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INTRODUCTION[3]

In this article, we consider the relevance of home sharing in family formation. When couples or groups of persons are recognized as families, they are afforded significant benefits and given certain obligations by the law.[4] Families have their own category of laws, rights, and obligations.[5] Currently, the law of family formation and recognition is in a state of flux. Although in some respects the defining legal lines of the family have been well settled for centuries around blood and the formal legal ties of marriage and parenthood, in significant ways, the family form has been fundamentally altered over the past few decades. The law of family formation has finally flexed to include normalization of same-sex couples through marriage equality.[6] And, Assisted Reproductive Technologies ("ART") and gamete donors have broken the essentiality of the conjugal, genetic link between parents and children, making reproduction more widely accessible to a greater range of persons.[7] Thus, the traditional "channeling function" of family law—into the

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[3] This article was written as an equal collaboration between the authors.

[4] *See infra* Part I (exploring the implications of family recognition). Recognized families enjoy tax benefits, social welfare benefits, and acknowledgement with regard to child care and support, health care and educational support, laws of family dissolution, among other significant benefits and obligations. *See, e.g.*, Twila L. Perry, The "Essentials of Marriage": Reconsidering the Duty of Support and Services, 15 YALE J.L. & FEMINISM 1, 37 & n.136 (2003) (discussing a range of benefits of marriage—tax benefits, social security benefits and pensions, the ability to file wrongful death actions, health and bereavement benefits, and intangible benefits such as respect).

[5] *See generally* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (exploring the legal system's treatment of families and family members).

[6] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (ruling prohibitions on same-sex marriage unconstitutional). Recent surveys by the Pew Foundation and other polling organizations show growing public acceptance of same-sex unions. *See, e.g.*, *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CTR. (Nov. 18, 2010), http:/www.pewresearch.org/pubs/1802/decline-marriage-rise-new-families [hereinafter PEW RESEARCH].

[7] *See* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1255–60 (2013). Adoption is a more traditional means of breaking genetic ties, but it necessitates specific legislation and judicial oversight in a manner that ART has avoided. *See* Naomi Cahn & the

nuclear sexual family including a heterosexual couple and its biologically and genetically related children—is expanding to include alternate family forms.[8]

While this expansion is positive in that it offers more flexibility in recognizing supportive, intimate family forms, the question is whether the law of family formation is getting it right as it expands. Is the law recognizing and supporting families in a manner that is meeting modern normative goals of family law or is it just expanding out of necessity due to technological changes (ART) or constitutional necessity (same-sex marriage)? Perhaps, the flexing of the law of family recognition should be done deliberately and not merely in response to technological necessity or constitutional demands.

In this article, we make a more deliberate assessment of how the law of family recognition should expand to include alternative forms, focusing, in particular, on the impact of the home in centering family life in a manner that goes beyond sexuality. On the one hand, the home has always been central to the family, but on the other hand, the home is not consistently used as a sufficient or necessary condition for family formation.[9] Here, we look more closely at the relevance of home sharing in current law and reimagine how home sharing should influence the law.[10] We base our analysis on an assessment of the doctrinal relevance of cohabitation and the inconsistencies and biases it reveals, including empirical sociological accounts of the relevance and benefits of home sharing, as well as a discussion of the dangers and drawbacks of over-reliance on the home in family formation.

The law of family formation should support and recognize family forms that improve people's well-being, provide stability, and support reproduction and vulnerability, allowing people to be more productive in the market and more secure in their attachments. Such recognition should not tolerate abuse but should consider citizens' rights to association and the autonomous pursuit of love, happiness, and a good life. If a family form meets these complex goals, or at least advances them, a liberal polity can be called upon to consider supporting them.[11]

The current law of family recognition can do more to advance these goals. Indeed, beyond recognition of ART and same-sex marriage, normative accounts of new rules for defining the family have been increasingly prevalent. Emphasis on functional caregiving for defining parent-child relationships has been especially

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Evan B. Donaldson Adoption Institute, *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIM. LAW. 1, 1 (2011).

[8] *See* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 514–15 (1992).

[9] See *infra* Part I for a description of the use of the home in family law doctrine.

[10] *Cf.* Shelly Kreiczer-Levy, *The Informal Property Rights of Boomerang Children in the Home*, 74 MD. L. REV. 127 (2014) (discussing the potential property rights between members of intergenerational families).

[11] *See* Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 304, 313 (2015).

influential and is becoming increasingly accepted by courts and legislatures.[12] Other suggestions, such as recognizing family through economic interdependence[13] and the relevance of emotional friendships,[14] have remained more theoretical, although they compellingly challenge our baseline assumptions about family constitution.

The expansion of the law of family recognition does not sufficiently account for to additional factors that we are argue in this paper require further consideration as we reimagine how to define family and how to parcel out family law's benefits. First, the law of family formation over-essentializes sexuality.[15] Such sexuality is represented both in the horizontal sexual couple and in the vertical parenting relationship based upon or mimicking sexual reproduction. While important in creating intimacy, sexuality and sexual reproduction are not the exclusive triggers for creating intimate family forms. Yet, only sexual couples enjoy the benefits of family recognition.

Second, cohabitation—with or without sexuality—is an underexplored and increasingly relevant indicator for complex family forms, creating stability, protecting vulnerability, and expressing associative desires. Family has always been centered around the home, and home life has been demonstrated to be central and significant for an increasing variety of households. Intergenerational families, elderly parents and older children living with nuclear families, small kin groups (siblings who co-reside), adult long-term roommates, and non-married couples increasingly reside together for extended periods of time and engage in economic sharing and emotional interdependence in ways that support the functions of the traditional family.[16]

Now is a crucially relevant time to consider the importance of these factors in family formation. As the legalization of same-sex marriage is resulting in

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[12] *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002) [hereinafter ALI PRINCIPLES]; *see also* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 18–20 (2008); Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 17 (1997); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 316–17 (2007); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 123 (2004); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 74–75 (2007); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 421–25 (2013).

[13] *See generally* Janet Halley, *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 PACE L. REV. 887 (2011) (discussing the economic significance of families); Alicia Brokars Kelly, *Better Equity for Elders: Basing Couples' Economic Relations Law on Sharing and Caring*, 21 TEMP. POL. & C.R.L. REV. 387, 388–89 (2012) (discussing assessment of the degree of economic interdependence in relationships).

[14] *See, e.g.*, Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 208–11 (2007).

[15] *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 143–44 (1995) (discussing the overemphasis on sexuality in family law).

[16] *See infra* Part II.A.

legislatures repealing domestic relations and civil union legislation as unnecessary,[17] we need to recognize that non-sexual families, kin groups, and intergenerational families could benefit from such legislation in meaningful ways and that such families fulfill many of the goals of family law. Moreover, while marriage equality may make discussion of alternatives to marriage irrelevant for sexual same-sex couples, the discussion is still relevant for non-sexual sibling and kin groups, intergenerational families, and unrelated adults who choose to cohabit over long periods of time and engage in either economic or emotional sharing without sexuality. These groups, who will never be entitled to, nor wish to "marry," should take up the fight for these alternative family forms. As to sexual cohabitants who choose not to marry, it is less apparent why they need these alternate statuses, as they are not likely to choose to formalize their relations, although they may choose alternative registration systems for the increased flexibility and the lower imposition such status may entail. Moreover, in certain limited circumstances that we describe in this article, obligations or rights can be justifiably imposed on cohabitants,[18] and then the act of living together, whether sexual or not, may be relevant.

For instance, cohabiting non-sexual siblings have recently increased requests for legal recognition,[19] though this is currently only granted in Hawaii.[20] As long-term cohabitants who are interdependent economically and emotionally, these cohabitants look to state recognition to assist with the needs of health care proxies in aging and social welfare benefits that are otherwise reserved for "nuclear family" members.[21] Another group of non-sexual families who seek these benefits are older children living with parents and middle-aged adults caring for elderly parents.[22] Sexual cohabitation is also becoming more accepted and increasingly prevalent,[23] creating the support systems of family life. These cohabitants provide each other with familial support, stability, and protection, yet they cannot access the state benefits of family life.

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[17] *See, e.g.*, WASH. REV. CODE § 26.60.100 (2012) (preserving domestic partnerships only for those over sixty-two years of age in light of the advent of same-sex marriage in Washington), http://apps.leg.wa.gov/rcw/default.aspx?cite=26.60.100.

[18] *See infra* Part III.

[19] *See infra* notes 177–181 and accompanying text.

[20] *See* HAW. REV. STAT. § 572C-1 (1997), http://www.capitol.hawaii.gov/hrscurrent/Vol12_Ch0501-0588/HRS0572C/HRS_0572C-0001.htm. Reciprocal beneficiaries have access to a limited number of rights and benefits on the state level, including inheritance rights, *id.* § 560:2-102, workers compensation, *id.* § 386-41, health insurance and pension benefits, *id.* § 88-339; § 431:10A-601, hospital visitation, *id.* § 323-2, healthcare decision making, *id.*, and the right to sue for wrongful death, *id.* § 663-3. Hawaii's reciprocal beneficiary status also offers reciprocal beneficiaries the option to jointly own property as "tenants by the entirety." *Id.* § 572C Note. Reciprocal beneficiaries must be two adults who cannot otherwise marry. *Id.* § 572C-4.

[21] *See infra* notes 177–181 and accompanying text.

[22] *Cf.* Debra H. Kroll, *To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL. & C.R.L. REV. 403, 409 (2012) (discussing the increasing care responsibilities of adults for aging parents).

[23] *See* PEW RESEARCH, *supra* note 6.

Non-sexual cohabitation has occasionally been used as a tool in defining the family, even without the formal ties of marriage and legal parenthood.[24] Yet, the extent and nature of how home sharing creates family rights and obligations is riddled with inconsistencies and conflicting determinations.[25] 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,[26] but in other contexts, joint living has provided no familial legal rights or obligations at all.[27] Usually cohabitation takes on legal meaning when it most mirrors the nuclear, sexual family,[28] but other laws take a more expansive perspective on family constitution.[29] Indeed, we demonstrate deep doctrinal inconsistencies between rent control ordinances, public housing laws, and food stamp programs, which take on a broader definition of family to include the household where sexuality is not crucial, and private family law, which decidedly does not.[30] Such a divergence in the doctrine of family formation has developed without sufficient consideration of the justification of excluding households from private family law benefits while simultaneous recognizing them as family for administrative and zoning purposes.

Although the term "cohabitation" is often understood to connote sexuality, in this article, we want to break apart the connection of cohabitation and sexuality.[31] 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 legal domesticity/cohabitation both in terms of time frame and the extent of joint living.[32] 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 the home divorced from other considerations and concerns. Therefore, this article first weighs the

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[24] *See infra* Part I.

[25] *See infra* Part I.

[26] *See, e.g.*, Rosenbury, *supra* note 12, at 191, 197–98 (summarizing different scholars views of the ways in which the non-traditional family is harmed by the state).

[27] *See infra* Part I.

[28] *See, e.g.*, Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966), *rev'd*, 388 U.S. 1, 4 (1967) (explaining that cohabiting as man and wife in Virginia where mixed race marriages were not permitted was taken as evidence of an illegal marriage).

[29] *See infra* Part I.

[30] *See infra* Part I.

[31] *Cf.* Rosenbury, *supra* note 12, at 200 (discussing the different forms of domestic relationships separate from those relating to marriage and conjugality and the legal preference afforded to more traditional conjugal relationships). Indeed, "cohabitation" is regularly assumed to include sexual relationships. *See, e.g.*, Sally F. Goldfarb, *Who Pays for the "Boomerang Generation"?: A Legal Perspective on Financial Support for Young Adults*, 37 HARV. J.L. & GENDER 45, 52, 54 (2014); Lynne Marie Kohm, Roe*'s Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1368–69 (2014).

[32] *See infra* Part I.A.

nature, benefits, and drawbacks of legal recognition of cohabitation and then attempts to provide the beginning of a legal framework that accounts for both the benefits and the concerns in a nuanced manner.

This inquiry therefore includes both a descriptive account of the ways the home has been both relevant and irrelevant to family formation and provides a series of prescriptive suggestions for making the home part of the inquiry of legal family formation. We are not arguing that the home should be the exclusive or even dominant factor in family recognition. We are, however, arguing that the home should be part of the discussion of family formation, that it should be considered in a manner not essentially tied to sexuality, and that it should be used consistently across legal doctrines. Moreover, while marriage as the fundamental basis for family formation has been awarded a comprehensive list of benefits and obligations, in our discussion of the home, we suggest that cohabitation need not mirror marriage and can be used to form family ties in a differentiated manner.

