

THE HOUSEHOLD: THE LAW, ECONOMICS, AND SOCIOLOGY
OF AN UNDEREXAMINED INSTITUTION

Robert C. Ellickson*

* Walter E. Meyer Professor of Property and Urban Law, Yale Law School. Version presented at the Harvard-MIT Organizational Economics Seminar, April 3, 2003. I thank Jennifer Arlen, Stephen Bainbridge, Henry Hansmann, Jill Hasday, Joni Hersch, John Langbein, Richard McAdams, Robert Pollak, Roberta Romano, Edward Schwartz, Reva Siegel, Henry Smith, and James Whitman for suggestions, and John Eisenberg for research assistance.

Note to Participants in Harvard-MIT Organizational Economics Seminar

The Introduction (at p. 6) promises an article with ten parts. In fact, I have sent you only the Introduction and first five parts. My work on the remainder is not yet ready for the light of day. Even so, the draft is on the long side. A reader with limited time might want to concentrate on:

The Introduction (pp. 1-6);

Part IV (pp. 36-51) (on coordination systems within households); and

Part V (pp. 51-61) (on why ownership of a household usually is bestowed on the contributors of its at-risk capital).

I anticipate, although not with much confidence, that the latter two parts will be of greatest interest to organizational economists. The two figures are located at the end.

- - - Bob Ellickson

Lawyers and legal scholars understandably focus mostly on domains of life where law is central. There is much to be learned, however, from domains where people deliberately structure their affairs to minimize formalities such as written contracts and legal entanglements. Just as study of conditions of anarchy helps illuminate the effects of the presence of government, the study of domains that people intentionally keep casual can shed light on the merits of formal contracting and legal regulation.

This article analyzes one of the most important human institutions where informality traditionally has prevailed — the household. Although the household lies at the core of everyday life, it has received scant attention from legal scholars and organizational economists.¹ The members of a household (that is, its owners and occupants) together manage a real estate enterprise that makes use of inputs of capital and labor in order to provide shelter, meals and other services to occupants. Through their interactions household members typically devise a set of norms (or implicit contracts) that govern their supply of inputs, their sharing of household outputs, and the behavior of occupants within the household territory. My chief goal in this article is to stimulate academic interest in the nature of these everyday practices.

It is important at the outset to distinguish the household from both marriage and the family, two closely related social molecules with which it commonly is conflated. *Marriage* denotes a legal relationship between two people. When marital partners cohabit a home they jointly own, their household can be regarded as wholly subsumed by their marriage. The domain of a marital relationship, however, rarely is congruent with the domain of the household relationships of the married pair. Much of marital property law addresses entitlements to assets other than the marital home — for example, to children, financial accounts, and the other spouse's human capital. In that sense, a marital relationship is larger and more multifaceted than a household relationship. Conversely, important aspects of the household relationships of some married people are likely not to be governed by marital law. First, a married couple need not co-habit. Indeed, in the United States 6% of married persons do not live with their spouses.² Second, when married partners do cohabit, they need not co-own their dwelling. Third, when a married couple does cohabit and co-own, others may join them in either or both of those activities. To emphasize the institutional distinction

¹ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *Yale L.J.* 549 (2001), arguably is an exception. Those authors apparently intend, however, for their normative prescriptions to apply to commonses of all sizes, including ones controlling territories much larger than a household, an institution to which they make scant reference.

² In 1998, 110.6 million married Americans were living with their spouses, but 7.3 million were not. *Statistical Abstract* 1999, at 60.

between marriage and the household, I feature nonmarital households in much the discussion to come.³

Family denotes a kinship relationship by blood, adoption, or marriage, but not necessarily a household relationship.⁴ Important intrafamily dealings include the transmission of wealth between generations and the provision of informal social insurance. However, family members, even more obviously than spouses, need neither cohabit nor co-own, and cohabitants and co-owners need not be kin. In 1998 in the United States 13 million people lived in multioccupant housing units in which all residents were not related by family ties.⁵ These clusterings included unmarried heterosexual couples, gay and lesbian partners, platonic housemates, and small intentional communities.⁶

The household is imminently worthy of scrutiny as an institution distinct from broader marital and family relationships. Households have been ubiquitous throughout human history. Even in industrialized nations, households still are the sites of a large fraction of economic and social activity. According to one analyst, in the 1980's American women, irrespective of their marital status, were spending an average of 32.9 hours a week on housework, and men, 15.7 hours.⁷ In the United States, recent estimates of the value of within-household production have run from 24% to 60% of G.D.P. — that is, to trillions of dollars per year.⁸

³ On the law and economics of the marriage relationship itself, see, e.g., Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901 (2000); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 Va. L. Rev. 509 (1998).

⁴ Many adept commentators overlook this point. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 Stan. L. Rev. 1599, 1622-30 (2000) (blurring distinction between Chinese households and families).

⁵ 1999 Statistical Abstract, at 60; see also *infra* text accompanying notes ___ - ___.

⁶ 1999 Statistical Abstract, at 60. These households increased in number from 1.1 million in 1970 to 5.3 million in 1998. *Id.*

⁷ John P. Robinson & Geoffrey Godbey, *Time for Life: The Surprising Ways Americans Use Their Time* (1997) (reporting data from time diaries)[check]. Empirical studies of time devoted to housework in the United States are summarized in Table 1 of Joni Hersch, *Marriage, Home Production, and Earnings*, in *Marriage and the Economy* (Shoshana Grossbard-Shectman ed., 2001?).

⁸ For reviews of the literature, see Euston Quah, *Economics and Home Production: Theory and Measurement* 80-89 (1993); Oli Hawrylyshyn, *The Value of Household Services: A Survey of Empirical Estimates*, 22 *Rev. Income & Wealth* 101 (1976). Most estimates fall in the lower part of the range described. Without citing authority, Gary Becker asserts: “Families [sic] in all societies, including modern market-oriented societies, have been responsible for a sizable part of economic activity — *half or more* — for they have produced much of the consumption, education, health, and other human capital of the members.” Gary S. Becker, *A Treatise on the Family* 303 (enlarged ed.

The norms that govern household affairs, moreover, have had Promethean influence. The rules that our ancestors developed to resolve problems arising around their hearths provided templates for achieving cooperative solutions in settings outside the home. Even today it is typically within the household that children first learn how to recognize and deal with the problems posed by common property, collective enterprise, and intrafamily dependence. Study of the household therefore promises to shed light on the origins of more complex institutions.

When a single individual such as the Unibomber Ted Kaczynski is both the sole owner and occupant of a dwelling unit, there can be little inner-household conflict. This article therefore focuses on households where multiple occupants face the task of managing a domestic space. Then there may drama — indeed, perhaps enough to sustain a television sitcom series.⁹ Additional coordination complexities arise when some or all of the owners of a occupied dwelling unit don't reside there. In that event the co-owners must deal both with the tenants and with one another. In short, the rules of a household can govern as many as three distinguishable types of relationships — those among occupants, those among co-owners, and those between occupants and owners.¹⁰ Figure 1 portrays these three spheres of interaction. By failing to distinguish among these different sorts of intrahousehold relationships, leading works on domestic life, such as those by Nobel economist Gary Becker and prize-winning historian Michael Grossberg, muddy their portrayals of the home.¹¹

While legal scholars and institutional economists have neglected the household,

1991) [emphasis added].

⁹ It is notable that many leading television series have been set in multioccupant households. While most of these have featured married couples (I Love Lucy, the Sopranos), in some the principal homemates have not been unrelated (The Odd Couple, Laverne and Shirley).

¹⁰ When I use the term *household* in this article, I am referring to this set of institutional arrangements. A household therefore is to be distinguished both from its dwelling unit (the *house* or *apartment*) and from the subgroup of persons who regularly share the dwelling's spaces (the *occupants*). The U.S. Census Bureau, which faces the practical task of categorizing diverse living arrangements, provides no term that encompasses all the owners, occupants, and other patrons of a dwelling unit. It defines a household more narrowly than I, as a collection of occupants: "A 'household' comprises all persons who occupy a 'housing unit,' that is, a house, an apartment, or other group of rooms, or a single room that constitutes 'separate living quarters.'" Statistical Abstract 1999, at 6. The Bureau in turn defines a "housing unit" as a room or rooms lived in by persons who do not live and eat with any other occupants of the same structure (and thus, by implication, who *do* often live and eat with one another). *Id.* at 718. The Bureau defines a "family" as a set of persons related by birth, marriage, or adoption who live together in the same housing unit. *Id.* at 6. It uses the term "group quarters" to describe the residences of persons in dormitories, jails, nursing homes, military barracks and the like. *Id.* In 1990, just under 3% of the United States population lived in group quarters. Statistical Abstract 1996, at 67. On group quarters, see *infra* text at notes ___ - ___.

¹¹ See Becker, *supra* note ___; Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1995).

numerous social historians, demographers, and sociologists have studied the institution. Aristotle devotes the first Book of the *Politics* to analysis of the household, which he envisions as the basic building block of political life.¹² The reform of the household has been at the center of Utopian thought. Plato, Thomas More, B.F. Skinner and others have imagined new institutional arrangements for providing housing and meals. Partly on account of the relative paucity of constraints on innovation in household forms, experiments with unconventional households — for example, monasteries, kibbutzim, co-housing — have been incessant. The historical record therefore helps illuminate the viability of alternative household arrangements.

Basic positive questions abound. Why are the occupants (and also, for that matter, the owners) of a dwelling units so often related by kinship? Why has the average number of household occupants fallen, particularly during the twentieth century? More fundamentally (and to redirect a question Coase famously asked in another context),¹³ why don't all adults live alone? Or, conversely, all in one huge household? How do household members obtain the rules that govern their relationships and what sorts of rules to they tend to favor? In this article I make an initial foray into answering these sorts of questions. My overarching thesis is that individuals tend to structure their households, even ones brought together by love and affection, with a close eye to reducing the transaction costs of their domestic interactions.

My analysis explicitly links three heretofore separate literatures within institutional economics. The first, already mentioned, is the literature on the “family.” The second is the scholarship that analyzes the commons. When more than one person has regular access to a domestic space, it is a commons — a shared domain that invites opportunism by one user at the expense of others. Multioccupant households therefore must develop mechanisms for avoiding the tragic results that shared use may cause.

The third literature addresses the ownership of business enterprise. Like a firm, a household requires inputs of both labor and capital to enable the production of goods and services. Typically the occupants of a household provide most of the labor and the owners, most of the at-risk capital. When the owners of a household are not identical with its occupants, household members must come to an understanding about which of them is authorized to make various household decisions and which of them is to bear the

¹² Aristotle saw the household (*oikos*) as the basic component first of the village, and, beyond that, of the city (*polis*). Aristotle, *The Politics* 9 (Ernest Barker trans., R.F. Stalley revision, 1995). Although *oikos* is the etymological root of *economics*, until recent decades economists have given scant attention to “home economics.” Instead, during the nineteenth century the topic became the province of popularists. One influential work was Catharine Beecher, *A Treatise on Domestic Economy* (1841), reprinted many times over during the ensuing decades. On Beecher’s influence, see Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 61-63 (1985).

¹³ See Ronald H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937), reprinted in R.H. Coase, *The Firm, the Market, and the Law* 33 (1988).

consequences of choices made. Particularly when some or all of the owners of a dwelling are absentees, there may arise a separation of ownership from control — a homespun version of a problem much explored in the business context.¹⁴

To illuminate and make vivid the various issues of household governance, throughout the article I make some use of a hypothetical household of greater than usual complexity. For short I'll refer to it as the "Sitcom household" because the relationships within it are rich enough to provide weekly comedy fare. This household is envisioned as having five regular occupants who reside together in a single-family dwelling. The five are: Dad, an endearingly opinionated widower; Junior, Dad's affable but unemployed 23-year old son; Sis, Dad's 13-year old tomboy daughter; Granny, Dad's wisecracking mother; and Cheri, a ditzzy but nubile live-in au pair and housekeeper. These five occupants provide virtually all household labor and consume virtually all household services. The ownership structure of the Sitcom house, however, complicates the structure of relations within it. Dad owns the house in equal shares with his sister, Aunt Audrey, a hard-charging professional. After Dad's wife died a decade ago, Audrey and he acquired the house, each providing half of the down payment and taking title as tenants in common. Audrey resided in the Sitcom house for several years, but a few months ago she married and promptly bought a house with her new husband. Soon after Audrey's departure, Dad hired Cheri.

The Sitcom household illustrates the often distinct governance structures of marriages, families, and households. Audrey, the co-owner with Dad, is the only member of the dramatis personae with an ongoing marriage, but her marriage is not nested within the Sitcom household because she lives elsewhere. Family relationships abound, but one resident (Cheri the au pair) isn't a family member, and some family members (Junior, Sis, and Granny) are occupants but not owners and Aunt Audrey is an owner but not an occupant. As noted, within this household there are three distinct types of relationships, each with its own potential for cooperation or strife: the relations among the five co-occupants, who require rules to govern their commons; between the two joint owners, who require rules to govern their co-ownership relationship; and between the co-owner group and co-occupant group, who need rules to govern their landlord-tenant relationship. Note that only one of the members, Dad, is involved in all of these relationships, and that he's involved on both ends of the landlord-tenant relationship.

Armed with this illustrative case, I proceed. Part I presents a brief snapshot of current U.S. households, along with data on households in other times and places. Part II explores the Coasean question of the boundary between a household and the larger economy and suggests why households have become smaller and less self-sufficient over time. Part III turns to an important methodological question of what inferences can be drawn from the

¹⁴ Classic treatments of this problem in the corporate context include Adolph Berle & Gardiner Means, *The Modern Corporation and Private Property* (1932); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976).

survival and nonsurvival of various household forms. Part IV discusses how members of a household commonly can coordinate more cheaply by gift exchange than by contract or hierarchy. Part V explains why members of a household typically confer ownership only on contributors of at-risk capital and not on providers of other inputs. The next three parts address in turn the specific problems that arise in the three types of household relationships mentioned in the prior paragraph. Part VI addresses how co-occupants manage a household commons, and Part VII, how a dwelling's co-owners interact. Part VIII deals with the landlord-tenant relationship, in particular the "implicit leases" that govern behavior in family households. The article becomes more normative in Part IX, which analyzes the relationship between the household and the state. Part X concludes.

I. PARTICIPANTS IN HOUSEHOLDS: AN HISTORICAL OVERVIEW

A brief survey of available evidence of patterns of both household occupancy and household ownership will serve to provide a backdrop for an inquiry into how transaction costs and other considerations affect household organization. Because all of us are veteran observers of households, few of the basic facts will startle.

A. Occupants of Households: The Predominance of Small, Kin-Based Clusters

1. Numbers of Occupants

The occupants of most households in United States today can be counted on the fingers of one hand.¹⁵ As Table 1 indicates, 90.9% of Americans living in housing units¹⁶ in 1999 were living in households with five or fewer occupants. Only 3.9% lived in households occupied by seven or more persons.¹⁷ Not only are U.S. households small, they have been becoming smaller.¹⁸ The average number of occupants of a American home has

¹⁵ Household size in the United States varies slightly by state. In 1996, the average number of persons per household (including single-person households) ranged from a low of 2.49 in Colorado to a high of 3.08 in neighboring Utah. Statistical Abstract 1999, at 63.

¹⁶ Table 1 excludes the 7.8 million people living in "group quarters," about half of whom are institutionalized, and about another one quarter of whom reside in college dormitories. See 2000 Census QT-P12. For more on the group-quarters population, see *infra* text accompanying notes ____ - ____.

¹⁷ There were 1.3 million such households and their occupants numbered 10,259,000. Calculated from data in 1999 AHS, at 62. Thus the average number of occupants in these largest of households appears to have been eight. This figure is potentially misleading, however, because households occupied by ten or more unrelated persons probably were not included. See *infra* note ____.

¹⁸ On the changing demographics of U.S. households in the period 1940–1980, see James A. Sweet & Larry L. Bumpuss, *American Families and Households* (1987).

fallen by more than half since the Founding, from 5.79 in 1790, to 4.76 in 1900, to 2.62 in 1998.¹⁹

Table 1

Occupants of U.S. Housing Units, 1999²⁰

<u>No. of Occupants</u>	<u>% of Occupied Housing Units</u>	<u>% of Occupants of Housing Units</u>
1 person	26.2%	10.2%
2 persons	32.9	25.8
3 persons	16.2	19.0
4 persons	14.8	23.2
5 persons	6.5	12.7
6 persons	2.2	5.2
7 persons or more	<u>1.3</u>	<u>3.9</u>
Total	100.0%	100.0%

Although households do tend to be somewhat larger in underdeveloped countries, the American pattern is hardly exceptional. A survey of average household sizes in 63 nations in 1990 reported a range from a low of 1.9 (in Netherlands, Germany, and Sweden) to a high of 7.7 (in Senegal).²¹ Peter Laslett, perhaps the most eminent historian of the household, found that the average number of household occupants in England and Wales remained relatively constant from 1600 to 1900, at about 4.75;²² by 1961, however, the number had

¹⁹ The figures for 1790 and 1900 are from 1 Historical Statistics of the United States: Colonial Times to 1970, at 41 (1975); the figure for 1998 is from Statistical Abstract 1999, at 60. Relatedly, the percentage of American households containing seven or more persons fell from 36% in 1790, to 20% in 1900, to 1% in 1998, and the percentage containing just a single member rose from 4% in 1790, to 5% in 1900, to 26% in 1998. See the two sources just cited, at p. 42 and p.61 respectively.

²⁰ Calculated from data in 1999 AHS, at 62.

²¹ Shlomo Angel, Housing Policy Matters: A Global Analysis 351 (2000) (reporting World Bank data). Gary Becker assembled data from over a dozen surveys of household composition in different societies in different eras. See Becker, *supra* note ____, at 46-47. In Becker's table the United States in 1970 had the smallest average household size (3.11 members), and India in 1970-71 had the largest (6.64). The Indian survey also reported the highest percentage of households with ten or more members: 16%.

²² Peter Laslett, Mean Household Size in England Since the Sixteenth Century, *in* Household and Family in Past Time 125, 138 (Peter Laslett & Richard Wall eds., 1972).

dropped to 3.04.²³ Average household size in Sweden fell by more than half during the twentieth century alone.²⁴

2. Family vs. Nonfamily Households

Occupants of households typically are related by kinship. In 1998, 85% of the U.S. population was living in multi-person *family* households, that is, ones where the householder and at least one other occupant were related by birth, adoption, or marriage.²⁵ Another 10% of the U.S. population — two-thirds of those not residing in a family household — lived alone.²⁶ I have previously referred to the remaining 5% of the populace, namely the 13 million people who reside in multioccupant nonfamily households. Table 2 indicates the distribution of the sizes of these nonfamily clusters.²⁷ A comparison of Tables 1 and 2 demonstrates that housemates who lack kinship ties generally form smaller groupings than kinfolk do. In 1998 multioccupant nonfamily households had 2.4 residents on average (and hence a median and a mode of 2 persons), compared to an average of 3.2 in family households.²⁸ Among the Americans living in nonfamily settings in 1998, three times more were in singles than in doubles, and four times more were in doubles than in triples. Only 1 nonfamily household in 1,000 had six or more occupants.²⁹

²³ Id. at 138.

