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# FAMILY FORMATION AND THE HOME

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## I. INTRODUCTION

Although in some respects the defining lines of the family have been well settled for centuries around blood and formal legal ties of marriage and parenthood, in other respects the shape of the family is constantly evolving. In this article, we consider how living together creates, reflects and imbues family life with meaning. From intergenerational families, voluntary kin groups, to room-mates and unmarried couples with children, domesticity has occasionally been used as a tool in defining the family even without the formal ties of

marriage and legal parenthood.[1] Yet, the extent and nature of how domesticity in a manner not necessarily connected to marriage and sex creates family rights and obligations is riddled with inconsistencies and conflicting determinations.[2] On the one hand, it has been argued that domesticity has in some contexts had too great an impact on family law by ignoring relationships that occur outside the home,[3] but in other contexts joint living has provided no familial legal rights or obligations at all.[4] In the current era where the question of what constitutes a family has received so much attention, the role that the joint-home plays in creating mutual familial rights and obligations in a manner decoupled with sexuality has been largely overlooked. Joint living in a single home can involve marriage and traditional notions of parenthood, but can also involve intergenerational families and those who are otherwise considered legal strangers. Usually cohabitation takes on legal meaning when it most mirrors the nuclear, sexual family, but other laws take a more expansive perspective on family constitution.[5]

In this article, we focus on clarifying the nature of domesticity and its impact on family formation. We argue that understanding the nature and significance of sharing a home demands decoupling sex from cohabitation and imbuing cohabitation with its own separate legal import decoupled from sexuality. Although the term "cohabitation" often is understood to connote sexuality, in this article, we want to break apart the connection of cohabiting and sexuality.[6] Moreover, the cohabitation or domestic joint-living we are referring to includes intentional joint living for an extended or semi-permanent time frame. Not all house-sharing would meet the minimum standard we lay out for

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[1] *See infra* Part II.
[2] *See infra* Part II.
[3] *See e.g.*, Laura Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189 (2007).
[4] *See infra* Part II.
[5] *See infra* Part II.
[6] **We understand that in order to divorce cohabitation from sexuality, another term may be necessary to depict the domestic home sharing that we envision. We are still struggling with what terminology is most appropriate and would welcome feedback on this issue. This draft uses the concept of cohabitation in a broad sense to include joint living without sexuality, but we are considering whether use of this term needs to be modified. However, for the sake of this draft, we ask that cohabitation be understood not to necessitate sexuality although sexuality may be involved.**

legal domesticity/cohabitation both in terms of time frame and the extent of joint living.[7] Borrowing from social science research, we argue that domesticity has its own emotional, familial significance that deserves legal recognition in a manner that is not essentially intertwined with sexuality and is more reflective of the way relationships are formed and are important to cohabitants. On the other hand, we recognize the dangers of attributing too much significance to cohabitation alone divorced from other considerations and concerns. Therefore, this article first weights the nature, benefits and drawbacks of cohabitation in the context of family formation than attempts to provide a legal framework that accounts for both the benefits and the concerns in a nuanced manner.

A fundamental inquiry engrossing legal scholars and lawmakers is defining the contours of the family and the rights and obligations the state imparts to family life. The law has traditionally defined the family around marriage, biology and adoption as a way to "channel" the family into its nuclear form.[8] In this regard, the state-protected family traditionally revolves around sexual relations and sexual reproduction. The family based on heterosexual sex and reproduction has been coined the "sexual family."[9] But these traditional definitional tools have come under attack from a myriad of sources in recent decades. Both for practical and normative reasons. The traditional sexual family does not perform all the family law functions that it was intended to perform and family structure is constantly evolving. The law increasingly contends with the changing nature of family-life in allotting benefits and responsibilities belonging to the family.

First, modern developments in science and technology have simply made biology an unreliable and often confusing rule for creating legal parenthood. The increased use of assisted reproductive technologies have made identifying motherhood based on birth and genetics a modern legal puzzle, as the two are now easily separated and divided.[10] The use of gamete donors and in vitro fertilization has made genetics in general a contested focus of familial connections. And, sexuality can no longer be trusted as the sole creator of children, although parental-child relations can still mirror traditional sexual produced parenthood, just in a more technologically advanced form.

Second, the relationship between marriage and family has been much criticized in recent years. The increasing recognition of same-sex families has challenged traditional notions of marriage and family, enveloping a more diverse range of conjugal couples that can form a familial life. However, feminist accounts of such expanding families have argued that same-sex families that attempt to replicate patriarchal

[7] *See infra* Part II. A.
[8] Carl Schneider, *The Channeling Function of Family Law*, 20 HOFSTRA L. REV. 495 (1992).
[9] MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 143 (1995).
[10] *See* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L. J. 1223 (2013).

conjugal family life under the umbrella of marriage miss important opportunities to look beyond sexual relationships in creating family life. Thus, feminists have argued that the focus of marriage on creating family fails to account for the important nature of caregiving and dependency that has nothing to do with sex.[11] Some same-sex advocates have argued that replicating conjugal norms for family life, misses the opportunity for same-sex couples to expand family definitions beyond sexual hierarchies and create a more inclusive family form that relies on relationships and not sex.[12]

Third, the break-up of the nuclear family due to rising divorce rates, increase in step-families, increase in single parent homes and complex networks of care that help manage children have led to an increasing focus on the ways in which familial status can be created through emphasis on caregiving relationships.[13] The ALI Principles as well as multiple legal scholars have argued that functional caregiving relationships can create familial legal rights and obligations through doctrines such as de facto parenthood, parenthood by estoppel and functional parenthood.[14]

Finally, attempts to expand definitions of family have gone even farther. Some have pointed to economic interdependence and renewed reliance on the antiquated notion of the economic household[15] and

[11] FINEMAN, *supra* note 9; Viviana Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & LAW 307 (2004); 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, 1535-41 (1993); Joan Williams, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1-9 (2000).

[12] *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 19 (2008).

[13] Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394-95 (2008).

[14] THE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2000) [hereinafter ALI Principles]. *See also* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 19-20 (2008); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 314-17 (2007); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85 (2004) ("[T]he rule of the 'exclusive' family . . . is a central problem in family law in the United States" but it is also harmful to children, families, and the public because it is an "intentionally, but unnecessarily, limited vision of parenthood that distorts the narrative of too many people's lives."); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 74 (2007); Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 14 (1997); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Formal and Functional Parenthood*, 20 GEORGE MASON L. REV. 419, 421-425 (2013). .

[15] Janet Halley, *After Gender: Tools for Progressivism in a Shift for Sexual Domination to the Economic Family*, 31 Pace L. Rev. 887 (2011); Alicia

emotional friendships as overlooked and relevant familial indicators that deserve legal recognition.[16] Modeling and shaping the family with ever greater fluidity, these scholars look to economic interdependency and emotional connections as creating familial, emotional and economic bonds of equal value to traditional conjugal familial relationships. Hence, the breakdown of biology, marriage, sex, and increasing focus on care, alternate family forms and alternate emotional and economic bonds has challenged traditional family law from all corners.

In reality, regardless of traditional legal assumptions, the variety of families that provide benefits to dependents and mutual support to adults is constantly evolving. If states want to support such alternative structures that provide the benefits of family life in modern times, family law must evolve to meet the needs of these evolving family structures. Moreover, even as traditional forms of family life are increasingly challenged, and alternative forms of family life have developed and been recognized, the significance of a joint home life and the role the home plays in creating and molding the family has always been central. We will argue that cohabitation deserves to be part of this discussion of reframing the nature of family life and has been largely overlooked as other factors have been given greater credence.

Perhaps in the desire to keep the definition of family modern and relevant the failure to look closer at the importance of domesticity can be explained by the perception that domesticity is a non-progressive, traditionalist indicator of family life. Joint-living is nearly always equated with emphasis on the sexual family.[17] Indeed, cohabiting as "man and wife" outside of marriage is regularly viewed as "marriage like" and while on the one hand signifies rejecting the institution of marriage, in other contexts it is also viewed as a mirror and evidence of a marital relationship only without the formalities.[18] Therefore, emphasis on cohabitation has been regularly criticized as traditionalist due to its close link with sexuality and sexually-linked domesticity. And, cohabitation is closely associated with parental rights based on marriage and genetic affiliation. The home can be a conservative force, ordering familial patterns by those who live together in a manner that parallels the traditional nuclear family. When imposed as a requirement upon same-sex couples or step-families as well as conjugal couples, the boundaries of the home can indeed feel like traditional proxies for

Brokars Kelly, *Better Equity for Elders: Basing Economic Relations Law on Sharing and Caring*, 21 TEMPLE POLITICAL AND CIVIL RIGHTS L.J. 101 (2012).

[16] Rosenbury *supra* note 3, at 200.

[17] *See id.* at 200. "Cohabitation" is regularly assumed to include sexual relationships, *see e.g.*, Lynne Marie Kohn, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1368-39 (2014); Sally Golfarb, *Who Pays for the Boomerang Generation? A legal Perspective on Financial Support for Young Adults*, 37 HARV. J. L. & GENDER 45, 52, 52 (2014).

[18] *See e.g.*, Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966)l Loving, 388 U.S. 1, 4 (1967) (quoting Va. Code Ann. §20-58 (1960 Repl. Vol.) (explaining that cohabiting as man and wife in Virginia where mixed race marriages were permitted was taken as evidence of an illegal marriage).

replicating nuclear families in a limited number of variations that are sufficiently close to idealized norms.

However, the act of living together no longer, nor did it really ever, live up to the ideal form of the nuclear sexually focused family behind a white picket fence. Married couples with children usually (but not always)[19] live together, creating the typical "Norman Rockwell" ideal of cohabitation. But, there are many more forms of cohabitation – room-mates, unmarried couples, grandparents living with children and grandchildren, parental figures living with extended kin, parents living with adult children, to name a few. And these other forms of domesticity also provide family supports of caring for dependents, providing mutual support and stability to participants. These varied forms of cohabitation may or may not come with legal rights and obligations that reflect, parallel or diverge from traditional family rights and obligations. For instance, on the one hand, living together may entitle cohabitants to a variety of welfare-based entitlements and zoning cases tend to view family as being formed by living together in a flexible manner. On the other hand, private rights and obligations between cohabitants are rare and when afforded do so almost always when coupled with sexuality. The lack of cohabitation may also have significance in determining the legal implications of family life. And, marriage itself need not include cohabitation at all. Isolating the significance of cohabitation thus allows a more precise analysis of the meaning of family and the nature of legal obligations in family life.

This article considers the nature of home sharing and how it affects the definition of family as part of the process of reframing the family form.[20] We argue for a separate and meaningful legal category of domesticity that can create legal status equitably across family forms. We believe that cohabitation can be an instrumental and progressive tool to recognizing diversity and heterogeneity. Cohabitation reflects the modern reality of diverse family forms and legal recognition can protect vulnerability and promote freedom of association. Such legal recognition should also be mindful of the potential dangers of imposing legal rules or structuring family life based merely on cohabitation. Taking into account these benefits and concerns, cohabitation can complement other formal frameworks that are becoming less relevant.[21] Indeed, rather than becoming obsolete due to the increasing popularity of same-sex marriage,[22] formal domestic partner registration systems can serve as a platform for recognizing diverse relationships in a

[19] *See generally*, Steve K. Berensen, *Should Cohabitation Matter in Family Law?*, 13 J. L. & FAM. STUD. 289 (2011).

[20] *See e.g.*, Shelly Kreiczer-Levy, *Informal Property Rights of Boomerang Children in the Home*, 72 MD. L. REV. 127 (2014) (discussing the potential property rights between members of intergenerational families).

[21] *See* Schneider, *supra* note 8.

[22] *See e.g.*, Wash. Rev. Code § 26.60.100 (2012) (Referendum Measure No. 74, approved November 6, 2012) (preserving domestic partners only for those over 62 years of age in light of the advent of same-sex marriage in Washington).

manner that includes sexual cohabitation but is not limited to sexual relationships. Thereby domestic partnership regulations can be made more relevant by expanding them to include cohabitants who are not necessarily having sex.

When people choose alternative forms of family formation through cohabitation, the state should step forward to recognize them for the security and stability that such relationships provide, and the way such family forms protect dependency, vulnerability and provide mutual support, further protecting the right to intimate association. In this manner, we seek to suggest that the state consider the prospect of alternative family forms based on the important act of home sharing in a manner that does not confine, threaten or exploit those who live together, but rather creates flexible legal structures that can account for both the benefits and potential threats of domesticity. Such family forms need not replicate or replace the institution of marriage, but create another structure in which family can be formed, dependency and vulnerability recognized, and intimacy can be supported.

In the first part, we will discuss the areas of family law in which cohabitation may be relevant – sexual couples and parenthood as well as the laws involving non-conjugal relations, laws of incest, elder law, welfare and tax law, zoning and rent control. We will point out how cohabitation is imbued with legal import inconsistently and with little theoretical justification. We point to how cohabitation is too often used as a proxy for sex when cohabitation is linked to legal familial status. Moreover, cohabitation has been used to create legal rights in relation to third parties such as the state in a much more expansive manner than it creates obligations between cohabitants. This distinction should be analyzed and family law should be more in line with other legal doctrines. On the whole, we conclude that cohabitation as a legal category has received too little attention and can be a useful tool to uncovering what is important in familial recognition.

In the second part, we define cohabitation as a separate legal category outside of the realm of sexual relations and sexual reproduction. We consider why, normatively, one might care about cohabitation and the benefits and support structure it provides. Cohabitation over an extended period of time that involves joint living creates a tangible amount of interdependency both financial and emotional. We rely on social science studies and empirical accounts to demonstrate the centrality and importance of home-life. Cohabitation provides varying degrees of interdependency, security and stability, support and intimacy among those who live together. These characteristics affect cohabitants regardless of sexuality. Home-sharing provides many of the benefits of a traditional nuclear family and thus is relevant in the state's support and recognition of alternative family forms. In this part, we will also consider potential drawbacks of creating legal categories based on cohabiting, in particular we discuss recent criticism against the domestic sphere as recreating privacy and hierarchy in a potentially dangerous manner. We also take seriously the legitimacy of other factors in recognizing the legal family. Therefore, our recommendations do not include broad recognition of cohabitants as

a legal family but nuanced and limited recognition as will be outlined in the third part.

In the third part, we lay out the different possibilities for how joint living should reflect family life in the law. Such perspectives will entail thinking of cohabitation as separate from sex and applying the legal category of cohabitation as we define it equitably among different family forms. In addressing these questions we propose a modest but significant legal arena for cohabitation as one of several building blocks in creating a more diverse field of familial obligations. In particular, we argue that cohabitation when combined with economic sharing should result in certain property rights between cohabitants. And we argue that cohabitation coupled with caring may result in streamlined rights and obligations regarding children. Finally, cohabitation alone when not coupled with sharing or caring should be supported by the state through a system of registration. When formally registered, cohabitation should create certain mutual obligations between cohabitants as well as in relation to third-parties depending on the election of the parties involved.

We argue for consistent and principled use of cohabitation in creating family laws and avoidance of instrumentalist emphasis on traditionalist visions of the sexual nuclear family that prejudices the variety of cohabitant experiences. Cohabitation, we conclude, should either imbue or not imbue legal rights and responsibilities but should do so in a consistent manner that does not channel nuclear familial forms and prejudice alternative, supporting, home-based familial relationships. To the extent that we care about supporting nurturing relationships, if cohabitation promotes such relationships it should be used as an indicator of kin-like, family bonds, regardless of the way cohabitants conform to traditional notions of family.