In Part I, 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 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, particularly when divorced from sexuality, has received too little attention and can be a useful tool to uncovering what is important in familial recognition.

In Part II, 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, 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 Part III, we lay out the different possibilities for how the law should reflect joint living in family life. 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 forms. In particular, we argue that cohabitation, when combined with economic sharing, should result in certain property rights between cohabitants. And we argue that cohabitation, when coupled with caring, may result in streamlined rights and obligations regarding children. Finally, cohabitation alone, when not coupled with sharing or caring, could be supported by the state through a system of voluntary registration. When formally registered, cohabitation would create certain mutual obligations between cohabitants as well as in relation to third parties depending on the election of the parties involved.

I. LEGAL IMPLICATIONS OF COHABITATION IN DEFINING THE FAMILY

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. 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, to using it 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.[33] Without such justifications, biases or 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 is ignored when involving non-traditional family forms. However, 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 legal recognition of sexual cohabitation tends to reinforce traditional conceptions of the nuclear family.

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[33] In the context of cohabitation that assumes sexuality, Cynthia Bowman has considered legal recognition in depth. *See generally* Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL'Y. 119 (2004) (discussing the different ways states treat cohabitation in the context of same-sex and heterosexual couples).

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 may move to another city or country, 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.[34] 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 children's care and safety, but as long as one parent or an agent of such a parent resides with and cares for the child, legal parenthood is not broken for lack of cohabitation.[35] If both parents were to abandon their child, neither living with the child nor providing for the child's habitation with a responsible adult, this would constitute abuse and neglect, threatening and ending the legal relationship between parent and child.[36] Thus, although cohabitation is certainly not required for defining legal parenthood, providing for a responsible adult to cohabit 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 propose two new legal statuses for

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[34] *See* Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions, in* MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 145 (Marsha Garrison & Elizabeth S. Scott eds., 2012). However, many children born out of wedlock are born to cohabiting couples. *Id.* at 145.

[35] *See generally* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. (SUPPLEMENT) 125 (2006) (discussing the legal concept of parenthood).

[36] *See* 59 AM. JUR. 2D *Parent and Child* § 34, Westlaw (database updated November 2015). For examples of how states define child abuse and neglect, see generally U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT IS CHILD ABUSE AND NEGLECT? (2013), https://www.childwelfare.gov/pubPDFs/whatiscan.pdf. As an example, the Utah Juvenile Court Act, defines "abuse" as "(i) nonaccidental harm of a child; (ii) threatened harm of a child; (iii) sexual exploitation; or (iv) sexual abuse" and "neglect," in relevant part, as "(i) abandonment of a child . . . ; [or] (iii) failure or refusal of a 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." UTAH CODE ANN. § 78A-6-105(1)(a), (27)(a) (West, Westlaw through 2015 First Spec. Sess.).

parents: parent by estoppel and de facto parent.[37] 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 primarily lives, and who has lived with the child for a significant span of time, a period of at least two years.[38] A parent by estoppel is acknowledged by the legal parent as a co-parent and is obligated to pay child support or is an individual who, among other things, has lived with the child for at least two years or since the child's birth.[39] 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[40] and the cases that have established de facto parenthood or parenthood by estoppel modeled on the ALI Principles.[41] Co-residence is understood in such contexts to strengthen relationships and reflect commitment.[42]

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 seen 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 "[he] receives the child into his . . . home and openly holds out the child as his . . . natural child."[43] In *In re Nicholas H.*, the court emphasized 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 . . ."[44] In addition, the Uniform Parentage Act § 204(a)(5) creates a presumption of paternity to an unmarried man

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[37] ALI PRINCIPLES, *supra* note 10, § 2.03(1).

[38] *Id.* § 2.03(1)(c).

[39] *Id.* § 2.03(1)(b).

[40] *See id.* § 2.03(1).

[41] *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 551–52 (N.J. 2000) (requiring cohabitation as one of the four elements necessary for obtaining the status of de facto parent); A.F. v. D.L.P., 771 A.2d 692, 697–99 (N.J. Super. Ct. App. Div. 2001) (finding the cohabitation element was not met for creating a de facto parenthood relationship and obtaining visitation rights).

[42] *See, e.g.*, Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, U. CHI. LEGAL F., 2004, at 358, 362 (praising how the ALI Principles reflect the relevance and importance of a variety of committed relationships that nurture children).

[43] CAL. FAM. CODE § 7611(d) (West, Westlaw through urgency legislation through Ch. 807 of 2015 Reg. Sess. and Ch. 1 of 2015-2016 2nd Exec. Sess.).

[44] *In re* Nicholas H., 46 P.3d 932, 933 (Cal. 2002) (emphasis added).

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.[45] The home therefore serves as a metaphor for accepting a child into one's most intimate space, and providing the child physical and emotional shelter, thus signaling that an individual treats the child as his or her own.[46]

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.[47] We contend, however, that *requiring* cohabitation in order to create familial status can exclude other forms of family formation when appropriate, as these forms do not parallel the cohabitation usually found in the traditional nuclear family.[48] Making cohabitation a requirement could undermine other deep-seated functional care relationships. In this context, we therefore can see how cohabitation may be used to create new family forms, while also being 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 ways. For married couples, 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 *McGuire v. McGuire* famously determined, courts will normally not enforce a financial support duty if the married couple is cohabiting and not legally separated.[49] Similarly, in California, as well as other states, when spouses live together during the time a child is conceived, the husband is conclusively presumed to be the father of any

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[45] UNIF. PARENTAGE ACT § 204(a)(5) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002).

[46] For other cases that emphasize co-residence, see Kinnard v. Kinnard, 43 P.3d 150, 151, 154–55 (Alaska 2002); Elisa B. v. Superior Court, 117 P.3d 660, 668–69 (Cal. 2005).

[47] *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995) (applying four-prong test including cohabitation for determining psychological parenthood); Middleton v. Johnson, 633 S.E.2d 162, 167–70, 172–73 (S.C. Ct. App. 2006) (granting visitation to mother's former boyfriend, who fulfilled the four prong test for being a de facto or psychological parent); Surles v. Mayer, 628 S.E.2d 563, 572–73 (Va. Ct. App. 2006) (holding that mother's former boyfriend, who had cohabited with her for almost three years and had been the functional equivalent of a stepparent to the child, had standing as a "person with a legitimate interest" to seek visitation); *see also* V.C. v. M.J.B., 748 A.2d 539, 551–52 (N.J. 2000); *In re* Parentage of L.B., 122 P.3d 161, 176–77 (Wash. 2005).

[48] *See* A.F. v. D.L.P., 771 A.2d 692, 699–701 (N.J. Super. Ct. App. Div. 2001) (holding that lack of cohabitation precluded parental status even after petitioner's history of caring for the child).

[49] McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953).

children born during such time period.[50] If a married couple is living apart at the time the child is born, the husband is only the presumed father of the child.[51] Thus, cohabitation creates a signal that the marriage is essentially functioning as it is supposed to be, buttressing the formal marital status.

When formal marital status does not exist between conjugal couples, cohabitation could potentially take on even more significance. 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.[52] Legal status is attributed to cohabitants even without registration as domestic partners in the state of Washington,[53] less consistently in some other states,[54] and in a number of foreign countries,[55] as well as according to the recommendations of the ALI Principles.[56] 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.[57] Scholars have similarly advocated for imposing the legal status of cohabitation on cohabitants regardless of registration in order to protect vulnerable parties.[58] For instance, Cynthia Bowman argues that many of the benefits awarded

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[50] *See* Michael H. v. Gerald D., 491 U.S. 110, 117–19, 122, 131–32 (1989); Ferdinand S. Tinio, Annotation, *Presumption of Legitimacy of Children Born After Annulment, Divorce, or Separation*, 46 A.L.R.3d § 21 (1972).

[51] CAL. FAM. CODE § 7611(a) (West, Westlaw through all 2015 Reg. Sess. laws and Ch. 1 of 2015-2016 2nd Exec. Sess.); *see also* Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J.L. & FAM. STUD. 289, 289 (2011). Under many of these statutes, the presumption can be rebutted by scientific evidence. *See* UNIF. PARENTAGE ACT §§ 204(a), 204(b), 631(1) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002).

[52] *Cf.* Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1570, 1634 (2009) (discussing the treatment and legal regulation of un-married cohabitants).

[53] *See* Connell v. Francisco, 898 P.2d 831, 834, 837 (Wash. 1995) (providing property distribution for committed, intimate, unmarried cohabitants); *see also* Van Allen v. Weber, Nos. 42169-1-II, 42569-6-II, 2012 WL 6017690, at *3 (Wash. Ct. App. Dec. 4, 2012); Ross v. Hamilton, No. 39887-7-II, 2011 WL 1376767, at *3–*4 (Wash. Ct. App. Apr. 12, 2011).

[54] *See, e.g.*, Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990) (holding that the court may order support or equitable distribution of property between unmarried cohabitants under state law); Shuraleff v. Donnelly, 817 P.2d 764, 769 (Or. Ct. App. 1991).

[55] 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, 362–65 (2008). For Austria, Germany, and Norway, see Brienna Perelli-Harris & Nora Sánchez Gassen, *How Similar are Cohabitation and Marriage? Legal Approaches to Cohabitation Across Western Europe*, 38 POPULATION & DEV. REV. 435, 447, 460 (2012).

[56] ALI PRINCIPLES, *supra* note 10, §§ 6.01(1); 6.03(1)–(4), (6); 6.04(2).

[57] *See id.* § 6.04.

[58] *See, e.g.*, CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 242 (2010) (ebook); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1165–68 (1981); William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1681–82

to married couples should be extended to unmarried cohabitants if they lived together for more than two years and had a child together.[59]

However, in the vast majority of cases in the United States, 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.[60] Indeed, until fairly recently, in many states in the United States, unmarried cohabitation was a criminal offense and contracts between unmarried cohabitants were considered unenforceable.[61] Since the landmark case of *Marvin v. Marvin*,[62] courts have enforced express and even implied agreements between cohabitants, if and when such agreements can be proven.[63] However, many states will not allow implied contracts between cohabitants,[64] although some may still accept narrow unjust enrichment claims.[65] Additionally, cohabitants seeking to enforce a *Marvin* contract have had limited success due to lack of evidence that an agreement or unjust enrichment actually existed.[66] At best, the inquiry in such cases seems to be whether the cohabitation mirrors a marital relationship, and the closer it comes to marriage, the better chance a party has at succeeding in a *Marvin* claim.[67] However, creating an actual legal category that would apply to cohabitants based on their actions alone has only been minimally adopted in the United States.[68] The reason for avoiding imposing such a status upon cohabiting couples,

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(1984); Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1365–66 (2001).

[59] BOWMAN, *supra* note 56, at 225–26, 228.

[60] Berenson, *supra* note 49, at 297 (stating that these jurisdictions have followed the rule set in *Marvin v. Marvin*, 557 P.2d 106, 113 (Cal. 1976)).

[61] *See* William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO L.J. 1881, 1928 (2012); Harry G. Prince, Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?, 70 MINN. L. REV. 163, 191–93 (1985).

[62] *Marvin*, 557 P.2d 106.

[63] *See, e.g.*, Levar v. Elkins, 604 P.2d 602, 603–04 (Alaska 1980); Carroll v. Lee, 712 P.2d 923, 925, 929 (Ariz. 1986) (en banc); Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) (en banc); Mason v. Rostad, 476 A.2d 662, 666 (D.C. 1984); Kinkenon v. Hue, 301 N.W.2d 77, 81 (Neb. 1981); Hay v. Hay, 678 P.2d 672, 673, 675 (Nev. 1984); *In re* Estate of Roccamonte, 808 A.2d 838, 847 (N.J. 2002); Beal v. Beal, 577 P.2d 507, 510–11 (Or. 1978) (en banc); Doe v. Burkland, 808 A.2d 1090, 1093–94 (R.I. 2002); Watts v. Watts, 405 N.W.2d 303, 316 (Wis. 1987); Burns v. Koellmer, 527 A.2d 1210, 1212, 1217–18 (Conn. App. Ct. 1987); Glasgo v. Glasgo, 410 N.E.2d 1325, 1332 (Ind. Ct. App. 1980); Tyranski v. Piggins, 205 N.W.2d 595, 598–99 (Mich. Ct. App. 1973) (applying this rule cautiously); Collins v. Davis, 315 S.E.2d 759, 762 (N.C. Ct. App. 1984), *aff'd per curiam*, 321 S.E.2d 892 (N.C. 1984); Knauer v. Knauer, 470 A.2d 553, 566 (Pa. Super. Ct. 1983).