²⁴ See Orvar Lofgren, *Family and Household: Images and Realities: Cultural Change in Swedish Society*, in *Households: Comparative and Historical Studies of the Domestic Group* 446, 466 (Robert McC. Netting et al. eds., 1984) (reporting that average household size in Sweden dropped from 4.56 persons in 1890 to 2.4 persons in 1976). The data reported supra note ___ indicate that the downward trend continued after 1976.

²⁵ Unless otherwise indicated, the data in this paragraph are drawn from Statistical Abstract 1999, at 60-62. A householder is an occupant whose name is on the deed or lease to the dwelling unit.

²⁶ The propensity to live alone increases with age. Of those aged 20 to 24, 6% lived singly, compared to 31% of those over age 64. Statistical Abstract 1999, at 57.

²⁷ As before, the figures in Table 2 do not include persons living in “group quarters.” See supra note ___.

²⁸ Computed from data in 1999 Statistical Abstract 62 (Table 73).

²⁹ The percentage of nonfamily households that contained four or more members fell from 2.8% in 1940 to 1.1% in 1998. See Sweet & Bumpass, supra note ___, at 349, and Table 2.

Table 2

U.S. Nonfamily Households, 1998³⁰

<u>No. of Occupants</u>	<u>% of Nonfamily Households</u>	<u>% of Occupants of Nonfamily Households</u>
1 person	83.2%	68.2%
2 persons	13.4	22.0
3 persons	2.2	5.4
4 persons	0.8	2.8
5 persons	0.2	1.0
6 persons	0.1	0.6
7 persons or more	<u>0.02</u>	<u>0.1</u>
Total	100.0%	100.0%

Again, the pattern in the United States is unexceptional. In all societies in all historical periods, occupants of households typically have been related by marriage or kinship. This was so in Mesopotamia and the rest of the ancient Near East.³¹ In Europe it has been true since the beginning of the historical record.³² Kinship-based households also have been predominant on other continents, for example, in Japan and Ghana.³³

3. Varieties of Larger Households

Although small nuclear-family households tend to dominate the domestic-services sector, more complex forms also arise.

a. Family households that include unrelated members

In the late nineteenth century perhaps as many as a quarter of U.S. households included at least one boarder or live-in servant unrelated to the household's head.³⁴ Today

³⁰ Calculated from data in Table 72, 1999 Statistical Abstract.

³¹ See Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 Chi.-Kent L. Rev. 321, 354-57 (1995).

³² See David Herlihy, *Medieval Households* (1985); *Household and Family in Past Time*, supra note __; and sources cited infra note __.

³³ Chie Nakane, *An Interpretation of the Size and Structure of the Household in Japan over Three Centuries*, in *Household and Family in Past Time*, supra note __, at 517; Jack Goody, *The Evolution of the Household*, in *Household and Family in Past Time*, supra note __, at 100.

³⁴ See, e.g., Edward T. Pryor, Jr., *Rhode Island Family Structure: 1875 and 1960*, in *Household and Family in Past Time*, supra note __, at 571,586 (reporting that Rhode Island

no more than 5% of households do.³⁵

b. Extended-family households

Extended-family households appear to have been predominant during the earliest historical periods of the ancient Near East, at least in rural areas.³⁶ The conventional image, fostered in the *Odyssey*, is that of a sprawling multigenerational enterprise hierarchically governed by a *paterfamilias* who resides with several of his married adult children and their families.³⁷ David Herlihy, a leading historian of domestic life, stresses that households in fact were highly diverse before the fall of the Roman empire. Partly on account of polygamy and (especially) slavery, households then might include scores or hundreds of occupants.³⁸ As cities and markets developed, however, there was a tendency to downsize to the nuclear-family household.³⁹ The Hellenic *oikos*, for instance, was a more compact institution than its Homeric predecessor.⁴⁰ Xenophon, a canonical source on Greek life during the fourth century B.C., asserted that a single husband-wife team typically lay at the core of the Hellenic household.⁴¹ An *oikos*, however, did commonly include slaves, a practice that prompted Aristotle to devote much of his discussion of the household to rationalizations for slavery.⁴²

With the demise of slavery after the fall of Rome, family farms managed by nuclear

households that included one or more nonrelatives declined from 24% to 2% of the total between 1875 and 1960.

³⁵ See AHS 1999, at 62-64 (indicating that 1% of households include lodgers and 4% include unrelated adults who are neither co-owners nor co-renters).

³⁶ See Ellickson & Thorland, *supra* note ___, at 354-57 (citing sources on household forms in ancient Mesopotamia, Israel, and Greece). Partly because the evidence is thin, historians differ in their portrayals. Compare, e.g., I.M. Diakonoff, *The Structure of Near Eastern Society Before the Middle of the 2d Millennium B.C.*, 3 *Oikumene* 7, 42-43 (1982) (arguing that ancient man knew only communal property), with J.N. Postgate, *Early Mesopotamia: Society and Economy at the Dawn of History* 91-93 (1992) (stating that, at least in cities, Mesopotamian households rarely included more than one conjugal unit).

³⁷ For discussion, see William James Booth, *Households: On the Moral Architecture of the Economy* 15-34 (1993).

³⁸ David Herlihy, *Medieval Households* 58-59 (1985).

³⁹ See Ellickson & Thorland, *supra* note ___, at 355 (on the trend in Mesopotamia).

⁴⁰ See Booth, *supra* note ___, at 34-93; Cheryl Anne Cox, *Household Interests: Property, Marriage Strategies, and Family Dynamics in Ancient Athens* (1998).

⁴¹ [Xenophon]

⁴² See *supra* note ___. On the Hellenic household, see Virginia J. Hunter, *Policing Athens: Social Control in the Attic Lawsuits, 420-320 B.C.* (1994); and sources cited *supra* note ___.

households unquestionably came to the fore in northwestern Europe. By medieval times, most French and English peasants were living in nuclear households whose number of occupants averaged on the order of 6 and seldom exceeded 10.⁴³ In a influential challenge to the previously prevailing view that extended-family households had been the norm in Europe prior to the nineteenth century, Peter Laslett adduced evidence that the nuclear household in fact had predominated.⁴⁴

Today extended-family households are exceptional in the United States. Three or more generations of the same family are present in but 3% of households.⁴⁵ In sharp contrast to rural life in ancient times, only 1% of households include two or more conjugal units.⁴⁶

c. Large nonfamily households

As previously noted, nonfamily households tend to be smaller than family households.⁴⁷ Large numbers of nonkin, however, sometimes do unite to create an institution that delivers domestic services. These entities warrant close study, partly on account of their traditional prominence in utopian thought.

At present over 50,000 people in the United States reside in housing units where seven or more unrelated persons members sleep and eat their meals.⁴⁸ An additional 3.7

⁴³ See, e.g., Barbara A. Hanawalt, *The Ties that Bound: Peasant Families in Medieval England* 5, 103-04 (1986); David Herlihy, *Medieval Households* 62-72 (1985) (reporting results of early ninth century survey of rural lands in St. Germain, where the median household size was six). See also sources cited supra note ___ [Laslett].

⁴⁴ See Peter Laslett, Introduction: The History of the Family, *in* *Household and Family in Past Time* 1 (Peter Laslett & Richard Wall eds., 1972). Laslett later restricted the scope of this thesis to northwestern Europe. See Peter Laslett, *Family and Household as Work Group and Kin Group: Areas of Traditional Europe Compared*, *in* *Family Forms in Historic Europe* 513 (Richard Wall, J. Robin & Peter Laslett eds., 1983). See generally David I. Kertzer, *Household History and Sociological Theory*, 17 *Annual Rev. Sociol.* 155 (1991) (reviewing historians' debate over trends in household size).

⁴⁵ See AHS 1999 at 64. In Japan, where housing is more expensive and there is less extrafamily support for the aged, extended-family households are more common. S. Philip Morgan & Kiyosi Hiroshima, *The Persistence of Extended Family Residence in Japan: Anachronism or Alternative Strategy?*, 48 *Am. Sociological Rev.* 269 (1983).

⁴⁶ 1999 Statistical Abstract, at 60.

⁴⁷ See supra text accompanying notes ___ - ___.

⁴⁸ See 1999 Statistical Abstract, at 61. [add longitudinal data on U.S. large nonfamily households and group quarters]

million persons voluntarily live in what the Census Bureau calls “group quarters.”⁴⁹ A resident of a group quarters may have a separate sleeping space, but typically eats meals in a congregate dining facility. The group-quarters category includes dormitories, fraternities and sororities, some military quarters, some eldercare facilities, and some residential complexes of religious orders. Nonkin who cluster in large numbers may be able to exploit efficiencies of scale in the production of shelter, meals, social activities, and other services, but at the sacrifice of individual autonomy and privacy. These arrangements therefore disproportionately attract those who are single, childless, and relatively impecunious. Thus while 5.4% of Americans aged 18 to 29 years live in a voluntary group quarters, the percentage falls to 0.6% for those aged 30 to 49 years.⁵⁰

Many contemporary group quarters, such as dormitories and nunneries, are governed in largely hierarchical fashion by their owners. One of the most instructive historical predecessors of the hierarchical group quarters is the English noble household.⁵¹ At their peak in the mid-fifteenth-century, an earl’s household might have as many as 500 occupants sharing a common dining facility. The residents typically included the noble’s immediate family, friends and retainers who assisted in entertaining, and a multitude of hired servants. Particularly when the occupants were numerous, the noble who owned the household commonly would issue “ordinances” governing the conduct of occupants and hire stewards to supervise household operations.

Contemporary intentional communities typically eschew hierarchy in favor of participatory governance. Communes such as kibbutzim and Hutterite communities offer occupants separate quarters for sleeping but encourage communal meals.⁵² Census Bureau publications do not reveal how many group quarters take the form of participatory communes, perhaps because the number appears to be small.

B. Owners of Households

The owners of a dwelling unit are the persons so identified in pertinent deeds and

⁴⁹ U.S. Census Bureau, *Census 2000, Total Population in Households and Group Quarters by Sex and Selected Age Groups* (Internet Release Date Mar. 20, 2001) [hereinafter cited as *Group Quarters Population*]. This figure excludes 4.1 million “institutionalized” persons living under supervised care or custody in facilities such as orphanages, nursing homes, and penitentiaries. *Id.* For the Census Bureau’s technical definition of “housing units” and “group quarters,” see AHS 1999 at A-9. All households occupied by nine or more people unrelated to the householder are automatically included in the group quarters count. *Id.*

⁵⁰ Calculated from *Group Quarters Population*, *supra* note ____.

⁵¹ See Kate Mertes, *The English Noble Household 1250-1600: Good Governance and Politic Rule* (1988).

⁵² For more on intentional communities, see *infra* text at notes ____ - ____.

court decrees.⁵³ For every bushel of data the Census Bureau publishes about household occupants, it publishes a mere thimbleful about owners. The available sources, sketchy though they are, reveal a now familiar pattern: the owners of a household tend to be few in number (typically fewer than the occupants); when there are multiple owners, they usually are related by kinship.

Many studies support these propositions. Carole Shammass and her co-authors sampled deeds recorded in Bucks County, Pennsylvania, between 1890 and 1980. In 1890, almost all real estate was in the name of a single individual (typically the husband in the case of a married couple). By 1980, almost 70% of Bucks County deeds named an husband and wife as co-grantees (typically as joint tenants with right of survivorship).⁵⁴ William Hines, in a study of deeds recorded in Iowa in 1954-64, found that about 40% of the deeds named single grantees and another 55%, a husband and wife.⁵⁵ To adduce more recent evidence, I examined a sample of grantees in real estate transactions of all types in greater New Haven, Connecticut, in 2002. Some 48% of the deeds designated a single individual as the grantee, and another 37% a man and woman who on the face of it were likely to be a husband and wife.⁵⁶ Taken together, these sources suggest that in over 90% of cases, single-family dwellings in the United States are owned either by one person or by a married couple.⁵⁷ Other sorts of ownership pairings, such as the two siblings who own the Sitcom Household, appear to be rare. With apologies to Robert Putnam, one can say that Americans have long

⁵³ This is the Census Bureau's definition (see, e.g., AHS 1999, Appendix A, A-8). On why these owners almost always are the contributors of at-risk capital, not of labor, see *infra* text accompanying notes ___-___.

⁵⁴ Carole Shammass, Marylynn Salmon & Michel Dahlin, *Inheritance in America from Colonial Times to the Present* 172 (1987).

⁵⁵ Computed from data presented in N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 *Iowa L. Rev.* 582, 607, 617 (1966). A caveat: Hines included in the single-grantee category not only individuals but also corporations, trusts, and estates.

⁵⁶ I examined a sample of 316 transactions in New Haven and 14 nearby towns compiled by the *Commercial Record* and reprinted in the *New Haven Register*, *Je.* 15, 2002, at E2. In 10% of the transactions the grantee was either a partnership, corporation, or government. Three percent of the deeds named two grantees of the same sex, and of the remaining 3% I could not divine the genders of the two grantees from their names. The *Commercial Record* lists no more than two grantees in any instance. Nevertheless, I doubt if more than 1-2% of the transactions involved three or more grantees. A more thorough study of ownership interests would include probate records as well as recorded deeds. A statute of succession may distribute interests in an intestate's real property to a relatively large number of grantees, for example, to all the deceased's children.

⁵⁷ See also the studies of incidence of co-ownership cited in Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenancy Possession Value Liability and a Call for Default Rule Reform*, 1994 *Wis. L. Rev.* 334, 398 n.204.

been accustomed to either “owning alone” or to owning solely with their spouses.⁵⁸

C. Owner-Occupants of Households

Another stylized fact of relevance: those who own a dwelling unit usually come from the ranks of those who occupy it. In the late 1990's 67% of all occupied U.S. dwelling units had at least one owner-occupant, up from slightly less than half during the period 1900 to 1940.⁵⁹ Of single-family dwellings, detached or attached, 84% are owner-occupied.⁶⁰ Of the dwellings that have at least one owner-occupant, in 96% *all* of the owners are occupants.⁶¹ The desire for homeownership runs deep. When asked by pollsters in 1999 which items on a list of two dozen constituted part of “the good life,” Americans included “a home you own” more often (88%) than any other item, including “a happy marriage” (76%) and “a lot of money” (57%).⁶²

The American pattern again is not exceptional. In most Western European nations most dwellings are owner-occupied.⁶³ Even in ancient times owner-occupancy of single-family houses was common.⁶⁴ There have been exceptions, of course, such as various Communist collectivizations that shifted ownership of land to the state, but these mostly were ephemeral.

D. Absentee Landlords of Housing Units

When householders lease, rather than purchase, their dwelling unit, ownership relations are multilayered. The individuals whose names are on the lease can appropriately be regarded as “owners” of the leasehold itself—that is, of the block of time they contracted for. For the duration of the lease these individuals are simultaneously tenants of the landlord under whom they hold, and also sub-landlords of any occupants of the leasehold premises whose names do not appear on the lease.

⁵⁸ Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

⁵⁹ Statistical Abstract 2001, at 606; James W. Hughes, *Economic Shifts and the Changing Homeownership Trajectory*, 7 *Housing Pol’y Debate* 293 (1996).

⁶⁰ Statistical Abstract 1998, at 729.

⁶¹ AHS 1999, at 76. In about 5/6 of the instances in which some owners weren’t occupants, the absentee owners did not share in bearing the costs of ownership. *Id.*

⁶² See Karlyn Bowman, *Opinion Pulse*, *The American Enterprise* 60 (June 2000).

⁶³ See Economic Commission for Europe, *Human Settlements Situation in the ECE Region Around 1980*, at 34 (United Nations 1986). That source indicates a Western European range in 1980 from a low of 29.7% owner-occupancy in Switzerland to a high of 73.8% in Ireland.

⁶⁴ See Ellickson & Thorland, *supra* note ____, at 337-38 n.80.

There is a lack of good data on the identities of absentee landlords of residential units. Like owner-occupiers, nonoccupying owners of residential property appear to strive to keep their numbers to a minimum. George Sternlieb found in his famous studies of Newark, New Jersey, that most slum landlords are either single individuals or married couples.⁶⁵ Census data indicate that tenants in a building with from two to four dwelling units commonly rent from a landlord who occupies another unit in the same building.⁶⁶ According to one estimate, corporations own only about 1% of American housing (measured by value).⁶⁷ Expensive residential properties, such as large multifamily structures, are the most likely candidates for corporate ownership because that form best enables the spreading of investment risks.⁶⁸ If there were scale efficiencies to exploit, a corporation or other business association also might acquire a collection of separate single-family dwellings and other small buildings. But this happens rarely.⁶⁹

⁶⁵ In 1964, when Sternlieb first studied Newark, over 50% of the tenements were owned either by individuals or husband-wife pairs and under 20% by corporations. George Sternlieb, *The Tenement Landlord* 122, 253 (1969). By 1972, of the slum properties not owned by the City of Newark, almost two-thirds were owned by individuals or husband-wife pairs. George Sternlieb & Robert W. Burchell, *Residential Abandonment: The Tenement Landlord Revisited* 56 (1973).

Other scraps of evidence support the proposition that the landlords of small buildings typically are single individuals (or couples). See, e.g., Elizabeth Blackmar, *Manhattan for Rent, 1785–1850*, at 37-38 (1989) (identifying a number of single individuals (and no co-owning entities) who owned multiple houses in Manhattan in the 1760s); John Allen & Linda McDowell, *Landlords and Property: Social Relations in the Private Rented Sector* 134, 140 (1989) (in 7 of 8 relevant case studies landlords were single individuals).

⁶⁶ In the U.S., owners inhabit 20% of the dwelling units in residential structures containing 2 to 4 units. *Statistical Abstract* 1998, at 729. There is evidence that the residency of an owner in such a structure enhances the quality of building maintenance. Powell, *One Man's Ceiling is Another Man's Floor: Landlord/Manager Residency and Housing Condition*, 61 *Land Econ.* 106 (1985). An on-site landlord is more vulnerable to informal tenant sanctioning and therefore is less likely to act opportunistically.

⁶⁷ *Statistical Abstract* 2001, at 611. It is unclear whether the 1% figure includes ownership by real estate investment trusts. Relatedly, a study of the ownership of rental housing in Brown County, Wisconsin (home of Green Bay) found that “[o]ver 90 percent of the properties in the sample are held in personal ownership (as distinguished from a partnership or corporation).” Rand, *First Annual Report of the Housing Assistance Supply Experiment* 52 (1974).

⁶⁸ About 15% of American households live in structures that contain five or more dwelling units. *AHS* 1999 at 42. According to a National Multi Housing Council survey, the top 50 owners of apartment units controlled 2.3 million units in 1999, or 14% of the 16.7 million rental units in buildings with five or more units. *Housing & Dev. Reporter*, Mar. 22, 1999, at 742.

⁶⁹ Consistent with other studies of ownership of slum properties, Sternlieb's 1964 survey of Newark tenements found that over 40 percent were owned by landlords who held no other rental properties and less than 25% by landlords with seven or more rental properties. Sternlieb, *supra* note ____, at 122. Ownership was slightly less concentrated in 1972, the year of Sternlieb's follow-up survey. Sternlieb & Burchell, *supra* note ____, at 59-60.

