggles*, 1 MISHPAT UMIMSHAL 323 (1993); Sapir, *supra* note 75, at 658-59; Shetreet, *supra* note 94, at 723 (criticizing the "sweeping formulations" of the Court and its suggestion that "everything is justiciable"). The Court did, however, decline to derive environmental rights from "human dignity" since this would elevate "the entire array of political, civil, social, and economic human rights to a constitutional status." HCJ 4128/02 Israeli Envtl. Ass'n v. Prime Minister [2002] IsrSC 58(3) 503, 518-19. The Israeli approach is in contrast to that of the U.S. Supreme Court, which considers certain issues inappropriate for judicial decision, *see, e.g.*, Baker v. Carr, 369 U.S. 186 (1962), and is relatively reserved in its careful recognition of new unenumerated fundamental rights, *see, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Regents of Univ. of Mich. v. Ewing, 474 U.S 214, 225-26 (1985).

96. Dotan, *supra* note 2, at 331-34; Shetreet, *supra* note 94, at 697.

97. *See, e.g.*, BARAK, *supra* note 90, at 416-33; Baruch Bracha, *Constitutional Interpretation*, 3 MISHPAT UMIMSHAL 335 (1995).

98. *See* references to cases and legal literature in Bracha, *supra* note 8, at 627.

99. *See, e.g.*, HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported).

100. For the constitutional status of due process under Israeli law, see the decision of Judge Menachem Klein in CA [TA] 156232/05 Hertzeliya Municipality v. Hadara Sales Vardiman [2005], *available at* http://www.nevo.co.il/serve/home/it/titles.asp?build= 2&System=1&Exec=&cpq=1.

101. HCJ 205/94 Nof v. Israel [1997] IsrSC 50(5) 449.

102. *See, e.g.*, HCJ 366/03 Commitment to Peace & Soc. Justice Ass'n v. Ministry of Treasury (not yet reported), *available at* http://web1.nevo.co.il/serve/home/it/titles.asp?build=2&System=1& Exec=&cpq=1 (requiring the state to provide food, home, health services, and reasonable sanitary conditions).

103. Even before the enactment of the Basic Laws, equality principles were enshrined in Israeli common law, but a statute was capable of violating that right. "The right to equality constitutes an integral part of Israeli law . . . . Since the establishment of the State, the Supreme Court has repeatedly held that equality is the 'soul of the whole of our constitutional system . . . .'" HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 29) (surveying decisions establishing the importance of the right to equality prior to the constitutional revolution). *See* CA 721/94 El Al v. Danilovitz [1996] IsrSC 48(5) 749; CA 524/88 Pri HaEmek Agric. Coop. Soc'y Ltd. v. Sedei Yaakov Workers Settlement Ltd. [1991] IsrSC 45(4) 529, 561. By later deriving the right to equality from Basic Law: Human Dignity and Liberty, the Israeli Supreme Court accorded the previously recognized right new supra-legislative status. *See, e.g.*, HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 39); CA 5394/92 Hoppert v. Yad

exercised interpretive power slickly ushered these guarantees through the window even after the legislature unequivocally threw them out the door.[104] This activist and expansionist interpretive trend has such momentum that it led religious political figures to state that they would oppose even the enactment of the Ten Commandments as Basic Law for fear of the Court's "unbridled" judicial creativity.[105]

C. The Benchmarks of Israeli Constitutional Review

The Israeli legal system, like other constitutional democracies, recognizes that individual rights must be balanced against other state interests, and so allows them to be infringed upon, subject to well-defined constitutional parameters.[106] The Basic Laws allow the encroachment of otherwise-applicable fundamental rights under their Limitation Clause, which provides that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[107]

This clause thus creates a four-part test that legislation must pass as a prerequisite to its constitutionality:

VaShem [1994] IsrSC 48(3) 353, 362. For the constitutional status of the right to religion, see Sapir, *supra* note 3, at 190-91.

104. Moshe Landau, *Granting Constitution to Israel by Means of Case Law*, 3 MISHPAT UMIMSHAL 697, 701 (1996).

105. Segev, *supra* note 7, at 467.

106. Dorner, *supra* note 87, at 1331; *see also* HCJ 6427/02 Movement for Quality Gov't in Israel v. Knesset [2005] (not yet reported) (opinion of Barak, C.J., at ¶ 45) (noting that the Limitation Clause is "the foothold on which the constitutional balance between society as a whole and the individual is based"). Other countries and institutions have similar systems. *See, e.g.*, S. AFR. CONST. 1996 art. 36; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 29, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Canada, for example, has a Notwithstanding Clause. Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) art. 33. Section 33(1) of the Charter of Rights permits Parliament or a provincial legislature to adopt legislation to override section 2 of the Charter (containing such fundamental rights as freedom of expression, freedom of conscience, freedom of association and freedom of assembly) and sections 7-15 of the Charter (containing the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, a number of other legal rights, and the right to equality). Such a use of the notwithstanding power must be contained in an act, not subordinate legislation (regulations), and must be express rather than implied. For a thorough discussion of the origin and application of the Notwithstanding Clause, see DAVID JOHANSEN & PHILIP ROSEN, LAW AND GOVERNMENT DIVISION, PARLIAMENTARY RESEARCH BRANCH, THE NOTWITHSTANDING CLAUSE OF THE CHARTER (2005), *available at* http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm.

107. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, art. 8; Basic Law: Freedom of Occupation, 1992, S.H. 90, art. 4; s*ee also* LCA 3145/99 Bank Leumi of Israel Ltd. v. Hazan [2003] IsrSC 57(5) 385, 405 (holding that the Limitation Clause is intended to delineate the boundaries within which primary legislation of the Knesset can be enacted even where it contains a violation of human rights, provided that this violation is found in the proper sphere of the balances between the protection of the right and the need to achieve other important purposes that are involved in violating it).

- Impairment of constitutionally protected rights can only be by law or in accordance with law, rather than by administrative order or regulation.[108]
- The impairing law must be consistent with the values of the State of Israel as both a Jewish and democratic state,[109] though attempts to formulate a synthesis between these seemingly incompatible objectives have provoked bitter controversy.[110] The prevalent judicial model suggests that potential conflicts should be avoided by applying the most abstract and universalistic interpretation possible of Jewish principles.[111]
- The impairing law must have a "proper" purpose. A purpose may be regarded as proper if it is intended to realize general social goals, such as welfare policies or protection of the public interest, which are consistent with the values of the state as a whole and which display sensitivity to the place of human rights in the overall social system.[112] The evaluation of whether a purpose is proper is not limited to considering the historic purpose that motivated the legislature, but may also include possible purposes apparent to the Court at the time of its opinion.[113] The degree to which the purpose needs to be realized for it to be "proper" varies in accordance with the nature of the right that is violated and the extent of the violation thereof. Thus, the more important the right, and the more serious the violation of the right, the stronger must be the public interest in order to justify the violation.[114]

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108. *See* HCJ 3267/97 Rubinshtein v. Minister of Sec. [2000] IsrSC 52(5) 481, 521-24.

109. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, arts. 1A, 8; Basic Law: Freedom of Occupation, 1992, S.H. 90.

110. *See, e.g.*, Abraham Sagie, *Judaism and Democracy—A Conflict?*, 2 DEMOCRATIC CULTURE 169 (2000). One group of scholars gives precedence to the term "Jewish" and argues that it refers specifically to religious law. *See* Menachem Elon, *The Way of Law in the Constitution: The Values of the Jewish and Democratic State in Light of Basic Law: Human Dignity and Freedom*, 17 MISHPATIM 659 (1993). Another group emphasizes the term "democratic" and argues in favor of a secular interpretation of Judaism: a nationalism historically related to religion but normatively independent of it. *See* BARAK, *supra* note 90, at 328-47.

111. BARAK, *supra* note 90, at 328-47; Dorner, *supra* note 87, at 1333-35.

112. *See* HCJ 6427/02 Movement for Quality Gov't in Israel v. Knesset [2006] (not yet reported) (opinion of Barak, C.J., at ¶¶ 51-52); HCJ 5016/96 Horev v. Minister of Transp. [2000] IsrSC 51(4)1, 42.

113. CA 6821/93 Unified Bank Mizrahi v. Migdal Collective Vill. [1995] IsrSC 49(4) 221, 343.

114. HCJ 4769/95 Menahem v. Minister of Transp. [2003] IsrSC 57(1) 235, 258; HCJ 6055/95 Tzemah v. Minister of Def. [1999] IsrSC 53(5) 241, 273. This constitutional examination, however, is still underdeveloped in Israeli law and it is not yet clear how to determine when a purpose is sufficiently important to qualify as valid under the Limitation Clause. To date, the Court has recognized only that when a statute violates a central right, such as human dignity, the purpose of the law will justify the violation if the purpose seeks to realize a "major social goal," or an "urgent social need," but "[i]t is possible that violations of less central rights will justify a lower level of need." HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Barak, C.J., at ¶ 63); HCJ 5016/96 *Horev*, at 42; HCJ 6427/02 *Movement for Quality Gov't in Israel* (opinion of Barak, C.J., at ¶ 53). It seems, thus, that the Israeli Court rejected the exemplary Canadian

- Finally, the law may only impair rights to the extent necessary. This test of proportionality is comprised of three sub-tests inspired by Canadian and European law.[115] Under the "rational relationship" sub-test, the legislative means by which a fundamental right is injured must be rationally tailored to achieve a state interest. Under the "least restrictive means" test, the state must not be able to achieve its purpose by other, less restrictive legislative measures. Finally, under the "proportionate measure test," or "proportionality in the strict sense," there must be a proper balance between the public good and the private harm arising from infringement of a right. It concerns "the benefit arising from the policy as compared with the damage that it brings in its wake."[116] The application of the subtests is influenced by the nature of the violated right and its status on the scale of human rights, the degree and scope of the violation thereof, and the importance and weight of the values and interests that the violating law is intended to realize.[117]

These unique elements of the Israeli Constitution provide a backdrop against which I analyze the current state of divorce law and future efforts to safeguard women's right to marital dissolution. The legislature has not released itself from obligations to change the current deeply-flawed system, and the ongoing constitutional revolution must therefore influence the path forward.

III. VIEWING DIVORCE LAW THROUGH A CONSTITUTIONAL LENS

The evolving Israeli Constitution has the potential to affect and govern the divorce domain. The following section explores divorce as a new entrant in the pantheon of fundamental constitutional rights, then moves on to analyze the

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model which adopts a unified test, whereby the law's purpose is deemed proper if directed to social needs of fundamental importance, regardless of which particular right is being affected. *See* R. v. Oakes, [1986] S.C.R. 103, 138 (Can.). The Israeli system is thus more akin to the problematic American-style use of tiers of scrutiny; under this complex and judicially manipulable system, the government must meet different standards in justifying legislation, depending on the nature of the right at issue. *See, e.g.*, Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984).

115. Proportionality is the central test in Canada. *See* Oakes, 1 S.C.R., at 138; PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 875 (3d ed. 1992). This is also the case in Germany, the European Community, and the European Court for Human Rights in Strasburg. *See* Georg Nolte, *General Principles of German and European Administrative Law—A Comparison in Historical Perspective*, 57 MOD. L. REV. 191, 192-93 (1994).

116. For leading cases analyzing these tests, see HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807; HCJ 450/97 Tnufa v. Minister of Labor & Welfare [1998] IsrSC 52(2) 433; HCJ 4128/00 Prime Minister v. Hofman [2003] IsrSC 57(3) 289; HCJ 987/94 Yuronet Golden Lines v. Minister of Commc'n [1996] IsrSC 48(5) 412.

117. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Procaccia, J., at ¶ 4); HCJ 4769/95 *Menahem*, at 280; HCJ 1715/97 Israel Inv. Managers Ass'n v. Minister of Fin. [1997] IsrSC 51(4) 367, 420-22.

implications of a divorce right on the current regime of marital dissolution and current proposals for its reform.

A. The Right to Marital Freedom: Outlines of its Constitutional Profile

As previously discussed, one of the most salient trends shaping the Israeli constitutional landscape is the judicial eagerness to interpret generously the key concepts of "dignity" and "liberty." Most importantly, the Supreme Court has held that the right to family life—the right to belong to a family unit, to marry and live together, and to bear and raise children—is constitutionally protected.[118] These rights are "fundamentals of human existence," at the core of human dignity and autonomy,[119] and it is thus "hard to describe human rights that are their equal in their importance and strength."[120]

While all the justices acknowledged that the right to family life is enshrined in Basic Law: Human Dignity and Liberty,[121] they based the existence of the right on different foundations. Most justices viewed family life as deriving directly from the constitutional right to human dignity. They explained,

> The right to human dignity constitutes a collection of rights which must be safeguarded in order to uphold the right of dignity. Underlying the right . . . is the recognition that man is a free entity, who develops his person and his abilities as he wishes in the society in which he lives; at the centre of human dignity is the sanctity of human life and liberty. Underlying human dignity are the autonomy of the individual will, freedom of choice and freedom of action of the person as a free entity. Human dignity is based on the recognition of the physical and spiritual integrity of man, his humanity, his value as a human being, all of which irrespective of the extent of his usefulness.[122]

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118. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶¶ 28, 38; opinion of Jubran, J. at ¶ 7; opinion of Procaccia, J., at ¶ 6) (noting that the right to family life, derived from the rights to life and dignity, includes the right to marry a person of one's choice in accordance with one's outlook on life; the right for family members to live together in a location of their choice; the right of parents to realize parenthood in its entirety, to enjoy a relationship with their children and not to be severed from them; and the right of the child to family life); s*ee also* HCJ 3648/97 Stamka v. Minister of Interior [1999] IsrSC 53(2) 728, 782, 787 ("The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel . . . [and] the right of family members to live together in the place of their choice."); AAA 4614/05 State of Israel v. Oren [2006] (not yet reported) (opinion of Beinisch, C.J., ¶ 11), *available at* http://www.nevo.co.il/serve/home/it/titles.asp?build=2&System=1&Exec=&cpq=1 (recognizing "the right to family life, which includes the right of the individual to choose his partner and to establish a family with him").

119. CA 2245/06 Dvorin v. Prison Auths. [2006] (not yet reported), at ¶ 12.

120. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Procaccia, J., at ¶ 6); *see also* LFA 377/05 Future Adopting Parents of a Minor v. Biological Parents [2005], 72 Dinim-El 286 (opinion of Procaccia, J., at ¶ 6).

121. See the opinions of each of the eleven justices in HCJ 7052/03 *Adalah Legal Ctr*.

122. HCJ 6427/02 Movement for Quality Gov't in Israel v. Knesset [2006] (not yet reported) (opinion of Barak, C.J., at ¶ 35).

These justices reasoned that, given the meaning and scope of this central constitutional guarantee, a basic element of the right to human dignity must be a person's ability to shape freely her family life and to raise her children accordingly.[123] The right to family life is thus "in the heart" of and "within the scope of the essence of the right to dignity."[124]

Some justices also found that the right to family life "goes to the heart of the essence of a human being as a free citizen,"[125] and thus is protected by the right to liberty, as well as dignity.[126] For the Court, "[i]n establishing his family, a person shapes the way in which he lives his life and builds his private world. Therefore, in protecting the right to family life, the law protects the most basic freedom of the citizen to live his life as an autonomous person, who is free to make his choices."[127]

For other Justices, the right to marry and to enjoy family life is an integral part of the fundamental right to life.[128] They explained that the Basic Law extends protection not only to the "sanctity of life," but also to "the human right to realize the meaning of life and its *raison d'être*."[129] Since "the right to family is a *raison d'etre* without which the ability of man to achieve . . . self-realization is impaired,"[130] safeguarding the right to life in its full sense requires protection of the right to family life. Justice Procaccia went on to stress that, "[a]mong human rights, the human right to family stands on the highest level. It takes precedence over the right to property, to freedom of occupation and even to privacy and intimacy. It reflects the essence of the human experience and the concretization of realizing one's identity."[131]

In addition, some justices have found a basis for the protection of the family unit in the right to privacy and the right to equality. Justice Barak found the right to family life in the right "to privacy and to intimacy," although he did not elaborate on the constitutional nexus between the two concepts.[132] Taking another path, Justice Rivlin noted that violations of the right to family life may have "ramifications . . . on a defined and distinct sector of the population,

123. HCJ 7052/03 *Adalah Legal Ctr.*, (opinion of Barak, C.J., at ¶ 32).

124. *Id*.; s*ee also* CA 5587/93 Nahmani v. Nahmani [1995] IsrSC 49(1) 485, 497.

125. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Jubran, J., at ¶ 10).

126. *Id.* at ¶ 8 (opinion of Jubran, J.); HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Rivlin, J., at ¶ 8) (explaining that denying the right to realize family life "deals a mortal blow to a person's fundamental ability to dictate his life story. . . . The right to family life is therefore protected in the provisions of the Basic Law as a part of the basic right to liberty and as a part of the basic right to dignity.").

127. *Id.* at ¶ 7 (opinion of Jubran, J.).

128. Basic Law: Human Dignity and Liberty extends constitutional protection to the "life, body or dignity of any person." Basic Law: Human Dignity and Liberty, 1992, S.H. 150, art. 2.

129. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Procaccia, J., at ¶ 6).

130. *Id.* ("Without protection for the right to family, human dignity is violated, the right to personal autonomy is diminished and a person is prevented from sharing his fate with his spouse and children and having a life together with them.").

131. *Id*.

132. *Id*. (opinion of Barak, C.J., at ¶ 32) (relying on Basic Law: Human Dignity and Liberty, art. 7(a)).

which is also a minority group," in the case at hand the Israeli Arab, thereby implicating equality rights.[133]

Thus, the right to family life has been given foundations in the rights to life, dignity, liberty, privacy, and equality—the most important human rights in the Israeli Constitution. These same rights, I argue, also demand the recognition of the constitutional status of marital dissolution; what is more, divorce must be a component of the right to family life itself if that constitutional guarantee is to be complete and whole.

Marital freedom encompasses a "positive" as well as a "negative" freedom. Both are crucial for human well-being,[134] and either alone would entitle divorce to constitutional protection. The positive meaning of marital freedom is grounded in the right to family life, especially its foundations in dignity and liberty, while the negative sense is based in the rights to physical and emotional integrity, dignity, life, equality, and privacy. With the support of these combined foundations, it will become clear that the right to marital freedom must enjoy a powerful, supra-legislative constitutional status.

In a formal sense, the "positive" right to divorce corresponds to and naturally follows from the right to family life, and must therefore enjoy equivalent constitutional status. Both marriage and divorce allow individuals to express their identity and their hopes for the future.[135] Moreover, denial of the right to divorce, which is also the denial of the right to remarry, is tantamount to deprivation of the precious opportunity to build a new life in place of what has come before, and to imbue that life with flavor, substance, and meaning.[136] Since, as the Supreme Court recognized, the "family ties of a person are . . . the centre of his life,"[137] and "a clear expression of a person's self-realization,"[138] the denial of the right to divorce and remarry inhibits one's personhood and self-fulfillment. Such a denial "deals a mortal blow to a person's fundamental ability to dictate his life story."[139]

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133. *Id.* at ¶ 9 (opinion of Rivlin, J.).

134. JUDITH WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE xi (1989) ("Divorce has two purposes. The first is to escape the marriage, which has grown intolerable for at least one person, [what I call a negative liberty]. The second is to build a new life [or positive liberty]. Everyone who initiates a divorce fervently hopes that something better will replace the failed marriage—and this second-life-building aspect of divorce turns out to be far more important than the crisis.").

135. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 671 (1980).

136. *Id.* (citing Boddie v. Connecticut, 401 U.S. 371 (1971) for the proposition that "acquiring one's 'single' associational status" is valuable both in its own right and as the key to remarriage and its many advantages).

137. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 32). This view of the centrality of family ties to an individual's life and identity is shared by the U.S. Supreme Court. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618-20 (1984).

138. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 32).

139. *Id.* at ¶ 8 (opinion of Rivlin, J.); s*ee also* Karst, *supra* note 135, at 635-36 (noting that an individual's intimate associations shape his "sense of his own identity" and "give him his best chance to be seen (and thus to see himself) as a whole person rather than as an aggregate of social roles").

In fact, inhibiting divorce and thus remarriage violates the right to dignity in the same way as would prohibitions on first marriages–-in either case, "to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance."[140] Indeed, commentators have stressed that marriage, whether a first or later marriage, constitutes "the most enriching and liberating relationship to facilitate human adults to personally develop and achieve their fullest potential," and "the best setting for the safest and most beneficial expression of sexual intimacy."[141] The importance of the right to remarry is demonstrated in its staggeringly common exercise by divorcees—more than ninety percent remarry in less than five years,[142] seeking the wealth of physical, metaphysical, and psychological benefits concomitant to marriage.[143] In fact, studies have found that a divorcee is even more likely to remarry than a single person of the same age is to marry.[144]

Deprivation of the right to divorce violates more than just the right to remarry. When unmarried individuals are legally barred from marrying the partners of their choice because those individuals are trapped in moribund marriages that they are unable to formally dissolve,[145] it can also violate the right to marry itself.[146]

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140. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 35) (quoting Dawood v. Minister of Home Affairs 2000 (3) SA 936 (CC) (S. Afr.)); *see also* Booysen v. Minister of Home Affairs 2001 (4) SA 485 (CC) (S. Afr.) (reaffirming the *Dawood* holding). Interestingly, most people about to remarry believe they will form better unions and that their new marriages will last a lifetime. This is the case even with couples entering a third, fourth, or fifth marriage. GWYNN DAVIS & MERVYN MURCH, GROUNDS FOR DIVORCE 21 (1988); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 172 (1991).

141. Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 780 (2001); *see also* Lynn D. Wardle, *Conference on Marriage, Families, and Democracy: The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 374-75 (2003).

142. WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 150 (1993); PETER J. RIGA, MARRIAGE AND FAMILY LAW: HISTORICAL, CONSTITUTIONAL, AND PRACTICAL PERSPECTIVES 126 (1986); Stephen D. Sugarman, *Introduction*, *in* DIVORCE REFORM AT THE CROSSROADS 1, 2 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

143. *See, e.g.*, Hara Estroff Marano, *Debunking the Marriage Myth: It Works for Women, Too*, N.Y. TIMES, Aug. 4, 1998, at F7 (citing U.S. research establishing that marriage "lengthens life, substantially boosts physical and emotional health and raises income over that of single or divorced people or those who live together"). These findings are consistent with those of other countries as well. *See* Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARRIAGE & FAM. 527 (1998); *see also* George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 617 (1999) (listing the intangible benefits of marriage and noting that they are a main reason that same-sex couples seek legal access to marriage).

144. GOODE, *supra* note 142, at 150.

145. *See* discussion *supra* Part I.C.

146. Bigamy is prohibited in Article 176 of the Israeli Penal Code, 1977, S.H. 864. As discussed *supra* in Part I, husbands (but not wives) may escape this criminal prohibition by obtaining a rabbinic permit to remarry while still formally married. Israeli Penal Code, art. 177. Note that the technical ability to separate and cohabitate is not a proper substitute for marriage. Research suggests that non-marital relationships are more fragile and less likely to last than those that receive legal recognition. *See, e.g.*, MILTON REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY 120, 123 (1993). Thus, the right of the unmarried individuals to enjoy a stable family life may be seriously curtailed by divorce restrictions.

Further, and most significantly, the constitutionally protected process of defining one's identity through basic life choices, including marriage, is an ongoing process rather than a single discrete act.[147] As one's self-definition evolves over time, so too do the basic life choices flowing from that definition. A crucial part of an individual's ability to "shape[] the way in which he lives his life and builds his private world,"[148] inherent in the right to family life, is thus the chance to change that private world—through, for example, ending a marriage that is no longer consistent with one's life plan and basic values. The choice of an intimate partner affects one's entire identity. It transforms one from being a solitary individual to part of a union, but that union can only continue while it matches one's self-understanding. Hence, the right to liberty demands that an individual will not be bound irrevocably to identity-constituting marital choices made early in life—and so requires an exit through divorce.[149]

In sum, underlying the right to divorce are the same values and interests that entitle family life to rigorous constitutional protection. Indeed, construing the right to family life to include divorce and remarriage is in line with the Supreme Court's holding that the meaning of this right is "not exhausted by the right to marry and to have children."[150] Further, this construction follows from the Court's admonishment that the right to family life is "protected *in its entirety* by the Basic Law"[151] and that it "should be interpreted generously and liberally . . . [and] should not be restricted."[152]

The positive sense of the right to divorce is also worthy of constitutional status for the sake of marriage itself.[153] It is only the ability to exit which gives

147. *See* David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 1000 (1979) ("From the earliest life of the infant to quite old age, the development and exercise of autonomous choice underlies the deepening individuation of the person.").

148. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Jubran, J., at ¶ 7).

149. *Cf.* Karst, *supra* note 135, at 637 (noting that "our intimate associations profoundly affect our personalities and our sense of self," and, when voluntary, they play a part in self-definition); J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 612 (1977) (noting that "nothing is more central to self realization and fulfillment" than decisions about personal associations and other issues central to "our uniqueness and individuality").

150. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 27).

151. *Id*. at ¶ 8 (opinion of Jubran, J.) (emphasis added).

152. *Id.* at ¶¶ 7-8 (opinion of Rivlin, J.).

153. Some have, of course, argued that divorce diminishes esteem for marriage and undermines the institution, but this is inconsistent with available evidence on the current status of marriage. "Far from declining, the popularity of marriage increases . . . . [E]very relevant social investigation seems to validate further the enormous strength and growing solidity of marriage as an institution ramifying into every other sphere of life." DAVIS & MURCH, *supra* note 140, at 21 (describing British society) (quoting ARCHBISHOP OF CANTERBURY'S GROUP, PUTTING ASUNDER (1966)). Davis and Murch further note that "[p]aradoxically, the value which people attach to marriage is confirmed by the present high divorce rate. This is because they get divorced, in large part, in order to remarry. . . . There is also evidence of strong commitment to the concept of permanent marriage amongst those who remarry after divorce." *Id.* Americans, for instance, still cling as strongly as ever to the ideal of marriage as a lifetime undertaking, despite the prevalence of divorce in the United States. Commentators further stress that since divorce is

meaning and full value to the decision to stay and live together in marriage.[154] As divorce becomes more readily available, "marriage itself takes on a special significance for its expressive content as a statement that the couple wishes to identify with each other."[155] Indeed, it is only the *choice* to maintain marriage that permits full realization of the associational values of caring, commitment, intimacy, and self-identification that accord marriage its elevated status.[156] Freedom to choose whether to sustain or end a relationship further heightens the sense of commitment to marriage by allowing "the cared-for partner [to] gain[] in self-respect by seeing himself through his caring partner's eyes as one who is worth being cared for," while "the caring partner affirms her autonomy and her responsibility by choosing the commitment."[157] It is precisely the legal power of exit, then, that "converts the daily life of marriage into a manifestation of a choice that positively reaffirms spouses' plural identity."[158]

The right to divorce not only adds value to the meaning of marriage; it may also, in fact, further promote marriage as an institution. Restrictions on divorce may deter individuals from entering into marriage in the first place, making formal marital union an unattractive endeavor and a costly risk.[159] Further, divorce protects the status of the current concept of marriage: "If too many cold and loveless marriages were forcibly preserved, then the entire cultural ideal of affectionate marriage would be weakened and compromised. Better for the . . . bankrupt marriages to dissolve than for the credibility of the institution itself to be damaged."[160]

Divorce is also an important vehicle to improve marriage, as the threat of potential exit encourages parties to invest in their relationships and to optimize the quality of marital life.[161] Historically, moreover, a denial or even mere restriction on divorce has proven detrimental to the institution of the family—

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simply a remedy that releases spouses from unworkable marriages, it neither destroys marriages nor tarnishes the purity of home and family. Disintegration begins long before filing for a divorce, and so a reduction in marital dissolution would require improving marital relations, not curtailing divorce. RILEY, *supra* note 140, at 122. Further, commitment between spouses does not arise from the act of marriage; over the course of the marriage, what becomes important is the spouse's choice to remain committed of his or her own free will, rather than because the law commands it. Thus, "easing exit from marriage may reduce the import of the act of marriage as an initial statement. But once the act of marriage recedes in the past, the freedom to leave gives added meaning to the decision to stay." Karst, *supra* note 135, at 637-38.

154. Karst, *supra* note 135, at 637-38.

155. *Id.* at 636.

156. *Id*. at 633, 637-38.

157. *Id.* at 633.

158. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 87 (2004).

159. The United States and Italy provide instructive examples of this phenomenon. *See* NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 104-08 (1962); GOODE, *supra* note 142, at 65-66.

160. RILEY, *supra* note 140, at 73 (stating that divorce may purify marriage and make it "the holiest of earthly institutions"); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 19 (1997).

161. Frantz & Dagan, *supra* note 158, at 90; s*ee also* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 568, 599 (2001).

spouses were unfaithful, mistreated, or abandoned one another, or simply lived separately.[162] Thus, the freedom to divorce promotes a deeper and more meaningful enjoyment of marital rights and can reaffirm family life.[163] By definition, then, a high regard for marriage supports the constitutional stature of divorce.

In addition to its positive sense, marital exit contains a "negative" component unrelated to marriage. This element of divorce is a form of self-defense[164]—the right to end one's suffering, to be released from a constant threat to one's emotional or even physical well-being, and to regain tranquility, peace, and a reasonable quality of life.[165] Being forced to remain in an unwanted relationship can cause as much harm as being prevented from beginning a wanted relationship.[166] Both are substantive constitutional liberties: just as we must not prevent others from loving or marrying the person of their choice, so we must not dictate whether, whom, and for how long others love.

Given the role that divorce can play in liberation from the anger, pain, and aggravation associated with bad marriages,[167] it is not surprising that commentators have often stressed the link between divorce and individual happiness, referring to marital liberty as the "right to happiness" itself.[168] Indeed, writers have even described divorce as a journey from sickness to health, from darkness into the light, and, more starkly, from slavery to freedom.[169]

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162. RILEY, *supra* note 140, at 183; *see also* Wilkinson & White, *supra* note 149, at 567 (suggesting that restrictions against divorce and remarriage might result in increased extramarital cohabitation or bigamy).

163. This is also the approach adopted by Jewish law. In Jewish jurisprudence, the discussion of divorce law precedes that of marriage law, reflecting the insight that the freedom to divorce is what preserves and strengthens marriage and motivates couples to get married and invest in the relationship. *See* ELIYAHU KITOV, A MAN AND HIS HOME 85-88, 92 (2004).

164. Dagan & Heller, *supra* note 161, at 568.

165. *See* BLAKE, *supra* note 159, at 48-49; J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 14 (1997) (explaining that the great emotional content of family relations elevates the stakes in marriage, "making domestic life delightful when it succeed[s] and devastating when it fail[s]").

166. Wilkinson & White, *supra* note 149, at 576; *see also* Karst, *supra* note 135, at 638 (noting that "the two strongest cases for protecting the freedom of intimate association . . . are the case of 'consenting adults' who choose to associate with each other, and the case of the unwilling person who is compelled to maintain an unwanted association with another").

167. RILEY, *supra* note 140, at 71.

168. This linkage between divorce and happiness is prominent in U.S. discussions of divorce. In the early twentieth century, for example, advocates of liberal divorce laws declared that the growth of divorce signaled Americans' "demand for a larger degree of freedom and happiness." WILLIAM E. CARSON, THE MARRIAGE REVOLT: A STUDY OF MARRIAGE AND DIVORCE 445 (1915); *see* BLAKE, *supra* note 159, at 166 (noting that some U.S. legislators advocated lenient divorce proposals as a means of bringing relief from "a hell on earth" to couples unhappily married); WHITEHEAD, *supra* note 160, at 67 (arguing that an individual's right to divorce is rooted in "the individual's right to have a satisfying inner life to fulfill his/her needs and desires," and that the "entitlement to divorce was based on the individual entitlement to pursue inner happiness").

169. WHITEHEAD, *supra* note 160, at 69-70. Indeed, divorce is not only an individual right, but also a psychological resource: the dissolution of the marital bond offers the chance "to make oneself over from the inside out, to refurbish and express the inner self, and to acquire certain valuable psychological

In this negative sense, a right to marital exit is thus required to secure several fundamental rights. It is intrinsic to physical and emotional integrity, the constitutional status of which has long been affirmed by the Israeli Supreme Court;[170] it enhances the capacity for a self-directed life and thus functions as an essential element of human dignity; and its contributions to individual wellbeing render it important to the right to (a healthy and meaningful) life as broadly defined in Israeli constitutional jurisprudence.[171]

A secure path of exit is especially critical in guaranteeing these rights for women, and thus for a constitutional regime committed to gender equality. Marriage has historically been a tool of institutionalized patriarchal oppression,[172] which presupposed female economic dependency, self-sacrifice, and subservience, and which defined women primarily as wives, mothers, and daughters.[173] Making marriage legally difficult or impossible to leave was part of keeping women within this "oppressive heterosexual orthodoxy of ascribed roles and domesticity."[174] Women have borne a disproportionate share of the resulting misery of strict divorce laws, with gender bias evident in the availability of divorce grounds and in the application of the laws.[175]

To this day, marriage often remains a fundamentally gendered arrangement and one of the central sites of the sex-based double standards that disadvantage women.[176] Even with the best of intentions, marriages still tend to slip into

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assets and competencies, such as initiative, assertiveness, and a stronger and better self-image." *Id.* at 5. One study, for example, found that both men and women felt leaving marriage gave them a newfound sense of freedom and control over their personal lives. CATHERINE KOHLER RIESSMAN, DIVORCE TALK: MEN AND WOMEN MAKE SENSE OF PERSONAL RELATIONSHIPS 165 (1990).

170. *See, e.g.*, HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Barak, C.J., at ¶ 31); HCJ 4128/02 Man, Nature & Law Israel Envtl. Prot. Soc'y v. Prime Minister [2004] IsrSC 58(3) 503.

171. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Procaccia, J., at ¶ 6).