[64] *See, e.g.*, Merrill v. Davis, 673 P.2d 1285, 1286 (N.M. 1983); Morone v. Morone, 413 N.E.2d 1154, 1158 (N.Y. 1980).

[65] *See, e.g.*, Wilcox v. Trautz, 693 N.E.2d 141, 143 (Mass. 1998).

[66] *See, e.g.*, Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 144–46 (2014).

[67] *See* Eskridge, *supra* note 59, at 1930.

[68] *See In re* Marriage of Pennington, 14 P.3d 764, 772–73 (Wash. 2000) (en banc); Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 490, 537 (2007).

absent some finding of a contractual obligation, is that it is considered paternalistic and an intrusion on the autonomous choice to be in a relationship that is different from marriage and does not have similar rights and obligations.[69]

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.[70] Once cohabitants register as domestic partners, they enjoy some or all of the benefits of marriage, depending on state law.[71] A number of the domestic partner laws are intended only for use by homosexual couples.[72] Others provide registration only for intimate couples, whether heterosexual or homosexual, by prohibiting partnerships between family members.[73] Some civil union statutes do not require cohabitation, but other domestic partner statutes are based on and require joint domesticity, thus the terminology: "domestic partners."[74] 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.[75] Some proposals do not require domestic partners to be conjugal, although except for Hawaii, no state within the United States has not adopted this version of domestic partnerships.[76]

Cohabitation can also be used to prove the existence of marriage-like relationships when couples are not registered as married.[77] 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

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[69] *See* Lifshitz, *supra* note 50, at 1624.

[70] *See, e.g.*, COLO. REV. STAT. ANN. § 15-22-104(1) (West, Westlaw through First Reg. Sess. of the 70th General Assemb. (2015)); D.C. CODE ANN. § 32-702(a) (West, Westlaw through Sept. 29, 2015); MD. CODE ANN. HEALTH-GEN. § 6-101(a) (West, Westlaw through 2015 Reg. Sess. of the General Assemb.); NEV. REV. STAT. ANN. § 122A.100 (West, Westlaw through legislation effective through June 30, 2015); WIS. STAT. ANN. § 770.07 (West, Westlaw through 2015 Act 60).

[71] *See, e.g.*, D.C. CODE ANN. § 32-702(a) (Westlaw).

[72] *See, e.g.*, CAL. FAM. CODE § 297(4) (West, Westlaw through Ch. 807 of 2015 Reg. Sess. and Ch. 1 of the 2015-2016 2nd Exec. Sess.) (allowing opposite-sex couples to register only if one of them is over the age of 62 but allowing same-sex couples to register without restriction); DEL. CODE ANN. tit. 13, § 202 (West, Westlaw through 80 Laws 2015, ch. 193).

[73] *See infra* notes 346–348 and accompanying text.

[74] *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 2710(2)(B) (Westlaw through 2015 First Reg. Sess. of the 127th Leg. (the general effective date is Oct. 15. 2015)) ("Domestic partners may become registered domestic partners if [they] have been legally domiciled together in this State for at least 12 months preceding the filing . . . ."); N.J. STAT. ANN. § 26:8A-4 (West, Westlaw through L.2015, c.115 and J.R. No. 7).

[75] *See, e.g.*, CAL. FAM. CODE § 297 (Westlaw) (defining "domestic partners" as two same-sex adults, unrelated by blood and over the age of 18, and allowing opposite-sex adult couples to register if one or both of the persons are over the age of 62).

[76] *See infra* notes 347–348 and accompanying text.

[77] *See, e.g.*, Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966), *rev'd*, 388 U.S. 1, 4 (1967) (cohabiting as man and wife in Virginia where mixed race marriages were not permitted was taken as evidence of an illegal marriage).

marriages illegal, how can prosecution for breaking such a law be enforced? For example, if one cannot register to marry two wives, how can the existence of the second wife be proven? Cohabitation and joint living have therefore been used as a proxy for a marriage that cannot be otherwise formally registered.[78] 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 it has been included as a requirement in common law marriage statutes.[79]

Even those who support legal recognition—with or without registration—of unmarried cohabitating couples do not endorse a similar recognition of living apart together ("LAT") relationships.[80] LAT is a form of committed relationship that does not include a shared residency, and some scholars consider it a new family form,[81] particularly suitable for older divorcees, widows, and widowers who wish to develop intimate relations but still maintain a significant degree of autonomy.[82] This committed relationship that does not include cohabitation is not recognized by either the law or progressive calls for reform.[83] The lack of support for LAT relationships points 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 who have conjugal relations in a manner that mirrors married sexual couples. However, 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 couples, to benefit from domestic violence protection.[84] Thereby, same-sex couples were able to benefit from such laws, despite the Ohio Defense of Marriage Law, which prohibited recognition of same-sex marriages by

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[78] *See, e.g., id.* at 83.

[79] *See In re* Estate of Love, 618 S.E.2d 97, 102 (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 and number three: consummation according to law."); *see also* Piel v. Brown, 361 So. 2d 90, 94–95 (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 being married).

[80] *Cf.* Irene Levin & Jan Trost, *Living Apart Together*, 2 COMMUNITY, WORK & FAM. 280 (1999) (discussing LAT relationships).

[81] *See id.* at 281.

[82] *See* Sofie Ghazanfareeon Karlsson & Klas Borell, *Intimacy and Autonomy, Gender and Ageing: Living Apart Together*, 27 AGEING INT'L, Fall 2002, at 11, 17–18.

[83] *See* Berenson, *supra* note 49, at 317–19.

[84] *See, e.g.*, State v. Carswell, 871 N.E.2d 547, 554 (Ohio 2007).

constitutional amendment.[85] The Ohio Supreme Court has held 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.[86]

However, roommates, intergenerational families, and other cohabitants who do not have sex or other familial status often do not similarly benefit from the protections of domestic violence laws.[87] There is indeed something about 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.[88] All "household" members could benefit from domestic violence protections.

Regarding couples, cohabitation therefore has limited legal impact that remains in the realm of the sexual family, as it is used to create legal rights in the United States 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 who do not have sex anymore may still be considered to be cohabiting, but the existence of a sexual component at the beginning of the relationship is essential.[89] Sexuality, then, is usually perceived as a key component of both marriage and cohabitation.[90]

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. Yet, currently, only sexual cohabitants benefit from even the limited legal support described above.

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[85] *See* OHIO REV. CODE ANN. § 3101.01(C) (West, Westlaw through 2015 Files 1 to 31, 40 and 45 of the 131st General Assemb. (2015-2016) and 2015 State Issues 1 and 2), *declared unconstitutional by* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[86] *See Carswell*, 871 N.E.2d at 554.

[87] *See, e.g.*, State v. Williams, 683 N.E.2d 1126, 1128–31 (Ohio 1997) (holding that the offense of domestic violence between cohabitants arises out of a relationship, and not marital status, but must consist of consortium); City of Cleveland v. Johnson, 19 N.E.3d 604, 607 (Ohio Ct. App. 2014) (finding domestic violence between non-married couple where they were "living as [] spouse[s]").

[88] *See infra* Part II.B.

[89] *See infra* Part II.B.

[90] *See* Rubin v. Joseph, 213 N.Y.S. 460 (N.Y. App. Div. 1926); Steinberger v. Steinberger, 33 N.Y.S.2d 596, 597 (N.Y. Sup. Ct. 1940); *see also* Perry, *supra* note 2, at 8–9.

3. Capacity to Marry: When Biology and Cohabitation Conflict—At times, cohabitation is not used as a proxy for sex or care, but rather, it conflicts with the norms of sexual reproduction. This is especially evident in incest. Stepchildren 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 then becomes whether cohabitation is sufficient to create a family life that prohibits incest or whether the sexual family is 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 frequently relaxed when blood is not involved.[91] Moreover, stepchildren who cohabit with their parents' spouses are not prohibited from marrying parental figures with whom they have lived.[92]

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, it 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 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.[93] Indeed, potentially abusive sexual relations are much more common between parental figures and adoptive children or stepchildren than with biological children.[94] Such delicacy may

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[91] *See* Israel v. Allen, 577 P.2d 762, 764 (Colo. 1978) (finding no legitimate interest in prohibiting marriage between siblings related by adoption); *Ex parte* Bourne, 2 N.W.2d 439, 440 (Mich. 1942) (holding that a sexual relationship between a stepfather and stepdaughter is not incestuous); State v. Bale, 512 N.W.2d 164, 165–66 (S.D. 1994) (holding incest statute was not violated by relationship between father and adopted daughter); *In re* 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); *see also* Walter J. Wadlington, III, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 VA. L. REV. 478, 478–79 (1963). *See generally* Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998). Other states do include adoptive relatives in incest laws. *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1140–46, 1144 n.322 (2003) (citing Model Penal Code § 230.2 (AM. LAW INST., Proposed Official Draft 1962)).

[92] For instance, see the famous case of Woody Allen marrying his wife's adopted daughter with whom he had cohabited. *See* Glenn Collins, *Mixed Reviews Greet Woody Allen Marriage*, N.Y. TIMES, Dec. 25, 1997, at B3.

[93] *See* Cahn, *supra* note 89, at 1143–44.

[94] *See* Linda Gordon & Paul O'Keefe, *Incest as a Form of Family Violence: Evidence from Historical Case Records*, 46 J. MARRIAGE & FAM. 27, 30–31 (1984) (reporting on case records from 1880 to 1960, with non-biological fathers including step-, foster-, and adoptive-fathers); Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L.

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 regard to capacity to marry.

4. Care for Dependent Relatives: New Parameters for the Home and the 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.[95] The lack of sexuality or resemblance to 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 unrelated or uninvolved roommates, demarks a clear differentiation between the sexual and asexual family.

One state, however, has started to give some legal recognition to those who care for dependent relatives outside of the sexual family. Illinois has a unique rule that encourages family members to live with their elderly or disabled relatives and care for them.[96] To date, no other state has a similar rule.[97] Under this law, a relative who has provided in-home care for at least three years will be able to bring a claim against the estate upon the death of the disabled person.[98] In addition, the court may authorize and direct the guardian of the estate to make conditional gifts from the estate to the live-in caregiver that will be distributed after the death of the disabled relative.[99] Generally, the provision allows family members to recover "the additional opportunity and emotional costs of committing their lives to disabled relatives,"[100] and the legislature chose to encourage private care by rewarding immediate family members.[101] 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 forgone" when a family member commits his life to "making the lives of disabled persons better."[102]

REV. 251, 262–66 (2001); *see also* Margaret Mead, *Anomalies in American Post-Divorce Relationships*, *in* DIVORCE AND AFTER 97–112 (1970) (advocating preserving home and family for non-sexual affection).

[95] *See generally* Kreiczer-Levy, *supra* note 8.

[96] *See* 755 ILL. COMP. STAT. ANN. 5/18-1.1 (West, Westlaw through P.A. 99-482 of the 2015 Reg. Sess. (excluding P.A. 99-480)).

[97] For a discussion of the Illinois rule and other, different elder care rules in the law of succession, see Thomas P. Gallanis & Josephine Cittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 MICH. J.L. REFORM 761, 771–73 (2012).

[98] 755 ILL. COMP. STAT. ANN. 5/18-1.1 (Westlaw). For a discussion of the provision, see Heather M. Fossen Forrest, Comment, *Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers*, 63 LA. L. REV. 381, 401–07 (2003).

[99] 755 ILL. COMP. STAT. ANN. 5/11a-18.1(a) (West, Westlaw through P.A. 99-482 of the 2015 Reg. Sess. (excluding P.A. 99-480)).

[100] *In re* Estate of Jolliff, 771 N.E.2d 346, 351 (Ill. 2002) (discussing 755 ILL. COMP. STAT. ANN. 5/18-1.1 (Westlaw)).

[101] *See id.* at 356.

[102] *Id.* at 350.

