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Family Law for the One-Hundred-Year Life

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NAOMI CAHN, CLARE HUNTINGTON & ELIZABETH SCOTT

Family Law for the One-Hundred-Year Life

ABSTRACT. Family law is for young people. To facilitate child rearing and help spouses pool resources over a lifetime, the law obligates parents to minor children and spouses to each other. Family law's presumption of young, financially interdependent, conjugal couples raising children privileges one family form – marriage – and centers the dependency needs of children.

This age myopia fundamentally fails older adults. Families are essential to flourishing in the last third of life, but the legal system offers neither the family forms many older adults want nor the support of family care older adults need. Racial and economic inequities, accumulated across lifetimes, exacerbate these problems. Family law's failures are particularly pressing in light of a tectonic demographic shift underway in our society: Americans are living longer, with half of all five-year-olds today projected to live more than one hundred years. The proportion of older adults as a percentage of our population is also rapidly growing and will soon surpass that of minor children.

This Article argues that family law must adapt to the new old age. At a conceptual level, family law should address the interests and needs of families across the life span, not just those of younger people. And it must reflect three core commitments: centering the autonomy interests of older persons, addressing structural inequities, and ensuring that legal mechanisms are efficient and accessible.

This conceptual shift leads to a series of practical reforms to laws governing family formation and family support. The interests of older adults will be better served if they have access to a broader array of family forms and can easily customize these family relationships. We thus propose reforms that decenter marriage as the primary option and make it easier to opt into and out of legal obligations. To support the familial caregiving that is essential to wellbeing, we propose a set of reforms to federal, state, and local laws that would provide economic relief and other support to family caregivers. By offering pluralistic family forms, better support for familial caregiving, and an appreciation of the legal implications of the centrality of relationships in the last third of life, this Article charts a path for family law for the one-hundred-year life.

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ARTICLE CONTENTS

| | |
|---|------|
| INTRODUCTION | 1695 |
| I. FAMILY AND THE ONE-HUNDRED-YEAR LIFE | 1703 |
| A. Longer Lives and New Families | 1704 |
| 1. The New Old Age: A Time of Opportunity (for Some) | 1704 |
| 2. Family Formation Trends | 1708 |
| 3. Implications | 1714 |
| B. Familial Caregiving | 1716 |
| 1. Care Needs | 1716 |
| 2. Who Provides Care | 1718 |
| 3. Implications | 1721 |
| II. INCREASED LONGEVITY AND THE LIMITS OF CONTEMPORARY FAMILY LAW | 1725 |
| A. Family Law's Age Myopia | 1726 |
| B. The Consequences of Family Law's Inattention to Older Adults | 1728 |
| 1. A Failure to Satisfy Older Adults' Relationship Preferences | 1729 |
| a. The Misalignment of Legal Marriage | 1729 |
| b. Neglect of Other Family Forms | 1731 |
| c. The Challenges of Tailoring Family Relationships | 1735 |
| 2. A Failure to Support Familial Caregiving by Adult Children | 1737 |
| III. FAMILY LAW FOR THE NEW OLD AGE | 1741 |
| A. The Conceptual Framework | 1741 |
| B. Practical Reforms: Family Formation | 1745 |
| 1. A New Approach to Family Formation | 1745 |
| a. Registration of Family Groups: An Opt-In Mechanism | 1746 |
| b. Tailoring Marriage: An Opt-Out Mechanism | 1752 |
| 2. Implementation Issues | 1755 |
| a. Knowledge and Access | 1755 |
| b. Zoning | 1757 |
| | 1693 |



| | |
|--|------|
| C. Practical Reforms: Supporting Family Caregiving | 1758 |
| 1. Working Within the Libertarian Paradigm | 1759 |
| 2. Moving Beyond the Privatization of Dependency | 1764 |
| CONCLUSION | 1768 |

INTRODUCTION

The United States is experiencing a tectonic demographic shift: the number of adults aged 65 and older is on track to more than double in a single generation, and more than twenty percent of the population will soon be older adults.¹ Longevity has also dramatically increased,² with some experts predicting that half of all five-year-olds alive in the United States today will live at least one hundred years.³ Not only are people living longer, they also are challenging stereotypes about the “fragile” elderly; many older adults are thriving physically and socially, albeit with notable differences by race and income.⁴

The emergence of the new old age has captured the popular imagination, with many self-help books about living long and living well.⁵ Scholars across

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1. See *Older Americans 2020: Key Indicators of Well-Being*, FED. INTERAGENCY F. ON AGING-RELATED STATS., at xvi (2020) [hereinafter *Older Americans*] (explaining that by 2030, the population over the age of 65 “is projected to . . . [grow] from 35 million [in 2000] to 73 million”). Throughout this Article, we refer to “older adults.” In general, we use this term to refer to people aged 65 and older, although we recognize that legal systems use different age cut-offs in different contexts and that age can be measured in ways other than chronologically. See generally Alexander Boni-Saenz, *Legal Age*, 63 B.C. L. REV. 521 (2022) (describing chronological, biological, and subjective conceptions of age).
 2. Life expectancy for older people has grown significantly, with an older person now expected to live eighty-five years. See *Life Expectancy at 65*, ORG. ECON. COOP. & DEV. (2022), <https://data.oecd.org/healthstat/life-expectancy-at-65.htm> [<https://perma.cc/3UW6-PH6S>]; see also Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2020*, 71 NAT’L VITAL STATS. REPS. 1, 5 fig.1 (Aug. 8, 2022) (showing life expectancy at birth, in contrast to other studies showing life expectancy for those who survive to age 65). Some demographers contend life expectancy has been increasing approximately 2.5 years every decade for the past 150 years, and there is no evidence that we are close to a biological limit on life expectancy. Jim Oeppen & James W. Vaupel, *Broken Limits to Life Expectancy*, 296 SCI. 1029, 1031 (2002).
 3. *The New Map of Life: 100 Years to Thrive*, STAN. CTR. ON LONGEVITY 2 (Nov. 2021), https://longevity.stanford.edu/wp-content/uploads/2021/11/NMOL_report_FINAL-5.pdf [<https://perma.cc/2R4J-YVES>]; see also Oeppen & Vaupel, *supra* note 2, at 1031 (noting that “centenarians may become commonplace within the lifetimes of people alive today”). Increased longevity is one of several trends contributing to the rapid graying of the United States. See *infra* text accompanying note 53 (identifying three forces driving the graying of America: increasing longevity, decreasing fertility, and slowing immigration).
 4. See *infra* text accompanying notes 49–61.
 5. See, e.g., ANDREW J. SCOTT & LYNDA GRATTON, *THE NEW LONG LIFE: A FRAMEWORK FOR FLOURISHING IN A CHANGING WORLD* *passim* (2020); NIR BARZILAI, *AGE LATER: HEALTH SPAN, LIFE SPAN, AND THE NEW SCIENCE OF LONGEVITY* 9 (2020) (predicting that, in the “near future,” we will be living healthy and vital lives in our nineties and beyond); DAVID A. SINCLAIR & MATTHEW D. LAPLANTE, *LIFESPAN: WHY WE AGE—AND WHY WE DON’T HAVE TO* 87–115 (2019) (offering a geneticist’s advice on how to slow, if not reverse, the aging process); LYNDA

disciplines are engaging with these critical trends, studying many aspects of aging,⁶ creating research centers,⁷ and establishing an interdisciplinary field of aging studies.⁸ Similarly, legal scholars are beginning to address the profound implications of increased longevity and the graying of America,⁹ elevating the long-standing field of elder law.¹⁰

GRATTON & ANDREW SCOTT, *THE 100-YEAR LIFE: LIVING AND WORKING IN AN AGE OF LONGEVITY* *passim* (2016) (discussing how to rethink finances, education, career, and relationships to create a fulfilling one-hundred-year life). Not all depictions are rosy. *See, e.g.,* ROZ CHAST, *CAN'T WE TALK ABOUT SOMETHING MORE PLEASANT?* (2014) (discussing the reality of life for her parents in their nineties).

6. Researchers in several disciplines—including scholars in demography, *see, e.g.,* Oeppen & Vaupel, *supra* note 2, medicine, *Why Study Centenarians? An Overview*, B.U. SCH. OF MED., <https://www.bumc.bu.edu/centenarian/overview> [<https://perma.cc/M5GH-WD5E>], and economics, Andrew J. Scott, Martin Ellison & David A. Sinclair, *The Economic Value of Targeting Aging*, 1 NATURE AGING 616 (2021)—are studying longevity and old age.
7. *See, e.g.,* 100 Years to Thrive, STAN. CTR. ON LONGEVITY, <https://longevity.stanford.edu/about> [<https://perma.cc/TQ3F-W9CU>] (“The mission of the Stanford Center on Longevity is to accelerate and implement scientific discoveries, technological advances, behavioral practices, and social norms so that century long lives are healthy and rewarding.”); *Our Research*, CTR. FOR RET. RSCH. BOS. COLL., <https://crr.bc.edu/about-us/our-research> [<https://perma.cc/D3MS-7LXS>] (“[O]ur research covers any issue affecting individuals’ income in retirement.”).
8. The interdisciplinary study of aging views aging “as a phenomenon that is inextricably caught up in and realized through social and cultural practices, much in the same way that such embodied entities as gender, race, disability, or sexuality are. Such a perspective puts what may be termed a rather queer light on gerontology.” Chris Gilleard, *Aging and Aging Studies: Celebrating the Cultural Turn*, 1 AGE CULTURE HUMS. 35, 36 (2014).
9. For the earliest works in the legal academy on the one-hundred-year life, *see* Anne Alstott, *Law and the Hundred-Year Life*, 26 ELDER L.J. 132 (2018); and Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561 (2021), which analyzes the many ways in which the common law of property reflects the interests of young and middle-aged white men and does not account for an aging population.
10. The field of elder law focuses on old age, but elder-law scholars generally do not address family law issues, such as family formation. *See* Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 188 & 192 (2019) (arguing that research on issues such as how to encourage familial care for aging adults is “much-needed”). Instead, elder law addresses questions adjacent to those we explore in this Article, such as governmental support programs, estate planning, and guardianship. *See id.* at 199. Practitioners of elder law provide legal services to older adults, and much of the focus is on health issues, such as qualifying for Medicaid or end-of-life planning, with relatively little attention devoted to family law issues, including grandparents’ rights. *See id.* at 188. For further discussion of elder law, *see* Naomi Cahn, *Changing Demographics, Elder Law, and Trusts and Estates*, 46 AM. COLL. TRUSTS & ESTS. COUNS. L.J. 15, 15-16 & 21 (2020), which explores how changing family structures affect trusts and estates.

Family law and family law scholars, however, have barely reckoned with the one-hundred-year life or with the needs and interests of older adults.¹¹ The overall goals of family law are to facilitate family formation and to support families in fulfilling the critical societal function of caring for individuals' dependency needs.¹² But although it is clear from research on aging that families are central to wellbeing in old age,¹³ family law fails to address the needs of an aging population.¹⁴

As this Article argues, the fundamental problem—both conceptually and practically—is that family law is designed for younger people, facilitating child

11. Although most family law scholars have yet to grapple with these critical shifts in aging, a few scholars have addressed important aspects of family law and aging. See generally Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1 (2013) [hereinafter Weaver, *Grandma in the White House*] (analyzing the caregiving provided by older adults); Jessica Dixon Weaver, *The Perfect Storm: Coronavirus and The Elder Catch*, 96 TUL. L. REV. 59 (2021) (coining the phrase “the elder catch” to describe the dual demands on adults to work and care for aging parents and children and describing the financial and mental strain this creates, especially for women). For preliminary thoughts on the intersection of aging studies and family law, see Naomi R. Cahn, *The Golden Years, Gray Divorce, Pink Caretaking, and Green Money*, 52 FAM. L.Q. 57, 65 (2018).

12. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992) (setting forth five functions of family law: protecting citizens from harm by other citizens, especially harm from parents and spouses; helping people to organize their lives as they wish by giving effect to contracts about private affairs; resolving disputes within the family, especially at the end of relationships; expressing society's views about desirable behavior; and channeling people into social institutions that are widely believed to further desired ends, notably marriage and parenthood).

13. See *infra* text accompanying notes 62–64.

14. Throughout the Article, we analyze family law in both its narrow and broader sense. See Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1003–08 (2013). In its narrow sense, family law creates categories of legal relationships, governs entry and exit from those relationships, and regulates behavior during them. See *id.* In its broad sense, family law includes the ways related areas of law shape and influence family life, from zoning regulations to criminal law. See *id.* As we demonstrate, in both its narrow and broad sense, family law must address the needs of older adults for meaningful relationships and familial support.

In defining the scope of family law, this Article takes into account the important observation of Jacobus tenBroek in the early 1960s concerning family law for the rich contrasted from family law for the poor. Although family law is neutrally applied regardless of income, there are two different family law systems: one set of regulations that applies to the wealthy, who are able to opt out of default rules and have little political oversight, and another set that applies to the use of public funds, which affects the poor and subjects them to stringent monitoring by the state. Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 257–58 (1964).

rearing and helping spouses pool resources to build a life together.¹⁵ The prevailing regulatory regime thus obligates parents to children and spouses to each other through strong rules of economic sharing and prioritization of spouses over others.¹⁶ This regime likely reflects the preferences and reinforces the commitment of younger adults entering marriage and planning to raise a family.¹⁷

But the presumption at the heart of contemporary family law – of young, financially interdependent, conjugal couples, raising minor children – does not consider the interests of older adults. Most older adults will be single at some point¹⁸ and, if they seek to form new family relationships, typically want emotional support and companionship, not a coparent or economic partner.¹⁹ Moreover, many older people want to keep their assets for their adult children, not leave them to a late-in-life spouse.²⁰ Older adults are thus less likely to want traditional marriage with its presumption of financial interdependence. But they are also a diverse group, varying greatly in their wishes about their preferred family form and in the level of commitment they want to undertake. Some will choose to live together in informal unions; others will eschew coupling altogether and instead choose to satisfy their needs for emotional connection and support by living in nonconjugal dyads or groups – with friends, siblings, and in cohousing arrangements.²¹

Further, with its single-minded focus on the dependency needs of children, family law's age myopia overlooks the dependency needs of older adults. Under

15. See *infra* text accompanying notes 157–171 (describing family law's focus on younger people and hypothesizing that this focus owes to family law's development during an era in which life expectancy was shorter and divorce uncommon).

16. See *id.*

17. Indeed, scholars have argued that the default rules regulating marriage and divorce embody the terms that would be chosen by couples executing a hypothetical bargain as they enter marriage and plan to start a family. See generally Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1301–32 (1998) (analyzing marriage and divorce law as majoritarian default rules derived in a hypothetical bargain framework); Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 243 (arguing that the obligations undertaken in entering marriage reinforce commitment and stability).

18. See *infra* text accompanying notes 71–74.

19. Francine Russo, *Why Older Couples Don't Need Marriage to Have Great Relationships*, TIME (Sept. 19, 2021, 8:00 AM EDT), <https://time.com/6099079/older-couples-great-relationships> [<https://perma.cc/9AE5-D43J>].

20. *Id.*

21. See *infra* text accompanying notes 84–87.

our libertarian regime, family members, especially adult children, are the primary source of eldercare.²² Across the country, familial caregivers are helping older relatives with every aspect of daily life – an undertaking equivalent to an unpaid part-time job for the caregiver.²³ This caregiving supports flourishing by enabling older adults to age in place, a strong preference for most older people.²⁴ Older adults at all income levels rely on unpaid family caregivers, and Black caregivers spend the most time providing that care, followed by Latinx and Asian family caregivers.²⁵

Aging in the United States reflects deeply entrenched inequities, compounding family law's failures.²⁶ Older persons of color tend to have relatively more health problems, fewer savings, and less accumulated wealth.²⁷ In general, lower-income older adults experience worse health than middle- and upper-income older adults.²⁸ Older women often face greater financial hardship than older men.²⁹ And gay and lesbian older adults are less likely to have adult children.³⁰ As we explain throughout the Article, these differences impact both family formation and familial caregiving.

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22. See MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 19-21 (2020) (describing the system in the United States of limited state support for caregiving and instead the country's reliance on families to provide this care); *infra* text accompanying notes 107-138 (describing the caregiving needs of older adults and the role of family members in providing it, and further noting that adult daughters and wives are overwhelmingly the caregivers in their families).
 23. See Gai Wettstein & Alice Zulkarnain, *How Much Long-Term Care Do Adult Children Provide?*, CTR. FOR RET. RSCH. BOS. COLL. 1, 2 (June 2017), http://crr.bc.edu/wp-content/uploads/2017/06/IB_17-11.pdf [<https://perma.cc/55CM-LYLD>] (estimating that each month adult children provide about seventy-seven hours of unpaid care to parents or parents-in-law).
 24. See *infra* text accompanying note 86.
 25. See *Caregiving in the U.S.*, AARP 31 (May 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf> [<https://perma.cc/SXQ5-83X4>] (“African American [family] caregivers report providing more hours of care each week (31.2 hours on average) than either White (21.2 hours) or Asian American (24.1) caregivers. Hispanic caregivers provide 26.0 hours of care weekly”); see also *id.* at 38 (noting that as compared with white family caregivers, Latinx and African American caregivers provide more help with medical and nursing tasks).
 26. These include inequities grounded in race, socioeconomic status, ethnicity, religion, gender, sexual orientation and identity, and disability.
 27. See *infra* text accompanying notes 59-61, 96-98.
 28. See *infra* note 60 and accompanying text.
 29. See *infra* notes 100-101 and accompanying text.
 30. See Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html> [<https://perma.cc/8ZJG-SMSR>] (noting that 14.7% of same-sex couples and 37.8% of different-sex couples in the United States had at least one child under the age of eighteen in their households).

Family law doctrine and policy do little to acknowledge these age-related differences and inequities, fundamentally failing to assist older Americans in forming the families that they want and to support the caregiving that almost all individuals will need in old age. Beginning with family formation, the law presents only one option for relationship recognition—marriage, which carries default rules imposing economic obligations and joint decision-making.³¹ If older people want intimate partnerships but not the full range of legal consequences that come with it, they have no easily available means for tailoring their commitments.³² And despite the growing importance of nonconjugal, nondyadic relationships to older people, family law does not recognize these family-like arrangements, instead often creating obstacles to the formation of alternative families.³³

Family law also does not adequately support families in providing care to older members. To be sure, our libertarian political regime, which privatizes dependency across the lifespan, offers limited support to parents of minor children.³⁴ But adult children caring for parents receive even less support.³⁵ The underlying assumption is that family members, typically women, provide care altruistically, despite caregiving's financial, social, and physical toll.³⁶

Taken together, family law's failures make it much harder for older adults to live fulfilling lives. Therefore, this Article contends, it is essential to fundamentally rethink family law for the final third of life. Just as two earlier waves of successful legal reform—no-fault divorce in the 1970s and marriage equality beginning in the 2000s—adapted family law to the changing needs of society, so too would the new wave of family law reform we propose.

The family law we envision—family law for the new old age—entails broad-based conceptual and practical shifts to better address the interests and needs of older adults and to support them in leading fulfilling lives. On a conceptual level, we contend that family law doctrine and policy must reflect the empirical reality that families play a crucial role in enhancing the wellbeing of older adults, but it is a different role than in other life stages.³⁷ Further, family law for the new old

31. See *infra* text accompanying notes 164-166.

32. See *infra* Section II.B.1.c.

33. See *infra* text accompanying notes 189-201.

34. See EICHNER, *supra* note 22, at 19-42 (explaining that in the United States, unique among wealthy nations, the burden of fulfilling the dependency needs of children falls heavily on the family).

35. See *infra* text accompanying notes 212-229.

36. See *infra* text accompanying notes 143-147.

37. Cf. Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1416 (2020) (citing research that indicates the importance of a healthy "parent-child relationship . . . for healthy child development").

age must reflect three core commitments: placing center stage the autonomy interests of older persons,³⁸ addressing structural inequities, and ensuring that legal mechanisms to support wellbeing in older adults are efficient and accessible.

On a practical level, we propose two core areas of family law reform. The first core area is family formation, decentering traditional legal marriage as the primary option available to older adults. Family law for the new old age recognizes that the interests of older adults will be better served if they can easily customize their preferences for family relationships. Our solution is to offer two sets of options.³⁹ For older adults who want to marry, family law should provide simple and efficient ways to opt out of marital rights and obligations. For older adults who prefer other family relationships—conjugal or nonconjugal, dyadic or non-dyadic—family law should allow those couples or groups to opt into rights and obligations through a registration system. Today, couples and groups can overcome some of these customization obstacles to family formation through contract, but this option is burdensome and expensive.⁴⁰ We therefore emphasize, for all reforms, accessibility and affordability.

The second core area is caregiving, seeking to strengthen family caregiving for individuals later in life. It would be preferable for the state to assume a more active role in supporting older adults, but a sea change in the state's approach to privatizing dependency is not imminent, despite a barrage of compelling criticism in recent decades.⁴¹ Even within the libertarian framework, however, there is much that the law can and should do to better support family members caring for older adults. The presumption that family care is provided gratuitously and

38. Family law scholars have long debated the balance between autonomy and dependency, but this debate focuses primarily on adolescents. *See id.* at 1440–44 (demonstrating that the law recognizes the decision-making capacity of adolescents through such mechanisms as the mature minor doctrine); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448, 1496–1505 (2018) (arguing that the law should do more to foster and respect children's development and expression of their interests and beliefs). We lack the same discourse about the reality of dependency in old age, even though it is central to flourishing in old age.

In this Article, we largely set aside the issue of diminished decision-making capacity that some older adults experience. Instead, we assume that older adults have the capacity to make decisions about their families and their care.

39. *Cf.* Erez Aloni, *Registering Relationships*, 87 *TUL. L. REV.* 573, 599 (2013) (proposing a range of relationship forms and allowing people to choose); William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 *GEO. L.J.* 1881, 1889–90 (2012) (arguing for more state-recognized relationship options).

40. *See infra* Section II.B.1.c.

41. *See, e.g.*, EICHNER, *supra* note 22, at 19–42; CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 193–95 (2014); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 85–114 (2006).

effortlessly pervades family law and related doctrines. To undermine this assumption and to provide concrete assistance, we propose a set of reforms that would provide economic relief and other support to familial caregivers.⁴² Individually, these shifts in law and policy may seem minor, but taken together they can weaken, and perhaps even eliminate, the presumption that intrafamilial care is provided gratuitously and need not be supported. And they can mitigate some of the economic, social, and physical costs of unpaid caregiving. We also consider more far-reaching change that would move beyond the privatization of dependency.

As this discussion makes clear, the wave of reform that we propose will include core aspects of family law, such as family formation, as well as areas of law that affect families even as they are not traditionally considered a part of family law, like zoning regulations and the tax code.⁴³ With this broad understanding of family law in mind, we address multiple areas of the law that create significant obstacles to family formation and eldercare.

In exposing fundamental deficits and proposing a family law for the new old age, this Article fills a significant gap in the literature. It brings family law scholars into the debate about how to address radically increasing longevity and the rapid graying of the American population. This Article also contributes to the ongoing debate about family law's privileging of the marital family. Many scholars, including each of us, have criticized family law for its emphasis on marriage and its general disregard of nonmarital families.⁴⁴ But legal scholars have paid little attention to the way in which family law's preoccupations harm *older* adults. As we show in this Article, that damage is different and deserves its own response.

In Part I, we describe and reflect on the trends in family formation and familial caregiving, noting the growing importance of these issues in light of increased longevity and the graying of America. In Part II, we argue that family law suffers from age myopia, offering neither the family forms older adults want nor the support of family care older adults need. In Part III, we propose a family

42. See *infra* Section III.C.

43. See *supra* note 14.

44. Scholars have shown how the single-minded focus on marriage harms other families and can undermine the very purposes that family law aims to promote—intimacy, care, and the stability in raising children. See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 202-10 (2015) (arguing that family law's rules and institutions are based on marital relationships, to the detriment of nonmarital families); see also Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1248 (2019) (“[O]ur approach to nonmarital relationships rests on the principle that such relationships should be seen as one of a continuum of possible types of intimate relationships”); cf. Scott, *supra* note 17, at 248 (arguing that the lack of legal recognition of cohabitation relationships results in poor support for dependency).

law for the new old age, which begins with a conceptual shift in family law so that it addresses the needs and preferences of older adults and includes practical reforms; we also identify open substantive questions and implementation issues.

By offering a pluralistic array of family forms, better support for familial caregiving, and a broad new understanding of the legal implications of the centrality of relationships in the last third of life, family law for the new old age meets the moment. It is an ambitious agenda that will require changes in federal, state, and local law. And it is past the time to start.

I. FAMILY AND THE ONE-HUNDRED-YEAR LIFE

Several important demographic and social changes provide the context for understanding the failure of family law to serve the interests of older adults. As we explain in this Part, many individuals are living robust lives into their eighties, nineties, and beyond, but others face extended decline and financial insecurity. Not surprisingly, health challenges increase with advancing age.⁴⁵ But despite vulnerability created by health and other challenges, the last third of life can be a time of fulfillment. And for most people, growing older is a mix of vulnerability and flourishing.

Throughout this period, families play a critical role in supporting wellbeing and mitigating the challenges of old age. As older adults anticipate additional years of life, many are forming new families and finding companionship, as well as emotional and social connection, with new partners and groups. But older adults often have different expectations and preferences in these relationships than younger adults. And as adults age and, typically, need more care than earlier in their adult lives, families again play a key role, providing needed care, social connection, and economic support.⁴⁶ Indeed, adequate care is a critical determinant of whether old age is a time of fulfillment or deprivation. This Part offers an empirical account of aging as a time of both opportunity and challenge, paying particular attention to differences by gender, race, and income.

