

**The relationship between the state, cohabitation, and childbearing across  
Europe: policy dimensions and theoretical considerations**

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The interaction between public and private spheres has been of central concern to sociologists, political scientists, and demographers (Esping-Andersen 1990, Orloff 1993). A number of broad studies have examined whether and how policies impact family behavior (Hantrais 2004; Hantrais and Letablier 1996, Gauthier 1996), but demographers have primarily focused on whether family policies can raise fertility, an important issue in countries with very low fertility (Neyer and Andersson 2008, Gauthier 2007, Hoem 2008, McDonald 2006). In general, European researchers have paid far less attention to how family policies shape union formation and union status at birth. Few studies have examined the role of the state in the formation of cohabiting versus marital unions, particularly those that involve childbearing and childrearing. This gap in the literature has motivated us to delve deeper into the policies that may influence individuals' decisions to form or remain in cohabiting unions, especially when they involve children. As a first step towards understanding this relationship, we provide here a comprehensive overview of these policies. By examining policy dimensions in detail and exploring examples from a range of countries, we raise questions about how individuals respond to changing institutional structures, or alternatively how legal structures are modified to reflect changes in societal-level behavior.

The increase in cohabitation and childbearing within cohabitation unions has been one of the most striking changes in the family in the past few decades (Kiernan 2004, Perelli-Harris et al 2009, Perelli-Harris et al 2010). Although childbearing within cohabitation has increased in nearly every country in Europe, the variation across countries is remarkable (Kiernan 2004; Perelli-Harris et al. 2009). By 2008, most of Western, Central, and Eastern Europe experienced 20-30% of births outside of marriage, while all of Northern Europe, the U.K., and France had at least 40% of

births outside of marriage. Parts of southern Europe experienced only a slight increase - for example, in 2008 less than 6% of births were born out-of-wedlock in Greece - but this is the exception to a general phenomenon (Eurostat 2010). Although a range of cultural, economic and ideational forces may have led to the increase and variation across countries and over time (Kiernan 2004; Perelli-Harris et al. 2009; Perelli-Harris et al. 2010; Heuveline and Timberlake 2004), state policies regulating marriage and cohabitation may also be one of the most important explanations.

In most countries of Europe, the family policies that influence childbearing within cohabitation are only indirectly related to the phenomenon. Unlike in the United States, where former president George W. Bush's administration implemented the "Healthy Marriage Initiative" to explicitly encourage marriage, most governments in Europe have not attempted to increase marriage or influence the rate of childbearing within cohabitation (Cherlin 2009). If anything, countries have responded to behavioral change by enacting legislation that reflects new demographic realities, such as expanding cohabitators' rights or instituting registration systems to record civil unions. Therefore, in order to investigate the reciprocal relationship between policies and childbearing within cohabitation, we must examine policies that may not have been explicitly enacted to promote marriage or support cohabitation. We focus on policies that regulate or influence: (1) the relationship between couples in intimate, co-residential unions, with a comparison between informal unions and marriage, and (2) the relationship between parents and their children, with a particular focus on unmarried fathers.

Studying the role of policies at the intersection between union status and childbearing provides important insights into how policies shape the relationship not only between couples, but also the relationship between parents and their children.

The decision to give birth or raise children in a cohabiting union grants cohabitation a particular significance, since it challenges one of the legal and social functions of marriage. Indeed, pregnancy and birth often signal critical junctures in the cohabiting relationship and prompt marriage (Perelli-Harris et al 2009). Thus, studying the way policies influence childbearing within cohabitation provides an additional level of importance in the way that the state is involved in the lives of children and future generations, a level that goes beyond just the regulation of the relationship between private individuals.

Thus, our goal in this paper is to provide a systematic, but broad overview of possible policy areas that could influence a couple's decision to cohabit or marry. We first provide details into the specific aspects by which policies can regulate the relationship between couples, and between couples and their children. Then, drawing on the framework proposed by Neyer and Andersson (2008), we discuss general theoretical considerations that are important for understanding the relationship between the state and the individual, especially with respect to childbearing within cohabitation. Finally, we suggest new directions for research. Throughout the paper, we interweave examples from around Europe to highlight how policies can encourage or discourage the increase of childbearing within cohabitation. We do not attempt to provide a systematic classification of countries, nor do we aim to imply causality. Nonetheless, the paper serves as a call for empirical research into the effects of social policies on cohabitation and childbearing within cohabitation.

## **REGULATING THE RELATIONSHIP BETWEEN COUPLES**

The state has had an interest in governing the relationship between couples in order to formalize the affiliation between non-biological individuals, regulate property and

subsequent inheritance, provide protection to individuals, manage disputes between its citizens, and structure the taxation of households. Historically, the state (as well as the church) regulated relationships between couples through official marriage, and unmarried couples were outside of legal jurisdiction. In some countries during certain periods, marriage was seen as such a central institution that living together outside of wedlock was considered criminal. In these countries, laws to allow a man and woman to live together without being married were updated only in the mid 20<sup>th</sup> century, for example as late as 1968 in Italy, 1970 in parts of Germany, and 1972 in Norway (Bradley 2001), although most of the laws were clearly not strictly maintained.

Even though marriage was historically the central organizing institution of society, some couples did live outside of marriage, usually due to social or financial barriers. For example, until the late 19<sup>th</sup> century, the landless and unskilled laborers in Germany did not have the right to marry, because marriage was tied to the status of a “Bürger” (citizen) (Mitterauer 1983). During the 19<sup>th</sup> century in some parts of Austria, farmer’s children not entitled to inherit the farm and people from lower classes, such as servants, had to remain unmarried (Mitterauer 1983; Kytir and Münz 1986). In 19<sup>th</sup> century Paris, the costs of marriage were especially high for rural to urban migrants who had to obtain (and pay for) birth certificates and affidavits showing they had lived in Paris for at least six months. (Fuchs 1992). Thus, cohabiting couples, with the exception of some avant garde couples who protested the institution of marriage (Trost 1978), were by and large disadvantaged, i.e. rural inhabitants, previously married, or the poor (Kiernan 2004; Mitterauer 1983; Laslett et al 1980).

Starting in the late 1960s and early 1970s, the institution of marriage began to fundamentally change and more couples began to live together outside of marriage. During this period, values and attitudes about sex, gender relations, women’s

employment, and the role of the individual and society changed dramatically (Thornton, Axinn, Xie 2007). Simultaneously, states began to provide greater welfare protection of the weak and vulnerable, as well as increased state support for families, and diverging trajectories of different welfare and family policy contexts began to emerge (Knijn et al 2007, Gauthier 1996). These forces resulted in fundamentally different national and state approaches to the institution of marriage and cohabitation, although the policies aimed at regulating the relationship between unmarried partners continue to evolve.

### **The spectrum of laws that regulate marriage and cohabitation**

Theoretically, the laws and regulations governing marriage and cohabitation range along a spectrum, with legal systems that equalize the rights of cohabitators and married people at one end and legal systems that ignore cohabitation or actively favor marital unions at the other. The two ends of the spectrum can be considered ideal types that we refer to as *equalizing cohabitation* and *privileging marriage*. The legal system that governs marriage and cohabitation incorporates a complex constellation of policies, all of which may influence couples' decisions to cohabit or marry. In fact, as discussed further below, the laws and policies of a particular country are not always coherent and oriented towards achieving the same goal. Therefore, it can be difficult to neatly place countries along this spectrum or apply ideal types without an in-depth analysis of a variety of legal aspects. One of the primary goals of this paper is to outline these aspects and provide examples from different countries to illustrate the range of policies across the spectrum.

