THE LEGAL TREATMENT OF COHABITATION IN POLAND AND THE UNITED STATES

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I. INTRODUCTION

The dynamic nature of family law is well illustrated by the issue of cohabitation. In some corners, discouraged, in others, favored—cohabitation, or the residential union of two romantic partners outside of marriage—has encountered many social, legislative, and judicial reactions.

With the rate of cohabitation continuing to rise, it is important to consider the law relating to cohabitation,[1] particularly that governing the end of a cohabitation. Such an end may be triggered by a cohabitant's death or the breakup of the relationship[2]—only ten percent of cohabitants not married within five years remain together.[3] Upon the end of a cohabitation, many concerns arise, often involving property division. Occasionally, issues related to childbearing also appear—33.8% of births in the United States in 2002 were nonmarital, many the result of cohabitation.[4]

The current absence of a comprehensive law on cohabitation, however, requires many of these problems to be collaterally addressed by the law, such as through paternity or contract law. This collateral approach is typically triggered only upon the end of the relationship, when legal resolution and intervention is often necessary to wind down the relationship. The necessity of comprehensive legal regulation of cohabitation, however, is the subject of both great debate and this Article.

Despite a dynamic discussion on cohabitation,[5] the law on cohabitation has remained static in recent years. There may be numerous reasons for this, not

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[1] In recent years, cohabitation has been the subject of academic scholarship, but not of significant legal change. For a sampling of the literature on cohabitation, see Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403 (2004); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309 (2008) [hereinafter Garrison, *Nonmarital Cohabitation*]; *see also infra* note 17 and accompanying text

[2] Cohabitation, by current definition, falls outside of legal regulation. This would likely remain uncontroversial if all cohabitations were successful and thus no issues attendant to their breakup ever arose. *See infra* note 125 and accompanying text.

[3] Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 322. However, "approximately 60% of all U.S. cohabitants and 70% of those in a first, premarital cohabitation marry within five years." *Id.*

[4] *Id.* at 314. This is as opposed to only 3.8% of nonmarital births in the United States in 1940. *Id.*

the least of which is that many cohabitants intend to exist outside the law. Furthermore, cohabitation may be difficult to legally characterize—even the level of commitment differs among cohabitating couples.[6]

Given the resilience of the issues surrounding cohabitation, a comparative analysis might offer a new perspective. This Article, therefore, considers cohabitation in Poland and the United States, limiting itself to opposite-sex couples.[7] These two countries have been selected for analysis because, despite their lack of comprehensive law on cohabitation, they have each encountered and dealt with the issues arising from such relationships.[8] They have done so differently, offering the opportunity for comparative analysis.[9]

Part II of this Article therefore begins by surveying American law on cohabitation, while Part III surveys equivalent Polish law. Part IV compares and analyzes the issues arising from cohabitations in both countries, offering concluding thoughts on the legal treatment of nonmarital cohabitation, given that many of these relationships intend to exist outside of legal regulation.

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[5] For a review of the literature on cohabitation, see Lynne Marie Kohm & Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U. L. REV. 261 (2005). *See also supra* note 1.

[6] Professor Garrison notes the various cohabitation types, which range from negligible commitment, to a step in the marriage process, to informal marriage. *See* Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 323.

[7] For a discussion of the corresponding issues in same-sex relationships, see, for example, Symposium, *Breaking With Tradition: New Frontiers for Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 65 (2005); Symposium, *Can Anyone Show Just Cause Why These Two Should Not Be Lawfully Joined Together?*, 38 NEW ENG. L. REV. 487 (2004); *Same-Sex Marriage Symposium Issue*, 18 BYU J. PUB. L. 273 (2004); A.B.A. Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339 (2004). For a discussion of the legal remedies following the breakup of a same-sex cohabitation, see, for example, *Vasquez v. Hawthorne*, 33 P.3d 735 (Wash. 2001).

[8] For a comparative approach to cohabitation in China and the United States, see Annie Y. Wang, *Unmarried Cohabitation: What Can We Learn from a Comparison Between the United States and China?*, 41 FAM. L.Q. 197 (2007). For the legal approaches of other countries to cohabitation, see *infra* notes 9, 67, 108, 113; *see also* Erin Cleary, Note, *New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 RUTGERS L. REV. 519, 528-30 (2008).

[9] *See* Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 VICTORIA U. WELLINGTON L. REV. 793, 793-94 (2009).

> There are several [legal] approaches [to cohabitation] that can be taken, for example: laissez faire, leaving the parties to rely on the general law for any remedy; an "opt-in" scheme, which enables parties to jointly sign up to a legislatively determined regime (or perhaps to choose from more than one option); a special statutory scheme that is imposed on the parties, possibly with an opt-out mechanism; or the equation of unmarried relationships with marriage (and civil unions or registered partnerships if they exist in the country).

Id. But see infra note 144.

II. COHABITATION IN THE UNITED STATES

Cohabitation in the United States[10] is largely a legally unprotected status that confers no rights or obligations on cohabitants, despite some initial case law on the topic in the 1970s that made inroads into its judicial recognition.[11] Cohabitation, in both its rights and obligations, therefore remains separate and legally distinct from marriage in the United States. This legal treatment of cohabitation has remained static over the years, even though the cohabitation rate has been rising, which, in turn, has prompted many issues for courts to resolve upon the end of cohabitations.

A. Background on Cohabitation in the United States

Cohabitation has historically been discouraged by most states' laws, especially before the 1970s. This discouragement manifested itself in both social disapproval and the lack of remedies upon the dissolution of the cohabiting relationship.[12] As is often the case, it is unclear whether law influenced public policy against cohabitation or vice versa.

Much of the opposition to cohabitation has been rooted in public policy reasons that ranged from the disapproval of sexual relationships outside of marriage to concern for women and children of unstable cohabitations.[13] Many

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[10] It is not easy to define "cohabitation." *See infra* notes 109-10 and accompanying text. *But see infra* notes 57, 111-13 and accompanying text.

[11] For the argument that *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), although progressive on the topic of cohabitation, failed to increase the success of these claimants, see Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 322. This is not to say that *Marvin* has been ignored by courts. *See* Kohm & Groen, *supra* note 5, at 266 n.43:

> Included among the states which have followed the *Marvin* approach are Minnesota (Carlson v. Olson, 256 N.W.2d 249 (1977)) and New Jersey (Koslowski v. Koslowski, 403 A.2d 902 (1979)). Other states have accepted some, but not all of the grounds for recovery sanctioned by *Marvin*. *See, e.g.*, Marone v. Marone, 50 N.Y.2d 481 (1980); Tapley v. Tapley, 122 N.H. 727 (1982). Some states follow minimal aspects of Marvin. *See, e.g.*, MINN. STAT. § 513.075 (2004); TEX. FAM. CODE ANN. § 1.108 (Vernon 1998).

Id.

[12] *See, e.g.*, Schwegmann v. Schwegmann, 441 So. 2d 316, 324 (La. Ct. App. 1983) (noting Louisiana's interest in discouraging "relationships which serve to erode the cornerstone of society, i.e., the family"); Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979) (rejecting the contract claims between unmarried cohabitants due to a public policy disfavoring "private contractual alternatives to marriage").