172. HALPERIN-KADDARI, *supra* note 2, at 227 ("Feminist legal writing has exposed the institution of the patriarchal family as a prime locus of domination and control of women by men, and revealed its legal regulation as a system that enables and reinforces male supremacy."); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 451 (1996) ("Marriage signifies hierarchy and dominance, subjugation and the loss of individual identity."); Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 247, 262 (2001) (arguing that marriage has historically been based on unequal social arrangements that shaped the aspirations and experiences of both sexes to the disadvantage of women); Frantz & Dagan, *supra* note 158, at 77, 91; Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

173. RIONE TENNENHOUS EISLER, DISSOLUTION: NO FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 77, 79, 100 (1977) (noting that the law also subjected a woman to domestic chastisement if she failed to perform services to her husband's satisfaction); Chambers, *supra* note 172, at 453; Fineman, *supra* note 172, at 247; s*ee also* THE STATE, THE LAW AND THE FAMILY: CRITICAL PERSPECTIVES (Michael D. A. Freeman ed., 1984).

174. Chambers, *supra* note 172, at 453-54, 451.

175. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 27 (1989); *see also supra* Part I.

176. Barbara Bennett Woodhouse (with comments by Katherine T. Bartlett), *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2559 (1994); Fineman, *supra* note 172, at 256 (noting the "persistent gendered divisions of family responsibility" between men and

traditional, gendered patterns.[177] This is particularly true in Israel, which is a family-oriented, traditional society with strong patriarchal elements, where families continue to unequally assign labor and domestic tasks.[178] The unequal division of labor and resulting inequality "serve[] to perpetuate the gender stereotypes that perpetuate subordination."[179] Caught in inegalitarian marriages, women cannot form "a true plural self" or enjoy the collective goods of marriage like intimacy, caring, emotional attachment, and commitment. [180]

More liberal divorce laws, however, undermine male-dominated marriage and gender inequality simply by giving women the "freedom to leave."[181] Not surprisingly, the advent of liberal divorce law in America was accordingly perceived as "a splendid enhancement of [women's] status both in marriage and after" and signified "achievable freedom and societal validation for goals of self-actualization."[182] Divorce gave women the chance to "[g]et better by getting out,"[183] and thus came to be viewed as a boon and a restoration of their "natural right of equality."[184]

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women). See also the classic research of Jessie Bernard, which added an additional psychotherapeutic dimension to the feminist critique of traditional marriage, and demonstrated that such marriages were not simply the source of unequal status for women, but also led to female unhappiness and stunted personal growth. Indeed, Bernard argued that "[t]o be happy in a relationship which imposes so many impediments on her, as traditional marriage does, a woman must be slightly ill mentally." JESSIE BERNARD, THE FUTURE OF MARRIAGE 51 (2d ed. 1982). Some have challenged Bernard's work; for such accounts, see WHITEHEAD, *supra* note 160, at 52.

177. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 19 (1988) (noting that even working wives tended to be expected to perform more household tasks than their husbands); Fineman, *supra* note 172, at 255, 270 (describing the failure of equality and gender-neutrality initiatives to transform practices in many families that continue to reflect traditional, gendered patterns).

178. Chava Frankfort-Nachmias, *Israel: The Myth of Gender Equality*, *in* WOMEN'S RIGHTS: A GLOBAL VIEW 127, 131 (Lynn Walter ed., 2001). The phenomenon is accentuated due to the centrality of the military in Israeli culture. *Id.* at 130-32. The inequality in work performed by women and men has been established in a number of studies of Israeli families, demonstrating that spouses are "rarely equal partners" when it comes to household work. *Id.* at 131. Frankfort-Nachmias concludes that "the gendered division of labor and the perception that women's role is secondary to men's have made Israeli women dependent on men and severely limit the choices open to them." *Id.* at 131-32.

179. RHODE, *supra* note 175, at 133.

180. Frantz & Dagan, *supra* note 158, at 91-92. Even more deplorably, women's subordination in marriage "keep[s] them from moving up the scale of needs toward personal fulfillment and . . . realizing their full human potential." WHITEHEAD, *supra* note 160, at 50.

181. DAVIS & MURCH, *supra* note 140, at 69. Divorce was also shown to reduce the psychological inequality between men and women. WHITEHEAD, *supra* note 160, at 78-79.

182. J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 550-51 (1994); s*ee also* EISLER, *supra* note 173, at 11 (noting that the no-fault revolution was perceived as a product of either women's liberation or the following "male backlash").

183. DIFONZO, *supra* note 165, at 24 (noting that socially conditioned subservience to men is transformed into the "right to exit visa from an unhappy union" and endorsing the proposition that "the decision whether to divorce should be the woman's because she stakes the most on the marriage venture"); WHITEHEAD, *supra* note 160, at 52.

184. RILEY, *supra* note 140, at 31; *see id.* at 4 (noting that supporters of divorce often hoped that it would eventually lead to equality and reciprocity in marriage); *see also* WHITEHEAD, *supra* note 160, at 16 (noting that in the United States, divorce has been associated with women's freedoms and prerogatives since the nation's inception).

The separate marital stakes and experiences for men and women underscore the need for a liberal divorce regime in order to enforce the right to equality, compensate for the discrimination of traditional marriage, and allow women the option to improve their lives through divorce. Indeed, while marriage may become detrimental to women, the freedom to divorce has been shown to nurture competency in a working world that is more likely to recognize and reward women's intelligence, initiative, and risk-taking. Having the option of divorce was also found to bolster women's self-esteem, self-determination, and sense of control and identity to such an extent that "divorce becomes the defining achievement of women's lives, the great article of their freedom."[185] Divorce is thus not simply a legal remedy for broken marriages, but rather a potentially constitutive component of the individual female self, making it a critical element of a legal system and a social order committed to ensuring gender equality.[186]

The constitutional right to divorce may also be solidly based on the right to privacy. Privacy's constitutional magnitude is so great that it is accorded a separate and elaborate article in Basic Law: Human Dignity and Liberty.[187] While Israeli privacy doctrine is significantly under-theorized and under-developed,[188] it does include at least the two main types of privacy protected under U.S. constitutional jurisprudence: providing for individual autonomy in making the "most basic decisions about family and parenthood,"[189] and recognizing an "individual interest in avoiding disclosure of personal matters."[190] The right to marital freedom in Israel should be protected by both of these concepts of privacy.

First, privacy is implicated in the constitutionally protected "basic freedom of the individual to live his life as an autonomous person, who is free to make

185. WHITEHEAD, *supra* note 160, at 61, 64 (arguing that divorce can "define[] a sense of self and lead[] to greater maturity" and to self-knowledge that is "stimulating and energizing and growth-enhancing"). Further, "[a]fter being in a long-term marriage in which they tended to deny so much of themselves, divorce gives many women their first chance to validate their reality, to explore who they are, to cherish newfound identities, to heal old wounds, and ultimately to take care of themselves." *Id.* at 55.

186. *Id.* at 64-65.

187. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, art. 4.

188. This description of underdeveloped Israeli privacy doctrine refers to analysis of the right to privacy as a "framework" or a "general" right from which specific unenumerated rights may be derived, as in the U.S. context. This is in contrast to numerous laws and decisions discussing and protecting privacy rights in themselves, most notably the Protection of Privacy Act, 1981, S.H. 128. For an extensive overview of the status and application of privacy interests in Israeli law, see Appelfeld Zer Fisher, Protection of Privacy—An Overview, http://www.patentim.com/forum_articles.asp?ArticleID=323&Fnumber=30 (last visited Nov. 20, 2008).

189. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 849 (1992); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) ("'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment' . . . . A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'" (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-640 (1974)).

190. Whalen v. Roe, 429 U.S. 589, 599 (1977).

his choices."[191] On one of the few occasions that the Israeli Supreme Court has specifically addressed the scope and outline of constitutional privacy, the Court paid special heed to both the institution of marriage and its dissolution, stating that "[t]he autonomy to establish a family, to plan a family and to bear children is a matter of personal privacy. Human liberty encompasses the freedom of independent choice on matters of marriage, *divorce*, childbirth, and many other private matters within the sphere of personal autonomy."[192]

Similarly, the Court has stated that "especially in our turbulent and complex world, there are few choices in which a person realizes his free will as much as the choice of the person with whom he will share his life."[193] The related choice to exit marriage must fall well within the safeguarded constitutional boundaries of the right to privacy as among the most intimately private, life-altering decisions of a lifetime, going to the essence of personhood and identity.[194] Few decisions in life shape one's entire existence so fundamentally, and so profoundly express individual autonomy, free will, and freedom of choice as the decision of whom to love, live with, and possibly leave.[195] As such, these decisions are constitutionally protected, and while making them, individuals are entitled to remain within the realm of personal privacy secured by the Israeli Constitution.[196]

The Law Commission of Canada similarly concluded that fidelity to the principles of autonomy requires recognizing as a fundamental freedom the right to determine whether and with whom to form marriages and other close personal relationships.[197] Thus "the state must also avoid direct or indirect forms of coercive interference with adults' freedom to choose whether or not to form, *or remain in*, close personal relationships."[198]

The right to divorce may further be sheltered under the second type of privacy recognized in U.S. law. Divorce battles inevitably involve a violation of privacy in the most literal sense. In Israel, such proceedings force large

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191. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Jubran, J., at ¶ 7).

192. CA 5587/93 Nahmani v. Nahmani [1995] IsrSC 49(1) 485, 499 (emphasis added).

193. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Jubran, J., at ¶¶ 3, 7).

194. The Court reasoned that "[i]n an era when 'human dignity' is a protected constitutional basic right, we should give effect to the human aspiration to realize his personal existence, and for this reason we should respect his desire to belong to *the family unit of which he regards himself to be a part*." CA 7155/96 A v. Attorney-General [1997] IsrSC 51(4) 160 (emphasis added); *see also* CFH 6041/02 A v. B [2004] IsrSC 58(6) 246, 256 (implying that the fundamental freedom of association also includes the freedom to disassociate, since it recognizes an individual's right to determine to which family unit they belong and so which family unit to exit); Karst, *supra* note 135, at 635-37.

195. *See* HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 32) ("There are few decisions that shape and affect the life of a person as much as the decision as to the person with whom he will join his fate and with whom he will establish a family.").

196. *Id.* (finding that the individual prerogative to shape one's family life according to one's free will is a fundamental constitutional right).

197. *See* LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 18 (2001).

198. *Id.* (emphasis added).

amounts of private information into the open:[199] they entail brutal intrusion into the most intimate aspects of one's relationship, including one's physical and mental diseases, weaknesses, and defects, one's sexual lifestyle, and sometimes one's entire lifestyle, including religious activity and immodest behavior.[200] Some cases are so intimately detailed as to embarrass the reader, let alone the parties involved.[201] Whatever the outcome of the case, it "demeans the marital relationship, humiliates the parties, and damages the residual family relationships."[202] It is no wonder that individuals have gone to extreme lengths to avoid the personal revelations and scandals of a local dissolution hearing—some travel long (and expensive) distances to get migratory divorces, while others resort to deception to fake their way to freedom.[203] Strict divorce laws thus force individuals to choose between their privacy and their marital liberty.

In sum, if the right to marital privacy means anything, it must require that a person may leave a failing marriage freely, without being interrogated about the most intimate details of his or her life. Thus, not only a right to divorce, but a right to divorce without substantive inquiry into the content of a marriage is necessary to fulfill the constitutional right to privacy.

The paramount importance of marital dissolution to personal happiness and the need to defend this core human freedom, in both its negative and positive facets, speak for themselves. The fundamental rights to dignity, liberty, equality, privacy, and family life all join together to construct a powerful, supra-legislative right to marital dissolution that enjoys potent constitutional protection.

B. Constitutional Dimensions of the Current Divorce Regime

Israel's highly discriminatory religious divorce law allows women, observant and nonobservant alike, only a limited divorce right, and fails to acknowledge the constitutional status of the rights to both marital liberty and

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199. LIFSHITZ, *supra* note 62, at 19; s*ee, e.g.*, Case No. 023559859-21-1 (on appeal, Case No. 023559859-21-1), *in* 18 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 4-5 (2008); Case No. 017310855-21-1, *in* 18 THE LAW AND ITS DECIDER, *supra*, at 7; Case No. 014191472-21-1 (on appeal Case No. 310830138-21-1), *in* 16 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 3-4 (2007); Case No. 040135832-21-1, *in* 15 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 3 (2007).

200. LIFSHITZ, *supra* note 62, at 19; Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 253 (1997); Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L. Q. 75, 82 (1969).

201. S*ee, e.g.*, Case No. 3-21-02371268, *in* 14 THE LAW AND ITS DECIDER: RABBINICAL COURT DECISIONS IN FAMILY MATTERS 5-6 (2007); s*ee also* SHARSHEVSKI, *supra* note 14, at 304-8, 314-21; SHIFMAN, *supra* note 13, at 295-304. For U.S. decisions, see the cases described in BLAKE, *supra* note 159, at 59-60.

202. Goldstein & Gitter, *supra* note 200, at 82-83.

203. RILEY, *supra* note 140, at 135-40; Raymond C. O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 353 (1999).

gender equality.[204] A law that impinges upon these rights must meet the constitutional requirements of the Limitation Clause, or it is unconstitutional and void. While the current religious divorce law is immune from constitutional invalidation,[205] the constitutional status of divorce must guide both the interpretation of the existing law and the development of new legislative policy concerning divorce.

1. Limitations on the Interpretive Techniques of Divorce Law and the Adoption of New Religious Doctrines

Divorce laws are immune from invalidation under the Basic Laws, yet they still must be interpreted and implemented according to the principles of the new Israeli Constitution, so as to safeguard human rights.[206] All judicial bodies, including the rabbinical court, are subject to this interpretive obligation.[207] Thus, in this new constitutional era, the rabbinical court's judicial latitude and discretion are strictly limited. It may no longer adopt and apply religious doctrines as it sees fit, particularly its stringent and discriminatory interpretations of divorce law.[208] Rather, it must champion more liberal interpretations of Jewish law that are sensitive to women's equality and dissolution rights. It is thus a grave constitutional transgression for the rabbinical courts to have recently revitalized the retroactive invalidation doctrine, which allows the violation of women's dignity and equality rights and places basic marital liberties under constant threat. Such an unjustified and unconstitutional doctrine merits immediate invalidation.

In addition to its "negative" duty to refrain from impairing liberty to the extent possible, the rabbinical court is also subject to a "positive" constitutional duty to employ available religious tools to further women's rights and marital

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204. Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and its Implementation in the State of Israel*, 28 B.C. INT'L & COMP. L. REV. 79, 136-37 (2005).

205. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, art. 10.

206. Bracha, *supra* note 8, at 610-13. Only Basic Law: Freedom of Occupation stipulates explicitly that old law must be interpreted in the spirit of the directives of the Basic Law. Basic Law: Freedom of Occupation, 1992, S.H. 90, art. 10. However, the Court read this interpretive technique into Basic Law: Human Dignity and Liberty as well. *See, e.g.*, CrimA 2316/95 Genimat v. State of Israel [1996] IsrSC 49(4) 589, 653-54 (holding that the meaning of the "arrest law," as well as the process of weighing the competing governmental and liberty interests, were changed); HCJ 4562/92 Zandberg v. Broadcasting Authorities [1996] IsrSC 50(2) 793 (radically reinterpreting a new law to make it compatible with the Basic Law); FC (TA) 13990/96 Doe v. Doe [1996] (not yet reported) (holding, in a family court proceeding, that the maintenance law must be interpreted differently and in line with the constitutional right to equality).

207. Basic Law: Human Dignity and Liberty, art. 11; s*ee, e.g.*, HCJ 4358/93 Tzuk v. Grand Rabbinical Court [1994] IsrSC 48(4) 563, 570-72 (holding that the rabbinical court is subject to the Basic Laws' directives); HCJ 3914/92 Lev v. Rabbinical Court [1994] IsrSC 48(2) 491, 502-03. The rabbinical court has acknowledged this obligation. *See, e.g.*, Case No. 8621530-64-1 Applebaum v. Applebaum [1998] (not yet reported).

208. Yechiel S. Kaplan, *A New Trend Concerning the Execution of Divorce Decisions*, 21 MEHKAREI MISHPAT 608, 632-4 (2005).

freedom. An excellent example of the course the rabbinical court should take would be extending female divorce grounds to include grounds which have long been recognized under Jewish law but that are for the most part not currently considered by the rabbinical court—for example, the "fed-up" ground, which applies when the wife finds her husband distasteful,[209] or the ground of eighteen months of separation without any chance of reconciliation.[210] Application of these additional divorce grounds may liberate large numbers of women and at least ameliorate the shameful practice of *get* extortion. These and other religious solutions, developed through the centuries to tackle the *aguna* problem, might and should be utilized in the service of the new constitutional commitment to women's rights.[211]

But innovative interpretations of existing religious divorce law, while important to safeguarding the welfare of women, are not the only constitutional key available. Another important means is the use of legislatively-conferred power to induce recalcitrant spouses to release their wives.