## II. LEGAL IMPLICATIONS OF COHABITATION IN DEFINING THE FAMILY

Cohabitation plays a meaningful role in family law. Various legal doctrines attribute significance to the fact that people live or have lived together in shaping and defining familial rights and responsibilities. Yet, this recognition is sporadic and inconsistent. And, other doctrines fail to attribute any meaning to cohabitation at all. Indeed, other indicators of family, such as biology, marriage and functional care have been much more significant in forming family ties than cohabitation. In the absence of a clear rule with theoretical support, legal doctrines give varying degrees of weight and importance to cohabitation, ranging from treating it as the basis of legal rights and obligations, or as one factor in determining rights and obligations, to ignoring cohabitation altogether. A broad conceptualization of these differences, particularly in the context of considering cohabitation in a manner divorced from sexuality, that explains and justifies such distinctions is missing from

the literature.[23] Without such justifications, biases and hidden, unwanted assumptions may underlie these distinctions. Indeed, many of these rules only recognize cohabitation when it supports traditional perceptions of the family. Cohabitation is therefore often invoked when dealing with the sexual family or the functional equivalent thereof and yet ignored when involving non-traditional family forms. But, the legal import of cohabitation if used consistently can support legal recognition to a broader range of familial forms, creating rights and obligations beyond the sexual family. The progressive potential of cohabitation as a source of obligation that acknowledges new families and different lifestyles is largely overlooked in current legal analysis because it tends to reinforce traditional conceptions of the nuclear family.

In this part, we will first outline a range of legal doctrines, pointing to the varying legal significance of cohabitation. Then, we will describe how current doctrine inconsistently attributes significance to cohabitation, mirroring traditional notions of the sexual family and often downplaying cohabitation's progressive potential.

### *A. The Doctrine*

#### 1. Parenthood: Cohabitation as a Proxy for Care

Parents and children do not have to live together. Parents may get divorced or one parent move to other cities or countries, but they still remain legal parents of their children. And, increasingly, children are born out of wedlock and never live with their parents at all.[24] While many parents live with their children, creating a clear and logical association between parenthood and cohabitation, there is no requirement to cohabit with a child in order to be recognized as a legal parent. Cohabitation between parents and children is necessary to provide for their care and safety, but as long as one parent or an agent of such a parent resides and cares for the child, legal parenthood is not broken for lack of cohabitation. If both parents were to abandon their child, neither living with the child nor providing for their habitation with a responsible adult, this would constitute abuse and neglect, threatening and ending the legal relationship between parent and child.[25]

[23] In the context of cohabitation that assumes sexuality, Cynthia Bowman has considered legal recognition in depth. *See* Cynthia Bowman, *Legal Treatment of Cohabitation in the U.S.* 26 L. & POL. 119 (2004).

[24] Sara S. McLanahan & Irwin Garfinkel, *Fragile Families* 144 *in* MARRIAGE AT THE CROSSROADS (2012) (although more than half of children born out of wedlock are born to cohabiting couples).

[25] *See* 59 Am. Jur. 2d Parent and Child § 34 (1987). For examples of how states define child abuse and neglect, see generally U.S. Department of Health and Human Services, Administration for Children & Families, Child Welfare Information Gateway, What Is Child Abuse and Neglect? (2008) (available at https://www.childwelfare.gov/pubs/factsheets/whatiscan.cfm.) The Juvenile Court Act of 1996, U.C.A. 1953 § 78A-6-105(1)(a) defines "[a]buse" as "(i) non-accidental harm of a child; (ii) threatened harm of a child; (iii) sexual exploitation; or (iv) sexual abuse." § 78A-6-105(25)(a) defines neglect, in relevant part, as "(i) abandonment of a child ...; (iii) failure or refusal of a

Thus, although cohabitation is certainly not required for defining legal parenthood, providing for cohabitation with a child is a necessary element of retaining parenthood.

The importance of cohabitation in defining parenthood can be seen in other modern developments in family law. Cohabitation has been recognized as an important component in the definition of parental roles in the context of functional parenthood. For example, the ALI's Principles of Family Dissolution proposes two new legal statuses for parents: parent by estoppel and de facto parent.[26] These statuses acknowledge the parental status of parties who function as parents without a biological or formal legal relationship with the child. A de facto parent is an individual who although not acknowledged by the legal parent as a co-parent, provides the majority of caretaking for a child, or at least as much as a legal parent with whom the child primary lives and who has lived with the child for a significant period of time, a period of at least two years.[27] A parent by estoppel is acknowledged by the legal parent as a co-parent and is obligated to pay child support or an individual who, among other things, has lived with the child for at least two years, or since the child's birth.[28] Thus, in order to be considered an alternative form of parent, living with the child is, for the most part, essential according to the ALI Principles and the cases that have established de facto or parenthood by estoppel modeled on the ALI Principles.[29] Co-residence is understood in such contexts to strengthen relationship and reflect commitment.

While underneath the functional parenthood status of the ALI Principles it is functioning as a parent and caretaking that is essential to the functional parenthood statuses of de facto parenthood and parenthood by estoppel described above, cohabitation is used as a required indicator of the intensive caregiving relationship that must be established to create these parental statuses. There are other situations in which cohabitation can be used as a strong indicator of required care. Opening one's home to a child can also be considered as accepting a commitment to care for him or her in the context of establishing paternity. According to California's family code, a man is presumed to be a child's natural father if "[H]e receives the child into his home and openly holds out the child as his natural child."[30] In re Nicholas,[31] the

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parent, guardian, or custodian to provide proper or necessary subsistence, education, or medical care, or any other care necessary for the child's health, safety, morals or well-being ...."

[26] Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03(1) (American Law Institute 2002).

[27] *Id* at §2.03 (1) (c).

[28] *Id* at §2.03 (1) (b).

[29] *See e.g.*, V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000) (cohabitation is one of the four required elements for obtaining the status of de facto parent); A.F. v. D.L.P 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001) (cohabitation element not met for creating de facto parenthood relationship and obtaining visitation rights).

[30] Calif. Fam. Code § 7611 (d).

court emphasizes the importance of co-residence by conflating love and home: "[w]hile his presumed father is providing *a loving home* for him, his mother has not done so, and his biological father, whose identity has never been judicially determined, has shown no interest" [emphasis added].[32] In addition, the Uniform Parentage Act § 204(5) creates a presumption of paternity to an unmarried man who for the first two years of the child's life resided in the same household with the child and openly held out the child as his own. The home therefore serves as a metaphor for accepting a child into one's most intimate space, providing him or her physical and emotional shelter, and thus signaling that you treat that child as your own.[33]

Thus, we see that when steps are taken to imbue non-traditional family forms with legal meaning, cohabitation is used as a proxy for ensuring a minimal level of caregiving as well as reflecting the traditional nuclear family form. Using cohabitation as a proxy for caregiving may be seen as a tool for progressive family formation by imbuing new familial forms with legal status.[34] We contend, however, that, *requiring* cohabitation in order to create familial status can exclude other forms of family formation when appropriate that do not parallel the cohabitation usual in the traditional nuclear family.[35] Making cohabitation a requirement could undermine other deep-seated functional care relationships. In this context, we thus see how cohabitation can be used to create new family forms and yet also be used to ensure certain traditional parallels with the sexual family.

*2.* Partnership: Cohabitation as a Proxy for Sex

The cohabitation of married or unmarried couples is legally significant in a number of important ways. In essence, it is used as a proxy for functioning sexual relationships. For instance, when a married couple shares a home, it raises the presumption that the relationship is working well enough to be left alone. In other words, cohabitation protects the sexual family from legal interference. As

[31] 46 P.3d 932, 941 (Cal. 2002).
[32] At 933.
[33] For other cases that emphasize co-residence, see Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kinnard v. Kinnard 43 P.3d 150, 151 (Alaska 2002).
[34] In re Custody of H.S.H.-K., 193 Wis. 2d 649, 533 N.W.2d 419, 435–436 (1995) (four prong test including cohabitation for determining psychological parenthood) Middleton v. Johnson, 369 S.C. 585, 633 S.E.2d 162 (Ct. App. 2006) (granting visitation to mother's former boyfriend, who fulfilled the 4 prong test for being a de facto or psychological parent); Surles v. Mayer, 48 Va. App. 146, 628 S.E.2d 563 (2006) (mother's former boyfriend, who had cohabited with her for three years and been the functional equivalent of a stepparent had standing as a "person with a legitimate interest" to seek visitation); In re Parentage of L.B., 122 P.3d 161 (Wash. 2005); V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000).
[35] *See* A.F. v. D.L.P., 771 A.2d 692, 694-696 (N.J. Super. Ct. App. Div. 2001) (lack of cohabitation precluded psychological status after long-term caregiving relationship); T.F. v. B.L., 813 N.E.2d 1244, 1254 (Mass. 2004) (lack of cohabitation, as well as duration of relationship, precluded an award of visitation).

McGuire v. McGuire famously determined, courts will normally not enforce a financial support duty if the married couple is cohabitating and not legally separated.[36] Similarly, in California, as well as other states,[37] when spouses live together the husband is conclusively presumed to be the father of any child born during their cohabitation. If a married couple is living apart at the time the child is born, the husband is only the presumed father of the child.[38] Thus, cohabitation creates a signal that the marriage is essential functioning as it is supposed to be, buttressing the formal marital status.

When formal marital status does not exist between conjugal couples, cohabitation could take on even more significance, although the level of such significance is deeply contested. Without formal marital ties to establish relationships, cohabitation can be used to establish legal recognition and status in a manner similar if not equivalent to marriage.[39] According to some laws, cohabitation is a necessary element in recognizing commitments between parties when a couple is not married. Legal status is attributed to cohabitants even without registration as domestic partners in the state of Washington,[40] and in a number of foreign countries,[41] as well as according to the recommendations of the ALI Principles. [42] According to the ALI Principles, the division of property between domestic partners should be the same as between a married couple, unless it is proven that, despite living together, the couple did not "share a life together as a couple."[43] Scholars have similarly advocated for imposing the legal status of cohabitation on cohabitants regardless of registration in order to protect vulnerable parties.[44] For instance, Cynthia Bowman argues that many

[36] McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).
[37] Presumption of Legitimacy of Children Born After Annulment Divorce or Separation 46 A.L.R.3d 158; Michael H. v. Gerald D., 491 U.S. 110 (1989).
[38] Cal. Fam. Code § 7540 (2010). The presumption can be rebutted by scientific evidence. See Berenson, *supra* note 19 at 288.
[39] *See e.g.*, Shahar Lifshitz, *Married against Their Will? Toward a Pluralist Regulation of Spousal Relationship***,** 66 WASH. & LEE L. REV. 1565 (2009).
[40] Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995) (providing property distribution for committed, intimate, unmarried cohabitants); *See also* Van Allen v. Weber, No. 42169-1-II, 2012 WL 6017690 (Wash. Ct. App. Dec. 4, 2012); Ross v. Hamilton, No. 39887-7-II, 2011 WL 1376767 (Wash. Ct. App. Apr. 12, 2011).
[41] The Danish Registered Partnership Act, No. 372 (Denmark 1989); for Israeli law see Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate* 22 BYU J. PUB. L. 359 (2008); for Austria, Germany Norway see Brienna Perelli Harris &Nora Sánchez Gassen, *How Similar are Cohabitation and Marriage? Legal Approaches to Cohabitation across Western Europe* 33 POPULATION & DEVELOPMENT REV. 435 (2012).
[42] ALI Principles chapters 6, 7.
[43] ALI Principles § 6.04 (American Law Institute 2002).
[44] CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW AND PUBLIC POLICY (2010); *See also* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); see alsoWilliam Reppy,

of the benefits awarded to married couples should be extended to unmarried cohabitants, if they lived together for more than two years and had a child together.[45]

However, in the vast majority of cases in the U.S., cohabitation alone is not reason enough to award one partner a share of the property accumulated during the cohabitation period by the other partner even when cohabitants are intimate.[46] Indeed, until fairly recently, in many states in the U.S. unmarried cohabitation was a criminal offense and contracts between unmarried cohabitants were considered unenforceable.[47] Since the landmark case of Marvin v. Marvin,[48] courts have enforced express and even implied agreements between cohabitants, if and when they can be proven.[49] But many states will not allow implied contracts between cohabitants, although some may still accept narrow unjust enrichment claims.[50] And, cohabitants seeking to enforce a *Marvin* contract have had limited success due to lack of evidence that an agreement or an unjust enrichment actually existed.[51] At best, the inquiry in such cases seems to be whether the cohabitation mirrors a marital relationships and the closer it comes to marriage, the better chance at succeeding in a *Marvin* claim.[52] However, creating an actual legal category that would apply to cohabitants based on their actions alone has only been minimally adopted in the U.S. although it is

Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984); Ira Mark Ellman, *"Contract Thinking" Was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001)

[45]Bowman, *id*.

[46]Following the rule set in Marvin v. Marvin, Berenson, *id* at 297.

[47] *See* Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165 (1985); William N. Eskridge, *Family Law Pluralism: The Guided Choice Regime Of Menus, Default Rules and Override Rules*, 100 GEO L. J. 1881, 1928 (2012).

[48] Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

[49] *See e.g.*, Levar v. Elkins, 604 P.2d 602 (Alaska 1980); Carroll v. Lee, 712 P.2d 923 (Ariz. 1986); Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000); Burns v. Koellmer, 527 A.2d 1210 (Conn. App. Ct. 1987); Mason v. Rostad, 476 A.2d 662 (D.C. 1984); Glasgo v. Glasgo, 410 N.E.2d 1325 (Ind. Ct. App. 1980) (implied contract for support but not property sharing); Tyranski v. Piggins, 205 N.W.2d 595 (Mich. Ct. App. 1973) (cautious application of this rule); Kinkenon v. Hue, 301 N.W.2d 77 (Neb. 1981); Hay v. Hay, 678 P.2d 672 (Nev. 1984);*In re* Estate of Roccamonte, 808 A.2d 838 (N.J. 2002); Collins v. Davis, 315 S.E.2d 759 (N.C. Ct. App. 1984),*aff'd per curiam*, 321 S.E.2d 892 (N.C. 1984); Beal v. Beal, 577 P.2d 507 (Or. 1978); Knauer v. Knauer, 470 A.2d 553 (Pa. Super. 1983); Doe v. Burkland, 808 A.2d 1090 (R.I. 2002) (imposing property sharing but not contractual support payments); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

[50] Crooke v. Gilden, 414 S.E.2d 645 (Ga. 1992); Wilcox v. Trautz, 693 N.E.2d 141, 145 n.3 (Mass. 1998);Merrill v. Davis, 673 P.2d 1285 (N.M. 1983); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980).

[51] *See e.g.*, Merle Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILLA. L.. REV. 135, 144-146 (2014).

[52] Eskridge, *supra* note 47, at 1930.

more popular in other countries.[53] The reasons for avoiding imposing such a status upon cohabiting couples, absent some finding of a contractual obligation, is that it is considered paternalistic and an imposition on the autonomous choice to be in a relationships that is different from marriage and does not have similar rights and obligations.