45. *Older Adults: Health and Age-Related Changes*, AM. PSYCH. ASS'N (Sept. 2021), <https://www.apa.org/pi/aging/resources/guides/older> [<https://perma.cc/2MAE-CWAV>].

46. The relational bonds between caregiver and care recipient can vary, with, for example, older Black people and members of the LGBTQ community less likely to depend on a spouse or children. See, e.g., Chanee D. Fabius, Jennifer L. Wolff & Judith D. Kasper, *Race Differences in Characteristics and Experiences of Black and White Caregivers of Older Americans*, 60 GERONTOLOGIST 1244, 1248 tbl.2 (2020) (demonstrating that Black caregivers are less than half as likely as white caregivers to be married to the care recipient (13.3% to 28.2%), that Black caregivers are slightly more likely than white caregivers to be children (52.4% to 48.4%) or nonrelatives (9.6% to 9.1%), and that Black caregivers are substantially more likely to be “[o]ther family” (24.7% to 14.3%)); Nancy J. Knauer, *LGBT Older Adults, Chosen Family, and Caregiving*, 31 J.L. & RELIGION 150, 158 (2016).

A. Longer Lives and New Families

1. The New Old Age: A Time of Opportunity (for Some)

Life expectancy for older people has increased significantly. The average older person can now expect to live until age eighty-five,⁴⁷ and many reach the age of one hundred.⁴⁸ Life expectancy varies by race, ethnicity, sex, and income: Hispanic older people have the highest life expectancy, followed by white and then Black adults.⁴⁹ Women of all races and ethnicities are statistically more

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47. This statistic is from 2018, the most recent year available. See Arias & Xu, *supra* note 2, at 5 fig.1. Although our focus is on changes in life expectancy among older people, it is worth noting that life expectancy at birth has nearly doubled over the past 150 years, increasing from 39.4 years in 1860 to 78.8 years in 2020. See Aaron O'Neill, *Life Expectancy in the United States, 1860-2020*, STATISTA (June 21, 2022), <https://www.statista.com/statistics/1040079/life-expectancy-united-states-all-time> [<https://perma.cc/8KE4-ZJV7>]. As we explain in this Section, there are notable differences in life expectancy among older people by race, income, and gender, but when looking at life expectancy at birth, the differences are even more stark. See, e.g., *Large Life Expectancy Gaps in U.S. Cities Linked to Racial & Ethnic Segregation by Neighborhood*, N.Y.U. LANGONE HEALTH (June 5, 2019), <https://nyulangone.org/news/large-life-expectancy-gaps-us-cities-linked-racial-ethnic-segregation-neighborhood> [<https://perma.cc/UU2G-PJ7W>] (“[P]eople living in East Harlem live an average of 71.2 years while those living in the Upper East Side, just a few blocks away, live to 89.9 years.”). COVID-19 exacerbated the gap, with an expected decrease in life expectancies for Black and Latinx individuals that is double or triple that for white people. See Theresa Andrasfay & Noreen Goldman, *Reductions in 2020 U.S. Life Expectancy Due to COVID-19 and the Disproportionate Impact on the Black and Latino Populations*, 118 PROCS. OF NAT’L ACAD. OF SCIS. art. no. 5, at 2-6 (2021).
48. See *supra* note 3 and accompanying text; see also *Actuarial Life Table*, U.S. SOC. SEC. ADMIN. (2019), <https://www.ssa.gov/oact/STATS/table4c6.html> [<https://perma.cc/CE3A-RFLC>] (demonstrating through period life expectancy that some older adults may reach or exceed the age of one hundred); Ferris Jabr, *How Long Can We Live?*, N.Y. TIMES MAG. (Oct. 1, 2021), <https://www.nytimes.com/2021/04/28/magazine/human-lifespan.html> [<https://perma.cc/X5UU-Y5T3>] (“The United Nations estimates that there were about 95,000 centenarians [across the globe] in 1990 and more than 450,000 in 2015. By 2100, there will be 25 million.”). Demographers predict that the human capacity for longevity, while not infinite, will continue to increase. See Oeppen & Vaupel, *supra* note 2, at 1031.
49. See Arias & Xu, *supra* note 2, at 3 tbl.A (showing that Hispanic individuals who reach age 65 are expected to live another 21.4 years, as compared with 19.4 years for white individuals, and 18 years for Black individuals). The Census data on longevity do not report on Asian individuals. For a source that describes life expectancy at birth for Asian people and Pacific Islanders, see Off. of Minority Health, *Profile: Asian Americans*, U.S. DEP’T HEALTH & HUM. SERVS. (Oct. 12, 2021, 12:47 PM), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=63> [<https://perma.cc/W3RC-CLQW>], which notes that life expectancies at birth for Asian Americans are 82.7 years for women, and 78.4 years for men.

likely to live longer than men of the same race or ethnicity.⁵⁰ And higher-income individuals live longer than lower-income individuals.⁵¹

Not only are individuals living longer, but the proportion of the population that is older is also increasing significantly, soon to reach more than twenty percent and outstrip the percentage of minor children.⁵² A lower birth rate, slowing immigration, and the aging of the Baby Boom generation, combined with increased longevity, have all contributed to this graying of America.⁵³

This extended old age offers many opportunities for flourishing.⁵⁴ Indeed, many older adults report that they are happy and healthy. Studies of self-reported happiness find that individuals in their seventies are happier than

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50. See Arias & Xu, *supra* note 2, at 3 tbl.A (showing that for all groups, a man who was 65 in 2018 was expected to live to age 83, and a woman to approximately age 86). Combining race, ethnicity, and gender, Hispanic women have the greatest life expectancy and Black men the shortest. Up until the age of 115, women remain more likely to live longer than men, although the disparity shrinks as they age. See *Actuarial Life Table*, *supra* note 48.
 51. One study found a 14.6-year gap in life expectancy between men at the bottom of the income distribution and men at the top, and a 10.1-year difference for women. Raj Chetty, Michael Stepner, Sarah Abraham, Shelby Lin, Benjamin Scuderi, Nicholas Turner, Augustin Bergeron & David Cutler, *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 315 JAMA 1750, 1754 fig.2 (2016). The data from the study also revealed a steady increase in life expectancy with each incremental gain of income. *Id.*; see CONG. RSCH. SERV., R44846, THE GROWING GAP IN LIFE EXPECTANCY BY INCOME: RECENT EVIDENCE AND IMPLICATIONS FOR THE SOCIAL SECURITY RETIREMENT AGE 10-13 (2021).
 52. In 1900, the proportion of the population aged 65 and older was 4.1%. See Admin. for Cmty. Living, 2017 *Profile of Older Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS. 2 (Apr. 2018), <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf> [<https://perma.cc/P7JE-RE75>]. In 1950, 8% of the population was aged 65 or older. See Erin Duffin, *Share of Old Age Population (65 Years and Older) in the Total U.S. Population from 1950 to 2050*, STATISTA (Sept. 30, 2022), <https://www.statista.com/statistics/457822/share-of-old-age-population-in-the-total-us-population> [<https://perma.cc/K3UJ-HZC8>]. In 2020, that figure rose to 16.9%, and it is expected to increase to 22% by 2050. *Id.* By 2035, the U.S. Census Bureau predicts that there will be more older adults than children. See Jonathan Vespa, *The U.S. Joins Other Countries with Large Aging Populations*, U.S. CENSUS BUREAU (Oct. 8, 2019), <https://www.census.gov/library/stories/2018/03/graying-america.html> [<https://perma.cc/HYM3-R7Z6>] (estimating that in 2035, “[p]eople age 65 and over are expected to number 77.0 million . . . while children under age 18 will number 76.5 million”).
 53. See Vespa, *supra* note 52. This trend is also happening around the world. See Kazuo Yanase, Yohei Matsuo, Eugene Lang & Eri Sugiura, *The New Population Bomb*, NIKKEI ASIA (Sept. 22, 2021, 6:06 JST), <https://asia.nikkei.com/Spotlight/The-Big-Story/The-new-population-bomb> [<https://perma.cc/YX34-93AF>].
 54. See, e.g., Maggie Jones, *The Joys (and Challenges) of Sex After 70*, N.Y. TIMES MAG. 39 (Jan. 12, 2022), <https://www.nytimes.com/2022/01/12/magazine/sex-old-age.html> [<https://perma.cc/P37M-CHA5>] (explaining that some people have the best sexual experiences of their lives in their final decades); Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 33-

younger adults; happiness appears to decrease from the thirties into the fifties and then to increase through the seventies.⁵⁵ Older adults also generally report good health, with seventy-eight percent reporting that their health is good, very good, or excellent.⁵⁶ Although some older adults report isolation and frequent loneliness,⁵⁷ conditions that correlate with poor health and cognitive decline,⁵⁸ a large majority do not.

There are, however, differences by race and income: older Black and Hispanic adults report worse health than older white and Asian adults.⁵⁹ And lower-income older adults report worse health than middle- and upper-income older

46 (2016) (proposing a mechanism for older people anticipating dementia and other capacity-diminishing disabilities to express sexual consent in advance of incapacity).

55. David G. Blanchflower & Carol Graham, *Happiness and Aging in the US: Why It Is Different from Other Places and Why It Matters*, BROOKINGS INST. (Dec. 7, 2020), <https://www.brookings.edu/blog/up-front/2020/12/07/happiness-and-aging-in-the-us-why-it-is-different-from-other-places-and-why-it-matters> [<https://perma.cc/9GZ7-PX5R>] (noting that “life satisfaction begins to decline in the 70s, particularly after age 80, in large part driven by widowhood and health shocks”).
56. *Older Americans*, *supra* note 1, at 28. As might be expected, the percentage of people reporting good health declines with age, although a substantial portion of those aged eighty-five and older still report good health. *See id.* (“Eighty-one percent of those ages 65-74 reported good or better health. At age 85 and over, 68 percent of people reported good or better health.”).
57. NAT’L ACADS. SCIS., ENG’G & MED., *SOCIAL ISOLATION AND LONELINESS IN OLDER ADULTS: OPPORTUNITIES FOR THE HEALTH CARE SYSTEM* 1 (2020) (“Approximately . . . 24 percent . . . of community-dwelling Americans aged 65 and older are considered to be socially isolated.”).
58. *See Older Americans*, *supra* note 1, at 8 (explaining that social isolation and loneliness are connected to a variety of physical and mental conditions); Julianne Holt-Lunstad, *Loneliness and Social Isolation as Risk Factors: The Power of Social Connection in Prevention*, 15 AM. J. LIFESTYLE MED. 567, 574-78 (2021).
59. Michael E. Martinez & Tainya C. Clarke, *Percentage of Adults in Fair or Poor Health, by Age Group and Race and Ethnicity—National Health Interview Survey, United States, 2019*, 70 MORBIDITY & MORTALITY WKLY. REP. 333, 333 (2021); *see Older Americans*, *supra* note 1, at 26-28. Older gender diverse adults may also face health challenges. *See* Lauren Catlett, *Healthcare Needs and Assets of Gender Diverse Older Adults: A Systematic Integrative Review*, J. NURSING SCHOLARSHIP 20-21 (2022) (reviewing the literature on the health needs and strengths of older gender diverse adults).

adults.⁶⁰ These differences are rooted in the social determinants of health, which impact physical health and wellbeing.⁶¹

Family relationships play a critically important role in the health and wellbeing of older adults because these relationships often are an essential part of their social network.⁶² The evidence is clear that a well-functioning social network improves the sense of wellbeing in old age.⁶³ Supportive family relationships can mitigate loneliness and contribute positively to fulfillment in old age.⁶⁴

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60. The relationship works in two directions: lower-income adults tend to have more health problems, and wealth and income fall when people become ill and disabled. See Richard W. Johnson, *Later-Life Household Wealth Before and After Disability Onset*, URB. INST. 13-18 (May 2017), <https://www.urban.org/sites/default/files/publication/90531/after-life-household-wealth-before-and-after-disability-onset.pdf> [<https://perma.cc/XJ2S-8ZFE>]; James M. Poterba, Steven F. Venti & David A. Wise, *Were They Prepared for Retirement? Financial Status at Advanced Ages in the HRS and AHEAD Cohorts* 11-13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17824, 2012), <http://www.nber.org/papers/w17824.pdf> [<https://perma.cc/BK6K-HTAD>]; James M. Poterba, Steven F. Venti & David A. Wise, *The Asset Cost of Poor Health* 11-14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16389, 2010), <http://www.nber.org/papers/w16389.pdf> [<https://perma.cc/FXE6-DNK9>].
 61. See Off. of Disease Prevention and Health Promotion, *Social Determinants of Health*, U.S. DEP'T HEALTH & HUM. SERVS., <https://health.gov/healthypeople/objectives-and-data/social-determinants-health> [<https://perma.cc/9UVL-FVB6>] (describing the many factors that cumulatively impact health, including safe housing and neighborhoods, discrimination, violence, education, job opportunities, income, access to nutritious food, opportunities for physical activity, and more).
 62. See Jialu L. Streeter, Sarah Raposo & Hsiao-Wen Liao, *The Importance of Social Relationships for Longevity*, STAN. CTR. ON LONGEVITY, <https://longevity.stanford.edu/sightlines-project-social-engagement-special-report> [<https://perma.cc/AB8F-QKD7>]. Research also suggests that intergenerational and sibling relationships are important as we age. See Patricia A. Thomas, Hui Liu & Debra Umberson, *Family Relationships and Well-Being*, 1 INNOVATION IN AGING art. no. igx025, at 4-7 (2017).
 63. See, e.g., Nancy J. Donovan & Dan Blazer, *Social Isolation and Loneliness in Older Adults: Review and Commentary of a National Academies Report*, 28 AM. J. GERIATRIC PSYCHIATRY 1233, 1237-40 (2020).
 64. See, e.g., Julianne Holt-Lunstad, Ryan Layton, Bonnie Barton & Timothy B. Smith, *Science into Practice: Effective Solutions for Social Isolation and Loneliness*, 44 GENERATIONS J. 1, 5 (2020) ("[T]hose who transition from being lonely to unlonely were characterized by greater family support and lower family strain . . ."); Donovan & Blazer, *supra* note 63, at 1235. Of course, wellbeing in old age is also correlated with other factors. Lower-income individuals experience loneliness at higher rates than those with higher income, and women are slightly more likely than men to experience it. See G. Oscar Anderson & Colette E. Thayer, *A National Survey of Adults 45 and Older: Loneliness and Social Connections*, AARP RSCH. 5 (2018), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/life-leisure/2018/loneliness-social-connections-2018.doi.10.26419-2Fres.00246.001.pdf [<https://perma.cc/JF7E-KPFB>]. Widowhood, chronic illness, and relocation are factors associated with loneliness in women. See Claudia Beal, *Loneliness in Older Women: A Review of the Literature*, 27 ISSUES IN MENTAL HEALTH NURSING 795, 797, 804-07 (2006).

2. Family Formation Trends

Given the importance of family relationships to wellbeing in the last third of life, it is unsurprising that, as life expectancy increases, many older adults are creating new families, often having lost earlier family relationships to death, divorce, or dissolution.⁶⁵ The family patterns of older adults, in part, reflect broader changes in family formation and dissolution across the population over the past sixty years. Throughout American society, fewer adults are married,⁶⁶ divorce and remarriage are more common,⁶⁷ and many more couples cohabit outside of marriage.⁶⁸ There are differences by race and income—for example,

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65. Almost half of all older divorced men and women cohabit or remarry within ten years. See Susan L. Brown, I-Fen Lin, Anna M. Hammersmith & Matthew R. Wright, *Repartnering Following Gray Divorce: The Roles of Resources and Constraints for Women and Men*, 56 *DEMOGRAPHY* 503, 513 figs.1 & 2 (2019).
 66. In 1960, seventy-two percent of all adults were married, D'Vera Cohn, Jeffrey S. Passel, Wendy Wang & Gretchen Livingston, *Barely Half of U.S. Adults Are Married—A Record Low*, PEW RSCH. CTR. (Dec. 14, 2011), <https://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low> [<https://perma.cc/2MAT-23S3>], but today, just over half of all adults between ages twenty-five and fifty-four are married, Richard Fry & Kim Parker, *Rising Share of U.S. Adults Are Living Without a Spouse or Partner*, PEW RSCH. CTR. (Oct. 5, 2021), <https://www.pewresearch.org/social-trends/2021/10/05/rising-share-of-u-s-adults-are-living-without-a-spouse-or-partner> [<https://perma.cc/QFG3-Z862>]. Moreover, the age of first marriage has risen over the past generation. See *United States Indicators: Median Age at First Marriage (Women)*, POPULATION REFERENCE BUREAU, <https://www.prb.org/usdata/indicator/marriage-age-women/snapshot> [<https://perma.cc/X5JW-TWNE>]. However, one demographic group for which the marriage rate is increasing is same-sex couples. See *Facts About LGBTQ+ Families*, FAM. EQUAL. COUNCIL (June 2020), <https://www.familyequality.org/resources/facts-about-lgbtq-families> [<https://perma.cc/V9SD-JFTW>]. There is growing divergence in marriage rates across the income spectrum, with wealthier people becoming increasingly more likely to be married than low-income people. The marriage rate among lower-income individuals has dropped below forty percent. See Richard V. Reeves & Christopher Pulliam, *Middle Class Marriage Is Declining, and Likely Deepening Inequality*, BROOKINGS INST. (Mar. 11, 2020), <https://www.brookings.edu/research/middle-class-marriage-is-declining-and-likely-deepening-inequality> [<https://perma.cc/HB6T-5TSV>].
 67. In 1960, 13% of married adults were in second or subsequent marriages. See Gretchen Livingston, *Four-in-Ten Couples Are Saying “I Do,” Again*, PEW RSCH. CTR. 8 (Nov. 14, 2014), https://www.pewresearch.org/wp-content/uploads/sites/3/2014/11/2014-11-14_remarriage-final.pdf [<https://perma.cc/8UCT-6K56>]. By contrast, in 2016, almost a quarter of married adults were in second or subsequent marriages. Yeris Mayol-García, Benjamin Gurrentz & Rose M. Kreider, *Number, Timing, and Duration of Marriages and Divorces: 2016*, U.S. CENSUS BUREAU 23 (Apr. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p70-167.pdf> [<https://perma.cc/KT75-FND3>] (explaining that 24% of married men and 23% of married women had previously been married).
 68. Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. 14 (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/wp>

marriage is concentrated among more highly educated couples, whereas less-educated partners tend to live together in informal unions⁶⁹ – but the percentage of married people has generally decreased for all racial groups except Asian people.⁷⁰

Some of these trends are reflected in the family forms of older adults. More than ninety percent of all people aged 65 and older have been married, but a much smaller percentage are currently married.⁷¹ The absence of a spouse often is due to widowhood but also to an increasing divorce rate for older adults,⁷²

-content/uploads/sites/3/2019/11/PSDT_11.06.19_marriage_cohabitation_FULLL.final_.pdf [https://perma.cc/U85U-M3S3]; see Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older*, PEW RSCH. CTR. (Apr. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older> [https://perma.cc/FH3Z-LHZ2].

69. Horowitz et al., *supra* note 68, at 16. In 1960, three million people in the United States were divorced. 1960 *Census: Population, Supplementary Reports: Marital Status of the Population*, U.S. CENSUS BUREAU (Dec. 28, 1962), <https://www2.census.gov/library/publications/decennial/1960/pc-s1-supplementary-reports/pc-s1-39.pdf> [https://perma.cc/C2PM-5HV8]. In 2021, more than twenty-five million Americans were divorced. Erin Duffin, *Marital Status of the United States Population in 2021, by Sex*, STATISTA (Sept. 30, 2022), <https://www.statista.com/statistics/242030/marital-status-of-the-us-population-by-sex> [https://perma.cc/V5GX-BC2F].
70. USAFacts, *The State of American Households: Smaller, More Diverse and Unmarried*, U.S. NEWS & WORLD REP. (Feb. 14, 2020, 6:17 PM), <https://www.usnews.com/news/elections/articles/2020-02-14/the-state-of-american-households-smaller-more-diverse-and-unmarried> [https://perma.cc/R4X2-Q7QE].
71. Andrew W. Roberts, Stella U. Ogunwole, Laura Blakeslee & Megan A. Rabe, *The Population 65 Years and Older in the United States: 2016*, U.S. CENSUS BUREAU 5 fig.2 (Oct. 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf> [https://perma.cc/DA79-CNUZ] (showing that approximately two-thirds of men aged 65 and older, and less than half of women of the same age, are married). The divorce rate for older adults is still lower than that of younger cohorts. See Wendy Wang, *The State of Our Unions: Marriage Up Among Older Americans, Down Among the Younger*, INST. FOR FAM. STUD. (Feb. 12, 2018), <https://ifstudies.org/blog/the-state-of-our-unions-marriage-up-among-older-americans-down-among-the-younger> [https://perma.cc/5N7L-A9VE]. Note that almost sixty percent of those over the age of sixty have been married only once. Benjamin Gurrentz & Yeris Mayol-García, *Love and Loss Among Older Adults: Marriage, Divorce, Widowhood Remain Prevalent Among Older Populations*, U.S. CENSUS BUREAU (Apr. 22, 2021), <https://www.census.gov/library/stories/2021/04/love-and-loss-among-older-adults.html> [https://perma.cc/46H9-8AGW]; see Mayol-García et al., *supra* note 67 (reporting additional statistics about marriage and divorce).
72. In 1980, only 3% of women, and 4% of men, aged 65 and older were divorced, but in 2018, the divorce rate for those aged 65 and older was 14% for women, and 11% for men. See Mark Mather, Paola Scommegna & Lillian Kilduff, *Fact Sheet: Aging in the United States*, POPULATION REFERENCE BUREAU (July 15, 2019), <https://www.prb.org/resources/fact-sheet-aging-in-the-united-states> [https://perma.cc/WR8K-28D4]. In the period from 1990 to 2017, the divorce

especially for those who are not financially stable and are not in first marriages.⁷³ The rate of never-married older adults is also increasing.⁷⁴

When older adults form new families, they are more likely to cohabit with a new partner than to remarry.⁷⁵ Indeed, the cohabitation rate for older adults tripled from 1996 to 2017, although the rate is far lower than that of younger adults.⁷⁶ Unlike younger cohabitators, who typically marry or break up relatively quickly, older cohabiting relationships are relatively stable, lasting an average of ten years and usually ending with the death of one partner rather than a decision

rate rose for all adults aged fifty and above, see Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population*, PEW RSCH. CTR. (Mar. 9, 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population> [<https://perma.cc/DFG9-P5VX>], more than doubling for those aged fifty-five to sixty-four, and nearly tripling for those aged 65 and older, see Colette Allred, *Age Variation in the Divorce Rate, 1990 & 2017*, BOWLING GREEN STATE UNIV.: NAT'L CTR. FOR FAM. & MARRIAGE RSCH (2019), <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/allred-age-variation-div-rate-fp-19-13.html> [<https://perma.cc/URG9-4TJQ>].

More than one-quarter of all divorces are “gray divorces,” meaning that they occur between people aged fifty and above. See I-Fen Lin, Susan L. Brown & Kagan A. Mellencamp, *The Roles of Gray Divorce and Subsequent Repartnering for Parent-Adult Child Relationships*, 77 J. GERONTOLOGY: SOC. SCIS. 212, 212 (2022). The divorce rate is declining or increasing only slightly for younger people. See Allred, *supra*.

73. Stepler, *supra* note 72; Naomi Cahn & June Carbone, *Who Is at Risk for a Gray Divorce? It Depends*, INST. FOR FAM. STUDS. (May 1, 2017), <https://ifstudies.org/blog/who-is-at-risk-for-a-gray-divorce-it-depends> [<https://perma.cc/D87C-5GS8>]; I-Fen Lin, Susan L. Brown, Matthew R. Wright & Anna M. Hammersmith, *Antecedents of Gray Divorce: A Life Course Perspective*, 73 J. GERONTOLOGY: SOC. SCIS. 1022, 1030 (2018) (“[T]he marital biography, marital quality, and economic resources, which are strongly related to divorce earlier in the life course, are also integral to divorce in later life.”).
74. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RSCH. CTR. (Sept. 24, 2014), <https://www.pewresearch.org/social-trends/2014/09/24/record-share-of-americans-have-never-married> [<https://perma.cc/P38Y-F6VV>]; Brittany M. King, *Does Marrying Younger Mean Marrying More Often? When and How Often People Marry Changes by Birth Cohort*, U.S. CENSUS BUREAU (Aug. 31, 2022), <https://www.census.gov/library/stories/2022/08/does-marrying-younger-mean-marrying-more-often.html> [<https://perma.cc/BZB4-FLGA>].
75. See Brown et al., *supra* note 65, at 513 figs.1 & 2; Deborah Carr & Rebecca L. Utz, *Families in Later Life: A Decade in Review*, 82 J. MARRIAGE & FAM. 346, 351 (2020); Benjamin Gurrentz, *Unmarried Partners More Diverse Than 20 Years Ago: Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html> [<https://perma.cc/9JXW-9P2U>].
76. Gurrentz, *supra* note 75. In 2017, the rate for older adults cohabiting was six percent, which was more than seven times lower than the cohabitation rate for those aged thirty-five to sixty-four. *Id.*

to part ways.⁷⁷ As compared with their peers who have remarried, older cohabitators are similarly satisfied with their relationships.⁷⁸

Some women choose cohabitation because they wish to avoid the gendered caregiving expectations associated with marriage.⁷⁹ And some older adults cohabit because it provides more flexibility and fewer obligations than marriage, with partners able to negotiate their own approaches to financial autonomy.⁸⁰ Finally, older adults increasingly form living-apart-together relationships, in which each individual maintains autonomy and separate living arrangements.⁸¹ As with cohabitation, women might favor these relationships as a way to avoid the anticipated burden of long-term caregiving,⁸² and both parties may prefer the financial independence.⁸³

In another trend in family formation, older people are living in informal family groups that currently are not recognized as families. Nonconjugal, congregated living has increased with a growing number of options, such as intentional cohousing communities (grown-up communes or “villages”),⁸⁴ voluntary kin groups,⁸⁵ and naturally occurring retirement communities. Some of these arrangements support aging in place, an important goal for many people as they

77. See Susan L. Brown & Matthew R. Wright, *Marriage, Cohabitation, and Divorce in Later Life*, 1 INNOVATION IN AGING art. no. igx015, at 4 (2017).