[13] *See, e.g*, Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) ("Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefore.") For a discussion regarding the protection of children from the full consequences of a failed cohabitation, see Israel L. Kunin & James M. Davis, *Pitfalls and Promises: Cohabitation, Marriage and Domestic Partnerships: Article: Protecting Children and the Custodial Rights of Co-Habitants*, 22 J. AM. ACAD. MATRIMONIAL LAW. 29 (2009); *see also supra* note 12 and *infra* note 138.

commentators have further pointed to research suggesting the benefits of marriage when compared to cohabitation.[14]

The general societal disapproval of cohabitation has meant a very short history of cohabitation in the United States. Not until the 1970s did cohabitation begin to more frequently appear both in society and in the literature, before which it was "statistically and socially invisible."[15] Several factors may have influenced this drastic change, including shifting societal views of marital and non-marital relationships.[16]

Whatever the reason, however, there is no question that the recent increase of cohabitation has been dramatic. There were fewer than 500,000 opposite-sex cohabiting couples in 1960, but 4.9 million such couples in 2000.[17] Despite this increase of cohabitation in recent years, American law has not comprehensively addressed cohabitation, instead adopting the piecemeal approach considered next. The possible reasons for this approach—not the least of which is that many cohabitations intend to exist outside legal regulation—are considered in Part IV.

B. American Law on Cohabitation

Family law predominantly falls within the domain of the states, and there is no one consistent legal approach to cohabitation among the states.[18]

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[14] William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1005-13 (2003) (outlining research suggesting that cohabitants are less faithful to each other, less happy, less wealthy, and less stable than married couples); *see also* Brinig & Nock, *supra* note 1, at 409 (noting that cohabitation reduces the partners' chances of future marital success).

[15] Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 4 (2007) (citing Kathleen Kiernan, *European Perspectives on Union Formation*, *in* THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 40, 42 (Linda J. Waite ed., 2000) ("It was statistically invisible both because it was not very common and because it could not be reliably studied until large-scale surveys and longitudinal studies were undertaken. And it was socially invisible because, as I describe below, the phenomenon was largely confined to lower-income and less-educated people.") Sociologist Eleanor Macklin determined 1966-1975 as the point at which cohabitation gained greater social acceptance. Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation: An Overview*, *in* CONTEMPORARY FAMILIES AND ALTERNATIVE LIFESTYLES 49, 52 (Eleanor D. Macklin & Roger H. Rubin eds., 1983).

[16] For a discussion on these factors, see, for example, *infra* notes 52-54.

[17] Bowman, *supra* note 15, at 7.

[18] *See, e.g.*, Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern.") Justice Antonin Scalia, however, has expressed concern about the federalization of American family law:

> I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).

Nonetheless, California's approach, outlined in the watershed case *Marvin v. Marvin*,[19] now embodies the approach of many states.[20]

At issue in *Marvin* was the six-year cohabitation of a Hollywood couple.[21] Upon the end of the relationship, Michelle Marvin brought suit against Lee Marvin for declaratory relief, asking the court to determine her contract and property rights.[22] These claims were based upon an alleged oral promise between the Marvins that Michelle would render services to Lee as companion, homemaker, housekeeper, and cook, surrendering her career as an entertainer and singer in exchange for Lee's financial support for the rest of her life.[23] Shortly after the relationship ended, however, Lee stopped supporting her, prompting Michelle to bring a lawsuit for continued support.[24]

The California Supreme Court, reversing the lower court, held that the terms of the contract as alleged by Michelle did not rely upon any unlawful consideration, providing a basis for declaratory relief.[25] The court further held that express contracts between nonmarital partners should be judicially enforced unless explicitly founded upon the consideration of meretricious sexual services.[26] The court also concluded that if cohabitants lacked an express contract, the court should inquire into the conduct of the parties to determine whether that conduct demonstrated an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.[27] To resolve these types of cases, the *Marvin* court suggested the use of the doctrine of quantum meruit or equitable remedies such as constructive or resulting trusts.[28]

Given the strong public policy reasons at the time against both the acknowledgement of cohabitation and the enforcement of cohabitation agreements,[29] the *Marvin* decision was relatively radical.[30] Nonetheless, *Marvin* was not the limitless sanction of cohabitation remedies as often portrayed—Michelle received little relief from the subsequent remand and appeal.[31] Furthermore, the California Supreme Court's opinion included language that could constrict cohabitants' contractual freedom by allowing courts to inquire into the parties' "conduct" and "the nature of their relationship."[32]

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[19] 557 P.2d 106, 121-22 (Cal. 1976).
[20] Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 315; *see also supra* note 11.
[21] *Marvin*, 557 P.2d at 110.
[22] *Id.* at 111.
[23] *Id.* at 110.
[24] *Id.*
[25] *Id.* at 116.
[26] *Id.* at 122.
[27] *Id.*
[28] *Id.* at 122-23; *see infra* Part IV.B and note 127.
[29] *See supra* Part II.A.
[30] *See* Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 315; *see also supra* note 11.
[31] Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 317.
[32] David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1470 (2001).

At the opposite end of the spectrum of states' positions on cohabitation was *Hewitt v. Hewitt*.[33] In that case, the Illinois Supreme Court held that a cohabitation did not trigger any property rights.[34] The court noted, "[t]he issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State."[35] The court decided that this was inappropriate.[36]

Nonetheless, as Marsha Garrison underscores, appellate courts in at least half the states have now permitted contract claims between cohabitants, although a few have rejected recovery based on implied contract.[37] Meanwhile, five states, including Illinois, have disallowed any relief based on a cohabiting relationship.[38]

In every American jurisdiction, however, the legal rights and obligations of cohabitants are fewer than those of spouses.[39] For one, there is no comprehensive law on cohabitation, with many relevant issues being addressed by the law collaterally. Furthermore, although in many states cohabitants can jointly adopt,[40] qualify for protection under state domestic violence legislation,[41] and receive certain judicial remedies following their breakup,[42] cohabitants do not have the full rights and obligations of marriage.[43] Finally, many states have

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[33] 394 N.E.2d 1204 (Ill. 1979).

[34] *Id.* at 1211.

[35] *Id.* at 1209.

[36] *Id.* at 1211. For commentary on *Hewitt*, see Mark Strasser, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 B.Y.U. L. REV. 1135, 1148-1153 (2001).

[37] Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 315-16.

[38] These include Illinois, Mississippi, Georgia, Louisiana, and Michigan. *Id.* at 316 & n.29.

[39] *See infra* note 43.

[40] *See, e.g.*, *In re* Adoption of Carl, 709 N.Y.S.2d 905 (N.Y. Fam. Ct. 2000). *But see* Catherine L. Hartz, *Arkansas's Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 ARK. L. REV. 113 (2010) (discussing the banning of adoption by cohabitants); Mark Strasser, *Adoption, Best Interests, and the Arkansas Constitution*, 63 ARK. L. REV. 3 (2010) (discussing the same).

[41] *See, e.g.*, FLA. STAT. ANN. § 741.30 (West 2010); MINN. STAT. ANN. § 518B.01 (West 2006); WIS. STAT. § 813.12 (2007-08).

[42] Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 755-57 (2010). For further discussion of the rights of cohabitants, see *id.* at 754-761.