To simplify what follows, I generally ignore renting households and absentee landlords and instead focus on households in owner-occupied dwellings (which are complicated enough).

E. An Overarching Explanation of the Observed Patterns: The Quest to Reduce Transaction Costs

My central thesis is that people who have a choice over the matter structure their households with a sharp eye to reducing the transaction costs of managing their domestic lives. It is notable that all of the observed characteristics of ordinary households serve this general purpose. To introduce some points more fully elaborated below: inter-occupant coordination is easier when occupants are few and kin-related; inter-owner coordination similarly is simplified when owners are few and kin-related; and occupant-owner coordination becomes easier when some occupants also are owners. Individuals historically have embraced the prevailing forms of household composition because these forms afford decisive transaction-cost advantages.

Consider in particular the prevalence of owner-occupancy. This form of tenure is hardly an unalloyed blessing. Homeownership can tie up much of an owner's capital in a relatively illiquid and undiversified investment.⁷⁰ Moreover, the transaction costs of buying and selling a home are much higher than the transaction costs of beginning and ending a leasehold.

Why then is does the owner-occupancy of housing appeal to so many? The Internal Revenue Code certainly includes numerous artificial inducements to own. Even in the absence of these tax subsidies, however, homeownership would be common because in many contexts it inherently enables significant reductions in transaction costs. A residential tenant must negotiate with the landlord to achieve a variety of desirable outcomes that an owner-occupant can achieve more cheaply. First, an owner-occupant inherently has greater security of possession than does a renter because no absentee landlord has the unilateral power to increase the rent, refuse to renew, or evict for breach of the lease. Owner-occupancy lessens or eliminates the need to negotiate over those issues. Second and relatedly, a sitting tenant typically faces a bilateral monopoly situation when bargaining with a landlord because the tenant may have put down roots and faces positive moving costs.⁷¹ The landlord may be tempted to exploit the tenant's vulnerability by, say, shirking on maintenance. An owner-occupant, by contrast, can control maintenance levels directly. Third, owner-occupancy simplifies the tasks of arranging for building improvements. An owner-occupant can directly order capital improvements while a sitting tenant and absentee landlord have to negotiate over both the design of the improvement and the allocation of its costs and

⁷⁰ See Henry Hansmann, *The Ownership of Enterprise* 201-02 (1996).

⁷¹ Hansmann, *supra* note ____, at 197-99.

benefits.⁷² When a household has multiple owner-occupants or includes some nonowning occupants, owner-occupancy hardly eliminates all the transaction costs of achieving the sorts of occupant objectives just listed. But, by sidestepping the need for negotiations with absentee landlords, owner-occupancy does promise to significantly simplify domestic decisionmaking.

The considerations mentioned in the prior paragraph help explain the popularity of the condominium form. Henry Hansmann has persuasively argued that an association of building occupants typically is less competent than a hierarchically organized landlord in governing the building's common elements.⁷³ Association members not only are numerous but also have heterogeneous interests when the repair of a specific common area would particularly benefit adjacent units. The disadvantages that Hansmann notes, however, may be entirely offset by the transaction-cost savings arising from the elimination of the absentee landlord in the management of the interior of a unit.

II. DETERMINANTS OF THE SCALE AND SCOPE OF HOUSEHOLD ECONOMIES

As noted, the average number of occupants of a typical U.S. household fell from 5.8 in 1790 to 2.6 in 2000. What forces have influenced the size of households and the scope of their operations?

A. The Coasean Question of the Boundary of Household Enterprise

Why don't we all live in one all-enveloping household? Or, conversely, all in one-person households? These questions are analogous to ones that Ronald Coase famously asked about the nature of the business firm.⁷⁴ In both contexts the puzzle is the location of the boundary between the internal economic activity of an enterprise and the world beyond it.⁷⁵ Coase hypothesized that a firm's managers would compare the relative efficiency of internal production and external trade and then choose the more cost-effective option. Like members of a firm, members of a household repeatedly confront make-or-buy decisions.⁷⁶

⁷² There still may be a need to negotiate with one's co-owners, however. See *infra* text at notes ___ - ___.

⁷³ See Hansmann, *supra* note ___, at 195-223 (criticizing tax subsidies and threats of rent control that lead to excessive occupant-ownership of multifamily buildings).

⁷⁴ Coase, *supra* note ___.

⁷⁵ The analysis in this Part assumes that individuals are free to create and manage households as they choose, unconstrained by external laws and norms. The realism of this assumption is addressed in the Part III.

⁷⁶ For prescient recognition of this point, see Margaret G. Reid, *The Economics of Household Production* 219-23 (1934).

One of their options is to combine their own inputs of labor and capital in order to produce a flow of housing, meals, care, and other domestic services, mostly for consumption by the household's regular occupants. The other is to contract out. Instead of cooking their own meals, for example, household occupants could dine in a restaurant or order the delivery of a hot meal from an outside provider.

To make efficient make-or-buy decisions, household members have to minimize the sum of two familiar kinds of costs: deadweight losses and transaction costs. First, apart from transaction costs, home production may be cheaper than outside production, or vice versa. Household members incur deadweight losses (that is, miss out on potential gains from trade) when they choose the more expensive source of supply. Typically this consideration favors buying from outsiders because labor and capital is unlikely to be as specialized within a home as within the economy at large. On the other hand, transaction cost considerations commonly favor home production. Within-household supply eliminates the burdens of negotiating with outsiders and tends to reduce transportation costs. While within-household provision surely gives rise to transaction costs as well, the repeat nature of the household dealings and the typically high levels of trust among household members tend to make these relatively low.⁷⁷ Trust is the expectation that another person will act cooperatively, instead of opportunistically, in a situation where both options are available.⁷⁸ Housemates who trust one other are more likely to share home-cooked meals than those who don't because trusting housemates have a comparative advantage at within-home production.

I hypothesize that household members strive in fact to minimize the sum of the transaction costs and deadweight losses they incur in arranging for the provision of domestic goods and services. Whether increasing the size and scope of household activities would serve this end would depend on, among other things, the nature of both the occupants and their trading opportunities.

1. Advantages of Adding Occupants

A variety of efficiencies of scale and scope may be available within a household.⁷⁹ First, multiple occupants may benefit from economies of scale in consumption. The aphorism that "two can live as cheaply as one" exaggerates, but forgivably. Some internal household services are pure public goods. Heat from a furnace, security from an alarm system, the pleasing sight of a well-painted exterior, amicable relations with a neighboring

⁷⁷ For fuller discussion, see *infra* text accompanying notes ____ - ____.

⁷⁸ For a review of social-scientific definitions of trust, see Erik Luna, *Transparent Policing*, 85 *Iowa L. Rev.* 1107, 1159 n.205 (2000). On the general topic, see, e.g., James S. Coleman, *Foundations of Social Theory* 91-116 (1990); Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995).

⁷⁹ See Angus Deaton & Christina Paxson, *Economies of Scale, Household Size, and the Demand for Food*, 106 *J. Pol. Econ.* 897 (1998) [check].

household — all are nonrivalrously consumed. Other household goods and services, although potentially rivalrously consumed, are seldom congested in practice: the dining room, the clothes dryer, basic telephone service (at least in a home without a teenager).

Second, economies of scale and scope may be available on the production side. Team production may outdo separate solo efforts. A second pair of hands eases the task of moving a sofa or making a Christmas tree plumb. An increase in the number of housemates enables occupants to specialize in their roles in household production.⁸⁰ Persons with complementary skills may pair up *ex ante* partly to exploit this possibility. *Ex post*, after a household has been formed, members can make specialized investments in human capital. One occupant may learn how to clean the oven; another, how to prune the shrubs.⁸¹ Moreover, in contexts where it is true that “the more, the merrier,” an increase in size may improve the quality of a household’s internal social life.

Third, the larger a household, the better it can spread risks among its occupants. Historically the multiperson household has served as a key venue for the provision of social insurance.⁸² Through a system of reciprocal gift exchange, occupants can provide care to those among them who are temporarily disabled. Informal insurance against a long-term disability also is possible, especially in a household fueled by kinship altruism.

2. Disadvantages of Adding Occupants

Given these potential advantages of size, why aren’t there more large households, particularly among nonkin?⁸³ Why do two-thirds of the Americans who don’t live in family households choose to live alone?⁸⁴ First, on the supply side, the transaction costs of managing the shared household space rise with the number of occupants.⁸⁵ Second, on the demand side, an occupant’s ability to determine the nature of the shared environment tends

⁸⁰ See Becker, *supra* note __, at 30-53, 57-64.

⁸¹ These considerations have influenced the evolution of households since the dawn of history. Because of economies in production, households have tended to be larger in agricultural societies than in hunter-gatherer societies. Burton Pasternak

⁸² For examples of this system at work, see, e.g., Mertes, *supra* note __, at 73-74 (on English’s lords’ systems of social insurance for elderly servants within their households); Stefan Dercon & Pramila Krishnan, *In Sickness and in Health: Risk Sharing within Households in Rural Ethiopia*, 108 *J. Pol. Econ.* 688 (2000).

⁸³ For an analysis of why there are many large business enterprises but few large households, see Becker, *supra* note __, at 51-53. Becker stresses that firms are more capital intensive than households. I give more weight to the intensity of individuals’ greater preference for autonomy and privacy in their home environment than in their workplace.

⁸⁴ See *supra* note __ and accompanying text.

⁸⁵ See *infra* text at notes __-__.

to decline as the number of housemates rises. A person who lives alone has broad control over the music played, the food served, the guests invited. A person who lives with others has less autonomy. Third, the sharing of household spaces diminishes privacy. The more housemates one has, the less secure the information about one's sexual partners, medical problems, and eccentric tastes. For all these reasons even a person living alone may decide that adding a housemate on balance would be an undesirable move.

B. Causes of the Relative Decline of Within-Household Production

Social, economic, and political conditions determine the weightiness of the considerations just canvassed. In general, internal household economies have been shrinking. As noted, the number of occupants in an average household has fallen over time, especially since 1900.⁸⁶ In addition (and irrespective of size), household occupants have been shifting away from internal production and toward acquiring goods and services through external trade. Centuries ago a household's occupants were likely to grow much of their own food, make much of their own clothing, and erect their own buildings.⁸⁷ Most twenty-first-century households, by contrast, are far less self-sufficient (*autarkic* is the fancy synonym). To take an extreme example, a contemporary household of two urban professional DINKs (double income, no kids) — may obtain *all* of their essentials through cash transactions with outsiders. According to one estimate, between 1930 and 1985 the output of households in the United States fell from 73% of the output of the external market sector to 28%.⁸⁸ This pattern of smaller and less self-sufficient household units can be traced to a number of causes.

1. Technological Progress Typically Disfavors Household Production

Technological advances tend to shrink the size and scope of the household sector.⁸⁹ First, new communications and transportation technologies such as mail-order catalogs and

⁸⁶ See supra text at notes ___ - ___.

⁸⁷ Tocqueville offered a memorable portrait of an early nineteenth-century American nuclear-family household living on the frontier. These stalwarts had cleared their own land, built their own log house, and hewn their own furniture. But even Tocqueville's prototypical household had books and kitchenware — items presumably acquired by trade with outsiders. Alexis de Tocqueville, *Democracy in America* 731-33 (J.P. Mayer ed., 1988) (1840).

⁸⁸ John Devereux & Luis Locay, *Specialization, Household Production, and the Measurement of Economic Growth*, 82 *Am. Econ. Rev.* 399, 402 (Pap. & Proc. 1992). But see Hawrylyshyn, supra note ___, at (asserting that home production's share of the national economy did not decrease much during the twentieth century).

⁸⁹ See Reid, supra note ___; Luis Locay, *Economic Development and the Division of Production Between Households and Markets*, 98 *J. Pol. Econ.* 965 (1990); Stephen L. Parente, Richard Rogerson & Randall Wright, *Homework in Development Economics: Household Production and the Wealth of Nations*, 108 *J. Pol. Econ.* 680 (2000).

e-commerce may sufficiently reduce the transaction costs of external trade to tip a household to favor buying over internal provision. For instance, when improved trade technologies enable the rise of insurance companies and state social-insurance programs, households may relinquish much of their traditional role in spreading the risks of disability.

Second, technological innovations enable a greater specialization of labor in both the household and nonhousehold sectors. Specialization, however, tends to disfavor home production because most specialized skills are more valuable when sold in the external labor market than when applied at home.⁹⁰ In a post-industrial society many housemates therefore are likely to work for outside employers and to use a portion of their take-home pay to acquire household services from outsiders such as supermarkets, home improvement contractors, lawn maintenance firms, and visiting-nurse agencies. In 1800, when public schooling was in its infancy, the home was an economical site for teaching and apprenticeship training. With the advent of specialized teachers and parents whose comparative advantages lie elsewhere, home-schooling has declined.

Third, innovations in home appliances have eliminated many of the economies of scale once achievable by living en masse. Until 1850 or so, the laboriousness of keeping a fire going for heat and cooking favored group living. The advent of the likes of the gas furnace and the microwave oven have made living alone a more viable option. When clothes washers and vacuum cleaners are widely affordable, fewer households are likely to hire live-in servants. New technologies also can offer substitutes for the social benefits of cohabitation. When two friends can communicate by cell phone and e-mail, they have less reason to live together. The availability of new hardware, however, does not inevitably make households smaller. The home of the future conceivably may feature a dedicated media room wired with elaborate electronic gadgetry. Scale efficiencies in the provision of this sort of high-cost amenity would put upward pressure on household size.

2. Social Capital and Liberal Politics Facilitate Household Trade with Outsiders

Social and political conditions affect the ease of arms-length trade and thus the balance between what housemates do for themselves and what they purchase from others.⁹¹ As social capital becomes more plentiful in a culture, housemates can more confidently rely on outsiders' promises. As a consequence households can be expected to be smaller and less self-sufficient in Northern Italy than in Southern Italy, where civil society is less supportive

⁹⁰ For analysis of how occupants of a multiperson household decide how to allocate their labor to internal and external production, see Patricia F. Apps & Ray Rees, *Collective Labor Supply and Household Production*, 105 *J. Pol. Econ.* 178 (1997).

⁹¹ See Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 *J. Econ. Lit.* 581, 593-94 (1985) [hereinafter cited as Pollak, *Families and Households*].

of trust and trade with nonkin.⁹² Relatedly a state, by adopting policies and institutions that bring order and the rule of law to a wide territory, can enable housemates to deal more confidently with outside providers. Nations with the high levels of social trust and confidence in the rule of law therefore tend to have smaller and less autarkic households.⁹³

Some examples from history illustrate these points. Partly in response to the emergence of the city (*polis*), the ancient Greek household became smaller and less autarkic between the Homeric and Hellenic eras.⁹⁴ Those who governed the polis provided a public marketplace and brought order to a large territory within which potential traders could interact and develop social capital. By Aristotle's time Athenian households were shopping for many of their goods and services.⁹⁵

In the gargantuan English noble households of the late Middle Ages, the resident staff produced many of the goods and services consumed on the premises, including communal meals, defense against marauders, religious ceremonies, arbitration of disputes, and education.⁹⁶ The average number of occupants in an earl's household rose from around 35 in 1250 to a peak of about 200 by 1450.⁹⁷ According to Kate Mertes, this rise was partly attributable to changes in surrounding social and political conditions: "England's political instability and lack of centralized control in the years between 1399 and 1485 must have contributed to the development of the household in the fifteenth century."⁹⁸ After 1485, the King, Parliament, and royal courts gradually became better at providing defense, adjudication, and other public goods. As England stabilized, noble householders were able

⁹² On the inward-looking nature of Southern Italian households, see Edward C. Banfield, *The Moral Basis of a Backward Society* (1958); Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (1993).

⁹³ See, e.g., Nancy R. Buchan, Rachel T.A. Croson & Robyn M. Dawes, *Who's with Me? Direct and Indirect Trust and Reciprocity in China, Japan, Korea, and the United States* (unpublished paper) (reporting results of laboratory experiments that indicate that Americans are relatively trusting).

⁹⁴ See *supra* text at note ____.

⁹⁵ Compare Hunter, *supra* note ____, at 80 (describing home production of food and cloth), with *id.* at 78 (noting the responsibility of slaves to do the "shopping").

⁹⁶ "Undoubtedly children in the [noble] household received as their main education the whole process of socialization into the household, in learning to survive as servants and among their peers in such a way as to prepare them for life as heads, or as members, of households." Mertes, *supra* note ____, at 175. Yet even these huge households were far from autarkic. Their financial records reveal incessant purchases of wines, foodstuffs, and other supplies and services from outside vendors.

⁹⁷ Mertes, *supra* note ____, at 185-87.

⁹⁸ Mertes, *supra* note ____, at 186-87. Mertes also attributes the rise to nobles' increased ability to administer a feudal domain from a central place and to statutory changes that made a household appointment a noble's preferred method of compensating a loyal follower. *Id.* at 185-87.

to trade more readily with outsiders. Over the course of the next centuries the size and scope of earls' household economies shrank steadily.⁹⁹

3. Demographic Changes: Longer Lives, Lower Birth Rates

During the twentieth century, the life expectancy of an American at birth rose from 47 years to 77 years.¹⁰⁰ Simultaneously, birth rates fell by half.¹⁰¹ In rounded fractions, over the course of the century the portion of the population under age 15 dropped from 1/3 to 1/5, and the portion aged 45 or older rose from 1/6 to 1/3.¹⁰² These trends are in line with those in other developed nations, where most people at death now will have devoted fewer years to raising minor children than to having served as a parent of adult children.

The graying of a population usually lessens average household size. Most householders feel a stronger urge to live with their minor children than with their grown-up children or with senior relatives.¹⁰³ A principal reason is that care provided to a small child is far more likely to affect the recipient's life chances.

4. Greater Wealth Increases Demand for Privacy

The richer people are, the more likely they are to choose an atomized living arrangement. In economic terms, privacy and autonomy appear to be "superior goods" — that is, outcomes for which demand increases disproportionately with wealth. Changes in

⁹⁹ See *id.*, graph at 218.

¹⁰⁰ The 1900 figure is based on reports from the limited number of states then collecting death statistics. See *Statistical Abstract 1999*, at 874. The latter figure, for 1998, is from *Statistical Abstract 2001*, at 74. Because much of the change is due to the control of diseases of early childhood, the increase in life expectancy after age 5 is less pronounced. In 1998, a white five year old could expect to live to age 77, and a black five year old to age 70. *Statistical Abstract 2001*, at 74.

¹⁰¹ In the United States the birth rate (per 1,000 population) dropped by slightly over half between 1910 and 1997. *Statistical Abstract 1999*, at 874. Scientific advances that have made pregnancy easier to control are partly responsible. The changing nature of the internal household economy, however, also has contributed to the drop. Even at an early age children living in a rural household commonly were able to provide some useful labor. With the increase in both urbanization and the sophistication of household gadgetry, children are less likely to be valuable contributors around the home. This diminishes some parents' eagerness to add to their broods.

¹⁰² See *Statistical Abstract 1999*, at 869 (figures for 1900); *Statistical Abstract 2001*, at 13 (figures for 2000).