On the other hand, there are a growing number of states that have some form of registration for domestic partnerships that provide legal status to unmarried cohabitants.[54] Once cohabitants register as domestic partners, they enjoy some or all of the benefits of marriage depending on state law. A number of the domestic partner laws are intended only for use by homosexual couples.[55] Others provide for registration only for intimate couples, whether heterosexual or homosexual, by prohibiting partnerships between family members.[56] Some civil union statues do not require cohabitation but other domestic partner statues are based on and require joint domesticity, thus the terminology: "domestic partners."[57] These registration systems have a variety of requirements based on age, biological relation and numbers of persons as well, but all are intended for sexual couples whether same-sex or opposite sex.[58] Some proposals do not require domestic partners to be conjugal, although U.S. state law has not adopted this version of domestic partnerships.[59]

Cohabitation can also be used to prove the existence of marriage-like relationships when couples are not registered as married. When the act of being married itself is prohibited by law, such as in the case of antiquated laws against misogyny and modern laws against bigamy, cohabitation may be evidence of marriage. If marriage is not available to a couple due to laws that makes such marriages illegal, how can persecution for breaking such a law be enforced? For example, if one cannot register to marry two wives, how can the existence of the second

[53] See, e.g., Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 483 (2007); In re Marriage of Pennington, 14 P.3d 764, 770 (Wash. 2000).

[54] *See e.g.*, Nev. Rev. Stat. § 122A.100(2) (2012); Wis. Stat. § 770.07(1)(a) (2012); Md. Code Ann., Health-Gen. § 6-101(a) (West 2012); D.C. Code § 32-702(a) (West 2010); Colo. Rev. Stat. § 15-22-104(1) (2012).

[55] DEL. CODE TIT. 13,§ 202 (2012); N.J. STAT. § 37:1-30 (2012); CAL. FAM. CODE § 297.5(a) (2011) (opposite sex couples may register only if one of them is over the age of 62.)

[56] *See infra* notes 226 - 228 and accompanying text.

[57] *See, e.g.*, N.J. STAT. § 26:8A-4 (2012); ME. REv. STAT. tit. 22, § 2710(2B) (2012) ("The domestic partners have been legally domiciled together in this State for at least 12 months preceding the filing.").

[58] *See e.g.*, California Family Code. According to CAL. FAM. CODE § 297 (domestic partners are two same sex adults, unrelated by blood and over the age of 18. Opposite sex adult can register if one or both of the persons are over the age of 62).

[59] *See infra* notes 227-228 and accompanying text.

wife be proven? Cohabitation and joint living have been therefore used as a proxy for a marriage that cannot be otherwise formally registered.[60] Similarly, when marriages are not registered, but one party argues that a marriage was intended in a state that recognizes common law marriage, cohabitation is important evidence of such intent. While the traditional elements of common law marriage boil down to intent to marry, capacity to marry and consummation of the marriage, and thus do not necessarily require cohabitation, in practice cohabitation is essential to proving intent and consummation of the marriage and thus is rarely if ever missing from couples adjudicated to be married by common law and has been included as a requirement in common law marriage statutes.[61]

Even those who support legal recognition with or without registration of unmarried cohabitating couples do not endorse a similar recognition of LAT (living apart together) relationships.[62] LAT is a form of committed relationship that does not include a shared residency. Some scholars consider it a new family form,[63] particularly suitable for older divorcees, widows and widowers that wish to develop intimate relations but still maintain a significant degree of autonomy.[64] This committed relationship that does not include cohabitation is not legally recognized by either the law or progressive calls for reform.[65] The lack of support for LAT relationships point to the relevance of cohabitation in modern configurations of expanding family forms at least among sexual couples. Although cohabitation alone has had limited influence as a legal status, the existence of cohabitation remains central to recognizing alternative forms of family life.

Domestic violence laws have extended their protection to non-married cohabitants that have conjugal relations in a manner that mirrors the sexual couple. Other cohabitants do not always enjoy specialized domestic violence protections. In Ohio, as well as other states, such cohabitation provisions in domestic violence protection orders can enable same-sex couples as well as heterosexual non-married

[60] *See e.g. See e.g.*, Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966); Loving, 388 U.S. 1, 4 (1967) (quoting Va. Code Ann. §20-58 (1960 Repl. Vol.) (explaining that cohabiting as man and wife in Virginia where mixed race marriages were permitted was taken as evidence of an illegal marriage).

[61] In re Estate of Love, 618 S.E.2d 97 (Ga. Ct. App. 2005) ("To constitute a valid marriage in this state, there must be – number one; parties able to contract. Number two; an actual contract an number three: consummation according to the law."); Piel v. Brown, 361 So.2d 90 (Ala.1978) (explaining that continuous cohabitation is an element of common law marriage in order to prove consummation of the marriage, which is sometimes listed instead of the elements of continuous cohabitation and holding out to the public as married).

[62] Irene Levin & Jan Trost, *Living Apart Together*, 2 COMMUNITY, WORK & FAMILY 279 (1999).

[63] Irene Levin, *Living Apart Together: A New Family Form?,* 52 CURRENT SOCIOLOGY 223 (2004).

[64] Sofie Ghazanfreeon Karlsson & Klas Borell, *Intimacy and Autonomy, Gender and Ageing: Living Apart Together*, 27 AGEING INTERNATIONAL 11 (2002).

[65] Berenson, *supra* note 19, at 318.

couples to benefit from domestic violence protection. [66] Thereby, same-sex couples were able to benefit from such laws despite the Ohio Defense of Marriage Law that prohibits recognizing same-sex marriages by constitutional amendment. The Ohio Supreme Court allowed that cohabitation -- at least when there are conjugal relations-- creates a separate legal category other than marriage that can benefit from the protection of the domestic violence statute.[67] Therefore, at least when same-sex couples are engaged in sexual relations in a manner that mirrors heterosexual conjugal relations, cohabitation allows same-sex couples a measure of recognition and protection.

However, room-mates, intergenerational families and other cohabitants who do not have sex do not benefit from the protections of domestic violence.[68] There is indeed something about the sexual intimacy that makes such protections particularly necessary. However, living together and sharing space even when not coupled with sex can make domestic violence similarly intimidating and problematic due to the joint living and interdependency that can create vulnerability. All "household" members could also benefit from domestic violence protections.

Regarding couples, cohabitation is therefore has limited legal impact that remains in the realm of the sexual family as it is used to create legal rights in the U.S. only among sexual couples. And, even among sexual couples the legal relevance of cohabitation is limited. However, cohabitation is still relevant in considering progressive reforms as can be understood from the lack of support for LAT relationships. Cohabitation has thus been primarily a conservative force that provides some rights and obligations in limited circumstances when conjugal unmarried couples act in a manner that mirrors married couples. This does provide some equity to those who choose not to marry, but the relief is limited to those in sexual relationships that come as close as possible to what traditional marriage looks like, including specialization, long-term commitment and joint expenditures. Couples that don't have sex anymore may still considered to be cohabiting, but the existence of a sexual component and the beginning of the relationships is essential.[69] Sexuality then is usually perceived as a key component of both marriage and cohabitation.[70]

[66] Ohio v. Carswell, 871 N.E.2d at 551, 554-555 (Ohio 2007)..
[67] *Id.* at 554.
[68] State v. Williams, 683 N.E.2d 1126 (Sup. Ct. Oh. 1997) (offense of domestic violence between cohabitants arises out of relationship, and not marital status, but must consist of consortium); Cleveland v. Johnson, 19 N.E.3d 604 (Ct. of App. Oh. 2014) (domestic violence between non-married couple where they are "living as spouse.")
[69] *Id*.
[70] Twila L. Perry, *The Essential of Marriage: Reconsidering the Duties of Support and Services*, 15 YALE J.L. & FEMINISM 1, 8-10 (2003); Steinberger v. Steinberger, 33 N.Y.S.2d 596, 597 (Sup. Ct. Bronx County 1940); Rubin v. Joseph, 213 N.Y.S. 460, 461 (App. Div. 2d Dep't 1926).

To sum up, under current law, cohabitation essentially depicts sexual relations without marriage. However, cohabitation could be the basis of a legal category that is much more expansive. However, currently, only sexual cohabitants benefit from even the limited legal support described above.

### 3. Capacity to Marry: When Biology and Cohabitation Conflict

At times, cohabitation is not used as a proxy for sex or care but rather conflicts with the norms of sexual reproduction. This is especially evident in incest. Step-children and adoptive children live with parents and non-biologically related children in a household. While the vertical authority between parents and children may be retained in a manner that mimics the sexual family, the biological link is clearly missing. Thus, the question becomes is cohabitation sufficient to create a family life that prohibits incest or is the sexual family the only real basis for prohibiting interfamily sexual relations? Indeed, although adopted children may be raised together with sexual children and be treated as "natural" children for nearly all intents and purposes, incest laws that prohibit marriage between siblings are not infrequently relaxed when blood is not involved.[71] Other states do include adoptive relatives in incest regulations.[72] But, on the whole if an adoptive child raised in the same household as a sibling would want to marry that sibling or even a parental figure, many states allow such marriages. Moreover, stepchildren who cohabit with their parents' spouses are not prohibited from marrying parental figures with whom they lived.

Accordingly, although cohabitation may be used as a proxy for family in certain situations, it is clearly a lesser category that can be put aside when biology and sexuality are missing. Cohabitation is merely a proxy for family and in many states is not recognized for the levels of intimacy that occur due to cohabitation alone. Such cohabitation and intimacy may make marriage between siblings through adoption problematic as sexuality and familial intimacy are intertwined. Home

[71] Israel v. Allen, 577 P.2d 762, 764 (Colo. 1977) (holding that state did not have legitimate interest in prohibiting marriage between siblings related by adoption); Ex Parte Bourne, 2 N.W.2d 439, 440 (Mich. 1942) (determining that a sexual relationship between a stepfather and his stepdaughter was not incestuous); Miesner v. Geile, 747 S.W.2d 757 (Mo. Ct. App. 1988) (allowing marriage between uncle and niece by adoption); In re Matter of Adoption of Adult Anonymous, 435 N.Y.S.2d 527, 529-31 (N.Y. Fam. Ct. 1981) (holding that because incest statute was inapplicable to parties without blood ties, adoption proceeding by two homosexual adults wishing to establish legally cognizable relationship was allowable); State v. Bale, 512 N.W.2d 164, 166 (S.D. 1994) (sexual relations with adoptive daughter did not constitute incest); Walter Wadlington, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 Va. L. Rev. 478, 483 (1963); *see also* Leigh B. Bienen, Defining Incest, 92 Nw. U. L. Rev. 1501, 1521-22 (1998).

[72] Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1141-42 (2003), at 1140 (citing Model Penal Code § 230.2 at 188-89 (Proposed Official Draft 1962)).

should ideally be a safe place for children in which sexual interaction is inappropriate. Preventing sexual abuse and exploitation of children relies on recognizing the intimate nature of the cohabitating family.[73] Indeed, potentially abusive sexual relations are much more common between parental figures and adoptive children or step-children than with biological children.[74] Such delicacy may be less relevant if siblings through adoption do not live in the same home, stressing how cohabitation creates an important element for consideration in family law. In laws of incest, blood relationships are obviously central, but the nature of intimacy in the home, particularly in the context of parenthood, is also worth considering with regards to capacity to marry.

4. Care for Dependent Relatives: New Parameters for the Cohabiting Family

For the most part, adult family members who live together without any other biological or legal connection have no special legal status or legal obligations to one another. The lack of sexuality or reflection of a sexual or reproductive relationship leaves the law out of these relationships altogether. The lack of legal status for adult family members who cohabit as well as room-mates demarks a clear differentiation between the sexual and asexual family.

One state however, has started to give some legal recognition to care for dependent relatives outside of the sexual family. The state of Illinois has a unique rule that encourages family members to live with their elderly or disabled relatives and care for them. To date, no other state has a similar rule.[75] Under certain circumstances, a relative who has provided in-home care will be able to bring a claim against the estate upon the death of the disabled person.[76] In addition, the court may authorize and direct the guardian of the estate to make conditional gifts from the estate that will be distributed after the death of the disabled relative.[77]

Generally, this provision allows family members to recover the "additional opportunity and emotional costs of committing their lives to

[73] Cahn, *id*, at 1140.

[74] Linda Gordon & Paul O'Keefe, *Incest as a Form of Family Violence: Evidence from Historical Case Records*, 46 J. MARRIAGE & FAM. 27, 30 (1984) (reporting on case records from 1880 to 1960, with nonbiological fathers including step-, foster-, and adoptive-fathers); Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 253 (2000); Margaret Mead, *Anomalies in the American Post-Divorced Relationships, in* DIVORCE AND AFTER 97 (1970) (preserving home and family for non-sexual affection).

[75] For a discussion of the Illinois rule and other, different, elder care rule in the law of succession see Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession*, 45 MICH. J. L. REFORM 761 (2012).

[76] 755 ILSC 5/18-1.1 (2008). For a discussion of the provision, see Heather M. Fossen Forrest, *Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers*, 63 LA. L. REV. 381, 401-407 (2003).

[77] 755 ILCS 5/11a-18.1 (a) (2008).

disabled relatives."[78] The legislature chose to encourage private care by rewarding immediate family members.[79] The provision does not deal with compensation for damages, but rather with awarding certain relatives for the "often unseen and intangible sacrifices made, and opportunities foregone"[80] when a family member commits his life to "making the lives of disabled persons better."[81]

A caretaker, according to the rule, is someone who "dedicates himself or herself to the care of the disabled person by *living with and personally caring for the disabled person for at least 3 years*." The court interprets these conditions strictly. Two and half years of care was deemed insufficient.[82] Also, living with the disabled was construed as not being equivalent to excessive visiting but requiring some sort of shared living arrangement.[83] The rule reflects an assumption that caring for someone becomes more dedicated, committed and beneficial when the caretaker resides with the disabled person. Cohabitation is thus indicative of commitment, and a necessary element in obtaining the gift. However, the potential of focusing on care, commitment and communal life is restricted only to immediate familial relationships, defined by marriage and biological relations.

According to the rule, in order to receive the gift, a caretaker must be "any spouse, parent, brother, sister, or child of a disabled person". The court has explained that this "class of people [is] most likely to provide dedicated residential and personal care with a loving and altruistic motive".[84] This justification reinforces the traditional definition of the family as the primary provider of care.. It leaves out two important care providers. First, in-laws are left out of the definition, despite the fact that daughters in law often provide valuable care to their parents in law.[85] Second, the definition currently excludes non-related caretakers. Thus, if the disabled person is cared for by a friend or longtime companion, this type of care will not be compensated.

The Illinois rule assumes that a clear distinction can be made between egoistic and altruistic motives. It is doubtful that such a clear line of separation can be made, especially considering the law gives a

[78] *In re* Estate of Jolliff 199 Ill 2d 510 (2002).
[79] *Id*, at 527.
[80] *Id* at 517.
[81] *Id*.
[82] In re Estate of Riordan, 351 Ill. App. 3d 594 (2004).
[83] Id, p. 596. Also see In re Estate of Hoehn 234 Ill. App. 3d 627 (1992).
[84] *Id*, at 523.
[85] *See* Deborah M. Merill, *Daughters-in-Law as Caregivers to the Elderly: Defining the In-Law Relationship* 15 RESEARCH ON AGING 70 (1994) (arguing that daughters-in-law assist with as many caregiving tasks and are as likely to perceive themselves as the primary caregiver. However, daughters-in-law provide, on average, 6 fewer hours of care per week compared to daughters); Also see Norma D. Peter Davies, Miriam S. Moss & Rachel A. Pruchno, *Children-in-Law in Caregiving Families,* 39 THE GERONTOLOGIST 66 (1999) (the experience of caregiving are very similar for biological children and children-in-law in caregiving families).

financial reward termed a "gift" for the care.[86] Yet, this line of reasoning reflects an important agenda. The value of personal care, not triggered by immediate consideration, is considered higher for the disabled person (and perhaps also for society) than hired care or even care that is done out of non-altruistic motives. Still, cohabitants of all forms who are caring for dependents, whether or not they are receiving immediate contribution may be essentially interconnected and engage in mutually beneficial relationships worth of legal recognition. Although limited, this statute presents a new vision for recognizing the need for legal support of cohabitants even in the non-sexual family.[87]

5. Welfare and Tax Benefits

Welfare benefits have important financial advantages for low i.ncome families. Tax benefits can be equally advantageous, for middle and high income families. Because these rights and benefits are occasionally awarded to a family and not to an individual, the legal definition of a family may prove to have considerable economic implications.