### **Registered unions**

Some governments – the Netherlands, France, Luxembourg, Belgium, and some regions of Spain - have implemented systems for registering informal unions that

provide some of the benefits and obligations of marriage, but not all. Countries with registered cohabitation fall in between the two extremes of the spectrum; governments recognize that cohabiting unions exist and should be regulated by law, but they have not simply granted all cohabitators equal rights to married people. In addition, in countries with registered cohabitation, a substantial proportion of cohabitators do not register their unions and continue to fall outside of the law or only have limited rights according to the law. Thus, multiple types of unions could exist in these countries; for example, Poortman (2010) has identified five types of unions in the Netherlands: marriage (including marriage with prenuptial agreements), registered cohabitation, non-registered cohabitation, and even cohabiting unions with a private legal contract that provide some inheritance rights and perhaps some provisions for alimony.

We continue with the example of the Netherlands because it represents a country that has attempted to recognize cohabitation by providing an extra legal category for cohabitation, but has not necessarily achieved the goal of incorporating cohabiting unions into a legal framework (Schrama 2008). The rights and responsibilities accorded to registered partnerships are very similar to marriage, with only a few exceptions related to the ease of dissolution and parental rights (Antokolskaia and Boele-Woelki 2002). Registered cohabiting partners receive similar rights to financial provisions, maintenance, and alimony as married partners, and since 2002 automatic joint custody of children born into the union. Registration of cohabiting unions even takes place in front of a registrar, who is allowed – but not required – to execute the same ceremony as for marriage (Boele-Woelki and Schrama 2005). The dissolution of registered partnerships, however, is much easier than for divorce. While the partnership dissolution is a formal process, cohabitators can apply

jointly and unilaterally for dissolution, without court intervention (Antokolskaia and Boele-Woelki 2002).

Although the Dutch government has aimed to recognize cohabiting unions by adopting registered partnerships, this goal has not necessarily been achieved and may even have led to unintended consequences. The Dutch government enacted the Act on Registered Partnerships in 1998 to acknowledge the social and economic importance of cohabiting relationships and to provide a legal basis for same-sex couples. However, marriage also became an option for same-sex couples in 2001, thereby generally negating the reason to register same-sex partnerships (Anatolskaia ad Boele-Woelki 2002). Nonetheless, registered partnerships remained in effect, even increasing substantially in 2001. This increase may have been because the Act provided a means for cohabiting partners to reject the formal institution of marriage or attain joint custody over children. However, the Act also allowed married couples to convert their marriages into registered partnerships, allowing for an easier divorce without court intervention. Therefore, the Act may have impacted couples who were already married more than cohabiting couples. Finally, even though registered partnerships became possible, a nationally representative Dutch survey shows that only half of cohabiting couples registered their partnership (or had a cohabitation contract) (Poortman 2010). These data indicate that cohabiting couples may be ignorant of the benefits of registering their partnerships, both for themselves and their children, or they may not register their partnerships due to inertia (Schrama 2008). This Dutch example shows that even though a country may implement a system for registering cohabitation, a significant percent of families can remain outside of the law without all of the protection accorded to formal families, especially in case of relationship termination.



In France, registered cohabitation was clearly a by-product of the initiative to provide same-sex couples legal status. The French government was disinclined to acknowledge same-sex marriage, and only after many discussions and rearrangements instituted Pacs (*Pacte Civil de Solidarité*) in 1999 (Martin and Théry 2001). The Pacs do not offer as many benefits as Dutch registered partnerships, but also do not require the same obligations after union dissolution. After registering a Pacs at the *tribunal d'instance*, couples are ensured a number of tax and social security system benefits (e.g. health insurance, maternity benefits, funeral benefits), but must also provide mutual material assistance and become liable for household debt. In case of dissolution, registered cohabiters are not eligible for any compensation or survivors pensions, and they maintain possession of their personal property, with joint possession in rare cases (Köppen 2009; Godard 2007; Ferrand 2005; Le Goff 2002; Bradley 2001; Martin and Théry 2001). Couples that wish to terminate a Pacs can do so by a mutual agreement communicated to the *tribunal d'instance*. All in all, the French government continues to emphasize the difference between marriage and Pacs by considering marriage as the superior institution (Bradley 2001, Borrillo and Fassin 2004).

Spain is another interesting example, because the legal situation of cohabiting couples is probably the most complex in Europe, even though cohabitation rates have only recently been to increase. In the late 1990s many regions enacted different laws and policies to regulate cohabitation and in some places systems for registering nonmarital partnerships (González Beilfuss 2005). A strange ruling of the constitutional court in 1994 prompted certain regions to agitate for regulation: the court decided that a woman who had cohabited for 55 years, was not entitled to receive a widow's pension after her partner's death, even though the couple had been

opponents of the Franco regime and had refused to marry for political reasons. The subsequent political action resulted in a patchwork of laws and regulations across Spain (González Beilfuss 2005). For example in Catalonia, cohabitators are obliged to financially provide for each other during the relationship, and if a nonmarital relationship ends, the economically stronger partner might need to provide financial compensation to the weaker party. Other regional laws, however, do not contain such provisions, because they lack the jurisdiction to legislate in these areas (e.g. the regions of Andalucía, Valencia, Madrid). Finally, some regions in Spain have not enacted laws on cohabitation and common Spanish law applies.

The examples of France, the Netherlands, and Spain show that while governments may have made gains in providing cohabitators with legal recognition through registered partnerships, they nonetheless still fail to capture the majority of couples living in informal unions – those who remain outside of the law - or provide coherent laws to protect all citizens. These examples show that governments may be willing to provide alternatives to marriage by instituting different types of unions, but that 1) the type of registered cohabitation itself still ranges along a spectrum from being very similar to marriage to being oriented towards a more temporary union with few rights, and 2) not all cohabiting couples wish to enter into these types of arrangements. Therefore, it is not clear that provisions for registered cohabitation have led to an increase in cohabitation within any given country, although the institution of registered cohabitation was clearly a response to increased cohabitation rates (and rights for homosexual couples, which we discuss further below).

### **Rights and responsibilities during a union**

We now turn to outlining the specific rights and responsibilities accorded to married and cohabiting couples. Although we aim to be comprehensive in our approach, we

acknowledge that there are still aspects we do not cover, for example, spousal immunity and privilege in court, or compensation in case of wrongful death; we assume that cohabiting couples are unlikely to think of and plan for these rare events and that they therefore have little impact on the decision to marry. Thus, we try to focus on the major policies and laws that are most likely to influence a change from cohabitation to marriage. We distinguish between aspects that may be influential during a union and upon union breakdown. Within unions, the following legal aspects are discussed: tax systems, maintenance, social security (welfare, health insurance), and the right to adopt and use methods of artificial insemination.

***Income tax systems.*** Like cohabitation policies in general, income tax systems also appear to range along a spectrum with individualized taxation that tends to be neutral towards cohabitation at one end and joint taxation that favors marriage at the other (Dingeldey 2001). In individualized tax systems, predominantly used in Scandinavia, taxes are declared separately for each individual, irrespective of whether the person is married or cohabiting, and few tax incentives encourage marriage. In joint taxation systems, the income of both spouses or of all household members is added and then split by a predefined quotient, an approach especially advantageous for couples in which one spouse's income is higher than the other's. Usually this type of system preferences marriage. In Germany, for example, where the total income of the couple is divided by two, only married couples can take advantage of tax splitting; cohabiting couples are treated like single persons (Martiny 2005:94). In France, joint income taxes are calculated by adding the income of all household members and dividing it based on number of household members, with greater quotients for higher-parity children. Married couples and couples in Pacs can take advantage of the tax splitting system, but cohabiting couples can not (Köppen 2009). However, French cohabiting

couples are allowed to include children on one partner's individual declaration, and divide the total according to the same schedule as for married couples. Single parents with co-resident children, on the other hand, are able to divide their income by a slightly higher quotient. Until 1996, however, cohabiting couples in France were able to benefit from the tax advantages granted to single people (Ferrand 2005), which may have provided an incentive for couples to remain unmarried and facilitated the increase in childbearing within cohabitation. Most other European countries fall somewhere in between the two ideal types mentioned above (Dingeldey 2001). However, a third type of tax system calculates taxes on an individual basis but provides considerable tax relief when only one person in a family is employed (Dingeldey 2001).