2. New Legislative Tactics Aimed at Alleviating Women's Marital Plight

Throughout the years, the Israeli legislature has made some unsuccessful efforts to address the problems of the *aguna*.[212] After the advent of the constitutional revolution, however, the Knesset granted the rabbinical court another powerful tool, authorizing it to deprive recalcitrant spouses of a catalog of privileges, including the right to exit the country, hold a driver's license or banking privileges, and pursue employment in state-licensed professions.[213] In drastic cases, even incarceration is permissible.[214] This new law, though infrequently applied, has proven highly effective in "persuading" husbands to divorce their trapped wives.[215] However, the law has far-reaching effects on

209. For a detailed discussion of the "fed-up" ground, see Elimelech Vestraich, *The Rise and Decline of the Wife's Right to Leave Her Husband Without Fault in Medieval Jewish Law*, 21 SHNATON HA'MISHPAT HA'IVRI 123-47 (2000).

210. See the opinion of Rabbi Chaim Palaggi, a noted mid-nineteenth century Talmudic authority in his Responsa, 2 *Ha-Hayyim Veha-Shalom*, no. 112, *quoted in* Shifman, *supra* note 19, at 35.

211. *See generally* SHLOMO RISKIN, WOMEN AND JEWISH DIVORCE: THE REBELLIOUS WIFE, THE AGUNAH AND THE RIGHT OF WOMEN TO INITIATE DIVORCE IN JEWISH LAW, A HALAKHIC SOLUTION (1989); Eliakim Rubinshtein, *For the Rescue of Agunot*, 26 TCHUMIN 190, 193-98 (2006) (discussing proposals to solve the *aguna* problem).

212. *See* Izhak Shilo, *Aginut*, *in* SEFER SHAVA, *supra* note 63, at 50, 54-55.

213. The Rabbinical Courts (Enforcement of Divorce Judgments) Law, 1995, S.H. 139, arts. 1-3A. In its initial formulation, this new law penalized only husbands who refused to comply with the ruling of a rabbinic court to divorce, but it was amended shortly after, in the name of equality, to include recalcitrant women as well.

214. Before the new law went into effect, the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, S.H. 165, art. 6 did allow for imprisonment but it outlined such a cumbersome and uninviting procedure that it was rarely used.

215. *See* Shlomo Dichovsky, *Enforcement of Divorce*, 25 TCHUMIN 132 (2005) (reviewing the implementation of the new law).

fundamental, constitutionally-protected civil rights, and hence it must meet the parameters of the Limitation Clause to survive.[216]

Application of the Limitation Clause shows that the new law is constitutionally permissible. First, the rights were impaired through a legislative act, as required.[217] Second, this measure is consistent with the values of the State of Israel as a Jewish state. Judaism views attempts to unchain an *aguna* as a lofty goal and encourages the compulsion of recalcitrant husbands in appropriate cases.[218] The law also befits Israeli democratic values: It passed by majority vote, which conforms at the very least to the narrow definition of democracy.[219]

Third, the purpose underlying the new law—to alleviate the plight of *get* refusees and to protect their right to divorce—should be considered a proper one. The law is aimed at counterbalancing men's divorce power, correcting the inherent gender inequality of the Israeli divorce regime and inhibiting the widespread phenomenon of *get* extortion. By facilitating fair and extortion-free divorce proceedings, the law further supports the rights to remarry, become parents, and enjoy family life, all of which are fundamental rights of the highest order.[220] Aiding in the realization of fundamental rights, as this law does, is ranked as one of the most laudable purposes a law may possibly serve.[221]

Fourth, the legislative means chosen are tailored to achieving the law's purpose, since they encourage a recalcitrant spouse to obey the rabbinical court's order to divorce, while restricting that spouse's rights as little as possible. In this regard, it must be acknowledged that the legislature enjoys broad latitude to select legislative means,[222] and that the list of sanctions provided was indeed the product of the lawmakers' reasoned deliberations and balancing processes, designed to target a wide variety of persons, including

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216. Indeed, in two instances, husbands have attempted to question the constitutionality of the new law, but the Supreme Court dismissed their claims without any judicial review. *See* HCJ 3068/96 Goldshmit v. Goldshmit [1997] (not yet reported); HCJ 631/96 Even Tzur v. Grand Rabbinical Court [1997] Tak-El 96(2) 696.

217. Dichovsky, *supra* note 215, at 132-33.

218. Compulsion may even be exercised by means of physical torture. For Jewish divorce law's principles, see Yechiel S. Kaplan, *Enforcement of Divorce: Judgments by Imprisonment: Principles of Jewish Law*, 15 JEWISH L. ANN. 57-145 (2004). *See also* Clinton, *supra* note 4, at 295.

219. Ruth Gavison, *Jewish and Democratic State: Political Identity, Ideology and the Law*, 19 IYUNEI MISHPAT 631, 644-56 (1995).

220. *See* the discussion *supra* Part III.A; *see also* Kaplan, *supra* note 208, at 664.

221. Indeed, "legislation that is intended to protect human rights is certainly for a proper purpose." CA 6821/93 Unified Bank Mizrahi v. Migdal Collective Vill. [1995] IsrSC 49(4) 221, 459 (opinion of Barak, C.J.); *see supra* Part II.C.

222. *See* CA 6821/93 *Bank Mizrahi*, at 495; *see also* Archibald, *supra* note 77, at 47. In HCJ 1715/97 Israel Inv. Managers Ass'n v. Minister of Fin. [1997] IsrSC 51(4) 367, 386-87, the Supreme Court stated:

> We must recognize the legislature's room to manoeuvre or the "margin of appreciation" given to it, which allows it to exercise its discretion in choosing the (proper) purpose and the means (whose violation of human rights is not excessive) that lie on the edge of the margin of appreciation. Indeed, we must adopt a flexible approach that recognizes the difficulties inherent in the legislature's choice, the influence of this choice on the public and the legislature's institutional advantage.

those against whom more limited penalties would be ineffective.[223] To minimize constitutional concerns, however, the rabbinical court must apply potential penalties in a graduated fashion, only escalating in severity if less restrictive measures fail.[224] The limited duration of these penalties provides further evidence that the statute is appropriately tailored: it is not punitive and, accordingly, its effects persist only until a spouse allows the dissolution of a marriage.[225] Additionally, the legislature sought to assure careful execution of its new law, instructing the rabbinical court to use its authority sensibly, support its decisions, and consider the specific circumstances of each case.[226]

Lastly, the law is also proportional in the strict sense. While balancing the spouses' competing rights, the test weighs the importance of the interests at stake and the extent of their violation. In this case, while the rights of the husband—the more commonly recalcitrant spouse—may be infringed, that abridgment is less severe than that which would otherwise be inflicted on the wife. After all, it is within his power to end the conditional abridgment of his rights, while that would not be true for his wife without the law. Given the particular importance of the fundamental guarantee to divorce in the Israeli Constitution,[227] and the temporary and conditional nature of the curtailment of the husband's rights, the wife's marital liberty outweighs the interests of her husband in these circumstances.[228]

In sum, the curtailment of the recalcitrant spouses' rights required by the new law satisfies the four-pronged constitutional test: It is authorized by law, consistent with Israel's Jewish and democratic values, for a proper purpose, and proportional.

In fact, the new law is not merely constitutional; the *absence* of such a law would be incompatible with a constitution that supports marital rights through a

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223. For some husbands, only the loss of their physical liberty is decisive, but for other husbands, civil economic sanctions may prove more effective. *See* Michael S. Berger & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 295, 314 (John Witte, Jr. & Johan D. van der Vyver eds., 1996); Cwik, *supra* note 17, at 136-37.

224. Thus, property rights should be targeted first, followed as necessary by occupational liberties, traveling rights, and ultimately, in the most severe cases, physical freedom. *See* Kaplan, *supra* note 208, at 668-69. Kaplan also notes that the original bill included more restrictive means that were eventually left out to minimize the curtailment of spouses' rights. *Id.* at 668.

225. *Id.* at 666. Thus, the impairment of husbandly rights is only conditional. The keys to restoring his suspended privileges are found in his own pocket: as soon as he releases his wife from the chains of marriage, he is also entitled to his freedom. *See* HCJ 631/96 Even Tzur v. Grand Rabbinical Court [1997] Tak-El 96(2) 696.

226. Rabbinical Courts (Enforcement of Divorce Judgments) Law, 1995, S.H. 139, art. 4; s*ee* Kaplan, *supra* note 208, at 692-95.

227. CA 377/05 Doe v. Doe [2005] IsrSC 60(1) 124; *see* HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (opinion of Procaccia, J., at ¶ 6).

228. HCJ 6893/05 Levi v. Gov't [2005] Tak-El 2005(3) 1417, 1423 (holding that the more fundamental the right, the more powerful the governmental interest must be in order to justify impairment).

right to divorce. Israeli constitutional law, unlike the U.S. model,[229] does not just establish a "negative" constitutional duty of state noninterference in individual's freedom of choice. It imposes a "positive" duty to act, requiring affirmative state intervention to further implement fundamental rights.[230] Thus, the legislature must both refrain from abridging women's divorce rights and provide remedies for the meaningful vindication of those entitlements. In particular, the legislature must confront husbands' exploitation of their wives' religious beliefs and correct the disparity in spousal bargaining power. The Knesset, however, has failed to live up fully to its positive constitutional responsibility.

While the new law included a variety of penalties to encourage compliance with divorce orders, some far-reaching, it passed over one relatively unrestrictive remedy—higher pre-divorce support payments. In fact, such a provision was deleted from the final draft of the bill.[231] Its omission is particularly unfortunate because this measure would be highly useful, not only because it would provide a meaningful financial deterrent for recalcitrant husbands, which would also directly benefit the recipient woman, but also because it is the means that the rabbinical court is most willing to apply.[232] Indeed, the rabbinical court has proven unsympathetic to using the means that actually were included in the new law.[233] Given the fundamental character of the right to divorce and the especially scrupulous protection it deserves, adding this tool to the set of measures available for use against recalcitrant spouses is necessary for the Knesset to meet its constitutional obligation to defend marital freedom.

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229. Barbara Stark, *Rhetoric, Divorce and International Human Rights: The Limits of Divorce Reform for the Protection of Children*, 65 LA. L. REV. 1433, 1441 (2005) ("negative rights are firmly enshrined in constitutional jurisprudence," while "positive rights have never established a foothold in American jurisprudence").

230. BARAK, *supra* note 90, at 261-63; s*ee, e.g.*, HCJ 366/03 Commitment to Peace and Soc. Justice Ass'n v. Ministry of Treasury [2005] (not yet reported), *available at* http://web1.nevo.co.il/serve/home/it/titles.asp?build=2&System=1&Exec=& cpq=1; HCJ 161/94 Atarri v. State of Israel [1994] (not yet reported). For the classification of state duties as negative and positive, see Bracha, *supra* note 8, at 591-606; and Merin, *supra* note 204, at 92-94.

231. *See* Draft Bill Rabbinical Courts (Enforcement of Divorce Decrees) Law, 1994, HH, 495, art. 7. For a brief discussion of the American model on this issue, see Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 585 n.9 (1999).

232. Shlomo Dichovsky, *Monetary Enforcement Measures Against Recalcitrant Husbands*, 26 TCHUMIN 173, 177 (arguing that this sanction is religiously undisputed and might be employed even when the court only "orders" divorce but does not use compulsory language); *see also* Bleich, *supra* note 4, at 172-73 (explaining that this remedy is not considered to be an illegitimate means of coercing a *get*); Kaplan, *supra* note 208, at 633-34; Pinchas Shifman, *Jewish Law in the Decisions of the Courts*, 13 SHNATON HA'MISHPAT HA'IVRI 371, 371-72 (1987).

233. Kaplan, *supra* note 208, at 696-99.

C. Constitutional Assessment of Potential Developments

In addition to its implications for the existing divorce regime, a constitutional right to marital freedom provides a standard by which to understand and constrain existing proposals for reforming the system of divorce law. Indeed, any new amendment to the current divorce regime might be attacked as a violation of the constitution.[234] Divorce reforms, therefore, cannot merely constitute a substantial improvement on the old regime, but must *fully* conform to constitutional norms to retain their legitimacy.[235]

As described above in Part II, the leading proposals envision three different models of divorce regulation reform. The first model would create a unified marriage system that applies to all citizens, while the other two call for the establishment of two coexisting marital tracks: the old religious regime, supplemented by a civil option—a "spousal covenant"[236]—for use by the overwhelming majority of Israelis who do not want religion to govern their marital choices.[237] None of these models, however, properly account for the fundamental character of the right to marital dissolution. The following analysis aims to provide this missing constitutional consideration, in order to define the permissible legislative bounds within which to debate competing models. The models are discussed below from most to least restrictive of the divorce right.

1. The Gavison-Medan Covenant: A (Re)Call for Fault-Based Divorce

The Gavison-Medan Covenant seeks to balance two competing interests: Jewish law and freedom of religion. Thus, in its provision regulating marriage, civil-secular principles govern, but in the regulation of divorce, civil law yields

234. CA 6821/93 Unified Bank Mizrahi v. Migdal Collective Vill. [1995] IsrSC 49(4) 221, 489 (opinion of Barak, C.J.).

235. HCJ 9333/03 Kniel v. Gov't [2005] IsrSC 60, 277, ¶ 21; HCJ 6055/95 Tzemach v. Minister of Def. [1997] IsrSC 53(5) 241, 258 (invalidating a new provision regarding the arrest of soldiers despite the improvements for the situation of detained soldiers created by that provision).

236. *See, e.g.*, Ariel Rozen-Tzvi, *The Rabbinical Court, Halacha, and the Public: A Very Narrow Bridge*, 3 MISHPAT UMIMSHAL 173 (1995). Note the creation by some American states of a two-tiered system of marriage: the traditional marriage contract, with minimal formalities of formation and dissolution, and a "covenant" marriage, which imposes heightened requirements for both entrance to and exit from the union. This system has been adopted by Louisiana, Arkansas, and Arizona, and other states are considering similar proposals. *See generally* Lynne Marie Kohm, *A Comparative Study of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31 (1999).

237. In Israeli Jewish society, 16% of the population is considered religious or ultra-Orthodox, while the vast majority does not identify as religious (almost forty percent are "traditional," following only religious practices that are considered cultural, such as Jewish holidays, and over forty percent define themselves as secular). *See* Shimon Shetreet, *State and Religion: Funding of Religious Institutions—The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 449 (1999).

to religion, granting Jewish law control.[238] The model thus retains the religious divorce system, which focuses on fault-based grounds for marital dissolution.[239] Given the constitutional nature of the right to divorce, I contend that a fault-based regime would fail to clear the Limitation Clause's constitutional bar. Admittedly, like other rights, the dissolution right is not absolute; it may be infringed for the sake of powerful countervailing interests, provided that the infringement is no greater than is required.[240] However, even if we posit that such a law would be consistent with the values of Israel and is for a proper purpose—designed to protect both the marital institution and children's welfare[241]—it would still impair the right to divorce too much to be constitutionally acceptable.

Conditioning divorce on a showing of fault may prove to be impermissibly intrusive into the marital relationship and spouses' private lives. A survey of courts' decisions in fault-based divorce actions reveals a focus on the most intimate and private moments of marriage, which disdains the right to marital privacy and actually encourages violations of this privacy both inside and outside of the courtroom.[242]

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238. *See* Yaacov Medan, *Explanatory Memorandum to the Gavison-Medan Covenant*, *in* GAVISON & MEDAN, *supra* note 64, at 51-52.

239. The Gavison-Medan model also provides for civil dissolution of marriage. However, such an arrangement is not an "absolute" divorce, but more similar to a legally-codified separation, and thus it will not be analyzed here. The following discussion instead focuses generally on the constitutional status of fault-based divorce regimes, not only the one envisioned by the Gavison-Medan model. For discussion of historical variations on the basic fault regime model, see the work of Lawrence M. Friedman, especially *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000). *See generally* BLAKE, *supra* note 159.

240. As Chief Justice Barak explained with regard to the right to equality, "the right to equality, like all other human rights, is not an 'absolute' right. It is of a 'relative' nature. This relativity is reflected in the possibility of violating it lawfully, if the conditions of the limitations clause are satisfied." *See* HCJ 11163/03 Supreme Monitoring Comm. for Arab Affairs in Israel v. Prime Minister [2006] (1) IsrLR 105 (opinion of Barak, C.J., at ¶ 22); *see also* LCA 3145/99 Bank Leumi of Israel Ltd. v. Hazan [2003] IsrSC 57(5) 385, 405 ("The basic rights, even though they are supreme rights of a constitutional nature, are not absolute, but they arise from a reality that requires balances to be struck between the duty to uphold important rights of the individual and the need to provide a solution to other worthy interests, whether of an individual or of the public . . . .").

241. When a fault regime is also based on religion, as is the case under the Gavison-Medan model, it gives rise to another proper purpose in support of its enactment—the preservation of the cohesiveness and unity of Israeli Jewish society. As explained in Part I.C., absent religious divorce, women are prohibited from remarriage; if they violate this prohibition, the offspring of any such marriage would be deemed illegitimate and forever barred from marrying within the Jewish community. Consequently, an unbridgeable rift would exist between orthodox and secular Jews, with the former being unable to marry the latter, thus irreparably dividing the Jewish people into two nations. Hence, the reason for requiring a religious divorce is not religious per se, but a cultural-national one, which would avoid the need for genealogical records and danger of a national schism. *See supra* notes 56-57 and accompanying text.