78. See *id.* (“The relationship dynamics of later life cohabitation are akin to remarriage. Older cohabitators and remarried individuals report comparable levels of emotional satisfaction, openness, pleasure, interaction, criticism, and demands, although cohabitators are less likely than remarried individuals to say their relationships are very happy.”).

79. Brown, et al., *supra* note 65, at 507. A Google search for dating after age fifty turns up the common advice to women not to be “the nurse” or “the purse.” See *You Don’t Want to Be a Nurse and You Don’t Want to Be the Purse*, GOOGLE, <https://www.google.com/search?q=You%20Don%27t%20Want%20to%20Be%20the%20Nurse%20and%20You%20Don%27t%20Want%20to%20Be%20the%20Purse> [https://perma.cc/KAJ6-VQHU].

80. Brown et al., *supra* note 65, at 508; Brown & Wright, *supra* note 77, at 3-5.

81. Francine Russo, *Older Singles Have Found a New Way to Partner Up: Living Apart*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/well/family/older-singles-living-apart-LAT.html> [https://perma.cc/66VK-UJNR].

82. *Id.*; Carr & Utz, *supra* note 75, at 351 (finding that cohabitation may result in “less rigid gendered expectations regarding household roles such as spousal caregiver”).

83. Brown et al., *supra* note 65, at 508. This also has implications for long-term care coverage if either party seeks to qualify for Medicaid. See *infra* text accompanying notes 179-181.

84. Melissa Stanton, 6 *Creative Housing Options: The Choices for How and Where to Live as an Older Adult Are Growing*, AARP (July 2014), <https://www.aarp.org/livable-communities/info-2014/creative-age-friendly-housing-options.html> [https://perma.cc/PA96-5W9Z].

85. Dawn O. Braithwaite et al., *Constructing Family: A Typology of Voluntary Kin*, 27 J. SOC. & PERS. RELATIONSHIPS 388, 390-92, 396-402 (2010).

age,⁸⁶ and all promote ongoing social and emotional connections.⁸⁷ Of course, some older people also reside in nursing homes, assisted living, or continuing-care retirement communities.⁸⁸

A final point distinguishes older adults entering new family relationships from those forming their first families: older adults often have children from earlier relationships. More than eighty percent of older adults have children,⁸⁹ and, in contrast to former spouses and partners, these relationships usually remain important to older adults as they form new families.⁹⁰

Not all older adults live with others. Indeed, more than a quarter of older Americans live alone – double the percentage for younger people.⁹¹ However, as

86. Reshma Kapadia, *How Covid-19 Will Shape the Future of Senior Living. New Models of Care, More Aging in Place.*, BARRON'S (May 29, 2020, 11:47 AM ET), <https://www.barrons.com/articles/how-covid-19-will-shape-the-future-of-senior-living-new-models-of-care-more-aging-in-place-51590767276> [<https://perma.cc/SE5Q-V7KZ>]; Joanne Binette & Kerri Vasold, *2018 Home and Community Preferences: A National Survey of Adults Ages 18-Plus*, AARP (July 2019), <https://www.aarp.org/research/topics/community/info-2018/2018-home-community-preference.html> [<https://perma.cc/765H-RHE5>] (finding that seventy-six percent of older adults want to age in place, but some recognize that it might not be possible). On the benefits of aging in place, see Elizabeth Giardino, Melissa Vandawalker, Tresa Kappil, Anna Robinson & Cayla Roby, *Supporting Aging in Place Through IWISH: Second Interim Report from the Evaluation of the Supportive Services Demonstration*, U.S. DEP'T OF HOUS. & URB. DEV. (Apr. 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/Supporting-Aging-in-Place-Through-IWISH-Report-2021.pdf> [<https://perma.cc/WV9U-ZSU8>].

87. See Stanton, *supra* note 84.

88. See *Nursing Home Care*, CDC (Dec. 15, 2022), <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm> [<https://perma.cc/Y8AY-W676>] (noting that 1.3 million people live in nursing homes as of 2017). Contrary to a common stereotype, most older adults do not live in nursing homes but in some other living situation. See Richard W. Johnson, *ASPE Research Brief: What Is the Lifetime Risk of Needing and Receiving Long-Term Services and Supports?*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1, 7 (Apr. 2019), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/188046/LifetimeRisk.pdf [<https://perma.cc/56FR-7KU8>] (discussing evidence that only fourteen percent of older adults live for more than two years in a nursing home).

89. See *First-Ever Census Bureau Report Highlights Growing Childless Older Adult Population*, U.S. CENSUS BUREAU (Aug. 31, 2021), <https://www.census.gov/newsroom/press-releases/2021/childless-older-adult-population.html> [<https://perma.cc/N4TB-7YG8>].

90. See Carr & Utz, *supra* note 75, at 353.

91. See Jacob Ausubel, *Older People Are More Likely to Live Alone in the U.S. than Elsewhere in the World*, PEW RSCH. CTR. (Mar. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/03/10/older-people-are-more-likely-to-live-alone-in-the-u-s-than-elsewhere-in-the-world> [<https://perma.cc/HZ9X-WAMF>] (finding that twenty-seven percent of those who are age 60 and older live by themselves); see Joseph Chamie, Opinion, *Living Alone in America*, HILL, July 19, 2021, 7:00 PM ET, <https://thehill.com/opinion/finance/563786-living-alone-in-america> [<https://perma.cc/XYD6-EBS5>] (“While about 5 percent of adults below age 25 years

we discuss below, many older adults in this category live near their adult children.⁹² Older women are more likely than men to live alone, and Black men and women live alone at higher rates than older white individuals.⁹³ The rates for LGBTQ seniors living alone are higher than those for cisgender heterosexual older adults,⁹⁴ a trend that is likely changing with greater societal acceptance of same-sex relationships and gender diversity.⁹⁵

Finally, inequity shapes family formation in the last third of life. The children of highly educated married couples are more likely to be raised in financially secure marital families, to marry themselves, and to remain married, perpetuating their privileged status through life.⁹⁶ Individuals who are less well-off, disproportionately those in communities of color, are less likely to be married or to benefit from two incomes throughout childhood and adulthood.⁹⁷ In old age, they are more likely to rely on Social Security as their only source of income.⁹⁸

live alone, the proportion doubles to about 12 percent for ages 25 to 64 years, nearly doubles again to 22 percent for those aged 65 to 74 years and jumps to approximately 33 percent for those aged 75 years and older.”).

92. See *infra* note 130.

93. See Ausubel, *supra* note 91 (explaining that twenty percent of older women, but only eleven percent of men, live alone); Rodney Brooks, *Old, Black and Alone: A Grim Forecast*, NEXT AVE. (Nov. 22, 2017), <https://www.nextavenue.org/old-black-alone-grim-forecast> [<https://perma.cc/CTR9-7E5B>].

94. See Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, WILLIAMS INST. 6 (Aug. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf> [<https://perma.cc/4R2T-ARJD>]. They are also less likely to have children who can care for them and more likely to rely on “families of choice.” See *id.* at 8.

95. See Danielle Taylor, *Where Same-Sex Couples Live: Male Couples Make Up Majority of Same-Sex Households in Large Cities But Not Nationwide*, U.S. CENSUS BUREAU (Sept. 18, 2019), <https://www.census.gov/library/stories/2019/09/where-same-sex-couples-live.html> [<https://perma.cc/CLX3-KMYJ>] (finding that large cities have higher percentages of same-sex couple households than does the United States at large).

96. See, e.g., DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 111-39 (2019) (discussing how privilege compounds at each life stage, from conception to graduate education); Allison Anna Tait, *Inheriting Privilege*, 106 MINN. L. REV. 1959 (2022) (explaining how intergenerational wealth transfers contribute to social inequity).

97. See MARKOVITS, *supra* note 96, at 117-18.

98. Social Security is the only source of income for about twenty percent of older adults. See *The Role of Benefits in Income and Poverty*, NAT’L ACAD. SOC. INS., <https://www.nasi.org/learn/social-security/the-role-of-benefits-in-income-and-poverty-2> [<https://perma.cc/N78J-EMDL>]; see also *id.* (noting that for those 65 and older, “Social Security is the sole source of income for 40 percent of Hispanics, 33 percent of African Americans, 26 percent of Asian and Pacific Islanders, 18 percent of whites, and 20 percent of unmarried women.”). Without Social Security, the poverty rate for older people would be forty percent, rather than its current nine percent. *Id.*

Older women are more likely than men to live in poverty,⁹⁹ and older Black women have the highest poverty rate among older adults and have the highest rate of living alone.¹⁰⁰ These unequal positions can impact family formation. For example, for women over the age of fifty-five, Black women are three times more likely than white women to have never been married.¹⁰¹

3. Implications

With higher life expectancy and improved health outcomes, the last third of life can be a time of flourishing, in which individuals lead independent, fulfilling lives. Today, older adults anticipate many years of life ahead, and those without long-term spouses or partners may want to pursue new family relationships. But their purposes in forming families often differ from those of younger adults. Most older couples are beyond childbearing age and thus do not seek a partner with whom to share childrearing and build a financial life together, and they might prefer not to assume ongoing financial obligations in their new family

99. This is true for a variety of reasons, including family and work patterns as well as women's longer life expectancy. See Paula Span, *Why Older Women Face Greater Financial Hardship than Older Men*, N.Y. TIMES (Dec. 28, 2021), <https://www.nytimes.com/2021/12/26/health/older-women-financial-hardship-retirement.html> [<https://perma.cc/YAW5-97GP>].

100. See ZHE LI & JOSEPH DALAKER, CONG. RSCH. SERV., R45791, POVERTY AMONG THE POPULATION AGED 65 AND OLDER 14 fig.10 (2021) (noting a poverty rate of 19.1% for older Black women, 19.8% for Hispanic women, 14.9% for Asian women, and 10.3% for white women); Carly Stern, *Why Black Women Are Aging Alone*, OZY (Jan. 31, 2020), <https://www.ozy.com/the-new-and-the-next/kinless-why-black-women-are-aging-alone/270227> [<https://perma.cc/89K3-4MSH>] (noting that older Black women are more likely to be living alone and without close relatives).

101. See Mayol-García et al., *supra* note 67, at 6 (finding that eighteen percent of Black women had never married compared to six percent of white women). There are numerous reasons for a lower marriage rate among Black women. See R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1348-53 (2015) (describing race-based inequities that disadvantage Black families, making it harder for Black couples to find the economic footing that typically underlies the decision to marry); Kim Parker & Renee Stepler, *Americans See Men as the Financial Providers, Even as Women's Contributions Grow*, PEW RSCH. CTR. (Sept. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/09/20/americans-see-men-as-the-financial-providers-even-as-womens-contributions-grow> [<https://perma.cc/82PT-YG48>] (reporting survey results showing that “[a]dults with lower incomes and less education are more likely to place a high value on a spouse or partner’s ability to provide for a family—whether that spouse is a man or a woman”); Wendy Wang, *Research Brief: More than One-Third of Prime-Age Americans Have Never Married*, INST. FOR FAM. STUD. 3 (Sept. 2020), <https://ifstudies.org/ifs-admin/resources/final2-ifs-single-americansbrief2020.pdf> [<https://perma.cc/A3X4-PDQ2>] (reporting a survey that found that “[a] stable job is important in marriage formation, especially for men,” since, “[a]ccording to single men in the recent . . . survey, not having a stable job is one of the most important reasons why they are not married”).

relationships.¹⁰² Instead, many seek intimacy, emotional connections, and mutual care—essential functions satisfied by family relationships, especially when social networks become more limited later in life.¹⁰³ As the data indicate, a range of family relationships can fulfill the needs and purposes of individuals in this stage of life, including marriage, cohabitation, living apart together,¹⁰⁴ and non-conjugal groups.

The data also indicate that older adults are likely to have diverse preferences about which family forms best suit their needs and varied expectations about commitment and financial sharing in new relationships. Some older couples will choose marriage, perhaps for religious or social reasons. But even older couples who marry might have varied goals and expectations. Some wish to undertake a broad commitment, with financial sharing, inheritance rights, and other expectations, such as surrogate decision-making, that are associated with legal marriage. But others may want a marriage without financial sharing or with sharing only for the duration of the relationship or may see other economic disadvantages to marriage.¹⁰⁵ Older couples who prefer to cohabit also are likely to vary in their expectations about financial sharing, care obligations, joint decision-making, and inheritance. Finally, older adults may vary in whether they prefer that an adult child or a later-in-life family member act as a surrogate decision maker or inherit their property.

102. Many older adults act as primary or secondary caregivers for grandchildren. Of the approximately 7.2 million grandparents who lived with a minor grandchild in 2019, almost 2.5 million were primary caregivers and almost half of these grandparents had been primary caregivers for at least five years. See *Selected Social Characteristics in the United States*, U.S. CENSUS BUREAU (2019), <https://data.census.gov/cedsci/table?id=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2019.DP02&vintage=2017> [https://perma.cc/V2XA-KNZ5]. For further discussion of grandparents as primary caregivers, see Weaver, *Grandma in the White House*, *supra* note 11.

103. See MARTHA C. NUSSBAUM & SAUL LEVMORE, *AGING THOUGHTFULLY: CONVERSATIONS ABOUT ROMANCE, RETIREMENT, WRINKLES, AND REGRET* 167 (2017) (“Mature love is compelling to the extent that people bring to it their past, the vicissitudes of their lengthy lives, and a sense of both comedy and tragedy that comes from constant awareness of the past.”); Russo, *supra* note 19.

104. See generally CYNTHIA GRANT BOWMAN, *LIVING APART TOGETHER: LEGAL PROTECTIONS FOR A NEW FORM OF FAMILY* (2020) (providing a legal and sociological analysis of living-apart-together couples).

105. See Russo, *supra* note 19; see also Paula Span, *More Older Couples Are “Shacking Up,”* N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/health/older-americans-unmarried-couples.html> [https://perma.cc/3FBU-LYWY] (listing potential economic disadvantages of marriage for older couples).

This raises an important point: older adults forming second and subsequent families generally will vary in their loyalties to each family.¹⁰⁶ Many older adults who create new families will have close bonds with adult children and other family members from earlier relationships, and they may want to give priority to those relationships. But in other families, filial bonds may have become attenuated over time, resulting in reduced feelings of obligation for both generations. Thus, some older individuals might have complex family loyalties, while others experience greater commitment and connection to families formed later in life than to earlier family relationships.

Finally, the experience and wellbeing of low-income older adults and those in communities of color are likely to differ from those of higher-income white people in this age cohort. As all of these data show, less advantaged older adults are less likely to report good health and more likely to live in conditions of financial insecurity. These differences impact family formation.

B. Familial Caregiving

As we show below, most older adults will need care at some point, although the level of needed care varies greatly. Caregiving for older adults has typically been provided without compensation by family members.

1. Care Needs

Although most older adults report experiencing good health, older individuals, not surprisingly, tend to have more physical health challenges and disabilities than younger persons—a reality that is likely to continue even if advances in healthcare keep pace with increasing longevity.¹⁰⁷ Moreover, the strength of

¹⁰⁶. For an analysis of the complex ties between adult children and their divorced parents, see Lin et al., *supra* note 72, at 213–15. Overall, mothers remain more likely to stay in contact with their adult children. *See id.* at 214.

¹⁰⁷. *See Older Americans*, *supra* note 1, at 28. As might be expected, the percentage of people reporting good health declines with age, although a substantial portion of those aged eighty-five and older still report good health. *See id.* (“The proportion of people reporting good to excellent health was lower among the oldest age groups. Eighty-one percent of those ages 65–74 reported good or better health. At age 85 and over, 68 percent of people reported good or better health.”).

this correlation varies by demographic.¹⁰⁸ Although self-reporting of good physical health does not vary significantly by gender,¹⁰⁹ it does differ by race, ethnicity, and income.¹¹⁰

Cognitive health also declines with age, and dementia becomes more common.¹¹¹ The magnitude of this correlation, too, varies with race and ethnicity, educational attainment, and gender.¹¹² And older adults also experience mental-health challenges, such as depression,¹¹³ in greater numbers than during mid-life.¹¹⁴

Most older adults will need care at some point during old age. Some older adults need no assistance in the tasks of daily living, and the care needs of others are minimal.¹¹⁵ But for many older adults, especially those in their upper eighties and older, the needs are greater, and include not only help with meal preparation,

108. See *id.* (finding that seventy-five percent of adults over age 65 report good to excellent health, including sixty percent of those over age eighty-five).

109. See *id.* (“The levels of health reported by older men and older women were similar.”).

110. See *supra* text accompanying notes 59–61.

111. See B.L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 *NEUROEPIDEMIOLOGY* 125, 128 tbl.2 (2007) (finding that 13.9% of adults aged 71 and older had some form of dementia and that for those aged 90 and older the proportion rises to 37.4%).

112. See 2022 *Alzheimer’s and Dementia Facts and Figures*, ALZHEIMER’S ASS’N 25 (2022), <https://www.alz.org/media/Documents/alzheimers-facts-and-figures.pdf> [<https://perma.cc/5JPT-4WW8>] (“[O]lder Blacks are about twice as likely to have Alzheimer’s or other dementias as older Whites [O]lder Hispanic adults are about one and one-half times as likely to have Alzheimer’s or other dementias as older White adults” (footnote omitted)); *Older Americans*, *supra* note 1, at 104 (showing a strong negative correlation between educational attainment and incidence of dementia, with the highest rates among those without a high school diploma); 2022 *Alzheimer’s and Dementia Facts and Figures*, *supra*, at 24 (“Almost two-thirds of Americans with Alzheimer’s are women.”).

113. *Older Americans*, *supra* note 1, at 31 (“In 2018, for both sexes, a U-shaped pattern is apparent in the prevalence of clinically relevant depressive symptoms. It is especially pronounced for women, with the highest prevalence for those ages 55–59 (19 percent) and those ages 80–84 and 85 and over (both 16 percent) and lowest for women in their late 60s and early 70s (both 12 percent).”).

114. Angelina R. Sutin, Antonio Terracciano, Yuri Milaneschi, Yang An, Luigi Ferrucci & Alan B. Zonderman, *The Trajectory of Depressive Symptoms Across the Adult Life Span*, 70 *JAMA PSYCHIATRY* 803, 805–06 (2013) (reporting the results of a longitudinal study and finding that “depressive symptoms were the highest in early adulthood, declined in middle adulthood, and then increased in older adulthood”).

115. See Anek Belbase, Anqi Chen & Alicia H. Munnell, *What Level of Long-Term Services and Supports Do Retirees Need?*, CTR. FOR RET. RSCH. BOS. COLL. 4 (June 2021), https://crr.bc.edu/wp-content/uploads/2021/06/IB_21-10_.pdf [<https://perma.cc/9L86-8U9D>] (projecting that seventeen percent “of 65-year-olds will die without ever requiring [long-term services and supports (LTSS)]” and that twenty-two percent “will experience minimal [LTSS] needs”).

cleaning, and household chores, but also assistance with the basic physical hygiene tasks of daily life.¹¹⁶ Researchers call both kinds of needs long-term services and supports (LTSS),¹¹⁷ and categorize the needs as minimal, moderate, or severe, depending on the number of daily activities that require assistance and the duration of the need.¹¹⁸ A strong majority of older adults will experience moderate or severe LTSS needs, although the period typically lasts fewer than three years.¹¹⁹ The need for LTSS varies by marital status, income, and race.¹²⁰

2. *Who Provides Care*

Most older adults live at home, not in an institutional-care facility.¹²¹ But hiring an in-home caregiver is prohibitively expensive for many, if not most, older adults, especially if caregiving is needed for an extended period.¹²² Moreover, most private insurance plans and Medicare do not cover this kind of care,

116. See Johnson, *supra* note 88, at 1-2, 4.

117. See *id.* at 1-2 (indicating that a 2005-2006 study defined LTSS needs as “limitations with two or more activities of daily living (ADLs), such as bathing, dressing, and getting up and down, limitations with four or more instrumental activities of daily living (IADLs), such as preparing meals, completing household chores, and taking medication, or receipt of paid LTSS”).

118. Belbase et al., *supra* note 115, at 2-3.

119. See *id.* at 4 & tbl.3 (projecting that 38% of older adults will have moderate LTSS needs at some point and that 24% will have severe LTSS needs); *id.* at 4 tbl.3 (noting that for most older adults, the period of moderate or severe LTSS needs is fewer than three years; only 24% of older adults are projected to have moderate or severe LTSS needs that last for more than three years).

120. See *id.* at 4 & fig.2 (finding that married adults, “who tend to be wealthier and enjoy the support of a spouse,” are more likely than unmarried adults to have no or minimal need for LTSS); Richard W. Johnson, Melissa M. Favreault, Judith Dey, William Marton & Lauren Anderson, *Most Older Adults Are Likely to Need and Use Long-Term Services and Supports*, U.S. DEP’T OF HEALTH & HUM. SERVS. 3 (Jan. 2021), <https://aspe.hhs.gov/sites/default/files/private/pdf/265066/MostLikelyIB.pdf> [<https://perma.cc/F4FG-ZQCM>] (“[O]lder adults with limited lifetime earnings are more likely to develop serious LTSS needs than those with more earnings, and limited earners have longer durations of need.”); Johnson, *supra* note 88, at 4, 6 (“[P]eople of color—especially nonHispanic [sic] Blacks—and people with limited financial resources before developing disabilities experienc[e] much longer spells of severe LTSS needs than other people.”).

121. See *supra* note 88 and accompanying text.

122. See Anek Belbase, Anqi Chen & Alicia H. Munnell, *What Resources Do Retirees Have for Long-Term Services & Supports*, CTR. FOR RET. RSCH. BOS. COLL. 5 (Sept. 2021), https://crr.bc.edu/wp-content/uploads/2021/09/IB_21-16.pdf [<https://perma.cc/2MB4-YK7N>] (“36 percent of individuals do not have enough resources for even a year of [paid] minimal care, and only 21 percent could cover severe [care] needs.”).

and there are limited home-care benefits available under Medicaid.¹²³ As a result, unpaid care, overwhelmingly provided by family members, forms the backbone of eldercare.¹²⁴ This is true even when older adults have moderate or severe care needs.¹²⁵ Indeed, nearly half of older adults with severe LTSS needs rely *solely* on unpaid caregivers.¹²⁶

Spouses provide extensive care for each other, but because one spouse typically outlives the other, adult children provide much more care to older adults.¹²⁷

123. See Johnson, *supra* note 88, at 1:

[P]aid care is expensive, public programs like Medicare do not generally cover LTSS costs, and relatively few people have private insurance coverage that can help defray expenses Relatively few home care recipients receive Medicaid benefits because there are long waiting lists for Medicaid home and community-based services Moreover, the Medicaid income allowances for [recipients] are often too low to cover reasonable living expenses

Id. (citations omitted); see also Belbase et al., *supra* note 122, at 2 (providing a similar analysis). Some are able to buy long-term-care insurance, which can include home-care benefits. See *A Shopper's Guide to Long-Term Care Insurance*, NAT'L ASS'N OF INS. COMM'RS 11 (2019), <https://content.naic.org/sites/default/files/publication-ltc-lp-shoppers-guide-long-term.pdf> [<https://perma.cc/AH4C-2QSA>]. But the long-term-care-insurance industry is itself troubled. See, e.g., Justin Papp, *Lawmakers, Regulators Seek Long-Term Care Insurance Solutions*, ROLL CALL (Apr. 27, 2022, 7:00 AM), <https://rollcall.com/2022/04/27/lawmakers-regulators-seek-long-term-care-insurance-solutions> [<https://perma.cc/SV6G-SF7N>].

124. Of all the care received by older adults, sixty-four percent is from unpaid caregivers, and only thirty-six percent is from paid caregivers. See Belbase et al., *supra* note 122, at 2 fig.1. Nearly half of older adults with severe LTSS needs rely solely on unpaid caregivers. See Johnson, *supra* note 88, at 3, 18 tbl.2. There are 2.4 million people who provide paid care, and their pay varies depending on the level of assistance needed. See *How to Hire a Caregiver*, AARP (Sept. 27, 2021), <https://www.aarp.org/caregiving/home-care/info-2018/hiring-caregiver.html> [<https://perma.cc/27PR-R3ZF>]; Marsha Mercer, *Can You Afford a Home-Care Worker?*, AARP (Oct. 25, 2021), <https://www.aarp.org/caregiving/financial-legal/info-2017/afford-a-homecare-worker.html> [<https://perma.cc/29TR-65U8>].