***Health insurance and welfare benefits.*** In Europe, health insurance is usually organized around the individual, but partners may cover an unemployed spouse. Some countries require that couples be married; for example in Germany, only married spouses can be co-insured in the health insurance of the main earner of the household (Martiny 2005). Other countries – such as the Netherlands, France and Austria -- extend health insurance coverage to unmarried spouses, but usually only under certain conditions (Waaldijk 2005, Ferrand 2005, Austrian General National Insurance Act). In countries which have introduced a universal right to health insurance, such as Sweden, rights to health care are independent of marital status (Ytterberg and Waaldijk 2005).

The situation for welfare payments, however, is quite different: states usually focus on de facto residence, not type of union, in order to ensure that payments are not provided to households where one member can support the others. This is the situation in all of the 15 original member states of the European Union (Hantrais

2004), with the exception of Austria, which treats cohabiting people like single people (Bundeskanzleramt Österreich 2010). These examples suggest that states use marital status to restrict access to benefits, as in the case of health insurance, but ignore marital status to avoid paying out benefits, such as with welfare payments.

***Financial maintenance:*** Most European countries, for example England, Norway, Germany, and Switzerland, do not require cohabiting couples to financially support their partners during the relationship (Barlow et al 2005; Noack 2001; Martiny 2005; Becker 1994). In the Netherlands and France, however, registered partners have the same obligation to provide for each other as married couples, while unregistered couples do not; this could be one of the reasons why couples are reluctant to enter into a registered partnership (Boele-Woelki and Schrama 2005; Ferrand 2005). In Spain, the legal situation is probably the most complex in Europe. Here, the question of whether cohabitators have an obligation to maintain each other depends on the autonomous region in which the partners live. In Catalonia, for example, cohabitators are obliged to financially provide for each other during the relationship, whereas in other regions, no such duty exists (González Beilfuss 2005).

***The right to adopt and use assisted reproductive technology.*** In some Western European countries, controversy has arisen over whether registered partners, particularly same-sex couples, should receive assistance in becoming parents (Cherlin 2009). Not all countries allow cohabiting couples the same access to reproductive technology as married couples, although it seems to be considerably easier for cohabiting couples to undergo fertility treatments than to adopt a child. In Germany, for instance, the Medical Association advocates that partners living in stable, long-term relationships should be eligible to use medically assisted methods of reproduction (Bundesärztekammer 2006), but the German Civil Code states that only

married couples can jointly adopt a child; unmarried people must adopt a child individually. The situation is similar in Norway, Sweden, Austria and France, where cohabiting couples are allowed to undergo artificial insemination but not adopt jointly (Ferrand 2005; Ryrstedt 2005a and 2005b, Austrian Civil Code, §179); even couples in French Pacs are not allowed to adopt. In England, and the Netherlands, however, cohabiting couples are allowed to adopt, provided that certain conditions are fulfilled (Boele-Woelki and Schrama 2005; Barlow et al 2005). Interestingly, in Spain, which tends to follow a traditional family model (Reher 1998), artificial insemination became possible for all women irrespective of marital status in 1988, and couples in stable relationships were given the right to jointly adopt in 1987 (González Beilfuss 2005). Thus, Spain's early permission of assisted reproduction and joint adoption by cohabiting couples contradicts general classifications of family types.

**Rights and responsibilities after a union dissolves.** Although few people plan to end a relationship when they enter into it, the policies regulating dissolution and divorce may still be very influential in the choice to cohabit or marry. Some partners may decide to marry in order to protect themselves in case of union dissolution, particularly after the birth of a child or taking time off of work to maintain the household. On the other hand, the lack of regulation for ending a cohabiting union may be one of the main reasons individuals remain in cohabitation: they do not want to go through a time-intensive and perhaps costly bureaucratic procedure if their union ends. Prior personal experience or watching someone they know (especially parents) may lead them to choose cohabitation over marriage (Thornton 1991). The severity of divorce legislation, such as provisions for no-fault divorce, waiting time, division of joint property, and the requirement to pay alimony may play a role in dissuading couples to marry. Here, however, we do not focus on differences in

divorce law across countries, but instead highlight the potential differences between marriage and cohabitation after a union dissolves. We provide an overview of what we consider to be the most influential aspects: alimony and division of property and household goods.

**Alimony:** In most European countries, unregistered cohabitators are not obliged to pay alimony to their partner after separation (Barlow et al 2005; Noack 2001; Wellenhofer 2005). Exceptions exist if a couple has common children, in which case many European countries require that the primary childcare provider receives financial maintenance for a limited period of time (Kulms 1994; Becker 1994). Spanish courts have also recently begun to extend the maintenance and financial compensation rights of marital couples to cohabitators irrespective of the existence of common children (González Beilfuss 2005). Such court rulings also occur in other countries, for example Norway (Ryrstedt 2005a) or Germany (Wellenhofer 2005). Despite these exceptions, the general principle remains that former unregistered cohabitators do not have a right to claim compensation. Regarding registered cohabitators, only the Netherlands has enacted legal rules requiring alimony after union dissolution (Boele-Woelki and Schrama 2005). In France, no such obligation exists for Pacs (Ferrand 2005). In Spain, some of the regional laws on registered cohabitation contain provisions for alimony (González Beilfuss 2005).

***The division of property and household goods.*** One of the primary reasons for official marriage has been the legal regulation of property; thus, divorce law is usually well specified in European legal systems and managed through court proceedings. However, because cohabiting couples fall outside the law, far fewer regulations and court proceedings determine the division of property after cohabiting unions dissolve. In many European states, for example Germany, England, and Austria, no laws exist

to explicitly deal with the division of property in case of union dissolution, and ownership is strictly determined by who paid for the property, with disputes decided in courts on a case-by-case basis (Barlow et al 2005; Wellenhofer 2005). Some European states, however, have implemented laws to regulate the division of property after the break up of a household community. In Sweden, for example, the Cohabitees (Joint Homes) Act explicitly states that if a marriage-like relationship dissolves, partners must equally divide joint property and household goods, but partners are free to decide differently in a written agreement. Also, the division of property according to this law does not happen automatically; partners (or one of the partners) must demand that property is divided according to the Act (Ryrstedt 2005b). Norway has also enacted an “Act relating to Property Rights on Dissolution of a Household Community,” which specifies that cohabiting couples must have lived together for two years or have a child together. In addition, Norwegian courts have recognized the ‘housewife’s right to joint ownership’, which provides joint ownership of the household if one partner has done most of the household work. Even in Norway, however, cohabitators are generally treated like single people, and the rights to joint ownership are granted on a case-by-case basis (Ryrstedt 2005a). In countries with registered partnerships, registered partners may be subject to regulations for the division of joint property, for example, in the Netherlands, all goods are considered joint property (Boele-Woelki and Schrama 2005). In France, the Civil Code originally stated that household goods bought after the beginning of a Pacs would be held jointly (if the Pacsés did not decide on a different property regime), but in 2006, each Pacs partner became the sole owner of the goods he/she bought, although partners can decide to hold joint property in a partnership agreement (Godard 2007; Ferrand 2005).



**After the death of a partner.** Regulations may also differ for cohabiting and marital partners after the death of a partner. Although most young couples usually do not expect to die in the near future, the security of a legally protected relationship might prompt some couples to marry, especially when children are involved. Here we consider the right to remain in housing, inheritance, and the right to a spouse's pension.