Stephen Sugarman argues that some public programs have a flexible definition of family, while others are stricter and fail to acknowledge diverse familial types.[88] An example of the inclusive approach is evident in food stamp benefits. Food stamp programs provide funds for low income families for the purchase of specific food items. The program is structured around household eligibility and employs a broad definition of the household.[89] According to U.S code § 2012, a household is "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption."[90] The definition looks into the living arrangement and the economic function of a group, instead of the parties' formal familial status. This broad recognition of informal relationships has been criticized and Congress even attempted to appeal this broad definition of household. In 1971, the Act was amended to deny food stamps from households containing adults that are not married to each other or otherwise related.[91] This amendment was challenged and eventually struck down by the Supreme Court. The court held that the new classification of household was irrelevant for the purpose of the act, as it excluded "those persons who are so desperately in need of aid that

[86] For a critique of rigid differentiation of commercial and intimate caregiving work, *see* Pamela Laufer-Ukeles, *Money, Caregiving and Kinship: Should Paid Caregivers be able to Obtain De Facto Parental Status?* 74 Mo. L. Rev. 25 (2009).

[87] *Cf.* HENDRICK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERENCE AND OLD AGE (2012) (discussing voluntary compensation for care through inheritance).

[88] Stephen D. Sugarman, *What is a "Family"? Conflicting Messages from Our Public Programs* 42 FAM. L. Q 231 (2008).

[89] *Id* at 241.

[90] 7 USC §2012 (m) (1).

[91] Sugarman, *supra* note 88 at 242.

they cannot even afford to alter their living arrangements so as to retain their eligibility."[92]

Similarly, public housing benefits employ a broad definition of the family. There are two major public housing schemes in the United States. The government either owns housing units that are available to people in need at low cost or subsidizes rent of privately owned units for families in need.[93] There are several requirements for eligibility for public housing. Yet, there is no requirement that there be a formal familial relationship. U.S. Department of Housing and Urban Development (HUD) regulations define a family as "a group of individuals residing together.[94]"

On the other hand, tax law has a much stricter understanding of a household. Federal income tax allows married couples to file "joint returns".[95] This rule allows married couples to combine resources for tax purposes, and gain an important financial advantage because of the progressive tax regime. Couples can therefore, if one of the two earns significantly less than the other, average down their income gain.[96] This advantage is only available for married couples and only recently extended to same-sex married couples.[97] Single parent families also enjoy tax benefits.[98] However, other adults who live together and pool their resources, such as unmarried couples or otherwise unrelated group of adults, do not enjoy the same potential benefits.

This section provided three examples of benefits given to a group of individuals that function as a single economic unit for a particular purpose. Food stamp programs and public housing schemes employ a substantive definition of household, focusing on cohabitation and the pooling of resources. Tax law, on the other hand, provides a formalistic definition, focusing on the traditional nuclear family. The distinction between benefits for the poor and the provisions of tax law that most effect the wealthy demonstrates incongruity and inconsistency and begs for explanation and justification.

### 6. Rent Control & Land Use: The Reframing of Cohabitation in the Realm of Property Law

#### *a. Rent Control*

Several states have rent control rules that serve as governmental housing regulations. New York City is particularly demonstrative, as it

[92] USDA v. Moreno, 413 US 528, 538 (1973).
[93] Sugarman, *supra* note 88 at 244
[94] 24 CFR §5.403. cf Madeline Howard, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97 (2007) (criticizing the effect of zoning restrictions on public housing benefits of low income non-traditional families. It is clear from the analysis that these types of families are indeed entitled to the benefits but are unable to integrate into stronger neighborhoods because of zoning laws).
[95] 26 USC § 6013(a).
[96] Sugarman, *supra* note 88 at 239.
[97] United States v. Windsor, 570 U.S. 12 (2013).
[98] Single parents can file as heads of households and gain the benefits of lower marginal rates. See Sugarman, *supra* note 88 at 239.

accounts for the city with the single largest number of rent control units.[99] Moreover, its exceptional rent control regulations have spurred discussion by legal scholars.[100] These regulations thus provide a rare example to explore the potential cohabitation holds as a legal category decoupled from the sexual family. It includes a uniquely broad definition of familial relations that includes people unrelated to the tenant by blood or marriage. In the 1980s, the New York rent control regulation § 2204.6 (d) provided that upon the death of a rent control tenant, the landlord cannot evict the surviving spouse of the deceased tenant or some other member of the deceased family who has been *living with* the tenant.[101] In *Braschi v. Stahl Associates Company*, the court considered whether a same-sex lifetime partner of the deceased tenant falls under the definition of "family" in the regulation.

The court in *Braschi* concluded that the term family should not be restricted to formal relations, but must take into account the reality of family life. The court also offered guidelines to distinguish between non-familial and familial relationships in the home. Among these guidelines are "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."[102]

The New York Rent and Eviction Regulations have since embraced these criteria. Current regulation stipulates that where a tenant has permanently vacated the housing accommodation and "such family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years," he or she will be protected from eviction.[103] The definition of family members is

[99] Edgar O. Olsen, *Is Rent Control Good Social Policy?* 67 CHICAGO-KENT L. REV., 931 (1991) ("Controls now exist in six states (California, Connecticut, Maryland, Massachusetts, New Jersey, and New York) and the District of Columbia. New York City accounts for thirty-nine percent of all rent controlled units; Los Angeles, seventeen percent; San Francisco, seven percent; and Washington, D.C., four percent."). Also, according to the New York Housing and Vacancy Survey of 2011, there were 1,025,214 rent regulated units in New York City. See http://www.census.gov/housing/nychvs/ .

[100] See John G. Culhane *A "Clanging Silence":Same-Sex Couples and Tort Law*, 89 KENTUCKY L. J 911 (2001); William B. Rubenstein, *We are Family: A Reflection on the Search for Legal Recognition of Gay & Lesbian Relationships*,8 J.L. & POLICY 89 (1991); Rebecca L. Melton, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of Family* 29 J. FAM. L. 497; Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269 (1991); Paris R. Baldacci, *Pushing the Law to Encompass the Reality of Our Families: Protecting Lesbian and Gay Families from Eviction from Their Homes - Braschi's Functional Definition of Family and Beyond* 21 FORDHAM URB. L.J. 973 (1994).

[101] *See* description in Braschi v. Stahl Associates Company 543 N.E. 2d 49 (NY 1989).

[102] *Id.*

[103] 9 NYCRR 2204.6 (d) (2012).

broad and includes formal relations, stepparents, in-laws and "any other person residing with the tenant in the housing accommodation as a primary residence who can prove emotional and financial commitment and interdependence between such person and the tenant."[104] Evidence of such commitment includes, for example, the longevity of the relationship; reliance on each other for the payment of expenses or common necessities; intermingling of finance; engagement in family-type activities and formalization of legal obligations.[105]

This innovative definition of family based on co-residence in the housing context provides a different model for defining family and imbuing family with legal meaning. The question is why this definition is confined to the property context and what benefit could it provide if used more broadly? It is worth considering the potential legal significance of interdependence and commitment described in the rental and welfare benefit contexts in other family law contexts. In particular, it is worth evaluating the proper relation between cohabitation and other relevant factors.

*b. Land Use*

Zoning law has gradually developed a capacious definition of the family that is based mostly on cohabitation. Interestingly, the judicial tendency to focus on cohabitation as constitutive of a family developed in order to counterbalance a restrictive approach of local zoning ordinances. Certain ordinances limit residence in local districts to families only, as part of a general land use planning. Occasionally these ordinances define the family narrowly in order to regulate occupancy and exclude various types of living arrangements from particular neighborhoods. In the case of *Moore v. City of East Cleveland, Ohio*,[106] for example, the zoning ordinance employed a selective definition of family.[107] The state did not recognize the Moore family, which included Mrs. Inez Moore, her son and two grandsons, Dale and John. John came

[104] 9 NYCRR 2204.6 (d) (3).
[105] *Id*.
[106] 431 US 494 (1977).
[107] Section 1341.08 (1966) provides:
"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
"(a) Husband or wife of the nominal head of the household.
"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.
"(e) A family may consist of one individual."

to live with his grandmother when he was a baby following his mother's death, and was a ten-year old child at the time the case was decided. [108] The household was not considered a family because John was not the offspring of the son with which she was living, but rather his nephew, bringing too many family lines to constitute one nuclear family.[109]

The United States Supreme Court struck down the ordinance, stating that the state cannot standardize people's preferences by "forcing them to live in certain narrowly defined family patterns".[110] The court also emphasized the importance of broader familial relations, including intergenerational ties.[111]

In *Borough of Glassboro v. Vallorosi*,[112] the ordinance defined family as "one or more persons occupying a dwelling unit as a single non-profit housekeeping unit, who are living together as a stable and permanent living unit, being a traditional family unit or the functional equivalency [sic] thereof."[113]The New Jersey Supreme Court had to decide whether a group of ten college students that share a home together constitute a family according to the ordinance. The students each had a separate renewable lease for a semester-long period. The students shared a kitchen, ate together and shared the household chores. They also had a common checking account to pay for food and other bills. All of them planned to live in the house until graduation. The court decided that these ten college students living together did constitute a family, because the occupancy shows stability, permanency and can be described as the functional equivalent of a family.[114]

The courts in zoning cases typically employ a broad definition of “family”. They therefore use criteria such as "cohesiveness and permanence"[115] or "stable and permanent living unit."[116]This type of judicial inquiry equates cohabitation with freedom of association due to the threat of public intervention in people's choice of home and cohabitants. Therefore, restrictions of these choices are interpreted narrowly and occasionally struck down. This broader interpretation of the family is quite progressive and distinct from the way obligations and rights are defined in traditional family law. Within family law, relationships are defined quite narrowly, with most-room mates, cohabiting non-conjugal adult family members and even sexual cohabitants having little if any legal connection at all. But, when dealing with regulations that rest in property and zoning laws, the definitions broaden.

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[108] 431 US 494, 507 (1977).
[109] *Id.*
[110] *Id*.
[111] *Id*, at 508.
[112] 117 N.J. 421 (1990).
[113] *Id* at 423.
[114] *Id* at 426.
[115] Penobscot Area Housing Development Corp v. City of Brewer 434 A. 2d. 14 (1981).
[116] Borough of Glassboro v. Vallorosi 117 N.J. 421 (1990).

Other land use issues that involve cohabitation include fair housing and choice of cohabitants. In *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*,[117] the court had to decide whether a Fair Housing Act applies to a commercial website that helps people find roommates. The website required users to disclose information about their sex, sexual orientation and familial status and matched potential roommates accordingly. The Fair Housing Council of San Fernando Valley claimed that this requirement violates the Fair Housing Act. The court determined, however, that if the Fair Housing Act were interpreted to apply to "shared living situations", it would deprive people of their constitutional right of association.[118] This right includes "the freedom to enter into and carry on certain intimate or private relationships".[119] There is no indication, the court explained, that Congress intended to interfere with relationships inside the home.

For the purpose of our analysis, we leave aside the more general problem of fair housing and focus on the portrayal of cohabitation. The court discusses intimacy in the home, and the inevitable compromise of privacy when living with others.

Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms […]The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. Roommates also have access to our physical belongings and to our person.

The court's analysis draws on central characteristics of cohabitation to portray a description of domesticity as a foundation for intimate relations. It expands the right of association beyond the sexual family into a more flexible definition of intimate relations. Most importantly, it recognizes the potentially intimate, interdependent, and meaningful "home" creating nature of cohabitation regardless of sexuality.[120]

Although we celebrate the part of the case that recognizes the potential of legal implications for non-familial cohabitation, we also recognize that recognition of cohabitation has to be contextual and meet minimal requirements for joint living. Thus, while people who live together may be cohabitating, they may also not be.[121]

[117] 666 F.3d 1216 (9th Cir. 2012).
[118] *Id*. For a critical analysis of the decision see Tim Iglesias, *Does Fair Housing Law Apply to "Shared Living Situations"? or the Troubles with Roommates* 22 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 111 (2014).
[119] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).
[120] We discuss the legal definition of cohabitation that we propose entailing minimum threshold requirements in further detail in Part III.
[121] *Cf*. Iglesias, *supra* note 118.

### *B. Making Sense of the Doctrine: From Proxy to Substance*

The analysis of the law of cohabitation reveals no unifying justificatory principle that explains when and how cohabitation affects family formation. Within the context of family law, the law focuses on legal recognition of the nuclear, sexual family, and uses cohabitation as a proxy for the sexual family when for some reasons formal indicators such as marriage or adoption are absent. These doctrines use cohabitation to extend rights beyond the traditional family in a limited manner and only in places that most resemble it. However, when such rights are in limited circumstances extended to unmarried conjugal families, whether due to a *Marvin* contract, registration system or other protective statutes, cohabitation remains central to recognizing the relevance of these alternative family forms.

In other laws related to family formation, biology and marriage also trump the relevance of cohabitation significantly. Elder care rules in Illinois only compensate spouses and relations of blood for providing care to dependent relatives. Similarly, rules concerning capacity to marry define incest as based mostly on biological affinity rather than the upbringing of children in the same home. Federal tax law limits the possibility of filing joint returns to married couples alone. In all these examples, cohabitation is rarely treated as an alternative foundation for intimate relations, but rather, when recognized at all, as one of the ways to establish the sexual family.

In contrast, other doctrines, such as rent control, land use law and food stamps, go farther in taking cohabitation seriously. Even when cohabitants are not biologically related and do not have a conjugal relation, the significance of living together is recognized by the law. Indeed, there is a substantial difference between legal doctrines that provide rights and benefits in a very limited manner to unmarried cohabitants and only when such cohabitants most mirror the sexual family and zoning and other administrative doctrines that employ a more expansive definition of the family.

In zoning, fair housing law and rent control, courts deal primarily with freedom of association. The issue at hand is often whether or not a person can choose his or her cohabitants. In all the land use cases reviewed above, cohabitants did not ask to be recognized as a family in terms of mutual rights and obligations, only to be allowed either to continue to live together or choose with whom they cohabit. Indeed, rent control regulations address the right not to be evicted from one's home. Similarly, public housing schemes and food stamps programs provide financial benefits to certain households. Yet, these regulations do not affect familial obligations *between* the parties, but rather a third party's (the landlord or the government) obligation to respect cohabitation. In contrast, doctrines concerning partnership, parenthood or care for dependents deal directly with attributing *familial* rights and obligations between cohabitants. The law recognizes plurality of lifestyle in the home usually when dealing with outside threats and not with internal domestic conflicts.

Based on the doctrinal analysis in this section, we draw the following non-exhaustive conclusions. First, given the contradictions and inconsistencies apparent in our analysis, cohabitation deserves a systematic and comprehensive legal analysis. It should be viewed as something substantive and not just a formal proxy for sexuality. Cohabitation does not necessarily involve sexuality and involves its own characteristics, interdependencies and benefits. Too often in family law doctrine cohabitation is only used as a proxy for the sexual family and is not given independent legal status. Thus, cohabitation should be separated from sexuality and given its own legal relevance.