A caretaker, according to the rule, is someone who "dedicates himself or herself to the care of the person with a disability by *living with and personally caring for the person with a disability for at least [three] years.*"[103] The court interprets these conditions strictly. For example, two and half years of care has been deemed insufficient.[104] Also, living with the disabled has been construed as not being equivalent to excessive visiting, but requiring some sort of shared living arrangement.[105] 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 it is 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 "[a] spouse, parent, brother, sister, or child of a person with a disability,"[106] and the court has explained that this is the "class of persons most likely to provide dedicated residential and personal care with a loving and altruistic motive."[107] This justification reinforces the traditional definition of the family as the primary provider of care, but 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.[108] 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. However, it is doubtful that such a clear line of separation can be made, especially considering the law gives a financial reward termed a "gift" for the care.[109] 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

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[103] 755 ILL. COMP. STAT. ANN. 5/18-1.1 (Westlaw).

[104] *In re* Estate of Riordan, 814 N.E.2d 597, 598–600 (Ill. App. Ct. 2004).

[105] *Id.* at 599–600; *see also In re* Estate of Hoehn, 600 N.E.2d 899, 899–900 (Ill. App. Ct. 1992) (living across the hall is not equivalent to living with the disabled person).

[106] 755 ILL. COMP. STAT. ANN. 5/18-1.1 (Westlaw).

[107] *Jolliff*, 771 N.E.2d at 354.

[108] *See generally* Deborah M. Merrill, *Daughters-in-Law as Caregivers to the Elderly: Defining the In-Law Relationship*, 15 RES. ON AGING 70 (1993) (arguing that daughters-in-law assist with as many caregiving tasks and are as likely to perceive themselves as the primary caregiver, but daughters-in-law provide, on average, six fewer hours of care per week compared to daughters); Norah D. Peters-Davis, et al., *Children-in-Law in Caregiving Families*, 39 GERONTOLOGIST 66 (1999) (explaining that the experience of caregiving is very similar for biological children and children-in-law in caregiving families).

[109] *See generally* Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25 (2009) (critiquing rigid differentiation of commercial and intimate caregiving work).

is done out of non-altruistic motives. Still, cohabitants of all forms who are caring for dependents, whether or not caregivers who are receiving immediate contribution, may be essentially interconnected and engage in mutually beneficial relationships worthy of legal recognition. Although limited, the Illinois statute presents a new vision for recognizing the need for legal support of cohabitants even in the non-sexual family.[110]

5. Welfare and Tax Benefits—Welfare benefits have important financial advantages for low-income families.[111] Tax benefits can be equally advantageous for middle- and high-income families.[112] 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 D. Sugarman argues that some public programs have a flexible definition of family, while others are stricter and fail to acknowledge diverse familial types.[113] An example of the inclusive approach is evident in food stamp benefits.[114] 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.[115] According to 7 U.S.C. § 2012, the definitional section for the Supplemental Nutritional Assistance Program (commonly known as the food stamps program), a household is "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption."[116] 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 repeal it. In 1971, the Act was amended to deny food stamps from households containing adults who were not married to each other or otherwise related.[117] This amendment was challenged and eventually struck down by the Supreme Court.[118] The Court held that the new classification of household was irrelevant for the purpose of the act, as it excluded "*only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[119]

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[110] *See* HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE 28–29 (2012) (discussing voluntary compensation for care through inheritance).

[111] *See* Stephen D. Sugarman, *What Is a "Family"? Conflicting Messages from Our Public Programs*, 42 FAM. L. Q. 231, 245 (2008).

[112] *See id.* at 241.

[113] *Id.* at 232.

[114] *See id.* at 241–42.

[115] *See id.*

[116] 7 U.S.C. § 2012(m)(1)(B) (2014).

[117] Sugarman, *supra* note 109, at 242.

[118] *See* USDA v. Moreno, 413 US 528, 538 (1973).

[119] *Id.*

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 it subsidizes rent of privately owned units for families in need.[120] There are several eligibility requirements for public housing.[121] Yet, none of these requirements stipulates that there must be a formal familial relationship.[122] Instead, U.S. Department of Housing and Urban Development (HUD) regulations define a family a "a group of persons residing together."[123]

On the other hand, tax law has a much stricter understanding of a household. Federal income tax allows married couples to file joint returns.[124] This rule allows married couples to combine resources for tax purposes and gain an important financial advantage because of the progressive tax regime.[125] Couples can therefore, if one of the two earns significantly less than the other, average down their income gain.[126] This advantage is only available for married couples and was only recently extended to same-sex married couples.[127] Single parent families can also enjoy tax benefits.[128] 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 who 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 affect 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—Several jurisdictions have rent control rules that serve as governmental housing regulations. New York City is particularly demonstrative, as

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[120] Sugarman, *supra* note 109, at 244.

[121] *See* 24 C.F.R. §5.403 (2011).

[122] *See id. But see* Madeline Howard, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97, 98 (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. *See id.*

[123] 24 C.F.R. § 5.403.

[124] 26 U.S.C. § 6013(a) (2011).

[125] Sugarman, *supra* note 109, at 238–39.

[126] *Id.*

[127] *See* United States v. Windsor, 133 S. Ct. 2675, 2682, 2694–96 (2013).

[128] *See* Sugarman, *supra* note 109, at 239 (discussing how single parents can file as heads of households and gain the benefits of lower marginal rates).

it accounts for the city with the single largest number of rent control units.[129] Moreover, its exceptional rent control regulations have spurred discussion by legal scholars.[130] These regulations provide a rare example through which to explore the potential cohabitation holds as a legal category decoupled from the sexual family. The New York Rent and Eviction Regulations involve a uniquely broad definition of familial relations that includes people unrelated to the tenant by blood or marriage. In the 1980s, the New York City rent control regulation contained in § 2204.6(d) provided that upon the death of a rent control tenant, the landlord could not evict "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's *family* who ha[d] been living with the tenant."[131] In *Braschi v. Stahl Associates Company,* the court considered whether a same-sex lifetime partner of the deceased tenant fell under the definition of "family" in the regulation.[132]

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."[133] The court also discussed factors that distinguish between non-familial and familial relationships in the home.[134] Among these 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."[135]

The New York Rent and Eviction Regulations have since embraced these criteria. The current regulation stipulates that where a tenant has permanently vacated the housing accommodation and "such family member has resided with the

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[129] Edgar O. Olsen, *Is Rent Control Good Social Policy?* 67 CHI.-KENT L. REV. 931, 931 (1991) (stating that rent controls exist in six states—California, Connecticut, Maryland, Massachusetts, New Jersey, New York—and the District of Columbia—and further stating that 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 1,025,211 rent regulated units in New York City. *Rent Stabilization in New York City,* FURMAN CTR. FOR REAL EST. & URB. POL'Y, http://furmancenter.org/files/publications/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf (last visited July 4, 2016).

[130] *See generally* 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, 975–76 (1994); John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law,* 89 KY. L.J. 911, 914–15, 922 (2001); Martha Minow, *Redefining Families: Who's In and Who's Out?,* 62 U. COLO. L. REV. 269, 275 (1991); William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships,* 8 J.L. & POL. 89, 89 (1991); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family",* 29 J. FAM. L. 497, 501 (1990–91).

[131] *See* Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 50 (N.Y. 1989).

[132] *Id.* at 51.

[133] *Id.* at 53.

[134] *Id.* at 55.

[135] *Id.*

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.[136] The definition of "family member" is broad and includes formal relations, step-relations, 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."[137] 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 finances, engagement in family-type activities, and formalization of legal obligations.[138]

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 is this definition 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—as 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.

Zoning law provides an additional example of the gradual development of a capacious definition of 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 general land-use planning.[139] Occasionally these ordinances define 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*, for example, the zoning ordinance employed a selective definition of family.[140] The state did not recognize

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[136] N.Y. COMP. CODES. R. & REGS. tit. 9, § 2204.6(d) (Westlaw through amendments included in the New York State Register, Vol. XXXVII, Issue 44, dated Nov. 4, 2015).

[137] *Id.* § 2204.6(d)(3).

[138] *Id.*

[139] *See infra* notes 141–145 and accompanying text.

[140] Moore v. City of East Cleveland, 431 U.S. 494, 531–33 (1977) (Stewart, J., dissenting). The city had determined that:

> 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.

the Moore family, which included Inez Moore, her son, and her two grandsons, Dale and John.[141] John came 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.[142] The household was not considered a family because John was not the offspring of the son with which he was living, but rather the nephew, bringing too many family lines to constitute one nuclear family.[143] The Supreme Court struck down the ordinance, stating that the city could not standardize people's preferences by "forcing all to live in certain narrowly defined family patterns."[144] The Court also emphasized the importance of broader familial relations, including intergenerational ties.[145]

In *Borough of Glassboro v. Vallorosi*, the ordinance at issue defined a 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."[146] The New Jersey Supreme Court had to determine whether a group of ten college students sharing a home together constituted a family according to the ordinance.[147] The students each had a separate renewable lease for a semester-long period.[148] The students shared a kitchen, ate together, and shared household chores.[149] They also had a common checking account to pay for food and other bills.[150] All of them planned to live in the house until graduation.[151] Upon review, the court decided that these ten college students living together did constitute a family, because the occupancy showed stability, permanency, and could be described as the functional equivalent of a family.[152]

> (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.

Id.

[141] *Id.* at 496.

[142] *See id.* at 506 (Brennan, J., concurring).

[143] *See id.* at 500.

[144] *Id.* at 505–06.

[145] *See id.* at 504–05.

[146] Borough of Glassboro v. Vallorosi, 568 A.2d 888, 889 (N.J. 1990) (quoting GLASSBORO, N.J. CODE OF ORDINANCES § 107-3 (1986)).

[147] *Id.*

[148] *Id.* at 890.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *See id.* at 894–95 (citing Borough of Glassboro v. Vallorosi, 535 A.2d. 544, 549 (N.J. Super. Ct. Ch. Div. (1987)).

The courts in zoning cases typically employ a broad definition of "family." They therefore use criteria such as "cohesiveness and permanence"[153] or whether there exists a "stable and permanent living unit."[154] 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 on these choices are interpreted narrowly and occasionally struck down. This broader interpretation of the family is quite progressive and is distinct from the way obligations and rights are defined in traditional family law. Within family law, relationships are defined quite narrowly, with most roommates, 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.

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*, the court had to decide whether the Fair Housing Act applied to shared-living situations with regard to a commercial website that helped people find roommates.[155] The website required users to disclose information about their sex, sexual orientation, and familial status, and it matched potential roommates accordingly.[156] The Fair Housing Council of San Fernando Valley claimed that this requirement violated the Fair Housing Act.[157] 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.[158] This right includes "the freedom to enter into and carry on certain intimate or private relationships."[159] "There is no indication," the Court explained, "that Congress intended to interfere with personal relationships inside the home."[160]

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 in *Roomate.com* discussed intimacy in the home, and the inevitable compromise of privacy when living with others:

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[153] Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 22 (Me. 1981).

[154] *Vallorosi*, 568 A.2d at 894 (interpreting the Glassboro ordinance at issue).

[155] Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1218, 1223 (9th Cir. 2012).

[156] *Id.* at 1218.

[157] *Id.*

[158] *Id.* at 1220–22. For a critical analysis of the decision, see generally Tim Iglesias, *Does Fair Housing Law Apply to "Shared Living Situations"? Or the Trouble with* Roommates, 22 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 111 (2014).

[159] *Roomate.com*, 666 F.3d at 1220 (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987)).

[160] *Id.* (emphasis removed).

> 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.[161]

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.[162] Although we celebrate the part of the case that recognizes the potential legal implications for non-familial cohabitation, we also acknowledge that recognition of cohabitation has to be contextual and must meet minimal requirements for joint living. Thus, while people who live together may be cohabitating, they may also not be.[163]

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

An 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 such families. However, when such rights are in limited circumstances extended to unmarried conjugal families, whether due to a *Marvin* contract, a 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 trump the relevance of cohabitation significantly. Elder care rules in Illinois only compensate spouses and blood relations for providing care to dependent relatives.[164] Similarly, rules concerning capacity to marry define incest as based mostly on biological affinity rather than the upbringing of children in the same home.[165] And federal tax

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[161] *Id.* at 1221.

[162] See discussion *infra* Part II for our proposed legal definition of cohabitation that includes minimum threshold requirements.