***The right to remain in housing rented by a deceased partner.*** The general trend across Europe seems to be to extend housing rights to the surviving partner of a cohabiting union. Spain, Germany, France, Sweden, the Netherlands, Austria and Norway have introduced some rights for cohabitators to stay in the apartment rented by their deceased partner, although the exact conditions differ by country. For example, in France, surviving cohabitators have the right to stay in the common home if the deceased partner was the sole tenant of the apartment and the surviving partner had lived there for at least one year (French Law no. 89-462 of 6. July 1989, §14), but partners in Pacs do not need to meet the one year residence requirement and can use the apartment and furniture gratuitously for one year or pay rent out of the inheritance (French Civil Code, §763 and §515-6). In Spain, surviving spouses are required to have lived with their partner for two years or have common children. In general, however, states have provided measures to protect surviving partners, regardless of union status, from immediate eviction.

***Entitlement to survivor's inheritance and pension:*** If a married spouse dies, the surviving spouse is automatically entitled to inherit property, even without a will, and receive a survivor's pension. In most European countries, however, such as Austria, France and Germany, cohabitators do not have automatic rights to inherit (Conseil des Notariats de l'Union Européenne 2010). In France, even registered partners are not

defined as statutory heirs (Ferrand 2005). This lack of inheritance rights leaves cohabitants in a particularly vulnerable position if one partner dies unexpectedly without having appointed the other partner as an heir in a will. Other European countries have, however, started to extend inheritance rights to cohabitants: since 2009, cohabitants with joint children have limited rights to inherit from each other in Norway (Agency for Public Management and eGovernment (Difi)), England (Barlow et al. 2005), Sweden (Ryrstedt 2005b), and some regions in Spain (González Beilfuss 2005). In case of inheritance, cohabitants often have to pay higher taxes than spouses or family member (e.g. in Germany: Bundesministerium der Justiz 2009). Exceptions to this rule are Austria and Sweden, where inheritance tax has been abolished (Conseil des Notariats de l'Union Européenne 2010; Ryrstedt 2005b), and France, where since 2007 Pacsés, like spouses, do not have to pay inheritance tax (Conseil des Notariats de l'Union Européenne 2010).

Cohabitants also have few rights to receive a survivor's pension under state pension schemes in Switzerland (Freiburghaus-Arquint 2000), Germany (Martiny 2005), Austria (Mairhuber 2003), England (Barlow et al. 2005) and France - not even Pacs-partners are considered for survivor's pensions – (Ferrand 2005). The situation is different only in Sweden and Norway, where cohabitants can profit from a survivor's pension if they have children together, or in Sweden – if they have been in a long-term relationship (Noack 2001; Ministry of Health and Social Affairs and National Social Insurance Board 2007). Thus, overall, cohabitants are in a disadvantaged position in case of the death of a partner.

Taken together, this comparison of legal provisions across Europe suggests that the financial obligations and rights which nonmarital partners have towards each other continue to be far less defined than for married couples. A few exceptions exist

in France, Spain and the Netherlands, where there are registered partnerships, but even these countries have not achieved a complete harmonization of the rights for all types of cohabiting and married couples. Experts often point out that cohabitators can close these legal gaps by entering into registered partnerships or partnership contracts (e.g. Boele-Woelki and Schrama 2005), but only some cohabitators enter into registered partnerships and even fewer negotiate contracts (e.g. Germany: see Martiny 2005). Of course, couples may enter into cohabitation precisely to avoid the legal regulations associated with marriage, particularly if they are unsure about the long-term survival of their union. Therefore, cohabitators may not wish for their rights and obligations to be harmonized with those of married couples, since harmonization may in fact be detrimental to them personally.

## **REGULATING THE RELATIONSHIP BETWEEN PARENTS AND CHILDREN**

Just as the state has an interest in regulating the relationship between adult partners, the state also has an interest in regulating the relationship between parents and children. The state is responsible for protecting children's rights, for example the right to be raised in a safe and secure environment, which usually requires that fathers provide child support. The state also has an interest in resolving disputes between relatives and regulating inheritance after parents' death. However, besides protecting children's rights, the state must also protect parental rights, for example the right to establish paternity, pass down the family name, or make decisions regarding the care and upbringing of one's own children. This bundle of rights and responsibilities, often referred to as child custody, includes decisions related to the child's education, health and residence (Melli 2003). The ability to attain these parental rights, or how readily these rights are granted, is often determined by the legal status of the union. These

rights can also be placed along a spectrum with those that *equalize cohabitation* at one end and those that *privilege marriage* at the other.

Historically, official marriage has been the primary means for establishing paternity and regulating the relationship between parents and children. Married husbands were not required to establish paternity – it was assumed for all children born to their wives. Married husbands also automatically obtained sole parental custody, which allowed them to make major decisions about the care and upbringing of their children. These principles, still codified in European legal systems today, have a long tradition dating back to civil codes enacted in the 19<sup>th</sup> century (e.g. the French Civil Code of 1804, German Civil Code of 1896; Austrian Civil code of 1812). Since the enactment of these Civil Codes, little has changed, except for the broadening of custody rights to include mothers starting in the 1950s (Meulders-Klein 1990, Dopffel 1994).

In contrast, states usually did not acknowledge children born out-of-wedlock or provide automatic establishment of paternity for unmarried fathers. In Germany, for example, the Civil Code of 1896 did not include provisions for the unmarried father to recognize his child. A maintenance claim against the father was possible, but this did not result in the official establishment of affiliation (Meulders-Klein 1990). Indeed, until 1970 the German Civil Code explicitly stated that a nonmarital child and his father were not related. The situation was similar in England, where a procedure to establish paternity was only introduced in 1987 (Meulders-Klein 1990). In other countries, fathers had to initiate the establishment of paternity and were often dependent on additional conditions. For example, the original version of the Austrian and French Civil Codes allowed for the establishment of paternity by including the name of the father on the birth- or baptismal certificate. In Austria, the father had to

explicitly agree that his name be included, and two witnesses had to testify on his behalf. In France, the recognition depended entirely on the will of the father; proceedings to establish paternity were forbidden. Other countries, such as Norway and Sweden, however, actively required that paternity be established for every nonmarital child in order to ensure maintenance payments (Meulders-Klein 1990). Even today, the Scandinavian governments take a proactive role in establishing paternity, and while the government has acknowledged that such measures may seem intrusive, they justify them by being in the best interests of the child (Ministry of Justice 2009).

States were also reluctant to provide unmarried fathers custody, and in some countries, unmarried mothers were also restricted in access to custody. In Germany, for example, a nonmarital child was assigned a legal guardian who represented the legal interests of the child, advised the mother, and tried to establish paternity. At the beginning of the 20<sup>th</sup> century, this guardian was often the maternal grandfather, but from 1922, Youth Welfare offices were responsible for appointing a guardian (Buske 2004). The mother maintained only limited rights and still had the responsibility of raising the child. The father could obtain child custody by marrying the mother and applying to the state to legitimate or adopt the child with the mother's consent, but the latter two procedures were relatively rare as they would strip the mother of her rights and obligations to care for her child (Meulders-Klein 1990, Dopffel 1994, Becker 1994). In Austria, fathers did not have parental power over their nonmarital children, but were replaced by a legal guardian and had to pay maintenance; however, the law did allow father and mother to coordinate and compromise on the education and care of the child. In 1917, the Swedish government also introduced a law that assigned a

social welfare officer to oversee the household budget and distribution of state benefits for families with nonmarital children (Hobson and Takahashi 1997).

As with other legislation regarding nonmarital children, changes in custody law have occurred only within the past few decades. Legal guardians were only abolished in 1973 in Sweden (Dopffel 1994) and in 1989 in Austria (Kulms 1994). In Germany, mothers could appeal in court to acquire full parental custody after 1970, but only in 1998 was the automatic allocation of a legal guardian was completely abolished (Dienel 2002). In Switzerland, a legal advisor is still appointed for every nonmarital child in order to establish paternity and advise the mother in case of need (Swiss Civil Code, §309). Italy and Sweden were the first countries to allow joint parental custody for the parents of non-marital children in 1975 and 1976, respectively (Thieme 1994; Dopffel 1994). Norway and Spain introduced legal reforms at the beginning of the 1980s (Dopffel 1994) and France, England and Austria followed at the end of the decade (Meulders-Klein 1990; Barlow et al. 2005; Hamilton 2002; Forder 1993). Germany and Switzerland were the last countries to introduce joint parental responsibility for non-marital children in 1998 and 2000 respectively (Schweppe 2002; Graham-Siegenthaler 2002).