[43] For example, the spousal privilege regarding adverse testimony and confidential communications does not extend to cohabiting couples. Katherine M. Forbes, Note, *Time for a New Privilege: Allowing Unmarried Cohabitating Couples to Claim the Spousal Testimony Privilege*, 40 SUFFOLK U. L. REV. 887, 888 (2007). Also, "[c]ourts seem particularly hesitant to allow cohabitational partners to recover in tort actions, such as loss of consortium." Alisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV 391, 392 (2005). Another tort action for which unmarried cohabitants rarely recover is bystander recovery for negligent infliction of emotional distress. Meredith E. Green, Comment, *Who Knows Where the Love Grows?: Unmarried Cohabitants and Bystander Recovery for Negligent Infliction of Emotional Distress*, 44 WAKE FOREST L. REV. 1093, 1093 (2009). Finally, cohabitants rarely have automatic inheritance rights. Jennifer Berhorst, Note, *Unmarried Cohabitating Couples: A Proposal for Inheritance Rights under Missouri Law*, 76 UMKC L. REV. 1131, 1144 (2008). These are only a few examples of the marital privileges and obligations that cohabitants do not possess.

continued to outlaw fornication and cohabitation,[44] and the cohabitation of an ex-spouse creates grounds to end alimony.[45]

In light of this piecemeal legal approach of most states, in 2001, the influential American Law Institute proposed ALI Principles on the subject of cohabitation to serve as model legislation for the states.[46] These principles defined domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."[47] The principles would recognize a domestic partnership status and grant legal implications for the termination of a cohabitation similar to those upon the dissolution of marriage.[48] However, the principles have not catalyzed states to pass comprehensive state law on cohabitation and have been criticized.[49]

In sum, American law on cohabitation is a patchwork of provisions that differ from state to state with the result that most issues arising from cohabitation are addressed by the law on a collateral basis, such as through paternity or contract law. A parallel situation has arisen in foreign countries, including Poland, where there is likewise no comprehensive law on cohabitation.

III. COHABITATION IN POLAND

One of the key examples of the evolution of family law was the shift away from the traditional type of marriage wherein the husband was the bread winner and the wife was a homemaker.[50] However, this evolution of marriage in adjustment to people's preferences and realities has not stopped the increase of cohabitations and their consequent replacement of many marriages in Poland.[51]

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[44] *See, e.g.*, FLA. STAT. § 798.02 (2010); N.C. GEN. STAT. § 14-184 (2009); VA. CODE ANN. § 18.2-345 (2010); *see also* Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation For Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135 (2005).

[45] *See, e.g.*, Linstroth v. Dorgan, 2 So. 3d 305 (Fla. Dist. Ct. App. 2008) (terminating alimony upon showing of cohabitation); Bird v. Bird, 688 S.E.2d 420 (N.C. 2009) (holding the same); Black v. Black, 199 P.3d 371 (Utah Ct. App. 2008) (holding the same).

[46] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION, ch. 6 (2000).

[47] *Id.* § 6.01.

[48] *Id.* § 6.02

[49] For a criticism of these principles, see, for example, Westfall, *supra* note 32, at 1467. *But see* Strasser, *supra* note 36.

[50] Also changing has been American society's perception of marriage. Jared Richards, Note, *Turning a Blind Eye to Unmarried Cohabitants: A Look at How Utah Laws Affect Traditional Protections*, 2007 UTAH L. REV. 215, 216 (2007) ("A number of social factors such as women's suffrage, mobility, the civil rights movement, reproductive technology, and divorce reform, have shaped the way we view marriage.").

[51] Andrzej Szlęzak, *Cohabitation Without Marriage in Poland*, 5 INT'L J.L. & FAM. 1, 2-3 (1991) [hereinafter Szlęzak, *Cohabitation Without Marriage in Poland*] ("However, even in the absence of statistics, there is no doubt that the incidence of cohabitation has increased in recent years."). In Poland, there are two forms of getting married. Future spouses can choose a civil marriage or a religious marriage with civil consequences—only these marriages are recognized by law. One of

As cohabitation continues to increase in prominence, it is important to evaluate the background and legal status of these types of relationships in Poland.

A. Background on Cohabitation in Poland

In Poland, cohabitation is more common today than a few years ago,[52] but not as popular as in other countries.[53] Nonetheless, cohabitation has become a social phenomenon, with more people deciding to cohabit every year due to a preference to avoid the regulation of their relationship by law. In other words, cohabitants do not want to obey the given rules for marriage—preferring the possibility of establishing their own rules.[54] This does not necessarily mean, however, that the law on marriage is inflexible or that it deprives spouses of the freedom to create the rules concerning their relations. Furthermore, it is not harsh or difficult to divorce.[55] Even so, many cohabiting couples desire to avoid the legal consequences of marriage.

The term "cohabitation"[56] was originally used to name the relationship between a woman and a man,[57] but nowadays also applies to same-sex couples.[58]

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the types of cohabitation is a religious marriage, i.e., a marriage made in the church under church law, but not necessarily in the Roman Catholic Church—it can be any church. Religious marriages, without civil consequences, are treated under Polish law as unmarried cohabitations. *See, e.g.*, TADEUSZ SMYCZYŃSKI, PRAWO RODZINNE I OPIEKUŃCZE 28-40 (2009). Religious marriages may also be known as "de facto marriages" (małżeństwa faktyczne). *See* Mirosław Nazar, *Prawo Rodzinne i Opiekuńcze*, *in* 11 SYSTEM PRAWA PRYWATNEGO 933 (2009).

[52] The rate of so-called informal marriages grew from 1.3% of all marriages in 1988 to 2.2% in 2002. *See* Monika Młynarska & Laura Bernardi, *Meaning and Attitudes Attached to Cohabitation in Poland*, 16 DEMOGRAPHIC RES. 520-554 (2007). For corresponding American data, see Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 313. Professor Garrison reported that in the United States, between 1970 and 2000, the number of cohabitations rose almost ten-fold—from 523,000 to 4,880,000. *Id.*

[53] For data on cohabitation, see, for example, Kathleen Kiernan, *Unmarried Cohabitation and Parenthood in Britain and Europe*, 26 LAW & POL'Y 33-55 (2004).

[54] *See* Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 283-84 (2008) (internal citations omitted) [hereinafter Garrison, *Reviving Marriage*]:

> An important reason why marriage is controversial is that it is in decline. All across the industrialized world, young adults are marrying later and increasing numbers may not marry at all. Those who do marry face a relatively high probability that their relationships will terminate in divorce. As a result of these convergent trends, today's adults spend, on average, a smaller proportion of their adult lives within a marital household than did their ancestors.

[55] Tadeusz Smyczyński, *Czy Potrzebna Jest Regulacja Prawna Pożycia Konkubenckiego (Heteroseksualnego i Homoseksualnego)?*, *in* PRAWO RODZINNE W POLSCE I W EUROPIE: ZAGADNIENIA WYBRANE 462 (Piotr Kasprzyk ed., 2005).

[56] In this context, the term "cohabitation" is more appropriate for both same- and opposite-sex couples than the term "concubinage." The opinion in Poland regarding whether the term "concubinage (konkubinat)" should be used to refer to same-sex couples is divided. Interestingly, the official translation of the French Civil Code uses the term "concubinage" to refer to both same- and opposite-sex couples. CODE CIVIL [C. CIV.] art. 515-8 (Fr.), *available at* http://195.83.177.9/upl/pdf/code_22.pdf.

Generally, however, no Polish legislation uses the terms "cohabitation" or "concubinage,"[59] instead using the terms "close persons" or people "being in de facto relationships," "living together," "being in intimate relations," or "actually cohabiting."