[163] *Cf.* Iglesias, *supra* note 156 (critiquing the *Roomate.com* opinion).

[164] *See supra* Part I.A.4.

[165] *See supra* Part I.A.3.

law limits the possibility of filing joint returns to married couples.[166] In all these examples, cohabitation is rarely treated as an alternative foundation for intimate relations, but rather, when recognized at all, it is treated 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 further 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 these laws.[167] 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 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 the land use cases reviewed above, cohabitants did not ask to be recognized as a family in terms of mutual rights and obligations, but only to be allowed to continue to live together or to 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 stamp 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 the cohabitants. 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, particularly 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

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[166] *See supra* Part I.A.5.

[167] *See supra* Part I.A.6.

of 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, strong justifications have been developed in administrative and property law for separating sexuality and cohabitation and for 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, including freedom of association and freedom of joint intimacy. Cohabitation tends to be more influential as a legal category 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 in recognizing the value of cohabitation divorced from marriage and sexuality.

II. 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 societal context.[168] 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, and thus, it is difficult to identify one predominant form. According to a report by the U.S. Census Bureau, there are a diverse number of household formations.[169] In 2012, 17.8% of American households included families living with children or other relatives without the presence of a spouse.[170] Multigenerational households, consisting of three or more generations living together, accounted for 5% of all family households, although this percentage differed by race and national origin.[171] According to the report, "[m]ultigenerational households made up 3 percent of

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[168] On the interrelation of law and social sciences in cohabitation, see, for example, ANNE BARLOW ET AL., COHABITATION, MARRIAGE AND THE LAW: SOCIAL CHANGE AND LEGAL REFORM IN THE 21ST CENTURY (2005).

[169] *See* JONATHAN VESPA, ET AL., U.S. CENSUS BUREAU, No. P20-570, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, 4 (2013), https://www.census.gov/prod/2013pubs/p20-570.pdf.

[170] *Id.* at 5 fig.1. The report clarifies that an unmarried partner of the parent may or may not be present. *Id.* n.11.

[171] *Id.* at 7.

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."[172] Another household pattern included parents living with an adult child—16% of men and 10% of women aged twenty-five to thirty-four were living with their parents.[173] Finally, 6.1% of all American households included non-family households.[174] This data shows that cohabitation is a diverse phenomenon encompassing various living arrangements, including multigenerational and intergenerational households, groups of unrelated adults, and unmarried couples. Cohabitation outside of the sexual family seems to be more common in minority households, but it represents a significant percentage of living arrangements overall.

For instance, intergenerational households are increasingly prevalent. American adults in their twenties and early thirties are "more likely to be living with their parents than in previous generations."[175] In fact, the centrality of the phenomenon has been captured by recent media attention[176] and has drawn many references in popular culture.[177] Moreover, it is a rising phenomenon not only in the United States,[178] but it has actually become a global trend.[179] This pattern of cohabitation has its roots in economic changes. The economic downturn and housing crisis affect the opportunities of college graduates to become financially independent, and

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[172] *Id.* A householder is defined as "[o]ne of the people who owns or rents the residence." *Id.* at 2. A referenced person is "the member[] of the household around whom [the] family unit[] is organized." *Id.* at 12.

[173] *Id.* at 9.

[174] *Id.* at 5 fig.1. 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 claiming to represent people living alone. In 2012, women living alone made up 15.2% of all households, men living alone made up 12.3%, and nonfamily households made up 6.1% of all households. *Id.* at 5 fig.1.

[175] Sharon Sassler et al., *Are They Really Mama's Boys/Daddy's Girls? The Negotiation of Adulthood Upon Returning to the Parental Home*, 23 SOC. F. 670, 670–71 (2008).

[176] *See, e.g.*, Nancy Anderson, *Boomerang Children Living at Home May Not Be Such a Bad Thing*, FORBES (Aug. 16, 2012, 10:15 AM), http://onforb.es/N648We; Adam Davidson, *It's Official: The Boomerang Kids Won't Leave*, N.Y. TIMES MAG. (June 20, 2014), http://nyti.ms/1ql8KgP.

[177] For movies, see, for example, LONESOME JIM (InDigEnt & Plum Pictures 2005); JEFF, WHO LIVES AT HOME (Indian Paintbrush et al. 2011); *see also* LINDA PERLMAN GORDON & SUSAN MORRIS SHAFFER, MOM, CAN I MOVE BACK IN WITH YOU?: A SURVIVAL GUIDE FOR PARENTS OF TWENTYSOMETHINGS (2004).

[178] RICHARD FRY & JEFFREY S. PASSEL, PEW RESEARCH CTR., IN POST-RECESSION ERA, YOUNG ADULTS DRIVE CONTINUING RISE IN MULTI-GENERATIONAL LIVING (2014), http://www.pewsocialtrends.org/files/2014/07/ST-2014-07-17-multigen-households-report.pdf.

[179] *See generally* Clara H. Mulder, et al., *A Comparative Analysis of Leaving Home in the United States, the Netherlands and West Germany*, 7 DEMOGRAPHIC RES. 565 (2002). For Israel, see generally Shelly Kreiczer-Levy, *Intergenerational Relations and the Family Home*, 8 LAW & ETHICS HUM. RTS. 131 (2014). For Canada, see generally Barbara A. Mitchell, Andrew V. Wister & Ellen M. Gee, *"There's No Place like Home": An Analysis of Young Adults' Mature Coresidency in Canada*, 54 INT'L J. AGING & HUM. DEV. 57, 57–58 (2002).

they therefore need their parents' assistance.[180] As the recession deepens, homeowners in their thirties and forties are sometimes forced to move back in with their parents due to foreclosure.[181] Elderly parents living with their children is another increasing phenomenon. There are the so-called "feminist grandmothers" who are moving in to care for their grandchildren and to aid working parents.[182] As Jessica Dixon Weaver explains, "The reintegration of elders into the nuclear family appears to be both a necessary and welcome change."[183] In addition, there are also parents who need care and assistance in their old age and end up sharing a home with their adult children.[184] This co-residence pattern is more common among racial and ethnic minority groups.[185]

Another telling example of cohabitation divorced from the sexual family is siblings and kin groups who seek legal recognition as family members for social welfare benefits provided by the state. The famous case of the Burden sisters was brought before the European Court of Human Rights.[186] The case dealt with two elderly sisters who had lived together from birth.[187] They co-owned a house and two other properties and "had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners."[188] Each sister had willed her property to the other, and both sought to avoid the considerable inheritance tax they would be expected to pay.[189] While spouses and civil partners in the United Kingdom could leave their property to each other and be exempted from the tax, the exemption was not available for other individuals who lived together in a committed long-term relationship.[190] The sisters turned to the European Court of Human Rights, but were ultimately denied relief.[191]

A similar Israeli case is currently drawing media attention. Two sisters, aged eighty-eight and ninety-three, who have lived together their entire life, are asking

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[180] *See* Hillary 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. & PUB. POL'Y 39, 68–69 (2011).

[181] *Id.* at 69.

[182] Penelope Green, *Your Mother Is Moving In? That's Great*, N.Y. TIMES (Jan. 14, 2009), http://www.nytimes.com/2009/01/15/garden/15mothers.html (quoting Dr. Ellen Pulleyblank Coffey).

[183] Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 4 (2013).

[184] *See* Namkee G. Choi, *Coresidence Between Unmarried Aging Parents and Their Adult Children: Who Moved in with Whom and Why?*, 25 RES. ON AGING 384, 384 (2003).

[185] *See* Jennifer E. Glick & Jennifer Van Hook, *Parents' Coresidence With Adult Children: Can Immigration Explain Racial and Ethnic Variation?*, 64 J. MARRIAGE & FAM. 240, 240 (2002).

[186] Burden v. U.K., 2008-III Eur. Ct. H.R. 49 (2008).

[187] *Id.* ¶ 10.

[188] *Id.* ¶ ¶ 11, 53.

[189] *See id.* ¶¶ 11–12.

[190] *See id.* ¶¶ 13–19.

[191] *Id.* ¶ 66.

to be recognized as legal cohabitants.[192] They claim to be entitled to a survivor pension plan from the institution of social security after one of them passes away, much like spouses and sexual cohabitants in Israel.[193] The case has yet to be decided, but it seems that they are facing an uphill battle that is unlikely to succeed, as Israeli law currently only recognizes sexual cohabitants.[194]

It is hardly a surprise that these two examples of cohabiting siblings concerned elderly sisters, as they both deal with issues of vulnerability in old age. As Rosemary Auchmuty points out in her analysis of the *Burden* case, "single women and old people also have a long history of being overlooked and disregarded in the handing out of privileges."[195] These examples demonstrate that 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. Legal recognition of a broader concept of cohabitation can be used to effectively protect the vulnerability of older individuals and to foster the freedom of association of adults and the variety of family forms. A broader concept of cohabitation reflects the interdependent and stable home lives that many cohabitants experience.

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 purposes 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 and semi-permanent.[196] Even if they do not actually live together for a long period of time, the original expectations and overall intentions of the parties 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 contributions to the household.[197] *Second*, when parties live together, the arrangement must include some form of joint living. That is, the parties can neither live in completely separate spaces nor have very little contact.[198] They cannot be strangers who simply live

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[192] Or Kashti, *Elderly Sisters Fight to Be Legally Recognized as a "Couple"*, HAARETZ ISRAELI NEWS SOURCE (July 3, 2015, 1:09 AM), http://www.haaretz.com/israel-news/.premium-1.664250.

[193] *See id.*

[194] *See id.*

[195] Rosemary Auchmuty, *Beyond Couples*, 17 FEMINIST LEGAL STUD. 205, 216 (2009).

[196] For an example of the importance of longevity in zoning cases, see generally Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990). Cynthia Bowman takes up a related suggestion regarding cohabitating couples, arguing 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* notes 56–57 and accompanying text.

[197] Kreiczer-Levy, *supra* note 8, at 144.

[198] *See id.* at 143–44. *Cf.* Iglesias, *supra* note 156, at 113 (arguing that not all types of shared physical spaces implicate intimate association).

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.[199] 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

In this section we describe in more detail the effects of home sharing and the way the home creates joint lives that advance the goals of family law in a liberal polity.

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.[200] These two core meanings have been studied in a variety of disciplines, including phenomenology, psychology, sociology, and environmental studies.[201]

The individual meaning of the home revolves around such a home creating a sense of identity, belonging, permanence, and continuity.[202] The home is a place that allows the occupier to create a personal environment that reflects her everyday needs and her individual taste.[203] It gives the individual spatial orientation; it allows comfort in locating oneself.[204] 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.[205] The law celebrates this individual vision of home.[206] Legal rules protect possession in the home on the one hand, and privacy and freedom from intrusion on the other hand.[207] The home is a protected space where one is free to defend oneself from intrusion, even with the use of deadly force.[208] This

[199] *See* Kreiczer-Levy, *supra* note 8 at 138–39, 141–43.

[200] *See, e.g.*, Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & SOC'Y 580, 588 n.28 (2002).

[201] *See id.* at 588.

[202] *See* Judith Sixsmith, *The Meaning of Home: An Exploratory Study of Environmental Experience*, 6 J. ENVTL. PSYCHOL. 281, 282, 287 (1986).

[203] *See* Fox, *supra* note 198, at 599.

[204] *See id.* at 593.

[205] *See* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 269–70, 272 (2006).

[206] *See id.* at 269–70.

[207] *See id.* at 256–57.

[208] Almost all states have such laws. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-51.3 (West, Westlaw through Ch. 266 of the 2015 Reg. Sess. (excluding 240-241, 246, 258-264)) (stating that "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be"); OHIO REV. CODE ANN. § 2901.09 (West, Westlaw through Files 1 to 26 of the 131st General Assemb. (2015-2016)) (permitting residents to defend their homes using deadly force without the requirement of retreating); Crawford v. State, 190 A.2d 538, 541 (Md. 1963) (citing

legal focus on privacy or possession reflects an ethos of the home as a castle,[209] a sphere where one is left alone and is completely free from outside threats: the state, creditors, or landlords.[210]

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.[211] The home enables interactions with others, either as guests and neighbors or the people with whom one lives.[212] Communication with others is a central characteristic of the home.[213] When asked to provide reasons why certain dwelling places were considered home, many respondents in a study performed by Sandy Smith pointed to their relationships inside the home.[214] A related study by Judith Sixsmith found that the type and quality of relationships and the emotional environment they afforded were significant aspects of the social dimension of home.[215] In fact, some respondents explained that the home would not be a home without their family.[216] Sixsmith has developed an account of relationships in the home:

> Thus, social networks built around a home and the relationships that create and are created in a home are of 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.[217]

The interdisciplinary literature illustrates that living with people who are near and dear to the heart is one of the qualities that make a house a home.[218] Indeed,

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common law rule that use of deadly force is allowed in the case of home intrusion); Barton v. State, 420 A.2d 1009, 1010 (Md. Ct. Spec. App. 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.").