Historically, nonmarital children did not enjoy the same rights and status as marital children and were legally discriminated against, as reflected in terms such as “illegitimate” and “bastard.” In fact, historical demographers used these terms as recently as 1980, for example in Laslett et al.’s book on *Bastardy and its comparative history* (1980). Legal systems prohibited nonmarital children from inheriting from their father and usually did not provide nonmarital children the same rights to receive maintenance as marital children. Throughout Europe during the 20<sup>th</sup> century many of these inequalities were rectified and the legal position of marital and nonmarital

children was harmonized, although the variation in the timing of the implementation of reforms was even larger than for the reforms concerning parental rights. Norway was the first state to grant nonmarital children the right to inherit from their father in 1915 (Dopffel 1994), but the distinction between marital and non-marital children was only completely abolished in 1981 (Skevik 2003). Sweden and Italy extended certain rights of nonmarital children in the 1940s (Dopffel 1994; Thieme 1994). In Germany, although the Weimar Republic Constitution of 1919 proclaimed the legal equality of nonmarital children, only in 1997 did nonmarital children achieve full equality of inheritance rights (Stintzing 1999). Most other countries harmonized their legislation on marital and nonmarital children during the three decades from the 1960s to the 1980s. These examples suggest that the acceptance and prevalence of nonmarital childbearing today may date back to state policies in the past, thereby providing evidence that the emergence of nonmarital childbearing may be a continuation of a previous historical relationship between the state and the family.

### **The establishment of paternity and joint custody**

As we have seen, the rights of nonmarital children have been harmonized with those of marital children over the course of the preceding century. Similarly, the legal rules defining the relationship between nonmarital children and their fathers have undergone important reforms. Today, in nearly all countries of Europe, fathers who live with the mother of their child can establish paternity and acquire joint custody (Hamilton and Perry 2002). However, the procedures and requirements for establishing paternity and attaining joint parental custody still differ substantially across Europe. Country-specific differences in negotiating bureaucratic obstacles, which also range along the spectrum from *equalizing cohabitation with marriage* to

*privileging marriage*, may motivate parents to marry rather than remain in cohabitation.

In all countries, the paternity of nonmarital children can be established via father's recognition of the child or court ruling. Countries differ, however, in whether mothers are required to provide consent, as in Germany (Schweppe 2002) and the Netherlands (Reinhartz 2002). In other countries, such as Spain or Switzerland, mothers are not granted a right of veto and can only contest the veracity of the paternity claim *ex post* (Graham-Siegenthaler 2002). As historically shown in Norway and Sweden, the state takes an active role in the establishment of paternity (Saldeen 2002; Lødrup 2002), with Social Welfare offices legally responsible for indentifying fathers of nonmarital children. In Austria, the Civil Code automatically assumes paternity for co-residential men who had a sexual relationship with the mother 300 to 180 days before the birth. Paternity is then established via father's recognition of the child, or, in case of controversy, by court ruling (Kriegler 2002).

In some countries, such as Spain, Italy, France and England, fathers automatically acquire joint custody once paternity is established (Roca 2002; Ceschini 2002), although some countries stipulate specific requirements, for example in France, legal paternity must be established within one year (Ferrand 2005). In other countries, such as Germany and the Netherlands, a specific, separate application is required for unmarried fathers to attain joint custody, and again this may depend on the mother's consent (Dethloff 2005; Boele-Woelki and Schrama 2005). Note that in the Netherlands, fathers in registered partnerships automatically receive joint custody (Boele-Woelki and Schrama 2005). Finally, in some states, couples must meet further conditions to acquire joint parental custody. In Austria, parents must share a common household (Kriegler 2002), and in Switzerland, parents must contract a formal



agreement regarding the allocation of the personal care and financial responsibility for the child; this contract is then evaluated by guardianship authorities who can grant joint custody if they deem it to be in the best interests of the child (Graham-Siegenthaler 2002).

Finally, countries vary as to whether unmarried fathers can transfer their family name to their children. In most countries, couples can jointly decide which surname the child receives, especially if paternity has been established or the couple has registered for joint custody. In Austria, a nonmarital child generally receives the mother's surname, but couples can apply to change the child's name to the father's after the father has acknowledged paternity. In Switzerland, however, this is not the case. Nonmarital children receive the mother's last name, and fathers who would like to pass the paternal family name to their children must marry the mother. Le Goff and Ryser (2010) surmise that this is one of the reasons the percent of births within cohabitation has remained low (17% in 2008; Eurostat 2010) relative to nearby countries, even though the country has relatively high rates of premarital cohabitation. In addition, other aspects of Swiss family law discourage childbearing within cohabitation, such as having to negotiate bureaucratic obstacles to establish paternity and joint custody. Thus, Switzerland represents a case where state policies influence the decisions to exit cohabitation and enter marriage only when children are involved.

To summarize, even though fathers have successively acquired more rights in the care, education, and naming of their nonmarital children, the status and rights of married and unmarried cohabiting fathers has not been completely harmonized in any of the European countries considered here. In general across Europe, fathers must legally recognize their nonmarital children to establish paternity, although in some cases paternity can be established by court ruling. The only exception is Austria,

where a presumption of paternity applies to cohabiting fathers, based on the assumption that women only have sexual relations with co-resident men. Joint parental responsibility is automatically conferred to both unmarried parents in some countries, but only under the condition that both have previously recognized their child. In other countries, parents have to actively submit an application for joint custody. A combination of automatic presumption of paternity and automatic allocation of joint custody, as is the case in marriage, does not yet exist in any of the countries considered here. Therefore, these bureaucratic obstacles, which are a reflection of general policies towards cohabitation, may prompt couples with children to marry – usually the easiest route.

## **THEORETICAL CONSIDERATIONS**

In the preceding section we outlined the specific policy areas that may impact cohabitation and childbearing within cohabitation, but did not address general theoretical considerations. A rich body of social research has raised important theoretical considerations that must be addressed when analyzing the relationship between the state and the family. Here we follow the theoretical framework proposed by Neyer and Andersson (2008) to raise issues pertinent to cohabitation and childbearing within cohabitation. Neyer and Andersson (2008) focus on the impact of family policies on fertility, yet many of the generalizations about policy are also applicable to childbearing within cohabitation. Neyer and Andersson describe three major conceptualizations of family policies: (1) Kamerman and Kahn's (1991) approach to family policies that includes "everything that government does to and for the family..."; (2) the approach of feminist welfare-state researchers, who regard family policies as a central part of the welfare-state context and define family policies as policies that structure society by structuring private relationships (e.g. partnership

and parenthood); and (3) Bourdieu's (1996) argument that the state uses family policies to construct and institutionalize a particular form of family. Like Neyer and Andersson (2008), we draw on these three conceptualizations of family policy to explore 1) the "quantity," "coherence," and "timing" of family policies related to childbearing within cohabitation; 2) how family policies are situated in welfare-states contexts and influenced by other legal, cultural, gender, and economic institutions, and 3) the potential disconnect between laws, family ideologies, perceptions, and behavior.