Of course, cohabiting relationships are various—their extent and level of intimacy can differ. Some cohabitants are so intimate that they may not differ from spouses; for example, the cohabitants' personal and property relations are the same as between spouses—they hold property together as a married couple would. On the other hand, there are cohabitants whose personal relations are very strong, but not their property relations.[60] Although the property relations of cohabitants do not currently have any legal meaning in Poland, it cannot be denied that such relations could cement the relationship.[61]

Nonetheless, the common characteristic of all cohabitations is a relationship wherein the cohabitants presume long-lasting cohabitation, despite its lack of formal basis. The crucial feature of cohabitation is therefore the permanent consent of being together—temporary relationships and accidental acquaintances do not constitute cohabitations.[62] The lack of such consent at any point in the relationship causes its breakdown. In marriage, meanwhile, such consent to be together is important at wedlock, but its latter absence does not end the marriage—additional circumstances must arise for a spouse to file a lawsuit for divorce.[63]

The key element of cohabitation is the common home.[64] The temporary separation of cohabitants caused by extraordinary circumstances, however, does not preclude the couple from being cohabitants. Furthermore, two-home-cohabitations are possible when cohabitants have two homes but their relationship is based upon commitment, co-acting, mutual help, and the commitment of both parties' activities to the fulfilment of their common needs.[65]

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[57] See the definition given by Wanda Stojanowska, who wrote that cohabitation is "a real union between a man and a woman who live together in a way parallel to married life without being married." Wanda Stojanowska, *Poland: Cohabitation*, 27 J. FAM. L. 275, 275 (1988-1989).

[58] Smyczyński, *supra* note 55, at 462. It should be added, however, that there are some doubts regarding this definition. *See* Nazar, *supra* note 51, at 909-10.

[59] There is only one piece of legislation using the term "concubinage." *See* ustawa z 22 stycznia 1999 r. o ochronie informacji niejawnych [Classified Information Protection Act of Jan. 22, 1999], Dz. U. z 2005 r., nr 196, poz. 1631 ze zm.

[60] In such cases, for example, each cohabitant keeps a separate apartment, but decisions are undertaken by both as if they were spouses.

[61] *See* Uchwała Sądu Najwyższego z dnia 30 stycznia 1986 r., III CZP 79/85 [decision of the Supreme Court of the Republic of Poland of 30 Jan. 1986].

[62] This feature of cohabitation is not, however, highlighted in the law applied to cohabitation.

[63] *See* KODEKS RODZINNY I OPIEKUŃCZY [KRO] [Family and Guardianship Code of Feb. 25, 1964] art. 56. This Code came into force on Jan. 1, 1965.

[64] *See, e.g.*, Andrzej Szlęzak, STOSUNKI MAJĄTKOWE MIĘDZY KONKUBENTAMI: ZAGADNIENIA WYBRANE 16 (1992).

[65] *See* Nazar, *supra* note 51, at 918.

Presently, the legal status of same-sex couples is similar to that of opposite-sex cohabitants—cohabitations are not legally recognized[66] and such unions are rare. Although Poland's neighbor Germany has introduced law regarding same-sex couples,[67] Poland has not yet done so. Currently, the Constitution of the Republic of Poland states that marriage is a relationship between a woman and a man.[68] Same-sex couples therefore could not be married without a change to the Constitution.[69] One possible solution is to decide that the appellation "marriage" will not be used to describe such relationships.[70] Nonetheless, with regard to both same-sex and opposite-sex cohabitation, no comprehensive regulation currently exists in Poland.

B. Polish Law on Cohabitation

In Poland, there is no law imposing negative consequences upon cohabitation,[71] which is in accordance with Recommendation No. R (88) 3 of the Committee of Ministers to Member States on the validity of contracts between persons living together as unmarried couples and their testamentary dispositions.[72] This approach to cohabitation may be described as neutral and pragmatic.[73]

While Polish law generally remains indifferent to the set up and break down of cohabitations, Polish legislators have given cohabitants some rights due to the increasing rate of cohabitation. In certain situations, cohabitants receive protection "based on social, moral, and humane consideration."[74] Many of the legal consequences of cohabitation, however, are the result of a close relation between the partners, a common home, the maintenance of a common household, or a common livelihood.

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[66] However, this approach has been criticized. *See, e.g.*, Michał Płachta, *O Prawie Odmowy Zenznań Osoby Najbliższej*, 10 PAŃSTWO I PRAWO 66 ff (1988).

[67] *See* Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebesnpartnerschaften vom 16.2.2001, verkündet in Jahrgang 2001 Nr. 9 vom 22.2.2001. England has also been considering cohabitation legislation. *See infra* note 108; *see also* R.J. Probert, *A Review of Cohabitation: The Financial Consequences of Relation-ship Breakdown, Law Com. No. 307 (HMSO 2007)*, 41 FAM. L.Q. 521 (2007).

[68] *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] art. 18 (Poland). According to this provision "[m]arriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland." *Id.*

[69] *See* Elżbieta Skowrońska-Bocian, *Family and Succession Law*, *in* INTRODUCTION TO POLISH LAW 87 (Stanisław Frankowski ed., 2005).

[70] Using another term, but giving same-sex couples the same rights as spouses, could permit circumvention of the constitutional law. *See* Nazar, *supra* note 51, at 946.

[71] Neither same- nor opposite-sex cohabitation is forbidden by Polish law.

[72] The recommendation was adopted by the Committee of Ministers on Mar. 7, 1988, at the 415th meeting of the Ministers' Deputies. *See* COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, ON THE VALIDITY OF CONTRACTS BETWEEN PERSONS LIVING TOGETHER AS AN UNMARRIED COUPLE AND THEIR TESTAMENTARY DISPOSITIONS (Mar. 7, 1988).

[73] Szlęzak, *Cohabitation Without Marriage in Poland*, *supra* note 51, at 3.

[74] Stojanowska, *supra* note 57, at 278.

It is significant that the Polish Supreme Court (Sąd Najwyższy) noted that cohabitation has a permanent place in the system of moral standards and principles in modern society,[75] implying the necessity of taking cohabitation into account when interpreting legislation that uses terms such as "member of family" or "close person." Nonetheless, this statement should be supplemented with reservations—according to the KRO,[76] "family" consists of spouses and their children. Some provisions expand this definition to further relatives, but cohabitants, according to the KRO, are not a family. They can be treated as a family only in other situations than those mentioned in the KRO, and the conclusion that cohabitants are family could be derived only after a complex examination of the features of the given relationship. Another important observation is that the KRO regulates relations between parents and children even in the context of cohabitants' rights—this regulation is not connected with the parents' marital status.[77]

Polish regulations on cohabitation can be divided into four groups. The first one consists of provisions taking into account people who live together in an intimate relationship.[78] The second includes provisions using the term "close person"[79] or "closest person."[80] Importantly, these provisions include the guaranteed right of refusal to testify in a criminal case against a cohabitant[81] and the protected right to occupy the common apartment.[82] The third group of regulations on cohabitation takes into consideration the keeping of a common household.[83] Finally, the last group of provisions uses the terms "family" and

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[75] *See* Wyrok Sądu Najwyższego z dnia 13 kwietnia 2005 r., IV CK 648/04 [decision of the Supreme Court of the Republic of Poland of 13 Apr. 2005]. In this decision, the Court confirmed the opinion that art. 446 § 3 KC should be applied to cohabitants. This provision guarantees that, upon the death of a person as a result of tort, "the closest family members," whom the deceased voluntarily and permanently provided with means of substance, may demand an annuity from the person obliged to redress the damage.