Second, in some contexts, particular in family law, as when cohabitation is required as a factor in legal doctrine to prove de facto parenthood, cohabitation has a restrictive and conservative effect, acting as a mirror to the sexual family. In other contexts, requiring cohabitation may be logical in light of other factors involved. However, to the extent possible, particularly in the context of custody and visitation to children where caregiving is also an essential factor, cohabitation should act as a factor and not a limiting requirement in developing a modern doctrine of family law. Care should be taken when incorporating cohabitation to make it a force of progressive recognition of diverse familial forms and not a restrictive, traditionalist requirement.

Third, there are strong justifications that have been developed in administrative and property law for separating sexuality and cohabitation and recognizing how cohabitation affects emotional and economic interdependencies in relationships that could benefit from legal recognition in ways that have nothing to do with sexuality -- freedom of association and freedom of joint intimacy. Cohabitation tends to be more influential as a legal category as against third-parties as opposed to obligations and rights between cohabitants. Family law can benefit from the insights of administrative and property law in decoupling sexuality from cohabitation and recognizing the value of cohabitation divorced from marriage and sexuality.

## III. COHABITATION AS A LEGAL CATEGORY

Cohabitation is first and foremost a social phenomenon. It has social, cultural and psychological functions and is understood only against its social background. Because legal treatment of cohabitation has to be mindful of its social benefits and risks, this part looks into the phenomenon of cohabitation and examines its central features. It then explores whether cohabitation can serve as a separate legal category, and the various strengths and weaknesses of such an approach.

### *A. Scope of Inquiry and Legal Definition of Cohabitation*

Living arrangements in the United States have changed over time. It is therefore difficult to identify one predominant form of living arrangement. According to a report by the American census bureau,

there are a diverse number of household formations.[122] In 2012, 17.8% of American households included families whose householder was living with children or other relatives without the presence of a spouse. [123] Multigenerational households, consisting of three or more generations living together accounted for five percent of all family households,[124] although this percentage differed by race and national origin. According to the report, "multigenerational households made up 3 percent of family households with a White, non-Hispanic householder compared with 6 percent of those with an Asian reference person and 8 percent of those with a Black or Hispanic reference person".[125] Another household pattern includes parents living with an adult child. 16 percent of men and 10 percent of women aged 25-34 were living with their parents.[126] Finally, 6.1 percent of all American households included non-family households.[127] This data shows that cohabitation is a diverse phenomenon encompassing various living arrangements, including multigenerational and intergenerational households, a group of unrelated adults, and unmarried couples. Cohabitation outside of the sexual family seems to be more common in minority households, but represents a significant percentage of living arrangements overall.

Conceptualizing cohabitation as a proxy for spousal relations misses the richness and complexity of this social institution, and its potential to challenge traditional familial norms. One dominant form of cohabitation includes boomerang children living with their parents. As the recession deepens, the economic climate makes it harder for college graduates to become financially independent, and they therefore need their parents' assistance.[128] In addition, homeowners in their thirties and forties are sometimes forced to move back in with their parents due to foreclosure.[129] Economic hardship also serves to explain other forms of cohabitation. Roommates and other nonrelatives live together in order to save resources. In addition, an increase in life expectancy in Western Societies results in an increasing need of elderly people to live with

[122] Jonathan Vespa, Jamie M. Lewis, and Rose M. Kreider, *America's Families and Living Arrangements: 2012*, CURRENT POPULATION REPORTS, P20-570 (U.S. Census Bureau, 2013).
[123] *Id*, at 5. an unmarried partner of the parent may or may not be present.
[124] *Id* at 7. As opposed to non-familial households.
[125] *Id*.
[126] *Id*, at 9.
[127] According to the report "A *nonfamily household* can be either a person living alone or a householder who shares the housing unit only with nonrelatives—for example, boarders or roommates. The nonrelatives of the householder may be related to each other", id at 2. Yet, there is a different percentage for people living alone. According to figure 1 (at p. 5) 15.2% of households included women living alone, 12.3% included men living alone and 6/1 include nonfamily households.
[128] Hilary B. Farber, *A Parent's 'Apparent' Authority: Why Intergenerational Coresidence Requires a Reassessment of Parental Consent to Search Adult Children's Bedrooms* 21 CORNELL J. L & PUBLIC POLICY 39, 68-69 (2011).
[129] *Id*.

their families, as the family continues to be the main source of support for the elderly.[130] For all these reasons, cohabitation beyond spouses and children is an important phenomenon that deserves legal attention.

In considering the normative consequences of cohabitation, one must first define the scope of the exploration. Not all forms of living arrangements can be termed cohabitation. Some living arrangements are short-term and casual, with limited shared space and few social interactions. For purpose of this article, and the legal reforms we propose, we define with particular contours the term "cohabitation" or "cohabitants." In order for co-residents to be considered cohabitants, they must meet two prerequisites. *First*, the parties need to think of the arrangement as long-term, semi- permanent arrangements.[131] Even if they do not actually live together for a long period of time, the original expectations and overall intentions are important. The longevity of the arrangement is significant because it affects the willingness of the parties to invest in the home in a variety of ways, including emotional investment, sacrifices and contribution to the household. *Second*, when parties live together, the arrangement has to include some form of joint living. That is, the parties cannot live in completely separate spaces nor have very little contact.[132] They cannot be strangers that simply live under the same roof. Cohabitation is about interaction and sharing a home. Examples of joint living can include common activities, joint decision making, shared expenses and agreed-upon rules of conduct.[133] With this definition in mind, in the next part we consider the socio-legal attributes of sharing a home.

### *B. Social Science Explanation of the Substantive Importance of Cohabitation*

There is an array of interdisciplinary scholarship that focuses on the home. The research suggests that there are two main definitional approaches to the meaning of the home: home as a place of individual control and privacy, and home as a locus where one experiences social relations. These two core meanings have been studied in a variety of disciplines, including phenomenology, psychology, sociology and environmental studies.[134]

[130] Jose´ Miguel Latorre Postigo *The Co-residence of Elderly People with their Children and Grandchildren* 36 EDUCATIONAL GERONTOLOGY 330 (2010).
[131] For longevity in zoning cases, see Borough of Glassboro v. Vallorosi 117 N.J. 421 (1990). Also see Cynthia Bowman's suggestion regarding cohabitating couples. Bowman argues that unmarried couples should be awarded the same benefits as married couples provided they lived together for more than two years and had a child together. See *supra* note 44.
[132] *Cf* Iglesias, *supra* note 118 (arguing that not all types of shared physical spaces implicate intimate association). Also *see* Kreiczer-Levy, *supra* note 20
[133] Kreiczer-Levy, *id*.
[134] *See, e.g*., Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* J. L. SOC'Y 580 (2002) at 588 and fn 28.

The individual meaning of the home revolves around home as creating a sense of identity, belonging, permanence and continuity.[135] The home is a place that allows the occupier to create a personal environment that reflects her everyday needs and her individual taste.[136] It gives the individual spatial orientation; it allows comfort in locating oneself.[137] The home is potentially a haven; it is a place where one begins her journey, and it is a place to come back to. In addition, the home is probably the most significant site for privacy and autonomy in modern culture as well as legal reality.[138] The law celebrates this individual vision of home. Legal rules protect possession in the home, on the one hand, and privacy and freedom from intrusion, on the other hand.[139] It is a protected space where one is free to defend oneself from intrusion even with the use of deadly force.[140] This legal focus on privacy or possession reflects an ethos of the home as a castle,[141] a sphere where one is left alone and is completely free from outside threats: the state, creditors or landlords.[142]

Yet, a home is not just about control and autonomy. Relationships within the home are equally central to the definition of a home. Lisa Austin suggests that home is important for individual identity because it is a location that hosts important social relations.[143] The home enables interactions with others, either as guests and neighbors or the people one lives with.[144] Communication with others is a central characteristic

[135] Judith Sixsmith, *The Meaning of Home: an Exploratory Study of Environmental Experience* 6 J. ENVIRON. PSYCH. 281 (1986).
[136] Fox, *supra* note 134 at 599.
[137] *Id* at 593.
[138] *See* D. Benjamin Barros, *Home as a Legal Concept* 46 SANTA CLARA L. REV. 256 (2006) at 259-276, and especially 269-276.
[139] *See* Barros, id.
[140] *See e.g.*, Crawford v. State, 231 Md. 354, 190 A.2d 538 (1963) (citing common law rule that use of deadly force is allowed in the case of home intrusion); Barton v. State, 46 Md. App. 616, 618, 420 A.2d 1009, 1010-1011 (1980). (A man "is not bound to flee and become a fugitive from his own home, for, if that were required, there would, theoretically, be no refuge for him anywhere in the world."); Ohio S.B. 184 (September 30, 2008) (announcing the "castle" law in Ohio which permits residents to defend their homes using deadly force without the requirement of retreating); N.C. G.S.§ 14-51.3 (2011). Almost all states have such "castle laws."
[141] On privacy, see JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009). See also Barros, supra note 138 at 25; Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1100 (2009).
[142] *See, e.g*., Fox, *supra* note 134.
[143] Lisa M. Austin, *Person, place or thing: property and the structuring of social relations*, 60 *U. Toronto L. J*. 445, 451 (2010).
[144] Sixsmith, *supra* note 135; Sandy G. Smith, *The Essential Qualities of a Home*, 14 J. ENVIRON. PSYCH. 31, 39 (1994). *Also see* Shelley Mallett, *Understanding Home: a Critical Review of the Literature* 52 THE SOCIOLOGICAL REVIEW 62, 68 (2004).

of the home.[145] When asked to provide reasons why certain dwelling places were considered home, many respondents in a study performed by Prof. Sandy Smith's pointed to their relationships inside the home.[146] A related study by Judith Sixsmith found that the type and quality of relationships and the emotional environment which they afforded were significant aspects of the social dimension of home.[147] In fact, some respondents explained that the home would not be a home without their family.[148] Sixsmith develops an account of relationships in the home:

Thus, the social network built around a home and the relationships that create and are created in a home are of an utmost importance. […] It is familiarity with other people, their habits, emotions, actions etc., indeed the very knowledge that they are there, which creates an atmosphere of social understanding, whereby the person's own opinions, actions and moods are accepted, if not always welcomed.[149]

The interdisciplinary literature illustrates that living with people who are dear and near to heart is one of the qualities that make a house a home. Indeed, most people live with others.[150] Philosophers have similarly described the home as essentially being with others.[151]

Yet, relationships in the home can also be offensive and intrusive. Some feminist theorists critique legal emphasis on the home, arguing that the home can act as a prison for women.[152] It is defined as a "feminine spatiality", where women function as primary caretakers.[153] The home thus subjects them to traditional roles of tending to the needs of other members of the family.[154] In addition, it has been argued that the home is a physical setting "through which basic forms of social relations and social institutions are constituted and reproduced".[155] The association of home with the family confines human relations to a structure easily located and understood. It allows society to control the family, favor certain associations and encourage certain patterns of behavior, particularly those associated with the nuclear family.[156] Indeed, the legal rules reviewed above support the conclusion that legal

[145]Smith, *id*.
[146] *Id* at 37, 39.
[147] Sixsmith, *supra* note 135 at 291.
[148] *Id*.
[149] *Id*.
[150] *See*, generally, ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH ( 2008)
[151] *See* Mallet, *supra* note 144 at 81 (discussing Kuang Ming Wu and Buber).
[152] *Id*
[153] Lorna Fox, *Re-Possessing "Home": A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 435- 451 (2008).
[154] See discussion in at Fox, *Re-Possessing "Home"*, id.
[155] See Mallet's discussion, *supra* note 144 at 66, citing Peter Saunders & Peter Williams, *The Constitution of the Home: Towards a Research Agenda* 3 HOUSING STUDIES 81, 82 (1988).
[156] Cf Rosenbury, *supra* note 3. Also see Ethan Leib, *Friends as Fiduciaries* 86 WASH. U. L. REV. 665 (2009).

regulation of the home provides a channeling function in favor of preferred, nuclear, biological and marital family forms.[157]

Moreover, the home embodies both the benefits and risks of privacy.[158] Home life can be a shelter from the public sphere but it can also be dangerously protected from public scrutiny creating the setting for abuse of vulnerable parties, such as women and children.[159] The extent to which the home has been and continues to be potentially abusive cannot be ignored. Therefore, when discussing children in particular, cohabitation alone, we argue should not come with automatic rights only a presumption for limited rights when coupled with sustained care.

Even when not amounting to physical abuse or consecrating traditionalist family forms, cohabitation can mean intrusion, loss of privacy and even subordination. The dark side or at least non-intimate side of cohabitation must also be taken into account. For instance, sociological studies point to their difficulties in handling rules forced on them by parents. [160] Children often experience the loss of privacy and autonomy, and an inability to influence decision making in the home. [161]Parental rules regarding sexual relationships at home, requirements concerning information on children's whereabouts, and control of domestic spaces by parents are all indicative of loss of autonomy and independence. [162]Living with others in these cases poses a threat to intimacy and solidarity. In addition, in certain cases people live together without enjoying intimacy and interdependency. People sometimes live together simply because it is convenient. Under the current reality of recession, and in light of economic hardship, sharing a home clearly offers financial gain.

Both these potential benefits and risks should inform legal rules. From a legal perspective, the social phenomenon of cohabitation holds certain advantages as a foundation for familial rights and obligations. First, cohabitation can be used as a *proxy for intimacy*. One of the biggest challenges of family law is how to define the family in a way that truly allows for freedom of association.[163] An inclusive, progressive definition of the family should go beyond the sexual family.[164] On the

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[157] *See supra* Part I.

[158]*See generally* Jeanine Suk, *Is Privacy a Woman?* 97 GEORGETOWN L.J. 485 (2009) (discussing the problematic nature of privacy in the home).

[159] *See* Robin Fretwell Wilson, *Undeserved Trust: Reflections on the American Law Institute Treatment of De Facto Parents, in* RECONCEIVING THE FAMILY: CRITIQUING THE AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAWS OF FAMILY DISSOLUTION 90 (2012).

[160] Naomi Rosh White, *"Not Under My Roof": Young People's Experience of Home*, 34 YOUTH & SOCIETY 214, 217 (2002).

[161] *Id*.

[162] *Id*. *Cf* Evie Kins et al. *Patterns of Home Leaving and Subjective Well Being in Emerging Adulthood: The Role of Motivational Processes and Parental Autonomy Support*, 45 DEVELOPMENTAL PSYCHOLOGY 1416 (2009).

[163] *See supra* notes 8 - 16 and accompanying text

[164] *Id*.

one hand, in creating a more inclusive approach to family, the law looks for ways to recognize intimacy in informal relations and to provide rights and obligations to intimate associations that are not formally recognized or supported under current legal rules. On the other hand, it is extremely difficult to discern between different levels of intimacy and commitment.

For example, Laura Rosenbury has argued for legal recognition of friends as providing familial functions of care and support.[165] Yet, arguably, there are all kinds of friends. We have "convenience friends and historical friends and crossroad and cross-generational friends and friends who come when you call them at two in the morning".[166] We share a certain level of intimacy with all of them, but the intensity of the relationship and the degree of our commitments vary greatly. Thus, Rosenbury's insight about the nature of friendship and the intimacy involved is important. But, capturing the right level of intimacy in granting legal recognition to friendship can be tricky. Recognizing friendship is likely to be difficult to discern and potentially under and over inclusive.