### **The quantity, coherence, and timing of family policies**

Drawing on the work of Kamerman and Kahn, Neyer and Andersson (2008) describe how a broad spectrum of family policies may be more effective at influencing behavior than stand-alone policies (quantity), how family policies need to fit together to achieve similar goals (coherence), and how the timing of policies needs to precede societal development rather than lagging behind it (timing). Each of these dimensions is also important for how policies shape individuals' decisions about cohabitation and marriage. As described in detail above, many aspects could encourage couples to enter into marriage or remain in cohabitation, e.g. tax benefits, laws of inheritance, protection of private property, or the provision of equal parental rights. Thus, the sheer *quantity* of incentives supporting either marriage or cohabitation could deter or facilitate the spread of cohabitation. Likewise, individual policies or laws may be ineffective if they conflict with other policies. States may aim to support cohabitation by providing cohabitators with the same tax and welfare benefits granted to married people, but those benefits may be irrelevant if, for example, only married people can receive inheritance in case of death, as in Sweden ([Agell and Brattström 2008] in Ohlsson 2009). Thus, it is important to evaluate the *coherence* of policies across

different policy domains as well as the relative importance of the policies (Neyer and Andersson 2008).

Understanding the *timing* of the enactment of policies and legislation is also fundamental to understanding whether policies are leading to changes in behavior or reacting to changes that have already occurred. Only by knowing that a change in policy occurred before a change in behavior can we conclude that the policy may have led to the new behavior, although policies enacted at a later time may indeed facilitate an increase in behavior. For example, the initiation of marital benefits led to a sharp increase in marriage in several countries. In Sweden new regulations in the National Widow's Pension Scheme led to a sharp, but temporary, increase in marriage rates in 1989 (Hoem 1991). In Austria, the introduction and elimination of marriage allowances led to marriage booms in 1972, 1983, and 1987 and could have stalled increases in nonmarital childbearing directly afterwards (Prioux 1993; Prskawetz et al. 2008). On the other hand, the introduction of single-mother benefits could lead to an increase in births in cohabitation. Some have argued that in France, the establishment of a single-mother benefit (*allocation pour parent isolé*) in 1976 provided a monthly income to single mothers for up to three years after each birth. This means-tested benefit may have led low-income cohabiting couples to hide their relationships and postpone marriage, resulting in an increase in births within cohabitation throughout the 1980s, especially among the least educated (Knijn et al 2007). Nonetheless, such examples must be used with caution: even if the implementation of a policy may seem to have led to an increase in behavior, the relationship between a policy and behavior may in fact be spurious and instead caused by other factors such as social or economic change.

### **Situating policies related to cohabitation and childbearing within cohabitation**

When evaluating the relationship between policies and behavior, it is very important to remember that policies, and indeed individuals, are located within specific contexts. Welfare-state researchers emphasize that family policies and laws are situated within state contexts that structure society (Neyer and Andersson 2008, Esping-Andersen 1990). The welfare-state context may be critical to how states relate to individuals and families. States often protect and provide for their constituents by implementing tax and transfer systems; whether these systems are organized around married couples or individuals could be crucial to whether couples find it more advantageous to marry or remain within cohabitation. Several classification systems have specified how nations cluster in types of welfare states, the most common of which is Esping-Andersen's "three worlds of welfare capitalism" (Esping-Andersen 1990). The welfare-state classification system may be useful for organizing the relationship between policies and childbearing within cohabitation, because it provides a general depiction of how the state regards and financially supports families and individuals.

On the other hand, welfare-state classification systems may be completely orthogonal or even irrelevant to cohabitation and childbearing within cohabitation. The welfare-state typology often ignores other types of legal, cultural, gender, and economic institutions that may not be directly related to family policy, but nonetheless have a strong effect on individual behavior (Neyer and Andersson 2008). Feminist welfare-state researchers have emphasized how gender needs to be incorporated into such classification schemes in order to accurately capture the gender hierarchies and power relations within families (Orloff 1993). Such considerations are of particular importance to union formation, since state policies may favor a particular type of gender ideology that may then structure its regulation of formal and informal

relationships. For example, Scandinavian countries have been motivated to increase gender equality at home or in the workforce and create policies that support women's position within cohabitation. In addition, Scandinavian policies that support gender equality may also have led women to become more independent and therefore less reliant on the legal institution of marriage (Bracher and Santow?). The German state, on the other hand, has favored the breadwinner model and essentialized women's role towards the household and raising children. This orientation towards conservative gender roles has been essential for structuring tax and benefits around marriage.

A state's orientation and ideology clearly dates back to cultural and historical factors that determine the state's relationship to families and the individual (Bradley 2001). In certain countries, the constitution explicitly favors marriage as one of the fundamental ways in which society is organized. In Germany, for example, "marriage and family are under the special protection of the state" (German Basic Constitutional Law 1949 Ostner 2001?). In other countries, socialist ideology may have encouraged the acceptance of other family forms, thus leading to a legislation of neutrality that favors neither marriage nor cohabitation (Bradley 2001). In addition, the fundamental structure of the legal system itself may be essential to a state's ability to respond to changes in the family or regulate cohabitation. Bradley (2001) argues that "Differences in legal tradition are (another) ... factor which may explain divergent approaches to statutory regulation of cohabitation." Thus, the agility and type of courts and legislative bodies (e.g. common law vs. civil law) may impede or facilitate the development of family law.

Like other family policy researchers, we tend to focus on the national level, but policies at the regional, local or indeed supra-national level may also be of relevance to the increase in cohabitation. For example, different regions of Spain have

enacted different policies regarding cohabitation, and some regions have even created systems for registering cohabitation (González Beilfuss 2005). Studying regional variation may in fact provide analytical power to better determine the impact of policies on behavior (Neyer and Andersson 2008). At the other end of the space continuum, policies in European countries may be subject to or highly influenced by supra-national institutions, such as the European Union or Council of Europe. For example, twenty-two states of the Council of Europe have ratified the ‘European Convention on the Legal Status of Children born out of Wedlock’ of 1975, and thus obliged themselves to revise their national law to “bring the legal status of children born out of wedlock into line with that of children born in wedlock” (Council of Europe 1975). Even when there is no obligation to adapt national legislation to European norms, governments may do so to garner political favor or raise their esteem. National family law has also been the subject of international courts; for example, in December 2009, the European Court of Human Rights declared that current German law, which does not allow fathers to obtain judicial review for custody over a nonmarital child, discriminates against fathers and is not accordance with articles 14 and 8 of the European Convention on Human Rights. Since then, the German government has indicated that it will change the legal framework governing child custody to allow for court judgment (Sueddeutsche Zeitung 2009).

Besides variation across regions, childbearing within cohabitation may differ substantially within nations by educational, class, ethnic and religious groups, due to the differential impact of policies -- family-related or not. For example, women with low education and few employment prospects may be more likely to marry if they gain greater tax advantages than highly educated women who may have a similar income to their spouses, as in Germany (Konietzka and Kreyenfeld 2002).

Immigrants or cross-national couples may marry in order to attain residence permits or citizenship. It also important to note that policies may only become relevant to individuals at different periods throughout the lifecourse. As discussed in Perelli-Harris et al (2009), individuals may decide to marry at various points throughout the childbearing process, when policies provide certain benefits. In Germany, for example, tax benefits may not encourage cohabiting partners with similar incomes to marry early in their union, but they may encourage marriage when the woman would like to withdraw from the labor market to care for young children.

Cultural, historical, and economic institutions may also interact with legal regulations to produce substantial variation across regions, even within the same country. For instance, although the East and West regions of Germany have been governed by the same legal regulations for 20 years, the level of nonmarital childbearing is strikingly different (Konietzka and Kreyenfeld 2002). In the West, 26% of all births occurred outside marriage in 2003, while in the East nearly 58% occurred outside of marriage (Dorbritz and Naderi 2005). These differences have been explained by a number of economic, social, and historical factors. First, Eastern German women have had a long history of attachment to the labor force, while Western German women have been more likely to rely on their husbands for financial support (Konietzka and Kreyenfeld 2002). The labor force attachment in the East may have led to female independence and a preference for cohabiting unions, which are easier to dissolve. Second, the current Eastern German level of nonmarital childbearing may date back to attitudes formed in the 1908s, when the social policies of the German Democratic Republic encouraged women to remain unmarried in order to qualify for maternity leave. Finally, the differences in nonmarital childbearing between East and West Germany appear to date back centuries to the Prussian regime,



thus providing evidence that historical attitudes may be more important in this setting than policies (Goldstein and Kluesener 2009). This example shows that although current policies may play a very important role in encouraging or discouraging a particular behavior, they may be insufficient to alter underlying cultural patterns.