125. See Johnson, *supra* note 88, at 3 (noting that, in 2014, only fifty-two percent of older adults with severe LTSS needs received paid care); *id.* (demonstrating that unpaid caregivers provide care at all levels of severity of need); *id.* (“Many older people with severe LTSS needs rely exclusively on family and unpaid caregivers, and most paid care episodes are relatively short.”); *id.* at 5 (“Paid LTSS does not generally last nearly as long as severe LTSS needs.”).

126. See *id.* at 3.

127. Indeed, adult children are by far the largest group providing care to older adults. See Belbase et al., *supra* note 122, at 2 fig.1 (reporting that, of the unpaid caregiving hours an older adult receives, approximately 52% are performed by a child; 27% by a spouse; 16% by a relative other than a child or spouse; and 6% by nonrelatives); *Caregiving in the U.S.*, *supra* note 25, at 5 (reporting that fifty percent of all unpaid caregivers care for a parent or parent-in-law); Janice Compton & Robert A. Pollak, *The Life Expectancy of Older Couples and Surviving Spouses* 11–13 (IZA Inst. of Lab. Econ., Discussion Paper No. 12571, 2019), <https://ssrn.com/abstract=3445837> [<https://perma.cc/7AVP-PEG7>] (investigating joint life expectancy for different-

And the amount of unpaid care provided by adult children is substantial, averaging twenty-one hours a week.¹²⁸ In addition to the tallied hours of physical care, family members spend an exceptional amount of time on what Elizabeth F. Emens identifies as “life admin”: the burdensome clerical tasks that are an inevitable part of eldercare.¹²⁹ Familial care is possible because most adult children live very close to¹³⁰—and, increasingly, with¹³¹—their parents and parents-in-law.

Caring for older adults is not shared evenly across demographic groups. Black, Latinx, and Asian family members provide more care than white family members, and adult daughters provide twice as much care as adult sons.¹³² The lowest-income older adults are the most likely to receive paid LTSS care, typically through Medicaid.¹³³ But even with this support from Medicaid, there is insufficient coverage for LTSS needs, and unpaid care must make up the difference.¹³⁴

sex spouses, estimating the number of years that each spouse will survive, and finding that the woman is more likely to be the survivor).

128. See Wettstein & Zulkarnain, *supra* note 23, at 1-2.

129. ELIZABETH F. EMENS, *LIFE ADMIN: HOW I LEARNED TO DO LESS, DO BETTER, AND LIVE MORE*, at ix-x, 68-69 (2019).

130. See Janice Compton & Robert A. Pollak, *Proximity and Co-Residence of Adult Children and Their Parents in the United States: Descriptions and Correlates*, 2015 ANNALS OF ECON. & STAT. 91, 99 (finding that for married different-sex couples, the median distance between a daughter and mother is twenty miles and between a son and mother is twenty-five miles); *id.* at 103 (noting a strong correlation between education and proximity and revealing that a bachelor's degree for either a child or the mother was correlated with greater distance); *id.* at 108 (“Compared with their white counterparts, blacks are more likely to live with and near their mothers. Hispanics are more likely to live with their mothers, but are no more likely to live near them.”); see also *Caregiving in the U.S.*, *supra* note 25, at 21 (reporting that, among all care recipients aged eighteen and older—thus including some younger care recipients—seventy-six percent of caregivers live within twenty minutes of the care recipient).

131. See *Family Matters: Multigenerational Living Is on the Rise and Here to Stay*, GENERATIONS UNITED 1, 2, 7 (2021), <https://www.gu.org/app/uploads/2021/04/21-MG-Family-Report-WEB.pdf> [<https://perma.cc/ASS4-Z6UX>] (reporting that twenty-six percent of individuals in the United States live in a household with at least three generations—a nearly fourfold increase over a decade—and indicating that eldercare is a primary reason for this increase). Families of color and families with foreign-born individuals are more likely to live in multigenerational households than white families. See *id.* at 8.

132. See *supra* text accompanying note 25 (noting that Black family members provide the most care, followed by Latinx and Asian families); Wettstein & Zulkarnain, *supra* note 23, at 3 fig.3 (describing the difference between adult daughters and sons).

133. Johnson et al., *supra* note 120, at 4.

134. See Johnson, *supra* note 88, at 5; Chance D. Fabius, Jennifer L. Wolff, Amber Willink, Maureen E. Skehan, John Mulcahy & Judith Kasper, *Community-Based Long-Term Services and Supports: Are the Needs of Older Adults and Their Caregivers Being Met?*, COMMONWEALTH FUND (Oct. 27, 2021), <https://www.commonwealthfund.org/publications/issue-briefs/2021/oct/community>

Finally, many adult children do more than provide physical care; they also provide economic support. Older adults are less likely than their younger adult counterparts to be employed in income-producing work, and adult children help to reduce economic risk in old age.¹³⁵ This support is critically important because of the high rate of financial insecurity among older adults.¹³⁶

The cohort of adult children available to fulfill the critically important role of caring for aging parents is shrinking as the birth rate declines. Family size has declined steadily since the mid-twentieth century; in 1965, parents had an average of 2.44 children, whereas in 2021, the average was 1.93.¹³⁷ Relatedly, the “support ratio” of adults between the ages of eighteen and sixty-four compared to those age 65 and older is expected to decrease from 6.0 in 1960 to 2.4 by 2060.¹³⁸

3. Implications

Preserving autonomy and independence is critical to older adults. It is not surprising, then, that a large majority of older adults prefer to age in place, to

-based-long-term-services-and-supports-are-needs-older [https://perma.cc/AS8L-J3HC] (noting that studies have shown that adverse consequences from unmet LTSS needs are more commonly experienced by those who are enrolled in Medicaid, as well as those with higher levels of disability and those with dementia).

135. See Wettstein & Zulkarnain, *supra* note 23, at 3 (noting that adult children providing care to parents and parents in law “reported that they spent 35 percent of their budget on parental care on average”).
136. Nearly one in three older adults is economically insecure, defined as living below 200% of the federal poverty level. Juliette Cubanski, Wyatt Koma, Anthony Damico & Tricia Neuman, *How Many Seniors Live in Poverty?*, KAISER FAM. FOUND. (Nov. 19, 2018), <https://www.kff.org/medicare/issue-brief/how-many-seniors-live-in-poverty> [https://perma.cc/YZ4Y-9KW2]. Older adults have a lower poverty rate than children and younger adults, but it is still significant—an average of nine percent. See LI & DALAKER, *supra* note 100, at 1 (“In 2019, the 8.9% poverty rate among individuals aged 65 and older was lower than the 9.4% poverty rate among adults aged 18-64 and the 14.4% poverty rate among children under 18 years old.”). Among older adults, the poverty rate increases with age, is highest for Black adults, followed by Hispanic adults, Asian adults, and white adults, is higher for women than men, is lowest for married couples, and is significantly higher for older adults who live alone than older adults who live with other people. *Id.* at 1, 8-12. These categories overlap and thus, for example, older Black women experience an exceptionally high poverty rate. *Id.* at 14 fig.10 (noting that older Black women have a poverty rate of 20.2%).
137. Erin Duffin, *Average Number of Own Children Under 18 in Families with Children in the United States from 1960 to 2022*, STATISTA (Dec. 13, 2022), <https://www.statista.com/statistics/718084/average-number-of-own-children-per-family> [https://perma.cc/NCY5-XZH7].
138. Mark Mather & Lillian Kilduff, *The U.S. Population Is Growing Older, and the Gender Gap in Life Expectancy Is Narrowing*, POPULATION REFERENCE BUREAU (Feb. 19, 2020), <https://scorecard.prb.org/the-u-s-population-is-growing-older-and-the-gender-gap-in-life-expectancy-is-narrowing> [https://perma.cc/9GC9-9LMT].

live in their own homes, rather than in a nursing home or other institutional setting.¹³⁹ In part, this is because aging in place affords independence and autonomy. The problem is that most older adults, especially if they live to an advanced age, need assistance with daily living tasks. In our society, the burden of providing that assistance falls on family members; there is limited government support for hiring in-home caregivers.¹⁴⁰ Assistance is possible because family members, and particularly adult children, often live in the home with the older person or nearby and can provide needed care and support.

The data thus reveal that family members are an unpaid workforce performing a critically important societal function: caring for vulnerable older adults.¹⁴¹ The justification for this allocation of responsibility for caregiving is, apparently, that the care provided by family members is undertaken out of familial love. But this unpaid care, which is valued at hundreds of billions of dollars annually,¹⁴² comes at a considerable economic and noneconomic cost to the caregivers.¹⁴³ Economic costs include foregone earnings and savings, and increased debt. The challenges of balancing care work and paid employment sometimes lead the

139. See Binette & Vasold, *supra* note 86 (noting that seventy-six percent of older adults prefer to age in place); see also Karan Kaul, *American Seniors Prefer to “Age in Place” – but What’s the Right Place?*, URB. INST. (June 3, 2019), <https://www.urban.org/urban-wire/american-seniors-prefer-age-place-whats-right-place> [<https://perma.cc/N4C5-9SRV>] (noting the need to “retrofit” existing housing with safety equipment as people age and that three million older people are treated each year for falls).

140. See *supra* note 123 and accompanying text.

141. As noted earlier, family members are the primary source of care, but unrelated adults also provide unpaid home care. See *supra* note 46.

142. See Wettstein & Zulkarnain, *supra* note 23, at 3 (noting that an estimate from 2012 found that replacing unpaid care with formal care would cost \$211 billion).

143. See Ashley Kirzinger, Andrey Kearney, Mellisha Strokes, Liz Hamel & Mollyann Brodie, *KFF Health Tracking Poll – October 2021: Home and Community Based Services and Seniors’ Health Care Needs*, KFF (Oct. 15, 2021), <https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-october-2021> [<https://perma.cc/DR4M-64JE>].

caregivers to leave their jobs.¹⁴⁴ And caregivers report that providing care negatively affects their own physical and mental health,¹⁴⁵ even though they also typically derive meaning from the work.¹⁴⁶ In short, caring for elderly parents has a direct cost—financial and emotional—on adult children and other family members that they are required to bear without compensation and with little government assistance. This burden is likely to worsen as the fertility rate continues to decline, leaving fewer adult children to care for aging parents.¹⁴⁷

The burden of the health challenges associated with old age and of providing care for older adults falls disproportionately on groups that can least afford it. Altogether, then, aging compounds the structural inequities in our society for both older adults and their caregivers. First, those inequities result in lifetime health disadvantages, including the ability to pay for care.¹⁴⁸ And although Medicaid will pay for long-term institutionalized care when an older adult is unable to remain in their home, older adults with few resources who wish to age in place must rely on unpaid caregiving because they cannot afford paid in-home care.¹⁴⁹ Second, caregiving responsibilities compound existing disadvantage, because

144. Most adult children caring for parents or parents-in-law are employed. See *Caregiving in the U.S.*, *supra* note 25, at 63 fig.65 (indicating that sixty-nine percent are employed). That caregiving, however, creates challenges at work. *Id.* at 68–70 (describing these challenges, including the need to leave work early or arrive late and also the decision to leave a job to meet care needs). For further discussion, see Wettstein & Zulkarnain, *supra* note 23, at 3, which states that “the opportunity cost of informal care in the United States was \$522 billion in 2012”; and *Caregiving in the U.S.*, *supra* note 25, at 56–61, which details the financial strain on unpaid caregivers, but also notes that the financial strain of caring for a parent or parent-in-law was less than caring for a spouse or a younger disabled adult. While caregivers of all races and ethnicity experience financial strain, Hispanic/Latino and Black caregivers report the most. See *Caregiving Out-of-Pocket Costs Study*, AARP 15 (June 2021), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/lrc/2021/family-caregivers-cost-survey-2021.doi.10.26419-2Fres.00473.001.pdf [<https://perma.cc/WH57-8P32>].

145. *Caregiving in the U.S.*, *supra* note 25, at 48–56 (detailing these effects and identifying some correlates, including the intensity of the care needs, the hours of care provided, and whether the caregiver feels alone in the care responsibility). For one example, see generally Amanda K. Damjanovic, et al., *Accelerated Telomere Erosion Is Associated with a Declining Immune Function of Caregivers of Alzheimer’s Disease Patients*, 179 J. IMMUNOLOGY 4249 (2007) (detailing the neurological impact on a caregiver of caring for a person with Alzheimer’s disease).

146. *Caregiving in the U.S.*, *supra* note 25, at 55 fig.55 (indicating that fifty-one percent of unpaid caregivers report a sense of purpose from their work).

147. Aaron O’Neill, *Total Fertility Rate in the United States from 1800 to 2020*, STATISTA (June 21, 2021), <https://www.statista.com/statistics/1033027/fertility-rate-us-1800-2020> [<https://perma.cc/HFF6-WAZL>] (showing that the fertility rate has declined substantially, from almost four children per woman in 1900 to fewer than two children in 2020).

148. See *supra* text accompanying notes 59–61.

149. See *infra* Section III.B for further discussion of Medicaid and a proposal to provide more public support for aging in place.

caregivers of color, lower-income caregivers, and those with less education, provide the highest number of weekly care hours.¹⁵⁰ Caring for an older adult can be the equivalent of an unpaid part-time job, limiting the caregiver's ability to undertake paid work or assume greater responsibilities that could lead to higher wages.¹⁵¹ A final aspect of inequity is that older adults who have never partnered or do not have children lack family caregivers. As noted earlier, for many older LGBT individuals, it is chosen family, not adult children, who provide care during old age;¹⁵² if these chosen family members are also older, they might not be able to provide the requisite care.

* * *

Life expectancy has increased steadily in this country and will likely continue to increase. Our account of aging trends in this Part shows that the new old age brings opportunities for older adults to live fulfilling, independent lives, and for many to forge new family relationships. The evidence supports that a range of family forms appeal to older adults and that personal preferences might vary across the age cohort. At the same time, as older adults live to an advanced age, many will face health challenges requiring substantial care and support; in our society, the responsibility for providing that care is borne by family members. As we have emphasized, vulnerability to health challenges and the opportunity for flourishing in old age are not mutually exclusive; indeed, they are often interwoven. Many older adults deal with the health and financial challenges of aging while still leading rich, full lives. But a key lesson of this Part is that for older adults who need caregiving, adequate care and support are essential elements of wellbeing. Thus, today, the wellbeing of many older adults weighs heavily on the shoulders of their family members, and that burden will only get heavier in the future.

In the next Part, we evaluate how well contemporary family law responds to the challenges posed by the new old age. Not surprisingly, we find that current law and policy has either not recognized the challenges or responded inadequately.

150. See *Caregiving in the U.S.*, *supra* note 25, at 31-32 & n.34.

151. See *supra* text accompanying notes 128-129.

152. See Knauer, *supra* note 46, at 158.

II. INCREASED LONGEVITY AND THE LIMITS OF CONTEMPORARY FAMILY LAW

Human relationships are essential to wellbeing across the life span, and yet conventional family law focuses mostly on the interests of younger people, and not of older adults. To facilitate child rearing and pooling of resources over a lifetime, family law strongly privileges marriage, a union premised on long-term commitment and financial sharing. Many older adults, however, prefer other family forms that can contribute to satisfying and more secure lives later in life. Further, family law focuses primarily on securing familial care for minor children but not on family caregiving of older adults, although, as described above, adult children and other family members play an essential role in this care. In both ways, family law undermines the interests and discounts the needs of an aging population.

In analyzing these failures, this Part defines family law both narrowly and broadly. In its narrow sense, family law determines which groupings of individuals constitute a legally recognized family and the rights and duties that accompany this recognition.¹⁵³ In its broader sense, family law includes areas of legal regulation that influence how families are formed and function,¹⁵⁴ including tax law, estate and inheritance law, local zoning laws, social welfare law,¹⁵⁵ and so on. This broader conception of family law reveals the many ways that law undermines family functioning,¹⁵⁶ but it also makes available a wide range of legal tools for fostering flourishing in the last third of life — tools we use in Part III.

153. See *infra* Section III.A.

154. See Abrams, *supra* note 14, at 1003-08 (distinguishing family law—traditionally defined as marriage, divorce, and related issues such as parentage—from “the law of the family,” which includes “the many ways in which families are created, shaped, and constrained by law,” including tax law, contract law, property law, welfare law, criminal law, tort law, and so on); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 761-62 (2010) (setting out different levels of family law meaning and coverage).

155. This includes Social Security, Medicare, and Medicaid.

156. It also exposes the importance of legal definitions of family: when the law adopts a narrow definition of family, as it typically does, this definition is amplified across the legal landscape, offering benefits to recognized families and inflicting harm both directly and indirectly on groups that function as families but do not enjoy legal recognition. To give just one example, many government obligations and benefits are conferred on individuals by virtue of their family status, such as the right to take leave to care for an ill family member. See 29 U.S.C. § 2612(a)(1) (2018); Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J.F. 215, 232-35 (2021) (exploring newly developing employment-leave laws that expand coverage to extended and chosen family members).

A. *Family Law's Age Myopia*

At its core, family law is designed primarily to support young people in building a life together and raising children.¹⁵⁷ Family law thus encourages married couples to share resources over a lifetime so they can support children and, ultimately, each other. It attends to the dependency needs of children, and it protects a spouse who is financially vulnerable due to investments in child rearing rather than a career.¹⁵⁸ These goals reflect a foundational principle in family law: the privatization of dependency. Unlike most wealthy countries, the United States does not treat the demands of raising children as a responsibility shared by the state and the family. Instead, families bear primary responsibility for minor children, with limited support from the state.¹⁵⁹

Doctrine and policy embody these aims. Clear rules determine who is a legal parent,¹⁶⁰ define and enforce the duty of parents to provide care and financial support for minor children,¹⁶¹ and establish parental autonomy in child rearing.¹⁶² To promote child rearing further, family law privileges marriage as a family form, granting it strong legal protection and enforcing financial obligations between spouses.¹⁶³ Sticky default rules in divorce, for example, presume that marital resources should be distributed to both spouses and that one spouse may be liable to provide financial support to the other after divorce.¹⁶⁴ Further,

157. There are numerous accounts of family law's functions. See, for example, Schneider, *supra* note 12, at 497-98, which sets forth family law's functions as protective, facilitative, arbitral, expressive, and channeling. However, in the text we focus on a clear through-line in family law doctrine and policy.

158. See Scott & Scott, *supra* note 17, at 1309-18 (describing how the default rules for spousal support protect spouses who are made financially vulnerable through child-rearing roles); see also JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 192-214 (2011) (describing these aspects of family law).

159. See EICHNER, *supra* note 22, at 19-42 (describing the United States' "free-market family policy"). Public education, which begins at age five in most states, is the first stage at which the state assumes considerable responsibility for children. *Id.* at 38.

160. See, e.g., UNIF. PARENTAGE ACT § 102 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017).

161. See GROSSMAN & FRIEDMAN, *supra* note 158, at 223-31 (describing the duty to provide support and the formal child-support enforcement system).

162. See Huntington & Scott, *supra* note 37, at 1394-97. A legal parent bears these obligations and enjoys this protection of the parent-child relationship regardless of marital status.

163. Family law thus draws a sharp line between marital and nonmarital conjugal relationships. Marriage also serves to privatize adult financial support.

164. Spousal support is usually short-term but sometimes may not terminate until the retirement or death of the payor spouse. The developing effort to terminate spousal support on retirement is an ambivalent recognition of longer lives; income for the payor spouse is likely to

spouses enjoy mutual inheritance rights that cannot be altered unilaterally.¹⁶⁵ Other rules governing marriage assume mutual dependence between spouses, such as default rules that favor a spouse over other family members as a surrogate decision maker.¹⁶⁶ Together, these rules and policies impose a strong duty of support on parents of minor children and strong mutual obligations on spouses.

The mutual commitments that married couples undertake and the financial interdependence encouraged by the default rules regulating divorce likely reflect the interests and the preferences of younger adults entering marriage, particularly those who plan to have children together.¹⁶⁷ Financial interdependence and commitment can provide security and stability to these families. The law furthers these ends by supporting marital families through a host of benefits and privileges, such as immigration preferences that keep families together¹⁶⁸ and tax deductions that benefit married couples with unequal incomes.¹⁶⁹

While the law confers many privileges and benefits on marriage, nonmarital families are subject to general disregard. Many scholars have criticized family law

decrease, but the recipient spouse is likely to have ongoing needs. *See, e.g.,* N.J. STAT. ANN. § 2A:34-23(j) (West 2014) (“Alimony may be modified or terminated upon the prospective or actual retirement of the obligor.”). Moreover, long-term spousal support is awarded in relatively few marriages, so this is only a token acknowledgment. *See* GROSSMAN & FRIEDMAN, *supra* note 158, at 196, 204-05.

165. The elective share in common-law states cannot be waived unilaterally. It might apply against all property owned by the decedent spouse. For an account of the historical development of spousal inheritance laws, see Naomi Cahn, *What’s Wrong About the Elective Share “Right,”* 53 U.C. DAVIS L. REV. 2087, 2094-96 (2020).
166. For examples of laws prioritizing a spouse as a preferred surrogate decision-maker, see S.C. CODE ANN. § 44-66-30(A) (2022); and IND. CODE § 16-36-1-5(a) (2022), establishing that a spouse is second only to a legally designated representative. *See also* Am. Bar Ass’n Comm’n on L. & Aging, *Default Surrogate Consent Statutes*, ABA (Oct. 2022), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-sept-default-surrogate-consent-statutes.pdf [<https://perma.cc/B2PX-X5JM>] (listing surrogate consent statutes state-by-state).
167. *See generally* Scott & Scott, *supra* note 17, at 1263-74 (analyzing the default rules regulating divorce in a hypothetical bargain framework and concluding that a couple entering marriage would agree to rules of concurrent ownership and to alimony for the spouse who has assumed a caretaking role).
168. For examples of the many family preferences in immigration law, see 8 U.S.C. § 1151(b)(2)(A)(i) (2018), which establishes that U.S. citizens’ “immediate relatives,” defined as “the children, spouses, and parents of a citizen of the United States,” are not subject to “direct numerical [immigration] limitations”; and § 1153(a)(1)-(4), which sets forth the preference and numerical allocation of visas for immigrants’ family members who do not qualify as “immediate relatives”: citizens can sponsor spouses, children, and siblings; legal permanent residents can sponsor spouses and unmarried children. These preferences, however, do not recognize informal relationships such as cohabitants.
169. *See* I.R.C. § 6013(a) (2018); *see also* DOROTHY BROWN, *THE WHITENESS OF WEALTH* 25-32 (2021) (explaining how this rule furthers wealth accumulation for white couples).

on this ground.¹⁷⁰ We endorse many of these critiques, which show that the single-minded focus on marriage harms other families and can undermine the very purposes that family law aims to promote—intimacy, care, and the raising of children. But scholars have paid little attention to the way in which family law’s preoccupation with marriage harms older adults.¹⁷¹

B. The Consequences of Family Law’s Inattention to Older Adults

Family law’s presumption of a financially interdependent, conjugal couple, bound to one another by a formal long-term commitment and raising minor children is not responsive to the life stage of older adults. Nor does it account for their substantial dependency needs. This inattention, and family law’s focus on the interests of younger people, likely does not represent any intent to exclude older adults or to ignore their interests. Instead, in an era when life expectancy was far briefer than it is today and divorce was uncommon, the interests of older adults that we identify in this Article may have seemed less pressing. But today, the large cohort of older adults living longer is ill served by family law doctrine and policy that does little to acknowledge age-related differences. As we show in this Section, contemporary family law fails to adequately assist older Americans in choosing the families and lives they want and support the caregiving almost all will need.¹⁷²

170. See, e.g., Huntington, *supra* note 44, at 225 (discussing how the marital presumption “privileges marital families at the expense of nonmarital families”); Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1894 (2018) (“[T]he law as it stands remains tethered to marriage.”); see also Carbone & Cahn, *supra* note 44, at 1250–54 (suggesting that even states where family law recognizes nonmarital relationships inadequately “grapple with the multiple reasons that guide the decisions of modern couples to live together in informal relationships”); Scott, *supra* note 17, at 248 (explaining that nonmarital relationships “lack a legal framework”).

171. For the rare exception, see Aloni, *supra* note 39, at 582–83, 585, which describes older adults as a group that is likely to cohabit and notes some of the reasons why they might prefer not to marry.

172. These failures occur in both private family law, which is typically state law, see tenBroek, *supra* note 14, at 257–58, and in the public law of programs and policies that rely on family definitions, which is often, but not always, federal law. See, e.g., 26 U.S.C. § 152(c) (2018) (defining a “qualifying child,” which governs eligibility for higher payments under the Earned Income Tax Credit, set forth in 26 U.S.C. § 32 (2018)); *Astrue v. Capato*, 566 U.S. 541, 548 (2012) (interpreting a provision of the Social Security Act, which requires determining whether an individual is a child of an insured deceased person based on “the intestacy law of the insured individual’s domiciliary State” (quoting 42 U.S.C. § 416(h)(2)(A) (2018)) (internal quotation marks omitted))).