¹⁰³ Natural selection fosters kinship altruism, especially toward one's children. See Richard Dawkins, *The Selfish Gene* (1976). Kibbutzniks learned through experience that most parents prefer to concentrate their child-rearing efforts on their own children, rather than on other members' children. Becker, *supra* note __, at 44-45.

the housing choices of elderly Americans and of Yale Law School students illustrate this proposition.¹⁰⁴

Over the course of the twentieth century most single elderly Americans shifted from living in an extended-family household to living alone. In 1900, 77% of retired noninstitutionalized men over age 65 were living with either one of their children or another family member (in addition to, or other than, their wives). By 1990, this percentage had plummeted to 20%.¹⁰⁵ Dora Costa has investigated whether this change was driven more by increased demand (seniors' preference for privacy and autonomy) or by reduced supply (children's diminished generosity). She concludes that seniors' quest for privacy is the main driving force.¹⁰⁶ Once one of the poorest groups in American society, the elderly have prospered as a result of retirement programs, old-age assistance, and the general increase in national wealth. Now able to afford a wider range of housing choices, an elderly person typically elects to live singly. In 2000, of Americans age 65 or over who were not living with a spouse, 66% were living alone.¹⁰⁷

The preference for singles also has sharpened in dormitory environments. When the Yale Law School's Sterling Law Buildings were originally completed in 1930, about 80% of the dormitory beds were situated in either double or triples. These typically were laid out in a suite that included a large common room that adjoined a tiny private bedroom for each occupant. This design enabled some efficiencies of scale in living, but with a loss of autonomy and privacy. When the Law School began planning the remodeling of these dormitory spaces in the 1990s, a far more prosperous era, all law students who were interviewed stated that they preferred single rooms. The Law School's planners followed this advice. In the remodeled dormitories, opened in 2000, all student rooms had been transformed into true singles.¹⁰⁸

¹⁰⁴ A third example: As wealth increases, children tend to depart from the parental home at a younger age. See Richard W. Johnson & Julie DaVanzo, *Economic and Cultural Influences on the Decision to Leave Home in Peninsular Malaysia*, 35 *Demography* 97 (1998); Leslie A. Whittington & E. Elizabeth Peters, *Economic Incentives for Financial and Residential Independence*, 33 *Demography* 82 (1996).

¹⁰⁵ See Dora L. Costa, *The Evolution of Retirement: An American Economic History, 1880-1990*, at 108, 130 (1998).

¹⁰⁶ Costa, *supra* note ___, at 114-30. "Increases in income have always been associated with an increased demand for the privacy and autonomy provided by separate living arrangements. Rising incomes therefore contributed enormously to the increase of the well-being among the elderly." *Id.*, at 128.

¹⁰⁷ See Statistical Abstract 2001, at 42. See generally Ellen A. Kramarow, *The Elderly Who Live Alone in the United States: Historical Perspectives on Household Change*, 32 *Demography* 335 (1995).

¹⁰⁸ Interview with Associate Dean Mike K. Thompson, Yale Law School, Aug. 17, 2000. As in many group quarters arrangements, these singles provide only semiprivate quarters. Occupants

III. THE EFFICIENCY OF MARKETS FOR HOUSEHOLD FORMS IN A LIBERAL SOCIETY

Up to this point the discussion has implied that any observed change in the distribution of household forms — for example, more seniors living alone, or fewer extended family households — is welfare enhancing. Arrangements that survive, however, are not invariably the best possible. Indeed, as mentioned, leading contributors to the canon of Utopian writing have proposed drastic changes in prevailing household institutions. These writers plainly saw no reason to defer to the predominance of the nuclear-family household.

What normative conclusions can be inferred from the survival (or nonsurvival) of a particular household form in a particular society? The answer depends on the society's background rules that govern the freedom of its citizens to create and dissolve household institutions. My thesis in this Part is that only in a society with "liberal" background rules — ones that enable the creation of "liberal households"¹⁰⁹ — can an observer be confident that the households that exist have forms that are welfare enhancing. Because the applicable rules prevailing in American society generally *are* liberal, however, I conclude (with some caveats) that the survival of any particular household form here does suggest its normative soundness. This is a distinctly antiutopian conclusion. It implies that the conventional nuclear-family household predominates because it makes its members better off than they would be in a large communal household of the sort that Plato, More, Skinner, and others have envisioned.

A. Preconditions for Emergence of Liberal Households

Liberalism rests on the premise that an individual presumptively can decide better than a state, a master, or any other third party what arrangements, including household arrangements, suit that individual best. To advance the goal of giving individuals wide-ranging choice among household forms, a society's background laws and social norms that constrain the process of household formation must be liberal in the following respects: First, there must be ample competition in the provision of housing units so that would-be occupants and owners are able to select from a broad array of physical spaces. Second, to enable them to tailor their own institutional arrangements, household members must have substantial freedom to contract as they wish. Third, as a group, household members must enjoy the basic entitlements of private property owners — namely, the right to exclude unwanted outsiders,¹¹⁰ the privilege of deciding land uses, and the power to transfer household interests. Fourth, each household member must be free to move about, to

control their sleeping rooms (which are much larger than those in the original design), but share with dorm-mates other spaces such as bathrooms, lounges, and eating facilities.

¹⁰⁹ I owe the term to William James Booth. See Booth, *supra* note ___, at 95-176 (1993).

¹¹⁰ Cf. U.S. CONST., amend. III, limiting the quartering of troops in "houses."

associate consensually with others, and to exit unilaterally from an unsatisfactory household arrangement. Complications arise, to be sure, in the elaboration and reconciliation of these rules, and all societies in fact fall short of perfect liberalism.¹¹¹

B. Relations Among Household Members in a Liberal Society

It is notable that the formation of household relationships in a liberal society is much freer than the formation of family and marital relationships. Family relationships, apart from adoption and marriage, are fixed by immutable biologic facts; entry into blood relationships is nonconsensual and exit from them is not possible. Marital relationships are strictly regulated by the state, which typically requires official rites and waiting periods before both entry and exit.¹¹² Household relationships are far more free-form. Liberal states, perhaps recognizing the difficulty of controlling how people shape their domestic institutions, make few efforts to govern the creation and dissolution of households. Informal social norms, such as those against “living in sin” or “abandoning one’s partner,” of course may constrain household forms. Nevertheless, in practice individuals have wide berth to live and own as they wish.

1. How Freedom of Contract Can Augment Household Surplus

As noted at the outset, in a complex domestic institution such as the Sitcom Household there are three types of distinguishable relationships: those among occupants, those among co-owners, and those between occupants and owners. Each of these relationships can give rise to mutually beneficial exchanges of goods and services (including affection). Gains that arise from internal household trade can be termed *household surplus*.¹¹³ Individuals join together to form households in anticipation of securing gains of this sort.¹¹⁴

The assurance of freedom of contract in all three types of relationship promises to

¹¹¹ In practice there are limitations on all of these rights, mainly because individuals vary in their competence and because an individual’s choices may have negative effects on others. See infra text accompanying notes __-__.

¹¹² At least through the eighteenth century, a woman’s entry into marriage typically resulted in her ceding most of her powers to contract and own property to her husband, a distinctly illiberal outcome. On the coverture system and its breakdown, see Rick Geddes & Dean Lueck, *The Gains From Self-Ownership and the Expansion of Women’s Rights*, 92 *Am. Econ. Rev.* 1079 (2002).

¹¹³ Compare the notion of “marital surplus,” a concept used in some law-and-economics work on the family. See, e.g., Wax, *supra* note ____, at 529-31.

¹¹⁴ Researchers find that, all else equal, marriage increases a husband’s wages by at least 10 percent. Eng Seng Loh, *Productivity Differences and the Marriage Premium for White Males*, 31 *J. Human Resources* 566 (1996) [check]. Some of this undoubtedly arises from gains in household efficiency.

enhance shareable surplus. First, in a household with multiple occupants, freedom of contract enables occupants to tailor the terms and conditions under which they share household spaces, including the inputs they each provide and the outputs they each receive. Second, in a household with multiple owners (equity investors, typically), freedom of contract enables owners to decide how best to share the benefits and burdens of co-ownership. Third, when occupants are not identical to owners, freedom of contract enables the two sides to decide how to structure the owner-occupant (landlord-tenant) relationship. In each of these three bargaining domains, efficiency-minded parties generally can be expected to strive to minimize the sum of their transaction costs and their deadweight losses arising from failures to exploit potential gains from trade.

2. Exit Rights: Default or Immutable?

Included in the foregoing list of “liberal” background rules was an individual’s right to exit unilaterally from a household.¹¹⁵ For an occupant, the right of exit from a co-occupancy arrangement means the freedom to physically remove both one’s person and one’s personal belongings. Liberal societies in fact confer these exit rights by prohibiting, as a matter of law, acts such as kidnaping, slavery, the forced performance of personal services contracts, and landlord seizures of tenants’ personal property. To have an analogous power of unilateral exit, a co-owner would have to be able to force dissolution of a co-ownership arrangement (and hence recovery of invested capital). Liberal societies in fact confer this power of exit by entitling a co-owner to initiate a legal action to partition. When there are owner-occupant (landlord-tenant) relationships within a household, both owners and occupants are free to end them unilaterally at the end of the term, or, in the case of a periodic tenancy, after giving adequate notice. When a landlord-tenant relationship still is in midterm, liberal law entitles a tenant to exit unilaterally by abandoning his interest, a step that limits the owner to the remedy of damages. A landlord, by contrast, cannot force out a nonbreaching tenant in mid-term without the tenant’s consent. This limitation on landlord exit in midterm, however, is of little practical consequences (outside of rent control jurisdictions) because few residential leases exceed two years in length. In sum, the default rules of American law generally do extend robust exit rights to all participants in a household.

A liberal society also must face the difficult issue of whether a member who has the legal right to exit from a household relationship is empowered to waive that right. Restated in the familiar terminology of Ayres and Gertner, are exit rights from household relationships immutable or mere defaults that the parties can vary by contract? Both occupants and owners may foresee some advantages from locking themselves into domestic

¹¹⁵ As explained *infra* text accompanying notes __-__, this power of exit establishes a threat point that influences the distribution of shares of household surplus. Dagan and Heller place protection of the right of exit at the center of their vision of a normatively attractive regime that they call the “liberal commons.” See Dagan & Heller, *supra* note __, at 567-77. [See also Albert Hirschman, *Exit, Voice, and Loyalty*, at 22-25]

relationships. Cooperative behavior among parties in a relationship is likely to increase when no party can force the relationship into end game. While still in midgame, any would-be noncooperator must fear that the other parties will respond with negative sanctions during future periods of play. In addition, as Albert Hirschman famously observed, when exit is constrained participants are likely to rely more on voice. More intense conversation itself may strengthen trust and pleasure in an ongoing relationship. Those who seek a high level of household solidarity therefore are particularly likely to desire to relinquish their default rights to terminate household relationships.

In practice, however, liberal states generally do not permit occupants and tenants to waive exit rights. As a matter of law, an occupant cannot contract into slavery, kidnaping, or a personal-services obligation specifically enforceable by an employer; nor may a tenant contract into a nonabandonable lease. These prohibitions on occupants' choices can be chalked up to a legal paternalism that has arisen out of past experiences with youthful enthusiasms. A person who makes a long-term commitment to remain in a certain household has incomplete information and may not be able to predict how her personal tastes will evolve. As time passes, Cheri, for example, might come to regret promising to stay at the Sitcom House. Legal rules that empower her to leave despite her past promises assure her the chance for a fresh start in a greener pasture.

These paternalist considerations have less far bite when owners (as opposed to occupants) have waived either their default partition rights or their default lease-termination rights. The obligations of the owners of a household, whether to one another or to tenants, virtually never include duties to provide services *in person* (as opposed to duties to provide capital or physical space). For instance, if Aunt Audrey were to have waived her right to partition her co-ownership arrangement with Dad or to terminate her lease with Cheri, those steps would not limit where Audrey could reside or work. In addition, if Audrey were to become overburdened with debts, she could use the bankruptcy process to obtain a fresh financial start. Nevertheless, like occupants, owners lack perfect foresight. As a result, courts sometimes do invalidate consensual leases and waivers of partition rights that would bind owners for what is regarded as an overly lengthy period of time.¹¹⁶

3. The Distribution of Surplus Within a Liberal Household

Until a generation ago, economists modeled the family household as if all members had identical preferences. Paul Samuelson supposed that household members were cohesive enough to resolve all issues by consensus. Gary Becker hypothesized the existence of an altruistic dictator who served as the household head and whose decisions would thwart

¹¹⁶ [California statute that limits leases to fifty years. Stoebuck & Whitman on waivers of partition rights.]

opportunism by any household member.¹¹⁷ More recently, however, economists have begun to apply game-theoretic models that assume that family members may battle over shares of the domestic pie. This conception is more consistent with the rational-choice approach that is dominant in economics and also with observations of actual families.¹¹⁸

Heretofore, however, economists interested in the “family” have not been alert to the distinction between a marriage and a household. Marriage, among other things, is an institutional arrangement for managing *marital* assets, which do not necessarily include the marital home.¹¹⁹ A household, by contrast, is an institutional arrangement for managing a real estate enterprise that delivers shelter, meals, and other domestic services to a group of people that need not include a married couple. Marriage conventionally is a two-person affair.¹²⁰ In contrast to bargaining within a marriage, bargaining within a household can occur within as many as three separate circles: among co-occupants, among co-owners, and between occupants and owners.¹²¹

Each of these three bargaining circles affords participants potential gains from trade. Cooperative game theory suggests how the participants might divide these gains.¹²² In game-theoretic terms an occupant or owner’s utility level in the event of exit from a household relationship establishes that member’s “threat point.” The other bargainers in the relevant circle, to deter exit by a valued member, must allocate to that person enough surplus to make it more advantageous for that person to remain in the relationship than to terminate it. If the other four occupants of the Sitcom household would like Junior to remain there, their rules governing use of the common spaces can’t be too harsh on him. If Dad wants Aunt Audrey to remain as a co-owner, he must make her investment a winner for her. If Granny wants to remain living in the Sitcom household, she has to make her presence a net boon for Dad and Aunt Audrey, the (implicit) landlords who have the power to terminate her stay.

A household member’s threat of exit becomes more credible as his opportunities in

¹¹⁷ See, e.g., Gary S. Becker, A Theory of Social Interactions, 82 J. Pol. Econ. 1063, 1074-83 (1974); see especially the “Rotten Kid Theorem,” *id.* at 1080. As Becker later conceded, this conception is implausible even for most kinship-based households. See Becker & Murphy, *supra* note ___, at 4-5. In a liberal household, I see cooperation as arising not on account of a benevolent dictator’s edicts, but mainly on account of norms that have evolved from repeat interactions.

¹¹⁸ For a valuable review of the intellectual trends described in this paragraph, see Shelly Lundberg & Robert A. Pollak, Bargaining and Distribution in Marriage, 10 J. Econ. Persp. 139 (Fall 1996).

¹¹⁹ See *supra* text accompanying notes ___ - ___.

¹²⁰ Wax, *supra* note ___, provides a tour-de-force of the legal and social scientific literature on bargaining within marriage.

¹²¹ See Figure 1, *supra* p. ___.

¹²² See Lundberg & Pollak, *supra* note ___, at 146-49.

other possible arrangements improve. Recognizing this reality, the others in the bargaining circle may allocate that person a larger share of the available surplus to reduce the likelihood of exit.¹²³ In colonial Andover, Massachusetts, for example, as young men were increasingly tempted to migrate west, fathers had to grant their youngest sons land to dissuade them from leaving the family nest.¹²⁴ Changes in law and social norms can alter threat points by changing both opportunity sets and the transaction costs of exit. Enhancement of women's employment opportunities outside the home, for example, serves to boost women's power within the home. Legal reforms that make it easier for a co-owner to partition property, or for a spouse to divorce, ease exit from a household and thereby strengthen the bargaining position of those with comparatively good alternative opportunities.¹²⁵

C. Inferences to be Drawn from the Survival of a Household Form in a Liberal Society

Legal assurance of exit rights pressures each existing household to arrange its internal affairs to the satisfaction of each member. As a result, it would initially appear that a liberal society could rely on the market for household forms to produce the optimal mix of household arrangements. For a variety of reasons, however, this view is overly rosy. Indeed, for many millennia various visionaries have rejected it outright.

1. Utopians' Challenges to Existing Household Forms

¹²³ It is widely believed that a husband is likely to obtain a majority of the surplus from a marriage because he usually has greater opportunities to remarry after divorce, a reality that makes his threat of exit more credible than his wife's. See, e.g., Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 *Int'l Econ. Rev.* 31 (1980) [check]; Wax, *supra* note ___, at ___-___.

¹²⁴ See Pollak, *Families and Households*, *supra* note ___, at 603-04 (1985) (drawing this example from Philip J. Greven, *Four Generations* (1970)).

¹²⁵ The Coase Theorem might be thought to suggest otherwise. For example, if it were efficient for a disgruntled wife to remain in a household, her husband arguably could strike a bargain with her to stay regardless of her legal entitlement to exit. See Becker, *supra* note __ at 331-34 (making this argument and offering data to support it). The Coase Theorem's invariance proposition, however, is implausible in this context for a number of familiar reasons. (See generally Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, *Perspectives on Property Law* 200-32 (3rd ed. 2002).) First, shifting an entitlement may have wealth effects. Second, because of bilateral monopolies and emotional entanglements in a household setting, transaction costs may be high even though few are involved. Third, there is the familiar asymmetry between willingness-to-pay and willingness-to-accept, which tends to make entitlements stick where they are first allocated. For evidence contrary to Becker's, see Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 *Harv. J.L. Pub. Pol'y* 241 (1993) (finding that no-fault divorce statutes increase the rate of divorce).

Drastic reform of the conventional household has been a central theme of utopian writing. Major contributors to utopian thought have imagined settlements where dozens or even hundreds of unrelated adults would eat communal meals and reside in collectively governed housing.¹²⁶ In *The Republic* Plato proposed that the governing class of Guardians share dwellings, storehouses, wives, and a modest food allotment.¹²⁷ Residents of many early Christian communities, such as the Essenes (and later the Hutterites), sought to live with “all things common.”¹²⁸ Thomas More’s *Utopia* depicts a fictional island where 10 to 16 adults grouped together by central authorities occupy each city row-house.¹²⁹ These rowhouses are freely accessible by others; occupants take their meals in yet larger groups in common dining halls.¹³⁰ In the nineteenth-century, Fourier, Marx, and others argued that household was a venue for the oppression of women and anticipated that communal living might free women from their straits.¹³¹ In the United States this line of thinking helped fuel a spate of experiments with intentional communities offering group dining.¹³² Edward Bellamy’s *Looking Backward*, one of the bestsellers of the late nineteenth century, envisions a future of nuclear-family households whose occupants rent their dwellings from the state, eat food cooked in public kitchens, and obtain household cleaning and nursing services from assigned members of the national industrial force.¹³³ In *Walden Two*, B.F. Skinner depicts a community of nearly 1,000 persons sharing a common eating room and dwelling in personal rooms located within a complex of buildings governed by a six-person Board of

¹²⁶ This vision may resonate with innate human instincts that evolved many millennia ago when our ancestors were clustered together in hunter-gatherer bands. On utopian thought generally, see Krishan Kuman, *Utopia and Anti-Utopia in Modern Times* (1987); Frank E. Manuel & Fritzie Manuel, *Utopian Thought in the Western World* (1979).