[209] *See* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 2 (2009); *see also* Barros, *supra* note 203, at 257; Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1105 (2009).

[210] *See, e.g.*, Fox, *supra* note 198, at 601 (acknowledging that home is thought of as a refuge from outside threats).

[211] Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, 60 U. TORONTO L.J. 445, 451 (2010).

[212] *See* Sixsmith, *supra* note 200, at 281–82; Sandy G. Smith, *The Essential Qualities of a Home*, 14 J. ENVTL. PSYCHOL. 31, 39 (1994); *see also* Shelley Mallett, *Understanding Home: A Critical Review of the Literature*, 52 SOC. REV. 62, 68 (2004).

[213] *See* Smith, *supra* note 210, at 33, 43.

[214] *Id.* at 37, 39.

[215] *See* Sixsmith, *supra* note 200, at 291.

[216] *See id.*

[217] *Id.*

[218] *See, e.g.*, Austin, *supra* note 209, at 451; Mallett, *supra* note 210, at 83.

most people live with others.[219] Philosophers have similarly described the home as essentially being with others.[220]

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.[221] It is often defined as a feminine spatiality, where women function as primary caretakers.[222] The home thus subjects women to traditional roles of tending to the needs of other members of the family.[223]

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."[224] The association of home with the family confines human relations to a structure that is 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.[225] Indeed, the legal rules reviewed above support the conclusion that legal regulation of the home provides a channeling function in favor of preferred, nuclear, biological, and marital family forms.[226]

Moreover, the home embodies both the benefits and risks of privacy.[227] 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.[228] 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, but 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 the non-intimate side—of cohabitation must also be taken into account. For instance, sociological studies point to

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[219] *See* ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 1 (2008) (noting that "[m]ost homes have more than one resident").

[220] *See* Mallett, *supra* note 210, at 83.

[221] *See id.* at 72.

[222] *See* 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, 436–37 (2008).

[223] *See id.* at 488.

[224] Mallett, *supra* note 210, at 68 (quoting Peter Saunders & Peter Williams, *The Constitution of the Home: Towards a Research Agenda*, 3 HOUSING STUD. 81, 82 (1988)).

[225] *See* Rosenbury, *supra* note 12, at 91 (noting that the law's encouragement of marriage perpetuates traditional behaviors among individuals). *See generally* Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009) (discussing the potential to consider friends as fiduciaries).

[226] *See supra* INTRODUCTION.

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

[228] *Cf.* Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90, 106–17 (Robin Fretwell Wilson ed., 2006).

childrens' difficulties in handling rules forced on them by parents.[229] Children often experience the loss of privacy and autonomy and an inability to influence decision making in the home.[230] 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.[231] 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. One of the biggest challenges of family law is determining how to define the family in a way that truly allows for freedom of association.[232] An inclusive, progressive definition of the family should go beyond the sexual family.[233] On the one hand, in creating a more inclusive approach to family, the law thereby 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.[234] Yet, arguably, there are all kinds of friends. We have convenience friends, historical friends, crossroad friends, cross-generational friends, and "friends who come when you call them at two in the morning."[235] We share a certain level of intimacy with all of them, but the intensity of the relationship and the degree of commitments vary greatly. Thus, Rosenbury's insight about the nature of friendship and the intimacy involved is important. However, capturing the right level of intimacy in granting legal recognition to

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[229] Naomi Rosh White, *"Not Under My Roof!": Young People's Experience of Home*, 34 YOUTH & SOC'Y 214, 216–18 (2002).

[230] *See id.*

[231] *See id.* at 218–20. *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 PSYCHOL. 1416 (2009) (discussing implications of a study "for the meaning and development of autonomy during emerging adulthood").

[232] *See supra* notes 9–17 and accompanying text.

[233] *See supra* notes 9–17 and accompanying text.

[234] *See* Rosenbury, *supra* note 12, at 202–19.

[235] 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 (1986).

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 *attachment* between the parties involved.[236] While "intimacy" is often taken to mean "privacy," it also means commitment to ongoing, shared experiences that include caring about the other and investing in a relationship.[237]

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.[238] Cohabitants rely on each other for the payment of expenses or common necessities, and occasionally they even have intermingling funds.[239] In addition, they may engage in common activities, enjoy spending time together, and rely on each other's care and support when necessary.[240] 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 *stability* to a relationship. Cohabitants share a physical setting that is also perceived as one's most private and intimate spatiality.[241] 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.[242] Home invests a person's life with stability and is a condition for

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[236] Consider with the cohabitation of couples. One study found that, "[w]hile cohabitation did not appear to be related to couple permanence, it was associated with measures of couple intimacy." Barbara J. Risman et al., *Living Together in College: Implications for Courtship*, 43 J. MARRIAGE & FAM. 77, 80 (1981); *see also* Em Griffin & Glenn G. Sparks, *Friends Forever: A Longitudinal Exploration of Intimacy in Same-Sex Friends and Platonic Pairs*, 7 J. SOC. & PERS. RELATIONSHIPS 29 (1990) (analyzing data of longitudinal study related to identifying variables predictive of closeness among pairs of friends).

[237] *See* Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 33–34 (1976).

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

[239] Legal rules can distinguish between familial and non-familial relationships in the home based on, among other things, emotional and financial interdependency. *See* Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53–54 (N.Y. 1989); *see also* N.Y. COMP. CODES R. & REGS. tit. 9 § 2204.6(d) (West, Westlaw through amendments included in the New York State Register, Vol. XXXVII, Issue 51, dated Dec. 23, 2015); ALI PRINCIPLES, *supra* note 10, § 6.04.

[240] *See, e.g.*, Borough of Glassboro v. Vallorosi, 568 A.2d 888, 894 (N.J. 1990).

[241] *See supra* notes 200–202 and accompanying text.

[242] *See Vallorosi*, 568 A.2d at 891, 894–95.

physical safety.[243] Cohabitants are thus physically connected, and they 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 an opportunity to recognize the intimacy created when people live together as its own foundation for familial rights and obligations, 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, it 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. Home sharing often leads to mutual care and nurture, as well as interdependence, attachment, and stability, which are fundamental aspects of the kind of familial relationships that family law intends to support in order to advance all people's well-being. Thus, in expanding our notions of family and in exploring a more progressive vision of the family form, cohabitation provides an important focal point. 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 may 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 of limited rights when coupled with sustained and significant levels of caregiving demonstrated by the cohabiting functional parent.[244] 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 craft a nuanced approach to the legal significance of cohabitation that 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 in 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 such recognition of cohabitation.

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[243] *See* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829 (2009) (citing KARL POLANYI, THE GREAT TRANSFORMATION 178 (1944)).

[244] *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 421–23; ALI PRINCIPLES, *supra* note 10, § 2.03 cmt. b(iii).

III. COHABITATION AND FAMILY FORMATION: CARING, SHARING, AND FORMAL REGISTRATION

Theoretically, it is possible to imbue cohabitation with a range of legal significance in the law of family formation—from little or no legal relevance or, at the other extreme, as the primary legal factor in recognizing the legal family. In between these extreme positions are many shades of gray and the potential to recognize cohabitation in some contexts and not in 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 some potential for 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 should 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 should be relevant in providing presumptive rights to visit with children, but only if significant caregiving is also involved. Finally, cohabitation alone should create legal rights and obligations only 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.[245] However,

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[245] *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 421–23.

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 may 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 with meeting 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.[246] 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.[247] Yet, the analysis does not preclude economic sharing outside the home.[248]

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 avoid imposing 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 the French *Pacte Civil de Solidarité* ("PACs") and to recognize such intimate associations in granting state benefits. This allows cohabitants to "opt-in" to family-related benefits. The other is to impose or ascribe rights and obligations upon cohabitants due to the fact that they cohabitate like the ALI Principles suggest is appropriate.[249]

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[246] *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 835–36 (Wash. 1995) (holding that cohabitants in a meretricious marriage-like relationship are entitled to equitable distribution even if not married); *see also* ALI PRINCIPLES, *supra* note 10, § 6.03 Reporter's Notes cmt. b (referring to the well-established case law in the state of Washington, as well as developments in Oregon, Mississippi, and Florida for providing equitable distribution to cohabitants).

[247] *Connell*, 898 P.2d at 835–36; ALI PRINCIPLES, *supra* note 10, § 6.03 Reporter's Notes cmt. b.

[248] *See* Halley, *supra* note 11, at 901 (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 streams 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 11, at 398 (focusing on economic sharing without reference to cohabitation as a basis for property distribution).

[249] *See* ALI PRINCIPLES, *supra* note 9, § 6.03 Reporter's Notes cmt. b.

Ascribing legal status that imposes rights and obligations is appropriate when there are vulnerable parties who need the protection of the state.[250] 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.[251] And, the emotional bonds 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, as 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 is not caring or sharing, there is less vulnerability, and 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 can act as a conservative force in tying people who live together into mandatory, marriage-like relations.[252]

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 cohabitation is combined with caring or sharing, rights and obligations may be imposed due to the potential vulnerability involved. When cohabitation stands

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[250] *See generally* Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13 (Martha Albertson Fineman & Anna Grear eds., 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 NEV. L.J. 619, 619–20 (2013) (describing the vulnerability of the human condition and the subsequent need for state protection due to that vulnerability).

[251] *See, e.g.*, JOAN WILLIAMS, *UNBENDING* GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101–13 (2000); Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 170–71 (1998); Laura T. Kessler, *The Attachment Cap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 386–87 (2001) (describing women's disproportionate caregiving responsibilities and their detrimental effects on women's participation in market work).

[252] *See* Lifshitz, *supra* note 50, at 1571–72.

by itself, registration of status should be provided for and accepted by the state, and default rules for such registration should be created.

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 such as nursing home care for the elderly or boarding school for older children exist, 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, though it does not match the ideal nuclear family.

Providing care to children and other dependents creates a derivative dependency or vulnerability.[253] Home care for family members and other cohabitants is usually not paid, and time spent caring compromises market work, therefore increasing economic vulnerability.[254] Moreover, caring stems from and furthers deep emotional bonds and attachments that affect both the cared for and the caregiver.[255] Cohabitation strengthens the constancy of 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 a 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 also an end to the joint home that has served as the center of both the caregiver's 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 take into account

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[253] *See supra* notes 248–249 and accompanying text.

[254] *See supra* notes 248–249 and accompanying text.

[255] *See* JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9–28 (1973); JOSEPH GOLDSTEIN, ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 39–57 (1979); JOSEPH GOLDSTEIN, ET AL., IN THE BEST INTERESTS OF THE CHILD 54–59 (1986); *In re* Marriage of Burgess, 913 P.2d 473, 478–81 (Cal. 1996) ("[T]he paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—*weigh heavily in favor of maintaining ongoing custody arrangements.*") (emphasis added).

these vulnerabilities.[256] Children's needs are the focus of custody and child support determinations under the best interests standard.[257]

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.[258] Thus, these cohabitant caregivers and the economic and emotional vulnerability that develops due to caregiving are left completely to the 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.[259]

Take, for example, the facts of the New York case *In re E.S. v. P.D.*[260] The case dealt with a custody dispute over a nine-year-old child.[261] The mother and father of the child were married, and the mother was diagnosed with cancer when the child was three years old.[262] At that time, the mother's mother was asked to move in with the family to help raise the child and to take care of the mother.[263] The child's grandmother did so and cared for the mother and the child until the mother's death about nine months later, then stayed in the home to care for the child for three and a half more years.[264] 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:

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[256] UNIF. MARRIAGE & DIVORCE ACT § 307(a) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1970) (listing other factors, including contribution of each spouse to acquisition of the marital property and contribution of a spouse as homemaker); *see also* Solomon v. Solomon, 857 A.2d 1109, 1115–16 (Md. 2004) (discussing whether "tax liabilities should . . . be taken into account in valuing property for a marital award").