It is against this background that cohabitation can, at least potentially, open up new possibilities for capturing different forms of intimacy. Cohabitation can serve as a good proxy for close, intimate relationships for three central reasons. First, many people live together because they enjoy each other's company, trust one another and want to share their lives. Cohabitation demonstrates intimacy because when living together is long-term and characterized by joint living, it signals *commitment* between the parties involved. While intimacy is often taken to mean privacy, it also means commitment to ongoing shared experiences that includes caring about the other and investment in a relationship.[167]

Second, sharing a home itself creates intimacy between the cohabitants involved. Long term relationships in the home tend to be *interdependent* both economically and emotionally.[168] Cohabitants rely on each other for the payment of expenses or common necessities, and occasionally even have intermingling funds.[169] In addition, they may

[165] *Supra* note 156.

[166] For several categories of friendship, see JUDITH VIORST, NECESSARY LOSSES - THE LOVES, ILLUSIONS, DEPENDENCIES, AND IMPOSSIBLE EXPECTATIONS THAT ALL OF US HAVE TO GIVE UP IN ORDER TO GROW 170 (1998).

[167] *See* Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, Summer 1975 PHIL. & PUB.AFFAIRS 26, 33.

[168] For property's role in creating communities, see Eduardo M. Peñalver *Property as Entrance*, 91 VA. L. REV. 1889 (2005).

[169] Legal rules distinguish between familial and non-familial relationships in the home based on, among other things, emotional and financial interdependency. See Braschi v. Stahl Associates Company 543 N.E. 2d 49 (NY 1989). ("the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services"). Also see

engage in common activities, enjoy spending time together and rely on each other's care and support when necessary. Cohabitation signals the intent to have such a relationship and the act of cohabiting furthers the nature of the intimate relations by creating sharing and interdependency over time.

Third, cohabitation adds a level of *dependability* to a relationship. Cohabitants share a physical setting that is also perceived as one's most private and intimate spatiality. Living together instills stability and constancy, because the parties are grounded in the same location, a location that is often associated with roots and permanence.[170] Home invests a person's life with stability and is a condition for physical safety.[171] They are thus physically connected, and are bound to interact with one another on an ongoing long-term and semi-permanent basis.

Relationships in the home encapsulate a promise and a risk. The promise is opportunity to recognize the intimacy created when people live together as its own foundation for familial rights and obligation, in a way that frees us from traditional boundaries. At the same time, cohabitation poses the risk of creating an illusion of an open definition when in actuality only replicates the same traditional structure or even worse creates realms of privacy that hide abusive behaviors. Both the benefits and dangers must be kept in mind.

Overall, we believe that recognizing cohabitation as a legal category makes sense because of the important elements of intimate association that it captures: commitment to an ongoing relationship, interdependence and stability. Thus, in expanding our notions of family and exploring a more progressive vision of the family form, cohabitation provides an important focal point. It is an excellent signal for commitment and intimacy and inherently creates intimacy, stability and interdependency. Thus, it should be part of the vision for expanding the family form.

However, the conformist, conservative and potentially dangerous potential of providing legal significance to cohabitation should also be kept in mind in crafting appropriate rules. For instance, cohabitation as a requirement for family can do more harm than good in expanding family forms. Intimacy in family life and strong relationships that need to be recognized can exist without cohabitation. And, imposing familial obligations on cohabitants in too broad a manner may not capture the nature of joint-living and trap people in relationships they did not intend. Moreover, when discussing children in particular, cohabitation alone should not come with automatic rights. Rather, cohabitation should only create a presumption for limited rights when coupled with sustained and significant levels of caregiving that must be demonstrated

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Principles of the Law of Family Dissolution: Analysis and Recommendations § 6.04 (American Law Institute 2002), and 9 NYCRR 2204.6 (d) (2012).

[170] See *supra* note 135 and accompanying text.

[171] See Penalver's discussion of land, in Eduardo Penalver, *Land Virtues*, 94 CORNELL L. REV. 829 (2009).

by the cohabiting functional parent.[172] Children's interests and the dangers of cohabitation need to be considered as well as the benefits and intimate relationships cohabitation creates. Thus, we attempt to create a nuanced approach to the legal significance of cohabitation which both captures the nature of the intimacy, commitment, dependability and interdependence involved, but does not go too far in trapping people in their domestic lives or assuming that only cohabitation is relevant in creating familial life.

In the next part, we will set out our vision for a consistent and meaningful legal recognition of cohabitation decoupled from sex that takes into account the risks and benefits of the legal recognition of cohabitation.

## IV. COHABITATION AND FAMILY FORMATION: CARING, SHARING AND FORMAL REGISTRATION

Theoretically, it is possible that cohabitation have little or no legal significance, as it does for the most part in mutual obligations in traditional family law or that it have overwhelming significance as the primary model for family formation. In between these extreme positions are many shades of gray and the potential to recognize cohabitation in some context and not others. We believe that given the centrality and importance of the home in people's lives described above, cohabitation should be a separate category with legal significance. Moreover, we believe in the importance of recognizing the legal status of cohabitants in a consistent manner, with different applications and levels of recognition justified and explained. However, the risks and dangers of focusing on cohabitation in family formation must also be kept in mind and cohabitation not have a coercive or confining impact. The normative account of cohabitation we describe aims to be progressive and to heed the risks of the historically conservative use of cohabitation. It looks to expand the definition of family using the legal category of cohabitation in a fluid and flexible manner that is less based on the rigidity of sexual and genetic relations, but not in an exclusive or coercive manner that tends to limit choice and intimacy instead of increasing flexibility.

In order to comport with the normative framework outlined above, the legal significance of cohabitation should be applied carefully in different contexts. In order to account for both the risks and benefits of cohabitation, a normative account has to consider the relevance of cohabitation together with other factors – namely, caring, sharing and registration – to justify imposition of rights and obligations in certain contexts and prefer autonomy in others. We provide three examples of how we believe the legal category of cohabitation should affect legal rights and obligations. We argue that it is appropriate to impose property distribution obligations upon cohabitants only when there is economic sharing in addition to cohabitation. Moreover, cohabitation

[172] Laufer-Ukeles & Blecher-Prigat, *supra* note 14, at 130-131; AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2000).

should be relevant in providing presumptive rights to visit with children, but only if there is also significant caregiving involved. Finally, cohabitation alone should create legal rights and obligations if the cohabitants register their status so as to capture their intent and commitment to the cohabitating relationship.

Cohabitation plays a different role in each of these examples. In the context of caring for children, cohabitating with children for whom one is caring demonstrates evidence of a deep and encompassing caregiving relationship that may be indicative of functional parenthood deserving of legal status.[173] However, cohabitation should not be a requirement for being awarded visitation or custodial rights depending on the context because requiring cohabitation can have a conservative effect on family formation and not reflect the variety of relationships formed. Moreover, custody decisions need to focus on advancing children's interests and thus cohabitation alone should not automatically come with visitation rights. Rather, cohabitation should create a rebuttable presumption of visitation when cohabitation is coupled meets minimum caregiving requirements. With regard to property distribution, the economic sharing often involved in cohabitation can justify imposing an equitable division of property upon termination of the cohabitant relationships. And, cohabitation is often a necessary element for imposing such a regime on non-marital relationships because it serves as the foundation for a shared household. Yet, the analysis does not preclude economic sharing outside the home.[174] Finally, cohabitation can stand on its own merits when parties formally agree to the legal status, explicitly incurring state benefits and certain mutual obligations upon themselves in a matter that is supported but not imposed by the state. Such a registration system can increase autonomy and not impose unwanted obligations on those who choose to enjoy the benefits of cohabitation.

We believe that state recognition of cohabitation in this manner is important to capture the intimate associations in new, more progressive forms of family life that are crucial to people's lives. There are two main ways the state can support cohabitants. One is to allow cohabitants to create formal legal relations between themselves through registration systems like PACs and to recognize such intimate associations in granting state benefits. This allows cohabitant to "opt-in" to family related benefits. The other is to impose or ascribe upon

[173] *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 14.

[174] *But see* Halley, *supra* note 15 (focusing on the broader concept of economic household, not necessarily including cohabitation, as the basis of family law) ("All household members may live in the same residence, or they may not. What is crucial is that households pool income and labor resources in that they allocate work responsibilities and income stream among household members for the purposes of reproducing both existing and new humans, securing social security, and contextualizing and distributing the costs and benefits of consumption."); Kelly, *supra* note 15 (focusing on economic sharing whether or not involving cohabitation as a basis for property distribution).

cohabitants rights and obligations due to the fact that they cohabitate like the ALI Principles of Family Dissolution suggests is appropriate.

Ascribing legal status that imposes rights and obligations is appropriate when there are vulnerable parties that need protection from the state. [175] Alternately, when the parties explicitly choose to create formal legal relations imposition of those autonomously chosen mutual obligations is appropriate. Cohabitation creates vulnerability when the cohabitant relationships include caring or sharing. When the intimate association involved in cohabitating results in caregiving for children or dependent elders with regard to which there is no formal legal connection, such care can create deep, intimate relationships between the dependent and the caregiver and economic vulnerability since such care is often unpaid and, in order to care, caregivers are likely to compromise their availability for paid market work. And, the emotional bonds that are created result in vulnerability because the relationship can be terminated at the whim of a formal legal parent or guardian.

When cohabitation leads to economic sharing and commingling this also creates vulnerability to non-married persons since property belongs to title holders and owners in a manner that does not take into account such sharing. Cohabitants can be evicted at will, and receive no compensation for their longtime sharing. Therefore, cohabitation combined with caring and/or sharing creates a strong reason for the state to step in and protect cohabitants. But, when there isn't caring or sharing, there is less vulnerability and therefore there should be greater reliance on the will of the parties. In such cases it is up to the state to provide recognition of these alternative family forms if the parties intend to create them but imposition is less justifiable. In fact, imposition can trap people in relationships they do not want or intend and act as a conservative force in tying people who live together into mandatory marriage-like relations.[176]

In the following parts we will give examples for how we believe the legal category of cohabitation should be applied. We develop three categories and consider the legal implications of cohabitation in each category. We conclude that when cohabitant is combined with caring or sharing, rights and obligations may be imposed due to the potential vulnerability involved. When cohabitation stands by itself, registration of status should be provided for and accepted by the state and default rules for such registration created.

[175] *See* MARTHA ALBERTSON FINEMAN, VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (2013); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J.L. & Feminism 1 (2008); Martha Albertson Fineman, *Feminism, Masculinities and Multiple Identities*, 13 Nevada L. J. 619, 619-620 (2013) (describing the vulnerability of the human condition and the subsequent need for state protection due to that vulnerability).

[176] Lifshitz, *supra* note 39, at 1572-1573.

### *A. Cohabitant Caregivers: Caring for Dependents in the Home*

Caring for dependents in the home is a modern reality as well as an ancient tradition. Although alternatives exist such as nursing home care for the elderly or boarding school for older children, home care for dependents is still a fundamental part of the lives of most people. At any given time, many families are caring in their home for dependent children and not infrequently for elderly and infirm relatives as well. This is a social phenomenon that has always been relevant for many households even if it didn't match the ideal nuclear family.

Providing care to children and other dependents creates a derivative dependency or vulnerability.[177] Home care to family members and other cohabitants is usually not paid and tine spent caring compromises market work increasing economic vulnerability. Moreover, caring stem from and furthers deep emotional bonds and attachments which affect both the cared for and the caregiver. Cohabitation strengthens the constancy and dependency on care as the home is normally the site of the care provided. Joint living engrains the dependency within the caregivers own home-life creating a joint household and communal caregiving relationship centered on the mutual home. And, the joint nature of the home makes ending such care not just a termination of that caregiving relationship but an end to the joint home that has served as the center of both the caregiver and dependent's lives.

When care is provided within the sexual family to children or between spouses the law has developed equitable means to contend with such economic and emotional vulnerability. Caregiving is a factor in property distribution and custody determinations when marital relationships end that explicitly takes into account these vulnerabilities.[178] Children's vulnerability is the focus of custody and child support determinations under the best interests standard.

But, when care is provided by those who do not have legal ties to the children involved, the care creates vulnerabilities to which the law gives no relief. Agreements might be made and payment provided but this is rare. Cohabitants in particular live together and share a home where caring for dependents is something that is naturally shared. Moreover, when children and even elderly relations are involved, sharing care work among those living in a joint household becomes part of the overall family life and not something that is contracted or paid for due to general distaste for commodifying intimate relations.[179] Thus, these cohabitant caregivers and the economic and emotional vulnerability that develops due to caregiving is left completely to the

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[177] FINEMAN, *supra* note 9.

[178] Unif.Marriage & Divorce Act § 307 (among other factors: "(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;); Solomon v. Solomon, 383 Md. 176 (2004).

[179] *See* Laufer-Ukeles, *supra* note **Error! Bookmark not defined.** a t90-93. Even if caregiving is paid, that should not disqualify caregiving figures whether cohabitant or not from obtaining de facto parental status and commensurate custodial rights depending on the situation. *Id.* at 94-96.

good will of those with legal ties to children, a fact that can often be harmful to children and to those upon whom they depend for care.[180]

Take for example, the facts of a New York case of In Matter of E.S. v. P.D.[181] This case dealt with a custody dispute over an eight year old child.[182] The mother and father of the child were married. The mother was diagnosed with cancer when the child was four years old. At that time the father asked the mother's mother to move in with him to help raise the child and to take care of the mother. The child's grandmother did so and cared for the mother and the child until the mother's death about nine months later and then stayed in the home to care for the child for three and a half more years. The grandmother was undoubtedly part of the home and was a cohabitant in accordance with our definition above, having no particular plans to leave the home and living in a joint manner with the child and the father. In addition, the grandmother cared for the child in an intimate and ongoing manner. The court describes the caregiving as follows:

"…the grandmother comforted, supported and care for the motherless child. She got him ready for school, put him to bed, helped him with his homework, cooked his meals, laundered his clothes, and drove him to school and to doctor's appointments and various activities, including gym class, karate class, bowling soccer, little league baseball and swimming class…."

Moreover for three years they even spent summers cohabiting together in the grandmother's summer house, maintaining the family structure that they had created even during vacations. But, eventually power struggles arose mainly about how to raise the child (strict versus more lenient) and the father asked the grandmother to move out and refused to let her visit with his eight year old son. After two months of no contact despite the grandmother's requests, he allowed some phone calls and highly supervised visitation the conditions of which led her to seek judicial recourse. The trial court granted the grandmother regular, unsupervised visitation despite the strenuous objection of the father. The case went to the highest court in New York as the father challenged the decision based on Troxel v. Granville's parental right's presumption.[183] The Court granted her visitation based on a best interests analysis and a grandparents statute that provided for grandparent visitation.[184]

The decision clearly came out right from an emotional perspective, although one could certainly argue that it does not sufficiently conform with the holding of Troxel v. Granville.[185]One way to rebut the

[180] *See* Pamela Laufer-Ukeles, *Separating Care from the Caregiver: Reuniting Children's Interests and Caregiver's Interests* (Nevada Law Journal, forthcoming)

[181] 863 N.Y.3d 150 (2007).

[182] *Id.* at 154.

[183] *Id.* at 155.

[184] *Id.* at 155-156.