¹²⁷ Plato, *The Republic*, Bk. 3, 416d-e, Bk. 4, 419-420c (Francis MacDonald Cornford ed., 1945).

¹²⁸ See Martin Hengel, *Property and Riches in the Early Church* 8-9, 31-34 (John Bowden trans., 1974).

¹²⁹ Thomas More, *Concerning the Best State of a Commonwealth and the New Island of Utopia* 55-56 (George M. Logan & Robert M. Adams eds, 1989) (1518). Rural households, with a minimum of 40 adults, are even larger. *Id.* at 44.

¹³⁰ *Id.* at 47, 57-60. More himself probably regarded Utopia’s scheme as unworkable. See Peter Ackroyd, *The Life of Thomas More* 169-75 (1998).

¹³¹ See Jackson, *Crabgrass Frontier*, *supra* note ___, at 51. See also Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *Yale L.J.* 1073, 1198-1205 (1994) (describing the “cooperative housekeeping” movement of the post-Civil War period, whose participants aspired to create metahouseholds).

¹³² See *supra* text accompanying notes __-__.

¹³³ Edward Bellamy, *Looking Backward 2000-1887*, at 161-62, 168-69, 262-63 (John L. Thomas ed., 1967) (1888).

Planners.¹³⁴

Perhaps inspired by these writings, idealists have created numerous intentional communities whose occupants have shared a congregate dining hall and perhaps other buildings and lands as well. The United States has given birth to a disproportionate share of experiments in collective living, including the New Harmony, Oneida, and Amana ventures of the nineteenth century, the burst of Woodstock Era initiatives, and the Rajneeshpuram settlement in eastern Oregon in the 1980s.¹³⁵ After a few years the members of most of these institutions either dissolve them or subdivide them into more conventional households.¹³⁶ A collective founded and governed hierarchically by a charismatic leader is particularly unlikely to endure.¹³⁷ Two of the most long-lived communal movements are the Hutterite settlements of the Great Plains and the Israeli kibbutzim. These seem to survive in part because their members are ethnically homogeneous and strongly embrace a collectivist ideology. Nevertheless, both Hutterite communities and kibbutzim have been deeply troubled and their continued survival is hardly assured.¹³⁸

Experiments with intentional communities continue unabated, a pattern that indicates some contemporary demand for unconventional household forms. Modern communards usually keep the number of members small and commit themselves to a participatory form of governance.¹³⁹ The cohousing movement, started in Denmark in the 1970's, offers a template less revolutionary but more implementable than the utopians' models. A typical cohousing settlement consists of several dozen dwellings, perhaps each occupied by a nuclear-family. A family owns and controls its own dwelling but shares with the other

¹³⁴ B.F. Skinner, *Walden Two* 18-20, 40-44, 48 (1976) (1948).

¹³⁵ See Ellickson, *Property in Land*, supra note ___, at 1344-62.

¹³⁶ See Benjamin Zablocki, *Alienation and Charisma: A Study of Contemporary American Communes* 76-77, 148-51 (1980); Ellickson, *Property in Land*, supra note ___, at 1359-60.

¹³⁷ On George Rapp's domination of the affairs of the Harmony Society, first established in Pennsylvania in 1805, see Richard H. Chused, *Cases, Materials and Problems in Property* 252-57 (2d ed. 1999). On the rise and fall of Rajneeshpuram, see James S. Gordon, *The Golden Guru: The Strange Journey of Bhagwan Shree Rajneesh* (1987) [check].

¹³⁸ For more extended discussion of Hutterite settlements and kibbutzim, and also of the tradeoffs between hierarchical and communal governance, see Ellickson, *Property in Land*, supra note ___, at 1346-52. On a schism within the Hutterite faith, arising from its system of governance by elders, see *Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W. 2d 357 (S.D.1999).

¹³⁹ For reports of how residents of contemporary settlements view themselves, visit the Intentional Communities Website at www.ic.org/. In the most ambitious of these ventures a resident who works outside the settlement is expected to put all earnings into the common pot. Co-occupants thus own their human capital collectively, much like a husband and wife in a community-property state.

members the ownership and use of a central dining facility.¹⁴⁰ By 2002 there were 67 occupied cohousing communities in North America, with roughly the same number in the works.¹⁴¹

2. Potential Imperfections in Markets for Household Forms

Dissatisfaction with the prevailing household forms is understandable in a nonliberal society, where the survival of a particular form says little about its merits. For example, the Soviet Union used to randomly assign several unrelated families to share urban housing units.¹⁴² These *komunalkas* persisted not because they were popular with occupants (quite the contrary!) but rather because occupants lacked exit options on account of the state's monopoly over housing supply and the state's control of residency permits. Illiberal background conditions can work more subtly. Residents of the Russian repartitional villages (*miri*) that predated the 1917 Revolution were mired in a rigid socio-political system that afforded them few choices and scant exit opportunities.¹⁴³ Throughout history many illiberal societies have denied some competent adults freedom of household choice. In numerous cultures parents still arrange for their children's marriages (and thus typically their children's households).¹⁴⁴ Masters typically have chosen where slaves have resided. Over the course of recent centuries conditions governing household formation generally have become more liberal in most nations.¹⁴⁵ As Henry Maine famously observed, most legal systems have evolved from defining rights and duties as outgrowths of family and marital relationships and toward letting individuals define rights and duties voluntarily by contract.¹⁴⁶

¹⁴⁰ See Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 *J. Land Use & Envtl. L.* 3 (1999); Linton Weeks, *Co-Housing: The Challenge of Building New Communities*, 9 *Responsive Community* 58 (No. 3, Summer 1999). In a Hutterite community or kibbutz, by contrast, a couple typically is granted exclusive occupancy of a sleeping quarters, but not ownership of it.

¹⁴¹ See <http://www.cohousing.org/cmty/groups-us.html> (visited July 5, 2002).

¹⁴² On *komunalkas*, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *Harv. L. Rev.* 621, 650-58 (1998); Michael Wines, *Tight Space. No Privacy. Soviet Decor.*, *N.Y. Times*, Feb. 5, 2000, at A1.

¹⁴³ See Ellickson, *Property in Land*, *supra* note ____, at 1393-94 (1993).

¹⁴⁴ In many of these cultures an intended spouse is increasingly likely to be entitled to veto a proposed arrangement. See, e.g., Laura Kendall, *Getting Married in Korea: Of Gender, Morality, and Modernity* 85-115 (1996) (describing Korean tradition of arranged marriage). [check] See generally sources cited in Margaret Brinig, *In Search of Prince Charming*, 4 *J. Gender, Race & Justice* 321, 333-36 (2001).

¹⁴⁵ See Mary Ann Glendon, *The New Family and the New Property* 11-13, 41-46 (1981).

¹⁴⁶ Henry Maine, *Ancient Law* 180-82 (first published 1861)

Even in a liberal society, however, the market for households may be beset with imperfections. First, no society is perfectly liberal. The law may deny many citizens — for example, children, institutionalized persons,¹⁴⁷ and those incompetent to protect their own interests — freedom to reside where they choose. Unable to exit, these individuals are potentially vulnerable to abuse by those who govern their living spaces. Moreover, not all groupings in a liberal society are voluntary. When several siblings become co-owners of their parents' home as a result of intestate succession, the relationship is not one they chose.¹⁴⁸ A rent-control law may lock a landlord and tenant into a relationship longer than the one they had contracted for. Even when the legal system would enforce exit rights, informal enforcers may deny that possibility. A spouse, for example, may remain in a nuclear household out of fear that leaving would provoke either a violent response from the abandoned mate or ostracism by acquaintances.

Second, some household forms conceivably may generate externalities (negative or positive, tangible or intangible). Defenders of traditional values may be troubled by the example set when an unmarried couple publically cohabits. Many more observers would be upset by the presence of a de facto polygamous household .

Third, because exit is never a costless step, inertia favors perpetuation of existing household forms. An occupant who leaves a household invariably must incur search and moving expenses, the transaction costs of winding up intra-household claims, and the sacrifice of any household-specific human capital. These may be minor — for instance, when a graduating senior departs from a dorm room. The costs of exit are likely to be larger in middle age, however, when ties with co-occupants typically have been deeper and knowledge of household operations is more specialized. For similar reasons, inertia supports continuation of existing co-ownership and landlord-tenant relationships.

Fourth, a person who is risk averse may stick with a known, but imperfect, household, out of fear that another, seemingly better, prospect will not pan out.¹⁴⁹

Fifth, numerous government policies may distort outcomes in the market for households. Zoning and housing laws limit the array of available housing units. Income tax law may overreward (or underreward) homeownership and co-residence. Government

¹⁴⁷ The 1990 Census tallied 3.3 million persons institutionalized in nursing homes, prisons, mental health facilities, and the like. See 1996 Statistical Abstract, at 67.

¹⁴⁸ On how reliance on intestate succession led to fractionated ownership of African Americans farms in the rural South, see Dagan & Heller, *supra* note ___, at 551, 603-09; Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 *Nw. U.L. Rev.* 505, 517-23 (2001).

¹⁴⁹ See generally Andreas Flache, *Individual Risk Preferences and Collective Outcomes in the Evolution of Exchange Networks*, 13 *Rationality & Soc'y* 304 (2001).

policies governing eligibility for welfare and housing benefits may influence choice of co-habitants.

3. The Reality of Stiff Competition Among Household Forms

For all these reasons it is idle to suppose that prevailing household forms invariably are ideal. On the other hand, it also would be a mistake to exaggerate the importance of the imperfections listed. In particular, the rigidities created by exit costs and risk aversion, while important in the short run, tend to wash out over time as new generations not mired in existing household arrangements come of age.

Because it has been one of the most liberal of societies, the United States has witnessed vigorous market competition in household forms. Those on the demand side have countless options. Many senior citizens are free to choose among living alone, with family members, or in congregate housing for the elderly. University students commonly can pick among an array of alternative living arrangements, perhaps including hierarchically governed dormitories, more communal cooperatives and fraternities, and off-campus housing. Although constrained by zoning laws, land developers who succeed in offering more satisfying forms of occupancy and ownership can expect consumers to flock to their sales offices. The websites of the cohousing and intentional-community movements chronicle ongoing experiments with innovative domestic institutions. Their market share remains infinitesimal, however. Consumers in markets in the United States and other developed nations have spoken. When presented with a wide array of choices among living arrangements, most people opt for small households, most often ones based on kinship.¹⁵⁰

IV. INTERACTIONS AMONG HOUSEHOLD MEMBERS: THE TRANSACTIONAL EFFICIENCIES MADE POSSIBLE BY TRUST

Problems may arise in any of the three relationships that are nested within a complex household — namely, the relationship among occupants, that among owners, and that between occupants and owners. The participants in all three of these relationships have an interest in generating and enforcing rules governing each other's behavior.¹⁵¹ By curbing opportunistic actions and inactions, these rules can augment the household's shareable

¹⁵⁰ See also Ellickson, *Property in Land*, *supra* note __, at 1357-62 (discussing history of competition between intentional communities and more conventional household forms). For guarded discussions of the inferences that can be drawn from the survivorship of an ownership form, see Hansmann, *supra* note __, at 22-23; Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 *Stan. L. Rev.* 127 (1999).

¹⁵¹ In any social context there are not only substantive rules that govern primary behavior of this sort, but also a variety of additional rules that govern the operation of the dispute resolution system itself. See Robert C. Ellickson, *Order Without Law* 132-36 (1991).

surplus. A plausible overarching standard is that a household member should act as he would if he were the sole owner-occupant of the premises (for then opportunism at the expense of co-members would not be possible).¹⁵²

The expected time horizon of a household relationship is likely to influence how participants engage in rulemaking and dispute resolution. As Lisa Bernstein has argued in another context, interpersonal dynamics during midgame differ from those in endgame.¹⁵³ In midgame each relevant party is receiving a satisfactory share of the household surplus, prefers to remain, and can be expected to favor rules than are relationship-preserving. Especially during this midgame stage, members of households are likely to govern each other by means of informal norms created through gift exchanges and other informal interactions, and not by rules provided by the legal system. In endgame, by contrast, when the parties anticipate that some or all of them are about to exit, they are likely to favor a quite different set of substantive and procedural rules. At that stage they also are more likely to be amenable to turning to law.

A. The Limits of Law in Structuring Household Affairs

It must be stressed that a liberal legal system does provide and enforce basic background rules that individuals are likely to take into account at all stages of their interactions. Legal prohibitions on mayhem, theft, and kidnaping, for example, help to curb intrahousehold violence and to assure rights of exit.¹⁵⁴ These baseline entitlements set the foundation for household bargaining and interplay.¹⁵⁵

Having set these baseline rules, however, those who govern a liberal legal system are not likely to aspire to govern many of the details of household relations, especially in midgame and especially among co-occupants.¹⁵⁶ Liberal law is silent, for example, about

¹⁵² [Richard A. Posner, *Economic Analysis of Law*]

¹⁵³ Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996).

¹⁵⁴ Because the social norms of a liberal culture support these same entitlements, the legal system hardly is entirely responsible for their existence.

¹⁵⁵ See also *infra* text at notes ___ - ___ (on state supervision of ongoing households to protect incompetents and to control externalities). Some scholars have envisioned a greater role for law during household midgames. See Pollak, *Families and Households*, *supra* note ___, at 597 (implying that, because household governance contracts are necessarily incomplete, courts or other external institutions have a role in supervising these relationships) [check]; Siegel, *Home as Work*, *supra* note ___, at 1215-16 (anticipating that the law's conferral on wives of property rights in household labor would have far-reaching practical consequences for household operations).

¹⁵⁶ The landlord-tenant relationship, the one most likely to involve parties who are at arm's length, is the most legally regulated of the three.

the assignment of housework and about etiquette in common household spaces. Lawmakers indeed likely would fail were they to attempt to regulate these low-level matters. It is a staple of empirical legal scholarship that individuals in a continuing relationship typically resolve their low-stakes disputes beyond the shadow of the law.¹⁵⁷ They opt for informal governance, not for the slower, and more costly, legal system. In midgame a civil lawsuit between co-occupants of a household is vanishingly rare (absent a prospect of collecting an award from a liability insurance company).¹⁵⁸ Because a lawsuit tends to rupture a relationship permanently,¹⁵⁹ litigation between co-owners and between landlords and tenants also is overwhelming concentrated in the endgame stage.¹⁶⁰

B. Possible Sources of Household-Created Rules: Contracts, Hierarchies, and Norms

Household members can use three basic mechanisms to generate customized rules to govern their interactions. First, the parties to a relationship can enter into explicit bilateral contracts that set out their rights and duties. Second, they can agree to establish a hierarchical governance structure to make rules and decisions that they all will obey.¹⁶¹ Third, through unilateral actions such as the spontaneous conferral of gifts and punishments, they can informally create a pattern of norms specific to their household.¹⁶² The literature on the organization of business enterprise has focused on the first two of these mechanisms of coordination, that is, on contracts and hierarchies.¹⁶³ The liberal household is an

¹⁵⁷ See sources cited in *Order Without Law*, supra note ___, at 141-47, 256-57. A particularly pertinent study is Vilhelm Aubert, *Some Social Functions of Legislation*, 10 *Acta Sociologica* 98 (1967), discussed in *id.* at 141-42. Aubert found that no lawsuits had been brought under the Norwegian Housemaid Law of 1948 during the first two years it had been in effect because housemaids, to curb employer abuse, could continue to rely entirely on their powers of exit.

¹⁵⁸ On possibilities of tort litigation between family members, see Homer H. Clark, Jr., *Domestic Relations* §§ 10.1-10.2 (2d ed. 1988).

¹⁵⁹ [Galanter]

¹⁶⁰ Midgame litigation is more likely when exit is constrained, as in a landlord-tenant relationship in a jurisdiction with rent control.

¹⁶¹ See *Order Without Law*, supra note ___, at ___-___ (calling this “organizational control”). Under nonliberal conditions, a hierarchy within a household may be nonconsensually created. For example, masters may be able to dictate terms to slaves; and parents, to minor children. In the *Politics*, Aristotle asserts that “every household is monarchically governed by the eldest of kin,” a nonconsensual approach. Aristotle, supra note ___, at 9. But see note ___ supra (on *philia* as a constraint on the behavior of a Hellenic household head). I focus on the dynamics of liberal households and therefore say little about these nonconsensual hierarchies.

¹⁶² To simplify the exposition I sometimes refer to this process simply as “gift exchange,” even though in practice it involves not only informal carrots but also informal sticks.

¹⁶³ [Oliver Williamson, *Markets and Hierarchies*]

intriguing institution, in part, because it is a venue where informal mechanisms such as gift exchange tend to be more important than they are in business contexts.

Each of the three coordination devices just listed is associated with a set of transaction costs. While the participants in a household relationship may rely on just one of these devices, they also can mix them with infinite variety. My central positive thesis, again, is that household members are alert to transaction cost considerations and choose household forms and governance structures that promise to maximize the surplus they each derive in the domestic sphere.¹⁶⁴

1. Intrahousehold Contracts

By entering into a contract, oral or written, members of a household may be able to clarify their rights and duties. If reduced to writing, a contract also can assist in the proof of obligations in the event of a later dispute.¹⁶⁵ A striking feature of household relationships, however, is how seldom they are governed by written contracts.¹⁶⁶

Of the three relationships nested within a household, that among co-occupants typically is the most complex. Cohabitants interact on numerous and disparate dimensions, usually over a lengthy period of time. The transaction costs of hammering out and enforcing even a moderately complete contract to govern a multistranded relationship of this sort are high. There is a far cheaper approach: living with housemates one can trust — notably with kin or others who share a close and enduring social network.¹⁶⁷ Indeed, a housemate who insists on a written contract evinces a lack of trust, a signal that itself may damage the relationship.¹⁶⁸ It is notable that, in a nation with millions of unrelated housemates, major

¹⁶⁴ This is a concrete application of my more general hypothesis that a closely knit group generates norms that maximize its members' welfare. See *Order Without Law*, supra note ____, at 167-83.

¹⁶⁵ A variant of the statute of frauds conceivably might bar judicial enforcement of an oral contract among housemates. Cf. Minn. Stat. §§ 513.075 (1998) (court can enforce cohabitation agreement between an unmarried man and woman only if it is in writing and only after termination of the relationship); but cf. *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (allowing ex-cohabitant to pursue recovery based on oral contract, but not on implied contract theory); but see *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (permitting ex-cohabitant to proceed on both oral- contract and implied-contract theories).

¹⁶⁶ I know of no systematic empirical work on the topic. See infra note ____ (on incidence of antenuptial and postnuptial agreements). For insightful exploration of the role of express contracting in family settings, see Carl E. Schneider & Margaret F. Brinig, *An Invitation to Family Law* 427-75 (2d ed. 2000).

¹⁶⁷ See infra text accompanying notes ____ - ____.