242. *See* LIFSHITZ, *supra* note 62, at 19. The violation of privacy inherent in any divorce law based on fault is exacerbated in the Israeli context, since photographs and other such evidence of adultery might be admissible in rabbinical court divorce proceedings even if they were obtained through a violation of privacy. This practice creates a strong incentive for such violations. *See* Ruth Zafran, *Sex, Lies, and Videotape: On the Protection of Privacy in Procedures Conducted in the Rabbinical Courts*, 7 MISHPAT UMIMSHAL 811 (2005); s*ee also* HCJ 6650/04 Jane Doe v. Rabbinical Court [2006] (not yet reported) (criticizing the use of incriminating photographs as a basis for a divorce order, due to the resulting severe and pernicious harms on the right to privacy).

Moreover, the restrictions on divorce embedded in a fault-based regime are severe. The road to marital freedom is only open for an "innocent" spouse against a "guilty" partner, as defined by law.[243] Thus, fault divorce sentences numerous individuals to suffer in marriages that are over for all practical purposes, yet in which no recognized "fault" has been committed.[244] Indeed, the fault-based regime has forced couples to engage in subterfuge, perjury, and deception in order to escape broken marriages.[245] What's more, *mutual* fault can trump an otherwise valid divorce action and effectively allow a defending spouse to "admit even the most repellent charges made in the complaint and still prevent the plaintiff from securing a divorce."[246] Ironically, therefore, the case in which divorce seems most compelling—when both parties are at fault—is the case in which they are most deprived of marital release. Marriage then becomes a form of punishment for couples who mistreat each other. Consequently, the fault system both unduly burdens marital freedom and diminishes respect and esteem for the fundamental institution of marriage.[247]

The stringent limitations on the right to divorce imposed by a fault-based system are particularly problematic from a constitutional perspective, given that they are not accompanied by societal benefits of a corresponding magnitude. The state interest is in preserving viable marriages, not maintaining formal unions that are in reality empty shells.[248] When the original marital ties fade,

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243. Note also that formulations invoking specific fault grounds and casting the parties in the role of "innocent" and "guilty" do not account for the complex psychological makeup of conjugal relationships. In particular, they place too much emphasis on particular kinds of statutorily-specified endings while undervaluing other elements of conduct during marriage. *See* Bennett Woodhouse, *supra* note 176, at 2546-47. *See also* DIFONZO, *supra* note 165, at 49-50 (criticizing fault-based divorce for focusing solely on statutorily-enumerated fault grounds rather than evaluating the health of a marriage as a whole).

244. *See, e.g.*, McCurry v. McCurry, 10 A.2d 365 (Conn. 1939); Yosko v. Yosko, 97 S.W.2d 1023 (Tex. Civ. App. 1936). It should also be stressed that for "every married couple that enters the divorce courts, there are uncounted numbers that remain under one roof," suffering through emotional, if not *de jure*, divorce. Nathan W. Ackerman, *Divorce and Alienation in Modern Society*, *in* JEWS AND DIVORCE 91, 97 (Jacob Freid ed., 1968); s*ee also* Karst, *supra* note 135, at 671 (conditioning divorce on a showing of fault places "an insuperable burden on some spouses, and thus . . . interfere[s] very significantly with such a spouse's decision to associate with another person in marriage").

245. WHITEHEAD, *supra* note 160, at 39-40; Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 659-60 (1984). When American divorce regimes were based on fault, collusion was notoriously "common, ordinary, typical, and everybody—certainly all the judges and lawyers—knew" that divorce-minded couples fabricated evidence to pave their way out of a moribund marriage. Friedman, *supra* note 239, at 1506.

246. J.G. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213 (1942).

247. "It is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment." De Burgh v. De Burgh, 250 P.2d 598, 601 (Cal. 1952) (en banc).

248. As the Idaho Supreme Court aptly explained in *Howay v. Howay*:

> The proposition is universally accepted that the state has a paramount interest in marriage and divorce. . . . However, the state is not the author of man. . . . When the marriage relationship has completely and finally broken down and the relations of the parties have reached an impasse where reconciliation is impossible and the family unit has ceased to exist, no rule or regulation promulgated by authority of the state can restore it. The object of the state's protection has ceased to exist.

the state's main legislative concern must be minimizing the damage to the residual and reorganized family relationship.[249] Yet investigating the identity of the culprit, as required by fault-based regimes, does just the opposite: it aggravates tension and animosity between spouses, and "exacerbates the aggressive forces" undermining families.[250] The fault-based regime thus undercuts the inter-parental post-divorce relationships that are central to children's adjustment and well-being,[251] and by so doing, runs counter to state interests.

Finally, the limitations on marital exit harm women's equality. Historically, restrictions on divorce have been a means to cement hierarchical relations as an organizing principle of marriage and to establish the "right" of husbands to obedience.[252] Traditional fault grounds, in particular, inherently reflected "both the gender-based expectations of the traditional marriage contract and the double standard applied to men's and women's sexual behavior."[253] A fault regime was thus a sophisticated means of maintaining husbands' authority and reinforcing female dependence on men within a patriarchal family structure.[254] For example, under the American fault system, a woman's failure to conform to the traditional role of wife and mother was a sufficient ground for the husband to force a divorce and evade alimony claims; a husband's behavior, however, would not be grounds for divorce unless he completely abandoned his wife financially or repeatedly abused her.[255] The same inequality of treatment applied to the adultery ground and even lack of chastity before marriage, working to the detriment of women.[256]

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264 P.2d 691, 697 (Idaho 1953). *See also DeBurgh*, 250 P.2d at 601 ("[W]hen a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. 'Public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.'" (quoting Hill v. Hill, 142 P.2d 417, 422 (Cal. 1943))).

249. Goldstein & Gitter, *supra* note 200, at 78.

250. *Id.* at 81. Minimizing parental conflict leads to more well-adjusted children, who are less likely to need mental health treatment, engage in anti-social behavior, or experience problems at school, and who are more able to form stable and healthy families of their own when they grow up. *See* Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 432 (1999).

251. Catherine C. Ayoub, Robin M. Deutsch & Andronicki Maraganore, *Emotional Distress in Children of High Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION CTS. REV. 297, 299 (1999); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 160 (2003) (noting increasing evidence connecting the level of parental conflict with poor post-divorce adjustment of children).

252. *See, e.g.*, Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 322 (2002) (stating that anti-divorce campaigners aimed to "reinforce the dependence of women on men within a hierarchical family structure").

253. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110-11 (1989).

254. *Id.* at 1113.

255. *Id.* at 1111.

256. *Id.*

Even if this discriminatory motivation is not at work, divorce restrictions may still be constitutionally suspect. Under the Israeli Supreme Court's equality jurisprudence, the right to equality is violated not only when a law is tainted with improper or discriminatory considerations, but also when the law causes a disparate impact on groups within Israeli society in practice.[257] Divorce restrictions, especially fault requirements, add procedural delays, complications, and expense to the divorce process, which create a disproportionate burden for women in their quest for marital freedom.[258] Thus, since women as a group are substantially poorer than men, and even women who are well-off are usually poorer than their husbands, men's deeper pockets give them a substantial advantage over women in a contest for a divorce decree.[259] The obstacles posed by fault divorce are exacerbated for spouses who are trying to escape abusive marriages, usually women.[260] Fault barriers hence lead to *de facto* inequality between men and women, and as such are constitutionally suspect.

The discriminatory nature of fault-based restrictions is further accentuated by the resulting duration of the restriction. By burdening divorce, the fault regime creates an additional disparate impact on women, because a delay on marital release significantly diminishes women's ability to exercise the right to remarry and bear children in a new relationship.[261] Men's prospects of remarriage and fertility, by contrast, are time-sensitive only to a very limited

257. Thus, a law can be a violation of the right to equality even when there is no intention to discriminate. *See, e.g.*, HCJ 11163/03 Supreme Monitoring Comm. for Arab Affairs in Israel v. Prime Minister [2006] (1) IsrLR 105 (opinion of Barak, C.J., at ¶ 18) ("[P]rohibited discrimination may also occur without any discriminatory intention or motive on the part of the persons creating the discriminatory norm. Where discrimination is concerned, the discriminatory outcome is sufficient."); s*ee also* HCJ 2671/98 Israel Women's Network v. Minister of Labour & Soc. Affairs [1998] IsrSC 52(3) 630, 654; HCJ 721/94 El-Al Israel Airlines Ltd. v. Danielowitz [1994] IsrSC 48(5) 749, 759; HCJ 104/87 Nevo v. Nat'l Labour Court [1990] IsrSC 44(4) 749, 759. This is a much broader view of equal protection than exists in American constitutional law. *See* Washington v. Davis, 426 U.S. 229 (1976).

258. In the United States, for example, it was found that the entire divorce process is shaped by the inability of many women to afford proper representation. Thus, the financial ability to litigate is a major barrier to women's access to courts, and even when they do litigate, rarely can they afford lengthy divorce proceedings. *See* Lynn Hecht Schafran, *Gender Bias in the Courts*, *in* WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET 39, 44 (Elizabeth A. Mulroy ed., 1988).

259. *Id.* at 40.

260. Indeed, in the United States for instance, the vast majority of unilateral divorce petitions have been filed by women, who frequently cite domestic violence as a basis for their petitions. *See* Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126 (2000); Martha Heller, *Should Breaking Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263 (1996); Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 393 (1999).

261. American studies found that while seventy-five percent of divorced women under thirty will remarry, that percent drops to fifty percent for women aged thirty to forty. GOODE, *supra* note 142, at 152.

degree.[262] Given such unequal effects of restrictions on the right to divorce, it is constitutionally necessary for divorce law to correct them.

The gender inequality is reinforced by another feature of fault-based systems: the reliance on judges—in Israel, highly conservative rabbinical court judges—to define what constitutes "fault." These definitions are often influenced by gender bias and cultural assumptions about women and their "proper" social and familial roles.[263] Indeed, the fault regime has led to the reinforcement of a hierarchical model of marriage in every aspect of judicial decisionmaking; it cultivates an overt double standard of sexuality, tyrannical behavior on the part of husbands, and female dependency and submissiveness.[264]

In conclusion, a fault-based regime conflicts sharply with the right to divorce and fails to clear the hurdles of the Limitation Clause. Only a fault-free regime, which does not rely on any considerations of blame, could pass constitutional muster; even a mixed-ground regime, combining no-fault grounds alongside fault-based grounds, would be impermissible.[265] The remaining question is whether being based on a *pure* no-fault avenue to divorce will in itself allow a regime to survive constitutional attack. As the discussion of the next proposed model indicates, there is no such simple answer.

2. The IDI Model: Experimentation with a No-Fault Concept of Divorce

The next model, developed by the Israel Democracy Institute (IDI), is based on a no-fault approach, the only type of approach that may be allowed

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262. For instance, while only twenty-eight percent of women over forty have a chance to get remarried, most men over forty are still likely to remarry. *Id.*

263. *See* EISLER, *supra* note 173, at 190; *see also* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 542-43 (2d ed. 2002) (describing the double standard that once governed the consideration of adultery as a ground for divorce); Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 625 (1999) (arguing that gender plays a role in assessing fault in divorce actions and that courts use sexist application of fault laws); Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN L. REV. 607, 634-35 (1997); Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 3 (1990); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 186 (1990).

264. *See* MARY JO FRUG, POSTMODERN LEGAL FEMINISM 141-45 (1992) (discussing how legal rules influence female sexuality); Bennett Woodhouse, *supra* note 176, at 2529 (arguing that when judges make judgments about marital fault, "traditional biases about gender roles and sexuality often distort a court's interpretations of events and their meaning" and arguing that the fault-based divorce regime reinforces stereotypes about women's sexuality and reflects an obsession with controlling women and a double standard that rewards heterosexual males, and perpetuates sex-based stereotypes); s*ee also* Constance Backhouse, *"Pure Patriarchy": Nineteenth-Century Canadian Marriage*, 31 MCGILL L.J. 264, 291-312 (1986) (surveying Canadian cases).

265. A mixed-ground regime combines no-fault grounds (such as separation for a defined period or irretrievable breakdown of marriage) alongside fault-based grounds and defenses. This allows the parties two legal avenues to obtain divorce. To date, more than half of the jurisdictions in the United States reflect this regime. *See* Matthew Butler, *Grounds for Divorce: A Survey*, 11 J. CONTEMP. LEGAL ISSUES 164, 166 (2000).

into the constitutional sanctuary of the right to divorce. Unlike fault-based divorce, fault-free regimes serve state interests well. They protect families by allowing couples to end destructive marriages, leaving society with healthy rather than non-functional marriages and allowing former partners to move on to stronger and more productive relationships.[266] This system benefits not only the individuals involved, but also their children and society at large.[267]

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266. Christopher Lasch, *Divorce and the Family in America*, ATLANTIC MONTHLY, Nov. 1966, at 57-61; s*ee also* RILEY, *supra* note 140, at 72. Some commentators argue instead that no-fault divorce law promotes divorce and conveys the message that "an unsatisfying marriage should be set aside even if it is not miserable." *See, e.g.*, Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 101 (2001). Such an argument is flawed for two reasons. First, the content of divorce rules does not have nearly so strong an influence: The impact of legal change on the divorce rate or on attitudes toward divorce is at best unclear, and it seems more likely that social norms influence law more than the law influences social norms. *See* Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1969-70 (2000). For instance, "every study of the impact of [no-fault] laws on divorce rates has concluded that no relationship existed between the introduction of no-fault and the rise in divorce." JACOB, *supra* note 177, at 162. Indeed, in Sweden, while divorce law was liberalized comparatively early, the divorce rate has always been lower than that of the United States. The rate in Japan, where divorce is extremely easy, is even lower than that of Sweden. *See* Eric V. Wicks, *Fault-Based Divorce "Reforms," Archaic Survivals, and Ancient Lessons*, 46 WAYNE L. REV. 1565, 1571-72 (2000). Second, divorce is a momentous decision: it is a disorganizing, unsettling, and extremely traumatic life experience. Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 625 (2006); Michael A. Robbins, *Divorce Reform: We Need New Solutions, Not a Return to Fault*, 79 MICH. B.J. 190, 192 (2000) (noting that most people cite divorce as "the worst thing they have ever experienced"). Divorce is accompanied by significant physical, physiological, and legal consequences. *See* WHITEHEAD, *supra* note 160, at 54-55. The decision to divorce is thus normally taken with the utmost seriousness, especially when children are involved. The presence of children may place pressures on parents, particularly women, "to remain in unhappy, even dangerous marriages . . . as well as to devote themselves to fixing or enduring, rather than exiting, the marriage." *Id.* at 64. Beginning in the 1930s, sociologists began to demonstrate, for example, that the divorce rate was higher among childless couples than among parents. *See* BLAKE, *supra* note 159, at 229. Interviews with divorced couples illustrate that "people will put up with an extraordinary amount—years of unhappiness—in order to try to keep their marriage and family together." DAVIS & MURCH, *supra* note 140, at 35-36; *see id.* at 155 (concluding that very few decisions to divorce are made impetuously); DIFONZO, *supra* note 165, at 13-14 (1997) (noting that most divorces occur after years of working to make the marriage survive); Monard Paulsen, *Divorce—Canterbury Style*, 1 VAL. U. L. REV. 93, 96 (1966) (describing the participants in a typical divorce case as "a tragic, weary couple who concluded after years of sincere efforts to make the marriage succeed that the pain should cease"). Further, most divorce-seeking couples are unaware of, let alone materially influenced by, divorce law; whatever impact it does have is vastly overshadowed by other cultural influences, such as gender, race, religious tradition, socioeconomic status, and personal family history. JACOB, *supra* note 177, at 147 (noting that couples rarely knew the content of divorce laws before meeting with an attorney); REGAN, *supra* note 146, at 176. At most, divorce rules become meaningful only after an "emotional divorce" has taken place and the couple decides to separate. *See* Friedman, *supra* note 239, at 1499.

267. It should be emphasized that marital strife and dysfunctional family relationships, and not divorce, were found to be the cause of children's most serious emotional problems. Accordingly many researchers have concluded that divorce can improve, rather than damage, children's welfare and well-being by eliminating the conflict. *See, e.g.*, Brenda L. Bacon & Brad McKenzie, *Parent Education After Separation/Divorce: Impact of the Level of Parental Conflict on Outcomes*, 42 FAM. CT. REV. 85, 86 (2004); Karen R. Blaisure & Margie J. Geasler, *Results of a Survey of Court-Connected Parent Education Programs in U.S. Counties*, 34 FAM. & CONCILIATION CTS. REV. 23-40 (1996); E. Mavis Hetherington, Martha Cox & Roger Cox, *Effects of Divorce on Parents and Children*, *in* NONTRADITIONAL FAMILIES: PARENTING & CHILD DEVELOPMENT 233-88 (Michael E. Lamb ed., 1982); Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade of Review of Research*, 39 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 963 (2000).