[185] Troxel v. Granville, 530 U.S. 57 (2000) (there must be presumptive weight given to a parent's wishes in determining whether to allow grandparents to visit with children despite a parent's objection)

presumption or special weigh announced in *Troxel* in favor of parent's rights would be to lean on the cohabitant relationship. But, there was no particular focus on the relevance of the cohabitant relationship between grandmother, father and son. In this case, the cohabitation is central to the nature of the relationship among the parties although the decision focused on the biological relationship between the grandmother and the grandchild and the care provided. Cohabitation created a separate family unit and made the grandmother particularly vulnerable to the whims of the father as she had to vacate his house immediately while the child was at a friend's house and without an opportunity to say goodbye. This grandmother's entire life which was centered on the shared home established with her former son-in-law and grandson was uprooted because of a parenting dispute with the child's father. While we do not believe that cohabitation need be a requirement for obtaining visitation rights or establishing functional parenthood, cohabitant status is clearly relevant and, when combined with ongoing care, establishes a distinct legal connection among the parties. Therefore, cohabitation plus care as illustrated in the case of E.S. v. P.D., should provide a rebuttable presumption of visitation rights that would likely have avoided years of litigation in multiple courts. Cohabitation plus care can streamline a determination of functional parenthood and thereby accurately reflect the shared home that is often created in such scenarios. Custodial rights should be imposed protect the caregiver-child relationship from termination at the whim of the legal parent.

Cohabitants without biological relations with a child and who provide ongoing care to dependents should also have presumptive rights to visitation and possibly more depending on the nature of the relationship between children and formal parents. Most often, it is same-sex partners who are cohabitants with their sexual partners and their partner's biological child that seek judicial recourse for visitation once their sexual relationship with the biological parent ends.[186] Often these cohabitants have engaged in long-term parenting roles with children. Unlike in grandparent cases, in same-sex partner cases cohabitation is sometimes, although not always, a relevant criteria. However, when used it is looked to as a requirement as opposed to a presumptive factor in awarding visitation. Requiring cohabitation acts as a traditionalist tool, modeling the homosexual family on the ideal heterosexual nuclear family. A number of cases in the same-sex parent context have demonstrated how the requirement of cohabitation can be a traditionalist force.[187] Cohabitation need not be present in order to create functional parenthood status or rights to visitation. But, making it a presumptive factor acknowledges the ways that cohabitation creates

[186] *See e.g.*, Elisa B. v. Superior Court, 37 Cal.4th 108, (Cal.Rptr.2d 2005); Rubano v. DiCenzo, 759 A.2d 959 (Cal.Rptr.2d)

[187] *See e.g.*, A.F. v. D.L.P., 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001); T.F. v. B.L., 813 N.E.2d 1244, 1254 (Mass. 2004); *See* J.W. v. R.J.R., A-4440-08T1, 2010 WL 520505 (N.J. Super. Ct. App. Div. Feb. 16, 2010).

intimacy and interdependency and expresses ongoing commitment, creating a home where caregiving is shared and attachments created.

Even cohabitants without a sexual relationship with a legal parent or a biological relationship with the child should have their cohabitant status considered in determining whether they should be allowed visitation rights with a child once cohabitation ends. The nature of the shared home just as central to a family's life, caregiving relationships just as important, the attachments and sacrifice just as pronounced and the vulnerabilities produced by the prospect of ending the relationship or from economic sacrifice for the sake of caregiving just as significant as when there is a sexual relationship between parents. Both the child and the caregiver will suffer if their relationship is not recognized. And, again, such legal relevance if clear can help avoid harmful litigation.[188]

Visitation would reflect the nature of the relationship before the end of cohabitation and, as long as a formal parent is responsible for the child, be limited to visitation.[189] Moreover, judicial intervention should occur only at the end of the cohabitant relationship, which signifies a time of crisis for the child.[190] These rights are not waivable, transferable or subject to contract as they should be focused on children and relationships and not adult liberty rights. The primary fear of imposing such rights would be that it would threaten the parental rights of the child's formal parent, but for the sake of the children and the caregivers involved, such concerns should be set aside.[191]

Imagine two friends who cohabit and raise their kids together after they ended relationships with their children's legal fathers who are largely not involved in the children's everyday lives. Imagine, also, that although each mother is clearly the dominant parent for their own biological children, the friends share carpools, cooking, bathing and putting children to sleep depending on work schedules. Imagine one mother's relationship with the children deepens further as her friend has work assignments that result in frequent travel, creating increasing interdependency and emotional bonds between her and all the children.

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[188] Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 175–76 (1984); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 44 (1987) (" . . . custody litigation imposes clear and immediate harm upon children."); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 63 (1991) ("children have an interest in not being the subjects of long and bitter litigations to determine their custody. Many experts have expressed the view that litigated custody disputes can have a negative effect on children, often resulting in tension, uncertainty, and feelings of torn loyalties."); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 124 (1997).

[189] Laufer-Ukeles & Blecher-Prigat, *supra* note 14, at 472.

[190] *Id.* at 471-472.

[191] *See e.g.*, Troxel v. Granville, 530 U.S. 57 (2000). Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (holding unconstitutional Delaware's statute that allowed more than two parents based on functional caregiving because of the invasion of parental privacy involved).

If one biological family moves out due to a change in circumstance it would be assumed that the cohabitant would be allowed to visit with the child when she could. However, if that mother refuses the other woman visitation because of hard feelings, this could devastate the child and caregiver depending on the length of the cohabitation. The longer the cohabitation the more intimacy, interdependency and shared living that results in high levels of caregiving that should be recognized. But, the likelihood under current family law that cohabitants could obtain visitation rights to each other's children despite the intensity of care involved is unlikely,[192] although it has not been often tested.[193] If these friends were sexual partners, then states are starting recognize the possibility of visitation, whether same-sex or heterosexual. And, the ALI Principles seem to acknowledge the possibility that non-sexual, non-biological caregivers may be entitled to visitation, but in practice such awards have remained within the sexual families and others are not given standing. But sex does not have anything to do with caregiving relationship. It is a proxy for a committed relationship between adults and perhaps for intimacy of the home, but home sharing also is a good indicator of intimacy and commitment,[194] and thus sexuality should not be the only factor involved. Creating a cohabitant class that has presumptive rights to such visitation if intense caregiving is also involved can open up legal rules to alternative family lifestyles in a progressive manner. And, as long as cohabitation is not a requirement it can avoid providing rights only in a conformist, traditional manner.

To be clear, this rebuttable presumption must also take into account the risks of cohabitation – the risks that result from abuse and power struggles within the private sphere of the home. Therefore, the presumption toward visitation should only be applied when there is also a demonstration of significant functional care provided which would have to be demonstrated by the cohabitant caregiver seeking visitation. And, if there is evidence of abuse or neglect by such a caregiver, it is clear that such a presumption would be overcome. If, as Robin Wilson argues cohabitant boyfriends have high rates of abuse, any evidence of such abuse should be used to eliminate a claim for visitation.[195] Custodial decisions must always be made with children's interests at the

[192] *Cf. e.g.*, Jhordan C. v. Mary K., 179 Cal.App.3d 386, 397 (1986) (refusing to decide issue of whether a non-cohabitant friend of mother can be appointed as de facto parent to preserve future visitation rights despite the intent of friends to raise children together); Scott v. Superior Court, 843 Cal.App. 3 Dist. (2009) (refusing former cohabitant who provided significant care to father's standing to seek visitation with child).

[193] The rarity of non-sexual cohabitants asserting visitation rights on children reflects the traditional notions of who is entitled to such rights, usually associated with the sexual family. If the law took a more progressive approach, family structures could be channeled differently and people more willing to assert legal rights.

[194] *See* part II.B.

[195] *See* Wilson, *supra* note 159.

forefront. However, such concerns should not be used to totally ignore the importance of cohabitation either.

### *B. Commingling Property: Shared Economic Households*

Cohabitation contributes to a sense of physical safety and stability, and creates intimacy and interdependency. When cohabitation is coupled by [with?] comingling of property, income or labor, it becomes the foundation for a shared household; a single economic unit. Because of the communal nature of this type of cohabitation, parties are potentially vulnerable if and when the cohabitant relationship ends. When a cohabitant is both the formal title holder of the home and the principal economic provider, non-owner cohabitants will most often have no legal protection and will have the most to lose if the cohabitant relationship comes to an end. Unless cohabitants are married, non-owners will receive no proprietary or contractual interest in the home and be forced to move out. Their contribution to the household and to the communal efforts of the shared lives will not be recognized.

When married couples pool labor and income, the law acknowledges sharing by awarding equitable distribution of assets accumulated during the marriage.[196] Either through equitable distribution or community property rules, the law recognizes the economic functioning of the family in a way that extends beyond calculating financial contributions, incorporating in-kind labor and caregiving functions as well.[197] Property distribution rules in all fifty states value nonmarket contributions to the shared marital household, and the ALI principles although not binding, support going further and recognizing emotional stability, optimism and social skills.[198] Legal rules compensating non-market work at the dissolution of marriage are based alternately on partnership theory,[199] marriage as an egalitarian liberal community, [200]or as a way to compensate in-kind and caregiving contributions within a joint household that are otherwise not accounted

[196] *See* generally LYNN D. WARDLE & LAURENCE C. NOLAN, FAMILY LAW IN THE USA 247-248 (2011); JAY E. FISHMAN, SHANNON P. PRATT & WILLIAM J. MORRISON STANDARDS OF VALUES: THEORY AND APPLICATIONS 167-177 (2007).

[197] See discussion at Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property* 102 NORTHWESTERN U. L. REV. 1623, 1631 (2008) ("The most prevalent justification for the rule classifying spouses' earnings as marital is known variously as the partnership theory of marriage, the contribution theory, the joint property theory, or the marital-sharing theory") . Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 397; Helene S. Shapo, *"A Tale of Two Systems": Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 722 (1993); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 44 (1994).

[198] American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations §, § 4.09 cmt. c, at 735.

[199] *See* discussion in Motro, *supra* note 197.

[200] Carolyn Frantz &, Hanoch Dagan *The Properties of Marriage*, 104 COLUM. L. REV. 75, 103 (2004).

for.[201] Such compensation is particularly compelling when the couple commits to a joint life within a marriage.

Yet, while there are other forms of joint-living beyond marriage, equitable division rules currently apply only to married couples. Unmarried couples who comingle property, contribute nonmarket goods and share income are not entitled to such rights and benefits.[202] Even when they function as a single economic unit, in most states in the U.S. cohabitation of unmarried couples is not reason enough to award one partner a share of the property accumulated during the cohabitation period by the other partner. Even after the *Marvin* rule, proving implied agreements of economic sharing is difficult and often unsuccessful. [203]Indeed, there have been calls for reform that argue for extending similar rights to unmarried cohabitants.[204] Yet, even these suggestions are narrow in their scope and apply only to marriage-like, sexual relationships.

Alicia Kelly offers a more comprehensive view of economic sharing in families.[205] She supports recognizing sharing not only in intimate partnerships but also within intergenerational families. Kelly's focus is on the need for equitable distribution based on sharing behaviors generally, whether economic or through caregiving and not on the particular intimacy, interdependency created by cohabitation and the vulnerability it creates.[206] We believe that cohabitation in particular when combined with economic sharing creates the need for recognition due to the distinct benefits of intimacy and stability as well as the particular vulnerability it creates. Furthermore, the focus on cohabitation allows for a wider vision of the family than Kelly acknowledges because it goes beyond biological and sexual ties that are still the focus of Kelly's expanded vision of the family unit. The legal category of cohabitation acknowledges nonrelatives that function as a single economic unit. We look to anchor such unity and joint living in the home because it naturally generates a shared living experience that goes beyond sexuality and biology.

The facts of Frambach v. Dunihue make an excellent example of how joint-living solidifies and entrenches the need to compensate economic sharing. [207] Mr. Dunihue was a widower with seven children. The Frambachs were a married a couple that lived nearby with their four children. On one occasion, the Frambachs and the Dunihues waited out a hurricane together in the Frambachs' home. This arrangement proved to be so pleasant and agreeable that the two families decided to make it permanent. The three adults and their eleven children lived together in the Frambachs' home for nineteen years. During that period,

[201] ALI principles, supra note 198.
[202] *See* notes 46-50 and accompanying text
[203] *See* discussion at notes 51-52 and accompanying text.
[204] *See, e.g.*, Bowman, supra note 44.
[205] Alicia B. Kelly, *Sharing Inequalities*, 2013 MICH. ST. L. REV. 593.
[206] *Id* at 607.
[207] Frambach v. Dunihue 419 So. 2d 1115 (STATE 1982).

Mr. Dunihue made a number of physical improvements to the house, which was not suited for so many occupants as it was small and had no indoor plumbing. Although each of the men had a separate bank account, Mrs. Frambach had access to both accounts and decided which account would be used to pay a particular bill. The three adults also shopped together for clothes, furniture, and automobiles. They therefore comingled income and labor and each of these adults contributed to the household, physically and financially. This idyllic environment lasted for almost two decades until it ended abruptly. One day Mrs. Frambach called Mr. Dunihue at work and told him he had thirty minutes to move out.

Because Mr. Dunihue had no available remedy based on cohabitation and economic sharing, he had to resort to contractual arguments. He claimed that "the Frambachs had promised him a place to live for the rest of his life in exchange for his work,"[208] and requested that an equitable lien be imposed on the property. The trial court concluded that they were all a single family unit and that the fair result would be to make them tenants in common "right down the middle." The appellate court reversed the decision. The court felt compelled to deny such equitable distribution because it found no evidence of a promise or an agreement. Moreover, employing a narrow unjust enrichment perspective, the court explained that the only relevant question was whether Dunihue's "contributions exceed the value of the benefits received by him from the Frambachs,"[209] and the court suspected the contributions would prove equal. Thus, the contractual argument failed to provide the relief Mr. Dunihue requested and which seemed intuitively fair to the trial court. The nature of the joint household itself, however, was not sufficient cause for an equitable property distribution absent a finding of contractual agreement

The appellate court failed to acknowledge the value of cohabitation coupled with economic sharing that created a single economic unit. Just as in a joint economic household formalized by a marriage certificate, the Frambachs and Dunihues had built a community in the home that cannot be fully appreciated if we focus solely on an external valuation of contribution. The trial court rightly acknowledged the shared household, and each party's participation in a common and familial enterprise. When cohabitation ended, Mr. Dunihue became vulnerable because he lost his home, and the financial sharing that went with it. In this case, the home was not only a physical haven, but it also meant financial stability, sociability, intimacy and interdependency. Because Mr. Dunihue has no formal property or contractual rights in the home, the law failed to recognize his loss.

When cohabitation is coupled with economic sharing, a cohabitant with no formal rights should be entitled to legal protection, acknowledging her interest in the home, through rules of constructive

[208] *Id* at 1117.
[209] *Id.*

trust or an equitable lien.[210] Such legal devices are particularly relevant in securing equitable distribution for those who live in a shared space. However, parties can decide to explicitly opt out of this rule. Private contracting can be important as it allows property owners to open up their home to their extended family and friends and engage in economic sharing without fearing legal remedies. Much like married couples can, within limits, enter a prenuptial agreement to curtail default rules regarding equitable distribution,[211] so can other cohabitants opt to prevent the creation of a constructive trust or equitable lien in most circumstances. Hesitant parties can therefore continue to live together without necessarily making a legal commitment. However, due to the potential vulnerability involved, when no explicit agreement preceding the relationship exists, the constructive trust should be imposed when cohabitation is combined with economic sharing.[212]This default rule is important for two reasons. First, when cohabitants function as a single economic unit, the law should acknowledge the value of cohabitation. Default rules have a powerful expressive function by communicating the values promoted by the law.[213] Second, the rule imposes transaction costs the party who does not share the communal ideal of cohabitation and forces him to raise his objection and convince non-owner cohabitants to contract for equitable distribution.[214]

[210]On informal sources of property rights, see Joseph Singer, *The Rule of Reason in Property law*, 46 UC. DAVIS L. REV. 1369 (2013). For definition of these legal tools and their specifics see, e.g., Henry Monaghan, *Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity* 38 U. DET. L.J. 10 (1961).