¹⁶⁸ An antenuptial agreement similarly betrays a distrust about whether the upcoming marriage will endure. Although it is frequently stated that antenuptial agreements have become more

legal formbooks (including ones for amateurs) do not include form contracts to govern relations among the co-occupants of a household.¹⁶⁹

Many co-occupants undoubtedly do engage in good deal of oral contracting. When new problems arise, they can resolve them amicably through conversation. Especially at the beginning of their co-occupancy, housemates may discuss how spaces are to be shared, chores performed, and bills paid. These conversations then lead to ongoing practices that create a “custom of the household.” In midgame the co-occupants might either honor this custom as a matter of self-disciplined habit or enforce it against each other by means of self-help measures. A proposed change from an established household tradition would be a prime candidate for an advance oral agreement.¹⁷⁰

A co-ownership relationship usually involves a set of interactions simpler than those entailed in co-occupancy. Nonetheless, co-owners must divide up long-enduring chores of property management and decide on repairs, improvements, tenants, and so on.¹⁷¹ Perhaps surprisingly, American legal formbooks also do not include contracts to govern relations among the co-owners of a housing unit or other real estate.¹⁷² This implies that few co-owners regard as cost-justified the execution of a written contract to govern these future uncertainties.¹⁷³ Instead, like co-occupants, their usual strategies are to co-own only with persons they anticipate they can trust, and to rely on oral contracting and on implicit contracting (the evolution of their own co-owning customs). Written contracts among co-owners seem to be found mainly in settings where the co-owners are both numerous and not

common, the data to support that proposition appear to be entirely anecdotal. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65, 143 n.244 (1998); Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 *Stan. L. Rev.* 887, 891 (1997).

¹⁶⁹ [Nolo Press and other sources] But cf. Abby Ellin, *Taming Roommate Chaos*, *N.Y. Times*, Mar. 16, 2003, § 3 (Business), at 9 (advocating, and giving examples of, written “roommate agreements”). As an empirical matter, written contracts among housemates are most likely to be used in low-trust settings, for example, in households where co-occupants are socially distant or unusually numerous.

¹⁷⁰ See *infra* text at notes ___ - ___.

¹⁷¹ Co-owners commonly commence their relationship by acquiring land by deed or probate decree that creates a joint tenancy, tenancy-in-common, or another of the standard forms of concurrent ownership. The legal system provides, for each of these forms, a (largely identical) set of default rules to govern interowner behavior. In practice, co-owners are unlikely to know these rules at the outset, and also are unlikely to consult lawyers, in midgame, to learn what these rules provide. The details of the law of co-ownership rarely are relevant prior to endgame, and they may not affect behavior even then. See *infra* text accompanying notes ___ - ___.

¹⁷² [Nolo Press and other sources]

¹⁷³ Accord Lewis, *supra* note ___, at 392.

related by kinship, as in co-housing communities and in condominium associations.

Of the three relationships within a complex household, the owner-occupant relationship is the one most likely to give rise to a written contract. But even landlords and tenants may decline to put their understanding on paper. In the two-thirds of the housing stock that is owner-occupied, a written lease between the owners and a nonowning but occupying family member surely is uncommon. Dad and Aunt Audrey are not likely to have negotiated a document with Sis, or with Granny, or with Junior (well, perhaps with Junior, in an effort to make him grow up). One or more of those three might be paying rent pursuant to an oral agreement but, because they are related to the owners by kinship, even that is doubtful. An express lease is more likely when landlords and tenants lack an intimate relationship, for example, when owners put up a boarder such as Cheri. As any poverty lawyer knows, however, in the less expensive portion of the rental market especially, many leases between arm's-length landlords and tenants are oral.¹⁷⁴ In sum, the members of even a complex household are likely to persevere without resorting at all to written contracts.

2. Household Hierarchies

Especially when household members are numerous, unintimate, and unequal, they may regard hierarchical governance as the most efficient approach. A hierarchy, by concentrating powers of rulemaking, adjudication, and enforcement in specialists, may lead to decisions that are speedier and perhaps even sounder than those generated by means of a more decentralized approach. Hierarchies, of course, can be mixed blessings. The creation of a bureaucracy may give rise to new administrative costs and pose risks of rigidity, intolerance of minority opinions, and capture by unfaithful agents.

Each of the three relationships within a household may give rise to its own hierarchy. A group of absentee owners may organize themselves into a corporation, bureaucratized partnership, or trust (the standard English institution for the governance of co-owned property).¹⁷⁵ Nonowning occupants may delegate powers over interoccupant relations to a board, for example, a council of dormitory residents. The most complex household hierarchies govern the relationship between owners and occupants (and perhaps relationships within those groups as well). One notable example, mentioned previously, was the highly bureaucratized medieval English noble household. A contemporary example is the governance structure of a cohousing development, whose board may be authorized to regulate both owner and occupant behavior.

The extended-family household ruled by a *paterfamilias* is perhaps the most

¹⁷⁴ [Rand data from Brown County, Wisconsin, in 1970's: 12% of tenants had a written lease at the outset of their tenure. This percentage likely has risen in recent decades, partly as a result of Section 8.]

¹⁷⁵ [Dagan and Heller source]

historically important case of domestic hierarchy. This arrangement simplified decisionmaking by concentrating in one person the power to govern interoccupant relations, owner-occupant relations, and foreign relations with neighboring households. Typically this gain in administrative efficiency came at the sacrifice of liberal principles. A *paterfamilias* traditionally was not consensually chosen by the housemates but rather designated through application of cultural rules of family succession (ones that traditionally favored senior males).¹⁷⁶ In addition, the *paterfamilias* form commonly has flourished in cultures that have not assured exit rights — certainly not to slaves and perhaps not to others as well. Even in these traditional settings, however, social norms commonly evolved to reduce abuse of centralized household power.¹⁷⁷ The law-giver (*kurios*) in a Homeric household, for example, was constrained by social norms to promote a shared sense of affectionate belonging (*philia*).¹⁷⁸ In addition, a *paterfamilias* typically cannot sell the household premises and pocket the proceeds, but instead must while alive give other family members access to it and at death pass it along in accordance with mechanical rules of succession.

When an individual's freedom of exit from household relationships is assured, a hierarchical governance structure can be expected to endure the rigors of the market for households only when it serves to augment household surplus. With the rise of liberal principles in recent centuries, the *paterfamilias* form, while showing some staying power in India, China, and elsewhere, generally has been losing market share.¹⁷⁹

3. Social Norms (Household-Specific and Ambient)

Many household rules are informal norms, that is, understandings of appropriate behavior (commonly unspoken) that arise out of repeat dealings. Occupants, who have the richest set of interactions, are likely to have the most elaborate set of norms. Rules against offensive household behavior can arise from patterns of informal punishment. If Sis were to turn the television set up to too loud, Junior could respond with a sarcastic comment or by

¹⁷⁶ Compare contemporary Hutterite communities, which are governed by committees of males chosen largely by seniority. See Ellickson, Property in Land, *supra* note ___, at 1347. Partially offsetting its many disadvantages, the mechanical selection of leaders through application of rules of seniority reduces the amount of energy individuals waste in jockeying for positions of power. Cf. James M. Buchanan, Rent Seeking, Noncompensated Transfers, and Laws of Succession, 26 J.L. & Econ. 71 (1983) (identifying some advantages in mechanical rules of inheritance).

¹⁷⁷ Compare Gary Becker's conception of a household ruled by an altruistic dictator, *supra* note __ and accompanying text.

¹⁷⁸ On the Homeric household and other ancient extended families, see sources cited *supra* notes __-__.

¹⁷⁹ [check: The Extended Family: Women and Political Participation in India and Pakistan (G. Minault ed., 1981). In India, it traditionally has been thought appropriate for a bride to move into her husband's extended family household. On China, see Ruskola sources; The Chinese Family and Its Ritual Behavior (Hsieh Jih-chang & Chuang Ying-chang eds., 1985).]

changing the channel. Conversely, housemates may bestow informal rewards on a household member who performs valuable work. Whenever Granny cooks, Dad could wash the dishes.

Repeated interactions among co-owners and between landlords and tenants also can give rise to norms. Because Aunt Audrey, the other co-owner, lives elsewhere, Dad may get into the habit of paying all the maintenance expenses. Granny's steady use of a particular chair in the family room may eventually create an understanding that her informal lease to the Sitcom Household includes an entitlement to sit there.

A variety of potential enforcers can help give norms teeth. As noted, a household member may use a self-help sanction — a withheld service, a kind word — to punish or reward another. In addition, a member may internalize some operative norms, after which he would enforce those rules on himself by feeling guilt after violating a rule of behavior and a warm glow after contributing a good deed. While members may tailor their own norms, much of the custom of a household is likely to be consistent with prevailing cultural norms about how a household should function. Ambient community norms, for example, are likely to set standards for cleanliness, child supervision, and yard care, and ambient norms governing gender roles are almost certain to influence the internal allocation of household tasks. Visiting friends and neighbors can contribute to the enforcement of these ambient norms by using positive and negative gossip and other tools of informal social control. Outsiders are especially likely to intervene to protect helpless insiders or to control negative neighborhood effects.¹⁸⁰ Otherwise external observers in a liberal society are likely to give household members wide berth to structure internal affairs.¹⁸¹

C. How Arrangements that Generate Trust Can Reduce Transaction Costs: Of the Virtues of Gift Exchange

Participants in a household relationship have to deter opportunistic behavior within their ranks. By finding cheaper mechanisms to accomplish this end, they can augment their shareable surplus. Participants can be said to trust one another if each of them expects the others to be disinclined to harm the collective welfare in pursuit of short-run personal gains. The next section describes some structural attributes of household relationships that are likely to foster trust among participants and hence to reduce their costs of achieving cooperative outcomes. In this section I discuss the gains that trust can bring in its train. One has already been mentioned. Parties who do not trust one another are more likely to feel compelled to reduce their agreements to writing, a potentially time-consuming procedure.¹⁸²

¹⁸⁰ Cf. *infra* text accompanying notes ___ - ___ (on state regulation of household affairs).

¹⁸¹ See Alan Wolfe, *One Nation, After All* (1998) (describing broad tolerance of most Americans toward others' modes of living); but cf. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *Mich. L. Rev.* 338, 412-19 (1997) (on possibility of "nosy norms").

¹⁸² See *supra* text accompanying note ____.

But trust has other major advantages as well.

1. Trust Reduces Monitoring Costs

Household services performed in isolation from other members may be difficult to monitor for quality. Someone who is lax when caring for an infant, scrubbing pots, or seeding a lawn may never be detected. The problem of unobservability poses difficulties whatever the system of household governance. When free of the risk of detection, a shirker can flout rules of any kind — for example, the terms of a written contract with housemates, the rules of a hierarchical household, or informal household norms. The members of a household may deal with this risk by increasing monitoring efforts. In many instances, however, their cheaper countermeasure is to associate only with persons who are relatively unlikely to shirk. Family members and friends, for example, are likely to harbor altruistic feelings toward one another, a disposition that promises to curb their opportunism. Thus agricultural economists have observed that family farms predominate in the production of crops for which supervision of field workers is difficult.¹⁸³ In addition, even two individuals who operate at arm's length are less likely to shirk when they are enmeshed in a relationship that is destined to be long-enduring. Under those conditions the victim of an opportunistic act has many opportunities to levy on the perpetrator heavy informal punishments (calibrated upward to take into account the difficulty of detecting of the deviant act). In short, monitoring costs within a household fall when relationships are intimate or close-knit.

2. Trust Enables Gift Exchange, Potentially the Cheapest of Transactional Methods

Even in a business context, parties engaged in a long-term contractual relationship find it impossible to execute contracts that completely govern their rights and obligations. To supplement the terms of their express contracts, they are likely to engage in a process of gift exchange.¹⁸⁴ Household transactions tend to be distinctive from business transactions in two ways. First, because participants in many household relationships lack even a bare-bones express contract, for them the gift-exchange process is primary, not supplementary.¹⁸⁵ Second, while cash is an important medium of exchange among parties at arm's length, intimates typically are loath to use this cold and impersonal medium, even as a component of gift exchange. In intimate households the suppliers of the labor and capital used to

¹⁸³ See Pollak, *Families and Households*, supra note ___, at 591-93. [also Allen and Lueck?]

¹⁸⁴ See, e.g., George Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 *Q.J. Econ.* 543 (1982); Simon Gaechter & Ernst Fehr, *Fairness in the Labour Market? A Survey of Experimental Results* (SSRN 2002) (reviewing the labor-market literature on gift exchange); Janet Tai Landa, *Trust, Ethnicity, and Identity: Beyond the New Institutional Economics of Ethnic Trading Networks, Contract Law, and Gift-Exchange* (1994).

¹⁸⁵ Gift exchange must be distinguished from altruistic gift-giving. In a family household many gifts, especially ones from parents to children, are given with little or nothing expected in return.

produce the flow of domestic services typically are not compensated in cash, but rather given entitlements both to consume a portion of those domestic services and also to receive an appropriately sized flow of inputs from the other housemates. Because housemates typically are indifferent about whether their gifts are exchanged simultaneously or serially, these in-kind exchanges may fitful and at times uneven.

To illustrate, in the Sitcom household only one occupant, Cheri the au pair, is likely to be paid cash for her labor inputs. Dad probably does not pay his children, Junior and Sis, for the value of their chores.¹⁸⁶ Dad and Aunt Audrey, the owners, similarly are apt neither to charge Granny rent nor to pay one another for time spent in managing the Sitcom property. Instead, the kinfolk within the household are likely to make unilateral in-kind gifts to one another, with the expectation of reciprocation.

This system is hardly unique to kinfolk. Unrelated friends who live or own together also commonly reject *ex ante* bilateral agreements, especially ones calling for cash compensation.¹⁸⁷ Suppose at graduation two college graduates were to agree to live together in a distant city beginning the following fall. During the summer one of them would have to travel there to find an appropriate apartment to lease. How should the other roommate reward this extraordinary contribution? Cash compensation would be possible, but no doubt unusual. Instead, the friends likely would prefer for the benefitted student to even up accounts by making a return gift, such as in September handling setup arrangements for utility services for the shared apartment. The two could orally work out this in-kind exchange before the apartment search began. If the searcher trusted his friend, however, he could undertake the search unilaterally and anticipate that the friend eventually would reciprocate with an appropriate gift.

Each of the participants in a gift-exchange relationship must keep a rough mental account of who has contributed and received what.¹⁸⁸ Especially in contexts where gifts are lumpy and sporadic, one of the participants may suffer a short-run deficit in the balance of trade. This net creditor may hesitate to point out the imbalance as that remark would signal a lack of trust that the net debtor eventually will even-up accounts. Nevertheless, a member who receives too little back from a housemate eventually can be expected to respond through escalating self-help measures. As grievances deepen, these informal remedies might progress from gentle reminders, to more caustic comments, to conspicuous refusals to

¹⁸⁶ Some parents do pay children to perform household chores, perhaps in part to prepare them for work experiences outside the household.

¹⁸⁷ Cf. Ellickson, *Order Without Law* 61-62, 78, 234-36 (1991) (describing preference of neighbors in rural Shasta County, California, to use in-kind gifts, not money, to compensate one another).

¹⁸⁸ Cf. *id.* at 55-56 (discussing mental accounting of interneighbor debts).

perform customary duties, to threats of exit, and finally to actual exit from the household.¹⁸⁹ A grievant's set of sanctioning opportunities grows with the thickness of the set of social interactions between the parties. In general, co-occupants interact more than nonoccupying co-owners do, and thus have richer menu of informal sanctions.

Why is gift exchange so common among intimates?¹⁹⁰ One principal reason is that in many contexts trusting individuals regard gift exchange as administratively cheaper than other systems of coordination, including explicit bilateral contracting.¹⁹¹ Household members confident that their gift exchange system will be mutually advantageous are able to avoid the hassle of negotiating and enforcing agreements over particular contributions. How much was sweeping out the garage worth? How well was the job done? These sorts of questions may arise within household relationships based on gift exchange because members may find it desirable to keep rough mental accounts. But the transaction costs of keeping those accounts are far less than the costs of bargaining out in advance the terms of a garage-cleaning deal and later administering that contract. In a trusting environment, a garage cleaning can be initiated unilaterally, without any prior negotiation.

In addition, gift exchange is a potentially more pleasurable *process* than bilateral contracting, especially when cash transfers are involved. Intimates tend to shy away from explicit contracts and payments of cash because both devices symbolize social distance.¹⁹²

¹⁸⁹ Cf. *id.* at 56-64 (on neighbors' application of escalating self-help sanctions to control deviants). If the net creditor were to be an owner and the net debtor a tenant, expulsion of the debtor would be another option.

¹⁹⁰ Household members conceivably might avoid making cash payments for household labor in order both to reduce occupants' income-tax liabilities and to increase occupants' welfare benefits. Similarly, owners might choose not to charge cash rents in order to reduce taxable income. Because gift exchange was the prevalent in family households prior to the advent of both the income tax and means-tested welfare programs, however, the primary motivations for it must lie elsewhere.

¹⁹¹ Previous theorists of gift exchange have not stressed its capacity to reduce transactions costs. For an overview of alternative theories, see Jonathan R. Thomas & Timothy Worrall, *Gift-Giving, Quasi-Credit and Reciprocity*, 14 *Rationality & Society* 309, 315-17 (2002). In an alternative view, gift exchange (as opposed to cash compensation) persists because it systematically advantages the powerful, in particular men over women. See, e.g., Vicki Schultz, *Life's Work*, 100 *Colum. L. Rev.* 1881, 1899-1902 (2000) (applauding trend toward more contracting out of household work on ground that outside workers are less likely to be exploited than inside workers). [Also cite Martha Fineman, Joan Williams, Susan Moller Okin?] This view challenges my assumption that background legal and social conditions are liberal — that is, that occupants can use either voice or exit to avoid exploitation. This illiberal conception of the household seems not to comport with how most housemates subjectively view their personal situations. [check: Norval D. Glenn, *Marriage on the Rocks*, 21 *Psychol. Today* 20 (1987); Barbara Defoe Whitehead, *The Divorce Culture* (1997)]

¹⁹² See Ellickson, *Order Without Law*, *supra* note ____, at 234-35. Feminists scholars who urge monetary compensation for household work appear to recognize this point. See, e.g., Susan Moller Okin, *Justice, Gender, and the Family* 180-81 (1989) (opposing cash compensation for

A well-socialized dinner guest arrives bearing a “spontaneous” gift of a bottle of wine, not proffering a pre-negotiated twenty-dollar bill. Law and norms permit gifts of babies and sexual favors, but forbid their sale.¹⁹³ By declining to commodify their relationship, household members express their feelings of intimacy and thereby deepen their mutual trust.

3. Potential Shortcomings of Gift Exchange

As time passes, the process of gift exchange within a household generates expectations and hence household-specific norms governing the rights and duties of participants. Like other forms of rules, norms have drawbacks. First, they are inevitably vague, especially in how they apply to a new situation. Even intimate housemates therefore sometimes resort to oral contracts to clarify their governing rules. When their first infant arrives, a couple is likely to talk through who is to be on night duty.

Second, especially when gifts are lumpy and sporadic, accounts between the parties to a gift exchange relationship are likely to be unbalanced when their relationship comes to an end. If the relationship has soured, the net creditor at that stage may have to resort to appeals for intervention by outsiders, including perhaps persons involved in the legal system. In practice, large endgame imbalances are more likely to arise between landlords and tenants and among co-owners than they are to arise among co-occupants. Those who don’t cohabit with one another have less opportunity to even-up unbalanced accounts through adjustments in daily interactions. In addition, co-occupants contribute labor to a household, an input typically less lumpy than capital. Lawyers thus are more likely to be involved in landlord-tenant and co-owner endgames than in co-occupant endgames.