In addition, fault-free regimes challenge traditional gender norms, support an ideal of marriage as an equal partnership of autonomous individuals,[268] and provide an exit that is a crucial safeguard for women's dignity, health, safety, and sometimes their very lives.[269] Indeed, no-fault divorce laws were at least in part motivated by new perceptions about sexual equality and the desire to eliminate gender-based presumptions and double standards.[270]

However, the no-fault version envisaged by this model still places limits on the parties' ability to free themselves from marriage, such as the imposition of a mandatory waiting period before a divorce can be obtained. True, "soft" and temporary constraints on exit may prove compatible with the right to divorce, if they work to ensure a responsible exercise thereof.[271] Imposing a short waiting period may allow transitory emotions to cool and encourage due reflection and attempts at reconciliation, thus safeguarding against possibly impulsive decisions in this crucial life choice.[272] However, as the analysis of the IDI model will show, the proper purpose served by reasonable "cooling-off" periods does not constitutionally justify this type of divorce restriction under all circumstances. Further, the distinction that this model *does* make in imposing waiting periods—between consensual and contested divorce—is problematic. The constitutionally-proper distinction should instead be based on the presence of minor children.[273]

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268. Indeed, supporters of no-fault divorce believe "that the ease of divorce would eventually lead to equality and reciprocity in marriage." RILEY, *supra* note 140. No-fault divorce encourages increased participation of women in the labor force and female economic independence. It also supports the notion of shared parenting, which many studies have suggested as a way of decreasing the rigidity of gender roles, providing a less gendered environment for children. Weakening gender roles in this way also increases economic opportunity for women, who will no longer be seen as marginal employees because of putative childcare responsibilities. *See,e.g.*, NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 205-09 (1978); DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE 110-14 (Other Press 1999) (1976); RILEY, *supra* note 140, at 4; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 533-37 (1984); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80-90 (1987); Shahar Lifshitz, *I Want to Get Divorced Now! On the Civil Regulation of Divorc*e, 28 IYUNEI MISHPAT 671, 711-12 (2005); Scott, *Social Norms and the Legal Regulation of Marriage*, *supra* note 266, at 1950.

269. Feminists feared that restricted divorce provisions would force wives to remain in harmful marriages, while liberal divorce laws offered protection to wives by allowing them to escape destructive marriages. RILEY, *supra* note 140, at 118, 135; JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE-TWENTIETH-CENTURY AMERICA 260 (1991); Judith Stacey, *Good Riddance to "the Family": A Response to David Popenoe*, 55 J. MARRIAGE & FAM. 545, 545-47 (1993).

270. *See*, *e.g*., Thomas M. Mulroy, *No-Fault Divorce—Are Women Losing the Battle?*, 75 A.B.A. J. 76, 76 (1989).

271. Dagan & Heller, *supra* note 161, at 568-69, 599-600; Frantz & Dagan, *supra* note 158, at 88.

272. Dagan & Heller, *supra* note 161, at 600.

273. This is the law governing divorce in Virginia, for instance. Under Virginia divorce law, childless couples can obtain a divorce after six months separation, while the period is one year for couples with minor children. *See* VA. CODE ANN. § 20-91(9)(a) (Supp. 2008).

In its role as *parens patriae*,[274] protection of children is one of the state's most compelling interests.[275] This creates important implications for divorce law's treatment of couples with children.[276] The state's obligation to protect its youngest and most helpless citizens is critical, as the very survival and prosperity of any nation depends upon the health and well-being of its children.[277] Israeli jurisprudence has thus repeatedly emphasized the strength of the state interest in protecting the family and safeguarding children's welfare.[278] Additionally, the two-parent family occupies a singularly important role in Israeli culture; marriage, in Israel and elsewhere, is perceived as the optimal site for the upbringing and protection of children, offering myriad physical, emotional, psychological, and economic benefits.[279] Moreover, the reality of unhappy marriages may prove distinctly better for children than that of divorce in certain instances.[280] Studies have confirmed that the welfare of

274. According to the *parens patriae* doctrine, the government has an obligation to protect individuals who cannot protect themselves, including children, the elderly, and the insane. *See, e.g.*, Gregory Thomas, *Limitations on* Parens Patriae*: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51 (2007).

275. *See* HCJ 979/99 Carlo (a minor) v. Minister of the Interior [2000] (not yet reported) (opinion of Beinisch, J., at ¶ 2); s*ee also* PETER J. RIGA, MARRIAGE AND FAMILY LAW: HISTORICAL, CONSTITUTIONAL, AND PRACTICAL PERSPECTIVES 3 (1986).

276. Wilkinson & White, *supra* note 149, at 577 n.58.

277. Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1551 (1998).

278. *See* HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Barak, C.J., at ¶¶ 25-26) ("[T]he family relationship, and the protection of the family and its basic elements (the spouses and their children) lie at the basis of Israeli law. . . . Protection of the family unit finds special expression when the family unit includes a minor. This protection is required both by the right of the parents to raise their children, and by the rights of the child himself."). For similar statements in the U.S. context, see, for example, *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." (citation omitted)).

279. *See, e.g.*, Alice Shavley, The Status of the Woman and Gender Equality in Israel, http://lib.cet.ac.il/Pages/item.asp?item=2277 (last visited Dec. 11, 2008) (stressing the importance of family in Israeli society because "the demographic need in preserving the Jewish majority in the country and the bitter historical experience of persecutions and war—all rendered the existence and perseverance of the family unit a value of supreme importance . . . to the survival of the entire Jewish nation"). The Israeli Supreme Court has long recognized that "the family unit is the basic unit . . . of Israeli society." CA 238/53 Cohen v. Attorney-General [1954] 8 IsrSC 4, 53 (quotation omitted). Indeed, "[p]rotecting the institution of the family is a part of public policy in Israel. In the context of the family unit, protecting the institution of marriage is a central social value . . . there is a supreme public interest in protecting this status and in regulating . . . the scope of rights and duties that formulate it." HCJ 693/91 Efrat v. Dir. of Population Registry, Ministry of Interior [1993] IsrSC 47(1) 749, 783.

280. The research literature exploring the impact of divorce on children is complex and seems to have gone through three stages of development, in line with the public's views about children and divorce. During the first stage, divorce was viewed as harmful to children and thus the framework of marriage was almost always preferred. During the second stage, research emphasized that the happiness of individual parents, rather than the presence of an intact marriage, was the key determinant of children's wellbeing and that children fared better after divorce than in a disintegrating marriage. Today, the accumulated evidence best supports the view that divorce may be either harmful or beneficial to children, depending on the level of marital discord experienced in the marriage. While dissolving low-

children of divorce ranks lower than that of children of intact marriages by every measure of wellbeing.[281] For instance, in addition to the emotional and psychological problems that may come with a family dissolution,[282] children of divorce who remain in single parent families are also likely to experience educational problems[283] and poverty.[284] As the Israeli Supreme Court has recently remarked:

> It is difficult to exaggerate the importance of the relationship between the child and each of his parents. . . . From the viewpoint of the child, separating him from one of his parents may even be regarded as abandonment and affects his emotional development. Indeed, "the welfare of children requires that they grow up with their father and mother within the framework of a stable and loving family unit, whereas the separation of parents involves a degree of separation between one of the parents and his children."[285]

Given the centrality of the family structure for children's development and the potentially grave consequences of marital dissolution for children and thus society at large, the state interest in child welfare is an essential factor in shaping the precise contours and boundaries of the right to divorce. It thus constitutes a "proper purpose" in light of which the extent and nature of permissible divorce restrictions may be delineated.[286]

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discord marriages is harmful for children, dissolving marriages with higher levels of marital discord is beneficial to them. For an excellent study reviewing existing research in favor of these propositions, see generally Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71 (2001). Amato suggests that about half of children are harmed by divorce and about half are helped. *Id.* at 93. For a summary of other studies on this point, see Katherine Shaw Spaht, *Why Covenant Marriage?: A Change in Culture for the Sake of the Children*, 46 LA. B.J. 116, 117 (1998). *See also* RONALD L. SIMONS ET AL., UNDERSTANDING DIFFERENCES BETWEEN DIVORCED AND INTACT FAMILIES: STRESS INTERACTION AND CHILD OUTCOME 203-05 (1996); Rex Forehand, Lisa Armistead & Corinne David, *Is Adolescent Adjustment Following Parental Divorce a Function of Predivorce Adjustment?*, 25 J. ABNORMAL CHILD PSYCHOL. 157 (1997).

281. Spaht, *supra* note 277, at 1554-55, 1557 (noting that these children suffer "educationally, economically, physically, psychologically, or emotionally").

282. H. Patrick Stern et al., *Professionals' Perceptions of Divorce Involving Children*, 22 U. ARK. LITTLE ROCK L. REV. 593 (2000) (noting that children of divorce experience psychological abuse, and "children of high-conflict divorce may develop severe physical, cognitive, and emotional problems").

283. SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 48-49 (1994).

284. *See* DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 46 (1988) (noting the lack of poverty among children who live in intact families); ELAINE C. KAMARCK & WILLIAM A. GALSTON, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S 12 (1990) ("It is no exaggeration to say that a stable, two-parent family is an American child's best protection against poverty.").

285. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Israel v. Minister of Interior [2006] (not yet reported) (opinion of Barak, C.J., at ¶ 28) (quoting LCA 4575/00 A v. B [2001] IsrSC 55(2) 321, 331).

286. Indeed, as Justice Cheshin explained, "[t]here are strong forces that are capable of affecting the determination of the boundaries of the basic right in principle, and every interest ought to find its proper place." HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Cheshin, J., at ¶ 40). Following long-standing beliefs, a line of scholarly voices has called for limits on the right to divorce based on the needs of children, and some legislatures have followed suit by imposing stricter divorce standards on parents of minors. *See, e.g.*, TONY WRAGG, FAMILY LAW IN A NUTSHELL 20-23 (4th ed. 1998); James Herbie

The state interest in protecting children requires, at a minimum, mechanisms that induce thoughtful parental decisionmaking about divorce and provide opportunities to resolve differences in troubled marriages.[287] A relatively short limit on exit, such as a mandatory waiting period of six months, could realize these objectives in a way that is mindful of the interests of children without disproportionately curtailing parents' fundamental right to divorce. In the same vein, for the sake of their children, parents may be obligated to participate in special education and counseling sessions prior to divorce, in order to explore both the possibility of keeping the marriage together and the potential effects of divorce on their children.[288]

That said, a constitutional regime committed to marital freedom must still extend its protection to parents.[289] While the state may impose certain limits on the realization of the right to divorce, such limits may only extend so far.[290] Thus, any rule that always puts the interests of children above the parental right to divorce is a constitutional impossibility, since it would radically impede the parents' right to personal integrity and to pursue their own happiness by way of marital emancipation.[291] Moreover, since divorce in situations of high marital discord has proven healthier for children than recurrent exposure to their parents' battles,[292] a categorical prohibition on divorce for couples with children poorly serves the key state interest in child welfare.[293] Thus, while certain restrictions on parents' rights to divorce may be permissible and even desirable, a regime which infringes on the parents' core right to no-fault divorce is still constitutionally improper.

DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 927-31 (2000); Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reforms*, 67 CORNELL L. REV. 45, 90 (1981); Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367, 1380 (1993).

287. *See, e.g.*, Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 44. (1990). Interestingly, even people who oppose restrictions on divorce do view favorably such restrictions when they are imposed on couples with young children. *See* Scott, *Divorce, Children's Welfare, and the Culture Wars*, *supra* note 266, at 96.

288. Amato, *supra* note 280, at 91-93.

289. Indeed, while family law scholars disagree on the desirable scope of the right to divorce, the overwhelming majority of scholars are united in their agreement that divorce should be available for couples with children. *See, e.g.*, Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435 (1992). But see *supra* note 286 for a handful of scholars who call for a no-divorce regime for parents.

290. Chief Justice Barak has made this point in regards to human rights more generally. *See* HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Barak, C.J., at ¶ 57); *see also* Robert M. Gordon, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435 (1998).

291. *See, e.g.*, Scott, *supra* note 287, at 27-28.

292. *See supra* note 280.

293. *See* Amato, *supra* note 280, at 92 (concluding that divorce should be made easier rather than stricter for parents as a means to protect children, and that in cases of violence or abuse, divorce should be allowed to occur as expeditiously as possible).

Outside the context of couples with children, the constitutionality of delaying divorce, through waiting periods or other means, is quite dubious.[294] Given that the right to divorce is integral to the individual right to family life, and in view of the special weight and strength accorded to that guarantee in Supreme Court jurisprudence, "a reduction thereof is possible only where it is confronted by a conflicting value of special strength and importance."[295] A divorce restriction is thus constitutionally warranted only if carefully tailored to realize an "essential" and "urgent" social need, or a "major social interest."[296] This is not the case when a childless couple is involved, however. After all, the parties are the best judges of the viability of their marriage. A state-imposed waiting period, without an additional purpose, smacks at least somewhat of paternalism[297] and flouts the historical lesson that "[i]f one party is unwilling to continue the relation there isn't any power on earth . . . to make it a go."[298] Indeed, one Israeli family court has found that requiring consent to divorce is offensive to Basic Law: Human Dignity and Liberty, since, insofar as marriage requires mutual consent for its initiation, it must also enjoy the consent of both parties for its continued existence.[299] Attempts to force the continuation of a marriage are even less realistic when the parties *both* desire dissolution.

A mandatory waiting period for childless couples also fails to meet the proportionality test. The purpose underlying the waiting period—the state interest in ensuring that marriages are not broken off lightly—is insufficient to support restrictions in these circumstances, and can be adequately addressed by means less offensive to fundamental rights. Thus, the deterrent effects of the economic consequences of divorce, such as property settlements and alimony, the embarrassment of public declaration of marital failure, and the emotional cost of terminating so intimate a relationship are sufficient to serve well any state interest in this regard without unnecessarily burdening marital liberty.[300]

The second major problem with basing restrictions on consent, rather than the presence of children, is that delaying consensual and childless divorce is

294. Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L. J.L. POL. & FAM. 216, 221 (1997).

295. HCJ 7052/03 *Adalah Legal Ctr.* (opinion of Procaccia, J., at ¶ 7).

296. *Id.*

297. *See* Richards, *supra* note 147, at 1011 ("No good argument can be made that paternalistic considerations would justify interferences in basic choices such as whether to marry, bear children or be heterosexual."); Scott, *supra* note 287, at 14 ("[M]odern norms do not support paternalistic restrictions on those divorces in which only the interests of two adults are at stake."). For a detailed examination of the weakness of paternalistic justifications for the curtailment of fundamental lifestyle choices and rights, see Wilkinson & White, *supra* note 149, at 619-20.

298. Poteet v. Poteet, 114 P.2d 91, 92 (N.M. 1941). Indeed, many accounts of modern divorce emphasize the wide divergence between the formal rules for divorce and the actual behavior of litigants; a reading of such accounts suggests that when a party desired dissolution, she got one no matter what the divorce law on the books was. *See, e.g.*, DAVIS & MURCH, *supra* note 140; DIFONZO, *supra* note 165, at 10; RHODE, *supra* note 175, at 237; Robbins, *supra* note 266, at 190.

299. FC (BS) 15440/97 Pawajan v. Pawajan [1998] (not yet reported); *see also* FC (BS) 19240/98 Lavdanko v. Lavdanko [1999] (not yet reported).

300. Wilkinson & White, *supra* note 149, at 576.

actually more restrictive than the current system, which allows immediate dissolution when the divorce is consensual. For that matter, even when a divorce is opposed, proof of fault on the part of the opposing spouse leads to immediate divorce.[301] Thus, this no-fault model leads to paradoxical results: women who are cheated on, cruelly mistreated, or deserted are in fact worse off, since the six-month waiting period applies regardless of their husbands' fault or consent. Worse, if a spouse contests the divorce, the injured party must wait at least a year or more to obtain their freedom from the marriage.

Third, drawing distinctions based on consent encourages a practice similar to *get* extortion. That is, parties may oppose the divorce as a vehicle to harass one another or to attempt to gain concessions. As discussed above in Part II, allowing the non-consent of a party to meaningfully impede his or her spouse's ability to divorce disproportionately victimizes women who are usually the parties seeking dissolution. Further, it commodifies divorce and forces women, in effect, to "pay" for the exercise of their constitutional rights, thus further intensifying gender-based social and economic inequality.[302]

Fourth, the suggested treatment of contested divorce is highly problematic. Even in the case of unilateral divorce, a six-month waiting period satisfactorily serves any state interest in requiring time for a couple to cool their emotions and rationally consider reconciliation,[303] and thus achieves the desired goals without intruding upon dissolution rights more than is necessary. Given the unsuccessful nature of extended waiting periods in previous divorce regimes,[304] and the potential psychological effects of such delays on both spouses and children,[305] a lengthier period—here, potentially up to two years—would

301. This is true for fault regimes elsewhere. For a description of U.S. fault regimes, see Ellman, *supra* note 294, at 218. No wonder, then, that under mixed-ground systems in England and the United States, which provide both no-fault and fault grounds for dissolution, couples habitually resorted to the fault option in order to bypass the no-fault waiting period and win a speedy ticket to freedom. *Id.* at 222.

302. Research indicates that women's standards of living consistently decrease more than men's after a divorce. *See, e.g.*, LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985). Given this economic reality, it is especially important that, in divorce proceedings, "neither [the] legal existence [of a non-viable marriage] nor its related legal incidents should become weapons used to obtain revenge for the breakdown or to extort a favorable settlement." Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6, 8 (Herma Hill Kay & Stephen D. Sugarman eds., 1990).