[257] *See* UNIF. MARRIAGE & DIVORCE ACT § 307(b).

[258] *See* Laufer-Ukeles, *supra* note 107, at 90–93. 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 94–97.

[259] *See generally* Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregivers' Rights and Children's Rights*, 15 NEV. L.J. 236 (2014) (discussing the pitting of children's rights and caregivers' rights).

[260] *In re* E.S. v. P.D., 863 N.E.2d 100 (N.Y. 2007).

[261] *Id.* at 102.

[262] *Id.* at 101–02.

[263] *Id.* at 102.

[264] *Id.*

> [The] grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, 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. [265]

Moreover, for three years, the father, grandmother, and child spent summers cohabiting in the grandmother's summer house, maintaining the family structure that they had created, even during vacations.[266] But, eventually power struggles arose, mainly about how to raise the child (under a strict standard versus a more lenient one), and the father asked the grandmother to move out and refused to let her visit with his then-eight-year-old son.[267] After two months of no contact despite the grandmother's requests, the father allowed some phone calls and highly supervised visitation, the conditions of which led the grandmother to seek judicial recourse.[268] The trial court granted the grandmother regular, unsupervised visitation despite the strenuous objection of the father.[269] 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.[270] The court granted the grandmother visitation based on a best interests analysis and a statute that provided for grandparent visitation.[271]

The decision clearly came out correctly from an emotional perspective, although one could certainly argue that it does not sufficiently conform with the holding of *Troxel v. Granville*.[272] One way to rebut the presumption or special weight announced in *Troxel* in favor of parent's rights would be to lean on the cohabitant relationship. But in *in re E.S. v. P.D.*, there was no particular focus on the relevance of the cohabitant relationship between the grandmother, father, and son. In that case, the cohabitation was central to the nature of the relationship between the grandmother and child and factored into the best interests determination in addition to the care provided, although the decision to grant visitation under the grandparent visitation statute is anchored in the biological relationship between the grandmother and the grandchild..[273] Cohabitation could be given a more central, anchoring, role in a custody determination. Cohabitation created a separate family unit and made the grandmother particularly vulnerable to the

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[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *See id.* at 103.
[270] *Id.*
[271] *Id.*
[272] Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").
[273] *See in re E.S.*, 863 N.E.2d at 103, 106.

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.[274] 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.[275]

While we do not believe that cohabitation needs to 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 parties. Therefore, "cohabitation plus care," as illustrated in the case of *in re 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 to protect the caregiver-child relationship from termination at the whim of the legal parent.

Cohabitants without biological relations to a child and who provide ongoing care to dependents should also have presumptive rights to visitation, and possibly more than that, depending on the nature of the relationship between the children and their formal parents. Most often, it is same-sex partners who are cohabitants with their sexual partners and their partner's biological child who seek judicial recourse for visitation once the sexual relationship ends.[276] Often these cohabitants have engaged in long-term parenting roles with the children.[277] Unlike in grandparent cases, in same-sex partner cases, cohabitation is often a relevant criterion.[278] However, when used, cohabitation is looked to as a requirement, as opposed to a presumptive factor, in awarding visitation.[279] 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.[280]

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[274] *See id.* at 102.

[275] *See id.*

[276] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005); Rubano v. DiCenzo, 759 A.2d 959, 961 (R.I. 2000).

[277] For a discussion of cases in which long-term functional caregivers receive legal status regarding children with whom they live, see Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 422 n.7, 441–46 (citing the landmark cases of *Rubano*, 759 A.2d 959; Quinn v. Mouw-Quinn, 552 N.W.2d 843 (S.D. 1996); Jean Maby H. v. Joseph H., 246 A.D.2d 282 (N.Y. App. Div. 1998); *In re* Marriage of Sleeper, 929 P.2d 1028 (Or. Ct. App. 1996); Bupp v. Bupp, 718 A.2d 1278 (Pa. Super. Ct. 1998)).

[278] *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 422 n.7, 441–46 (citing *Rubano*, 759 A.2d 959; *Quinn*, 552 N.W.2d 843; *Jean Maby H.*, 246 A.D.2d 282; *Marriage of Sleeper*, 929 P.2d 1028; *Bupp*, 718 A.2d 1278).

[279] *See* T.F. v. B.L., 813 N.E.2d 1244, 1253 (Mass. 2004) (finding that lack of cohabitation, as well as duration of relationship, precluded finding of parenthood); V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (listing cohabitation with child as one of four required factors); A.F. v. D.L.P., 771 A.2d 692, 699–701 (N.J. Super. Ct. App. Div. 2001) (denying visitation because of failure to cohabit with child).

[280] *See T.F.*, 813 N.E.2d at 1253–54; *A.F.*, 771 A.2d at 699–700.

Cohabitation need not be present in order to generate functional parenthood status or rights to visitation.[281] But, making cohabitation a presumptive factor acknowledges the ways that it produces intimacy and interdependency, and expresses ongoing commitment, creating a home where caregiving is shared and attachments are developed.

Even cohabitants without a sexual relationship with a legal parent or a biological relationship to a 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 is just as central to a family's life, the caregiving relationships are just as important, the attachments and sacrifice are just as pronounced, and the vulnerabilities produced by the prospect of ending the relationship or from economic sacrifice for the sake of caregiving are just as significant as when there is a sexual relationship between parents. Both the child and the caregiver will suffer if these relationships are not recognized. And, again, such legal relevance, if clear, can help avoid harmful litigation.[282]

Visitation would reflect the nature of the relationship before the end of cohabitation, andas long as a formal parent is still primarily responsible for the child, custodial awards would be limited to visitation.[283] Moreover, such judicial intervention should occur only at the end of the cohabitant relationship, a time of crisis for the child.[284] These rights would not be waivable, transferable, or subject to contract, as they should be focused on children and relationships, and not on 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,[285] but for the sake of the children and the caregivers involved, such concerns should be set aside.

Imagine two friends who cohabit and raise their kids together after they have ended their relationships with the 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

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[281] *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 458, 460–61.

[282] *See* Richard Neely, Commentary, *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) ("[C]ustody 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 (1990-91) ("[C]hildren 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, 123–24 (1997).

[283] *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 475.

[284] *See id.* at 471–72.

[285] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 68–70 (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).

the duties of carpooling, cooking, bathing, and putting the 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 of the children. 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 children and caregiver, depending on the length of the cohabitation. The longer the cohabitation, then, the more intimacy, interdependency, and shared living that will result in high levels of caregiving should be recognized. But the likelihood under current family law that cohabitants could obtain visitation rights to each other's children, despite the intimacy of care involved, is unlikely,[286] although it has not been often tested.[287]

If these friends were sexual partners, whether same-sex or heterosexual, obtaining such rights may be more possible, as states are starting to recognize the possibility of visitation with non-biological caregivers in committed relationships with biological parents. 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 sexual families.[288] But sex does not have anything to do with a caregiving relationship. It is a proxy for a committed relationship between adults, and perhaps for the intimacy of the home—but non-sexual home sharing also is a good indicator of intimacy and commitment,[289] and thus sexuality should not be the only factor involved. Creating a cohabitant class that has presumptive rights to such visitation, if intimate 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, considerations of cohabitation 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 shown by the cohabitant caregiver seeking

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[286] *See, e.g.*, Scott v. Superior Court of Sacramento Cty., 171 Cal. App. 4th 540, 544–46 (Cal. Ct. App. 2009) (refusing former cohabitant who provided significant care to father's children standing to seek visitation with child); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 397 (Cal. Ct. App. 1986) (refusing to decide issue of whether a non-cohabitant friend of mother could be appointed as de facto parent to preserve future visitation rights despite the intent of friends to raise children together).

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

[288] *See* ALI PRINCIPLES, *supra* note 10, § 2.03(1).

[289] *See supra* Part II.B.

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,[290] then any evidence of such abuse should be used to eliminate a claim for visitation. Custodial decisions must always be made with children's interests at the 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 it creates intimacy and interdependency. When cohabitation is coupled 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 titleholder 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 will 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 their sharing by awarding equitable distribution of assets accumulated during the marriage.[291] 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.[292] Property distribution rules value nonmarket contributions to the shared marital household,[293] and the ALI Principles, although not binding,

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[290] *See* Wilson, *supra* note 226, at 106–16.

[291] *See* JAY E. FISHMAN ET AL. , STANDARDS OF VALUE: THEORY AND APPLICATIONS 168–77 (2007); LYNN D. WARDLE & LAURENCE C. NOLAN, FAMILY LAW IN THE USA 247–48 (2011).

[292] *See* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 397 (1993); Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. 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.") (internal citations omitted); 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, 43–46 (1994).

[293] *See, e.g.*, Ferguson v. Ferguson, 639 So.2d 921, 934 (Miss. 1994) (discussing the relevance of indirect domestic services contributing to earned income as relevant for equitable distribution); UNIF. MARRIAGE & DIVORCE ACT § 307 94 U.L.A. 288 (1998). *See also* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 115 (2013) ("[W]e can now hardly think of marital property law without equal division, which is probably the feature least contested by courts, commentators and lay people alike . . . . Equal division, is this view,

support going further and recognizing emotional stability, optimism, and social skills.[294] Legal rules compensating non-market work at the dissolution of marriage are based alternately on partnership theory,[295] the idea of marriage as an egalitarian liberal community,[296] or as a way to compensate in-kind and caregiving contributions within a joint household that are otherwise not accounted for.[297] 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.[298] Even when couples function as a single economic unit, in most states in the United States, 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.[299] Even after the *Marvin* ruling, proving implied agreements of economic sharing is difficult and often unsuccessful.[300] Indeed, there have been calls for reform that argue for extending similar rights to unmarried cohabitants.[301] 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.[302] She supports the recognition of sharing not only in intimate partnerships, but also within intergenerational families.[303] 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 or interdependency created by cohabitation and the vulnerability it creates.[304] We believe that cohabitation, particularly 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.[305] The legal category of cohabitation proposed

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simply reflects an accurate valuation of both spouses' contribution, taking into account nonmarket work and interpersonal support.").

[294] ALI PRINCIPLES, *supra* note 10, § 4.09 cmt. c.

[295] *See* Motro, *supra* note 290, at 1631–36.

[296] Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 103–06 (2004).

[297] *See* ALI PRINCIPLES, *supra* note 10, § 4.09 cmt. c.

[298] *See supra* note 58–62 and accompanying text.

[299] *See* Berenson, *supra* note 49, at 297.

[300] *See supra* note 64 and accompanying text.

[301] *See, e.g.*, Bowman, *supra* note 56, at 3–5.

[302] *See generally* Alicia B. Kelly, *Sharing Inequality*, 2013 MICH. ST. L. REV. 967 (2013).

[303] *See id.* at 967–68, 981–82.

[304] *See id.* at 981–82.

[305] *See id.*

in this article would additionally acknowledge nonrelatives who function as a single economic unit. We look to anchor such unity and joint living in the home because this relationship naturally generates a shared living experience that goes beyond sexuality and biology.