1. *A Failure to Satisfy Older Adults' Relationship Preferences*

a. *The Misalignment of Legal Marriage*

Contemporary family law uses a one-size-fits-all approach to relationships. It privileges marriage with its rights, obligations, and presumption of financial sharing, even though marriage may not suit the interests and needs of older adults. Some older adults remain in one marriage throughout their lifetimes, but many older adults are divorced, widowed, or single, and if they enter new relationships, there are many reasons why they might not want to assume the commitments and obligations of marriage.¹⁷³

To begin, the default rules associated with legal marriage often do not match the expectations and needs of older adults. Most older adults are not raising children together and thus may not want or need the obligations of mutual economic support associated with marriage.¹⁷⁴ And many older people do not want to leave their estates to a new spouse, but instead to children, grandchildren, or other beneficiaries. These wishes can be thwarted by inheritance laws in most states that give each spouse an elective share in the other's estate.¹⁷⁵

Relatedly, the doctrines surrounding marriage fail to account for the importance of the relationship between many older parents and their adult children. The law strongly protects the relationship between a parent and minor child, but once the child is grown, the law assumes that there is little need to

173. For a discussion of the reasons individuals may prefer not to marry, see Mary Charlotte Y. Carroll, Note, *When Marriage Is Too Much: Reviving the Registered Partnership in a Diverse Society*, 130 YALE L.J. 478, 481 (2020), which explains that “the law may render marriage an unattractive option for three reasons: its default regime of inheritance rights and asset sharing, its impact on qualification for disability and long-term care entitlements, and its inability to evolve with changing cultural norms about relationship permanence and gender roles.”

174. See *supra* text accompanying notes 89-90, 102 (explaining that older couples who repartner typically have adult children from earlier relationships and do not seek to raise children with the new partner, although some are raising grandchildren), 163-165 (describing the legal obligations that accompany marriage). In a minority of equitable-distribution states, courts can distribute both marital and separate property upon divorce. GROSSMAN & FRIEDMAN, *supra* note 158, at 199-200. Further, in community-property states, spouses have equal rights to property earned during the marriage, unless waived. *Id.* at 194-95.

175. See *supra* text accompanying note 165 (describing the elective share). Thus, if an older adult wants a child, and not a new spouse, to inherit all of their property, this desire can be realized only through a spousal agreement. Some couples might not realize that a surviving spouse could inherit a share of separate property brought into the marriage, as required in every non-community-property state except Georgia. By contrast, the omitted-spouse doctrine subordinates a surviving spouse's claims to a bequest made to preexisting, nonjoint children. See Cahn, *supra* note 10, at 19.

support the relationship.¹⁷⁶ In some contexts, this makes sense. The types of obligations that parents have to their minor children are not appropriate when children become self-sufficient adults. But if an older adult remarries, this marriage legally displaces an adult child for many purposes. This response potentially undermines the wishes and needs of parents and of their adult children, and it makes it harder for older adults to structure these relationships in ways that are most beneficial to their wellbeing. To give one example, many older adults wish to delegate decision-making authority to an adult child, but the law presumes that a spouse is the default decision maker.¹⁷⁷

Finally, for those older adults who prefer marriage, the law creates disincentives.¹⁷⁸ The obligations and commitments of legal marriage in themselves act as a deterrent to marriage later in life, leading some couples not to marry who might otherwise choose marital status. Further, the marital presumption of financial interdependence impacts eligibility for long-term care under Medicaid

176. For the rare counterexample, see 42 U.S.C. § 300gg-14 (2018), which requires group health plans and health-insurance issuers to cover children until the age of twenty-six. In addition, approximately twenty-five states require adult children to support their financially needy parents. See Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL'Y L. & ETHICS 147, 177 (2016); Rebecca Lake, *An Overview of Filial Responsibility Laws*, SMARTASSET (Aug. 5, 2022), <https://smartasset.com/estate-planning/filial-responsibility-laws> [<https://perma.cc/AWC5-G3ZA>]. Though rarely enforced since the creation of Social Security, they are still occasionally used. Hoffman, *supra*, at 177-78. Other countries impose various obligations, including visiting and financial support. See H. Hunter Bruton, *Improving Familial and Communal Eldercare in the United States: Lessons from China and Japan*, 102 MINN. L. REV. HEADNOTES 1, 17, 26 n.185 (2018) (noting that China and Japan have filial-responsibility laws imposing obligations such as visiting and financial support).

177. See *supra* text accompanying note 166. For instance, in the absence of the decedent's designation of an individual with the right to control burial, preference is typically given to the surviving spouse, followed by the surviving children. See, e.g., IOWA CODE § 144C.5 (2022); CAL. HEALTH & SAFETY CODE § 7100 (West 2022); Katie M. Alfus, Note, *Better Homes and Scattered Gardens: Why Iowa Should Legalize "Human Composting" as a Method of Final Disposition*, 106 IOWA L. REV. 325, 339 (2020).

178. For an extended treatment of this issue, see Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 695 (2013), which argues that the "growing gap between legal fiction and social reality [of the institution of marriage] undermines the ability of the tax-and-transfer system to achieve any of a range of objectives," including "shoring up the traditional family." See also Richard L. Kaplan, *Preferencing Nonmarriage in Later Years*, 99 WASH. U. L. REV. 1957, 1958 (2022) (contending that the law "propagates an overwhelming preference for nonmarriage" for older couples); Joanna Zhang, *Marriage in the Golden Years: Revisiting Benefits and Obligations in Light of the New Individualism*, 38 N.Y.U. REV. L. & SOC. CHANGE 361, 395-96 (2014) ("[A] couple could simply divorce in order to avoid the heightened burdens Medicaid imposes on married spouses. In fact, this strategic practice, known as the 'Medicaid divorce,' is not uncommon today." (internal quotation marks omitted)).

and disability under Supplemental Security Income, creating a significant deterrent to marriage.¹⁷⁹ Based on the strong assumption that marriage involves financial sharing, eligibility for these benefits is affected by the amount of a married couple's combined assets and income.¹⁸⁰ Under this regulatory regime, the act of getting married can render an older person ineligible for these important and widely used benefits, discouraging some older couples who might want to marry from doing so.¹⁸¹

In short, regardless of one's views of the merits of the state privileging marriage to support the raising of children,¹⁸² legal marriage under contemporary law ill suits the needs of many older couples, even those who *want* to marry.

b. Neglect of Other Family Forms

Apart from marriage, family law has little to offer by way of relationship options. Cohabitation is largely unrecognized as a legal status and, unlike married couples, cohabitants receive little support as a family group. And nonconjugal, nondyadic relationships are completely out of the realm of family law.¹⁸³ This

179. See 20 C.F.R. § 416.1802(a) (2021) (stipulating that having an ineligible spouse may reduce Supplemental Security Income benefits and potentially result in ineligibility altogether).

180. See *Spousal Impoverishment*, MEDICAID, <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html> [<https://perma.cc/T3DU-3UEZ>] (setting out the 2022 guidelines); Carroll, *supra* note 173, at 490-91; Cahn, *supra* note 10, at 19 (noting that “[t]he Medicaid long-term eligibility rules . . . are neither marriage-neutral nor couples-neutral”); Zhang, *supra* note 178, at 376. On the issue of “neutrality,” see Daniel Hemel, *Beyond the Marriage Tax Trilemma*, 54 WAKE FOREST L. REV. 661, 663 (2019), which notes that couples’ neutrality means that the same tax liability applies to all married couples with the same income, while marriage neutrality ensures that a married couple pays taxes in the same amount as if the spouses were not married.

181. Carroll, *supra* note 173, at 481. Erez Aloni observed that some states created domestic-partnership status, open only to older adults, to protect older couples from losing government benefits. See Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1287 (2014) (“Finally, the state itself creates domestic partnerships registrations, open to elderly only, in order to allow these partners to avoid the termination of post-marital benefits but allowing them to enjoy state protections that otherwise are reserved only to married couples.”). With the extension to same-sex couples of the right to marry, however, many states abolished domestic-partnership status. See Heidi L. Brady & Robin Fretwell Wilson, *The Precarious Status of Domestic Partnerships for the Elderly in a Post-Obergefell World*, 24 ELDER L.J. 49, 50 (2016) (“State legislatures almost universally closed off the nonmarital statuses after enacting same-sex marriage. Many also converted existing relationships into marriage.”).

182. See Schneider, *supra* note 12, at 496-512 (describing the role of family law in channeling childbearing couples into marriage).

183. As described *infra* text accompanying notes 250-252, a few jurisdictions are recognizing polyamorous groups, but these are by far the exception. Further, Colorado allows nonconjugal

failure to recognize alternative family forms makes it harder for older adults to structure their relationships in ways that are most beneficial to their wellbeing.¹⁸⁴

Turning first to cohabitation, many older adults live with a new partner informally rather than remarry.¹⁸⁵ Some of these couples do not want the rights and obligations that accompany marriage, nor do they want the government to treat them as financial partners. But for older cohabitants who want to undertake *some* mutual obligations and desire legal acknowledgment of the emotional importance of their relationships, there is no ready-made family form. Instead, as we explain below,¹⁸⁶ these couples must undertake substantial effort to tailor their commitments and clarify their mutual understandings through individual contracts and other legal tools. In short, family law generally offers only two starkly dichotomous options: marriage, with its attendant benefits and obligations, or cohabitation, with neither.

A few states provide some legal recognition to cohabitants. In a dwindling number of states, for example, couples can enter domestic partnerships or civil unions, which offer a status with distinct commitments and (often) fewer legal consequences than marriage, as well as no federal benefits.¹⁸⁷ One state, Colorado, allows couples to execute designated beneficiary agreements, which specify understandings about familial rights and duties, a mechanism that cohabiting couples can use to clarify their understandings.¹⁸⁸ But the vast majority of states do not provide an easy means for older cohabitants to formalize understandings

partners to register as designated beneficiaries, but this option is limited to dyads. *See infra* text accompanying note 254. For a discussion of the multiple ways family law disregards and devalues nonmarital families, see generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

184. As elaborated *infra* Section II.B.1.c, older adults can designate alternative decision makers, draft wills, sign powers of attorney for health care and financial stewardship, and enter into binding cohabitation or prenuptial and nuptial agreements. But those are cumbersome procedures.

185. *See supra* text accompanying note 75-80.

186. *See infra* Section II.B.1.c.

187. With the advent of marriage equality, many states have eliminated their civil-union and domestic-partnership rules. *See* Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 *FORDHAM L. REV.* 1509, 1518-26 (2016) (discussing the fates of many of these statuses after marriage equality); Carroll, *supra* note 173, at 502. Not all repeals have invalidated these systems entirely. For example, Wisconsin ended its domestic partnership registry in 2018, but couples who registered before April 1, 2018, still maintain their status and benefits. *See* WIS. STAT. § 770.07 (2022). On the other hand, in California, domestic beneficiary status, once limited to same-sex couples and different-sex couples in which one partner was over age sixty-two, was extended to all couples in 2019. 2019 Cal. Stat. 2253, 2253-54.

188. COLO. REV. STAT. § 15-22-101-11 (2022). As described in Section III.B *infra*, a couple can execute a contract embodying their expectations for their relationship, but this is often an expensive undertaking, one that few cohabitants undertake.

about financial sharing, medical decision-making, relationships with adult children, and other matters.

Finally, some older adults choose to satisfy their needs for care and intimacy later in life through platonic dyadic relationships or through larger groups, but the law does not treat these groups as families and, accordingly, does not facilitate their formation.¹⁸⁹ These may be multigenerational or polyamorous groups, siblings or other relatives, as well as families of choice, with surrogate relatives. These family groups are likely to become more common for older individuals, and like cohabiting couples, they may want to receive recognition as families and memorialize their financial and other expectations. But the law provides no legal status for them.¹⁹⁰

The law not only fails to recognize these groups as families but also creates obstacles that impede their ability to live together. Zoning regulations, in particular, impede some family groups from living in neighborhoods by limiting homes to single-family residences.¹⁹¹ Traditionally, many zoning ordinances defined family as persons related by “blood, adoption or marriage,” a narrow definition directed at creating and maintaining neighborhoods of traditional marital families.¹⁹² This definition typically excludes groups of unrelated persons living together, an exclusion the Supreme Court upheld in *Village of Belle Terre v. Boraas*.¹⁹³ Prohibitions of “unrelated persons” from living in single-family neighborhoods are probably unconstitutional as applied to cohabiting couples

189. See, e.g., John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 386-87 (2015) (suggesting sisters might want legal recognition under designated beneficiary statutes); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 409-10 (2012) (suggesting the recognition of donor-conceived networks); Kaiponanea Matsumura, *Beyond Polygamy*, 107 IOWA L. REV. 1903, 1936-62 (2022) (advocating for the legal recognition of consensual nonmonogamous relationships).

190. Even though Colorado allows a nonconjugal, dyadic couple to execute a designated beneficiary agreement, see *supra* note 188, the statute does not permit groups to do so. See COLO. REV. STAT. ANN. § 15-22-104 (West 2022). Groups (in Colorado and other states) could clarify their expectations and understandings through contract or affirmative declaration of individual intentions, but this requires effort, expense, and forethought.

191. See, e.g., Kate Redburn, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412, 2416 (2019) (explaining that zoning law fails to recognize many family groups by excluding them from single-family residential districts).

192. *Id.* at 2430-31.

193. 416 U.S. 1, 9 (1973) (“The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one.”).

and their children.¹⁹⁴ But some courts have upheld ordinances with this language as legitimately excluding cohabiting couples *without* children from single-family neighborhoods, as well as groups of more than two adults living together.¹⁹⁵ And even the more expansive definitions of family often aim to exclude nondyadic groups by strictly limiting the number of adults allowed to live in a single unit in a residential zone.¹⁹⁶ These restrictive ordinances, if upheld, would prevent many older adults wanting to form families of choice from living in residential neighborhoods. Finally, many localities prohibit more than one living unit on a single residential lot, preventing some multigenerational families from living together.¹⁹⁷

The limited recognition of family forms is amplified in other legal contexts as well, such that the privilege accorded to the marital family is reinforced while other family groups receive few benefits that support their ability to care for members.¹⁹⁸ The Family and Medical Leave Act, for example, does not cover

194. See *Moore v. City of East Cleveland*, 431 U.S. 494, 496–97, 504–05 (1977) (holding that a zoning ordinance that excludes a grandchild from living with his grandmother, even when other relatives are also living in the home, is unconstitutional).

195. *State v. Champoux*, 555 N.W.2d 69, 71, 74 (Neb. App. 1996).

196. See, e.g., MILFORD, CONN., ZONING REGUL. art. XI, § 11.2 (Aug. 1, 2011) (defining family as “[p]ersons related by blood, marriage or adoption, or a reasonable number of individuals occupying a dwelling unit who are committed to living together as a single housekeeping unit”). Fairfax County, Virginia provides “no more than four unrelated people may live in one house.” *Code Compliance: Multiple Occupancy/Multiple Dwelling*, FAIRFAX CNTY., <https://www.fairfax-county.gov/code/multiple-occupancymultiple-dwelling> [<https://perma.cc/67SH-KG8X>]. A similar ordinance was held unconstitutional under the New Jersey state constitution in *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894 (N.J. 1990), in which the court determined that ten college students constituted a family. For an extended discussion of how zoning law defines family, see generally Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1 (2020).

197. See Amy Sokolow, *Massachusetts Advocates Say In-Law Apartments Will Help Older Adults, People with Disabilities*, BOS. HERALD (July 29, 2021, 6:19 AM), <https://www.bostonherald.com/2021/07/28/advocates-say-in-law-apartments-will-help-older-adults-people-with-disabilities> [<https://perma.cc/JT7C-4K4A>]. See generally Redburn, *supra* note 191, at 2418 (explaining that zoning law fails to recognize many family groups by excluding them from single-family residential districts).

198. Marriage is not, however, always privileged. See Naomi R. Cahn, *Singlehood*, WASH. U. J.L. & SOC. POL’Y (forthcoming 2023) (manuscript at 3, 6–7) (on file with authors) (discussing the marriage tax penalty, the Earned Income Tax Credit, and Medicaid long-term care eligibility).

caretaking leave for nonmarital partners,¹⁹⁹ and spouses and children are preferred surrogate decision makers.²⁰⁰ In all these ways, family law accords benefits (or detriments) on the basis of a narrow base of relationships and excludes many others that older adults might prefer.²⁰¹

c. *The Challenges of Tailoring Family Relationships*

Older adults who do not desire traditional legal marriage with its attendant rights and duties are left to their own devices to clarify their expectations in forming family relationships. It is possible for a marital couple to opt out of the legal obligations triggered by marriage and for a cohabiting couple or a group to assume emotional and financial obligations to one another, but only through time-consuming and expensive efforts that many will not undertake. Rights and duties between spouses, for example, can be altered by contract, before or during the marriage.²⁰² A married couple can execute a contract in which each spouse waives the right to a share of the other spouse's estate,²⁰³ thus permitting the spouses to execute wills leaving all property to a child or other person. Spouses can also agree by contract to retain their earnings and income as separate property and to waive spousal support on divorce. Other adults in conjugal and non-conjugal groups can execute contracts to define the extent and limits of family

199. See 29 U.S.C. § 2612(a)(1) (2018) (covering leave for the birth or adoption of a “son or daughter,” and to care for a “spouse, or a son, daughter, or parent” when they have a serious health condition). The regulations expand the definitions of parent and “son or daughter” to include stepparent, foster parent, or *in loco parentis* relationships. See 29 C.F.R. § 825.122(c)-(d) (2021). For “covered servicemembers,” the “next of kin” extends to other “blood relative[s].” *Id.* § 825.122(e).

200. See *supra* note 166; see also Shana Wynn, *Decisions by Surrogates: An Overview of Surrogate Consent Laws in the United States*, ABA (Oct. 1, 2014), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_36/issue_1_october2014/default_surrogate_consent_statutes [<https://perma.cc/UWK8-XJNZ>] (reporting that most states have “hierarchy surrogate consent” statutes and, although about half include “a close friend,” this comes at the bottom of the priority list, following many relatives; spouses are invariably first, followed by adult children).

201. One of us has argued that marriage should not be the organizing principle for a variety of benefits and obligations that should, instead, be focused on the individual rather than depending on family groups. See Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 60-61 (2021).

202. Some spousal duties are not subject to spousal agreement, such as those defined by the doctrine of necessities. That doctrine obligates one spouse to a third-party creditor for necessary household expenses, including medical debts, incurred by the other spouse. See, e.g., VA. CODE ANN. § 55.1-202 (2022); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 839-40 (2004) (explaining the doctrine).

203. See Cahn, *supra* note 165, at 2121-22.

obligations they agree to undertake.²⁰⁴ And they can leave their estates by will to members of their families of choice. Further, an older person can designate a healthcare proxy, overriding the default favoring spouses or other relatives, in favor of a chosen person.²⁰⁵ And individuals can purchase property jointly and open joint bank accounts with other persons in their family of choice.²⁰⁶

But these means of formalizing family relationships are each separate transactions that require different documents and often involve lawyers. Consequently, although older adults can, with substantial effort, go some distance to memorialize their preferences about family relationships, relatively few take these steps. For example, most spouses do not execute premarital contracts, and such contracts are rare indeed among other adult family groups.²⁰⁷ The cost of contracting to achieve parties' goals and expectations in forming a new family later in life is often prohibitive. Many individuals are also simply not in the habit of consulting attorneys and may be uncomfortable doing so even if they could afford the expense. Others may not be familiar with default rules, and thus may not appreciate the need to contract out.²⁰⁸ And many people are reluctant to confront their own mortality by creating health-care proxies or executing wills or advance medical directives.²⁰⁹ Finally, even the ability to contract, as Jacobus

204. Thus, for example, three friends could execute a contract agreeing to share all living expenses while they live together, and distribute property acquired by the family group in the event that it dissolves. The contract could also include terms designating each as a surrogate medical decision maker for the other, and providing that any party deciding to leave the family must give three months' notice.

205. See, e.g., FLA. STAT. § 765.203 (2022) (detailing the suggested form for designation of a health-care surrogate); MASS. GEN. LAWS ch. 201D, § 2 (2022) (stating the right of every competent adult to "appoint a health care agent by executing a health care proxy").

206. They can designate someone to handle financial issues through a power of attorney or by establishing a trust; they can also designate someone to take control of their body at death.

207. There is no definitive source for how many couples enter into prenuptial agreements, but one of the only studies to look at actual agreements found that they are more probable in subsequent marriages and among older couples. See Elizabeth R. Carter, *Are Premarital Agreements Really Unfair?: An Empirical Study*, 48 HOFSTRA L. REV. 387, 409 (2019) ("Prior marriage does appear to be correlated with entering into a premarital agreement—but the picture is complex."). Even Carter, who carefully studied the recorded premarital agreements in one Louisiana parish, could not compare the number of such agreements to parish-wide estimates of the number of marriages. *Id.* at 403 n.95.

208. Cf. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 441-44 (1993) (reporting the results of a survey of people registering for marriage licenses and finding that the participants' knowledge of the legal rules governing divorce was limited).

209. Even though those over the age of 65 are more likely than younger people to execute advance directives, fewer than half do so. Kuldeep N. Yadav et al., *Approximately One in Three US Adults Completes Any Type of Advance Directive for End-Of-Life Care*, 36 HEALTH AFFS. 1244, 1247

tenBroek warned almost sixty years ago, creates a bifurcated system of family law; low-income people are highly unlikely to formalize their expectations regarding family relationships given the high cost of doing so.²¹⁰

Even those older adults who undertake the effort to formalize their understandings and create family groups that suit their needs and desires may not be recognized as families by the government. For many purposes, as we have explained, only married couples are accorded family status and receive government benefits and privileges on that basis. Other groups may function as families, but even if they create legally enforceable family rights and obligations *inter se*, they will not necessarily be deemed families by the government.²¹¹

* * *

In sum, contemporary family law fails to recognize and support the relationships that older people might desire and that are more consonant with the life stage they are in. As the next Section shows, family law also fails to support family caregiving, which is essential to the wellbeing of older adults.

2. *A Failure to Support Familial Caregiving by Adult Children*

The dependency needs of older adults fall heavily on the family, but family law does not adequately support families in this essential work. To be sure, family law gives a nod to the vital role that family members play as caregivers. Eligible adult children can take leave from work to provide care to parents and other close relatives, for example.²¹² It is also possible, if difficult, for an adult child to claim the parent or another qualifying relative as a dependent even if they do not

(2017); Michelle Andrews, *Many Avoid End-of-Life Care Planning, Study Finds*, NPR (Aug. 2, 2017, 9:00 AM ET), <https://www.npr.org/sections/health-shots/2017/08/02/540669492/many-avoid-end-of-life-care-planning-study-finds> [<https://perma.cc/EC43-LBWR>].

210. See tenBroek, *supra* note 14, at 257–58.

211. This, of course, was an argument for marriage equality prior to *Obergefell v. Hodges*, 576 U.S. 644 (2015). Same-sex couples could execute contracts in most states but could not receive the benefits and privileges that accompanied marriage. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 953–57 (Mass. 2003) (describing the benefits and privileges that accompany marriage and from which same-sex couples were excluded). To the extent the state seeks to support marriage, see *Obergefell*, 576 U.S. 644, special benefits for marriage may be warranted. On the other hand, it might be more appropriate to disaggregate those benefits entirely from marriage and provide them for individuals. See generally Cahn & Carbone, *supra* note 201 (arguing for decoupling benefits from marriage).

212. See discussion of the Family and Medical Leave Act, *supra* text accompanying notes 198–201.

share the same home.²¹³ Finally, dependent-care flexible spending accounts allow an adult child to pay for some of the cost of adult day care with pretax dollars, if the older adult qualifies as a dependent of the adult child.²¹⁴

But this modest state support falls far short of the need. If an older parent lives nearby but not in the same household as their adult child, stringent rules make the income-tax deduction largely unavailable,²¹⁵ even though for many families, this arrangement allows the child to provide aid while supporting the older adult's independence. The government offers very limited subsidies for in-home care of older adults.²¹⁶ And there is no recompense for an adult child who must leave the workforce to provide care to an older person and thereby suffers severe financial hardship, including lost income and Social Security benefits.²¹⁷

The response of regulators and courts to intrafamily personal-care contracts illustrates well the law's failure to support family care, especially for low-income

213. See I.R.C. § 24(h) (2018) (setting out the terms of the dependent credit); *id.* § 152(d) (defining qualifying relatives whom the taxpayer can claim as a dependent to include individuals in a specified relationship or who are members of the taxpayer's household); Alexandra M. Ferrara, Note, *Incentivizing the Care of Adult Family Members Through a Two-Part Tax Credit*, 94 N.Y.U. L. REV. 819, 839-41 (2019) (defining the scope of the credit and arguing that it is not a sufficient subsidy); *For Caregivers*, IRS, <https://www.irs.gov/faqs/irs-procedures/for-caregivers> [<https://perma.cc/6VWR-SERV>].

214. See *Dependent Care Flexible Spending Accounts (FSAs)*, PAYFLEX, <https://www.payflex.com/en/individuals/products-programs-dependent-care-fsa.html> [<https://perma.cc/2LF5-GWQ5>]. The pretax contribution limit is \$5,000 annually. *Id.*

215. See *For Caregivers*, *supra* note 213; cf. Weaver, *Grandma in the White House*, *supra* note 11, at 48 (discussing the limitations of tax credits for grandparents who care for grandchildren).