Anticipating the chance of an unbalanced account in endgame, a person about to enter into a gift-exchange relationship can use a variety of ex ante strategies to mitigate the risk. As the next section stresses, the primary strategy in the household context is to live, own, and rent from someone with whom one will still share a social circle after the household relationship is over. Another is to arrange for an ex ante exchange of hostages, for example, a security deposit to secure lease obligations.

Third and finally, gift exchange is unlikely to work well when participants place widely different values of the goods and services transferred. If Sis were unilaterally to drape the family room with party decorations, she might be surprised to find that the other occupants of the Sitcom Household didn’t place any positive value on her labor. If Dad unilaterally decided to pay to replace the roof, he might discover that his co-owner Aunt

particular household tasks, but advocating that each spouse receive half of any paycheck received for work outside the household); Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 161-66 (1995) (urging that governments compensate contributors of household work) [check].

¹⁹³ See Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987).

Audrey thought the existing roof was fine. When appraisals differ, both parties in a gift exchange relationship may regard themselves as behind, raising the specter of a continuing feud.¹⁹⁴

One way to reduce this risk of divergent valuations is choose intimates as housemates. Because intimates have relatively good knowledge of each other's tastes, they are more likely to agree on the value of what is being exchanged. Another method, sensible even for intimates, is to develop procedural norms that require a member who is about to do something out-of-the-ordinary to receive advance authorization from the other members. Thus, because both Sis and Dad failed to discuss their unusual inputs in advance, Sitcom household norms governing gift-exchange might entitle the other co-occupants and co-owners to reject their personal appraisals of the value of what they had done. By contrast, household norms should entitle a member to rely on application of the usual household accounting rules to unilateral acts that perpetuate household traditions. While Sis can't expect credit for putting drapes in the living room, she can for accomplishing her usual task of taking out the trash. Aunt Audrey may be entitled to resist paying a share of Dad's outlay for the new roof, but not of his outlays for property taxes. Granny needs no advance approval before sitting in her traditional chair, but does before inviting her bridge club over for dinner.

D. Attributes of Households that Tend to Foster Trust

Each of the three internal household relationships — occupant-occupant, owner-owner, and owner-occupant — is potentially a source of pleasure in itself. People obviously prefer to interact with persons for whom they feel affection and loyalty. They thus are strongly inclined to live with, own with, and implicitly rent from either family members and friends. These associative preferences are a major reason why the market for households produces the outcomes described at the outset of this Article.¹⁹⁵

Transaction-cost considerations, however, also importantly influence household forms. For the reasons just canvassed, trust within a household relationship promises many benefits, in particular the possibility of coordination by gift-exchange. In a liberal society where household arrangements are voluntary, a time-tested ex ante strategy is to seek out household relationships that are conducive to the emergence of trust. All else equal, trust is more likely when participants are few, tied together by kinship or other enduring bonds, homogeneous, and equal.

1. The Advantages of Small Numbers

¹⁹⁴ See generally Ellickson, *Order Without Law*, supra note ____, at 220, 253. Feuds also may arise when memories of past events are discordant. To reduce this risk, the provider of an extraordinary input to a household may be wise to publicize and document its delivery.

¹⁹⁵ See supra text at notes ____ - ____.

Gift exchange becomes more difficult as the number of persons in the relevant circle of exchange increases. First, more numbers means more burdens of computing exchange balances. In a twosome there is one dyadic relationship ($\frac{1}{2}$ per capita); in a threesome, three (1 per capita); and in a fivesome, ten (2 per capita). Second, because not all household behavior can be observed, monitoring costs rise with numbers. A person with just one housemate, upon discovering at breakfast that the refrigerator's container of orange juice is empty, knows who the culprit is. A person with four housemates who finds himself in the same pickle must engage in more extensive detective work. Third, freeriding in enforcement is more likely as numbers rise. When there are only two housemates, all the benefits of informal punishment of an orange juice grabber accrue to the enforcer. When there are five housemates, many of these benefits are externalized to others. These considerations help explain why, of the Americans living in nonfamily households, over twenty times more live in twosomes than in fivesomes.¹⁹⁶ On the ownership side, they also help explain why the great majority of American residential real estate is owned by no more than two persons.¹⁹⁷

2. The Advantages of Kinship

As the evidence in Part I demonstrated, household relationships of all types are likely to be based on kinship. This occurs not only because people generally prefer to spend time with kin, but also because kinship reduces the costs of household transactions.¹⁹⁸ Robert Pollak offers four reasons for why family ties enhance trust.¹⁹⁹ First, biologists hypothesize the existence of an evolved altruism toward kin — that is, the persons whose gene pool one shares.²⁰⁰ Second, expulsion from a kinship network is particularly costly because that network is irreplaceable. Because of its uniqueness, the kinship game is a game played until death and the long shadow of its future helps induce cooperative play at present. Third and relatedly, information about one's kin is apt to be unusually complete, a reality that tends to deter a person from acting in a way that would tarnish his reputation with kin. Fourth, in most societies prevailing social norms support loyalty to kin.²⁰¹

¹⁹⁶ See supra p. ____ (Table 2).

¹⁹⁷ See supra text at notes ____ - ____.

¹⁹⁸ Cf. David D. Haddock & Daniel D. Polsby, *Family As a Rational Classification*, 74 Wash. U. L.Q. 15 (1996) [check].

¹⁹⁹ See Pollak, *Families and Households*, supra note ____, at 585-88 (1985). Pollak also notes some disadvantages of kinship-based households. The multiplex nature of kinship ties poses risks that conflict will be imported into the household from an external strand of the kinship relationship, for example, a sibling rivalry. Members who are added to a household mainly for kinship reasons are not likely to possess the labor skills the household most needs, and may make the household expand to beyond its most efficient size. See *id.* at 587-88.

²⁰⁰ See also Becker, supra note ____, at 277-306 (discussing altruism within the family).

²⁰¹ These same four factors explain the predominance of households containing closely related kin (e.g., parents and children), as opposed to more distantly related ones (second cousins).

3. The Advantages of Social Linkages Other Than Kinship

Nonfamily household relationships commonly are based on pre-existing friendships or other enduring social associations, perhaps ones arising out of workplace, school, or religious interactions.²⁰² As in the case of kin, an arrangement of this sort gives rise not only to consumption benefits but also to transactional efficiencies. Previous social contacts provide information about trustworthiness. A person can interact more confidently with someone who previously has reciprocated gifts. It also is advantageous to enter into a household relationship with a person who is likely to remain in one's social circle after the household relationship itself ends. Prospects of further contact extend the length of the game, thereby reducing risks of opportunism during the household's waning days. For example, when housemates are members of a larger network of friends established during college days, none of them is likely to disappear at the end of the lease without paying an appropriate share of the final phone bill. The prospect of negative gossip within a social circle operates as powerful deterrent.

In prime neighborhoods of New York City, where apartments are unusually expensive, about two dozens companies specialize in helping total strangers pair up as roommates.²⁰³ These pairs may have difficulty in engaging in gift exchange until they build up trust. They therefore are apt to make relatively greater use of oral and written contracts and to narrow the scope of their mutual enterprise (e.g., share fewer home-cooked meals).

4. The Advantages of Homogeneity

Entering into household relationships with persons like oneself can bring benefits. When occupants have homogeneous tastes, they can more readily agree on what television shows to watch, what magazines to subscribe to, how to stock the refrigerator, and what friends to invite to dinner. When owners have similar discount rates and architectural tastes, they can more easily decide on what capital improvements to make. A landlord and tenant get along better when they share sensibilities about standards of housekeeping and levels of noise. As a result, to the extent that tastes vary according to attributes such as social class, age, gender, and ethnicity, household members can be expected to sort out accordingly.²⁰⁴ This is especially true in the case of occupants, whose interactions are the most multistranded. On the other hand, while homogeneity in tastes is advantageous because it lessens the risk of divergent valuations of outcomes, homogeneity in skills is disadvantageous. More potential gains from internal trade are available when the parties in

²⁰² There has been little empirical work on the bases, other than kinship, of assortive pairings among co-occupants, among co-owners, and between landlords and tenants. [but see Hayakawa]

²⁰³ See Dennis Hevesi, Making Roommates of Perfect Strangers, N.Y. Times, Aug. 20, 2000, § 11, at 1.

²⁰⁴ Cf. Becker, supra note __, at 108-34 (discussing "assortive mating" that tends to pair partners of like quality).

a household relationship possess different but complementary talents.

5. The Advantages of Equality

In many contexts, competent adults prefer to arrange their relationships so that participants have equal rights, duties, and powers.²⁰⁵ If their endowments of capital permit, co-owners thus are likely to own in equal shares. In part to avoid hassles about how to share utility costs and the like, graduate-student co-occupants are likely to prefer to rent a dwelling unit where the bedrooms are roughly equal in quality. Residents of most contemporary intentional communities embrace a strong egalitarian ethic in both ownership and use. In an arms-length landlord-tenant relationship, the default rule for the length of notice required to terminate a month-to-month tenancy typically is equal for both landlord and tenant, creating a symbolic equality between them.

Equality offers both consumption and transactional advantages. Adults in a liberal society are likely to have been acculturated to prefer to interact as equals. It is a staple of social science theory, moreover, that equality among participants tends to reduce decisionmaking costs and thus to facilitate the achievement of cooperative outcomes.²⁰⁶ Equalizing reciprocal gifts is simplest when the two giftgivers are identically situated.

V. APPLYING THE THEORY OF THE FIRM TO THE DOMESTIC SETTING: WHY HOUSEHOLD MEMBERS TYPICALLY CONFER OWNERSHIP ON PROVIDERS OF AT-RISK CAPITAL

Those associated with a single-family house, if asked to identify the house's owners, probably would respond by listing the grantees named in the most recent deed conveying the house.²⁰⁷ If next asked why those particular persons had been listed as grantees, they likely would respond that the grantees had provided the equity capital — that is, the funds used to defray the portion of the purchase price not financed by means of debt capital provided by mortgage lenders. After initially acquiring title, these same grantees also are likely to be the persons who provide additional infusions of equity, either to cover deficits incurred in

²⁰⁵ On rival conceptions of equality of inputs and outputs in the household context, see Su, *supra* note ___ [check]; see also Wax, *supra* note ___, at 533-37 (discussing notions of equality within marriage).

²⁰⁶ See, e.g., Donald Black, *The Behavior of Law* 11-36 (1976) (perspective of a sociologist of law); Henry Hansmann, *The Ownership of Enterprise* 39-44 (1996) (perspective of a law-and-economics scholar).

²⁰⁷ The Census Bureau defines an owner as “someone whose name is on the deed, mortgage, or contract to purchase.” American Housing Survey 1999, at A-25.

ownership operations or to finance improvements to the premises.²⁰⁸ What are the powers of a household's owners? Why, among all the various parties involved in household operations, are contributors of equity capital given these special powers?²⁰⁹

A. Basic Concepts in the Theory of the Ownership of Enterprise

According to the theory of the firm, the owner of an enterprise has two key entitlements: the power to make residual control decisions and the right to receive residual financial flows.²¹⁰ These entitlements tend to be bundled together in a household enterprise, just as they are in any other form of enterprise.

1. Residual Control Decisions

The owners of a private parcel of land have broad powers to decide three basic sorts of issues: (1) who can enter and remain on the premises; (2) how the premises are to be used and developed; and (3) under what circumstances the premises are to be transferred to another owner.²¹¹ When Dad and Aunt Audrey acquired the Sitcom house, they assumed general powers this sort. Prevailing laws and immutable social norms circumscribe the scope of owners' powers.²¹² If Sis were to fail to clean her room, for example, legal prohibitions on child abuse and neglect would prevent Dad from punishing her by kicking her out of the house.

The owners of a household commonly choose to trade or give away some of the entitlements of ownership that they initially acquired. Cheri's explicit employment contract with the owners might entitle her to dwell in the guesthouse and to paint its interior in a color

²⁰⁸ The donee of a dwelling conveyed as a gift, or the devisee of an inherited dwelling, initially puts up no equity, but typically does make later cash infusions. In an instance where an owner has been exceptionally passive, the doctrine of adverse possession may confer title to a household premises on long-time occupants, including ones who previously had not contributed capital. Once adverse possessors obtain title, however, thereafter they similarly are likely to be capital providers.

²⁰⁹ I know of no empirical studies that document that providers of at-risk capital indeed own households. It is reassuring, however, that I have never encountered anyone who disputes the truth of the general proposition. A young adult who wishes to acquire a home knows that the key step is to marshal enough money for a down payment (as opposed, say, to acquiring labor skills with an eye later to trading labor services for a share of household ownership).

²¹⁰ For a lucid formulation of these notions, see Paul Milgrom & John Roberts, *Economics, Organization and Management* 289-90 (1992).

²¹¹ See Ellickson, *Property in Land*, *supra* note ___, at 1362-63.

²¹² Lawmakers and normmakers are most likely to control a household's owners either for paternalistic reasons (e.g., to protect vulnerable household occupants) or to protect neighbors from negative externalities from household operations. See *infra* text at notes ___ - ___.

of her choice. Granny, through a process of gift exchange with Dad and Aunt Audrey, might have acquired implicit rights to live rent free in the Sitcom House. In a nice twist of the sitcom drama, Sis might charm Dad into ceding her control over decisions over whom to invite to an adult dinner party.

Owners' residual control powers are the ones that they originally acquired but have not yet traded or given away. If, as is almost certain, Dad and Aunt Audrey's express and implicit obligations to the various occupants are partial, they retain the power to decide many issues. Some possibilities: Has the time finally arrived to charge Junior rent or to kick him out of the house? Can Cheri invite her lover to move in with her? Can Granny continue to monopolize use of the dining table with her jigsaw puzzles? Should a swimming pool be built in the back yard? Because Aunt Audrey at last wants out and because Dad now prefers to live in a smaller nest, is it time to put the Sitcom house up for sale?

The owners of a household (in their roles as owners, as distinguished from other possible roles such as occupants or family members) are primarily interested in controlling household behavior that affects the value of their residual financial claims. For example, because Dad and Aunt Audrey incur opportunity costs when they cede space to an occupant, they are likely to want to assure themselves an adequate reciprocal flow of compensating benefits from that occupant. For instance, if they thought that, on balance, Granny already controlled "enough" space within the house, they would resist her attempts take permanent control of the dining table for her jigsaw puzzles. Granny's choice of home reading material, by contrast, would not affect the value of Dad and Aunt Audrey's residual. The owners' implicit lease with Granny thus would limit her use of the dining table, but not her choice of books.

As another example, suppose that Junior wanted to bring a dog into the Sitcom house as a personal pet. Because the dog might negatively affect the residual value of the shared environment, Junior certainly would have to obtain Dad's (and possibly Aunt Audrey's) approval. In this instance Dad and Junior are enmeshed in three conceptually distinct relationships: father-son; co-occupancy; and (implicit) landlord and tenant. It is the last of these that gives Dad the greatest leverage over Junior's dog decision. (If Junior were the sole owner of the house, Dad's influence would plummet.) If Dad did accede to Junior's request, however, he likely would concede that Junior should have the power to decide the dog's name, diet, and training, unless those choices somehow would affect the residual value of the household premises.

2. Residual Financial Flows

Figure 2 portrays the financial flows to and from the main participants in a household's economy. Entitlements to some of these flows may be governed by express contracts. For instance, a labor contract might establish the compensation owners are to pay a domestic worker; a lease, an occupant's rental obligation to owners; and a mortgage, the owners' financial obligations to a secured lender. In a hierarchical household, bureaucratic

rulings determine entitlements to some internal flows. In most households, entitlements to many internal flows are protected by household-specific norms that the members generate through their repeated informal dealings. Laws, such as statutes that forbid slavery or the neglect of children, also may govern some of these entitlements.

As in a business firm, the residual financial flows in a household enterprise are the ones that remain unallocated after all existing commitments that govern inflows and outflows have been honored. The value of the owners' "equity" in the household is the discounted present value of these residual flows. In most instances, ownership of a household has positive market value.²¹³

3. Ownership: An Amalgamation of Control and Financial Residuals

The owners of a household, like the owners of any type of enterprise, typically have *both* the power to make residual control decisions *and* the right to receive residual financial flows. Scholars of business enterprise argue that the patrons of a firm benefit from this bundling because it sharpens incentives for prudent management.²¹⁴

To illustrate, suppose that the roof over the Sitcom house were to have begun to leak, an eventuality governed neither by contract among the members, nor by household norm, nor by housing code. If the owners of the household (Dad and Aunt Audrey) had residual control powers, they would have the exclusive authority to decide whether and how to repair the roof, but also the burden of bearing the attendant costs. Suppose a roofing contractor offered to reshingle the entire roof for a stated sum. This reshingling would serve the owners' financial interest only if it would increase the discounted future occupancy value of the household premises by an amount greater than the repair's cost. Someone who bears the financial consequences of a decision is likely to deliberate more carefully than someone who does not bear those consequences. If Dad and Aunt Audrey were to have the residual financial claim to the sitcom household, therefore it would be wise also to empower them, and them alone, to decide whether the roof repair should be undertaken.

B. Why Suppliers of a Household's At-Risk Capital Tend to End Up as its Owners

Bestowing on the owner of a household both residual control powers and residual financial claims thus tends to improve the quality of household decisions. This proposition,

²¹³ The market value might be negative, however, if the household enterprise happened to be burdened by excessive mortgage debt, confiscatory property taxes, or unfavorable (express or implicit) leases.

²¹⁴ Theorists of business organization agree that it generally is efficient to bestow residual rights of control on the residual financial claimant. See, e.g., Henry Hansmann, *The Ownership of Enterprise* 11-12 (1996); Paul Milgrom & John Roberts, *supra* note ___, at 289-93; Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 *J.L. & Econ.* 395, ___ - ___ (1983).

however, leaves open the issue of which of the parties involved in a household is the most likely candidate to serve as its owner.

1. The Various Patrons Who Might Own a Household

Like any enterprise, a household is associated with a variety of “patrons” (to borrow a useful term of Henry Hansmann’s).²¹⁵ Figure 2 identifies the four chief patrons involved in a typical household’s economy. The arrows in the Figure indicate possible inflows and outflows from each patron. These participants’ inputs supply the factors necessary for household production. Two of the patrons — owners and occupants — have been featured in the previous discussion. Owners may make their equity contributions either in cash (for instance, a down payment on a house) or in-kind (for instance, the gift of previously acquired land). Occupants supply most household labor and may provide some operating funds. Figure 2 indicates two other patrons who typically are sitting in the wings: mortgage lenders and outsiders. Lenders provide debt capital. Outsiders contract with owners or occupants to provide some goods and services — such as groceries and lawn-mowing — that are consumed within the household.

Using these various inputs, the members of a household generate goods and services that include, at minimum, shelter and meals.²¹⁶ Particularly in a family household, the range of services is likely to be far broader and may include, among others, emotional and medical care, child training, and entertainment. Household members typically distribute most of these outputs to occupants, either as unilateral gifts or as obligations owed under the household’s contracts, norms, and other binding rules.²¹⁷ Housemates also may export some household products to outsiders, and may provide some household services to casual guests whom they have invited in to share meals or accommodations. As noted, owners receive any residual outflows, whether cash or in kind.