### **Constructing the family**

Although the state may try to structure families and individuals, family policies and laws may not correspond to social realities or the changing nature of relationships (Bourdieu 1996). In other words, family policies and laws may not reflect what families “should be like” according to societal norms and values. This disconnect with social reality is particularly pertinent with respect to cohabitation, which is often outside of official legal marriage and may not be regulated by the state in any way. In fact, couples may live together without marrying specifically to avoid the legal constraints of marriage and the fallout after a divorce. Thus, cohabitation and childbearing within cohabitation may be completely outside of legal jurisdiction.

Even if family policies and laws exist to regulate and support particular family forms, individuals may not be aware of them, or may in fact ignore them, even though the laws and policies may be in their best interest. Cohabiting couples with children may know they should take the necessary steps to attain legal recognition for the father, but fail to do so, a failure which could have negative consequences in case of union dissolution or death (Schrama 2008). Likewise, marriage may be in a couple’s best financial interest, but the couple may still fail to marry because they are ignorant of the benefits or beset by inertia. Alternatively, individuals may have the perception that they maintain certain rights when they do not. For example, in the UK, there is a pervasive myth that people in common law marriages (cohabiting unions) enjoy

similar rights to inheritance after their spouses death as people in legal marriages, even though they do not. Evidently this myth is widespread; a UK survey showed that more than half of cohabiting respondents believed they same rights as married people (Barlow et al 2005). This example provides evidence that: “Family policies always act on two levels: on the level of facts and on the level of perception.” (Neyer and Andersson 2008). The absence or presence of a body of law that regulates cohabitation may not impact cohabitation at all.

It is important to keep in mind that policy-makers may be motivated to enact laws or policies that have nothing to do with heterosexual cohabitation, but instead arose from the struggle for gay rights. The creation of registered partnerships to protect same-sex couples may have led to the rise of legal registration for heterosexual couples. Both the Netherlands and France implemented registered cohabitation for heterosexuals in order to grant same-sex couples legal rights, and yet the debates surrounding their implementation were quite different and resulted in different outcomes for heterosexual couples. Debates in France danced around reproductive rights, such as access to adoption and reproductive technologies, especially for same-sex couples; in the end, Pacs provided no rights for joint adoption or medically assisted insemination (Borrillo and Fassin 2004). In the Netherlands, however, parenthood for same-sex couples was not as big of an issue and thus registered partnerships have very similar rights as married couples, both for same-sex and straight couples.

Finally, policies aimed at protecting individuals may have consequences that were unintended by policy-makers. A number of countries have enacted a system of transfers and benefits as part of a social safety net to protect vulnerable people, namely single mothers and their children. Family policies and legal regulations that

were originally designed for these purposes may lead to unintended or even unwanted outcomes. For example, cohabiting couples may try to profit from single mother benefits by postponing entry into marriage and hiding cohabiting relationships (Hantrais 2004; Noack 2001; Martin and Théry 2001). The French single-mother benefit mentioned above could be said to have unintended consequences, since it was most likely not the government's intent to increase childbearing within cohabitation. The Netherlands also provided unemployment benefits to single mothers with children under the age of 18, and the rising numbers of mothers on benefits led to concerns about cohabitation fraud (Knijn et al 2007). Recently, governments have attempted to reduce this behavior by putting a strong emphasis on the distinction between single and cohabiting parents and eliminating incentives not to enter marriage (see, for instance, Noack 2001 for the Norwegian case, or Hantrais 2004 for the UK).

## **NEW DIRECTIONS IN RESEARCH**

Our goal thus far has been to outline policy dimensions and raise general theoretical considerations that may influence couples' decisions to marry or remain within cohabitation. However, although we have provided hints that policies may have an effect, our examples have not led to conclusive evidence that policies have led to the increases in cohabitation, or alternatively that states have reacted to the increases by changing policies. Clearly further research is needed to provide more concrete evidence for this relationship. Here we propose new directions in research that would elucidate whether there is a relationship between cohabitation and policy, and how this relationship differs across states.

First, more information is needed about the constellation of policies that may impact cohabitation and childbearing within cohabitation. An in-depth policy database covering the policy areas outlined above would allow researchers to investigate to what extent quantity and coherence are important for influencing behavior, as suggested by Kamerman and Kahn (1991). The policies in a given country could be placed along a spectrum to determine whether the policies are closer to *equalizing cohabitation* or *privileging marriage*. This type of analysis would reveal whether policies tend to cluster together within countries -- indicating that states maintain a uniform approach to cohabitation and marriage -- or spread out along the spectrum -- indicating a less coherent approach to policies associated with cohabitation and marriage. Researchers may find that the sheer quantity of policies clustering at one end of the spectrum may be most relevant for influencing couples' decisions to marry or remain in cohabitation. On the other hand, variation across countries may be explained by only a few prominent policies, such as the tax system or bureaucratic obstacles to obtaining joint custody, regardless of the quantity of policies.

The study "More or Less Together" is an example of a cross-national comparison of the legal differences between civil marriage, registered partnerships, and informal cohabitation (for different-sex or same-sex partnerships) (Waldijk et al 2005) (see figure 2). The authors measured the "levels of legal consequences" (LLC) by asking lawyers in 9 countries to complete questionnaires on 33 policies related to parenting, material, and other legal consequences. Lawyers indicated whether a particular policy was applicable to each type of union or only available under certain conditions. This analysis resulted in a numerical value attached to each type of union in each country. We plot the results of their comparison along the spectrum in Figure 2; the spectrum shows the percent of legal consequences granted to married couples

that are also granted to couples in informal cohabitation (registered partnerships are evaluated separately), with the left end of the spectrum indicating no rights (*privileging marriage*) and the right end of the spectrum indicating equal rights (*equalizing cohabitation*).

Although the Waaldijk et al (2005) study provides an interesting analysis of the rights and obligations of different types of partnerships across Europe, the results do not necessarily accord with other studies or the levels of cohabitation or childbearing within cohabitation. For example, we find it surprising that informal relationships (not registered partnerships) in the Netherlands have similar legal consequences as those in Sweden and are higher than in other Scandinavian countries. In 2003, right before the LLC survey was conducted, about 30% of children were born out-of-wedlock in the Netherlands, while 56% were born out-of-wedlock in Sweden and 64% in Iceland (Council of Europe 2006). These differences could be because policies do not cause or reflect actual behavior, but the differences could also arise because the Waaldijk et al study does not consider policies most important for influencing decision-making. For example, in the section on parenting consequences, Waaldijk et al only include information about the legal recognition of children, they do not include information about parental authority or custody, which can be obtained under different procedures, as discussed above. Schrama (2008) points out that in the Netherlands, parental authority is very important in case of death or union dissolution, and many couples may have married to gain this protection. Another potential issue with the Waaldijk et al approach is that they do not weigh the importance of individual policies; one particular area, e.g. tax law, may be more influential than another, e.g. spousal immunity in criminal prosecution. Finally, the estimates shown on Figure 2 are comprised of a comparison between the LLC for cohabiting couples

and married couples; the authors also calculate the LLC for married couples and find that in no country does the LLC for married couples exceed 76 out of 99 points. This raises questions about whether their measures adequately capture the advantages or disadvantages of marriage and cohabitation in a particular country, and indeed whether the rights and obligations of cohabitators approach those of married persons in similar policy areas. Thus, this study, which focuses on the *quantity* of policies but not necessarily their *coherence*, misses some of the nuances in policy, as well as understating the contextual, historical, and ideological factors that may be very important for explaining cross-national behavior.