303. Wilkinson & White, *supra* note 149, at 576. While any time period is in some sense arbitrary, a waiting period of six months is a reasonable estimate of the time necessary for these goals; because six months provides sufficient time, it should be the upper limit of permissible delay. Going beyond the minimum time required unnecessarily magnifies the couple's mental anguish and seems tainted by a desire to deter couples from exercising their fundamental right rather than to help them reach a reasoned decision.

304. Empirical examination of the history of extended waiting periods indicates that delays longer than several months fail to divert divorce or improve marriage. *See, e.g.*, J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 39, 43-45 (1997); DiFonzo, *supra* note 286, at 945-49.

305. *See* Scott, *supra* note 287, at 77 (noting the psychological harm of waiting periods on spouses and potential economic costs on dependent spouses "if economic settlement is linked to the actual divorce").

violate the proportionality prong of the Limitation Clause. It would also disserve state interests. Imposing delays on divorce escalates the tension and bitterness between the parties, jeopardizes their welfare, and exposes their children to extended marital conflict, which in turn may increase their children's behavioral and psychological difficulties.[306] Hence, a long waiting period withholds the only viable remedy for the evils of terminally-ill marriages that also serves an interest in safeguarding the emotional and physical wellbeing of all family members. Moreover, since divorce law is unlikely to force people to remain emotionally connected within the marriage or celibate outside of it,[307] a waiting period for divorce often amounts merely to a waiting period for remarriage. Given that remarriage may be highly beneficial for the divorced custodial parent and her children,[308] a long waiting period not only lacks proper constitutional purpose and proportionality, but also may be counterproductive.[309]

Fifth, this model's proposed judicial examination of the state of the marriage after one year from the divorce application fails to pass constitutional muster, because it violates the rights to marital and individual privacy. In fact, requiring an inquiry into the entire substance of the marriage may even lead to greater intrusions upon privacy than fault-based proceedings.[310] This inquiry, under the IDI model, is concerned with the actual state of marriage and the potential for reconciliation (or lack thereof), rather than the presence of a discrete act of marital fault. Since proof of a single or even repeated marital transgression may not be indicative of the state of the marriage, the IDI model thus spurs a deeper inquiry into the private and most intimate details of marital life.[311] Thus, while the fault-based inquiry fails to properly comprehend the full

306. Marital discord has a tremendous negative influence on children's well-being, and the length of exposure to marital conflict is positively correlated with behavioral and psychological difficulties. *See, e.g.*, Ayoub, Deutsch, & Maraganore, *supra* note 251, at 299-301; Ellman, *supra* note 294, at 222, 229.

307. *See, e.g.*, WHITEHEAD, *supra* note 160, at 56; Ellman, *supra* note 294, at 223; Goldstein & Gitter, *supra* note 200, at 80.

308. Ellman, *supra* note 294, at 221 & n.32. Note that women are usually the custodial parent after divorce. *See, e.g.*, Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 453 (1998).

309. DiFonzo, *supra* note 286, at 948-49 (finding that long waiting periods may "result in preventing remarriage, promoting cohabitation with the possibility of out-of-wedlock births, enhancing the likelihood that the spouse most anxious for the divorce will bargain away financial considerations, and delaying the rebuilding of lives after the break-up of a marriage that is now 'legally intact but factually dead'" (footnotes omitted)).

310. *See* DiFonzo, *supra* note 286, at 896 (noting that a "'detailed inquest into the whole married life would prove more distasteful and embarrassing' than the established [fault] proceedings") (citing LAW COMM'N, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE Cmnd. 3123 (1966)); Goldstein & Gitter, *supra* note 200, at 78; *supra* Parts III.A and III.C.1.

311. DiFonzo, *supra* note 286, at 892-96. DiFonzo analogizes such a judicial inquiry of marital breakdown to a coroner's examination of "a corpse for clues to its demise," since the courts would have to "conduct an inquest on each assertedly dead marriage to determine whether conjugal resuscitation [were] possible." *Id.* at 894.

picture of marital life, the deeper, more holistic inquiry called for under the IDI model, with its concomitant intrusion of the judiciary into the bedroom and the loss of individual privacy, is hardly an improvement from a constitutional perspective. To avoid such an intrusion, courts in many countries view the act of initiating divorce proceedings as itself demonstrating the irretrievable breakdown of a marriage.[312] Indeed, a continued desire for divorce after a *year-long* waiting period should provide more than sufficient reassurance that reconciliation is impossible, without the need for a burdensome and intrusive additional inquiry.

Finally, one caveat merits attention: the issue of judicial discretion. As a constitutional matter, any divorce model must provide for immediate exit in cases of domestic violence or child abuse.[313] While the IDI model invests the court with full discretion to expedite or delay the divorce proceedings as necessary, it does not include a mandatory exemption from restrictions on the divorce right where domestic violence is present. The limitations on judicial discretion enforced by such an exemption are particularly important given the prevalence of domestic violence as a cause of divorce,[314] and the ability of batterers to engage in litigation to harass and intimidate their wives.[315]

A study of rabbinical court decisions illustrates the potential dangers of judicial discretion: it found many cases in which women who sought divorce after suffering domestic violence were sent back to their abusers.[316] For the rabbinical court, violence is not necessarily a sufficient basis to compel a husband to divorce his wife, if that violence is not life-threatening.[317] The history of the treatment of domestic violence in American family courts, in which judicial intolerance for husbands' brutality was slow to develop, and domestic violence was frequently an insufficient basis for divorce,

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312. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 81 (1987) ("[T]he virtually universal understanding in practice is that the breakdown of a marriage is irretrievable if one spouse says it is."); DiFonzo, *supra* note 286, at 895 (noting "the traditional reluctance of common law judges to engage in inquisitorial procedures"); Lifshitz, *supra* note 268, at 681-88, 699.

313. In such situations, the right to divorce becomes a direct derivative of the constitutionally protected guarantees to both life and physical integrity, the most fundamental of all rights. Basic Law: Human Dignity and Liberty, 1992, S.H. 150, art. 2. In that capacity, only the most minimal restrictions on the right to divorce may be constitutionally tolerable.

314. Schafran, *supra* note 258, at 59.

315. Reihing, *supra* note 260, at 394; Ver Steegh, *supra* note 251, at 161-62.

316. *See* Frishtic, *supra* note 24, at 100-10 (examining a representative sample of rabbinical court decisions). In the cases analyzed in this study, the rabbinical court proved consistently reluctant to issue orders, especially when violence was not habitual, but even when it was systematic and brutal. In some cases when battered wives predicated their divorce petitions on several different grounds, the rabbinical court ruled in favor of the wife based on other grounds rather than condemnation of violence. Thus, when one woman asked for a divorce both because her husband secretly married a second wife and because he had beat her nightly, strangled her, and spat on her, the court ordered divorce based on the fact of the second marriage. *Id.* at 102-03.

317. *Id.* at 102, 109-11.

demonstrates the problems with leaving it to a court to decide whether particular circumstances justify marital release.[318]

But even beyond cases of child abuse or domestic violence, the broad discretion conferred upon family law judges is constitutionally problematic. It unjustifiably leaves the fundamental right to marital dissolution at the mercy of possibly conservative judges. These judges have the discretion to measure how much conjugal suffering merits the redemption of divorce, and in doing so, may simply sustain an empty marital shell. Indeed, in family law contexts, judicial discretion has been exercised all too often to the detriment of women.[319] Scholarly literature has persuasively demonstrated that discriminatory and stereotyped views of women and gender relations permeate many aspects of judicial decisionmaking.[320]

In sum, the IDI's vision of no-fault divorce, while moving in the right constitutional direction, still suffers from significant flaws. It maintains a distinction between consensual and disputed divorces, imposes a burdensome waiting period, and requires too much judicial discretion and invasion of privacy. The next model removes some of these barriers, but continues to rely on the division between consensual and disputed divorce—which, as the next section explains, is a constitutionality deal-breaker.

3. The Ministry of Justice Model: A Lenient No-Fault Variation

The proposal by the Ministry of Justice is a classic divorce-on-demand model.[321] It provides an easy, barrier-free exit for consenting couples and a

318. *See* David Jaros, *The Lessons of* People v. Moscat*: Confronting Judicial Bias in Domestic Violence Cases Interpreting* Crawford v. Washington, 42 AM. CRIM. L. REV. 995, 1000-01 (2005) (noting that, historically, domestic violence legislation was typically "applied only in the most egregious circumstances involving severe injury"). Under the fault system, battered wives who had continued to live with their husbands or had "provoked" their abuse, to name two examples, were forced to remain married to their abusers. *See* RHODE, *supra* note 175, at 238. Even in the late twentieth century, taskforce reports on gender bias in the courts identified patterns of trivialization of complaints and disbelief of female petitioners, absent evidence of severe injuries. *Id.* at 241; *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 750-52 (1990) [hereinafter *Gender Bias*]. The point is not that most twenty-first-century American judges, for example, undervalue the gravity of domestic violence or treat it lightly. On the contrary, over the last two decades there has been a dramatic shift in the treatment of domestic violence cases due to the growing awareness of the scope and seriousness of this phenomenon. Jaros, *supra*, at 1000. Rather the past experiences of women in American family courts is a reminder of the *potential* misuse of judicial discretion, particularly in a context where such discretion serves no broader purpose.

319. The problem of gender bias in the exercise of judicial discretion in family law matters has been well documented. *See, e.g.*, Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 277 & n.23 (1992); *see also* HALPERIN-KADDARI, *supra* note 2, at 38-42; *Gender Bias*, *supra* note 318 (providing a comprehensive report of the effect of gender bias in Massachusetts family courts).

320. EISLER, *supra* note 173, at 62; Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, 24 JUDGES J. 12, 12-17, 48-52 (1985); Schafran, *supra* note 258, at 42, 45-46.

321. *See generally* GOODE, *supra* note 142 (providing a comprehensive review of divorce regimes worldwide).

lenient exit procedure with a brief six-month waiting period for spouses seeking divorce without their partners' consent.[322] However, this model still runs into constitutional problems, because, like the IDI model, it differentiates between consensual and contested divorce, and requires mediation for all couples seeking dissolution.

A constitutional divorce regime can differentiate between couples based on the presence of children, but not on the presence or absence of consent to divorce; further, such a regime must eliminate the bargaining chip of resisting dissolution. Thus, the proposed regime is over-inclusive, as it delays the freedom of childless spouses without vindicating any significant state interest other than paternalistic interference to justify the curtailment of divorce rights.[323] It is also under-inclusive, as it allows a couple with minor children to end their marriage immediately,[324] without regard for the potential of a limited waiting period to lead to meaningful exercise of the divorce right and encourage reconciliation attempts.[325]

In addition, the Ministry of Justice model requires the parties to undergo some form of mediation to resolve their disputes before a divorce may be granted.[326] Since the nature and particulars of the procedure are not clear in the proposal, it is difficult to assess its constitutionality.[327] Nonetheless, international examples of mediation bring up concerns that the Israeli legislature must address if such a provision is to be constitutionally permissible.

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322. Bill Determining the Status of Couples Entering into a Spousal Covenant 2004 arts. 8(a)(2), 9(b), *as reprinted in* LIFSHITZ, *supra* note 62, at 97-105.

323. Goldstein & Gitter, *supra* note 200, at 83. If this model's underlying rationale in delaying a couple's marital freedom is double-checking whether the marriage is irretrievably broken, it is futile and cannot justify restrictions on the right to divorce. *See supra* Part III.C.1.

324. In these cases, it may be advisable to allow divorce even before the end of the statutory period currently required for non-consenting couples, if and when mutually satisfactory financial and custodial arrangements are concluded. For a proposal in this spirit, see Goldstein & Gitter, *supra* note 200, at 76. It would encourage spouses to cooperate for the sake of their children, but does not risk the use of unnecessary pressure against any of the parties, since, with only a minimal and temporary limitation on dissolution, the party with less desire to divorce has no significant power to force an unfavorable agreement in exchange for freedom. This approach strikes a proper constitutional balance between human rights and state interests.

325. *See, e.g.*, Scott, *supra* note 287, at 76-78 (listing the benefits of waiting periods before divorce). Such a mechanism will better serve the institution of marriage and the family, which are both fundamental in the Israeli society and legal system. *See supra* Parts II, III.B.2.

326. Divorce mediation is a process through which an impartial third-party mediator facilitates the resolution of family disputes by voluntary settlement. *See Model Standards of Practice for Family and Divorce Mediation: The Symposium on Standards of Practice*, 39 FAM. CT. REV. 121, 127 (2001) [hereinafter *Model Standards*]; Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. REV. 425, 428 (2003).

327. Mediation programs vary widely along several policy dimensions, yet the bill does not clearly define the term. *See* Definitions Clause, Bill Determining the Status of Couples Entering into a Spousal Covenant 2004, *as reprinted in* LIFSHITZ, *supra* note 62; *see also* Judith M. Wolf, *Sex, Lies, and Divorce Mediation*, 33 ARIZ. ATT'Y 24, 25 (1996) (noting that while "divorce mediation is undoubtedly one of the fastest-growing areas of alternative dispute resolution . . . [i]t is probably also the least understood").

The United States has a long history of experimentation with divorce mediation,[328] accompanied by an acute controversy over the fairness and efficiency of this process.[329] One major concern is mediation's role in reinforcing power imbalances within a marriage: When the process empowers the already-stronger spouse (usually the husband), mediation tends to cause additional harm to women.[330] Women in divorce mediation may also be impacted by social pressure and stereotypes, suffer from greater economic risk, possess less information about legal rights and marital assets, and feel more compelled to forgo their financial rights for the sake of obtaining favorable custody rights.[331] Critics lament that divorce mediation

> thus perpetuates patriarchy by freeing men to use their power to gain greater control over children, to implant more awareness of male dominance into women's consciousness, and to retain more of the marital financial assets . . . . [T]hose who structure court affiliated programs, as well as mediators, now should recognize their complicity in the continued oppression of women and their dependent children.[332]

The inequality that may be reinforced by mediation is particularly severe when one party has physically abused the other; the unequal bargaining power in that situation may be so potent as to neutralize a woman's ability to protect her liberty and property rights.[333] Moreover, since the violence tends to intensify during separation,[334] merely attending mediation sessions may be

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328. *See, e.g.*, Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 991 (2000); Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 LOY. J. PUB. INT. L. 37, 43 (2003); Karl Kirkland, *Advancing ADR in Alabama: 1994-2004: Efficacy of Post-Divorce Mediation and Evaluation Services*, 65 ALA. LAW. 186, 187 (2004).

329. Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1323-29 (1995). For information on the benefits of divorce mediation in the U.S., see *Model Standards*, *supra* note 326, at 127; Kenneth J. Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1744-45 (1984).

330. *See, e.g.*, Gagnon, *supra* note 319, at 272-73; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-51 (1991).

331. *Gender Bias*, *supra* note 318, at 747, 772; Saccuzzo, *supra* note 326, at 433; s*ee also* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 523 (1992).

332. Bryan, *supra* note 331, at 523.

333. *Gender Bias*, *supra* note 318, at 773 (noting that "a woman will be willing to take less to get out of the situation because of the danger" and that she will not be "looking out for her long-term financial interest"); s*ee also* Yelena Ayrapetova, *HB 004: Mandatory Divorce Mediation Program Passed in Utah*, 7 J. L. FAM. STUD. 417, 419 (2005); Gagnon, *supra* note 319, at 280; Colleen N. Kotyk, *Tearing Down the House: Weakening The Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL OF RTS. J. 277, 300 (1997); James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1186 (1995) (noting that, by ignoring abusers' coercive power, mediation may perpetrate second-order abuse on victims).

334. Karla Fischer et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2138-39 (1993).

risky for abused spouses.[335] In fact, a number of battered women have been murdered by their estranged abusers when they came to the courthouse.[336] Mediation may also have the potential to exacerbate conflict and abuse, as studies find that it leads to more incidents of post-proceeding abuse than a trial does.[337] These risks to battered women's personal safety and overall interests have unsurprisingly led their advocates to overwhelmingly oppose mediation as a dispute resolution mechanism.[338]

Given women's often-disadvantaged position in divorce mediation, as well as the dangers associated with the process, it is constitutionally dubious at best to condition the exercise of the right to divorce on participation, and clearly impermissible when domestic violence is involved. The fear of confronting their abusers in the unequal setting of mediation, and requiring them to bargain over custody and visitation rights under such conditions, may force women to forgo the exercise of their right to divorce altogether.[339] Given the extremely high rates of abuse against wives seeking divorce,[340] this potential barrier to marital liberty could jeopardize the right to divorce for numerous women.

Divorce mediation thus poses a danger to women's equality and divorce rights and, at times, their bodily integrity—all of which are protected under the Israeli Constitution.[341] Moreover, since divorce mediation may perpetuate unequal bargaining power between spouses, it may further deprive women, usually the less powerful party, of their fair share of marital property.[342] Since this dispossession takes place in mediation, women are not only deprived of their property, but also of their day in court and the concurrent rules and

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335. *See, e.g.*, LINDA GIRDNER, ABA CTR. ON CHILDREN & THE LAW, DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR JUDGES AND ADMINISTRATORS: INSTRUCTOR'S GUIDE 12 (1999); René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How To Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 98 (2001); Holly Joyce, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL LAW. 447, 452-53 (1997) (noting that the pressure in mediation to agree to generous visitation rights may give the abuser more access to his victim outside of proceedings).