[211] On prenuptial agreements see Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. Rev. 145, 153 (1998).

[212] For opt in versus opt out see generally Erez Aloni, *Registering Relationships* 87 TUL. L. REV. 573 (2013).

[213] For the expressive function of the law see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) ; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) ; Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement* 148 U. PA. L. REV. 1503 (2000). For the power of default rules see Russell Korobkin, *The Status Quo Bias and Contract default rules* 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *Symposium The Legal Implication of Psychology: Human Behavior, Behavioral Economics, and The Law: Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998). *Cf*, David Charny, *Hypothetical Bargains: the Normative Structure of Contract Interpretation* 89 MICH.L. REV. 1815, 1867-1868 (1991); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1990).

[214] This concept bears resemblance to penalty rules in contract law. Such rules are purposely set at what the parties would *not* want, in order to encourage them to reveal information to each other. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 89–91 (1989).

It is important to note that the suggested rule is not about economic sharing *per se*. Our argument focuses on the unique nature of economic sharing in the home. It builds on the physical safety, financial security and interdependency of living with others and then highlights the benefits and vulnerabilities that economic sharing adds to cohabitation. That being said, the argument does not preclude other judicial remedies that recognize sharing outside the home, as Alicia Brokars Kelly suggests.[215]

### *C. Registering the Cohabitant Family: Default Rules and the Need for State Recognition*

We now consider the legal consequences of cohabitation as it stands on its own merits. Even when cohabitation is not coupled by caring and sharing, it has considerable social benefits as we argued in part III. These social benefits are important and deserve legal recognition when the parties explicitly choose to create formal legal relations. The state should provide legal registration systems for cohabitants in order to support these beneficial relationships and the secure, intimate home life that cohabitation provides.

Think, for example, on the famous sitcom Will & Grace.[216] William Truman and Grace Adler have been best friends since their freshman year of college. They have been living together in a New York City apartment for years. As Will is gay, the couple had never had an intimate conjugal relationship. These are two independent unrelated adults that did not comingle their income or property, and neither of them requires care. Nonetheless, their relationship is long standing, stable, affectionate and interdependent. In these circumstances, it does not seem necessary to impose legal obligations on the parties, as there are no particular vulnerabilities that need protection. At the same time, the state should support and allow them to protect their intimate relationship if they so choose because of the benefits and security it provides to them. The argument in favor of legal recognition of cohabitation through state supported systems of registration is thus shaped by the values of autonomy and freedom of association.[217] In addition, the state should support intimacy that provides security and stability to individuals living together in a shared home.

Suppose Will wants to make Grace his beneficiary for a health, life insurance or a pension plan. Suppose he wants Grace to have hospital visitation rights or medical decision making power in case he becomes ill.[218] Perhaps Grace wants Will to inherit her estate, even in the absence of a valid will or continue to live in her rent control apartment after her death. To address these needs, we suggest a model of registration. If

[215] *Supra* note 205

[216] http://en.wikipedia.org/wiki/Will_%26_Grace.

[217] For freedom of association see *supra* note 118 - 120. For autonomy and belongingness in family law see Bruce C. Hafen, *Individualism and Autonomy in Family: The Wanning of Belonging* 1991 BYU. L. REV. 1.

[218] See Colorodo's designated beneficiary law: COLO. REV. STAT. §§ 15-22-101 to -112 (2012).

cohabitants formally register their status so as to capture their intent and commitment to the cohabitating relationship, their relationship should create legal rights and obligations. The reason to address the needs of cohabitants is both to respect their autonomy and for the state to support stable, interdependent relationships that provide security and intimacy in the home to committed cohabitants. A full blown model of registration that includes a comprehensive survey of rights and obligations exceeds the scope of this article. Instead, we offer several guidelines for a registration scheme that correspond to the benefits of cohabitation, including intimacy, stability and interdependency, and consider the values of autonomy, freedom of association and a progressive vision of family formation. Some of these guidelines are inspired by existing models and scholarly suggestions.[219] In particular, we compare our model to Registered Domestic Partnerships in European countries and American states,[220] the French *Pacte Civil de Solidarité* (PACS)[221] and calls for reform.[222]

First, registration provides an opt-in scheme that allows parties to pick and choose their desired level of commitment. As Erez Aloni argues, an opt-in regime respects the autonomy of the parties because it does not force duties based on the living arrangement alone.[223]

Second, to be eligible for registration, parties must actually cohabit. A shared residence may not be enough to secure eligibility for the benefits we discuss in the following paragraphs because not all living arrangements would be considered as cohabitation. As we indicated in part III, cohabitation requires long term commitment and some form of joint living. These requirements are hard to prove in advance, especially to an administrative authority such as the registrar. Moreover, people may want to register in order to create a framework for their relationship that is future-oriented. Therefore people who intend to cohabit or who already cohabit would be eligible to register as cohabitants and receive state benefits. However, if it later appears that registrants were not cohabitants, an involved party or the state would be able to potentially cancel those benefits through court action. Cohabitant benefits should only be cancelled in the case of fraud or if the parties willingly and voluntarily decide not to cohabit but remain registered, not upon an untimely death or other good faith reason when the commitment to cohabit existed but perhaps ended sooner than intended. Once a cohabitant relationship is established and then ends,

[219] *See, e.g.*, Aloni, *supra* note 212; LAW COMMISSION OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 117 (2001)

[220] BEYOND CONJUGALITY, *id* (discussing Denmark; Netherland; France; Belgium; Catalonia, Spain; Hawaii, USA and Nova Scotia, Canada).

[221] Claudina Richards, *The Legal Recognition of Same-Sex Couples: The French Perspective*, 51 INT'L & COM. L.Q. 305, 322 (2002); Claude Martin & Irène Théry, *The PACS and Marriage and Cohabitation in France*, 15 INT'L J.L. POL'Y & FAM. 135 (2001).

[222] BEYOND CONJUGALITY, *supra* note 219; Aloni, *supra* note 212.

[223] Aloni, *supra* note 212 at 616.

any one of the cohabitant parties should have the right and obligation to end their legal status by contacting the state registration system. On the one hand, there is the value of promoting autonomy for cohabitant couples. On the other hand, there is valid state policy in supporting relationships of those who actually cohabit. The state need not be overly careful in determining those who cohabit as long as there is autonomous registration, but the state also has an interest in protecting itself from fraudulent conduct and the provision of potentially expensive benefits such that some oversight may be necessary.

Third, unlike the prevailing view, we reject a firm limitation on the number of parties to a registration union. Current schemes do not allow more than two individuals to register as cohabitants.[224] As long as individuals are indeed living in a joint household, cohabitation can involve more than two individuals. However, some limit seems reasonable as decision-making and the provision of state benefits can be overly complicated by too many cohabitants.[225] Communes and community living in apartment buildings with shared expenses are likely to complicate interpersonal commitments.

Furthermore, in accordance with our call to decouple sex and the home, we support a scheme that allows unions between close relatives. This guideline differs from the general assumption, as most schemes do not recognize such unions, including those employed by France, Nova Scotia and Nordic countries.[226] Only a minority of registered partnership regime allow close relatives to register. In Hawaii, under the "reciprocal beneficiaries" scheme, non-conjugal couples are permitted to register their relationship.[227] In addition, Colorado's designated beneficiary law provides that any two adults can register this way, no matter if related or not.[228]

These two requirements, limiting the number of individuals who can form a union and denying registration from relatives, seek to mimic the conjugal relationship, based on an ideal of monogamist couples. Together, these rules serve to exclude various types of cohabitants, including multigenerational and intergenerational families, siblings and groups of roommates. Although cohabitation-based registration may contribute to equalizing the status of same sex couples, the purpose of the reform is far more progressive and inclusive. Indeed, current regimes fail to address the full scope of cohabitation as a current social

[224]For France, see Richards, *supra* note 221 at 317; for a comprehensive survey of European countries and several American states see BEYOND CONJUGALITY, *supra* note 219 at 117-118, 133. However, the Canadian law commission suggested that in principle, there is no reason to limit registration to two people. Yet, the commission requires economic or emotional dependence of some duration. *See id* at 133, n. 16.

[225] The limit in the number of cohabitants we leave to future considerations that take into account context and variety of benefits and obligations involved.

[226] BEYOND CONJUGALITY, *supra* note 219 at 117-118

[227] Haw. Rev. Stat. § 572C-4 (2012).

[228] COLO. REV. STAT. §§ 15-22-104. However, the law requires that neither party is married to another person or a designated beneficiary of another person.

phenomenon and meet its potential as promoting a progressive vision of the family.

A fourth guideline refers to the exclusivity of registration. Suppose Will wants to register his relationship with his good friend Jack. We suggest that if Will wants to add Jack to an existing cohabitation union, with the agreement of other cohabitants (namely Grace), such an addition should be approved, provided Jack lives in the same home with Will and Grace. Cohabitation can indeed evolve to include more individuals. This rule allows the family to develop over time and is still founded on joint living. However, the model precludes individuals from having separate registered unions at the same time. Will can only share a home with one group, and cannot be part of several homes at the same time. Will can choose to end cohabitation with Grace and move in with Jack. To do that, the law should allow an easy exit from an existing cohabitation union.[229] However, Will can be married and at the same time also have a cohabitant relationship. This may affect mutual rights and obligations but must be explored in context.

Fifth, registration should establish eligibility to benefits offered by various state, governmental entities, private companies and organizations that are based on joint living, in case the parties wish to receive them. Such benefits may include health and life insurance plans,[230] medical decision making,[231] hospital visitation rights,[232] and rent control protection.[233] The Colorado scheme of "designated beneficiary" law serves as the inspiration for this guideline. Cohabitants will file a state-provided form and by checking specific boxes on this form, cohabitants will be able to decide which of the listed benefits they will commit to.[234] However, the list of available benefits on this form

[229] For the importance of exit for autonomy see Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L. J *549* (2001)

[230] COLO. REV. STAT. §§ 15-22-104; The CALIFORNIA INSURANCE EQUALITY ACT (AB 2208).

[231] COLO. Rev. Stat. §§ 15-22-104. Maryland domestic partnership law. see NATIONAL CENTER FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES WITHIN THE UNITED STATES 7 (2014), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf [hereinafter NCLR]. Also see POLIKOFF, *supra* note 12 at 134. Polikoff supports registration for non conjugal couples, which will affect only medical decision making and inheritance rights.

[232]COLO. REV. STAT. §§ 15-22-104. Also see Maryland domestic partnership law. See Jessica Feinberg, *The Survival of Non-Marital Relationship Statuses in the Same-Sex Marriage Era: A Proposal* 87 TEMP. L. REV. 47 (2014) at n. 37.

[233]9 NYCRR 2204.6 (d) (2012). PACS provide protection for residential leases when one member dies. *See* Feinberg, *supra* note 232 at 15.

[234] COLO. REV. STAT. §§ 15-22-101 to -112 (2012)

should be associated with joint living, which is the basis for creating a cohabiting relationship.[235]

Sixth, registration may also influence the mutual rights obligations between the parties. Much like third parties benefits, cohabitants will be able to check boxes in the provided form and decide whether or not they want to include these mutual obligations in their union. Such rights may include property distribution or support after separation. It is important to note that there is a difference between parties that affirmatively choose to distribute property upon separation and the protection of vulnerable parties in case of economic sharing. However, within one cohabitant group, if so chosen, state provided benefits and mutual benefits must be equally provided to each other cohabitant so as to regularize and not overly complicate the relationship.

Another example of mutual rights is inheritance rights, and the applicability of intestate succession rules, in case the deceased did not execute a valid will. The subject of intestate succession is particularly important because a substantial number of people die without executing a will.[236] There can be numerous reasons for not making a will, including premature death, poor access to resources and fear of confronting mortality.[237]In addition, intestacy rules are important because they have an expressive function,[238] as they communicate a social message regarding who is considered to be the family of the deceased.[239]

Nancy Polikoff suggests a registration system with predetermined bundle of rights and obligations that includes intestate rights. According to her suggestion, if someone dies intestate, without executing a valid will, the designated person would receive the same share of the estate that the spouse would have received.[240] The problem with this rule is the diversity of cohabitants' relationships. Some individuals might want to designate a smaller share of their estate to their cohabitants than the share of the spouse, which is quite considerable. A different possibility

[235] *Cf* Aloni, *supra* note 212 at 610 (criticizing rights and benefits based on status that is no longer a proxy for economic dependence).

[236] *See* LAWRENCE WAGGONER ET AL. FAMILY PROPERTY LAW: WILL, TRUSTS AND FUTURE INTERESTS (2006) at 2-1 (call it the "conventional wisdom", which also claims that the older and wealthier a person is, the more likely she will execute a will. Yet, they mention a study by Fellows that casts doubt on the notion that most people die intestate. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States* 1978 AM.B. FOUND. RES. J. 319, 336-9. *Also see* EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 14 (5th ed. 1993).

[237] Adam J. Hirsch, *Default Rules in Inheritance Law – A Problem in Search of its Context* 73 FORDHAM L. REV. 1031, 1047-1052 (2004).

[238] *See, e.g.,* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1990). *Also see* Ronald J. Scalise Jr, *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents* 37 SETON HALL L. REV. 171, 173-176 (2006).

[239] Spitko, *id* at 1100.

[240] POLIKOFF *supra* note 12 at 134.

is to treat a registration form as a will substitute that allows the parties to determine the specific share their cohabitant will receive.[241]

To conclude, we offer a general framework of cohabitation-based registration, guided by the values of autonomy and freedom of association. However, the framework is not meant to serve as a comprehensive suggestion. Rather, the purpose of these suggested guidelines was to demonstrate the plausibility of cohabitation-based registration, and to stress the progressive potential of cohabitation as a foundation for the family.

## V. CONCLUSION

Rights and obligations in family law have always been and remain centered around the sexual family. However, focusing on sexuality and children born of sexual reproduction as the center of family law is hard to justify in the face of other compelling bases for intimate associations. Sexuality is used as a proxy for intimacy and as a normative channeling function for family life, but other bases for intimacy are just if not more relevant to people's lives. In particular, we argue that the intimacy and shared life of the home creates and entrenches joint familial life in a manner that deserves legal recognition for the security and stability that cohabitation provides and the intimacy it reflects.

The legal recognition for cohabitation we suggest should be completely divorced from sexuality. When coupled with caring and sharing, rights and obligations should be imposed on cohabitants. When based on voluntary, mutual commitments without caring and sharing, the state should respect and support the benefits of cohabitation by providing appropriate legal registration systems for cohabitants. Moreover, the suggested framework is mindful of the potential regressive effect of cohabitation, and offers a nuanced approach that takes into account the promise and the perils of the institution. Crafting legal doctrines requires careful consideration of the legal context, other relevant factors and vulnerabilities involved.

Legal recognition of cohabitation does not cancel other forms of family formation. It can coexist and buttress other factors in creating familial status including more traditional markers such as biology and marriage and more progressive principles based on functional care and economic households. However, it is our argument that cohabitation itself is an important and meaningful factor for family formation as the home as an essential ingredient in individual security, stability and social relations. The status of cohabitation, based on longevity and joint action, deserves consistent and reasoned legal status in family law, administrative law and beyond.

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[241] On will substitutes see John H. Langbein, *The NonProbate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) ; Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOKLYN L. REV. 1123 (1993). *Also see* RESTATEMENT OF LAW, (THIRD) PROP: (WILLS AND OTHER DONATIVE TRANSFERS)§7.1 (2003).