Nonetheless, such a study is a first step to understanding differences in rights and obligations across states and how policies may impact behavior. In order to better explain the relationship, however, researchers need to acquire greater in-depth knowledge of the policies that may or may not influence the decision to marry or cohabit. Future analyses could better specify the *quantity* of rights, for example, the number of policies that mention cohabitation, which would provide information on whether the legal system even considers other family forms besides marriage. Researchers should examine the *coherence* of policies to see whether certain policies areas are most influential. Studies could also focus on the *timing* of these policies, to determine whether critical junctures led to a change in behavior (Neyer and Andersson 2008); one such example would be to analyses the timing of the adoption of new policies across different regions within a country, e.g. Spain.

In addition, as suggested by feminist state researchers, policies need to be situated in welfare, historical, regional, and socioeconomic contexts, in order to better understand how state ideology as a whole may influence the diffusion of cohabitation. Although this may seem to preclude comparison across a great number of countries, a

careful comparison should be able to analyze major differences between countries without ignoring context-specific effects. Finally, more research is needed to determine whether peoples' knowledge of their rights and obligations accords with what is written in the law, or indeed whether the laws matter at all to their decisions. Barlow's (2005) surprising finding that half of cohabitators in the UK assume that they have similar rights to married people suggests a disconnect between public perception and legal reality. Surveys and qualitative research that investigates peoples' knowledge and attitudes towards legal policy would provide important insights into whether policies do indeed make a difference in couples' decisions to cohabit or to marry.

## **CONCLUSION**

In this paper, we outlined the policy areas in which the state regulates the relationship between partners and the relationship between parents and children. We noted that policies appear to range along a spectrum from policies that *equalize cohabitation* with marriage to policies that *privilege marriage*, and we describe the range of policies in each area. We then discussed important theoretical considerations that may facilitate, alter, or mediate the relationship between the state and family formation. Indeed, the issues we raised may be more important than any direct relationship between a given set of policies and the decision to cohabit and marry. Finally, we offered suggestions for how researchers could analyze these relationships in future research, by focusing on the quantity, coherence, and timing of policies; situating policies and individuals within specific contexts; and analyzing the perception and reality of policies and their legal consequences.

In this study, we found evidence that certain countries had longstanding approaches that favored marriage, while others tolerated or even supported alternative family forms. These findings suggest that although cohabiting unions may appear to be an “alternative to marriage” in many countries, according to the prevalence or duration of unions (Heuveline and Timberlake 2004), they may still be very different in terms of legal recognition. Countries exhibit a great deal of variation in their approach to cohabitation on a number of dimensions, but this approach is not necessarily comprehensive or coherent. Thus, the policy landscape differs significantly across countries, as does its relationship to individual behavior.

This theoretical overview raises important questions about the changing institution of marriage, as well as the increasing “institutionalization” of cohabitation. If laws and regulations are expanded to incorporate cohabitation, what does that imply for the institution of marriage? If states equalize cohabitation and marriage, does that mean cohabitation is increasingly an “alternative to marriage?” Increasing the rights and obligations accorded to cohabiting couples inherently challenges the legal function of marriage. This leads to questions about whether marriage and cohabitation are distinct institutions or whether they are increasingly substitutes for one another. In addition, this study raises questions about the role of children within these unions; policies directed towards granting unmarried fathers equal rights may negate the reason for marrying when children are born. Again, policies may be changing the function of marriage, so that marriage is no longer the sole state-sanctioned relationship for raising children. As a result, children may still play an important part in defining a couple’s commitment and influencing decisions to marry, but they may also become increasingly irrelevant to decisions about converting cohabitation into marriage.



Changing policies to accord cohabitators more rights and responsibilities challenges the legal uniqueness of marriage, but it can also fundamentally change the social and economic function of marriage. The state's recognition of cohabitation as an alternative family form has been fundamental to a societal acceptance of the behavior and its increased practice. Needless to say, people will feel less pressure to marry if the legal and financial benefits to marriage dwindle. As a result, the role of marriage in these societies may take on different social meanings, or may be related to less tangible benefits such as status or emotional commitment to the relationship. Thus, the state may play a fundamental role in altering couples' decisions to cohabit or marry – by reducing the legal disadvantages of remaining within cohabitation – but nonetheless, marriage may retain its symbolic meaning. Studies show that although marriage may be postponed throughout different life events, eventually most people marry (Andersson and Philipov 2002), and indeed most people want to marry, even in Sweden (Bernhardt 2004). Thus, the expansion of policies to regulate cohabitation may have little impact on marriage in the long-run. Further research in this area will shed more light onto how the function of marriage and cohabitation has changed over time, why cohabitation, especially as a setting for childbearing and rearing, is increasing so rapidly, but also whether marriage will ever truly disappear.

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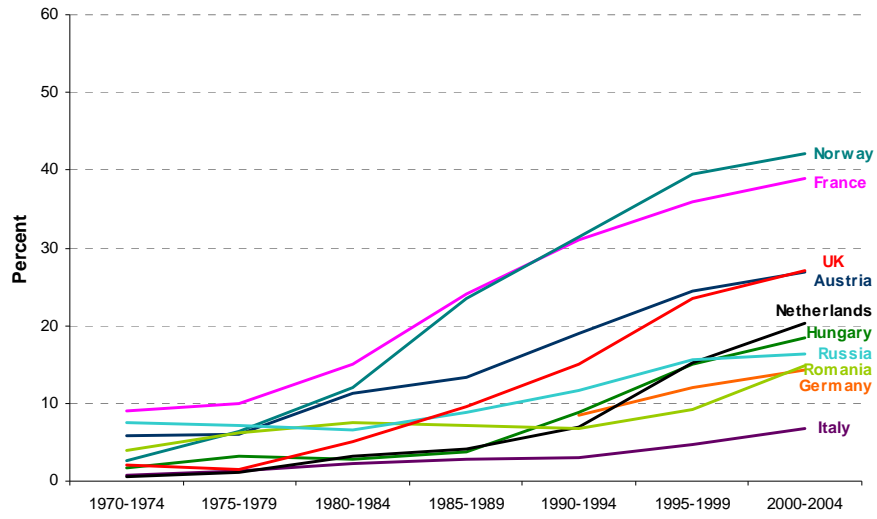
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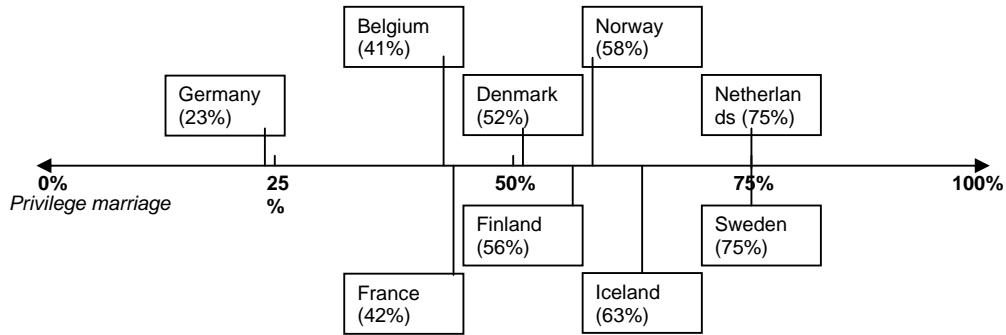
**Figure 1: Percent of all births born to cohabitation, by country, 1970-latest date available.**



Source: Perelli-Harris et al. 2009



**Figure 2. Percent of the legal consequences granted to married couples that are also granted to cohabiting couples in informal unions (not registered partnerships)**



Source: Waaldijk et al (2005)

Note: Waaldijk et al (2005) assigned points to assess the rights and obligations (legal consequences) in 33 legal areas for married and cohabiting couples. This graph shows the total number of consequences granted to cohabiting couples divided by the total number of consequences granted to married people.