[76] KODEKS RODZINNY I OPIEKUŃCZY [KRO] [Family and Guardianship Code of Feb. 25, 1964], Dz. U. nr 9, poz. 59 with amendments. This Code came into force on Jan. 1, 1965.

[77] Szlęzak, *Cohabitation Without Marriage in Poland*, *supra* note 51.

[78] *See* art. 691 KODEKS CYWILNY [KC] [Civil Code of Apr. 23, 1964], Dz. U. nr 16, poz. 93 with amendments. This Code came into force on Jan. 1, 1965. *See also* art. 115 § 11 KODEKS KARNY [KK] [Criminal Code of Jun. 6, 1997], Dz. U. nr 88, poz. 553 with amendments.

[79] *See, e.g.*, art. 446 § 2 KC; art. 908 § 3 KC.

[80] *See* art. 115 § 11 KK.

[81] Notably, the prevailing opinion is that a cohabitant is not a "close person" according to the KODEKS POSTĘPOWANIA CYWILNEGO [Code of Civil Procedure of 17 Nov. 1964] and therefore has no privilege to refuse to testify. *Compare* Tadeusz Ereciński, Jacek Gudowski, & Maria Jędrzejewska, *Komentarz: Część Pierwsza—Postępowanie Rozpoznawcze. Część Druga—Postępowanie Zabezpieczające*, *in* 1 KODEKS POSTĘPOWANIA CYWILNEGO 589 (Tadeusz Ereciński ed., 2006) *with supra* note 43.

[82] According to art. 691 KC, a "close person" becomes lessee *ex lege* upon the death of a person renting an apartment. However, one condition must be fulfilled: the close person must have lived with the deceased person continuously up to the death. *See also infra* notes 102-03 and accompanying text.

[83] *See, e.g.*, art. 827 § 3 KC; art. 828 § 3 KC.

"member of a family" in a broader sense and differently from the meanings used in the KRO.[84] Due to a wider definition of "close persons" in criminal law, for example, cohabitants have a well-developed set of rights.[85] Cohabitation, however, is not a basis for awarding alimony between cohabitants[86]—it is not a legal union, and such a de facto union does not bear obligations of alimony between partners.[87]

These various regulations on cohabitation, however, do not amount to the same rights that spouses have in marriage. Such rights would be especially important in the law of succession and at the breakdown of the cohabiting relationship. Instead, Polish courts have decided not to apply the rules governing divorces at the breakdown of cohabitations, determining that the regulation of the KRO on the breakdown of marriage does not apply to cohabitation.[88] It is not possible to apply these rules because there is no gap in the regulation,[89] and, in fact, cohabitation is outside of legal regulation[90]—laws using *expressis verbis* the terms "marriage" or "spouses" cannot be used as the source of rights for cohabitants.

In Poland, there was no watershed case on cohabitation, like the *Marvin* case in the United States.[91] Perhaps such a case would shift the status of cohabitants in Poland, but cases regarding remedies for cohabitation are rather rare in the courts, although it is possible to find some decisions of the Supreme Court regarding the property consequences upon the termination of cohabitation. The majority opinion is that cohabitants may enter into typical contracts (*contractus nominatus*) or other contracts (*contracus innominatus*) so long as they are within the confines of the freedom of contract.[92] Such contracts do not have any consequences for third parties even if they are informed of the

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[84] *See, e.g.*, art. 6 pkt 14 ustawy z dnia 12 marca 2004 r. o pomocy społecznej [Social Assistance Act of Mar. 12, 2004]; art. 111 § 3 ustawy z dnia 29 sierpnia 1997 r. – Ordynacja Podatkowa [Tax Law of Aug. 29, 1997].

[85] *See, e.g.*, art. 52 KK; art. 58 KK; art. 61 KK; art. 63 § 1 KK; art. 182 KK; art. 183 § 1 KK; art. 183 § 2; art. 184 KK; art. 191 § 3 KK; art. 261 § 1 KK; art. 542 § 2 KK.

[86] Nazar, *supra* note 51, at 924.

[87] Stojanowska, *supra* note 57, at 277.

[88] *See, e.g.*, Uchwała Sądu Najwyższego z dnia 2 lipca 1955 r., II CO 7/55 [decision of the Supreme Court of the Republic of Poland of 2 July 1955]; Wyrok Sądu Najwyższego z dnia 6 stycznia 2007 r., IV CSK 301/07 [decision of the Supreme Court of the Republic of Poland of 6 Jan. 2007].

[89] Sometimes it is considered permissible to make an analogy to the case of the breakdown of a religious marriage. *See* MIROSŁAW NAZAR, ROZLICZENIA MAJĄTKOWE KONKUBENTÓW 52 (1993). But this is not a common opinion, and, in the majority of such cases, the parties of religious marriages are treated as cohabitants. *See* Wyrok Naczelnego Sądu Administracyjnego z dnia 12 kwietnia 2000 r., V SA 1512/99 [decision of the Supreme Administrative Court of 12 Apr. 2000]. *See also supra* note 51.

[90] *See* Sąd Apelacyjny w Warszawie w wyroku z 8 października 1997 r. (sygn. I ACa 648/97) [decision of the Court of Appeals in Warsaw of 8 Oct. 1997].

[91] Marvin v. Marvin, 557 P.2d 106, 121-22 (Cal. 1976); *see also supra* Part II.B.

[92] Szlęzak, *Cohabitation Without Marriage in Poland*, *supra* note 51; *see also infra* notes 97, 132 and accompanying text.

contracts[93]—this is one of the features distinguishing contracts of cohabitants from marital agreements.

Cohabitation certainly does not limit the freedom of contract and cohabitants can regulate their rights and duties using contracts not forbidden by law.[94] Such contracts may be connected with the personal relations of cohabitants,[95] and these relations often determine the provisions of the contracts concluded by cohabitants.[96] Cohabitants can also make an agreement concerning the distribution of their property when the cohabitation is terminated. Such a contract is not institutionalized by the law, but can nonetheless be created by parties given their freedom of contract. This contract may be a kind of framework agreement similar to the contract concluded by entrepreneurs. For example, cohabitants may introduce the rules regarding their duties in the household and toward children, their common expenses, or the place of their home. However, the contract would be void if contrary to the general regulations in force or the principles of community life.[97]

Unjust enrichment is another theory used by Polish courts in dealing with the termination of cohabitations.[98] Although this doctrine is available, contributing money and goods to a cohabitant during the cohabitation is justified even when there is not any legal basis for such contributions. In one of the cases concerning cohabitants, for example, the Supreme Court in Poland decided to apply the rules of joint-ownership and its dissolution,[99] but this is an isolated opinion. It is impossible to introduce a presumption that everything that is acquired by one cohabitant is the subject of joint-ownership of both cohabitants.

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[93] For the consequences of premarital agreements on third parties, see Margaret Ryznar & Anna Stępień-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context,* 13 CHAP. L. REV. 27, 52, 59 (2009).

[94] *See* Uchwała Sądu Najwyższego z dnia 30 stycznia 1970 r., III CZP 62/69 [decision of the Supreme Court of the Republic of Poland of 30 Jan. 1970].