336. Beck and Sales, *supra* note 328, at 997.

337. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 55 (1995). For a concise summary of further arguments against mediating cases involving domestic violence, see Belzer, *supra* note 328, at 45-53; Rimelspach, *supra* note 335, at 96-99.

338. *See* Gagnon, *supra* note 319, at 272-73; s*ee also* Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues,* 19 CLEARINGHOUSE REV. 431, 433 (1985).

339. Belzer, *supra* note 328, at 50-51; Leigh Goodmark, *Alternative Dispute Resolution and the Potential for Gender Bias*, 39 JUDGES J. 21, 22 (2000).

340. In the United States, estimates indicate that one out of four women seeking dissolution has been physically abused. Gagnon, *supra* note 319, at 273. In Israel, statistics providing the exact prevalence of domestic violence are difficult to find. Moderate statistics estimate that one out of every seven women has been subject to domestic violence. *See* The Phenomenon of Domestic Violence in Israel, http://www.wizo.org/women_violent_go.asp?catid=50 (last visited Dec. 17, 2008). For facts and figures about gender-based domestic violence, see HALPERIN-KADDARI, *supra* note 2, at 196-97.

341. The rights to life and bodily integrity are explicitly protected under article three of Basic Law: Human Dignity and Liberty, 1992, S.H. 150. The right to equality is an unenumerated right derived from the concept of human dignity throughout the Basic Law. *See* discussion *supra* Part II.B.

342. For additional information on due process and property violations stemming from divorce mediation in the U.S. context, see Kotyk, *supra* note 333, at 292-307.

formality of adversarial proceedings that might ensure a fair and impartial outcome.[343] Since both due process and property rights are safeguarded under Basic Law: Human Dignity and Liberty, such results are constitutionally problematic as well as harmful to women.[344]

If the model requires spouses to pay for their mandatory mediation before gaining access to divorce, further constitutional problems arise, because exercising the right to divorce would be beyond the reach of those who could not afford the fee on top of the other costs associated with divorce.[345] One commentator cautioned:

> Particularly in divorce cases, when partners are setting up two households on the same income that formerly supported only one, money is tight. Divorcing parties who are mandated to use and pay for mediation services may be unduly pressured to settle on unacceptable terms because they cannot afford to pay lawyers' fees for trial or further negotiation, in addition to the fees they have been forced to spend for mediation.[346]

Additionally, because equal division of mediation fees has a disproportionately harsh effect on those partners, usually women, with fewer economic resources, it may fail to protect their constitutional right to equality.[347] Required fees could even lead women under monetary strain to rush to end the expensive process and agree to unfavorable settlements for financial reasons.[348]

Despite the many potential constitutional pitfalls to a divorce mediation scheme, the process can, and should, survive if enacted with great care.[349]

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343. *Id.* at 300, 308.

344. The right to property is explicitly protected under article three of Basic Law: Human Dignity and Liberty, 1992, S.H. 150. For the constitutional status of due process under Israeli law, see the decision of Judge Menachem Klein in CA [TA] 156232/05 Hertzeliya Municipality v. Hadara Sales Vardiman [2005], *available at* http://www.nevo.co.il/serve/home/it/titles.asp?build=2&System=1&Exec=&cpq=1.

345. In a similar situation, the U.S. Supreme Court invalidated even an economically-modest barrier to divorce—a sixty dollar non-waivable filing fee—as an unconstitutional bar to accessing divorce court and the ability to adjust a "fundamental human relationship." Boddie v. Connecticut, 401 U.S. 371, 383 (1971).

346. King, *supra* note 250, at 382.

347. For a discussion of this point in the U.S. context, see *id*. at 455-58.

348. *Id.* at 456.

349. Developing a mediation process that lives up to constitutional requirements is important because mediation potentially offers many benefits, including promoting effective and amicable resolution of divorce disputes, facilitating communication, encouraging understanding, and reducing hostility and trauma to couples and their children. *See, e.g.*, *Model Standards*, *supra* note 326, at 127 (describing mediation as a way to reduce costs, increase participants' self-determination, and act in the best interest of children); Rigby, *supra* note 329, at 1744-45 (listing the perceived advantages of the mediation process); Patricia L. Sullivan, *Culture, Divorce, and Family Mediation in Hong Kong*, 43 FAM. CT. REV. 109, 116 (2005) (describing benefits of mediation as reported by participants in a Pilot Scheme mediation study). Many believe that these benefits more than make up for any potential for harm and may make mediation an effective process for women despite gender-based power imbalances. Rimelspach, *supra* note 335, at 104; *see also* Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227, 228-29 (1992) (describing the role

Constitutionally sound implementations of divorce mediation must respect each party's fundamental right to divorce, equality, due process, and property, and give special attention to ensuring fairness to women, who are often disproportionately at risk in the process. To begin with, divorce mediation must be voluntary rather than mandated by the state,[350] and parties must have the opportunity to learn about the process (and its alternatives) and to withdraw at anytime.[351] Voluntary participation coupled with an "escape hatch mechanism" alleviates constitutional concerns, [352] since the law would not force anyone who could be harmed by mandatory mediation to use the process.

In order to further minimize abridgments of women's fundamental rights, the legislature should establish screening procedures and statutory guidelines for the qualifications, training, and conduct of mediators. Such mechanisms would serve to ensure a fair process and address women's unequal position in mediation and the possible violation of their rights to life, bodily integrity, property, and equality.[353] Relevant regulations should include the presence of both male and female mediators,[354] general instruction to be vigilant for power imbalances and to conduct negotiations so as to equalize power relationships between parties (especially by ensuring equal access to necessary information),[355] and requirements to terminate proceedings if power imbalances become too great.[356] Such regulations are designed to contribute to the equalization of the parties' positions and thus to safeguard women's rights.[357]

Further, to avoid the barrier to the right to divorce erected through party-paid divorce mediation schemes, public funding must be available for mediation. Such financing would alleviate the disparate impact that mandated payment of mediation has on women and prevent associated economically-based settlement pressure.[358] Additionally, requiring judicial review of

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of mediators in affecting imbalances). The mediation process does not violate parties' constitutionally-guaranteed right to privacy, found in article seven of Basic Law: Human Dignity and Liberty, 1992, S.H. 150, because, unlike divorce proceedings, the process does not require bringing details of relationships into public view. Gagnon, *supra* note 319, at 274.

350. Kotyk, *supra* note 333, at 307-08.

351. *See* GIRDNER, *supra* note 335, at 18-19.

352. Kotyk, *supra* note 333, at 291, 307-08.

353. *See, e.g.*, Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 3, 19-20 (Jay Folberg & Ann Milne eds., 1988). For a survey of mediators' duties regarding fairness, see McEwen, Rogers & Maiman, *supra* note 329, at 1333-36.

354. Wolf, *supra* note 327, at 25.

355. This is, for instance, the law in California. *See* McEwen, Rogers & Maiman, *supra* note 329, at 1333. Since power imbalances are often data or information inequalities, it is important that the mediator discuss with the less-informed party how best to obtain information and that the less-informed party be able to review financial information with professionals. *See, e.g.*, Wolf, *supra* note 327, at 33-34.

356. John Haynes, *Power Balancing*, *in* DIVORCE MEDIATION, *supra* note 353, at 277, 280-81; s*ee also* Belzer, *supra* note 328, at 52.

357. *See* Belzer, *supra* note 328, at 52; Haynes, *supra* note 356, at 280-81; McEwen, Rogers & Maiman, *supra* note 329, at 1333; Wolf, *supra* note 327, at 25, 33-34.

358. King, *supra* note 250, at 460.

settlements in order to bar those that are so unjust as to offend basic sensibilities could alleviate due process concerns by providing access to the court system in extreme cases.

Most importantly, cases of domestic violence require separate treatment. In order to avoid the danger and unfairness of divorce mediation to abuse survivors, nearly all U.S. jurisdictions prohibit mediation when domestic violence is involved.[359] To retain constitutional legitimacy, the Ministry of Justice model must be amended to follow this example by specifically exempting cases involving domestic violence from mediation.

Any other approach may call into question the constitutional legitimacy of mediation as a tool of divorce regulation. Abused wives facing divorce and all of its associated difficulties must not and cannot be forced to risk their fundamental rights to physical and psychological safety or marital property in order to exercise their fundamental right to divorce. At the very least, the legislation should grant abused spouses the ability to choose whether to go through mediation, making it possible only if requested by the victim[360] and adequate safety options are in place.[361] Thus, screening for domestic violence must be part of the process in order to eliminate the cases from mediation, or safety measures must be included to protect battered women from further abuse.[362] Given victims' underreporting of abuse,[363] in order to protect the rights to bodily integrity and life, the rule should require ending mediation if it would threaten the mental or physical health or safety of either of the parties or their children.

Crafting an appropriate mediation provision is especially important because not only the process but also the results of mediation impact the right to divorce. If mediation fails, the Ministry of Justice model permits the court to withhold divorce until property and custody proceedings are concluded, no matter how long they last. This essentially amounts to an *additional* waiting

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359. Belzer, *supra* note 328, at 43; Carrie-Anne Tondo et al., *Mediation Trends*, 39 FAM. CT. REV. 431, 445 (2001) (providing mediation chart of the states); Ver Steegh, *supra* note 251, at 192.

360. *See, e.g.*, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 407 (Nat'l Council of Juvenile and Family Court Judges 1994); Gagnon, *supra* note 319, at 291. Although the legislature can and should protect battered women's fundamental rights, it should not force this protection upon them. If other women are allowed to participate in mediation and to enjoy its myriad benefits, it is both discriminatory and paternalistic to deprive abuse victims of this option if they want it. *See* Nancy Thoennes et al., *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6, 8 (1995); *see also* Belzer, *supra* note 328, at 54.

361. For example, the mediator should have experience and training related to domestic violence and should meet with each spouse separately and discuss both the reasons for the victim's participation in mediation and safety options and protective orders. *See* Gagnon, *supra* note 319, at 278; Ver Steegh, *supra* note 251, at 191.

362. Rimelspach, *supra* note 335, at 104; s*ee also* WIS. STAT. § 767.11(8)(b) (2001) (providing rules to end mediation in cases where it would be harmful to parties). Commentators also describe screening as "the most important stage in divorce mediation for discovering abuse cases and rooting out those which do not belong in mediation." Belzer, *supra* note 328, at 55.

363. Alexandra Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 268-69.

period for divorce, and thus suffers from the same constitutional infirmities as the delays discussed above. Specifically, the provision fails to justify its excessive burden on the right to divorce based on the proper purpose and proportionality prongs of the Limitation Clause: It mainly serves to pressure the party desiring dissolution into unfavorable arrangements (hardly a "proper purpose"), and it deprives couples of marital freedom for extended or undefined periods of time at the discretion of particular judges.[364]

In addition, any divorce model must keep the availability of divorce entirely separate from the financial pressures associated with marital dissolution. As observed, conditioning divorce on the conclusion of the property proceedings places an unjustified limitation on the exercise of the right to divorce. But further, it is constitutionally unjustifiable to impede divorce in the name of women's economic interests.[365] Making it more difficult to divorce for the sake of financial considerations would run counter to the Israeli Constitution: both the "fitness" subtest, insisting on a rational relationship between legislative means and ends, and the "minimal harm" subtest, allowing for only the least restrictive measures when in the zone of constitutionally-guaranteed fundamental rights, would go unmet. While protection of the financially vulnerable spouse is indeed a compelling interest, this legislative end must be served through property and alimony rules, which are more appropriate to secure just consequences of marital dissolution than the laws governing divorce itself.[366]

All in all, the Ministry of Justice's model demonstrates that a no-fault basis for divorce is necessary yet not sufficient to ensure the constitutional propriety of a divorce regime. While this model requires adjustment to fully protect women's fundamental rights in general and to divorce in particular, it includes

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364. Past actions of the rabbinical court are indicative of the danger in this model. When parties could not reach an agreement in divorce proceedings, the court would often pressure the wife into submitting to her husband's demands. *See* discussion *supra* Part I.B. Under that system, proceedings may be prolonged "without time limit." *See* First Legal Aid, http://www.odnet.co.il/heb/frmIndex.htm (last visited Nov. 16, 2008).

365. This is currently a popular theme in U.S. jurisprudence. *See* WEITZMAN, *supra* note 302, at 323 (finding a disparity in consequences of no-fault divorce for men and women) and the enormous research literature that followed. For a survey of such research, see ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 83-87 (1992). For criticism of Weitzman, see, for example, *Review Symposium on Weitzman's* Divorce Revolution**,** 1986 AM. B. FOUND. RES. J. 757 (1986); and Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989).

366. Ellman, *supra* note 294, at 224, 230. This state interest could be addressed through much more tailored and effective means, such as reform of property law or improvement of employment opportunities or even adoption of a spousal *post*-divorce maintenance system along the lines of alimony, which is still unheard of in the Israeli legal system. *See* Cahn, *supra* note 200, at 254, 336. As important as a discussion of desirable post-divorce financial arrangements is, it falls beyond the scope of this piece. For examples of exploration of this point by U.S. family law scholars, see generally Trevor S. Blake, *You Get What You Pay For: A New Feminist Proposal for Allocating Marital Property upon Divorce*, 4 GEO. J. GENDER & L. 889 (2003); Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119 (2001); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51 (1998-1999).

basic provisions, like mediation, which, if properly implemented, would meet constitutional requirements and benefit divorcing couples on their way to marital freedom.

CONCLUSION

Israel is unique. It is the only democracy in the Middle East, the only Jewish state on earth, the only country with a solely religious divorce regime and a uniquely activist judiciary that *created* a constitution.[367] The Israeli constitutional revolution with respect to the status of human rights is perhaps unfinished, imperfect, or undesirable, but it is a living fact—and it must be the basis for reform of that singular divorce regime. Twenty-first century Israel enjoys a formal constitutional system accompanied by American-style judicial review. A significant number of rights have been transformed into fundamental rights, endowed with formal constitutional recognition and supra-legislative status. Marital dissolution, I argue, ought to be amongst them.

To this day, Israel remains the only modern state where *civil* marriage and divorce are nonexistent.[368] While Israel's judges have threatened to create civil marriage and divorce if the legislature refuses to do so,[369] neither legislative nor judicial action has been taken, so a discriminatory, limited, fault-based divorce regime remains the sole outlet. Looking forward to the day when that action actually occurs, this study seeks to further the development and understanding of Israeli divorce and constitutional law in order to facilitate the implementation of constitutional mandates in the divorce arena. In reinterpreting, reforming, and reframing her divorce law, Israel must take into account the constraints that the constitutional status of divorce would impose on her legislative latitude.

The art of crafting a constitutionally-satisfactory divorce regime is both delicate and complicated. It requires careful tailoring and perceptive weighing of the rival interests demanding their constitutional due, and the legislature undoubtedly faces a challenging and ambitious undertaking. If the task is accomplished properly, Israeli citizens could enjoy a divorce regime that alleviates, or at least does not exacerbate, the anxiety, complications, and trauma associated with divorce. My underlying objective has thus been to enrich the Israeli discourse by proposing tools designed to rectify the injustices

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367. *See* discussion *supra* Part II.A.

368. Lerner, *supra* note 3, at 252 (quoting Yoram Schachar, *History and Sources of Israeli Law*, *in* INTRODUCTION TO THE LAW OF ISRAEL 1, 3 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995)); *see also* Gidon Sapir, *How Should a Court Deal with a Primary Question That the Legislature Seeks To Avoid? The Israeli Controversy over Who Is a Jew As an Illustration*, 39 VAND. J. TRANSNAT'L L. 1233, 1260 (2006) (noting that Israel has only religious marriage).

369. Halperin-Kaddari, *supra* note 44, at 154 (noting Chief Justice Aharon Barak's speech "Law in Israel in the Next Millennium" from Jan. 3, 1999).

of the current law and to delineate the foundational principles that will serve as the cornerstone of the new or additional divorce regime.

The ideal constitutional divorce regime must have at its center some vision of no-fault divorce. This regime would be the least restrictive means to both further state interests and vindicate individual rights to dissolution, dignity, privacy, and equality, especially for women. This ideal regime would include a mandatory, yet reasonable, waiting period for reflection and reconciliation, followed by the ability to divorce without proving fault or justifying motives. Any other system would prove overly intrusive and damaging to those seeking to end their marriages and reorder their lives, and would only increase the number of marriages that are "legally alive but factually dead."[370]

Israel is only one step short of bestowing upon its citizens divorce laws that are respectful of human rights, as befits a constitutional democracy. It is hoped that this analysis will aid both family-law scholars and policymakers in crafting the divorce regime that Israeli women have craved since the State's inception. If the legislature rises to the challenge and accepts a constitutional key—the right to marital liberty—the opportunity to unlock women's marital chains may finally be within reach.

370. Ellman, *supra* note 294, at 225.