The facts of *Frambach v. Dunihue* provide an excellent example of how joint living solidifies and entrenches the need to compensate economic sharing.[306] Mr. Dunihue was a widower with seven children.[307] The Frambachs were a married a couple who lived nearby, raising their four children.[308] On one occasion, the Frambachs and the Dunihues waited out a hurricane together in the Frambachs' home.[309] This arrangement proved to be so pleasant and agreeable that the two families decided to make it permanent.[310] The three adults and their twelve children lived together in the Frambachs' home for nineteen years.[311] During that period, Mr. Dunihue made a number of physical improvements to the house, which was previously not suited for so many occupants, as it was small and had no indoor plumbing.[312] 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.[313] The three adults also shopped together for clothes, furniture, and automobiles.[314] They therefore comingled income and labor, and each of these adults contributed to the household physically and financially.[315] This idyllic environment lasted for almost two decades until it ended abruptly.[316] One day, Mrs. Frambach called Mr. Dunihue at work and told him he had thirty minutes to move out.[317]

Likely 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,"[318] and he requested that an equitable lien be imposed on the property.[319] 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."[320] The appellate court reversed the decision.[321] The court felt compelled to

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[306] *See* Frambach v. Dunihue, 419 So. 2d 1115, 1116–17 (Fla. Dist. Ct. App. 1982).
[307] *Id.* at 1116.
[308] *Id.*
[309] *Id.*
[310] *See id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *See id.*
[316] *Id.*
[317] *Id.*
[318] *Id.* at 1116–17.
[319] *Id.* at 1117.
[320] *Id.*

deny such equitable distribution because it found no evidence of a promise or an agreement.[322] Moreover, employing a narrow unjust enrichment perspective, the court explained that the only relevant question was whether Dunihue's "contributions exceed[ed] the value of the benefits received by him from the Frambachs," and the court suspected the contributions would prove equal.[323] Thus, the unjust enrichment argument failed to provide Mr. Dunihue the relief he requested and which seemed intuitively fair to the trial court.[324] The nature of the joint household itself was not sufficient cause for an equitable property distribution absent a finding of contractual agreement.[325]

The appellate court in *Frambach* 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, as 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 a means of financial stability, sociability, intimacy, and interdependency. Because Mr. Dunihue had 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 trusts or equitable liens.[326] Such legal devices are particularly relevant in securing an 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.[327] Much like married couples can, within limits, enter a prenuptial agreement to curtail default rules regarding equitable distribution,[328] so can other cohabitants opt to prevent the creation of a constructive trust or equitable

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[321] *Id.*

[322] *See id.*

[323] *Id.*

[324] *See id.*

[325] *See id.*

[326] *See generally* Henry Monaghan, *Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity*, 38 U. DET. L.J. 10 (1960) (explaining constructive trusts and equitable liens); Joseph William Singer, *The Rule of Reason in Property Law*, 46 U. CAL. DAVIS L. REV. 1369, 1380–81 (2013) (explaining the rationale underlying informal sources of property rights).

[327] *Cf.* Kreiczer-Levy, *supra* note 8 (discussing the author's suggestions for remedies for the end of familial sharing situations in the context of parent and adult-child relationships).

[328] *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, 154 (1998).

lien in most circumstances.[329] 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. 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.[330] Second, the rule imposes transaction costs on 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.[331]

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 Kelly suggests.[332]

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 II. These social benefits are important and deserve legal recognition when the parties explicitly choose to create

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[329] *See* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 590–91, 618, 622 (2013) (discussing, in particular, Washington state's system of opting in to such legal benefits and obligations).

[330] For the expressive function of the law, see generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). For the power of default rules, see generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *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 (1991) (discussing the modern trend to interpret contracts based on what the parties would have assented to had they explicitly discussed the issue); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (identifying the problematic expressive function of laws disfavoring homosexual individuals and same-sex couples).

[331] 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).

[332] *See generally* Kelly, *supra* note 300.

formal legal relations. As such, 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."[333] William Truman and Grace Adler have been best friends since their freshman year of college, and they have lived together in a New York City apartment for years.[334] As Will is gay, the couple is not in an intimate conjugal relationship.[335] These are two independent unrelated adults who 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 such cohabitants 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.[336] 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 or 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.[337] Perhaps Grace wants Will to inherit her estate, even in the absence of a valid will, or to continue to live in her rent control apartment after her death. To address these needs, we suggest a model of registration. If 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 that consider the values of

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[333] *See* Evan Cooper, *Decoding* Will and Grace*: Mass Audience Reception of a Popular Network Situation Comedy*, 46 SOC. PERSP. 513, 517 (2003).

[334] *See id.* at 516–17.

[335] *See id.*

[336] *See supra* notes 151–152. *Cf.* Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU. L. REV. 1 (1991) (discussing autonomy and belonging in family law).

[337] Based on their circumstances, such an arrangement would potentially be allowed in Colorado. *See* COLO. REV. STAT. ANN. §§ 15-22-101 to -112 (West, Westlaw through the First Reg. Sess. of the 70th General Assemb. (2015)).

autonomy, freedom of association, and a progressive vision of family formation. Some of these guidelines are inspired by existing models and scholarly suggestions.[338] In particular, we compare our model to Registered Domestic Partnerships in European countries and American states,[339] the French *Pacte Civil de Solidarité* (PACS),[340] and other calls for reform.[341]

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.[342]

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, however, as not all living arrangements would be considered cohabitation. As we indicated in Part II, cohabitation requires long-term commitment and some form of joint living.[343] These requirements are hard to prove in advance, especially to an administrative authority such as the registrar.[344] 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 to 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, any one of the cohabitant parties should have the right and obligation to end the 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

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[338] *See generally, e.g.*, Aloni, *supra* note 327 (proposing more options for legal recognition of relationships); LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 117–18 (2001) (discussing registration of relationships).

[339] *See* LAW COMM'N OF CAN., *supra* note 336, at 117–18 (discussing developments in European countries, including Denmark, the Netherlands, France, Belgium, and Spain, and in North American countries, including Hawaii, U.S., and in Nova Scotia, Canada).

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

[341] *See, e.g.*, LAW COMM'N OF CAN., *supra* note 336, at 122 (Canadian proposal); *see generally* Aloni, *supra* note 327 (analyzing registration of non-marital relationships scheme).

[342] *See* Aloni, *supra* note 327, at 616.

[343] *See supra* note 194–197 and accompanying text.

[344] Registration schemes usually include formal requirements rather than discretionary authority. *See, e.g.*, LAW COMM'N OF CAN., *supra* note 336, at 117–18 (analyzing current registration schemes); Aloni, *supra* note 327, at 608–09 (discussing proposed registered contratual relationship scheme).

policy in supporting relationships of those who actually cohabit. The state need not be overly careful in determining who cohabits 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.[345]

Third, unlike the prevailing view, we reject a firm limitation on the number of parties to a registered union. Current schemes do not allow more than two individuals to register as cohabitants.[346] 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 could be overly complicated by too many cohabitants.[347] Communes and community living in apartment buildings with shared expenses are likely to complicate interpersonal commitments. As in the case of fraud, discussed in the previous paragraph, if relationships are abusive or exploitative due to fundamental inequality, as many argue polygamous relationships may be by nature, state oversight can be used to cancel benefits and registration on public policy grounds, as multiple marriages are cancelled.

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.[348] Only a minority of registered-partnership regimes allow close relatives to register. In Hawaii, under the "reciprocal beneficiaries" scheme, non-conjugal couples are permitted to register their relationships.[349] In addition, Colorado's designated beneficiary law provides that any two adults can register this way, no matter if they are related or not.[350]

These two requirements, limiting the number of individuals who can form a union and denying registration to relatives, seek to mimic the conjugal relationship based on an idea 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

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[345] *See* United States v. Bowman, 260 U.S. 94, 98 (1922).

[346] *See* Richards, *supra* note 338, at 315; LAW COMM'N OF CAN., *supra* note 336, at 117, 119–20. However, the Canadian Law Commission suggested that in principle, there is no reason to limit registration to two people. *Id.* at 118–19. Yet, the commission requires economic or emotional dependence of some duration. *Id.* at 133 n.16.

[347] We leave the limit on the number of cohabitants to future considerations that take into account the context and variety of benefits and obligations involved.

[348] *See* LAW COMM'N OF CAN., *supra* note 336, at 133 n.17.

[349] HAW. REV. STAT. ANN. §§ 572C-2, C-4 (West, Westlaw through Act 243 [End] of the 2015 Reg. Sess.).

[350] *See* COLO. REV. STAT. ANN. § 15-22-104 (1)(a) (West, Westlaw through 2015 First Reg. Sess. of the 70th General Assemb. (2015)). However, the law requires that neither party is either married to another person or is a designated beneficiary of another person. *Id.*

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 both fail to address the full scope of cohabitation as a current social phenomenon and do not meet their potential to promote 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 he 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.[351] However, Will can also be married, and at the same time have a cohabitant relationship. This may affect mutual rights and obligations, but it must be explored in context.

Fifth, registration should establish eligibility for 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,[352] medical decision-making,[353] hospital visitation rights,[354] and rent control protection.[355] The Colorado scheme of "designated beneficiary"

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[351] *Cf.* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 568 (2001) (discussing the importance of exit for autonomy).

[352] *See* CAL. HEALTH & SAFETY CODE § 1374.58 (West, Westlaw through Ch. 807 of 2015 Reg. Sess. & Ch. 1 of 2015-2016 2d Exec. Sess.) (requiring equal coverage under such benefits for registered domestic partners and spouses); CAL. INS. CODE §§ 381.5, 10121.7 (West, Westlaw through Ch. 807 of 2015 Reg. Sess. & Ch. 1 of 2015-2016 2d Exec. Sess.)); COLO. REV. STAT. ANN. § 15-22-102 (West, Westlaw through 2015 First Reg. Sess. of the 70th General Assemb. (2015)).

[353] *See* COLO. REV. STAT. ANN. § 15-22-102 (Westlaw); MD. CODE ANN. HEALTH-GEN. § 6-203 (West, Westlaw through 2015 Reg. Sess. General Assemb.) (allowing domestic partners to serve as health care agents); NAT'L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 1, 6–8, 22 (2015), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf (noting those states that have legally empowered domestic partners to make health care decisions). *Cf.* Polikoff, *supra* note 40, at 356 (supporting registration for non-conjugal couples, which would affect only medical decision-making and inheritance rights).

[354] *See* COLO. REV. STAT. ANN.§§ 15-22-102, 22-104 (Westlaw); MD. CODE ANN. HEALTH-GEN. §§ 6-201 to -202 (Westlaw) (mandating hospital visitation rights to domestic partners). *Cf.* Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 49 (2014) (noting that the history of the state's recognition of nonmarital status began with ordinances requiring hospital visitation and insurance rights).

[355] *See* 9 N.Y. UNCONSOL. LAW § 2204.6(d) (West, Westlaw through amendments through Mar. 1, 2015). The French PACS status provides "protection for residential leases when one member of the PACS dies." Feinberg, *supra* note 352, at 55.

law serves as the inspiration for this guideline.[356] 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.[357] However, the list of available benefits on this form should be associated with joint living, which is the basis for creating a cohabiting relationship.[358]

Sixth, registration may also influence the mutual rights and obligations between the parties. Much like they can for third party 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 who affirmatively choose to distribute property upon separation and the protection of vulnerable parties in the case of economic sharing. However, within one cohabitant group, if so chosen, state-provided and mutual benefits must be equally provided to each cohabitant so as to regularize and not overly complicate the relationship.

Another example of mutual rights is succession 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.[359] There are numerous reasons for not making a will, including premature death, poor access to resources, and fear of confronting mortality.[360] In addition, intestacy rules become important due to their expressive function,[361] communicating a social message regarding who is considered to be the family of the deceased.[362]

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[356] *See* COLO REV. STAT. ANN. §§ 15-22-101 to -112 (Westlaw).

[357] *Id.* §§ 15-22-104, -106.

[358] *Cf.* Aloni, *supra* note 327, at 610–11 (criticizing rights and benefits based on a status that is no longer a proxy for economic dependence).

[359] Richard Eisenbreg, *Americans' Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014 11:04 AM), http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#475e782ff07b; *see also* THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 25 (5th ed. 2011) (stating the conventional wisdom is that "[t]he older and wealthier you are, the more likely you are to have a will"). Yet, a study by Mary Fellows casts doubt on the notion that most people die intestate. 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, 337–38 (1978) (reporting demographic characteristcs of those who do and do not have wills); *see also* EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 14 (5th ed. 1993).

[360] *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1047–50 (2004).

[361] *See, e.g.*, Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 199–200 (2006); Spitko, *supra* note 328, at 1103.

[362] *See* Spitko, *supra* note 328, at 1100.

Nancy Polikoff suggests a registration system with a predetermined bundle of rights and obligations that includes intestate rights.[363] According to her suggestion, if someone dies intestate—that is, without executing a valid will—the designated person would receive the same share of the estate that the spouse would have received. 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 a spouse, which is quite considerable. A different possibility is to treat a registration form as a will substitute that allows the parties to determine the specific share their cohabitant will receive.[364]

To conclude, we offer a general framework for 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 proposed guidelines is to demonstrate the plausibility of cohabitation-based registration and to stress the progressive potential of cohabitation as a foundation for the family.

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 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 it 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, as well as other relevant factors and vulnerabilities involved.

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[363] *See* Polikoff, *supra* note 40, at 367–68.

[364] On will substitutes, see generally RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.1 (AM. LAW INST. 2003); 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 BROOK. L. REV. 1123 (1993).

Legal recognition of cohabitation does not cancel other forms of family formation. Cohabitation 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 is 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.