216. Nina A. Kohn, *For Love and Affection: Elder Care and the Law's Denial of Intra-Family Contracts*, 54 HARV. C.R.-C.L. L. REV. 211, 214-15, 214 n.9 (2019) (noting that professional in-home care typically costs \$20 per hour and thus is "generally only viable for those with some degree of wealth, or those who qualify for Medicaid and manage to secure a spot in their state's 'waiver' program for covering home . . . long-term care services" and that demand for these waivers far outstrips supply).

217. The estimated lifetime wealth loss (including reduced working hours, cessation of employment, foregone promotions) attributed to family caregiving is estimated to be between \$303,260 and \$659,139. *The MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents*, METLIFE MATURE MKT. INST. 12 (2011), <https://www.caregiving.org/wp-content/uploads/2011/06/mmi-caregiving-costs-working-caregivers.pdf> [<https://perma.cc/T5P6-LQUL>]. A later study estimated that family caregivers for parents lose \$300,000 in lifetime income and benefits. Dena Bunis, *Bill Would Give Some Family Caregivers Financial Relief*, AARP (May 14, 2019), <https://www.aarp.org/caregiving/financial-legal/info-2019/tax-credit-for-caring-act.html> [<https://perma.cc/PRP4-QGC6>].

families.²¹⁸ In arranging in-home care, older adults sometimes contract with service providers, but they also contract with family members.²¹⁹ A care contract is especially helpful when an older adult wants to receive these services from a family member but the family member cannot provide care without compensation.²²⁰ But these agreements run into problems. If the older adult is trying to qualify for Medicaid, many states scrutinize the contracts to ensure they are not simply a means for transferring assets from the older adult to the younger relative, helping the older adult satisfy Medicaid's means-tested eligibility requirements.²²¹ Partly based on the assumption that familial care is provided altruistically, state regulators regularly find that the agreements are, indeed, fraudulent transfers.²²² This is an example of income-based discrimination: intrafamilial contracts for care are not scrutinized by public authorities unless the care recipient seeks to qualify for public support through Medicaid.²²³

In other situations, older adults who lack sufficient income may execute care contracts with children or other family members to be paid after the care recipient's death from the decedent's estate. Indeed, these arrangements may be the only means to enable older adults to remain in their homes supported by family.²²⁴ Care contracts are sometimes challenged by other beneficiaries on grounds of undue influence or testator incompetence. If the contract is in writing and the hours of care and compensation rate are clearly described, courts are inclined to

218. See Kohn, *supra* note 216, at 214-15.

219. See *id.* (describing this practice). Payment received under such agreements is treated as income to the caregiver and may be subject to income tax as well as Social Security and Medicare taxes, just as though the parties were unrelated. *Id.* at 217. An older person may want to "encourage or reward care, or family members may demand it." *Id.* at 215.

220. See *id.* at 215 ("In some cases, payment may reflect the fact that providing care is not a financially viable option for the care provider without a guarantee of payment.").

221. See *id.* at 215-17 (describing the interplay of personal care contracts and Medicaid planning); Richard L. Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 VA. TAX REV. 509, 531-34 (2005). If the payor is trying to qualify for Medicaid, then the amount paid must be pursuant to a written contract, at a fair market value. See, e.g., IDAHO ADMIN. CODE r. 16.03.05.831 (2021) (providing that "[a] contract for personal services to be furnished to the participant by a relative is presumed to be made for the purpose of qualifying for Medicaid," although the presumption can be rebutted if the agreement is in writing, for future services, and for fair market value).

222. See Kohn, *supra* note 216, at 226-33 (describing the results of a comprehensive study of 124 administrative hearings concerning personal care contracts and finding deep distrust that these contracts were anything but attempts to qualify for Medicaid); *id.* at 242-45 (describing state regulators as believing that family care is provided altruistically).

223. See generally tenBroek, *supra* note 14, at 257-58 (explaining the two-tiered system of law for low-income and high-income people, and how this has led poor people to be scrutinized by the state more than high-income people).

224. See Kohn, *supra* note 216, at 214-17.

enforce them, but oral contracts or those with imprecise terms may fare less well.²²⁵

Finally, multigenerational living is an attractive option for many families, allowing them to share expenses and caregiving duties, and to build social connections between generations; however, in many localities, zoning regulations make this harder. In addition to narrow definition of families discussed above,²²⁶ many localities prohibit the construction of an additional living unit within a home.²²⁷ The colloquial names for these units—“granny flats” and “in-law suites”—are telling, and, indeed, the units can facilitate both familial caregiving and the independence of the older adult.²²⁸ But many zoning restrictions make it hard, if not impossible, for families to make the needed adjustments to their homes.²²⁹

The failure to support familial caregiving does not only impose a burden on the caregiver; it may also contribute to elder abuse. This serious and ongoing problem is commonly perpetuated by family members.²³⁰ In a society in which

225. See, e.g., *Cragle v. Gray*, 206 P.3d 446, 452 (Alaska 2009) (refusing to enforce oral contract in which granddaughter agreed to provide care for grandmother); see also Naomi Cahn, *Continuity and Caregiving: Comments on Someday All This Will Be Yours*, 40 LAW & SOC. INQUIRY 492, 495 (2015) (discussing cases).

226. See *supra* text accompanying notes 191-197.

227. New York, for example, has many localities that prohibit accessory dwelling units in residential areas zoned for single-family homes. The New York State Legislature is currently considering a bill to prohibit these restrictions. *New York Lawmakers Considering Laws to End Single-Family Zoning*, ROCKLAND CNTY. BUS. J. (Dec. 21, 2021), <https://rcbizjournal.com/2021/12/21/new-york-lawmakers-considering-laws-to-end-single-family-zoning> [https://perma.cc/S9QN-BC7S]. Under SB 9 and SB 10, California prohibits such restrictions in local zoning ordinances and allows owners to build up to four units per residential lot. *Id.*; Trevor Bach, *Newsom Signs 2 Controversial Measures to Boost Housing. Will They Be Consequential?*, REAL DEAL (Sept. 16, 2021, 5:13 PM), <https://therealdeal.com/la/2021/09/16/newsom-enacts-2-controversial-measures-to-boost-housing-will-they-be-consequential> [https://perma.cc/7C2C-T637]; see also Lisa Prevost, *The A.D.U. Experiment*, N.Y. TIMES (Dec. 10, 2021), <https://www.nytimes.com/2021/12/10/realestate/the-adu-experiment.html> [https://perma.cc/MW8B-WTB5] (describing zoning changes to allow accessory dwelling units on single building lots).

228. See, e.g., Weaver, *Grandma in the White House*, *supra* note 11, at 59-60 (describing the benefits for older adults of accessory dwelling units on their children's property).

229. Even if a locality permits the creation of an in-law suite, other zoning restrictions, such as the requirement of separate parking for each unit, might make it practically impossible or prohibitively expensive. For one discussion of these challenges, see *In-Law Suites*, BLDG. CODE F. (Feb. 27, 2015), <https://www.thebuildingcodeforum.com/forum/threads/in-law-suites.11779> [https://perma.cc/7C3U-VNZP].

230. See *Frequently Asked Questions*, NAT'L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/FAQ.aspx> [https://perma.cc/A75S-SMGP] (“Most cases of elder abuse are perpetrated by known and trusted others. This includes family members . . .”). Approximately ten percent of all older

families bear the primary burden of care for vulnerable older adults, family law fails to help families provide older adults with physical care, financial assistance, emotional support, and social connections.

* * *

In sum, current family law and policy are ill-suited to respond to a population that is aging, particularly against the backdrop of other demographic trends affecting family life. Our society is likely to continue to rely on families to serve functions vitally important to human welfare, but substantial legal and policy reform is needed to adapt family law to the aging population. In the next Part, we turn to this challenge.

III. FAMILY LAW FOR THE NEW OLD AGE

To serve the interests of individuals across the life span, not just younger adults, we propose a wave of family law reform. We intentionally use the term “wave” because of the potentially profound impact of the legal changes we are proposing—analogue to earlier waves of family law reform that established no-fault divorce and recognized marriage equality. To attain the goals that we describe, this far-reaching reform movement will require changes in federal, state, and local law. This is family law for the new old age.

This new wave begins with a conceptual shift in family law. Rather than assuming that legal rules and policies designed for younger adults meet the needs and preferences of older adults, family law must focus on the interests of individuals *across* the life span. The wave of reform also entails concrete reforms to two broad areas of doctrine and policy: family formation and familial caregiving. As detailed below, we first propose reforms that allow older adults to efficiently tailor their preferences for family relationships, providing options for individuals entering marriage and those forming various types of nonmarital relationships. Second, we suggest reforms to make it easier for family members to care for older adults.

A. *The Conceptual Framework*

The family law we propose is built on the empirical realities shaping the lives of older adults. As we have described, families are crucial to the wellbeing of

people have been victims of elder abuse, almost sixty percent of which is perpetrated by family members. *Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (Feb. 23, 2021), <https://www.ncoa.org/article/get-the-facts-on-elder-abuse> [<https://perma.cc/BB9G-UU8K>].

older adults, but families play a different role as people age than earlier in life. And a lifetime of accumulated advantage or disadvantage shapes old age, with some older adults arriving at the threshold of old age with considerable economic resources, and others facing substantial financial challenges.²³¹

These empirical realities must influence the law's approach to family formation and familial support. To help older adults form the families they want on the terms they prefer, family law should take an approach that embraces these differences. This means offering a broader range of family forms and allowing easy tailoring of commitments. For those older adults who do not want to marry but seek formal recognition of their relationships, family law should offer non-marital family forms for couples and groups through a readily accessible mechanism for opting into and tailoring mutual commitments. And for those who *do* want to marry, family law should also create a readily accessible mechanism for these couples to opt out of marital obligations and allow the couple to tailor their marriage in an age-relevant manner. This approach would better reflect the role relationships play in the last third of life and embrace the pluralism of relationships during old age.

Rather than a blinkered focus on the dependency of minor children, family law must recognize the significant dependency needs of older adults. This requires acknowledgment and support of the familial caregiving that plays a central role in the wellbeing of older people, and a recognition of the economic, physical, and emotional toll on familial caregivers. A core problem is the privatization of caregiving, although as we explain below, we are not optimistic about a sea change in this approach to dependency. And yet even within a libertarian paradigm, there is much more the state can and should do to support this caregiving and the caregivers.

In pursuing these goals, family law for the new old age should draw on three principles. The first is autonomy. This principle is especially important in regulation affecting the lives of older adults because as individuals age and become more vulnerable, the risk increases that others will assume they lack the capacity for self-determination.²³² Unless older adults lack the ability to live their lives

231. See *supra* text accompanying notes 59–61, 96–101, 132–134, 148–152.

232. See Boni-Saenz, *supra* note 1, at 526 (“Autonomy involves the individual’s ability to engage in self-authorship and self-determination. The definition of legal age implicates autonomy interests because the state helps define the range and content of available identity options while also legitimizing individuals’ identities through state recognition.” (footnote omitted)). The elder-law literature is replete with discussion of how to preserve the autonomy—and the related concept of dignity—of older people. See, e.g., Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1102–03 (2009) (discussing how elder-protection laws may undermine dignity and autonomy); Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1120–26 (2013) (addressing alternatives to guardianship).

according to their own values and preferences, they should not be more limited than other adults in their freedom to do so. Thus, a key premise of our reform framework is that older adults should be free to decide who will be part of their families, and they should have substantial freedom to tailor the terms of these family relationships.²³³ Moreover, older adults should be able to choose who will provide care and emotional support, whether it is a family member as traditionally defined or chosen family.²³⁴ Autonomy can involve opting out of obligations and opting in; our proposed legal reforms involve both, changing a person's map of obligations and legal ties to other people.

Equity is the second principle. As this Article has made clear, a lifetime of disadvantage profoundly burdens the health and wellbeing of some older adults.

233. For an example of discussion concerning the autonomy of older adults in tailoring their relationships, we can look to the lively scholarly debate over whether cohabitants should be subject to financial obligations to one another without choosing affirmatively to undertake them. Under the American Law Institute's (ALI's) *Principles of the Law of Family Dissolution: Analysis and Recommendations*, domestic partners are subject to the same spousal-support and property-sharing obligations as spouses, with limited ability to opt out, after living together for a designated period of time. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.05-.06 (AM. L. INST. 2002). Many scholars have criticized the ALI Principles as imposing obligations without consent. See, e.g., Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 819-26 (2005); Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 305 (Robin Fretwell Wilson ed., 2006); Scott, *supra* note 17, at 249-52 (criticizing the Principles as illiberal and unworkable); see also Eleanor Brown, Naomi Cahn & June Carbone, *The Price of Exit*, 99 WASH. U. L. REV. 1897, 1928 (2022) (arguing that "imposing . . . financial obligations arising from the fact of cohabitation" raises the barriers to leaving relationships, which restricts the autonomy of people cohabitating). An additional concern about imposing familial obligations without affirmative consent is that it risks replicating the history of southern states during Reconstruction declaring Black couples married and then using that status to control and punish Black individuals and families. See Lenhardt, *supra* note 101, at 1325-28 (describing this history).

234. The care given by adult children to their parents is, consequently, entirely different from the care provided by parents to their minor children. Older people are presumed to have legal capacity unless they are subject to a guardianship. See Nina A. Kohn, *The Lawyer's Role in Fostering an Elder Rights Movement*, 37 WM. MITCHELL L. REV. 49, 65 n.66 (2010) ("[T]he guardianship process is inherently rights limiting because imposition of guardianship prevents older adults from making all or certain decisions on their own behalf . . ."). By contrast, children are presumed to lack legal capacity. See Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 561 (2000).

Moreover, "parents have a constitutional liberty interest in the care and custody of their children that is protected under the Due Process Clause of the 14th Amendment." RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. I, ch. 1, intro. note (AM. L. INST., Tentative Draft No. 1, 2018). Adult children do not have such a liberty interest. Recognizing the caregiving provided by adult children for their parents does not, then, open the door to the argument that these adult children should also have more control over their parents' lives.

It follows that reforms to accommodate the needs and interests of older adults must address structures of inequity along the lines of race, income, gender, and sexual orientation. To do so, the law must acknowledge that the situations of older adults are diverse and shape rules and policies to mitigate – not reinforce – structural disadvantage.

The third principle is efficiency. Existing efforts to foster social connection and allow individuals to customize their family relationships have been ineffective, in large part because the available legal mechanisms are burdensome, time consuming, and costly.²³⁵ Reforms that aim to promote the interests of older adults will be successful only if they are readily available and low in cost.²³⁶ These attributes are also essential, of course, to advancing the principle of equity. Well-designed reforms in our framework aim to offer substantial benefits to older adults at a reasonable cost. Further, the principle of efficiency should also shape reforms that support family care. If family members need to navigate a complex bureaucracy to qualify for government support, many will be deterred.

A threshold question that must be addressed in formulating a reform agenda is which groups qualify as families. We are persuaded that a range of relationships grounded in mutual commitment and affection can fulfill the conventional functions of families for older adults, providing sustained social connections and the care and support needed in times of illness and disability.²³⁷ Any effort to define the category of family is bound to be under- and overinclusive, but in our view, family relationships generally are based on biological connection, legal relationship, functional roles,²³⁸ or on a serious commitment (explicit or implicit)

235. See *supra* text accompanying notes 202–208.

236. We recognize that any reform that relies on technology could create obstacles to lower-income people and some people of color. See Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption> [<https://perma.cc/2GRG-UU8Z>]; Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, PEW RSCH. CTR. (July 16, 2021), <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s> [<https://perma.cc/6HF9-HVAR>].

237. See *supra* Section I.A.3.

238. Legal parent-child relationships, for example, are formed through marriage, adoption, and functional parenting. See UNIFORM PARENTAGE ACT § 201 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017). But see Katharine K. Baker, *Equality and Family Autonomy*, 21 U. PA. J. CONST. L. 412, 415 (2022) (questioning the turn to legal recognition of functional family forms).

to provide mutual care, emotional support, and often financial sharing.²³⁹ The challenge is to provide older adults with choices that suit their needs and facilitate their ability to form families that are compatible with their expectations – and then to support those groups in fulfilling their critical function.

In the next Section, we propose reforms to family law doctrine and policy to make family law for the new old age a reality.

B. Practical Reforms: Family Formation

The core of our proposal for reforming family formation rules is to make it easier for older adults to tailor their family relationships. In this Section, we propose a new approach to family formation, identify open questions for lawmakers seeking to adopt these proposals, and address implementation challenges.

1. A New Approach to Family Formation

Family law should provide two alternatives for couples and groups to form and tailor legal relationships: “family-group registration” for couples and groups who do not want to marry, and a “marital menu” for couples who choose to marry but want to customize their commitments.²⁴⁰ Family-group registration would provide a readily available means for nonmarital couples and groups, both conjugal and nonconjugal, to opt into familial obligations. It would assist these couples and groups in formalizing expectations and choosing the obligations that suit their needs and preferences. The marital menu would serve as a streamlined substitute for a prenuptial agreement, providing an efficient mechanism for couples who choose to marry but want to opt out of some obligations and

²³⁹. This definition focuses on older adults’ family relationships. Of course, a de facto parent and minor child can have a functional family relationship based on the parent’s assumption of parental responsibilities. See UNIFORM PARENTAGE ACT § 201 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2017). While individuals in family groups formed by older adults often may not want to share income and property, they likely will share the costs of housing, food, and other household expenses. See Jennifer Molinsky, *Are More Older Adults Sharing Housing?*, JCHS (Aug. 20, 2018), <https://jchs.harvard.edu/blog/are-more-older-adults-sharing-housing> [<https://perma.cc/ATG2-667P>] (explaining that “‘home sharing’ among older adults has garnered increased attention . . . [and the data] suggest that this is as yet a small – but growing – phenomenon”). On issues involving single people, see generally Cahn, *supra* note 198. See also Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1368 (2015) (discussing single status).

²⁴⁰. For a description of the benefits of offering a range of relationship forms, see Aloni, *supra* note 39, at 599. For a proposal to recognize relationships based solely on emotional intimacy or sex, see generally Matsumura, *supra* note 189.

expectations that would otherwise flow from marriage.²⁴¹ It thus would offer an easy, simple way to customize marital rights and obligations.

Under this proposal, family-group registrants and marrying couples would be presented with clear options, but the options for each would differ because of the different contexts. Nonmarital groups and couples would not ordinarily have legal rights and obligations to each other, and thus they opt into these rights and duties by choosing from a list of options.²⁴² In contrast, a married couple ordinarily *does* have rights and obligations, and thus the function of the menu is to allow the couple to opt out of some of the legal consequences associated with marriage. As an example, the marital menu would include the option *not* to take an elective share in each other's estate, which would not be included in the options for family-group registration.

a. Registration of Family Groups: An Opt-In Mechanism

We propose a registration system that would allow nonmarital couples and other groups to undertake family commitments and tailor these commitments to their particular interests and needs.²⁴³ In this country, registration systems

241. Other scholars have proposed more limited options. For example, David Chambers suggests that

“designated friends” would obtain a limited number of privileges and undertake a limited number of responsibilities relating to the care for the other when ill or incapacitated or upon death but would not receive any of the governmental financial benefits or undertake any of the financial responsibilities that attach to marriage.

David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348 (2001); see also ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT 78-107 (2011) (proposing that friends can take medical leave to help each other, have standing to sue for wrongful death, be eligible for tax deductions for caregiving, and be treated as fiduciaries). But see Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 224 (2007) (critiquing this proposal as maintaining a family versus friends hierarchy that privileges family over friends).

242. In other words, it is only through the selection of specific rights and duties that individuals in nonmarital families assume rights and duties toward one another, whereas obtaining a marriage license alone carries an array of default rights and duties.

243. Other scholars have proposed registration systems that would facilitate family formation as alternatives to marriage; most have limited registration to cohabiting couples or other dyads. Erez Aloni has offered the most comprehensive proposal. See Aloni, *supra* note 39. Aloni proposed a model that he called registered contractual relationships (RCRs), unions similar to the French *Pacte Civil de Solidarité* (popularly known as PACS). Under his proposal, two individuals could execute a contract defining their obligations to one another and register the contract. A registered couple, under Aloni's model, would receive the government benefits of

were originally developed in conjunction with the fight for marriage equality.²⁴⁴ With the advent of national marriage equality, some of these laws have been repealed on the view that they represented a “marriage-lite” status;²⁴⁵ but such repeals deny the “radical potential” of these alternative systems.²⁴⁶ Registration systems can provide attractive alternatives to marriage, broadening options in a way that expands individual choice, promotes pluralism, and responds to the problem of “elder orphans.”²⁴⁷

marriage. *Id.* at 608-09. Aloni emphasized the importance of facilitating efficient contract formation and of making termination easier than divorce. *Id.* at 608-09, 611-12. William N. Eskridge, Jr., also proposed a registration model in which couples could choose from different relationship options that offered different levels of commitment, including domestic partnership, cohabitation, civil union, civil marriage, and covenant marriage. See William N. Eskridge, Jr., *A Liberal Vision of U.S. Family Law in 2020*, in *THE CONSTITUTION IN 2020*, at 245, 249-50 (Jack M. Balkin & Reva B. Siegel eds., 2009).

244. See, e.g., Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 111-54 (2014) (finding that advocates for domestic-partnership recognition in California ultimately aimed for marriage equality; these advocates argued, in part, that same-sex relationships were marriage-like and thus deserved recognition). But see Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 293 (2013) (“[F]or a constituency of unmarried gay and straight individuals, domestic partnership was an innovation – a paradigm shift in the legal understanding and recognition of intimate relationships and the conferral of public and private benefits.”).
245. See Matsumura, *supra* note 187; Carroll, *supra* note 173, at 500-02.
246. Murray, *supra* note 244, at 298. But see NeJaime, *supra* note 244, at 111-54 (detailing how marriage served as an “anchoring principle for domestic partnership [in California] in the 1980s and early 1990s”); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1773-74 (2005) (noting the confining nature of many domestic partnership regimes). Indeed, the debate around the original California domestic-partnership law was between those who “viewed domestic partnership as a way to move the legal status of same-sex couples incrementally closer to marriage,” and those who wanted to establish “a true alternative to marriage: ‘a kind of “family diversity model” that would create a system of legal protections that made sense for people who were not necessarily a romantic intimate couple.’” Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1258 (2010) (quoting Telephone Interview with Jon Davidson, Legal Dir., Lambda Legal (Feb. 17, 2010)).
247. For further discussion, see, for example, Murray, *supra* note 244, at 300, arguing that “domestic partnership was once an innovation that sought to challenge marriage’s primacy”; and Cummings & NeJaime, *supra* note 246, at 1256, stating that “[f]or many, the push for domestic partnership represented an effort to challenge the dominance of marriage by creating a range of relationship formats, with different rights and benefits attaching to each.” Elder orphans are those “without a partner, children, siblings or parents who are still alive.” Stern, *supra* note 100. Black women are approximately twice as likely as white women to fall into this category. *Id.* On the other hand, in jurisdictions where both marriage and these partnership systems are available, few people choose the latter. See Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1018 (2018) (noting that after marriage was opened to same-sex

Further, family-group registration will have an important expressive value. As noted above, some people cohabit instead of marrying because they do not want the cultural associations of marriage, especially the gendered caregiving expectation.²⁴⁸ Providing a formal legal status through family-group registration could be a step toward a new institution without these associations and expectations.²⁴⁹

For guidance on developing the registration option, we look to multiple sources, including existing registration systems.²⁵⁰ These typically focus on two individuals in a marital-type relationship, but some allow registration of non-conjugal relationships,²⁵¹ and a few allow more than two people to register.²⁵² In

couples in Hawaii “only 23 couples entered civil unions compared to the 22,820 who married”). True, the reason might be that the status is just marriage by another name, but the small number of people registering in Colorado as designated beneficiaries tends to disprove that. *See id.* (“Since Colorado created a designated beneficiary status in 2009 . . . only 672 couples in three populous counties registered as designated beneficiaries in comparison to the approximately 131,100 who married.”).

248. *See supra* text accompanying notes 79–83.

249. Institutions are a sociological phenomenon, and law plays a critical role in creating and reinforcing them. *See* Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 408–09, 422–29 (2022) (defining an institution and describing the role of the law).

250. We rely on jurisdictions that have adopted a variety of opt-in mechanisms allowing partners to register their relationships, *see infra* text accompanying notes 251–254, and scholars who have proposed such mechanisms. *See, e.g.,* Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families*, 25 MICH. J. GENDER & L. 161, 205–10 (2018) (describing one approach in Canada); Aloni, *supra* note 39, at 632–47 (describing the relationship-registration system in France—*Pacte Civil de Solidarité*—and its significant uptake); *see also* Chambers, *supra* note 241, at 1348–49 (discussing his “designated friends” proposal).

251. *See, e.g.,* HAW. REV. STAT. ANN. § 572C-4 (West 2022) (allowing for the registration of “reciprocal beneficiaries” for two people who are legally prohibited from marrying one another). The legislative findings mention the possibility of a “widowed mother and her unmarried son.” HAW. REV. STAT. ANN. § 572C-2 (West 2022). In Canada, conjugality is explicitly not a requirement. Rosenbury, *supra* note 241, at 221–22. In France, PACS “legal status . . . [is] available to any two people who share a home and wish to provide each other with mutual assistance and support.” *Id.* at 221.