[95] The cohabitants' personal bond forms one argument against the applicability of contract law to cohabitation. For further details, see Brunon Paul, *Koncepcja Rozliczeń Majątkowych Między Konkubentami*, 3 PRZEGLĄD SĄDOWY 40 (2003).

[96] Occasionally, the personal relations between cohabitants are so strong that performances of cohabitants can be qualified as gratitude and courtesy services. The dominant opinion, however, is that performances of cohabitants are non-gratuitous. *See* Nazar, *supra* note 51, at 956.

[97] *See supra* note 92, *infra* note 132, and accompanying text.

[98] *See, e.g.,* Uchwale Sądu Najwyższego z dnia 30 września 1966 r., III PZP 28/66 [decision of the Supreme Court of the Republic of Poland of 30 Sept. 1966]; Uchwale Sądu Najwyższego z dnia 30 stycznia 1970 r., III CZP 62/69 [decision of the Supreme Court of the Republic of Poland of 30 Jan. 1970]; Uchwale Sądu Najwyższego z dnia 27 czerwca 1996 r., III CZP 70/96 [decision of the Supreme Court of Poland of 27 June 1996]; Wyrok Sądu Najwyższego z dnia 26 czerwca 1974 r., sygn. akt. III CRN 132/74 [decision of the Supreme Court of the Republic of Poland of 26 June 1974]; Wyrok Sądu Najwyższego z dnia 16 maja 2000 r., V CKN 32/00 [decision of the Supreme Court of the Republic of Poland of 16 May 2000]; *see also infra* notes 126-29 and accompanying text.

[99] *See* Uchwała Sądu Najwyższego z dnia 30 stycznia 1986 r., III CZP 79/85 [decision of the Supreme Court of the Republic of Poland of 30 Jan. 1986]; *see also* Szlęzak, *Cohabitation Without Marriage in Poland, supra* note 51, at 9.

Furthermore, the expenditures made so as to improve the property of the other cohabitant can be treated as not a title to purchase a share in co-ownership.

Nonetheless, one of the most significant problems for cohabitants is the death intestacy. The surviving cohabitant is deprived of everything because the only family members constituting intestate successors include children, spouses, parents, brothers, sisters, grandparents, and stepchildren.[100] The intestate successor is also the local community and the State Treasury.[101] Meanwhile, a cohabitant, as a "close person" who lived with the deceased up until the day of death, is entitled to retain the use of the dwelling and its household equipment for a period of three months from the day of the death.[102] The source of much litigation, however, is the division of assets when the cohabitant is a co-owner. Of course, the consequences of intestate succession law can be avoided by a well-prepared will.[103] This is possible because, in Poland, the same principles apply to testamentary dispositions of cohabitants as to other persons. Of course, the surviving cohabitant should take into consideration the legitim.[104]

In sum, the rate of cohabitation in Poland has been increasing, although not as much as in other countries. Any non-negligible number of cohabitations, however, prompts courts to deal with important issues regarding cohabitation and the protection of cohabitants, many of which parallel those issues in American cohabitation cases.

IV. COMPARATIVE LESSONS REGARDING COHABITATION

As evidenced by the preceding consideration of cohabitation in both the United States and Poland, the primary inquiry into the legal treatment of such relationships is whether they should be regulated by law. The ensuing debate reveals that among the most important considerations is the protection of cohabitants upon the termination of a cohabitation. This goal has been addressed, to varying extents, by the use of cohabitation agreements and the

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[100] *See* Mariusz Zalucki, *Inheritance Law in the Republic of Poland and Other Former Eastern Bloc Countries: Recodification of the Circle of Statutory Heirs*, 14 ELECTRONIC J. COMPARATIVE L. 6-7 (2010), *available at* http://www.ejcl.org/142/art142-1.pdf.

[101] The order of succession is crucial—successors are divided into groups and the next group comes into inheritance when the previous one cannot inherit or does not want to inherit. *See* arts. 931-40 KC.

[102] Art. 923 KC.

[103] *See supra* note 72 and accompanying text.

[104] Legitim is a monetary claim that the testator's descendants—the surviving spouse and parents of the testator who would be the heirs under an intestacy—have to the successor appointed in the will (legitim, *zachowek*). This claim amounts to one-half of the value of the part that the entitled person would have taken in intestacy. As a rule, the legitim is detached from the financial situation of the entitled persons. It should be added, however, that a person who is permanently incapable of work or is a minor receives a fraction that amounts to two-thirds of the part in intestacy. The legitim is not based on the needs of the entitled persons. *See* art. 991 KC.

theory of unjust enrichment. The shortfalls of these approaches, however, need to be balanced against the consequences of increased regulation of cohabitation.

A. The Legal Regulation of Cohabitation

The push behind the legal regulation of cohabitation, and the imposition of marriage-like expectations, may reveal a pro-marriage inclination previously exhibited by a quickness to classify cohabiting relationships as common law marriages.[105] On the other hand, perhaps legal recognition of cohabiting relationships undermines marriage by conflating the two differing levels of commitment, meanwhile obviating the need to marry to gain legal benefits.[106] In this regard, the law might influence couples not to marry.[107]

Whatever the case, the regulation of cohabitation is very complex. Cohabitation is *ex definitione* outside of any regulation—an argument in favor of the retention of the unregulated status of cohabitation.[108] Furthermore, it is difficult to legally define cohabitation[109]—including the necessary timeframe

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[105] For further background on common law marriage, see *infra* note 118. The primary distinctions between cohabitation and common law marriage are that, in the latter, couples hold themselves out to be married and are treated by the law as such.

[106] For arguments against cohabitation as a legal alternative to marriage, see Duncan, *supra* note 14, at 1001 (2003); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005). *But see* Bowman, *supra* note 15.

[107] *But see* Bowman, *supra* note 15, at 38-43 (arguing that marriage is so well-ingrained and appreciated in American society that legislating on cohabitation has no impact on it); Garrison, *Reviving Marriage*, *supra* note 54, at 284, 287 (noting that "it would be premature to write an obituary for marriage," "marriage remains an important life goal for most Americans," and "overwhelmingly, young Americans assert that they would be 'more economically secure, have more emotional security, a better sex life, and a higher standard of living' if they were married."). Professor Garrison also suggests that it might be possible that cohabitation is delaying, but not replacing, marriage. *Id.* at 285.

[108] This has not prevented an Israeli court from imposing marriage-like obligations on cohabitants despite the parties' agreement and intention to keep the relationship outside of legal regulation. CA 7021/93 Bar-Nahor v. Estate of Osterlitz [1994] Tak-El 94(3) 1512. For a discussion of this case, see Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. PUB. L. 359, 375-78 (2008). This approach may result in a marriage against people's will. Shahar Lifshitz, *Married Against Their Will? A Liberal Analysis of Cohabitation Law*, 25 TEL AVIV U. L. REV. 741 (2002) (Isr.). The Law Commission in England has also recommended regulating cohabitation, although not to the same extent as marriage. THE LAW COMM'N, COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN: A CONSULTATION PAPER (2006), http://www.lawcom.gov.uk/docs/cp179.pdf; *see also supra* note 67.