Those jointly involved in an enterprise have an interest in allocating ownership rights to the patron who values them most highly.²¹⁸ Conferring ownership rights in this way

²¹⁵ Hansmann uses *patron* to describe any party who transacts with a business firm. Hansmann, *supra* note ____, at 12.

²¹⁶ This follows from the definition of a household. See *supra* note ____.

²¹⁷ Households are sites of staggering amounts of unilateral gift-giving, especially from parents to children. This complicates empirical analysis of the original locus of entitlements within a given household.

²¹⁸ Splitting ownership rights among two or more patrons generally is inadvisable. For example, if suppliers of both labor and capital were to share the ownership of a household, transaction costs would escalate because both the number and the heterogeneity of the decisionmakers would increase. See *infra* text at notes __ - __. But cf. Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* 238-74 (1995) (arguing that an employee with firm-specific human capital merits a share in the ownership of a corporation).

reduces the patrons' total costs of obtaining their needed factors of production. In addition, patrons benefit from allocating ownership in a manner that reduces the total transaction costs of governing the enterprise. The suppliers of some factors, if not granted the protection of ownership rights, might insist on being protected with contractual guarantees that the participants would find costly both to draft and administer. The selection of a governance system for a household (or any other enterprise) thus is a positive-sum game. All patrons, including nonowners, can benefit from an arrangement that maximizes household surplus through reductions in the costs both of inputs and of the transaction costs of governance.²¹⁹

Of the various patrons, outsiders who trade with the household are the least plausible candidates to serve as owners. Because they rarely are knowledgeable about household conditions, they tend to be poorly qualified to make residual control decisions. In addition, unlike providers of capital, outsiders typically can protect themselves by means of simple express contracts. For instance, a disgruntled provider of an ephemeral service can resort to the self-help measure of refusing additional service, and a provider of a durable good or permanent physical improvement can insist on being paid in advance. A mortgage lender similarly can protect itself by limiting its loan to less than the value of the household property and by securing the debt with a senior lien on the premises.²²⁰

Occupants, on the other hand, are facially plausible candidates to serve as the owners of a household. Unlike the outsiders just mentioned, occupants typically do have detailed knowledge of the enterprise. If occupants indeed were to own a household, they conceivably could raise all the capital they needed by means of either loans or retained earnings.²²¹

To anticipate the possible merits and demerits of occupant ownership, consider a hypothetical commune that twelve communards might wish to establish on a farm in Vermont. Three of the twelve (the "trust-fund kids") between them have enough capital to establish the enterprise. The other nine are impecunious. Because founders of contemporary intentional communities tend to be strongly egalitarian, the group might balk at letting only the three trust-fund kids put up the entire down payment and assuming exclusive ownership of the farm. Instead, the twelve might prefer that all of them be listed on the deed as

²¹⁹ In Hansmann's terms, this is the "lowest-cost assignment of ownership." See Hansmann, *supra* note ____, at 21-22.

²²⁰ Like a bondholder of a business corporation, a mortgagee can use covenants and security interests to protect itself from household policies that might jeopardize repayment of the debt. A basic strategy of many mortgage lenders is to ensure that the equity owners have stakes sufficiently large to deter them from pursuing overly risky projects. Absent government-subsidized mortgage insurance, the combined loan-to-value ratios of first and second mortgages therefore rarely exceed 90%. Otherwise, as loan-to-value ratios escalate, mortgage lenders (and their insurers) have to be increasingly active in monitoring the behavior of mortgagors.

²²¹ Scholars of business organization have analyzed the analogous possibility of a worker-owned business firm that borrows all needed capital. See, e.g., Hansmann, *supra* note ____, at 75-77.

grantees. To acquire the needed down payment, the twelve then would borrow funds from the three, perhaps securing that loan with a second mortgage. The twelve might anticipate that this arrangement would enable them to labor together on the farm, consume some of its produce, sell surplus produce to outsiders, and apply any net income to service all mortgage debt, including that owed to their three richer colleagues. If the communards later were to need additional capital, they might imagine that they could obtain it either out of retained earnings or from additional secured loans provided by the trust-fund kids. Why wouldn't a worker/occupant ownership arrangement of this sort be a viable alternative to a more conventional form of household ownership? Before answering this specific question, I first review the many merits of bestowing ownership on capital contributors.

2. The Advantages of Conferring Ownership on a Household's Contributors of At-Risk Capital

In practice, a household's patrons typically arrange to confer ownership — that is, the rights to make residual control decisions and to receive residual financial flows — on its suppliers of equity capital. The literature on the ownership of enterprise suggests four basic reasons for this result. In rough order of increasing complexity and weightiness, they are these:

a. Equity investors in households tend to be few in number and stable in identity

The providers of a household's equity capital are likely to be less numerous than its occupants. The Sitcom household, for instance, has five occupants, but only two suppliers of equity. Two people can make decisions more easily than can five. Although these particular numbers are no more than artifacts of a hypothetical case, data presented in Part I indicate that in the United States over 90% of single-family houses are owned exclusively either by a single individual or by a married couple.²²² By empowering a smaller number of equity contributors to govern, a multi-occupant household can reduce its decisionmaking costs without forgoing economies of scale in household production and consumption.²²³

In addition, the equity investors in a household are likely to turn over less frequently than the household's occupants do.²²⁴ Even in an owner-occupied nuclear family household, peripheral occupants such as Cheri the housekeeper are likely to come and go, and so might some individual family members such as Junior and Granny. The list of occupants of a large, nonfamily household is likely to be even more unstable. Occupancy of rental units is

²²² See supra text at notes ___ - ___. By comparison, Table 1, supra p. ___, indicates that a lesser proportion (59.1%) of U.S. housing units of all types are occupied by fewer than three persons.

²²³ See supra text at notes ___ - ___.

²²⁴ If occupants indeed were a household's owners, however, they likely would move in and out somewhat less frequently.

particularly volatile, with a 31% turnover rate in 1999–2000.²²⁵ To avoid the complexities of absentee-ownership by former occupants, a departing occupant might be required to transfer his ownership interest either to a successor occupant, or to sell it back to the remaining occupants.²²⁶ The negotiation of those transfers, however, would significantly increase an occupant's transaction costs of entering into and exiting from a household. Unless scrupulously recorded on public records, a revolving door of occupant-owners also would confuse vendees, mortgage lenders, tax collectors, and other outsiders in need of assurance about the state of the current title to a household premises. By adding to transaction costs, occupant-ownership thus is likely to disadvantage all of a household's patrons.

b. Suppliers of capital tend to bear risks better than suppliers of labor do

A risk-averse person is helped by the diversification of his combined holdings of human capital and financial capital. An occupant who has specialized (nontransferrable) skills in housework already is somewhat invested in the dwelling he occupies. Particularly if he has little financial capital, for reasons of diversification he may prefer not to have a share of the ownership of the residual financial claim in the same dwelling. Other, less-risk-averse, patrons of the same household also likely would not want him to serve as an owner. For example, if Granny and Cheri were co-owners of the Sitcom house and neither had much in the way of savings, they might be overly cautious about taking on more household debt to finance the replacement of the leaking roof. If Dad, another co-owner, had a larger and more diversified financial portfolio, he would be less wary of the downside risk of the roof project and therefore annoyed by their excessive caution.²²⁷ This narrow point leads to a more general one.

c. The interests of suppliers of capital tend to be more homogeneous than the interests of occupants

²²⁵ Statistical Abstract 2001, at 28. [check original source (Current Pop. Repts, P20-538, tbls. 25 & 26)] By contrast, according to Census Bureau data, the rate of turnover of ownership of owner-occupied housing is barely less than the rate of turnover of occupancy of such units. The Bureau reports that, in 1999, 8% of owner-occupied units were sold (computed from data reported in id. at 599, 604) and, in the same year, 9% of the occupants of owner-occupied housing units moved to a different dwelling (id. at 28). It is unclear, however, how the Bureau tallies a sale by only one of several co-owners or a move by only one of several co-occupants.

²²⁶ Alternatively, an occupant's ownership rights could be usufructuary, that is, limited to the time period of personal occupation. If so, however, an occupant about to depart would have an overly shortsighted perspective when weighing the costs and benefits of household decisions on improvements and other matters with long-lasting consequences.

²²⁷ Hansmann regards risk-bearing considerations as a relevant, but often exaggerated, influence on ownership forms. See Hansmann, *supra* note __, at 44-45, 57.

Hansmann has stressed the transaction-cost advantages to conferring ownership on persons whose interests are homogeneous. The interests of suppliers of equity capital to a household typically are more homogeneous than are the interests of the household's occupants (whether in their capacities as consumers, suppliers of labor, or both). For example, Dad and Aunt Audrey, in their capacities as equity investors, have similar financial stakes in any roof repair project that might be undertaken.²²⁸ This would reduce their decisionmaking costs.

A roof-repair project, by contrast, would affect occupants in different ways. The construction activity might inconvenience some occupants more than others. Moreover, the occupants of some bedrooms might obtain special benefits from the repair. If occupants controlled the decision over whether to replace the roof, these differences might cause fractiousness.

In addition, homogeneity of ownership interests facilitates the calculation of shares of ownership. Capital contributions are especially easy to value. Although some account may have to be made of the time at which a contributor provided capital, figuring out the shares of a household's equity capital is likely to require no more than simple mathematical calculations. This is not true in the case of labor inputs, where difficult valuation problems loom. For example, if labor were to be the residual claimant in the Sitcom household, the occupants might wrangle over the fractional interests that, say, Junior and Granny should get. A simpler rule (such as one-occupant/one-share) would reduce these transaction costs, but create incentive problems by failing to correlate ownership interests with work performed.

- d. Because suppliers of at-risk capital are those most vulnerable to opportunism, they value rights of control more than others do

Suppliers of at-risk capital to a household are especially vulnerable to opportunism by other patrons. In a liberal society, a household worker who feels exploited can exit with most (if not all) of his personal human capital in tow.²²⁹ A supplier of debt capital can insist on the protection provided by a senior security interest, and outside suppliers of goods and services can insist on simultaneous bilateral exchange. A supplier of at-risk capital, by contrast, turns over a long-lived asset that opportunistic household managers could either expropriate or expose to unduly high risks. Oliver Williamson has argued that providers of at-risk capital to a business firm typically cannot negotiate with the firm's other patrons a

²²⁸ If Dad were to be occupying at an (implicitly) favorable rent, he personally would reap more benefits from the repair than Aunt Audrey would, a difference that could complicate their decisionmaking. See *infra* text at notes ___-___.

²²⁹ Just as a company employee may have firm-specific human capital, a household worker may have household-specific human capital. To that extent, an occupant may indeed be vulnerable to opportunism by other household members.

contract with adequately protective provisions.²³⁰ The complexity of the task makes the transaction costs of contracting prohibitive. In light of the special vulnerability of suppliers of at-risk capital, all patrons of a household enterprise are likely to agree that their cost-minimizing approach is to bestow ownership on these equity suppliers.

Suppose, for example, the Sitcom house were to be owned by its five occupants who raised all needed capital by means of loans from outsiders. To finance a roof repair, the owners might turn to a bank. Because the owners would not have invested any equity capital in their house, the bank likely would be highly skittish about making the loan. Because prior secured lenders to the household would have senior liens on the household premises, the bank would have little or no security if the owners were either to squander the loan proceeds on a foolish repair project or to divert the sum elsewhere.²³¹ The bank, of course, could take defensive measures. It might make its own appraisal of the cost-effectiveness of the proposed roof repair project, condition the disbursement of loan installments on the submission of evidence of actual repair work, and so on.²³² Those precautions, however, would give rise to redundant transaction costs. Not only would the owners of the household have to appraise the merits of a proposed roof repair, but so would their lender. By contrast, if the owners of the household were to have an equity stake that would be jeopardized if the household were to waste the funds, the bank would not need to monitor the situation so closely.

The arguments presented above indicate why occupant-ownership of the hypothetical Vermont commune would be unlikely to endure.²³³ Twelve cannot decide nearly as quickly as three. In some contexts, the impecunious will be overly cautious about new projects. When three of the owners are lenders and nine are not, there will be a potentially divisive heterogeneity of interests on some issues. Finally and most seriously, as time passes the three trust fund kids are likely to find themselves victims of opportunism by the majority. With little or no equity at stake, the nine might be lax about maintaining the commune's buildings, keeping out troublemakers, paying the property taxes, and so on. The three trust fund kids thus eventually might condition their additional infusions of capital on their

²³⁰ See Oliver Williamson, *Corporate Governance*, 93 *Yale L.J.* 1197, 1210 (1984).

²³¹ Especially if not personally liable for the debt, the residual claimant of an enterprise that is fully leveraged may be tempted to invest in an overly risky project because the owner reaps all gain if the project is successful but bears none of the loss if it fails.

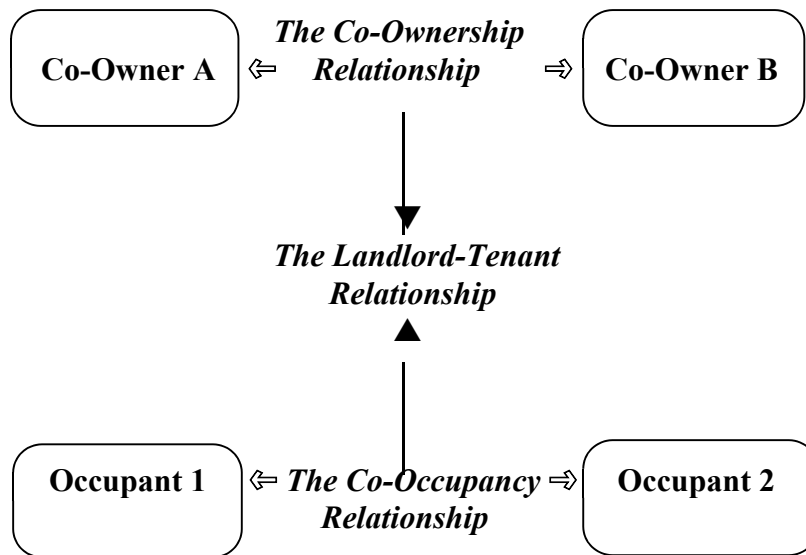
²³² On the agency costs of 100% debt financing in the corporate context, see Hansmann., *supra* note ___, at 53-56; Roberta Romano, *Foundations of Corporation Law* 119-120 (1993) (noting, at 120, that "we do not see 100 percent debt-financed firms").

²³³ This is not to say that worker ownership can never be enduring. See, e.g., Gurang Mitu Gulati, M. Thomas Isaac, William A. Klein, *When a Worker's Cooperative Works: The Case of Kerala Dinesh Beedi*, 49 *UCLA L. Rev.* 1417 (2002) (reviewing literature on worker ownership, including theories of why it is unlikely to persist).

obtaining more residual rights of control. As history suggests, experiments with communal ownership eventually tend to succumb to creeping capitalism.²³⁴

By contrast, a household owned by contributors of risk capital takes a form that has the potential to endure. Critics who favor more idealistic alternatives might argue that this form prevails on account of contingent acculturated biases that are inculcated in societies that have market economies. Not so. The ownership of household enterprise by its capital contributors persists because this form of governance provides major — and inherent — transactional advantages.

²³⁴ See supra note ___ and accompanying text [Zablocki]. Scholars of intentional communities have paid scant attention to issues of finance. For example, the leading study of the Israeli kibbutz, Melford E. Spiro, *Kibbutz: Venture in Utopia* (rev. ed. 1970), fails to broach the issue. [But check J. Weisman, *The Kibbutz: Israel's Collective Settlement*, 1 *Israel L. Rev.* 99 (1966)] Because a kibbutz is committed to democratic governance by member-occupants, its members are likely to be loath to grant residual control decisions to financiers. To raise capital a kibbutz thus is likely to depend on a combination of retained earnings and loans from special government-supported banks. On the latter, see Joel Brinkley, *Kibbutzim, Israel's Utopias, Develop a Flaw: Debt*, *N.Y. Times*, Mar. 5, 1989, at A14.



(N.B. An Occupant may also be an Owner.)

Figure 1: The Three Relationships Embedded Within a Complex Household

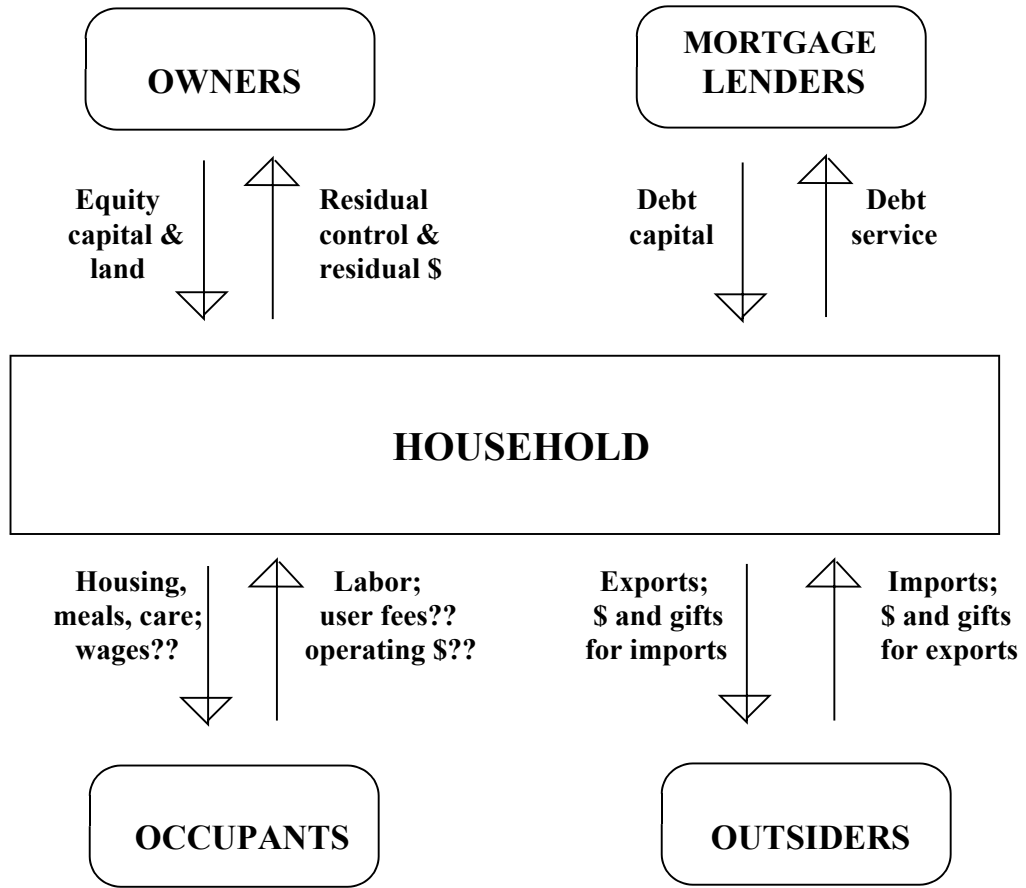


Figure 2: An Overview of the Household Economy