252. CITY OF SOMERVILLE, MASS., ORDINANCE No. 2020-16, § 2-502(c) (defining “domestic partnership” as “the entity formed by people who meet the following criteria” which include, *inter alia*, being in a relationship of mutual support, caring and commitment and considering themselves to be a family, but do not include a maximum number of individuals); CITY OF CAMBRIDGE: AN ORDINANCE No. 2020-14 (Mar. 8, 2021), https://library.municode.com/ma/cambridge/ordinances/code_of_ordinances?nodeId=1072098 [<https://perma.cc/TRC3-FYJH>] (defining domestic partnerships); *see* Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html> [<https://perma.cc/9NY6-KHZV>] (noting that Cambridge may have been the first jurisdiction to include polyamorous relationships).

the United States, most jurisdictions offering these mechanisms establish a pre-set array of benefits and obligations.²⁵³ In Colorado, however, partners over the age of eighteen can choose to become “designated beneficiaries,” with each partner able to select from a list of possible rights and obligations.²⁵⁴

In light of the diverse interests of older adults, we strongly favor a registration system that allows partners to select the types of obligations to assume and benefits to confer on each other. This list of options would allow a couple or group to tailor their relationship as they see fit, making commitments around issues ranging from health-care surrogate decision-making to inheritance rights under state law.²⁵⁵

Our model can and should be available to unrelated nonconjugal, as well as conjugal, groups, and to nondyadic, as well as dyadic, groups.²⁵⁶ Today, these groups make up a less visible percentage of families formed by older adults than conjugal couples, but this seems likely to change, and the undertaking of mutual commitments promises to offer social, emotional, and financial benefits to family groups of all types.

Even if the couples or groups who want to form family relationships choose to undertake few explicit mutual obligations, substantial social and personal

253. Even the Cambridge ordinance, which permits those in polyamorous relationships to register as domestic partners, is targeted to intimate partners (without using that language) and establishes a set of rights without customization. *Policy Order POR 2020 #180*, CAMBRIDGE (Mar. 8, 2021, 5:30 PM), https://cambridgema.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2656&MediaPosition=&ID=12316 [<https://perma.cc/LS8J-HR5Q>].

254. See COLO. REV. STAT. § 15-22-105(3) (2022); see also COLO. REV. STAT. § 15-22-104(1)(a)(I) (2022) (establishing a minimum age to register as a designated beneficiary).

255. An alternative is a status-based approach, under which mutual obligations are imposed on individuals living together in a family relationship unless they opt out. The ALI’s *Principles of the Law of Family Dissolution* adopts such an approach. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (AM. L. INST. 2002); see also *supra* note 233 (discussing the debate over imposing financial obligations in the absence of affirmative choice). Two of the authors of this Article have critiqued the ALI’s approach to this issue. See, e.g., Scott, *supra* note 17, at 255–64 (arguing that obligations could be imposed in cohabitation relationships on the basis of implied contract, allowing couples to opt out by contract); Cahn & Carbone, *supra* note 44, at 1251–53 (discussing varying types of nonmarital relationships, noting that they do not fit within a “one-size-fits-all” model and thus rejecting a status-based regime). The authors of this Article agree that an opt-out regime would not be an effective approach to meeting the diverse family-formation preferences of older adults.

256. See Matsumura, *supra* note 189, at 1910–21 (describing the wide range of plural relationships and the need for the law to begin with the experiences of these families rather than try to fit these families within the structure of dyadic marriage).

benefits can follow from registering as a family.²⁵⁷ The ability to formalize intimate emotional bonds can have significant symbolic value and meaning, announcing and likely reinforcing a serious commitment to care for one another, even in the absence of legal obligations.²⁵⁸ Family relationships play a key role for individuals at all income levels in fulfilling emotional and social needs and avoiding isolation. Thus, for both conjugal and nonconjugal groups, registration of family relationships can offer substantial benefits, even with few legal rights and obligations.

An open question is whether and how family formation through registration affects family status in other areas of law. Specifically, the question is whether families formed by registration should receive any of the state or federal government benefits and burdens available to married couples or other family members. Registration by nonmarital couples and groups signals their intention to form families and gives family members the rights and obligations in relation to one another that they have selected from the list of options. But lawmakers will need to decide whether other legal changes follow from family registration, and they may be concerned about strategic registration by groups motivated primarily by the desire to obtain government benefits. Even when no strategic intent exists, a registered family that includes several members could absorb substantial resources if each member were entitled to government benefits that spouses enjoy.²⁵⁹

For these reasons, we predict that government actors adopting a registration system will proceed cautiously in extending benefits to groups that register as families – and this seems like the right approach. But family registration *should* trigger the forms of government recognition necessary for the group to function as a family. Thus, as discussed below,²⁶⁰ zoning regulation should define “family” broadly enough to accommodate new families created through registration, enabling the registered family to live in residential neighborhoods as other families do. Beyond this, regulators may determine that extending other benefits to

257. Even couples who do not want to share financial resources may share household expenses such as rent, groceries, utilities, and more. See Megan DeMatteo, *Sharing Is Caring: A Fintech Study Reveals How Couples Are Splitting the Bills*, CNBC SELECT (Feb. 12, 2021), <https://www.cnbc.com/select/how-to-split-household-bills> [https://perma.cc/KWJ7-5P5Y].

258. See Scott, *supra* note 17, at 242–43; Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941).

259. For example, it could be quite costly for each surviving family member in a larger family group to receive the equivalent of Social Security Administration spousal-survivor benefits.

260. See *infra* Section III.B.2.b.

these families enhances individual wellbeing and social welfare.²⁶¹ As we discuss below,²⁶² reforms that strengthen government support for families often should extend to all families. Thus, for example, family members in a registered family should qualify under the Family and Medical Leave Act.

A second open question is how family-group registration relates to marriage. Jurisdictions will need to decide whether a person can be married and in a registered family relationship. For example, an older adult whose spouse has advanced dementia may want to remain married to the spouse but to register a new family with a partner or group. Some jurisdictions may choose to allow such a person to remain married and also register a new relationship, reasoning that doing so better suits the needs and life situation of the older adult. By contrast, other jurisdictions may conclude that allowing both a marriage and a family registration dilutes the importance of marriage and raises too many questions about how to balance potentially conflicting obligations flowing from the marriage and the registration. There is some precedent for resolving this open question. In Colorado, for example, a person cannot be a spouse and a designated beneficiary simultaneously.²⁶³ The Uniform Law Commission, in its project on the economic rights of cohabitants, recognized that a “cohabitant” might be married to a third party, but provided options for states on how to balance the rights of a spouse and a cohabitant.²⁶⁴

A final open question is whether registration is open to all adults. While our reforms aim to support the interests of older adults, some, and perhaps all, forms of family-group registration should not be limited on this basis. Multigenerational family groups, by definition, are not limited to older adults. Further, we can think of no argument against allowing nonconjugal family groups that include younger adults to register. The registration of younger conjugal couples might raise concerns about diluting the importance of marriage, a concern we

261. For example, under the Colorado Designated Beneficiary Act, a locality could make municipal employee health or pension benefits available to designated beneficiaries if the employee so designates. See COLO. REV. STAT. § 15-22-105 (2017). If a jurisdiction adopted this provision under our proposal, and there was more than one family beneficiary, the benefit (analogous to a spousal benefit) would likely be divided among the employee’s family members.

262. See *infra* Section III.C.

263. COLO. REV. STAT. ANN. § 15-22-104 (West 2013) (requiring that reciprocal beneficiaries not be married to a third party, in a civil union, or in another reciprocal beneficiary agreement).

264. Nat’l Conf. of Comm’rs on Unif. State L., *Uniform Cohabitants’ Economic Remedies Act* § 2(1), UNIF. L. COMM’N (May 4, 2022), <https://www.uniformlaws.org/viewdocument/final-act-4?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5&tab=librarydocuments> [<https://perma.cc/W3FP-CARG>] (requiring that cohabitants not be married to one another); *id.* § 8(c) (providing options for cohabitants married to a third party).

anticipate might be raised against allowing younger couples to tailor marriage.²⁶⁵

b. Tailoring Marriage: An Opt-Out Mechanism

We also propose a “marital menu” for couples who choose to marry but do not want to assume the array of default obligations that follow from legal marriage under current law. As we have explained, many older couples considering marriage may wish to avoid the financial interdependence that follows, including the sharing of marital property, potential liability for spousal support on divorce, and spousal inheritance rights that might preempt children from inheritance; they may also want a child (or other person) to serve as a surrogate medical decision maker. If these couples could easily choose their desired options when they obtain a marriage license, they could tailor their marriage to a form that many older adults will find more suitable to their stage in life and do so with minimal effort and expense. A menu of options available to couples entering marriage provides the means to achieve this goal.

This proposal to provide older adults with an efficient means of tailoring marital obligations is not intended to create an alternative marital status – what might be called “silver marriage.” Couples today can tailor their marital expectations by executing contracts opting out of the default financial obligations of marriage and of mutual inheritance rights.²⁶⁶ They can also execute health-care proxies designating a non-spouse as a surrogate decision maker.²⁶⁷ But such tailoring is cumbersome and costly because it often requires the services of an attorney. The menu of options we propose offers an efficient means for these couples to attain their desires for family formation without undertaking a substantial burden. In short, it will function as a streamlined substitute for a prenuptial agreement, allowing marriage to become a realistic option for those without the resources to execute such agreements.

A couple who selects terms from the menu of options limiting financial interdependence is a married couple, just as a couple who executes a prenuptial agreement is a married couple. Thus, married couples who take advantage of the

²⁶⁵. See *infra* text accompanying notes 269–274.

²⁶⁶. See *supra* text accompanying notes 202–207. Parties can make choices for customizing marital obligations and incidents at the outset of marriage, but also at a later time. Nat’l Conf. of Comm’rs on Unif. State L., *Uniform Premarital and Marital Agreements Act*, UNIF. L. COMM’N (Jan. 2, 2013), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f5d36125-9433-c7d8-28ec-6244f4a316e6&forceDialog=0> [<https://perma.cc/CBY9-YNLX>].

²⁶⁷. See *supra* note 205.

opt-out mechanism should not be legally differentiated from other spouses, other than in the customized terms to which they have agreed.²⁶⁸

An open question for lawmakers is whether the mechanism we propose for customizing marriage terms should be limited to older adults or open to all couples who wish to marry, regardless of age.²⁶⁹ Discrimination against older adults based on age is far from eradicated,²⁷⁰ and any age-based classification requires justification.²⁷¹ Advocates for age equity may argue there is no rationale for limiting the opt-out menu to older adults.²⁷² Couples of all ages can execute premarital agreements, and our menu is simply an efficient way of allowing couples to accomplish the same goal, regardless of age. Other couples, regardless of age, might thus benefit from – and prefer – the marital menu.

On the other hand, those who favor restricting the customized marriage option to older adults may offer two counterarguments. First, as we have explained, the financial commitments of marriage serve to protect children, as well as parents of minor children who are financially vulnerable due to their childrearing role. A readily available alternative status with reduced financial interdependence between spouses could erode these protections in ways that younger adults entering marriage may not consider. And even though these younger couples, in theory, could execute prenuptial agreements, few will opt to do this. The second argument is more abstract. Marital status signals a family relationship of serious

268. “Covenant marriage” has also been termed a “customized marriage” for allowing couples to opt into a divorce-restricted marriage. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 935 (2000). Our proposal differs in that it allows customizable options and is designed to expand marital choices.

269. This question is less relevant to family-group registration; indeed, some family groups, such as multigenerational families, by definition, will include younger persons.

270. See, e.g., Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 2018), <https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment> [https://perma.cc/8TYL-42HB]. Approximately 13,000 age-discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC) in 2021. *Age Discrimination in Employment Act (Charges Filed with EEOC) (Includes Concurrent Charges with Title VII, ADA, EPA, and GINA) FY 1997 - FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/age-discrimination-employment-act-charges-filed-eeoc-includes-concurrent-charges-title> [https://perma.cc/K2H9-6EV5].

271. Age-based discrimination is, however, subject to the rational-basis standard, which means many age-based laws are found permissible. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976); see also Alexander A. Boni-Saenz, *Age Diversity*, 94 S. CAL. L. REV. 303, 341-43 (2021) (discussing different forms of age-based discrimination and how they have been construed as “rational and not arbitrary” to pass rational-basis review).

272. One such argument may focus on the complexities of measuring age. See Boni-Saenz, *supra* note 1, at 523-24.

and lasting commitment, in part because the parties mutually commit to financial interdependence. This signal and the meaning of marriage as a secure setting for raising children could be diluted if couples of all ages can readily opt for a relationship of minimal financial commitment.²⁷³ On this view, limiting marriage reform to older adults, whose interests and needs differ from younger couples, reduces the risk of eroding the meaning of marriage. To be sure, our proposal to offer formal alternatives to marriage, both marital and nonmarital, is likely to be criticized on the ground that it devalues and erodes the meaning of marriage. But if the marital menu is reserved for older adults, with their distinctive needs and preferences, its impact is cabined and is less likely to dilute the meaning of marriage.²⁷⁴

This Article does not take a position on whether customized marriage should be open to all adults. It seems likely that states that adopt our streamlined opt-out reform for marriage will vary as to whether this option is open to all couples or only to older adults. This response would mirror that of jurisdictions adopting domestic-partnership laws. While domestic-partnership registration was available to all same-sex couples in the jurisdictions that enacted these laws, some laws allowed different-sex couples generally to register, while others restricted the latter group to older adults.²⁷⁵

273. See Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 WM. & MARY L. REV. 453, 494-504 (2019); Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 546-47 (2007); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1952-59 (2000).

274. As we indicate above, our goal is not to create an alternative marital status. An option reserved for older adults will be perceived as a separate “silver marriage” status.

275. California’s initial statewide domestic-partnership law permitted same-sex couples and different-sex couples who were over sixty-two to register. Murray, *supra* note 244, at 297. California’s age limit for different-sex couples was in part to protect “older couples wary of losing their Social Security benefits,” *id.* at 297-98, but the policy choice was also political. There was an effort to include all couples, but the Governor was concerned about the perception that the bill would undermine marriage. Consequently, the bill was modified to cover only older, different-sex couples, “contending that there was no procreation argument in favor of their marriages,” which “provided a new political constituency to support the bill and ‘gave politicians cover’ by linking the bill to an uncontroversial population.” Cummings & NeJaime, *supra* note 246, at 1259 (citation omitted). When California expanded eligibility to include younger different-sex couples, *see supra* note 187, this change brought a substantial increase in domestic-partnership registrations, *see* Emily Zentner, *I Do: California Domestic Partnerships Surge After More Opposite-Sex Couples Allowed to File*, CAPRADIO (Sept. 22, 2020), <https://www.caprдио.org/articles/2020/09/22/i-do-california-domestic-partnerships-surge-after-more-opposite-sex-couples-allowed-to-file> [<https://perma.cc/3ELS-WWT4>].

Before New Jersey allowed same-sex couples to marry, the state restricted domestic partnerships to same-sex couples and different-sex couples who were sixty-two or older. The Civil

2. *Implementation Issues*

Allowing nonmarital couples and other groups to register their relationships and all couples and groups to tailor their family commitments is an efficient means of facilitating family formation for older adults, but implementation of this reform is likely to pose challenges. We address some of these challenges in this Section, leaving other practical implementation issues to future work.

a. *Knowledge and Access*

Experience shows that few parties avail themselves of contractual means of customizing expectations in either marital or nonmarital relationships. This may be due to the expense and time required, as well as to a lack of awareness that formal clarification could be useful. For our proposed reforms to be successful, the registration regime must be accessible, inexpensive, and familiar to older adults. A registration system with tailored options will not be useful if few people are aware of it or if the process is viewed as too complex or confusing. And safeguards must exist to ensure that family members understand the commitments they are making.

Integrating the broad family-registration regime into the existing bureaucratic system of marriage licensure might be the simplest and most effective means of operationalizing the reform. Every state has a licensing system in place that all couples entering marriage can use and that can provide the apparatus for allowing both married couples and other family groups to register and tailor their relationships.²⁷⁶

To make older adults aware of the options for family formation, informational material can be available in physicians' offices, Social Security offices, senior centers, and other locations frequented by older adults. Information could

Union Act, 2006 N.J. Laws C.103 (codified at N.J. STAT. ANN. § 26:8A-4.1 (West 2007)) (limiting domestic partnerships to couples if “[b]oth persons are of the same sex and therefore unable to enter into a marriage with each other that is recognized by New Jersey law, except that two persons who are each 62 years of age or older and not of the same sex may establish a domestic partnership”). New Jersey now limits new domestic partnerships to people aged sixty-two and older. N.J. STAT. ANN. § 26:8A-4.1 (West 2022). The Virgin Islands created a status, vesper marriage, limited to adults aged sixty and older. Vesper marriage creates no property or inheritance rights. V.I. CODE ANN. tit. 16, § 81 (West 2022). It was originally passed in 1981 and is available only for different-sex couples.

276. For an example of a marriage licensing system, see *Marriage License Information*, CITY OF CHARLOTTESVILLE, <https://www.charlottesville.gov/177/Marriage-License-Information> [<https://perma.cc/66YX-JKZD>].

also be distributed with Medicare forms and in periodicals that target older adults, such as AARP publications.²⁷⁷

A registration system risks replicating rather than reducing inequity because lower-income couples are already less likely to formalize their relationships.²⁷⁸ For this reason, it is critical that the system is easily accessible, and that registration is inexpensive and appropriately publicized to couples and groups across the income spectrum. Providing information and access in key locations and through channels likely to reach lower-income individuals is one means of assuring widespread awareness of opportunities for family formation. These channels could include disseminating information through communities of faith and in social-welfare offices where seniors seek benefits such as food stamps.

The list of options concerning the terms of family relationships must also be clear and straightforward, so that individuals can execute their wishes without consulting attorneys. This will require simplification, which likely means that the standard list of options will be limited to a finite number of clearly explained choices, with fine-tuned customization requiring individual opting out.²⁷⁹

As these implementation suggestions make clear, there is a tension between two important goals. The first is to make the options from which individuals choose the terms of family commitment easily available, accessible, and tailored to parties' needs. The second is to assure that these decisions, which may have important consequences, are made with deliberation on the basis of adequate information. The latter goal requires that older adults deciding to form new families and to clarify relationships with adult children have a clear understanding of the obligations they are undertaking and relinquishing. Too much complexity—and too many terms from which to choose—may be confusing, but oversimplification of terms may be misleading.

There are several ways to address these competing interests. One potential approach is to provide that other formally executed legal documents, such as

277. Cf. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 920–32 (2013) (suggesting that an optional form for do-it-yourself wills be appended to state income tax forms).

278. See *supra* text accompanying notes 96–99. We note that one reader suggested that the registration system could reduce inequity, because the availability of registration for nonmarital groups dilutes the privileging of marriage.

279. Numerous scholars have proposed simplifying options for statuses so more people are able to understand the statuses in general and differences between statuses. See, e.g., Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 722–24 (2021) (“[A] proliferation of statuses . . . can be cognitively taxing, and may impair choice by making it too difficult to comprehend the various options. Even if the number of options does not rise to the level of cognitive overload, the presence of multiple statuses poses . . . [the risk] that people (including the parties to the relationship as well as third parties) will not understand the differences between the options or will manipulate the boundaries between them.”).

wills, contracts, and health-care directives, override choices made in the family-registration process.²⁸⁰ These documents are usually executed with the assistance of an attorney, who can provide advice and guidance and encourage deliberation. Widely available informational material can also improve informed decision-making. Further, a brief waiting period between the receipt and submission of forms will allow parties to discuss their decisions prior to making a commitment. Finally, exit costs should be low, as compared to the costs of the divorce process. Dissolution should not involve a court process or attorneys.²⁸¹

b. Zoning

A second implementation challenge is ensuring that nonmarital groups are able to live in residential neighborhoods. As explained earlier, many zoning ordinances define family narrowly, by strictly limiting the number of adults allowed to live in a residential zone. These ordinances may impede the efforts of nondyadic groups of older adults to form families of choice. It is critical, then, to reform zoning laws that apply a restrictive definition of families in designating residential neighborhoods.

Court decisions recognizing larger and less traditional groups as families under local-zoning ordinances provide a model for a definition that accommodates the diverse preferences of older adults.²⁸² The New Jersey Supreme Court struck down as unconstitutional a zoning ordinance that narrowly defined family to strictly limit unrelated adults from establishing a household; the court recognized as a family a married couple, an unmarried woman, and their respective

280. This is the approach of a Colorado statute. COLO. REV. STAT. ANN. § 15-22-108 (West 2022). In Washington state, a later will can revoke some will substitute designations under a “super-will” statute. WASH. REV. CODE ANN. § 11.11.020 (West 2006); see RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 7.2 cmt. e (AM. L. INST. 2003); Cynthia J. Artura, *Super-will to the Rescue? How Washington’s Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 WASH. L. REV. 799, 799 (1999). Other jurisdictions might make different choices, allowing the registration to override prior designations and recognize only subsequent formally executed documents.

281. Colorado requires no court proceeding to revoke a designated-beneficiary agreement. COLO. REV. STAT. ANN. § 15-22-111 (West 2022) (“A designated beneficiary agreement that has been recorded with a county clerk and recorder may be unilaterally revoked by either party to the agreement by recording a revocation with the clerk and recorder of the county in which the agreement was recorded.”); see also Aloni, *supra* note 39, at 608 (arguing that the termination of registered contractual relationships should require little formality).

282. See, e.g., *City of Santa Barbara v. Adamson*, 610 P.2d 436, 442 (Cal. 1980) (finding that a zoning ordinance’s definition of family—which distinguished between groups of people related by blood, marriage, or adoption and other groups—violates the California Constitution).

children, who lived together as brother and sisters.²⁸³ This court later found ten college students to be a family under an ordinance defining family as “persons . . . living together as a stable and permanent living unit, being a traditional family unit or the functional equivalency thereof.”²⁸⁴ The court interpreted the definition of family capaciously to include families of choice that older adults might seek to create.

C. *Practical Reforms: Supporting Family Caregiving*

Many scholars and advocates have argued convincingly that the state should assume far greater responsibility for the dependency needs of children, older adults, and disabled persons.²⁸⁵ We support this reform agenda but are not optimistic that a sea change in our political economy is likely in the near future. In the meantime, there is much more that family law can and should do to help family members provide older adults care, emotional support, and social connections in the last third of life.

A key goal of our reform proposal is to challenge squarely the presumption that family caregiving is provided gratuitously and with little effort, a presumption that pervades family law and related doctrines.²⁸⁶ Family law that is responsive to the needs of older adults requires acknowledging and alleviating the care burden that family members carry. The goal is not to monetize all intrafamilial

²⁸³. *State v. Baker*, 405 A.2d 368, 375 (N.J. 1979).

²⁸⁴. *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 894 (N.J. 1990) (quoting *GLASSBORO, N.J.*, CODE § 107-3 (1986)). The court observed that for a group of unrelated persons to constitute a single family, it “must exhibit a kind of stability, permanency and functional lifestyle which is equivalent to that of the traditional family unit.” *Id.* at 894 (quoting *Open Door Alcoholism Program, Inc. v. Bd. of Adjustment*, 491 A.2d 17, 22 (N.J. Super. Ct. App. Div. 1985)). The group of students in question ate together, shared expenses and chores, and planned to stay together through college. *Id.* at 894.

²⁸⁵. See, e.g., EICHNER, *supra* note 22, at 40-42 (explaining how the U.S. government fails to adequately support those caring for children); see generally AI-JEN POO & ARIANE CONRAD, *THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA* (2015) (calling for improved public-policy support for caregivers and caretaking).

²⁸⁶. See, e.g., Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 85 (2021); Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2025 (2018); Kohn, *supra* note 216, at 213; see also Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. STATE L.J. 1325, 1365-66 (2019) (explaining that a Pennsylvania court’s decision rested on a presumption of altruism, rather than economic advantage, in intimate relationships); Reva B. Siegel, *Critical Legal Histories and Law’s (In)determinacy*, 70 STAN. L. REV. 1673, 1676 (2018) (describing the shift from contract-based to altruism-based rationales for judicial rejection of marital contracts). Most of the scholarship within family law on this issue looks at adult intimate relationships, while elder-law scholarship is more likely to focus on children and other nonintimate partners.

care but to recognize its utility and impact. Many of our proposed reforms are relatively small changes, but taken together, our reform agenda can undermine, and perhaps reverse, the presumption that intrafamilial care is provided gratuitously. These changes also recognize the emotional, economic, and physical burden of such care; to the extent they foster such care, they provide benefits—literally—to the caregiver but can also promote the flourishing of older adults.

What follows is not a comprehensive list of potential reforms but instead examples of future directions that acknowledge and seek to alleviate the burden on family members of providing what has typically been unpaid (and fiscally unrecognized) caregiving.²⁸⁷ After addressing reforms that would improve the current system within our libertarian framework, we turn briefly to more visionary reforms that move beyond the privatization of dependency.

1. *Working Within the Libertarian Paradigm*

Some reforms center on revising how federal law accounts for caregiving, including revisions to Social Security, tax, and Family and Medical Leave Act coverage. Beginning with changes to Social Security, a fairly straightforward reform responds to the situation of a caregiver who leaves the paid labor force to provide unpaid care and then stops accumulating any Social Security credits because their care work is outside of the paid workforce. Proposed federal legislation, which we endorse, would treat familial caregiving as work for purposes of Social Security benefits, so long as the caregiver spends at least eighty hours a month providing care.²⁸⁸ With the average familial caregiver providing seventy-seven hours of care a month,²⁸⁹ this amendment would cover many adults.

²⁸⁷ Given the substantial overlap in child- and older-adult-dependency care, many of the current and proposed treatments are the same in each context.