[109] *See, e.g.*, Smith v. Smith, 769 N.W.2d 591, 591-92 (Mich. 2008) (Corrigan, J., dissenting) ("I would grant leave to appeal because I believe that the test for 'cohabitation' that the Court of Appeals adopted emphasizes definitions of cohabitation that do not square with the contemporary living conditions of cohabiting couples."); Graev v. Graev, 898 N.E.2d 909 (N.Y. 2008) (litigating the meaning of "cohabitation"). *But see supra* note 57, *infra* notes 111-13 and accompanying text.

triggering a cohabitation, the starting point of the cohabitation, and the depth of the cohabitation.[110]

However, an important prerequisite to cohabitation legislation is the construction of a definition of cohabitation. Although the characteristics of cohabitation can widely differ,[111] there are some common features which could be used in its definition.[112] Any proposed definition, however, should consider the stability and continuity of the relationship.

In some countries, such definitions already exist to facilitate legislation.[113] This sort of explicit terminology is especially important in countries such as Poland—a civil law country where precedents are not a source of law and do not have binding force, being only guidelines. Even with a legal definition of cohabitation, however, judges would retain a wide margin of discretion, which sometimes permits bias when the judge holds a strong belief that only marriage creates rights and that cohabitation is undesirable.

Nonetheless, some commentators have called for the legal regulation of the rights of cohabitants. Significantly, certain cohabitants themselves want to be given rights without duties,[114] which could be controversial and the source of many problems. For example, in such a case, spouses could feel unfairly treated because marriage means both rights and duties.[115]

Furthermore, legal regulation of cohabitation might have several unintended consequences. For example, any potential regulation of cohabitation could create another set of relationships to replace it. The result might be the existence of cohabitations regulated by law and the creation of those sufficiently different to avoid legal regulation.[116] Moreover, the regulation of cohabitation could weaken the institution of marriage because some couples, taking into account the prospective rights of cohabitants, could decide to remain cohabitants instead of marrying. In this way, the legislator would promote cohabitation.[117]

Nonetheless, one primary argument often advanced for the regulation of cohabitation is that it would protect the more vulnerable partner from unmet expectations and exploitation. For example, if one partner contributes nontangible value to the cohabitating relationship, this contribution might not be

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[110] *Compare* the problems mentioned in Stroud v. Stroud, 641 S.E.2d 142, 148-52 (Va. Ct. App. 2007).

[111] *See supra* note 6 and accompanying text.

[112] For example, the definition of cohabitation could require a shared home.

[113] Cohabitation was legally defined in Hungary in 1977. For further details about cohabitation in Hungary, see Orsolya Szeibert-Erdős, *Same-Sex Partners in Hungary: Cohabitation and Registered Partnership*, 4 UTRECHT L. REV. 212 (2008).

[114] Smyczyński, *supra* note 55, at 462.

[115] This is another way the law on cohabitation could be perceived to discourage marriage. *See supra* notes 106-07 and accompanying text.

[116] For example, if cohabitation legislation were triggered by a three-year cohabitation, many cohabitations would end by that mark, especially if cohabitants were well-informed of the law and preferred to avoid its reach.

[117] *See supra* notes 106-07 and accompanying text.

recognized by the courts. In many contexts, this reasoning intends to protect women from leaving the relationship with less than they contributed.[118] However, cohabitation agreements and the theory of unjust enrichment may achieve these goals without changing the unregulated nature of cohabitation. These substitutes for the legal regulation of cohabitation are considered next.

B. Alternative Legal Protection of Cohabitants

Cohabitation is a social phenomenon[119] that may be a basis for legal acknowledgment. However, this does not mean that complete and developed regulation is necessary. In fact, although the rate of cohabitation is increasing, it might be precisely due to the status's freedom from legal regulation.

In any case, cohabitation should not be treated the same as marriage and these two institutions are not concurrent. Instead, the cautious approach is warranted and regulation should reach only as far as the basic protection of cohabitants is necessary.[120] Any additional consequences of cohabitation should be left to the cohabitants to determine. Using the freedom of contract, they could construct their relationship in a way that fulfils their expectations and is not forbidden by law. They may also structure their property holdings through joint ownership.[121]

In fact, resources might be better spent developing the contractual framework for agreements between cohabitants and general rules on the issues, instead of developing a comprehensive legal framework governing

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[118] It has been suggested that women may not be able to bargain as aggressively as men and therefore need judicial protection. Andrew J. Cherlin, *Toward a New Home Socioeconomics of Union Formation*, *in* THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 133 (Linda J. Waite ed., 2000) ("[W]omen do not bargain as far toward the margins of their power as men do." (quoting Paula England & Barbara Stanek Kilbourne, *Markets, Marriages, and Other Mates: The Problem of Power*, *in* BEYOND THE MARKETPLACE 163, 171 (Roger Friedland & A.F. Robertson eds., 1990))). This may have been the reasoning, in part, prompting the imposition of common law marriage on certain cohabiting couples. *See, e.g.*, Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIMONIAL LAW. 151, 157 (2009). However, the question is whether the reduction of a woman to a certain skill set advances women in relationships. For example, the courts have not permitted agreements for one partner to be "a lover, companion, homemaker, traveling companion, and cook" because of its resemblance to a sex-for-hire contract. Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 319.

[119] Nowadays it is not an "undesired phenomenon," although legislators promote marriage and give spouses more rights. *See* Szlęzak, *Cohabitation Without Marriage in Poland*, *supra* note 51, at 4.

[120] For arguments in favor of a cautious approach in regulating cohabitation, see Garrison, *Nonmarital Cohabitation*, *supra* note 1. *But see* Westfall, *supra* note 32, at 1490 ("The National Conference of Commissioners on Uniform State Laws and state legislatures should respond to the widely felt need for greater certainty and predictability in this area by specifying the circumstances under which cohabitants have claims against each other when their relationship ends and the manner in which such claims can be modified or eliminated. For example, compensation may be appropriate for a cohabitant who pays for education or training of the other party.").

[121] Title and ownership would therefore be in both cohabitants' names.

cohabitation.[122] This is especially true given that the recommendation of the Committee of Ministers in Europe states that "many problems concerning persons living together as an unmarried couple may be resolved by the conclusion of contracts between such persons."[123] Importantly, there are no inherent obstacles, in either the Polish or American legal systems, to applying contract law to cohabitation, barring conflict with public policy.[124]

Of course, when a cohabitation proceeds smoothly, nobody is concerned with the consequences of a hypothetical breakdown of the relationship, especially given that the cohabitants do not want the law involved in their relationship. When the relationship fails, however, cohabitants attempt to find any legal basis for receiving compensation from their former partners for their outlays, work in the household, help in an enterprise, or other expenses made during the cohabitation.[125]

If no agreement or joint ownership exists between the cohabitants, courts often use the theory of unjust enrichment in awarding parties compensation for a failed cohabitation.[126] The theory of unjust enrichment essentially permits the court to order restitution in an unjust situation wherein the defendant has obtained a benefit at the plaintiff's expense.[127] The court therefore must evaluate the cohabitation and award compensation based on its judgment of the

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[122] This is especially true given that cohabitants still constitute a relatively small percentage of couples. According to the Polish National Census of 2002, cohabitants composed only 1.8% of families. Single parents were more prevalent—they composed 19.4% of families. POLISH NATIONAL CENSUS OF 2002, http://www.stat.gov.pl/cps/rde/xbcr/gus/PUBL_gospodarstwa_domowe_i_rodziny.pdf. These statistical data were collected eight years ago, and the situation has changed a bit since then, but cohabitation is still not prevalent. However, this does not mean that it should be ignored. Furthermore, these data could be misleading because some people conceal their cohabitation in order to avoid losing privileges for single parents—they declare being single parents despite being cohabitants. Such privileges were cited as a reason for cohabitation in Poland even twenty-five years ago. *See* Stojanowska, *supra* note 57, at 279.

[123] COUNCIL OF EUROPE, *supra* note 72.

[124] Szlęzak, *Cohabitation Without Marriage in Poland*, *supra* note 51.

[125] *Id.*

[126] Professor Sherwin argues against such restitution in cases of cohabitation because of the remedy's expansive and discretionary nature. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712 (2006). *See also* Garrison, *Nonmarital Cohabitation*, *supra* note 1, at 310 (discussing the equitable doctrines of relief, including quantum meruit, the purchase money resulting trust, and the constructive trust); *infra* notes 127-28 and accompanying text.

[127] It is not easy to define the theory of unjust enrichment. For a survey of the various meanings and implications of the doctrine, see Sherwin, *supra* note 126, at 713-17; *see also* Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE L. REV. 933, 942 (2008) ("A court following unjust enrichment principles may reject an absolutist view of property and contract and override particular property, contract, and gift doctrines.").

relationship—no doubt a difficult task for courts,[128] but not entirely different from those decisions made during divorce proceedings.[129]

To limit this judicial discretion, couples entering into cohabitations are well-advised to seek a cohabitation agreement that establishes the consequences of the relationship.[130] For example, property division upon the end of the cohabitation is an issue if the partners do not hold property jointly.[131] Of course, couples must be mindful of the public policy limits to the judicial enforcement of these agreements.[132] Nonetheless, the cohabitation contract is similar to marital agreements in that it introduces the general rules on the property of spouses, but does not cause the transfer of specific goods to other kind of property.[133] Instead, the contract organizes the property relations between cohabitants.

Such cohabitation contracts, however, are not a basis for specific performance.[134] Instead, they show the aims of the partners and explain why the partners decided to perform in this or that way.[135] If this objective was not achieved, the rules on return of undue benefit are applied.[136]

Nonetheless, these contracts may be controversial because while it is not possible to apply rules of marriage to cohabitation, the possibility of cohabitation contracts may permit the circumvention of this prohibition. This is why some commentators argue that cohabitants should not be allowed to create, through a cohabitation contract, the same or similar property regimes as the marital property regimes.[137] Until recently, furthermore, such contracts were held unenforceable as against public policy in the United States, which encouraged marriage and discouraged contracts for sexual relations.[138]

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[128] Sherwin, *supra* note 126, at 733 ("Claims arising out of failed domestic relationships also raise questions about the capacity of courts to assess what is just between parties.").

[129] *But see id.* at 734 ("In contrast, divorce proceedings have tended to become more objective over time.").

[130] For further discussion on cohabitation agreements, see Margaret W. Hickey, *Pitfalls and Promises: Cohabitation, Marriage and Domestic Partnerships: Article: Estate Planning for Cohabitants*, 22 J. AM. ACAD. MATRIMONIAL LAW. 1 (2009).

[131] *See supra* note 121 and accompanying text.

[132] *See, e.g.*, *supra* Part II.A; *supra* notes 92, 97 and accompanying text; *infra* note 138 and accompanying text.

[133] For the meaning of marital agreements in Poland, see Ryznar & Stępień-Sporek, *supra* note 93.

[134] *See* Nazar, *supra* note 51, at 958.

[135] *See* Wyrok z dnia 12 stycznia 2006 r., II CK 342/05 [decision of the Supreme Court of the Republic of Poland of 12 Jan. 2006]. According to this decision, it is possible to receive the return of money and goods given to a former partner if a plaintiff succeeds in proving that they were donations because the former partner gave a basis for the belief that the relationship would be long-lasting. *Id.*

[136] For further remarks on unjust enrichment, see *supra* notes 98, 126-29 and accompanying text.

[137] *See* AGNIESZKA DAMASIEWICZ, INTERCYZY I UMOWY MIĘDZY KONKUBENTAMI: KLAUZULE UMOWNE 198 (2008).

[138] Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 191 (1985). For a history of the public policy objections to cohabitation agreements and cohabitation, see *id. See also supra* Part II.A.

The practical problem today, of course, is the rarity with which cohabitants enter into written agreements, even if it is a typical contract. In Poland, more so than in the United States, cohabitation agreements are not popular and are concluded very rarely, often only when the cohabitants are lawyers or have substantial assets. Furthermore, upon the termination of the cohabitation, it is hard to have clear proof of the existence of a contract between cohabitants, as well as its terms. In such a case, cohabitants in Poland turn to art. 60 section 1 KC, which states that the intention of a person performing a legal transaction may be expressed by any means that sufficiently reveals his or her intention and a declaration of intent can be made by electronic means.[139] In other words, the cohabitants must try to prove that the conduct of their ex-partners implied a contract.[140] However, such proof fails when the contract needs a special form to be valid—such as the notarial deed.[141] When the proof is successful, however, the court uses rules based on the contract. The civil-law partnership is one of the most significant contracts, but sometimes courts are reluctant to apply its rules.

The transfer of goods between cohabitants, in many situations, is actually a contract of donation under Polish law. In this context, the possibility to revoke a donation is essential. It may be done if the donee has been guilty of flagrant ingratitude toward the donor.[142] The lack of the definition of "ingratitude" allows the inclusion of cases when a donee has, without just cause, left his or her partner. However, this is controversial because the key feature of cohabitation is that it can be terminated at any time by any party without the risk of negative consequences.[143] Nonetheless, to protect cohabitants at the end of a relationship, cohabitation agreements and unjust enrichment remain alternatives to the comprehensive legal regulation of cohabitation.

V. CONCLUSION

The increase of cohabitation in many societies, as illustrated in the United States and Poland, has exposed courts and legislatures to many relevant issues. Among the most important of these has been the protection of cohabitants after an unsuccessful cohabitation. However, neither the United States nor Poland has recognized the application of a comprehensive law on cohabitation, instead allowing cohabitation agreements and theories of unjust enrichment.

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[139] Art. 60 § 1 KC.

[140] *But cf.* Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979) (rejecting contractual claims between unmarried cohabitants due to a public policy "disfavor[ing] private contractual alternatives to marriage"); *supra* notes 27, 37 and accompanying text.

[141] Notaries have a more significant role in European civil law countries than in the United States. *See* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM X, http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf.

[142] Art. 898 § 1 KC.

[143] Szlęzak, *Cohabitation Without Marriage in Poland*, *supra* note 51, at 7.

Many issues, such as the financial support of any resulting children, are treated collaterally under the law by, for example, paternity or contract law.

Although there are certain disadvantages to such an approach to cohabitation, these shortfalls need to be balanced against the consequences of increased regulation of cohabitation. Specifically, many of these relationships intend to exist outside the domain of the law.[144] Furthermore, should the law extend to cohabitation, another relationship status might develop to avoid legal regulation. The result is that only in marriage do partners currently seek and receive maximum rights and obligations.[145] Cohabitants, on the other hand, accept fewer rights and obligations, as well as less clarity during the duration of the debate on cohabitation.

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[144] When it comes to the legal treatment of cohabitation, "we find two extremes: cohabitants have little or no rights, or they have duties imposed upon and imputed to them as if they are married, when they have chosen not to marry." Both have obvious disadvantages. Kohm & Groen, *supra* note 5, at 267. *But see supra* note 9.

[145] *See, e.g.*, *supra* note 43.