²⁸⁸ See, e.g., Social Security Caregiver Credit Act of 2021, S. 1955, 117th Cong. (2021) (allowing a Social Security credit to be added to a worker's total career earnings and used to calculate future Social Security benefits for caregivers who spend at least eighty hours per month providing care); Cahn, *supra* note 11, at 82; see also Dina Bakst & Phoebe Taubman, *From the Great Depression to the Great Recession: Advancing Women's Economic Security Through Tough Economic Times and Beyond*, 32 WOMEN'S RTS. L. REP. 25, 28 (2010) (discussing the 2009 version of the Act); Hofri-Winogradow & Kaplan, *supra* note 286, at 2018 (noting that the idea of such legislation had been proposed in 2002); Amy Zietlow & Naomi Cahn, *The Honor Commandment: Law, Religion, and the Challenge of Elder Care*, 30 J.L. & RELIGION 229, 255 (2015) (addressing the 2014 introduction of the Act); Michelle Cottle, Opinion, *Who Will Take Care of America's Caregivers*, N.Y. TIMES, Aug. 12, 2021, <https://www.nytimes.com/2021/08/12/opinion/caretakers-elderly-home-health-aides.html> [<https://perma.cc/N6CE-X5GL>] (mentioning the Social Security Caregiver Credit Act).

²⁸⁹ See *supra* note 23 and accompanying text.

Second, there are many ways that the tax system can better support familial caregiving, regardless of whether the caregiver is in the workforce. As described above, taxpayers are entitled to claim a qualifying older relative as a dependent, even if they do not live in the same household, but there are stringent income and support requirements.²⁹⁰ Relaxing these requirements would make this benefit available to many more families. Proposals for additional support include a federal tax credit for expenditures by eligible working family caregivers and more robust tax support for family care.²⁹¹ One concrete proposal of this nature is the Credit for Caring Act, which Congress has repeatedly considered; this law would allow working caregivers a limited credit to reimburse eligible expenses incurred on behalf of a long-term care recipient.²⁹² Such a credit would offer useful support, although only financial expenditures, and not labor or lost wages, would count towards receipt of the credit.²⁹³

Finally, the Family and Medical Leave Act (FMLA) could be amended to provide better support for familial caregivers. The law currently allows an eligible

290. I.R.C. § 152 (2018); *see also* Ferrara, *supra* note 213, at 839-40 (discussing the conditions under which a taxpayer can claim a dependent tax credit for an adult relative, such as limits on income for the dependent).

291. For example, employers could receive tax incentives to provide adult day care centers. Donna Harkness, *What Are Families for? Re-Evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 341 (2013). On the limitations of the current tax system in accounting for caregiving, such as through requirements that a deduction for medical expenses is permissible only where those expenditures exceed 7.5% of the taxpayer's adjusted gross income, *see* Kaplan, *supra* note 221, at 543-51.

292. *See* Credit for Caring Act of 2019, H.R. 2730, 116th Cong. (2019); Credit for Caring Act of 2021, S. 1670, 117th Cong. (2021); Nancy Kerr, *Credit for Caring Act Would Provide Tax Credit to Family Caregivers*, AARP (July 15, 2021), <https://www.aarp.org/caregiving/financial-legal/info-2021/new-credit-for-caring-act.html> [<https://perma.cc/HFR2-7ZNA>]; Cottle, *supra* note 288. Eligible family caregivers who work would receive a thirty percent credit for qualified expenses, such as human assistance, home modifications, and health monitoring, that they paid if the expenses total above \$2,000. S. 1670. On average, American family caregivers pay more than \$7,200 per year in out-of-pocket expenses, which is more than a quarter of the income of a typical caregiver. This impacts people differently by race, as "Hispanic/Latino caregivers spend 47 percent of their income on caregiving on average, and African Americans spend 34 percent." Nancy LeaMond, *Caregiving Impacts Every Family in All Walks of Life*, AARP (Aug. 6, 2021), <https://www.aarp.org/caregiving/financial-legal/info-2021/nancy-leamond-credit-for-caring-act.html> [<https://perma.cc/5HAX-RACU>]. The credit could be phased out as the caregiver's income increases.

293. *See* S. 1670 (authorizing reimbursement for qualified expenses but not making lost wages reimbursable). Accordingly, the credit is somewhat limited in that it would not account for wages for unpaid leave to provide care and would focus only on expenditures for the care recipient.

spouse or adult child to take up to twelve weeks of unpaid leave to care for someone with a “serious health condition.”²⁹⁴ The FMLA could be expanded in several ways to provide broader support for family caregiving. First, because the leave is unpaid, a caregiver would be taking unpaid leave to do an unpaid job;²⁹⁵ the benefit to caregivers of the leave would be greatly increased if the leave were paid. Second, instead of the current coverage of employers with fifty employees or more,²⁹⁶ smaller employers could be required to provide leave.²⁹⁷ Third, while a “serious health condition” allows a caregiver to take leave for inpatient care or continuing treatment, it does not include less serious illnesses, such as the flu;²⁹⁸ expanding the term would allow leave for additional health conditions. Coverage could also include other types of care-related work provided by family members, such as assisting a parent’s transition into a rehabilitation or assisted living center,²⁹⁹ and doing “life admin,” the often overwhelming office-type work that is an inevitable part of eldercare.³⁰⁰ Finally, coverage could extend to care for parents-in-law, as well as care by long-term nonmarital partners, grandchildren,

294. 29 U.S.C. §§ 2611, 2612(a)(1) (2018). Although the serious-health-condition requirement places a potentially onerous condition on being able to use this benefit, “various of the illnesses that often accompany aging—such as Alzheimer’s disease, strokes, diabetes, arthritis and heart disease—readily fit within the meaning of a serious health condition.” Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 385 (2004) (footnotes omitted). While eldercare was a key motivation for enacting the Family and Medical Leave Act (FMLA), eldercare is the basis for less than twenty percent of all leaves. See Cahn, *supra* note 11, at 77.

295. See Charles P. Sabatino, *Into the Matrix of Law and Caregiving*, 37 BIFOCAL 96, 102 (2016); Weaver, *Grandma in the White House*, *supra* note 11, at 42 (advocating expansion of FMLA).

296. 29 U.S.C. § 2611(4)(A)(i) (2021). Another eligibility issue is that the employee must have worked for the employer for at least twelve months and a minimum of 1,250 hours over the previous twelve-month period. See *id.* § 2611(2)(A).

297. As of January 1, 2022, California includes employers with five or more employees. CAL. GOV’T CODE § 12945.2(b)(3)(A) (West 2021).

298. 29 C.F.R. § 825.113 (a)-(d) (2021).

299. The definition of serious health condition would not cover such events. See *id.* While some employees might have access to sick leave, employers can decide whether that leave includes care for other family members. Widiss, *supra* note 156, at 225; *What’s the Difference? Paid Sick Leave, FMLA, and Paid Family and Medical Leave*, U.S. DEP’T OF LABOR (Sept. 2016), <https://www.dol.gov/sites/dolgov/files/oasp/legacy/files/paidleavefinalrulecomparison.pdf> [<https://perma.cc/8W64-6FVS>] (setting out differences between paid sick leave, FMLA leave, and paid family and medical leave).

300. See EMENS, *supra* note 129, at 68-69; Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2331, 2376 (2021); Mary Anne Case, *When Someday Is Today: Carrying Forward the History of Old Age and Inheritance into the Age of Medicaid*, 40 LAW & SOC. INQUIRY 499, 502 n.4 (2015) (“[E]lders who may now be able to hire someone on their own or the government’s dime to perform bodily care services still may need to depend

siblings, or registered family members – all of whom regularly serve as caregivers for older adults.³⁰¹

States are beginning to undertake such reforms, providing not just paid leave but also expanding leave eligibility to additional individuals and for additional reasons. Some states include not just caregivers who are related to the person “by blood or affinity” but also caregivers for whom the dependent relies upon for care.³⁰² Importantly, these new definitions are not tied to traditional definitions of family and thus address the problem of supporting care only by legally recognized family members;³⁰³ registered family members under our proposal could qualify. Finally, yet another way to support care is to ensure that employees do not face discrimination because of their familial-care responsibilities.³⁰⁴

Beyond these changes to federal law, we also support reforms that more directly allow most people to satisfy their preference to age in place.³⁰⁵ This requires substantial assistance for both the older adult and the caregiver: support for the older person, for example, through grant programs that help retrofit homes with grab bars and other aids³⁰⁶ and expanded support for the caregiver through the means identified in this Section. It also includes changes to zoning

on a trusted family member or friend for what Liz Emens calls ‘relational admin.’”). Elizabeth F. Emens cites a case in which a court decided that leave to find more appropriate daycare for an autistic child could be authorized under the FMLA. See Emens, *supra*, at 2376.

301. See Sabatino, *supra* note 295, at 102–03; Weaver, *Grandma in the White House*, *supra* note 11, at 37 (noting that, unless a grandparent stood *in loco parentis* to a grandchild, neither would be eligible for FMLA leave).

302. Widiss, *supra* note 156, at 233–34 (describing the recent laws that recognize “chosen family” in addition to family members related by blood or affinity). For example, in the third category, Rhode Island allows leave for a “care recipient,” defined as “a person for whom the employee is responsible for providing or arranging health- or safety-related care, including, but not limited to, helping the person obtain diagnostic, preventive, routine, or therapeutic health treatment or ensuring the person is safe following domestic violence, sexual assault, or stalking.” 28 R.I. GEN. LAWS ANN. § 28-57-3(1) (West 2022).

303. See Widiss, *supra* note 156, at 216–17, 221–23 (describing the limitations of leave laws that cover care only for family members related by blood or affinity; further describing the diversity of caregiving relationships—especially among lower-income families, families of color, and LGBTQ families—which often extend beyond legally recognized family relationships).

304. Because workers caring for older people may face disparate employment treatment, incentives could be “given to encourage adoption by employers of the U.S. Equal Employment Opportunity Commission’s Best Practices for Workers with Caregiving Responsibilities.” Harkness, *supra* note 291, at 342; see U.S. EQUAL EMP. OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007).

305. *E.g.*, Kaul, *supra* note 139.

306. Press Release, U.S. Dep’t of Hous. & Urb. Dev., HUD Awards \$30 Million to Help Low-Income Elderly Homeowners Age in Place (Aug. 6, 2021), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_119 [<https://perma.cc/P9T4-AYV8>].

laws that prohibit “in-law” apartments. In some localities, zoning ordinances have been reformed to make it easier for families to build or renovate their homes so older adults can live with their adult children.³⁰⁷ These living arrangements may be optimal for some multigenerational households, preserving the privacy and autonomy of older adults while allowing them to live with adult children or other caregiving family members.

Facilitating intrafamily care contracts is another core goal of reform. As discussed earlier, when individuals contract with a family member to provide care, the amount paid must be pursuant to a written contract, at fair market value, if the payor seeks to qualify for Medicaid.³⁰⁸ These requirements are reasonable, but states should not—as many do—also subject the contracts to a rebuttable presumption that they are made for the purpose of Medicaid fraud.³⁰⁹ Instead, if the requirements are met, courts and administrative agencies should presume that such contracts are legitimate. Avoiding special scrutiny in the Medicaid context would mean that all intrafamily contracts are treated the same, a response that would support the care provided by lower-income families.

While not an exhaustive overview of all potential solutions within the existing libertarian paradigm, this Section offers promising reforms to better support familial caretaking.³¹⁰ It does not address, and we do not endorse, some of the

307. See Prevost, *supra* note 227; Conor Dougherty, *It's Been a Home for Decades, but Legal Only a Few Months*, N.Y. TIMES (Dec. 18, 2021), <https://www.nytimes.com/2021/12/18/business/economy/california-housing.html> [<https://perma.cc/P6G5-PFKJ>] (“[T]he [California] state legislature has spent the past five years passing a flurry of new laws designed to increase density and speed the pace of new construction. They’ve vastly lowered regulatory barriers that prevented backyard homes and essentially ended single-family zoning with legislation that allows duplexes in most neighborhoods across the state.”); Plan. & Dev. Servs., *Accessory Dwelling Units Code Amendment*, CITY TUCSON, <https://www.tucsonaz.gov/pdsd/accessory-dwelling-units-code-amendment> [<https://perma.cc/6AJX-U2VC>] (noting that the city government adopted a reform to allow accessory dwelling units to “[s]upport multi-generational households and living arrangements”); see also Weaver, *Grandma in the White House*, *supra* note 11, at 59–60 (describing the benefits of accessory dwelling units).

308. See *supra* text accompanying notes 219–223.

309. See *supra* text accompanying notes 221–222.

310. For example, we contend that existing laws on elder abuse—which apply to both family and nonfamily members and set a floor of acceptable behavior—should continue to be enforced. E.g., CONN. GEN. STAT. § 53a-59a (2011).

One form of elder abuse law applies to reporting requirements: specific individuals must report specific forms of mistreatment. These reports are typically owed to the state’s adult protective services unit. A second type of law imposes civil sanctions or punishment on those—not just family members—who mistreat older people.

Zietlow & Cahn, *supra* note 288, at 253–54 (discussing various forms of elder abuse laws); see also Ben Chen, *Elder Financial Abuse: Capacity Law and Economics*, 106 CORNELL L. REV. 1457,

more problematic solutions, such as filial-responsibility laws, which impose a duty on adult children to support their parents.³¹¹ Even though they are largely unenforced, these laws serve an expressive function, underscoring the expectation of the privatization of dependency, a problematic premise.

Adult children *are* supporting their parents through their unpaid caregiving. Additional support for caregiving within the family will help mitigate the inevitable stress that this role entails, stress that increases the cost to caregivers and ultimately can undermine the care that older adults receive. The wellbeing of older adults depends on reforming our law and recognizing the important role that family caregivers fulfill.

2. *Moving Beyond the Privatization of Dependency*

Even with all these family-supportive reforms, care remains privatized, with the responsibility falling on families to cobble together arrangements and apply for eligible programs on their own. The state could simultaneously support families and improve care through much broader and visionary programs.

A first step would be to expand Medicaid coverage for in-home care, a reform that would facilitate aging in place, while mitigating the burden on family members. States are required to provide institutional care for those who satisfy Medicaid's stringent income and resource limitations, but states are not required to

1465-66 (2021) (addressing economic abuse of older people, including by family members); David Horton & Reid Kress Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. 561, 584 (2021) (discussing the magnitude of maltreatment and criminal abuse statutes); Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 2 (2012) (arguing that criminalization, while necessary, must ensure that it does not oppress victims, perpetuate negative stereotypes about older people, or erase the necessity of victim services). Caregiving stress likely contributes to elder abuse, a serious, ongoing problem in this country that is most commonly perpetuated by family members. See, e.g., Taylor Jillian Altman, Note, *A Crime at Any Age: Intimate Partner Abuse in Later Life*, 105 CALIF. L. REV. 1543, 1549 (2017). Approximately ten percent of all older people have been victims of elder abuses, sixty percent of which is perpetrated by family members. *Get the Facts on Elder Abuse*, *supra* note 230.

311. "Filial responsibility laws, which create the duty for adult children to support their parents, are rarely enforced when compared to other family-relation laws establishing the duty for spouses to support each other and for parents to support their minor children." Karen L. Sheng, Note, *Kinder Solutions to an Unkind Approach: Supporting Impoverished and Ill Parents Under North Carolina's Filial Responsibility Law*, 71 DUKE L.J. 209, 212 (2021). Such laws "are a relic of a bygone era with lower health-care costs, shorter life expectancies, and greater reliance on criminal law, rather than family law, to serve an expressive value and channeling function." *Id.* at 234. On the other hand, they are alive and enforced in China. Bruton, *supra* note 176, at 17-18.

offer home and community-based services (HCBS) to all who qualify,³¹² even though these services may be critical to allowing older adults to stay in their homes without overly burdening family members. HCBS generally are more cost effective,³¹³ and they are available in some states,³¹⁴ but supply falls far short of demand.³¹⁵ Moreover, HCBS can be offered only if a state receives a “waiver,” and eligibility for such services varies by state.³¹⁶ The American Rescue Plan Act provided additional federal matching funds for state HCBS programs, allowing for more people to qualify for HCBS; that temporary funding could be made permanent.³¹⁷ But more fundamental reform would mandate that states provide

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312. See Larisa Antonisse, Note, *Strengthening the Right to Medicaid Home and Community-Based Services in the Post-Covid Era*, 121 COLUM. L. REV. 1801, 1805 (2021). As Larisa Antonisse explains, “Medicaid’s bias toward coverage of institutional services is largely a statutory relic of the program’s inception at a time when institutionalization of people needing long-term care was the norm.” *Id.* at 1817. As a result, “the program permits states to cap the number of beneficiaries covered and the amount of home-based care beneficiaries can receive and allows states to limit the cost of those services.” Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 GEO. L.J. ONLINE 1, 11 (2021). For a list of what qualifies as home and community-based services (HCBS), see *Home- and Community-Based Services*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 15, 2022, 12:39 PM), <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/info/hcbs> [https://perma.cc/7B9M-WM22].
313. See Antonisse, *supra* note 312, at 1820 n.83.
314. See Molly O’Malley Watts, MaryBeth Musumeci & Priya Chidambaram, *Medicaid Home and Community-Based Services Enrollment and Spending*, KFF (Feb. 4, 2020), <https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending> [https://perma.cc/3DJX-Z8BU] (explaining that more than “2.5 million individuals receive HCBS through an optional Section 1915 (c) or Section 1115 waiver, and nearly 1.2 million receive optional personal care state plan services, while 600,000 receive home health state plan services”).
315. See Tara Sklar & Rachel Zuraw, *Preparing to Age in Place: The Role of Medicaid Waivers in Elder Abuse Prevention*, 28 ANNALS HEALTH L. & LIFE SCIS. 195, 198–202 (2019) (discussing the evolution of HCBS waivers and limitations in existing implementation); Johnson, *supra* note 88, at 1 (describing the long waiting lists for HCBS).
316. *Home- and Community-Based Services*, *supra* note 312; see Molly O’Malley Watts, MaryBeth Musumeci & Priya Chidambaram, *State Variation in Medicaid LTSS Policy Choices and Implications for Upcoming Policy Debates*, KFF (Feb. 26, 2021), <https://www.kff.org/report-section/state-variation-in-medicicaid-ltss-policy-choices-and-implications-for-upcoming-policy-debates-issue-brief> [https://perma.cc/CYX3-BY4D] (discussing state variations). HCBS are, as the Centers for Medicare and Medicaid Services notes, “usually less than half the cost of residential care.” *Home- and Community-Based Services*, *supra* note 312. The primary basis for states to offer HCBS is through a Section 1915(c) waiver. Antonisse, *supra* note 312, at 1822.
317. See Tyler Cromer, Allison Rizer, Henry Claypool & Anne Tumlinson, *Modernizing Long-Term Services and Supports and Valuing the Caregiver Workforce*, HEALTH AFFS. (Apr. 13, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210409.424254/full> [https://perma.cc/H8QE-NPWG] (advocating for modernizing Medicaid eligibility policies by addressing the existing bias towards institutional care and for investment in the long-term-care workforce).

HCBS in addition to more costly institutional care, rather than making such services available only through state waivers.³¹⁸

As a second, and related step, Medicare, which provides health insurance for most people over the age of 65, should cover long-term care, which it currently does not.³¹⁹ Today, individuals able to pay can purchase long-term-care insurance or pay directly out of pocket.³²⁰ But Medicare coverage for long-term care could become equivalent to that of Medicaid, including both nursing-home coverage and HCBS.³²¹

A third fundamental change would be a fully refundable tax credit for providing care to an older adult upon a certification that the caregiver provides at least fifty percent of such care. This would create a major change in benefit

318. See Kohn, *supra* note 312, at 16–17 (suggesting that the federal government prevent states from preferring institutional care over community care).

319. For discussion of how to do so, see Leonard E. Burman & Richard W. Johnson, *A Proposal to Finance Long-Term Care Services Through Medicare with an Income Tax Surcharge*, URB. INST. 3 (June 2007), <https://www.urban.org/sites/default/files/publication/43046/411484-A-Proposal-to-Finance-Long-Term-Care-Services-through-Medicare-with-an-Income-Tax-Surcharge.PDF> [<https://perma.cc/5LMN-DRTJ>]; and Zachary Anderson, Note, *Solving America's Long-Term Care Financing Crisis: Financing Universal Long-Term Care Insurance with a Mandatory Federal Income Tax Surcharge that Increases with Age*, 25 ELDER L.J. 473, 502–04 (2018). Medicare covers approximately eighteen percent of the population. *Percentage of People Covered by Medicare in the United States from 1990 to 2021*, STATISTA (Sept. 15, 2022), <https://www.statista.com/statistics/200962/percentage-of-americans-covered-by-medicare> [<https://perma.cc/DWT3-7E3U>].

320. See *Long-Term Care*, MEDICARE, <https://www.medicare.gov/coverage/long-term-care> [<https://perma.cc/4B2U-D7YN>] (“Medicare doesn’t cover long-term care . . . if that’s the only care you need.”); Valarie K. Blake, *Health Care Civil Rights Under Medicare for All*, 72 HASTINGS L.J. 773, 788 (2021). Medicare will only cover limited forms of in-home care under some circumstances. See *Home Health Services*, MEDICARE, <https://www.medicare.gov/coverage/home-health-services> [<https://perma.cc/N95L-MT8S>]. Medicare covers around fifty-four million people based on age. *Medicare - Statistics & Facts*, STATISTA (Feb. 22, 2023), <https://www.statista.com/topics/1167/medicare/#dossierKeyfigures> [<https://perma.cc/G7WU-ABAD>]. About twelve million of those people are “dually eligible” for Medicaid and Medicare. *Seniors & Medicare and Medicaid Enrollees*, MEDICAID, <https://www.medicaid.gov/medicaid/eligibility/seniors-medicare-and-medicaid-enrollees/index.html> [<https://perma.cc/U5TQ-5NK3>]. Consider that

[i]n the New York metro area, home care costs can exceed \$10,000 per month and a nursing facility can exceed \$18,000 per month. As Medicare does not have long-term care benefits, there are three ways in which an elder can pay these exorbitant costs: private payment with personal funds, a robust long-term care insurance policy, or finally, make themselves financially eligible for the Medicaid program.

Brian Andrew Tully, *The Growth and Business of Elder Law*, 46 ACTEC L.J. 113, 114 (2020) (footnote omitted).

321. A relatively minor reform would be to ensure that Medicare covers cost planning, just as it now covers counseling on advance medical directives. See Naomi Cahn & Amy Zietlow, *Religion and End-of-Life Decision-Making*, 2016 U. ILL. L. REV. 1713, 1735.

eligibility, because, unlike existing mechanisms, it would not require proof of eligible expenses or proof of dependency. Recent precedent exists in the COVID-19 child tax credit, which could serve as a model.³²²

In sum, the current system makes no sense economically, families are bearing the brunt of the cost, and sweeping reform is needed. Nursing-home care is unaffordable for most people unless they are wealthy or qualify for Medicaid; aging in place, ironically, is much more affordable but receives far less support. The government can and should undertake much more ambitious reform to support familial caregiving.

* * *

In addition to facilitating family formation and supporting families in providing care, the government should offer programs and services to older adults that enrich their lives, reduce isolation and stress, and increase their capacity to live independently. We touch only briefly on this category of support because these programs and services are not necessarily directed toward families, although families can reap substantial benefits from them. For example, communities with active senior centers provide older adults with a setting for social interaction and the opportunity to meet others with whom bonds may be formed. Senior centers can also provide recreational activities, book discussions, lectures, opportunities for physical exercise, and other activities. Indeed, entire communities can be built around aging.³²³ The government can also improve support for transportation services that provide freedom of movement for older adults. Finally, financial, mental health, and other forms of counseling and advice services can allow older adults to live independent lives capably. These proposals would enhance the lives of all older adults, including, and perhaps especially, those who are *not* living with or near family members.

322. See *The Child Tax Credit*, WHITE HOUSE, <https://www.whitehouse.gov/child-tax-credit> [<https://perma.cc/5BTT-3VHG>].

323. See, e.g., Priti Salian, *Is This the World's Most Aging-Friendly City?*, NEXT CITY (May 24, 2021), <https://nextcity.org/urbanist-news/is-this-the-worlds-most-aging-friendly-city> [<https://perma.cc/9L2K-VL2V>]; see also David M. English, *The Home: Where Our Heart Resides*, 35 BIFOCAL 158, 162 (2014) (discussing funding for transportation and senior centers under the Older Americans Act); Joanne Lynn, *The Challenges of Caring for the Growing Elderly Population*, 41 BIFOCAL 225, 225 (2020) ("Our social support arrangements are inadequate, since the Older Americans Act (OAA) has never been funded at a level that meets the needs.").

CONCLUSION

The wave of family law reform we propose in this Article will transform family law. Our proposals promise to contribute to flourishing in the new old age, expanding the opportunities for older adults to form families of choice, and supporting family caregivers. This new wave of reform requires a fundamental rethinking of what family law means in the last third of life. The family law we envision addresses the intimacy, caregiving, and caretaking needs of older adults, offering essential support that allows them to lead fulfilling lives according to their own values and preferences. In so doing, it prioritizes autonomy and equity. With the adoption of our reform agenda, family law will progress toward fulfilling its essential purposes—facilitating family formation and supporting families in fulfilling dependency needs—across the lifespan.